THE PARTISAN SAMARITAN: THE COMMUNICATIONS DECENCY ACT AND THE MODERN INTERNET

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It is an undeniable reality that the modern era has become an age of unexpected and unprecedented technological and societal growth. Whether it be the testing of self-driving cars,[1] the introduction of augmented reality into the market,[2] or the advancements of 5G[3] and artificial intelligence technologies,[4] the very way citizens view the world is constantly shifting. Despite the impact of these technologies, their precursor, the Internet, dominates the public consciousness. It has pervasively entered almost every aspect of life. In the U.S., a 2019 Pew poll showed that ninety-four percent of adults have a cellphone of some kind, while eighty-one percent own smartphones.[5] In China, even the payment for fruit at a stand has transitioned to using a QR code and a phone through their massively popular WeChat app.[6] China has had to make it illegal to refuse to accept physical

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1. Alex Davies, *This Vehicle Has No Side-View Mirrors—and It's Legal*, WIRED (Feb. 6, 2020, 12:54 PM), https://www.wired.com/story/vehicle-no-side-view-mirrors-legal/.

2. *What Is Augmented Reality?*, THE FRANKLIN INST., https://www.fi.edu/what-is-augmented-reality (last visited Feb. 9, 2020).

3. *Everything You Need to Know About 5G*, QUALCOMM, https://www.qualcomm.com/invention/5g/what-is-5g (last visited Feb. 9, 2020).

4. *Artificial Intelligence: What It Is and Why It Matters*, SAS, https://www.sas.com/en_us/insights/analytics/what-is-artificial-intelligence.html (last visited Feb. 9, 2020); *Benefits & Risks of Artificial Intelligence*, FUTURE OF LIFE INST., https://futureoflife.org/background/benefits-risks-of-artificial-intelligence/?cn-reloaded=1 (last visited Feb. 9, 2020).

5. *Mobile Fact Sheet, Who Owns Cellphones and Smartphones*, PEW RSCH. CTR. (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/mobile/.

6. Shan Li, *Welcome to China. You Probably Can't Buy Anything, Though.*, WALL ST. J. (Nov. 10, 2019, 2:55 PM), https://www.wsj.com/articles/welcome-to-china-you-probably-cant-buy-anything-though-11573415753.

currency as their citizens shift to digital transactions.[7] The Internet makes the metamorphosis from physical to digital possible.

One of the greatest contributions of the Internet has been its capacity to facilitate communication. What once required proximity and soundwaves now moves instantly through cyberspace via Internet mediums, such as websites.[8] Among these, social media has become a dominant player. To illustrate, in 2019, seventy-two percent of American adults used some form of social media and seventy-three percent used YouTube.[9] Americans benefit immensely from these products, and the companies generate massive revenue from their services;[10] however, some have begun to wonder whether tech companies have too much power,[11] particularly regarding their capacity to censor speech under § 230 of the Communications Decency Act (hereinafter "the Act").[12]

Part I of this Note will explore the legislative interests that led to the passing of the Act, the powers it gives to social media companies, and the issue of censorship in the modern day. Part II will then investigate the creation, narrowing, and later abrogation of a resurging solution to private censorship through the analogy to the corporate town derived from *Marsh v. Alabama*[13] and *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*[14] Part III will explore the modern application of the standards in *Lloyd Corp. v. Tanner*,[15] *Hudgens v. NLRB*,[16] and *Jackson v.*

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7. *Id.*

8. *See* Manjul Tiwari, *Speech Acoustics: How Much Science?*, 3 J. NAT. SCI. BIOL. & MED. 24, 24 (2012).

9. *Social Media Fact Sheet*, PEW RSCH. CTR. (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/social-media/; Patrick Van Kessel, *10 Facts About Americans and YouTube*, PEW RSCH. CTR. (Dec. 4, 2019), https://www.pewresearch.org/fact-tank/2019/12/04/10-facts-about-americans-and-youtube/.

10. *See* Megan Graham, *Digital Ad Revenue in the US Surpassed $100 Billion for the First Time in 2018*, CNBC, https://www.cnbc.com/2019/05/07/digital-ad-revenue-in-the-us-topped-100-billion-for-the-first-time.html (May 7, 2019, 11:10 AM).

11. *See* Aaron Smith, *Public Attitudes Toward Technology Companies*, PEW RSCH. CTR. (June 28, 2018), https://www.pewresearch.org/internet/2018/06/28/public-attitudes-toward-technology-companies/ (finding that a net total of seventy-two percent of Americans in 2018 believe it likely that social media platforms censor political views); Dominic Rushe & Kari Paul, *'Too Much Power': Congress Grills Top Tech CEOs in Combative Antitrust Hearing*, THE GUARDIAN (July 29, 2020, 4:16 PM), https://www.theguardian.com/technology/2020/jul/29/tech-hearings-facebook-mark-zuckerberg-amazon-jeff-bezos-apple-tim-cook-google-sundar-pichai-congress.

12. 47 U.S.C. § 230.

13. Marsh v. Alabama, 326 U.S. 501 (1946).

14. Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).

15. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

Metropolitan Edison Co.[17] as applied to social media. Part IV will then reevaluate the analogy of the corporate town considering the Supreme Court's recent decision in *Packingham v. North Carolina*.[18] Part V will explain why the Court should continue to reject the analogy in respect of the separation of powers and the protection of private property owners.

I. COMMUNICATIONS DECENCY ACT OF 1996

When considering the development of the law, jurisprudence, and the threats to individual liberty, no person could have anticipated the technological expansion of the twentieth and twenty-first centuries. Though the development of early Internet technology began in the 1960s with the U.S. Defense Department, the privatization and proliferation of Internet resources began in the early 1990s.[19] Before 1998, the National Science Foundation, created and funded by the U.S. government, managed the Internet before turning over control to the commercial sector.[20] Internet services proliferated and—as with any new forum of human activity—so too did legal conflict.

A. Protecting the Good Samaritan

In 1996, Congress passed the Communications Decency Act codified in 47 U.S.C. § 230.[21] Courts considered the Act a response to the holding of *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[22] wherein the Supreme Court of New York held that an Internet network was liable for the information published on its service because the network exercised editorial control.[23] Prodigy hosted a computer bulletin upon which over 60,000

16. Hudgens v. NLRB, 424 U.S. 507 (1976).

17. Jackson v. Metro. Edison Co., 419 U.S. 345 (1974).

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

19. David Hart, *A Brief History of NSF and the Internet*, NAT'L SCI. FOUND. (Aug. 13, 2003), https://www.nsf.gov/news/news_summ.jsp?cntn_id=103050.

20. *Id.*

21. 47 U.S.C. § 230.

22. Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 031063/94, 1995 WL 323710, at *1 (N.Y. Sup. Ct. May 24, 1995).

23. *Id.* at *1, *5; Zeran v. Am. Online, Inc., 129 F.3d 327, 331 (4th Cir. 1997) ("Another important purpose of § 230 was to encourage service providers to self-regulate the dissemination of offensive material over their services. In this respect, § 230 responded to a New York state court decision, *Stratton*

messages were posted a day; the bulletin featured content guidelines and board leaders to enforce those guidelines.[24] There were so many posts that Prodigy had long stopped manual review of all of the posts but retained the capacity to delete posts.[25] The court held that this constituted sufficient editorial control over the posts that, despite the vast amount of messages, Prodigy could be held as a publisher of the information with "the same responsibilities as a newspaper."[26] However, such a holding imposed an incommensurate burden upon Internet service providers in comparison to the scope of their forum and thereby acted as a deterrence from self-monitoring for fear of liability.[27]

Congress desired to promote the growth of the Internet and stop the precedent set by *Prodigy* from chilling self-regulation by Internet service providers; how could a service provider be expected to sift through every communication made on their service?[28] In response, the Act removed such potential liability from Internet service providers:

> **(1) Treatment of publisher or speaker**
>
> No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.
>
> **(2) Civil liability**
>
> No provider or user of an interactive computer service shall be held liable on account of—
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected[.][29]

The Act defines an interactive computer service (hereinafter "ICS") as "any information service, system, or access software provider that provides

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Oakmont, Inc. v. Prodigy Servs. Co."); *See* Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1162–63 (9th Cir. 2008); RODNEY A. SMOLLA, LAW OF DEFAMATION § 4:86 (2d ed. 2020), Westlaw.

24. *Stratton Oakmont*, 1995 WL 323710, at *1–3.
25. *Id.* at *3.
26. *Id.* at *3, *5.
27. *See* SMOLLA, *supra* note 23.
28. *Zeran*, 129 F.3d at 331; *see* SMOLLA, *supra* note 23.
29. 47 U.S.C. § 230(c)(1)–(2)(A).

or enables computer access by multiple users to a computer server."[30] The Act also defines a similar yet distinct term: an "information content provider" (hereinafter "ICP") is "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."[31] An ICS creates the infrastructure for others to post their content.[32]

For illustration, consider the relationship between an ICS and ICP to that of a newspaper and its authors. The newspaper acts as a forum or infrastructure (the ICS) of content provided by its authors (the ICP). The newspaper is considered a publisher through its exercise of editorial control and is therefore exposed to "increased liability."[33] Once considered a publisher, the one who reposts the content of another is liable for the content as if they were the original speaker.[34] Prior to the Act, an ICS that exercised any editorial control was treated analogously to a newspaper and held liable as if they created the content in the first place.[35] However, it is far more difficult to monitor a forum on the Internet than it is to check the content of a newspaper that is about to be published. Rather than chill Internet forums away from accepting user content, Congress decided to promote the development of the Internet and the self-monitoring of ICSs with the inclusion of two immunities in the Act.[36]

First, ICSs are not to be treated as publishers of content provided by another.[37] Second, ICSs may voluntarily act "in good faith to restrict access to" objectionable content without liability.[38] The second immunity is referred to as the "Good Samaritan" immunity.[39] Just as the Good Samaritan in the Bible stopped to aid the wounded man along the road with no duty beyond that owed to his fellow man,[40] so too did Congress intend for ICSs to exercise their good faith discretion while traversing the virtual desert.

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30. *Id.* § 230(f)(2).

31. *Id.* § 230(f)(3).

32. *See id.* § 230(f)(2).

33. Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710, at *1, *3 (N.Y. Sup. Ct. May 24, 1995).

34. *Id.*

35. *Id.* at *3, *5; RESTATEMENT (SECOND) OF TORTS: LIAB. OF REPUBLISHER § 578 (AM. L. INST. 1977).

36. 47 U.S.C. § 230(b)–(c).

37. *Id.* § 230(c)(1).

38. *Id.* § 230(c)(2).

39. *Id.* § 230(c).

40. *Luke* 10:25–37.

Courts determine whether an entity is an ICS or ICP by the character of the challenged action; an entity may be an ICS by hosting a forum but be an ICP in regard to its own posts on that forum.[41] For example, Facebook may be an ICS by hosting profiles provided by others but be an ICP by making public service announcements or posts on those hosted profiles.[42] Services such as Facebook, Twitter, Google, and Craigslist have all been considered ICSs and granted such protection.[43]

B. Too Much Protection, Too Much Power

The Internet has kept up its expansive growth, and ICSs have been allowed to create a "flourishing middle ground" between declining to monitor their platform and highly curating their content for fear of liability.[44] However, concerns as to the broad discretion given to ICSs to remove content they find "objectionable"[45] have even moved members of Congress to accuse ICSs of acting with political bias and having too much control over public discourse.[46] The fear of an Orwellian despotism by tech giants has incited many to speak out against them for "the online world that was supposed to bring us together and tear down the last bastions of censorship has instead created the greatest censorship and surveillance infrastructure the world could ever imagine."[47] Examples of censorship accusation come from both sides of the political spectrum. Live Action, a pro-life organization, levied accusations of censorship against Facebook in September 2019.[48]

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41. *See* Fair Hous. Council v. Roommates.com, LLC, 521 F.3d 1157, 1162–63 (9th Cir. 2008).

42. *See* Maynard v. Snapchat, Inc., 816 S.E.2d 77, 79–81 (Ga. Ct. App. 2018).

43. *E.g.*, Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014) (holding Facebook is an ICS); Fields v. Twitter, Inc., 217 F. Supp. 3d 1116, 1121 (N.D. Cal. 2016) (holding Twitter is an ICS); Dowbenko v. Google Inc., 582 F. App'x 801, 805 (11th Cir. 2014) (holding Google is an ICS); Chi. Laws.' Comm. for C.R. Under L., Inc. v. Craigslist, Inc., 519 F.3d 666, 671–72 (7th Cir. 2008) (holding Craigslist is an ICS).

44. Letter from Elizabeth Banker, Deputy Gen. Couns., Internet Ass'n, to William Barr, Att'y Gen., U.S. Dep't of Just. (Feb. 27, 2020) (on file with author).

45. 47 U.S.C. § 230(c)(2)(A).

46. *See* STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., REINING IN BIG TECH'S CENSORSHIP OF CONSERVATIVES (2020).

47. Kalev Leetaru, *Is Twitter Really Censoring Free Speech?*, FORBES (Jan. 12, 2018, 5:06 PM), https://www.forbes.com/sites/kalevleetaru/2018/01/12/is-twitter-really-censoring-free-speech/#8992d8b65f5c.

48. Christopher Carbone, *Facebook's Zuckerberg Says There 'Clearly was Bias' in Controversy over 'Censorship' of Pro-life Group Live Action*, FOX NEWS (Sept. 20, 2019), https://www.foxnews.com/tech/facebooks-zuckerberg-bias-censorship-pro-life-live-action.

Tulsi Gabbard, a Democratic candidate for president, sued Google for hindering her campaign.[49] In a Judiciary Committee hearing, House Representative Jim Jordan flatly stated that, "big tech is out to get conservatives" and referenced a plethora of alleged instances of censorship before the CEOs of Amazon, Facebook, and Google.[50] Such tension has arisen that former President Trump released an Executive order attempting to limit the scope of the immunity to deny protection to "those who purport to provide users a forum for free and open speech, but in reality use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints."[51] The Internet has become increasingly popular as the medium for cultural and political dialogue and the need to protect the public has been the cause for Executive action and oversight by both the House and Senate.[52]

While many believe the best recourse to such alleged abuse would be through the legislature,[53] some have argued that the public's interests should be protected more fundamentally by the First Amendment.[54] Such a concept has traditionally been barred by the state actor limitation.[55] However, recent language by the Supreme Court[56] has breathed a new life to consider ICSs as state actors: the analogy to corporate towns.[57]

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49. Daisuke Wakabayashi, *Tulsi Gabbard, Democratic Presidential Candidate, Sues Google for $50 Million*, N.Y. TIMES (July 25, 2019), https://www.nytimes.com/2019/07/25/technology/tulsi-gabbard-sues-google.html.

50. House Judiciary, *Online Platforms and Market Power: Examining the Dominance of Amazon, Apple, Facebook, and Google*, YOUTUBE (July 29, 2020), https://youtu.be/WBFDQvIrWYM.

51. Exec. Order No. 13925, 85 Fed. Reg. 34079, 34080 (May 28, 2020).

52. *Id.*; *Facebook CEO Testimony Before House Financial Services Committee*, C–SPAN (Oct. 23, 2019), https://www.c-span.org/video/?465293-1/facebook-ceo-testimony-house-financial-services-committee; *Google and Censorship*, C–SPAN (July 16, 2019), https://www.c-span.org/video/?462661-1/senate-judiciary-hearing-google-censorship.

53. *Google and Censorship*, *supra* note 52.

54. *E.g.*, Jonathan Peters, *The "Sovereigns of Cyberspace" and State Action: The First Amendment's Application—or Lack Thereof—to Third-Party Platforms*, 32 BERKELEY TECH. L.J. 989, 1024 (2017); Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M. L. REV. 121, 146–51 (2014); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1612–13 (2018).

55. *See* discussion *infra* Section II.B.

56. Packingham v. North Carolina, 137 S. Ct. 1730, 1735–36 (2017).

57. *See infra* Section II.A.

II. LEGAL BACKGROUND OF THE CORPORATE TOWN

A. Expansion

The founding fathers argued for a Bill of Rights to defend the people from the threat of a centralized federal government.[58] Accordingly, the Supreme Court has strictly applied the restriction of the First Amendment to the Federal government, and, through the Supremacy Clause, all state actors.[59] However, the Court has occasionally ventured so far as to hold private actors as state actors under certain circumstances.

Marsh v. Alabama is the seminal case and founding analogy for considering a private entity to be a state actor.[60] In that case, Gulf Shipbuilding Corporation owned a town named Chickasaw, Alabama.[61] It "ha[d] all the characteristics of any other American town[,]" including streets, sewers, a company paid sheriff, stores, and services such as sewage disposal.[62] Appellant, a Jehovah's Witness, attempted to distribute religious literature but was warned she was on Gulf Shipbuilding Corporation's private property and had to leave.[63] She refused, was arrested, and was convicted pursuant to an Alabama statute that "[made] it a crime to enter or remain on the premises of another after having been warned not to do so."[64] She appealed to the Alabama Court of Appeals, which affirmed her conviction.[65] The Alabama Supreme Court denied her petition for certiorari,

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58. *See, e.g.*, *To James Madison from Thomas Jefferson*, FOUNDERS ONLINE, NAT'L ARCHIVES & RECS. ADMIN. (Dec. 20, 1787), https://founders.archives.gov/documents/Madison/01-10-02-0210 ("[A] bill of rights is what the people are entitled to against every government on earth . . . ."); JAMES MADISON, SPEECH INTRODUCING PROPOSED CONSTITUTIONAL AMENDMENTS (1789), *reprinted in* THE AMERICAN REPUBLIC: PRIMARY SOURCES 332, 337 (Bruce Frohnen ed., Liberty Fund 2002) ("[I]f all power is subject to abuse, that then it is possible the abuse of the powers of the General Government may be guarded against in a more secure manner than is now done . . . ."); BRUTUS, ESSAY I (1787), *reprinted in* THE AMERICAN REPUBLIC: PRIMARY SOURCES, *supra* at 314, 314–19.

59. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 567 (1972) ("[T]he First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only."); Gitlow v. New York, 268 U.S. 652, 666–70 (1925); Schneider v. New Jersey, 308 U.S. 147, 160–65 (1939).

60. Marsh v. Alabama, 326 U.S. 501, 509–10 (1946).

61. *Id.* at 502.

62. *Id.*

63. *Id.* at 503.

64. *Id.* at 503–04.

65. Marsh v. State, 21 So. 2d 558, 563 (Ala. Ct. App. 1945), *rev'd sub nom.* Marsh v. Alabama, 326 U.S. 501 (1946).

but the United States Supreme Court granted review and reversed her conviction.[66]

The issue before the Supreme Court was whether a private property owner operating a company town was subject to constitutional restraints.[67] The Court rejected the argument that the corporation had absolute control over the town by virtue of its private ownership rights.[68] The State argued that "the corporation's right to control the inhabitants of Chickasaw [was] coextensive with the right of a homeowner to regulate the conduct of his guests."[69] However, the Court responded with the principle that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[70] Thus, owners of private roads or bridges are subject to restraints as they are "operated primarily to benefit the public and . . . their operation is essentially a public function."[71] The Court continued, "[w]hether a corporation or a municipality owns or possesses the town[,] the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free."[72] The Court held that the property rights of the corporation were insufficient "to justify" a restriction of the "fundamental liberties" possessed by "a community of citizens."[73]

This analysis of the public function of the town and the extent of its invitation to the public resulted in a balancing test between the "Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion."[74] The municipal character and public function of the land acted as factors in the analysis in determining that the private property interests of the Gulf Shipbuilding Corporation were insufficient to deprive the people of their fundamental liberty.[75]

66. *Marsh*, 326 U.S. at 504, 509–10.
67. *Id.* at 502.
68. *Id.* at 505–06.
69. *Id.*
70. *Id.* at 506.
71. *Id.*
72. *Id.* at 507.
73. *Id.* at 509.
74. *Id.*
75. *See id.* at 507–08.

Marsh provides the broadest analogical framework by which to balance Constitutional and private rights.[76] The fundamental liberties and interests of the public can supersede the private interests of individuals and subject private actors to Constitutional scrutiny.[77] Such a comparison between private and public interests was manifestly simple when the only difference between Chickasaw and an ordinary town was its ownership.[78] However, such expansive precedent required further development.

In 1968, the Court applied and further expanded the *Marsh* holding in *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc*.[79] This case concerned picketing by a union on the grounds of a privately-owned mall.[80] The mall sued for an injunction against the picketers—which was granted by the Pennsylvania Court of Common Pleas, Pennsylvania's trial court—that required that "all picketing be carried on along the berms beside the public roads outside the shopping center."[81] This injunction was upheld indefinitely after an evidentiary hearing by that Pennsylvania court.[82] The Supreme Court granted certiorari and reversed, repeating the holding in *Marsh* that, "[o]wnership does not always mean absolute dominion" and stating, in this case, that "Logan Valley Mall is the functional equivalent of a 'business block' and for First Amendment purposes must be treated in substantially the same manner."[83] It reasoned that because "[t]he general public ha[d] unrestricted access to the mall property" for its free use, "[t]he shopping center [] is clearly the functional equivalent of the business district of Chickasaw involved in *Marsh*."[84] Accordingly, the Court treated the mall as the equivalent of a business area of a municipality.[85] It compared this municipal area to "streets, sidewalks, parks, and other similar public places" that were "so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights [could not] constitutionally be denied

76. *Id*. at 509.

77. *Id.*

78. *Id*. at 502.

79. Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 316–25 (1968).

80. *Id*. at 310–11.

81. *Id*. at 312.

82. *Id.*

83. *Id*. at 325.

84. *Id.* at 318.

85. *Id.* at 315, 325.

broadly and absolutely."[86] It felt it necessary to expand the conception of municipal or state property due to the societal and economic advances of the day.[87]

The Court reasserted that the decision in *Marsh* was correct as it responded to the needs of a developing society: it provided flexibility.[88] The Court stated:

> The economic development of the United States in the last 20 years reinforces our opinion of the correctness of the approach taken in *Marsh*. The large-scale movement of this country's population from the cities to the suburbs has been accompanied by the advent of the suburban shopping center, typically a cluster of individual retail units on a single large privately owned tract. It has been estimated that by the end of 1966 there were between 10,000 and 11,000 shopping centers in the United States and Canada, accounting for approximately 37% of the total retail sales in those two countries.[89]

The Court continued that individuals have a vested interest in being able to challenge the conditions of such shopping centers.[90] The Court was responding to the variance between the capacity to criticize working conditions in urban and suburban communities and how suburban shopping centers could "largely immunize themselves . . . by creating a *cordon sanitaire* of parking lots around their stores."[91] The *Marsh* doctrine allowed the Court to respond to the developing modern world and its new assortment of forum and fixtures.[92] The Court turned private property into public fora to make sure that speakers could reach their intended audience.[93]

B. Narrowing

Four years later, the Supreme Court read *Marsh* narrowly in *Lloyd Corp. v. Tanner*,[94] in which it stated that private actors must exercise "municipal

86. *Id.* at 315–16.
87. *See id.* at 324–25.
88. *See id.*
89. *Id.* at 324.
90. *Id.* at 324–25.
91. *Id.*
92. *See id.*
93. *Id.*
94. Lloyd Corp. v. Tanner, 407 U.S. 551, 562–63 (1972).

functions or power" to be treated as state actors.[95] *Lloyd Corp.* concerned leafletting at the Lloyd Center, a privately owned mall open to the public.[96] Respondents were distributing handbills on the property to protest the Vietnam War until mall security threatened to have them arrested unless they stopped.[97] Respondents left and brought suit against the Center.[98] The District Court stressed "that the Center '[was] open to the general public,'" and "the functional equivalent of a public business district."[99] The court held that the Center's prohibition on leafletting was an infringement on respondents' First Amendment rights.[100] The Appellate Court affirmed in a per curiam opinion, stating that they were "bound by the 'factual determination' as to the character of the Center."[101] The Supreme Court reversed both the district and appellate court, rejecting the proposition that "people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please."[102]

Distinguishing the facts of *Lloyd Corp.* from *Marsh*, the Court stated that while in *Marsh*, "the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State," in this case, there "is no comparable assumption or exercise of municipal functions or power."[103] The Court rejected the appellees' argument that because such a business district has "sidewalks, streets, and parking areas which are functionally similar to facilities customarily provided by municipalities[,]" the public has the same free speech rights they would have on similar public facilities.[104] "Th[is] argument," the Court stated, "reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use."[105] Although open to the public, the mall did not "lose its private character merely because the public is generally invited to use it for designated purposes."[106] The Court recognized that

95. *Id.* at 569.
96. *Id.* at 553–56.
97. *Id.* at 556.
98. *Id.*
99. *Id.*
100. *Id.* at 556–57.
101. *Id.* at 556.
102. *Id.* at 568, 570.
103. *Id.* at 569.
104. *Id.* at 568–69.
105. *Id.* at 569.
106. *Id.*

balancing private property interests against the individual right of free expression might be required in some instances; however, a precondition for such an analysis was that the private entity essentially act as the State.[107] The Court did not expressly overrule *Logan Valley* but laid the groundwork to do so.

Four years later, in *Hudgens v. NLRB*,[108] the Supreme Court expressly limited *Marsh* and found *Logan Valley* incompatible with the state of the law.[109] Hudgens owned a shopping center in Georgia which hosted several stores.[110] A union of employees rose up against one of the stores and went on strike.[111] The union picketed within the mall and directly outside the entrances until threatened with arrest for trespass.[112] The union brought suit against the mall under *Logan Valley* and succeeded on First Amendment grounds.[113] The Court acknowledged that its decision in *Lloyd Corp.* "amounted to a total rejection of the holding in *Logan Valley*[,]"[114] and restated the essential holding in *Lloyd Corp.* that there was no dedication of the privately owned and operated shopping center to public use that could justify extension of the First Amendment to the shopping center.[115] As *Lloyd Corp.* held that the respondents had no First Amendment right to enter the shopping center, the *Hudgens* Court held that "the constitutional guarantee of free expression ha[d] no part to play" in this case.[116] The Court also elaborated on its treatment of *Marsh*, emphasizing that the rule in *Marsh* was limited to cases in which the private actor performs the "full spectrum of municipal powers," thereby standing "in the shoes of the State."[117] This narrowing only continued.

In *Jackson v. Metropolitan Edison Co.*,[118] even a heavily regulated electricity service was "not sufficiently connected" with the State as to subject it to constitutional scrutiny.[119] While *Marsh* focused upon the nature

107. *See id.* at 567–69.
108. Hudgens v. NLRB, 424 U.S. 507 (1976).
109. *Id.* at 517–18, 521.
110. *Id.* at 509.
111. *Id.*
112. *Id.*
113. *Id.* at 509–10.
114. *Id.* at 518 (alteration in original).
115. *Id.* at 519–20.
116. *Id.* at 520–21.
117. *Id.* at 519.
118. Jackson v. Metro. Edison Co., 419 U.S. 345 (1974).
119. *Id.* at 358–59.

of the space and fundamental liberty interests of the public,[120] *Jackson* focused on a nexus between state action and the private entity.[121] The Court in *Jackson* rejected *Marsh*'s "public function" test.[122] Though the Court recognized that the private utility company provided an "essential public service," it refused to characterize the private utility as a state actor as it was not exercising "powers traditionally [and] exclusively reserved to the State."[123] The inquiry was "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[124] It recognized two ways of establishing such a connection: affirmative support for the private action or a relationship of interdependence between the State and private actor.[125] Accordingly, since *Jackson*, the state of law is that a private entity could only be treated as a state actor if there is a sufficient nexus between the state and the actor as to fairly treat them as the state.[126] This requires some affirmative action or acquiescence of authority by the State, whether it be the nexus test,[127] joint participation,[128] or entwinement.[129]

C. The Analogy in Summary

Until *Lloyd Corp.*, *Marsh* stood for the proposition that even the owners of private property may subject themselves to constitutional limitations by opening their property to the general public.[130] When the public becomes so invested in an institution that their expectations amount to those for roads, bridges, or sidewalks, those institutions expose themselves to constitutional restraints upon their conduct.[131] *Logan Valley* showed that the resulting interest balancing test for such a space was a flexible inquiry that could

120. Marsh v. Alabama, 326 U.S. 501, 507–09 (1946).
121. *Jackson*, 419 U.S. at 351.
122. *Id.* at 352–53.
123. *Id.*
124. *Id.* at 351.
125. *Id.* at 356–57.
126. *Id.* at 351.
127. *Id.* at 357–59.
128. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).
129. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 300–02 (2001).
130. Marsh v. Alabama, 326 U.S. 501, 506 (1946).
131. *Id.*

respond to the societal developments and needs of the time.[132] The Court in *Lloyd Corp.* shifted in defense of the private property owner's interest.[133] The property owner's invitation to the public was for the purposes of facilitating commerce.[134] Even if the public is invited upon the property, it does not lose its private character.[135] *Hudgens* built upon *Lloyd Corp.*, expanding First Amendment application, and demonstrated that the property must be municipal in all ways except in ownership.[136] *Jackson* cemented this tenet by requiring a nexus between the State and the private actor, thereby adding a third party, the government, to the analysis.[137] The interest balancing test of *Marsh* was all but lost in the inquiry behind the insurmountable state actor limitation.[138] What is more, requiring an exercise of traditional state powers removed the flexibility under *Logan Valley* that had allowed the Court to respond to new economic and technological concerns.[139]

III. THE NEW FRONTIER OF SOCIAL MEDIA AND A NARROW *MARSH*

The case law had seemed settled on the matter of the state actor limitation, but no one could have expected the rise of the Internet, let alone how it would become central to public dialogue and communication. Internet service providers flourished under the Act, and, as expressive speech moved online, so too did accusations that ICSs were abusing their discretionary authority.[140] Lower courts have applied the narrow interpretation of *Marsh*, making no distinction between physical and cyber spaces.[141]

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132. *See* Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 324–25 (1968).

133. Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972).

134. *See id.* at 564–65.

135. *Id.* at 569.

136. Hudgens v. NLRB, 424 U.S. 507, 520–21 (1976).

137. Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

138. *See id.*

139. *Id.* at 352–53.

140. *See* Prager Univ. v. Google LLC, No. 17-CV-06064, 2018 WL 1471939, at *1 (N.D. Cal. Mar. 26, 2018); Quigley v. Yelp, Inc., No. 17-cv-03771, 2017 U.S. Dist. LEXIS 103771, at *1 (N.D. Cal. Jul. 5, 2017).

141. *See* Quigley v. Yelp, Inc., No. 17-CV-03771, 2018 WL 7204066, at *3–4 (N.D. Cal. Jan. 22, 2018); *Prager Univ*., 2018 WL 1471939, at *1.

In *Prager University v. Google LLC*,[142] the plaintiff alleged that Google and its subsidiary YouTube had discriminated against it based on its conservative political identity, despite defendant's alleged content neutrality.[143] Plaintiff argued that Google holds "YouTube out to the public as a forum intended to defend and protect free speech where members of the general public may speak, express, and exchange their ideas."[144] The plaintiff argued that YouTube could be considered a state actor under the *Marsh* public function test because "[d]efendants hold YouTube out 'as a public forum dedicated to freedom of expression to all' and 'a private property owner who operates its property as a public forum for speech is subject to judicial scrutiny under the First Amendment.'"[145] The court conceded that some language in *Marsh* supported the plaintiff's claim, but stated that the case law, culminating in *Hudgens*, defeated such analysis.[146] It stated that only a very small list of activities are traditionally exercised by the government:

> Defendants do not appear to be at all like, for example, a private corporation that governs and operates all municipal functions for an entire town,[147] or one that has been given control over a previously public sidewalk or park,[148] or one that has effectively been delegated the task of holding and administering public elections.[149]

Not only must a private actor exercise a traditional function of the government, but they must also exercise a power that is exclusively performed by it.[150] Though the government participates in the dissemination of news and the fostering of debate, that function is not exclusive to the government.[151] The court held that private actors are not "state actors subject to First Amendment scrutiny merely because they hold out and operate their private property as a forum for expression of diverse points of view."[152]

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142. *Prager Univ.*, 2018 WL 1471939, at *1.
143. *Id.* at *2.
144. *Id.* at *1.
145. *Id.* at *5–6.
146. *Id.* at *6–8.
147. *Id.* at *8 (citing Marsh v. Alabama, 326 U.S. 501, 507–09 (1946)).
148. *Id.* (citing Evans v. Newton, 382 U.S. 296, 301 (1966)).
149. *Id.* (citing Smith v. Allwright, 321 U.S. 649, 664 (1944)).
150. *Id.* at *5–6.
151. *See id.* at *8.
152. *Id.*

In *Quigley v. Yelp, Inc.*, the plaintiff had been blocked from commenting on multiple ICSs: Yelp, Disney, Twitter, Facebook, and the Washington Times.[153] He sought a temporary restraining order, claiming that the ICSs should be considered state actors. He alleged that a sufficient nexus existed between these private entities and the State as these ICSs provided a public function by disseminating news and fostering debate, the government had financed the creation of the internet and uses these services to collect information on the electorate, and because the government maintains accounts on their websites.[154] In the court's order denying the motion, it denied the plaintiff's claim that the government's mere use of the ICSs constituted sufficient entanglement to consider them state actors.[155] It wrote, "[p]laintiff does not argue the government participates in the operation or management of defendants' websites; he merely argues the government uses the defendants' websites in the same manner as other users. This is not sufficient to show state action."[156] The government must take affirmative action to create a nexus with the private entity that extends beyond the manner any other user might use the service.[157]

IV. A NEW DICTA DIRECTION?

The courts have traditionally upheld the precedent derived from *Lloyd Corp.*, *Hudgens*, and *Jackson* whereby they abandon the expanded public function test of *Marsh*.[158] However, the rise of technology and cyberspace as a forum for speech has created another "economic development" akin to *Logan Valley*.[159] The rise of cyberspace forces a reevaluation of the law and "the once off-the-wall theory that [ICSs] should count as state actors for First Amendment purposes is starting to look a bit more on the table."[160] While

153. Quigley v. Yelp, Inc., No. 17-cv-03771, 2017 U.S. Dist. LEXIS 103771, at *1 (N.D. Cal. Jul. 5, 2017).

154. *Id.* at *1; Quigley v. Yelp, Inc., No. 17-CV-03771, 2018 WL 7204066, at *3–6 (N.D. Cal. Jan. 22, 2018).

155. *Quigley*, 2017 U.S. Dist. LEXIS 103771, at *6.

156. *Id.* at *7.

157. *See id.* at *6–7.

158. *See* Prager Univ. v. Google LLC, No. 17-CV-06064, 2018 WL 1471939, at *1, *8 (N.D. Cal. Mar. 26, 2018); *Quigley*, 2018 WL 7204066, at *3–4.

159. *See* Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 324 (1968).

160. Heather Whitney, *Search Engines, Social Media, and the Editorial Analogy*, *in* EMERGING THREATS, KNIGHT FIRST AMENDMENT INST. COLUM. U. 24 (David Pozen ed., 2018),

the Court had moved from evaluating speech in relation to its spatial context to determine whether a nexus exists between state action and the private property owner, *Packingham v. North Carolina*[161] may represent a return to the principles of *Logan Valley*.

In *Packingham*, North Carolina had passed a law that made "it a felony for a registered sex offender 'to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.'"[162] Petitioner Lester Packingham, a registered sex offender, posted to Facebook in 2010 to celebrate and thank God for a positive day in traffic court.[163] The authorities saw the post and traced the post to Packingham.[164] As a registered sex offender, he was indicted by a grand jury for accessing a social media site in violation of the state law.[165] The state appellate court reversed on First Amendment grounds, but the Supreme Court of North Carolina rejected the argumentation of the appellate court and affirmed the constitutionality of the statute.[166] The United States Supreme Court reversed, stating that "[i]t is well established that, as a general rule, the Government 'may not suppress lawful speech as the means to suppress unlawful speech.' That is what North Carolina has done here. Its law must be held invalid."[167] This case dealt directly with a government entity and the First Amendment rights of a citizen; however, the language of the Court hearkens back to the central principles of *Marsh* in support of the corporate town analogy.

The Court began by returning to the fundamental principles of the First Amendment to provide context for their decision.[168] It stated, "[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak

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https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3130724 (choose "Download This Paper" or "Open PDF in Browser").

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

162. *Id.* at 1733.

163. *Id.* at 1734 (posting: "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No fine, no court cost, no nothing spent. . . . Praise be to GOD, WOW! Thanks JESUS!").

164. *Id.*

165. *Id.*

166. *Id.* at 1734–35.

167. *Id.* at 1738 (citation omitted) (quoting Ashcroft v. Free Speech Coal., 535 U.S. 234, 255 (2002)).

168. *Id.* at 1735.

and listen once more."[169] In protection of these rights, the Court enshrined the right to speak in certain "spatial context[s]."[170] Certain fora were protected areas for the public to exercise their right to speak.[171] A repeated tenet of such protection "is that a street or a park is a quintessential forum for the exercise of First Amendment rights."[172] Though communication has become digital and easily accessible, "[e]ven in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire."[173] In deciphering which forum was the most important "in a spatial sense," the Court said "the answer is clear. It is cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular."[174] So massive is this forum that "[s]even in ten American adults use at least one Internet social networking service" and "three times the population of North America" use Facebook.[175] In humility, the Court expressed:

> [W]e cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.[176]

The Internet is such a pervasive and changing medium for communication that not only must the law be willing to reevaluate itself, but it must be willing to consistently reevaluate itself with the rapid pace of technology.[177]

Such a background seems to parallel the language of *Logan Valley* that called for judicial flexibility in the wake of the urbanization of society and the emerging challenges of the city space.[178] What seems remarkable about *Packingham* is that it makes an effort to consider the freedom of speech in

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169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* (citation omitted).
175. *Id.*
176. *Id.* at 1736.
177. *See id.*
178. *See* Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 324–25 (1968).

relation to its spatial context first: it focuses on a fundamental rights analysis in relation to the forum.[179] The language, as well as the form of the argument, parallels *Logan Valley*: societal development necessitates flexibility in the law and a return to the balancing of fundamental rights and liberties.[180] Though the Court does not address the state actor limitation, if it were to apply this spatial analysis of fundamental liberties to communication on an ICS's forum, its analysis could very well resemble *Marsh* and *Logan Valley*.

It is this broad language of the Court that moved Justices Alito and Thomas to concur separately in the case.[181] Justice Alito wrote, "I cannot join the opinion of the Court, however, because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks."[182] He continued, "this language is bound to be interpreted by some to mean that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any internet sites[.]"[183] However, it would seem the possible consequences of their dicta go further: to equate the Internet to public streets and parks would be to directly contradict the Court in *Lloyd Corp.* and result in the dedication of the Internet to public use as a public forum.[184] If the Internet generally is a protected forum for free expression, then each of its divisions could be accordingly protected: such as Facebook, Google, Twitter, etc. *Packingham* may represent an invitation by the Court to reintroduce the language of *Marsh* and *Lloyd Corp.* for a fundamental interest balancing analysis.

Following *Packingham*, the responsibilities of ICSs have not been clarified, but rather left in a quagmire. In *Knight First Amendment Institute at Columbia University v. Trump*,[185] President Trump banned several individuals from his Twitter account.[186] They sued, alleging that the President participated in unconstitutional discrimination.[187] The court held that President Trump created a public forum on his Twitter page and was

179. *Packingham*, 137 S. Ct. at 1735–36.
180. *See id.*; *Logan Valley*, 391 U.S. at 324–25.
181. *Packingham*, 137 S. Ct. at 1738 (Alito, J., concurring).
182. *Id.*
183. *Id.*
184. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972).
185. Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019).
186. *Id.* at 232.
187. *Id.* at 233.

thereby unable to discriminate against the public's use of the forum.[188] This narrow holding focused on a forum created by the Executive, a clear state actor.[189] However, the court went out of its way to say that it was not considering "whether private social media companies are bound by the First Amendment when policing their platforms."[190] According to the court, the question was still at play.[191]

In addition, the court did not address the corresponding role or duties implicated by such a decision to the hosting Internet service provider. If a social media page were to be considered a designated public forum, would an ICS be able to remove content from it? Would this be sufficient entanglement to consider the ICS a state actor? Lower courts have consistently held that ICSs can restrict a user's ability to post content on their network, but the Supreme Court has not weighed in on the subject and what limitations may exist when the user is the President of the United States.[192]

V. THE ARGUMENT AGAINST FIRST AMENDMENT APPLICATION

A. Considering a Judiciary Resolution by First Amendment Expansion

As the Supreme Court has not yet addressed whether the First Amendment governs the responsibilities of ICSs in monitoring their platforms, some have called for the Court to expand the application of the First Amendment to ICSs.[193] The argument appeals to a fundamental principle of free speech: protecting speech where it actually occurs.[194] The Court has adapted and even expanded constitutional jurisprudence to address the interests of the modern era,[195] but to implement the corporate town analogy would require an expansion of both the state actor limitation and the public forum analysis.[196] Not only would such shift in jurisprudence be

188. *Id.* at 237.

189. *See id.* at 234–37.

190. *Id.* at 230.

191. *See id.* at 230, 237.

192. VALERIE C. BRANNON, CONG. RSCH. SERV., R45650, FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT 9 (2019).

193. Peters, *supra* note 54, at 1019.

194. *Id.*

195. *E.g.*, South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2095 (2018); Riley v. California, 573 U.S. 373, 401–03 (2014).

196. *See supra* Section II.D.

unlikely, due to the recent affirmation of *Hudgens*,[197] but it would be incommensurate with maintaining the separation of powers.

As discussed above, *Marsh* and *Logan Valley* represent a manner of avoiding the state actor limitation by returning to a fundamental interest balancing test as expressed in *Marsh*: "[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."[198] Jonathan Peters argues that "*Marsh* should be expanded and read functionally."[199] Such an approach would require not only the expansion of the state actor limitation, but also the public forum analysis.[200] Jonathan Peters states further that a "state action theory suitable for the digital world ought to respect the importance of free expression as a means to personal development and self-fulfillment."[201] A "traditional approach" to the state actor limitation does not protect free expression "where it actually occurs" and "can be an 'affront to the dignity' of an individual user."[202] He argues in the alternative that "a state action theory based on an expanded *Marsh* would allow courts to compare public and private spaces more generally to assess whether a private space is functionally public."[203] This assessment would be guided by "(1) the nature of the private property interests at issue, and (2) whether the space is operated for general use by the public for expressive purposes, or whether the operation is itself a public function."[204] Such an approach would allow greater flexibility in an age of rapid technological growth.[205]

However, the Court has rejected removing the distinction between the state actor and the public forum analysis. In *Manhattan Community Access Corp. v. Halleck*, the Court held, in a 5-4 decision, that a private company operating public access cable channels did not become a state actor by

197. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1929–30 (2019).

198. Marsh v. Alabama, 326 U.S. 501, 506 (1946); *see supra* Section II.A.

199. Peters, *supra* note 54, at 1023.

200. *Id.* at 1023–24.

201. *Id.* at 1019.

202. *Id.*; *see also* Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992) (holding that airports are not public forums as they "hardly qualif[y] for the description of having 'immemorially . . . time out of mind' been held in the public trust and used for the purposes of expressive activity") (alteration in original) (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)).

203. Peters, *supra* note 54, at 1024.

204. *Id.*

205. *Id.*

hosting services open to the public.[206] The Court reaffirmed *Jackson*, stating even if an actor proves a "function [that] serves the public good or the public interest in some way[,] . . . [for the function to] qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally *and* exclusively performed the function."[207] It continued that "'very few' functions fall into that category."[208] To avoid the state actor limitation, the appellees attempted to "widen the lens and contend that the relevant function here is not simply the operation of public access channels on a cable system, but rather is more generally the operation of a public forum for speech."[209] Appellees continued that the operation of a public forum for speech was a traditional and exclusive function of the government, but Justice Kavanaugh, writing for the majority, stated: "[t]hat analysis mistakenly ignores the threshold state-action question."[210]

Furthermore, the state actor limitation existed to defend the system of private property.[211] The Court reaffirmed the principles of *Lloyd Corp.* and *Hudgens* stating that:

> The *Hudgens* decision reflects a commonsense principle: Providing some kind of forum for speech is not an activity that only governmental entities have traditionally performed. Therefore, a private entity who provides a forum for speech is not transformed by that fact alone into a state actor. . . . [M]erely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints.[212]

If private property owners were subject to the First Amendment by opening their doors to the public, "all private property owners and private lessees . . . would lose the ability to exercise what they deem to be appropriate editorial discretion within that open forum."[213] They would have

206. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1929–30 (2019).
207. *Id.* at 1928–29.
208. *Id.* at 1929 (quoting Flagg Bros., v. Brooks, 436 U.S. 149, 158 (1978)).
209. *Id.* at 1930.
210. *Id.*
211. *Id.*
212. *Id.*
213. *Id.* at 1930–31.

to be open to all or none.[214] Returning to the language in *Lloyd Corp.* and repeated in *Hudgens*, the Court stated, "[t]he Constitution by no means requires such an attenuated doctrine of dedication of private property to public use."[215] The Court reaffirmed *Hudgens* and rejected the appellees' attempt to "circumvent this Court's case law."[216]

Though the Court's decision concerns the medium of television, its language is entirety applicable to cyberspace and ICSs.[217] Specifically, "merely hosting speech by others . . . does not alone transform private entities into state actors."[218] Applied directly, no ICS could be treated as a state actor for hosting content posted by an ICP.[219] This would seem to all but foreclose the inquiry unless the Court were to fundamentally distinguish cyberspace from physical space for constitutional inquiry.

The Supreme Court has expanded the application of the Constitution to respond to the modern era and digital space in certain spaces, but the issue of ICS curation and censorship is clearly distinguishable from such instances due to its legislative character. In *Riley v. California*, the Court limited searches incident to arrests by stating that accessing an arrestee's phone required a warrant.[220] A cell phone was considered distinct, quantitively and qualitatively, from other physical objects because mass storage and cyberspace raise additional privacy interests under the Fourth Amendment.[221] In *South Dakota v. Wayfair, Inc.*, the Court allowed states to tax internet services that were not physically located within the state.[222] However, both of these are clearly distinguishable from expanding the First Amendment to include ICSs.

In both cases, the Court proceeded to change precedent because they had created the precedent in the first place.[223] When addressing whether to leave the issue of internet taxation to Congress, the Court in *Wayfair* stated:

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214. *Id.*

215. *Id.* at 1931 (quoting Hudgens v. NLRB, 424 U.S. 507, 519 (1976)).

216. *Id.*

217. *See id.* at 1930–31.

218. *Id.* at 1930.

219. *See id.*

220. Riley v. California, 573 U.S. 373, 403 (2014).

221. *Id.* at 393–98.

222. South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2099–100 (2018).

223. *See* Chimel v. California, 395 U.S. 752, 765 (1969) (establishing the reasonableness test for a search incident to an arrest); Nat'l Bellas Hess, Inc. v. Dep't of Revenue, 386 U.S. 753, 756–58 (1967) (establishing the physical presence rule by stating that a company is only subject to taxation if it has sufficient minimum contacts with the state: physical presence in the state).

> It is inconsistent with the Court's proper role to ask Congress to address a false constitutional premise of this Court's own creation. Courts have acted as the front line of review in this limited sphere; and hence it is important that their principles be accurate and logical, whether or not Congress can or will act in response. It is currently the Court, and not Congress, that is limiting the lawful prerogatives of the States.[224]

In instances where the courts act as the "front line of review," they bear the responsibility of remedying their error.[225] The Supreme Court in *Wayfair* overturned its own precedent that it found outdated and unworkable.[226] Unlike the precedent at issue in *Wayfair*, the Act and its policy concerns are the result of legislative action. An act is legislative in character when it has "the purpose and effect of altering the legal rights, duties and relations of persons."[227] The problems created by the Act are legislatively created and implicate First Amendment values, but they clearly fall within the permissible boundaries of the power of the legislature. The Act alters the legal duties between two private entities: service providers and users.[228] The Act may have been a response to judiciary action in *Stratton Oakmont*, but the discretionary authority given to ICSs was an exercise of Article I power.[229] It would be inappropriate for the Court to override a proper exercise of Article I power.[230]

CONCLUSION

The analogy of internet providers to corporate towns continues to be a recurring reminder of the public's fundamental interest in speech and the limiting of abuse by private entities. The Court in *Marsh* refused to allow a private entity to exercise the authority of a governmental entity without giving the public the necessary protections against government despotism.[231] The Court in *Logan Valley* refused to allow private landowners to abuse the development of suburbia to sanitize themselves from public discourse while

224. *Wayfair*, 138 S. Ct. at 2096–97.
225. *Id.*
226. *Id.* at 2097–99.
227. INS v. Chadha, 462 U.S. 919, 952 (1983).
228. *See* 47 U.S.C. § 230.
229. *See Chadha*, 462 U.S. at 952.
230. *See Wayfair*, 138 S. Ct. at 2096.
231. Marsh v. Alabama, 326 U.S. 501, 509 (1946).

opening themselves up to the public.[232] It accepted that the traditional public forum of the market space could shift as economies and societies shifted.[233] It is these very interests—protecting the individual from the despotism of third parties with power amounting to that of the government and protecting the shifting spaces where speech actually occurs—that have prompted the return of the analogy.[234]

Despite these interests, the Court distinguished between the government and private entities.[235] It recognized the distinct purposes of private land and the limited invitation to the public.[236] An entity that exists to facilitate commerce has its own interests that are also to be protected not subsumed under an attenuated doctrine of public dedication.[237] Accordingly, the Court recognized that some affirmative action was required by the government itself to allow a private entity to be treated as the government.[238]

With the rise of massive ICSs that control the places where speech actually occurs, the public has returned to a fear of despotism by private individuals.[239] With its language in *Packingham*, the Court reaffirmed the fundamental right to speak on the Internet but spoke so broadly as to invite analogy to the principles espoused by *Marsh* and *Logan Valley*.[240] The Court invited, intentionally or otherwise, the return of the corporate town analogy,[241] and the public's response provides an opportunity to analyze how it expresses their fear of despotism. Even recognizing the value of such an interest, the Court should not, and would be unlikely to, return to the principles of *Marsh.* Doing so would be to overturn not only the state actor doctrine and blur the line between private actors and the government but would fail to respect the legislative character of the issue. The public does have a means of redressing private abuses of its authority: through its representatives in the legislature. That is where the people have the capacity to address ICS responsibility and protect themselves.

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232. Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 325 (1968).

233. *Id.* at 324–25.

234. *E.g.*, Peters, *supra* note 54, at 1019, 1022–24.

235. Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972).

236. *Id.*

237. *See id.* at 565–66, 569.

238. Jackson v. Metro. Edison Co., 419 U.S. 345, 357–59 (1974).

239. *See supra* Section I.B.

240. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735–36 (2017).

241. *See* discussion *supra* Section II.E.