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Part I - Foreword

Content Moderation and Antitrust | Concurrences On-
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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

1. L. Nylén, 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. Nylén, 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.

nine contributions to this *Concurrences On-Topic* on content moderation and antitrust. The contributions 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 The Supreme Court found that the NAACP's boycott had First Amendment protection (as the Eighth Circuit found with respect to NOW's boycott¹⁵), 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 treatment¹⁶ but also

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

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.

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

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

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).

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 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

31. Szóka, *supra* note 25, ¶¶ 17–21.

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.

See also:

Part X - Getting the bad end of a bilateral bargain: The administrative state ignores Trump's executive order prohibiting "jawboning" of private speech – *3 November 2025, Art. 129631*

Part IX - Competition, market failure, and doublethink in news markets – *3 November 2025, Art. 129716*

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