Northwestern Journal of Technology and Intellectual Property

Volume 20 | Issue 2 Article 4

Spring 2023

ABOUT-FACE: HOW FACEBOOK'S RESTRICTIONS ON USER POSTS COULD VIOLATE ANTITRUST LAW

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NORTHWESTERN
JOURNAL OF TECHNOLOGY
AND
INTELLECTUAL PROPERTY

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February 2023 VOL. 20, NO. 2

Volume 20, Number 2 (2023)
Northwestern Journal of Technology and Intellectual Property

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ABSTRACT— This Note examines whether Facebook's restrictions on its users' posts are subject to Sherman Act § 2. This Note looks at the economic activity generated by social media activity and argues that posts are commerce. While this piece finds that current antitrust jurisprudence likely favors Facebook, an alternative approach sought by some antitrust scholars could influence judges to preclude the platform's restrictions.

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INTRODUCTION – HOW SOCIAL MEDIA RESTRICTIONS ON CONTENT COULD BE FOUND TO BE MONOPOLY

Politicians on both sides of the aisle agree that Big Tech restricts public discourse and seek recourse.[1] Most literature focuses on:

a) whether the First Amendment affects Big Tech's ability to police content posted on its platforms or
b) whether the Sherman Act prohibits Big Tech companies from buying out potential competitors. However, less literature discusses whether social media content restrictions themselves violate the Sherman Act.

Using Meta's Facebook platform as an example, this paper argues that social media posts are inherently commercial in nature, and thus, may become subject to Sherman Act § 2 liability. The ability to communicate and share information attracts users to Facebook and brings Meta billions of dollars in revenue.[2] The shared content enables advertisers to send targeted advertisements to users based on their usage.[3] As a social media network, Facebook is both a tremendous marketplace for businesses and a source for investment information.[4]

Although Facebook possesses dominant market share in the social advertising space and uses its power to exclude businesses from optimal social advertising, Facebook's monopoly power likely does not violate the Sherman Act. While antitrust law previously emphasized excluding competition, antitrust law today emphasizes low prices and maximal output.[5] Courts are thus more likely to accept Facebook's arguments that its restrictions help consumers over advertisers' concerns that such actions limit their ability to compete with Facebook in the social advertising market.

This paper demonstrates Facebook's potential liability for its posts over three sections. Section I defines the "commerce" that the Sherman Act intended to regulate and argues that social media posts satisfy this definition.

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[1] *See generally* Roger P. Alford, *The Bipartisan Consensus on Big Tech*, 71 EMORY L.J. 893 (2022).

[2] Sarah E. Needleman, *Facebook's Ad Business Drives Surge in Revenue Following Google's Act*, WALL ST. J. (Apr. 28, 2021, 7:00 PM), https://www.wsj.com/articles/facebook-fb-1q-earnings-report-2021-11619610405 [https://perma.cc/8EXC-WZSE].

[3] *See* Klein v. Facebook, Inc., 580 F. Supp. 3d 743, 790–91, 792 (N.D. Cal. 2022) (Facebook records likes and utilizes "view tags" to track its users browsing activities and sell this data to advertisers).

[4] *See* Mae Anderson, *Outage Highlights How Vital Facebook Has Become Worldwide*, ASSOCIATED PRESS, (Oct. 5, 2021), https://apnews.com/article/facebook-outage-global-reaction-281fded63f1478193d7e5e3e799833fc [https://perma.cc/E37A-D74K]; *see also* Michelle Fox, *Social Media is the Most Popular Source of Investment Ideas for Young Investors, CNBC Survey Finds*, CNBC, (Aug. 26, 2021,8:59 AM), https://www.cnbc.com/2021/08/26/social-media-top-pick-of-young-investors-for-ideas-cnbc-survey-finds.html [https://perma.cc/5BAA-GFKL].

[5] Tim Wu, THE CURSE OF BIGNESS 87–91 (2018).

Section II discusses antitrust law's development. Section III analyzes how social media content restrictions fare under current antitrust jurisprudence and then discusses how the restrictions could face heightened scrutiny under a possible reversion in the antitrust doctrine.

I. SOCIAL MEDIA POSTS ARE COMMERCE UNDER SHERMAN ACT § 2

This section makes two arguments. First, this section argues that "commerce" as understood at the time of the Sherman Act includes intercourse for the purposes of trade. Second, this section argues that Facebook posts are such intercourse, as they drive advertising revenue, facilitate business, and inform financial decisions.

A. Defining "Commerce" Under Sherman Act § 2

The Sherman Act § 2 states:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, **to monopolize any part of the trade or commerce among the several States,** or with foreign nations, shall be deemed guilty. . . .[6]

The Sherman Act defines both "commerce" and the "persons" subject to this law:

> "Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States. . . .[7]
>
> The word 'person' or 'persons' wherever used in this Act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.[8]

Social media posts are part of the "trade or commerce among the several States."[9] The first edition of Black's Law dictionary, published one year after the passing of the Sherman Act, states:

> [Commerce] comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of different states. The power to regulate

[6] 15 U.S.C. § 2.
[7] 15 U.S.C. § 12(a).
[8] *Id.*
[9] 15 U.S.C. § 2.

> it embraces all the instruments by which such commerce may be conducted.[10]

Social media content is a substantial aspect of "commerce among the several States." Posts are forms of engaging in "intercourse for the purposes of trade"[11] because they generate revenue and facilitate broader commercial activity.

B. Social Media Posts Serve Several Commercial Functions

Social media companies generally, and Meta in particular, serve several roles in today's economy. Perhaps Facebook's most prominent and direct economic contribution is advertising.[12] Facebook exploits users' posts to tailor specific advertisements of interest for each user.[13] During the COVID-19 pandemic, Facebook's advertising revenues have grown at even greater paces as safety protocols caused online sales and traffic to increase.[14]

Meta also allows platform users to leverage their audiences to provide non-traditional revenue opportunities. Its platforms host many online influencers who sign endorsement deals with marketers to advertise products to their followers via posts.[15]

Meta's role in the economy stretches beyond advertising to facilitating business and spreading news. Businesses depend on Meta platforms Facebook, Instagram, and WhatsApp to provide customer service. These businesses lose revenue when these platforms become unavailable.[16] Forty-eight percent of American adults say that they often get their news from social media, with about one-third regularly getting their news from Facebook.[17]

Social media also informs investment decisions. Thirty-five percent of eighteen- to thirty-four-year-olds use social media to investigate possible

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[10] *Commerce*, BLACK'S LAW DICTIONARY (1st ed. 1891).

[11] *Id.*

[12] *See* Mike Isaac, *Facebook's Profit Surges 101 Percent on Strong Ad Sales*, N.Y. TIMES (July 28, 2021), https://www.nytimes.com/2021/07/28/business/facebook-q2-earnings.html [https://perma.cc/KBF4-2UE3] (Facebook advertising revenue grew by 101 percent during the second quarter of 2021).

[13] Rebecca Jennings, *Why Targeted Ads are the Most Brutal Owns*, VOX (Sept. 25, 2018, 8:30 AM), https://www.vox.com/the-goods/2018/9/25/17887796/facebook-ad-targeted-algorithm [https://perma.cc/U7CZ-XF9W].

[14] *See* Needleman, *supra* note 3.

[15] *See* Isaac, *supra* note 13.

[16] *See* Anderson, *supra* note 5.

[17] Mason Walker and Kateryna E. Matsa, *News Consumption Across Social Media in 2021*, PEW RSCH. CTR. (Sept. 20, 2021), https://www.pewresearch.org/journalism/2021/09/20/news-consumption-across-social-media-in-2021/ [https://perma.cc/G2QH-J5LY].

investments.[18] Nearly one-third of Gen Z looks to Instagram and to Facebook for investment advice.[19]

Because social media posts drive advertising revenue, business operations, and financial decisions, they are vital cogs of commercial activity. Posts are "intercourse for the purposes of trade" and are thereby commerce regulated by the Sherman Act.

II. DOCTRINAL DEVELOPMENT OF SHERMAN ACT § 2

The previous section establishes that social media content is inherently commercial. The question is whether restricting user posts is monopolization under Sherman Act § 2. The following section overviews this prohibition's doctrinal development. It highlights what behavior the Sherman Act seeks to encourage and what behavior it seeks to protect against. These notions have oscillated between the time of the Sherman Act's passage in 1890 and today.

A. Antitrust Law: From a Focus on "Bigness" to Consumer Welfare

Congress passed the Sherman Act in 1890 in response to the formation of trusts that effectively usurped entire industries, such as oil and steel.[20] In its early years, the Sherman Act prevented single companies from overtaking industries and dictating the terms by which citizens could enjoy a given product.[21] Case law at this time favored allowing many smaller companies to compete within an industry rather than allowing a few large firms to collectively control the vast majority of the market.[22] Courts cautioned against anything that trended toward market consolidation. This trend is exemplified by the Supreme Court's decision in the 1962 case *Brown Shoe*. There, the Court shut down a merger between shoe companies, even though the resulting market share of the proposed firm would not attain outsize market share, due to a trend toward market consolidation within the shoe industry.[23]

Antitrust law evolved significantly in the 1970s. That decade saw a revolution driven by the "Chicago School." The Chicago School was a group of University of Chicago professors and their students, the most prominent

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[18] *See* Fox, *supra* note 5.

[19] *See* Charlotte Principato, *Here's Where the Youngest Generation of Investors is Getting Their Financial Advice*, MORNING CONSULT (May 25, 2021, 12:01 AM), https://morningconsult.com/2021/05/25/tiktok-is-flush-with-financial-advice-but-social-media-hasnt-replaced-professional-sources-for-guidance-yet/ [https://perma.cc/RQ5E-ADA3].

[20] Wu, *supra* note 6, at 25.

[21] *Id.*

[22] *Id.* at 42.

[23] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 344–45 (1962).

of which was then-Professor Robert Bork. The Chicago School insisted that "bigness" was not the aim of the antitrust laws. Rather, the laws sought to promote consumer welfare, as measured by increased output and lower prices.[24] The Chicago School supported commercial restrictions that served the greater economic good of producing more goods more cheaply.[25] Chicago School adherents do not fret about competition so long as there is optimal allocation of products at the desired amounts sought by different consumers.[26]

The Chicago School has proved influential. Since the 1970s, courts have adopted the School's "jurisprudence of principle,"[27] by which they focus on the economic effects of a restrictive action.[28] As courts generally defer to a firm's assessments of maximal consumer welfare, few antitrust cases prosecuted in recent years have succeeded.[29]

The current framework for a Sherman Act § 2 violation requires that the defendant firm possess market power.[30] The plaintiff must then prove that the defendant willfully maintains its market power through prohibitive means.[31] If the plaintiff succeeds, the defendant must then prove business justifications outweigh any negative aspects of the restraint.[32] Should the defendant firm make this demonstration, a plaintiff can still succeed by proving the defendant's actions produce greater harm to allocative efficiencies than defendants' purported procompetitive effects.[33] The next section applies this framework to determine whether Facebook's restrictions on user posts violate Sherman Act § 2.

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[24] *See* Wu, *supra* note 6, at 87–88.

[25] *Id.* (Bork's scholarship convinced judges that the Sherman Act always intended to maximize production at lowest cost and only constrain activity that effectively raised prices on consumers).

[26] *Cf. id.* at 88 ("Bork insisted, 'courts should be guided exclusively by consumer welfare and the economic criteria which that value premise implies.'").

[27] *See generally* John O. McGinnis and Andrew M. Meerkins, *Dworkinian Antitrust*, 102 IOWA L. REV. 1 (2016) (the authors coin this jurisprudential theory in reference to antitrust law's adaption to the most current economic principles, in contrast to the theory of legal positivism, which views antitrust jurisprudence like statutory interpretation in general, where the law stems from the statutory text and may be supplemented by a judge's policy discretion).

[28] *See* Wu, *supra* note 6, at 87–91.

[29] *See id.* at 16.

[30] *See* United States v. Microsoft Corp., 253 F.3d 34, 51 (D.C. Cir. 2001).

[31] *See id.* at 51.

[32] *See id.* at 59. In other words, the behavior creates productive efficiencies that outweigh any concerns in the efficiencies of allocating the good or service in question.

[33] *See id.*

III. HOW A CLAIM COULD, BUT IS UNLIKELY TO SUCCEED, UNDER THE CURRENT FRAMEWORK

Under the current framework, a court is unlikely to find that Facebook restrictions on social media posts violate Sherman Act § 2. Facebook possesses market power in the social advertising market, and its posting restrictions are exclusionary. But, consistent with recent trends in antitrust jurisprudence, courts would likely defer to possible procompetitive justifications and give less weight to arguments that user post restrictions impair consumer welfare.[34]

A. Facebook Qualifies as a Monopoly Under the Sherman Act.

A firm is a monopoly under Sherman Act § 2 when it possesses market power willfully attained through anticompetitive means. One can establish market power by first defining the firm's relevant market, and then quantifying the firm's share within that market to determine whether that market share is outsize.[35] Next, one assesses whether the firm acted in an anticompetitive manner to attain its market share, such as by imposing barriers to entry into the market, in which case, the market power is problematic.[36] One can apply this test to Facebook to demonstrate that Meta's platform possesses market power.

1. Facebook Posts Are a Part of the Social Media Advertising Market

To determine Facebook's market share, we first define its niche distinctive of social media companies at large. In doing so, we cannot use mere semantics: products that are "reasonably interchangeable by consumers for the same purposes" belong to the same market.[37] Nonetheless, product markets can be differentiated along products' prices, uses, and qualities.[38] Statements made by company representatives that differentiate products,[39] as well as industry recognition of distinctive submarkets, are also dispositive.[40]

Social media advertisements involve such distinctions. Facebook engages in the social advertising market, which is distinctive of search

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[34] *See infra* Section III.C.

[35] *See Microsoft*, 253 F.3d at 50, 51.

[36] *See id.*

[37] *Id.* at 51–52 (in proving that Microsoft monopolized the operating system market, the Circuit Court limited the relevant market to all Intel-compatible PC operating systems, excluding Macintosh operating systems because changing over from PC to Mac hardware and programs was prohibitively expensive).

[38] *Klein*, 580 F. Supp. 3d at 764.

[39] *See* Epic Games, Inc. v. Apple, Inc., 559 F. Supp. 3d 898, 980–81 (N.D. Cal. 2021).

[40] *See* Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).

advertising.[41] Social advertising and search advertising target distinct consumer groups. These forms of advertising are also used and priced differently. Search advertisements target consumers who are already looking for certain information or products, whereas social advertisements seek out potential customers and tailor ads for those consumers to find.[42] Search advertisement prices correspond to changes in demand for the particular searched product. Social advertisement prices, on the other hand, are not as elastic, as they depend on changes in preferences of a general group interested in a particular product.[43] Further, social advertising can be cheaper. On social media, small businesses only need to pay to advertise their product to the "granularly defined audiences" they seek, rather than for an ad that will come up to anyone who searches for the product.[44]

Meta itself, and the industry at large, differentiates between Facebook's social advertising and general search advertising. Former Facebook COO Sheryl Sandberg has differentiated social advertising from search advertising.[45] Additionally, an advertising company states "'social ads' and 'search ads" have fundamentally different purposes . . . whereas 'social ads' are best for targeting audience segments who may be interested in your products or services, 'search ads' are great for targeting customers already looking for you."[46] Thus, social advertising is a distinctive submarket within the advertising industry.

2. Facebook Possesses Over 65% of Market Share Within the Social Advertising Market

Facebook possesses a significant enough market share in the social advertising market to demonstrate market power. Social media advertising market share is measured by the revenue that advertisements generate across social media networks.[47] In 2021, Meta had approximately 70% of the U.S.

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[41] *Klein*, 580 F. Supp. 3d at 783.

[42] *See id.*

[43] *See id.*

[44] *See id.*

[45] *See id.* at 782 (the Facebook Chief Operating Officer told investors, "[w]e're not TV, we're not search[, w]e are social advertising," and later said, "we are a third thing").

[46] *See id.* (citation omitted).

[47] *Social Media Advertising: United States: Market Definition*, STATISTA, https://www.statista.com/outlook/dmo/digital-advertising/social-media-advertising/united-states [https://perma.cc/A2WH-NJWL].

social media advertising market,[48] which surpasses 65%, the threshold to make out a prima facie case for market power.[49]

3. Facebook's Network Effects and Switching Costs Pose Barriers to Entry

Facebook possesses not only a problematic share in a distinctive market; it also bars entry into the social advertising space. Meta precludes competing advertisers from utilizing a similarly capable advertising platform by means of its network effects and shifting costs.

a. The Social Advertising Market Includes Both Conventional Advertisers and User Advertisers Who Compete with Meta

Facebook's platform serves three separate groups of social advertisers: itself, its conventional advertisers, and its user advertisers. Meta markets its suite of networks and services.[50] Conventional advertisers pay Meta to target particular users based on the habits users depict in their Facebook posts.[51] There are also advertisers who are themselves Facebook users. These "user advertisers," as this paper terms them, create Facebook pages to engage other users who might be interested in the user advertisers' business, particular products, or ideas.[52] While both conventional and user advertisers are beneficiaries of the Facebook platform, they effectively compete with Meta, which markets its own products and ideas and can leverage its control of the platform to shut out these groups of advertisers.

b. Facebook's Network Effects and Switching Costs Pose Barriers to Entry against competing advertisers

Both conventional and user advertisers are subject to significant network effects and switching costs that prevent them from shifting social advertisements elsewhere. A network effect, as it relates to barriers to entry, "is a feature that makes a network more valuable as its number of users increases."[53] Individuals join and remain on Meta's platforms because

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[48] *Social Media Advertising: United States*: *Highlights*, STATISTA, https://www.statista.com/outlook/dmo/digital-advertising/social-media-advertising/united-states [https://perma.cc/B974-QXFF].

[49] United States v. H&R Block, 833 F. Supp. 2d 36, 51 (D.C. Cir. 2011).

[50] *See* Nitasha Tiku, *Facebook Launches a New Ad Campaign with an Old Message*, WIRED (Apr. 26, 2018, 5:17 PM), https://www.wired.com/story/facebook-launches-a-new-ad-campaign-with-an-old-message/ [https://perma.cc/27MR-RCGN].

[51] *See* Jennings, *supra* note 14.

[52] *See* Anderson, *supra* note 5 (highlighting how Meta users depend on its platforms to market their businesses to other users).

[53] Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law, vol IIB, ¶421h at 95 (5th ed. 2021).

everyone else in their lives is on these platforms.[54] Even Google cannot replicate Meta's array of services.[55] Facebook's overall social network has an indirect network effect on social advertisers.[56] This is because users' aggregate and individual sustained Facebook activity yields additional data points that companies use to produce ever more targeted advertising.[57]

Facebook users also face significant switching costs. Moving from Facebook to a potential competitor means losing data, photos, and additional information that cannot be automatically moved to another platform.[58] In turn, Facebook users who advertise to other platform users, and those who buy ads to market to the users, are effectively trapped as well. Advertisers must keep working with Facebook, no matter its costs and impositions, as advertisers' captive audience is unlikely to move to another platform unless their entire network switches simultaneously.[59] Any alternative platform would require footing the costs of both building the platform and successfully covering users' switching costs.[60]

Facebook's network effects and switching costs impose barriers to entry for alternative platforms, and thus, preclude alternative markets for competing advertisers. Because the platform also wields market power in the social advertising market, Facebook possesses monopoly power under Sherman Act § 2.

B. Facebook Engages in Exclusionary Conduct to Maintain Monopoly Power

Facebook restrictions on user posts would likely be found exclusionary because they maintain a market structure that stifles competing social advertisers. When Facebook removes user posts that would otherwise attract particularized advertisements, conventional advertisers can no longer

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[54] *See* Fed. Trade Comm'n v. Facebook, 581 F. Supp. 3d 34, 50 (D.D.C. 2022) [hereinafter *Facebook II*].

[55] *See Klein*, 580 F. Supp. 3d 743, 794 (N.D. Cal. 2022) ("[A]round the time Google+ entered the social network market, 'prominent investors . . . noted that the social networking market had extreme network effects, making it increasingly hard to see a materially successful new entrant, even with all of Google's resources.'") (quoting U.S. HOUSE OF REPRESENTATIVES, 116TH CONG., REPORT ON INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS, at 144 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 [https://perma.cc/HP7Z-9KN7]).

[56] *See id.* at 781.

[57] D. Daniel Sokol & Roisin Comerford, *Antitrust and Regulating Big Data*, 23 GEO. MASON L. REV. 1129, 1146–47 (2016).

[58] *See Facebook II*, 581 F. Supp. 3d at 50–51.

[59] *See Klein*, 580 F. Supp. 3d at 781.

[60] *See id.*

effectively target these users. Similarly, when Facebook restricts posts, user advertisers' exchange of their data is no longer adequately compensated in potential customers, since they cannot react to restricted users' preferences.

1. Post Restrictions Harm Competing Advertisers' Advertisement Quality

A firm that engages in exclusionary conduct that prohibits competitors from maintaining their market power is liable under Sherman Act § 2.[61]

A monopolist firm is exclusionary when its acts "have an 'anticompetitive effect,'" which means that it "harm[s] the competitive process and thereby harm[s] consumers."[62] Courts will also find conduct anticompetitive when it "reasonably appears capable of making a significant contribution" to maintaining the firm's monopoly power.[63] To prove a Sherman Act § 2 violation, the onus is on the plaintiff to show the defendant firm's restrictive practices harm allocative efficiencies,[64] i.e., the matching of consumers with quantities of product they each seek.

Facebook restrictions are anticompetitive because they impede advertisers' ability to target interested audiences. Indeed, restrictions that hamper advertisers' capacity to utilize user data can be reasonably attributed to preserving Facebook's power in social media advertising. Apple's restrictions that limit Facebook advertisers' ability to tailor advertisements has hampered demand for ads and projected social advertising revenue,[65] particularly those of smaller advertisers.[66] Such restrictions disproportionately limit the reach of small businesses advertisements, for whom the paucity of data raises costs for less targeted ads.[67] Thus, Facebook restrictions of user posts limit the quality of social advertisements available to competing advertisers.

2. Numerical Price Isn't a Restraint Because User Advertisers Do Not Pay to Advertise

One can conceptualize how Facebook excludes conventional advertisers, as conventional advertisers buy ads that depend on user post

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[61] *Microsoft*, 253 F.3d 34, 58 (D.C. Cir. 2001).

[62] *Id.*

[63] *Id.* at 79.

[64] *See* Aspen Skiing Co. v. Aspen Skiing Highlands Skiing Corp., 472 U.S. 585, 605 n.32 (1985).

[65] *See* James Clayton, *Facebook: Daily Active Users Fall for First Time in 18-year History*, BBC (Feb. 3, 2022), https://www.bbc.com/news/business-60238565 [https://perma.cc/YM6F-28JM].

[66] *See* Christopher Mims, *As Apple and Facebook Clash Over Ads, Mom-and-Pop Shops Fear They'll be Victims*, WALL ST. J. (Apr. 10, 2021, 12:29 AM ET), https://www.wsj.com/articles/apple-facebook-clash-over-ads-small-businesses-fear-theyll-be-impacted-11618009627 [https://perma.cc/Q772-ZNNA].

[67] *See id.*

content. But Facebook also engages in exclusionary conduct toward user advertisers, even though they do not pay money to reach fellow users.

Generally, an antitrust lawsuit alleging harm to consumer welfare succeeds to the extent that the act elevated price levels,[68] which are typically measured in terms of dollar cost rather than some other valued consumer asset. Should one look solely through the dollar cost lens, Facebook's restrictions do not exclude user advertisers. Advertisements cost consumers nothing. Further, the marginal cost for posting on social media is zero, as is the cost of sharing or accessing content.[69] Because content creation and advertisements themselves present no monetary cost to consumers, there is no explicit problematic price action against user advertisers.

But courts do not consider that restricting ideas might inhibit the broader commercial activity that is more closely associated with prices and output. What Facebook users do not pay for in cash, they pay for with another highly-prized asset—their data.[70] While commonplace today, relinquishing one's data is no meager sacrifice. Technology users are generally concerned about the data privacy sacrifices they make to attain free services.[71] Forty-six percent of consumers feel they cannot effectively protect their data.[72] Thirty-two percent of technology users take active steps to protect their data and prefer to spend time and money rather than give up their data.[73]

Given consumer concerns about sacrificing their own data, one could reason that user advertisers only desire to endure such a cost if they can adequately reach their desired consumers. As mentioned above, however, Facebook restrictions on fellow users' ability to post on Facebook dulls any advertiser's ability to target people who would be interested in engaging with their products or services.[74] Thus, posting restrictions are a prohibitive cost that is exclusionary to user advertisers as well.

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[68] *See* Gregory Day, *Monopolizing Free Speech*, 88 FORDHAM L. REV. 1315, 1334 (2020).

[69] *Id.*

[70] *See* Natasha Singer, *What You Don't Know About How Facebook Uses Your Data*, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/technology/facebook-privacy-hearings.html [https://perma.cc/S7UZ-G9DS].

[71] CISCO, BUILDING CONSUMER CONFIDENCE THROUGH TRANSPARENCY AND CONTROL 4 (2021), https://www.cisco.com/c/dam/en_us/about/doing_business/trust-center/docs/cisco-cybersecurity-series-2021-cps.pdf?CCID=cc000742&DTID=esootr000875&OID=rptsc027438 [https://perma.cc/G8MF-2TRC].

[72] *Id.*

[73] *Id.* at 5.

[74] *See supra* section III.B.i.

C. Procompetitive Justifications Likely Spare Facebook under Current Doctrine, But Could Change If Data Privacy Factors into Consumer Welfare

While Facebook possesses market power and engages in exclusionary conduct, Facebook would likely defeat a Sherman Act § 2 claim under courts' current approaches to analyzing procompetitive justifications.[75] Recall that, should one prove a firm both has market power and maintains this power through exclusionary conduct, the firm can assert procompetitive justifications to defend itself against the antitrust claim. Procompetitive justifications generally require that the defendant firm point to a particular market failure that its restraint fixes.[76] Once the firm identifies this market failure, courts generally defer to the firm's assessment of what is in its best interest to produce the greatest output. Courts also tend to accept firms' arguments that a restriction is necessary to bolster its product.[77] "When a valid business reason exists for the conduct alleged to be predatory or anti-competitive, that conduct cannot support the inference of a [Sherman Act] violation."[78]

Facebook could counter a potential antitrust claim by contending that its content restrictions target the market failure of misinformation and poor advertising. Facebook might argue that it must police content it deems offensive or false in the interest of protecting the platform's reputation. The firm could also point to its increased role as a reliable business information provider and its traditional role as an advertiser.

Facebook's restrictions on the posts that compete with its own advertisements are likely not subject to antitrust scrutiny. In fact, Facebook would point to *California Dental*, in which the United States Supreme Court held that advertising restrictions enhance the quality and veracity of the product.[79] Facebook would argue that the higher quality data yields more targeted ads, which maintain a platform that matches individuals with their most ideal consumer preferences. Although Facebook wields disproportionate power compared to an individual user, Facebook has no

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[75] *See* HDC Med., Inc. v. Minntech Corp., 473 F.3d 543, 550 (8th Cir. 2007).

[76] *See* John M. Newman, *Procompetitive Justifications in Antitrust Law*, 94 IND. L.J. 501, 504 (2019).

[77] *See The Antitrust Laws*, FED. TRADE COMM'N https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/3CBY-SKFL].

[78] *See HDC Med. Inc.*, 473 F.3d at 549 (holding that Minntech's altered design of barcode scanners was not considered exclusionary because the change helped customers better use the product).

[79] *See* California Dental Ass'n v. F.T.C., 526 U.S. 756, 771 (1999).

duty to assist its competitors,[80] so long as it takes advantage of its own infrastructure and does not specifically stifle users it previously supported.[81]

A plaintiff can still successfully find a Sherman Act § 2 violation by proving either that the business justifications do not adequately outweigh the exclusionary effects or that the measures are not necessary for maximizing consumer welfare. Perhaps there is no need for Facebook to remove "bad" ideas and facts, as erroneous information does not stand the test of time. A restricted content producer can point to the words of Justice Holmes "that the 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."[82] Just as state censorship yields poor effects, why should a platform that hosts billions[83] of users be able to take down content unilaterally?

Beyond information quality, alternative arguments show that Facebook posting restrictions would reduce the quality of social advertising and platform usage and thereby harm consumer welfare. As mentioned above, user post restrictions cut out advertisers from reaching their intended audiences.[84] In turn, consumers seeking the products, services, and information that social advertisers market face greater difficulty finding what they seek.

Limitations that prevent advertisers from targeting classes of customers extend to more sensitive commercial products as well. Restrictions hamper economic activity related to political beliefs, health status, and other sensitive topics.[85] Restrictions against non-inherently commercial posts, such as political or ideological posts, prevent underfunded candidates from reaching interested citizens to compete with more prominent politicians.[86] A

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[80] *See* Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2004).

[81] *See* Fed. Trade Comm'n v. Facebook, Inc., 560 F. Supp. 3d 1, 25 (D.D.C. 2021) ("[For a monopoly maintenance scheme] to be actionable [under §2], such a scheme must involve specific instances in which that policy was enforced (i) against a rival with which the monopolist had a previous course of dealing; (ii) while the monopolist kept dealing with others in the market; (iii) at a short-term profit loss, with no conceivable rationale other than driving a competitor out of business in the long run.").

[82] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[83] *Number of Active Monthly Facebook Users Worldwide as of 3rd quarter 2022*, STATISTA, https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/ [https://perma.cc/7KF2-CWQB].

[84] *See supra* Section III.B.

[85] *See* Amanda Silberling, *Facebook Will No Longer Allow Advertisers to Target Political Beliefs, Religion, Sexual Orientation*, TECHCRUNCH (Nov. 9, 2021, 5:28 PM CST), https://techcrunch.com/2021/11/09/facebook-will-no-longer-allow-advertisers-to-target-political-beliefs-religion-sexual-orientation/ [https://perma.cc/G4VV-HCYS].

[86] *See* Niam Yaraghi, *Twittter's Ban on Political Advertisements Hurts our Democracy*, BROOKINGS INST. (Jan. 8, 2020), https://www.brookings.edu/blog/techtank/2020/01/08/twitters-ban-on-political-advertisements-hurts-our-democracy/ [https://perma.cc/8PUV-922D].

potential consequence is that individuals who hoped for the economic proposals of an underfunded candidate are cut out from the chance to support their desired commercial policies.[87]

Nonetheless, courts hesitate to lift company-imposed restrictions, as doing so might restrict the firms' Free Speech rights.[88] Additionally, greater deference is accorded to technology companies and other evolving industries, as courts lack expertise in these products and are hesitant to remedy practices that may change in the time elapsed since the antitrust litigation began.[89] Overall, courts are more likely to defer to Facebook's assessment of what maximizes consumer welfare over potential adverse effects.

D. A Possible Reversion to Emphasize Market Power and Non-monetary Consumer Costs Might Also Result in Facebook Liability

Courts might abandon the consumer welfare standard and instead focus on market share and exclusionary conduct. Some academics disagree with the Chicago School and argue that the Sherman Act intended to focus on bigness.[90] These scholars argue that the threat of outsize companies is not whether they produce less products or charge high prices.[91] Rather, the outsize market share is a threat to democracy itself,[92] as private companies effectively control a market. They point to authoritarian regimes that came about in countries, such as the Nazi regime in Germany, arguing that outsize control of industries led to the loss of freedom and liberty in such countries.[93] The proponents of this approach to antitrust law are referred to as the "Neo-Brandeisian School" of antitrust scholars.[94]

Under a framework proposed by Neo-Brandeisian academics, courts would be more likely to invalidate social media companies' content restrictions. Tim Wu, Lina Khan, and Neo-Brandeisians echo the words of Justice Louis Brandeis, who decried that "Men are not free . . . if dependent industrially upon the arbitrary will of another."[95]

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[87] *See id.*

[88] Day, *supra* note 71, at 1342–44.

[89] *See* United States v. Microsoft Corp., 253 F.3d 34, 49 (D.C. Cir. 2001) ("By the time a court can assess liability, firms, products, and the marketplace are likely to have changed dramatically.").

[90] *Cf.* Wu, *supra* note 6, at 15.

[91] *Contra id.* at 87–91.

[92] Promoting Competition in the American Economy, Exec. Order No. 14,036, 86 Fed. Reg. 36987 (July 9, 2021).

[93] *Cf.* Wu, *supra* note 6, at 14.

[94] *Id.* at 127.

[95] Justice Louis D. Brandeis, Address at Faneuil Hall, Boston: True Americanism (July 5, 1915), https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/business-a-profession-chapter-22.

Professor Wu criticizes the Chicago School's movement toward consumer welfare and advocates for a greater focus on market concentration. The goal of antitrust law, he argues, is to ensure that no single entity can exercise dispositive political power. He points toward the tendency for economies that feature disproportionate private market power to give way to autocracy and political upheaval.[96]

Neo-Brandeisians consider exclusionary effects beyond price as well. They believe that a narrow focus on prices has not actually improved consumer welfare.[97] Rather, they argue for a broader focus that would consider restraints that a firm imposes on other market participants, such as a firm's upstream suppliers.[98] Lina Khan, the current chair of the Federal Trade Commission, is similarly concerned with the impact of online platforms' behavior on those who depend on it as a critical intermediary for their business.[99] She asserts that "the current framework in antitrust—specifically its equating competition with 'consumer welfare,' typically measured through short-term effects on price and output—fails to capture the architecture of market power in the twenty-first century marketplace."[100] This alternative, which emphasizes market concentration and non-price specific restrictions, rather than business justifications, might lead to broader consideration of effects and find Facebook restrictions on user posts liable under the Sherman Act.

CONCLUSION

Because Facebook posts drive advertising revenue, facilitate business operations, generate news, and guide investment decisions, they are commerce under the Sherman Act. Under the current doctrine, a claim against Facebook restrictions on user posts is unlikely to constitute a Sherman Act § 2 violation. While Facebook's practices demonstrate non-honest and industrial acquisition of market power in the advertising space, and its practices stifle competing advertisers who use the Facebook platform, courts would likely defer to Facebook's business justifications that its restrictions ensure advertising quality and its platform integrity.

Should courts place greater emphasis on market share and the effects of a firm's impositions on those who use its platform, as Neo-Brandeisians wish,

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[96] *Id.* at 14.

[97] *See* Marshall Steinbaum & Maurice E. Stuckett, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. CHI. L. REV. 595, 600 (2019).

[98] *Id.* at 612.

[99] *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 710 (2017).

[100] *Id.* at 716 (citation omitted).

they may find Facebook posting restrictions liable under § 2 of the Sherman Act.