



12-2019

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Recommended Citation

95 Notre Dame L. Rev. 893 (2019).

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NOTES

DE FACTO STATE ACTION: SOCIAL MEDIA NETWORKS AND THE FIRST AMENDMENT

*Paul Domer**

INTRODUCTION

On October 16, 2018, the world was witness to an immense shock—YouTube, the video streaming website, was down for over an hour.¹ YouTube's dominance on the internet could be seen in the Google (another internet giant) search trends for the same day. Google searches for YouTube normally far outpace searches for the other leading video streaming sites, Vimeo and Dailymotion.² On October 16, those sites saw a huge uptick in searches.³ Even then they were outpaced by YouTube, with far more people searching for answers to their YouTube issues than looking for alternatives.⁴ This resulted from YouTube being down for only one hour.

The dominance of a select few social media companies on the internet raises important implications for the free flow of information and ultimately the law. Traditionally, courts have treated the right of free speech—like all

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1 Saheli Roy Choudhury, *Google's YouTube Suffers a Major Outage*, CNBC (Oct. 16, 2018), <https://www.cnbc.com/2018/10/17/googles-youtube-outage-affected-users-in-us-australia-asia-europe.html>. A similar hours-long outage occurred a decade earlier, when an attempt by the government of Pakistan to block access to the site in that country inadvertently affected the entire world. Ryan Singel, *Pakistan's Accidental YouTube Re-Routing Exposes Trust Flaw in Net*, WIRED (Feb. 25, 2008), <https://www.wired.com/2008/02/pakistan-accid/>.

2 *Search Terms Comparison*, GOOGLE TRENDS, <https://trends.google.com/trends/explore?date=2018-10-01%202018-10-20&geo=US&q=vimeo,dailymotion,youtube> (last visited Oct. 27, 2018).

3 Greg Sandoval, *The World Is So Dependent on YouTube for Videos That People Frantically Searched for Alternatives During Its 90-Minute Outage*, BUS. INSIDER (Oct. 17, 2018), <https://www.businessinsider.com/vimeo-and-dailymotion-big-winners-during-youtubes-two-hour-outage-2018-10>.

4 *See id.*; *Search Terms Comparison*, *supra* note 2.

constitutional rights in the American system—as a protection against government intrusion only.⁵ This limitation reflects the longstanding belief that government, given its immense power, is the primary threat to liberty.⁶ The exception, for when a private entity is engaged in a “public function,” has been narrowly construed by the courts.⁷

Technological change has in turn changed the variables that are used in this calculus. While governments, if shorn of constitutional restraints, retain the power to censor, private social media companies arguably possess the same power. A great deal of speech, including political speech, is conducted online.⁸ Further, a huge amount of this activity on the internet can be traced to just five companies: Facebook, Microsoft, Apple, Amazon, and Alphabet, the parent company of Google.⁹ Of those, YouTube and Facebook are dedicated social media sites. Though private entities, the social media giants are the forums in which public discourse takes place. Facebook alone is host to more than two billion users,¹⁰ a larger population than any country.¹¹ Moreover, the social media entities hold themselves out as public forums where ideas can be freely exchanged.¹² They have become, despite their private ownership, heavily intertwined with the very public function of speech.

5 The Civil Rights Cases, 109 U.S. 3, 17 (1883) (“In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings.”).

6 *E.g.*, John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 575 (2005) (“[G]overnment exists to protect individual freedom, and for that purpose it must also be restrained.”).

7 *See, e.g.*, *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974) (noting that constitutional actions may only be brought against a private entity where there is “state action present in the exercise by a private entity of powers traditionally exclusively reserved to the State”).

8 *See generally* Frederica Liberini et al., *Politics in the Facebook Era: Evidence from the 2016 US Presidential Elections 2* (Univ. of Warwick Ctr. for Competitive Advantage in the Glob. Econ., Working Paper No. 389, 2018).

9 Farhad Manjoo, *Tech’s Frightful Five: They’ve Got Us*, N.Y. TIMES (May 10, 2017), <https://www.nytimes.com/2017/05/10/technology/techs-frightful-five-theyve-got-us.html>. Google is also YouTube’s parent company. Kevin B. Johnston, *Top 4 Companies Owned by Google*, INVESTOPEDIA, <https://www.investopedia.com/investing/companies-owned-by-google/> (last updated June 25, 2019).

10 *Most Popular Social Networks Worldwide as of October 2018, Ranked by Number of Active Users (in Millions)*, STATISTA, <https://web.archive.org/web/20181021124855/https://www.statista.com/statistics/272014/global-social-networks-ranked-by-number-of-users/> (last visited Oct. 6, 2019) [hereinafter *Most Popular Social Networks*].

11 *See 2019 World Population by Country*, WORLD POPULATION REV., <http://worldpopulationreview.com/> (last visited Oct. 4, 2019) [hereinafter *2019 World Population*].

12 *See, e.g.*, *About*, FACEBOOK, <https://www.facebook.com/pg/facebookapp/about/> (last visited Oct. 21, 2018) (stating its “[m]ission” is to “[g]ive people the power to build community and bring the world closer together”); *About YouTube*, YOUTUBE, <https://www.youtube.com/yt/about/> (last visited Oct. 21, 2018) (“Our mission is to give everyone a voice and show them the world.”).

“A right of free correspondence between citizen [and] citizen . . . whether public *or private* . . . is a natural right; it is . . . one of the objects for the protection of which society is formed, [and] municipal laws established.”¹³ Thus Thomas Jefferson described the kinds of interactions that now take place on social media, interactions necessarily involving speech. Tellingly, he mentioned that private interactions, not only those involving a state actor, were part of the natural right. Typically, however, American courts only recognize governments as threats to freedom of speech, under the state action doctrine.¹⁴ A case involving an exception to the state action doctrine in the realm of free speech only reached the U.S. Supreme Court in 1946. In that case, *Marsh v. Alabama*, a Jehovah’s Witness was arrested and convicted of trespassing for proselytizing on a public sidewalk that nonetheless was, like everything else in the “company town,” privately owned.¹⁵ The Court reversed, holding that the First and Fourteenth Amendments applied against a private actor if it exercised all the powers and responsibilities traditionally associated with a government—policing, utilities, and traffic control, for example.¹⁶ Writing for the majority, Justice Black declared, “The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”¹⁷

The Court later circumscribed the very circumscriptions of property owners’ rights. In *Lloyd Corp. v. Tanner*,¹⁸ and again in *Hudgens v. NLRB*,¹⁹ the Court severely limited the ability to claim a right of free speech in spaces open to the public but privately owned. Both cases involved protests in public shopping areas that were private property, and in both the Court reasoned that because the property owners did not exercise the level of government-like control as did the company town in *Marsh*, the exception to the state action doctrine did not apply.²⁰ The Court did uphold a challenge to private speech restrictions in *PruneYard Shopping Center v. Robins*, but only because it deferred to the California Supreme Court’s broader interpretation of that state’s constitution.²¹

The line of cases stretching back to *Marsh* all involved access to privately owned physical spaces. The rise of the internet has created new quandaries. Is the internet akin to a privately owned shopping space open to the public? Or is it that the modern public forum is, at the very least, a “digital company town,” and thus where constitutional protections apply? The Court has not

13 Letter from Thomas Jefferson to James Monroe (Sept. 7, 1797), in 7 THE WRITINGS OF THOMAS JEFFERSON 1795–1801, at 171, 172 (Paul Leicester Ford ed., New York, G.P. Putnam’s Sons 1896) (emphasis added).

14 See Fee, *supra* note 6, at 577–78.

15 *Marsh v. Alabama*, 326 U.S. 501, 502–04, 513 (1946).

16 *Id.* at 505–09.

17 *Id.* at 506.

18 407 U.S. 551, 569–70 (1972).

19 424 U.S. 507, 518–21 (1976).

20 See *Hudgens*, 424 U.S. at 508, 519–21; *Lloyd Corp.*, 407 U.S. at 568–69.

21 *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 79–80, 88 (1980).

yet taken a case involving free speech on the internet in a dispute between private actors. In 2017, it did take a case involving state-imposed restrictions on access to social media. In *Packingham v. North Carolina*, the Court struck down a state law banning registered sex offenders from using social media.²² Writing for the majority, Justice Kennedy declared access to public forums a “fundamental principle of the First Amendment” and social media as the primary place for exchange of views in the modern world.²³ But that case explicitly dealt with government action, and whether the internet should be considered a public forum in speech disputes among private actors was left unresolved. The lower courts have produced rulings both in favor²⁴ and against²⁵ the proposition that the state action doctrine is less strict when dealing with the internet.

It is almost indisputable that the internet serves an indispensable role in modern public discourse. Social media stands out among online content for both its size and scope. Within the United States, more than 60% of internet users—nearly 170 million people—use Facebook,²⁶ and some 58% of Americans use YouTube.²⁷ And Americans do not just use those sites for finding friends and watching cat videos. In 2017, 43% of Americans frequently got their news online, to the detriment of traditional sources such as television.²⁸ Some 45% of Americans get at least some of their news from Facebook alone.²⁹

This reliance on social media has had an immense impact on the political sphere. Political campaigns have turned to “microtargeting”—gathering data on individual social media users and then targeting advertisements specifically at those individual users.³⁰ President Barack Obama’s campaign made widespread use of microtargeting to get out the vote in support of his reelection in 2012.³¹ The social media presence of Donald Trump’s cam-

22 *Packingham v. North Carolina*, 137 S. Ct. 1730, 1733, 1738 (2017).

23 *Id.* at 1735.

24 *See, e.g.*, *Sandvig v. Sessions*, 315 F. Supp. 3d 1, 8, 15–16 (D.D.C. 2018).

25 *See, e.g.*, *Prager Univ. v. Google LLC*, No. 17-CV-06064, 2018 WL 1471939, at *1, *5–6 (N.D. Cal. Mar. 26, 2018).

26 Niall Ferguson, *What Is to Be Done? Safeguarding Democratic Governance in the Age of Network Platforms*, HOOVER INST. (Nov. 13, 2018), <https://www.hoover.org/research/what-be-done-safeguarding-democratic-governance-age-network-platforms>.

27 Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, PEW RES. CTR. (Sept. 7, 2017), <http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/>.

28 Jeffrey Gottfried & Elisa Shearer, *Americans’ Online News Use Is Closing In on TV News Use*, PEW RES. CTR. (Sept. 7, 2017), <http://www.pewresearch.org/fact-tank/2017/09/07/americans-online-news-use-vs-tv-news-use/>.

29 Shearer & Gottfried, *supra* note 27.

30 Jeff Semple, *Micro-Targeting: How Facebook Is Selling You to Advertisers*, GLOB. NEWS (June 23, 2018), <https://globalnews.ca/news/4293050/microtargeting-facebook-selling-you/>.

31 Allison Brennan, *Microtargeting: How Campaigns Know You Better than You Know Yourself*, CNN (Nov. 5, 2012), <https://www.cnn.com/2012/11/05/politics/voters-microtargeting/index.html>.

paign in 2016 is already notorious, but it was undoubtedly effective. Microtargeting by the Trump campaign focused on key swing states like Michigan and Wisconsin.³² The Trump campaign focused nearly half of its spending on digital media, and its social media microtargeting has been shown to have boosted voter turnout among Republican ranks.³³

Social media sites recognize their influence, and they have sought to exercise a level of control over speech on their platforms akin to government regulation. Among social media sites, Facebook stands out for its sheer size. Facebook recognized the political impact advertising on its site had, and after the 2016 election required “Paid for by” disclosures on political advertisements on its site.³⁴ Federal law already requires such disclosures for political ads in traditional media;³⁵ now the same has been achieved for a huge portion of online political advertising, initiated by a private actor, not the government. With regard to all forms of content on its site, Facebook imposes its “Community Standards,” which prohibit any language attacking “protected characteristics” such as race or gender.³⁶ In contrast, the Constitution precludes the government from any content-based restrictions on speech outside a few narrow categories like defamation.³⁷ For the millions of Americans who use Facebook regularly, they are entitled to less freedom of speech on that platform than they are accustomed to elsewhere, and entirely at Facebook’s discretion.

Access to social media platforms is no small matter for modern discourse. Some commentators have explicitly called Facebook a “company town,”³⁸ and more importantly have pointed out that joining this modern social commons is hardly optional for anyone wanting a public voice.³⁹ This digital company town has few precedents, making it difficult to fit a right of access to social media into existing jurisprudence. The closest historical parallel may be Hollywood in the era of the Hays Code, during which all films produced in the United States had to meet the moral standards of a small

32 Josh Meyer, *Democrats Fume over Parscale’s Limited Answers on Russian Digital Meddling*, POLITICO (March, 19, 2019), <https://www.politico.com/story/2018/03/19/trump-russian-digital-parscale-470263>; see also Parscale: TV News “Thought I Was a Joke,” CBS NEWS (Oct. 8, 2017), <https://www.cbsnews.com/news/parscale-tv-news-thought-i-was-a-joke/>.

33 Liberini et al., *supra* note 8, at 1–2, 5.

34 *Shining a Light on Ads with Political Content*, FACEBOOK (May 24, 2018), <https://newsroom.fb.com/news/2018/05/ads-with-political-content/>.

35 See, e.g., Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 311, 116 Stat. 81, 105–06.

36 *Community Standards: Objectionable Content*, FACEBOOK, https://www.facebook.com/communitystandards/objectionable_content (last visited Oct. 6, 2019).

37 See, e.g., *United States v. Alvarez*, 567 U.S. 709, 717–18 (2012) (plurality opinion) (listing categories of constitutionally unprotected speech).

38 Zeynep Tufekci, *Facebook: The Privatization of Our Privates and Life in the Company Town*, TECHNOSOCIOLOGY (May 14, 2010), <http://technosociology.org/?p=131> [hereinafter Tufekci, *Facebook*].

39 See Zeynep Tufekci, *Google Buzz: The Corporatization of Social Commons*, TECHNOSOCIOLOGY (Feb. 17, 2010), <http://technosociology.org/?p=102> [hereinafter Tufekci, *Google Buzz*].

cadre of censors who operated completely free of the government.⁴⁰ This had a stultifying effect on American cinema for decades, but even then it was restricted to a single medium. Social media's reach in modern times is even more pervasive.

Objectors might claim that social media companies have their own free speech rights that would be curtailed if they could not control their own content. They would be right—if social media companies counted as publishers.⁴¹ But the social media giants of today do not hold themselves out as publishers. Facebook⁴² and YouTube⁴³ alike advertise themselves as places where the user, not the company, can produce and post content. This self-image comports nicely with the law, for since 1996 a federal statute defines online content hosts as not being publishers and immunizes them from any kind of civil liability.⁴⁴ If social media sites are not publishers in any other respects, there is no reason to treat them as such for freedom of speech purposes.

This Note argues that the social media companies fit into the historical exception to the state action doctrine established in *Marsh*, such that the largest social media companies, given their power, should be considered public forums despite their private ownership. Therefore, those companies, though private, could be subject to First and Fourteenth Amendment claims of violating the right of free speech. Part I of this Note surveys the history of the public forum element of the state action doctrine in free speech cases. Part II will look at the scope of the social media companies' role in speech and why it should thus be subject to free speech protections. Part III will consider some objections to this proposed extension of the law.

I. THE STATE ACTION DOCTRINE, PRIVATE ENTITIES, AND FREE SPEECH

Generally, the courts recognize that only government actors can infringe constitutional rights, a stance designated the "state action doctrine."⁴⁵ If the actor that allegedly violated a plaintiff's rights is not connected to the state, then the plaintiff's claims fail, regardless of the rights at issue or the nature of the alleged infringement.⁴⁶ In the area of free speech, the courts have recognized certain instances where claims of constitutional violations can be brought against private actors in spite of the state action doctrine. In such cases, the issue was less the speech itself than the purported right of access to a forum for the purpose of speaking. Different lines of cases have touched

40 See TIM WU, *THE MASTER SWITCH* 116–17 (2010).

41 See, e.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

42 *Terms of Service*, FACEBOOK, <https://www.facebook.com/terms.php> (last updated July 31, 2019).

43 *About YouTube*, *supra* note 12.

44 Communications Decency Act of 1996, Pub. L. No. 104-104, § 502, 110 Stat. 133, 138 (codified at 47 U.S.C. § 230 (2012)).

45 Fee, *supra* note 6, at 573.

46 *Id.* at 575.

on access to physical spaces and, more recently, the internet. These forums will be discussed in turn.

A. *Access to Privately Owned Public Places*

Private owners of public places can be held to constitutional guarantees of free speech in certain circumstances. The Supreme Court has upheld this principle, but it has limited its scope to instances where the private owner is acting like a government. This limitation is based on a respect for the private owner's right of free speech, with the decision to exclude certain speakers itself considered speech.

The first notable case on this issue was *Marsh*.⁴⁷ The town of Chickasaw, Alabama, was a "company town," owned and operated by Gulf Shipbuilding Corporation.⁴⁸ The town had residences, shops, and streets like any other town, and was fully accessible to the public.⁴⁹ It was policed by a county sheriff's deputy who, when patrolling the town, was paid by the company.⁵⁰ Thus there was "nothing to distinguish them from any other town and shopping center except the fact that the title to the property belong[ed] to a private corporation."⁵¹

A Jehovah's Witness, surnamed Marsh, sought to distribute religious literature on the sidewalks of the town's main business district.⁵² She was informed that she could only do so with a permit, that no permit would be forthcoming, and that she must leave the premises.⁵³ Upon her refusal, she was arrested by the deputy employed by the company.⁵⁴ She was subsequently convicted in state court for trespassing and appealed, arguing that the ban on her presence in the town violated her rights to freedom of the press and of religion, as protected by the First and Fourteenth Amendments.⁵⁵

Marsh ultimately appealed to the Supreme Court. There, Alabama argued that the conviction was valid, as the town was legally private property, and so under the full control of its owner; the Alabama court had rejected any contention that constitutional protections applied in the case.⁵⁶ The Court disagreed, finding that the private ownership of the property was not the end of the matter. Writing for the Court,⁵⁷ Justice Black declared, "Own-

47 326 U.S. 501 (1946).

48 *Id.* at 502, 504.

49 *Id.* at 502–03.

50 *Id.* at 502.

51 *Id.* at 503.

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.* at 503–04.

56 *Id.* at 504–06.

57 Justice Jackson did not take part in the consideration of the case; of the other eight Justices, three dissented from Justice Black's opinion. Justice Frankfurter wrote a separate

ership does not always mean absolute dominion.”⁵⁸ He justified this by saying, “The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”⁵⁹ For example, the private owners of roads and bridges could not block access to certain individuals, as the properties in question serve a public function.⁶⁰ Just as the state permitted some private entities to operate roads and bridges, so had Alabama allowed a private company to operate an entire town.⁶¹ Citizens of company towns had no less constitutional protection than did citizens of other towns.⁶² Under those circumstances, individuals are protected in their freedom of speech and religion, even against private entities.⁶³ Justice Black concluded, “When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.”⁶⁴

It is important to note that the private entity’s infringement of another private individual’s rights ultimately rested on intervention by the state. Marsh was arrested by a deputy sheriff who was paid by the private company but was nonetheless an agent of the government. Her punishment for trying to hand out religious literature in the town was not just forced removal from the premises, but a criminal conviction in the courts of Alabama. Indeed, it was Alabama, not the company, that was the respondent in the case. The private party seeking to restrict another private party’s access to a public forum was ultimately dependent on state action. One private actor’s restrictions against another were meaningless without enforcement by the state. In other cases, the Supreme Court held that private action could violate constitutional rights precisely because of the necessary involvement of the state.⁶⁵

The next time the issue of access to a privately owned public place came before the Court, the connection to state action was even more tenuous, and yet the Court found a constitutional violation. A union protest was held in the parking lot outside a supermarket located in the Logan Valley Mall in

concurring opinion. *See id.* at 510–11 (Frankfurter, J., concurring); *id.* at 512–17 (Warren, C.J., Reed and Burton, JJ., dissenting).

58 *Id.* at 506.

59 *Id.*

60 *Id.*

61 *Id.* at 507.

62 *Id.*

63 *Id.* at 508.

64 *Id.* at 509.

65 *See, e.g.,* *Shelley v. Kraemer*, 334 U.S. 1, 8, 20 (1948) (finding private agreements to restrict housing to certain racial groups unconstitutional); *see also* Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. Rev. 503, 524 (1985) (arguing that all private deprivations of rights involve state action).

Pennsylvania.⁶⁶ The owners of both the mall and supermarket sought an injunction against the picketers, arguing they were trespassing.⁶⁷ The Supreme Court of Pennsylvania upheld the injunction solely on the grounds that the mall was private property, and thus the picketers were trespassing.⁶⁸

The U.S. Supreme Court reversed, finding that the freedom of speech of the picketers had been violated. Writing for the majority, Justice Marshall found the similarities with *Marsh* to be “striking.”⁶⁹ As in *Marsh*, the Logan Valley Mall had the attributes of a “business district”: it included several businesses and was freely accessible to the public.⁷⁰ The key difference with *Marsh* was that the owners of the mall in *Amalgamated Food Employees Union Local 590 v. Logan Valley* did not offer any municipal services.⁷¹ However, Marshall noted that the holding in *Marsh* discussed constitutionally protected activity in a commercial area. In that regard, there was no difference between *Marsh* and *Logan Valley*, as both cases involved expressive activity in a commercial area that was privately owned but publicly accessible. Given this, “the State may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises,” provided that the exercise was “generally consonant with the use to which the property is actually put.”⁷² The picketers were protesting the way in which that store was being operated, so their protest was “consonant” with its use; Marshall declined to opine on whether a protest unrelated to activity in the store would be protected.⁷³ Requiring the picketers to remain on the public roads outside the shopping mall would “substantially hinder the communication of the ideas which petitioners seek to express to the patrons of [the supermarket].”⁷⁴ Marshall concluded by quoting Justice Black in *Marsh*, declaring once again that ownership was not “absolute dominion.”⁷⁵

For his part, Justice Black dissented from the majority in *Logan Valley*, stating bluntly that his opinion in *Marsh* was “never intended to apply to this kind of situation.”⁷⁶ Black’s dissent noted that the premises involved in *Marsh* were an entire town, not merely a single store therein.⁷⁷ Moreover, the picketers in *Logan Valley* had conducted their protest in the loading area of the supermarket, a much more limited—and much more private—space

66 *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 310–11 (1968). Interestingly, none of the picketers were actually employees of the supermarket. *Id.* at 311.

67 *Id.* at 312.

68 *Id.* at 313.

69 *Id.* at 317.

70 *Id.* at 318.

71 *Id.*

72 *Id.* at 319–20.

73 *Id.* at 320 n.9.

74 *Id.* at 323.

75 *Id.* at 325.

76 *Id.* at 330 (Black, J., dissenting).

77 *Id.* at 330–31.

than the one in *Marsh*.⁷⁸ Black insisted that the correct reading of *Marsh* was to treat private property as if it were public only if the private property had “all the attributes of a town,” including “residential buildings, streets, a system of sewers, a sewage disposal plant and a ‘business block’ on which business places are situated.”⁷⁹ In subsequent cases, Black’s more limited view would become the doctrine of the Court.

Just four years later, the Court faced a situation almost identical to that of *Logan Valley* but came to the opposite conclusion. In *Lloyd Corp.*, a mall sought an injunction against individuals who had been distributing handbills in protest of the Vietnam War in the public areas of the mall.⁸⁰ The lower courts had found the mall to be a public forum akin to those in *Marsh* and *Logan Valley* and found the injunction violated the protestors’ First Amendment freedoms.⁸¹ However, the distribution of antiwar handbills was totally unrelated to the normal use of the mall, presenting a question different from that in *Logan Valley*.⁸² Additionally, the mall in *Logan Valley* was in an isolated area and so “no other reasonable opportunities for the pickets to convey their message to their intended audience were available.”⁸³ Given that publicly owned sidewalks were just outside the mall, the protestors had an alternative forum in which to express their message.⁸⁴ Nor was the Court faced with a company town as in *Marsh*.⁸⁵ The majority pronounced that the “Court [had] never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only.”⁸⁶ As such, the mall’s desired injunction against the handbill distribution did not violate the First Amendment rights of the distributors.⁸⁷

Mirroring Justice Black, Justice Marshall—the author of the majority in *Logan Valley*—dissented in *Lloyd Corp.* He found the mall in question to be much like a business district as described in *Marsh* and *Logan Valley*, given that it was viewed as such by the local municipality.⁸⁸ The shopping center in *Lloyd Corp.* had often allowed nontenants and nonshoppers to host events and marches on its premises, meaning it had clearly been held out as a public forum.⁸⁹ As public entities increasingly outsourced more areas and services to private ownership, the clashes with the First Amendment would continue,

78 *Id.* at 328, 331.

79 *Id.* at 332 (quoting *Marsh v. Alabama*, 326 U.S. 501, 502 (1946)).

80 *Lloyd Corp. v. Tanner*, 407 U.S. 551, 556 (1972).

81 *Id.* at 556–57.

82 *Id.* at 560.

83 *Id.* at 563.

84 *Id.* at 566–67.

85 *Id.* at 563.

86 *Id.* at 568.

87 *Id.* at 570.

88 *Id.* at 576 (Marshall, J., dissenting).

89 *Id.* at 578–79.

and if mere private ownership meant the First Amendment could not apply, then “free speech [would become] a mere shibboleth.”⁹⁰

While *Lloyd Corp.* did not explicitly overrule *Logan Valley*, the end came two years later in *Hudgens*.⁹¹ The National Labor Relations Board (NLRB), relying on *Logan Valley*, had sanctioned a mall owner for restricting employees of a store in the mall from holding a strike march on the premises.⁹² The NLRB concluded that such a restriction was a clear violation of the strikers’ free speech rights.⁹³ The Court invoked Black’s dissent in *Logan Valley* for a narrower understanding of *Marsh*’s application of the First Amendment to a private actor.⁹⁴ The majority pointed to cases involving the regulation of speech by local governments, all of which noted that the First Amendment protected against government action.⁹⁵ Ultimately, the Court held that, except in the unique instance of a company town as found in *Marsh*, “the constitutional guarantee of free expression has no part to play in a case [involving private action].”⁹⁶

When the Court did uphold a free speech challenge to a private restriction in the wake of *Hudgens*, it did so only because a state constitutional provision provided the rationale. In *PruneYard*, several high school students who were taking signatures for a petition on the grounds of a public shopping center were forced to leave by a security guard, citing the center’s policy against expressive activity not related to mall business.⁹⁷ The students filed suit against the center, arguing that their free speech rights under the California Constitution were being violated.⁹⁸ The California Supreme Court agreed on the grounds that the California Constitution recognized a right of free speech generally, which was enforceable even against a private entity.⁹⁹ The shopping center pointed to the Court’s holding in *Lloyd Corp.* and asserted that no free speech claims could be brought against them as a private entity.¹⁰⁰ The U.S. Supreme Court disagreed with the center and upheld the decision of the California court. Writing for the majority, Justice Rehnquist stated, “Our reasoning in *Lloyd*, however, does not *ex proprio vigore* limit the authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive

90 *Id.* at 586.

91 424 U.S. 507, 518 (1976).

92 *Id.* at 508–10.

93 *Id.* at 510.

94 *See id.* at 518–20.

95 *Id.* at 520.

96 *Id.* at 521.

97 *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 77 (1980).

98 *See id.* at 76–78.

99 *Id.* at 78. The relevant part of the California Constitution reads as follows: “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.” CAL. CONST. art. I, § 2(a).

100 *See PruneYard Shopping Ctr.*, 447 U.S. at 80.

than those conferred by the Federal Constitution.”¹⁰¹ Thus, California could allow its citizens rights to expressive activity on certain privately owned premises, subject only to the federal Constitution’s limits on the taking of private property without just compensation.¹⁰² There was nothing in the case to suggest that allowing the students to collect signatures at the shopping center would have interfered with its normal business.¹⁰³ PruneYard Shopping Center could only make such “time, place, and manner regulations that [would be necessary to] minimize any interference with its commercial functions.”¹⁰⁴

Justice Marshall concurred and in his opinion recalled his earlier opinion in *Logan Valley*.¹⁰⁵ To Justice Marshall, open-air shopping centers like in that case and in *PruneYard* were open to the public in a general manner akin to streets and parks.¹⁰⁶ As such, the owners’ property rights were not infringed upon, and the free speech interests of the students rightly won out.¹⁰⁷ Like Justice Marshall, all the other Justices concurred in the judgment, but other concurrences were not as full of praise for the majority.¹⁰⁸ Justice Powell concurred on the understanding that the decision was limited only to shopping centers of the open-air design, fully accessible to the public, such as the one in question.¹⁰⁹ He was concerned that construing the decision more broadly might result in private property owners being forced by the state to accommodate views with which they disagreed.¹¹⁰

Such concerns reflected the very limited concept of the public function exception to the state action doctrine in place since *Hudgens*, which remains the law to this day. This particular line of cases all related to the right of access to physical spaces for free speech purposes. In each case, the property rights of the private owners were at stake, but so were the rights of the owners to control expression that might be imputed to them by virtue of it occurring on their property.

B. Right of Access on the Internet

The recency of the internet has given the courts little opportunity to address the freedom of speech with regards to the internet, with only two cases reaching the Supreme Court in the past two decades.¹¹¹ Given the nature of the internet, and social media in particular, the extension of the

101 *Id.* at 81 (citing *Cooper v. California*, 386 U.S. 58, 62 (1967)).

102 *Id.*

103 *Id.* at 83.

104 *Id.*

105 *Id.* at 89 (Marshall, J., concurring).

106 *Id.* at 89–90.

107 *See id.* at 89–95.

108 Justice Blackmun most curiously dissented from only a single sentence in Justice Rehnquist’s majority opinion. *Id.* at 88–89 (Blackmun, J., concurring in part).

109 *Id.* at 96 (Powell, J., concurring).

110 *Id.* at 98–100.

111 *The Supreme Court, 2016 Term—Leading Cases*, 131 HARV. L. REV. 233, 233 (2017).

public forum to allow free speech suits against privately owned entities may yet be possible.

In *Packingham*, the Court held that laws restricting access to online social media were an infringement of the First Amendment right to free expression.¹¹² At issue was a North Carolina law that barred registered sex offenders from using social networking sites if those networks were also available to minor children.¹¹³ One such registered sex offender was arrested for logging onto Facebook simply to thank God that his traffic ticket was dismissed.¹¹⁴ On appeal from conviction in the North Carolina state courts, the Supreme Court reversed.¹¹⁵ Justice Kennedy, writing for the majority, described the ability of “persons [to] have access to places where they can speak and listen” as a “fundamental principle of the First Amendment.”¹¹⁶ He described “cyberspace” as the most important forum for the exchange of ideas, referring to “the ‘vast democratic forums of the Internet’ in general, and social media in particular.”¹¹⁷ Justice Kennedy warned that “[t]he nature of a revolution in thought can be that, in its early stages, even its participants may be unaware of it.”¹¹⁸ The transformations brought to society by the internet amounted to a revolution, and Justice Kennedy warned that the Court should “exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.”¹¹⁹ The Court consequently held that a law denying access to social media prevented the defendant from freely exercising his First Amendment rights and so was unconstitutional.¹²⁰ The reversal nonetheless rested on the fact that at issue was a state law, not the actions of a private entity.¹²¹

In wake of the holding in *Packingham* (or, more exactly, Justice Kennedy’s rhetoric), lower courts have had a mixed approach to treating social media as a public forum graced with First Amendment protection. In the most celebrated case, the Twitter profile of the President of the United States was deemed a public forum and thus subject to First Amendment protection.¹²² Several Twitter users tweeted messages critical of President Donald Trump to his official Twitter profile, @realDonaldTrump; the President blocked them soon after, such that neither party could view the other’s tweets.¹²³ The Knight First Amendment Institute and the blocked accounts

112 *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

113 *Id.* at 1733.

114 *Id.* at 1734.

115 *Id.* at 1734–35.

116 *Id.* at 1735.

117 *Id.* (citation omitted) (quoting *Reno v. ACLU*, 521 U. S. 844, 868 (1997)).

118 *Id.* at 1736.

119 *Id.*

120 *Id.* at 1738.

121 *Id.*

122 Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 549 (S.D.N.Y. 2018).

123 *Id.* at 553.

sued the President and his press secretary.¹²⁴ The district court held that the President’s Twitter account, because it offered a space where the general public could interact with a public official, constituted a public forum.¹²⁵ Therefore, “[t]he viewpoint-based exclusion of the individual plaintiffs from that designated public forum [was] proscribed by the First Amendment and [could not] be justified by the President’s personal First Amendment interests.”¹²⁶ The court noted Justice Kennedy’s dicta describing the internet as a “vast democratic forum,” but due to the lack of other historical precedents it did not find *Packingham* dispositive by itself.¹²⁷

Suits against private entities in the lower courts have yet to be fully resolved, and these have gone both for and against the idea of social media as a modern public forum. One of the latter such cases involved a YouTube user’s suit against Google, YouTube’s parent company, dismissed for failure to state a colorable claim of state action.¹²⁸ Prager University, a conservative-leaning YouTube channel, claimed that YouTube was unjustly censoring its videos, primarily by placing age restrictions on them—thus limiting their visibility in searches on the site—and by demonetizing them by stripping the videos of the ability to generate ad revenue.¹²⁹ Prager University alleged that this was due to YouTube’s liberal bias, and thus it was engaging in impermissible viewpoint discrimination.¹³⁰ Recognizing that YouTube was a private entity, Prager cited *Packingham* as a basis for judging the social media site to be a public forum¹³¹ and thus subject to suit under the doctrine originating in *Marsh*.¹³² The court found this argument unconvincing, noting that *Packingham* involved a law and thus clearly involved state action.¹³³ As for *Marsh*, the court looked at the line of cases stretching to *Hudgens* and held that *Marsh*’s doctrine was applicable only to a physical space, namely a company-owned town.¹³⁴ YouTube simply did not engage “in one of the ‘very few’ public functions that were traditionally ‘exclusively reserved to the State.’”¹³⁵

One of the more recent cases to cite *Packingham* has, in fact, been allowed to proceed on the merits.¹³⁶ In *Sandvig v. Sessions*, the plaintiffs are four professors seeking to analyze data from real estate websites to gauge the

124 *Id.* at 553–55.

125 *Id.* at 574–75.

126 *Id.* at 580.

127 *Id.* at 574.

128 *Prager Univ. v. Google LLC*, No. 17-CV-06064, 2018 WL 1471939, at *8 (N.D. Cal. Mar. 26, 2018). The suit also involved claims of false advertising under the Lanham Act, which were also dismissed by the court. *Id.* at *9. Those claims are beyond the scope of this Note.

129 *Id.* at *1–2.

130 *Id.*

131 *Id.* at *8.

132 *Id.* at *6.

133 *Id.* at *8.

134 *Id.* at *6–8.

135 *Id.* at *8 (quoting *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978)).

136 *See Sandvig v. Sessions*, 315 F. Supp. 3d 1, 8 (D.D.C. 2018).

potential effects of racial discrimination.¹³⁷ For some websites, such data mining is a violation of their terms of service as a kind of unauthorized access¹³⁸ and would subject the researchers to criminal liability under federal law.¹³⁹ The plaintiffs sued, arguing the law criminalizing the unauthorized access was a violation of their First Amendment rights to engage in expressive conduct, namely research.¹⁴⁰ Normally, there would be no right of free speech allowing access to another's private property, even a website.¹⁴¹ The court posed the question, "Why, then, would it violate the First Amendment to arrest those who engage in expressive activity on a privately owned website against the owner's wishes? The answer is that, quite simply, the Internet is different."¹⁴² Citing to *Packingham*, the court deemed the internet to be a public forum, subject to First Amendment protections.¹⁴³ The terms of service imposed by privately owned websites were not dispositive, as "simply placing contractual conditions on accounts that anyone can create, as social media and many other sites do, does not remove a website from the First Amendment protections of the public Internet."¹⁴⁴ Thus, the court permitted the plaintiff's First Amendment claims to proceed,¹⁴⁵ though it should be noted that despite the court's reasoning, the defendant was a state actor—namely, the then-sitting Attorney General of the United States.¹⁴⁶

The Court recently took up the question of access in a similar situation: public access cable channels.¹⁴⁷ The case did not involve nor even mention the internet, but it reaffirmed a strict adherence to the state action doctrine. There, filmmakers claimed it was a First Amendment violation when Manhattan Neighborhood Network (MNN) refused to air their content.¹⁴⁸ MNN is a private entity, but New York City designated it as the local public access television network to enable those outside the mainstream media to produce and air content.¹⁴⁹ Despite its status being government given, the Court ruled that MNN was not a state actor.¹⁵⁰ Justice Kavanaugh put it bluntly: "The Free Speech Clause does not prohibit *private* abridgment of speech."¹⁵¹ Exceptions to the state action doctrine apply only when a private actor

137 *Id.* at 8–9.

138 *See id.* at 8.

139 *Id.* at 8–10.

140 *Id.* at 10.

141 *See id.* at 11 (first citing *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976); and then citing *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567–68 (1972)).

142 *Id.*

143 *Id.* at 12–13.

144 *Id.* at 13.

145 *Id.* at 34.

146 *Id.* at 10.

147 *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019).

148 *Id.* at 1927.

149 *Id.*

150 *Id.* at 1926.

151 *Id.* at 1928.

engages in activities historically reserved to the government, and the “operation of public access channels on a cable system is not a traditional, exclusive public function.”¹⁵² The Court noted such functions include “running elections and operating a company town.”¹⁵³ As will be discussed later in this Note, online social media has gained a role in the conduct of elections. Moreover, MNN claims that, at most, it reaches “hundreds of thousands” of people.¹⁵⁴ Online social media, this Note shall show, is much, much larger.

It remains to be seen exactly how the courts will treat free speech issues on the internet in the wake of *Packingham*. It is possible for a private entity to be subject to First Amendment challenges if it serves a public function akin to a state actor, a doctrine that dates to *Marsh*. But *Marsh* applied the doctrine in the unique situation of a company-owned town, a very specific kind of physical space. Social media’s control, meanwhile, is best reflected by viewing social media as a digital town.

II. SOCIAL MEDIA: THE PUBLIC FORUM OF TODAY

This Part will look at the role social media plays as the modern public forum. It will begin by looking at the size and reach of the largest social media platforms, with a particular focus on Twitter, Facebook, and YouTube. These platforms are among the most visited websites and are increasingly not only a primary source of news, but a primary battlefield for elections. With their immense size comes a system of content and disclosure regulations that mimics the regulatory power of a state while being entirely controlled by the social media entities themselves. These enforcement activities have already had a censorial effect that would be impermissible in government hands.

A. *The Size and Power of Social Media*

Twitter, Facebook, and YouTube—all American companies—dominate online content sharing.¹⁵⁵ YouTube was the second most visited website in the United States in 2018, after Google, with Facebook coming in third.¹⁵⁶ Twitter was the eighth most visited site.¹⁵⁷ Interestingly, the first and second

152 *Id.* at 1926.

153 *Id.* at 1929 (first citing *Terry v. Adams*, 345 U.S. 461, 468–70 (1953) (plurality opinion); then citing *Marsh v. Alabama*, 326 U.S. 501, 505–09 (1946); then citing *Smith v. Allwright*, 321 U.S. 649, 662–66 (1944); and then citing *Nixon v. Condon*, 286 U.S. 73, 84–89 (1932)).

154 MANHATTAN NEIGHBORHOOD NETWORK, ANNUAL REPORT 2016: REDEFINING COMMUNITY MEDIA (2016), https://www.mnn.org/sites/default/files/mnn_ar_122917.pdf.

155 Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1603 (2018). Facebook is the clear leader; in 2016, 90% of the one million most shared articles were shared on Facebook, with Twitter coming in a distant second at around 6%. *Facebook Grows as Dominant Content Sharing Destination*, MARKETING CHARTS (Aug. 24, 2016), <https://www.marketingcharts.com/digital-70111>.

156 *Top Sites in United States*, ALEXA, <https://www.alexa.com/topsites/countries/US> (last visited Oct. 27, 2018).

157 *Id.*

most visited sites, Google and YouTube, are owned by the same parent company, Alphabet.¹⁵⁸ The high traffic reflects the sheer mass of people who use the most popular social media sites. Facebook alone has 2.234 billion users globally, followed by YouTube at 1.9 billion.¹⁵⁹ Twitter has 335 million users.¹⁶⁰ By way of comparison, the world's most populous country, China, has 1.4 billion people, and the United States is home to around 327 million.¹⁶¹ Thus, the two most visited and most used social media sites, Facebook and YouTube, are individually home to more people than the largest nation in the world.

Within the United States, 60% of the population uses social media at least once a month, and in turn Facebook alone is used by 60% of all internet users, or 169.5 million people.¹⁶² YouTube represents a similar share of the population, with 58% of Americans using that site.¹⁶³ Americans' use of social media goes beyond conversing with friends. The Pew Research Center found that in 2017, 43% of Americans frequently got their news online, closing in on the 50% who primarily relied on television.¹⁶⁴ More importantly, fully two-thirds of Americans reported getting at least some of their news from social media.¹⁶⁵ Facebook was once again the clear leader, with some 45% of Americans getting news on that site.¹⁶⁶ These users often overlap, with 26% of Americans getting news from more than one social media site.¹⁶⁷

Social media sites do not passively observe the activities of their millions of users. Social media users' activities can be tracked by the websites and the collected data can be used for microtargeting, wherein the sites build up a psychological profile of the user and target advertisements tailored to the user's personality.¹⁶⁸ Facebook's user interface lends itself to this kind of data collection and analysis, as users can indicate their preferences for certain topics—from fashion to politics—through “likes.”¹⁶⁹ By compiling these likes, data analysts can make predictions about a user's demographic information, including political affiliation.¹⁷⁰ People's deepest attributes can be

158 Alejandro Alba, *A List—from A to Z—of All the Companies, Brands Google's Alphabet Currently Owns*, N.Y. DAILY NEWS (Aug. 11, 2015), <https://www.nydailynews.com/news/world/z-list-brands-companies-google-alphabet-owns-article-1.2321981>.

159 *Most Popular Social Networks*, *supra* note 10.

160 *Id.*

161 *2019 World Population*, *supra* note 11.

162 Ferguson, *supra* note 26.

163 Shearer & Gottfried, *supra* note 27.

164 Gottfried & Shearer, *supra* note 28.

165 Shearer & Gottfried, *supra* note 27.

166 *Id.*

167 *Id.*

168 Semple, *supra* note 30.

169 Michal Kosinski et al., *Private Traits and Attributes Are Predictable from Digital Records of Human Behavior*, 110 PROC. NAT'L ACAD. SCI. 5802, 5802 (2013).

170 *Id.* at 5804.

“automatically and accurately” gleaned from their Facebook likes, and that is before analyzing things such as their online purchases or search histories.¹⁷¹

Targeted advertising based on social media analysis has great political ramifications that have already changed elections in the United States. Microtargeting was first used on a wide scale for political advertising in the United States during the 2012 presidential elections.¹⁷² Government action had made the data crunching easier: in the wake of the controversies over the 2000 presidential election, voter registration information was digitized.¹⁷³ Analysts hired by the presidential campaigns used the digitized voter rolls to match social media users with potential voters and targeted ads accordingly.¹⁷⁴ The Obama campaign looked up those who were voting early in the election and used their social media profiles to gauge which candidate they were likely to have voted for, hoping to identify areas where Obama was likely trailing his challenger.¹⁷⁵ The campaign then used that information to target get-out-the-vote ads at likely Democratic voters in those areas; President Obama went on to win reelection.¹⁷⁶

The political use of social media reached new levels of notoriety in the 2016 presidential election. Facebook in particular came under scrutiny for the role it played in the final outcome: the election of Donald Trump.¹⁷⁷ During that election, Facebook offered to embed its operatives in each of the opposing campaigns to assist them in crafting their Facebook outreach.¹⁷⁸ While Hillary Clinton’s campaign declined, President Trump’s campaign accepted.¹⁷⁹ The Trump campaign also worked with embedded operatives from Google and Twitter, as well as the private firm Cambridge Analytica, all under the direction of Brad Parscale.¹⁸⁰ Parscale took charge of data analysis, using it to frame microtargeting campaigns in crucial swing states like

171 *Id.* at 5805.

172 Brennan, *supra* note 31.

173 *Id.*

174 *Id.*

175 Sasha Issenberg, *How Obama’s Team Used Big Data to Rally Voters*, MIT TECH. REV. (Dec. 19, 2012), <https://www.technologyreview.com/s/509026/how-obamas-team-used-big-data-to-rally-voters/>.

176 *Id.*

177 See Eve Smith, *The Techlash Against Amazon, Facebook and Google—and What They Can Do*, ECONOMIST (Jan. 20, 2018), <https://www.economist.com/briefing/2018/01/20/the-techlash-against-amazon-facebook-and-google-and-what-they-can-do?fsrc=scn/fb/te/bl/ed/thetechlashagainstamazonfacebookandgoogleandwhattheycandoamemotobigtech>.

178 See Evan Osnos, *Can Mark Zuckerberg Fix Facebook Before It Breaks Democracy?*, NEW YORKER (Sept. 10, 2018), <https://www.newyorker.com/magazine/2018/09/17/can-mark-zuckerberg-fix-facebook-before-it-breaks-democracy>.

179 *Id.*

180 Nolan D. McCaskill & Darren Samuelsohn, *Trump Campaign’s Digital Director Agrees to Meet with House Intel Committee*, POLITICO (July 14, 2017), <https://www.politico.com/story/2017/07/14/brad-parscale-trump-digital-house-intel-committee-240557>.

Michigan and Wisconsin.¹⁸¹ The Trump campaign also used social media as a major source of campaign money; the campaign netted \$280 million from fundraising on Facebook alone.¹⁸² Though both campaigns used microtargeting on social media, the Trump campaign was far more aggressive—and ultimately effective—than the Clinton campaign.¹⁸³ Indeed, the Trump campaign spent 47% of its advertising budget on digital media, while the Clinton campaign spent just 8%.¹⁸⁴ Trump focused on men and conservatives—his putative base,¹⁸⁵ and a strategy that contributed to his election. A subsequent study found that Trump’s microtargeting of Republicans with Facebook ads increased their likelihood to vote by 5%–10%.¹⁸⁶ Facebook ads also had the effect of turning undecided voters toward the Trump camp.¹⁸⁷ Theresa Hong, another digital content worker for the Trump campaign, stated bluntly that “[w]ithout Facebook we wouldn’t have won.”¹⁸⁸

Facebook itself had tested its ability to influence voting in a prior election. During the 2010 midterm elections, Facebook targeted sixty million of its users with messages encouraging the site’s visitors to go out and vote, though it did not advocate for any particular candidate or party.¹⁸⁹ Those who viewed the message could click a button to announce they had voted and see up to six friends who had done the same.¹⁹⁰ Facebook analyzed its users’ data and found that the messages encouraged some 60,000 people to vote who otherwise would not have, and they in turn encouraged a total of 340,000 additional voters.¹⁹¹ For Jonathan Zittrain, a professor at Harvard Law School, the success of Facebook’s experiment raised the specter of “digital gerrymandering,” which he defined as “the selective presentation of information by an intermediary to meet its agenda rather than to serve its users.”¹⁹² Should Facebook target such a get-out-the-vote campaign at users of a certain political stance, and exclude those identifying with the opposite camp, a single private company could potentially swing an election.¹⁹³ Facebook’s intentions aside, its power to influence voters is readily apparent.¹⁹⁴

181 *Parscale: TV News “Thought I Was a Joke,” supra* note 32. Oddly enough, according to Parscale, Donald Trump himself was skeptical of the value of digital advertising, preferring to focus on television commercials. His doubts were dispelled only after his victory. *Id.*

182 Osnos, *supra* note 178.

183 Liberini et al., *supra* note 8, at 2.

184 *Id.* at 1–2.

185 *Id.* at 27.

186 *Id.* at 5.

187 *Id.*

188 Osnos, *supra* note 178.

189 Jonathan Zittrain, *Engineering an Election*, 127 HARV. L. REV. F. 335, 336 (2014).

190 *Id.*

191 *Id.* at 336

192 *Id.*

193 *See id.*

194 Facebook did introduce new procedures after the 2016 elections to deter the spread of “fake news” and misleading information, which some argue heavily reduced Facebook’s

It is no surprise that the largest social media sites are the focus of such intense political activity. The utility of social networks depends on their size, as a network with a small number of users has less value than a larger one.¹⁹⁵ There is simply more information to be gleaned from a larger network of people, a benefit to users and advertisers alike.¹⁹⁶ Social media sites with “few users are worthless except for niche purposes.”¹⁹⁷ Such niche purposes often have negative effects. Gab is a nascent social networking site specifically founded to promote free speech and challenge the dominance of the larger social media sites.¹⁹⁸ Compared to the billions on Facebook, Gab is microscopic: in 2018, it reported having only 394,000 users.¹⁹⁹ Given its few restrictions on the nature of content, it has attracted a large number of so-called “alt-right” users, including violent racists and white supremacists banned from the larger sites for their hateful comments.²⁰⁰ This is hardly an enticing alternative to Facebook, and is but one example of how high the barriers are to breaking Facebook’s dominance in social media use.²⁰¹

B. Social Media’s Control Over Content

Moreover, the control that the leading social media sites exert on the content their users publish is increasingly reminiscent of that a state entity would exercise. As Mark Zuckerberg, the founder of Facebook, himself said, “In a lot of ways Facebook is more like a government than a traditional company. We have this large community of people, and more than other technology companies we’re really setting policies.”²⁰²

Facebook stands out among social media sites because of its sheer size. Its regulations on content thus affect an immense group of people. Facebook requires its users to abide by its terms of service.²⁰³ These

influence in the 2018 elections. See Alexis C. Madrigal, *The Facebook Election That Wasn’t*, ATLANTIC (Nov. 6, 2018), <https://www.theatlantic.com/technology/archive/2018/11/the-facebook-election-that-wasnt/574996/>.

195 Spencer Weber Waller, *Antitrust and Social Networking*, 90 N.C. L. REV. 1771, 1787 (2012).

196 *Id.* at 1788.

197 Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1371 (2018).

198 Alina Selyukh, *Feeling Sidelined by Mainstream Social Media, Far-Right Users Jump to Gab*, NPR (May 21, 2017), <https://www.npr.org/sections/alltechconsidered/2017/05/21/529005840/feeling-sidelined-by-mainstream-social-media-far-right-users-jump-to-gab>.

199 GAB AI INC., ANNUAL REPORT 1 (2018).

200 See Emma Grey Ellis, *Gab, the Alt-Right’s Very Own Twitter, Is the Ultimate Filter Bubble*, WIRED (Sept. 14, 2016), <https://www.wired.com/2016/09/gab-alt-rights-twitter-ultimate-filter-bubble/>.

201 See Langvardt, *supra* note 197, at 1384.

202 DAVID KIRKPATRICK, *THE FACEBOOK EFFECT* 254 (2010). Zuckerberg made that statement about his conversations with the chief operating officer of Facebook, Sheryl Sandberg, intrigued by her former work in government.

203 *Terms of Service*, *supra* note 42.

expressly state that users must adhere to Facebook’s community standards.²⁰⁴ These standards describe Facebook as a place for people “to share their experiences, connect with friends and family, and build communities.”²⁰⁵ The standards serve to keep “abuse off our service,” and they apply “around the world, and to all types of content.”²⁰⁶ These standards are meant to be as comprehensive and far reaching as possible; Facebook states that even “content that might not be considered hateful may still be removed for violating a different policy.”²⁰⁷ Those who violate Facebook’s standards face varying levels of consequences based on the nature of the infraction.²⁰⁸ First-time violators may get off with only a warning, but serial violators may see their ability to post content restricted or have their profiles disabled entirely.²⁰⁹ The standards explicitly ban the use of hate speech, which are defined as an attack on people based on certain “protected characteristics—race, ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity, and serious disease or disability.”²¹⁰ An “attack” is defined as “violent or dehumanizing speech, statements of inferiority, or calls for exclusion or segregation.”²¹¹ Such regulations are among the reasons many extremists have moved to other sites such as Gab, where the echo-chamber effect may actually radicalize such persons further.²¹² The community standards and terms of service show that, even while serving as a public forum, Facebook intends to maintain limits on what content is permissible on its site.

Facebook’s mechanism for enforcing its standards ultimately relies on a mix of digital and human means. Given the sheer size of Facebook’s user base, it necessarily relies on automatic digital processes to proactively flag content.²¹³ Nonetheless, millions of reports must still be reviewed by human moderators, trained by Facebook in its standards.²¹⁴ Facebook employs at least forty-five hundred content moderators, who work out of undisclosed locations around the world.²¹⁵ The job can be incredibly stressful, and the nature of the content has at times left some moderators traumatized.²¹⁶

204 *Id.*

205 *Community Standards: Introduction*, FACEBOOK, <https://www.facebook.com/communitystandards/introduction> (last visited Oct. 19, 2019).

206 *Id.*

207 *Id.*

208 *Id.*

209 *Id.*

210 *Community Standards: Objectionable Content*, *supra* note 36.

211 *Id.*

212 See Ali Breland, *Twitter Crackdown Sparks Free Speech Concerns*, HILL (Nov. 17, 2017), <https://thehill.com/policy/technology/360806-twitter-crackdown-sparks-free-speech-concerns> (“[I]f you drive them underground . . . they’re going to radicalize further . . .” (first omission in original)).

213 Nick Hopkins, *Facebook Moderators: A Quick Guide to Their Job and Its Challenges*, GUARDIAN (May 21, 2017), <https://www.theguardian.com/news/2017/may/21/facebook-moderators-quick-guide-job-challenges>.

214 *Id.*

215 *Id.*

216 *Id.*

Facebook’s moderators find themselves trying to balance the ability of Facebook’s users to express themselves with Facebook’s goal of blocking harmful content as defined in its community standards.²¹⁷ As Carl Miller, a social media researcher at the thinktank Demos, put it: “Private companies are doing what we’ve only really expected constituted officials of sovereign power to do.”²¹⁸

In fact, this regulation of content stands in contrast to what American jurisprudence permits of government actors. When American courts review restrictions on speech, they subject those that focus on the content of that speech to strict scrutiny.²¹⁹ Indeed, in the eyes of the Supreme Court, “[t]he Constitution ‘demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality.’”²²⁰ There are some kinds of speech that can be restricted based on content, but these are limited to a small number of “historic and traditional categories” of speech, including incitement, obscenity, defamation, speech integral to criminal conduct, fighting words, child pornography, fraud, true threats, and “speech presenting some grave and imminent threat the government has the power to prevent.”²²¹ Facebook, in contrast, follows a much stricter standard for what it considers “hate speech,” as described above. For the nearly two-thirds of Americans who use Facebook, their online speech is subject to stricter restrictions based on content than is their everyday speech, based on free speech jurisprudence.

Most interestingly, Facebook has introduced rules governing the disclosure of political ads on its site that closely parallel those in place in American election law. Facebook faced heavy criticism for allowing political ads on its site that were paid for by Russian agents intending to influence the 2016 election.²²² Facebook adopted a policy on political ads that subjected such ads to special requirements, stating, “[a]dvertisers can run ads about social issues, elections or politics, provided the advertiser complies with all applicable laws and the authorization process required by Facebook.”²²³ The policy applies to any ads paid for by a political candidate, promoting voting, relating to “any social issue in any place where the ad is being run,” or subject to

217 See Olivia Solon, *To Censor or Sanction Extreme Content? Either Way, Facebook Can’t Win*, *GUARDIAN* (May 23, 2017), <https://www.theguardian.com/news/2017/may/22/facebook-moderator-guidelines-extreme-content-analysis>.

218 *Id.*

219 *United States v. Alvarez*, 617 F.3d 1198, 1202 (9th Cir. 2010), *aff’d*, 567 U.S. 709 (2012).

220 *Alvarez*, 567 U.S. at 716–17 (plurality opinion) (omission in original) (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004)).

221 *Id.* at 717 (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)).

222 Nancy Scola, *Facebook Rolls Out Political Ad Disclosures*, *POLITICO* (May 24, 2018), <https://www.politico.com/story/2018/05/24/facebook-rolls-out-political-ad-disclosures-1299421>.

223 *Advertising Policies: 10.a Ads About Social Issues, Elections or Politics*, FACEBOOK, https://www.facebook.com/policies/ads/restricted_content/political (last visited Oct. 9, 2019).

regulation as political advertising.²²⁴ Facebook will not approve an ad that does not comply with laws regarding political advertising.²²⁵ Facebook put the new policy into effect on May 24, 2018.²²⁶ It now requires all “election-related and issue ads” to include a “Paid for by” disclaimer.²²⁷ This mimics exactly the requirements of U.S. election law for campaign advertisements. Under the Bipartisan Campaign Reform Act of 2002, candidates for political office must identify themselves and give explicit statements of endorsement for any advertisements run by their campaigns.²²⁸ The law applies only to radio and television ads.²²⁹ Federal regulations also require disclosure for printed material.²³⁰ Now, there also exist regulations for online advertising, not due to any government action, but due to the action of the world’s largest social networking site.

The other large social media sites maintain similar content regulation regimes. Twitter initially stood out for its commitment to unfettered expression, bluntly declaring that Twitter represented the “free speech wing of the free speech party.”²³¹ Now its cofounder, Evan Williams, has expressed doubts, saying, “I thought once everybody could speak freely and exchange information and ideas, the world is automatically going to be a better place I was wrong about that.”²³² In light of that change of heart, Twitter requires that its users abide by its Twitter rules.²³³ The rules are much like Facebook’s community standards: promoting violence, making threats, and harassing particular groups, which includes the use of “[h]ateful conduct,” are all prohibited.²³⁴ Moreover, Twitter’s terms “may change from time to time, at [its] discretion.”²³⁵

YouTube also maintains its own rules, including provisions for keeping videos up while stripping them of advertising revenue. YouTube restricts

224 *See id.*

225 *Id.*

226 *Shining a Light on Ads with Political Content*, *supra* note 34.

227 *Id.*

228 Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 311, 116 Stat. 81, 105–06. This is often called the “McCain–Feingold” legislation after the two senators who first proposed it. *Bipartisan Campaign Reform Act*, WIKIPEDIA, https://en.wikipedia.org/wiki/Bipartisan_Campaign_Reform_Act (last visited May 23, 2019).

229 Bipartisan Campaign Reform Act § 311.

230 *See* Contribution and Expenditure Limitations and Prohibitions, 11 C.F.R. § 110.11 (2019) (to be codified at 52 U.S.C. § 30120).

231 Josh Halliday, *Twitter’s Tony Wang: ‘We Are the Free Speech Wing of the Free Speech Party,’* GUARDIAN (Mar. 22, 2012), <https://www.theguardian.com/media/2012/mar/22/twitter-tony-wang-free-speech>.

232 David Streitfeld, *‘The Internet Is Broken’: @ev Is Trying to Salvage It*, N.Y. TIMES (May 20, 2017), <https://www.nytimes.com/2017/05/20/technology/evan-williams-medium-twitter-internet.html>.

233 *Twitter Terms of Service*, TWITTER (May 25, 2018), <https://twitter.com/en/tos>.

234 *The Twitter Rules*, TWITTER, <https://help.twitter.com/en/rules-and-policies/twitter-rules> (last visited Oct. 9, 2019).

235 *Twitter Terms of Service*, *supra* note 233.

access to videos that it judges to be “[n]ot suitable for most advertisers.”²³⁶ This means that the videos will be limited in their appearances in searches and will not host ads, thus generating no advertising revenue for users who choose to post the videos.²³⁷ YouTube’s decision to demonetize videos hurt many content creators, as they relied on YouTube ad revenue to finance their operations.²³⁸

The social media companies regulate content for their own purposes—namely, advertising revenue. A service dominated by extremist, violent, or pornographic content would not draw in many users, hurting the social media companies’ opportunities for selling ads.²³⁹ As noted by Kate Klonick of St. John’s University Law School, “the primary reason companies take down obscene and violent material is the threat that allowing such material poses to potential profits based in advertising revenue.”²⁴⁰ However, as noted, the social media sites operate outside any government control, and are not subject to the same limits as the government. In particular, Facebook’s attempt to pinpoint the source of ads could have a chilling effect on political discourse. *New York Times* tech columnist Farhad Manjoo has pointed out that Facebook is indeed becoming governmental in its reach and control, especially with regards to politically oriented posts.²⁴¹ He observed,

Facebook would sort of be in some way the arbiter for what’s right and wrong on Facebook. That may help with the fake news problem. I think it’s unclear at this point. But the kind of upshot of that is, on the other hand, you get Facebook kind of acting as something like the ministry of information for kind of every country in which it operates, where, you know, it might be able to decide, like, this is true, and this is not true.²⁴²

The incredible size and wide-reaching influence of the largest social media sites reveals the immense importance they hold in public discourse in the twenty-first century. Some observers have already likened it to a modern public square. Zeynep Tufekci, a professor at the University of North Carolina, has explicitly called the internet “our social commons.”²⁴³ Social interaction is a key part of being human, and so every society has its “commons,” a

236 *Request Human Review of Videos Marked “Not Suitable for Most Advertisers,”* YOUTUBE, https://support.google.com/youtube/answer/7083671?hl=en&ref_topic=9153572 (last visited Oct. 9, 2019).

237 *See id.*

238 Sahil Patel, *The ‘Demonetized’: YouTube’s Brand-Safety Crackdown Has Collateral Damage*, DIGIDAY (Sept. 6, 2017), <https://digiday.com/media/advertisers-may-have-retuned-to-youtube-but-creators-are-still-losing-out-on-revenue/>.

239 Kevin Roose, *On Gab, an Extremist-Friendly Site, Pittsburgh Shooting Suspect Aired His Hatred in Full*, N.Y. TIMES (Oct. 28, 2018), <https://www.nytimes.com/2018/10/28/us/gab-robert-bowers-pittsburgh-synagogue-shootings.html>.

240 Klonick, *supra* note 155, at 1627.

241 *See How 5 Tech Giants Have Become More Like Governments Than Companies*, NPR (Oct. 26, 2017), <https://www.npr.org/2017/10/26/560136311/how-5-tech-giants-have-become-more-like-governments-than-companies> (interviewing Farhad Manjoo).

242 *Id.*

243 Tufekci, *Google Buzz*, *supra* note, at 39.

place where people can most easily engage in social interaction.²⁴⁴ Using social media—and particularly Facebook, given its massive user base—is hardly “optional.”²⁴⁵ Professor Tufekci compared a decision not to use social media as akin to a decision not to use antibiotics—technically it is an option, but the results will be very negative.²⁴⁶ Hundreds upon hundreds of millions of people use Facebook as their social commons, expecting to find it a free space with which to interact with others.²⁴⁷ And yet this social infrastructure is under complete private control, which Tufekci explicitly calls a “company town.”²⁴⁸ The parallels to *Marsh* could not be more clear, for the digital company town of today has a level of control over public discourse much like that Justice Black feared. As Justice Black said in *Marsh*, “The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”²⁴⁹

Like Professor Tufekci, Professor Tim Wu of Columbia Law School points out that social interaction is in a special category.²⁵⁰ Information is no normal commodity.²⁵¹ The passage of information necessarily involves individual expression in a way any other product could not.²⁵² Wu sees the social media giants as part of an information industry embedded into the economic, political, and social lives of all of us.²⁵³ Social media thus plays an integral part in the very question of whose voice gets heard in our society. Leslie Berlin, a historian of technology at Stanford, has acknowledged the immense power Facebook could potentially wield over the flow of information in society: “[T]he question Mark Zuckerberg is dealing with is: Should my company be the arbiter of truth and decency for two billion people? Nobody in the history of technology has dealt with that.”²⁵⁴

As Wu points out, there is a discomfiting historical parallel to this situation. In the 1930s, movie production in Hollywood came under the control of a private monopoly that enforced strict rules of what could and could not be depicted onscreen.²⁵⁵ Catholic activists had long been clamoring for more regulation of the content of motion pictures, believing their wanton depictions of sexuality and crime had a corrupting influence on society.²⁵⁶

244 Tufekci, *Facebook*, *supra* note 38.

245 Tufekci, *Google Buzz*, *supra* note 39.

246 *See id.*

247 Tufekci, *Google Buzz*, *supra* note 39.

248 Tufekci, *Facebook*, *supra* note 38.

249 *Marsh v. Alabama*, 326 U.S. 501, 506 (1946).

250 Wu, *supra* note 40, at 302.

251 *Id.*

252 *Id.* at 301–02.

253 *See id.* at 303.

254 Osnos, *supra* note 178.

255 Wu, *supra* note 40, at 119.

256 *See id.* at 115–16; *see also* THOMAS DOHERTY, *HOLLYWOOD’S CENSOR* 59–60 (2007) (detailing social science research of the 1930s that allegedly proved films had a corrupting influence on the youth).

Their criticisms were hurting the public image of the film industry,²⁵⁷ and the filmmakers feared the public outcry might invite a government crackdown.²⁵⁸ In response to such criticism, Hollywood, acting through the Motion Picture Producers and Distributors of America (MPPDA), moved to censor itself through the implementation of the Production Code in 1934.²⁵⁹ The code required films to maintain a clear distinction between the concepts of good and evil, as understood by Hollywood's conservative critics, and severely restricted any depictions of sexuality.²⁶⁰ No theater could show a film that violated the code, to which all film production companies acceded, without being heavily fined.²⁶¹

Implementation of the code fell under the influence of one particularly powerful member of the MPPDA, Joseph Breen, a conservative Catholic who in time became the sole judge of whether or not a film met the requirements of the code.²⁶² That such an immense power over expression was vested in one man was not lost on observers at the time. One magazine described Breen as having probably "more influence in standardizing world thinking than Mussolini, Hitler, or Stalin," and "possibly more than the Pope."²⁶³ It was not until after World War II, when television and foreign films started offering viable entertainment alternatives to Hollywood films, that the code's grip started to slip.²⁶⁴ Still, it was only abandoned in 1968, and replaced with the modern rating system.²⁶⁵

Such a standardization in thinking resulted from the control of only one medium, film, while social media has a much wider reach.²⁶⁶ The censorship did not come from the government, but the control over an entire form of expression was still total.²⁶⁷ Wu regards the historical example of the code as a kind of barrier to entry to the "marketplace of ideas."²⁶⁸ The idea of such a market for ideas originates in a famous dissenting opinion from one of the most celebrated Justices of the Supreme Court, Oliver Wendell Holmes Jr.²⁶⁹ Writing in *Abrams v. United States*, he argued that "the ultimate good desired

257 See Bob Mondello, *Remembering Hollywood's Hays Code, 40 Years On*, NPR (Aug. 8, 2008), <https://www.npr.org/templates/story/story.php?storyId=93301189>.

258 DOHERTY, *supra* note 256, at 59.

259 See Wu, *supra* note 40, at 116–17, 123. The code was commonly called the "Hays Code" as the committee that drafted it was headed by former Postmaster General Will Hays. Mondello, *supra* note 257.

260 Wu, *supra* note 40, at 120–21.

261 *Id.* at 119.

262 *Id.* at 123.

263 Frederick James Smith, *Hollywood's New Purity Tape Measure*, LIBERTY MAG., Aug. 15, 1936, at 43. Interestingly, the Italian dictator Mussolini did have a slight influence on Breen, publicly condemning any negative reference to spaghetti in film. *Id.*

264 Mondello, *supra* note 257.

265 *Id.*

266 See Wu, *supra* note 40, at 117, 302.

267 See *id.* at 117.

268 *Id.* at 122.

269 See *id.*; *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market.”²⁷⁰ As Wu notes, private action can serve as much as a stumbling block to certain kinds of expression as government action.²⁷¹

The largest social media sites of today have such a dominant role in discourse over the internet that it is hard for any meaningful expression of ideas to occur outside their reach. Billions of people are on Facebook alone, in effect transitioning the social commons onto a single platform. Facebook, YouTube, and Twitter all have regulations that, for good or ill, determine what content can appear on those sites. In the case of political ads, Facebook has regulations that parallel those put in place by the United States government. This comes at a time when American elections are increasingly waged on social media and when some forces are already finding their voices silenced on those platforms. Even the closest historical parallel, the Hollywood Code, does not reach the scale of social media’s control, as film remained in competition with other media for entertainment and so offered the public an alternative means of expression. With social media, the lack of meaningful alternatives means that free expression exists at the sufferance of the private entities that dominate so many aspects of modern life.

III. CAN WE DO ANYTHING? SHOULD WE?

This Part will consider the main possible objections to the regulation of privately owned social media companies as private entities. First, it may be objected that the social media companies are publishers and so have their own free speech rights in their decisions regarding what content appears on their sites. This ignores the fact, however, that the social media sites are not acting as publishers, openly soliciting content. Rather, the *users* are the publishers. Second, since the government is much more limited in its ability to censor hateful content, treating social media companies as state actors would likewise limit their ability to do the same. But limiting access to even the largest social media sites does not prevent extremists from engaging in hateful conduct elsewhere, including violence. At any rate, the free speech rights of all social media users—the vast majority of us—are at stake, and so this interest must take precedence.

A. *Social Media Are Not Publishers*

It is certainly true that entities that publish content have their own free speech rights just as the creators of that content do. The Supreme Court held as much in *Miami Herald Publishing Co. v. Tornillo*.²⁷² Florida law at the time required newspapers that published editorials critical of a candidate to allow that candidate to publish a response in the same paper.²⁷³ The Court

270 *Abrams*, 250 U.S. at 630.

271 See Wu, *supra* note 40, at 122.

272 418 U.S. 241, 258 (1974).

273 *Id.* at 244.

acknowledged that access to alternative means of expressing an objection were limited, given that many media interests are concentrated in the same hands.²⁷⁴ But newspapers were (and are) themselves engaged in speech, and have the right to express their views without being forced by the government to express the views of others.²⁷⁵ The Court was adamant:

The choice of material to go into a newspaper, . . . whether fair or unfair[,] constitute[s] the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.²⁷⁶

The Florida law was thus unconstitutional.²⁷⁷

The largest social media sites have not held themselves out as publishers, and in relation to the content created by their users, do indeed act more like forums than publishers. *Packingham* suggests that the Court considers social media to be a public forum rather a collection of publishers.²⁷⁸ Moreover, social media platforms do not actively solicit specific content to be published on their sites, which Professor Klonick notes is “unlike how an editorial desk might solicit reporting or journalistic coverage.”²⁷⁹ This lack of active solicitation with regards to its users is in contrast to the publishing activities some social media sites do offer, like streaming original films.²⁸⁰ Describing social media sites as publishers would also go against their own self-characterizations. Facebook’s terms of service explicitly state that its service is meant to “[e]mpower you [the user] to express yourself and communicate about what matters to you.”²⁸¹ YouTube declares its mission is “to give everyone a voice and show them the world.”²⁸² It defines its values as based on freedom of expression, freedom of information, freedom of opportunity, and freedom to belong.²⁸³ The image social media sites create for themselves at least suggests a forum for others to create content, not a publisher of content itself.

Calling Facebook a publisher would contradict the statements of its own founder. Mark Zuckerberg was called before a U.S. Senate committee and was directly asked, “Are you a tech company, or are you the world’s largest publisher?”²⁸⁴ Zuckerberg responded, “I view us as a tech company, because

274 *Id.* at 249–50.

275 *Id.* at 255–56.

276 *Id.* at 258.

277 *Id.*

278 *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

279 Klonick, *supra* note 155, at 1660.

280 For example, YouTube does create some original content of its own, but this is a paid service separate from the main part of the site. Ben Popper, *Red Dawn: An Inside Look at YouTube’s New Ad-Free Subscription Service*, VERGE, <https://www.theverge.com/2015/10/21/9566973/youtube-red-ad-free-offline-paid-subscription-service> (last visited Nov. 17, 2019).

281 *Terms of Service*, *supra* note 42.

282 *About YouTube*, *supra* note 12.

283 *Id.*

284 Ferguson, *supra* note 26.

the primary thing that we do is build technology and products.”²⁸⁵ He proceeded to say that, nonetheless, he felt Facebook was responsible for the content on its site.²⁸⁶

The law, however, exempts online content hosts—including social media—from responsibility for the content they host, explicitly defining them as *not* being publishers. Congress passed the Communications Decency Act in 1996 “to promote the continued development of the Internet” and “to preserve the vibrant and competitive free market that . . . exists for the Internet.”²⁸⁷ To that end, Congress included § 230(c), regarding the “blocking and screening of offensive material.”²⁸⁸ The law is succinct: “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”²⁸⁹ The section further immunizes online content hosts from civil liability for any action taken in good faith to restrict access to material that the host considers to be “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”²⁹⁰ Torts such as defamation provide a good example of the ramifications of this immunity. Historically, publishing defamatory material opened the publisher to tort liability the same as the defamatory author.²⁹¹ To prevent tort claims from hampering the development of the internet, Congress simply declared online content hosts not to be publishers by operation of law.

While a case involving § 230(c) of the law has not reached the U.S. Supreme Court, the lower courts have been “[n]ear-unanimous” in construing the law to provide internet content hosts immunity from any liability for content posted by third parties.²⁹² Within a year of the law’s passage, the U.S. Court of Appeals for the Fourth Circuit handed down the first major decision involving the statute in *Zeran v. America Online, Inc.*²⁹³ There, the plaintiff had sued America Online for failing to remove defamatory posts made by unknown third parties.²⁹⁴ The court unanimously held that

285 *Id.*

286 *Id.*

287 Pub. L. No. 104-104, § 509, 110 Stat. 56, 137–39 (1996) (codified as amended at 47 U.S.C. § 230).

288 47 U.S.C. § 230(c) (2012).

289 *Id.* § 230(c)(1).

290 *Id.* § 230(c)(2)(A).

291 *See, e.g.,* RESTATEMENT (SECOND) OF TORTS § 578 (AM. LAW INST. 1977). Indeed, each time a publisher reprints defamatory material, it gives rise to a new and separate cause of action—against the publisher, not the original author of the defamatory words. *Id.* cmt. b.

292 *Chi. Lawyers’ Comm. for Civil Rights Under the Law, Inc. v. Craigslist, Inc.*, 461 F. Supp. 2d 681, 688 (N.D. Ill. 2006).

293 129 F.3d 327 (4th Cir. 1997). Those were truly the earliest days of the internet, for the court noted that the internet in 1997 was used by “approximately 40 million people”—minuscule in comparison to today’s billions. *Id.* at 328.

294 *Id.* at 328.

§ 230(c) barred any suit that would put the content host in the position of a publisher.²⁹⁵ Indeed, even if the host exercised a “publisher’s traditional editorial functions,” like deciding to remove content, any civil suit would be barred.²⁹⁶ Thus, even when an internet content host might in fact be a publisher, it would still not be one in the eyes of the law. Tellingly, the court in *Zeran* understood Congress’s purpose was to neutralize any threat “to *freedom of speech* in the new and burgeoning Internet medium.”²⁹⁷ Facebook, too, has taken advantage of § 230(c) to escape liability in a defamation suit.²⁹⁸ In that case, the court held that “a website does not create or develop content when it merely provides a neutral means by which third parties can post information of their own independent choosing online.”²⁹⁹ That holding succinctly states the true role social media sites play: not as publishers, but as hosts of the publications of others. To enjoy immunity from tort liability, social media sites must necessarily be public forums, not publishers, but by the same logic they lose the First Amendment protections for editorial decisions *Tornillo* extended to publishers.

B. *The Issue of Hate Speech*

Some might charge that, if subject to the same rules as the government, the social media sites would be unable to prevent hate speech from spreading.³⁰⁰ But banning extremist and hateful voices from the major social networks has not silenced them altogether. Pushing extremist users into forums where few, if any, countervailing voices can be heard risks “radicalizing” them further.³⁰¹ Twitter’s policies caused many white supremacists to retreat to the alternative social networking site, Gab, and this created an echo-chamber effect whereby the most violent and extreme voices were amplified.³⁰² Robert Bowers, the accused killer of eleven people at a Pittsburgh synagogue, was a Gab user and often posted anti-Semitic content on the site.³⁰³ Removing the most extreme content from the larger sites may have prevented it from reaching a wider audience, but it did not prevent extremism from reaching its most receptive audience. Moreover, the Pittsburgh shooting shows that restricting extremists from the main social media sites will not eliminate violence altogether. It even raises the possibility that exclusion will only exacerbate the issue, building resentment in banned individuals that will feed a cycle of hate. As journalist Ian Miles Cheong pointed out, “if you drive them underground . . . they’re going to radicalize further.”³⁰⁴ He added that

295 *Id.* at 330.

296 *Id.*

297 *Id.* (emphasis added).

298 *Klayman v. Zuckerberg*, 753 F.3d 1354, 1357 (D.C. Cir. 2014).

299 *Id.* at 1358.

300 *See* Ferguson, *supra* note 26.

301 Breland, *supra* note 212.

302 Ellis, *supra* note 200.

303 Roose, *supra* note 239.

304 Breland, *supra* note 212 (omission in original).

“[t]he best way to counter arguments is to provide good arguments.”³⁰⁵ That line is reminiscent of Justice Kennedy’s admonition in *United States v. Alvarez*—“The remedy for speech that is false is speech that is true.”³⁰⁶ The American tradition is to meet hateful speech with nobler, and more numerous, speech.

At stake also are the free speech rights of the majority of users who are not engaged in hateful conduct. As historian Niall Ferguson has noted, permitting obscene or even hateful content may be worth its risks, as it is preferable to a system where “our freedom of speech [is] circumscribed by the community standards of unaccountable private companies, run by men who imagine themselves to be emperors.”³⁰⁷

CONCLUSION

This Note has argued that the public function exception to the state action doctrine should include the largest social media companies. The free spread of information is undoubtedly a major component of a free and democratic society. Traditionally, the government was seen as the primary threat to the free expression of ideas. Historically, the government could not touch free expression based on its content, but for exceptions for things such as libel, incitement of violence, or fraud. One notable exception was made in *Marsh*, for a company town. There, a private entity owned the entire municipality and was responsible for all municipal functions. Because the private entity functioned in all respects like a city, it was, for all intents and purposes, a state actor. As such, it was subject to claims based on the First Amendment’s protection of free speech.

Marsh has long since been treated as being of limited utility. Most privately owned public places do not have the same level of total control as the company town in *Marsh*. But in the twenty-first century, there is a noncorporeal company town. Expression on the internet is conducted on social media sites. Facebook alone has two billion members—in essence, the largest nation on Earth. Twitter has a user base larger than the population of the United States. Within the United States, social media is well on its way to outstripping traditional media as the main source of information for the public. Social media has already had an enormous impact on the political world. Facebook has even imposed regulations on electoral advertising of the same nature as the law requires in offline media. The internet, and especially social media, is indeed the modern public forum. And yet the largest social media companies have so far remained immune from any judicial remedies should they violate the free expression of their users. The law does, in fact, and should, allow an exception to the state action doctrine when private power becomes so great it threatens freedom in the same way as does a state.

305 *Id.*

306 *United States v. Alvarez*, 567 U.S. 709, 727 (2012) (plurality opinion).

307 Ferguson, *supra* note 26. Ferguson’s reference to “men who imagine themselves to be emperors” is a reference to Mark Zuckerberg, who has indicated his favorite historical figure is the Roman emperor Augustus. *Id.*; see Osnos, *supra* note 178.

