PRIVACY AND ANTITRUST: UNDERPANTS GNOMES, THE FIRST AMENDMENT, AND SUBJECTIVITY

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PRIVACY AND ANTITRUST: UNDERPANTS GNOMES, THE FIRST AMENDMENT, AND SUBJECTIVITY

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INTRODUCTION

Privacy has begun to creep into antitrust discussions. In some ways, this should not be surprising. Some of the largest and most ubiquitous companies, like Google and Facebook, give away their services in return for consumer data.[1] If information about ourselves really is the price we pay for content, why shouldn't antitrust limit companies' ability to collect and analyze consumer data?

Although this logic has some facial appeal, this paper identifies three major concerns with the inclusion of privacy[2] in antitrust analysis. The first concern is conceptual. The analogy between privacy and quality begins to break down once we recognize that unlike selecting lower quality levels to enjoy lower costs, firms invest in collecting and analyzing data to improve content and to enhance matching between sellers and consumers, who have heterogeneous tastes for privacy. The second concern goes to fundamental rights to speak. An antitrust rule that limits firms' ability to collect and analyze consumer data is likely to trigger some form of First Amendment scrutiny. Third, allowing antitrust enforcers to consider privacy would inject an undesirable level of subjectivity into antitrust enforcement decisions, which is likely to attract socially wasteful rent seeking expenditures and to deter beneficial data collection efforts.

This brief essay is not intended to provide a definitive answer to the proper role of privacy in antitrust analysis, but rather to identify and begin grappling with some of the important issues that to date have been ignored. These preliminary observations, nonetheless, cast serious doubt on the ability of antitrust to accommodate privacy considerations.

This paper proceeds in two parts. Part I explores the calls to incorporate privacy within antitrust analysis. Part II, the heart of the article,

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[1] *See, e.g.*, Saul Hansell, *Does Being Free Cheapen Google's Brand?*, N.Y. TIMES BITS (July 8, 2009, 1:29PM), http://bits.blogs.nytimes.com/2009/07/08/does-being-free-cheapen-googles-brand/; David Zax, *Is Personal Data the New Currency?*, MIT TECH. REV. (Nov. 30, 2011), http://www.technologyreview.com/view/426235/is-personal-data-the-new-currency/.

[2] This article concerns privacy, which broadly involves the observation and analysis of consumer behavior. For the purposes of this article, privacy is distinct from data security, which involves the protection of consumer data once it has been collected.

explores three serious considerations that call into question the wisdom of incorporating privacy into antitrust analysis, and is followed by a brief conclusion.

I. INCORPORATING PRIVACY INTO ANTITRUST

We live in a world where a large portion of online content is free. We do not pay to search on Google or Bing, post our photos on Facebook or MySpace, or read the latest news on CNN.com or Foxnews.com. Apps like Angry Birds are available for free in Apple's and Google's app stores. Why does everyone give away things online? The answer, in some ways, is that they do not. These businesses ("publishers") monetize the content they provide for free by selling access to our attention. By collecting more data about their users, publishers can improve their products and target ads more precisely to the consumers who are most likely to respond. Do more searches on Google, and Google learns more about you. Combine your search data with what Google knows from your Gmail and other interactions with Google properties, as well as reports from tracking cookies placed by its display advertising network, and Google has a pretty good idea of what you like.[3] Google can use this information to provide you with better search and map results, as well as more relevant ads, both of which will help Google's bottom line. First, better content makes for a more attractive product, encouraging greater use of Google's services, increasing both ad revenue and Google's database of consumer information.[4] Second, the expansion of Google's database also allows Google to earn more revenue by facilitating targeted ads that are more likely to elicit consumer responses.[5]

So in some regard, nothing is free online–we pay by revealing data that provides a picture of our likes and dislikes. As the already-tired cliché goes, "data is the new currency."[6] If this is the case, then collecting

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[3] *See, e.g.*, Quentin Hardy, *Rethinking Privacy in an Era of Big Data*, N.Y. TIMES BITS (June 4, 2012, 9:55 PM), http://bits.blogs.nytimes.com/2012/06/04/rethinking-privacy-in-an-era-of-big-data/.

[4] *See, e.g.*, HOWARD BEALES, THE VALUE OF BEHAVIORAL TARGETING 1-2 (2010), *available at* http://www.networkadvertising.org/pdfs/Beales_NAI_Study.pdf.

[5] *See, e.g.*, *Id.*

[6] Marjorie Censer, *Six People to Watch: Helping Government Agencies Use Big Data*, WASH. POST, (Jun. 17, 2012), http://articles.washingtonpost.com/2012-06-17/business/35462866_1_big-data-data-companies-cell-phones ("Data is the new currency."); Steve Lohr, *The Age of Big Data*, N.Y. TIMES, (Feb. 11, 2012),http://www.nytimes.com/2012/02/12/sunday-review/big-datas-impact-in-the-world.html ("A report by the forum, 'Big Data, Big Impact,' declared data a new class of economic asset, like currency or gold."); Editorial, *New World of Data*, NAT. BUS. REV. (May 18, 2012) ("Data is the new currency of the cloud and companies that are able to maximize its value will thrive."); Somini Sengupta, *What You Didn't Post, Facebook May Still Know*, N.Y. TIMES, (Mar. 25, 2013), http://www.nytimes.com/2013/03/26/technology/facebook-expands-targeted-advertising-through-outside-data-sources.html ("data is the new currency of marketing"); Zax, *supra* note 3("Facebook owns your data, and is able to monetize that data spectacularly."); Dominic Basulto, *Is Social Profiling*

additional data, or more intensively mining existing data, is akin to charging a higher price, which may naturally bring to mind an antitrust problem.

The starting point for any discussion of privacy as an antitrust issue should begin with then-Commissioner Pamela Jones Harbour's dissent in the Federal Trade Commission's ("FTC") decision to clear the Google/DoubleClick merger. Although Commissioner Harbour's objections rested partly on traditional antitrust precepts concerning whether Google's and DoubleClick's advertising services should best be viewed as complements or substitutes, she also articulated a theory centered on privacy concerns.[7] She worried that the network effects from combining the parties' data would risk depriving consumers of meaningful privacy choices.[8] To remedy this problem, Commissioner Harbour suggested requiring a firewall between the Google and DoubleClick datasets for some period of time.[9] In a subsequent law review article Commissioner Harbour (with Tara Koslov) expanded on these arguments, suggesting that in a Sherman Section 2 context, antitrust enforcers should consider whether "achieving a dominant market position might change the firm's incentives to compete on privacy dimensions."[10] Harbour's article also suggests that antitrust should consider whether market dominance reduces incentives to innovate new technologies that would protect consumer privacy.[11] Most recently, Harbour again argued in a New York Times Op-Ed that the FTC should focus on Google's dominant role in collecting consumer data as it conducted its antitrust investigation into Google's search practices.[12]

Discrimination?, WASHINGTONPOST.COM, (May 3, 2012, 12:47 PM) http://www.washingtonpost.com/blogs/innovations/post/is-social-profiling-the-new-racism/2012/05/03/gIQAXQQDzT_blog.html ("Like it or not, data is the new currency that courses through the Internet."); R. Colin Johnson, *In a Smart-System World, Data's 'the New Currency'*, EETIMES.COM, (Nov. 7, 2011, 9:40 AM), http://eetimes.com/electronics-news/4230381/In-a-smart-system-world--data-s--the-new-currency- ("Data is the new currency"); Alex Pham, *CES 2013: The Sensors Will Be Watching You*, BILLBOARD.BIZ, (Jan. 7, 2013, 11:15 AM) http://www.billboard.com/biz/articles/news/1510489/ces-2013-the-sensors-will-be-watching-you ("In the age of algorithms, data is the new currency").

[7] Dissenting Statement of Chairman Harbour at 5, 9-12, In re Google/DoubleClick, No. 071-0170 (F.T.C. Dec. 20, 2007), *available at* http://www.ftc.gov/os/caselist/0710170/071220harbour.pdf.

[8] *Id.* at 9.

[9] *Id.* at 9 n.23.

[10] Pamela Jones Harbour & Tara Isa Koslov, *Section 2 in a Web 2.0 World: An Expanded Vision of Relevant Product Markets*, 76 ANTITRUST L.J. 769, 794 (2010).

[11] *Id.* at 794-95.

[12] *See* Pamela Jones Harbour, Op-Ed., *The Emperor of All Identities*, N.Y. TIMES (Dec. 19, 2012), http://www.nytimes.com/2012/12/19/opinion/why-google-has-too-much-power-over-your-private-life.html.

Other prominent observers have echoed similar themes.[13] Professor Peter Swire argued, for example, that the combination of "deep" and "broad" tracking resulting from the Google/DoubleClick merger would reduce the quality of the search product for consumers with "high privacy preferences."[14] According to Professor Swire, "this sort of quality reduction is a logical component of antitrust analysis . . . [A]ntitrust regulators should expect to assess this sort of quality reduction as part of their overall analysis of a merger or dominant firm behavior."[15] Professor Robert Lande has framed the issue in a subtly different manner, focusing on optimal levels of choice, not reductions in quality. For example, arguing in connection with the Microsoft/Yahoo! merger, Lande explains "consumers also want an optimal level of variety, innovation, quality, and other forms of nonprice competition. Including privacy protection."[16] Senator Al Franken, moreover, recently expressed concerns that Google and Facebook's dominance are expressed through lower levels of privacy available for consumers.[17]

Some have taken a more direct tack, arguing that because privacy is a fundamental value, antitrust should also consider how conduct *directly* impacts privacy. For example, in reaction to the Google/DoubleClick merger, a consortium of consumer advocacy groups petitioned the FTC to take direct account of privacy considerations in its review of the

[13] Other observers have made a related point that direct privacy regulation will have ameliorative effects on competition. Nathan Newman, for example, argues in conjunction with Google's decision to integrate data across Google sites, that regulatory restrictions on Google's ability to mine consumer data (such as, for example, requiring "opt-in" and the ability for consumers to choose the platforms on which they wish to share data) would limit the amount of "data controlled by Google" and hence make "more room for alternative companies to compete by accommodating those privacy concerns." Nathan Newman, *Solving the Google Privacy Problem Will Largely Solve the Google Antitrust Problem*, HUFFINGTON POST (Mar. 1, 2012), http://www.huffingtonpost.com/nathan-newman/solving-the-google-privac_b_1313380.html; *see also* Reynolds Holding, *Google's Antitrust Problem is All About Privacy*, SLATE.COM (June 7, 2012, 12:47 PM), http://www.slate.com/blogs/breakingviews/2012/06/07/google_s_antitrust_problem_is_all_about_privacy_.html (arguing that because Google's dominance stems from its access to personal data, limiting Google's ability to collect data "could give competition a useful jolt").

[14] *See* Peter P. Swire, Submitted Testimony to the Federal Trade Commission Behavioral Advertising Town Hall, at 5 (Oct. 18, 2007), *available at* http://ftc.gov/os/comments/behavioraladvertising/071018peterswire.pdf.

[15] *Id.* at 5-6.

[16] Robert H. Lande, *The Microsoft- Yahoo Merger: Yes, Privacy is an Antitrust Concern*, FTC: WATCH, Feb. 25, 2008 at 1.

[17] *See* Senator Al Franken, How Privacy has Become and Antitrust Issue, Speech at the American Bar Association Section of Antitrust Law Spring Meeting (Mar. 29, 2012) (transcript available at http://www.huffingtonpost.com/al-franken/how-privacy-has-become-an_b_1392580.html) ("When a company is able to establish a dominant market position, consumers lose meaningful choices. . . . The more dominant these companies become over the sectors in which they operate, the less incentive they have to respect your privacy.").

transaction.[18] They asserted that privacy was a "personal and fundamental right in the United States," which is affected adversely by the "collection, use, and dissemination of personal information."[19] After alleging that the transaction "will give one company access to more information about the Internet activities of consumers than any other company in the world," the groups asked the FTC to prevent the merging of Google's and DoubleClick's data, and to impose additional restrictions on data use and collection on the merged companies.[20]

The most recent attempt to inject privacy into antitrust appears in Commissioner Rosch's statement on closing the Google investigation, in which he cryptically hinted that Google's data collection practices might have antitrust implications.[21] Rosch explained that Google has a "monopoly or near-monopoly power in the search advertising market and this power is due in whole or in part to its power over searches generally," and then took Google to task for not revealing to consumers that its market position is due to the personal data it collects.[22]

The problem with contentions that antitrust laws should directly consider how conduct affects privacy, irrespective of competitive effects, can be addressed rather easily. Absent amendment of the antitrust laws or

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[18] *See* Complaint, In re Google & DoubleClick, Inc., No. 71-0170 (F.T.C. April 20, 2007), *available at* http://epic.org/privacy/ftc/google/epic_complaint.pdf. These arguments are akin to those made by some that antitrust involving media companies should consider not only the price that advertisers pay, but also how conduct affects such non-economic goals as "diversity of opinion." *See, e.g.*, Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 55 B.C. L. Rev. 551, 617 (2012); Maurice E. Stucke & Alan P. Grunes, *Antitrust and the Marketplace of Ideas*, , 69 ANTITRUST L.J. 249 (2001).

[19] Google & DoubleClick Complaint, *supra* note 18, at ¶ 7.

[20] *See id.* at ¶¶ 54, 56-59.

[21] Concurring and Dissenting Statement of Commissioner Rosch at 1 n.1, In re Google Inc., No. 111-0163 (F.T.C. Jan. 3, 2013), *available at* http://www.ftc.gov/os/2013/01/130103googlesearchroschstmt.pdf.

[22] *See id.*. It is unclear whether this alleged deception would form the basis of an antitrust or consumer protection claim, but the citations to *International Harvester* and *North American Phillips* strongly suggest the latter. *Id.* It is also unclear what remedy Commissioner Rosch had in mind, but it seems plausible that he would remedy Google's "half truths" by requiring it to disclose how it uses consumer information to improve its search product. In a post-decision interview, Commissioner Rosch elaborated on his cryptic footnote:

> Google has told consumers that everything it is doing in terms of gathering information about their shopping habits et cetera was for the benefit of consumers. In fact, that is wrong–that is a classic half-truth. Because everything they have done in that regard, in my judgment, was for the benefit of Google, and more specifically, in favour of Google search, over which they have monopoly power. And I think that is to some extent, in whole or in part, related to their position in respect to search. That's valuable to them, incredible valuable to them, to attract advertisers. I've always been in favor of making a claim based upon half-truths.

Ron Knox, *An Interview with Tom Rosch*, GLOBAL COMPETITION REV., Feb. 2013, at 51-52, *available at* http://www.globalcompetitionreview.com/features/article/32974/an-interview-tom-rosch/.

serious departure from stare decisis, courts are unlikely to accommodate privacy effects in an antitrust analysis. First, the Supreme Court has been clear that antitrust is about fostering competition on the assumption that "competition is the best method of allocating resources in a free market [because it] recognizes that all elements of a bargain–quality, service, safety, and durability–and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers."[23] In *National Society of Professional Engineers v. United States*[24] ("*NSPE*"), for example, a trade group of engineers had adopted an ethics policy prohibiting competitive bidding on the grounds that price competition would lower quality to unacceptable levels. The Supreme Court roundly rejected this as a justification in a rule of reason inquiry, explaining "the inquiry is confined to a consideration of impact on competitive conditions." [25] Clearly, then, *NSPE* stands for the proposition that anticompetitive conduct cannot be saved from antitrust condemnation even if it were to have an ameliorative impact in other non-competition dimensions. Although a plea to include privacy in antitrust analysis asks to condemn pro-competitive or benign conduct–rather than authorize anticompetitive conduct–based on privacy considerations, the result would be the same. Public policy concerns outside of competition are reserved for legislatures, not antitrust tribunals, to consider. Thus, antitrust has no solicitude for marketplace behavior that does not pose a threat to competition, irrespective of its effect on consumer privacy.[26]

Further, even if one were to accept the analogy between enhanced personal data collection and prices (or equivalently, lower quality) at face value, there is nothing in the antitrust laws to prevent a firm from unilaterally engaging in this conduct. Antitrust's longstanding aversion to price regulation means that a legal monopolist is free to charge whatever price the market will bear.[27]

This leaves the notion that firms will exercise illicit market power through reductions in privacy. This argument potentially has more purchase. For rather than attempting to import a non-competition goal into antitrust, it accepts antitrust's domain as being limited to competitive concerns, but smuggles privacy into the analysis by offering it as a *metric of competition*. Indeed, the Supreme Court was clear in *NSPE* that the Sherman Act's

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[23] Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 695 (1978).
[24] 435 U.S. 679 (1978).
[25] *Id.* at 690.
[26] *But see* Associated Press v. United States, 326 U.S. 1, 19-20 (1945) (suggesting that antitrust should consider how competition in media markets affects diversity of viewpoints).
[27] *See*Verizon Commc'ns Inc. v. Law Offices 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.").

competition prescription is intended not just to produce lower prices, but also favorably to affect quality.[28] So, the argument goes, if conduct leads to lower levels of privacy, isn't that the same as lower levels of quality, and therefore evidence of uncompetitive markets? I attempt to address this question in the next section.

II. CONSIDERATIONS

On its face the privacy-as-quality analogy is appealing. Upon closer inspection, however, the analogy breaks down. Further, even if we were to accept the privacy-as-quality analogy at face value, using antitrust to regulate the collection and use of personal data poses serious First Amendment issues and is likely to provide regulators and judges with an undesirable level of discretion to condemn practices under the antitrust laws.

A. *Underpants Gnomes*

The Underpants Gnomes of Southpark fame were on a mission to collect underpants from all the residents of Southpark ("Phase 1").[29] Why? The answer was clear: To Make Profit ("Phase 3").[30] When pressed on exactly how they would profit from stealing underpants ("Phase 2"), however, they had no answer.[31] They could not articulate a plausible nexus between their larceny and profits.[32] Online publishers and Underpants Gnomes share some similarities. They collect something intimate from you–your personal data–with the hopes of profiting. Unlike the Underpants Gnomes, however, publishers have a ready answer to the question: "What's Phase 2?" They are not merely sitting on mounds of personal data hoping that somehow it will lead to profits. Rather, publishers use that data to improve their content and to match buyers and sellers more effectively through targeted advertising.[33]

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[28] *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695.
[29] *South Park: Gnomes* (Comedy Central television broadcast Dec. 16, 1998), *available at* http://www.southparkstudios.com/full-episodes/s02e17-gnomes.
[30] *Id.*
[31] *Id.*
[32] The Power Point slide prepared by the Gnomes showed the following equation: "Underpants + ? = Profit." *Id.*
[33] *See*, *e.g.*, Beales, *supra* note **Error! Bookmark not defined.**, at 1.

Figure 1: Underpants Gnomes[34]

This is where the analogy between privacy and quality begins to break down. Consider the manufacturer that exercises market power by skimping on quality in order to pad profits. Why do profits increase when, for example, a cookie maker uses less sugar or inferior coco powder, or an automobile manufacturer uses low quality paint or electronics? *Ceteris paribus*, profits rise because inferior inputs tend to mean lower costs. In this manner, a reduction in quality with the price held constant is analogous to an increase in price.

Contrast this situation with an online publisher that decides to collect and mine additional consumer data. Distinct from the reduction in quality scenarios above, the online publisher does not profit automatically by reducing consumer privacy. Taking additional consumer data is not the same as skimping on quality, because collecting, storing, and analyzing data is an *additional* cost. For the publisher, improved data is an investment. The publisher hopes to enhance its revenue by using the additional data to improve the quality of its content and through selling more finely targeted ads.[35] Thus, reducing privacy would be an odd way to exercise market power.

Further, unlike a bland cookie or less durable car, consumers derive some benefits from the data they reveal, benefits that must be weighed against any privacy harms. First, it helps publishers improve their services

[34] *South Park: Gnomes*, *supra* note **Error! Bookmark not defined.**.
[35] Targeted ads command significantly higher rates than untargeted ads. *See*, *e.g.*, Beales, *supra* note 4, at 6-7; Avi Goldfarb & Catherine E. Tucker, *Privacy Regulation and Online Advertising*, 57 MGMT SCI. 57 , 68 (2011); *see also* Thomas M. Lenard & Paul H. Rubin, The FTC and Privacy: We Don't Need No Stinking Data!, ANTITRUST SOURCE, October 2012, *available at* http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/oct12_lenard_10_22f.authcheckdam.pdf.

through, for example, personalization of search results.[36] Second, the higher revenue streams from targeted ads allow publishers to provide higher quality platforms and content for the same price of $0.[37] Third, targeted ads generate more revenue only because they are more effective at matching buyers and sellers–and absent fraud or duress, a sale represents a value creating exchange of money for goods.[38] What's more, the value consumers place on these benefits and costs will vary throughout the population.[39] Some consumers may care little about being tracked online or having Google read their emails, and they may derive great utility from easier searching and highly relevant ads. On the other hand, there are others who may detest targeted ads and the "creepy" feeling from knowing that their search and browsing histories are stored on multiple servers. For these people, data collection may well be a net reduction in quality.

Once we take consumer heterogeneity into account, decisions by publishers to collect more data should be seen as choosing a position on a Hotelling line in a differentiated products setting, rather than as exercising market power. More concretely, consider a merger between publishers that does not raise any competitive concerns because they are small players in an unconcentrated market. Assume, however, that one publisher gives away content for free, but collects a great deal of information from its consumers in order to generate revenues from targeted ads. The second publisher also gives its content away, but because it collects no data it provides lower quality content and less relevant ads. The relative positions of publishers 1 and 2 are shown on the Hotelling line in Figure 2 as P1 and P2, respectively. Suppose that the merged company plans to collect data from customers at each site. That is, after the merger, both firms will be positioned near *A* on the Hotelling line.

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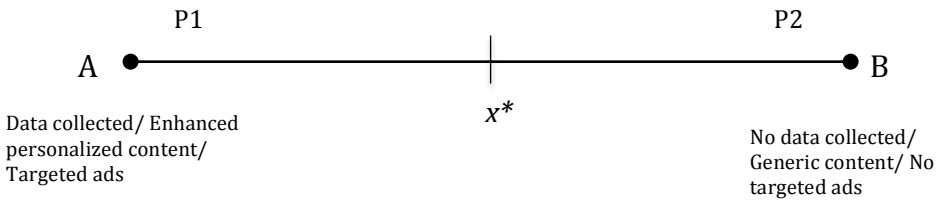
[36] *See, e.g.*, Lenard & Rubin, *supra* note 35, at 3.
[37] *See* Beales, supra note 4, at 3 (showing that publishers capture most of the revenue from targeted ads).
[38] *See Id.* at 1, 20.
[39] *See*, *e.g.*, Kai-Lung Hui & I.P.L. Png, *The Economics of Privacy*, *in* HANDBOOKS IN INFORMATION SYSTEMS, VOL. 1, ECONOMICS AND INFORMATIONAL SYSTEMS 489-92 (Andrew B. Whinston & Terrence Hendershott, eds., 2006) (reviewing the empirical literature and noting that "the key policy issue is not whether individuals value privacy. It is obvious that people value privacy. What is not known is *how* much people value privacy and the extent to which it varies."); *see also* Leslie K. John et al., *Strangers on a Plane: Context-Dependent Willingness to Divulge Sensitive Information*, 37 J. CONSUMER RES. 858 (2011); Alessandro Acquisti et al., *What is Privacy Worth?*, (Carnegie Mellon University Working Paper), *available at* http://www.heinz.cmu.edu/~acquisti/papers/acquisti-privacy-worth.pdf.

Figure 2: Privacy Tradeoffs on a Hotelling Line



Does this repositioning represent consumer harm? The answer will be different for different consumers. Some may love the more relevant content and ads available now at Publisher 2; others who preferred anonymity may bemoan privacy intrusions. Again turning to Figure 2, assume that before the merger, consumers to the left of x^* received content from Publisher 1, and those to the right purchased from Publisher 2. After the merger, consumers from A-x^*–those who prefer to trade personal data for enhanced content–are better off because they will be able to trade data for higher quality content and more relevant ads from Publisher 2. Those consumers from x^*-B are worse off, as Publisher 2 is now further from their preferred privacy position.

It is important to note that unlike the case of a merger that creates market power, which is exercised through higher prices that unambiguously harm all consumers, the decision to collect more consumer data comes with both benefits and costs. The degree of net harm or benefit from an online publisher repositioning itself will depend on the mass of consumers found at various points along the line. The bigger point from this exercise is that the relationship between privacy and quality is purely subjective. Saying that a publisher's decision to collect and analyze additional data reduces the quality of its service is akin to saying that a restaurant's decision to replace corn with green beans on its menu lowers the quality of its food. These statements will likely be true for some, but are false for others. There is no right answer.

B. *The First Amendment*

Even if we were to accept privacy as an antitrust consideration, an antitrust order limiting the ability of a firm to collect and analyze consumer data is likely to raise some First Amendment issues. The Supreme Court has long been careful to avoid conflicts between the Sherman Act and the

First Amendment by limiting the application of the former in at least two lines of cases reflecting separate First Amendment concerns.[40]

The *Noerr-Pennington* doctrine takes its name from the first cases that called on the Court to interpret the Sherman Act in light of the First Amendment right to petition.[41] In *Noerr*, the Supreme Court stressed the "essential dissimilarity" between concerted lobbying of the government to act and the type of agreements that the Sherman Act typically confronts, such as price fixing, boycotts, and market divisions.[42] The Court bolstered its interpretation that the Sherman Act does not reach lobbying efforts by noting that to conclude otherwise "would raise important constitutional questions. The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to invade these freedoms."[44] Taken together, this long line of cases sketches out a general rule that legitimate attempts to secure government action–legislative, regulatory, and judicial–are exempt from antitrust scrutiny.[45]

The Court also had occasion to consider the application of the antitrust laws in light of the First Amendment's protection of speech and association in *NAACP v. Claiborne Hardware Co*.[46] *Claiborne* involved an NAACP-led boycott of white businesses in Claiborne County Mississippi, which was "designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution."[47] The plaintiffs alleged that the boycott violated the Mississippi antitrust laws by diverting business from white-owned to black-owned stores.[48] The Supreme Court rejected this claim, holding that "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a non-violent, politically motivated boycott . . . ."[49]

The antitrust laws, however, will not be blocked by the First Amendment when the speech in question is an agreement among competitors to restrain competition. For example, in *FTC v. Superior Court Trial Lawyers Association*[50] ("*SCTLA*"), the Supreme Court had no trouble finding that a concerted refusal by attorneys to take cases unless higher

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[40] *See* United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965); E. R.R. Presidents' Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135 (1961).
[41] *See Pennington*, 381 U.S. at 670; *Noerr*, 365 U.S. at 135.
[42] *Noerr*, 365 U.S. at 136.
[44] *Id.* at 137-38.
[45] *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499 (1988).
[46] 458 U.S. 886 (1982).
[47] *Id.* at 914.
[48] *Id.* at 892.
[49] *Id.* at 914.
[50] 493 U.S. 411 (1990).

compensation was offered was not protected by the First Amendment.[51] The defendants contended that both the *Noerr-Pennington* doctrine and *Claiborne* covered their conduct because the boycott was intended to inform the public of their plight and to spur government action–namely, an increase in the daily rate paid by the government to public defenders.[52] The Court disagreed noting that the objective of the joint activity was not to urge a government-imposed restraint of trade or to vindicate a fundamental right, but rather "to increase the price that they would be paid for their services."[53] Similarly, in *NSPE*, the Court held the order enjoining the engineers from publishing ethical opinions calling into question competitive bidding did not infringe the First Amendment.[54] It noted that an "injunction against price fixing abridges the freedom of businessmen to talk . . . about prices," but similarly does not run afoul of the First Amendment.[55] Thus, antitrust has the power to prevent conduct that has a *direct* anticompetitive effect,[56] even if that conduct happens to be speech. As the Court explained in *Giboney v. Empire Storage & Ice Co.*:

> [I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.[57]

So what would the First Amendment have to say about an antitrust order that restricted a company's ability to collect or use consumer data? First, such an order may indirectly burden the publisher's commercial speech rights. Beginning with *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[58] which concerned an attempt by the state of Virginia to prevent pharmacists from advertising their prices, the Supreme Court recognized the value to consumers from the free flow of marketplace information: "As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[59] As developed in later cases, restrictions on commercial speech are subject

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[51] *Id.* at 426-28.
[52] *Id.* at 419.
[53] *Id.* at 427.
[54] *See* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 696-97 (1978).
[55] *Id.* at 697.
[56] Conduct that asks government to engage in anticompetitive behavior is protected under the *Noerr-Pennington* doctrine because any anticompetitive effect comes from the government, not directly from the petitioner. E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136-37 (1961).
[57] *See* Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) (citation omitted).
[58] 425 U.S. 748 (1976).
[59] *Id.* at 763; *see also* Bates v. State Bar of Ariz., 433 U.S. 350, 364 (1977) (advertising "performs an indispensable role in the allocation of resources in a free enterprise system").

to "intermediate scrutiny," which places the burden on the government to show that the law directly advances a substantial interest and that the measure is drawn to achieve that interest.[60] Accordingly, to the extent that a restriction on data collection and use impedes the ability of advertisers to convey their commercial messages to consumers, it risks running afoul of the First Amendment.

Indeed, the Tenth Circuit employed this approach in *U.S. West, Inc. v. FCC*,[61] when confronted with a Federal Communication Commission ("FCC") regulation that limited the ability of cable companies to use subscriber data to target advertising.[62] The court rejected the FCC's contention that the regulations did not limit speech because it only prevented more granular targeting of advertisements, explaining that "a restriction on speech tailored to a particular audience, 'targeted speech,' cannot be cured simply by the fact that a speaker can speak to a larger indiscriminate audience . . . ."[63] Because the FCC failed to show that the use of the subscriber information in question threatened "specific and significant" consumer harm, or to consider the efficacy of alternative means to protect consumer privacy, the court vacated the rule.[64]

Merely finding an impact on commercial speech, however, will not automatically doom government action. For instance, privacy-based restrictions on the use of consumer financial data have survived commercial speech inquiries. In *Mainstream Marketing Services v. FTC*[65] the Tenth Circuit found that although the FTC's "Do Not Call" list clearly impinged on telemarketers' commercial speech rights, the asserted government interest in protecting consumers' privacy interests was substantial, and the regulatory program was sufficiently tailored toward its end.[66]

A second possibility is that an antitrust order addressing publisher's collection of consumer data would directly implicate the First Amendment. That is, irrespective of its effect on commercial speech, courts may find a

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[60] *See* Bd of Trs. of the State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980). The trend, however, has been for greater scrutiny to be applied under the commercial speech inquiry. See Neil Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. Rev. 1149, 1207 (2005).

[61] 182 F.3d 1224 (10th Cir. 1999).

[62] *Id.* at 1228.

[63] *Id.* at 1232.

[64] *Id.* at 1235, 1238-40.

[65] 358 F.3d 1228 (10th Cir. 2004).

[66] *Id.* at 1250-51 ("Do not call" regulation survives intermediate scrutiny);*see also* Trans Union LLC v. F.T.C., 295 F.3d 42, 46, 53 (D.C. Cir. 2002) (regarding an FTC regulation pursuant to Graham-Leach-Bliley restricting the ability of financial institutions to disclose private information to third parties survives intermediate scrutiny); Trans Union Corp. v. F.T.C., 245 F.3d 809, 818-19 (D.C. Cir. 2001) (regarding FTC rules restricting use of credit reports under Fair Credit Reporting Act survive intermediate scrutiny).

direct First Amendment interest in the collection and use of consumer data. Although some scholars have expressed skepticism that laws restricting the collection and use of consumer data should raise First Amendment concerns,[67] others have made persuasive arguments to the contrary.[68] For example, Professor Jane Bambauer makes the cogent observation that if we accord Constitutional protection to the right to receive information, it should make little difference whether we receive it from a "speaker" or directly from our observations of the world.[69]

The recent Supreme Court decision in *Sorrell v. IMS Health Inc*.[70] provides some support for this idea.[71] *Sorrell* involved a challenge to a Vermont statute that prohibited pharmacies, hospitals, and other health care entities from selling or disclosing prescriber-identifying information for marketing purposes, and prevented pharmaceutical companies from using this data for marketing purposes.[72] Examining the statute's plain language and its legislative history, which revealed a clear intent to hinder the marketing of brand name drugs, the Court found the law had enacted content and speaker-based restrictions on protected speech.[73] Although the Court held that heightened scrutiny was appropriate, it ultimately disposed of the case under the less stringent commercial speech inquiry.[74] Importantly for the question of whether the First Amendment directly protects data creation and use, the Court disagreed with the petitioner's contention that prescriber-identifying information was merely a commodity, the sale, transfer, or use of which should be considered an economic activity that could be regulated, rather than protected speech.[75] The Court spoke of the "*rule* that information is speech," and explained that "[t]his Court has held that the *creation* and dissemination of information are speech within the meaning of the First Amendment . . . Facts, after all, are

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[67] *See* Richards, *supra* note 60, at 1182-90 (detailing myriad rules that affect the use and collection of data that are treated as laws restraining conduct, not speech); *see also* Ashutosh Bhagwat, Sorrel v. IMS Health: *Details, Detailing, and the Death of Privacy*, 36 VT. L. REV. 855 (2012); Shubha Ghosh, *Informing and Reforming the Marketplace of Ideas: The Public-Private Model for Data Production and the First Amendment*, 2012 UTAH L. REV. 653, 705-06 (2012).

[68] *See* Jane Yakowitz Bambauer, *Is Data Speech?*, 66 STAN. L. REV. (forthcoming 2013) (manuscript at 17), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2231821; Fred H. Cate & Robert Litan, *Constitutional Issues in Information Privacy*, 9 MICH. TELECOMM. & TECH. L. REV. 35, 49, 57 (2002) Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049, 1051-52 (1999);

[69] Bambauer, *supra* note 68, at 23.

[70] 131 S. Ct. 2653 (2011).

[71] *Id.* at 2667.

[72] *Id.* at 2662-63.

[73] *Id.* at 2663.

[74] *Id.* at 2667.

[75] *Id.* at 2666. The argument that the dissemination of data was conduct, rather than speech, was pressed by Justice Breyer in his dissent. *See Sorrell*, 131 S. Ct. at 2685 (Breyer, J., dissenting).

the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs."[76]

Whether data collection and use are protected directly or enjoy protection due to their impact on commercial speech is germane to the level of protection they are afforded. If data collection and use are speech, government regulations–including antitrust orders–are potentially subject to some higher level of scrutiny than the intermediate scrutiny applied to commercial speech.[77] Of course such a distinction may be meaningless; the Supreme Court has expressly refused to balance the Sherman Act against the First Amendment.[78] Rather, the Court's holdings have rested on an interpretation of the Sherman Act that avoids a direct constitutional conflict.[79] Accordingly, if faced with an antitrust order implicating the collection or use of data, the Court likely would follow its jurisprudence and continue to interpret the Sherman Act as not covering protected speech.

All told, an antitrust order preventing a publisher or an ad network from collecting data on consumers' web browsing, combining such data with additional data reservoirs, or using data to customize content or target advertising is more likely to be treated like the speech in the *Noerr-Pennington* line of cases and *Claiborne Hardware* than the conduct in *SCTLA* or *NSPE*.[80] From a policy viewpoint, moreover, this is the correct

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[76] *Id.* at 2667 (emphasis added) (citation omitted). Professors Bambauer and Bhagwat reach similar conclusions. *See* Bambauer, *supra* note 68, at 23; Bhagwat, *supra* note 67, at 862.

[77] Bambauer contends that although collecting consumer data is done by a business and often linked to advertising, because the right to collect data is so intertwined with the right to speak it should not necessarily be subject to lower levels of scrutiny associated with commercial speech or speech involving a private, rather than public, concern. *See* Bambauer, *supra* note 68, at 46-51.

[78] *See, e.g.*, E. R.R. Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 137-37 (1961); Sosa v. DIRECTV, Inc., 437 F.3d 923, 931 (9th Cir. 2006) (analyzing the Supreme Court's approach to the First Amendment and the Sherman Act in *Noerr*).

[79] *See* F.T.C. v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 424 (stating that the Court in *Noerr* was "[i]nterpreting the Sherman Act in the light of the First Amendment's Petition Clause"); *see also* Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc., 508 U.S. 49, 56 (arguing that the Court in *Noerr* interpreted the Sherman Act, in part, to avoid imputing "'to Congress an intent to invade 'the First Amendment right to petition"). The recent application of *Noerr* principles to the National Labor Relations Act ("NLRA") provides additional insight into the role that the First Amendment plays in defining the scope of *Noerr* protection. *See* BE & K Constr. Co. v. NLRB, 536 U.S. 516, 525 (2002). As in *Noerr*, the Court in *BE & K* turned to statutory construction to avoid the constitutional question, holding that the NLRB's standard was invalid because there was nothing in the relevant statutory text to suggest that it "must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose." *Id.* at 536. In light of the *BE & K* decision, the Ninth Circuit recently concluded that the *Noerr* doctrine "stands for a generic rule of statutory construction, applicable to any statutory interpretation that could implicate the rights protected by the Petition Clause . . . Under the *Noerr-Pennington* rule of statutory construction, we must construe federal statutes so as to avoid burdening conduct that implicates the protections afforded by the Petition Clause unless the statute clearly provides otherwise." *Sosa* , 437 F.3d at 931 (citations omitted).

[80] This may explain why the FTC has been hesitant to litigate a case in which it alleged that data collection practices constitute "unfair acts or practices" under Section Five of the FTC Act. All cases involving data collection that have alleged unfairness have settled. *See* Jennifer Woods, *Federal Trade*

decision. Unlike speech that effects a conspiracy to fix prices, data collection and use do not represent conduct that directly harms competition. Rather, using antitrust to limit the collection and use of consumer data would decrease the amount of marketplace information available to consumers, rendering markets less efficient.

C. *Subjectivity*

In addition to raising serious conceptual issues and constitutional concerns, viewing privacy as a dimension of competition would inject a large degree of additional subjectivity into antitrust analysis. What is the "competitive" benchmark against which privacy will be measured, and how does a regulator measure a reduction in privacy competition? As discussed in Part II.A, there is no objective answer to these inquiries. Increased subjectivity means enhanced regulatory discretion, and hence less certainty over legal standards. These factors invite rent seeking and lead to over deterrence.

When government actors have the power to make decisions that affect the distribution of resources, private parties rationally spend money in an attempt to effect a favorable distribution.[81] The larger the pot over which the government has control, the more will be spent on these activities.[82] In the limit, parties rationally may exhaust nearly the value of the rent to be determined.[83] Accordingly, as long as antitrust regulators and courts can prohibit certain business practices, companies rationally will spend money in an attempt to persuade them to redistribute wealth in their favor.[84] So, even without privacy as an antitrust concern, lawyers, economist, and government relations types make a rich living attempting to convince the courts, and Department of Justice and FTC officials that their clients' practices and transactions do not run afoul of the Sherman or

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Commission's Privacy and Data Security Enforcement Under Section 5, AMERICAN BAR ASSOCIATION, *available at* http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/federal_trade_commissions_privacy.html.

[81] Resource distribution can be accomplished through both rent extraction and rent creation. *See* FRED S. MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION 2 (1997).

[82] *See* J. Gregory Sidak, *The Petty Larceny of the Police Power*, 86 CALIF. L. REV. 655, 658 (1998) (commenting on the large amount of money spent on rent seeking).

[83] *Id.*

[84] *See, e.g.*, Knox, *supra* note 22; Gordon Crovitz, *Google's $25 Million Bargain*, WALL ST. J., Jan. 14, 2013, at A13; Gordon Crovitz, *Silicon Valley's 'Suicide Impulse*,*'* WALL ST J., Jan. 28, 2013, at A13; Tony Romm, *How Google Beat the Feds*, POLITICO.COM (Jan. 3, 2013, 05:20 PM), http://www.politico.com/story/2013/01/how-google-beat-the-feds-85743.html. This is why the "rectangle" costs associated with government created market distortions are often thought to be larger than the "triangle," or deadweight loss, costs. *See* McChesney, *supra* note 81, at 12-13.

Clayton Acts, while their clients' competitors' do.[85] The inclusion of a subjective metric like privacy into antitrust analysis will further exacerbate this tendency.

When the law is fairly well established, one is left primarily to argue that the facts place the conduct under scrutiny on one side or another of the line between legality and illegality. With the exception of certain forms of unilateral conduct,[86] this is largely the case for most of antitrust.[87] Things change, however, when one injects a subjective metric like privacy into the inquiry. Imagine a merger like the one proposed in Part II.A. By assumption, if privacy were left out of the analysis, the ability of regulators or parties opposing the merger to block the transaction would be minimal, as the facts do not suggest competitive concerns. Once privacy enters the discussion, however, there is a far greater opportunity for regulators to scuttle the deal as there is no objectively agreed upon competitive level of privacy. And with the regulatory domain enhanced, rivals will find it worth their while to expend resources to convince regulators that privacy concerns should doom the transaction.

To put this point more formally, consider the following simple model. Parties will expend lobbying resources (L) to effect a favorable governmental decision from a court or regulator, which is worth V. Lobbying resources increase the probability of a favorable decision (P).[88] Thus, the expected value from lobbying level L can be written as: $P(L) \cdot V$. The marginal benefit to a company from an additional unit of lobbying to persuade an antitrust regulator is the change in the probability (P) that the ultimate governmental decision goes in its favor, weighted by the value of that decision (V). If c is the marginal cost of an additional unit of lobbying, the rational party will expend resources on lobbying until $\frac{\partial P}{\partial L} \cdot V = c$. Because including privacy in antitrust analysis adds an additional–and

[85] *See Silicon Valley's 'Suicide Impulse,' supra* note 84.

[86] For example, courts have split on their handling of bundling and loyalty rebates. *See, e.g.*, LePage's Inc. v. 3M, 324 F.3d 141, 178-79 (3d Cir. 2003) (Greenberg, J., dissenting).

[87] Consider the case of a naked horizontal agreement to fix prices or to allocate markets. If the facts are ambiguous, parties will expend resources to convince authorities that there was no agreement, or that if there were one, the agreement was reasonably ancillary to efficiency enhancing conduct. *See, e.g.*, Polygram Holding, Inc. v. F.T.C., 416 F.3d 29, 32-33 (D.C. Cir. 2005). No reasonable legal argument, however, could be advanced that the alleged conduct–if shown–is not per se illegal. *See* Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50 (1990). Similarly, a party could not advance with a straight face an argument to condemn above-cost pricing by a small firm. Rather, it must argue that the firm in question has monopoly power and that its prices are predatorily low. *See* Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993). Save for some nuances around the margins, regulatory discretion in these circumstances largely is confined to interpretation of the facts. *Palmer*, 498 U.S. at 49-50 (citing and analyzing fact-specific elements of per se Sherman Act violations).

[88] Thus, $\frac{\partial P}{\partial L} \geq 0$.

highly subjective–hook on which regulators can hang their decisions, it is likely that $\frac{\partial P}{\partial L}$ would be larger on average for lobbying with privacy as a germane issue than without. Consequently, because the marginal product of lobbying is larger when antitrust regulators and courts consider privacy, parties will rationally spend more to change governmental decisions in their favor.

A second cost likely associated with subjectivity is over-deterrence. It is a standard result in the economics of accidents literature that uncertainty in a legal regime leads potential violators to take too much precaution.[90] What does this mean in the context of antitrust? To take too much care in antitrust means to avoid business practices where the line between legal and illegal behavior is blurred.[91] The magnitude of these error costs depends on exactly which business practices firms are choosing to forego.[92] If privacy were to enter into antitrust considerations, firms likely would limit data collection and analysis that would be on net beneficial to consumers to avoid the possibility of an antitrust suit.

CONCLUSION

As the prevalence of firms that rely on consumer data grows, it is likely that calls to nest privacy within antitrust similarly will become more common. To some, it is like killing two birds with one stone: more competitive markets and fewer privacy invasions. However facially appealing it may be to combine privacy and antitrust, the merger of these two policy issues presents some serious concerns. Once we realize that publishers have solved the Underpants Gnomes problem, the analogy between privacy and quality breaks down. What's more, limiting a firm's ability to collect and use data is likely to suppress protected speech. Finally, the inherent subjectivity in the exercise will increase incentives to divert resources from marketplace competition to curry favor with antitrust regulators. It will also cause firms to underinvest in beneficial uses of consumer data. Collectively, these problems suggest that antitrust is the wrong vehicle to address privacy concerns.

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[90] *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 224-27 (2004).

[91] David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73, 73-74 (2005).

[92] *See id.* at 84-85.