RECENT DEVELOPMENTS

WHAT IS AN INDEPENDENT AGENCY TO DO? THE TRUMP ADMINISTRATION'S EXECUTIVE ORDER ON *PREVENTING ONLINE CENSORSHIP* AND THE FEDERAL TRADE COMMISSION

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President Trump's Executive Order on Preventing Online Censorship is the latest in a series of proposals aimed at independent agencies, chiefly the Federal Communications Commission (FCC) and Federal Trade Commission (FTC), that seek to police how tech companies operate their social media platforms. These measures suffer from fatal defects. They run against the weight of First Amendment law and, our focus, beyond the limits of FTC Section 5 authority. We briefly summarize the scope of that authority before analyzing the Executive Order against the backdrop of the First Amendment and Section 5; concluding it would be illegal and imprudent to enforce. We conclude with suggestions for how the FTC should handle the position it finds itself in—facing an Executive Order to consider and study unlawful enforcement actions that not only undermine its independence, but also shift its attention away from its primary mission of consumer protection toward policing free speech.

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INTRODUCTION

President Trump's Executive Order on *Preventing Online Censorship*, issued in response to Twitter's content flag on one of the President's tweets, is the subject of significant discussion among legal commentators and the public.[1] The order contains a menu of provisions aimed at digital platforms, including narrowing the scope of the immunity these platforms enjoy under § 230(c) of the Communications Act of 1934 (Section 230).[2] The White House's May 28 Executive Order also directs the Federal Trade Commission (FTC) to consider taking a number of actions, including: reviewing online speech policies issued by social media platforms; using its authority under the FTC Act to sanction actions from platforms that "restrict speech in ways that do not align with those entities' public representations about those practices"; and issuing reports describing public complaints of online censorship.[3]

The Executive Order is the latest intervention demanding that the FTC—and to some extent, the Federal Communications Commission (FCC)—play a greater role in policing speech involving online platforms. This trend, no doubt driven in large part by accusations of digital platforms engaging in censorship and other forms of bias against conservative speech, also had its fair share of proposed legislation. Senator Josh Hawley (R-MO), for example, introduced a proposal that would condition Section 230 immunity upon compliance with an FTC audit for content-neutrality to the satisfaction of a supermajority of Commissioners under a clear and convincing evidence standard.[4] Senator Ted Cruz (R-TX) suggested online platforms should be

1. Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (June 2, 2020); *see, e.g.*, Christine S. Wilson (@CSWilsonFTC), TWITTER (June 9, 2020, 3:49 PM), https://twitter.com/CSWilsonFTC/status/1270442869183168512 (calling attention to President Trump's Executive Order on Preventing Online Censorship); *infra* note 13 (analyzing reform of Section 230(c) of the Communications Decency Act).

2. 47 U.S.C. § 230(c). While Title 47 is only an informal codification (Congress has not codified it into positive law) this article will cite to it for the sake of convenience.

3. Exec. Order No. 13,925, 85 Fed. Reg. at 34,082; 15 U.S.C. § 45(a).

4. Press Release, Josh Hawley, Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies (June 19, 2019), https://www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies.

forced to be "neutral public forums," harkening back to the infamous and oft-criticized Fairness Doctrine.[5] Together, both senators have called for the FTC to probe tech companies and their online content curation practices.[6] Support for a new Fairness Doctrine, or something like it, is also bipartisan; President-elect Biden called for Section 230 immunity to be "immediately" removed as part of a broader criticism of digital platforms.[7]

This chorus can be heard throughout independent agency circles, too. FCC Commissioner Brendan Carr celebrated the Executive Order as "welcome news!"[8] FTC Commissioner Christine S. Wilson also continued the dialogue started by the Executive Order, saying the question "whether companies covered by § 230 should be prohibited from restricting speech in ways that contradict their own marketing and representations" is an important one to answer.[9] She suggested such an analysis "could be undertaken using the FTC's authority to police unfair and deceptive conduct."[10] She also expressed support for a FTC 6(b)[11] inquiry into "the

5. Ted Cruz, *Facebook Has Been Censoring or Suppressing Conservative Speech for Years*, FOX NEWS (Apr. 11, 2018), https://www.foxnews.com/opinion/sen-ted-cruz-facebook-has-been-censoring-or-suppressing-conservative-speech-for-years; *see generally* Thomas Hazlett & David W. Sosa, *Was the Fairness Doctrine a "Chilling Effect"? Evidence from the Postderegulation Radio Market*, 26 J. LEGAL STUD. 279 (1997) (concluding empirical evidence supports the argument that the Fairness Doctrine had a "chilling effect").

6. Ben Brody, *Cruz, Hawley Want the FTC to Probe Social Media Content Curation*, BLOOMBERG (July 15, 2019, 1:31 PM), https://www.bloomberg.com/news/articles/2019-07-15/cruz-hawley-want-the-ftc-to-probe-social-media-content-curation.

7. Cristiano Lima, *Biden: Tech's Liability Shield 'Should be Revoked' Immediately*, POLITICO (Jan. 17, 2020, 10:56 AM), https://www.politico.com/news/2020/01/17/joe-biden-tech-liability-shield-revoked-facebook-100443.

8. Brendan Carr (@BrendanCarrFCC), TWITTER (May 28, 2020, 6:12 PM), https://twitter.com/BrendanCarrFCC/status/1266130329040904194.

9. Christine S. Wilson (@CSWilsonFTC), TWITTER (June 9, 2020, 3:49 PM), https://twitter.com/CSWilsonFTC/status/1270442869183168512.

10. *Id.*

11. Section 6(b) is a powerful investigative tool that empowers the Federal Trade Commission (FTC) to require an entity to file "annual or special . . . reports or answers in writing to specific questions" to provide information about the entity's "organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals." 15 U.S.C. § 46(b). Commissioner Wilson, with Commissioner Chopra, previously called on the "Commission to prioritize 6(b) studies that explore consumer protection issues arising from the privacy and data security practices of technology companies, including social media platforms." Fed. Trade Comm'n, Statement of Comm'r Christine S. Wilson, Joined by Comm'r Rohit Chopra, Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders (Feb. 11, 2020), https://www.ftc.gov/system/files/documents/reports/6b-orders-file-special-reports-technology-platform-companies/statement_by_commissioners_wilson_and_chopra_re_hsr_6b_0.pdf.

interactions between content curation, targeted advertising, data collection and monetization, and [the] creation/refinement of algorithms."[12]

There are many possible criticisms of proposals surrounding efforts to reform Section 230.[13] Most of these criticisms acknowledge the fact that the efforts to reform Section 230 are in tension with the First Amendment.[14] The Executive Order and these proposals aimed at Section 230 are part of two broader dialogues taking place with significant ramifications for the future of the internet, e-commerce, and digital platforms in the United States. The first involves the appropriate role of antitrust in constraining the activities of large tech companies and digital platforms.[15] Senator Elizabeth Warren (D-MA) called for a total rework of the antitrust status quo, doing away with its consumer welfare orientation, prohibiting a number of common business practices, focusing on firm size, and breaking up big tech companies in the process.[16] Senator Hawley, too, encouraged a recalibration of the current antitrust balance in favor of stricter enforcement.[17] Attorney General

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12. Wilson, *supra* note 10.

13. *See, e.g.*, Daphne Keller, *Toward a Clearer Conversation About Platform Liability*, KNIGHT FIRST AMENDMENT INST. (May 7, 2018), "Emerging Threats" essay series, https://ssrn.com/abstract=3186867 (canvassing arguments for and against Section 230's speech protections); Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33, 44–45 (Nov. 2019) (arguing that amendments to Section 230 could undermine its procedural benefits).

14. *See, e.g.*, Tim Wu, *Trump's Response to Twitter Is Unconstitutional Harassment*, N.Y. TIMES (June 2, 2020), https://nyti.ms/3eG1UAH ("By retaliating against Twitter for what it said in its warning labels, Mr. Trump violated the First Amendment. Official reprisal for protected speech, as the Supreme Court has put it, 'offends the Constitution.'") (quoting Hartman v. Moore, 547 U.S. 250, 256 (2006); Crawford-El v. Britton, 523 U.S. 574, 588, n. 10 (1998)); TechFreedom (@TechFreedom), TWITTER (May 28, 2020, 1:28 AM), https://twitter.com/TechFreedom/status/1265877617519009792 ("The relevant case here is the Manhattan Access (2019): all 5 conservatives agreed that providing a forum for speech wasn't enough to make a private cable programmer a gov[ernment] actor, even where state law forced cable [companies] to set aside 'public access' channel capacity.").

15. For example, early drafts of a proposed reform bill overturn *Trinko* and require dominant companies to share essential facilities. The legislation would also criminalize predatory pricing, making the sole test of liability whether a product was priced below cost. *See* Lauren Hirsch, *Elizabeth Warren's Antitrust Bill Would Dramatically Enhance Government Control over the Biggest US Companies*, CNBC (Dec. 7, 2019, 11:32 AM), https://www.cnbc.com/2019/12/07/warrens-antitrust-bill-would-boost-government-control-over-biggest-companies.html.

16. *Id.*

17. *See* Chris Ciaccia, *GOP Sen. Hawley Says Amazon Should Be Investigated for Antitrust Violation*, FOX NEWS (Apr. 28, 2020), https://www.foxnews.com/tech/gop-sen-hawley-says-amazon-should-be-investigated-for-antitrust-violation (encouraging stricter enforcement in antitrust laws).

William P. Barr recently suggested, "[o]ne way that [platform bias against conservatives] can be addressed is through the antitrust laws and challenging companies that engage in monopolistic practices."[18] Congress also regularly holds hearings on the matter, with the antitrust debate expanding to absorb concerns over privacy.[19] This political debate mirrors one ongoing in academia, where a growing school of proponents—for not just increasing antitrust enforcement, but revolutionizing antitrust institutions—are entering the dialogue.[20] The antitrust revolutionaries—Neo-Brandeisians seems to be the most common moniker—are remarkably well-funded; have the ear of antitrust agencies and Congress; and are out to have federal and state governments play a central role in the development and design of digital platforms, as well as people's interactions with them.[21]

The second conversation involves congressional and Executive Branch control over independent agencies, such as the FTC. Axon's recent wholesale challenge to the constitutionality of the FTC is one example of growing intellectual skepticism of independent agencies.[22] That skepticism took form in *Seila Law v. Consumer Financial Protection Bureau*.[23] In *Seila*, the Supreme Court held the Consumer Financial Protection Bureau's (CFPB's) independent agency structure unconstitutional, and raised doubts about the future for independent agencies', including the FTC's, exercise of executive authority—with Justice Thomas' concurrence in part advocating for the

18. David McCabe & Cecilia Kang, *Barr's Interest in Google Antitrust Case Keeps It Moving Swiftly*, N.Y. TIMES (June 25, 2020), https://nyti.ms/3fXkDbE.

19. *See* David McCabe, *In House Antitrust Hearing, Lawmakers Focus on Harms to Privacy*, N.Y. TIMES (Oct. 18, 2019), https://nyti.ms/31qlJov (noting the multiple hearings in the House of Representatives).

20. *See* Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 294 (2019) (analyzing the debate between more and less antitrust regulation).

21. *See* Tony Romm, *Facebook Co-founder and Critic Chris Hughes Spearheads a $10 Million 'Anti-monopoly' Fund*, WASH. POST (Oct. 17, 2019, 6:00 AM), (noting funding contributions from George Soros and Pierre Omidyar); David McCabe, *America's Top Foundations Bankroll Attack on Big Tech*, N.Y. TIMES (Dec. 11, 2019), https://nyti.ms/36iVtiA (noting various funding streams in the tens of millions).

22. *See, e.g.*, *CPI Talks… with Senator Mike Lee*, COMPETITION POL'Y INT'L (Mar. 1, 2020) (opining that "the FTC, like other administrative agencies" operates outside of the U.S. Constitution's framework); https://www.competitionpolicyinternational.com/cpi-talks-with-senator-mike-lee/; Bryan Koenig, *Axon Blasts Latest FTC 'Avoidance Attempt' In Authority Row*, LAW360 (Mar. 10, 2020, 6:40 PM), https://www.law360.com/articles/1251649/axon-blasts-latest-ftc-avoidance-attempt-in-authority-row (providing background on Axon's suit alleging the FTC's administrative proceedings violate due process and equal protection rights).

23. 140 S. Ct. 2183, 2199–200, 2204 (2020).

overturning of *Humphrey's Executor*.[24] One can hear the branch cracking under the FTC even in the more minimalist majority opinion—by casting *Humphrey's Executor* as a narrow exception to the presidential removal rule, the stage is set for follow-on litigation about the scope of said exception.

Deeper still, both the Order and many of the proposals involving Section 230 hide the administrative rubicon that is being approached and, in some instances, crossed. Many of the Executive Order's directives issue to independent agencies, which are by design intended to be legally insulated from the President.[25] The Executive Order's language carefully tests that insulation. Interbranch conflicts are rarely the "wolf" that "comes as a wolf";[26] by purporting to direct the FTC to take action, the Executive Order implicitly, albeit subtly, challenges nearly a century of precedent concerning the Executive's interactions with independent agencies. Less subtly, the Executive Order invites the FTC to apply its consumer protection authority to police the speech of digital platforms.[27] We focus upon this tension between the Executive Order and agency independence, and how the FTC should respond to the Executive Order in terms of law and policy.

Part I reviews the Executive Order's substantive provisions and tracks some early hurdles in its implementation. Part II dives into the specifics surrounding Section 5 of the FTC Act. Part III suggests how the FTC should respond. Part IV concludes the FTC would do a disservice to the law and its independence by attempting to police content on social media in this manner.

I. THE EXECUTIVE ORDER ON PREVENTING ONLINE CENSORSHIP

President Trump's draft Executive Order on *Preventing Online Censorship* announced the "policy of the United States that lawful content should be free from censorship in our digital marketplace of ideas" in response to the

24. *See id.* at 2211 (Thomas, J., concurring in part and dissenting in part) ("The Court's decision today takes a restrained approach on the merits by limiting *Humphrey's Executor v. United States*, rather than overruling it.") (citations omitted).

25. Exec. Order No. 13,925, 85 Fed. Reg. 34,079, 34,081, 34,082 (June 2, 2020) (assigning duties to the FCC and FTC). There is some debate about the power of the President to bind independent agencies through executive orders; independent agencies tend to resolve these disputes through the political process, so the question is scarcely litigated. *See* C. Boyden Gray, *The President's Constitutional Power to Order Cost-Benefit Analysis and Centralized Review of Independent Agency Rulemaking*, (Mercatus Working Paper, 2017).

26. Morrison v. Olson, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

27. Exec. Order No. 13,925, 85 Fed. Reg. at 34,081.

proprietors of online platforms' concern about censorship.[28] The current Executive Order mandates an audit and review of federal advertising expenditures, cutting contracts for noncomplying platforms.[29] It calls for a new interpretation of the immunity provisions of Section 230, with FCC rulemaking to that end.[30] And the order seeks to invoke the FTC's Unfair or Deceptive Acts or Practices (UDAP) authority; lest it stop there, it establishes a working group to explore State UDAP laws.[31]

Two provisions, those to the FCC—concerning Section 230—and those to FTC, with respect to its UDAP authority, touch upon core principles of agency independence and the First Amendment.[32] Both claim to further the policy articulated in the Executive Order's preamble, but important nuances arise upon careful consideration. For example, the Executive Order purports to limit Section 230 to its text,[33] by narrowing the "good faith" immunity in § 230(c)(2)(A)[34] to exclude platforms "engag[ing] in deceptive or pretextual actions (often contrary to their stated terms of service) to stifle viewpoints with which they disagree."[35] The Executive Order directs the Secretary of Commerce to petition the FCC to engage in rulemaking to implement this policy, with particular focus on content restrictions that are "deceptive" or "pretextual," or those "taken after failing to provide adequate notice, reasoned explanation, or a meaningful opportunity to be heard."[36] The Executive Order's FTC provisions share similar structure: "The FTC shall consider taking action, as appropriate and consistent with applicable law, to prohibit unfair or deceptive acts or practices . . . by entities regulated by

28. Craig Wilson, *Here's Trump's Executive Order Meant as Payback to Twitter. It's Doomed to Fail.*, INPUT MAG. (May 28, 2020, 11:45 AM), https://www.inputmag.com/culture/heres-trumps-executive-order-meant-as-payback-to-twitter-its-doomed-to-fail (noting that prior Executive Order draft emphasized that the "policy of the United States that lawful content should be free from censorship in our digital marketplace of ideas").

29. Exec. Order No. 13,925, 85 Fed. Reg. at 34,081.

30. *Id.* at 34,080.

31. *Id.* at 34,082.

32. *See id.* at 34,080.

33. *Id.* at 34,080. ("[T]he immunity should not extend beyond its text.").

34. *See* 47 U.S.C. § 230(2)(a) ("No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.").

35. Exec. Order No. 13,925, 85 Fed. Reg. at 34,080.

36. *Id.* at 34,081.

section 230 that restrict speech in ways that do not align with those entities' public representations about those practices."[37]

This meticulously crafted language speaks to the interlocking legal and political constraints lurking under the Executive Order's plain text. As a preliminary matter, the Executive Order very carefully avoids directly ordering the FTC to do anything—the word "consider" concedes that it will be up to a vote of the Commission whether to pursue any of the Executive Order's directives at all.[38] The Executive Order's careful dance, however, does not fully accomplish this task because it mandates the FTC *consider* the policy.[39]

The Executive Order's remaining provisions address the typical legal and administrative concerns common to all executive orders of this type and are beyond the scope of this Paper.

II. SECTION 5 OF THE FTC ACT AND SPEECH RESTRICTIONS

Section 5 of the FTC Act, like most other American antitrust laws, reads like its drafter was interrupted; it declares: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."[40] And that's it. Or rather, it was, until a 1980 FTC Policy statement[41]—which Congress later codified—restricting the definition of unfair acts or practices.[42] As former Commissioner J. Thomas Rosch put it, after the "court of equity" holding in *Sperry & Hutchinson*,[43] "the Commission applied standards that best can be described as 'bloppy,'" ultimately prompting congressional intervention to

37. *Id.* at 34,082.

38. The role of independent agencies in the broader administrative law framework was in part established by a case concerning the FTC. Constitutionally, such agencies can have their decision making insulated from the President if Congress so intends. *See* Humphrey's Ex'r v. United States, 295 U.S. 602, 628 (1935).

39. Exec. Order No. 13,925, 85 Fed. Reg. at 34,082.

40. *See*, *e.g.*, 15 U.S.C. § 45(a)(1) .

41. The FTC's Unfairness Policy Statement was attached in an appendix to International Harvester Co. FED. TRADE COMM'N, POLICY STATEMENT ON DECEPTION (1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [hereinafter DECEPTION STATEMENT].

42. *See* 15 U.S.C. § 45(n); J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Deceptive and Unfair Acts and Practices Principles: Evolution and Convergence, Remarks at the California State Bar (May 18, 2007), https://www.ftc.gov/sites/default/files/documents/public_statements/deceptive-and-unfair-acts-and-practices-principles-evolution-and-convergence/070518evolutionandconvergence_0.pdf.

43. 405 U.S. 233, 244 (1972).

fence in the FTC's jurisdiction.[44] Section 5 authority is conceptually divided into three parts: (1) deception; (2) unfair acts or practices; and (3) unfair methods of competition.[45] The first two—collectively, UDAP—belong to the consumer protection side of the FTC's house and the third to the competition mission.[46] As with the Executive Order, we focus on the Commission's UDAP authority.

A. Deception

The deception prong is a stalwart of the FTC's consumer protection authority under Section 5. The FTC's landmark Policy Statement on Deception, issued in 1983, added needed clarity to the FTC's praxis. It recognizes that "[c]ertain elements undergird all deception cases"—the following criteria form actionable deception cases under Section 5: "First, there must be a representation, omission or practice that is likely to mislead the consumer . . . Second, [FTC Staff will] examine the practice from the perspective of a consumer acting reasonably in the circumstances . . . Third, the representation, omission, or practice must be a 'material' one."[47]

Materiality has proved to be key for deception cases.[48] A material "act or practice is likely to affect the consumer's conduct or decision with regard to a product or service."[49] To be material it therefore must cause a consumer to choose one product over another, to their detriment.[50] A materially false statement results in injury when, in the absence of a deception, the consumer would have chosen a more preferred option.[51] Materiality separates

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44. Rosch, *supra* note 42; *see also* Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2264 (2012) (discussing expansion of FTC's authority after the decision).

45. 15 U.S.C. § 45(a)(1).

46. *A Brief Overview of the Federal Trade Commission's Investigative, Law Enforcement, and Rulemaking Authority*, FED. TRADE COMM'N, https://www.ftc.gov/about-ftc/what-we-do/enforcement-authority (revised Oct. 2019).

47. The Deception Statement offers examples: "false oral or written representations, misleading price claims, sales of hazardous or systematically defective products or services without adequate disclosures, failure to disclose information regarding pyramid sales, use of bait and switch techniques, failure to perform promised services, and failure to meet warranty obligations." *See* DECEPTION STATEMENT, *supra* note 41.

48. TAD LIPSKY ET AL., GLOB. ANTITRUST INST., DECEPTION, MATERIALITY, AND THE ECONOMICS OF CONSUMER PROTECTION COMMENT OF THE GLOBAL ANTITRUST INSTITUTE 1 (2019).

49. *See* DECEPTION STATEMENT, *supra* note 41.

50. *Id.*

51. *See* Nomi Technologies, Inc., 160 F.T.C. 437, 439 (2015) (dissenting statement of Comm'r Joshua D. Wright).

deception from sales hyperbole, by requiring that the consumer would "have chosen differently but for the deception"—unlike a hard sell, that most reasonable people would take with a grain of salt.[52]

Some representations are presumptively material and thus unlawful. For example, claims that "significantly involve health, safety, or other areas with which the reasonable consumer would be concerned" or "express claims for which the seller knew (or should have known) that an ordinary consumer would need omitted information to adequately evaluate the product or service, and that the omission would mislead a consumer."[53]

One can see the latent constitutional issues at play here; under its deception authority the FTC is policing speech and therefore must do so within the bounds of the First Amendment. The Supreme Court recently spoke on a similar issue in *Manhattan Community Access Corp. v. Halleck*.[54] That opinion makes clear that a private corporation that "opens its property for speech by others is not transformed by that fact alone into a state actor" subject to the constraints of the First Amendment. But our focus is on the agency's role in such disputes.[55]

The FTC had cause to confront such an issue in 2004. In response to calls to use the agency's deception authority to investigate Fox News' "fair and balanced" slogan, then-Chairman Timothy J. Muris issued the following statement:

> I am not aware of any instance in which the Federal Trade Commission has investigated the slogan of a news organization. There is no way to evaluate this petition without evaluating the content of the news at issue. That is a task the First Amendment leaves to the American people, not a government agency.[56]

The FTC had several potential options available to respond to the deception claims about Fox News. The agency could have opened the door to using its UDAP authority to police slogans and speech, which would almost inevitably offend the First Amendment, but at a minimum would convert the agency to an active player in the radioactive Fairness Doctrine game. It could have "studied the issue," made soft gestures to the possibility of UDAP enforcement down the road, and lived to fight another day. This course would ultimately waste agency resources on a fruitless endeavor—at least as measured by consumer protection objectives rather than political ones. And of course, the FTC could choose to avoid the Pandora's box

52. *See* DECEPTION STATEMENT, *supra* note 41.

53. *See* Ciaccia, *supra* note 17.

54. 139 S. Ct. 1921 (2019).

55. *Id.* at 1926.

56. Timothy J. Muris, Chairman, Fed. Trade Comm'n, Statement on the Complaint Filed Today by MoveOn.org (July 19, 2004).

entirely. Chairman Muris's statement offers the appropriate line on the use of Section 5 authority with respect to the First Amendment because there simply is no viable alternative. A successful deception claim requires (1) a representation, (2) that is deceptive, and (3) material; but it also cannot run afoul of the First Amendment.[57] As we will discuss below, the likelihood that any relevant representations are deceptive and material is very unlikely. The likelihood that an enforcement action based upon such representations passes First Amendment muster is nil.

B. Unfair Acts or Practices

The other prong of the FTC's Section 5 consumer protection authority, unfairness, is constrained by the 1994 Amendments to those acts or practices that cause or are likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and are "not outweighed by countervailing benefits to consumers or competition."[58] The amendments demarcate the outer limits of what the Commission can do under its rulemaking authority to "define with specificity acts or practices which are unfair."[59] As Howard Beales, former Director of the Commission's Bureau of Consumer Protection has noted, "the primary difference between full-blown unfairness analysis and deception analysis is that deception does not ask about offsetting benefits."[60] It is "well established that one of the primary benefits of performing a cost–benefit analysis is to ensure that government action does more good than harm."[61]

Should the Commission choose to advance the Executive Order's directives, it will have to do so within the confines of its Section 5 authority. It has some latitude when doing so; it acts "like a court of equity" for unfairness claims.[62] But Congress cabined the FTC's authority after its early

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57. *See* DECEPTION STATEMENT, *supra* note 41.

58. *See* Elise M. Nelson & Joshua D. Wright, *Judicial Cost-Benefit Analysis Meets Economics: Evidence from State Unfair and Deceptive Trade Practices Laws*, 81 ANTITRUST L.J. 997, 1006–07 (2017).

59. *See* 15 U.S.C. §§ 45(n), 57(a). *Cf.* United States v. Mead Corp., 533 U.S. 218, 229 (2001) (confining agency rulemaking to the scope of Congress' grant of authority to an administrative agency).

60. Joshua D. Wright & John M. Yun, *Stop Chug-a-lug-a-lugin 5 Miles an Hour on Your International Harvester: How Modern Economics Brings the FTC's Unfairness Analysis Up to Speed with Digital Platforms*, 83 GEO. WASH. L. REV. 2130, 2141 (2015).

61. *See* Apple, Inc., 157 F.T.C. 651, 656 (2014) (dissenting statement of Comm'r Joshua D. Wright) (citing Int'l Harvester Co., 104 F.T.C. 949, 1070 (1984)).

62. FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 244 (1972) (holding that legislative and judicial authorities determine that the Federal Trade Commission does not overstep its power if it considers public values beyond simply those enshrined in anti-trust laws).

frolics in unfairness law with the FTC Act Amendments of 1994. And all of this is only if the Executive Order can clear the same constitutional hurdles that the Section 230 provisions also suffer from.

C. Applying Section 5 UDAP Authority to Social Media Platforms

The weight of the statutory authority and previous agency guidance statements mean that the FTC cannot use its Section 5 deception authority, in matters of speech on social media platforms—like with Twitter's content flag—consistent with constitutional law. Chairman Muris's laconic statement is an example for the agency to follow on First Amendment issues.[63] First Amendment considerations, coupled with the materiality requirement for deception, place long odds on a successful Section 5 action against social media platforms.

A deception claim begins with a representation—which would be what, exactly, in this context? The social media platforms do not represent themselves as completely neutral.[64] Perhaps the closest to a representation may be the various platforms' rules and terms of use agreements, which the Executive Order focuses upon.[65] In Twitter's case, their rules say "[y]ou may not use Twitter's services in a manner intended to artificially amplify or suppress information" and their enforcement philosophy says that "[w]e empower people to understand different sides of an issue and encourage dissenting opinions and viewpoints to be discussed openly."[66]

For the sake of argument, let us assume these platform rules and terms of service are a type of representation. We can even assume *arguendo* that they would prove misleading to at least a substantial minority of consumers, despite the fact that these consumers have been barraged on the same social media platforms with claims and complaints and even congressional hearings purporting to expose the fact that the platforms are decidedly *not* impartial. Two down, one to go, at least for the purposes of argument. But that last one, materiality, is the dead letter office for a deception claim. "A representation simply cannot be deceptive under the long-standing FTC Policy Statement on Deception in the absence of materiality."[67] Materiality requires behavior to change if the consumer is exposed to the truth rather

63. Muris, *supra* note 56.

64. *See, e.g.*, *The Twitter Rules*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited Nov. 20, 2020) (noting types of impermissible language).

65. *Id.*; *Our Approach to Policy Development and Enforcement Philosophy*, TWITTER, https://help.twitter.com/en/rules-and-policies/enforcement-philosophy (last visited Nov. 20, 2020).

66. *Supra* note 65.

67. *See* Nomi Technologies, Inc., Nomi Technologies, Inc., 160 F.T.C. 437, 439 (2015) (dissenting statement of Comm'r Joshua D. Wright).

than the alleged deceptive statement.[68] The materiality inquiry is critical because the FTC's Policy Statement on Deception uses materiality as an evidentiary proxy for consumer injury.[69] It is hard to see how Twitter's rules, or any similar social media conduct guidelines, are material in all but the rarest circumstances.

The argument that must be proved is that users would have chosen differently had they known the "truth" about the deceptive representation.[70] The overwhelming majority of users do not read terms of service agreements, and would never be exposed to the purported deception in the first place.[71] Strike one. The other fatal flaw is that the subset of customers who think Twitter is biased against conservatives, including the President, are regularly complaining, *on Twitter*, about precisely that.[72] What behavior has changed? Leaving the platform? It does not appear so. Using the platform more to highlight the alleged deviation from terms of service? Switching to other platforms? Do we really believe that, had Twitter not claimed to commit to being fair and impartial, the President would communicate somewhere else?

"Deception causes consumer harm because it influences consumer behavior."[73] Simply put, revealed preferences of consumers' choices on platforms suggest that claims in the terms of service and moderation are unlikely to influence behavior given the value consumers derive from social media. The imagination struggles to think of examples of social media platforms moderating their content or creating content warnings that could meet this test. Even then, after clearing those almost insurmountable hurdles, the claim would still have to satisfy the First Amendment. To say that is unlikely would be too generous. "Platforms themselves have First Amendment speech rights, and they exercise these when they themselves speak, such as by attaching a fact check to user-generated content."[74] The

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68. *See* DECEPTION STATEMENT, *supra* note 41.

69. *Id.*

70. *Id.*

71. OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE 33–57 (2014); Arielle Pardes, *Welcome to the Wikipedia for Terms of Service Agreements*, WIRED (Apr. 18, 2018, 7:00 AM), https://www.wired.com/story/terms-of-service-didnt-read/.

72. Donald J. Trump, @RealDonaldTrump, TWITTER (May 26, 2020, 7:40 PM), https://twitter.com/realdonaldtrump/status/1265427539008380928.

73. Nomi Technologies, Inc., 160 F.T.C. 437, 439 (2015) (dissenting statement of Comm'r Joshua D. Wright).

74. *See* Jennifer Huddleston, *Content Moderation, Section 230, and The First Amendment*, AM. ACTION F. (May 28, 2020), https://www.americanactionforum.org/insight/content-moderation-section-230-and-the-first-amendment/.

Executive Order relies upon *Packingham v. North Carolina*,[75] but *Manhattan Access* makes clear that a platform is not transformed into a public forum just because it carries the public's speech. [76]

An FTC action against social media platform representations about political content based upon its unfairness authority would fare no better. The required elements are simply not met. Above and beyond the First Amendment issues such actions face, there are reasons to be skeptical that alleged political bias in content curation by digital platforms causes "substantial injury" and is not "reasonably avoidable by consumers," or that any harm is not "outweighed by countervailing benefits."[77] Why? Largely for the same reasons as with deception above; there is no evidence of substantial consumer injury. Likewise, such regulations are arguably "reasonably avoidable by consumers."[78] There *are* platforms with little to no moderation. They just happen to be among the most notoriously vile places on the internet. [79] The inescapable conclusion is that most consumers value some content moderation as a good. Consumer preferences already demonstrated that the benefits of the platform's content moderation choices provide countervailing benefits that outweigh any harm imposed upon them by the same choices. But even more broadly, these platforms generate awe-inducing amounts of consumer surplus: Facebook, alone, has been estimated to generate $31 billion in consumer surplus each month for U.S. customers—making it hard to argue these platforms are making people worse off, let alone the billions of dollars worse off that would be necessary.[80] To presume that the surplus consumers receive is arbitrarily dropped from the sky, or can be preserved while allowing an agency bureaucracy to tinker with its inner workings and design, rather than the conscious product of choices made by these platforms to enhance user experience, is a form of nirvana fallacy.[81]

The level of moderation is a dimension to social media platforms that companies compete upon. Twitter's approach is noticeably different from Facebook's.[82] That even extends to online platforms that are not social

75. 137 S. Ct. 1730, 1737 (2017); Exec. Order No. 13,925, 85 Fed. Reg. 34,079, 34,081 (June 2, 2020).

76. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930–31 (2019).

77. 45 U.S.C. § 45(n).

78. *Id.*

79. *See, e.g.*, Kevin Roose, *'Shut the Site Down,' Says the Creator of 8chan, a Megaphone for Gunmen*, N.Y. TIMES (Aug. 4, 2019), https://nyti.ms/2YHCIkS (discussing one such space).

80. *See, e.g.*, Hunt Allcott et al., *The Welfare Effects of Social Media*, 110 AM. ECON. REV. 629, 667 (2020).

81. Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J.L. & ECON. 1 (1969).

82. *See, e.g.*, Nellie Bowles, *The Complex Debate over Silicon Valley's Embrace of Content Moderation*,

media—on the software side, Apple has long made its screening criteria in the App Store a selling point for products targeted at children.[83] And the fact that platforms publish terms of service that guide their moderation offers consumers a way to "reasonably avoid" having posts flagged or taken down.[84] Simply put, even if the Order were to survive its First Amendment difficulties, a platform's decision to moderate its content under Section 5 is not "unfair."[85]

Those high barriers to speech issues are perhaps why FTC Commissioner Wilson's response to the order calls not for an FTC 6(b) inquiry into speech but into privacy issues instead, like "the interactions between content curation, targeted advertising, data collection and monetization, and [the] creation [and] refinement of algorithms."[86] This subtle sleight-of-hand shifts between two different issues. How platforms moderate their social spaces and how they interact with consumer data and advertisers are two wholly different questions raising wholly different issues. The complexity of these issues and their importance to society is not well served by conflating them.

Where the Order may gain traction is in its call for a commission to survey the enforcement of state UDAP provisions. Only a little over half of the states have provisions that harmonize their antitrust laws with the federal government; anachronistic case law can lurk in the others, and there is cause to be concerned—empirical results "suggest there is little or no economic analysis at work in at least some, and perhaps in many, court decisions on state UDAP claims."[87]

III. HOW SHOULD THE FTC RESPOND TO THE EXECUTIVE ORDER ON PREVENTING ONLINE CENSORSHIP?

The FTC faces a crossroads on both legal and political dimensions. President Trump's Executive Order on *Preventing Online Censorship* does make some demands on it, and the FTC must respond or risk open warfare with the White House. Context is critical here; the controversy over the Order is but a skirmish in a broader campaign about the role of administrative

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N.Y. TIMES (June 30, 2020), https://nyti.ms/3h0pry3 (contrasting Twitter's more aggressive approach to regulating content).

83. *See* Jennifer M. Oliver, *App Developer Chronicles His Saga with Apple's 'Anti-Competitive' App Store*, NAT'L L. REV. (Sept. 15, 2020), https://www.natlawreview.com/article/app-developer-chronicles-his-saga-apple-s-anti-competitive-app-store.

84. 45 U.S.C. § 45(n); *see* BERIN SZÓKA ET AL., HEARINGS ON COMPETITION & CONSUMER PROTECTION IN THE 21ST CENTURY, 15 (2018) (citing Federal Trade Commission Act, 15 U.S.C. § 45(b)).

85. 15 U.S.C. § 45(b).

86. Wilson, *supra* note 10.

87. *See* Nelson & Wright, *supra* note 58, at 1023.

agencies—particularly independent ones—in our constitutional scheme. Fighting is on multiple fronts: Axon's facial challenge to the FTC's legitimacy, although unsuccessful, is on appeal before the Ninth Circuit and is just one salvo inspired by the reinvigorated skepticism about *Humphrey's Executor* and independent agencies.[88] The Supreme Court fired a shot over the bow when it found the CFPB's sole independent director structure unconstitutional.[89] Chief Justice Roberts's opinion in *Seila Law* recasts *Humphrey's Executor* and *Morrison v. Olson* as narrow exceptions to the rule of presidential control of agency heads, and it will take some time for the full implications of that decision to bear fruit.[90] And Justice Gorsuch's dissent in *Gundy v. United States*[91]—coupled with favorable remarks about it by Justice Kavanaugh's in his concurrence in *Paul v. United States*[92]—has reinvigorated the conversation around the nondelegation doctrine, the bedrock of the administrative state writ large.

So how should the agency respond? On the legal dimension as an enforcement agency, there are inherent flaws with any UDAP investigations based on speech restrictions; fundamentally these are akin to asking the U.S. government to police speech and allegations of anti-conservative bias. As former-Chairman Muris made clear, this "is a task the First Amendment leaves to the American people, not a government agency."[93] The FTC is a law enforcement agency, and the First Amendment is one of the laws it must enforce.

With that in mind, one can broadly sketch out four alternative approaches the FTC could pursue in response to the Executive Order. The first would be to embrace the order's call for UDAP investigations into social media platforms and to conduct a study. Commissioner Wilson suggested considering the Order's UDAP suggestions, but the 6(b) inquiry she proposed is focused upon privacy as opposed to policing speech and platform bias.[94] Another alternative would be to conduct the 6(b) study, but with no UDAP investigation. A third option would be to jump straight into the investigation without a study. The fourth would be following Chairman Muris's lead which, in this case, would mean no UDAP investigation and abstaining from

88. *See* Thomas Dillickrath & Molly Lorenzi, *Arizona District Court Tentatively Dismisses* Axon v. FTC, ANTITRUST L. BLOG (Mar. 19, 2020), https://www.antitrustlawblog.com/2020/03/articles/government-merger-and-civil-conduct-investigations/tentative-ruling-axon-v-ftc/.

89. *Seila Law*, slip op. at 32.

90. *Id.* at 16–18.

91. 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

92. 140 S. Ct. 342, 343 (2019) (Kavanaugh, J., concurring) ("Justice Gorsuch's thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.").

93. Muris, *supra* note 56.

94. Wilson & Chopra, *supra* note 11.

using the FTC's resources on a 6(b) study targeted at an area—content curation and alleged political bias—that have no nexus to the FTC's mission of protecting competition and consumers.

The first three approaches are each plagued by the same problem. Ultimately, the FTC's Section 5 authority does not support any action in this sphere on the backend, so any study or investigation would do little more than waste precious government resources. Commissioner Wilson's proposals adeptly avoid these issues about the inability to act on private speech, but they only do so by shifting the focus of the study away from free speech, which is where the Executive Order directs its focus, to privacy and targeted advertising. Any study or investigation of alleged platform bias cannot avoid entangling the FTC in the policing of speech. Former-Chairman Muris had the right answer when it comes to the FTC's involvement in free speech issues, and it has the added benefit of being extremely cost effective.

The FTC also faces an important political challenge arising from the Executive Order. Should the FTC defend its independence in light of the Executive Order? And if so, how?

In our view, the FTC must also protect whatever *Seila Law* leaves of its independence. Not just for the sake of independence itself, but because its independence is a critical asset that helps the under resourced agency achieve its core objectives in protecting consumers and competition across the modern economy. Former-Chairman William E. Kovacic explained the importance of the "FTC managing carefully its [independence]. One way to envision the FTC's work is that its activities involve either accumulating political capital or spending political capital. In choosing new programs, the agency must be attentive to the balance of its political capital account."[95] The FTC is in a difficult position as an *independent* law enforcement agency. The FTC's duty to the whole of the law, which includes the First Amendment and not just Section 5, implies that requests—including those from the White House—to consider investigations that are plainly not consistent with the First Amendment should be rejected. The FTC's independence—so long as it remains—exists precisely for circumstances such as these. As a law enforcement agency, it need not and should not dip a toe into this arena.

On this point, Chairman Joseph J. Simons laudably followed Chairman Muris' example. In response to a question during an oversight hearing from Senator Roger Wicker (R-Miss.) about what action the FTC has taken under

95. WILLIAM E. KOVACIC, CHAIRMAN, FED. TRADE COMM'N, THE FEDERAL TRADE COMMISSION AT 100: INTO OUR 2ND CENTURY 9 (2009), https://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-100-our-second-century/ftc100rpt.pdf.

the Executive Order, Chairman Simons clarified that the FTC hasn't "taken any action according to the [E]xecutive [O]rder," and he reaffirmed that political speech is not within the FTC's jurisdiction.[96]

There is a second dimension to the political crossroads facing the FTC. Proposals to have the FTC police the internet to snuff out political bias harken back to the dead and abandoned Fairness Doctrine, which required broadcast license holders to present both sides of controversial issues of public importance in an honest, equitable, and balanced way.[97] The Fairness Doctrine was routinely criticized as censorship by conservatives, including by then-Representative Mike Pence, who signed on as a co-sponsor to a bill that would ban the Commission from prescribing "any rule, regulation, policy, doctrine, standard, or other requirement . . . that broadcasters present opposing viewpoints on controversial issues of public importance, commonly referred to as the 'Fairness Doctrine.'"[98] Conservatives were right then. This is no place for government.[99]

CONCLUSION

The Executive Order on *Preventing Online Censorship* fights a losing battle attempting to enforce the First Amendment against social media platforms because they, as private entities, are not subject to its limitations. Section 230 of the Communications Decency Act does not change the outcome; what it does do is allow social media to exist in the first place. The FTC Act is not

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96. *Oversight of the Federal Trade Commission: Hearing Before the S. Comm. on Commerce, Sci., and Transp.*, 116th Cong. (2020). The FTC continues to face immense pressure from the President over the Executive Order—Chairman Simons has reportedly been haled to the Oval Office to discuss it, a "very unusual" occurrence according to former Chairman Kovacic. *See* Leah Nylen et al., *Trump Pressures Head of Consumer Agency to Bend on Social Media Crackdown*, POLITICO (Aug. 21, 2020, 6:40 PM), https://www.politico.com/news/2020/08/21/trump-ftc-chair-social-media-400104.

97. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 377 (1969) ("There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees . . . . The broadcaster must give adequate coverage to public issues . . . and coverage must be fair in that it accurately reflects the opposing views."); KATHLEEN ANN RUANE, CONG. RSCH. SERV., FAIRNESS DOCTRINE: HISTORY AND CONSTITUTIONAL ISSUES (2011) (tracing the evolution of the Fairness Doctrine from its establishment by the Radio Act of 1927 to its abolition in 1987).

98. Broadcaster Freedom Act of 2007, H.R. 2905, 110th Cong. (2007); Editorial, '*Fairness' is Censorship*, WASH. TIMES (June 17, 2008), https://www.washingtontimes.com/news/2008/jun/17/fairness-is-censorship/.

99. *See* Thomas W. Hazlett, *The Fairness Doctrine and the First Amendment*, 96 PUB. INT. 103, 104 (1989) (contending that any governmental standard that purports to strive toward "fairness" would "cause great political mischief").

a source of enforcement authority here, either—most platforms' conduct would survive the legal tests of the FTC's UDAP authority. Calls for the FTC to take up the mantle as the cop on the internet beat are nothing more than a redressed Fairness Doctrine, but as we have seen with the first, that emperor has no clothes. Some conservatives engaged in naked hypocrisy in their stances on the Fairness Doctrine and cannot have it both ways when it comes to government regulation of speech. Attempts to thread the needle to find some balance for the FTC through investigations or studies will inevitably fall to the same problem faced by all regulations on speech: Who will watch the watchman? Our system places that responsibility on the people themselves, and it leaves it up to them to decide what to read and how to think. That is as it should be—to ask the agencies to take up this task is at odds with our notion of liberty.