Monopolies of Misinformation: How Competitive Markets Can Improve Public Dialogue

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I. INTRODUCTION

The Pacific Northwest tree octopus (Octopus Paxarbolis) is unique among cephalopods for its ability to survive on land, where it inhabits the tree canopies of the Olympic Peninsula's temperate rainforests.[1] It is also completely fictional and the subject of a notorious 1998 Internet hoax now "commonly used in Internet literacy classes" to teach students responsible Internet browsing.[2]

However, the lesson appears not to have stuck with students, and now misinformation plagues the Internet with consequences for the physical world. Many in the medical and political communities credit misinformation for seeding the present distrust in COVID-19 vaccines and U.S. elections,[3] and that distrust has contributed to vaccine hesitancy, the COVID-19 death count, the erosion of faith in democratic government, and the false justification of political violence.[4]

Given misinformation's ill effects, it is not surprising that Americans generally agree that misinformation should be curtailed in some manner or another.[5] Indeed, 88% of Americans believe that it has caused "some" or "a

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1. Lyle Zapato, *Help Save the Endangered Pacific Northwest Tree Octopus from Extinction!*, ZAPATO PRODS. INTRADIMENSIONAL, https://zapatopi.net/treeoctopus/ [https://perma.cc/7AXF-AKW7] (last visited Nov. 20, 2021).

2. *Save The Pacific Northwest Tree Octopus*, LIBR. OF CONG., https://www.loc.gov/item/lcwaN0010826 [https://perma.cc/695M-4ELL] (last visited Nov. 20, 2021); *see also* Shem Unger & Mark Rollins, *Don't Believe Everything About Science Online: Revisiting the Fake Pacific Northwest Tree Octopus in an Introductory Biology College Course*, 32 SCI. EDUC. INT'L 159, 159-61 (2021) ("This study found that a large number of university students failed to determine this [hoax] as false.").

3. *See* Heather Hollingsworth, *Doctors Grow Frustrated over COVID-19 Denial, Misinformation*, ASSOCIATED PRESS (Oct. 4, 2021), https://apnews.com/article/coronavirus-pandemic-misinformation-health-433991ea434e12ccfdf97b5db415310d [https://perma.cc/56Q7-Q6BG] (reporting health care providers' exasperation with misinformation as a barrier to patients consenting to certain care); *see* Vera Bergengruen & Billy Perrigo, *Facebook Acted Too Late to Tackle Misinformation on 2020 Election, Report Finds*, TIME (Mar. 23, 2021, 6:00 AM), https://time.com/5949210/facebook-misinformation-2020-election-report/ [https://perma.cc/UMQ5-3VSF] ("The debate over accountability, content moderation, [and] online misinformation . . . is likely to take center stage . . . on Capitol Hill . . . .").

4. *See* Emma Pierson et al., *The Lives Lost to Undervaccination, in Charts*, N.Y. TIMES (Sept. 14, 2021), https://www.nytimes.com/interactive/2021/09/14/opinion/states-undervaccination-deaths.html [https://perma.cc/5A8W-4ZZR]; s*ee* Craig Silverman et al., *Facebook Hosted Surge of Misinformation and Insurrection Threats in Months Leading Up to Jan. 6 Attack, Records Show*, PROPUBLICA (Jan. 4, 2022, 8:00 AM), https://www.propublica.org/article/facebook-hosted-surge-of-misinformation-and-insurrection-threats-in-months-leading-up-to-jan-6-attack-records-show [https://perma.cc/HF2R-DPGU].

5. *See The American Public Views the Spread of Misinformation as a Major Problem*, ASSOCIATED PRESS & NORC (Oct. 8, 2021), https://apnorc.org/projects/the-american-public-views-the-spread-of-misinformation-as-a-major-problem/ [https://perma.cc/WV3Y-YWJ7]; *see* Amanda Seitz & Hannah Fingerhut, *Americans Agree Misinformation Is a Problem, Poll Shows*, ASSOCIATED PRESS (Oct. 8, 2021), https://apnews.com/article/coronavirus-pandemic-technology-business-health-misinformation-fbe9d09024d7b92e1600e411d5f931dd [https://perma.cc/4PEX-2BGD].

great deal" of confusion regarding "basic facts."[6] However, finding a solution has proven challenging.

So far, the debate over how to combat misinformation has stagnated around reforming controversial Section 230,[7] a provision of the Communications Decency Act that, among other things, limits the liability websites face for user-posted content on their platforms.[8] Section 230 reform efforts generally aim to alter websites' legal incentives to motivate action,[9] and although there have been many proposals,[10] thus far, none have evidently offered a solution for misinformation that has proven sufficiently politically popular, constitutionally viable, and regulatorily effective to become law.[11] For one, the politics of misinformation have become entwined with the divisive politics of how to respond to COVID-19 and claims of election fraud,[12] and secondly, the First Amendment bars a broad range of speech regulation with few exceptions.[13]

In contrast, a simultaneous antitrust reform movement is poised to alter the market incentives that websites and social media firms face when deciding how to handle misinformation on their platforms. The movement has already claimed misinformation as just another symptom of a larger monopoly problem that permits powerful firms to prioritize their own interests over consumer preferences[14]—specifically consumers' preference for trustworthy, accurate news[15]—and the support for antitrust change is growing.[16] Since the

6. MICHAEL BARTHEL ET AL., PEW RSCH. CTR., MANY AMERICANS BELIEVE FAKE NEWS IS SOWING CONFUSION 3 (2016), https://www.pewresearch.org/journalism/wp-content/uploads/sites/8/2016/12/PJ_2016.12.15_fake-news_FINAL.pdf [https://perma.cc/M872-7A2G].

7. Daren Bakst & Dustin Carmack, *Section 230 Reform: Left and Right Want It, for Very Different Reasons*, HERITAGE FOUND. (Apr. 12, 2021), https://www.heritage.org/technology/commentary/section-230-reform-left-and-right-want-it-very-different-reasons [https://perma.cc/GR5F-9452] ("[B]oth the left and the right agree that Section 230 needs to be reformed. But this is generally where the agreement ends . . . . Some want to reduce the chilling of speech . . . . And some want to use Section 230 reform . . . to chill speech still further.").

8. *See* 47 U.S.C. § 230(c)(2)(A), (c)(1).

9. Meghan Anand et. al., *All the Ways Congress Wants to Change Section 230*, SLATE (Mar. 23, 2021, 5:45 AM), https://slate.com/technology/2021/03/section-230-reform-legislative-tracker.html [https://perma.cc/K9M3-UVHG].

10. *Id.*

11. *See id.*

12. *See supra* notes 3-4 and accompanying text.

13. *See* discussion *infra* Section II.C.1.

14. Sean Illing, *Why "Fake News" Is an Antitrust Problem*, VOX (July 18, 2018, 9:00 AM), https://www.vox.com/technology/2017/9/22/16330008/eu-fines-google-amazon-monopoly-antitrust-regulation [https://perma.cc/7CFJ-CEFH].

15. *See* AM. PRESS INST., *Section 3: How People Decide What News to Trust on Digital Platforms and Social Media*, *in* A NEW UNDERSTANDING: WHAT MAKES PEOPLE TRUST AND RELY ON NEWS 14, 14-23 (2016) [hereinafter *How People Decide What News to Trust*], https://www.americanpressinstitute.org/wp-content/uploads/2016/04/What-Makes-People-Trust-and-Rely-on-News-Media-Insight-Project.pdf [https://perma.cc/C3AB-W6VF].

16. *See* discussion *infra* Section II.B.2.

early 2000s, tech giants like Meta, which owns Facebook;[17] Google, which owns YouTube;[18] and Amazon have amassed considerable influence, both economic and otherwise,[19] leaving many to ask whether U.S. antitrust laws need to catch up with the twenty-first century.[20]

One major area of antitrust law currently under scrutiny is Section 7 of the Clayton Antitrust Act and its case law,[21] which together provide the standards that agencies and courts use to decide whether a particular merger poses too great of a threat to consumers to permit its consummation.[22] Generally, this analysis involves weighing the post-merger level of market concentration,[23] often quantified into a Herfindahl–Hirschman Index ("HHI") value,[24] against any redeeming, procompetitive qualities of the merger to predict its probable effect on competition and therefore consumers.[25] In recent years, this approach's application has been criticized as overly deferential towards merging parties.[26]

Combined and compared side-by-side, the parallel reform movements behind Section 230 and Section 7 convene at the following conclusion: the unfettered spread of misinformation continues to pose a serious, present threat to public health and debate, but the remedy of Section 230 reform alone risks being too politically unpopular, too constitutionally vulnerable, or too regulatorily ineffective to await. Therefore, until these conditions change, Congress should prioritize antitrust reform and amend Section 7 by joint resolution to incorporate a bright-line HHI ceiling for the social media market to hinder market concentration, increase competition, and ultimately empower consumers to demand greater content scrutiny from their social media platforms.

To support this proposal, this Note first compares Section 230 and Section 7 in their respective regulatory, political, and constitutional contexts. Then, this Note argues that establishing an HHI ceiling for Section 7 merger

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17. *See* Salvador Rodriguez, *Facebook Changes Company Name to Meta*, CNBC (Oct. 29, 2021, 8:56 AM), https://www.cnbc.com/2021/10/28/facebook-changes-company-name-to-meta.html [https://perma.cc/MJ5T-CY39].

18. *See Google Buys YouTube for $1.65 Billion*, NBC NEWS (Oct. 9, 2006, 11:54 AM), https://www.nbcnews.com/id/wbna15196982 [https://perma.cc/5TNK-2JZV].

19. *See* Sara Morrison & Shirin Ghaffary, *The Case Against Big Tech*, VOX (Dec. 8, 2021, 5:30 AM), https://www.vox.com/recode/22822916/big-tech-antitrust-monopoly-regulation [https://perma.cc/2U9S-LTP5].

20. *See* Steve Kovach, *Democrats and Republicans Disagree on How to Curb Big Tech's Power – Here's Where They Differ*, CNBC (Oct. 7, 2020, 12:50 PM), https://www.cnbc.com/2020/10/07/democrats-and-republicans-disagree-on-how-to-regulate-big-tech.html [https://perma.cc/G2U8-NKV5].

21. *See* STAFF OF H. SUBCOMM. ON ANTITRUST, COM., AND ADMIN. L. OF THE COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS 20-21 (Comm. Print 2020) [hereinafter INVESTIGATION OF COMPETITION IN DIGITAL MARKETS].

22. *See* discussion *infra* Section II.B.1.b.

23. *See infra* notes 104-10 and accompanying text.

24. *See infra* notes 105-06 and accompanying text.

25. *See infra* notes 111-14 and accompanying text.

26. *See* AURELIEN PORTUESE, INFO. TECH. & INNOVATION FOUND., REFORMING MERGER REVIEWS TO PRESERVE CREATIVE DESTRUCTION 2 (2021), https://www2.itif.org/2021-merger-reviews.pdf [https://perma.cc/ER2B-EX6D].

review is likely to both minimize misinformation's ill effects and provide a more reliable tool than Section 230 reform for combatting misinformation, at least until the political and constitutional context surrounding Section 230 shifts.

The background is divided into four parts. Section II.A explains how Section 230 protects social media firms from legal liability for misinformation and how the divisive politics of misinformation render changing Section 230 politically difficult. Section II.B discusses how Section 7 aligns social media firms' market incentives with consumers' preferences against misinformation and how antitrust politics are united towards increasing the regulation of social media firms. Section II.C highlights the stark disparity in constitutional scrutiny that reform options would endure to amend Section 230 under the demanding First Amendment and Section 7 under the permissive commerce clause. Section II.D briefly covers the typical business model of social media firms and how the social media market's economics renders it vulnerable to monopolization and suitable for antitrust regulation.

The analysis that follows is bifurcated and concludes by addressing rebuttals. Section III.A argues (1) that anti-misinformation Section 230 reform is unlikely to muster the political support required in Congress and (2) that even if it were to, Section 230 reform is likely to either be regulatorily counterproductive or constitutionally vulnerable. Section III.B then argues that Section 7 reform is not only constitutionally safe and politically popular but also capable of compelling social media firms to mitigate misinformation. At last, Section III.C concludes by addressing likely criticisms of the proposal within the context of a whole-of-government effort to mitigate misinformation wherever and whenever possible, within which the social media market's HHI ceiling exists as a humble but nonetheless valuable tool.

II. BACKGROUND

A. Section 230 and Misinformation Politics

1. Section 230's Law

Section 230 of the Communications Decency Act limits the liability of websites for their user-posted content and was passed in the early years of the Internet when courts differed on whether a website could be liable for such content.[27] Consider the tort of defamation, for example. Common law defamation possesses four elements:

27. Note, *Section 230 as First Amendment Rule*, 131 HARV. L. REV. 2027, 2029 (2018) (discussing the judicial history which led to "Congress enact[ing] [S]ection [230]").

> (a) a false and defamatory statement concerning another, (b) an unprivileged publication to a third party, (c) fault amounting at least to negligence on the part of the *publisher*; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.[28]

Because "publication" includes "intentionally and unreasonably fail[ing] to remove defamatory matter that [someone] knows to be . . . in his possession or under his control,"[29] whether a website could be held liable for defamatory content posted on its site by a third-party turned on whether the website was a "publisher,"[30] and this question divided courts.[31]

In *Cubby, Inc. v. CompuServe Inc.*, the Southern District of New York held an Internet service provider not liable for a third-party's defamatory post "because it had 'no more editorial control' than would 'a public library, book store, or newsstand' and therefore was a mere *distributor* that did not know or have reason to know of the content."[32] But in *Stratton Oakmont, Inc. v. Prodigy Servs.*, a New York state court held the owner of a website was "liable as a *publisher* of defamatory posts" because the owner possessed and "exercised 'editorial control' over offensive content" by electing to moderate such content.[33] Seeking to remedy this potentially perverse incentive for websites to turn a blind eye to their users' posts to avoid legal vulnerability as a publisher,[34] then-Congressmen Ron Wyden and Chris Cox proposed Section 230, framing it as a "'sword and shield' for Internet companies."[35] The sword empowered websites to moderate and censor without fear of liability, declaring that

> [n]o provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable . . . .[36]

The shield, on the other hand, protected websites from defamation liability by settling that "[n]o provider or user of an interactive computer service shall be

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28. RESTATEMENT (SECOND) OF TORTS § 558 (AM. L. INST. 1977) (emphasis added).
29. RESTATEMENT (SECOND) OF TORTS § 577(2) (AM. L. INST. 1977).
30. Note, *supra* note 27, at 2029.
31. *See id.* (discussing the varying judicial application of publisher liability to websites).
32. *Id.* at 2028 (quoting Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135, 140-41 (S.D.N.Y. 1991)) (emphasis added).
33. *Id.* at 2029 (quoting Stratton Oakmont, Inc. v. Prodigy Servs. Co., 1995 WL 323710, at *4-5 (N.Y. Sup. Ct. May 24, 1995)) (emphasis added).
34. *See* Daisuke Wakabayashi, *Legal Shield for Social Media Is Targeted by Lawmakers*, N.Y. TIMES (Dec. 15, 2020), https://www.nytimes.com/2020/05/28/business/section-230-internet-speech.html [https://perma.cc/5MBU-8BBQ] ("[Wyden and Cox] were worried [publisher doctrine] would act as a disincentive for websites to take steps to block pornography and other obscene content.").
35. *Id.*
36. 47 U.S.C. § 230(c)(2)(A).

treated as the publisher or speaker of any information provided by another information content provider."[37]

Together, the sword and shield granted websites generous freedom in operating their platforms, and although it is impossible to know exactly what a world without Section 230 would have looked like, it remains undeniable that the Internet landscape we know today, dominated by giants such as Amazon, Apple, Facebook, and Google,[38] is a product of the protective legal environment Section 230 fostered.[39] However, Section 230's protection also ensured that websites were free to abide user-posted misinformation, and this consequence soon proved unpopular.[40]

2. Misinformation's Politics

Today, a bipartisan revolt has erupted against Section 230,[41] fueled by the view that social media firms no longer deserve the broad protections from liability that Section 230 provides them, and each party's grievance lies with either the sword or the shield.[42] "Conservatives claim that [the sword] gives tech companies a license to silence [conservative] speech," whereas "[l]iberals criticize [the shield] for giving platforms the freedom to profit from harmful speech and conduct."[43] This sword-and-shield framework helps illustrate the dynamic of the Section 230 debate, but it is also accurate to simply frame the debate as "a disagreement [over] the importance of allowing Americans to speak their minds."[44]

On the right, conservatives tend to disapprove of deplatforming individuals on account of their speech,[45] and some Republican state legislatures have gone so far as to "impos[e] fines on social media companies

37. 47 U.S.C. § 230(c)(1).

38. Chris Alcantara et al., *How Big Tech Got So Big: Hundreds of Acquisitions*, WASH. POST (Apr. 21, 2021), https://www.washingtonpost.com/technology/interactive/2021/amazon-apple-facebook-google-acquisitions/ [https://perma.cc/YLP7-QBW3] (describing the ubiquity of Amazon, Apple, Facebook, and Google in modern life).

39. *See Section 230 of the Communications Decency Act*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/cda230 [https://perma.cc/W75F-6MRN] (last visited Apr. 9, 2022) (explaining how Section 230 protections have allowed "user-generated websites" to "thrive," free from "potential liability for their users' actions").

40. *See* Marguerite Reardon, *Democrats and Republicans Agree That Section 230 Is Flawed*, CNET (June 21, 2020, 5:00 AM), https://www.cnet.com/news/democrats-and-republicans-agree-that-section-230-is-flawed/ [https://perma.cc/4TJC-M6Z7] ("Republicans and Democrats . . . have called for [Section 230] to be dismantled.").

41. *Id.*

42. *See* Danielle Keats Citron & Mary Anne Franks, *The Internet as a Speech Machine and Other Myths Confounding Section 230 Reform*, 2020 U. CHI. LEGAL F. 45, 46-47 (2020).

43. *Id.*

44. Bakst & Carmack, *supra* note 7.

45. Colleen McClain & Monica Anderson, *Republicans, Democrats at Odds over Social Media Companies Banning Trump*, PEW RSCH. CTR. (Jan. 27, 2021), https://www.pewresearch.org/fact-tank/2021/01/27/republicans-democrats-at-odds-over-social-media-companies-banning-trump/ [https://perma.cc/55GZ-VYSH].

that . . . bar political candidates in th[at] state."[46] Notable examples include former President Trump's broad ban from multiple social media platforms following the January 6th insurrection and Representative Marjorie Taylor Greene's personal Twitter ban following her "repeated violations of [Twitter's] COVID-19 misinformation policy."[47]

On the left, liberals tend to support silencing or discrediting distributors of misinformation.[48] Misinformation—which is defined as "incorrect or misleading information," regardless of the speaker's mens rea[49]—has troubled liberals, who worry it weakens public confidence in the efficacy of public health measures and the validity of elections.[50] In fact, health care professionals have credited social media platforms, such as Facebook, with encouraging vaccine hesitancy by facilitating the spread of vaccine misinformation.[51] Facebook itself reported that misinformation is so rife on its platform that the United Nations Children's Fund ("UNICEF") and the World Health Organization "will not use [the] free ad [space]" Facebook

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46. David McCabe, *Florida, in a First, Will Fine Social Media Companies That Bar Candidates*, N.Y. TIMES (May 24, 2021), https://www.nytimes.com/2021/05/24/technology/florida-twitter-facebook-ban-politicians.html [https://perma.cc/2E89-S6DS]; *see also Texas Passes Social Media 'De-Platforming' Law*, BBC NEWS (Sept. 10, 2021), https://www.bbc.com/news/technology-58516155 [https://perma.cc/ZF4Y-BT59].

47. Joe Hernandez, *Facebook Suspends Marjorie Taylor Greene's Account over COVID Misinformation*, NPR (Jan. 3, 2022, 6:55 PM), https://www.npr.org/2022/01/02/1069753102/twitter-bans-marjorie-taylor-greenes-personal-account-over-covid-misinformation [https://perma.cc/7R8Y-6QCF]; *see* Sarah Fischer & Ashley Gold, *All the Platforms That Have Banned or Restricted Trump So Far*, AXIOS (Jan. 11, 2021), https://www.axios.com/platforms-social-media-ban-restrict-trump-d9e44f3c-8366-4ba9-a8a1-7f3114f920f1.html [https://perma.cc/2TXR-ZLHL]; *see* Shannon Bond, *Facebook Ban on Donald Trump Will Hold, Social Network's Oversight Board Rules*, NPR (May 5, 2021, 11:36 AM), https://www.npr.org/2021/05/05/987679590/facebook-justified-in-banning-donald-trump-social-medias-oversight-board-rules [https://perma.cc/MXX6-BDYV].

48. *See* EMILY A. VOGELS ET AL., PEW RSCH. CTR., MOST AMERICANS THINK SOCIAL MEDIA SITES CENSOR POLITICAL VIEWPOINTS 4-6 (2020), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2020/08/PI_2020.08.19_social-media-politics_REPORT.pdf [https://perma.cc/LY3Y-KTJ7].

49. *Misinformation*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/misinformation [https://perma.cc/TZ6J-9DH6] (last visited Nov. 22, 2021); *see How to Address COVID-19 Vaccine Misinformation*, CDC, https://www.cdc.gov/vaccines/covid-19/health-departments/addressing-vaccine-misinformation.html [https://perma.cc/9Z93-LKRY] (last visited Nov. 22, 2021).

50. *See* Anna Edgerton, *Democrats Can't Force Facebook to Stem Covid Misinformation*, BLOOMBERG (July 20, 2021, 8:47 AM), https://www.bloomberg.com/news/articles/2021-07-20/democrats-can-t-make-facebook-help-win-the-covid-information-war [https://perma.cc/5LRQ-6PWL] ("Biden's struggle to control the coronavirus and vaccine misinformation online was evident in his broadside . . . that companies like Facebook . . . were 'killing people.'"); *see* Shirin Ghaffary, *Democratic Party Leaders Are "Banging Their Head Against the Wall" After Private Meetings with Facebook on Election Misinformation*, VOX (Oct 1, 2020, 4:20 PM), https://www.vox.com/recode/2020/10/1/21497453/facebook-democrats-2020-election-misinformation [https://perma.cc/83AK-4UB5] ("Democrats want to see Facebook more aggressively remove misinformation relating to the election.").

51. Hollingsworth, *supra* note 3.

provides "to promote pro-vaccine content, because they do not want to encourage the anti-vaccine commenters that swarm their [p]ages."[52]

Thus, because both political parties disagree over the source of Section 230's flaw, their ideas of how to remedy it are directly opposed, with one wishing to uncage speech and the other seeking to bind it. In contrast to the divisive politics and misinformative digital landscape Section 230 has generated, Section 7 has raised bipartisan political support for reform and actively combats the free flow of misinformation on social media.

B. Section 7 and the Antitrust Reform Movement

1. Section 7 Within the Broader Antitrust Law Context

To understand the relationship between Section 7 and misinformation, it is necessary to understand how Section 7 motivates firms to serve consumer preferences. Section 7 of the Clayton Antitrust Act is the statutory crux of antitrust-focused merger review,[53] the process whereby agencies and courts evaluate a merger, before or after its consummation, for antitrust concerns and decide whether to permit the merger to be consummated or not undone.[54] This Note focuses on antitrust-specific review ("merger review"), which is handled federally by the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"),[55] but many other bodies such as the FCC and the Committee on Foreign Investment in the United States ("CFIUS") may also review mergers to serve other interests, such as "the public interest, convenience, and necessity" or national security.[56]

Although conceptually straightforward, modern merger review proves to be a complex, ever-evolving task that requires parties to monitor market conditions,[57] case law,[58] and prevailing judicial attitudes to navigate its

52. Donie O'Sullivan et al., *Facebook Is Having a Tougher Time Managing Vaccine Misinformation Than It Is Letting On, Leaks Suggest*, CNN (Oct. 27, 2021, 10:56 AM), https://www.cnn.com/2021/10/26/tech/facebook-covid-vaccine-misinformation/index.html [https://perma.cc/L533-FLGZ].

53. *See* discussion *infra* Section II.B.1.b.

54. ANDREW GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES CONCEPTS AND PROBLEMS IN COMPETITION POLICY 671-74 (3d ed. 2017) (providing an introduction into merger review).

55. *Merger Review*, FTC, https://www.ftc.gov/news-events/topics/competition-enforcement/merger-review [https://perma.cc/Q5ME-5K35] (last visited Apr. 5, 2022).

56. *Overview of the FCC's Review of Significant Transactions*, FCC (July 10, 2014), https://www.fcc.gov/reports-research/guides/review-of-significant-transactions [https://perma.cc/X2LU-8EW8]; *The Committee on Foreign Investment in the United States (CFIUS)*, U.S. DEP'T OF TREASURY, https://home.treasury.gov/policy-issues/international/the-committee-on-foreign-investment-in-the-united-states-cfius [https://perma.cc/MP2P-FPDA] (last visited Jan. 9, 2022).

57. *See infra* notes 107-10 and accompanying text.

58. GAVIL ET AL., *supra* note 54, at 672-74 (outlining the roles of different sections of the Sherman Antitrust Act, Clayton Antitrust Act, and Federal Trade Commission Act).

terrain.[59] To explain how Section 7 merger review empowers consumers, a brief overview of the goals and means of antitrust law is warranted.

a. Sherman Antitrust Act Foundation

U.S. antitrust law first arose to ensure markets prioritized consumer interests at a time when a small number of trusts came to dominate the U.S. economy.[60] The result was the 1890 Sherman Antitrust Act ("SAA"),[61] which prohibits "[e]very contract, combination . . . , or conspiracy, in restraint of trade," under Section One, and the conspired, attempted, or successful "monopoliz[ation]" of trade, under Section Two.[62] While fleshing-out these undefined offenses during the SAA's first decades, courts identified antitrust law's goals and enforcement tools.[63]

i. Section One and the Objective of Antitrust Law

Section One liability requires (1) concerted, (2) anticompetitive conduct,[64] and its case law settled antitrust law's goal of prioritizing consumer welfare.[65] Initially, the Supreme Court insisted on adhering to a plain reading of Section One's prohibition against *every* contract in restraint of trade,[66] but because "[e]very agreement concerning trade . . . [necessarily] restrains,"[67] the Court reversed course in 1911 in *Standard Oil Co. of N.J. v. United*

59. *Id.* at 68-78 (providing an overview of intellectual movements that inform antitrust law's goals and values).

60. John A. James, *Structural Change in American Manufacturing, 1850-1890*, 43 J. ECON. HIST. 433 (1983) ("At the time of the Civil War it was still essentially a county of small-scale enterprises, but with the emergence of large firms and concentrated national markets, that picture had changed radically by the end of the century.").

61. GAVIL ET AL., *supra* note 54, at 102.

62. 15 U.S.C. §§ 1-2 (emphases added).

63. *See* discussion *infra* Section II.B.1.a.i-ii.

64. S*ee, e.g.*, NCAA v. Alston, 141 S. Ct. 2141, 2167-68 (2021) (Kavanaugh, J., concurring) ("Price-fixing . . . is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work."); *see* 15 U.S.C. § 1.

65. *See infra* notes 70-72 and accompanying text; *see* Christine S. Wilson, Comm'r, FTC, Luncheon Keynote Address at George Mason Law Review 22nd Annual Antitrust Symposium: Antitrust at the Crossroads?, at 1 (Feb. 15, 2019), https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf [https://perma.cc/AC5Z-E5BG] ("Under the consumer welfare standard, business conduct and mergers are evaluated to determine whether they harm consumers in any relevant market.").

66. United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 312 (1897) ("The language of [Section One] includes every contract . . . in restraint of trade . . . . [A]s the very terms of the statute go, they apply to any contract of the nature described.").

67. Bd. of Trade of Chi. v. United States, 246 U.S. 231, 238 (1918) ("Every agreement concerning trade . . . restrains. To bind, to restrain, is of their very essence.").

States,[68] instead reading into "the language of Section [One]" "a reasonableness modification,"[69] known as the "rule of reason."[70]

This rule of reason asks "whether the restraint . . . promotes competition or . . . suppress[es] . . . competition," and this fact-intensive inquiry "ordinarily" requires investigating all the "facts peculiar to the business," such as the restraint's nature, probable or actual effect, history, and purpose.[71] By directing the rule of reason to serve competition, the Court had crowned "consumer welfare" as the sole, cognizable goal and beneficiary of antitrust law.[72] However, even armed with the consumer welfare standard, Section Two issues would expose to courts the limitations of relying on enforcement tools that wait until after an antitrust injury has been inflicted to intervene.[73]

ii. Section Two and the Limits of Ex Post Facto Intervention

Section Two liability requires (1) unilateral or concerted anticompetitive conduct and (2) "monopoly power,"[74] and its application exposed the dilemma caused by allowing monopolies to establish themselves before intervening.[75]

A fundamental assumption in mainstream economics is that firms seek to maximize their profits,[76] and because a firm's productive efficiency will generally increase with scale,[77] firms tend to have an incentive to grow their productive capacity and market share. Assuming sufficient price competition remains after the firm has grown, consumers will receive the newfound "surplus" from the increased productive efficiency in the form of lower prices, but once a firm grows beyond a certain size, perhaps a 90% market share, price competition is likely to be too weak to compel the monopolist to share its efficiency gains with consumers.[78] This dynamic is most readily

68. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 67 (1911) (distinguishing between the more literal construction of Section One from *Trans-Missouri Freight Ass'n.* from the "rule of reason" applied by the Court).

69. GAVIL ET AL., *supra* note 54, at 103.

70. *Id.*

71. *Bd. of Trade of Chi.*, 246 U.S. at 238.

72. *See* Wilson, *supra* note 65, at 1.

73. *See* discussion *infra* Section II.B.1.a.ii.

74. United States v. Microsoft Corp., 253 F.3d 34, 50 (D.C. Cir. 2001) ("[M]onopolization has two elements: '(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" (quoting United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966))).

75. *See infra* notes 81-89 and accompanying text.

76. H.T. Koplin, *The Profit Maximization Assumption*, 15 OXFORD ECON. PAPERS 130, 130-31 (1963) (discussing the influence of the profit maximization assumption).

77. *Glossary of Statistical Terms: Economies of Scale*, OECD, https://stats.oecd.org/glossary/detail.asp?ID=3203 [https://perma.cc/38U4-4U7R] (last visited Jan. 8, 2022) ("Economies of scale refers to the phenomenon where the average costs per unit of output decrease with the increase in the scale or magnitude of the output being produced by a firm.").

78. *See* MAXWELL L. STEARNS ET AL., LAW AND ECONOMICS: PRIVATE AND PUBLIC 49-55 (2018).

understood in the context of price competition, but "[e]nhanced market power can also . . . manifest[] in non-price terms . . . that adversely affect customers, [such as] reduced product quality, reduced product variety, reduced service, or diminished innovation."[79] Regardless of the form of its manifestation, the inverse relationship between the *ability* from scale and the *incentive* from competition to cater to consumers' preferences informs Section Two doctrine.[80]

In 1945, the Second Circuit, acting in place of a disqualified Supreme Court,[81] faced a difficult decision in *United States v. Aluminum Co. of America.* The Department of Justice alleged, among other things, that the defendant, "Alcoa,"[82] the "single producer of 'virgin' [aluminum] ingots in the United States," was an unlawful monopoly because of its monopoly power alone.[83] On one hand, Alcoa had achieved a massive market share of "over ninety per cent,"[84] having crushed "at least one or two abortive attempts to enter the industry" by ensuring its supply always exceeded current demand.[85] On the other hand, actively restricting market supply had been affirmed to be anticompetitive behavior just five years prior in *United States v. Socony-Vacuum Oil Co.*,[86] and Alcoa had done the exact opposite by expanding its supply.[87]

Presented with these facts, the Second Circuit agonized that "Alcoa[] . . . was . . . a monopoly; indeed it ha[d] never been anything else," but "[t]he successful competitor, having been urged to compete, must not be turned upon [once] he wins."[88] Judge Hand himself unabashedly expressed his frustration at the legal and economic dilemma in an internal memo:

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79. U.S. DEP'T OF JUST. & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 2 (2010), https://www.ftc.gov/sites/default/files/attachments/mergers/100819hmg.pdf [https://perma.cc/5HMK-UCYE] [hereinafter HORIZONTAL MERGER GUIDELINES].

80. *See infra* notes 81-89 and accompanying text.

81. United States v. Aluminum Co. of America (*Alcoa*), 148 F.2d 416, 421 (2d Cir. 1945); *see also* 28 U.S.C. § 2109; *see generally* Lino A. Graglia, *Punished for Being Successful*, WALL ST. J. (Mar. 7, 1997, 12:26 AM), https://www.wsj.com/articles/SB857697229646440000 [https://perma.cc/KZ7G-K7XA] (explaining that the "the Supreme Court [was] unable to hear the government's appeal because [it] lack[ed] . . . a quorum" because "too many of the justices had worked on the case in their earlier careers").

82. *Alcoa*, 148 F.2d at 421.

83. *Id.* at 423.

84. *Id.*

85. *Id.* at 430-31.

86. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220 (1940) ("The elimination of [crude oil overproduction] is no legal justification for [restricting market supply].").

87. *See Alcoa*, 148 F.2d at 430-31.

88. *Id.* at 430.

> [I]f we hold that [Alcoa] is not a monopoly, deliberately planned and maintained, everyone who does not get entangled . . . in the incredible nonsense that has emanated from the Supreme Court, will, quite rightly I think, write us down as asses. Wherever the line should be drawn, it must include a company such as this, if the [Sherman] Act is to be enforced.[89]

In the end despite the Circuit's concerns, it ruled against Alcoa,[90] arguing that "possession of unchallenged economic power deadens initiative" and "immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress."[91] Following this decision, it would seem as if the Second Circuit had adopted a no-fault monopolization standard for the whole U.S., but despite never being officially overturned, modern Section Two doctrine has rejected the no-fault standard, reaffirming the requirement of anticompetitive conduct.[92] As a result, possessing monopoly power is insufficient for a charge of monopolization; the defendant must also have "used [anticompetitive] acts to gain or sustain [it]."[93]

Today, Section Two anticompetitive conduct can be fulfilled by a variety of anticompetitive activities,[94] and "monopoly power" can be established where a firm has "the power to control prices or exclude competition."[95] However, by resolving the monopoly dilemma in favor of requiring anticompetitive conduct before permitting intervention, Section Two doctrine allows monopolies to still form so long as they grow lawfully or otherwise evade detection. Section 7 exists to limit the scope of this loophole.

b. Section 7's Law

By "arresting mergers . . . when the trend to[wards] [monopolization] . . . was still in its incipiency,"[96] Section 7 protects consumers by helping courts avoid difficult cases like *Aluminum Co. of America* from arising in the first

89. Marc Winerman & William Kovacic, *Learned Hand,* Alcoa*, and the Reluctant Application of the Sherman Act*, 79 ANTITRUST L.J. 295, 295-96, 296 n.2 (2013) (quoting an "undated pre-conference memo" physically on file at the Harvard Law School Library).

90. *Alcoa*, 148 F.2d at 448.

91. *Id.* at 427.

92. Otter Tail Power Co. v. United States, 410 U.S. 366, 377 (1973) ("Use of monopoly power 'to destroy threatened competition' is a violation . . . [Section] 2 of the Sherman Act.").

93. GAVIL ET AL., *supra* note 54, at 504.

94. *E.g., Microsoft Corp.*, 253 F.3d at 58, 64, 66, 85 (holding that Microsoft violated Section Two by "engaging in a variety of exclusionary acts . . . to maintain its monopoly," including "irremovably" "binding [Internet Explorer] to Windows"); *see also* JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 779-80 (7th Cir. 1999) (permitting a Section Two claim to continue based on facts violative of Section One).

95. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956).

96. Brown Shoe Co. v. United States, 370 U.S. 294, 317 (1962).

place.[97] Enacted in 1914, Section 7 of the Clayton Antitrust Act ("CAA") enjoins mergers "where . . . the effect of such acquisition[s] . . . *may* be substantially to lessen competition, or to tend to create a monopoly,"[98] and as the statutory language suggests, its legal standards are imprecise.[99] As a former general counsel to the FTC explained, "[i]n US merger policy, . . . goals have not always been constant, or consistent with each other, and our enforcement tools have not always been perfectly adapted to their tasks."[100] Therefore, the best way to understand Section 7's standards are as functions of evolving judicial attitudes towards the virtue of market intervention when armed with imperfect information but nonetheless asked to predict the future.

i. Merger Review Analytical Framework

Merger review operates on the "theory . . . that high market concentration can facilitate collusive behavior," the subject of Section One, and even grant "[monopoly] power," the subject of Section Two, which in either case enables firms to betray consumers.[101] The goal of Section 7 is to protect consumer welfare by preemptively depriving firms of the ability to engage in anticompetitive conduct at all.

Mergers come in three varieties: horizontal, vertical, [and] conglomerate.[102] "[H]orizontal mergers . . . involve sellers of substitutes, . . . vertical mergers . . . involve firms['] . . . suppliers [and] customers," and "[c]onglomerate mergers involve firms that sell neither substitutes nor complements."[103] For horizontal mergers, courts consider the post-merger market concentration and its distance from the pre-merger concentration.[104] Although courts could rely on a simple count of competitors or their market shares,[105] typically the DOJ and FTC will provide an HHI measurement, "calculated by summing the squares of the individual firms' market

97. *See* Debra A. Valentine, Assistant Dir. for Int'l Antitrust, Fed. Trade Comm'n, Prepared Remarks Before INDECOPI Conference: The Evolution of U.S. Merger Law (Aug. 13, 1996), https://www.ftc.gov/public-statements/1996/08/evolution-us-merger-law [https://perma.cc/632A-R285] ("[T]here is no doubt that Congress was concerned about the monopoly power of the great industrial trusts – it wanted to protect consumers and smaller firms from unfair use of that power.").

98. 15 U.S.C. § 18 (emphasis added).

99. *See* GAVIL ET AL., *supra* note 54, at 697-700 (detailing the various, conflicting authorities that attorneys must consider).

100. Valentine, *supra* note 97.

101. *Id.*

102. *See* GAVIL ET AL., *supra* note 54, at 671.

103. *Id.*; *see generally* Adam Hayes, *Cross Price Elasticity: Definition, Formula for Calculation, and Example*, INVESTOPEDIA, https://www.investopedia.com/terms/c/cross-elasticity-demand.asp [https://perma.cc/5BX7-HV4V] (last updated July 31, 2022) (explaining that substitutes are goods or services consumers may view as alternatives, such as Pepsi and Coke sodas, whereas complements are goods or services consumers may view as most useful together, such as peanut butter and jelly).

104. F.T.C. v. Penn State Hershey Med. Ctr., 838 F.3d 327, 346-47 (3d Cir. 2016).

105. GAVIL ET AL., *supra* note 54, at 766.

shares."[106] This first requires courts to consider the merger in the context of the relevant geographic market,[107] the relevant product market,[108] and the number and character of current and future possible market participants.[109] For example, in a defined market where two firms each have a fifty percent market share, the HHI would be 5,000, and the FTC and DOJ would designate that market as "Highly Concentrated" because its HHI value measured "above 2500."[110]

Next, courts will consider any mitigating factors that may overcome any anticompetitive concerns suggested by the market concentration, such as the presence of monopsonistic buyers,[111] low barriers to market entry for potential competitors,[112] and new productive efficiencies.[113] Finally, furnished with the anticompetitive and procompetitive considerations, courts weigh them to predict the merger's net-competitive effect for consumers.[114] Given the predictive nature of this final weighing, the analysis delegates a large degree of discretion to a judge's judicial attitude towards market intervention to tip the scales.[115]

ii. Judicial Attitudes Evolve

Judicial attitudes towards consumers' need for protection have varied over time and in response to those times. In 1962, the Supreme Court dictated in *Brown Shoe Co. v. United States* that "Congress used the words '*may* be substantially to lessen competition' . . . , to indicate that [Section 7's] concern was with *probabilities*, not certainties"[116] and that because Congress "appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets," newfound, post-merger

106. HORIZONTAL MERGER GUIDELINES, *supra* note 79, at 18.

107. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 334 (1963).

108. United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 380-81 (1956) ("[W]hether the defendants control the price and competition in the market for such part of trade . . . depends upon . . . whether there is a cross-elasticity of demand between [the defendants' product and its substitutes].").

109. United States v. Waste Mgmt., Inc., 743 F.2d 976, 983 (2d Cir. 1984) ("[E]ntry into the relevant product and geographic market by new firms . . . in the Fort Worth area is so easy that any anti-competitive impact of the merger . . . would be eliminated . . . .").

110. HORIZONTAL MERGER GUIDELINES, *supra* note 79, at 19.

111. United States v. Baker Hughes Inc., 908 F.2d 981, 981-92 (D.C. Cir. 1990) (permitting a merger in the context of a powerful and limited number of buyers); *see also* HORIZONTAL MERGER GUIDELINES, *supra* note 79, at 27.

112. *Waste Mgmt., Inc.*, 743 F.2d at 983.

113. F.T.C. v. Procter & Gamble Co., 386 U.S. 568, 580 (1967) ("*Possible* economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies, but it struck the balance in favor of protecting competition.") (emphasis added).

114. *See* F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 726-27 (D.C. Cir. 2001).

115. *See* discussion *infra* Section II.B.1.b.ii; *see also H.J. Heinz Co.*, 246 F.3d at 727 n.26 ("The most difficult mergers to assess may be those that . . . create[e] market power that increases the risk of oligopolistic pricing while at the same time creating efficiencies that reduce production or marketing costs." (quoting LAWRENCE A. SULLIVAN & WARREN S. GRIMES, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK 511 (1st ed. 2000))).

116. Brown Shoe Co. v. United States, 370 U.S. 294, 323 (1962) (emphases added).

productive efficiencies were a non-cognizable mitigating factor.[117] Indeed in 1967, the Court reaffirmed that "[p]ossible economies [of scale] cannot be used as a defense,"[118] and upon this basis, the Court went on to enjoin mergers with post-merger market shares as low as five percent.[119]

However, the last time the Supreme Court decided a substantive Section 7 case was in 1974,[120] and since then the lower Circuits have mutinied and departed from its caselaw.[121] In the context of stagflation and increased foreign competition of the 1970s,[122] Circuits sought greater certainty of anticompetitive effects before enjoining mergers.[123] Procedurally, the plausibility standards adopted in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.* and *Bell Atlantic Corp. v. Twombly* were procedural manifestations of courts' newfound hesitancy to intervene, and Circuits may have interpreted the Supreme Court's procedural holdings as tacit permission to diverge from its substantive holdings as well.[124] Since then, the FTC and DOJ have likewise updated their jointly published *Merger Guidelines*[125]—which provide notice of how they will analyze mergers[126]—to recognize productive efficiencies as a cognizable mitigating factor.[127] But today, attitudes are reversing once again.[128]

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117. *Id.* at 344.

118. F.T.C. v. Procter & Gamble Co., 386 U.S. 568, 580 (1967).

119. United States v. Pabst Brewing Co., 384 U.S. 546, 550, 553 (1966).

120. GAVIL ET AL., *supra* note 54, at 697 ("[T]he trail of Supreme Court decisions interpreting the amended Section [7] begins with *Brown Shoe* in 1962 and effectively ends with *[United States v. General Dynamics, 415 U.S. 486]* in 1974 . . . . ").

121. *See infra* notes 122-24 and accompanying text.

122. Int'l Fin. Discussion Paper 799 The Great Inflation of the 1970s, at 2, 18-19 (Apr. 2004), https://www.federalreserve.gov/pubs/ifdp/2004/799/ifdp799.pdf [https://perma.cc/EW79-BAKV]; JOHN ZYSMAN & LAURA TYSON, AMERICAN INDUSTRY IN INTERNATIONAL COMPETITION: GOVERNMENT POLICIES AND CORPORATE STRATEGIES 15, 18 (1983) (discussing the "intense foreign competition" the United States began to face in the era following the Second World War).

123. *See* GAVIL ET AL., *supra* note 54, at 71-73, 440-41.

124. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) ("[I]f the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must [present] more persuasive evidence . . . than would otherwise be necessary."); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) ("Asking for plausible grounds to infer an agreement . . . simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.").

125. *Mergers*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers [https://perma.cc/G5CM-DDWE] (last visited Jan. 29, 2022).

126. GAVIL ET AL., *supra* note 54, at 719 ("The Merger Guidelines . . . describe how the Justice Department and Federal Trade Commission will exercise their prosecutorial discretion . . . , not . . . the applicable legal standard that should or would be applied by a court."); HORIZONTAL MERGER GUIDELINES, *supra* note 79, at 1 ("These Guidelines describe the principal analytical techniques . . . on which the Agencies usually rely . . . .").

127. HORIZONTAL MERGER GUIDELINES, *supra* note 79, at 29-31.

128. *See* discussion *infra* Section II.B.2.

2. The Antitrust Reform Movement

Today, a sense that too much faith has been placed in efficiency's ability to counterbalance increased market concentration has arisen, and a bipartisan movement has coalesced to respond.[129] Technology markets have become increasingly concentrated in the hands of a few, large corporations,[130] and ongoing litigation alleges that at least one of these giants unlawfully guarded their newfound monopoly power.[131] In the ongoing case of *FTC v. Facebook, Inc.*, the FTC seeks Facebook's dissolution to answer for its alleged monopolization strategy of "maintain[ing] its dominant position by acquiring companies that could emerge as or aid competitive threats," such as Instagram and WhatsApp,[132] a policy its CEO, Mark Zuckerberg, summarized in 2008 as "it is better to buy than compete."[133] Following *Citizens United v. FEC*, such firms' ability to translate their economic power into political influence through campaign contributions came under the protection of the First Amendment,[134] permitting Facebook alone to spend almost twenty million dollars on lobbying in 2020.[135]

In response, the FTC withdrew its support of the *Vertical Merger Guidelines* on the basis that it "contravened the Clayton Act's [nonexistent] language with [regard] to efficiencies,"[136] and the DOJ followed suit.[137] Both agencies have even "launched a joint public inquiry" to "seek[] comments . . . to inform potential revisions to the [Horizontal] guidelines" as well.[138]

In Congress, Democrats and Republicans now share "broad agreement that Big Tech wields too much power in the market and that government needs

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129. *See* discussion *infra* Section II.B.2.

130. *See* Jasper Jolly, *Is Big Tech Now Just Too Big to Stomach?*, THE GUARDIAN (Feb. 6, 2021, 3:00 AM), https://www.theguardian.com/business/2021/feb/06/is-big-tech-now-just-too-big-to-stomach [https://perma.cc/76W9-3KBR].

131. First Amended Complaint at 1-2, F.T.C. v. Facebook, Inc., 581 F. Supp. 3d 34 (D.D.C. 2022) (No. 1:20-cv-03590-JEB).

132. *Id.*

133. *Id.*

134. *See* Citizens United v. FEC, 558 U.S. 310, 353 (2010) ("There is simply no support for the view that the First Amendment . . . permit[s] the suppression of political speech by media corporations."); *see* JANE CHUNG, PUB. CITIZEN, BIG TECH, BIG CASH: WASHINGTON'S NEW POWER PLAYERS 7-13 (2021), https://www.citizen.org/wp-content/uploads/Big-Tech-Big-Cash-Washingtons-New-Power-Players.pdf [https://perma.cc/X47W-TT8P].

135. *See* CHUNG, *supra* note 134, at 8.

136. Press Release, Fed. Trade Comm'n, Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary (Sept. 15, 2021), https://www.ftc.gov/news-events/press-releases/2021/09/federal-trade-commission-withdraws-vertical-merger-guidelines [https://perma.cc/45YF-MLNF].

137. Jonathan Kanter, Assistant Att'y Gen., U.S. Dep't of Just. Antitrust Div., Remarks at FTC Press Conference Announcing Call for Public Comment: Modern Competition Challenges Require Modern Merger Guidelines, at 1-5 (Jan. 18, 2022), https://www.justice.gov/opa/speech/file/1463546/download [https://perma.cc/CS9B-MNHE].

138. Press Release, Fed. Trade Comm'n, Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers (Jan. 18, 2022), https://www.ftc.gov/news-events/press-releases/2022/01/ftc-and-justice-department-seek-to-strengthen-enforcement-against-illegal-mergers [https://perma.cc/R9S9-6D9P].

to put more restrictions in place."[139] On the right, conservatives again claim that "social media platforms like [Meta's] Facebook and Google's YouTube [unfairly] discriminate against conservative viewpoints."[140] On the left, liberals criticize social media firms as notable bad actors within a broader, economy-wide monopoly problem.[141]

Nonetheless, the left and right have found considerable common ground as to goals and solutions. In 2020, the House Judiciary Subcommittee on Antitrust published a bipartisan report that claimed Apple, Google, Amazon, and Meta possessed monopoly power in their respective markets and that at least Amazon and Facebook have engaged in exclusive dealing and predatory mergers to maintain it.[142] The report also offered remedial proposals such as establishing a "[p]resumptive prohibition against future mergers and acquisitions by the dominant platforms," "[s]trengthening Section [7] of the Clayton Act [by] restoring presumptions and bright-line rules," and "overriding problematic precedents in the case law."[143]

In the Senate, Democratic Senator Amy Klobuchar has teamed up with Senate Republicans Chuck Grassley and Tom Cotton to sponsor a number of antitrust bills,[144] which would prohibit dominant firms from using their monopoly power to "[b]ias[] search results in favor of [themselves],"[145] "shift the burden of proof to [the party] that wishes to buy or merge with another to show [the merger is] not anticompetitive,"[146] and otherwise complement other House proposals.[147] Therefore, politically, both parties appear willing to

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139. Kovach, *supra* note 20.

140. *Id.*

141. *See* Press Release, Amy Klobuchar, Senator, Senator Klobuchar Introduces Sweeping Bill to Promote Competition and Improve Antitrust Enforcement (Feb. 4, 2021) [hereinafter Senator Klobuchar Introduces Sweeping Bill], https://www.klobuchar.senate.gov/public/index.cfm/2021/2/senator-klobuchar-introduces-sweeping-bill-to-promote-competition-and-improve-antitrust-enforcement [https://perma.cc/CZ3A-B8X8].

142. Kovach, *supra* note 20.

143. INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 21, at 20-21.

144. *See* Senator Klobuchar Introduces Sweeping Bill, *supra* note 141; *see* Ashley Gold, *New Klobuchar, Cotton Bill Could Block Big Tech Mergers*, AXIOS (Nov. 5, 2021), https://www.axios.com/klobuchar-cotton-big-tech-antitrust-bill-535d9df6-5b39-4e75-b6d8-13f30c21f3cf.html [https://perma.cc/S2WB-4AWW]; *see* Press Release, Amy Klobuchar, Senator, Klobuchar, Grassley, Colleagues to Introduce Bipartisan Legislation to Rein in Big Tech (Oct. 14, 2021) [hereinafter Klobuchar, Grassley, Colleagues to Introduce Bipartisan Legislation], https://www.klobuchar.senate.gov/public/index.cfm/2021/10/klobuchar-grassley-colleagues-to-introduce-bipartisan-legislation-to-rein-in-big-tech [https://perma.cc/H23V-7MFV]; *see* Ryan Tracy & John D. McKinnon, *Antitrust Tech Bills Gain Bipartisan Momentum in Senate*, WALL ST. J. (Nov. 25, 2021, 5:30 AM), https://www.wsj.com/articles/antitrust-tech-bills-gain-bipartisan-momentum-in-senate-11637836202 [https://perma.cc/H2QT-577X].

145. Klobuchar, Grassley, Colleagues to Introduce Bipartisan Legislation, *supra* note 144.

146. Gold, *supra* note 144.

147. Lauren Feiner, *Lawmakers Unveil Major Bipartisan Antitrust Reforms That Could Reshape Amazon, Apple, Facebook and Google*, CNBC (Dec. 13 2021, 1:35 PM), https://www.cnbc.com/2021/06/11/amazon-apple-facebook-and-google-targeted-in-bipartisan-antitrust-reform-bills.html [https://perma.cc/JV27-XXS5].

regulate social media firms if it means eroding their economic or political influence.[148] The question is how to do so without offending the Constitution.

C. Constitutionality of Regulating Markets and Speech

In addition to determining whether Section 230 and Section 7 reform will improve upon the status quo and whether it is politically popular, it is necessary to assess whether the Constitution will permit it.

1. Speech Regulation and the First Amendment

As a general rule, the First Amendment bars speech regulation by prohibiting any "law . . . abridging the freedom of speech, or of the press,"[149] although various exceptions exist,[150] such as for defamation,[151] some compelled speech,[152] some commercial speech,[153] and other categories less relevant to this Note.[154]

To avail itself of defamation, discussed in greater detail above,[155] Congress need only revoke Section 230 to resubject websites to potential liability as publishers.[156] But even so, as a constitutional matter, "public official[s]" cannot "recover[] damages for . . . defamat[ion] . . . unless . . . the statement was made with 'actual malice'—that is, . . . knowledge that it was false or with reckless disregard [for the truth],"[157] and in "matter[s] of public concern, . . . even a private figure must show actual malice in order to recover presumed . . . or punitive damages."[158]

To instead actively require websites to remove misinformation or at least flag it for readers, Congress would have to satisfy the more demanding constitutional requirements for compelling speech or controlling commercial speech.[159]

For instance, in *National Institute of Family and Life Advocates. v. Becerra*, the Supreme Court held that compelling unlicensed crisis pregnancy centers to "provide a government-drafted notice, [that] stat[ed] that '[the]

148. *See* discussion *supra* Section II.B.2.

149. U.S. CONST. amend. I.

150. KATHLEEN ANN RUANE, CONG. RSCH. SERV., 95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 1-35 (2014) (providing a broad overview of the basics of First Amendment doctrine).

151. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 301-02 (1964) ("The imposition of liability for private defamation does not abridge the freedom of public speech or any other freedom protected by the First Amendment.") (Goldberg J., concurring).

152. *See infra* notes 160-62 and accompanying text.

153. *See infra* notes 163-65 and accompanying text.

154. *See* RUANE, *supra* note 150, at 1-35.

155. *See supra* notes 28-33 and accompanying text.

156. *See supra* notes 34-37 and accompanying text.

157. *Sullivan*, 376 U.S. at 279-80.

158. RUANE, *supra* note 150, at 21 (citing Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974)); *see* Gertz v. Robert Welch, Inc., 418 U.S. 323, 323-24 (1974).

159. *See infra* notes 160-65 and accompanying text.

facility [wa]s not licensed as a medical facility by the State of California,'"[160] likely violated the First Amendment because it "alter[ed] the content of [their] speech,"[161] and crucially, "regulations [that] 'target speech based on its . . . content . . . are presumptively unconstitutional and . . . justif[iable] only [when] *narrowly tailored* to serve *compelling state interests*.'"[162]

Alternatively, Congress could argue that mandating the censorship or flagging of misinformation is merely the regulation of *commercial* speech, which needs only (1) "concern lawful activity and not be misleading," (2) implement a "substantial" "government interest," (3) "directly advance[] the government interest," and (4) be no "more extensive than . . . necessary . . . ."[163] But a platform's decision regarding how to treat a user's post would strain to be construed as commercial speech, "speech which does 'no more than propose a commercial transaction.'"[164] Consequently, constitutional policy seems to be placing its faith in "preserv[ing] an uninhibited marketplace of ideas in which truth will [hopefully] ultimately prevail."[165]

2. Market Regulation and the Commerce Clause

In contrast to speech regulation, market regulation enjoys relatively permissive constitutional standards under the commerce clause, which only requires that Congress have a "rational basis" for believing the economic activity regulated, when "taken in the aggregate, substantially affect[s] interstate commerce."[166] Therefore, regulation that is framed as speech regulation faces far more constitutional scrutiny than regulation framed as market regulation, and importantly, such market regulation is regulatorily common and justified on the basis of rectifying market failures, such as network effects.[167]

D. Social Media Market's Network Effect

Because this Note considers how competition impacts social media firms as conductors of misinformation, it is worth taking a moment to discuss the nature of the social media market as a platform market. Platform markets are characterized by the presence of "platform" firms that facilitate transactions between two parties by bringing them together in exchange for a

160. Nat'l Inst. of Fam. & Life Advocs. v. Becerra (*NIFLA*), 138 S. Ct. 2361, 2370 (2018) (quoting CAL. HEALTH & SAFETY CODE § 123472(b)(1) (West 2018)).

161. *Id.* at 2365 (quoting Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988)) (second alteration in original).

162. *Id.* at 2371 (quoting Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)) (emphases added).

163. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980).

164. Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 64-66 (1983) (quoting Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1973)).

165. *NIFLA*, 138 S. Ct. at 2366 (quoting McCullen v. Coakley, 573 U.S. 464, 476 (2014)).

166. Gonzales v. Raich, 545 U.S. 1, 2 (2005) (citing United States v. Lopez, 514 U.S. 549, 557 (1995)).

167. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 15-35 (1982).

fee from one or both parties.[168] The more parties a platform can gather on one side, the greater the value the platform has for the other side.[169] Take credit cards for example. Merchants naturally prefer to deal with a credit card company only when many of their customers will use that card, and likewise, customers naturally prefer to hold a credit card only when the stores they frequent accept that card.[170]

This relationship between the popularity and value of a platform is known as the "network effect," and it can help a monopolist entrench its monopoly power by giving consumers another reason to avoid smaller platforms.[171] Additionally, once a network has entrenched itself, Sherman Antitrust Act action provides a poorer remedy because both sides of the platforms are consumers, so the complex, if not contradictory, interests of "both sides of the platform" must be considered[172] before assessing "as a whole" "[]competitive effects."[173] If not by legal intervention, the only way to overcome the network effect and dislodge the monopolist is for a rival platform to achieve a discount, quality, or innovation "leap[]" that finally motivates consumers to migrate to its platform instead.[174]

Social media firms qualify as platforms because they typically unite non-paying users and paying advertisers; users seek the content they enjoy, and advertisers seek the users most likely to act upon their advertisements.[175] For example, Facebook's service as a platform is to observe its users' browsing habits, categorize their interests, and sell to advertisers the service of connecting them to the appropriate users.[176] When users seek to connect with friends or family, it remains far simpler to endure one platform than

168. GAVIL ET AL., *supra* note 54, at 622-25.

169. *Id.*

170. *See* United States v. Visa U.S.A., Inc., 344 F.3d 229, 234-36 (2d Cir. 2003) (describing the relationship between cardholders, merchants, and banks within the "General Purpose Payment Card Industry"); GAVIL ET AL., *supra* note 54, at 622 ("[M]erchants are more likely to accept a payment system's card the greater its number of cardholders, and cardholders are more likely to obtain a card the greater the number of merchants that accept it.").

171. *See* GAVIL ET AL., *supra* note 54, at 622 ("'Network effects' arise when the value of a product to a buyer depends on the number of other users. Communication systems are an example: a telephone is more valuable the more [people] you can call.").

172. Ohio v. Am. Express Co., 138 S. Ct. 2274, 2286 (2018).

173. *Id.* at 2287.

174. GAVIL ET AL., *supra* note 54, at 1100 ("To dislodge an industry leader in a market with strong network effects . . . the entrant may need to develop a dramatically improved product that 'leapfrogs' the market leader's technology.").

175. *See Social Media Fact Sheet*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/ [https://perma.cc/4U89-8399]; *see, e.g.*, Greg McFarlane, *How Facebook (Meta), Twitter, Social Media Make Money from You*, INVESTOPEDIA, https://www.investopedia.com/stock-analysis/032114/how-facebook-twitter-social-media-make-money-you-twtr-lnkd-fb-goog.aspx#:~:text=The%20primary%20way%20social%20media,before%20social%20media%20companies%20existed [https://perma.cc/3ZWJ-JYQ4] (last updated Nov. 04, 2021).

176. Mark Zuckerberg, *Understanding Facebook's Business Model*, META (Jan. 24, 2019), https://about.fb.com/news/2019/01/understanding-facebooks-business-model/ [https://perma.cc/LF6T-TUY5].

convince their entire social circle to migrate to another.[177] Thus, the social media market as a platform market is especially vulnerable to monopolization and a strong candidate for market correction.

Now, having unpacked some of the legal and economic causes for misinformation's unfettered spread on social media and having considered the political and constitutional hurdles to statutory reform, the final step is to ask: assuming the political and constitutional background will persist unchanged for the foreseeable future, what can be done right now to mitigate misinformation?

III. ANALYSIS

A. Difficulty of Section 230 Reform

1. Proponents of Section 230 Reform Pursue Politically Irreconcilable Goals

The first hurdle for Section 230 reform is political feasibility. Although both parties share a general discontent with Section 230, Republicans and Democrats seek mutually exclusive ends; the left wishes to regulate speech by requiring websites to moderate misinformation, and the right wants to deregulate speech by prohibiting websites from moderating speech.[178] Therefore, because their goals exist in opposite directions from the status quo, future changes to Section 230 are unlikely to include provisions that might address platforms' legal permission to abide misinformation on their websites.

2. Amending Section 230 Risks Constitutional Criticism or Ensures Regulatory Regression

The second hurdle for anti-misinformation Section 230 reform is ensuring the change from the status quo both works as a regulatory tool and survives constitutional scrutiny. The simplest way to remove websites' liability shield is to revoke Section 230 entirely. Websites would once again be vulnerable to defamation liability, which is constitutionally sound,[179] and the Internet would revert to the pre-Section 230 status quo.[180] But platforms would regain the perverse incentive to avoid moderating their platform's third-party content,[181] or simply opt to disallow user-posted content entirely.

177. *See* Lydia Emmanouilidou & Brandi Fullwood, *We Asked Listeners Why They Can't Quit Facebook. Here's What You Said*, WORLD (Feb. 4, 2019, 2:00 PM), https://theworld.org/stories/2019-02-04/we-asked-listeners-why-they-cant-quit-facebook-heres-what-you-said [https://perma.cc/4Y3Q-NKHS] (reporting reasons why users of Facebook chose not to leave the platform).

178. *See* discussion *supra* Section II.A.2.

179. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 301-02 (1964).

180. *See* discussion *supra* Section II.A.1.

181. *See* discussion *supra* Section II.A.1.

This result would not only be counterproductive but also deprive users the benefits of access to social media.[182]

Given liberals' desire to actively minimize misinformation,[183] and conservatives' desire to embolden speech,[184] reform could also include changes beyond mere revocation. For instance, Congress could pass a statute that simply imposes a duty on websites to ensure its content does not include misinformation. This change would directly address the misinformation problem, but it could very well violate the First Amendment and the "marketplace of ideas" ideal it endorses.[185] Specifically, any statute that compels social media platforms to permit, disclaim, or remove misinformative posts risks being challenged as content-altering, compelled speech of the platform, just as the mandated disclosure was in *National Institute of Family and Life Advocates. v. Becerra*.[186]

Thus, successfully reforming Section 230 to tackle misinformation as speech is a tall order. The task raises the political support of the left but evokes deep suspicion from the right and,[187] depending on Congress' legislative approach, either restores the pre-Section 230 risk of legal liability for platforms' censorship of misinformation or risks invalidation of the statute under the First Amendment.[188] If, however, misinformation is tackled as a symptom of a market failure in need of correction under Section 7, the political, regulatory, and constitutional hurdles shrink considerably.[189]

B. Viability of Section 7 Reform

1. Amending Section 7 Enjoys Constitutional Permission and Bipartisan Appeal

In contrast to Section 230 reform, amending Section 7 to include a bright-line Herfindahl-Hirschman Index ceiling for the social media market would enjoy the permissive constitutional scrutiny of the commerce clause and the warmer reception of both political parties, given their desire to erode the economic or political influence of large social media firms.[190]

182. *See, e.g.*, *Is Social Media Good for Society?*, PROCON.ORG, https://socialnetworking.procon.org/ [https://perma.cc/UXG4-RTXU] (last updated Nov. 18, 2022).

183. *See supra* notes 43, 48-50 and accompanying text.

184. *See supra* notes 43, 45-47 and accompanying text.

185. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2366 (2018) (quoting McCullen v. Coakley, 573 U.S. 464, 476 (2014)).

186. *See supra* notes 160-62 and accompanying text.

187. *See* discussion *supra* Section II.A.2.

188. *See* discussion *supra* Sections II.A.1, II.C.1.

189. *See* discussion *infra* Section II.D.

190. *See* discussion *supra* Section II.B.2.

Constitutionally, the Clayton Antitrust Act already avows authority from the commerce clause,[191] and a market-specific HHI ceiling would likewise satisfy its requirements. Congress would be readily able to argue, if challenged, that it had a "rational basis" for believing that the merging of social media firms, when "taken in the aggregate, substantially affect[s] interstate commerce,"[192] insofar as those firms may have a nationwide presence and facilitate online advertising.[193]

Politically, both parties share an interest in weakening the power of social media firms, economically or otherwise,[194] and preventing further concentration or reconcentration is one such method of diminishing their individual influence over online speech.[195] Of course, both parties might disagree over the precise value at which to set the HHI ceiling, but they could at least agree that some minimum is appropriate. As such, the parties' goals are at least in the same direction from the status quo, even if not equal in distance.

This unidimensional dynamic is to be expected because economic regulation commonly bears witness to it.[196] Economic regulation tends to garner broad support at some minimum level because it is "extremely difficult to insure against" the "vagaries of the business cycle,"[197] and capitalism is more palatable when "citizens participate together in risk-reducing arrangements."[198] Economic regulation tackles all sorts of market failures, such as externalities, inadequate information, and, yes, monopolies and cartels.[199] In each case, "[t]he justification for intervention arises out of an alleged inability of the marketplace to deal with particular structural problems."[200] In the case of misinformation and social media platforms, if left unchecked, monopolies in social media will inevitably arise at one point or another and fail to provide consumers the level of content moderation they desire.

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191. Clayton Antitrust Act of 1914, Pub. L. No. 63-212, § 1(a), 38 Stat. 730, 730 (1914) (codified at 15 U.S.C. § 12(a)) (taking care to define "'[c]ommerce' as . . . trade or commerce among the several States and with foreign nations . . . .").

192. Gonzales v. Raich, 545 U.S. 1, 2 (2005) (citing United States v. Lopez, 514 U.S. 549, 557 (1995)).

193. *See, e.g.*, *Social Media Fact Sheet*, *supra* note 175; *see e.g.*, McFarlane, *supra* note 175.

194. *See* discussion *supra* Section II.B.2.

195. *See* discussion *infra* Section VI.B. III.B.2.

196. *See infra* notes 197-200 and accompanying text.

197. Theodore R. Marmor & Jerry L. Mashaw, *The Case for Social Insurance*, *in* THE NEW MAJORITY: TOWARD A POPULAR PROGRESSIVE POLITICS 78, 78 (Stanley B. Greenberg & Theda Skocpol, eds., 1997).

198. *Id.* at 78-79.

199. BREYER, *supra* note 167, at 15-35.

200. *Id.* at 15.

2. Strengthening Section 7 Mitigates the Harms of Misinformation

The most important question is whether establishing an HHI ceiling in the social media market will in fact mitigate misinformation's negative effects. Although there are limits to Section 7's ability to control social media firms' misinformation policies by influencing their market incentives, amending Section 7 can still make a worthwhile contribution.

An HHI ceiling can mitigate misinformation because consumers of news prefer sources they trust and respect.[201] Without a competitive market, social media firms have little incentive to provide the moderation necessary to receive the public's trust and respect. Televised news is analogous. Presented with a choice, consumers turn to the channel they trust and respect,[202] but if a consumer is unable to verify the validity of news and cannot access another source, for example when at a diner or airport that only airs one news station, then the viewer may simply have to rely on the news-source she can access.

Although the incentive for social media firms to respond to consumer preferences is currently weaker than it would be in a more competitive market, it is still visible. The practice of deplatforming is one example. When a personality's use of a platform becomes overly offensive to the sensibilities of a majority of users, platforms sometimes deplatform the personality to disassociate themselves and satisfy their broader user base.[203] In a similar vein, Twitter's practice of adding warnings to misinformative posts displays the same purpose.[204] Younger readers may even be familiar with YouTube's "Adpocalypse,"[205] where upon "learning [that] their ads [were] appearing on YouTube next to videos espousing racist and anti-Semitic views," companies such as "Wal-Mart, PepsiCo, Starbucks, [and] General Motors" pulled many of their ads from the platform.[206] In response, YouTube enacted broad measures to ensure hate speech received no revenue from YouTube.[207] The

201. *How People Decide What News to Trust*, *supra* note 15, at 14-27.

202. *See* Amy Mitchell et al., *Loyalty and Source Attention*, *in* PEW RSCH. CTR., THE MODERN CONSUMER: NEWS ATTITUDES AND PRACTICES IN THE DIGITAL ERA 8-10, 12-14 (2016), https://www.pewresearch.org/journalism/wp-content/uploads/sites/8/2016/07/PJ_2016.07.07_Modern-News-Consumer_FINAL.pdf [https://perma.cc/VZ49-QSV7].

203. *See* Hernandez, *supra* note 47; *see* Fischer & Gold, *supra* note 47; *see* Bond, *supra* note 47.

204. *See COVID-19 Misleading Information Policy*, TWITTER, https://help.twitter.com/en/rules-and-policies/medical-misinformation-policy [https://perma.cc/P3E3-RPKD] (last visited Apr. 8, 2022).

205. Rachel Dunphy, *Can YouTube Survive the Adpocalypse?*, N.Y. MAG. (Dec. 28, 2017), https://nymag.com/intelligencer/2017/12/can-youtube-survive-the-adpocalypse.html [https://perma.cc/QR5Q-R4CH].

206. Ian Sherr, *Wal-Mart, PepsiCo and Dish Pull YouTube Ads over Hateful Videos*, CNET (Mar. 24, 2017, 8:57 PM), https://www.cnet.com/news/wal-mart-pepsi-and-dish-pull-youtube-ads-over-hateful-videos-google-alphabet-antisemitism/ [https://perma.cc/N4L6-7HUA].

207. *See* Dunphy, *supra* note 205.

goal of the HHI ceiling is to strengthen that market incentive to cater to consumers' preferences regarding misinformation.

By forbidding future increases in market concentration or reconcentration through stringent Section 7 merger review, new competitors will be given the breathing space needed to develop and compete, including over the quality of the news sharing they facilitate. Without the ability to maintain their monopoly power by mergers, monopolies will inevitably fall because in anticompetitive markets, antitrust enforcers can seek divestiture remedies, as it does against Facebook today and did against Microsoft in 2001.[208] In competitive markets, monopolies still suffer from "deaden[ed] initiative,"[209] and they eventually rise and fall in the dynamic environment of competition.[210]

Once freed from the "unchallenged economic power" that "deadens initiative" and delays "industrial progress,"[211] the social media market may even develop and discover more effective tools for identifying and neutralizing misinformation on their platforms. The FTC and DOJ assert that "[c]ompetition . . . spurs firms to innovate,"[212] and in its absence, we cannot know what anti-misinformation policies or tools consumers have been denied, from yet discovered or developed sorting algorithms to artificial intelligence.[213]

C. Section 7 Reform's Role Within Whole-of-Government Action

Implementing an HHI ceiling should be viewed as one aspect of a whole-of-government action plan. Although an HHI ceiling would improve upon the present, it has certain limitations, which, while not outweighing its benefits, do highlight the opportunity for fruitful, non-mutually exclusive supplementation.

First, an HHI ceiling would not constitute a panacea for misinformation. For one, social media is not the sole source of misinformation. Radio and podcasts have been labeled the "Wild West of the airwaves" for providing speakers who have already been excluded from other

208. First Amended Complaint at 1-2, F.T.C. v. Facebook, Inc., 581 F. Supp. 3d 34 (D.D.C. 2022) (No. 1:20-cv-03590-JEB); *see* United States v. Microsoft Corp., 253 F.3d 34, 105-07 (D.C. Cir. 2001) (reversing and remanding the question of divestiture as a remedy for Microsoft's violation of Section Two).

209. United States v. Aluminum Co. of America (*Alcoa*), 148 F.2d 416, 427 (2d Cir. 1945).

210. Rick Newman, *10 Great Companies That Lost Their Edge*, U.S. NEWS & WORLD REP. (Aug. 19, 2010, 10:39 AM), https://money.usnews.com/money/blogs/flowchart/2010/08/19/10-great-companies-that-lost-their-edge [https://perma.cc/G43R-8SMU] (listing popular businesses that lost economic relevance over time).

211. *Alcoa*, 148 F.2d at 427.

212. HORIZONTAL MERGER GUIDELINES, *supra* note 79, at 23.

213. *See* Katarina Kertysova, *Artificial Intelligence and Disinformation*, 29 SEC. & HUM. RTS. 55, 55-60 (2018) (discussing possible use of artificial intelligence to combat misinformation).

more scrutable platforms a voice.[214] Nor are mainstream news outlets and politicians immune from spreading misinformation either. News networks have televised misleading information on occasion,[215] and politicians have wielded the credibility of their offices to tout less than truthful claims.[216] And if the competitive social media market were to come to resemble traditional news networks, then much like with traditional news, the consumer and the provider will be free to consume and circulate misinformation in accordance with their preferences, and in all likelihood a significant number will.

Nonetheless, such a world is preferable to the present and preferable to waiting for misinformation-focused Section 230 reform. Yes, misinformation will continue to exist and circulate; the faith the First Amendment places in Americans to freely navigate a marketplace of ideas ensures that reality. But at least consumers of news through social media will have more choice in how and from whom they consume their news, and at least social media firms will have a greater incentive to provide moderated content. Even for the firms and consumers that prefer zero moderation, their level of content-scrutiny will be known and comparable for others to see.

Second, to the extent that social media platforms' economies of scale have created productive efficiencies that may have flowed to consumers, an HHI ceiling will sever one avenue to these efficiencies, meaning that consumers may be denied possible innovations only realizable with scale. However, the judgement call as to whether consumers would be better served by scale or competition is one which the U.S. already makes via the prosecutorial discretion of the FTC and DOJ. The HHI ceiling merely gives these bodies a tool to readily enjoin statutorily indefensible mergers without expending time, money, and expertise litigating a prediction of the future. To the extent consumers do lose out on shared productive efficiency gains, that cost is still the price that affords consumers a more democratic market that is rich with competition. Moreover, doubting monopolists' willingness to share efficiency gains with consumers is not only a non-radical return to standing Supreme Court caselaw, but also loyal to Congress' original choice to favor "fragmented . . . markets" over "occasional[ly] higher . . . prices."[217]

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214. Tiffany Hsu & Marc Tracy, *On Podcasts and Radio, Misleading Covid-19 Talk Goes Unchecked*, N.Y. TIMES (Nov. 12, 2021), https://www.nytimes.com/2021/11/12/business/media/coronavirus-misinformation-radio-podcasts.html [https://perma.cc/QTR4-3WLG].

215. *See* Michael Grynbaum & Sydney Ember, *CNN Corrects a Trump Story, Fueling Claims of 'Fake News'*, N.Y. TIMES (Dec. 8, 2017), https://www.nytimes.com/2017/12/08/business/media/cnn-correction-donald-trump-jr.html [https://perma.cc/3XDD-TT5C]; *see also* Oliver Darcy, *Analysis: TV Providers Should Not Escape Scrutiny for Distributing Disinformation*, CNN (Jan. 8, 2021, 7:19 AM), https://www.cnn.com/2021/01/08/media/tv-providers-disinfo-reliable-sources/index.html [https://perma.cc/HL5Y-JS7D].

216. Philip Bump, *A Year of Election Misinformation from Trump, Visualized*, WASH. POST (Feb. 11, 2021, 6:04 PM), https://www.washingtonpost.com/politics/2021/02/11/year-election-misinformation-trump-visualized/ [https://perma.cc/NS8K-ANK6].

217. Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) (asserting that Congress "appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets").

Third, an HHI ceiling—even one relying on competitive markets and antitrust enforcers to push current monopolies back beneath its ceiling—provides an underinclusive and slow tool to undo current, and prevent future, monopolies. After all, because Section Two doctrine rejected the no-fault standard and kept the requirement of anticompetitive conduct, new monopolies can still grow by their individual merits without mergers,[218] and current monopolies will likely still take time to be dissolved or shrink in response to enforcement and fair competition. However, the faith in competition to rectify present misallocations and inefficiencies is the heart of U.S. antitrust law, and a long-term improvement in the competitiveness of markets should not be ignored for its lack of instant gratification.

Therefore, misinformation will persist, but at least it will persist in fewer places, among fewer communities, and within more conspicuous forms and fora. From there, it is up to the people themselves to sort fact from fiction, but at least they will be better equipped for that task.

IV. CONCLUSION

As should be clear by now, a tremendous amount of trouble could have been avoided if U.S. students simply remembered to question every tree octopus they saw. But they did not, and why they did not is outside the scope of this Note. For now, it suffices to say that when faced with the blight of misinformation upon the U.S. forum for public debate and the danger it poses to democracy and public health, every worthwhile step should be taken to disarm, displace, and debunk it. Establishing an HHI ceiling by joint resolution is one such step.

Even if we would rather pin our frustrations on the power Section 230 has granted to some of the largest conductors of misinformation, trying to abolish or replace Section 230 is unlikely to remedy the situation, at least for now. The task is constitutionally vulnerable, politically fraught, and regulatorily risky. Instead, directing our frustrations towards addressing social media's monopoly problem constitutes a productive, even if relatively unsatisfying, improvement in raising the quality of public debate. Establishing an HHI ceiling for the social media market by statute, despite its reliance on market forces and the marketplace of ideas, remains a worthwhile, constitutionally firm, politically savvy, and regulatorily safe step in the right direction to cleansing our forests of tree octopuses.

218. *See* discussion *supra* Section II.B.1.a.ii.