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TRADITIONALLY EXCLUSIVE LIMITATIONS IN THE DIGITAL ERA:

THE LIMITATIONS ON THE STATE ACTION DOCTRINE AND ITS INABILITY TO PROTECT PERSONAL FREEDOMS FROM BIG TECH

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I. INTRODUCTION

Concerns over the reach of Big Tech[2] have been

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[2] "Big Tech refers to the major technology companies such as Apple, Google, Amazon, Facebook, and Microsoft, which have inordinate

growing for a number of years. The latter half of President Trump's tenure in office, in particular, drew worldwide attention as controversies between censorship, freedom of speech, and big tech blossomed. Amazon has built a surveillance network that allows police to monitor and obtain recordings taken by Ring doorbells and home networks.[3] Big Tech is often accused of learning and cataloging everything about an individual, including where they live, where they work, what they eat, who they socialize with, and their day-to-day routines—and then selling it off for profit and advertising.[4] Doomsayers preach of a dystopian world where Big Tech sells entire lives in "behavior futures markets."[5] And, if Cambridge Analytica's actions in 2018 and their attempts to influence the Presidential election are any proof,

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influence." BIG TECH, https://www.pcmag.com/encyclopedia/term/big-tech (last visited July 15, 2021).

[3] Lauren Bridges, *Amazon's Ring is the Latest Civilian Surveillance Network the US Has Ever Seen*, THE GUARDIAN (Mar. 18, 2021, 8:51 EST), https://www.theguardian.com/commentisfree/2021/may/18/amazon-ring-largest-civilian-surveillance-network-us.

[4] Rinat Abitov, *The Dangers of Big Tech Companies and Data Collection*, LINKEDIN (Mar. 19, 2021), https://www.linkedin.com/pulse/dangers-big-tech-companies-data-collection-rinat-abitov.

[5] *See* Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (2019), https://www.hbs.edu/faculty/Pages/item.aspx?num=56791.

those naysayers may be right.[6]

The halls of Congress have been far from silent, yet the wheels of change are often slow in turning even with bipartisan support, and legislation addressing perceived concerns has not been forthcoming. Congress has, for example, started considering making some changes to antitrust laws that would target Big Tech.[7] The proposed measures would make it harder for the significant, market-dominating companies to make additional acquisitions and lower the bar for challenging anti-competitive conduct, [8] yet these measures only address a small portion of the problem.

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[6] Cambridge Analytica was a British data-analytics consulting firm that admitted to improperly obtaining the data of over 87 million Facebook users in 2018. It then used that data to influence the Presidential election. *See* Alexandra Ma and Ben Gilbert, *Facebook Understood How Dangerous the Trump-linked data firm Cambridge Analytica Could Be Much Earlier than It Previously Said. Here's Everything That's Happened Up Until Now*, INSIDER (Aug 23, 2019, 3:30 PM), https://www.businessinsider.com/cambridge-analytica-a-guide-to-the-trump-linked-data-firm-that-harvested-50-million-facebook-profiles-2018-3; *See also* Alex Hern, *Cambridge Analytica: How Did it Turn Clicks Into Votes?*, THE GUARDIAN (May 6, 2018, 3:00 EST), https://www.theguardian.com/news/2018/may/06/cambridge-analytica-how-turn-clicks-into-votes-christopher-wylie.

[7] Brent Kendall and Ryan Tracy, *Congress Eyes Antitrust Changes to Counter Big Tech*, *Consolidation*, WALL ST. J. (MAR. 11, 2021, 2:18 PM EST), https://www.wsj.com/articles/congress-eyes-antitrust-changes-to-counter-big-tech-consolidation-11615458603?mod=article_inline.

[8] *Id.*

While these measures may help foster competition—if they are ever actually enacted—anti-trust legislation primarily protects the public from monopolies and restraints on trade.[9] In other words, they do little to abate the worries of the average citizen regarding predominant concerns over the corporate expansion of these already powerful Big Tech firms. In the absence of congressional action, a few states have proposed a number of regulations aimed at protecting consumer privacy.[10] Amongst these are restrictions that would seek to limit the reach of Big Tech on issues ranging from online privacy to digital advertisements.[11] Nevertheless, without the backing of Congress, these laws are naturally limited in scope and feasibility.

Despite growing concerns, there have been very few legal challenges to tech companies' power over online speech,[12] and even fewer that have been successful. The

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[9] Schwing Motor Co. v. Hudson Sales Corp., 138 F. Supp 899, 903 (D. Md. 1956).

[10] Sebastian Herrera and Dan Frosch, *Why the Next Big-Tech Fights Are in State Capitals*, WALL ST. J. (Mar. 14, 2021, 2:42 PM EST), https://www.wsj.com/articles/why-the-next-big-tech-fights-are-in-state-capitals-11615714201.

[11] *Id.*

[12] Ahiza García-Hodges, *Big Tech Has Big Power Over Online Speech. Should it be Reined In?*, NBCNEWS (Jan 21. 2021, 12:00 PM EST), https://www.nbcnews.com/tech/tech-news/big-tech-has-big-power-over-online-speech-should-it-n1255164.

dearth of cases is attributable, at least in part, to the current legal framework[13] and the lack of a successful methodology available to challenge these tech industry giants. Claims filed under existing anti-trust laws are amongst the leading challenges to Big Tech, but those are necessarily limited by their design to address a few specific issues.[14] All other potential claims, particularly those reflecting harm to individual liberties, lack a vehicle capable of bringing the judicial claims necessary to restrain Big Tech overreach. Many plaintiffs have tried using the state action doctrine as a means of inhibiting these companies, yet the doctrine is inherently flawed and has been so limited by the Court that its judicial inadequacies cannot be overcome.

This paper proceeds in three sections. First, I outline the traditional cases that serve as the structural basis for the state action doctrine, paying specific attention to the judicially imposed constraints and limitations. Then, in the second section, I demonstrate through recent case law how those same constraints and limitations prevent the doctrine

[13] *Id.*
[14] *See Schwing supra* note 9.

from being applied in the digital age to preserve personal liberty from Big Tech overreach. Third, I propose a solution in the form of an administrative remedy and a revival of the bygone fairness doctrine.

II. THE STATE ACTION DOCTRINE

A. PURPOSE

The state action doctrine is derived from the Civil Rights Cases and is predicated upon the distinction between private and government action.[15] This doctrine serves as a tool to determine when private actions can be regulated by the same principles as state action.[16] It is a tool designed to address the "essential dichotomy between deprivation by the

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[15] United States v. Stanley, 109 U.S. 3, 17 (1883) ("[C]ivil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual . . . but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and [he] may presumably be vindicated by resort to the laws of the State for redress. An individual cannot deprive a man of his right[s].").

[16] Shelley v. Kraemer, 334 U.S. 1, 13 (1948) ("[The Fourteenth] Amendment erects no shield against merely private conduct, however discriminatory or wrongful."); Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) ("As a matter of substantive constitutional law the state-action requirement reflects judicial recognition of the fact that 'most rights secured by the Constitution are protected only against infringement by governments'" (quoting Flagg Bros., v. Brooks, 436 U.S. 149, 156 (1978)).

state, subject to scrutiny under its provisions, and private"[17] action "however discriminatory or wrongful."[18] Although there is not "any set of circumstances absolutely sufficient,"[19] the courts have applied the doctrine in several different scenarios, arguably inconsistently,[20] recognizing that "there may be some countervailing reason against attributing activity to the government."[21]

Broadly, the courts apply the state action doctrine via either what is known as the public functions test or the entanglement test. More specifically, the courts seem to have carved out several machinations through which private conduct can be transformed into state action: (1) the public

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[17] Jackson v. Metropolitan Edison Co., 419 U.S. 345, 348 (1974).
[18] *Id.* (quoting Shelley, 334 U.S. at 13).
[19] Brentwood Acad. v. Tenn. Secondary Sch. Ath. Assoc., 531 U.S. 288, 295 (2001) (citing Nat'l Collegiate Ath. Assoc. v. Tarkanian, 488 U.S. 179, 193, 196 (1988)).
[20] *See* Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982) (the "two-prong" test); *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 157 (1978) (the "joint action" test); *See* Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974) (the "nexus" test); *See* Adickes v. S. H. Kress & Co., 398 U.S. 150, 170 (1970) (the "state compulsion" test); *See* Terry v. Adams, 345 U.S. 461 (1953) (the "public function" test); *See also* Marsh v. Alabama, 326 U.S. 501 (1946) (the "public function" test); *See also* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) (the "nexus" test).
[21] Brentwood, *supra* note 19, at 295. ("What is fairly attributable is a matter of normative judgment, and the criteria lack rigid simplicity. [N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient.")

functions doctrine, which equates a private entity that performs a function that has been traditionally, exclusively reserved to the state to state action; (2) the entwinement doctrine, when there is joint activity between a private entity and a state or state actor; (3) when the state either expressly or implicitly endorses private conduct; and (4) when there has been judicial enforcement of some harmful or discriminatory private conduct. The courts regard each inquiry as fact-specific to the case and governed by underlying public policy principles.[22]

B. THE TESTS

1. PUBLIC FUNCTIONS TEST

The first approach is the most commonly used in attempts to limit the reach of Big Tech. It attempts to equate private conduct to state action when a private party or entity performs some function or commits some act traditionally and exclusively reserved to the state.[23] Although this doctrine may have fallen into disfavor by the present-day courts, the doctrine has been successfully applied in cases

[22] *See* Lugar, *supra* note 16.
[23] *See* Jackson, *supra* note 17 at 352.

involving company towns,[24] elections,[25] and municipal parks.[26]

Marsh v. Alabama is one of the first instances where the Court applied this test, and it is still one of the leading cases on the application of the theory.[27] In Marsh, a Jehovah's Witness was arrested and charged with criminal trespass after seeking to distribute religious literature on a sidewalk[28] in Chickasaw, a suburb of Mobile, Alabama.[29] Chickasaw was a "company town" that the Gulf Shipbuilding Corporation wholly owned.[30] The Court found it to be identical to any other residential town except that the corporation paid the deputy,[31] merchants rented stores from the company rather than owning them, and the company owned the streets and sidewalks.[32] Despite the town's privately-owned nature, the Court stated that there was "nothing to stop highway traffic from coming onto the

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[24] Marsh v. Alabama, 326 U.S. 501 (1946).
[25] *See* Nixon v. Condon, 286 U.S. 73 (1932); Smith v. Allwright, 329 U.S. 649 (1944); Terry v. Adams, 345 U.S. 461 (1953).
[26] Evans v. Newton, 382 U.S. 296 (1966).
[27] Marsh, *supra* note 24, at 506.
[28] *Id.* at 503-4.
[29] *Id.* at 502.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 503.

business block and [making] free use of the facilities available there."[33] As a result, the Court concluded that "the town and its shopping district [were] accessible to and freely used by the public in general and there [was] nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation."[34] By taking on the form of a traditional municipality and taking on the wide range of associated municipal powers, the company-owned town had thus assumed the state's traditional role.[35]

The courts have also used the public function doctrine in election-related cases, often to ameliorate perceived social injustice. The case of Smith v. Allwright[36] was an instance concerning the Democratic Party's "[p]rimary elections [which were] conducted by the party under state statutory authority."[37] There, the Democratic Party restricted membership to "all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the

[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] Smith v. Allwright, 321 U.S. 649 (1944).
[37] *Id.* at 663.

State."[38] The Court equated the primary election process to a traditional government function, stating that "[w]hen primaries become a part of the machinery for choosing officials . . . the same tests to determine the character of discrimination or abridgment should be applied to the primary as are applied to the general election." [39] Thus, "[i]f the State requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices . . . it endorses, adopts and enforces the discrimination" of the private party. [40]

The Court also reached a similar conclusion in Terry v. Adams,[41] concluding that an association's chief objective was "to deny Negros any voice or part in the election."[42] Because the majority of voters in that district generally abided by and supported the candidates elected in the association's primary,[43] the association had become an

[38] *Id.* at 657.
[39] *Id.* at 664.
[40] *Id.*
[41] Terry v. Adams, 345 U.S. 461 (1953).
[42] *Id.* at 465.
[43] *Id.*

integral part of the election process, a traditional state function. The two cases' conclusion is clear: any attempted interference with the election machinery that controls access to ballots is the equivalent of a private group performing a traditional state function and will be regulated as such.

i. RETRACTION AND LIMITATIONS

a. STRICT LIMITATIONS WHEN AFFECTING PRIVATE PROPERTY

Although the Court seemed to have found a use for the public functions test and briefly expanded it,[44] the doctrine was quickly whittled down and its scope narrowed over the next decade. In Lloyd Corp. v. Tanner,[45] the Court distinguished previous cases of Marsh and Logan Valley, specifically noting several key limitations to the public functions test, especially regarding the intersection of personal liberties and private property. First, integral to the decision in Marsh was that the company town was

[44] *See* Amalgamated Food Emps. Union v. Logan Valley Plaza, 391 U.S. 308, 318 (1968) (where the Court briefly expanded the public function test. Citing to Marsh, the Court found that the shopping mall where an individual sought to distribute material was the "functional equivalent" business plaza in Marsh and thus subject to the constraints of the Fourteenth Amendment).
[45] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

"performing the full spectrum of municipal powers and stood in the shoes of the State."[46] Second, it stated that "property [does not] lose its private character merely because the public is generally invited to use it for designated purposes."[47] In other words, requiring property rights to give way "to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist . . . would diminish property rights without significantly enhancing the asserted right of free speech."[48]

b. THE TRADITIONALLY EXCLUSIVE REQUIREMENT

Courts consistently hold that a private party must be performing an action that has been traditionally performed by the states, yet their holdings have been elusive—perhaps purposefully so—in what a traditional state function is.[49] The Court has emphasized that "very few" actions or functions will ever fall into this category. [50] In *Jackson v.*

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[46] *Id.* at 569.
[47] *Id.*
[48] *Id.* at 567.
[49] Flagg Bros., Inc. *supra* note 16, at 158.
[50] *Id.*

Metropolitan Edison Co., the Court attempted to clarify what it meant by functions and powers traditionally reserved to the states.[51] In doing so, the Court sharpened the lines between a public function and a public good, further limiting the state action doctrine's application.[52] In that case, Jackson sued a privately owned and operated utility company, alleging that "Metropolitan's termination of her service . . . constituted 'state action' depriving her of property in violation of the Fourteenth Amendment's" due process clause.[53] Jackson argued that because Metropolitan was a heavily regulated entity by the Pennsylvania Public Utility Commission, retained monopoly status,[54] and provided electricity as an essential public service,[55] the termination of her services without notice and an opportunity for a hearing was improper.[56]

Although the Court conceded that "something of a governmentally protected monopoly will more readily be found to be state acts than will the acts of an entity lacking

[51] Jackson, *supra* note 17, at 349.
[52] *Id.* at 358-9.
[53] *Id.* at 346.
[54] *Id.* at 351-2.
[55] *Id.* at 352.
[56] *Id.*

these characteristics,"[57] it ultimately held that "there [must be] a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[58] Thus, although the provision of electricity and other utilities was a public good, it wasn't a function traditionally within the realm of state powers. Further, in forming its decision, the Court explicitly recognized that private performance "of powers traditionally exclusively reserved to the State" was necessary to implicate the Fourteenth Amendment.[59] In doing so, the Court specifically cited previous cases decided under the public function test, further limiting the doctrine to the performance of actions not performed by both the state and any other private entity.[60]

The Court in *Rendell-Baker v. Kohn*[61] further clarified the doctrine, holding that a privately owned operation funded by the government and for-public benefit was insufficient to invoke the state action doctrine. The Court

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[57] *Id.* at 349.
[58] *Id.*
[59] *Id.* at 352.
[60] *Id.* at 357-58.
[61] Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

conceded that "the education of maladjusted high school students [was] a public function"[62] but continued its analysis to state that this was "only the beginning of the inquiry"[63] and "that until recently the State had not undertaken to provide education for students who could not be served by traditional public schools." Rather, while educating special needs children was a function of the state, it wasn't a traditionally exclusive function. The Court predicated a similar holding in *Blum v. Yaretsky*,[64] a case decided on the same day as *Rendell-Baker*,[65] on the case of *Polk v. Dodson*, which questioned whether a public defender was acting as an agent of the state when representing an indigent criminal defendant.[66] The Court in *Polk* stated that the public defender's "assignment entailed functions and obligations [that were] in no way dependent on state authority."[67] As a result, *Blum* concluded that nursing homes did not perform a traditionally exclusively reserved function to the states.[68]

2. ENTWINEMENT TEST

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[62] *Id.* at 842.
[63] *Id.*
[64] Blum v. Yaretsky, 457 U.S. 991 (1982).
[65] The Court decided both decisions on June 25, 1982.
[66] Rendell-Baker, *supra* note 61, at 1009.
[67] Polk County v. Dodson, 454 U.S. 312, 318 (1981).
[68] Blum, *supra* note 64 at 1011.

The second category of actions that the courts have found to create state action is when a private party and a state jointly deprive a third party of his constitutional rights. In such a situation, a court generally looks to the nature and extent of the relationship between the private party and the state. Generally speaking, this leaves two distinct situations. The first occurs when a state actor is directly involved in depriving constitutional rights.[69] The second occurs when a state and private party enter a mutually beneficial relationship—a "symbiotic relationship"—and the private party takes an action that transmutes into state action due to the relationship.[70]

Adickes v. S. H. Kress & Co.[71] is a classic example of when a state actor becomes involved with a private entity in

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[69] *See* Monroe v. Pape, 365 U.S. 167 (1967) (holding that the involvement of a state official in a conspiracy to deprive another of their constitutional rights provides the state action necessary to show a direct violation of equal protection rights regardless of whether the actions were either lawful or official); *see also* United States v. Price, 383 U.S. 787, 794 (1966) ("To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.").

[70] *See* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

[71] Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).

denying a third-party a constitutional right. In that case, it was alleged that a Kress employee and a Hattiesburg police officer acted together to deny an individual access to the Kress store because she "was a white person in the presence of Negroes."[72] In remanding the case for a new trial, the Court held that such joint participation between a state official and a private individual in a conspiracy to discriminate against a third party racially was sufficient "to show a direct violation of petitioner's Fourteenth Amendment equal protection rights."[73] Additionally, the Court found a violation of Fourteenth Amendment rights when state statutes or municipal participation fostered discrimination, at least in part.[74] In *Smith v. Allwright*, the state statute did not mandate discriminatory exclusion of blacks from voting in a party primary.[75] Still, the statute did prescribe that the nominees chosen in the primary create the general ballot.[76] And when the discriminatory terms of a will precluded blacks from enjoying a municipal park in *Evans v.*

[72] *Id.* at 152.
[73] *Id.*
[74] *See* Smith v. Allwright, 321 U.S. 649, 664 (1944); *see also* Evans v. Newton, 382 U.S. 296, 301-2 (1966).
[75] *See id.* at 664.
[76] *Id.*

Newton, the Court held that the city's involvement in maintaining the park was sufficient to implicate state involvement.[77]

i. LIMITATIONS

a. THE NEED FOR A SYMBIOTIC RELATIONSHIP

State action can exist when a state and a private entity enter into a mutually beneficial relationship, and the private party acts in a way that violates a third party's constitutional rights. The best example of this may still be *Burton v. Wilmington Parking Authority*.[78] In that case, the Court held that a relationship between a city-owned parking garage and a privately owned restaurant that maintained a lease with the parking garage was sufficient to impute the discriminatory acts by the restaurant onto the state.[79] The restaurant itself was located within the garage, which was owned and operated by the Wilmington Parking Authority,[80] and "constituted at physically and financially integral and .

[77] Evans *supra* note 26, at 301-2.
[78] Burton, *supra* note 70.
[79] *Id.* at 724.
[80] *Id.* at 716.

. . indispensable part of the State's plan to operate as a self-sustaining unit."[81] Furthermore, the Court reasoned that the mutually conferred benefits[82] "together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicates that degree of state participation and involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn."[83]

The Court has since limited the entwinement doctrine and stated that the facts in Burton were dependent on the symbiotic relationship created between the public parking garage and the private restaurant.[84] Specifically, the Court stressed that the public parking garage was dependent on the restaurant to recoup its investment in as much as the restaurant was the parking garage for accessible parking

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[81] *Id.* at 724.
[82] *See id.* at 715. (The land and building were publicly owned, and the building was dedicated to public uses in the performance of essential government functions by statute. The public was responsible for the original purchase of the land, the building's construction, and the cost of maintenance on the building, and the money made from renting space and parking were to be used to repay the initial cost to the city. Restaurant guests were given convenient parking and easy access to the restaurant. No improvements on the building could be assessed for additional taxes because the building itself was exempted tax-free by the city.)
[83] *Id.* at 724.
[84] *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 175 (1972).

and tax-free advantages.[85] In contrast, in *Moose Lodge No. 107 v. Irvis*, the Court held that a privately owned building on privately owned land without any public access could not be transmuted by applying a state statute or regulation, even if it partially controls the private party's performance.[86] Accordingly, while unconstitutional, discriminatory acts must not necessarily originate from the state, state action which actively encourages or endorses otherwise illegal private conduct will be sufficient to impute state action[87] so long as the state has "significantly involved itself with invidious discriminations."[88] Thus, "a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[89]

b. LEGISLATION AND FUNDING ALONE IS INSUFFICIENT

[85] *Id.*
[86] *Id.*
[87] *Id.* at 173.
[88] Reitman v. Mulkey, 387 U.S. 369, 380 (1967).
[89] Blum, *supra* note 64, at 1004.

In *Rendell-Baker v. Kohn*, [90] public funds accounted for at least ninety and up to ninety-nine percent of a private school's operating budget during one year.[91] In addition, Boston and Brookline directly regulated the school[92] and required it to comply with numerous regulations, particularly record-keeping functions.[93] However, the Court clearly stated that "legislative policy choice in no way makes these services the exclusive province of the State."[94] The Court echoed this sentiment, exemplifying its intent to construe the doctrine narrowly in *Blum v. Yaretsky*.[95] There, the Court held that receiving state funding by a privately owned nursing home,[96] paying over ninety percent of the patients' medical expenses,[97] and a state requirement to complete patient care assessment forms[98] was insufficient to transmute the private action into state action. At the core of the Court's holding was that the nursing home wasn't required to rely on the assessment form when discharging or

[90] Rendell-Baker, *supra* note 61.
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.*
[95] Blum v. Yaretsky, *supra* note 64.
[96] *Id.* at 1011.
[97] *Id.*
[98] *Id.* at 1008.

transferring patients[99] or in any way implicate State responsibility for those decisions.[100] Instead, the Court reasoned that it was the human aspect: the doctors made informed medical judgments according to professional standards not governed by the state, which were responsible for the discharges.[101] The Court summarized this restriction by bluntly stating that "the mere fact that a business is subject to state regulation does not by itself convert its action into that of the State."[102]

III. BIG TECH, THE FIRST AMENDMENT, AND THE FAILURE OF THE STATE ACTION DOCTRINE

A. INTRODUCTION

The concept of freedom of speech with the realm of Big Tech has been a social and political hot topic for many years, yet it has only recently come to the forefront of discussion. This recent discussion is due in no small part to the major impact these companies have on our daily lives. The result as of late has generally been a bevy of

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[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] Jackson, *supra* note 17, at 350.

conservative voices crying out that liberal-loving Big Tech has unduly conspired to silence and suppress any politically oppositional point of view.

In particular, social media platforms are a significant and growing contributor to how both individuals and companies interact with one another. While only five percent of American adults used social media in 2005, that number has grown by over fourteen times since then.[103] As many as seven out of ten Americans[104] and more than 4.33 billion people worldwide[105] use social media platforms to access news, entertainment, and communication. Google-owned YouTube is currently crowned king of social media, with a reported 81% of American adults visiting the site daily.[106] The platform boasts an excess of 2 billion users[107] in over 100

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[103] *Social Media Fact Sheet*, PEWRESEARCH (April 7, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/.
[104] *Id.*
[105] *Global Social Media Stats*, DATAREPORTAL, https://datareportal.com/social-media-users (last visited July 15, 2021).
[106] *Social Media Use in 2021*, PEWRESEARCH (APRIL 7, 2021), https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/. (last visited July 15, 2021).
[107] *See* ABOUT YOUTUBE, https://www.youtube.com/intl/en-GB/about/press/#:~:text=Global%20Reach,in%20more%20than%20100%20countries (last visited July 15, 2021) (reporting 2+ billion users); Maryam Mohsin, *10 YouTube Stats Every Marketer Should Know in 2021*, OBERLO (Jan. 25, 2021),

countries and 80 different languages.[108] It is visited by more than 30 million visitors daily, and more than 400 hours of videos are uploaded every hour.[109] More content has been uploaded to YouTube than has been produced by major U.S. television networks; the company reports that over 1 billion hours of video are watched on its site every day.[110]

After President Trump banned naysayers and dissenters from viewing his Twitter account in 2018, claims emerged which alleged that his actions had curtailed freedom of speech and lacked the authority as a government actor to limit who heard his message.[111] More recently, in what has been called a "coordinated crackdown on freedom of speech,"[112] social media platforms began closing down and

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https://www.oberlo.com/blog/youtube-statistics (last visited July 15, 2021) (reporting 2.3 billion user worldwide); Prager Univ. v. Google LLC, 951 F.3d 991, 995 (9th Cir. 2020) ("more than 1.3 billion users").

[108] *See* ABOUT YOUTUBE, https://www.youtube.com/intl/en-GB/about/press/#:~:text=Global%20Reach,in%20more%20than%20100%20countries (last visited July 15, 2021) (reporting 2+ billion users).

[109] Prager Univ., *supra* note 107, at 995.

[110] *Id.*

[111] *See* Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019).

[112] Bradford Littlejohn, *Big Tech and the Battle for Republican Liberty*, PUBLIC DISCOURSE (July 15, 2021), https://www.thepublicdiscourse.com/2021/07/76774/.

suspending users' accounts, finding them in violation of their terms of service following the capital riots in late 2020.[113] During this "crackdown," Twitter suspended over 70,000 accounts,[114] and Facebook also removed an undisclosed number. Facebook briefly banned President Trump[115] in January, and the platform announced in June of 2021 that the suspension would last at least two years.[116] By then, Twitter had permanently banned President Trump from its platform in January 2021.[117]

Challenges to Big Tech under the First Amendment have been predictably limited. The First Amendment guarantees that "Congress shall make no law . . . abridging

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[113] *Id.*

[114] Ellen Nakashima, et. al, *Purges Force Extremists Off Social Media Sites. That Can Complicate Investigators' Work.* WASHINGTON POST (Jan. 17, 2021, 8:51 PM EST), https://www.washingtonpost.com/national-security/far-right-investigations-encrypted-fbi/2021/01/17/bd7a71ac-580a-11eb-a931-5b162d0d033d_story.html.

[115] Andrea Chang, *Trump Returns to Twitter After Facebook Extends Ban Through Inauguration,* LA TIMES (Jan. 7, 2021, 7:21 AM EST), https://www.latimes.com/business/story/2021-01-07/facebook-suspends-trump-account.

[116] Mike Isaac and Sheera Frenkel. *Facebook Says Trump's Ban Will Last at Least 2 Years,* NY TIMES (June 7, 2021), https://www.nytimes.com/2021/06/04/technology/facebook-trump-ban.html.

[117] Kate Conger and Mike Isaac, *Twitter Permanently Bans Trump, Capping Online Revolt,* NY TIMES (Jan. 12, 2021), https://www.nytimes.com/2021/01/08/technology/twitter-trump-suspended.html.

the freedom of speech"[118] and provides a broad blanket of protection for various types of expression. Although the First Amendment's constraints were originally only applicable to the federal government, the Fourteenth Amendment's Due Process Clause later applied the phrase to state governments as well.[119] Integral to this are the concepts that the Constitution and its limitations only apply to governmental actors and actions attributable to the government or a government actor,[120] and the amendment protects only private actors.[121] Indeed, the Court has stated explicitly that "[t]he constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state."[122]

Prima facie, the state action doctrine appears to be the perfect vehicle for would-be plaintiffs to bridge the gap between Big Tech platforms and the constraints imposed by the First Amendment. However, attempts to utilize the

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[118] U.S. CONST. amend. I.
[119] *See* Gitlow v. New York, 268 U.S. 652 (1925) (applying the First Amendment to the states via the Fourteenth Amendment).
[120] Erwin Chemerinsky, *Rethinking State Action*, 80 NW. UNIV. L. REV. 503, 507 (1985); Hudgens v. NLRB, 424 U.S. 507, 513 (1976) ("the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state").
[121] Manhattan Cmty. Access Corp. v. Halleck, 139 S.Ct. 1921 (2019).
[122] Hudgens v. Nat'l Labor Relations Bd., 424 U.S. 507, 513 (1976).

doctrine have fallen short in a predictable pattern.[123] Ultimately, the ambiguity left behind by the Court in the public functions test applications, along with the limitations imposed in its application, have made that avenue a non-starter when it comes to preserving the freedom of speech from the chilling effect of censorship in Big Tech. Routinely, the Court has refused to find any government function.

B. THE TRADITIONAL PROBLEMATIC BARRIERS PERSIST

1. NO TRADITIONALLY EXCLUSIVE GOVERNMENT FUNCTION EXISTS, ESPECIALLY IN THE DIGITAL WORLD

The traditional line of cases following *Lloyd Corp*. has made it clear that the precedent set in Marsh was to be viewed as an anomaly predicated upon the pervasive control

[123] *See, e.g.,* Shulman v. Facebook.com, 2017 U.S. Dist. LEXIS 183110, at *4 (D.N.J. Nov. 6, 2017) (Facebook is not a state actor); Forbes v. Facebook, Inc., 2016 U.S. Dist. LEXIS 19857, at *2 (E.D.N.Y. Feb. 18, 2016) (Facebook is a private corporation whose actions are not attributable to the state); Doe v. Cuomo, 2013 U.S. Dist. LEXIS 40899, at *9 (N.D.N.Y. Feb. 25, 2013) (Facebook is not a state actor under the joint action test); Young v. Facebook, Inc., 2010 U.S. Dist. LEXIS 116530, at *3 (N.D. Cal. Oct. 25, 2010) (Facebook is not a state actor); *see also* Green v. Am. Online (AOL), 318 F.3d 465, 472 (3d Cir. 2003) (AOL is not a state actor); Abu-Jamal v. Nat'l Pub. Radio, 1997 U.S. Dist. LEXIS 13604, at *4 (D.D.C. Aug. 21, 1997) (NPR is not a state actor).

Gulf retained over the company-owned municipality of Chickasaw.[124] Although the Court in *Marsh* may have rested its decision at least in part on the fact that the town square was open to the public and immediately accessible from the nearby highway, those facts alone are insufficient in the digital age to hold Big Tech accountable for censoring speech.[125] The Court has made it clear that "a private entity may qualify as a state actor [only] when it exercises 'powers traditionally exclusively reserved to the State." [126] Aside from "running elections and operating a company town," not much else qualifies. [127] Certainly, "[p]roviding some kind of forum for speech is not an activity that only governmental entities have traditionally performed."[128]

Prager University, an organization with the mission to "provide conservative viewpoints and perspective on public issues,"[129] challenged YouTube in 2020 However, the Court dismissed the case due largely to its inability to bridge

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[124] Marsh, *supra* note 24.
[125] *Id.*
[126] Halleck, *supra* note 121, at 1940 (quoting Jackson, *supra* note 17, at 352).
[127] *Id.* at 1929.
[128] Halleck, *supra* note 121, at 1930.
[129] Prager Univ., *supra* note 107, at 995.

the gap between YouTube, a private entity, and the constraints of the First Amendment.[130] As a result, YouTube tagged several dozen of Prager's videos and classified them as restricted, subjecting them to YouTube's Restricted Mode.[131] YouTube's Restricted Mode is a user-activated feature designed to screen out potentially mature content the user may not want to watch.[132] It uses a combination of signals, such as "video title, description, metadata, Community Guidelines reviews, and age restrictions," to filter out content.[133] Content typically subject to Restricted Mode features drugs, alcohol, violence, and specific details about war, terrorism, crime, and political conflict.[134] In addition, YouTube demonetized some of Prager's videos, meaning the company could not make money from advertisements.[135]

Prager attempted to challenge YouTube because it performs a public function,[136] yet it failed to meet the

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[130] *See id.*
[131] *Id.*
[132] YOUTUBE HELP, https://support.google.com/youtube/answer/174084?hl=en&co=GENIE.Platform%3DDesktop (last visited July 21, 2021).
[133] *Id.*
[134] Prager Univ., *supra* note 107, at 996.
[135] *Id.*
[136] *Id.* at 997.

demanding requirement of showing that the company is conducting a traditionally exclusive government function. The courts have made it clear that hosting speech on a private platform is not an activity traditionally performed by governmental entities.[137] Further, the court held that "YouTube does not perform a public function by inviting public discourse on its property."[138] Additionally, Prager attempted to argue that YouTube had circumscribed its own rights by opening it up to the public in general.[139] The Court declined to credit this argument as well, blatantly refusing to apply the principles from *Marsh* and once again distinguishing that holding as a "unique and rare context" where a private actor was performing the full range of municipal powers.[140] Rather, operating a platform for user-generated content is a far cry from exercising the full range of municipal powers evidenced in Marsh.[141] YouTube does

[137] Prager Univ., *supra* note 107, at 999; Halleck, *supra* note 121, at 1929.
[138] Prager Univ., *supra* note 107.
[139] *Id.* at 998-99.
[140] *Id.* at 999.
[141] *Id.*

not even evidence any characteristic of any American town.[142]

2. DIGITAL PLATFORMS ARE NOT PUBLIC FORUMS

Although the argument of "Big Tech as a public forum" may initially appear to be appealing, it too is an argument that ultimately fails. Indeed, the town square or public street is the quintessential model in American jurisprudence of the public forum.[143] The courts have long held that open spaces such as those where the public has unconditional access have been used to communicate, share ideas, and discuss relevant topics.[144] And at least one opinion seems to equate the realms of Facebook, Twitter, and LinkedIn to these traditional public spaces.[145] However, the courts have routinely held the fact that Internet platforms that are open to the public are not state actors by virtue of

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[142] *Id.*

[143] *See generally* United States v. Kokinda, 497 U.S. 720, 742 (1990); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983) (Streets and parks have long been public places for assembly, discussing ideas, and communicating, the government cannot prohibit all communications therein).

[144] *Id.* (citing Hague v. Committee for Industrial Organizations, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.)).

[145] *See* Packingham v. North Carolina, 137 S.Ct. 1730, 1737 (2017) (holding that a state statute preventing a felon from accessing social media altogether was equivalent to preventing the individual from exercising his First Amendment rights).

that fact alone.[146] For a public forum to exist, it must be the government that opens the property to public discourse, not a private entity.[147] Any attempt to label any Big Tech platform as a public forum would, by definition, need to meet the threshold inquiry of whether or not the government opened the forum.[148]

Knight First Amend. Inst. at Columbia Univ. v. Trump questioned the boundaries of Big Tech's ability to censor and regulate material on its platforms.[149] In that case, the Second Circuit Court of Appeals affirmed the District Court's holding that comment threads ("the 'interactive space' associated with each tweet")[150] on Twitter, a digital,

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[146] *Id.* at 997; *See* Belknap v. Alphabet, Inc., 504 F. Supp. 3d 1156 (D. Or. 2020) (Alphabet, Google, and YouTube are not state actors simply because they created a public forum); Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1934 (2019) (A private entity is not a state actor merely because it provides a forum for speech); *See, e.g.,* Freedom Watch, Inc. v. Google, Inc., 368 F. Supp. 3d 30, 40 (D.D.C. 2019) (cert. denied) (Facebook and Twitter are private businesses which are not transmuted into state actors simply because they are open to public use); Howard v. Am. Online Inc., 208 F.3d 741, 754 (9th Cir. 2000) (Providing Internet service to the public without more did not make America Online (AOL) a state actor).

[147] *See* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).

[148] *Id.*

[149] Knight First Amdt. Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2019).

[150] *Id.* at 233.

social media platform, were the equivalent of a public forum.[151] In reaching its holding, the court stated that "to determine whether a public forum has been created . . . look 'to the policy and practice of the government' as well as 'the nature of the property and its compatibility with expressive activity to discern the government's intent.'"[152] Applying this test, the Second Circuit court concluded that "opening an instrumentality of communication 'for indiscriminate use by the general public' creates a public forum."[153] Further, neither temporary government control of property "[n]or [the fact] that the government does not 'own' the property in the sense that it holds title to the property, is . . . determinative of whether the property" is sufficient for First Amendment purposes.[154] As a result, the court affirmed the District Court's holding that then-President Trump was unable to regulate who could view and comment on his social media posts without infringing upon their First Amendment liberties.[155]

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[151] *Id.*
[152] *Id.* at 226 (quoting *Cornelius*, 473 U.S. at 806).
[153] *Id.* (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983)).
[154] *Id.* at 235.
[155] *Id.*

On appeal, the Court vacated the Second Circuit opinion.[156] It then remanded with instructions to dismiss as moot following the administration change, but not without Justice Thomas authoring a concurring opinion.[157] In that opinion, Justice Thomas rightly pointed out that the Second Circuit's argument is in tension with the classic definition of what constitutes a public decision.[158] Despite President Trump being a government official who often used Twitter to speak in an official capacity, Twitter remains a private company, not a government-controlled space.[159] Although President Trump could control other users' ability to post on the comment threads, his authority to regulate the forum and control it was secondary to Twitter, who retained the authority "to remove an account at any time for any reason."[160] The fact that Twitter exercised that authority to ban President Trump from the platform further evidenced that whatever control President Trump retained as a

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[156] Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1221 (2021) (Thomas, J. concurring).
[157] *Id.*
[158] *Id.* at 1222.
[159] *Id.*
[160] *Id.*

government official was only secondary to that of the private entity.

Similarly, simply self-labeling as a public forum is insufficient to create a public forum. Transmutation of property into a public forum is not possible by the actions of a private individual.[161] The court in *Prager* declined to classify YouTube as a public forum for this reason. Instead, *Prager* asserted that YouTube's self-representation as being committed to freedom of expression and that a comment by an executive before a congressional committee that the platform was a "neutral public fora" was insufficient to transmute the private property into a public forum.[162]

3. PRIVATE PROPERTY IS NOT TRANSFORMED BY HOSTING SPEECH AND REGULATIONS ARE STILL NOT ENOUGH

Problematic is the fact that courts continue to uphold the traditional line of cases from *Lloyd Corp.* forward, which holds that merely providing a venue for public speech does not transmute the private party into a state actor.[163] Private

[161] Prager Univ., *supra* note 107 at 999.
[162] *Id.*
[163] Lloyd Corp., *supra* note 45, at 569.

property owners have a long-standing history of opening up their property to the public for speech, and the courts have made it clear that an Internet Service Provider whose network provided access to the Internet was not a government actor.[164] As a result, courts have consistently denied that private digital companies that host user-generated content on their platforms create state actors.[165] Even in the digital realm, courts rejected the argument, steadfastly maintaining that "[s]uch a rule would eviscerate the state action doctrine's distinction between government and private entities because 'all private property owners and private lessees who open their property for speech would be subject to First Amendment constraints.'"[166]

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[164] *See, e.g.,* Howard, *supra* note 146, at 754 (providing Internet service does not make AOL an instrument of the government); Green v. Am. Online (AOL), 318 F.3d 465, 472 (3d Cir. 2003) ("AOL is not transformed into a state actor because [it] provides a connection to the Internet on which government and taxpayer-funded websites are found [or] because AOL opens its network to the public whenever an AOL member accesses the Internet and receives email or other messages from non-members of AOL); *See also* Sanger v. Reno, 966 F. Supp. 151, 163 (E.D.N.Y. 1997) (providers are not state actors and are free to impose content-based restrictions without implicating the First Amendment");

[165] Belknap, *supra* note 146; *Howard*, *supra* note 146, at 754.

[166] Prager Univ., *supra* note 107, at 997 (quoting Halleck, *supra* note 121).

Although *Halleck* was not a suit against Big Tech *per se,* it is still instructive in this regard. The case involved a claim against Time Warner's cable system in Manhattan.[167] The New York State Public Service Commission, which regulates cable franchising, passed a state law that requires cable systems to set aside channels for public access on a free-of-use, first-come, first-served basis.[168] Halleck co-produced a film critical of Manhattan Neighborhood Network, which aired on its public access channels.[169] The network initially aired the program and then suspended Halleck and his co-producer from all network services and facilities.[170] Halleck then brought suit, claiming that the network had violated his First Amendment rights by restricting access to the statutorily required public access channels.[171] Dismissing all of Halleck's claims, the Court reiterated that "a private entity who provides a forum for speech is not transformed by that fact alone into a state actor."[172] If so, then those property owners "would lose the

[167] Halleck, *supra* note 21, at 1926.
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.* at 1930.

ability to exercise what they deem to be appropriate editorial discretion within that open forum."[173] Further, such a court-made law would completely disregard private property interests in America.[174]

The Court in *Halleck* also upheld the traditional limitation that "the fact that the government licenses, contracts with, or grants a monopoly to a private entity does not convert the private entity into a state actor—unless the private entity is performing a traditional, exclusive public function."[175] Once again, the Court forewarned that such a holding would transform virtually every private entity regulated by a government statute or regulation into a state actor, subjecting their activities to the multitude of constitutional restraints.[176]

IV. CONGRESSIONAL ACTION IS THE SOLUTION

Unfortunately, there is no quick-and-ready solution. At its core, the state action doctrine imputes constitutional limitations on private actors or entities under certain

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[173] *Id.* at 1931.
[174] *Id.*
[175] *Id.*
[176] *Id.* at 1932.

conditions such that individual liberties are not unduly burdened or outright extinguished. Although it is far from defunct, the doctrine is a mediocre bandage to potential claims at best that the Court has shown no interest in revitalizing or expanding. Although there may be as-of-yet unexplored judicial remedies, the soundest solution is for Congress to invoke its legislative authority and provide for a remedy. In particular, this paper contends that the best way for it to do so is in the form of enacting legislation providing for either (1) the delegation of authority to an administrative agency along with the instruction to create an administrative body to promulgate rules governing censorship within the Big Tech arena, review alleged infringements, and commence enforcement actions against violators or (2) the creation of a statutory cause of action which would allow individuals to challenge perceived violations in court. In either event, the revival and adaptation of the fairness doctrine can provide the basis for a standard to which these entities should be held accountable.

A. THE ADMINISTRATIVE REMEDY

Administrative agencies are entities within the executive branch of the government tasked with creating rules and regulations at the behest of Congressional direction.[177] Agencies are each governed by their respective enabling statutes, which outline the agency's realm of authority per congressional intent and have two means of effectuating their statutory purpose: rulemaking and adjudication.[178] The Congressional delegation of authority to an administrative agency would provide for several different mechanisms to check against Big Tech action and unwarranted censorship. First, agencies are expected to possess the requisite expertise regarding the areas of the law entrusted to them under the congressional delegation of authority; they possess the ability to create and effectuate the best rules and regulations.[179] Second, administrative regulation would provide an avenue for both private individuals and entities to challenge perceived violations of

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[177] Jason Gordon, *Administrative Agencies – Explained*, THE BUSINESS PROFESSOR (Sept. 23, 2021), https://thebusinessprofessor.com/en_US/us-legal-system/what-are-administrative-agencies.
[178] *Id.*
[179] Chevron, *infra* note 182.

any rules the agency promulgates. Third, the agency would possess the innate authority to commence adjudicatory action against and sanction Big Tech companies that fail to comply with regulation.

Administrative agencies are generally recognized as experts in their respective fields, a fact exemplified by the high level of judicial deference given to them by courts.[180] Indeed, the Court's general philosophy when reviewing cases arising out of administrative rulemaking or adjudication tends to be a high level of deference predicated solely upon this expertise.[181] The result is the Court's recognition that "[j]udges are not experts in the field"[182] and that Congress delegates authority to administrative agencies "thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so [than the courts]."[183] This framework has created a series of entities within the federal

[180] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415 (1971) ("The APA accords the agency a presumption that it has acted in accordance with the law.").
[181] Jason Metha, *The Development of Federal Professional Responsibility Rules: The Effect of Institutional Choice on Rule Outcomes*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 57, 86 (2007).
[182] Chevron, U.S.A., Inc. v. NRDC, Inc, 467 U.S. 837, 865 (1984).
[183] *Id.*

government's executive branch that can create and enforce regulatory rules within specific realms of authority.[184]

The procedures and requirements for both rulemakings, the administrative equivalent of legislative action, and adjudication, the administrative equivalent of judicial procedures, are governed by the Administrate Procedures Act ("APA").[185] Additionally, the APA also creates and prescribes the standards for judicial review of agency action.[186] The rulemaking function of administrative agencies is a quasi-legislative function and the means by which agencies administer rules.[187] According to the APA, rulemaking procedures can be formal or informal.[188] Formal rulemaking is a trial-like procedure governed by Sections 556[189] and 557[190] of the APA and is rarely used. However, it is arguably the best means of satisfying Due Process

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[184] *Id.*
[185] Administrative Procedures Act, 5 U.S.C. § 550 et seq. (1946).
[186] 5 U.S.C.S. § 556 (LEXIS through Pub. L. No. 117-80).
[187] Chevron, supra note 182, at 843.
[188] Administrative Procedures Act, 5 U.S.C. § 550 et seq. (1946); *see also,* Int'l Council of Shopping Ctrs. v. Oregon Env't Quality Comm'n, 556 P2d 138, 140 (Or. Ct. App. 1976) ("[T]he federal Administrative Procedures Act provides for two types of agency rulemaking.).
[189] 5 U.S.C.S. § 556 (LEXIS through Pub. L. No. 117-80).
[190] 5 U.S.C.S. § 557 (LEXIS through Pub. L. No. 117-80).

concerns and creating the fairest, most accurate, representative, and (arguably) effective rules. Informal rulemaking, also known as Notice and Comment rulemaking, is governed by Section 553 of the APA and is by far the more common of the two.[191]

Notice and Comment procedures are designed "to facilitate the informed and reasoned decision making of governmental agencies"[192] and "reflect Congress's 'judgment that informed administrative decision making require[s] that agency decisions be made only after affording interested persons an opportunity to communicate their views to the agency."[193] Indeed, the notice and comment procedures are thought to "assure the legitimacy of administrative norms,"[194] and one of its fundamental benefits is to increase and allow for "public participation and fairness [from and] to affected parties[.]"[195] As a result, the informal rulemaking

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[191] Int'l Council of Shopping Ctrs., *supra,* note 188, at 140 ("The more common type [of rulemaking] is called "informal" or "notice-and-comment" rulemaking [whereas] [t]he other federal rulemaking procedure is called "formal" rulemaking."

[192] Comm. for Fairness v. Kemp, 791 F. Supp. 888, 896 (D.D.C. 1992).

[193] Air Transp. Ass'n v. Department of Transp. 900 F.2d 369, 375 (D.C. Cir. 1990) (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 316, (1979)).

[194] *Id.*

[195] Am. Hosp. Asso. v. Bowen, 834 F.2d 1037, 1044 (D.C. Cir. 1987).

process is perhaps one of the best ways to gather views for all interested parties and form the fairest and most appropriate rules.

Under notice and comment rulemaking, an agency will provide notice of any proposed rule or proposed changes to a rule to the public via publication in the Federal Register and then receive comments from interested persons for a set period of time.[196] The initial publication in the Federal Register almost always explains what the agency is trying to accomplish with the proposed rulemaking, what prompted the rulemaking, the various contents and provisions of the proposed rule, reference to the legal authority under which the rule is promulgated,[197] and any other information that might be deemed pertinent by the agency. Interested parties are then permitted to comment on the pending rules, affording them the opportunity to participate in the process by bringing potentially problematic concerns to the agency's attention and lobbying for beneficial changes.[198]

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[196] 5 U.S.C.S. § 553(b) (LEXIS through Pub. L. No. 117-80).
[197] 5 U.S.C.S. § 553(b)(2) (LEXIS through Pub. L. No. 117-80).
[198] *Contacting Elected Officials: Comment on Pending Regulations,* BERKLEY LIBRARY,

Additionally, the notice and comment period provides a level of transparency that may not be available in other forms of rulemaking.[199] Finally, this period has the effect of reducing antagonization to the final rule from governed entities,[200] making the rule easier to enforce, and decreasing the cost of enforcement after the rule goes into effect.[201]

Adjudication under the APA is the agency process for issuing an order and is roughly an issuance of final agency action in any other matter except rulemaking.[202] Adjudication is the administrative equivalent for judicial action, and as such, is typically directed toward a single or select few individuals and predicated upon facts unique to only those individuals. Like rulemaking, the APA states that adjudication procedures can be either formal or informal,

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https://guides.lib.berkeley.edu/ContactingOfficials/regs (last visited Jan. 28, 2022).

[199] Stephen M. Johnson; *#BetterRules: The Appropriate Use of Social Media in Rulemaking,* 44 FLA. ST. U. L. REV. 1379, 1385 (2017); Michael Herz, *Using Social Media in Rulemaking: Possibilities and Barriers*, 1, 6 (Nov. 21, 2013) [https://perma.cc/FP83-BDNW].

[200] *Id.*; *See also* Herz, *supra* note 199, at 6.

[201] *Id.*; *See also* Herz, *supra* note 199, at 6.

[202] 5 U.S.C.S. § 551(6) (LEXIS through Pub. L. No. 117-80) ("'order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing").

although the latter is once again the more common of the two. Because adjudication is fundamentally a quasi-judicial enforcement action often initiated by the agency, the agency retains wide latitude and discretion in whom it chooses to prosecute. This ability gives the agency the power to tackle the worst offenders and choose the specific facts and circumstances on a case-by-case basis to broadcast its decision to enforce the rules to other potential offenders. Although this prevents enforcement on a widespread level since the terms of the adjudication only apply to the specific parties, it provides a strong signal to others in the respective industry and functions as a form of constructive notice as to what will be tolerated and what will not. Even the mere threat of adjudication or enforcement can have a coercive effect.

B. THE FAIRNESS DOCTRINE

1. BRIEF HISTORY AND OVERVIEW

Almost all forms of media, both broadcasts and print, are protected within the boundaries of the First Amendment

by its free speech guarantees.[203] Broadcasts in particular have been the subject of extensive government regulation for almost an entire century.[204] As early as the 1920s, the United States Supreme Court recognized that "[w]ithout government control, the medium [of radio] would be of little use because of the cacophony of competing voices, none of which could be clearly and predictably heard."[205] The result was the creation of the Federal Communications Commission ("FCC") in 1934,[206] which gained the ability to regulate radio broadcasting in the public interest.[207] The public interest was "[v]ery shortly thereafter [interpreted to require] ample play for the free and fair competition of opposing views" and applied "to all discussions of issues of importance to the public."[208] Thus, at their core, both the

[203] *See* Red Lion Broad. Co. Inc. v. FCC, 395 U.S. 367 (1969).
[204] United Mine Workers of Am. Int'l Union v. Parsons, 172 W. Va. 386, 396 (W. Va. 1983) (citing United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948)).
[205] Red Lion Broad. Co. Inc. *supra* note 203, at 376.
[206] Federal Communications Act of 1934, Pub. L. No 73-416, 48 Stat. 1064 (1934) (codified at 47 U.S.C. § 151-757).
[207] Nat'l Broad. Co. v. United States, 319 U.S. 190, 216 (1943) ("The touchstone provided by Congress was the public interest, convenience, or necessity, a criterion which is as concrete as the complicated factors for judgment in such a field of delegated authority permit (quoting Federal Commc'n Comm'n v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940))).
[208] Red Lion Broad. Co., *supra* note 203, at 377 (internal citations omitted).

FCC and its predecessor, the Federal Radio Commission, shared the same goal of achieving fairness.

The fairness doctrine arose out of this public interest and its fundamental purpose was predicated upon the public's fundamental right to be informed.[209] As a result, the effect of the fairness doctrine was to impose two requirements on broadcast coverages regarding any topic concerning public importance.[210] First, the broadcaster was required to give an issue of public concern adequate coverage, and second, it must accurately reflect different points of view.[211] Both prongs of this requirement reflected the precept that the public interest has a right to the free flow of information and access to opposing points of view.[212]

One of the key facets of the fairness doctrine was the enforcement of how broadcasting networks applied it.[213] After *Red Lion*, there was a "constitutional obligation to provide an opportunity for the presentation of contrasting

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[209] United Mine Workers of Am. Int'l Union, *supra* note 204, at 397.
[210] *Id.*
[211] Red Lion Broad. Co., *supra* note 203, at 377.
[212] *Id.*
[213] United Mine Workers of Am. Int'l Union, supra note 204, at 402.

views on the controversial issues of public importance,"[214] which was triggered whenever only a single side of any controversial public issue was presented.[215] Important as well is that "while no particular individual has a guaranteed right of access to the broadcast microphone for his own self-expression, the public as a whole does retain its paramount right to receive suitable access to social, political, esthetic, moral, and other ideas and experiences."[216]

Thus, networks were given "considerable discretion in selecting the manner of coverage, the appropriate spokesman, and the techniques of production and presentation."[217] Invariably, this wide range of discretion meant that there was an ever-evolving and ever-changing methodology being applied by networks and press entities in order to meet the requirements imposed by the fairness doctrine. Moreover, there was no set formula proscribed for broadcasts to follow in order to ensure fairness, which created a grey area of uncertainty for broadcast companies. While they were able to develop remedies to comply with the

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[214] *Id.*
[215] *See* Green v. FCC, 447 F.2d 323 (D.C. Cir. 1971).
[216] United Mine Workers, *supra* note 213, at 402 (internal citations omitted).
[217] 48 F.C.C.2d 1, 16 (June 27, 1974).

doctrine's requirements on a case-by-case basis, this also meant that they might not always be certain of compliance with the rule. As a result, the courts tended to look at whether broadcast entities had to make "a diligent, good-faith effort to communicate to [proponents of an opposing view their] willingness to present their views."[218] And in doing so, the entity was required to provide a sufficient amount of time to the alternative point of view such that it presented a "reasonably balanced presentation."[219]

2. PAST CRITICISMS

The second prong of the fairness doctrine fairly received criticism that it stifled speech and abridged an individual's First Amendment rights rather than empowered them.[220] At its basis, the doctrine was essentially a requirement imposed by the government, which mandated that a broadcaster or network convey speech that did not endorse and which it may have believed contained potentially dangerous

[218] *Id.* at 14.
[219] United Mine Workers, *supra* note 204, at 403 (internal citations omitted).
[220] R. Trevor Hale & James C. Phillips, *Article: The Fairness Doctrine in Light of Hostile Media Perception*, 19 COMMLAW CONSPECTUS 395, 400-05 (2011).

consequences.[221] Rather than risk violating the law and facing judicial consequences, the recourse for many entities may have been simply that broadcasters and news sources chose to forgo reporting on specific issues and "avoid controversy"[222] rather than risk the fines associated with inadequate coverage.[223] When this happens, the consequence then is that "political and electoral coverage would be blunted or reduced."[224] Obviously, such a result would run contrary to the doctrine's purpose to keep the public informed.

In addition, the origins of the doctrine trace back to the 1920s when radio was viewed as a form of entertainment and not necessarily a part of the press or news-media world.[225] In that era, access to the spectrum capable of hosting electromagnetic airwaves was viewed as a limited

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[221] *Id.*
[222] Miami Herald Pub. Co., Div. of Knight Newspapers, Inc. v. Tornillo, 418 U.S. 241, 257 (1974) (discussing the effects of a Florida statute which statute that granted a political candidate a right to equal space to answer criticism and attacks on his record by a newspaper and which also made it a misdemeanor for the newspaper to fail to comply).
[223] *Id.*
[224] *Id.*
[225] Hale & Phillips, *supra* note 221, at 406.

commodity requiring regulation.[226] Indeed, this "scarcity argument" was alive and well in the late 1960s when the Court recognized the fairness doctrine as constitutionally valid in *Red Lion Broadcasting Co*.[227]

3. REMEDY

Congressional delegation placing the responsibility for crafting the rules and regulations within the hands of an administrative agency would constitute a crucial first step toward solving the issue of Big Tech companies abridging individuals' fundamental liberties. An agency is in the best position to craft the rules necessary to effectively govern the digital world due to its expertise and ability to gather pertinent information through notice and comment rulemaking. Further, an agency's ability to adjudicate claims against the giants would serve as an enforcement mechanism capable of enforcing its rules. Private individuals or entities would be able to seek rulemaking, and it would

[226] *Id.*; *See* Red Lion Broad, Co. *supra* note 178, at 390 ("Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium.").
[227] *Id.*

provide an avenue through which individuals could file grievances when they feel their rights have been violated.

The FCC, for example, was able to exercise some level of regulatory authority over the Internet (especially over Internet Service Providers ("ISPs")) until 2010 when the D.C. Circuit Court of Appeals ruled that it was unable to exercise ancillary jurisdiction over ISPs.[228] In its mandate, the Communications Act of 1934 grants broad authority to the FCC to regulate "interstate and foreign commerce in communication by wire and radio so as to make available . . . to all the people of the United States a rapid, efficient, Nation-wide, and worldwide wire and radio communication service with adequate facilities at reasonable charges."[229] The FCC has generally recognized this to be a wide grant of authority, and the courts have supposed the contention, although it is not limitless. Over the past century, the FCC has grown beyond "the dissemination of radio

[228] Comcast Corp. v. FCC, 600 F.3d 642 (D.C.C. April 6, 2010) (Holding that the FCC could not regulate Internet Service Providers under Title II powers granted to it by the enabling act because the FCC classified Internet Service Providers as information services governed by Title 1 of the Communications Act of 1934 and not common carriers as governed by Title II of the Act,).

[229] 47 U.S.C. § 151 (1996).

communications intended to be received by the public, directly or by the intermediary of relay stations,"[230] and the now-expanded definition also includes a wide variety of broadcast stations, including television, satellite, wire, and cable.[231]

Although a blanket rule constituting an application of First Amendment freedoms to social media platforms would be a massive first step in the right direction, a revival and adaptation of the fairness doctrine would better serve the goal of protecting speech on digital platforms. Although almost all forms of speech are protected to varying degrees, the primary interest in today's age is the unwarranted suppression of speech the media giants do not agree with—particularly speech revolving around political ideologies. The fairness doctrine, at its core, is specifically designed to protect these types of speech by guaranteeing equal treatment to opposing points of view so long as it is within the public interest. While the concept of what constitutes the

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[230] 47 U.S.C. § 153(7) (2010).

[231] *What We Do*, FCC, https://www.fcc.gov/about-fcc/what-we-do#:~:text=The%20Federal%20Communications%20Commission%20regulates,of%20Columbia%20and%20U.S.%20territories (last visited July 31, 2021).

public interest is debatable, it is undeniable that didactically opposed, liberal and conservative ideologies seeking to foster discussion and disseminate information and political beliefs would fall within this realm.

Past criticisms of the fairness doctrine carry substantial weight, yet their application to the digital arena arguably lessons such concerns that were derived from an era relegated to radio and visual broadcast. Rather than encouraging a broadcaster or news reporter to seek out a speaker from an opposing point of view and affording them equal airtime on what may be a limited broadcast, Big Tech would merely be required to allow opposing messages to exist within the same space. Under a modern application of the fairness doctrine, the company would simply be prohibited from actively seeking to censor one type of speech while allowing another to proliferate or actively promoting one while simply permitting another to exist behind a digital dead zone.

In a digital, algorithm-driven world, a modern application of the fairness doctrine would also mean that companies could not use algorithms to achieve the same effect. Google, for example, would not be permitted to use

algorithms to actively bury conservative-leaning search results, passively pushing articles supporting an opposing point of view to the forefront. Likewise, companies such as Facebook would not be permitted to use algorithms to promote advertisements or other content supporting one political agenda or censor messages supporting one type of political ideology. Platforms such as YouTube would be unable to use algorithms to push favored videos to the detriment of another. Under a modern application of the fairness doctrine, these companies would be able to support one type of content only if it gives equal treatment to an opposing point of view. There's no reason for any platform to forgo hosting content supporting a certain ideology so long as it also allows equal access to another.

C. THE ALTERNATIVE – A STATUTORY RIGHT OF ACTION

In addition to administrative enforcement, Congress also holds the ability to create a private right of action that would permit individuals or entities to bring the suit directly in court. The most analogous example of this is perhaps the

Fair Debt Collections Practice Act ("FDCPA").[232] Created as part of Title VIII in 1977, the FDCPA was enacted specifically because "existing laws and procedures for redressing injuries"[233] were inadequate and because there was "abundant evidence of the use of abusive, deceptive, and unfair . . . practices."[234] The FDCPA creates an administrative remedy in that it enables the Consumer Financial Protection Bureau ("CFPB") and the Federal Trade Commission ("FTC")[235] to enforce its provisions, but in addition, the Act also creates a private right of action that provides citizens with the ability to sue directly in court.[236] While the Act specifically prohibits several practices and types of conduct that a debt collector may not engage in, broadly prohibiting any "conduct [whose] natural consequence of which is to harass, oppress, or abuse any person,"[237] enumerates numerous unfair practices[238] and false or misleading representations,[239] and there also is a

[232] Fair Debt Collections Practices Act, 15 U.S.C. § 1692, *et. seq*. (1977).
[233] 15 U.S.C. § 1692(b) (1977).
[234] 15 U.S.C. § 1692(e) (1977).
[235] 15 U.S.C. § 1692(l) (2010).
[236] 15 U.S.C. § 1692(k) (2010).
[237] 15 U.S.C. § 1692(d) (1977).
[238] 15 U.S.C. § 1692(f) (1977).
[239] 15 U.S.C. § 1692(e) (1996).

plethora of case law that has developed within the various circuits interpreting these provisions. Most pertinent, however, the FDCPA enables a person who recovers against a debt collector who fails to comply with the FDCPA actual damages, additional damages up to a statutory cap, enables class action lawsuits, and allows for the recovery of attorney's fees in the case of a successful suit.[240]

Creating a statutory right of action would provide individuals direct access to the courts and has the potential to be a powerful tool in protecting an individual's rights against Big Tech's infringement. The primary concern over the creation of such a right of action would be flooding the courts with potentially unwarranted or frivolous claims, yet the pleading process is designed to act as a gatekeeper to the courts. Additionally, some courts have added a requirement to similar state laws that a potential plaintiff establish, as a precondition to any private action, that the aggrieved action was against the public interest, caused public injury, or

[240] 15 U.S.C. § 1692(k) (2010).

affected consumers in general.[241] Preconditions such as these have a preclusive effect and help ensure that only meritorious claims make it onto the courts' dockets.

V. CONCLUSION

As attempts to restrain the reach and oversight of Big Tech continue, cases are almost certain to attempt using the state action doctrine as a means of transmuting these company's actions into state action. As demonstrated above, however, the hurdles imposed by the doctrine are difficult, if not outright impossible, to overcome. In the absence of express congressional legislation or the Court overturning half a century's worth of jurisprudence, the applicability of the doctrine within the digital realm is virtually nonexistent.

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[241] Zeeman v. Black, 273 S.E.2d 910 (Ga. Ct. App. 1980) (interpreting Ga. Code Ann. §§ 106-1210, 106-1203(a) and holding that a private suit could be brought under the Fair Business Practices Act only for protection of the public); Tracker Marine, L.P. v. Ogle, 108 S.W.3d 349, 352-3 (Tex. App. 2003) (Comparing laws within the other states, the court observed that "Nebraska and New York require [a] public interest impact at before allowing private actions [and] Nevada allows private actions only by the elderly or disabled"); McTeer v. Provident Life and Acc. Ins., 712 F. Supp. 512, 514 (D.S.C. 1989) (interpreting South Carolina Law S.SC. Code Ann. § 39-5-140(a) and holding that a transaction must affect the public interest); Lightfoot v. MacDonald, 544 P.2d 88, 90 (Wash. 1976) (interpreting Wash. Rev. Code § 19.86.090 and holding that "A breach of a private contract affecting no one but the parties to the contract . . . is not an act or practice affecting the public interest").

Aside from assuming the full range of municipal powers as demonstrated by the unique circumstances in *Marsh*, discriminatory tampering with the election process, or maintaining public property such as parks, the Court has only expressed one other traditionally exclusive government function, which is the power of eminent domain.[242] At the end of the day, nothing is going to be a traditionally exclusive government function. Arguably, even the performance of war has been contracted out to soldiers-for-hire and mercenary groups. The result is that the public functions test is virtually guaranteed to be nonapplicable to any digital application. The entwinement doctrine may offer a glimmer of hope as the current administration seeks to encourage social media giants such as Facebook to stop the flow of misinformation, particularly surrounding the vaccine,[243] but the level of involvement from the executive branch necessary to reach the symbiotic relationship required seems unlikely.

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[242] Jackson, *supra* note 17 at 353.

[243] *Biden Calls on Facebook to Stop Spread Of 'Outrageous Misinformation' About Covid Vaccines*, YAHOO ENTERTAINMENT (July 19, 2021), https://www.yahoo.com/entertainment/biden-calls-facebook-stop-spread-165242183.html.

As it stands, Big Tech and the companies' Internet actions are regulated by Section 230 of the Communications Decency Act.[244] The act is designed specifically to provide immunity for providers who host content, such that they are not liable for the content itself.[245] In combination with the inability to impose the requirements of fundamental civil liberties, these companies enjoy a large shield of immunity from many civil actions. Although there is no promising, forthcoming solution, the Court has at least recognized the problem. Justice Thomas warned:

> Today's digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors. Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties. We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.[246]

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[244] Lauren Feiner, *Big Tech's Favorite Law is Under Fire,* CNBC, https://www.cnbc.com/2020/02/19/what-is-section-230-and-why-do-some-people-want-to-change-it.html (updated Feb. 19, 2020, 9:22 AM EST).

[245] Communications Decency Act, 47 U.S.C. § 230(c)(1) (2021) ("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.").

[246] *Biden Calls on Facebook to Stop Spread Of 'outrageous misinformation' about Covid Vaccines*, *supra* note 140, at 1221.

Justice Thomas's suggested solution was a closer look at the doctrines surrounding common carriers and public accommodations, two legal doctrines that limit a company's right to exclude, which are still very much intact and relevant to the issues at hand. Until the Court creates another avenue for approaching the issue or Congress passes legislation, however, the state action doctrine is not the key to successfully limiting Big Tech.