FREE SPEECH ON PRIVATELY-OWNED FORA: A DISCUSSION ON SPEECH FREEDOMS AND POLICY FOR SOCIAL MEDIA

By: Colby M. Everett ∗

I. INTRODUCTION

On August 12, 2017, white-supremacists held a rally in Charlottesville, Virginia, under the guise of a "Unite the Right" demonstration.[1] The rally quickly turned violent when a man drove a sedan through a crowd of counter-protestors, injuring several and killing one.[2] Following this horrific day of violence, individuals and organizations nationwide publicly decried white supremacy and neo-Nazism.[3] On the internet, however, a new form of condemnation arose with frightening implications for free speech rights. "Google canceled

∗ J.D. Candidate, May 2019, University of Kansas School of Law; B.S.J., 2016, University of Kansas. A special thanks to Stephen R. McAllister, U.S. Attorney for the District of Kansas; E.S. & Tom W. Hampton Distinguished Professor of Law at the University of Kansas School of Law, for his guidance, mentorship, and inspiration. Thank you, Eric and Cathy Everett, for your everlasting encouragement; your love is the impetus of my life's success. To my fiancée, Rachel Stetson, you are my most fervent advocate: a practitioner of compassion. To my cohort-at-law and fellow jurist, Shauna Leslie, J.D. Candidate, May 2019, University of Kansas School of Law, you consistently challenge and support me: vigorously pursue justice, take not lightly the due process accorded your adversaries.

[1] Holly Yan, Devon M. Sayers & Steve Almasy, *Virginia Governor on White Nationalists: They Should Leave America,* CNN (Aug. 14, 2017, 6:22 AM), http://www.cnn.com/2017/08/13/us/charlottesville-white-nationalist-rally-car-crash/index.html [https://perma.cc/K3Z8-H8NZ].

[2] *See id.*

[3] *See* Richard Fausset & Alan Feuer, *Far-Right Groups Surge into National View in Charlottesville*, N.Y. TIMES (Aug. 13, 2017), https://www.nytimes.com/2017/08/13/us/far-right-groups-blaze-into-national-view-in-charlottesville.html [https://perma.cc/FBE7-P7GY].

the website-hosting registration for the neo-Nazi website Daily Stormer" just after GoDaddy Inc., the host of the website, discontinued its service as their web host.[4] With these quick actions, two entities censored constitutional speech on perhaps the most effective forum: the internet. Hate speech is one of many forms of protected speech.[5] In fact, the Supreme Court recognizes fewer than ten free speech exceptions.[6] If Google and GoDaddy were government entities, the Court would unquestionably reverse their censorship.[7]

Despite the Charlottesville fallout, the internet provides users with extensive speech prospects. Since its inception, cyberspace has expanded exponentially and continues to multiply by the second. The internet is the ultimate arena for enabling personal and societal growth in private and commercial life. But, the promulgation of privately-held companies hosting internet-user contribution—through ownership of various communication pathways—raises concerns about content control.[8] These private communication conduits include: Internet Service Providers (ISPs), upstream providers, the Domain Name

[4] Yoree Koh & Jack Nicas, *Google, GoDaddy Crack Down on Neo-Nazi Site Daily Stormer,* WALL ST. J. (Aug. 14, 2017, 9:18 PM), https://www.wsj.com/articles/google-cancels-neo-nazi-site-daily-stormers-registration-1502740126 [https://perma.cc/UM6N-LLT6].

[5] *See generally* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[6] *See generally, e.g.*, Morse v. Frederick, 551 U.S. 393 (2007) (holding that a student's drug-related political speech was not protected when weighed against school's goal of discouraging drug use by students); Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) (holding that a public school could punish a student for indecent speech at a school assembly); Miller v. California, 413 U.S. 15 (1973) (setting forth rules for obscenity prosecution under Federal law, but giving states and localities flexibility in judging obscenity); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that inflammatory speech "inciting or producing imminent lawless action and is likely to incite or produce such action" is unprotected); United States v. O'Brien, 391 U.S. 367 (1968) (holding that burning draft cards in protest of Vietnam War was not protected symbolic speech); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (holding that "fighting words" that cause injury or breach of peace are not protected speech); Schenck v. United States, 249 U.S. 47 (1919) (holding that speech can be limited during wartime); Abrams v. United States, 250 U.S. 616 (1919) (holding that distribution of leaflets that encourage violent revolution is not protected speech); Debs v. United States, 249 U.S. 211 (1919) (holding that anti-war speech designed to obstruct recruiting is not protected speech).

[7] *See generally* Reno v. ACLU, 521 U.S. 844, 885 (1997).

[8] *See* Jonathan Peters & Brett Johnson, *Conceptualizing Private Governance in a Networked Society,* 18 N.C. J.L. & TECH. 15, 41 (2016).

System (DNS), content hosts, web-hosting services, third-party platforms, and search and application providers.[9] While end-users[10] directly or indirectly interact with each of these conduits, the most recognizable are third-party platforms.[11] Social media websites—Facebook, Twitter, Instagram, and others—are of particular interest as third-party platforms, given their prevalence, familiarity, and capacity to regulate user action.[12]

Through the lens of United States Supreme Court precedent, this article argues social media are public fora regulated by quasi-governmental actors seeking to filter certain speech. Further, this article analyzes the policy means and implications of conferring free speech rights on end-users of such platforms. First, Section II(a) and II(b) discuss how third-party platforms, like social media websites, actively and consciously censor the speech of users to exclude adverse content as they see fit. Further, Section II examines the presumptive invalidity of content-based censorship when carried out by a government actor.[13]

Next, Section III(a) of the article analyzes how social media sites' censorship has quasi-governmental characteristics. As social media

[9] *See id.* at 41–58 (explaining Internet Service Providers (ISPs) are the "user's entry point responsible for making web content accessible . . . [a]n ISP is supported by backbone providers that simply transmit data and have no direct relationship with the actors at either endpoint." A user of the internet must utilize an internet service provider like AT&T, Comcast, and Spectrum. Upstream providers can be either a large ISP providing internet access to a local ISP or it can be a third-party platform leasing servers from commercial data centers, like those owned by Amazon, that host their platform as upstream providers. The Domain Name System (DNS) allows for the conversion of "human-readable host and domain names, such as Yahoo.com," to data-formatted "numeric Internet Protocol (IP) addresses" so a user can navigate to the proper location on their computer via internet access. The DNS is a vehicle for ease of use. Content hosts are not communication conduits, but, rather, third-party platforms that contain multitudes of data for user access. Web-hosting services are corporations like GoDaddy, Inc., that provide the computing power and storage for an individual or company's website. The web-hosting service GoDaddy is discussed in some depth infra. Third-party platforms, like Google, Yahoo, Facebook, and Twitter, enable users to simply and easily share their own content. Search and application providers are intermediaries that allow people to access and index the data on the internet with ease).

[10] *See id.* (explaining that end-users are the people actually utilizing the service provided by the various communication conduits).

[11] *See id.* at 41.

[12] *See id.*

[13] *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992).

sites have quasi-governmental characteristics, they must be restrained by constitutional principles and the First Amendment. Section III(b) posits that if Facebook operates as a public forum analogous to a town square, the government cannot leave speech arbitration to the private sector. Rather, the government has a duty to protect the speaker-users. Even so, the two avenues discussed in Section III(a) and III(b)—quasi-governmental and public forum characteristics—are closely intertwined. As a quasi-governmental entity or public forum, the government must protect speech rights of users.

Section IV discusses possible solutions to online, public censorship. The most direct remedy is congressional action, as outlined in IV(a). This remedy would adversely affect the social media site's private rights and economic goals. Furthermore, Congress may already have a duty to act if social media are public fora because securing a public space for free speech is compulsory. Congressional action would have far-reaching effects. Section IV(a) also discusses solutions, policies, outcomes, and counterarguments associated with congressional action as a remedy. Section IV(b) analyzes the courts' ability to address censorship under color of state action, given their familiarity protecting free speech in cyberspace. Section IV(b) concludes by considering this solution, the outcomes, and the counterarguments of the courts' ability to end censorship and protect free speech.

Lastly, Section V advocates for congressional action as the preferred avenue of conferring free speech rights on end-users of social media because of the difficulty of judicial review in state action and due process claims. This article characterizes the social media-free speech issue and delivers a best-means congressional policy solution for the constant, oppressive speech censorship that occurs online today.

II. CONTEXT OF THE INTERNET, SOCIAL MEDIA, AND CENSORSHIP

Today, Americans commonly access and use the internet to express thoughts and ideas. At its base level, the internet lends itself to principles of accessing and sharing information. The United States government, through acts of Congress[14] and judicial review,[15] has

[14] *See generally, e.g.*, 47 U.S.C. § 230(a)(3) (2018); In re Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015).
[15] *See generally* Reno v. ACLU, 521 U.S. 844 (1997).

taken affirmative steps to protect the uninhibited access to and sharing of information. Nevertheless, censorship by private actors at platform chokepoints, like Google, GoDaddy, and Facebook, still occurs.[16]

A. Online Free Speech and Censorship: Relevant Laws and Regulations

Notwithstanding Charlottesville, Google, and GoDaddy, internet free speech should not be infringed; it is a refuge for free speech.[17] On the internet, the Court applies the free speech constitutional tradition that "governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it."[18] In 2015, the Federal Communications Commission ("FCC") classified ISPs as common carriers, which contributed to the constitutional bounds of free speech on the internet.[19] The lack of government regulation of internet speech does not bind, but contributes to free speech. Additionally, the ISP common carrier classification prevents ISPs from discriminating against customers and content. They must remain neutral. The FCC's 2015 Open Internet Order established outright bans on control and prioritization of certain users and content to end consumer disadvantage.[20] The FCC stated that "[t]his 'no unreasonable interference/disadvantage' standard protects free expression" on the internet.[21] The United States Telecom Association quickly and unsuccessfully challenged the FCC's reclassification of common carriers and support of net neutrality.[22] This victory for internet users' speech was short-lived. In late 2017, under Chairman Ajit Pai, the FCC voted to roll back the 2015 net neutrality protections and rescind the ISP common carrier classification to the economic

[16] *See generally* Peters & Johnson, *supra* note 8, at 15–16.
[17] *See Reno*, 521 U.S. at 885.
[18] *See id.*
[19] *See generally* 30 FCC Rcd. at 5601.
[20] *See id.* at 5601, 5608, 5609.
[21] *Id.* at 5601, 5609.
[22] *See generally* U.S. Telecom Ass'n v. FCC, 825 F.3d 674 (D.C. Cir. 2016) (finding that the FCC did not violate the Administrative Procedure Act in its reclassification of broadband service as telecommunication service and upholding the 2015 Open Internet Order), *petition for en banc reh'g denied*, 855 F.3d 381 (D.C. Cir. 2017).

advantage of ISPs and bane of users.[23] This rollback occurred on June 11, 2018, packaged within the FCC's Order entitled "In the Matter of Restoring Internet Freedoms."[24] This 2018 Order could allow ISPs to bundle internet packages, only allowing access to certain websites in the bundle.[25] Additionally, it opens the door to paid prioritization, a system allowing large companies to pay for optimized data transfer rates.[26] Faster transfer rates would place sites like Facebook and Google in the fast lane, leaving small business and users in a slow lane.[27] Lastly, and most critically, ISPs "now have the power to block websites, throttle services and censor online content."[28] Explicitly, the 2018 order declassified ISPs as common-carriers, ending utility-style regulation in favor of market-based policy.[29] It reversed the Obama-era Order, "Protecting and Promoting the Open Internet."[30] It reinstated the private mobile service classification of mobile broadband internet service, which allows throttling of user data.[31] It re-established the FTC's authority to police privacy practices of ISPs.[32] This will require ISPs to disclose network management practices, performance, and commercial terms of service.[33] Lastly, the 2018 Order eliminated the FCC's conduct rules.[34] For the present moment, ISPs are, once again, capable of censoring speech and controlling what internet end-users access. However, many other speech safeguards exist.

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[23] *See* John D. McKinnon, *FCC Votes to Dismantle Net-Neutrality Rules*, WALL ST. J. (Dec. 14, 2017, 5:11 PM), https://www.wsj.com/articles/fcc-readies-unwinding-of-net-neutrality-regime-1513247401 [https://perma.cc/Z52H-AERH].
[24] *See generally* In re Restoring Internet Freedoms, 33 FCC Rcd. 311 (2018).
[25] *See* Keith Collins, *Net Neutrality Has Officially Been Repealed. Here's How That Could Affect You.*, N.Y. TIMES (June 11, 2018), https://www.nytimes.com/2018/06/11/technology/net-neutrality-repeal.html?rref=collection%2Ftimestopic%2FNet%20Neutrality&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=9&pgtype=collection [https://perma.cc/SP94-V9G3].
[26] *See id.*
[27] *See id.*
[28] *Id.*
[29] *See generally* In re Restoring Internet Freedoms, at 311.
[30] *See generally id.*
[31] *See generally id.*
[32] *See generally id.*
[33] *See generally id.*
[34] *See generally id.*

In section 230 of the Communications Decency Act (CDA), Congress established that the internet is the premiere forum for broad speech, opportunity, and intellectual progress.[35] Congress safeguarded the free speech guarantee in section 230 of the CDA by immunizing all internet users from liability for distributing other content—with the exception of intellectual property violations. Thus, websites like Facebook, Google, and Twitter do not have to censor the content of their users for fear of tortious liability.[36] Section 230 aims to prevent censorship on the privately-owned web for the purpose of encouraging free speech without fear of prosecution or lawsuit.[37] To the extent that the U.S. government is involved in internet functionality and activity, the judiciary[38] and administrative[39] branches overwhelmingly support the conferral of user free speech rights on the internet.

B. Social Media Free Speech and Censorship

On the internet, private actors threaten free speech far more than pure state actors. As private organizations, Google and GoDaddy's post-Charlottesville actions exemplify the rampant, startling issue of constitutionally-allowed speech censorship.[40] Social media allows users to contribute to the marketplace of ideas in more places and to a greater audience than any other platform.[41] Businesses use social media to tailor their marketing to consumers, employers use social media to investigate potential hires, and politics nearly depends on it.[42] Social media enables technologically-advanced, layperson communication, and access is paramount to participating in this digital society.[43] Unfortunately, social media is another strand in the web of internet-user speech suppression.[44] Facebook possesses more power

[35] *See* 47 U.S.C. § 230(a)(3) (2018).
[36] *See generally* Marjorie Heins, *The Brave New World of Social Media Censorship*, 127 HARV. L. REV. F. 325 (2014).
[37] *See id.*
[38] *See generally* Reno v. ACLU, 521 U.S. 844 (1997).
[39] *See generally* In re Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015).
[40] *See* Koh & Nicas, *supra* note 4.
[41] *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).
[42] *See* Kevin Park, *Facebook Used Takedown and It Was Super Effective! Finding a Framework for Protecting User Rights of Expression on Social Networking Sites,* 68 N.Y.U. ANN. SURV. AM. L. 891, 895–96 (2013).
[43] *See id.* at 896.
[44] *See generally* Peters & Johnson, *supra* note 8, at 49.

today to determine what individuals can say than any Supreme Court justice, king, or president.[45] On social media, speech is subject to moderation or suppression via guidelines and regulations established not by courts, Congress, or administrative agency, but by corporate employees.[46] Content moderation, and the processes surrounding it, is largely a secret business practice, undisclosed to the public.[47] The public, in Facebook's case, is over 2 billion people—above a quarter of the world population—and two-thirds of the U.S. population.[48] Social media companies publicly disclose their community guidelines,[49] but the platforms are relatively devoid of adjudicatory proceedings following censorship.[50] Facebook allows an appeal of censored pages and profiles, but not posts.[51] Typically, the after-censorship response from Facebook is a terse, vague explanation of the violative content and the company's quest to promote an inclusive environment.[52] Financial burdens, time, and opportunity cost make litigating censorship nearly impossible; for most, its simply not worth it.

Social media websites utilize community guidelines and moderation to retain users and protect business interests.[53] These websites outsource a vast majority of moderation to armies of overseas contractors who screen flagged information and make judgment calls

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[45] *See* Jeffrey Rosen, *The Deciders: Facebook, Google, and the Future of Privacy and Free Speech,* THE BROOKINGS INSTITUTION 1, 2 (May 2, 2011), https://www.brookings.edu/wpcontent/uploads/2016/06/0502_free_speech_rosen.pdf [https://perma.cc/6L93-YMDL].

[46] *See Community Standards*, FACEBOOK, https://www.facebook.com/communitystandards/ [https://perma.cc/C5U4-5NTX].

[47] *See* Sarah Roberts, *Social Media's Silent Filter*, THE ATLANTIC (Mar. 8, 2017), https://www.theatlantic.com/technology/archive/2017/03/commercial-content-moderation/518796/ [https://perma.cc/E9VB-LTM9].

[48] *See* Josh Constine, *Facebook Now Has 2 Billion Monthly Users...and Responsibility*, TECHCRUNCH.COM (Jun. 27, 2017), https://techcrunch.com/2017/06/27/facebook-2-billion-users/ [https://perma.cc/68JA-B2RQ].

[49] *See Community Standards*, *supra* note 46.

[50] *See Facebook*, ONLINECENSORSHIP.ORG (Nov. 8, 2017), https://onlinecensorship.org/resources/how-to-appeal [https://perma.cc/8TWG-5CCX] [hereinafter ONLINECENSORSHIP].

[51] *See id.*

[52] *See* Adrian Chen, *The Laborers Who Keep Dick Pics and Beheadings Out of Your Facebook Feed*, WIRED.COM (Oct. 23, 2014, 6:30 AM), https://www.wired.com/2014/10/content-moderation/ [https://perma.cc/9P6E-AF4R].

[53] *See id.*

based on guideline compliance.[54] The rest is left to algorithms.[55] In the case of the former, employees suffer psychological trauma, and, in the latter, content is mistakenly moderated.[56]

Conferring free speech rights to users on social media will likely allow indecent and hateful expression to reach sensitive ears and eyes. Furthermore, such speech could negatively affect users and, thus, business. The Communication Decency Act encourages restriction of constitutional speech by stating that:

> "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."[57]

This immunization cuts against the grain of First Amendment jurisprudence. The Court, and society, has never supported viewpoint discrimination: "[t]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[58] Conversely, social media opposes this doctrine. Facebook, for example, retains the power to moderate nude photographs, which could impact the arts, sexual education, gender politics, and other meaningful speech.[59] Of course, speech need not be meaningful to be protected.[60] Yet, Adam Mosseri, Facebook's Vice President of News Feed, says, "[we] believe in giving people a voice and . . . we cannot become arbiters of truth ourselves."[61] In thirteen years, Facebook created one of the most effective forums for discourse, but actively disposes of nearly 100 years of free speech jurisprudence.[62] Meanwhile, the Supreme Court recognizes that social media is probably the most powerful free speech vehicle available to citizens.[63] Social media "allows a person with an Internet connection to become a town crier with a voice that resonates farther than it could from any

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[54] *See id.*
[55] *See id.*
[56] *See* Roberts, *supra* note 47.
[57] 47 U.S.C. § 230(c)(2) (2018).
[58] *E.g.*, Street v. New York, 394 U.S. 576, 592 (1969).
[59] *See* Heins, *supra* note 36, at 326.
[60] *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 533 (2001) (holding that the government is prohibited from creating view-point restrictions on speech).
[61] Roberts, *supra* note 47.
[62] *See generally id.*
[63] *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

soapbox."[64] Social media is a free speech platform—the modern town square—deserving of constitutional protection.[65] It does not matter that control of the public forum is vested in a corporation or government entity; it is imperative that speech conduits stay free.[66] The town square exists not for those in control of it, but, rather, those who use it. As Matthew Prince, co-founder and CEO of Cloudfare, a global network that improves internet efficiency and security, said after terminating business with Daily Stormer following Charlottesville: "My moral compass alone should not determine who gets to stay online."[67] The question of what should be said online is a question for the judiciary or the people.

III. SOCIAL MEDIA AS QUASI-GOVERNMENTAL ACTORS AND PUBLIC FORA

Social media undoubtedly fills many roles for users. The term "government actor" would not typically be used to characterize Facebook, but the corporation's actions in censoring user content draws such a conclusion. Furthermore, social media presents itself as a platform open to the public to gather users and to "bring the world closer together."[68] Social media websites, despite private ownership, sufficiently thrust themselves into the public light that they discard their private rights.[69] Social media platforms, aside from private rights, share all the traits and similarities as a public forum.[70]

A. Social Media as Quasi-Governmental Actors

Social media is all but government acting as arbiters of free speech. Furthermore, state action on the sites is contemporaneous and entwined. Facebook, by virtue and action, possesses many quasi-governmental characteristics. Facebook approximates a public forum because of the service it provides and its deliberate entangling of

[64] *Id.* at 1737.
[65] *See generally id.*
[66] *See* Marsh v. Alabama, 326 U.S. 501, 507 (1946).
[67] Matthew Prince, *Was I Right to Pull the Plug on a Nazi Website?*, WALL ST. J. (Aug. 2, 2017, 6:26 PM), https://www.wsj.com/articles/was-i-right-to-pull-the-plug-on-a-nazi-website-1503440771 [https://perma.cc/CBQ2-ZUV2].
[68] Constine, *supra* note 48.
[69] *See* discussion *infra* Section III.b.
[70] *See* discussion *infra* Section III.b.

private property rights with public speech rights.[71] It is well settled that the internet, in general, is a neutral space where the free-flow of information cannot be censored by government actors.[72] Facebook is a corporation that exists within this expansive free speech framework, but vigorously censors the content flowing through its platform.[73] Sites like Facebook inhibit the free-flow internet by stifling unpleasant, yet constitutionally protected, speech. The corporation moderates user content by exercising legislative authority through the issuance of community guidelines and executive authority through censorship; all without judicial review.[74] Facebook exercises quasi-governmental authority and, by principle and precedent, should be restricted by and subject to the Constitution.

The delimited, private interests of sites like Facebook—incentivized by user retention and encouraged by section 230(c)(2) of the Communication Decency Act—seem to outweigh the free speech rights of two-thirds of Americans.[75] Asserting that a select few on the corporate ladder should control vast speech is untenable and contradictory to constitutional principles. Corporate administrators cannot constitutionally restrain free speech,[76] yet this is exactly the action Facebook undertakes. Furthermore, "when private property is 'affected with a public interest, it ceases to be *juris privati* only.'"[77] The Court's precedent, when balancing public and private rights in

[71] *See generally* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).
[72] *See generally* Reno v. ACLU, 521 U.S. 844 (1997).
[73] *See generally, e.g.*, Washington Post, *Facebook Reveals Its Censorship Guidelines for the First Time – 27 Pages of Them*, L.A. TIMES (Apr. 24, 2018, 7:25 AM), http://www.latimes.com/business/technology/la-fi-tn-facebook-guidelines-20180424-story.html# [https://perma.cc/XX57-WRZC] (explaining that Facebook's censorship is prolific and widespread. Algorithmic and human arbiters scan inconceivable amounts of content every day and delete them at will).
[74] *See generally Community Standards, supra* note 46; *see* Chen, *supra* note 52; Roberts, *supra* note 47.
[75] *See* 47 U.S.C. § 230(c)(2) (2018).
[76] *See* Marsh v. Alabama, 326 U.S. 501, 508 (1946).
[77] Munn v. Illinois, 94 U.S. 113, 126 (1876) (quoting Lord Hale, C.J., De Portibus Maris, 1 HARG. LAW TRACTS 78) (defining the Latin phrase "*juris privati*" to mean "of private right." Here, it is used to demonstrate that the greater the public use of the private thing, the less private protection received by the thing).

this way, is fractured.[78] As private ownership concedes to public possession, property rights decrease and increase, respectively.[79]

In *Marsh v. Alabama*, the Supreme Court held, via the First and Fourteenth Amendment, that a company-owned town could not restrict the distribution of religious materials by an individual seeking to do so on company-owned property "freely used by the public."[80] The company-owned property was a shopping center sidewalk, accessible and usable by all in the town or otherwise.[81] It is indistinguishable from other government-owned town squares, except by deed of property.[82] The Court largely analogizes the corporation-owners of the town to a municipality stating "[t]hese people, just as residents of municipalities, are free citizens of their State and country."[83] At the time, the city street and town square were the most effective pubic fora to exchange ideas. Regardless of ownership, the community forum and marketplace of ideas must remain free.[84] In *Marsh*, the town was quasi-governmental because it was privately-owned, but operated as a government municipality.[85] Simply because the ownership rests in private hands does not mean public rights can be overlooked.[86] The Court notes, "[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 . . . constitutional rights of those who use it."[87] The owners of these facilities cannot regulate them as they wish.[88] These facilities are built to serve the public function and, therefore, they are subject to state regulation and constitutional protection for their users.[89]

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[78] *See, e.g.*, *Marsh*, 326 U.S. at 501; *Munn*, 94 U.S. at 126. *But see, e.g.*, Hudgens v. NLRB, 424 U.S. 507, 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551, 551 (1972).
[79] *See, e.g.*, *Munn*, 94 U.S. at 126.
[80] *Marsh*, 326 U.S. at 501–02.
[81] *See id.* at 503.
[82] *See id.*
[83] *Id.* at 508.
[84] *See id.* at 507.
[85] *See generally id.*
[86] *See generally id.*
[87] *Id.* (comparing Republic Aviation Corp. v. NLRB, 324 U.S. 793, 798, 802 (1945)).
[88] *See id.* at 506.
[89] *See id.*

Facebook is the company-owned town square that two-thirds of Americans utilize to express themselves.[90] In fact, Facebook is a more powerful democratic forum than the town square.[91] Facebook is freely accessible by all members of the public with an internet connection aged thirteen and older,[92] and is the largest community of human beings on Earth.[93]

Like *Marsh*, private ownership does not proscribe constitutional rights.[94] Facebook, as a corporation and owner of a service, has entirely opened its property, for its advantage, to the public.[95] It is operating a public forum in a quasi-governmental sense[96] consistent with *Marsh*.[97] Facebook's public includes the American people, and over 200 years of American jurisprudence supports nearly absolute free speech protection on public forums.[98] Facebook avails itself of financial benefit from free-flow of information and use by the public. Given the level of public access on Facebook, it cannot circumscribe the free speech rights of its users and the CDA should not encourage it.[99] Facebook is "operated primarily to benefit the public and since . . . [its] . . . operation is essentially a public function, it is subject to state regulation."[100] As a quasi-governmental entity operating as a public

[90] Constine, *supra* note 48.
[91] *See generally* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).
[92] *See generally How do I report a child under the age of 13?*, FACEBOOK, https://www.facebook.com/help/157793540954833 [https://perma.cc/25LY-Z66U] [hereinafter *Facebook Age*] (showing that First Amendment freedoms extend to all Americans regardless of age, yet it is a violation of Facebook's terms of service to provide false information about age in creating a profile such that an individual younger than 13 could participate on its forum).
[93] *See* Trevor Puetz, *Facebook: The New Town Square*, 44 SW. L. REV. 385, 395 (2014).
[94] *See generally Marsh*, 326 U.S. at 506.
[95] *See* Constine, *supra* note 48 (explaining that Facebook's mission to "bring the world closer together" by garnering users and connecting individuals globally for greater economic profit).
[96] *See* Puetz, *supra* note 93, at 388.
[97] *See Marsh*, 326 U.S. at 507 ("Whether a corporation or a municipality owns or possesses a 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.").
[98] *See generally, e.g.*, Grayned v. City of Rockford, 408 U.S. 104 (1972) (holding that time, place, and manner restrictions are constitutional speech restrictions on public fora).
[99] *See* 47 U.S.C. § 230(c)(2) (2018).
[100] *Marsh*, 326 U.S. at 506.

forum, Facebook is subject to the restrictions of the Constitution.[101] Here, Congress or the courts must protect users' free speech rights on the social media public forum, as both entities have in the past.[102] Generally, the United States Government has no duty to act or protect speakers.[103] However, when a speaker, on state-owned property, is conforming with time, place, and manner restrictions, an adverse private actor could not interfere with the speech—calling the government's 'no duty to act' rule into question.[104] In any sense, private censorship by a quasi-governmental entity, operating for the public, cannot stand.

B. Social Media as Public Fora

Social media websites are the most important places for the exchange of views today.[105] Supreme Court precedent gives extreme deference to free speech on the internet.[106] The Court, in *Packingham v. North Carolina*, reasoned—despite past difficulty in understanding the most important places for free speech[107]—that the "'vast democratic forums of the internet' in general, and social media in particular" is most sacred.[108] This characterization does not draw from the importance of public streets, town squares, and parks, but rather emphasizes social media as the greatest opportunity for individuals to engage in a variety of protected speech.[109] In the minds of users and dicta of the Court in *Packingham*,[110] it is clear that social media occupies a significant place in the free speech jurisprudence framework. To the Court, the most important modern place for the

[101] *See generally id.*
[102] *See generally Marsh*, 326 U.S. 501; Packingham v. North Carolina, 137 S. Ct. 1730 (2017).
[103] *See generally* Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) (holding that a municipality and police department could not be sued under 42 U.S.C. § 1983 for failing to protect an individual).
[104] *See generally* Cox v. New Hampshire, 312 U.S. 569 (1941) (holding that the government cannot restrict speech content, but may place reasonable time, place, and manner restrictions on the speech for public safety).
[105] *See generally* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).
[106] *See generally id.*; Reno v. ACLU, 521 U.S. 844, 869 (1997).
[107] *See Packingham*, 137 S. Ct. at 1735 (noting the difficulty in identifying the most important spaces for the free exchange of views).
[108] *Id.* (quoting *Reno*, 521 U.S. at 867).
[109] *See id.* at 1735–36 (quoting *Reno*, 521 U.S. at 870).
[110] *See generally id.* at 1735.

exchange of views is social media, a forum that is actively censored by the very private actors that host the free-flow of information.[111]

In the past, jurists found it difficult to classify Facebook as a public forum because "the websites clearly are not traditional public fora."[112] Recently, however, this changed. The Court reasoned in *Packingham* that "[t]oday, one of the most important places to exchange views is cyberspace, particularly social media, which offers 'relatively unlimited, low-cost capacity for communication of all kinds' . . . to users engaged in a wide array of protected *First Amendment* activity on any number of diverse topics."[113] Moreover, a public forum, traditional or otherwise, is defined as a "*medium* customarily employed for public speech."[114] The private-property argument for social media does not comport with this definition. It is notable, however, that the Court overcame private property rights in the interest of free speech in *Marsh*.[115] The company-owned town could not restrict free speech rights in an area generally open to the public.[116] The company-owned town—a non-traditional public forum—is unquestionably privately owned, yet functions to promote the free speech of the users they entice.[117] This is true of social media, too.

Social media is a modern-age public forum. Facebook is a critical forum for modern speech; it often functions as a town square.[118] In fact, the Court is wary of any action that might limit free speech on the internet.[119] For now, in terms of free speech jurisprudence relating to public forums, even streets, sidewalks, and parks occupy a backseat to the internet, and they are wholly incomparable in magnitude to social media.[120] Citizens should have a First Amendment right to social media access in order to promulgate speech, and this right

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[111] *See id.*
[112] Park, *supra* note 42, at 900.
[113] *Packingham*, 137 S. Ct. at 1732 (quoting *Reno*, 521 U.S. at 870).
[114] *Public Forum (Traditional Public Forum)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (2012) (emphasis mine).
[115] *See generally* Marsh v. Alabama, 326 U.S. 501 (1946).
[116] *See id.* at 505.
[117] *See id.*
[118] *See* Puetz, *supra* note 93, at 385 (citing Peter Sinclair, *Freedom of Speech in the Virtual World*, 19 ALB. L. J. SCI. & TECH. 232 (2009)).
[119] *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017).
[120] *See id.* at 1735.

should not be broadly restricted by the government.[121] Now, and for the foreseeable future, social media is the privately-owned public forum of choice.[122]

The courts should confer First Amendment speech rights on the users of websites like Facebook, notwithstanding private ownership. Supreme Court precedent demonstrates that individual, constitutional protection outweighs private rights in certain circumstances.[123] Oftentimes, this principle is a give and take, where the greater public access to the private commodity, the lesser property protection the commodity receives.[124] Private property that serves the public interest will cease to be private property.[125] In *Marsh*, the role of the company-town shared an essential nexus to a municipality such that it assumed the roles and restrictions of a municipality.[126] Here, social media sites are so directly tied to and intertwined with the role of a public forum that a similar, essential nexus exists.[127] Further, pure, orderly speech

[121] *See Packingham*, 137 S. Ct. at 1737 (striking down a state statute that forbade a convicted sex offender from accessing social media).
[122] *See id.* at 1735.
[123] *See generally* Marsh v. Alabama, 326 U.S. 501 (1946). The Supreme Court has fluctuated when it comes to conferring speech rights on public property when it comes to shopping malls. In *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968), the Court extended speech rights to employee-picketers on private shopping mall property in which their supermarket-employer was located. Later, the Court distinguished this case in *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972), making generous factual distinctions between picketers that have a demonstration purpose related to the property versus individuals exercising free speech in a private mall when an alternative public venue is available nearby. However, the Court squashed the issue completely and expressly in *Hudgens v. NLRB*, 424 U.S. 507 (1976), recognizing that *Lloyd* overturned *Logan Valley* and raising private property rights of shopping malls over individual speech rights. In sum, it is not outside the Court's capacity to allow free speech rights to trump private property rights.
[124] *See* Munn v. Illinois, 94 U.S. 113, 126 (1876) (quoting Lord Hale, C.J., De Portibus Maris, 1 HARG. LAW TRACTS 78).
[125] *See id.*
[126] *See generally Marsh*, 326 U.S. 501.
[127] *See* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295 (2001) ("If the Fourteenth Amendment is not to be displaced, therefore, its ambit cannot be a simple line between States and people operating outside formally governmental organizations, and the deed of an ostensibly private organization or individual is to be treated sometimes as if a State had caused it to be performed. Thus, we say that state action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly

is unlikely to interfere with business or compromise property rights.[128] Ample similarities exist between traditional public fora and social media to extend constitutional speech protection to users via congressional action or state action doctrine and the Fourteenth Amendment.[129] Granted, users of Facebook sign an end-user adhesion contract where they consent to many of the company's censorship tactics. However, there is a strong presumption against waiver of constitutional rights in any circumstance.[130] Public policy does not favor waiver of constitutional speech rights on the most effective free speech fora available.[131]

Classifying social media as public fora is critical to and consistent with the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[132] Corporate censorship by arbitrary guidelines does not foster this ideology. The platform to further this legacy is the "'vast democratic forums of the Internet' in general and social media, in particular"—"uninhibited, robust, and wide-open." [133] [134]

IV. SOLVING THE PROBLEM OF ONLINE SPEECH CENSORSHIP

Social media are powerful vehicles for global dissemination of speech.[135] In light of this, and as fora open to the public,[136] users must be given free speech protection on social media.[137] Corporate speech

private behavior 'may be fairly treated as that of the State itself.'") (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 351 (1974)).

[128] *See* Diamond v. Bland, 11 Cal. 3d 331, 345 (1974) (Mosk, J., dissenting) (This proposition has been generally upheld through Supreme Court decisions like *Marsh*, 326 U.S. 501).

[129] *See generally Brentwood Acad.*, 531 U.S. at 295.

[130] *See, e.g.*, Gonzalez v. County of Hidalgo, 489 F.2d 1043, 1046 (5th Cir. 1973) (citing Fuentes v. Shevin, 407 U.S. 67, 94 n.3 (1972); Brookhart v. Janis, 384 U.S. 1, 4 (1966)); Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937).

[131] *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

[132] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[133] *Packingham*, 137 S. Ct. at 1735 (quoting Reno v. ACLU, 521 U.S. 844, 868 (1997)).

[134] *N.Y. Times Co.*, 376 U.S. at 270.

[135] *See Packingham*, 137 S. Ct. at 1735.

[136] *See* Munn v. Illinois, 94 U.S. 113, 126 (1876) (quoting Lord Hale, C.J., De Portibus Maris, 1 HARG. LAW TRACTS 78).

[137] *See generally*, *e.g.*, Reno v. ACLU, 521 U.S. 844, 869–71 (1997) (upholding citizens' free speech rights, generally, on the internet).

censorship imposed on millions of United States' citizens[138] cannot congruously stand with the Constitution, and the Government must remedy it.[139] The constitutionally accessible remedies for users are congressional action and judicial review. However, these solutions come with caveats and dissension, despite their magnanimity.

A. Congressional Action

Congressional action is the best means to secure social media as a platform for protected user-speech. The United States Constitution gives Congress the power to enact legislation applying to the internet through the Commerce Clause: "[t]o regulate Commerce with foreign Nations, and among the several States."[140] The United States Supreme Court broadly interprets the Commerce Clause allowing Congress to act based on misuse of channels of interstate and foreign commerce, instrumentalities moving in commerce, and activities relating to commerce.[141] The internet and social media are completely incorporated; notwithstanding Congress has successfully and affirmatively acted on internet regulation before.[142]

Furthermore, Congress retains a duty to act to secure social media as public fora free from external interference.[143] Generally, the Government has no duty to act or protect citizens,[144] but free speech on public fora is distinguishable. Distinct from the proposition that the government is not duty-bound to act, the Court believes that free speech rights "imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."[145] Surely time, place, and manner restrictions overwhelmingly upheld by the Supreme Court are limitations

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[138] *See* Chen, *supra* note 52.
[139] *See generally* U.S. CONST.
[140] U.S. CONST. art. I, § 8, cl. 3.
[141] *See* Perez v. United States, 402 U.S. 146, 150 (1971) (affirming Congress' power through the Commerce Clause with respect to extortionate credit transactions).
[142] *See, e.g.*, *Reno*, 521 U.S. at 873–74 (invalidating unconstitutionally vague provisions of the Communications Decency Act, 47 U.S.C § 223 (2012)); *see also, e.g.*, 47 U.S.C. § 223 (2012).
[143] *See* Cox v. New Hampshire, 312 U.S. 569, 574 (1941).
[144] *See generally* Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005) (holding that a municipality and police department could not be sued under 42 U.S.C. § 1983 for failing to protect an individual).
[145] *Cox*, 312 U.S. at 574.

provided to secure the forum and protect the speaker and listener.[146] If the Government fails to secure a forum open to the public for speech and no other forum exists, speech is equivalently suppressed.[147]

In *Hague v. Committee for Industrial Organization*, the Court invalidated an ordinance that restricted speech on any public fora subject to the indiscriminate opinion of a municipal officer.[148] Such an ordinance arbitrarily and unjustifiably eliminated all possible locales for speech, suppressing it completely.[149] Given the importance of social media as a vehicle for free speech and the lack of effective, similar, alternative venues,[150] Congress must act to dilate the free speech vessels of social media. Notably, social media are not traditional public fora, thus a traditional public alternative will not suffice.[151] Furthermore, Congress should act in the best interests and wishes of the citizens by whom they are duly elected, including conferring and protecting basic civil liberties.[152]

In its most basic form, congressional action should come via statute dictating First Amendment protection for users of social media on those specific websites.[153] This statute comes with the freedoms established by the Constitution[154] and Supreme Court precedent.[155] As

[146] *See id.* at 576 (reasoning that such restrictions decrease general disorder in public speech events).
[147] *See generally, e.g.*, Lovell v. Griffin, 303 U.S. 444, 451–52 (1938) (invalidating an ordinance prohibiting the distribution of literature without a permit).
[148] *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939).
[149] *See id.*
[150] *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).
[151] *See Public Forum (Traditional Public Forum)*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (2012) (defining a traditional public forum as "[a] speaker's corner in a public park, certain pavilions in a city, and a bulletin board for public use . . . . ").
[152] *See generally* U.S. CONST. pmbl.
[153] *See id.* amend. I.
[154] *See id.*
[155] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n. 4 (1938) (ascribing strict scrutiny judicial review to legislation which appears to be prohibitive of the Constitution and Bill of Rights).

such, many forms of unprotected speech[156] already overlap with speech excluded by Facebook's community guidelines.[157]

The statute must be strict in application to avoid ensnaring websites that do not fit the mold of social media. Associational rights—the right to assemble, join, leave, and take collective action—command a narrow construction.[158] While a broad range of social media websites exist, certain platforms operate on the spectrum of inclusivity. Some websites, like Facebook and Twitter, tout themselves as completely open to the public, while others, like topic and demographic-specific forums, have a specific and articulable message. Examples of these topic-specific forums are gambling websites, demographic-based dating websites, gaming chatrooms, and others.[159] This proffered congressional action seeks to avoid enmeshing or including these exclusive and limited purpose forms of social media, given their clear message and associational rights. The Court noted, in *Roberts v. United States Jaycees*, an implicit "right to engage in activities protected by the First Amendment" and "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, education, religious, and cultural ends."[160] Furthermore, a right to exclusion exists to a certain extent where "[f]orcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that

[156] *See generally* Miller v. California, 413 U.S. 15 (1973) (setting forth rules for obscenity prosecution under federal law, but giving states and localities flexibility in judging obscenity); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that inflammatory speech "inciting or producing imminent lawless action and is likely to incite or produce such action" is unprotected); Watts v. United States, 394 U.S. 705 (1969) (distinguishing political hyperbole from true threats); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (holding that "fighting words" that cause injury or breach of peace are not protected speech).

[157] *See Community Standards*, *supra* note 46.

[158] *See generally* NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461–63 (1958) (affirming the right and freedom of association under the First Amendment).

[159] *See Black People Meet*, PEOPLE MEDIA INC., https://www.blackpeoplemeet.com [https://perma.cc/86Q6-E3SS]; *Farmer's Only*, FARMERSONLY MEDIA INC., https://www.farmersonly.com [https://perma.cc/ELE2-JC8E]; *Online Sports Betting, Poker, Casino, and Racebook at Bovada*, BOVADA.LV, https://www.bovada.lv [https://perma.cc/3B87-HBG4]; *Senior Match*, SENIORMATCH.COM, https://www.seniormatch.com [https://perma.cc/2XJX-9VUW]; *Video Games Chat Room*, CHAT-AVENUE.COM, https://www.chat-avenue.com/videogamechat.html [https://perma.cc/8V8V-SV4N].

[160] Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

it intends to express."[161] Clearly, "freedom of association plainly presupposes a freedom not to associate" and exclude.[162] Freedom of association is essential to the practice of free speech via the Fourteenth Amendment Due Process Clause.[163]

However, the First Amendment associational right is contingent on a group's possession of and engagement in an identifiable expressive message.[164] In *Boy Scouts of America v. Dale*, the organization constitutionally excluded homosexuals from membership because homosexuality did not fit the expressive message and values of the Boy Scouts; requiring the acceptance of homosexuals would violate the organization's associational rights.[165] In *Hurly v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, relied upon by the Court in *Boy Scouts of America*, a group of parade organizers sought to exclude a gay organization from marching, not because they disagree with the sexual orientation of the group, but because it did not fit the message of the organizing group and the parade itself.[166] The *Hurley* court noted that the reason for exclusion does not matter, but "it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."[167] These holdings give power to topic and user-specific online fora to exclude users as they see fit.[168]

Facebook, however, does not possess this exclusionary right. As noted in *Boy Scouts of America*, absent an expressive message, there can be no expressive associational rights.[169] Facebook, by explicit, overwhelming, inclusive openness, waives the opportunity to assert

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[161] Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).
[162] *Id.* (alterations in original) (internal quotations omitted) (quoting *Roberts*, 468 U.S. at 623).
[163] *See NAACP*, 357 U.S. at 460–63.
[164] *See Boy Scouts of Am.*, 530 U.S. at 648.
[165] *See id.* at 654–55.
[166] *See* Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 574–75 (1995).
[167] *Id.* at 574–75.
[168] *See generally Boy Scouts of Am.*, 530 U.S. at 643; *Hurley*, 515 U.S. at 643; *cf.* Christian Legal Soc'y v. Martinez, 561 U.S. 661, 662 (2010) (holding that the CLS chapter could exclude gays from the organization and that such exclusion was protected expressive activity, but, because the exclusion violated the University's policy, there was no constitutional requirement for the University to fund the organization).
[169] *See Boy Scouts of Am.*, 530 U.S. at 648.

associational rights in opposition to this proposed legislation.[170] Facebook does not have an identifiable message beyond absolute public-openness.[171] Strictly ascribing user speech protection to the open, inclusive websites eliminates the potential for the litigation that arose in quasi-public fora like the shopping mall cases.[172] The statute would only target those social media sites maintaining status as absolutely open to the public—e.g. Facebook, Twitter, Instagram, and others.

In addition to conferring First Amendment protection with narrow construction, the legislation must include a statutory cause of civil action for deprivation of rights.[173] Facebook limits its internal appeals process to profiles and pages, and no appellate process exists when Facebook moderates individual speech.[174] This statute would provide for a cause of action, using section 1983 of the Civil Rights Act as a vehicle for suit, anytime a social media site moderated constitutional content.[175] With section 1983, Facebook would "be liable to the party injured" because moderation of protected First Amendment subject matter would be a "deprivation of . . . rights . . . secured by the Constitution."[176] Exemplary damages are unsuitable for the claim, but injunctive relief mandating the restoration of censored content would be beneficial.[177] All relief should include compensation for attorney's fees and litigation costs. Large corporations would be far more careful with censorship and indigent individuals would have access to relief. Lastly, the legislation should provide for a small statutory award of,

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[170] *See* Constine, *supra* note 48.
[171] *See generally id.*
[172] *See generally* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968); Hudgens v. NLRB, 424 U.S. 507 (1976); *cf.* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980). This line of Supreme Court cases is collectively referred to as the "shopping mall cases."
[173] *See* 42 U.S.C. § 1983 (2018).
[174] *See* ONLINECENSORSHIP, *supra* note 50.
[175] *See* 42 U.S.C § 1983 (2018).
[176] *Id.*
[177] *See* Stephen J. Shapiro, *Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy?*, 62 MERCER L. REV. 449, 449 (2011) (citing RESTATEMENT (SECOND) OF TORTS § 901 (1979) ("[T]orts are maintainable . . . (a) to give compensation, [provide] indemnity or restitution for harms.")) (explaining that "the primary purpose of tort law is to compensate parties injured by the wrongful conduct of another.").

perhaps, $1,000 to deter social media websites from exercising broad, arbitrary moderation and chancing the possibility of suit. This statutory cause of action would provide individual users the opportunity to appeal otherwise unnegotiable moderation, and, via threat of monetary loss and litigation, dissuade social media from taking unconstitutional action.

Social media, like Facebook, would be unsuccessful in bringing a compelled speech claim against this legislation. Facebook may argue that conferring free speech rights on users would compel them to sponsor and propagate disagreeable speech that violates their current community standards.[178] This argument will not stand. In *Turner Broadcasting Systems v. FCC*, the Court held that the Cable Television Consumer Protection and Competition Act of 1992[179]— mandating that broadcast programmers carry local television access to subscribers—did not substantiate compelled speech because its application was content neutral.[180] Furthermore, the Court held that the local content requirement does not alter the message of the broadcasters.[181] The Court reasoned that the broadcast corporations—and, presently, Facebook—could "disclaim any identity of viewpoints between the management and the speakers who use the broadcast facility."[182] Requiring Facebook to support free user speech would not encumber Facebook's message, because they lack an identifiable one, and the opportunity exists for Facebook to disclaim the viewpoint of its users.[183] Notably, "[t]he First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."[184] This

[178] *See Community Standards*, *supra* note 46.
[179] *See generally* 47 U.S.C. § 534 (2014).
[180] *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 655 (1994).
[181] *See id.*
[182] *Id.* (comparing Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) (holding that the California Constitution may confer on its citizens broader First Amendment protection than the U.S. Constitution even to the extent that it offends private property rights and to that extent free speech will weigh heavier in the balance)).
[183] Facebook could adopt a strong, identifiable message to circumvent free speech policy. Doing so would give them an exclusionary right, but the message must be clear and strong.
[184] *Turner Broad. Sys*., 512 U.S. at 657.

statute is content-neutral, which avoids compelling social media speech. Social media are "critical pathway[s] of communication."[185]

This legislation may impede some social media private property rights. There will undoubtedly be an impact on user retention with the proliferation of distasteful, yet constitutionally protected, speech on social media. Social media websites encompassed by this legislation, however, would be unsuccessful in bringing a regulatory takings claim. Regulatory takings jurisprudence stems from a Fifth Amendment bar to taking "private property . . . for public use, without just compensation."[186] In *Penn Central Transportation Company v. New York City*, the Court established a balancing test consisting of the following: 1) does the government regulation have an unreasonable economic impact on the claimant, 2) to what extent has the regulation interfered with the owner's reasonable investment-backed expectations, and 3) the character of the government action.[187] Furthermore, a taking under the *Penn Central* test occurs in situations with a permanent physical occupation of the property,[188] a regulation causing loss of all economically beneficial or productive use of the property,[189] or the government demanding an exaction with no essential nexus to a legitimate state interest[190] or lacking a general proportionality to the impacts of the particular project at hand.[191] Clearly, the three taking exceptions to the *Penn Central* test do not

[185] *Id.*
[186] U.S. CONST. amend. V.
[187] *See* Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978).
[188] *See generally* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 420 (1982) (holding that a permanent physical occupation of an owner's property constituted a taking requiring just compensation under the Fifth and Fourteenth Amendments).
[189] *See generally* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1006 (1992) (holding that a taking requiring just compensation occurred under the Fifth and Fourteenth Amendments when the State enacted legislation preventing a landowner, who purchased residential tracts to build homes, from building permanent structures on that property, thus frustrating the purpose for the purchase).
[190] *See generally* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 827 (1987) (holding that the conditioning of a building permit upon a grant of a public easement constituted a taking requiring just compensation).
[191] *See generally* Dolan v. Tigard, 512 U.S. 374, 377 (holding that the city's property dedication exaction was not roughly proportionate to the complainant's proposed land use plan and impact).

apply to this social media-free speech legislation and may be discarded.

While the *Penn Central* test is more applicable, this legislation cannot qualify as a regulatory taking of Facebook's property or interests. First, under the *Penn Central* test, conferring speech rights on Facebook users would probably not have an unreasonable economic impact on Facebook.[192] While some users may be offended or slighted by the propagation of distasteful protected speech, it is unlikely to cause many users to flee the site. Facebook would likely remain the public forum of choice for the vast majority of users, leaving the site unaffected by the legislation. For *Penn Central's* second step, this legislation could not conceivably interfere with the reasonable investment-backed expectations of Facebook, because the site would continue operating in substantially the same way.[193] None of this action would seem to negatively affect Facebook's financial future. Facebook generates profits by selling advertising customized to specific target audiences. In turn, Facebook investors generate profit when the stock performs well. It is unlikely advertising interest or stock performance would be noticeably affected by this government action. Finally, the character of the government action taken through this legislation promotes the common good for two-thirds of America, despite potential burdens on Facebook. The Court supports interference arising "from some public program adjusting the benefits and burdens of economic life to promote the common good."[194]

Even considering this legislation, social media websites could take steps that allow users to choose the content they view. Allowing individual users to censor content—the equivalent of not attending an expressive event on a traditional public forum—protects the speaker and listener's rights, as well as the property rights of the site. This procedure constitutionally balances all interests.

Lastly, dissenters will argue that the open floodgates of protected, yet detestable, speech will negatively impact minors on social media. However, internet speech legislation designed to protect minors cannot withstand constitutional scrutiny and failed in the past. The Court considered the issue in *Reno v. ACLU*, challenging the CDA at 47 U.S.C. § 223, and it enjoined enforcement of section 223 because

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[192] *See Penn Cent. Transp. Co.*, 438 U.S. at 124.
[193] *See id.*
[194] *Id.* (internal citations omitted) (citing United States v. Causby, 328 U.S. 256 (1946)).

of CDA's First Amendment violations.[195] Section 223 focused on content-based regulation of sexually explicit speech for the purpose of protecting minors.[196] The Court reasoned that it is untenable to regulate all adult-oriented, constitutional speech on the internet simply because one of the recipient-viewers might be a minor.[197] The same is true of this social media legislation. Simply because some users of social media are minority-aged, does not mean that all majority-aged, constitutional speech should be censored on the most powerful public forum in existence.[198] An argument to the contrary is unsustainable and inconsistent with precedent.[199]

Notwithstanding precedent, social media websites like Facebook could succeed on any one of the above issues. The strongest among them is a simple argument of property rights;[200] that the government interest in providing a conduit of free speech for citizens is not so high as to squash Facebook's property rights.[201] The *Penn Central* test could weigh heavily in favor of Facebook given the impact on reasonable, investment-backed expectations.[202] However, this argument would not be ripe until after the implementation of the law.[203] It is also dependent on a showing of negative impact on reasonable, investment-backed expectations.[204] This fact would be easily represented by a demonstrable effect on Facebook's value as a publicly-traded company. Yet, the bar is high and the Court favors congressional action for protection of civil liberties.[205]

Overall, this narrow congressional action preserves associational rights, avoids compelled speech, and leaves private property rights unconstrained. This is the government action necessary to protect the First Amendment speech rights of users on social media. Absent

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[195] *See generally* Reno v. ACLU, 521 U.S. 844 (1997) (interpreting 47 U.S.C. § 223 (2012) for constitutional muster).
[196] *See id.* at 875.
[197] *See id.* at 876.
[198] *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).
[199] *See Reno*, 521 U.S. at 885.
[200] *See* U.S. v. Craft, 535 U.S. 274, 278–79 (2002) (explaining property rights as a "bundle of sticks").
[201] *See* Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978).
[202] *See id.*
[203] *See* Abbott Labs. v. Gardner, 387 U.S. 136, 148–49 (1967) (explaining the context of ripeness for judicial resolutions).
[204] *See Penn Cent. Transp. Co.*, 438 U.S. at 124.
[205] *See id.* (internal citations omitted) (citing United States v. Causby, 328 U.S. 256 (1946)).

congressional action, opportunity exists for the courts to address speech censorship on social media.

B. Judicial Review

If Congress cannot act, the courts may provide First Amendment protection through the Fourteenth Amendment Due Process Clause by way of state action entwinement doctrine. Generally, private actors remain free from the responsibility of providing private citizens with civil liberties, free speech included.[206] However, the Court in *Marsh v. Alabama* believed that when the actions of a corporation are analogous to a government body, a quasi-governmental character is assumed concertedly with constitutional, civil liberty protections.[207] Following *Marsh*, the Court toiled with a string of messy First Amendment-private property cases involving expressive speech in shopping malls.[208] The Court's nebulous, final word indicates that when other avenues for speech exist, private property owners—not quasi-governmental entities—can bar the speech.[209]

Social media is different than both a company-town and a shopping mall because it allows for greater speech dissemination.[210] Further, the free speech-social media paradigm lacks the presence of the employer-employee relationship that seems to dominate the shopping mall cases—nearly all included a discussion of collective

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[206] *See* Puetz, *supra* note 93, at 395; *see also* U.S. v. Morrison, 529 U.S. 598, 621 (2000) (quoting Shelley v. Kraemer, 334 U.S. 1 (1948)).

[207] *See* Marsh v. Alabama, 326 U.S. 501, 502 (1946).

[208] *See generally* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (prohibiting speech on private property when there is no nexus between speech and property and when an alternative venue is available nearby); Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) (allowing free speech when picketer's speech bore nexus to property); *but see* Hudgens v. NLRB, 424 U.S. 507 (1976) (recognizing the flawed reasoning in *Logan Valley*, in favor of *Lloyd*, and elevating private property rights of shopping malls over individual speech rights); *cf.* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (affirming the California state legislature's police power to extend citizen's free speech protections to fora like shopping malls, even when privately owned, because the law did not limit but expanded citizen's rights in comparison to the United States Constitution).

[209] *See generally* Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992) (discussing free speech, trespass to property, and unfair labor practices); *see also Lloyd Corp.*, 407 U.S. 551; *Amalgamated Food Emps. Union Local 590*, 391 U.S. 308; *but see Hudgens*, 424 U.S. 507; *cf. Pruneyard Shopping Ctr.*, 447 U.S. 74.

[210] *See* Puetz, *supra* note 93, at 403–04.

bargaining.[211] That said, websites like Facebook invite wholly-open public participation and subsequently censor and moderate disagreeable material.[212]

An aggrieved user does not need new jurisprudence to litigate this issue in the courts; the First and Fourteenth Amendments via state action entwinement suffice.[213] The key factor allowing judicial review is the presence of state action. And, in the case of social media in general and Facebook in particular, state action exists. The Court requires that "conduct allegedly causing the deprivation of a federal right be fairly attributable to the State."[214] Here, the Court outlines a two-part test for attribution of state action.[215] Primarily, "the deprivation must be caused by . . . a rule of conduct imposed by the State" and, secondarily, "the party charged with the deprivation must be a person who may fairly be said to be a state actor."[216] The Court clarifies the second requirement by stating that fair characterization of the party as a state actor relies on concerted action or aid from state officials or that the "conduct is otherwise chargeable to the State."[217]

Facebook's speech censorship is a deprivation caused by a state-imposed rule of conduct because section 230 of the CDA encourages content-based censorship.[218] Further, Facebook's censorship conduct is otherwise chargeable to the state because of statutory impositions on the corporation. In section 230 of the CDA, Congress established that the internet "offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[219] Yet, inherent in the name of the Act itself, Congress implies that the internet should be a decent

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[211] *See generally Lechmere, Inc.*, 502 U.S. 527; *see also Amalgamated Food Emps. Union Local 590*, 391 U.S. 308; *Lloyd Corp.*, 407 U.S. 551; *but see Hudgens*, 424 U.S. 507.
[212] *See* Puetz, *supra* note 93, at 404.
[213] *See* U.S. CONST. amend. I ("Congress shall make no law . . . . ") (the First Amendment does not address private actors); *see also* Gitlow v. New York, 268 U.S. 652, 666 (1925) (holding that the First Amendment is incorporated to the states by way of the Fourteenth Amendment Due Process Clause).
[214] Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).
[215] *See id.*
[216] *Id.*
[217] *Id.*
[218] *See* 47 U.S.C. § 230(f)(2) (2018).
[219] *Id.* § 230(a)(3).

environment where providers of information should be immunized from civil liability for censorship of user speech:

> "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."[220]

Here, Congress defines "interactive computer service[s]" as "information service[s] . . . that provide[] or enable[] computer access by multiple users to a computer server;" incorporating social media.[221] In conflict with constitutional principles, Congress encourages content-based censorship to further the goal of making the internet a decent, inclusive space.[222] This is unlike *Flagg Brothers v. Brooks*, where the Court found an absence of state action when New York state law authorized, but did not command, direct, or encourage, a warehouseman to sell private property following an eviction.[223]

Encouraging content-based speech censorship by providing immunity from civil liability, regardless of "whether or not such material is constitutionally protected," certainly causes a deprivation of user rights through the state-imposed Act.[224] Furthermore, Facebook commits countless speech censorship acts every second. These satisfy the first element of the state-action attribution test.[225] Congress and websites like Facebook seek decency and inclusivity regardless of the cost to speech liberty.[226] The CDA's statutory impositions and encouragement allows Facebook to further its private goals of increasing users, and therefore profit, to the detriment of free speech on the most powerful forum.[227] [228] Under the second prong, Facebook's censorship of user content is otherwise chargeable to Congress because of their sponsorship and immunization of social

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[220] *Id.* § 230(c)(2)–(2)(A).
[221] *Id.* § 230(f)(2).
[222] *See id.* § 230(c).
[223] *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 151 (1978). Notably, the practice forming the factual basis of *Flagg Bros.* is common and legal, today.
[224] 47 U.S.C. § 230(c)(2)(A) (2018).
[225] *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).
[226] *See generally* 47 U.S.C. § 230(a) (2018); Constine, *supra* note 48.
[227] *See generally* 47 U.S.C. § 230(a) (2018).
[228] *See generally* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017) (quoting Reno v. ACLU, 521 U.S. 844, 868 (1997)).

media, regardless of "whether or not such material is constitutionally protected."[229] The State's speech-suppressive goals are encouraged by the CDA and masquerade as Facebook's user-censorship.[230] Therefore, Facebook's censorship is an action under color of state law and amounts to state-action for due process purposes.[231]

Without finding state action, there will be no reprieve for censored users.[232] In *United States v. Morrison*, the Court emphasized that the Fourteenth Amendment "'erects no shield against merely private conduct, however discriminatory or wrongful.'"[233] The decision in *Morrison*[234] is Facebook's foothold against any state-action claim brought under the First and Fourteenth Amendments. Notably, however, the Court in *Morrison* distinguished exclusively private conduct and explicitly preserved state action doctrine,[235] as propagated by *Lugar*,[236] with respect to due process violations. Facebook's legal foundation would teeter on a statutory interpretation argument that censorship encouragement in section 230 of the CDA[237]—regardless of constitutionality—does not sufficiently form the tie of state-action. Furthermore, any censorship Facebook conducts is so far removed from the state interests, it could not otherwise be chargeable to the state.[238] Even so, Facebook's argument is weak considering the facts.

Concluding that Facebook's censorship constitutes state action would allow an aggrieved user to bring a section 1983 action[239] for a violation of their First Amendment rights.[240] Additionally, an aggrieved user could supplement their free speech argument with the quasi-governmental entity and public forum reasoning. Undoubtedly, arguments for state action arise through a showing of public function,

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[229] 47 U.S.C. § 230(c)(2)(A) (2018).
[230] *See generally id.*
[231] *See* Lugar v. Edmondson Oil Co., 457 U.S. 992, 942 (1982).
[232] *See generally* U.S. v. Morrison, 529 U.S. 598, 621 (2000) (emphasizing that the Fourteenth Amendment prohibits only state action).
[233] *Id.* (quoting Shelley v. Kraemer, 334 U.S. 1 (1948)).
[234] *See generally Morrison*, 529 U.S. 598.
[235] *See id.* at 621–23 (noting individual invasion of individual rights does not measure up to a due process violation, but state action doctrine is still good law).
[236] *See generally Lugar*, 457 U.S. at 936.
[237] *See generally* 47 U.S.C. § 230(c)(2)(A) (2018).
[238] *See Lugar*, 457 U.S. at 937.
[239] *See generally* 42 U.S.C. § 1983 (2018).
[240] *See generally Lugar*, 457 U.S. at 942.

which shares an undeniable nexus to the role of social media.[241] State action arguments would carry considerable weight in the courts, given their inclination to protect online free speech—as discussed in cases like *Reno* and *Packingham*[242]—and private-state actor jurisprudence.[243] Aggrieved, censored users have an avenue to speech freedom through the courts.

V. CONCLUSION

Social media are the most powerful public fora in existence today.[244] The Court, in precedent and dicta, gives enormous weight to free speech on the internet, paving the way for user free speech protection on social media.[245] Even so, websites like Facebook, Twitter, Instagram, and others, engage in user speech censorship every second.[246] Given the breadth of these "vast democratic fora," user speech protection is imperative.[247] Social media websites like Facebook clearly possesses quasi-governmental characteristics, through exercise of content-based censorship, and are sufficiently analogous to a town square such that the government cannot leave speech arbitration to corporate policy.[248] Additionally, Congress immunized social media websites and encouraged the censorship of protected content.[249] This sweeping, unconstitutional censorship can only be cured through legislative or civil remedy—the private, corporate-owners are disinclined to alter their community standards.[250]

Congressional action is the most absolute and effective way to protect user speech on social media. As it stands, websites like Facebook embody a public accommodation, yet are virtually unregulated by any government entity. The Constitution gives Congress the power to enact legislation through the Commerce

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[241] *See, e.g.*, Marsh v. Alabama, 326 U.S. 501, 502–03 (1946).
[242] *See generally* Packingham v. North Carolina, 137 S. Ct. 1730 (2017); Reno v. ACLU, 521 U.S. 844 (1997).
[243] *See, e.g.*, *Lugar*, 457 U.S. at 942; *see also Marsh*, 326 U.S. at 502.
[244] *See Packingham*, 137 S. Ct. at 1735.
[245] *See generally Packingham*, 137 S. Ct. 1730; *Reno*, 521 U.S. 844.
[246] *See generally* Roberts, *supra* note 47.
[247] *Reno*, 521 U.S. at 868.
[248] *See* discussion *supra* Sections III.a, III.b.
[249] *See* 47 U.S.C. § 230(c) (2018).
[250] *See generally Community Standards*, *supra* note 46.

Clause, including the internet.[251] Furthermore, Congress may have a duty to act, given the responsibility of Government to provide an avenue of speech when all other effective locales are eliminated.[252] In form, the legislation should narrowly dictate First Amendment protection for users of social media: a specific and identifiable group of websites.[253] Furthermore, the legislation will not offend associational rights, because Facebook has no identifiable message;[254] compelled speech rights, because the legislation is content-neutral;[255] or property rights, because it does not meet the elements of *Penn Central*.[256] *Morrison* may be a legal basis to challenge the legislation,[257] but it is weak and relies on rejection of the state action doctrine.[258] The legislation must include a statutory cause of action for deprivation of rights under section 1983 of the Civil Rights Act[259] and injunctive relief for censorship. This statutory cause of action should be supplemented by a statutory award for deterrence and litigation and attorney's fees for egregious acts of censorship. Narrowly-tailored government action is necessary to protect the First Amendment rights of social media users.

Alternatively or congruently, the courts may be able to articulate First Amendment protection via the Fourteenth Amendment, by way of state action entwinement for social media users. The keystone for successful judicial review is characterizing social media censorship as state action. State action exists because social media censorship is a deprivation caused by state-imposed rule of conduct via section 230(c) of the CDA.[260] Further, that conduct is otherwise chargeable to Congress because of their statutory encouragement for corporate-owners of social media to censor the content.[261] Section 230(c) incentivizes social media to further private-economic interest by

[251] *See* U.S. CONST. art. I, § 8, cl. 3; *see also* 47 U.S.C. § 223 (2018); *Reno*, 521 U.S. 849.
[252] *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939).
[253] *See* U.S. CONST. amend. I.
[254] *See generally* Boy Scouts of Am. v. Dale, 530 U.S. 640, 643 (2000); Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 559 (1995).
[255] *See generally* Turner Broad. Sys. v. FCC, 512 U.S. 622, 655 (1994).
[256] *See generally* Penn Cent. Transp. Co. v. N.Y.C., 438 U.S. 104, 124 (1978).
[257] *See generally* U.S. v. Morrison, 529 U.S. 598, 621 (2000).
[258] *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 937 (1982).
[259] *See* 42 U.S.C. § 1983 (2018).
[260] *See* 47 U.S.C. § 230(c) (2018).
[261] *See Lugar*, 457 U.S. at 937.

providing immunity from suit, regardless of "whether or not such material is constitutionally protected."[262] Therefore, social media censorship amounts to state action under color of state law for due process purposes. Furthermore, arguments to social medias' public function as quasi-governmental entities and public fora lend support to the presence of state action. This provides injured, censored users an avenue for relief, under section 1983,[263] of social medias' incessant, unconstitutional speech moderation.

Charlottesville, and the subsequent events, should forward free speech in the pursuit of freedom, not restrain it on the most effective fora.[264] It is time for Congress or the courts to effectively and permanently dilate the most pervasive channel for discourse and vigorously support the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[265] Social media corporations must not be allowed to stifle that national legacy.

[262] 47 U.S.C. § 230(c)(2)(A).
[263] *See* 42 U.S.C. § 1983 (2018).
[264] *See* discussion *supra* Section I.
[265] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).