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The Obsolescence of Advertising in the Information Age

ABSTRACT. The vast amount of product information available to consumers through online search renders most advertising obsolete as a tool for conveying product information. Advertising remains useful to firms only as a tool for persuading consumers to purchase advertised products. In the mid-twentieth century, courts applying the antitrust laws held that such persuasive advertising is anticompetitive and harmful to consumers, but the Federal Trade Commission (FTC) was unable to pursue an antitrust campaign against persuasive advertising for fear of depriving consumers of advertising's information value. Now that the information function of most advertising is obsolete, the FTC should renew its campaign against persuasive advertising by treating all advertising beyond the minimum required to ensure that product information is available to online searchers as monopolization in violation of section 2 of the Sherman Act.

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INTRODUCTION

In an age in which two of the five largest tech firms in the United States both earn about ninety percent of their revenues by selling advertising space, it is hard to believe that as late as the 1970s the Federal Trade Commission (FTC) viewed non-false, non-misleading advertising as anticompetitive conduct capable of violating the antitrust laws.[1] But the FTC did, believing that advertising has the power, through repetition and brand image creation, to induce consumers to buy things that they do not really want, to the disadvantage of competitors selling the things that consumers would otherwise buy.[2] From the 1950s to the 1970s, the FTC brought a series of antitrust cases against some of the nation's largest advertisers, including Procter & Gamble and Kellogg, in which the power of advertising to create an illegitimate competitive advantage through the manipulation of consumer preferences played an important role.[3] Buoyed perhaps by the consumer movement, which peaked during this period, the FTC won the agreement of the federal courts that heavy advertising of S.O.S. scrub pads, the ReaLemon brand of concentrated lemon juice, and Clorox bleach were anticompetitive because, as Justice William O. Douglas put it in the Clorox case, advertising "imprint[s]" a brand "in the mind of the consumer."[4]

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1. *See* Alphabet Inc., Annual Report (Form 10-K) 24, 27 (Dec. 31, 2016), http://abc.xyz/investor/pdf/20161231_alphabet_10K.pdf [http://perma.cc/2FWS-GKK8] (showing Google advertising revenues of $79.383 billion and total Google revenues of $90.272 billion); Facebook, Inc., Annual Report (Form 10-K) 40-41 (Dec. 31, 2016), http://s21.q4cdn.com/399680738/files/doc_financials/annual_reports/FB_AR_2016_FINAL.pdf [http://perma.cc/T642-2QEQ] (showing advertising revenues of $26.885 billion and total revenues of $27.638 billion); *see also* Elizabeth Mensch & Alan Freeman, *Efficiency and Image: Advertising as an Antitrust Issue*, 1990 DUKE L.J. 321, 323-38 (describing the FTC's antitrust campaign against advertising).

2. *See* The Procter & Gamble Co., 63 F.T.C. 1465, 1582 (1963) (arguing that "brand competition" has "the end only of maintaining high prices, discouraging new entry, and, in general, impairing, not promoting, socially useful competition"); *see also* Borden, Inc., 92 F.T.C. 669, 669 (1978) (charging ReaLemon owner Borden with "[e]recting barriers to entry into the reconstituted lemon juice market through extensive trademark promotion and advertising which has artificially differentiated Borden's reconstituted lemon juice from comparable products of its competitors"). For other references to the psychological effect of advertising in opinions of this period, see sources cited *infra* note 85.

3. *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 588-89 (1967); Kellogg Co., 99 F.T.C. 8, 12 (1982); Mensch & Freeman, *supra* note 1, at 323-38.

4. *Procter & Gamble Co.*, 386 U.S. at 579 (upholding a challenge to Procter's acquisition of Clorox because Procter's advertising resources gave Clorox an advantage over rivals); Gen. Foods Corp., 69 F.T.C. 380, 945, 947 (1966) (upholding a challenge to General Foods' acquisition of S.O.S. because General Foods' advertising resources gave S.O.S. an advantage over Brillo); *see also* Borden, Inc. v. FTC, 674 F.2d 498, 515-16 (6th Cir. 1982) (treating the

The view of advertising as fundamentally manipulative succumbed in the 1970s to the view that prevails today: that advertising does no more than convey useful product information to consumers.[5] According to this view, the power of advertising to attract demand to a product arises only because advertising shows consumers that advertised products are better, not because advertising seduces with images, or overpowers through repetition.[6] The Supreme Court embraced this informative view of advertising in 1976, extending First Amendment protection to advertising on the explicit ground that the "free enterprise economy" requires "informed" consumers.[7] The FTC followed suit, terminating its remaining antitrust cases against advertising in the early 1980s and continuing only to regulate false or misleading advertising, the only forms of advertising that can harm markets when advertising functions only to convey information.[8]

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strength of the ReaLemon brand, combined with competitive pricing, as exclusionary for purposes of a monopolization claim under section 2 of the Sherman Act), *vacated*, 461 U.S. 940 (1983). ReaLemon's lemon-shaped containers, ubiquitous in supermarket produce sections, are still familiar to consumers today. The opinion in the ReaLemon case was vacated at the request of the Solicitor General after incoming Reagan Administration appointees changed the FTC's position on the case. *See* Daniel M. McClure, *Trademarks and Competition: The Recent History*, 59 LAW & CONTEMP. PROBS. 13, 19 (1996).

5. For an overview of this change in the economic literature, see Kyle Bagwell, *The Economic Analysis of Advertising*, *in* 3 HANDBOOK INDUS. ORG. 1701, 1716-20 (2007), which surveys the early informative view literature in economics and observes that it "really took flight in the 1960s, largely under the leadership of a group of 'Chicago School' economists." In law, the change was foreshadowed by Justice Harlan's concurrence in the Clorox case. *See Procter & Gamble Co.*, 386 U.S. at 603 (Harlan, J., concurring) ("Proper advertising serves a legitimate and important purpose in the market by educating the consumer as to available alternatives."). In the First Amendment context, the change started with Martin Redish. *See* Martin H. Redish, *First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 432-33 (1970).

6. *See* Phillip Nelson, *Advertising as Information*, 82 J. POL. ECON. 729, 732 (1974) (arguing that "advertised brands [are] better buys").

7. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 749-50, 765, 770 (1976); *see also* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980) ("The First Amendment's concern for commercial speech is based on the informational function of advertising."); Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 53 (2000) (arguing that First Amendment commercial speech doctrine should center on the "information function" of commercial speech); Redish, *supra* note 5, at 447 (stating that "the [F]irst [A]mendment interests in commercial speech are clearly not present in all forms of advertising").

8. *See infra* note 125 and accompanying text. The end of the FTC's campaign against advertising is discussed in Mensch & Freeman, *supra* note 1, at 338. For the FTC's success in the ensuing decades at challenging advertisements that mislead children in particular, see J. Howard Beales, III, *Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present*, 12 GEO. MASON L. REV. 873, 873-74 (2004). The courts went beyond merely ceasing to challenge advertising as anticompetitive to treat advertising as affirmatively procompeti-

The irony of the rise of the informative view is that its timing corresponded almost exactly with the dawn of the information age, that era of huge reductions in the cost of communication and data analysis, that has rendered almost completely unnecessary the provision of product information to consumers through advertising.[9] Today, consumers can get more product information by reading "add to cart" pages on Amazon, or online product reviews on any number of platforms, than they can get from viewing advertisements on billboards or television, or through the advertising links placed by Facebook in its feeds and Google at points all across the web.[10] Beyond the basic provision of product descriptions and specifications to online retailers, and display of this information on a seller's own website, advertising is now obsolete as a useful source of product information. Consumers can get all the information that advertising provides, and much more, when and where they actually want it, on their own online.[11]

The persistence of advertising as a business despite its information obsolescence shows how far from the mark the informative view really is. The information age has ravaged newspaper advertising, the form of advertising that functioned most as a genuine provider of useful product information, replacing newspaper classifieds, for example, with free services like Craigslist.[12] But the information age has otherwise failed to diminish the amount firms spend on advertising, even as it has shifted much advertising online, because advertising never was primarily about disseminating product information, but about ma-

tive, and to promote the practice for that reason. The courts allowed manufacturers, for example, to prevent retailers from discounting, in order to ensure that retailers have sufficient revenues to promote the manufacturers' products. *See* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890, 907 (2007); Mensch & Freeman, *supra* note 1, at 339 (listing other examples). Congress joined the effort to encourage advertising when it passed trademark anti-dilution legislation in 1995 that strengthened the control of firms over their brand images. *See* H.R. REP. No. 104-374 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 1029; Robert N. Klieger, *Trademark Dilution: The Whittling Away of the Rational Basis for Trademark Protection*, 58 U. PITT. L. REV. 789, 860-64 (1997) (arguing that "[d]ilution protection . . . encourages companies to invest more than they otherwise might in the creation of intangible associations that add no real value to the product and that deride economic efficiency").

9. For a definition of the information age, see *infra* note 133.

10. *See infra* Part III.

11. For the significance of allowing consumers to choose when and where to consume advertising, rather than having advertising thrust upon them, see *infra* text accompanying note 175.

12. *See* Robert G. Picard, *Shifts in Newspaper Advertising Expenditures and Their Implications for the Future of Newspapers*, 9 JOURNALISM STUD. 704, 705, 713 (2008) (observing that the internet substitutes for classified advertising and showing that classified advertising amounted to as much as a third of newspaper revenues); *see also infra* note 148.

nipulation, changing preferences rather than just informing them.[13] The information obsolescence of advertising has laid this characteristic bare and in so doing undermined the foundation for the entire edifice of the contemporary legal treatment of advertising, from antitrust's current unwillingness to condemn advertising, to First Amendment protection for commercial speech.

With the demise of the information function of advertising, the manipulative character of advertising must once again take center stage in the law, and the FTC must accordingly renew its antitrust campaign against advertising, with the goal of stamping out the practice except in those limited areas in which it provides information that cannot be had anywhere else.[14] The best way for the FTC to do that is by challenging advertising as illegal monopolization in violation of section 2 of the Sherman Act, as the FTC once did in an earlier era.[15]

Critics of advertising often attack advertising's effect on culture, particularly the way advertising crowds public-spirited speech, like the arts and political debate, out of public fora, replacing them with speech aimed solely at serving the narrow pecuniary interests of private speakers.[16] The virtue of an antitrust challenge to manipulative advertising is that it would focus not on what advertising does to culture but on what it does to the market, the very object that the pursuit of narrow pecuniary interests is supposed to nourish.[17] Advertising in its manipulative guise, so far from smoothing the flow of commerce, threatens technological advance, by giving consumers a reason—image—to purchase a product that is distinct from the only reason for which a consumer should buy a product in a well-functioning market: that the product is actually better at

13. *See* Klieger, *supra* note 8, at 856-57 (stating that "[m]ost advertising . . . is not informational, but . . . aimed at the consumer's heart rather than his mind"); *see also* EDWARD HASTINGS CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION: A RE-ORIENTATION OF THE THEORY OF VALUE 120 (7th ed. 1956) (distinguishing manipulative advertising from informative advertising and arguing that "manipulative" advertisements "create a new scheme of wants by rearranging [the consumer's] motives"). For the shift to online advertising, see Eden Ames, *Digital To Beat TV in Ad Spend by 2018*, AM. MARKETING ASS'N, http://www.ama.org/publications/MarketingNews/Pages/digital-to-overcome-tv-ad-spending-by-2018.aspx [http://perma.cc/KA5J-6VNG].

14. Those areas are described *infra* Part III.

15. *See* Borden, Inc. v. FTC, 674 F.2d 498, 515-16 (6th Cir. 1982), *vacated*, 461 U.S. 940 (1983).

16. *See* Ronald K.L. Collins & David M. Skover, *Essay: Commerce and Communication*, 71 TEX. L. REV. 697, 707-29 (1993).

17. According to the "invisible hand property" of competitive markets, consumer maximization of private individual utility functions and firm maximization of private profits leads to maximization of welfare in the Pareto sense. ANDREU MAS-COLELL ET AL., MICROECONOMIC THEORY 547-49 (1995).

doing what it purports to do.[18] Tinkering with the decision-making processes of consumers prevents consumers from rewarding, through their purchase decisions, the innovators who best meet their needs, and thereby threatens the foundation of technological progress in a free market system.[19] A firm that can win with advertising wins in the mind, and not in the market, delivering the firm from the discipline of competition on the merits. Shorn of its information function, advertising threatens not only culture, but commerce.

The notion that advertising blinds the consumer to genuine differences in product quality smacks of paternalism, because it suggests that consumers do not always know what is best for them.[20] The power of manipulative advertising to make consumers buy products they do not really prefer cannot, however, be denied, either as a matter of common sense, or, increasingly, of neuroscience.[21] Moreover, the paternalism of intervening to stop manipulative advertising is only the long-established, judicially-approved, congressionally-mandated paternalism of the antitrust laws, which have the rather libertarian goal of ensuring a level playing field for all products, so that the best rise to the top on their own, through the discerning choices of consumers.[22]

The notion that advertising manipulates also appears puritanical, because it suggests that seduction is not a good in itself for which consumers might be willing to pay.[23] There can be no question, however, that whatever pleasure consumers might take in being seduced is not sufficient compensation for the harmful effects of buying products they do not really prefer. Antitrust has long

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18. *See* Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 716 (1997) (stating that consumer sovereignty leads "to an efficient economic market" because "[i]t is by choosing some goods or some options over others that consumers satisfy their own wants and send their signals to the economy").

19. *See* Earl W. Kintner, *Federal Trade Commission Regulation of Advertising*, 64 MICH. L. REV. 1269, 1270 (1966) (recognizing the "power possessed by advertisers in the 'battle for men's minds' . . . to influence the direction of our economic development").

20. *See, e.g.*, Mensch & Freeman, *supra* note 1, at 350-53, 372-73 (chastising the mid-century supporters of the FTC's campaign against advertising because they "could not quite believe that image and desire could be more real, even for economics, than the thing itself" and decrying one scholar's "[elitist] contempt for American consumerism").

21. *See infra* notes 39-44 and accompanying text.

22. *See* Averitt & Lande, *supra* note 18, at 715, 718, 720 (stating that "antitrust law can best be understood as a way of protecting the variety of consumer options in the marketplace" and that such protection allows the "economy to act primarily in response to the aggregate signals of consumer demand, rather than in response to government directive or the preferences of individual businesses"). For a brief legal history of the antitrust laws, see HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 57-68 (4th ed. 2011).

23. *See* Mensch & Freeman, *supra* note 1, at 372-73.

accepted the teaching of economists that technological innovation, not image, is the single most important driver of consumer welfare, to be protected at all costs.[24] For this reason, antitrust almost always exempts the monopoly built on technological innovation from censure, and must, a fortiori, reject anticompetitive conduct that threatens innovation, no matter how incidentally pleasurable to consumers that conduct might be.[25] The assumption of the courts and the FTC in the mid-century cases, that uninformative advertising must be anticompetitive and consumer-harmful advertising, was right.[26]

The Article proceeds as follows. Part I describes the three faces of advertising as manipulation, pleasure, and information, and argues that advertising's threat to innovation is more important than any pleasure advertising provides. Part II details the FTC's attack on advertising. The legacy of the mid-century campaign against advertising is a set of federal court precedents treating advertising as anticompetitive. The apotheosis of the informative view of advertising ultimately prevented the FTC from using these holdings to expand its attack on advertising. Nevertheless, these precedents have never been repudiated by the courts and could be reinvoked today.[27] Part III makes the case that the information function of advertising has become obsolete. Without this justification for advertising, the door is open to revive the antitrust case against advertising.

Part IV lays out how enforcers today could challenge advertising as illegal monopolization under section 2 of the Sherman Act. In particular, the denial of any value to persuasive advertising under the mid-century precedents permits antitrust to treat advertising as exclusionary conduct. Because advertising threatens innovation in all cases, advertising should count as a per se violation of the antitrust laws, saving enforcers the trouble of proving in each case that advertisers have monopoly power. Part V responds to constitutional counterarguments by showing that the obsolescence of the information function disqual-

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24. *See* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 613-14 (1990).

25. *See* United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); HOVENKAMP, *supra* note 22, at 296, 300-01.

26. That assumption was highlighted by the dissenter in the ReaLemon case, who complained that "I do not believe that it is the function of the FTC to decide which consumer preferences are 'rational' and which 'irrational.'" *See* Borden, Inc. v. FTC, 674 F.2d 498, 520 n.4 (6th Cir. 1982), *vacated*, 461 U.S. 940 (1983). The argument of this Article is that it is perfectly reasonable to suppose that manipulative advertising causes consumers to buy technologically inferior products, and that both current antitrust law and economic science agree that such buying decisions are irrational. *See infra* text accompanying notes 40 & 71.

27. *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 579 (1967) (upholding a challenge to a merger that would give the merged firm an advertising advantage over competitors); Gen. Foods Corp. v. FTC, 386 F.2d 936, 945, 947 (3d Cir. 1967) (same); *Borden*, 674 F.2d at 515-16 (treating branding as illegal monopolization).

ifies advertising from First Amendment protection. In the information age, most advertising falls into the category of commercial speech currently occupied only by false advertising, a category that receives no protection because it conveys no useful information.[28] Part VI discusses the economic implications of an advertising ban, including the need for government subsidization of the media and online search to make up for the loss of advertising revenues that these industries would suffer under a ban. Subsidies might be funded by a tax on firms; because of the low cost of running online search services, the tax would be considerably smaller than the amounts firms currently spend on advertising.

I. THE VALUE OF ADVERTISING

In a world of perfect competition, numerous firms strive to sell an identical product by undercutting each other's prices.[29] Advertising is anticompetitive relative to that world, because advertising differentiates the advertised product from those of competitors, if only in the minds of consumers, causing consumers to make buying decisions based on factors other than just relative price.[30] But mere anticompetitive effect is not enough for an antitrust violation; what matters is the value to consumers of the activity that has the anticompetitive effect.[31] An improvement in the engineering of a product that makes the product more useful to consumers also differentiates a product from those of competitors, causing consumers to prefer the product for reasons other than just price, but antitrust would never condemn a firm for producing a better product.[32] Whether advertising is anticompetitive in a way that antitrust should find objectionable depends on the value of advertising, whether advertising makes the product better in some sense, as a technologically innovative product does, or instead manipulates consumers into preferring products that are not really better for them.[33]

The oldest view of advertising, born at about the time that mass advertising first appeared in the 1920s, is that advertising is indeed manipulative, playing upon the mind to induce consumers to buy products that they do not in fact

28. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980).

29. CHAMBERLIN, *supra* note 13, at 114.

30. This point is discussed in more depth in Section IV.A *infra*. For more on the exclusionary character of product differentiation in particular, see *infra* note 183.

31. *See infra* note 185 and accompanying text.

32. *See infra* note 192 and accompanying text.

33. *See* Mensch & Freeman, *supra* note 1, at 350.

prefer.[34] For most of the history of the manipulative view, adherents treated the manipulative character of advertising as self-evident, not without reason.[35] Modern advertising, which famously focuses on selling the experience rather than the product, on image creation rather than information dissemination, is self-evidently designed to induce consumers to make purchase decisions based on factors that are at best tenuously related to the product itself, a fact to which any marketing textbook quite explicitly attests.[36] Pervasive advertising of Santa drinking Coke, for example, seems obviously designed to induce consumers to buy Coke not because they prefer the taste of Coke to Pepsi, but because repetition has made Coke the first thing to come to mind when consumers think about refreshments, or because the association with Santa, and thence with

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34. For an overview of the start of mass advertising, see STUART EWEN, CAPTAINS OF CONSCIOUSNESS ADVERTISING AND THE SOCIAL ROOTS OF THE CONSUMER CULTURE 32 (2008), which notes that "[d]uring the 1920s . . . advertising grew to the dimensions of a major industry." For examples of the manipulative view from across the twentieth century, see Bagwell, *supra* note 5, at 1710-16. Notable examples of this view include CHAMBERLIN, *supra* note 13, at 119-20; JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY 155-56 (1958), which states that advertising's "central function is to create desires"; ALFRED MARSHALL, INDUSTRY AND TRADE 304-07 (1920), which describes most advertising as "social waste"; and JOAN ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION 90 (2d ed. 1969), which states that advertising "plays upon [the consumer's] mind with studied skill, and makes him prefer the goods of one producer to those of another because they are brought to his notice in a more pleasing and forceful manner."

35. *See, e.g.*, CHAMBERLIN, *supra* note 13, at 119 (stating conclusorily that "[a]dvertising affects demands . . . by altering the wants themselves"); GALBRAITH, *supra* note 34, at 155-56 (containing a similarly conclusory statement); ROBINSON, *supra* note 34 (same). The intuitive obviousness of the manipulative character of advertising is perhaps best reflected in the fact that most consumers trust recommendations from friends and family more than those of advertisers. Press Release, Nielsen, Global Consumers' Trust in "Earned" Advertising Grows in Importance (Apr. 10, 2012) [hereinafter Nielsen Press Release], http://www.nielsen.com/us/en/press-room/2012/nielsen-global-consumers-trust-in-earned-advertising-grows.html [http://perma.cc/9629-33FC]; *see also* ROLAND MARCHAND, ADVERTISING THE AMERICAN DREAM: MAKING WAY FOR MODERNITY, 1920-1940, at 25 (1985) (remarking that in the 1920s the public had the "habit of referring to advertising as 'a game'"); Cass R. Sunstein, *Fifty Shades of Manipulation*, 1 J. MARKETING BEHAV. 213, 227 (2016) ("In an advertising campaign, everyone knows the nature of the interaction. In some ways, manipulation is the coin of the realm.").

36. *See* J. SCOTT ARMSTRONG, PERSUASIVE ADVERTISING: EVIDENCE-BASED PRINCIPLES, at x, 3 (2010) (claiming to provide "useful knowledge" about how to engage in persuasive advertising, based upon research in "fields including psychology, consumer behavior, . . . and propaganda"); MONLE LEE & CARLA JOHNSON, PRINCIPLES OF ADVERTISING: A GLOBAL PERSPECTIVE 11 (2d ed. 2005) (distinguishing the "persuasive" and information functions of advertising); MARCHAND, *supra* note 35, at 10-11 (observing that it was not until the 1920s that most advertising switched from being informational in character, having the "quality of announcements," to being persuasive in character, "selling the benefit instead of the product, . . . prestige instead of automobiles, sex appeal instead of soap").

happy childhoods, has woven the product into the consumer's emotional fabric.[37] The manipulative character of advertising has seemed so clear to adherents of this view that economist Edward Chamberlin, in his pioneering work on product differentiation, could summarily conclude that

> Advertising affects demands . . . by altering the wants themselves . . . . An advertisement which merely displays the name of a particular trademark or manufacturer may convey no information; yet if this name is made more familiar to buyers they are led to ask for it in preference to unadvertised, unfamiliar brands. Similarly, selling methods which play upon the buyer's susceptibilities, which use against him laws of psychology with which he is unfamiliar and therefore against which he cannot defend himself, which frighten or flatter or disarm him—all of these have nothing to do with his knowledge. They are not informative; they are manipulative. They create a new scheme of wants by rearranging his motives. As a result, demand for the advertised product is increased, that for other products is correspondingly diminished.[38]

In recent years, advances in neuroscience have started to provide a scientific basis for the manipulative view.[39] These advances suggest what most people intuit, that the brain has two decision-making systems, an impulsive system and a deliberative system.[40] The deliberative system generates what may reasonably be considered true preferences and trains the impulsive system to ensure that these preferences are implemented at the lowest cost in terms of mental effort, and with the required speed when time is of the essence.[41] But the

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37. *See* Emily Fogg-Meade, *The Place of Advertising in Modern Business*, 9 J. POL. ECON. 218, 231 (1901) (describing advertising as a "subtle, persistent, unavoidable presence that creeps into the reader's inner consciousness. A mechanical association is formed and may frequently result in an involuntary purchase"). Advertising of Coke appears to have been successful in achieving this goal. One study found that subjects could not distinguish Coke from Pepsi in blind testing, preferred drinks labeled "Coke" over identical drinks labeled "Pepsi," and showed activity in the memory and cognitive control portions of their brains when told they were drinking Coke, but not when told they were drinking Pepsi. Samuel M. McClure et al., *Neural Correlates of Behavioral Preference for Culturally Familiar Drinks*, 44 NEURON 379, 384-85 (2004).

38. CHAMBERLIN, *supra* note 13, at 119-20.

39. *See* Bagwell, *supra* note 5, at 1825-27.

40. *See* B. Douglas Bernheim & Antonio Rangel, *Addiction and Cue-Triggered Decision Processes*, 94 AM. ECON. REV. 1558, 1562 (2004).

41. *See id.* at 1561-62 (arguing that the measure of consumer welfare should be consumers' deliberative system preferences); Anuj K. Shah & Daniel M. Oppenheimer, *Heuristics Made Easy: An Effort-Reduction Framework*, 134 PSYCHOL. BULL. 207, 207 (2008) (discussing "heuristic" behaviors used by people to "process information in a less effortful manner than one

impulsive system can also prevent preferences, as generated by the deliberative faculty, from being expressed in the choices people make.[42] To borrow a striking example from the neuroeconomics literature, tourists maimed in London as a result of looking in the wrong direction before crossing the street freely choose to look in a direction that they themselves would agree they do not prefer, because their impulsive faculty, trained by the habit of looking in the wrong direction in their home countries, overpowers their deliberative faculty.[43] Thus neuroscience can now give an account of how advertising might induce consumers to purchase products that they do not in fact prefer: by training consumers' impulsive faculty to overcome their deliberative faculty in making product choices.[44]

This account has allowed the manipulative view to respond to the attack that there can be no better evidence of consumer preferences than the products consumers in fact choose to buy.[45] For advocates of this consumer sovereignty view, if consumers favor advertised products, that can only be because consumers actually prefer those products. The evidence that consumers can make impulsive decisions counters this view by showing that a consumer's actual buying decisions are no window into a consumer's soul.

The consumer sovereignty view is a cousin of a more searching critique of the view of advertising as manipulative that first appeared in the 1960s, in-

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would expect from an optimal decision rule"); *see also* Andrew Westbrook & Todd S. Braver, *Cognitive Effort: A Neuroeconomic Approach*, 15 COGNITIVE, AFFECTIVE & BEHAV. NEUROSCIENCE 395, 399 (2015) (pointing to constraints on "working memory" as an explanation for why people experience mental tasks as requiring effort).

42. Bernheim & Rangel, *supra* note 40, at 1561-62 ("There are plainly circumstances in which it makes no sense to infer preferences from choices.").

43. *See id.* at 1562.

44. Sunstein, *supra* note 35, at 222 (describing "the now-widespread view that the human mind contains not one but two 'cognitive systems,'" an "automatic, intuitive system, prone to biases and to the use of heuristics," and a "more deliberative, calculative, and reflective" system, and observing that "[s]avvy marketers know that if they want to influence behavior, they should engage" the first of these systems); T.M. Wilkinson, *Nudging and Manipulation*, 61 POL. STUD. 341, 345 (2013) (describing manipulation as "the perversion of a decision-making process").

45. For this charge, see ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 318 (1993). Even as he concurred in the Court's decision in the Clorox case to treat advertising as anticompetitive, Justice Harlan also gave voice to this charge, writing that "[i]t is not the [FTC's] function to decide which lawful elements of the 'product' offered the consumer should be considered useful and which should be considered the symptoms of industrial 'sickness.' It is the consumer who must make that election through the exercise of his purchasing power." FTC v. Procter & Gamble Co., 386 U.S. 568, 604 (1967) (Harlan, J., concurring). For a rejection of the charge as a "mere tautology," see Mensch & Freeman, *supra* note 1, at 352-53. For a more nuanced defense of consumer sovereignty, see Abba P. Lerner, *The Economics and Politics of Consumer Sovereignty*, 62 AM. ECON. REV. 258, 258 (1972).

spired perhaps by the vigor with which the FTC attacked advertising during that period.[46] The critique, which is associated with the Chicago School of antitrust analysis, is that advertising's power over consumer purchase decisions arises not from manipulation but because advertising makes the product better, much as a technological innovation does, either directly, by enhancing the pleasure the consumer takes in consuming the product, or indirectly, by providing the consumer with useful product information that helps the consumer to realize that the product is in fact better.[47] Here is Robert Bork, perhaps the most influential member of the Chicago School:

> When advertising and promotion provide information, pleasure, or what have you, the composition of the original product is changed. The original product, after all, is usefully thought of not merely as a physical object, but rather as a bundle of services or gratifications to be derived from the object. The provision of information or aura adds another group of services or gratifications. This change in the composition of the product offered the consumer will require that resources be bid away from other employments. But if the new product proves more profitable, this means that consumers prefer the new allocation of resources – and that efficiency has been increased.[48]

The view that advertising can enhance the pleasure that consumers take in consuming the advertised product amounts to the notion that advertising is what economists call a product complement, the milk and sugar to the advertised product's coffee, essential for real enjoyment of the product, given away free not to manipulate people into consuming the complemented product, but because it is easier to collect payment for both through a single charge levied on one item.[49] Advertising complements the advertised product by giving consumption of the advertised product social meaning, an "aura" in Bork's terms,

46. For a discussion of major contributions to this reaction, see Bagwell, *supra* note 5, at 1716-23, which describes the "informative view" and the "complementary view." For the FTC's attack on advertising, see *infra* Part II.

47. For an introduction to the Chicago School of antitrust, see George L. Priest, *Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law*, 57 J.L. & ECON. S1, S4-14 (2014). For the view of advertising as pleasure enhancing, see Bagwell, *supra* note 5, at 1720-23. For the informative view of advertising, see *id.* at 1718-19; Nelson, *supra* note 6, at 732.

48. BORK, *supra* note 45, at 318. For Bork's significance, see Priest, *supra* note 47, at S1-2.

49. *See* HAL R. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 111-12 (7th ed. 2006); Gary S. Becker & Kevin M. Murphy, *A Simple Theory of Advertising as a Good or Bad*, 108 Q.J. ECON. 941, 961-63 (1993).

often in the form of prestige.[50] Advertisements for Louis Vuitton teach society, and the buyer, that Louis Vuitton is a sign of luxury, and that in turn increases the pleasure the buyer takes in owning a Louis Vuitton bag.[51]

By contrast, the view that advertising helps consumers identify the products they prefer draws its power from the notion that all advertising is usefully informative, regardless of content.[52] Much advertising, of course, seems to provide little in the way of useful product information, making it hard, at least at first glance, to justify in information terms.[53] An advertisement showing Santa drinking Coke conveys neither information about the characteristics of the product nor even information about the product's existence to all but the tiny minority of Americans who have never heard of Coke.[54] Proponents of the informative view argue, however, that the bare existence of advertising itself conveys the information that the advertiser is willing to spend money promoting the product, and that in turn informs consumers that the advertiser believes that the product will be pleasing enough to consumers to cover the cost of the advertising.[55]

The informative view of advertising in particular has flourished since the 1970s, perhaps because the informative view provides both friends and enemies of advertising with support, without requiring either to dive down the rabbit hole of human psychology to establish that advertising sows either pleasure or confusion in the mind.[56] The informative view allows defenders of advertising to redeem virtually all advertising, but only so long as the advertising contains

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50. BORK, *supra* note 45, at 318; Bagwell, *supra* note 5, at 1720-23; Becker & Murphy, *supra* note 49, at 942; Franklin M. Fisher & John J. McGowan, *Advertising and Welfare: Comment*, 10 BELL J. ECON. 726, 727 (1979).

51. *See* Fisher & McGowan, *supra* note 50, at 727.

52. *See* Nelson, *supra* note 6, at 732.

53. *See* Becker & Murphy, *supra* note 49, at 943-44; Rodney A. Smolla, *Information, Imagery, and the First Amendment*, 71 TEX. L. REV. 777, 784-85 (1993); *see also* MARCHAND, *supra* note 35, at 10-11 (remarking upon the change from informational to image-based advertising that took place in the 1920s).

54. *See* Nelson, *supra* note 6, at 732; *see also* Gene M. Grossman & Carl Shapiro, *Informative Advertising with Differentiated Products*, 51 REV. ECON. STUD. 63, 63-64 (1984) (professing to take "a very favorable view" of advertising by assuming that the consumer is "unaware of the existence of a particular brand unless she sees an ad describing it").

55. *See* Richard E. Kihlstrom & Michael H. Riordan, *Advertising as a Signal*, 92 J. POL. ECON. 427, 428 (1984) (treating advertising as "simply a conspicuous expenditure of resources by firms" that can serve as a quality signal to consumers); Nelson, *supra* note 6, at 732.

56. *See* Bagwell, *supra* note 5, at 1716-20 (tracing the origins of the informative view to the 1960s and 1970s). The desire of some economists to avoid the problem of psychology is reflected in Farouk Gul & Wolfgang Pesendorfer, *The Case for Mindless Economics*, *in* THE FOUNDATIONS OF POSITIVE AND NORMATIVE ECONOMICS: A HANDBOOK 3 (Andrew Caplin & Andrew Schotter eds., 2010) (rejecting behavioral economics).

no falsehoods. When advertising is false, detractors of advertising can get to work, because under the informative view, false advertising can be as harmful to consumers as truthful advertising can be helpful to consumers.[57] False advertising can lead consumers to buy the wrong products to the same extent as truthful advertising can be relied upon to help consumers find the right products.[58]

Reducing good and bad advertising to true and false advertising is highly unsatisfactory from the perspective of protecting consumers, because this reduction ignores the challenge posed by the vast expanse of manipulative, but truthful and non-misleading, advertising.[59] Coke's Santa advertising, for example, is clearly aimed at doing more than merely informing the public that Coke is better, but the advertising is neither false nor misleading, except perhaps to children who do not yet know that Santa is fiction, making it entirely

57. *See* Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 669-70 (1977). The appeal of false advertising as a refuge for detractors of advertising is illustrated by the work of Averitt and Lande, who dismiss the threat of "'image' advertising" as something "which consumers could set aside if they desire" but characterize "[a] manufacturer's use of false or misleading information" as "perhaps the greatest single threat to the free exercise of consumer choice." Averitt & Lande, *supra* note 18, at 717, 733.

Condemnation of false advertising generally extends to misleading advertising as well. Misleading advertising suggests the truth of a false statement without actually making the false statement. *See* Kintner, *supra* note 19, at 1280. By contrast, manipulative advertising uses repetition and associations that might very well be true to interfere with the ability of consumers to translate their preferences into buying decisions. *See supra* note 44 and accompanying text. In this Article, "false advertising" is understood to include misleading advertising.

58. *See* Pitofsky, *supra* note 57, at 663, 669-70 (arguing that advertising "facilitates the functioning of the market economy," but that deceptive and misleading advertising should be proscribed); *see also* Averitt & Lande, *supra* note 18, at 716, 733 (describing the goal of the regulation of false advertising as to allow consumers to make informed decisions, and thereby to send signals to the economy to satisfy consumer wants, signals that will not be sent if consumer "decisionmaking abilities have been impaired by incorrect information"); Nelson, *supra* note 6, at 749-50.

59. *See* Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 CORNELL L. REV. 513, 529 (2014); Nicholas Kaldor, *The Economic Aspects of Advertising*, 18 REV. ECON. STUD. 1, 7 (1950) ("[F]ew would care to justify the methods, and the scale of expenditure, of modern advertising by reference to the services of information which it provides."). Neil Averitt and Robert Lande fail to recognize the scope of manipulative advertising when they condemn "subliminal ads" because they "bypass the viewer's conscious mind," making them "inconsistent with the goal of rational consumer choice," but do not condemn "associational or image advertising" because in their opinion these forms do "not inevitably prevent the operation of the consumers' critical faculties." Averitt & Lande, *supra* note 18, at 749.

unproblematic in an informative-view world.[60] Despite this gap, the law reoriented itself along informative view lines with remarkable rapidity in the 1970s, with the Supreme Court granting First Amendment protection to advertising in 1976 on the explicit ground that advertising conveys useful product information,[61] and expressly exempting only false advertising from that protection.[62] At about the same time, the FTC retreated from attempts to go beyond antitrust-based condemnation of the advertising of homogeneous products, which have no differences about which advertising might provide useful information, to challenge the information-rich advertising of differentiated products.[63]

The informative view has remained the dominant view of advertising ever since, leaving unanswered the basic question whether truthful, non-misleading advertising on balance manipulates, informs, or acts as a product complement, enhancing the pleasures of consumption.[64] By ignoring the possibility of manipulation, the informative view does no more than establish another way in which advertising might be valuable to consumers, in addition to advertising's role as a product complement. But the question of the value of advertising can be answered only by going beyond adherence to any particular view to carry out a comparison of the relative effects of each of advertising's three functions, a balancing of the harm of the manipulative function, in terms of the losses consumers suffer when advertising manipulates them into purchasing products that they do not actually prefer, against the gains consumers enjoy when advertising enhances the pleasure consumers take in consuming advertised products,

60. *Cf.* MICHAEL F. JACOBSON, CTR. FOR SCI. IN THE PUB. INTEREST, MARKETING COKE TO KIDS, vi, 16-17 (2016) (calling on the FTC to treat Coke's Santa Claus advertisements as deceptive marketing to children).

61. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 765 (1976).

62. *Id.* at 771-72; *see also* Goodman, *supra* note 59, at 525 ("Because the principal purpose of commercial speech protection is to safeguard the consumer's interests in accurate information, it naturally follows that inaccurate information would fall outside the zone of protection.").

63. *See* Gen. Foods Corp. II, 103 F.T.C. 204 (1984); Kellogg Co., 99 F.T.C. 8 (1982); Heublein, Inc., 96 F.T.C. 385 (1980). These cases are discussed *infra* Part II. For the significance of homogeneous products, see *infra* note 90 and accompanying text.

64. The dominance of the informative view is suggested by the fact that virtually every model described in Kyle Bagwell's review of the advertising economics literature since the 1970s treats advertising as informative. *See* Bagwell, *supra* note 5, at 1762-1813. The multifunctional character of advertising has been noted by other scholars. *See* Smolla, *supra* note 53, at 800 (observing that advertising is "multidimensional" in function).

and the further gains consumers enjoy when advertising reveals to them, through the provision of information, which products they will like best.[65]

The problem of balancing these relative effects would be easy to solve if any given advertisement were to have only one of the three functions, with some advertisements purely informing, others purely manipulating, and still others purely complementing, because then antitrust could preserve advertisements with either of the two beneficial functions, the informative and the complementary, and ban only manipulative advertisements.[66] This strategy of disaggregation works, but only in part. It will become clear in Part III that the vast majority of advertising no longer provides consumers with useful product information, meaning that most advertising can only be manipulative or complementary, taking the problem of how to preserve the informative function of advertising out of the mix. But unlike the informative function, neither the complementary nor manipulative functions of advertising can be distilled out of any given advertisement.[67] The association any particular advertisement creates between the advertised product and a particular image always at once manipulates and titillates.[68] Santa drinking a Coke both induces the consumer to buy Coke for Santa, rather than for Coke, and confers pleasure, transforming the consumption of Coke into an occasion for holiday cheer. Today, the problem of reconciling the opposing effects of manipulative and complementary advertising, the two faces of what will here be called the "persuasive" aspect of advertising, is all that is left of the problem of determining the value of advertising, and cannot be ignored.[69]

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65. *See* Rebecca Tushnet, *It Depends on What the Meaning of False Is: Falsity and Misleadingness*, 41 LOY. L.A. L. REV. 227, 257 (2007) (recognizing the importance of identifying "which is to be master" when advertising has multiple opposing effects).

66. *See* Smolla, *supra* note 53, at 800 (describing the regulation of advertising as "problematic" precisely because "it is extremely difficult to regulate speech on the basis of the characteristics of any one communicative strain").

67. *See id.*

68. In his concurrence in the Clorox case, Justice Harlan identified this problem, writing that "[u]ndeniably advertising may sometimes be used to create irrational brand preferences . . . but it is very difficult to discover at what point advertising ceases to be an aspect of healthy competition." FTC v. Procter & Gamble Co., 386 U.S. 568, 603-04 (1967) (Harlan, J., concurring).

69. Bagwell distinguishes complementary advertising from persuasive advertising. Bagwell, *supra* note 5, at 1705-6. For Bagwell, persuasive advertising changes preferences, and corresponds to manipulative advertising as that term is used in this Article, whereas complementary advertising appeals to pre-existing, static, preferences for consuming advertising in combination with the advertised product. *See id.* In this Article, persuasive advertising refers to both complementary and manipulative advertising because both intensify the desire of consumers for the advertised product, whether by appealing to the consumer's static preference for consumption of the advertised product in combination with advertising (the case of

That ultimately poses no great challenge for antitrust policy toward advertising, however, because both economics and prevailing antitrust doctrine make clear that the harm to consumers caused by advertising in its manipulative guise must far exceed any benefit conferred upon consumers by advertising operating as a product complement.[70] The reason is that manipulation threatens technological innovation, which is recognized by economists as the most important driver of gains to consumers in the economy.[71] In order for a free enterprise economy to deliver technological progress at the rate, and in the direction, preferred by consumers, consumers must be able to signal their preferences to firms through their purchase choices.[72] Those choices reward firms that innovate in ways consumers prefer with revenues, and punish firms that sell disfavored products with bankruptcy. Manipulative advertising breaks the link between consumer preferences and the signals consumers send through their purchase choices, by preventing the seat of consumer preferences in the mind, the deliberative faculty, from controlling those decisions.[73] The result is a threat to the ability of the free market to innovate technologically at the rate,

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complementary advertising) or by changing consumer preferences themselves (the case of manipulative advertising). By contrast, informative advertising has no effect on the strength of a consumer's desire for the advertised product, but instead reveals to the consumer that a particular product is the product for which the consumer has had a strong preference all along.

70. For a second development of the argument introduced here, see *infra* text accompanying note 208.

71. For the importance of technological innovation, see SCHERER & ROSS, *supra* note 24, at 613-14; JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 84-85 (1976); *see also infra* notes 200-201 and accompanying text.

72. *See* EUGENE SILBERBERG, THE STRUCTURE OF ECONOMICS: A MATHEMATICAL ANALYSIS 363-64 (1990) (observing that "any economic system solves . . . the problem of production," which "depends upon the production of information concerning the valuation of goods by consumers and the ability of individuals to utilize that information" for production purposes); Averitt & Lande, *supra* note 18, at 715-16 (stating that the ability of consumers to make independent decisions about what to buy is the factor "that causes [the] economy to act primarily in response to the aggregate signals of consumer demand, rather than in response to government directives or the preferences of individual businesses" and describing that ability of consumers as being "part of the Western world's answers Marxism"); *see also* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107 (1984) (stating that business conduct that "has the effect of reducing the importance of consumer preference in setting price and output is not consistent with" consumer welfare); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 765 (1976) ("So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.").

73. For the effects of manipulative advertising, see *supra* note 44 and accompanying text.

and in the direction, that consumers prefer.[74] When, under the influence of manipulative advertising, the preference signals received by markets fail to reflect true consumer preferences, markets respond by delivering technologies to consumers that are inferior in the sense of failing to satisfy consumers' true preferences.

Whatever complements-pleasure advertising gives consumers in exchange for purchasing inferior products must fail fully to compensate consumers for this loss, because technological innovation contributes more to consumer welfare than does image.[75] The pleasures of the best Super Bowl commercial pale in comparison to the value provided to consumers by the invention of the television itself, the glory of the billboards in Times Square to the invention of the lightbulbs that illuminate them.[76] Antitrust recognizes the overriding importance of technological innovation.[77] For this reason, antitrust almost never condemns innovation, despite the competitive disadvantage that innovation creates for rivals that have failed to innovate, and the higher prices for the innovative product that result from this undermining of competition.[78] If antitrust is willing to restrain itself to avoid chilling innovation, then it has all the more reason to unleash itself against persuasive advertising, which always creates a risk of chilling innovation by preventing consumers from reflecting their preferences in their purchase decisions.[79]

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74. *See* Kintner, *supra* note 19, at 1270 (acknowledging the "power possessed by advertisers . . . to influence the direction of our economic development"). Manipulative advertising undermines the "invisible hand" property of markets, which exists only if consumers maximize their own utility functions, meaning that consumers act according to their true preferences. *See* MAS-COLELL ET AL., *supra* note 17, at 547-49.

75. Economists recognize technological innovation, rather than complements-pleasure, as the most important driver of economic growth. *See* SCHERER & ROSS, *supra* note 24, at 613-14.

76. *See* ROBERT J. GORDON, THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR 116-20, 319-20 (2017) (discussing the transformative material effects of the invention of the lightbulb and television).

77. *See* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004) (refusing to condemn monopoly per se in order "to safeguard the incentive to innovate").

78. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945) ("A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although, the result may expose the public to the evils of monopoly, the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat. The successful competitor, having been urged to compete, must not be turned upon when he wins."). For more on this point, see *infra* note 199 and accompanying text.

79. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 107 (1984) (stating that "Congress designed the Sherman Act as a consumer welfare prescription" and that a "restraint that has the effect of reducing the importance of consumer prefer-

The notion that advertising's threat to innovation trumps any modest pleasure advertising may confer on consumers is already baked into current legal restrictions on false advertising, and the courts' willingness to exempt false advertising from First Amendment protection.[80] Advertising can serve as a pleasurable complement to the advertised product even when the advertising is false, because some people want to be deceived.[81] False advertising about the origin of a product, for example, might increase the prestige of the product despite being false, just as the map showing the mythical location of Häagen Dazs that once graced every carton of Häagen Dazs ice cream may have given prestige-pleasure to 1980s ice cream consumers who thought that they were consuming imported ice cream instead of ice cream made in New York.[82] Yet the only constant in the Court's First Amendment jurisprudence over the past forty years has been that false advertising is entitled to no protection, and the FTC has enforced federal deceptive advertising statutes throughout this period.[83] The implication is clearly that courts and enforcers believe that the economic harm that comes from the making of product choices that do not reflect actual preferences, here because consumers have false information about those choices, exceeds any pleasure that the advertising may confer. If complements-pleasure cannot save false advertising, then it should not save persuasive advertising, which similarly results in product choices that do not reflect true preferences.

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ence in setting price and output is not consistent with this fundamental goal of antitrust law" (internal quotation marks omitted)).

80. Federal law contains multiple restrictions on false advertising. *See* 15 U.S.C. § 1125 (2012) (Lanham Act false advertising provision); 15 U.S.C. §§ 45, 52-55 (2012) (FTC false advertising authority); *see also* Pom Wonderful LLC v. Coca-Cola Co., 134 S. Ct. 2228, 2234 (2014) (discussing Lanham Act false advertising claims). More examples are listed in Kathleen M. Sullivan, *Cheap Spirits, Cigarettes, and Free Speech: The Implications of* 44 Liquormart, 1996 SUP. CT. REV. 123, 153 n.114. The Supreme Court denied First Amendment protection to false advertising in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976). The relevance of false advertising to the law of persuasive advertising is also discussed in Section IV.A and Part V.

81. *See infra* text accompanying note 220.

82. *See* Richard D. Lyons, *Reuben Mattus, 81, the Founder of Haagen-Dazs*, N.Y. TIMES (Jan. 29, 1994), http://www.nytimes.com/1994/01/29/obituaries/reuben-mattus-81-the-founder-of-haagen-dazs.html [http://perma.cc/QTL5-V5FQ].

83. *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 579 (2011) (appearing to strengthen First Amendment protection for informative commercial speech while affirming the continuing vitality of the denial of First Amendment protection to false advertising); J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets To Protect Consumers?*, 83 GEO. WASH. L. REV. 2157, 2183-2200 (2015) (discussing, and critiquing, FTC false advertising enforcement over this period).

It is remarkable that the question of the relative effects of persuasive advertising in its manipulative and complementary guises appears nowhere in the FTC and federal court opinions that emerged from the FTC's mid-century campaign against advertising.[84] It was self-evident to the majorities in those cases as well as the FTC that purely persuasive advertising has no value.[85] What bothered the FTC was only that some advertising might be genuinely informative.[86]

II. THE MID-CENTURY ASSAULT ON ADVERTISING

From the late 1950s through the 1970s, the FTC's Bureau of Competition sought to establish persuasive advertising as an anticompetitive practice illegal under the antitrust laws.[87] To succeed, the Bureau faced two challenges. First, the Bureau had to convince the FTC and the courts that persuasive advertising is without value, manipulative rather than complementary. This turned out to be easy, the FTC and the courts accepting it with little debate.[88]

Second, the Bureau had to find a way to target only persuasive advertising, as opposed to informative advertising, which the FTC was loath to condemn.[89]

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84. *See infra* Part II.

85. *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 569, 571 (1967); Borden, Inc. v. FTC, 674 F.2d 498, 515-16 (6th Cir. 1982), *vacated*, 461 U.S. 940 (1983); Gen. Foods Corp. v. FTC, 386 F.2d 936, 945, 947 (3d Cir. 1967); Procter & Gamble Co., 63 F.T.C. 1465, 1581-82 (1963).

86. *See* Gen. Foods Corp. II, 103 F.T.C. 204, 364 (1984); Kellogg Co., 99 F.T.C. 8, 241 (1982); Heublein, Inc., 96 F.T.C. 385, 596 (1980); *Procter & Gamble Co.*, 63 F.T.C. at 1580.

87. *See* Mensch & Freeman, *supra* note 1, at 325-38 (describing a series of FTC cases that characterized advertising as anticompetitive); Daniel M. McClure, *Trademarks and Unfair Competition: A Critical History of Legal Thought*, 69 TRADEMARK REP. 305, 349 (1979) (stating that the FTC "has decided to attack monopolies and oligopolies which have preserved their market power by heavy brand advertising and promotion of trademarks"); McClure, *supra* note 4, at 20 (describing the FTC's "position" before the 1980s as being that "trademarks and brand differentiation" were "anticompetitive"); Yale Brozen, *New FTC Policy from Obsolete Economic Doctrine*, 41 ANTITRUST L.J. 477, 477-78 (1972) (attacking the FTC's "new policy toward advertising" that "advertising is a barrier to entry behind whose shelter firms behave monopolistically"); William H. Ball, Jr., *Government Versus Trademarks: Today – Pharmaceuticals, ReaLemon and Formica – Tomorrow?*, 68 TRADEMARK REP. 471, 494 (1978) (lamenting that in 1978 "no single field of inquiry is more likely to arouse the crusading zeal of the FTC and its allies in the Consumerist Movement than that of advertising").

88. *See Procter & Gamble Co.*, 386 U.S. at 569, 571; *Borden*, 674 F.2d at 515-16; *Gen. Foods Corp.*, 386 F.2d at 945, 947; *Procter & Gamble Co.*, 63 F.T.C. at 1581-82.

89. *See Procter & Gamble Co.*, 63 F.T.C. at 1581 ("Advertising performs a socially and economically useful function insofar as it educates the consumer to the broad range of product alternatives that he should consider in seeking to make an optimal allocation of his necessarily limited economic resources.").

The Bureau succeeded at targeting only persuasive advertising by bringing a series of cases involving advertising of homogeneous goods like Clorox, for which advertising could not convey any useful information regarding differences between the offerings of competitors, because there were no differences other than those created in the minds of consumers by advertising.[90] But the Bureau failed to escape the information problem in the cases it brought involving heterogeneous products like breakfast cereals, products that differed in fact, not just in advertising.

In 1984, having run out of homogenous products cases, and increasingly sensitive to the information value of advertising, the FTC abandoned the campaign against advertising.[91] Left on the books were two federal appeals court decisions and a Supreme Court decision establishing advertising that lacks information content as anticompetitive conduct under the antitrust laws.[92] The campaign made clear that if it is accepted that persuasive advertising harms consumers, then the main challenge facing enforcers is to separate persuasive advertising from informative advertising. As described in Part III, that challenge has all but disappeared in the information age.

The Bureau initiated its campaign against advertising in 1957, when it challenged Procter & Gamble's acquisition of Clorox.[93] The challenge was not, as in most merger cases, based on the theory that Procter was trying to swallow a competitor, because Procter did not compete in the bleach market. Instead, the challenge was based on the theory that Procter would give Clorox an advertising advantage.[94] As the second-largest advertiser in the United States at that time, Procter could obtain advertising discounts for Clorox, based on Procter's large advertising volume for its other products, that competing bleach-makers could not obtain, allowing Clorox to out-promote those competitors.[95] If the

90. *See id.* (arguing that the educational function of advertising "is distorted in the case of a homogeneous product").

91. *See Gen. Foods Corp. II*, 103 F.T.C. at 363-64.

92. *See Procter & Gamble Co.*, 386 U.S. at 569, 571; *Borden*, 674 F.2d at 515-16; *Gen. Foods Corp.*, 386 F.2d at 945, 947.

93. *Procter & Gamble Co.*, 63 F.T.C. at 1469. The account of the campaign against advertising that follows is based on the excellent treatment in Mensch & Freeman, *supra* note 1, at 323-38. The Bureau challenged the Clorox acquisition under Clayton Act section 7's prohibition on acquisitions that "may . . . substantially . . . lessen competition, or . . . tend to create a monopoly." 15 U.S.C. § 18 (2012).

94. *See Procter & Gamble Co.*, 63 F.T.C. at 1470-72.

95. *See Procter & Gamble Co.*, 386 U.S. at 573; *Procter & Gamble Co.*, 63 F.T.C. at 1472-73. The complaint also argued that Procter could leverage its sale of a "complete line" of household cleaning and laundry products to grocery stores to induce stores to give Clorox favorable access to shelf space, further disadvantaging competitors. *Procter & Gamble Co.*, 63 F.T.C. at 1472-73.

Bureau had thought that advertising were exclusively informative or complementary, then the Bureau would have had no reason to view Clorox's advertising advantage as anticompetitive, because Clorox advertising would either help consumers decide whether Clorox is right for them or affirmatively increase the pleasure they take in using Clorox.[96] But as Justice Douglas later observed, "all liquid bleach is chemically identical," eliminating any information function for Clorox advertising.[97] That left only complements-pleasure as a justification for advertising. In choosing to characterize Clorox's advertising advantage as anticompetitive, the Bureau must have thought, if it considered the question at all, that the manipulative character of advertising dominates the complementary character.

The Supreme Court agreed.[98] In reversing the Sixth Circuit, Justice Douglas, writing for the majority, observed that

> Clorox spen[ds large sums] on advertising, imprinting the value of its bleach in the mind of the consumer. . . . The Commission found that these heavy expenditures went far to explain why Clorox maintained so high a market share despite the fact that its brand, though chemically indistinguishable from rival brands, retailed for a price equal to or, in many instances, higher than its competitors.[99]

He concluded that "[t]he major competitive weapon in the successful marketing of bleach is advertising . . . . Procter would be able to use its volume discounts to advantage in advertising Clorox."[100] For the Court, an advantage in

96. For the effects of informative and complementary advertising, see *supra* text accompanying notes 49 and 52.

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

98. *See id.* at 581 (reflecting a lone concurrence from Justice Harlan).

99. *Id.* at 572.

100. *Id.* at 579. Justice Douglas held that a second factor, in addition to advertising, supported the conclusion that the merger would lessen competition. Because Procter had initially considered entering the bleach market directly, instead of by acquiring Clorox, Justice Douglas concluded that "the acquisition of Clorox by Procter eliminated Procter as a potential competitor." *Id.* at 580. Mensch and Freeman argue that the presence of this additional factor "left unresolved whether advertising advantages alone . . . would be sufficient basis for invalidating a . . . merger." Mensch & Freeman, *supra* note 1, at 330 (footnote omitted).

There is nothing in Justice Douglas's opinion, however, that suggests that the majority viewed the two factors as cumulative, rather than alternative, in force. In introducing the two factors, the opinion states only that "[t]he anticompetitive effects with which this product-extension merger is fraught can be easily seen." *Procter & Gamble Co.*, 386 U.S. at 578. Despite his hostility to viewing advertising as anticompetitive, Justice Harlan, in his concurring opinion, rejected the potential competition factor, and relied exclusively on advertising advantages in concurring with the majority's result, suggesting that the Justices viewed the

persuasive advertising was unquestionably anticompetitive, allowing the Court to condemn a merger that would enable more persuasive advertising.

Justice Harlan, in a concurrence that reads like a dissent, objected to the majority's treatment of persuasive advertising as anticompetitive. Taking the view that advertising complements the advertised product, and may therefore be treated as an "element" of the product, broadly defined, he argued that "[i]t is not the Commission's function to decide which lawful elements of the 'product' . . . should be considered useful and which should be considered the symptoms of industrial 'sickness.' It is the consumer who must make that election through the exercise of his purchasing power."[101] He also alluded to the difficulty of distinguishing informative from persuasive advertising, arguing that "[p]roper advertising serves a legitimate . . . purpose . . . by educating the consumer as to available alternatives . . . . Undeniably advertising may sometimes be used to create irrational brand preferences . . . but it is very difficult to discover at what point advertising ceases to be an aspect of healthy competition."[102] But Justice Harlan was notably silent about whether the advertising at issue in the case might be considered informative, given that all bleach is chemically identical.

In 1963, the Bureau brought a second case on similar facts, this time challenging the 1957 acquisition of S.O.S., the maker of steel wool scrub pads, by General Foods. The Bureau claimed that General Foods had given S.O.S. an advertising advantage that had driven S.O.S.'s closest competitor, Brillo, into a sale to Purex.[103] Like Procter with regard to Clorox, General Foods was a major advertiser of a wide range of grocery products, and could therefore pass bulk television advertising discounts unavailable to Brillo on to S.O.S.[104] The Third Circuit, relying on the Clorox case, agreed, remarking that "consumer preference for . . . S.O.S . . . . had been generated through extensive advertising" and that "psychological barriers to entry were substantially heightened by this merger."[105] Here again, the information function of advertising was absent, the

two factors as alternative grounds for condemning the merger. *Id.* at 600-02 (Harlan, J., concurring).

101. *Procter & Gamble Co.*, 386 U.S. at 604; *see also* Mensch & Freeman, *supra* note 1, at 330.

102. *Procter & Gamble Co.*, 386 U.S. at 603-04.

103. Gen. Foods Corp., 69 F.T.C. 380, 380, 382-83, 385, 400, 402 (1966); Mensch & Freeman, *supra* note 1, at 328.

104. *Gen. Foods Corp.*, 69 F.T.C. at 383, 400.

105. Gen. Foods Corp. v. FTC, 386 F.2d 936, 945, 947 (3d Cir. 1967). As in the Clorox case, the Bureau also argued that General Foods' ability to offer a full line of grocery products put smaller competitors at a disadvantage. *Gen. Foods Corp.*, 69 F.T.C. at 386. The Third Circuit appeared to treat that as an anticompetitive effect of the merger. *See Gen. Foods Corp.*, 386 F.2d at 945.

court observing that all steel wool pads are "functionally identical," whether sold by S.O.S., Brillo, or another competitor.[106] The court's treatment of the advertising as anticompetitive signaled its belief that uninformative, and therefore purely persuasive, advertising is anticompetitive.

Between 1974 and 1976, the Bureau brought four more advertising-related cases.[107] Three of these were monopolization cases that challenged advertising as an exclusionary practice in violation of section 2 of the Sherman Act, rather than as an anticompetitive consequence of a merger. The most important of these cases was the Bureau's 1974 challenge to Borden's use of advertising to exclude a competitor from the market for reconstituted lemon juice.[108] Although, as the Sixth Circuit later observed, "no objective differences in quality exist[] between ReaLemon and any . . . other brands of processed lemon juice," Borden had used advertising to build a ninety-percent national market share for its ReaLemon brand, which the firm sometimes sold at a thirty-percent premium over the prices of competitors.[109] When a small Chicago producer tried to expand into new geographic markets, Borden responded by matching the competitor's prices and ramping up its advertising outlays, relying on the advertising-driven preference of consumers for its brand to ensure that consumers faced with a choice between otherwise identical, and identically priced, options would choose ReaLemon.[110]

The Sixth Circuit held that this was illegal monopolization, observing that ReaLemon's power "was attributed to successful product differentiation . . . maintained . . . through extensive advertising," and holding that "when a monopolist through brand identification . . . can and does manipulate prices . . . to exclude equally efficient competitors . . . such price manipulation is an unreasonable use of power[.]"[111] The case confirms the judicial determination

106. *Gen. Foods Corp.*, 386 F.2d at 945.

107. *See* Gen. Foods Corp. II, 103 F.T.C. 204, 204 (1984); Kellogg Co., 99 F.T.C. 8, 8 (1982); Heublein, Inc., 96 F.T.C. 385, 385 (1980); Borden, Inc., 92 F.T.C. 669, 669 (1978).

108. *Borden, Inc.*, 92 F.T.C. at 669, 671.

109. Borden, Inc. v. FTC, 674 F.2d 498, 502, 511 (6th Cir. 1982), *vacated*, 461 U.S. 940 (1983); *Borden, Inc.*, 92 F.T.C. at 670.

110. *Borden*, 674 F.2d at 502-3, 515-16. The FTC did find that Borden had priced ReaLemon below its average total costs in some local markets. *Id.* at 504. But this was not sufficient to serve as the basis for a predatory pricing claim. *See id.* at 519 n.3 (Kennedy, J., dissenting).

111. *Borden*, 674 F.2d at 511, 515-16. The holding that advertising is illegal exclusionary conduct is somewhat obscured in the ReaLemon case by the rhetoric of "price manipulation." As stated, the court's argument was that the act of meeting competitors' prices while using advertising to make consumers shun competitors' products was exclusionary. *See id.* at 512. This was no more than the argument that the use of advertising was exclusionary, because the reference to price was redundant. The unspoken assumption in any treatment of advertising as exclusionary is always that the advertiser is selling the product at a price low enough for the ad-

developed in the earlier merger cases that persuasive-advertising-driven attraction of demand is illicit anticompetitive conduct and uses it for the first time as the basis for a monopolization claim under section 2 of the Sherman Act.[112]

In the Clorox, S.O.S., and ReaLemon cases, the Bureau had skirted the problem of balancing the beneficial effects of advertising's information function against the harmful effects of its manipulation function by challenging advertising of homogeneous products.[113] In the cases the Bureau brought in the 1970s, the Bureau tried to go beyond treating purely persuasive advertising as anticompetitive to treat all advertising, whether containing informative elements or not, as anticompetitive. The first suggestion that this gambit would fail came in the FTC's challenge to the acquisition of the second largest winemaker in the United States, United Vintners, by Heublein, owner of Smirnoff vodka.[114] The FTC rejected the case in 1980 on the relatively benign ground that Heublein did not in fact have an advertising advantage that it could pass on to United Vintners.[115] But in doing so, the FTC observed that "[e]ven if" Heublein were to give United Vintners an advertising advantage,

> [t]he wine market differs markedly . . . from the liquid bleach or steel wool markets [at issue in the Clorox and S.O.S. cases]; it is composed . . . of competing products varying significantly in price, quality and use. Where such product differences exist, an advantage in advertising costs is less likely to be of competitive importance. It is also more likely to be competitively useful, encouraging product variations by informing consumers of a wide range of different products.[116]

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vertising to sway consumers. If the prices charged for a product are high enough, consumers will not buy the product, no matter how well the product is advertised. The reference in the opinion to "price manipulation" does no more than to give unnecessary voice to that assumption.

112. The Bureau brought the case under the FTC's authority to prohibit "unfair methods of competition." 15 U.S.C. § 45(a) (2012). This authority permits the FTC to enforce prohibitions in the other antitrust statutes, including the prohibition on monopolization contained in section 2 of the Sherman Act. *See* FTC v. Cement Inst., 333 U.S. 683, 693 (1948). The Sixth Circuit concluded that the FTC had decided the ReaLemon case under section 2, and based its opinion on an interpretation of the requirements of that statute. *See Borden*, 674 F.2d at 506.

113. *See supra* text accompanying note 90.

114. Heublein, Inc., 96 F.T.C. 385, 385-89 (1980).

115. *See id.* at 385, 595. The Bureau also alleged that access to distribution through Heublein would give United Vintners an advantage over rivals. *Id.* at 592-93. The FTC rejected this argument as well. *Id.* at 594-99.

116. *See Heublein, Inc.*, 96 F.T.C. at 595-96 (footnote omitted).

Unlike bleach, steel wool scrub pads, and lemon juices, wines differ, giving advertising something about which to inform consumers.

The perils of challenging advertising with any plausible amount of information content was also on display in the Bureau's monopolization case against the major breakfast cereals makers, including Kellogg and General Mills.[117] In that case, the Bureau's main theory was that the cereals makers had used brand proliferation—selling Rice Krispies, Product 19, and Raisin Bran, instead of just Corn Flakes, for example—to cut the market up into pieces so small that each piece could not support entrance by a new competitor.[118] But the complaint also invited the FTC and the courts to view the cereals makers' advertising as anticompetitive. The complaint alleged that the cereals makers "produce basically similar . . . cereals, and then emphasize . . . trivial variations such as color and shape," suggesting that differences between the defendants' cereal brands were of no intrinsic value, serving only to render the firms' persuasive advertising more effective.[119]

The brand proliferation argument failed before an administrative law judge in 1981 because the argument violated the well-established antitrust safe harbor for any product design change that can be understood to improve a product.[120] The administrative law judge observed that "[c]onsumers' desire for variety for breakfast is responsible, in large measure, for the differentiation of [ready-to-eat] cereals" and concluded that "the introduction of new brands . . . is a legitimate means of competition."[121] But the administrative law judge also rejected the suggestion that advertising of the brands was anticompetitive, observing

117. Kellogg Co., 99 F.T.C. 8, 8-12 (1982).

118. *Id.* at 172-74; Richard Schmalensee, *Entry Deterrence in the Ready-To-Eat Breakfast Cereal Industry*, 9 BELL J. ECON. 305, 314 (1978) (proposing the brand proliferation theory). The administrative law judge treated the case as alleging a violation of the Sherman Act. *Kellogg Co.*, 99 F.T.C. at 39, 269. The complaint also alleged monopolization through acquisition of competitors, Kellogg's role as provider of shelf-space services to retailers, and misleading advertising. *Id.* at 12-16.

119. *Kellogg Co.*, 99 F.T.C. at 12. Advertising did not play a more central role in the case because a Chicago School critique of the connection between monopoly and advertising, distinct from the information and complements views, was starting to be felt in the Bureau. *See* F.M. Scherer, *The Federal Trade Commission, Oligopoly, and Shared Monopoly*, 46 REV. INDUS. ORG. 5, 16 (2015) (stating that "[r]escue was found" in the brand proliferation theory). The critique, which is shown to fail in Section IV.C, was that monopoly causes advertising, not the other way around, because monopolies have more to gain from advertising than do other firms. *See infra* text accompanying note 243.

120. *See Kellogg Co.*, 99 F.T.C. at 16; *infra* note 199.

121. *Kellogg Co.*, 99 F.T.C. at 256.

that "[a]dvertising performs a necessary and legitimate function of advising prospective customers of the attributes of products offered for sale."[122]

The triumph of the informative view at the FTC came not long after in the FTC's disposition of the remaining anti-advertising case, which had been filed in 1976, but was not resolved until 1984.[123] The Bureau charged that the Maxwell House division of General Foods had sought to monopolize the coffee market in the eastern United States, of which Maxwell House controlled forty-five percent, through advertising, to the detriment of Procter's Folger brand, among others.[124] The case resembled the ReaLemon case, involving the use of a brand image advantage to block expansion by a competitor into new geographic markets. But this time the market in question was one in which products differed in taste and quality. The FTC therefore saw nothing anticompetitive about an advertising advantage, stating that "the leadership position of [the Maxwell House brand] in the eastern sales areas stemmed in large part from respondent's superior efficiency in advertising, promoting and maintaining the quality of that brand in those areas."[125] Consumers, observed the FTC, "gained valuable information from Maxwell House promotions."[126]

The immediate cause of the termination of the FTC's campaign against advertising was the arrival of the Reagan Administration in 1981, which terminated the Bureau's appeal of the administrative law judge's decision in the cereals case, and appointed the commissioner who authored the FTC's rejection of the Maxwell House case.[127] But failure of the campaign to revive as administrations

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122. *Id.* at 241.

123. Gen. Foods Corp. II, 103 F.T.C. 204, 204 (1984).

124. *Id.* at 205-6, 216. The Bureau also alleged traditional predatory pricing, among other things. *Id.* at 206. The FTC ultimately held that there was no violation of the Sherman Act, and refused to recognize a violation under the broader terms of section 5 of the FTC Act. *Id.* at 364-66.

125. *Gen. Foods Corp. II*, 103 F.T.C. at 363, 373. The FTC also opined that "a company may reap the benefits of both marketing as well as superior quality by charging retailers a higher price than its less successful competitors." *Id.* at 354.

126. *Gen. Foods Corp. II*, 103 F.T.C. at 364.

127. *See Kellogg Co.*, 99 F.T.C. at 270; Mensch & Freeman, *supra* note 1, at 336. *See generally* Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483, 506-09 (2006) (describing the "radical non-enforcement agenda" for antirust during the Reagan Administration). It is by no means clear, however, that a different administration would have taken a different approach to advertising in the face of a nationwide anti-government mood, driven on the right by a business-funded backlash against the consumer movement, and on the left by Vietnam-War-era distrust of the state. *See* MICHAEL PERTSCHUK, REVOLT AGAINST REGULATION: THE RISE AND PAUSE OF THE CONSUMER MOVEMENT 47-68 (1982).

F.M. Scherer, who was director of the FTC's Bureau of Economics during part of the cereals case, recalls, for example, the bipartisan backlash against the case after the Washington Post accused the FTC of acting as the "national nanny" in an influential editorial:

of both parties have come and gone in the decades since suggests that the appeal of the informative view played a decisive role in the campaign's demise.[128] The receding tide of FTC condemnation for advertising did, however, beach a number of important precedents in the U.S. and federal reports. Because the FTC itself killed both *Heublein* and the Maxwell House case, and the Reagan Administration killed the cereals case, the courts never had to consider the information function of advertising, because their cases, the Clorox, S.O.S., and ReaLemon cases, all involved homogeneous products, about which advertising was unlikely to be informative.[129] But the courts did have an opportunity to consider the value of persuasive advertising in those three cases, and in all three they treated it as anticompetitive.[130] The opinions of the federal courts that decided the Clorox, S.O.S., and ReaLemon cases have never been repudiated by the courts and remain good law.[131] Persuasive advertising remains a judicially recognized form of anticompetitive conduct under the Sherman Act. So a return of enforcers to condemnation of persuasive advertising would not be difficult to implement at a doctrinal level. But for such condemnation to extend beyond cases in which products are homogeneous, and the information function of little importance, enforcers would need to find a way around the problem of the information function of advertising that bedeviled the FTC's mid-century campaign. The rise of the information age presents just such a way.[132]

> [T]urmoil broke out on Capitol Hill. Among other things, bills were filed (but not passed) that would have ended the case or removed the Commission's authority to impose a divestiture remedy. The F.T.C.'s appropriation was held in limbo for 2 years, with occasional mandated work stoppages. And in the final week of the 1979 presidential campaign, both major candidates—Jimmy Carter and Ronald Reagan—gave speeches in Michigan disavowing continuation of the cereal proceedings.

Scherer, *supra* note 119, at 7, 20-21.

128. The FTC's successful 1986 challenge to Coca-Cola's acquisition of Dr. Pepper appears to be the only challenge to truthful, non-misleading advertising that the government has brought since. In that case, the FTC argued, and a district court agreed, that one of the barriers to entry into the cola market was "large expenditures for advertising to fix the brand name and image in the mind of the consumer." FTC v. Coca-Cola Co., 641 F. Supp. 1128, 1137 (D.D.C. 1986), *vacated*, 829 F.2d 191 (D.C. Cir. 1987); *see also* Jean-Pierre Dubé, *Product Differentiation and Mergers in the Carbonated Soft Drink Industry*, 14 J. ECON. & MGMT. STRATEGY 879, 880 (2005).

129. *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 572 (1967); Borden, Inc. v. FTC, 674 F.2d 498, 511 (6th Cir. 1982), *vacated*, 461 U.S. 940 (1983); Gen. Foods Corp. v. FTC, 386 F.2d 936, 945 (3d Cir. 1967).

130. *See Procter & Gamble Co.*, 386 U.S. at 569, 571; *Borden, Inc.*, 674 F.2d at 515-16; *Gen. Foods Corp.*, 386 F.2d at 945, 947.

131. For the vacatur of the ReaLemon case at the request of the government, see *supra* note 4.

132. *See infra* Part III.

III. THE OBSOLESCENCE OF ADVERTISING

A peculiar feature of the information justification for advertising is that it has persisted so long into the information age without challenge. For the rise of online search renders the information function of all but the most basic forms of advertising obsolete and wasteful.[133] Because consumers can get all the information they want from online search, they do not need firms to invest hundreds of billions of dollars a year in sponsorships, online and television advertising, product placement in movies, and so on in order to find and evaluate products that they may want to buy.[134] In the information age, the only remaining nonredundant use of most forms of advertising is persuasion. To the extent that enforcers wish to return to the mid-twentieth-century view that persuasive advertising is fundamentally manipulative, they may now do so without concern that prohibiting advertising might deprive consumers of the information they need to make purchase decisions.[135]

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133. Castells dates the start of the information age to the 1970s. *See* MANUEL CASTELLS, THE RISE OF THE NETWORK SOCIETY 39 (2d ed. 2010). But it was not until 1998, when Google first went online, that advertising started to become obsolete. *From the Garage to the Googleplex*, GOOGLE, http://www.google.com/about/our-story [http://perma.cc/68AF-K56V]. Once Google went online, consumers became able to find any and all product information available on the internet. But in the late 1990s, many firms did not yet have websites containing product information, so there was not enough information on the internet to replace the information content of traditional advertising. *See* Nathan Heinze & Qing Hu, *The Evolution of Corporate Web Presence: A Longitudinal Study of Large American Companies*, 26 INT'L J. INFO. MGMT. 313, 317-19 (2006) (finding that in 1997 only 63.8% of S&P 500 corporate websites contained product information). By the mid-2000s, however, large firms had likely placed enough product information online for advertising by large firms to have become obsolete. *See id.* (finding that in 2003 95.6% of S&P 500 corporate websites contained product information). Small firms appear to place much less product information online, even today, but that may be because the large firms that supply small businesses place product information online for them. *See* Carly Okyle, *It's 2016, But Nearly Half of U.S. Small Businesses Still Don't Have a Website*, ENTREPRENEUR (Feb. 19, 2016), http://www.entrepreneur.com/article/271068 [http://perma.cc/L95L-7BB9] (finding that only 41% of small businesses sampled had websites by 2014); *see also* Rachel Abrams & Robert Gebeloff, *In Towns Already Hit by Steel Mill Closings, a New Casualty: Retail Jobs*, N.Y. TIMES (June 25, 2017), http://www.nytimes.com/2017/06/25/business/economy/amazon-retail-jobs-pennsylvania.html [http://perma.cc/Y7HP-5XER] (observing that some small retailers have no web presence due to restrictions imposed by manufacturers that wish to sell their own products directly through their own websites).

134. *See Media Advertising Spending in the United States from 2015 to 2020 (in Billion U.S. Dollars)*, STATISTA, http://www.statista.com/statistics/272314/advertising-spending-in-the-us [http://perma.cc/W7S7-PWNZ] (showing total media advertising expenditures in the United States of about $200 billion in 2016); *Principles of Marketing*, U. MINN. 353-56 (2015), http://open.lib.umn.edu/principlesmarketing/ [http://perma.cc/4TGE-VWJY] (describing a range of advertising methods).

135. For that view and for the concern that advertising might be informative, see *supra* Part II.

Economists identify three kinds of information provided by advertising: search, experience, and commitment information.[136] Search information helps consumers find the products that meet their needs.[137] This includes information about the existence of a product (cola), price ($2.25), location (the local vending machine), attributes (sweet, liquid, caffeinated, cold), and uses (to stay awake, quench thirst, obtain energy). Economists place more detailed information about what it is like to use a product in a separate category called "experience" information.[138] Experience information cannot be acquired in full other than by sampling a product.[139]

Commitment information tells the consumer how much value the seller is willing to stake on a good experience.[140] The more a firm spends on advertising, the stronger the signal the firm sends to consumers that the firm believes consumers will be pleased with the product, because if the product fails to please consumers, the money is lost.[141] The actual content of the advertising, whether Santa is in the Coke commercial, for example, is generally irrelevant to the conveyance of commitment information.[142] Only characteristics of an advertising campaign that suggest a large financial commitment by the advertiser, such as the production quality and frequency of the advertising, matter.[143] For adherents of the informative view of advertising, this explains why much advertising conveys almost no search information, whether regarding price, location, or even use. This advertising is designed only to signal commitment.[144]

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136. *See* Bagwell, *supra* note 5, at 1718-19 (discussing these types of information in slightly different terms).

137. *See* Nelson, *supra* note 6, at 730 (describing "qualities of a brand that the consumer can determine by inspection prior to purchase of the brand" as "search qualities"); George J. Stigler, *The Economics of Information*, 69 J. POL. ECON. 213, 213, 220, 223-24 (1961) (discussing advertising of seller location and price as facilitators of consumer search for products); George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76, 84 (1977) (suggesting that information about the uses of a product is valuable to households).

138. *See* Nelson, *supra* note 6, at 730 (defining as the "experience qualities" of a good those that "are not determined prior to purchase").

139. *See id.* (giving as an example of experience information "the taste of a brand of canned tuna fish").

140. Bagwell calls this the "signaling-efficiency effect" of advertising. *See* Bagwell, *supra* note 5, at 1718-19.

141. Phillip Nelson argues that the commitment is credible because the firms that offer the most desirable products at the lowest prices will have the most demand to gain from advertising and therefore will invest the most in advertising. *See* Nelson, *supra* note 6, at 732.

142. *See id.*

143. *See id.*

144. *See id.*

Online search provides all three kinds of information at least as well as advertising, and search and experience information far better. Online search consists of an information gathering function, called web crawling, in which the search engine seeks to identify all of the information on the web, and an indexing function, in which the search engine catalogs the information for easy retrieval in response to search queries.[145] These crawling and indexing functions give consumers access to search information because most firms make search information available on their websites, or those of retailers, often on product description pages that contain "add to cart" buttons for placing orders online.[146] That gives search engines the information they need to respond to queries. The web crawling and indexing allow consumers quickly to find far more search information than they could ever glean from a lifetime of reading newspaper advertisements or coupon circulars, where much advertising-provided search information was once found.[147] The rise of online search has triggered large declines in newspaper advertising for just this reason.[148]

The affirmative character of online search, that a user must enter a query in order to obtain a result, would appear to restrict online search's ability to provide existence information, because a consumer cannot search for a particular type of product when the consumer does not know that the type exists. This appearance is false, however, because the consumer can always elect to enter a general search query, such as a search for "the products I probably don't know that I need."[149] Some consumers of course might never run such a search, and

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145. *See* WAMAN S. JAWADEKAR, KNOWLEDGE MANAGEMENT: TEXT & CASES 278 (2011).

146. *See* Heinze & Hu, *supra* note 133, at 317-19 (finding that in 2003 95.6% of S&P 500 firms displayed detailed product information on their websites).

147. *See* Stigler, *supra* note 137, at 22; Nelson, *supra* note 6, at 745-46.

148. *See* Kory Kroft & Devin G. Pope, *Does Online Search Crowd Out Traditional Search and Improve Matching Efficiency? Evidence from Craigslist*, 32 J. LABOR ECON. 259, 284 (2014) (finding that Craigslist alone brought about a seven percent decline in help-wanted advertisements in the average major local newspaper between 2005 and 2007); Will Oremus & Grace Ballenger, *Google Has Officially Eaten the Newspaper Industry*, SLATE (Nov. 12, 2012), http://www.slate.com/blogs/future_tense/2012/11/12/google_ad_revenue_tops_entire_us_print_media_industry_chart.html [http://perma.cc/538G-GQWP] (noting that in 2012 Google advertising revenue exceeded total print newspaper and magazine advertising revenue for the first time); Suzanne Vranica & Jack Marshall, *Plummeting Newspaper Ad Revenue Sparks New Wave of Changes*, WALL ST. J. (Oct. 20, 2016), http://www.wsj.com/articles/plummeting-newspaper-ad-revenue-sparks-new-wave-of-changes-1476955801 [http://perma.cc/2CF3-C3EQ] (discussing a significant drop in global print newspaper advertising since 2006 and observing that online advertising revenues have not offset this decline).

149. Running this search on Google yielded, among many other things, a list of "The Best Korean Beauty Products on Amazon that You (Probably) Don't Know About," including "amazing nail repair masks [that] slip onto each finger, and protect and heal nails, cuticles, and nail roots, along with dead skin." *See* Eva Grant, *The Best Korean Beauty Products on Amazon*

therefore miss some information about unconscious needs that might otherwise reach them through advertising. That, however, would simply reflect the preference of those consumers not to discover unconscious needs. Unlike in the case of preferences exposed to manipulative advertising, there is no reason to suppose that a consumer's preference against exploring the unknown might not be genuine.[150]

Moreover, it would be a mistake to suppose, particularly in the information age, that advertising provides *additional* existence information to nonsearchers, instead of merely *different* existence information.[151] Those who do not actively search for new things still learn about new things through what marketers call "word-of-mouth," unsolicited recommendations from friends and family; advertising may do no more than replace the information provided by word-of-mouth with information provided by advertisers.[152] Social media has vastly magnified the power of word-of-mouth, by allowing consumers to view remarks about products posted by family and friends in their social media feeds.[153] If advertising ever were needed to supplement the existence information provided by word-of-mouth, the explosion of word-of-mouth in the information age suggests that is no longer true.[154] Indeed, consistent with the view that advertising seeks to replace, rather than supplement, consumers' existence information, advertisers have sought to coopt online word-of-mouth, placing advertisements, for example, in feeds otherwise reserved for friends , with some[155] That is probably bad for consumers, who have traditionally

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that You (Probably) Don't Know About, GIRLBOSS (Jan. 26, 2018), http://www.girlboss.com/girlboss/2018/1/26/best-korean-skincare-and-beauty-products [http://perma.cc/F2HQ-XSAZ].

150. For a believer in consumer sovereignty, a consumer's preference against the unknown should be just as sacred as a consumer's preference for advertised products. *See supra* text accompanying note 45.

151. *Cf.* Nelson, *supra* note 6, at 747 (conceding that the "recommendations [of friends and family] must sometimes provide better information or they would never be used").

152. *See* Robert Allen King et al., *What We Know and Don't Know About Online Word-of-Mouth: A Review and Synthesis of the Literature*, 28 J. INTERACTIVE MARKETING 167, 167 (2014).

153. *See id.* at 167, 170 (describing the "volume and reach" of "electronic word-of-mouth" as "unprecedented").

154. *See id.* at 170.

155. *See* Arnaud De Bruyn & Gary L. Lilien, *A Multi-Stage Model of Word-of-Mouth Influence Through Viral Marketing*, 25 INT'L J. RES. MARKETING 151, 151-52 (2008) (defining "viral marketing" as the use of electronic "consumer-to-consumer . . . communications – as opposed to company-to-consumer communications – to disseminate information about a product or service, thereby leading to more rapid and cost effective adoption by the market"); Kurt Wagner, *Facebook Is Putting Ads Everywhere in Hopes of Finding the Next News Feed*, RECODE (July 15, 2017), http://www.recode.net/2017/7/15/15973750/facebook-ads-everywhere-instagram-messenger-whatsapp [http://perma.cc/ZAB2-RT67].

trusted word-of-mouth far more than advertising, presumably because they believe that word-of-mouth provides more useful existence information.[156]

Online search also provides consumers with better experience information than does advertising. Online product reviews written voluntarily by consumers themselves, and accessible for free through online search, provide consumers with more, and more reliable, experience information than they can obtain from advertising.[157] These reviews are hosted by review platforms like Yelp, and online retailers like Amazon, or posted by consumers to personal blogs or social media pages.[158] Consumers and the platforms that host their work have a greater interest in accuracy than firms that engage in advertising. Consumers volunteering reviews often have no financial interest in their conclusions. Review platforms, which are themselves advertising-supported, compete for readers based on accuracy.[159] Retail platforms also compete for buyers based on review accuracy and may be willing to sacrifice manufacturer relationships to earn buyer goodwill.[160] By contrast, advertising has traditionally provided very limited experience information, such as photos of smiling Coke drinkers or testimonials from paid spokesmen on television. Although there is evidence of manipulation of online consumer reviews, any manipulation cannot match that possible in traditional advertising, which is under the full control of the seller of the advertised product.[161]

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156. King et al., *supra* note 152, at 169; Nielsen Press Release, *supra* note 35.

157. *See* Peter S. Fader & Russell S. Winer, *Introduction to the Special Issue on the Emergence and Impact of User-Generated Content*, 31 MARKETING SCI. 369, 369 (2012) (describing the rise of online product reviews).

158. Yelp is an example of an advertising-supported review website. The company describes itself as "bringing 'word of mouth' online," hosts 121 million reviews on businesses ranging from restaurants to autos, and generated $713.1 million in advertising revenue in 2016, including through the sale of sponsored links on its website. Yelp Inc., Annual Report (Form 10-K) 1-2 (Dec. 31, 2016).

159. *See id.* at 11.

160. *See* Chee Chew, *Update on Customer Reviews*, AMAZON BLOG (Oct. 3, 2016), http://www.amazon.com/p/feature/abpto3jt7fhb5oc [http://perma.cc/2P76-Z5FL] (stating that the company prohibits compensated reviews except in a small number of cases and actively polices attempts to "manipulate reviews").

161. One of the more enigmatic forms of manipulation occurs when repeat customers write reviews for products that they may never have purchased. *See* Eric T. Anderson & Duncan I. Simester, *Reviews Without a Purchase: Low Ratings, Loyal Customers, and Deception*, 51 J. MARKETING RES. 249, 264 (2014) (finding, somewhat mysteriously, that for a particular apparel retailer five percent of reviews were made by repeat customers about products that the researchers could not confirm they had purchased). Some manipulation is more prosaic. *See* Dina Mayzlin et al., *Promotional Reviews: An Empirical Investigation of Online Review Manipulation*, 104 AM. ECON. REV. 2421, 2421 (2014) (finding evidence that independent hotels submit fake reviews to harm competitors).

Consumers can also get commitment information from online search. In a world without advertising, firms could signal commitment by donating funds to charity and disseminating information on the donation amount through their websites, which consumers could then find through online search. Just like an expensive advertising campaign, a donation signals the belief of the donor that the firm's product will meet with enough popularity to cover the cost of the donation. Although some firms already choose to signal commitment through charity today, most still use advertising campaigns.[162] This cannot be because such campaigns are more effective at signaling commitment. The commitment information provided by charitable donations is identical to the commitment information provided by advertising campaigns.[163] The current preference for commitment advertising likely arises because that advertising also has a persuasive function.[164]

For online search to replace advertising as a conveyor of search, experience, and commitment information, firms must still spend enough on advertising to disseminate search information on their own webpages and the "add to cart" pages of retailers, and firms must still publish commitment information on their own websites (online reviews provide the experience information). This basic level of advertising is the only advertising that remains useful to consum-

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A more troubling concern is that online reviews, even when not fake, do not provide a representative sample of product experiences. *See* Anderson & Simester, *supra*, at 265; Xinxin Li & Lorin M. Hitt, *Self-Selection and Information Role of Online Product Reviews*, 19 INFO. SYS. RES. 456, 472 (2008). While there is no doubt some bias in consumer reviews, it is difficult to imagine that the bias could be worse than the bias in advertising, which is produced by the same firms whose products the advertising recommends. Consumers, at least, seem to think that consumer reviews are more objective. *See* Nielsen Press Release, *supra* note 35 (finding that consumer trust in online reviews is second only to that in "recommendations from friends and family").

162. Firms today sometimes signal commitment by promising to donate to charity if a consumer makes a purchase. For a discussion of this practice, called cause-related advertising, see P. Rajan Varadarajan & Anil Menon, *Cause-Related Marketing: A Coalignment of Marketing Strategy and Corporate Philanthropy*, 52 J. MARKETING, July 1988, at 58. Cause-related advertising makes up about one percent of media advertising expenditures. *See Social Impact Statistics*, ENGAGE FOR GOOD (2018), http://engageforgood.com/guides/statistics-every-cause-marketer-should-know [http://perma.cc/E8DG-73JU] (stating that cause-related marketing donations are projected to be about $2 billion in 2017); STATISTA, *supra* note 134 (stating that total media advertising expenditures in the United States in 2016 were about $200 billion).

163. Indeed, the information is better because marketers do not broadcast the dollar value of their advertising campaigns, making it harder for consumers to use advertising campaigns to judge commitment. *See* Becker & Murphy, *supra* note 49, at 944.

164. *See id.* (attacking the notion that commitment advertising is intended to convey information because then "companies should advertise how much they spend on advertising, yet almost no companies do that").

ers in the information age. All advertising that goes beyond it, from sponsorships, to flashy packaging, to the online advertisements placed on websites and mobile apps by Google's AdWords product, is now obsolete from an information perspective.[165]

The obsolescence of most advertising in the information age does not appear to have reduced the level of advertising in the period since large amounts of product information started to become available online about fifteen years ago, although it has changed the composition of advertising.[166] Search advertising, once found in abundance in newspapers, has declined, while data and analytics, as well as social media platforms, have made possible the proliferation of a new kind of advertising tailored to the individual characteristics of each consumer.[167] The resilience of advertising despite the obsolescence of its information function shows the power of its persuasive function. If advertising were purely informative, it would have already gone the way of the newspaper classified section. The information age has laid bare a hundred-billion-dollar project to obtain business from consumers not by selling better products, but through seduction and guile.[168]

The obsolescence of the information function of all but the advertising needed to put product information on "add to cart" pages and firm websites makes it possible to ban all other advertising without reducing the access of consumers to product information.[169] Such a ban would eliminate much but

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165. *See Principles of Marketing*, *supra* note 134, at 300-03 (listing advertising methods).

166. For evidence that enough information started to become available about fifteen years ago, see *supra* note 133.

167. *See* Vranica & Marshall, *supra* note 148 (noting that since 2001 global advertising spending has increased, digital advertising has grown from almost nothing to a third of all advertising, and print advertising in newspapers has fallen significantly); Bagwell, *supra* note 5, at 1824 (discussing the trend toward targeted advertising).

168. Media advertising expenditures in the United States were about $200 billion last year. *See* STATISTA, *supra* note 134. A fraction of that is spent on the provision of product information on websites. The rest is likely persuasive advertising.

169. Except, of course, for the 10% of consumers who do not use the internet. *See Internet/Broadband Fact Sheet*, PEW RES. CTR. (Feb. 5, 2018), http://www.pewinternet.org/fact-sheet/internet-broadband [http://perma.cc/L6D5-JPF7]. Banning advertising would likely reduce the size of this non-user group, because those members who can afford internet access might embrace online search after losing access to product information through advertising. A ban on advertising would, however, hurt the remaining low-income Americans who are unable to obtain internet access. *See* Monica Anderson, *Digital Divide Persists Even as Lower-Income Americans Make Gains in Tech Adoption*, PEW RES. CTR. (Mar. 22, 2017), http://www.pewresearch.org/fact-tank/2017/03/22/digital-divide-persists-even-as-lower-income-americans-make-gains-in-tech-adoption [http://perma.cc/TAP4-59D4]. Implementation of an advertising ban must therefore be accompanied by a government guarantee of internet

not all persuasive advertising, however, because it would be impossible to prevent the advertising that would remain on "add to cart" pages, and particularly firm websites, from being persuasive as well as informative.[170] An image of Santa drinking Coke on a firm's own website would be informative under a ban of all other advertising, because consumers would not be able to get the information contained in that advertisement anywhere else. But though protected for its information content, the advertisement would also continue to manipulate through the association it creates between Coke and Santa. A ban could not stop that manipulation, because it is impossible to distill out the informative character of that advertisement and ban only the persuasive aspects.[171] The association with Santa might tell consumers something about the experience of drinking Coke, for example, making it impossible to ban the image.[172]

A ban on advertising outside of "add to cart" pages and firm websites would benefit consumers and improve efficiency in three ways.[173] First, by eliminating the harmful effects of manipulative advertising on technological innovation, the prohibition would increase consumer welfare, as discussed in Part I. Second, the lower prices associated with a reduction in the anticompetitive effects of advertising would represent an efficiency gain because part of those lower prices would be made possible through the avoidance of wasteful advertising costs.[174] Firms would no longer waste billions of dollars on seduction.

Third, a ban would create an immediate efficiency gain by eliminating what economists call obtrusive advertising, advertising that is forced on consumers, preventing them from consuming product information at the times and places that they prefer.[175] Restricting advertising to firm websites and "add to cart"

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access. For a discussion of the need for government subsidization of various media services in the wake of an advertising ban, see *infra* Part VI.

170. *See* Smolla, *supra* note 53, at 800.

171. *See id.*

172. *See supra* text accompanying note 138.

173. These three benefits run counter to the effects predicted by advertising advocates. *See* Adam Thierer, *Advertising, Commercial Speech, and First Amendment Parity*, 5 CHARLESTON L. REV. 503, 514-15 (2011) (arguing that regulation of marketing will "likely raise prices, restrict choice, and diminish marketplace competition and innovation"). One additional benefit of a ban on advertising is that a ban would increase the overall effectiveness of online search as a provider of product information. The ban would drive firms to put more product information online by leaving them only that option for advertising, further increasing the reservoir of information from which search may draw. For the failure of some businesses to put product information online, see *supra* note 133.

174. *See infra* note 264.

175. *See* Bagwell, *supra* note 5, at 1723 n.21 ("The successful advertisement is obtrusive. It continually forces itself upon the attention. It may be on sign boards, in the street-car, on the page

pages would enable consumers to consume advertising at their own option, using online search platforms to call forth advertising only when consumers really want it.[176] The billboard may once have been necessary to get the word out about cornflakes, but the billboard is inconvenient, there when the consumer wants to watch the sunset, but not there when the consumer is writing up a grocery list. Online search allows consumers to get product information when they want it, but not when they do not want it.[177] The demise of obtrusive advertising would also greatly reduce the power of any remaining persuasive advertising. The inability to engage in obtrusive advertising would deprive firms of the ability to subject consumers to repetitive messages, which is an important weapon in advertising's arsenal of manipulation.[178]

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of a magazine, or on a theatre program. Everyone reads it involuntarily, and unconsciously it makes an impression. It is a subtle, persistent, unavoidable presence that creeps into the reader's inner consciousness." (quoting Emily Fogg-Meade)).

176. Some consumers might of course prefer to receive obtrusive advertising. It could even be the case that so many consumers prefer obtrusive advertising relative to those who do not that banning obtrusive advertising would inflict a net loss on society. But the popularity of obtrusive advertising is unlikely to be so strong, the pull of the persuasive functions of advertising explaining any intuition in the reader to the contrary. Enabling obtrusive advertising for those consumers who do prefer it will become easier as the information age advances. Consumers can already opt out of Google-placed advertisements on some websites. *See* Google Contributor, http://contributor.google.com/v/beta [http://perma.cc/3NVL-Q9ZL]. Allowing consumers to opt in instead under an advertising ban would be easy.

177. Obtrusive advertising may also harm consumers if consumers consider it a bad, perhaps because they find it annoying. *See* Bagwell, *supra* note 5, at 1723; Becker & Murphy, *supra* note 49, at 961-62. The argument pursued here is distinct. The argument is that any good consumers might obtain from obtrusive advertising, whether due to advertising's informative or complementary character, is less than it could be because consumers cannot choose when to consume obtrusive advertising. Similarly, peaches, though a good in the minds of most consumers because peaches are sweet and cause no illness, are less valuable if consumers are sometimes forced to eat them when not hungry.

The argument is akin to, but not quite the same as, the argument that advertising is not supplied efficiently because it is supplied jointly with the advertised product, preventing consumers from registering their preferences specifically for advertising. *See* Kaldor, *supra* note 59, at 4. The problem of joint supply arises regardless whether advertising is obtrusive. Unobtrusively-supplied advertising, which the consumer can consult at the consumer's option, might still be provided at a suboptimal level because the consumer is unable to signal to the firm the consumer's preferred level of advertising by paying separately for the advertising. When the advertising is supplied obtrusively, and the consumer therefore has no choice whether to consume it, an additional inefficiency is added on top of the joint supply inefficiency, because consumer choice is limited further. Not only can the consumer not influence how much is invested in advertising by buying advertising separately, but the consumer is also deprived of the choice when to consume advertising.

178. *See* Margaret C. Campbell & Kevin Lane Keller, *Brand Familiarity and Advertising Repetition Effects*, 30 J. CONSUMER RES. 292, 292 (2003). Why stop at banning persuasion in advertising, when advertising is not the only mechanism by which firms persuade consumers to

IV. IMPLEMENTING AN ADVERTISING BAN

Persuasive advertising excludes competitors from the market for the advertised product, by making consumers prefer the advertised product over those of competitors.[179] This makes a monopolization claim under section 2 of the Sherman Act, which attacks conduct that excludes competitors from markets, the appropriate vehicle for challenging advertising on antitrust grounds.[180] To prevail on a monopolization claim under section 2, a plaintiff must show that the defendant (1) has engaged in an illegal form of exclusionary conduct and (2) enjoys monopoly power in the market from which the defendant has excluded competitors.[181] Injunctive relief prohibiting advertising, breaking up the offending firm, or taking other steps designed to restore competition to the

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purchase products? Advertising is but one part of marketing, the general term for all of the efforts of a firm to extract value from consumers through the sale of a product. *See Principles of Marketing*, *supra* note 134, at 2. All aspects of marketing may be thought to have some persuasive effect on consumers, including pricing and engineering decisions, both of which are treated as aspects of marketing by business scholars. *Id.*

The answer is that advertising lies at one extreme end of a spectrum between persuasion and function. Advertising is pure persuasion, at least when advertising is not also providing information. Advertising in its persuasive form adds no functionality to the advertised product. Advertising does not, for example, make lightbulbs glow brighter or smartphone charges last longer. The prestige created by the complementary aspect of persuasive advertising has a *social* function, allowing an owner of a Louis Vuitton bag to gain acceptance in the right social circles, but that prestige does not make the bag itself easier to carry. Packaging, which for a great many products is the sole vehicle of persuasion, and indeed often doubles as a kind of in-store advertising, is closer to the functional end of the spectrum because packaging is also functional: it protects the product from the outside world.

Product design choices fall even closer to the functional end of the spectrum. The fins on 1950s cars made them look like space rockets (a persuasive effect) but might also have helped with air flow (a functional concern). *See* Grady Gammage & Stephen L. Jones, *Orgasm in Chrome: The Rise and Fall of the Automobile Tailfin*, 8 J. POPULAR CULTURE 132 (1974).

All forms of persuasion can be manipulative, and therefore harmful to consumers. But the more closely a form is entwined with function, the more likely that a ban on that form's use would block functional improvements and slow technological progress. For this reason, unless it becomes possible better to identify and isolate manipulation, restrictions on persuasion are best limited to advertising, and related forms of marketing, like salesmanship, that fall furthest from function. This Article focuses on advertising, but the normative claims made herein should be understood to include these related forms of persuasion.

179. *See* Klieger, *supra* note 8, at 859 (stating that "the development of brand personalities" allows a "company to keep other producers out of its market").

180. 15 U.S.C. § 2 (2012); United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001).

181. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); HOVENKAMP, *supra* note 22, at 292.

market, is available, as are treble damages and disgorgement of profits, depending on the identity of the plaintiff.[182]

A. Exclusionary Conduct

Exclusionary conduct comes in two broad kinds, "disabling" conduct that excludes by reducing the quality of products offered by competitors and "improving" conduct that excludes by increasing the quality of the excluder's product.[183] Both forms are exclusionary because they put competitors at a disadvantage, in the first case by making competitors' products less desirable to consumers, sometimes by driving these competitors and their products entirely from the market, and in the second case by making the excluder's products more desirable to consumers than those of competitors.[184]

Whether exclusionary conduct is illegal under the Sherman Act depends on whether the conduct harms consumers, after taking into account the effect of the exclusion on both prices and the quality of the product offered by the defendant.[185] These two effects can be opposing, the exclusion leading to higher

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182. PHILLIP AREEDA ET AL., ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES 47-60 (2004).

183. Disabling exclusion may also be achieved by raising the costs of rivals, and improving exclusion may also be achieved by reducing the costs of the excluder, which is otherwise known as process innovation. *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power over Price*, 96 YALE L.J. 209, 214 (1986); Frederic M. Scherer, *First Mover Advantages and Optimal Patent Protection*, 40 J. TECH. TRANSFER 559, 562 (2015) (discussing process innovation); *see also* Sam Peltzman, *The Gains and Losses from Industrial Concentration*, 20 J.L. & ECON. 229, 231-32 (1977) (discussing the exclusionary character of cost reductions).

184. The exclusionary character of both forms may be understood as resulting from product differentiation. *See* CHAMBERLIN, *supra* note 13, at 71. Both forms differentiate the product of the excluder from those of competitors. Because some consumers will prefer the differences in the excluder's product, they will be willing to purchase the excluder's product even when the product is offered at a higher price. *See id.* at 113-14. If these consumers' preference for the excluder's product is very strong, then they will be willing to pay a much higher price; if weak, then only a slightly higher price. But either way, product differentiation has shifted the market away from the perfectly competitive world in which price competition drives price down to the cost of production. *See id.* at 114. The excluder may charge a price above cost and the consumer will still be willing to pay that price, even if competitors offer their own products for less. *See Microsoft*, 253 F.3d at 58 ("[T]o be condemned as exclusionary, a monopolist's act must . . . harm the competitive process.").

185. That was the substance of the D.C. Circuit's view in *Microsoft*, distilled "[f]rom a century of case law on monopolization." *Microsoft*, 253 F.3d at 58. The D.C. Circuit observed that illegal exclusionary conduct must "harm consumers," and ultimately exists only if the "anticompetitive harm of the conduct outweighs the procompetitive benefit," the latter defined to include "enhanced consumer appeal." *Id.* at 58-59. The archetypical anticompetitive harm of exclusionary conduct is higher prices. *See* HOVENKAMP, *supra* note 22, at 292 (defining as exclusionary "a practice that deters . . . existing rivals from increasing their output in response

prices, and therefore consumer harm, but the profits generated from those higher prices funding improvements in product quality, making consumers better off.[186] Because the disadvantage to competitors created by exclusionary conduct always leads to higher prices, the product quality effect alone determines whether net consumer harm exists.[187]

Most exclusionary conduct that the courts traditionally recognize as harmful to consumers and therefore as illegal, including tying, exclusive dealing, and certain refusals to deal, is of the disabling variety.[188] Disabling conduct usually operates by making it harder for competitors to offer a product at all in the market, effectively reducing the quality of competitors' products to zero, preventing the product quality effect from offsetting the harm of higher prices created by the exclusion. The firm that engages in predatory pricing, to use a classic example of illegal exclusionary conduct, drives competitors to bankruptcy, and competitors' products from the market, leaving consumers with nothing to show for the exclusionary conduct but the same old product offered by the excluder before taking action, but sold at a higher price.[189] The case against this traditional form of illegal exclusionary conduct would be strong enough if the excluded products were no better than the excluder's. But because they might well be better than the excluder's—and the better the excluded products, the more the excluder has to gain from excluding them—traditional forms of exclusionary conduct are even more harmful because they can suppress excellence, leading not only to higher prices but also to the consumption of inferior products.[190] It will become clear shortly that manipulative advertising is a form of disabling conduct.

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to the monopolist's price increase"). For harm to consumer welfare, rather than total welfare, as the proper standard, see John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 216-30 (2008).

186. For a graphical model of these opposing effects, see Ramsi A. Woodcock, *Inconsistency in Antitrust*, 68 U. MIAMI L. REV. 105, 126-33 (2013).

187. Because exclusionary conduct is conduct that "harm[s] the competitive process," and firms lack power over price only when subject to competition, higher prices are a necessary consequence of exclusionary conduct, all else equal. *Microsoft*, 253 F.3d at 58; CHAMBERLIN, *supra* note 13, at 114.

188. For a list of examples of illegal exclusionary conduct, see HOVENKAMP, *supra* note 22, at 313-14.

189. *See id.* at 370.

190. *See* Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 ANTITRUST L.J. 14 & n.60 (2015); *see also* Averitt & Lande, *supra* note 18, at 720 (observing that anticompetitive conduct can reduce competitors' "option-enhancing investment in research and innovation"). A firm that disables competitors could in theory use its higher prices to fund improvements to its own product, offsetting any losses to consumers from suppression of competitors' innovative products by increasing the value of its own

By contrast to their treatment of disabling conduct, courts have been much more forgiving of improving conduct, because when a firm excludes by increasing product quality there is a chance that the harm to consumers from the higher prices arising from the exclusion might be offset by the benefits consumers derive from having better products. It will become clear shortly that both informative and complementary advertising are forms of improving conduct.[191] Technological improvement, which will be referred to here simply as "innovation," is a third way in which firms improve their products. Innovation is nearly always treated by the courts as exempt from condemnation.[192] The reason for which antitrust recognizes this exemption, the principle of innovation primacy, has important implications for the antitrust treatment of the other two advertising-based ways in which firms improve their products.

It is sometimes said that the reason for the innovation exemption is that innovation excludes only by offering consumers enough value to entice consumers freely to choose the innovative product over the products of competitors,

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product to consumers. But there is no reason to suppose that a firm that is able to exclude competitors, and use the resulting demise of competition to raise prices, will voluntarily waste the profits the firm generates thereby on investments in product improvements. The firm would instead keep those profits for itself. The firm that disables competitors by charging a price well below cost, for example, has no reason to spend the profits that the firm generates by raising prices thereafter on research and development of better products for consumers.

Of course, research and development could further increase the profits of the firm by increasing demand for the firm's products. But the possibility of increasing demand implies that innovation would not take place entirely in the market in which the firm achieved monopoly through exclusionary conduct, for in that market there are no competitors' products away from which to attract demand. Instead, the innovation must touch on some other market that remains competitive. Only in a market in which competitors remain can innovation attract new demand, by excluding those remaining competitors. A firm that has already fully excluded competitors from a market has no incentive to innovate in that market.

191. *See infra* text accompanying notes 205 & 216.

192. *See* United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); HOVENKAMP, *supra* note 22, at 296. The exception is "essential facilities" cases, in which courts force a defendant to grant access to infrastructure that competitors need in order to compete with the defendant. *See* HOVENKAMP, *supra* note 22, at 336-40; Robert Pitofsky et al., *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 ANTITRUST L.J. 443, 445-50 (2002). In these cases, the infrastructure, which might be electricity transmission lines, and the defendant's product, which might be electric power, may be thought of as a single composite innovative product. That innovative product excludes competitors because competitors lack the infrastructure needed to create their own competing composite products. The defendant's electric power is a better product because the defendant has the power lines to deliver the product to consumers, whereas competitors lack access to power lines and can only sell a product that cannot be delivered. *See* Pitofsky et al., *supra* at 445-50. When courts force sharing of infrastructure in this context, they effectively treat innovation as exclusionary conduct.

with the result that innovation never harms consumers.[193] But the case for the exemption is not so clear-cut. While innovations that exclude competitors because of their popularity surely make consumers better off than if consumers were unable to buy the innovations at all, antitrust intervention could, in some cases, both preserve the innovation and eliminate the innovation's exclusionary effects, by forcing innovators to share with competitors, leading to price competition that makes consumers even better off.[194] The antitrust exemption for innovation-based exclusion therefore cannot be that unregulated innovation always benefits consumers.[195]

The reason for which antitrust exempts innovation is that forced sharing does not always make consumers better off, and when forced sharing fails, it destroys innovation. When antirust forces sharing, competitors sell the same innovative product as does the innovator, leading to competition that forces prices down, benefiting consumers.[196] If that competition would drive prices down substantially, but not below costs, then the failure of antitrust to intervene to compel sharing leaves consumers worse off. By contrast, if competition would drive price down below the level needed to cover the innovator's research costs, the innovator's incentive to innovate would be eliminated and consumers would ultimately be denied access to the innovation, because firms anticipating this result would choose not to innovate at all.[197] In that case, the innovators' exercise of rights to exclude competitors from the innovation would not harm consumers, because it would bring consumers an innovative

193. *See* BORK, *supra* note 45, at 318.

194. Antitrust courts have broad authority to force sharing through injunction. *See* AREEDA ET AL., *supra* note 182, at 50-51. For those few cases in which antitrust forces sharing as a remedy for innovation-based exclusion, see *supra* note 192.

195. In other words, the baseline against which to measure harm is an ameliorative baseline, the world in which the law intervenes, not the world in which the law does nothing. It is for this reason that courts award expectation, rather than reliance, damages in contract. Expectation damages are measured against a baseline world in which the law compels performance of the contract. L.L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 54 (1936). By contrast, reliance damages are measured against a baseline world in which no contract was created at all.

196. This is the reason for which innovation economists seek to find the optimal patent "breadth." The optimal patent breadth limits appropriation of the innovation by competitors enough to ensure that prices are just high enough to reward the innovator, but no more. *See* Vincenzo Denicolò, *Do Patents Over-Compensate Innovators?*, 22 ECON. POL'Y 680, 689, 694, 696 (2007) (discussing patent breadth and suggesting that the optimal patent breadth may be less than full protection, meaning that some sharing of the innovative product may be optimal).

197. *See* SCHERER & ROSS, *supra* note 24, at 622-23.

product that they could not enjoy in the presence of forced sharing and competition.[198]

The courts exempt innovation from antitrust scrutiny because they fear that in trying to adhere to the forced-sharing baseline, they might at times mistakenly create competition that drives prices too low to cover the innovator's research costs, reducing the incentive of firms to invest in innovation.[199] The possibility of mistake would not be very scary if the benefits of innovation were thought to be small, because in that case any losses to consumers, in the form of lower quality products, might be offset by gains from lower prices in markets in which court-ordered competition were not to discourage innovation. But economists believe, and the courts accept, that the benefits consumers enjoy from being able to purchase innovative products far exceed the losses consumers suffer from paying monopoly prices for those products, implying that the harm from mistakes is likely to overwhelm the benefits of enforcement.[200] Indeed, economists believe that innovation is by far the greatest source of gains to consumers in the economy.[201] It is therefore much better to risk leaving consumers to pay monopoly prices for innovative products than to risk denying

198. There is more likely to be a continuum of outcomes, rather than just the extremes of innovation-and-sharing and sharing-but-no-innovation described here. Firms adjust their investments in innovation based on their expectations regarding sharing, with the result that more sharing means less, but not no, innovation. *See* Woodcock, *supra* note 186, at 126-36. Optimal antitrust enforcement would require antitrust to target the level of sharing that calls forth the optimal level of innovation. *See id.* By protecting innovation in all cases, the principle of innovation primacy prevents antitrust from trying to target the optimal level of innovation. *See infra* text accompanying note 202.

199. DANIEL J. GIFFORD & ROBERT T. KUDRLE, THE ATLANTIC DIVIDE IN ANTITRUST: AN EXAMINATION OF US AND EU COMPETITION POLICY 28 (2015) ("[M]onopoly is generally tolerated when legally acquired on the general rationale of promoting innovation even in specific instances where such a prospect is far-fetched."); HOVENKAMP, *supra* note 22, at 296, 300; *see also* Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407-08 (2004); Novell, Inc. v. Microsoft Corp., 731 F.3d 1064, 1073 (10th Cir. 2013).

200. F.M. Scherer observes that "good economic performance depends much more critically upon sustaining a vigorous pace of technological progress than upon plausible variations in allocative efficiency or income distribution." SCHERER & ROSS, *supra* note 24, at 682. The Court has echoed this view, associating innovation-based monopoly with "economic growth." *Trinko*, 540 U.S. at 407. That Scherer means engineering-based progress, rather than progress in complementary advertising, is clear from the areas of technological progress that he lists elsewhere in the same work, including "aircraft engines and parts," "semiconductors," and "optical instruments and lenses." SCHERER & ROSS, *supra* note 24, at 615-16.

201. *See* Scherer & Ross, *supra* note 24, at 613-14; Richard J. Gilbert & Steven C. Sunshine, *Incorporating Dynamic Efficiency Concerns in Merger Analysis: The Use of Innovation Markets*, 63 ANTITRUST L.J. 569, 569 (1994). Joseph Schumpeter memorably argued that innovation is as much more effective at creating value than is lowering prices "as a bombardment is in comparison with forcing a door . . . ." SCHUMPETER, *supra* note 71, at 84.

them access to innovative products.[202] The antitrust principle that innovation must always be protected is the principle of "innovation primacy."

By inducing consumers to forsake the products of competitors in favor of the advertised product, without improving the quality of the advertised product itself, manipulative advertising operates like traditional forms of illegal exclusion, disabling competitors. But unlike traditional exclusion, manipulative advertising uses the mind of the consumer to disable competing products, making consumers unwilling to buy those products, even when consumers prefer them.[203] As with traditional exclusion, there is no reason to suppose that the higher prices that result will be offset by increases in product quality, and indeed the harm will be magnified in those cases in which the excluded products are more innovative than the excluder's.[204] But unlike traditional forms of exclusion, manipulative advertising is tied to complementary advertising, which genuinely improves the product for consumers, increasing, for example, the prestige-pleasure consumers take in consuming the product.[205] Thus persuasive advertising, which always has both manipulative and complementary effects, simultaneously disables competitors' products and improves the advertiser's own product.[206] Whether persuasive advertising should count as illegal exclusion therefore depends on whether the dual harms to consumers of higher prices and sabotage of the ability to choose innovative products associated with manipulative advertising are counterbalanced by the benefits to consumers of advertising operating as a product complement.[207]

This would be a difficult question if innovation and complementary advertising were to confer benefits in equal magnitudes on consumers.[208] In that case, the pleasure consumers take in complementary advertising might more than compensate consumers for the harm of paying higher prices for inferior

202. In lamenting the few exceptional cases that prove the rule, Geoffrey Manne and Joshua Wright make this argument more clearly than any court. *See* Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMPETITION L. & ECON. 153, 167, 172-83 (2010).

203. For manipulative advertising, see *supra* text accompanying note 40.

204. *See supra* note 190 and accompanying text.

205. *See supra* text accompanying note 67.

206. All persuasive advertising is potentially manipulative as well as complementary. *See* supra text accompanying note 67. It is never clear whether Santa makes consumers drink Coke by sabotaging the consumer's decision-making process or by enhancing the experience of drinking Coke with holiday cheer, or both. *See supra* text accompanying note 68. As a result, complementary advertising always appears only as part of the broader problem of how to regulate persuasive advertising as a whole. *See* Smolla, *supra* note 53, at 800.

207. *See supra* text accompanying note 69.

208. *Cf.* Tushnet, *supra* note 65, at 257 (lamenting the absence of "tools to identify which is to be master" when advertising has multiple opposing effects).

products as a result of the manipulative effects of persuasive advertising. But product innovation and complementary advertising are not created equal. Although complementary advertising is similar to innovation, in that it increases product quality and therefore benefits consumers, complementary advertising is also different in that it does not achieve this through engineering, by changing the functionality of the product, but rather by operating on the consumer's mind.[209] Economists agree that innovation, rather than the mental benefits of complementary advertising, is the most important source of consumer welfare gains in the economy.[210] A practice that threatens innovation must therefore be condemned, even if the condemnation might destroy other, secondarily important sources of consumer welfare, such as complementary advertising.

The calculus is almost the same as that which leads to the exemption of innovation from antitrust enforcement.[211] In the case of the innovation exemption, courts eschew enforcement because enforcement might chill innovation, notwithstanding the higher prices that result.[212] In the case of persuasive advertising, it is nonenforcement, not enforcement, that could chill innovation, not to mention raise prices, by allowing firms to use persuasive advertising to lure consumers away from innovative products.[213] The courts can therefore protect innovation in this case only by enforcing the antitrust laws, notwithstanding the incidental loss of the pleasure of complementary advertising that might result.

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209. This distinction between engineering and image is hardier than other distinctions that have been used to bolster the antitrust case against advertising. Elizabeth Mensch and Alan Freeman have argued, for example, that the FTC's mid-century cases were based on a distinction between the "mere images" of advertising and "'real' quality or price." Mensch & Freeman, *supra* note 1, at 337. They go on to dismiss the "liberal's quest for economic 'reality'" as "like the Marxist quest for use value instead of exchange value, or like the scientific positivist's belief in the fact/value distinction." *Id.* at 351. Writing in the First Amendment commercial speech context, Rodney Smolla similarly criticizes the "intolerant" academic who finds no value in advertising that provides consumers with "fantasies about their own personas and lifestyles." Smolla, *supra* note 53, at 783. This Article avoids that trap by accepting that image has real value as complementary advertising. But at the same time the Article preserves a meaningful distinction between advertising and the product, one that favors the product, by making the fundamentally uncontroversial observation that consumers value technological progress, which is to say, the quality of the product, to a far greater degree than they value image, a proposition obvious to anyone who would choose a smartphone over a smartphone advertisement.

210. *See supra* notes 200 & 201.

211. *See supra* note 199 and accompanying text.

212. *See supra* note 202 and accompanying text.

213. For the innovation-suppressing effect of persuasive advertising, see text accompanying note 203.

This is a calculus of averages. In some cases persuasive advertising may be mostly complementary in character, making condemnation bad for consumers, whereas in other cases, persuasive advertising may be mostly manipulative and innovation-suppressing, making condemnation good for consumers. Condemnation is the correct overall policy only because it is impossible to identify, or isolate out, the manipulative and complementary aspects of persuasive advertising, and the great value of innovation relative to complementary advertising suggests that on average the losses from failing to condemn persuasive advertising exceed the gains, just as that great value suggests to antitrust today that the losses from forcing sharing of innovation, and thereby inadvertently discouraging some innovation, exceed the gains from inducing lower prices for innovation in some markets.[214] It is, in the parlance of antitrust economics, a matter of error costs.[215]

The principle of innovation primacy also explains the antitrust treatment of both informative and false advertising, further strengthening the case that innovation primacy should decide the antitrust treatment of persuasive advertising as well. By helping consumers to identify the most innovative products, informative advertising has an effect similar to innovation itself, increasing the quality of the products that consumers actually buy and causing consumers to forsake competitors' inferior offerings.[216] Antitrust may be understood to exempt informative advertising from condemnation, just as antitrust exempts innovation from condemnation, because innovation primacy requires that antitrust treat the innovation effect as dominating the price effect.[217] The gains consumers get from being able to find innovative products must far exceed the losses they suffer from paying higher prices for informatively advertised products.

False advertising is similar in effect to persuasive advertising, making antitrust's condemnation of false advertising particularly significant for the case against persuasive advertising.[218] Like the manipulative side of persuasive ad-

214. For the dual character of persuasive advertising, see *supra* note 206.

215. For a survey and critique of error cost analysis in antitrust, see Ramsi A. Woodcock, *Per Se in Itself: How Bans Reduce Error in Antitrust* (Ga. St. Univ., Working Paper, 2016) http://ssrn.com/abstract=2896453 [http://perma.cc/XGU2-YZ9M].

216. For informative advertising, see *supra* text accompanying note 52.

217. For the unwillingness of the FTC to treat informative advertising as anticompetitive, see *supra* Part II.

218. The antitrust foundation of all FTC false advertising enforcement is often overlooked. Between its founding in 1914 and 1938, the FTC brought numerous false advertising cases under the FTC Act's prohibition on "[u]nfair methods of competition," language that the Court has held prohibits everything prohibited by the Sherman Act, including monopolization. 15 U.S.C. § 45(a)(1) (2012); FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454 (1986); Ira M. Millstein, *The Federal Trade Commission and False Advertising*, 64 COLUM. L.

vertising, the false or misleading information contained in false advertising suppresses innovative products, in this case by using false or misleading information, rather than the sabotaging of the consumer's decision-making process employed by manipulative advertising, to make inferior products appear superior.[219] But false advertising, like persuasive advertising, also has a complemen-

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REV. 439, 452-53 (1964). In 1931, however, the Court reprimanded the FTC for bringing false advertising cases without bothering to allege any harm to competition, but instead focusing exclusively on the harm to consumers from being deceived. FTC v. Raladam Co., 283 U.S. 643, 654 (1931). As one commentator has noted, "[i]n almost every instance of false advertising, a harmful effect to a competitor [can] be shown" and consequently the "practical result [of the ruling] was simply to require that the Commission establish in each instance a competitive effect." Millstein, *supra*, at 453. Congress nonetheless responded in 1938 by amending the FTC Act to grant the FTC explicit authority to regulate "deceptive acts or practices," freeing the FTC from making the antitrust argument against false advertising clear in every case, but also obscuring for subsequent generations the antitrust basis for the FTC's regulation of false advertising. Pub. L. No. 75-447 § 5, 52 Stat. 111, 111 (1938) (codified as amended 15 U.S.C. § 45(a)(1) (2012)).

One genuine contribution of the "deceptive acts or practices" amendment to the FTC's powers is that it allows the FTC to proceed against false advertising without needing to show monopoly power, as might be required were the FTC to challenge false advertising as monopolization. *See supra* note 181 and accompanying text. That monopoly power requirement would otherwise limit false advertising regulation to firms with large market shares in relevant markets and stands as a possible limit to antitrust's ability to condemn persuasive advertising as well. *See infra* Section IV.B. Monopoly power played little role in pre-1938 FTC cases against false advertising because the requirement remained inchoate in that early period of antitrust doctrinal development and, in any event, the FTC has a vaguely defined power under its unfairness mandate to relax the normal monopolization claim requirements associated with the Sherman Act. *See, e.g.*, FTC v. Typewriter Emporium, 1 F.T.C. 105, 106 (1918) (containing no reference to monopoly power, other than the observation that respondent, which falsely advertised used typewriters as new, sold "large numbers" of typewriters); *see also* Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 ANTITRUST L.J. 363, 374 (1998) (dating the first formal articulation of the monopoly power requirement to 1956); Neil W. Averitt, *The Meaning of "Unfair Methods of Competition" in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 244 (1980) (discussing relaxation of the monopoly power requirement in FTC unfairness cases).

219. *See* Goodman, *supra* note 59, at 557. For the innovation-suppressing effect of persuasive advertising, see text accompanying note 204. Edwin Baker attempts to distinguish false advertising and manipulative advertising on the ground that false advertising makes it impossible for the target to reject the message, because the message is false, whereas manipulative advertising gives the target "the theoretical possibility of rejecting the message," saving the message from condemnation. C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 258 (2011). It is not clear, however, why the consumer should find it easier to overcome, say, the cognitive effects of incessant repetition of a true advertisement than to overcome the effects of a false advertisement. *See* Goodman, *supra* note 59, at 529. It might be easier for the consumer to overcome the false advertisement by, for example, consulting an independent source of information, than to resist the power of repetition in making a purchase decision.

tary side.[220] An advertisement that falsely claims the endorsement of a celebrity may confer prestige-pleasure on consumers just as well as an advertisement that makes the claim truly, at least so long as the falsity of the advertisement is concealed. In condemning false advertising, the antitrust laws already recognize implicitly that the harm done by advertising to innovation is more important than the pleasure complementary advertising may confer on consumers.

Although a remarkably powerful tool for explaining current antitrust law, innovation primacy does not explain why, in the mid-century advertising cases, the FTC rejected cases for which the challenged advertising might have been informative, as well as persuasive.[221] When advertising is both informative and persuasive, there are two innovation effects, each running contrary to the other, the informative character of the advertising tending to promote innovation, but the manipulative character of the advertising tending to suppress innovation.[222] It is not obvious which effect should be considered the stronger, and therefore impossible to use the rule of innovation primacy to assume that either condemnation or exemption would tend on average to be in the best interests of consumers. The FTC seemed to privilege information effects, exempting advertising of mixed informative-persuasive character even though there is no body of economic literature that supports the notion that the benefits of informative advertising tend greatly to exceed the costs of persuasive advertising.[223]

By eliminating the information function of most advertising, the information age saves the case against persuasive advertising from having to resolve the problem of how to weigh the conflicting innovation effects of mixed informative-persuasive advertising.[224] Most advertising is now purely persuasive, and the rule of innovation primacy requires that most advertising therefore be treated as harmful to consumers, making it illegal exclusionary conduct.[225] Alt-

220. *See supra* text accompanying note 81.

221. *See* Gen. Foods Corp. II, 103 F.T.C. 204, 364 (1984) (information about differences between coffees); Kellogg Co., 99 F.T.C. 8, 241 (1982) (information about differences between breakfast cereals); Heublein, Inc., 96 F.T.C. 385, 596 (1980) (information about differences between wines).

222. For more on these two effects, see text accompanying notes 203 & 216.

223. The FTC's behavior was consistent, however, with the view common in First Amendment commercial speech scholarship that a lack of information is a greater threat to personal autonomy than being subject to persuasion. *See* Goodman, *supra* note 59, at 529 (observing that advertising laws "imagine an individual who is supremely capable when presented with truthful information but inept and vulnerable when presented with false or misleading information").

224. *See supra* note 65 and accompanying text.

225. For the purely persuasive character of most advertising today, see *supra* Part III. For innovation primacy, see *supra* text accompanying note 202.

hough the mid-century advertising cases make no mention of innovation primacy, they support this result because the cases treat purely persuasive advertising as anticompetitive.[226]

B. *Monopoly Power*

A firm has monopoly power under the antitrust laws if the firm is able profitably to raise price above the competitive level.[227] In principle, all persuasive advertisers have monopoly power under this standard, because persuasive advertising always gives the advertiser power profitably to raise price. The consumer's advertising-induced preference for the advertised product is by definition a willingness to pay more for the advertised product, relative to the products of competitors.[228] But courts tend to require more than just the power profitably to raise price; they require the power profitably to raise price by a substantial amount. This is expressed in the market share method normally used by plaintiffs to establish monopoly power, which is to show that the defendant has a high market share in a market in which a firm with a 100% market share could profitably raise price by a "significant" amount, usually at least 5%.[229] The significant price increase requirement means that conduct that creates power to raise price by only small amounts will not be condemned.[230] As applied, the monopoly power requirement would therefore limit a ban on advertising to advertising by firms with substantial pricing power.[231]

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226. *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 569, 571 (1967); Gen. Foods Corp. v. FTC, 386 F.2d 936, 945, 947 (3d Cir. 1967); *see also* Borden, Inc. v. FTC, 674 F.2d 498, 515-16 (6th Cir. 1982), *vacated*, 461 U.S. 940 (1983); *supra* text accompanying note 131.

227. *See* HOVENKAMP, *supra* note 22, at 89; John B. Kirkwood, *Market Power and Antitrust Enforcement* 5, 13-46 (Seattle Univ. Sch. of Law, Working Paper, 2017) http://ssrn.com/abstract=2942315 [http://perma.cc/5374-H5AS].

228. Consumer demand for a product is the amount consumers are willing to pay for the product. *See* HAL R. VARIAN, INTERMEDIATE MICROECONOMICS: A MODERN APPROACH 3-5 (8th ed. 2010). It follows that the power of advertising to increase demand for a product is the power to increase the prices that consumers are willing to pay for the product, and therefore the power to increase the actual prices charged for the product. *See* CHAMBERLIN, *supra* note 13, at 119-20.

229. *See* HOVENKAMP, *supra* note 22, at 92-93, 96, 293-94; *Horizontal Merger Guidelines*, U.S. DEP'T JUST. & FED. TRADE COMMISSION § 4.1.1 (Aug. 19, 2010), http://www.justice.gov/atr/public/guidelines/hmg-2010.html [https://perma.cc/F39C-WWLM].

230. *See* HOVENKAMP, *supra* note 22, at 95.

231. Market shares were substantial in the three successful mid-century advertising cases. *See Borden, Inc.*, 674 F.2d at 511 (90%); Gen. Foods Corp., 69 F.T.C. 380, 383 (1966) (51%); Procter & Gamble Co., 63 F.T.C. 1465, 1469 (1963) (48%). The market shares in the two merger cases were relatively low because merger law has a lower power threshold. *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 362, 364 (1963) (suggesting that a 30% market

Courts sometimes waive the monopoly power requirement, however, for conduct that is known to be harmful to consumers in almost all cases. Courts insist on substantial pricing power for satisfaction of the monopoly power requirement in order to filter out low-consumer-harm cases not justified by the costs of enforcing the law.[232] For conduct that is known to be harmful in almost all cases, enforcement is inexpensive, however, because it requires only ascertainment that the prohibited conduct has taken place, rather than an expensive case-specific inquiry into the effects of the conduct, so there is no need to filter out low-harm cases to save on enforcement costs.[233] Conduct subject to a waiver of the monopoly power requirement is said to be illegal "per se."[234]

The best-known example of per se illegal conduct is price fixing.[235] If two firms fix prices, then all else equal the fixed price will exceed the prices the firms would charge were they to pick their prices separately. Neither firm need worry that those consumers who would substitute the product of the other firm in response to a unilateral price increase will do so when the firms work together to fix prices, because when the firms work together the other firm's prices will rise as well.[236] If consumers are not willing to accept much of a price increase for either firm's product before abandoning both products, however, the price fixers will not be able to raise price by much, and their price fixing would therefore fail the monopoly power requirement. But antitrust bans price fixing regardless whether the price fixers satisfy the monopoly power requirement, because antitrust knows that price fixing always allows a profitable raising of prices, and therefore harm to consumers, even if the increase in prices is small.[237] Identifying price-fixing conduct, rather than engaging in a costly case-specific inquiry into effects, is therefore sufficient to establish consumer harm. By contrast, when two firms merge there will be a similar increase in power over price, but the merged firm may be in a position to reduce costs, or increase

share can violate section 7's prohibition of mergers that create "incipient" threats to competition).

232. *See* HOVENKAMP, *supra* note 22, at 92-93 (observing that the level of the price increase used to define the relevant market "must be more than trivial" because "we do not want to bring antitrust's cumbersome machinery into operation" otherwise).

233. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 103-04 (1984).

234. *See id.*

235. *See* HOVENKAMP, *supra* note 22, at 212.

236. Similar "unilateral competitive effects" occur when firms merge, although in the case of merger there may be countervailing benefits to consumers. *See* ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS, AND PROBLEMS IN COMPETITION POLICY 675 (3d ed. 2017); HOVENKAMP, *supra* note 22, at 576.

237. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940) (stating that the per se rule against price fixing "reaches more than monopoly power").

product quality, due to consolidation of the merging firms' operations.[238] These effects could make consumers better off, and so a costly case-specific inquiry into the net effects of the merger is required to determine whether consumer harm exists, and a power test is therefore required to filter out low-harm cases that do not justify the costs of such a case-specific inquiry.

Persuasive advertising should be subject to per se condemnation because advertising is, like price fixing, harmful to consumers in all cases, requiring no case-specific inquiry to determine net effects. Persuasive advertising makes consumers willing to pay more for the advertised product for reasons that, because of the principle of innovation primacy, must be assumed to involve no gain in consumer welfare.[239] As a result, advertising, like price fixing, raises prices without offering any possible countervailing benefit.[240] If persuasive advertising receives per se treatment, then section 2 of the Sherman Act would effectively ban most advertising.[241] If not, then only firms with large market shares in appropriately defined markets would violate section 2 when they advertise.

C. *Overcoming Mid-Century Concerns*

The obsolescence of the informative function of most advertising gives renewed relevance to four issues that troubled the persuasive view of advertising mid-century, when the FTC last brought antitrust cases against persuasive advertising. None of these concerns, which related to (i) the causal relationship between advertising and monopoly, (ii) the benefits that advertising-driven increases in firm scale might have for consumers, (iii) the possibility that advertising by competitors might cancel out, and (iv) the possibility that advertising might facilitate entry by newcomers, ultimately undermines a renewed antitrust campaign against advertising.

The question that most troubled antitrust mid-century was causality: whether exclusion might cause advertising, not the other way around. A number of studies that supported the antitrust case against advertising had found that advertising levels and profits were correlated across industries, suggesting that advertising tended to reduce competition, which would otherwise keep

238. *See* GAVIL ET AL., *supra* note 236, at 675-78 (discussing "unilateral competitive effects" and the "Williamson Diagram" showing the "procompetitive efficiencies" of mergers).

239. *See supra* text accompanying note 202.

240. *See* Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 103-04 (1984).

241. *See supra* note 181.

profits low.[242] But skeptics challenged the direction of causality, arguing that advertising might be an effect of profitability and lack of competition, rather than a cause.[243] A firm that has managed to exclude competitors for a reason other than advertising, such as the engineering superiority of the firm's product, has an incentive further to increase demand for its product through advertising because the absence of competition allows the firm to earn higher margins on that demand.[244] The empirical relationship between advertising and profit could not therefore establish that advertising harms competition. This causality problem had a profound effect on the antitrust campaign against advertising, leading the FTC to switch the focus of its case against the breakfast cereals makers away from advertising.[245]

In retrospect, it is remarkable that this argument so troubled antitrust, because the law prohibits making matters worse, just as much as it prohibits making matters bad to begin with. Even when there is some other independent cause of a firm's power in a particular market, such as the firm's ownership of an innovative product that the competition cannot reproduce, advertising still excludes competitors, because advertising can generate additional profits for the firm only by diverting business from other firms.[246] It might very well be

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242. *See* JOE S. BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES (1956); William S. Comanor & Thomas A. Wilson, *Advertising Market Structure and Performance*, 4 J. REPRINTS ANTITRUST L. & ECON. 25, 437 (1972).

243. *See* Richard Schmalensee, *Advertising and Profitability: Further Implications of the Null Hypothesis*, 25 J. INDUS. ECON. 45, 45 (1976); *see also* Mensch & Freeman, *supra* note 1, at 346; Nelson, *supra* note 6, at 732. An important precursor of this work was Robert Dorfman & Peter O. Steiner, *Optimal Advertising and Optimal Quality*, 44 AM. ECON. REV. 826, 826 (1954). The popularity of game theory models starting in the 1980s led to signaling models of advertising in which a firm uses its advertising levels to demonstrate to potential entrants that it will be able to defend its market position. These have been used to support the notion that monopoly causes advertising because a firm that has a monopoly position based on its greater efficiency relative to rivals can make a credible threat to defend its position and therefore will be more likely to advertise. *See* Bagwell, *supra* note 5, at 1798-1802; Kyle Bagwell & Garey Ramey, *Advertising and Limit Pricing*, 19 RAND J. ECON. 59, 60 (1988).

244. *See* Dorfman & Steiner, *supra* note 243, at 826; Schmalensee, *supra* note 243, at 49.

245. F.M. Scherer appears to be referring to the effect of the causality problem on planning for the cereals case when he remarks that "[a]s the F.T.C. staff prepared its detailed presentation [in the cereals case], it was recognized that traditional economic theories did not provide sufficient support for the proposition that heavy advertising significantly discouraged entry," leading the staff to embrace the alternative theory that the profusion of breakfast cereal brands prevented new entrants from getting a foothold in the market. Scherer, *supra* note 119, at 16; *see supra* text accompanying note 118.

246. Nicholas Kaldor observes that advertising can increase demand "at the expense of the demand for non-advertised or little-advertised goods" or "at the cost of intended saving." *See* Kaldor, *supra* note 59, at 9. Demand driven up at the expense of savings is demand driven up

the case that eliminating the other source of exclusionary effect, the innovativeness of the firm's product, for example, would cause the firm to refrain from advertising, by reducing margins. But that has no bearing on the question whether advertising excludes when the firm chooses to advertise.

Indeed, the problem of causality is not limited to advertising. All exclusionary conduct, not just advertising, drives demand to the excluder, making the excluder more profitable the greater the excluder's pricing power. But it is no defense to any form of exclusionary conduct that it was carried out by a once and future monopoly, or that the market would remain uncompetitive after elimination of the conduct.[247] The FTC's concern in the cereals case that advertising might be an effect of monopoly, instead of a cause, also never met with judicial endorsement and should not be allowed to limit treatment of advertising as exclusionary.[248]

The situation is different, however, if the exclusionary conduct might lead to lower, rather than higher, prices. That is the subject of the second issue that troubled mid-century antitrust, the argument that the scale made possible by advertising might sometimes lead to lower prices, and therefore be good for consumers, because of the effect of scale on the structure of cost and demand. The increase in demand for a firm's products created by advertising might pull prices down by allowing the firm to realize scale economies, or by making demand more elastic as demand increases.[249] Either way, the benefit that the lower prices confer on those consumers who would have bought the product even without the advertising might outweigh the harm to consumers who would have paid a lower price, or who would not have bought at all, but for the adver-

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at the expense of future goods, because savings are invested in production of goods for future consumption.

247. Instead, the opposite is true. A successful monopolization claim must establish that the excluder already had monopoly power or obtained such power as a result of exclusionary conduct. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966). When the excluder already had monopoly power, the exclusionary conduct is condemned because the conduct "maintained" that power. *Id.*

Similarly, because activities that increase or buttress preexisting market power harm consumers, antitrust prohibits mergers in already-concentrated markets. Indeed, merger enforcement becomes stricter the more concentrated the market. *See Horizontal Merger Guidelines*, *supra* note 229, § 5.3 (stating that a concentration increase of 200 HHI points is presumptively anticompetitive in "highly concentrated markets" but only subject to "scrutiny" in "moderately concentrated markets").

248. *See supra* note 245 and accompanying text.

249. *See* Avinash Dixit & Victor D. Norman, *Advertising and Welfare*, 9 BELL J. ECON. 1, 2 (1978) [hereinafter Dixit & Norman, *Advertising and Welfare*]; Avinash Dixit & Victor D. Norman, *Advertising and Welfare: Reply*, 10 BELL J. ECON. 728, 729 (1979); Kaldor, *supra* note 59, at 15.

tising.[250] Thus persuasive advertising might benefit consumers as a group, despite inducing some consumers to buy products they do not really prefer, the advertising working to sacrifice the welfare of those consumers for the benefit of others. Economists concluded that the ultimate consumer welfare effect of persuasive advertising depends on the details of the market at issue.[251]

This ambiguity of consumer welfare effect presents no obstacle for an antitrust ban on advertising, or indeed for per se treatment of advertising, because allowing firms to achieve economies of scale by suppressing the potentially superior products of competitors would conflict with the principle of innovation primacy.[252] In order for the economy to innovate in the direction of consumers' preferences, consumers must be able to express those preferences in their purchase decisions.[253] Depriving consumers of the ability to do that for the sake of realizing economies of scale in the production of an existing, and potentially inferior, technology, sacrifices innovation for the sake of lower prices, which is precisely the tradeoff that innovation primacy was developed to avoid.[254] All traditional forms of monopolization, whether predatory pricing, tying, or refusing to deal, harm those consumers who prefer the products of excluded competitors, but also drive those consumers to buy the excluder's products, possibly leading to cost or demand effects that lower prices.[255] But the courts have never recognized this possibility as a defense to these traditional forms of exclusionary conduct.[256] The ambiguous consumer welfare effects of scale play

250. *See* Dixit & Norman, *Advertising and Welfare*, *supra* note 249, at 4-5.

251. *Id.* at 16; Kaldor, *supra* note 59, at 15.

252. For per se treatment for advertising, see *supra* Section IV.B.

253. *See supra* note 72 and accompanying text.

254. *See supra* text accompanying note 202.

255. *See* Kaldor, *supra* note 59, at 15 (comparing the effects of advertising to those of patents and other methods of excluding competitors).

256. These traditional forms of exclusionary conduct are for the most part not subject to a per se ban, as advertising ought to be. *See* HOVENKAMP, *supra* note 22, at 297-301 (describing the case-specific inquiry normally used to identify exclusionary conduct). That is not because courts wish to sacrifice competition in the name of scale, but because these forms may in some cases include attempts to improve products, rather than to disable the products of competitors. Such attempts fall within the innovation exemption, so courts must examine conduct falling within these forms on a case-by-case basis to filter out the good conduct, and apply the monopoly power requirement to save on the costs of this case-by-case review. *See, e.g.*, *id.* at 341-44 (discussing innovation justifications for refusals to deal); *see also supra* Section IV.B. By contrast, persuasive advertising has no product-improving character, other than its complements function, which is assumed to pale in comparison with its harmful effects, which is why a per se rule is appropriate for persuasive advertising. *See supra* text accompanying note 202.

no role in traditional monopolization cases, and should play no role in advertising cases, either.

The next issue that troubled mid-century antitrust was that advertising might cancel out between firms, leading to no net anticompetitive effect.[257] Coke might use advertising to draw demand away from generic cola to Coke, but if Pepsi did the same, with the same intensity, demand for both might remain unchanged. In the view of some economists, advertising could have an anticompetitive effect only if one competitor had an advertising advantage relative to others.[258] Nicholas Kaldor argued, for example, that advertising tended to lead to greater concentration only because advertising would always at first give one firm, perhaps the first-mover, a size advantage, which would then lead to an economy of scale in advertising, and thence to a permanent advertising advantage.[259] Economies of scale in advertising lay at the heart of the FTC's argument in *Heublein* and the Clorox and S.O.S. cases that the defendants in those cases had given an advertising advantage to the brands they had acquired.[260]

The canceling issue is the most peculiar of the four issues that troubled antitrust, because it seems to ignore the grade-school admonition, followed in every other area of antitrust law, that two wrongs do not make a right. It is no defense to tying, for example, that the competition did it too, with the result that the competition was not in fact excluded from the market.[261] Indeed, the federal courts that heard the mid-century advertising cases did not express the view that only an advertising advantage, as opposed to advertising itself, is capable of counting as exclusionary conduct.

The notion that two wrongs do not make a right has a strong economic foundation in the advertising context. Advertising that cancels out inflicts the same harm on consumers as unilateral advertising that actually succeeds at re-

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257. *See* A.C. PIGOU, THE ECONOMICS OF WELFARE 176 (4th ed. 1932) (stating that "[i]t may happen that the expenditures on advertisement made by competing monopolists simply neutralize each other").

258. *See, e.g.*, Kaldor, *supra* note 59, at 13.

259. *Id.* at 15.

260. *See* FTC v. Procter & Gamble Co., 386 U.S. 568, 579 (1967); Procter & Gamble Co., 63 F.T.C. 1465, 1473 (1963).

261. Otherwise, antitrust would recognize the defense of unclean hands, to allow a firm to resist suit for monopolization when the plaintiff has engaged in exclusionary conduct as well. But antitrust does not recognize that defense. *See* Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 214 (1951); Gerald J. McConomy, *Unclean Hands: The Effect of Plaintiff's Antitrust Violations in Antitrust Actions*, 113 U. PA. L. REV. 1071, 1080-81, 1084 (1965).

ducing competition.[262] Firms doing battle through advertising that cancels out all have higher costs, because they must spend on advertising, with the result that market prices must be higher, despite the persistence of competition. The greater the advertising battle, the higher the costs, until the consumer ends up in a market in which prices are as high as they would be in a monopoly, but the resulting revenues are spent by firms on advertising instead of on themselves.[263] Not only is the harm to consumers as great as under unilateral advertising, but cancelling actually results in a greater overall decline in economic welfare because the extra advertising costs represent waste.[264] Because advertising battles inflict the same harm on consumers as unilateral advertising, there is no need for economists to appeal to advertising efficiencies, and a consequent imbalance of advertising power, in order to treat advertising as exclusionary conduct.[265] All advertising is exclusionary, whatever the context.

But advertising's power to exclude can sometimes be used for good, as the final issue that troubled antitrust, that advertising helps market newcomers challenge entrenched incumbents, suggests. The most important source of rewards for innovation is not patent, copyright, or trade secret law, as is commonly believed, but what economists call first-mover advantage.[266] There are many sources of first-mover advantage; the source relevant here is the loyalty, enabled by trademark rights, that consumers tend to exhibit toward the first brand of an innovative product to enter the market, such as the iPhone for smartphones, or Bayer for aspirin.[267] Empirical work suggests that advertising by competitors can be effective at eroding innovators' loyalty advantage, bring-

262. Nicholas Kaldor thought differently, but only because he believed that advertising would never truly cancel out and some firms would obtain an advantage over others. *See* Kaldor, *supra* note 59, at 13.

263. The situation is similar to the one in which firms compete wastefully to obtain a monopoly, although in this case firms never do succeed. *See* Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807, 809 (1975).

264. MARSHALL, *supra* note 34, at 305; Posner, *supra* note 263, at 809 (stating that monopoly acquisition costs are wasteful).

265. The FTC seemed to recognize this in the Clorox case, when it wrote that "[a]ll forms of business rivalry are, in a sense, 'competition,' but not necessarily in the sense contemplated by" the antitrust laws, and concluded that "brand 'competition'" that results in higher prices is not "socially useful competition." *Procter & Gamble Co.*, 63 F.T.C. at 1582. Paradoxically, however, the FTC Bureau of Competition in the Clorox case challenged the merged firm's advertising advantage, not the fact of advertising itself.

266. Scherer, *supra* note 183, at 559-61, 563-64, 570-72.

267. *See* SCHERER & ROSS, *supra* note 24, at 585; Bagwell, *supra* note 5, at 1807-08 (summarizing empirical work that finds that being a pioneering brand is a "substitute" for advertising in generating brand loyalty); *see also* EDWARD H. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION: A RE-ORIENTATION OF THE THEORY OF VALUE 273 (7th ed. 1958) (recognizing the power of trademark to create and preserve own-product monopoly power).

ing competition to innovative product markets and ensuring that first-mover advantages do not persist longer than necessary to compensate innovators for their costs.[268]

In principle, advertising might indeed be used to break down an innovator's loyalty advantage, but only government is in a position to use advertising in a way that benefits consumers. An advertising campaign targeting the loyalty of consumers to an innovator would need to be implemented late enough to ensure that the innovation generates enough rewards from loyalty to cover costs, but early enough to ensure that the innovation has not become obsolete and therefore of no value to consumers.[269] To prevent a wasteful advertising battle between the incumbent and the entrant, a battle that might well dissipate, through the higher prices required to pay for it, any advantages of competition for consumers, defensive advertising by the innovator would need to be banned.[270] Finally, to ensure that the brand advantage enjoyed by the incumbent is not simply replaced by a brand advantage for the entrant, the advertising campaign would need to be carefully designed to eliminate the special place of the incumbent's product in the mind of the consumer without creating a special place for the entrant's product.

Without such a carefully structured deployment, advertising could: prematurely erode first-mover advantages, reducing innovation; result in an advertising battle that does no more than convert the first mover's monopoly profits into revenues for advertising agencies; or replace a first-mover-based monopoly with an advertising-based monopoly. The empirical evidence showing that advertising facilitates entry suggests that antitrust enforcers may want to authorize advertising of limited duration as a remedy in monopolization cases in which first-mover advantages play a role, but not that as a general matter advertising is procompetitive.[271] Moreover, all exclusionary conduct, not just advertising, may be deployed to erode first-mover advantages. A competitor might just as well employ predatory pricing, tying, or exclusive dealing contracts, instead of advertising, to break into a market, thereby increasing compe-

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268. *See* John Deighton et al., *The Effects of Advertising on Brand Switching and Repeat Purchasing*, 31 J. MARKETING RES. 28, 41 (1994) (finding that purchase decisions in certain household product categories are primarily influenced by past experience).

269. *See* Woodcock, *supra* note 186, at 126-36 (discussing the need for neither too little nor too much reward for innovation); *see also* Scherer, *supra* note 183, at 570-76 (modeling social value arising from first-mover advantages under various assumptions regarding the rate of erosion of such advantages).

270. *See supra* note 263 and accompanying text.

271. *See* Deighton et al., *supra* note 268, at 41; *see also* Richard S. Cornfeld, *A New Approach to an Old Remedy: Corrective Advertising and the Federal Trade Commission*, 61 IOWA L. REV. 693, 695-96 (1976) (discussing the use of "corrective advertising" by the FTC as a remedy for false advertising).

tition. But the law would not treat those practices as any less exclusionary for having been deployed against a monopolist.[272] It is no defense in antitrust to a claim of monopolization that the defendant replaced an earlier monopoly.[273]

V. THE OBSOLESCENCE OF FIRST AMENDMENT PROTECTION FOR ADVERTISING

The FTC prepared all of the cases that made up its campaign against advertising before the Court first accorded First Amendment protection to commercial speech.[274] A renewed campaign against advertising would therefore have to contend with a regime of First Amendment protection that the FTC did not face, and which has only grown more protective of advertising in the intervening decades.[275] First Amendment protection for commercial speech ultimately presents no obstacle to a renewed antitrust campaign against advertising because protection for commercial speech is predicated on the same informative function of advertising upon which the original FTC campaign foundered, but which is now obsolete.[276]

It is often said that the Court accords advertising, under the moniker of commercial speech, a level of protection under the First Amendment that is intermediate between the absolute protection the Court accords political speech under that amendment and the absence of protection accorded by the Court to incitement, fighting words, and the like.[277] But this characterization is wishful

272. For a list of illegal exclusionary practices, including these three examples, see HOVENKAMP, *supra* note 22, at 313-14.

273. Antitrust permits exclusion only through "superior skill, foresight and industry." *See* United States v. Aluminum Co. of Am., 148 F.2d 416, 430 (2d Cir. 1945). But the monopoly power requirement slightly expands this rule. By exempting firms with limited influence over price from liability, the monopoly power requirement allows firms to use traditional forms of exclusionary conduct to challenge entrenched incumbents, at least before those firms have any prospect of becoming large. *See supra* Section IV.B. If persuasive advertising is treated as per se illegal, firms challenging incumbents would not benefit from this safe harbor in their advertising activities.

274. The FTC filed the last of its advertising cases, the Maxwell House case, on July 14, 1976, shortly after the Court first recognized First Amendment protection for commercial speech on May 24 of that year, in *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 770-73 (1976).

275. The First Amendment is not mentioned in any of the opinions generated by the advertising cases.

276. For the obsolescence of the information function, see *supra* Part III. For the function's role in the demise of the FTC campaign against advertising, see *supra* Part II.

277. 2 RODNEY A. SMOLLA & MELVILLE B. NIMMER, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 20:4 (2017).

thinking about the extent of the Court's embrace of commercial speech protection. Commercial speech received no protection until 1976, when the Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* extended protection only to commercial speech that *informs*.[278]

Writing for the Court in *Virginia Board*, Justice Blackmun observed that

> [a]dvertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.[279]

The Court made the limitation of First Amendment protection for advertising to informative advertising even clearer in a subsequent case, declaring that "[t]he First Amendment's concern for commercial speech is based on the informational function of advertising."[280] But the strongest evidence of the limitation comes from the Court's exemption of false advertising, the quintessential form of uninformative advertising, from protection.[281] In the world in which Justice Blackmun wrote, there was only one kind of obviously uninformative advertising, putting aside advertising of the handful of homogeneous products in the economy, such as the bleach at issue in the Clorox case, and that was false advertising.[282] The explicit denial of protection to false advertising in *Virginia Board* has remained perhaps the most stable element of the Court's commercial speech jurisprudence over the past forty years, allowing the FTC to serve as a federal enforcer of truth-in-advertising throughout this period.[283] Intermediate protection of informative speech has come to mean that regulation of informative advertising must be backed by an important government purpose and narrowly tailored to that purpose, but to this day regulation of unin-

278. *See* 425 U.S. at 770-73; C. Edwin Baker, *The First Amendment and Commercial Speech*, 84 IND. L.J. 981, 981-82 (2009).

279. 425 U.S. at 765.

280. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980).

281. *Id.*

282. For a discussion of Clorox-related litigation, see *supra* note 93 and accompanying text.

283. 425 U.S. at 771-72; Sullivan, *supra* note 80, at 153 & n.114; *see also* Lee Mason, *Content Neutrality and Commercial Speech Doctrine After* Reed v. Town of Gilbert, 84 U. CHI. L. REV. 955, 994-95 (2017) (observing that recent cases that threaten to extend full protection to most commercial speech would not apply to false advertising).

formative speech does not need to meet that standard, or any standard at all.[284] The intermediate level of protection received by commercial speech applies only to informative speech.[285]

The limitation of First Amendment commercial speech protection to informative speech means that advertising that is purely persuasive, in the sense that it conveys no useful product information, is not protected by the First Amendment.[286] By rendering the information function of most advertising obsolete, the information age has transformed most advertising into purely persuasive advertising, rendering its First Amendment protection obsolete as well, and thrusting most advertising into the same category of unprotected commercial speech that is today occupied only by false advertising.[287]

Any regulation of commercial speech necessarily discriminates against speech on the basis of content, because commercial speech is defined by its content: commercial speech, the Court has said, is speech that proposes a commercial transaction.[288] In the decades since the Court recognized limited protection for informative commercial speech, the Court has made increasingly clear that it will tolerate no content-based discrimination against speech of any kind, a position at odds with the Court's willingness to permit some regulation of commercial speech.[289] The Court has not yet made clear how it would reconcile the rule against content discrimination with the rule of limited protection for commercial speech, but a good guess is that the Court would prohibit content discrimination unless the purpose of the discrimination is the same as the purpose for which the Court provides only limited protection for commercial speech in the first place.[290]

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284. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 566; Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 480 (1989).

285. *See* Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107, 1128 (2006).

286. For the definition of persuasive advertising, see *supra* note 69 and accompanying text.

287. For the obsolescence of the information function of most advertising, see *supra* Part III.

288. *See Va. State Bd. of Pharmacy*, 425 U.S. at 761-62; Mason, *supra* note 283, at 984.

289. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015); Sorrell v. IMS Health Inc., 564 U.S. 552, 565-66 (2011); Mason, *supra* note 283, at 957.

290. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 388 (1992) (endorsing this approach in the context of fighting words); Mason, *supra* note 283, at 974-75. It is not entirely clear that the rule against content discrimination applies to false advertising, which otherwise receives no First Amendment protection. If the rule does not apply to false advertising, then the rule might not apply to persuasive advertising either, to the extent that persuasive advertising counts, alongside false advertising, as another form of unprotected commercial speech. *See* Sullivan, *supra* note 80, at 128. *But see* Smolla, *supra* note 53, at 789. For purposes of argument, however, the assumption in this Article is that the rule against content discrimination does apply

In *Virginia Board*, Justice Blackmun wrote that the purpose of limiting First Amendment protection for commercial speech is to ensure that consumers are "intelligent and well informed," because intelligent and well informed consumers are "indispensable" to the nation's "free enterprise system."[291] In the language of economics, the purpose of limiting protection for commercial speech is to ensure that consumers' preferences are reflected in their purchase decisions, because that is essential for the free enterprise system reliably to translate consumer preferences into production decisions.[292] The rule against content discrimination therefore requires that the purpose of any discrimination against commercial speech be to ensure that consumers are able to express their preferences in their purchase decisions.

Antitrust condemnation of persuasive advertising is a permissible form of content-based regulation of commercial speech because the purpose of that condemnation is precisely to ensure that consumers are able to reflect their preferences in their purchase decisions.[293] That purpose is a part of antitrust's overall goal of safeguarding an essential element of the free enterprise system, competition, which cannot flourish when consumers come under the control of advertisers.[294] Because the Court's limitations on commercial speech protection share with antitrust the goal of safeguarding the free market system, the courts have never condemned an antitrust action on First Amendment grounds, with the exception of those actions that would have limited the ability of firms to petition the government for relief from market forces.[295] The identity of the ends of antitrust and limited First Amendment protection for commercial speech means that if there is only one legal regime that should raise no First Amendment concerns when it limits speech, that regime is antitrust. It is no stretch to say that the purpose of the Court's commercial speech doctrine is at a minimum to allow antitrust to operate freely, even when that operation restricts speech.

The Court's treatment of false advertising is instructive here again. Condemnation of false advertising is as content-based as condemnation of persua-

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to persuasive advertising, as well as false advertising, and an exception to the rule is therefore required for an antitrust ban on either form of advertising to survive.

291. *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

292. For this economic account, see *supra* text accompanying note 72.

293. *See supra* text accompanying note 72.

294. *See, e.g.*, N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade."). For the effects of advertising on competition, see *supra* Section IV.A.

295. *See* Hillary Greene, *Muzzling Antitrust: Information Products, Innovation and Free Speech*, 95 B.U. L. REV. 35, 50 (2015).

sive advertising. Both kinds of regulation single out a particular kind of advertising, either advertising containing false information or advertising containing no useful information, for limitation, but both do that only to protect the decision-making processes of consumers, in the first case by ensuring that consumers can accurately distinguish the attributes of different products and in the second by ensuring that consumers can put their true preferences to work in selecting between those products.[296] For this reason the Court lets stand regulations targeting false advertising and must similarly let stand antitrust condemnation of persuasive advertising, notwithstanding the content-basedness of such condemnation.[297]

The identity of the purposes of banning persuasive advertising and limiting protection for commercial speech also explains why banning persuasive advertising would pass muster even were intermediate scrutiny of regulations burdening persuasive advertising appropriate.[298] Recall that intermediate scrutiny requires that a regulation burdening commercial speech be narrowly tailored toward achieving an important government purpose.[299] A ban's purpose of protecting the free enterprise system must count as an important government purpose because that is the purpose for which the Court permits some regulation of commercial speech in the first place.[300] Condemnation of all advertising outside of "add to cart" pages and firm websites is also narrowly tailored to achieve the goal of limiting interference with consumer decision making. Exempting those two forms of advertising from the ban ensures that the only advertising that remains informative, and therefore essential to the free enterprise system, is not affected by the ban.[301] Although the ban would restrict much complementary advertising, this result is unavoidable because of the dual nature of persuasive advertising.[302] The important purpose and narrow tailoring requirements are therefore satisfied.

Some commentators have argued that the persuasive function of advertising strengthens, rather than weakens, the case for First Amendment protection for advertising, because all persuasive advertising, whether manipulative or

296. For the mechanisms of operation of false advertising and persuasive advertising, see *supra* notes 203, 218.

297. Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 142 (1994).

298. For the intermediate protection requirements, see *supra* note 284.

299. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 480 (1980).

300. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 765 (1976).

301. For the uninformativeness of all other advertising, see *supra* Part III.

302. For this dual nature, see *supra* note 206.

complementary, has an expressive element identical to the expressiveness of fully protected political speech.[303] In the words of one commentator,

> the one thing the government may not do is regulate speech because it "sells" a lifestyle, fantasy, ethos, identity, or attitude that happens to be regarded by most as socially corrosive. To the extent that advertisers are selling fantasies, lifestyles, identity, or anything other than "hard core" transactional information, they are doing what all other speakers routinely do.[304]

The trouble with this view is that it applies with equal force to false advertising, but neither the Court nor these commentators have suggested that the First Amendment should protect false advertising.[305] Many find fiction much more expressive than non-fiction, the false more powerful than the merely persuasive, and yet the Court accords false advertising less, rather than more, protection than the intermediate level afforded informative commercial speech.[306] The expressive character of persuasive advertising cannot trouble the Court, so long as the Court wishes to allow any regulation of false advertising, or indeed of any advertising at all, given the ease with which persuasive elements can be added to any advertisement for purposes of obtaining First Amendment protection.[307] If persuasive advertising were protected, then Häagen Dazs could claim to be a town in Europe, because the umlaut seduces as much as it misleads.

The Court dealt briefly with the problem of persuasive advertising in *Sorrell v. IMS Health Inc.*, a challenge to a Vermont law that prevented branded drug makers from using data on doctors' prescribing habits to target those doctors

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303. *See* Smolla, *supra* note 53, at 780-82; Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech*, 76 VA. L. REV. 627, 639-46 (1990).

304. Smolla, *supra* note 53, at 780-81.

305. *See* Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, 512 U.S. 136, 142 (1994); Kozinski & Banner, *supra* note 303, at 651-52.

306. For the Court's treatment of false advertising, see *supra* note 283 and accompanying text. For the expressiveness of falsehoods, see Varat, *supra* note 285, at 1109 n.3.

307. The First Amendment distinguishes between "factually false statements" and "those that are deceptive or misleading," or "deceptions short of deliberate lies." Varat, *supra* note 285, at 1126-28. The First Amendment provides little protection for factually false statements, regardless whether they are commercial in nature, but protects deceptive or misleading statements when they are noncommercial. *See id.* at 1130; *see also* Post, *supra* note 7, at 35-36. *But see* Kozinski & Banner, *supra* note 303, at 651 (arguing that it is "not at all certain that very much would change" in the regulation of false advertising were all commercial speech to be fully protected). Eliminating the carve-out from First Amendment protection for false advertising would certainly prevent regulation of deceptive or misleading advertising as well. *See* Tushnet, *supra* note 65, at 228-29.

for sales calls.[308] In an argument echoing the Clorox case, one of Vermont's defenses of the law was that these sales calls were too effective at causing doctors to prescribe high-price branded drugs, despite the fact that branded and generic drugs are identical in effect, even if not always in every detail of their chemical formulas.[309] The Court rejected Vermont's contention by analogy to political speech, observing that persuasiveness has never been a ground for denying protection to political expression.[310]

Against the backdrop of a ban on the advertising of a near-homogenous product, and the absence of any claim in the case that the sales calls operated as a product complement to the medicine, the Court appeared in *Sorrell* to be considering the constitutional status of purely manipulative advertising, and to have held that manipulative advertising has First Amendment protection.[311] It is unlikely, however, that the Court really intended such a holding, because the Court viewed the sales calls as informative, despite the near-homogeneity of branded and generic drugs.[312] The Court referred repeatedly to the information value of the sales calls, observing that "many listeners find detailing," which is a name for those sales calls, "instructive," and that "the fear that people would make bad decisions if given truthful information cannot justify content-based burdens on speech."[313] The Court saw itself as ruling on a regulation of advertising that was both informative and persuasive, rather than on the purely persuasive advertising that would be the subject of an antitrust ban. Whether it was reasonable for the Court to treat advertising of homogenous pharmaceuticals as informative is another matter.[314]

Although the Court's holding poses no threat to an antitrust advertising ban, the Court's analogy to political speech is important, because that analogy must be rejected when the time comes for the Court actually to consider the status of purely persuasive speech. The analogy must be rejected because the

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308. 564 U.S. 552, 557-59 (2011).

309. *Id.* at 577-78. For the Clorox case, see *supra* note 93 and accompanying text. For the near-homogeneity of branded and generic drugs, see Colleen Kelly, *The Balance Between Innovation and Competition: The Hatch-Waxman Act, the 2003 Amendments, and Beyond*, 66 FOOD & DRUG L.J. 417, 422-23 & n.66 (2011).

310. *Sorrell*, 564 U.S. at 577-78.

311. For manipulative advertising, see *supra* text accompanying note 44.

312. *See Sorrell*, 564 U.S. at 578.

313. *Id.* at 577-78 (citation omitted) (quotation marks omitted).

314. Unlike the bleach at issue in the Clorox case, an individual drug is not likely to be known to all consumers, or even to all doctors, so the sales calls could conceivably have increased awareness of the existence or uses of drugs, even if they could not provide useful information regarding differences between branded drugs and generic drugs. For the Clorox case, see *supra* note 93 and accompanying text.

Court has committed to maintaining in the commercial world a system, the free enterprise system, that the Court has not committed to maintaining in the political arena.[315] The foundation of that system is consumer control of markets, the power of consumers to dictate their preferences to producers through their product choices.[316] Commercial speech can destroy that system, either by denying consumers the accurate information they need to identify the products that they prefer, which is the false advertising already recognized as a threat by the Court, or by interfering with the decision-making process used by consumers to translate preferences into choices, which is the manipulative aspect of persuasive advertising.[317]

By contrast, the political system that the Court seeks to maintain does not require that any one group be in control.[318] The Court has never committed, for example, to ensuring that voters, the probable equivalent of consumers in the political world, are always able to translate their policy preferences into votes, and thence into government action.[319] Indeed, the Court itself is perhaps

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315. For the Court's embrace of the free enterprise system in the commercial arena, see *supra* note 291 and accompanying text.

316. *See supra* text accompanying note 72.

317. *See* JOHN KENNETH GALBRAITH, THE NEW INDUSTRIAL STATE 205 (2015) ("The general effect of the sales effort . . . is to shift the locus of decision in the purchase of goods from the consumer where it is beyond control to the firm . . . ."). For the mechanisms of operation of false advertising and persuasive advertising, see *supra* notes 203, 218. For recognition by the Court of the threat of false advertising, see Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771-72 (1976).

318. Robert Post bases a defense of the denial of protection to false advertising on a similar ground. He argues that the power relationship between advertiser and consumer should serve as the basis for carving out false advertising from First Amendment protection. Post, *supra* note 7, at 38. Post, however, seems to adhere to a heroic view of the consumer psyche, and to see only factually false statements as capable of preventing consumers from translating their preferences into purchase decisions. *See id.* at 40-41 (stating that "the Court has not been able entirely to transcend older images of consumers as vulnerable and reliant"). He would therefore deny protection only to those statements. *See id.* at 40. To his credit, however, Post recognizes that making unequal power relationships the ground for denial of protection "would shift judicial attention away from the content of particular communications and instead direct judicial scrutiny to the structural preconditions of consumer rationality and independence." *Id.* at 41. In doing so, Post hints at both the reason for which antitrust condemnation of advertising is not content discrimination for First Amendment purposes (of which, see *supra* text accompanying note 289) and the key role played in this Article by weakness in the human decision-making process.

319. Robert Post makes a similar point when he argues that in the political realm the Court tends to assume that there is no need for intervention to correct power imbalances between speakers. *See* Post, *supra* note 7, at 40. Post suggests that this is because the political realm is "self-governing," able to handle the problem of power on its own. *Id.* But laissez faire in political speech may be justified instead on the ground that sometimes imbalances of power are a good thing in politics, if not in commerce.

the greatest symbol of the counter-majoritarianism of the political system that the Court seeks to maintain, a counter-majoritarianism that has no place in the free enterprise system the Court seeks to protect in the commercial world.[320] Having no commitment to ensuring that voters always control politics, the Court has never committed to ensuring that voters be "intelligent and well informed."[321] The Court protects false political speech, at least when merely deceptive, rather than factually inaccurate, to the same extent that the Court protects true political speech, and has always permitted persuasive political advertising, as the Court noted in *Sorrell*.[322] It follows that because the Court's goals for commerce and politics are different, the Court's treatment of persuasion in commercial and political speech can also be different, and any analogy from one to the other therefore inappropriate.[323]

VI. THE IMPLICATIONS OF BANNING ADVERTISING

While banning uninformative advertising is certainly not akin to banning political speech for First Amendment purposes, a ban would threaten many of the industries through which political speech flows, including the newspaper, television, sports, entertainment, online search, product review, and social media industries, referred to here broadly as the media, all of which would be deprived of a source of revenue by the demise of advertising.[324] From a purely

320. *See* Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 NW. U. L. REV. 933, 936, 938-42 (2001).

321. *Va. State Bd. of Pharmacy*, 425 U.S. at 765.

322. Sorrell v. IMS Health Inc., 564 U.S. 552, 577-78 (2011). For the Court's protection of deceptive or misleading political speech, see *supra* note 307. The reason the Court has given for treating deceptive or misleading advertising differently from deceptive or misleading political speech differs from the account given here. *Va. State Bd. of Pharmacy*, 425 U.S. at 772 n.24. The Court has argued that deceptive or misleading advertising merits less protection because it is easier for an advertiser to ensure that advertisements are not deceptive or misleading, presumably because advertisements relate to the advertiser's own products, than it is for political speakers to verify the quality of the information they seek to disseminate. *Id.* This foundation has been widely recognized as unconvincing; some other rationale must be at play. *See, e.g.*, Kozinski & Banner, *supra* note 303, at 635-37; Post, *supra* note 7, at 36-37.

323. *Cf.* Sunstein, *supra* note 35, at 238 (describing as "highly doubtful" the possibility that the inability of consumers to shield themselves from manipulative advertising creates "a sufficient basis for a general 'manipulation exception' to the existing protection accorded to commercial speech").

324. *See* Thierer, *supra* note 173, at 515 ("[R]egulatory advocates must explain how the content and services currently supported by advertising and marketing will be possible if those techniques are choked off."). Online search, social media, and review websites, as well as the news media, probably rely the most on advertising revenues. *See* Jesse Holcomb & Amy Mitchell, *Revenue Sources: A Heavy Dependence on Advertising*, PEW RES. CTR.: JOURNALISM &

economic perspective, starving the media of advertising revenue would be healthy, because persuasive advertising harms consumers.[325] The lost revenues represent the elimination of socially wasteful spending by advertisers, spending that under a ban would likely flow instead to more consumer-beneficial methods of attracting demand, such as technological innovation.[326] Coca-Cola might, for example, finally find a way to take the calories out of Coke without sacrificing taste. If the result is the demise of industries that have grown fat on the provision of advertising services, that represents no more than the elimination of a massive distortion in the allocation of resources caused by persuasive advertising.[327]

The media need not suffer under an advertising ban, however, if consumers prove willing to pay more up front for media services, to compensate for the loss of the subsidy from advertising.[328] Consumers of course already pay in full for their media services today, but only indirectly, in the form of the higher prices they pay for lower-quality products sold through manipulative advertising, higher prices that provide advertisers with the funds that they spend on advertising.[329] But if under a ban consumers prove unwilling to pay in full up front for media services, that is no reason to allow the media to die, not least because of the importance of preserving the institutions that facilitate political

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MEDIA (Mar. 26, 2014), http://www.journalism.org/2014/03/26/revenue-sources-a-heavy-dependence-on-advertising [http://perma.cc/6EV8-GBJ4] (estimating that more than sixty-nine percent of news media revenues come from advertising); Alphabet Inc., *supra* note 1, at 24 (showing Google advertising revenues of about $80 billion and total Google revenues of about $90 billion); Facebook, Inc., *supra* note 1, at 39 ("We generate substantially all of our revenue from advertising."); Yelp Inc., *supra* note 158, at 4, 6 (reporting about $625 million in advertising revenues and about $715 million in total revenues).

325. For the argument that persuasive advertising harms consumers, see *supra* text accompanying note 74.

326. For sources on waste, see *supra* note 264.

327. *See* Kaldor, *supra* note 59, at 7 (remarking upon the "social losses caused by [advertising's] distortion of demand").

328. The experience of the newspaper industry, which is already suffering from the demise of search advertising in the information age, is not, however, encouraging. *See* Hsiang Iris Chyi, *Paying for What? How Much? And Why (Not)? Predictors of Paying Intent for Multiplatform Newspapers*, 14 INT'L J. MEDIA MGMT. 227, 242 (2012) (finding based on survey data that consumer willingness to pay for online newspaper access is "weak"); Hsiang Iris Chyi & Ori Tenenboim, *Reality Check*, 11 JOURNALISM PRAC. 798, 800-801 (2017) (observing that most attempts by newspapers to charge for online access have failed). For the effects of the information age on newspapers, see *supra* note 148.

329. For the effects of manipulative advertising upon price and quality, see *supra* text accompanying notes 203-204.

speech.[330] Public funding would be essential. This already exists for radio, television, and the arts.[331] Funding would need to be increased, but that would not be hard in a fiscal sense because there would be a ready source of funds available: the savings of firms no longer allowed to spend on advertising.[332] To the extent that society believes that this money would be better spent on the media than reallocated by firms to innovation and other pursuits, the government could tax firms at their historical rate of advertising expenditure and transfer the funds to the media.[333]

Greater government involvement in the media is no threat to democracy, relative to the current system, for it involves transfer of funding decisions from the undemocratic institution of business to democratic governments.[334] Indeed, the United States was once a pioneer in government subsidization of the media. Postal subsidies that allowed newspapers and magazines to flow virtually free to subscribers through the mail made the media in the United States the envy of European observers like Alexis de Tocqueville in the nineteenth century, without any apparent Big Brother effects.[335] The experience of other democracies with government funding of the media, such as the United Kingdom, which spends $4 billion per year on the BBC, and Germany, which spends $7 billion per year on its own public broadcasting services, has been similarly be-

330. *See* ALEX S. JONES, LOSING THE NEWS: THE FUTURE OF THE NEWS THAT FEEDS DEMOCRACY 57-81 (2009) (arguing that the news industry is essential to the health of the First Amendment).

331. CORP. FOR PUB. BROAD., 2014 ANNUAL REPORT 3, 85 (2014) (showing federal funding for public radio and television of $445 million in 2014); *How the United States Funds the Arts*, NAT'L ENDOWMENT FOR ARTS 3 (Nov. 2012), http://www.arts.gov/sites/default/files/how-the-us-funds-the-arts.pdf [http://perma.cc/JP3V-CRFJ] (stating that seven percent of funding for not-for-profit arts groups comes from the government).

332. Estimates of total annual advertising expenditures in the United States vary from $200 billion to $300 billion. *See Media Advertising*, *supra* note 134 (showing about $200 billion in 2016); Leslie Levesque et al., *Economic Impact of Advertising in the United States*, IHS MARKET 3 (2015) (showing about $323.4 billion in 2016).

333. The average firm spends 7.5% of its revenues on advertising, with firms in the consumer packaged goods industry spending the highest proportion of revenues, 24%, and energy firms the lowest, 4%. *See Marketing Budgets Vary by Industry*, DELOITTE (Jan. 24, 2017), http://deloitte.wsj.com/cmo/2017/01/24/who-has-the-biggest-marketing-budgets [http://perma.cc/3KLC-A7D8].

334. *See* Usha Rodrigues, *The Seductive Comparison of Shareholder and Civic Democracy Symposium: Understanding Corporate Law through History*, 63 WASH. & LEE L. REV. 1389, 1397-1404 (2006) (discussing reasons for which corporations are not democratically governed).

335. *See* RICHARD R. JOHN, SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE 1-4 (1995).

nign.[336] The current media and arts funding model in the United States, in which money is funneled to privately organized non-profit organizations, also ensures political independence.[337]

The consequences of an advertising ban for the online search and social media industries, understood here to include product review platforms like Yelp, as well as firms like Google and Facebook, are particularly important. These industries provide the infrastructure that has rendered most advertising obsolete, by allowing consumers to obtain all the product information they need through online search and word-of-mouth.[338] If a ban on advertising would destroy these industries, then a ban would have the paradoxical effect of eliminating the justification for banning advertising.[339] The consequences of a ban would not necessarily be so grim, however, because firms in these industries appear to earn substantially more than the cost of the services they provide.[340] Thus although a ban would likely force these firms to start charging consumers for the services the firms provide, and consumers would likely not be willing to pay as much for access to these services as advertisers do today, these firms might still be able to survive on lower earnings.

But insolvency is not the only threat to the health of online search and social media under a ban. The absence of competition is another. While advertising is no longer informative, advertising still has the potential to become informative in response to attempts by online search and social media providers to block access to information. As such, advertising still serves as an important source of redundancy in consumer access to product information.[341] If Google

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336. Rasmus Kleis Nielsen, *'Frozen' Media Subsidies during a Time of Media Change: A Comparative Analysis of Media Policy Drift in Six Western Democracies*, 10 GLOBAL MEDIA & COMM. 121, 126-27 (2014) (providing 2008 funding estimates); *see also* Rodney Benson et al., *Public Media Autonomy and Accountability: Best and Worst Policy Practices in 12 Leading Democracies*, 11 INT'L J. COMM. 22, 1, 3, 15 (2017) (observing that public media have been shown to offer "more in-depth, diverse, and critical public affairs reporting" than "commercial counterparts" and that public media in Germany and the United Kingdom have some of the highest levels of "autonomy and accountability" of public media systems in the "12 leading democracies").

337. *See, e.g.*, CORP. FOR PUB. BROAD., *supra* note 331, at 3.

338. *See supra* Part III.

339. For the reliance of these industries on advertising revenues, see *supra* note 324.

340. In 2016, Facebook had net income of $10.22 billion on revenues of $27.64 billion, and Google parent Alphabet had net income of $19.48 billion on revenues of $90.27 billion, amounts likely more than large enough to compensate investors for use of their capital. Facebook, Inc., *supra* note 1, at 40; Alphabet Inc., *supra* note 1, at 43.

341. *See* Jean-Christophe Plantin et al., *Infrastructure Studies Meet Platform Studies in the Age of Google and Facebook*, 20 NEW MEDIA & SOC'Y 293, 305 (2018) ("Google presents issues similar to Facebook. Because it designs and controls Internet search, the company holds enormous power over the visibility of web-based resources."); *see also* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation Symposium: State Courts and Federal-*

and Facebook, for example, were to take money from Coke to exclude references to Pepsi from search results and friend feeds, Pepsi could today still get product information to consumers through other advertising channels, but would be unable to do so under an advertising ban.[342] To avoid this result under a ban, Congress would need to guarantee competition in the online search and social media industries, so that consumers would be able to pick the search engine and social media platforms offering the least-biased results.

Guaranteeing competition might be difficult, however, because online search and social media exhibit economies of scale, as reflected in the monopoly-level market shares of Google and Facebook today.[343] Google provides better search results, and Facebook more friends, the more people use the services, so a market with lots of competing mini-Googles and mini-Facebooks would not provide the same quality of service.[344] Public provision of online search and social media would therefore be a better solution to the challenges posed by an advertising ban than would a market-based approach, just as public provision has proven the preferred approach to providing the brick-and-mortar equivalents of online search and social media: public roads and the Post Office, which enable physical search and the exchange of long-distance word-of-mouth by physical means.[345] It is difficult to see government funding of online search and

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ism in the 1980's, 22 WM. & MARY L. REV. 639, 642-49 (1981) (celebrating the virtues of redundancy in the law).

342. Google has been fined by the European Union for biasing product search results in favor of results for which Google has received payment from retailers. *See Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, Antitrust: Commission Fines Google €2.42 Billion for Abusing Dominance as Search Engine by Giving Illegal Advantage to Own Comparison Shopping Service—Factsheet*, EUROPEAN COMM'N (June 27, 2017), http://europa.eu/rapid/press-release_MEMO-17-1785_en.htm [http://perma.cc/V7J6-G2E6].

343. Google has a 70% share of the global search engine market and Facebook 76% of the global social media market. *See Search Engine Market Share*, NETMARKETSHARE, http://www.netmarketshare.com/search-engine-market-share.aspx [http://perma.cc/67BY-5HLU]; *Social Media Stats Worldwide*, STATCOUNTER GLOBAL STATS, http://gs.statcounter.com/social-media-stats [http://perma.cc/9FS5-J8L2].

344. *See* Justus Haucap & Ulrich Heimeshoff, *Google, Facebook, Amazon, eBay: Is the Internet Driving Competition or Market Monopolization?*, 11 INT'L ECON. & ECON. POL'Y 49, 51, 56 (2014).

345. *See* Brett M. Frischmann, *Infrastructure Commons in Economic Perspective*, *in* INTERNET POLICY & ECONOMICS 29 (W.H. Lehr & L.M. Pupillo eds., 2009) (classifying both roads and the internet as "social infrastructure" that should be provided by government because they generate value "downstream" for which consumers of the infrastructure are not willing to pay privately); J. Gregory Sidak, *Abolishing the Letter-Box Monopoly*, 1 CRITERION J. ON INNOVATION 401, 404-17 (2016) (discussing the government-granted monopolies that fund the Postal Service).

The cost to the government of providing online search and social media services can be estimated from the cost of operating Google search, Facebook, and Yelp, which was no more

social media as a threat to privacy or political independence when private ownership of these industries is today built upon exploitation of the personal data of users for advertising purposes, and has proven vulnerable to commandeering by at least one foreign government.[346]

CONCLUSION

It is a strangeness of this dawn of the information age that the great efficiencies information technology has created in the storage and indexing of information have so far seemed not to liberate consumers from the imperfect guidance of Madison Avenue. But the fruits of technological advance go to those who control the technology. The information age has stripped from advertising its information value and left only its value as a persuasive tool, even as it has heightened those powers of persuasion by making available large amounts of data on consumer habits. It is appropriate for antitrust, that great equalizer of the power of producers and consumers, to help consumers realize the efficiencies of the information age by taking commercial speech out of the public square and putting it at the end of an online search query, where it belongs.

than $52 billion in 2016. *See* Yelp Inc., *supra* note 158, at 51-53 (providing dollar values for "cost of revenue," "product development," and "general and administrative" costs which sum to $296.393 million); *see also* Alphabet Inc., *supra* note 1, at 29-31 (listing, for Google parent Alphabet, "other cost of revenues," which include the cost of data centers, "research and development" cost, and "general and administrative" cost which sum to $39.278 billion); Facebook, Inc., *supra* note 1, at 40 (listing "cost of revenue," "research and development," and "general and administrative" expenses which sum to $11.44 billion). Using Google, Facebook, and Yelp to provide all online search and social media services consumed in the United States might require no expansion in capacity, given these companies already have a global user base and Google has its own local search service that competes with Yelp. But even if expansion were required, it would be cheap given the low cost of adding users and information to existing platforms. Fifty-two billion dollars, or 1.3% of the 2016 U.S. federal budget, therefore seems to be a reasonable upper bound for the cost of government subsidization of online search and social media. *See* CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: 2017 TO 2027 14 (Jan. 2017) (listing 2016 budget outlays of $3.9 trillion).

346. *See* David Streitfeld et al., *How Calls for Privacy May Upend Business for Facebook and Google*, N.Y. TIMES (Mar. 24, 2018), http://www.nytimes.com/2018/03/24/technology/google-facebook-data-privacy.html [http://perma.cc/6WYS-64TN]; *see also* Indictment at 2-4, United States v. Internet Research Agency, No. 1:18-cr-00032-DLF (D.D.C. Feb. 16, 2018).