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

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ABSTRACT

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,

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>.

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 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

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

6. *Ibid.*

7. See D.J. Trump, @realDonaldTrump, Truth (Sept. 27, 2024), <https://truth-social.com/@realDonaldTrump/posts/113210776247146944>.

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).

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 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.

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

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.

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.”).

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 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

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

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).

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 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

42. Ibid.

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.

*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 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

56. *Ibid.* at 663.

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.

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 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 unlawful⁷⁰ 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

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.

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”).

did the dicta of *Associated Press* take on such a life of its own?

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*

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.

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.

Lawyers (1990) (*SCTLA*), one of two Supreme Court cases dealing with concerted refusals to deal, also known as group boycotts.⁹¹ Why?

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 undeniable 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

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

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.”).

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 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 "undeniably" 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

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

102. *Ibid.* at 933.

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

economic motivation for [publishing speech] would clearly be insufficient, by itself, to turn the materials into commercial speech.”¹¹⁸ Indeed, “commercial 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.

(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)).

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.

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

49. If economic self-interest might, “[a]t times,”¹²⁴ 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

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).

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 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 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

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>.

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

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

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

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 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.

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

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.*

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