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ABSTRACT

Society has a love-hate relationship with social media. Thanks to social media platforms, the world is more connected than ever before. But with the ever-growing dominance of social media there have come a mass of challenges. What is okay to post? What isn't? And who or what should be regulating those standards? Platforms are now constantly criticized for their content regulation policies, sometimes because they are viewed as too harsh and other times because they are characterized as too lax. And naturally, the First Amendment quickly enters the conversation. Should social media platforms be subject to the First Amendment? Can—or should—users be able to assert their First Amendment rights against these platforms? This Article dives into the legal and policy implications surrounding the application of the First Amendment to social media platforms. Because the state action doctrine generally serves as a bar to enforcing constitutional restrictions on private actors, this Article examines these

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First Amendment questions in light of the state action doctrine, and more particularly its public function exception. This Article considers whether social media platforms fit within the public function exception and whether such an application is tenable and proper as a matter of law and public policy.

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INTRODUCTION

The internet has radically changed how people communicate and receive information.[1] Gone are the days when a person's message could only go as far as her voice could carry or to as many people as she had postage stamps. With social media, the opportunities for

[1] *See* Mark Lemley, Davis S. Levine & David G. Post, *Don't Break the Internet*, 64 STAN. L. REV. ONLINE 34, 37 (2011) (calling the internet "a global platform for innovation, speech, collaboration, civic engagement, and economic growth.").

connection are nearly limitless.[2] In light of social media's status and role, this Article will examine whether social media platforms should be treated as state actors under the public function exception so that users may assert First Amendment rights against those platforms.

Every advance in technology raises new challenges and questions. For every beneficial use of social media, there are countless harmful uses, ranging from hate speech to fake news to online harassment.[3] In response, social media platforms[4] employ content regulation policies that dictate what content is appropriate and acceptable to be posted.[5] But these policies have come under extensive criticism due to their ambiguity or arbitrary application.[6] Some say these platforms are not doing enough, and others contend that these guidelines impinge on free speech values.[7]

Although the First Amendment protects rights regarding freedom of speech and expression, those protections do not serve as a check on private actors due to the state action doctrine.[8] However,

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[2] *See infra* Section I.A.

[3] *See, e.g.*, *ADL Report: Anti-Semitic Targeting of Journalists During the 2016 Presidential Campaign*, ANTI-DEFAMATION LEAGUE 1 (Oct. 19, 2016), https://www.adl.org/sites/default/files/documents/assets/pdf/press-center/CR_4862_Journalism-Task-Force_v2.pdf [hereinafter *ADL Report*]; Sheera Frenkel, *Facebook Tackles Rising Threat: Americans Aping Russian Schemes to Deceive*, N.Y. TIMES (Oct. 11, 2018), https://www.nytimes.com/2018/10/11/technology/fake-news-online-disinformation.html.

[4] For the definition of "social media platform," see *infra* notes 15–21 and accompanying text.

[5] *See infra* Section I.B.

[6] *See infra* Section I.B.

[7] *Compare* Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M. L. REV. 121, 127 (2014) ("[S]ocial network websites face external and internal pressures to censor content or block particular users' access, a troubling situation given the importance social network websites have assumed in contemporary social and political life."), *with* Vera Eidelman, *Facebook Shouldn't Censor Offensive Speech*, ACLU (July 20, 2018), https://www.aclu.org/blog/free-speech/internet-speech/facebook-shouldnt-censor-offensive-speech ("If Facebook gives itself broader censorship powers, it will inevitably take down important speech and silence already marginalized voices.").

[8] *See infra* notes 60–61 and accompanying text.

the Supreme Court has carved out exceptions to this doctrine, holding that in some situations a private actor may be treated as a state actor, such as when an entity serves a "public function."[9] Courts have held that online service providers, including social media platforms, are not state actors, giving platforms substantial latitude in regulating content.[10]

This Article will consider the merits of extending the public function exception to encompass social media platforms by examining why such a change would be harmful as a matter of policy and legal principle. Part I discusses the role of social media in modern society and how platforms regulate content. Part II examines the First Amendment and the state action doctrine. Part III delves into commentary on the legal and social merits of bringing platforms under the restrictions of the First Amendment. Finally, Part IV weighs the merits of finding that such platforms fit within the definition of state action, explaining why it is a legally unstable approach that would grant the internet an improper pedestal in the eyes of the law.

I. OVERVIEW OF SOCIAL MEDIA PLATFORMS

A. Social Media Platforms in Modern Society

To say the internet is an important part of modern life is an understatement. Social media platforms have recently become central to everyday life. In 2018, approximately seven out of every ten Americans used social media "to connect with one another, engage with news content, share information and entertain themselves."[11] Considering that one in twenty Americans used social media in 2005,[12] the adoption rate of these technologies is staggering. Moreover, around seventy-five percent of Facebook users and sixty percent of Instagram users visit these sites at least

[9] *See infra* notes 68–79 and accompanying text.

[10] *See infra* notes 63–67, 80–93 and accompanying text.

[11] *Social Media Fact Sheet*, PEW RES. CTR. (Feb. 5, 2018), http://www.pewinternet.org/fact-sheet/social-media/.

[12] *Id.*

once a day.[13] Internet use is "near ubiquitous."[14]

The term "social media" lacks a concrete definition.[15] Dictionaries define it generally. For example, Merriam-Webster uses the definition, "forms of electronic communication . . . through which users create online communities to share information, ideas, personal messages, and other content."[16] The term is used broadly in common language. "Social media" is often used as an umbrella term to refer to specific platforms, like Facebook, Twitter, Instagram, Snapchat, and LinkedIn, with little consideration for what characteristics actually make them social media platforms.[17] For purposes of this Article, I will adopt Carr & Hayes' proposed definition of social media: "Internet-based channels that allow users to opportunistically interact and selectively self-present, either in real-time or asynchronously, with both broad and narrow audiences who derive value from user-generated content and the perception of interaction with others."[18] Social media platforms are particularly distinguished by their interactivity component and the value they derive from user-generated content.[19] This definition encompasses websites like Facebook, Twitter, Instagram, and Yelp.[20] It does not extend to websites providing services like email and online news, or to websites like Wikipedia, Skype, or Netflix.[21]

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[13] *Id.*

[14] *Internet/Broadband Fact Sheet*, PEW RES. CTR. (Feb. 5, 2018), http://www.pewinternet.org/fact-sheet/internet-broadband/.

[15] *See* Caleb T. Carr & Rebecca A. Hayes, *Social Media: Defining, Developing, and Divining*, 23 ATLANTIC J. COMM. 46, 46–47 (2015).

[16] *Social Media*, MERRIAM-WEBSTER, INC., https://www.merriam-webster.com/dictionary/social%20media (last visited Nov. 12, 2018); *see also Social Media*, CAMBRIDGE DICTIONARY, https://dictionary.cambridge.org/us/dictionary/english/social-media (last visited Nov. 12, 2018) (defining social media as "websites and computer programs that allow people to communicate and share information on the internet using a computer or mobile phone.").

[17] *See* Carr & Hayes, *supra* note 15, at 46–49; *Social Media Use in 2018*, PEW RES. CTR. (Mar. 1, 2018), http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/.

[18] Carr & Hayes, *supra* note 15, at 50.

[19] *See id.* at 51–52.

[20] *Id.* at 53.

[21] *Id.*

While social media platforms were initially started to serve a social purpose,[22] they now serve numerous roles in society. President Trump uses Twitter to make official statements, and the National Archives requires that his tweets be archived under the Presidential Records Act.[23] Facebook is a go-to source for news.[24] Newsrooms and journalists rely on Twitter to track and disseminate information.[25] Social media sites are a vital part of the art community, enabling artists to reach broader audiences and providing a new creative medium.[26] Social media gives the average person with internet access the ability to reach just as many readers as any major news source.[27] In the words of Twitter's CEO, "[p]eople do see us as a digital public square."[28]

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[22] *See, e.g.*, Kathleen Chaykowski, *Mark Zuckerberg Gives Facebook a New Mission*, FORBES (June 22, 2017), https://www.forbes.com/sites/kathleenchaykowski/2017/06/22/mark-zuckerberg-gives-facebook-a-new-mission/ (noting that, according to Mark Zuckerberg, Facebook "was built to accomplish a social mission — to make the world more open and connected.").

[23] *See* Lincoln Caplan, *Should Facebook and Twitter be Regulated Under the First Amendment?*, WIRED (Oct. 11, 2017), https://www.wired.com/story/should-facebook-and-twitter-be-regulated-under-the-first-amendment/.

[24] *See* Matt Taibbi, *Taibbi: Beware the Slippery Slope of Facebook Censorship*, ROLLING STONE (Aug. 2, 2018), https://www.rollingstone.com/politics/politics-features/facebook-censor-alex-jones-705766/ ("70 percent of Americans get their news from just two sources, Facebook and Google.").

[25] *See* Peter Suderman, *The Slippery Slope of Regulating Social Media*, N.Y. TIMES (Sept. 11, 2018), https://www.nytimes.com/2018/09/11/opinion/the-slippery-slope-of-regulating-social-media.html.

[26] *See* Carolina A. Miranda, *Social Media Have Become a Vital Tool for Artists — But Are They Good for Art?*, L.A. TIMES (June 23, 2016), https://www.latimes.com/entertainment/arts/miranda/la-et-cam-is-social-media-good-for-art-20160517-snap-htmlstory.html ("[T]he advent of social media has transformed the ways in which artists interact with each other, their public and the institutions that govern their careers. . . . Services such as Facebook and Instagram have come to be regarded as essential spaces . . . .").

[27] *See* Hunt Allcott & Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 211 (2017).

[28] Cecilia Kang & Sheera Frenkel, *Republicans Accuse Twitter of Bias Against Conservatives*, N.Y. TIMES (Sept. 5, 2018),

B. Social Media Platforms' Content Regulation Policies

Unfortunately, but predictably, social media platforms are not immune from objectionable content, ranging from the controversial to the outright illegal. This content includes, but is not limited to, hate speech,[29] "fake news,"[30] harassment,[31] and revenge pornography.[32] In response, most platforms use "community guidelines" to regulate posted content. For example, Instagram states that its Community Guidelines exist to "create a safe and open environment for everyone."[33] The guidelines prohibit content like hate speech, nudity, and "[s]erious threats of harm."[34] In contrast, Twitter permits "[s]ome forms of graphic violence, adult content, or hateful imagery" as long as the tweets are marked as sensitive.[35]

Moreover, these content regulations have teeth. In September 2018, Twitter permanently banned Alex Jones, creator of Infowars,

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https://www.nytimes.com/2018/09/05/technology/lawmakers-facebook-twitter-foreign-influence-hearing.html.

[29] *See, e.g.*, Sheera Frenkel et al., *On Instagram, 11,696 Examples of How Hate Thrives on Social Media*, N.Y. TIMES (Oct. 29, 2018), https://www.nytimes.com/2018/10/29/technology/hate-on-social-media.html; *ADL Report*, *supra* note 3.

[30] *See, e.g.*, Sheera Frenkel, *Facebook Tackles Rising Threat: Americans Aping Russian Schemes to Deceive*, N.Y. TIMES (Oct. 11, 2018), https://www.nytimes.com/2018/10/11/technology/fake-news-online-disinformation.html.

[31] *See, e.g.*, Aaron Smith & Maeve Duggan, *Crossing the Line: What Counts as Online Harassment?*, PEW RES. CTR. 2 (Jan. 4, 2018), https://www.pewinternet.org/wp-content/uploads/sites/9/2018/01/PI_2018.01.04_Online-Harassment-Scenarios_FINAL.pdf.

[32] *See, e.g.*, Mary Anne Franks, *Drafting An Effective "Revenge Porn" Law: A Guide for Legislators* (Aug. 17, 2015), https://ssrn.com/abstract=2468823; Andrew Koppelman, *Revenge Pornography and First Amendment Exceptions*, 65 EMORY L.J. 661, 661 (2016).

[33] *Community Guidelines*, INSTAGRAM, INC., https://help.instagram.com/477434105621119 (last visited Oct. 15, 2018).

[34] *Id.*

[35] *Twitter Media Policy*, TWITTER, INC., https://help.twitter.com/en/rules-and-policies/media-policy (last visited Oct. 15, 2018). But such content may not appear in "live video, header, or profile images." *Id.*

a right-wing conspiracy theorist website.[36] Twitter noted that Mr. Jones' posts had violated the platform's "Abusive Behavior" policy, which prohibits "targeted harassment."[37]

Some believe that these policies are applied arbitrarily. For example, Instagram shut down a photographer's account after she posted a photo of a naked model, even though the model's breasts were censored with a leaf to avoid violation of the site's standards.[38] Facebook removed the same photo from its platform.[39] In a display of arbitrariness, Instagram deleted a post of a 1992 poem advocating for LGBT rights because the poem violated community standards, possibly because it contained words such as "dyke" and "fag."[40] In protest, various users reposted the poem; some of the reposts were removed, but others were not, even though the content was identical.[41] Later, Instagram restored the original post.[42] These incidents demonstrate the challenges platforms face in accurately and consistently applying content regulations and guidelines.[43]

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[36] *See* Kate Conger & Jack Nicas, *Twitter Bars Alex Jones and Infowars, Citing Harassing Messages*, N.Y. TIMES (Sept. 6, 2018), https://www.nytimes.com/2018/09/06/technology/twitter-alex-jones-infowars.html.

[37] *Abusive Behavior*, TWITTER, INC., https://help.twitter.com/en/rules-and-policies/abusive-behavior (last visited Oct. 15, 2018); *see also* Conger & Nicas, *supra* note 36.

[38] José Da Silva, *Instagram Deletes Photographer Dragana Jurisic's Account and Facebook Censors Her Work*, THE ART NEWSPAPER (May 14, 2018), https://www.theartnewspaper.com/news/photographer-dragana-jurisic-has-instagram-account-closed-down-and-work-censored-on-facebook.

[39] *Id.*

[40] Hanna Kozlowska, *Why Is Instagram Censoring a 1992 Poem Revered by the LGBTQ Community?*, QUARTZ (Jan 26, 2018), https://qz.com/1190263/why-is-instagram-censoring-zoe-leonards-poem-from-1992/. Instagram only stated the post "violat[ed] community standards." *Id.*

[41] *Id.*

[42] *Id.* Instagram said it was "taken down by mistake." *Id.*

[43] *See also* Julia Jacobs, *Will Instagram Ever 'Free the Nipple'?*, N.Y. TIMES (Nov. 22, 2019), https://www.nytimes.com/2019/11/22/arts/design/instagram-free-the-nipple.html; Tracy Jan & Elizabeth Dwoskin, *A White Man Called Her Kids the N-word. Facebook Stopped Her from Sharing It.*, WASH. POST (July 31, 2017), https://www.washingtonpost.com/business/economy/for-facebook-erasing-hate-speech-proves-a-daunting-challenge/2017/07/31/922d9bc6-6e3b-11e7-9c15-177740635e83_story.html?utm_term=.42ceb51a8c2c.

Perhaps the most well-known example of a controversial "take down" was Facebook's removal of a Pulitzer Prize-winning 1972 photograph of a naked, nine-year-old girl running from a napalm bombing in the Vietnam War.[44] After a massive backlash, Facebook restored the photo but also maintained that such a photo was presumed to violate its standards.[45] Yet the photo contained no sexual connotations and instead represented a newsworthy, tragic, and historical moment.[46]

Not all controversial content regulation has been as obvious. Social media platforms have been accused of political bias resulting in censorship of certain political viewpoints.[47] Lawmakers have suggested that Facebook has censored conservative voices on the site,[48] and more generally, seventy-two percent of Americans believe that companies like Facebook and Twitter "actively censor political views."[49] Facebook kept its guidelines secret for some time, but recently published its internal Community Guidelines.[50] Some platforms even utilize proprietary algorithms, which in turn has led to accusations that these algorithms favor certain news organizations and political viewpoints over others.[51] The extent and impact of the

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[44] Mark Scott & Mike Isaac, *Facebook Restores Iconic Vietnam War Photo It Censored for Nudity*, N.Y. TIMES (Sept. 9, 2016), https://www.nytimes.com/2016/09/10/technology/facebook-vietnam-war-photo-nudity.html.

[45] *Id.* Facebook suggested the photo might "even qualify as child pornography" in some countries. *Id.*

[46] *Id.*

[47] *See, e.g.*, Joan E. Solsman & Richard Nieva, *Twitter 'Censorship' Still an Obsession for Congress as Hearing Gets Political*, CNET.COM (Sep. 5, 2018), https://www.cnet.com/news/twitter-censorship-still-an-obsession-for-congress-as-hearing-gets-political/.

[48] *Id.*

[49] Riley Griffin, *Most Americans Think Facebook and Twitter Censor Their Political Views*, BLOOMBERG (June 28, 2018), https://www.bloomberg.com/news/articles/2018-06-28/most-americans-think-social-media-giants-censor-their-views.

[50] Emma Woollacott, *Facebook Reveals Its Secret Rules For Censoring Posts*, FORBES (Apr. 24, 2018), https://www.forbes.com/sites/emmawoollacott/2018/04/24/facebook-reveals-its-secret-rules-for-censoring-posts/#49150c2c56da.

[51] *See* Derek Ruths & Jürgen Pfeffer, *Social Media for Large Studies of Behavior*, 346 SCIENCE 1063, 1063 (2014); Taibbi, *supra* note 24; *see also*

implementation of these algorithms are unclear.[52]

Considering how social media platforms have enhanced communication and provided alternative avenues for important messages, content policies may threaten and stifle the types of speech that made these platforms important to begin with. Social media platforms call themselves "digital public square[s]."[53] But they impose far more rules than traditional public squares.[54]

II. CENSORSHIP, THE FIRST AMENDMENT, AND STATE ACTION

A. The Right to Censor and the State Action Doctrine

While social media platforms may be subject to criticism and complaints of bias and arbitrariness in the application of content regulations, the First Amendment currently provides no recourse. The First Amendment states that, "Congress shall make no law . . . abridging the freedom of speech."[55] This clause distinguishes the United States from most other nations due to the heightened value placed on protecting a wide variety of speech and expression[56] as compared to other values.[57] Essentially, "the

Elizabeth Dwoskin, *Facebook is Rating the Trustworthiness of its Users on a Scale from Zero to 1*, WASH. POST (Aug. 21, 2018), https://www.washingtonpost.com/technology/2018/08/21/facebook-is-rating-trustworthiness-its-users-scale-zero-one/.

[52] *See* Ruths & Pfeffer, *supra* note 51, at 1063.

[53] Kang & Frenkel, *supra* note 28; *see also Community Standards: Introduction*, FACEBOOK, https://www.facebook.com/communitystandards/introduction (last visited Oct. 22, 2018).

[54] *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

[55] U.S. CONST. amend. I.

[56] *See, e.g.*, Cohen v. California, 403 U.S. 15, 16, 26 (1971) (holding that wearing a "Fuck the Draft" jacket was not conduct justifying criminal conviction); Matal v. Tam, 137 S. Ct. 1744, 1765 (2017) (holding a statute could not prohibit trademark registration on the basis the mark might be disparaging); Street v. New York, 394 U.S. 576, 592 (1969) ("[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive . . . .").

[57] *See* FLOYD ABRAMS, THE SOUL OF THE FIRST AMENDMENT xv (2017) ("The exceptionalism of the United States in the protections it offers . . . does not

government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[58] As Justice Harlan so memorably put it, "one man's vulgarity is another's lyric."[59]

But the First Amendment's protections have a substantial limit because the Constitution generally serves as a check on the government but not on private entities.[60] As a general rule, under the state action doctrine, the First Amendment applies only when the "censorship" or invasion on the freedom of speech is an act by the government.[61] Under certain circumstances, a private actor may be held to be a state actor and therefore subject to constitutional restrictions.[62] But courts have consistently held that online service providers of various kinds are not state actors, even when First Amendment issues are at stake.[63] For example, courts have held that AOL is not a state actor subject to the First Amendment.[64] The trend

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mean that other democratic nations do not respect, honor, and generally seek to protect it; it does mean that American law does so more often, more intensely, and more controversially than is true elsewhere.").

[58] Texas v. Johnson, 491 U.S. 397, 414 (1989).

[59] *Cohen*, 403 U.S. at 25; *see also id.* at 26 ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.").

[60] *See* The Civil Rights Cases, 109 U.S. 3, 11 (1883).

[61] *See id.*; Bronner v. Duggan, 249 F. Supp. 3d 27, 41 (D.D.C. 2017) ("To trigger First Amendment protection, the infringement upon speech must have arisen from state action of some kind."). State action arises in the context of the Fourteenth Amendment and applies the First Amendment to the states through the incorporation doctrine. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925); *The Civil Rights Cases*, 109 U.S. at 10–11.

[62] *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 296 (2001) (discussing various doctrines under which a private entity may be a state actor, such as state control, public function, and sufficient entwinement).

[63] *See, e.g.*, Green v. America Online (AOL), 318 F.3d 465, 472 (3d Cir. 2003); Estavillo v. Sony Comput. Entm't Am., No. C-09-03007 RMW, 2009 WL 3072887 (N.D. Cal. Sept. 22, 2009); Noah v. AOL Time Warner Inc., 261 F. Supp. 2d 532, 546 (E.D. Va. 2003); Island Online, Inc. v. Network Solutions, Inc., 119 F. Supp. 2d 289, 307 (E.D.N.Y. 2000); Cyber Promotions, Inc. v. America Online, Inc., 948 F. Supp. 436, 445 (E.D. Pa. 1996).

[64] *See Green*, 318 F.3d at 472; *Noah*, 261 F. Supp. 2d at 546; *Cyber Promotions, Inc.*, 948 F. Supp. at 445.

has also extended to a private domain name registrant[65] and to Sony's PlayStation 3 Network.[66] Most importantly, Facebook is no exception.[67]

B. The Public Function Exception to the State Action Doctrine

Of the possible exceptions to state action, the public function exception is most relevant to social media platforms.[68] In *Marsh v. Alabama*, the Supreme Court held that a private, company-owned town was a state actor because the town's operation was "essentially a public function."[69] Significant to the Court's rationale was the principle that "[t]he 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."[70] The Court even went so far as to assert that in balancing the rights of property owners with other persons' First Amendment rights, "the latter occupy a preferred position."[71] Thus, when a facility is "built and operated primarily to benefit the public" and when its "operation is essentially a public function," state action exists.[72] Twenty years later in *Evans v. Newton* the Supreme Court relied on *Marsh* and held that a privately-owned park was subject to state action because of its "public character."[73]

The public function exception has been increasingly narrowed since *Marsh* and *Evans*. In 1968, the Supreme Court held a private

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[65] *See Island Online, Inc.*, 119 F. Supp. 2d at 307.

[66] *See Estavillo*, 2009 WL 3072887.

[67] *See* Young v. Facebook, Inc., No. 5:10–cv–03579–JF/PVT, 2010 WL 4269304, at *2–3 (N.D. Cal. Oct. 25, 2010) (dismissing plaintiff's Section 1983 First Amendment claim).

[68] *See* Jackson, *supra* note 7, at 142.

[69] Marsh v. Alabama, 326 U.S. 501, 505–06 (1946); *see also* Jackson, *supra* note 7, at 143 (noting that *Marsh* "effectively treated the company-owned town like a state actor.").

[70] *Marsh*, 326 U.S. at 507.

[71] *Id.* at 509; *see also id.* at 506 ("Ownership does not always mean absolute dominion.").

[72] *Id.* at 506.

[73] Evans v. Newton, 382 U.S. 296, 301 (1966).

shopping center was a state actor subject to the First Amendment.[74] But the Court quickly reversed track and subsequently overruled itself.[75] In 1974, the Supreme Court limited public functions to "the exercise by a private entity of powers *traditionally exclusively* reserved to the State."[76] This exclusivity requirement was reaffirmed when the Supreme Court held a private school did not fall under the public function exception because, while education was arguably a public function, it was not within "the *exclusive* province of the State."[77] The Second Circuit backed away from a pure exclusivity requirement in 2004, stating the function must have traditionally been an "exclusive, *or near exclusive*, function of the State."[78] But even with a more flexible standard, the court refused to hold that a library met the exception.[79]

Not only has the public function exception been narrowed, but it has also been rejected with respect to online service providers. For example, in 1996, a federal district court ruled that AOL "exercises absolutely no powers which are in any way the prerogative, let alone the *exclusive* prerogative, of the State."[80] In that case, the plaintiff argued that AOL, as a provider of email services, performed a public function because the email services were free, open to the public, and a place "where public discourse, conversations and commercial transactions can and do take place."[81] But the district court refused to analogize AOL to the company town in *Marsh*, ruling that providing those services was "not an exercise of any municipal power or public service that was traditionally exercised by the

[74] *See* Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 316–20 (1968).

[75] *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 562–64 (1972) (limiting *Logan Valley* but declining to overrule it); Hudgens v. NLRB, 424 U.S. 507, 518 (1976) (holding that *Lloyd Corp.* and *Logan Valley* were incompatible and explicitly stating that *Lloyd Corp.* did in fact overrule *Logan Valley*).

[76] Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974) (emphasis added).

[77] Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (emphasis added).

[78] Horvath v. Westport Library Ass'n, 362 F.3d 147, 151 (2d Cir. 2004) (emphasis added).

[79] *Id.* at 152.

[80] Cyber Promotions, Inc. v. America Online, Inc., 948 F. Supp. 436, 441 (E.D. Pa. 1996).

[81] *Id.* at 442.

State."[82] Although this case is now over twenty years old, the holding is emblematic of the continuing trend against attributing state action to online providers.[83]

The Supreme Court's most recent discussion of the public function exception in the First Amendment context focused heavily on the exclusivity requirement. In *Manhattan Community Access Corp. v. Halleck*, the Court held that the operation of public access cable channels was not a "traditional, exclusive public function."[84] The Court emphasized that "'very few' functions fall into" the public function category.[85] It then proceeded to list numerous functions that do *not* fit the exception: "running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and supplying electricity."[86] But in this case, the channels were operated by a private nonprofit.[87] The Court observed that because public access channels have historically been operated by *both* public and private entities, such operation "is not a *traditional, exclusive* public function within the meaning of this Court's cases."[88]

But the Court went even further. It rejected the notion that the "function" at issue was not simply operation of public access cable, but instead operation of "a public forum for speech."[89] In reasoning that could be considered somewhat circular, the Court pointed out that when a private entity provides a forum for speech, it is not subject to the First Amendment because it is not a state actor.[90] In fact, the Court asserted, it is a "commonsense principle" that providing an open forum for speech is not an activity that *only* governments have traditionally performed.[91] "In short, merely

[82] *Id.*
[83] *See supra* notes 63–67 and accompanying text.
[84] 139 S. Ct. 1921, 1926 (2019).
[85] *Id.* at 1929.
[86] *Id.*
[87] *Id.* at 1926.
[88] *Id.* at 1929–30.
[89] *Id.* at 1930.
[90] *Id.*
[91] *Id.*

hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints."[92] The Court thus recognized a constitutional principle that private property owners—even in the digital space—have editorial discretion within the bounds of their property.[93] Such reasoning seems to foreclose the possibility of recognizing social media platforms as state actors under current precedent and the legal landscape. As private entities, social media platforms fit well within the Court's description of a private actor that simply opens up its property for speech. And as the Court noted, such an act is not enough to find there was state action to meet the exception.

III. COMMENTARY AND CRITICISM

A. Calls to Embrace Free Speech

Within the realms of law, politics, and society, opinions differ on the merits and the legal and social implications of social media content regulation. Moreover, even the starting points for some of these analyses vary. For instance, some authors have focused on the possible merits of stemming the tide of fake news and online harassment on social media.[94] In contrast, others have concentrated on mechanics over merits, looking at *how* rather than *why* the First Amendment can be applied to these private actors.[95]

The ACLU has characterized Facebook as having a "nearly unparalleled status as a forum for political speech and debate," arguing that the platform should not remove anything except

[92] *Id.*; *see also id.* ("As Judge Jacobs persuasively explained, it 'is not at all a near-exclusive function of the state to provide the forums for public expression, politics, information, or entertainment.'" (quoting Halleck v. Manhattan Cmty. Access Corp., 882 F.3d 300, 311 (2d Cir. 2018) (Jacobs, J., concurring in part and dissenting in part))).

[93] *Id.* at 1931.

[94] *See, e.g.*, Caplan, *supra* note 23; Danielle Keats Citron, *Civil Rights in Our Information Age*, *in* THE OFFENSIVE INTERNET: SPEECH, PRIVACY AND REPUTATION 31, 38–46 (Saul Levmore & Martha C. Nussbaum eds., 2010).

[95] *See, e.g.*, Jackson, *supra* note 7, at 121–22;

"unlawful speech."[96] While acknowledging that a private company is not "technically bound" by the First Amendment, the organization has expressed grave concern over Facebook's ability to moderate posts or serve as an "arbiter of truth versus misinformation."[97] Notable about the ACLU's standpoint is its depiction of Facebook as "a forum for the speech of billions of people."[98] The organization took it a step further, calling Facebook a "gatekeeper[] of the modern-day *public square*,"[99] a phrase that harkens back to the "public function" language in *Marsh*.[100]

Benjamin Jackson takes a similar position, arguing that even a "narrow conception" of the public function exception supports subjecting sites like Facebook to the First Amendment.[101] He compares social network sites to "public squares and meeting places" in that both "provid[e] a space that has the *primary* purpose of serving as a forum for public communication and expression, that is *designated* for that purpose, and that is *completely open* to the public at large."[102] Jackson makes an intriguing argument to address the exclusivity requirement from *Jackson v. Metropolitan Edison Co.*; he suggests that although large, privately owned spaces have existed in the past, "they have rarely been dedicated to public speech or open to virtually all comers."[103] Thus, he argues, a large forum like Facebook that is dedicated to public speech provides "a service that was previously 'exclusively' provided by the State."[104]

B. Apparent Challenges with the Marsh Exception

In 1999, when the internet was a new phenomenon, the *Harvard Law Review* dedicated one of its annual *Developments in the Law* articles to "what the law of cyberspace could look like in the

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[96] Eidelman, *supra* note 7.
[97] *Id.*
[98] *Id.*
[99] *Id.* (emphasis added).
[100] *See* Marsh v. Alabama, 326 U.S. 501, 506 (1946).
[101] Jackson, *supra* note 7, at 146.
[102] *Id.*
[103] *Id.* at 147.
[104] *Id. But see infra* Section IV.A.

future."[105] The article warns that "[a]bdicating cyberspace to proprietary interests—and rejecting the existence of public forums in cyberspace—may pose too great a threat to free speech."[106] The article also takes an intriguing position with respect to analogizing internet entities to the company town in *Marsh*. *Marsh* never actually used the phrase "state action" or "state actor."[107] Because *Marsh* dealt with enforcement of a state trespass law, the Court may have presumed state action but then "engage[d] in a substantive balancing of competing rights."[108] Thus, in the opinion of the *Harvard Law Review*, *Marsh* was not even a state action case.[109] But that interpretation of *Marsh* is inherently and fundamentally flawed because the Supreme Court has explicitly recognized *Marsh* as a state action case.[110]

Professor Tim Wu of Columbia Law School takes an extremely negative approach to using the First Amendment to protect free speech in the social media context, calling the First Amendment "a bystander in an age of aggressive efforts to propagandize and control online speech."[111] One of the bases for his claim is the state action doctrine.[112] Wu distinguishes social media platforms from the company town in *Marsh*, pointing out that while platforms like Facebook may serve an important public function, "it seems much harder to say that they are acting like the government all but in

[105] *Developments in the Law: The Law of Cyberspace*, 112 HARV. L. REV. 1574, 1585 (1999) [hereinafter *Developments*].

[106] *Id.* at 1603.

[107] *Id.* at 1629 n.120.

[108] *Id.*; *see also* Molly Shaffer Van Houweling, *Sidewalks, Sewers, and State Action in Cyberspace*, THE BERKMAN KLEIN CTR. FOR INTERNET & SOC'Y AT HARV. U., https://cyber.harvard.edu/is02/readings/stateaction-shaffer-van-houweling.html (last visited Oct. 19, 2018) ("Strangely, *Marsh v. Alabama* is viewed as a classic case in . . . [state action] jurisprudence, although the existence of state action in *Marsh* was so clear that Justice Black's majority opinion does not even mention the requirement.").

[109] *See Developments*, *supra* note 105, at 1628–29, 1629 nn.120–21.

[110] *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974).

[111] Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. (Sept. 1, 2017), https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete.

[112] *Id.*

name."[113] Wu properly warns that if the influence of a platform were sufficient to extend the public function exception, then the category would become far too large and undefinable: "If the major speech platforms . . . ought to be classified as state actors based not on the assumption of specific state-like duties but merely on their influence, it is hard to know where the category ends."[114]

Wu's solution to online speech issues is unclear. He suggests the government could enact laws to address "improper" efforts to control speech online, all the while acknowledging that such laws would raise their own First Amendment problems.[115] But in a direct response to Wu's paper, Geoffrey Stone of the University of Chicago pushes back.[116] He argues that because the Supreme Court has been willing to play "fast-and-loose" with state action in the past, it might do so again.[117] However, Stone provides little justification for this assertation, only noting that "profound private threats to our system of free expression" might incentivize the Court to take action.[118]

C. The Right to Access Speech Platforms

Even though the government has appeared at times to shy away from regulation of the internet and social media platforms,[119] the Supreme Court recently appeared at least willing to consider the need for encouraging open access to social media sites.[120] In *Packingham v. North Carolina*, state action was not the issue since

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[113] *Id.*

[114] *Id.*

[115] *Id.* The implications of state action on social media platforms' First Amendment rights is beyond the scope of this Article.

[116] Geoffrey R. Stone, *Reflections on Whether the First Amendment is Obsolete*, KNIGHT FIRST AMEND. INST. (Nov. 1, 2017) https://knightcolumbia.org/content/reflections-whether-first-amendment-obsolete.

[117] *See id.*

[118] *Id.* (Stone also suggests that *Marsh* might be a "good jumping off point" but fails to rebut any of Wu's criticisms of analogizing social media platforms to company towns); *see also* Wu, *supra* note 111.

[119] *See, e.g.*, *infra* notes 134–43 and accompanying text.

[120] *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735–37 (2017).

the Court was tasked with considering the constitutionality of a North Carolina statute preventing registered sex offenders from accessing social networking websites.[121] But in the majority opinion, Justice Kennedy made bold statements regarding the importance of the internet in general. He affirmed that "social media in particular" is one of "the most important places (in a spatial sense) for the exchange of views."[122] Justice Kennedy described one of the First Amendment's "fundamental principle[s]" as being that "all persons have *access* to places where they can speak and listen."[123] Most notable about this statement is the Court's apparent extension of the First Amendment right to *speak* to the right to have *access* to places to speak. Justice Kennedy later warned that "the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium."[124] Statements like these signal that the Court may be seeking ways to promote freedom of speech on the internet.[125]

Similarly, in 1994, the Supreme Court considered a First Amendment challenge by cable companies to a statute requiring them to transmit local broadcast stations.[126] Although the Court remanded the case for further consideration, the Court was concerned about the "potential for abuse of this private power over

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[121] *Id.* at 1734.

[122] *Id.* at 1735; *see also* Reno v. ACLU, 521 U.S. 844, 868 (1997) (referring to the internet as "vast democratic forums").

[123] *Packingham*, 137 S. Ct. at 1735 (emphasis added).

[124] *Id.* at 1736.

[125] Since Justice Kennedy has retired, it is left to be seen whether other justices will be willing to continue this ideology. *See* Michael D. Shear, *Supreme Court Justice Anthony Kennedy Will Retire*, N.Y. TIMES (June 27, 2018), https://www.nytimes.com/2018/06/27/us/politics/anthony-kennedy-retire-supreme-court.html. Notably, Justice Kennedy's replacement, Justice Brett Kavanaugh, once argued that net neutrality regulations violate the First Amendment rights *of online service providers* because they restrict providers' editorial discretion. *See* United States Telecom Assoc. v. FCC, 855 F.3d 381, 417–18 (D.C. Cir. 2017) (Kavanaugh, J., dissenting); *see also supra* note 115 and accompanying text. So far on the Supreme Court bench, Justice Kavanaugh has already authored one opinion rejecting the public function exception. *See supra* notes 84–93 and accompanying text.

[126] Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 626 (1994).

a central avenue of communication."[127] The Court noted there is value in "ensur[ing] that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."[128] Again, state action was not at issue, but this case demonstrates the Court's concern that the public have unimpeded access to information, even when the platform is maintained by a private entity. Also, the Court did not immediately strike the statute as violative of the First Amendment even though the statute directly affected cable companies' discretion as to what content they provided.[129] Thus, this position, along with the position in *Packingham*,[130] suggests that the Supreme Court might be willing to treat social media platforms as a public function. Using phrases like "critical pathway of communication"[131] and "most important places . . . for the exchange of views"[132] is a good start.[133]

D. Policy Considerations

Congress has demonstrated reluctance to attribute liability to online platforms in other legal spheres. The most prevalent example is 47 U.S.C. § 230, which immunizes websites from liability for third-party content.[134] In doing so, Congress recognized that "[t]he Internet . . . offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity," and that the internet has

[127] *Id.* at 657.
[128] *Id.*
[129] *Id.* at 668.
[130] *See supra* notes 119–25 and accompanying text.
[131] *Turner Broad.*, 512 U.S. at 657.
[132] Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).
[133] *See also* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1611 (2018) (suggesting that *Packingham* "might breathe new life into the application of state action doctrine to internet platforms"). *But see supra* notes 84–93 and accompanying text (discussing the Court's latest discussion on the public function exception—and rejection of the doctrine for public cable access—in *Manhattan Community Access Corp. v. Halleck*).
[134] 47 U.S.C. § 230(c)(1) (2012); *see also* Eric Goldman, *The Ten Most Important Section 230 Rulings*, 20 TUL. J. TECH. & INTELL. PROP. 1, 1–2 (2017).

"flourished, to the benefit of all Americans, with a minimum of government regulation."[135] Section 230 has been characterized as providing "the legal foundation for the Internet we know and love the most."[136] Among other things, the statute protects websites from being liable for moderating third-party content, including a website's decision on what content to publish, edit, or remove.[137] In fact, Section 230 may even serve to reduce website censorship, since websites can be less concerned with liability for what they do or do not permit.[138]

Social media platforms are covered by Section 230's immunity.[139] In other words, Section 230 appears to protect social media platforms from many legal claims and causes of action that the First Amendment (through state action) would otherwise hold them responsible for.[140] The statute serves to protect social media platforms' editorial discretion.[141] Of course, if state action was

[135] 47 U.S.C. § 230(a)(3)–(4).

[136] Goldman, *supra* note 134, at 2.

[137] 47 U.S.C. § 230(c); *see also* Zeran v. Am. Online, Inc., 129 F.3d 327, 332–33 (1997); Goldman, *supra* note 134, at 3.

[138] *See* Note, *Section 230 As First Amendment Rule*, 131 HARV. L. REV. 2027, 2027 (2018) ("This intermediary liability protection encourages websites to engage in content moderation without fear that their efforts to screen content will expose them to liability for defamatory material that slips through. Without this protection, websites would have an incentive to censor constitutionally protected speech in order to avoid potential lawsuits.").

[139] Section 230's immunity only extends if the service provider is not also functioning as an "information content provider" (ICP). Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1162 (9th Cir. 2008). An ICP is a provider "responsible, in whole or in part, for the creation or development of information provided." 47 U.S.C. § 230(f)(3). When platforms regulate user-generated content, they are likely protected by Section 230. *See Roomates.com*, 521 F.3d at 1162–64 (distinguishing between displaying third-party content and actually contributing to content creation); *see also* Klayman v. Zuckerberg, 753 F.3d 1354, 1357–60 (D.C. Cir. 2014) (holding Facebook immunized by Section 230); Perkins v. Linkedin Corp., 53 F. Supp. 3d 1222, 1246–49 (N.D. Cal. 2014) (holding LinkedIn not protected by Section 230 as to its generation of emails).

[140] Section 230 often arises with tort liability, but "creates . . . immunity to *any* cause of action." *Zeran*, 129 F.3d at 330; *see also Roomates.com*, 521 F.3d at 1164 (considering Section 230 immunity in the context of a civil rights claim).

[141] *See Zeran*, 129 F.3d at 330.

attributed to social media platforms, the First Amendment's protections would trump any statute, including Section 230.[142] Nevertheless, Section 230's history represents an important policy consideration, namely that the internet has thrived *because of* the immunity and discretion granted to websites.[143] Section 230 has demonstrated the benefits derived from protecting online providers, rather than opening them to liability.

Professor Richard Epstein has cautioned against stretching existing legal principles to fit the internet.[144] Although acknowledging that some principles "may need a bit of tweaking," he posits that if they were sound at their inception, then they should suffice now.[145] The internet may create tension between property rights and the First Amendment, but Epstein argues this is nothing new compared to traditional tensions.[146] "There is less novelty here than meets the eye."[147] Just because a technology involves the "control and dissemination of information" does not mean the First Amendment must play a role, since the First Amendment does not necessarily trump property rights.[148] But Epstein's view may not be entirely accurate. In 1969, the Supreme Court suggested that "[i]t is

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[142] *See* U.S. CONST. art. VI, cl. 2.

[143] Section 230 was recently amended to exclude from immunity websites engaged in certain acts related to sex trafficking. *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, 132 Stat. 1253 (2017) (codified in part at 47 U.S.C. § 230(e)). The amendment is the subject of substantial controversy, including a constitutional challenge. *See, e.g.*, Woodhull Freedom Found. v. United States, 334 F. Supp. 3d 185 (D.D.C. 2018), *appeal docketed*, No. 18-5298 (D.C. Cir. Oct. 12, 2018); Eric Goldman, *Sex Trafficking Exceptions to Section 230* (Santa Clara Univ. Sch. of Law Legal Studies Research Papers Series, No. 2017-13, 2017), https://ssrn.com/abstract=3038632; Emily Stewart, *The Next Big Battle Over Internet Freedom Is Here*, VOX (Apr. 23, 2018), https://www.vox.com/policy-and-politics/2018/4/23/17237640/fosta-sesta-section-230-internet-freedom.

[144] *See* Richard Epstein, *The Irrelevance of the First Amendment to the Modern Regulation of the Internet*, 23 COMPETITION: J. ANTITRUST & UNFAIR COMPETITION L. SEC. ST. B. CAL. 100, 100 (2014).

[145] *Id.* at 111; *see also* Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (1996).

[146] Epstein, *supra* note 144, at 102.

[147] *Id.* at 111.

[148] *Id.* at 100–01, 111.

the purpose of the First Amendment to preserve an uninhibited marketplace of ideas . . . rather than to countenance monopolization of that market, whether it be by the Government itself or a *private licensee*."[149] If the Court formerly entertained the notion of the First Amendment trumping other private property rights, it might do so again.[150]

Another caveat comes from Peter Suderman, who warns against placing too much value in social media.[151] While acknowledging that it is unsurprising that the rise of social media has been followed by calls for regulation of the content on those platforms, he asserts that regulation would damage how people view speech itself.[152] In Suderman's view, embracing regulation is, at its core, "a view that speech . . . is not an individual right, but a collective good that should be subject to political control."[153] Thus, it is more important for citizens to take responsibility for their own social media consumption rather than impose regulations on others.[154] Suderman specifically argues against government involvement in regulation but also appears opposed to forcing platforms to be completely open and unregulated.[155] Suderman's solution is to keep the government

[149] Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (emphasis added). While the Court was specifically addressing the fairness doctrine here, the Court's willingness to make this statement is noteworthy. *See id.* ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."). The FCC subsequently withdrew the fairness doctrine based on its own position the doctrine was unconstitutional. *See In re Syracuse Peace Council*, 2 FCC Rcd. 5043, 5057–58 (1987); *see also* Thomas W. Hazlett et al., *The Overly Active Corpse of Red Lion*, 9 NW. J. TECH. & INTELL. PROP. 51, 51 (2010) (calling *Red Lion* "fatally flawed.").

[150] *See supra* notes 70–72, 119–29 and accompanying text.

[151] Suderman, *supra* note 25; *see also infra* notes 200–04 and accompanying text; *cf.* Orin S. Kerr, *Applying the Fourth Amendment to the Internet: A General Approach*, 62 STAN. L. REV. 1005, 1015–16 (2010) (arguing that while the internet may require new rules in certain contexts, "the role of the Constitution should remain constant regardless of technology."); Joseph H. Sommer, *Against Cyberlaw*, 15 BERKLEY TECH. L.J. 1145, 1149 (2000) ("To risk a metaphor from another technology, the Internet can be an excellent lens for seeing other things. It is not, however, a particularly useful focal plane of legal analysis.").

[152] *See* Suderman, *supra* note 25.

[153] *Id.*

[154] *Id.*

[155] *Id.* ("Social media corporations, as private entities, have the right to ban

out of regulation of platforms entirely and to simply allow them to regulate themselves.[156]

Professor Ari Ezra Waldman provided a thought-provoking defense of social media platforms' content regulation in a written statement before the U.S. House of Representatives Committee on the Judiciary.[157] Waldman compared social media platforms to traditional media platforms, which have editorial discretion to control what is published.[158] According to Waldman, content regulations provide structure; without regulations, "[i]t would just be spectacle, and really bad, cacophonous, headache-inducing spectacle at that."[159] Even though internal content regulation may be imperfect, Waldman argued, it is better than nothing.[160] Waldman also defended the systems employed to regulate content, stating that the "top level moderation happens back at headquarters, by lawyers directly responsible for content moderation policies and training."[161] His implication seems to be that since these moderators "are trained to exercise judgment based on rules set out by the platforms," users should just trust them.[162] Without citing any specific authority, he also asserted that the policies "reflect . . . free speech norms."[163]

Ultimately, though, Waldman's overall attitude toward social media platforms is somewhat unclear, given that he proceeded to

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anyone, for any or no reason.").

[156] *See id.*

[157] *Filtering Practices of Social Media Platforms: Hearing Before the H. Comm. on the Judiciary*, 115th Cong. 2 (2018) (written statement of Ari Ezra Waldman, Professor of Law, New York Law School), https://docs.house.gov/meetings/JU/JU00/20180426/108231/HHRG-115-JU00-Wstate-WaldmanA-20180426.pdf [hereinafter *Filtering Practices*].

[158] *See id.* at 3–4 ("Neither Salon nor the National Review can publish everything.").

[159] *Id.* at 4; *see also* Emma Grey Ellis & Louise Matsakis, *Diamond and Silk Expose Facebook's Burden of Moderation*, WIRED (Apr. 14, 2018), https://www.wired.com/story/diamond-and-silk-expose-facebooks-burden-of-moderation/ (pointing out that "to communicate anything, Facebook can't communicate everything.").

[160] *See Filtering Practices*, *supra* note 157, at 5.

[161] *Id.* at 4.

[162] *Id.*

[163] *Id.*

transition into criticism of Facebook's privacy policies and data protection.[164] Irrespective of Waldman's "just trust them" view as to content regulation, he makes a valid point with respect to the role Facebook plays in society: "[W]e don't have a First Amendment right to Facebook's amplification of our words."[165] But even this assertion is called into question in light of Justice Kennedy's discussion on how *access* to places to speak is part of the First Amendment's protections.[166] If First Amendment rights include access to opportunities to speak, and if social media platforms are so powerful in amplifying our speech, then perhaps a person should have the *right* to access and speak on social media.

IV. WEIGHING THE MERITS OF FINDING STATE ACTION

This Part will explore the chances and merits of finding that social media platforms are state actors under the public function exception. As will be discussed, courts should not find that these platforms fit the public function exception, both as a matter of law and as a matter of policy. This Part will first consider the problems with attributing state action to social media platforms, and then will explore alternative regulation methods.

A. The Public Function Exception

As an initial matter, social media platforms may bear some resemblance to the company town in *Marsh v. Alabama*. Social media platforms open up their service for public use, just like the company town in *Marsh* opened up its private property for public use.[167] But the challenge is identifying the specific public *function*

[164] *Id.* at 6–7 ("[A]lthough the evidence isn't there to suggest a systemic bias when it comes to content moderation, there is evidence that Facebook . . . cares very little about . . . our data.").

[165] *Id.* at 4.

[166] *See supra* notes 119–25 and accompanying text.

[167] *See* Marsh v. Alabama, 326 U.S. 501, 507 (1946) (Whether a website, existing purely on the internet, can be fairly analogized to a physical space, like a town, is another intriguing issue beyond the scope of this Article). *See generally* Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439 (2003); Mark A. Lemley, *Place and Cyberspace*, 91 CALIF.

that social media platforms serve. Benjamin Jackson accurately notes that social media platforms serve a function of providing a forum for communication and expression.[168] But that function is not uniquely public.[169] Outside the online realm, various entities provide large venues for the exchange of information, such as newspapers and libraries.[170] Those entities can be private or public, and the private entities are not state actors.[171] Thus, there is no tradition that venues for communication and expression are operated by the State. The analogy is further weakened because, even though some such venues may be public, many of those venues have been traditionally private.[172] Therefore, this is not an area where the function has been an "exclusive, or near exclusive,"[173] state function. Moreover, even though a social media platform may have a governing body for its users, that fact alone is insufficient to attribute state action to the platform.[174]

L. REV. 521 (2003).

[168] Jackson, *supra* note 7, at 146; *see also supra* notes 15–21 and accompanying text (discussing the definition of the term "social media").

[169] *See, e.g.*, *supra* notes 111–14 and accompanying text.

[170] *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019) ("After all, private property owners and private lessees often open their property for speech. Grocery stores put up community bulletin boards. Comedy clubs host open mic nights.").

[171] *See, e.g.*, Assocs. & Aldrich Co. v. Times Mirror Co., 440 F.2d 133, 134–36 (9th Cir. 1971) (holding that a newspaper was not a state actor); Horvath v. Westport Library Ass'n, 362 F.3d 147, 152 (2d Cir. 2004) (holding that a library does not perform a public function).

[172] For example, Benjamin Franklin "provided library services to the citizens of Philadelphia two hundred and fifty years ago." *Horvath*, 362 F.3d at 152. Private libraries still exist, like those in universities. *See, e.g.*, *Professional Center Library: About*, WAKE FOREST U., http://library.law.wfu.edu/about/ (last visited Oct. 26, 2018) (noting that "[t]he Wake Forest University Professional Center Library is a private academic library."). Newspapers are also not state-run. *See, e.g.*, Paul Farhi, *Washington Post to be Sold to Jeff Bezos, the Founder of Amazon*, WASH. POST (Aug. 6, 2013), https://www.washingtonpost.com/national/washington-post-to-be-sold-to-jeff-bezos/2013/08/05/ca537c9e-fe0c-11e2-9711-3708310f6f4d_story.html.

[173] *Horvath*, 362 F.3d at 151.

[174] For a discussion of the most recent iteration of the Court's articulation of this principle, *see supra* notes 84–93 and accompanying text. *See also* Orin S. Kerr, *The Problem of Perspective in Internet Law*, 91 GEO. L.J. 357, 395 (2003)

B. Negative Consequences

Even if the public function exception *could* be extended to social media platforms, the broader, more fundamental question is whether it *should* be extended. Such an extension would be inappropriate as a matter of policy. Further, such an extension would be an inappropriate legal doctrine.[175]

1. A Free For All on Social Media

At first glance, the consequences of finding social media platforms to be state actors are extremely appealing. With the state action requirement satisfied, social media users could invoke their First Amendment rights to freedom of speech, thus preserving the "uninhibited marketplace of ideas."[176] In fact, a prospective plaintiff would have two methods for asserting those First Amendment rights: both (1) a claim for equitable relief under the Fourteenth Amendment,[177] and (2) a claim for civil relief under Section 1983.[178]

("While *Marsh* remains good law, the Supreme Court generally has rejected the *Marsh* approach when a private entity 'seemed' like the government only to specific individuals encountering the entity in the context of a specific relationship.").

[175] One tremendous consequence of treating social media platforms as state actors is that state action is not just a First Amendment doctrine. For example, if an entity is a state actor, then it is subject to not only the First Amendment but also the Fourteenth Amendment as a whole. *See supra* note 61. Because this Article is focusing solely on First Amendment issues, the plethora of consequences outside of the First Amendment context are beyond the scope of this Article. Nonetheless, those consequences would be far-reaching and deserve extensive consideration.

[176] McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014) (quoting FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984)).

[177] *See supra* note 61; Julie K. Brown, *Less is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 564 (2008).

[178] *See* 42 U.S.C. § 1983 (2012) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution . . . shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."); Brown, *supra* note 177, at 564. Although Section 1983, instead

Of course, not all speech or expression would be permissible. Even where the First Amendment applies, certain forms of speech may be prohibited.[179] Consequently, social media sites could likely still prohibit traditionally unprotected speech, including language that incites illegal action,[180] fighting words,[181] obscenity,[182] child pornography,[183] and some forms of defamation.[184] But negative consequences would follow. For example, Twitter would no longer be able to allow users to block other users, since that action would constitute an infringement on the blocked user's ability to speak and have access to portions of the platform.[185] Another example is hate speech. Hate speech is protected under the First Amendment.[186] Thus, ironically, platforms would be required to *keep up* much of the objectionable content (such as hate speech) that many have

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of requiring state action, requires the defendant to have acted under color of state law, the presence of state action satisfies the color of law requirement. *See* Lugar v. Edmonson Oil Co., 457 U.S. 922, 935 (1982) ("If the challenged conduct . . . constitutes state action . . . then that conduct was also action under color of state law and will support a suit under § 1983.").

[179] *See* United States v. Stevens, 559 U.S. 460, 468 (2010) (quoting R.A.V. v. City of St. Paul, 505 U.S., 377, 382–83 (1992)) (noting that "the First Amendment has 'permitted restrictions upon the content of speech in a few limited areas,' and has never 'include[d] a freedom to disregard these traditional limitations.'").

[180] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

[181] *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[182] *See* Miller v. California, 413 U.S. 15, 23 (1973).

[183] *See* New York v. Ferber, 458 U.S. 747, 764 (1982).

[184] *See, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964); Gertz v. Robert Welch, Inc., 418 U.S. 323, 345–46 (1974).

[185] A similar situation has already occurred, when President Donald Trump was prohibited from blocking Twitter followers who expressed views he disagreed with, because such blocking violated the First Amendment rights of the blocked users. *See* Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 230 (2d Cir. 2019). Notably the court explicitly avoided considering "whether private social media companies are bound by the First Amendment when policing their platforms." *Id.*

[186] *See* Matal v. Tam, 137 S. Ct. 1744, 1764 (2017) ("Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting))).

called for platforms to exercise *more* control over.

Applying First Amendment protections would also raise new, complex questions about content regulation even within unprotected forms of speech. Under current First Amendment jurisprudence, the government cannot regulate a subcategory of speech according to different rules than those that apply to the larger category.[187] For example, even though Facebook could prohibit fighting words,[188] it would not be permitted to regulate some fighting words but allow others. Granting social media users the protections of the First Amendment would effectively tie the hands of social media platforms, inhibiting them from acting in an editorial function to engage in meaningful or helpful content curation or control.[189]

2. Maintaining the Public/Private Distinction

A further challenge to attributing state action to social media platforms is its interference with the line the Supreme Court has drawn, for better or for worse, between public and private actors.[190] This line is rooted in a respect for private autonomy and the proper

[187] *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 386 (1992).

[188] *See supra* notes 180–85 and accompanying text.

[189] Editorial discretion is a central privilege to any private entity that opens up its forum to the public. *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930–31 (2019) ("If the rule were otherwise, all private property owners and private lessees who open their property for speech would be subject to First Amendment constraints and would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum."). Newspapers' editorial function has long been recognized as an important and protected privilege. *See, e.g.*, Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 570 (1995); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974); *N.Y. Times Co.*, 376 U.S. at 265–66; *supra* notes 134–43 (discussing Section 230's protection of online providers' editorial privilege).

[190] The Supreme Court itself has acknowledged this line is not clear or consistent. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 632 (1991) ("Unfortunately, our cases deciding when private action might be deemed that of the state have not been a model of consistency."). But the Court has insisted that the line does exist. *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) ("Our cases try to plot a line between state action subject to Fourteenth Amendment scrutiny and private conduct (however exceptionable) that is not.").

role of the judiciary.[191] The public/private distinction recognizes that there are "some areas of life . . . where individual and associational decision-making must remain largely free from governmental control."[192] This distinction developed out of the sixteenth and seventeenth centuries and is more or less assumed, even taken for granted, in modern society.[193]

While social media sites may be analogized to company towns, the two are fairly distinguishable.[194] At its core, Facebook is a private website operated for commercial profit purposes. It may serve the public but so does a restaurant. Yet a restaurant is only subject to certain restrictions because Congress took legislative action.[195] Absent such legislation, which is in the purview of Congress' authority,[196] constitutional restrictions should not be forced on social media platforms by stretching an already confusing and convoluted doctrine.[197] While perhaps the public/private

[191] *See Brentwood Acad.*, 531 U.S. at 295 (alteration in original) (quoting Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 191 (2001)) (noting there is a "judicial obligation" to "preserv[e] an area of individual freedom by limiting the reach of federal law"); Gerald Turkel, *The Public/Private Distinction: Approaches to the Critique of Legal Ideology*, 22 LAW & SOC'Y REV. 801, 801 (1988) ("The dichotomy appears necessary for individual autonomy, the maintenance of social institutions, and the conduct of legal action . . . .").

[192] James M. Oleske, Jr., *Doric Columns Are Not Falling: Wedding Cakes, the Ministerial Exception, and the Public-Private Distinction,* 75 MD. L. REV. 142, 145 (2015).

[193] *See* Morton J. Horwitzt, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1423 (1982); Oleske, *supra* note 192, at 144.

[194] *See supra* Section IV.A.

[195] The Civil Rights Act of 1964 prohibits certain discriminatory acts by "places of public accommodation," including restaurants. 42 U.S.C. § 2000a(a), (b)(2) (2012).

[196] *See* Jackson, *supra* note 7, at 159 ("[A]s most social network websites are for-profit businesses that serve customers across state lines, it seems that Congress would have adequate Commerce Clause power to regulate at least some of the activities of social network websites."); Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 94 (2009) (quoting United Bhd. of Carpenters & Joiners of Am., Local 610 v. Scott, 463 U.S. 825, 833 (1983)) ("[T]he Commerce Clause 'no doubt' allow[s] Congress to proscribe private efforts to prevent the exercise of speech or rights secured only against state interference . . . .").

[197] *See, e.g.*, Charles L. Black, Jr., *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 95 (1967)

distinction is actually a fiction or unwarranted as a matter of policy,[198] there must be a better reason to remove this distinction than the simple fact that an entity exists online. As discussed in the next subsection, the internet need not and should not change all of the rules.

3. Internet Exceptionalism

Attributing state action to social media platforms elevates the internet to a position it should not hold, an act scholars have coined as "internet exceptionalism."[199] Fundamentally, social media platforms are forums for communication and expression, just like newspapers, libraries, and many other "offline" entities.[200] Yet these offline equivalents are not state actors.[201] While the internet has created many unique questions, the rules for a platform or entity should not change simply because it exists online. When an online platform serves the same purpose as an offline platform, the same rules should apply.

The advent of the internet and social media is not the first time new technology has raised new questions. In this respect, the internet is not unique. Since the dawn of time, mankind has developed new technologies. With each new technology comes new questions. Yet they are but variations on a familiar theme. Unless the fundamental function changes, the mere novelty of the technology ought not merit changes in the law. New technology

(calling the state action doctrine a "conceptual disaster area"); sources cited *supra* note 190.

[198] *See, e.g.*, Henry J. Friendly, *Public-Private Penumbra–Fourteen Years Later*, 130 U. PA. L. REV. 1289, 1291 (1982); Hila Shamir, *The Public/Private Distinction Now: The Challenges of Privatization and of the Regulatory State*, 15 THEORETICAL INQUIRIES L. 1, 2 (2014) (citing numerous sources critiquing and supporting the distinction).

[199] *See, e.g.*, Tim Wu, *Is Internet Exceptionalism Dead?*, *in* THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 179, 179–80 (Berin Szoka & Adam Marcus eds., 2011); Eric Goldman, *The Third Wave of Internet Exceptionalism*, TECH. & MARKETING L. BLOG (Mar. 11, 2009), https://blog.ericgoldman.org/archives/2009/03/the_third_wave.htm.

[200] *See supra* notes 169–71 and accompanying text.

[201] *See supra* note 172 and accompanying text.

alone should not dictate changes in the law.[202] The law should be developed and applied independent of the medium.[203] Courts should not abolish the public/private distinction online unless they are willing to do so offline. Furthermore, courts should not expand the definition of state action in the online sphere where it has not done so offline. Social media platforms, newspapers, and book clubs all serve the fundamental purpose of facilitating communication and expression. Unless courts are willing to extend state action to newspapers and book clubs, they should not extend state action to social media platforms.[204]

C. Alternative Regulation Methods

Professor Lawrence Lessig of Harvard Law School has articulated four "modalities of regulation"—four ways in which behavior can be shaped and controlled.[205] These four modalities are

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[202] *See, e.g.*, Easterbrook, *supra* note 145, at 208 (1996); Sommer, *supra* note 151, at 1148 ("Law is a conservative practice, drawing heavily on analogy and history. Of course, legal doctrines will change; they always do. The new information technologies will trigger some of these changes. But with a few exceptions, these changes will exist only in the details.").

[203] *See* Easterbrook, *supra* note 145, at 208. *Contra* Orin S. Kerr, *Foreword: Accounting for Technological Change*, 36 HARV. J. L. & PUB. POL'Y 403, 403 (2013) ("A law created for one world may have a very different impact when applied to the facts of a different era. As a result, changing technology and social practice often trigger a need for legal adaptation.").

[204] Actually, not applying the First Amendment to social media platforms might in fact help platforms address current issues like Russian interference and targeted bots, since platforms would not have to be concerned about "censoring" those voices and could invoke their editorial privilege. *See* Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (discussing the important of a newspaper's editorial privilege). Just as the New York Times can refuse to publish an advertisement it suspects was sponsored by Russia attempting to improperly influence a U.S. election, so too could Facebook regulate its ads to thwart Russian bots. *See, e.g.*, Scott Shane, *Facebook Removes More Accounts Tied to Russian 'Troll Factory'*, N.Y. TIMES (Apr. 3, 2018), https://www.nytimes.com/2018/04/03/business/facebook-russian-trolls-removed.html.

[205] Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 507 (1999).

law, social norms, markets, and architecture.[206] The law is merely one way to control objectionable behavior. Thus, while social media platform's content regulation may be harmful and concerning, the First Amendment is not the only potential or viable solution.

In addition to regulation by law, Lessig notes that social norms are enforced by the community, and the markets regulate by price.[207] Both of these modalities can be and have been used to remedy objectionable content regulation online. Social media platforms have come under extreme scrutiny for their content regulation practices.[208] Moreover, the scrutiny and pressure has originated both from Congress and private entities.[209] As a result of that scrutiny, platforms have begun to acknowledge the unique role they play in modern society and the need to take responsibility for improving how they handle these challenges.[210]

For example, Facebook has already taken steps in response to criticism of its takedown procedures. In April 2018, the website published its formerly secret, internal community guidelines for public access.[211] These guidelines are quite detailed.[212] While they may not be perfect, they add a new level of transparency. Additionally, Facebook has instituted an appeals process, giving users the opportunity to explain their content and provide more

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[206] *Id.*

[207] *Id.*

[208] *See, e.g.*, *2017 Was a Year of Scrutiny for Social Media and Other Tech*, PBS NEWSHOUR (Dec. 27, 2017), https://www.pbs.org/newshour/show/2017-was-a-year-of-scrutiny-for-social-media-and-other-tech.

[209] *See, e.g.*, *supra* note 208 and accompanying text; Tom Hudson, *Social Media, Search Under Scrutiny on Wall Street and Capitol Hill*, MIAMI HERALD (Aug. 31, 2018), https://www.miamiherald.com/latest-news/article217602880.html; *Social Media Firms Under Scrutiny for 'Russian Meddling'*, BBC NEWS (Nov. 1, 2017), https://www.bbc.com/news/world-us-canada-41821359.

[210] *See, e.g.*, *Twitter: Transparency and Accountability: Hearing Before the H. Comm on Energy & Commerce*, 115th Cong. (Sept. 5, 2018) (written statement of Jack Dorsey, Chief Executive Officer, Twitter, Inc.), https://docs.house.gov/meetings/IF/IF00/20180905/108642/HHRG-115-IF00-Wstate-DorseyJ-20180905.pdf [hereinafter *Twitter: Transparency and Accountability*].

[211] *See* Woollacott, *supra* note 50.

[212] *See Community Standards: Introduction*, *supra* note 53.

context if they think their content does not violate the guidelines.[213] Recent policy changes at YouTube (although arguably not a social media platform within the definition of this Article[214]) serve as another example of how platforms are becoming more responsive. In June 2019, YouTube announced that it would increase its efforts to remove "hateful content" such as videos that deny historical events or that advocate group discrimination.[215] Content targeted by the new policy would include videos promoting Nazi ideology, denying the Holocaust, or denying the shooting at Sandy Hook Elementary School.[216] These types of changes exemplify how platforms are regulated by social norms and pressure.

Furthermore, market forces are becoming more influential regulators. For example, consumers have begun calling for brands to put pressure on social media platforms to better handle data, fake news, and offensive content.[217] As brands begin to recognize how consumers link their brand to social media platforms, those brands may begin to exert economic influence over social media platforms by threatening to pull advertisements if the platforms do not begin to more effectively address these important issues. Because most social media platforms rely heavily on advertisement revenue, consumers and advertisers have a direct leveraging tool to encourage, or even force, platforms to make policy changes.[218]

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[213] *See* Woollacott, *supra* note 50. Instagram, which is owned by Facebook, also implemented a similar structure. *See Changes to Our Account Disable Policy*, INSTAGRAM (July 18, 2019), https://instagram-press.com/blog/2019/07/18/changes-to-our-account-disable-policy/.

[214] *See supra* note 18–21 and accompanying text.

[215] *See* Georgia Wells, *YouTube Bans Hateful Videos From Platform*, WALL STREET J. (June 5, 2019), https://www.wsj.com/articles/youtube-bans-supremacist-videos-11559754035?mod=djemwhatsnews.

[216] *See id.*

[217] *See Trust Barometer Special Report: Brands and Social Media*, EDELMAN (June 18, 2018), https://www.edelman.com/research/trust-barometer-brands-social-media.

[218] *See, e.g.*, Wells, *supra* note 215 ("YouTube also has to factor in the concerns of advertisers, who covet the huge and devoted audience that the platform brings but don't want their brands to be associated with hate or extremism. . . . [N]ew ads on YouTube videos are critical to the conglomerate's [Google's] future.").

The stock market itself has also reflected the pressure placed on social media platforms. During Twitter CEO Jack Dorsey's testimony before the Senate Intelligence Committee on possible interference in the 2016 U.S. presidential election, Twitter's stock dropped six percent.[219] In contrast, Facebook's stock rose nearly four and a half percent when Mark Zuckerberg confidently testified before Congress, admitting that Facebook had made mistakes in the past and describing practical steps the company was taking to remedy various issues.[220] Profit-driven social media platforms cannot ignore stock market trends and how the market reacts directly to platforms' action or inaction.[221]

Since social media platforms depend on users to maintain relevance, platforms will respond to criticism and outcry. The power of users to influence platforms should not be underestimated. Money is a motivator. Platforms will not and cannot discount the financial repercussions of ignoring the social and market influences currently at play.[222]

In the legal realm, the First Amendment is not the only available

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[219] Amelia Lucas, *Twitter Shares Fall 6% as CEO Jack Dorsey Testifies Before Senate*, CNBC (Sept. 5, 2018), https://www.cnbc.com/2018/09/05/twitter-shares-drop-6percent-during-dorseys-senate-testimony.html.

[220] *See Mark Zuckerberg Testimony: Senators Question Facebook's Commitment to Privacy*, N.Y. TIMES (Apr. 10, 2018), https://www.nytimes.com/2018/04/10/us/politics/mark-zuckerberg-testimony.html.

[221] Stock market performance can also be linked to the advertising issues discussed above. *See also* Wells, *supra* note 215 (discussing how, after an earnings call at Alphabet Inc. (Google's parent company) where advertisement growth was reported to be decelerating, "Alphabet's stock took its biggest dive in nearly seven years.").

[222] *See* Emily Stewart, *The $120-Billion Reason We Can't Expect Facebook to Police Itself*, VOX (July 28, 2018), https://www.vox.com/business-and-finance/2018/7/28/17625218/facebook-stock-price-twitter-earnings. While Ms. Stewart argues that Facebook and Twitter cannot be trusted to regulate themselves, her analysis demonstrates how market forces affect platforms' decisions. Ms. Stewart accurately notes that "big money can speak pretty loud" and that platforms will make profit-motivated decisions. *Id.* Her observation is the very reason why platforms are likely to improve their policies: because stock prices reflect consumer confidence, and because consumers place pressure on brands (in turn pressuring the platforms), platforms will recognize the financial repercussions and react accordingly.

form of regulation. For example, existing state contract law might be invoked if a social media platform fails to properly apply its own content guidelines.[223] Since users agree to abide by Instagram's Community Guidelines when they agree to the service's Terms of Use,[224] Instagram's failure to properly abide by its own Community Guidelines could be considered a breach of the Terms of Use by Instagram. The legal foundation of such a claim is unclear at best since some courts have ruled that Facebook's Terms of Service do not create affirmative obligations for Facebook.[225] In fact, Facebook has used its own Terms of Service to successfully defend against a breach of contract claim.[226] But with platforms beginning to publicly acknowledge their duty to consumers and rework their internal regulation policies,[227] it is possible that those policies and terms of service could be interpreted to confer contractual obligations on the platform and not just the user.

A more tenable legal enforcement option is consumer protection law. Agencies like the Federal Trade Commission ("FTC") have rules in place that govern improper practices by social media platforms.[228] Moreover, the Justice Department has already begun talks to explore consumer protection in the context of social media platforms.[229] The FTC has brought enforcement actions against

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[223] *See* James L. Gattuso, *The Downside of Regulating Facebook*, FOUND. FOR ECON. EDUC. (May 06, 2018), https://fee.org/articles/the-downside-of-regulating-facebook/.

[224] *See Terms of Use*, INSTAGRAM, INC., https://help.instagram.com/581066165581870?helpref=faq_content (last visited Oct. 26, 2018).

[225] *See, e.g.*, Caraccioli v. Facebook, Inc., 167 F. Supp. 3d 1056, 1064 (N.D. Cal. 2016); Young v. Facebook, Inc., No. 5:10–cv–03579, 2010 WL 4269304, at *3 (N.D. Cal. Oct. 25, 2010).

[226] *See Caraccioli*, 167 F. Supp. 3d at 1063–64.

[227] *See, e.g.*, *Twitter: Transparency and Accountability*, *supra* note 210, at 1 ("We are committed to hold ourselves publicly accountable towards progress of our health initiative.").

[228] *See* Gattuso, *supra* note 223. Under 15 U.S.C. § 45(a)(2) (2012), the FTC can prevent entities from "using unfair methods of competition . . . and unfair or deceptive acts or practices."

[229] *See U.S. Justice Department to Discuss Consumer Protection at Social Media Meeting*, REUTERS (Sept. 24, 2018), https://www.reuters.com/article/us-usa-justice-tech/u-s-justice-dept-to-discuss-consumer-protection-at-social-

various social media platforms, including Twitter, Snapchat, and the now-defunct Google Buzz.[230] In 2019, the FTC fined Facebook approximately $5 billion for mishandling users' personal information—the largest fine the federal government has ever levied against a technology company.[231] Most recently, many large technology companies have come under considerable scrutiny in the antitrust context. Facebook is facing an antitrust probe by the FTC.[232] Moreover, several state Attorneys General have announced their own antitrust investigation into both Facebook and Google.[233] Although the FTC's focus in the technology sphere has been on data privacy and security,[234] the agency could also focus its efforts on fairness in content regulation.[235] The Federal Communications Commission ("FCC") is another viable candidate for the task.[236] Although the FCC is currently only authorized to regulate communications by radio, television, wire, satellite, and cable, it is a fundamental authority for communication and technology regulation.[237] Regulating social media platforms could very well

media-meeting-idUSKCN1M42Q9?il=0 [hereinafter *Social Media Meeting*].

[230] *See, e.g.*, Julie Brill, *Privacy & Consumer Protection in Social Media*, 90 N.C. L. REV. 1295, 1298–99 (2012); *Snapchat Settles FTC Charges That Promises of Disappearing Messages Were False*, FED. TRADE COMMISSION (May 8, 2014), https://www.ftc.gov/news-events/press-releases/2014/05/snapchat-settles-ftc-charges-promises-disappearing-messages-were.

[231] *See* Cecilia Kang, *F.T.C. Approves Facebook Fine of About $5 Billion*, N.Y. TIMES (July 12, 2019), https://www.nytimes.com/2019/07/12/technology/facebook-ftc-fine.html?module=inline.

[232] *See* Barbara Ortutay, *Under Pressure: Facebook Faces Antitrust Probes*, ASSOCIATED PRESS (Sept. 6, 2019), https://apnews.com/be13c1c442f9474c82194ca86aa327a9.

[233] *See id.*; *48 U.S. States Launch Antitrust Investigation into Google*, CBS NEWS (Sept. 10, 2019), https://www.cbsnews.com/news/google-antitrust-probe-48-u-s-states-launch-antitrust-investigation-of-google-dominance-in-search-ads-and-data/.

[234] *See, e.g.*, *Social Media Meeting*, *supra* note 229; Brill, *supra* note 230, at 1296–97.

[235] *See* Brill, *supra* note 230, at 1299 ("Consumers have certain expectations based on what they are told will be done with their information, and social networks must honor the promises they make to consumers.").

[236] *See* 47 U.S.C. § 151 (2012).

[237] *What We Do*, FCC, https://www.fcc.gov/about-fcc/what-we-do (last visited Nov. 7, 2019).

come within the purview of this agency. Its expertise on communication and technology would make it well suited for the task.

CONCLUSION

While the First Amendment, coupled with the public function exception, is an appealing remedy to social media censorship, the legal and policy costs outweigh the benefits of extending the doctrine. The legal and policy foundations for extending the exception are weak and would require an unnecessary degree of internet exceptionalism as justification. Alternative regulation methods—like consumer and brand pressure, market forces, and Congressional and executive agency action—can adequately resolve many of these challenges. Social media and the internet may raise questions, but the questions are not new, and the answers need not be radical.