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Social Media and Censorship: Rethinking State Action Once Again

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**SOCIAL MEDIA AND CENSORSHIP: RETHINKING STATE
ACTION ONCE AGAIN**

*Michael Patty**

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I. INTRODUCTION

John Stuart Mill offers arguably the most insightful and important defense of free speech. He contends that freedom of speech will contribute to “the permanent interest of man as a progressive being.”¹ Freedom of speech is often justified based on the idea that an undisturbed marketplace of ideas is an essential ingredient to a healthy democracy.² Indeed, the Supreme Court has declared this the primary purpose of the First Amendment: “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”³ This is a strong defense, but it does not go far enough. Mill does us a great service when he reminds us that we are fallible beings.⁴ He reasons that although we may be confident a view is incorrect, it alone is no basis to silence that view.⁵ He reasoned that any silenced opinion could be true, and to deny this is to assume one’s infallibility.⁶ In addition, Mill provides that although a silenced opinion could be incorrect, it “may, and very commonly does, contain a portion of the truth”⁷

Much ink has been spilled over the importance of freedom of speech, but Mill’s positions are particularly insightful additions. And there are many more reasons to defend freedom of speech—one of

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1. Michael Lacey, *Mill on Freedom of Thought and Expression*, ROUTLEDGE: TAYLOR & FRANCIS GROUP 1, 1 <http://documents.routledge-interactive.s3.amazonaws.com/9781138793934/A2/Mill/MillTruth.pdf> [<https://perma.cc/2LUD-4WW4>].
 2. Brian Miller, *There's No Need to Compel Speech. The Marketplace of Ideas Is Working*, FORBES (Dec. 4, 2017), <https://www.forbes.com/sites/brianmiller/2017/12/04/theres-no-need-to-compel-speech-the-marketplace-of-ideas-is-working/#674806914e68> [<https://perma.cc/VXP4-ZXEY>]. For a highly critical discussion of the analogy of the marketplace of ideas, see Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951 (1997).
 3. Jacquelyn E. Fradette, *Online Terms of Service: A Shield for First Amendment Scrutiny of Government Action*, 89 NOTRE DAME L. REV. 947, 948 (2013) (quoting *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969)).
 4. Lacey, *supra* note 1, at 1.
 5. *Id.*
 6. *Id.* (quoting Mill: “the peculiar evil of silencing the expression of an opinion is that it is robbing the human race . . . If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error”).
 7. *Id.* at 2.

which is that viewpoint diversity helps us get a clearer view of the truth.⁸ Regardless of the many reasons why free speech should be protected, important changes to the way we exchange ideas, driven by the invention and proliferation of social media, are challenging the law's ability to safeguard free speech and the marketplace of ideas.

The way in which we exercise the right to free speech and engage with others in the marketplace of ideas has fundamentally changed.⁹ Freely expressing one's views on important social and political matters evokes the traditional image of "a person standing on a soap box in the town square speaking her mind into a megaphone with Congress restrained by the text of the First Amendment and unable to interfere."¹⁰ Now, with an internet connection and a social media account, "any person . . . can become a town crier with a voice that resonates farther than it could from any soapbox."¹¹ Some have compared the significance of this transformation to the magnificent changes that came with the introduction of the printing press in Europe.¹²

The First Amendment is based on the premise that the government is the primary threat to free speech and, absent government censorship, the marketplace of ideas exists in a healthy and undisturbed state.¹³ But that premise may no longer be reliable in light of the increasing popularity of private social media companies.¹⁴ Today, people increasingly use social media platforms like Facebook,

8. See Nathan Honeycutt, *Political Intolerance Among University Faculty Highlights Need for Viewpoint Diversity*,

FORBES (Nov. 21, 2016 12:48 PM), <https://www.forbes.com/sites/realspin/2016/11/21/political-intolerance-among-university-faculty-highlights-need-for-viewpoint-diversity/#771f348514b5> [https://perma.cc/96NR-URD3].

9. See generally Aaron Smith & Monica Anderson, *Social Media Use in 2018*, PEW RESEARCH CTR.: INTERNET & TECHN. (Mar. 1, 2018), <http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/> [https://perma.cc/92JU-XEXP].

10. Fradette, *supra* note 3, at 948.

11. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

12. Jordan Peterson, *YouTube is the Modern Day Gutenberg Press*, YOUTUBE (Dec 7, 2017), <https://www.youtube.com/watch?v=1nALQe3L9Os> [https://perma.cc/4CMF-ZALC].

13. Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. COLUM. U. (Sept. 2017), <https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete> [https://perma.cc/4S9R-XWQ7].

14. See *id.*

YouTube, and Twitter to discuss social and political matters.¹⁵ Nearly two-thirds of American adults (65%) use these sites, an increase of fifty-eight percent since 2005.¹⁶ Ninety percent of young adults age eighteen to twenty-nine use social media, and this is up from twelve percent in 2005.¹⁷ The clear trend is that speech is increasingly taking place on private social media platforms that have wide latitude to censor content under the contractual relationship they establish with their users.¹⁸

The movement of speech onto private platforms is concerning; some scholars wonder if this trend is making the First Amendment obsolete.¹⁹ The reason why is because the First Amendment only protects against speech restrictions imposed by state actors; infringements on one's speech by private actors are generally not protected by the constitution.²⁰ Because social media companies are private actors, any censorship suits against those companies would not survive the threshold requirement of state action.²¹ Thus, any dispute would be resolved by contract which could either limit (or extend) additional First Amendment protections to users.²²

This article will attempt to meaningfully advance the scholarship addressing the relationship between social media companies, the state action doctrine, and the First Amendment. It will argue that, despite numerous allegations of censorship and calls for judicial intervention, it is unlikely that federal courts will consider social media companies state actors despite their increasing influence and importance. But it will also argue that it is increasingly likely that a court could conclude that a social media company is a state actor in light of recent trends

15. Maeve Duggan & Aaron Smith, *The Political Environment on Social Media*, PEW RESEARCH CTR.: INTERNET & TECH. (Oct. 25, 2016), <http://www.pewinternet.org/2016/10/25/the-political-environment-on-social-media/> [https://perma.cc/Rf2T-VQX7].

16. *Id.*

17. *Id.*

18. *Id.*

19. Wu, *supra* note 13 (“[T]he main point of this paper . . . is to demonstrate that a range of speech control techniques [have] arisen from which the First Amendment, at present, provides little or no protection.”).

20. Julie K. Brown, *Less Is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 561 (2008).

21. *See id.*

22. *See* Fradette, *supra* note 3, at 948.

and desires to impose regulations on these companies.²³ Further, it will argue that if courts continue to conclude that social media companies are not state actors, it may be time to once again rethink our state action jurisprudence and whether we should tolerate infringements on speech just because they are committed by private actors.²⁴

Further, anticipating the possibility that a court could conclude that a social media company is a state actor, this article will explore the appropriate First Amendment scrutiny that ought to be applied to censorship on social media platforms, arguing that intermediate scrutiny is most appropriate. It will conclude by echoing recent scholarship which suggests that the First Amendment may be becoming increasingly obsolete in light of the movement of speech into private realms outside the scope of constitutional protection²⁵, and why this should both give us pause and force us to contemplate solutions.

Part I will explore in more detail the changing landscape of political and social discussion, how social media companies regulate speech, and increasing allegations of censorship on social media platforms. Part II will discuss the state action doctrine²⁶, its purpose, history, and exceptions. Part III will introduce the First Amendment, the different levels of scrutiny courts apply in First Amendment cases, and why intermediate scrutiny is the most appropriate tier to apply to alleged censorship on social media platforms.

II. SOCIAL MEDIAL PLATFORMS AND CENSORSHIP CONCERNS

A. *The Changing Landscape of Political and Social Discussion*

It goes without saying that the way people talk about politics and current events has radically changed. People today are increasingly engaging in political speech online.²⁷ Social network sites now enjoy traffic of hundreds of millions of viewers; around 800 million users

23. Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M. L. REV. 121, 127 (2014).

24. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507 (1985).

25. See Wu, *supra* note 13.

26. I would like to thank Benjamin F. Jackson for his article's contribution and generation of the idea for this article.

27. See Duggan & Smith, *supra* note 15.

visit Facebook²⁸ daily.²⁹ In a given week, millennials generally look to social media platforms for their sources of political news.³⁰ About half of Generation X reported receiving news on Facebook in a given week.³¹ During the 2016 presidential election, about one-third of eighteen to twenty-nine-year-old Americans listed social media as the most helpful source for informing them about the election.³²

Political candidates have also taken advantage of the low cost of advertising to promote their policies and candidacies on social media sites like YouTube.³³ Since April 2015, voters have watched more than 110 million hours of such content on YouTube.³⁴ After popular current events occur, the time Americans spend watching videos online related to these events greatly increases, and candidates attempt to provide video content to educate voters about their positions on the topics.³⁵

Content creators on YouTube hold tremendous sway over the opinions of the users who frequent their channels.³⁶ More than half of YouTube users between the ages of eighteen and forty-nine comment that their political opinions are influenced by YouTube creators.³⁷ Politicians have associated their political campaigns with these

28. See Ellen P. Goodman & Julia Powles, *Facebook and Google: Most Powerful and Secretive Empires We've Ever Known*, THE GUARDIAN, (Sept. 28, 2016 3:00 EDT), <https://www.theguardian.com/technology/2016/sep/28/google-facebook-powerful-secretive-empire-transparency> [https://perma.cc/69VF-MKFC].

29. See Duggan & Smith, *supra* note 15.

30. Amy Mitchell, Jeffrey Gottfried, & Katerina Eva Matsa, *Millennials and Political News*, PEW RESEARCH CTR.: JOURNALISM & MEDIA (June 1, 2015), <http://www.journalism.org/2015/06/01/millennials-political-news/> [https://perma.cc/45WR-BM4U].

31. *Id.*

32. Jeffrey Gottfried, Michael Barthel, Elisa Shearer & Amy Mitchell, *The 2016 Presidential Campaign-a News Event That's Hard to Miss*, PEW RESEARCH CTR.: JOURNALISM & MEDIA (Feb. 4, 2016), <http://www.journalism.org/2016/02/04/the-2016-presidential-campaign-a-news-event-thats-hard-to-miss/> [https://perma.cc/V35U-4AMH].

33. Kate Stanford, *How Political Ads and Video Content Influence Voter Opinion*, THINK WITH GOOGLE (Mar. 2016), <https://www.thinkwithgoogle.com/marketing-resources/content-marketing/political-ads-video-content-influence-voter-opinion/> [https://perma.cc/88ET-R7J3].

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

content creators to try to gain influence over their followers.³⁸ YouTube also serves as a key forum for political dialogue and debate of important issues because social media platforms provide a low cost and easy means for people to express their opinions.³⁹

Multiple United States Supreme Court justices have also recognized the importance of this emerging trend of speech taking place on social networking websites.⁴⁰ During oral argument in *Packingham v. North Carolina*, Justice Anthony Kennedy, speaking of Twitter and Facebook, noted that “[t]heir utility and the extent of their coverage are greater than the communication you could have ever had, even in the paradigm of public square.”⁴¹ Justice Kagan agreed, responding that: “[t]he president now uses Twitter . . . everybody uses Twitter. . . [a]ll 50 governors, all 100 senators, every member of the House has a Twitter account. So this has become a . . . crucially important channel of political communication.”⁴² Justice Ginsburg said that it is dangerous to restrict access to social media because “these people are being cut off from a very large part of the marketplace of ideas. And the First Amendment includes not only the right to speak, but the right to receive information.”⁴³ Justice Kagan agreed:

Whether it's political community, whether it's religious community . . . these sites have become embedded in our culture as ways to communicate and ways to exercise our constitutional rights. How many people under 30 do you think don't use these sites to get all their information? Under 35? I mean, increasingly, this is the way people get everything, all information.⁴⁴

Such responses indicate the openness of our highest court to the notion that speech on these platforms is increasingly important and worthy of protection.

38. Stanford, *supra* note 33.

39. *Id.*

40. See Mark Grabowski, *Opinion: Twitter's Censorship May Be Unconstitutional*, WASHINGTON EXAMINER (Mar. 14, 2017, 8:00 AM), <https://www.washingtonexaminer.com/twitters-censorship-may-be-unconstitutional/article/2617261> [<https://perma.cc/E2UW-Y3L3>].

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

B. *How is Content Regulated by Social Media Companies?*

Confronted with so much speech and political content, social media companies use a variety of mechanisms to regulate their traffic.⁴⁵ On YouTube⁴⁶, one way that content can be restricted or limited is through its “Restricted Mode” feature.⁴⁷ This feature is an optional setting that is, according to YouTube, used by “a small subset of users, such as libraries, schools, and public institutions, who choose to have a more limited viewing experience on YouTube.”⁴⁸ The default Restricted Mode setting is off.⁴⁹ But if a user turns it on, YouTube uses a rating system that categorizes videos based on their content.⁵⁰ YouTube first uses an algorithm that automatically assesses every video based on varying “signals,” including the title, metadata, and language in the video so YouTube can comb through a massive amount of content and assign ratings to that content.⁵¹ Human reviewers sometimes review videos and assign ratings under different criteria, including “context, tone, and focus” to determine how to rate the content.⁵² YouTube concedes that with the amount of content the algorithm reviews, the system is imperfect.⁵³ An additional trigger for human review occurs when a user “flags” a video as “potentially inappropriate”⁵⁴ Further, if a user believes their video has been improperly categorized and made unavailable in restricted mode, they may appeal which also triggers manual review.⁵⁵

45. See generally Jeffrey Rosen, *The Delete Squad: Google, Twitter, Facebook and the new global battle over the future of free speech*, NEW REPUBLIC (Apr. 28, 2013), <https://newrepublic.com/article/113045/free-speech-internet-silicon-valley-making-rules> [<https://perma.cc/NCV3-2NYA>].

46. Although there are numerous social media platforms, this section will focus on the practices of YouTube and Facebook.

47. Defendant’s Opposition to Plaintiff’s Motion for Preliminary Injunction at *4, *Prager Univ. v. Google LLC*, (N.D. Cal. Mar. 26, 2018) No. 17-CV-06064-LHK, 2018 WL 105688.

48. *Id.*

49. *Id.*

50. *Id.* at *5.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

Facebook regulates content through a complicated system with multiple levels of protection.⁵⁶ Facebook provides staffers in a variety of locations around the world with a rulebook that gives guidance to assist with interpretation of Facebook's community standards to make initial censorship decisions.⁵⁷ Content reviewers are estimated to review several thousand posts a day per person.⁵⁸ While many of the decisions to censor content are straightforward⁵⁹, a significant amount of the decisions involve discretion.⁶⁰ In harder cases, much like the law, the community guidelines don't offer much guidance as to how the speech or content should be treated.⁶¹ Next, if certain content continues to receive more complaints, regional managers act as a mid-level appellate court, and if the controversy surrounding the content continues to grow, top U.S. executives can step in to make the decision.⁶² Interestingly, Facebook employees have expressed concern for how Facebook handles controversial content, but they declined to be named for fear of job repercussions.⁶³ Undoubtedly, the practice of regulating content on these platforms is daunting. While certainly not exhaustive, the above mechanisms are illustrative of the processes in place to regulate content on social media platforms.

C. Allegations of Censorship and Political Bias on Social Media Platforms

On the whole, social media companies have expressed their commitment to the open exchange of diverse points of view.⁶⁴ But,

56. See Kristina Cooke, Dan Levine, Dustin Volz, *Facebook Executives Feel the Heat of Content Controversies*, REUTERS (Oct. 28, 2016, 12:05 AM), <https://www.reuters.com/article/us-facebook-content-insight/facebook-executives-feel-the-heat-of-content-controversies-idUSKCN12S0D3> [<https://perma.cc/6PLK-FBXG>].

57. *Id.*

58. Aarti Shahani, *From Hate Speech to Fake News: The Content Crisis Facing Mark Zuckerberg*, NPR (Nov. 17, 2016, 5:02 AM), <https://www.npr.org/sections/alltechconsidered/2016/11/17/495827410/from-hate-speech-to-fake-news-the-content-crisis-facing-mark-zuckerberg> [<https://perma.cc/6NSL-78R6>].

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. Shahani, *supra* note 58.

64. See Jackson, *supra* note 23, at 127.

they also have competing interests which create pressure to censor content.⁶⁵ In the wake of WikiLeaks' release of classified United States information, the Department of Justice was able to force Twitter to provide information about WikiLeaks accounts.⁶⁶ Senator Joe Lieberman attempted to persuade Twitter to block pro-Taliban accounts and speech.⁶⁷ Further, YouTube was faced with pressure from several politicians in the United States and abroad to block many videos that promoted terrorism.⁶⁸ Social media companies also face pressures to prevent criminals from targeting victims, accusers, or witnesses, or to prevent harassment and intimidation.⁶⁹ There are also strong economic pressures related to preserving relationships with advertisers who place their ads on users' videos.⁷⁰ While scholars have addressed these internal and external pressures that encourage censorship, less attention has been paid to the possibility that censorship may be caused by the political bias of those who regulate content on the platforms themselves.⁷¹ This contention has gained considerable traction in the preceding months, particularly among those on the political right.⁷² These allegations were brought into the national spotlight in Mark Zuckerberg's recent testimony when Senator Ted Cruz questioned Mr. Zuckerberg about political bias on his platform.⁷³

While both conservative and liberal speech has been subject to censorship on both Facebook and YouTube, outrage surrounding this censorship has been most pronounced on the right.⁷⁴ Most salient is a

65. *Id.*

66. *Id.* at 128–29.

67. *Id.* at 129.

68. *Id.*

69. *Id.* at 129–30.

70. Daisuke Wakabayashi & Sapna Maheshwari, *YouTube Advertiser Exodus Highlights Perils of Online Ads*, N.Y. TIMES (Mar. 23, 2017), <https://www.nytimes.com/2017/03/23/business/media/youtube-advertisers-offensive-content.html> [<https://perma.cc/4ZKB-KBSC>].

71. See Jackson, *supra* note 23, at 131 (briefly addressing politically motivated reasons for censorship on social media platforms).

72. Blair Guild, *Sen. Ted Cruz Grills Mark Zuckerberg about Facebook Political Bias*, CBS NEWS (Apr. 10, 2018, 7:12 PM), <https://www.cbsnews.com/news/sented-cruz-grills-mark-zuckerberg-facebook-political-bias/> [<https://perma.cc/R8KJ-9YZQ>].

73. *Id.*

74. See *id.*

recent dispute between YouTube and Prager University.⁷⁵ Prager University was created by the prominent conservative figure Dennis Prager devoted to, among other things, “promote what is true, what is good, what is excellent, and what is noble through digital media.”⁷⁶ The site reports that they have received over two billion views on YouTube and Facebook, combined.⁷⁷ Prager University filed a lawsuit in the Northern District of California alleging that around three dozen of their YouTube videos were restricted due to the conservative viewpoints they espoused.⁷⁸ YouTube again found itself in the spotlight over decisions to censor certain content when, following the Parkland shooting, YouTube introduced increased restrictions on videos that involve firearms.⁷⁹ YouTube will now restrict videos that promote or link to websites that sell guns and other accessories.⁸⁰ It will also restrict videos that contain instructions on how to assemble guns.⁸¹ In addition, conspiracy theorist Alex Jones was recently banned from several social media companies’ platforms, including YouTube.⁸²

These allegations of censorship and political bias have also been levied at Twitter. In 2015, the former CEO of Twitter was alleged to have taken measures to prevent speech critical of President Obama during a Q&A session from spreading on Twitter.⁸³ It was specifically

75. See *infra*, section III.B.1 (discussing this litigation in detail).

76. *About Us*, PRAGERU, <https://www.prageru.com/about/> [<https://perma.cc/82PQ-WWJ2>].

77. PRAGERU, <https://www.prageru.com> [<https://perma.cc/CF7R-BDBN>].

78. Ian Lovett & Jack Nicas, *PragerU Sues YouTube in Free-Speech Case*, WALL STREET JOURNAL (Oct. 23, 2017, 10:24 PM), <https://www.wsj.com/articles/prageru-sues-youtube-in-free-speech-case-1508811856> [<https://perma.cc/F3HF-DZMB>].

79. Niraj Chokshi, *YouTube to Ban Videos Promoting Gun Sales*, N.Y. TIMES (Mar. 22, 2018), <https://www.nytimes.com/2018/03/22/business/youtube-gun-ban.html> [<https://perma.cc/XZQ9-8UWZ>].

80. *Id.*

81. *Id.*

82. April Glaser, *Apple Banned Alex Jones and Infowars, and Spotify and Facebook Followed Suit*, SLATE (Aug 06, 2018, 9:32 AM), <https://slate.com/technology/2018/08/apple-and-spotify-are-now-both-blocking-infowars-and-alex-jones-podcasts.html> [<https://perma.cc/RXH7-F2M7>].

83. Rudy Takala, *Report: Twitter Censored Messages Critical of Obama*, WASHINGTON EXAMINER (Aug. 11, 2016, 1:38 PM), <http://www.washingtonexaminer.com/report-twitter-censored-messages-critical-of-obama/article/2599141>.

alleged that the former CEO ordered that his employees create an algorithm that would suppress critical speech and if any such speech was missed by the algorithm, employees would manually censor it.⁸⁴ Twitter also came under fire for banning Breitbart News editor Milo Yiannopoulos, and appearing to remove “DNC leaks” from Twitter’s “trending news” section while it was gaining popularity among users.⁸⁵ More recently the CEO of Twitter came under fire for his post on Twitter that signaled his agreement with an article that, among other things, declared that “there is no bipartisan way forward” and that the United States has two irreconcilable worldviews “that must be resolved in short order.”⁸⁶ Some have argued that this article’s main contention is that the Republican party needs to be severely marginalized in order for the United States to move forward and solve its major problems.⁸⁷

Conservative groups are not the only groups claiming censorship on social media platforms. In 2016, a coalition of more than seventy civil rights groups asked Facebook to provide additional clarification regarding its policies for censoring content.⁸⁸ They alleged that Facebook consistently removed posts that documented human rights violations and sometimes the removal was initiated by police request.⁸⁹ The groups pointed to several examples: “the deactivation of Korryn Gaines’ account during a standoff with police, the suspension of live footage from the Dakota Access pipeline protests, the removal of historic photographs such as ‘napalm girl’, the disabling of Palestinian journalists’ accounts and reports of Black Lives Matter activists’ content being removed.”⁹⁰ In addition, the LGBTQ community expressed concern that YouTube was hiding content created by members of their community under their Restricted

84. *Id.*

85. *Id.*

86. Teri Webster, *Twitter CEO Sparks Controversy by Praising Article Suggesting Dems Start ‘Civil War’*, THE BLAZE (Apr. 8, 2018 12:19 PM), <https://www.theblaze.com/news/2018/04/08/twitter-ceo-sparks-controversy-by-praising-article-suggesting-dems-start-civil-war> [<https://perma.cc/7HQD-44EF>].

87. *Id.*

88. Olivia Solon, *Civil Rights Groups: Facebook Should Protect, Not Censor, Human Rights Issues*, THE GUARDIAN (Oct. 31, 2016, 3:54 EDT), <https://www.theguardian.com/technology/2016/oct/31/facebook-human-rights-censorship-civil-rights-mark-zuckerberg-aclu> [<https://perma.cc/VU4G-25M3>].

89. *Id.*

90. *Id.*

Mode. Users reported that videos containing the words “‘gay,’ ‘lesbian,’ and ‘bisexual’” were hidden.⁹¹

There are three reasons why any allegations of censorship on social media should raise serious concerns. First, the power of social media companies is truly remarkable. Facebook, for example, exceeded 500 billion in market capitalization in late 2017⁹² and at that time had more than two billion active users.⁹³ This represents a major concentration of power and control over a significant amount of speech.

Second, it is reasonable to conclude that many of the executives and employees responsible for regulating content on these platforms are politically liberal.⁹⁴ A recent Stanford study reported in the New York Times found that young Silicon Valley technology entrepreneurs are within the range of the most left-leaning Democrats.⁹⁵ This liberalism is reflected in the values and policies that govern these companies and this was illustrated in the recent firing of the Google engineer James Damore.⁹⁶ Google fired Damore because they had concluded he promoted harmful gender stereotypes when he authored a paper that criticized what he believed to be “Google’s ideological echo chamber.”⁹⁷

91. Libby Watson, *YouTube’s Restricted Mode is Hiding Some LGBT Content [Update]*, GIZMODO (Mar. 17, 2017, 4:32 PM), <https://gizmodo.com/youtubes-restricted-mode-is-hiding-some-lgbt-content-1793382337> [<https://perma.cc/N3CE-LWJ4>].

92. Matt Egan, *Facebook and Amazon Hit \$500 Billion Milestone*, CNN MONEY (July 27, 2017, 10:29 AM), <http://money.cnn.com/2017/07/27/investing/facebook-amazon-500-billion-bezos-zuckerberg/index.html> [<https://perma.cc/LAS6-9P5A>].

93. *Id.*

94. Dylan Matthews, *The Vast Majority of Tech Entrepreneurs are Democrats - But a Different Kind of Democrat*, VOX (Sept. 6, 2017, 1:20 PM), <https://www.vox.com/policy-and-politics/2017/9/6/16260326/tech-entrepreneurs-survey-politics-liberal-regulation-unions> [<https://perma.cc/8K7W-FJBS>].

95. Farhad Manjoo, *Silicon Valley’s Politics: Liberal, With One Big Exception*, N.Y. TIMES (Sept. 6, 2017), <https://www.nytimes.com/2017/09/06/technology/silicon-valley-politics.html> [<https://perma.cc/KD2D-8LVL>].

96. See Alain Sherter, *James Damore Lawsuit: Fired Engineer Sues Google*, CBS NEWS (Jan. 8, 2018, 2:50 PM), <https://www.cbsnews.com/news/james-damore-lawsuit-fired-engineer-sues-google/> [<https://perma.cc/97EA-VYC7>].

97. See *id.*

Third, because these platforms are private, their actions are generally outside the scope of the constitutional protection.⁹⁸ Concerns surrounding this censorship are warranted because this is posed to continue or increase absent any preventive action by the companies or the law. To be sure, the increasing attention being paid to such censorship can in part be described by “The Streisand Effect.”⁹⁹ Nonetheless, the allegations of censorship warrant serious consideration, and the next section will discuss whether social media companies can be considered state actors and thus be subject to the First Amendment’s protections.

While there are numerous social media platforms an influencer can utilize, the photo-sharing website Instagram is by far the most utilized.¹⁰⁰ A report from a platform that connects companies with influencers found that 99.3 percent of respondent influencers used Instagram to share their messages, as compared to Facebook (67.1 percent), Snapchat (50.8 percent), and Twitter (43.1 percent).¹⁰¹

Instagram allows users to edit and share photographs and videos (also known as “content”).¹⁰² When a user adds content it is displayed on a user’s profile and other Instagram users who “follow” them are able to see the content.¹⁰³ The main goal is “to share and find only the best photos and videos.”¹⁰⁴ Each Instagram profile has a “followers” and “following” count which allows Instagram users to know who they follow, and how many users follow them.¹⁰⁵ A profile may be set to “public,” where all Instagram users may see the content, or to

98. Brown, *supra* note 20, at 563.

99. See Charles Arthur, *The Streisand Effect: Secrecy in the Digital Age*, THE GUARDIAN (Mar. 19, 2009, 8:05 PM), <https://www.theguardian.com/technology/2009/mar/20/streisand-effect-internet-law> [<https://perma.cc/TK3P-8KC4>] (describing the Streisand Effect as a situation where a person attempts to suppress or hide information, and as result, the opposite occurs: more attention is drawn to that information).

100. Ayaz Nanji, *The Most Important Social Media Networks for Influencers*, MARKETING PROF. (May 16, 2017), <https://www.marketingprofs.com/charts/2017/32069/the-most-important-social-network-for-influencers> [<https://perma.cc/QAT8-2K56>].

101. *Id.*

102. See Elise Moreau, *What is Instagram, Anyway?*, LIFEWIRE (Mar. 26, 2019), <https://www.lifewire.com/what-is-instagram-3486316> [<https://perma.cc/66LQ-GUN9>].

103. *See id.*

104. *Id.*

105. *Id.*

“private”, where only an Instagram user’s followers can see the content.¹⁰⁶

Instagram also has an “explore” tab which allows users to find or add followers and to search for interesting accounts to follow.¹⁰⁷ Instagram tailors the recommend content it provides to each individual user.¹⁰⁸ Instagram users can also use the search bar to search for specific users or hashtags.¹⁰⁹ Hashtags are “words or multi-word phrases preceded by the # symbol”¹¹⁰ If an Instagram post includes hashtags on a public post, then the post will appear on the hashtag page.¹¹¹

III. THE STATE ACTION DOCTRINE

A. Principles, History, and Purpose

Any alleged constitutional violation begins with the threshold question of whether the alleged violator’s conduct can be subject to the Constitution’s protections.¹¹² This is because the United States Constitution only applies to the actions or omissions of state actors, and it does not constrain the behavior of private actors.¹¹³ This distinction between public and private action is known as the state action doctrine.¹¹⁴ Much has been said about the doctrine’s confusing and unpredictable nature.¹¹⁵ Some have described it as “dysfunctional” and “a conceptual disaster area”; Justice Black described the United States Supreme Court’s state action jurisprudence as “a torchless search for a way out of a damp and

106. *Id.*

107. Moreau, *supra* note 102.

108. *Id.*

109. *Id.*

110. Sandra Grauschopf, *What Does ‘Hashtag’ Mean & How Do You Use One Correctly?*, THE BALANCE EVERYDAY (Sept. 30, 2017), <https://www.thebalance.com/what-does-hashtag-mean-and-how-do-you-use-one-892814> [<https://perma.cc/87M9-AC9G>].

111. *How Do I Use Hashtags?*, INSTAGRAM, <https://help.instagram.com/351460621611097> [<https://perma.cc/42X3-MBZT>].

112. See Brown, *supra* note 20, at 563.

113. John L. Watts, *Tyranny by Proxy: State Action and the Private Use of Deadly Force*, 89 NOTRE DAME L. REV. 1237, 1239 (2014).

114. See Brown, *supra* note 20, at 561.

115. *Id.* at 562.

echoing cave.”¹¹⁶ On the other hand, some authorities have commented that the doctrine is “the most important problem in American law.”¹¹⁷ A key point of emphasis regarding this doctrine is that although certain conduct that involves “constitutional values”¹¹⁸ might be restricted by private actors, there is no constitutional violation because courts have no power to redress these private interferences.¹¹⁹ In case after case, courts have consistently tolerated the violation of essentially every value inherent in the constitution on the basis that such private infringements¹²⁰ are bereft of state action.¹²¹ These private infringements are not at all insignificant because they can produce the same or additional harm as state actors.¹²² In fact, the increasing flow of wealth and power into the hands of private actors increases these concerns because private action can be essentially indistinguishable from state action, but only the latter is subject to constitutional scrutiny.¹²³

An often neglected inquiry is why the law should tolerate such private infringements simply because they are committed by private actors.¹²⁴ An important starting point to address this question is to investigate the beliefs held at the time the Constitution was written.¹²⁵ When the Constitution was written, there was widespread belief that the common law adequately shielded personal liberties from private invasion.¹²⁶ The reasoning followed that there was no need for the Constitution to address what was already given strong protections in the common law.¹²⁷ However, when our national government was

116. See Brown, *supra* note 20, at 562.

117. Kevin L. Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 327 n.3 (1990).

118. *Id.* at n.2 (defining constitutional values as “the value[s] that a particular constitutional provision would promote if the provision were construed as applying to both public and private deprivations”).

119. See *id.*

120. Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 507 (1985) (defining private infringements of constitutional rights as a short-hand for actions by private individuals that seem to deny the values that courts protect when they apply the constitution).

121. *Id.* at 510 (collecting cases).

122. *Id.* at 511.

123. *Id.*

124. *Id.*

125. Chemerinsky, *supra* note 120, at 511.

126. *Id.*

127. *Id.* at 512.

created, a primary fear was that it wouldn't be constrained by the common law and that it could violate liberties in ways that private entities couldn't.¹²⁸ Therefore, the Bill of Rights was added to incorporate these preexisting common law protections and require the new national government to be constrained by them.¹²⁹

When Fourteenth Amendment was ratified, it was still thought that the common law provided adequate protection against private infringements of rights such as discrimination by restaurants and transportation.¹³⁰ This was the basis of the Supreme Court's reasoning in the *Civil Rights Cases* which held that certain forms of private discrimination were not controlled by the Constitution because people could seek relief in the common law.¹³¹ This is a key point: the case that formally announced the state action doctrine *assumed* that there were effective common law protections when it reached its decision finding no state action.¹³² Now, however, there are increasingly no common law protections for many rights, including private infringements of speech.¹³³ This would include any such private speech infringements committed by social media companies. So why should such private infringements be accepted? Maybe they shouldn't be, and regardless of the answer, it is a question worth reconsidering given the importance of free expression. Given the increasing power of social media companies and the movement of speech online, censorship allegations on social media platforms provide a wonderful opportunity to once again reexamine the state action doctrine as Dean Chemerinsky suggested in 1985.¹³⁴

128. *Id.*

129. *Id.* at 513–14 (“For example, the fourth amendment's protection against unreasonable searches and seizures was identical to the protection that the common-law actions of trespass and false arrest provided against private invasions of liberty. Similarly, the fifth amendment's prohibition against government takings of property without just compensation applied common-law principles of conversion to federal actions. Basic common-law assurances redressing deprivations of life, liberty, and property were applied to the national government via the fifth amendment's due process clause. Most dramatically, legal historian Leonard Levy has demonstrated that the first amendment's protection of freedom of speech was meant solely to incorporate well-established common-law principles.”).

130. *Id.* at 515.

131. Chemerinsky, *supra* note 120, at 515.

132. *Id.* at 516–17 (emphasis added).

133. *Id.*

134. *Id.*

B. State Action Exceptions

Setting aside the important history of the doctrine above, there are exceptions to the general rule requiring state action, and the Supreme Court has handed down several tests to determine when state action is present.¹³⁵ There are two primary exceptions to the general rule discussed above: the public function exception and the entwinement exception.¹³⁶

1. Public Function Exception

The “public function” exception provides that a private entity will be deemed a state actor if they engage in conduct that is “traditionally exclusively reserved to the State.”¹³⁷ The primary purpose of this exception is to prevent private actors such as corporations and companies from abusing their power when they have duties and powers delegated to them by state actors.¹³⁸ The public function exception has its origins in *Marsh v. Alabama*.¹³⁹ There, a Jehovah’s Witness entered a privately-owned town and distributed religious information.¹⁴⁰ The managers of the town initiated criminal proceedings against him, which led to a trespass conviction.¹⁴¹ The Supreme Court reversed and held that the private company town’s property rights did not “justify the State’s permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties . . .” and treated the company owned town as a state actor.¹⁴²

The Court based its decision on several rationales.¹⁴³ First, the Court reasoned that the town was essentially identical to other towns except for the fact that it was privately owned and could undermine liberty in the same way that the government could.¹⁴⁴ Second, because the town and its shopping area were freely accessible to the public,

135. See Brown, *supra* note 20, at 564–65.

136. Jackson, *supra* note 90, at 140 (citing Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974) (citation omitted)).

137. *Id.*

138. *Id.*

139. *Id.* (citing *Marsh v. Alabama*, 326 U.S. 501 (1946)).

140. *Id.*

141. Jackson, *supra* note 90, at 140.

142. *Id.*

143. *Id.* at 144.

144. *Id.*

the town served a public function that was virtually identical to that exercised by the state.¹⁴⁵ Third, by treating the company town as a state actor and subjecting constitutional scrutiny to its actions, the value of democratic self-governance would be advanced.¹⁴⁶ Each one of these rationales supports a finding that social network platforms should fall under the public function exception.¹⁴⁷ First, social network platforms can inflict much greater injury to free speech than the town in *Marsh*.¹⁴⁸ Second, these platforms are increasingly becoming the primary tool by which people engage in the marketplace of ideas, and they are also increasingly used by public officials to communicate with members of the public.¹⁴⁹ Third, these social networking websites are becoming important means for political communication and mobilization.¹⁵⁰

Despite the seemingly expansive scope of the language in *Marsh*, the scope of *Marsh* has been considerably narrowed in later cases.¹⁵¹ In *Jackson v. Metro. Edison Co.*, the Court held that the public function exception only “encompasses public functions that are both ‘traditionally *and* exclusively’ provided for by the State.”¹⁵² Therefore, this case stands for the proposition that it is not enough for a government to have historically engaged in a particular function; privately run organizations must not also engage in the same activity in order for state action to be found.¹⁵³ It has also been argued that social networking companies should still be viewed as state actors because they are like “public squares and meeting places,” and they are arguably the “town squares of the twenty-first century.”¹⁵⁴ Because managing public squares and meeting places have been traditionally managed by the state, social networking websites can be considered a public function that was traditionally within the purview of the state.¹⁵⁵

145. *Id.*

146. *Jackson*, *supra* note 90, at 144.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *Jackson*, *supra* note 90, at 145.

152. *Id.*

153. *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974) (emphasis added).

154. *Jackson*, *supra* note 90, at 145.

155. *Id.*

Thus far, with respect to private internet companies, courts have not been receptive to the argument that they constitute state actors under the public function exception.¹⁵⁶ The Third Circuit and two additional federal courts have rejected¹⁵⁷ the argument that America Online (“AOL”) is a state actor because 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”¹⁵⁸ Further, other federal district courts have rejected arguments that Sony’s PlayStation 3 Network is a state actor because it “serves solely as a forum for people to interact subject to specific contractual terms,” and the network functions mainly for entertainment reasons.¹⁵⁹ Courts have also rejected the notion that a private domain name registrant is a state actor because the internet, as well as the registration of domain names on the internet do not come close to being “traditional and exclusive public functions.”¹⁶⁰

Recently, a federal court, for the first time, thoroughly analyzed whether a social media company is a state actor under the public function exception.¹⁶¹ While the court dismissed the complaint with leave to amend, it provides a model for how many courts are likely to analyze claims that social media companies are state actors under *Marsh*.

a. Prager University v. Google LLC

In *Prager Univ. v. Google LLC*, Plaintiff Prager University filed a complaint asserting that YouTube violated their First Amendment rights.¹⁶² Their principal argument was that while YouTube held itself

156. *Id.* at 142.

157. *Id.* at n.104 (citing *Green v. Am. Online*, 318 F.3d 465, 472 (3d Cir. 2003); *Noah v. AOL Time Warner, Inc.*, 261 F. Supp. 2d 532, 546 (E.D. Va. 2003) (citing *Green*, 318 F.3d at 472); *see also* *Cyber Promotions, Inc. v. Am. Online, Inc.*, 948 F. Supp. 436, 437 (E.D. Pa. 1996).

158. *Id.* at 143 (quoting *Cyber Promotions*, 948 F. Supp. at 437).

159. Jackson, *supra* note 90, at 143 (quoting *Estavillo v. Sony Computer Entm't Am.*, No. C-09-03007 RMW, 2009 WL 3072887 at *1–2 (N.D. Cal. Sept. 22, 2009).

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

161. *Prager Univ. v. Google LLC*, No. 17-CV-06064-LHK, 2018 WL 1471939, at *1 (N.D. Cal. Mar. 26, 2018)

162. *See id.*

out as a purveyor of viewpoint neutrality, it repeatedly engaged in censorship practices that discriminated against Plaintiff because of its conservative political views.¹⁶³ They argued that the censorship took the form of placing age restrictions on some of its videos or “demonetizing” them, which means to prevent placing ads on their videos in a viewpoint discriminatory manner.¹⁶⁴ Importantly, the censorship allegations above did not include any claims that its videos have been *completely* removed from YouTube.¹⁶⁵ To support its arguments, they placed their videos side-by-side to videos where access had been restricted next to other videos that had not been restricted, which discussed the same or similar topic but from a liberal point of view.¹⁶⁶

Prager University’s key contention was based on an analogy to *Marsh*.¹⁶⁷ They argued that YouTube holds itself out “as a public forum dedicated to freedom of expression to all” and that “a private property owner who operates its property as a public forum for speech is subject to judicial scrutiny under the First Amendment.”¹⁶⁸ The Court rejected this contention, but it also presented language from *Marsh* that appeared supportive of the Plaintiff’s position: “[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”¹⁶⁹

But, according to the Court, subsequent Supreme Court decisions have rejected any broad extension of this language in *Marsh*. As support for this proposition, the Court discussed what are referred to as the “shopping mall cases.”¹⁷⁰ The Court began its discussion of these cases, noting that in *Logan Valley*, the Supreme Court held that a privately-owned shopping center was unable to forbid workers from protesting a store in a shopping center because such a restriction

163. *Id.*

164. *Id.* at *2.

165. *Id.* (emphasis added).

166. *Id.*

167. *Id.* at *6.

168. *Id.*

169. *Id.*

170. See generally Brady C. Williamson & James A. Friedman, *State Constitutions: The Shopping Mall Cases*, WIS. L. REV. 883 (1998).

violated their First Amendment rights.¹⁷¹ The Supreme Court in *Logan Valley* reasoned that the shopping center was open to the public in the same way that a commercial center of a town would be, and the Supreme Court analogized to *Marsh*.¹⁷² It continued to reason that the shopping center was “clearly the functional equivalent of the business district of [the privately-owned town] involved in *Marsh*.”¹⁷³

However, the *Prager University* Court pointed out over the course of eight years, the Supreme Court formally overturned its decision in *Logan Valley* and adopted the reasoning of Justice Black’s dissent in *Logan Valley*.¹⁷⁴ Justice Black authored the *Marsh* majority opinion, and in his dissent in *Logan Valley*, he heavily criticized the *Logan Valley* majority for its misunderstanding of *Marsh* and its appropriate scope. Four years after *Logan Valley*, the Supreme Court in *Lloyd Corp. v. Tanner* held that a private shopping center was within its right to forbid anti-Vietnam War protestors from disseminating literature in the shopping center because it was not a state actor.¹⁷⁵ The Supreme Court held that, based on Justice Black’s dissent in *Logan Valley*, *Marsh* ““was never intended to apply”” outside ““the very special situation of a company-owned town.””¹⁷⁶ The Court emphasized that in *Marsh*, the privately-owned town assumed the “full spectrum” of powers that would traditionally be performed by the State.¹⁷⁷ The Court then distinguished the shopping center at issue in the case reasoning that there was “no comparable assumption or exercise of municipal functions or power.”¹⁷⁸

The *Prager University* Court summarized what it believed was the key takeaway from the above cases: that the reach of *Marsh* is limited.¹⁷⁹ Consistent with that characterization, the Court rejected the notion that *Marsh* supports YouTube being deemed a state actor because of the simple fact that they operate a private forum for

171. *Prager Univ.*, 2018 WL 1471939 at *6 (citing *Amalgamated Food Emp. Union Loc. 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 325 (1968), *abrogated* by *Hudgens v. N. L. R. B.*, 424 U.S. 507 (1976)).

172. *Id.*

173. *Id.*

174. *Id.* at *7.

175. *Id.* (citing *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972)).

176. *Prager Univ.*, 2018 WL 1471939 at *7 (quoting *Lloyd Corp., Ltd.*, 407 U.S. at 562–63).

177. *Id.*

178. *Id.* (quoting *Lloyd Corp., Ltd.*, 407 U.S. at 569).

179. *Id.* at *8.

expression of varied perspectives.¹⁸⁰ Finally, the *Prager University* Court recognized that while the Supreme Court, in *Packingham*, recognized the increasing importance of social media, it was distinguishable because the question of state action was not before the Court.¹⁸¹

In conclusion, the *Prager University* Court reasoned that YouTube appears to not at all be like a private corporation “that governs and operates all municipal functions for an entire town, or one that has been given control over a previously public sidewalk or park, or one that has effectively been delegated the task of holding and administering public elections.”¹⁸² YouTube and Google, according to the Court, are private entities that maintain their own video-sharing social media platform, and they are within their right as to how they manage content that has been created or uploaded,¹⁸³ and that this conclusion is consistent with other court decisions that have not treated social media companies or online service providers as state actors.¹⁸⁴

Courts will likely find the reasoning in the *Prager University* case persuasive given the way *Marsh* has been narrowed by the Supreme Court. Thus, despite the increasing importance of social media platforms in our discourse, courts will likely not be persuaded by arguments that social media platforms should be deemed state actors under the public function exception. But recent events, scholarship, and statements from social media executives and lawmakers indicate that the likelihood of state action may be greater under the entwinement exception discussed below.

2. The Entwinement Exception

The second primary exception to the state action doctrine is the entwinement exception.¹⁸⁵ Under the entwinement exception, a private actor may be subject to constitutional scrutiny “because he has acted together with or has obtained significant aid from state officials,

180. *Id.*

181. *Prager Univ.*, 2018 WL 1471939 at *8.

182. *Id.* (internal citations omitted).

183. *Id.* (collecting cases).

184. *Id.* (collecting cases).

185. Jackson, *supra* note 23, at 152.

or because his conduct is otherwise chargeable to the State.”¹⁸⁶ The key requirement is that there is a “sufficiently close nexus” between the government and the challenged action,¹⁸⁷ because the purpose of the exception is to assure the protections of the constitution are only triggered when it can be said that the government is responsible for the particular conduct the plaintiff is challenging.¹⁸⁸ Therefore, “private conduct must comply with the Constitution if the government has authorized, encouraged, or facilitated the unconstitutional conduct.”¹⁸⁹ For example, state action will be found under this exception if a private party was given the power to manage publicly accessible property knowing that the private party will prevent access to the property in a manner that violates the constitution.¹⁹⁰ Importantly, mere government licensing or regulation is not enough to establish state action. The same is true for government financial support of a nongovernmental party, unless the financial support is given to weaken constitutional protections.¹⁹¹

Some scholars have argued that because the federal government was involved in the internet’s creation, and its goal for this was to facilitate communication and the exchange of ideas, the federal government should be seen as adequately entwined with the internet to support the treatment of internet actors as state actors.¹⁹² But this argument has been criticized by those who support considering social media platforms as state actors; they contend it would foreclose a finding of state action because the government did not participate in the creation of social media companies.¹⁹³ In addition, it has been argued that the approach above would not strike an appropriate balance because it would effectively treat all internet actors as state actors.¹⁹⁴ Regardless, courts to this point have rejected these arguments.¹⁹⁵

186. *Id.* at n.160 (quoting *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 937 (1982)).

187. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

188. *Id.*

189. Jackson, *supra* note 23, at 152 n.161 (citing ERWIN CHEREMINSKY, CONSTITUTIONAL LAW 519–21 (4th ed. 2011)).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 153.

194. Jackson, *supra* note 23, at 153.

195. *Id.* at n.167.

Courts have also rejected other arguments that social media platforms or their parent companies have sufficient relations with the government to become sufficiently entwined.¹⁹⁶ Federal courts have rejected the contention that Facebook is a state actor because of its contractual relationship with the government, which allows agencies to operate certain pages on Facebook.¹⁹⁷ Courts have similarly rejected the argument that Google is sufficiently entwined with the government because Google has collaborated with the government to create a digital library with state universities.¹⁹⁸ Benjamin Jackson argues that similar contentions are likely to continue to be unsuccessful given the minimal contacts between the government and social media companies, and that to date, the websites do not seem to have any special relationship with the government warranting a finding of state action.¹⁹⁹

However, Jackson recognizes that his contention is currently limited to the situation in the United States.²⁰⁰ He presents numerous examples of foreign governments being more actively engaged in censorship activity by requesting Facebook, for example, to take down certain videos or posts.²⁰¹ Jackson correctly emphasizes the fact specific nature of the state action inquiry, and how litigants could possibly be successful on an entwinement claim if the right facts presented themselves.²⁰² One scenario he presents is if Facebook began censoring content related to WikiLeaks in coordination with federal agencies.²⁰³ He presents another where entwinement could be found if the government and social media platforms engage in a joint initiative to protect children from sexual predators.²⁰⁴ Recent trends in the United States illustrate that Jackson's positions could be vindicated, and regarding his sexual predator hypothetical, he may have a crystal ball.

Recent events indicate that the U.S. government may elect to take a more active role in working with social media companies to censor

196. *Id.*

197. *Id.*

198. *Id.*

199. Jackson, *supra* note 23, at n.167.

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. Jackson, *supra* note 23, at n.167.

content.²⁰⁵ As one example, the U.S. has become more concerned with the deleterious effect of unrestrained communication on social media platforms, as illustrated by the increasing concerns surrounding “fake news” and the U.S. government’s desire to limit its effect on our elections.²⁰⁶ When members of Congress held hearings related to the dissemination of fake news, multiple members expressed their grave concerns related to fake news.²⁰⁷ Some Democrats explicitly threatened to attempt to regulate social media companies if they fail to address the different manifestations of fake news.²⁰⁸ Dianne Feinstein, in one hearing with social media executives, remarked, “[y]ou have to be the ones to do something about it . . . [o]r we will.”²⁰⁹ Additional support for the proposition that entwinement may be more likely is that recently, some experts have commented that social media companies may not be able to tackle the fake news problem on their own even if they wanted to.²¹⁰ This is because they lack the “expertise or intelligence or the assets” in their companies²¹¹, and it is extremely difficult to draw the line between fake news and garden variety political punditry.²¹² Former executives within Facebook have also suggested that social media companies ought to do more to solve the fake news problem.²¹³ Adam D’Angelo, a former chief technology officer at Facebook, commented that it is essential that users are more

205. Kara Swisher, *US Government Should Deal With Fake News Conflict*, CNBC (Mar. 9, 2018, 7:43 AM), <https://www.cnbc.com/video/2018/03/09/us-government-should-deal-with-fake-news-conflict-kara-swisher.html> [<https://perma.cc/KS7P-CWKV>] (presenting the comments of Ash Carter, the former Defense Secretary, specifically advocating that tech companies work together with the government to reach solutions to fight fake news).

206. Darrel M. West, *Report: How to Combat Fake News and Disinformation*, BROOKINGS (Dec. 18, 2017), <https://www.brookings.edu/research/how-to-combat-fake-news-and-disinformation> [<https://perma.cc/H2Y8-TSKY>].

207. Zach Weismueller, *‘Fake News’ Is Not an Excuse to Regulate the Internet*, REASON (Jan. 17, 2018), <https://reason.com/archives/2018/01/17/why-fake-news-is-not-an-excuse-to-regula> [<https://perma.cc/455R-Q3E6>].

208. *Id.*

209. *Id.*

210. Ali Breland, *Social Media Fights Back Against Fake News*, THE HILL (May 27, 2017, 11:52 AM), <https://thehill.com/policy/technology/335370-social-media-platforms-take-steps-to-protect-users-from-fake-news/> [<https://perma.cc/X6AE-G78N>].

211. *Id.*

212. *Id.*

213. *Id.*

aware of where their news is really coming from, and government regulation at some point to address this issue is a “real option.”²¹⁴

Therefore, while concrete examples of entwinement between social media companies and the government are lacking in the United States, it appears that the probability of such a situation is increasing as lawmakers, experts, and members of social media companies become more concerned about content on social media.²¹⁵ The government could begin to affirmatively work with these companies to censor content and create the entwinement necessary to trigger the protections of the First Amendment.²¹⁶

Interestingly, a case almost exactly matching Benjamin Jackson’s sexual predator hypothetical above came before the Supreme Court in 2017 in *Packingham v. North Carolina*.²¹⁷ There, the state action issue was not before the Court; the case involved a North Carolina law that prohibited sex offenders from accessing social media platforms.²¹⁸ The Court struck the law down and held that it violated the First Amendment.²¹⁹ In that case, there were no facts illustrating that the government cooperated with Facebook to enforce the particular law against Petitioner. The Petitioner who challenged his conviction under that statute was discovered by a law enforcement officer looking for violators on his own.²²⁰ But in the future, as Jackson points out, one could reasonably anticipate that a situation could occur where the enforcement of a similar law would require Facebook sharing information of potential violators with authorities.²²¹ Due to the highly fact-specific nature of the state action doctrine and its exceptions, a finding of state action through the entwinement exception is clearly an uphill battle, but it is one that appears to be increasingly likely.²²²

214. Matthew Ingram, *Former Facebook Exec Says Government Action on Fake News Is a Real Possibility*, FORTUNE (Apr. 25, 2017), <http://fortune.com/2017/04/25/facebook-government-fake-news/> [<https://perma.cc/KXD6-B4VR>].

215. See Jackson, *supra* note 23, at 154.

216. See *id.*

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

218. *Id.*

219. *Id.*

220. Brief for Petitioner at 6, *Packingham v. North Carolina*, 137 S. Ct. 1730, 1734 (2017) (No. 15–1194).

221. See Jackson, *supra* note 23, at 154.

222. See Chemerinsky, *supra* note 120, at 511.

But concluding that social media companies are not state actors is another example of how the doctrine tolerates significant private infringements to go unchecked.²²³ In addition, the doctrine developed based on the premise that infringements by private actors were adequately protected by the common law.²²⁴ But as more individual rights were created, many were left unprotected,²²⁵ and the same is true with respect to social media companies; no such protections exist for claims of censorship by social media companies in the common law. Such a reality should give us pause to consider the utility of the state action doctrine along with how we can effectively promote freedom of expression on social media platforms.

To be sure, there are some strong reasons why treating social media companies as state actors would be problematic.²²⁶ While social media platforms play an increasingly influential and important role in our national conversation, one could argue that degree of influence should not be the test for state action.²²⁷ If this were the test, every employer would be a state actor, and possibly every family, which may allow the exceptions to swallow the rule.²²⁸ Treating these companies as state actors would also hamstring their ability to respond to many other problems such as “trolling, flooding, [and] abuse . . .”²²⁹

But without legal recourse under the First Amendment, there is no guarantee that individual instances or patterns of censorship will be adequately addressed. Disputes will be resolved under the contractual relationships established by social media companies who are free to limit (or extend) the scope of expression in comparison to the First Amendment or discriminate based on viewpoint.²³⁰ This is particularly troubling if such claims of censorship continue or increase, especially if the claims involve viewpoint discrimination, and it warrants an important conversation about how to ensure private companies commit to free expression on their platforms.

Thus, while unlikely, it is possible that a court could find that a social media company is a state actor and disagree with the reasoning

223. *See id.*

224. *Id.* at 511–12.

225. *See id.* at 511–16.

226. *See Wu, supra* note 13.

227. *See id.*

228. *See id.*

229. *Id.*

230. *See Fradette, supra* note 3, at 948.

in *Prager University*, for example, or find state action under the entwinement exception. The next section will address the appropriate level of First Amendment scrutiny a court should apply if they were to consider social media companies state actors.

C. *The First Amendment*

The free speech clause of the First Amendment provides that Congress “shall make no law . . . abridging the freedom of speech.”²³¹ The history of the First Amendment is as interesting as it is surprising.²³² For most of American history, the First Amendment remained dormant, even well into the 1920s.²³³ It finally came to life when the government began controlling speech during the First World War by levying criminal charges on those who were opposed to the war.²³⁴ Initially, federal courts and the Supreme Court were silent in response to this strong censorship.²³⁵ This trend changed only after Judge Hand and others began articulating the foundation for the modern First Amendment.²³⁶ First Amendment jurisprudence has been characterized as “sprawling”²³⁷ and highly fact-specific.²³⁸ This characterization has raised concerns that judicial activism is being promoted, and that there is a lack of guidance for lower courts and practitioners.²³⁹

231. U.S. CONST. amend I.

232. See Wu, *supra* note 13.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at n.17 (citing *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting)).

237. Lawrence Rosenthal, *First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech*, 86 IND. L.J. 1, 1 (2011).

238. The fact-specific nature has been stated both as a general observation and as a criticism of the doctrine. Compare The Honorable John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1300 (1993) (presenting the fact-specific nature of first amendment jurisprudence neutrally), with Mike Rappaport, *Justice Thomas on the Tiers of Scrutiny*, LAW & LIBERTY (Aug. 12, 2016), <http://www.libertylawsite.org/2016/08/12/justice-thomas-on-the-tiers-of-scrutiny> [<https://perma.cc/CU5S-WH7T>] (presenting Justice Thomas’s views that fact-specific nature is better characterized as inconsistency that is undesirable).

239. Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 299 (1998).

1. The First Amendment: Tiers of Scrutiny

First Amendment free speech doctrine is incredibly formalistic.²⁴⁰ It “aggressively subdivides the known world into endless categories and describes distinctive rules and tests to evaluate the constitutionality of regulations that fall within those categories.”²⁴¹

Under a First Amendment speech analysis, the first step is to place the speech regulation into its proper category.²⁴² There are two main categories: content-neutral laws and content-based laws.²⁴³ Distinguishing between these two categories is no easy task, and how the speech regulation is characterized is frequently outcome-determinative.²⁴⁴ After a speech regulation is categorized, it will be subject to the standard of scrutiny that has been determined for that particular category.²⁴⁵ There are three different levels of scrutiny that can apply to a particular speech regulation: “rational basis review, intermediate scrutiny, and strict scrutiny.”²⁴⁶

Rational basis review is the lowest standard of review; it is highly deferential, and the default standard that courts apply.²⁴⁷ This review carries a presumption that the law is constitutional.²⁴⁸ It demands that the challenged regulation be “rationally related to a legitimate government interest.”²⁴⁹ Given this highly deferential standard, this level of scrutiny provides almost no problem for regulations that impinge on speech.²⁵⁰

240. See *Free Speech Doctrine After Reed v. Town of Gilbert*, 129 HARV. L. REV. 1981, 1982 (2016).

241. *Id.*

242. See 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH, § 3:1 (2018).

243. Erika Schutzman, *We Need Professional Help: Advocating for A Consistent Standard of Review When Regulations of Professional Speech Implicate the First Amendment*, 56 B.C. L. REV. 2019, 2028 (2015).

244. See SMOLLA, *supra* note 242, at § 3.1; Erwin Chemerinsky, *Content Neutrality As A Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 53–54 (2000).

245. Schutzman, *supra* note 243, at 2026.

246. *Id.*

247. *Id.*

248. David T. Hardy, *The Right to Arms and Standards of Review: A Tale of Three Circuits*, 46 CONN. L. REV. 1435, 1438 (2014).

249. Schutzman, *supra* note 243, at 2026 (quoting *City of Cleburne v. Cleburne Living Cir., Inc.*, 473 U.S. 432, 440 (1985)).

250. See Schutzman, *supra* note 243, at 2026.

Intermediate scrutiny is the second most stringent form of review; it requires that a “regulation directly advance[] a substantial government interest and that the regulation is not more extensive than necessary to serve that interest.”²⁵¹ Courts apply this level of scrutiny to content-neutral regulations as well as several other types of regulations.²⁵² This level of review is one of the Supreme Court’s most commonly utilized balancing methods.²⁵³ Unlike rational basis review, which arguably acts as a rubber stamp for regulations that burden speech, and strict scrutiny, which often is deadly rather than strict,²⁵⁴ intermediate scrutiny demands that a court compare opposing interests and is not nearly as outcome-determinative.²⁵⁵ Given that at its core it is a balancing test, it has received significant criticism from judges and scholars who charge that it is both unpredictable and that it incentivizes judicial activism.²⁵⁶ It has also been characterized as “malleable, uncertain, highly flexible, unpredictable, contrived, inconsistent, and inadequate.”²⁵⁷ The test has also been manipulated by the Supreme Court.²⁵⁸ In several cases, the Court has applied the test to regulations that are normally subject to strict scrutiny, or altered the application of the intermediate scrutiny standard to effectively require a justification that is between intermediate and strict scrutiny.²⁵⁹ As a result, dissenting justices have criticized this scrutiny as a violation of stare decisis.²⁶⁰

Strict scrutiny offers the utmost protection to speech under the First Amendment.²⁶¹ Under this standard of review, courts uphold

251. See *id.* at 2026–27.

252. See *id.* at 2027; Wexler, *supra* note 239, at 301, n.15 (listing the different applications of intermediate scrutiny).

253. Wexler, *supra* note 239, at 300.

254. *Id.* at n.16 (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on A Changing Court: A Model for A Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)). But see Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 812 (2006) (providing an empirical analysis to disprove the widespread assertion that when strict scrutiny applies, laws are almost always struck down).

255. Wexler, *supra* note 239, at 300.

256. *Id.* at 300–01.

257. *Id.* at 301 (internal quotation marks omitted).

258. *Id.*

259. *Id.* at 301–02.

260. Wexler, *supra* note 239, at 303.

261. Schutzman, *supra* note 243, at 2027.

regulations only if they “further[] a compelling interest and [are] narrowly tailored to achieve that interest.”²⁶²

2. Speech Regulated Under Content-Neutral Laws

There are two major categories that speech is placed into, and each has its own level of scrutiny.²⁶³ Content-neutral laws, as their label suggests, apply to speech regardless of the particular subject matter or content conveyed; they “regulate the time, place, or manner of expression.”²⁶⁴ These regulations are subject to a less demanding review, and as a consequence, they are upheld more frequently.²⁶⁵ Content-neutral laws are commonly perceived as less threatening to free expression given that they don’t target specific content; however, many courts have taken a contrary view, recognizing that content-neutral laws can actually burden more speech than certain content based laws.²⁶⁶ If a speech regulation is deemed content-neutral, it will survive if it passes intermediate scrutiny.²⁶⁷

The first step in the content-neutrality inquiry is determining whether the regulation is content-neutral on its face.²⁶⁸ If it is, then the court should consider whether the purpose behind enacting the law is content-neutral or content-based.²⁶⁹ Therefore, before concluding that a law is content-neutral, a court must engage in a two-step inquiry: first, evaluate the face of the regulation, and then its purpose.²⁷⁰

3. Speech Regulated Under Content-Based Laws

On the contrary, content-based regulations are presumed to be unconstitutional and are subject to strict scrutiny.²⁷¹ To survive strict scrutiny, the government must prove that the law is “narrowly tailored to serve compelling state interests.”²⁷² There are several means by

262. *Id.* at 2027 (internal quotations omitted).

263. *See* SMOLLA, *supra* note 242, at § 3.1.

264. *See id.* § 3.2, n.5.

265. *See id.* § 3.1.

266. *See id.*

267. *See id.*; *see also* Schutzman, *supra* note 243, at 2027.

268. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2228 (2015).

269. *Id.*

270. *Id.*

271. *See id.* at 2226.

272. *Id.*

which a speech regulation can be deemed content-based: (1) if the speech is targeted “based on its communicative content”; (2) if the regulation “applies to particular speech because of the topic discussed or the idea or message expressed”; (3) if the regulation cannot be supported “without reference to the content of the regulated speech”; or (4) that were passed “because of disagreement with the message conveyed.”²⁷³ Many scholars argue that the purpose of distinguishing speech regulations based on whether they regulate content is to prevent regulations that are motivated by animus towards certain disfavored speech.²⁷⁴

In First Amendment jurisprudence, viewpoint discrimination is viewed as a subset of content-based speech regulation.²⁷⁵ Generally, the First Amendment forbids viewpoint discrimination; examples of this type of regulation involve government restrictions based on “disapproval of the ideas expressed,”²⁷⁶ or favoring certain speech over other speech.²⁷⁷ Viewpoint discrimination is also found when a financial burden is imposed on particular speakers based on the content of their speech.²⁷⁸

4. Intermediate Scrutiny: The Most Appropriate Tier

There are multiple ways a user could theoretically contest social media speech regulations. For instance, a user could seek to challenge specific restrictions placed on the content they post, or they could seek to challenge the overall policies that govern content on the platform.²⁷⁹ Looking at the *Prager University* case as an example, the

273. *Id.* at 2222 (internal quotations omitted).

274. HARVARD LAW REVIEW, *supra* note 240, at 1983 (citing Ashutosh Bhagwat, *Purpose Scrutiny in Constitutional Analysis*, 85 CALIF. L. REV. 297, 362 (1997); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) (arguing a main purpose of First Amendment law is to discover and prevent improper government motives)).

275. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (reasoning that viewpoint discrimination is an egregious form of content discrimination).

276. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

277. *See Rosenberger*, 515 U.S. at 828.

278. *Id.* at 828–29 (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)).

279. Future articles could expand on other legal challenges which might require the application of different tiers of scrutiny.

Plaintiff did not advocate for a particular level of scrutiny to be applied to the discriminatory practices of YouTube if the Court deemed YouTube to be a state actor. But looking at Prager's allegations and those raised by other users, it appears the restrictions placed on their videos are the result of a content-based speech regulation regime. YouTube's restricted mode feature makes certain videos unavailable to users who have restricted mode turned on, and those restrictions and categorizations are determined based on the content of the speech at issue.²⁸⁰ Thus, at least with respect to these allegations, and others like them, the regulation at issue would be deemed facially content-based because they target speech and subject it to restrictions based on its "communicative content."²⁸¹ Further, content-based regulations are subject to strict scrutiny, a principle recently clarified and emphasized by the majority in *Reed v. Town of Gilbert*.²⁸²

However, intermediate scrutiny appears to be the most appropriate level of scrutiny to apply to social media speech regulations despite the fact that they would likely be content based restrictions traditionally subject to strict scrutiny. This is because, as private companies who face pressures to censor content, a more deferential approach should be given to their decisions to regulate content on their platforms.²⁸³ While this recommendation may contravene existing Supreme Court precedent under *Reed*, there is increasing support for the proposition that not every content-based speech restriction ought to be subject to strict scrutiny.²⁸⁴

The concurrences in *Reed* advanced several arguments to support the notion that rigidly applying strict scrutiny to content-based restrictions does not always make sense.²⁸⁵ The reasoning from these concurrences strongly supports applying intermediate scrutiny to the content-based speech restrictions of social media companies.

280. See Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction at 4, *Prager Univ. v. Google LLC*, (N.D. Cal. Mar. 26, 2018) No. 17-CV-06064-LHK, 2018 BL 105688 (discussing the content regulation regime).

281. *Reed*, 135 S. Ct. at 2226.

282. See *id.*

283. See Jackson, *supra* note 22, at 142.

284. See *Reed*, 135 S. Ct. at 2234 (Breyer, J. concurring); *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 834 (9th Cir. 2016), *cert. granted in part sub nom.*; *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 464 (2017).

285. See *Reed*, 135 S. Ct. at 2234–36 (Breyer, J. concurring).

In *Reed*, Justice Breyer's concurrence opened by stating that the First Amendment required sensitivity to both expressive interests and the public's legitimate need for sensible regulations.²⁸⁶ Content-based restrictions and the resulting strict scrutiny, he reasoned, ought to be "a rule of thumb" rather than automatic because strict scrutiny almost certainly leads to a regulation being struck down, however reasonable it is.²⁸⁷ He conceded that there are undoubtedly situations where it makes perfect sense to apply strict scrutiny to a content-based restriction; in several cases, the Supreme Court has discovered that certain content-based restrictions were used to suppress disfavored viewpoints.²⁸⁸ He also affirmed the importance of preventing the government from disfavoring a particular point of view because it would inhibit the free exchange of ideas.²⁸⁹

But he also pointed out that such an automatic trigger of strict scrutiny would hamstring the government's ability to implement sensible regulations because such regulations almost always require content-based regulations.²⁹⁰ The essence of his opinion is that it is a much better approach to limit the application of the content based strict scrutiny framework to situations where there are instances of viewpoint discrimination or a traditional public forum is threatened, but in all other cases, the framework should be a "rule of thumb."²⁹¹ The key question Breyer focuses on is whether the challenged regulation disproportionately harms First Amendment interests when compared to the objectives of the regulation.²⁹² To answer this question, he would consider "the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so."²⁹³ Justice Kagan joined by Justice Ginsburg echoed this point of view.²⁹⁴ Further, they also reasoned that the two primary reasons to apply strict scrutiny to content-based

286. *Id.* at 2234.

287. *Id.*

288. *Id.*

289. *Id.*

290. 135 S. Ct. at 2235.

291. *Id.* at 2234.

292. *Id.* at 2234–35.

293. *Id.* at 2236.

294. *See id.* (Ginsburg, J., Kagan, J., concurring).

regulations is to prevent viewpoint favoritism and preserve the marketplace of ideas.²⁹⁵

Additionally, several circuits have expressed disfavor with rigidly applying strict scrutiny to all content-based speech restrictions.²⁹⁶ One such example is in cases where courts were faced with disputes about the appropriate amount of protection that “professional speech”²⁹⁷ ought to be afforded.²⁹⁸ The cases from these circuits stand for the proposition that intermediate scrutiny applies to content-based restrictions in the context of professional speech. Some support this approach because it correctly balances the rights of professionals to speak with a state’s right to regulate the profession to advance the public interest.²⁹⁹

The reasoning expressed in the *Reed* concurrences, along the rationales supporting the application of intermediate scrutiny to professional speech, support applying intermediate scrutiny to the speech regulations put in place by social media companies. Clearly, private social media companies are very different entities than a government. A fundamental aspect of a social media company’s business model is advertising revenue from the videos uploaded by users, and these companies have a strong interest in maintaining relationships with those advertisers.³⁰⁰ In addition, they are arguably entitled to additional deference because the initial decision to restrict content is often performed by an algorithm due to the voluminous amount of content that needs to be reviewed on a daily basis.³⁰¹

What complicates this analysis, however, is the fact that the allegations against YouTube and Facebook have centered around viewpoint discrimination.³⁰² For example, Prager University contends

295. *Id.*

296. See Schutzman, *supra* note 243, at 2042.

297. *Id.* at 2033 (defining professional speech as “personalized” speech by a professional that occurs “in the context of a fiduciary-type relationship” between a professional and that professional’s client).

298. *Id.* at 2042 (presenting decisions from the Eleventh, Third, and Fourth Circuit that applied intermediate scrutiny to professional speech regulations).

299. *Id.* at 2053.

300. Wakabayashi & Maheshwari, *supra* note 70.

301. See Defendant’s Opposition to Plaintiff’s Motion for Preliminary Injunction at 4, *Prager Univ. v. Google LLC*, (N.D. Cal. Mar. 26, 2018) No. 17-CV-06064-LHK, 2018 BL 105688 (discussing the content regulation regime).

301. See *Reed*, 135 S. Ct. at 2226.

302. See *Prager Univ.*, 2018 WL 1471939 at *2.

that the many of their videos are placed into restricted mode, but many other videos created by liberal users are not placed into restrictive mode.³⁰³ It is at this level that the rationales supporting the approaches in the *Reed* concurrences break down. Those concurring justices emphasized the prudence of flexibility when it comes to applying the First Amendment, but they couched those positions in concessions that strict scrutiny is especially appropriate when viewpoint discrimination is afoot.³⁰⁴ Therefore, a Court should consider the flexibility that Justice Breyer advocated and depart from intermediate scrutiny if it is established that regulations are applied or created to discriminate based on viewpoint.³⁰⁵

Finally, the benefits of applying intermediate scrutiny to content-based restrictions on social media outweigh the costs. Although this tier of scrutiny has been criticized for its impact on *stare decisis* and promoting judicial activism, it is, at its core, a balancing test.³⁰⁶ In the context of social media platforms, it is essential to give due consideration to the reasons why these companies would restrict certain content. Intermediate scrutiny best strikes the appropriate balance between the importance of speech and the need for social media platforms to proactively manage content to further their legitimate business interests.³⁰⁷

IV. CONCLUSION

Social media companies have transformed the way in which we engage in the important conversations of our day.³⁰⁸ These companies are both influential and powerful and have signaled their desire to provide a platform for all ideas to be exchanged. But this ideal is not always achieved in practice. Social media companies have many good reasons to censor content which would not survive constitutional scrutiny. But censorship on these platforms, especially censorship that may involve political bias, should give us pause. This is especially true if legal recourse is unavailable due to the low likelihood that these companies will be deemed state actors. Regardless, this note has

303. *Id.*

304. *See Reed*, 135 S. Ct. at 2234–36 (Breyer, J., concurring).

305. *See id.* at 2235.

306. Wexler, *supra* note 239, at 300–01.

307. *See Jackson*, *supra* note 23, at 156.

308. Duggan & Smith, *supra* note 15.

argued that if the courts were to consider social media companies state actors, they ought to apply intermediate scrutiny because it strikes the best balance between expressive values and respect for the sovereignty of social media companies.³⁰⁹ Some may argue that those who allege censorship are free to join a different platform or create one of their own, but such a contention should also give us pause because of the likelihood that such a trend would further deepen the polarized state of our discourse.³¹⁰ It is time to once again to rethink our state action jurisprudence, as Dean Chemerinsky argued, by asking ourselves “why infringements of the most basic values—speech, privacy, and equality—should be tolerated just because the violator is a private entity rather than the government.”³¹¹

309. See Jackson, *supra* note 23, at 156.

310. See Amy Mitchell, et al., *Political Polarization & Media Habits*, PEW RESEARCH CTR.: JOURNALISM & MEDIA, (Oct. 21, 2014), <http://www.journalism.org/2014/10/21/political-polarization-media-habits/> [<https://perma.cc/ATE3-U48G>].

311. Chemerinsky, *supra* note 120, at 505.