THE "SOVEREIGNS OF CYBERSPACE" AND STATE ACTION: THE FIRST AMENDMENT'S APPLICATION—OR LACK THEREOF—TO THIRD–PARTY PLATFORMS

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ABSTRACT

Many scholars have commented that the state action doctrine forecloses use of the First Amendment to constrain the policies and practices of online service providers. But few have comprehensively studied this issue, and the seminal article exploring "[c]yberspace and the [s]tate [a]ction [d]ebate" is fifteen years old, published before the U.S. Supreme Court reformulated the federal approach to state action. It is important to give the state action doctrine regular scholarly attention, not least because it is increasingly clear that "the private sector has a shared responsibility to help safeguard free expression." It is critical to understand whether the First Amendment has a role to play in the private sector, as Internet companies continue to develop and enforce their own content rules—as "lawyers at Facebook and Google and Microsoft" exercise "more power over the future of . . . free expression than any king or president or Supreme Court justice." They are the "sovereigns of cyberspace." This Article analyzes the state action doctrine as it exists today, examining: (1) how it distinguishes the public and private spheres, and (2) whether it forecloses the First Amendment's application to nongovernmental Internet companies, specifically third–party platforms like Facebook and Twitter. The Article concludes that the state action doctrine does foreclose such an application. And with that in mind, the author suggests a state action theory suitable for the digital world.

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I. INTRODUCTION

> We cannot think about [the state action problem] too much; we ought to talk about it until we settle on a view both conceptually and functionally right.[1]
>
> —Professor Charles L. Black, Jr.

The Internet exists in an architecture of privately owned websites, servers, routers, and backbones.[2] Though this architecture enables Internet users to speak online,[3] it has also enabled companies like Google and Facebook to conduct "private worldwide speech 'regulation'"[4] as they create and enforce their own rules regarding what types of user content are

1. Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 70 (1967).
2. David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 377 (2010).
3. *Id.*
4. Susan Benesch & Rebecca MacKinnon, *The Innocence of YouTube*, FOREIGN POL'Y (Oct. 5, 2012), http://foreignpolicy.com/2012/10/05/the-innocence-of-youtube/.

permissible on their platforms.[5] Essentially, the companies are developing a de facto free speech jurisprudence, and in doing so they appear to be free to devise their content rules unconstrained by constitutional limits, including those imposed by the First Amendment.[6] The basic reason: the companies are nongovernmental entities.

Scholars have noted that online intermediaries appear to operate outside of constitutional strictures. Professor David Ardia says that "[w]hat many consider the largest public space in human history is not public at all."[7] Professor Jeffrey Rosen says it is challenging to protect "values like privacy and free speech in the age of Google and Facebook, which are not formally constrained by the Constitution."[8] Professor Jack Balkin says that as "our economic and social lives are increasingly dominated by information technology and information flows, the First Amendment seems increasingly irrelevant to the key free speech battles of the future."[9] Underlying these comments is the state action doctrine, which dictates that the federal government lacks the "power to regulate the policies and practices of private entities under Section 5 of the Fourteenth Amendment."[10] Recall that the First Amendment begins: "*Congress* shall make no law . . . ."[11] And the Fourteenth Amendment, which has been read to apply the First Amendment to the states, includes the command: "No *state* shall . . . ."[12] A threshold question in all First Amendment cases, therefore, is whether an alleged violation was committed by a government actor.[13]

5. *See* Somini Sengupta, *On Web, a Fine Line on Free Speech Across the Globe*, N.Y. TIMES (Sept. 16, 2012), http://www.nytimes.com/2012/09/17/technology/on-the-web-a-fine-line-on-free-speech-across-globe.html.

6. *See id.*

7. Ardia, *supra* note 2, at 377.

8. Jeffrey Rosen, *The Deciders: Facebook, Google, and the Future of Privacy and Free Speech*, *in* CONSTITUTION 3.0: FREEDOM AND TECHNOLOGICAL CHANGE 81 (Jeffrey Rosen & Benjamin Wittes eds., 2011).

9. Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 427 (2009).

10. *Developments in the Law: State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1250 (2010) [hereinafter *State Action and the Public/Private Distinction*].

11. *See* U.S. CONST. amend. I (emphasis added); *see also* EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS 1 (4th ed. 2011).

12. U.S. CONST. amend. XIV (emphasis added); *see also* VOLOKH, *supra* note 11, at 1.

13. VOLOKH, *supra* note 11, at 1.

Courts so far have held that private online service providers are not state actors for First Amendment purposes.[14] However, few scholars have directly addressed the problem of the state action doctrine and its application to such providers, and those scholars mostly have done so in special contexts like virtual worlds or government–operated webpages, or in a discussion of a larger topic like the power that intermediaries exercise over speech.[15] Moreover, the seminal article exploring "[c]yberspace and the [s]tate [a]ction [d]ebate" is fifteen years old, published before the U.S. Supreme Court handed down a decision reformulating the federal approach to state action.[16] Now is the time to give the doctrine more scholarly attention—as Professor Charles Black said, to "talk about it until we settle on a view both conceptually and functionally right"[17]—because Internet policy discussions worldwide are converging on the idea that "the private

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14. *See, e.g.*, Name.Space, Inc. v. Network Sols., Inc., 202 F.3d 573 (2d Cir. 2000); Island Online, Inc. v. Network Sols., Inc., 119 F. Supp. 2d 289 (E.D.N.Y. 2000); Nat'l A-I Advert., Inc. v. Network Sols., Inc., 121 F. Supp. 2d 156 (D.N.H. 2000); CompuServe, Inc. v. Cyber Promotions, Inc., 962 F. Supp. 1015 (S.D. Ohio 1997); Am. Online, Inc. v. Cyber Promotions, Inc., 948 F. Supp. 436 (E.D. Pa. 1996).

15. *See, e.g.*, Ardia, *supra* note 2; Rosen, *supra* note 8; Balkin, *supra* note 9; *see also* Eric Goldman, *Speech Showdowns at the Virtual Corral*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 845, 851–53 (2005) (considering the tension between free speech rights and private property rights in the context of virtual worlds, and arguing that virtual worlds, like other online providers, do not merit special rules); James Grimmelmann, *The Internet is a Semicommons*, 78 FORDHAM L. REV. 2799, 2816–18 (2010) (arguing that the Internet is a semicommons and that the interplay between its private and common characteristics explains some of the enduring tensions in Internet law, including those under the state action doctrine); Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 988 (2008) (showing that intermediaries have power over speakers but no responsibility to the speakers in using that power, and that "the First Amendment does not currently require a particular solution"); Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 700 (2010) (discussing the fact that "[d]espite the best efforts of some advocates to expand the scope of the First Amendment, it remains a limit on governmental action that does not reach private action," even those of Internet intermediaries); David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, 2010 BYU L. REV. 1981, 1985–2010 (2010) (discussing why the First Amendment's public forum doctrine is ill–suited to address the problems created when the government engages in expressive activities online).

16. *See generally* Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 U. COLO. L. REV. 1263, 1263 (2000).

17. Black, *supra* note 1, at 70.

sector has a shared responsibility to help safeguard free expression."[18] In the United States, it is critical to study and understand whether the First Amendment has any role to play in the private sector as "lawyers at Facebook and Google and Microsoft" exercise "more power over the future of . . . free expression than any king or president or Supreme Court justice."[19] They are the "sovereigns of cyberspace."[20] Against that background, this Article offers a singular examination of the First Amendment's application to nongovernmental Internet companies, specifically third–party platforms like Facebook and Twitter. This Article explores the state action doctrine, focusing on: (1) how it distinguishes the public and private spheres, and (2) whether it forecloses the First Amendment's application to nongovernmental third–party platforms.

This Article begins with a general analysis of the doctrine and its traditions and values, as well as its historical distinction between public and private spheres.[21] Then, the Article explores the law of public forums in order to analyze the similarity between third–party platforms and public forums.[22] And, finally, the Article concludes that the state action doctrine, under its latest reformulation by the Supreme Court, *does* foreclose the First Amendment's application to private Internet companies like Facebook and Twitter.[23] With that in mind, the author suggests a state action theory suitable for the digital world that would enable judges to balance the rights of property owners with those of property users and be able to characterize a space as public for state action purposes even if it did not qualify as a traditional public forum.[24]

II. STATE ACTION DOCTRINE: GENERAL ISSUES

The state action doctrine, first articulated in 1883 in the *Civil Rights Cases*, is one of the "most complex and discordant doctrines in American

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18. Hillary Rodham Clinton, U.S. Sec'y of State, Remarks on Internet Freedom at the Newseum, Washington, D.C. (Jan. 21, 2010), https://2009-2017.state.gov/secretary/20092013clinton/rm/2010/01/135519.htm.

19. Terry Gross & Jeffrey Rosen, *Interpreting the Constitution in the Digital Era*, NPR (Nov. 30, 2011, 12:13 PM), http://www.npr.org/2011/11/30/142714568/interpreting-the-constitution-in-the-digital-era.

20. REBECCA MACKINNON, CONSENT OF THE NETWORKED: THE WORLDWIDE STRUGGLE FOR INTERNET FREEDOM xiv (2012).

21. *See infra* Part II.

22. *See infra* Part II. Section E.

23. *See infra* Part III.

24. *See infra* Part III. Section C.

jurisprudence."[25] For years, it held that the Fourteenth Amendment and the Bill of Rights restricted only governmental action.[26] However, as the doctrine evolved, it came to apply far more widely—even to actions of private individuals and entities. For example, in the 1946 case *Marsh v. Alabama*, the U.S. Supreme Court ruled that Alabama violated the First and Fourteenth Amendments by forbidding a Jehovah's Witness from distributing religious materials in a privately–owned town.[27]

The challenge of applying the doctrine today lies at the juncture explored in *Marsh*, where the private and public spheres meet. It is a challenge not only because the doctrine is "complex and discordant" but also because of increasing privatization that has significantly "altered the foundation upon which the traditional understanding of the public/private distinction has been built."[28] Such privatization has touched many areas of public life, from prisons[29] to hospitals[30] to schools[31] to development agencies[32] and beyond.

There is a need, then, for a continuing discussion of the proper boundaries of the state action doctrine,[33] which remains as important today as it was in the last century.[34] The doctrine has emerged fitfully, and the public/private distinction has evolved over time.[35] For those reasons, the doctrine and distinction have been targets of scholarly criticism.[36] The

25. *State Action and the Public/Private Distinction*, *supra* note 10, at 1250; *see also* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505 (1985) (describing the views of commentators that the state action doctrine is so incoherent that it "never could be rationally or consistently applied").

26. *See Civil Rights Cases*, 109 U.S. 3, 18 (1883).

27. 326 U.S. 501 (1946).

28. *See, e.g., State Action and the Public/Private Distinction*, *supra* note 10, at 1250–51.

29. *See* Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005).

30. *See* BENJAMIN R. BARBER, JIHAD VS. MCWORLD 239 (1995).

31. *See* Valerie Strauss, *A Primer on the Damaging Movement to Privatize Public Schools*, WASH. POST (Jan. 7, 2016), https://www.washingtonpost.com/news/answer-sheet/wp/2016/01/07/a-primer-on-the-damaging-movement-to-privatize-public-schools/.

32. *See Swaney v. Tilford*, 898 S.W.2d 462, 463 (Ark. 1995).

33. *State Action and the Public/Private Distinction*, *supra* note 10, at 1251.

34. *Id.* at 1250.

35. *See id.* at 1311–12.

36. *See, e.g.*, Richard C. Reuben, *Public Justice: Toward a State Action Theory of Alternative Dispute Resolution*, 85 CALIF. L. REV. 577, 610–11 (1997) (describing various examples of the criticism).

doctrine has been described as "incoherent,"[37] a "conceptual disaster area,"[38] a "failure,"[39] and a ruse to advance subjective policy goals.[40] Some scholars have called for the doctrine's abandonment "in favor of a balancing approach that focuses on constitutional values."[41]

But other scholars have defended the doctrine for its role in "preserving the primacy of the law of a written constitution,"[42] and the Supreme Court continues to use the doctrine to analyze constitutional claims in a range of contexts, such as racial discrimination, creditors' rights, defamation, and antitrust.[43] Historically, the Justices have used one of two tests to apply the doctrine, finding the conduct of a private actor to be state action where: (1) "the private actor performs a public function"; or (2) the private actor "performs a private function that has a close 'nexus' to, or 'entanglement' with, the government."[44] Those tests represent a "threshold requirement" of government or quasi–government action for "judicial consideration of constitutional claims and congressional enforcement of constitutional rights."[45]

In the last thirty–five years, the Supreme Court has merged those tests within a single two–part framework,[46] under *Lugar v. Edmondson Oil Co.*,[47] *Edmonson v. Leesville Concrete Co.*,[48] and *Georgia v. McCollum*[49]:

> The first inquiry is "whether the claimed [constitutional] deprivation has resulted from the exercise of a right or privilege having its source in state authority." . . . The second inquiry is whether the private party charged with the deprivation can be described as a state actor. In resolving that issue, the Court [has] found it useful to apply three principles: (1) "the extent to which the actor relies on governmental assistance and benefits"; (2)

37. Michael J. Phillips, *The Inevitable Incoherence of Modern State Action Doctrine*, 28 ST. LOUIS U. L.J. 683, 683 (1984).

38. Black, *supra* note 1, at 95.

39. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1149 (1978).

40. *See, e.g.*, Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221, 230.

41. Reuben, *supra* note 36, at 610.

42. *Id.* (citing Richard S. Kay, *The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law*, 10 CONST. COMMENT. 329, 337–43 (1993)).

43. *See id.* at 610–11.

44. *Id.* at 611.

45. *State Action and the Public/Private Distinction*, *supra* note 10, at 1255.

46. Reuben, *supra* note 36, at 611–12.

47. 457 U.S. 922 (1982)

48. 500 U.S. 614 (1991).

49. 505 U.S. 42 (1992).

> "whether the actor is performing a traditional governmental function"; and (3) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority."[50]

This so–called *Lugar–Edmonson* framework lends support to commentators who have argued that the chief concern of the state action doctrine is to balance public interests and private harms.[51] The pressing issue is determining what facts can trigger the finding of state action, a finding that "generally occurs when the complained-of conduct touches the most fundamental of constitutional concerns."[52]

A. BACKGROUND

To understand where the doctrine is today, it is important to understand from where it came. As noted above, the Supreme Court articulated the doctrine in 1883 in the *Civil Rights Cases*, invalidating the Civil Rights Act of 1875 and holding that Congress lacked the power to enact legislation regulating private racial discrimination under the Fourteenth Amendment.[53] That law penalized the private owners of places of public accommodation who discriminated based on race. Justice Joseph P. Bradley, writing for the majority, distinguished private and public wrongs, noting that where a wrongful act is not "sanctioned in some way by the state, or . . . done under state authority, [the victim's] rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress," but not by resort to the Constitution.[54]

Justice Bradley saw violations of the constitutional rights of one private actor by another as a "conceptual impossibility."[55] Theoretically, his distinction between private and public wrongs promoted the "individualist goal of self-realization . . . by protecting the sphere of private conduct from judicial inquiry," as long as the private conduct did not violate state statutes or the common law.[56] Thus, Justice Bradley found that Section 5 of the Fourteenth Amendment did not authorize Congress to regulate private conduct, writing, "[u]ntil some State law has been passed, or some state action . . . has been taken, adverse to the rights of citizens sought to be

50. *Id.* at 51 (citations omitted).
51. Reuben, *supra* note 36, at 612.
52. *Id.*
53. *State Action and the Public/Private Distinction*, *supra* note 10, at 1256.
54. *See Civil Rights Cases*, 109 U.S. 3, 17 (1883).
55. *State Action and the Public/Private Distinction*, *supra* note 10, at 1257.
56. *Id.*

protected by the fourteenth amendment, no legislation of the United States under said amendment . . . can be called into activity . . . ."[57]

In the seventy years following the *Civil Rights Cases*, the Supreme Court reworked the state action doctrine significantly.[58] The reworking reflected the Court's "concern with the failure of existing legal rules to address troubling instances of racial discrimination," ultimately signaling a dramatic shift from "formalist reasoning toward functionalist and instrumentalist reasoning."[59] The doctrine's leading critic in the mid–twentieth century was Professor Charles Black, who believed the doctrine was "the most important problem in American law."[60] He focused on the law's role in addressing systemic racism, and he argued that the law was failing to play its role because of the state action doctrine's willful blindness to nongovernmental actions.[61]

Black dedicated much of his attention to *Reitman v. Mulkey*, in which the Supreme Court considered a provision of California's Constitution that prohibited the state from enacting laws limiting a private actor's discretion in the use of his or her real property.[62] Justice Byron White, writing for the majority, adopted a functionalist and instrumentalist approach, focusing on "the necessity for a court to assess the potential impact of official action in determining whether the State has significantly involved itself with invidious discriminations."[63] The lower court had analogized California's constitutional prohibition on state enactment of antidiscrimination laws with a state statute authorizing racial discrimination, an analogy White accepted because he viewed the impact to be the same.[64]

On this basis, the Court rejected the distinction between "state action and inaction" that was at the heart of the *Civil Rights Cases* and invalidated California's provision because it encouraged or involved the state in authorizing private discrimination.[65] Black defended *Reitman* because it rejected the state action doctrine's early formalism but did not reject the doctrine altogether, a position Black shared.[66] He wanted to harmonize the

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57. *Civil Rights Cases*, 109 U.S. at 13.
58. *See State Action and the Public/Private Distinction*, *supra* note 10, at 1258.
59. *Id.* (citing Phillips, *supra* note 37, at 699–700, 734–35).
60. *See* Black, *supra* note 1, at 69.
61. *See State Action and the Public/Private Distinction*, *supra* note 10, at 1259.
62. *Id.* at 1259–60.
63. *See* 387 U.S. 369, 380 (1967).
64. *State Action and the Public/Private Distinction*, *supra* note 10, at 1260.
65. *Id.*
66. *See* Black, *supra* note 1, at 82 (discussing Black's proposal for the rule in *Reitman*).

doctrine with the "demands of justice"[67] and thought it was insensible for the doctrine to act as an impediment to the resolution of the great problems of the day.[68]

B. MODERN INTERPRETATION

Under the current conception of the state action doctrine, the line between the public and private spheres is blurry. Scholars calling for the doctrine's abandonment have done so because they believe it is "an abuse of deduction that ignores competing rights and interests," and scholars defending the doctrine have done so because they believe it protects "individual autonomy."[69] For its part, the Supreme Court, in the 2000 landmark case *United States v. Morrison*,[70] reaffirmed the doctrine as it was articulated in the *Civil Rights Cases*.[71]

Morrison addressed a provision of the Violence Against Women Act that offered a federal remedy to victims of gender–motivated violence.[72] Writing for the majority, Chief Justice William Rehnquist said the Commerce Clause did not authorize such a provision and reviewed Congress's powers under Section 5 of the Fourteenth Amendment.[73] He acknowledged the "enduring vitality of the *Civil Rights Cases*" and adopted their description of Congress's powers under Section 5.[74] He said the provision at issue was "directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias."[75] As one group of commentators put it:

> [D]espite abundant congressional findings regarding disparate treatment on the basis of gender by state officials, Chief Justice Rehnquist deemed the intended remedy "simply not 'corrective in its character, adapted to counteract and redress the operation of such prohibited [s]tate laws or proceedings of [s]tate officers.'" Thus, the Court invalidated an attempt by Congress to remedy violations of equal protection—otherwise a permissible exercise

67. *State Action and the Public/Private Distinction*, *supra* note 10, at 1260.
68. *See id.*
69. *Id.* at 1261.
70. 529 U.S. 598 (2000).
71. *Id.* at 602; *see also State Action and the Public/Private Distinction*, *supra* note 10, at 1262 n.56 ("If there is a single person responsible for the current, confining idea of state action, it is Rehnquist." (quoting David J. Barron, *Privatizing the Constitution: State Action and Beyond*, *in* THE REHNQUIST LEGACY 345, 346 (Craig M. Bradley ed., 2006))).
72. *Morrison*, 529 U.S. at 601–02.
73. *Id.* at 598.
74. *Id.* at 624.
75. *Id.* at 626.

> of its enforcement power under the Fourteenth Amendment, even under the *Civil Rights Cases*—because it targeted private individuals rather than the states and state officials responsible for the violations. Regardless of whether the provision furthered the ends envisioned in the Fourteenth Amendment, it failed to satisfy the formal requirement of state action.[76]

For these and other reasons, Professor Mark Tushnet believes the state action doctrine is "distracting us from paying attention to what truly matters."[77] He and Professor Gary Peller have called for the doctrine's abandonment, rejecting the public/private distinction's logic because "[e]very exercise of 'private' rights in a liberal legal order depends on the potential exercise of state power to prevent other private actors from interfering with the rights holder," and thus "no region of social life . . . can be marked off as 'private' and free from governmental regulation."[78] Taking that argument to its logical conclusion, Tushnet says the doctrine's abandonment could "require the government to remedy de facto burdens on constitutional rights."[79] That would mean constitutional rights serve substantive interests that, "when threatened, may require action on the part of the government."[80]

Morrison is the latest word from the U.S. Supreme Court on the state action doctrine, once again making violations of constitutional rights by a private actor a "conceptual impossibility." This Article does not go as far as abandoning the doctrine, as Professors Tushnet and Geller advocate, but instead would support its reformulation to enable judges, as explained below, to balance the rights of property owners with those of property users.

C. FREE EXPRESSION AND PRIVATE SPACES

In light of that background, it might seem strange to apply the First Amendment to privately owned spaces. Doing so creates a tension between property rights and expressive rights. So far, however, those rights have coexisted relatively peacefully because "spaces traditionally understood to be public have historically been publicly owned,"[81] a reality that today is changing. New forums for public expression are developing apart from the

76. *State Action and the Public/Private Distinction*, *supra* note 10, at 1262–63 (citations omitted).

77. *Id.* at 1263.

78. Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 789 (2004).

79. *State Action and the Public/Private Distinction*, *supra* note 10, at 1264.

80. *Id.*

81. *Id.* at 1303.

classic public square, and their connection to state actors is tenuous, if not nonexistent.[82]

Platforms like YouTube, Facebook, and Twitter defy easy classification in this area.[83] To the extent they offer free public access and a place to engage in expressive activities, they operate as a virtual public forum—but, of course, their ownership is private. Thus, they are not unlike private shopping malls, which historically have had "dual public and private characteristics."[84] A line of cases addressing the application of federal and state free expression protections to private shopping malls has produced varied results, showing that the "balance between the values of autonomy and free speech reflects different conceptions of what makes a mall 'public'": the nature of its ownership or the nature of its use.[85]

Marsh v. Alabama,[86] decided in 1946, was the first case to address the application of free expression protections to privately owned spaces.[87] The issue before the Supreme Court was whether Alabama could punish a person who distributed religious literature in a company–owned town against the town management's wishes.[88] The Justices held that the town, which was owned and operated by the Gulf Shipbuilding Corporation, could not freely restrict expressive activity there, because the company town was the functional equivalent of a public municipality.[89] Justice Hugo Black, writing for the majority, noted that whether a private or public entity "owns or possesses the town[,] the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free."[90]

Twenty years later, the Supreme Court extended those principles to privately owned shopping malls.[91] In 1968, in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, the Court decided whether peaceful picketing of a business located in a private shopping center could be enjoined because it invaded the property rights of the

82. *Id.*
83. *See id.* (citing the modern shopping mall as an example).
84. *See id.*
85. *Id.* at 1303–04.
86. 326 U.S. 501 (1946).
87. *Id.* at 502.
88. *Id.*
89. *Id.* at 507.
90. *Id.*
91. *See* Amalgamated Food Emps. Union v. Logan Valley Plaza, Inc., 391 U.S. 308, 319–20 (1968).

shopping center's owners.[92] The Justices held that peaceful picketing "in a location open generally to the public" was protected by the First Amendment.[93] The Court said the shopping center served "as the community business block."[94]

After that, the Court decided *Lloyd Corp. v. Tanner* in 1972.[95] The issue was whether "the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling [wa]s unrelated to the shopping center's operations."[96] The Justices narrowed *Logan Valley* by ruling that the First Amendment did not protect expressive activity in a private shopping mall unless the activity was "directly related in its purpose to the use to which the shopping center property was being put."[97]

Finally, the Court reversed *Logan Valley* in the 1976 case *Hudgens v. NLRB*,[98] holding that the First Amendment "guarantee of free expression has no part to play in a case" where the speech activities occur at a privately owned shopping center.[99] The Court held that a shopping center was not the "functional equivalent" of a municipality because it did not possess all of the attributes of one.[100] Justice Potter Stewart, writing for the majority, said a stronger showing of state action was necessary because the First Amendment is a check "on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only."[101] *Lloyd Corp.* and *Logan Valley* represent a significant narrowing of the state action doctrine.

Notably, as the U.S. Supreme Court developed that line of cases, California state courts confronted similar issues,[102] developing a body of law that departed in critical ways from the federal system's formalistic approach to state action. California law is useful to consider here for that reason, as an alternative to the federal approach—and because many of the major technology companies discussed in this Article, such as Facebook and YouTube, are physically based in California and operate in the shadow

92. *Id.* at 309.
93. *Id.* at 313.
94. *Id.* at 319.
95. 407 U.S. 551 (1972).
96. *Id.* at 552.
97. *Id.* at 563 (quoting *Amalgamated Food Emps. Union*, 391 U.S. at 320 n.9).
98. 424 U.S. 507 (1976).
99. *Id.* at 507.
100. *Id.* at 520.
101. *Id.* at 519
102. *State Action and the Public/Private Distinction*, *supra* note 10, at 1305.

of its laws (although, obviously, these companies are subject to the laws of all the places where they operate).

Four years before *Logan Valley*, the California Supreme Court ruled that the First Amendment protected expressive activity in privately owned shopping malls based on their "public character."[103] Then, after the U.S. Supreme Court decided *Logan Valley* and *Hudgens*, "California was forced to rule that the First Amendment did not require mall owners to accommodate private speech."[104] That paved the way for *Robins v. Pruneyard Shopping Center*[105] in 1979, in which the California Supreme Court addressed whether soliciting signatures at a private shopping center was protected by the *state* constitution.[106] The justices answered in the affirmative, supporting more expansive state free speech rights than those offered by the First Amendment.[107]

The California Supreme Court pointed to the difference in the commands of the state and federal constitutions.[108] The California provision commanded that "[e]very person may freely speak, write and publish his or her sentiments on all subjects," while the federal provision commanded that "Congress shall make no law . . . abridging the freedom of speech."[109] Thus, the state action doctrine did not control *Pruneyard*'s outcome, and ultimately the U.S. Supreme Court affirmed *Pruneyard* in the face of a federal constitutional challenge.[110]

The issue in the federal case was whether California's constitutional provisions permitting people to exercise free speech rights at a privately owned shopping center violated either the owner's property rights under the Fifth and Fourteenth Amendments or the owner's free speech rights under the First and Fourteenth Amendments.[111] The justices held that *Tanner* did not limit a state's authority to adopt "individual liberties more expansive than those conferred by the Federal Constitution" and that states "may adopt reasonable restrictions on private property so long as [they] do not amount to a taking without just compensation."[112] This is significant because it

103. *See* Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union, 394 P.2d 921, 924 (Cal. 1964).

104. *State Action and the Public/Private Distinction*, *supra* note 10, at 1305.

105. 592 P.2d 341 (Cal. 1979).

106. *Id.* at 342.

107. *Id.* at 347.

108. *State Action and the Public/Private Distinction*, *supra* note 10, at 1305.

109. *Id.*

110. *Id.* (citing Robins v. Pruneyard Shopping Ctr., 447 U.S. 74, 88 (1980)).

111. *Pruneyard*, 447 U.S. at 88.

112. *Id.* at 81.

means a state does not necessarily violate property rights by protecting expressive activity on private property.[113]

Later, the California Supreme Court, in the 2001 case *Golden Gateway Center v. Golden Gateway Tenants Association*,[114] reaffirmed *Pruneyard* when it addressed whether California law requires state action as a threshold for free expression violations.[115] The court said it is required but can be satisfied when private property is "freely and openly accessible to the public."[116] This means California's state action doctrine focuses on a property's public use rather than its ownership. *Golden Gateway*, in effect echoing *Pruneyard*, cited the differences between the state and federal constitutions to account for California's divergence from federal law.[117] But, interestingly, the opinion emphasized that California's doctrinal approach, in concentrating on the public nature of a property, was consistent with the conception of state action in federal constitutional history.[118]

The California Supreme Court noted that the distinction between government and private conduct "has been a hallmark of American constitutional theory since the birth of our nation."[119] And the court remarked that this distinction serves two important purposes:

> First, this demarcation is necessary to preserve private autonomy. "[B]y exempting private action from the reach of the Constitution's prohibitions, [the state action limitation] stops the Constitution short of preempting individual liberty—of denying to individuals the freedom to make certain choices. . . . Such freedom is basic under any conception of liberty, but it would be lost if individuals had to conform their conduct to the Constitution's demands."
>
> Second, a state action limitation safeguards the separation of powers embodied in every American constitution by recognizing the limited ability of courts "to accomplish goals which are essentially legislative and political." "Without a state action limitation, the courts will possess the same authority as the legislature to limit individual freedoms, but will lack the degree of accountability which should accompany such power." As a result, absent a state action requirement, "the 'rule of law' would

113. *State Action and the Public/Private Distinction*, *supra* note 10, at 1306.
114. 29 P.3d 797 (Cal. 2001).
115. *See id.* at 809–10.
116. *Id.* at 810.
117. *See id.* at 809.
118. *See id.* at 808.
119. *Id.*

> approach in Sir Ivor Jennings' caustic but realistic phrase, 'rule by the judges alone.'"[120]

Thus, state action retains its place in California's constitutional scheme, but *Pruneyard* established—and *Golden Gateway* affirmed—that California's doctrine differs from that of the federal system. It is worth noting that very few states have followed California's lead to offer more speech protections than the First Amendment.[121] Despite speech provisions similar to California's, seventeen state supreme courts have held that a more traditional state–action theory, such as *Morrison*'s, is required to bring speech claims under their constitutions.[122] New Jersey is the only state that (to some degree) has followed California.[123] Balancing property and speech rights on a case–by–case basis, New Jersey has extended private–property speech protections to a variety of contexts, including private colleges and universities, residential communities, and hallways in residential buildings.[124]

These cases indicate that "the doctrine is still being shaped at the state level as courts continue to face difficult factual applications of their theories of state action."[125] One such application, regardless of level, involves platforms like Facebook, YouTube, and Twitter. They all share some of the characteristics of traditional public spaces, but they all are privately owned, too. The implications of their public and private characteristics are explored in the next section of this Article.

D. A MATTER OF VALUES

At the heart of any democratic legal system is a matrix of principles and values concerned with such things as equality and due process that apply generally, without regard to specific legal facts. For example, in the U.S. legal system, it is a foundational aspiration to provide equal justice under law,[126] secured chiefly through the Equal Protection Clause and the "neutrality and independence of the judiciary."[127] Similarly, underlying every legal rule or standard is a matrix of values concerned with discrete

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120. *Id.* (citations omitted).
121. *See State Action and the Public/Private Distinction*, *supra* note 10, at 1306.
122. *Id.* at 1306–07.
123. *Id.* at 1307.
124. *See id.*
125. *Id.*
126. Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 L. & CONTEMP. PROBS. 279, 290 (2004).
127. *Id.* at 291.

matters like property rights or free expression interests that apply when specific facts implicate them.[128] For example, subjecting a private actor to liability for a First Amendment violation creates tension between the values of autonomy and property rights and that of free expression. Put it in the context of this Article, there is tension between the autonomy and property rights of the third–party platforms (e.g. Twitter and Facebook) and the free expression rights of their users. Before addressing this tension, however, a more general discussion is necessary.

Recall that California's approach to the state action doctrine diverges from the federal system's approach as well as the approach of most state courts that have addressed state action requirements.[129] These divergent approaches reflect varying conceptions of what it means to protect expressive activities on private property and different ideas of what values the state action doctrine ought to protect.[130] California's theory may be "anomalous," but it reflects the "larger national dialogue about free expression and state action in public spaces."[131] One way to understand the divergent approaches, as noted earlier, is to focus on sources of authority.[132] California relied on its own constitution to expand free speech protections beyond those of the First Amendment.[133]

Sources of authority, however, do not fully account for the divergence.[134] After all, the majority of state constitutions around the country contain speech and press provisions "virtually identical" to California's, and yet the majority have rejected California's approach.[135] For example, New York's constitution is so similar that the California Supreme Court declared in *Golden Gateway* that New York's constitutional

128. *See* Jordan Daci, *Legal Principles, Legal Values and Legal Norms: Are They the Same or Different?*, 2010 ACADEMICUS–INT'L SCI. J. 109, 110–11 (2010).

129. *State Action and the Public/Private Distinction*, *supra* note 10, at 1308.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *See also* Stanley H. Friedelbaum, *Private Property, Public Property: Shopping Centers and Expressive Freedom in the States*, 62 ALB. L. REV. 1229, 1261 (1999) ("Little can be gained by contrasting the claimed nonspecificity of the First Amendment's wording with the greater protection said to be found in state expressive freedom guarantees.").

135. *State Action and the Public/Private Distinction*, *supra* note 10, at 1308; *see also* Gregory C. Sisk, *Uprooting the* Pruneyard, 38 RUTGERS L.J. 1145, 1163–65 (2007) (highlighting the similarity of free speech clauses in the constitutions of California, New York, and Iowa).

history was relevant to its own interpretation of California's constitution.[136] Meanwhile, New York, by contrast, characterized California's state action approach as "hardly persuasive authority."[137]

California's approach also borrows from First Amendment law.[138] As discussed above, the early California cases made use of the First Amendment, and a more recent California case, *Fashion Valley Mall v. NLRB*, decided in 2007, was framed as an application of *Pruneyard*,[139] which the California Supreme Court described as an extension of the early cases' "First Amendment-based jurisprudence."[140] More broadly, the California Supreme Court has referred in its opinions to fundamental First Amendment concepts,[141] likening the private mall in *Fashion Valley*, for example, to "sidewalks of the central business district which, have immemorially been held in trust for the use of the public."[142] Such language echoes *Hague v. Committee for Industrial Organization*, in which the U.S. Supreme Court defined traditional public forums.[143] All meaning: the California Supreme Court's position does not appear to be that the state constitution recognizes new types of public spaces—rather, it appears to be that shopping malls are new public forums, as that concept is understood vis–à–vis the First Amendment.[144]

Of course, this does not mean *Pruneyard*, *Golden Gateway*, and *Fashion Valley* are primarily or only First Amendment cases.[145] It means simply that there is appreciable overlap between California and federal doctrine in this area, an overlap that illustrates the "problem of defining public space[s] in today's world."[146] The U.S. Supreme Court focuses on ownership to distinguish private and public property,[147] while the California Supreme Court focuses on how a space is used.[148] These opposing conceptions of "public" are the result of conscious choices based partly on

136. *See* Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 804–05 (Cal. 2001).

137. SHAD All. v. Smith Haven Mall, 488 N.E.2d 1211, 1214 n.5 (N.Y. 1985).

138. *See* Fashion Valley Mall, L.L.C. v. NLRB, 172 P.3d 742, 749 (Cal. 2007) (citing Gerawan Farming, Inc. v. Lyons, 12 P.3d 720 (Cal. 2000)).

139. *Id.* at 745.

140. *State Action and the Public/Private Distinction*, *supra* note 10, at 1309.

141. *Id.*

142. *Id.* (citing *Fashion Valley Mall*, 172 P.3d at 745).

143. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939).

144. *State Action and the Public/Private Distinction*, *supra* note 10, at 1309–10.

145. *Id.* at 1310.

146. *Id.*

147. *Id.*

148. *Id.*

the values underlying them.[149] The U.S. Supreme Court has chosen to emphasize the values of autonomy and property rights, and the California Supreme Court has chosen to emphasize the free speech rights of "individual speakers against powerful private actors."[150] But these values do conflict in numerous ways.

On the one hand, California's approach pits the expression rights of patrons and owners against one another in a way that the U.S. Supreme Court's approach does not.[151] First, requiring mall owners to allow expressive activities on their property could interfere with the owners' marketing activities that are essential to the mall's commercial purpose.[152] This might put the owners in the discomfiting position of serving as the "host for [their] own roasting."[153] Second, to the extent that mall owners are required to host speech they find disagreeable, California's approach could compel the owners to promote beliefs, at least indirectly, that they do not share, creating a potential conflict with post–*Pruneyard* cases holding that states cannot require private actors to provide forums for expression that those actors find disagreeable.[154]

On the other hand, it is not clear that the U.S. Supreme Court's approach offers a better way to balance the competing values. One team of commentators put it this way:

> As shopping centers continue to adopt more characteristics of the town square, a theory that cannot protect rights in these locations is problematic in light of our nation's history of protecting free discourse in the spaces where such speech actually occurs. The more accessible owners make their property, the more public it becomes; California's approach is appealing because it recognizes that even private property can assume public characteristics. Even conceding the difficulty of balancing the rights of owners and speakers, the bright-line rule of government ownership can become a simplistic and "absurd basis for choosing between the two liberties," because conditioning free speech protections on the

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149. *Id.* at 1310–11.

150. *Id.* at 1311.

151. *Id.* at 1312.

152. Gregory C. Sisk, *Returning to the* Pruneyard*: The Unconstitutionality of State-Sanctioned Trespass in the Name of Speech*, 32 HARV. J.L. & PUB. POL'Y 389, 396 (2009).

153. *Id.*

154. *State Action and the Public/Private Distinction*, *supra* note 10, at 1312 (referencing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. Boston, Inc., 515 U.S. 557 (1995)).

> identity of the property owner provides an artificially clear line that can minimize the merits of competing rights claims.[155]

Such arguments are meritorious and animate Part IV's suggestions for a state–action theory suitable for the digital world, where so much speech on matters of public concern occurs in privately owned spaces like Facebook and YouTube. A state–action theory for private spaces can have serious implications for the ability to speak freely online, whether the source of authority is state or federal. In fact, the scope of a modern state–action theory can make the difference between speaking out and not. Thus, there is a need for a debate over its proper scope because "[a]s the public becomes more private, and the private becomes more public, the contours of the state action doctrine may come to define the contours of our most basic constitutional rights."[156]

E. PUBLIC FORUM LAW

This Section explores public forum law to analyze the similarity, if any, between public forums—property historically associated with the exercise of expressive rights—and third–party platforms like Facebook and Twitter. The analysis in this Section is general in nature and provides the framework for evaluating the public character of private property that will be used in the next part to consider whether the state action doctrine, in its current form, forecloses the First Amendment's application to third–party platforms.

Pruneyard relied on the functional equivalence of a privately owned shopping center and a traditional public forum (i.e., the "downtown" or "central business district").[157] The opinion emphasized the center's "open and unrestricted invitation to the public to congregate freely," thereby exempting "an individual homeowner" from the ambit of California's free expression provision, "because individual homes are not freely and openly accessible to the public."[158] As discussed above, this means that the application of California's free expression provision on private property depends on "the public character of the property."[159] *Golden Gateway* affirmed this approach by holding that "the actions of a private property

155. *Id.* at 1313 (citations omitted).
156. *Id.* at 1250 (citations omitted).
157. *See* Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 809–10 (Cal. 2001) (citing Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 346 (Cal. 1979)).
158. *Id.* at 809.
159. *Id.*

owner constitute state action for purposes of California's free speech clause only if the property is freely and openly accessible to the public."[160]

It is worthwhile, then, to explore the law of public forums and to consider the similarity between third–party Internet platforms, such as Facebook and Twitter, and public forums, such as public sidewalks and parks. The goal is to understand the extent of their functional equivalence. This is also valuable because the California Supreme Court, which referred to the public character of private property as a necessary condition of state action, followed lower court decisions that used *Pruneyard* to compare various types of private property and public forums[161]:

> [O]ur Courts of Appeal have consistently held that privately owned medical centers and their parking lots are not functionally equivalent to a traditional public forum for purposes of California's free speech clause because, among other things, they are not freely open to the public. Our lower courts have also suggested that an apartment complex does not resemble a traditional public forum because it "is a place where the public is generally excluded."[162]

Under *Hague* and its progeny, the right to express your views in public places is fundamental to a free society, and certain public property is so historically associated with the exercise of expressive rights that the property cannot be closed, not entirely, to constitutionally protected expression—to speeches, meetings, parades, protests, and the like.[163] The basic reason is that the property may be owned by the government, but it is held "in trust" for the public.[164] That means members of the public should have as much right to speak there as they would on their own property.[165] Likewise, when the government chooses to open forums to the public, it should not be permitted to skew public debate there by regulating viewpoints.[166] But on most public property, the government should be permitted "to regulate speech [there] in order to make its use of the property more efficient" (after all, speech can distract people, interfere with traffic flow, and so on—thus, content–neutral time, place, and manner limitations

160. *Id.* at 810.
161. *Id.*
162. *Id.* (citations omitted).
163. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 514 (1939).
164. *Id.*
165. VOLOKH, *supra* note 11, at 603.
166. *Id.*

are permissible).[167] Their historical significance is what makes public forums special, as explained by Justice Owen Roberts in *Hague*: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[168]

Thus, the U.S. Supreme Court has divided public property into five categories.[169] The first is the traditional public forum, which includes "government property that has traditionally been available for public expression," such as sidewalks and parks.[170] The second is the designated public forum, which includes "'government property that has [been] . . . intentionally opened up for [the] purpose' of being a public forum."[171] The third is the limited public forum, which includes government property "limited to use by certain groups or dedicated solely to the discussion of certain subjects."[172] The fourth is the nonpublic forum, which includes all other government–owned property not used by the government for speaking.[173] And, finally, the fifth is "[n]ot a forum at all," which includes government property that the government uses to speak (e.g. through a government–owned television channel).[174]

Importantly, expressive activities in traditional and designated public forums are subject to reasonable time, place, and manner regulations.[175] To be constitutional, such regulations must be content neutral,[176] narrowly tailored,[177] serve a significant government interest,[178] and leave open ample

167. *Id.*
168. 307 U.S. at 515.
169. VOLOKH, *supra* note 11, at 601.
170. *Id.*
171. *Id.* (citations omitted).
172. *Id.* Earlier cases called this category a designated public forum and said the test was the one used when the government acted as sovereign, except the government could limit such a forum to the purposes for which it was created. *Id.* In practice, however, that was effectively the same as applying the "reasonable-and-viewpoint-neutral test" (after all, speaker and subject–matter limitations were permitted). *Id.* More recent cases, such as *Christian Legal Society Chapter of the University of California v. Martinez*, 561 U.S. 661, 662 (2010), and *Pleasant Grove City v. Summum*, 555 U.S. 460, 461 (2009), have treated the limited public forum as a separate category. VOLOKH, *supra* note 11, at 601.
173. VOLOKH, *supra* note 11, at 602.
174. *Id.* at 603.
175. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).
176. *See, e.g.,* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 295 (1984).
177. *See, e.g.,* Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).
178. *See, e.g.,* Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton, 536 U.S. 150, 175 (2002).

alternative forums or channels of communication for protected expression.[179] Meanwhile, expressive activities in limited and nonpublic forums can be subject to restrictions that are both reasonable and viewpoint neutral.[180] In some such forums, like military bases and prisons, which are nonpublic, the government enjoys even broader authority to restrict expressive activities.[181] And in the fifth public–property category—"not a forum at all"—the government acts as the speaker and may decide what speech to allow, even based on viewpoint.[182]

It is important to keep these concepts in mind when considering, in the next part of this Article, the propriety of the First Amendment's application to third–party platforms like Facebook and Twitter. Whether such platforms are seen as the functional equivalent of a public forum is legally significant and instructive in evaluating the public character of privately owned property.[183]

III. APPLYING THE FIRST AMENDMENT TO THIRD–PARTY PLATFORMS

As noted in Part I, the Internet's architecture relies on intermediaries to transport, host, and index content,[184] enabling Internet users to speak online—and giving the intermediaries tremendous power to shape the

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179. *See, e.g.,* Heffron v. Soc'y for Krishna Consciousness, 452 U.S. 640, 648 (1981).

180. *See, e.g.,* Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, 561 U.S. 661, 679 (2010).

181. *See generally* Thornburgh v. Abbott, 490 U.S. 401 (1989) (prisons); Brown v. Glines, 444 U.S. 348 (1980) (military bases).

182. *See, e.g.,* Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 667, 676–78 (1998).

183. It is useful to say a few words about 42 U.S.C. § 1983 liability for private actors. A comprehensive discussion is beyond the scope of this Article, but the statute authorizes the filing of a civil action against a state actor for a deprivation of civil or constitutional rights. Jeremy Brown, *Pan, Tilt, Zoom: Regulating the Use of Video Surveillance of Public Places*, 23 BERKELEY TECH. L.J. 755, 780 n.166 (2008). Although the statute's language does not include any immunities, the U.S. Supreme Court has granted immunity to government officials where there exists a "tradition of immunity . . . so firmly rooted in the common law and . . . supported by such strong policy reasons" that Congress would not have abolished that tradition upon enacting § 1983. *See* Wyatt v. Cole, 504 U.S. 158, 164 (1992) (quoting Owen v. City of Indep., 445 U.S. 622, 637 (1980)). Immunity reflects the government's interest in managing the risk of "distraction of officials from their governmental duties" and of "deterrence of able people from public service." *See* Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982). This is relevant because it is possible for private actors like YouTube and Facebook to be deemed state actors under § 1983.

184. *See* Ardia, *supra* note 2, at 377.

public discourse.[185] Third–party platforms like Facebook and Twitter conduct "private worldwide speech 'regulation'" as they draft and enforce their respective platforms' content rules.[186] "They decide what types of content may be posted, whether to remove certain content in response to user requests, whether to remove content that allegedly violates the law, and how to display and prioritize various content types using algorithms, all against the background of democratic values and business interests."[187] The platforms are developing what amounts to a de facto free speech jurisprudence, and the crux of this Article is an exploration of whether the state action doctrine permits, and ought to permit, the First Amendment's application to such platforms. This Part employs the concepts explored in the foregoing Sections, and it includes both descriptive and normative perspectives.

The focus of this analysis is limited to one type of Internet intermediary: third–party platforms.[188] To compare Internet intermediaries and how they facilitate online speech, Professor David Ardia developed a trifurcated classification system for them, including: (1) *communication conduits*, which transport data across the network; (2) *content hosts*, which store, cache, or otherwise provide access to content; and (3) *search and application providers*, which index or filter content without necessarily hosting it.[189] The second classification includes web–hosting services and third–party platforms[190] that provide access to content by operating between primary publishers and audiences.[191] More specifically, web–hosting services allow users to host their own webpages, and third–party platforms—like Facebook and Twitter—offer various services to users that enable them to share content and network socially.[192] Content hosts are the focus of this Article because they have knowledge of, and control over, the

185. *See id.* Also playing a major role are common law principles of intermediary liability and Section 230 of the Communications Decency Act. *See, e.g.*, Aniket Kesari, Chris Hoofnagle & Damon McCoy, *Deterring Cybercrime: Focus on Intermediaries*, 32 BERKELEY TECH. L.J. (forthcoming 2017); Shahrzad T. Radbod, *Craigslist—A Case for Criminal Liability for Online Service Providers?*, 25 BERKELEY TECH. L.J. 597 (2010). They are worthy of discussion, but they are not the focus of this Article.

186. Benesch & MacKinnon, *supra* note 4.

187. *See generally* Jonathan Peters, *All the News That's Fit to Leak*, *in* TRANSPARENCY 2.0: DIGITAL DATA AND PRIVACY IN A WIRED WORLD 117, 117–29 (Charles N. Davis & David Cuillier eds., 2014).

188. *See* Ardia, *supra* note 2, at 386.

189. *Id.* at 386–87.

190. *Id.* at 387.

191. *Id.* at 388–89.

192. *See id.* at 389.

content of the speech they intermediate.[193] Content hosts—and specifically third–party platforms—have billions of users and "are many speakers' principal means of online communication."[194] Thus, content hosts truly stand to operate as arbiters of free expression online.[195] As such, the rest of this Article considers whether the state action doctrine permits application of the First Amendment to third–party platforms.

A. TO SAY WHAT THE LAW IS

According to the rules laid out in *Hudgens* and *Morrison*, as well as those laid out in the *Lugar–Edmonson* framework, the communications activities on third–party platforms would not satisfy state action requirements for federal purposes.[196] *Morrison* reaffirmed the narrow and

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193. *See id.*

194. *See Third-Party Platforms*, ELEC. FRONTIER FOUND., https://www.eff.org/free-speech-weak-link#platforms (last visited Sept. 17, 2017).

195. By contrast, communication conduits have no direct knowledge of, and very limited control over, the content of the speech they facilitate. Ardia, *supra* note 2, at 387. And search and application providers have limited knowledge of, and limited control over, the content of the speech they intermediate, insofar as search engines and filtering software select search results based on neutral computer algorithms and thematic preferences that represent the companies' judgments about what information to present and how to do so. Eugene Volokh, *First Amendment Protection for Search Engine Search Results*, VOLOKH CONSPIRACY (May 9, 2012, 2:37 PM), http://www.volokh.com/2012/05/09/first-amendment-protection-for-search-engine-search-results/.

196. *See* United States v. Morrison, 529 U.S. 598, 599 (2000); Hudgens v. NLRB, 424 U.S. 507, 519 (1976). It is possible, but not plausible, that a court would use the *Lugar–Edmonson* framework to find state action. The chief concern would be the three principles that guide the analysis of the second step. To satisfy the first principle, the argument would be that content hosts rely on governmental assistance and benefits on the theory that, but for the government–financed research that led to ARPANET, there would be no Internet. This is likely not a winning argument because other than the ancestor connection, content hosts are independent from the government. In addition, from a policy point of view, it is not sensible to allow an actor's mixed public–private origins to be sufficient to satisfy the principle that the actor relies on governmental assistance and benefits. Ardia, *supra* note 2, at 377. In the case of content hosts, it ignores the totality of the circumstances that today the Internet exists on a layered architecture of "privately owned Web sites, privately owned servers, privately owned routers, and privately owned backbones." *Id.* Because of the federal approach's formalism, ownership is key. Next, to satisfy the second principle, the argument would be that content hosts are performing a traditional governmental function on the theory that the government has played a role in the online environment by supporting its creation. However, third–party Internet platforms store, cache, or otherwise provide access to content, operating between primary publishers and their audiences. That is not a traditional government function in the offline or online world. Finally, to satisfy the third principle, the argument would be that the injury caused—the deprivation of free speech interests—is aggravated in a unique way by the incidents of governmental authority on the theory that, but for the government–financed research that led to ARPANET and later the

traditional approach articulated in the *Civil Rights Cases*, which treated the violation of the constitutional rights of one private actor by another as a "conceptual impossibility."[197] *Hudgens*, meanwhile, reversed a line of cases extending state action to private actors.[198] Justice Potter Stewart, writing for the majority, said the First Amendment "has no part to play in a case" where the expressive activities occur at a privately owned shopping center.[199] The Court said such a center is not "functionally similar" to a municipality because it does not possess all of the attributes of one.[200] To argue that a shopping center is "dedicated to certain types of public use" because it is "open to the public" and "serves the same purposes as a 'business district' of a municipality" is to go too far.[201] Under *Hudgens*, the "Constitution by no means requires such an attenuated doctrine of dedication of private property to public use."[202]

Hudgens also dismissed the applicability of the theoretically close *Marsh* decision, which involved a company town with "all of the attributes of a state-created municipality" that exercised "semi-official municipal functions as a delegate of the State."[203] The company town's owner, in effect, was performing "the full spectrum of municipal powers and stood in the shoes of the State."[204] In the context of third–party platforms, "there is no comparable assumption or exercise of municipal functions or power."[205] They perform a variety of functions to facilitate speech on blogging sites like Tumblr, social networks like Facebook, photo–hosting services like Flickr, and video–hosting services like YouTube.[206] They play a crucial role in the distribution of speech and in facilitating a "speaker's broad reach and

Internet, there would have been no injury at all. However, the Internet was designed to be distributed and decentralized, which means platforms are not required to seek the approval of any central authority to host content. In that sense, the platforms have virtual free will, and thus the responsibility for their actions cannot extend to the government. All of that said, it is important to note that these results come from applications of the law as it exists, not how it ought to be. For a discussion of how the law ought to be, see *infra* Section III.B.

197. *State Action and the Public/Private Distinction*, *supra* note 10, at 1257; *see also Morrison*, 529 U.S. at 599.

198. *Hudgens*, 424 U.S. at 507.

199. *Id.* at 521.

200. *Id.* at 519.

201. *Id.* at 519 (quoting Lloyd Corp. v. Tanner, 407 U.S. 551, 568–69 (1972)).

202. *Id.*

203. *Id.*

204. *Id.*

205. *See id.*

206. *See* Ardia, *supra* note 2, at 388.

a listener's varied choices."[207] And, from a technological standpoint, they store, cache, or otherwise provide access to Internet content, operating between speakers and their audiences.[208] But despite their significance, they certainly do not have all of the attributes of a municipality that the U.S. Supreme Court required under *Marsh* for state action, such as "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated."[209] For these reasons, under *Hudgens* and *Morrison*, as well as *Marsh*, the federal state action doctrine would foreclose the First Amendment's application to third–party platforms.

The same result can be reached under the *Lugar–Edmonson* framework, lending support to commentators who have said the doctrine's chief concern is to balance public interests and private harms.[210] The framework requires a two–step inquiry: (1) to determine "whether the claimed constitutional deprivation has resulted from the exercise of a right or privilege having its source in state authority";[211] and (2) to determine "whether the private party charged with the deprivation can be described as a state actor."[212] Under the second step, three principles are relevant: (1) "the extent to which the actor relies on governmental assistance and benefits;" (2) "whether the actor is performing a traditional governmental function;" and (3) "whether the injury caused is aggravated in a unique way by the incidents of governmental authority."[213]

To apply that framework and those principles in the context of third–party platforms, consider a February 2011 incident when Facebook removed a drawing posted by the New York Academy of Art to its Facebook page that depicted a topless woman.[214] Imagine the Academy wanted to file a legal complaint. The creation and public exhibition of art is protected First Amendment activity, so the first step under the *Lugar–Edmonson* framework would be satisfied: the "deprivation has resulted from the exercise of a right . . . having its source in state authority."[215] The second step, however, is a different story. In other words, Facebook could

207. *Id.* at 389.
208. *Id.* at 387.
209. *See* Marsh v. Alabama, 326 U.S. 501, 502 (1946).
210. Reuben, *supra* note 36, at 612.
211. Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991).
212. Georgia v. McCollum, 505 U.S. 42, 51 (1992).
213. *Id.*
214. *See* Adrian Chen, *How to Get Boobs on Facebook*, GAWKER (Feb. 19, 2011, 1:17 PM), http://gawker.com/5765057/how-to-get-a-boob-on-facebook.
215. *See McCollum*, 505 U.S. at 51.

not be described as a state actor, because it does not satisfy the three principles under the framework's second step.

First, Facebook does not rely to any appreciable extent on "governmental assistance and benefits."[216] Although government–financed researchers planted the Internet's seeds, and the company benefits today from certain government–created tax incentives, Facebook is otherwise independent from the government. The vast majority of the company's revenue comes from advertising,[217] and its other major sources of revenue have included private investments and its 2012 initial public offering.[218] In addition, the company is managed by a group of executives and directors, all free from government assistance or interference, except for laws and regulations of general applicability (e.g. rules governing the sale of securities).[219]

Second, Facebook is not "performing a traditional governmental function"[220] by storing, caching, or providing access to content.[221] The government traditionally has played no such role in the online environment. Here, the closest offline analogs are bookstores and libraries, which intermediate all manner of print publications, from books to pamphlets and magazines—and beyond.[222] Public archives are a possible analog, too. The government traditionally has not owned or operated book or media stores, and even though public libraries receive government funding and are staffed by civil servants, in effect making their operation a governmental function, they are distinguishable from third–party platforms because such libraries are governed by a board that serve the public interest.[223] The board's mission is critical to the libraries' functioning, and there is no equivalent for third–party platforms.[224] Similarly, public archives are operated to serve the

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216. *See id.*

217. Anita Balakrishnan, *Facebook Ad Revenue Shoots Up 53%, Sending Shares Climbing*, CNBC (Feb. 2, 2017, 11:16 AM), http://www.cnbc.com/2017/02/01/facebook-earnings-q4-2016.html.

218. Paul Vigna, *What's Facebook Really Worth? Try $13.80*, WALL ST. J. (May 25, 2012, 1:14 PM), https://blogs.wsj.com/marketbeat/2012/05/25/whats-facebook-really-worth-try-13-80/.

219. *See* Owen Thomas, *Here Are All the Top Executives Who Actually Run Facebook*, BUS. INSIDER (Aug. 2, 2012, 3:10 PM), http://www.businessinsider.com/facebook-senior-management-team-2012-8.

220. *McCollum*, 505 U.S. at 51.

221. Ardia, *supra* note 2, at 387.

222. *Id.* at 388.

223. RICHARD E. RUBIN, FOUNDATIONS OF LIBRARY AND INFORMATION SCIENCE 299 (2000).

224. *See id.*

public interest, and many of the documents they house are required by law to be preserved and publicly accessible (e.g. under the Presidential Records Act). That is not true for the data hosted by third–party platforms.

Third, "the injury caused"—the deprivation of free speech rights—"is [not] aggravated in a unique way by the incidents of governmental authority."[225] In fact, it is not aggravated at all by government. Facebook's content–policy team is led by employees,[226] and working under them are content moderators, mostly independent contractors, who review complaints about content that allegedly violates the platform's rules.[227] At the time of the incident involving the New York Academy of Art, those teams were responding to removal requests by applying rules set out in Facebook's "Operations Manual for Live Content Moderators," produced by a private consulting firm.[228] After removing the drawing posted by the Academy, Facebook apologized and said the removal was its own mistake.[229] In other words, any injury was caused by Facebook or its agents. For these reasons, under the *Lugar–Edmonson* framework, the state action doctrine would foreclose the First Amendment's application to third–party platforms.

Importantly, Facebook is not unique. This Article uses Facebook as an example because it is the largest third–party platform, but it would be possible to substitute any number of other platforms, such as Twitter, YouTube, or Flickr, in place of Facebook. Twitter, especially, has seen its share of recent content–related controversies—from the bullying of actress–comedian Leslie Jones that prompted the microblogging site to ban Milo Yiannopoulos, to the use of Twitter to spread false and misleading claims during the 2016 presidential election.[230] In any case, there are differences among the third–party platforms but, at a high level of abstraction, they all serve the same purposes. They store, cache, or otherwise provide access to

225. *See McCollum*, 505 U.S. at 51.

226. *See Community Standards*, FACEBOOK, https://www.facebook.com/communitystandards/ (last visited Dec. 22, 2017).

227. Jeffrey Rosen, *The Delete Squad*, NEW REPUBLIC (Apr. 28, 2013), https://newrepublic.com/article/113045/free-speech-internet-silicon-valley-making-rules.

228. *See id.*

229. *Id.*

230. *See* Mike Isaac, *Twitter Bans Milo Yiannopoulos in Wake of Leslie Jones's Reports of Abuse*, N.Y. TIMES (July 20, 2016), https://www.nytimes.com/2016/07/20/technology/twitter-bars-milo-yiannopoulos-in-crackdown-on-abusive-comments.html; Donie O'Sullivan, *Fake News Rife on Twitter During Election Week, Study from Oxford Says*, CNN MONEY (Sept. 28, 2017, 2:06 PM), http://money.cnn.com/2017/09/28/media/twitter-fake-news-election-study/index.html.

Internet content,[231] and they offer a variety of services to users that enable them to share content and network socially.[232] There is no doubt they have radically democratized publishing. And, for now, there is no doubt that the state action doctrine does not permit the First Amendment's application to such platforms.

B. To Say What the Law Ought to Be

As online communication continues to evolve,[233] and as content hosts continue for many people to be the principal means of public communication,[234] a state action theory that fails to protect free speech interests in such spaces is problematic—especially "in light of our nation's history of protecting free discourse in the spaces where such speech actually occurs."[235] The private is becoming more public, and thus the state action doctrine may come to define the contours of our fundamental rights.[236] That being said, a state action theory that fails to protect the values of autonomy and property rights is equally problematic. It would preempt individual liberty, insofar as it would deny property holders the "freedom to make certain choices," such as how a platform wants to operate and the types of speech it wants to host.[237] That freedom is fundamental to any conception of liberty and would be lost if platforms had to comply strictly with First Amendment requirements.[238] With these concerns in mind, the goal of this section is to articulate a state action theory suitable for a digital world "where public title and public use overlap with less frequency."[239]

It is tempting to adopt California's more liberal approach to state action because of its sensitivity to free expression interests. After all, the expressive uses of third–party platforms can be consequential. An anonymous blogger covering police corruption might use a hosting service like Blogger to share what she knows with the world.[240] A group with unpopular views might assemble on a social networking site like Facebook

231. Ardia, *supra* note 2, at 387.

232. *See* ELEC. FRONTIER FOUND., *supra* note 194.

233. *See* Rosen, *supra* note 8, at 260.

234. *See* ELEC. FRONTIER FOUND., *supra* note 194.

235. State *Action and the Public/Private Distinction*, *supra* note 10, at 1313 (citing Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).

236. *Id.* at 1250.

237. Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 808 (Cal. 2001).

238. *Id.*

239. *State Action and the Public/Private Distinction*, *supra* note 10, at 1312.

240. Ardia, *supra* note 2, at 388.

to debate those views.[241] Citizen journalists might monitor government power by publishing photos and videos on hosting sites like Flickr and YouTube.[242] Activists might organize protests using Twitter. [243]

Drawing on the ideas of Professor Thomas Emerson, such uses of third–party platforms stand to facilitate self–fulfillment by allowing users to express themselves; to advance knowledge and discover truth by debating ideas and sharing content with one another; to achieve a more stable and adaptable community by being exposed to more ideas and developing greater tolerance; and to allow users to be involved in the democratic decision–making process by holding those in power accountable for their actions.[244] Indeed, the accountability of elected officials "interrelates with participation, in that government accountability makes individual and public participation meaningful."[245] Thus, all of those uses of third–party platforms illuminate the value of free expression to the individual (i.e. the platform user) and the value of free expression to society as a whole (i.e. all citizens).

A state action theory suitable for the digital world ought to respect the importance of free expression as a means to personal development and self–fulfillment—and the role of content hosts in providing access to such expression. Just as a liberal approach to state action threatens a platform's autonomy and property rights, a traditional approach that fails to protect expression where it actually occurs[246] can be an "affront to the dignity" of an individual user.[247] After all, without the freedom to search for truth and discuss questions of right and wrong, individuals are placed, as Emerson writes, in the "arbitrary control of others."[248]

Further, a state action theory suitable for the digital world ought to respect the freedoms of thought, discussion, and investigation as goods in their own right, as well as the idea that society benefits from an open exchange of ideas.[249] Whether or not the truth *always* prevails, it will *never* prevail in a legal system that fails to protect the online marketplace for

241. *Id.*
242. *Id.*
243. *Id.*
244. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6–7 (1970).
245. Reuben, *supra* note 126, at 288.
246. *See State Action and the Public/Private Distinction*, *supra* note 10, at 1313 (citing Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).
247. EMERSON, *supra* note 244, at 6.
248. *Id.*
249. *See generally* JOHN STUART MILL, ON LIBERTY (David Bromwich & George Kateb eds., 2003) (1859).

expression. This general idea has factored prominently in the case law of democracies worldwide, from the *Handyside* case in the European Court of Human Rights to the *Abrams* case in the U.S. Supreme Court.[250] Moreover, it is not unreasonable to look at third–party platforms as staples in "the promotion of civil society," the "space between purely governmental and purely private affairs," where a great deal of "societal interaction" takes place.[251] The interactions in that space encourage "cooperation, reciprocation, and a sense of common good among citizens at all levels of national life,"[252] an encouragement that would be impossible but for free expression—the exercise of which occurs increasingly via third–party platforms. This is an important point because, as Professor Robert Putnam found, civil society is "just as important to the consolidation of a healthy democracy as properly functioning political institutions."[253]

A state action theory that is blind to the value of free expression to the individual, the value of free expression to society, the value of civil society to democracy, and the indispensability of third–party platforms to all of the above would surely "distract[] us from paying attention to what truly matters."[254] The federal state action theory is so blind in the context of third–party platforms. But so is the California theory, which supports more expansive free expression rights than those afforded by the First Amendment. Recall that its theory focuses on a private property's public use rather than its ownership, and in evaluating a private property's public character, *Pruneyard* relied on the property's functional equivalence to traditional public forums.

At a glance, it appears possible for third–party platforms to satisfy California's requirements. In many ways, platforms have been replacing traditional public forums, the public streets and parks that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[255] The likes of Facebook and Twitter have not been held in trust for the public's use, because they are privately owned, but they have been used—and dedicated

250. *See* Abrams v. United States, 250 U.S. 616, 628 (1919); Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A) at 18–19 (1976).
251. Reuben, *supra* note 126, at 291–92.
252. *Id.* at 292.
253. *Id.*
254. *See State Action and the Public/Private Distinction*, *supra* note 10, at 1263 (quoting Professor Mark Tushnet).
255. *Hague*, 307 U.S. at 515.

to—various expressive purposes, and they have been "freely and openly accessible to the public."[256] Consider the leading platforms' policy statements: Google says it "aim[s] to offer a platform for free expression" and that it has a "bias in favor of people's right to free expression in everything [it does]."[257] Former Twitter CEO Dick Costolo once said, "We think of Twitter as the global town hall" and the "free speech wing of the free speech party."[258] Facebook says it "give[s] people the power to share and make the world more open and connected" and to "see the world through the eyes of others."[259] And YouTube says it "provides a forum for people to connect, inform, and inspire others across the globe."[260]

The problem is that the U.S. Supreme Court has characterized traditional public forums as "physical property owned or controlled by the government,"[261] so narrowly defining their boundaries that there is little, if any, room for the recognition of new traditional public forums, such as third–party platforms.[262] That problem is exemplified by *International Society for Krishna Consciousness v. Lee*,[263] in which the Court held that airports were not traditional public forums.[264] In light of the "lateness with which the modern air terminal has made its appearance," the Court wrote, "it hardly qualifies for the description of having 'immemorially . . . time out of mind' been held in the public trust and used for purposes of expressive activity."[265] Similarly, in *Perry Education Association v. Perry Local Educators' Association*, the Court concluded that traditional public forums arise "by long tradition or by government fiat."[266] No Internet platform currently could be a product of long tradition, and even though theoretically this could one day be the case, the Supreme Court's characterization of

256. Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 810 (Cal. 2001).

257. Rachel Whetstone, *Free Expression and Controversial Content on the Web*, GOOGLE (Nov. 14, 2007), http://googleblog.blogspot.com/2007/11/free-expression-and-controversial.html.

258. Laura Sydell, *On Its 7th Birthday, Is Twitter Still the 'Free Speech Party'?*, NPR (Mar. 21, 2013, 2:57 AM), http://www.npr.org/blogs/alltechconsidered/2013/03/21/174858681/on-its-7th-birthday-is-twitter-still-the-free-speech-party.

259. FACEBOOK, *supra* note 226.

260. Marc Aaron Melzer, *Copyright Enforcement in the Cloud*, 21 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 403, 424 n.108 (2011).

261. Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1981 (2011).

262. *See id.* at 1982–83.

263. 505 U.S. 672 (1992).

264. *Id.* 680–81.

265. *Id.* at 680 (citations omitted).

266. 460 U.S. 37, 45 (1983).

public forums as "property owned or controlled by the government" would remain an impediment.

Because of the nexus between traditional public forums and state action requirements, California's approach would not be suitable for a digital world.[267] Like the federal approach, it forecloses the First Amendment's application to third–party platforms and thus fails to protect "free discourse in the spaces where [it] actually occurs."[268] In other words, although California's state action theory is not blind to the value of free expression in privately owned spaces, it simply fails to make room for third–party platforms, which are indispensable to the public discourse in the present day.

For these reasons, neither the federal nor California state action theory is adoptable in its entirety. The next Section articulates a hybrid theory suitable for a digital world—a theory that "reconciles the increasing privatization of public forums with the rights of property owners."[269]

C. A THEORY SUITABLE FOR A DIGITAL WORLD

At this point in the Article, the state action doctrine has been disassembled and examined from a variety of angles, and it is time to reassemble the pieces and to devise a state action theory suitable for a digital world. Ironically, it requires a return to *Marsh*, decided in 1946 by the U.S. Supreme Court—fifty–eight years before Facebook was founded,[270] fifty–nine years before YouTube was founded,[271] and sixty years before Twitter was founded.[272] As discussed earlier, *Marsh* involved a company town with "all of the attributes of a state-created municipality" that exercised "semi-official municipal functions as a delegate of the State," and the U.S.

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267. The state constitution is amended regularly, so it would be possible to amend it to reduce or eliminate its focus on traditional public forums. *See* Jennie Drage Bowser, *Constitutions: Amend with Care*, NAT'L CONF. ST. LEGISLATURES (Sept. 1, 2015), www.ncsl.org/research/elections-and-campaigns/constitution-amend-with-care.aspx ("Citizens and lawmakers have been far more willing to make serious changes to state constitutions than to the federal one.").

268. *See State Action and the Public/Private Distinction*, *supra* note 10, at 1313 (citing Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).

269. See *id.* at 1314.

270. *Our Mission*, FACEBOOK, https://newsroom.fb.com/company-info/ (last visited Sept. 17, 2017) (noting that Facebook was founded in 2004).

271. Melzer, *supra* note 260.

272. Owen Williams, *Twitter Has Lost More Than $2 Billion Since It Was Founded Twitter Milestones*, NEXT WEB (Feb. 29, 2016), https://thenextweb.com/twitter/2016/02/29/twitter-has-lost-more-than-2-billion-since-it-was-founded/ (noting that Twitter was founded in 2006).

Supreme Court ruled that Alabama violated the First and Fourteenth Amendments by forbidding a Jehovah's Witness from distributing religious materials in the town. The opinion balanced the autonomy rights of property owners against the expressive rights of property users, recognizing that users occupy a "preferred position" in American jurisprudence.[273]

In short, *Marsh* should be expanded and read functionally. It held that a company town and a public municipality were functional equivalents, such that the company town had to comply with First Amendment requirements.[274] The Court held that the town's property interests did not resolve the case, noting 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."[275] Such a rule is suitable for the digital world because it recognizes that private property can take on public characteristics, and unlike the reasoning of *Hudgens* and *Morrison*, both written in formalist terms reflecting the *Civil Rights Cases*, *Marsh* does not make ownership dispositive. Rather, ownership is one factor in a case–by–case balancing of rights.

Further, *Marsh* is attractive because even though it permits comparisons of private and public spaces for state action purposes, unlike in *Pruneyard*, the comparisons are not tethered to traditional public forums. First, although the facts involved the distribution of literature on a sidewalk near a post office,[276] the U.S. Supreme Court has held that such spaces are not traditional public forums.[277] Second, although the case discusses generally the public character of spaces that are traditional public forums, it also discusses generally the public character of spaces that are *not* public forums, including turnpikes, ferries, and bridges.[278] Third, whereas the opinion discusses the private discharge of public functions and the public character of private property, it does not limit these concepts to spaces that would be the functional equivalent of traditional public forums.[279]

That said, it is necessary to broaden *Marsh's* scope—beyond the context of company towns—to allow courts to compare public and private spaces on a case–by–case basis. In other words, rather than comparing the attributes of a particular private space to the attributes of a town, as *Marsh*

273. Marsh v. Alabama, 326 U.S. 501, 509 (1946).
274. *Id.* at 507.
275. *Id.* at 506.
276. *Id.* at 503.
277. United States v. Kokinda, 497 U.S. 720, 721 (1990).
278. *Marsh*, 326 U.S. at 506.
279. *Id.* at 506–07.

did, a state action theory based on an expanded *Marsh* would allow courts to compare public and private spaces more generally to assess whether a private space is functionally public. In the free expression context, several considerations would guide that assessment: (1) the nature of the private property interests at issue, and (2) whether the space is operated for general use by the public for expressive purposes, or whether the operation is itself a public function, either of which would favor a finding of state action. That approach is protective of property interests and responsive to the realities of today's communications landscape—and it reflects the principle that the more a property owner opens up a space for public use, the more she must accommodate the rights of property users. It also accounts for values underlying the California and federal state action theories by considering private title (the federal emphasis) and public use (the California emphasis). Accounting for both puts the new approach between the formalism of *Hudgens* and the expansiveness of *Pruneyard* or *Fashion Valley*. Thus, it is not only functional, it is consistent with precedent recognizing the "need for careful balancing and . . . distinctions to ensure adequate protections for property rights."[280]

A functional *Marsh*–based state action theory for a digital world—where advances in technology so quickly outpace the law, and where the lines between the public and private spheres are collapsing—enables the state action doctrine to adapt to changing realities. This theory also ensures the primacy of fundamental rights and their relevance to the great problems of the day. Its basic adaptability empowers judges to take into consideration the particular and fast–changing attributes of the private online spaces that serve, as noted earlier, as the primary means of public communication for many people. And it allows judges to characterize a space as public for state action purposes, even if the space would not qualify as a traditional public forum. For those reasons, the theory ensures that as the public becomes more private, and the private becomes more public, the state action doctrine's contours will align with the contours of our fundamental rights.

IV. CONCLUSION

Answering Professor Black's call "to talk about [the state action doctrine] until we settle on a view both conceptually and functionally right,"[281] this Article examined the First Amendment's role in the private

280. *See State Action and the Public/Private Distinction*, *supra* note 10, at 1314.
281. Black, *supra* note 1, at 70.

sector as "lawyers at Facebook and Google and Microsoft" exercise "more power over . . . free expression than any king or president or Supreme Court justice."[282] To that end, the Article analyzed the doctrine's traditions and values, its historical distinction between the public and private spheres, and the law of public forums—ultimately concluding that the state action doctrine, under its latest reformulation by the U.S. Supreme Court, forecloses the First Amendment's application to third–party platforms.

However, the Article went on to suggest a state action theory suitable for the digital world that could be devised through further judicial revision of the doctrine or a constitutional amendment. It recognizes that the modern challenge of applying the doctrine lies where the private and public spheres meet—and that a state action theory that ignores speech in private digital spaces is problematic in light of our nation's history of protecting speech in the spaces where it actually occurs.[283] The new theory uses *Marsh* as a foundation because it can be both expanded and read functionally to enable judges to balance the rights of property owners with those of property users, accounting for the dynamism of online spaces. Thus, the theory ensures that as the public becomes more private, and the private becomes more public, the state action doctrine's contours will remain aligned with those of our fundamental rights. And any uncertainty that might come from this more flexible and functional approach will surely, in time, resolve itself "as the common law system [begins] to adjudicate cases and the intrinsic limits of precedent [begin] to take hold."[284]

Professor Berman wrote in 2000 that "[d]ebates about the state action doctrine are arising again in the online context largely because we are facing the very real possibility that all of cyberspace will become an effectively private, Constitution-free zone."[285] That possibility has been realized to a great degree, and the state action doctrine continues to deserve our scholarly attention. Internet platforms, which increasingly have "a shared responsibility to help safeguard free expression,"[286] are developing a de facto free speech jurisprudence that underscores the importance of adopting a state action theory suitable for a digital world "where public title and public use overlap with less frequency."[287] Indeed, it shows that such a theory should recognize the value of free speech as a means to personal and

282. Gross & Rosen, *supra* note 19.
283. *See State Action and the Public/Private Distinction*, *supra* note 10, at 1313 (citing Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).
284. Berman, *supra* note 16, at 1308.
285. *Id.* at 1308.
286. Clinton, *supra* note 18.
287. *State Action and the Public/Private Distinction*, *supra* note 10, at 1312.

democratic development and, correspondingly, the role of third–party platforms in providing access to that speech.