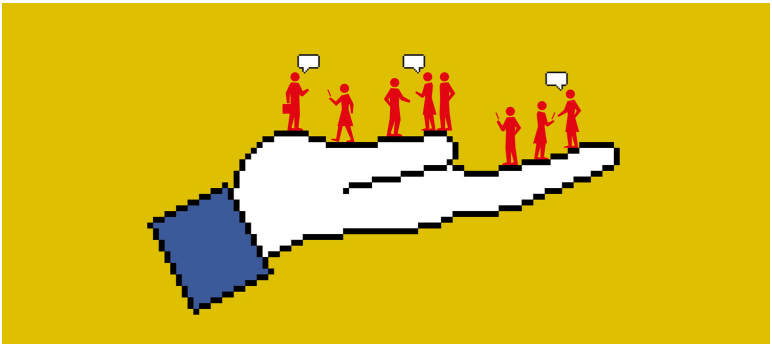
THE TECH GIANTS, MONOPOLY POWER, AND PUBLIC DISCOURSE



Collaboration and Competition in Information and News During Antitrust's Formative Era

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In November 2019, the Knight First Amendment Institute convened a major symposium at Columbia University, titled "The Tech Giants, Monopoly Power, and Public Discourse," to address concerns arising from the dominance of a small number of technology companies over a wide range of economic and expressive activity. The essays in this series were originally presented and discussed at this two-day event. Written by scholars and experts in law, computer science, economics, information studies, journalism, political science, and other disciplines, the essays focus on two questions: how and to what extent the technology giants' power is shaping public discourse, and whether anti-monopoly tools might usefully be deployed to expose or counter this power.

The symposium was conceptualized by Knight Institute staff, including Jameel Jaffer, Executive Director; Katy Glenn Bass, Research Director; Alex Abdo, Litigation Director; and Larry Siems, Chief of Staff. The essay series was edited by Glenn Bass with additional support from Lorraine Kenny, Communications Director; Sarah Guinee, Research Fellow; and Madeline Wood, Communications and Research Coordinator.

The full series is available at knightcolumbia.org/research/

INTRODUCTION

The First Amendment seeks to promote a robust marketplace of ideas, and antitrust law seeks to promote a robust marketplace of goods and services. To what extent are these principles related or even intertwined? To what extent do free speech and free competition share common ground when it comes to state interventions that may limit free exchange in small ways but promote free exchange in bigger ways? For instance, an exclusive legal right to a news story may prevent its broad dissemination and hence limit the right of others to speak and to compete, but also enable the creation of the story in the first place. Or legal intervention to require a dominant news provider to collaborate with its smaller competitors may constrain the dominant firm's editorial and competitive prerogatives, but also serve the larger goal of marketplace pluralism by facilitating the participation of more voices and more competitors.

These questions concerning the relationship between exclusivity, coercion, collaboration, and competition in information and news were raised in parallel during the formative years of contemporary First Amendment and antitrust law—and they have abiding importance today. Although the

First Amendment predated the Sherman Act by a century, First Amendment *jurisprudence* and antitrust jurisprudence developed during the same period, and at the hands of the same jurists. It was the sweep of dissenting and concurring opinions by Oliver Wendell Holmes and Louis Brandeis between 1919 and 1927 that gave birth to modern First Amendment jurisprudence.[1] It was also shortly before or during this period that Holmes and Brandeis left an indelible mark on antitrust law in such decisions as Holmes's recognition of the Sherman Act's broad jurisdictional reach[2] and rejection of void-for-vagueness arguments[3] and, particularly, Brandeis's seminal decision on Section 1 of the Sherman Act's rule of reason in *Chicago Board of Trade v. United States*.[4]

The nurturing of the early First Amendment and antitrust jurisprudences was not merely coincident in time but also coincident thematically. In cases concerning antitrust or unfair competition, Holmes and Brandeis expressed the same values and concerns that animated their First Amendment jurisprudence. Working through dissenting opinions much as in the First Amendment cases, they opposed both restraints on free competition necessary to the propagation of information, on the one hand, and government restrictions of collaborative information-sharing on the other. Seeking to work out the relationship between exclusivity, collaboration, and competition, Holmes and Brandeis argued that the government should neither promote informational exclusivity through the imposition of tort liability for unfair competition, nor stand in the way of voluntary and noncoercive efforts to facilitate the free flow of market information and democratic market access.

Holmes's and Brandeis's dissents planted the seed of an idea about the roles that antitrust, competition, and free speech could play in nurturing marketplace democracy—an organization of industry in which a multiplicity of firms could freely enter and participate to meet the varied needs and demands of consumers. During the New Deal period, especially when Brandeis's "anti-Bigness" views became the prevailing antitrust ideology,[5] the Justice Department began to bring antitrust cases in the newspaper industry on the theory that restraints on newspaper competition by dominant newspapers resulted not only in higher prices but also fundamentally challenged the functioning of a free press and the marketplace of ideas. But the initiation of antitrust prosecutions against news organizations raised

a different free speech question—whether the First Amendment barred the government from imposing its own vision of information freedom on dominant news organizations. Two competing visions of antitrust and a free press—one focused on the rights of dominant newspapers and the other on the rights of readers and smaller papers—reached the Supreme Court in 1945, in *Associated Press v. United States*.[6] Even as it struck down the Associated Press's bylaws allowing members to block local competitors from membership and rejecting the argument that such antitrust intervention infringed the free press rights of incumbent newspapers, Justice Hugo Black's majority opinion refused to join the constructivist view of a free press that held that the government should aggressively deploy antitrust law to promote First Amendment values. Instead, Black insisted that anticompetitive restraints in news media should be judged by the same standards—no more and no less—as restraints in other industries. Hence, the First Amendment would neither stand in the way of antitrust prosecutions involving news and information nor would it provide any additional impetus for such cases.

From *Associated Press* forward, the Justice Department continued to play an active role in policing anticompetitive restraints in news and information. Legal complaints and court decisions sometimes resonated with Brandeis and Holmes about the value to freedom and democracy of the unrestricted exchange of news, viewpoints, and information. As time passed, however, antitrust cases involving news and information began to focus increasingly on price effects and economic efficiency, and First Amendment values receded from the discussion. The project begun by Holmes and Brandeis—of thinking about exclusivity, collaboration, and competition as issues of marketplace democracy—largely faded from view.

Today, the questions posed by Holmes and Brandeis are again on the table for consideration. Particularly with the growth of massive technology gatekeepers like Google, Facebook, and Amazon, who sit upon mountains of data and control essential channels of information, the time is again ripe for thinking about the role of exclusivity, coercion, cooperation, and competition in the marketplaces of ideas and industry.

HOLMES AND BRANDEIS ON COMPETITION AND COERCION IN NEWS AND INFORMATION

THE AWAKENING of the First Amendment in the years immediately following the First World War in concurring or dissenting opinions by Justices Holmes and Brandeis is "one of the most familiar developments in American constitutional history."[7] Among the many memorable ideas advanced by Holmes and Brandeis in those early years of First Amendment jurisprudence, perhaps none stands out more than the "marketplace of ideas" metaphor advanced by Holmes (joined by Brandeis) in his first libertarian free speech dissent, in *Abrams v. United States*: "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundation of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."[8]

The Holmes/Brandeis vision of ideas competing with other ideas in a free market had obvious resonance for the broader organization of the economy and industrial competition, and Holmes and Brandeis were thinking about those issues at the same time as they began seriously to contemplate the First Amendment. At the same time that the Justices were wrestling with the meaning of free speech in cases involving espionage and criminal syndicalism, they had occasion to ponder the effects that legal-economic rules might have on the free flow of information in the news media and industry more broadly. Their dissents in two cases involving antitrust and unfair competition—*International News Service v. Associated Press*[9] and *American Column & Lumber Co. v. United States*[10]—brought their First Amendment values to questions of economic competition and organization.

International News Service v. Associated Press involved a common law unfair competition claim by the Associated Press (AP) against International News Service (INS) for the misappropriation of "hot news."[11] AP sought to enjoin INS from bribing AP newspaper members to leak AP stories to INS in advance of publication and copying news from bulletin boards and early editions of AP newspapers and selling it to INS customers. AP claimed a

property right to its news, not by virtue of federal copyright but at common law. At the Supreme Court, the majority upheld the unfair competition law claim, holding that "[t]he parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other."[12]

Both Holmes and Brandeis issued dissenting opinions. To Holmes, the question came down to whether there could be "property in the combination or in the thoughts or facts that words express."[13] Holmes believed that thoughts could not be propertized—that they remain in the public domain even though they are generated by individuals and are economically valuable. Unless the INS was misrepresenting the AP's thoughts as originally its own, there could be no common law tort claim. As in *Abrams*,[14] Holmes viewed ideas as free to travel until they found their resting place in human opinions.

Brandeis shared Holmes's view that thoughts and ideas could not be propertized: "The general rule of law is that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—became, after voluntary communication to others, free as the air to common use."[15] Like Holmes, he would have held that mere appropriation of the ideas of another, without fraudulent passing off as if they were the speaker's own, could not constitute a tort. Brandeis, however, went further than Holmes in stressing the *procompetition* value at stake in permitting free appropriation of ideas by competitors:

> That competition is not unfair in a legal sense merely because the profits gained are unearned, even if made at the expense of a rival, is shown by many cases besides those referred to above. He who follows the pioneer into a new market, or who engages in the manufacture of an article newly introduced by another, seeks profits due largely to the labor and expense of the first adventurer, but the law sanctions, indeed encourages, the pursuit.[16]

Here, Brandeis was drawing on an old common law principle—that competition may be painful to rivals is of no moment to the law.[17] People should

be free in competition to appropriate and propagate the ideas of others, for that is the nature of a free market and a free society.

Brandeis and Holmes returned to the relationship between competition and information dissemination three years later in an antitrust case involving information exchange among competitors—*American Column & Lumber Co. v. United States*.[18] The case is generally overshadowed by the information exchange decision of four years later in *Maple Flooring Manufacturers' Assn. v. United States*,[19] which did not draw a dissent from Holmes or Brandeis, but it was in *American Column* that Brandeis[20] and Holmes[21] continued the articulation of their view that the law should not impede the free flow of information, either to aid a competitor against another or to aid consumers as against producers.

The American Hardware Manufacturers' Association consisted of 400 members operating 465 hardwood mills, one-third of the total production in the United States.[22] In 1918, that body adopted an "Open Competition Plan" with the purpose of "disseminat[ing] among members accurate knowledge of production and market conditions so that each member may gauge the market intelligently instead of guessing at it; to make competition open and above board instead of secret and concealed; to substitute, in estimating market conditions, frank and full statements of our competitors for the frequently misleading and colored statements of the buyer."[23] The group served as a "central clearing house for information on prices, trade statistics and practices" among its members.[24] Among other things, the association promulgated monthly or weekly reports to its members on various categories of competitive information collected from its members, including member-specific production levels and purchaser-level pricing information.[25]

In the Supreme Court, the majority opinion of Justice John Hessin Clarke found this scheme a naked "competition suppressing organization" lacking only a definite agreement on prices to make it an obvious form of price fixing.[26] Holmes and Brandeis dissented, finding the voluntary and noncoercive exchange of information critically important to the functioning of a free and egalitarian society.

Holmes's often-overlooked two-paragraph dissent is worth printing in its entirety:

> When there are competing sellers of a class of goods, knowledge of the total stock on hand, of the probable total demand, and of the prices paid, of course will tend to equalize the prices asked. But I should have supposed that the Sherman Act did not set itself against knowledge—did not aim at a transitory cheapness unprofitable to the community as a whole because not corresponding to the actual conditions of the country. I should have thought that the ideal of commerce was an intelligent interchange made with full knowledge of the facts as a basis for a forecast of the future on both sides. A combination to get and distribute such knowledge, notwithstanding its tendency to equalize, not necessarily to raise, prices, is very far from a combination in unreasonable restraint of trade. It is true that it is a combination of sellers only, but the knowledge acquired is not secret, it is public, and the buyers, I think I may assume, are not less active in their efforts to know the facts. A combination in unreasonable restraint of trade imports an attempt to override normal market conditions. An attempt to conform to them seems to me the most reasonable thing in the world. I see nothing in the conduct of the appellants that binds the members even by merely social sanctions to anything that would not be practised, if we could imagine it, by an allwise socialistic government acting for the benefit of the community as a whole. The parties to the combination are free to do as they will.
>
> I must add that the decree as it stands seems to me surprising in a country of free speech that affects to regard education and knowledge as desirable. It prohibits the distribution of stock, production, or sales reports, the discussion of prices at association meetings, and the exchange of predictions of high prices. It is true that these acts are the main evidence of the supposed conspiracy, but that to my mind only shows the weakness of the Government's case. I cannot believe that the fact, if it be assumed, that the acts have been done with a sinister purpose, justifies excluding mills in the backwoods from information, in order to enable centralized purchasers to take advantage of their ignorance of the facts.[27]

Brandeis, always more verbose than the inimitable stylist Holmes but no less eloquent, offered his own dissenting point of view, framed through the archetypically Brandeisian lenses of dominance and marketplace

democracy. He began with an acknowledgment of the power of words to restrain freedom of action: "Restraint may be exerted through force or fraud or agreement. It may be exerted through moral or through legal obligations; through fear or through hope. It may exist, although it is not manifested in any overt act, and even though there is no intent to restrain. Words of advice, seemingly innocent and perhaps benevolent, may restrain, when uttered under circumstances that make advice equivalent to command."[28] For Brandeis, words only had the power to restrain when they flowed from a position of power, of dominance: "For the essence of restraint is power; and power may arise merely out of position. Wherever a dominant position has been attained, restraint necessarily arises." Such restraints attained through dominance and coercion were, to Brandeis, the heart of the Sherman Act's prohibition: "And when dominance is attained, or is sought, through combination—however good the motives or the manners of those participating—the Sherman Law is violated, provided, of course, that the restraint be what is called unreasonable."[29]

Brandeis then turned to the question of whether the column association's information exchange program reflected dominance or coercion. It did not: "In the case before us there was clearly no coercion."[30] The plan was voluntary and open; the information collected was available to buyers, sellers, and the general public, and meetings were open to the public—a point recalling Brandeis's famous aphorism, that "[s]unlight is said to be the best of disinfectants."[31] The information exchange might somewhat lessen competition, but Brandeis had already shown in *Chicago Board of Trade* that "the Sherman Act does not prohibit every lessening of competition" and that "[i]t is lawful to regulate competition in some degree."[32] But, continued Brandeis, the purpose of the Open Competition Plan was not even to regulate competition but rather "to make rational competition possible, by supplying data not otherwise available, and without which most of those engaged in the trade would be unable to trade intelligently."[33]

As in *Chicago Board of Trade*, Brandeis carefully analyzed the facts concerning the effects of the challenged agreement with a sympathetic eye on its leveling of the playing field among producers. In *Chicago Board of Trade*, Brandeis had found that the call rule lessened the power of certain Chicago warehouses and empowered more remote country dealers.[34] Similarly, in

American Column, he found that "[t]he absence of [the exchanged] information in the hardwood lumber trade enables dealers in the large centers more readily to secure advantage over the isolated producer. And the large concerns, which are able to establish their own bureaus of statistics, secure an advantage over smaller concerns."[35] Even if the information exchange led to an increase in prices, that would not make it illegal under the Sherman Act since its effect was not coercive but inclusive and had the effect of leveling power: "The illegality of a combination under the Sherman Law lies, not in its effect upon the price level, but in the coercion thereby affected."[36]

Brandeis's peroration, like Holmes's entire dissent, deserves repetition in full:

> The co-operation which is incident to this plan does not suppress competition. On the contrary, it tends to promote all in competition which is desirable. By substituting knowledge for ignorance, rumor, guess, and suspicion, it tends also to substitute research and reasoning for gambling and piracy, without closing the door to adventure, or lessening the value of prophetic wisdom. In making such knowledge available to the smallest concern, it creates among producers equality of opportunity. In making it available, also, to purchasers and the general public, it does all that can actually be done to protect the community from extortion. If, as is alleged, the Plan tends to substitute stability in prices for violent fluctuations, its influence, in this respect, is not against the public interest. The evidence in this case, far from establishing an illegal restraint of trade, presents, in my opinion, an instance of commendable effort by concerns engaged in a chaotic industry to make possible its intelligent conduct under competitive conditions.[37]

In separate *American Column* dissenting opinions, Holmes and Brandeis articulated a comprehensive vision about the free flow of information and coercion and dominance. In a country valuing free speech, there should be reluctance to condemn voluntary and noncoercive information exchanges, particularly those that resulted in the entry of knowledge into the broad public domain and the leveling of the commercial playing field. Significantly, both Holmes and Brandeis acknowledged that this information exchange *could* lead to higher prices for consumers but found that possibility

unimportant to the Sherman Act, which did not aim for "transitory cheapness unprofitable to the community as a whole."[38] Years before, Holmes had made clear his view that the Sherman Act's goal was not strictly to promote more intensive competition,[39] and now Brandeis joined him in articulating an antitrust vision in which collaborative efforts that democratized markets through information exchange would be tolerated and encouraged even if they diminished price competition at the margin.

Both the common law of misappropriation and antitrust treatment of information exchange have evolved considerably since *International News Service* and *American Column*. Today, the common law of unfair competition is no longer the subject of federal law,[40] and it is doubtful that INS would be liable for unfair competition under most state common law regimes.[41] It is also doubtful whether the information exchange program in *American Column* would be condemned under antitrust law, involving as it did past information, openness to the public, and a highly unconcentrated market.[42] Over time, Holmes and Brandeis largely got their way on hot news and noncoercive information exchange. But significant questions remained about the role of First Amendment values in industrial competition questions. In *International News Service* and *American Column*, free speech values were raised on behalf of the "weaker parties"—the smaller news service and "mom and pop" hardwood producers—as brakes on the overexpansion of liability in tort and antitrust to the benefit of dominant rivals. How would free speech and antitrust interact when the government sought to promote First Amendment values in antitrust cases against dominant companies? Would Holmes and Brandeis's vision for the free flow of information as a foil to economic dominance translate into a legal impetus for a campaign of vigorous trustbusting in the news industry? That question was soon to be answered in another case involving the Associated Press.

THE *ASSOCIATED PRESS* AND ANTITRUST'S FIRST AMENDMENT MANDATE

THE INS CASE HANDED the Associated Press a powerful weapon—the aid of the courts in preventing competitors from appropriating the AP's stories. But for the newspaper members of the AP, it was not enough to block competitor news agencies from feeding AP stories to their member newspapers. The AP newspapers wanted to make sure that they could maintain exclusive rights to AP stories in their local markets. So the AP adopted bylaws prohibiting all AP members from selling news to nonmembers and granting each member the power to block local newspaper rivals from joining the AP. To overcome a competitor's veto, the applicant would have to obtain a positive vote from four-fifths of the AP's membership—a virtually impossible task.

By the time the Justice Department brought an antitrust case against the AP in 1942, the organization had 1,200 members, among them most of the large newspapers. AP newspapers commanded 96 percent of circulation among morning dailies and 77 percent of evening circulation.[43] AP membership was particularly important to larger newspapers—of the 65 morning dailies with average daily circulation in excess of 50,000, all but one (the *Chicago Sun*) held AP membership.[44] The AP was widely perceived as economically dominant and ideologically pro-business: "Muckrakers and radical press commentators … long argued that the AP service reflected the pro-business biases of its large and profitable members. George Seldes, Oswald Garrison Villard, Walter Lippman, and Upton Sinclair had all excoriated the AP for passing off biased stories on race relations, labor disputes, and foreign affairs as objective wire stories."[45] Leading Socialist Eugene Debs opined that "if there is in this country a strictly capitalist class institution it is the Associated Press."[46]

The immediate backdrop to the antitrust case was the economic and political rivalry in Chicago between Robert McCormick's conservative, anti-New Deal, and isolationist *Chicago Tribune* and Marshall Field's upstart, pro-New Deal, and foreign policy interventionist *Chicago Sun*, which, as noted, was the one large morning daily that had not been able to join the AP.[47] The *Tribune*, an incumbent AP member, blocked the *Sun's* efforts to join. In 1942,

Field persuaded the Antitrust Division to file an antitrust lawsuit challenging the legality of the exclusionary bylaw.

Associated Press v. United States pitted two contrasting views about the meaning of the First Amendment as applied to news media.[48] The first, advocated by McCormick and the AP, cast the First Amendment in classical liberal terms—as freedom from governmental intervention.[49] McCormick argued that "the First Amendment was intended solely as a protection of the press against government encroachments."[50] Hence, the First Amendment could only serve as a negative right as against governmental intervention of the kind sought by the Justice Department. It had no affirmative content requiring governmental intervention to secure a freer marketplace of ideas. Similarly, the AP warned that should the government "become the economic arbiter of the newspaper field, it would regulate the field no less effectively than did the English kings through their system of licensing and taxation."[51]

The second view, propagated by Field and the Justice Department and adopted by Judge Learned Hand for a three-judge district court panel before the case went to the Supreme Court, viewed the First Amendment as a guarantee of "not just classical speech rights, but some kind of positive flow of information to the public."[52] Whereas the AP and McCormick focused on the free speech right of the established newspapers, Field, the Justice Department, and Hand focused on the free speech rights of new newspapers and, especially, the reader. Field asserted that "freedom of the press can have its full fruition only if new persons, with fresh points of view, can become publishers and compete against existing newspapers"[53] and that he was "contesting 'a privileged class with tremendous power and exclusiveness'—a group of individuals who connived to corrupt and distort freedom of the press."[54] The Justice Department advanced the view that the First Amendment assumed that "citizens would be able to obtain all information necessary to participate in government decision making" through a "free marketplace of ideas" and that "[a]rtificial and unnecessary restraints on news sources … could not be tolerated."[55] In Hand's vision, antitrust law should play a positive role in furthering the First Amendment goal of wide dissemination of information and competing viewpoints by ensuring that dominant firms were unable to lock down monopolies over news stories: "[N]either exclusively, nor even primarily, are the interests of the newspaper

industry conclusive; for that industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative collection."[56]

In *Associated Press v. United States*, the Supreme Court upheld the lower court's injunction against the AP's exclusionary bylaws in a sharply divided set of opinions, with the Justices expressing a variety of views on the contending perspectives on the First Amendment and the antitrust law under consideration. In dissent, Justice Owen Roberts endorsed McCormick's classical liberal and anti-statist view: "The decree here approved may well be, and I think threatens to be, but a first stop in the shackling of the press, which will subvert the constitutional freedom to print or to withhold, to print as and how one's reason or interest dictates. When that time comes, the state will be supreme and freedom of the state will have superseded freedom of the individual to print, being responsible before the law for abuse of the high privilege."[57] By contrast, Justice Felix Frankfurter's concurring opinion gave full-throated voice to the views espoused by Field, the Justice Department, and Hand: "The interest of the public is to have the flow of news not trammeled by the combined self-interest of those who enjoy a unique constitutional position precisely because of the public dependence on a free press. A public interest so essential to the vitality of our democratic government may be defeated by private restraints no less than by public censorship."[58]

Justice Hugo Black wrote for the majority. As a proponent of strong antitrust enforcement but also a First Amendment absolutist, Black could not fully embrace Learned Hand's view that a special interest in promoting a free and diverse press was necessary or available to sustain the government's case. This was an ordinary antitrust case: "[T]he restraints on trade in news here were no less than those held to fall within the ban of the Sherman Act with reference to combinations to restrain trade outlets in the sale of tiles, or enameled ironware, or lumber, or women's clothes, or motion pictures."[59] Black's choice of generic manufactured goods—tiles, ironware, and lumber (perhaps subliminally evoking the *American Column* scheme?)—as

comparators underlined his absolute determination not to carve out a special role for antitrust in the news media. The antitrust laws would not serve as First Amendment paladins, promoting democracy-enhancing competition in cases that could not have been brought if the subject of restraint were tiles or women's garments.

On the other hand, neither would the First Amendment stand in the way of antitrust enforcement in the news industry, any more than it would with women's garments. The problem with the AP's restraint was that it destroyed competition and disincentivized "the initiative which brings newcomers into a field of business."[60] As against the ordinary application of the Sherman Act, the First Amendment did not stand in the way: "Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not."[61]

The *Associated Press* decision partly vindicated, but declined to extend, Holmes and Brandeis's libertarian vision of free and noncoercive flows of information. The Sherman Act could be deployed to break down restraints that anticompetitively hindered the wide dissemination of news and ideas. Dominance and coercion factored into this analysis, as Holmes and Brandeis had it. The Associated Press's "bigness" determined the illegality of its bylaws. However, Justice Black refused the further step of granting the Justice Department a special commission to break down competitive barriers involving news media. His opinion normalized antitrust actions involving the news—they should be governed by the same standards as other antitrust cases. As time progressed and the standards applicable to "other antitrust cases" shifted in favor of the dominant, the salience of Holmes and Brandeis's founding vision for marketplace democracy eroded as well.

FROM FREE SPEECH TO LOWER PRICES

Despite Justice Black's rejection of a special antitrust regime for cases involving competitive restraints in the news media, in the years during and following the Second World War the Justice Department became active in policing dominance and coercion in the news industry. Between 1940 and 1970, the Justice Department brought 17 antitrust cases involving restraints on competition in the newspaper industry[62] as well as many others involving television and radio.

During the earlier postwar years, the Justice Department complaints often stressed the unique role of newspapers in disseminating a wide variety of ideas to the public. For example, in 1967 the Justice Department brought an antitrust case against three leading newspaper syndicates—Tribune Company, Field Enterprises, and the Hearst Corporation—alleging that the syndicates had agreed "not to license the features to any other newspaper published within an arbitrary and unreasonably broad territory surrounding the contracting newspaper's city of publication."[63] The Justice Department complaint stressed the role of features in ensuring exposure to a diversity of perspectives:

> Features are a substantial part of the makeup of most daily newspapers published in the United States. Some, such as columns, afford information and advice on a variety of subjects from a diversity of viewpoints. Other features such as comic strips and puzzles are available for the amusement of the newspaper's readers. Inability to supply popular features significantly limits a newspaper's capacity to provide a well-rounded service to its reading public.[64]

(The 1975 consent decree in the case remains in force to this day, although the Justice Department recently requested public comment on the judgment as part of its project of cleaning up legacy antitrust judgments.)[65]

The courts, too, often saw fit to editorialize about the value of antitrust in promoting the wide dissemination of viewpoints. In a monopolization case against the *Kansas City Star,* the U.S. Court of Appeals for the 8th Circuit decried "monopolistic control of advertising [which] strikes at the very heart

of a competitor's dissemination of news."[66] In rejecting a tying claim based on the requirement of the New Orleans *Times-Picayune* that advertisers buy space in both the morning and evening papers, the Supreme Court waxed on about the importance of an economically unrestrained free press to the "flow of democratic expression and controversy which maintains the institutions of a free society" and endorsed Holmes's marketplace of ideas—"that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection."[67]

Despite occasional obligatory references to the value of economic competition in promoting free speech and democracy, antitrust analysis of the news media began to shift from noble ideas about newspapers as guardians of the flame of liberty to realism about newspapers as flesh-and-blood businesses. Congress passed the Newspaper Preservation Act of 1970, providing a limited antitrust exemption for joint operating arrangements between newspapers to share production facilities and combine their commercial operations.[68] The newspapers are required to retain separate editorial and reporting staffs and to determine their editorial policies independently, thus preserving some viewpoint diversity, but the core economic functions can be combined.

With the rise of the consumer welfare standard for antitrust in the 1970s, the Justice Department shifted its tone in newspaper cases from information flows to higher prices. Consider a 2011 speech by Christine Varney, the Assistant Attorney General for the Antitrust Division, entitled "Dynamic Competition in the Newspaper Industry."[69] Varney begins with the obligatory paeans to the "vital role" of the press in our democracy and the complementary spirit of antitrust, which favors free competition as the best means of allocating resources. But most of the speech treats antitrust enforcement in the newspaper industry as the application of normal antitrust principles, concerned with "conduct that restrains competition and harms consumers by raising prices, restricting output, or reducing innovation." She treats *Associated Press* as confirming "the principle that newspapers, like other businesses, may not unreasonably restrain trade." On her reading, the Court rejected AP's First Amendment defense and held that "[n]ewspapers … are subject to the same legal standards as are other businesses."[70] The First Amendment is primarily relevant for what it does *not* do—get in the way of the Justice Department's

enforcement actions—than for what it *does* do.

Similarly, recent complaints by the Justice Department directed against newspaper mergers have tended to focus exclusively on economic effects, as for example in this allegation of anticompetitive effect in the Department's complaint against the Tribune Company's acquisition of Freedom Holdings, which would have combined control over the *Los Angeles Times* and the *Orange County Register:* "Tribune's acquisition of Freedom's assets would eliminate that competition and likely lead to higher prices and lower quality services for advertisers trying to reach readers in those counties."[71] The tendency to focus on higher prices rather than the free flow of information or the marketplace of ideas can be seen in antitrust cases involving other news media as well. In its unsuccessful challenge to AT&T's vertical merger with Time Warner, the Justice Department articulated two theories of consumer harm: First, that "the merger would result in higher prices for consumers of traditional subscription television;" and second, that "the merger would enable the merged company to impede disruptive competition from online video distributors—competition that has allowed consumers greater choices at cheaper prices."[72] Both theories, of course, come down to higher prices.

From time to time, the idea of competition and the free flow of information as central to democratic values pops back up in antitrust or similar cases involving competition. For instance, in *Turner Broadcasting System v. Federal Communications Commission*, the Supreme Court returned to the relationship between economic competition and free speech, narrowly upholding application of the "must carry" provisions of the 1992 Cable Act and observing that "assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."[73] Nonetheless, the free competition/free speech project begun by Holmes and Brandeis has largely faded into concerns over price effects and efficiency. One would not expect to see a Justice Department complaint or judicial decision today premised on Holmes and Brandeis's recognition in *American Column* that sometimes the free flow of information means that consumers must pay more—and that that is an acceptable cost of marketplace democracy. As Holmes and Brandeis might see it, the consumer has prevailed over the small businessman and the voter.

THE ENDURING IMPORTANCE OF HOLMES AND BRANDEIS'S MARKETPLACE METAPHOR

IF THERE IS A CENTRAL THEME in Holmes and Brandeis's view of markets—covering both the market of ideas and the market of regular products—it is that markets are shaped by a series of conscious choices by market participants and by the government and that those choices involve tradeoffs. For Holmes, Brandeis, and those that followed in their tradition, neither markets nor minds would be "free" if simply left alone from either governmental coercion or active structuring by market participants. Constructing well-functioning markets—ones that would be free in a thick, and not merely superficial, sense—requires paying attention to power dynamics, dominance, and coercion. In order for there to be more effective competition, courts should sometimes tolerate some degree of competitor collaboration, particularly collaboration that results in greater access to information by a greater number of market participants. When structuring legal rules on informational exclusivity, courts should be aware of the democratic value of self-help appropriation, reproduction, and dissemination. And, at times, coercive intervention by the state might itself be required to prevent dominant market actors from limiting the free flow of information in ways that could imperil both marketplace democracy (in the sense of a market populated by a plurality of independent and consumer-responsive firms) and political democracy more broadly.

It is understandable that, despite the immense importance of Holmes and Brandeis to First Amendment jurisprudence and the Supreme Court's continued reference to the marketplace of ideas metaphor,[74] the vision of these two men of informational freedom as indispensable to the democratic role of economic markets faded after the mid-20th century. This was due in large part to the fact that antitrust law grew considerably more aggressive on principally economic grounds. The *Associated Press* decision may not have endorsed the Holmes/Brandeis vision of a distinctive role for First Amendment values in antitrust cases, but the government still won the case. And the rising tide of antitrust enforcement in the postwar era included many cases involving newspapers, radio, and television that, while not usually cast in free speech terms, may nonetheless have served free speech values

by opening channels for a freer flow of ideas and information.

Today, with the ascent of information juggernauts like Facebook, Google, and Amazon, the questions posed by Holmes and Brandeis are back on the table. Does the marketplace of ideas function best when simply left alone by the government, or is some governmental intervention to break up dominance and lessen coercion necessary to optimizing free flows of information and ideas? Can the government promote the marketplace in other ways, particularly by propertizing or de-propertizing certain forms of information or requiring (or not requiring) dominant firms to share their data with rivals or consumers? And what are the rules governing self-help information exchange or other collaboration by smaller actors in the market seeking to level the playing field with the dominant firms?

For Holmes and Brandeis, answering these questions would have required resorting not to neutral or generally applicable rules about speech and competition but to an appreciation of the relative positions of the various actors in the market—consumers, producers, intermediaries, and the like. To return to Brandeis in *American Column*, "the essence of restraint is power; and power may arise merely out of position. Wherever a dominant position has been attained, restraint necessarily arises."[75] For Holmes and Brandeis, that today's marketplace might be characterized by an unlimited cacophony of voices would not make it free if those voices were subject to the dominance and control of a few firms. One can only wonder what their antitrust agenda would have been given the immense technological and social changes of the last century.

In that vein, it is worth considering what sort of a case might be brought today in the Big Tech space on the theory that there is a special role for pro-competition values in buttressing First Amendment values when dominant firms assume hegemonic control over the flow of information. In *Associated Press*, Justice Black did not need a First Amendment boost to the government's antitrust theory in order to find the restrictive bylaw unlawful and, by enjoining it, to open up both economic competition and a freer market for news and information.[76] He did not need it because antitrust expressed in purely business terms was sufficiently aggressive to do the job. Today, antitrust is considerably narrower in economic terms than it was in 1945. Antitrust cases require a showing of harm to consumer welfare or economic

efficiency. Are there cases where consumers benefit in economic terms from the scale and scope of the Big Tech giants—for example by obtaining social media or internet search services for free—and yet the benefit to consumer welfare comes at the price of democratic or liberal values as essential channels of speech and information pass into the controlling hands of a few? Questions such as these would surely have interested Holmes and Brandeis.

CONCLUSION

THE NORMS AND METAPHORS of free exchange and competition within an open marketplace are central to both the First Amendment and antitrust law. During the formative years of these ideas, leading jurists saw the relationships between free speech and free competition and attempted to express them in legal doctrines. While it was comparatively easy to cast the value of free information flow in libertarian legal doctrine—as reasons for the courts *not* to impose particular types of liability or propertize information—it became harder to make the case for an affirmative deployment of liability by the government in order to nurture free speech and a democratic marketplace. With the rise of the consumer welfare framework, the distinctive role that procompetition norms (in antitrust or otherwise) might play in nurturing democracy has faded. Holmes and Brandeis's vision for a world of free information flows, unrestrained by dominant firms or the forces of coercion, receded into the jurisprudential background as antitrust became more aggressive on principally economic terms. In recent years, as antitrust law has become less aggressive on economic terms and technological shifts have enabled a few dominant firms to amass immense power over reams of data and the channels of information exchange, the questions posed by Holmes and Brandeis are ripe for renewed consideration.

NOTES

1 Whitney v. California, 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring); Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting). In each of these opinions, Justices Brandeis and Holmes were joined by the other.

2 Swift & Co. v. United States, 196 U.S. 375 (1905).

3 Nash v. United States, 229 U.S. 373 (1913).

4 Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918).

5 *See* ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE (1966).

6 326 U.S. 1 (1945).

7 David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1205, 1207 (1983).

8 *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

9 248 U.S. 215 (1918).

10 257 U.S. 377 (1921).

11 On the background of the Associated Press case, see Richard A. Epstein, *International News Service v. Associated Press, Custom and Law as Sources of Property Right in News*, 78 VA. L. REV. 85 (1992); *see also* Andrew Beckerman-Rodau, *Ideas and the Public Domain: Revisiting INS v. AP in the Internet Age*, 1 N.Y.U. J. OF INTELLECTUAL PROP. & ENT. L. 1 (2011).

12 *Associated Press*, 248 U.S. at 235–36.

13 *Id.* at 246 (Holmes, J., dissenting).

14 *Abrams*, 250 U.S. at 630–31 (Holmes, J., dissenting).

15 *Associated Press* 248 U.S. at 250 (Brandeis, J., dissenting).

16 *Id.* at 259.

17 *Schoolmaster's Case*, Anon., Y.B. 11 Hen. 4, fol. 47, Hil., pl. 21 (1410) (Eng.) (rejecting argument that opening of a new school in competition with incumbent school amounted to a legal trespass).

18 257 U.S. 377 (1921).

19 Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925). *See generally* Craig R. Maginness, *The Exchange of Price Information as a Restraint of Trade: Reassessing Per Se Rules in Light of First Amendment Protection of Commercial Speech*, 48 FORDHAM L. REV. 1005, 1011 (1980).

20 *American Column*, 257 U.S. at 416 (Brandeis, J., dissenting).

21 *Id.* at 412–13 (Holmes, J., dissenting).

22 *Id.* at 391 (majority opinion).

23 *Id.* at 392.

24 *Id.* at 393.

25 *Id.* at 396.

26 *Id.* at 399.

27 *Id.* at 412–13 (Holmes, J., dissenting).

28 *Id.* at 414 (Brandeis, J., dissenting).

29 *Id.*

30 *Id.*

31 LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914) ("Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").

32 *American Column*, 257 U.S. at 415 (Brandeis, J., dissenting) (citing *Chicago Bd. of Trade*, 246 U.S. 231).

33 *Id.*

34 *Chicago Bd. of Trade*, 246 U.S. at 237 (discussing ostensible role of call rule in "break[ing] up a monopoly in that branch of the grain trade acquired by four or five warehousemen in Chicago").

35 *American Column*, 257 U.S. at 416 (Brandeis, J., dissenting).

36 *Id.* at 417–18.

37 *Id.*

38 *Id.* at 412 (Holmes, J., dissenting).

39 Northern Sec. Co. v. United States, 193 U.S. 197, 403 (1904) (Holmes, J., dissenting) ("The act says nothing about competition.").

40 The AP case arose during a time period when federal courts created a general common law on such matters as contracts and torts. In *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Supreme Court withdrew the federal courts from the enterprise of creating federal common law. Today, the common law of unfair competition is state law, and a federal court deciding an unfair competition case would apply state rather than federal law.

41 *See generally* Shyamkrishna Balganesh, *"Hot News": The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419 (2011); Andrew Becker-

man-Rodau, *Ideas and the Public Domain: Revising INS v. AP in the Internet Age*, 1 N.Y.U. J. OF INTELL. PROP. L. 1, 4-5 (2011).

42 *See, e.g.*, Todd v. Exxon Corp., 275 F.3d 191 (2001).

43 SAM LEBOVIC, FREE SPEECH AND UNFREE NEWS: THE PARADOX OF PRESS FREEDOM IN AMERICA 77 (2016); John Henry Lewin, *The Associated Press Decision-An Extension of the Sherman Act?*, 13 U. CHI. L. REV. 247, 251 (1946).

44 Lewin, *supra* note 43, at 251.

45 Lebovic, *supra* note 43, at 77.

46 *Id*.

47 *Id*. at 77-79.

48 *Id*. at 76-84.

49 *Id*. at 79; Margaret A. Blanchard, *The Associated Press Suit: A Philosophical Clash over Ownership of First Amendment Rights*, 61 BUS. HIST. REV. 43, 43-44 (1987).

50 Lebovic, *supra* note 43 at 79.

51 *Id*. at 79.

52 *Id*. at 80. *See* United States v. Associated Press, 52 F. Supp. 362 (1943).

53 *Id*. at 78.

54 Blanchard, *supra* note 49, at 50.

55 Blanchard, *supra* note 49, at 53.

56 *United States v. Associated Press*, 52 F. Supp. at 372.

57 Associated Press v. United States, 326 U.S. 1, 48 (1945) (Roberts, J., dissenting).

58 *Id*. at 28–29 (Frankfurter, J., concurring).

59 *Id*. at 18–19 (majority opinion) (citations excluded).

60 *Id*. at 13–14.

61 *Id*. at 20.

62 *17 Antitrust Cases Filed Against Papers Since 1890*, WASH. POST (Aug. 2, 1977), at D7.

63 Complaint at 4, United States v. Chi. Tribune-New York News Syndicate, Inc., 67 Civ. 4596 (S.D.N.Y. 1967), *quoted in* Keith Roberts, *Antitrust Problems in the Newspaper Industry*, 82 HARV. L. REV. 319, 339 (1968). *See also* United States v. Chi. Tribune-New York News Syndicate, Inc., 309 F. Supp. 1301 (S.D.N.Y. 1970) (denying motion to dismiss the complaint).

64 Complaint at 2–3, United States v. The Hearst Corp., Civ. No. 67-4598 (ELP) (S.D.N.Y. Feb. 8, 1973).

65 Legacy Antitrust Judgment, *U.S. v. Chicago Tribune-New York News Syndicate, Inc., et al.*, DEP'T OF JUST., https://www.justice.gov/atr/legacy-antitrust-judgment-chicago-tribune-new-york-news-syndicate-inc-et-al [https://perma.cc/PT47-29RV] (requesting public comments by Sept. 16, 2019).

66 Kansas City Star Co. v. United States, 240 F.2d 643, 662 (8th Cir. 1957).

67 Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 602-03 (1953).

68 15 U.S.C. §§ 1801-04.

69 Christine Varney, Assistant Attorney General of the Antitrust Division, U.S. Department of Justice, Address for the Newspaper Association of America: Dynamic Competition in the Newspaper Industry (Mar. 21, 2011), https://www.justice.gov/atr/file/518316/download [https://perma.cc/B8HZ-DE44].

70 *Id*.

71 Complaint at 9, United States v. Tribune Publ'g Co., No. 2:16-cv-01822 (C.D. Cal. Mar. 17, 2016).

72 Complaints at 3, 6, United States v. AT&T Inc., No. 1:17-cv-02511 (D.D.C. Nov. 20, 2017).

73 Turner Broadcasting Sys. v. FCC, 512 U.S. 622, 663 (1994).

74 For a sampling of recent cases deploying the "marketplace of ideas" metaphor, see Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2374 (2018); Matal v. Tam, 137 S. Ct. 1744, 1762 (2017); Walker v. Texas Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2246 (2015); Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 188 (2007).

75 American Column & Lumber Co. v. United States 257 U.S. 377 (1921).

76 326 U.S. at 22.

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