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Antitrust as Speech Control

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ANTITRUST AS SPEECH CONTROL

HILLARY GREENE* & DENNIS A. YAO**

ABSTRACT

Antitrust law, at times, dictates who, when, and about what people can and cannot speak. It would seem then that the First Amendment might have something to say about those constraints. And it does, though perhaps less directly and to a lesser degree than one might expect. This Article examines the interface between those regimes while recasting antitrust thinking in terms of speech control.

Our review of the antitrust-First Amendment legal landscape focuses on the role of speech control. It reveals that while First Amendment issues are explicitly addressed relatively infrequently within antitrust decisions that is, in part, because certain speech (for example, speech that promotes economic efficiency) receives indirect protection as a byproduct of antitrust law. The potential challenges associated with indirect, rather than direct, protection of such speech are then explored. Significantly, such de facto protection does not, however, extend to speech furthering noneconomic values. We then consider some of the pros and cons associated with extending protection to nonefficiency speech values.

Central to society's improved treatment of such speech within antitrust settings is a willingness to recognize the pitfalls of the status quo, to undertake incremental change and to consciously

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cultivate learning. Perhaps the reality that such interface issues are only likely to worsen given the ever-growing and evolving information economy will get society talking.

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INTRODUCTION

Antitrust law, at times, dictates who, when, and about what people can and cannot speak. It would seem then that the First Amendment might have something to say about those constraints. And it does, though less than one might expect.¹ The interface between these two areas of law² is the subject of this Article.

Navigating the interface of First Amendment and antitrust law has always been challenging³ and, we argue, is potentially becoming more so. The Supreme Court has couched antitrust in terms of constitutional qualities, such as when it characterized the Sherman Act as the “Magna Carta of free enterprise.”⁴ The Court has also employed economics-based metaphors in the First Amendment context, such as when it describes the “marketplace of ideas.”⁵ The two legal regimes are, nonetheless, rooted in different—and incommensurate—systems. This central tension appears throughout precedents that address the interface and has led to the spheres-of-influence solution.⁶

This Article examines these issues by recasting antitrust thinking in terms of speech control. Speech facilitates a substantial portion of conduct that runs afoul of antitrust laws and sometimes constitutes the objectionable conduct itself.⁷ Standard analyses of

1. Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765 (2004). Schauer observes that, Little case law, and not much more commentary explain why the content-based restrictions of speech in the Securities Act of 1933, Sherman Antitrust Act, the National Labor Relations Act, the Uniform Commercial Code, the law of fraud ... and countless other areas of statutory and common law do not, at the least, present serious First Amendment issues.

Id. at 1768. In this more theoretical piece, Schauer concludes that the explanation is “an often serendipitous array of political, cultural, and economic factors determining what makes the First Amendment salient in some instances of speech regulation but not in others.” *Id.* at 1765.

2. See generally Stanley D. Robinson, *Reconciling Antitrust and the First Amendment*, 48 ANTITRUST L.J. 1335 (1979).

3. See *id.* at 1335-36.

4. *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972) (“Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise.”).

5. 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 2:4 at 2-5 (2018).

6. See, e.g., *infra* text accompanying notes 27-28.

7. See, e.g., *infra* text accompanying notes 11-14.

the antitrust-First Amendment interface usually focus on whether the speech of concern is political speech.⁸ Such analyses do not examine speech in the context of what seem to be garden-variety antitrust cases. Surveying the broader antitrust landscape with a speech lens, as we do in Part I of this article, allows for that.

Most of antitrust law can be swept into this speech control framework given the strong role of communications in the negotiation and consummation of commercial agreements as well as in mergers and in monopolization conduct that involves communications.⁹ Understanding the role of speech in these varied contexts allows one to identify if speech values are directly or indirectly present and, if so, how well they are protected. Furthermore, the analysis highlights the problems posed in complex settings involving “hybrid” speech that has both economic efficiency and nonefficiency impacts.¹⁰

Part II of the article argues that speech is protected indirectly as a byproduct of antitrust law. Such *de facto* protection extends to speech that enhances economic efficiency, the core concern of antitrust law, but not to speech furthering noneconomic values. The failure of antitrust thinking to deal forthrightly with speech rights is an increasing concern in an era when information-based activities constitute a critical and growing part of our economy.

I. FIRST AMENDMENT AND ANTITRUST LANDSCAPE

Speech is any communication from one party to at least one other party. Its relevance to antitrust law is pervasive as it is used to come to agreements (for example, negotiations to reach an explicit price fixing agreement),¹¹ facilitate agreements (for example, information about sales that allow firms to monitor possible deviations from a price agreement),¹² and interpret actions (for example, explanation for a capacity decrease). Sometimes speech itself is the anticompetitive conduct (for example, an expressive boycott).¹³

8. See generally *infra* Part I.A.

9. See generally *infra* Part I.C.

10. See *infra* text accompanying notes 255-57.

11. See generally *infra* text accompanying notes 75-78.

12. See, e.g., *infra* note 100 and accompanying text.

13. See, e.g., *infra* notes 146-49 and accompanying text (characterizing the boycott in *FTC*

Generally, speech is problematic for antitrust purposes when it is part of a pattern of action and communication that together reduces market competition.¹⁴

There are a number of ways to conceptualize the value of free speech to society. We divide the value in terms of speech as a “means to an end” and as an “end in itself” as described by Smolla and Nimmer, which roughly follows the marketplace and the human dignity/self-fulfillment theories justifying free speech.¹⁵ While the emphasis of the marketplace theory is based on supporting the process of discourse and its value to society, the human dignity theory concerns the value of self-expression without regard to the value to society.¹⁶ As Justice Thurgood Marshall observed, “The First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression.”¹⁷ This article focuses on the two forms of utilitarian value.

We adapt these values to the antitrust context by expanding the means to an end value into a utilitarian value which consists of the social utility associated with contributing to improved economic efficiency in the marketplace and the social utility associated with contributing to nonefficiency purposes including augmenting the “marketplace of ideas” which impacts political, social, and economic decisions and understandings.¹⁸ This division mirrors the approach

v. Superior Court Trial Lawyers Association as “expressive”).

14. See *Todd v. Exxon Corp.*, 275 F.3d 191, 213 (2d Cir. 2001) (holding that frequent meetings during which defendants discussed compensation information constitutes a factor suggesting an anticompetitive information exchange); see also *United States v. Utah Soc’y for Healthcare Human Res. Admin.*, No. 94C282G, 1994 WL 729931, at *2 (D. Utah Sept. 14, 1994) (alleging the conspiracy to restrain nurse’s wages unfolded through a series of telephone calls, information surveys, and HR association meetings).

15. SMOLLA, *supra* note 5, § 2:21. For instant purposes, we include the ability of speech to contribute to democratic self-governance under the marketplace for ideas justification, as both concern social utility. Despite the value of these distinctions for instant purposes, these theories are not “mutually exclusive” but, instead, can be understood as “mutually supportive rationales” that favor “elevated protection for freedom of speech.” *Id.* at § 2:7.

16. “Free speech is thus especially valuable for reasons that have nothing to do with the collective search for truth or the processes of self-government, or for any other conceptualization of the common good.” *Id.* § 2:21. For example, “people who have freedom to develop their own unique lives will make better democratic citizens.” DANIEL A. FARBER, *THE FIRST AMENDMENT 9* (West Acad., 4th ed. 2014).

17. *Procunier v. Martinez*, 416 U.S. 396, 427 (1974), *rev’d on other grounds*, 490 U.S. 401 (1989).

18. See SMOLLA, *supra* note 5, § 2:4 at 2-4.1, 2-5.

antitrust analysis takes in recognizing economic efficiency that results from the actions in question while not recognizing non-efficiency impacts.¹⁹ While this distinction is often blurred it remains valuable for understanding the interface of antitrust law and speech rights.

In antitrust cases involving speech rights, First Amendment issues tend to form bookends of sorts. First, there may be consideration of whether the speech or expressive conduct in question warrants immunity based on the First Amendment.²⁰ When, as is generally the case, there is no immunity,²¹ First Amendment issues occasionally reappear to potentially limit remedies that unduly constrain speech.²² Sandwiched in between is the standard antitrust liability analysis that is typically devoid of overt speech considerations.²³ We examine the bookends, then return to the liability analysis.

A. Immunity

Immunity refers to “[a]ny exemption for a duty [or] liability.”²⁴ In this context, immunity refers to protection from antitrust liability under the First Amendment. If the speech or expressive conduct at issue (hereinafter “speech”) being challenged on antitrust grounds receives First Amendment immunity, then the matter is

19. See, e.g., *infra* Part I.C.9.

20. See *infra* Part I.A.

21. See *infra* Part I.A.

22. See *infra* Part I.B.

23. We know of only two cases that address arguments that conventional legal standards should be modified owing to the presence of First Amendment rights. In *Levitch v. Columbia Broadcasting System, Inc.*, 495 F. Supp. 649, 661 (S.D.N.Y. 1980), the defendant sought to increase the pleading requirements—rather than seek immunity—owing to the presence of First Amendment rights. Despite some engagement by the court, it ultimately granted a motion to dismiss to the plaintiff based on traditional pleading standards. *Id.* For further discussion of *Levitch*, see generally Hillary Greene, *Muzzling Antitrust: Information Products, Innovation and Free Speech*, 95 B.U. L. REV. 35, 97-99 (2015). The other case is the D.C. Circuit court ruling in *Superior Court Trial Lawyers v. FTC*, 856 F.2d 226 (D.C. Cir. 1988), *rev'd*, 493 U.S. 411 (1990), in which that court advocated applying the antitrust rule of reason, rather than per se treatment, owing to the presence of speech interest. *Id.* This position was supported by the concurring Justices before the Supreme Court. See *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 439-40 (1990) (Brennan, J., concurring in part and dissenting in part).

24. *Immunity*, BLACK'S LAW DICTIONARY (8th ed. 2004).

dismissed.²⁵ Two factors are worth noting. First, the Constitutional challenges within this context do not question the legitimacy of the antitrust laws generally but rather their application to specific facts.²⁶ Second, the speech at issue is ultimately subject to binary treatment.²⁷ Either the speech at issue receives First Amendment protection and is immunized from antitrust enforcement, or it is subject to the full force of the antitrust laws. There is no middle ground.²⁸

In antitrust law, the most straightforward application of the First Amendment is protection of direct petitioning of government (for example, lobbying).²⁹ The political character of the speech is self-evident, based on the existence of a government entity to which the communication is directed, and results in immunization.³⁰

Somewhat more challenging issues have arisen regarding boycotts in which the underlying refusal to deal with another party is meant to prompt the government to adopt a particular policy. In *Missouri v. National Organization for Women*, the National Organization for Women (NOW) organized a boycott of the convention-based industry in Missouri to pressure the state to approve the Equal Rights Amendment.³¹ NOW's action was described as "a politically motivated but economically tooled boycott participated in and organized by noncompetitors of those who suffered as a result of the boycott."³² Though the Eighth Circuit's ultimate decision upholding immunity for the defendants was focused narrowly on the right to petition, the court's decision emphasized that the legislation at issue was not economic legislation, and that the boycotters were

25. See, e.g., *Missouri v. Nat'l Org. for Women*, 620 F.2d 1301, 1319 (8th Cir. 1980).

26. See, e.g., *id.* (holding that the scope of the Sherman Act did not cover the speech at issue).

27. See, e.g., *id.* (applying the First Amendment to the facts).

28. See Greene, *Muzzling Antitrust*, *supra* note 23, at 39.

29. See, e.g., *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 670 (1965); *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961) (holding that petitioning the government, even for anticompetitive purposes, warrants First Amendment protection and is therefore immunized from antitrust action). The Noerr-Pennington doctrine, which is self-evidently grounded in the First Amendment, is beyond the scope of this Article which focuses on the under or unappreciated speech interests. See *id.*

30. See Greene, *Muzzling Antitrust*, *supra* note 23, at 39.

31. *Nat'l Org. for Women*, 620 F.2d at 1302-03.

32. *Id.* at 1302.

not businesses focused on increased profits.³³ This characteristic is important because categorizing the speech at issue as political has, in effect, been deemed essential for immunity and because that designation has been increasingly defined in terms of communications in which the speaker has no economic interest.³⁴

The binary treatment of constitutional defenses to antitrust challenges provides a simple rule to support difficult judicial decisions: is the speech at issue protected and, therefore, immunized from antitrust scrutiny?³⁵ One advantage of a binary or spheres-of-influence treatment is that it avoids tradeoffs by treating constitutional rights (for example, speech) as trumping the nonconstitutional values of antitrust law. A disadvantage is that it is, alone, a blunt instrument for protecting speech values.

B. Remedies

Significantly, just because no First Amendment issues arose or were credited up through the point when antitrust liability is found, does not mean that speech-related considerations do not shape antitrust law.³⁶ First Amendment-based protection may emerge to prevent unconstitutional restrictions on speech that are a part of the remedy for illegal conduct. Assuming a finding of antitrust liability, if the remedy to the anticompetitive conduct involves a restriction on speech, this restriction must be sufficiently tailored to meet the appropriate level of scrutiny.³⁷

The least stringent level of scrutiny given to government action, is a “highly deferential” standard that requires the government restraint at issue to “bear[] a rational relation to [some legitimate]

33. *See id.* at 1311-12, 1319.

34. Hillary Greene, *Antitrust Censorship of Economic Protest*, 59 DUKE L.J. 1037, 1046 (2010) (“More specifically, the Court has held that a nonexhaustive list of topics for which expression would be entitled to ‘full First Amendment protection’ includes ‘philosophical, social, artistic, economic, literary, or ethical matters.’ Protected speech need not be political either in content or in context (namely, government petitioning).” (quoting *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977))). The importance of economic interest is further discussed in the Boycott discussion below. *See infra* Part I.C.8.

35. *See* Greene, *Muzzling Antitrust*, *supra* note 23, at 39.

36. *See* Greene, *supra* note 34, at 1046 (quoting *McDonald v. Smith*, 472 U.S. 479, 485 (1985)).

37. *See id.*

end.”³⁸ Intermediate scrutiny, as applied in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, requires that a “restriction of speech must serve ‘a substantial interest,’ and it must be ‘narrowly drawn.’”³⁹ Most importantly for these purposes, this is the standard that applies to commercial speech with the caveat that “[f]or commercial speech to come within that provision, it at least must concern lawful activity and not be misleading.”⁴⁰ Finally, “[s]trict scrutiny” is the highest and most demanding level of review in constitutional law. It is traditionally articulated as requiring a ‘compelling governmental interest’ and demanding that the law be ‘precisely tailored’ or the ‘least restrictive means’ to effectuate that interest.”⁴¹

Two cases that illustrate how First Amendment considerations may affect the remedies phase of an antitrust action are *United States v. National Society of Professional Engineers*⁴² and *ES Development v. RWM Enterprises, Inc.*⁴³ In the late 1970s, the Department of Justice (DOJ) challenged the National Society of Professional Engineers’ Code of Ethics, which contained a provision “prohibit[ing] any form of competitive bidding on engineering projects.”⁴⁴ The Society’s effort to enforce that prohibition prompted an antitrust suit by DOJ claiming a Section 1 violation.⁴⁵ The D.C. District Court found against the Society and enjoined it from adopting any “future expression that the price practice [bidding] is unethical,” and required it to “publish an advice that its prior ruling has been rescinded.”⁴⁶ It also ordered “the Society to state

38. SMOLLA, *supra* note 5, § 3:2 at 3-7 n.4 (quoting JOHN NOWAK & RONALD ROTUNDA, CONSTITUTIONAL LAW § 14.3 (4th ed. 1991)).

39. *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564-65 (1980)).

40. *Cent. Hudson*, 447 U.S. at 566.

41. SMOLLA, *supra* note 5, § 2.5 at 2-88.5.

42. 555 F.2d 978 (D.C. Cir. 1977), *aff’d*, 435 U.S. 679 (1978).

43. 939 F.2d 547 (8th Cir. 1991), *cert. denied*, 502 U.S. 1097 (1992).

44. *Nat’l Soc’y of Prof’l Eng’rs*, 555 F.2d at 979.

45. *Id.*

46. *Id.* at 984; *see id.* at 980. (“The district court then entered judgment enjoining the defendant from adopting any rule or policy statement which in any way prohibits or discourages the submission of price quotations or states or implies the price competition is unethical and further ordered the defendant ‘to state in any publication of its Code of Ethics that the submission of price quotations for engineering services at any time and in any amount is not considered an unethical practice.’”).

affirmatively that it does not consider competitive bidding to be unethical.”⁴⁷ The D.C. Circuit Court affirmed the first two remedial measures, but declared that compelling speech by the Society “encroach[ed] on that sphere of free thought and expression protected by the First Amendment.”⁴⁸ Its rationale was that “[a]ny such regulation by the state should not be more intrusive than necessary to achieve fulfillment of the governmental interest [regarding antitrust].”⁴⁹

On appeal, the Supreme Court affirmed both the finding of liability and the remedy as modified by the circuit court.⁵⁰ The Court’s only discussion of the level of scrutiny applied is the statement of their inquiry, “whether the relief represents a *reasonable method* of eliminating the consequences of the illegal conduct.”⁵¹ The Court concluded it did, notwithstanding the fact that the injunction “goes beyond a simple proscription against the precise conduct previously pursued.”⁵² With regard to the Society’s fears that the injunction “if broadly read, will block legitimate paths of expression on all ethical matters relating to bidding,” the Court felt that, “[i]f the Society wishes to adopt some other ethical guideline more closely confined to the legitimate objective of preventing deceptively low bids, it may move the district court for modification of the decree.”⁵³

Chief Justice Burger dissented from “that portion of the judgment prohibiting petitioner from stating in its published standards of ethics the view that competitive bidding is unethical.... The First Amendment guarantees the right to express such a position and that right cannot be impaired under the cloak of remedial judicial action.”⁵⁴

47. *Id.* at 984 (describing the district court’s decree).

48. *Id.*

49. *Id.*

50. *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 681 (1978).

51. *Id.* at 698 (emphasis added). *National Society of Professional Engineers* predates *Central Hudson*, where the intermediate scrutiny standard for commercial speech was established. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 564-65 (1980).

52. *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 698 (quoting *United States v. Nat’l Soc’y of Prof’l Eng’rs*, 555 F.2d 978, 983 (1977)).

53. *Id.* at 698-99.

54. *Id.* at 701 (Burger, J., concurring in part and dissenting in part).

In *ES Development, Inc. v. RWM Enterprises, Inc.*, the district court found that the defendants, automobile franchisees, conspired to prevent development of an auto mall proposed by ES Development.⁵⁵ The proposed mall would have “operate[d] in the manner of a condominium complex.”⁵⁶ The claim was that the franchisees did not want their respective car manufacturers to establish new franchises in the mall because the competition, as well as the convenience of one-stop shopping more generally, would hurt their own sales.⁵⁷ Towards that end, eight local franchisees formed a “Dealer’s Alliance” which, among other things, jointly hired an attorney who drafted generic letters which each of the franchise members then sent to their respective manufacturers.⁵⁸ The franchisees were all entitled to voice their concerns to their respective manufacturers regarding the award of any same-line franchise within their respective territories.⁵⁹ However, the manner in which they jointly undertook this effort was condemned under the antitrust laws.⁶⁰ The district court rejected the defendants’ First Amendment defense.⁶¹

The injunction prohibited the defendants from individual, joint, or coordinated activity regarding the proposed auto mall.⁶² They were also enjoined from “communicating with or responding to communications from any automobile franchisor or manufacturer” regarding the auto mall.⁶³ Defendant RWM Enterprises argued on appeal that these provisions were “overbroad in that they prohibit them from exercising their constitutionally protected rights of commercial speech.”⁶⁴

The Eighth Circuit upheld the finding of antitrust liability and recognized the district court’s “authority to impose certain restrictions upon the commercial speech of individual entities which have

55. No. 89-1867-C-5, 1989 U.S. Dist. LEXIS 17706, at *16 (E.D. Mo. Dec. 27, 1989).

56. *ES Dev., Inc. v. RWM Enters., Inc.*, 939 F.2d 547, 550 (8th Cir. 1991).

57. *Id.* at 551.

58. *Id.* at 551-52.

59. *See ES Dev.*, 1989 U.S. Dist. LEXIS 17706, at *18-20.

60. *See id.* at *16.

61. *See ES Dev.*, 939 F.2d at 556.

62. *ES Dev., Inc. v. RWM Enters., Inc.*, No. 89-1867-C-5, 1989 U.S. Dist. LEXIS 17705, at *1 (E.D. Mo. Dec. 27, 1989) (order granting preliminary injunction).

63. *Id.*

64. *ES Dev.*, 939 F.2d at 557.

violated the Sherman Act.”⁶⁵ The circuit court, relying on *Central Hudson*, found, however, that the “failure to limit the duration of its [remedial] restraint against appellants’ individual exercise of commercial speech renders the relief overbroad, particularly in light of its constitutional ramifications.”⁶⁶ Limitations upon such communications were necessary to prevent the appellants from continuing to benefit from and from continuing such conduct,⁶⁷ although, “the continuing effects of the conspiracy are certain to recede with time.”⁶⁸ Upon remanding to the district court, the circuit court observed that those defendants who settled with the plaintiff “agreed not to oppose the development of the Mall for a period of two years.”⁶⁹ Without any explanation, the circuit court “suggest[ed]” that the “limitation probably ought not to exceed three years.”⁷⁰

The rarity with which First Amendment challenges to antitrust remedies arise within judicial opinions is notable given the extent to which communication and information restriction remedies appear in cases. The lack of such challenges could be because the typical speech remedies applied already roughly meet the *Central Hudson* tests,⁷¹ or courts may avoid First Amendment challenges by choosing second-best remedies that do not involve speech. It is also possible that some courts may anticipate that the potentially offending conduct lacks a remedy that would pass First Amendment muster and hence choose not to find liability.⁷²

C. Liability

This Section explores the role of speech and its protection within the liability phase of an antitrust proceeding. Our survey of

65. *Id.*

66. *Id.*

67. *Id.* at 558.

68. *Id.*

69. *Id.* at 558-59.

70. *Id.* at 559.

71. See *supra* Part I.B.

72. If so, this raises problems regarding the transparency of the process and the candor of the courts. First Amendment issues may be considered earlier in a legal proceeding. For example, even at the early stages of a proceeding (that is, motions to dismiss or for summary judgment) courts may openly wonder what remedies might be available given First Amendment constraints.

antitrust conduct is selective rather than exhaustive. For many causes of action the role of speech is straightforward. Considering several such actions is, nonetheless, instructive because it sharpens our understanding of more complex settings. We begin our survey of the legal landscape of antitrust with matters involving concerted action, which include horizontal agreements (for example, collusion, information sharing, boycotts, and vertical price-fixing) and follow with a discussion of unilateral actions that involve speech (for example, disparaging speech about a competitor's product and predatory design of information products where the product itself is speech). We particularly focus on antitrust violations that more directly raise speech issues. This vantage point provides us a perspective on the relationship between speech rights and antitrust law.

In what follows we briefly describe the conduct at issue, what speech is involved, and how it may contribute to both anticompetitive and procompetitive effects. Where relevant, we also consider whether any values beyond economic efficiency might be implicated by the conduct in question and the relationship between the efficiency and nonefficiency content of speech.

1. *Collusion*

A central rationale for antitrust law is to prevent collusion among firms to raise prices.⁷³ Prices are the "central nervous system of the economy" and the diminution of competition between horizontal competitors through direct price fixing is particularly pernicious.⁷⁴ As such, an agreement to fix price is deemed per se illegal under Section 1 of the Sherman Act, meaning that the agreement is presumptively illegal regardless of whether any actual competitive harm has or is likely to result from the conduct at issue.⁷⁵ The manner in which this illegal *activity* is defined is based on conduct,⁷⁶

73. See *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927).

74. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940).

75. *Trenton Potteries Co.*, 273 U.S. at 397-400. Market division, a closely related collusive activity, also receives per se treatment. See, e.g., *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990).

76. See, e.g., *Trenton Potteries Co.*, 273 U.S. at 397-400 (discussing price fixing agreement without reference to the "speech" involved).

but the agreement is negotiated through speech. Furthermore, speech can be critical for maintaining collusion by supporting monitoring of actions that might otherwise be seen as defections and for adjusting the agreement.

Antitrust laws against price fixing have been periodically, albeit unsuccessfully, challenged on First Amendment grounds.⁷⁷ It is unsurprising that such a defense is handily rejected given that speech is being used strictly as a means to an illegal end. Most importantly for instant purposes, the fact that speech facilitates the activity, price fixing, does not operate to insulate price fixing from the application of the antitrust laws.⁷⁸

It is useful to consider why this example engenders no First Amendment defense. What does it mean for speech to be just a means to facilitate the agreement? In terms of content, the speech is directed solely to the agreement itself: an agreement condemned under both the civil and criminal antitrust actions.⁷⁹ Stated alternatively, the speech is *de minimis* and is subordinated to the conduct, and is without any other redeeming purpose. There is no meaning to the speech beyond its facilitation of the collusive agreement. This is suggested, in part, because the sole audience is the colluding parties. It is private, not public, and the content of the speech is presumably limited to narrow marketplace concerns. For all these reasons, there is no tradeoff between protecting antitrust values and First Amendment values.

2. *Invitation to Collude*

An interesting variant to classic collusion cases are matters the Federal Trade Commission (FTC) has brought under a *per se* invitation-to-collude theory.⁸⁰ Relying on the Commission's Section 5

77. See, e.g., *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 376 (7th Cir. 1987).

78. See, e.g., *FTC v. Superior Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 431 (1990) ("The most blatant, naked price-fixing agreement is a product of communication, but that is surely not a reason for viewing it with special solicitude.").

79. See *supra* notes 73-76 and accompanying text.

80. Although the FTC has a litigation stance that invitations to collude are *per se* illegal, their selection of cases takes into account factors that reflect rule of reason thinking; for example, they take into account other factors such as business justifications for the communications at issue. See Larry Fullerton, *FTC Challenges to "Invitations to Collude,"* 25

authority, the FTC has prosecuted one party for allegedly inviting another party to collude even if the solicited party declines.⁸¹ Because no agreement is reached, there is no actual collusion. Some obvious distinctions between collusion and invitations to collude are apparent. Most important are the differing tradeoffs. Because collusion has not occurred, the actual harm is certainly less than with actual collusion. Prohibiting such invitations is meant to deter attempts to collude, thereby presumably reducing collusion. Deterrence is particularly important given the difficulty of discovering actual collusion.

As with collusion, speech is subordinated to the illegal act. Under the invitation-to-collude theory, there was a unilateral effort, albeit unsuccessful, to collude, and speech in the form of an invitation was the alleged illegal act.⁸² How can or should these different circumstances influence the law? One can ask whether there are any redeeming purposes, potential procompetitive aspects, associated with such speech. That might seem like a question whose merits do not survive its utterance. Certainly, in the simple naked invitation to collude, there is merely a failed attempt to do something illegal. But some comparatively aggressive uses of the invitation to collude theory, those in which the communications were public,⁸³ for example, have led some observers to wonder about its potential to overreach and to question whether the associated speech might have legitimate purposes.⁸⁴ If there was no market power, why solicit a collusive agreement? Why would one solicit collusion in a public forum rather than in private? Could clamping down on activities somehow interfere with or chill meetings between competitors that could enhance social welfare or somehow discourage public discussions with investment analysts?⁸⁵ In fact, some commentators argue that, “[a] strong argument can be made under the First Amendment

ANTITRUST 30, 30, 32 (2011). Additionally, invitation to collude cases have also been brought under an attempted monopolization claim. *See, e.g.,* *United States v. Am. Airlines, Inc.* 743 F.2d 1114, 1115 (5th Cir. 1984).

81. *See, e.g.,* Kevin J. Arquit, *Developments and Trends in FTC Antitrust Enforcement*, 2 ANN. ANTITRUST L. INST. 459, 461-65 (1993) (discussing cases).

82. *See* Fullerton, *supra* note 80.

83. *In re Valassis Commc'ns, Inc.*, 141 F.T.C. 247, 249 (2006).

84. *See* Fullerton, *supra* note 80, at 33-34; *see also* Arquit, *supra* note 81, at 464.

85. *Id.*

for a *per se* rule against sanctioning [certain types of] public speech ... under the antitrust laws.”⁸⁶

3. Information Sharing Generally

As a further variation, consider information sharing activities that raise anticompetitive concerns but do so in settings where communications have a clearer procompetitive potential. Here, unlike with invitations to collude, the article of faith in communications may be more easily justified. These contexts might include private information sharing that occurs as a prelude to mergers or is ongoing between joint venture partners. We then address industry-wide public information sharing and the special case of self-regulatory organizations and professional associations.

The primary antitrust concern associated with information sharing is that sharing of competitively sensitive information has sometimes been implicated as a facilitating practice supporting tacit coordination.⁸⁷ Knowledge of firm-specific transaction and pricing information or future plans could, for example, assist in the negotiation of a collusive agreement or in monitoring compliance with an existing explicit or tacit price or a quantity-fixing agreement.⁸⁸ But

86. Henry N. Butler & Larry E. Ribstein, *Corporate Governance Speech and the First Amendment*, 43 U. KAN. L. REV. 163, 205 (1994). They state that “[f]rom the standpoint of reasonable fit between regulatory ends and means, the invitation to collude theory [reflected to select FTC proceedings], are at least highly questionable.” *Id.* at 203 (footnote omitted). Additionally, they argue that the burden on the government to show need for the regulation is not fulfilled noting that “the Court has made it clear that the First Amendment requires the government to show more than the mere *possibility* of regulatory benefit to justify commercial speech regulation.” *Id.* at 204; *see supra* notes 39-41 and accompanying text (discussing commercial speech standards).

87. *See* FED. TRADE COMM’N & U.S. DEP’T OF JUSTICE, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 6 (2000) [hereinafter *Guidelines*]; Plaintiff Competitive Impact Statement at 2, *United States v. Utah Soc’y for Healthcare Hum. Res. Admin.*, No. 94C282G (D. Utah Mar. 14, 1994) (describing the information exchanges raising antitrust concern: “[f]rom ... 1984 ... through ... 1992 ... [there was a] conspiracy to restrain[] wage competition for registered nursing services in Salt Lake County, Utah.... effectuated through telephone calls and written surveys.... through [HR association] meetings.”).

88. *See* GUIDELINES, *supra* note 87, at 15-16; *see also* Org. for Econ. Cooperation and Dev. (OECD), *Directorate for Financial and Enterprise Affairs, Roundtable on Information Exchanges Between Competitors Under Competition Law, Note by the Delegation of the U.S.*, DAF/COMP/WD 117 at 2 (Oct. 21, 2010).

lack of market-relevant information is also a key obstacle to efficient resource allocation.

4. *Information Sharing and Mergers*

Parties to a merger may exchange private information as part of the due diligence process leading to a potential acquisition.⁸⁹ Such information could facilitate coordination prior to the merger or between the parties even if no merger occurs.⁹⁰

In *Omnicare*, after noting that there is virtually no case law establishing “standards for determining when premerger discussions are anticompetitive,”⁹¹ the district court discussed the tensions between pro and anticompetitive effects that are involved in premerger information sharing.⁹²

The balance the court seeks to strike here is a sensitive one. On the one hand, courts should not allow plaintiffs to pursue Sherman Act claims merely because conversations concerning business took place between competitors during merger talks; such a standard could chill business activity by companies that would merge but for a concern over potential litigation. On the other hand, the mere possibility of a merger cannot permit business rivals to freely exchange competitively sensitive information. This standard could lead to ‘sham’ merger negotiations, or at least allow for periods of cartel behavior when, as here, there is a substantial period of time between the signing of the merger agreement and the closing of the deal.⁹³

89. See William Blumenthal, Gen. Counsel, Fed. Trade Comm’n, *The Rhetoric of Gun-Jumping: Remarks Before the Ass’n of Corporate Counsel* (Nov. 10, 2005), https://www.ftc.gov/sites/default/files/documents/public_statements/rhetoric-gun-jumping/20051110gunjumping.pdf [<https://perma.cc/SPA8-5YU3>].

90. *Id.*

91. *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 594 F. Supp. 2d 945, 968 (N.D. Ill. 2009). *Omnicare* alleged that UnitedHealth Group and PacifiCare (health insurers) shared information during merger negotiations that was used by each to better negotiate a deal with *Omnicare* (an institutional pharmacy). *Id.* at 948. The district court granted summary judgment for the insurers, *id.* at 981, which was affirmed by the Seventh Circuit. *Omnicare, Inc. v. UnitedHealth Grp., Inc.*, 629 F.3d 697, 699 (7th Cir. 2011).

92. See *Omnicare, Inc.*, 594 F. Supp. at 968.

93. *Id.*

Why is there so little antitrust case law on this subject? One explanation is that firms have incentives to protect competitively sensitive information during the process to keep them from being vulnerable to information trolling by rival firms. As a matter of self-protection as well as to avoid potential antitrust issues, communications can be carefully structured in terms of what is revealed when and to whom.⁹⁴ While the content of the communications here is competitively sensitive, limiting the listeners to the direct parties involved and their advisors as well as meting out the information depending on the apparent seriousness of the suitor, also increases the difficulty of using this information in anticompetitive ways.⁹⁵

5. Information Sharing, Joint Ventures, and Other Collaborations

Joint ventures and other collaborations that involve an “efficiency-enhancing integration of economic activity” between firms are analyzed under a rule of reason which balances the anticompetitive harm of such a collaboration against its procompetitive benefits.⁹⁶ Anticompetitive harms are of particular concern when the collaborating parties are horizontal rivals because the agreement and subsequent interactions may be a channel through which “independent decision making” is limited or explicit or tacit collusion is facilitated.⁹⁷ Procompetitive benefits are recognized if the collaborative agreement is “reasonably necessary” to achieve them.⁹⁸ Because ongoing communication is essential to such collaborations, speech restrictions are typically a guard against anticompetitive harm but they also might pose a danger of reduced efficiency benefits.

94. See Holly Vedova et al., *Avoiding Antitrust Pitfalls During Pre-Merger Negotiations and Due Diligence*, FED. TRADE COMM’N (Mar. 20, 2018), <https://www.ftc.gov/news-events/blogs/competition-matters/2018/03/avoiding-antitrust-pitfalls-during-pre-merger> [<https://perma.cc/ZU77-3DPX>].

95. See *id.* Another explanation could be that if collusion were to actually occur the focus of a collusion case would be on direct evidence relating to the collusive agreement. The FTC has challenged such premerger *information sharing* both in instances when it has and when it has not challenged the underlying merger. See *id.*

96. GUIDELINES, *supra* note 87, at 4.

97. See *id.* at 6.

98. See *id.* at 9.

Private information exchanges between joint venture partners which have the potential to facilitate collusion, but are not central to the procompetitive purpose of the venture, may be proscribed. For example, the 1984 NUMMI joint venture between General Motors and Toyota to produce subcompact automobiles was subject to a consent order that allowed exchange of “information necessary to produce the Sprinter-derived vehicles” but proscribed the parties from

the transfer or communication of any [nonpublic] information concerning current or future prices of new automobiles or component parts produced by either automaker; sales or production forecasts or plans for any product not produced by the Joint Venture; marketing plans for any product ... and development and engineering activities relating to the product of the Joint Venture.⁹⁹

6. Industry-Wide Information Sharing

Firm decision making is enhanced when firms have good market information regarding prices, quantities, costs, demand, and so on.¹⁰⁰ This information is commonly organized through third parties who survey market participants and provide the industry with such information allowing, for example, firms to benchmark their performance against others in their industry and in the economy more generally.¹⁰¹ While such information is important to the efficient operation of markets, some types of information sharing among firms may facilitate explicit or tacit coordination among horizontal rivals in a manner similar to that described for collaborations between firms.¹⁰²

99. General Motors Corp., 103 F.T.C. 374, 374 (1984) (consent order).

100. See J. Thomas Rosch, Comm’r Fed. Trade Comm’n, *Antitrust Issues Related to Benchmarking and Other Information Exchanges, Remarks Before the ABA Section of Antitrust Law and ABA Center for Continuing Legal Education’s Teleseminar on Benchmarking and Other Information Exchanges Among Competitors* 2-3 (May 3, 2011).

101. *Id.* at 15-16. Within industry, information exchanges such as performance benchmarking have the potential to raise antitrust concerns and, as a result, proposed information exchanges have generated the most business review requests. See *id.* at 24.

102. See *id.* at 16. Trade associations have, for example, been implicated in exchanges of competitively sensitive information that were alleged to facilitate collusion. See, e.g., *In re Nat’l Ass’n of Music Merchs.*, No. C-4255, 2009 WL 1102975, at *4-5 (F.T.C. Apr. 8, 2009). For

As an example of the tension between the anticompetitive and procompetitive effects associated with industry information sharing, consider *United States v. Airline Tariff Publishing Co.*¹⁰³ The Airline Tariff Publishing Company, a joint venture of eight U.S. airlines, created a system by which current and future pricing information was collected and then reported to the airlines and the public.¹⁰⁴ DOJ argued, among other things, that the airlines used future fares as a means through which price agreements could be negotiated, noting that the airlines frequently modified future fares in response to changes in fares of their competitors.¹⁰⁵ Critically, many of these fares were not yet available for purchase.¹⁰⁶ Thus, although the fares were ostensibly public, DOJ argued that the unavailable fares had limited value to anyone other than the airlines themselves.¹⁰⁷ The consent order focused on proscribing pricing information dissemination for which consumers could not benefit, leaving intact the overall information sharing system which could presumably be used in the same way as before, but at a higher cost.¹⁰⁸ Here, because no direct communication among the firms was alleged, the government was careful not to undermine any real consumer value that public pricing information provides.¹⁰⁹

Information exchanges in healthcare markets that may include prices, costs, wages, healthcare outcomes, and effective protocols are valuable inputs to improving the efficiency of contracting processes and individual decision making.¹¹⁰ To delineate some safe practices

a discussion of concerns and issues involving the possible anticompetitive effects associated with benchmarking of compensation, see *Todd v. Exxon Corp.*, 275 F.3d 191, 199 (2d Cir. 2001). Information exchanges, for example, regarding cyber threats involve information that is “very technical in nature” and “very different” than “competitively sensitive information such as current or future prices and output or business plans” and hence is unlikely “to raise antitrust concerns.” U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST POLICY STATEMENT ON SHARING OF CYBERSECURITY INFORMATION 3-4, 7 (2014).

103. 836 F. Supp. 9 (D.D.C. 1993).

104. *Id.* at 10.

105. See Complaint at 5-8, *United States v. Airline Tariff Publ’g Co.*, 836 F. Supp. 9 (D.D.C. 1993) (No. 92-2854).

106. See *id.* at 7.

107. See *id.* at 6-8.

108. *Airline Tariff Publ’g Co.*, 836 F. Supp. at 10-14.

109. See *id.* at 12.

110. See U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, STATEMENT OF ANTITRUST ENFORCEMENT POLICY IN HEALTH CARE 49 (Aug. 1996).

that could help avoid information exchanges being used “by competing providers for discussion of coordination of provider prices and costs,” DOJ and FTC issued healthcare antitrust guidelines; the guidelines suggest information collection be managed by a third party, the information should not be current (specifically, it should be more than three months old), and it should be aggregated to avoid revealing connections between particular prices and costs and individual providers.¹¹¹

For antitrust purposes, the content of that communication becomes more worrisome as the information involves future as opposed to historical information, and is disaggregated (for example, more easily identified to particular firms) rather than aggregated.¹¹² Depending on time lags, historical information may facilitate monitoring of coordinated behavior. “Future” potential price information, the focus of the Airline Tariff Publishing Co. case,¹¹³ could be seen as moving the role of communication beyond mere facilitation of a tacit coordination scheme to one of facilitating the negotiation about the terms of the coordination.

7. Self-Regulatory Initiatives and Professional Organizations

In many sectors of the economy, industry-based or nonprofit organizations impose some guidance or limitations on the competitors’ activities. For example, financial accounting standards are created by the Financial Accounting Services Board which operates

111. *Id.* at 45; see also *United States v. Utah Soc’y for Healthcare Hum. Res. Admin.*, No. 94-C-282G, 1994 WL 750648, at *4 (D. Utah Sept. 9, 1994) (consent agreement) (restricting among other things exchanging current or perspective information regarding wages of nurses with specific comments on what communication is not prohibited). Along these lines, the enforcement agencies note that sharing information regarding employment conditions represents an antitrust risk, noting “a buyer may need to obtain limited competitively sensitive information” and suggesting the importance of taking “appropriate precautions.” U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 5 (Oct. 2016).

112. See GUIDELINES, *supra* note 87, at 15-16 (“[O]ther things being equal, the sharing of information ... on current operating and future business plans is more likely to raise concerns than the sharing of historical information.... [O]ther things being equal, the sharing of individual company data is more likely to raise concern than the sharing of aggregated data that does not permit recipients to identify individual firm data.”).

113. See *supra* notes 103-09 and accompanying text.

independently from the government,¹¹⁴ while other organizations create technical standards. State bar associations create and administer minimum quality standards needed to practice law in a given state, and some organizations such as the NCAA impose rules on its members relating to amateurism in sports.¹¹⁵ These self-regulatory organizations negotiate and publicize guidelines or rules governing their members, oftentimes promoting purposes that arguably extend beyond the self-interest of their membership.¹¹⁶

While the welfare-enhancing aspects of self-regulation are clear, so too is the potential for self-regulation to shape competition in possibly anticompetitive ways. A number of professional association rules have been challenged as anticompetitive.¹¹⁷ These include restrictions on speech such as price advertising in the case of various professions including optometry¹¹⁸ and dentistry,¹¹⁹ and policies suggesting acceptable standard setting processes.¹²⁰ First Amendment issues have also directly surfaced in this context, especially regarding professional norms which have been defended, albeit frequently without success, on speech grounds (for example, American Medical Association and National Society of Professional Engineers).¹²¹

In summary, antitrust law and policy regarding information sharing broadly defined, by regulating what can and cannot be communicated either privately or publicly, can be viewed as antitrust control of speech. We see this most directly in the remedies to

114. See generally KARTHIK RAMANNA, POLITICAL STANDARDS: CORPORATE INTEREST, IDEOLOGY, AND LEADERSHIP IN THE SHAPING OF ACCOUNTING RULES FOR THE MARKET ECONOMY 6-7 (2015).

115. See, e.g., NCAA, SUMMARY OF NCAA ELIGIBILITY REGULATIONS—NCAA DIVISION I (2018), https://www.ncaa.org/sites/default/files/2018-19_Summary_of_NCAA_Regulations_20180608.pdf [<https://perma.cc/Z825-GVV3>].

116. See, e.g., *id.*

117. See *Anticompetitive Practices*, FED. TRADE COMM'N, <https://www.ftc.gov/enforcement/anticompetitive-practices> [<https://perma.cc/AN97-PXYV>] (“[A]nticompetitive practices include ... trade association rules.”).

118. See, e.g., *In re Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549, 549, 606 (1988).

119. See, e.g., *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 759 (1999); *Cal. Dental Ass'n*, 121 F.T.C. 190, 190 (1996).

120. See, e.g., Letter from Thomas O. Barnett, Assistant Att'y Gen., to Robert A. Skitol, Drinker, Biddle & Reath (Oct. 30, 2006).

121. See *Nat'l Soc'y for Prof'l Eng'rs v. United States*, 435 U.S. 679, 697 (1978); *Am. Med. Ass'n v. FTC*, 638 F.2d 443, 451-52 (2d Cir. 1980).

anticompetitive conduct which proscribe speech that constitutes the objectionable conduct¹²² as well as speech that could facilitate objectionable conduct.¹²³ But we also see it in enforcement agency guidelines and business review letters that designate what types of communications are relatively safe or dangerous from an antitrust prosecution perspective.

8. *Boycotts*

Another way in which parties may coordinate with one another is through boycotts. “Courts have interpreted Section 1 to prohibit competitors from agreeing with one another not to deal, or to deal only on specified terms, with other economic actors. Cases describe this conduct in various ways, often referring to a ‘group boycott’ or a ‘concerted refusal to deal.’”¹²⁴

Consider first the most basic boycott example. A group of horizontal competitors engage in a concerted refusal to deal with a supplier unless it reduces its price. This is effectively price fixing and the boycott is merely a mechanism for the collusion. As in the naked collusion example discussed previously,¹²⁵ only anticompetitive harms occur or have the potential to occur and there are no procompetitive benefits associated with the boycott.¹²⁶ The speech at issue is solely a means to the end of the collusive activity. It has no purpose other than within that narrow sense and it is likely to be private, as such it has no First Amendment value. When undertaken to affect price, boycotts are per se illegal.¹²⁷

Boycotts are generally motivated by dissatisfaction with the actions of the parties being boycotted and may be partially or fully motivated by the boycotters’ economic self-interest.¹²⁸ For example, a

122. See *supra* Part I.C.1.

123. See *supra* Parts I.C.2-3.

124. 1 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 109 (8th ed. 2017).

125. See *supra* Part I.C.1.

126. Exercising countervailing power to lower price is not generally recognized as procompetitive. See John B. Kirkwood, *Buyer Power and Healthcare Prices*, 91 WASH. L. REV. 253, 263 n.43 (2016).

127. See, e.g., *Radiant Burners v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659-60 (1961).

128. See, e.g., Greene, *supra* note 34, at 1038 (“The expressive boycotts this Article addresses are characterized by speech that is political yet also economically self-interested.”).

typical boycott involves purchasers who refuse to buy from a seller perhaps because of some unfairness they attach to the seller such as its price is “too high” (for example, boycott by buyers of sugar because of monopolistic pricing by the seller),¹²⁹ or because of dissatisfaction with the seller’s labor practices (for example, boycott against Nike motivated by the conditions under which its shoes are manufactured in Asia).¹³⁰ The latter boycott would be seen as a boycott intended to promote a social goal, whereas the former boycott would be seen as a reflection of pure economic self-interest. Hence, boycotts present a useful contrast to the collusion setting in which there are no procompetitive justifications and the invitation to collude settings in which there could be a weak efficiency basis for favoring greater speech.¹³¹ Boycotts range from settings where there is no social value to those in which a speech value is present and grounded in a noneconomic purpose.

Consider boycotts whose only goals are based on social or political principles and not self-interested economic benefit. NOW publicly calls for a nationwide boycott of Missouri’s convention industry unless Missouri ratifies the Equal Rights Amendment (ERA).¹³² What would standard antitrust analysis look like within such a case? Arguably there is an anticompetitive effect—the harm to the local economy, as a result of the boycott.¹³³ There is no procompetitive effect, as traditionally defined by antitrust law.¹³⁴ So, under conventional antitrust analysis, the boycott would be condemned under the antitrust laws.¹³⁵

The foregoing analysis reflects the position adopted by the Missouri Attorney General John Ashcroft and by the dissent in *Missouri*

129. See, e.g., *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 222-23 (1948).

130. See Ashley Lutz, *How Nike Shed Its Sweatshop Image to Dominate the Shoe Industry*, BUS. INSIDER (June 6, 2015, 8:38 AM), <http://www.businessinsider.com/how-nike-fixed-its-sweatshop-image-2015-6> [<https://perma.cc/2YPE-4NCA>].

131. See *supra* Part I.C.2.

132. See *Missouri v. Nat’l Org. for Women*, 467 F. Supp. 289, 291 (W.D. Mo. 1979).

133. See *Missouri v. Nat’l Org. for Women*, 620 F.2d 1301, 1321-22 (8th Cir. 1980) (Gibson, J., dissenting).

134. See *id.* at 1311-12 (majority opinion). But note that the ERA is an inherently economic piece of legislation that would have profound effects on the economy.

135. See *id.* at 1319-20.

v. National Organization for Women in the Eighth Circuit.¹³⁶ That position did not prevail.¹³⁷ The majority in the Eighth Circuit found that the NOW-led boycott reflected an important speech interest that warranted protection which ultimately took the form of immunization from the antitrust laws.¹³⁸ The disagreement between the two parties was not so much over the relative anticompetitive and procompetitive effects.¹³⁹ Instead the debate concerned whether or not the anticompetitive effects were immunized by the First Amendment because the boycott was protected political speech.¹⁴⁰ The Court emphasized that the boycotters did not have direct economic self-interest in the boycott's purpose, though it would ultimately deny that this fact influenced its analysis.¹⁴¹ The majority viewed the Constitution as prohibiting any tradeoff between the First Amendment right to petition and antitrust values.¹⁴²

Boycott settings with mixed political and economic motives present more difficult problems when a court feels compelled to decide between complete immunity and no protection as outcomes. In *FTC v. Superior Court Trial Lawyers Ass'n*, the FTC alleged that the Superior Court Trial Lawyers Association, a group of lawyers providing legal services to indigent criminal defendants in the District of Columbia, organized a boycott with the intent of raising their rates.¹⁴³ Evidence was raised that suggested the boycotters were partially motivated by altruistic social reasons, but even in acknowledging this evidence, in a 5-4 decision the Supreme Court found the boycott per se illegal and articulated a rule that any economic interest in a boycott disqualified an immunity defense based on speech.¹⁴⁴

This case also raised another critical twist in terms of a speech analysis. The appellate court argued that the Superior Court Trial

136. See *id.* at 1319-22. For a more in-depth treatment of *Missouri v. National Organization for Women*, see Greene, *supra* note 34.

137. See *id.* at 1318-19.

138. See *id.*

139. See *id.*

140. Compare *id.*, with *id.* at 1321-22 (Gibson, J., dissenting).

141. See *id.* at 1302-03, 1314 (majority opinion).

142. See *id.* at 1318-19.

143. 493 U.S. 411, 415-19 (1990). For a more in-depth treatment of *Superior Court Trial Lawyers*, see, for example, Greene, *Muzzling Antitrust*, *supra* note 23, at 55-56.

144. *Superior Ct. Trial Lawyers Ass'n*, 493 U.S. at 426-28.

Lawyers Association boycott had “an element of expression warranting First Amendment protection.”¹⁴⁵ Here, the boycott was arguably expressive conduct because it uniquely conveyed through a combination of hardship and solidarity a rejection of the status quo and did so publicly.¹⁴⁶ It was not merely about facilitating the boycott or perhaps attracting others to the cause.¹⁴⁷ The expressive part makes the boycott *itself* speech, but the Supreme Court, working within the confines of speech as an immunity defense, still rejected the boycott as speech thereby limiting concern to economic conduct only.¹⁴⁸

In summary, while the law regarding polar cases of boycott behavior such as involving pure economic self-interest (for example, *Klor's, Inc. v. Broadway-Hale Stores*¹⁴⁹) is relatively clear cut, there are debates regarding the application of antitrust law to settings with mixed economic and political interests (for example, *Superior Court Trial Lawyers Ass'n v. FTC*¹⁵⁰). Furthermore, there is longstanding ambiguity regarding the circumstances under which a per se as opposed to rule-of-reason treatment is warranted for boycotts.¹⁵¹

9. Vertical Price-Fixing

The treatment of vertical price agreements in antitrust has a somewhat complicated history because of the historically harsh view antitrust law has had of vertical price fixing juxtaposed with the desire to protect a firm's freedom to choose with whom to do business¹⁵² and the economic efficiencies associated with some

145. *Superior Ct. Trial Lawyers Ass'n v. FTC*, 856 F.2d 226, 248 (D.C. Cir. 1988).

146. *See id.*

147. *Cf. id.*

148. *Superior Ct. Trial Lawyers Ass'n*, 493 U.S. at 430-36.

149. 359 U.S. 207 (1959).

150. 856 F.2d 226 (D.C. Cir. 1988).

151. “[T]he circumstances in which a concerted refusal to deal constitutes a per se unlawful group boycott today are not clearly defined.” ABA SECTION OF ANTITRUST LAW, *supra* note 124, at 110-11.

152. *See generally* William S. Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 HARV. L. REV. 983, 983-84 (1985) (discussing the history of judicial and legislative price fixing and noting that Congress eventually passed legislation “making vertical price-fixing an approved form of business conduct,” but that legislation was overturned); *see also* *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984).

structures of agreement.¹⁵³ Until relatively recently, vertical price agreements (also known as resale price maintenance) were per se illegal, though in practice were treated more leniently (at least in terms of prosecutorial discretion).¹⁵⁴ Under older precedent, much attention was paid to determining whether an agreement existed or, for example, whether a manufacturer was imposing a (legally permissible) unilateral policy under which it would only sell to retailers who set prices above a minimum level.¹⁵⁵ Today, vertical price agreements are handled under a rule of reason analysis,¹⁵⁶ which makes market power a necessary condition for illegality¹⁵⁷ and allows restrictive agreements to be justified on efficiency grounds.¹⁵⁸

As in the premerger communication analysis,¹⁵⁹ the speech component of vertical agreements is private and limited to those parties for which some communication, though not necessarily about price, is justified as necessary to achieve efficiency purposes. Vertical price-fixing under the older per se treatment constituted an extreme example of how speech was controlled by the antitrust laws. For example, manufacturers could unilaterally announce terms under which they would deal with retailers, but they could not engage in back-and-forth discussions of those terms. Even under the change largely to rule-of-reason treatment of vertical restraints, the nature of communications still plays an important role in the judicial resolution of such cases.¹⁶⁰

153. Vertical price-fixing is one form of distributional restraint. The other class of vertical restraints involve interbrand competition. See, for example, ABA SECTION OF ANTITRUST LAW, *supra* note 124, at 134-221 for a general discussion.

154. See, e.g., D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 GEO. WASH. L. REV. 2064, 2071-72 (2015) (collecting statistics for FTC enforcement).

155. See, e.g., *Monsanto Co.*, 465 U.S. at 763; *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 400 (1911).

156. See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 900-04 (2007); *State Oil Co. v. Khan*, 522 U.S. 3, 17-18 (1997).

157. *Leegin*, 551 U.S. at 898.

158. *Id.* at 885-86.

159. See *supra* Part I.C.4.

160. Michael A. Lindsay, *Resale Price Maintenance and the World After Leegin*, 22 ANTITRUST 32, 36 (2007) ("*Leegin* greatly reduces the risk of per se liability if the unilateral policy evolves into a bilateral agreement.").

D. Monopolization and Attempted Monopolization

In the preceding Sections, the focus was largely on concerted action—action involving communications among multiple speakers. We now turn our attention to matters involving single speakers which may fall afoul of Section 2 of the Sherman Act.

1. Disparagement

If a firm with enough market power to raise monopolization or attempted monopolization concerns makes materially misleading statements about a rival's service, product, or company, the firm may be liable to a disparagement-based antitrust claim.¹⁶¹ Some courts do not recognize such claims, while other courts recognize disparagement at least in theory, but in practice seem to collect such claims into some larger pattern of actions which is sometimes referred to as an antitrust "broth."¹⁶²

Misleading statements are harmful to competition because they lead buyers or sellers to make inefficient decisions, whereas accurate statements would improve marketplace decision making.¹⁶³ Because the content of these statements is often subjective and involves judgment calls by both the speaker and the listeners, defendants argue first that their speech is factual (and beneficial) and therefore fully protected by the First Amendment and that, in any event, the First Amendment protects their right to express opinions if the statement is not factually incorrect.¹⁶⁴ One key problem is that statements may lead different listeners to infer different meanings from the same explicit message.¹⁶⁵

161. ABA SECTION OF ANTITRUST LAW, *supra* note 124, at 317-19. *But see id.* at 319 & n.686. Materially misleading statements about one's own product or service would also, in theory, be liable to antitrust claims (for example, relating to vaporware). *See, e.g.,* Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?*, 63 SMU L. Rev. 1069, 1097-1102 (2010) (discussing vaporware).

162. *See generally* Daniel A. Crane, *Does Monopoly Broth Make Bad Soup?*, 76 ANTITRUST L.J. 663 (2010) (analyzing the use of antitrust "broth" theory).

163. *See* ABA SECTION OF ANTITRUST LAW, *supra* note 124, at 317.

164. *See* Greene, *Muzzling Antitrust*, *supra* note 23, at 45 ("[T]he expression of opinion receives substantial protection under the First Amendment.").

165. *See* Butler & Ribstein, *supra* note 86, at 170.

Materially misleading statements about a competitor are typically prosecuted under the Lanham Act,¹⁶⁶ the FTC Act as “deceptive acts or practices,”¹⁶⁷ or related state consumer protection statutes.¹⁶⁸ The existence of these alternative legal routes may partially explain the reluctance of the courts to recognize disparagement as an independent antitrust claim.¹⁶⁹ One can interpret such avoidance as either strongly favoring speech values or as foisting the tradeoff to a different legal regime.

2. *Predatory Design*

Predatory design is another monopolization or attempted monopolization cause of action which has a history tracing back to *Berkey Photo, Inc. v. Eastman Kodak Co.* and more recently to cases such as *C.R. Bard v. M3 Systems, Inc.*¹⁷⁰ In such cases, a defendant with sufficient market power to support an attempted monopolization claim is alleged to redesign its product to disadvantage competitors.¹⁷¹ The mechanism, for example, may be the creation of intentional incompatibilities to a core product so that a complementary product of a rival is disadvantaged relative to the complementary product of the core product producer. Alternatively, it could be that the output of the core product disadvantages rivals’ ability to sell products, again relative to a competing product which the core producer also sells.

As a concrete example of the latter mechanism, consider Google’s market-dominant search engine.¹⁷² At the risk of oversimplifying, Google’s product returns results according to a particular

166. See Crane, *supra* note 162, at 672-73.

167. *Anticompetitive Practices*, *supra* note 117.

168. See Jeff Miles, *Principles of Antitrust Law* 30 (2016), https://www.americanbar.org/content/dam/aba/administrative/healthlaw/01_antitrust_primer_01.authcheckdam.pdf [<https://perma.cc/NF3H-XCYD>].

169. See Greene, *Muzzling Antitrust*, *supra* note 23, at 101 n.315.

170. See *C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1369-72 (Fed. Cir. 1998); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 269, 283, 294 (2d Cir. 1979).

171. See, e.g., *C.R. Bard*, 157 F.3d at 1382-83.

172. Sharon Nelson & John Simek, *Making Your Web Site Visible: How to Find a Good Seo Company*, 36 LAW PRACTICE 24, 24 (2010) (“Despite the existence of other search engines like Yahoo, Bing and Ask, Google remains the indisputable king, with over 65 percent of market share at present.”); see also Mark R. Patterson, *Google and Search-Engine Market Power*, HARV. J.L. & TECH., July 2013.

algorithm.¹⁷³ Many competition agencies have examined whether Google has manipulated its search results to relatively advantage its own “vertical properties” over competitors’ vertical websites.¹⁷⁴ The alleged anticompetitive effect is that Google’s search algorithm causes competitors’ websites to become so depressed in the rankings that traffic to their sites decreased, sometimes significantly so.¹⁷⁵ The potential procompetitive effects come from the redesigned search product which Google claims produces higher quality search rankings for the consumer.¹⁷⁶

But what is the potential nexus between predatory design of information products and speech? In *Sorrell v. IMS* the Supreme Court recognized information that was the content of economic transactions being regulated under Vermont law as speech.¹⁷⁷ Not surprisingly, defendants in cases involving predatory design of information products such as the Google’s search engine argue that such products are speech and hence protected by the First Amendment.¹⁷⁸

In these cases, the speech is not about facilitating agreements or characterizing products, the product itself might be considered speech. Google has argued this point, asserting that the search engine results are opinions about how to organize information, similar to what a newspaper would publish.¹⁷⁹ The information product category raises doubt whether our current immunity-based treatment of the speech-antitrust interface is sufficiently robust to deliver satisfactory legal outcomes. Under our current regime two polar outcomes could emerge. Either information products will be

173. See generally *How Search Algorithms Work*, GOOGLESARCH (Sept. 6, 2018), <https://www.google.com/search/howsearchworks/algorithms/> [<https://perma.cc/D4KG-DR6T>].

174. See FED. TRADE COMM’N, FTC FILE NO. 111-0163, STATEMENT OF THE FEDERAL TRADE COMMISSION REGARDING GOOGLE’S SEARCH PRACTICES (2013) [hereinafter STATEMENT ON GOOGLE SEARCH PRACTICES]; Summary of Commission Decision of 27 June 2017, Case AT.39740—Google Search (Shopping), 2018 O.J. (C 9/08) ¶ 11-28. While the FTC closed its investigation without bringing any charges, see STATEMENT ON GOOGLE’S SEARCH PRACTICES, *supra*, at 1, the EU has found that Google illegally manipulated its search services. *Summary of Commission Decision*, ¶¶ 1-2, 9-10.

175. STATEMENT ON GOOGLE’S SEARCH PRACTICES, *supra* note 174, at 1-2.

176. See *id.*

177. *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 557 (2011).

178. See Greene, *Muzzling Antitrust*, *supra* note 23, at 37.

179. Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8:4 J.L. ECON. & POL’Y 883, 884 (2012).

treated as protected speech and will be immune from antitrust action (which might exempt from antitrust law the whole category of information products), or information products will be treated as any other product under the antitrust laws. That is, no solicitude will be given to the speech characteristics of the product. Either of these outcomes could, at times, force a complex problem into one of two crude solutions.

As it turns out, even if information product “speech” is not deemed to merit immunity, it may still be indirectly protected in the liability stage if it is recognized as contributing to economic value. This byproduct protection for speech applies quite generally across various antitrust causes of action and we address this point next.

II. PROTECTION OF SPEECH

Aside from relatively infrequent instances regarding immunity or remedial issues, First Amendment issues are not explicitly a part of the antitrust liability analysis.¹⁸⁰ Part II examines this phenomenon and shows how speech with economic efficiency value, nonetheless, receives some de facto protection in cases subject to rule of reason treatment.¹⁸¹ Generally, the rule of reason involves a fact-specific assessments of both the anticompetitive and procompetitive effects of particular conduct, balancing them against one another, and condemning those that lead to unreasonable restraints on trade.¹⁸²

This Section examines whether speech values are accounted for within a rule of reason assessment and explores whether they could be accommodated. This requires distinguishing between speech that

180. See *supra* Parts I.A-B.

181. See GUIDELINES, *supra* note 87, at 4. The alternative to rule of reason treatment is per se illegality which examines whether the conduct occurred and, if so, the conduct is condemned. See *supra* Part I.C.1. Presently, the only way to escape per se treatment is through immunity. See Greene, *Muzzling Antitrust*, *supra* note 23, at 55 (noting immunity’s all or nothing character). If that is rejected, there is no room for consideration of speech values or any other values for that matter. See Greene, *supra* note 34, at 1040. However, prosecutorial discretion on the part of antitrust regulators could “soften” this per se treatment in practice, see Susan S. DeSanti & Ernest A. Nagata, *Competitor Communications: Facilitating Practices or Invitations to Collude? An Application of Theories to Proposed Horizontal Agreements Submitted for Antitrust Review*, 63 ANTITRUST L.J. 93, 126-27 (1994), as it did for vertical price fixing pre-*Leegin*. See *supra* notes 152-55 and accompanying text.

182. See GUIDELINES, *supra* note 87, at 4.

is valued for its contributions to efficiency from speech that is not valued because it does not contribute to efficiency. The latter speech could serve nonefficiency values, expressive values, or both. However, in what follows we focus exclusively on nonefficiency values as they more directly benefit society and not just the speaker.¹⁸³

Antitrust law's general rejection of nonefficiency values is clearly reflected in their notable absence from the case law.¹⁸⁴ It is also evident in the infrequent instances in which they have been addressed. Long before *Superior Court Trial Lawyers*,¹⁸⁵ the Supreme Court addressed this issue within the context of professional associations. In their concurrence in *National Society of Professional Engineers*, Justice Blackmun, joined by Justice Rehnquist, noted that the "case does not require us to decide whether the 'Rule of Reason' as applied to the professions ever could take account of benefits other than increased competition."¹⁸⁶ However, they stated that given the majority's "holding that ethical norms can pass muster under the Rule of Reason only if they promote competition, [they are] not at all certain that the Court leaves enough elbowroom for realistic application of the Sherman Act to professional services."¹⁸⁷

We next address some potential consequences for antitrust law of not incorporating nonefficiency values in antitrust analysis and then examine some challenges that would be associated with doing so. Part II ends by noting how changes in technology, society, and the law are leading to more instances when speech rights and antitrust law will collide.

A. De Facto Protection for the Economic Efficiency Value of Speech

This Section argues that speech contributing to economic efficiency receives de facto protection under rule of reason analysis.

183. Distribution is an example of an economic goal but not one pertaining to economic efficiency. We include it as a noneconomic efficiency value.

184. See Greene, *supra* note 34, at 1052-54 (noting antitrust law's general disregard for noneconomic considerations).

185. For discussion of the case, see *supra* text accompanying notes 143-48.

186. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 699 (1978) (Blackmun, J., concurring).

187. *Id.* at 701.

Rule of reason analysis focuses on actual competitive effects and, as such, it indirectly accounts for speech that influences economic efficiency harms and benefits.¹⁸⁸

As an example, consider speech in the form of sharing current price information. Such an information exchange potentially poses both anticompetitive harms and procompetitive benefits.¹⁸⁹ For example, price information may facilitate monitoring for cheating on a collusive scheme while simultaneously allowing buyers to make better decisions or to drive better bargains.¹⁹⁰ The value of these communications is economic and, given their potential contribution to economic efficiency, would be accounted for in a rule of reason analysis.¹⁹¹ We consider this recognition of speech value to be a byproduct of antitrust law's focus on economic efficiency rather than its concern for the value of speech qua speech.¹⁹² The landscape survey notes many other information-sharing circumstances (for example, premerger information exchange and joint ventures) where the economic benefits and costs of the communications are considered within antitrust proceedings.¹⁹³

While the foregoing information-sharing examples involve coordinated effects, speech also plays a role in single-firm antitrust matters including monopolization or attempted monopolization.¹⁹⁴ Part I discussed the alleged predatory redesign of products by a firm with market power in which it is claimed that "the redesign creates intentional, and potentially unnecessary, incompatibilities with rival products."¹⁹⁵ In general, such cases turn on whether redesign was innovative which is a procompetitive defense.¹⁹⁶ Given any colorable claim to innovation the courts typically have not found that such redesigns violate the antitrust laws, so much so that innovation would appear to receive a form of per se legal treatment.¹⁹⁷ The cause of action for a redesign of information

188. See Miles, *supra* note 168, at 52-53.

189. See Rosch, *supra* note 100, at 1-2.

190. See *id.*

191. See GUIDELINES, *supra* note 87, at 4.

192. See Greene, *supra* note 34, at 1040.

193. See, e.g., *supra* Parts I.C.4-5.

194. See *supra* Part I.D.

195. Greene, *Muzzling Antitrust*, *supra* note 23, at 72.

196. See *id.* at 71-79.

197. *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp., LP*, 592 F.3d 991, 1000

products such as a search engines is different, where the concern, for example, is use of the search engine to disadvantage rivals of the search engine firm's other businesses (for example, Internet travel sites) rather than disadvantaging rivals through product incompatibilities. In the search engine scenario, there is arguably a one-to-one correspondence between the presence of the alleged innovation (facilitated through underlying algorithms) and the claimed improvements in usefulness of search responses (speech).¹⁹⁸ Under an antitrust rule of reason analysis, then, a nontrivial improvement in speech outcomes constitutes innovation and is, therefore, protected. This protection of speech is a byproduct of jurisprudential deference to innovation. It does not originate from the specific efficiency value of improvements at issue.¹⁹⁹

Even when the antitrust laws operate to provide de facto protection of speech, is a cost imposed as the result of that protection being indirect rather than direct? Quite possibly yes. The most obvious cost is that indirect protection could be too little because the level of protection accorded the direct concern is inadequate to protect the indirect concern. Continuing with the innovation example, antitrust doctrine regarding innovation arguably protects speech in information products to the extent that the underlying speech improves economic efficiency and, hence, is considered to constitute innovation. But lacking an efficiency improvement, speech which might serve a nonefficiency social value would be unprotected.

Two other costs of indirect protection are subtler. Indirect protection has an inherent degree of intertemporal unreliability associated with it.²⁰⁰ Regardless of how much protection is conferred indirectly on speech, if the antitrust law changes then so too may

(9th Cir. 2010) (arguing against trying to balance the value of innovation against anticompetitive harm); *United States v. Microsoft Corp.*, 253 F.3d 34, 66 (D.C. Cir. 2001) (finding claimed procompetitive innovation not substantiated so balancing unnecessary); see, e.g., Greene, *Muzzling Antitrust*, *supra* note 23, at 77 ("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. This disagreement regarding the appropriate analysis of alleged predatory design has been largely sidestepped in practice." (footnote omitted)).

198. See *supra* text accompanying notes 172-89.

199. See Greene, *Muzzling Antitrust*, *supra* note 23, at 39.

200. See *supra* Part I.B.

the protection afforded speech.²⁰¹ But, while such changes to antitrust may impact the protection of speech values, those changes are unlikely to be informed by those values. The question is not just whether there is sufficient protection but also whether such protection is secure.

Along similar lines, the indirect concern inherits ambiguity associated with the direct concern along with uncertainty regarding the extent of protection accorded the indirect concern.²⁰² In essence, if the law expressly at issue (that is, antitrust) is particularly ambiguous, then so too will be the resulting contours of the indirect protection. In the innovation case the status quo is both extremely protective and fairly unambiguous because it essentially results in de facto legality when innovation is invoked.²⁰³ However, most antitrust issues receive more nuanced treatment, often decidedly so.²⁰⁴ And, it is possible for antitrust to evolve in ways that prove to be less speech protective in the future.

Overall, this analysis suggests that, as a practical matter, a byproduct of antitrust law's focus upon economic efficiency is some level of de facto speech protection. In other words, rule of reason

201. Antitrust law evolves to reflect improvements in knowledge of theory, empirical methods, and in response to new fact patterns. These factors make legal development depend on when and how new understandings and new application techniques are developed. This path dependency implies that one would expect a law (that is, antitrust) that does not directly address First Amendment values to depart somewhat from a jurisprudence developed with First Amendment values in mind—even with generally consonant objectives. One example of path dependent and evolutionary changes in antitrust law is the recognition of merger efficiencies in antitrust merger analysis. While it has always been obvious that mergers offer significant potential for efficiencies, “the easy to claim, difficult to realize” character of such efficiencies has resulted in a slow recognition of merger efficiencies from almost no recognition to today’s limited recognition. See, for example, Dennis A. Yao & Kevin J. Arquit, *Applying the 1992 Horizontal Merger Guidelines*, 6 ANTITRUST 17, 17-19 (1992) for a general discussion of the practical problems of applying various analytical approaches to merger analysis.

202. This ambiguity could lead to some chilling of procompetitive conduct. See, e.g., *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 (1978) (the imposition of criminal liability on a corporate official without inquiry into intent “holds out the distinct possibility of overdeterrance ... [of] ... salutary and procompetitive conduct lying close to the borderline of impermissible conduct”).

203. See *supra* text accompanying note 196.

204. Furthermore, although the economic value associated with speech seems largely protected by spillovers, that protection is obtained through a full rule of reason analysis which involves considerable discovery and trial costs. See *generally supra* note 97. To the extent that speech values might short-circuit such an intensive process, one could argue that speech is undervalued.

analysis accounts for the procompetitive impact of speech even when there is no direct consideration of First Amendment rights. Such de facto protection is a partial answer to the question of why the First Amendment is not addressed more often in antitrust matters given antitrust's operation as a form of speech control. When the dominant value of speech is based on its instrumental contribution to economic efficiency, de facto protection would appear to offer non-trivial protection of speech interests.²⁰⁵

B. The Challenges Associated with Protecting Nonefficiency Values of Speech

Speech receives some de facto protection within the antitrust setting because it furthers the value of economic efficiency.²⁰⁶ But should its protection also extend to its nonefficiency considerations? Or would such an approach open a Pandora's box of philosophical and workability problems that would better remain closed?

This Section examines arguments for and against broadening the antitrust rule of reason analysis to include nonefficiency values promoted by speech or directly associated with it. Speech could be valued for its contribution to a social purpose, its contribution to the "marketplace of ideas," and the value of speech as self-expression.²⁰⁷ The first two are more directly utilitarian, since the contribution is more narrowly focused on the betterment of society. The first value

205. Protection of speech according to its contribution to economic efficiency is a decidedly antitrust view of speech. See Greene, *supra* note 34, at 1052. Using a First Amendment perspective, such an analysis can be thought of as determining the antitrust government interest for any restrictions in speech that may be included in the remedy. A speech restriction would be only justified if, when considering the procompetitive value of speech, a net antitrust harm is proven. If so, then any speech restriction would need to be sufficiently tailored to meet the appropriate level of scrutiny which, in this case, is presumably that of commercial speech. See Greene, *Muzzling Antitrust*, *supra* note 23, at 59. See generally *supra* text accompanying notes 38-41. Given the constitutional nature of the First Amendment, this level of scrutiny presumably exceeds that associated with a nonspeech antitrust remedy. The limit to the severity of the restraint at this remedy stage is determined by the category of speech, not by the content of the speech. See, e.g., Greene, *Muzzling Antitrust*, *supra* note 23, at 58-59. Nonetheless, less onerous restraints could be imposed, reflecting the court's view of the antitrust conduct that is being remedied.

206. See Greene, *supra* note 34, at 1052 ("[E]conomic efficiency has come to ... dominate antitrust analysis.").

207. See Greene, *Muzzling Antitrust*, *supra* note 23, at 92.

reflects the direct impact of the speech on social outcomes, while the second can be thought of as protecting the process of social discourse that may indirectly improve society. This Section discusses the implications for broadening protection to include these utilitarian nonefficiency benefits of speech. After discussing whether reform is needed, we examine the challenges associated with assessing speech's direct contribution to nonefficiency outcomes and with accounting for speech's indirect contribution.

*1. Considerations For and Against Broadening
First Amendment Protection*

As discussed in Part II.A, speech values already receive limited recognition within antitrust proceedings. As a thought experiment, this Section briefly explores key arguments for and against expanding that protection. The differences between those positions can be understood in terms of what is to gain (how adequate is the current regime in protecting First Amendment values? What is the value of the incremental speech protection?), what is to lose (what is the harm to antitrust values including potential decreased predictability? Are there broader implications for noneconomic values more generally?), and how do those effects compare?

We know the extreme positions on the ultimate question of how to compare that would unreservedly favor one regime and entirely eviscerate the other. Fortunately, such positions have not prevailed. But what of the countless intermediate positions that involve the possibility of tradeoffs? For example, those favoring increased First Amendment protections could do so for any number of reasons, including a sense that the current antitrust regime imposes a very weighty burden upon speech, and thus reforms to reduce that burden are justified even when they impose substantial costs on the antitrust regime. Another possibility would be that the cost to the antitrust regime associated with greater speech protection is sufficiently low so that even smaller amounts of increased speech protection are justified. Alternatively, those disfavoring expanded First Amendment protections may believe speech interests are currently well protected and that further protections would be of

minimal value while, perhaps, extracting unduly heavy penalties upon the antitrust regime.

The context of expressive boycotts illustrates how society fails to adequately confront tradeoffs presented in complicated situations in which noneconomic and economic purposes are intertwined. *Superior Court Trial Lawyers* involved such hybrid speech in which the First Amendment value of the speech as well as its antitrust harms derived from the boycott itself.²⁰⁸ Because the speech combined economic as well as noneconomic interests, the Court withheld any First Amendment solicitude.²⁰⁹ The Court justified this oversimplification claiming that, “[a] rule that requires courts to apply the antitrust laws ‘prudently and with sensitivity’ whenever an economic boycott has an ‘expressive component’ would create a gaping hole in the fabric of those laws.”²¹⁰ But, such oversimplification arguably operates in both directions. There is no middle ground.

For a different example of the First Amendment-antitrust interface, consider *NAACP v. Claiborne Hardware Co.*, a case that involved an NAACP-organized boycott against white merchants in Claiborne County, Mississippi.²¹¹ Elected officials, who were white, were presented with “a list of particularized demands for racial equality and integration.”²¹² When a “satisfactory response” was not received, a boycott of the “white merchants in the area” ensued.²¹³ Some targeted merchants sued based on antitrust grounds and tortious interference with business relations.²¹⁴ The initial award of more than a million dollars in the Chancery Court was appealed to the Mississippi Supreme Court.²¹⁵ That court reversed stating that the United States Supreme Court mandated that “boycotts to achieve political ends are not a violation of the Sherman Act.”²¹⁶ Although only the tort-related claims would come before the United

208. See *FTC v. Super. Ct. Trial Lawyers Ass’n*, 493 U.S. 411, 426-28 (1990).

209. *Id.* at 431-32.

210. *Id.*

211. 458 U.S. 886, 889 (1982).

212. *Id.* For a more in-depth treatment of *Claiborne Hardware*, see Greene, *Antitrust Censorship*, *supra* note 34, at 1060-63.

213. *Claiborne Hardware*, 458 U.S. at 889.

214. *Id.* at 890-93.

215. *Id.* at 893-94.

216. *Id.* at 894.

States Supreme Court,²¹⁷ its ruling regarding how to handle hybrid speech has important implications for antitrust law. The Court pointedly characterized the boycott as noneconomic: "There is no suggestion that the NAACP ... or the individual defendants were in competition with the white businesses or that the boycott arose from parochial economic interests."²¹⁸ This dovetailed with the Court's holding that the First Amendment protected "a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself."²¹⁹ As such, the award for the plaintiffs was reversed.²²⁰

While the Court's decision was correct, it also arguably oversimplified aspects of the case. For example, there was some economic self-interest involved because one or more boycotters owned a store that apparently benefited from the boycott.²²¹ Additionally, the boycott demand that, "[a]ll stores must employ Negro clerks and cashiers" could, in theory, redound to some boycotters' benefit.²²² Was there a concern that First Amendment immunity from liability (including antitrust liability) arguably would have been imperiled if any economic purpose were attached to the speech? In fact, Professors Areeda and Hovenkamp have argued more specifically that the First Amendment should not shield from antitrust liability any African American "merchant who stands to benefit directly from any decline in business to its white competitors."²²³

But the challenges posed by such mixed purpose speech are still wider. Consider, for example, firms whose goals include social objectives relating to issues such as sustainability,²²⁴ social responsibility, and workplace conditions.²²⁵ Firms adopting practices

217. *See id.* at 896-98.

218. *Id.* at 915.

219. *Id.* at 914.

220. *Id.* at 934.

221. *See id.* at 937.

222. *Id.* at 900.

223. 1B PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION 191-92 (3d ed. 2006).

224. *See generally* Richard A. Clarke et al., *The Challenge of Going Green*, HARV. BUS. REV., July-Aug. 1994, at 37, 37-38.

225. The motivations to pursue social purposes sometimes reflect management's belief that pursuing such purposes directly translates into profits. However, frequently the connection between the social purpose in question and profit is arguably based more on faith than on hard-headed business analysis. *See, e.g.*, Michael E. Porter & Mark R. Kramer, *Strategy &*

associated with such self-identified social purposes will usually share that information with their stakeholders, and perhaps even welcome or encourage similar activity by other market participants.²²⁶ What are the pros and cons associated with antitrust scrutiny reflecting a more expansive view of First Amendment protections within this context?

Under current antitrust law, self-identified social purposes have not been countenanced as a justification for otherwise anticompetitive behavior in part because the designation such purposes and the manner in which they are not societally sanctioned.²²⁷ It does not matter if the outcomes of private action are beneficial. But, for the sake of argument, suppose that society wanted to expand protection of speech in an antitrust analysis by providing limited recognition of the direct nonefficiency benefits facilitated by the speech. Such an analysis would be the nonefficiency benefit analog of the efficiency benefit in a market effects analysis.²²⁸ Beyond the possible policy objections associated with such an expansion, it raises a number of serious implementation problems. How would one measure nonefficiency effects and, once measured, how would one value the effects and compare them to anticompetitive harms? What level of proof would be required to establish various effects?²²⁹ Furthermore,

Society: The Link Between Competitive Advantage and Corporate Responsibility, 84 HARV. BUS. REV. 78 (2006).

226. Lack of recognition accorded the nonefficiency benefits of speech may chill a firm's willingness to speak on some social issues because of fears of increased risk from antitrust actions. In contrast to lack of aggressive enforcement that leads to visible actions by firms, lack of recognition of benefits would be relatively invisible because it results in a lack of action by firms.

227. *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 463-64 (1941).

228. This approach would also eliminate per se antitrust treatment when speech is involved.

229. Attempts to measure effects of corporate social responsibility actions have, for example, included creation of social responsibility or sustainability scorecards, but these measures are aggregated at the firm level with effects that may result as much from long-term efforts as immediate efforts. See CORI CUNNINGHAM, THE CONFERENCE BOARD, MEASURING THE IMPACT OF CORPORATE SOCIAL INVESTMENTS 37 (2014), <https://corporate-citizenship.com/wp-content/uploads/Measuring-Social-Impact.compressed.pdf> [<https://perma.cc/YRQ9-DV34>]. Given antitrust law's skepticism toward claims regarding procompetitive efficiencies, antitrust law's standard of proof may resist claims of social benefit. In the case of claimed efficiencies in competitor collaborations, for example, the FTC and DOJ Guidelines state that "participants must substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency; how and when each would be achieved; any costs of doing so.... Efficiency claims are not considered if they

as the impact of any given speech depends on what else has been said as well as the other actions taken by the firm, how can one apportion benefits and harm to the anticompetitive part of speech? These implementation problems are daunting, but arguably not insurmountable. Outside of antitrust, courts have balanced incommensurate values.²³⁰ Even within antitrust, courts have found ways (albeit often extremely limited) to handle comparisons between static price effects and dynamic innovation effects.²³¹

Overall, expanding protection of speech in an antitrust liability analysis would seem difficult to justify on the basis of the direct nonefficiency benefits alone. But what if one considers the contribution of speech to the marketplace of ideas? The “marketplace of ideas” rationale essentially refocuses the utilitarian benefit from the social purpose that speech might facilitate to the benefit of free speech itself. Furthermore, the significance of objections to self-identified social purpose as were raised in *Fashion Originators’ Guild*²³² would be diminished in force because the social purpose here is embodied as a constitutional right.²³³ This constitutional

are vague or speculative.” GUIDELINES, *supra* note 87, at 24.

230. The incommensurability problem can be seen—or rather not seen—in the treatment of the First Amendment defense in antitrust cases. Antitrust does not directly recognize noneconomic speech values once a court determines that the challenged conduct does not warrant immunity from the antitrust law, and, of course, if immunity is granted, then antitrust values are not considered. This binary categorization of outcomes which determines separate spheres of influence avoids incommensurate tradeoffs between speech and antitrust values. Such an approach has the potential to reduce the variability in judicial determinations because identifying simple rules for assigning matters to one category or another is easier than finding a reliable method to compare speech and efficiency values. While legislative bodies are constantly making decisions involving incommensurate values, are there principled ways to handle incommensurate values under the process requirements of the legal system? A detailed discussion of this issue is beyond the scope of this Article, but we note that incommensurate values is a problem plaguing other legal regimes, so it may be instructive to examine how this problem is handled elsewhere. See, for example, Nien-hê Hsieh, *Incommensurable Values*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2016) for a review of the philosophical arguments pertaining to comparing incommensurable values.

231. Hillary Greene, *Non-Per Se Treatment of Buyer Price-Fixing in Intellectual Property Settings*, 2011 DUKE L. & TECH. REV. 57, 77-80.

232. *Fashion Originators’ Guild of Am. v. FTC*, 312 U.S. 457, 463-64 (1941).

233. U.S. CONST. amend. I. Skepticism toward extending antitrust analysis to nonefficiency purposes also reflects that most social purposes have distributional effects which fall under the domain of legislative bodies. Protection of rights or process, on the other hand, are tasks better suited to the courts. JOHN HART ELY, *DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW* (1980).

right also differentiates free speech from legislatively prescribed social purposes.

Focusing on the process of social discourse rather than on the outcomes facilitated by speech eliminates the need to value speech according to its contribution to a social purpose and could be implemented by establishing a category of speech deserving of solicitude and giving all speech in that category the same value. This tentative “same value approach” reflects First Amendment jurisprudence, which generally avoids discrete content assessments in favor of rough categorizations of speech (for example, commercial versus political speech).²³⁴ Under this approach, corporate speech would not be subject to the overt utilitarianism that animates antitrust law and, as a result, the immensely difficult measurement problem would be replaced with the comparatively easier solicitude or no solicitude determination. The bluntness of the approach reflects the problem’s thorny nature and is far from perfect. But it offers a benefit relative to the current system wherein the speech value in the antitrust liability analysis is zero absent efficiency contributions.²³⁵

Of course, adding a speech-based nonefficiency element to antitrust liability analysis would increase complexity directly and, perhaps, even open the door to a broader range of noneconomic considerations.²³⁶ From this perspective, the costs of complexity go beyond that of any individual antitrust case to a general increase in uncertainty that a firm faces when assessing actions that may entail antitrust risk. Along these lines, simple rules, even if imperfect, may provide clearer guidance to business and, perhaps, may even feel less arbitrary.

A primary element to the aforementioned “same value approach” is determining which speech does or does not deserve solicitude. We now explore an example of how one might undertake this assessment that permits us to discuss a number of workability-related

234. See David F. McGowan, Comment, *A Critical Analysis of Commercial Speech*, 78 CALIF. L. REV. 359, 360-63 (1990).

235. See *supra* Part I.C.

236. See generally Lee Goldman, *The Politically Correct Corporation and the Antitrust Laws: The Proper Treatment of Noneconomic or Social Welfare Justifications under Section 1 of the Sherman Act*, 13 YALE L. & POL’Y REV. 137 (1995) for a discussion of the merits of including noneconomic factors in antitrust analyses.

challenges. We then conclude with a brief discussion of how one might balance a speech benefit against anticompetitive harms.

2. Distinguishing Speech Deserving of Solicitude—An Illustrative Example

What factors could one use to determine whether particular speech is deserving of solicitude in an antitrust liability analysis? We tentatively explore criteria based on the speech content, the speaker's intent, and the circumstances in which the speech occurred through a test loosely based on the Seventh Circuit ruling in *Wilk v. American Medical Association*, which provided defendants the possibility of a very limited noneconomic justification for a boycott with an anticompetitive effect.²³⁷ *Wilk's* test, which provides antitrust solicitude based on a nonefficiency value (dubbed the "patient care motive")²³⁸ is instructive in how one might devise recognition of a speech value. For discussion purposes, we assume that freedom of speech is valued beyond its contribution to economic efficiency and that it should receive recognition as a partial offset to anticompetitive harm within an antitrust liability analysis. It is helpful to remember that this recognition is not premised on the social purpose of the speech per se, it is premised on the value of speech itself. Nonetheless, the social purpose of the speech influences the proposed legal standard, as we explore next.

As applied in the speech context, a firm would receive limited recognition for the nonefficiency value of its speech if the speech is directed primarily towards a nonefficiency social purpose. In particular, recognition requires that (1) the claimed purpose has well-established merit; (2) the firm is seriously committed to the claimed nonefficiency purpose through its pattern of actions and communications generally; (3) the speech in question is directly linked to achieving the claimed nonefficiency purpose; and (4) a reasonable alternative way to achieve the claimed purpose without

237. 719 F.2d 207, 227 (7th Cir. 1983) ("[T]he burden of persuasion is on the defendants to show: (1) that they genuinely entertained a concern ... (2) that this concern is objectively reasonable; (3) that this concern has been the dominant motivating factor ... and (4) that this concern ... could not have been adequately satisfied in a manner less restrictive of competition.").

238. *Id.* at 221.

contributing to the anticompetitive conduct at issue, is unavailable.²³⁹ The serious commitment, direct linkage, and less restrictive alternative requirements probe whether the claimed purpose of the speech is primary or secondary. Assuming that an anticompetitive harm has been established, if the purpose appears to be secondary then it is more likely that the anticompetitive outcome was the primary motivation for the speech and, accordingly, that speech would not be recognized even if it did facilitate a meritorious social purpose.

If these tests are satisfied, then the speech would be recognized. The next implementation challenge facing the court is how to weigh the nonefficiency value along with other values such as an anticompetitive effect.

The *well-established merit* requirement is intended to deny recognition to nonefficiency speech that does not facilitate a social purpose.²⁴⁰ Such determinations will, at times, be quite difficult. That challenge is heightened by the unavailability of clear decision rules. However, some possible indicia for well-established merit could include whether U.S. local, state, or federal governments or well-respected international NGOs are pursuing the same or similar purposes. This potentially messy definitional problem would need to be worked out by courts over time.

The *serious commitment* to the claimed purpose seeks to distinguish positions that are sincere from those that are feigned.²⁴¹ Recognition of nonefficiency speech gives defendants an ex-post incentive to characterize speech subject to antitrust scrutiny as supporting a nonefficiency goal.²⁴² Along similar lines, it might give a firm an ex-ante incentive to create insurance for potentially anticompetitive speech by giving that speech an actual (but presumably

239. *See id.*

240. This requirement is related to the “concern is objectively reasonable” requirement in *Wilk* but, of course, differs because the *Wilk* court was not willing to entertain general public interest purposes unrelated to patient care.

241. *See* GUIDELINES, *supra* note 87, at 12 n.35 (“[P]rocompetitive intent does not preclude a violation....[b]ut extrinsic evidence of intent may aid in evaluating market power, the likelihood of anticompetitive harm, and claimed procompetitive justifications where an agreement’s effects are otherwise ambiguous.” (citation omitted)); *supra* text accompanying note 239.

242. *See* GUIDELINES, *supra* note 87, at 12.

secondary) nonefficiency purpose.²⁴³ To prevent abuse, a high threshold for this requirement is needed.

Distinguishing serious from feigned commitments might be possible if a clear pattern of actions and communications supporting the claimed nonefficiency purpose could be established by the defendant.²⁴⁴ The workability of such an approach is an open question, but there would be many instances in which a serious purpose would be easy to infer. For example, the seriousness of the purpose can be evaluated by asking whether nonefficiency speech itself was communicated in a manner that suggests the purpose was promotion of the asserted nonefficiency purpose and the firm's commitment to this purpose predates the alleged anticompetitive conduct.²⁴⁵

Next, assuming a serious commitment to a meritorious purpose, it is useful to assess whether achieving that purpose was a primary motivation for the speech. Is there a *direct linkage* between the speech in question and the nonefficiency purpose and, if so, is there a less restrictive alternative to the speech in question? Directness presumably increases as the speech content supports fewer alternative interpretations other than the claimed nonefficiency purpose. The linkage is also more likely to be more direct when the claimed purpose is relatively restrictive regarding what speech

243. *See id.*

244. The sincerity and seriousness of a nonefficiency purpose for speech could be inferred from a consistent set of corporate actions and communications constituting a credible narrative which the firm has found costly to develop. *See id.* Absolute consistency comes at a high cost when consistency is economically inconvenient or conflicts with another organizational purpose. Inconsistencies and counterexamples to a set of espoused purposes or positions put those purposes into question. *See Wilk*, 719 F.2d at 227. As a practical matter, one would expect that consistency positively correlates with a sincere pursuit of purpose, so greater consistency provides stronger evidence than less consistency that a firm is pursuing the claimed purpose. *See supra* text accompanying note 239. Within the context of *Noerr-Pennington*, *see supra* note 29, the Court has held "First Amendment rights may not be used as the means or the pretext for achieving 'substantive evils' ... which the legislature has the power to control. Certainly the constitutionality of the antitrust laws is not open to debate." *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 515 (1972).

245. For example, public speech might be more effective than private speech in achieving the claimed social purpose, because the social impact of speech is likely to increase with the number of listeners. In contrast, efficiency-oriented goals might be better achieved with private speech when such conversations involve sensitive, proprietary, or even embarrassing information. This is not to say that private speech cannot still have expressive or nonefficiency purposes.

would support it. For example, a vague social purpose, such as environmental sustainability, can be supported by a much wider range of speech content than a more precise social purpose such as eliminating child labor in a firm's supply chain.

The *less restrictive alternative* test as applied here asks whether the purported nonefficiency purpose of the relevant speech could be achieved through less restrictive means, such as through other speech that does not contribute to an antitrust concern.²⁴⁶ This test offers an indirect way to determine whether the claimed social purpose is primary. If the unused alternative is obvious to the firm, perhaps because it had been used previously, then the choice not to use the alternative is evidence supporting the proposition that the firm's primary purpose may have been anticompetitive. The test itself is quite conservative in its bias against recognizing speech for which a more antitrust-benign alternative exists.²⁴⁷

When applying a less restrictive alternative test, courts or prosecutors should not be unduly aggressive when second-guessing decisions of the business decision maker.²⁴⁸ As an example of how a less restrictive alternative test works in a more conventional antitrust setting, consider the DOJ/FTC Guidelines on Collaborations. They state that, in the context of efficiency-creating collaborative

246. See Greene, *Muzzling Antitrust*, *supra* note 23, at 85; C. Scott Hemphill, *Less Restrictive Alternatives in Antitrust Law*, 116 COLUM. L. REV. 927, 929 (2016); 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, 36 (1993).

247. The test also has the attractive feature that, by identifying an alternative that achieves the same purpose without a concomitant antitrust risk, it allows a court to reject speech without determining how much the speech contributes to achievement of the purported nonefficiency purpose. The less-restrictive alternatives approach is analogous to cost-effectiveness analysis, a common public policy tool, which also avoids toting up costs and benefits by selecting the choice that achieves the same benefit at the lowest possible cost. The ends-means tailoring used in First Amendment scrutiny of government restrictions on speech functions as an attenuated form of a less-restrictive-alternatives test. For a government interest that is important enough to pass the ends part of the test, the speech restriction has to achieve those ends in an appropriately tailored fashion. One component of appropriate tailoring is that there does not exist an alternative way to achieve the government interest that is appropriately less restrictive of the speech restriction in question. The First Amendment use of scrutiny is one form of the less restrictive alternatives test. See Alan O. Sykes, *The Least Restrictive Means*, 70 U. CHI. L. REV. 403, 403 (2003).

248. The less restrictive alternatives test manifests itself differently when addressing constitutionally protected speech as opposed to business discretion. One expects, for example, more latitude to be allowed to varying forms of speech than different types of business (non-speech) conduct.

agreements, “if the participants could have achieved ... similar efficiencies by practical, significantly less restrictive means” then claimed efficiencies from the agreement will not potentially offset anticompetitive effects.²⁴⁹ With experience, courts and the prosecuting agencies have developed indicia for what constitutes a “significantly less restrictive means” such as whether the firm or other firms in similar situations had implemented the alternative means in the past.²⁵⁰ Despite practical challenges associated with the less restrictive alternative test,²⁵¹ this approach has much to commend it.

3. *Balancing*

Assuming the presence of a benefit flowing from cognizable speech, how might the noneconomic benefits and antitrust harms associated with the speech in question be balanced? In the previous Section we discussed two approaches to balancing. The first approach would assess both the level of antitrust harm and the level of speech benefit and then engage in a rough comparison. While the antitrust community is experienced in assessing antitrust harm, it lacks experience with assessing speech benefits. As suggested above, this makes the latter assessment more difficult and as a consequence, the comparison even more challenging.²⁵²

The second approach is less demanding. Assuming the presence of cognizable speech, this approach would accord speech a small positive offset against anticompetitive harm that is independent of the content of the speech. Hence, the focus of the “comparison” is the size of the antitrust harm. If the antitrust harm is small, then the

249. GUIDELINES, *supra* note 87, at 24.

250. *See id.*

251. *See* Yao & Dahdouh, *supra* note 246, at 36.

252. And second, is making such tradeoffs consistent with how one thinks about the special value associated with free speech? As a balancing test, antitrust rule-of-reason analysis is based on economics, which is fundamentally the social science of tradeoffs. *See, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). The First Amendment, in contrast, while sometimes forced to make coarse tradeoffs, concerns rights over which tradeoffs are often avoided. Yet some assessment of the public policy interest in restricting speech is a component in a First Amendment analysis. *See* FARBER, *supra* note 16, at 21 (“Although the language of ‘balancing’ is out of favor, in case after case the Court has had to decide if particular state interests justify regulation of speech, and if so, to what extent.”)

benefit offsets the harm and there is no liability. But when the antitrust harm is substantial, antitrust liability is found. In other settings, the degree to which speech as part of a larger pattern of conduct raises additional questions regarding parsing antitrust harm across the entire set of actions that constitute the offending conduct.²⁵³

Exploring in depth the full range of approaches for expanding speech protections within antitrust settings is beyond the scope of this Article. Our goal was merely to address one possible approach. And, while further consideration is essential, concrete evidence may be hard to come by, not because this problem is rarely encountered, but because current law does not invite express treatment of it.

C. A Speculative Look at Future Challenges

Many social and economic trends bear on the overlap between the antitrust and First Amendment legal regimes. Here, we briefly consider several trends that underscore the increasing importance of better handling this overlap. First, the era in which firms can justify their place in society purely as providing shareholder value may be over. The global financial crises and general concerns about sustainability have led firms and managers to embrace a broader conception of themselves.²⁵⁴ In so doing, one can expect firms and managers to become even more vocal and active in staking out positions that, while advancing firm interests, may be defined more broadly than profit goals as conventionally understood.²⁵⁵ Such

253. One could apply a variant of the second approach to the remedy phase of the trial rather than to the antitrust liability analysis. That is, leave the liability analysis as is, but when speech meets the recognition tests described above, adjust the First Amendment constraint on allowable remedies to reflect the size of the antitrust harm. For a more in-depth treatment related to these approaches, see Greene, *Muzzling Antitrust*, *supra* note 23, at 94-95.

254. See, e.g., George Serafeim, *The Role of the Corporation in Society: An Alternative View and Opportunities for Future Research* (Harv. Bus. Sch., Working Paper No. 14-110, 2014); Andrew Winston, *Businesses Do—and Should—Play a Role in Creating a Better Society*, *GUARDIAN* (Aug. 24, 2015, 3:10 PM), <https://www.theguardian.com/sustainable-business/2015/aug/24/kingfisher-dow-unilever-peter-drucker-ge-ngo-sustainability> [<https://perma.cc/YQF8-SCBF>].

255. Another recent legal and social development may further complicate the speech and antitrust tradeoff. The controversial *Citizens United* decision finding political speech rights for corporations may give greater scope to arguments that commercial entities have a right to express opinions that have both political and trade effects. See generally *Citizens United*

positioning could result in increased antitrust concerns. For example, social pressure could incentivize firms to pursue collective responses characterized by hybrid communications.²⁵⁶

Second, the economy is increasingly becoming information driven with an attendant surge in the provision and value of information products.²⁵⁷ As discussed, information products embody speech and hence predatory redesign of such products creates an inseparability between conduct and speech.²⁵⁸ Furthermore, the information and digitization revolution, in turn, is changing the nature of information and product provision from business models that reduced costs by taking advantage of scale to those that are based on mass customization.²⁵⁹ While mass customization has enormous benefits to consumers, the ability to customize information products raises the prospect that firms with market power may also choose to shape products to reflect their stakeholder or manager preferences.²⁶⁰ We speculate that such preferences, as manifested in information products, could be defended as speech even if those preferences might also serve anticompetitive ends. Consider a multibusiness firm that operates a search engine and whose other product lines appear as results on its search engine. To the extent that the same preferences (for example, for ecotourism) inform both its search engine and its other product lines (for example, tourism-related enterprises), the former might favor the latter relative to the latter's competitors.

v. FEC, 558 U.S. 310 (2010).

256. See, e.g., David P. Baron, *Private Politics*, 12 J. ECON. & MGMT. STRATEGY 31 (2003) (discussing how activists pressure firms to take "responsible" actions).

257. See, e.g., Greene, *Muzzling Antitrust*, *supra* note 23, at 41.

258. See *supra* text accompanying notes 172-79. If information products are considered protected speech, then large and increasingly important portions of the economy could be exempted from antitrust protection for broad categories of action. See Greene, *supra* note 23, at 89. If, alternatively, information products are considered to be unprotected speech, protection of speech values would depend solely on economic considerations. See Greene, *supra* note 34, at 1040; *supra* text accompanying notes 27-28.

259. See James H. Gilmore & B. Joseph Pine II, *The Four Faces of Mass Customization*, HARV. BUS. REV., Jan.-Feb. 1997, at 91.

260. Daisuke Wakabayashi & Cecilia Kang, *Google's Pichai Faces Privacy and Bias Questions in Congress*, N.Y. TIMES (Dec. 11, 2018), <https://www.nytimes.com/2018/12/11/technology/google-pichai-house-committee-hearing.html> [<https://perma.cc/7W2C-6B3D>] (discussing congressional Republicans' worry that Google's search results are biased towards liberal positions).

This favoritism could emerge even without any specific intent to favor one's own product lines.

Third, recent years have also witnessed a resurgence of antitrust populism which advocates more aggressive antitrust enforcement to curtail what they see as an increasing consolidation of economic power. This position is founded on a belief that the economy has become increasingly concentrated and that this increased concentration generally harms consumers and negatively impacts other social goals regarding, for example, income distribution and the balance of political power in society.²⁶¹ Whether or not more aggressive antitrust enforcement makes sense, (re)introducing non-efficiency goals raises similar measurement and commensurability problems associated with increased speech protection. However, one stark difference characterizes the consequences of increased consideration of speech versus other nonefficiency based considerations (for example, distribution). Increased solicitude for speech values would, all things being equal, lead to less antitrust liability whereas greater incorporation of nonefficiency considerations unrelated to speech would lead to greater antitrust liability.²⁶²

Finally, First Amendment law may evolve in ways that are unrelated to antitrust matters but may have, nonetheless, important consequences for antitrust. There has been constant, arguably increasing, criticism of the commercial speech standard. For example, Justice Thomas is a persistent critic of intermediate scrutiny and he would apply strict scrutiny to commercial speech.²⁶³ This

261. For a leading proponent of so-called neo-populism, see generally Barry C. Lynn, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION (2010). *But see* Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714 (2018). Of course, the more populist impulses associated with antitrust have long received attention even during the more modern antitrust era. *See, e.g.*, Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PENN. L. REV. 1051 (1979).

262. Experience gained from implementing greater speech protection in antitrust would also inform the debate around adding other nonefficiency considerations to antitrust analysis.

263. *See Matal v. Tam*, 131 HARV. L. REV. 243, 247 (2017) (In *Matal v. Tam*, 137 S. Ct. 1744 (2017), "the Justices appear eager to define commercial speech narrowly, thus exposing more regulations to strict scrutiny"). Justice Thomas is a particularly strong and long-standing critic of the application applying a lesser protection, in the form of intermediate scrutiny, to commercial speech. *See, e.g.*, 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 522 (1996) (Thomas, J., concurring) ("I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech. Indeed, some historical materials suggest to the contrary."); *see also Tam*, 137 S. Ct. at 1769 (Thomas, J., concurring).

could have important implications for antitrust. Most directly, it could require speech-related remedies to be more tightly tailored and, presumably, less effective at preventing future anticompetitive outcomes.

CONCLUSION

The immunization of speech that would otherwise be condemned by antitrust law underscores the value society places on free speech. Yet, the current law, operating through the bookends of the speech immunity defense and speech constraints on remedies, arguably fails to give adequate attention to speech values. This failure can be attributed, in part, to the difficulty of the problem.

Part I described the landscape of antitrust actions through a speech lens. It revealed that speech is integral to a wide range of anticompetitive conduct but that its direct recognition was essentially limited to immunity and remedy questions. Significantly, however, within liability assessments, speech often receives some de facto protection for its contributions to efficiency. This is familiar ground for antitrust analysis. What is unfamiliar is how to analyze the nonefficiency aspects of speech (relating, for example, to contributions to the marketplace of ideas) and antitrust law does not try to do this.

It is much easier to point out the shortcomings of the current approach than to solve them. Solving a defect in the law rarely occurs in a Eureka moment, but occurs through a long path of common law development. The directions of these paths are shaped by the choices the courts make to grapple with the problems they confront. When, for example, courts avoid the problem of dealing with incommensurate values and tradeoffs by employing immunity or no-immunity categorization of fact patterns, case law development focuses on how to categorize fact patterns and circumvent tradeoffs.²⁶⁴ When tradeoffs are routinely accepted, as with many

("I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as 'commercial.'").

264. See *supra* notes 24-34 and accompanying text.

“purely” antitrust matters,²⁶⁵ courts figure out ways to make them. Thus, we think of development of a solution as a process of learning in which interim choices should be valued not just in terms of their impact today, but whether they facilitate learning needed to deliver a better tomorrow.

Legal regime design problems, therefore, involve a number of critical choices with attendant risks. How heavily should society bias its decisions to avoid false positives or false negatives with respect to protection of Constitutional issues? More specifically, how much risk is society willing to tolerate to further protect speech values in antitrust analysis? Should the speech rights of market entities in the context of antitrust-related conduct be treated differently than the speech rights of individuals? Could a first step “tie-breaking” approach in antitrust liability analysis, that at least allows for a transparent recognition of nonefficiency speech values, lead to a better understanding of how a more nuanced approach might work?

The stakes associated with this First Amendment-antitrust challenge are increasing. This overlap is often found in sectors of the economy that are both rapidly growing and evolving.²⁶⁶ Information services markets such as an Internet search combine the potential for anticompetitive conduct, conditions conducive to market power, and a service whose nature arguably implicates speech values.²⁶⁷ The de facto protection given to efficiency-based speech values through the application of the rule of reason in antitrust analysis²⁶⁸ is only a partial—though perhaps underappreciated—solution to these problems. Unfortunately, this partial solution may have suppressed the salience of the problem and contributed to a lack of needed development of jurisprudence.

265. See, e.g., *supra* text accompanying notes 91-93.

266. See *supra* notes 172-79.

267. See *supra* text accompanying notes 172-79.

268. See *supra* Part II.A.