PLATFORMS, POLITICAL ADVERTISING, AND ATTENTIONAL CHOICE

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ABSTRACT

As political advertising moves from traditional media sources to online platforms, federal and state disclosure laws have failed to keep pace. Only a handful of states have adopted transparency regulations that cover online political advertising to date, and the task facing lawmakers just became even more challenging.

In Washington Post v. McManus*, the Fourth Circuit invalidated a Maryland law that created disclosure-and-recordkeeping duties for online political ads. According to the court, Maryland's law violated the First Amendment because it placed these disclosure obligations on the platforms hosting the ads rather than the political actors buying the ads. This risked "manipulating the marketplace of ideas."*

The McManus *decision joins a long and unfortunate line of cases that rely upon a vague and functionally meaningless account of the "marketplace of ideas" to invalidate campaign finance regulations. These cases strike down laws for "interfering" with the marketplace of ideas without first explaining what the marketplace of ideas is or exploring how such a market might actually operate.*

In this Article, I evaluate online-platform disclosure laws under a thicker conception of the marketplace of ideas using the attentional-choice theory of competition. Contrary to the outcome in McManus*, I conclude that platform disclosure laws are fully consistent with (and even supportive of) robust competition in the marketplace of ideas.*

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INTRODUCTION

Since the Supreme Court first began disassembling campaign finance laws over forty years ago,[1] one piece of the regulatory apparatus has remained relatively resistant to constitutional challenge: disclosure laws. From *Buckley*[2] to *McConnell*[3] to *Citizens United*,[4] the Court has consistently upheld statutes promoting transparency in political spending.

As campaigns have continued to spend more and more on digital advertising, however, federal and state laws have fallen behind. The Honest Ads Act—a federal disclosure regime that would cover online political advertising—remains stalled in

1. *See generally* Buckley v. Valeo, 424 U.S. 1 (1976) (defendants—candidates, political parties, contributors and others—brought suit against the FCC challenging various aspects of the Federal Election Campaign Act of 1971).

2. *See id.* at 61.

3. *See* McConnell v. FEC, 540 U.S. 93, 194–201 (2003).

4. *See* Citizens United v. FEC, 558 U.S. 310, 366–71 (2010).

Congress,[5] and few states have adopted their own online disclosure laws.[6] In December 2019, these efforts encountered a new obstacle.

In *Washington Post v. McManus*, the Court of Appeals for the Fourth Circuit invalidated a Maryland law that imposes disclosure-and-recordkeeping requirements on online platforms hosting political advertisements.[7] The decision only applied to the specific challengers before the court,[8] but the opinion's reasoning does not seem likely to remain so limited for long. In particular, the court concluded that the law posed "a real risk of . . . manipulating the marketplace of ideas" by placing disclosure obligations on the platforms that run political ads rather than the political actors that purchase them.[9] The Fourth Circuit's view of what the "marketplace of ideas" demands[10]—and, by extension, what the First Amendment requires—could threaten a number of promising transparency measures, including the Honest Ads Act itself.

Yet, the *McManus* decision also offers an opportunity to revisit both the marketplace of ideas and the justifications typically offered by the government to support disclosure regimes. In this Article, I challenge the marketplace framework deployed by the *McManus* court and explore how disclosure regimes like Maryland's (and like the Honest Ads Act) might fare under an alternative attentional-choice theory of the First Amendment. Such an approach would offer substantially more flexibility to legislatures seeking to regulate political advertising and would justify those measures based on the government's interest in preserving a robust and competitive marketplace for competing political ideas.

Part I offers a brief summary of the unexplained assumptions that underpin the Supreme Court's current marketplace

5. Honest Ads Act, S. 1356, 116th Cong. (2019).

6. *See infra* Part II.

7. 944 F.3d 506, 523–24 (4th Cir. 2019).

8. *Id*. at 513.

9. *Id*. at 515–17.

10. *See id*.

metaphor and provides an overview of how the attentional-choice theory of competition distinguishes between a variety of competitive and anticompetitive practices by private actors in the marketplace of ideas. Part II then introduces how jurisdictions have implemented disclosure regimes for online political advertising to date. Finally, Part III explores the *McManus* decision and demonstrates how applying an attentional-choice framework would challenge each step in the Fourth Circuit's chain of reasoning.

I. BACKGROUND: ATTENTIONAL CHOICE & THE MARKETPLACE OF IDEAS

One concept dominates modern First Amendment jurisprudence: the marketplace of ideas.[11] The intuition behind the concept is simple: by invalidating laws that interfere with the flow of information throughout society,[12] courts can create an environment in which good ideas and bad ideas "compete" and members of the political community can arrive at their own conclusions free from the risk that government will "tilt public debate in a preferred direction."[13]

For all its surface appeal, however, the market metaphor remains a mile wide and an inch deep. Scholars have critiqued the doctrine for decades,[14] and behind all the sloganeering there does not appear to be any meaningful theoretical, empirical, or historical account of how a "marketplace of ideas" is supposed to function.[15] What resource does a "marketplace of ideas"

11. *See* Citizens Against Rent Control/Coal. for Fair Housing v. City of Berkeley, 454 U.S. 290, 295 (1981); *see also* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

12. *See* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 765 (1976); Associated Press v. United States, 326 U.S. 1, 20 (1945).

13. Sorrell v. IMS Health Inc., 564 U.S. 552, 578–79 (2011).

14. *See, e.g.*, R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. ASS'N 384, 385 (1974); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, DUKE L. J., Feb. 1984, at 4–5; Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 277, 296 (1992).

15. *See* G. Michael Parsons, *Fighting for Attention: Democracy, Free Speech, and the Marketplace of Ideas*, 104 MINN. L. REV. 2157, 2162–79 (2020).

allocate? What does competition look like? What does "winning" provide?

Sometimes, the Supreme Court describes competition at an individual level—a battle for one's acceptance or belief.[16] At other times, the Court conceives of the metaphor at a societal level—a competition over the spread of (and exposure to) certain ideas.[17] Either way, the Court glosses over the most critical question: what role do content *consumers* play?[18]

Any theory that cannot explain how consumer judgments ultimately feed back into the market and drive share allocation cannot purport to be a "market"-based theory at all. And, under current doctrine, an explanation of how this market mechanism operates is nowhere to be found. Instead, the Court protects an economic freedom to contract with respect to content-related activities and hopes that this naturally leads to a competitive ideational marketplace.[19]

There is no reason to think this approach should work. Protecting an unqualified freedom of contract does not even promote free competition in economic markets. In economic markets, we prohibit price-fixing or market-allocation agreements and we regulate other private practices specifically because we understand that *free contracting* among producers can undermine *free competition* for consumers.[20] We can identify such private behaviors as anticompetitive (and recognize

16. *See* Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 641 (1994); Thomas v. Collins, 323 U.S. 516, 536–37 (1945). *See also* Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, LEGAL THEORY, 1996, at 17 ("Only someone who *accepts* or *believes* a message should qualify as a consumer of it.").

17. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974); United States v. Alvarez, 567 U.S. 709, 727–28 (2012) (plurality opinion); Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled by* 395 U.S. 444, 449 (1969).

18. *See* Goldman & Cox, *supra* note 16, at 26–27 (observing that, in the Court's current conception of the marketplace, "there is no difference in payment between viewers who 'consume' [a] message and those who do not[;]" indeed, "there seems to be no 'exchange' or 'trade' at all").

19. *See* Parsons, *supra* note 15, at 2161, 2190–91.

20. *See* 15 U.S.C. § 1 (2018) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

government interventions as procompetitive) because we have well-developed (and constantly developing) theories about how economic competition actually works.[21]

The Supreme Court, on the other hand, has no theory about how competition between ideas (or "ideational competition") occurs. And a court that cannot clearly or coherently explain how a "marketplace of ideas" functions has no business holding that any law interferes with it.[22]

In a recent article, I introduced a new theory of competition for the marketplace of ideas: the "attentional-choice" theory of competition.[23] This theory suggests that our choices about who and what deserves our attention reflect the consumer judgments that have been missing from First Amendment "market" analysis.[24]

Attention is a scarce resource—we can only process so much, and each of us only has 24 hours in a day.[25] Within that time, we must allocate our attention to consuming and producing the content that is the most important to us.[26] These limits raise an uncomfortable reality: the information we receive—our knowledge of the world itself—is heavily mediated.[27] I only know about global events because one of my chosen informational intermediaries (NPR, The Economist, Twitter, etc.) decided to tell me. These intermediaries have immense power over the selection, prioritization, and framing of content that enters my informational ecosystem.[28] This makes my choice

21. *See generally* Kenneth J. Arrow & Gerard Debreu, *Existence of an Equilibrium for a Competitive Economy*, 22 ECONOMETRICA 265 (1954) (proving the efficiency of a competitive economic marketplace).

22. *See* Parsons, *supra* note 15, at 2190.

23. *See generally id.* (suggesting that the role of attention offers a more fruitful axis for analyzing competition in the marketplace of ideas).

24. *See id.* at 2160–61.

25. *See id.* at 2166–67; *see also* TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS 7 (2016); MATTHEW B. CRAWFORD, THE WORLD BEYOND YOUR HEAD: ON BECOMING AN INDIVIDUAL IN AN AGE OF DISTRACTION 11 (2015).

26. *See* Parsons, *supra* note 15, at 2166–67.

27. *See id.* at 2167–68; *see also* ALVIN I. GOLDMAN, KNOWLEDGE IN A SOCIAL WORLD 104 (1999); John Hardwig, *Epistemic Dependence*, 82 J. PHIL. 335, 335–36 (1985).

28. *See* Parsons, *supra* note 15, at 2167–68.

of intermediaries—and the *terms of access* to my attention—an especially intimate and important matter.

The attentional-choice theory of competition gives this consumer decision constitutional significance and provides a more nuanced framework for reviewing legislative enactments.[29] To evaluate how this framework might apply to transparency and disclosure laws, a brief overview of attentional-choice theory is necessary. Luckily, current events offer a one-man hypothetical—Michael Bloomberg—for exploring and explaining each of the theory's key dimensions.

A. *Market Entry (Expression as Production)*

The First Amendment prohibits the government from making laws that "abridg[e] the freedom of speech."[30] This Free Speech Clause ensures that "no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information" is silenced by the government and thereby kept from the people and their consideration.[31] Here, we find concern for both the dignity interests of the speaker (protecting the right to "say one's piece")[32] and the instrumental interests of society (ensuring the widest variety of ideas possible is made available for consumption, discussion, and debate).[33]

This doctrinal presumption towards protecting expression is sometimes called the "more speech" principle: the idea that "more speech, not less, is the governing rule" of the First Amendment.[34] To the extent this principle is used to protect one's ability to create content—a speech, a video, a manuscript, etc.—it guards a core predicate of attentional competition: free entry into the marketplace of ideas.

29. *See id*. at 2160–62, 2232–33.

30. U.S. CONST. amend. I.

31. Robert C. Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1111 (1993) (citing ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 75 (1960)).

32. Ingber, *supra* note 14, at 80.

33. *See, e.g.*, First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 776 (1978).

34. Citizens United v. FEC, 558 U.S. 310, 361 (2010).

This principle extends First Amendment protection to those economic expenditures necessary to create content. Even "[t]he humblest handbill or leaflet entails printing [and] paper . . . costs."[35] Thus, while money is not literally speech, such transactions deserve strong judicial scrutiny to ensure that information can be produced and made available for consumption.

Under attentional-choice theory, however, the more-speech principle covers only the creation of content.[36] This marks an important shift. Current doctrine often fails to distinguish between the availability of content[37] and one's exposure to content.[38] The more-speech principle should be understood to protect the former, not the latter. "The *availability* of a broad array of diverse opinions is a necessary predicate for competition between ideas to occur, but one's *exposure* to any given idea is [supposed] to be the result of the competition occurring between ideas within society."[39]

Consider, for example, Michael Bloomberg's presidential campaign hiring a speechwriter. This salary goes towards the creation of content: a speech on gun reform, perhaps. Or consider the costs associated with researching, developing, and drafting a Bloomberg News story. Journalists, editors,

35. Buckley v. Valeo, 424 U.S. 1, 19 (1976).

36. *See* Parsons, *supra* note 15, at 2168–79, 2194–95.

37. *See, e.g.*, Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866 (1982) (emphasizing the role of the First Amendment "in *affording the public access* to discussion, debate, and the dissemination of information and ideas" and noting that "the State may not . . . contract *the spectrum of available knowledge*" (quoting *Bellotti*, 435 U.S. at 783, and Griswold v. Connecticut, 381 U.S. 479, 482 (1965) (emphasis added))); Red Lion Broad. Co. v. Fed. Commc'ns Comm'n, 395 U.S. 367, 390 (1969) (observing that the preservation of an "uninhibited marketplace of ideas" requires "the public *to receive suitable access* to social, political, esthetic, moral, and other ideas and experiences" (emphasis added)).

38. Bigelow v. Virginia, 421 U.S. 809, 829 (1975) ("The policy of the First Amendment favors dissemination of information and opinion . . . ."); *Buckley*, 424 U.S. at 49 ("[T]he First Amendment . . . was designed to secure 'the widest possible dissemination of information from diverse and antagonistic sources . . . .'" (quoting New York Times v. Sullivan, 376 U.S. 254, 266 (1964))).

39. *See* Parsons, *supra* note 15, at 2168–69.

equipment, and business infrastructure are expensive—and all are necessary for the article to come into existence.[40]

Whether or not a single voter ever hears Bloomberg's speech or a single reader ever sees the Bloomberg News story, these outlays are required to bring the content into existence in the first place—to make it theoretically available for consumption. The more-speech principle protects these economic expenditures, thereby limiting the power of government to erect barriers to free entry into the marketplace of ideas.

Once this content exists, we are then faced with a different set of questions: How many people hear Bloomberg's speech? How many people read the Bloomberg News article? And why? These questions bring us to the next principle of the attentional-choice theory.

B. *Free Competition (Distribution & Attentional Demand)*

At the core of the "marketplace of ideas" is the concept of "free trade in ideas"—the notion "that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[41] As discussed above, this "free trade" principle has assumed many meanings over the years, not all of them consistent.[42] Traditionally, the Supreme Court has sought to protect any practices or expenditures that enhance the spread of content and has presumed that the spread of content—any content—is itself a virtue.[43]

Attentional-choice theory challenges this premise. The de facto spread of an idea far and wide is not inherently good or

40. *See, e.g.*, McConnell v. FEC, 540 U.S. 93, 251–52 (2003) (Scalia, J., dissenting) ("In any economy operated on even the most rudimentary principles of division of labor, effective public communication requires the speaker to make use of the services of others. An author may write a novel, but he will seldom publish and distribute it himself. A freelance reporter may write a story, but he will rarely edit, print, and deliver it to subscribers . . . . The right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise.").

41. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

42. *See supra* text accompanying notes 15–17.

43. *See* Parsons, *supra* note 15, at 2168–69, 2194–95.

even necessarily indicative of competitive market value. A product or company in the economic marketplace might enjoy a commanding market share, but that alone cannot tell us whether that share was obtained through competitive or anticompetitive means. The same goes for the marketplace of ideas.

Exposure itself constitutes an act of consumption.[44] A consumer's selection among sources—deciding which is worth watching or reading—is how that consumer's judgments about quality, credibility, and value feed back into the marketplace.[45] Unless the spread of content is based on these value judgments, one cannot say that success in the "marketplace of ideas" had anything to do with it.

"The listener—not the speaker—decides what content is worthy of attention in a competitive ideational market."[46] When information consumers *choose* to pay attention to a source, they confer value in the marketplace of ideas. Thus, under the attentional-choice framework, the free-trade principle extends constitutional protection to expenditures necessary to distribute content to satisfy attentional market demand.[47]

As the Supreme Court has observed, "virtually every means of communicating ideas in today's mass society requires the expenditure of money," and government limitations upon distribution expenditures would risk "restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."[48] When money is spent on meeting the demands of content consumers, "popular speakers and content gain the exposure they deserve and . . . ideas can travel as far as their reputation or merits will take them."[49] Here, the economic marketplace and the marketplace of ideas work in tandem, with

44. *See id.* at 2164–71.

45. *See id.* at 2180–82, 2196–200.

46. *Id.* at 2196–97.

47. *See id.* at 2197–201.

48. Buckley v. Valeo, 424 U.S. 1, 19 (1976); *see also* McConnell v. FEC, 540 U.S. 93, 251 (2003) (Scalia, J., dissenting), *overruled by* Citizens United v. FEC, 558 U.S. 310 (2010).

49. Parsons, *supra* note 15, at 2197.

compelling content and trusted speakers *earning* wider exposure and larger attentional market share.[50]

Bloomberg is, again, useful to demonstrate the boundaries of this concept. If the Bloomberg campaign wants to spend money to book a venue for a political rally or host content on a campaign website, the free-trade principle would protect the expenditures—these allow information to flow freely and spread based on attentional demand. Similarly, the costs to run and maintain Bloomberg News' distribution system fall within the scope of this protection. Whenever speakers, sources, and intermediaries have cultivated an audience and earned attention, the expenditures necessary to keep these channels of distribution open deserve full constitutional protection.[51]

Campaign-finance scholars will quickly recognize that this framework—and this standard for constitutional protection—does not turn on the identity of the speaker.[52] Bloggers, YouTubers, non-profits, for-profits, individuals, and the institutional press alike receive constitutional protections derived from the attention they have earned rather than any special a priori status.[53] This would have important implications for our existing campaign-finance regime.

For example, current federal campaign-finance law includes special provisions that exempt the press from having to report expenditures that might otherwise fall within the scope of those laws. Whereas an "expenditure" is defined by law to include any "payment" of "money or anything of value" by "any person for the purpose of influencing any election for Federal office,"[54] there is an exemption for the press, stating that the term "expenditure" does *not* include "any news story, commentary, or editorial distributed through the facilities of

50. *See id.*at 2198.

51. *See id.* at 2199.

52. *See Citizens United*, 558 U.S. at 349–56.

53. *See* Parsons, *supra* note 15, at 2198–200.

54. 52 U.S.C. § 30101(9)(A)(i) (2020).

any broadcasting station, newspaper, magazine, or other periodical publication."[55]

Yet, this press exemption includes its own exception when "such facilities are owned or controlled by any political party, political committee, or candidate."[56] This raised a question soon after Bloomberg entered the presidential race: Could Bloomberg continue to control Bloomberg News while campaigning as a presidential candidate, or would doing so forfeit the company's statutory press exemption?[57]

This statutory-law question ultimately fizzled: regulations provided a "bona fide news account" exception to the "candidate-owned" exception to the "press" exemption from applicable campaign-finance law (Whew!).[58] Under an attentional-choice framework, however, a constitutional-law question might have remained: What regulations can be imposed under the First Amendment with respect to expenditures that serve earned attention? Might the constitutional treatment differ for other types of expenditures?

C. *Anticompetitive Conduct (Advertising & Attentional Purchase)*

By focusing on the terms of access to our attention and measuring market success through consumer decisions, the attentional-choice theory provides a new lens for examining the competitive and anticompetitive effects of private conduct and legislative intervention alike. "If economic expenditures driven by attentional demand are pro-competitive, then economic

55. *Id.* § 30101(9)(B)(i).

56. *Id.*

57. *See* Rick Hasen, *Is Mike Bloomberg Breaking the Law by Continuing to Control Bloomberg News While a Presidential Candidate?*, ELECTION L. BLOG (Dec. 5, 2019, 8:55 PM), https://electionlawblog.org/?p=108304.

58. 11 C.F.R. § 100.132 (stating that "the cost for a news story . . . that represents a bona fide news account communicated in a publication of general circulation or on a licensed broadcasting facility; and . . . that is part of a general pattern of campaign-related news account that give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not an expenditure."). *But see* Hasen, *supra* note 57 ("This regulation strikes me as inconsistent with the text of the statute, but given that it exists and there is no working FEC, this is probably enough to give Bloomberg a safe harbor to do what he's doing.").

agreements that propagate exposure and consume attention in the *absence* of any underlying consumer choice frustrate the operation of the marketplace of ideas. Such content has not 'earned its keep' through competition."[59]

One example of how content can spread in the absence of any voluntary attentional choice is an advertising contract. Advertising agreements reflect the outright purchase and sale of human attention.[60] "A speaker that has earned and cultivated . . . access to attention through free trade (such as a newspaper) sells that access to a speaker that has *not* earned the consumer's attention (such as a shampoo manufacturer or a political candidate)."[61]

In short, "advertisements contain content that *no one chose to consume* from speakers that *no one chose to trust* with their attention."[62] Content gains wide circulation and market share in a manner largely divorced from any consumer-conferred value, with access to attention based on economic power alone.[63]

None of this is to say that media companies, online platforms, or other purveyors of valued content cannot adopt ad-based business models or that somehow the rights of consumers are violated through such arrangements.[64] Rather, the only question is whether the exposure gained through an advertising contract should be entitled to the same degree of constitutional protection as the exposure gained through attentional competition. If the marketplace of ideas has any meaning, the answer must be no.[65]

59. *See* Parsons, *supra* note 15, at 2211.

60. *See* Red Lion Broad. Co. v. Fed. Commc'ns Comm'n, 395 U.S. 367, 392 (1969) ("[S]tation owners . . . make time available . . . to the highest bidders . . . ."); *see also* Turner Broad. Sys. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 629 (1994) (noting that broadcasters "generate revenues by selling time to advertisers"); Tim Wu, *Blind Spot: The Attention Economy and the Law*, 82 ANTITRUST L.J. 771, 772 (2017) (stating that the basic model of the "attention industry" is to "attract attention by offering something to the public (entertainment, news, free services, and so on), and then resell[] that attention to advertisers for cash.").

61. Parsons, *supra* note 15, at 2211–12.

62. *Id.* at 2212.

63. *See id.*

64. *See id.* at 2216 n.320.

65. *See id.* at 2216–17.

The same goes for expenditures. Whereas expenditures for distribution meet attentional demand based on value ascribed by the listener, expenditures for advertising reflect value ascribed by the speaker alone.[66] If the First Amendment protects a marketplace of ideas, then judgments by speakers about the value of their own speech should not be entitled to the same degree of constitutional protection as judgments by consumers about the value of that speech.[67] "Every speaker—like every business—thinks their product is the best on the market and is worthy of the greatest market share. But that is not for the producer to decide."[68]

Here, Bloomberg's presidential quest throws into stark relief the absurdity of the Court's laissez-faire conception of the marketplace of ideas. Between November 24, 2019 (when he entered the race) and February 24, 2020, Bloomberg spent more than half a billion dollars on campaign advertising.[69] This was "$190 million more than all of his active Democratic rivals combined, including billionaire hedge-fund founder Tom Steyer . . . ."[70] As Bloomberg's ad spending rose, so did his national polls.[71]

66. *See id.* at 2213.

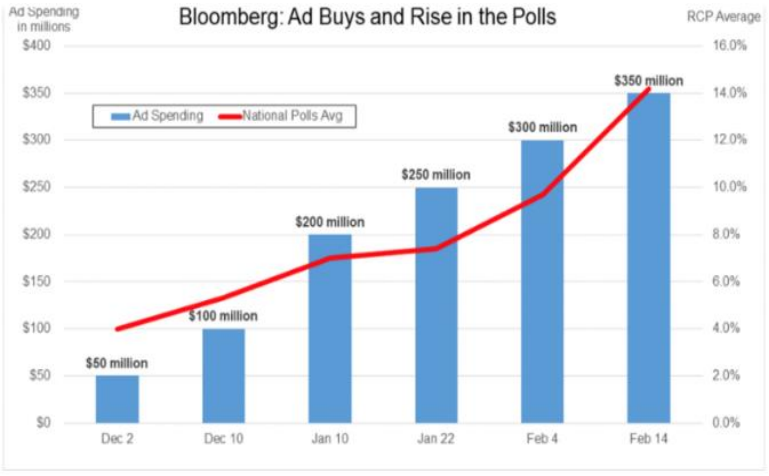
67. *See id.*

68. *Id.* at 2194–95.

69. *See* Bill Allison & Mark Niquette, *Bloomberg Tops Half a Billion Dollars in Campaign Advertising*, BLOOMBERG NEWS (Feb. 24, 2020, 11:44 AM), https://www.bloomberg.com/news/articles/2020-02-24/bloomberg-tops-half-a-billion-dollars-in-campaign-advertising.

70. *Id.*; *see also* Nick Corasaniti & Lazaro Gamio, *The Extraordinary Scale of Bloomberg's Ads, in 6 Charts*, N.Y. TIMES (Feb. 26, 2020), https://www.nytimes.com/interactive/2020/02/26/us/politics/michael-bloomberg-ad-campaign-spending.html (comparing ad spend between candidates).

71. *See* Paul Steinhauser, *Democracy 2020 Digest: Bloomberg's Poll Numbers Soar with Spending Surge*, FOX NEWS (Feb. 18, 2020), https://www.foxnews.com/politics/democracy-2020-digest-bloombergs-poll-numbers-soar-with-spending-surge.



[72]

To be sure, potential voters who see a Bloomberg advertisement might be *persuaded* to support Bloomberg (and all the spending in the world would not help if the ads were unpersuasive), but to say that Bloomberg's message during this period was "winning" in the "marketplace of ideas" is to omit a comical amount of context if the spread of content is itself presumed to be a function of marketplace competition.

As Chief Justice Roberts observed in *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, "[a]ll else being equal, an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted."[73] The greater the societal exposure, the greater the likelihood that only one perspective will be heard by any given person, and the greater chance that idea will be "persuasive." To this day, the Supreme Court has yet to grapple with the implications of this reality on the marketplace of ideas.[74]

72. *See id.*

73. 564 U.S. 721, 747 (2011); *see also* Citizens United v. FEC, 558 U.S. 310, 472 (2010) (Stevens, J., dissenting) ("[I]ndividuals in our society [do not have] infinite free time to listen to and contemplate every last bit of speech uttered by anyone, anywhere . . . . [C]orporate domination of the airwaves prior to an election may decrease the average listener's exposure to relevant viewpoints . . . .").

74. *See* Parsons, *supra* note 15, at 2163–71, 2215–16.

An attentional-choice theory of competition would address this tension between persuasion and exposure head on and could have profound consequences for First Amendment doctrine and the contours of campaign-finance law in particular. Under current doctrine, advertising is just another form of "speech" and advertisers are just another group of "speakers" worthy of full constitutional protection.[75]

If, instead, advertising agreements and expenditures were recognized as being primarily economic transactions—ones with a highly distorting effect on the spread of content within the marketplace of ideas—then the government could have a much larger role to play in regulating the terms of those transactions.

II. ONLINE POLITICAL ADVERTISING & PLATFORM DISCLOSURE OBLIGATIONS

Based on a more rigorous theory of how competition occurs in the marketplace of ideas, legislatures could play a larger role in promoting and protecting ideational competition. Just as the nation's antitrust laws were enacted "for the protection of competition, not competitors,"[76] so too could a principled approach to "attention antitrust" level the playing field without improperly tilting it toward any particular speakers or viewpoints.[77]

An attentional-choice theory of the First Amendment could give federal and state governments much broader leeway than existing doctrine to regulate the terms under which advertising occurs, including microtargeting rules or even advertising expenditure limitations (for campaigns and independent entities alike).[78]

This Article, however, focuses exclusively on transparency and disclosure requirements—the most marginal "mother-

75. *See id*. at 2215 n.317.

76. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 768 n.14 (1984).

77. *See* Parsons, *supra* note 15, at 2234.

78. *See id*. at 2234–43.

may-I" of policies left available to legislatures operating under current campaign-finance doctrine.[79]

The federal Honest Ads Act,[80] for example, would take the kind of political advertisement recordkeeping and disclosure obligations that currently apply to television and radio broadcasters[81] and extend those requirements to online platforms (such as Facebook).[82] Under the Act, an online platform with 50,000,000 or more unique monthly U.S. visitors would be required to keep records of requests to purchase political ads made by persons whose aggregate requests exceed $500 per calendar year.[83] These records would include a digital copy of the political ad, a description of the targeted audience, the number of impressions, the dates and times the ad was first and last displayed, the average rate charged, the candidate or issue to which the ad refers, and information about the ad purchaser.[84]

Despite federal inaction on the Honest Ads Act, four states (Maryland, California, New Jersey, and Washington) have imposed similar kinds of recordkeeping obligations on online platforms.[85] New York imposes reporting obligations on ad purchasers but requires the New York State Board of Elections (rather than the platforms) to host the database of these records.[86]

All of these transparency requirements are, admittedly, a relatively weak tool when it comes to safeguarding the marketplace of ideas. But until recently, at least campaign-finance experts could confidently conclude that these kinds of

79. *See* Buckley v. Valeo, 424 U.S. 1, 64–66 (1976); *see also* Citizens United v. FEC, 558 U.S. 310, 366–67 (2010); McConnell v. FEC, 540 U.S. 93, 194–202 (2003).

80. S. 1356, 116th Cong (2019).

81. 47 U.S.C. § 315(e) (2002).

82. S. 1356 § 8.

83. *Id.*

84. *Id.*

85. Ashley Fox & Tori Ekstrand, Regulating the Political Wild West: State Efforts to Address Online Political Advertising 15–24 (working paper), https://citapdigitalpolitics.com/wp-content/uploads/2020/01/State-Laws-CITAP-Working-Paper.pdf.

86. *Id.* at 20.

minimal statutory obligations should pass constitutional muster.[87]

All of that changed in December 2019 when the U.S. Court of Appeals for the Fourth Circuit invalidated Maryland's law.[88] Judge Wilkinson's opinion for a unanimous panel reads as an homage to the marketplace of ideas and a roadmap for dismantling disclosure requirements for online platforms. Yet, it also offers an important opportunity to examine how an attentional-choice theory of competition could offer more flexibility for legislatures seeking to improve political-ad transparency and more conceptual nuance for courts tasked with reviewing such legislation.

III. RETHINKING *WASHINGTON POST V. MCMANUS* UNDER ATTENTIONAL-CHOICE THEORY

Prior to the 2016 presidential election, Maryland's campaign finance regulations largely applied to political actors and required political committees making expenditures above a specific dollar amount to report information about their donors and TV, radio, and print-advertising purchases to the Maryland Board of Elections.[89]

In 2018, Maryland extended its disclosure-and-recordkeeping regulations to include online advertisements.[90] The new regulatory regime required online platforms—rather than political actors themselves—to make certain information available online (such as purchaser identity, amount paid, etc.) and to collect/retain records of other information and make it available upon request to the Maryland Board of Elections.[91] In response, a group of news outlets with online platforms

87. *See* Richard L. Hasen, *Deep Fakes, Bots, and Siloed Justices: American Election Law in a "Post-Truth" World*, 64 ST. LOUIS U. L.J. 535, 561 (2020).

88. Wash. Post v. McManus, 944 F.3d 506, 524 (4th Cir. 2019).

89. *Id.* at 510–11.

90. *Id.* at 511–12.

91. *Id.*

covered by the Act brought suit challenging the Act's publication-and-recordkeeping requirements.[92]

In *Washington Post v. McManus*, the Fourth Circuit invalidated the law as applied to the particular news-outlet plaintiffs.[93] The court stated explicitly that it did not mean to "expound upon the wide world of social media and all the issues that may be pertinent thereto."[94] Nonetheless, the court's First Amendment arguments (if credited) sweep broadly enough to implicate and potentially condemn a wide range of transparency- and disclosure-focused policy responses—perhaps even the Honest Ads Act.

Calling the Maryland law "a compendium of traditional First Amendment infirmities," the *McManus* court divvied up its objections into three main categories.[95] Below I discuss how the attentional-choice theory of competition counters, or at least complicates, each of the court's objections in turn.

As Congress and state legislatures alike consider enacting transparency regulation in this space, they should, of course, take the objections raised in *McManus* into consideration. But the analysis below suggests they might also consider raising an alternative state interest: protecting and enhancing free competition in the marketplace of ideas.

A. *Political Speech, Anonymity, and the Marketplace of Ideas*

The Fourth Circuit begins by rooting its decision firmly in the marketplace narrative: "[t]he lodestar for the First Amendment is the preservation of the marketplace of ideas."[96] "When the government seeks to favor or disfavor certain subject-matter because of the topic at issue, it compromises the integrity of our national discourse and risks bringing about a form of soft

92. *Id.* at 512.
93. *Id.* at 512–13.
94. *Id.* at 513.
95. *Id.*
96. *Id.*

censorship."[97] According to the court, content-based laws are presumptively unconstitutional "to ensure that the marketplace of ideas does not deteriorate into a forum for the subjects of state-favored speech."[98]

These concerns are heighted when content-based regulations "target *political* speech" because "our democracy relies on free debate as the vehicle of dispute and the engine of electoral change . . . ."[99] As such, "political speech occupies a distinctive place in First Amendment law" and regulations governing political speech "are especially suspect."[100]

Based on this understanding of the marketplace, the Maryland law is already starting off on its heels because the "publication and inspection provisions" of the Act "apply exclusively to political speech."[101] Then the outlook gets worse.

The Fourth Circuit observes that "freedom of speech 'includes both the right to speak freely and the right to refrain from speaking at all.'"[102] According to the court, the publication and inspection requirements impermissibly compel speech by "forc[ing] elements of civil society [the platforms] to speak when they otherwise would have refrained."[103]

Finally, the court raises concerns about the very transparency the Act was designed to foster, noting: "This country . . . has 'a respected tradition of anonymity in the advocacy of political causes.'"[104] Invoking the Federalist Papers, the court adds that, "[m]uch as our forebears elected to hash out the architecture of this nation under the pseudonyms of 'Publius' and 'Agrippa,' many political advocates today also opt for anonymity in hopes their arguments will be debated on their merits rather than their

97. *Id.*

98. *Id.*

99. *Id.* (citing Burson v. Freeman, 504 U.S. 191, 196 (1992)).

100. *Id.*

101. *Id.* at 514.

102. *Id.* at 515 (quoting Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31, 138 S. Ct. 2448, 2463 (2018)).

103. *Id.* at 514.

104. *Id.* at 515 (quoting McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 343 (1995)).

makers."[105] Thus, by "[r]equiring the press . . . to disclose the identity or characteristics of political speakers," the Act's provisions implicate our constitution's "protections for anonymous speech."[106]

For these reasons, the Fourth Circuit finds that the Act "poses a real risk of either chilling speech or manipulating the marketplace of ideas."[107] But each of these reasons—each step in the Fourth Circuit's analysis—starts from unsupported assumptions about how a "marketplace of ideas" operates. One cannot conclude that a law "manipulates the marketplace of ideas" if one has not first explained how a competitive marketplace functions and why.[108]

The attentional-choice theory provides a framework for evaluating this market competition—and upends most of the *McManus* court's core assumptions in the process. To start, advertising itself distorts free competition by providing exposure to content in a manner divorced from consumer choices about the credibility of the source or the value of the content itself. Thus, the fact that the First Amendment protects a "marketplace of ideas" sheds little light on the relevant constitutional question: whether the challenged regulation enhances or frustrates competition for attention within that marketplace.

In fact, if "political speech occupies a distinctive place in First Amendment law" because "our democracy relies on free debate,"[109] then it might provide special *justification* for regulation of political ads rather than special suspicion.[110] After all, if free competition between political ideas is at "the heart of the First Amendment's protection[,]"[111] then the distortion in exposure created by advertising is *most* damaging to First

105. *Id.* (citing *McIntyre*, 514 U.S. at 343, 343 n.6).

106. *Id.*

107. *Id.*

108. *See supra* Part I.

109. *McManus*, 944 F.3d at 513.

110. *See* Parsons, *supra* note 15, at 2243 n.464.

111. *McManus*, 944 F.3d at 514.

Amendment values when political debate is at stake. Determining which ideas, candidates, and issues gain broad societal exposure is a core marketplace function.

Although direct limitations on political advertising expenditures would level this playing field the most, the very least the government can do is ensure that consumers have context to understand how the market is being distorted. Advertising disclosure-and-recordkeeping requirements do just that.

An attentional-choice framework also demonstrates why the Fourth Circuit's "compelled speech" and "anonymity" concerns are misplaced. Whatever merit these objections may have with respect to expenditures serving attentional demand,[112] they ring hollow with respect to the terms of sale for attention purchased in the economic marketplace.

To refer to online platforms as "elements of civil society"[113] or "neutral third-part[ies]"[114]—and to say that platforms are forced to speak by disclosure regulations[115]—is to treat the hosts of ads as mere bystanders to the "speech" of political actors. But this overlooks how advertising agreements operate. Far from being "third parties," the platforms are the only entities involved in *both sides* of an advertising transaction.

Platforms sit at the center of two markets—the ideational and the economic.[116] Platforms earn attention from users based on attentional competition in the marketplace of ideas and then turn around and resell that attention as a commodity in the economic marketplace to political actors that have not earned it through attentional competition.[117] This economic transaction distorts the marketplace of ideas by allowing content to gain widespread exposure irrespective of any consumer-conferred attentional value. In other words, the political actor is a "third

112. *See supra* Part I.B. (discussing Bloomberg News expenditures).

113. *McManus*, 944 F.3d at 514.

114. *Id.* at 512, 513, 516–17, 523.

115. *See id.* at 514.

116. *See* Wu, *supra* note 60, at 787–88.

117. *See id.*

party" in the ideational market and the platform user is a "third party" in the economic market. The platform is the only actor that is *not* a "third party" in this attentional arbitrage.

In short, if the Fourth's Circuit's "compelled speech" objection is based on the fact of compulsion per se, then it is not clear why requiring one party to the economic transaction (platforms) to disclose certain information regarding that transaction is any more problematic than requiring the other party to the transaction (political actors) to do so. It is the terms of the economic transaction itself that are the rightful concern of the information consumer whose attention is being resold. To be sure, imposing recordkeeping duties on a platform might have a different *impact* on the marketplace of ideas than imposing those duties on a political actor; however, that raises a separate question altogether.[118]

The Fourth Circuit's "anonymity" objections miss the mark for similar reasons. The court's failure to distinguish between expression, attentional demand, and attentional purchase conflates constitutionally distinct activities.[119] Simply put, the Federalist Papers were not advertisements—and that should matter under the First Amendment.

"Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind. Persecuted groups and sects from time to time throughout history have been able to criticize oppressive practices and laws either anonymously or not at all."[120] Given this history, "the interest in having anonymous works enter the marketplace of ideas" might be seen to "outweigh[] any public interest in requiring disclosure as a condition of entry."[121] As such, one can reasonably think that "an author's decision to remain anonymous" should be "an aspect of the freedom of speech

118. *See infra* Part III.B.

119. *Compare supra* Parts I.A., I.B., *and* I.C., *with supra* Part III.A.

120. Talley v. California, 362 U.S. 60, 64 (1960).

121. McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995).

protected by the First Amendment"[122] even if the author faces no immediate threat of harassment or harm.[123]

Courts commonly invoke the Federalist Papers in favor of this "strong" reading of First Amendment anonymity rights.[124] The Federalist Papers were "written in favor of the adoption of our Constitution" and "were published under fictitious names."[125] Such anonymity, then and now, "provides a way for a writer who may be personally unpopular to ensure that readers will not prejudge her message simply because they do not like its proponent."[126]

These historical examples and vital principles raise significant questions about the proper balance between state disclosure interests and personal anonymity rights when expenditures—especially relatively small expenditures—must be disclosed. When transparency regulations threaten the creation of content or the ability to make content available to meet attentional demand, the potential marketplace impact is obvious and constitutional concerns should be at their zenith.[127]

The opposite is true, however, when transparency regulations govern the purchase of attention. There is no reason to think that advertising disclosure rules implicate any of the same historical or instrumentalist concerns. There is no traditional "right to anonymously purchase attention" and nothing about Maryland's law would have forced the authors of the Federalist Papers to disclose their identities. The Federalist Papers "were purchased by readers rather than

122. *Id.* at 341.

123. *See* Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure Laws in the Internet Age*, 27 J. L. & POL. 557, 565–66 (2012).

124. *See, e.g.*, *Talley*, 362 U.S. at 65.

125. *Id.*

126. *McIntyre*, 514 U.S. at 342.

127. *See, e.g.*, Coal. for Secular Gov't v. Williams, 815 F.3d 1267, 1272–74 (10th Cir. 2016) (examining application of Colorado registration and disclosure requirements to a coalition soliciting contributions to produce a policy paper regarding a statewide ballot initiative); Bailey v. Maine Comm'n on Gov. Ethics & Election Practices, 900 F. Supp. 2d 75, 78–86 (D. Me. 2012) (examining application of Maine disclosure requirements to the expenditures of an individual author of an anonymous website regarding a political candidate).

foisted on them as paid advertisements."[128] They circulated widely because people wanted to read them.

Even the strictest possible advertising-transparency regime—requiring disclosure with the first dollar spent—would allow for unlimited anonymous spending on the production of content and on the availability and distribution of content that has earned attentional demand.[129] The advocacy of "Publius" and "Agrippa" and their present-day analogues would remain safe—as would free competition in the marketplace of ideas.

B. *Platforms, Political Actors, and the Press*

Despite the Fourth Circuit's high-level objections to political disclosure regimes in general, these objections do not provide the primary foundation for its holding. As the court recognizes, "governments have long required, and the Supreme Court has long upheld, the publication and retention of certain information in connection with elections."[130] From *Buckley v. Valeo* through *Citizens United v. Federal Election Commission*, the Supreme Court has consistently upheld transparency regimes that implicate all of the supposed "infirmities noted above; they were content-based, pegged to political expression, and compelled speech in some form."[131]

What made Maryland's law unique (and unconstitutional, according to the Fourth Circuit) was not the nature of the disclosure-and-recordkeeping requirements but rather the entities to which those requirements applied.[132] By "burden[ing] *platforms* rather than political actors," the Maryland law supposedly violated a "key premise" of prior transparency

128. DEREK D. CRESSMAN, WHEN MONEY TALKS: THE HIGH PRICE OF "FREE" SPEECH AND THE SELLING OF DEMOCRACY 38 (2016).

129. *See, e.g.*, Parsons, *supra* note 15, at 2204 (discussing website hosting fees, making content freely available through video-on-demand, press expenditures, etc.). This is not to say that the Constitution *should* be read to require unlimited spending in these categories but simply that a law tailored narrowly to advertising does not directly implicate these concerns.

130. Wash. Post v. McManus, 944 F.3d 506, 516 (4th Cir. 2019).

131. *Id.*

132. *Id.* at 515–20.

regimes: that the regimes "impose no ceiling on campaign-related activities and do not prevent anyone from speaking."[133]

Because platforms "view political ads no differently than any other" and Maryland's law made advertisements containing political content "more expensive to host" than advertisements containing other content, the platforms shifted to "more profitable options" and hosted fewer political ads.[134] This, according to the Fourth Circuit, meant that the challenged law had a "chilling effect" and "reduce[d] the quantity of [political] expression" in violation of *Buckley*'s and *Citizens United*'s "key premise."[135]

The court's First Amendment concerns were "compounded" by the fact that many of the platforms subject to the law were news outlets.[136] According to *McManus*, this meant that the law also interfered with the press's "editorial function" and its ability to select what mix of "news, comment, and advertising" it wished to run.[137]

An attentional-choice approach to the marketplace of ideas would take seriously the allocation of government burdens and obligations among actors in the marketplace of ideas and the incentive structures that allocation creates. The critical concern, however, is how the regulation impacts the availability and mix of the *platform's* content, not the advertiser's.[138] When

133. *Id.* at 515–16 (quoting Citizens United v. FEC, 558 U.S. 310, 366 (2010)).

134. *Id.* at 516–17.

135. *Id.* (quoting Buckley v. Valeo, 424 U.S. 1, 19 (1976)). The *McManus* court attempted to distinguish similar recordkeeping requirements that apply to broadcasters, *see* 47 U.S.C. § 315(e) (2020), by stating that "[t]he broadcast industry has always held a distinctive place in First Amendment law" based on the scarcity of broadcast spectrum and the attendant need to give "government wider latitude in regulating what is said on them." *See McManus*, 944 F.3d at 519–20. This is a weak response. Not only is the scarcity rationale itself a much-maligned concept, *see* Parsons, *supra* note 15, at 2166 n.40, but the fact that government has "wider latitude to regulate" does not address the concern about chilling effects and limitations on political expression head on. This is not to say the medium is irrelevant under an attentional-choice framework. *See id.* at 2217–18. Rather, it is to say that the *McManus* court's response does not fit its own explanation about what makes platform obligations constitutionally problematic.

136. *McManus*, 944 F.3d at 517.

137. *Id.* at 518 (quoting Miami Herald Publ'g Co., Div. of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241, 258 (1974)).

138. *See* Parsons, *supra* note 15, at 2242–43.

advertising regulations threaten the former, judicial intervention may be warranted; when advertising regulations impact the latter, courts should more readily defer to reasonable, viewpoint-neutral legislative judgments.

Courts and commentators steeped in the laissez-faire tradition may find this hard to stomach. If platforms and other ad-driven outlets cease accepting campaign ads in response to a disclosure law, does that not "chill" a vast amount of political "speech"? No. Even a flat legislative prohibition on campaign ads would prevent no one from spending unlimited resources on "speaking" or unlimited resources on making their speech available to all who are interested.[139] Such a sweeping prohibition may be unwise,[140] or perhaps even unconstitutional based on the severity or partiality of the impact on platforms' own content,[141] but it would not "silence" any political actor.

Consider Twitter, which recently "stop[ped] all political advertising" on its platform because it decided that a "political message reach should be earned, not bought."[142] No one on Twitter was "silenced" by the platform's policy. Users are not suddenly prohibited from tweeting "Vote for Trump" or "Vote for Biden," nor are users prohibited from seeing these tweets or retweeting them. Advertisers are simply prohibited from paying for one of those tweets to consume more of users' attention than it would in the absence of that advertiser's payment.

By distinguishing between the *availability* of content and *exposure* to content, the attentional-choice theory makes clear that advertising regulations do not "reduce the quantity of expression" in the marketplace simply because they reduce "the size of the audience reached"[143] by a particular ad-purchaser in that marketplace. After all, if "the size of the audience reached"

139. *See id.* at 2222.

140. *See id.* at 2236–40.

141. *See id.* at 2242–43.

142. Jack Dorsey (@jack), TWITTER (Oct. 30, 2019, 4:05 PM), https://twitter.com/jack/status/1189634360472829952.

143. Buckley v. Valeo, 424 U.S. 1, 19 (1976).

is supposed to be a function of market competition based on consumer judgments, no speaker has a "right" to a large audience any more than a business has a "right" to a large market share.[144] The First Amendment protects the ability of a speaker to *earn* a large audience through attentional competition, not the power to buy whatever-sized audience that speaker has the economic power to afford.

Nor should any impairment of advertising-exposure be reflexively deemed a "chilling" of "speech."[145] If the First Amendment does not demand an unlimited right of access to attention through advertising contracts, then placing conditions on that economic exchange does not distort the marketplace of ideas even if the law results in diminished exposure to the regulated ads.[146] That is because an ad buy is a payment for unearned attention, not a payment incidental to speech or earned attention.[147]

Moreover, such a law should remain constitutional even if it imposes different regulatory burdens based on the type of content at issue in the advertisement and this distinction impacts the mix of content that gains exposure throughout society via advertising.[148]

The Fourth Circuit rightly observes that platform-based recordkeeping regulations might cause platforms to accept an advertisement for, say, Tide or Cheerios over an advertisement for Trump or Biden because the compliance costs for the latter are higher.[149] But does this incentive structure interfere with the

144. *See id.* at 157.

145. *See, e.g.*, Wash. Post v. McManus, 944 F.3d 506, 515–17 (4th Cir. 2019) ("In the end, each banner feature of the Act—the fact that it is content-based, targets political expression, and compels certain speech—poses a real risk of either chilling speech or manipulating the marketplace of ideas.").

146. For example, if two companies collude and illegally allocate geographic market share between them, ending the anticompetitive conduct will cause sales of the artificially-propped-up product to collapse. That does not mean the government intervention made the market "less competitive."

147. *Compare supra* Part I.C., *with supra* Parts I.A. *and* I.B.

148. *See infra* note 157 and accompanying text.

149. *See McManus*, 944 F.3d at 516–17.

speech rights of the political actor or the platform? If so, does it interfere in a way unjustified by the state's compelling interest in protecting free attentional competition? Arguably not.

Although the political actor may not be able to purchase *attention* (or may need to pay a higher premium to platforms for that attention),[150] the political actor's *speech* rights are in no way constrained. Similarly, a platform that opts out of hosting political ads because they are now marginally more expensive than hosting toothpaste ads is not "stopped" from "speaking."[151] The platform's own content is not impacted at all. The content relayed in an advertisement is principally the advertiser's, not the platform's.[152]

Of course, the platform has an interest in the overall mix of content that users receive insofar as it does not want the advertiser's content to degrade the attentional demand it has cultivated with its own content.[153] But the extent to which the platform's "editorial judgment" in the ideational marketplace can be used as a shield to protect its preference among advertisers in the economic marketplace becomes a more nuanced question under an attentional-choice theory of the First Amendment.[154]

After all, if a platform "view[s] political ads no differently than any other" and is happy to stop selling attention to political candidates when faced with the "headache" of

150. *See infra* note 157.

151. *Contra McManus*, 944 F.3d at 518.

152. *See* Parsons, *supra* note 15, at 2212. Indeed, one complication not addressed by the *McManus* court is that many modern platforms have no clue what advertisements are ultimately served to users alongside their content. The ad-selection and ad-serving process is often outsourced to another entity or set of entities that match particular ads to particular users. *See, e.g.*, Vivienne Kelly, *The Inquiry into Media Agencies and the Ad Tech Market: What You Need to Know*, MUMBRELLA (Mar. 9, 2020), https://mumbrella.com.au/the-inquiry-into-media-agencies-and-the-ad-tech-market-what-you-need-to-know-620596 (detailing the complex web of transactions and entities involved in the demand-side and supply-side of the ad tech market). This outsourcing upends traditional assumptions about media outlets or platforms exercising "editorial judgment" in selecting advertisements. *See McManus*, 944 F.3d at 518 (quoting *Miami Herald Publ'g Co.*, 418 at 258); *infra* notes 153–154 and accompanying text.

153. *See* Parsons, *supra* note 15, at 2216 n.320.

154. *See id.*

disclosing political-ad funding to its users,[155] perhaps First Amendment protections should not be "at their apex" simply because the platform has "decide[d] to host political [advertisements]."[156] Is the state's interest in encouraging robust, competitive, and well-informed debate among political candidates truly so marginal that it can be overridden by *The Cumberland Times-News*' preference to sell ads at the same price point to car dealerships and political candidates alike?[157]

Bringing the focus from the regulated entity (platform or political actor) back to the regulated action also demonstrates why the Fourth Circuit's "press" objections are unwarranted.[158] The fact that Maryland did not distinguish between news platforms and other online platforms is a First Amendment virtue, not a vice.

The Supreme Court has "consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers."[159] Online news outlets engage in the same attentional resale as other online platforms that cultivate sustained audience attention as a business model. The terms upon which that attention is resold to political actors raise all the same concerns whether the ad-seller is a traditional news outlet or not.

In enacting its law, Maryland faced the classic "media exemption trap." If the state "exempt[s] media corporations from campaign expenditures regulations[,] . . . the Court claims that [the state] has engaged in unconstitutional speaker

155. *See McManus*, 944 F.3d at 516 ("Faced with this headache, there is good reason to suspect many platforms would simply conclude: Why bother?").

156. *See id.* at 519.

157. Perhaps an even more pertinent question is appropriate: if the platform genuinely believes that political ads are more consistent with its vision for the aggregate mix of content it offers to its readers, why not simply raise the price to political actors to take out ads? This places the cost back on the political actors who can choose to pay the rate or not. *See id.* at 516 ("Political groups, by design, have an organic desire to succeed at the ballot box. And this ambition generally offsets, at least in part, whatever burdens are posed by disclosure obligations.").

158. *See id.* at 517–20.

159. Citizens United v. FEC, 558 U.S. 310, 352 (2010) (quoting Austin v. Mich. State Chamber of Commerce, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)).

discrimination."[160] If the state does include media corporations, however, "the Court accuses it of violating basic press freedoms."[161] The legislature is "damned if it does and damned if it doesn't."[162]

Under attentional-choice theory, states like Maryland are well-justified in enacting generally applicable laws that govern the purchase and sale of advertisements regardless of whether those statutes reach entities that one might consider the "traditional" press.[163] Any speaker, entity, or organization that "cultivates a following based on voluntary attentional choices" deserves First Amendment protection for the expenses that make its content available,[164] and any entity that resells that attention engages in conduct amenable to governmental regulation.

Whether the state's advertising regulations are justifiable under a means-ends inquiry constitutes a separate question, but the concerns raised above begin to reveal why the means-ends-fit inquiry might be more deferential under an attentional-choice framework than under current First Amendment doctrine.

C. *Means-Ends Fit*

Ultimately, the *McManus* court "decline[d] to decide whether strict or exacting scrutiny should apply" to Maryland's disclosure law because it held that the law would "fail[] even the more forgiving standard of exacting scrutiny."[165] The court rejected both of the justifications proffered by the State: preventing foreign election interference and informing the electorate.[166] Tellingly, however, the *McManus* opinion only

160. Sonja R. West, *The Media Exemption Puzzle of Campaign Finance Laws*, 164 U. PA. L. REV. ONLINE 253, 253 (2016).

161. *Id.*

162. *Citizens United*, 558 U.S. at 474 n.75 (Stevens, J., dissenting).

163. *See* Parsons, *supra* note 15, at 2198–200, 2228.

164. *Id.* at 2199.

165. Wash. Post v. McManus, 944 F.3d 506, 520 (4th Cir. 2019).

166. *See id.*

analyzes the first state interest—it fails to analyze the second state interest entirely.[167] Under an attentional-choice theory—and perhaps even under a laissez-faire theory—the State's second interest should have fared better.

According to the Fourth Circuit, the recordkeeping law was simultaneously too broad and too narrow to justify on the basis of preventing foreign election interference.[168] The law was too broad because "foreign nationals rarely . . . relied on paid content to try to influence the electorate."[169] The law was too narrow because it focused on election ads and "fail[ed] to regulate . . . the narrow band of *paid* content used by foreign nationals"; namely, political issue ads.[170] Finally, the State offered "scant evidence" of foreign meddling on news sites, let alone the types of small outlets covered by the Act.[171] For these reasons, the court held that the law did not provide a sufficiently "reasonable" fit to survive even exacting scrutiny.[172]

The Fourth Circuit's analysis of the State's secondary interest in informing the electorate, however, never materializes. Perhaps the court assumed its prior critique of the State's decision to regulate platforms instead of political actors provided a sufficient explanation of why the Act did not reasonably "fit" the State's interest in informing the electorate. Either way, an attentional-choice theory of competition should remove any doubt that platforms are a reasonable entity to regulate.

To start, once advertisements are recognized as inherently distorting (and attentional resale is identified as the source of that distortion), the platform becomes the most obvious entity to regulate. Platforms—like all ad-driven businesses—are the best-positioned market actor to provide accurate and up-to-

167. *See id.* at 520–23.
168. *See id.* at 521.
169. *Id.*
170. *Id.*
171. *Id.* at 521–22.
172. *Id.* at 523.

date attention-purchasing information because their business models depend on it.

Moreover, online platforms—unlike government agencies—are in a unique position to provide dynamic contextual information to content consumers, such as real-time impression insights, targeting insights, and insights about the spread of paid content within the platform.[173] Once attentional resale is identified as a business practice with mixed effects in the marketplace of ideas, it becomes far more reasonable for a legislature to require attention merchants to make this kind of real-time dynamic information available to consumers in an accessible format. Requiring the platform itself to publish this information directly also avoids an ongoing "unhealthy entanglement" between the government and news outlets.[174]

Finally, the fact that advertising regulations apply to an economic exchange with cross-cutting ideational effects means that legislatures should receive reasonable latitude to craft broader or narrower policies.[175] This includes the freedom to decide whether a regulation should apply broadly to all advertising or narrowly to political advertising only.

A broad transparency regulation that reaches all ads might avoid disadvantaging political ads[176] (and might have its own independent policy merits),[177] but legislatures should not be limited to taking an "all or nothing" approach. Such a sweeping transparency policy could have a severe impact on platforms' overall ad revenues, curtailing the ability for platforms to provide content that consumers have chosen.[178]

173. *See* Yaël Eisenstat, *I Worked on Political Ads at Facebook. They Profit By Manipulating Us.*, WASH. POST (Nov. 4, 2019, 6:00 AM), https://www.washingtonpost.com/outlook/2019/11/04/i-worked-political-ads-facebook-they-profit-by-manipulating-us/; *Platform Political Ad Database Comparison*, CITAP, https://citapdigitalpolitics.com/?page_id=1665 (last visited Apr. 3, 2020).

174. *See* Wash. Post v. McManus, 944 F.3d 506, 518 (4th Cir. 2019).

175. *See* Parsons, *supra* note 15, at 2242–43.

176. *See supra* Part III.B.

177. *See* Tarleton Gillespie, *We Need to Fix Online Advertising. All of It.*, SLATE (Nov. 15, 2019, 7:11 PM), https://slate.com/technology/2019/11/twitter-political-ad-ban-online-advertising.html.

178. *See* Parsons, *supra* note 15, at 2242.

A narrower transparency regulation targeting political ads avoids such a heavy-handed intervention and can be justified on the grounds that the spread of political content—more than any other—should be the byproduct of genuine attentional competition.[179] Two objections to this approach warrant discussion.

First, the fact that some platforms might cease accepting political ads in response to transparency legislation is not necessarily a reason to question the constitutionality of that legislation.[180] More than any other type of ad-driven exposure, the context for political ads matters. The fact that selling commoditized attention to political actors might no longer be profitable to attention merchants in the face of such legislation does not mean that the legislation is improperly interfering with the marketplace of ideas. The opposite may well be true. Balancing the tradeoffs between adequate context and artificial exposure is better left to the popular branches, absent any indicia of bad faith or viewpoint discrimination.

Moreover, a decision by platforms to cease running political ads in a handful of states and localities in response to such legislation could well reflect the consequences of *under*-regulation. If Congress enacted the Honest Ads Act and more states and localities imposed similar regulations, would the platforms continue to decline hosting political ads altogether or would the shifting profit incentives make regulatory compliance worthwhile again? The *McManus* decision does not grapple with this question, its consequences for the court's central line of reasoning, or its implications on any tailoring analysis.

Second, the fact that a reduction in political advertising might decrease overall exposure to political information is also not a

179. *See supra* Part III.A.

180. *See* Bridget Barrett, *The State of Digital Political Advertising in the 2020 US Elections*, PROTEGO PRESS, https://protegopress.com/the-state-of-digital-political-advertising-in-the-2020-us-elections/ (last visited Apr. 3, 2020) ("Reddit has banned all state and local political advertisements, Facebook has banned them in in Washington, and Google prohibits them in Maryland, Nevada, New Jersey, and Washington.").

reason to question the constitutionality of advertising-transparency regulations. Our instinct that exposure to any given piece of political information is necessarily "good" under the First Amendment reflects an assumption that cannot be reconciled with the fact that each of us has limited attentional capacity.[181]

Overcoming this instinct is difficult precisely because we have a hard time imagining that we would want to be deprived of information that we have not received.[182] But this is unavoidable. We necessarily live in a mediated information environment.[183] The relevant question is *what* information we will fail to receive and *why*. An attentional-choice view of the marketplace of ideas suggests that only those political ideas that manage to "break through" and arrive via our trusted intermediaries *should* translate into societal exposure and political action.[184] Such political information has earned our attention. Political content that reaches us via advertising has not.

CONCLUSION

The Fourth Circuit's decision in *McManus* demonstrates the dangerous extent to which modern First Amendment analysis has been supplanted by fuzzy marketplace intuitions. Even disclosure laws—one of the few measures that remain available to legislatures—risk being invalidated.

An attentional-choice theory of competition offers a framework for legislatures and courts alike to navigate the marketplace of ideas in a more nuanced way. As states adopt new political-advertising transparency regimes, this framework could provide a basis for imposing disclosure

181. *See* Parsons, *supra* note 15, at 2168–69.

182. *See, e.g.*, Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 912–13 (1998) (arguing that exposure to more political information is better for the democratic process).

183. *See* Parsons, *supra* note 15, at 2166–68.

184. *See id.* at 2224–26.

obligations on the actors best equipped to comply with them: platforms.