INTERNET AND TELECOMMUNICATIONS REGULATION

SECOND EDITION

2024-2025 SUPPLEMENT

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CHAPTER 1
Introduction to Internet and Telecommunications Regulation

Insert on pages 28-29, replacing the carryover paragraph:

Legal interpretations made by the agency are subject to a different form of review, one that has very recently changed. Beginning with Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the Supreme Court and the D.C. Circuit had firmly adopted the view that, if an agency's statute was ambiguous and the agency had been delegated authority to administer the statute, courts were required to defer to any "permissible" (meaning "reasonable") agency interpretation of the statute—including in situations in which an agency changed its mind about the meaning of a statutory provisions (which, as you will see, has happened in relatively dramatic fashion in the FCC's development and withdrawal of so-called net neutrality rules, Chapter 6). Throughout this casebook, you will see courts deferring to the FCC's interpretation of the Communications Act under this so-called "*Chevron* doctrine."

In June 2024, the Supreme Court declared, "*Chevron* is overruled." Loper Bright Enterp. v. Raimondo, 144 S. Ct. 2244, 2272 (2024). Henceforth, the Court said, courts must exercise their "independent judgment" on matters of statutory interpretation, while taking into account the views of administrative agencies. The Court also said, however, that Congress could "confer discretionary authority on agencies … subject to constitutional limits." When Congress does so, judges "independently identify and respect such delegations of authority, police the outer boundaries of those delegations, and ensure that agencies exercise their discretion consistent with the APA." *Id*. at 2268.

It is too early to know exactly how much the elimination of the *Chevron* doctrine will constrain the FCC's administration of the Communications Act, for the Communications Act unambiguously delegates much authority to the FCC. Yet, *Loper Bright* identified as a particular problem of *Chevron* the ability of agencies to change their minds on statutory interpretation, criticizing the holding of National Cable & Telecommunications Ass'n v. Brand X Internet Services, 545 U.S. 967 (2005) (excerpted in Chapter 6). And the Supreme Court has otherwise taken actions (best studied in an administrative law course) to reduce the historic deference courts have given agency lawmaking.

CHAPTER 5
Natural Monopoly Regulation

Insert on page 227, after note 8:

9. Constitutional Challenge. In Consumers' Research v. FCC, 2024 WL 3517592 (5^{th} Cir., July 24, 2024) (en banc), a divided United States Court of Appeals held that key elements of the FCC's universal service program under § 254 were unconstitutional. The court first expressed its doubts that Congress had complied with the nondelegation doctrine because it found that § 254 did not give the FCC sufficient direction in setting the amount of universal service contributions (which the court found were "taxes" and not "fees"). The court also expressed its doubts that the FCC could constitutionally delegate to the Universal Service Administrative Company authority to set the particular contribution rate charged and to otherwise administer the program. The court held that the combination of these two aspects of universal service under § 254 meant that the regime was unconstitutional. The Fifth Circuit's holding created a direct split with previous decisions from three circuits upholding the current scheme against identical constitutional challenges. *See* Consumers' Research v. FCC, 88 F.4th 917 (11th Cir. 2023), *cert. denied*, No. 23-743, 2024 WL 2883755 (U.S. June 10, 2024); Consumers' Research v. FCC, 67 F.4^{th} 773 (6^{th} Cir. 2023), *cert denied*, No. 23-456, 2024 WL 2883753 (U.S. June 10, 2024); Rural Cellular Ass'n v. FCC, 685 F.3d 1083, 1089–90 (D.C. Cir. 2012).

CHAPTER 6
Regulating Internet Access

Insert on page 316, after note 4:

Reclassifying Broadband Internet Access Under Title II

In 2024, the FCC repealed the 2018 order and reclassified broadband internet access service (BIAS) as a telecommunications service under Title II (so, picking up on footnote 8 on page 280 of the casebook, the 2024 rules were a re-re-re-reclassification). Safeguarding and Securing the Open Internet, Declaratory Ruling, Order, Report and Order, and Order on Reconsideration, FCC 24-52, 2024 WL 2109860 (2024). As with the earlier votes on net neutrality rules, the vote was 3-2, with the President's party prevailing.

The 2024 rules hewed very closely to the 2015 rules excerpted on pages 252-59 of the casebook – indeed, the 2024 order stated that the new rules were "materially identical" to the 2015 rules. *Id.* ¶ 257; *see also* ¶ 7 ("our approach reinstates the rules that the Commission adopted in 2015"). So the 2024 rules articulated definitions (of BIAS etc.) and rules that were basically verbatim from the 2015 rules. And the 2024 rules reinstated the bright-line rules from the 2015 rules prohibiting blocking, throttling, and paid prioritization by BIAS providers, and they reinstated the general conduct rule prohibiting, on a case-by-case basis, practices that cause unreasonable interference or unreasonable disadvantage to consumers or edge providers (and exempting "reasonable network management" from this rule). *Id.* ¶ 516. Similarly, the 2024 rules followed the 2015 rules in forbearing from imposing a range of Title II provisions, most notably (and most importantly for BIAS providers) rate regulation. *Id.* ¶ 386.

The similarity between the 2024 and 2015 rules reflects the 2024 majority's apparent agreement with the approach of the 2015 rules. It also reflects the fact that the 2015 rules were upheld in United States Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016) (excerpted on pages 260-72). By following the 2015 rules, the 2024 FCC majority placed itself in a position to argue that its rules were entitled to the same treatment as the 2015 rules.

Weren't there legal and factual developments between 2015 and 2024? Yes, but none that the FCC majority deemed sufficient to merit changing its 2015 approach. As for the former, in the intervening years the Supreme Court developed what has come to be called the major questions doctrine, under which "decisions of vast economic and political significance" relying on "an unheralded power" "in a long-extant statute" require clear congressional authorization. West Virginia v. EPA, 597 U.S. 697, 700, 724 (2022). The majority contended that the major questions doctrine was inapplicable, emphasizing the FCC's history of applying Title II (having classified DSL service under Title II in 2015 and BIAS under Title II in 2015), and arguing that net neutrality does not have vast economic significance. The dissenting commissioners instead emphasized the that BIAS had been regulated under Title I for all but the period between 2015 and 2018, and contended that net neutrality regulations are indeed of vast economic and political significance.

Notable among the factual developments was network slicing, which allows 5G mobile networks to create subnetworks (or slices) that have different network management rules without any physical division of network resources. As the 2024 order noted, "network slicing proponents contend that it allows [mobile networks] to establish separate slices for mobile broadband and fixed wireless traffic, while simultaneously offering customized slices for enterprise private networks, video calls, and a variety of other uses." 2024 order ¶ 201. Opponents of network slicing "express[ed] concern that network slicing will be used to circumvent our prohibition on paid prioritization, throttling, or unreasonable discrimination." *Id.* ¶ 202. Proponents of network slicing argued that it is a non-BIAS service and thus outside Title II (as the order applied Title II only to BIAS) or, if treated as a BIAS service, such slicing was a reasonable network management practice and thus permissible. Opponents, unsurprisingly, argued the opposite.

The 2024 order concluded that "Given the nascent nature of network slicing, we conclude that it is not appropriate at this time to make a categorical determination regarding all network slicing and the services delivered through the use of network slicing." *Id.* ¶ 203. The order stated that it would monitor the development of network slicing, and its general conduct rule gave it considerable flexibility in determining at a later point that network slicing was inconsistent with its 2024 rules.

We excerpt below the part of the 2024 order that responded to the 2018 order's argument (¶¶ 116 and 140-154 of the 2018 rules, excerpted on pages 284 and 290-93) that its transparency rule plus existing consumer protection and antitrust laws provided adequate protection:

SAFEGUARDING AND SECURING THE OPEN INTERNET

Declaratory Ruling, Order, Report and Order, and Order on Reconsideration,
FCC 24-52, 2024 WL 2109860 (2024)

4. The Restoring Internet Freedom Order's Framework Is Insufficient to Safeguard and Secure the Open Internet

482. We find that framework in the 2018 Restoring Internet Freedom Order (RIF Order), does not adequately protect consumers from the potential harms of BIAS provider misconduct. BIAS providers have the incentive and technical ability to engage in conduct that undermines the openness of the Internet. In 2018, when the Commission repealed the open Internet conduct rules, the Commission asserted that a modified transparency rule, combined with the effects of competition, would prevent BIAS provider conduct that might threaten the Internet's openness. Notwithstanding this conclusion, the Commission found that "[i]n the unlikely event that ISPs engage in conduct that harms Internet openness," preexisting antitrust and consumer protection laws will protect consumers. RIF Order, 33 FCC Rcd. at 393-94, para. 140. We believe that this framework is insufficient to safeguard and secure the open Internet.

483. Even while upholding the Commission's reliance on consumer protection and antitrust law to protect the open Internet in Mozilla Corp. v. FCC, 940 F.3d 1, 59 (D.C. Cir. 2019), the court observed that the RIF Order's "discussion of antitrust and consumer protection law is no model of agency decisionmaking." As the court explained, although "[t]he Commission theorized why antitrust and consumer protection law is preferred to *ex ante* regulations [it] failed to provide any meaningful analysis of whether these laws would, in practice, prevent blocking and throttling." *Id.* Consequently, although "the Commission opine[d] that '[m]ost of the examples of net neutrality violations discussed in the [2015 Open Internet Order] could have been investigated as antitrust violations,'" the RIF Order "fail[ed] to explain what, if any, concrete remedies might address these antitrust violations." *Id.* (citation omitted).

484. Consistent with the D.C. Circuit's skepticism of the RIF Order's approach, we find that the consumer protection and antitrust laws, even combined with transparency requirements, are insufficient to protect against blocking, throttling, and other conduct that harms the open Internet. We believe that the approach we adopt today, based on the 2015 Open Internet Order, is consistent

with a light-touch regulatory framework to protect Internet openness. Even while upholding the RIF Order, the D.C. Circuit was “troubled by the Commission’s failure to grapple with the fact that, for much of the past two decades, broadband providers were subject to some degree of open Internet restrictions,” *id.* at 79, and we aim to return to the Commission understanding that existed from the 2005 Internet Policy Statement through the repeal of the 2015 Open Internet Order in 2018.

485. As an initial matter, we find the RIF Order’s reliance on transparency as a deterrent for problematic practices to be insufficient to protect consumers and edge providers from BIAS provider misconduct. We affirm our tentative conclusion from the [NPRM we issued in 2023] that there are types of conduct, such as blocking, throttling, and traffic discrimination, that require *ex ante* intervention to prevent their occurrence in the first instance. We agree with those commenters that argue it is not enough for the Commission to require that BIAS providers disclose their policies on these network practices in the commercial terms of their service offerings because it does not restrict BIAS providers from engaging in harmful behavior. We conclude that a comprehensive set of conduct rules, which includes a transparency element, is required to protect consumers from harmful BIAS provider conduct, and that the open Internet rules we adopt today, including bright-line rules, are necessary to safeguard and secure the open Internet.

486. Furthermore, based on the record in this proceeding, we find that the RIF Order’s reliance on the DOJ and the FTC for enforcement of the consumer protection and antitrust laws is unlikely to provide sufficient deterrence to BIAS providers from engaging in conduct that may harm consumers, edge providers, and the open Internet. Both the DOJ and the FTC have authority to enforce the federal antitrust laws, and particularly sections 1 and 2 of the Sherman Act. In the 2010 and 2015 Open Internet Orders, the Commission found that it was necessary to adopt certain rules to protect the openness of the Internet and that sole reliance on enforcement of the antitrust laws by the DOJ and FTC was insufficient to protect edge providers, consumers, and the open Internet. In the RIF Order, the Commission reconsidered and concluded that conduct that harms the openness of the Internet was unlikely, and that other legal regimes—particularly antitrust law and section 5 of the Federal Trade Commission Act (FTC Act)—were sufficient to protect consumers.

487. We disagree with commenters who argue that existing consumer protection and antitrust laws provide adequate protection against the harms the open Internet rules we adopt today seek to prevent. To begin with, the FTC’s section 5 authority does not apply to “common carriers subject to” the Communications Act, so if BIAS providers are properly classified as common carriers, section 5 does not apply at all. 15 U.S.C. § 45(a)(2). With respect to antitrust oversight, it is not clear that all conduct that could harm consumers and edge providers would constitute an “unfair method of competition” under section 5 of the FTC Act or a violation of section 1 or 2 of the Sherman Act. For example, if a vertically integrated BIAS provider blocked or throttled the content of a particular edge provider with which it competed in the content market, it is not clear whether such conduct would constitute a violation of section 2 of the Sherman Act. It is well settled that there are two elements to the offense of unlawful monopolization under section 2 of the Sherman Act: “(1) the possession of monopoly power in the relevant market; and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.” United States v. Grinnell Corp., 284 U.S. 563, 570-71 (1966); *see also* Verizon Communications v. Law Offices of Curtis V. Trinko, 540 U.S. 398, 407 (2004) (stating that “it is settled law that [an offense under section 2 of the Sherman Act] requires[] . . . the possession of monopoly power in the relevant market”). As the Commission

has repeatedly explained, however, it is not necessary for a BIAS provider to have "market power with respect to end users" for it to be able to engage in conduct that harms edge providers, the open Internet, and consumers. 2015 Open Internet Order, 30 FCC Rcd. at 5633, para. 84 Thus, section 2 of the Sherman Act will not provide adequate protection, at least in cases where the BIAS provider lacks monopoly power over its end user customers. [W]hile the Sherman Act may complement the rules we adopt today, it would not be sufficient on its own to protect edge providers, consumers, and the open Internet.

488. Similarly, it is not clear that all conduct that harms edge providers, consumers, and the open Internet would necessarily violate section 5 of the FTC Act's prohibition on "unfair or deceptive acts or practices" even while BIAS providers are not classified as common carriers and thus are subject to the FTC Act. Commenters argue that the FTC is a more appropriate enforcer of open Internet principles, emphasize that the FTC has the authority to enforce BIAS provider pledges and commitments not to block, throttle, or otherwise harm consumers. But these commenters do not address whether the FTC would have any enforcement authority with respect to a BIAS provider that does not make affirmative pledges or commitments. Nor is it clear how the FTC would rule should a BIAS provider engage in other types of conduct that do not amount to blocking or throttling, but that nevertheless harm edge providers and the open Internet. As such, we disagree that consumer protection law is adequate to protect the open Internet.

489. We also find that there are significant advantages to adopting *ex ante* bright-line rules compared with relying on an *ex post* case-by-case approach, the latter of which is necessary for the DOJ and FTC. First, *ex ante* bright-line rules can reduce regulatory uncertainty and provide better guidance to BIAS providers, edge providers, and end users. In contrast, *ex post* case-by-case enforcement like that under the FTC and DOJ involves greater expense, longer delays in prosecuting enforcement actions, and greater uncertainty as to which types of conduct are allowed or proscribed.

491. Finally, we agree with Public Knowledge that "Congress correctly identified that telecommunications services require sector-specific rules from an expert regulator: the FCC." Public Knowledge Comments at 59. To the extent that the conduct complained of does not involve a violation of a bright-line rule, as with enforcement under the Sherman Act and to the extent that section 5 of the FTC Act might apply, it seems inefficient to place enforcement responsibility with generalist agencies rather than with the FCC, which possesses the technical and market knowledge and expertise concerning communications and broadband technologies. Indeed, the common carrier exception in section 5 of the FTC Act appears to presume that telecommunications carriers should instead be principally governed by sector-specific FCC rules. Moreover, because the FCC is constantly monitoring the telecommunications markets that it is charged with regulating, it is more likely to detect and deter conduct that harms the open Internet. Finally, the FCC is better placed to enforce open Internet rules and such violations where remedying harmful conduct is likely to require ongoing monitoring and supervision by the expert agency's enforcement oversight. Thus, we reaffirm our belief that the Commission, as the expert agency on communications, is best positioned to safeguard Internet openness.

Notes and Questions

1. Persuasion. Compare the 2024 and 2018 orders' discussion of these issues. Which arguments do you find persuasive, and why? What laws and/or facts would need to be different for you to reach a different conclusion?

2. Sector-Specific Regulation. Paragraph 491 contends that its sector-specific regulations are preferable to those of generalist agencies like the FTC. Which sort of regulator do you think is preferable with respect to BIAS? Picking up on the previous question: under what circumstances would you reach a different conclusion? How likely are those circumstances?

3. (Un)certainty. The bright-line rules prohibiting blocking, throttling, and paid prioritization by BIAS providers reflect a desire to create clear rules. The general conduct rule is quite different. It eschews certainty, choosing instead to determine unreasonableness on a case-by-case. This is another iteration of the choice between rules and standards. With respect to internet access, should there be a presumption in favor of one over the other?

Consider the FCC's decision to leave the status of network slicing unsettled, emphasizing that it is a developing technology. Who benefits from that uncertainty? Is the FCC's decision the right outcome? On what basis should an FCC Commissioner, or a judge, answer that question?

4. More Uncertainty. The FCC's various interpretations, alternatively holding that BIAS is a telecommunications (common carrier) service and that it is not, were upheld by the D.C. Circuit under the *Chevron* doctrine and specifically the Court's application of *Chevron* in *Brand X*, which allows administrative agencies very broad discretion to change their interpretation of ambiguous statutory provisions. As noted previously in this supplement, the Court overruled *Chevron*. Loper Bright Enterp. v. Raimondo, 144 S. Ct. 2244, 2272 (2024). The Court criticized *Brand X*, *see, e.g., id*. at 2272, and urged judges to "independently" interpret statutory provisions. *Loper Bright* may, therefore, be used against the latest agency change of mind, or, alternatively, it might indicate that the Court will decide the matter for itself.

CHAPTER 8
Antitrust in Networked Industries

Insert on page 351 before note 1:

0.5 "Old" and "Odd" Parallel Case. In a parallel action, forty-six states (plus the District of Columbia and the Island of Guam) sued Facebook alleging that the Instagram and WhatsApp acquisitions were violations of the antitrust laws. In New York v. Meta Platforms, Inc., 66 F.4th 288 (D.C. Cir. 2023), the District of Columbia Court of Appeals, remarking that "the States' lawsuit is not only odd, but old," upheld a district court ruling – also by Judge Boasberg – that the states had waited too long to act. The Circuit Court ruled that "the judicially-devised doctrine of laches, developed in the 18th century English Chancery Court and imported into our laws, took care of long-delayed claims for relief" and approved the district court's four-year limitation "because the typical remedy of divestiture, if ordered well after the merger has closed, will usually prejudice the defendant."

How should time factor into a merger review? Between 1921 and 1924, the ICC (which then had jurisdiction over telecom) approved 223 AT&T acquisitions of the 234 independent local telephone companies that existed in the US at that time. The latches doctrine did not deter Judge Greene more than a half-century later in United States v. AT&T on page 99 of the casebook.

Insert at the top of page 353, replacing pages 353-358 (before Notes and Questions):

EPIC GAMES, INC. V. APPLE, INC.

67 F.4th 946 (9th Cir. 2023)

Opinion for the court filed by Circuit Judge M. SMITH, in which District Judge McSHANE concurs and Circuit Judge THOMAS concurs in part and dissents in part.

M. SMITH, Circuit Judge:

Epic Games, Inc. sued Apple, Inc. pursuant to the Sherman Act, 15 U.S.C. §§ 1–2, and California's Unfair Competition Law (UCL). Epic contends that Apple acted unlawfully by restricting app distribution on iOS devices to Apple's App Store, requiring in-app purchases on iOS devices to use Apple's in-app payment processor, and limiting the ability of app developers to communicate the availability of alternative payment options to iOS device users. Apple counter-sued for breach of contract and indemnification for its attorney fees arising from this litigation.

Factual and Procedural History

I. The Parties

Apple is a multi-trillion-dollar technology company that, of particular relevance here, sells desktop and laptop computers (Macs), smartphones (iPhones), and tablets (iPads). In 2007, Apple entered, and revolutionized, the smartphone market with the iPhone—offering consumers, through a then-novel multi-touch interface, access to email, the internet, and several preinstalled "native" apps that Apple had developed itself. Shortly after the iPhone's debut, Apple decided to move on from its native-apps-only approach and open the iPhone's (and later, the iPad's) operating system (iOS) to third-party apps.

This approach created a "symbiotic" relationship: Apple provides app developers with a substantial consumer base, and Apple benefits from increased consumer appeal given the ever-expanding pool of iOS apps. Apple now has about a 15% market share in the global smartphone market with over 1 billion iPhone users, and there are over 30 million iOS app developers. Considering only video game apps, the number of iOS games has grown from 131 in the early days of the iPhone to over 300,000 by the time this case was brought to trial. These gaming apps generate an estimated $100 billion in annual revenue.

Despite this general symbiosis, there is periodic friction between Apple and app developers. That is because Apple, when it opened the iPhone to third-party developers, did not create an entirely open ecosystem in which developers and users could transact freely without any mediation. Instead, Apple created a "walled garden" in which Apple plays a significant curating role. Developers can distribute their apps to iOS devices only through Apple's App Store and after Apple has reviewed an app to ensure that it meets certain security, privacy, content, and reliability requirements. Developers are also required to use Apple's in-app payment processor (IAP) for any purchases that occur within their apps. Subject to some exceptions, Apple collects a 30% commission on initial app purchases (downloading an app from the App Store) and subsequent in-app purchases (purchasing add-on content within an app).

Epic is a multi-billion-dollar video game company with three primary lines of business, each of which figures into various aspects of the parties' appeals. First, Epic is a video game developer—best known for the immensely popular *Fortnite*, which has over 400 million users worldwide across gaming consoles, computers, smartphones, and tablets. Second, Epic is a gaming-software developer that offers several apps on Apple's App Store. Third, Epic is a video game publisher and distributor. It offers the Epic Games Store as a game-transaction platform on PC computers and Macs and seeks to do the same for iOS devices. As a distributor, Epic makes a game available for download on the Epic Games Store and covers the direct costs of distribution; in exchange, Epic receives a 12% commission—a below-cost commission that sacrifices short-term profitability to build market share. The Epic Games Store has over 180 million registered accounts and over 50 million monthly active users. Through the Epic Games Store, Epic is a would-be competitor of Apple for iOS game distribution and a direct competitor when it comes to games that feature cross-platform functionality like *Fortnite*.

II. The Developer Program Licensing Agreement

Apple creates its walled-garden ecosystem through both technical and contractual means. To distribute apps to iOS users, a developer must pay a flat $99 fee and execute the Developer Program Licensing Agreement (DPLA). By agreeing to the DPLA, developers unlock access to Apple's vast consumer base—the over 1 billion users that make up about 15% of global smartphone users. They also receive tools that facilitate the development of iOS apps, including advanced application-programming interfaces, beta software, and an app-testing software. In essence, Apple uses the DPLA to license its IP to developers in exchange for a $99 fee and an ongoing 30% commission on developers' iOS revenue.

The DPLA contains the three provisions that give rise to this lawsuit and were mentioned in the introduction. First, developers can distribute iOS apps only through the App Store (the distribution restriction). Epic Games, for example, cannot make the Epic Games Store available as an iOS app and then offer *Fortnite* for download through that app. Second, developers must use Apple's IAP to process in-app payments (the IAP requirement). Both initial downloads (where an app is not free) and in-app payments are subject to a 30% commission. Third, developers cannot communicate out-of-app payment methods through certain mechanisms such as in-app links (the anti-steering provision).

In 2010, Epic agreed to the DPLA. Over the next few years, Epic released three games for iOS, each of which Apple promoted at major events. In 2015, however, Epic began objecting to Apple's walled-garden approach. Epic's CEO Tim Sweeney argued, in an email seeking a meeting with Apple senior leadership, that it "doesn't seem tenable for Apple to be the sole arbiter of expression and commerce" for iOS users, and explained that Epic runs a competing game-transaction platform that it "would love to eventually" offer on iOS. Nothing came of this email, and Epic continued to offer games on iOS while complying with the DPLA's terms. In 2018, Epic released *Fortnite* on iOS— amassing about 115 million iOS users.

In 2020, Epic renewed the DPLA with Apple but sought a "side letter" modifying its terms. In particular, Epic desired to offer iOS users alternatives for distribution (the Epic Games Store) and in-app payment processing (Epic Direct Pay). Apple flatly rejected this offer, stating: "We understand this might be in Epic's financial interests, but Apple strongly believes these rules are vital to the health of the Apple platform and carry enormous benefits for both consumers and developers. The guiding principle of the App Store is to prove a safe, secure, and reliable experience for users."

Once Apple rejected its offer, Epic kicked into full gear an initiative called "Project Liberty": a two-part plan it had been developing since 2019 to undermine Apple's control over software distribution and payment processing on iOS devices, as well as Google's influence over Android devices. Project Liberty coupled a media campaign against Apple and Google with a software update expressly designed to circumvent Apple's IAP restriction. On the media-campaign side, Epic lowered the price of *Fortnite*'s in-app purchases on all platforms but Apple's App Store and Google's Google Play Store; it formed an advocacy group (the Coalition for App Fairness), tasking it with "generating continuous media …pressure" on Apple and Google; and it ran advertisements portraying Apple and Google as the "bad guys" standing in the way of Epic's attempt to pass cost- savings onto consumers.

On the IAP-circumvention side, Epic submitted a *Fortnite* software update (which Epic calls a "hotfix") to Apple for review containing undisclosed code that, once activated, would enable *Fortnite* users to make in-game purchases without using Apple's IAP. Unaware of this undisclosed code, Apple approved the update and it was made available to iOS users. Shortly thereafter Epic activated the undisclosed code and opened its IAP alternative to users. That same day, Apple became aware of the hotfix and removed *Fortnite* from the App Store. Apple informed Epic that it had two weeks to cure its breaches of the DPLA, or otherwise Apple would terminate Epic Games' developer account.

Three days after Apple removed *Fortnite* from the App Store, Epic filed a 62-page complaint against Apple, asking for permanent injunctive relief pursuant to the Sherman Act and the UCL. Epic's requested relief would essentially convert iOS into an entirely open platform: Developers would be free to distribute apps through any means they wish and use any in-app payment processor they choose. Taken together, this relief would create a pathway for developers to bypass Apple's 30% commission altogether, though Epic made open-ended assurances at trial that its relief would allow Apple to collect a commission—just not in the manner that the DPLA establishes. Apple brought counter-claims for breach of contract.[1]

III. Market Definition

The district court began its analysis by defining the relevant market for Epic's Sherman Act claims. Epic proposed two *single-brand* markets: the *aftermarkets* for iOS app distribution and iOS in-app payment solutions, derived from a *foremarket* for smartphone operating systems. Apple, by contrast, proposed the market for *all* video game transactions, whether those transactions occur on a smartphone, a gaming console, or elsewhere. The district court ultimately found a market between those the parties proposed: mobile-game transactions—*i.e.*, game transactions on iOS and Android smartphones and tablets. Compared to Epic's proposed aftermarkets, the district court's relevant market was both broader and narrower—broader in that it declined to focus exclusively on iOS, but narrower in that it considered only video game transactions instead of all app transactions. Compared to Apple's proposed market, the district court's relevant market was narrower—excluding game-console and streaming-service transactions.

The district court rejected Epic's proposed single-brand markets on several grounds. It held that there was no foremarket for smartphone and tablet operating systems because Apple does not license or sell iOS. More critically, it analyzed Epic's aftermarkets in the alternative and found a failure of proof. Epic presented no evidence regarding whether consumers unknowingly lock themselves into Apple's app-distribution and IAP restrictions when they buy iOS devices. A natural experiment facilitated by Apple's removal of *Fortnite* from the App Store showed that iOS *Fortnite* users switched about 87% of their pre-removal iOS spending to other platforms—suggesting substitutionality between the App Store and other game-transaction platforms. The district court also rejected Epic's relevant market-definition expert as "weakly probative" and "more interested in a result [that] would assist his client than in providing any objective ground to assist the court in its decision-making." Among other flaws, the expert's analysis contradicted his own academic articles on how to analyze two-sided markets; used consumer-survey wording that departed from well-established market-definition principles; failed to account for holiday-season idiosyncrasies; and excluded minors (who are an important segment of mobile-game purchasers). The district court then turned to Apple's proposed relevant market definition and refined it from *all* game transactions to *mobile* game transactions by relying extensively on the "practical indicia" of markets.

[1] The same day, Epic filed a 60-page complaint against Google, challenging its policies regarding the Google Play Store on Android devices—*i.e.*, smartphones and tablets that use the main operating- system alternative to iOS. *See* Complaint for Injunctive Relief, Epic Games, Inc. v. Google LLC, No. 3:20-cv-05671 (filed Aug. 13, 2020 N.D. Cal.).

Analysis

On appeal, Epic challenges the district court's Sherman Act and breach of contract rulings. We affirm the district court's denial of antitrust liability and its corresponding rejection of Epic's illegality defense to Apple's breach of contract counterclaim. Though the district court erred as a matter of law on several issues, those errors were harmless. Independent of the district court's errors, Epic failed to establish—as a factual matter—its proposed market definition.

I. Market Definition

Epic argues that the district court incorrectly defined the relevant market for its antitrust claims to be mobile-game transactions instead of Epic's proposed aftermarkets of iOS app distribution and iOS in-app payment solutions. Epic contends both that the district court erred as a matter of law by requiring several threshold showings before finding a single-brand market and that, once those errors are corrected, the record compels the conclusion that Epic established its single-brand markets. We agree that the district court erred in certain aspects of its market-definition analysis but conclude that those errors were harmless.

A. General Market-Definition Principles

The Sherman Act contains two principal prohibitions. Section 1 targets *concerted* action, rendering unlawful "every contract, combination …, or conspiracy, in restraint of trade." Section 2 targets *independent* action, making it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."

In most cases, a "threshold step" is defining the relevant market in which the alleged restraint occurs. The relevant market for antitrust purposes is "the area of effective competition"—*i.e.*, the arena within which significant substitution in consumption or production occurs. A market comprises "any grouping of sales whose sellers, if unified by a monopolist or a hypothetical cartel" could profitably raise prices above a competitive level.). If the "sales of other producers could substantially constrain the price-increasing ability of the monopolist or hypothetical cartel, these other producers must be included in the market. To conduct this inquiry, courts must determine which products have a reasonable interchangeability of use or sufficient cross-elasticity of demand with each other.

Often, this inquiry involves empirical evidence in the form of a "SSNIP" analysis, whether a hypothetical monopolist could profitably impose a **S**mall, **S**ignificant, **N**on-transitory **I**ncrease in **P**rice above a competitive level. As we have previously summarized:

> [A]n economist proposes a narrow geographic and product market definition and then iteratively expands that definition until a hypothetical monopolist in the proposed market would be able to profitably make a small but significant non-transitory increase in price ("SSNIP"). At each step, if consumers would respond to a SSNIP by making purchases outside the proposed market definition, thereby rendering the SSNIP unprofitable, then the proposed market definition is too narrow. At the next step, the economist expands the proposed geographic or product market definition to include the substituted products or area. This process is repeated until a SSNIP in the proposed market is predicted to be profitable for the hypothetical monopolist.

B. Single-Brand Aftermarkets

In some instances one brand of a product can constitute a separate market. More specifically, the relevant market for antitrust purposes can be an *aftermarket*—where demand for a good is entirely dependent on the prior purchase of a durable good in a *foremarket*.

In Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451 (1992), the Supreme Court considered the question of whether a lack of market power in the foremarket (photocopier machines, generally) categorically precludes a finding of market power in the aftermarket (replacement parts for and servicing of Kodak-brand photocopiers), which Kodak had allegedly achieved by contractually limiting customers to Kodak-provided parts and services. The Supreme Court rejected Kodak's invitation to impose an across-the-board rule because it was not convinced that the rule—which "rest[ed] on a factual assumption about the cross-elasticity of demand" in aftermarkets—would always hold true. The Supreme Court thus folded aftermarkets into the framework for assessing markets generally, evaluating cross-elasticity of demand to determine whether a hypothetical monopolist could profitably charge a supracompetitive price. ("The extent to which one market prevents exploitation of another market depends on the extent to which consumers will change their consumption of one product to a price change in another.")

The *Kodak* Court reasoned that "significant" information costs and switching costs could create a less responsive connection between aftermarket prices and foremarket sales, particularly where the percentage of sophisticated purchasers able to accurately life-cycle price is low. That is, these conditions might "lock-in" unknowing customers such that competition in the foremarket cannot discipline competition in the aftermarkets, meaning a hypothetical monopolist could price its aftermarket products at a supracompetitive level without a substantial number of customers substituting to other products. Whether a plaintiff has proven such a lock-in must be resolved on a case-by-case basis, focusing on the particular facts disclosed by the record.

In sum, to establish a single-brand aftermarket, a plaintiff must show: (1) the challenged aftermarket restrictions are "not generally known" when consumers make their foremarket purchase; (2) "significant" information costs prevent accurate life-cycle pricing; (3) "significant" monetary or non-monetary switching costs exist; and (4) general market-definition principles regarding cross-elasticity of demand do not undermine the proposed single- brand market.

D. Epic's Legal Challenges

With these principles in mind, we now turn to Epic's arguments that the district court committed legal error when it held that a market can never be defined around a product that the defendant does not license or sell.

We agree with Epic that the district court erred by imposing a categorical rule that an antitrust market can *never* relate to a product that is not licensed or sold—here smartphone operating systems. To begin, this categorical rule flouts the Supreme Court's instruction that courts should conduct market-definition inquiries based not on formalistic distinctions but on actual market realities.

Moreover, the district court's rule is difficult to square with decisions defining a product market to include vertically integrated firms that self-provision the relevant product but make no outside sales. For example, the D.C. Circuit in *Microsoft* noted that "Apple had a not insignificant share of worldwide sales of operating systems," even though Apple did not sell or license macOS but instead only included it in its own Mac computers. While the *Microsoft* court ultimately excluded macOS from its market, it did so on fact-bound substitutability grounds, not the categorical grounds that the district court used here.

Finally, the district court's rule overlooks that there may be markets where companies offer a product to one side of the market for free but profit in other ways, such as by collecting consumer data or generating ad revenue. *See, e.g.*, FTC v. Facebook, Inc. (D.D.C. 2022) It puts form over substance to say that such products cannot form a market because they are not directly licensed or sold.

Epic also argues that it is entitled, as a factual matter, to a finding in favor of its proposed aftermarkets. Though Epic attempts to avoid the clear-error label, its argument requires it to carry the heavy of burden on appeal of showing that the district court clearly erred in finding that (1) Epic failed to show a lack of general consumer awareness regarding Apple's restrictions on iOS distribution and payment processing, (2) Epic failed to show significant switching costs, and (3) the empirical evidence in the record support a market of mobile- game transactions, not Epic's iOS-specific aftermarkets.[2]

Beginning with the first prong, Epic had the burden of showing a lack of consumer awareness—whether through a change in policy or otherwise. Epic identified a purported change in policy, contrasting the App Store's now-immense profitability with a pre-launch statement from Steve Jobs that Apple did not "intend to make money off the App Store['s]" 30% commission. The district court reasonably found this statement to simply reflect Jobs's "initial expectation" about the App Store's performance, not an announcement of Apple policy. Especially in light of the district court's finding that Apple has "maintained the same general rules" for distribution and payment processing since the App Store's early days, it did not clearly err in concluding that Epic failed to prove a lack of consumer awareness through a change of policy.

Nor did the district court clearly err in finding that Epic otherwise failed to establish a lack of awareness. Indeed, the district court squarely found: "[T]here is *no evidence* in the record demonstrating that consumers are unaware that the App Store is the sole means of digital distribution on the iOS platform" (emphasis added). And on appeal, Epic fails to cite any evidence that would undermine the district court's characterization of the record.

Because of this failure of proof on the first prong of Epic's *Kodak* showing, we need not reach—and do not express any view regarding—the other factual grounds on which the district court rejected Epic's single-brand markets.

[2] The district court did not rule against Epic on the remaining prong of the *Kodak* test: the presence of significant information costs that make accurate life-cycle pricing difficult.

Moreover, the district court's finding on *Kodak's* consumer-unawareness requirement renders harmless its rejection of Epic's proposed aftermarkets on the legally erroneous basis that Apple does not license or sell iOS as a standalone product. To establish its single-brand aftermarkets, Epic bore the burden of rebutting the economic presumption that consumers make a knowing choice to restrict their aftermarket options when they decide in the initial (competitive) market to enter a contract. Yet the district court found that there was "no evidence in the record" that could support such a showing. As a result, Epic cannot establish its proposed aftermarkets on the record before our court—even after the district court's erroneous reasoning is corrected.

Conclusion

There is a lively and important debate about the role played in our economy and democracy by online transaction platforms with market power. Our job as a federal Court of Appeals, however, is not to resolve that debate—nor could we even attempt to do so. Instead, in this decision, we faithfully applied existing precedent to the facts as the parties developed them below.

THOMAS, Circuit Judge, concurring in part and dissenting in part:

I agree with much of the majority opinion. I agree that the district court erred in defining the relevant market. However, unlike the majority, I would not conclude that these errors were harmless. An error is harmless if it "do[es] not affect the substantial rights of the parties." 28 U.S.C. § 2111. The district court's errors relate to threshold analytical steps, and the errors affected Epic's substantial rights. Thus, I would reverse the district court and remand to evaluate the claims under the correct legal standard.

A threshold step in any antitrust case is to accurately define the relevant market. The district court rejected the foremarket of mobile operating systems because Apple does not sell or license its operating system separately from its smartphones. But we have previously recognized that such a market can exist. The district court then rejected Epic's proposed aftermarket of iOS app payment processing ("IAP") because IAP is integrated into the operations system. This conclusion was not only legally erroneous, but in contradiction to the district court's factual finding of separate demand.

The majority holds that the errors were harmless given the district court's analysis of the remaining steps in the Rule of Reason analysis. However, there is no direct authority for that proposition, and it amounts to appellate court fact-finding. Indeed, the Supreme Court has instructed that courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market.

Correction of these errors would have changed the substance of the district court's Rule of Reason analysis. Unless the correct relevant market is identified, one cannot properly assess anticompetitive effects, procompetitive justifications, and the satisfaction of procompetitive justifications through less anticompetitive means. Relying on the district court's market does not solve this problem. The parties formulated arguments around their own markets—not the district court's market. Remand would have given the parties an opportunity to argue whether the DPLA worked unfair competition in the district court's market.

Therefore, I respectfully concur in part and dissent in part.

Insert on page 359 before note 2:

2. Epic as a New Platform. The court tellingly observed that Epic had three lines of business that were each implicated in Apple's restrictive "walled garden" platform policies: Epic creates games, sells software for other games developers, and is a game publisher and distributor. Through this first role – as a games creator – it has been frustrated by Apple's 30% commission. But through other two roles, and especially in its role as an independent publisher and distributor, Epic appears to aspire towards offering its own platform, one that rivals Apple's App Store, and is more stymied by the DLPA's requirement for payment and distribution exclusivity. Accordingly, the court noted that "Through the Epic Games Store, Epic is a would-be competitor of Apple for iOS game distribution and a direct competitor when it comes to games that feature cross-platform functionality like *Fortnite*." The 30% tax could be characterized as a monopoly price, whereas the exclusivity requirement could be characterized as an entrenchment of monopoly power.

Do these two competitive concerns have equal weight under the antitrust laws? Should we view Epic's effort to challenge Apple's market dominance – and the restraints that deter them from doing so – differently from Epic's complaints about Apple's exercise of its market dominance?

Insert on page 359, to replace notes 2 and 3:

3. A Partial Victory. In addition to making claims under the Sherman Act, Epic also sued Apple under California's Unfair Competition Law. The 9th Circuit (in sections not included above) upheld the district court's conclusion that certain anti-steering provisions in Apple's DPLA violated California's Unfair Competition Law (UCL). To remedy that violation, the court issued a nationwide, permanent injunction preventing Apple from enforcing the anti-steering provisions, which extends to all app categories (not just gaming apps). In effect, the injunction gives app developers the ability to avoid Apple's 30% IAP commission by directing users to external websites for in-app purchases. If state law can stop what the Sherman Act cannot, is that a failure of the Sherman Act?

4. Multiple Suits. Software developers separately sued Apple for the same restrictive conduct which, they claimed, subjected them to Apple's anticompetitive 30% commission and prevented them from marketing their products directly to consumers. These lawsuits were initiated well before the commencement of Epic's action against Apple. The first of the developers' lawsuits, Apple iPhone Antitrust Litigation, 4:11-cv-6714-YGR (Pepper), was filed in 2011 on behalf of a class of iOS device consumers alleging harm from the commission rate. The second, filed in 2019 after Pepper returned from the Supreme Court, was Donald Cameron v. Apple Inc., 4:19-cv-3074-YGR (Cameron), which was filed on behalf of a class of iOS app developers also alleging violations of antitrust and competition laws. In 2021, Apple reached a settlement with the Cameron plaintiffs that included $100 million for small developers and some modest modifications to its App Store rules that will now allow companies to notify users directly to encourage them to make purchases directly, rather than through the App Store.

5. Is it the Jury? As was noted in footnote 1, Epic also sued Google for similar restraints on its Google Play Store. In December 2023, a unanimous jury – after just three hours of deliberation following a four-week trial – issued a verdict for Epic. The jury concluded that Google has monopoly power in Android app distribution and in-app billing services markets, and that Google exploited that monopoly power by illegally tying its Google Play app store with its Google Play Billing payment services. A copy of the jury verdict is available here: https://storage.courtlistener.com/recap/gov.uscourts.cand.364325/gov.uscourts.cand.364325.606.0.pdf

Epic's sweeping success against Google is in sharp contrast with its failure against Apple. One commentator remarked, "For [Epic CEO] Tim Sweeney, this is a surprising turn of events, since his real enemy has always been Apple, not Google … The Google case was seen almost as a sideshow compared to Epic's case against Apple, and it's turned out in the opposite direction." Bobby Allyn, "Epic Games beat Google but lost to Apple in monopoly lawsuits. What does it all mean?" NPR (Dec. 13, 2023). Note that Google's Play Store has been less restrictive than Apple's App Store, and its commissions were usually lower than Apple's 30% fees.

How will the inconsistent legal findings from Epic's two suits be reconciled? Will they need to be reconciled?

6. Or is it just Google? In December 2023, Google agreed to a $700 million settlement with Attorneys General of all 50 states, who brought an antitrust suit in 2021 alleging Google's Play Store used anticompetitive restraints to sustain a monopoly against software developers and Google Play users. The agreement also requires Google to change its Play Store rules to enable the installation of and billing for other apps to occur outside the Play Store.

A copy of the settlement agreement is available here: https://storage.courtlistener.com/recap/gov.uscourts.cand.381462/gov.uscourts.cand.381462.522.2.pdf. Do these terms have any implications for how antitrust actions will proceed against Apple, Google, or other platforms?

7. A Bigger Challenge to Apple. In March 2024, the Department of Justice and 16 states brought a far-reaching antitrust suit against Apple, claiming that it illegally maintains a monopoly over smartphones. Note that unlike Epic's case against Apple, which claims that Apple monopolizes the App Store and its surrounding software market, the DOJ case accuses Apple of monopolizing the market for smartphone devices. Central to the DOJ case is the claim that Apple institutes restraints that prevent iPhone users from switching to competing phones and for preventing interoperability across Apple's and other platforms for software, content, and other service markets.

The DOJ's complaint alleges two different market definitions: "performance smartphones" in the United States, and a broader "smartphones" in the United States. (The complaint is available here: https://www.justice.gov/d9/2024-06/423137.pdf.) How would litigating these market definitions differ from the market definition litigation that occurred in Epic v. Apple and Epic v. Google?

Insert on page 372, after note 3:

3.5. A "Middleware" Proposal. One market-based solution that has gained enthusiasm among policy experts is to allow users to append extensions, or "middleware," to dominant platforms such as Facebook, Amazon, and Google so as to tailor their algorithms to meet distinct user preferences. Such middleware extensions, advocates argue, would allow users to benefit from the scale economies the platforms offer while curtailing the force of their algorithmic power to gather private information, foreclose competition, promote anticompetitive bundles, and the like. The authors of a working group, led by Stanford's Francis Fukuyama, offered the following definition for a middleware solution:

> By "middleware," we refer to software products that can be appended to the major internet platforms. These products would interconnect with Facebook, Amazon, Apple, Twitter, and Google APIs and allow consumers to shape their feeds and influence the algorithms that those dominant platforms currently employ. Middleware would not necessarily disintermediate services between the consumer and the internet platform; rather, as a third- party service chosen by the consumer, it would make editorial judgments that are currently provided (usually without transparency) by the platform.
>
> A competitive middleware sector would [outsource] content curation to other organizations that enable consumers to tailor their feeds to their own explicit preferences. At the same time, middleware, in our view, could be a superior alternative to structural remedies imposed by either courts or regulators, in that it would directly respond to consumer preferences and market actors.

Francis Fukuyama, et al., Report of the Working Group on Platform Scale, at 30-31 (Nov. 17, 2020), https://cyber.fsi.stanford.edu/publication/report-working-group-platform-scale

Platform monopolies are increasingly invoking legal mechanisms – such as Computer Fraud and Abuse Act, intellectual property laws, and Verizon v. Trinko's interpretation of the Sherman Act – to preclude users from adding middleware or other extensions to their platform. In 2024, Ethan Zukerman, a professor at the University of Massachusetts Amherst and director of a software lab "dedicated to creating user-empowering middleware" sued Meta to oppose its exclusion of Zuckerman's software products. *See* Ethan Zuckerman, "I Love Facebook. That's Why I'm Suing Meta," New York Times (May 5, 2024). Professor Zuckerman's complaint reads:

> Professor Zuckerman believes that third-party tools that operate at the explicit direction of social media users are a particularly promising avenue for improving online experiences. By employing such tools, users could exercise more control over their digital lives—controlling how information is presented to them on the platforms and what information about them is collected. For example, users could employ third-party tools to customize a platform's interface, to block content the platforms allow but that users would prefer not to see, and to automatically update their privacy settings. Tools in this model would function like pop-up ad blockers or instant messaging aggregators. In other words, they would carry out their users' wishes, operating as extensions or "agents" of the user.

Zuckerman v. Meta Platforms, Case No. 3:24-cv-02596 (N.D. Ca. 2024). Professor Zuckerman invoked Section 230, the Computer Fraud and Abuse Act, and some state doctrines in asking for a declaratory judgment that permits him (and others) to use his middleware extension with his Facebook account.

Why might policy advocates consider Middleware to be an attractive and viable public policy solution to the distinct harms caused by the dominant platforms? What legal pathway would you advise them to prevent the platforms from prohibiting these extensions? Does Verizon v. Trinko really prevent Middleware advocates from invoking the Sherman Act, to prevent unilateral refusals to deal?

Insert on page 387, after note 1:

1.5. A Preliminary Victory for the Government. On August 5, 2024, District Judge Methta ruled that Google's use of its general search engine amounted to a violation of Section 2 of the Sherman Act. The opinion succinctly covers each element of a Section 2 claim in the following summary:

> Specifically, the court holds that (1) there are relevant product markets for general search services and general search text ads; (2) Google has monopoly power in those markets; (3) Google's distribution agreements are exclusive and have anticompetitive effects; and (4) Google has not offered valid procompetitive justifications for those agreements. Importantly, the court also finds that Google has exercised its monopoly power by charging supracompetitive prices for general search text ads. That conduct has allowed Google to earn monopoly profits.

United States v. Google LLC, Case No. 20-cv-3010 (D.D.C. 2024), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2024/pr24-59-Google.pdf, at 8.

The court's ruling addresses only the question of liability, with later proceedings on devising an appropriate remedy. Thus, the question asked in note 1 is additionally relevant: what kind of remedy do you believe is appropriate? How does recent growth in AI-search engines affect what the court should do? Consider the excerpt below:

> I never thought we'd reach this point, but Googling things can honestly feel like a chore. Not only do we have to hop through numerous links to pinpoint what we're searching for, but we also navigate a maze of ads, spam, and pop-ups. Even then, we often don't find the answers we need. So why not let AI try its hand at search?
>
> A new breed of AI search engines leverages the tech behind AI chatbots like ChatGPT to fetch answers to your queries—without sending you down rabbit holes. They automatically pick the links most relevant to your questions and summarize them for you. You don't have to scroll through a list of URLs or peruse entire websites to find a little piece of information. It's as if you have a personal search engine assistant.
>
> [The piece then proceeds to recommend three AI search engines, one for featuring "the best AI search experience," one for featuring "up-to-date information," and one for offering "AI search and browser in one."]

The Best AI Search Engines, https://zapier.com/blog/best-ai-search-engine/.

Insert on page 387, to replace note 5:

5. Antitrust Enforcement, Big Tech, and Vertical Agreements. At around the time the Department of Justice brought this suit, other antitrust enforcers brought similarly conceived actions against other dominant internet platforms. In 2021, the District of Columbia sued Amazon, claiming the internet retail giant was illegally securing its monopoly through a "Fair Pricing Policy" that prohibited its vendors from selling goods on other platforms at prices lower than those on Amazon (the suit was dismissed in an oral ruling in 2022). Also in 2021, a group of state attorneys general accused Google of forcing restrictive terms on software developers that sell apps on the Google Play Store, the same theory used by Epic in its suit against Apple. And multiple state and national authorities continued to scrutinize Apple's App Store restrictions even after its victory over Epic (see § 8.A.1). And in 2023, the FTC (with seventeen state attorneys general) sued Amazon for, among other charges, preventing vendors from selling at lower prices through other online retailers, biasing Amazon search results to preference Amazon products, and conditioning sellers' ability to obtain "Prime" eligibility for their products on their using Amazon's fulfillment service.

Note that all of these cases claimed that the monopolist-defendant violated the Sherman Act by implementing vertical restraints that secured its market power. Why do you think this is the prevailing theory behind these antitrust actions? Reciprocally, if this is the prevailing approach of enforcers, why do you think internet giants continue to rely so heavily on vertical restraints? Do these cases offer any additional insight to the materials discussed in Chapter 5, especially part 5.C, that detailed the many statutory and regulatory prohibitions preventing telecommunications networks from engaging in vertical agreements?

Insert on page 395, after note 4:

5. The EU's Digital Markets Act (DMA). In 2022, the European Parliament passed the Digital Markets Act. Central to the DMA is the identification of "gatekeepers," which are defined as "large digital platforms providing so-called core platform services, such as online search engines, app stores, messenger services." *See* https://digital-markets-act.ec.europa.eu/about-dma_en. The DMA imposes on gatekeepers both unique prohibitions (such as self-preferencing, tracking data for targeted advertising, and impeding users' access to outside sites) and unique obligations (such as enabling interoperability with third-parties, allowing users to access data they generate on the platform, and allowing businesses on the platform to contract directly with their customers).

Enforcement of the DMA began in 2023, and in September 2023 the European Commission ("EC") designated Apple as a gatekeeper in relation to its iOS, App Store and Safari. In June 2024, the EC concluded that Apple's App Store rules violated the DMA's "steering requirements," which require gatekeepers to allow developers to steer consumers to offers outside their app stores free of charge.

Although this was the first action taken by the EC under the DMA, it is unlikely to be the last. Alphabet, Amazon, ByteDance, Meta, and Microsoft were all deemed to be gatekeepers under the DMA, and noncompliance investigations have been initiated against Alphabet and Meta.

How does this regulatory approach towards internet platforms compare with the US approach? Is it possible for US antitrust enforcers to use the Sherman Act to mimic the substance of the DMA rules?

Insert on page 428, before note 3:

2.5. Worst Merger Ever? In 2021, less than four years after its acquisition of Time Warner, AT&T spun off its Warner Media assets and ceded management control to Discovery. *The New York Times* described the transaction as "a stunning retreat" by AT&T and an "about face" from the Time Warner purchase. The move also revealed how costly the merger turned out to be. The *Times* calculated that at the time of the spin off, AT&T shareholders' stake in the Time Warner assets were worth less than $20 billion, which amounts to a loss of about $47 billion from an original valuation of $109 billion valuation. See James Stewart, "Was This $100 Billion Deal the Worst Merger Ever?" New York Times (Nov.19. 2022). Does the failure of the deal, and AT&T's inability to foreclose (let alone profit from) downstream markets suggest that the Justice Department's lawsuit was wrongheaded?

Stewart, in his post-mortem of the acquisition's failure, faults a clash of corporate cultures for the merger's failure ("In the eyes of former Time Warner executives, a vibrant culture of creative energy and success nurtured over decades was destroyed in months.") But a close reading of Stewart's account, especially in light of Judge Leon's opinion, reveals that much of the organizational clash came from AT&T effort "to promote Warner's streaming content exclusively through AT&T's streaming service" and to prevent HBO subscriptions from being sold on other platforms. In short, Stewart's reporting appears to confirm the Justice Department's fear, and to contradict testimony offered by AT&T executives, that AT&T would withhold Time Warner content to target rival distributors.

Insert on page 428, after note 4:

5. More Failed Challenges to Vertical Mergers. Despite failing to stop the AT&T-Time Warner merger, the antitrust enforcement agencies have continued to bring challenges to vertical mergers. The record has not been good. In September 2022, a federal court denied the Justice Department's effort to prevent UnitedHealth Group, one of the nation's largest health insurers, from acquiring Change Healthcare, a provider of revenue and payment services. The DOJ argued that the $13b purchase would allow United to obtain from Change data belonging to competing insurers, thereby anticompetitively harming United's competitors. In February 2023, a federal court rejected the FTC's challenge to Meta's $400m acquisition of Within Unlimited, a virtual reality (VR) software developer. The FTC had argued that because of the breadth of Meta's platform, its acquisition of Within would substantially lessen competition in the market for VR fitness apps. And in July 2023, Microsoft, which owns (among other things) the Xbox console and a game streaming service, defeated the FTC's challenge to its $69b acquisition of Activision, maker of Call of Duty, Candy Crush, and other popular games. The FTC maintained that the vertical merger would give Microsoft outsized power to make Activision content exclusive to Xbox and foreclose Activision's popular offerings to competing consoles.

This string of losses might reflect a deeply-held skepticism in the judiciary that vertical mergers cause competitive harm. Put more forcefully, they might signal that there are few legal impediments to vertical acquisitions, even by monopolist platforms. Alternatively, they might suggest that the economics of vertical integration is either poorly understood or extremely difficult to explain in a legal setting. Or, more mundanely, a product of poor case selection or legal strategy among antitrust enforcers eager to halt vertical integration.

CHAPTER 12
Regulating Algorithms

Insert on page 675, after note 2:

MOODY v. NETCHOICE, LLC

144 S. Ct. 2383 (2024)

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SOTOMAYOR, KAVANAUGH, and BARRETT, JJ., joined in full, and in which JACKSON, J., joined as to Parts I, II and III–A. BARRETT, J., filed a concurring opinion. JACKSON, J., filed an opinion concurring in part and concurring in the judgment. THOMAS, J., filed an opinion concurring in the judgment. ALITO, J., filed an opinion concurring in the judgment, in which THOMAS and GORSUCH, JJ., joined.

Justice KAGAN delivered the opinion of the Court.

[Two] laws, from Florida and Texas, restrict the ability of social-media platforms to control whether and how third-party posts are presented to other users. Or otherwise put, the laws limit the platforms' capacity to engage in content moderation—to filter, prioritize, and label the varied messages, videos, and other content their users wish to post. NetChoice, an internet trade association, challenged both laws on their face—as a whole, rather than as to particular applications. The Court of Appeals for the Eleventh Circuit [held] that the Florida law was not likely to survive First Amendment review. The Court of Appeals for the Fifth Circuit [concluded] that the Texas law does not regulate any speech and so does not implicate the First Amendment.

Today, we vacate both decisions for reasons separate from the First Amendment merits, because neither Court of Appeals properly considered the facial nature of NetChoice's challenge. The courts mainly addressed what the parties had focused on. And the parties mainly argued these cases as if the laws applied only to the curated feeds offered by the largest and most paradigmatic social-media platforms—as if, say, each case presented an as-applied challenge brought by Facebook protesting its loss of control over the content of its News Feed. But argument in this Court revealed that the laws might apply to, and differently affect, other kinds of websites and apps. In a facial challenge, that could well matter, even when the challenge is brought under the First Amendment.

To do that right, of course, a court must understand what kind of government actions the First Amendment prohibits. We therefore set out the relevant constitutional principles, and explain how one of the Courts of Appeals failed to follow them. Contrary to what the Fifth Circuit thought, the current record indicates that the Texas law does regulate speech when applied in the way the parties focused on below—when applied, that is, to prevent Facebook (or YouTube) from using its content-moderation standards to remove, alter, organize, prioritize, or disclaim posts in its News Feed (or homepage). The law then prevents exactly the kind of editorial judgments this Court has previously held to receive First Amendment protection. It prevents a platform from compiling the third-party speech it wants in the way it wants, and thus from offering the expressive product that most reflects its own views and priorities. Still more, the law—again, in that specific application—is unlikely to withstand First Amendment scrutiny. Texas has thus far justified the law as necessary to balance the mix of speech on Facebook's News Feed and similar platforms; and the record reflects that Texas officials passed it because they thought those feeds skewed against politically conservative voices. But this Court has many times held, in many contexts, that 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. That principle works for social-media platforms as it does for others.

In sum, there is much work to do below on both these cases, given the facial nature of NetChoice's challenges. But that work must be done consistent with the First Amendment, which does not go on leave when social media are involved.

I

As commonly understood, the term "social media platforms" typically refers to websites and mobile apps that allow users to upload content—messages, pictures, videos, and so on—to share with others. Those viewing the content can then react to it, comment on it, or share it themselves. The biggest social-media companies—entities like Facebook and YouTube—host a staggering amount of content. Facebook users, for example, share more than 100 billion messages every day. And YouTube sees more than 500 hours of video uploaded every minute.

In the face of that deluge, the major platforms cull and organize uploaded posts in a variety of ways. A user does not see everything—even everything from the people she follows—in reverse-chronological order. The platforms will have removed some content entirely; ranked or otherwise prioritized what remains; and sometimes added warnings or labels. Of particular relevance here, Facebook and YouTube make some of those decisions in conformity with content-moderation policies they call Community Standards and Community Guidelines. Those rules list the subjects or messages the platform prohibits or discourages—say, pornography, hate speech, or misinformation on select topics. The rules thus lead Facebook and YouTube to remove, disfavor, or label various posts based on their content.

In 2021, Florida and Texas enacted statutes regulating internet platforms, including the large social-media companies just mentioned.

Florida's law regulates "social media platforms," as defined expansively, that have annual gross revenue of over $100 million or more than 100 million monthly active users. Fla. Stat. § 501.2041(1)(g) (2023). The statute restricts varied ways of "censor[ing]" or otherwise disfavoring posts—including deleting, altering, labeling, or deprioritizing them—based on their content or source. § 501.2041(1)(b).

The Texas law regulates any social-media platform, having over 50 million monthly active users, that allows its users "to communicate with other users for the primary purpose of posting information, comments, messages, or images." Tex. Bus. & Com. Code Ann. §§ 120.001(1), 120.002(b) (West Cum. Supp. 2023). With several exceptions, the statute prevents platforms from "censor[ing]" a user or a user's expression based on viewpoint. Tex. Civ. Prac. & Rem. Code Ann. §§ 143A.002(a), 143A.006 (West Cum. Supp. 2023).

II

The first step in the proper facial analysis is to assess the state laws' scope. What activities, by what actors, do the laws prohibit or otherwise regulate? The laws of course differ one from the other. But both, at least on their face, appear to apply beyond Facebook's News Feed and its ilk. Members of this Court asked some of the relevant questions at oral argument. Starting with Facebook and the other giants: To what extent, if at all, do the laws affect their other services, like direct messaging or events management? And beyond those social-media entities, what do the laws have to say, if anything, about how an email provider like Gmail filters incoming messages, how an online marketplace like Etsy displays customer reviews, how a payment service like Venmo manages friends' financial exchanges, or how a ride-sharing service like Uber runs?

The next order of business is to decide which of the laws' applications violate the First Amendment, and to measure them against the rest. For the content-moderation provisions, that means asking, as to every covered platform or function, whether there is an intrusion on protected editorial discretion. Even on a preliminary record, it is not hard to see how the answers might differ as between regulation of Facebook's News Feed (considered in the courts below) and, say, its direct messaging service (not so considered). Curating a feed and transmitting direct messages, one might think, involve different levels of editorial choice, so that the one creates an expressive product and the other does not. If so, regulation of those diverse activities could well fall on different sides of the constitutional line. To decide the facial challenges here, the courts below must explore the laws' full range of applications—the constitutionally impermissible and permissible both—and compare the two sets. Maybe the parties treated the content-moderation choices reflected in Facebook's News Feed and YouTube's homepage as the laws' heartland applications because they *are* the principal things regulated, and should have just that weight in the facial analysis. Or maybe not: Maybe the parties' focus had all to do with litigation strategy, and there is a sphere of other applications—and constitutional ones—that would prevent the laws' facial invalidation.

So we vacate the decisions below and remand these cases. That will enable the lower courts to consider the scope of the laws' applications, and weigh the unconstitutional as against the constitutional ones.

III

But it is necessary to say more about how the First Amendment relates to the laws' content-moderation provisions, to ensure that the facial analysis proceeds on the right path in the courts below. That need is especially stark for the Fifth Circuit. The Fifth Circuit was wrong in concluding that Texas's restrictions on the platforms' selection, ordering, and labeling of third-party posts do not interfere with expression. And the court was wrong to treat as valid Texas's interest in changing the content of the platforms' feeds. Explaining why that is so will prevent the Fifth Circuit from repeating its errors as to Facebook's and YouTube's main feeds.

A

Despite the relative novelty of the technology before us, the main problem in this case—and the inquiry it calls for—is not new. At bottom, Texas's law requires the platforms to carry and promote user speech that they would rather discard or downplay. The platforms object that the law thus forces them to alter the content of their expression—a particular edited compilation of third-party speech. That controversy sounds a familiar note. We have repeatedly faced the question whether ordering a party to provide a forum for someone else's views implicates the First Amendment. And we have repeatedly held that it does so if, though only if, the regulated party is engaged in its own expressive activity, which the mandated access would alter or disrupt. So too we have held, when applying that principle, that expressive activity includes presenting a curated compilation of speech originally created by others.

The seminal case is Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). There, a Florida law required a newspaper to give a political candidate a right to reply when it published "criticism and attacks on his record." *Id.* at 243. The Court held the law to violate the First Amendment because it interfered with the newspaper's "exercise of editorial control and judgment." *Id.* at 258. Forcing the paper to print what "it would not otherwise print," the Court explained, "intru[ded] into the function of editors." *Id*. at 256, 258. For that function was, first and foremost, to make decisions about the "content of the paper" and "[t]he choice of material to go into" it. *Id.* at 258. In protecting that right of editorial control, the Court recognized a possible downside. It noted the access advocates' view (similar to the States' view here) that "modern media empires" had gained ever greater capacity to "shape" and even "manipulate popular opinion." *Id.* at 249–250. And the Court expressed some sympathy with that diagnosis. *See id.* at 254. But the cure proposed, it concluded, collided with the First Amendment's antipathy to *state* manipulation of the speech market. Florida, the Court explained, could not substitute "governmental regulation" for the "crucial process" of editorial choice. *Id.* at 258.

In Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) (*Turner I*), the Court further underscored the constitutional protection given to editorial choice. At issue were federal "must-carry" rules, requiring cable operators to allocate some of their channels to local broadcast stations. The Court had no doubt that the First Amendment was implicated, because the operators were engaging in expressive activity. They were, the Court explained, "exercising editorial discretion over which stations or programs to include in [their] repertoire." *Id.* at 636. And the rules "interfere[d]" with that discretion by forcing the operators to carry stations they would not otherwise have chosen. *Id.* at 643–644.

In a later decision, the Court ruled that the regulation survived First Amendment review because it was necessary to prevent the demise of local broadcasting. See Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997) (*Turner II*). But for purposes of today's cases, the takeaway of *Turner* is this holding: A private party's collection of third-party content into a single speech product (the operators' "repertoire" of programming) is itself expressive, and intrusion into that activity must be specially justified under the First Amendment.

The capstone of those precedents came in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995), when the Court considered (of all things) a parade. The question was whether Massachusetts could require the organizers of a St. Patrick's Day parade to admit as a participant a gay and lesbian group seeking to convey a message of "pride." *Id.* at 561. The Court held unanimously that the First Amendment precluded that compulsion. The "selection of contingents to make a parade," it explained, is entitled to First Amendment protection, no less than a newspaper's "presentation of an edited compilation of [other persons'] speech." *Id.* at 570 (citing *Tornillo*, 418 U.S. at 258). And that meant the State could not tell the parade organizers whom to include. Because "every participating unit affects the message," said the Court, ordering the group's admittance would "alter the expressive content of the[] parade." *Hurley*, 515 U.S. at 572–573. The parade's organizers had "decided to exclude a message [they] did not like from the communication [they] chose to make," and that was their decision alone. *Id.* at 574.

[C]onsider three general points to wrap up.

First, the First Amendment offers protection when an entity engaging in expressive activity, including compiling and curating others' speech, is directed to accommodate messages it would prefer to exclude. "[T]he editorial function itself is an aspect of speech." Denver Area Ed. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727, 737 (1996) (plurality opinion). Or said just a bit differently: An entity "exercis[ing] editorial discretion in the selection and presentation" of content is "engage[d] in speech activity." Arkansas Ed. Television Comm'n v. Forbes, 523 U.S. 666, 674 (1998). And that is as true when the content comes from third parties as when it does not. (Again, think of a newspaper opinion page or, if you prefer, a parade.) Deciding on the third-party speech that will be included in or excluded from a compilation—and then organizing and presenting the included items—is expressive activity of its own. And that activity results in a distinctive expressive product. When the government interferes with such editorial choices—say, by ordering the excluded to be included—it alters the content of the compilation. (It creates a different opinion page or parade, bearing a different message.) And in so doing—in overriding a private party's expressive choices—the government confronts the First Amendment.

Second, none of that changes just because a compiler includes most items and excludes just a few. That was the situation in *Hurley*. The St. Patrick's Day parade at issue there was "eclectic": It included a "wide variety of patriotic, commercial, political, moral, artistic, religious, athletic, public service, trade union, and eleemosynary themes, as well as conflicting messages." 515 U.S. at 562. Or otherwise said, the organizers were "rather lenient in admitting participants." *Id.* at 569. No matter. A "narrow, succinctly articulable message is not a condition of constitutional protection." *Id.* It "is enough" for a compiler to exclude the handful of messages it most "disfavor[s]." *Id.* at 574. Suppose, for example, that the newspaper in *Tornillo* had granted a right of reply to all but one candidate. It would have made no difference; the Florida statute still could not have altered the paper's policy. Indeed, that kind of focused editorial choice packs a peculiarly powerful expressive punch.

Third, the government cannot get its way just by asserting an interest in improving, or better balancing, the marketplace of ideas. Of course, it is critically important to have a well-functioning sphere of expression, in which citizens have access to information from many sources. That is the whole project of the First Amendment. And the government can take varied measures, like enforcing competition laws, to protect that access. But 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. The regulations in *Tornillo* and *Hurley* were thought to promote greater diversity of expression. They also were thought to counteract advantages some private parties possessed in controlling "enviable vehicle[s]" for speech. *Hurley*, 515 U.S. at 577. Indeed, the *Tornillo* Court devoted six pages of its opinion to recounting a critique of the then-current media environment—in particular, the disproportionate "influen[ce]" of a few speakers—similar to one heard today (except about different entities). It 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.

B

"[W]hatever the challenges of applying the Constitution to ever-advancing technology, the basic principles" of the First Amendment "do not vary." Brown v. Entertainment Merchants Assn., 564 U.S. 786, 790 (2011). [A]nalogies to old media, even if imperfect, can be useful. And better still as guides to decision are settled principles about freedom of expression, including the ones just described. Those principles have served the Nation well over many years, even as one communications method has given way to another. And they have much to say about the laws at issue here.

Facebook's News Feed [and] YouTube's homepage present[] a user with a continually updating stream of other users' posts.

The key to the scheme is prioritization of content, achieved through the use of algorithms. Of the billions of posts or videos (plus advertisements) that could wind up on a user's customized feed or recommendations list, only the tiniest fraction do. The selection and ranking is most often based on a user's expressed interests and past activities. But it may also be based on more general features of the communication or its creator. Facebook's Community Standards and YouTube's Community Guidelines detail the messages and videos that the platforms disfavor. The platforms write algorithms to implement those standards—for example, to prefer content deemed particularly trustworthy or to suppress content viewed as deceptive.

Beyond rankings lie labels. The platforms may attach "warning[s], disclaimers, or general commentary"—for example, informing users that certain content has "not been verified by official sources."

But sometimes, the platforms decide, providing more information is not enough; instead, removing a post is the right course. The platforms' content-moderation policies also say when that is so. YouTube's Guidelines target videos falling within categories like: hate speech, violent or graphic content, child safety, and misinformation (including about elections and vaccines). The platforms thus unabashedly control the content that will appear to users, exercising authority to remove, label or demote messages they disfavor.[1]

Except that Texas's law limits their power to do so. As noted earlier, the law's central provision prohibits the large social-media platforms (and maybe other entities) from "censor[ing]" a "user's expression" based on its "viewpoint." § 143A.002(a)(2). The law defines "expression" broadly, thus including pretty much anything that might be posted. *See* § 143A.001(2). And it defines "censor" to mean "block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression." § 143A.001(1). That is a long list of verbs, but it comes down to this: The platforms cannot do any of the things they typically do (on their main feeds) to posts they disapprove—cannot demote, label, or remove them—whenever the action is based on the post's viewpoint. [I]f Texas's law is enforced, the platforms could not—as they in fact do now—disfavor posts because they:

- support Nazi ideology;
- advocate for terrorism;
- espouse racism, Islamophobia, or anti-Semitism;
- glorify rape or other gender-based violence;
- encourage teenage suicide and self-injury;
- discourage the use of vaccines;
- advise phony treatments for diseases;
- advance false claims of election fraud.

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[1] We therefore do not deal here with feeds whose algorithms respond solely to how users act online—giving them the content they appear to want, without any regard to independent content standards. *See* BARRETT, J., concurring.

The list could continue for a while. The point of it is not that the speech environment created by Texas's law is worse than the ones to which the major platforms aspire on their main feeds. The point is just that Texas's law profoundly alters the platforms' choices about the views they will, and will not, convey.

And we have time and again held that type of regulation to interfere with protected speech. Like the editors, cable operators, and parade organizers this Court has previously considered, the major social-media platforms are in the business, when curating their feeds, of combining "multifarious voices" to create a distinctive expressive offering. *Hurley*, 515 U.S. at 569. The individual messages may originate with third parties, but the larger offering is the platform's. It is the product of a wealth of choices about whether—and, if so, how—to convey posts having a certain content or viewpoint. Those choices rest on a set of beliefs about which messages are appropriate and which are not (or which are more appropriate and which less so). And in the aggregate they give the feed a particular expressive quality. Consider again an opinion page editor, as in *Tornillo*, who wants to publish a variety of views, but thinks some things off-limits (or, to change the facts, worth only a couple of column inches). "The choice of material," the "decisions made [as to] content," the "treatment of public issues"—"whether fair or unfair"—all these "constitute the exercise of editorial control and judgment." *Tornillo*, 418 U.S. at 258. For a paper, and for a platform too. And the Texas law (like Florida's earlier right-of-reply statute) targets those expressive choices—in particular, by forcing the major platforms to present and promote content on their feeds that they regard as objectionable.

That those platforms happily convey the lion's share of posts submitted to them makes no significant First Amendment difference. That Facebook and YouTube convey a mass of messages does not license Texas to prohibit them from deleting posts with, say, "hate speech" based on "sexual orientation." App. at 126a, 155a. It is as much an editorial choice to convey all speech except in select categories as to convey only speech within them.

Similarly, the major 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. For starters, users may well attribute to the platforms the messages that the posts convey in toto. Those messages—communicated by the feeds as a whole—derive largely from the platforms' editorial decisions about which posts to remove, label, or demote. And because that is so, the platforms may indeed "own" the overall speech environment. In any event, this Court has never hinged a compiler's First Amendment protection on the risk of misattribution. 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.

C

And once that much is decided, the interest Texas relies on cannot sustain its law. In the usual First Amendment case, we must decide whether to apply strict or intermediate scrutiny. But here we need not. Even assuming that the less stringent form of First Amendment review applies, Texas's law does not pass. Under that standard, a law must further a "substantial governmental interest" that is "unrelated to the suppression of free expression." United States v. O'Brien, 391 U.S. 367, 377 (1968). Many possible interests relating to social media can meet that test; nothing said here puts regulation of NetChoice's members off-limits as to a whole array of subjects. But the interest Texas has asserted cannot carry the day: It is very much related to the suppression of free expression, and it is not valid, let alone substantial.

Texas has never been shy, and always been consistent, about its interest: The objective is to correct the mix of speech that the major social-media platforms present. The large social-media platforms throw out (or encumber) certain messages; Texas wants them kept in (and free from encumbrances), because it thinks that would create a better speech balance.

But a State may not interfere with private actors' speech to advance its own vision of ideological balance. States (and their citizens) are of course right to want an expressive realm in which the public has access to a wide range of views. That is, indeed, a fundamental aim of the First Amendment. But the way the First Amendment achieves that goal is by preventing *the government* from "tilt[ing] public debate in a preferred direction." Sorrell v. IMS Health Inc., 564 U.S. 552, 578–579 (2011). It is not by licensing the government to stop *private actors* from speaking as they wish and preferring some views over others. And that is so even when those actors possess "enviable vehicle[s]" for expression. *Hurley*, 515 U.S. at 577. In a better world, there would be fewer inequities in speech opportunities; and the government can take many steps to bring that world closer. But it cannot prohibit speech to improve or better balance the speech market. On the spectrum of dangers to free expression, there are few greater than allowing the government to change the speech of private actors in order to achieve its own conception of speech nirvana. That is why we have said in so many contexts that the government may not "restrict the speech of some elements of our society in order to enhance the relative voice of others." Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam). That unadorned interest is not "unrelated to the suppression of free expression," and the government may not pursue it consistent with the First Amendment.

The Court's decisions about editorial control make that point repeatedly. Again, the question those cases had in common was whether the government could force a private speaker, including a compiler and curator of third-party speech, to convey views it disapproved. And in most of those cases, the government defended its regulation as yielding greater balance in the marketplace of ideas. But the Court held that such an interest could not support the government's effort to alter the speaker's own expression.[2]

The case here is no different. The interest Texas asserts is in changing the balance of speech on the major platforms' feeds, so that messages now excluded will be included. To describe that interest, the State borrows language from this Court's First Amendment cases, maintaining that it is preventing "viewpoint discrimination." Brief for Texas 19. But the Court uses that language to say what governments cannot do: They cannot prohibit private actors from expressing certain views. When Texas uses that language, it is to say what private actors cannot do: They cannot decide for themselves what views to convey. The innocent-sounding phrase does not redeem the prohibited goal. The reason Texas is regulating the content-moderation policies that the major

[2] Texas claims *Turner* as a counter-example, but that decision offers no help to speak of. *Turner* did indeed hold that the FCC's must-carry provisions, requiring cable operators to give some of their channel space to local broadcast stations, passed First Amendment muster. But the interest there advanced was not to balance expressive content; rather, the interest was to save the local-broadcast industry, so that it could continue to serve households without cable. That interest, the Court explained, was "unrelated to the content of expression" disseminated by either cable or broadcast speakers. *Turner I*, 512 U.S. at 647.

platforms use for their feeds is to change the speech that will be displayed there. Texas does not like the way those platforms are selecting and moderating content, and wants them to create a different expressive product, communicating different values and priorities. But under the First Amendment, that is a preference Texas may not impose.

Justice BARRETT, concurring.

Assume that human beings decide to remove posts promoting a particular political candidate or advocating some position on a public-health issue. If they create an algorithm to help them identify and delete that content, the First Amendment protects their exercise of editorial judgment—even if the algorithm does most of the deleting without a person in the loop. In that event, the algorithm would simply implement human beings' inherently expressive choice "to exclude a message [they] did not like from" their speech compilation. *Hurley*, 515 U.S. at 574.

But what if a platform's algorithm just presents automatically to each user whatever the algorithm thinks the user will like—e.g., content similar to posts with which the user previously engaged? The First Amendment implications of the Florida and Texas laws might be different for that kind of algorithm. And what about AI, which is rapidly evolving? What if a platform's owners hand the reins to an AI tool and ask it simply to remove "hateful" content? If the AI relies on large language models to determine what is "hateful" and should be removed, has a human being with First Amendment rights made an inherently expressive "choice ... not to propound a particular point of view"? *Hurley*, 515 U.S. at 575. In other words, technology 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*, 512 U.S. at 641 (emphasis added). So the way platforms use this sort of technology might have constitutional significance.

[Opinions of Justice JACKSON, concurring in part and concurring in the judgment, and of Justice THOMAS, concurring in the judgment, are omitted.]

Justice ALITO, with whom Justice THOMAS and Justice GORSUCH join, concurring in the judgment.

III

D

Although the only question the Court must decide today is whether NetChoice showed that the Florida and Texas laws are facially unconstitutional, much of the majority opinion addresses a different question: whether the Texas law's content-moderation provisions are constitutional as applied to two features of two platforms—Facebook's News Feed and YouTube's homepage.

[T]he majority paints an attractive, though simplistic, picture of what Facebook's News Feed and YouTube's homepage do behind the scenes. Taking NetChoice at its word, the majority says that the platforms' use of algorithms to enforce their community standards is per se expressive. But the platforms have refused to disclose how these algorithms were created and how they actually work. And the majority fails to give any serious consideration to key arguments pressed by the States. Most notable is the majority's conspicuous failure to address the States' contention that platforms like YouTube and Facebook—which constitute the 21st century equivalent of the old "public square"—should be viewed as common carriers.

[T]he majority rests on NetChoice's dubious assertion that there is no constitutionally significant difference between what newspaper editors did more than a half-century ago at the time of *Tornillo* and what Facebook and YouTube do today.

Maybe that is right—but maybe it is not. Before mechanically accepting this analogy, perhaps we should take a closer look.

Let's start with size. Currently, Facebook and YouTube each produced—on a daily basis—more than four petabytes (4,000,000,000,000,000 bytes) of data. By my calculation, that is roughly 1.3 billion times as many bytes as there are in an issue of the New York Times.

No human being could possibly review even a tiny fraction of this gigantic outpouring of speech, and it is therefore hard to see how any shared message could be discerned. And even if someone could view all this data and find such a message, how likely is it that the addition of a small amount of discordant speech would change the overall message?

Now consider how newspapers and social-media platforms edit content. Newspaper editors are real human beings, and when the Court decided *Tornillo* (the case that the majority finds most instructive), editors assigned articles to particular reporters, and copyeditors went over typescript with a blue pencil. The platforms, by contrast, play no role in selecting the billions of texts and videos that users try to convey to each other. And the vast bulk of the "curation" and "content moderation" carried out by platforms is not done by human beings. Instead, algorithms remove a small fraction of nonconforming posts post hoc and prioritize content based on factors that the platforms have not revealed and may not even know. After all, many of the biggest platforms are beginning to use AI algorithms to help them moderate content. Are such decisions equally expressive as the decisions made by humans? Should we at least think about this?

Other questions abound. Maybe we should think about the enormous power exercised by platforms like Facebook and YouTube as a result of "network effects." And maybe we should think about the unique ways in which social-media platforms influence public thought. To be sure, I do not suggest that we should decide at this time whether the Florida and Texas laws are constitutional as applied to Facebook's News Feed or YouTube's homepage. My argument is just the opposite. Such questions should be resolved in the context of an as-applied challenge. But no as-applied question is before us, and we do not have all the facts that we need to tackle the extraneous matters reached by the majority.

Instead, when confronted with the application of a constitutional requirement to new technology, we should proceed with caution. While the meaning of the Constitution remains constant, the application of enduring principles to new technology requires an understanding of that technology and its effects. Premature resolution of such questions creates the risk of decisions that will quickly turn into embarrassments.

Notes and Questions

1. Going Beyond. The Court's holding was to vacate and remand the cases back to the 5^{th} and 11^{th} Circuits to reconsider the facial challenge. The majority could have stopped there but instead went on to discuss at some length the application of the First Amendment to social media platforms. This discussion was not necessary to its holding (and thus was dicta), but by including it the Court sent a clear message about what it considers to be the appropriate First Amendment analysis. So what could have been a minimalist opinion about the standards for facial invalidation became a broader opinion about how the First Amendment applies to content moderation.

2. Nothing New? The majority stated that the analysis is straightforward in light of cases like *Tornillo, Turner*, and *Hurley*—the major feeds of platforms like Facebook and YouTube are speech under the First Amendment. According to the Court, prioritization of content, including by algorithms, triggers First Amendment scrutiny. And the Court's discussion makes it reasonably clear that, whether or not the Texas and Florida statutes are facially invalid, they are unconstitutional as applied to the main feeds of Facebook and YouTube.

3. Counter-Arguments. What are the strongest arguments against the Court's analysis? Consider in this regard some of the arguments that the Court explicitly or implicitly rejected:

> **Platforms as Conduits**: The 5th Circuit opinion stated that "[t]he Platforms are nothing like the newspaper in Miami Herald v. Tornillo. Unlike newspapers, the Platforms exercise virtually no editorial control or judgment. The Platforms use algorithms to screen out certain obscene and spam-related content. And then virtually everything else is just posted to the Platform with *zero* editorial control or judgment. Thus the Platforms, unlike newspapers, are primarily 'conduit[s] for news, comment, and advertising.'" NetChoice LLC v. Paxton, 49 F.4th 439, 459-60 (2022) (quoting *Tornillo*). The Court rejected this reasoning. Relatedly, the Court stated that users may attribute the views of posts to the platforms and that, in any event, application of the First Amendment does not depend on a risk of misattribution.
>
> **Common Carriage**: Closely related to treating platforms as conduits was the common-carrier argument. A centerpiece of the Texas and Florida statutes' findings, the 5th Circuit's opinion, and both states' arguments in the Supreme Court was that the social media platforms function as common carriers and should be treated as such, and thus that the relevant precedents were not cases like *Tornillo*. The majority did not squarely address this argument, but its analysis forecloses it—the application of *Tornillo*, *Turner,* and *Hurley* is not consistent with treating these platforms as common carriers.
>
> **Enormous Power**: Another related argument revolves around what Justice Aliso referred to as social media platforms' "enormous power," which Texas and Florida also emphasized. The Court noted that the same arguments had been made and rejected in *Tornillo* (see page 588 of the casebook).
>
> **Governmental Interests in Balancing Voices**: Should the government have the ability to regulate platforms' editing to ensure that the public receives an appropriate mix of perspectives (especially in light of those platforms' power)? The Court, invoking a line of cases, stated that the government has no valid (much less substantial) interest in creating an ideological balance of views by regulating private speakers.
>
> **Editing via Algorithm**: To return to the subject of the excerpts in this chapter of the casebook, the Court treated editing decisions via algorithm the same as decisions made entirely by a human for First Amendment purposes. The majority did not address "feeds whose algorithms respond solely to how users act online," but it made clear that algorithmic curation is speech for First Amendment purposes, and it drew no other distinctions among algorithms. If the majority thought there were other distinctions to be made among the

> algorithms that Facebook's and YouTube's main feeds use, presumably it would have written a different opinion suggesting such distinctions. Justice Barrett proposed (as did Professor Benjamin in a portion of his article not included in the excerpt in the casebook) that decisions made by AI might sufficiently cut humans out of the process to call into question the application of the First Amendment to the AI's editing decisions, but the majority did not so indicate. All this led Justice Alito to note with apparent frustration that "the majority says that the platforms' use of algorithms to enforce their community standards is per se expressive."

With respect to each of these conclusions in *Moody*, did the Court err? On what basis would you so argue?

CHAPTER 13
Privacy Regulation

Insert on page 706 before note 1:

0.5 Subsequent History. In 2023 the Seventh Circuit affirmed the district court's judgment, but wholly on standing grounds. Dinerstein v. Google, LLC, 73 F.4th 502 (7th Cir. 2023). The court wrote that the plaintiff had not suffered "injury in fact," under federal standing doctrine, for two main reasons. First, the court found that plaintiff had not suffered any privacy injury sufficiently similar to a common-law privacy injury to sustain the cause of action. The court relied on Google's promising not to de-identify the health data it has received and on the plaintiff's failure to establish that "medical records privacy" was similar to common law privacy harms. As to breach of contract, the court held that the common law availability of a cause of action for breach of contract in the absence of monetary damages was insufficient for article III standing purposes, even if a common law court would award nominal damages in such a case. The court's view, in all likelihood, would also prevent Congress from creating an enforceable cause of action in such circumstances. If this is correct, then private rights of action for many modern privacy intrusions might be compensable only in state courts under state law, which of course impacts the question of whether regulation should be federal or state.

Insert on page 705 after the second full paragraph:

Momentum for state privacy regulation has increased, with a total of five states having comprehensive consumer privacy laws in effect as of the end of 2023: California, Colorado, Connecticut, Virginia, and Utah. Several other states passed legislation taking effect in 2024, including Oregon, Montana, and Texas. Categorizing these laws is difficult, but most bear significant resemblance to the California and European schemes. The International Association of Privacy Professionals is one organization that seeks to track developments across the states: https://iapp.org/resources/article/us-state-privacy-legislation-tracker/. Another is the National Conference of State Legislatures: https://www.ncsl.org/technology-and-communication/2023-consumer-data-privacy-legislation.

Insert on page 715 at the end of note 4:

In 2023 the European Commission entered into force a new "adequacy decision" finding that a revised "data privacy framework" would allow transfer between EU and U.S. companies. This framework is subject to annual reviews and other modifications. For more information generally, *see* https://www.dataprivacyframework.gov/Program-Overview.

Insert on page 716 at the end of footnote 2:

See also Rebecca Janßen. Reinhold Kesler, Michael E. Kummer, Joel Waldfogel, GDPR and the Lost Generation of Innovative Apps, NBER Working Paper 30028 (May 2022) (https://www.nber.org/system/files/working_papers/w30028/w30028.pdf) (estimating that "GDPR induced the exit of about a third of available apps" on the Google Play Store and "in the quarters following implementation, entry of new apps fell by half").

CHAPTER 15
General Protection for Intermediaries of User-Generated Content: Section 230

Insert on page 785 after note 4:

5. "Material Contribution." As the *Jones* court noted (and as is reflected by *Roommates.com*), many courts of appeals have converged on the "material contribution" test for platform authorship—that is, the platform loses its section 230 immunity if it "materially contributes" to the unlawfulness of the content. Materiality, however, is a very general term, perhaps not as capacious as "reasonable" in the law but nearly so. A contribution is material when it is important enough (to the illegality of content) that a reasonable person would consider it material. In *Roommates.com*, the court said that the site's contribution was "direct and palpable" in contributing to the meaning of the ultimate posting, while the court in *Jones* said that the quips did not add to the defamatory content of the user posts.

The material contribution test obviously creates the possibility of argument as well as differing interpretations. For example, in Henderson v. Source for Public Data, 53 F.4th 110 (4th Cir. 2022), the court wrote that a material contribution is any activity that goes "beyond the exercise of traditional editorial functions," *id.* at 128, and held that a site that edited public records and provided summaries had made a material contribution. Because summaries, in the court's view, were beyond usual editorial functions, section 230 did not provide protection. On the facts of the case, the court's decision not to apply section 230 makes sense, because the plaintiffs' essential claim was that the site's summaries were inaccurate. But traditional editorial functions often include materially contributing to content, say by clarifying it or streamlining it or, really, any significant editing. Indeed, the court says that any "change [to] the substance of the content" eliminates section 230, *id.* at 129, which sweeps more broadly than either *Zeran* or *Roommates.com*.

Insert on page 798 after note 6:

7. *Gonzalez v. Google* and *Twitter v. Taamneh*. In 2022, the Supreme Court granted certiorari in two cases implicating section 230, which reflected in part the discontent over the breadth of its interpretation in the lower courts. Both cases involved claims seeking to impose secondary liability on the internet platforms under the Anti-Terrorism Act, *see* 18 U.S.C. § 2333. Plaintiffs alleged that the platforms distributed user-generated content that furthered certain terrorist acts. In the *Google* case, the Ninth Circuit held that section 230 insulated the platform (in that case, YouTube).

In its amicus brief, the United States (through the Solicitor General) took the position that a platform's content moderation practices—specifically its promotion of certain content—was activity outside section 230's immunity and could be the basis for a claim. It distinguished this from claims based on liability for the content actually promoted.

> 1. Plaintiffs' broadest theory of direct and secondary ATA liability is that YouTube is liable for allowing ISIS-affiliated users to create accounts and post videos on the site. The court of appeals correctly held that Section 230(c)(1) precludes liability on that basis. YouTube is undoubtedly a provider of an interactive computer service, and plaintiffs do not allege that YouTube edited or otherwise contributed to the creation of the videos at issue. To the extent plaintiffs allege that YouTube violated the ATA by allowing its platform to be used for the dissemination of videos, Section 230(c)(1) bars their claims.
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> 2. Plaintiffs' allegations regarding YouTube's use of algorithms and related features to recommend ISIS content require a different analysis. That theory of ATA liability trains on YouTube's own conduct and its own communications, over and above its failure to block or remove ISIS content from its site. Because that theory does not ask the court to treat YouTube as a publisher or speaker of content created and posted by others, Section 230(c)(1) protection is not available. That does not mean that YouTube should be deemed an information content provider with respect to the videos themselves. Although Section 230(c)(1) does not preclude liability premised on YouTube's recommendations if the elements of a private ATA suit are otherwise met, liability must be determined without regard to the fact that the recommended videos appeared on YouTube's own platform. Because the court of appeals did not consider whether plaintiffs have adequately pleaded the elements of ATA liability on that theory, the case should be remanded so that the court may do so in the first instance.

Brief for the United States as Amicus Curiae in Support of Vacatur, Gonzalez v. Google LLC, No. 21-1333 (U.S. Sup. Ct., Dec. 7, 2022) (https://www.supremecourt.gov/DocketPDF/21/21-1333/249441/20221207203557042_21-1333tsacUnitedStates.pdf).

Google and many other amici argued that removing content moderation (and promotion) practices from the scope of section 230 would essentially forbid internet platforms as we know them, and at argument the Justices appeared to struggle to grasp the technical operations. Indeed, Justice Kagan remarked: "[Y]ou know, every other industry has to internalize the costs of its conduct. Why is it that the tech industry gets a pass? A little bit unclear. On the other hand, I mean, we're a court. We really don't know about these things. You know, these are not like the nine greatest experts on the Internet." Tr. at 45–46 (https://www.supremecourt.gov/oral_arguments/argument_transcripts/2022/21-1333_q4lp.pdf).

Eventually, the Supreme Court did not decide the section 230 issues, holding in each case that the plaintiffs had failed to state claims under the ATA. *See* Twitter, Inc. v. Taamneh, 143 S. Ct. 1206 (2023); Gonzalez v. Google LLC, 143 S. Ct. 1191 (2023).

8. Continuing Discontent on the Supreme Court. Notwithstanding the Court's avoiding section 230 in *Taamneh* and *Gonzalez*, some Justices continued to express the need for a new case to decide these issues. Justice Thomas's most recent intervention (joined by Justice Gorsuch) is Doe v. Snapchat, 144 S. Ct. 2493 (2024) (dissenting from denial of certiorari), which cited many other of Justice Thomas's separate statements. Of current interest, Justice Thomas argued that the Court's recent holding in *Moody* (excerpted above) is inconsistent with the prevailing broad scope of section 230:

> Although the Court denies certiorari today, there will be other opportunities in the future. But, make no mistake about it—there is danger in delay. Social-media platforms have increasingly used § 230 as a get-out-of-jail free card. Many platforms claim that users' content is their own First Amendment speech. Because platforms organize users' content into newsfeeds or other compilations, the argument goes, platforms engage in constitutionally protected speech. *See Moody*. When it comes time for platforms to be held accountable for their websites, however, they argue the opposite. Platforms claim that since they are not speakers under § 230, they cannot be subject to any suit implicating users' content, even if the suit revolves around the platform's alleged misconduct. In the platforms' world, they are fully responsible for their websites when it results in constitutional protections, but the moment that responsibility could lead to liability, they can disclaim any obligations and enjoy greater protections from suit than nearly any other industry. The Court should consider if this state of affairs is what § 230 demands.

Id. at 2494. Do you agree with this characterization?

9. The Digital Services Act. The European Union in 2022 adopted a regulation titled the "Digital Services Act," which governs many practices that, in the U.S., would be protected by section 230. The DSA takes effect in February 2024, and many of the provisions will undergo further definition. But the official EU summary includes the following:

> Some of the obligations for intermediaries include:
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> - **Measures to counter illegal content online, including illegal goods and services**. The DSA imposes new mechanisms allowing users to flag illegal content online, and for platforms to cooperate with specialised 'trusted flaggers' to identify and remove illegal content;
> - **New rules to trace sellers** on online market places, to help build trust and go after scammers more easily; a new obligation **by online market places to randomly check** against existing databases whether products or services on their sites are compliant; sustained efforts to enhance the traceability of products through advanced technological solutions;
> - **Effective safeguards for users**, including the possibility to challenge platforms' content moderation decisions based on a new obligatory information to users when their content gets removed or restricted;
> - Wide ranging **transparency measures for online platforms**, including better information on terms and conditions, as well as transparency on the algorithms used for recommending content or products to users;
> - New obligations for **the protection of minors on any platform in the EU**;
> - **Obligations for very large online platforms and search engines** to prevent abuse of their systems by taking risk-based action, including oversight through independent audits of their risk management measures. Platforms must mitigate against risks such as **disinformation or election manipulation**, **cyber violence against women, or harms to minors online**. These measures must be carefully balanced against restrictions of freedom of expression, and are subject to independent audits;

- A new **crisis response mechanism** in cases of serious threat for public health and security crises, such as a pandemic or a war;
- **Bans on targeted advertising on online platforms** by profiling children or based on special categories of personal data such as ethnicity, political views or sexual orientation. Enhanced transparency for all advertising on online platforms and influencers' commercial communications;
- A ban on using so-called **'dark patterns'** on the interface of online platforms, referring to misleading tricks that manipulate users into choices they do not intend to make…

Questions and Answers: Digital Services Act (April 23, 2023)
(https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2348).

As particularly applicable to very large platforms, the DSA imposes affirmative obligations to monitor and to correct for several categories of harmful content, obligations not present under section 230 (and obligations that may also violated the first amendment).