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Content Moderation and Antitrust

Content Moderation and Antitrust: Part I - Foreword

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1. In August of 2020, *Politico* reported that then-President Trump was pushing then-Federal Trade Commission (FTC) Chairman Joseph Simons "*to aid his crusade against alleged political bias in social media*" by "*tak*[ing] *action on social media companies' (. . .) censorship of conservatives*." Chairman Simons had earlier told the Senate Commerce Committee that he did not believe the FTC had the authority to prohibit decisions related to political content curation. For Simons, the Commission's "*authority focuses on commercial speech*," and he explained that "*if we see complaints that are not within our jurisdiction, then we don't do anything*." [1] In response, President Trump was reported to be considering replacing Chairman Simons. [2] He did not, perhaps because the election results of 2020 would have made such an effort irrelevant.

2. Without commenting on the story, I note that at the time I was a member of Chairman Simons' senior staff, as director of the Office of Policy Planning, and recall the chairman's position as largely but not universally accepted among the commissioners, senior staff and career staff of the Commission. I also do not believe it was consistent with the position of the then-leadership of the Department of Justice, including the Antitrust Division, but my perception of their views may be incorrect. However, Chairman Simons' position is very clearly not the position of the current leadership of the FTC or the Antitrust Division of the Department of Justice, as evidenced by recent statements, enforcement actions and legal positions and policies publicly advocated for. [3]

3. I also do not remember seeing a thoughtful and careful analysis of Chairman Simons' position prior to or after his comments to the Senate Commerce Commission. Proponents and opponents of a role for antitrust or consumer protection law in this area tended, to my mind, to have adopted a position without seriously considering the limitations of either or both of First Amendment law and antitrust law. This second, non-consecutive, term for President Trump has triggered additional commentary on this topic in response to actions and statements by antitrust agency leadership.

4. I am pleased to have helped select and edit the nine contributions to this *Concurrences* On-Topic on content moderation and antitrust. The contributions

1. L. Nylen, J. Hendel and B. Woodruff Swan, Trump Pressures Head of Consumer Agency to Bend on Social Media Crackdown, *Politico* (Aug. 21, 2020), https://www.politico.com/news/2020/08/21/trump-ftc-chair-social-media-400104.
2. L. Nylen, B. Woodruff Swan, J. Hendel and D. Lippman, Trump Aides Interviewing Replacement for Embattled FTC Chair, *Politico* (Aug. 28, 2020). I do not remember Chairman Simons feeling "embattled." My recollection is that he was not willing to have the Commission undertake any investigation or action that he believed was outside the scope of the Commission's law enforcement authority and was not going to take a contrary position because of a fear of removal or replacement.
3. These matters are discussed throughout the articles included in this On-Topic, so they are not repeated here.

provide a range of views on the application of antitrust law to unilateral or joint content moderation decisions of publishers, and on the likely or proper scope of the protections offered by the First Amendment. Most importantly, although the positions of the authors are different, I do not believe they are political analyses, but rather the positions of ten legal scholars with significant experience in First Amendment law and/or antitrust law.

5. Santana Boulton provides a primer on the First Amendment, a necessary predicate for understanding under what conditions the antitrust laws can be used to police decisions by publishers (broadly defined), and by those interacting with publishers, to moderate (or, in the words of others, suppress) content. [4] Boulton's contribution covers the basic (and more complex) principles of First Amendment law: protected speech, levels of judicial scrutiny with regard to restrictions on persons' and entities' First Amendment rights, and the scope and type of permissible government interests that support such restrictions. According to Boulton, "[b]*ecause online content moderation decisions are protected speech, antitrust and consumer protection law cannot change these decisions without passing First Amendment scrutiny, and likely cannot change them at all*." [5] And "[e]*ven if the state could bring a suit against* [publishers] *for allegedly anticompetitive content moderation, any remedy that forced* [publishers] *to change how they moderate content would likely run afoul of the First Amendment's prohibitions against compelled speech*." [6] Antitrust theories of harm "*that are ostensibly unrelated to the content of* [publisher] *feeds may be more successful*." [7] One such theory is that content moderation decisions affect the quality of the offered product, and agreements among competitors to limit product quality are generally suspect when evaluated under the Sherman Act and the Federal Trade Commission Act. [8] However, according to Boulton, evaluating product quality is likely to require evaluation of the value of certain content, which, traditionally, the First Amendment does not allow. [9] Joint decisions by competitors on quantity of content, especially of commercial content, may avoid this First Amendment hurdle. [10]

6. Alden Abbott, a former general counsel for the Federal Trade Commission and counsel to the assistant attorney general for antitrust, Department of Justice, argues that "[d]*igital platform censorship raises serious antitrust and consumer protection policy concerns*" [11] and the FTC's "*inquiry into* (. . .) *censorship may well bring to light abuses of government power and actions by digital platforms that systematically favor particular viewpoints*." [12] Abbott identifies and evaluates the specific statutory authority available to the antitrust agencies to address these concerns. However, according to Abbott, before filing an enforcement action, the agencies (or private parties) will need to assess the First Amendment protections enjoyed by those who are purportedly acting illegally, as "*constrained by the U.S. Supreme Court's recent decision in* Moody v. NetChoice" and as articulated in *NAACP v. Claiborne Hardware* and *FTC v. Superior Court Trial Lawyers*. [13]

7. Madhavi Singh takes a deep dive into "*the murky law of* [antitrust] *group boycotts*" generally and as applied to the so-called political boycotts of *NAACP v. Claiborne* and *FTC v. Superior Court Trial Lawyers* (*SCTLA*), and the Eighth Circuit's earlier case of *Missouri v. National Organization for Women*. [14]

4. S. Boulton, Antitrust enforcement and protected speech: First Amendment primer

5. Ibid. ¶ 2.

6. Ibid.

7. Ibid. ¶ 24.

8. Ibid. ¶ 24, and footnotes 68, 69.

9. Ibid.

10. Ibid.

11. A. Abbott, Media and technology platform discrimination under federal antitrust and consumer protection law, ¶ 4.

12. Ibid. ¶¶ 4, 32.

13. Ibid. ¶¶ 6, 8–11, discussing *Moody v. NetChoice, LLC*, 603 U.S. 707, 732 (2024), *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 431–432 (1990), and *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 914 (1982).

14. M. Singh, Group boycotts and free speech: The intersection of antitrust and the First Amendment The Supreme Court found that the NAACP's boycott had First Amendment protection (as the Eighth Circuit found with respect to NOW's boycott [15]), but that the trial lawyers' boycott did not, because it was largely motivated by economic concerns. Madhavi articulates the Supreme Court's reasoning for the different treatment [16] but also explores the framework articulated in Justice William Brennan's concurring opinion, and Judge Douglas Ginsburg's earlier appellate opinion, in *SCTLA*. Both Justice Brennan and Judge Ginsburg viewed the trial lawyers' boycott as having an expressive component that suggested some First Amendment protection was warranted, even though the boycott was intended to advance a commercial or economic interest that would directly benefit the group. [17] Singh concludes that the "*purely political*" and "*purely economic*" perspectives of group boycotts are inadequate to evaluate the complex motivations in certain boycotts. She views the "*mixed-motive boycott*" or "*economic boycott with an expressive component*" framework of Justice Brennan and Judge Ginsburg as a potentially more attractive

8. Shaoul Sussman, formerly an associate director for enforcement at the FTC, recognizes that content moderation policies can have commercial effects: "[M]*any individuals and businesses earn a living from expressing their views or generating news*" and "*it is clear that the suppression of* (. . .) *expressive activity* (. . .) *can* (. . .) *lead to severe financial or commercial harm*." [19] While "[a]*t first glance, the suppression of speech, shadow banning or demonetization by tech platforms appear to be beyond the remit of competition enforcement*," [20] Sussman disagrees. However, he recognizes that Sherman Act case law on vertical restraints supports this initial reaction and, in response, suggests that an expansive (but case-law supported) application of FTC Act Section 5's prohibition on unfair methods of competition may be a way to identify and remediate the exclusionary effects of content moderation policies. [21] The commercial effects of content moderation policies—jointly agreed or adhered to—that have the effect of suppressing viewpoints, opinions and news place such policies within the analytical approach of *SCTLA*, and thus subject them to significantly less, if any, First Amendment protection. [22]

9. Other contributors are more skeptical of the arguments of Abbott, Singh and Sussman. Dan Gilman and Ben Sperry agree that "*non-price dimensions of products and services might rightly figure in competition matters*" and that "*firms operating* (. . .) *platforms are not generally immune from antitrust scrutiny* (. . .) *simply because they engage in protected speech*." [23] They suggest that the agencies' interest in examining content moderation policies as antitrust violations raises two questions: "*first, whether—and under what conditions—content moderation might prove anticompetitive, in violation of the antitrust laws; and second, whether, in such cases—supposing there are some—enforcement of the antitrust laws runs afoul of the speech clause of the First Amendment to the U.S. Constitution*." They offer "*a qualified 'no' as an answer to the first question and a likely 'yes' as an answer to the second*." [24] Considering both First Amendment doctrine and application of the Sherman Act's rule of reason to evaluate most restraints, they conclude that "*the agencies' ongoing inquiries and interventions* (. . .) *seem an unpromising waste of limited resources, at best*." [25]

10. Berin Szóka's contribution suggests he might agree with Gilman's and Sperry's conclusion. Building on and applying the First Amendment principles in Boulton's primer, Szóka attempts to identify the "red line" distinguishing between the expressive realm, which is protected by the First Amendment, and the commercial world, which competition law may police. [26] He questions whether the Supreme Court's distinctions are illusory and able to withstand close inspection. Four core antitrust cases—*Associated Press*, [27] *Lorain Journal*, [28] *Times-Picayune*, [29] and *Citizens Publishing* [30]—are considered and found insufficient to support the weight given to them by proponents of applying the Sherman Act to content moderation policies. In each case, according to Szóka's analysis, the Supreme Court applied the Sherman Act to the operations of a firm or firms in the news gathering and distribution industry, where the anticompetitive conduct did not have an expressive component or motivation. [31] But Szóka recognizes that, in opining on First Amendment protections for allegedly anticompetitive conduct, the courts, including the Supreme Court, have relied on *Associated Press* dicta to warn that businesses in communication and publishing markets are not immune from antitrust review; he analyzes and rejects the relevance of this dicta. [32] While *Moody* "*recognizes that competition*

framework for evaluating antitrust liability in current content moderation disputes. [18]

15. *State of Missouri v. National Organization for Women*, 620 F.2d 1301 (8th Cir. 1980), cert. denied, 449 U.S. 842 (hereinafter *NOW*).

16. Singh, *supra* note 13, ¶¶ 10–14.

17. Ibid. ¶¶ 15–20.

18. Ibid. ¶¶ 23–28.

19. S. Sussman, Section 5 and the marketplace of ideas, ¶ 11.

20. Ibid. ¶ 9.

21. Ibid. ¶¶ 20–25.

22. Ibid. ¶¶ 26–31.

23. D. Gilman, B. Sperry, Is there an empty set at the intersection of antitrust and content moderation?, ¶ 40.

24. Ibid. ¶¶ 1, 2.

25. Ibid. ¶ 40.

26. B. Szóka, The First Amendment's red line between the expressive and commercial realms, ¶ 7.

27. *Associated Press v. United States*, 326 U.S. 1 (1945).

28. *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

29. *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953).

30. *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969).

31. Szóka, *supra* note 25, ¶¶ 17–21.

law can police the commercial practices of media companies," Szóka concludes that the case law requires "*courts must err on the side of protecting the First Amendment right to make editorial judgments*" and "*determine whether companies are trying to* 'destroy legitimate competition*' with a rival in the same market or a potential rival, or among those engaged in concerted refusals to deal*." [33]

11. The contribution of Jonathan Massey, an experienced First Amendment and antitrust appellate litigator, asks "*what are the constitutional limits on antitrust regulation of content moderation by social media platforms and media companies?*" [34] Massey's review of the case law suggests "*nuanced consideration of both antitrust and free speech principles*" is required to identify these limits. [35] It is clear that "*the administration of generally applicable laws to economic activity (in a way that does not depend in any way on the content of expression) does not raise First Amendment issues*." [36] But, "[w]*here the government directly targets speech qua speech, the courts have applied a virtually automatic rule of invalidity, especially where there are concerns that the government has targeted expressive activity out of concern or disagreement with the manner in which it has been exercised*." [37] Massey concludes that, because the "*Supreme Court has erected formidable obstacles to regulations that target a mixture of expression and economic activity*," "*many instances of antitrust regulation of content moderation policies will be unlikely to survive First Amendment scrutiny*." [38]

12. Our two final contributions highlight inconsistencies in the current administration's application of its free-speech principles. Randy Stutz "*accepts the* [administration's] *controversial premise that editorial judgments on viewpoint diversity could give rise to a federally actionable news distortion*." [39] He concludes, however, that "*the government's efforts* (. . .) [*to prevent mainstream broadcast and digital media outlets from suppressing viewpoints*] (. . .) *are destined to fail even if the government is correct in believing that a lack of adequate viewpoint diversity can give rise to a federally actionable news distortion* (. . .) *because* [the administration] *has failed to formulate a coherent view on the nature of consumer demand for viewpoint diversity*." [40]

13. Larry Spiwak argues that President Trump's executive orders on adherence to constitutional principles and the protection of free speech rights are being undermined by his political appointees. [41] Spiwak reviews the conditions associated with the FTC's clearance of the Omnicom Group's acquisition of The Interpublic Group and the Federal Communications Commission's (FCC) approval of Skydance Media's acquisition of Paramount Global, and FCC Chairman Brendan Carr's threats to companies that distributed Jimmy Kimmel's late-night TV show, after the host's comments on the assassination of Charlie Kirk. He concludes that each instance is inconsistent with President Trump's deregulatory agenda that "*prohibit*[s] *government jawboning of private speech*" and that "*direct federal regulatory agencies to stay in their statutory lanes*." [42]

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32. Ibid. ¶¶ 33–37, 41–48.

33. Ibid. ¶¶ 58, 60.

34. J. Massey, Antitrust, content moderation, and the First Amendment, ¶ 2.

35. Ibid. ¶ 7

36. Ibid.

37. Ibid. ¶ 11.

38. Ibid. ¶¶ 12, 14.

39. R. M. Stutz, Competition, market failure, and doublethink in news markets,¶ 5.

40. Ibid. ¶¶ 1, 5.

41. L. J. Spiwak, Getting the bad end of a bilateral bargain: The administrative state ignores Trump's executive order prohibiting "jawboning" of private speech

42. Ibid. ¶ 19.

Content Moderation and Antitrust: Part II - Antitrust enforcement and protected speech: First Amendment primer

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Recent state and federal initiatives have sought to use antitrust and consumer protection laws to regulate how online platforms moderate user content. Proposals from the Federal Trade Commission, the Department of Justice, and states all attempt to frame content moderation as an anticompetitive practice. This Article lays out the basics of First Amendment law and levels of scrutiny, and explains that the First Amendment protects platforms' editorial discretion as expressive activity. Drawing on Supreme Court precedent, including Moody v. NetChoice, this Article explains that government actions compelling or constraining the manner in which platforms organize or present speech constitute content-based and often viewpoint-based regulations, subject to strict scrutiny.

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1. In recent years, federal and state officials have shown growing interest in using antitrust law to reshape how large technology platforms moderate online content. The Federal Trade Commission (FTC) released its Request for Public Comment Regarding Technology Platform Censorship, [1] Missouri sought comment on a Choice of Content Moderator rule, [2] and the Department of Justice (DOJ) Antitrust Division filed a statement of interest in a private antitrust case discussing "*viewpoint competition in the marketplace of ideas*." [3] But in each instance, the government ignores that it is the platform's speech that is protected from state interference. Internet platforms and publishers are themselves private speakers; their choices as to what speech to host are not constrained by the First Amendment. [4] Just as the government cannot force a publisher to print views it rejects, it cannot use the tools of antitrust law to dictate how platforms arrange and curate speech.

2. The following discussion covers the basic principles of First Amendment law, protected speech, tiers of scrutiny, and permissible government interests. Because online content moderation decisions are protected speech, antitrust and consumer protection law cannot change these decisions without passing First Amendment scrutiny, and likely cannot change them at all. Even if the state could bring a suit against platforms for allegedly anticompetitive content moderation, any remedy that forced platforms to change how they moderate content would likely run afoul of the First Amendment's prohibitions against compelled speech.

3. The First Amendment does not allow the government to rebalance the speech marketplace to better suit its own preferences—"*to 'un-bias' what it thinks biased*" [5]—through antitrust law or any other means. And when the government stretches antitrust beyond its statutory mandate to police speech choices, it risks undermining both free expression and the credibility of competition policy.

1. Fed. Trade Comm'n, Request for Public Comment Regarding Technology Platform Censorship (Feb. 20, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/P251203CensorshipRFI.pdf.

2. 15 C.S.R. 60-19.020, Prohibition on Restricting Choice of Content Moderator, 50 Mo. Reg. 853 (June 16, 2025), https://www.sos.mo.gov/CMSImages/AdRules/moreg/2025/v50n12June16/v50n12.pdf#page=89.

3. Statement of Interest of the United States at 1, *Children's Healthcare Defense v. WP Company, LLC*, No. 1:23-cv-02735 (D.D.C. July 11, 2025), https://www.justice.gov/opa/media/1407661/dl.

4. *Moody v. NetChoice, LLC*, 603 U.S. 707, 743 (2024) ("[T]*he Court uses* ['viewpoint discrimination'] *to say what governments cannot do: They cannot prohibit private actors from expressing certain views*.").

5. Ibid. at 719.

I. Understanding the First Amendment

4. The government cannot, consistent with the First Amendment, suppress speech or mandate certain ideas. [6] Government actions restricting speech may come in the form of a law, but restrictions can also arise from rules, policies, prosecutions, or other enforcement actions. [7] State actions that affect the balance of speech, such as requiring that a newspaper, platform, or parade host specific viewpoints, also run afoul of the First Amendment. The government cannot "*forc*[e] *a private speaker to present views it wished to spurn in order to rejigger the expressive realm*." [8]

5. A court reviewing a First Amendment challenge to an alleged speech restriction will first determine whether the government is regulating "speech." [9] Speech is legally broad: it includes written and spoken words, art, distributing speech and creative ideas, [10] expressive conduct, [11] and editorial functions. [12]

6. Selecting and curating others' speech and presenting it as a compilation is a classic editorial function: "[G]*overnment efforts to alter an edited compilation of third-party expression are subject to judicial review for compliance with the First Amendment*." [13] This applies to traditional publishers, e.g., newspapers, and to social media and other digital platforms. [14]

7. Even laws or regulations that do not expressly prohibit speech can burden expressive activity. [15] And laws can impact conduct with both expressive and non-expressive functions. [16]

8. If a court decides that a given law or regulation impacts speech, it must then decide whether the speech in question is protected. Laws that regulate unprotected [17] speech can still violate the First Amendment: those laws might draw impermissible content-based distinctions—like punishing some fighting words but not others [18]—or inadvertently impact protected speech. [19] But if the speech in question is protected, or if the regulation is content-based, courts next consider what level of scrutiny to apply.

9. In a First Amendment free speech analysis, courts generally apply either strict or intermediate scrutiny. [20] Strict scrutiny is an exacting standard: it usually applies to content-based regulations of speech, [21] and

6. U.S. Const. amend. I. *See also Texas v. Johnson*, 491 U.S. 397, 401 (1989) ("*Recognizing that the right to differ is the centerpiece of our First Amendment freedoms, a government cannot mandate by fiat a feeling of unity in its citizens*.") (internal citations omitted); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (explaining that "*above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content*").

7. *See*, e.g., *Cohen v. California*, 403 U.S. 15, 26 (1971) (reversing the conviction of an individual prosecuted for wearing a jacket with a slogan critical of the draft); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) (holding that a public school unconstitutionally applied a rule prohibiting the use of school facilities for religious purposes).

8. *Moody*, 603 U.S. at 732–733.

9. "*We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction*." *Johnson*, 491 U.S. at 403. *See also Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 445–446 (2d Cir. 2001) (analyzing whether computer code is speech).

10. *See Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 790 (2011) (reasoning that "[l]*ike the protected books, plays, and movies that preceded them, video games communicate ideas—and even social messages—through many familiar literary devices (such as characters, dialogue, plot, and music) and through features distinctive to the medium (such as the player's interaction with the virtual world)*," which "*suffices to confer First Amendment protection*").

11. *Johnson*, 491 U.S. at 404–406 (quoting *Spence v. Washington*, 418 U.S. 405, 409 (1974) (per curiam)) (expressive conduct is conduct that is "*sufficiently imbued with elements of communication*," like flag burning).

12. *Moody*, 603 U.S. at 717.

13. Ibid.

14. Ibid. ("*The principle does not change because the curated compilation has gone from the physical to the virtual world*.").

15. *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 468 (1995).

16. *See United States v. O'Brien*, 391 U.S. 367, 376 (1968) (stating that "*when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms*").

17. *See*, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992) (obscenity, defamation, and fighting words are not traditionally protected).

18. Ibid. at 384 ("[T]*he government may proscribe libel; but it may not make the further content discrimination of proscribing* only *libel critical of the government*.").

19. *See*, e.g., ibid. at 391. *See also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 246–256 (2002) (holding unconstitutional a law that criminalized speech beyond the unprotected categories of "*obscenity*" and "*child pornography*").

20. *See State v. Katz*, 179 N.E.3d 431, 454 (Ind. 2022) ("*Under the First Amendment, regulations of protected speech receive either intermediate or strict scrutiny, depending on whether the restriction is content neutral, or content based*.").

21. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2228 (2015) ("[S]*trict scrutiny applies either when a law is content based on its face or when the purpose and justification for the law are content based*.").

the government is only rarely able to meet it. [22] Intermediate scrutiny is less exacting than strict but still presents a serious barrier to the government. Content-neutral government actions—like time, place, and manner restrictions [23]—and commercial speech regulations are generally subject to intermediate scrutiny. [24]

10. Under "*heightened*" scrutiny, the government must show that it has an interest in regulating speech and that its regulation is narrowly tailored to serve that interest. The compelling government interest must be "*real*," not "*merely conjectural*." [25] And even in situations where the government's interest is noble—e.g., if the government is interested in promoting a diversity of viewpoints on social media—the government's interest may not be valid. [26] It is, for instance, never valid to "*interfere with private actors' speech to advance* [the government's] *own vision of ideological balance*." [27]

11. This sort of distinction is known as viewpoint discrimination, a type of content-based regulation. A state action that regulates speech based on subject matter, topic, or substantive message is content-based. [28] Viewpoint discrimination is particularly egregious, [29] but all content-based laws are generally subject to strict scrutiny, whether they are content-based on their face or in application. [30]

12. Strict scrutiny requires the government to prove that its action is narrowly tailored to advance a compelling governmental interest and that the action is the least restrictive means of achieving that interest. [31] National security, [32] judicial integrity, [33] and depriving criminals of ill-gotten gains are examples of "*compelling*" government interests. [34] If the government's interest is compelling, narrow tailoring means that the government must "*pursue its legitimate interests through 'means that are neither seriously underinclusive nor seriously overinclusive.'*"Santana Boulton2025-11-04T15:50:00Fixed cite—not sure how you all like your CRS formatted. [35] If a less restrictive means of achieving the government's interest is available, the government must use that means instead. [36]

13. Intermediate scrutiny generally applies to any content-neutral regulation, i.e., one that "*serves purposes unrelated to the content of expression*" [37] and does not regulate speech on the basis of its subject matter or viewpoint. [38] Time, place, or manner restrictions on speech that are content-neutral generally pass intermediate scrutiny. [39] Courts also apply intermediate scrutiny to restrictions on commercial speech—that is, speech that "*does no more than propose a commercial transaction*" [40] or "*expression related solely to the economic interests of the speaker and its audience*." [41] Still, restrictions must be narrowly tailored to directly advance a substantial government interest. [42] In commercial speech cases, narrow tailoring requires a reasonable, but not "*perfect*," fit. [43]

22. Ibid. at 2234 (Breyer, J., concurring) (strict scrutiny leads "*to almost certain legal condemnation*."). *See also Brown*, 564 U.S. at 799 (strict scrutiny is "*a demanding standard*"). Cf. *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444–445 (2015) (describing the case as "*one of the rare cases in which a speech restriction withstands strict scrutiny*").

23. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("*A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages, but not others. Government regulation of expressive activity is content-neutral so long as it is* 'justified *without reference to the content of the regulated speech.*'") (internal citations omitted).

24. Ibid. (limiting excessive noise was content-neutral); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562–563 (1980) ("*The Constitution therefore accords a lesser protection to commercial speech than to other constitutionally guaranteed expression*.").

25. *Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 664 (1994) (plurality op.).

26. *Moody*, 603 U.S. at 732–733, 740.

27. Ibid. at 741.

28. *Reed*, 135 S. Ct. at 2227 ("*Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed*.").

29. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

30. *See City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 71 (2022); *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015).

31. *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 813 (2000) ("*If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest*.").

32. *Haig v. Agee*, 453 U.S. 280, 307 (1981).

33. *Williams-Yulee*, 575 U.S. at 447.

34. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 119 (1991).

35. VICTORIA L. KILLION, CONG. RESEARCH SERV., R47986, FREEDOM OF SPEECH 6 (2024); *See also Brown*, 564 U.S. at 805.

36. *Playboy Ent. Grp., Inc.*, 529 U.S. at 813.

37. *Ward*, 491 U.S. at 791.

38. *Reed*, 576 U.S. at 163.

39. *Ward*, 491 U.S. at 784, 791.

40. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 776 (1976) (Stewart, J., concurring).

41. *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561.

42. Ibid. at 566.

14. Courts use other tests for specific circumstances, like campaign finance disclosure requirements [44] and commercial disclosure of purely factual and uncontroversial information. [45] But when antitrust enforcement or regulations target "*Big Tech censorship*," [46] courts will likely apply more traditional strict scrutiny.

II. Speech and content moderation

15. Federal agencies and certain state governments have recently expressed interest in using antitrust law to change how platforms moderate content. Regulations that impact content moderation impact speech—because content moderation decisions are protected speech. The threshold question in a free speech challenge is whether state action restricts speech. *Moody* made clear that a platform's content moderation choices are protected by the First Amendment: "*When the platforms use their Standards and Guidelines to decide which third-party content those feeds will display, or how the display will be ordered and organized, they are making expressive choices. And because that is true, they receive First Amendment protection*." [47]

16. Not everything that is literally speech is protected by the First Amendment. [48] Price fixing and other agreements to restrain trade are technically spoken—they involve freedom of both "speech" and "association"—yet neither is protected by the First Amendment. [49] These agreements are themselves illegal and are thus unprotected. [50] But content moderation practices are, as the Court has said, legal, non-commercial, and protected: content moderation is expressive editorial speech. [51] Regulations—and even antitrust enforcement actions—of private content moderation decisions thus trigger First Amendment scrutiny.

III. Scrutiny and government interests

17. State action restricting protected speech (like content moderation) is generally subject to at least intermediate scrutiny: the law must further a "*substantial government interest* (. . .) *unrelated to the suppression of free expression*." [52] In *Moody*, the Court declined to decide whether to apply strict or intermediate scrutiny to a Texas law altering platforms' content moderation choices: "*Even assuming that the less stringent form of First Amendment review applies, Texas's law does not pass*." [53]

18. That is because changing how platforms moderate content is never a valid government interest. [54] Texas's interest was expressly related to the suppression of free expression: "*to correct the mix of speech that the major social-media platforms present*." [55] Both the Federal Trade Commission and

43. *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989). Although intermediate scrutiny does not require that the law be the least restrictive means of achieving the government's interest, "*if there are numerous and obvious less-burdensome alternatives to the restriction on commercial speech, that is certainly a relevant consideration in determining whether the 'fit' between ends and means is reasonable*." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 n.13 (1993).

44. *See Buckley v. Valeo*, 424 U.S. 1 (1976).

45. *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); *see also* V. C. Brannon, Cong. Rsch. Serv., R45700, Assessing Commercial Disclosure Requirements under the First Amendment (2019).

46. *See* D. J. Trump, @realDonaldTrump, Truth (Dec. 10, 2024), https://truthsocial.com/@realDonaldTrump/posts/113631003888738065; D. J. Trump, @realDonaldTrump, Truth (Dec. 4, 2024, 12:21 PM), https://truthsocial.com/@realDonaldTrump/posts/113595703893773894.

47. *Moody*, 603 U.S. at 740.

48. *See supra* note 17 and associated text.

49. *See*, e.g., *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2665 (2011); *Associated Press v. United States*, 326 U.S. 1, 7 (1945) ("*The fact that the publisher handles news, while others handle food, does not, as we shall later point out, afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices*."). *Compare with NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 911 (1982) ("*In sum, the boycott clearly involved constitutionally protected activity. The established elements of speech, assembly, association, and petition, 'though not identical, are inseparable.' Through exercise of these First Amendment rights, petitioners sought to bring about political, social, and economic change*.").

50. *See United States v. Williams*, 553 U.S. 285, 297 (2008) ("*Offers to engage in illegal transactions are categorically excluded from First Amendment protection*."). *See generally Fed. Trade Comm'n v. Superior Ct. Trial Lawyers Assn.*, 493 U.S. 411 (1990) (illegal price-fixing agreement was not protected by the First Amendment, even as a boycott).

51. *Moody*, 607 U.S. at 731–732.

52. *O'Brien*, 391 U.S. at 377.

53. *Moody*, 607 U.S. at 740.

54. Ibid.

55. Ibid.

Missouri's potential antitrust actions on content moderation share that goal: to change platform content moderation. Chair Ferguson, for instance, has referred to content moderation—or "*drying up access to ideas*," as he said—as an injury to consumers. [56] The solution, presumably, is to host the ideas in question instead of moderating them off the platform.

19. But just last year, the Supreme Court recognized that "[t]*he reason*" governments attempt to "*regulat*[e] *the content-moderation policies that the major platforms use for their feeds is to change the speech that will be displayed there*." [57] And the government cannot, consistent with the First Amendment, "*interfere with private actors' speech to advance its own vision of ideological balance*." [58]

20. Because changing content moderation policies is not a compelling, substantial, or even valid government interest, antitrust actions that specifically seek to alter content moderation will likely be subject to (and fall under) First Amendment scrutiny.

IV. Antitrust actions and remedies impacting speech

21. The *Moody* Court observed, in a footnote, that, when "*the Government's interest was 'not the alteration of speech.' (. . .) the prospects of permissible regulation are entirely different*." [59] In *Turner*, the Court noted, "*the interest there advanced was not to balance expressive content*" but "*to save the local-broadcast industry, so that it could continue to serve households without cable*." [60] Because must-carry mandates for cable rested on an interest "'*unrelated to the content of expression' disseminated by either cable or broadcast speakers*," they were constitutionally permissible. [61]

22. While "*the government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas*," the Court noted that it is "*critically important to have a well-functioning sphere of expression, in which citizens have access to information from many sources*," and that "*the government can take varied measures, like enforcing competition laws, to protect that access*." [62]

23. Antitrust laws can apply to speech platforms, including social media platforms. *Associated Press v. United States*, for instance, applied antitrust law to a newspaper publisher organization regarding the ability of member newspapers to block potential competitors in their local markets from joining the press pool. [63] But the First Amendment limits the remedies that antitrust law can pursue. In *Miami Herald Publishing Co. v. Tornillo*, [64] the Court recognized that it "*foresaw the problems relating to government-enforced access as early as its decision in* Associated Press v. United States," where it "*carefully contrasted the private 'compulsion to print' called for by the Association's bylaws with the provisions of the District Court decree against appellants which 'does not compel AP or its members to permit publication of anything which their* "reason" tells them should not be published.'" [65] Likewise, lower courts have dismissed antitrust actions against Internet platforms when those actions were premised on platforms' protected editorial discretion. [66]

24. Antitrust theories that are ostensibly unrelated to the content of platform feeds may be more successful. Chairman Ferguson has suggested that the Commission could pursue joint agreements to moderate certain content because those agreements reduce product quality. [67] If such an enforcement action made it to court, courts would have to decide whether speech is a dimension of product quality. [68]

56. U.S. Dep't of Just., The Antitrust Division Hosts a Big-Tech Censorship Forum, YouTube, at 19:00 (Apr. 4, 2025), https://www.youtube.com/watch?v=RPPgJ-xkjWo.

57. *See Moody*, 603 U.S. at 743.

58. Ibid. at 741.

59. Ibid. at 742–743, n.10 (quoting *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 577 (1995)).

60. *Turner Broad. Sys., Inc.*, 512 U.S. at 647.

61. Ibid.

62. *Moody*, 607 U.S. at 732.

63. 326 U.S. 1 (1945).

64. 418 U.S. 241 (1974).

65. Ibid. at 245.

66. *See*, e.g., *E-Ventures Worldwide LLC v. Google Inc.*, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–630 (D. Del. 2007).

67. U.S. Dep't of Just., *supra* note 56, at 17:30

68. This seems unlikely. For speech to be a dimension of product quality, the government or courts would have to decide whether certain speech is more valuable or "better" than other speech; traditionally, the First Amendment does not allow the government to evaluate speech in those ways. Consider

Even if courts agreed with the government's antitrust theories and forbade joint decisions, platforms would likely be free to make the same decisions unilaterally. [69]

25. Governments cannot regulate protected speech merely by calling those speech practices unlawful or anticompetitive—the First Amendment still applies. And even if the regulations are ostensibly unrelated to suppressing speech, the First Amendment might still require heightened scrutiny. [70] In *Miami Herald*, Florida argued that forcing newspapers to carry candidate rebuttals did not violate the First Amendment because the newspaper could still say "*anything it wished*." [71] But the choice not to publish is as core to the First Amendment as the choice to publish: the entire compiled newspaper is an expressive speech product, and if the newspaper must include certain things in its speech, it cannot actually say "*anything it wishe*[s]." [72] Similarly, as the *Moody* Court recognized, a social media feed is the compiled expressive speech product of a platform, [73] and neither prohibiting nor mandating certain content moderation practices is consistent with the First Amendment.

26. Any remedy compelling platforms to change the speech that they carry would violate the First Amendment's prohibitions against compelled speech. [74] "*It has yet to be demonstrated*," the Court has said, "*how governmental regulation of* [editorial discretion] *can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time*." [75]

27. As the *Moody* Court said, the government can enforce competition laws against platforms and other speakers. But it must do so without substituting its speech judgments for the platform's own: "*in case after case, the Court has barred the government from forcing a private speaker to present views it wished to spurn in order to rejigger the expressive realm*." [76] The antitrust remedies available to the government in the realm of content moderation are thus sharply limited by the First Amendment.

S. B. ■

a TV show set to feature an upcoming episode about a politically motivated terrorism. Networks might pull the episode if such an event happens in real life. The quality of the show might be "worse" because the episode was pulled, but the decision not to air it was a speech decision on the part of the relevant networks. The government would not be able to compel half the networks to air the controversial episode just to make sure they were competing on speech quality.

69. Whether platforms have jointly agreed to moderate content in certain ways is a factual question, as is whether the "quality" of a platform speech product is something platforms compete on. Recall that the compilation of user-generated speech is the platform's own speech. The government cannot force a speaker to speak differently just because some segment of listeners would prefer a different speech product. An earlier effort to limit the type and amount of violence on broadcast television stations may be instructive as to the different treatment of joint or unilateral conduct. Subsequent to the expiration of an antitrust exemption for the development of guidelines with respect to violence on broadcast television, the Association of Independent Television Stations ("INTV") provided stations "*with suggested program guidelines specifically addressing the issue of television violence*" and "*encouraged* [stations] *to provide parental advisories on programs containing violent material that they believe might be objectionable to some viewers*." The Association distributed those guidelines to "*every independent television station in the country*" and all INTV members either "*adopted the* [guidelines] *or* [had] *individual station policies* (. . .) *consistent with* [the guidelines]." INTV determined that "[s]*tations* [have been] *rescheduling programs and* [broadcasting] *advisory messages*" consistent with the guidelines. INTV asked the Antitrust Division for its view of its legal liability for the adoption and dissemination of its policy guidelines. Letter from James B. Hedlund, President, Ass'n of Independent Television Stations, to Anne K. Bingaman, Assistant United States Att'y General, Dep't of Just. Antitrust Division (Nov. 18, 1993), https://www.justice.gov/sites/default/files/atr/legacy/2014/05/08/303381.pdf (request). In response, the Department of Justice indicated it had "*no present intention to challenge*" the conduct of the Association or its members. Relevant to the DOJ's position was that the independent television stations adopted the guidelines on a voluntary basis. Letter from Anne K. Bingaman, Assistant United States Att'y General, Dep't of Just. Antitrust Division, to James B. Hedlund, President, Ass'n of Independent Television Stations, Inc. (Jan. 25, 1994), https://www.justice.gov/sites/default/files/atr/legacy/2006/04/27/211721.pdf (response) ("*INTV adopted program policy guidelines with respect to violence in telecast materials* (. . .) *We understand that the program INTV has put in place, and the proposed continuing activities, are strictly voluntary*. (. . .) [T]*he Department does not believe that continuance of the activities by INTV and the independent television stations* (. . .) *warrant antitrust concern*."). The Department compared the Association's activity favorably to earlier challenged advertising standards of the National Association of Broadcasters that, inter alia, limited the amount of time devoted to commercials during broadcast hours and the number of products that could be advertised in a commercial. *See United States v. NAB*, 536 F. Supp. 149 (D.D.C. 1982). This was a restriction on the quantity of advertising, similar to an ongoing FTC investigation. *See*, e.g., Commission Order Denying Petition to Quash Civil Investigative Demand, *In the Matter of Civil Investigative Demand to Media Matters for America* (July 25, 2025) at 3 (describing an investigation "[t]*o determine whether any* (. . .) *legal entities have engaged in or are engaging in* [conduct] *to withhold, degrade, increase the cost of, or otherwise diminish the quantity of advertising placed on news outlets, media platforms, or other publishers*"), https://www.ftc.gov/system/files/ftc_gov/pdf/2510061mediamattersorder-denyingptq.pdf. *See also Media Matters for America v. FTC*, 2025 WL 2378009 (D.D.C. Aug. 15, 2025) (preliminary injunction in favor of plaintiff, noting that there are 17 such investigations according to FTC representations), order denying stay, 2025 WL 2988966 (D.C. Cir. Oct. 23, 2025).

70. *Miami Herald*, 418 U.S. at 256 ("*Governmental restraint on publishing need not fall into familiar or traditional patterns to be subject to constitutional limitations on governmental powers*.").

71. Ibid.

72. *See* ibid.

73. *Moody*, 603 U.S. at 731.

74. *Miami Herald*, 418 U.S. at 258.

75. Ibid.

76. *Moody*, 603 U.S. at 732.

Content Moderation and Antitrust: Part III - Media and technology platform discrimination under federal antitrust and consumer protection law

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The U.S. Federal Trade Commission (FTC) and the U.S. Department of Justice Antitrust Division (DOJ) have expressed interest in possible antitrust enforcement actions directed at viewpoint suppression by media companies and digital platforms. FTC and DOJ enforcement powers are constrained by the U.S. Supreme Court's recent decision in Moody v. NetChoice, which held that social media platforms' unilateral content moderation decisions are protected speech under the First Amendment of the U.S. Constitution. Thus, bringing antitrust (or consumer protection) cases to challenge media and platform discrimination would be an uncertain proposition, in light of case law, statutory limitations, and First Amendment considerations. However, the FTC's on-going public inquiry into technology platform censorship may well bring to light abuses of government power and actions by digital platforms that systematically favor particular viewpoints, and could lead platforms to revisit and perhaps reform their content moderation policies. These benefits could be achieved without the costs and risks of lawsuits, an important consideration in a time of limited government resources.

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I. Trump antitrust enforcers raise censorship concerns

1. The U.S. Federal Trade Commission (FTC) and the U.S. Department of Justice Antitrust Division (DOJ) have recently expressed interest in possible antitrust enforcement actions directed at viewpoint suppression by media companies and digital platforms. Both DOJ Assistant Attorney General for Antitrust Gail Slater and FTC Chairman Andrew Ferguson "*have said that they intend to effectuate President Trump's 'America First' agenda by using the antitrust laws to target the perceived censorship of conservative ideas by dominant technology firms and advertisers*." [1]

2. The FTC announced a public inquiry into technology platform censorship in February 2025. [2] In soliciting public comments, the FTC stated that it seeks "*to better understand how technology platforms deny or degrade (such as by 'demonetizing' and 'shadow banning') users' access to services based on the content of their speech or affiliations'* and how this conduct may have violated the law. [3] According to the FTC, "[c]*ensorship by technology platforms is not just un-American, it is potentially illegal. Tech firms can employ confusing or unpredictable internal procedures that cut users off, sometimes with no ability* [to] *appeal the decision. Such actions taken by tech platforms may harm consumers, affect competition, may have resulted from a lack of competition, or may have been the product of anti-competitive conduct*." [4]

3. In April 2025, the DOJ Antitrust Division "*hosted a* [panel] *discussion on the implications of Big-Tech censorship focusing on the impact of deplatforming on public discourse and how monopolization contributes to the ability of big tech companies to censor Americans*." [5]

4. Digital platform censorship raises serious antitrust and consumer protection policy concerns. FTC investigations would focus on possible violations of

1. Hogan Lovells, Trump 2.0 antitrust agenda takes shape in administration's first 100 days: What we're seeing and what to expect (Apr. 24, 2025), https://www.hoganlovells.com/en/publications/trump-20-antitrust-agenda-takes-shape-in-administrations-first-100-days-what-were-seeing-and-what-to.
2. FTC, Request for Public Comment Regarding Technology Platform Censorship (Feb. 19, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/P251203CensorshipRFI.pdf.
3. Ibid.
4. FTC, press release, Federal Trade Commission Launches Inquiry on Tech Censorship (Feb. 20, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/02/federal-trade-commission-launches-inquiry-tech-censorship.
5. DOJ, The Antitrust Division Hosts a Big-Tech Censorship Forum (Apr. 3, 2025), https://www.justice.gov/opa/video/antitrust-division-hosts-big-tech-censorship-forum.

Section 5 of the FTC Act, [6] which prohibits unfair methods of competition (UMC) (competition claims, which may extend beyond the Sherman Act) and unfair or deceptive acts and practices (UDAP) (consumer protection claims). DOJ inquiries would center on potential violations of Sections 1 or 2 of the Sherman Antitrust Act (antitrust), [7] which bar contracts, combinations or conspiracies that unreasonably restrain trade (Section 1), and prohibit illegal monopolization or attempted monopolization (Section 2). Both agencies might also consider censorship-related issues arising out of proposed mergers in enforcing Section 7 of the Clayton Act, [8] which prohibits mergers and acquisitions that may substantially lessen competition or tend to create a monopoly. A brief discussion of applicable federal antitrust and consumer protection law principles that the DOJ and the FTC might apply in evaluating media and technology platform viewpoint discrimination is set out below.

5. However, before filing lawsuits or otherwise seeking relief, the FTC and the DOJ will need to assess First Amendment protections enjoyed by platforms, as well as limitations on agency statutory authority.

II. First Amendment protections

6. FTC and DOJ enforcement powers are constrained by the U.S. Supreme Court's recent decision in *Moody v. NetChoice*, [9] which held that social media platforms' unilateral content moderation decisions are protected speech under the First Amendment of the U.S. Constitution.

7. The Court's *Moody* decision clarifies that the First Amendment of the U.S. Constitution [10] applies to online platforms and that content moderation decisions are protected. Thus, individual platforms may freely decide whether to include or exclude particular opinions—the government cannot regulate a single platform's choices "*just by asserting an interest in better balancing the marketplace of ideas*." In particular, the Court stressed that the First Amendment protects a platform's editorial discretion in curating and compiling user-generated content. The *Moody* case does not address agreements among platforms to censor opinions.

8. Older Supreme Court precedents deal with agreements among firms or individuals engaging in speech that have effects on competition.

9. In *Claiborne Hardware*, [11] civil rights groups agreed to boycott merchants who allegedly had engaged in racial discrimination. The Supreme Court held that this was a "political boycott" involving First Amendment-protected speech and not subject to Section 1 of the Sherman Act (which condemns group boycotts).

10. In *FTC v. Superior Court Trial Lawyers*, [12] however, the Supreme Court rejected the First Amendment defense asserted by public defenders who boycotted the District of Columbia government when it rejected the lawyers' petition for higher fees.

11. These two cases are easy to reconcile. While *Superior Court Trial Lawyers* may have involved an "*expressive component*," it was primarily a commercial boycott that redounded to the benefit of a cartel of self-interested lawyers seeking to extract higher payments from their employer. As such, it was a classic per se illegal price-fixing agreement that violated Section 1 of the Sherman Act. The boycotters in *Claiborne Hardware*, by contrast, sought constitutionally protected equal treatment, rather than economic self-advantage.

12. In *Associated Press v. United States*, [13] the Supreme Court held that restrictions in bylaws promulgated by the Associated Press (AP) wire service facially violated the Sherman Act. The

6. 15 U.S.C. § 45 (declaring unlawful "*unfair methods of competition* (. . .) *and unfair or deceptive acts and practices in or affecting commerce*"). Section 5 covers all conduct that violates the Sherman Act plus some conduct that goes beyond the Sherman Act's boundaries, though the precise scope of the FTC's authority to 'expand' the meaning of the Sherman Act is unclear and controversial. H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, 7th ed., West Academic Publishing, Eagan, 2024) at 743.

7. 15 U.S.C. §§ 1 and 2, respectively.

8. 15 U.S.C. § 18, which prohibits mergers and acquisitions that may substantially lessen competition or tend to create a monopoly.

9. *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024).

10. U.S. Const. amend. I.

11. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), *rehearing denied*, 459 U.S. 898 (1982).

12. *FTC v. Superior Ct. Trial Lawyers Assn.*, 493 U.S. 411 (1990).

13. *Associated Press v. United States*, 326 U.S. 1 (1945).

restrictions prevented AP members from selling news to non-members and allowed AP member newspapers to restrict admission to AP by competing newspapers. AP argued that the First Amendment protected its members' right to control their content and how it was distributed. The Supreme Court held that the First Amendment protects freedom of publication, but not the freedom of news organizations to combine and restrict others from publishing.

13. Reading these opinions as a whole, the First Amendment broadly shields an individual entity's decisions to favor one set of views and exclude others. A restrictive commercial agreement among multiple entities to discriminate against or prefer certain views is, however, subject to antitrust scrutiny. In light of *Claiborne Hardware* and *Superior Court Trial Lawyers*, the First Amendment would only displace antitrust if a court found that an exclusionary joint agreement's primary motivation was the vindication of constitutional rights. Exclusionary agreements whose central aim is a commercial benefit would not avoid antitrust condemnation, even if they had an expressive component.

III. Antitrust prosecution of unilateral conduct

14. Section 2 of the Sherman Act forbids unilateral acts of monopolization or attempted monopolization. To establish a Section 2 violation, the DOJ or the FTC must show that "*the firm has 'monopoly power' in any market*" and that the "*leading position was gained or maintained through improper conduct—that is, something other than merely having a better product, superior management or historic accident*." [14]

15. Take the case, for example, of alleged monopolization of public digital expression by a particular digital platform. Showing monopoly power would prove very difficult to do, given the large number of social media platforms (for example, Facebook, X (formerly Twitter), LinkedIn, YouTube, and TikTok).

16. Even assuming that a particular platform were held to hold monopoly power in some social media market, monopolization would also require a showing of "anticompetitive conduct"—such as imposing competitive harm on a rival without a legitimate business justification. Such a showing would likely be hard to make. For instance, a claim that the monopolist harmed potential competitors by refusing to deal with them would confront Supreme Court case law that sharply limits a monopolist's liability for refusals to deal. [15]

17. Finally, if a court found both monopoly power and anticompetitive conduct, the *Moody* decision almost certainly would preclude a court from striking down discriminatory content moderation decisions by the monopolist platform. This conclusion would apply equally to Sherman Act Section 2 prosecutions and to FTC cases alleging "standalone" UMC violations—unilateral unfair platform business conduct that falls short of Sherman Act monopolization. In both cases, the First Amendment would block antitrust from restricting the platform's moderation policy.

IV. Antitrust prosecution of concerted conduct

18. Section 1 of the Sherman Act declares illegal anticompetitive concerted conduct—contracts, combinations, or conspiracies that unreasonably restrain trade. The FTC's Section 5 UMC authority may reach some incipient anticompetitive behavior not strictly covered by Section 1. [16]

14. FTC, Monopolization Defined (accessed Aug. 7, 2025), https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined.

15. *See* DOJ, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act: Chapter 7 (Sept. 2008, withdrawn April 2009), https://www.justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-7.

16. The FTC has occasionally used its Section 5 UMC power to challenge "incipiency-related" activities such as invitations to collude and early-stage group boycotts that had not yet demonstrably harmed competition. *See*, e.g., Axinn Antitrust Insight: FTC Policy Statement Re Section 5 (Nov. 21, 2022), https://www.axinn.com/en/insights/client-alerts/Axinn_Antitrust_Insight_FTC_Policy_Statement_re_Section_5.

19. Public comments suggest [17] that the FTC and the DOJ are considering three types of potential Section 1 violations:

(i) Agreements among platforms to suppress particular content (for example, articles on the Hunter Biden laptop [18]). Antitrust enforcers could argue that suppression of particular content would harm consumers and competition by reducing a particular type of output. Each platform acting alone could suppress content, protected by the First Amendment. In contrast, a joint decision could have an anticompetitive business aim (avoiding losing business to competitors), not protected by the First Amendment, and thus subject to antitrust law, applying *Superior Court Trial Lawyers*. The platforms potentially could counter, however, that their interest was purely expressive, unrelated to business, citing *Claiborne Hardware*. The outcome of such a prosecution would be uncertain, and it could well turn on how a court weighed the competing "expressive speech" and "commercial aim" arguments under the facts presented.

(ii) Agreements among advertisers to boycott particular content or platforms. Advertisers could argue that such agreements primarily reflected freedom of expression and therefore are entitled to First Amendment protection, citing *Claiborne Hardware*. Enforcers could counter by noting the commercial nature of advertising sales, citing both *Superior Court Trial Lawyers* and *Associated Press* (boycott of sales to non-members of Associated Press was actionable under the Sherman Act). As in case (i), such a prosecution would face uncertainty, likely turning on judicial assessment of competing commercial interest and expressive speech arguments.

(iii) Agreements between technology platforms and government officials. The Supreme Court reiterated in 2024 that "*the First Amendment prohibits government officials from relying on the 'threat of invoking legal sanctions and other means of coercion (. . .) to achieve the suppression' of disfavored speech*." [19] It is the government, however, that is liable for this coercion, not private parties. Platforms could also argue that conversations with government officials are part of normal business and should not be chilled. On balance, the likelihood that alleged "platform-government agreements" could be successfully prosecuted as an antitrust violation appears low.

20. The DOJ fleshed out a proposed legal framework for analyzing content suppression by media companies in a July 2025 statement of interest ("SOI" or "Statement of Interest") filed in private antitrust litigation. [20] In this Sherman Act Section 1 case, *Children's Health Defense et al. v. Washington Post, et al.*, plaintiffs alleged a conspiracy to deplatform them for sharing independent news and opinions related to the COVID-19 pandemic. Specifically, plaintiffs asserted that the deplatforming occurred due to collusion involving the *Washington Post*, the BBC, AP, and Reuters with the large digital platforms, aimed at suppressing competition from independent perspectives that rival mainstream media. [21]

21. The SOI stressed that "*the law's longstanding recognition that content competition is a critical feature—and consumer benefit—of the news media industry*." [22] It noted "*that the Sherman Act's prohibitions apply fully when restraints of trade limit non-price features such as the type or quality of information that may compete in the marketplace for ideas*." [23] The DOJ therefore argued that plaintiffs' alleged exclusion from key distribution channels harms viewpoint competition in markets for news content and represents cognizable antitrust injury.

22. The SOI explained the DOJ's view that Section 1's prohibition on concerted actions that unreasonably restrain trade applies to restraints on viewpoint competition. Analyzing Sherman Act case

17. *See* DOJ, *supra* note 5.

18. *See*, e.g., S. Nelson, Facebook execs suppressed Hunter Biden laptop scandal to curry favor with Biden-Harris admin: bombshell report *New York Post* (Oct. 30, 2024), https://nypost.com/2024/10/30/us-news/fbi-tried-to-minimize-hunter-biden-laptop-bombshell-days-before-scoop-as-facebook-exec-warned-against-offending-dems/.

19. *National Rifle Association v. Vullo*, 602 U.S. 175, 189 (2024), citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

20. Statement of Interest of the United States of America, *Children's Health Defense, et al. v. WP Company, LLC D/B/A, et al.*, No.1:23-cv-2735 (TJK) (D.D.C. Jul. 11, 2025) ("Statement of Interest, *Children's Health*"), https://www.justice.gov/atr/media/1407666/dl?inline.

21. *See* DOJ, press release, Justice Department Files Statement of Interest on Suppression of Competition in the Marketplace of Ideas Through Deplatforming of Rival Viewpoints (Jul. 11, 2025), https://www.justice.gov/opa/pr/justice-department-files-statement-interest-suppression-competition-marketplace-ideas.

22. Statement of Interest, *Children's Health*, *supra* note 20, at 5 (citing cases).

23. Ibid.

law dealing with concerted action, the SOI concluded that "*when rival news publishers come together and conduct aspects of their news businesses jointly, that is concerted action subject to Section 1 scrutiny*." [24] Applying the antitrust rule of reason, this concerted action may unreasonably restrain trade because "*the diversity, quality, and availability of perspectives in the relevant news markets are allegedly key dimensions of competition in the relevant markets, valued by news consumers*." [25]

23. The SOI then examined the alleged behavior by defendants through the lens of product standard-setting assessments under the Sherman Act rule of reason. The SOI concluded that "*even if Defendants are correct that that their concerted efforts are directed only at defining standards for identifying misinformation, and applying such standards in flagging misinformation for each other, such joint activities are correctly subject to Section 1 scrutiny for potential anticompetitive effects when such effects are adequately pleaded. This analysis can account for impacts on the content, diversity, and quality of news wherever they are dimensions of competition that impact consumer welfare in the relevant markets*." [26]

24. The SOI suggests the approach that the DOJ may well take in evaluating whether to prosecute potential agreements involving news media, platforms, and advertisers to suppress or boycott particular viewpoints. The DOJ assessment recognizes that while such suppression clearly is joint conduct imposing potential harm in information markets, countervailing "efficiency arguments" (such as suppressing "misinformation") must also be weighed (even if skeptically) in a Sherman Act Section 1 rule of reason analysis. The SOI does not address First Amendment considerations, implicitly viewing the conduct it describes as essentially commercial in character. The Supreme Court's *Associated Press* and *Superior Court Trial Lawyers* would lend weight to this approach.

25. The Trump FTC has not indicated how it would apply Section 5's prohibition on unfair methods of competition to a claim of illegal suppression of content. There are no indications at this time, however, that the FTC is prepared to argue that such an analysis could ignore potential countervailing benefit arguments such as those noted in the SOI. [27]

V. Section 7 of the Clayton Act

26. Section 7 of the Clayton Act has not been applied directly to mergers that solely facilitate viewpoint discrimination. The Clayton Act focuses on anticompetitive effects and monopolization, not ideological bias, except perhaps to the extent that such bias plays a key role in substantially lessening quality competition in a relevant market.

27. Certain media mergers might raise concerns under Section 7 if they substantially lessened competition, especially in the markets where they operated, based on an argument that they diminished quality competition through a reduction in the supply of divergent points of view to the consumers of media products. DOJ Section 7 challenges centered solely on heightened viewpoint discrimination due to media industry concentration, however, could face the challenge that such harm is properly the province of communications regulatory law, administered by the Federal Communications Commission (FCC), rather than antitrust law. [28]

24. Ibid. at 10.

25. Ibid. at 11.

26. Ibid. at 15.

27. It appears doubtful that a far more aggressive approach than that set forth in the SOI would succeed. While the prohibition on unfair methods of competition has occasionally been invoked by the FTC to challenge potential anticompetitive conduct in its incipiency, *see supra* note 16, the Commission has not as of yet asserted in litigation that the prohibition could be applied in a manner that ignores key aspects of the Sherman Act rule of reason, such as the consideration of countervailing benefits or efficiencies.

28. *See Verizon Communications, Inc. v. Trinko*, 540 U.S. 398 (2004) (Telecommunications Act violations that harm a competitor are not cognizable as antitrust harm unless they also violate a duty imposed by the antitrust laws). The DOJ might respond that Trinko would be inapposite because reduction in media market quality competition would constitute an independent antitrust harm. The Federal Communications Commission (FCC) has media ownership regulations aimed at preventing excessive concentration and promoting diversity, but key rules have been rolled back in recent years. The issue is subject to ongoing litigation and debate, with some arguing that the rules are outdated in the digital age, while others contend they remain vital for protecting localism and a diversity of viewpoints. These FCC rules are extremely complex and have been subject to litigation. *See*, e.g., D. A. Scherer, Congressional Research Service, Federal Communications Commission (FCC) Media Ownership Rules (2021), https://www.congress.gov/crs-product/R45338; FCC, National Television Multiple Ownership Rule (rule proposed Jul. 8, 2025), https://www.federalregister.gov/documents/2025/07/08/2025-12603/national-television-multiple-ownership-rule; E. K. Reed, A. Meltzer, J. J. Broggi and S. Rigizadeh, Federal Court Vacates Portions of Local Television Ownership Rule, Wiley (Jul. 25, 2025), https://www.wiley.law/alert-Feder-

28. The FTC did consider viewpoint discrimination in its review (and settlement) of the proposed merger of Omnicom Group Inc. (Omnicom) and The Interpublic Group of Companies, Inc. (IPG). [29] This merger of the third- and fourth-largest providers of media-buying services to form a new number one would reduce the number of significant competitors from six to five. FTC Chairman Ferguson stated that when the Commission is "*presented not only with increasing concentration in the relevant market, but also a troubling history of collusion to the detriment of consumers and the free conduct of American political discourse and elections,* [its] *duty is especially pressing*." [30] To address the enhanced risk of post-merger collusion, the settlement barred Omnicom and IPG from entering or maintaining any agreement or practice that would steer advertising dollars away from publishers based on their political or ideological viewpoints. Ferguson stressed that the settlement did "*not limit either advertisers' or marketing companies' constitutionally protected right to free speech*," and went "*to great lengths to avoid interfering with the free, regular course of business between marketing firms and their customers*." [31]

VI. Unfair or deceptive acts or practices

29. Platform censorship could only constitute a unfair or deceptive act or practice (UDAP) under very narrow conditions that are seldom met, as explained in a commentary by George Mason Law School economics and privacy scholars. [32] Any FTC platform UDAP cases would likely be "legal longshots," representing a low probability of success at a high resource cost.

30. Deception. As the economics and privacy scholars point out, "*a representation is deceptive under the FTC Act* [only] *if it is material and likely to mislead a significant minority of reasonable consumers*." [33] Applying this test, a deception claim for platform censorship would only succeed if a platform could be shown to have violated very specific statements about how it would deal with particular types of content. Platforms are not likely to have made such very specific promises. Broad statements about a platform's moderation policy are inherently subjective, and would likely be seen by courts as mere "puffery." Furthermore, claims that a platform "fooled" consumers by engaging in "hate speech" or "misinformation" are subjective as well and unlikely to pass muster in court.

31. Unfairness. The FTC Act provides that *an act or practice is unfair if it* '[*(1)] causes or is likely to cause substantial injury to consumers [(2)] which is not reasonably avoidable by consumers themselves [(3)] and not outweighed by countervailing benefits to consumers or competition*." [34] To win a platform censorship case on unfairness grounds, the FTC would have to show three things: (i) there was a direct link between breaches of platform terms of service and harm imposed on many consumers; (ii) harm suffered by disfavored consumers outweighed the benefits to other platform users (such as a reduction in content the second group disliked); and (iii) disfavored consumers were reasonably unable to have avoided their injury (unlikely, since disfavored consumers probably could have found other platforms to post or review their comments). Any one of those three showings would be difficult to prove in court, let alone all three.

VII. Next step for the agencies

32. The FTC's inquiry into technology platform censorship may well bring to light abuses of

al-Court-Vacates-Portions-of-Local-Television-Ownership-Rule.

29. *See* FTC, Statement of Chairman Andrew N. Ferguson In the Matter of Omnicom Group / The Interpublic Group of Cos., Matter Number 2510049 (Jun. 23, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/omnicom-ipg-ferguson-statement_0.pdf.

30. Ibid. at 4. The collusion involved "*coordinated efforts to steer ad revenue away from certain news organizations, media outlets, and social media networks*." Ibid. at 3.

31. Ibid. at 6.

32. *See* Comments of The Program on Economics & Privacy, George Mason University Antonin Scalia Law School, Re FTC Request for Public Comment Regarding Technology Platform Censorship (May 21, 2025), https://masonlec.org/wp-content/uploads/2025/05/PEP-Comment-FTC-Censorship_Final-Filed-5.21.2025.pdf.

33. Ibid. at 16.

34. 15 U.S.C. §45(n).

government power and actions by digital platforms that systematically favor particular viewpoints. Shedding a spotlight on such conduct plainly serves the public interest, particularly when public malfeasance is revealed—as Supreme Court Justice Louis Brandeis famously stated, "*sunlight is said to be the best of disinfectants*." [35]

33. FTC inquiry "sunshine" could lead platforms to revisit and perhaps reform their content moderation policies. It might also discourage government officials from providing troublesome non-public content moderation "advice" to platforms. The FTC, the DOJ, and the White House could use the "bully pulpit" (speeches and public information campaigns) to call for the end of viewpoint discrimination. Both consumers and many commercial businesses that deal with platforms and the media would benefit from changes in behavior generated by these initiatives.

34. These benefits could be achieved without the costs and risks of lawsuits, an important consideration in a time of limited government resources. Moreover, bringing antitrust or consumer protection cases to challenge media and platform discrimination would be an uncertain proposition, in light of case law, statutory limitations, and First Amendment considerations. Whether the public policy importance of establishing new law in this area through litigation outweighs such concerns is a matter that will require close attention by Trump administration policymakers.

* This article draws in part upon A. Abbott, Competition Law and Technology Platform Censorship, Forbes (Jul. 9, 2025), https://www.forbes.com/sites/aldenabbott/2025/07/09/competition-law-and-technology-platform-censorship/.

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35. Sunlight Intern, Brandeis and the History of Transparency, Sunlight Foundation (May 26, 2009), https://sunlightfoundation.com/2009/05/26/brandeis-and-the-history-of-transparency/.

Content Moderation and Antitrust: Part IV - Group boycotts and free speech: The intersection of antitrust and the First Amendment

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This article examines the legal tension between antitrust law and the First Amendment through recent advertiser boycotts of X (formerly Twitter) and related disputes in the media industry. It traces the evolution of U.S. group boycott doctrine to show how courts have struggled to distinguish between economic and political boycotts. The paper argues that this binary framework is increasingly inadequate in an era when collective refusals to deal often mix economic and expressive motivations.

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I. Introduction

1. Following Elon Musk's acquisition of X, Media Matters, a nonprofit media company, reported that ads of prominent brands on X were appearing next to antisemitic and other offensive content. [1] Consequently, a large number of advertisers halted their advertising on X over brand safety concerns. [2] Soon thereafter, Musk sued the trade association, World Federation of Advertisers (WFA), along with major companies and members of WFA, including Unilever, Mars, and CVS, accusing them of engaging in a group boycott in violation of Section 1 of the Sherman Act. [3] The Missouri and Texas attorneys general and the FTC also issued civil investigative demands to Media Matters, all of which were blocked in a series of judgments as constituting retaliation against protected speech. [4] In June 2025, the House Judiciary Committee also released a report flagging certain activities of the WFA and its Global Alliance for Responsible Media (GARM) initiative as potentially anticompetitive. [5] Specifically, the report alleged that GARM, as an industry association, had facilitated unlawful restraint by "[c]*olluding to suppress voices and views disfavored by the leading marketers*." [6]

2. The advertiser boycott case and investigations raise interesting legal questions at the intersection of antitrust law and the First Amendment. The legal dilemma is whether the advertiser boycott amounts to a "concerted refusal to deal" or "group boycott" in violation of Section 1 of the Sherman Act, [7] or

1. E. Hananoki, As Musk endorses antisemitic conspiracy theory, X has been placing ads for Apple, Bravo, IBM, Oracle, and Xfinity next to pro-Nazi content, Media Matters for America (Nov. 16, 2023), https://www.mediamatters.org/twitter/musk-endorses-antisemitic-conspiracy-theory-x-has-been-placing-ads-apple-bravo-ibm-oracle (last visited Sept. 21, 2025).
2. B. Fung, C. Duffy and S. Delouya, Major advertisers flee X, deepening crisis at Elon Musk's social media site, CNN (Nov. 18, 2023), https://www.cnn.com/2023/11/17/tech/lionsgate-suspends-advertising-x-musk (last visited Sept. 21, 2025).
3. Complaint, *X Corp v. World Federation of Advertisers*, No. 7:24-cv-00114 (N.D. Tex. Aug. 6, 2024).
4. *Media Matters for America v. Federal Trade Commission*, 2025 WL 2378009 (D.D.C. Aug. 15, 2025); *Media Matters for America v. Paxton*, 138 F.4th 563 (D.C. Cir. 2025); *Media Matters for America v. Bailey*, No. 24-cv-147, 2024 WL 3924573 (D.D.C. Aug. 23, 2024), appeal dismissed following settlement in *Media Matters for America v. Paxton*, No. 24-7141, 2025 WL 492257 (D.C. Cir. Feb. 13, 2025).
5. House Judiciary Committee, Exporting Censorship: How GARM's Advertising Cartel Helped Corporations Collude with Foreign Governments to Silence American Speech (June 27, 2025), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/2025-06/Exporting%20Censorship%20Final.pdf (last visited Sept. 21, 2025).
6. House Judiciary Committee, GARM's Harm: How the World's Biggest Brands Seek to Control Online Speech (July 10, 2024), https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/2024-07-10%20GARMs%20Harm%20-%20How%20the%20Worlds%20Biggest%20Brands%20Seek%20to%20Control%20Online%20Speech.pdf (last visited Oct 30, 2025).
7. Ibid.

whether it is a protected political activity under the First Amendment. [8] This article surveys the U.S. law on group boycotts and outlines the controversial questions raised by the advertiser boycott cases.

II. The murky law of group boycotts

3. The Sherman Act, Section 1, prohibits contracts, combinations or conspiracies in restraint of trade. Group boycotts or concerted refusal to deal could be illegal under Section 1. The case law on group boycotts recognizes two categories: economically motivated (economic boycotts) and politically motivated (political boycotts). Economic boycotts are subject to the rule of reason analysis under Section 1, but may be treated as illegal per se if they satisfy certain criteria. [9] In contrast, political boycotts receive complete First Amendment immunity from antitrust liability. [10] The existence of a distinct third category—"economic boycotts with an expressive element"—was proposed but rejected by the Supreme Court in *SCTLA*. [11]

4.The case law's classification of a boycott as political or economic (or economic with an expressive element) depends on the objective of the boycott rather than its means of exclusion or effect. [12] The boundaries of these categories, the defensibility of these categories, and the appropriate legal standard for each raise complex questions without clear answers. The discussion that follows examines and seeks to clarify the current state of the law.

1. Economic boycotts

5. This category refers to the typical Section 1 group boycott case, which is an agreement among competitors (sometimes organized as a hub-and-spoke arrangement [13]) to refuse to do business with a firm, including a competitor, supplier, or purchaser, in a commercial setting. [14] Examples of economic boycotts include an association of manufacturers and distributors of appliances boycotting one small retailer by refusing to sell to them, [15] the New York Stock Exchange and its members boycotting a non-member by removing the direct telephone wire connection to the exchange (which hindered their ability to operate), [16] dress designers and manufacturers boycotting retailers who continue to deal with "style pirates," [17] and a nonprofit cooperative buying association of retailers expelling and boycotting one of its member retailers. [18] These boycotts do not contain any "expressive" component.

6. The case law on purely economic boycotts has sometimes condemned them per se, and at other times applied full rule of reason analysis, sometimes with little clarity as to why one approach was chosen over the other. [19] In *Northwest Wholesale Stationers*, the Supreme Court tried to clarify the circumstances for when group boycotts would be condemned as per se illegal. The Court observed that a "*plaintiff seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects*." [20] J. Brennan noted that the threshold for per se illegality is met when the plaintiff shows that some "*structural characteristics*" are present in the market, specifically when the boycotters possess market power or the boycott cuts off "*unique access to a business element necessary for effective competition*." [21] Despite J. Brennan's attempt at clarification, the law governing economic boycotts

8. J. Angwin, Trump Moves to Silence a New Target, *N.Y. Times* (July 30, 2025), https://www.nytimes.com/2025/07/30/opinion/ftc-advertiser-media-boycott.html (last visited Sept. 21, 2025).

9. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 298 (1985) (hereinafter *NW Stationers*).

10. *National Association for the Advancement of Colored People v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (hereinafter *NAACP*); *State of Missouri v. National Organization for Women*, 620 F.2d 1301 (8th Cir. 1980), cert. denied, 449 U.S. 842 (hereinafter *NOW*).

11. *Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990) (hereinafter *SCTLA*).

12. Ibid. at 426–427.

13. *Toys "R" Us, Inc., v. Federal Trade Commission*, 221 F.3d 928 (7th Cir. 2000).

14. D. Francis and C. J. Sprigman, *Antitrust: Principles, Cases, and Materials*, 3rd ed., D. Francis and C. J. Sprigman, New York, 2025, at 212.

15. *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

16. *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963).

17. *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941).

18. *NW Stationers*.

19. Ibid. at 294 ("*[T]here is more confusion about the scope and operation of the* per se *rule against group boycotts than in reference to any other aspect of the* per se *doctrine*" (quoting L. Sullivan, Handbook of the Law of Antitrust, West Publishing, St. Paul, 1977, at 229–230)).

20. Ibid. at 298.

21. Ibid. at 296–298.

remains ambiguous, and it is often unclear whether the per se standard or the rule of reason would apply to a case. [22]

2. Political boycotts

7. The doctrine becomes more interesting when the boycott does not have purely economic motivations. Such boycotts have been called by many names, including "*political boycotts*," [23] "*politically motivated economic boycotts*," [24] "*protest boycotts*," [25] "*mixed-motive boycotts*," [26] "*expressive political boycotts*," [27] and "*noncommercial boycotts*." [28] This article adopts the terms "politically motivated boycotts" or "political boycotts" not because they are superior to other classifications, but because it is the term employed by courts in the seminal cases of this category, namely, *Missouri v.* National Organization for Women (NOW), NAACP v. Claiborne Hardware (NAACP), and *FTC v. Superior Court Trial Lawyers Association* (SCTLA). The category of political boycotts and the applicable law are best understood through a close discussion of these three decisions. In the first two, the boycotts were deemed politically motivated and immunized from antitrust liability under the First Amendment; in SCTLA, the boycott was found not to fit this category and was held per se illegal.

2.1 *Missouri v. National Organization for Women*

8. In 1977, the National Organization for Women (NOW) agreed to boycott conventions in the State of Missouri because the state had failed to ratify the Equal Rights Amendment (ERA). Missouri motels and restaurants catering to the convention trade, and the Missouri economy more broadly, suffered economic losses. Missouri brought a suit claiming that NOW's boycott violated Section 1 of the Sherman Act. The Eighth Circuit, noting the absence of any direct legal precedent for this question, examined both the legislative history of the Sherman Act and case law, and concluded that it was not the intent of Congress to cover a "*politically motivated but economically tooled boycott*" [29] participated in and organized by noncompetitors of those who suffered as a result of the boycott. [30]

9. The court relied on *Noerr* while also acknowledging its factual distinctions. In *Noerr*, the defendant railroad companies had engaged in a publicity campaign to influence the adoption of a law that would raise the costs for their rivals, the trucking companies. The Supreme Court found that the railroads' campaign (even if "*unethical*") [31] did not fall within the scope of the Sherman Act, observing that "*no violation of the* [Sherman] *Act can be predicated upon mere attempts to influence the passage or enforcement of laws*." [32] Although *Noerr* did not involve a boycott, the court in *NOW*

22. *See generally*: *Honey Bum, LLC v. Fashion Nova, Inc*., 63 F.4th 813 (9th Cir. 2023) (group boycotts in a hub-and-spoke arrangement could be per se illegal only when there is a horizontal agreement among the spokes; without an agreement among the spokes, there is simply a collection of purely vertical agreements that would be subject to rule of reason analysis); *Flaa v. Hollywood Foreign Press Ass'n*, 55 F.4th 680 (9th Cir. 2022) (in addition to the two factors in *NW Stationers*, a per se prohibition applies only when the actions do not have plausible pro-competitive justifications); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (per se analysis is generally not extended to rules adopted by professional associations or practices whose economic impact is not immediately obvious).

23. J. L. Dauer, Political Boycotts: Protected by the Political Action Exception to Antitrust Liability or Illegal Per Se, *U.C. Davis L. Rev*., Vol. 28, 1995, pp. 1273–1310; J. F. Webb, Political Boycotts and Union Speech: A Critical First Amendment Analysis, *J. L. & Pol*., Vol. 4, No. 3, 1988, pp. 579– 596; B. Ellen Cohen, The Scope of First Amendment Protection for Political Boycotts: Means and Ends in First Amendment Analysis: *NAACP v. Claiborne Hardware Co*., *Wis. L. Rev*., Vol. 1984, No. 4, 1984, pp. 1273– 1314; R. L. Schwartz, Constitutional Law: First Amendment and the Effect on Political Boycotts and Violence, *NAACP v. Claiborne Hardware Co*., *Wake Forest L. Rev*., Vol. 19, No. 1, 1993, pp. 75–93; N. G. Fishman, Commercial Entities and Political Boycotts: First Amendment Protections Versus Sherman Act Prohibitions, *Conn. L. Rev*., Vol. 14, No. 2, 1982, pp. 391–408; R. E. Kennedy, Political Boycotts, the Sherman Act, and the First Amendment: An Accommodation of Competing Interests, *S. Cal. L. Rev*., Vol. 55, No. 4,1982, pp. 983–1030; J. Riddle, Political Boycotts and the Sherman Act, *Baylor L. Rev*., Vol. 32, No. 4, 1980, pp. 617– 628.

24. C. P. Cockerill, Application of *Noerr-Pennington* and the First Amendment to Politically Motivated Economic Boycotts: *Missouri v. NOW*, *Loy. L. A. L. Rev*., Vol. 13, No. 1, 1979, pp. 85–108.

25. G. C. Covington, Constitutional Law—The First Amendment and Protest Boycotts: *NAACP v. Claiborne Hardware Co*., *N.C. L. Rev*., Vol. 62, No. 2, 1984, pp. 399–414; Protest Boycotts Under the Sherman Act, *U. Pa. L. Rev*., Vol. 128, No. 5, 1980, pp. 1131–1165.

26. K. P. Kindred, When First Amendment Values and Competition Policy Collide: Resolving the Dilemma of Mixed-Motive Boycotts, *Ariz. L. Rev*., Vol. 34, No. 4, 1992, pp. 709–742.

27. E. A. Joyce, Antitrust Law – Applicability of Rule of Reason Analysis to Expressive Political Boycotts, *Suffolk U. L. Rev*., Vol. 24, No. 3, 1990, pp. 781– 788.

28. D. L. Beschle, Doing Well, Doing Good, and Doing Both: A Framework for the Analysis of Noncommercial Boycotts Under the Antitrust Laws, *St. Louis U. L.J*., Vol. 30, No. 2, 1986, pp. 385–426; D. K. Wright, NAACP v. Claiborne Hardware: Noncommercial Boycotts and the First Amendment, *Rutgers L.J*., Vol. 15, No. 1, 1983, pp. 203– 230; J. W. Meisel, *NOW* or Never: Is There Antitrust Liability for Noncommercial Boycotts, *Colum. L. Rev*., Vol. 80, No. 6, 1980, pp. 1317–1340.

29. *NOW* at 1301.

30. Ibid. at 1304–1309.

31. *Eastern Railroad Presidents Conference et al., v. Noerr Motor Freight, Inc*., 365 U.S. 127, 140–141 (1961).

32. Ibid. at 135.

determined that it was a relevant precedent because the defendants in *Noerr* were also trying to influence the passage of legislation; this was similar to NOW's boycott, which was intended to influence Missouri to ratify the ERA. The Court noted that NOW's politically motivated boycott was even less problematic (and more worthy of First Amendment protection) than the railroads' lobbying efforts in *Noerr* because the railroads were targeting their competitors by lobbying for legislation that would have hurt their rivals "*financially*," "*economically*," and "*commercially*." [33] In contrast, the ERA was a "*social or political piece of legislation*," and NOW (unlike the railroads) was not targeting its rivals and did not have a profit motive. [34] Even though NOW's boycott had an economic impact, it was a political activity aimed at influencing the legislature to take action. [35] Thus, the court found that the boycott was protected by "*the First Amendment right to petition and the Supreme Court's recognition of that important right when it collides with commercial effects of trade restraints*." [36]

2.2 *NAACP v. Claiborne Hardware Co.*

10. In 1966, the National Association for the Advancement of Colored People (NAACP) launched a boycott of white-owned businesses in Claiborne County, Mississippi, demanding that business leaders comply with their list of demands for equality and racial justice. Some of the white merchants challenged the boycott under both tort theory and as a violation of Mississippi's antitrust statute. The Supreme Court found that the boycott involved constitutionally protected activity, namely, "*elements of speech, assembly, association, and petition*." [37] Similar to the Eighth Circuit's analysis in *NOW*, the Supreme Court in *NAACP* also relied on the fact that "[t]*hrough exercise of* [their] *First Amendment rights, petitioners sought to bring about political, social, and economic change*." [38]

11. The court further noted that although some forms of regulation may have incidental effects on rights of speech and association, it should not impede peaceful political activity. [39] Although the NAACP boycotters "*foresaw – and directly intended – that the merchants would sustain economic injury as a result of their campaign*," yet the "*purpose of petitioners' campaign was not to destroy legitimate competition*." [40] Instead, the boycott was politically motivated "*to vindicate rights of equality and of freedom*" guaranteed by the Constitution itself. [41] Like the Eighth Circuit in *NOW*, the Supreme Court in *NAACP* also took account of the fact that the boycotters were not competing with the white merchants and thus, the boycott was purely a political dispute rather than an economic one and was protected by the First Amendment. [42]

12. In facts and reasoning, *NAACP* was very similar to *NOW*. Both cases involved boycotts: (i) which had political motivations, i.e., passing or ratifying laws or policies that were political or social in nature; (ii) which were orchestrated by not-for-profit associations against economic actors who were not their rivals. For both the Eighth Circuit and the Supreme Court, these factors shaped the conclusion that the boycotts were "political boycotts" and, therefore, protected by the First Amendment. A later case, *SCTLA*, however, did not fall within this category, thereby helping to clarify its outer boundaries.

2.3 *FTC v. Superior Court Trial Lawyers Association*

13. The FTC alleged that an agreement among trial lawyers not to represent indigent criminal defendants in the District of Columbia Superior Court [43] until the D.C. government increased their compensation was an unlawful group boycott subject to per se condemnation. The respondents—the Superior Court Trial Lawyers Association—raised two defenses. First, they argued that there was a social justification for their boycott: pre-boycott rates were unreasonably low, and the higher compensation for lawyers obtained through the boycott would translate into improved legal services for the indigent defendants. The Supreme Court, relying on *National*

33. *NOW* at 1311.

34. Ibid. at 1311–1312.

35. Ibid. at 1312.

36. Ibid. at 1319.

37. *NAACP* at 911.

38. Ibid.

39. Ibid. at 913–914.

40. Ibid. at 914.

41. Ibid.

42. Ibid.

43. The Superior Court of the District of Columbia serves as the trial court of general jurisdiction for the District of Columbia.

Society of Professional Engineers, [44] rejected this argument. [45] It noted that the social justifications proffered for respondents' restraint of trade do not make it any less lawful. [46]

14. The trial lawyers also argued that even if their conduct would otherwise be prohibited by antitrust law, it was nonetheless a form of political action protected by the First Amendment pursuant to *NAACP*. They contended that, just like the boycotters in *NAACP*, they sought to vindicate their constitutional rights by putting pressure on district officials to pass legislation to increase their compensation. [47] The Supreme Court disagreed, distinguishing its holding in *NAACP* on the ground that the NAACP's boycott sought "*equal respect and equal treatment to which they were constitutionally entitled*" and was not trying to profit financially from a lessening of competition in the boycotted market. [48] This was unlike the trial lawyers' boycott, where the SCTLA intended to secure an economic advantage for themselves and stood to "*profit financially from a lessening of competition in the boycotted market*" by raising the compensation above competitive levels. [49]

3. A third category of boycotts? *SCTLA*'s concurring opinion and the court of appeals' opinion

15. The court of appeals in *SCTLA* had adopted a new category of boycotts, which was rejected by the Supreme Court majority but supported by the concurring opinion of Justice Brennan. [50] To better understand the distinctiveness of the approach adopted by the court of appeals (and the concurring opinion of the Supreme Court), two points must be emphasized.

16. First, the court of appeals identified a new category of boycotts: "*boycotts having an expressive component*" or "*expressive boycott*." This is a distinct category from the "politically motivated boycotts" of *NOW* and *NAACP*. Both the court of appeals and the Supreme Court agreed that the SCTLA's boycott was not a "political boycott" like the boycotts in *NAACP* and *NOW*. Even if there was a political motive for the SCTLA's boycott, that was distinctly secondary to the economic one. [51]

17. Where the decision of the court of appeals and the Supreme Court diverges is this: The court of appeals observed that even though SCTLA's boycott was not politically motivated, it was not purely economic either. Instead, it had an expressive component, namely, the boycotters' speech about the inadequacy of compensation. [52] The Supreme Court overruled the court of appeals on this point, finding that the court "*exaggerates the significance of the expressive component in respondents' boycott*." [53] The Supreme Court found that the court of appeals' antitrust analysis on this point was flawed because, by this logic, every concerted refusal to deal (even a price-fixing agreement) would have some expressive component. [54] The Court noted: "*Every concerted refusal to do business with a potential customer or supplier has an expressive component. At one level, the competitors must exchange their views about their objectives and the means of obtaining them. The most blatant, naked price-fixing agreement is a product of communication, but that is surely not a reason for viewing it with special solicitude. At another level, after the terms of the boycotters' demands have been agreed upon, they must be communicated to its target: '*[W]*e will not do business until you do what we ask.' That expressive component of the boycott conducted by these respondents is surely not unique. On the contrary, it is the hallmark of every effective boycott*." [55]

18. The Supreme Court concluded that the court of appeals failed to demonstrate that there was something uniquely expressive in SCTLA's boycott that would warrant the creation of this distinct third category of "expressive boycott."

19. Second, the court of appeals had held that this distinct category of expressive boycotts should be

44. *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

45. *SCTLA* at 423–424.

46. Ibid. at 424.

47. Ibid. at 426.

48. Ibid. at 426–427.

49. Ibid.

50. Ibid. at 439–446 (Brennan, J. concurring).

51. *Superior Court Trial Lawyers Association v. FTC*, 856 F.2d 226, 246 (D.C. Cir. 1988) (hereinafter *SCTLA Court of Appeals*).

52. *SCTLA Court of Appeals* at 249–250.

53. *SCTLA* at 430.

54. Ibid. at 429–431.

55. Ibid. at 431.

reviewed under the rule of reason analysis. The Supreme Court in *O'Brien* had held that governmental regulation that furthered an important or substantial governmental interest could have an incidental burden on speech, provided such burden was not greater than is necessary for the furtherance of that interest. [56] The court of appeals held that, in light of *O'Brien,* antitrust laws should be applied "*prudently and with sensitivity*" and with a "*special solicitude for the First Amendment rights*" of the respondents. [57] The court explained that, "[w]*hile the state may legitimately regulate economic boycotts, the scope of its regulation must be limited lest the incidental restriction of the participants' First Amendment freedoms be greater than is essential to further the state's interest in maintaining competition*." [58] Such "*prudence and sensitivity*" required that the FTC prove that the boycotters possessed market power. [59] In other words, the court of appeals ruled that for expressive boycotts, the rule of reason, rather than per se illegality, was the appropriate standard because per se illegality would impose a burden on free speech that is higher than is essential to preserve competition. [60]

20. The Supreme Court disagreed with the court of appeals on this point, too. It noted that even if SCTLA's boycott were considered an "*expressive boycott*," *O'Brien* would not dictate the application of the rule of reason standard to an expressive boycott. [61] This is because "*the government's interest in adhering to a uniform rule may sometimes satisfy the* O'Brien *test even if making an exception to the rule in a particular case might cause no serious damage*." [62] The per se rule in antitrust is precisely such a uniform rule that avoids a complicated and prolonged economic investigation. Therefore, "*the administrative efficiency interests in antitrust regulation are unusually compelling*," enough to satisfy the *O'Brien* test and apply per se illegality. [63]

56. *U.S. v. O'Brien*, 391 U.S. 367, 376 (1968).

57. *SCTLA Court of Appeals* at 233–234.

58. Ibid. at 248.

59. Ibid. at 233–234.

60. Ibid. at 249.

61. *SCTLA* at 430–431.

62. Ibid. at 430.

63. Ibid.

III. Summary of the legal position

21. The preceding discussion about the law of group boycotts can be summed up as follows:

- There are two types of group boycotts: economically motivated (economic boycotts) or politically motivated (political boycotts).
- Economically motivated boycotts are per se illegal if boycotters possess market power or the boycott cuts off access to a business element that is essential to effective competition. [64] Otherwise, such boycotts are examined under the rule of reason standard.
- Politically motivated boycotts (*NAACP* and *NOW*) are protected by the First Amendment and not subject to antitrust liability.
- When determining whether a boycott is politically motivated, courts have considered factors such as the aim of the boycott (e.g., securing passage of social or political legislation versus seeking economic advantage), whether the boycotters stand to gain from a lessening of competition in the boycotted market, and the identity of the target (rivals versus noncompetitors).
- In *SCTLA*, the court of appeals and the concurring opinion proposed adopting a third category—"economic boycotts with an expressive component"—but the majority concluded that there was nothing uniquely expressive about SCTLA's boycott that would warrant the creation of a distinct category.

22. While the two categories may appear deceptively simple, their application to contemporary instances of group boycotts raises thorny issues.

IV. Application of doctrine to advertiser boycotts

23. The advertiser boycott of X illustrates the significant difficulties in applying the politically motivated and economically motivated distinction.

64. *NW Stationers* at 296–297.

At the outset, the conventional issues that arise in Section 1 cases are themselves not straightforward. Questions of whether there is sufficient evidence of an agreement among advertisers, whether the per se rule or the rule of reason should govern, whether boycotters collectively possess market power sufficient to warrant per se treatment, and whether there is evidence of anticompetitive effects would all be hotly contested. Beyond these quintessential antitrust inquiries, the First Amendment considerations add another layer of complexity.

24. The motivations behind the advertiser boycott defy classification as purely political or purely economic. Several advertisers reportedly suspended their spending because of concerns over antisemitic content and hate speech on the platform [65]—concerns that are likely to be characterized as political or expressive. Just as the boycotts in *NAACP* and *NOW* sought to secure the passage or adoption of social laws and policies demanding equal rights, the advertiser boycotts aim to influence the adoption of more socially responsible content moderation policies. Thus, advertiser boycotts could be considered political and deserving of First Amendment protection.

25. Other advertisers who suspended their spending reportedly cited brand safety, a lack of predictability, or dissatisfaction with the company's advertising innovations, all of which are economic motivations. [66] However, these reasons are legitimate business justifications—economic prudence in distancing a brand from offensive content, or halting business with a platform that has become unpredictable and whose quality of service has degraded. Even if the advertiser boycott has economic motivations, these seem very different from the SCTLA's economic motivation of withholding services to raise compensation. Unlike SCTLA, it is not clear that the advertisers would gain financially by a lessening of competition in the boycotted market (of ad distribution). Would it then be correct to consider these boycotts under the same category and apply the per se standard?

26. A further difficulty lies in how motivations are to be inferred. In earlier cases such as *NAACP*, *NOW*, and *SCTLA*, boycotts were orchestrated by associations that articulated a unified rationale and made their motivations and demands clear. By contrast, the advertiser boycott involves firms with potentially different motives for participating in joint action. In a heterogeneous group of advertisers without a central organizing body, how should courts determine whose motivations are political and whose are economic? Did GARM and WFA play a role in mobilizing the advertisers and articulating a unified rationale for the boycott? If not, should those divergent motivations be aggregated to characterize the group's collective conduct? Finally, the political-economic distinction itself risks creating strategic incentives. If First Amendment immunity attaches to boycotts framed as politically motivated, advertisers may have an incentive to couch what are essentially economic concerns in political terms.

27. Another recent complaint about group boycotts that implicates First Amendment concerns was filed by some online news publishers against the Trusted News Initiative (TNI). TNI's members include both media companies (like the BBC, *The Washington Post*, Reuters, and the Associated Press) and platform companies (like Meta, Google, Twitter, and Microsoft). [67] The complaint alleges that TNI and its members boycotted the plaintiff publishers over their reporting choices (especially relating to COVID-19 and Hunter Biden). Such content was labeled by the defendants as "*misinformation*," and was demoted, removed, or became a factor in suspending the member's accounts. The complaint alleges that the TNI's boycott lessened competition in the online news market and deprived users of diverse viewpoints.

28. Like the advertiser boycott, characterizing this boycott as either economic or political will prove controversial. This is especially so since both the defendants and the plaintiffs in the case are news media organizations that have usually enjoyed wide First Amendment protections. [68] Even platforms

65. J. Vanian, Apple, Disney, other media companies pause advertising on X after Elon Musk boosted antisemitic tweet, CNBC (Nov. 17, 2023), https://www.cnbc.com/2023/11/17/apple-has-paused-advertising-on-x-after-musk-promoted-antisemitic-tweet.html (last visited Sept. 21, 2025).

66. Kantar, More marketers to pull back on X (Twitter) ad spend than ever before (Sept. 5, 2024), https://www.kantar.com/press-center/more-marketers-to-pull-back-on-x-ad-spend-than-ever-before (last visited Sept. 21, 2025).

67. Complaint, *Children's Health Defense v. WP Co.*, LLC, No. 1:23-cv-02735-TJK (W.D. La. May 31, 2023).

68. *See generally New York Times Co. v. United States*, 403 U.S. 713 (1971); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974).

enjoy First Amendment protections for "expressive activities" such as curating (and removing) posts. [69] Thus, there is a strong case to be made that TNI's actions are protected under the First Amendment. At the same time, the plaintiffs have claimed that the boycott was aimed at rivals and was motivated by "*economic self-interest*" in excluding rival news sources that challenged both the business model and viewpoints of traditional news media. [70] Thus, it will be interesting to see whether and how the court categorizes this boycott as political or economic.

V. Conclusion

29. The difficulty in classifying the advertiser or TNI boycotts as purely political or purely economic reveals the inadequacy of that binary framework. It is time to reconsider this rigid division and recognize a possible third category—a "mixed-motive boycott" or an "economic boycott with an expressive component." In *SCTLA*, the Supreme Court declined to recognize an "*expressive boycott*" as a distinct category, not because such a category is impossible, but because the trial lawyers' boycott in that case was entirely economic and lacked a uniquely expressive dimension. That reasoning does not foreclose the creation of a third category in a future case. Unlike the SCTLA boycott, the advertiser and TNI boycotts carry a genuine expressive element that is not merely incidental to their economic objectives. A court assessing their antitrust liability would therefore have to confront the unresolved question of classification—and, with it, determine which legal standard should govern: First Amendment immunity, per se illegality, or rule-of-reason analysis.

M. S. ■

69. *Moody v. NetChoice, LLC*, 603 U.S. 707, 144 S. Ct. 2383, 219 L. Ed. 2d 1075 (2024).

70. Complaint, *Children's Health Defense*, at 4.

Content Moderation and Antitrust: Part V - Section 5 and the marketplace of ideas

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The FTC's recent inquiry into tech censorship and subsequent enforcement guidance suggest a concern that suppressive measures like deplatforming may violate antitrust laws or constitute unfair methods of competition (UMC). While the Sherman Act faces limitations, historical Supreme Court precedent indicates that Section 5 of the FTC Act offers a more viable and flexible vehicle for challenging these suppressive actions as UMCs. Crucially, established case law suggests that such competition-based enforcement aimed at preserving competition in the 'marketplace of ideas' may survive First Amendment scrutiny, drawing from precedent that rejects using the amendment as a shield for anticompetitive business practices. The article suggests that suppressive measures, like other forms of vertical foreclosure, can harm competition among content creators and platforms, and the FTC's UMC authority is potentially well-suited to address this harm in its incipiency without the market power or injury requirements of other antitrust statutes. Ultimately, the FTC may be able to intervene against private repression to ensure the "widest possible dissemination of information" in the digital age.

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1. In early 2025, the newly appointed chair of the Federal Trade Commission (FTC) issued a request for information (RFI) concerning tech censorship. [1] The inquiry sought to determine whether technology platforms were denying or degrading users' access to services on the basis of their speech or affiliations. Chairman Andrew Ferguson stated that "[t]*ech firms should not be bullying their users*," and that the "*inquiry will help the FTC better understand how these firms may have violated the law by silencing and intimidating Americans for speaking their minds*." [2] This statement was later followed by two notable actions that appeared to target entities based on their speech policies.

2. In late September 2025, the FTC finalized a consent order to settle FTC charges that Omnicom Group Inc.'s USD 13.5 billion acquisition of The Interpublic Group of Companies, Inc. (IPG) "*would violate the antitrust laws*" by potentially denying "*advertising dollars to media publishers based on their political or ideological viewpoint, except at the express and individualized direction of Omnicom's advertiser customers*." [3]

3. A month earlier, a federal district court judge had blocked an FTC investigation into Media Matters of America in connection with an alleged boycott or "*other forms of collusion or coordination, with respect to withholding, degrading, increasing the cost of, or otherwise diminishing the quantity of advertising placed on news outlets, media platforms, or other publishers*." [4]

4. Given the statement and subsequent actions, the FTC seems to be concerned that tech platforms, large advertisers or other media-related groups are orchestrating actions resulting in bans, shadow bans,

1. Fed. Trade Comm'n, Request for Public Comment Regarding Technology Platform Censorship (Feb. 19, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/P251203CensorshipRFI.pdf.

2. Fed. Trade Comm'n, Press Release, Federal Trade Commission Launches Inquiry on Tech Censorship (Feb. 20, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/02/federal-trade-commission-launches-inquiry-tech-censorship.

3. Fed. Trade Comm'n, Press Release, FTC Alters Final Consent Order in Response to Public Comments, Preventing Coordination in Global Advertising Merger (Sept. 26, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/09/ftc-alters-final-consent-order-response-public-comments-preventing-coordination-global-advertising; Complaint, Fed. Trade Comm'n, *In the Matter of Omnicom Group Inc. and The Interpublic Group of Companies, Inc.*, docket No. C-4823, at 3 (Sept. 26, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/2410059C4823Omnicom-Complaint.pdf; Decision and Order, Fed. Trade Comm'n, *In the Matter of Omnicom Group Inc. and The Interpublic Group of Companies, Inc.*, docket No. C-4823 (Sept. 26, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/OmnicomOrder.pdf.

4. Fed. Trade Comm'n, Civil Investigative Demand Issued to Media Matters for America, FTC File No. 251-0061 (May 20, 2025), available as Exhibit A to Commission Order Denying Petition to Quash Civil Investigative Demand, *In the Matter of Civil Investigative Demand to Media Matters for America* (July 25, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/2510061mediamattersorderdenyingptq.pdf; *Media Matters for America v. FTC*, 2025 WL 2378009 (D.D.C. Aug. 15, 2025) (preliminary injunction in favor of plaintiff), *order denying stay pending appeal*, 2025 WL 2988966 (D.C. Cir. Oct. 23, 2025). (reference checked – it is accurate, added a little language after "stay" and italicized it)

demonetization or other forms of censorship, and that these types of suppressive measures might violate the antitrust laws or constitute unfair methods of competition.

5. The RFI in particular generated a lot of interest; 3,465 comments were submitted to the FTC in response to the RFI. [5] At the same time, some commentators questioned the move and argued that antitrust enforcement is not an appropriate tool to address concerns surrounding content moderation. [6] Still others have expressed broader skepticism, pointing out that any enforcement action taken by the FTC to combat suppressive measures would likely violate the First Amendment. [7]

6. In fact, in enjoining the Commission's investigation into Media Matters' activities, District Court Judge Sparkle Sooknanan held that the FTC's issuance of the CID was a retaliatory act in response to Media Matters engaging in protected First Amendment activities. [8] But the court did not weigh in on the question of whether the theory of harm to competition of the FTC's broader investigation into certain "*advertisers* [which] *may have 'unlawfully agreed to coordinate the placement of ads' away from 'certain news outlets, publishers, and platforms'*" was itself unconstitutional on First Amendment grounds. [9]

7. Both the critique and commentary on Judge Sooknanan's ruling in the context of the Media Matters investigation might underestimate the ability of the FTC or even private parties to challenge these alleged censorship actions or "suppressive measures" more broadly. Below is a brief analysis outlining the potential contours of the FTC action in this space, assuming the Commission does find facts that support a theory of liability.

8. An overview of existing precedent suggests that enforcers or private parties may face serious limitations and difficulties in framing many of these suppressive measures as violations of the Sherman Act. However, Supreme Court precedent suggests that the FTC Act may prove a better vehicle for challenging these suppressive measures as unfair methods of competition. Additionally, established precedent suggests that such enforcement action might not violate the First Amendment.

I. Potential legal theories

9. At first glance, the suppression of speech, shadow banning or demonetization by tech platforms appear to be beyond the remit of competition enforcement. Initially, these suppressive measures seem less immediately and intuitively connected to a competitive process or otherwise directly tied to the diminution of competition in a relevant market. Instead, content moderation or deplatforming brings to mind common carrier regulation, contract or copyright law. [10]

10. But existing case law indicates that the marketplace of ideas, and news and opinion, may be treated as a commercial market, with those expressing ideas possessing a quasi-property right to monetize or earn a livelihood from speech. The American legal tradition has long recognized that any democratic society must cultivate a robust and thriving marketplace of ideas with competing views and opinions. The vocabulary used to describe the animating principles of freedom of speech, such as the "free exchange" of ideas, is derived from the language of commerce and the proverbial marketplace. Unsurprisingly, the First Amendment

5. *See* Regulations.gov, Docket FTC-2025-0023, Request for Public Comment Regarding Technology Platform Censorship, https://www.regulations.gov/document/FTC-2025-0023-0001. The FTC moderated the comments and posted 2,898 of the 3,465 comments submitted.

6. *See*, e.g., D. J. Gilman, Antitrust at the Agencies: Private Anticompetitive Censorship Edition, *Truth on the Market* (Feb. 21, 2025), https://truthonthemarket.com/2025/02/21/antitrust-at-the-agencies-private-anticompetitive-censorship-edition/.

7. *See*, e.g., Comments of TechFreedom, Request for Public Comments Regarding Technology Platform Censorship (May 21, 2025), https://techfreedom.org/wp-content/uploads/2025/05/TechFreedom-Comments-FTC-Political-Bias-Inquiry.pdf?ref=reneediresta.com; D. Inserra, The FTC's Doublethink Confuses Content Moderation, Censorship, and Expression, *Cato at Liberty* (Cato Institute blog) (Feb. 24, 2025), https://www.cato.org/blog/ftcs-doublethink-confuses-content-moderation-censorship-expression.

8. *Media Matters for America v. FTC*, 2025 WL 2378009 at *2 (D.D.C., Aug. 15, 2025) ("[G]*iven the comments by Chairman Ferguson and his colleagues about Media Matters, the timing of the CID, and evidence of pretext, Media Matters is likely to show that retaliatory animus was the but-for cause of the FTC's CID. Because the other equitable factors also favor Media Matters, the Court grants a preliminary injunction in its favor*.").

9. Memorandum Opinion at 5, *Media Matters for America v. FTC*, No. 1:25-cv-01959-SLS (D.D.C. Aug. 22, 2025) (Sooknanan, J.), https://law.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2025cv01959/281859/41/.

10. G. Sitaraman, Deplatforming, *Yale L. J.*, Vol. 133, No. 2, 2023, pp. 497–567, https://www.yalelawjournal.org/article/deplatforming.

itself is considered a bulwark that ensures the robust exchange of ideas in a variety of marketplaces of ideas. [11] Or as Justice Oliver Wendell Holmes Jr. summarized this notion succinctly in his famous *Abrams et al. v. U.S.* dissent: "[T]*he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution*." [12]

11. In addition to the generally accepted theoretical notion that ideas compete in a marketplace to gain traction and general acceptance, in daily practice, many individuals and businesses earn a living from expressing their views or generating news. [13] Many businesses, from newspapers to video channels, rely on the wide dissemination of their news, views and opinions through online platforms to operate and generate revenues. [14] And it is clear that the suppression of this expressive activity or the deplatforming of opinion or news outlets can, therefore, theoretically lead to severe financial or commercial harm in those markets. [15]

1. A cognizable antitrust market for news and content

12. Even if it is difficult to define competition for ideas in the abstract, it is clear that there may be readily definable antitrust markets for the dissemination and articulation of ideas, such as submarkets for blogs, video blogs, opinion articles, news articles, podcasts or even opinion posts on social media platforms.

13. In *Lorain Journal Co. v. U.S.*, the Supreme Court recognized a relevant market for the "*mass dissemination of news and advertising*." [16] Similarly, in *Kansas City Star Company v. U.S.*, the Eighth Circuit found a market for the "*dissemination of news and advertising in newspapers and on radio and television broadcasting stations in the four-county area*." [17] The court in *Kansas City Star* also emphasized that news markets can be relatively small and that the determination of the relevant market in each case must carefully consider the "*realities of* (. . .) *advertising*." [18] In the context of digital platforms, it is therefore entirely possible that there are unique and relatively small submarkets in today's digital age in which content creators and news outlets compete. [19]

2. Exclusion of competition in markets for content through suppressive measures

14. There are two primary areas in which individuals and businesses currently compete in the online platform space. First, online platforms compete with each other to attract users and business. [20] This type of competition can also manifest in competition for the acquisition of creative content, such as signing an exclusive deal with a host of a podcast. This type of platform rivalry can also manifest as competition for advertising spend on the platform itself. Second, the users of platforms, such as content creators or news publishers, compete with each other on platforms for likes, impressions, and engagement, which generate revenue. Content creators and news publishers also rely on robust competition in the "marketplace of ideas" to generate commercial endorsements or product placements and other forms of monetization, such as the marketing of content-related merchandise. [21] Suppressive measures could therefore theoretically harm competition in those spheres of commerce.

15. With respect to harm to platform competition,

11. *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

12. *Abrams v. United States*, 250 U.S. 616, 624, 630 (1919) (Holmes, J., dissenting). This view was later adopted by a majority of the Supreme Court. *See*, e.g., *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988).

13. *See United States v. Google LLC*, 778 F. Supp. 3d 797, 813 (E.D. Va. 2025).

14. Ibid.

15. M. H. Ribeiro, S. Jhaver, J. Cluet i Martinell, M. Reignier-Tayar and R. West, Deplatforming Norm-Violating Influencers on Social Media Reduces Overall Online Attention Toward Them, arXiv:2401.01253 (Jan. 2, 2024), https://arxiv.org/pdf/2401.01253.

16. 342 U.S. 143, 147 (1951).

17. 240 F.2d 643, 653 (8th Cir. 1957).

18. Ibid. at 659.

19. *See FTC v. IQVIA Holdings Inc.*, 710 F. Supp. 3d 329, 353 (S.D.N.Y. 2024).

20. U.S. Dep't of Just. and Fed. Trade Comm'n, Merger Guidelines (Dec. 18, 2023), § 2.9, https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

21. The term "marketplace of ideas" should not be confused with the concept of a "relevant market" or submarket for antitrust purposes.

platforms currently rely on cloud and other digital infrastructure providers to operate their business. If cloud or other infrastructure providers decide to stop providing those services to a platform in light of the content that is consumed or distributed on it, that type of vertical foreclosure may harm competition among platforms. For example, in 2021, Parler, a social media platform, alleged that Amazon stopped providing it with cloud services after it displayed content that Amazon claimed encouraged violence. [22] Around the same time, Apple removed Parler from its App Store. Parler eventually returned to the App Store only after "*months of productive dialogue with Apple*." [23] In both cases, providers of cloud services and digital infrastructure, respectively, allegedly excluded Parler and potentially thus limited competition among platforms to gain users and ad revenue. [24]

16. Suppressive measures may also harm competition among platform users or the creators of content that is distributed through online platforms. Thus, if a platform decides to deplatform a user or creator of content due to the nature of the content they generate, that type of exclusion (which is akin to "vertical foreclosure," which is frequently used in antitrust cases) may harm competition among content creators.

17. This type of harm has long been recognized by the courts, with the Supreme Court explicitly defining a "quasi-*property*" right in the "*acquisition and transmission of news*" irrespective of its originality or eligibility for copyright protection. [25] In that, in addition to deciding that the defendant had engaged in unfair competition when it unlawfully misappropriated the news product of the plaintiff's investigations, the Court found it a violation of common law unfair competition principles to falsely represent that that news product was derived from the defendant's own work. [26] In particular, the Supreme Court made clear that the misappropriation or diminution of the "*commercial value*" of such content can constitute "*unfair competition*," because such conduct inherently dampens the existing incentives of competitors to compete through the creation of original content. [27] This principle—that certain forms of information, like news, have protected commercial value—has been repeatedly reiterated by the courts. [28]

18. Recent research from EPFL, Switzerland, and Rutgers University corroborates the intuition that such vertical foreclosure can harm the competitive process. The researchers conducted a "*longitudinal, quasi-experimental study of 165 deplatforming events targeted at 101 influencers*" and found that, in aggregate, after one year, online attention towards a deplatformed personality is reduced by 64% on Google and by 43% on Wikipedia. [29]

19. Concerns with this type of suppressive measure are not theoretical and there are quite a few public allegations of such exclusion by digital platforms. For example, in 2022, The Babylon Bee, a satirical conservative website, alleged that it was locked out of its Twitter account after violating Twitter rules against "*hateful content*." [30] In a similar public incident, late last year, Laura Loomer, host of the Rumble video channel Loomer Unleashed, accused social media platform X of suppressing her account after criticizing then-DOGE co-chair Vivek Ramaswamy. [31] In both cases, platforms have allegedly excluded online creators based on their content and, at least in theory, could have limited competition in the marketplace of ideas and the corollary competition among creators to gain users and generate ad revenue.

22. J. Novet, Parler's De-platforming Shows the Exceptional Power of Cloud Providers Like Amazon, CNBC.com (Jan. 16, 2021), https://www.cnbc.com/2021/01/16/how-parler-deplatforming-shows-power-of-cloud-providers.html.

23. K. Lyons, Parler Returns to Apple App Store with Some Content Excluded, *The Verge* (May 17, 2021), https://www.theverge.com/2021/5/17/22440005/parler-apple-app-store-return-amazon-google-capitol.

24. L. Nylen, Parler Hits Amazon with Antitrust Suit Over Shutdown, *Politico* (Jan. 12, 2021), https://www.politico.com/news/2021/01/11/parler-amazon-antitrust-suit-457579.

25. *International News Service v. Associated Press*, 248 U.S. 215, 238 (1918).

26. Ibid.

27. Ibid. at 245.

28. *See Barclays Capital Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876 (2d Cir. 2011).

29. Ribeiro et al., *supra* note 15, at 15.

30. N. Lanum, Twitter, Facebook, Google Have Repeatedly Censored Conservatives Despite Liberal Doubts, Fox News (Mar. 29, 2022), https://www.foxnews.com/media/twitter-facebook-google-censored-conservatives-big-tech-suspension.

31. A. Singh, MAGA vs. Musk: Right-wing Critics Allege Censorship, Loss of X Badges, Axios (Dec. 27, 2024), https://www.axios.com/2024/12/27/musk-x-loomer-h1b-maga-verification.

3. Section 5 law of foreclosure/ exclusion through suppressive measures

20. In the wake of the Chicago School antitrust revolution, Sherman Act Section 1 cases involving vertical restraints or vertical foreclosure have been difficult to pursue successfully. [32] Under the rule of reason, it is likely that a court will focus on interbrand competition between platforms. A court may find that platforms compete by curating the content on their product and that protecting this form of competition outweighs harms to individual suppressed producers of content, especially if there is no horizontal agreement among the platforms to suppress that specific content producer. Similarly, any case involving suppressive measures brought under Section 2 of the Sherman Act would necessarily require showing monopoly power or a dangerous probability of monopolizing a relevant antitrust market. [33] Finally, Section 3 of the Clayton Act articulates a more lenient standard for vertical foreclosure, but is limited to the provision of goods, not services. [34]

21. However, Section 5 of the FTC Act may provide the Commission with a viable path to pursue suppressive measures as unfair methods of competition. [35] The 2022 FTC policy statement on unfair methods of competition supports the notion that such vertical restraints may violate the law. [36] Similarly, the law governing Section 5 and vertical restraints has remained largely intact, and key Supreme Court decisions governing its application remain good and enforceable law. [37]

(I revised this to remove the reference to Section 1 in the first quote, but to add the second quote to bring the reference to Section 1 back in.

22. First, the Supreme Court has already held in *FTC v. Texaco* that vertical foreclosure by a firm that does not compete in the relevant market in which competition is harmed can nonetheless violate Section 5. [38] In that case, the lessor of gas stations was found to violate Section 5 by lessening competition in the markets for tires, batteries, and car accessories by prohibiting the sale of Goodyear's rivals in Texaco-leased gas stations. [39] Thus, in the case of suppressive measures, it could similarly be argued by the FTC that platforms may violate Section 5 even though they themselves do not compete in the affected markets for the creation of content. For example, a cloud or infrastructure provider may violate Section 5 by blacking out a platform, even if it does not operate a platform. Similarly, a platform may violate the act if it suppresses a content creator even if the platform itself does not compete in the market in which the creator operates. In other words, the key question under Section 5 would be whether online platforms engage in vertical foreclosure and whether that foreclosure has a tendency to limit competition in a relevant market.

23. Second, unlike the Sherman Act or Section 3 of the Clayton Act, under Section 5 case law, it is not necessary to demonstrate a substantial lessening of competition to establish that a form of vertical foreclosure is unlawful. [40] Hence, while the Sherman Act and the Clayton Act require a showing of the total quantum of foreclosure, this showing is not required under Section 5. [41] Instead, the Supreme Court has explained that Section 5 was designed to

32. *See*, e.g., T. C. Wheeler, Embracing the Inevitable: Rethinking and Reshaping Antitrust Law Re: Vertical Restraints, *Miss. C. L. Rev.*, Vol. 35, Issue 3, 2017, pp. 472–494; D. Gifford and R. T. Kudrle, Towards a Coherent and Workable Antitrust Policy on Vertical Restraints, *J. L. Econ. & Pol'y*, Vol. 13, No. 1, 2017, pp. 55–90; B. A. Friedman, Permissible and Impermissible Vertical Restraints under the Sherman Antitrust Act: Does "Justice" Care?, *Denv. U. L. Rev.*, Vol. 63, Issue 1, 1985, pp. 127–148; *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 895–896 (2007) ("[T]*he antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result. (. . .) The Court, moreover, has evaluated other vertical restraints under the rule of reason even though prices can be increased in the course of promoting procompetitive effects*.").

33. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993).

34. 15 U.S.C. § 14.

35. *See* Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Commission File No. P221202) (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

36. Ibid. at 13, 16 (Section 5 may prohibit "*parallel exclusionary conduct that may cause aggregate harm*" and "*discriminatory refusals to deal which tend to create or maintain market power*").

37. *See also FTC v. Brown Shoe Co., Inc.*, 384 U.S. 316, 322 (1966) (rejecting the need to apply Clayton 3 case law involving Section 5 and stating that "*the Commission has power under § 5 to arrest trade restraints in their incipiency, without proof that they amount to an outright violation of § 3 of the Clayton Act or other provisions of the antitrust laws*."). The Court also noted that Brown Shoe's program "obviously conflicts with the central policy of both § 1 of the Sherman Act and § 3 of the Clayton Act." Id.

38. 393 U.S. 223, 226 (1968).

39. Ibid. at 299.

40. *Brown Shoe*, 384 U.S. at 322.

41. Ibid.

prohibit anticompetitive conduct in its incipiency and that the main consideration is whether the "*coercive practices*" are "*symptomatic of a more fundamental restraint of trade*" [42] and amount to "*the utilization of economic power in one market*" to limit competition in another. [43]As applied to suppressive measures, the key question would be whether deplatforming, shadow banning, suspension and other suppressive tools "unfairly burden" competition for a not-insignificant volume of commerce in the affected markets for ideas.

24. Third, Section 5 does not require a showing of market power. [44]

25. Although the facts and details of each individual case would likely determine whether certain suppressive measures amount to vertical foreclosure that violates Section 5, it is clear that a general argument could be made that some suppressive measures online may constitute an unfair method of competition. [45]

42. *Atlantic Refining Co. v. FTC*, 381 U.S. 357, 361 (1965) (affirming liability of the Commission opinion that "considered the coercive practices to be symptomatic of a more fundamental restraint of trade and found the sales-commission plan illegal in itself as 'a classic example of the use of economic power in one market *** to destroy competition in another market."); *See also Texaco*, 393 U.S. at 230 (the firm exercising vertical foreclosure must nonetheless be able to exert "*dominant economic power*" over the users of its products or services). (added the language in yellow). (highlighting the text to confirm I checked the text, removed the XXX and related language, and moved fn 43 from its original place at the end of paragraph to support the second quote.

43. *Atlantic Refining*, 381 U.S. at 369.

44. Statement of Commissioner Mark R. Meador In the Matter of Non-Compete Clauses (Matter No. P201200) (Sept. 5, 2025) at 2 ("*Because Section 5 focuses on the 'methods' by which firms compete, this authority allows the Commission to address anticompetitive practices that result in adverse economic effects even absent traditional showings of market power or structural market harms*."), https://www.ftc.gov/system/files/ftc_gov/pdf/meador-statement-noncompete-agreements-9.5.25.pdf.

45. In August 2025, Eliza Labs, Inc. and several additional plaintiffs filed a lawsuit against Elon Musk's X, alleging that because the plaintiffs' AI agents competed with X's AI agent Grok and its new functionalities, it decided to charge the plaintiffs a new USD 50,000/month fee to X and deplatformed them. One of the claims plaintiffs asserted in that case under California's Unfair Competition Law, which draws upon legal precedent applying Section 5 of the FTC Act. Complaint, *Eliza Labs v. X Corp*., case No. 25-7243 (N.D. Cal., S.F. Div. Aug. 27, 2025) (alleging that "*Defendant's conduct is unfair under* [California's Unfair Competition Law] *because it provides an unfair competitive advantage over Plaintiffs. Plaintiffs lawfully operated on X's platform and, solely because Plaintiffs' AI Agents competed with X's new AI Agents, Defendant deplatformed Plaintiffs thereby impeding Plaintiffs' ability to operate its AI Agents on X's platform, harming Plaintiffs. This conduct is contrary to public policy and undermines consumer protections to be free from anticompetitive actors abusing their monopoly positions to reduce competition and increase consumer costs*." Complaint, ¶ 115).

II. Unfair methods and the First Amendment

26. Some critics of the recent RFI have argued that the FTC will be barred from bringing cases involving deplatforming or other suppressive measures because they will violate the First Amendment right of platforms or other service providers. [46] In particular, that enforcement activity by the FTC will likely infringe upon platforms' content moderation decisions, which they argue are protected by the First Amendment.

27. First, it is unclear why cloud or other digital infrastructure providers that implement suppressive measures should receive any special treatment under the First Amendment in light of the Supreme Court's recent decision in *Moody v. NetChoice, LLC*. [47] The Supreme Court has explained in *Moody* that although such activities amount to constitutionally protected speech, this protected speech may be nonetheless subject to government regulation. In particular, the Court stated that the government can interfere in the content moderation decisions of platforms by taking "*varied measures*" like "*enforcing competition laws*" to protect speaker access. [48]

28. The Supreme Court's most recent affirmation of the ability of the government to intervene through competition enforcement in content moderation is consistent with well-established precedent.

29. For example, in *Associated Press v. U.S.*, the Court held that restraints of trade cannot be immunized by the First Amendment. [49] In that case, the Associated Press (AP) enacted a series of bylaws that granted each AP member the power to block its nonmember competitors from membership. The AP argued that its decision to deny access to news of the AP and of all of its member publishers was protected

46. Inserra, *supra* note 7.

47. *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024). The Court's opinion was limited to the consideration of content moderation of speakers on online platforms and did not weigh in on other forms of digital deplatforming, so it is unclear how the courts will analyze those forms.

48. Ibid. at 733 (citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 647 (1994)).

49. 326 U.S. 1 (1945).

by the First Amendment. The Court explained that the First Amendment "*rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society*." It also observed that the command that "*the government itself shall not impede the free flow of ideas does not afford nongovernmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom* [of other speakers]." [50] The Court concluded that since the aim of the First Amendment was to "*protect liberty of thought and of expression*," it would be wrong to "*fashion from it a shield for business publishers who engage in business practices condemned*" [51] by competition laws, especially when those anticompetitive acts result in the "*repression of that freedom by private interests*." [52]

30. *FTC v. Superior Court Trial Lawyers Ass'n* also rejected similar First Amendment immunity arguments and observed that a "*rule that requires courts to apply the antitrust laws 'prudently and with sensitivity' whenever an economic boycott has an 'expressive component' would create a gaping hole in the fabric of those laws*." [53] And in *Lorain Journal Co. v. U.S.*, the Court also echoed this sentiment when it explained that an injunction that forced a newspaper to accept advertisements regardless of whether those placing those advertisements had advertised in rival papers did not violate the First Amendment. [54]

31. Thus, it is less than clear that efforts by the FTC to challenge suppressive measures by online platforms using Section 5, including their content moderation decisions, would be outright barred by the First Amendment. Instead, these efforts may survive First Amendment scrutiny if they in fact seek to preserve competition in the marketplace of ideas by combating "*repression of that freedom*" by online platforms in an attempt to ensure the "*free flow of ideas*." [55]

S. S. ■

50. Ibid. at 20.

51. Ibid. at 7.

52. Ibid at 20.

53. 493 U.S. 411, 431–432 (1990).

54. 342 U.S. at 155–156.

55. *Associated Press*, 326 U.S. at 20.

Content Moderation and Antitrust: Part VI - Is there an empty set at the intersection of antitrust and content moderation?

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Antitrust scrutiny of large technology platforms has continued apace in ways both more and less familiar under the second Trump administration and its antitrust agencies. Of some controversy is enforcers' interest in a novel area of inquiry; that is, whether—and under what conditions—content moderation might prove anticompetitive, in violation of the antitrust laws. That question raises another: if so, would enforcement of the antitrust laws against such content moderation run afoul of the speech clause of the First Amendment to the U.S. Constitution? We suggest a qualified "no" as an answer to the first question and a likely "yes" as an answer to the second. While one might, in the abstract, imagine an antitrust case against something like a tech platform's content moderation practices, we suspect that finding facts and circumstances to make out a convincing antitrust case involving the actual tech platforms of interest would prove tough sledding. Moreover, recent Supreme Court precedent suggests limits to the reach of antitrust, at least as pertains to content moderation by privately operated tech platforms.

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"*President Trump has put a swift end to the weaponization of the federal government against Americans and their freedoms* (. . .)"

Andrew N. Ferguson [1]

1. Antitrust scrutiny of large technology platforms has continued apace under the second Trump administration and the leadership appointed at the Federal Trade Commission (FTC) and the Antitrust Division of the U.S. Department of Justice (DOJ) in 2025. Both the FTC and DOJ have maintained investigations, litigation, and, indeed, aggressive remedies proposals in the tech sector. [2] Beyond that, the agencies have opened a novel area of inquiry—one that raises a two-part question: first, whether—and under what conditions—content moderation might prove anticompetitive, in violation of the antitrust laws; and second, whether, in such cases—supposing there are some—enforcement of the antitrust laws runs afoul of the speech clause of the First Amendment to the U.S. Constitution. The case law seems to provide no precedent on private content moderation as an antitrust violation, and popular antitrust treatises, such as Areeda and Hovenkamp's fourteen-volume *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, do not appear to mention it at all. [3]

2. As we explain below, we suggest a qualified "no" as an answer to the first question and a likely "yes" as an answer to the second. Theoretically, one might imagine an antitrust case against something like a tech platform's content moderation policies or practices. We suspect, however, that finding facts and circumstances to make out a convincing case involving the actual tech platforms of interest would prove tough sledding. Moreover, recent Supreme Court precedent suggests limits to the reach of antitrust, at least as pertains to content moderation by privately operated tech platforms. This does not seem a fruitful use of limited agency resources, and it may

1. Model Letter Sent to Tech Companies from Andrew N. Ferguson, Chairman, U.S. Fed. Trade Comm'n, Aug. 21, 2025, at 1, https://www.ftc.gov/system/files/ftc_gov/pdf/ftc-unfair-security-letter-ferguson.pdf.

2. Enforcement matters brought by the Department of Justice and the Federal Trade Commission include lawsuits against Amazon, Apple, Google (two matters), Meta (two matters), and Microsoft. *See U.S. and Plaintiff States v. Apple*, case No. 2:24-cv-04055 (D.N.J. 2024) (Compl.); *FTC and Plaintiff States v. Amazon.com, Inc.*, case No. 2:23-cv-01495 (W.D. Wa. 2023) (Compl.); *FTC v. Microsoft Corp.*, case No. 3:23-cv-02880 (N.D. Cal. 2023) (Compl. for Temporary Restraining Order and Preliminary Injunction); *U.S. and Plaintiff States v. Google LLC*, case No. 1:23-cv-00108 (E.D. Va. 2023) (Compl.); *FTC v. Meta Platforms, Inc.*, case No. 5:22-cv-04325 (N.D. Cal. 2022) (Compl. for Temporary Restraining Order and Preliminary Injunction); *FTC v. Facebook, Inc.*, case No. 1:20-cv-03590 (D.D.C. 2021) (Compl. for Injunctive and Other Equitable Relief); *U.S. and Plaintiff States v. Google LLC*, case No. 1:20-cv-03010 (D. D.C. 2020) (Compl.).

3. *See*, e.g., H. Hovenkamp, *Principles of Antitrust*, 3rd ed., West Academic Publishing, St. Paul, 2025; P. E. Areeda and H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, 4th–5th ed., Wolters Kluwer, New York, 2022 (absence of the issue from these treatises confirmed by searching contents and indices, and by email with Herbert Hovenkamp, Sept. 21, 2025).

be something worse than that.

I. Content moderation and antitrust?

3. This new initiative seems to have begun with the FTC's February 2025 announcement of a Request for Public Comment Regarding Technology Platform Censorship, [4] which was pitched as "*a public inquiry to better understand how technology platforms deny or degrade users' access to services based on the content of their speech or affiliations, and how this conduct may have violated the law*." [5]

4. That sort of request—a request for information (RFI)—is not a law-enforcement investigation, and it does not require any party to submit anything in particular—no subpoena power or compulsory process is invoked. It is one sort of broad preliminary inquiry that may inform the Commission and, potentially (or not), lead to a more formal study, reporting, or investigation. It fits broadly under the FTC's authority under Section 6(a) of the FTC Act: "*To gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce* (. . .)" [6] As such, it might have been business as usual. Keeping up with market developments by various means—from rigorous empirical studies to issue-spotting workshops and RFIs—is a basic part of the FTC's statutory mission.

5. Yet, the issue of platforms' content moderation and the framing of the request hardly seemed a neutral inquiry into an area of potential interest. [7] It took little imagination to wonder whether an inquiry into "*censorship*" and how "*technology platform*" conduct "*may have violated the law*" may have skewed submissions to the agency and, perhaps, biased the inquiry itself. Encouraging input from "[t]*ech platform users who have been banned, shadow banned, demonetized, or otherwise censored*" (but no others) did not seem a neutral solicitation of public comment on the potential costs and benefits of platform conduct. Indeed, some of the Commission's commentary seemed ominous. The FTC's press release stated that "[c]*ensorship by technology platforms is not just un-American, it is potentially illegal*." [8] Posting on the platform X, Chairman Ferguson (very) similarly opined that "*Big Tech censorship is not just un-American, it is potentially illegal*." [9] Those may have been his genuine suspicions, but they were not reminiscent of the FTC's long lauded history as a research-based enforcement agency. To some, they may have seemed to flirt with prejudgment.

6. A somewhat clearer statement of concerns can be found in a statement of interest ("Statement" or "SOI") filed by the DOJ Antitrust Division in a private antitrust case brought against a number of major news publishers by, among others, the Children's Health Defense Fund—an organization previously chaired by U.S. Health and Human Services Secretary Robert F. Kennedy Jr. [10] Nominally, at least, a statement of interest can be distinguished from an amicus brief filed on behalf of or in support of a party. [11] Still, it was a statement supportive of the plaintiffs in the matter and a formal submission to a federal court. It may, in that regard, be distinguished from information gathering and *ex officio* remarks by agency officials that are not themselves legal instruments or even official agency guidance documents. [12]

7. The DOJ's Statement "*takes no position on the application of the law to the facts alleged in*

4. Fed. Trade Comm'n, Request for Public Comment Regarding Technology Platform Censorship, Feb. 20, 2025, https://www.ftc.gov/system/files/ftc_gov/pdf/P251203CensorshipRFI.pdf.

5. Fed. Trade Comm'n, Press Release, Federal Trade Commission Launches Inquiry on Tech Censorship, Feb. 20, 2025, https://www.ftc.gov/news-events/news/press-releases/2025/02/federal-trade-commission-launches-inquiry-tech-censorship.

6. 15 U.S.C. § 46(a).

7. *See*, e.g., D. J. Gilman, Antitrust at the Agencies: Private Anticompetitive Censorship Edition, *Truth on the Market*, Feb. 21, 2025, https://truthonthemarket.com/2025/02/21/antitrust-at-the-agencies-private-anticompetitive-censorship-edition/.

8. Press Release, *supra* note 5.

9. Post, Andrew Ferguson, Chairman, FTC, X, Feb. 20, 2025, https://x.com/AFergusonFTC/status/1892619431991287893.

10. Statement of Interest of the United States, *Children's Health Defense v. WP Co.*, Civil Action No. 1:23-cv-2735 (D.D.C. filed Jul. 11, 2025), https://www.justice.gov/atr/media/1407666/dl?inline.

11. *See* 28 U.S.C. § 517 (authorizing the Department of Justice to "*attend to the interests of the United States*" in a pending suit).

12. *See* J. Casper, FTC's Ferguson Says Tech Censorship Practices May Violate Antitrust Law, *Broadband Breakfast*, Mar. 25, 2025, https://broadbandbreakfast.com/ftcs-ferguson-says-tech-censorship-may-violate-antitrust-law/.

Plaintiffs' complaint or on the resolution of Defendants' motion." [13] That is consistent with an agency's legitimate interest in the courts' proper application of the laws that the agency is charged to enforce, an interest that extends to the legal principles themselves and not just their fit to specific facts alleged. Still, it is worth noting that the motion in question was a motion to dismiss for, among other things, failure to state a claim. Setting aside the facts, even as alleged, and the question of dismissal, leaves us with a question about how much clarification is on offer in the DOJ's Statement.

8. The Statement notes that nonprice dimensions of competition, including product quality, could be the gravamen of an antitrust complaint under either Section 1 or Section 2 of the Sherman Antitrust Act. [14] That abstract point is uncontroversial. For example, in the 2010 Horizontal Merger Guidelines, the FTC and the DOJ stated: "*Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence. When the Agencies investigate whether a merger may lead to a substantial lessening of non-price competition, they employ an approach analogous to that used to evaluate price competition*." [15]

9. Historically, the agencies have considered non-price effects in certain merger reviews under the Sherman and Clayton Acts, [16] and federal courts have noted the importance of non-price dimensions of competition in antitrust cases. [17] Hence, when considering hospital mergers, certain qualitative aspects of care may be salient: *ceteris paribus*, higher rates of post-operative infection are uniformly considered lower-quality outcomes, [18] and such non-price effects may be important, perhaps especially where exogenous constraints limit price competition.

10. But such antitrust cases are few and far between, and for good reason. For one thing, the conditions under which product quality (or quality-adjusted price) may be suppressed independent of (more easily assessed) price and output effects may be limited. Second, the material qualitative attributes of products may be numerous and diverse. At some level, such attributes may be indefinitely many and constitutive of the product itself. While the entire bundle of such attributes may have a market valuation, and while there may be market prices for certain variable product attributes (such as trim levels on an automobile), objective assessments—even ordinal assessments—of the value of individual qualitative attributes are far from the norm.

11. Both problems may have been skirted in the FTC's 1965 *Macaroni* case. There, the Court of Appeals for the Seventh Circuit agreed with the FTC that the "*highest quality macaroni products are made from 100% semolina and such products have the best consumer acceptance of all macaroni products*." [19] It was alleged that the defendant producers of dried pasta had agreed, through their association, to fix the amount of that "*highest quality*" input as a uniform cost-control measure. And so, the Seventh Circuit agreed with the FTC that "*where all or the dominant firms in a market combine to fix the composition of their product with the design and result of depressing the price of an essential raw material, they violate the rule against price-fixing agreements as it has been laid down by the Supreme Court*." [20] That is, the agreement was determined to be an agreement among horizontal competitors to fix quality-adjusted prices.

12. What would it mean to make out an analogous

13. Statement of Interest of the United States, *supra* note 10, at 2.

14. *See*, e.g., *National Macaroni Manufacturers Association, et al., Petitioners, v. Federal Trade Commission, Respondent*, 345 F.2d 421 (7th Cir. 1965); *see also*, Comments of the International Center for Law & Economics RE: FTC-2025-0023-0001, Request for Public Comments Regarding Technology Platform Censorship, May 21, 2025, https://laweconcenter.org/wp-content/uploads/2025/05/FTC-RFI-Technology-Platform-Censorship-2025.pdf.

15. U.S. Dep't Justice and U.S. Fed. Trade Comm'n, Horizontal Merger Guidelines, Aug. 19, 2010, at 2, https://www.justice.gov/atr/file/810276/dl?inline= (withdrawn Dec. 2023).

16. *National Macaroni Manufacturers Ass'n*, *supra* note 14; *see also*, M. Jones, B. Kobayashi and J. O'Connor, Economics at the FTC: Non-Price Merger Effects and Deceptive Automobile Ads, FTC Working Paper, Dec. 2018, https://www.ftc.gov/system/files/documents/reports/economics-ftc-non-price-merger-effects-deceptive-automobile-ads/1812-be-rio.pdf (FTC Bureau of Economics analysis of the non-price effects of the proposed merger between DraftKings, Inc. and FanDuel Ltd.).

17. *National Macaroni Manufacturers Ass'n*, *supra* note 14; *United States v. Continental Can Co.*, 378 U.S. 441 (1964).

18. The U.S. Department of Health & Human Services has developed certain measures of hospital quality, including certain core outcomes and process measures. *See*, e.g., Dep't Health & Human Servs., Agency for Health Care Research and Quality, Major Hospital Quality Measurement Sets, https://www.ahrq.gov/talkingquality/measures/setting/hospitals/measurement-sets.html.

19. *National Macaroni Manufacturers Ass'n*, 345 F.2d at 424.

20. Ibid. at 426.

case for a platform's content moderation policies? Of course, with unilateral conduct, we might even assume, for the sake of argument, that a given platform has lowered the quality of its content moderation and fail to find a viable case. Even firms with market power are typically free to price and design products as they will, subject to market (not regulatory or antitrust) discipline. But what if we—or a plaintiff—were to challenge that assumption? Content moderation policies—as written and as implemented—may themselves bundle (or exemplify) complex attributes and they are, in any case, but some of the many non-price attributes of a social media or other tech platform. We—the authors—may prefer one or another content moderation policy. One or both of us might find all of them to be acceptable or unacceptable in meeting our preferences. But our preferences do not constitute an intersubjective utility function, much less a market-wide assessment or ordering of content moderation policies, much less such an assessment or ordering of various tradeoffs, across non-price dimensions of product quality across platforms. With such policies, one person's meat may be another's poison, and variation across policies may be fundamental to healthy differentiated interbrand competition among platforms. The problem of valuation seems fundamentally confounding, even before we consider that there is no straightforward way to link qualitative variation to price with such services.

13. Formal comments submitted to the FTC by the International Center for Law & Economics put the problem thus: "*The complexity inherent to the tradeoffs* (. . .) *are even more difficult to assess when different consumer groups have sharply contrasting views of what constitutes indicia of quality along each of these dimensions. With political media, most would prefer to have more of what they want to read available, and less of what they don't want available, even if it comes at the expense of other consumers' preferences. There is no easy way to quantify and weigh general consumer welfare where one group's moderation preferences necessarily come at the expense of another's. In this sense, a non-price-effects analysis of political bias would be even more complex than a complaint based on user privacy.* (. . .) *when it comes to the algorithm that determines what is seen and in what order, or what is fact checked, or even what is monetized, there is no clear preference that all consumers share*." [21]

14. The DOJ's Statement recognizes that, in the abstract, a full rule of reason approach may be demanded if agreements among competitors regard the joint development of, e.g., voluntary product quality standards or information sharing about (input) product quality, whereas a truncated analysis may be appropriate when competitors agree "*on the pricing or features of the products they will and will not sell*." [22] In the abstract, well enough. But the *Macaroni* case is easily distinguished to the point where it is hard to see how platform content-moderation policies could be tantamount to price fixing. Without opining on the facts alleged and ways in which they might or might not fit the law, the DOJ's Statement seems to elide all the hard questions about the ways in which platform content moderation might or might not run afoul of the antitrust laws. It is unclear whether there is anything left to their clarification beyond the tepid point that non-price dimensions of competition may be relevant to antitrust analysis.

15. Similarly, we might consider the DOJ's numerous citations to the Supreme Court's 1945 decision in *Associated Press*, [23] which was about exclusionary conduct and not content moderation or non-price competition. Nothing in the decision turns on the question of whether the AP had unduly restricted its own access to news and thus had diminished the quality of its own product, or access to any specific quantity or quality of news on the part of its members. As detailed more below, it is not clear that the case says anything about the First Amendment considerations that a content moderation antitrust case might pose. Leaving aside the question of how to read *Associated Press* through the lens of subsequent First Amendment jurisprudence, the DOJ's Statement seems to establish little (if anything) more than the proposition that the business conduct of firms engaged in protected speech, among other activities, is not generally immune from antitrust scrutiny, even if some of their business conduct may be.

16. The DOJ's Statement indulges in high-flying language about the importance of antitrust and "*viewpoint competition in the marketplace of ideas*." Yet it avoids or even obscures everything that is hard about the underlying controversy—and indeed the

21. *See* Comments of the International Center for Law & Economics, *supra* note 14, at 20.

22. Statement of Interest of the United States, *supra* note 10, at 13.

23. *Associated Press v. United States*, 326 U.S. 1 (1945).

larger issue—on at least two fundamental points:

- What would it take for the plaintiffs to prevail on—or even establish antitrust standing to bring—their underlying antitrust complaint?
- How might antitrust liability or remedies be subject to First Amendment limitations?

17. The question of liability—and, indeed, the requirements of antitrust standing (above and beyond Article III standing)—goes to the basic question of what it would take for the plaintiffs in the case at issue to establish, or even adequately plead, harm to competition, and not just harm to the plaintiffs themselves. Stepping back from the facts alleged in the underlying private complaint, The DOJ's Statement sheds little to no light on the questions whether and under what conditions the content moderation policies of tech platforms might run afoul of the antitrust laws, independent of First Amendment questions.

II. Antitrust, content moderation, and the First Amendment

18. The DOJ's Statement does little to clarify the extent to which the First Amendment may cabin or even preclude antitrust liability for private content moderation decisions, whether cases are brought by private plaintiffs or a government enforcement agency. And the First Amendment questions are many. The Statement's numerous citations to *Associated Press* ignore what may be key aspects of that decision, even as it seeks to clarify the relationship between antitrust and the First Amendment as the Court understood it in 1945. How to read it through the lens of subsequent First Amendment jurisprudence—notably, cases involving news organizations, such as *Miami Herald Pub. Co. v. Tornillo* [24] and online content moderation, such as *Moody v. NetChoice* [25]—is hardly considered at all.

19. Moreover, much as with the FTC's platform censorship inquiry, the DOJ's Statement elides the First Amendment's distinction between government action and private action. The Statement cites, among other sources, Nobel laureate economist F. A. Hayek and Justice Oliver Wendell Holmes' dissent in *Abrams v. United States*, [26] to bolster the idea that diverse sources of speech are good for the marketplace of ideas. But these citations argue against government restrictions on speech, not against private ordering.

20. The Supreme Court has repeatedly made clear that the First Amendment only restrains government actors, [27] and that it affords private actors wide latitude to police speech on their property. [28] Antitrust law, after all—certainly antitrust action by federal enforcers—is government action, itself subject to the First Amendment. [29] The DOJ cites Hayek to bolster the argument that antitrust law may be used to ensure diverse voices in the marketplace of ideas. [30] But DOJ's citation is inapposite. Hayek's article—"The Use of Knowledge in Society"—argues that market actors, rather than government bureaucrats, are best positioned to utilize dispersed information. The article cited by the DOJ argues against central control by government actors.

21. The DOJ's Statement also ignores the limitations on remedies presented by the *Associated Press* decision itself. There, the Court noted: "*The decree does not compel AP or its members to permit publication of anything which their 'reason' tells them should not be published. It only provides that, after their 'reason' has permitted publication of news, they shall not, for their own financial advantage, unlawfully combine to limit its publication*." [31] In other words, antitrust remedies may not compel social-media platforms to publish material they do not wish to publish, whether because it is purported misinformation or for any other

24. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974).

25. *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024).

26. *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J., dissenting).

27. *Manhattan Community Access Corp. v. Halleck*, 139 S. Ct. 1921 (2019).

28. *Moody*, 603 U.S. at 731 ("[T]*he First Amendment offers protection when an entity engaging in expressive activity, including compiling and curating others' speech, is directed to accommodate messages it would prefer to exclude*.").

29. *See*, e.g., B. Sperry, First Amendment Conflict of Visions Redux: The Case of Facebook's Oversight Board and the Threat of Antitrust Action, *Truth on the Market*, May 12, 2020, https://truthonthemarket.com/2020/05/12/first-amendment-conflict-of-visions-redux-the-case-of-facebooks-oversight-board-and-the-threat-of-antitrust-action/.

30. Statement of Interest of the United States, *supra* note 10, at 5 (citing F. A. Hayek, The Use of Knowledge in Society, *Amer. Econ. Rev.*, Vol. 35, No. 4, 1945, pp. 519–530).

31. *Associated Press*, 326 U.S. at 20, n.18.

reason.

22. And, of course, there is the Supreme Court's 2024 decision in *Moody v. NetChoice*. At issue there were Florida and Texas laws that purported to regulate "*large social-media companies and other internet platforms*." [32] While recognizing that the state laws differed in various respects, the Court noted that both laws would "*curtail the platforms' capacity to engage in content moderation—to filter, prioritize, and label the varied third-party messages, videos, and other content their users wish to post*." [33] The decision seems very much on point, even if the content moderation at issue may not exhaust the issues of potential concern to the FTC. In *Moody*, the Court reasoned that "*a State may not interfere with private actors' speech to advance its own vision of ideological balance. States (and their citizens) are of course right to want an expressive realm in which the public has access to a wide range of views. That is, indeed, a fundamental aim of the First Amendment. But the way the First Amendment achieves that goal is by preventing* the government *from 'tilt[ing] public debate in a preferred direction.'* Sorrell v. IMS Health Inc.*, 564 U. S. 552, 578–579 (2011). It is not by licensing the government to stop private actors from speaking as they wish and preferring some views over others. And that is so even when those actors possess 'enviable vehicle[s]' for expression.* [*Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 577 (1995).] *In a better world, there would be fewer inequities in speech opportunities; and the government can take many steps to bring that world closer. But it cannot prohibit speech to improve or better balance the speech market. On the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana. That is why we have said in so many contexts that the government may not 'restrict the speech of some elements of our society in order to enhance the relative voice of others.'* Buckley v. Valeo*, 424 U. S. 1, 48–49 (1976)* (per curiam*). That unadorned interest is not 'unrelated to the suppression of free expression,' and the government may not pursue it consistent with the First Amendment*." [34]

23. It is worth noting that courts have consistently rejected claims that would require tech platforms to carry speech. In *Jian Zhang v. Baidu.com*, [35] the U.S. District Court for the Southern District of New York found that the application of a New York public accommodations law to a Chinese search engine that "censored" pro-democracy speech is inconsistent with the right to editorial discretion, stating that "*there is a strong argument to be made that the First Amendment fully immunizes search-engine results from most, if not all, kinds of civil liability and government regulation*." [36] Other courts have similarly found that tech platforms have a right to editorial discretion that limits antitrust claims. [37]

24. An antitrust case against advertisers would likely fare no better. In *FTC v. Superior Ct. Trail Lawyers Ass'n*, [38] the Supreme Court considered the interaction of antitrust law and the First Amendment in a group-boycott case in which a lawyer's association joined together to refuse to represent indigent defendants until the District of Columbia government increased their fees. [39] The Court distinguished the case from *NAACP v. Claiborne Hardware Co.*, [40] arguing that in this case "*the undenied objective of* [the lawyer association's] *boycott was an economic advantage for those who agreed to participate*," [41] while the black citizens who boycotted white merchants in Claiborne County, Mississippi, "*sought no special advantage for themselves*." [42] The government may regulate economic activity, but it may not infringe the First Amendment in doing so.

25. Here, the motivation for advertisers to withdraw from various platforms may be driven by various considerations beyond the mere economic, such that it would be challenging to attribute a motive of consolidating or exercising market power. That might be a relatively trivial point with unilateral conduct.

32. *Moody*, 603 U.S. at 707.

33. Ibid.

34. Ibid. at 741–742.

35. 10 F. Supp. 3d 433 (S.D. N.Y. Mar. 28, 2014).

36. Ibid. at 438.

37. *See*, e.g., *E-Ventures Worldwide LLC v. Google Inc.*, 2017 WL 2210029, at *4 (M.D. Fla. Feb. 8, 2017); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 629–630 (D. Del. 2007).

38. 493 U.S. 411 (1990).

39. *See* ibid. at 414.

40. 458 U.S. 886 (1982).

41. *Superior Ct. Trail Lawyers Ass'n*, 493 U.S. at 426.

42. Ibid.

But that attribution would be challenging with joint conduct as well. Even the DOJ's Statement recognizes that joint conduct about minimum quality standards or the identification of unreliable or otherwise damaging sources might be a case of voluntary standard setting, which could be procompetitive. [43] Turning to First Amendment concerns, a reviewing court would likely see an advertiser's decision not to be associated with content that it finds damaging to its brand to be a legitimate expression of its First Amendment rights. The decision to disassociate from particular content ecosystems could reflect an exercise of expressive choice, or a prudent measure to safeguard intangible reputational assets—activities that may themselves possess First Amendment dimensions. Decisions to adhere to, or participate in, standard-setting on these dimensions seem to raise the same constitutional questions.

26. While preserving brand equity is undeniably intertwined with a firm's overall economic well-being, it is analytically distinct from a concerted effort to manipulate market conditions in ways traditionally scrutinized under antitrust doctrines. Indeed, decisions to curtail advertising, while potentially serving long-term reputational interests or expressive aims, might concurrently impose immediate opportunity costs or a reduction in revenue, to the extent that advertising correlates with product or service sales. Ascertaining the primary impetus behind such conduct—whether predominantly expressive, reputational, or anticompetitively economic in the *Trial Lawyers* sense—presents a nuanced evidentiary challenge.

27. In either case, antitrust agencies would confront a formidable challenge if they sought to design remedies in such a case that would comport with existing First Amendment jurisprudence. Governmental compulsion of speech by private entities is generally disfavored. Social-media companies' creation of expressive products through curation and other moderation decisions, and businesses' decisions on whether or not to advertise on a particular platform, are both First Amendment-protected activities. Consequently, any remedial measure that would compel a social-media entity to host specific speech or mandate that businesses engage in specific advertising would likely raise substantial First Amendment questions.

28. There may be a path through the thicket. But the path is not obvious, and the prospect of its discovery seems unpromising.

III. Settlements, agency letters and soft law?

29. Several additional forays by the agencies—especially the FTC—merit consideration. One is a consent order in a merger matter involving Omnicom Group's acquisition of the Interpublic Group of Companies. [44] Also of interest are a series of letters sent to various tech firms by Andrew Ferguson, in his capacity as chairman of the FTC. [45] In *Omnicom*, the FTC had filed a complaint alleging that there had been a history of coordination in the market for media-buying services and that a "*history of coordination in an industry creates the risk of future coordination, in particular post-merger, where there will be one less significant competitor*." [46]

43. *See* Statement of Interest of the United States, *supra* note 10, at 13 ("[V]*oluntary product standards promulgated with 'meaningful safeguards' can sometimes have 'significant procompetitive advantages.'* Allied Tube & Conduit Corp. v. Indian Head, Inc., *486 U.S. 492, 501 (1988)*.").

44. Decision and Order, Fed. Trade Comm'n, *In the Matter of Omnicom Group Inc. and the Interpublic Group of Companies, Inc.*, docket No. C-4823, Sept. 26, 2025, https://www.ftc.gov/system/files/ftc_gov/pdf/OmnicomOrder.pdf.

45. *See* Fed. Trade Comm'n, Press Release, FTC Chairman Ferguson Warns Companies Against Censoring or Weakening the Data Security of Americans at the Behest of Foreign Powers, Aug. 21, 2025, https://www.ftc.gov/news-events/news/press-releases/2025/08/ftc-chairman-ferguson-warns-companies-against-censoring-or-weakening-data-security-americans-behest (regarding letters sent to "*more than a dozen prominent technology companies*"); Model Letter Sent to Tech Companies from Andrew N. Ferguson, *supra* note 1; Fed. Trade Comm'n, Press Release, Federal Trade Commission Chairman Andrew N. Ferguson Issues Letter on Gmail Using Partisan Filtering, Aug. 28, 2025, https://www.ftc.gov/news-events/news/press-releases/2025/08/federal-trade-commission-chairman-andrew-n-ferguson-issues-letter-gmail-using-partisan-filtering; Letter from Andrew N. Ferguson, FTC Chairman, to Sundar Pichai, Alphabet Corp., re Potential FTC Act Violations Related to Partisan Administration of Gmail, Aug. 28, 2025, https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-letter-alphabet-ceo-re-potential-ftc-act-violations-related-to-partisan-administration-of-gmail.pdf.

46. Complaint, Fed. Trade Comm'n, *In the Matter of Omnicom Group Inc. and the Interpublic Group of Companies, Inc.*, docket No. C-4823, at 3 (Sept. 26, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/2410059C4823OmnicomComplaint.pdf. The complaint defined "Media Buying Services" as "*media purchases of advertising inventory across any type of media and purchases on behalf of, or for later resale to, customers or potential customers (advertisers) but does not include other media services sold or billed separately by the company, such as media planning*

30. Perhaps. A history of unlawful, anticompetitive coordination involving merging parties might well underscore concerns about post-merger conduct. At the same time, the complaint did not allege a history of price fixing or market allocation agreements among the parties to the transaction; it did not allege that the merger was likely to lead to price fixing involving the merged entity and others in the market; and it did not allege (or explain how) the merger was likely to lead to increased prices or reduced output in the relevant market. Rather, it focused on the potential for a reduction in non-price competition. As we saw above discussing the DOJ's SOI in *Children's Health Defense*, the *Omnicom* complaint noted the potential for firms to coordinate on, e.g., standards of harmful or sensitive content. Further, the FTC complaint stated, "[s]*uch practices may have influenced the approaches of online platforms to censor speech about controversial topics and deny access or services to users. Such approaches are relatively transparent and easily observable by competitors*." [47]

31. In the abstract, an enforcer might well be concerned about the prospect of coordinated action post-merger. Coordination, like the acquisition of market power, may raise concerns about increased prices, reduced output, or, indeed, increased quality-adjusted prices. But the complaint makes a weak case for such concerns, and it raises all the problems we saw above with the DOJ's Statement and the FTC's request for information. It raises such concerns, but it does nothing to resolve them. Moreover, given such concerns, and given a thoroughgoing lack of precedent (or economic basis) for such a case, one might well worry if merger complaints seem to be raised, and settled, conditional on a regulator's comfort with a deal's potential (whether likely or not) impact on the marketplace of ideas (or, as in this case, advertising ideas).

32. One interesting question is whether these types of enforcement actions could amount to unconstitutional coercion. In *NRA v. Vullo*, [48] the Supreme Court considered the efforts of the New York State Department of Financial Services (DFS) to strong-arm consent decrees with an insurer and an insurance broker designed to harm the advocacy efforts of the National Rifle Association (NRA). The DFS had those entities "*agree*[] *not to provide any NRA-endorsed insurance programs (even if lawful)*" [49] The Court ruled 9-0 that this was unconstitutional coercion, stating that "*a government official cannot do indirectly what she is barred from doing directly: A government official cannot coerce a private party to punish or suppress disfavored speech on her behalf*." [50] Despite the DFS having authority over insurance regulation, it could not use that authority to suppress speech activities.

33. Here, the issue is slightly different, as the FTC is attempting to use a consent order to ensure Omnicom cannot coordinate with other advertisers nor act on its own to direct, refuse, or decline advertisements based on "*political or ideological viewpoints expressed in content*" of media publishers. [51] In other words, the FTC is trying to compel advertisers not to consider what content ads may run beside on social media platforms or other forms of media. Businesses that do not wish for their advertising dollars to run alongside content they find distasteful because it could harm their brand (and thus bottom line) should have the ability to employ advertising agencies to help them in their goals. This is the reverse issue of that presented in *Vullo*, one that was considered in *Moody* with a twist: whether the government can indirectly compel speech by forbidding advertising agencies from considering viewpoints on those media platforms. Nonetheless, the same principle should apply: the government cannot do indirectly what it may not do directly.

34. The FTC could argue that it is merely attempting to fulfill its enforcement mandate. Settlements may efficiently resolve antitrust concerns, and the agency has wide latitude when entering into consent agreements with merging parties. But it is not clear that FTC orders can coerce advertising agencies to carry material against their better business judgment and their customers' wishes without violating the First Amendment. This is why the order is careful to state that it only applies to agreements between Omnicom and "*any third party with respect to Media Buying Services*" and not to "*any agreement* (. . .) *between Omnicom and an Advertiser*," making clear that "*exclusion lists* (. . .) *or Other means of*

or campaign management." Ibid.

47. Ibid. at 4.

48. 602 U.S. 175 (2024).

49. Ibid. at 185.

50. Ibid. at 190.

51. Decision and Order, *supra* note 44, at 3.

differentiating between Media Publishers developed at the express direction of a particular client (. . .) *are expressly permitted*." [52] Nonetheless, the focus of the order as a whole is clearly on the issue of content, not the normal concerns of collusion to fix prices, reduce output, or allocate markets.

35. The letters to various tech companies offer another example of the FTC's efforts to curtail what it sees as censorship. These letters were issued in August 2025. First, on August 21, the FTC announced a series of letters from Andrew Ferguson, in his capacity as chairman of the FTC, to "*more than a dozen*" tech firms, including Akamai, Alphabet, Amazon, Apple, Cloudflare, Discord, GoDaddy, Meta, Microsoft, Reddit, Signal, Snap, Slack and X, and posted a "model letter." [53] The letters noted that "[b]*ecause online platforms have become so critical to public discourse, pervasive online censorship in recent years has outraged the American people. Not only have Americans been censored and expelled from platforms for uttering opinions and beliefs that were not shared by a small Silicon Valley elite, the previous administration actively worked to encourage such censorship*." [54]

36. The letters also suggest that such "*censorship*" might be a response to regulatory or other pressures imposed by foreign governments, and cautioned that compliance with such pressures might violate Section 5 of the FTC Act, including the consumer protection or unfair or deceptive acts or practices (UDAP) prong of Section 5 if, for example, firms promised a certain level or mechanism of security for consumers' personal information but failed to deliver on that promise.

37. Rhetorical flourishes aside, we do not doubt that some Americans have been displeased and others outraged by the moderation practices of one or another tech platform, even as others may have felt differently. Moreover, the letter is correct in that substandard privacy and security practices by tech firms (among others) might be in violation of Section 5, whether or not imposed in response to foreign pressure. As informal guidance for industry—albeit not under the imprimatur of the Commission itself—the letter is potentially useful. At the same time, it adds almost nothing to extant guidance from the agency, but for the strained bundling with the question of content moderation at the heart of this essay.

38. The August 28 letter to Sundar Pichai, CEO of Alphabet (Google's parent company), is similar, but seems more pointed—perhaps even threatening. As above, the letter raises concerns about potential violations of Section 5 of the FTC Act, with a focus on the consumer protection prong. But the letter to Pichai stops just short of alleging that conduct by Google violates the FTC Act. Citing contestable allegations by third parties, and no legal or research findings, [55] Ferguson writes to Pichai, "*due to recent reporting that suggests Alphabet's administration of Gmail is designed to have partisan effects, and accordingly to notify you that Alphabet may be engaging in unfair or deceptive acts or practices*." [56]

39. Again, there is no reason why an agency might not provide guidance to industry, and no reason why an FTC chairman, or any other sitting commissioner, might not raise general concerns about either competition or consumer protection matters under the agency's jurisdiction. The question remains whether writing "[a]*s the Chairman of the FTC, I write to inform you of your obligations under the FTC Act. Any act or practice inconsistent with these obligations could lead to an FTC investigation and potential enforcement action*" [57] is just that, or something more. There may be many fine lines on a spectrum running from inquiry, to opining, to "*jawboning*," [58] to pressure, to coercion. We are not sure where best, along that spectrum, to situate the missives from the chairman (but not the Commission). We are unsure, notwithstanding Chairman Ferguson's welcome assurance, in his letter, that "*President Trump has put a swift end to the weaponization of the federal government against Americans and their freedoms* (. . .)" [59]

52. Ibid. at 3–4.

53. Model Letter Sent to Tech Companies from Andrew N. Ferguson, *supra* note 1.

54. Ibid. at 1.

55. For a critique of the citations in the letter, *see* D. J. Gilman, Antitrust at the Agencies: Moderation in All Things Edition, *Truth on the Market*, Sept. 3, 2025, https://truthonthemarket.com/2025/09/03/antitrust-at-the-agencies-moderation-in-all-things-edition/.

56. Letter from Andrew N. Ferguson to Sundar Pichai, Alphabet Corp., *supra* note 45, at 1.

57. Ibid. at 2.

58. W. Duffield, Jawboning against Speech, Cato Institute, Sept. 12, 2022, https://www.cato.org/policy-analysis/jawboning-against-speech.

59. Model Letter Sent to Tech Companies from Andrew N. Ferguson, *supra*

IV. Conclusion

40. Our conclusion is brief and limited. The U.S. agencies are right that non-price dimensions of products and services might rightly figure in competition matters. That is an entirely uncontroversial position. They are right, too, that the firms operating such platforms are not generally immune from antitrust scrutiny, across all conduct and all lines of business, simply because they engage in protected speech. That, too, is entirely uncontroversial. At the same time, the conditions under which an enforcer might make out a good antitrust case about a platform's content moderation policies seem limited and poorly fit to what is generally known about such policies. The same might be said of consumer protection actions under the FTC Act. Moreover, the Supreme Court has been clear that the First Amendment's prohibition of censorship regards government censorship, not private moderation, and that the speech clause protects content moderation decisions against government intervention that would otherwise fall within state or federal police powers. What is left for content moderation by tech platforms at the intersection of antitrust liability and the First Amendment may or may not be the empty set. But it is limited, to be sure. And the agencies' ongoing inquiries and interventions in the space seem an unpromising waste of limited resources, at best.

D. G. & B. S. ■

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note 1, at 1

Content Moderation and Antitrust: Part VII - Antitrust, content moderation, and the First Amendment

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Social media platforms and media companies increasingly face the prospect of antitrust regulation of their content moderation activities. But there are important constitutional questions raised by such regulation, because content-moderation involves expressive activity protected by the First Amendment. Where the government directly targets speech qua speech, the courts have applied a virtually automatic rule of invalidity, especially where there are concerns that the government has targeted expressive activity out of concern or disagreement with the manner in which the right has been exercised. Only where content moderation has an economic dimension in addition to its expressive element will government antitrust regulation have a chance of surviving First Amendment scrutiny. Even then, the courts have erected formidable obstacles to regulations that target a mixture of expression and economic activity. This suggests that social media platforms and media companies have powerful constitutional defenses to antitrust review of their content moderation activities.

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1. In *Moody v. NetChoice* (2024), [1] the Supreme Court held that content-moderation algorithms involve expressive activity protected by the First Amendment. The Court opined that a platform's algorithms reflect "*editorial judgments*" about "*compiling the third-party speech it wants in the way it wants*" [2] and is therefore the platform's own "*expressive product*" entitled to constitutional protection. But the Court also recognized that when "*the Government's interest was 'not the alteration of speech' (. . .) the prospects of permissible regulation are entirely different*." [3]

2. What is the difference between "*permissible regulation*" and prohibited restriction of speech? In particular, what are the constitutional limits on antitrust regulation of content moderation by social media platforms and media companies? For example, consider a proposed merger between two media companies—one (Company A) that allows free and open comments (oral, video, written) in reaction to its stories and coverage, and another (Company B) that has adopted a "no comments" policy. If the merger provides that Company A will be operated as a wholly owned subsidiary of Company B and will retain its editorial discretion, except that the "no comments" policy will be extended to Company A, may the government object to the merger on the ground that extension of the "no comments" policy will lead to a significant restriction in the creation, dissemination, and consumption of information and ideas?

3. Or consider six media companies that jointly agree to develop and adopt a "responsible comments" policy after a series of violent or harmful incidents were associated with or triggered by comments to news stories. Could such an agreement be challenged under Section 1?

4. Or consider a media company with an 80% share in the relevant market that adopts a policy that it will no longer host community news websites publishing stories questioning the safety of any FDA-approved vaccine. Could such a decision be challenged as a Section 2 violation?

5. These questions are not merely hypotheticals. Antitrust regulators already consider expressive activities as part of their analyses (usually without acknowledging the First Amendment implications) and make decisions that have impacts on free speech. In the 2025 *Omnicom/IPG merger*, [4] for example, the Federal Trade Commission's (FTC) complaint alleged an increased likelihood of collusion (or

1. 603 U.S. 707 (2024).

2. Ibid. at 718.

3. Add the following? Ibid. at 743.

4. *In the Matter of Omnicom Group, Inc. and The Interpublic Group of Companies, Inc.*, FTC File No. 251-0049.

perhaps coordination) post-merger and ongoing coordination or collusion among media-buying agencies (which advise advertisers on where to place ads) to exclude certain platforms from access to their clients' advertisements. But is the choice of a platform part of the freedom of expression protected by the First Amendment?

6. Similarly, an Antitrust Division merger complaint issued in conjunction with the settlement of antitrust issues in a textbook company merger between Cengage Learning and Houghton Mifflin cited the risk that the proposed merger might have a negative impact on the quality of textbooks. [5] But does that represent a forbidden judgment regarding the content of speech?

7. The answer to these issues requires a nuanced consideration of both antitrust and free speech principles. On the one hand, the First Amendment does not provide media companies with immunity from antitrust law, as the Supreme Court made clear 80 years ago in *Associated Press v. United States* (1945) [6] in holding a group boycott illegal despite the fact that its members were newspapers (AP bylaws provided that members could not sell news to non-members and granted each member powers to block its non-member competitors from membership): "*The fact that the publisher handles news, while others handle food, does not* (. . .) *afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices*." [7] By the same token, closure of an adult bookstore where prostitution is taking place does not offend the First Amendment (*Arcara v. Cloud Books* (1986) [8]), nor would arrest of a newscaster for a traffic violation (even if she were en route to a studio for a show) or enforcement of employment nondiscrimination laws against job postings that sought to hire persons of only one race or gender (*Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations* (1973) [9]). In all these cases, the administration of generally applicable laws to economic activity (in a way that does not depend in any way on the content of expression) does not raise First Amendment issues.

8. Yet in *NAACP v. Claiborne Hardware Co*. (1982), [10] the Supreme Court held that that the First Amendment immunized a civil rights boycott from state antitrust law because the conduct at issue was "*a nonviolent, politically motivated boycott*" that was not intended "*to destroy legitimate competition*" but rather "*designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution*." [11] In other words, the boycott was a form of political expression rather than economic pressure. In that case, application of the antitrust laws targeted speech and only speech and therefore was blocked by the First Amendment. As the Court opined in another case, "[t]*here are, of course, some activities, legal if engaged in by one, yet illegal if performed in concert with others, but political expression is not one of them*" (*Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley* (1981) [12]).

9. The Supreme Court attempted to harmonize these two disparate strands of jurisprudence—one rejecting the First Amendment defense to antitrust claims, and the other accepting it—in *FTC v. Superior Court Trial Lawyers Ass'n* (1990), [13] where the Court upheld the application of the longstanding per se prohibition on group boycotts to a group of private attorneys who regularly acted as court-appointed counsel for criminal defendants in the District of Columbia. The Court held that an agreement among the criminal defense lawyers to stop providing such representation until the District increased group members' compensation was not protected by the First Amendment because the lawyers were "*business competitors who 'stand to profit financially from a lessening of competition in the boycotted market.' No matter how altruistic the motives of respondents may have been, it is undisputed that their immediate objective was to increase the price that they would be paid for their services*." [14]

5. Complaint, *United States v. Cengage Learning Holdings I, L.P.*, No. 1:08-cv-00899 (D.D.C. filed May 28, 2008), at ¶ 17 (citing likelihood that combined company would "*reduce its investment or other efforts to develop new or improved textbooks*"); ibid. at ¶ 23(c) ("*the rate of quality improvements in the textbooks and ancillary materials in each relevant market likely will decline*").

6. 326 U.S. 1 (1945).

7. Ibid. at 7.

8. 478 U.S. 697 (1986).

9. 413 U.S. 376 (1973).

10. 458 U.S. 886 (1982).

11. Ibid. at 914.

12. 454 U.S. 290, 296 (1981).

13. 493 U.S. 411 (1990).

14. Ibid. at 427.

10. The difference, in other words, is whether the boycott (or other challenged conduct) operates on the political level (where it would have an expressive element protected by the First Amendment) or on the economic level (where it would be subject to prohibition under the antitrust laws). As the Court explained in the *Superior Court Trial Lawyers* case: "*Those who joined the* Claiborne Hardware *boycott sought no special advantage for themselves*," but rather were trying to "*change a social order*" they considered unjust, whereas "*the undenied objective of* [the trial lawyers'] *boycott was an economic advantage for those who agreed to participate*." [15]

11. The Supreme Court's synthesis suggests that applying the antitrust laws to content moderation agreements and activities will raise grave First Amendment questions to the extent that the target of the government's regulation can be regarded as expressive. Where the government directly targets speech qua speech, the courts have applied a virtually automatic rule of invalidity, especially where there are concerns that the government has targeted expressive activity out of concern or disagreement with the manner in which it has been exercised. Only where content moderation has an economic dimension in addition to its expressive element—that is, where it involves the kind of financial or economic interest that the Court identified in *Superior Court Trial Lawyers*—will government antitrust regulation have a chance of surviving First Amendment scrutiny.

12. Even then, the Supreme Court has erected formidable obstacles to regulations that target a mixture of expression and economic activity. The Court has instructed that "*when 'speech' and 'nonspeech' elements are combined in the same course of conduct*," "*incidental restriction on* (. . .) *First Amendment freedoms*" are permissible only (i) if the government establishes "*a sufficiently important governmental interest in regulating the nonspeech element*" that "*is unrelated to the suppression of free expression*," and (ii) "*if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest*" (*United States v. O'Brien* (1968) [16]). Government may not regulate such mixed activity in such a manner that a substantial portion of the burden on speech does not serve to advance its goals; rather, government must ensure that, even when its regulation is not content-based, the restriction narrowly "*focuses on the source of the evils the* [government] *seeks to eliminate*" (*Ward v. Rock Against Racism* (1989) [17]). That is what it means for a law to be "*narrowly tailored*" to the government's interest.

13. Furthermore, where the First Amendment is involved, courts apply additional procedural guardrails to ensure that speech is not chilled or erroneously silenced. For example, the government may not, in a First Amendment case, apply a broad presumption that certain categories of speech are harmful without engaging in a more particularized examination. "*Broad prophylactic rules in the area of free expression are suspect*" (*NAACP v. Button* (1963) [18]). The First Amendment also requires courts to use a form of *de novo* review for issues of "*constitutional fact*" rather than deferring to determinations made by administrative agencies or lower courts (*Bose Corp. v. Consumers Union* (1984) [19]).

14. Under these principles, many instances of antitrust regulation of content moderation policies will be unlikely to survive First Amendment scrutiny. For example, where a regulator objects to a merger or other transaction on the ground that it will lead to a change in content moderation policies that will affect the creation, dissemination, and consumption of information and ideas, the government's interest appears to be directly (and impermissibly) tied to the content of speech. Where a regulator objects to an agreement among media companies to develop and adopt a "responsible comments" policy after violent incidents have been triggered by comments to news stories, the government's interest similarly appears to be tied to speech content. And where a regulator complains that a media company with a large market share has decided not to host certain community news websites with which it disagrees, the government's interest seems impermissibly content-based as well.

15. The constitutional limits on antitrust regulation of content moderation by social media platforms and

15. Ibid. at 426.

16. 391 U.S. 367, 376–377 (1968).

17. 491 U.S. 781, 799 (1989).

18. 371 U.S. 415, 438 (1963).

19. 466 U.S. 485 (1984).

media companies have yet to be definitely resolved, but enduring First Amendment principles appear to foreclose many regulatory strategies.

J. M. ■

Content Moderation and Antitrust: Part VIII - The First Amendment's red line between the expressive and commercial realms

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What can antitrust law do about the power of tech companies over online speech? In Moody v. NetChoice (2024), the US Supreme Court indicated that state laws forcing carriage of speech violated the First Amendment rights of online platforms, equating platforms with newspapers. Yet Moody reiterated that publishers have never been immune from antitrust law. This article explores how the First Amendment limits competition law by explaining how the Court has, since 1945, distinguished between the commercial and expressive realms. It concludes that antitrust law can police business practices, but not editorial judgments based on content or viewpoint.

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I. Introduction

1. What can the government do about the supposed political bias of Big Tech, advertisers, AI providers, or other intermediaries in digital media? A recent Supreme Court decision blocked direct must-carry mandates, yet left the door open for competition law to police those companies. [1] But does that include combating what some call private "censorship"?

2. Andrew Ferguson certainly thinks so. Lobbying to be made chairman of the Federal Trade Commission (FTC), he promised the White House he would "*Hold Big Tech Accountable and Stop Censorship*" and "*Focus antitrust enforcement against Big Tech monopolies, especially those companies engaged in unlawful censorship*." [2] Now, he says, "*investigating and policing censorship practices that run afoul of the antitrust laws is a top priority of the Trump-Vance FTC*." [3] The FTC has, indeed, opened a broad investigation of so-called censorship. [4]

3. Today's antitrust regulators know what they want: to stop "censorship" of "conservative" opinions. But they are not quite sure how to get there. Like Alice upon her arrival in Wonderland, they "*don't much care where*" their legal theories go, "*so long as* [they] *get somewhere*." [5] Then, as the Cheshire Cat told Alice, "*it doesn't matter which way you* [go]." [6] So, too, here—the legal arguments do not matter as long as this debate is essentially political.

4. That could remain true for years. Donald Trump has threatened tech companies with criminal prosecution for "blatant Interference of Elections." [7] Understandably, tech companies, advertisers and others across the tech ecosystem are desperate to avoid further inflaming him and his administration. As long as they're willing to settle rather than litigate, heated rhetoric and vague legal theories may suffice to bully the tech sector into submission. Indeed, the FTC and Department of Justice (DOJ) may avoid confronting the First Amendment at all. The FTC did just that recently: Two huge families of advertising

1. Moody v. NetChoice, LLC, 603 U.S. 707, 732 (2024).

2. FTC Commissioner Andrew M. Ferguson Overview, Punchbowl News, https://punchbowl.news/wp-content/uploads/FTC-Commissioner-Andrew-N-Ferguson-Overview.pdf.

3. Analysis of Agreement Containing Consent Order to Aid Public Comment, Omnicom Group Inc. and The Interpublic Group of Companies, Inc., 90 Fed. Reg. 27304 (June 26, 2025), at 27309, https://www.federalregister.gov/documents/2025/06/26/2025-11760/omnicom-group-inc-omnicom-and-the-interpublic-group-of-companies-inc-ipg-analysis-of-agreement.

4. Fed. Trade Comm'n, Press Release, Federal Trade Commission Launches Inquiry on Tech Censorship (Feb. 20, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/02/federal-trade-commission-launches-inquiry-tech-censorship.

5. L. Carroll, *Alice's Adventures in Wonderland*, Macmillan, London, 1865.

6. Ibid.

7. *See* D.J. Trump, @realDonaldTrump, Truth (Sept. 27, 2024), https://truthsocial.com/@realDonaldTrump/posts/113210776247146944.

agencies needed approval for their merger and were willing to agree to settlements to avoid political bias. That was the first time such theories have been put into enforceable legal requirements. [8]

5. Eventually, though, some company will refuse to settle, and judges will demand to know why the agencies' theories do not trigger the First Amendment—or why they pass constitutional muster. The DOJ recently offered such a theory, asserting that "*suppressing competition in the marketplace of ideas… is* (. . .) *a cognizable antitrust injury*" because "*individual liberty—and consumer welfare—benefit greatly from viewpoint competition in news markets and can suffer when that competition is reduced. News consumers desire and demand diverse perspectives*." [9] Effectively, DOJ argues, a non-price dimension of quality is reduced. Hence the government's supposed interest: "*Americans therefore vitally depend on viewpoint competition in the marketplace of ideas to limit the abuse of market power and ensure the free flow of information in our democracy*." [10]

6. In *Moody v. NetChoice* (2024), the Supreme Court seemed to say the opposite: "[I]*n case after case, the Court has barred the government from forcing a private speaker to present views it wished to spurn in order to rejigger the expressive realm*." [11] Whatever the mechanism, "*the government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas*." [12] Yet *Moody* added a proviso that has shaped the current debate: "*Of course, it is critically important to have a well-functioning sphere of expression, in which citizens have access to information from many sources*." [13] "*That is the whole project of the First Amendment*." [14]

7. But how can courts distinguish between the "*expressive realm*," [15] which the First Amendment protects, and the "*commercial world*," [16] which competition law may police? Is there a clear red line? Even if companies refuse to settle, getting clear judicial rulings could take years. [17] Yet we can already see just how limited the role of competition law really is: Economic self-interest alone cannot mark the border between the two realms, nor can First Amendment protection depend on the perception of listeners. Courts must, at a minimum, determine whether defendants are trying to "*destroy legitimate competition*" in a clearly defined market. [18]

8. Understanding this red line requires parsing the cases *Moody* cites, and, in turn, the cases they rely upon. We must follow the White Rabbit down his rabbit hole and see where it leads, doctrinally.

II. *Moody*: No government role in balancing media—except for competition law?

9. Our journey starts in 2021, after major platforms banned Donald Trump for his role in inciting the January 6 assault on the U.S. Capitol. Texas and

8. B. Szóka, Politicization of antitrust: Part IV – Advertiser boycotts, ad agencies, and political bias: A case study in politicization of competition law, *Concurrences* No. 7-2025, art. No. 127078. *See* Fed. Trade Comm'n, Analysis of Agreement Containing Consent Orders to Aid Public Comment, *In the Matter of Omnicom Group, Inc. and The Interpublic Group of Companies, Inc.*, File No. 251-0049, https://www.ftc.gov/system/files/ftc_gov/pdf/Omnicom-Analysis.pdf.

9. Statement of Interest of the United States at 1, *Children's Health Defense v. WP Company, LLC*, No. 1:23-cv-2735 (D.D.C. July 11, 2025), ECF No. 123.

10. Ibid.

11. *Moody*, 603 U.S. 707, 733 (2024).

12. Ibid. at 732.

13. Ibid. at 726.

14. Ibid. at 732.

15. Ibid. at 733.

16. *California Dental Ass'n v. FTC*, 526 U.S. 756, 773 (1999).

17. In 2021, Rumble sued Google for rigging user searches to prefer YouTube results over Rumble's competing video platform. It took over four years before the district court granted Google's motion for summary judgment purely on statute of limitations grounds. Order Granting Defendant's Motion for Summary Judgment, *Rumble, Inc. v. Google LLC*, No. 4:21-cv-00229-HSG (N.D. Cal. May 21, 2025), https://storage.courtlistener.com/recap/gov.uscourts.cand.371759/gov.uscourts.cand.371759.231.0.pdf. In August 2024, X and Rumble both filed lawsuits alleging that advertisers violated antitrust law by working together to coordinate their refusal to buy ads unless those platforms moderated user-generated content according to certain brand safety standards. Second Amended Complaint, X Corp. v. World Federation of Advertisers, 7:24-cv-00114-B (N.D. Tex. 2025), https://storage.courtlistener.com/recap/gov.uscourts.txnd.393003/gov.uscourts.txnd.393003.77.0_3.pdf; First Amended Complaint, Rumble Inc. v. World Federation of Advertisers, 7:24-cv-00115-O (N.D. Tex. 2024), https://storage.courtlistener.com/recap/gov.uscourts.txnd.393019/gov.uscourts.txnd.393019.13.0.pdf. Neither complaint cited a single court case, and neither company has yet filed a merits brief.

18. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 914 (1982).

Florida enacted laws that effectively compelled social media platforms to host user-generated content that the platforms found objectionable, including speech by political candidates. *Moody v. NetChoice* (2024) left no doubt that such must-carry mandates for social media violated the First Amendment: "[T]*he editorial judgments influencing the content of* [newsfeeds] *are* (. . .) *protected expressive activity. And Texas may not interfere with those judgments simply because it would prefer a different mix of messages*." [19] Platforms have the same First Amendment rights as newspapers; neither can be compelled to carry speech against their will. [20]

10. *Moody* relied on decades of First Amendment precedent, especially *Miami Herald* (1974), which acknowledged concern about the "*disproportionate 'influen[ce]' of a few speakers*" (about newspapers), which *Moody* called similar to the concern "*heard today*" (about platforms). [21] But in *Miami Herald*, that concern, said *Moody*, "*made no difference. However imperfect the private marketplace of ideas, here was a worse proposal—the government itself deciding when speech was imbalanced, and then coercing speakers to provide more of some views or less of others*." [22] As for newspapers, so too for platforms.

11. If competition law cannot do that, what can it do? *Moody* cited two cases for its proviso, without further commentary.

19. *Moody*, 603 U.S. 707, 708 (2024).

20. Ibid. at 728 (citing *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974)). The Court remanded the cases for further hearings as to whether some applications of the Texas and Florida laws in other circumstances might be constitutional on the facial challenges brought by plaintiffs. *Moody*, 603 U.S. at 744.

21. Ibid. at 723.

22. Ibid. at 732.

III. *Turner* and *Hurley*: What is, and is not, a legitimate government interest

12. *Turner Broadcasting v. FCC* (1994) upheld requirements that cable systems "*must carry*" broadcast channels "*to protect broadcast television from* (. . .) *unfair competition by cable systems*." [23] *Hurley* (1995) protected a parade organizer's right to decide what messages to include. [24] Together, *Turner* and *Hurley* make clear two key points that inform the limits of *Moody*'s proviso.

13. First, cable operators' power was unique. While a cable operator is, like a parade organizer—or a social media platform, noted *Moody* [25]—a "*conduit for speech produced by others and selected by cable operators for transmission*," it operates "*a franchised channel giving monopolistic opportunity to shut out some speakers*." [26] *Turner* called this "gatekeeper" power, but it meant something categorically different from the market power of newspapers, as noted in *Miami Herald*, or the way the term "gatekeeper" is now used in the European Union's Digital Markets Act. [27] Cable's "*bottleneck*" power rested on control over "*the physical connection between the television set and the cable network*," [28] which was then the only way to bring multi-channel video programming into homes, not only because of the "*extraordinary expense of constructing more than one cable television system to serve a particular geographic*

23. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 647, 652 (1994).

24. *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995).

25. *Moody*, 603 U.S. 707, 713 (2024).

26. *Hurley*, 515 U.S. at 577.

27. Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265, 12.10.2022, p. 1, Art. 3(1) ("*An undertaking shall be designated as a gatekeeper if: (a) it has a significant impact on the internal market; (b) it provides a core platform service which is an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future*.").

28. *Turner*, 512 U.S. 622, 657 (1994).

area" [29] but also because of "*local franchising requirements*." [30] Thus, "*unlike speakers in other media,* [cable operators] *can thus silence the voice of competing speakers with a mere flick of the switch*." [31] No tech company has anything like this power, which clearly rested on government monopoly franchising of the cable operator. Not even Justice Samuel Alito's dissent in *Moody* argued otherwise.

14. Second, cable operators' government-granted monopoly gave "*rise to the Government's interest in limiting monopolistic autonomy in order to allow for the survival of broadcasters who might otherwise be silenced and consequently destroyed*." [32] Because this interest "*was 'not the alteration of speech'* (. . .), *the prospects of permissible regulation* [were] *entirely different*" from "*regulating the parade*" in *Hurley* or "*regulating Facebook's News Feed or YouTube's homepage*." [33]

15. By pointing to these two discussions in *Turner* to support its proviso about competition law, *Moody* made clear what competition law could not do. In his *Moody* dissent, Justice Samuel Alito claimed the government interest considered valid in *Turner* ("*promoting the widespread dissemination of information from a multiplicity of sources*" [34]) was "*similar*" to the interest asserted by Texas and Florida in "*fostering a free and open marketplace of ideas*." [35] The *Moody* majority disagreed with both aspects of this comparison: The interest *Turner* upheld as valid "*was not to balance expressive content*," but to "*save the local-broadcast industry, so that it could continue to serve households without cable*," [36] and was thus "*unrelated to the content of expression*" disseminated by either cable or broadcast speakers. [37] Texas, said the majority, asserted an interest in "*changing the balance of speech on the major platforms' feeds, so that messages now excluded will be included*." [38] Thus, said the *Moody* majority, *Turner* "*offers no help to speak of*" to Texas and Florida. By the same token, *Turner* cannot justify the use of competition law to attempt to change the balance of speech. [39]

16. *Moody*'s citation to *Turner* also illustrated what competition law could do. That passage of *Turner* cited two cases: "Associated Press *and* Lorain Journal *both involved actions against members of the press brought under the Sherman Antitrust Act* (. . .)" [40] Our journey proceeds to these cases before returning to *Turner* and the history of must-carry obligations in communications law to explain how the Court gradually built upon those cases in ways that have confused the current debate—but, once properly understood, should not.

IV. The baseline of competition law: *Associated Press* and *Lorain Journal*

17. "[Newspapers] *are engaged in business for profit exactly as are other business men who sell food, steel, aluminum, or anything else people need or want*," said *Associated Press* (1945). [41] "*The fact that the publisher handles news, while others handle food, does not* (. . .) *afford the publisher a peculiar constitutional sanctuary in which he can with impunity violate laws regulating his business practices*." [42] Whether that is actually what is being regulated is a question of fact.

18. The Associated Press had "*bylaws which prohibited all AP members from selling news to nonmembers, and which granted each member*

29. Ibid. at 633.

30. Ibid.

31. Ibid. at 656.

32. *Hurley*, 515 U.S. 557, 577 (1995).

33. *Moody*, 603 U.S. 707, 742-43 n. 10 (2024); ibid. at 744 (calling these "*the heartland applications of the Texas law*").

34. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 180, 189 (1997).

35. *Moody*, 603 U.S. at 785.

36. Ibid. at 742-43 n. 10.

37. *Turner*, 512 U.S. 622, 647 (1994).

38. *Moody*, 603 U.S. 707, 732, 743 (2024).

39. In her concurring opinion, Justice Amy Coney Barrett relied on Turner for a different reason: "[T]*echnology may attenuate the connection between content-moderation* actions (e.g., *removing posts) and human beings' constitutionally protected right to* 'decide for [themselves] *the ideas and beliefs deserving of expression, consideration, and adherence.'* Turner Broadcasting System, Inc. *v.* FCC*, 512 U. S. 622, 641 (1994) (emphasis added). So the way platforms use this sort of technology might have constitutional significance*." Ibid. at 746 (Barrett, J., concurring). She did not elaborate on this speculation, and because it does not touch upon competition law, it is not discussed here.

40. *Turner*, 512 U.S. 622, 640 (1994).

41. *Associated Press v. United States*, 326 U.S. 1, 7 (1945).

42. Ibid.

powers to block its nonmember competitors from membership." [43] These "*provisions* [were] *designed to stifle competition in the newspaper publishing field*" and "*hindered and impeded the growth of competing newspapers*." [44] Thus, they violated Section 1 of the Sherman Act. [45]

19. Likewise, in *Lorain Journal* (1951), the trial court "*found that, at all times since WEOL commenced broadcasting*" in Lorain County, the sole local newspaper there "*executed a plan conceived to eliminate the threat of competition from the* [radio] *station. Under this plan, the publisher refused to accept local advertisements in the Journal from any Lorain County advertiser who advertised or who appellants believed to be about to advertise over WEOL*." [46] The newspaper's attempt to maintain its monopoly by coercing advertisers to boycott its rival violated Section 2 of the Sherman Act.

20. These two cases would be cited routinely in subsequent antitrust cases involving publishers. For example, in *Citizen Publishing* (1969), certain provisions of a joint operating agreement between two newspapers in the same market amounted to restraints on competition that "*have no support from the First Amendment as* Associated Press (. . .) *teaches*." [47] In *Times-Picayune* (1953), one of two newspapers in New Orleans was accused of violating the antitrust laws by requiring anyone who wanted to buy an advertising insert in that newspaper's morning edition to buy one in the evening edition as well; this allegedly harmed its rival, which published only an evening edition. [48]

21. Critically, in all four cases, the remedy (or potential remedy) did not interfere with publishers' editorial judgments, just as it was essential in *Turner* that cable operators were not being compelled to carry content that they objected to for editorial reasons (only business reasons). [49] In *Associated Press*, the trial court's decree did not "*compel AP or its members to permit publication of anything which their 'reason' tells them should not be published. It only provides that, after their 'reason' has permitted publication of news, they shall not, for their own financial advantage, unlawfully combine to limit its publication*." [50] The *Lorain Journal* was simply barred from forcing local advertisers to boycott the radio station by refusing to deal with any advertiser who chose to do business with the radio station. In *Citizen Publishing*, the remedial decree regulated "[n]*either news gathering nor news dissemination*," and dealt "*only with restraints on certain business or commercial practices*." [51] In *Times-Picayune*, had the government not failed to prove its case, [52] the remedy would have, presumably, been to allow advertisers to purchase an advertising insert in certain in either its morning or evening edition.

22. *Turner* mentioned *Associated Press* and *Lorain Journal* as examples of "*precedents governing legislative efforts to correct market failure in a market whose commodity is speech*," which "*warrant* [only] *rational-basis scrutiny*." [53] But the must-carry mandate in *Turner* was different: "*laws that single out the press, or certain elements thereof, for special treatment 'pose a particular danger of abuse by the State,'*" whereas "*the enforcement of a generally applicable law may or may not be subject to heightened scrutiny under the First Amendment*." [54] Thus, *Turner* applied "*heightened First Amendment scrutiny*." [55]

23. *Turner* applied intermediate, rather than strict, scrutiny, but seemed to indicate that the government's interest might be not only substantial, as required by intermediate scrutiny, but perhaps even compelling, as required by strict scrutiny: "*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*." [56] In applying this standard, *Turner* quoted *Midwest Video I* (1972) —which, in turn, quoted *Associated Press*—in declaring that "*it has long been a basic tenet of national communications*

43. Ibid. at 4.

44. Ibid. at 11–12.

45. Ibid. at 4.

46. *Lorain Journal Co. v. United States*, 342 U.S. 143, 148 (1951).

47. *Citizen Publishing Co. v. United States*, 394 U.S. 131, 139 (1969).

48. *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594 (1953).

49. *Turner*, 512 U.S. 622, 636 (1994).

50. *Associated Press*, 326 U.S. 1, 20 n.18 (1945).

51. *Citizen Publishing*, 394 U.S. at 139 .

52. *See* 345 U.S. at 627.

53. *Turner*, 512 U.S. 622, 640 (1994).

54. Ibid.

55. Ibid. at 641.

56. Ibid. at 663.

policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'" [57]

24. *Moody* makes two vital points clear: First, none of this justifies "*forcing a private speaker to present views it wished to spurn in order to rejigger the expressive realm*." [58] Second, whether through competition law or otherwise, "*it is no job for government to decide what counts as the right balance of private expression—to 'un-bias' what it thinks biased, rather than to leave such judgments to speakers and their audiences*." [59]

V. The First Amendment's red line

25. Across these cases, both in terms of theories of liability and remedies, the Supreme Court has drawn a line between policing the realm of "*business or commercial practices*" [60] and trying to "*rejigger the expressive realm*." [61] But is this line really so clear, or will it, like the Cheshire Cat, vanish upon closer inspection?

26. The Texas and Florida laws at issue in *Moody* were clearly on the prohibited side of this line. "*When the platforms use their Standards and Guidelines to decide which third-party content those feeds will display, or how the display will be ordered and organized, they are making expressive choices*"—just like newspapers curating content—and thus, "*they receive First Amendment protection*"—just like newspapers. [62] (This would have been the clear holding of *Moody*—had not the Court remanded the case for further hearings. It did so only because the plaintiffs had not met the heavy burden of showing that all possible applications of the law were unconstitutional. [63])

27. *Moody* added this, referring to *Turner*: "*A private party's collection of third-party content into a single speech product* ([cable] *operators' 'repertoire' of programming) is itself expressive, and intrusion into that activity must be specially justified under the First Amendment*." [64] Again, *Turner* upheld that intrusion only because of the unique "gatekeeper" power of cable, and because the must-carry mandate was content-neutral, both on its face and in its application. [65] Cable operators simply did not object to the nature of the content they were being asked to carry, whereas platforms strongly object to carrying certain content, or merely do not wish to carry it (for whatever reason). Thus, *Turner* was consistent with the First Amendment's red line.

28. Of course, those now running the antitrust agencies just want to sue—or at least, bluster about suing. The politics of the issue were best captured by Assistant Attorney General Gail Slater at a "Big Tech Censorship Forum" recently held by the Department of Justice's Antitrust Division. "*As the great Stephen K. Bannon would say*," she declared, "*it's time for 'action, action, action.'*" [66] Her impatience was palpable. To her, Big Tech's guilt was obvious; all that remained was to find a viable legal theory and an effective remedy. "*No, no!*" as the Queen of Hearts blurted out during Alice's trial, "*Sentence first—verdict afterward*." [67]

29. Those clamoring for "action" rely on *Moody*'s proviso about competition law. But for rhetorical ammunition, they quote *Associated Press*. That case has two sides: one restrained and milquetoast, the other bold and thrilling to those outraged about private "censorship." FTC Chair Andrew Ferguson claims that *Associated Press* justifies treating advertisers' refusal to run ads on X as a per se unlawful group boycott. [68] But he does not allege that advertisers are trying to exclude their rivals (as the Associated Press bylaws enabled newspapers to

57. Ibid. at 663–64 (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (quoting *Associated Press*, 326 U. S. at 20)).

58. *Moody*, 603 U.S. 707, 732 (2024).

59. Ibid. at 718.

60. *Citizen Publishing*, 394 U.S. 131, 139 (1969).

61. *Moody*, 603 U.S. 707, 732 (2024).

62. Ibid. at 716.

63. *See supra* note 20.

64. Ibid. at 730.

65. *See supra* paras 12-14.

66. U.S. Dep't of Just., The Antitrust Division Hosts a Big-Tech Censorship Forum, YouTube, at 19:40 (Apr. 4, 2025), https://www.youtube.com/watch?v=RPPgJ-xkjWo.

67. Carroll, *supra* note 5.

68. Concurring Statement of Commissioner Andrew N. Ferguson, FTC v. 1661, Inc. d/b/a GOAT (No. 2223016), at 3 n.12 (Dec. 2, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-goat-concurrence.pdf.

do) or even that advertisers are being coerced by someone else to suppress a new competitive threat (as the *Lorain Journal* tried to block market entry by a radio station viewed as a nascent competitive threat). Ferguson just wants action. The desire to do something about platform power is not limited to the political right: The left-leaning Open Markets Institute also relies on *Associated Press* in its support for—surprisingly, given its progressive politics—Texas and Florida's efforts to treat social media platforms as common carriers. [69]

30. Both cite passages of *Associated Press* that seem to endorse an active role for the government in policing "censorship" by private media owners. Yet none of these sentences was necessary to either holding of *Associated Press*: that group boycotts are unlawful [70] and that publishers are not immune from the antitrust laws. [71] These sentences were pure dicta: because they went "*beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision*." [72] They certainly do not tell us how to parse the First Amendment's red line.

31. Nevertheless, "[t]*his language has served as a bridge of sorts between the* [concepts of] *'mere economic regulation' and the very different 'furtherance of First Amendment values'*" found in *Associated Press*. [73] Notably, *Times-Picayune* (1953) cited *Associated Press* in declaring: "A vigorous and dauntless press is a chief source feeding the flow of democratic expression and controversy which maintains the institutions of a free society." [74] The Court added this, quoting appellate decision in *Associated Press*:

> The press, in fact, "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 selection. To many, this is, and always will be, folly, but we have staked upon it our all." [75]

This was clearly dicta based upon the dicta in decisions by both the Supreme Court and the appeals court in *Associated Press*. This is exactly the kind of concern that *Miami Herald* (1974) would find irrelevant to protecting the expressive judgments made by newspapers. [76] But in the interim, such lofty talk would quickly morph into "*arguments for ownership and access regulations*," [77] first for broadcasters, then for cable, and more recently for tech platforms.

32. Again and again, such arguments rely upon *Associated Press*. [78] To understand these arguments and assess what weight they carry, we must ask: How did the dicta of *Associated Press* take on such a life of its own?

69. Brief for Open Markets Institute as Amicus Curiae supporting NetChoice, *NetChoice v. Moody*, 603 U.S. 707 (2024), at 20.

70. Ibid. at 60.

71. Ibid.

72. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399–400 (1821) (Marshall, C.J.).

73. Ellen P. Goodman, *Media Policy and Free Speech: The First Amendment at War with Itself*, 35 Hofstra L. Rev. 1211, 1228 (2006) (quoting *Associated Press*, 326 U.S. at 21–23).

74. Ibid. at 602.

75. *Times-Picayune Pub. Co. v. United States*, 345 U.S. 594, 602–603 (1953) (quoting Learned Hand, J., in United States v. Associated Press, 52 F. Supp. 362, 372 (1943), aff'd, 326 U. S. 326 U.S. 1 (1945)).

76. *See Miami Herald Publishing Co. v Tornillo*, 418 U.S. 241 (1974).

77. E. P. Goodman, Media Policy and Free Speech: The First Amendment at War with Itself, *Hofstra L. Rev.*, Vol. 35, No. 3, 2007, pp. 1211–1262, at 1229 (quoting *Associated Press*, 326 U.S. at 21–23).

78. *See*, *e.g.*, Statement of Interest of the United States, *supra* note 9, 12; Ferguson GOAT Statement, *supra* note 9, at 3 n.12. Testimony of Adam Candeub, Professor of Law, Michigan State University, Senior Fellow, Center for Renewing America, Reining in Dominant Digital Platforms: Restoring Competition to Our Digital Markets: Before the Subcomm. on Competition Pol'y, Antitrust, and Consumer Rts. of the S. Comm. on the Judiciary, 118th Cong., at 2 (Mar. 7, 2023) ("Antitrust law has long recognized that special rules could apply when dealing with market power deployed to stifle speech."); Brief of Amici Curiae Moms for Liberty and Inst. for Free Speech in Support of Petitioners, Moody v. NetChoice, LLC, No. 22-277 at 21 (U.S. Jan. 23, 2024) ("just as '[f]reedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests,' Associated Press, 326 U.S. at 20, … any First Amendment interests that [social media platforms] have … does not entitle them to attack their users' speech and association."); Big Tech: A Case for Federal Action, Am. Principles Project 52 (2022), https://americanprinciplesproject.org/wp-content/uploads/2022/04/APP_2022BigTech_web.pdf ("Legislation and/or regulation can be constitutionally imposed on media companies, regardless of whatever their own First Amendment interests may be, when they wield a level of market dominance that chokes off the free flow of news to the public").

VI. Telecom regulation: *Red Lion* and *Midwest Video*

33. *Associated Press*, *Lorain Journal*, *Citizen Publishing*, and *Times-Picayune* all involved content-neutral application of the generally applicable antitrust laws against anti-competitive business practices that clearly involved no expressive judgment. Yet *Associated Press* was used, and continues to be useful to justify must-carry mandates imposed only on some speaker in ways that are not content-neutral because of its dicta and because the banal enforcement of antitrust law had the effect of furthering First Amendment values "*by prohibiting restraints of trade and encouraging entry into the media sector*"—a "*fortuitous alignment between mere economic regulation and First Amendment values*." [79] Those who wanted an active role for the government in policing media bias "*capitalized on this* (. . .) *alignment* (. . .) *by turning* [*Associated Press*'s] *dicta into a justification for communications regulation*." [80]

34. *Red Lion Broadcasting v. FCC* (1969) upheld the FCC's Fairness Doctrine, which required that, after airing "*a political endorsement, or of a personal attack while dealing with a controversial public issue*," a broadcast "*licensee must offer to make available a reasonable amount of broadcast time to those who have a view different from that which has already been expressed on his station*." [81] This requirement was clearly not content-neutral: it applied based on the content of broadcasters' speech and required them to carry certain kinds of speech. Yet *Red Lion* upheld this requirement because broadcasters enjoy monopoly privileges as licensees of radio spectrum, a scarce public resource. [82]

35. The Fairness Doctrine always had a whiff of competition policy to it. [83] So, unsurprisingly, *Red Lion* invoked *Associated Press*: "*It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee*." [84] *Red Lion* thus transformed the activist dicta of *Associated Press* into a clear holding: the government may, indeed, police the fairness of broadcast media. Yet even here, *Red Lion* retained the emphasis of *Associated Press* on competition claims. [85]

36. After *Red Lion*, the FCC cited both that decision and *Associated Press* to justify issuing the first rule requiring cable operators to carry broadcast signals. [86] *Midwest Video I* (1972) upheld the FCC's authority to issue this rule, agreeing with the FCC—and citing the same passage of *Associated Press*—that "*it has long been a basic tenet of national communications policy that 'the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.'*" [87] Unlike the Fairness Doctrine, both the government's interest and the must-carry mandate were content-neutral. The Court would ultimately, after changing its mind about the FCC's jurisdiction, [88] uphold the constitutionality of such mandates in *Turner*. [89]

37. *Turner* said that "*the Government's interest in eliminating restraints on fair competition is always substantial, even when the individuals or entities subject to particular regulations are engaged in expressive activity protected by the First Amendment*." [90] But this merely confirms that the government can regulate business practices. Here, unsurprisingly, *Turner* cited *Lorain Journal* and *Associated Press*, but also *Superior Court Trial Lawyers* (1990) (*SCTLA*), one of two Supreme Court cases dealing with concerted refusals to deal, also known as group boycotts. [91] Why?

79. Goodman, *supra* note 77, at 1229, 1230.

80. Ibid. at 1229–1230.

81. *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 391 (1969).

82. Ibid. at 390.

83. Ibid. at 377 ("[T]*he 'public interest requires ample play for the free and fair competition of opposing views, and the commission believes that the principle applies . . . to all discussions of issues of importance to the public.*'") (quoting *Great Lakes Broadcasting Co.*, 3 F.R.C.Ann.Rep. 32, 33 (1929)).

84. Ibid. at 390 (citing *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

85. Ibid. at 400–401 (citing *Associated Press*, 326 U.S. at 20).

86. *Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972) (citing *Associated Press*, 326 U.S. at 20).

87. Ibid.

88. Ibid.

89. *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994).

90. Ibid. at 664.

91. *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 431–432 (1990).

VII. Group boycotts and motive: *Claiborne Hardware* and *SCTLA*

38. *Turner* cited *SCTLA* for two points: First, "[e]*very concerted refusal to do business with a potential customer or supplier has an expressive component*." [92] Second, "*boycotters may communicate with third parties to enlist public support for their objectives* (. . .). *But this level of expression is not an element of the boycott*." [93] Thus, there was "*nothing unique about the 'expressive component' of respondents' boycott. A rule that requires courts to apply the antitrust laws 'prudently and with sensitivity' whenever an economic boycott has an 'expressive component' would create a gaping hole in the fabric of those laws*." [94] In other words, there are aspects of the commercial realm that have some expressive component—obviously. Neither holding undermines the First Amendment's red line.

39. But *SCTLA* also frames a more relevant question: Under what conditions does having an economic self-interest make something a regulable business practice, rather than protected expression? The appeals court found that "*the SCTLA boycott did contain an element of expression warranting First Amendment protection*," and remanded the case for the trial court to determine "*how much market power is sufficient to justify the condemnation of an expressive boycott*." [95] The Supreme Court reversed, holding that "*the undenied objective of* [the trial lawyers'] *boycott was an economic advantage for* [themselves]," [96] and the boycott was therefore unlawful.

40. The Supreme Court and appeals court disagreed over whether *Claiborne Hardware* (1982) controlled. That decision held that a "*politically motivated boycott*" of local white businesses organized by civil rights groups aimed to advance civil rights, not "*to destroy legitimate competition*," and was therefore protected by the First Amendment. [97] These boycotters, said *SCTLA* to distinguish that case, "*sought no special advantage for themselves*" ; they were trying to "'*change a social order that had consistently treated them as second-class citizens*. '" [98] While the *SCTLA* characterized *Claiborne Hardware* as a "political boycott," the earlier case also involved mixed motives: any boycotters stood to benefit directly from the economic changes demanded by the boycott, including that "All stores must employ Negro clerks and cashiers" and "the hiring of black policemen." [99] Likewise, participating black business owners obviously stood to benefit from the "significant" diversion of purchases from white-owned businesses to their own. [100] Yet *Claiborne Hardware* did not attempt to parse such mixed motivations, and instead erred on the side of broader First Amendment protection.

41. *Claiborne Hardware* thus established the general rule: Even mixed-motive boycotts will receive the protection of the First Amendment. But, the Court added, echoing *Associated Press*: "*The presence of protected activity* (. . .) *does not end the relevant constitutional inquiry.* (. . .) *The right of business entities to 'associate' to suppress competition may be curtailed. Unfair trade practices may be restricted*." [101] "*At times the difference between lawful and unlawful collective action may be identified easily by reference to its purpose*." [102] But this was an easy

92. Ibid. at 431 ("*At one level, the competitors must exchange their views about their objectives and the means of obtaining them. The most blatant, naked price-fixing agreement is a product of communication, but that is surely not a reason for viewing it with special solicitude. At another level, after the terms of the boycotters' demands have been agreed upon, they must be communicated to its target: 'we will not do business until you do what we ask.' That expressive component of the boycott conducted by these respondents is surely not unique. On the contrary, it is the hallmark of every effective boycott*.").

93. Ibid.

94. Ibid.

95. *Superior Court Trial Lawyers Association, et al., Petitioners, v. Federal Trade Commission, Respondent*, 856 F.2d 226, 247, 252 (D.C. Cir. 1988).

96. *SCTLA*, 493 U.S. 411, 426 (1990).

97. *NAACP v. Claiborne Hardware Co*., 458 U.S. 886, 914 (1982).

98. *SCTLA*, 493 U.S. at 426 (quoting *Claiborne Hardware*, 458 U.S. at 912).

99. 458 U.S. at 899–900. See also K. P. Kindred, When First Amendment Values and Competition Policy Collide: Resolving the Dilemma of Mixed-Motive Boycotts, 34 *Ariz. L. Rev.* 709, 730 n. 147 (1992) ("The *Claiborne Hardware* boycott may reasonably be characterized as a 'mixed-motive' boycott since it is highly likely that the black citizens were motivated by a mixture of both political and economic interests.").

100. Id. at 900–901 ("Originally, food purchases in Claiborne County were made alternately from white-owned and black-owned stores, but" the boycotters agreed to "to purchase food only from black-owned stores. Since MAP bought substantial quantities of food, the consequences of this decision were significant.").

101. *Claiborne Hardware*, 458 U.S. at 912.

102. Ibid. at 933.

case: civil rights boycotters' "*ultimate objectives were unquestionably legitimate*." [103] By contrast, in *SCTLA* the "*economic boycott*" by trial lawyers was unlawful because their "*immediate objective was to increase the price that they would be paid for their services*." [104] The civil rights boycotters were not trying "*to destroy legitimate competition*," [105] while the trial lawyers "*undeni*[ably]" were (among themselves). [106]

42. How should courts parse such distinctions? Prior to *SCTLA*, the "*Court's approach to resolving the question of the legality of concerted commercial activity undertaken for political ends* [was] *essentially inconsistent*." [107] In *Claiborne Hardware*, *SCTLA*, and two prior decisions, the Court "*resolved the issue via a different route. In each case, it avoided a thorough analysis of the combined political and commercial speech inherent in the conduct*." [108] The result left lower courts struggling "*to distinguish between boycotts that are primarily commercial but have 'ancillary' political purposes and boycotts that are essentially political but have 'ancillary' economic purposes*," using "*methodology* [that] *tends to be highly fact-specific, and is often heavily influenced by 'the presence or absence of economic gain flowing to the boycotters.'*" [109] Since *SCTLA*, the Supreme Court has not clarified this question. Only one court of appeals has discussed how to distinguish a political boycott from an economic boycott, and that decision pointed to a different factor. [110]

43. This lingering ambiguity has allowed the antitrust agencies to insist that what might seem to be expressive decisions can be regulated because they are driven by anti-competitive self-interest. The FTC recently refused to allow a merger to form the world's largest family of "media-buying services" (ad agencies) until the parties agreed to certain conditions about political neutrality in the placement of advertising for their clients. [111] The complaint alleged that "*a* concerted (. . .) *refusal to deal among Media Buying Services firms provides a direct economic benefit to the firms by ensuring that they are not competitively disadvantaged relative to their rivals, which are likewise foregoing the opportunity to reach potential audiences on the boycotted publishers' platforms*." [112] X makes similar arguments in its suit against advertisers who allegedly colluded in refusing to run ads on X, alleging that they benefit by shifting the costs of enforcing their brand safety standards onto the social media platform. [113]

44. These arguments cannot be right. Neither *Claiborne Hardware* nor *SCTLA* said that merely receiving some economic benefit would be sufficient to place a boycott in the commercial realm. Both cases required assessment of the "*ultimate objectives*" [114] or "*immediate objective*," [115] and *Claiborne Hardware* was careful to note that motive may only, "[a]*t times*," allow "*the difference between lawful and unlawful collective action* [to] *be identified easily*." [116] Thus, purpose may be indicative, but it is not necessarily dispositive.

45. Whether activity is protected by the First Amendment (as expressive) can only be determined by First Amendment doctrine, not competition law. While commercial speech does receive less protection than non-commercial speech, [117] "*an economic motivation for* [publishing speech] *would clearly be insufficient, by itself, to turn the materials into commercial speech*." [118] Indeed, "*commercial*

103. Ibid.

104. *SCTLA*, 493 U.S. at 427.

105. *Claiborne Hardware*, 458 U.S. at 914.

106. *SCTLA*, 493 U.S. at 427.

107. Kindred, *supra* note 99, at 738.

108. Ibid. (citing United Mine Workers v. Pennington, 381 U.S. 657 (1965); International Longshoremen's Ass'n v. Allied Int'l, Inc., 456 U.S. 212 (1982)).

109. Ibid. at 712.

110. *See supra* paras 52-53-54.

111. Fed. Trade Comm'n, In the Matter of Omnicom Group/The Interpublic Group of Co., File No. 251-0049 (Sept. 26, 2025), https://www.ftc.gov/legal-library/browse/cases-proceedings/251-0049-omnicom-groupthe-interpublic-group-co

112. Omnicom Complaint at 4, *In the Matter of Omnicom Group Inc. and The Interpublic Group of Companies, Inc.*, docket No. C-4823 (Sept. 26, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/2410059C4823Omnicom-Complaint.pdf.

113. Second Amended Complaint, X Corp. v. World Federation of Advertisers, 7:24-cv-00114-B at 15 (N.D. Tex. 2025), https://storage.courtlistener.com/recap/gov.uscourts.txnd.393003/gov.uscourts.txnd.393003.77.0_3.pdf

114. *Claiborne Hardware*, 458 U.S. at 933.

115. *SCTLA*, 493 U.S. at 427.

116. *Claiborne Hardware*, 458 U.S. at 933.

117. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996); *Central Hudson Gas & Elec. Corp. v. Public Svc. Comm'n of N.Y.*, 447 U.S. 557 at 566 n.9 (1980).

118. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 67 (1983) (citing *Bigelow v. Virginia*, 421 U.S. 809, 818 (1975); *Ginzburg v. United States*, 383 U.S. 463, 474 (1966); *Thornhill v. Alabama*, 310 U. S. 88 (1940)).

activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment." [119] In *303 Creative* (2023), the Court refused to allow an anti-discrimination law to "*force someone who provides her own expressive services to abandon her conscience and speak its preferred message instead*." [120] The website designer's obvious economic motive was irrelevant; what mattered was the expressive nature of the service (website design). This is what courts must focus on in parsing the First Amendment's red line: expressiveness.

46. Two hypotheticals illustrate why. Suppose that the Associated Press bylaws had set certain standards regarding the content of candidate newspapers—say, excluding papers that defended Jim Crow or the Soviet Union. Such standards might well have served the economic self-interest of some incumbent newspapers by protecting them from reckless upstarts promising alternatives to the consensus of "mainstream media." Chair Ferguson's arguments imply that the FTC could have opened an investigation to assess the balance of mixed motives and that the agency potentially could have sued. But *Moody* would require courts to determine whether the setting of such bylaws was really expressive—whether it was any different from the editorial judgments made by a single newspaper. The answer seems self-evident: under *Claiborne Hardware*, doubts about mixed motives would be resolved in favor of First Amendment protection. Expressiveness, in other words, trumps any mixed motive.

47. Or suppose that a group boycott by local businesses of a radio station was based not on the economic self-interest of the town's sole newspaper, as in *Lorain Journal*, but on businesses' objection to the racist or communist speech carried by the broadcaster. Every participating business might, in some sense, benefit from collusion by ensuring that its rivals did not defect from the boycott by buying ads on the radio station. Yet this would have been only an instrumental economic means of achieving an ultimately political purpose, not a way "*to destroy legitimate competition*"—not an ultimately economic purpose.

48. Now consider again the FTC's arguments. "[T]*he fact that* [advertisers] (. . .) *might believe they are better off in business terms if they don't associate with X*," as Chair Ferguson argues, "*doesn't in any way diminish the fact that their primary motive is to vindicate their expressive freedom not to associate*." [121] In addition, it is far from "*obvious why it would have been in* [advertisers'] *economic interest to conspire; X's complaint itself concedes that X's advertising prices were* lower *than their competitors. As such, it would seem more accurate to characterize GARM as a sort of standard-setting body for platform quality, compliance with which was entirely voluntary among members*." [122] Again, X alleges that advertisers benefit by shifting the costs of enforcing their brand safety standards onto the social media platform. [123] But this is exactly like saying, in the above hypotheticals, that local advertisers participating in a boycott of a racist or communist radio station would benefit by pressuring the newspaper to bear the cost of screening content that advertisers abhor. Perhaps so, but this merely makes it cheaper for advertisers to achieve ends that are ultimately expressive, not economic.

VIII. Clarifying the standard for refusals to deal: *FAIR* and *Waldrip*

49. If economic self-interest might, "[a]*t times*," [124]

119. *United States v. United Foods, Inc*., 533 U.S. 405, 410 (2001) ("*The fact that the speech is in aid of a commercial purpose does not deprive respondent of all First Amendment protection* (. . .)"); *Ginzburg*, 383 U.S. at 474 (citing *New York Times v. Sullivan*, 376 U.S. 254, 265–266 (1964) ("[I]*f the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement*."); *Smith v. California*, 361 U.S. 147, 150 (1959) ("*It is, of course, no matter that the dissemination takes place under commercial auspices. Certainly a retail bookseller plays a most significant role in the process of the distribution of books*.")). *See also Sorrell v. IMS Health, Inc*., 564 U.S. 552, 526 (2011) ("*The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys*. (. . .) *Commercial speech is no exception*" (internal quotation and citation omitted)).

120. *303 Creative LLC v. Elenis*, 600 U.S. 570, 597 (2023).

121. V. D. Amar and A. Bhagwat, Why Elon Musk's (and X's) Lawsuit Against Companies Who Have Stopped Advertising on the X Platform Is Legally Weak, Verdict (Aug. 26, 2024), https://verdict.justia.com/2024/08/26/why-elon-musks-and-xs-lawsuit-against-companies-who-have-stopped-advertising-on-the-x-platform-is-legally-weak/.

122. Ibid.

123. X Complaint, *supra* note 113, at 15.

be a reason to consider activity non-expressive, are there other reasons? *Rumsfeld v. FAIR* (2006) addressed a different kind of refusal to deal and found a different reason for denying First Amendment protection. [125] The Court upheld a requirement that law schools host military recruiters as a condition of receiving federal funding. [126] "Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive," for two reasons. [127] First, purpose: "Law schools facilitate recruiting to assist their students in obtaining jobs." [128] Second, accordingly, "*the required 'accommodation of a military recruiter' did not 'interfere with any message of the school.'*" [129] *Moody* concluded that *FAIR* "*could not have been resolved on that ground if the regulation had affected what happened in law school classes instead*." [130] Sending a message, by implication, would have placed the case in the expressive realm.

50. *Moody* was far more clear about why "*compiling and curating others' speech*," or its own speech, is an "*editorial function*" and thus is "*itself is an aspect of speech*." [131] Yet *Moody* focused on newsfeeds; the opinion does not directly resolve whether, for example, expressive judgments are being made when advertisers refuse to buy advertising on platforms because of the content on those platforms, when an app store refuses to host an app, or when a hosting service refuses to host a website.

51. One aspect of *FAIR* was clear: "[A]*n entity engaged in expressive activity when performing one function may not be when carrying out another*." [132] Courts must analyze each distinct "activity" to assess whether it involved a discernible "message." The Department of Justice now insists that it is not trying to police expressive activity, only "*speech-related anticompetitive conduct*." [133] The FTC makes similar assurances. [134] To what extent does *FAIR* justify such uses of competition law?

52. One appellate decision illustrates how such litigation will unfold. *Arkansas Times v. Waldrip* (8th Cir. 2022) interprets *FAIR* to mean that "*First Amendment protection does not extend to non-expressive conduct intended to convey a political message*." [135] Yet the appeals court also read *FAIR* to mean that intention alone is not dispositive: "[T]*he question wasn't whether someone* intended *to express an idea, but whether a neutral observer would* understand *that they're expressing an idea*"—at least. [136] *Waldrip* involved a state law requiring government contractors to certify they are not boycotting Israel or "*Israeli-controlled territories*." [137] A newspaper refused, on general principle and without public commentary, to sign such a certification when asked to do so by a state university that bought ads in the paper. Applying *FAIR* rather than *Claiborne Hardware*, the appeals court upheld Arkansas's law, even though it (unlike antitrust law) discriminates on the basis of both content and viewpoint, because the law prohibits only "*purely commercial, non-expressive conduct*," "*does not ban* Arkansas Times *from publicly criticizing Israel, or even protesting the statute itself*," and "*only prohibits economic decisions that discriminate against Israel. Because those commercial decisions are invisible to observers unless explained, they are not inherently expressive and do not implicate the First Amendment*." [138]

53. But can First Amendment protection really depend on whether, or how publicly or how convincingly, a speaker has explained its expressive decisions? The "*[Supreme] Court has never hinged a compiler's First Amendment protection on the risk of misattribution*," and thus *Moody* held that "*social-media platforms do not lose their First Amendment protection just because no one will wrongly attribute to them the views in an individual post*." [139] If the

124. *Claiborne Hardware*, 458 U.S. 886, 933 (1982).

125. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc*., 547 U.S. 47, 70 (2006) (hereinafter *FAIR*).

126. Ibid.

127. Ibid. at 64.

128. Ibid.

129. *Moody*, 603 U.S. 707, 731 (2024) (quoting *FAIR*, 547 U.S. at 64).

130. 603 U.S. at 732 n.4.

131. Ibid. at 731 (quoting *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996) (plurality opinion)).

132. Ibid. at 732 n. 4.

133. *See*, e.g., Statement of Interest of the United States, *supra* note 9, at 8.

134. *See*, e.g., Statement of Chairman Andrew N. Ferguson, 90 Fed. Reg. 27304 (June 26, 2025), at 27309 ("*Today's settlement does not limit either advertisers' or marketing companies' constitutionally protected right to free speech* (. . .). *No one will be forced to have their brand or their ads appear in venues and among content they do not wish*.").

135. *See Arkansas Times v. Waldrip*, 37 F.4th 1386, 1391 (8th Cir. 2022), cert. denied, No. 22-379 (2023).

136. Ibid.

137. Ark. Code Ann. § 25-1-503 (2017).

138. *Waldrip*, 37 F.4th 1386, 1394 (2022).

expressiveness of a certain activity cannot hinge on whether others perceive a speaker to have intended a certain message (by misattribution), why should it hinge on whether others perceive a speaker to have intended to disassociate themselves from Israel, or from others? For example, after January 6, Amazon Web Services (AWS) refused to continue providing hosting and related services to Parler because the upstart social media platform had consistently refused to moderate, as required by AWS's Acceptable Use Policy, the sort of incendiary content that led to the violent assault on the Capitol. [140]

54. Under *FAIR*, whether such refusals to deal are protected by the First Amendment would depend on whether a court concludes that regulation (via competition law or otherwise) would "sufficiently interfere with any message of the [speaker]." [141] Under *Waldrip*, a court must further decide whether any underlying expressive decision is "*invisible to observers*." [142] AWS explained its rationale privately, in an email to Parler. [143] While that email was quickly obtained by reporters and publicized, AWS did not seek to justify the decision publicly. But why should that matter? AWS's Acceptable Use Policy had long been public, and expressed a refusal to carry "content that is illegal, harmful, … or offensive." [144] Within months, AWS amended this policy to be more specific, explicitly prohibiting users to "threaten, incite, promote, or actively encourage violence, terrorism, or other serious harm." [145] but why should the level of specificity matter? Both are involve expressive judgments about what messages are "acceptable. " Requiring more public explanation, or *any* public explanation, would mean compelling speakers to explain decisions they may not wish to justify. But as *FAIR* recognized, "*freedom of speech prohibits the government from telling people what they must say*." [146] *Waldrip*'s standard also invites judges to make subjective judgments for essentially political reasons: in effect, does the *judge* understand, or agree with, the decision? The Supreme Court declined to review *Waldrip*, but it may yet rule that the decision is insufficiently protective of free speech. [147]

55. In any event, the refusals to deal that are most strongly attacked as anti-competitive censorship today are explained quite publicly and are hardly invisible. "*Facebook's Community Standards and YouTube's Community Guidelines detail the messages and videos that the platforms disfavor*," *Moody* noted, and both "*make a wealth of user-agnostic judgments about what kinds of speech, including what viewpoints, are not worthy of promotion*." [148] Not only are such community standards visible to users, but they also result in "*judgments* [that] *show up in Facebook's and YouTube's main feeds*." [149] Likewise, when Google banned the Parler app from its web store after January 6, it said, in a public statement: "*Our longstanding policies require that apps displaying user-generated content have moderation policies and enforcement that removes egregious content like posts that incite violence*." [150] Such explanations were widely repeated in media coverage. Similarly, the Global Alliance for Responsible Media—one of the entities sued by X—called its "Brand Safety Floor"—the minimum standards that advertisers agreed to insist upon before they place their ads on websites—"*the cornerstone for us to find balance between supporting responsible speech, bolstering public safety, and providing for responsible marketing practices*." [151]

139. 603 U.S. 707, 739 (2024).

140. AWS explained its decision as follows: "It's clear that Parler does not have an effective process to comply with the AWS terms of service. . . . Given the unfortunate events that transpired this past week in Washington, D.C., there is serious risk that this type of content will further incite violence." Parler LLC v. Amazon Web Services, Inc., No. 2:21-cv-00031-LK, slip op. at 4 (W.D. Wash. Apr. 12, 2021).

141. *FAIR*, 547 U.S. 47, 64 (2006).

142. *Waldrip*, 37 F.4th 1386, 1394 (2022).

143. John Paczkowski and Ryan Mac, Amazon Is Suspending Parler's Account, Effectively Taking the Social Network Offline, BuzzFeed News (Jan. 10, 2021), https://www.buzzfeednews.com/article/johnpaczkowski/amazon-parler-aws

144. AWS Acceptable Use Policy (Updated Sept. 16, 2016) (archived Jan. 7, 2021), available at https://web.archive.org/web/20210107191539/https://aws.amazon.com/aup/

145. AWS Acceptable Use Policy (Updated: July 1, 2021) (archived August 27, 2021) available at https://web.archive.org/web/20210827193755/https://aws.amazon.com/aup/

146. *FAIR*, 547 U.S. at 61 (citing *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943), *Wooley v. Maynard*, 430 U.S. 705, 717 (1977)).

147. Of course, the "*denial of a writ of certiorari imports no expression of opinion upon the merits of the case*." *Teague v. Lane*, 489 U.S. 288, 296 (1989) (quoting *United States v. Carver*, 260 U.S. 482, 490 (1923) (Holmes, J.)).

148. *Moody*, 603 U.S. 707, 735–736 and n.5 (2024).

149. Ibid. at 736 n.5.

150. S. Sardarizadeh, Google suspends 'free speech' app Parler, BBC (Jan. 9, 2021), https://www.bbc.com/news/technology-55598887; *see also* Apple letter to Parler, Amazon letter to Parler and Google's public statement on Parler, https://int.nyt.com/data/documenttools/parler-amazon-apple-google-responses/36b0d978e3ba3d3e/full.pdf.

56. Each of these examples involves judgments that any "*neutral observer would* understand" means "*that they're expressing an idea*." [152] In each case, a company or organization did exactly what the cable operators in *Turner* did not do: object to content that governmental actors want them to carry. Each case fell clearly within the expressive realm.

XIX. Conclusion

57. Having gone through the looking glass and back again, we can now summarize the relevant case law. *Moody* recognized that the government cannot, whatever the means, "*rejigger the expressive realm*." [153] *Miami Herald* recognize that the First Amendment shields the curation of content from regulation, even to address concerns about competition. *Moody* was clear: "*When the platforms use their Standards and Guidelines to decide which third-party content those feeds will display, or how the display will be ordered and organized, they are making expressive choices*." [154] Competition law can do nothing about these choices.

58. *Moody* did not comment on the other practices that some call "censorship," but its proviso recognizes that competition law can police the commercial practices of media companies. The relevant cases fell easily into the commercial realm. The Associated Press's bylaws allowed its member newspapers to suppress competition from direct rivals without making any objection to the content they carried. The *Lorain Journal* coerced advertisers to boycott its radio station rival. This group boycott had nothing to do with content; it was "*bold, relentless, and predatory* commercial *behavior*." [155] Likewise, the *Times-Picayune* refused to run ads not because of their content but in order to coerce advertisers to harm its rival. In *Citizen Publishing*, two newspapers simply agreed not to compete. Likewise, in *SCTLA*, the trial lawyers tried to do what the civil rights boycotters in *Claiborne Hardware* did not: "*destroy legitimate competition*." [156]

59. Only in exceedingly narrow circumstances has the Court upheld must-carry laws. *Red Lion* upheld requirements that broadcasters carry certain content only because they had been granted a government license over broadcast spectrum. [157] The Court has emphatically refused to apply *Red Lion* to other media: first cable, [158] then the Internet in general, [159] and, in *Moody*, platforms in particular. [160] *Turner* upheld requirements that cable operators carry broadcasters' signals to protect television competition from the unique, government-granted monopoly power of cable operators, whose objections had nothing to do with the content they were being asked to carry. Otherwise, the Supreme Court has consistently upheld the right of private parties who do not enjoy a government-granted monopoly (as in *Red Lion* and *Turner*) to make their own expressive judgments about the nature of content they will carry or be associated with.

60. *Moody* was clear that the curation of social media is protected expression, but the Court has yet to provide clear guidance as to what does *not* constitute an expressive judgment. *FAIR* upheld a requirement that law schools host military recruiters because hosting recruiters communicates no message and is only an economic measure: a way to help students find jobs. Whether a publisher has some economic self-interest in making such judgments may, "[a]*t times*," be instructive, [161] but ultimately, whether the activity is expressive cannot be resolved on grounds of motive alone; courts must err on the side of protecting the First Amendment right to make editorial judgments. Courts must determine whether companies are trying to "*destroy legitimate competition*" [162] with a rival in the same market, or a

151. Global Alliance for Responsible Media, GARM Brand Safety Floor & Suitability Framework (Sept. 23, 2023),https://4962377.fs1.hubspotuser-cont... https://4962377.fs1.hubspotusercontent-na1.net/hubfs/4962377/resource-library/GARM%20Brand%20Safety%20Floor%20Suitability%20Framework%2023%20Sept%20(3).pdf.

152. *FAIR*, 37 F.4th at 1391.

153. *Moody*, 603 U.S. 707, 733 (2024).

154. Ibid. at 716.

155. Lorain Journal Co. v. United States, 342 U.S. 143, 149 (1951) (quoting Lorain Journal Co. v. United States, 92 F. Supp. 794 , 796 (N.D. Ohio 1950)) (emphasis added).

156. 458 U.S. 886, 914 (1982).

157. At least one sitting justice has suggested that Red Lion itself was wrongly decided. *FCC v. Fox TV Stations, Inc*., 556 U.S. 502, 531–533 (2009) (Thomas, J., concurring).

158. *Turner*, 512 U.S. 622, 626 (1994).

159. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997) (discussing *Red Lion*, the Court concluded that "*our cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to this medium*.").

160. 603 U.S. 707 (2024).

161. *Claiborne Hardware*, 458 U.S. 886, 933 (1982).

potential rival, or among those engaged in concerted refusals to deal.

61. In *Waldrip*, an appeals court held that whether an activity is expressive turns on the understanding of a "*neutral observer*." [163] The Supreme Court may yet hold this standard to be inconsistent with *Moody* and with the general prohibition on compelled speech. Explained or not, most of what is alleged to be anti-competitive "censorship" would be plainly understandable as an expressive judgment were the question not so politically contentious. That intense political controversy may discourage companies from explaining their decisions, but it also underscores the expressive nature of those decisions.

62. It may be years before courts decide exactly which controversial practices are expressive, if companies remain unwilling to bear the political costs of defending their First Amendment rights in court. In *Moody*, social media platforms relied on their trade associations to challenge state must-carry laws, and did so without fear of enraging a hostile administration. But if the antitrust agencies sue those same platforms and other tech companies, most will, like Omnicom and The Interpublic Group of Companies (IPG), simply settle. This dynamic will allow the antitrust agencies to insist that their legal theories have been vindicated, even without any court decision on their merits.

63. One thing is sure: the antitrust agencies' leaders will continue to bluster about tech companies. "*Off with their heads!*" as the Queen of Hearts so often bellowed. [164] Heads are already rolling: the Global Alliance for Responsible Media ceased operations shortly after X brought an antitrust suit against it and large advertisers, citing the cost of defending that suit on top of a sustained campaign of harassment by Congressional Republicans. [165] If tech companies simply topple over like Wonderland's pack of cards, [166] the FTC and DOJ could spend years misusing the grandiose dicta of *Associated Press*. They could go on, like the Red Queen, believing (or at least claiming to believe) "*as many as six impossible things before breakfast*" [167] about what the First Amendment permits competition law to do.

B. S. ■

162. Ibid. at 914.

163. *See Waldrip*, 37 F.4th 1386, 1391 (2022).

164. Carroll, *supra* note 5.

165. Grace Gollasch, WFA Suspends GARM Following X Lawsuit, Marketing Week (Aug. 8, 2024), https://www.marketingweek.com/wfa-suspend-garm-x-lawsuit/ ("GARM is a small, not-for-profit initiative, and recent allegations that unfortunately misconstrue its purpose and activities have caused a distraction and significantly drained its resources and finances.").

166. Carroll, *supra* note 5.

167. Ibid.

Content Moderation and Antitrust: Part IX - Competition, market failure, and double-think in news markets

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Viewpoint diversity in news publishing is either a public good—non-excludable and non-rivalrous and thus underproduced absent regulatory intervention—or a private good—such that publishers' reputations, advertising, or other factors enable competitive market forces to meet consumer demand. Depending on which view is adopted as accurate, the proper approach to ensuring sufficient viewpoint diversity will differ. In its zeal to address a perceived imbalance of viewpoints in news markets, the Trump Administration has not paused to choose one view or the other. It has deployed both market-based and regulatory approaches in the same news markets simultaneously, all but ensuring that neither will work. Incoherent policy has led to self-defeating actions that work at cross-purposes with one another. Thus, the administration's rhetorical support for greater viewpoint diversity is unlikely to lead to any meaningful benefits.

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I. Public goods vs. private goods: "Don't just do something—stand there"

1. The Trump administration is persuaded that U.S. news markets currently lack an adequate diversity of political and ideological viewpoints. It has deployed the power of the U.S. federal government to prevent mainstream broadcast and digital media outlets from suppressing viewpoints that it believes they wrongly disfavor. The administration says it is protecting the public interest in an informed citizenry and promoting competition in the marketplace of ideas; critics say it is jawboning news publishers, coercing speech, and flouting the First Amendment for political gain.

2. Since the dawn of the deregulatory era in the telecommunications sector, and long before then in other media markets, the federal government has been loath to interfere with the editorial judgments of news publishers. Its rationale follows from the Reagan administration's 1987 decision to repeal the bulk of the fairness doctrine, which had held that broadcasters who were awarded the privilege of operating on scarce, publicly owned spectrum frequencies must afford "*reasonable opportunity for the presentation of contrasting viewpoints on controversial issues of public importance*." [1] President Reagan's Federal Communications Commission (FCC) concluded that this rule, which had sought to promote viewpoint diversity, had backfired by chilling speech: it induced broadcasters to avoid controversial issues of public importance rather than risk sanctions for a perceived imbalance in presentation. [2] The Supreme Court has since specified that "*the editorial function itself is an aspect of 'speech'*" [3] and explained that broadcasters, like other news publishers, "*enjoy the 'widest journalistic freedom'*." [4]

3. Notwithstanding the strong First Amendment protection for news producers' editorial judgments, the FCC does maintain a policy of protecting against

1. Fed. Commc'ns Comm'n, Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10415, 10416 (1964).
2. *In re Syracuse Peace Council Against TV Station WTVH Syracuse*, 2 FCC Rcd 5043, 5043 (1987), aff'd 867 F.2d 654 (D.C. Cir. 1989).
3. *Denver Area Educ. Telecommc'ns Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996).
4. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673 (1998) (citation omitted); *see also FCC v. League of Women Voters of California*, 468 U.S. 364, 375–376 (1984) ("[E]*xpression of editorial opinion on matters of public importance (. . .) is entitled to the most exacting degree of First Amendment protection*.").

"*news distortion*," which involves the "*deliberate staging, slanting, and falsifying of news*." [5] Because, "*in this democracy, no Government agency can authenticate the news, or should try to do so*," the policy is rarely invoked. [6] News distortion claims are subject to an exacting four-part test that applies only to "*egregious misconduct, including the wholesale fabrication of news stories*." [7]

4. The FCC found violations of its news distortion policy in only eight cases between 1969 and 2019—and only one case between 1985 and 2019. [8] All involved "*elaborate hoaxes, internal conspiracies, and reports conjured from whole cloth*." [9] Not once did the agency find news distortion based on a broadcaster's mere exercise of editorial discretion. [10] "*Rigging or slanting the news is a most heinous act against the public interest*," the agency has explained, but "*we will eschew the censor's role*" because a governmental inquiry to establish news distortion can "*constitute a worse danger than the possible rigging itself*." [11]

5. This essay takes no position on whether the Trump administration has violated anyone's First Amendment rights in any of its regulatory or enforcement activities targeting the news industry. For argument's sake, it accepts the controversial premise that editorial judgments on viewpoint diversity could ever give rise to a federally actionable news distortion claim. By taking that premise as given, the essay is able to examine the government's interventions on their own terms. It concludes that the government's efforts are destined to fail even if the government is correct in believing that a lack of adequate viewpoint diversity can give rise to a federally actionable news distortion claim. The administration cannot achieve its goals because it has failed to formulate a coherent view on the nature of consumer demand for viewpoint diversity.

I. Public goods vs. private goods: "Don't just do something—stand there"

6. If the administration is correct to believe that an ongoing suppression of valuable viewpoints is harming the public, it must first answer a basic question before it can ever hope to craft an effective policy response: Will competitive markets fix the problem on their own? Or, instead, do competitive markets fail to deliver viewpoint diversity, such that regulatory intervention is required?

7. The answer depends heavily on the nature of consumer demand for viewpoint diversity. Clearly, news consumers want some kind and degree of viewpoint diversity. Were it otherwise, Congress would not have bestowed a public-interest mandate on the FCC that counts viewpoint diversity among its "*lodestars*." [12] But if there is a market failure in news markets, consumers may not be able to send a clear market signal that reveals how much and what kind of viewpoint diversity they value.

8. The stakes of a potential market failure are high. As the U.S. Supreme Court has explained, governmental efforts to measure demand for viewpoint diversity without the aid of market signals would require "
qualitative judgments objectionable on both policy and First Amendment grounds." [13] Such judgments would defy the principle that "[t]*he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction*." [14]

5. C. Raphael, The FCC's Broadcast News Distortion Rules: Regulation by Drooping Eyelid, *Comm. L. & Pol'y*, Vol. 6, Issue 3, 2001, pp. 485–539, at 486.

6. *In re Complaints Covering CBS Program "Hunger in Am."*, 20 F.C.C.2d 143, 151 (1969); *see Galloway v. FCC*, 778 F.2d 16, 21 (D.C. Cir. 1985) (noting that the FCC "has given its policy against news distortion an extremely limited scope"); Raphael, *supra* note 5, at 501–07.

7. Comments of Former Commissioners Rachelle B. Chong, Ervin S. Duggan, Alfred C. Sikes, Gloria Tristani, and Tom Wheeler at 8–10, *In the Matter of News Distortion Complaint Involving CBS Broadcasting Inc., licensee of WCBS, New York, NY*, MB docket No. 25-73 (Mar. 26, 2025).

8. Ibid. at 10.

9. Ibid. at 11.

10. Ibid. at 11–13 (noting that previous complaints were forcefully rejected on free speech grounds).

11. *Hunger in Am.*, 20 F.C.C.2d at 151 (1969).

12. FCC 2018 Quadrennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules, 89 Fed. Reg. 12,196, 12,200 (Feb. 15, 2024) (to be codified at 47 C.F.R. pt. 73).

13. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 797 (1978).

Without the aid of consumer demand signals, any governmental efforts to inject balance thus may court intolerable risks of chilling speech, much as governmental investigations into news distortion may do so. [15]

9. News is an information-based product, so it is reasonable to worry that it could be susceptible to an information-based market failure. One concern is that the news may be what economists call an "experience good" or a "credence good." That is, consumers may not discover the quality of the news they consume, or their own satisfaction with it, until long after they have consumed it, or they may never fully know. [16] Empirical studies in the aftermath of the 2016 presidential election concretized this fear when numerous reports revealed a proliferation of "misinformation" or "fake news," particularly in online markets where the news is distributed digitally. [17]

10. Information problems of this kind theoretically could cause market failure if digital news consumers find themselves stuck in unhealthy informational feedback loops. [18] Whether because of misguided content moderation policies, filter bubbles, high search costs, or "information overload," news consumers may be unknowingly fed an impoverished information diet, which could prevent them from being exposed to alternative viewpoints that are necessary for a well-informed citizenry. [19] If consumers do not realize what they are missing when they consume news, then they may fail to signal demand for the socially optimal level of viewpoint diversity in news markets, or for a level that even comes close.

11. If information problems do create a market failure in news markets, then viewpoint diversity can be thought of as a "public good," not unlike clean air. Markets often fail to curb air pollution on their own because the benefits of clean air are hard to monetize. When a product manufacturer that emits air pollutants invests in emission controls, the benefits spill over to the public at large, such that the manufacturer's customers are often unwilling to bear the full cost of the controls by paying the higher prices necessary for the manufacturer to recoup its investment. The market signal that would otherwise indicate consumer demand for clean air thus gets muffled.

12. One of the defining features of a public good is that even highly competitive markets underproduce it, prompting regulatory intervention. Competitive manufacturing markets, for example, underproduce the emission controls that generate clean air, prompting Congress to establish minimum emission-control standards through the Clean Air Act. So too here, perhaps: if the market signal indicating consumer demand for alternative viewpoints is getting muffled, then in theory news producers may undersupply viewpoint diversity. And if information problems in news markets rise to the level of a market failure, then regulation would be the only potential solution. No amount of free-market competition would generate an increase in the supply of viewpoint diversity.

13. Of course, not all information problems lead ineluctably to market failure. Market mechanisms sometimes can solve information problems on their own, allowing competition to flourish. News consumers, for example, may be able to send adequate demand signals by relying on news producers' brands and reputations, advertising, third-party fact-checkers, or Pulitzer Prizes and other similar indicators of quality. If consumers can safely use market devices to accurately signal their demand for viewpoint diversity, then viewpoint diversity should be thought of as a "private good," not a public good.

14. In that case, a regulatory intervention would be unnecessary. Competition efficiently responds to consumer demand for private goods, so the free market thus would ensure that news publishers produce the socially optimal level of viewpoint diversity. The government would only need to provide vigorous antitrust enforcement to ensure that news markets remain competitive.

14. A complicating wrinkle is that news markets are not static. They can change over time, particularly when innovation leads to new methods of distribution. Consequently, in any given news

14. *Rosenberger v. Rector*, 515 U.S. 819, 829 (1995).

15. *Hunger in Am.*, 20 F.C.C.2d at 151.

16. *See* R. M. Stutz, Antitrust Law and Dominant-Firm Behavior in the Digital Technology Sector: Toward an Actionable Agenda for Policymakers, Am. Antitrust Inst. (June 28, 2021), at 20–22, https://tinyurl.com/22ptrpbs.

17. *See* ibid.

18. Ibid.

19. Ibid.

market, the available evidence may suggest that viewpoint diversity presents as a public good in one moment and a private good in the next. And because news is often distributed in telecommunications markets where the U.S. federal antitrust agencies and the FCC share concurrent jurisdiction, the government often has a choice whether to rely on antitrust enforcement or regulation to promote viewpoint diversity, or to use both as complements. [20] Before the government can decide how to act, however, it must first decide what problem it is trying to solve.

II. Bad behavior vs. market failure: "Either/or," not "yes/and"

15. Sound policymaking requires at least a temporary choice between the public-goods and private-goods frameworks. Before contemplating any particular enforcement or regulatory action in any given news market, the government must decide whether to treat viewpoint diversity as a private good that competitive markets efficiently produce (like manufactured goods) or as a public good that competitive markets underproduce (like clean air). It can act as though competitive markets meet consumer demand for viewpoint diversity in news markets or as though they underdeliver, but it cannot coherently act as though both are true at once.

16. Nevertheless, the government has done so. U.S. agencies have recently taken simultaneous enforcement and regulatory actions that alternately treat viewpoint diversity as a private good and a public good in the same digital news markets, apparently believing that competition can be both effective and ineffective in the same markets at the same time. That approach amounts to what George Orwell defined as "doublethink": "*holding two contradictory beliefs in one's mind simultaneously, and accepting both of them*." [21] Doublethink is a recipe for failed antitrust enforcement, failed regulation, or both.

17. Failure is mutually assured by the government's conflicting actions because the government cannot avoid underlying factual realities. Even if such factual realities are obscured by the dynamic nature of news markets, they will still have force. If viewpoint diversity is in fact a public good, then antitrust enforcement to promote competition will do nothing to increase its supply. If it is in fact a private good, then regulation to increase its supply will misallocate resources by distorting the market. Unless the government is deploying a multivariate, strategic policy based on complexities it has never articulated, its concurrent reliance on both market mechanisms and supply mandates thus will be self-defeating. Each approach will undermine the other.

III. Doublethink in digital news markets

17. The government's doublethink is reflected in at least three recent actions by the Antitrust Division of the U.S. Department of Justice (DOJ), the FCC, and the Federal Trade Commission (FTC). In overlapping digital news markets within the span of one month, the DOJ treated viewpoint diversity like a private good, the FCC treated it like a public good, and the FTC vacillated inexplicably. The result has been incomprehensible policy.

1. The DOJ's position: Competition sets the level of viewpoint diversity in news markets

18. On July 11, 2025, the DOJ filed a statement of interest in support of the plaintiffs on a motion to dismiss in *Children's Health Defense v. Washington Post Co.*, [22] a private antitrust case brought by non-mainstream content publishers alleging that mainstream news organizations illegally excluded them from "*digital news markets*." [23] The defendant news organizations helped form the Trusted News

20. *See* H. A. Shelanski, The Case for Rebalancing Antitrust and Regulation, *Mich. L. Rev.*, Vol. 109, Issue 5, 2011, pp. 683–732, at 718.

21. G. Orwell, *Nineteen Eighty-Four* (1949), pt. 2, ch. 9.

22. *Children's Health Def. v. Wash. Post Co.*, No. 1:23-cv-02735 (D.D.C. filed May 31, 2023).

Initiative (TNI), which they describe as an information-sharing partnership among media organizations and social media platforms that enables members to "*inform each other*" when they come across "*extreme disinformation*." [24] The plaintiffs allege that the TNI is pretextual. They maintain that the news organizations and platforms use the TNI to blocklist and boycott non-mainstream publishers that compete by offering alternative viewpoints. [25]

19. The DOJ supported the plaintiffs' theory of liability without mentioning the possibility of information problems or market failure. Moreover, the agency made several economic claims that did not depend on any case-specific facts or the kinds of inferences normally drawn in the plaintiff's favor at the motion-to-dismiss stage. First, the agency claimed, "[n]*ews consumers desire and demand diverse perspectives*." [26] Second, "*consumer welfare* (. . .) *benefit*[s] *greatly from viewpoint competition in* [digital] *news markets*." [27] Third, "*immunizing anticompetitive conduct that limits consumers' access to diverse viewpoints*" would "*cause grave harm in modern digital* [news] *markets*." [28]

20. The DOJ's claims only make sense if the agency believes that market mechanisms solve information problems in digital news markets. If a market failure prevents consumers who are denied viewpoint diversity from ever realizing what they are missing, then no amount of viewpoint competition will ever benefit consumers in these markets, nor will anticompetitive conduct make them any worse off. For the DOJ to believe it has any competition interest at stake in the outcome of the case, the agency must presuppose that competitive markets, free from monopolization, collusion or coordination, will adequately meet consumer demand for viewpoint diversity in digital news markets.

23. Compl. ¶¶ 133, 155, *Children's Health Def. v. Wash. Post Co.*, No. 1:23-cv-02735 (D.D.C. filed May 31, 2023) ("[T]*here are fundamental differences between the digital news market and the print and broadcast news markets*."); *see* Statement of Interest of the United States at 3, *Children's Health Def. v. Wash. Post Co.*, No. 1:23-cv-02735 (D.D.C. filed July 11, 2025) (applying its analysis to "*digital news markets*").

24. Br. in Supp. of Def's Mot. to Dismiss at 5, *Children's Health Def. v. Wash. Post Co.*, No. 1:23-cv-02735 (D.D.C. filed July 11, 2023) (alteration omitted).

25. Compl., *supra* note 23, ¶¶ 3–10, 318.

26. Statement of Interest, *supra* note 23, at 1.

27. Ibid.

28. Ibid. at 7.

2. The FCC's position: Individual firms can set the level of viewpoint diversity unilaterally

21. On July 24, 2025, the FCC conditionally approved the *Paramount/Skydance* merger under the Communications Act of 1934. [29] Skydance is a leading movie and television production company. [30] Paramount is an entertainment conglomerate that owns movie and television studios, streaming services, television networks, and CBS News. [31] CBS News is a unified, multi-channel news service that delivers content in a variety of markets, including digital news markets. [32]

22. The FCC reviews mergers under a public interest standard that includes, but is not limited to, the merger's effect on competition. When a transaction falls within the FCC's jurisdiction, the FCC and DOJ undertake parallel, complementary competition reviews. The DOJ evaluates whether the merger may substantially lessen competition under Section 7 of the Clayton Act, and the FCC evaluates any broader effects on competitive conditions that could otherwise inform its ultimate public-interest determination under the Communications Act. The FCC then weighs competitive benefits and competitive harms alongside other public-interest benefits and harms. [33]

23. The DOJ completed its competition review of *Paramount/Skydance* in August 2024, and the FCC did so in July 2025. Both agencies concluded that the merger did not threaten to create or enhance market power or otherwise harm competitive conditions. [34]

29. Mem. Op. & Order, *In re Applications of Skydance Media, LLC & Paramount Global*, FCC 25-43, docket No. 24-375 (July 24, 2025) (hereinafter "*FCC Paramount/Skydance* Op.").

30. *See* Skydance Media, About, https://skydance.com/about/ (last visited Nov. 12, 2025).

31. *See* Paramount Global, About, https://www.paramount.com/about/ (last visited Nov. 12, 2025).

32. *See* CBS News, About CBS News and Stations, https://www.paramount.com/about/brands/cbs-news (last visited Nov. 12, 2025).

33. *See generally* A. Maltas, T. Lin and R. F. Baldwin III, A Comparison of the DOJ and FCC Merger Review Processes: A Practitioner's Perspective, *ABA Antitrust Source* (Aug. 2016), https://www.americanbar.org/content/dam/aba/publishing/antitrust-magazine-online/aug16_full_source.pdf.

34. *See FCC Paramount/Skydance* Op., *supra* note 29, ¶ 49 (finding "*no evidence in the record that would support a finding of a transaction-related* [competition] *harm*"); Paramount Global, Registration Statement on Form S-4 (June 30, 2024), at 48, https://www.sec.gov/Archives/edgar/data/2041610/000119312524250679/d813356ds4.htm (noting that DOJ allowed the Hart-Scott-Rodino (HSR) Act waiting period to expire on August 19,

Having ruled out any anticompetitive effects, the FCC then weighed the merger's remaining public interest benefits and harms. [35] As relevant here, the FCC credited as a "*public interest benefit*" Skydance's unilateral commitment to provide politically and ideologically diverse viewpoints in all of "*CBS's reporting*," apparently including its reporting in digital news markets. [36]

24. The FCC's ruling does not square with the DOJ's statement of interest in *Children's Health Defense*. If a market failure causes the undersupply of viewpoint diversity in digital news markets, then the FCC's ruling is understandable because Skydance's unilateral commitment could help make up for the gap in supply. But if market mechanisms meet the demand for viewpoint diversity in digital news markets—as the DOJ must have thought in *Children's Health Defense*—then a single firm's unilateral choices are incapable of registering any effect. Any supply increase by the merged firm will be ephemeral because the other firms in the market will invariably compete away the difference, restoring the market equilibrium level of viewpoint diversity. [37]

25. The agencies' actions thus rest on conflicting premises. Whereas the DOJ's statement of interest only makes sense if market mechanisms solve information problems in digital news markets, the FCC's ruling only makes sense if market mechanisms fail to do so. One of two conclusions follows: Either the FCC credited a faux public interest benefit in *Paramount/Skydance*, or the DOJ asserted a competition interest without actually having one in *Children's Health Defense*. Without further explanation, something does not add up.

3. The FTC's (impossible) position: Coordinated effects can threaten viewpoint diversity, but unilateral conduct can fix the problem

26. On September 26, 2025, the FTC finalized a consent order settling a Section 7 challenge to the 6-5 horizontal merger of advertising conglomerates Omnicom and Interpublic Group (IPG). [38] The FTC's complaint alleged that the merger threatened coordinated anticompetitive effects in a relevant submarket for global media-buying services. [39] In this market, the "Big Six" media buyers, which would become the Big Five post-merger, represent advertisers in negotiating the purchase of ad inventory from media publishers, including digital news publishers. [40]

27. The FTC's complaint did not allege any unilateral anticompetitive effects. It alleged only that, by increasing concentration, the merger increased the likelihood that media buyers would collectively boycott non-mainstream publishers that compete by offering diverse viewpoints. [41] By withholding revenue from non-mainstream publishers, the FTC reasoned, collusive conduct could harm consumers by reducing viewpoint diversity, including in digital news markets. [42] The consent order requires the merged firm to make a unilateral non-discrimination commitment in all of its media buying agreements with "*any Third Party*," including advertisers, publishers, and other media buyers. [43]

28. The FTC's remedy is facially dubious because it imposes an obligation on only a single firm as a means of curing coordinated anticompetitive effects. Mergers only threaten coordinated effects when they generate an increase in concentration that affects firms' incentives to act collectively, through tacit coordination or explicit collusion. Because the FTC's

2024).

35. *See FCC Paramount/Skydance* Op., *supra* note 29, ¶¶ 50–59.

36. Ibid. ¶¶ 55, 59.

37. The merged firm's choices might make a difference if the firm has market power, but here both the FCC and the DOJ determined that the merger did not create or enhance market power in digital news markets. *See supra* note 34.

38. *In re Omnicom Grp. Inc. & Interpublic Grp. of Cos., Inc.*, FTC File No. 231-0052 (Sept. 26. 2025).

39. Compl. ¶¶ 15–24, *In re Omnicom Grp. Inc. & Interpublic Grp. of Cos., Inc.*, FTC File No. 251-0049 (Sept. 26, 2025).

40. Ibid. ¶¶ 6–7.

41. Ibid. ¶¶ 21, 24.

42. Ibid.

43. Decision & Order at 3, *In re Omnicom Grp. Inc. & Interpublic Grp. of Cos., Inc.*, FTC File No. 251-0049 (Sept. 26, 2025).

unilateral non-discrimination remedy allows further concentration and binds only the merged firm, the remedy can only exacerbate—it cannot mitigate—this structural risk. And indeed, the remedy does so. The non-discrimination provision increases the risk that the remaining four firms in the market, which are not bound by the consent order, will find it easier to collusively limit viewpoint diversity, provided the FTC is correct that these firms find it profitable (or otherwise preferable) to do so. [44]

29. Before the *Omnicom/IPG* merger, if any of those four firms had wished to fix the level of viewpoint diversity in digital news markets, then each firm had to reach an agreement with five other firms—the two merging firms plus its three remaining counterparts. After the FTC's consent order, each of those four firms need only reach an agreement with the three remaining counterparts. The merger itself eliminates IPG from the market, and the consent order, by preventing the New Omnicom from joining "*any agreement, understanding, rule or practice*" concerning viewpoint diversity, [45] gives each of the remaining four firms assurance that they can safely ignore the merged firm's preferences.

30. Once the consent order goes into effect, the remaining four firms, if they are rational, will set a low level of viewpoint diversity on their own, since doing so, according to the FTC's complaint, is more profitable (or otherwise preferable). The New Omnicom will then face a choice: it can either (i) compete by offering more than the market level of viewpoint diversity, or (ii) simply offer the market level of viewpoint diversity, without running afoul of the consent order. So long as the FTC's complaint is correct to allege that undersupplying viewpoint diversity "*provides a direct economic benefit*" and that supplying more than the equilibrium level of viewpoint diversity would "*disadvantage*[]" one firm "*relative to their rivals*," [46] then the merged firm would be irrational not to follow the market. [47] By leaving the equilibrium level of viewpoint diversity in the hands of four firms rather than five, the FTC's remedy is thus even worse for competition than unconditionally approving the merger—provided, again, that the FTC's complaint allegations are correct.

31. To be sure, the FTC's unilateral non-discrimination requirement can be effectual, and socially beneficial, if a market failure causes an undersupply of viewpoint diversity in digital news markets. Just as in *Paramount/Skydance*, a market failure would mean that the merged firm's unilateral commitment could help make up for the gap in supply caused by the underproduction of a public good. But in an antitrust case alleging coordinated anticompetitive effects, the belief that viewpoint diversity is a private good—and that competition would efficiently meet demand absent the antitrust violation—is fundamental to the premise of the claim. Viewed through a competition lens, the FTC's remedy is senseless because it makes the merger more like a 6-4 than a 6-5, which should alarm an agency concerned about collusive behavior in a five-firm market. The agency cannot have it both ways: either its complaint is wrong, or its remedy is.

IV. Conclusion: Policy incoherence without an explanation

32. The DOJ, FCC, and FTC confronted the same challenge in the same markets at the same time. Each sought to protect and promote viewpoint diversity in markets for the digital distribution of news. Yet they reached conflicting conclusions built on irreconcilable premises.

33. Cynics will say this administration cares so much for politics and so little for policy that it does not even bother to hide its politicized enforcement motives under a fig leaf of basic consistency. But the more charitable interpretation is that the administration is simply hedging, taking a belt-and-suspenders approach that combines both market-based and regulatory solutions, since it is not always clear whether inadequate viewpoint diversity in news

44. *See Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1387 (7th Cir. 1986) ("*The fewer competitors there are in a market, the easier it is for them to coordinate their pricing without committing detectable violations of section 1 of the Sherman Act*.").

45. *See* Decision & Order, *supra* note 43, at 3.

46. *See* Compl., *supra* note 39, ¶ 21.

47. *See*, e.g., OECD, Competition Enforcement in Oligopolistic Markets, *OECD Roundtables on Competition Policy Papers*, No. 172 (May 19, 2015), at 3 ("[P]*rofit-maximising firms in oligopoly markets will rationally take into account their rivals' behaviour and anticipated reactions when setting prices and other competitive variables*.").

markets presents primarily as a private goods problem or a public goods problem. Better to make errors of commission rather than errors of omission when ensuring a well-informed citizenry in a democratic society—or so the thinking goes.

34. One look at the FTC's self-defeating consent order in *Omnicom/IPG* should belie this fallacious reasoning. By resolving an antitrust claim premised on a functioning market with a remedy premised on a market failure, the FTC's consent order is not just ineffectual but counterproductive, provided its antitrust claim is correct. No matter how well intentioned its motives, the government will only work at cross-purposes with itself and undermine its own cause if it cannot untangle itself from doublethink.

35. It is not obvious why news producers would want to withhold diverse content that would make the quality of their products more attractive and valuable to their customers, and the administration is already out on a limb in presuming that doing so can give rise to a federally actionable news distortion claim. Why then court the significant First Amendment risk of burdening news publishers' editorial judgments only to pursue regulatory and enforcement actions that contradict and counteract each other? Rather than working toward an "*uninhibited marketplace of ideas in which truth will ultimately prevail*," [48] the government is running itself in circles and getting nowhere.

R. S. ■

48. *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390 (1969).

Content Moderation and Antitrust: Part X - Getting the bad end of a bilateral bargain: The administrative state ignores Trump's executive order prohibiting "jawboning" of private speech

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The Biden Administration had a well-documented reputation for using the "vast powers" of the administrative state to coerce private speech. Immediately upon taking office, President Trump sent a clear message that a new sheriff was in town by issuing an Executive Order expressly directing that "no Federal Government officer, employee, or agent engages in or facilitates any conduct that would unconstitutionally abridge the free speech of any American citizen" and that no taxpayer resources can be "used to engage in or facilitate any conduct that would unconstitutionally abridge the free speech of any American citizen." Unfortunately, the administrative state has yet to comply. This article presents several case studies demonstrating how private firms agreed to "voluntary" merger conditions curtailing their speech as a necessary prerequisite for getting their transactions approved by the government. This article concludes that while Americans voted for change in 2024, having the Trump administration's antitrust and regulatory agencies emulate the jawboning behavior of the previous administration is no change at all.

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1. As Chief Justice John Roberts astutely observed, the federal bureaucracy "*wields vast power and touches almost every aspect of daily life*." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting) (quotation marks omitted).]] Given this "vast power," it stands to reason that if a private entity has extensive dealings with the government, then whenever that entity needs some sort of regulatory approval from the government, the regulator and the regulated will essentially negotiate a bilateral bargain with each other. In practice, this bargain typically manifests as the private entity agreeing to "voluntary" commitments wholly unrelated to the transaction at hand while allowing the government to achieve political objectives outside of the normal course of business. T. R. Beard, G. S. Ford, L. J. Spiwak and M. L. Stern, Regulating, Joint Bargaining, and the Demise of Precedent, *Managerial and Decision Economics*, Vol. 39, Issue 6, 2018, pp. 638–651, https://onlinelibrary.wiley.com/doi/abs/10.1002/mde.2934;{

see also F. H. Easterbrook, The Supreme Court, 1983 Term—Foreword: The Court and the Economic System, *Harv. L. Rev.*, Vol. 98, No. 1, 1984, pp. 4–60, at 39.]] Over the years, such "voluntary" commitments have run the gamut from addressing labor market concerns, to subsidies for low-income consumers, to buildout requirements. [1] Importantly, as both parties basically get largely what they want out of the bargain, these informal regulatory intrusions are generally never appealed to the courts—often creating inconsistent and poorly reasoned precedents. [2]

2. Over the past several years, a disturbing wrinkle has developed in these regulatory bargains: rather than try to extract economic concessions, the government has attempted to use its "vast power" to coerce (or, to use the popular vernacular, "jawbone") private speech in violation of the First Amendment. While some sort of subtle jawboning has no doubt occurred since the founding of our republic, the Biden administration decided to throw open the doors to this Pandora's box. As legal scholar Professor Jonathan Turley observed, by creating a "*horrific, massive censorship system*," President Biden was the "*most anti-free speech president since John Adams*." [3]

1. For a comprehensive discussion of case studies, *see* T. R. Beard, G. S. Ford, L. J. Spiwak and M. Stern, Eroding the Rule of Law: Regulation as Cooperative Bargaining at the FCC, *Phoenix Center Policy Paper* No. 49 (Oct. 2015), https://www.phoenix-center.org/pcpp/PCPP49Final.pdf.
2. T. M. Koutsky and L. J. Spiwak, Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the "Public Interest" Standard, *CommLaw Conspectus*, Vol. 18, No. 2, 2010, pp. 329–348; but cf. *Competitive Enter. Inst. v. FCC* (D.C. Cir. 2020) (rejecting "voluntary" merger conditions unrelated to remedying any anticompetitive harm).
3. B. Hallowell, Jonathan Turley Delivers Blunt Message About Biden and "Horrific…Censorship", CBN News (July 18, 2024), https://cbn.com/news/politics/jonathan-turley-delivers-blunt-message-about-biden-and-horrific-censorship.

3. Take, for example, the Biden administration's well-documented "jawboning" of social media platforms to control the public narrative during the Covid pandemic. [4] This coercive jawboning came to a legal head with the Supreme Court's ruling in the case of *Murthy v. Missouri*. [5] Although there was a "sprawling" record of the government threatening to interfere with digital platforms' business models if they did not play ball, the Court dismissed the case on standing grounds. Why? Because it was not the digital platforms that complained about the government's jawboning; the petitioners in *Murthy* were third parties to the alleged government abuse—two states and five individual social media users. Given the breadth of their businesses and the "vast power" of the administrative state, the digital platforms apparently believed it was not worth the price to fight City Hall. [6]

4. The Biden administration's jawboning became an important issue for conservative voters leading up to the 2020 presidential election. Understanding his political base well, immediately upon taking office in January 2025, President Trump signed Executive Order No. 14149 entitled Restoring Freedom of Speech and Ending Federal Censorship. [7] This executive order sent a clear message that a new sheriff was in town and that the days of government coercing private speech were now over. Directly pointing to the pervasive jawboning of the Biden administration that led to *Murthy*, Executive Order No. 14149 provides, inter alia, that "*no Federal Government officer, employee, or agent engages in or facilitates any conduct that would unconstitutionally abridge the free speech of any American citizen*" and that no taxpayer resources can be "*used to engage in or facilitate any conduct that would unconstitutionally abridge the free speech of any American citizen*."

5. Adding to his "belt and suspenders" approach to ensure regulatory restraint, shortly thereafter President Trump also signed Executive Order No. 14219 entitled Ensuring Lawful Governance and Implementing the President's "Department of Government Efficiency" Deregulatory Initiative. [8] This executive order provides, inter alia, that no agency may issue a rule that "*raise*[s] *serious constitutional difficulties, such as exceeding the scope of the power vested in the Federal Government by the Constitution*"; is "*based on anything other than the best reading of the underlying statutory authority or prohibition*"; or "*implicate*[s] *matters of social, political, or economic significance that are not authorized by clear statutory authority*"—i.e., violates the Major Questions Doctrine as spelled out by the Supreme Court in *West Virginia v. EPA*. [9]

6. Yet while President Trump was making efforts to prevent the government from coercing private speech, something odd was concurrently occurring: many of President Trump's second-term appointees were making public statements openly calling for the government to regulate private speech. [10] Given this analytical disconnect, in February 2025 I published an essay with the Federalist Society in which I posited an important, but at the time unanswered, question: "President Trump Formally Prohibits Government Jawboning, But Will the Administrative State Comply?" [11] As of November 2025, the answer appears to be "no."

7. Let's look at a few recent examples (although there are certainly others that also merit discussion). [12] The

4. *See*, e.g., Letter from META CEO Mark Zuckerberg to the Honorable Jim Jordan, Chairman – Committee on the Judiciary of the United States House of Representatives (Aug. 26, 2024), https://www.americanrhetoric.com/speeches/PDFFiles/Mark-Zuckerberg-Letter-on-Govt-Censorship.pdf; *see also Missouri v. Biden*, No. 3:22-CV-01213, slip op. at 116–117 (W.D. La. July 4, 2023) (Memorandum Ruling on Request for Preliminary Injunction), aff'd in relevant part, *Missouri v. Biden*, 83 F.4th 350 (5th Cir. 2023) ("*The evidence thus far shows that the social-media companies cooperated* [with the Biden administration] *due to coercion, not because of a conspiracy*.").

5. *Murthy v. Missouri*, 603 U.S. 43 (2024).

6. L. J. Spiwak, Murthy Provides a Teachable Moment About the "Vast Power" of the Administrative State, Federalist Society Blog (Oct. 30, 2024), https://fedsoc.org/commentary/fedsoc-blog/murthy-provides-a-teachable-moment-about-the-vast-power-of-the-administrative-state.

7. 90 Fed. Reg. 8243 (2025), https://www.whitehouse.gov/presidential-actions/2025/01/restoring-freedom-of-speech-and-ending-federal-censorship.

8. 90 Fed. Reg. 10583 (2025), https://www.whitehouse.gov/presidential-actions/2025/02/ensuring-lawful-governance-and-implementing-the-presidents-department-of-government-efficiency-regulatory-initiative.

9. *West Virginia v. EPA*, 597 U.S. 697 (2022).

10. *See* L. J. Spiwak, When Antitrust and the First Amendment Collide, *Yale Journal on Regulation*, Notice & Comment (Feb. 26, 2025), https://www.yalejreg.com/nc/when-antitrust-and-the-first-amendment-collide-by-lawrence-j-spiwak.

11. L. J. Spiwak, President Trump Formally Prohibits Government Jawboning, But Will the Administrative State Comply? Federalist Society Blog (Feb. 12, 2025), https://fedsoc.org/commentary/fedsoc-blog/president-trump-formally-prohibits-government-jawboning-but-will-the-administrative-state-comply.

12. *See*, e.g., Fed. Trade Comm'n, Press Release, Federal Trade Commission Launches Inquiry on Tech Censorship (Feb. 20, 2025), https://www.ftc.gov/news-events/news/press-releases/2025/02/federal-trade-commission-launches-inquiry-tech-censorship; *see also* L. J. Spiwak, Sauce for the Goose: The

first example is the Federal Trade Commission's (FTC) consent agreement with Omnicom Group, Inc. (Omnicom) regarding its USD 13.5 billion acquisition of The Interpublic Group of Companies, Inc. (IPG). [13] Under the terms of the consent agreement, Omnicom is prohibited from: (i) directing advertisers' advertising spends; (ii) refusing advertisers' requests to direct advertising spends to a media publisher; or (iii) declining to deal with advertisers, [14] based upon: "*(1) Political or ideological viewpoints (including viewpoints as to the veracity of news reporting or other politically or ideologically contested facts, such as their characterization as 'misinformation,' 'disinformation,' 'bias,' or similar terms); (2) adherence to journalistic standards or ethics established or set by a Third Party; and/or (3) commitment or adherence to diversity, equity or inclusion (DEI), such as diverse ownership or casting*." [15]

8. In addition, the merged entity is required both to file compliance reports with the Commission [16] and to appoint an FTC-approved "*Monitor*" to ensure compliance and to receive complaints for five years. [17]

9. As a general proposition, when firms deliberately collude against a rival with the specific intent of driving that rival out of business in order to enable the cartel subsequently to raise prices and restrict output, such conduct violates the antitrust laws. [18] But this scenario was not the focus of the consent agreement. In fact, the consent agreement neither identifies—nor contains any provision that can in any way be reasonably construed to remedy—any specific anticompetitive harm that would arise because of the transaction.

10. Instead, the consent agreement is expressly designed to impose a duty to deal based on subjective political and ideological grounds that the government would decide are acceptable. We must ask: what if the merged entity wants to refuse to do business with another firm as a matter of conscience because it does not like the values or views of that firm? Such action is not anticompetitive conduct, but the very definition of freedom of expression and association. [19] Like it or not, antitrust law does not recognize a duty to deal with competitors—much less recognize a duty to deal with people whom one might find personally abhorrent. [20]

11. But here's the rub: the merged entity's willingness to enter into a consent agreement to govern its speech in order to get its transaction approved is strong evidence that it believed that it was better to bargain with the government than to fight it. [21] The consent agreement, therefore, is the epitome of the jawboning President Trump promised to stop.

12. We also have the Federal Communications Commission's (FCC) recent approval of Skydance Media's acquisition of Paramount Global, which includes the purchase of the CBS television network. [22] By the FCC's own admission, there were no material public interest harms arising from the transaction. [23] If anything, reasoned the FCC, Skydance's promised injection of new capital would bolster the operations of the CBS legacy owned-and-operated broadcast television stations—a business model that has been slowly dying due to competitive pressure from streaming services and alternative online platforms such as YouTube. [24]

13. But buried deep in the FCC's order, we find these little gems: to get the deal approved, Skydance "voluntarily" agreed to ensure that "*New*

FCC Lacks Authority to Interpret Section 230 Post-Loper Bright, Federalist Society Blog (Nov. 21, 2024), https://fedsoc.org/commentary/fedsoc-blog/sauce-for-the-goose-the-fcc-lacks-authority-to-interpret-section-230-post-loper-bright; L. J. Spiwak, The FCC Still Can't Interpret Section 230, Federalist Society Blog (May 1, 2025), https://fedsoc.org/commentary/fedsoc-blog/the-fcc-still-can-t-interpret-section-230.

13. *In the Matter of Omnicom Group Inc. and The Interpublic Group of Companies, Inc.*, Decision and Order docket No. C-4823 (Sept. 26, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/OmnicomOrder.pdf.

14. Ibid., section II.

15. Ibid., section I.D.

16. Ibid., section III.

17. Ibid., section IV.

18. *See*, e.g., *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

19. *See*, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982).

20. *See* Spiwak, *supra* note 12 and citations therein.

21. Beard et al., *supra* note 2.

22. *In the Matter of Applications for Consent to the Transfer of Control of Paramount Global*, FCC 25-43, Memorandum Opinion and Order, __ FCC Rcd. __ (rel. July 24, 2025) (hereinafter "*Paramount Order*"). For an explanation of the FCC's legal authority to review certain transactions, *see* Koutsky and Spiwak, *supra* note 4.

23. It should also be noted that the Department of Justice also found no competitive problems with the transaction and cleared the deal to proceed in August 2024. *See* Paramount Global Form 10-K, For the Fiscal Year Ended Dec. 31, 2024, at I-30, 31.

24. *Paramount Order*, *supra* note 24, ¶ 1.

Paramount's array of news and entertainment programming embodies a diversity of viewpoints across the political and ideological spectrum and that CBS's reporting is fair, unbiased, and fact-based." [25] Moreover, Skydance "voluntarily" agreed to install an "*ombudsman who reports to the President of New Paramount, and who will receive and evaluate any complaints of bias or other concerns involving CBS*" for a period of at least two years. [26]

14. Without question, CBS News has a long and well-deserved reputation for liberal bias. CBS, however, is free to say what it wants. But by the same token, if viewers are dissatisfied with the product CBS is peddling, then viewers are free to change the channel. And in the case of CBS News, the market had spoken—many Americans simply tuned CBS News out. [27] No wonder why Shari Redstone was so eager to sell, and, by extension, the merging parties were so willing to negotiate with the government to produce a bargain in which they agreed to the "voluntary" commitments highlighted above in exchange for getting the deal approved.

15. Still, in all of the years the FCC has extracted "voluntary" commitments, we now seem to have crossed the Regulatory Rubicon: the "voluntary" commitments in the Skydance/Paramount deal allow the federal government to put its thumb on the editorial scale of private speech. [28] Taking the current FCC's actions to their logical conclusion, what is to stop a Democrat-controlled FCC from pressuring a cable or satellite operator to deplatform Fox News or Newsmax because that particular administration does not like their conservative bent? Nothing. [29] Indeed, the current FCC provides the template.

16. Finally, we have the recent kerfuffle involving the temporary suspension of Jimmy Kimmel's late-night show for his inappropriate remarks about the murder of Charlie Kirk. To recap, Kimmel claimed on air that "*the MAGA gang*" was attempting to portray Charlie Kirk's assassin as "*anything other than one of them*." [30] As this statement was obviously false (in fact, the opposite was true, though conspiracy theories abound [31]), conservative voices were legitimately incensed and wanted the Trump administration to do something about it. Shortly thereafter, FCC Chairman Brendan Carr went on the Benny Johnson podcast to talk about what the FCC could do and suggested that the Commission had "*remedies we can look at*." At that point, Chairman Carr uttered the now-famous line: "*We can do this the easy way or the hard way* (. . .). *These companies can find ways to change conduct and take action, frankly, on Kimmel or there's going to be additional work for the FCC ahead*." [32] Shortly thereafter, three different corporations—all of which depend on FCC broadcast licenses—decided to temporarily suspend the broadcast of Mr. Kimmel's show: (i) ABC/Disney, which is a television network but which also owns several broadcast stations; [33] (ii) Nexstar, an owner of ABC affiliate stations around the country, which had recently announced that it planned to acquire a rival company in a USD 6.2 billion deal (a deal that requires FCC approval); [34] and (iii) Sinclair Television, another owner of many local TV stations, which does not currently have a major transaction pending before the FCC, but is widely expected to seek additional broadcast stations. [35]

17. So was the Kimmel suspension jawboning? Some argue that the Kimmel suspension raised no First Amendment concerns; [36] other scholars argue that the FCC was unlawfully punishing broadcasters for content the government did not like. [37] As there is

25. Ibid. ¶ 59.

26. Ibid.

27. C. Hall, Bret Baier Is Thriving in an Uncertain Trump Second Term: A Mediaite Q&A, Mediaite (Aug. 7, 2025), https://www.mediaite.com/opinion/bret-baier-is-thriving-in-an-uncertain-trump-second-term-a-mediaite-qa.

28. *See*, e.g., Beard et al., *supra* note 3.

29. L. J. Spiwak, In Response to Joel Thayer, Federalist Society Blog (Apr. 8, 2021), https://fedsoc.org/commentary/fedsoc-blog/in-response-to-joel-thayer.

30. G. Maddaus, FCC Chairman Threatens ABC Over Jimmy Kimmel's Remarks About Charlie Kirk's Killer, *Variety* (Sept. 17, 2025), https://variety.com/2025/tv/news/brendan-carr-abc-fcc-jimmy-kimmel-charlie-kirk-1236522406.

31. D. Dale, Fact Check: The Fake Photos, False Claims and Wild Conspiracy Theories Swirling Around the Murder of Charlie Kirk, CNN (Sept. 20, 2025), https://www.cnn.com/2025/09/20/politics/fact-check-charlie-kirk-murder.

32. Maddaus, *supra* note 32.

33. J. Koblin, M. M. Grynbaum and B. Barnes, ABC Pulls Jimmy Kimmel Off Air for Charlie Kirk Comments After F.C.C. Pressure, *N.Y. Times* (Sept. 17, 2025), https://www.nytimes.com/2025/09/17/business/media/abc-jimmy-kimmel.html.

34. Ibid.

35. Ibid.

36. *See*, e.g., D. Suhr, Straight Talk on FCC "Jawboning", Broadband Breakfast (Oct. 15, 2025), https://broadbandbreakfast.com/daniel-suhr-straight-talk-on-fcc-jawboning.

no final FCC order out at the time of this writing, I am reserving judgment until we can see the contours of any formal regulatory "bargain." That said, after over thirty years in this business, I have learned one immutable rule: when it comes to the government's exercise of its "vast powers," where there is smoke, there is a very good chance that there is fire. [38]

18. Either way, given the executive orders highlighted above, it was interesting to see the White House try to walk Chairman Carr's comments back. According to Vice President J. D. Vance, Chairman Carr was simply "*making a joke on social media*." In fact, argued the Vice President, the Trump administration "*believes in free speech*" and is "*fighting every single day to protect it*." To emphasize the point, the Vice President invited critics to compare the current administration to "*the Biden administration, where we found out just yesterday that conservatives on YouTube and on a number of social media platforms were being censored*." [39]

19. President Trump has articulated a deregulatory agenda for "*national success*." [40] To back that up, President Trump issued a series of consequential executive orders that prohibit government jawboning of private speech and direct federal regulatory agencies to stay in their statutory lanes. Yet we see no evidence to date that the administrative state aims to comply, and even President Trump has noticed. Soon after retaking office, President Trump lamented to conservative commentator Sean Hannity that although he "*write*[s] *an executive order and you think it's done, you send it out; it doesn't get done. It doesn't get implemented. They don't implement it*." [41]

20. Americans voted for change in 2024, but having the Trump administration's antitrust and regulatory agencies emulate the jawboning behavior of the previous administration is no change at all.

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37. *See*, e.g., J. B. Speta, The FCC Lacks Authority to Punish Broadcasters for Their Viewpoints, *Yale Journal on Regulation*, Notice & Comment (Sept. 26, 2025), https://www.yalejreg.com/nc/the-fcc-lacks-authority-to-punish-broadcasters-for-their-viewpoints-by-james-b-speta/.

38. Chairman Carr has repeatedly stated that he would like to revitalize the "public interest" standard for broadcast licensees. If so, then it is incumbent upon the FCC to issue some sort of Notice of Inquiry or Notice of Proposed Rulemaking where the agency sets forth its vision of what (and what does not) constitutes compliance with this standard, the public has an opportunity to comment on this proposal, and the final obligations can ultimately be challenged in court to ensure these new rules comply with the First Amendment. Courts do not look fondly on the Commission changing policy without providing the public with adequate notice. Cf. *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).

39. Vance D. Mastrangelo, FCC Chief's Kimmel Threat Was "Joke," *The Hill* (Sept. 25, 2025), https://thehill.com/homenews/media/5521172-vance-fcc-carr-kimmel-threat.

40. G. S. Ford and L. J. Spiwak, The Unexpected (and Unnecessary) "Regulatory Paradox" in Current U.S. Tech Policy, *Phoenix Center Policy Bulletin* No. 76 (June 2025), https://phoenix-center.org/PolicyBulletin/PCPB76Final.pdf.

41. Interview of President Trump and Elon Musk by Sean Hannity, *The Sean Hannity Show* (Feb. 18, 2025), https://rollcall.com/factbase/trump/transcript/donald-trump-interview-sean-hannity-fox-news-with-elon-musk-february-18-2025.

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