Public Governance, Administration and Finances Law Review Vol. 11. No. 1. (2026) • 17–34.

DOI: https://doi.org/10.53116/pgaflr.8712

The First Amendment and Global Online Speech

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Submitted 7 January 2026 | Accepted 4 June 2026 | Published online: 29 June 2026

Abstract: This article explores the tensions of free speech and censorship where social media platforms reign supreme in the U.S., but experience the Brussels effect in Europe and beyond. The catalyst for this inquiry is U.S. congressional efforts to investigate alleged EU censorship of American speech. This article examines competing interests and comparative approaches. In the absence of comprehensive regulation in the U.S., companies engaging in multi-country activity operate under the shadow of European regulation. Does compliance threaten to chill American speech? Is balancing the interest of deterring disinformation possible where freedom of thought is paramount to American ideals? Institutional self-regulation creates a competitive marketplace with some American social media giants engaging in heavy-handed content regulation while others claim to let anything go short of targeted harassment. The aim of this article is to honour American free speech and press principles while appreciating genuine threats that may threaten other core American values such as democracy. Balancing benefits and harms remains preferable given American constitutional and policy priorities. To what extent can the – self-enforced and judicial – remedies reflect this balancing approach like equitable relief rather than the blunt hands of banishment and censorship?

Keywords: free speech, First Amendment, social media regulation, EU law, equitable relief

1. Free speech

Free speech allows the public discussion necessary for democratic self-government.[1] Free speech absolutism is quintessentially American. The American approach to free speech, as authoritatively interpreted, is "exceptional" among liberal democracies (Schauer, 2005).

[1] See Rosen (2022). Violence and threats of violence pose grave threats to free speech, the rule of law, and democracy. "Our entire democratic experiment is going to crumble if people don't believe they are safe when they express their political views" (Murphy, 2025).

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This view stands for robust, almost unlimited protection of speech and expression. Of course, absolutism is not truly absolute as U.S. case law reveals exceptions to unlimited free speech.[2] A prominent governing American narrative remains one of liberty over dignity interests in comparison to a European prioritisation of dignity.[3] As a result, the U.S. is notorious for protecting offensive speech (Krotoszynski, 2009, pp. 120, 233). Free speech absolutism is not without internal and external critics (Schauer, 2005). This foundational free speech frame relies on the free-flowing marketplace of ideas in the public square where each listener can listen and participate and rationally discern winning principles and arguments (Krotoszynski, 2009, pp. 13–15). It also relies on the related notion that restraints on speech are antithetical to discourse, discovery and democratic self-governance (Krotoszynski, 2009, pp. 13–18).

This absolutism foundation has cracks, and it has shifted into digital social media platforms, which are very often siloed with exponential echo chambers. On many such social media platforms in the U.S., very little regulation curbs content. Instead, private company content moderation, if any, is the avenue for speech and expression constraints in the virtual square. Federal regulation then shields social media platforms from liability based on the postings of users and protects content moderation policy determinations.[4] Critics fear abuses of civility, disinformation and dilution of reliable content. The European response is to address such concerns with regulation. The U.S. thus far has relied largely on industry self-regulation for guardrails on content barring tortious activity.

Tension between the American and European approaches is palpable and may increase as companies seek to comply with new EU regulations. "The latest regulation – the broad-ranging Digital Services Act (DSA) – will create a host of tensions and outright conflicts with the U.S. speech regime applicable to social media platforms" (Nunziato, 2023, p. 117). Such comprehensive regulations incentivises multinational platforms to tilt their global content moderation to model EU parameters rather than American priorities of free speech balancing. If so, platforms will adopt EU preferences "protecting against dignitary, reputational, and societal harms more highly than absolute

[2] See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (establishing that the First Amendment does not protect "fighting words"); Tinker v. Des Moines, 393 U.S. 503 (protecting student wearing of armband as a war protest but noting that school officials may suppress speech that materially and substantially interferes with school operations); Brandenburg v. Ohio, 395 U.S. 444 (1969) (protecting inflammatory speech unless the speech is aimed at inciting violence); Miller v. California, 413 U.S. 15 (1973) (ruling that obscene speech is not protected First Amendment speech).

[3] See Whitman (2004, pp. 1160–1164), explaining that "American privacy law is a body caught in the gravitational orbit of liberty values, while European law is caught in the orbit of dignity" and that, in comparative privacy law relative differences matter because Americans and Europeans "are consistently pulled in different directions, and the consequence is that these two legal orders really do meaningfully differ: Continental Europeans are consistently more drawn to problems touching on public dignity, while Americans are consistently more drawn to problems touching on the depredations of the state. Indeed, as our many transatlantic conflicts suggest, the distances between us can often stretch into the unbridgeable". See also Carmi (2008, pp. 280, 323–324), assessing freedom of expression and free speech through the human dignity and liberty lens, emphasising that, in America, liberty trumps dignity, whereas, dignity overrides liberty in Germany: "Freedom of expression is normally classified as a classical liberty" […] "[s]imilarly 'human dignity' represents the influence of European thinkers, such as Hegel and Kant, on European rights discourse, as well as the increasing trend towards viewing human dignity as both a source of, and a constraint on, human rights."

[4] The Communications Decency Act of 1996, 47 U.S.C. § 230 (granting broad immunity).

freedom of expression". Notably, another contrast in policies is key: the EU countries "generally hold platforms accountable for their role in facilitating harmful content", while the U.S. "takes the opposite approach" (Nunziato, 2023, p. 117).

The United States House of Representatives Judiciary Committee, led by Chairman Representative Jim Jordan, has launched an investigation asserting that the EU's DSA regulations unlawfully censor speech (Orbán, 2025). Politically charged statements and rebukes are regular occurrences in the U.S. Congress. A congressional investigation may follow as a politicised weapon sometimes amounting to whataboutism.[5] "Theatre" and "circus" are two common pejorative refrains to describe and critique congressional investigations and hearings.[6] Still the inquiry is not necessarily meaningless.[7] Regardless of inherent political gamesmanship, the Judiciary Committee-led investigation demonstrates potential tensions between EU and American approaches to speech and social media content moderation.

The letter charges that the DSA regulations chilled speech in ways antithetical to U.S. First Amendment speech and press freedoms by stifling American speech (Orbán, 2025).[8] Specifically, the investigation asserts that the EU's DSA chills American and Polish speech about political rivals of the Donald Tusk-led Polish government.[9] The American political backdrop is split on ideological lines with one side pushing for greater content moderation of mis- and disinformation, and the other expressing concern about who is judging what constitutes mis- and disinformation. Those sceptical of such decisionmakers accordingly favour less to no restraints on digital platform political speech.

Ultimately, the Committee has issued a majority staff report condemning Europe's regulatory and enforcement efforts as blatant censorship. The text content of the Report is thirty-seven pages long, with twenty-two exhibits, together totalling one hundred and forty-five pages. According to the report, EU regulators primarily use the DSA to "target core political speech that is neither harmful nor illegal", and "pressure platforms, primarily American social media companies, to change their *global* content moderation policies in response to European demands" (Committee on the Judiciary of the U.S. House of Representatives, 2025, p. 1). The report asserts that the EU's regulatory campaign is meant to address "systemic risks" on the major social media companies such as YouTube, TikTok and Instagram, to identify and mitigate via censorship any "misleading or deceptive content and disinformation, any actual or foreseeable negative effects on civil discourse

[5] Whataboutism describes the rhetorical strategy of replying to an accusation with a counteraccusation. See Payne (2024).

[6] See, e.g., Alexander (2008, pp. 193–235), exploring actor Robert Taylor's reluctant testimony before the United States House of Representatives Committee on Un-American Activities investigating communist ties in Hollywood; describing the hearing as a "circus" and refusing to testify unless subpoenaed.

[7] See Boyse & Doran (2025): "To examine the context, and contradictions in these issues is not whataboutism."

[8] U.S. Constitution, First Amendment: "Congress shall make no law [...] abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[9] See also Tilles (2025): "Poland's opposition Law and Justice (PiS) party has blamed the death of a close associate of its leader, Jarosław Kaczyński, on the Polish authorities. She died days after being interviewed by prosecutors investigating allegations of wrongdoing involving a firm linked to Kaczyński." But cf. Tilles (2024): "The prison service has also appealed to politicians and media to stop "spreading false information."

and electoral processes", "hate speech" and "information which is *not* illegal".[10] Further, the report claims that the EU unfairly targets political opponents, political speech, memes and satire. The pressure, according to the report, includes draconian EU incentives such as massive penalties on global revenue" (Committee on the Judiciary of the U.S. House of Representatives, 2025, pp. 2–3). The report asserts that through the imposition of fact checkers, "trusted flaggers",[11] third-party arbitrators and fines, the EU censorship demands create a global censorship regime via the DSA that social media companies ignore at their peril. All of which, per the report, results in the imposition of "voluntary 'codes of conduct' on hate speech and disinformation" (Committee on the Judiciary of the U.S. House of Representatives, 2025, pp. 2–3). The report asserts that the conduct codes are essentially mandatory because the codes will be used by the EU to assess compliance with the DSA, including prohibitions on hate speech and disinformation (Committee on the Judiciary of the U.S. House of Representatives, 2025, p. 23).

In the United States, social media companies possess broad immunities from liability and are not otherwise regulated regarding content moderation. Accordingly, social media platforms, such as Facebook, Instagram and Twitter (now X), make their own content moderation protocols and decisions. In 2022, Elon Musk purchased Twitter renaming it X, and declared himself an absolutist on free speech promising that he would foster a free speech environment (Thompson, 2025). Without pressure from U.S. regulatory efforts and relatively no domestic guardrails forthcoming, the potential influence of EU efforts is worth watching closely. Will the EU's regulatory regime help foster best practices or result in overreach?

The House Judiciary Committee maintains that the EU has overzealously regulated potential disinformation that effectively blocks politically disagreeable content (Jordan, 2025b; 2025a, citing Palmer, 2025). EU regulators designed the DSA to achieve "effects 'in the United States'" (Committee on the Judiciary of the U.S. House of Representatives, 2025, p. 31). According to the Committee's letter to the EU, the House is investigating "how and to what extent foreign laws, regulations, and judicial orders compel or coerce companies to censor speech in the United States" (Jordan, 2025b, p. 1). Multinational companies, by definition, operate in more than one country. When such companies operate within Europe and operate in countries beyond Europe, compliance with EU laws may translate into a global policy matching European strictures even if lawful in other countries such as the U.S.[12] The House Committee's investigation seeks to uncover, spotlight and scrutinise such examples. It also alleges that the Biden–Harris administration "aided or abetted" the efforts of "foreign governments" to restrict "American's access to lawful speech in the United States" (Palmer, 2025, quoting

[10] Citing Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services and Amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L277), at recitals 80–84, Articles 34–35 (emphasis added by committee report).

[11] Committee on the Judiciary of the U.S. House of Representatives (2025, p. 20): "Trusted flaggers must publish reports to EU regulators outlining the notifications given to platforms and the actions platforms took in response." The report criticizes the lack of independence for the flagger requirement: "Flaggers can also have relationships with European regulators" (Committee on the Judiciary of the U.S. House of Representatives, 2025, p. 20).

[12] For examples of top 20 multinational companies headquartered in the U.S. (such as Apple Inc. and Alphabet Inc., owner of Google, YouTube, and more), see Afzal (2023).

Representative Jordan's statement). A key aim is to create political pressure that lessens restraints on digital platform speech including, for example, political speech supporting adversaries in Poland's election. Overall, the Committee alleges that the EU regulations claim to enhance online safety but instead constitute formidable censorship (Committee on the Judiciary of the U.S. House of Representatives, 2025, p. 37). The Committee asserts that content core to the First Amendment of the U.S. Constitution is under siege,[13] and that the EU regulatory offensive unfairly targets political conservatives.[14] Regardless of one's position on the value of the underlying speech, the Committee's allegations raise concerns worth examining and perhaps addressing as major social media companies experience increasing pressures to heighten global content moderation policies.

2. The disinformation threat

Disinformation is on the rise. It is a threat to democracies (Krotoszynski et al., 2025, p. 5). According to the EU, disinformation harms democracies and European citizens by "eroding trust in institutions and media, putting elections at risk, hampering citizens' ability to make informed decisions, and impairing freedom of expression" (European Commission, s. a.). Most people believe that disinformation threatens democracy [European Commission (s. a.) reporting that 83% of people think disinformation threatens democracy]. The European approach is to regulate and deter disinformation. The EU established an updateable Code of Practice on Disinformation (European Commission, 2018), described as "a pioneering framework to address the spread of disinformation, agreed upon by a number of relevant stakeholders" (European Commission, 2022). This voluntary code of conduct is now incorporated into the EU's DSA.

The full-throated free speech mantra for many in the U.S. is to permit information to flow freely without concern, or regulation, of disinformation. Some in the U.S. are rethinking whether this unlimited approach is sustainable in the modern context. Pressure points include the exponential potential of disinformation given the reach of content on online platforms, the use of countless bots, and the accelerated scope due to algorithmic pushing (Wirtz et al., 2026). All these features have the potential to deteriorate dialogue, enhance ideological silos, and, at worst, damage democratic self-governance (Krotoszynski et al. 2025, p. 5). Such pressure points also may skew the flow of the marketplace of ideas so much that it weakens the ability of discernment and rationality to operate. With such influences rising, reconsideration of an anything-goes stance may be warranted.

Still, banning and censoring do not come easily to the American psyche whether via regulation or institutional self-moderation. Methods that may garner greater traction could include permitting the speech to exist but flagging the potential for disinformation. Such systems are better than binary approaches, but intense scrutiny is essential because how

[13] Committee on the Judiciary of the U.S. House of Representatives (2025, p. 37): "The content under threat includes humor, satire, and core political speech—hallmarks of free expression."

[14] Committee on the Judiciary of the U.S. House of Representatives (2025, p. 4): "The censorship is largely one-sided, almost uniformly targeting political conservatives."

information is categorised or labelled and potentially flagged or downgraded in reach becomes an opportunity for manipulation of narratives by those in power. Those in power may be ideological partisans or the owners of private corporations running social media empires where disinformation often flourishes. Who decides what constitutes disinformation and will such decisions have any transparency? Those are the types of questions that typically stymy any systematic real efforts to curtail disinformation in the U.S.

Of course, certain legacy media outlets and social media platforms make such decisions and deemphasise certain content or censor it altogether (see, e.g., U.S. House of Representatives, 2023). Critics accuse the censors of biased media by suppressing only the views that do not comport with owners or with the ideological bent of their readership. For better or worse, such claims deepen silos and echo chambers while also weakening public perceptions of credibility of news outlets.

The control of owners of social media companies is enormous given the virtual lack of regulation in the U.S. For example, on X, critics allege that Musk purposefully deemphasised their social media influence. One example is Anastasia Loupis, who operated an X account that garnered intense viewership – daily hitting hundreds of thousands of people with far-right takes, conspiracy allegations and anti-Semitic rhetoric. After critiquing X-owner Musk for his support of visa programs loathed by MAGA-minded Trump backers, Loupis's social media impact plummeted without rebound. Similar phenomena occurred with several others.[15] Of course, these examples, if true, may be the result of other factors or driven by animus rather than an effort to minimise disinformation. Musk had previously disclaimed any silencing of critics.[16] Regardless, the power that social media companies have over the algorithms is palpable.

Political levers are also at play even in the absence of regulation in the U.S. Allegations of governmental interference exist with respect to presidential efforts to influence the treatment of certain content. For example, the Biden White House sought to lessen the impact of what it deemed election disinformation (see, e.g., PBS, 2024). Admittedly, the Biden White House held regular meetings with certain social media platform leaders including Facebook and X.[17] The administration sought to persuade Facebook to moderate certain, alleged disinformation on elections and public health, for example. Facebook, and other social media companies, did minimise and remove alleged disinformation, but may have done so based on governmental persuasion and their own judgments rather than unlawful coercion. Facebook, however, verified the White House's exertion of pressure, and appeared to express lament about caving to the pressure. Facebook's head, Mark Zuckerberg, stressed: "We made some choices that, with the benefit of hindsight and new information, we wouldn't make today. [...] We're ready to push back if something like this

[15] See Thompson (2025): "The *New York Times* found three users on X who feuded with Mr. Musk in December only to see their reach on the social platform practically vanish overnight. The accounts are the starkest signs yet that Mr. Musk or others at the company have the power to punish critics and that they may be willing to use it, startling free speech advocates who hoped that the billionaire would be their champion."

[16] See Thompson (2025): "There will always be critics. [...] What is perhaps notable is that I don't attempt to silence them even on a platform that I own."

[17] Murthy v. Missouri, 603 U.S. 43 (2024). "Thus, the officials peppered Facebook (and to a lesser extent, Twitter and YouTube) with detailed questions about their policies, pushed them to suppress certain content, and sometimes recommended policy changes. Some of these communications were more aggressive than others."

happens again" (PBS, 2024). The presidential administration maintained that such conversations and encouragement are ordinary and permissible. Challengers filed suit against the administration asserting that the government unlawfully coerced social media giants into eliminating certain posts from their platforms.[18]

The litigation failed to resolve the merits due to jurisdictional failings. Five social media users plus Louisiana and Missouri attorneys general brought the suit against the Biden Administration for violation of constitutional rights to free speech.[19] Plaintiffs described the Administration's actions as unsavoury "jawboning" by pressuring social media "companies into suppressing speech that the government did not agree with, mainly about the coronavirus pandemic" (Faguy, 2024). The pressure allegedly included threats to curtail Section 230 immunity of the Communications Decency Act,[20] upon which social media companies heavily rely to shield the bulk of their content moderation decision-making and related liability for their users' postings.[21] They alleged that, in the wake of communications with the Administration, the platforms minimised or suspended accounts (Faguy, 2024). According to plaintiffs, this pressure by the White House on social media companies to minimise or remove mis- and disinformation converted the companies' content-moderation determinations into state action thereby violating First Amendment speech rights.[22] The U.S. Supreme Court, in a 6–3 vote, ordered dismissal of the suit based on plaintiffs' failure to prove all the elements of standing to seek the requested injunctive relief.[23]

The majority reasoned that plaintiffs failed the three irreducible minimums of Article III standing,[24] which must be clearly demonstrated at the preliminary injunction phase.[25] First, plaintiffs failed to demonstrate a sufficient causal link establishing that the government's actions led to restriction of plaintiffs' content. It was unclear, in the Court's assessment, that any suppression occurred because of government pressure instead of independent content moderation policies of the platform companies.[26] The tenuous nature of causation was fatal. Next, the Court also determined that plaintiffs failed to show a substantial risk of future injury traceable to the challenged actions, especially given the significant decrease in White House communications with social media platforms about Covid-19 and election misinformation. Last, the Court ruled that plaintiffs could not satisfy the redressability prong of standing requirements because the grant of an injunction against the government would be unlikely to affect platform moderation decisions of the relevant companies.

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[18] Murthy v. Missouri, 603 U.S. 43 (2024).

[19] Murthy v. Missouri, 603 U.S. 49 (2024).

[20] Communications Decency Act, 47 U.S.C. § 230 (1996).

[21] See, e.g., Wold (2023), asserting that major social media companies have invoked Section 230 not only to rebuke tort victims' claims, but also "to prevent courts *from hearing the cases at all*".

[22] Murthy v. Missouri, 603 U.S. 54 (2024).

[23] Murthy v. Missouri, 603 U.S. 76 (2024).

[24] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–1 (1992), providing that plaintiffs must satisfy three Article III requirements: injury-in-fact, causation and redressability.

[25] Murthy v. Missouri, 603 U.S. 58 (2024).

[26] Murthy v. Missouri, 603 U.S. 61–62 (2024).

Justice Alito, joined by Justices Thomas and Gorsuch, dissented.[27] The dissenting opinion noted the voluminous record establishing plaintiffs' standing and their right to injunctive relief. According to Justice Alito, "this is one of the most important free speech cases to reach this Court in years".[28] Justice Alito's dissent emphasised the district court's determination that the White House, via high-ranking officials, had engaged in "a far-reaching and widespread censorship campaign" against disfavoured speakers on social media platforms.[29] The dissenting opinion described the pedigree of those targeted by the administration's "unrelenting pressure" in suppression efforts and their desire to speak on matters of "the utmost public importance".[30] The dissenters endorsed the district court's issuance of a preliminary injunction to protect plaintiffs' speech rights and the affirmance by the U.S. Court of Appeals for the Fifth Circuit.[31] Notably, Justice Alito acknowledged that "a fair portion" of users' social media posting on Covid-19, and the pandemic had "little lasting value", and even that some such content "was undoubtedly untrue or misleading, and [...] may have been downright dangerous".[32] Justice Alito notes that "we know that valuable speech was also suppressed". He then echoes a free speech absolutism principle: "That is what inevitably happens when entry to the marketplace of ideas is restricted." Notwithstanding purely private media companies' rights to publish anything they choose, the dissenters assert government coercion of private companies to suppress speech is unconstitutional. In the dissenters' assessment, plaintiffs amply satisfied all three standing doctrines to justify injunctive relief against the Administration.[33] The dissenting opinion closes with favourable analysis on the merits of the First Amendment claim for the most compelling plaintiff, Jill Hines, a healthcare activist confronting Covid-19 strictures on Facebook.[34] It emphasises the unlawful coercion of the administration, for example: "In sum, the officials wielded potent authority. Their communications with Facebook were virtual demands. And Facebook's quavering responses to those demands show that it felt a strong need to yield." The dissenters conclude, on the merits, that "the White House coerced Facebook into censoring [Hines's] speech".[35]

The *Murthy* Court's ruling on standing grounds leaves many open issues. Such rulings inherently render unresolved the merits of the allegations. Evidence showed pressure by the government on social media platforms, but the Court did not view such evidence as sufficient to establish. According to the Court, plaintiffs failed to establish the causal link required as part of Article III constitutional standing. In other words, in the Court's estimation, other factors may have motivated social media platforms to censor the content.

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[27] Murthy v. Missouri, 603 U.S. 76 (2024), Justice Alito dissenting.

[28] Murthy v. Missouri, 603 U.S. 77 (2024).

[29] Murthy v. Missouri, 603 U.S. 76 (2024), quoting Missouri v. Biden, 680 F. Supp. 3d 630, 729 (West. Dist. La. 2023).

[30] Murthy v. Missouri, 603 U.S. 77 (2024).

[31] Murthy v. Missouri, 603 U.S. 77 (2024), noting ample evidence supporting the requested injunctive relief affirmed in Missouri v. Biden, 83 F. 4th 350 (5th Cir. 2023).

[32] Murthy v. Missouri, 603 U.S. 78 (2024).

[33] Murthy v. Missouri, 603 U.S. 79 (2024).

[34] Murthy v. Missouri, 603 U.S. 79 (2024), evaluating the merits of the strongest plaintiff in its view; Murthy v. Missouri, 603 U.S. 68 (2024), acknowledging that Hines "makes the best showing of all the plaintiffs", but concluding that "most of the lines she draws are tenuous".

[35] Murthy v. Missouri, 603 U.S. 108 (2024).

Reasonable minds may disagree on the legal determination of the causal factor. But governmental pressure on companies and the resulting removals remain facts. How should one view those remaining facts: helpful governmental guidance to minimise mis- and disinformation versus improper governmental interference encroaching on a robust free market of ideas? For those, like the dissenting opinions, that see the administration's coercion as violative, the government's behaviour is cast as contra liberty and American free speech exceptionalism. For those aligned with the government's effort to curtail misinformation, liberty interests are overcome by the need to protect democracy from unfair influences. The Court, by finding a lack of standing, left the ultimate resolution of such important free speech questions for another day.

The Biden Administration is not the only actor in the U.S. that has sought to affect content moderation. Typically, influence is achieved through lobbying for legislation or litigating to challenge policies or enforcement. A recent example occurred after Texas and Florida passed content moderation regulation for social media platforms.[36] A group of affected networks, represented by an internet trade association called NetChoice, sued to enjoin enforcement of both statutes as facially unconstitutional.[37] The statutes mandated that covered platforms, such as YouTube and Facebook, must moderate content evenhandedly in "a consistent manner", and provide explanations for any censored or removed posts from the website.[38] The U.S. Court of Appeals for the Eleventh Circuit enjoined enforcement of the Florida statute as unconstitutionally constraining free speech.[39] It reasoned that the statute infringed on NetChoice editorial judgement.[40] In contrast, the U.S. Court of Appeals for the Fifth Circuit found that the Texas regulation did not violate the First Amendment. In fact, it "disagreed across the board".[41] According to the Fifth Circuit, platform content-moderation actions are "not speech" on any level, and therefore do not raise First Amendment concerns.[42]

The United States Supreme Court, in *Moody v. NetChoice,* determined that both appellate courts needed to more fully review a developed record to conduct the proper

[36] Fla. Stat. Ann. §§ 501.2041(1)(b), 501.2041(2)(b), 501.2041(2)(d)(1), 501.2041(2)(h), 501.2041(2)(j), 501.2041(3); Tex. Bus. & C. Code § 120.103(a)(1), 120.103(a)(2), 120.104; Tex. Civ. Prac. & Rem. Code Ann. §§ 143A.001(1), 143A.002(a), 143A.006; see also Moody v. NetChoice, LLC, 603 U.S. 707, 720 (2024). "In 2021, Florida and Texas enacted statutes regulating internet platforms, including the large social-media companies just mentioned. The States' laws differ in the entities they cover and the activities they limit. But both contain content-moderation provisions, restricting covered platforms' choices about whether and how to display user-generated content to the public. And both include individualized-explanation provisions, requiring platforms to give reasons for particular content-moderation choices."

[37] Moody v. NetChoice, LLC, 603 U.S. 717 (2024).

[38] Moody v. NetChoice, LLC, 603 U.S. 720–721 (2024).

[39] Moody v. NetChoice, LLC, 603 U.S. 722 (2024), citing NetChoice, LLC v. Attorney General, Florida, 34 F.4th 1196 (11th Cir. 2022).

[40] Moody v. NetChoice, LLC, 603 U.S. 721–722 (2024): "When a social-media platform 'removes or deprioritizes a user or post', [...] it makes a judgment rooted in the platform's own views about the sorts of content and viewpoints that are valuable and appropriate for dissemination;" quoting NetChoice, LLC v. Attorney General, Florida, 34 F.4th 1210.

[41] Moody v. NetChoice, LLC, 603 U.S. 722 (2024).

[42] Moody v. NetChoice, LLC, 603 U.S. 722 (2024), quoting NetChoice, LLC v. Paxton, 49 F.4th 439, 466, 494 (2022).

facial constitutional challenge.[43] The Court, in a majority opinion penned by Justice Elena Kagan, then provided precedential analysis to guide the inquiry.[44] It underscored several points. First, editorial functions alone may constitute "an aspect of speech" or "engaged in speech activity".[45] Second, this reasoning does not alter simply because the provider permits most items and excludes few. Last, "the government cannot get its way by asserting an interest in improving, or better balancing the marketplace of ideas".[46] The Court emphasised that new modalities do not change the fundamental First Amendment principles at play.[47] According to the Court, enforcement of Texas's law would dictate that platforms would be unable to disfavour certain viewpoints, which many of the platforms restrict. In fact, the Texas law would "profoundly alter the platforms' choices about the views they will, and will not, convey".[48] Ultimately, the Court concluded that under any level of scrutiny, the Texas law fails First Amendment review. Rather, "the interest Texas has asserted [to balance the mix of speech presented via social-media platforms] cannot carry the day: It is very much related to the suppression of free expression, and it is not valid, let alone substantial."[49] It is core to First Amendment goals that states not encroach on private speech to promote its own view of ideological balance.[50] Such state manoeuvres would promote certain views while impermissibly burdening others.[51] Accordingly, on remand NetChoice must establish that either Texas's or Florida's law "prohibits a substantial amount of protected speech relative to its plainly legitimate sweep".[52]

The Supreme Court noted that neither circuit court conducted the full analysis for the facial challenge, but continued on to declare that the Fifth Circuit already demonstrated a crucial flaw in in its reasoning because,[53] as the Court clarified: editorial judgements constitute constitutionally protected expression. Further, Texas's desire for a different mix of expression does not justify the intrusion on the private speech of others. The Supreme Court's conclusion reinforced fundamental First Amendment principles: "To give government that power is to enable it to control the expression of ideas, promoting those it favors and suppressing those it does not. And that is what the First

[43] Moody v. NetChoice, LLC, 603 U.S. 726 (2024). Justice Amy Coney Barrett warned about the path of a facial rather than an as-applied challenge: "A facial challenge to either of these laws likely forces a court to bite off more than it can chew." Moody v. NetChoice, LLC, 603 U.S. 747 (2024), Justice Barrett concurring.

[44] Moody v. NetChoice, LLC, 603 U.S. 726–731 (2024).

[45] Moody v. NetChoice, LLC, 603 U.S. 731 (2024), internal quote marks and citations omitted.

[46] Moody v. NetChoice, LLC, 603 U.S. 732 (2024).

[47] Moody v. NetChoice, LLC, 603 U.S. 733 (2024).

[48] Moody v. NetChoice, LLC, 603 U.S. 737 (2024), noting several examples such as supporting Nazism, terrorism and Islamophobia.

[49] Moody v. NetChoice, LLC, 603 U.S. 740 (2024).

[50] Moody v. NetChoice, LLC, 603 U.S. 741 (2024).

[51] Moody v. NetChoice, LLC, 603 U.S. 742 (2024).

[52] Moody v. NetChoice, LLC, 603 U.S. 743–744 (2024).

[53] Justices Thomas and Alito separately criticised this pivot by the majority into dictum. See Moody v. NetChoice, LLC, 603 U.S. 749–750 (2024), Justice Thomas concurring (emphasising the Court's focus on the incomplete and underdeveloped records in the lower appellate courts, but then continues on to address various applications); Moody v. NetChoice, LLC, 603 U.S. 766–767 (2024), Justice Alito concurring. "The holding in these cases is narrow: NetChoice failed to prove that the Florida and Texas laws they challenged are facially unconstitutional. Everything else in the opinion of the Court is nonbinding dicta."

Amendment protects all of us from."[54] The Court's reasoning evidences respect for free speech absolutism. It perhaps invites future modified regulatory reform that steers clear of viewpoint preferencing. In the meantime, however, it leaves content moderation in the hands of social media platforms.

Efforts to influence social media platform moderation policies are not limited to the U.S. Risks of disinformation can be dire to democracy and public health, and administrations may well wish to influence the tenor of important debates on the ever-powerful social media platforms. The congressional investigation is, in the eyes of some, a legitimate inquiry into speech suppression. It is also, in the eyes of adversaries, nothing more than a governmental effort to influence content moderation decisions against suppression of disinformation and an ideologically driven push to affect an election towards an aligned leader. Still, underlying concerns about who determines what content constitutes disinformation are legitimate. Efforts by governments, if unduly coercive, are also problematic.[55] Permissible persuasion, however, is lawful.[56] EU efforts to regulate content within its borders are also legitimate, but extraterritorial reach could be problematic depending on the methods of achieving that consequence. Drawing these types of lines is the challenge for the ideal protection of rights, comity among countries, and proper shaping of regulations and remedies.

Even if the U.S. stays the course of little regulation and institutional self-monitoring, Europe's ability to influence outcomes exceeds its borders. The premise of Representative Jordan's attack and the committee's investigation and report is that the EU is chilling American speech. This effect is possible given the reach of compliance efforts with EU regulations known as the Brussels effect[57] in that European regulatory efforts will influence policy beyond its geographical frame into the U.S. and its companies. If true, the Brussels effect is at minimum a phenomenon worth watching closely, and at maximum, may pose

[54] Moody v. NetChoice, LLC, 603 U.S. 744 (2024).

[55] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 67 (1963) (holding that the government cannot coerce third-party intermediaries to stifle disfavoured speech). In *Bantam Books,* Rhode Island created a state commission to review book materials to protect minors from offensive, indecent, and obscene language and images. Bantam Books, Inc. v. Sullivan, 372 U.S. 59–72 (1963). The commission would review and determine if the materials were objectional for underage minor readers, and, if so, would request the distributers "cooperation", coupled with a warning that the commission had shared "objectionable" publications with the local police departments and would abide by its duty to recommend prosecution of distributers of obscenity. Bantam Books, Inc. v. Sullivan, 372 U.S. 59–72 (1963). The Supreme Court ruled that this state "system of informal censorship" violated the First and Fourteenth Amendments. The Court emphasised a limitation on its rationale, however: "We do not hold that law enforcement officers must renounce all informal contacts with persons suspected of violating valid laws prohibiting obscenity." Bantam Books, Inc. v. Sullivan, 372 U.S. 71 (1963). Rather, according to the Court, "[w]here such consultation is genuinely undertaken with the purpose of aiding the distributor to comply with such laws and avoid prosecution under them, it need not [hinder] the full enjoyment of First Amendment freedoms. But that is not this case." Bantam Books, Inc. v. Sullivan, 372 U.S. 71–72 (1963). In the *Bantam* Court's view, the commission was not law enforcement officers; rather "[t]heir operation was in fact a scheme of state censorship effectuated by extra-legal sanctions; they acted as an agency not to advise but to suppress." Bantam Books, Inc. v. Sullivan, 372 U.S. 72 (1963).

[56] Bantam Books, Inc. v. Sullivan, 372 U.S. 71–72 (1963).

[57] See Bradford (2020), documenting how the EU, despite political turmoil, constitutes an influential superpower shaping the world to its liking across a host of important arenas including data privacy, environmental protection, antitrust, online hate speech, and consumer health and safety.

possible overreaches given the juxtaposed philosophical approaches between the EU and the U.S. on free speech and expression principles.

3. The Brussels effect[58]

The investigation's premise may gain momentum due to the phenomenon described as the Brussels effect (Bradford, 2012, p. 3). It connotes the significant influence that the EU has in shaping policy via regulations that force compliance for multinational companies (Bradford, 2012, p. 3). It enables the EU to channel its regulatory prowess into measurable influence (Bradford, 2012, p. 7). With a deeper, full "understanding of the conditions underlying the Brussels Effect explains why the EU, as opposed to any other large economy, can unilaterally supply global standards".[59] Further, such influence means that the EU sets targets for the world (Bradford, 2012, p. 3; Bradford, 2020, pp. 7–25). The DSA, following the trend of the effect of preceding European codes, "will likely further instantiate the Brussels effect, whereby platforms shape their globally applicable content moderation policies and practices to conform to the dictates of EU regulations" (Nunziato, 2023, p. 120). This power is remarkable and has the potential to do much good in the world. For the U.S., however, the Brussels effect raises genuine concerns given the divergence of interests.

The consequences of the Brussels effect may cause multinational companies to suppress American speech that would, or at least could, otherwise thrive in the U.S. This phenomenon might occur even if the original contemplation of the EU Code's reach was only within the EU. It would simply be easier and more efficient for companies to comply with EU regulations and practices globally.[60] Failure to comply at all would expose multinational platform companies to unacceptable risk.[61] For example, adhering to EU anti-hate speech principles might cause a multinational platform company to alter its terms-of-service agreements for compliance (Nunziato, 2023, p. 122).[62] Once the company makes the adjustment, it likely will use the same terms-of-agreement blocking such hate

[58] See Bradford (2012, pp. 1, 3), coining the phrase, "The Brussels Effect", and describing it as a deeply underestimated aspect of European power that the discussion on globalisation and power politics overlooks: Europe's unilateral power to regulate global markets. The European Union sets the global rules across a range of areas, such as food, chemicals, competition and the protection of privacy. EU regulations have a tangible impact on the everyday lives of citizens around the world."

[59] See Bradford (2012, p. 7): "Thus, the discussion of the Brussels Effect provides a more nuanced theory of the conditions under which a single jurisdiction can exert regulatory influence outside its borders."

[60] See Nunziato (2023, p. 122): "Although it was initially contemplated that the EU Code of Conduct would apply to content moderation only within the EU, the platforms unsurprisingly found it easier to comply with the Code's requirements globally. [...] A similar Brussels Effect likely flowed from the recently adopted EU Code of Practice on Disinformation."

[61] See Nunziato (2023, p. 124): "A platform's decision not to moderate any content, however, would render it in violation of the DSA."

[62] See also Keats Citron (2018, pp. 1055–1056): "Companies' presumptive deletion of hate speech [under EU regulations] is bound to have a global impact because [terms-of-service] agreements are involved rather than court orders or other forms of legal process."

speech content everywhere (Nunziato, 2023, p. 122),[63] including where the content might be lawful. Accordingly, under the Brussels effect, such "platforms will likely alter their globally applicable terms of service and content moderation guidelines in response to the DSA's mandates in ways that will be speech restrictive worldwide" (Nunziato, 2023, p. 122).

Again, the Brussels effect should be continuously monitored and assessed. Some will praise it; others will lambaste it. Regardless, the momentum is already in play and is impressive. It remains to be seen whether the European influence will promote best practices that appropriately balance interests or encroach too far on free speech rights in the U.S. when major social media companies alter their global content moderation policies in fear of EU reprisal. Still, greater transparency could benefit deeper insight by all.

4. The central tension

Friction, and even palpable conflict, between the EU DSA and U.S. free speech principles is inevitable given competing sensibilities. The Brussels effect intensifies this likelihood.[64] The DSA will enhance the pattern of EU regulations "incentivizing platforms to skew their global content moderation policies toward[s] Europe's balance of speech harms and benefits – instead of the U.S.'s balance".[65] This European oversized influence on content moderation policies and norms will further entrench U.S. congressional views that favour the ongoing and similar investigations alleging EU suppression of American speech. Additionally, it will stoke the rhetorical fires of dissension.

The right to disagree vehemently; the right to speak one's mind without fear of repercussion; the right to criticism the government; the right to offend – these are just a few core examples of U.S. free speech absolutism. European core principles, such as safeguarding human dignity and respect,[66] compete with this absolutism. This disparity is not the complete picture, of course. The story is more complex. For example, American colleges and universities adopt and impose hate speech codes for community wellbeing and respect of diverse student populations (Aichinger, 2023). Such codes typically prohibited offensive and intolerant speech aimed at students or groups based on protected minority status (Aichinger, 2023). These academic hate codes often continue in place notwithstanding federal court rulings invalidating such codes as violative of the First Amendment free speech rights of students (Aichinger, 2023).[67] The Supreme Court has not resolved the validity or invalidity of campus speech codes, but it has adopted First Amendment rationales that protects hideous speech and expression because the

[63] See also Keats Citron (2018, pp. 1055–1056), noting that terms-of-service [TOS] "agreements are typically the same across the globe. Thus, decisions to delete or block content as TOS violations mean content will be deleted or blocked everywhere the platform is viewed".

[64] See Nunziato (2023, p. 127): "The recent adoption of the DSA will bring with it tension and in some cases outright conflict with the U.S. free speech regime applicable to social media platforms."

[65] See Nunziato (2023, p. 127), concluding that the continuation of this trend "will solidify the EU's position of being the global driver of internet content moderation policies".

[66] EU Charter of Fundamental Rights, Article 1: "Human dignity is inviolable. It must be respected and protected."

[67] See, e.g., Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989), invalidating university hate speech code for vagueness, overbreadth, and viewpoint discrimination.

government cannot restrict speech based on "its disapproval of the ideas".[68] Such reasoning indicates the U.S. remains committed to a robust marketplace of ideas even when those ideas are abhorrent and offensive. To lawfully restrict, the speech must rise to the level of fighting words,[69] obscenity,[70] intimidation,[71] or targeted harassment (Tsesis, 2017).[72] Thus, there is much speech the U.S. continues to tolerate that Europe bans. Accordingly, starting frames of the U.S. and Europe may translate into overriding values that are at times irreconcilable.

In addition to competing views, U.S. regulatory reform efforts may invoke First Amendment frames that juxtapose with European platform regulatory approaches. The DSA and the Brussels effect contrasts with proposed federal legislation in the U.S. that aims to prohibit viewpoint discrimination in content moderation systems whether human or algorithmic driven (Nunziato, 2023, p. 124). One such legislative proposal, though it did not become law, is the Disincentivizing Internet Service Censorship of Online Users and Restrictions on Speech and Expression Act (DISCOURSE Act),[73] introduced in the Senate by then-Senator Mark Rubio. A key feature of this legislative effort was to limit Section 230 immunity for platforms engaging in viewpoint discrimination via human or algorithmic content moderation.[74] Such viewpoint restrictions may be likely by U.S. social media companies who alter their global content moderation policies and practices "in response to the DSA's mandates in ways that will be speech restrictive worldwide" (Nunziato, 2023, p. 122).

It is impossible to operate content moderation in compliance with edicts like those of the EU regulations that prohibit hate speech without colliding with view-point discrimination prohibitions of the U.S. Of course, the U.S. restrictions generally apply to

[68] R.A.V. v. St. Paul, 505 U.S. 377 (1992), invalidating, as violative of the First Amendment, the city's hate speech ordinance prohibiting hate symbols such as swastikas and cross-burnings. For helpful exploration of competing arguments for and against hate speech codes, see Papandrea (2017).

[69] Chaplinsky v. New Hampshire, 315 U.S. 568 (1942), establishing the fighting words doctrine as a category of speech not protected by the First Amendment.

[70] Miller v. California, 413 U.S. 15 (1973), defining test for obscene speech that lacks First Amendment protection when without serious literary, artistic, political, or scientific value.

[71] Terminiello v. Chicago, 337 U.S. 1 (1949), holding that a breach of peace ordinance unconstitutionally infringed on First Amendment free speech rights. Following the reasoning of *Terminiello,* some campus speech codes protect speakers against the "heckler's veto" where a heckler seeks to silence the speaker via intimidation and humiliation (Aichinger, 2023).

[72] See also The Communications Decency Act of 1996, 47 U.S.C. § 230(c)(2), providing immunity for social media platforms for "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".

[73] DISCOURSE Act, S. 2228, 117th Cong. (2021) (https://perma.cc/8LXU-T9ND).

[74] DISCOURSE Act, S. 2228, 117th Cong. (2021) § 2(a)(2)(B) provides that "[i]f an interactive computer service provider with a dominant market share: (i) engages in a content moderation activity that reasonably appears to express, promote, or suppress a discernible viewpoint for a reason that is not protected from liability under subsection (c)(2), including reducing or eliminating the ability of an information content provider to earn revenue, with respect to any information, the interactive computer service provider shall be deemed to be an information content provider with respect to that information; or: (ii) engages in a pattern or practice of content moderation activity that reasonably appears to express, promote, or suppress a discernible viewpoint for a reason that is not protected from liability under subsection (c)(2), including reducing or eliminating the ability of an information content provider to earn revenue, the interactive computer service provider shall be deemed to be an information content provider with respect to all information that is provided through the interactive computer service".

state actors, and so far, not to online social media platforms. The proposal does seek to amend Section 230 to provide that the Communication Decency Act's limitation on liability would not apply unless the platform has complied with the proposed legislation (Nunziato, 2023, p. 124, discussing Rubio, 2021). The Senator Rubio-led effort, however, has not progressed. Regardless, the underlying tension remains a relevant point of concern.

5. Lessons for a balancing approach with remedies-centred solutions

The congressional investigation highlights and exacerbates tensions that threaten the American commitment to free speech absolutism. It also pits America against the EU. The comparative philosophical approaches have never fully aligned. As noted, the U.S. leads with freedom of speech in its Bill of Rights, protecting liberty interests; whereas European countries prioritise other fundamental rights like human dignity. The congressional investigation's rhetoric converts the contrast and the EU regulations into a potential act of aggression threatening American free speech across social media platforms. This rhetorical frame is unfortunate as it lacks comity, though it may still raise reasons for concern about potential chilling of American speech. Is it possible to respect the EU's commendable efforts to regulate the most problematic speech with nuance, while defending the free speech rights of Americans?

A future article will address how a remedies-centred approach may offer useful lessons, guidance, and techniques to bring the United States free speech framing closer to a European stance. Remedies law is deeply familiar with balancing interests, especially when applying principles of equitable discretion regarding whether to permit the remedy and, if so, how to shape it. Balancing interests and tailoring relief might enable the United States to honour liberty while respecting dignity and to promote robust dialogue while discouraging disinformation. Extensive remedial resources (Dobbs & Roberts, 2018) exist for developing such solutions in a follow-on scholarly treatment. Important related questions warrant further exploration. For example: To what extent is the U.S. Congress trying to manipulate or control European speech and rules? Should the First Amendment have extraterritorial effect? How should the First Amendment treat disinformation or misinformation? Does it extend to company decisions or just state actors? Should the EU create a carveout to ensure some modicum of protection for American free speech interests? During the next stage of inquiry, it would be beneficial to think creatively about ways to balance competing interests with a remedial approach in mind so that more than one interest may garner respect to the extent possible.

6. Conclusion

The archetypal absolutism of American free speech and expression law is under pressure. Internal pressure exists from concerns about disinformation, hate speech and threats to democracy. External pressure comes from the Brussels effect on multinational companies

potentially reaching American speakers by suppressing them to comply with EU regulations. Absolutism does not lightly abide limits on the underlying liberty-inspired rights. A remedies-centred approach could solve the puzzle by extraterritorially protecting American speakers' rights, while otherwise leaving intact compliance with EU regulations. Such remedial requests require balancing of competing interests and shaping relief to show comity. Achieving this delicate balance may not always be attainable, but it is a goal well worth pursuing.

Acknowledgements

For helpful feedback, thanks to participants of the International Free Speech Discussion Forum held at Ludovika University of Public Service, Budapest, Hungary. Special thanks to András Koltay and Ron Krotoszynski for productive discourse and valuable suggestions. Thanks also to research assistant Colson Thornton.

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