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

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ABSTRACT

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.

Table of contents

- **Foreword**, Bilal Sayyed, Adjunct Professor, George Mason University, Arlington
- **Antitrust enforcement and protected speech: First Amendment primer**, Santana Boulton, Legal Fellow, TechFreedom, Washington D.C.
- **Media and technology platform discrimination under federal antitrust and consumer protection law**, Alden Abbott, Senior Research Fellow, George Mason University, Arlington
- **Group boycotts and free speech: The intersection of antitrust and the First Amendment**, Madhavi Singh, Deputy Director, Thurman Arnold Project, Yale University, New Haven
- **Section 5 and the marketplace of ideas**, Shaoul Sussman, Partner, Simonsen Sussman, New York
- **Is there an empty set at the intersection of antitrust and content moderation?**, Daniel Gilman, Senior Scholar of Competition Policy, and Ben Sperry, Research Director, International Center for Law & Economics, Portland
- **Antitrust, content moderation, and the First Amendment**, Jonathan Massey, Founding Partner, Massey & Gail, Washington, D.C.
- **The First Amendment's red line between the expressive and commercial realms**, Berin Szóka, President, TechFreedom, Washington D.C.
- **Competition, market failure, and doublethink in news markets**, Randy Stutz, President, American Antitrust Institute, Washington D.C.
- **Getting the bad end of a bilateral bargain: The administrative state ignores Trump's executive order prohibiting "jawboning" of private speech**, Lawrence Spiwak, President, Phoenix Center for Advanced Legal & Economic Public Policy Studies, Washington D.C.

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

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/CM-SImages/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.").

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.

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 unprotected¹⁷ speech can still violate the First Amendment: those laws might draw impermissible content-based distinctions—like punishing some fighting words but not others¹⁸—or inadvertently impact protected speech.¹⁹ But if the speech in

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 ‘non-speech’ 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

5. *Ibid.* at 719.

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*

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 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 restrictions²³—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

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.”).

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.

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.*”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*

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.

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

14. Courts use other tests for specific circumstances, like campaign finance disclosure requirements⁴⁴ 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*

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.

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://truth-social.com/@realDonaldTrump/posts/113631003888738065>; D. J. Trump, @realDonaldTrump, Truth (Dec. 4, 2024, 12:21 PM), <https://truth-social.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.

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 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

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

54. *Ibid.*

55. *Ibid.*

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).

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 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

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 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. Bingham, 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. Bingham, 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

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

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.*

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.

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

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*

Part VIII - The First Amendment's red line between the expressive and commercial realms – 3 November 2025, *Art. 129618*

Part VII - Antitrust, content moderation, and the First Amendment – 3 November 2025, *Art. 129342*

Part VI - Is there an empty set at the intersection of antitrust and content moderation? – 3 November 2025, *Art. 129340*

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