

COMPETITION FOR MISINFORMATION AND TRUTH

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Abstract: Antitrust has adopted the “marketplace of ideas” from the First Amendment. The essence of this standard is that people should rationally demand the truth, thereby causing accurate information to overcome falsehoods without antitrust’s help. This has, though, produced an odd approach in which antitrust promotes the flow of information without any regard for its truthfulness. Indeed, antitrust courts have ruled that misinformation’s remedy must come from more speech as opposed to enforcement. Judges have also asserted that misinformation is a form of competition, versus an anticompetitive act, because aggrieved companies can win over consumers by exposing their rivals’ lies. In fact, antitrust refuses to scrutinize whether misinformation entails a consequence of monopoly power, despite the prevalence of inaccurate content in concentrated markets like journalism, digital platforms, and more.

That said, what if people consume information in ways that defy antitrust’s expectations? Whereas antitrust refuses to remedy misinformation because consumers should rationally consume truthful information, perhaps people may actually prefer misinformation. This Article delves into cognitive and behavioral scholarship to explain why misinformation thrives in voids of competition. It shows that people become increasingly likely to demand misinformation in (1) rational and (2) irrational ways when competition declines. First, cognitive biases and conditions such as anxiety and depression have not only spurred people to find comfort in misinformation but to do so where they irrationally accept costs including, say, incarceration, sickness, or unemployment. This is especially prevalent in the absence of journalism, as dominant platforms can flood users’ feeds with misleading content meant to induce anxiety, enrage, comfort, and grab attention. Second, espousing misinformation can qualify as rational when it allows a person to join a community, find purpose, or maximize their welfare. These dynamics help to explain why mis-

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information has exploded in rural areas, news deserts, and informational monopolies where social isolation is greatest and credible news has dried up.

Given misinformation's prevalence in concentrated markets, the answer should come from more competition rather than just more speech. Knowing that antitrust law redresses inefficiencies caused by monopolies and trade restraints, enforcement should begin to treat misinformation as a market failure. When anticompetitive conduct creates a bottleneck of information, monopolists can generate revenue from filling voids with false and misleading content. Because monopoly power creates incentives to spread misinformation, and people become especially prone to believing falsehoods when living in a news desert, antitrust could attack the market structures that enable misinformation. Not only would this approach foster accurate information without entering unconstitutional waters like forcing a news organization or website to publish both sides of a debate, but it could better align antitrust with the First Amendment. To do so, antitrust must first assess why monopolies, news deserts, and informational vacuums impede "rational actors" from consuming truthful content. In fact, this research would help to inform recent developments, as the White House, Supreme Court Justices, subcommittees of the House of Representatives, Federal Trade Commission, and more have begun to debate antitrust's evolving treatment of speech, information, and misinformation.

INTRODUCTION

Antitrust must develop a coherent approach to information. Ever since the era of smokestacks and conveyor belts, a primary goal of antitrust has been to increase the output of tangible goods; after all, boosting the supply of a scarce good should lower its price and promote consumer welfare.¹ This framework, however, has created an awkward fit with today's information economy. Not only is information often valuable despite being non-scarce and "free," but firms can also collect and exploit information (generally in the form of data) to monopolize markets.² Per the U.S. Department of Justice (DOJ), the information economy has "enabled monopoly power of a nature and degree not seen in a century."³ Animating antitrust's struggles to understand information is *misinformation*.

¹ See *U.S. Gypsum Co. v. Ind. Gas Co.*, 350 F.3d 623, 626–27 (7th Cir. 2003) ("A private plaintiff must show antitrust injury—which is to say, injury by reason of those things that make the practice unlawful, such as reduced output and higher prices. The antitrust-injury doctrine was created to filter out complaints by competitors and others who may be hurt by productive efficiencies, higher output, and lower prices, all of which the antitrust laws are designed to encourage.").

² Despite the "free" appearance, it is more accurate to describe the content as "zero-price" when it comes in exchange for attention, data, or another commodity. See John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149, 151 (2015) (describing the rise of zero-price goods in modern attention markets).

³ Jonathan Kanter, Assistant Att'y Gen., Dep't of Just., Keynote Address at Fordham Law School: Solving the Global Problem of Platform Monopolization (Sep. 16, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-keynote-fordham> [<https://perma.cc/LQ2Q-E6JS>]; see also FED. TRADE COMM'N, FTC REPORT TO CONGRESS ON PRI-

Consider an underreported story about, ironically, journalism. Closures and consolidations of media companies have left more than 200 U.S. counties without a local outlet, creating what are known as “news deserts.”⁴ Another 1,562 counties—spanning most of America—appear to qualify as a monopoly where only a single publisher remains.⁵ And from this void has come misinformation. For example, Chevron founded a faux-news site, *Permian Proud*, in a journalism-free town to spread what journalism scholar Tim Franklin has described as “a wildfire of disinformation” about environmental and oil issues.⁶ Partisan firms have also designed websites masquerading as local news to publish propaganda.⁷ In Michigan, Locality Labs runs forty websites with legitimate-sounding names like the *Battle Creek Times* and *Lansing Sun* to create a façade of truth in a news desert.⁸

Another example involves digital platforms whereby monopolists such as Meta and Google are able to spread—and profit from—misinformation.⁹ With

VACY AND SECURITY 8 (2021), https://www.ftc.gov/system/files/documents/reports/ftc-report-congress-privacy-security/report_to_congress_on_privacy_and_data_security_2021.pdf [<https://perma.cc/PWA6-B737>] (proposing that the FTC expand its capability to consolidate and examine the activities of big tech companies that “use their monopoly power to engage in unfettered collection and use of consumer data”).

⁴ See Penny Abernathy, *The State of Local News*, NW. MEDILL LOC. NEWS INITIATIVE (June 29, 2022), <https://localnewsinitiative.northwestern.edu/research/state-of-local-news/report/> [<https://perma.cc/C493-2UQ4>] (documenting instances where partisan groups established dubious news outlets to spread misinformation).

⁵ See Brier Dudley, *America’s News Deserts Grow as Newspaper Closures Accelerate*, SEATTLE TIMES (Nov. 16, 2023), <https://www.seattletimes.com/opinion/americas-news-deserts-growing-as-newspaper-closures-accelerate/> [<https://perma.cc/KFY9-8UNY>] (reporting that 1,562 counties receive news from just one news source).

⁶ Adam Gabbatt, *‘Wildfire of Disinformation’: How Chevron Exploits a News Desert*, THE GUARDIAN (Sep. 12, 2022), <https://www.theguardian.com/media/2022/sep/12/chevron-newspaper-local-news-permian-proud-site> [<https://perma.cc/E47S-SLJN>] (quoting Tim Franklin of the Medill School of Journalism, describing Chevron’s actions as “fanning the flames of [a] wildfire of disinformation”); see also Molly Taft, *Chevron Jumps into Texas’ News Desert with Stories About Puppies, Football, and Oil*, GIZMODO (Aug. 18, 2022), <https://gizmodo.com/chevron-local-news-texas-permian-proud-1849424317> [<https://perma.cc/TF47-K2LY>] (documenting numerous instances where *Permian Proud* has spread misinformation).

⁷ Brendan Nyhan, *Americans Trust Local News. That Belief Is Being Exploited*, N.Y. TIMES (Oct. 31, 2019), <https://www.nytimes.com/2019/10/31/upshot/fake-local-news.html> [<https://perma.cc/GK9W-TW9Z>].

⁸ See Dominick Sokotoff & Katherina Sourine, *Pseudo Local News Sites in Michigan Reveal Nationally Expanding Network*, MICH. DAILY (Nov. 1, 2019), <https://www.michigandaily.com/news/community-affairs/pseudo-local-news-sites-michigan-reveal-nationally-expanding-network/> [<https://perma.cc/XAT6-MUMM>] (exploring Locality Labs).

⁹ Cristiano Lima-Strong, *Facebook Knew Ads, Microtargeting Could Be Exploited by Politicians. It Accepted the Risk*, WASH. POST (Oct. 26, 2021), <https://www.washingtonpost.com/politics/2021/10/26/facebook-knew-ads-microtargeting-could-be-exploited-by-politicians-it-accepted-risk/> [<https://perma.cc/8SUV-RJZ7>]; Samuel Woolley, *The Everyday People Spreading Political Propaganda Online for Fun and/or Profit*, SLATE (Feb. 27, 2023), <https://slate.com/technology/2023/02/automated-political-influencers-manufacturing-consensus.html> [<https://perma.cc/L5WJ-TBHF>].

journalism's decline, people have become more likely to seek information online where a platform's algorithm can diagnose a user's biases and then flood that user with misinformation designed to shock, comfort, and capture attention.¹⁰ When Facebook learned that engagement was driven by posts garnering angry emojis—which are disproportionately false—Facebook altered its algorithm to promote misinformation in users' timelines.¹¹ Similarly, Google has placed misleading ads on platforms like YouTube as well as unscrupulous webpages, which generate revenue for content creators, YouTube, and Google itself.¹² In essence, private actors have developed an unprecedented sum of power over information and misinformation due to the emergence of market power in social media,¹³ journalism, digital advertising,¹⁴ textbooks, and more—even pornography.¹⁵

Illustrating the issue's severity, misinformation has recently persuaded people to attack democratic institutions,¹⁶ reject life-saving care,¹⁷ and even perpetrate genocide.¹⁸ The rate of misinformation is also worsening, as fake news

¹⁰ See Tiffany Hsu, *Why Debunked Falsehoods About Haitian Migrants Gained Traction*, N.Y. TIMES (Sep. 24, 2024), <https://www.nytimes.com/2024/09/24/us/politics/haitian-migrants-disinformation.html> [https://perma.cc/9EP9-5ZV3] (“[A] handful of YouTube videos that echoed his claim were accompanied by ads from Mazda, Adobe and more than a dozen other large brands, which most likely earned the video creators several thousand dollars collectively, according to Eko, a group focused on corporate accountability. A substantial chunk of the ad revenue would have also gone to YouTube.”); see also Mark Sullivan, *Apple's Inconvenient Truth: It's Part of the Data Surveillance Economy*, FAST CO. (Jan. 17, 2019), <https://www.fastcompany.com/90293873/apples-inconvenient-truth-its-part-of-the-data-surveillance-economy> [https://perma.cc/M2JR-J57G] (explaining Apple's role in the surveillance economy).

¹¹ Brendan Morrow, *Facebook Reportedly Gave the Angry Emoji 5 Times as Much Weight as a 'Like'*, THE WEEK (Oct. 26, 2021), <https://theweek.com/facebook/1006422/facebook-reportedly-gave-the-angry-emoji-5-times-as-much-weight-as-a-like> [https://perma.cc/8H77-6ZV6].

¹² Craig Silverman, Ruth Talbot, Jeff Kao & Anna Klühspies, *How Google's Ad Business Funds Disinformation Around the World*, PROPUBLICA (Oct. 29, 2022), <https://www.propublica.org/article/google-alphabet-ads-fund-disinformation-covid-elections> [https://perma.cc/Y837-S7PM].

¹³ See *infra* notes 102–146 and accompanying text (explaining the emergence of monopolies in the digital sector).

¹⁴ See *infra* notes 120–122 and accompanying text.

¹⁵ Amy Adler, *Arousal by Algorithm*, 109 CORNELL L. REV. 787, 789 (2024).

¹⁶ E.g., Michael Kunzelman, *Trial Opens for QAnon Follower Who Chased Officer at Capitol*, AP NEWS (Sep. 20, 2022), <https://apnews.com/article/capitol-siege-arrests-riots-iowa-congress-8fb19564e096518a1af2252be390fda5> [https://perma.cc/G35N-D8MV]; Matt Houston, *Man Set Fire to 5G Cell Towers Around San Antonio, Indictment Alleges*, KENS5 (Mar. 9, 2023), <https://www.kens5.com/article/news/local/man-set-fire-5g-cell-towers-san-antonio-arrest/273-2552ba7b-1f59-4e14-8d3d-9a27e0407a50> [https://perma.cc/36U7-9LFM].

¹⁷ E.g., Geoff Brumfiel & Meredith Rizzo, *Their Mom Died of COVID. They Say Conspiracy Theories Are What Really Killed Her*, NPR (Apr. 24, 2022), <https://www.npr.org/sections/health-shots/2022/04/24/1089786147/covid-conspiracy-theories> [https://perma.cc/8VSV-GVD9].

¹⁸ See Paul Mozur, *A Genocide Incited on Facebook, with Posts from Myanmar's Military*, N.Y. TIMES (Oct. 15, 2018), <https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html> [https://perma.cc/3Z6W-5XDQ] (“The campaign in Myanmar looked similar to online influence campaigns from Russia, said Myat Thu, a researcher who studies false news and propaganda on Facebook. One technique involved fake accounts with few followers spewing venomous comments beneath posts and sharing misinformation posted by more popular accounts to help them spread rapidly.”).

doubled between 2019 and 2020,¹⁹ became seventy percent more likely to be shared online than conventional content,²⁰ and received six times as many clicks on Facebook.²¹ In fact, misinformation is often weaponized against survivors of tragedies,²² religious minorities,²³ children,²⁴ and other vulnerable groups.²⁵ All in all, policymakers describe misinformation as one of society's greatest threats,²⁶ if not the biggest.²⁷

But despite misinformation's link to concentrated markets, antitrust has typically refused to intervene. Misinformation could impact antitrust in two ways: as an anticompetitive conduct (i.e., when a firm uses misinformation to exclude a rival) or effect (i.e., if a concentrated market is more likely to produce misinformation). But when antitrust courts were initially asked to resolve misinformation disputes, their solution was to adopt the "marketplace of ideas" from the First Amendment.²⁸ It is not that the First Amendment controls these cases

¹⁹ See Emily Stewart, *America's Growing Fake News Problem, in One Chart*, VOX (Dec. 22, 2020), <https://www.vox.com/policy-and-politics/2020/12/22/22195488/fake-news-social-media-2020> [<https://perma.cc/Q5S7-AKEJ>] (reporting that between 2019 and 2020, reader engagement among the top 100 new stories rose from 8% to 17%).

²⁰ See Steven Lee Myers, *How Social Media Amplifies Misinformation More Than Information*, N.Y. TIMES (Oct. 13, 2022), <https://www.nytimes.com/2022/10/13/technology/misinformation-integrity-institute-report.html> [<https://perma.cc/4ZN3-M86H>] (discussing the ease by which misinformation spreads online).

²¹ Elizabeth Dwoskin, *Misinformation on Facebook Got Six Times More Clicks Than Factual News During the 2020 Election, Study Says*, WASH. POST (Sep. 4, 2021), <https://www.washingtonpost.com/technology/2021/09/03/facebook-misinformation-nyu-study/> [<https://perma.cc/U78K-TL4H>]; Sara Brown, *MIT Sloan Research About Social Media, Misinformation, and Elections*, MIT SLOAN (Oct. 5, 2020), <https://mitsloan.mit.edu/ideas-made-to-matter/mit-sloan-research-about-social-media-misinformation-and-elections> [<https://perma.cc/ZQ92-Q9BK>].

²² See, e.g., Elizabeth Williamson & Emily Steel, *Sandy Hook Families Are Fighting Alex Jones and the Bankruptcy System Itself*, N.Y. TIMES (Mar. 18, 2023), <https://www.nytimes.com/2023/03/18/us/politics/alex-jones-bankruptcy.html> [<https://perma.cc/N46K-L6SC>] (discussing the parents of Sandy Hook victims who were then targeted with disinformation campaigns).

²³ See *infra* notes 115–119 and accompanying text.

²⁴ Melinda Wenner Moyer, *Schoolkids Are Falling Victim to Disinformation and Conspiracy Fantasies*, SCI. AM. (Feb. 1, 2022), <https://www.scientificamerican.com/article/schoolkids-are-falling-victim-to-disinformation-and-conspiracy-fantasies/> [<https://perma.cc/K3AE-4V4W>].

²⁵ NINA JANKOWICZ ET AL., *MALIGN CREATIVITY: HOW GENDER, SEX, AND LIES ARE WEAPONIZED AGAINST WOMEN ONLINE* 20–21 (2021), https://www.wilsoncenter.org/sites/default/files/media/uploads/documents/Report%20Malign%20Creativity%20How%20Gender%2C%20Sex%2C%20and%20Lies%20are%20Weaponized%20Against%20Women%20Online_0.pdf [<https://perma.cc/EW6Y-5TQ7>] (reporting that a tactic among internet trolls is to flood social media with sexualized disinformation as a way of silencing women—especially transgender women).

²⁶ Stuart A. Thompson, *Many Developed Countries View Online Misinformation as 'Major Threat'*, N.Y. TIMES (Aug. 31, 2022), <https://www.nytimes.com/2022/08/31/technology/pew-misinformation-major-threat.html> [<https://perma.cc/7FY2-A5M4>].

²⁷ Chris Stewart, Guest Opinion, *The Biggest Threat to Our Country Is Misinformation*, DESERET NEWS (Dec. 15, 2020), <https://www.deseret.com/opinion/2020/12/15/22174359/rep-chris-stewart-the-biggest-threat-to-our-country-is-misinformation/> [<https://perma.cc/43YZ-8LXA>].

²⁸ See *infra* notes 64–91 and accompanying text (outlining the jurisprudence of the marketplace of ideas in the context of the First Amendment).

but rather antitrust judges have largely agreed with—and imported—the marketplace of ideas’ logic.²⁹ The marketplace of ideas’ essence is that truthful content should naturally rise above falsehoods so long as enough speech or information exists, which should negate the government’s need to intervene.³⁰ While perhaps a wise method of deciding First Amendment disputes, it has led antitrust enforcers and judges to institute a paradoxical treatment of information versus misinformation: the promotion of information is treated as a key ingredient of competition yet antitrust disregards whether the information is accurate or not.

Consider an illustration. On one hand, the rise of dominant platforms has sparked a realization that firms are able to suppress information as a way of restricting competition. Indeed, a corporation can monopolize a market by preventing people from learning that cheaper or better competitors exist, and this may violate antitrust law, as judges have begun to surmise.³¹ For instance, a court in 2023 emphasized the primacy of fostering information en route to ruling that Apple may have committed an antitrust offense by burying helpful content about cheaper options.³² The judge—aware of the case’s potential to shape future antitrust cases—remarked that “the open flow of information [has] become[] even more critical” to antitrust, markets, and more.³³ Likewise in 2023, the Federal Trade Commission (FTC) initiated a landmark antitrust lawsuit alleging that Amazon “suppressed the flow of useful price and quality information,” which undermined a consumer’s ability to comparison-shop and in turn “artificially inflated prices.”³⁴ Here, the restriction of information is potentially an anticompetitive act.

Curiously, however, the *spreading of misinformation* isn’t considered a matter for antitrust even if it appears akin to the *suppression* of information—i.e., the former act reduces information while the latter obscures it.³⁵ Antitrust

²⁹ See *infra* Part III.B.1 (discussing the marketplace of ideas).

³⁰ Schachar v. Am. Acad. of Ophthalmology, Inc., 870 F.2d 397, 400 (7th Cir. 1989) (“If such statements should be false or misleading or incomplete or just plain mistaken, the remedy is not antitrust litigation but more speech—the marketplace of ideas.”).

³¹ Adams v. Am. Bar Ass’n, 400 F. Supp. 219, 221–22 (E.D. Pa. 1975) (rejecting an antitrust lawsuit because, in part, the court “doubt[ed], in a world which has not yet reached the ominous year of 1984, whether monopolization of ideas is even possible”).

³² Epic Games, Inc. v. Apple Inc., 559 F. Supp. 3d 898, 1055 (N.D. Cal. 2021), *aff’d in part, rev’d in part*, 67 F.4th 946 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 681 (2024) (mem.) and 144 S. Ct. 682 (2024) (mem.); see also Andrew I. Gavil, *Locating Competitive Process Claims in the Consumer Welfare Debate*, PROMARKET (Apr. 11, 2023), <https://www.promarket.org/2023/04/11/locating-competitive-process-claims-in-the-consumer-welfare-debate/> [<https://perma.cc/G68T-YJEE>] (discussing how obscuring information can lead to monopolization of markets).

³³ *Epic Games*, 559 F. Supp. 3d at 1055.

³⁴ Complaint [Public Redacted Version] at 128, FTC v. Amazon.com, Inc., No. 2:23-cv-01495 (W.D. Wash., Nov. 2, 2023).

³⁵ See Nat’l Soc’y of Pro. Eng’rs v. United States, 435 U.S. 679, 695 (1978); see also Gregory Day & Abbey Stemler, *Infracompetitive Privacy*, 105 IOWA L. REV. 61, 92 (2019) (describing the importance of information to markets and competition).

courts have specifically cited the marketplace of ideas to rule that falsehoods will seldom harm markets or consumers and, further, the solution must come from more speech rather than antitrust enforcement.³⁶ Judges have even asserted that misinformation is a form of competition rather than an anticompetitive act because aggrieved companies can win over consumers by exposing their rivals' lies.³⁷ Notice the tension: antitrust courts have sought to promote the flow of information without any regard for its truthfulness, refusing to entertain whether misinformation could confuse consumers in a manner akin to insufficient information.

It may actually make sense why antitrust has adopted the First Amendment's treatment of information. Both doctrines presume that people "rationally" seek to maximize their welfare by demanding high-quality goods like cars or accurate information.³⁸ Because firms should rationally endeavor to meet consumer demand, competition is naturally expected to improve the quality of information or other products in a market.³⁹ This preference among consumers for high-quality information existing in a market should therefore nullify any role for antitrust (or the First Amendment).⁴⁰

But perhaps antitrust has aided the spike of misinformation. Antitrust's presumption is that rational actors tend to prefer truthful content that markets should naturally supply; yet particularly in news deserts and informational voids, people seem to *want* false and misleading speech.⁴¹ That is, antitrust ignores misinfor-

³⁶ See, e.g., *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 400 (7th Cir. 1989) ("If such statements should be false or misleading or incomplete or just plain mistaken, the remedy is not antitrust litigation but more speech—the marketplace of ideas.").

³⁷ See *Retractable Techs., Inc. v. Becton Dickinson & Co.*, 842 F.3d 883, 895 (5th Cir. 2016) ("First, false advertising simply 'set[s] the stage for competition in a different venue: the advertising market.' In such a setting, a business that is maligned by a competitor's false advertising may counter with its own advertising to expose the dishonest competitor and turn the tables competitively against the malefactor. Far from restricting competition, then, false or misleading advertising generally sets competition into motion." (alteration in original) (citation omitted) (quoting *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 623 (7th Cir. 2005))); *GDHI Mktg. LLC v. Antsel Mktg. LLC*, 416 F. Supp. 3d 1189, 1202 (D. Colo. 2019) (explaining that false statements "set the stage for competition." (quoting *Sanderson*, 415 F.3d at 623)).

³⁸ See Christopher T. Wonnell, *Truth and the Marketplace of Ideas*, 19 U.C. DAVIS L. REV. 669, 670 (1986) ("The argument from truth is often characterized by the metaphor of an open 'marketplace of ideas' in which truth supposedly emerges from the competition of true and false ideas for the adherence of an audience." (footnote omitted)); see also Dawn Carla Nunziato, *The Marketplace of Ideas Online*, 94 NOTRE DAME L. REV. 1519, 1523–24 (2019) (describing the role of the marketplace ideas and its relationship to promoting the truth).

³⁹ See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 134 (2005) ("The entire antitrust enterprise is dedicated to the proposition that business firms behave rationally.").

⁴⁰ See *infra* notes 64–91 and accompanying text (describing the function of the marketplace of ideas in First Amendment litigation).

⁴¹ See Kevin T. Greene et al., *An Evaluation of Online Information Acquisition in US News Deserts*, 14 SCI. REPS. 1, 3–6 (2024) (exploring the rise of misinformation in news deserts).

mation's relationship to monopolies and anticompetitive acts due to the self-correcting marketplace of ideas, though the increasing rate of untruthful content suggests that antitrust has misjudged when, or the degree to which, people demand low-quality speech. The assumption of rational behavior underlying antitrust law appears less accurate in the realm of (mis)information. Thus, as information becomes a central part of the economy, antitrust must reassess its fidelity to the marketplace of ideas—which was never meant to govern actual markets—by asking when concentration has limited society's capacity to “rationally” reject low-quality information.

This Article delves into cognitive and behavioral scholarship to rebut antitrust's treatment of misinformation. It shows that people become more likely to demand misinformation in (1) rational and (2) irrational ways when competition declines. First, cognitive biases and conditions such as anxiety and depression have not only spurred people to find comfort in misinformation but to do so where they irrationally accept costs like incarceration, sickness, or unemployment⁴². This is especially prevalent in the absence of journalism, as dominant platforms can flood a person's feed with content meant to induce anxiety, enrage, comfort, and misinform.⁴³ Second, espousing misinformation can qualify as rational when it allows a person to join a community, find purpose, or maximize their welfare.⁴⁴ Consider how leaders of cults have maintained their movement's solidarity by reminding adherents of their prior feelings of loneliness⁴⁵; some groups have even developed dating apps to build community.⁴⁶ Befriending a likeminded group of “truth-seekers” may thus exceed the value of accepting a

⁴² See *infra* notes 240–291 and accompanying text (exploring potential reasons why people might rationally or irrationally consume misinformation).

⁴³ DAVID ARDIA, EVAN RINGEL, VICTORIA SMITH EKSTRAND & ASHLEY FOX, UNC CTR. FOR MEDIA L. & POL'Y, ADDRESSING THE DECLINE OF LOCAL NEWS, RISE OF PLATFORMS, AND SPREAD OF MIS- AND DISINFORMATION ONLINE 2 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3765576 [<https://perma.cc/K8M2-Q37X>] (“As local news sources decline, a growing proportion of Americans are getting their news and other information from social media. This raises concerns, including the spread of misinformation and the use of platform infrastructure to engage in disinformation campaigns. Platforms wield significant advantages over local news sources in the current information environment: the dominant platforms possess proprietary, detailed caches of user data, which the platforms use to force advertisers, users, and news outlets into asymmetrical relationships. In the vacuum left by the disappearance of local news sources, users are increasingly reliant on information sources that are incomplete, and may be misleading or deceptive.”).

⁴⁴ See *infra* Part IV.B.

⁴⁵ Ralph Jones, *How Do You Find Love When You Believe the World Is Flat?*, WIRED (Aug. 9, 2020), <https://www.wired.com/story/flat-earth-singles/> [<https://perma.cc/7S8T-SKDE>] (“Does the belief system make her lonely? ‘Of course,’ she says. ‘That’s why it’s so important to keep contact with the people that feel the same. It’s so isolating that we really have to stick together.’ While opening you up to a community of like-minded people, a belief in flat Earth can clearly sever ties and alienate the people you love. ‘I do have a really good group of online friends,’ says Dolan, ‘but in real life . . . people that I’ve known for 20, 30 years, they definitely want nothing to do with it.’”).

⁴⁶ *Id.*

mundane reality.⁴⁷ These dynamics help to explain why misinformation has exploded in rural areas, news deserts, and informational monopolies where social isolation is greatest and credible news has dried up.⁴⁸ In other words, people seem to consume poor information in voids of competition akin to buying poor low-quality goods in a monopolized market.

Given misinformation's prevalence in concentrated markets, the answer should perhaps come from more competition rather than just more speech. Knowing that antitrust law redresses certain types of inefficiencies caused by monopolies, mergers, and trade restraints, enforcement should begin to treat misinformation as a market failure. When anticompetitive conduct creates a bottleneck of information—whether in the form of social media, journalism, or textbooks—a monopolist can generate revenue from filling voids with false or misleading content.⁴⁹ Consider the House Subcommittee report finding that due to a lack of competition, dominant news firms face few consequences when promoting misinformation and are incentivized to promote exploitative and addictive content, which increases engagement.⁵⁰ Because monopoly power creates incentives to spread misinformation and, second, people become especially prone to believing falsehoods when living in a news desert, antitrust could address the market structures that tend to enable misinformation.⁵¹ This approach would help to foster accurate information without entering unconstitutional waters like forcing a newspaper to publish both sides of a debate.⁵² It would also promote competitive markets rather than tasking governments with deciding which content is true or not. And by treating misinformation as a market failure, the pro-

⁴⁷ See Max Fisher, “*Belonging Is Stronger Than Facts*”: *The Age of Misinformation*, N.Y. TIMES (May 7, 2021), <https://www.nytimes.com/2021/05/07/world/asia/misinformation-disinformation-fake-news.html> [<https://perma.cc/5JHY-UYAU>] (“First, and perhaps most important, is when conditions in society make people feel a greater need for what social scientists call ingrouping—a belief that their social identity is a source of strength and superiority, and that other groups can be blamed for their problems. As much as we like to think of ourselves as rational beings who put truth-seeking above all else, we are social animals wired for survival. In times of perceived conflict or social change, we seek security in groups. And that makes us eager to consume information, true or not, that lets us see the world as a conflict putting our righteous ingroup against a nefarious outgroup.”).

⁴⁸ See Melhaney Reichelt et al., *Addressing COVID-19 Vaccine Hesitancy in Rural Communities: A Case Study in Engaging Trusted Messengers to Pivot and Plan*, 11 FRONTIERS PUB. HEALTH 1, 1–2 (2023) (discussing the prevalence of a particular type of misinformation in rural communities).

⁴⁹ See *infra* notes 147–164 and accompanying text (explaining the decline in the number of news sources in the United States).

⁵⁰ MAJORITY STAFF OF SUBCOMM. ON ANTITRUST, COM. & ADMIN. L. OF H. COMM. ON THE JUDICIARY, 117TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS 53 (Comm. Print 2020), <https://www.govinfo.gov/content/pkg/CPRT-117HPRT47832/pdf/CPRT-117HPRT47832.pdf> [<https://perma.cc/H69J-M3AE>].

⁵¹ See *infra* Part IV.C.2.

⁵² See, e.g., *Mia. Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 243–44 (1974) (striking down a law intended to make publishers of newspapers give equal time to multiple sides of a debate).

positional would better align antitrust with the First Amendment.⁵³ But to do so, antitrust must first assess why monopolies impede “rational actors” from consuming truthful content.

Notably, antitrust has just begun to reassess its relationship with free speech and misinformation. In 2024, X initiated a novel lawsuit alleging that its advertisers had colluded to force X to remove hate speech and misinformation.⁵⁴ To Elon Musk, an exploitation of market power that mandates the moderation of (low-value) content or misinformation was anticompetitive.⁵⁵ In fact, the current chairman of the FTC, Andrew Ferguson, made free speech—including one’s right to espouse misinformation—a key part of his antitrust platform: “No government agency should be in the business of policing speech. Nebulous terms like ‘misinformation,’ ‘disinformation,’ and ‘malinformation,’ really mean any speech which goes against the elite consensus in DC and Silicon Valley.”⁵⁶ This stance has even produced competing reports from the House of Representatives about whether a group (or perhaps cartel?) organized to lessen misinformation violates antitrust law.⁵⁷ Not dissimilar, Biden’s DOJ stated that antitrust must

⁵³ See, e.g., *Minority Television Proj., Inc. v. FCC*, 736 F.3d 1192, 1212–13 (9th Cir. 2013) (en banc) (“Given the scarcity of the broadcast spectrum and the absence of viable alternative means of communication, the Court may have justifiably believed that it was confronted with a market failure—a bottleneck in the pathways of communication. It may have served the First Amendment to correct that market failure by keeping those pathways accessible to a multitude of views, . . . and otherwise regulated.” (Kozinski, J., dissenting) (citations omitted)); Kevin S. Haeberle & M. Todd Henderson, *Making a Market for Corporate Disclosure*, 35 YALE J. ON REG. 383, 390 (2018) (describing a lack of accurate information as a market failure).

⁵⁴ Complaint at 1–6, *X Corp. v. World Fed’n of Advertisers*, No. 7:24-cv-00114-O (N.D. Tex. Aug. 6, 2024).

⁵⁵ Kate Conger, *X, Owned by Elon Musk, Brings Antitrust Suit Accusing Advertisers of a Boycott*, N.Y. TIMES (Aug. 6, 2024), <https://www.nytimes.com/2024/08/06/technology/x-antitrust-suit-advertisers-elon-musk.html> [<https://perma.cc/3GPR-XQWU>].

⁵⁶ Andrew Ferguson (@AFergusonFTC), X (Nov. 11, 2024, at 20:51 ET), <https://x.com/AFergusonFTC/status/1856152760850243905> [<https://perma.cc/3P4H-WG7W>]; see Concurring Statement of Commissioner Andrew N. Ferguson *FTC v. 1661, Inc.*, FED. TRADE COMM’N (Dec. 2, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-goat-concurrence.pdf [<https://perma.cc/8KT9-M5G7>] (“[W]e must vigorously enforce the antitrust laws against any platforms found to be unlawfully limiting Americans’ ability to exchange ideas freely and openly. We must prosecute any unlawful collusion between online platforms, and confront advertiser boycotts which threaten competition among those platforms.”).

⁵⁷ Compare INTERIM STAFF REP. OF THE H. COMM. ON THE JUDICIARY, GARM’S HARM: HOW THE WORLD’S BIGGEST BRANDS SEEK TO CONTROL ONLINE SPEECH (July 10, 2024), <https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-07-10%20GARMS%20Harm%20-%20How%20the%20Worlds%20Biggest%20Brands%20Seek%20to%20Control%20Online%20Speech.pdf> [<https://perma.cc/68UH-CAUJ>] (demonstrating one view of misinformation as an anticompetitive behavior), with DEMOCRATIC STAFF REP., H. COMM. ON THE JUDICIARY, THE DELUSION OF COLLUSION: THE REPUBLICAN EFFORT TO WEAPONIZE ANTITRUST AND UNDERMINE FREE SPEECH (Dec. 31, 2024), https://democrats-judiciary.house.gov/sites/evo-subsites/democrats-judiciary.house.gov/files/migrated/UploadedFiles/HJC_Dem_ATR_Report_-_Delusion_of_Collusion.pdf [<https://perma.cc/YQH4-SKED>] (showing a divergent view of misinformation as an anticompetitive behavior).

begin to prioritize the marketplace of ideas as a core aspect of democracy.⁵⁸ Even a U.S. Supreme Court Justice has lamented the effects of monopolies on free speech; Justice Thomas used the word “unprecedented” to describe “the concentrated control of so much speech in the hands of a few private parties,” surmising that antitrust, free speech, and other laws may need to evolve to govern this emerging dynamic.⁵⁹

This Article proceeds in four parts. Part I explores the marketplace of ideas in which private parties are thought to promote truthful information better than the government.⁶⁰ Although it originated from First Amendment cases, the metaphor has been imported into other doctrines to shield misleading and false speech. Part II delves into the incentives to spread misinformation as well as the amplifying forces of modern technology and market power, given the degree of misinformation emanating from concentrated markets such as local journalism and digital platforms.⁶¹ Part III discusses (mis)information in an antitrust context to explain why enforcement has refused to intervene. Indeed, antitrust borrowed its logic from the marketplace of ideas to hold that suppressing information can qualify as an anticompetitive act, but the spread of misinformation is none of antitrust’s business.⁶² Part IV challenges antitrust’s belief in self-correcting markets of (mis)information, given the predictable instances when people—rationally and irrationally—choose low-quality information over truth. It then proposes a solution based upon treating low-quality information as a market failure associated with concentrated markets.⁶³

⁵⁸ See Directorate for Fin. & Enter. Affs. Competition Comm., *The Interaction Between Competition and Democracy—Note by the United States*, ORG. FOR ECON. COOP. & DEV. 5 (Dec. 3, 2024), <https://www.justice.gov/atr/media/1382296/dl?inline#:~:text=Antitrust%20Division%20is%20focused%20on,a%20vibrant%20marketplace%20of%20ideas> [<https://perma.cc/Q74Z-3R4T>] (“Markets that involve the exchange of information between members of a society are ‘particularly important to healthy democratic functioning because they facilitate the communication of news or the interchange of ideas.’ Consistent with this principle, the Antitrust Division is focused on protecting competition in the marketplace of ideas by preventing large companies from dominating this space. Several recent enforcement actions help ensure that content publishers, creators, writers, and citizens can enjoy the benefits of a vibrant marketplace of ideas.” (footnotes omitted) (quoting Daniel A. Crane, *Antitrust as an Instrument of Democracy*, 72 DUKE L.J. ONLINE 21, 28 (2022), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1097&context=dlj_online [<https://perma.cc/U7JB-LC2Q>])).

⁵⁹ *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220, 1221 (2021) (mem.) (Thomas, J., concurring). Justice Thomas further stated, “[w]e will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.” *Id.*

⁶⁰ See *infra* notes 64–91 and accompanying text.

⁶¹ See *infra* notes 92–179 and accompanying text.

⁶² See *infra* notes 180–236 and accompanying text.

⁶³ See *infra* notes 237–344 and accompanying text.

I. THE MARKETPLACE OF IDEAS

The marketplace of ideas guides the First Amendment as well as helps to inform other doctrines such as antitrust, copyright, and trade secrets. The concept proffers that markets—instead of governments—are best equipped at challenging meritless speech. On occasion, though, free speech principles permit state actors to combat falsehoods when a market failure of information would likely result. Typically, however, the marketplace of ideas instructs the First Amendment and other bodies of law to ignore misinformation; this is despite the recent explosion of false and misleading content, as this Part explores.

To trace the marketplace of ideas' origin, the First Amendment states only that "Congress shall make no law . . . abridging the freedom of speech."⁶⁴ By specifically mentioning "Congress," the First Amendment exclusively restrains government action.⁶⁵ That is, state and federal actors are seldom able to restrict untrue or repugnant content whereas private parties may say most things as well as suppress others' speech.⁶⁶ A primary reason for treating government differently than private actors concerns society's faith in the economics of ideas. This concept was popularized in 1919 by Justice Oliver Wendell Holmes via dissent in *Abrams v. United States*:

[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.⁶⁷

As Joseph Blocher noted about *Abrams*: "Never before or since has a Justice conceived a metaphor that has done so much to change the way that courts, lawyers, and the public understand an entire area of constitutional law."⁶⁸

The marketplace of ideas' essence is that state actors must allow people to spread misinformation or speak unpopular opinions in case that banned content might later gain widespread approval, given the groundbreaking theories, music,

⁶⁴ U.S. CONST. amend. I.

⁶⁵ Philip Hamburger, *Privileges or Immunities*, 105 NW. U. L. REV. 61, 68 (2011). The initial belief was actually that the word "Congress" meant the First Amendment restrained only the federal government. *Id.* That was until the Fourteenth Amendment incorporated the First Amendment and thereby imposed free speech protections on states. *Id.*

⁶⁶ See David L. Hudson, *In the Age of Social Media, Expand the Reach of the First Amendment*, AM. BAR ASS'N (Nov. 19, 2018), <https://www.americanbar.org/groups/crsj/resources/human-rights/archive/age-social-media-expand-reach-first-amendment/> [<https://perma.cc/4SVS-ZHZB>] (discussing the nature of private platforms within the First Amendment's framework).

⁶⁷ 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁶⁸ Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 824–25 (2008).

and literary masterpieces censored throughout history.⁶⁹ It is not that all ideas bear merit but rather markets are considered more capable of sifting out falsehoods.⁷⁰ Limitations on speech could even stall our ability to “test and improve our own thinking both as individuals and as a Nation.”⁷¹ And because the capacity of private actors to suppress low-value speech should negate the government’s role, courts tend to apply strict scrutiny when state and federal actors regulate content.⁷²

Regulation of unsavory speech might also impede the marketplace of ideas if people worried about whether legitimate speech might run afoul with the law—known as the “chilling effect.”⁷³ One court found certain restrictions of academic freedom to be unconstitutional since “the chilling effect on academia that could result from allowing cases like this to proceed jeopardizes ‘that robust exchange of ideas which discovers truth out of a multitude of tongues.’”⁷⁴ This stance has similarly led judges to overrule laws punishing publishers for spreading fake news, which is often a form of misinformation, due to its chilling effect.⁷⁵ For the truth to prevail, people must willingly introduce speech into the marketplace of ideas in the first place.

But importantly, doctrines like perjury, defamation, and fraud do punish certain forms of falsehoods despite the First Amendment. To Justice Scalia, state actors may constitutionally combat untruthful speech if “the social interest in order and morality outweighs the negligible contribution of those categories of

⁶⁹ See Gregory Day, *Monopolizing Free Speech*, 88 FORDHAM L. REV. 1315, 1317 (2020) (detailing the harm of censored content).

⁷⁰ See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (“It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . .”).

⁷¹ 303 Creative LLC v. Elenis, 600 U.S. 570, 584 (2023).

⁷² Day, *supra* note 69, at 1317 (explaining the marketplace of ideas in *Abrams*).

⁷³ Suneal Bedi, *The Myth of the Chilling Effect*, 35 HARV. J.L. & TECH. 267, 268 (2021) (“A guiding legal principle of the First Amendment is the existence of the chilling effect. That is, certain speech regulations may have the ‘indirect effect of deterring a speaker from exercising her First Amendment rights.’ Put another way, a regulation may only seek to censor, limit, or restrict certain types of speech, but because citizens fear sanctions, the same regulation ends up censoring, limiting, or restricting other potentially valuable types of speech.” (footnotes omitted) (quoting Monica Youn, *The Chilling Effect and the Problem of Private Action*, 66 VAND. L. REV. 1473, 1474 (2013))).

⁷⁴ *Pellegrini v. Ne. Univ.*, No. 12-cv-40141, 2013 WL 5607019, at *1 (D. Mass. Aug. 23, 2013) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967)); see also *PSINET Inc. v. Chapman*, 167 F. Supp. 2d 878, 889 (W.D. Va. 2001) (“Thus, even if the proposed adult verification measures are unlikely to have a chilling effect on the speech of content providers, implementation of those measures may chill the willingness of some adults to participate in the ‘marketplace of ideas’ which adult Web site operators provide.”), *aff’d*, 362 F.3d 227 (4th Cir. 2004).

⁷⁵ See *Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 52 (1988) (“[A] rule that would impose strict liability on a publisher for false factual assertions would have an undoubted ‘chilling’ effect on speech relating to public figures that does have constitutional value. ‘Freedoms of expression require breathing space.’” (quoting *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986))).

speech to the marketplace of ideas.”⁷⁶ This creates tension about when government may lawfully regulate false and misleading expressions as opposed to when it must allow private actors to utter lies.

So when does free speech shield misinformation? A seminal case illustrating the constitutional analysis of misinformation is *United States v. Alvarez*.⁷⁷ There, Xavier Alvarez was arrested pursuant to the Stolen Valor Act after he lied about serving in the Marines and receiving the Medal of Honor.⁷⁸ The Supreme Court overturned his conviction, ruling that free speech must shield most mis-truths.⁷⁹ It held that laws can only punish a genre of falsehood when it would meaningfully harm society such as a person lying under oath or falsely claiming to represent government⁸⁰—and Mr. Alvarez’s lies didn’t rise to that level.⁸¹ The public isn’t helpless but misinformation’s solution must stem from the marketplace of ideas: per the majority, “Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.”⁸²

One way of viewing this framework is that the First Amendment permits censorship when a certain type of market failure would occur.⁸³ By “certain type,” it is not that misinformation alone permits government to act but, say, a democratic or economic injury that exceeds the societal value of free speech.⁸⁴ If

⁷⁶ *Davenport v. Wash. Educ. Ass’n*, 551 U.S. 177, 188 (2007).

⁷⁷ *United States v. Alvarez*, 567 U.S. 709, 713–15 (2012) (plurality opinion).

⁷⁸ *Id.* at 713.

⁷⁹ *See id.* at 723 (“Permitting the government to decree this speech to be a criminal offense, whether shouted from the rooftops or made in a barely audible whisper, would endorse government authority to compile a list of subjects about which false statements are punishable. That governmental power has no clear limiting principle. Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth.” (citing GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* (Centennial ed. 2003) (1949))).

⁸⁰ *Id.* at 724.

⁸¹ *See id.* (“The previous discussion suffices to show that the Act conflicts with free speech principles. But even when examined within its own narrow sphere of operation, the Act cannot survive. In assessing content-based restrictions on protected speech, the Court has not adopted a free-wheeling approach, but rather has applied the ‘most exacting scrutiny.’ Although the objectives the Government seeks to further by the statute are not without significance, the Court must, and now does, find the Act does not satisfy exacting scrutiny.” (citations omitted) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994))).

⁸² *See id.* at 727–28 (“The remedy for speech that is false is speech that is true.”).

⁸³ *See* David S. Ardia, *Beyond the Marketplace of Ideas: Bridging Theory and Doctrine to Promote Self-Governance*, 16 HARV. L. & POL’Y REV. 275, 278 (2022) (“[T]he First Amendment does not bar the government from addressing market failures in the actual markets in which communication takes place, especially when those failures undermine the public’s capacity for self-governance.”).

⁸⁴ *See* Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897, 917 (2010) (exploring the weighing of free speech values versus harms); Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 855 (2018) (examining fake news and regulations of speech as market failures).

more speech would not undo misinformation's actual and significant harms, scholars have called this scenario a market failure deserving of intervention.⁸⁵

That said, government cannot generally mandate the espousal of truthful statements—a precedent that has grown especially important in light of digital platforms.⁸⁶ In *Miami Herald Publication Co. v. Tornillo*, the Supreme Court struck down a law forcing newspapers to give equal treatment to rival narratives.⁸⁷ The Court in *Tornillo* reasoned that editors must enjoy the right to reject content even if “[t]he First Amendment interest of the public in being informed is . . . in peril because the ‘marketplace of ideas’ is today a monopoly.”⁸⁸ More recently, the Court of Appeals for the Fifth Circuit held that the White House violated the First Amendment by cajoling social media companies into removing fake news about COVID-19 and vaccines; the Administration argued that Big Tech’s ambivalence was putting public health at risk but the Fifth Circuit concluded that the White House strong-armed digital platforms and thus improperly interfered with how private markets discover the truth.⁸⁹

Lastly, although the marketplace of ideas was originally meant to guide free speech, other doctrines have injected this metaphor into regulations of actual markets. Take antitrust. As observed in the Introduction and discussed more richly in Part III, antitrust refuses to regulate misinformation—even if it excludes rivals or emanates from a monopoly—because falsehoods are expected to invite more speech, which should elevate truthful content without antitrust’s help.⁹⁰ Other regimes that borrow from the First Amendment include trade secrets, copyright, securities, and trademark law.⁹¹

⁸⁵ See Blocher, *supra* note 67, at 836 (using the market failure theory, though mentioning that the Supreme Court has generally avoided this typification).

⁸⁶ See *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“Even if a newspaper would face no additional costs to comply with a compulsory access law and would not be forced to forgo publication of news or opinion by the inclusion of a reply, the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.” (footnote omitted)).

⁸⁷ *Id.* at 251.

⁸⁸ *Id.*

⁸⁹ *Missouri v. Biden*, 80 F.4th 641, 677 (5th Cir. 2023) (per curiam), *rev'd*, 603 U.S. 43 (2024).

⁹⁰ See *infra* Part III.

⁹¹ See, e.g., Courtney M. Cox, *Legitimizing Lies*, 90 GEO. WASH. L. REV. 297, 348 (2022) (discussing trade secret law’s “neutral view” of deception in protecting a trade secret: “As a normative matter, this reflects a judgment that other measures are better suited to protect against the harms of lies. Such justifications have a strong pedigree and are repeatedly cited: ‘[T]he remedy to be applied is more speech, not enforced silence.’ ‘[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.’” (alteration in original) (footnotes omitted) (quoting *United States v. Alvarez*, 567 U.S. 709, 728 (2012) (plurality opinion))).

In sum, the marketplace of ideas drives the First Amendment as well as doctrines tasked with regulating actual markets. At this concept's core is the belief that truthful content should naturally prevail, suggesting that market failures of information are uncommon. So why has fake news exploded over the past decade if information markets should typically self-correct?

II. THE AGE OF MISINFORMATION, TECHNOLOGY, AND MONOPOLIES

People are presumed to act rationally by demanding accurate information, yet the explosion of bogus content seems to defy the marketplace of ideas. One explanation involves technology while another factor concerns monopolies. Regarding the latter, private actors have accrued an unprecedented sum of power to promote untruthful content as competition declines in local journalism, digital spheres, audio mediums, and more. To trace this phenomenon, Section A details how technology boosted incentives to spread misinformation⁹² and then Section B adds the compounding factor of monopolies.⁹³

A. The Modern Age of Misinformation

There is substantially more fake news than a decade ago, indicating that “[t]he information ecosystem is broken.”⁹⁴ Americans ingested twice as much misinformation in 2020 than 2019,⁹⁵ and an MIT study found that fake news travels up to ten times as fast as the truth.⁹⁶ Helping to explain this landscape is the digitization process, as governments, people, and businesses can now easily spread misinformation without the costs of using scarce mediums. Indeed, mass communication was once inherently expensive due to the process of creating and distributing content affixed to tangible books and movies but modern technology has enabled people to create and share unlimited volumes of non-scarce misinformation at no price.⁹⁷ And this lessening of costs has increased the incentive to disburse forms of engaging, shocking, and viral misinformation.

⁹² See *infra* notes 94–101 and accompanying text.

⁹³ See *infra* notes 102–179 and accompanying text.

⁹⁴ Anupreeta Das & Pragati K.B., *How the Indian Media Amplified Falsehoods in the Drumbeat of War*, N.Y. TIMES (May 17, 2025), <https://www.nytimes.com/2025/05/17/world/asia/india-news-media-misinformation.html> [<https://perma.cc/P3JA-MUXB>].

⁹⁵ Stewart, *supra* note 19; Renee Diresta, *The Return of Fake News—and Lessons from Spam*, WIRED (June 5, 2019), <https://www.wired.com/story/the-return-of-fake-news/> [<https://perma.cc/NX8X-AW4V>].

⁹⁶ Katie Langin, *Fake News Spreads Faster Than True News on Twitter—Thanks to People, Not Bots*, SCIENCE (Mar. 8, 2018), <https://www.science.org/content/article/fake-news-spreads-faster-true-news-twitter-thanks-people-not-bots> [<https://perma.cc/LL47-U6N3>].

⁹⁷ See Zeynep Tufekci, *It's the (Democracy-Poisoning) Golden Age of Free Speech*, WIRED (Jan. 16, 2018), <https://www.wired.com/story/free-speech-issue-tech-turmoil-new-censorship/> [<https://perma.cc/YCQ4-85SA>] (discussing the ease by which speech is now spread).

An example of misinformation's economics comes from lawsuits by Dominion Voting Systems against media companies following the 2020 election. In one complaint, defamatory messages were revealed from on-air talent who privately debunked allegations of rigged elections and, specifically, voting machines ("really crazy stuff" and "[t]errible stuff damaging everybody") while the same people publicly trumpeted the false claims.⁹⁸ When others in the company sought to curtail misinformation, the on-air talent—who privately rejected the bogus stories—wanted to fire whistleblowers because it was destroying the company's value: "Please get her fired . . . It needs to stop immediately, like tonight. It's measurably hurting the company. The stock price is down. Not a joke."⁹⁹

Similar conspiracies took root after 2024's election. Elon Musk was said to have employed his satellite internet system, Starlink, to fix the election in Donald Trump's favor.¹⁰⁰ This theory, known as BlueAnon, "promises that Harris will soon make things right—that she was the true winner of the election, that she will still take office in January, and that the real plans behind her loss and concession will soon be revealed."¹⁰¹

In short, the ease of posting and distributing content at no cost has accelerated misinformation after seemingly every major event, whereas in analog times, the acts of making and distributing books, newspapers, and movies levied inherent costs. And because misinformation has proven to capture attention, firms encounter incentives to distribute misinformation. Compounding matters is the erosion of competition.

B. Modern Monopolies and Misinformation

The lack of competition in information markets has spurred false and misleading content. One issue is that helpful sources of information like public libraries are disappearing.¹⁰² It is also problematic that concentration has mounted

⁹⁸ Jeremy W. Peters & Katie Robertson, *Fox Stars Privately Expressed Disbelief About Election Fraud Claims. 'Crazy Stuff.'*, N.Y. TIMES (Feb. 16, 2023), <https://www.nytimes.com/2023/02/16/business/media/fox-dominion-lawsuit.html> [<https://perma.cc/5FKM-GA83>]; Meryl Komfield & Elahe Izadi, *What to Know About the Lawsuit Dominion Filed Against Fox News*, WASH. POST (Mar. 7, 2023), <https://www.washingtonpost.com/media/2023/03/07/fox-news-dominion-lawsuit-explained/> [<https://perma.cc/6JU5-LXAR>].

⁹⁹ Peters & Robertson, *supra* note 98.

¹⁰⁰ Jessica Huseman, *Post-Election Lesson: The Era of Conspiracy Theories and Misinformation Won't End Quickly*, VOTE BEAT (Nov. 18, 2024), <https://www.votebeat.org/2024/11/18/donald-trump-election-integrity-left-conspiracy-theories-starlink-dominion/> [<https://perma.cc/JP99-GPT4>].

¹⁰¹ Molly Olmstead, *The New Election Conspiracy Theory That's Coming from Liberals*, SLATE (Nov. 15, 2024), <https://slate.com/news-and-politics/2024/11/trump-election-elon-musk-starlink-conspiracy-theory-voting.html> [<https://perma.cc/54V5-8SJF>].

¹⁰² Brewster Kahle, *The US Library System, Once the Best in the World, Faces Death by a Thousand Cuts*, THE GUARDIAN (Oct. 9, 2023), <https://www.theguardian.com/commentisfree/2023/oct/09/>

in information sectors like digital platforms, local journalism, and audio formats, enabling monopolists to generate revenue via disseminating misinformation. In fact, these events seem related: as local journalism declines, society has become more dependent on singular sources of (unreliable) information such as Facebook. This is particularly problematic when algorithms are able to detect, curate, and inundate users with a stream of false narratives. Subsection 1 explains why digital markets are prone to monopolization.¹⁰³ Subsection 2 explains the erosion of local journalism and its effect on misinformation.¹⁰⁴ Subsection 3 discusses misinformation in the context of audio mediums.¹⁰⁵ Subsection 4 provides a wider discussion on the misinformation problem.¹⁰⁶

1. Digital Platforms

A reason why digital markets are prone to monopolization is that greater levels of engagement and usership create data, which dominant companies can employ to keep users tethered to their platforms and away from competitors—colloquially known as a “data-opoly.”¹⁰⁷ Whereas economic theory predicts that most monopolies are fleeting,¹⁰⁸ data’s network effects have enabled digital markets to become more impenetrable as time elapses.¹⁰⁹ Especially given the zero-prices charged for Facebook and Instagram (which are both owned by Meta), this dynamic has produced monopolies and concentration and, as we’ll see, misinformation.

An issue of concentration is that even well-intentioned platforms wield substantial power over whether to suppress or promote a false narrative. For example, at Meta, Mark Zuckerberg has singularly driven the decision of whether

us-library-system-attack-digital-licensing [<https://perma.cc/83PL-9VGT>] (detailing the erosion of American libraries).

¹⁰³ See *infra* notes 107–146 and accompanying text.

¹⁰⁴ See *infra* notes 147–164 and accompanying text.

¹⁰⁵ See *infra* notes 165–176 and accompanying text.

¹⁰⁶ See *infra* notes 177–179 and accompanying text.

¹⁰⁷ See Maurice E. Stucke, *Should We Be Concerned About Data-Opolies*, 2 GEO. L. TECH. REV. 275, 275 (2018).

¹⁰⁸ High prices are thought to attract cheaper rivals, which should naturally correct the market. See Lina M. Khan, *The Ideological Roots of America’s Market Power Problem*, 127 YALE L.J.F. 960, 974–75 (2018), <https://www.yalelawjournal.org/forum/the-ideological-roots-of-americas-market-power-problem> [<https://perma.cc/G725-B4QN>] (explaining the role of self-correcting markets in antitrust law).

¹⁰⁹ See Chiara Farronato & Daniel Björkegren, *To Regulate Network-Based Platforms, Look at Their Data*, HARV. BUS. REV. (Oct. 18, 2021) (“Much of the dominance of today’s tech firms, from Amazon to Google to Facebook, arises from network effects. These platforms facilitate *connections*: they connect people to products, to friends, to apps, to drivers, and to homes that would not otherwise be available to them. As more people use these platforms, they can facilitate exponentially more connections, and thus provide more value to each person. It is Amazon’s connections to consumers (both for discovery and delivery) that make it so attractive to many businesses.”).

to suppress content and certain speakers.¹¹⁰ A platform may even face incentives to reject censorship; after all, revenue is typically tied to usership and activity, incentivizing platforms to promote or ignore misinformation that grabs attention.¹¹¹ Akin to Facebook's reliance on emojis,¹¹² seventy-four percent of misinformation types on X come from verified (i.e., paid) accounts, meaning that X profits from elevating certain types of falsehoods.¹¹³

Compounding matters, algorithms can tether a user to a platform or app by deducing the information that a user will likely consume. Because misinformation is often meant to shock, enrage, and captivate, the decision to view or favorite a type of misinformation trains the platform to flood a user's feed with false and misleading content.¹¹⁴ Despite the heterogeneity of information found online, the curation of misinformation can overwhelm users who may lack access to journalism, libraries, and other sources of information (as explained shortly).

The Myanmar genocide is a prime example showing the combustibility, technology, and market power of misinformation.¹¹⁵ When Facebook became the

¹¹⁰ See Nikolas Guggenberger, *Moderating Monopolies*, 38 BERKELEY TECH. L.J. 119, 122 (2023) ("President Trump was banned from the biggest social media platform on earth when Mark Zuckerberg wanted it—not earlier and not later.").

¹¹¹ Gregory Day, *Antitrust, Attention, and the Mental Health Crisis*, 106 MINN. L. REV. 1901, 1903 (2022).

¹¹² Jeremy B. Merrill & Will Oremus, *Five Points for Anger, One for a "Like": How Facebook's Formula Fostered Rage and Misinformation*, WASH. POST (Oct. 26, 2021), <https://www.washingtonpost.com/technology/2021/10/26/facebook-angry-emoji-algorithm/> [<https://perma.cc/Z69H-4VCY>]; see also Luke Munn, *Angry by Design: Toxic Communication and Technical Architectures*, 7 HUMANS. & SOC. SCIS. COMM'NS 1, 5–6 (2020) (describing YouTube and other platforms); Karen Hao, *How Facebook Got Addicted to Spreading Misinformation*, MIT TECH. REV. (Mar. 11, 2021), <https://www.technologyreview.com/2021/03/11/1020600/facebook-responsible-ai-misinformation/> [<https://perma.cc/28YB-TZ6B>] ("By the time thousands of rioters stormed the US Capitol in January, organized in part on Facebook and fueled by the lies about a stolen election that had fanned out across the platform, it was clear from my conversations that the Responsible AI team had failed to make headway against misinformation and hate speech because it had never made those problems its main focus. More important, I realized, if it tried to, it would be set up for failure. The reason is simple. Everything the company does and chooses not to do flows from a single motivation: Zuckerberg's relentless desire for growth.").

¹¹³ Todd Spangler, *X/Twitter Verified Blue Check-Mark Users Are 'Superspreaders' of Disinformation About Israel-Hamas War, Study Says*, VARIETY (Oct. 20, 2023), <https://variety.com/2023/digital/news/x-twitter-blue-check-mark-users-superspreaders-disinformation-israel-hamas-war-1235763100/> [<https://perma.cc/NL7L-VAH5>]; see also Jess Weatherbed, *Blue Checkmarks on X Are 'Superspreaders of Misinformation' About Israel-Hamas War*, THE VERGE (Oct. 20, 2023), <https://www.theverge.com/2023/10/20/23925086/x-verified-blue-checkmarks-superspreader-misinformation-israel-hamas-war> [<https://perma.cc/47DJ-BPAB>] (reporting on the prevalence of misinformation disseminated by "verified" users on X).

¹¹⁴ See Marcia Stepanek, *The Algorithms of Fear*, STANFORD SOC. INNOVATION REV. (June 14, 2016), https://ssir.org/articles/entry/the_algorithms_of_fear# [<https://perma.cc/2CAU-UDCH>] (discussing the echo chamber nature of online spaces).

¹¹⁵ See Hao, *supra* note 112 (describing how misinformation on Facebook fueled a genocide in Myanmar); Tiffany Hsu, *Pinterest Bans Climate Misinformation from Posts and Ads*, N.Y. TIMES

monopolistic supplier of information in Myanmar—as “legitimate publishers” had entirely disappeared by 2018—misinformation proliferated about the country’s Muslim people that led to their slaughter.¹¹⁶ Far from a matter of sheer religion, “clickbait actors” received tenfold the average person’s salary from Facebook.¹¹⁷ The United Nations found that Facebook played a “determining role” in the atrocities,¹¹⁸ with one writer observing that “[t]he algorithms that underpin Facebook’s business weren’t created to filter out what was false or inflammatory; they were designed to make people share and engage with as much content as possible by showing them things they were most likely to be outraged . . . by.”¹¹⁹

Another example that demonstrates misinformation’s power is platforms’ ability to profit from directing users to fake news dangled by Google Ads, which dominates digital advertising.¹²⁰ Specifically, Google placed advertisements on forty-one percent of the approximately 800 online articles flagged as distributing erroneous claims regarding COVID-19, and on twenty percent of articles espousing false claims concerning climate change.¹²¹ Likewise, TikTok’s advertisements reflect a “cesspool” of misinformation about elections, presenting misleading information such as incorrect voting requirements and election dates.¹²²

Further illustrating the role of Google Ads, Jair Bolsonaro, the loser of Brazil’s 2020 election, spread online misinformation about the election that featured Google advertisements worth “millions of dollars” to the peddlers of fake news and Google itself.¹²³ Misinformation inspired Bolsonaro’s supporters to ransack

(Apr. 6, 2022), <https://www.nytimes.com/2022/04/06/technology/pinterest-climate-misinformation.html> [<https://perma.cc/T5NC-5DPL>] (discussing Pinterest’s attempts to block misinformation before it could gain popularity).

¹¹⁶ Karen Hao, *How Facebook and Google Fund Global Misinformation*, MIT TECH. REV. (Nov. 20, 2021), <https://www.technologyreview.com/2021/11/20/1039076/facebook-google-disinformation-clickbait/> [<https://perma.cc/9Q9S-FWUD>].

¹¹⁷ *Id.*

¹¹⁸ Eli Meixler, *U.N. Fact Finders Say Facebook Played a ‘Determining’ Role in Violence Against the Rohingya*, TIME (Mar. 13, 2018), <https://time.com/5197039/un-facebook-myanmar-rohingya-violence/> [<https://perma.cc/2K77-6WUE>].

¹¹⁹ *Id.*

¹²⁰ See David McCabe & Nico Grant, *U.S. Accuses Google of Abusing Monopoly in Ad Technology*, N.Y. TIMES (Jan. 24, 2023), <https://www.nytimes.com/2023/01/24/technology/google-ads-lawsuit.html> [<https://perma.cc/L45T-HU3A>] (discussing monopoly power in the ad market); Hao, *supra* note 116.

¹²¹ Silverman et al., *supra* note 12 (discussing the economics of Google Ads and the relationship to misinformation).

¹²² Maggie Harrison Dupré, *Research Confirms TikTok Is a Cesspool of Misinformation*, FUTURISM (Oct. 26, 2022), <https://futurism.com/tiktok-political-misinformation> [<https://perma.cc/WVY3-VJFL>].

¹²³ Silverman et al., *supra* note 12 (“Google ads are a major source of revenue for sites that spread election disinformation in Brazil, notably false claims about the integrity of the voting system that have been advanced by the incumbent president, Jair Bolsonaro The resulting ad revenue is potentially worth millions of dollars to the people and groups running these and other unreliable sites—while also making money for Google.”).

government buildings, resulting in about 1,500 arrests,¹²⁴ as well as the detainment of former officials for their roles in the security breach and attempted coup.¹²⁵ When the military arrived, many protestors were delighted due to a prominent conspiracy theory that Brazil's generals intended to reinstall Bolsonaro into office—only to discover that the soldiers had actually come to apprehend the rioters.¹²⁶ To put these events into a greater context, *ProPublica* and *The Washington Post* calculated that about 10,000 posts of election-related misinformation appeared daily on Facebook.¹²⁷ Not only did society witness 10.1 billion instances of fake news related to the 2020 election in the United States, but the fake news was sixfold more viral than accurate speech.¹²⁸

It is also notable that Google's search engine, which controls over ninety percent of this market,¹²⁹ is prone to answering questions with fake news presented as the truth.¹³⁰ Observers found that Google's algorithms are poorly de-

¹²⁴ Ana Ionova, André Spigariol & Jack Nicas, *Brazilian Authorities Arrested the Rioters. Now They Are Arresting Security Officials.*, N.Y. TIMES (Jan. 10, 2023), <https://www.nytimes.com/2023/01/10/world/americas/brazil-bolsonaro-riot.html> [https://perma.cc/944J-NDJQ].

¹²⁵ Anthony Faiola, Samantha Schmidt & Marina Dias, *Brazil's Military Blocked Arrests of Bolsonaro Rioters, Officials Say*, WASH. POST (Jan. 14, 2023), <https://www.washingtonpost.com/world/2023/01/14/brazil-riot-investigation-military-collusion/> [https://perma.cc/GDW2-VADR]; see also Jack Nicas, Flávia Milhorance & Ana Ionova, *How Bolsonaro Built the Myth of Stolen Elections In Brazil*, N.Y. TIMES (Oct. 25, 2022), <https://www.nytimes.com/interactive/2022/10/25/world/americas/brazil-bolsonaro-misinformation.html> [https://perma.cc/8CJW-8AK4] (“The result has been a yearslong campaign that has undermined millions of Brazilians’ faith in the elections that underpin one of the world’s largest democracies. In a poll this month, three out of four of Mr. Bolsonaro’s supporters said they have little or no trust in Brazil’s voting machines.”).

¹²⁶ Euan Marshall, *Bolsonaristas Cheered the Military’s Arrival—Then Were on the Floor with Guns to Their Heads*, THE TELEGRAPH (Jan. 9, 2023), <https://www.telegraph.co.uk/world-news/2023/01/09/bolsonaristas-cheered-militarys-arrival-floor-guns-heads/> (on file with author).

¹²⁷ Silverman et al., *supra* note 12. “Facebook groups swelled with at least 650,000 posts attacking the legitimacy of Joe Biden’s victory between Election Day and the Jan. 6 siege of the U.S. Capitol, with many calling for executions or other political violence, an investigation by ProPublica and The Washington Post has found.” Craig Silverman, Craig Timberg, Jeff Kao & Jeremy B. Merrill, *Facebook Groups Topped 10,000 Daily Attacks on Election Before Jan. 6, Analysis Shows*, WASH. POST (Jan. 4, 2022), <https://www.washingtonpost.com/technology/2022/01/04/facebook-election-misinformation-capitol-riot/> [https://perma.cc/E725-TA92].

¹²⁸ Dwoskin, *supra* note 21; Vera Bergengruen & Billy Perrigo, *Facebook Acted Too Late to Tackle Misinformation on 2020 Election, Report Finds*, TIME (Mar. 23, 2021), <https://time.com/5949210/facebook-misinformation-2020-election-report/> [https://perma.cc/H8H2-4SSR]; see also Kristie-Valerie Hoang, Note, *Liar, Liar, Democracy on Fire: A Federal Elections Exception for Social Media Jawboning*, 66 B.C. L. REV. 1915, 1938 (2025) (explaining that between election day on November 3, 2020 and the attack on the United States Capital on January 6, 2021, “internet users published more than 650,000” posts questioning the validity of the 2020 election results on Facebook despite “virtually no evidence of election illegitimacy”).

¹²⁹ Sumit Sharma, *Google Is a Monopoly, but Its Search Engine Does Not Have to Be*, TECH POL’Y (Apr. 23, 2024), <https://www.techpolicy.press/google-is-a-monopoly-but-its-search-engine-does-not-have-to-be/> [https://perma.cc/7C5K-SAWR].

¹³⁰ Sara Fischer, *The Local News Crisis Is Deepening America’s Divides*, AXIOS (July 4, 2022), <https://www.axios.com/2022/07/04/local-newspapers-news-deserts> [https://perma.cc/4NUT-RNBM].

signed to spot accurate information,¹³¹ animated by both humorous stories (i.e., Elmer's glue is an ideal ingredient for pizza crust¹³²) and dangerous content such as medical misinformation.¹³³ This landscape is especially alarming, per *Scientific American*, due to the role of “[d]o[ing] your own research” in enabling conspiracy theories.¹³⁴

Commercial information is similarly manipulable. Some platforms have reportedly sought to make their in-house goods appear more appealing by burying competitors in searches or even altering reviews.¹³⁵ Take Yelp, which alleged in 2024 that Google manipulated online searches to suppress information about rivals in an effort to monopolize markets.¹³⁶ An allegation central to Yelp's lawsuit was that Google maintained approximately ninety percent of the market share in general internet searches, and thus acted as an informational gatekeeper.¹³⁷ The concealment of information as a way of protecting one's market has likewise drawn antitrust lawsuits against Apple and Amazon.¹³⁸ Moreover, instead of hiding information, some platforms have reportedly fabricated user reviews to harm competition, which has led the U.K. to investigate companies such as Google and Amazon.¹³⁹

¹³¹ Ina Fried, *Google's AI Summaries Cause Headaches and Spawn Memes*, AXIOS (May 24, 2024), <https://www.axios.com/2024/05/24/googles-ai-overview-search-summaries> [<https://perma.cc/Z7NK-QN6H>].

¹³² See Kyle Robison, *Google Promised a Better Search Experience—Now It's Telling Us to Put Glue on Our Pizza*, THE VERGE (May 23, 2024), <https://www.theverge.com/2024/5/23/24162896/google-ai-overview-hallucinations-glue-in-pizza> [<https://perma.cc/96GN-LLPX>].

¹³³ See Talya Minsberg, *Google Is Using A.I. to Answer Your Health Questions. Should You Trust It?*, N.Y. TIMES (May 31, 2024), <https://www.nytimes.com/2024/05/31/well/live/google-ai-health-information.html> [<https://perma.cc/8EAM-W773>] (explaining that Google's generative AI tool, launched in May of 2024, provided users with inaccurate information when users sought medical advice).

¹³⁴ See Lauren Leffer, *How Search Engines Boost Misinformation*, SCI. AM. (Dec. 20, 2023), <https://www.scientificamerican.com/article/how-search-engines-boost-misinformation/> [<https://perma.cc/EWP3-VQER>] (“Unfortunately, this time science seems to be on the conspiracy theorists' side. Encouraging Internet users to rely on search engines to verify questionable online articles can make them more prone to believing false or misleading misinformation, according to a study published today in *Nature*. The new research quantitatively demonstrates how search results, especially those prompted by queries that contain keywords from misleading articles, can easily lead people down digital rabbit holes and backfire.”).

¹³⁵ Eugene Kim, *Amazon Has Been Promoting Its Own Products at the Bottom of Competitors' Listings*, CNBC (Mar. 18, 2019), <https://www.cnbc.com/2018/10/02/amazon-is-testing-a-new-feature-that-promotes-its-private-label-brands-inside-a-competitors-product-listing.html> [<https://perma.cc/QUY7-GLBD>]; Shira Ovide, *Amazon's Open Secret*, N.Y. TIMES (June 18, 2021), <https://www.nytimes.com/2021/06/18/technology/amazon-reviews.html> [<https://perma.cc/9E53-CHEZ>].

¹³⁶ Luis Rijo, *Yelp Sues Google Alleging Monopoly Abuse in Local Search Market*, PPC LAND (Aug. 28, 2024), <https://ppc.land/yelp-sues-google-alleging-monopoly-abuse-in-local-search-market/> [<https://perma.cc/ZD25-SAZN>].

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

Non-social media monopolies have likewise emerged as chief spigots of misinformation. For example, groups on Amazon have banded together to self-publish books about dubious topics that traditional outlets would not publish.¹⁴⁰ A similar example comes from Wikipedia, which cannot match the rate that individuals and bots distort information.¹⁴¹ This dynamic has, for example, advanced hate speech in Central Europe after individuals altered Wikipedia's portrayal of Croatian fascists during World War II to make them appear like heroes.¹⁴²

That said, it's worth questioning whether individual platforms are even capable of combatting misinformation,¹⁴³ as more fake news may exist than fact checkers.¹⁴⁴ After all, Facebook blocked 3.4 billion ads in 2022.¹⁴⁵ Moderation has even emerged on the "front lines" of today's culture wars due to the power of platforms to censor (mis)information.¹⁴⁶ The greater point is that Google, Facebook, and other platforms profit from fostering viral misinformation—and this development seems buoyed by the rising concentration of local journalism.

¹⁴⁰ See Ava Kofman, Francis Tseng & Moira Weigel, *The Hate Store: Amazon's Self-Publishing Arm Is a Haven for White Supremacists*, PROPUBLICA (Apr. 7, 2020), <https://www.propublica.org/article/the-hate-store-amazons-self-publishing-arm-is-a-haven-for-white-supremacists> [<https://perma.cc/2Q8J-JS6L>] (detailing suggestions from users on anonymous message boards, including to "write a concise book of only factual indisputable information exposing the Jews . . . [and] their selling of our high tech secrets to China/Russia [and] their long track record of pedophilia and perversion").

¹⁴¹ See Masha Borak, *The Hunt for Wikipedia's Disinformation Moles*, WIRED (Oct. 17, 2022), <https://www.wired.com/story/wikipedia-state-sponsored-disinformation/> [<https://perma.cc/E9ED-TMQD>].

¹⁴² *Id.* ("One of the most long-running disinformation attempts went on for more than a decade after a group of ultra-nationalists gamed Wikipedia's administrator rules to take over the Croatian-language community, rewriting history to rehabilitate World War II fascist leaders of the country The research tracked 86 editors who are already banned from Wikipedia. The editors tried to sway narratives on the English-language Wikipedia page for the Russo-Ukrainian war toward pro-Kremlin views, through subtle changes like casting doubt on the objectivity of pro-Western accounts, changing historical context, and adding links from Russian state-owned news and websites.").

¹⁴³ Tiffany Hsu, *On TikTok, Election Misinformation Thrives Ahead of Midterms*, N.Y. TIMES (Aug. 14, 2022), <https://www.nytimes.com/2022/08/14/business/media/on-tiktok-election-misinformation.html> [<https://perma.cc/L48Z-AEF3>].

¹⁴⁴ Lydia Morrish, *Fact-Checkers Are Scrambling to Fight Disinformation with AI*, WIRED (Feb. 1, 2023), <https://www.wired.com/story/fact-checkers-ai-chatgpt-misinformation/> [<https://perma.cc/J22Z-P39U>].

¹⁴⁵ Barbara Ortutay, *Report: TikTok Bad at Culling US Election Misinformation Ads*, AP NEWS (Oct. 21, 2022), <https://apnews.com/article/technology-business-government-and-politics-misinformation-a18a35a2a2542eadfc3893983a818511> [<https://perma.cc/LLD6-T8ZE>].

¹⁴⁶ Will Oremus, *How Social Media 'Censorship' Became a Front Line in the Culture War*, WASH. POST (Oct. 28, 2022), <https://www.washingtonpost.com/technology/2022/10/09/social-media-content-moderation/> [<https://perma.cc/K7WT-F49Q>].

2. Local Journalism

Competition has eroded in local journalism, enabling singular publishers to control information in many U.S. towns and cities.¹⁴⁷ Since 2004, about 2,100 newspapers have shuttered—approximately two papers per week—diminishing the number of people working in local news by almost sixty percent.¹⁴⁸ Rather than thousands of independent outlets remaining, about ten corporations own the grand majority of them.¹⁴⁹ And many of the surviving outlets fit the description of a “ghost newspaper” in which few journalists remain.¹⁵⁰ Sinclair Broadcast Group operates over 170 television news stations itself.¹⁵¹ If private equity acquires a newspaper, local staff has typically been slashed.¹⁵² It is also common for one corporation to own many stations in the same market, generating identical stories across “rival” channels to erect a façade of competition and truth.¹⁵³ In some markets, all publishers have disappeared to create a news desert.¹⁵⁴

When a singular corporation remains, local media has increasingly been found to disperse misinformation.¹⁵⁵ For instance, private companies like Metric Media operate identical newspapers in the same town or news desert under different names to parrot fake stories, known as “pink slime journalism.”¹⁵⁶ As one report found, “[t]hese hyper-partisan news outlets are growing as traditional lo-

¹⁴⁷ Molly Taft, *The Ohio Train Derailment Is a Disaster of Misinformation*, GIZMODO (Feb. 16, 2023), <https://gizmodo.com/ohio-toxic-train-derailment-misinformation-conspiracies-1850119412> [<https://perma.cc/KYJ9-ZQVB>] (describing the consequences of local media’s decline).

¹⁴⁸ Steven Waldman, *Our Local-News Situation Is Even Worse Than We Think*, COLUM. JOURNALISM REV. (Feb. 25, 2022), https://www.cjr.org/local_news/local_reporters_decline_coverage_density.php [<https://perma.cc/3HCD-QCYV>].

¹⁴⁹ Abernathy, *supra* note 4.

¹⁵⁰ PENELOPE MUSE ABERNATHY, UNIV. N.C. AT CHAPEL HILL, *NEWS DESERTS AND GHOST NEWSPAPERS: WILL LOCAL NEWS SURVIVE?* (2020), https://www.usnewsdeserts.com/wp-content/uploads/2020/06/2020_News_Deserts_and_Ghost_Newspapers.pdf [<https://perma.cc/778P-AQUN>].

¹⁵¹ Justin C. Blankenship & Chris J. Vargo, *The Effect of Corporate Media Ownership on the Depth of Local Coverage and Issue Agendas: A Computational Case Study of Six Sinclair TV Station Websites*, 15 ELEC. NEWS: BROAD. & MOBILE JOURNALISM 139, 153 (2021).

¹⁵² Michael Ewens, Arpit Gupta & Sabrina T. Howell, *Local Journalism Under Private Equity Ownership* (Nat’l Bureau of Econ. Rsch., Working Paper No. 29743), https://www.nber.org/system/files/working_papers/w29743/w29743.pdf [<https://perma.cc/5XAE-2QTA>].

¹⁵³ Paul Farhi, Jack Gillum & Chris Alcantara, *In This Town, You Can Flip the Channel All You Want—the News Is Often the Same*, WASH. POST (June 14, 2018), <https://www.washingtonpost.com/graphics/2018/lifestyle/sinclair-broadcasting/> [<https://perma.cc/KTH9-7DDL>] (“The TV news has a familiar feel to it here in west-central Pennsylvania. News stories broadcast on WJAC, the NBC affiliate in town, have appeared on nearby station WATM, the ABC affiliate. And many of those stories are broadcast on WWCP, the Fox station here, as well. Not just the same topics—*identical* stories, reported by the same reporter or anchor, and repeated, almost verbatim at times, by the other stations.”).

¹⁵⁴ Sara Fischer, *The Local News Crisis Is Deepening America’s Divides*, AXIOS (July 4, 2022), <https://www.axios.com/2022/07/04/local-newspapers-news-deserts> [<https://perma.cc/3PS3-F473>].

¹⁵⁵ Taft, *supra* note 147.

¹⁵⁶ Ryan Zickgraf, *How ‘Pink Slime’ Journalism Exploits Our Faith in Local News*, WASH. POST (Aug. 15, 2022), <https://www.washingtonpost.com/outlook/2022/08/12/pink-slime-journalism-local-news/> [<https://perma.cc/3KMP-T3GP>].

cal newsrooms shrink.”¹⁵⁷ Consider also Sinclair—the singular station in many markets—which compelled a personality at each of its news stations to read an identical, politically charged script about the “mainstream media” and its nefarious motives.¹⁵⁸ The impetus, *Vox* found, was that “[l]ocal news isn’t sexy” and thus misinformation generates engagement.¹⁵⁹

A related issue is that people are more likely to subscribe to bogus theories when reliable information has vanished. After a train wreck in an Ohio town caused a strange gas to emanate, the absence of local media spawned falsehoods.¹⁶⁰ A prominent claim that “no one [was] talking about this” suggested a conspiracy yet the actual issue seems to have derived from the lack of local journalists to cover the disaster—and in this vacuum came misinformation.¹⁶¹ One study of the crash found that the county’s three newspapers were not only owned by one corporation but cuts had left the area without any capacity to investigate.¹⁶² *Nature* explored this phenomenon in which false content was found to thrive in “information voids.”¹⁶³

The point is that competition has declined in local news and, as a result, fostered misinformation. And not only are dominant publishers responding to incentives to disperse untruthful content but a vacuum of credible sources can make people more susceptible to misinformation. An additional explanation for journalism’s decline is that many types of news, social content, and advertisements have moved to digital markets where two platforms, Facebook and

¹⁵⁷ Rose White, *A Newspaper Delivered to 1 Million Michigan Mailboxes Might Be ‘Pink Slime,’* MLIVE (May 14, 2024), <https://www.mlive.com/public-interest/2024/05/a-newspaper-delivered-to-1-million-michigan-mailboxes-might-be-pink-slime.html> [<https://perma.cc/4X59-T7VU>].

¹⁵⁸ Blankenship & Vargo, *supra* note 151, at 140.

¹⁵⁹ Dylan Matthews, *Sinclair, the Pro-Trump, Conservative Company Taking Over Local News, Explained*, VOX (Apr. 3, 2018), <https://www.vox.com/2018/4/3/17180020/sinclair-broadcast-group-conservative-trump-david-smith-local-news-tv-affiliate> [<https://perma.cc/DP59-QRUW>].

¹⁶⁰ *Id.*

¹⁶¹ Taft, *supra* note 147.

¹⁶² *Id.* (“All three of Columbiana County’s remaining newspapers . . . are owned by the same company; all have very small staffs and no dedicated environmental reporters. Meanwhile, both the Pittsburgh Post-Gazette and the Akron Beacon Journal, the two major papers closest to East Palestine, have suffered layoffs and stagnant wages in recent years. One of the reasons the February 3 crash received delayed national attention is the dearth of local reporters on the ground to chase down stories and amplify them.”).

¹⁶³ Editorial, *How Online Misinformation Exploits ‘Information Voids,’* 625 INT’L J. SCI. 215, 215–16 (2024) (“In one experiment, participants used the search engine to verify claims that the US government engineered a famine by locking down during the COVID-19 pandemic. When they entered terms used in inaccurate news stories, such as ‘engineered famine’, to get information, they were more likely to find sources uncritically reporting an engineered famine. The results also held when participants used search terms to describe other unsubstantiated claims about SARS-CoV-2: for example, that it rarely spreads between asymptomatic people, or that it surges among people even after they are vaccinated.”).

Google, claim eighty-five percent of all new revenue growth from digital advertising in the United States.¹⁶⁴ Lesser known is misinformation in audio markets.

3. Audio Mediums

It is seldom noticed that audio competition has declined and generated misinformation. With respect to concentration, there are three platforms for podcasts: Apple, Spotify, and iHeart. A problem is that audio platforms face few incentives to challenge misinformation from the biggest shows—especially ones hosted on an exclusive platform—but rather allow misleading content to reach their listeners.¹⁶⁵ One report found that even consumers who reject misinformation cannot abandon the major platforms due to a lack of options and competition.¹⁶⁶ Another factor explaining a podcast's power to disperse fake news is that listeners can seldom interact with, or fact-check, content.¹⁶⁷ Because listeners tend to trust, or even bond with, the hosts of their favorite podcasts, scholars have concluded that audio mediums are more effective at spreading falsehoods.¹⁶⁸ Of the 36,000 most popular podcast episodes, 70% have shared “debunked” information.¹⁶⁹ Yet the *New York Times* found that misinformation does not typically violate a platform's policies, allowing falsehoods to spread.¹⁷⁰ Again, the decision whether to squelch misinformation typically belongs to one or two platforms.

Local radio has witnessed the same consolidation and misinformation.¹⁷¹ When the FCC repealed rules meant to increase diversity in radio, it enabled conglomerates to overtake airwaves.¹⁷² Almost a majority of America's radio is controlled by two companies: Infinity and Clear Channel (which was recently

¹⁶⁴ VICTOR PICKARD, *DEMOCRACY WITHOUT JOURNALISM?* 126 (2020).

¹⁶⁵ Lucien Clough, *Spotify's Dilemma*, THE SPECTATOR (Feb. 18, 2022), <https://stuyspec.com/article/spotify-s-dilemma> [<https://perma.cc/3UT4-UXTF>].

¹⁶⁶ Alex Harman, *Mad About Joe Rogan? Be Madder at Streaming Monopolies*, YORK DISPATCH (Feb. 8, 2022), <https://www.yorkdispatch.com/story/opinion/contributors/2022/02/08/mad-joe-rogan-madder-streaming-monopolies/6703899001/> [<https://perma.cc/W9DT-PH8K>].

¹⁶⁷ 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/5F4T-6QHB>].

¹⁶⁸ *Id.*

¹⁶⁹ Valerie Wirtschafter, *The Challenge of Detecting Misinformation in Podcasting*, BROOKINGS (Aug. 25, 2021), <https://www.brookings.edu/articles/the-challenge-of-detecting-misinformation-in-podcasting/> [<https://perma.cc/E77W-39RX>].

¹⁷⁰ In one instance, a popular pastor claimed that the Covid-19 vaccine is “an egg that hatches into a synthetic parasite and grows inside your body . . . like a sci-fi nightmare, and it's happening in front of us.” Hsu & Tracy, *supra* note 167.

¹⁷¹ Guggenberger, *supra* note 110, at 148 (noting consolidations in the radio market).

¹⁷² See Eric Cortellessa & Phillip Longman, *A Free Market Won't Self-Correct the Disinformation Problem*, WASH. MONTHLY (Feb. 27, 2021), <https://washingtonmonthly.com/2021/02/27/a-free-market-wont-self-correct-the-disinformation-problem/> [<https://perma.cc/46QY-WX3G>].

acquired by iHeart).¹⁷³ The effect, like with podcasts, is that radio giants have harmonized the presentation of local news from distant places.¹⁷⁴ As local news declines, radio stations have opted to syndicate national shows that pump the same misinformation into much of America¹⁷⁵—for example, *Coast to Coast* promotes misinformation about chemtrails and more by using several stations in the same town.¹⁷⁶ In each example, misinformation has increased as markets become more concentrated.

4. A Greater Discussion

The above discussion of platforms, local journalism, and audio formats is abridged; indeed, other markets of information have increasingly grown concentrated, assuaging misinformation. For instance, Amy Adler uncovered the monopolization of pornography where one corporation, MindGeek, can dictate (mis)information about salient issues affecting, as an example, how men perceive and treat women.¹⁷⁷ To Adler, because “users have little power to keep content they explicitly do not want, including hate speech, violent material, and misinformation, out of their algorithmically produced recommendations,” MindGeek can “invisibly spoon feed content to viewers MindGeek also determines to a large extent what content gets *created* in the first place, in a way that exacerbates many of the feedback loop issues that plague other platforms . . . [g]iven the company’s extraordinary market power.”¹⁷⁸ Take also academic textbooks where a handful of publishers dominate the market; the consequences

¹⁷³ Martin Scherzinger, *Music, Corporate Power, and Unending War*, 60 CULTURAL CRITIQUE 23, 40 (2005).

¹⁷⁴ See PICKARD, *supra* note 164, at 110 (“[B]ig corporate media giants like Sinclair can operate an entire station from a different part of the country, far removed from local voices and concerns.”).

¹⁷⁵ See Sheera Frenkel & Tiffany Hsu, *How Local Media Spreads Misinformation from Vaccine Skeptics*, N.Y. TIMES (Aug. 1, 2021), <https://www.nytimes.com/2021/08/01/technology/local-media-misinformation-vaccine-skeptics.html> [<https://perma.cc/7EEE-SHVB>] (discussing the power of local radio to promote misinformation, specifically *Coast to Coast* which is syndicated on 640 channels); Tim Karr, *How Media Consolidation Endangers Our Health Amid Pandemic*, COMMON DREAMS (Aug. 2, 2021), <https://www.commondreams.org/views/2021/08/02/how-media-consolidation-endangers-our-health-amid-pandemic> [<https://perma.cc/GH92-UTSX>] (“To fill the local-news gap, conglomerated broadcast owners have turned to syndicated content. So instead of those 640 local AM stations featuring reporting from local journalists, these outlets—many of which are owned by the same company—instead rely on syndicated content. For example, the vaccine deniers at *Coast to Coast AM* benefit from having their program carried by multiple local radio stations owned by iHeartMedia, the nationwide radio conglomerate formerly known as Clear Channel Communications.”).

¹⁷⁶ COAST TO COAST AM: *Chemtrails Revealed* (May 6, 1999), <https://www.coasttocoastam.com/show/chemtrails-revealed/> [<https://perma.cc/KVU7-U4GW>].

¹⁷⁷ Adler, *supra* note 15, at 823–24.

¹⁷⁸ *Id.* at 809, 812.

include higher prices as well as a bottleneck of information across academic fields.¹⁷⁹

In short, the marketplace of ideas instructs courts to resist reviewing speech's veracity yet misinformation belies fidelity in self-correcting markets. The belief is that people should naturally demand accurate information, which companies will supply, causing the market to correct inefficiencies like fake news. Perhaps a solution lies in promoting competition: if information markets are becoming increasingly concentrated—and this dynamic fosters untruthful content—why doesn't antitrust intervene? After all, antitrust is meant to foster competition for the sake of improving markets and consumer welfare. The next Part explores the paradoxes of antitrust's faith in the marketplace of ideas.

III. MISINFORMATION, MARKETPLACE OF IDEAS, AND ANTITRUST

Antitrust promotes information as an ingredient of competition but considers the spread of misinformation to be harmless—even though each act may similarly prevent consumers from finding the truth in a market. The reason why courts reject antitrust lawsuits grounded in misinformation is that market forces are naturally expected to elevate truthful content, a theory adopted from the First Amendment's commercial speech doctrine. Yet misinformation's prevalence in concentrated markets casts doubt on whether antitrust should continue to follow the First Amendment's model. Section A of this Part explains that antitrust was established during the era of smokestacks and scarce goods, which might poorly apply to information sectors.¹⁸⁰ Section B details how antitrust courts have embraced the marketplace of ideas to reject claims based on untruthful content.¹⁸¹ Section C explains why antitrust's adoption of the First Amendment makes theoretical sense, even if the results have proven odd.¹⁸² Section D discusses antitrust's symmetry with the marketplace of ideas.¹⁸³ Part III concludes with a question: should antitrust continue to ignore misinformation if markets don't self-correct or promote truthful content?

A. Antitrust in the World of Smokestacks and Information

The traditional basis of antitrust is rational behavior, which may poorly govern today's information economy. For starters, antitrust has long sought to optimize the output of scarce goods because an item's value has traditionally

¹⁷⁹ Henry Farrell, *College Textbooks Are a Racket*, WASH. POST (Oct. 21, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/10/21/college-textbooks-are-a-racket/> [https://perma.cc/CCC3-QKRG].

¹⁸⁰ See *infra* notes 184–193 and accompanying text.

¹⁸¹ See *infra* notes 194–211 and accompanying text.

¹⁸² See *infra* notes 212–233 and accompanying text.

¹⁸³ See *infra* notes 234–236 and accompanying text.

derived from its scarcity (i.e., the more scarce, the more valuable).¹⁸⁴ For this reason, antitrust is primarily suspicious of output restrictions, which should naturally raise a good's price by reducing its supply.¹⁸⁵ But if a monopolist restricts output, an antitrust lawsuit must still show that competition was unreasonably excluded because high prices should typically encourage markets to self-correct; indeed, high prices are expected to attract new competitors hoping to undersell the monopolist, leading the monopolist to lower its own prices in order to retain consumers.¹⁸⁶ Given that people rationally flock to low prices while competitors should rationally seek to satisfy consumer demand, an antitrust lawsuit typically cannot survive unless an anticompetitive act prevented the market from self-correcting an economic injury such as high prices or restricted output.¹⁸⁷

That said, antitrust has struggled to keep pace with information. Although antitrust has traditionally promoted the output of scarce products, the modern economy is shifting to non-priced, non-scarce goods based on information.¹⁸⁸ Take firms like Google and Facebook, which have monopolized markets and amassed fortunes by providing unlimited quantities of zero-priced information (often in exchange for attention).¹⁸⁹ Here, a monopolist is neither restricting output nor raising prices. Even when Amazon, Apple, and others sell physical goods, their dominance has largely stemmed from the collecting and analyzing of data about consumers, trends, and markets.¹⁹⁰ While this shift to non-scarce goods would seemingly frustrate an apparatus meant to promote output, courts have taken the approach that antitrust can still effectively foster competition; to

¹⁸⁴ See HOVENKAMP, *supra* note 39, at 134 ("The entire antitrust enterprise is dedicated to the proposition that business firms behave rationally.").

¹⁸⁵ *Sterling Merch., Inc. v. Nestlé, S.A.*, 656 F.3d 112, 121 (1st Cir. 2011); Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 66 (2019) ("[U]nder the consumer welfare ('CW') principle, as most people understand it today antitrust policy encourages markets to produce output as high as is consistent with sustainable competition, and prices that are accordingly as low.").

¹⁸⁶ See, e.g., *Am. President Lines, LLC v. Matson, Inc.*, 633 F. Supp. 3d 209, 224 (D.D.C. 2022) (explaining that an element of an illegal monopolization claim is that the monopolist put forth barriers to entry which prevented the market from self-correcting). Without barriers to entry, high prices should theoretically attract competitors with lower prices, naturally correcting the market without antitrust intervention. See *id.*

¹⁸⁷ See *Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.").

¹⁸⁸ See John M. Newman, *The Myth of Free*, 86 GEO. WASH. L. REV. 513, 548–49 (2018) (explaining how attention has become a valuable currency analogous to dollars).

¹⁸⁹ *Id.*

¹⁹⁰ Noga Blickstein Shchory & Michal S. Gal, *Market Power Parasites: Abusing the Power of Digital Intermediaries to Harm Competition*, 35 HARV. J.L. & TECH 73, 77 (2021).

Richard Posner, “antitrust doctrine is supple enough, and its commitment to economic rationality strong enough, to take in stride the competitive issues presented by the new economy.”¹⁹¹ Yet as firms accrue power to monopolize information markets and exclude rivals, antitrust has staked an odd stance.¹⁹²

Antitrust’s approach to information versus misinformation is based on the marketplace of ideas, borrowed from the First Amendment’s commercial speech doctrine. As explained next, a consensus has begun to prevail that the suppression of information can qualify as anticompetitive, though antitrust cares little about misinformation—even if it might harm consumers in the same ways.¹⁹³

B. Antitrust’s Protection of Information After Virginia State Board of Pharmacy

Information is increasingly treated as a function of competition, though antitrust’s approach differed before embracing the First Amendment. It was, in fact, previously the case that untruthful speech could offend antitrust law;¹⁹⁴ to illustrate the old approach, the Supreme Court held in 1967 that Procter and Gamble’s ads “imprint[ed]” Clorox on consumers’ minds and thus convinced them to spend more money on a “chemically indistinguishable” product.¹⁹⁵ This amounted to an antitrust offense because a dominant firm employed a non-meritorious method of monopolizing the market.¹⁹⁶ Per the Supreme Court, Procter and Gamble built market power via informational coercion rather than business acumen.¹⁹⁷ But developments would soon alter antitrust’s approach.

The watershed moment changing how antitrust courts understood information arose from, oddly, a First Amendment case. It was *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* in 1976 when the Supreme Court ruled that the informational nature of commercial speech deserves constitutional protection, even if some content might stretch the truth or offend community standards:

Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the alloca-

¹⁹¹ Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 925 (2001).

¹⁹² See Newman, *supra* note 2, at 165–74 (discussing the erosion of prices in modern digital markets).

¹⁹³ See *infra* notes 194–211 and accompanying text.

¹⁹⁴ FTC v. Procter & Gamble Co., 386 U.S. 568, 572 (1967).

¹⁹⁵ *Id.*; see also Ramsi A. Woodcock, *The Obsolescence of Advertising in the Information Age*, 127 YALE L.J. 2270, 2281 (2018) (describing the change in antitrust law whereby courts began to embrace persuasive advertising as a function of efficient markets rather than anticompetitive conduct).

¹⁹⁶ *Procter & Gamble Co.*, 386 U.S. at 572.

¹⁹⁷ *Id.*

tion of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.¹⁹⁸

Today, courts insist that consumers cannot always rely on firms to tell the unvarnished truth but must view claims skeptically.¹⁹⁹ And this development, albeit grounded in the First Amendment, changed how antitrust treats (mis)information: it's now the case that, first, the suppression of information is able to qualify as anticompetitive conduct but second, misinformation is considered just fine.²⁰⁰

For example, one year after *Virginia State Board of Pharmacy*, the Supreme Court held in an antitrust case, *National Society of Professional Engineers v. United States*, that promoting information is critical to competition.²⁰¹ The case involved a professional organization's rule that its sellers cannot disclose pricing information until consumers selected their preferred vendor;²⁰² the organization's rationale was that people would overvalue prices relative to quality, which could incentivize sellers to offer inferior services as a way of lowering rates.²⁰³ But the Court concluded that competitors cannot agree to withhold pricing information because prices are the economy's "central nervous system."²⁰⁴ Put differently, antitrust courts asserted that, akin to *Virginia State Board of Pharmacy*, commercial speech provides important information about products and rivals. Lending support to this framework is antitrust's leading treatise, which explained "[t]he less information a consumer has about relative price and quality, the easier it is for market participants to charge supracompetitive prices."²⁰⁵

¹⁹⁸ 425 U.S. 748, 765 (1976) (citing *Dun & Broadstreet, Inc. v. Grove*, 404 U.S. 898, 904–06 (1971) (Douglas, J., dissenting)); see also *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561–62 (1980) (remarking that commercial speech "not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information").

¹⁹⁹ *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 480 (1997) (Souter, J., dissenting) ("[P]ersuasion is an essential ingredient of the competition that our public law promotes . . .").

²⁰⁰ *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 563.

²⁰¹ 435 U.S. 679, 684 (1978).

²⁰² *Id.*

²⁰³ See *id.* ("[C]ompetitive pressure to offer engineering services at the lowest possible price would adversely affect the quality of engineering. Moreover, the practice of awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety, and welfare. For these reasons, the Society claimed that its Code of Ethics was not an 'unreasonable restraint of interstate trade or commerce.'").

²⁰⁴ See *id.* at 692, 694–95 (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940)) (reasoning that an agreement to withhold pricing information was "nothing less than a frontal assault on the basic policy of the Sherman Act").

²⁰⁵ *Epic Games, Inc. v. Apple Inc.*, 559 F. Supp. 3d 898, 1055 (N.D. Cal. 2021) (quoting AREEDA & HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICA-*

This precedent has grown more important as digital platforms innovate ways of depressing information and, as a result, excluding competition. Take Apple, which ran into antitrust trouble in 2023 for concealing information about pricing.²⁰⁶ The court not only highlighted the importance of maximizing information,²⁰⁷ but also noted that its suppression may create underexplored types of anticompetitive problems in today's economy: "Apple's conduct does not fall within the confines of traditional antitrust law," yet it may now create a violation.²⁰⁸ Likewise, the FTC lodged an antitrust case against Amazon based partially on the giant's ability to squelch information.²⁰⁹ The FTC alleged that Amazon created anticompetitive effects because Amazon has the capability to bury listings of cheaper goods while emphasizing listings of expensive ones.²¹⁰

If the goal is to inform consumers, false or misleading content should perhaps offend antitrust law too. After all, both the suppression of information and the sharing of falsehoods can fool consumers into buying a worse good at monopoly prices. But as explained next, antitrust promotes information without usually caring about the content's truthfulness pursuant to the marketplace of ideas.²¹¹

C. But Antitrust Ignores Misinformation

It may seem odd that antitrust promotes the flow of information without regard for its accuracy. There are two ways in which flooding the market with

TION § 2008c), *aff'd in part, rev'd in part*, 67 F.4th 946 (9th Cir. 2023), *cert. denied*, 144 S. Ct. 681 (2024) (mem.) and 144 S. Ct. 682 (2024) (mem.).

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ See *id.* at 1057–58 (“[I]t hides information for consumer choice which is not easily remedied with money damages. The injury has occurred and continues and can best be remedied by invalidating the offending provisions. In terms of balancing, Apple’s business justifications focus on other parts of the Apple ecosystem and will not be significantly impacted by the increase of information to and choice for consumers. Rather, this limited measure balances the justification for maintaining a cohesive ecosystem with the public interest in unclinking the veil hiding pricing information on mobile devices and bringing transparency to the marketplace.”).

²⁰⁹ Complaint [Public Redacted Version], *supra* note 34, at 79 (“Amazon manipulates those recommendation widgets so that sellers cannot compete on equal footing against Amazon’s private label products. Instead, Amazon purposefully suppresses information about competing products to give its own private label products an artificial boost.”).

²¹⁰ *Id.* at 8–9, 128 (“When Amazon detects elsewhere online a product that is cheaper than a seller’s offer for the same product on Amazon, Amazon punishes that seller. It does so to prevent rivals from gaining business by offering shoppers or sellers lower prices. . . . Another form of punishment is to bury discounting sellers so far down in Amazon’s search results that they become effectively invisible. . . . Amazon’s conduct has artificially inflated prices for both shoppers and sellers, degraded the quality of online superstores for shoppers and of online marketplace services for sellers, reduced output in both relevant markets, hindered shoppers from comparison-shopping for the best deals, suppressed the flow of useful price and quality information to shoppers, [and] stifled sellers’ ability to gain additional business . . .”).

²¹¹ See *infra* notes 214–233 and accompanying text.

falsehoods could, but does not, produce an antitrust offense. First, antitrust allows companies to spread lies as a way of impeding competition because the marketplace of ideas should naturally foster the truth.²¹² Second, antitrust is supposed to intervene when exclusionary conduct caused an inefficiency like low-quality information but courts have avoided assessing whether a market's caliber of information has diminished due to the marketplace of ideas.²¹³

1. Misinformation Is Competition Rather Than Anticompetitive

Antitrust judges assert that misinformation's remedy must come from more speech rather than enforcement—akin to the First Amendment.²¹⁴ Because the marketplace of ideas is thought to reveal the truth, antitrust courts have expressly remarked that aggrieved brands must communicate their products' virtues in the face of misinformation. For instance, when a publisher lied to eliminate rivals, a district court held that an antitrust claim cannot be based upon misinformation.²¹⁵ This ruling endorsed “traditional free speech principles” about self-correcting markets in which the truth should prevail. That is, “[t]he genuine anticompetitive effects of false and misleading statements about a competitor are minimal at best.”²¹⁶ Citing precedent, the court reasoned that although a statement may be misleading or untruthful, the remedy is more speech rather than an antitrust case.²¹⁷

In fact, misinformation isn't said to constitute an anticompetitive act but rather is competition.²¹⁸ Courts have ruled that falsehoods “set the stage for competition” because an injured party “could respond with information to refute that claim.”²¹⁹ Antitrust's stance is indeed that a company should capitalize on its rival's deceitfulness because an exposed lie will “generate bad will toward the firm by which [the public] was misled.”²²⁰ Per one court, the plaintiff “could

²¹² See *infra* notes 214–233 and accompanying text.

²¹³ See *infra* notes 225–233 and accompanying text.

²¹⁴ *Mercatus Grp. v. Lake Forest Hosp.*, 641 F.3d 834, 851 (7th Cir. 2011).

²¹⁵ *GDHI Mktg. LLC v. Antsel Mktg. LLC*, 416 F. Supp. 3d 1189, 1195–96, 1201–02 (D. Colo. 2019).

²¹⁶ *Id.* at 1201 (quoting *Mercatus Grp.*, 641 F.3d at 851); see also Maurice E. Stucke, *When a Monopolist Deceives*, 76 ANTITRUST L.J. 823, 826 (2010) (“Today some U.S. federal courts applying the Sherman Act readily condemn a monopolist's deception involving advertising and product disparagement, while others are reluctant to condemn it. Nearly every court recognizes, however, that a monopolist's deceptive advertising and product disparagement under certain factual circumstances can violate the federal antitrust laws.”).

²¹⁷ *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989).

²¹⁸ See *Mercatus Grp.*, 641 F.3d at 852 (quoting *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 623 (7th Cir. 2005)) (“The genuine anticompetitive effects of false and misleading statements about a competitor are minimal, at best.”).

²¹⁹ *Id.*

²²⁰ *Id.* (quoting *Covad Commc'ns Co., v. Bell Atl. Corp.*, 398 F.3d 666, 674 (D.C. Cir. 2005)).

have refuted the false allegations with truthful information” and in the process “derived a distinct competitive advantage.”²²¹

In short, antitrust courts have concluded that misinformation might burden a specific competitor but does not harm the competitive process.²²² Justifying this framework, one judge remarked that competition and its related speech isn’t supposed to be congenial: “Antitrust law does not compel your competitor to praise your product or sponsor your work. To require cooperation or friendliness among rivals is to undercut the intellectual foundations of antitrust.”²²³ For this reason, antitrust courts have largely denied claims grounded in misinformation because more speech should persevere.²²⁴ Consider also when low-quality content emanates from a concentrated market.

2. Courts Avoid Judging the Quality of Ideas and Expressions

Although a chief goal of antitrust is to promote the quality of goods in a market, courts have ignored information or expression’s veracity. Oftentimes, judges and enforcers have emphasized the non-obvious effects of exclusionary acts while refusing to treat misinformation as diminished quality. Rather than viewing misinformation as an anticompetitive act, it could also be scrutinized as the anticompetitive effect of exclusionary conduct.

Take the FTC’s lawsuit against Facebook which was largely focused on privacy and features, despite how Facebook has been shown to promote fake news.²²⁵ This was notwithstanding a Congressional Subcommittee’s report finding that Facebook “maintained its monopoly through a series of anticompetitive business practices” and “[i]n the absence of competition, Facebook’s quality has deteriorated over time, resulting in . . . a dramatic rise in misinformation.”²²⁶ Similarly, the DOJ’s lawsuit against Google’s monopoly focused on ad prices while ignoring misinformation; in fact, the same House Report detailed the false

²²¹ *GDHI Mktg.*, 416 F. Supp. 3d at 1202 (quoting *Mercatus Grp.*, 641 F.3d at 852).

²²² *Covad Commc’ns Co.*, 398 F.3d at 675.

²²³ *Schachar*, 870 F.2d at 399 (citing *Ind. Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409, 1413–14 (7th Cir. 1989)).

²²⁴ *MacDermid Printing Sols., LLC v. Cortron Corp.*, 833 F.3d 172, 186 (2d Cir. 2016) (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 (1983)); see also Gregory Day & Abbey Stemler, *Are Dark Patterns Anticompetitive?*, 72 ALA. L. REV. 1, 29–32 (2020) (describing the case law of antitrust condemning only coercive forms of misinformation).

²²⁵ Complaint for Injunctive & Other Equitable Relief at 12, *FTC v. Facebook, Inc.*, No. 1:20-cv-03590 (D.D.C. Jan. 13, 2021).

²²⁶ MAJORITY STAFF OF SUBCOMM. ON ANTITRUST, *supra* note 50, at 8, 14 (“The company used its data advantage to create superior market intelligence to identify nascent competitive threats and then acquire, copy, or kill these firms. Once dominant, Facebook selectively enforced its platform policies based on whether it perceived other companies as competitive threats. In doing so, it advantaged its own services while weakening other firms.”).

and misleading content on Google's platform.²²⁷ In addition, the government's action against broadcasters targeted the advertising market but didn't mention information's quality.²²⁸ When the largest book publishers sought to merge, enforcers avoided questions of whether the deal would improve the quality of expression or information in a market but instead targeted the monetary advances paid to authors.²²⁹

Along the same lines, a few courts have described the marketplace of ideas as not sufficiently economic to implicate antitrust.²³⁰ A consequence is that antitrust must perhaps resist judging a market's quality of information in terms of false or accurate. For example, Gary Johnson asserted that his omission from the presidential debates impaired the marketplace of ideas.²³¹ But the U.S. Court of Appeals for the District of Columbia ruled that ideas do not trade in economic markets as antitrust requires, given the lack of prices or formal economic transactions.²³² Similarly, a company alleged it was illegally boycotted after it took part in WikiLeaks' release of classified documents; and likewise, the antitrust court dismissed the action due to the difficulty of determining whether harm occurred in a media market, noting that "ideas" cannot make up an economic market.²³³ But most often, courts have resisted assessing the quality of content but rather left the job to the marketplace of ideas. This landscape is actually logical in light of antitrust's parallels with free speech.

D. Antitrust's Symmetry with the Marketplace of Ideas

As an aside, it makes sense why antitrust follows the First Amendment's treatment of (mis)information due to each doctrine's fidelity to microeconomic

²²⁷ *Id.* at 204 (demonstrating that Google profits from, as an example, listing fake businesses on Google Maps, buoyed by Google's market power); see also Rob Copeland & Katherine Bindley, *Millions of Business Listings on Google Maps Are Fake—and Google Profits*, WALL ST. J. (June 20, 2019), <https://www.wsj.com/articles/google-maps-littered-with-fake-business-listings-harming-consumers-and-competitors-11561042283> (on file with author) (describing how con artists hijack the names of legitimate businesses which also benefits Google's model).

²²⁸ Complaint, *United States v. Sinclair Broad. Grp.*, No. 1:18-cv-02609 (D.D.C. Nov. 13, 2018).

²²⁹ Constance Grady, *The Planned Penguin Random House-Simon & Schuster Merger Has Been Struck Down in Court*, VOX (Nov. 1, 2022), <https://www.vox.com/culture/23316541/publishing-antitrust-lawsuit-merger-department-justice-penguin-random-house-simon-schuster> [<https://perma.cc/W7BP-YYU5>].

²³⁰ *Johnson v. Comm'n on Presidential Debates*, 869 F.3d 976, 983 (D.C. Cir. 2017); *DataCell ehf. v. Visa, Inc.*, No. 1:14-cv-1658, 2015 WL 4624714, at *7 (E.D. Va. July 30, 2015).

²³¹ *Johnson*, 869 F.3d at 983.

²³² See *id.* (stating that speech and information do not qualify as economic markets under antitrust law).

²³³ *DataCell ehf.*, 2015 WL 4624714, at *7 ("If the products in DataCell's market are ideas, then the antitrust laws cannot help DataCell. Congress created antitrust laws to protect free market competition, not to protect the free exchange of ideas. If the products in DataCell's market are classified State Department documents, then the antitrust laws are an even poorer fit. In either case, DataCell cannot fit its grievances into the framework of [the] Sherman Act.").

theory. Consider two shared pillars: (1) rational actors should cause markets to self-correct and (2) government's over-intrusion would likely harm society and markets more than allowing some undesirable practices to go unpunished. With the first pillar, both doctrines expect for inefficiencies such as high prices or untruthful speech to incentivize rivals to enter a market and correct it without governmental intervention.²³⁴ It is indeed a function of welfare-maximizing actors that markets should naturally raise the quality of information and most other goods. As to the second pillar, the rationale is that over enforcement tends to chill valid types of competition and speech.²³⁵ That is, free speech cases insist that overly regulating content would harm society more than allowing rational actors to decide the truth; antitrust assumes the same, cautioning against enforcement because rational actors should naturally correct anticompetitive practices.²³⁶ Due to these doctrines' symmetries, antitrust has likely adopted the marketplace of ideas as its intellectual justification for allowing misinformation to spread.

But perhaps antitrust's faith in the marketplace of ideas is naive. If people act irrationally by preferring low-quality information, wouldn't it suggest that antitrust—and the First Amendment—have adopted an unwise approach? Maybe the marketplace of ideas has lost enough competition to perform its truth-seeking function? But curiously, economics would still expect truthful content to prevail: a monopolist offering low-quality goods like misinformation should attract rivals with better products (i.e., the truth) endeavoring to meet consumer demand. Misinformation, however, has increased. We must, it appears, question whether consumers act rationally and if antitrust has put too much trust in the marketplace of ideas. To this end, Part IV finds that many people living in news deserts prefer untruthful content in rational and irrational ways, suggesting that antitrust has put too much faith in the marketplace of ideas and thus, improvidently refused to recognize misinformation.

²³⁴ See Alan Devlin, *Extraneous Liability in Antitrust*, 53 ARIZ. L. REV. 781, 813–14 (2011) (“In the antitrust setting, the law is trustful of free-market mechanisms that promise to undo market distortions. . . . [W]here innocent behavior leads to monopoly conditions, the government should, and must, sit back and allow the market to self-correct, as supracompetitive prices entice entry.”).

²³⁵ See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 2–3 (1984) (“If the court errs by condemning a beneficial practice, the benefits may be lost for good. Any other firm that uses the condemned practice faces sanctions in the name of stare decisis, no matter the benefits. If the court errs by permitting a deleterious practice, though, the welfare loss decreases over time. Monopoly is self-destructive. Monopoly prices eventually attract entry. True, this long run may be a long time coming, with loss to society in the interim. The central purpose of antitrust is to speed up the arrival of the long run. But this should not obscure the point: judicial errors that tolerate baleful practices are self-correcting, while erroneous condemnations are not.”).

²³⁶ See *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1439 (9th Cir. 1995) (describing the presumption of self-correcting markets in antitrust law).

IV. IRRATIONAL COMPETITION FOR TRUTH AND COMPETITION

Misinformation casts doubt on antitrust's approach. The current belief is that antitrust need not govern misinformation because rational actors should demand high-quality information and thus cause the market to correct. To rebut antitrust's stance, this Part delves into behavioral and cognitive scholarship to show why many people, acting rationally and irrationally, demand misinformation. It explains that untruthful content tends to flourish in scenarios where few sources of information exist and social isolation is greatest; here, dominant platforms, apps, and other forms of media can inundate people with inaccurate information designed to comfort, enrage, captivate, and ultimately, capture attention. That is, misinformation constitutes a type of market failure caused by inadequate competition. Because the First Amendment stops state actors from regulating false and misleading speech—for good reason—antitrust should promote competition in information markets. To help illustrate the current missteps of antitrust, this Part begins by untangling the brain to explore why informational voids lead people to choose untruthful content.²³⁷ Section B urges antitrust to view misinformation as a market failure, which would actually harmonize antitrust and the First Amendment.²³⁸ Section C delves into the research's implications for antitrust's greater purpose as well as the First Amendment.²³⁹

A. Untangling the Brain: Misinformation's Persuasiveness

Antitrust assumes that markets should typically elevate truthful content, yet many people seem to prefer misinformation in rational and irrational ways. To begin, the term “irrational” means non-utility maximizing behavior.²⁴⁰ Economists assume that people are capable of selecting among options to maximize their welfare—that is, a rational act.²⁴¹ For example, buyers of traditional goods are generally thought to act rationally by selecting low-priced widgets (holding other factors equal).²⁴² But with misinformation, it seems irrational to embrace the net costs of espousing fake news if it creates greater costs than benefits. On the other hand, it can be rational for a person to prefer misinformation if it max-

²³⁷ See *infra* notes 240–291 and accompanying text.

²³⁸ See *infra* notes 292–330 and accompanying text.

²³⁹ See *infra* notes 331–344 and accompanying text.

²⁴⁰ See Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2220–21 (2012) (“Behavioral law and economics is built upon the foundational assumption that consumers make predictable and systematically irrational decisions, and, indeed, that individual choice is not a reliable predictor of individual economic welfare . . .”).

²⁴¹ See *Kahn v. Walmart Inc.*, 107 F.4th 585, 595 (7th Cir. 2024) (discussing “Adam Smith’s *homo economicus*” in which “a perfectly rational being . . . gathers and evaluates the optimal amount of information about options in the marketplace to maximize utility preferences”).

²⁴² See James J. Bernstein, *Demand-Side Disarmament: Or How I Learned to Deter the Bomb*, 47 LOY. L.A. INT’L & COMPAR. L. REV. 1, 12 (2024) (“Rational actors in the public or private sector will seek cheaper substitutes.”).

imizes their welfare. As such, Subsection 1 offers insights into how cognitive biases and heuristics have led people to irrationally espouse misinformation.²⁴³ Subsection 2 explores misinformation as a rational decision.²⁴⁴ In fact, rational and irrational dynamics explain why misinformation has flourished in news deserts, rural areas, and other places where credible sources are declining, loneliness is extreme, and competition is sparse. The greater point is that misinformation is causally related to monopolies and anticompetitive conduct.²⁴⁵

1. The Irrational Persistence of Misinformation

One cannot entirely pin misinformation on a lack of intelligence.²⁴⁶ Take a Jeopardy! champion who made a harmless hand gesture that was misperceived as white supremacist messaging.²⁴⁷ This event inspired 595 former contestants to write a vitriolic letter about Jeopardy's complicity in spreading hate speech.²⁴⁸ Remarkably, when the Anti-Defamation League dispelled the group's theory, signees of the letter—a smart and successful group—refused to concede.²⁴⁹ Their comments included “Is anyone else feeling gaslit?”²⁵⁰ and “We saw it. We know we did. But a lot of people (including the [expletive] ADL) are telling us we didn't. That's some classic gaslighting.”²⁵¹ Given that misinformation can impact people of varying intelligence levels, the field of behavioral economics—which arose from a mix of economics and psychology—helps to explain how heuristics and cognitive biases spur irrational activities such as espousing misinformation.

One explanation is the cognitive bias of groupthink where individuals irrationally embrace a community's beliefs. People can find comfort in receiving

²⁴³ See *infra* notes 246–281 and accompanying text.

²⁴⁴ See *infra* notes 282–291 and accompanying text.

²⁴⁵ See Hiroko Kanoh, *Why Do People Believe in Fake News Over the Internet? An Understanding from the Perspective of Existence of the Habit of Eating and Drinking*, 126 *PROCEDIA COMPUT. SCI.* 1704, 1706 (2018) (“Analysis of transmission dynamics could therefore provide insight into how misinformation spreads and competes online. For example, disease strains can evolve and compete in a host population, much like rumours, and infections and opinions are both shaped by social contacts. Modelling of competing disease strains indicates that, as contacts become more localized, the diversity of circulating strains can increase.” (quoting Adam Kucharski, *Post-Truth: Study Epidemiology of Fake News*, 540 *NATURE* 525 (2016))).

²⁴⁶ Kirsten Weir, *Why We Fall for Fake News: Hijacked Thinking or Laziness?*, *AM. PSYCH. ASS'N* (Feb. 11, 2020), <https://www.apa.org/news/apa/2020/fake-news> [<https://perma.cc/NJR2-6X2X>].

²⁴⁷ Ben Smith, *I'll Take 'White Supremacist Hand Gestures' for \$1,000*, *N.Y. TIMES* (May 16, 2021), <https://www.nytimes.com/2021/05/16/business/media/jeopardy-hand-gesture-maga-conspiracy.html> [<https://perma.cc/9LXH-LBE5>].

²⁴⁸ J! Contestants Letter, *Letter from Former Jeopardy! Contestants Regarding Offensive Terminology and Gesture Aired This Week*, *MEDIUM* (Apr. 28, 2021), <https://medium.com/@j.contestants.letter/letter-from-former-jeopardy-2eda854efdf1> [<https://perma.cc/W7ZY-HK4B>].

²⁴⁹ Smith, *supra* note 247.

²⁵⁰ *Id.*

²⁵¹ *Id.*

validation of their false theories, creating an echo chamber of misinformation.²⁵² Groupthink is particularly persuasive when a person trusts the source of the misinformation,²⁵³ endeavors to remain faithful to a community,²⁵⁴ believes others lack enough sense to diagnose fake news,²⁵⁵ or seeks confirmation of their beliefs (confirmation bias).²⁵⁶ A person becomes even more susceptible to groupthink when experiencing loneliness and isolation.²⁵⁷ A related dynamic is that untruthful speech is more likely to take root when it relates to one's prior experiences, known as the "illusory truth effect"²⁵⁸—for example, people were more likely to trust disinformation about wars right after World War II.²⁵⁹ The greater point is that groupthink helps to explain why especially lonely individuals rely on poor information to make irrational decisions such as rejecting life-saving care.²⁶⁰

People are also more likely to believe emotionally charged content due partially to anxiety and despair, given that fake news is often designed to stir "shock, fear, anger, or [create] moral outrage."²⁶¹ In this sense, emotions may overcome a person's ability to reason.²⁶² Amplifying this dynamic is stress; per the *Association of American Medical Colleges*, misinformation is especially appealing to anxiety sufferers who are "more motivated to seek information to either legitimize their anxiety or to help them to ease the worry."²⁶³ Akin to anxie-

²⁵² Patrick Boyle, *Why Do People Believe Medical Misinformation?*, ASS'N AM. MED. COLLS. (Nov. 3, 2022), <https://www.aamc.org/news-insights/why-do-people-believe-medical-misinformation> [<https://perma.cc/CT47-SFCS>].

²⁵³ Gordon Pennycook & David G. Rand, *The Psychology of Fake News*, 25 TRENDS COGNITIVE SCI. 388, 389 (2021).

²⁵⁴ Mike Brooks, *Why Do We Believe Fake News and Conspiracy Theories?*, PSYCH. TODAY (Oct. 27, 2021), <https://www.psychologytoday.com/us/blog/tech-happy-life/202110/why-do-we-believe-fake-news-and-conspiracy-theories> (on file with the author) ("The more extreme that one becomes in partisanship, the more likely he or she will distort information to maintain group allegiance . . .").

²⁵⁵ Sacha Altay & Alberto Acerbi, *People Believe Misinformation Is a Threat Because They Assume Others Are Gullible*, 26 NEW MEDIA & SOC'Y 6440, 6443 (2024).

²⁵⁶ Patricia Moravec, Randall K. Minas & Alan R. Dennis, *Fake News on Social Media: People Believe What They Want to Believe When It Makes No Sense at All*, 43 MIS Q. 1343, 1346 (2019) (discussing confirmation bias).

²⁵⁷ Mikiya Hayashi, Takashi Ideno & Kazuhisa Takemura, *The Relationship Between Fear of Isolation and Thinking Ability About Social Issues*, 67 JAPANESE PSYCH. RSCH. 98, 98–99 (2025).

²⁵⁸ Dan Pilat & Sekoul Krastev, *Why Do We Believe Misinformation More Easily When It's Repeated Many Times?*, DECISION LAB, <https://thedecisionlab.com/biases/illusory-truth-effect> [<https://perma.cc/8Q7X-QVKX>].

²⁵⁹ See *id.*

²⁶⁰ See, e.g., *Covid Vaccine Refuser Died After Terrible Mistake, Says Partner*, BBC (Aug. 5, 2021), <https://www.bbc.com/news/uk-england-dorset-58080116> [<https://perma.cc/H7Z7-3DY6>].

²⁶¹ Pennycook & Rand, *supra* note 253, at 391; Drew Harwell & Taylor Lorenz, *Sorry You Went Viral*, WASH. POST (Oct. 21, 2022), <https://www.washingtonpost.com/technology/interactive/2022/tiktok-viral-fame-harassment/> [<https://perma.cc/4RZR-BE2A>].

²⁶² Cameron Martel, Gordon Pennycook & David G. Rand, *Reliance on Emotion Promotes Belief in Fake News*, 5 COGNITIVE RSCH. 1, 3 (2020).

²⁶³ Boyle, *supra* note 252.

ty is despair.²⁶⁴ Especially in rural areas where opportunities are limited yet social isolation is greatest, fake news can serve as a coping mechanism.²⁶⁵ And given where newspapers are shuttering, the rates of despair and isolation combined with a lack of credible publishers have generated a perfect storm of misinformation.²⁶⁶

The information economy can also overwhelm people, making it difficult to snuff out misinformation.²⁶⁷ For instance, TikTok displays content via short bursts, which renders it less likely that users will scrutinize each claim.²⁶⁸ In fact, platforms like TikTok can “diagnose” one’s biases from their time on certain videos,²⁶⁹ enabling the platform to “repeat and amplify” misinformation via a polarizing stream of content.²⁷⁰ Not only may the resharing of fake news bury the truth,²⁷¹ but people tend to put more faith in speech the more they hear it²⁷²—despite whether a headline seems implausible.²⁷³ Placement also matters,

²⁶⁴ See *id.* (discussing anxiety as a driver of individuals’ acceptance of medical misinformation); Wenjing Pan, Diyi Liu & Jie Fang, *An Examination of Factors Contributing to the Acceptance of Online Health Misinformation*, 12 FRONTIERS PSYCH. 1, 3 (2021) (same).

²⁶⁵ Carol Graham, Amy Liu & Isabel Shaheen O’Malley, *The Local Ingredients That Fuel Misinformation*, BLOOMBERG (Apr. 15, 2024), <https://www.bloomberg.com/news/articles/2024-04-15/why-some-us-counties-are-more-vulnerable-to-misinformation-despair> [<https://perma.cc/DK6N-TNAP>].

²⁶⁶ *Id.* (using counties in West Virginia as an example of how despair combined with a paucity of local newspapers increases misinformation).

²⁶⁷ Tiffany Hsu, *Worries Grow That TikTok Is New Home for Manipulated Video and Photos*, N.Y. TIMES (Nov. 4, 2022), <https://www.nytimes.com/2022/11/04/technology/tiktok-deepfakes-disinformation.html> [<https://perma.cc/9AJ5-EG6K>].

²⁶⁸ See Kristin Corry, *Irrational Fear Is a TikTok Genre Now*, VICE (Oct. 19, 2022), <https://www.vice.com/en/article/v7vxb8/irrational-fear-tiktok-genre> [<https://perma.cc/6KFH-YLM6>] (explaining misinformation’s popularity on TikTok).

²⁶⁹ Ben Smith, *How TikTok Reads Your Mind*, N.Y. TIMES (Dec. 5, 2021), <https://www.nytimes.com/2021/12/05/business/media/tiktok-algorithm.html> [<https://perma.cc/V76Y-MY7U>].

²⁷⁰ Eleanor Cummins, *The Creepy TikTok Algorithm Doesn’t Know You*, WIRED (Jan. 3, 2022), <https://www.wired.com/story/tiktok-algorithm-mental-health-psychology/> [<https://perma.cc/WL8Q-E66Y>]; see also Chris Stokel-Walker, *Why Do People Believe Everything They Watch on TikTok?*, VICE (Feb. 6, 2023), <https://www.vice.com/en/article/z34a95/why-do-people-believe-everything-on-tiktok> [<https://perma.cc/WPL6-MJJ6>] (“On TikTok, this tendency to consume information in bite-sized nuggets is accelerated by the platform’s For You page, which is designed as a conduit for virality, and adhering to the truth in one’s videos is not always a guarantee for achieving the deserved level of exposure.”).

²⁷¹ Filippo Menczer & Thomas Hills, *Information Overload Helps Fake News Spread, and Social Media Knows It*, SCI. AM. (Dec. 1, 2020), <https://www.scientificamerican.com/article/information-overload-helps-fake-news-spread-and-social-media-knows-it/> [<https://perma.cc/DA5R-QQ6H>].

²⁷² See Richard Sima, *Why Do Our Brains Believe Lies?*, WASH. POST (Nov. 3, 2022), <https://www.washingtonpost.com/wellness/2022/11/03/misinformation-brain-beliefs/> [<https://perma.cc/BGD9-GZFC>] (“[T]he more something is repeated, the more familiar and fluent it feels whether it is misinformation or fact.”).

²⁷³ Xiaoli Nan, Yuan Wang & Kathryn Thier, *Why Do People Believe Health Misinformation and Who Is at Risk? A Systematic Review of Individual Differences in Susceptibility to Health Misinformation*, 314 SOC. SCI. & MED. 1, 2 (2022).

as people trust misinformation listed at the top of Google searches.²⁷⁴ Even a quick exposure to a bogus headline can help to solidify false beliefs.²⁷⁵

Once misinformation is believed, people seem unwilling to change their minds. Even when an individual begins to accept the truth, researchers found that falsehoods can persevere in guiding a person's thinking.²⁷⁶ Individuals may still cling to misinformation after receiving a retraction—the “continued influence effect.”²⁷⁷ This phenomenon is explained by the way the brain codes content into its networks so when the truth emerges, misinformation remains.²⁷⁸ A revision can thus fail to gain as much traction as the original misinformation.²⁷⁹

An important variable is that some people possess a personality type conducive to misinformation: they love chaos. Research has shown that individuals who are more likely to share misinformation seek to upset dominant narratives and established orders.²⁸⁰ A scholar described this dynamic as “[i]t basically measures people's desire to burn down existing institutions . . . [the] need to create some sort of anarchy. And it basically is stemming from this distrust of whatever social institutions we see all around us.”²⁸¹

The above discussion traces an array of scenarios where irrational beliefs may persist. Consider the broad implications. Most notably, it helps to explain misinformation's prevalence in concentrated markets. Given that loneliness and

²⁷⁴ Katy Steinmetz, *How Your Brain Tricks You into Believing Fake News*, TIME (Aug. 9, 2018), <https://time.com/5362183/the-real-fake-news-crisis/> [<https://perma.cc/VN85-98ST>].

²⁷⁵ *Id.*

²⁷⁶ Ullrich K.H. Ecker et al, *The Psychological Drivers of Misinformation Belief and Its Resistance to Correction*, 1 NATURE REV. PSYCH. 13, 16 (2022).

²⁷⁷ *See id.* at 16, 22 (“[T]he original information is not simply erased . . .”).

²⁷⁸ *See id.* at 16 (“Theoretical accounts of the CIE draw heavily on models of memory in which information is organized in interconnected networks and the availability of information is determined by its level of activation. When information is encoded into memory and then new information that discredits it is learned, the original information is not simply erased or replaced. Instead, misinformation and corrective information co-exist and compete for activation. For example, misinformation that a vaccine has caused an unexpectedly large number of deaths might be incorporated with knowledge related to diseases, vaccinations, and causes of death. A subsequent correction that the information about vaccine-caused deaths was inaccurate will also be added to memory and will likely result in some knowledge revision.” (footnotes omitted)).

²⁷⁹ *See id.* (“One school of thought—the integration account—suggests that the CIE arises when a correction is not sufficiently encoded and integrated with the misinformation in the memory network. There is robust evidence that integration of the correction and misinformation is a necessary, albeit not sufficient, condition for memory updating and knowledge revision. This view implies that a successful revision requires detecting a conflict between the misinformation and the correction, the co-activation of both representations in memory, and their subsequent integration.” (footnotes omitted)).

²⁸⁰ Asher Lawson & Hemant Kakkar, *Personality Type, as Well as Politics, Predicts Who Shares Fake News*, SCI. AM. (Nov. 12, 2021), <https://www.scientificamerican.com/article/personality-type-as-well-as-politics-predicts-who-shares-fake-news/> [<https://perma.cc/7KWN-LQDY>].

²⁸¹ Cody Schmidt, *One's Tendency to Share Fake News Is Influenced by Their Personality, New Fuqua Study Suggests*, DUKE CHRON. (Nov. 18, 2021), <https://www.dukechronicle.com/article/2021/11/fake-news-conservatives-liberals-fuqua-school-of-business-study-research-conscientiousness-media> [<https://perma.cc/4Y5L-M9GJ>] (quoting Hemant Kakkar).

despair are greatest in rural communities where local news has disproportionately shuttered, people are prone to finding fake news—intended to enrage, polarize, and scare—on social media platforms designed to overwhelm. The human brain is almost hardwired to seek out, believe, and espouse misinformation within a news desert. But it is also true, as explained next, that misinformation can promote a person's welfare and thus spread as a rational act.

2. The Rationality of Misinformation

Embracing misinformation is not irrational when one is able to maximize their welfare such as making friends, remedying loneliness, or experiencing intimacy. For instance, conceding that the Earth is round might only generate a nominal utility; after all, whether the earth is actually spherical would seldom change how most people approach their day-to-day lives. But believing in a flat earth may enable people to join a community dedicated to the falsehood. It can also provide a sense of purpose, encouraging individuals to believe they are truth seekers. And as already explained, believing a conspiracy theory may alleviate anxiety and gratify people driven by chaos. The value of espousing a bogus theory can thus make the act rational as well as survive in equilibrium.

To show the potential rationality of misinformation, a group travelled to Dallas, Texas to witness the resurrection of John F. Kennedy Jr. (JFK Jr.)—who died via plane crash in 1999—with the expectation that he would assume the office of Vice President upon returning to life.²⁸² About a thousand people settled in Dealey Plaza (where President Kennedy was assassinated) on several occasions to witness JFK Jr.'s return and, each time, left disappointed—only to remain dedicated to the movement.²⁸³ To explain this group's durability, one leader urged followers to keep their faith by reminding them of their prior isolation.²⁸⁴ She remarked that they “were home alone feeling lonely . . . They had nobody there. We've heard these stories for months about people, people feeling alone, having nobody they can talk to. And now you have, what, 1,000 people in Dallas?”²⁸⁵ Another adherent expressed:

What drew me . . . was an opportunity to be with like-minded people, because everybody's story in this movement is that we've lost friends . . . We've lost family, we've lost credibility, we've been isolated,

²⁸² Meryl Kornfield, *Why Hundreds of QAnon Supporters Showed Up in Dallas, Expecting JFK Jr.'s Return*, WASH. POST (Nov. 2, 2021), <https://www.washingtonpost.com/nation/2021/11/02/qanon-jfk-jr-dallas/> [<https://perma.cc/TZ5E-CNZL>].

²⁸³ *Id.*

²⁸⁴ Will Sommer, *QAnon Crowd Super Bummed That JFK Jr. Did not Appear in Dallas*, DAILY BEAST (Nov. 2, 2021), <https://www.thedailybeast.com/qanon-crowd-super-bummed-that-jfk-jr-did-not-appear-in-dallas> [<https://perma.cc/PWB7-TL55>].

²⁸⁵ *Id.*

we've been lonely, and we've been called lots of different names, "crazy" among them. And so there was this opportunity suddenly to gather with like-minded people and that was what I wanted to do.²⁸⁶

Based on these and similar statements, notice that the belief in a falsehood might generate a small cost yet create a much greater benefit by allowing adherents to find communities, friendship, and intimacy. Here, misinformation's espousal can become a rational behavior.

When the movement's leader—Michael Protzman who was known as "Negative 48"—died in a dirt bike accident in 2023, many followers became convinced that his demise constituted part of "the plan."²⁸⁷ One member exclaimed that "the person who died was in fact just one version of Michael Protzman, 'the evil version' and that the good Michael Protzman—who is in fact JFK Jr. in a mask—is still alive and well."²⁸⁸ The point is that people embraced facially absurd theories, in many instances, driven by a desire for community.

Such instances are hardly an anomaly; numerous groups espousing misinformation persist in the face of accurate information. Consider the popularity of flat earth theories. As one follower explained, he struggled socially until becoming a believer. The community allowed him to connect with others—and find people to date—bonded by their faith.²⁸⁹ There is even a dating app for Flat Earthers to solidify this movement.²⁹⁰ As a Flat Earther explained upon being asked whether she's lonely, "Of course . . . That's why it's so important to keep contact with the people that feel the same."²⁹¹ If a love-starved adherent finds a match, their belief in a debunked theory might rationally create more utility than costs.

In short, misinformation can persist for reasons beyond intelligence or gullibility. Two findings are that (1) people may irrationally consume information, and (2) individuals might rationally prefer misinformation because it maximizes their welfare more than truthful content. And in both circumstances, people become increasingly likely to espouse misinformation when they live in a news desert or otherwise lack access to legitimate information. Recall, though, that antitrust law assumes that people will typically demand high-quality information

²⁸⁶ David Gilbert, *Inside the QAnon Cult That Believes JFK Is About to Return*, VICE (Nov. 12, 2021), <https://www.vice.com/en/article/m7vaw4/qanon-jfk-dallas-protzman> [https://perma.cc/ZU7T-5DBZ].

²⁸⁷ David Gilbert, *The Leader of the JFK-QAnon Cult Is Dead. His Followers Think It's All Part of the Plan.*, VICE (July 6, 2023), <https://www.vice.com/en/article/88x8b4/michael-protzman-negative-48-jfk-qanon-dead> [https://perma.cc/GCR2-THV2].

²⁸⁸ *Id.*

²⁸⁹ Jones, *supra* note 45.

²⁹⁰ *Id.*

²⁹¹ *Id.*

and thus, negate any need for enforcement. As such, antitrust must evolve its approach, as explained next.

B. The Ideal Role of Truthful Information in Markets

This Section proposes how antitrust should remedy misinformation as a market failure caused by anticompetitive behavior.²⁹² Such an approach would not redress all forms of errant speech—after all, it’s necessary for society to engage in robust debate about what’s true—but would instead seek an acceptable level whereby uncompetitive markets are less able to spawn misinformation. Doing so would, in fact, better align antitrust with free speech principles.

The research has so far shown that concentrated markets mixed with social isolation enable false narratives to proliferate. For one, people are prone to curated misinformation on TikTok and Facebook in communities where local news has shuttered.²⁹³ When adding the potential of friendship and intimacy,²⁹⁴ it portends how smart and rational persons can grow radicalized through conspiracies.²⁹⁵ Per the American Psychological Association, an “[e]cho chamber[]” of misinformation has bound communities.²⁹⁶ And since “opportunistic” actors such as pink slime journalists profit from filling informational voids with misinformation²⁹⁷—namely, content that engages, shocks, and angers—it explains today’s level of polarization.²⁹⁸ As individuals feel overwhelmed by misinfor-

²⁹² See *infra* notes 293–330 and accompanying text (providing a framework for how antitrust may remedy misinformation as a market failure).

²⁹³ See *supra* notes 107–164 and accompanying text (explaining the impact of online misinformation on news deserts); see also Michelle Geering, *How Researchers Are Analyzing Misinformation*, SEEK RSCH. MAG. (2021), <https://www.k-state.edu/seek/fall-2021/how-researchers-analyze-misinformation/> [<https://perma.cc/H639-T8V5>] (describing the temptation to receive one’s news from low-quality online sources when living in a news desert).

²⁹⁴ See ARDIA ET AL., *supra* note 43, at 18 (“The absence of these infrastructures can leave a gap consuming misinformation”).

²⁹⁵ Margaret Sullivan, *Every Week, Two More Newspapers Close—and ‘News Deserts’ Grow Larger*, WASH. POST (June 29, 2022), https://www.washingtonpost.com/media/2022/06/29/news-deserts-newspapers-democracy/?_pml=1 [<https://perma.cc/LJ9T-XJF2>].

²⁹⁶ *How and Why Does Misinformation Spread?*, AM. PSYCH. ASS’N (Nov. 29, 2023), <https://www.apa.org/topics/journalism-facts/how-why-misinformation-spreads> [<https://perma.cc/68VG-RAS7>].

²⁹⁷ See ARDIA ET AL., *supra* note 43, at 18 (“The absence of these infrastructures can leave a gap filled by opportunistic actors. A 2020 report from Napoli reveals the growth of partisan media outlets ‘masquerading’ as local news sources. The report identifies more than 400 partisan media outlets mostly owned and operated by a handful of conservative-leaning corporations or individuals. More than half of the sites identified in the report focus on local or hyperlocal communities, filling the space left behind by the disappearance of dedicated local news sources. Napoli is skeptical that these ‘local’ sites are actually operating within their purported communities, noting that one of the outlet owners was previously caught using content produced by Filipino writers under fake bylines.”).

²⁹⁸ Joshua P. Darr, Matthew P. Hitt & Johanna L. Dunaway, *Newspaper Closures Polarize Voting Behavior*, 68 J. COMM’N 1007, 1009 (2018); Mekela Panditharatne, *How ‘News Deserts’ Amplify Misinformation and Could Impact Midterm Elections*, COMMON DREAMS (Nov. 2, 2022), <https://>

mation, they tend to grow less resistant and more indoctrinated.²⁹⁹ Evidencing this dynamic is the rate of misinformation pumped into electoral battlegrounds that lack local newspapers.³⁰⁰ Or Myanmar's ethnic cleansing where people were only able to receive news via Facebook due to an informational bottleneck.³⁰¹ Misinformation can also help to alleviate loneliness and isolation, especially in rural areas where people pine for human connections.³⁰² Misinformation is, in essence, a plague of concentrated markets.

An ideal doctrine to promote accurate information is antitrust, which governs market structures rather than forbidding actors from saying untruthful things. This is critical because the First Amendment bars government from censoring speakers or forcing them to utter truthful statements.³⁰³ Recall *Miami Herald Publishing Co. v. Tornillo* in which the First Amendment prevented the government from forcing newspapers to print certain content, even when a monopoly would likely impede the truth.³⁰⁴ Practically speaking, laws and groups designed to squelch fake news will almost inherently engender mistrust and fail.³⁰⁵ Although the government cannot compel people to speak the truth in a news desert, antitrust may attack the monopoly.

Antitrust must thus ditch its judge-made rule about lies existing in a self-correcting marketplace of ideas. While enforcers and courts are correct that competition isn't typically friendly,³⁰⁶ this assumption underestimates misinfor-

www.commondreams.org/views/2022/11/02/how-news-deserts-amplify-misinformation-and-could-impact-midterm-elections [https://perma.cc/EHF9-UPNP].

²⁹⁹ See *supra* notes 261–266 and accompanying text (describing the role of anxiety in spreading misinformation).

³⁰⁰ Mekela Panditharatne, 'News Deserts' Could Impact Midterm Elections, BRENNAN CTR. FOR JUST. (Oct. 31, 2022), <https://www.brennancenter.org/our-work/analysis-opinion/news-deserts-could-impact-midterm-elections> [https://perma.cc/X3S7-JBP9] ("The consequences of the decline of local newspapers are particularly stark for voters in battleground states, including Arizona, Florida, Georgia, Michigan, Minnesota, New Hampshire, Nevada, North Carolina, Pennsylvania, Texas, and Wisconsin. Several battleground states saw the most viral misinformation about voting by mail ahead of the 2020 election, according to research by media insights company Signal Labs.").

³⁰¹ See *supra* notes 115–119 and accompanying text (describing misinformation in the Myanmar genocide).

³⁰² See, e.g., Nikki Usher, *Delegitimizing Rural Public Health Departments: How Decaying Local News Ecologies, Misinformation, and Radicalization Undermine Community Storytelling Networks*, 707 ANNALS AM. ACAD. POL. & SOC. SCI. 90, 92 (2023) ("My research finds that the perfect storm of frayed rural economies, disintegrating local news media, rising distrust in social institutions, and platform-enabled misinformation undermines the ability of the storytelling network to provide science-based health information to residents.").

³⁰³ See *supra* notes 64–91 and accompanying text (explaining the jurisprudence of the First Amendment).

³⁰⁴ 418 U.S. 241, 258 (1974).

³⁰⁵ Ben Sperry, *Knowledge and Decisions in the Information Age: The Law & Economic Misinformation on Social Media*, 59 GONZ. L. REV. 319, 321 (2024) (discussing the failure of plans by the U.S. Department of Homeland Security to institute a "Disinformation Governance Board," which was described as fatally "Orwellian").

³⁰⁶ *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 399 (7th Cir. 1989).

mation's capacity to prevail in an equilibrium. As this Article shows, it is common for people in concentrated markets to prefer low-quality information for irrational and rational reasons.³⁰⁷ A company espousing misinformation can even reap a competitive edge.³⁰⁸ As such, antitrust courts must revisit their stance that misinformation is neither an exclusionary act nor effect due to the presumed harmlessness of each. Since antitrust redresses market failures, the solution involves remedying scenarios in which elevated misinformation, caused by insufficient competition, cannot self-correct. This would involve antitrust's ordinary way of assessing conduct—the rule of reason—in which courts ask if an act's anticompetitive effects are justified by efficiencies.³⁰⁹ Such a proposal would not review all instances of misinformation but instead inquire into whether competition cannot emerge due to artificial barriers to entry and, as a result, promote a suboptimal level of misinformation.

Take Meta, which had previously encouraged third parties to place their content on its platform by directing interested users to outside websites.³¹⁰ But then Facebook slowed down the process by which users could navigate to a third party while speeding up its news browser, “Facebook Instant Articles,” as a way of capturing ad dollars.³¹¹ The issue is two-fold: third-parties cannot leave Facebook due to its dominance, and Facebook wields the singular power to promote engaging false stories.³¹² Per one report: “because [a] *New York Times* article is not incendiary or outrageous, it may not lead to 100,000 ‘likes’ on Facebook. With less engagement, Facebook will not make as much money from the *New York Times* article as it would from the article claiming the Pope had endorsed Donald Trump, and hence its algorithm will give the *New York Times* article lower priority.”³¹³ That is, Facebook excluded competition over ad dollars in a manner that increased the rate of misinformation. The suppression of competition that results in heightened misinformation should thus fit within antitrust's scope; after all, this market is unlikely to self-correct as the enterprise assumes.

Another area involves mergers: enforcers should ask if an acquisition would lessen competition in a way that consolidates power over information—

³⁰⁷ See *supra* notes 240–291 and accompanying text (outlining rational and irrational reasons why individuals may choose to consume misinformation).

³⁰⁸ See *supra* notes 184–193 and accompanying text.

³⁰⁹ See Gregory Day, *Anticompetitive Healthcare*, 101 WASH. U. L. REV. 1539, 1564–65 (2024) (“But since antitrust presumes that defendants are typically driven by efficiency, most conduct receives scrutiny under the rule of reason, which searches for an act's efficiencies despite its anticompetitive effects. The rule of reason avoids type I errors by generally assuming that conduct is *procompetitive*.” (footnotes omitted)).

³¹⁰ Sally Hubbard, *Fake News Is a Real Antitrust Problem*, COMPETITION POL'Y INT'L 3–4 (2017), <https://www.competitionpolicyinternational.com/wp-content/uploads/2017/12/CPI-Hubbard.pdf> [<https://perma.cc/34Z6-Y4K7>].

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

no matter if it is a platform, newspaper, or audio server. One example comes from Sinclair which used mergers to generate an unprecedented sum of power to disperse misinformation over local airwaves.³¹⁴ Put differently, enforcers must question whether a merger would vest a singular actor with an outsized power over the nature and flow of (mis)information.

Alternatively, antitrust courts should allow lawsuits based on misinformation. As we have seen, the act of spreading false content can muddy markets in the same way as concealing information—in both scenarios, a market failure may result that diminishes competition and erodes consumer welfare. While platforms like Apple, Amazon, and Facebook have received most of the attention for their power over information, this dynamic extends to others: the three biggest makers of football helmets—which control ninety percent of the market—were accused of lying to malign the maker of a “safety clip” to discourage consumers from purchasing it.³¹⁵ Since one organization sets safety standards for football helmets, the lawsuit asserted that the ploy influenced the organization to keep the rival device out of schools.³¹⁶ Here, misinformation was anticompetitive.

A helpful way of thinking about how misinformation may help antitrust to evolve for the modern economy involves scarcity. Antitrust has long focused on optimizing the output of scarce goods, but it has rejected assessing the quality of speech, expression, or information in a market; in this sense, enforcement was more concerned about the output and prices of physical newspapers than the content inside of them. But as information becomes non-scarce and traded without prices, antitrust must adapt by promoting competitive market structures that would better help consumers to demand accurate content and incentivize firms to supply it. Here, information is now the product rather than its carrier.

To operationalize this proposal, the fact-finding function of a jury could determine whether a line of speech is not only false but suppressed competition. Far from a radical proposal, it is currently the job of juries to assess speech’s falsity in other areas of law like defamation—antitrust juries could do the same. This approach would actually synchronize antitrust law with the First Amendment, as both doctrines are sometimes said to remedy market failures. But currently, antitrust adheres to an absolutist view of the marketplace of ideas which goes beyond the First Amendment.

Indeed, antitrust has almost entirely refused to assess whether a lie constitutes an anticompetitive act or effect, whereas the First Amendment allows some

³¹⁴ See *supra* notes 150–158 and accompanying text (describing a tactic of Sinclair).

³¹⁵ *Hobart-Mayfield, Inc. v. Nat’l Operating Comm. on Standards for Athletic Equip.*, 48 F.4th 656, 661–62 (6th Cir. 2022).

³¹⁶ *Id.*

laws to punish lies.³¹⁷ Consider doctrines such as defamation, perjury, and fraud that assume too much harm would result if untruthful speech was left unabated.³¹⁸ It is also the case that disclosure laws in securities, real estate, and more fit the description of compelled speech yet pass constitutional muster since informational asymmetries would block truthful content from prevailing; here, buyers operate under an informational deficit *vis a vis* sellers, justifying laws designed to counteract informational market failures.³¹⁹ For this reason, the First Amendment disfavors restrictions on speech unless a market failure would impose too great of a cost. Notably, antitrust is supposed to follow this framework (in other words, only when conduct would bar rivals from arising and correcting an inefficiency like low quality may antitrust typically intervene).³²⁰ Antitrust should thus approach misinformation as a market failure with the same lens as the First Amendment.³²¹

Reasonable minds can contest the above approach, especially if it seems like a *de facto* way of regulating content. There are, indeed, great reasons why government must avoid dictating what private actors say—even if it’s false. It is also worth asking whether antitrust provides the correct vehicle. Recall that a longstanding issue was that antitrust sought to regulate political and social problems, which caused antitrust to harm competition.³²² Focusing antitrust on only economic goals provided the solution.³²³ The question, then, is whether governing markets of information would improvidently expand antitrust’s scope to meddle into social issues like speech, akin to the pre-consumer welfare era. All these concerns contain merit. That said, the rise of information as economic activity suggests that antitrust must adapt to modern concerns—misinformation being one of them. And the proposal is quite limited, governing only scenarios where an informational bottleneck would likely result and thus harm the market. In other words, this Article proposes governing market structures—as antitrust is meant to do—rather than speech.

³¹⁷ See *supra* notes 64–91 and accompanying text (explaining the limitations of First Amendment protections).

³¹⁸ See *infra* notes 333–339 and accompanying text.

³¹⁹ See Kevin S. Haeberle, *Information Asymmetry and the Protection of Ordinary Investors*, 53 U.C. DAVIS. L. REV. 145, 182 (2019).

³²⁰ See *Verizon Commc’ns Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (explaining that the market is generally expected to self-correct); *Aerotec Int’l, Inc. v. Honeywell Int’l, Inc.*, 4 F. Supp. 3d 1123, 1137 (D. Ariz. 2014) (“The purpose of antitrust law is not to protect market participants from the market; it is to protect the public from market failure.”), *aff’d*, 836 F.3d 1171 (9th Cir. 2016).

³²¹ Bennett Capers & Gregory Day, *Race-ing Antitrust*, 121 MICH. L. REV. 523, 539 (2023) (“The reason why Congress codified such broad language, according to the Court, was so that future courts could define the Sherman Act’s scope based on the common law of competition. However, this landscape spawned confusion, lack of predictability, and, important to this story, an antitrust revolution led by economists.” (footnotes omitted)).

³²² See *supra* notes 184–193 and accompanying text.

³²³ See *supra* notes 184–193 and accompanying text.

In fact, even though antitrust has long ignored speech and misinformation, this landscape is perhaps changing. Given the dominance of platforms and decline of journalism, fears have surfaced about the unprecedented capacity of private firms to moderate, suppress, and alter information.³²⁴ This has even begun to drive a reevaluation of antitrust's approach. As noted in the Introduction, the White House,³²⁵ Congressional committees,³²⁶ academic conferences,³²⁷ and recent lawsuits³²⁸ have started to argue that antitrust should foster competition among platforms, speakers, and information. Part of this movement has notably involved the boom of misinformation.³²⁹ Although the marketplace of ideas and misinformation were long thought to exist outside of antitrust's scope,³³⁰ recent events have primed this framework to change. The first step concerns examining the presumption that rational actors should naturally prefer accurate content and thus negate any role for antitrust.

The point is that antitrust should inquire into whether exclusionary conduct, merger, or monopoly is likely to generate a market failure of information. Contrary to antitrust's faith in the marketplace of ideas, Section A traced the places in which markets are unlikely to self-correct for untruthful content. This would harmonize antitrust's treatment of misinformation with information—a particularly salient goal due to the emergence of information in economic production and antitrust enforcement. It would also reject an absolutist view of the marketplace of ideas that even the First Amendment rejects. There are additional implications of this Article's proposal, discussed next.

C. Implications

This Section briefly (1) discusses the future of antitrust, given its struggles to adapt to the rise of information markets³³¹ and (2) revisits the First Amendment's approach.³³²

³²⁴ See *supra* notes 51–53 and accompanying text (describing the problematic incentives of market power and misinformation).

³²⁵ See *supra* notes 51–53 and accompanying text.

³²⁶ See *supra* notes 51–53 and accompanying text.

³²⁷ 2025 Antitrust and Competition Conference—*Economic Concentration and the Marketplace of Ideas*, UNIV. CHI. BOOTH SCH. BUS. (Apr. 10–11, 2025), <https://www.chicagobooth.edu/research/stigler/events/2025-antitrust> [<https://perma.cc/DB52-XTM2>].

³²⁸ Complaint at 1–6, *X Corp. v. World Fed'n of Advertisers*, No. 7:24-cv-00114-O (N.D. Tex. Aug. 6, 2024).

³²⁹ See Katrina vanden Heuvel, *News Deserts Are a Civic Crisis*, WASH. POST (July 19, 2022), <https://www.washingtonpost.com/opinions/2022/07/19/save-local-news-democracy/> [<https://perma.cc/LJ2N-2K GK>] (arguing for an increase of antitrust enforcement due, in part, to a rise of misinformation).

³³⁰ See *infra* notes 184–236 and accompanying text.

³³¹ See *infra* notes 333–339 and accompanying text.

³³² See *infra* notes 340–344 and accompanying text.

1. Antitrust's Purpose

It is important to discuss how the rise of misinformation implicates core issues of antitrust such as its purpose. There was a time when antitrust could remedy most harms caused by monopoly power, which led to populist, unpredictable, and unwieldy enforcement.³³³ This catalyzed a revolution in the 1970s where, today, enforcement may only review economic acts and injuries.³³⁴ The founders of this movement, “the Chicago School,” grounded their theory in a mix of historical authorities (i.e., the Sherman Act’s legislative record) and textual sources (i.e., the Sherman Act governs “trade” and “commerce”).³³⁵ As Robert Bork of the Chicago School said, and as has been repeated many times, antitrust’s trajectory depends on determining its goals.³³⁶

And this landscape has created more confusion in the digital era. When Facebook, Google, and others offered “free” services, it was initially the position of Robert Bork and other scholars that a company cannot violate antitrust law because “free” services do not qualify as trade or commerce.³³⁷ But then a consensus formed that “free” digital services are best described as “zero-priced” since people exchange attention and data instead of dollars.³³⁸ That is, it wasn’t initially clear whether, or how, digital commodities fit into antitrust’s framework until enforcers sued Facebook and Google.

The rise of misinformation furthers this debate. While courts, scholars, and enforcers are now unified over whether zero-prices implicate antitrust law, courts have ruled several times that the marketplace of ideas is not sufficiently economic for review.³³⁹ And this stance perhaps made sense until companies like Apple,

³³³ See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962) (“But we cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.”).

³³⁴ See Harry First, *Bork and Microsoft: Why Bork Was Right and What We Learn About Judging Exclusionary Behavior*, 79 ANTITRUST L.J. 1017, 1017 (2014) (discussing Bork’s impact on antitrust law as an economic doctrine).

³³⁵ Day, *supra* note 69, at 1330 (“From a textual standpoint, the Sherman Act is limited to condemning practices that harm ‘trade’ or ‘commerce,’ as section 1 of the Sherman Act bans ‘[e]very contract, combination in the form of trust or otherwise . . . in restraint of trade or commerce’” (alteration in original) (emphasis omitted) (quoting 15 U.S.C. § 1 (2018))).

³³⁶ See, e.g., Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 836 (2014) (discussing Judge Bork’s research on antitrust’s goals and its long-lasting impact).

³³⁷ Robert H. Bork, Opinion, *Antitrust and Google*, CHI. TRIB. (Dec. 24, 2012), [https://www.chicagotribune.com/2012/04/06/antitrust-and-google-2/\[https://perma.cc/C9PB-G5MD\]](https://www.chicagotribune.com/2012/04/06/antitrust-and-google-2/[https://perma.cc/C9PB-G5MD]) (“Regulators may attempt to develop . . . antitrust complaints against the search engines but they are unsupported. There is no coherent case for monopolization because a search engine, like Google, is free to consumers”).

³³⁸ Newman, *supra* note 2, at 165–74 (discussing why zero-price goods fit into antitrust’s scope).

³³⁹ See *supra* note 230 and accompanying text.

Amazon, Google, and Facebook innovated ways of suppressing competition by altering the market's flow of information. This has created, as already discussed, a paradoxical landscape in which the suppression of information is anticompetitive but not the spreading of misinformation—despite the similarities between the two forms of conduct. At the core of this mismatch are questions about which acts fit into antitrust's purview as economic behavior; while antitrust courts have resisted scrutinizing speech, this Article finds litanies of ways in which misinformation is the logical and economic consequence of concentrated markets. Misinformation is, indeed, the response of economic incentives based on market power that erodes consumer welfare. For this reason, antitrust must continue to assess its scope and purpose. Other doctrines must also assess their relationship to the marketplace of ideas.

2. The First Amendment

It is worth discussing in greater detail that antitrust has adopted a broader scope of the marketplace of ideas than free speech. First off, Justice Holmes was a social Darwinist.³⁴⁰ His belief was that power and strength can cause ideas to prevail but those ideas would not necessarily entail the truth.³⁴¹ For the “proletariat” to advocate a stance, Justice Holmes felt that their best odds laid with a fairly unregulated marketplace of ideas.³⁴² That is, the truth would not necessarily prevail, but lower classes could best effectuate their ideas via a greater scope of free speech; his use of the term “marketplace” referred more to a social than economic venue.³⁴³ According to Holmes, the government should only lawfully punish speech when it poses an immediate threat.³⁴⁴

As such, antitrust currently enforces a more expansive version of the marketplace of ideas than free speech. Not only have free speech courts given commercial speech a modest level of protection, but they also refused to give constitutional cover to types of untruthful content like defamation and perjury. Yet, antitrust refuses to scrutinize the anticompetitive components of misinformation due to an unflinching belief in markets. This mismatch shouldn't come as a surprise, given antitrust's faith in microeconomics as enforcement's lodestar. The effect, though, is that antitrust has adopted a more formidable view of the marketplace of ideas than even free speech's caselaw.

³⁴⁰ Seth Vannatta, *Justice Holmes, the Social Darwinist*, 14 PLURALIST 78, 78–79 (2019).

³⁴¹ Alexander Tsesis, *Deliberate Democracy, Truth, and Holmesian Social Darwinism*, 72 S.M.U. L. REV. 495, 497–98 (2019).

³⁴² *Id.*

³⁴³ *Id.* at 498–99.

³⁴⁴ *Id.* at 497–98.

CONCLUSION

There is a recognition that information is critical to the health of modern markets—in fact, information has increasingly become the product itself. The issue, however, is that information markets have grown concentrated, enabling a few firms to decide which types of information may be widely available. Hardly a “bad thing” by itself, it is often the case that moderation or even censorship limits the rising tide of misinformation. This has generated a societal conundrum about whether or when dominant corporations should—given their market power—alter the flow of (mis)information. In many instances, platforms have trumpeted the virtues of free speech, though such a stance may also seem like a self-serving way of garnering users and engagement. In other words, can private markets reasonably be expected to reveal the truth in light of both declining competition as well as the misinformation phenomenon?

Curiously, antitrust scrutinizes the act of suppressing information as anti-competitive but allows firms to spread misinformation. The justification lies in the marketplace of ideas where the maximization of ideas and speech should naturally promote competition regardless of the truthfulness of information. For this reason, misinformation has been described as competitive and harmless because firms could expose their rivals with accurate information. Antitrust courts, scholars, and enforcers have thus rejected this type of claim even though misinformation seems to emanate from concentrated markets.

That said, the marketplace of ideas assumes that an adequate level of competition exists. Just like other facets of the economy in which monopolies wield power, the orthodox view assumes that no monopoly may act as a chokepoint of information. This Article argues that antitrust should intervene where the First Amendment cannot by scrutinizing whether misinformation constitutes an anti-competitive act or effect. A driving reason is that antitrust’s presumption of self-correcting markets has proven inaccurate. Cognitive biases, heuristics, and conditions lead people—irrationally and rationally—to prefer, demand, and consume misinformation when living in informational vacuums, news deserts, and otherwise isolated areas. In fact, monopolists like dominant platforms encounter incentives to flood users’ feeds with misinformation in order to shock, comfort, and grab attention. For this reason, antitrust must dispel its presumption of self-correcting markets and instead address the rise of misinformation from concentrated markets.

