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The Private Abridgment of Free Speech

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ABSTRACT

This Article challenges the orthodoxy that First Amendment speech rights can bind only the state. I argue that the primary justification for the freedom of speech is to protect fundamental interests like autonomy, democracy, and knowledge from the kind of extraordinary power over speech available to the state. If so, this justification applies with nearly equal force to any private agents with power over speech rivaling that of the state. Such a class of private agents, which I call *quasi-state agents*, turns out to be a live possibility once we recognize that state power is more limited than it seems and can be broken down into multiple, equally threatening parts. Quasi-state agents might include a limited set of corporations, from the largest social media platforms to powerful private employers. However, because quasi-state agents are not *exactly* like state agents but pursue important private aims that the state cannot, I argue that the First Amendment might bind them slightly differently (and less demandingly) than it does the state. Drawing on examples from American state and comparative constitutional law, I offer several analytical models for understanding this differential application.

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> Private property owners who have so transformed the life of society for their profit (and in the process, so diminished its free speech) must be held to have relinquished a part of their right of free speech. They have relinquished that part which they would now use to defeat the real and substantial need of society for free speech.
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> —N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp.[1]

INTRODUCTION

In his 1909 short story, "The Machine Stops," E.M. Forster describes a world in which the human population has, due to some calamity, lost the ability to survive on the surface of the earth. Each person lives in an isolated chamber underground. There appear to be no common spaces, and people do not congregate together. Travel to visit other chambers is possible but arduous and unpopular. Humans communicate, between their chambers, using a form of video messaging. All systems below the surface, including the video messaging, are provided by a powerful technology known as the Machine, which is thought of as a sort of deity. It is unclear how the Machine originated or who, if anyone, influences its operations now.

Imagine a world just like this one, but with two modifications: the Machine is not a deity, but a powerful technology corporation; and the only technology it provides is video messaging. The Machine would control nearly all communication in this world, excepting only the occasional in-person conversations that people have when they travel. Now imagine further that, one day, the Machine decides to cut off all outgoing video messaging services for approximately half of the world's population, based on criticisms they have made of the Machine.

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[1] 650 A.2d 757, 780 (N.J. 1994).

If this happened in the United States, it would not seem to offend any constitutional right. First Amendment doctrine treats public and private agents as categorically different with respect to the free speech guarantee. For all public (i.e., government) agents, that guarantee imposes a *duty*: whenever they act, they are bound to respect subjects' freedom of speech. For practically *no* private (i.e., nongovernment) agent, however, does the guarantee create any duty. The only regular exception is when a private agent's conduct is causally linked with the state itself, such as when the state encourages or facilitates it.[2] This sharp public-private distinction is usually just assumed by courts and seldom challenged.

The justification for the distinction might seem obvious: it is the state alone that possesses the extraordinary power to silence speakers and distort public discourse, whereas it is private agents who are vulnerable to that power. The typical private agent can do exceedingly little to actually silence another's speech or to influence the overall course of public discussion. At the same time, if private agents bore a duty not to treat other people differently based on their views and utterances, the enforcement of such a duty would threaten interests in privacy, private property, freedom of association, and even freedom of expression itself. In other words, the distinction between public and private is supposed to track the distinction between the powerful and the powerless, between those who need to be constrained and those who need to be protected.

Yet this distinction begins to crack when applied to Forster's Machine, or even to today's non-fictional mammoth media corporations like Meta, Twitter, and Google. The critical communication channels that the latter own—from social media to search engines—are so widely used, especially for discussions of political issues, that scholars refer to them as the "public infrastructure" of communication, and the Supreme Court itself has described them as "the modern public square."[3] Their owners—if they wanted—could drastically and immediately alter the topics and balance of nationwide public discourse just by tweaking their speech-filtering algorithms or "deplatforming" specific speakers. In other words, they could fundamentally transform our political order and thwart many of the lofty values associated with the First Amendment, from the openness of political discourse to the pursuit of knowledge and autonomy.

And yet the First Amendment, as currently interpreted, is powerless to place any obstacle in their path if they choose to do so. Indeed, the Amendment may *guarantee* their power if courts conceive of the exercise of that power as a matter of the corporations' own freedom of expression.[4] Scholars alarmed by this power have sought to

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[2] *See, e.g.*, Evans v. Newton, 382 U.S. 296, 299 (1966) (stating private conduct that is too entwined with the government will no longer be considered private conduct); Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972) (explaining that private conduct that receives a benefit from the state will be subject to constitutional protections). I discuss another rarely applied exception in Section I.A, *infra*.

[3] Packingham v. North Carolina, 582 U.S. 98, 107 (2017).

[4] The Court will likely decide this issue in *Moody v. NetChoice, LLC*, 144 S. Ct. 478 (2023) (mem.).

legally constrain it primarily through constitutional evasion: by denying that the companies' editorial choices about the speech on their platforms are the sorts of speech acts protected by the First Amendment.[5] These proposals, however, also evade the point that these choices are at the very core of First Amendment concern.

This Article articulates a more muscular vision of the First Amendment, one that constrains *power*, whether it is private or public. I argue that the Amendment imposes free speech duties on a limited set of private agents with extraordinary, *state-like* power over speakers or the primary channels of speech amplification. I call these *quasi-state agents*. Their free speech duties, for reasons articulated in the foregoing, also override any prima facie First Amendment rights that these agents may have possessed.

The argument runs as follows. The First Amendment explicitly forbids only "Congress" from abridging the freedom of speech.[6] But judicial interpretation has implicitly expanded the category of duty holders to *all* state agents. Their justification is that these agents, like Congress, have power to impinge on the core First Amendment values, including the integrity of the democratic process, the pursuit of collective knowledge, and the autonomy of individual speakers.[7] Therefore, for the theoretical coherence of the doctrine, a further expansion is required, to bind all agents—public or private—with similar powers to impinge on these values. Indeed, the Supreme Court seemed to recognize the same in a series of cases from the 1940s, 1950s, and 1960s—including the famous *Marsh v. Alabama*,[8] which is gaining renewed attention in scholarship[9]—before veering course.

What sort of power impinges on First Amendment values? The answer requires two new conceptual distinctions. *First*, free speech values can be *individual* or *collective*. Individual values are those that are largely realized by individuals, such as autonomy or participation in the democratic process; collective values are those that are largely realized by society as a whole, and benefit individuals only indirectly,

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[5] *See, e.g.*, Pauline Trouillard, *Social Media Platforms Are Not Speakers. Why Are Facebook and Twitter Devoid of First Amendment Rights?*, 19 OHIO ST. TECH. L.J. 257, 265–66 (2023) (arguing that content moderation is not speech); Eugene Volokh, *Treating Social Media Platforms Like Common Carriers?*, 1 J. FREE SPEECH L. 377, 408–09 (2021) (arguing that social media can be regulated as common carriers, without First Amendment concern, with respect to their function of "hosting" speech).

[6] *See* U.S. CONST. amend. I.

[7] *See, e.g.*, Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94 (1973) (Douglas, J., concurring) (explaining that Congress cannot cause a government agency to violate the First Amendment). *See generally* Daniel J. Hemel, *Executive Action and the First Amendment's First Word*, 40 PEPP. L. REV. 601 (2013).

[8] 326 U.S. 501 (1946).

[9] *See* Genevieve Lakier & Nelson Tebbe, *After the "Great Deplatforming": Reconsidering the Shape of the First Amendment*, LPE PROJECT (Mar. 1, 2021), https://lpeproject.org/blog/after-the-great-deplatforming-reconsidering-the-shape-of-the-first-amendment/ [https://perma.cc/4YZG-R46D].

such as the integrity of the democratic process or the advancement of collective knowledge. *Second*, power over speech—that is, the power to control what is said and heard—is not monolithic but has at least three different dimensions: *strength*, the likelihood that exerting the power will produce the acts of speaking or hearing favored by the agent with the power; *density*, the number and importance of opportunities for speaking or listening that are under the agent's power; and *breadth*, the number of individuals whose speaking or listening can be affected by the power.

Equipped with these distinctions, we can see that, to threaten a given type of free speech value, an agent only needs to have two of the three dimensions of power. To threaten *individual* values, an agent needs to be able to reliably control what *one individual* says or hears across *nearly all* channels of communication. That requires power that is high in strength (reliable control) and density (over many channels), but not in breadth. To threaten *collective* values, an agent only needs to reliably control at least *one channel* of speech amplification that is very broadly used across a population. Such an agent has power that is high in strength (reliable control) and breadth (over many speakers/listeners), but not in density.

Identifying the exact degree of strength, density, or breadth of power over speech that poses an intolerable threat to First Amendment values would be difficult for three reasons: because drawing lines on spectrums is always challenging; because judges and constitutional theorists—those whose writings might help to establish such a line—have always just presumed, *arguendo*, that the state is the only relevant threat; and because different free speech theories might yield different answers. So, this Article argues by analogy: because the *state's* power over speech poses intolerable threats to free speech values, private agents with power over speech comparable to the state's—in the sense of posing a similar threat to a core free speech value—should be similarly constrained by free speech rights.

Two types of currently existing corporations are likely to fit the bill, each possessing great power over speech along different dimensions. The first are the corporations mentioned above that own communications services used regularly by nearly a majority of the population, such as the largest social media platforms and search engines (think Facebook, YouTube, and Google).[10] These corporations have very strong and *broad* power over speech, as described above. Corporations in the second category are less often in the limelight: private employers in labor markets with a low number of jobs and a high number of workers available to fill them. These corporations can have very strong and *dense* power over speech: the ability to make certain individuals afraid to speak up about public issues, potentially for years, for fear of losing their jobs.

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[10] *See* Belle Wong, *Top Social Media Statistics and Trends of 2023*, FORBES ADVISOR (May 18, 2023, 2:09 PM), https://www.forbes.com/advisor/business/social-media-statistics/ [https://perma.cc/54HJ-PSWS] (reporting that in 2023 Facebook and YouTube each had 2.9 million and 2.5 million monthly active users across the world respectively, making them the most used social media platforms in the world).

None of this is to say that the duties imposed on any quasi-state agent would look exactly like those typically imposed on the state. To the extent that the agents differ from the state, their duties might be different or even less demanding. Doctrinally, this might work in two ways. First, the doctrine might be altered such that the duties of the state would apply to private quasi-state agents in a diluted or otherwise modified fashion. Second, the differences might be accommodated within existing doctrine. The First Amendment is already more context-sensitive than one might think; even the *state* possesses modified (and in a sense, less demanding) duties when it is acting in certain managerial roles such as educator or employer. Perhaps operating certain private organizations is simply a distinct managerial role calling for distinct duties.

Models for adopting constitutional law to private parties are more easily found than American constitutional lawyers might suppose. High courts in both American states and foreign nations have interpreted their constitutions to provide speech rights against certain private entities. This Article, in its final lap, draws on those bodies of case law to develop options for doctrinally implementing private free speech duties. I offer three options: quasi-state agents could have duties directly under the First Amendment that are formally (though perhaps not substantively) identical to those of the state; they could have duties directly under the First Amendment that are less demanding than those of the state; or they could have duties *indirectly* under the First Amendment, to be enacted by government officials via legislation, regulation, or the common law that reflect constitutional principles.

The Article proceeds as follows. Part I introduces the historical Supreme Court cases mentioned above that, for a time, recognized First Amendment duties for certain powerful private agents that cut against two traditional doctrines: the state action doctrine and media's editorial rights. Part II explains that these deviant cases reflect a principle underlying First Amendment law and theory: that the state is bound by free speech duties because of its extraordinary power over speech and thus its ability to impinge on free speech values. I then argue that this same principle justifies an extension of at least some First Amendment duties to the class of quasi-state agents. Part III considers several reasons we might nonetheless have for diluting the free speech duties that we impose on quasi-state agents, relative to those of the state. These reasons pertain to the agents' own liberty claims, and to the social value of their pursuit of private aims. Finally, Part IV draws on comparative law and U.S. state judicial opinions to present the three possibilities for how quasi-state agents might be held to have free speech duties.

I. HOW THE FIRST AMENDMENT CURRENTLY BINDS (FEW) PRIVATE AGENTS

The proposition that some private agents, acting entirely independent of government, must respect free speech duties appears to run against the current of precedent.

Countless cases assume that constitutional rights—with one exception[11]—create duties only for government agents. But my argument is not an interpretation of the case law that seeks consistency with every case outcome. Rather, it aims to articulate a principle that represents a deeper undercurrent in the doctrine: that what the First Amendment constrains is extraordinary power—power over the channels of communication.

This underlying principle has even—on occasion—surfaced to determine case outcomes. For fleeting moments during the mid-twentieth century, the Supreme Court extended free speech duties to private agents. It did so precisely in cases in which private power over speech was at its zenith: when a big company had a firm grip over critical channels of communication. Unsurprisingly, the opinions do not paint their holdings as revolutionary; and those holdings were closely confined by subsequent decisions. The cases nonetheless demonstrate the influence of the principled undercurrent; highlight areas of doctrine that need to flex to overtly accommodate it; and offer a glimpse of what such an accommodation might look like in practice.

This Part presents these cases, organized around the two First Amendment doctrines that they appeared to flout. The first and most obvious of these doctrines is the state action doctrine, which establishes that parties can only raise constitutional rights claims against the government, not against private actors. The second is the "editorial rights" doctrine, according to which media entities have rights to choose exactly what and how to publish of others' speech—even if that means that they deny other private parties the opportunity to speak. This doctrine implies that media entities lack conflicting duties like the ones advocated in this Article.

Here, the discussion will be purely descriptive. In later sections of the Article, I will defend the theoretical merits of these cases and explain how their insights could be incorporated more systematically into free speech jurisprudence.

A. State Action Doctrine

The rule that no private agent has constitutional free speech duties is most clearly enforced in constitutional law by the state action doctrine. This doctrine requires that, for a plaintiff to bring a claim that her constitutional right was violated, she must prove that the action was taken by a state official or institution.[12] It is often viewed as a threshold requirement, such that, unless it is met, a court cannot even hear the merits of the claim. The requirement applies not just to free speech rights but to every individual right in the Constitution, aside from the right against slavery and involuntary servitude.[13] It is religiously applied, perhaps especially with

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[11] The Thirteenth Amendment secures the right against enslavement and involuntary servitude against *everyone*, not just the government. U.S. CONST. amend. XIII.

[12] *See* Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982) (outlining the state-action requirement).

[13] *See* U.S. CONST. amend. XIII.

respect to free speech. Courts have repeatedly thrown out frivolous lawsuits claiming that private actors like Facebook or Amazon have violated someone's freedom of speech.[14]

A limited number of exceptions to the state action doctrine exist. The primary set of exceptions allows an action to be counted as state action when it was taken by a private agent at the behest of[15] or with the approval of the state,[16] or by a private agent institutionally entwined with the state.[17] These "exceptions" could also be characterized as relatively straightforward *extensions* of the state action doctrine, insofar as they involve causal involvement on the part of the state.

But the final and most controversial exception applies to agents that are fully, structurally and causally, independent of the state. Under this exception, a private agent may be bound by constitutional rights, including free speech rights, when it exercises a "public function."[18] Below, I explain how the public function exception, when it was first introduced in the First Amendment context, rested on a recognition of the state-like power of the entities to which it applied. However, this functionalist power analysis quickly gave way to a more formalistic inquiry into whether the agent was like the state in *all* respects or served a function that had only ever been provided by the state—shrinking the number of exceptional cases recognized effectively to zero.

1. The Power Approach

The Supreme Court first recognized the public function exception for a "company town" in the 1946 case *Marsh v. Alabama*.[19] While the opinion in this case did not explicitly claim to create any exception to the state action doctrine, the Court later read it as doing so[20]—and for good reason.[21]

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[14] *Cf.* Parler LLC v. Amazon Web Servs., LLC, 514 F. Supp. 3d 1261, 1264 (W.D. Wash. 2021) (affirming that the First Amendment only applies to the government and not private actors).

[15] *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 170 (1970) (discussing how a state is responsible for a private party's action when state law has compelled the act).

[16] *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178–79 (1972) (holding that state sanctions enforcing adherence by private parties to rules that violate constitutional rights are unconstitutional).

[17] *See* Evans v. Newton, 382 U.S. 296, 299 (1966) ("Conduct that is formally 'private' may become so entwined with governmental policies . . . as to become subject to the constitutional limitations placed upon state action.").

[18] *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928–30 (2019).

[19] 326 U.S. 501, 509 (1946).

[20] *See, e.g.*, *Halleck*, 139 S. Ct. at 1942 n.11 (Sotomayor, J., dissenting) (describing *Marsh* as extending First Amendment liability to a company town); Lugar v. Edmondson Oil Co., 457 U.S. 922, 939 (1982) (describing *Marsh* as articulating a "public function" test for state action).

[21] One might alternatively read *Marsh* as simply concluding that the *state* cannot enforce

Chickasaw, Alabama, was a densely populated town owned in its entirety—buildings, streets, sidewalks, sewers, and all—by Gulf Shipbuilding Corporation, a private company.[22] Most of Chickasaw's residents were employees of Gulf.[23] The town connected to a public highway, and non-resident members of the public could freely enter it.[24] The town had a commercial area in which many companies had rented out stores, and Gulf had posted in the windows of all of these stores the same notice: "This Is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted."[25] Grace Marsh, a Jehovah's Witness who lived outside of Chickasaw, attempted to distribute religious literature on the sidewalk outside one of the stores and was asked to leave.[26] When she refused, she was arrested for trespassing.[27]

The Court reversed Marsh's resulting conviction as a violation of her First Amendment rights *by* Gulf.[28] The corporation could not be allowed "to govern a community of citizens so as to restrict their fundamental liberties . . . ."[29] Justice Hugo Black's opinion explicitly compares the power that Gulf had over speech within Chickasaw to the power a municipal government would have over speech within its jurisdiction, describing both as inherently constrained.[30] While a municipality would have the physical power to ban the distribution of religious literature on its streets, it would not have the *authoritative* power to do so given the First Amendment. Black says the same of Gulf: he denies that "the mere fact that all the property interests in the town are held by a single company is enough to give that company power, enforceable by a state statute, to abridge these freedoms [of speech]."[31]

In what sense does a private corporation's power need to be state-like in order to be bound by the First Amendment? The opinion is hardly a model of clarity, but it gives two major clues. The first is its emphasis that Gulf was acting like a company

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its trespassing laws in ways that violate its own duties; in a sense, the private act becomes an act of state through enforcement. *See, e.g.*, Frederick Schauer, Hudgens v. NLRB *and the Problem of State Action in First Amendment Adjudication*, 61 MINN. L. REV. 433, 435–36 (1977) (offering this as one possible interpretation). However, if the interpretation rests on the premise that the state acts whenever it enforces its laws relating to private property, then it would implode the state action doctrine: private agents would be effectively bound by all constitutional rights if they ever want their property rights enforced. While I have some sympathies for such a reading, as I explain in Part IV, my reading is equally plausible (as discussed in this section) and has far less radical implications. *See* discussion *infra* Section IV.A.

[22] *See Marsh*, 326 U.S. at 502–03.

[23] *Cf. id.* at 502.

[24] *Id.* at 503.

[25] *Id.*

[26] *Id.*

[27] *Id.* at 503–04.

[28] *See id.* at 508–10.

[29] *Id.* at 509.

[30] *Id.* at 504–06.

[31] *Id.* at 505.

that provides critical public infrastructure in a monopolistic or oligopolistic market—an entity today often called a "common carrier."[32] Black developed a lengthy analogy between Gulf's company town and typical common carriers, "privately held bridges, ferries, turnpikes and railroads . . . ."[33] He describes these enterprises as distinctive for two reasons: they "open[] up [their] property for use by the public in general" and provide a "public function," seemingly a service vital to the public interest.[34] Such common carriers, Black explicitly observes, are bound by the Constitution on a sliding scale: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[35]

Relevant to the First Amendment context of *Marsh*, Gulf was serving the "public function" of operating certain channels of communication. As Black states it, "[w]hether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free."[36] But it was surely not enough for Gulf to control just *any* channel of communication. Black explains further:

> Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored.[37]

Notice first the passive language—"their information must be uncensor*ed*"—confirming that, for First Amendment purposes, what matters is that the interest in information is infringed, irrespective of who does the infringing. The language also suggests that Gulf controlled channels of communication vital or numerous enough to actually "censor" information necessary for democratic participation. Gulf could

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[32] *See* Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH L. 463, 465–75 (2021) (describing contested definitions of a common carrier).

[33] *Marsh*, 326 U.S. at 506–09.

[34] *Id.* at 506. The idea of treating corporations as bound by constitutional rights when they performed public functions can be found as far back as Justice Harlan's dissent in the *Civil Rights Cases*. 109 U.S. 3, 48 (1883) ("It is fundamental in American citizenship that, in respect of [civil] rights, there shall be no discrimination by the State, or its officers, or by individuals, or *corporations exercising public functions or authority*, against any citizen because of his race or previous condition of servitude.") (emphasis added).

[35] *Marsh*, 326 U.S. at 506.

[36] *Id.* at 507.

[37] *Id.* at 508.

not effectively ban its citizens from acquiring information *anywhere*. But it controlled a central distribution point for information in Chickasaw: the streets in the business district, and indeed *all* the streets.

From the common carrier and censorship discussions in *Marsh*, we can gather that the private agents that must respect free speech rights include those that control certain channels of communication on which the public in general—especially in their capacity as voters—depend for information. Given the Court's examples, the channels may need to function as public forums (i.e., central spaces for the discussion of public issues) or be otherwise critical for democracy (e.g., channels on which many people depend). Either way, the Court recognized that a corporation *capable of infringing on vital free speech interests*, on a scale that the state could, was bound by the First Amendment.

After a long period of disuse, *Marsh*'s public function exception was revived in the late 1960s—again, in a First Amendment case. *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza* arose after members of a local union began picketing outside a store that had hired nonunion employees.[38] Logan Valley Plaza, the large shopping center within which the store was located, secured an injunction against picketing on the center's grounds.[39] The Court lifted the injunction, applying the public function exception and citing *Marsh*.[40] Justice Marshall, writing for the majority, analogized the shopping mall to the business district of Chickasaw.[41] He emphasized the *Marsh* opinion was reinforced by the economic development of the United States that had led to a "large-scale movement of this country's population from the cities to the suburbs . . ." and the accompanying "advent of the suburban shopping center . . ." which he seemed to anticipate might rival or even replace city streets and parks—the original public forums—as the center of public life.[42] In other words, he emphasized the shopping mall's control over a space—a functional business district—that was critically important for realizing free speech interests.[43]

Logan Valley arguably expanded the public function exception beyond *Marsh*. Marshall acknowledged that the shopping center's total power was much less than Gulf's; the center's entire power was comparable only to Gulf's power over the *commercial* area of Chickasaw.[44] He nonetheless suggested that no more than this power was at issue in *Marsh*, because there was "no showing made there that the corporate owner would have sought to prevent the distribution of leaflets in the *residential* areas of the town."[45] At the very least, *Logan Valley* clarified that a corporation could be bound by First Amendment duties even if it lacked *total* power like the state's.

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[38] 391 U.S. 308, 311 (1968).
[39] *See id.* at 313.
[40] *See id.* at 325 (citing *Marsh*, 326 U.S. at 506).
[41] *See id.* at 318.
[42] *Id.* at 324.
[43] *Id.* at 319–20.
[44] *Id.* at 318.
[45] *Id.* (emphasis added).

Marshall also hinted at limitations on the public function exception. He acknowledged that "it may well be that respondents' ownership of the property here in question gives them various rights, under the laws of Pennsylvania, to limit the use of that property by members of the public in a manner that would not be permissible were the property owned by a municipality."[46] The shopping center, he acknowledged, might not be "without power to make reasonable regulations governing the exercise of First Amendment rights on their property. Certainly their rights to make such regulations are *at the very least* co-extensive with the powers possessed by States and municipalities . . . ."[47]

The effects of *Logan Valley*, at least for a time, radiated into *state* constitutional law. Over about the next decade, several state supreme courts extended the reach of their state free speech clauses to some powerful private agents, primarily large shopping complexes and universities. Most notably, in 1980 in *State v. Schmid*, the Supreme Court of New Jersey deemed Princeton University bound by state constitutional free speech duties.[48] The court went so far as to conclude that New Jersey constitutional rights are subject to no state action doctrine at all.[49] California's Supreme Court interpreted its constitution to provide a right of "speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned" because those centers "provide an essential and invaluable forum for exercising those rights."[50] The constitutions of Massachusetts, Colorado, and Washington were also read to grant a right—either under free speech provisions or other democratic process provisions—to collect signatures for ballot access or initiatives at regional shopping malls.[51]

2. The Modern Approach

The public function exception has not exactly flourished since *Marsh*. *Logan Valley*'s extension of the exception beyond the company town was first confined to its facts in a case called *Lloyd Corp. v. Tanner*, and eventually altogether overruled.[52] In limiting *Marsh*'s application, *Lloyd* explained that *Marsh* had "involved

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[46] *Id.* at 319.

[47] *Id.* at 320.

[48] 423 A.2d 615, 632–33 (N.J. 1980).

[49] *Id.* at 628.

[50] Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 347 (Cal. 1979).

[51] Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590, 597 (Mass. 1983); Bock v. Westminster Mall Co., 819 P.2d 55, 61 & n.7 (Colo. 1991) (en banc); Alderwood Assocs. v. Wash. Env't Council, 635 P.2d 108, 117 (Wash. 1981) (en banc).

[52] Lloyd Corp. v. Tanner, 407 U.S. 551, 570 (1972) (holding that a shopping center had *not* infringed First Amendment rights when it told distributors of anti-war handbills on its premises to leave); *see also* Hudgens v. NLRB, 424 U.S. 507, 518 (1976) (formally overruling *Logan Valley*, 391 U.S. 308).

the assumption by a private enterprise of *all* of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State."[53] This time, the Court picked apart differences between the company town and the involved shopping center, such as that Gulf owned land *beyond* the shopping district of Chickasaw whereas the Lloyd Corporation did not.[54] *Marsh* thus survived, but only as a formalistic test for whether a private agent walks and talks exactly like a state.

In the years that followed, the Court emphasized that "very few" functions qualify as public in *Marsh*'s sense.[55] The Court applied the classification to only one other setting, primary elections, and excluded from it a variety of activities, including "running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and supplying electricity."[56] It appears that the *Marsh* doctrine is now only applicable to two relics of history: company towns and all-white primaries.[57]

The Court ultimately clarified that the public function exception applies only where the private agent has "powers traditionally *exclusively* reserved to the State."[58] For instance, three years ago in *Manhattan Community Access Corp. v. Halleck*, a radio channel creator claimed that Manhattan Neighborhood Network, a non-profit that runs New York City's public access channels, had violated her First Amendment rights by barring her from all public channels because of a show she produced that was critical of the network.[59] The Court dismissed Halleck's claim, and emphasized the history of public access channels run by private agents to prove that the state did not exclusively engage in this activity.[60] The Court also described the function of Manhattan Neighborhood Network more generally as providing a forum for speech—an activity that, obviously, is not an exclusively government function.[61] Indeed, it is hard to imagine any function involving communication that is *exclusively* a government function. Never mind that the running of a public forum was the original public function recognized by the Court in *Marsh* and *Logan Valley*.

The state cases applying free speech duties against private agents had somewhat longer-lasting effects than their Supreme Court counterparts. The *Logan Valley*

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[53] *Lloyd Corp.*, 407 U.S. at 569 (emphasis added).

[54] *Id.* at 562–64.

[55] Flagg Bros. v. Brooks, 436 U.S. 149, 158 (1978).

[56] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1929 (2019) (collecting cases).

[57] *See* Terry v. Adams, 345 U.S. 461, 468–70 (1953) (applying the Fifteenth Amendment in the context of primary elections); Smith v. Allwright, 321 U.S. 649, 662–66 (1944) (same).

[58] *Halleck*, 139 S. Ct. at 1928 (citing Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974)).

[59] *Id.* at 1927.

[60] *Id.* at 1929–30.

[61] *Id.* at 1930.

spinoffs recognizing state constitutional rights to gather signatures in shopping centers were never officially revoked. Most were narrowly cabined by the 1990s, with the partial exceptions of New Jersey and Massachusetts.[62] Indeed, the free speech clause of New Jersey remains without any state action requirement at all, and the question remains open in Massachusetts.[63]

B. Editorial Rights

As explained above, courts have held that, under the First Amendment, media entities have robust "editorial rights" to decide which speech to publish, or not. Courts have applied these rights to newspapers, cable television companies, and (so far) social media companies.[64] If a company has such an enforceable right, then this implies that they cannot have an enforceable duty, like the state, to respect free speech rights. They are allowed to discriminate finely based on the content and viewpoint of the speech they are considering for publication.

Yet a small number of cases from the mid-to-late twentieth century, the same period as *Marsh* and *Logan Valley*, found that certain very powerful media companies lack editorial rights and could be forced, by Congress or federal agencies, to respect free speech values. The rationale for treating these media companies differently lies, again, in the nature of the companies' power to undermine free speech interests. The key cases are *Associated Press v. United States*, *Red Lion Broadcasting Co. v. FCC*, and *Turner Broadcasting System, Inc. v. FCC* (*Turner I*).[65]

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[62] *Compare* Southcenter Joint Venture v. Nat'l Democratic Pol'y Comm., 780 P.2d 1282, 1283 (Wash. 1989) (en banc) (rejecting a right to solicit contributions and distribute literature in a shopping mall), *and* Golden Gateway Ctr. v. Golden Gateway Tenants Ass'n, 29 P.3d 797, 810 (Cal. 2001) (finding no right to distribute leaflets in an apartment complex), Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060, 1072, 1074 (N.J. 2007) (finding that a restriction on expressive activities in a "common-interest [residential] community" was not "unreasonable or oppressive," and therefore did not violate speech rights), *with* Dublirer v. 2000 Linwood Ave. Owners, Inc., 103 A.3d 249, 260 (N.J. 2014) (holding that a restriction on posting notices and distributing campaign materials inside a private cooperative apartment building was unreasonable and thus violated the residents' speech rights), *and* Glovsky v. Roche Bros. Supermarkets, Inc., 17 N.E.3d 1026, 1035 (Mass. 2014) (applying the right to gather signatures only to area outside a supermarket).

[63] *See generally* Roman v. Trs. of Tufts Coll., 964 N.E.2d 331 (Mass. 2012) (declining to find a speech rights violation on private college property but only because a state itself would not have violated rights under the circumstances).

[64] Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (newspapers); Turner Broad. Sys., Inc. v. FCC (*Turner I*), 512 U.S. 622, 636 (1994) (cable); NetChoice, LLC v. Att'y Gen., Fla., 34 F.4th 1196, 1203 (11th Cir. 2022) (holding social media platforms' content moderation does fall within protected editorial judgment).

[65] *See generally* Associated Press v. United States, 326 U.S. 1 (1945); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969); *Turner I*, 512 U.S. 622.

The earliest case, decided in 1945, involved the Associated Press (AP), a co-operative association of newspapers, whose employees collected and wrote up news and then distributed that news for a fee to the association's members.[66] The AP gave its members the ability to block non-member competitors from membership (and thus from access to AP stories).[67] The United States brought an antitrust lawsuit against the AP for this policy.[68] One of the AP's defenses was that enforcing antitrust law against it would abridge the freedom of the press by compelling the members of the AP to share the product of their ingenuity with others before publishing it themselves.[69] The Court rejected this argument.[70] The justices' brief explanation was telling, and worth quoting in full.

> It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.[71]

One can scarcely find in a judicial opinion clearer language acknowledging that the First Amendment protects a freestanding right to free speech—that it is not only a restraint on government, but on all agents powerful enough to repress that right. While the free press claims of the AP members were perhaps not especially strong in this case, the Court sets the stage for its future approval of much more reaching government regulation on large media companies.

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[66] *Associated Press*, 326 U.S. at 4.
[67] *Id.* at 4–9.
[68] *Id.* at 4.
[69] *Id.* at 14–15.
[70] *Id.* at 15–16.
[71] *Id.* at 20 (emphasis added).

Two decades later, the Court in *Red Lion Broadcasting Co. v. FCC*, allowed the Federal Communications Commission (FCC) to place far more stringent restrictions on the speech of broadly powerful media companies.[72] The Court's First Amendment cases are extremely skeptical of state regulations of media that interfere with the content of what media may publish. However, in *Red Lion*, Justice White's opinion upheld the FCC's rule, called the fairness doctrine, which required that radio and television broadcasters to discuss public issues *and* give at least some coverage to each side of those issues in order to maintain their federal licenses.[73] Effectively, the FCC was telling broadcasters to cover some universe of content and, given the finitude of the airwaves under their control, *not* some other universe of content.[74]

In response to the broadcasters' claim that the fairness doctrine abridged their First Amendment rights, the Court maintained that broadcasters did not have the same freedom of "refusing in [their] speech or other utterances to give equal weight to the views of [their] opponents" as did other speakers or media actors.[75] In other words, the Court declared that broadcasters lacked at least some of the standard editorial rights.

This holding is generally read as resting on a unique feature of the broadcast medium, namely, the physical scarcity of the spectrum. Only a finite number of radio and television frequencies exist, such that it is not even *possible* for everyone to speak over them; even if there were enough airwaves for everyone to speak, the speech would, due to signal interference, not amount to "intelligible communication."[76] It is under *these* conditions that broadcasters lack editorial rights. The Court states: "[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."[77] The Court makes a point of observing that the broadcast spectrum is "increasingly congested" and that, while the spectrum is expanding, the uses for that spectrum are also growing apace over time.[78]

But I suggest that the feature of broadcasting that most strongly underwrote the Court's opinion was not physical scarcity, but a form of economically induced scarcity: concentrated market power. What mattered to the Court was not just the limited number of frequencies that *existed*, but the limited number of frequencies that in fact *reached a large audience*. The fact that such a small number of radio and television stations were able to dominate viewership was due to the lack of a sufficiently competitive marketplace for these media. There are several reasons to

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[72] 395 U.S. 367, 400–01 (1969).
[73] *Id.* at 369–75.
[74] *See id.* at 375–78.
[75] *Id.* at 386–87.
[76] *Id.* at 388.
[77] *Id.*
[78] *Id.* at 396–97.

support this reading. *First*, the Court repeatedly implies that "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . ." requires access to a *diversity* of such material.[79] It repeatedly worries about the limited number of *views* on the air, stating that without the fairness doctrine, the "station owners and a few networks would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, . . . and to permit on the air only those with whom they agreed."[80] The Court here even mentions "private censorship," as it did in *Marsh*.[81] *Second*, the Court explicitly invokes the idea of an economic monopoly no fewer than seven times, even though the respondent broadcasters—including CBC and NBC in addition to Red Lion Broadcasting—were clearly not monopolies. At one point, the Court declares: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."[82] *Third*, the Court mentions that the top broadcasters now (e.g., CBC and NBC) had gained an edge in the market from the FCC's decision to grant them licenses at the advent of broadcasting.[83] Their licenses gave them an advantage over new entrants to the market and solidified their dominance.[84] These historical observations were irrelevant to the physical scarcity of the broadcast spectrum, but were crucial to an account of concentration in the broadcasting market.

Red Lion, read as an opinion about concentrated media markets rather than physical scarcity, implies that media companies lose their editorial rights precisely when they are powerful enough to affect whether or not the general public is hearing a diversity of viewpoints. When this happens, their would-be editorial discretion conflicts with (and is trumped or even negated by) the First Amendment right of the public to be informed. As the Court says: "[T]he people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[85]

This makes legal space for Congress or the FCC to sweep in to force the broadcasters to respect the right of the public. Nothing the Court says settles the question of whether the broadcasters might also have a freestanding constitutional *duty* to do the same, but nothing it says is incompatible with this line of thought, either. I return to this distinction in Part IV.

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[79] *Id.* at 390.
[80] *Id.* at 392.
[81] *Id.*
[82] *Id.* at 390.
[83] *Id.* at 400.
[84] *Id.*
[85] *Id.* at 390.

Nonetheless, the Court is clear that the broadcasters' lack of editorial rights did not entail regulatory *carte blanche* for the FCC. The agency was not free to "vindicate its own idiosyncratic conception of the public interest or of the requirements of free speech."[86] It was therefore critical that the Court was offered no evidence of the Commission's:

> [R]efusal to permit the broadcaster to carry a particular program or to public his own views; of a discriminatory refusal to require the licensee to broadcast certain views which have been denied access to the airwaves; of government censorship of a particular program contrary to [the Telecommunications Act]; or of the official government view dominating public broadcasting. Such questions would raise more serious First Amendment issues.[87]

In other words, the FCC was fine so long as they simply required coverage of certain issues from all sides without discriminating against any of those sides.

In subsequent cases, however, the Court declined to extend the holding of *Red Lion* beyond broadcast media, on the grounds that these other media sources were not physically scarce. The Court never again analyzed concentration in a media market as a basis for the lifting of editorial rights. Just four years after *Red Lion* in *Miami Herald Publishing Co. v. Tornillo*, the Court held that Florida was blocked from applying a fairness doctrine-like policy to any newspapers, because of newspapers' editorial rights.[88] Despite *Red Lion*, in *Turner I* two decades later, the Court recognized the editorial rights of cable television companies because cable lacked the "unique physical limitations of the broadcast medium."[89] Moreover, the Court in that case was unequivocal that *Red Lion* was decided based on those physical factors and not, as the FCC had argued, on what it called "market dysfunction" in a speech market.[90] While lower courts have held that internet service providers, like broadcasters, do *not* have editorial discretion rights, the conclusion is based not on a market concentration rationale but on the assumption that these companies are merely conduits for the speech of others that do not actually engage in speech.[91]

Marsh and *Logan Valley* represent the Court's (fleeting) willingness to impose constitutional free speech duties on private corporations that controlled vital opportunities

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[86] *Id.* at 395.

[87] *Id.* at 396.

[88] 418 U.S. 241, 258 (1974).

[89] *Turner I*, 512 U.S. 622, 637 (1994).

[90] *Id.* at 639; *see also id.* at 640 ("[T]he special physical characteristics of broadcast transmission, not the economic characteristics of the broadcast market, are what underlies our broadcast jurisprudence.").

[91] *See, e.g.*, Mozilla Corp. v. FCC, 940 F.3d 1, 65–66 (D.C. Cir. 2019).

for engaging in public speech within a community. *Red Lion* stands for the Court's (again, fleeting) willingness to step back and allow Congress to impose constitutional-like free speech duties on private corporations that served as gatekeepers over some of the highest-visibility sources of news in the nation—even when those duties appeared to conflict with those corporations' own constitutional free speech rights. All of these are exceptional cases, and not just in the sense that their precedential sun has set. They all represent situations in which private corporations posed genuine state-like threats against free speech interests. The fact that, even in a few cases, the Court interpreted constitutional rights and duties to protect against those threats, *whomever* posed them, suggests at the very least that the First Amendment order rests not exclusively on a concern about states as such but on a concern about state-like power over speech. Understandably, these concerns ordinarily line up. But when they come apart, courts are faced with a genuine, internal First Amendment conflict.

The remainder of this Article defends more systematically orienting free speech doctrine around the concern for state-like power and offers a glimpse of how it could be done. Unfortunately, the deviant cases from this Part are too few and too abstractly written to give us a unified account of state-like power over speech, much less of the sort of duties that might come with that power. The next two Parts do that difficult theoretical work.

II. THE THEORETICAL CASE FOR BINDING STATE-LIKE PRIVATE AGENTS

This Part argues that we have no principled reason for binding *only* state agents by First Amendment speech rights.[92] To be clear, I am not arguing that we have no more reason to bind the state than any private agent. I contend only that the rigid contemporary First Amendment public-private line over which *no* free speech claims may cross is indefensible in principle.

I am, somewhat unusually in an article on law, excluding *stare decisis* as a principled reason, i.e., that we have always done it this way. (I will even here set aside the argument that we in fact have *not* always done it this way, as Part I illustrated.) My inquiry concerns whether we have a *justification* for our practice.

My contention is that the only principled reason we have for binding state agents at all requires binding *more* than state agents. I first make the case that the only affirmative justification we have for binding the state itself by *any* constitutional right is the state's power over specific fundamental interests that the right is supposed to serve. I dismiss as implausible justifications based on the text, original intent, and the nature of a constitution. I then explain that, in the context of speech rights, our justification for binding the state—its specific power over the realization

[92] I deliberately set aside practical reasons. I doubt that it is seriously impracticable to breach the public-private barrier because it has been done before in other jurisdictions without any social calamity, but I am analyzing the principles that motivate our doctrine.

of the free speech interests—does not justify binding it alone. Indeed, *two* types of private agents might, at least in principle, have structurally similar power over these interests. These are the promised *quasi-state agents*. They will in certain respects resemble Gulf Shipbuilding Corporation or CBS in the 1960s—but perhaps with even more power.

This Part thus establishes the prima facie case for imposing some sort of First Amendment duties on quasi-state agents. But the case is only prima facie: that is, I offer an affirmative justification for imposing these duties. Yet I do not claim, nor could I, that in all respects state agents and quasi-state agents are identically situated. Thus, there might still be countervailing reasons for not applying these duties to quasi-state agents in the usual way, to the usual degree, or even at all. I postpone an exploration of these countervailing reasons until Part III.

A. Why Bind the State by Constitutional Rights?

I have by now thoroughly set up the consensus assumption that individual rights in the Constitution generally create duties for government agents only. Going forward, I will call this principle the *state-only-duties principle.* Can the principle be justified?

A justification cannot be found in the text, which barely hints at whom it binds. The constitutional Preamble, the introductory statement of the document's purpose, makes no mention of any duty holder.[93] Most of the rights provisions themselves simply grant a "right of the people" (e.g., the "right of the people to keep and bear arms" or "the right of the people . . . against unreasonable searches and seizures")—without specifying who must respect the right.[94] When a rights provision *does* specify a duty bearer, that bearer is a government agent. The First Amendment names Congress as the agent with the duty to respect the liberties of speech and religion.[95] The Fourteenth Amendment, too, binds a specified set of agents: the states.[96] But these exceptions are far from conclusive, especially because they specify *different* state agents.

The state-only-duties principle matches the proposition, occasionally expressed in American judicial opinions, that a constitution, *by its nature*, limits governmental and not private power.[97] In one document, on this account of constitutions, the People both delegate power to the government and limit it. As a historical matter,

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[93] U.S. CONST. pmbl.

[94] The bulk of the exceptions come after the Bill of Rights were passed, with the Fourteenth Amendment and the various voting rights amendments. Several provisions in the Bill of Rights concerning the criminal process could not be read as binding anyone other than the state insofar as the state is the only entity that conducts any criminal process. *See* U.S. CONST. amends. II, IV.

[95] U.S. CONST. amend. I.

[96] U.S. CONST. amend. XIV.

[97] *See, e.g.*, Southcenter Joint Venture v. Nat'l Democratic Pol'y Comm., 780 P.2d 1282, 1287 (Wash. 1989).

it is certainly true that the primary subject of all constitutions is governmental power. Yet no justification is obvious for why a constitution could not *also* grant or limit power to private agents. Other peoples have done so.[98] Indeed, as previously observed, the American people[99] themselves enshrined the right against enslavement and involuntary servitude against *all* actors, state or private, back in 1865.[100] It is also unclear that in the eighteenth century a long enough tradition of constitution-writing existed for anyone to have a clear conception of what one—in general—was. Why couldn't a constitution be conceived more simply as a set of fundamental, difficult-to-alter rules, institutions, and values that the People choose to govern their society?

Perhaps the best answer is that *the American* People at the Founding intended to limit the rights in *their* Constitution to rights against the government. History makes clear that the Founders feared, above all else, a centralized national government.[101] When they spoke of the Bill of Rights, they described them as binding a potentially tyrannical state.[102] Yet this is decisive only on a rather cramped view of originalism, sometimes known as application originalism.[103] On this view, we should think of original intent as the Founders' concrete "'assumptions and expectation[s] about the correct application' of their principles . . . ."[104] It is much harder to know how the Founders' *broader principles* as originally construed would apply to our modern media reality.[105]

We could alternatively, consistently with everything just said, think that the Founders intended to bind the federal government just because it happened at the time to be the most powerful agent around—the agent most in need of constraint. Indeed, the U.S. constitutional tradition adapted over time in this direction. Initially, the people

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[98] *See, e.g.*, India Const. art. 24 ("No child below the age of fourteen years shall be employed in any factory or mine or engaged in any other hazardous employment."); CONSTITUIÇÂO FEDERAL [C.F.] [CONSTITUTION] art. 40, § XVI (Braz.) (providing that National Congress shall have exclusive powers "to authorize, in Indian lands, the exploitation and use of hydric resources and the prospecting and mining of mineral resources.").

[99] Or rather, the constitutional proxy for the people: the state legislatures elected by the people at that time eligible to vote.

[100] U.S. CONST. amend. XIII.

[101] *See, e.g.*, Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 266–67 (2017).

[102] *Cf. id.* (citing the Founders' call for a bill of rights so that a "Check will be placed on the Exercise of . . . the powers granted").

[103] *See* Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 28 (2009) (noting that "the only commentators who take [this originalism variant] seriously are those aiming to attack it").

[104] Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1284 (1997).

[105] *See generally, e.g.*, JACK M. BALKIN, LIVING ORIGINALISM (2011) (arguing that fidelity to original meaning still leaves enough flexibility to confront technological developments from after the founding).

feared the power of a federal government over individuals (and the new states). But over time, the threat that *state* governments could pose to individual rights became clearer and was curbed in 1868 by the ratification of the Fourteenth Amendment, which ensured that state governments, and not just the federal government, guarantee equal protection, due process, and the privileges or immunities of citizens.[106] Yet, what if we have now reached an era in which a new type of *private* agent can pose the same threat to individual rights that a state government could? Might the drafters and ratifiers of the Bill of Rights or Fourteenth Amendment think that the constitutional rights they developed were meant to be used against such a threat?[107]

But perhaps the justification for binding the government by constitutional rights is its extraordinary power. The central state at the Founding had the power to pass legislation binding across the nation, enforce that legislation against citizens, tax, and raise armies.[108] The state is only more powerful today, with its massive armies, tanks, and missiles.[109] We might finally have arrived at a justification for binding only the state: for a state, to use the classical definition, has a monopoly on the legitimate use of force within its jurisdiction.[110] It is always going to be the (by far) most powerful agent around.

Yet the rights provisions in the Constitution do not bluntly dilute, impede, and slow down power, the way the structural provisions do. They are more scalpel-like, limiting the exercise of power in specific ways. The guaranteed rights, it is generally accepted, are singled out among all other possible rights based on their importance to certain fundamental interests of individuals and society. Arguably they are meant to limit government's power *to impinge on those specific interests.* For instance, the right against unreasonable searches in the Fourth Amendment is justified as ensuring privacy; the right to bear arms is justified as ensuring self-defense.[111] The power the state would use to impinge on those interests might be significantly less than its total power.

In order to determine if any other constitutional right could apply to private agents, therefore, one would need to conduct an inquiry for each right. One would first need to identify the fundamental interests that the right is supposed to serve and the sort of threat the government poses to those interests. For some rights, like the

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[106] U.S. CONST. amend. XIV, § 1.

[107] *See, e.g.*, John Adams, *A Dissertation on the Canon and the Feudal Law*, BOS. GAZETTE, May 21, 1765 (describing the people's natural right to knowledge and the utmost importance of the "preservation of the means of knowledge"); Campbell, *supra* note 101, at 268–70 (describing the Founding-era belief in a natural right to freedom of expression).

[108] U.S. CONST. art. I, § 1; *id.* art. I, § 7, cls. 1, 11–15.

[109] *Cf.* MAX WEBER, POLITICS AS A VOCATION 2 (1919) (explaining that a state's ability to enforce laws within its territory is contingent on its legitimate and exclusive ability to use violence).

[110] *See id.*

[111] *Cf.* Aharon Barak, *Constitutional Human Rights and Private Law*, 3 REV. CONST. STUD. 218, 229 (1996) (explaining the argument that *human* rights protect dignity, and dignity can be just as easily harmed by private as by public agents).

trial rights in the Fourth, Fifth, and Sixth Amendments, it is readily apparent that the state is the *only* agent that poses the relevant threat. For others, the answer may be less clear. Below, I sketch the inquiry for free speech and press rights.

B. Why Bind the State by Free Speech Rights?

On the traditional theories, the First Amendment's Speech Clause is justified as promoting one of three fundamental interests: autonomy, democracy, or knowledge (often described as truth[112]).[113] Under autonomy theories, free speech—encompassing, whenever I use the phrase, the ability to both speak freely and to hear what others have freely to say—serves individuals' interests in expressing themselves or in exploring and developing their intellect and character.[114] Under democracy theories, free speech serves individuals' interests in political participation or in living in a democratic society where voters are informed and elections are legitimate.[115] Under knowledge theories, free speech allows for truth to be tested and sorted from falsehood, which serves individuals' interests in having true justified beliefs and in living in a society where knowledge is growing and widely disseminated. Most contemporary free speech scholars are pluralists who believe that First Amendment speech rights serve all of these interests, and possibly additional ones.[116]

But where is the justification for protecting speech rights against *the state* in particular? So far, each of these theories only asserts that a certain general free flow of speech promotes autonomy, democracy, and knowledge. After all, the flow of speech can be constrained by all sorts of interventions. When someone tells me to "Be quiet!," this may, depending on the speaker and context, stem the flow of my speech and may, depending on what I have to say, undermine my autonomy, the democratic process, and the dissemination of knowledge. Yet few would argue that this intervention *unacceptably* impinges free speech interests. What is it about government interventions with speech, in particular, that are unacceptable?

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[112] *See, e.g.*, Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 441 (2019).

[113] This is a simplification, but in line with the ordinary way of talking about free speech theory.

[114] *See generally, e.g.*, Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283 (2011); C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989); Martin H. Redish, *Self-Realization, Democracy, and Freedom of Expression: A Reply to Professor Baker*, 130 U. PA. L. REV. 678 (1982); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFFS. 204 (1972).

[115] *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 10–14 (1960); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 479–82 (2011).

[116] *See, e.g.*, Leslie Kendrick, *Are Speech Rights for Speakers?*, 103 VA. L. REV. 1767, 1788 (2017); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY chs. 2–6 (1982); Joseph Blocher, *Nonsense and the Freedom of Speech: What Meaning Means for the First Amendment*, 63 DUKE L.J. 1423, 1441–56 (2014).

Free speech theorists are relatively silent on this question, perhaps because it is simply assumed that the only duty holder with respect to free speech rights is the government. But the answer seems straightforward: state officials' unusual power over the channels of communication allows them to staunch the flow of speech to an exceptionally high degree, and their motives to maintain their ruling status may encourage abuses of that power. The state can harm the flow of speech in two ways that are critical to the triad of free speech values: (1) it can cut off most of an individual's avenues for speaking or listening, such that it is extremely difficult for an individual to express themselves or be heard by an audience aside from their closest associates, or (2) it can advantage or disadvantage the dissemination of certain ideas, information, or views at such scale so as to distort public discussion across society and, ultimately, public opinion. The first way of staunching the flow hurts any of the more individualistic framings of the free speech values: the individual's ability to form themselves, the individual's participation in the democratic process, or the individual's ability to form justified true beliefs. The second way of staunching the flow hurts the more consequentialist framings of the free speech values: society's culture of free inquiry and tolerance; democracy's legitimacy, or the informed nature of its decision-making; or the building and widespread dissemination of a societal body of knowledge. Theorists might disagree about exactly which degree of encroachment is unacceptable, but nearly all can agree that the degree to which the *state* is capable is.

So, we have our more narrowly drawn justification for binding the state by free speech rights. Is it unique to the state? It might be, if state agents are the only sort that pose this extreme threat to free speech interests. The state certainly seems uniquely able to control the channels of communication, with its riot police and tanks. But if it turns out that some private agent can threaten free speech interests as effectively, or nearly as effectively, as the state does, then the case for the state-*only*-duties principle falters. Indeed, failing to apply the First Amendment against this private agent might actually thwart the purposes of that Amendment. According to the free speech theories mentioned above, the First Amendment plays a pivotal role in noble projects such as the development of the self, the legitimacy of elections, and the education of citizens. But if a private party controls these processes and their outcomes as tightly as the state could, then, no matter how far the state steers clear of speech, these projects would crumble. The First Amendment would shield the freedom of speech from one attacker, only to step back and allow the attacker standing in the wings to step in.

Below I examine whether the state truly is unique in its power over speech and its motives to abuse that power. Before I do, I want to acknowledge that my pursuit of *state-like* private power involves a proxy. If what the First Amendment is about is achieving certain free speech goals, then there is no reason to think that the power that threatens those goals rises even close to the power of the state, whatever the state's power happens to be. The threatening level of power might be significantly less

than that of the state.[117] But articulating an independent yardstick for measuring exactly when power triggers constitutional duties would be extraordinarily difficult, not least because it might vary based on one's preferred free speech theory. Reasoning by analogy therefore offers the advantages of being relatively clear and ecumenical—as well as capturing the summits of private power, such as the Machine. As the Supreme Court of New Jersey said in applying its free speech clause against a regional shopping center, we "cannot determine precisely the extent of damage to free speech that will call forth our constitutional provision to prevent it, but precision is not required in this case: the damage is massive."[118]

An alternative model might link private agents' constitutional duties to respect free speech to a continuum of power: the more power an agent has, the more stringent its free speech duties.[119] But such an approach would be much harder to implement than the one suggested here. Courts would have to determine a wide range of duties for private agents, based on their exact level of power. I expect that it is similarly for the practicalities of implementation that courts have always applied free speech duties equally to all state agents, irrespective of their exact degree of power (for surely governmental entities and officials vary in this respect). Moreover, a continuum model, insofar as it did impose some duties on private agents with relatively low magnitudes of power, might contribute greatly to hardship and uncertainty for individuals, as I detail in Part III.

C. Is the State's Power Over Speech Unique?

No private agent could match a functioning state's total power over the channels of communication in a society, given the latter's police power. At least any private agent other than the science-fictional Machine. But certain rare private agents might have power that poses a comparable threat to free speech. This possibility is gradually made more realistic by a closer examination of state power over speech, which turns out to be both: (1) excessive and (2) less than it appeared. First, I show that the state may be able to achieve grave impediments to free speech interests while only utilizing part of its power. In other words, the state has excess power with respect

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[117] For instance, one might believe that the enshrinement of certain constitutional rights meant that they were guaranteed, *simpliciter*, not just that the government could not infringe them. *Cf.* The Civil Rights Cases, 109 U.S. 3, 46–49 (1883) (Harlan, J., dissenting) (arguing that the Privileges or Immunities Clause was meant to grant constitutional rights to every citizen and not only to prohibit states from infringing those rights).

[118] N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 779 (N.J. 1994).

[119] I take Genevieve Lakier and Nelson Tebbe to have suggested something analogous to this model in a recent online essay. *See* Lakier & Tebbe, *supra* note 9. Chemerinsky also proposed a similar model in the 1980s for private duties to respect *all* constitutional rights, and not just speech rights. *See generally* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985).

to speech. Second, I contend that the state's power is subject to many unique constraints and limitations. When we couple the excess nature of the state's power with the constraints on its power, it becomes less far-fetched that a private agent could achieve similar results.

To begin, the state's power over speech is not a monolith, but, like all power, has different discernable dimensions. I discuss three. The first, and perhaps most obvious, is the power's *strength*, or the likelihood that an exertion of power over speech will in fact achieve the desired results: that is, that the speaker(s) will speak what the state wishes (perhaps silence) and the listener(s) will hear what the state wishes (again, perhaps silence). Persuasive abilities might afford very weak power over speech; a gun, or blackmail, might afford very strong power over speech. The density of power over speech is the range of potential speech acts to which the power extends. Say that a gunman follows a speaker around and threatens them each time they try to speak their message, whispering it, shouting it, typing it, broadcasting it, painting it onto a canvas. Such a gunman has power of not only great strength, but also great density. Lastly, the breadth of power over speech is the number of speakers and listeners subject to the power. So, the gunman following just *one* speaker around might have a relatively low breadth of power—unless that speaker is routinely talking to vast crowds of people. Each of these three dimensions of power contributes to achieving the powerful agent's desired results with respect to speech.

The state's power over speech is extraordinary in terms of its strength, density, and breadth. To begin, the strength of the state's power (over any action, including speech) is unparalleled because of its control of physical force, which in turn grants it nearly endless resources and a massive network of agents for executing its will. By using or threatening the use of force, the state is able to coerce people into speaking or not speaking, hearing or not hearing. It can use its police power to shut down websites, presses, or public squares. Or it can deter people from using those means of communication by attaching to their use fines or prison sentences. That deterrence is reinforced by the state's surveillance apparatus, made possible by the resources mentioned above.

For similar reasons, the state's *density* of power over speech is also extraordinary because it may deploy force over almost any of the channels of communication within its jurisdiction. If protestors stand on one corner, then the state may run them off that corner—and the next, and the next, and the next. Due to the state's surveillance capacities, it might then, like the gunman described above, effectively follow them around and censor them over phones, over the internet, or on private property. In other words, the state can police and obstruct almost any channel of communication that a speaker (or listener) might want to utilize.

The breadth of the state's power is no less extraordinary. A state can use force throughout its territory, and therefore, over the potentially huge number of speakers and listeners located there. The state can, for instance, credibly forbid all people in its territory from speaking a certain message. Even if the state cannot enforce this

prohibition against everyone, the fear that it will often suffices to achieve very high compliance across a wide swath of its population. The state could also affect multitudes of speakers and listeners simply by closing off a widely used means of communication, like a popular television station or telephone service. India, for example, frequently shuts down internet access to prevent mass protests.[120]

Recall above that I mentioned two specific threats that the state poses to free speech: (1) it can cut off most of an *individual*'s avenues for speaking or listening or (2) it can advantage or disadvantage the society-wide dissemination of certain ideas, information, or views so as to tip the balance of public opinion. The first sort of threat matters most for individualistic free speech theories, like autonomy-based ones. The second threat matters more for theories, like those that are democracy-based and truth-based, that foreground larger-scale societal consequences.[121] As mentioned above, contemporary free speech scholars are usually pluralists about free speech values and see all three of the standard values as playing a role in why we protect free speech.[122] I therefore submit that we would have reason to constrain the state if it was powerful enough to pose either of these threats.

Yet the state may be able to pose each of these types of threats with power that is high along only two of the three dimensions identified: strength, plus one of the others.[123] With respect to thwarting individual's speech opportunities, the state might single out a small minority and cut off all avenues of communication for them and only them. The state would be exercising power of a high strength and density, but not a high breadth. Yet they would be clearly posing the first grave threat to free speech. With respect to the second grave threat, the state might tilt public opinion in its favor just by forcing the top one or two media outlets to suppress anti-government messages. It would thereby exercise power of a high strength and breadth, but not a high density, because it would only be affecting a couple of channels of communication. While the state would increase its total impact on public opinion by clamping down on additional media outlets and preventing people from gathering on the streets for anti-government protests, these steps might not be necessary to tip opinion in its favor. In other words, the state has *excess* power relative to the free speech dangers it poses, because it does not need all dimensions of its power to pose them.

On the other hand, the state faces constraints and limitations on its use of force, personnel, and resources to manipulate speech, particularly in a society like the

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[120] *See* Anand Katakam, *India Leads the World in Internet Shutdowns*, REUTERS (Dec. 20, 2019, 11:28 AM), https://www.reuters.com/article/india-citizenship-internet/india-leads-the-world-in-internet-shutdowns-idINKBN1YO1WR [https://perma.cc/WF6N-AWTD].

[121] Both threats are of course overlapping, insofar as interferences with an individual speaker's and listener's opportunities will affect the flow of ideas, and vice versa.

[122] *See* sources cited *supra* note 114.

[123] An agent might also trade off among these dimensions of power. One might make up for having slightly less strength of power than the state by having more breadth or more density.

United States with a strong democratic and free press culture. There are several reasons for this. The first is the state's highly imperfect detection of noncompliance at scale. While the state might be able to single out and deter a particular individual from speaking anywhere, it would struggle to similarly deter the entire population. It only has so many personnel available to assist in enforcement, and only so many installations of surveillance technology. Even authoritarian countries cannot, despite their best efforts, fully contain dissent. The second is that state actions to silence, twist, or compel speech can predictably produce public backlashes and, in democracies, electoral rebukes that deter the state from acting in the first place. The state is an extremely, and perhaps uniquely, transparent agent, especially in a highly digitized society. Its most forceful interventions in speech are widely noted and hard to hide. Throwing many people, or even a small number of high-profile people, in jail for speech tends to get noticed, and to cause an uproar. The third is the law, which may explicitly limit the state's power. For instance, the Fourth Amendment would limit American government agents' ability to follow people into their homes and listen to their speech.[124] The fourth is that many states are not univocal actors: one part of the government may prevent another part from acting. In the United States, for instance, checks and balances might deter any severe abuses of speech by a single power-hungry branch.

Given that the state's power over speech is both excessive and limited relative to the free speech threats it poses, it seems more plausible that a private agent might pose at least a comparable threat. Indeed, I argue that there are two categories of such speech-threatening private agents. These *quasi-state agents* have either (a) high strength and high *density* of power over speech; or (b) high strength and high *breadth* of power over speech. Each type of quasi-state agent will pose a different type of threat to free speech. In the case of high density-but-not-breadth of power actors, the primary threat is to individuals' speech opportunities. In the case of high breadth-but-not-density of power, the primary threat is to the larger system of public discourse (and elections). Sometimes quasi-state agents of either type will actually pose a *greater* threat to free speech than can the state.

1. Dense-and-Strong-Power Quasi-State Agents

The government has power over speech that is both exceptionally strong and exceptionally dense: it can altogether shut off many avenues of communication, and it can do this for most if not all avenues of communication. A private agent with similar strength and density of power over speech across an entire population is perhaps science fiction. But a private agent might gain power of *comparable* strength and density over a smaller number of speakers or listeners. This may be because the agent controls a group or institution to which members are tightly bound, perhaps

[124] *See, e.g.*, Silverman v. United States, 365 U.S. 505, 511–12 (1961).

because the group or institution provides resources crucial for life. I have in mind cases such as certain private employers, nursing homes, or universities.

Consider first the strength of power. Even though private agents lack the state's ability to employ physical force, some will be able to coerce individuals with a high rate of success by threatening deprivation of a vital benefit that they control. Of course, the strength of power thereby achieved is not as high as the state's—a private agent cannot physically shut off means of communication or guarantee their abandonment. But, if they can effectively determine—via robust incentives or disincentives—how an individual uses an avenue of communication, then their strength of power over that avenue is comparable to the state's. Indeed, as explained above, the state may have excess power for this purpose.

Many private employers, for instance, could easily hit this strength benchmark. Employers can threaten penalties for breaking speech rules that, for most people, carry extraordinary motivational force: demotion, or even job loss. A threat of termination may be nearly as effective as a threat of physical violence or jail time, insofar as the employee's general long-term well-being (and perhaps that of her family) largely depends on her job. Indeed, if she is ill or disabled, her very health and life may depend on the continued medical insurance coverage that her job provides. One theorist of the workplace describes the penalty of job loss as "exile."[125] Of course, even job loss may not be a strong enough motivation to guarantee the employee's compliance if she can easily find another job. But in industries with no unions and a high supply of laborers but few jobs in the labor market, employees may have no realistic option to quit and look for another job and potential employers may anyway have little incentive to woo new employees with reasonable speech policies.

The fact that the state provides a "higher authority" above a powerful private employer provides little consolation where there is no law. Only about half of American workers in the private sector are protected from any employer control over their speech off the job through state and local legislation,[126] and many of these protections apply only to narrow classes of speech.[127] While federal statutes shield some private employee speech as well, they are also restricted to a few types of speech such as whistle-blowing and union activity.[128] Indeed, property law enforced

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[125] *See, e.g.*, ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES 38–39 (2017); Hélène Landemore & Isabelle Ferreras, *In Defense of Workplace Democracy: Towards a Justification of the Firm-State Analogy*, 44 POL. THEORY 53, 55 (2016).

[126] Eugene Volokh, *Private Employees Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 297 (2012).

[127] *Id.*; *see also* Genevieve Lakier, *The Non–First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2357–58 (describing various state protections for a narrow range of employees' expressive acts, such as political speech, political activity such as voting or running for office, and union activity); *cf.* ANDERSON, *supra* note 125, at 53 (observing that in the U.S. private employers have sweeping authority over employees' off-duty conduct, with limited exceptions such as labor union activity).

[128] *See* Cynthia Estlund, *Can Employees Have Free Speech Rights Without Due Process Rights (in the Private Sector Workplace)?*, 2 J. FREE SPEECH L. 259, 260–63 (2022).

by the state would back up employers in disputes with employees: if an employee fired for her unprotected speech shows up at work, she could be removed by the police for trespassing, at the employer's behest.

Private entities with such strength of power over the speech of their dependents may also, sometimes, have high *density* of power, too—if they can surveil many of their dependents' means of communication, both inside and outside the areas they control. Gulf Shipbuilding is an exemplar, because it owned both the workplace and the homes of its employees in Chickasaw.[129] But even a more typical employer can monitor employees' speech across the workday, by installing recording devices, monitoring electronic communications that use the firm's software, or even relying on the reports of coworkers (under the influence of a similar power).[130] Beyond the workplace's walls, an employer can also monitor employee posts on social media and keep an eye out for employee names in high-visibility media.[131] While informal research suggests that the cause of most firings for social media activity are racist and other discriminatory posts, there are also numerous examples of firings for expressing one's sexual orientation or participating in artistic or political movements.[132]

Virtually no employer will have the motivation, much less resources, to monitor employees' use of *every* means of communication. Phone calls, digital instant messaging, lower-visibility public spaces or media, and the home will presumably be beyond their reach. These entities may nonetheless make it perilous and exhausting for their employees to express themselves as they search out safe means of communication. Moreover, if these private methods of communication were the only ones available to an employee, they would be altogether inadequate for certain types of speech, such as advocating for union organization, protesting employment conditions, or any form of political speech designed to reach large audiences. Yet some

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

[130] *See* The Daily, *The Rise of Workplace Surveillance*, N.Y. TIMES (Aug. 24, 2022), https://www.nytimes.com/2022/08/24/podcasts/the-daily/workplace-surveillance-productivity-tracking.html [https://perma.cc/DP9M-RQ78]; *cf.* ANDERSON, *supra* note 125, at 39–40.

[131] *See, e.g.*, Joe Gagliese, *Your Employees Are On Social Media, You're Right To Be Worried: 5 Worst-Case Scenarios*, FORBES (Nov. 2, 2022, 7:00 AM), https://www.forbes.com/sites/theyec/2022/11/02/your-employees-are-on-social-media-youre-right-to-be-worried-5-worst-case-scenarios/?sh=1a7e55be1752 [https://perma.cc/8LCJ-VP2E]; *From Instagram to Insta-Fired: 86% of Canadian Companies Would Fire Employees for Inappropriate Social Media Posts*, FIN. POST (Jan. 11, 2023), https://financialpost.com/globe-newswire/from-instagram-to-insta-fired-86-of-canadian-companies-would-fire-employees-for-inappropriate-social-media-posts [https://perma.cc/W2WX-LUYW].

[132] Brady Robards & Darren Graf, *Who Really Gets Fired Over Social Media Posts? We Studied Hundreds of Cases to Find Out*, THE CONVERSATION (June 15, 2022, 10:24 PM), https://theconversation.com/who-really-gets-fired-over-social-media-posts-we-studied-hundreds-of-cases-to-find-out-182424 [https://perma.cc/NV2S-LHKN]; *see also* Joseph Goldstein, *NYU Langone Fired Him for His Posts on the Mideast War. He's Suing.*, N.Y. TIMES (Nov. 24, 2023), https://www.nytimes.com/2023/11/24/nyregion/nyu-langone-cancer-doctor-fired-lawsuit.html [https://perma.cc/WR93-HKXM].

theorists describe this sort of public speech as the most valuable speech under the First Amendment.[133]

One can imagine, for instance, a secretary who posts on social media about a controversial political topic. She may be friends with several of her colleagues in the office, including her boss, and her post might be noticed. Some of those colleagues may then start to complain about working with her because of her political views, though those views have nothing to do with her ability to carry out her job responsibilities, including her ability to interact respectfully with other members of the office. She may then be fired to placate other workers, or because the boss's views do not match her own. In the actual world, employees are not uncommonly pressured to refrain from—or even to engage in—certain types of political or religious speech.[134]

On the listener's side, an employer may also have significant opportunities to monopolize the information that their employees *receive* about policy questions and elections. Often employers will circulate emails to their employees recommending particular candidates for election, for the good of the business.[135] If an employee is generally politically apathetic, these emails can carry great weight. In addition, they may chill employee speech that runs counter to the employer's expressed views.

Private entities may have even more objectionable power over individuals' speech than governments do, because the former lack both the pressures toward transparency and the democratic accountability to which the latter is subject.[136] At the same time, constraints on their power are not altogether absent. A firm's treatment of its employees, for instance, may affect the willingness of other firms, or consumers, to do business with them. However, unlike government, private agents—even large companies—are often able to act under the radar. Individual firings and undignified work conditions are rarely picked up by the media unless they involve high-profile firms; the threat of firing will be covered much less often still. While

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[133] *See e.g.*, Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1109 (1993).

[134] *See, e.g.*, Charlotte Garden, *Was It Something I Said? Legal Protections for Employee Speech*, ECON. POL'Y INST. (May 5, 2022), https://www.epi.org/unequalpower/publications/free-speech-in-the-workplace/ [https://perma.cc/VMM3-MVTL] (describing cases, inter alia, in which workers were pressured to join a Trump rally, fired for having a Kerry-Edwards bumper sticker on their car, or raising concerns about COVID-19 protections in the workplace); Christopher Spata, *Can You Be Fired for Protesting? In Florida, You Can*, TAMPA BAY TIMES (June 11, 2020), https://www.tampabay.com/news/2020/06/11/can-you-be-fired-for-protesting-in-florida-you-can/ [https://perma.cc/ZTN3-XB4M] (relating (sometimes contested) claims by workers to be fired for participating in or posting about (positively or negatively) the 2020 racial justice protests).

[135] *See, e.g.*, Allie Robbins, Note, *Captive Audience Meetings: Employer Speech vs. Employee Choice*, 36 OHIO N. U. L. REV. 591, 591 (2010).

[136] *See* ANDERSON, *supra* note 125, at 45 ("Private government is government that has arbitrary, unaccountable power over those it governs. This is of course a matter of degree. Its powers may be checked in certain ways by other governments, by social norms, and by other pressures.").

one might argue that social media is slowly shrinking the transparency gap between the public and private spheres, the gap remains.[137]

One can offer similar analyses for powerful organizations that dominate the lives or livelihoods of their members or residents, like, as mentioned above, nursing homes and universities. Such groups or institutions may be hard to exit because they provide crucial resources for life; their leaders may actually find it easier to monitor members than the state does because detection is easier on a smaller scale or with access to personal spaces. The more dependent the individual is on the institution, the more the institution looks functionally like the state. Yet the Supreme Court has regularly insisted that such entities are not bound by the First Amendment because they do not serve functions traditionally exclusively performed by the state.[138]

2. Broad-and-Strong-Power Quasi-State Agents

Another set of private agents that might rival state power over speech are those with high strength and *breadth* of power over speech. These agents have power over the way in which a massive quantity of speech is distributed across an entire jurisdiction. It is this breadth of power that allows some quasi-state agents to mold and manipulate public discourse and ultimately public opinion, just as the state—absent free speech protections—could.[139]

It might be tempting to think that certain politicians, celebrities, and influencers have very broad power over speech—relatively and absolutely—because they have enormous standing audiences. Some of these individuals have millions of followers on social media who read their every post; when they are interviewed on national television, millions of people tune in. If we think of a *speech event* as a speech act by a speaker that is heard by a listener, then these individuals control millions of speech events by simply deciding whether and how to speak, thereby changing what millions of people hear. I would not consider these individuals to be quasi-state agents, however, because the *density* of their power over speech is typically trivial. These individuals control no one's speech but their own. Put another way, they only control speech events involving their own speech. This matters for their impact on public discourse because they are just one (even famous) voice in a sea of other (often famous) voices and will struggle to truly manipulate public discourse unless they have something truly extraordinary to say. Considered holistically, then, this

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[137] As noted above, federal and state laws also constrain some employer control of employee speech, but these restrictions are far from expansive. *See supra* note 127.

[138] *See* Manhattan Cmty. Access Network v. Halleck, 139 S. Ct. 1921, 1926 (2019).

[139] This Article focuses on private agents that have both relatively *and* absolutely broad power over speech. That is, they have the power to reach many speakers and listeners within a large jurisdiction, like the United States. It may nonetheless be worthwhile considering, in future work, quasi-state agents with broad power relative to smaller jurisdictions, such as Gulf Shipbuilding or the only local newspaper in a small town.

makes their power—broad as it is—no match for the state's. A broad-power quasi-state agent need not have *high* density of power, but it needs more than trivial density. Typically, a broad-power quasi-state agent will control at least one whole, widely used *channel* of communication.[140]

The only entities likely to achieve broad-power status are therefore owners of truly *mass* media and telecommunications—those who serve up information to an exceptionally large segment (perhaps a majority) of the population. Mass *media* companies specialize in one-to-many communication channels. They offer a small number of people the opportunity to amplify their speech to massive audiences. But the companies remain the gatekeepers, deciding who those amplified speakers will be. Consider a television or radio station with a massive audience, like CBS in the 1960s when 29 million Americans regularly tuned into the nightly news with Walter Cronkite.[141] (By contrast, the top American television news programs today reach only one or two million listeners.[142]) Mass *telecommunications* companies specialize in many-to-one communication, or *inter*personal communication at scale. They offer a massive number of people the opportunity to connect with a small number of associates. Consider a telephone or internet company. Both mass media and telecommunications companies can affect a massive number of speech events each day and therefore have the ability to manipulate public discourse at scale. Indeed, states often use the largest media and telecommunications companies within their territories in order to achieve their own power over speech.[143] They threaten and cajole the owners to shut down or manipulate their essential channels of communication in ways that the state prefers.[144]

These companies naturally lack the government's *density* of power over speech. They can only affect speech conveyed over the channels of communication that they control. A television station, for instance, cannot control anything that is communicated on other television stations, on radio stations, in newspapers, during in-person conversations, etc. But their density of power is still not trivial, insofar as they control *all* the speech that is communicated over their channel.

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[140] It is for similar reasons that most civic organizations, like churches, lack state-like breadth of power over speech. These organizations may issue statements, and perhaps control the speech of their leaders, but they cannot control the speech of still others.

[141] *See* Karlyn Bowman, *The Decline of the Major Networks*, FORBES (July 27, 2009, 12:01 AM), https://www.forbes.com/2009/07/25/media-network-news-audience-opinions-columnists-walter-cronkite.html?sh=2901235147a5 [https://perma.cc/377E-E8VX].

[142] *See Cable News Fact Sheet*, PEW RSCH. CTR. (Sept. 14, 2023), https://www.pewresearch.org/journalism/fact-sheet/cable-news/ [https://perma.cc/MR6R-J84Y].

[143] *See, e.g.*, Daniela Stockmann & Mary E. Gallagher, *Remote Control: How the Media Sustain Authoritarian Rule in China*, 44 COMPAR. POL. STUDS. 436, 441–42 (2011) (describing the use of media by the Chinese government to achieve regime stability); Katakam, *supra* note 120.

[144] *Id.*

At exactly what point a mass communications company acquires *state-like* breadth of power may be hard to pinpoint. But a company that is regularly able to control speech events involving a majority of a population, as speakers and listeners, seems a good candidate. Such a company may be able to affect broad patterns in public discourse: which topics fade or surge in discussion, which evidence is thought to be trustworthy, which views are thought to be well-accepted.[145] It will, in a meaningful sense, control public *attention*. It might even, by tilting speech in favor of some views and against others, be able to change public *opinion* at the margins.

In the United States, no media organization is as poised to manipulate public opinion as the owners of the major social media platforms and search engines. These companies' power over what is said and heard is unparalleled in history in its absolute scale. One of the reasons is the sheer number of individuals who use their media services. While perhaps no private agent can reach quite as many speakers and listeners within a state as the state can, many big media companies still touch a very high percentage of the total population. When the United States was founded, no single newspaper was able to reach a majority of residents.[146] Today, many media companies come close, and Meta and Google surely exceed the target. Nearly seven-tenths of the American population has Facebook accounts;[147] 40% has Instagram accounts.[148] Google, through YouTube, reaches 81% of the population.[149] Its search engine is used by 86%.[150] These modern companies control the means of communication that are used *both* to speak and to consume speech. Indeed, they are frequently described—arguably even by the Supreme Court itself—as the new public forums.[151]

The reach of these platforms extends not only to those who *directly* use them but also to those who hear second-hand of speech circulated on them. Even newspaper stories now frequently include screenshots of posts and comments from the top social media platforms.

What all of this means is that the platforms can, often with a metaphorical flick of a switch, change a national conversation. Often, they can do this by using their algorithms simply to demote content. Take, for instance, the news story about Hunter

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[145] Erin Miller, *Media Power Through Epistemic Funnels*, 20 GEO. J.L. & PUB. POL'Y 873, 877–79 (2022).

[146] Charles G. Steffen, *Newspapers for Free: The Economies of Newspaper Circulation in the Early Republic*, 23 J. EARLY REPUBLIC 381, 381–82 (2003) (discussing the reach and growth of newspapers in early nineteenth century America).

[147] Brooke Auxier & Monica Anderson, *Social Media Use in 2021*, PEW RSCH. CTR. (Apr. 7, 2021), https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/ [https://perma.cc/W2W4-YALU].

[148] *Id.*

[149] *Id.*

[150] Alexander Kunst, *Most Used Search Engines by Brand in the U.S. as of June 2023*, STATISTA (Aug. 25, 2023), https://www.statista.com/forecasts/997254/most-used-search-engines-by-brand-in-the-us [https://perma.cc/7RJK-FWVY].

[151] *See* Packingham v. North Carolina, 582 U.S. 98, 104 (2017).

Biden's abandoned laptop. Twenty days prior to the 2020 election, the *New York Post* ran a story claiming to reveal contents from Joe Biden's son's laptop, including emails that supposedly revealed corruption by the presidential candidate.[152] Facebook and Twitter quickly disabled the option for their users to share it, ultimately citing concerns that the story was based on hacked (and therefore unreliable) material.[153] These actions effectively suppressed the story not just on those platforms, but in public discourse more broadly. While the suppression was certainly no great loss to public edification given that the claims of corruption were baseless, it raised the specter that a snap judgment about journalistic "reliability" by the social media giants could have had an impact on a rather close election. Indeed, hacking was not, in the end, the source of the story's unreliability.[154] Even the former CEO of Twitter, Jack Dorsey, criticized the decision.[155]

These "big tech" companies also have blunter methods to change which topics are publicly discussed, and when: they can outright block speech and speakers. Most famously, Meta, followed shortly after by Twitter, chose in 2021 to suspend a sitting American president from its platforms after the January 6 riot at the Capitol.[156] Whether one thought that move justified to prevent violence or not, it exhibited an extraordinary power over public discourse. Nor is Trump's the only case. Social media platforms routinely make controversial decisions to deplatform or "blacklist" other individuals and groups.[157] (While most of the largest social media companies do not appear to deplatform out of mere personal dislike, "X"'s owner Elon Musk has shown the possibility of even this abuse of power.[158]) The platforms have,

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[152] *See* Lauren Feiner, *FEC Says Twitter Acted Lawfully in Restricting the New York Post's Article on Hunter Biden*, CNBC (Sept. 15, 2021, 5:06 PM), https://www.cnbc.com/2021/09/15/twitter-acted-lawfully-in-restricting-nypost-hunter-biden-article-fec.html [https://perma.cc/7AJJ-3SBM].

[153] Andrew Rice & Olivia Nuzzi, *The Sordid Saga of Hunter Biden's Laptop: The Most Invasive Data Breach Imaginable Is a Political Scandal Democrats Can't Just Wish Away*, N.Y. MAG. (Sept. 12, 2022), https://nymag.com/intelligencer/article/hunter-biden-laptop-investigation.html [https://perma.cc/KRX6-PX9P].

[154] *Id.*

[155] *See* Feiner, *supra* note 152.

[156] Brian Fung, *Facebook Bans Trump from Posting for Remainder of His Term in Office*, CNN (Jan. 7, 2021, 7:06 AM), https://www.cnn.com/2021/01/07/tech/facebook-trump-restrictions/index.html [https://perma.cc/D878-7GLD].

[157] Sam Biddle, *Revealed: Facebook's Secret Blacklist of "Dangerous Individuals and Organizations,"* THE INTERCEPT (Oct. 21, 2021, 1:16 PM), https://theintercept.com/2021/10/12/facebook-secret-blacklist-dangerous/ [https://perma.cc/NKD5-2KV3] (relating scholars' worries that white militant groups are treated more leniently, or less often listed at all, than other violence-linked groups composed primarily of Muslims or people of color).

[158] *See* A. Martinez & Bobby Allyn, *Twitter Owner Elon Musk Suspends the Accounts of Several High-Profile Journalists*, NPR (Dec. 16, 2022), https://www.npr.org/2022/12/16/1143330589/twitter-owner-elon-musk-suspends-the-accounts-of-several-high-profile-journalist [https://perma.cc/G2JZ-45K4].

conversely, made decisions to treat certain "VIP" accounts—usually those of politicians and celebrities—with kid gloves.[159]

The concern is that these methods of influencing public discussion at scale can affect not just what we read but also what we think, how we act, and how we vote. Research suggests that social media as it is currently operated has had impacts on rates of, among other things, political polarization, extremist radicalization, and even bullying among youth.[160] Any reasonably aware observer over the past decade can also see how social media has changed our habits of attention and information consumption more generally.[161] Definitive studies of the platforms' influence over elections are scarce, owing in part to the difficulty of any such causal analysis. Yet a Facebook executive in 2020 opined in a leaked internal email that the company had "tools available" to them to change the outcome of the upcoming presidential election.[162] And indeed Facebook did, in its own internal study back in 2010, demonstrate that, by manipulating their site design, it can drastically change voter turnout in a congressional election.[163] In a country with a history of close elections, this should raise much more serious alarm than it has.

Another reason why social media platforms have such breadth of power over speech is that they control so much of not just which speech is heard but also which

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[159] *See* Salvador Rodriguez, *Facebook Shields Millions of VIP Users from Standard Moderation Protocols, Per Report*, CNBC (Sept. 13, 2021, 12:31 PM), https://www.cnbc.com/2021/09/13/facebook-shields-millions-of-vip-users-from-moderation-protocols.html [https://perma.cc/8ME6-2JTA].

[160] *See, e.g.*, Paul Barrett et al., *How Tech Platforms Fuel U.S. Political Polarization and What Government Can Do About It*, BROOKINGS (Sept. 27, 2021), https://www.brookings.edu/articles/how-tech-platforms-fuel-u-s-political-polarization-and-what-government-can-do-about-it/ [https://perma.cc/SJ4M-ZNAP]; Tanya Basu, *YouTube's Algorithm Seems to Be Funneling People to Alt-Right Videos*, MIT TECH. REV. (Jan. 29, 2020), https://www.technologyreview.com/2020/01/29/276000/a-study-of-youtube-comments-shows-how-its-turning-people-onto-the-alt-right/ [https://perma.cc/C2AA-32BN]; Reginald H. Gonzales, *Social Media as a Channel and Its Implications on Cyber Bullying*, DLSU RESEARCH CONGRESS 2014, https://www.dlsu.edu.ph/wp-content/uploads/pdf/conferences/research-congress-proceedings/2014/LCCS/LCCS-I-009-FT.pdf [https://perma.cc/FHM3-9MTH]; *see also* Chad De Guzman, *Meta's Facebook Algorithms 'Proactively' Promoted Violence Against the Rohingya, New Amnesty International Report Asserts*, TIME (Sept. 28, 2022, 9:13 PM), https://time.com/6217730/myanmar-meta-rohingya-facebook/ [https://perma.cc/HSY6-9KZZ].

[161] *See, e.g.*, Elettra Bietti, The Data-Attention Imperative (Feb. 16, 2024) (unpublished manuscript) (available at SSRN), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4729500 [https://perma.cc/5BVA-LYVQ].

[162] Kevin Roose et al., *Don't Tilt Scales Against Trump, Facebook Executive Warns*, N.Y. TIMES (June 30, 2020), https://www.nytimes.com/2020/01/07/technology/facebook-trump-2020.html [https://perma.cc/PS7G-YNFZ]. The executive, Andrew Bosworth, also stated that while it was "tempting" to use these tools, and he had been "desperately wanting to pull any lever at [his] disposal to avoid" a Trump victory, he firmly believed that the company should not in fact do so. *Id.*

[163] *See generally* Robert M. Bond et al., *A 61-Million-Person Experiment in Social Influence and Political Mobilization*, 489 NATURE 295 (2012) (reporting the results of the internal study).

speech is *uttered and amplified* in the first place. A television station will provide a platform for the speech of a small number of people. A social media platform will provide a platform for a vast number of people. This increases the total number of speech events occurring on the platform, and the number of people seeking out the platform (either for self-publication or consumption).

Even if what distinguishes the class of agents that we are characterizing is the breadth of their power, they must also have strength of power to qualify as quasi-state agents. But the strength of their power will manifest in a different way than the *dense*-power quasi-state agents discussed above. Because broad-power agents directly control (because they own) means of communication, they will be able to fully close off those means to certain speakers and listeners. They might reject a request for publication or withdraw already-published speech. Or, in the case of a social media platform, they might deny a speaker or (less likely) listener access to the platform altogether.

In some cases, these quasi-state agents' power might even be *stronger* than government power, for several reasons. First, their power usually cannot be effectively resisted. It would be extremely challenging for a speaker to force themselves onto a media platform if denied access by the owner. By contrast, since the government does not directly control many means of communication, its influence over those means must take the form of coaxing of the owners that theoretically could be refused. In the possible if extremely unlikely case that a speaker *was* able to force themselves onto a speech platform, perhaps by hacking, the owner might call on the *state itself*, via its criminal and/or property law, to dispel them.

Second, the checks on the power of broad quasi-state agents may be weaker than the democratic checks on the state's power.[164] Of course, media corporations are, like employers, subject to market pressures. Whenever a social media company, for example, suppresses controversial speech, it is likely to lose some customers who disliked the suppression. At the same time, a decision that alienates some customers can bring in or retain others. Likely only decisions to take down very popular speech are sufficiently deterred by market considerations. This is presumably partly why, at least until Fox News introduced a new business model, the top news companies presented only mainstream views and excluded outlier views.[165] Moreover, even a consumer who is disconcerted by social media's manipulative decisions might find it harder to "exit" the company than a citizen finds it to vote a manipulative politician out of

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[164] *See, e.g.*, Lakier, *supra* note 127, at 2320–23 (presenting historical testimony that monopolistic telecommunications corporations were feared to be less constrained than the government).

[165] Miller, *supra* note 145, at 876; Bruce Bartlett, *How Fox News Changed American Media and Political Dynamics*, THE BIG PICTURE (May 21, 2015, 9:00 AM), https://ritholtz.com/2015/05/how-fox-news-changed-american-media-and-political-dynamics/ [https://perma.cc/NRT7-G7L3] (discussing how through ideology and economics media maintained a liberal character until Fox News upended the model).

office. The social media market is oligopolistic and beset by "network effects"—that is, when consumers gain benefits from using the same service that everyone else is using.[166] These can leave consumers with few viable options to exit *to*.

Finally, like *dense*-power quasi-state agents, *broad*-power quasi-state agents may be able to act less transparently than the state can. Rather than twist the arms of publishers like the state must, broad-power quasi-state agents *are* the publishers and can simply decline to publish on their own. More subtly, they can manipulate even speech that they publish so as to minimize its impact—diminishing its visibility, juxtaposing it with counter-speech, or attaching warnings and disclaimers to it.[167] Social media platforms can be all the subtler at such manipulations of speech because of their use of algorithms to display different speech to different users; they can manipulate speech for only some users, or manipulate speech differently for each user, such that patterns are hard to track.[168]

D. State Motives

One might say that the state poses a special threat to speech not only because it has extraordinary power, but also because it has a distinctive and potent reason to abuse that power with respect to speech. Officials of the state generally want to continue to rule. For that, they may find it helpful to silence anti-government speech, much as Vladimir Putin has done in Russia during his invasion of Ukraine.[169] They may also find it helpful to ingratiate themselves with the population's majority, and thereby to suppress speech that the majority would prefer not to hear. This motive is all the stronger in democratic countries like the United States. To put all of the state's power over speech in the hands of one agent is additionally concerning when that agent has strong temptations to use it to their advantage to manipulate the political process.

Yet private corporations can have similarly bad motives to use their power for self-entrenchment. They have motives to silence voices favoring their competitors or criticizing themselves (including their abuses of power). Research shows that companies like Meta and Google favor their own products in search results.[170]

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[166] Miller, *supra* note 145, at 893–94; *What Is the Network Effect?*, WHARTON ONLINE (Jan. 17, 2023), https://online.wharton.upenn.edu/blog/what-is-the-network-effect/ [https://perma.cc/3R67-9LM3].

[167] *See* Filippo Menczer, *Facebook's Algorithms Fueled Massive Foreign Propaganda Campaigns During the 2020 Election—Here's How Algorithms Can Manipulate You*, THE CONVERSATION (Sept. 20, 2021, 8:31 AM), https://theconversation.com/facebooks-algorithms-fueled-massive-foreign-propaganda-campaigns-during-the-2020-election-heres-how-algorithms-can-manipulate-you-168229 [https://perma.cc/524S-CE2Q].

[168] *See id.*

[169] Anton Troianvoski & Valeriya Safronova, *Russia Takes Censorship to New Extremes, Stifling War Coverage*, N.Y. TIMES (May 18, 2022), https://www.nytimes.com/2022/03/04/world/europe/russia-censorship-media-crackdown.html [https://perma.cc/RGL5-ERA6].

[170] *See, e.g.*, Orla Lynskey, *The Power of Providence*, *in* DIGITAL DOMINANCE: THE POWER

Employers often have motives to prevent union organizing that might give employees bargaining power. But corporations can also have motives specifically to affect the balance of *political* power in their jurisdiction. Most will want to ensure that the jurisdiction passes laws cementing their own economic power. For instance, U.S. corporations might favor Republican candidates who will deregulate, reduce taxes, and discourage antitrust action.[171] But a smaller number of corporations may have purely political agendas. For example, Rupert Murdoch, owner of Fox News, reportedly seeks to influence global political patterns in a more conservative and specifically business-friendly direction.[172] And Elon Musk, the new owner of Twitter, often appears to suppress speech based purely on personal preference.[173]

III. REASONS AGAINST BINDING STATE-LIKE PRIVATE AGENTS

The last Part argued that our justification for binding state agents by First Amendment free speech rights also justifies binding certain highly powerful private agents as well. But even assuming that argument is successful, it establishes no more than a prima facie case for actually imposing any First Amendment duties on quasi-state agents. We can always decline to impose a duty we have reason to impose where there are persuasive countervailing reasons against doing so. For instance, one might be concerned (i) that the potential bearer has their own competing rights claims, or would not be able to meet the duty without undue cost; (ii) that the consequences of enforcement for society would be unacceptable; or (iii) that the duty would not be practically enforceable against the bearer.[174] Since my interest in this Article is primarily about issues of principle, I focus on the first two.[175]

To begin, what sorts of free speech duties could quasi-state agents be subject to? Under the First Amendment's Free Speech and Press Clauses, the primary duty to

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OF GOOGLE, AMAZON, FACEBOOK, AND APPLE 176, 183–87 (Damian Tambini & Martin Moore eds., 2018).

[171] Harry Stevens, *First of its Kind Study Shows CEO Political Donations Favor GOP*, AXIOS (Mar. 31, 2019), https://www.axios.com/2019/03/31/ceo-political-giving-republicans [https://perma.cc/N5JE-92NN].

[172] *See* Jane Mayer, *The Making of the Fox News White House*, THE NEW YORKER (Mar. 4, 2019), https://www.newyorker.com/magazine/2019/03/11/the-making-of-the-fox-news-white-house [https://perma.cc/98G5-5KF2].

[173] *See* Robert A. George, *Elon Musk Sabotages His Defense of Free Speech*, BLOOMBERG (Nov. 4, 2022, 9:00 AM), https://www.bloomberg.com/opinion/articles/2022-11-04/elon-musk-sabotages-his-defense-of-free-speech?embedded-checkout=true [https://perma.cc/PM6R-8KZV].

[174] *See generally, e.g.*, IRIS MARION YOUNG, RESPONSIBILITY FOR JUSTICE (2011); T.M. Scanlon, *Rights and Interests*, *in* 1 ARGUMENTS FOR A BETTER WORLD: ESSAYS IN HONOR OF AMARTYA SEN (Kaushik Basu & Ravi Kanbur eds., 2008).

[175] I also doubt that the practical costs of implementation would be unbearable, particularly because quasi-state agents will likely be (1) a small number of (2) corporations with great resources.

which the state has been held is what we might call a duty of impartiality. While the state can say whatever it wants in its *own* speech, it cannot interfere with *others'* speech by suppressing, burdening, or twisting it based on its content or viewpoint. There are limited exceptions for when the state is regulating speech in special managerial zones (such as an office, school, or military base)—but even these regulations must have some motivation other than censorship. The same duty of impartiality, if applied to private agents, would seem to demand that they not discriminate, in distributing benefits and burdens under their control, on the basis of the recipients' speech. For instance, a private employer likely could not hire, fire, promote, or demote employees based on viewpoints expressed in their speech. Or a newspaper editor likely would not be able to reject letters to the editor based on their viewpoint or correctness.

Certainly, imposing such a duty on a private individual would set off most, if not all, of the three alarm bells above. Completely dissolving the boundary between public and private actors for First Amendment purposes could have devastating consequences for both individuals and society as a whole. However, I argue that these concerns are much weaker if the duty of impartiality were to be applied *only* against quasi-state agents—particularly because those agents are likely to be large corporations distributing benefits and burdens in commercial exchanges. That said, I acknowledge that some of the concerns may justify imposing on quasi-state agents only diluted versions of First Amendment rights. I explain how that dilution could work in Part IV.

Before discussing these countervailing concerns, let me explain one crucial analytical point. I have maintained that free speech duties can "override" free speech rights. I say this metaphorically. What I mean, more directly, is that duties and rights must cohere or correlate (on Hohfeld's framework, one cannot have a right unless someone else has a duty, and vice versa), and so must be decided *together* in analysis that takes into account all of the interests that are relevant to both determinations.

Here, I will engage in an analysis not only of the interests that the public has in constraining private power over free speech but also the interests that these powerful private agents have. If the overall analysis concludes that these private powers have a duty to uphold the free speech rights of others, then they do not themselves have rights to do otherwise; any conflicting rights that they previously might have been thought to have do not hold. In the end, a select few of those agents whom I have called quasi-state agents might not have duties at all because of the strength of their countervailing interests—but this is not the typical case. Moreover, even for those on whom duties are properly imposed, the *contours* of those duties may be affected by these countervailing interests. Where they lack speech duties, quasi-state agents may retain some speech rights.[176]

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[176] On some of the models for operationalizing quasi-state agent duties discussed in Part IV, speech duties might be adjudicated on a case-by-case basis. In these cases, it is best to think of the actual duties and rights as remaining unsettled and the analysis in each case

A. Personal Liberty

The most common defense of the state-only-duties principle says that holding private agents to a duty of impartiality like the state's would impinge on personal liberty.[177] One might even think that a private agent's ability to be partial is protected by other rights. The most obvious candidates, as I explain below, are expressive and associational rights—*themselves* protected by the First Amendment—and property rights. But these rights claims are most persuasive, I argue, in the case of private individuals and small organizations, not the massively powerful corporations that quasi-state agents are likely to be.

1. Expressive and Associative Liberty

Say that an individual, just because she dislikes another person's speech, refuses to invite him onto her property, excludes him from a parade she is organizing, removes him from her will, or refuses to include his article in her edited volume. All of these choices are expressive or associative: that is, they are motivated by her desire to express her dislike of the speaker's speech or what that speech reveals about him and not to be associated with him on that basis. At the same time, her actions can have an impact on his speech: he is directly denied a speech opportunity (in the case of her parade, or edited volume) and he may be deterred from speaking similarly in the future (so as to be invited again to her house, or to be re-added to her will). In other words, the individual's freedom of expression, perhaps counter-intuitively, includes a kind of freedom of *suppression*—freedom to deter or block others' speech in certain ways. One might therefore be concerned that enforcing a duty of impartiality—a requirement of respecting others' free speech rights—to private parties would negate the duty holder's *own* free speech rights.[178] Expression and association are such an important part of everyday human life that constricting those activities across the board—requiring, for instance, close association with those whose beliefs one finds abhorrent—might take a heavy toll on any individual.

But the objection seems substantially less compelling when the obligation is born only by the quasi-state agents identified in the last Part. Three reasons why

involving that of free speech (and other) interests of different parties. *See* discussion *infra* Sections IV.C, IV.D.

[177] *Cf.* Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1785–87 (2013). For more support, see also *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019) (declining to find state action in order, in part, to protect a "robust sphere of individual liberty"); Lakier, *supra* note 127, at 2336 (recounting how employers resisted restrictions for firing workers based on speech as a violation of property and liberty); Barak, *supra* note 111, at 230–31 (describing the individual autonomy loss from horizontally applying human rights).

[178] For a version of this objection, see Schauer, *supra* note 21, at 449–50.

these agents' expressive or associative claims are diminished stand out. *First*, insofar as nearly all quasi-state agents will be corporations, the free speech rights of corporations are less weighty than those of individuals.[179] Corporations lack the autonomy interests that individuals possess.[180] Indeed, the Supreme Court itself has expressly recognized only an instrumental rationale for corporate speech rights.[181]

Corporate speech can also serve an instrumental purpose: multi-membered corporations can speak with voices that are not identical to that of any of their members, thereby improving the diversity and ostensibly overall quality of the marketplace of ideas.[182] But for this purpose, corporations' ability to suppress others' speech is substantially less critical than their ability to issue statements on their own behalf[183]—an ability which would not be affected by a state-like duty of impartiality. I delve more deeply into these instrumental concerns in the next subsection.

Second, even if corporations have associational rights for noninstrumental reasons, the associations of the largest commercial corporations are typically less intimate and less valuable than personal associations. Corporate relationships tend to be transactional, whether they are employment relationships, seller-buyer relationships, or provider-user relationships. The interactions within these relationships are contracted and focused on the corporation's narrow goals—in the case of a commercial corporation, usually profit. The larger the corporation, the more this holds true. Walmart almost certainly has less-valuable relationships with its customers and employees than the owner of almost any local deli has with its own. Being forced to be roommates with a person with abhorrent political views is almost incomparable to being forced to engage in a commercial transaction with that person among many thousands of others. Moreover, very large corporate owners are unlikely to be perceived as sympathetic to the views of those whom they are forced to associate with, given their ability to disavow any such sympathy and to explicitly

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[179] *Cf.* Adam Winkler, *Corporate Personhood and the Rights of Corporate Speech*, 30 SEATTLE U. L. REV. 863, 863 (2007) (arguing that corporate speech rights are lesser than those held by individuals).

[180] *See, e.g.*, C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's* The Value of Free Speech, 130 U. PA. L. REV. 646, 648–58 (1982); *see also* Avital Mentovich et al., *The Psychology of Corporate Rights: Perception of Corporate Versus Individual Rights to Religious Liberty, Privacy, and Free Speech*, 40 LAW & HUM. BEHAV. 195, 195 (2016); Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 IOWA L. REV. 995, 996 (1998).

[181] The Supreme Court itself has expressly recognized only an instrumental rationale for corporate speech rights and so the Court could follow this reasoning consistently with its own doctrine. Baker, *supra* note 180, at 655. Of course, there are reasons to think that the Court would not actually treat corporate speech rights as less weighty than individual speech rights. *See, e.g.*, Sorrell v. IMS Health Inc., 564 U.S. 552, 580 (2011).

[182] *See* Citizens United v. FEC, 558 U.S. 310, 354–55 (2010).

[183] *Cf. id.* at 354 ("By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests.").

explain their legal obligations (e.g., "While we do business with these individuals as required by law, we abhor their messages").

Third, a parallel argument applies to expressive rights. Even if corporations in general have expressive rights for noninstrumental reasons, the largest corporations' decisions about allocating benefits and burdens (including the awarding or withdrawing of speech opportunities) may have only minimal expressive significance. The expressive significance of an action necessarily depends on its context, including the number of recipients of the benefits or burdens: the more recipients, generally the less expressive significance. For instance, a painter's choice to accept a commission to paint a portrait of a private party sends a more meaningful message than a massive corporation's choice to accept the same private party's online order. Each decision "to deal," so to speak, will be approached and perceived in a different manner. In the former case, a message is more likely to be sent and perceived. Part of the difference is that the painter can, assuming she has many potential customers, be choosy; given that she will only take one customer at a time anyway, it conveys a message—even if just mere non-repulsion—that she takes *this particular* customer. By contrast, the largest corporations often have a default of dealing with everyone and so any affirmative choice to deal will typically not be felt or perceived as meaningful.[184] And again, corporations' disavowals should significantly alleviate any such feeling or perception.

For illustration, consider Meta. Its platforms Facebook and Instagram accept nearly every user onto their platforms and so an acceptance does not send any nuanced message. Indeed, some scholars and courts have argued that a platform like Meta is not speaking when it accepts or excludes users' content, and therefore has no expressive claim.[185] At the least, it seems clear enough that Meta's expressive claim is *diminished*. One could argue that Meta desires to send the blunt message that certain fringe, especially abhorrent ideas are unacceptable, and thus to eject those who espouse those ideas from the platform. A duty of impartiality would prevent it from doing even this; the state cannot reject even speech it deems abhorrent. But the bluntness of the message makes its expression less imperative.[186]

Notice that the arguments above apply most strongly to large corporations that have "open[ed] up" their services "for use by the public in general"[187]—those who

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[184] This argument would not apply to even large media companies, such as television networks, that publish only a small selection of speech. Yet while television networks like Fox News and CNN may have a large viewership, the case for quasi-state agency is for them much weaker than for online-only companies that reach a majority of Americans, such as Facebook and Google.

[185] *See, e.g.*, Trouillard, *supra* note 5, at 265–66.

[186] *But see* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 580–81 (1995) (concluding that the fact that city-authorized parade organizers had excluded almost no one from their parade did not prevent them from exercising expressive rights when they excluded an LGBTQ group).

[187] Marsh v. Alabama, 326 U.S. 501, 506 (1946).

are arguably common carriers. Yet the arguments can also apply to corporations that exclude a small number of speakers for public relations reasons and not because of a strong mission. This maps onto the approach of the original *Marsh* decision.

I should offer one qualification to the entire discussion above. Because a firm's employment relationships are in virtually every case less numerous than its customer relationships, a firm's decision to employ someone will usually be taken and perceived as at least *more* expressive/associational than a decision to deal with someone. In the case of a very large firm, the expressive/associational significance of the decision will still be nil. But in the case of a smaller firm, her relationship with other members of the firm may be somewhat more intimate and their hiring of her may be deemed more expressive. That is, the associational claims of even a quasi-state firm will grow as the firm shrinks. I return to this qualification in Part IV.

2. Property Rights

Many of the same decisions that private agents make about allocating benefits and burdens based on speech implicate property rights.[188] The removal of someone from your house or your will, for instance, is an associative act but, at the same time, a choice about how to manage your property. Similarly, a shopping mall owner's refusal to allow a protestor on mall grounds is a decision about property.[189] There are three reasons, however, why quasi-state agents' claims to be partial are not substantially stronger just because property is involved.

First, quasi-state agents *choose* to grow their power (or, in the rare case where they do not, choose to keep it). As our power grows, so can our responsibilities.[190] One makes a choice to simultaneously grow one's power and to limit how one can legitimately exercise it. If a corporation truly wanted to avoid First Amendment obligations, and thereby to retain full freedom to choose how to dispose of its property, then it could do so simply by not seeking to expand the corporation's power. For instance, a broad-power quasi-state agent might sell off part of their media corporation to avoid triggering First Amendment obligations.

Second, quasi-state agents' property claims are likely to concern commercial, corporate property and one's interest in disposing of this sort of property is significantly more limited than one's interest in disposing of, say, residential or personal

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[188] Nearly all jurisdictions I have encountered that apply free speech rights against private entities temper that application based on potential losses to those entities' commercial and property interests. *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice], July 29, 2021, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] III ZR 179/20, ¶ 88 (Ger.); State v. Schmid, 423 A.2d 615, 623–33 (N.J. 1980); Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590, 592–93 (Mass. 1983).

[189] *See, e.g.*, Lloyd Corp. v. Tanner, 407 U.S. 551, 567–70 (1972); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 88 (1980).

[190] *See, e.g.*, Erin L. Miller, *With Great Power Comes Great (Individual) Responsibility*, 20 POL. PHIL. & ECON. 22, 39 (2020).

property that one uses in one's private life. These latter types of property tend to be more closely linked to the self and to be used in one's private and intimate plans and projects. Intuitively, one has a stronger interest in deciding whom to allow to enter their home or to whom to gift their favorite sweater than in deciding whom to allow to enter their place of business or to sell to/buy from. This intuition is reflected in how aggressively most societies regulate business activity in particular. But again, the intuition can falter when it comes to small businesses, where a mom-and-pop's storefront may be as treasured as the family home.

Third, our interest in our property arguably diminishes marginally as the property accumulates. A person's interest in their first ten thousand dollars of income in a year is much weightier than their interest in the tenth ten thousand dollars they make in the same year, assuming they have no savings. The first ten thousand dollars are needed for the necessities of human life, such as shelter and food, whereas the tenth ten thousand dollars are free to be spent on non-essential goods or even luxuries. Insofar as a duty of impartiality would merely *reduce* the profits that an already exceptionally lucrative firm can make, this interest cannot stand up to the potential harms that quasi-state agents can inflict on others' First Amendment rights.[191]

Antitrust is an illustrative case. Antitrust law prohibits certain business firms from engaging in free market transactions that would be permissible but for the market power of the firm.[192] We deem the integrity of an entire competitive marketplace to be more important than any one, extremely powerful firm's ability to do business exactly as it would like (i.e., dispose of its property exactly as it would like). For instance, in *Associated Press v. United States*, discussed in the next section, the Court states:

> While it is true in a very general sense that one can dispose of his property as he pleases, he cannot "go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade."[193]

If we make this sacrifice of liberty in order to prevent the monopolization of the economic marketplace, it is unclear why we would not make the same sacrifice in order to prevent the monopolization of the marketplace of ideas or the control of the free speech choices of individuals. Indeed, *Associated Press* assumes that property rights end prior to this point.

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[191] Some support for this argument is actually found in judicial precedent. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 19–21 (1976) (recognizing a lesser free speech interest in donating *more* money to a candidate).

[192] *See* Associated Press v. United States, 326 U.S. 1, 15 (1945).

[193] *Id.*

The case for property rights might be stronger, however, when it comes to the survival of one's business. Owning a business is central to many people's livelihood and even identity. If First Amendment obligations would somehow harm a company's actual existence, and not merely its size or profits, then there might be arguments cutting against the enforcement of those obligations—or at least their full force. I expect that this concern will seldom arise for quasi-state agents, but I will return to it in Part IV.

The argument from personal liberty *against* imposing a duty of impartiality on quasi-state corporations is generally quite weak, perhaps too weak to override the full-value First Amendment interests on the other side of the ledger: the First Amendment interests that quasi-state agents' partiality would infringe. However, as the remarks above acknowledge, personal liberty may be a more compelling defense against a duty of impartiality when it comes to (a) smaller corporations and (b) corporations that stand to lose their business altogether.

B. Societal Harms

Another potential defense of the state-only-duties principle is that enforcing a duty of impartiality on private agents would intolerably burden society as a whole—including in ways that undermine free speech interests. Specifically, private agents need to be able to exclude others based on their views (as revealed, among other places, in their speech) in order to create certain types of valuable social groups that drive diversity, energy, and experimentation in civil society.

The first group is the like-minded community. We want people to be able to convene events, clubs, and online forums, to which only those of certain interests, values, or political persuasion are invited. Such communities are obviously invaluable insofar as they allow others to enjoy the company of those of similar views and values and sometimes even to debate nuances and applications of their shared views. In addition, a like-minded group sometimes becomes more of a collective agent when it comes together not just to hang out or debate but also to achieve a collective vision. Some degree of coherence among participants' beliefs and values is necessary for effective collective action. A group that aims to combat racism would obviously struggle to achieve its goals if it was forced to include white supremacists.

In the First Amendment context, a vibrant marketplace of ideas itself depends on the existence of such viewpoint-discriminatory collective agents: the media. Media organizations are needed to filter the morass of speech created each day and elevate above the rest only the speech they deem worthy of reaching larger audiences. That is, we need decidedly *partial* media, albeit a diversity of them. If every media organization was required to publish speech on a first-come or some other impartial basis, the quantity of speech available would be unmanageable for any individual and we would lack anything resembling a common public sphere.

Yet notice that, insofar as these are instrumental goals, they should be achievable so long as the vast majority of corporations lack impartiality duties. If only quasi-state agents are subject to impartiality obligations, then the remaining corporations' pursuit of decentralized private aims may well be enough to sustain a diverse civil society and functional marketplace of ideas. For instance, if Reddit was a quasi-state agent, a subreddit could still pursue its own ideas and kick out any members who failed to live up to them, even if the overarching platform could not eject members based on viewpoint.

Let me return to our two types of quasi-state agents: broad-power and dense-power. Imposing First Amendment obligations on broad-power quasi-state agents is especially unlikely to create a substantial dent in the vibrance of civil society and the marketplace of ideas. The media corporations most likely to rival the state in the breadth of their power over public discourse are also the least likely to be engaging in the serious exclusion and filtering of speech that is vital to the working of the marketplace of ideas. This is a function of market principles; in order to attract the largest possible numbers of viewers/listeners/users, a company must appeal to a maximally diverse segment of the population. A communications giant like Meta tends to *include* on its platforms vastly more speech created by users than it excludes.[194] Its platforms are thus not primarily relied on, like newspapers and news television shows, to amplify a small number of ideas and subjects over others based on quality.

At the same time, when it comes to social media platforms in particular, we might worry that their very possibility depends on the existence of a certain kind of speech discrimination: content moderation, or the ability to remove and demote certain speech. A platform that could not exclude or demote *any* speech or speakers might soon find itself overwhelmed by bots and spam.[195] If so, it might cease to be the sort of platform that attracted large numbers of users in the first place.

Now consider dense-power quasi-state agents. The example I have offered is an employer in a loose labor market with easily replaceable employees. Some such employers might still be pursuing specific private, even non-profit, aims. If these employers were not permitted to fire or demote employees who contradicted the company's vision in private or in public, then the company might not be able to effectively pursue those aims. This remains a fairly strong argument against the application of the First Amendment against these private employers, at least in cases involving speech core to the mission of the employer.

Overall, both types of quasi-state agents, if bound by a duty of impartiality, would be less likely to effectively achieve their private aims—a loss of uncertain

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[194] Facebook reports removing only minute percentages of content, such as .02% categorized as hate speech or .08% categorized as nudity and sexual activity. *Community Standards Enforcement Report*, META (2023), https://transparency.fb.com/data/community-standards-enforcement/ [https://perma.cc/P9DS-CY2M].

[195] *See, e.g.*, Jack M. Balkin, *How to Regulate (and Not Regulate) Social Media*, 1 J. FREE SPEECH L. 71 (2021); Ashutosh Bhagwat, *The Law of Facebook*, 54 U.C. DAVIS L. REV. 2353, 2353–54 (2020).

value to society. This would therefore probably be the main point of disagreement in the implementation of quasi-state agent duties. Again, the more broadly an agent opens up its services for use by the public, offering a service to all without a message, the more likely it is to have private aims that are frustrated by free speech duties. In Part IV, I examine how these losses could be somewhat limited by imposing only a restricted duty of impartiality.

Just one subset of quasi-state agents has an especially strong set of countervailing reasons against being subject to full First Amendment obligations: small private employers. Due to their small size, their associative and expressive liberties are somewhat stronger than those of other quasi-state agents. They may also be more at risk, without viewpoint-discriminatory employment practices, of not being able to keep their businesses afloat or of losing the chance to realize their ideological aims.

Imposing full First Amendment duties on other quasi-state agents, on the other hand, raises few compelling liberty concerns. It might however, make it harder for those whose business models or missions are built around viewpoint discrimination to thrive. The extent of the social cost resulting from this difficulty is up for debate. I am personally inclined to think that the cost would be slighter than we might fear, given the possibility of new business models emerging and the remaining ability of smaller, less powerful corporations to engage in viewpoint discrimination. But given the substantial unknowns, I explain in the next Part how *partial* First Amendment duties on these agents might offer a fair compromise.

IV. DOCTRINAL MODELS FOR BINDING STATE-LIKE PRIVATE AGENTS

The preceding sections have made the case that extraordinary power over speech, whether public or private, should not be free of all First Amendment constraints. Private entities with state-like power over others' speech, which I call quasi-state agents, should be treated differently by First Amendment doctrine than private individuals with the power of only their own voice. In this Part, I explore a range of options for what that differential treatment might look like.

One relevant consideration is that quasi-state agents are, while state-*like*, not *exactly* like the state. And some quasi-state agents will be more state-like than others. The main sticking point, as explained in the last Part, is this; private agents—even massively powerful ones—often pursue valuable private goals that the state is not capable of pursuing, given the latter's charge to fulfill the public interest. Respect for these goals—not for any particular goal, but for the general practice of pursuing private aims—could call for a softening of quasi-state agents' constitutional burdens. I am not entirely persuaded, except for the exceptional class of small private employers, but I have acknowledged compelling arguments for such a softening.

In what follows, I present three distinct models for how quasi-state agents might be bound by the First Amendment, with varying degrees of flexibility to accommodate

these agents' private aims.[196] The first and most obvious option is that quasi-state agents are treated just like the state under the First Amendment; the agents have duties directly from the text—the same duties that courts have recognized the state as bound by. I call these *direct and identical duties*. I explain, however, why this may still allow for the substantial pursuit of private aims, given how the doctrine holds even the government to a relaxed impartiality standard when it is acting in a managerial capacity.

The other two models add even more flexibility. The second option is that quasi-state agents have *direct and lesser duties*. This option is the same as the last, except the duties of the quasi-state agents are less demanding than those imposed on the state—for instance, they might result from weighing the private interests of a company against the damage they can do to free speech values. The government has higher duties because it has no competing private interests. The third option is that quasi-state agents have *indirect duties*. Here, quasi-state agents' duties would be "indirect" in the sense that they are not self-enforcing (do not come directly from the text, like direct duties) but instead would require that legislatures or courts take action to activate and specify those duties in further detail—and potentially in more flexible, less demanding ways than First Amendment law has.

These models are not mere analytical possibilities: they have been used by real courts in many jurisdictions to interpret the constitutional duties—including free speech duties—of private agents.[197] Most obviously, the U.S. Supreme Court itself has recognized constitutional constraints on private action in isolated pockets of its jurisprudence using all three of these models.[198] The discussion in Part I touched on some, but not all, of these examples. But other jurisdictions have more openly and liberally applied free speech rights against private agents. Several U.S. states, including most notably New Jersey, Massachusetts, and California, have applied state-constitutional free speech guarantees against limited numbers of private actors using either direct or indirect duties.[199] In addition, many countries apply their constitutional rights, sometimes including free speech rights, against private actors.[200] This is known in comparative constitutional law as the "horizontal application" of

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[196] An awkwardness of Supreme Court substantive due process jurisprudence is that federal agents are bound by speech rights via the First Amendment and state agents are bound by arguably identical speech rights via the Fourteenth Amendment—though both sets of duties (those of federal agents and those of state agents) are expounded through the same body of case law (consisting of both state and federal cases). A private entity judged to have government-like power over speech could thus be found to be bound by either the First Amendment or the Fourteenth Amendment.

[197] *See, e.g.*, *infra* notes 208, 216 and accompanying text.

[198] *See, e.g.*, *infra* notes 208, 247 and accompanying text.

[199] *See, e.g.*, *supra* notes 48–51 and accompanying text; *see also infra* note 216 and accompanying text.

[200] *See infra* note 204 and accompanying text.

constitutional rights and is selectively practiced by countries including Canada, India, Ireland, Germany, South Africa, and Switzerland.[201] I draw on the practices of many of these jurisdictions in articulating the models of quasi-state agency below.

A. Expanding State Action

Before launching into my three options, I want first to set aside the one proposal for constraining private parties by constitutional rights that has already appeared in American constitutional legal scholarship, and explain why it is not well-suited to the free speech context.

Some critics of the state action doctrine, writing primarily in the context of racial discrimination, have attempted to expand the concept of state action so far as to effectively abolish the distinction between private and state action.[202] On their view, states authorities can be seen as engaging in state action whenever they enforce private choices. To the extent that those private choices infringe on constitutional rights, the *enforcement* of them is invalid.[203] So, for instance, if a person was to exclude someone from their property on the basis of their race, and called on the police to enforce that decision, then they would implicate the state in their racial discrimination. Because of the state's property rights, the state always sides with the private owner anyway. Extended into the First Amendment context, this would suggest at least that private owners could not *enforce* partial decisions toward others' speech, in cases involving property or other material under the owner's control.

You can see how this would work. If a shopping mall attempts to exclude my protest from its grounds, and I attempt to continue to protest anyway, then the police might remove me from the property. If Facebook excludes me from its platform and I somehow (very unrealistically, given my lack of computer skills) managed to hack my way back onto the platform, I could be fined for breaking laws against hacking. In all of these cases, the police's action would itself be considered a speech-discriminatory act of the state.

This is the only model that I would recommend against adopting, for two reasons. First, as discussed in Part III, the countervailing reasons *against* imposing speech-respecting duties on private parties apply most strongly when those duties are applied against *all* private parties. Under the argument considered here, any distinction among the private agents would not matter; all that matters is the role of the *state* in enforcing those agents' choices. I therefore suspect that a more nuanced

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[201] *See infra* note 205 and accompanying text.

[202] *See, e.g.*, Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 92 GEO. L.J. 779, 789 (2004); Cass R. Sunstein, *State Action Is Always Present*, 3 CHI. J. INT'L L. 465, 467–68 (2002).

[203] On the most obvious (but not prevailing) interpretation of the case *Shelley v. Kraemer*, 334 U.S. 1, 20–21 (1948), the Court followed exactly this line of reasoning in holding that a court enforcement of a racially restrictive covenant on real estate sales was invalid.

approach like the three canvassed below would be more appropriate to the First Amendment in particular (however well this argument might work with respect to other rights).

Second, an expansion of state action would likely fail to constrain a great deal of quasi-state agent conduct that threatens vital First Amendment interests. Often speech-discriminatory decisions by these agents are not sought to be enforced by law. For instance, when Facebook seeks to exclude a user from the platform, it simply does it—without any police or judicial assistance. Any hackers who did break through could be easily removed fairly quickly, without resort to the law.

B. Direct and Identical Duties

To reiterate, the direct-and-identical-duties model conceives of the First Amendment as directly binding quasi-state agents in the *same* way that it binds full state agents. Quasi-state agents could look to existing First Amendment jurisprudence for the clearest guidance for their conduct. The *directness* of the binding means that quasi-state agents' duties would be immediately enforceable by courts, without any need for action by other government decision-makers.[204] Quasi-state agents could be directly challenged by other private parties, just as the state can be, for violating the Speech Clause or the Press Clause.

This model for the horizontal application of constitutional rights is relatively rare in the world but has been selectively implemented in Ireland and South Africa.[205] Ireland's highest court, for instance, has recognized that the nation's judges have a duty to *create* causes of action for violation of constitutional rights by private actors.[206]

But the direct-and-identical-duties model is not entirely alien to the American context, either. *Marsh v. Alabama* can be read as one example under the First Amendment. In addition to repeatedly implying that Gulf had violated the constitutional rights of the public to receive information, the opinion explicitly states that: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the . . . constitutional rights of those who use it."[207] *Logan Valley*, though overruled, arguably followed this model as well.[208] In addition, the Thirteenth Amendment, as mentioned above,

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[204] Courts might need to do one thing: create new causes of action, as they have done with respect to certain constitutional rights in other countries. *See* Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 396–98 (2003).

[205] *Id.*

[206] *See* Hosford v. John Murphy & Sons, [1987] IR 621, 626 (Ir.) ("Uniquely, the Irish Constitution confers a right of action for breach of constitutionally protected rights against persons other than the State and its officials.").

[207] Marsh v. Alabama, 326 U.S. 501, 506 (1946).

[208] 391 U.S. 308, 325 (1968).

is widely recognized as establishing direct-and-identical duties for *all* private actors not to subject others to slavery or involuntary servitude. This Amendment, as opposed to the Fourteenth Amendment, grants Congress power to regulate private conduct directly.[209] The Court has also recognized that causes of action that are ordinarily available only to sue state agents can be used to sue private parties for Thirteenth Amendment violations.[210]

Notice one implication of this model: if a quasi-state agent has any First Amendment right that conflicts with its duties under the First Amendment then the duty presumably takes precedence, insofar as the same occurs for state agents. So, for instance, Gulf Shipbuilding could not claim that it had a free speech right to suppress speech in the streets that it owned because such a right would conflict with the duties the Court declared it to have.

Direct-and-identical duties offer the least accommodation for the private aims of quasi-state agents because they treat those agents just like the state, which has no private aims. But, perhaps surprisingly, this model may still offer some amount of accommodation given contemporary free speech doctrine. While I emphasized the burdens of a duty of impartiality in Part III, the reality is that even the state's duty has many exceptions that relieve its total burden. The first and most obvious, mentioned earlier, is that the state may speak on its own behalf. State actors frequently issue statements condemning or praising not only the actions of private individuals but also their speech. The state can even choose to fund some organizations but not others based on their speech.[211] The second is that the state is able to directly suppress speech as part of its role as an employer, the administrator of public schools including universities, and the owner of other spaces such as government buildings and military bases. Robert Post has referred to these special spaces as "managerial domains."[212] In each of these domains, courts recognize that these state institutions—whether the public office or the public school—have certain purposes that, to be effectively accomplished, may require suppressing speech based on its content. Thus, for instance, the state is able to regulate speech content that is substantially disruptive of workplace or learning environments and may even fire employees or suspending students on this basis.[213]

Imagine that quasi-state agents were treated under First Amendment law like states running their own special managerial domains. If so, then any duty of impartiality

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[209] *See* The Civil Rights Cases, 109 U.S. 3, 20 (1883).

[210] *See* Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438, 441–44 (1968) (holding that 42 U.S.C. § 1982 applies to private suits under the Thirteenth Amendment).

[211] *See* Rust v. Sullivan, 500 U.S. 173, 178, 203 (1991); Rumsfeld v. FAIR, 547 U.S. 47, 59–60 (2006).

[212] *See* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 254 (1995).

[213] *See* Pickering v. Bd. of Educ., 391 U.S. 563, 574–75 (1968); Connick v. Myers, 461 U.S. 138, 150 (1983); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512–13 (1969).

would likely contain exceptions for (1) speech that is clearly in the name of the quasi-state agent and, most significantly, (2) suppressions and demotions of speech that undermine the basic purpose of the domain. In the case of social media platforms, this seems likely to allow for the continuation of platform "recommendation" lists and, at the least, basic housekeeping acts like the removal of bots and overt spam. In the case of employers, it would likely allow for disciplining employees based on rude or disruptive speech—certainly when that speech is uttered as part of their job responsibilities.[214]

But direct-and-identical duties would likely not allow discrimination based on political or ideological viewpoints. Therefore, it would continue to still impair companies' pursuit of certain private goals, as discussed in the last Part. Some additional room for maneuvering in this space might be allowed under the next approach discussed.

C. Direct and Lesser Duties

A second possibility is that quasi-state agents are directly bound by First Amendment duties, but their duties are not identical to those the state bears. If quasi-state agents were only subject to lesser duties, this might permit them to pursue private aims beyond the basic housekeeping and corporate statements allowed by direct-and-*identical* duties. Justice Marshall may have hinted at this approach in *Logan Valley* when he noted that private businesses subject to customers' First Amendment rights would still have the "power to make reasonable regulations governing the exercise of First Amendment rights on their property," and that these rights would be "*at the very least* co-extensive with the power possessed by States and municipalities . . . ."[215] Indeed, several of the states that have applied their state constitutional free speech guarantees against private agents in the wake of *Logan Valley* have arguably adopted the direct-and-lesser-duties model.[216]

Courts would have to identify these lesser duties, on a separate doctrinal track from that devoted to full state agents. Perhaps the most straightforward way of doing so would involve balancing the rights of quasi-state agents (including any claimed expressive and associative rights) against the free speech rights they threaten to hinder. Many of the same factors examined in Part III, including the expressive and property interests of quasi-state agents, could be used in the balance. Open balancing

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[214] *Cf.* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (limiting the freedom of speech of even *public* employees to speech not uttered pursuant to the employee's "official duties").

[215] Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 320 (1968) (emphasis added).

[216] *See* Batchelder v. Allied Stores Int'l, Inc., 445 N.E.2d 590, 595–96 (Mass. 1983) (recognizing a right to collect signatures for ballot access on private property, though only when balanced against the property interests of the owner); *see also* Glovsky v. Roche Bros. Supermarkets, Inc., 17 N.E.3d 1026, 1032 (Mass. 2014) (referring to this analysis as balancing).

is often perceived as alien to the First Amendment, but the doctrine does employ it on occasion. For instance, under the *Pickering* test, courts balance the free speech rights of employees against the state's interest in maintaining a functioning workplace.[217]

We can see how a balancing model might work from judicial opinions in New Jersey, which has adopted a direct-and-lesser-duties model for interpreting its state constitution's own free speech clause. In *State v. Schmid* in 1980, the Supreme Court of New Jersey held that the (state) freedom of speech applies not just against the government but against certain private entities that "assume[] a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property."[218] In each case, the court said it would balance the interests of the property owner against the speech and assembly interests of the public.[219] It would need to consider, among other things, how the expression might affect the normal uses of the property, the scope of any (even implied[220]) invitation to the public to use the property, and the extent to which the property was needed to convey the speakers' message.[221] The court clarified, however, and has reiterated in later cases, that the burden on the private property owner should not be too great.[222]

Using this analysis, the court overturned Schmid's conviction for trespassing while distributing political literature on Princeton University's campus.[223] University policy required anyone not affiliated with the university to have an invitation or permission to be on campus, and Schmid lacked both.[224] The court concluded that Schmid could invoke the First Amendment against Princeton because of the university's educational mission and its general invitation to the public to congregate on its grounds for purposes relating to free speech.[225] But this did not mean that Princeton was required to let everyone onto its campus just as a city must let everyone into its parks; the university has due deference in administering its educational institution.[226] At the same time, the court insisted that the university must have a "reasonable regulatory scheme" governing public free speech on its campus, rather than a standardless and discretionary permission requirement that did not even attempt to grapple with the free speech interests at stake.[227]

Germany also offers an example of how such balancing might work in more contemporary cases. Under the German system, private agents' duties under the Basic

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[217] *See Pickering*, 391 U.S. at 568.
[218] 423 A.2d 615, 628 (N.J. 1980).
[219] *Id.*
[220] *Cf.* N.J. Coal. Against War in the Middle E. v. J.M.B. Realty Corp., 650 A.2d 757, 780–81 (N.J. 1994) (clarifying this fact).
[221] *See Schmid*, 423 A.2d at 623, 630.
[222] *Id.* at 630.
[223] *Id.* at 633.
[224] *Id.* at 617.
[225] *Id.* at 631–33.
[226] *Id.* at 632.
[227] *Id.* at 633.

Law (the constitution) are *indirect* on the model explained below.[228] But in deciding the exact contours of those duties, its courts often consider the competing constitutional rights of private parties and attempt to give each effect to the greatest extent possible.[229] Many of these cases balance the free speech rights of individuals versus corporations, including social media platform owners.[230] Factors that can strengthen an *individual*'s rights claim vis-à-vis a platform's can include the platform's dominant position in an economic market; the corporation's "structural advantage," or greater bargaining power (from, e.g., superior information or resources); or the necessity of the platform to individuals' participation in social life.[231] Conversely, factors that can strengthen the corporation's rights claim include its property interest in the successful operation of its business model and its interest in not being held liable for others' actions.[232]

Consider a recent pair of German cases against Facebook. Two individuals who had posted right-wing, anti-immigrant content had their posts removed and their accounts blocked for violating Facebook's Community Standards against hate speech.[233] To determine what Facebook's constitutional obligations, if any, were to the users, the Federal Court of Justice balanced the individual users' free speech rights against Facebook's "commercial interest in creating an attractive communication and advertising environment," its interest in not being liable for third-party content, its free speech rights, and the free speech rights of society as a whole.[234] Its conclusion was strikingly similar to *Schmid*'s: Facebook had a right to develop its own Community Standards and enforce them—but it has a legal obligation, in doing so, to take into account its users' speech rights.[235] As a result, it must offer rules that are clear and objective, so that users will understand them, and it must provide certain due process to users whose content or accounts are removed, including notice, a

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[228] *See generally* BVerfG, 1 BvR 3080/09, Apr. 11, 2018, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/04/rs20180411_1bvr308009en.html [https://perma.cc/47FE-233J].

[229] *Id.* ¶ 32.

[230] Bundesgerichtshof [BGH] [Federal Court of Justice], July 29, 2021, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] III ZR 192/20, ¶ 8 (Ger.).

[231] *See, e.g.*, BVerfG, 1 BvR 3080/09, ¶ 41; *see also* BVerfG, 1 BvQ 42/19, § 2, May 22, 2019, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/05/qk20190522_1bvq004219en.html [https://perma.cc/8V6G-Y6J5] (citing the "considerable market power in Germany" of Facebook and the fact that the company is "used by more than 30 million people in Germany every month").

[232] *See* BVerfG, 1 BvR 3080/09, ¶¶ 33, 35–36.

[233] Bundesgerichtshof [BGH] [Federal Court of Justice], July 29, 2021, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ], ¶ 7; *id.* ¶ 5.

[234] *Id.*; Matthias C. Kettemann & Torben Klausa, *Regulating Online Speech: Ze German Way*, LAWFARE (Sept. 20, 2021, 8:01 AM), https://www.lawfaremedia.org/article/regulating-online-speech-ze-german-way [https://perma.cc/CQ8V-E94Y].

[235] Kettemann & Klausa, *supra* note 234.

statement of reasons, an opportunity to respond, and a second review.[236] Just as *Schmid* did, the court emphasized that these requirements would not significantly jeopardize the economic interests of Facebook.[237]

Balancing could at least partially accommodate quasi-state agents' pursuit of private aims, in part because, unlike direct-and-*identical* duties, direct-and-*lesser* duties might not fully negate the corporations' own expressive rights claims. Instead, the corporations' rights would simply be diminished in the sense that they could be partially or fully outweighed by the speech rights of the public. A court might, for instance, conclude that a non-profit corporation could fire or demote employees based on speech counter to the corporation's goals but not simply based on background ideological disagreements. Or they might decide that corporations could fire employees in leadership positions based on viewpoints but not other employees. When it comes to social media platforms, courts interpreting the First Amendment might follow the lead of Germany and New Jersey and impose procedural duties falling short of impartiality, such as duties to constrain their own discretion in the suppression of speech, duties to respect due process, and/or duties of transparency and disclosure.

D. Indirect Duties

A quite different option is that quasi-state agents could have *indirect* duties under the First Amendment. These duties would be "indirect" in the sense that they would not be self-enforcing but would need to be both activated and defined through legislation, regulation, and judicial interpretation. Like the direct-and-lesser-duties model, this model leaves open the possibility of less demanding duties for quasi-state agents than for full state agents, depending on the choices of the relevant legislators, regulators, or judges. Peculiar as indirect duties for private might sound, it has been occasionally adopted by foreign courts, U.S. state courts, and the Supreme Court itself. Below, I consider first how judges could play a role in the articulation of indirect duties, and then how political actors could do the same.

1. Judicial Definition

In most jurisdictions where judges define indirect duties, they do so by interpreting existing non-constitutional law—private law, criminal law, etc.—so that it is consistent with or promotes constitutional *values*.[238] In Germany, for instance, the

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[236] Bundesgerichtshof [BGH] [Federal Court of Justice], July 29, 2021, Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] ¶ 85; *id.* ¶ 97.

[237] *See id.* ¶¶ 76, 89.

[238] *See* BVerfGE, 1 BvR 400/51, Jan. 15, 1958, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/1958/01/rs19580115_1bvr040051en.html [https://perma.cc/JGN7-BJM3]; Retail, Wholesale & Dep't Store Union, Loc. 580 v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573, 603–04 (Can.); *see also* Gardbaum, *supra* note 204, at 404, 406.

main vehicles for this "indirect" effect of the Basic Law are the undefined and broad legal terms of private law statutes.[239] So, for instance, German courts have interpreted a statutory requirement that each party to a contract in "good faith" not try to unreasonably disadvantage the other party to demand that the parties respect various values guaranteed by the Basic Law.[240] These include dignity and equality,[241] as well as the freedom of speech of all parties and of other persons affected by the contract.[242] While American private law is mostly spelled out in common law, rather than in statutes as in Germany, it, too, could be adapted to constitutional values. In the context of quasi-state power over speech, these values might include ensuring that people have adequate alternatives for speaking freely or that the primary channels of communication provide access to a diversity of viewpoints on public issues.[243]

Indeed, the U.S. Supreme Court has already arguably interpreted private law in light of constitutional free speech values in one context. In one of its most famous cases, *New York Times v. Sullivan*, the Court considered a defamation action, a dispute of private law: the public safety commissioner of Montgomery, Alabama, sued the *New York Times*, in his personal capacity, for publishing an advertisement by supporters of Martin Luther King, Jr. that made various slightly exaggerated statements about actions taken by the Montgomery police against civil rights protestors.[244] The Court held that the defamation action violated the First Amendment, even though the suit was brought by a private individual, not a state actor.[245] (Generally speaking, a court decision in a private law case is not considered "state action."[246]) The Court then drew on the First Amendment's purpose of encouraging the robust criticism of government and public officials to modify common law defamation doctrine: henceforth, public figures bringing defamation suits would have to prove not only that the challenged statement was false but also that the defendant made it with "actual malice," i.e., reckless disregard for its truth.[247] This diverged from the earlier libel rule that the defendant was liable unless she could establish the truth of her statement.[248]

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[239] Gardbaum, s*upra* note 204, at 404.

[240] *See* BVerfG, 1 BvR 3080/09, Apr. 11, 2018, ¶ 38, https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2018/04/rs20180411_1bvr308009en.html [https://perma.cc/7SSP-G7DE].

[241] *Id.* ¶¶ 40–41.

[242] Bundesgerichtshof [BGH] [Federal Court of Justice], July 29, 2021, Entscheidungen des Bundesgerichtshofes in Zivilsachen 230, 347–89, paras. 74–75 (interpreting national contract law).

[243] *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 369 (1969) (describing the purpose of the fairness doctrine).

[244] 376 U.S. 254, 256–58 (1964).

[245] *Id.* at 264. One could argue that the state action in the case was simply the substantive shape of defamation law. Still, the case interprets a duty that one private party owes to another (not to defame) in light of constitutional principles.

[246] *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 349 (1974).

[247] *Sullivan*, 376 U.S. at 279–80.

[248] *Id.* at 267.

Ultimately, a plaintiff was disabled from using tort law to remedy her injury in the ordinary way, because her use of that remedy would stifle free speech interests.

States have gone much further in interpreting their common law considering (state) free speech values, often specifically in the case of powerful private agents. California is perhaps the most notable, but not the only, example.[249] In *Robins v. Pruneyard* in 1979, the California Supreme Court interpreted private property rights to be limited by the California Constitution's free speech guarantee.[250] Specifically, a privately owned shopping mall, which provided an "essential and invaluable forum for exercising those rights," was blocked from invoking the state's trespass law in the ordinary way against members of the public collecting signatures for a political petition on the mall's property.[251] The court observed that property rights in California had been interpreted to be "responsible and responsive to the needs of the social whole."[252] Given "the strength of 'liberty of speech' in this state," the court concluded that property rights must give way to the free speech claims of the signature gatherers.[253]

2. Legislative and Regulatory Definition

The responsibility of defining quasi-state agents' indirect First Amendment duties could lie not only with courts but also with the political branches. Legislatures or agency regulators could give those duties more specificity than judicial interpretation could and would have more flexibility to craft narrowly drawn duties to address quasi-state agents' actual harms to free speech interests in light of changing societal conditions and needs. These statutory or regulatory duties could also, unlike indirect duties through judicial interpretation, be enforced even absent a civil lawsuit or criminal trial.

This is effectively the approach in *Associated Press* and *Red Lion*. The Court did not suggest in either of those cases that a member of the public could sue the AP or NBC under the First Amendment; that is, it did not suggest that these large media companies had direct constitutional duties. It did, however, give the nod to the Department of Justice's antitrust action against the AP and the FCC's fairness doctrine—even though these policies may well have encroached on these companies' traditional editorial rights.[254] It also, in both cases, indicated that these encroachments were

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[249] *See, e.g.*, State v. Shack, 277 A.2d 369 (N.J. 1971) (requiring that a property owner, on principles of freedom of speech, give federal employees access to private property to convey to workers information about available federal assistance programs).

[250] Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 342 (Cal. 1979).

[251] *Id.* at 347.

[252] *Id.* at 345.

[253] *Id.* at 346, 348.

[254] *See* Associated Press v. United States, 326 U.S. 1, 19–20 (1945); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 375 (1969).

justified by the First Amendment interest in ensuring the dissemination of a diversity of viewpoints over the essential channels of communication upon which individuals and democratic discourse more broadly depend.[255] In other words, the First Amendment itself justified the imposition of duties that overrode free speech rights.

Today's mass media and telecommunications companies face many legal constraints on their power that arguably could be justified under the First Amendment. For instance, common carrier laws impose duties of non-discrimination upon mass telecommunications companies that provide telephone and internet services.[256] While these laws are ordinarily upheld by courts because the companies are thought to be mere "conduits" for communication and not actual publishers with editorial rights,[257] the distinction is somewhat difficult to uphold and has engendered substantial debate when it comes to its application to social media platforms.[258] A growing number of voices are also calling for antitrust actions against Google and Meta.[259] Indeed, the Department of Justice just filed a new, broader lawsuit against the former alleging that it is monopolizing certain digital advertising technologies.[260] Still others are calling for legislation or regulation that requires the biggest tech companies to follow certain due process and transparency rules in their handling of speech.[261] One way of seeing all of these projects—along with that of the obsolete fairness doctrine—is as enacting a scheme of indirect First Amendment duties against quasi-state agents in particular.

E. Distrust of the State

Yet, recall that our justification in Part II for imposing free speech duties on quasi-state agents was the terrible threat that the state itself poses to free speech interests. It might seem odd, having rooted our analysis in this point, to turn around

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[255] *Associated Press*, 326 U.S. at 20; *Red Lion Broad. Co.*, 395 U.S. at 389, 392.

[256] For details on these laws, see generally Yoo, *supra* note 32.

[257] *See, e.g.*, U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 741 (D.C. Cir. 2016); *see also* Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 DUKE L.J. 1673, 1686–87 (2011).

[258] *See* Bhagwat, *supra* note 195, at 2382 (summarizing Sabeel Rahman's argument). *See generally* Volokh, *supra* note 5 (arguing that social media platforms could be classified as common carriers specifically with respect to their hosting of speech); Yoo, *supra* note 32.

[259] *See, e.g.*, Lina M. Khan, *Sources of Tech Platform Power*, 2 GEO. L. TECH. REV. 325 (2018).

[260] Press Release, U.S. Dep't of Just., Justice Department Sues Google for Monopolizing Digital Advertising Technologies (Jan. 24, 2023), https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies [https://perma.cc/4XAE-AL8Z].

[261] Lakier, *supra* note 127, at 2371 (describing regulations that might enact free speech values).

and hand more power over free speech interests to the original agent of concern. Indeed, entrusting state actors to regulate speech in any way—even how private agents treat that speech—cuts against core First Amendment tradition.

However, note that our situation involves a clash of powers: free speech interests will be severely threatened, one way or another, either by a private power or a public power. In this stalemate, there are reasons to release the constraints on the powerful democratic agent. *First*, the release would be *for the narrow purpose of constraining the powerful, undemocratic agent*. Entrusting the state to define the indirect First Amendment duties of quasi-state agents would not give the state a blank check to regulate however it pleases. Those duties could not, for instance, require promoting or demoting any particular viewpoint. For instance, *Red Lion* was clear that the First Amendment restrained the FCC from requiring that "the official government view dominat[e] public broadcasting."[262]

Second, a democratic state, as described in Part II, is subject to certain pressures to conform to these limitations on its power. Consider a worst-case scenario in which a broad-power quasi-state agent, like the most widely used social media platform, intervenes just prior to an election to significantly tilt public discourse in favor of a particular candidate or party. If the state is not allowed to regulate, there is nothing more to be done and no way to prevent further such abuses of power. By contrast, if the public version of this worst-case scenario happened and the *FCC* abused its power to regulate the quasi-state agent in order to drastically tilt public discourse in another direction, then there are "higher" authorities that could step in to stop the abuse or prevent further such abuses—from the other branches of government to the voters themselves.[263]

CONCLUSION

This Article has argued that the inflexible line in First Amendment doctrine between state and non-state agents is an empty formalism. If the freedoms of speech and the press matter, it is because they protect the ability of individuals to express their opinions freely and for public opinion to form freely. This means that *whoever* has the power to disrupt these outcomes flouts those freedoms. In nearly every case, the state has this power. This explains why courts have applied the First Amendment to all agents backed by the power of the state and not just to Congress, as the constitutional text demands. But at least in our time, the state is not the *only* agent with this power.

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[262] 395 U.S. 367, 396 (1969).

[263] Of course, voters are limited in their time and ability to gather information about government conduct, understand the political and policy issues at stake, engage in sound causal reasoning, and free themselves of biases. *See* CHRISTOPHER H. ACHEN & LARRY M. BARTELS, DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT 1–4 (Tali Mendelberg ed., 2016). But they provide a partial check on at least the most severe abuses.

I have made the case that two types of private agents also hold the power to thwart First Amendment speech rights and thus should be held—in some manner—to be bound by those rights. Placing a functional inquiry about power, rather than a formalist inquiry about state status, at the heart of free speech doctrine offers several advantages. First, it renders the doctrine coherent with the purposes that ostensibly motivate it, to protect the free expression of individual opinion and the free formation of public opinion. Second, it explains multiple threats to free speech in the modern world, from social media companies to especially powerful employers. Third, unlike much contemporary thinking about powerful media companies, it leaves open the possibility that the activities in which these powerful agents are engaged may be, on some level, speech. This matters when less powerful agents engage in them.

Once First Amendment doctrine has embraced a more functional line between private and public agents, it confronts the next task of deciding how exactly the relevant private agents are to be bound. This Article has offered several models for doing so, drawing on the experience of both domestic and foreign jurisdictions. Each provides a different level of flexibility in accounting for the reality that even state-like agents are still not *exactly* the state.