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# DIGITAL SHOPPING MALLS AND STATE CONSTITUTIONS — A NEW FONT OF FREE SPEECH RIGHTS?

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## I. INTRODUCTION

In May 2019, Donald Trump tweeted that he is "continuing to monitor the censorship of AMERICAN CITIZENS on social media platforms" and declared that the government is "monitoring and watching[] closely." [1] In response, Orin Kerr dryly noted, "[g]overnment to review decisions of private companies to ensure protection of free speech."[2] Government monitoring of private actors to protect individual free speech interests intuitively seems at odds with the First Amendment doctrine — which focuses on the protec-

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1. Donald J. Trump (@realDonaldTrump), TWITTER (May 3, 2019, 3:55 PM), https://twitter.com/realDonaldTrump/status/1124447302544965634 [https://perma.cc/9LEK-DHWP].

2. Orin Kerr (@OrinKerr), TWITTER (May 3, 2019, 5:30 PM), https://twitter.com/OrinKerr/status/1124471247834796034 [https://perma.cc/Z3YN-MAZM].

tion of free speech *from* government actors.[3] This conception stems from the state action doctrine — the Constitution only protects individuals from *government* action, and not actions taken by private actors. While this doctrine has been consistently and roundly criticized,[4] it remains a fixed bright-line rule in our constitutional jurisprudence today.[5]

In 2019, the Supreme Court reaffirmed the vitality of the state action doctrine in *Manhattan Community Access*.[6] The Court was asked to consider whether providing public access channels on a privately owned cable network transformed a private nonprofit into a state actor.[7] The Court found that operating public access channels on cable was not a "traditional, exclusive public function" and "a private entity who provides a forum for speech is not transformed by that fact alone into a state actor."[8] Therefore, the private nonprofit was "not subject to First Amendment constraints on how it exercises its editorial discretion with respect to the public access channels."[9] The full meaning of *Manhattan Community Access* will be debated in lower courts and academic circles for several years.[10] For now, the decision reinforces the argument that social media platforms (private actors) are not subject to First Amendment restrictions when they delete posts or ban individuals for violating their policies.[11] In fact, under the modern conception of free speech rights,[12] social media platforms could argue

3. *See* Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2371 (2018) (highlighting "the fundamental principle that *governments* have 'no power to restrict expression because of its message, its ideas, its subject matter, or its content'") (emphasis added) (citation omitted).

4. *See generally* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985).

5. *See, e.g.*, Louis M. Seidman, *State Action and the Constitution's Middle Band*, 117 MICH. L. REV. 1, 4–8 (2018) (discussing the state action doctrine and its application in recent Supreme Court cases).

6. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019).

7. *Id.* at 1926. New York state law required Time Warner to provide public access to some channels on its cable system. *Id.* at 1937. New York City designated Manhattan Neighborhood Network, a private nonprofit, to operate these channels. *Id.* at 1927.

8. *Id.* at 1930.

9. *Id.* at 1933.

10. The media characterized this as a win for social media platforms. *See* Mike Masnik, *Supreme Court Signals Loud And Clear That Social Media Sites Are Not Public Forums That Have To Allow All Speech*, TECHDIRT (June 18, 2019) https://www.techdirt.com/articles/20190617/16001942415/supreme-court-signals-loud-clear-that-social-media-sites-are-not-public-forums-that-have-to-allow-all-speech.shtml [https://perma.cc/WU8W-PCUW]. But, as of November 2019, no articles or lower court decisions have explicitly found that *Halleck*'s holding applies to the Internet.

11. Prior to *Manhattan Cmty. Access*, this point was contested in academic circles, *see infra* notes 14–15. The impact of the case remains to be seen.

12. *See infra* Part IV.

that this type of tweet by the President restricts *their* First Amendment rights by creating a "chilling effect" on their editorial choices.[13]

The debate today between scholars, advocates, and others around social media platforms revolves around several contested legal issues and norms. One major axis of debate centers on whether social media platforms are in fact private actors. Some scholars are firmly convinced that social media platforms are private actors and so not subject to the First Amendment,[14] while others have attempted to push the boundaries of the state action doctrine to include online social media platforms.[15] A second axis of debate focuses on existing content moderation policies and whether private regulation is a good substitute for the First Amendment and government regulation.[16] Lastly, the Communications Decency Act ("CDA"), a federal statute, is another ingredient in the current debate on Internet policy and regulation. CDA § 230[17] immunizes providers of interactive computer services, such as social media platforms, from liability for third-party content. This federal law has been the cornerstone of Internet policy and regulation since 1996, but its viability has come under increasing scrutiny

13. *See* Frank Lomonte & Linda Norbut, *"Failing New York Times" v. Trump: Is There a First Amendment Claim for Official Condemnation by Tweet?*, 33 COMMS. LAWYER 1, 1, 21–26 (2018). *See also infra* Part IV.

14. *See, e.g.*, Noah Feldman, *Are You Sure You Want a Right to Trump's Twitter Account?*, N.Y. TIMES (June 6, 2018), https://www.nytimes.com/2018/06/05/opinion/first-amendment-trump-twitter.html [https://perma.cc/WZB3-HDDJ]; Eric Goldman, *Of Course the First Amendment Protects Google and Facebook (And It's Not a Close Question)*, KNIGHT FIRST AMEND. INST. (Feb. 26, 2018), https://knightcolumbia.org/content/course-first-amendment-protects-google-and-facebook-and-its-not-close-question [https://perma.cc/TE5D-ZJDS]; Alan Rozenshtein, *No, Facebook and Google are Not State Actors*, LAWFARE (Nov. 12, 2019, 8:30 AM) https://www.lawfareblog.com/no-facebook-and-google-are-not-state-actors [https://perma.cc/3J7A-M9HY].

15. *See, 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. 990, 1023 (2017); Heather Whitney, *Search Engines, Social Media, and the Editorial Analogy*, KNIGHT FIRST AMEND. INST. (Feb. 23, 2018), https://knightcolumbia.org/content/search-engines-social-media-and-editorial-analogy [https://perma.cc/PJT2-VGXL]; Jed Rubenfeld, *Are Facebook and Google State Actors?*, LAWFARE (Nov. 04, 2019, 8:20 AM) https://www.lawfareblog.com/are-facebook-and-google-state-actors [https://perma.cc/V7UF-FETU].

16. *See* Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018); DAPHNE KELLER, INTERNET PLATFORMS: OBSERVATIONS ON SPEECH, DANGER, AND MONEY 21–28, (Hoover Institution Aegis Series Paper No. 1807, June 13, 2018), https://www.hoover.org/sites/default/files/research/docs/keller_webreadypdf_final.pdf [https://perma.cc/62YG-PJRS]; *see also* Mark Zuckerberg, *The Internet Needs New Rules. Let's Start in These Four Areas.*, WASH. POST (Mar. 30, 2019, 3:00 PM), https://www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas [https://perma.cc/Y8ZF-KLC8]; Evelyn Douek, *Breaking Up Facebook Won't Fix Its Speech Problems*, SLATE (May 10, 2019, 10:26 AM), https://slate.com/technology/2019/05/chris-hughes-facebook-antitrust-speech.html [https://perma.cc/M2GV-Q5WA].

17. 47 U.S.C. § 230 (2012).

in the last several years.[18] Importantly, the debate today around the Internet, free speech, and the right regulatory framework (if any) solely revolves around the Federal Constitution and a nationwide policy. Should it?

States, conceivably a co-equal partner in the structure of American government, have begun to take notice of the national debate and attempted to respond. In 2019, legislators in California and Texas introduced bills relating to online speech and social media platforms.[19] As the attempts of social media platforms to regulate content continue to make news,[20] the likelihood that states will ask whether they have a role in the current debate increases. This would not be the first time that states regulate what initially appeared to be a solely national issue in the absence of congressional action.[21]

This Note eschews the focus on federal rights and nationwide policy. Instead, the Note looks to state constitutions as the potential source of free speech rights online and considers the states' ability to avoid the limitations of the federal state action doctrine. Specifically, this Note revisits *Pruneyard Shopping Center v. Robins*,[22] which affirmed that states could extend greater free speech protections under state constitutions than the Federal Constitution would otherwise mandate.[23] Part II builds out the legal argument through a discussion

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18. *See, e.g.*, Danielle Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 404 (2017) (arguing that "Section 230 is overdue for a rethinking"). *But see* Joshua Geltzer, *The President and Congress Are Thinking of Changing This Important Internet Law*, SLATE (Feb. 25 2019, 3:40 PM), https://slate.com/technology/2019/02/cda-section-230-trump-congress.html [https://perma.cc/59RK-Q3FQ].

19. Assemb. B. 1316, 2019–20 Leg., Reg. Sess. (Cal. 2019) (prohibiting social media platforms from censoring online content based on viewpoint, with limited exceptions); S.B. 2373, 86th Leg., Reg. Sess. (Tex. 2019) (providing a private right of action against social media platforms that discriminate based on viewpoint).

20. *See, e.g.*, Allyson Chiu, *Facebook Wouldn't Delete an Altered Video of Nancy Pelosi. What About One Of Mark Zuckerberg?*, WASH. POST (June 6, 2019, 6:23 AM), https://www.washingtonpost.com/nation/2019/06/12/mark-zuckerberg-deepfake-facebook-instagram-nancy-pelosi [https://perma.cc/FRP9-7AFP]; Eli Rosenberg, *A Right-Wing Youtuber Hurled Racist, Homophobic Taunts at a Gay Reporter. The Company Did Nothing.*, WASH. POST (June 5, 2019, 3:57 PM), https://www.washingtonpost.com/technology/2019/06/05/right-wing-youtuber-hurled-racist-homophobic-taunts-gay-reporter-company-did-nothing [https://perma.cc/MG26-S5CV]. *See also* Sam Wolfson, *Facebook Labels Declaration of Independence as 'Hate Speech'*, THE GUARDIAN (July 5, 2018, 1:10 PM), https://www.theguardian.com/world/2018/jul/05/facebook-declaration-of-independence-hate-speech [https://perma.cc/B4S3-38TK].

21. For example, states have taken the lead on climate action and privacy/data security when Congress has refused to act. *See, e.g.*, California Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE §§ 38500–38599 (West 2018); California Consumer Privacy Act , CAL. CIV. CODE §§ 1798.100–1798.198 (West 2019); California "Shine the Light" Law, CAL. CIV. CODE §§ 1798.83–84; *see also* Illinois Biometric Information Privacy Act, 740 ILL. COMP. STAT. 14/1, 14/5 (2008).

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

23. This has been attempted several times recently in a number of federal and state cases in California. *See infra* Part III.

of *Pruneyard* and how California courts have approached its holding since the original 1979 state supreme court decision. Part III considers federalism issues and the likely challenges to extending these rights online. Part IV revisits *Pruneyard* and its underlying assumptions and considers how a court may balance these interests in the modern First Amendment framework. Part V concludes.

## II. APPLYING PRUNEYARD TO THE INTERNET

### *A. The Pruneyard Decision(s)*

On a Saturday afternoon[24] in the late 1970s, a group of high school students set up a table within the Pruneyard shopping center in Campbell, California to solicit signatures.[25] The students planned to collect signatures for a petition opposing UN Resolution 3379 (declaring that "Zionism is a form of racism and racial discrimination")[26] but were soon stopped by a security guard.[27] The guard notified the students that because they lacked permission to solicit, they would have to move to the public sidewalk area.[28] The mall had a general policy of prohibiting "any tenant or visitor [from] engag[ing] in publicly expressive activity, including the circulating of petitions, that is not directly related to the commercial purposes."[29] The students complied and subsequently brought suit to enjoin the shopping center from denying access; the trial court rejected the suit, and the state court of appeal affirmed the trial court decision.[30]

In a 4-3 decision, the California Supreme Court reversed and held that the California Constitution protects free speech and petition rights "when reasonably exercised" in privately owned shopping malls.[31] The opinion does not mention the state action doctrine once. But the public nature of shopping centers where the public is invited and their ability to "provide an essential and invaluable forum for exercising

24. *See Pruneyard*, 447 U.S. at 77; Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 342 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980). Neither the California Supreme Court nor the United States Supreme Court note in their decisions what year this took place. The UN Resolution was passed in 1975, and the arguments before the California Supreme Court took place in 1979 — providing a four-year window of time this could have occurred in.

25. *See Pruneyard*, 447 U.S. at 77.

26. *See* G.A. Res. 3379 (XXX), at 83 (Nov. 10, 1975).

27. *Robins*, 592 P.2d at 342.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.* at 347. In reaching this holding, the court first had to determine whether *Lloyd v. Tanner*, a factually similar case decided by the United States Supreme Court, established a federal property right "immune from regulation" (and if it therefore created preemption issues). *Id.* at 344. The court held it did not. *Id.*

[speech and petition] rights" appear to underpin the court's holding.[32] The court further noted that this decision did not mean that "those who wish to disseminate ideas have free rein"[33] — property owners could still impose reasonable time, place, and manner restrictions. In addition, the court stressed that the defendant was not an individual or "modest retail establishment" but a large twenty-one-acre shopping center.[34]

In 1980, in a 9-0 decision, the U.S. Supreme Court affirmed.[35] Justice Rehnquist noted that "it is well established" that states may impose reasonable restrictions on private property as long as they do not run afoul of the Federal Constitution.[36] Thus, the Court affirmed that states could provide greater individual rights under their constitutions, provided these state rights did not violate the Federal Constitution. The Court then addressed the First Amendment and Fifth Amendment claims brought by the shopping center.[37] First, the Court noted that extending free speech rights into privately owned shopping malls "clearly does not amount" to a Fifth Amendment violation in part because the shopping center could restrict the activity through time, place, and manner regulations.[38] In addition, the shopping center's First Amendment claim failed because the shopping center was open to the public and could disavow the message, there was no "prescribed position or view" required by the state, and the shopping center's exclusion of individuals was not an editorial function.[39]

### *B. Evolution of the Pruneyard Doctrine*

Today, *Pruneyard* remains good law, though the California Supreme Court has pruned the breadth of the initial decision. In 2001, a plurality of the court read the state action doctrine back into *Pruneyard* and held that apartment tenants did not have a state constitutional right to distribute leaflets in a privately owned apartment complex.[40]

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32. *See id.* at 347.

33. *Id.*

34. *See id.* (citing Diamond v. Bland, 521 P.2d 460, 470 (Cal. 1975) (J. Mosk, dissenting)).

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

36. *Id.* at 81.

37. The court also summarily dismissed the shopping center's Fourteenth Amendment claim to due process. *See id.* at 84–85.

38. *Id.* at 83. The court also noted that the shopping center did not sufficiently demonstrate that "the 'right to exclude others' is so essential to the use or economic value of their property that the state-authorized limitation of it amounted to a 'taking.'" *Id.* at 84. This perspective likely would also hold true for social media companies, whose business models rest on increasing new users and content.

39. *Id.* at 85–88.

40. Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 799–804 (Cal. 2001). The concurrence and dissent, a majority of the justices, expressly disagreed with this holding. *See id.* at 812 ("[A]lthough I concur in the judgment, I do not join the lead opin-

Six years later, the court revisited *Pruneyard* to consider whether a mall could prohibit boycotts or similar activities of stores located in the shopping mall.[41] The court found that "[p]rohibiting speech that advocates a boycott . . . is not content neutral" and applied strict scrutiny.[42] Importantly, the majority opinion did not consider the threshold question of whether there was state action, instead reiterating that a privately owned shopping mall could be a public forum if opened to the public.[43] In 2012, the California Supreme Court appeared to formalize the public forum analysis, determining that areas adjacent to stores' entrances and exits in a mall are not a public forum under *Pruneyard*.[44] In doing so, the court appears to have limited the application of *Pruneyard* to the common areas of shopping malls or centers.[45] The court has not applied *Pruneyard* since 2012.

Today, the state and federal jurisprudence primarily differ in that California courts conduct an analysis of the character of the property to determine if it possesses sufficient characteristics of a public forum, while for First Amendment purposes courts must determine whether the government owns the property.[46] California utilizes a balancing test, while the Supreme Court employs a categorical test.[47]

Since this decision nearly forty years ago, other states have been reluctant to follow suit in rejecting the traditional state action requirement.[48] New Jersey is the only state that affords similar free

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ion's discussion or conclusions with regard to the state action doctrine.") (C.J. George, concurring); *id.* at 827 ("[N]either the text of the state free speech clause, the history of its adoption, our prior pronouncements, nor considerations of constitutional theory supports judicial imposition of a state action limitation on Californians' free speech rights.") (J. Werdegar, dissenting).

41. Fashion Valley Mall, LLC v. NLRB, 172 P.3d 742, 743 (Cal. 2007).

42. *Id.* at 751.

43. *Id.* at 745–46.

44. Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8, 290 P.3d 1116, 1120–21 (Cal. 2012). Importantly, all seven justices joined this portion of the opinion. *Id.* at 1141 ("I agree with the majority that the privately owned walkway in front of the customer entrance to the grocery store is not a public forum.") (J. Chin, concurring in part and dissenting in part).

45. *Id.* at 1120 ("[*Pruneyard*'s] reasoning is most apt in regard to shopping centers' common areas [which promote social activity]. By contrast, areas immediately adjacent to the entrances of individual stores typically lack seating and are not designed to promote relaxation and socializing.").

46. Case Comment, *Developments in the Law — State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1313–14 (2010).

47. *Compare* Ralphs Grocery Co., 290 P.3d at 1121 (considering the character of the grocery store walkway to determine if it is a public forum), *with* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928–29 (2019) (noting that private actors can "qualify as a state actor in a few limited circumstances" and then noting that "'very few' functions fall into" the traditional/exclusive public function category).

48. At least seventeen states have followed the Supreme Court's view on state action for free speech challenges under their respective state constitutions. *See Developments in the Law*, *supra* note 46, at 1306–07.

speech protections in private spaces.[49] Colorado recognizes shopping malls as a public forum but allows owners to limit free speech activities to certain locations.[50] Massachusetts and Washington have extended limited free speech protections in private shopping malls for electioneering purposes but did not rely solely on free speech as the underlying rationale.[51]

### *C. Extending Pruneyard Beyond Shopping Malls*

Similarly, federal courts in California have also been reluctant to extend *Pruneyard* to a broader set of private actors when there is no state action.[52] In the context of applying the principles of *Pruneyard* to the Internet, California federal courts have either judiciously avoided the issue by declining to assert supplemental jurisdiction on the state constitutional question[53] or expressed skepticism about applying *Pruneyard* "wholesale [to] the digital realm of the internet."[54] For example, in *hiQ Labs v. LinkedIn*, Judge Chen raised an important scaling concern: would the entire Internet be analogized to a shopping mall or only certain websites?[55] In concluding his analysis on whether *Pruneyard* applies to the Internet, Judge Chen highlighted that "the potentially sweeping implications [of applying *Pruneyard* to the Internet] and the lack of any more direct authority" were the determinative factors in ruling that the plaintiff did not sufficiently plead their claim.[56] Thus, while no court has explicitly rejected the proposition that *Pruneyard* could apply to the Internet,[57] courts rightly hesitate to import a doctrinal framework based on real property to cyberspace, given the large number of unknowns.[58] The *Pruneyard* line of cases, however, provides some key guiderails to help shape how this doctrine would apply to the Internet.

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49. *See* Peters, *supra* note 15, at 1004.

50. *See* Robertson v. Westminster Mall Co., 43 P.3d 622, 626 (Colo. App. 2001).

51. *See Developments in the Law*, *supra* note 46, at 1307 (noting that both courts also relied on a concern for free elections).

52. *See* Campbell v. Feld Entm't, Inc., Nos. 12-CV-4233-LHK, 13CV-0233-LHK, 2014 WL 1366581, at *5–8 (N.D. Cal. Apr. 7, 2014) (finding that there is a state actor requirement and collecting other cases).

53. *See, e.g.*, Prager Univ. v. Google LLC, No. 17-CV-06064-LHK, 2018 WL 1471939, at *13–14 (N.D. Cal. Mar. 26, 2018). In explaining why state courts are better situated to analyze this question, Judge Koh noted that "[t]his is an especially important consideration in the instant case because Plaintiff asserts a claim that demands an analysis of the reach of Article I, section 2 of the California Constitution in the age of social media and the Internet." *Id.*

54. *See* hiQ Labs, Inc. v. LinkedIn Corp., 273 F. Supp. 3d 1099, 1115–16 (N.D. Cal. 2017).

55. *Id.* at 1116.

56. *Id.* at 1117.

57. Though two recent California state court decisions further muddy the waters. *See* discussion *infra* note 100.

58. *See* hiQ Labs, 273 F. Supp. 3d at 1116.

First, it seems highly unlikely that the principles of *Pruneyard* would apply to the entire Internet. The underlying logic of *Pruneyard* turned on the size of the shopping mall — a twenty-one-acre complex that attracted thousands of customers daily — it was not a "modest retail establishment."[59] Similarly, websites also come in different shapes and sizes — personal blogs, for example, may be more similar to an individual, while small-business websites with a low amount of traffic may fall under a "modest retail establishment" definition. Thus, applying *Pruneyard* to the Internet context should not subject the whole cyberspace to First Amendment scrutiny. California courts would have to consider to what degree a website contains the same characteristics as a shopping mall (e.g., Internet traffic, unique users, revenue, services provided, etc.) to determine if that specific website qualifies as a public forum. In doing so, courts will first have to grapple with what it means to be open to the public online.[60]

In this framework, a dynamic webpage whose sole purpose is the sale of goods is unlikely to be open to the public because the website does not encourage or promote public discourse on its page. A website like Amazon, whose focus is on commerce, but which has webpages that allow and encourage users to post reviews, is more open because Amazon is encouraging discourse between users and sellers. Today, social media platforms are likely the best digital analogy to shopping malls. But even within the social media platform landscape, unresolved questions remain. For example, does a requirement that all users sign in and agree to the terms and conditions mean that a social media platform is not open to the public?[61] What if the platform allowed everyone to sign up with the only restriction being an age limit, pursuant to federal law?

Under the second prong, the court should then consider what portions of the website are designed to promote "relaxation and socializing" and which portions are more analogous to entrances and exits.[62] A court could consider whether reviews on a website such as Amazon are there to promote relaxation and socializing, or whether they are there to facilitate the actual transaction, similar to entrances and exits allowing users to purchase their groceries. Or in the context of social media platforms, Facebook could argue that the real name requirement is a necessary component of the entrance to the platform, rather

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59. *See* Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 347–48 (Cal. 1979).

60. *See* Noah Feldman, *Twitter Trolls, Mallrats and the Future of Free Speech*, BLOOMBERG (Feb. 26, 2018, 6:00 AM), https://www.bloomberg.com/opinion/articles/2018-02-26/white-nationalist-s-lawsuit-is-wrong-twitter-can-ban-racists [https://perma.cc/PDK2-WV6A].

61. For example, Tumblr allows users to view almost all of its content without registration, while Facebook requires users to sign up in order to participate.

62. *See* Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8, 290 P.3d 1116, 1120–21 (Cal. 2012).

than being part of the public space where users' free speech rights are restricted. Courts will likely struggle initially finding the right analogies that apply to what aspects of social media platforms are necessary and which promote "rest and relaxation." Importantly, this second step of the analysis would ensure that even if a website was found to be open to the public, it would not be an all-or-nothing proposition — platform owners would be able to delineate where it would make sense to allow speech.[63]

Effectively, applying a *Pruneyard* framework creates a threshold two-part inquiry for any plaintiff seeking to establish a free speech violation under the California Constitution: (1) whether this *specific* website is a public forum that is open to the public, and (2) what portions of this website are effectively designed to promote discourse.[64] Then, the court would consider whether the restrictions by the website owner are reasonable time, place, and manner restrictions and if this stated claim is in tension with federal law or the defendant's federal constitutional rights.[65]

## III. FEDERALISM BARRIERS TO APPLYING *PRUNEYARD* TO THE INTERNET

Under the Supremacy Clause, federal law preempts conflicting state laws.[66] The Court alluded to this in its *Pruneyard* decision when it noted that state constitutions could guarantee greater rights provided they do not conflict with the Federal Constitution.[67] In some instances, even in the absence of federal law, federalism principles still constrain state action.[68] This section considers the potential federalism barriers to any *Pruneyard*-type state constitutional free speech claim.[69]

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63. Admittedly, the entrance/exit analogy is a difficult one to conceptualize in a digital shopping mall. But this would be the work of courts, amici and academics to fully develop.

64. This analysis focuses on social media platforms and interactive websites that host user-generated content. Whether this type of analysis would be applicable to other portions of cyberspace (e.g. Authoritative DNS Providers and other backbone infrastructure) is beyond the scope of this Note. *Cf.* Matthew Prince, *Why We Terminated Daily Stormer*, CLOUDFLARE (Aug. 16, 2017, 6:29 PM), https://blog.cloudflare.com/why-we-terminated-daily-stormer/ [https://perma.cc/43H9-A8EC].

65. Conceivably, defendants may also claim that their state constitutional rights are also being violated. That question is beyond the scope of this Note.

66. *See, e.g.*, Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) (noting that "[c]onsistent with [the Supremacy Clause] we have long recognized that state laws that conflict with federal law are 'without effect'") (internal quotations omitted).

67. *See* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 80–81 (1980).

68. *See infra* Sections III.B, III.C.

69. While Part II considered the scope of application through the lens of California, nothing in this doctrinal framework prevents other states from extending greater free speech protections under their respective constitutions. *See supra* notes 48–51.

### *A. The Current Bulwark — CDA § 230*

The most immediate, and likely successful, barrier is CDA § 230, considered "one of the most valuable tools for protecting freedom of expression and innovation on the Internet."[70] This section grants "provider[s] or user[s] of an interactive computer service"[71] (such as a website) immunity from liability for hosting third-party content. Prior to the enactment of the CDA, a 1995 New York state court decision, *Stratton Oakmont, Inc. v. Prodigy Services Co.*,[72] created an odd incentive framework for Internet providers in the 1990s: providers that did not moderate or control the content of online message boards were immune from liability for content posted by third parties.[73] Conversely, providers that used automatic language filters and stated they controlled the content of the message boards were not immune.[74] Thus, Internet providers were disincentivized from engaging in moderation of even offensive content to avoid liability. Inclusion of broad immunity in § 230 of the CDA was in part a response to this decision.[75]

Section 230 contains several grants of immunity as well as enumerated exceptions. The two main provisions are within subsection (c), titled "'Good Samaritan' blocking and screening of offensive material."[76] Subsection (c)(1) prohibits users or providers of "interactive computer services" from being treated as "the publisher or speaker of any information provided by another information content provider."[77] Courts have looked to § 230(e)(3), which expressly preempts *any* cause of action or liability under any inconsistent state or local law,[78] as the necessary companion piece to (c)(1) to determine the scope of immunity.[79] Subsection (c)(2) grants immunity from civil liability to users or providers of "interactive computer services" for any voluntary content moderation by the user or provider in good faith.[80] These two subsections are independent claims. The difference between them is that actors that cannot take advantage of the initial

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70. *Section 230 of the Communications Decency Act*, ELECT. FRONTIER FOUND., https://www.eff.org/issues/cda230 [https://perma.cc/5SFN-VYQP].

71. 47 U.S.C. § 230(c)(1) (2012).

72. 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

73. *See* Cubby Inc. v. CompuServe Inc., 776 F. Supp. 135, 135 (S.D.N.Y. 1991); *see also* Jeff Kosseff, *The Gradual Erosion of the Law That Shaped the Internet: Section 230's Evolution over Two Decades*, 18 COLUM. SCI. & TECH. L. REV. 1, 5–6 (2016).

74. *See* Kosseff, *supra* note 73, at 5–6.

75. *Id.* at 6–7.

76. 47 U.S.C. § 230(c) (2012).

77. *Id.* § 230(c)(1). The statute defines "information content provider" as "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." *Id.* § 230(f)(3).

78. *Id.* § 230(e)(3).

79. *See* Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100–01 (9th Cir. 2009).

80. 47 U.S.C. § 230(c)(2) (2012). Notably, this content only has to be objectionable to the user or provider and can still be removed even if constitutionally protected. *Id.*

immunity in (c)(1) may still claim immunity from liability under (c)(2) if their actions to moderate are taken in good faith.[81] But courts have not always been entirely clear in their § 230 immunity analyses as to whether the defendant is immune because they fall under the protection of (c)(1) or (c)(2).[82] Lastly, § 230(e) also notes some important exceptions to the § 230 immunity, including prosecutions under federal criminal statutes, wiretap laws, intellectual property claims, and claims under state laws consistent with § 230.[83]

Since the CDA was enacted in 1996, courts have grappled with identifying the limits to § 230 immunity — creating an ebb and flow of cases expanding and then retracting its scope.[84] Recent cases suggest that the courts may be in a period of retrenchment.[85] In addition, there is an ongoing debate over what the proper scope of § 230 protection should be, how broadly this immunity from liability should extend, and whether Congress should amend the statute.[86] But, as currently applied, § 230 generally allows online platforms to keep or take down third-party content pursuant to their own content policies.[87]

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81. *See* Barnes, 570 F.3d at 1105.

82. *See* Eric Goldman, *Facebook Wins Appeal Over Allegedly Discriminatory Content Removal–Sikhs for Justice v. Facebook*, TECH. & MARKETING L. BLOG (Sept. 13, 2017) https://blog.ericgoldman.org/archives/2017/09/facebook-wins-appeal-over-allegedly-discriminatory-content-removal-sikhs-for-justice-v-facebook.htm [https://perma.cc/YD9J-Z8GR] [hereinafter Goldman, *Facebook Wins Appeal*] (noting that (c)(2) is becoming increasingly irrelevant); Eric Goldman, *Twitter Defeats Yet Another Lawsuit from a Suspended User–Cox v. Twitter*, TECH. & MARKETING L. BLOG (Mar. 9, 2019) https://blog.ericgoldman.org/archives/2019/03/twitter-defeats-yet-another-lawsuit-from-a-suspended-user-cox-v-twitter.htm [https://perma.cc/353N-SV86] (noting that the court did not do a proper (c)(2) analysis).

83. 47 U.S.C. § 230(e)(1)–(4) (2012). The other exception is sex trafficking laws. *See id.* § 230(e)(5).

84. *See generally* Kosseff, *supra* note 73 (tracing the evolution and breadth of § 230 immunity in the courts generally). In particular, "in the early years of Section 230, the immunity appeared to be nearly impenetrable." *Id.* at 15.

85. *See, e.g.*, Eric Goldman, *Ninth Circuit Chunks Another Section 230 Ruling — HomeAway v. Santa Monica (Catch-up Post)*, TECH. & MARKETING L. BLOG (May 1, 2019), https://blog.ericgoldman.org/archives/2019/05/ninth-circuit-chunks-another-section-230-ruling-homeaway-v-santa-monica-catch-up-post.htm [https://perma.cc/X2J5-XDVL]. The Ninth Circuit's opinions are especially important because the Ninth Circuit is home to the majority of the major online platforms, thus courts in other circuits tend to rely on them. *See* Kosseff, *supra* note 73, at 15.

86. *See, e.g.*, Citron & Wittes, *supra* note 18, at 404 (arguing that "Section 230 is overdue for a rethinking."); *see also* Issie Lapowsky, *Lawmakers Don't Grasp the Sacred Tech Law They Want to Gut*, WIRED (July 17, 2018, 5:47 PM) https://www.wired.com/story/lawmakers-dont-grasp-section-230 [https://perma.cc/3PCW-EEFT] (discussing the merits and downsides of amending CDA § 230).

87. *See* Sofia Grafanaki, *Platforms, First Amendment and Online Speech: Regulating the Filters*, 39 PACE L. REV. 111, 138 (2018) ("Regardless of whether this is good or bad law, the end result is that platforms, as online intermediaries, while not obligated to monitor and police content provided by others using the platform, are at the same time free to do so under their own rules.").

Today, in the majority of cases, the question of immunity is determined under § 230(c)(1).[88] Courts have set out a three-part test to determine whether the defendant is eligible for § 230(c)(1) immunity: (1) the defendant is a user or provider of an interactive computer service, (2) the plaintiff's state law cause of action would treat the defendant as a publisher or speaker under a state law cause of action,[89] and (3) the content or information was provided by another party.[90]

The first element is consistently met as courts have found that online social media platforms fall within the definition of an "interactive computer service."[91] The second element, in the context of social media platforms, usually turns on the scope of traditional editorial publishing functions, which include "deciding whether to publish, withdraw, postpone or alter content."[92] Courts have also held that these functions include "a website operator's decisions in structuring its website and posting requirements."[93] In *Backpage*, the First Circuit held that the "protective carapace" of § 230 applies to "website policies and practices" that may facilitate illegal conduct through its posting rules.[94] Lastly, the only requirement for the third prong is that the content or information is not provided by the defendant.[95] Thus, courts have found § 230(c)(1) immunity even in instances when the third-party content is from the plaintiff, rather than the paradigmatic cases where a plaintiff sues the platform for a post by a separate third party.[96]

The case of *Sikhs for Justice* is illustrative. There, a human rights group brought multiple claims against Facebook for taking down its

88. *See* Goldman, *Facebook Wins Appeal*, *supra* note 82 (noting the "increasing irrelevance" of (c)(2)). *But see* e-ventures Worldwide, LLC v. Google, No. 2:14-cv-646-FtM-PAM-CM, 2017 WL 2210029, at *3 (M.D. Fla. Feb. 8, 2017) (applying (c)(2) and noting the problem with applying (c)(1) in instances where the plaintiff and the third-party content provider are the same).

89. Because a *Pruneyard*-type claim arises from the state constitution, this is the applicable rule.

90. *See* Jane Doe No. 1 v. Backpage.com, LLC, 817 F.3d 12, 18 (1st Cir. 2016); Klayman v. Zuckerberg, 753 F.3d 1354, 1357 (D.C. Cir. 2014); Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1100–01 (9th Cir. 2009).

91. *See, e.g.*, Carafano v. Metrosplash Inc., 339 F.3d 1119, 1123 (9th Cir. 2003) (noting that "reviewing courts have treated § 230(c) immunity as quite robust, adopting a relatively expansive definition of 'interactive computer service'").

92. Zeran v. Am. Online Inc., 129 F.3d 327, 330 (4th Cir. 1997).

93. *See, e.g.*, *Jane Doe No. 1*, 817 F.3d at 22.

94. *Id.* at 20, 22. Plaintiffs alleged that Backpage had taken affirmative steps in structuring its website to facilitate sex trafficking through its posting rules by allowing anonymous e-mails, stripping of metadata, limiting phone number display, and acceptance of anonymous payments. *Id.* at 20. The court found that all of these choices fell within "publisher or speaker" language of § 230(c)(1). *Id.*

95. *See, e.g.*, Sikhs for Justice v. Facebook, 144 F. Supp. 3d 1088, 1093 (N.D. Cal. 2015), *aff'd*, 697 Fed. Appx. 526, (9th Cir. 2017).

96. *See id.*; Cox v. Twitter, Inc., C/A 2:18-2573-DCN-BM, at *3 (D.S.C. Feb. 18, 2019).

Facebook page advocating for Sikh independence in India.[97] This is exactly the type of factual scenario that a plaintiff would bring under a *Pruneyard* claim. In a short memo, the Ninth Circuit affirmed the district court's dismissal of the claim based on § 230 immunity.[98] The court noted that: (1) Facebook was an "interactive computer service provider," and (2) the organization sought to hold Facebook "liable as a publisher" for taking down its Facebook page. This, the court reasoned, fell squarely within the purview of § 230 because Facebook did not create the underlying content and was therefore not "an information content provider."[99]

Similarly under a *Pruneyard* claim, the plaintiff would be forced to argue, like the Sikhs for Justice group, that the platform in question violated their state constitutional right by censoring content. It is quite likely that a *Pruneyard* claim would be barred because (1) the social media platform is a provider of an interactive computer service, (2) the hypothetical plaintiff is seeking redress for a traditional publishing function (deciding what content to keep or take down), and (3) the content is the plaintiff's.[100]

Further, even if the social media platform was unable to meet the three-part test that courts have fashioned for § 230(c)(1), the platform may still argue that it has immunity under § 230(c)(2) because it found the content in question objectionable. Importantly, this is a subjective standard. Here, the question will turn on the good faith requirement and is less likely to be resolved at the motion to dismiss or summary judgement stage.[101] This establishes an additional hurdle for the social media platform to overcome, but assuming the content was removed in good faith, the platform is likely immune from liability.

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97. *See Sikhs for Justice*, 697 Fed. Appx. at 526; *accord* Goldman, *Facebook Wins Appeal*, *supra* note 82.

98. *See Sikhs for Justice*, 697 Fed. Appx. at 526.

99. *Id.* This tracks with the general understanding by the courts that § 230 provides immunity from liability for third-party content. If Facebook had created the page in question on its initiative, § 230 would not apply. *See* 47 U.S.C. § 230(c)(1) (2012) ("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*.") (emphasis added).

100. At least two superior court judges have adopted this view in California. *See* Johnson v. Twitter, No. CEC-18-G00078, at 9–10 (Cal. Sup. Ct. July 3, 2018) (ruling that § 230 precludes plaintiff's *Pruneyard* claim); Taylor v. Twitter, No. CGC-18-564460, Order, at 2 (Cal. Sup. Ct. July 11, 2018) (dismissing two of plaintiff's causes of action arising under "the California Constitution's freedom of speech provisions" and a separate state law.). This order was vacated by a new order on September 24, 2018 dismissing all three of Taylor's causes of action after the California Court of Appeals issued a writ of mandate finding that the lower court judge erred in finding that §230 did not preclude plaintiff's third state law cause of action. *See* Twitter v. Superior Court for the City and County of San Francisco, A154973, at 193 (Cal. Ct. App. Aug. 17, 2018). The new order dismisses all three causes of action summarily without identifying the reasons. *See Taylor*, No. CGC-18-564460, at 1–2.

101. *See* VALERIE C. BRANNON, CONG. RESEARCH SERV., R45650, FREE SPEECH AND THE REGULATION OF SOCIAL MEDIA CONTENT 1, 13–15 (2019).

For now, § 230 likely remains an impenetrable bulwark when platforms remove third-party content. However, the efficacy of § 230 has been called into question.[102] In 2018, the statute was amended,[103] creating a crack in its legal shield for the first time since it was passed in 1996.[104] The new amendments shrank the scope of the "protective carapace" of § 230 by eliminating immunity against claims based on violations of certain sex trafficking laws.[105] Further, there has been increased interest over the scope of this immunity in Congress.[106] Given the renewed interest, perhaps there is space for change.

### *B. Dormant Commerce Clause*

The Dormant Commerce Clause, as applied to state regulation of the Internet, has undergone similar ebbs and flows as § 230. The doctrine contains two overlapping, but distinct, concepts: extraterritoriality[107] and undue burden.[108] Nearly contemporaneously with the passing of § 230 in 1996, *Americans Libraries Ass'n v. Pataki*[109] was decided

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102. *See* Mike Masnick, *Republicans Blame CDA 230 for Letting Platforms Censor Too Much; Democrats Blame CDA 230 for Platforms Not Censoring Enough*, TECHDIRT (June 10, 2019, 9:45 AM), https://www.techdirt.com/articles/20190606/10475942343/republicans-blame-cda-230-letting-platforms-censor-too-much-democrats-blame-cda-230-platforms-not-censoring-enough.shtml [https://perma.cc/ULF5-XDVJ].

103. *See* Elizabeth Dias, *Trump Signs Bill Amid Momentum to Crack Down on Trafficking*, N.Y. TIMES (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/us/backpage-sex-trafficking.html [https://perma.cc/D5GQ-8YXZ].

104. *See* Jeffrey Neuburger, *FOSTA Signed into Law, Amends CDA Section 230 to Allow Enforcement against Online Providers for Knowingly Facilitating Sex Trafficking*, PROSKAUER: NEW MEDIA & TECH. L. BLOG (Apr. 11, 2018), https://newmedialaw.proskauer.com/2018/04/11/fosta-signed-into-law-amends-cda-section-230-to-allow-enforcement-against-online-providers-for-knowingly-facilitating-sex-trafficking [https://perma.cc/FUY4-AT7C].

105. Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 4, 132 Stat. 1253, 1254–55 (2018).

106. *See* VALERIE C. BRANNON, CONG. RESEARCH SERV., LSB10306, LIABILITY FOR CONTENT HOSTS: AN OVERVIEW OF THE COMMUNICATION DECENCY ACT'S SECTION 230, at 4 (2019); *see also* Drew Clark, *With Google and Facebook Under Fire, Section 230 is at a Tipping Point as More Push for Changes*, BELTWAY BREAKFAST (June 12, 2019), https://www.beltwaybreakfast.com/congress/2019/06/12/with-google-and-facebook-under-fire-section-230-is-at-a-tipping-point-as-more-push-for-changes [https://perma.cc/83CS-E6FT].

107. Extraterritoriality preempts state regulation of conduct outside its borders. Interestingly, while academic scholars have declared this doctrine as "dead", at least one circuit court appears to disagree. *Compare* Darien Shanske, *Proportionality as Hidden (but Emerging?) Touchstone of American Federalism: Reflections on the* Wayfair *Decision*, 22 CHAP. L. REV. 73, 76 (2019) *with* Recent Case, Association for Accessible Medicine v. Frosh, 887 F.3d 664 (4th Cir. 2018), 132 HARV. L. REV. 1748 (2019).

108. Courts will invalidate state regulations that are facially neutral but place "too great a burden on interstate commerce." Shanske, *supra* note 107, at 76. As Shanske notes, this is the traditional two-part *Pike* balancing test the Supreme Court established to determine whether state regulations violate the Dormant Commerce Clause. *See* Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

109. 969 F. Supp. 160 (S.D.N.Y. 1997).

in 1997. This leading case on state Internet regulation for nearly a decade found that a New York state statute criminalizing pornographic communication with minors violated the Dormant Commerce Clause.[110] The court found that the statute violated the Dormant Commerce Clause for three reasons: extraterritoriality, undue burden on interstate commerce, and because the Internet was an economic "nature preserve" that "must be marked off" from state regulation "to protect users."[111] Commentators pointed out that this conception is a "nuclear bomb of a legal theory" because it would destroy any state regulation of the Internet.[112] But the view remained dominant into the early 2000s, because as one court put it, "attempting to localize Internet regulation is extremely problematic because the Internet 'by its nature has no local areas.'"[113]

As Internet technology evolved, however, courts began to diverge from the *American Libraries* view, even in contexts outside of criminal statutes, to find that states were not powerless.[114] This culminated in *Wayfair v. South Dakota*,[115] where the Supreme Court overruled an earlier set of cases that had prohibited states from requiring businesses to collect use taxes if they had no physical presence in that state.[116] Interestingly, the Court chose to link the doctrinal analysis for the dormant Commerce Clause for state taxes to the traditional test for state regulation.[117] In doing so, the Court noted that the rapid change in Internet technology strained the physical presence rule.[118] Read broadly, *Wayfair* represents a nudge by the Court that bright-line rules cannot be applied to the Internet.[119] Given the Court's direction on

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110. *See* Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 YALE L.J. 785, 786 (2001).

111. *See* Am. Libraries Ass'n v. Pataki, 969 F. Supp. 160, 169 (S.D.N.Y. 1997).

112. *See* Goldsmith & Sykes, *supra* note 110, at 787.

113. PSINet, Inc. v. Chapman, 362 F.3d 227, 234 (4th Cir. 2004). *But see* Goldsmith and Sykes, *supra* note 110, at 787 (noting that this view "rests on an impoverished understanding of the architecture of the Internet").

114. *See* Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 960–62 (N.D. Cal. 2006) (finding that defendant's argument that it would have to either modify the national Target website, or create a separate California Target homepage to meet state disability requirements was insufficient to trigger the Dormant Commerce Clause). The case also collected the major cases that either followed *American Libraries* or distinguished it in the decade since. *See id.* at 958–59.

115. 138 S. Ct. 2080 (2018).

116. *See* Shanske, *supra* note 107, at 73–75.

117. *Id.* at 75–78 (noting that prior to *Wayfair*, the court analyzed state taxes under a distinct doctrinal framework and in *Wayfair* the court remanded down to the South Dakota Supreme Court to analyze under *Pike* whether this taxing scheme placed an undue burden on interstate commerce).

118. Wayfair v. South Dakota, 138 S. Ct. 2080, 2092 (2018) (citing Walter Hellerstein, *Deconstructing the Debate Over State Taxation of Electronic Commerce*, 13 HARV. J.L. & TECH. 549, 553 (2000)).

119. *Cf. id.* at 2086, 2097 (noting that "the Court should not maintain a rule that ignores these substantial virtual connections to the State" and that the "far-reaching systemic and

remand to conduct a *Pike* analysis,[120] the factors the Court highlighted as relevant are also applicable for state regulations.

Now, consider a scenario where multiple states enact *Pruneyard* constitutional amendments, enter into a multi-state compact to enact a uniform level of state free speech protection online, provide state software to enable online platforms to establish this level of protection, and provide a safe harbor for platforms that use this software.[121] The Court strongly hints that this type of scheme would not place an undue burden on interstate commerce.[122]

Of course, courts may distinguish *Wayfair* because it was a state tax case.[123] But district courts have already found that *individual* state regulation of online platforms likely does not violate the extraterritoriality principle or unduly burden interstate commerce.[124] Thus, a better reading of *Wayfair* is a soft approval by the Court that state Internet regulation in the "Cyber Age" should not be left behind.[125] This view is further strengthened by two members of the Court disliking the Dormant Commerce Clause doctrine generally,[126] and the

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structural changes in the economy" and "many other societal dimensions" caused by the Cyber Age "counsel for repeal of the bright-line rule of physical presence").

120. *See* Shanske, *supra* note 107, at 73–75.

121. These are all factors, as the Court noted, that favored a finding that there was no undue burden on interstate commerce. *See Wayfair*, 138 S. Ct. at 2099–100.

122. *See* Shanske, *supra* note 107, at 76.

123. At least one court distinguished *Wayfair* in considering whether it changed the underlying minimum contacts test for personal jurisdiction. *See* Georgalis v. Facebook, Inc., No. 1:18CV256, 2018 WL 6018017, at *3–4 (N.D. Ohio Nov. 16, 2018). While the interconnection between the Due Process Clause and the Commerce Clause is beyond the scope of this Note, the initial decision in *Georgalis* seems anomalous. Plaintiff sued Facebook for deleting his comments, and rather than conduct a CDA § 230 analysis under a Rule 12(b)(6) motion, the court instead chose to dismiss on lack of personal jurisdiction under Rule 12(b)(2). *See* Georgalis v. Facebook, Inc. 324 F. Supp. 3d 955, 960–61 (N.D. Ohio 2018). It is possible that this ruling is an outlier, but the proposition that an Internet platform's actions against a specific user do not establish minimum contacts for specific jurisdiction would create an additional burden for plaintiffs seeking to adjudicate a *Pruneyard* claim in the non-home state of the social media platform.

124. *See* Nat'l Fed'n of the Blind v. Target Corp., 452 F.Supp.2d 946, 960–962 (N.D. Cal. 2006) (collecting other district court cases that have found no Dormant Commerce Clause violation).

125. *Cf. Wayfair*, 138 S. Ct. at 2097 (noting that the Internet has caused dramatic economic and societal changes and compounded the states' ability to collect revenue under the physical presence rule).

126. Justice Thomas, of course, is the biggest critic of the Dormant Commerce Clause. *See* American Trucking Ass'n, Inc. v. Michigan Pub. Serv. Comm'n, 545 U.S. 429, 439 (2005) (Thomas, J. dissenting) ("[T]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.") (internal citations and quotations omitted). Justice Gorsuch, following in Justice Scalia's footsteps, has also expressed skepticism. *See Wayfair*, 138 S. Ct. at 2100 (Gorsuch, J. concurring) ("My agreement with the Court's discussion of the history of our dormant commerce clause jurisprudence, however, should not be mistaken for agreement with all aspects of the doctrine."); *accord* Eric Citron, *Potential Nominee Profile: Neil Gorsuch*, SCOTUSBLOG (Jan. 13, 2017, 12:53 PM) https://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch [https://perma.cc/4URN-D9LS].

Chief Justice at one point noting that the doctrine is "not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake . . . ."[127]

### *C. Federal Common Law — Is There a Dormant Speech Clause?*[128]

Assuming the Dormant Commerce Clause is no longer a blanket shield against state Internet regulation, is there another federalism issue that justifies the (perhaps) correct intuition that states regulating speech online is incongruous with the architecture and nature of online speech?

Federal common law post-*Erie Railroad v. Tompkins*[129] is rooted in the concept that certain issues, such as boundary disputes between two states, or allocation of water from an interstate stream, are "unique federal interests" and cannot be decided by state law.[130] The Court has previously found a unique federal interest even in the absence of a controlling federal statute or explicit constitutional direction.[131]

Today, a strong argument exists that the Internet has become our interstate stream. Flowing between all fifty states, online communication, like a stream, conveys a vital resource — information.[132] Two divergent state laws regulating identical online content would be preempted by a dormant speech clause, applied because speech on the

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127. United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343 (2007).

128. Full credit for this name goes to Kendra Albert, Clinical Instructional Fellow at the Cyberlaw Clinic and Lecturer on Law at Harvard Law School.

129. 304 U.S. 64 (1938).

130. For example, in a case decided on the same day as *Erie*, the Court held that the question of how to apportion water from an "interstate stream . . . between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938) (importantly, this was a case with two private litigants and neither state was a party to the suit). But, as scholars have pointed out, the Supreme Court has struggled in articulating a coherent theory of federal common law. *See* Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 589 (2006).

131. *See* Banco National de Cuba v. Sabbatino, 376 U.S. 398, 426–28 (1964). In *Sabbatino* the Court relied on background constitutional principles and the separation of powers between the judiciary and the executive to find that the doctrine in question had "constitutional underpinnings" and that courts could not apply state contract law. *Id.* at 423, 427, 429.

132. This of course is a bold claim, but consider the similarities in the DHS's description of the water and cyberspace. *Compare Water and Wastewater Systems Sector*, DEP'T OF HOMELAND SECURITY, https://www.dhs.gov/cisa/water-and-wastewater-systems-sector [https://perma.cc/C8GV-RRCT] ("[E]nsuring the supply of drinking water and wastewater treatment and service is essential to modern life and the Nation's economy") with *Critical infrastructure and the Internet of Things*, FED. L. ENF'T TRAINING CTR., https://www.fletc.gov/critical-infrastructure-and-internet-things [https://perma.cc/U2BH-ML75] ("The Internet underlies nearly every facet of our daily lives and is the foundation for much of the critical infrastructure that keeps our Nation running.").

Internet is a uniquely federal interest.[133] This proposition also rests partially on the intuition in *American Libraries*' assertion that the Internet is a "national preserve," but one of content rather than of economy.[134] Thus, while states may freely provide different standards of free speech protections in the physical world, the scope of Internet speech rights should be subject to federal law because of the increasing necessity of the Internet as a fundamental tool of discourse that allows all of us to be "digital citizens."[135] This view would remain consonant with the Court's decision in *Pruneyard* that the limit to the states' ability to extend greater protections of rights is federal law or the Constitution.

Whether this novel position is convincing likely depends on the reader's intuitions about the continuing vitality of the idea of states as the "laboratories of democracy" in an increasingly interconnected world.[136] Given the lack of uniformity at the national level on the proper balance between free speech and content moderation, states can experiment with different levels of speech protections with more transparency than social media platforms currently employ.[137] Further, states would likely challenge the premise that speech rights flowing from different state constitutions (and therefore providing different levels of regulation or protection) would conflict because they apply to identical content. Given the sophistication of geolocation[138] and the widespread use of filter technology today,[139] the application of differ-

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133. *Cf. Hinderlider*, 304 U.S. at 110. In comparison to the use taxes likely authorized by *Wayfair*, which do not impose multiple state taxes on one individual item, *Pruneyard* speech claims may result in multiple standards on the same online content.

134. *See* American Libraries Ass'n v. Pataki, 969 F. Supp. 160, 169 (S.D.N.Y. 1997). To the extent the Court is willing to find that in some limited domestic areas there is a need for the Nation to speak with one voice, like in foreign affairs, the Internet seems the prime example of the need for a national space of uniform discourse. *Cf. Sabbatino*, 376 U.S. at 426–28 (1964) (finding such a need in foreign affairs).

135. For a discussion of "digital citizenship" and the role of the Internet in civic and democratic participation, see generally KAREN MOSSBERGER, CAROLINE J. TOLBERT, AND RAMONA S. MCNEAL, DIGITAL CITIZENSHIP: THE INTERNET, SOCIETY AND PARTICIPATION (2008).

136. This view was popularized by Justice Brandeis in *New State Ice Co. v. Liebmann*. 285 U.S. 262, 311 (1932).

137. *See* Evelyn Douek & Kate Klonick, *Facebook Releases an Update on Its Oversight Board: Many Questions, Few Answers*, LAWFARE (June 27, 2019, 3:41 PM), https://www.lawfareblog.com/facebook-releases-update-its-oversight-board-many-questions-few-answers [https://perma.cc/N5JQ-JKE9]; Evelyn Douek, *YouTube's Bad Week and the Limitations of Laboratories of Online Governance*, LAWFARE (June 11, 2019, 12:05 PM), https://www.lawfareblog.com/youtubes-bad-week-and-limitations-laboratories-online-governance [https://perma.cc/549L-3W97].

138. *See generally* Kevin F. King, *Personal Jurisdiction, Internet Commerce and Privacy: The Pervasive Legal Consequences of Modern Geolocation Technologies*, 21 ALB. L.J. SCI. & TECH. 61 (2011) (discussing the existing technology that allows for online platforms to accurately track and customize content and restrict access based on geolocation).

139. Online content filters were present from the very beginning of the Internet in the form of kill files. A message board could set up filters based on keywords to prevent en-

ent layers of speech protections would prevent any conflict; content filters would prevent two citizens of different states from seeing the same piece of content unless their respective free speech protections were consonant.[140] The resolution of this tension may lie in a judicial tool not explicitly relied on by the Supreme Court — proportionality. If the Court views state speech rights as "congruous and proportional" to remedying injuries from existing online content moderation policies, it may reject the concept of a dormant speech clause — forcing Congress to speak on the issue directly.[141]

Ultimately, while there are good policy and economic rationales for the dormant free speech clause, it is unlikely to be viable today because the current makeup of the Supreme Court favors strong state sovereignty[142] and the historical move away from finding new areas of federal common law.[143]

## IV. REVISITING *PRUNEYARD* TODAY: CORPORATE FIRST AMENDMENT RIGHTS AND REASONABLE RESTRICTIONS

So where does this leave courts today? § 230 remains a stalwart shield. But what happens in a world where Congress amends § 230 and a court does not find any federalism arguments persuasive?

Social media platforms would likely still have a First Amendment defense, reflecting the drastic evolution of First Amendment doctrine since *Pruneyard* was originally decided.[144] In fact, at least one First Amendment scholar has opined that *Pruneyard* may no longer be good law.[145] In addition, even if its First Amendment challenge fails,

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countering any post with those words. *See* Kill File, WIKIPEDIA, https://en.wikipedia.org/wiki/Kill_file [https://perma.cc/3CRP-EMDE]. Similarly, Twitter today allows the same type of content filtering based on specific words. *See How to Use Advanced Muting Options*, TWITTER, https://help.twitter.com/en/using-twitter/advanced-twitter-mute-options [https://perma.cc/EX5Z-DMY2].

140. This is further illustrated by the practices of some online platforms to filter certain content by a country's origin, to account for the differences in speech levels across nations. *See, e.g.*, Klonick, *supra* note 16, at 1650–51.

141. This position assumes of course that § 230 was modified in a manner that would allow *Pruneyard*-claims to be brought. *See* Shanske, *supra* note 107, at 82 (discussing proportionality principles as applied to vertical federalism).

142. *See, e.g.*, Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1461 (2018) (striking down federal law prohibiting states from authorizing sports betting). Even in *Wayfair*, the dissent did not disagree with the states' ability to tax online platforms, rather the Chief Justice based his argument on a "heightened form of *stare decisis*" and that this type of radical change of Internet commerce should be left to Congress. *See* Wayfair v. South Dakota, 138 S. Ct. 2080, 2102 (2018) (Roberts C.J., dissenting).

143. *See* Paul Lund, *The Decline of Federal Common Law*, 76 B.U. L. REV. 895, 1014–16 (1996). *But see* Tidmarsh & Murray, *supra* note 130, at 586.

144. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (extending First Amendment political speech rights to corporations).

145. *See* Noah Feldman, *Twitter Trolls, Mallrats and the Future of Free Speech*, BLOOMBERG (Feb. 26, 2018 6:00 AM), https://www.bloomberg.com/opinion/articles/2018-

the platform can still impose reasonable time, place, manner restrictions.[146]

Today, corporations lean heavily on the doctrine of compelled speech to repel unwanted government regulations.[147] Twitter, Facebook, and other social media platforms utilize free speech claims as a backstop to the initial § 230 claim.[148] Courts in these instances have generally applied a bright-line rule that a social media platform, like a newspaper, has a "First Amendment right to decide what to publish and what not to publish on its platform."[149] This has strong logical appeal but relies on an outdated, unitary concept of platforms.

Social media platforms are no longer static webpages akin to newspapers. Today, they are vibrant ecosystems where conversations, meetings, town halls, and rallies occur in real time.[150] Yet courts continue to fit platforms solely into the publisher category, even though there are other, more nuanced alternative categories available, such as law schools.[151] As platforms continue to evolve, the publisher analogy must break. Scholars have proposed alternative frameworks for how to view online platforms, drawing from existing legal frameworks. Kate Klonick, for example, has noted that platforms could fall into one of three possible categories: company towns,[152] common carriers or broadcasters, and newspaper editors.[153] The appropriate level of First Amendment protection for the platform would depend on the

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02-26/white-nationalist-s-lawsuit-is-wrong-twitter-can-ban-racists [https://perma.cc/Q9S7-EH5R].

146. This is consistent with both the California Supreme Court decision and the Supreme Court decision. *See* Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 84 (1980).

147. *See, e.g.*, Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2361 (2018); Hurley v. Irish-American Gay, Lesbian, and Bisexual Grp. of Boston, 515 U.S. 557, 557 (1995).

148. *See* La'Tiejira v. Facebook, 272 F. Supp. 3d 981 (S.D. Tex. 2017); Johnson v. Twitter, No. CEC-G00078 (Cal. Sup. Ct. Mar. 8, 2018).

149. *La'Tiejira*, 272 F. Supp. 3d. at 991 (citing Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974)).

150. *See* Tanguy Catlin et al., *Insurance beyond the digital: The rise of ecosystems and platforms*, MCKINSEY & CO. (Jan. 2018), https://www.mckinsey.com/industries/financial-services/our-insights/insurance-beyond-digital-the-rise-of-ecosystems-and-platforms [https://perma.cc/A8VU-KQ92] (discussing the role of tech platforms and the transition to eco-systems).

151. *See* Rumsfeld v. Forum for Acad. and Inst. Rights, 547 U.S. 47, 64 (2006) (the Chief Justice found that "[a] law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.").

152. In *Marsh v. Alabama*, the Supreme Court created an exception to the state action doctrine for privately owned company towns. 326 U.S. 501, 502 (1946). Whether online social media platforms are sufficiently analogous to digital company towns is an open issue in legal academia. *See* Klonick, *supra* note 16, at 1658–59. Courts so far have rejected this view. *See* Michael Patty, *Social Media and Censorship: Rethinking State Action Once Again*, 40 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 99, 118 (2019).

153. *See* Klonick, *supra* note 16, at 1658.

category. Heather Whitney has also proposed alternative analogies courts could use when determining the right level of First Amendment protections for online platforms.[154] In addition to the company town category, Whitney also proposes a shopping mall or law school category and a fiduciary or public trustee model.[155]

Because so far the majority of cases have been decided on § 230 grounds, First Amendment doctrine as applied to social media platforms has not had a chance to evolve in the courts.[156] Scholars have developed and proposed the necessary analytical frameworks beyond categorizing them as simply publishers, and the burden is now on the courts to develop the case law. Within these frameworks, courts should consider whether the platform is *acting* like a publisher (or a newspaper editor) or, for example, a grocery store in a *specific* instance.[157]

Connecting the animating principles behind the recent majority opinions in *Wayfair* and *Packingham v. North Carolina*,[158] a strong case can be made for the Court's rejection of bright-line rules as applied to the Internet.[159] In both instances, the Court recognized that the rapid change in technology had created a massive change in our society, such that bright-line rules must give way to a measured balancing of interests.[160]

Lastly, assuming that courts adopt a framework proposed by Klonick, Whitney, or another legal scholar and find that a social media platform is acting not as a publisher but as a law school in a particular instance, the platform would still be able to impose reasonable time, place, manner restrictions against *Pruneyard*-speech rights.[161] In this instance, courts will have to determine how to import existing

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154. *See* Heather Whitney, *Search Engines, Social Media, and the Editorial Analogy*, KNIGHT FIRST AMEND. INST. 1 (2018) https://knightcolumbia.org/sites/default/files/content/Heather_Whitney_Search_Engines_Editorial_Analogy.pdf [https://perma.cc/PJT2-VGXL].

155. *See id.*

156. *See* Brannon, *supra* note 101, at 21–38.

157. *Id.* at 7–23.

158. 137 S. Ct. 1730 (2017).

159. *But see* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019).

160. For example, in *Packingham*, the majority notes in dicta that because this is the first time "this Court has taken to address the relationship between the First Amendment and the modern internet . . . [it] must exercise *extreme caution* before suggesting that the First Amendment provides scant protection for access to vast networks in that medium." Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017) (emphasis added). Of course, both *Wayfair* and *Packingham* are Justice Kennedy opinions, who is no longer on the court. But the suggestion to the lower courts to be cautious in applying bright-line rules to the Internet remains.

161. At least one author has suggested that a content filter may qualify as reasonable time, place, manner restrictions. *See* Eric Emanuelson, Jr., *Fake Left, Fake Right: Promoting an Informed Public in the Era of Alternative Facts*, 70 ADMIN. L. REV. 209, 226–29 (2017).

reasonable restrictions case law premised on physical location into cyberspace.[162]

## V. CONCLUSION

This Note has traced one doctrinal framework for the states to engage in a broader discussion of online speech. While a strong argument exists that states can extend free speech protections online, federal law today likely preempts such attempts. However, as the online platform ecosystem evolves and congressional scrutiny of platform immunity continues, the likelihood of further § 230 amendments increases. Assuming a change in federal law, courts will then have to grapple with whether federalism principles bar states from extending these rights online. Importantly, whether there is a countervailing federalism theory likely depends on the courts' perception of the role of states in experimenting with new and broader rights protections.[163] If that occurs, courts will have to consider *Pruneyard*-type claims within the context of modern First Amendment doctrine. Namely, corporations today have stronger First Amendment protections under the Federal Constitution. The categorical nature of this protection rests on the applicability of the analogy of the online platform as a publisher. This Note echoes the sentiment of others that the publisher analogy today is doing too much analytical work to support the platforms' First Amendment claims.

Ultimately, states are likely to attempt to find creative ways to participate in the discussion of online speech rights and courts will (once again) determine the appropriate balance of interests in Internet federalism.

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162. In addition, some scholars suggest that time, place, manner restrictions are not as effective online. *See, e.g.*, Danielle Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 103–04 (2009).

163. While beyond the scope of this Note, the question of how far state First Amendment doctrine can deviate from existing federal First Amendment case law is another factor to consider in extending state free speech protections online. *See* Trusz v. UBS Realty Investors, LLC, 123 A.3d 1212 (Conn. 2015) (rejecting the Supreme Court precedent on employee free speech rights and finding that the Connecticut constitution provided broader speech protections to employees); *cf.* Beeman v. Anthem Prescription, 315 P.3d 71 (Cal. 2013) (answering a question from an en banc Ninth Circuit and analyzing what level of scrutiny to apply under the California Constitution to a state statute requiring prescription drug claims processors to provide certain information).