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# CENSORSHIP AND FREEDOM OF EXPRESSION IN THE AGE OF FACEBOOK

Benjamin F. Jackson\*

## INTRODUCTION

For hundreds of millions of people, hardly a day goes by without at least a brief visit to a social network website, such as Facebook. Social network websites play a major role in social life and politics across the globe, shaping how individuals interact with each other and how political movements organize and communicate with the public at large. While, thus far, social network websites have served as relatively open and free forums for speech, they face a number of external and internal pressures to censor content. The prospect of censorship by social network websites is especially troubling because it is unclear whether the First Amendment provides any protections for communications on social network websites. Privately owned spaces, like these websites, are ordinarily shielded from First Amendment scrutiny by the state action doctrine.

This article argues that federal courts can and should extend First Amendment protections to communications on social network websites due to the importance these websites have assumed as forums for speech and public discourse. Part I provides background on social network websites. Part I.A discusses the importance of social network websites in contemporary social life and politics. Part I.B explores the pressures that might lead social network websites to censor content, as well as the potential implications of such censorship.

Part II explains how First Amendment protections can be extended to communications on social network websites in order to mitigate this threat of censorship. Part II.A sets aside the threshold issue of state action in order to demonstrate that public communications on social network websites are especially deserving of First Amendment protection, because they simultaneously invoke the three First Amendment freedoms of speech, press, and association. Part II.B then argues that courts can and should deem censorial acts by social network websites to be state action under the public function exception to the state action doctrine

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and, where possible, the entwinement exception to the state action doctrine.

Because courts may cite the availability of alternative paths to protection of communications on social network websites as a rationale for not taking the route argued for by Part II.B, Part III briefly examines whether state constitutional law, state and federal legislation, and federal media access regulations might also be able to provide protections for communications on social network websites. Part III demonstrates that each of these alternatives is less viable and less desirable than court-recognized First Amendment protections for communications on social network websites.

## I. SOCIAL NETWORK WEBSITES AND THE THREAT OF CENSORSHIP

### A. *Social Network Websites in Contemporary Social Life and Politics*

In recent years, social network websites such as Facebook,<sup>1</sup> Google+, Instagram, Myspace, Tumblr, Twitter, and YouTube have become a prominent feature of the online landscape. Currently, two-thirds of all Americans with internet access are users of a social network website,<sup>2</sup> and many users of the most popular social network websites make visits to such sites a near-daily ritual.<sup>3</sup> Facebook, the world's most popular social network website,<sup>4</sup> has over 800 million users worldwide and can

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1. Because Facebook is currently the most widely known and paradigmatic example of a social network website, this Article will primarily use Facebook to illustrate its points.

2. Aaron Smith, *Why Americans Use Social Media*, PEW INTERNET (Nov. 15, 2011), <http://pewinternet.org/Reports/2011/Why-Americans-Use-Social-Media.aspx>.

3. See danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 211 (2008), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1083-6101.2007.00393.x/pdf> (noting that many users of social networks "integrated these sites into their daily practices"); see also *Global Audience Spends Two Hours More a Month on Social Networks than Last Year*, NIELSEN (Mar. 19, 2010), <http://blog.nielsen.com/nielsenwire/global/global-audience-spends-two-hours-more-a-month-on-social-networks-than-last-year.html> (detailing the results of a 2010 survey that indicated that across 10 countries, the average Facebook user logged into the site 19 times per month, spending nearly 6 hours on the site).

4. Katie Baker, *Mark Zuckerberg's 650 Million Friends (and Counting)*, NEWSWEEK MAGAZINE (Mar. 6, 2011, 12:00 AM), <http://mag.newsweek.com/2011/03/06/mark-zuckerberg-s-650-million-friends-and-counting.html>. While Facebook is by far the most popular social network website in the United States and in most countries, some other social networks dominate particular countries' markets, such as Orkut in

receive upwards of 500 million site visits a day.<sup>5</sup>

Social network websites differ from other kinds of websites for two main reasons. First, the user experience on a social networking website is oriented towards connections with other users. All social network websites “allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.”<sup>6</sup> Second, social network websites allow their users to message one another and share online content with other users to whom they are connected, typically through public commenting tools and stream-based updates.<sup>7</sup> As one federal court has noted, social network websites “exist[ ] because [their] users *want* to share information—often about themselves—and to obtain information about others, within and among groups and subgroups of persons they already know or with whom they become acquainted through using [social network websites].”<sup>8</sup> Aside from personal information, users of social networking websites may also share music, images, videos, and links to other websites.<sup>9</sup>

Relationship-focused social network websites, such as Facebook, have a third distinguishing characteristic: they support pre-existing, so-called real-world social relationships.<sup>10</sup> While some relationship-focused

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Brazil, Ozone and Renren in China, Mixi in Japan, Cyworld in Korea, VKontakte and Odnoklassniki in Russia, and Zing in Vietnam. *Id.*

5. Nathan Olivarez-Giles, *Facebook F8: Redesigning and hitting 800 million users*, L.A. TIMES (Sept. 22, 2011, 2:55 PM), <http://latimesblogs.latimes.com/technology/2011/09/facebook-f8-media-features.html>.

6. See danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 211 (2008), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1083-6101.2007.00393.x/pdf>. Individual social network websites may vary considerably in terms of “visibility and access” as well as “their features and user base,” but all share this common trait. *Id.* at 213–14.

7. danah m. boyd, *Social Network Sites as Networked Publics: Affordances, Dynamics, and Implications*, in *A NETWORKED SELF: IDENTITY, COMMUNITY, AND CULTURE ON SOCIAL NETWORK SITES* 39, 43 (Zizi Papacharissi ed., 2011).

8. *Cohen v. Facebook, Inc.*, 798 F. Supp. 2d 1090, 1092 (N.D. Cal. 2011); see also James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1152–60 (2009) (explaining that Facebook enables its members to present an image of themselves to the world, to deepen their relationships with others, to establish their social position, and to build social capital).

9. See boyd & Ellison, *supra* note 6.

10. See *id.* at 221 (“[T]he available research suggests that most [social network websites] primarily support pre-existing social relations.”); see also Andreas Wimmer & Kevin Lewis, *Beyond and Below Racial Homophily: ERG Models of a Friendship Network Documented on Facebook*, 116 AM. J. SOC. 583, 603 (2010) (noting that “pic-

social network websites do exist primarily to help strangers connect based on shared interests, for the most part users of these websites are connected to people who are already part of their extended social network.<sup>11</sup>

These unique features have enabled social network websites to become part of the fabric of social life for hundreds of millions of people around the world. Social network websites have transformed how individuals communicate, how authorities govern,<sup>12</sup> and how companies sell their goods and services. Social network websites serve a variety of purposes: parents use Facebook to vet nannies; police, to keep tabs on suspects; and even federal government authorities, to prepare for natural disasters.<sup>13</sup>

Just as social network websites have transformed our social lives, so too have they transformed politics. In both the United States and abroad, social network websites have become an important tool for political campaigning, mobilizing protests, political expression, and debate. Several American politicians—including Barack Obama, Sarah Palin, and Scott Brown—extensively used social network websites during recent campaigns.<sup>14</sup> As Barack Obama's 2008 presidential campaign demonstrated, social network websites allow politicians to communicate with millions of their supporters within a single day and enable their supporters to connect with each other and online groups, which can be used to help plan rallies or support get-out-the-vote efforts.<sup>15</sup> Individual citizens

tures on Facebook represent and document, on the aggregate, 'real life' relationships that are socially meaningful. . . .").

11. See boyd & Ellison, *supra* note 6, at 221; Smith, *supra* note 2 ("Roughly two thirds of social media users say that staying in touch with current friends and family members is a major reason they use these sites, while half say that connecting with old friends they've lost touch with is a major reason behind their use of these technologies.").

12. The Obama White House maintains a Twitter feed, and at least thirty government agencies communicate to the public through Facebook and other social network websites. See Michael Sherer, *Obama and Twitter: White House Social-Networking*, TIME (May 6, 2009), <http://www.time.com/time/politics/article/0,8599,1896482,00.html>.

13. Somini Sengupta, *Half of America Is Using Social Networks*, N.Y. TIMES BITS (Aug. 26, 2011, 7:30 PM), <http://bits.blogs.nytimes.com/2011/08/26/half-of-america-is-using-social-networks/>.

14. See DAVID KIRKPATRICK, *THE FACEBOOK EFFECT* 293–94 (2010) ("Barack Obama's 2008 presidential campaign used Facebook masterfully."). See generally TECHNO POLITICS IN PRESIDENTIAL CAMPAIGNING (John Allen Hendricks & Lynda Lee Kaid eds., 2011) (discussing use of new social media to reach voters).

15. See KIRKPATRICK, *supra* note 14, at 293 (noting that the 2008 Obama campaign had "a large Facebook page, which gathered millions of fans during the campaign," and also that "local and regional Obama campaigns invited supporters to join their own Facebook groups, which allowed them to mobilize local supporters en masse."). Google has also pitched its social networking website, Google+, at politicians, explaining on one promotional webpage how the site's features can be of use to

and groups, meanwhile, have also used social network sites to mobilize political support. For example, in the United States social network websites have played an important role in the Occupy Movement, which “began as a Twitter experiment.”<sup>16</sup> Occupy’s supporters have used Facebook, Tumblr, Twitter, and YouTube to mobilize support and organize protests. At its height, the movement counted more than 400 Facebook pages with 2.7 million fans around the world, as well as over 100 Twitter accounts with tens of thousands of followers.<sup>17</sup>

Looking outside the United States brings social network websites’ potential as a tool for political mobilization into even sharper relief. For example, social network websites played a key role in the Arab Spring, helping citizens to organize protests and circumvent state censorship in such countries as Iran,<sup>18</sup> Tunisia,<sup>19</sup> and Egypt.<sup>20</sup> Facebook has also become a force for political mobilization in Latin America. In 2008, activists in Colombia used Facebook to organize marches against the paramilitary

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them. See *Google+ Politics*, GOOGLE+, <https://www.google.com/+learnmore/politics/index.html> (last visited Jan. 6, 2012).

16. Jennifer Preston, *Protesters Look for Ways to Feed the Web*, N.Y. TIMES, Nov. 25, 2011, at A28; see also Ben Berkowitz, *From a Single Hashtag, a Protest Cirled the World*, REUTERS (Oct. 17, 2011, 4:54 PM), <http://www.reuters.com/article/2011/10/17/us-wallstreet-protests-social-idUSTRE79G6E420111017>.

17. Preston, *supra* note 16; see also Alysia Santo, *Occupy Wall Street’s Media Team*, COLUM. JOURNALISM REV. (Oct. 7, 2011, 11:57 AM), [http://www.cjr.org/the\\_news\\_frontier/occupy\\_wall\\_streets\\_media\\_team.php?page=all](http://www.cjr.org/the_news_frontier/occupy_wall_streets_media_team.php?page=all) (explaining that Occupy website gets 500,000 “hits” per day).

18. Rebecca Santana, *Iran Election, Uprising Tracked on Twitter as Government Censors Media*, HUFFINGTON POST (June 15, 2009, 9:36 PM), [http://www.huffingtonpost.com/2009/06/15/iran-election-uprising-tr\\_n\\_215914.html](http://www.huffingtonpost.com/2009/06/15/iran-election-uprising-tr_n_215914.html) (noting how supporters of Iranian presidential candidate Mir-Hossein Mousavi and the Green Movement used Twitter to communicate and organize in light of government censorship of the traditional media).

19. See Ethan Zuckerman, *What if Tunisia Had a Revolution, But Nobody Watched?*, MY HEART’S IN ACCRA (Jan. 12, 2011), <http://www.ethanzuckerman.com/blog/2011/01/12/what-if-tunisia-had-a-revolution-but-nobody-watched/> (noting that during the 2011 Tunisian Revolution many Tunisians “turn[ed] to YouTube and DailyMotion videos, to blogs, Twitter and especially Facebook” to keep up-to-date on the news in their country); Kristen McTighe, *A Blogger at Arab Spring’s Genesis*, N.Y. TIMES (Oct. 12, 2011), <http://www.nytimes.com/2011/10/13/world/africa/a-blogger-at-arab-springs-genesis.html> (noting that “protesters were able to break the media blackout by spreading video, information and commentary through the Internet and social media operations”).

20. Mike Giglio, *The Facebook Freedom Fighter*, NEWSWEEK, Feb. 21, 2011, at 14, available at <http://mag.newsweek.com/2011/02/13/the-facebook-freedom-fighter.html>; see also Charles Levinson & Margaret Coker, *Turmoil in Egypt: The Secret Rally That Sparked an Uprising*, WALL ST. J., Feb. 11, 2011, at A9 (protesters announced demonstration locations on internet).

organization FARC that drew 10 million participants in Colombia and 2 million more worldwide,<sup>21</sup> and in 2011 thousands of young Nicaraguans used Facebook to protest the re-election bid of Nicaraguan President Daniel Ortega.<sup>22</sup>

Aside from their use as a campaigning and mobilization tool, social network websites have also become prominent forums for political expression and debate. The United States' military action in Libya was the ninth most-talked about topic on Facebook in 2011 (though most of the other top ten topics, such as the Packers' Super Bowl win and the death of Steve Jobs, were anything but political),<sup>23</sup> and YouTube's homepage lists "News & Politics" and "Nonprofits & Activism" as two of its eighteen primary video channels.<sup>24</sup> No doubt many readers of this article have personal experience with political statements by friends in their Facebook news feed.

Of course, the role of social network websites in politics should not be overstated, as several participants in social media-fueled protest movements have noted. Social network websites are at best one campaigning tool in a set of many, and no online protest can yet replace the importance of boots on the ground<sup>25</sup> or eliminate the necessity, at times, of old-fashioned political communication tactics like distributing fliers and door-to-door advocacy.<sup>26</sup> The fact remains, though, that social network websites have clearly become a powerful tool for political mobilization and organization, as well as an important forum for political speech and debate around the globe.

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21. KIRKPATRICK, *supra* note 14, at 4.

22. Tim Rogers, *Mideast Unrest Spreads to Nicaragua — Virtually*, TIME (Feb. 26, 2011), <http://www.time.com/time/world/article/0,8599,2055679,00.html>.

23. Jonathan Chang, *Like My Status: Memology 2011*, FACEBOOK (Dec. 6, 2011, 9:01 PM), <https://www.facebook.com/notes/facebook/like-my-status-memology-2011/10150391956652131>.

24. YOUTUBE, <http://www.youtube.com/channels> (last visited Oct. 12, 2013) ("Causes & Non-profits" and "News & Politics" listed among top video channels).

25. *See, e.g.*, Preston, *supra* note 16 (noting that many Occupy Wall Street organizers and social media experts have stated that while the online component to the protests was critical, the protest movement was unsustainable without a physical presence).

26. While social network websites undoubtedly played a key role in organizing protests during the 2011 Egyptian Revolution, protest organizers also made distributing fliers in working-class districts of Cairo a key element of their publicity strategy, as the internet and Facebook were not as widely used in those districts. Levinson & Coker, *supra* note 20.

### B. *The Threat of Censorship on Social Network Websites*

Most of the major social network websites have publicly committed themselves to the ideals of openness and transparency. Twitter has committed itself to “the open exchange of information.”<sup>27</sup> Facebook also says that its “mission is to give people the power to share and make the world more open and connected,”<sup>28</sup> which it claims will “create greater understanding”<sup>29</sup> and decrease violent conflict throughout the world.<sup>30</sup> But even if one grants that social network websites have a good track record thus far, it does not then follow that one should blindly trust them—they are, after all, for-profit companies that pursue their own financial interests. Despite their ostensible commitments to openness and the free exchange of ideas, social network websites face external and internal pressures to censor content or block particular users’ access, a troubling situation given the importance social network websites have assumed in contemporary social and political life.

#### 1. External Pressures to Engage in Censorship

External pressures on social network websites to censor content or block access are most obvious in repressive and authoritarian regimes, particularly those that are run by a Communist party or a theocracy.<sup>31</sup>

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27. *Transparency Report*, TWITTER, <https://transparency.twitter.com> (last visited Dec. 13, 2013).

28. *Facebook—Info*, FACEBOOK, <http://www.facebook.com/facebook?sk=info> (last visited Jan. 6, 2012).

29. *Facebook Principles*, FACEBOOK, <http://www.facebook.com/principles.php> (last visited Dec. 13, 2013). Facebook has also identified “Freedom to Share and Connect,” “Free Flow of Information,” and “Fundamental Equality” as some of its ten core principles. *Id.* Myspace, however, has made no such commitments, conceiving of itself primarily as a method to “[d]iscover, share and connect” to music, design and culture rather than a force for political or societal good. *See Learn More*, MYSPACE, <https://myspace.com/learnmore> (last visited Oct. 9, 2013).

30. *See Peace on Facebook*, FACEBOOK, <http://peace.facebook.com/> (last visited Dec. 13, 2013) (aimed at decreasing world conflict through facilitating connections between individuals from diverse backgrounds). Such lofty aspirations may not be as far-fetched as they might at first seem, as the technologies that have made ideas and people increasingly mobile and that make people aware of the perspectives of other individuals who are unlike themselves may be a major factor in recent declines in intrastate violence and interstate war. *See* STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* (2011). Critics of technological determinism, however, might oppose this claim.

31. Some repressive regimes, however, in apparent recognition of the maxim “if you cannot beat them, join them,” have instead turned to social network websites to keep tabs on their political opponents. For instance, several commentators have speculated that the now-deposed Tunisian dictator Zine El Abidine Ben Ali’s decision to

China has blocked Facebook entirely since 2009<sup>32</sup> and also blocks Twitter;<sup>33</sup> Vietnam has also taken steps to block Facebook;<sup>34</sup> and Iranian authorities are so fearful of the use of social network websites as an organizing tool that they will go to great lengths to put a stop to any gatherings organized on social networks, including water gun fights.<sup>35</sup>

Democracies have seen their fair share of such pressure as well. India's government, for example, has recently made several pushes to censor content on social network websites, calling on social media websites to censor content if individuals formally complain that the content is "disparaging" or "harassing," or if it offends the cultural "sensibilities" of Indian people.<sup>36</sup> The United States has also witnessed governmental and political pressure to censor content on social network websites. In the wake of WikiLeaks' release of classified United States diplomatic cables, the Department of Justice obtained a court order for Twitter to turn over

open up Tunisia to Facebook subsequent to his initial decision to block the site was made in the hopes of "us[ing] that openness to keep tabs on those who were using Facebook and Twitter to communicate and organize." McTighe, *supra* note 19. Similarly, the late Venezuelan strongman Hugo Chavez encouraged citizens to denounce enemies of his Bolivarian movement on Twitter. Mac Margolis & Alex Marin, *Twitter a Tool for Spies*, NEWSWEEK (International Edition), June 14, 2010, available at <http://mag.newsweek.com/2010/06/07/twitter-a-tool-for-spies.html>. These developments have led some commentators to conclude that the rise of communications on social network websites is just as likely to undermine democracy and prop up authoritarian regimes as it is to promote democracy and freedom. See generally EVGENY MOROZOV, *THE NET DELUSION: THE DARK SIDE OF INTERNET FREEDOM* (2011) (discussing potential dangers of the internet and social media negatively impacting global democracy).

32. Loretta Chao, *Mr. Zuckerberg Goes to China*, WALL ST. J., Dec. 23, 2010, at B1, available at <http://online.wsj.com/news/articles/SB10001424052748703814804576035143409583806>.

33. Evelyn M. Rusli & Mark Scott, *Saudi Prince Invests \$300 Million in Twitter*, N.Y. TIMES DEALBOOK (Dec. 19, 2011, 5:13 AM), <http://dealbook.nytimes.com/2011/12/19/saudi-prince-invests-300-million-in-twitter/>.

34. Ben Stocking, *Vietnam Internet Users Fear Facebook Blackout*, SYDNEY MORNING HERALD, (Nov. 17, 2009), <http://news.smh.com.au/breaking-news-technology/vietnam-internet-users-fear-facebook-blackout-20091117-iki0.html>.

35. Farnaz Fassihi, *Iran's Wet Blankets Put a Damper on Water-Park Fun*, WALL ST. J., Aug. 31, 2011, at A1, available at <http://online.wsj.com/news/articles/SB10001424053111904823804576502342250845116>.

36. See Heather Timmons, *'Chilling' Impact of India's April Internet Rules*, N.Y. TIMES INDIA INK (Dec. 7, 2011, 4:39 AM), <http://india.blogs.nytimes.com/2011/12/07/chilling-impact-of-indias-april-internet-rules/>; Heather Timmons, *'Any Normal Human Being Would be Offended'*, N.Y. TIMES INDIA INK (Dec. 6, 2011, 7:35 AM), <http://india.blogs.nytimes.com/2011/12/06/any-normal-human-being-would-be-offended/>.

information about its WikiLeaks-related accounts,<sup>37</sup> which, while not censorship itself, assumedly had a chilling effect on WikiLeaks-related tweets.<sup>38</sup> Twitter has also faced challenges from Senator Joe Lieberman, who led an effort to have Twitter block pro-Taliban accounts and messages.<sup>39</sup> YouTube has faced challenges from Senator Lieberman, Representative Anthony Weiner (who perhaps had good reason to fear social network websites<sup>40</sup>), and British security minister Pauline Neville-Jones, who called for YouTube to remove a long list of pro-terrorism videos.<sup>41</sup> School districts around the United States have also taken steps to limit the kinds of communications that students and teachers may engage in on social network websites.<sup>42</sup>

## 2. Internal Pressures to Engage in Censorship

Social network websites also face internal pressures to censor their content or block particular users' access. Certain forms of such censorship may serve several legitimate and largely apolitical ends, while only minimally affecting legitimate First Amendment interests. First, social network websites may censor communications in order to prevent convicted

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37. See Paul Sonne, *U.S. Presses Twitter for Data on WikiLeaks*, WALL ST. J., Jan. 10, 2011, at A13, available at, <http://online.wsj.com/news/articles/SB10001424052748704482704576072081788251562>.

38. Twitter eventually won a motion to lift the order. Jerry Brito, *First Privacy, Now Censorship: Will Twitter Continue to Stand Up for Its Users' Rights?*, TIME (Jan. 2, 2012), <http://techland.time.com/2012/01/02/privacy-and-censorship-will-twitter-continue-to-stand-up-for-its-users-rights-this-year/>.

39. *Id.*

40. Weiner was forced to resign from Congress after he was caught sending lewd photos of himself to a young woman through his Twitter account. See Editorial, *Anthony Weiner Resigns*, N.Y. TIMES, June 17, 2011, at A34, available at <http://www.nytimes.com/2011/06/17/opinion/17fri4.html>; Devlin Barrett, *Weiner Fails to Quell Controversy Over Photo*, WALL ST. J., June 2, 2011, at A6, available at <http://online.wsj.com/news/articles/SB10001424052702304563104576359970261287018>.

41. YouTube initially complied with the politicians' demands but ultimately backtracked and decided not to guarantee that such videos would be screened out. See Brian Bennett, *YouTube Is Letting Users Decide on Terrorism-Related Videos*, L.A. TIMES (Dec. 12, 2010), <http://articles.latimes.com/2010/dec/12/nation/la-na-youtube-terror-20101213>.

42. See Jennifer Preston, *Rules to Stop Pupil and Teacher From Getting Too Social Online*, N.Y. TIMES, Dec. 18, 2011, at A1, available at, <http://www.nytimes.com/2011/12/18/business/media/rules-to-limit-how-teachers-and-students-interact-online.html> (noting that school districts are "imposing strict new guidelines that ban private conversations between teachers and their students on cellphones and online platforms like Facebook and Twitter").

criminals from preying on victims, accusers, or witnesses,<sup>43</sup> or to prevent certain users from harassing or intimidating other users.<sup>44</sup> Second, the censorship of pornographic or violent materials may help to create and maintain an environment acceptable to users of as many ages and sensibilities as possible, thereby broadening the site's ability to serve as a forum for public communications and discourse, and increasing its value to advertisers.<sup>45</sup> Third, such censorship may be necessary to prevent harm to the website due to hacking and phishing attacks.<sup>46</sup> Fourth, such censorship may be necessary to comply with copyright and trademark laws and laws governing publicity.<sup>47</sup> Such censorship does, of course, have the potential to be abused or to be applied overinclusively, but one would think that a certain amount of these kinds of censorship is necessary to maintaining the atmosphere that attracts users to such sites in the first place.<sup>48</sup>

However, social network websites might censor content for more troubling reasons. For example, they might discriminate against view-

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43. See *Inmates Using Facebook, Cell Phones to Harass Their Victims, Accusers, Witnesses*, C.B.S. NEWS (Nov. 21, 2011, 11:45 AM), [http://www.cbsnews.com/8301-504083\\_162-57328739-504083/inmates-using-facebook-cell-phones-to-harass-their-victims-accusers-witnesses/](http://www.cbsnews.com/8301-504083_162-57328739-504083/inmates-using-facebook-cell-phones-to-harass-their-victims-accusers-witnesses/); Meg Handley, *How Prisoners Harass Their Victims Using Facebook*, TIME (Feb. 18, 2010), <http://www.time.com/time/business/article/0,8599,1964916,00.html>. Additionally, convicted sex offenders are forbidden from using Facebook. *Statement of Rights and Responsibilities*, FACEBOOK (Apr. 26, 2011), <http://www.facebook.com/legal/terms?ref=pf> [hereinafter FACEBOOK, *Statement*].

44. Facebook's Statement of Rights and Responsibilities, for example, asks users not to "bully, intimidate, or harass any user" or post content that is "hateful" or "threatening." FACEBOOK, *Statement*, *supra* note 43.

45. Facebook asks users not to post "pornographic" materials, or those which "in-cite[ ] violence" or "contain[ ] nudity or graphic or gratuitous violence." *Id.* YouTube similarly censors pornographic and obscene content, and reserves the right to "at any time, without prior notice and in its sole discretion, remove such content and/or terminate a user's account for submitting such material in violation" of YouTube's terms of service. *Terms of Service*, YOUTUBE (June 9, 2010), <http://www.youtube.com/t/terms>.

46. See Tom Loftus, *Facebook Slammed by Porn Attack*, WALL ST. J., Nov. 16, 2011, at B4 (noting that Facebook suffered a "coordinated spam attack" that resulted in the posting of pornographic and violent images on users' news feeds); Claire Sud-dath, *The Downside of Friends: Facebook's Hacking Problem*, TIME (May 5, 2009), <http://content.time.com/time/business/article/0,8599,1895740,00.html> (noting that in recent years, Facebook has suffered upwards of 4,500 hacking and phishing attacks per year).

47. See PAUL D. McGRADY, JR., McGRADY ON SOCIAL MEDIA § 1.03 (2011).

48. Cf. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 62 (2009) (arguing that civil rights lawsuits against speech on social network websites that attacks "women, people of color, and members of other traditionally disadvantaged classes" promote rather than undermine First Amendment values because they "help[] preserve vibrant online dialogue and promote a culture of political, social, and economic equality").

points on matters of public concern that interfere with their business interests,<sup>49</sup> filtering out viewpoints that are critical of their business practices or those of their partners, or that they think will offend and scare away certain users or business partners. They might also suppress statements that they believe could wrongly be attributed to the social network website itself.<sup>50</sup> Further, social network websites might censor content in order to promote specific political agendas or in response to political pressure from certain sets of users. For example, Myspace twice deleted its 35,000-member “Atheist and Agnostic Group,” the first time after an organized campaign from conservative Christian users who opposed the group, and the second time following an attack by Christian hackers who deleted the group’s material and renamed it “Jesus is Love.”<sup>51</sup> This incident serves as an example of how social network websites can be used to impair individuals’ ability to freely express themselves and associate online.

### 3. The Potential Effects of Censorship on Users of Social Network Websites

Why should we care about censorship on social network websites? After all, even if such censorship seems likely to occur sooner or later, social network websites are privately owned and exist primarily to earn a

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49. Cf. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 22 (2004) (arguing that “businesses that control telecommunications networks will seek to limit forms of participation and cultural innovation that are inconsistent with their economic interests”) [hereinafter Balkin, *Digital Speech*]; Molly Shaffer Van Houweling, *Side-walks, Sewers, and State Action in Cyberspace*, <http://cyber.law.harvard.edu/is02/readings/stateaction-shaffer-van-houweling.html> (last visited Dec. 13, 2013) (expressing the fear that “ISPs who face only limited competition will prevent their subscribers from easily accessing Internet content that competes with content offered by the ISP or its corporate affiliates, or content that is critical of them”).

50. Cf. Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2093 (2004) [hereinafter Balkin, *Virtual Liberty*] (arguing that owners of virtual worlds “have countervailing incentives to (1) censor speech critical of how the owner is running the space; (2) censor speech it thinks will offend and hence scare customers away; and (3) censor speech that it believe customers will (fairly or unfairly) associate with the game owner or blame the game owner for allowing in the space”).

51. David Briggs, *MySpace Deletes Site for Atheists, Founder Says*, PLAIN DEALER (Cleveland), Jan. 31, 2008, at E1. Myspace later restored the group without public comment, but banned several of the previously regular contributors from joining the group. *MySpace Atheist and Agnostic Group Restored (Sort Of)*, SECULAR STUDENT ALLIANCE (Feb. 2, 2008, 9:41 PM), <http://www.secularstudents.org/node/1942>.

profit. One could argue that any beneficial social effects of the sites are at most a subsidiary consideration for their owners.

There are three reasons that censorship of communications on social network websites should make us seriously worried. First, individual speakers whose messages have been censored on a dominant social network website may lack a meaningful alternative venue for their communications. Social network websites have diminished the importance and the effectiveness of traditional physical venues for speech, like public parks, as well as traditional forms of political communication, such as pamphlets and fliers. At the same time, an individual shut out of a dominant social network website may have no comparable alternative social network in which to express their views. This is the case because social network websites are characterized by network effects: the more users a social network website has, the more valuable that website becomes to its users.<sup>52</sup> These network effects “often lead to an equilibrium in which a single firm or product dominates an industry segment,”<sup>53</sup> which means one major relationship-focused social network website will typically dominate in a given country.<sup>54</sup> In other words, not all social network websites are created equal, and being shut out of a dominant one could drastically reduce the size of the online audience for a speaker’s message (perhaps to the point where it is practically nonexistent).<sup>55</sup> Further, users may hesitate to provoke the ire of a particularly dominant relationship-focused social network website such as Facebook due to a fear of losing access to an important means of communication, as well as the many digital mementos of their social life stored by that social network website.<sup>56</sup> Net-

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52. See generally Arun Sundararajan, *Network Effects*, <http://oz.stern.nyu.edu/io/network.html> (last visited Jan. 9, 2012). Websites are also generally characterized by power laws, which even aside from network effects means that “the top 20% of web sites get about two-thirds of all web hits.” M.E.J. Newman, *Power Laws, Pareto Distributions and Zipf’s Law*, 46 CONTEMP. PHYSICS 323, 334 (2005).

53. Sundararajan, *supra* note 52.

54. See Baker, *supra* note 4.

55. Even if an alternative social network website is available, the costs of switching from one social network website to another may nevertheless be exceedingly high. Cf. Eric Goldman, *Speech Showdowns at the Virtual Corral*, 21 SANTA CLARA COMPUTER & HIGH TECH. L.J. 845, 850 (2005) (discussing the costs of switching between competing virtual world websites).

56. See Dan Fletcher, *How Facebook is Redefining Privacy*, TIME (May 20, 2010), <http://content.time.com/time/magazine/article/0,9171,1990798,00.html> (noting how when the author’s account was deactivated by Facebook for violating the rules of the site, he lost “all [his] photos, all [his] messages and all [his] status updates from [his] senior year of high school through the first two years of college,” erasing years of “digital mementos” that he “still miss[es]”).

work effects thus heighten the likelihood that censorial acts by social network websites will have chilling effects on expression.

Second, networks tend to organize themselves around certain particularly well-connected nodes. When the operator of a social network censors the communications of a user or group representing such a node, it could have a devastating impact on a particular message or form of communication.<sup>57</sup> Nodal organization also makes it easier to identify individuals belonging to a particular group, making it easier to harass them and prospectively censor their speech.

Third, political commitments on social network websites are often very public. Saying something on a political subject in anything other than a private message on a social network website necessarily involves exposing one's views to other people—as one commentator has noted, “[j]oining a protest group on Facebook is unlike standing in a crowd and holding up a sign at a protest. It may be easier to do in terms of convenience, but it is a more public commitment. It's more like signing a petition with our name and address in a way that many others can immediately see.”<sup>58</sup> Social network websites and individuals who have access to them typically possess an extraordinary ability to personally identify supporters of particular messages and viewpoints.<sup>59</sup> This could make cooperation between social network websites and government or political actors to censor content especially dangerous, as it raises the possibility of online censorship translating into offline harassment or intimidation.<sup>60</sup>

In sum, the threat of censorship on social network websites is real: social network websites face numerous pressures, both external and internal, to abridge the ability of particular users and groups to espouse certain political viewpoints on their websites, and such censorship can easily

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57. See NASSIM NICHOLAS TALEB, *THE BLACK SWAN* 226 (2007) (“Networks have a natural tendency to organize themselves around an extremely concentrated architecture: a few nodes are extremely connected; others barely so. . . . This seems to make networks more robust: random insults to most parts of the network will not be consequential since they are likely to hit a poorly connected spot. But it also makes networks more vulnerable. . . . Just consider what would happen if there is a problem with a major node.”).

58. See KIRKPATRICK, *supra* note 14, at 288.

59. Social network websites typically possess personal information on individual users at a very granular level. See Fletcher, *supra* note 56. Facebook has even developed technology that can recognize individual users' faces in photographs posted on its website. Geoffrey A. Fowler & Christopher Lawton, *Facebook Again in Spotlight on Privacy*, WALL ST. J., June 8, 2011, at B1.

60. These characteristics distinguish social network websites from the rest of the internet, which is generally characterized by relative anonymity, decentralized distribution, multiple points of access, and no simple system for linking content to real-world people or places. See LAWRENCE LESSIG, *CODE: VERSION 2.0* 236 (2006).

lead to important real-world consequences. It is frightening to imagine that the great power wielded by these websites could go largely unchecked.

## II. EXTENDING FIRST AMENDMENT SCRUTINY TO THE ACTIONS OF SOCIAL NETWORK WEBSITES

If a governmental actor, such as Congress, a federal agency, or a state government, were to directly censor content on a social network website, or if they were to coerce an operator of a social network website into doing so, this censorial act would be subject to First Amendment scrutiny. But what happens when an operator of a social network website acts to censor content on its own? This Part argues that, in light of the importance of social network websites in modern social and political life, and in light of the fact that protecting communications on social network websites would promote core First Amendment values, courts can and should hold that censorial acts by social network websites are state action subject to First Amendment scrutiny.<sup>61</sup>

This Part begins by setting aside the threshold issue of state action to argue that protecting communications on social network websites would promote core First Amendment values, as communications on social network websites simultaneously invoke the three First Amendment freedoms of speech, press, and association. Some might argue that conducting this First Amendment analysis before the threshold state action analysis gets things backwards, but that is precisely the point: to show how a narrow and formalist construction of the state action doctrine could prevent the protection of communications that so vigorously embody First Amendment values.

This Part will then explore how the public function exception to the state action doctrine can allow First Amendment scrutiny to be extended

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61. This Article will not take a stance on what level of scrutiny is appropriate for assessing the constitutionality of content-based restrictions on communications on social network websites, leaving this fascinating topic to be addressed by future articles. As established, social network websites may have several legitimate reasons for engaging in content-based discrimination. *See supra* Part I.B. Some might argue that this militates toward applying some form of intermediate scrutiny to content-based restrictions on communications on social network websites; others might argue that this merely means that when strict scrutiny is applied it will be relatively easy to establish that such restrictions serve a compelling interest. For an example of what such a discussion might look like, *see* Peter Swire, *Social Networks, Privacy, and Freedom of Association: Data Protection vs. Data Empowerment*, 90 N.C. L. REV. 1371 (2011–12) (detailing several different possible approaches to the level of scrutiny to be applied to the regulation of privacy on social network websites).

to the conduct of social network websites. This Part will then show how a consideration of the spaces that the Court has protected under the public forum doctrine further bolsters this conclusion. Then, this Part will demonstrate how the entwinement exception to the state action doctrine could also protect against certain instances of censorship by social network websites. Lastly, this Part will explain why courts may nevertheless be disinclined to hold social network websites to be state actors.

### A. *The Basic Case for First Amendment Protections*

Public communications by users of social network websites deserve First Amendment protection because they simultaneously invoke three of the interests protected by the First Amendment: freedom of speech, freedom of the press, and freedom of association.

#### 1. Freedom of Speech on Social Network Websites

With respect to freedom of speech, the Court has read the First Amendment's textual reference to "speech" quite broadly to cover a wide range of expressive activities; even such expressive nonverbal conduct as sleeping in a park,<sup>62</sup> wearing a black armband,<sup>63</sup> burning a military draft card,<sup>64</sup> burning an American flag,<sup>65</sup> and burning a large cross<sup>66</sup> may trigger some form of First Amendment scrutiny. Since communications on social network websites can mimic traditional modes of speech such as public speaking and pamphleteering even more closely than these already-protected expressive activities, they almost certainly merit protection under the First Amendment's Speech Clause.<sup>67</sup> Indeed, for similar reasons the Fourth Circuit recently held that clicking the "like" button on Facebook is protected speech.<sup>68</sup>

Further, the Supreme Court's reasoning in *Reno v. ACLU*<sup>69</sup> supports treating communications on social network websites as constitution-

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62. See *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984).

63. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

64. See *United States v. O'Brien*, 391 U.S. 367 (1968).

65. See *Texas v. Johnson*, 491 U.S. 397 (1989).

66. See *Virginia v. Black*, 538 U.S. 343 (2003).

67. Although few cases have yet addressed this issue, the Eastern District of Arkansas recently found that an individual's Facebook status updates were protected speech that touched on a matter of public concern. *Mattingly v. Milligan*, No. 4:11CV00215 JLH, 2011 WL 5184283, at \*4 (E.D. Ark., Nov. 1, 2011). The Eastern District of Virginia, however, concluded that "liking" a Facebook page was not constitutionally protected speech because it did not involve the making of "actual statements." *Bland v. Roberts*, 857 F. Supp. 2d 599, 604 (E.D. Va. 2012).

68. *Bland v. Roberts*, 730 F.3d 368, 385-86 (4th Cir. 2013).

69. 521 U.S. 844 (1997).

ally protected speech. In *Reno*, the Court stated that there is “no basis for qualifying the level of First Amendment scrutiny that should be applied to [the internet],” since “[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox,” and since “[t]hrough the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”<sup>70</sup> Although the Court’s references to these relics of an internet era long since passed might now strike us as rather quaint, the Court’s reasoning applies with equal force to communications on social network websites, which, like chat rooms, involve public statements; like mail exploders, can reach many individuals at the same time; and like newsgroups, involve messages broadcast primarily to those individuals who are connected to the speaker through the network on which it is published. Further, political communications on social network websites also appear to merit especially strong First Amendment protection, as political speech lies at the heart of the First Amendment’s protections,<sup>71</sup> and the Court has “decline[d] to draw . . . constitutional lines based on the particular media or technology used to disseminate political speech from a particular speaker.”<sup>72</sup> Therefore, so long as communications on social network websites do not fall within a category of speech that is traditionally unprotected by the First Amendment,<sup>73</sup> they merit protection under the Speech Clause.

## 2. Freedom of the Press on Social Network Websites

Public communications on social network websites are also similar to traditional publishing and deserve similar protection under the Press Clause of the First Amendment. Issuing a public communication on a social network website involves the dissemination of a written message to several different individuals simultaneously, much like the publication of

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70. *Id.* at 870. Despite the *Reno* Court’s articulation of a broad rationale for protecting internet speech, the Court took a contextual approach to internet speech that carefully considered the extent to which less restrictive alternatives were available as well as the scope of the statutory language at issue in the case. *See id.*; *see also* DANIEL A. FARBER, *THE FIRST AMENDMENT* 222 (3d ed. 2010).

71. *See* *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2816–17 (2011); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 339–40 (2010).

72. *Citizens United*, 558 U.S. at 326.

73. Some categories of unprotected speech are incitement to violence, libel, obscenity, fighting words, and commercial advertising. FARBER, *supra* note 70, at 13. Speech falling within these categories is only unprotected to some degree, of course—for each category, the Court has created rules detailing the boundaries of permissible government regulation. *Id.*

a free newspaper or newsletter. Public communications on social network websites also often serve the same social role as newspapers and other forms of traditional print media, namely keeping readers up-to-date on current events and politics. The Press Clause's limited protections for publishers<sup>74</sup> should therefore also extend to some degree to users of social network websites when they are issuing public communications.

### 3. Freedom of Association on Social Network Websites

A strong case can also be made that the First Amendment right to associate protects public communications on social network websites. Justice Brennan's majority opinion in *Roberts v. United States Jaycees*<sup>75</sup> distinguished two different features of the First Amendment right to associate: the "intrinsic" feature and the "instrumental" feature. The "intrinsic" feature of the right to associate establishes that "choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."<sup>76</sup>

The "personal affiliations that exemplify" this intrinsic feature of the right to associate are those "that attend the creation and sustenance of a family," which involve "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life."<sup>77</sup> Additionally, families are characterized by "relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."<sup>78</sup> Thus, "[d]etermining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments."<sup>79</sup> The Jaycees failed to

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74. For example, the Press Clause specifies that publishers may not be singled out for special burdens. FARBER, *supra* note 70, at 207. The enforcement against publishers of a general law that burdens speech is not subject to stricter First Amendment scrutiny than that which would be applied to the enforcement of the law against other persons or organizations. See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669–70 (1991).

75. 468 U.S. 609 (1984).

76. *Id.* at 617–18.

77. *Id.* at 619–20.

78. *Id.* at 620.

79. *Id.*

qualify because membership in their organization was, for the most part, unselective, and their national organization was largely impersonal.<sup>80</sup>

The “instrumental” feature of the right to associate, meanwhile, exists “for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion.”<sup>81</sup> In these cases, the Court has recognized a right to “associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”<sup>82</sup> This right was “plainly implicated” in the Jaycees’ case.<sup>83</sup>

Communications on social network websites can invoke both of these features of the right to associate. With respect to the intrinsic feature of the right to associate, it is clear that in some instances such communications represent the sharing (or, as any Facebook user can attest is often the case, over-sharing) of thoughts, experiences, beliefs, and the distinctively personal aspects of one’s life with a select group of other users with whom the individual is connected. When an individual chooses to invite another individual to be their friend on Facebook, the former is inviting the latter to associate with them through the sharing of public or semi-public messages, such as Facebook timeline posts, private messages, photos, music, or videos. Though such a relationship is surely more impersonal than the familial relations at the far end of Justice Brennan’s spectrum, it certainly involves a significantly greater degree of intimacy than membership in a large organization like the Jaycees. Some communications on social network websites therefore display the distinctive characteristics of those activities that are protected by the intrinsic feature of the right to associate.

Where communications on social network websites do not represent the sharing of private thoughts or musings with one’s intimate friends or less-than-intimate acquaintances, they might take the form of supporting the aims of a particular political or religious group, or of mobilizing or coordinating group action. For instance, a political group might try to rally or mobilize its supporters through its Facebook page, and it might communicate with them through private messages. Members of the group might also express support for the group on the group’s Facebook page, or they might try to advance the group’s cause by posting supportive statements on their timeline, such that the messages show up in other users’ news feeds. Such communications would differ from pure speech in that they involve coordinated action amongst numerous group members

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80. *Id.* at 620–21.

81. *Id.* at 618.

82. *Id.* at 622.

83. *Id.*

in support of a particular goal or set of goals. In this sense, these communications would invoke the instrumental feature of the right to associate, just as the Jaycees' message did.<sup>84</sup> Thus, some individuals' messages on social network websites may be protected by the intrinsic feature of the right to associate, whereas the instrumental feature of the right to associate may protect messages by groups, as well as speech in support of group activities.

Public communications on social networks can therefore be seen as simultaneously invoking three of the interests protected by the First Amendment: freedom of speech, freedom of the press, and freedom of association. Setting aside the threshold issue of state action, then, the case for extending First Amendment protections to such communications appears at first glance to be quite strong. Despite this, such communications will not be protected unless censorial acts by social network website operators can be conceived of as state action, an issue to which this article will now turn.

### *B. The State Action Doctrine*

The state action doctrine provides that only the acts of the government or those acting on its behalf are subject to constitutional scrutiny, which ordinarily leaves nongovernmental<sup>85</sup> conduct, like that of social network websites, beyond the purview of the Constitution's protections.<sup>86</sup>

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84. Operators of social network websites could try to argue that being forced to serve as a forum for viewpoints with which they disagree violates *their* right to associate, citing such cases as *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group*, 515 U.S. 557 (1995), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000). Communications on social network websites are easily distinguishable from those that take place in the context of a parade or those that are made by the leaders of an organization, in that few would mistake such communications for the message of the operator of the social network website itself; a reasonable reader would almost surely conclude that such communications represent the viewpoint of the speaker only. Users of social network websites appear much more intuitively analogous to "outsiders" than to those who come onto the site to "become [a] member[ ]" of its "expressive association," that is, who come onto the site in order to promote its messages and its overarching mission. *Cf. Rumsfeld v. Forum For Academic Institutional Rights, Inc.*, 547 U.S. 47 (2006) (holding that a military recruiter's presence on a law school campus does not violate the law school's right to associate).

85. This article takes the stance that the "private"/"public" distinction (which concerns the openness and accessibility of a given thing or space to the public at large) and the "governmental"/"nongovernmental" distinction (which concerns the ownership of a space or the identity of an actor) are separate and distinct concepts, though it bears mentioning that the imprecise use of these terms has caused much confusion regarding the state action doctrine.

86. ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 519–21 (4th ed. 2011).

The state action doctrine has a long constitutional pedigree, with its origins in Supreme Court decisions that followed on the heels of the passage of the Fourteenth Amendment, such as *United States v. Cruikshank*,<sup>87</sup> *Virginia v. Rives*,<sup>88</sup> and *The Civil Rights Cases*.<sup>89</sup> Although from the 1940s to the 1960s the Court expanded the applicability of the Constitution to nongovernmental conduct by adopting an expansive interpretation of the state action doctrine, in part to aid the process of racial desegregation, the Court has been narrowing the doctrine ever since through such cases as *Jackson v. Metropolitan Edison Co.*<sup>90</sup> Thus, while the state action doctrine has been roundly and justly criticized on a number of grounds,<sup>91</sup> it is now a constitutional “commonplace”<sup>92</sup> and “a central principle of constitutional law.”<sup>93</sup>

As social network websites are privately owned (as are nearly all online forums for speech<sup>94</sup>), the state action doctrine may render their

87. 92 U.S. 542, 554 (1875) (“The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another.”).

88. 100 U.S. 313, 318 (1879) (“The provisions of the Fourteenth Amendment. . . all have reference to State action exclusively, and not to any action of private individuals.”).

89. 109 U.S. 3, 13 (1883) (“[T]he prohibitions of the [Fourteenth Amendment] are against state laws and acts done under state authority.”).

90. 419 U.S. 345, 349 (1974) (stating that there is an “essential dichotomy . . . between deprivation by the State, subject to [constitutional] scrutiny under its provisions, and private conduct . . . against which the Fourteenth Amendment offers no shield”); see also CHEMERINSKY, *supra* note 86, at 530 (describing the development of the state action doctrine).

91. See, e.g., CHEMERINSKY, *supra* note 86, at 523–25 (arguing that the Fourteenth Amendment might be read as applying to government inaction in the face of private rights violations as forcefully as it does to government action itself, and that the state action doctrine “sacrifices individual freedom because it permits the violation of rights” and because “[s]peech can be lost or chilled just as much through private sanctions as through public ones”); 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, 1267 (2000) (“the state action doctrine rests on the often illusory hope that we can draw a clear and coherent line between what constitutes public as opposed to private behavior”); Note, *Developments in the Law—State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1310–11 (2010) (arguing that the Court’s focus on who owns the space in which speech takes place as opposed to the character and nature of that space has the perverse result of insulating spaces widely perceived to be “public” in nature from constitutional scrutiny).

92. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1543 (6th ed. 2009).

93. CHEMERINSKY, *supra* note 86, at 521.

94. See DAWN NUNZIATO, *VIRTUAL FREEDOM* 49 (2009) (noting the “near-complete shift in cyberspace from public to private ownership of forums and conduits for expression”); Berman, *supra* note 91, at 1305 (noting that on the internet “one uses

actions immune to First Amendment scrutiny, despite the fact that they are in many senses public spaces, and they have more power to censor public communications than many governmental actors.<sup>95</sup> Some might welcome this situation. After all, subjecting social network website owners' actions to constitutional scrutiny would necessarily restrict their property rights, interfering with their ability to protect the website from harm<sup>96</sup> as well as their expressive marketing activities.<sup>97</sup> One might also prefer leaving decisions about what communications are permissible on social network websites to the websites themselves, which generally have clear and publicly announced policies on this issue, rather than leaving such decisions to the ad hoc application of balancing tests by courts.<sup>98</sup>

These private property-based arguments are ultimately unconvincing in the case of social network websites. Subjecting social network websites to some degree of constitutional scrutiny is crucial given their importance to contemporary social and political life, their unique characteristics, and their incentives for engaging in censorship. For one, social network websites are not truly private property given their openness and the role they now play in our society. Further, the fact that network effects often cause there to be only one dominant social network website of a given type causes certain social network websites to have natural monopoly power, which may further justify restricting their private property rights (as natural monopolists like common telecommunications carriers are often subject to regulations relating to their public functions). Al-

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privately-owned browsers to access privately-owned online service providers, with messages traveling over privately-owned routers to privately-owned web sites").

95. Most scholars believe that the state action doctrine would serve to insulate internet speech regulators from constitutional scrutiny. *See, e.g.*, NUNZIATO, *supra* note 94, at 114; Andrew William Bagley, *Don't Be Evil: The Fourth Amendment in the Age of Google, National Security, and Digital Papers and Effects*, 21 ALB. L.J. SCI. & TECH. 153, 186 (2011) ("[I]n today's dynamic world new technologies are replacing traditional functions, such as mail delivery, with expansive communication platforms not contemplated by traditional notions of exclusive state functions."). One scholar has gone so far as to suggest this may be true of social network websites as well. *See* Swire, *supra* note 61.

96. *Cf.* NUNZIATO, *supra* note 94, at 102 (arguing that internet service providers should not be conceptualized as state actors because of their unique needs with respect to protecting their property from harm).

97. Lawrence Lessig, however, has suggested that even if the First Amendment is applied to virtual spaces, regulations of pornography and spam messages in those spaces are likely to be held constitutional given the long history of such regulation in physical spaces. *See* LESSIG, *supra* note 60, at 245–47.

98. *Cf.* Berman, *supra* note 91, at 1307 & n.171 (arguing that "applying the Constitution more broadly could result in a far greater number of legal disputes being resolved through the ad hoc application of a vague balancing calculus").

though social network websites must retain a great degree of control over their private property, this consideration merely argues in favor of applying a more deferential level of scrutiny to censorial acts by social network websites—not for exempting them from constitutional scrutiny altogether.

Courts can and should extend First Amendment scrutiny to the acts of social network websites by invoking one of the exceptions to the state action doctrine, under which acts by nongovernmental actors can be found to be equivalent to state action for constitutional purposes.<sup>99</sup> Although the Court has admitted that the “cases deciding when private action might be deemed that of the state have not been a model of consistency,”<sup>100</sup> these cases can be grouped into two exceptions to the state action doctrine: the “public function exception” and the “entwinement exception.”<sup>101</sup>

### 1. The Public Function Exception

Under the public function exception, “the exercise by a private entity of powers traditionally exclusively reserved to the State” constitutes state action.<sup>102</sup> The public function exception serves as a check against the abuse of power by private companies and corporations, which have in recent years assumed many of the powers and duties that have historically been the province of the state.<sup>103</sup>

Courts have thus far been hostile to claims that the acts of privately owned internet companies constitute state action under the public function exception. The Third Circuit and two federal district courts have rejected the claim that America Online (AOL) is a state actor<sup>104</sup> on the

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99. This argument assumes that the Bill of Rights is not merely a limit on government behavior, but also serves to affirmatively promote and effectuate our constitutional values. This article also assumes that social network websites can be held to be state actors when engaging in censorship, while at the same time exempting them from constitutional scrutiny outside of the First Amendment context. This is, of course, a major assumption to make, and exploring its defensibility is beyond the scope of this article.

100. *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991).

101. The entwinement exception is also sometimes referred to as the “nexus” exception.

102. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974) (citations omitted).

103. See Allison D. Garrett, *The Corporation as Sovereign*, 60 ME. L. REV. 129, 130–32, 141–63 (2008) (arguing that private companies now “act similarly to traditional nation–states in some ways. They have tremendous economic power, establish security forces, engage in diplomatic, adjudicatory and ‘legislative’ activities, and influence monetary policy.”).

104. *Green v. America Online*, 318 F.3d 465, 472 (3rd Cir. 2003); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 546 (E.D. Va. 2003) (citing *Green*, 318 F.3d at

grounds that AOL “exercises absolutely no powers which are in any way the prerogative, let alone the *exclusive* prerogative, of the State,” and AOL is “merely one of many private online companies which allow [their] members access to the Internet. . . .”<sup>105</sup> Federal district courts have also rejected the claim that Sony’s PlayStation 3 Network is a state actor on the grounds that it “serves solely as a forum for people to interact subject to specific contractual terms” and exists primarily for entertainment purposes.<sup>106</sup> They have also rejected the claim that a private domain name registrant is a state actor on the grounds that both “the Internet” and “registration of Internet domain names” are “by no stretch of the imagination” traditional and exclusive public functions.<sup>107</sup> However, social network websites differ considerably from the websites and networks that these courts have considered. Social network websites much more closely resemble the public spaces the Supreme Court has chosen to protect in both its public function exception and public forum doctrine jurisprudence, which this article will now consider in turn.

#### a. The Public Function Exception Generally

The public function exception originates from the seminal case of *Marsh v. Alabama*.<sup>108</sup> In *Marsh*, a Jehovah’s Witness came onto the premises of a company-owned town and distributed religious literature against the wishes of the town’s management, leading to a criminal conviction for trespass.<sup>109</sup> The Court reversed the conviction, holding that the private property rights of the company did not “justify the State’s permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties. . . .”<sup>110</sup>

The Court thus effectively treated the company-owned town like a state actor. It based this holding on three rationales. First, the company-owned town was essentially no different from any other municipality “except [for] the fact that the title to the property belong[ed] to a private corporation,”<sup>111</sup> which implies that the company town had the power to

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472); *see also* *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436, 437 (E.D. Pa. 1996).

105. *Cyber Promotions*, 948 F. Supp. at 441–42.

106. *Estavillo v. Sony Computer Entm’t Am.*, No. C-09-03007 RMW, 2009 WL 3072887, at \*1–2 (N.D. Cal. Sept. 22, 2009).

107. *See* *Island Online, Inc. v. Network Solutions, Inc.*, 119 F. Supp. 2d 289, 306 (E.D.N.Y. 2000).

108. *See generally* *Marsh v. Alabama*, 326 U.S. 501 (1946).

109. *See id.* at 503–504.

110. *Id.* at 509.

111. *Id.* at 503.

undermine freedom as effectively as the state.<sup>112</sup> Second, because the town and its shopping district were accessible to and freely used by the public in general, the town was undoubtedly serving a public function akin to that traditionally exercised by the state.<sup>113</sup> Third, holding the company-owned town constitutionally accountable would foster better democratic self-governance.<sup>114</sup> In combination, these three rationales suggest that the public function exception is rather expansive in scope.

Each of the *Marsh* Court's rationales for the public function exception applies to social network websites. First, with respect to the power to undermine freedom, social network websites enjoy more power to curb individual freedom than small company-owned towns in Alabama—if it wanted to, Facebook could severely curb the ability of over 800 million users to espouse particular political messages to their friends and acquaintances. Second, with respect to openness, most social network websites are open to almost anyone willing to abide by their terms of service.<sup>115</sup> Third, with respect to self-governance, in our country social network websites are important tools for political communication and mobilization, as well as for communication between the government and citizens.<sup>116</sup> In sum, social network websites may be privately owned, but they are sufficiently public, at least in the sense with which *Marsh* is concerned, in nature to be treated as state actors, and as they do some of the things that governments do, they should be limited in some of the ways in which governments are limited.

One could attempt to counter these arguments by pointing out that social network websites do not perform core government functions like operating public thoroughfares, parks, or police departments.<sup>117</sup> But just

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112. STONE ET AL., *supra* note 92, at 1597.

113. *See Marsh*, 326 U.S. at 503–506 (“The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”).

114. *See id.* at 508 (noting that “[m]any people in the United States live in company-owned towns,” that “[t]o act as good citizens they must be informed,” and that therefore “[i]n order to enable them to be properly informed their information must be uncensored”); *see also* NUNZIATO, *supra* note 94, at 52 (arguing that under *Marsh* “the dispositive inquiry is whether the speech regulations by the powerful regulator at issue interfere with the open channels of communication essential for individuals to participate meaningfully in democratic self-government.”).

115. Such terms of service are admittedly speech-restricting.

116. *See supra* text accompanying notes 14–24.

117. An argument could be made that some social network websites do provide such services, as they may maintain public infrastructure, provide for security, and enforce property rights. *Cf.* Jason S. Zack, *The Ultimate Company Town: Wading in the Digital Marsh of Second Life*, 10 U. PA. J. CONST. L. 225 (2007) (arguing for extending the *Marsh* Court's reasoning to Second Life, an online virtual world).

because the performance of such functions is sufficient to satisfy the public function exception does not mean that it is necessary to do so. In *Marsh*, it appears that it was not Gulf Shipbuilding's maintenance of the town's sewer system that so troubled the Court, but rather its control of who could speak on the town's sidewalks.<sup>118</sup> It would seem rather odd to focus a First Amendment analysis on municipal services that have nothing to do with speech, and one would hope that the outcome in a case involving a freedom of speech claim would not be "controlled by the absence of sewers in cyberspace."<sup>119</sup> Therefore, one can persuasively claim that under *Marsh*, the acts of social network websites to censor speech can be construed as state action under the public function exception.

Nevertheless, *Marsh's* scope has been significantly narrowed by subsequent cases. In *Jackson v. Metro. Edison Co.*<sup>120</sup> the Court held that the exception only encompasses public functions that are both "traditionally" and "exclusively" provided for by the State.<sup>121</sup> Thus, under *Jackson*, the actions of a private utility that enjoys a state-granted monopoly do not constitute state action, because although governments have historically run utilities, privately run utilities also commonly exist.<sup>122</sup> In addition, although the Court extended the public function exception to privately owned shopping centers in *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza*,<sup>123</sup> reasoning that shopping centers are open to the public and functionally the same as the commercial center of a municipality,<sup>124</sup> the Court quickly reversed course in *Lloyd Corp. Ltd. v. Tanner*<sup>125</sup> and then formally overruled *Logan Valley* in *Hudgens v. Nat'l Labor Relations Bd.*<sup>126</sup> While the rationale for *Marsh* remains persuasive, it appears

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118. See Shaffer Van Houweling, *supra* note 49 (arguing that in *Marsh* "it was Gulf Shipbuilding's control of sidewalks—not sewers—that made the *state's* trespass prosecution problematic").

119. *Id.*

120. 419 U.S. 345 (1974).

121. *See id.* at 352.

122. *See id.* at 357; *see also* Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (reaffirming the importance of exclusivity to the public function exception, and stating that the question is not just whether a party performs a public function but rather "whether the function performed has been 'traditionally the *exclusive* prerogative of the State.'" (citations omitted)).

123. 391 U.S. 308, 325 (1968) (holding that a privately owned shopping center could not exclude striking laborers from picketing a store within the shopping center).

124. *See id.* at 317–19.

125. 407 U.S. 551, 570 (1968) (holding that a privately owned shopping center could exclude anti-Vietnam War protesters from distributing literature on its premises). Some commentators believe the case is difficult to defend as a matter of constitutional doctrine. *See, e.g.,* CHEMERINSKY, *supra* note 86, at 534.

126. *See* *Hudgens v. NLRB*, 424 U.S. 507, 518–21 (1976).

unlikely that the Court would extend the public function exception to nongovernmental actors unless they perform core government functions such as operating “bridges, ferries, turnpikes and railroads,”<sup>127</sup> operating a public park,<sup>128</sup> or providing for “education, fire and police protection, and tax collection.”<sup>129</sup>

Even this more narrow conception of the public function exception can still permit social network websites to be viewed as state actors. Social network websites do serve an important public function: providing a space that has the *primary* purpose of serving as a forum for public communication and expression,<sup>130</sup> that is *designated* for that purpose, and that is *completely open* to the public at large.<sup>131</sup> In other words, social network websites are like public squares and meeting places—indeed, one might go so far as to say that social network websites are the town squares of the twenty-first century—and they are both designed and designated for this purpose, unlike the shopping malls in the *Logan Valley* line of cases, which are first and foremost dedicated to shopping and commercial activity, and whose ability to serve as a forum for speech is merely incidental to the design features required by a building that houses multiple retailers in a relatively small space and seeks to provide a pleasurable window-shopping experience. Since managing public squares and meeting places is something that has traditionally been done by the government, social network websites therefore serve a public function that has traditionally been the province of the state.

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

128. See *Evans v. Newton*, 382 U.S. 296, 301–302 (1966) (operating a previously public park that is “open to every white person” is a public function).

129. See *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 163–64 (1978) (implying that the privatization of these government functions would not allow state and local governments to escape “the strictures of the Fourteenth Amendment”).

130. Communications on social network websites are not necessarily fully public, as many social network websites offer users the ability to limit who is able to receive particular messages, as well as the ability to send private messages, and listeners can often choose from whom they wish to hear. However, real-world public spaces are often no different; no one would object to construing a town square as a “public place” just because an individual strolling through the square could choose to ignore a speech being given there, or because that individual was able to have a private conversation with a friend in the middle of the square.

131. See *Marsh*, 326 U.S. at 506 (“The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”). Social network websites have generally pursued a policy of openness, allowing all comers to be members unless they violate the site’s terms of service. Some sites restrict access to certain small groups of individuals—Facebook, for example, does not allow convicted sex offenders to access its website. FACEBOOK, *Statement*, *supra* note 43.

Social network websites are also able to accommodate millions upon millions more speakers and listeners at once than almost any public space that has ever existed in human memory.<sup>132</sup> In the past, only governments were able or willing to offer spaces that are even remotely comparable in size for use by the public at large. While large privately owned spaces like stadiums, airports, and shopping malls do exist, they have rarely been dedicated to public speech or open to virtually all comers. In this sense, social network websites provide a service that was previously “exclusively” provided by the State. Social network websites therefore serve a public function that has *both* traditionally *and* exclusively been the province of the State, and therefore can be held to be state actors even under a narrow view of the public function exception.

#### b. The Public Forum Doctrine

The case for treating social network websites as state actors under the public function exception is further strengthened by comparing them to the government-owned and government-controlled spaces that the Court has protected under the First Amendment public forum doctrine. In both form and function, social network websites strongly resemble the spaces the Court has identified as traditional public forums, such as public streets, sidewalks, and parks, serving essentially the same role of providing a space for free expression, discussion, and debate of important social and political issues. This strong resemblance between social network websites and traditional public forums thus further clarifies how social network websites serve a function that has both traditionally and exclusively<sup>133</sup> been the province of the state. At the same time, because promoting speech in public forums promotes First Amendment values, and because public forums and social network websites strongly resemble each other in both form and function, it follows that protecting communications on social network websites would promote First Amendment values as well, even if the public forum doctrine would not apply to social network websites *per se*.<sup>134</sup> The public function exception and the public

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132. Cf. *boyd*, *supra* note 7, at 54 (“While there are limits to how many people can be in one physical space at a time, networked publics support the gathering of much larger groups, synchronously and asynchronously.”).

133. Privately owned streets, sidewalks, and parks do exist, but common sense suggests that they are quite uncommon. The existence of these minor exceptions to the general rule of government ownership and control of such spaces would defeat a finding of exclusivity only through the operation of a narrow and unthinking technicality.

134. The public forum doctrine applies only to spaces owned or operated by the government. See NUNZIATO, *supra* note 94, at 72–73 (arguing that the public forum doctrine does not apply to the internet); Balkin, *supra* note 50, at 2081 (“[T]here is no ‘traditional public forum’ for virtual spaces.”). Government-managed Facebook

forum doctrine therefore dovetail neatly in making the case for extending federal constitutional scrutiny to the actions of social network websites.

Under the public forum doctrine, restrictions on speech in public spaces that have traditionally served as a venue for free expression and debate are subject to special constitutional scrutiny. The public forum doctrine owes its origin to two cases from the late 1930s, *Hague v. Committee for Industrial Organization*<sup>135</sup> and *Schneider v. Irvington*,<sup>136</sup> which established that the First Amendment protects speech in spaces that have traditionally served as forums for the purpose of public discussion and the dissemination of information, particularly streets and parks.<sup>137</sup> Courts and commentators have since established several convincing rationales for this doctrine. For one, protecting such spaces ensures that “even if all private property owners were permitted to discriminate against the speech of their choosing, there would remain some publicly owned places conducive to expressive purposes that the state must preserve as open spaces for public discussion and debate.”<sup>138</sup> Further, providing for access to public forums helps to subsidize the speech of poorly financed speakers<sup>139</sup> as well as undervalued speech,<sup>140</sup> and it also ensures that “in public places people may be confronted with speech they would rather avoid,” which promotes cultural understanding and empathy and prevents our political life from degenerating into factionalism and conflict.<sup>141</sup>

While *Hague* and *Schneider* established the basic form of the public forum doctrine, the contemporary doctrine largely derives from *Perry Education Ass’n v. Perry Local Educators’ Ass’n*,<sup>142</sup> in which the Court delineated three categories of spaces that receive differing levels of scrutiny under the public forum doctrine. The first category is the traditional public forum, which may arise “by long tradition or by government fiat,”

pages, however, might be conceived of as some form of public forum protected by the First Amendment. See Lyrisa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1976–77 (2011).

135. 307 U.S. 496 (1939).

136. 308 U.S. 147 (1939).

137. See *id.* at 163; *Hague*, 307 U.S. at 515–16 (Roberts, J., concurring).

138. NUNZIATO, *supra* note 94, at 42.

139. Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1147 (2005).

140. David J. Goldstone, *A Funny Thing Happened on the Way to the Cyber Forum: Public vs. Private in Cyberspace Speech*, 69 U. COLO. L. REV. 1, 9 (1998).

141. Noah D. Zatz, Note, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 169 (1998); see Steven G. Gey, *Reopening the Public Forum — From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1538–39 (1998).

142. 460 U.S. 37 (1983).

and in which the government may not engage in content regulation or close the forum without a compelling governmental interest.<sup>143</sup> The Court typically describes traditional public forums as resembling “outdoor areas that are not intimately connected with government facilities.”<sup>144</sup> Thus, traditional public forums include streets,<sup>145</sup> sidewalks,<sup>146</sup> and parks.<sup>147</sup> The second category is the limited public forum, which is property that has been opened as a forum for public communication by the government.<sup>148</sup> Limited public forums are treated like traditional public forums so long as they are open to the public, but differ from public forums in that the government may close off access to them entirely if it wishes to do so.<sup>149</sup> The third category is the nonpublic forum, which is property that is not by tradition or designation a forum for public communication. Access to nonpublic forums may be regulated by the government so long as the regulation is “reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”<sup>150</sup>

While the Court has generally been reluctant to designate spaces other than streets, sidewalks, and parks as public forums,<sup>151</sup> public forums need not be physical spaces—for example, the Court has held the array of student organizations funded by a public university to be a limited public

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143. *Id.* at 45. It should be noted, however, that the Court is willing to uphold time, place, and manner restrictions in traditional public forums. *See, e.g.,* *Frisby v. Shultz*, 487 U.S. 474, 481 (1988) (upholding an ordinance prohibiting residential picketing that focuses on and takes place outside of a particular residence).

144. *FARBER, supra* note 70, at 184.

145. *See, e.g.,* *Jamison v. Texas*, 318 U.S. 413, 417 (1943); *Schneider v. Irvington*, 308 U.S. 147, 163 (1939).

146. *See, e.g.,* *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 377 (1997) (asserting that sidewalks are a “prototypical” public forum); *Boos v. Barry*, 485 U.S. 312, 318 (1988) (observing that “public streets and sidewalks[ ] [are] traditional public fora”); *United States v. Grace*, 461 U.S. 171, 183 (1983) (holding that sidewalks outside courthouse were public forums). *But see* *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (holding by plurality that a sidewalk connecting a post office to a parking lot is not a traditional public forum).

147. *See, e.g.,* *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

148. *See* *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

149. *See id.* at 46.

150. *Id.* (citation omitted).

151. *See, e.g.,* *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 676 (1998) (televised presidential candidate debates); *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695 (1992) (airport terminal); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 805–806 (1985) (annual fundraising drive conducted in federal offices); *Members of the City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 814 (1984) (utility poles); *Heffron v. Int’l Soc’y for Krishna Consciousness*, 452 U.S. 640, 655 (1981) (state fairgrounds); *U.S. Postal Serv. v. Greenburgh Civic Ass’ns*, 453 U.S. 114, 133 (1981) (home mailbox).

forum.<sup>152</sup> The Court has recognized that speech in online spaces may strongly resemble certain forms of speech in spaces traditionally protected under the public forum doctrine, such as pamphleteering in a public place.<sup>153</sup> Some Justices, notably Justice Kennedy, have suggested that a more functional approach to designating spaces as public forums might be appropriate given recent technological developments and the decreasing relevance of streets, sidewalks, and parks for public expression.<sup>154</sup> Several scholars share Justice Kennedy's view, and some have been willing to go further than the Court in arguing for extending the public forum doctrine to all or some online spaces.<sup>155</sup>

Spaces on the internet can easily be analogized to physical spaces.<sup>156</sup> Indeed, if any spaces on the internet share a similarity in form or function to the public streets, sidewalks, and parks that have been designated traditional public forums, social network websites share the strongest resemblance to them. In terms of form, using Facebook can very much sim-

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152. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

153. See *Reno v. ACLU*, 521 U.S. 844, 870, 880 (1997) (citing public forum doctrine case law to compare the use of internet distribution mechanisms to pamphleteering). Additionally, during the oral argument for *Reno*, Justice Kennedy stated that the internet is “a pretty public place, though, because anyone with a computer can get on line . . . and convey information and images, so it is much like . . . a street corner or a park, in a sense.” See Transcript of Oral Argument at 17–18, *Reno v. ACLU*, 521 U.S. 844 (1997) (No. 96-511).

154. See, e.g., *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 802–803 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“Minds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media. The extent of public entitlement to participate in those means of communication may be changed as technologies change. . . .” (citation omitted)).

155. See, e.g., Gey, *supra* note 141, at 1618–19; David J. Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway*, 46 HASTINGS L.J. 335 (1995); Nunziato, *supra* note 139, at 1161–64. Goldstone, however, only proposes that government-owned or government-controlled internet spaces should be considered public forums. See Goldstone, *supra*, at 383. Admittedly, however, courts have thus far been skeptical of such arguments. For instance, two federal district courts have rejected the argument that Google's search engine is a public forum. *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 632 (D. Del. 2007); *Kinderstart.com, LLC v. Google, Inc.*, No. C 06-2057 JF (RS), 2007 WL 831806, at \*14–15 (N.D. Cal. Mar. 16, 2007).

156. See, e.g., Zatz, *supra* note 141, at 179–87 (comparing physical spaces to internet spaces); Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439, 494 (exploring the use of physical metaphors to describe cyberspace and contending that “courts and commentators have adopted the cyberspace as place metaphor”).

ulate the experience of strolling down a public street or through a public square in a small town.<sup>157</sup> In scrolling down your news feed, you come across both close friends and acquaintances, seeing what they are up to by observing them silently from afar, or perhaps even stopping to chat with them through a comment on a posting or through a private conversation. You might also come across a group of individuals, including some you do not know, discussing a social or political issue by commenting on some material that someone has posted. You could even come across a protest or a call to action, issued either by one of your friends or by one of the groups whose updates you subscribe to.

Facebook also serves many of the same functions as traditional public forums. Today's citizens are probably more likely to view an online social network website like Facebook as a "natural and proper place[ ] for the dissemination of information and opinion"<sup>158</sup> than they are a public street or park. Although our tradition of physically protesting in public spaces is still alive and well, Facebook and similar social network websites allow speakers to disseminate information at a very low cost and to a fairly broad audience (though perhaps to fewer strangers than one might come across in a traditional public forum). Further, audiences on such websites are often confronted with speech that they would otherwise avoid or not hear, contrary to the popular image of the online echo chamber.<sup>159</sup> Therefore, in both form and function, social network websites strongly resemble those spaces that have traditionally been open to public expression and debate by the government. This strong resemblance between social network websites and traditional public forums further solidifies the case for extending the public function exception to social network websites, while at the same time clarifying how protecting communications on social network websites would promote First Amendment values.

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157. See boyd, *supra* note 7, at 45 ("Through mundane comments[ ] [on social network websites], participants are acknowledging one another in a public setting, similar to the way in which they may greet each other if they were to bump into one another on the street.").

158. *Schneider v. Irvington*, 308 U.S. 147, 163 (1939); cf. NUNZIATO, *supra* note 94, at 85 (arguing that the Internet is "the functional equivalent of the public town square").

159. See Eytan Bakshy, *Rethinking Information Diversity in Networks*, FACEBOOK (Jan. 17, 2012, 11:00 AM), <http://www.facebook.com/notes/facebook-data-team/rethinking-information-diversity-in-networks/10150503499618859>.

## 2. The Entwinement Exception

The public function exception is, of course, but one of two exceptions to the state action doctrine. Under the entwinement exception, a nongovernmental actor may be deemed a state actor “because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.”<sup>160</sup> Thus, “private conduct must comply with the Constitution if the government has authorized, encouraged, or facilitated the unconstitutional conduct,”<sup>161</sup> for example by giving the nongovernmental party the authority to manage a publicly accessible property with the knowledge that the nongovernmental party will restrict access to the property in an unconstitutionally discriminatory manner.<sup>162</sup> In general, government licensing or regulation is insufficient for a finding of state action,<sup>163</sup> and the same is true for government financial support of a nongovernmental party,<sup>164</sup> unless the purpose of that financial support is to undermine the protection of constitutional rights.<sup>165</sup>

Some commentators have argued that in light of the federal government’s involvement in the creation of the internet and its goal in doing so of fostering communication and the free exchange of information, the federal government should be viewed as sufficiently entwined with the internet to justify treating some or all internet actors as state actors.<sup>166</sup> In

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160. *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982); *see also* *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (citation omitted) (“[S]tate action may be found . . . only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’”); *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 724 (1961).

161. CHEMERINSKY, *supra* note 86, at 529.

162. *See* *Evans v. Newton*, 382 U.S. 296, 301 (1966).

163. *See, e.g.*, *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999); *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974); *Columbia Broad. Sys. v. Democratic Nat’l Comm.*, 412 U.S. 94, 140 (1973); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177 (1972).

164. For example, in *Rendell-Baker v. Kohn*, 457 U.S. 830, 832, 841–42 (1982), the Court held that a private school that received over 90 percent of its funds from the state was not a state actor so long as its actions were not “compelled or even influenced by any state regulation.”

165. *See* *Gilmore v. City of Montgomery*, 417 U.S. 556, 569 (1974) (stating that government may not support private schools with racially discriminatory admissions policies); *Norwood v. Harrison*, 413 U.S. 455, 467–68 (1973) (stating that Mississippi may not aid private schools that practice racial discrimination).

166. *See* NUNZIATO, *supra* note 94, at 99; Jennifer Arnette-Mitchell, Note, *State Action Doctrine Reborn Again: Why the Constitution Should Act as a Checking Mechanism for ICANN’s Uniform Dispute Resolution Policy*, 27 *HAMLIN J. PUB. L. &*

its broadest form this argument proves too much, as it could be used to justify treating virtually any internet actor as a state actor, and in its narrow form it does not apply to social network websites, which the government did not have a hand in creating. Moreover, courts have consistently rejected such arguments.<sup>167</sup>

Courts have also thus far rejected claims that social network websites or their parent companies have relationships with the government that show sufficient entwinement to demonstrate state action. Federal courts have rejected the argument that Facebook is a state actor because of its contracts with government agencies, which allow the agencies to operate pages on Facebook,<sup>168</sup> as well as the argument that Google (which operates the social network websites Google+ and YouTube) is entwined with the State because Google is working on a collaborative digital libraries project with state universities.<sup>169</sup> Such claims are likely to continue to be unavailing given the rather minimal nature of the contacts between the State and social network websites: at the moment, state, federal, and local governments appear to use social network websites merely as a basic communication tool, and they do not have any special relationship with the sites.<sup>170</sup> Thus, at the moment, social network websites would almost certainly not be classified as state actors under the entwinement exception.

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POL'Y 307, 342–46 (2006) (arguing that the Internet Corporation for Assigned Names and Numbers (“ICANN”) should be viewed as a state actor since it is a delegatee of the federal government’s authority to regulate the internet and because its policies are in part the result of government encouragement); A. Michael Fromkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 113–25 (2000) (arguing that it is at least plausible that ICANN can be considered a state actor under existing Supreme Court precedents).

167. See *McNeil v. Verisign, Inc.*, 127 Fed. App'x 913, 914 (9th Cir. 2005) (ICANN is not a state actor, despite the fact that it was first established by agencies of the United States government to administer the internet domain name system); *Murawski v. Pataki*, 514 F. Supp. 2d 577, 588 (S.D.N.Y. 2007) (Yahoo! was not “transformed into a state actor because it benefited from early public funding of the development of the internet”); *Island Online, Inc. v. Network Solutions, Inc.*, 119 F. Supp. 2d 289, 307 (E.D.N.Y. 2000) (rejecting the argument that the government was entwined in the obscenity policy of a private domain name registrant).

168. See *Young v. Facebook, Inc.*, No. 5:10-cv-03579-JF/PVT, 2010 WL 4269304, at \*3 (N.D. Cal. Oct. 25, 2010).

169. *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631 (D. Del. 2007); *KinderStart.com v. Google, Inc.*, No. C 06-2057 JF (RS), 2007 U.S. Dist. LEXIS 22637, at \*42–44 (N.D. Cal. Mar. 16, 2007) (unpublished decision).

170. This claim applies only to the United States, as some foreign governments have been more active in involving themselves in the censorial conduct of social network websites, as is the case with several foreign governments and Twitter. See Sengupta, *supra* note 13.

Yet given that such claims are highly fact-specific, one could easily imagine scenarios in which litigants could be successful on a claim against a social network website based on the entwinement exception. For example, if Facebook began censoring messages related to WikiLeaks as part of a coordinated effort with federal agencies, such censorship might satisfy the entwinement exception, and be deemed state action. Similarly, a joint initiative between social network websites and the government to protect children from sexual predators could potentially invoke the entwinement exception, based on what form it took and the extent of the State's involvement. Thus, while it is currently unlikely that social network websites would be deemed state actors under the entwinement exception, courts can and should hold social network websites to be state actors under the entwinement exception in situations in which it applies.

### 3. Judicial Restraint and the Limits of Existing Doctrine

Despite the foregoing arguments, the claim that social network websites should be characterized as state actors remains vulnerable to attack on several grounds, which could further discourage courts that are already disinclined to stake out new territory on the frontiers of the First Amendment and the state action doctrine. For one, there is simply no getting around the fact that social network websites are run by private companies for profit, which argues for placing a somewhat heavier thumb on the property rights end of the scale in cases involving social network websites than in cases involving government-administered public spaces. Additionally, social network websites' ability to regulate spaces that resemble public squares may not really be all that problematic when we consider that debate and meaningful public speech in such spaces is a relatively rare occurrence, and such spaces are virtually nonexistent in many municipalities, particularly those in suburbs and exurbs.<sup>171</sup> Lastly, even though not being able to access a social network website could be particularly damaging to a speaker's ability to get their message out, numerous alternatives to such websites do exist, including other websites, mail, newspapers, magazines, television, and passing out leaflets, which could lead a court to be more comfortable with censorial acts by social network websites.<sup>172</sup>

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171. See Berman, *supra* note 91, at 1272.

172. To the *Cyber Promotions* court, the existence of such alternatives was dispositive with respect to the court's rejection of the applicability to AOL of the exclusivity argument. *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436, 443 (E.D. Pa. 1996). In *Reno v. ACLU*, 521 U.S. 844 (1997), the Supreme Court rejected the argument that certain types of speech could be proscribed on the internet because

A hesitant court thus has plenty of material to work with. One can imagine how such a court might consider these competing arguments in a hypothetical case involving Facebook. Suppose the following:

Facebook wants to enter a large market in which it does not currently compete. This new market is governed by a particularly repressive and autocratic regime notorious for violating human rights. Because of the regime's actions, criticism, discussion, and protest of the regime have become relatively common among American users on Facebook. For example, American Facebook users post status updates that share news stories and editorials criticizing the regime for its human rights record, which sparks commentary and debate amongst their friends; they belong to Facebook groups which espouse viewpoints critical of the regime; and they and the groups to which they belong use Facebook to promote public protests of the regime.

Facebook, in the hopes of appeasing the regime and convincing it that it will not undermine its authority, censors some of the content that is critical of the regime and promotes material that is favorable to it. Rather than simply ham-handedly deleting critical content or groups, Facebook instead engages in more subtle forms of censorship, such as modifying its graph search to hide Facebook groups and pages critical of the regime and removing them from user suggestions.

In response, a user administering a group affected by these changes sues Facebook, alleging a violation of her First Amendment rights, and claiming that Facebook's censorial actions can be viewed as state action under the public function exception.

There is no clear answer as to what the result in this hypothetical case would be. The plaintiff will argue that Facebook is serving as a substitute for or supplement to real-world forums like public forums, and therefore it is performing a function that is both traditionally and exclusively the province of the State. The plaintiff will also argue that subjecting Facebook to First Amendment restrictions is wholly reasonable, as it would merely forbid Facebook from engaging in viewpoint discrimination unless it can be justified by some countervailing and legitimate compelling interest.

Facebook will have several strong arguments with which to counter these claims. First, Facebook will point out that the plaintiffs are swimming against doctrinal currents, and that courts have overwhelmingly

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there were ample non-internet avenues of communication available for speakers. *Id.* at 879–80.

held privately owned internet companies not to be state actors. Then, Facebook will point out that not only does it not offer municipal services, but also it is a for-profit company that generates revenues from advertising and that faces competition for users' time and advertisers' dollars from other social network websites and other forms of entertainment. In this sense, Facebook will argue that no government has ever engaged in the activities that form the core of its business, and therefore it does not serve any function that has "traditionally," let alone "exclusively," been the province of the state. Further, Facebook will argue that applying First Amendment scrutiny to its actions unduly interferes with its private property rights and ability to manage its business, and could open up the floodgates to attacks by groups bent on destroying the valuable atmosphere and infrastructure of the site, such as distributors of pornography.

The plaintiffs will cry foul, arguing that Facebook is trying to have things both ways with respect to whether the site is a public space (as its advertising suggests) or a private one (its stance in the litigation), but Facebook will counter that it is a commonplace for privately owned businesses to open their premises to the public at large while still retaining ultimate control over access to their properties.

It is easy, given the existing case law, to imagine a court siding with Facebook, citing both judicial restraint and the availability of alternative paths to protection such as state constitutional law, federal and state legislation, and federal media access regulations. But with regard to the former, the foregoing arguments in this Part demonstrate that it is wholly defensible for courts to hold that social network websites are state actors, even within the bounds of existing doctrine. And with regard to the latter, a brief but careful examination should make clear that this argument carries little water.

### III. ALTERNATIVE PATHS TO PROTECTION

It may, of course, be possible to shield communications on social network websites from the censor's hand without requiring federal courts to creatively interpret federal constitutional law. The three primary means of achieving this are state constitutional law, state and federal legislation, and federal media access regulations. This Part addresses how each of these alternative approaches is less desirable and less viable as a long-term solution than securing court-recognized First Amendment protections for communications on social network websites.

### A. State Constitutional Law

State constitutional law might provide an alternative path to protection for communications on social network websites.<sup>173</sup> State courts can step into the breach left by the federal constitution's under-protection of constitutional rights,<sup>174</sup> and their doing so offers several advantages over federal solutions, including allowing for greater experimentation and being easier to reverse by democratic means.<sup>175</sup> Ultimately, though, this approach is a less-than-ideal alternative to the recognition by federal courts of First Amendment protections for communications on social network websites.

Several states' high courts have already recognized rights under their state constitutions that could be used to establish protections for speech on social network websites, despite the fact that social network websites are privately owned spaces. For example, in the wake of the Supreme Court's decisions in the *Logan Valley* line of cases, the Supreme Court of California concluded that the California Constitution protects speech and petitioning in privately owned shopping centers,<sup>176</sup> and the federal Supreme Court affirmed this decision and found that states could recognize a right of access to shopping centers under their own state constitutions.<sup>177</sup> Then, in the 2001 case of *Golden Gateway Center v. Golden Gateway Tenants Ass'n*,<sup>178</sup> a plurality of the California Supreme Court suggested that private property in California may be subject to the speech provisions of the California Constitution if it is the "functional equivalent of a traditional public forum."<sup>179</sup> The Supreme Court of California has also in recent years taken a more expansive view of the state action doctrine under the federal constitution than federal courts have been willing

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173. See, e.g., Goldstone, *supra* note 140, at 23 ("An alternative strategy for parties seeking access in private forums is to establish a right of access based on state law."); Nunziato, *supra* note 139, at 1164–67 (arguing that state courts should interpret the free speech provisions of their state constitutions to extend to internet forums).

174. See Jeffrey S. Sutton, *What Does—And Does Not—Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 709 (2011) ("At issue is whether *state action* violates the Federal Constitution. If the state constitution prohibits the law or conduct at issue, however, there is no work for the Federal Constitution to do."); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 503 (1977).

175. See Jeffrey S. Sutton, *Speech, Why Teach—And Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 173–78 (2009).

176. *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 347 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980).

177. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

178. 29 P.3d 797 (Cal. 2001).

179. *Id.* at 810.

to do.<sup>180</sup> As Facebook and several other popular social network websites are based in California, California state constitutional law could thus prove a potent weapon in the battle over censorship on social network websites.

Outside of California, in *New Jersey Coalition Against War in the Middle East v. J.M.B. Realty*,<sup>181</sup> the New Jersey Supreme Court stated that “the New Jersey Constitution’s right of free speech is broader than the right against governmental abridgement of speech found in the First Amendment,” and held that under the New Jersey Constitution private shopping malls must allow leafleting and related nondisruptive exercises of free speech rights on their property.<sup>182</sup> Colorado will sometimes enforce the freedom of expression protections of its constitution against nongovernmental entities.<sup>183</sup> Less expansively, Massachusetts and Washington have recognized a limited expressive right in private malls to collect signatures for electoral petitions, though they have based these rulings on rights relating to free elections, rather than on speech rights alone.<sup>184</sup>

However, at least seventeen state high courts have held that the state action requirement of their constitution is identical to that formulated by the Supreme Court,<sup>185</sup> and “[f]ew states have followed California in accepting the Supreme Court’s invitation to adopt state free speech protections more expansive than those guaranteed by the First Amendment.”<sup>186</sup> Further, pursuing state constitutional law as a means for protecting communications on social network websites has several major drawbacks. First is the problem of incomplete coverage—as is already evident from the existing case law, the possibility of obtaining protections for social network websites under all, or even most, states’ constitutions is slim to none, especially when one considers the steep costs of state-by-

180. See *Intel Corp. v. Hamidi*, 71 P.3d 296, 311 (Cal. 2003) (“[T]he use of government power, whether in enforcement of a statute or ordinance or by an award of damages or an injunction in a private lawsuit, is state action that must comply with First Amendment limits.”).

181. 650 A.2d 757 (N.J. 1994).

182. *Id.* at 770.

183. See *Curious Theatre Co. v. Colo. Dep’t of Pub. Health & Env’t*, 220 P.3d 544, 551–52 (Colo. 2009).

184. Note, *Developments in the Law*, *supra* note 91, at 1307 (citing *Batchelder v. Allied Stores Int’l, Inc.*, 445 N.E.2d 590, 595 (Mass. 1983); *Alderwood Assocs. v. Wash. Env’tl. Council*, 635 P.2d 108, 116–17 (Wash. 1981) (plurality opinion)).

185. Note, *Developments in the Law*, *supra* note 91, at 1306.

186. *Id.* at 1306.

state litigation.<sup>187</sup> This problem is compounded by the realities of geography. Social network websites may have headquarters and offices in certain physical locations, but their users are literally everywhere. Subjecting social network websites to a fifty-state regulatory regime is a recipe for confusion, especially when one considers that state constitutional law often results in less-than-coherent doctrine.<sup>188</sup> Additionally, given the possibility for divergent approaches amongst the states, complicated choice-of-law and jurisdictional questions appear to be inevitable,<sup>189</sup> further casting doubt on the viability of an approach based on state-by-state litigation.

State constitutional law therefore does provide a possible alternative to the recognition of First Amendment protections for communications on social network websites by federal courts, but given its major drawbacks it is a less desirable approach than securing federal constitutional protections.

### B. State and Federal Legislation

Legislation at the state and federal levels could also provide an alternative path to protection for communications on social network websites. At the federal level, as most social network websites are for-profit businesses that serve customers across state lines, it seems that Congress would have adequate Commerce Clause power to regulate at least some of the activities of social network websites.<sup>190</sup> At the state level, the legislature of California has already passed a statute aimed at deterring “strategic lawsuits against public participation,” commonly known as “SLAPPs,” granting individuals the right to speak and petition freely in “public forums,” regardless of whether they are publicly or privately owned.<sup>191</sup>

Such legislation could have several potential benefits over other means of regulating social network websites, such as allowing for more

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187. See Erwin Chemerinsky, Essay, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1699–1700 (2010) (arguing that relying on state constitutions to protect rights “never will provide more than partial success” and noting that state-by-state litigation is expensive).

188. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992) (“[S]tate constitutional law today is a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements.”).

189. See Goldstone, *supra* note 140, at 25–26.

190. See Zatz, *supra* note 141, at 227 (arguing that Congress has power under the Commerce Clause to regulate activity on the internet).

191. See CAL. CIV. PROC. CODE § 425.16 (West 2004).

dynamic custom-tailoring as the legislation is amended over time, and facilitating enforcement by providing for sanctions or inducements.<sup>192</sup>

However, the legislative approach suffers from an Achilles heel: legislation is undoubtedly a form of state action, which means it would be subject to First Amendment scrutiny by courts. The viability of this approach to protecting communications on social network websites will therefore depend on the level of scrutiny applied by courts (a topic beyond the scope of this article), as well as how solicitous courts are willing to be of the government's case for the interests served by the legislation, which the social network websites would argue interferes with *their* First Amendment rights. In addition, defining statutory terms that adequately describe new and emerging technologies is notoriously difficult, which raises the prospect of such legislation being struck down as unconstitutionally vague or overbroad if it is not worded carefully.<sup>193</sup> While state or federal legislation is thus an attractive alternative to a court-oriented approach to securing protection of communications on social network websites, it is an endeavor mired in uncertainty and risk, and therefore less viable and desirable than securing federal constitutional protections.

### C. Federal Media Access Regulations

Regulations issued by the Federal Communications Commission (FCC) could potentially provide a third alternative path to protection for communications on social network websites. For example, the FCC could issue a rule that prevents social network websites from restricting access based on a user's views on political or social issues. This approach is an inferior alternative to court-recognized First Amendment protections for communications on social network websites for several reasons. As a preliminary matter, the FCC probably lacks the statutory authority to issue such rules. Even if the FCC had the authority, such regulations would likely be held unconstitutional given the Supreme Court's recent approach to media access regulations. Moreover, as a matter of general policy there are several reasons to believe that media access regulations for social network websites are ill advised.

First, the FCC probably lacks the authority to issue rules regarding access to or discrimination by social network websites. Under the Com-

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192. See Curtis J. Berger, *Pruneyard Revisited: Political Activity on Private Lands*, 66 N.Y.U. L. REV. 633, 672-73 (1991).

193. For example, a federal court recently struck down a Louisiana statute that banned sex offenders from using social network websites because the statutory definition of "social networking" was overbroad, potentially extending to cover "many commonly read news and information websites." *Doe v. Jindal*, 853 F. Supp. 2d 596, 604 (M.D. La. 2012).

munications Act of 1934 (as amended by the Telecommunications Act of 1996), the FCC lacks explicit authority to regulate the internet,<sup>194</sup> but it can regulate access to internet content under its “ancillary authority” under Title I of the Act,<sup>195</sup> which authorizes the FCC to make regulations as necessary to effectuate its specifically delegated functions (which can be broadly and loosely defined as regulating the transmission of telecommunications).<sup>196</sup> However, in *Comcast Corp. v. FCC*,<sup>197</sup> the D.C. Circuit held that the FCC failed to argue with specificity its statutory basis to regulate broadband internet data management practices,<sup>198</sup> stating that even if some kinds of obligations on cable internet providers are within the FCC’s Title I ancillary authority, the fairly basic ones at issue in the case were not.<sup>199</sup> *Comcast* thus casts serious doubt on the FCC’s authority to regulate access to the internet pursuant to its Title I ancillary jurisdiction,<sup>200</sup> and if the FCC cannot regulate network management by internet service providers (ISPs) or access to the internet as a whole under Title I, it is hard to imagine the FCC has the authority under Title I to regulate access to or discrimination by social network websites.<sup>201</sup> In addition, even if the FCC did have the authority to regulate the transmission of internet data under its Title II common carrier authority,<sup>202</sup> that authority would

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194. See *Comcast Corp. v. FCC*, 600 F.3d 642, 645 (D.C. Cir. 2010). The Communications Act defines two categories of entities relevant to the FCC’s authority to regulate internet entities: telecommunications carriers and information-service providers. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005). Telecommunications carriers are subject to mandatory common carrier regulations under Title II, whereas information-service providers are not. See *id.* at 975–76. Computing and the internet have traditionally been interpreted as falling in the information-service-providers category. Philip F. Weiss, Note, *Protecting a Right to Access Internet Content*, 77 *BROOK. L. REV.* 383, 391 (2011). For example, the Supreme Court has upheld an FCC determination that cable internet service providers (ISPs) are information-service providers. See *Brand X Internet Servs.*, 545 U.S. at 988–89. The FCC has, however, recently asserted that the “transmission component” of internet service is a “telecommunications service” that can be regulated pursuant to Title II of the Communications Act, but whether this interpretation is valid is a matter of open debate. See *infra* note 202.

195. See *Brand X Internet Servs.*, 545 U.S. at 975–76.

196. See 47 U.S.C. § 154(i) (2006).

197. 600 F.3d 642 (D.C. Cir. 2010).

198. *Id.* at 661.

199. *Id.* at 650.

200. See Weiss, *supra* note 194, at 401–402.

201. Of course, this assumes that social network websites fall under the statutory definition of an information-services provider, see 47 U.S.C. § 153 (2012), which is also debatable.

202. The FCC responded to *Comcast* with its “Third Way” proposal, which asserts that broadband internet service can be separated into two categories for regulatory

almost certainly not permit the FCC to regulate social network websites, as such websites are not involved in the transmission of internet data—they are among the data that is transmitted. Thus, the FCC probably does not have the authority to issue rules regarding access to or discrimination by social network websites.

Yet even supposing the FCC has authority to regulate access to social network websites, it is highly likely that such regulations would be found unconstitutional under the Supreme Court's recent approach to media access regulations. From the late 1960s through the mid-1990s, the Court upheld several regulations that aimed to provide speakers with greater access to broadcast media due to a fear that "much of the nation's communication system [would] reflect only the views of a small privileged minority."<sup>203</sup> In *Red Lion Broadcasting Co. v. FCC*,<sup>204</sup> the Court upheld an FCC regulation known as the "fairness doctrine," which mandated that broadcasters give fair coverage of opposing viewpoints on issues of public importance.<sup>205</sup> The Court justified this holding by noting the scarcity of opportunities for speech in the broadcast media (with the scarcity itself traceable to the government's issuing of broadcast licenses to only a small group of broadcasting companies), expressing a fear of "monopolization" of the "marketplace of ideas" through the operation of "unlimited private censorship . . . in a medium not open to all."<sup>206</sup> The Court noted that without the fairness doctrine, "station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed."<sup>207</sup> Because leaving a broadcasting licensee unregulated would give them broad speech-restricting powers, the FCC could require them to "share

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purposes: a "transmission" component that the FCC can regulate pursuant to Title II's common carriage requirements, and an "information" component that the FCC can regulate subject to its Title I ancillary authority. See Austin Schlick, *A Third-Way Legal Framework for Addressing the Comcast Dilemma*, BROADBAND.GOV (May 6, 2010) <http://www.broadband.gov/third-way-legal-framework-for-addressing-the-comcast-dilemma.html>. The FCC's assertion that it can regulate access to the internet under Title II has since been challenged by regulated parties, the House of Representatives, and legal scholars, and remains a source of ongoing controversy. See generally Weiss, *supra* note 194, at 401–402 & nn.116–21.

203. FARBER, *supra* note 70, at 214.

204. 395 U.S. 367 (1969).

205. *Id.* at 375. The FCC later repealed the fairness doctrine, noting the increase in the availability of information services since *Red Lion*. See FCC, *Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, 102 F.C.C.2d 145 (1985).

206. *Red Lion Broad. Co.*, 395 U.S. at 390, 392.

207. *Id.* at 392.

[their] frequency with others and to conduct [themselves] as a proxy or fiduciary with obligations to present those views and voices which are representative of [their] community and which would otherwise, by necessity, be barred from the airwaves.”<sup>208</sup>

Following *Red Lion*, the Court upheld regulations of television broadcasting in several other cases. In *CBS, Inc. v. FCC*,<sup>209</sup> the Court upheld a federal statute requiring broadcasters to “allow reasonable access to or to permit purchase of reasonable amounts of time” by candidates for federal office.<sup>210</sup> Most notably, in *Turner Broadcasting System, Inc. v. FCC*,<sup>211</sup> the Court upheld a federal statute commonly known as the “must-carry rule,” which required cable systems to transmit local commercial and public broadcasting stations.<sup>212</sup> Though the Court’s holding was based primarily on the rationale that the must-carry rule served the legitimate purpose of preventing the destruction of the television broadcasting industry,<sup>213</sup> the Court also noted that a subsidiary goal of the rule was to prevent the loss to public discourse that would be caused by decisions of cable programmers to deny access to local and educational programming.<sup>214</sup> These cases suggest that regulations aimed at preventing a small group of entities from monopolizing access to an important medium for speech are constitutional.

As social network websites are now one such important medium for speech, *Red Lion*, *CBS*, and *Turner* could therefore theoretically furnish a constitutional justification for federal regulations that mandate access to social network websites. This argument is likely to be unavailing for several reasons. First, the Court has suggested that the scarcity rationale it embraced in the earlier broadcasting cases is no longer applicable in a world of cable television and the internet. Regarding the internet, in *Reno v. ACLU*,<sup>215</sup> the Court rejected the argument that the internet itself was a “‘scarce’ expressive commodity” because the various means of communicating on the internet, including chat rooms, webpages, newsgroups, and “mail exploders,” give individuals a multitude of internet-

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208. *Id.* at 389.

209. 453 U.S. 367 (1981).

210. *Id.* at 387, 396–97.

211. 512 U.S. 622 (1994).

212. *Id.* at 643–44. The Court remanded the case to the district court, which found the must-carry rule unconstitutional, a result that was later affirmed by the Court on appeal. *See Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 185 (1997).

213. *Turner*, 453 U.S. at 672–73.

214. *See id.* at 648–49. The dissenters disagreed on this point, finding the rationale for the statute content-based. *See id.* at 677–78 (O’Connor, J., concurring in part and dissenting in part).

215. 521 U.S. 844 (1997).

based means through which to communicate.<sup>216</sup> The Court thus found the internet greatly different from broadcasting, and accordingly refused to extend *Red Lion* and its progeny to the internet.<sup>217</sup>

Even if it is true that opportunities to speak on the internet are virtually limitless, social network websites are especially important and distinguishable from other websites in that they serve a unique social and political function. In addition, because of network effects, at any given time there will be only a small handful of dominant social network websites, making them a scarce resource. Given their importance, limited number, and capacity for restricting especially valuable speech, social network websites are thus much more analogous to the dominant flagship television broadcasters of yore than they are to the average website, chat room, or email service. But the fact remains that *Red Lion* is still dead<sup>218</sup>—and with it probably any hope that the Court will backtrack from *Reno*.

Second, a court disinclined to find regulations relating to access to social network websites constitutional could also draw from the Court's treatment of access mandates for newspapers<sup>219</sup> and its recent treatment of federal regulations of cable programming. With respect to newspapers, in *Miami Herald Publishing Co. v. Tornillo*,<sup>220</sup> the Court held that laws mandating access to space in newspapers are unconstitutional given newspapers' need to exercise editorial judgment and control,<sup>221</sup> completely ignoring the fact that in most cities, opportunities for speech in newspapers are even scarcer than those on television stations.<sup>222</sup>

With respect to cable programming, in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,<sup>223</sup> the Court upheld some federal regulations of indecent cable programming,<sup>224</sup> refusing to apply the categorical standards the Court had developed in prior First Amendment cases because such approaches all “suffer from the same flaws . . .

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216. *Id.* at 870.

217. *See id.* at 868–70.

218. *See generally* Thomas W. Hazlett, Sarah Oh & Drew Clark, *The Overly Active Corpse of Red Lion*, 9 NW. J. TECH. & INTELL. PROP. 51 (2010).

219. An analogy between social network websites and newspapers is apt, given the arguments in Part II.A regarding freedom of the press and given that social network websites, like newspapers, bring together content, distribution, and advertising into a single business model. *See supra* Part II.A; *see also* HAZLETT ET AL., *supra* note 218, at 94 n.274.

220. 418 U.S. 241 (1974).

221. *See id.* at 256–58.

222. *See* FARBER, *supra* note 70, at 216.

223. 518 U.S. 727 (1996).

224. *Id.* at 743–47.

[in that] [t]hey import law developed in very different contexts into a new and changing environment, and they lack the flexibility necessary to allow government to respond to very serious practical problems without sacrificing the free exchange of ideas the First Amendment is designed to protect.”<sup>225</sup> In a concurrence, Justice Souter expressed concern over the Court’s making a strong pronouncement on First Amendment principles while communications technology is in a state of flux.<sup>226</sup>

The Court thus signaled its hesitance to interfere with industries experiencing rapid change, and strongly implied that the scarcity rationale underpinning the *Red Lion* line of cases no longer has much bite, except to the extent that the Court will now weigh the public’s access rights against the interests of private telecommunications companies.<sup>227</sup> The Court reinforced these messages in *United States v. Playboy Entertainment Group*,<sup>228</sup> where the Court invalidated a regulation requiring cable operators to scramble pornographic channels or to limit programming on those channels to certain hours,<sup>229</sup> emphasizing that cable “expands the capacity to choose” and expressing the worry that government regulation would endanger the potential of the ongoing technological “revolution.”<sup>230</sup>

Taken together, these cases suggest that it is unlikely that the Court would hold regulations mandating access to social network websites constitutional, as these cases appear to appear to undermine any claim that the scarcity of speaking opportunities within an important medium for communication is constitutionally dispositive, and they suggest that the Court is very hesitant to tread on private property rights in industries characterized by rapid innovation and development, as the social network website industry surely is. Such hesitance is certainly justifiable, as access regulations would run a very real risk of stifling innovation on social net-

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225. *Id.* at 740.

226. *See id.* at 776–77 (Souter, J., concurring).

227. *See* Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer’s New Balancing Approach*, 31 U. MICH. J.L. REF. 817, 868 (1998) (arguing that Justice Breyer’s opinion in *Denver Area* adopts an approach where “[a]ccess rights must be weighed against the free speech rights of the cable operator”). *But see* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 384 (1999) (arguing that *Denver Area* “was a case about access rights” and that a majority of justices in the case “treated decisions by cable operators not to carry programming as ‘censorial,’ and acknowledged that the availability of access to such a medium was a question of constitutional moment”).

228. 529 U.S. 803 (2000).

229. *Id.* at 818, 826–27.

230. *Id.* at 818.

work websites,<sup>231</sup> and would likely make it more difficult for social network websites to organize, sort, and filter content, which is one of the primary ways in which they add value to users' internet experiences<sup>232</sup> (even if their power to do so at the same time creates the potential for abuse).<sup>233</sup> As both a matter of constitutional doctrine and general policy, then, the case for such access regulations stands on shaky ground. Pursuing federal media access regulations as an alternative to court-recognized First Amendment protections for communications on social network websites is therefore ill-advised.

## CONCLUSION

Social network websites present us with a strange juxtaposition: on the one hand, social network websites are incomparably open and tolerant venues for expression of all kinds, and on the other hand, they are essentially Constitution-free zones where the threat of censorship, both overt and subtle, looms large. Even if other actors such as state courts, state legislatures, or Congress are willing to step in to protect users of social network websites, the censorship anticipated by this article may nonetheless jeopardize the future of online speech. As speech in our streets, on our sidewalks, and within our parks increasingly becomes eclipsed in importance by that on social network websites, one cannot help but be troubled by the lack of constitutional protections that communications on social network websites may face as a consequence of the state action doctrine. But if courts are willing to take a fresh perspective on the public function exception to the state action doctrine in light of the strong arguments for extending First Amendment protections to commu-

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231. See John Blevins, *The New Scarcity: A First Amendment Framework for Regulating Access to Digital Media Platforms*, 79 TENN. L. REV. 353, 357, 416 (2012) (arguing that subjecting regulations of social network websites to higher First Amendment scrutiny will protect innovation from "unnecessary and harmful regulatory intervention").

232. See Balkin, *Digital Speech*, *supra* note 49, at 7 (arguing that the digital revolution "brings to the forefront the importance of organizing, sorting, filtering, and limiting access to information, as well as the cultural power of those who organize, sort, filter, and limit access"); Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 701–02, 757 (2010) (arguing that the internet cannot be experienced except through intermediaries and that the Court's jurisprudence recognizes "that the exercise of editorial discretion by intermediaries facilitating electronic communication serves important free speech values").

233. Extending First Amendment scrutiny to social network websites could admittedly also lead to both of these negative effects, but would likely be less intrusive and less likely to ossify over time than administrative rules.

nications on social network websites, perhaps the fears expressed in this article can be converted into brighter hopes for the future of online speech.