Regulating ISPs in the Age of Technology Exceptionalism

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Introduction

Changes in technology have fundamentally altered the manner in which Americans communicate. The Supreme Court has recognized that the Internet "provide[s] perhaps the most powerful mechanism[] available to a private citizen to make his or her voice heard . . . allow[ing] a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'"[1] Thus, it is no surprise that many view a free and open Internet as essential to the First Amendment right to free speech. A United States Senator described net neutrality as "the most important First Amendment issue of our time."[2] Opponents of the recent repeal of net neutrality[3] view the repeal as an attack on freedom of speech values.[4] A prevailing concern is that Internet service providers (ISPs) will either directly block content or limit access by lowering Internet speed when accessing specific content.[5]

However, others have rightfully pointed out that, at least facially, net neutrality is not a First Amendment issue.[6] Under the state-action doctrine, the First Amendment can only be violated by the action of a state entity; purely private conduct does not implicate the First Amendment.[7] Although

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1. Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (quoting Reno v. American Civil Liberties Union, 521 U.S. 844, 870 (1997)).

2. Al Franken, *Net Neutrality Is Foremost Free Speech Issue of Our Time*, CNN (Aug. 5, 2010, 8:05 AM), http://www.cnn.com/2010/OPINION/08/05/franken.net.neutrality/index.html [https://perma.cc/ZJ4X-KNAP].

3. FCC Restoring Internet Freedom, 83 Fed. Reg. 7852 (Feb. 22, 2018) (to be codified at 47 C.F.R. pts. 1, 8, 20).

4. *E.g.*, Corynne McSherry, *An Attack on Net Neutrality Is an Attack on Free Speech*, EFF (June 22, 2017), https://www.eff.org/deeplinks/2017/06/attack-net-neutrality-attack-free-speech [https://perma.cc/P9U3-LNW4].

5. Klint Finley, *Here's How the End of Net Neutrality Will Change the Internet*, WIRED (Nov. 22, 2017, 5:00 AM), https://www.wired.com/story/heres-how-the-end-of-net-neutrality-will-change-the-internet [https://perma.cc/TZT2-KMAV].

6. Daniel Lyons, *The First Amendment Red Herring in the Net Neutrality Debate*, FORBES (Mar. 10, 2017, 9:07 AM), https://www.forbes.com/sites/washingtonbytes/2017/03/10/the-first-amendment-red-herring-in-the-net-neutrality-debate [https://perma.cc/K3U6-5V2P].

7. *See Developments in the Law — State Action and the Public/Private Distinction*, 123 HARV. L. REV. 1248, 1255 (2010) ("[A]bsent some action on the part of a state entity . . . there can be no constitutional violation.").

there are exceptions to the doctrine, scholars have concluded that under current jurisprudence, ISPs are almost certainly not state actors.[8]

Nevertheless, a recent development at the Supreme Court may provide room for a new argument in support of declaring ISPs state actors: the introduction of technology exceptionalism. The Supreme Court's decisions in *Riley v. California*[9] and *Carpenter v. United States*[10] have indicated that the Court has a "deep and abiding belief in the exceptional nature of the modern technological era."[11] Technology exceptionalism argues that certain technologies are so innovative that they disrupt the traditional balance of power or values, and therefore the law must adapt in turn.[12] Although the Court's decisions in *Riley* and *Carpenter* applied to Fourth Amendment law, the Court's underlying reasoning has the potential to have a much broader impact.

Analyzing the Internet and ISPs through technology exceptionalism shifts the question away from mere application of state-action doctrine formalities. This perspective is reflected in the public discourse in favor of net neutrality. When net-neutrality proponents discuss net neutrality as a free speech issue, they are referring to the *values* of free speech underlying the First Amendment, rather than direct legal application of the state-action doctrine to ISPs. By analyzing the Internet's influence on the underlying values of free speech, the dangers of repealing net neutrality become clear.[13] Under equality principles, the Internet has made public discourse freer: it has become much easier for citizens to speak out, to be heard, and to access others' speech in the Internet Age.[14] Yet, a sacrifice has been made. Public discourse is now primarily performed on platforms owned and controlled by

8. *See* Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 429 (2009) ("Network providers like Comcast are not state actors."); Geoffrey A. Manne et al., *A Conflict of Visions: How the "21st Century First Amendment" Violates the Constitution's First Amendment*, 13 FIRST AMEND. L. REV. 319, 324–26 (2014) ("ISPs are not state actors under any of these exceptions. . . ."); Daniel Rudofsky, *Modern State Action Doctrine in the Age of Big Data*, 71 N.Y.U. ANN. SURV. AM. L. 741, 757–59 (2017) (summarizing court approaches to whether ISPs are state actors).

9. 573 U.S. 373 (2014).

10. 138 S. Ct. 2206 (2018).

11. Paul Ohm, *The Many Revolutions of* Carpenter, 32 HARV. J.L. & TECH. 357, 399 (2019).

12. *See* Ryan Calo, *Robotics and the Lessons of Cyberlaw*, 103 CAL. L. REV. 513, 553 (2015) ("[A] technology is exceptional if it invites a systemic change to laws or legal institutions in order to preserve or rebalance established values.").

13. *See* Balkin, *supra* note 8, at 430 ("[W]hether network providers can discriminate against content . . . touches on important free speech values.").

14. *Id.* at 441 ("New technologies offer ordinary citizens a vast range of new opportunities to speak, create and publish. . . ."); Dawn C. Nunziato, *First Amendment Values for the Internet*, 13 FIRST AMEND. L. REV. 282, 290 (2014) ("[T]he Internet has the true potential to be the paradigm marketplace of ideas."); Nicholas P. Dickerson, Comment, *What Makes the Internet so Special? And Why, Where, How, and by Whom Should Its Content Be Regulated?*, 46 HOUS. L. REV. 61, 62–63 (2009) ("[T]he Internet has emerged as the ultimate forum for public expression.").

private entities.[15] Without net-neutrality protection, the risk of private actors blocking and limiting speech has been laid bare. If the First Amendment cannot reach ISPs, it is clear that "the First Amendment [is] . . . increasingly irrelevant to the key free speech battles of the future."[16] Given the ever-increasing role of the Internet in modern-day speech, the question of whether ISPs can be state actors needs to be revisited in light of technology-exceptionalism arguments.

Part I of this Note begins by outlining current state-action doctrine jurisprudence and summarizes why scholars have concluded that ISPs cannot currently be classified as state actors. Part II follows with a discussion of the Supreme Court's recent embrace of technology-exceptionalism reasoning as applied to the Fourth Amendment in *Riley* and *Carpenter*. Considering this new avenue for constitutional interpretation, Part III provides the best available arguments in favor of ISPs being state actors. Still, even under this new approach, such arguments are likely to fail. Therefore, Part IV concludes by discussing how the policy concerns underlying free speech can still be protected in an age where the primary public forum is privately controlled.

I. Modern State-Action Doctrine

At a glance, the state-action doctrine appears straightforward: constitutional rights can only be infringed through the action of a state entity.[17] The doctrine arises from judicial interpretation of the protections in the Constitution. The First Amendment only requires that "Congress shall make no law . . . abridging the freedom of speech."[18] No such restrictions are placed on the conduct of private actors. Similarly, although the Fourteenth Amendment extends the First Amendment to cover state action, it provides no protections against private action.[19] As the state-action doctrine developed, numerous exceptions were created.[20] This Note focuses on the public-function exception because it provides for the best argument that ISPs are state actors.[21] Under the public-function exception, a private entity is a

15. Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1121 (2005) ("[T]oday private actors wield the vast majority of power over Internet speech—power unchecked by the First Amendment.").

16. Balkin, *supra* note 8, at 427.

17. *Developments in the Law — State Action and the Public/Private Distinction*, *supra* note 7, at 1255.

18. U.S. CONST. amend. I.

19. *See* U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

20. *See generally Developments in the Law — State Action and the Public/Private Distinction*, *supra* note 7 (discussing judicially adopted exceptions to the state-action doctrine).

21. For discussion on other state-action-doctrine exceptions and their inapplicability to ISPs, see Manne et al., *supra* note 8, at 327–32.

state actor when it performs a public function that "has been 'traditionally the *exclusive* prerogative of the State.'"[22] The public-function exception was first announced in *Marsh v. Alabama*.[23]

In *Marsh* the Court held that a "company town" owned by a private corporation was a state actor and therefore violated the Constitution when it imposed criminal punishment on a Jehovah's Witness for distributing religious literature on its sidewalks.[24] The Court noted that the town had "all the characteristics of any other American town" including "residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block.'"[25] The Court refused to follow the argument that the First and Fourteenth Amendments could not reach the town because it was privately owned.[26] Instead, the Court noted that the operation of the town was "essentially a public function."[27] Although the facts in *Marsh* were extreme, the Court's opinion contains broad language that suggests a loosening of the formalist approach to the state-action doctrine. The Court argued that "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[28] Furthermore, the Court evoked the principles underlying the First Amendment, stating: "Whether 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."[29] These statements support a viewpoint that the public–private distinction is not dispositive. Instead, the inquiry becomes whether First Amendment values are being violated by private entities holding themselves out to the public. Viewed in this way, *Marsh* stands for the proposition that the government owes a duty to protect the underlying values of the First Amendment.[30] Yet, *Marsh* has never been read that broadly.

The Supreme Court did briefly expand the broad principles outlined in *Marsh* in the case *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc*.[31] In *Logan Valley*, the Court held that picketers had the First Amendment right to protest on the private property of a shopping

22. Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982) (quoting Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974) (emphasis added by the Court in *Rendell-Baker*)).

23. 326 U.S. 501 (1946).

24. *Id.* at 503.

25. *Id.* at 502.

26. *Id.* at 505–07.

27. *Id.* at 506.

28. *Id.*

29. *Id.* at 507.

30. *See* Nunziato, *supra* note 15, at 1132 ("*Marsh* therefore places primacy on the government's affirmative obligations under the First Amendment to establish and protect the pre-conditions of democratic self-government.").

31. 391 U.S. 308 (1968).

center.[32] However, Justice Black, who authored the majority opinion in *Marsh*, dissented in *Logan Valley*, writing that "Marsh was never intended to apply" outside of the context of a company town.[33] Black emphasized that "private property [can only] be treated as though it were public . . . when that property has taken on *all* the attributes of a town."[34] Shortly after *Logan Valley*, the Court decided two cases that presented similar facts, and ultimately severely limited the expansion of *Marsh*. First, in *Lloyd Corp., Ltd. v. Tanner*[35] the Court determined that the company town in Marsh was a state actor only because it "was performing the full spectrum of municipal powers and stood in the shoes of the State."[36] Second, in *Hudgens v. NLRB*[37] the court officially adopted Justice Black's dissent in *Logan Valley* to limit *Marsh* solely to the context of company towns.[38] Thus, despite the language in *Marsh* suggesting a less formalist approach to the state-action doctrine, the public-function exception has been applied strictly.

The dichotomy between the expansive language and limited holding of *Marsh* is striking. For proponents of free speech principles, the language in *Marsh* is a beckoning finger, inviting policy arguments in support of reining in abusive acts by private entities. Still, even as applied to ISPs, these arguments have so far failed. In *Cyber Promotions, Inc. v. America Online, Inc.*[39] the court held that a company did not have a right under the First Amendment to send e-mail to users of America Online (AOL), an ISP, without restriction by AOL.[40] In support of its argument, the plaintiff compared AOL's activity to those of the company town in *Marsh*, arguing that by opening its network to the public, AOL was performing a public function.[41] The court disagreed, finding that "[b]y providing its members with access to the Internet . . . AOL is not exercising *any* of the municipal powers or public services traditionally exercised by the State as did the private company in *Marsh*."[42] The court found that the Internet was not traditionally under the exclusive control of the government, noting that the Internet is a global network, owned and operated by a myriad of entities.[43] Although it acknowledged that AOL had opened its system to the public, the

32. *Id.* at 325.
33. *Id.* at 330 (Black, J., dissenting).
34. *Id.* at 332.
35. 407 U.S. 551 (1972).
36. *Id.* at 569.
37. 424 U.S. 507 (1976).
38. *See* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 159 (1978) (noting that *Hudgens* "adopted Mr. Justice Black's interpretation of the limited reach of *Marsh*").
39. 948 F. Supp. 436 (E.D. Pa. 1996).
40. *Id.* at 446–47.
41. *Id.* at 442.
42. *Id.*
43. *Id.* at 441–42.

court rejected that AOL was standing in for the State because it was not "performing any municipal power or essential public service."[44]

Cyber Promotions, decided in 1996, is the last case to directly address whether ISPs are state actors. A modern-day challenge would have strong arguments to distinguish from *Cyber Promotions*. Even ten years ago, the Internet of 1996 was seen as unrecognizable and quaint.[45] In 1996, a mere 23% of adults in America used the Internet.[46] Ninety percent of Americans use the Internet today.[47] Whereas the average Internet user in 1996 used the Internet for half an hour a month,[48] in 2019 the average American spends around six and a half hours using the Internet *per day*.[49] From a realist perspective, it is nonsensical to compare AOL in 1996 to ISPs today.

Given the formalistic approach of the jurisprudence, however, scholars have concluded that courts are almost certain to follow *Cyber Promotions* and hold that ISPs are not state actors.[50] Under this formalism, the ever-growing importance of the Internet does not factor into the determination of whether an ISP is a state actor. Instead, the question is settled by the fact that connecting customers to the Internet is not a public function that has been traditionally exclusively controlled by the government. Despite the expansive language in *Marsh*, courts have historically disfavored the public-function exception and will likely continue to strictly limit it. However, technology exceptionalism has developed as a new form of logical reasoning at the Supreme Court and may provide support for a less formalistic approach to the public-function exception.

II. Technology Exceptionalism at the Supreme Court

Riley v. California represents the "beginning of a new jurisprudence that applies time-honored constitutional principles to twenty-first century forums where fundamental civil liberties are exercised and must be protected."[51] In short, *Riley* announced the Supreme Court's, and particularly Chief Justice

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44. *Id.* at 442.

45. *See* Farhad Manjoo, *Jurassic Web*, SLATE (Feb. 24, 2009, 5:33 PM), https://slate.com/technology/2009/02/the-unrecognizable-internet-of-1996.html [https://perma.cc/3AC4-37W3].

46. Susannah Fox, *The Internet Circa 1998*, PEW RES. CTR. (June 21, 2007), https://www.pewinternet.org/2007/06/21/the-internet-circa-1998 [https://perma.cc/4X2J-Z8BZ].

47. Monica Anderson et al., *10% of Americans Don't Use the Internet. Who Are They?*, PEW RES. CTR. (Apr. 22, 2019), https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they [https://perma.cc/W6Y5-E5QP].

48. Manjoo, *supra* note 45.

49. Matthew Hughes, *Study Shows We're Spending an Insane Amount of Time Online*, NEXT WEB (Jan. 30, 2019, 8:06 PM), https://thenextweb.com/tech/2019/01/31/study-shows-were-spending-an-insane-amount-of-time-online [https://perma.cc/7ZNY-NB9W].

50. *See, e.g.*, Manne et al., *supra* note 8, at 326 ("ISPs would presumably stand in the same position today as in 1996, when *Cyber Promotions* was decided.").

51. Adam Lamparello, *The Internet Is the New Marketplace of Ideas: Why* Riley v. California *Supports Net Neutrality*, 25 DEPAUL J. ART, TECH. & INTELL. PROP. L. 267, 273 (2015).

Roberts's, openness to technology exceptionalism. Technology exceptionalism recognizes that recent technological advances "have led to differences in kind and not merely in degree from the technology of the past."[52] These dramatic shifts must be met with changes in the law in order to resolve the resulting imbalances of power and values.[53]

In *Riley*, the Court held that, under the Fourth Amendment, the police must obtain a warrant before they can search the contents of an arrestee's cell phone.[54] In the opinion, Chief Justice Roberts recognized that cell phones have fundamentally changed the balance of power between arrestees and arresting officers.[55] In the past, arresting officers were limited to searching the small amount of physical items an arrestee was carrying.[56] However, if arresting officers were allowed to search cell phones, they would have access to immense troves of personal data.[57] Roberts rejects the argument that cell phones are not exceptional in strong terms, stating: "The United States asserts that a search of all data stored on a cell phone is 'materially indistinguishable' from searches of . . . physical items. That is like saying a ride on horseback is materially indistinguishable from a flight to the moon."[58]

Roberts's strong view of technology exceptionalism continued in *Carpenter v. United States*. In *Carpenter*, the Court held that government collection of cell-site location information (CSLI) constitutes a search under the Fourth Amendment.[59] Roberts begins the opinion by stating that there are more cell phones in America than there are people.[60] Similar to *Riley*, Roberts recognizes that cell phones, in this case through the presence of CSLI, have significantly changed the balance of power between citizens and the government.[61] The government no longer has to manually follow someone to surveil them; instead, the "[g]overnment can now travel back in time to retrace a person's whereabouts."[62] Further, cell phones are not a technology that people can simply opt out of: "carrying [a cell phone] is indispensable to participation in modern society."[63] Roberts's message is clear: cell phones have changed the landscape of privacy, and the Fourth Amendment must adapt to keep up.

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52. Ohm, *supra* note 11, at 399.
53. Calo, *supra* note 12, at 553.
54. Riley v. California, 573 U.S. 373, 386 (2014).
55. *See id.* at 393 ("Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person.").
56. *Id.* at 393–94.
57. *Id.*
58. *Id.* at 393.
59. Carpenter v. United States, 138 S. Ct. 2206, 2223 (2018).
60. *Id.* at 2211.
61. *Id.* at 2217–18.
62. *Id.* at 2218.
63. *Id.* at 2220.

Although *Riley* and *Carpenter* only apply to the Fourth Amendment, these cases clearly announce the Court's openness to arguments based on technology exceptionalism. Technology exceptionalism represents a new and powerful form of legal reasoning that can apply across different areas of law. A clear next step is to apply technology exceptionalism to the Internet and ISPs. The Internet has fundamentally changed the landscape of public discourse and has shifted power toward the private entities that control it. Thus, technology exceptionalism creates a new argument against formalistic applications of the state-action doctrine to ISPs.

III. Reevaluating the State-Action Doctrine's Applicability to ISPs Under Technology Exceptionalism

Technology exceptionalism has created a new avenue in which to argue that ISPs should be declared state actors. Like the cell phone's impact on the Fourth Amendment in *Riley* and *Carpenter*, the Internet has had a massive effect on the principles underlying the First Amendment. Freedom of speech stands for the underlying "principle that debate on public issues should be uninhibited, robust, and wide-open."[64] Further, "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas."[65] These underlying purposes are broad and are impacted by any limitation on citizens' ability to freely and openly engage in public discourse. Public discourse has moved away from public spaces and into the privately controlled realm of the Internet. This necessitates a reconsideration of First Amendment law in order to rebalance the power between the public's rights to free and open speech, and private property rights.

A. The Internet's Effect on Free Speech Principles

The Internet represents a massive shift in the balance of power in public discourse. Historically, public discourse has primarily happened in public spaces like town squares, street corners, and parks.[66] Although an individual's sphere of influence was limited, the First Amendment protected speech in those public areas.[67] The Internet has revolutionized our ability to engage in speech. On one hand, the Internet has allowed for individuals to have a much greater reach with their speech, for little or no cost.[68] Prior to the repeal of net neutrality, there were few external restrictions on speech on

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

65. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969).

66. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) ("[S]treets and parks . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

67. *Id.*

68. *See* Nunziato, *supra* note 15, at 1120 (declaring the Internet "a uniquely powerful vehicle for speakers and publishers to express themselves to worldwide audiences at very low cost").

the Internet, allowing public discourse to become more "uninhibited, robust, and wide-open" than ever before.[69] Thus, the Internet became an almost ideal format for open and democratic public expression.[70]

However, when public discourse moved to the Internet, something was sacrificed. Speech is no longer conducted primarily in public spaces where it is protected by the First Amendment. Instead, speech is largely conducted over the Internet, which is controlled by private actors that traditionally cannot be reached by the First Amendment.[71] The recent repeal of net neutrality sounded a grave reminder of who really holds the power over the Internet.[72] ISPs have the power to outright block content or to limit service speeds to certain content.[73] Even if fears of ISP abuses are overblown, it is undeniable that ISPs will have immense control over how citizens engage in speech going forward.

Opponents to net neutrality have argued that if customers truly desire net-neutral policies, economic demand will ensure such products exist.[74] Similarly, there is an argument that ISPs cannot be state actors because users can always switch to a different provider.[75] However, these views are naïve for several reasons. First, most Americans have very limited choice in Internet provider. Under the FCC's latest statistics, 18% of American households have only one choice in broadband provider.[76] An additional 32% have only two choices.[77] At higher speeds the numbers get more drastic. Eighty-three percent of households have zero or one 100Mbps Internet

69. *Sullivan*, 376 U.S. at 270.

70. *See* Nunziato, *supra* note 14, at 294 ("The Internet . . . is as much a public forum for expression as any other medium ever known or invented.").

71. *See* Nunziato, *supra* note 15, at 1121 ("[P]rivate actors wield the vast majority of power over Internet speech—power unchecked by the First Amendment."); *Developments in the Law — State Action and the Public/Private Distinction*, *supra* note 7, at 1303 ("The traditional public square is disappearing, and as new fora for public expression arise, their connection to state actors is often less clear.").

72. FCC Restoring Internet Freedom, 83 Fed. Reg. 7852 (Feb. 22, 2018) (to be codified at 47 C.F.R. pts. 1, 8, 20).

73. *See* Finley, *supra* note 5 (explaining that Internet providers will likely block content or limit speeds to certain classes of paying customers after the repeal of net neutrality).

74. *See, e.g.*, Manne et al., *supra* note 8, at 321 ("If consumers truly desired net neutrality and punished companies for diverting from such a policy, social pressure and contracts could likely do most of the work to ensure 'neutral' outcomes.").

75. *See* Joseph E. Brenner, Note, *Paying the Pied Piper: An Examination of Internet Service Provider Liability for Third Party Speech*, 16 PITT. J. TECH. L. & POL'Y 155, 170 (2016) (arguing that there are "inherent limitations on an ISP's power" because an "ISP's ability to limit the content's dissemination is wholly limited to the internet services *they* provide") (emphasis in original).

76. *See* FCC, INTERNET ACCESS SERVICES: STATUS AS OF JUNE 30, 2017, at 6 fig.4 (2018) (noting that 18% of census blocks in which Internet speeds of at least 25Mbps were available only had a single service provider).

77. *Id.*

provider available.[78] Without sufficient competition, providers have little incentive to change their practices.[79] Furthermore, even where there is choice between ISPs, there is no good reason to assume that the terms of service of the products will be significantly different.[80] Finally, there are numerous economic reasons for ISPs to block content or preference certain content over others. For instance, ISPs might block disfavored sites or give speed advantages to their own content.[81] With little to no competition and economic incentives to exercise control over what content can be accessed, it is difficult to envision ISPs forgoing that power.

First Amendment values are implicated as long as ISPs have the power to place substantial restrictions on speech, even if ISPs ultimately do not use that power.[82] The protection of First Amendment values now lies mostly in the hands of private actors.[83] Under the traditional state-action doctrine, the law would be unable to address these imbalances. However, technology exceptionalism offers a new rationale for reinterpretation of the state-action doctrine.

B. Making the Argument that ISPs Are State Actors Under Technology Exceptionalism

Technology exceptionalism proposes that certain technologies are so disruptive to the balance of power and values underlying constitutional protections that the law must change in order to correct those imbalances. Technology exceptionalism provides the best source of logical reasoning to argue that ISPs are state actors. If courts accept that the Internet and ISPs have compromised First Amendment values in a substantial way, it is easier to argue against formalistic approaches to the state-action doctrine. Instead, courts must be willing to protect the values underlying the First Amendment by effecting change in the law.

The Internet is an exceptional technology that has drastically shifted the balance of power in public discourse. In order to preserve the established values underlying the First Amendment, the law needs to be reconsidered. Citizens can no longer rely on protection from government action. Instead, free speech values are in the hands of private companies. In the context of

78. *Id.*

79. Balkin, *supra* note 8, at 431.

80. *See* Nunziato, *supra* note 15, at 1121 ("Each of the major ISPs establishes and enforces Terms of Service by which it prohibits the expression of certain types of speech that fall within the protection of the First Amendment.").

81. *See* Balkin, *supra* note 8, at 428–29 (describing the potential dangers of allowing ISPs to discriminate against content).

82. *Id.* at 430 ("[W]hether network providers can discriminate against content . . . touches on important free speech values.").

83. *Id.* at 428 (explaining that Americans depend on ISPs in order to engage in public discourse).

the Fourth Amendment, the Supreme Court recognized that technology has changed the world drastically and that the law needs to adapt to keep up.[84] The same reasoning applies to the First Amendment and the Internet. The Supreme Court has already acknowledged the Internet's outsized impact on public expression.[85] Having identified that First Amendment principles are in flux, we must change our legal approach in order to protect those underlying values.[86]

Applying technology-exceptionalism reasoning to the state-action doctrine may push courts away from formalism. Once again, we can turn to the broad language in *Marsh*. ISPs, for their own advantage, have opened their services to the public.[87] Thus, ISPs should be held to protecting the free speech rights of the public.[88] Opponents will counter by arguing that ISPs do not perform the full range of municipal functions as the company town in *Marsh*. However, the relevant inquiry should be the extent to which ISPs stand in the shoes of the state in controlling *speech*, rather than every aspect of a municipality. In *Marsh*, it is doubtful that the operation of the sewer system by the company town is what tipped the scale for the Court. Instead, the Court likely found state action because the town controlled all the locations in which citizens could engage in speech. When the street corners, sidewalks, and parks are all under private control, there are no public spaces left in which to practice free speech. These are the municipal functions that courts should focus on.

Still, ISPs certainly are not controlling streets and sidewalks. Yet, technology exceptionalism allows courts to take a more realism-based approach and ask whether ISPs control functions that fulfill the same purposes as the important municipal functions in *Marsh*. ISPs own and control the physical infrastructure that citizens use to access the Internet and thus engage in public discourse.[89] This infrastructure has become more important than roads and sidewalks for participation in speech. An individual only needs an Internet connection to engage in the largest public forum the

84. *See* Lamparello, *supra* note 51, at 267 ("[T]he Court's reasoning reflects a fundamental truth: the world has changed, and to protect basic civil liberties, the law must change as well.").

85. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (stating that the Internet "provide[s] perhaps the most powerful mechanism[] available to a private citizen to make his or her voice heard").

86. *See* Balkin, *supra* note 8, at 438 ("The rise of digital networks as a dominant technology for speech in our age transforms the way we should think about the First Amendment and the principles of freedom of expression.").

87. *See* Marsh v. Alabama, 326 U.S. 501, 506 (1946) (discussing how owners of facilities that are open to the public and operate primarily to benefit the public are subject to state regulation because they essentially serve a public function).

88. *See id.* ("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.").

89. Rudofsky, *supra* note 8, at 782.

world has ever seen. Like cell phones, access to the Internet is essential in order to be a functioning member of society. First Amendment principles should not be compromised simply because the Internet has not been traditionally controlled by the government. The infrastructure controlled by ISPs can be viewed under the broader label of channels of communication. While the Internet itself has not been the exclusive prerogative of the government, channels of communication have been. As the Court recognized in *Marsh*, there is an "interest in the functioning of the community in such manner that the channels of communication remain free," regardless of whether those channels are publicly or privately owned.[90] Focusing on the underlying values that the First Amendment seeks to protect, and recognizing how the Internet has affected those values, allows for a more expansive interpretation of the state-action doctrine. Such an interpretation is essential to allow the law to adapt and continue to protect freedom of expression.

Furthermore, if ISPs do begin to block content, future court challenges may provide better vehicles to argue for a change in law. In *Cyber Promotions*, the plaintiff was a spammer sending over 1.9 million emails a day.[91] It is not surprising that the court was unsympathetic to a spammer asking for an expansion of rights. Yet, if future plaintiffs are individuals whose speech has been blocked, perspectives may begin to change.

Nevertheless, these arguments are still likely to fail. The Supreme Court's state-action doctrine has been strict and there is no indication of a willingness to change the law in this area. Even Justice Black, who authored the *Marsh* opinion, believed the doctrine should be extremely limited.[92] Thus, although the seeds of a more radical doctrine are present, the environment appears hostile to such growth. Future appeals for protection of First Amendment principles may be sympathetic, but the Court is still likely to conclude that the Constitution simply does not reach the action of private entities. Additionally, the Court will likely prefer to leave such regulation to Congress or the FCC. Thus, even though these arguments probably will fail in the judicial system, they provide powerful support for legislative or regulatory approaches to protect free speech.

IV. Alternative Approaches to Protect Free Speech Values in the Internet Age

Numerous alternatives to the current state-action doctrine have been proposed in the literature.[93] On one extreme, some commentators have called

90. *Marsh*, 326 U.S. at 507.

91. Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 436, 452 (E.D. Pa. 1996).

92. Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 332 (1968) (Black, J., dissenting).

93. *See, e.g.*, Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Serve Human Needs*, 52

for the end of the state-action doctrine all together, arguing that "constitutional rights . . . serv[e] substantive interests, which, when threatened, may require action on the part of the government."[94] This argument mirrors the realism-based approach supported under technology exceptionalism. As has been shown, this approach is likely to fail.[95] On the other end of the spectrum is the strict formalism represented by current jurisprudence. Given stare decisis, judicial reconstruction of the state-action doctrine is likely not the path of least resistance.[96]

Instead, free speech proponents may turn to legislative and regulatory solutions. Although technology-exceptionalism arguments are likely to fail to expand the state-action doctrine, the same arguments support broader legal protection of First Amendment principles. Even if courts hold that they cannot reach ISP conduct, court challenges can highlight the risks inherent in a post-net-neutrality Internet and provide an impetus for change. A simple solution is to revert the FCC's recent repeal of net neutrality and relabel ISPs as common carriers. This would prevent ISPs from "interfering with or manipulating the internet traffic based on a user's identity, or the content of a user's message."[97] Yet, the controversy over the FCC's handling of the net-neutrality repeal shows the flaws inherent in any regulatory approach.[98] In today's extremely polarized political climate, regulatory action may swing rapidly from administration to administration.[99] Protection of First Amendment values should not be subject to severe fluctuation.

Thus, a legislative solution is preferable over leaving control of essential Internet policy in the hands of the FCC. Appetite for legislative solutions has been seen at the state level, with multiple states having already enacted their own net-neutrality laws.[100] However, disparate state approaches are likely to

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HARV. C.R.-C.L. L. REV. 145, 159–64 (2017) (proposing seven alternatives to the current state-action doctrine).

94. *Developments in the Law — State Action and the Public/Private Distinction*, *supra* note 7, at 1264.

95. *See supra* Part III.

96. *See* Balkin, *supra* note 8, at 444 ("The key players in ensuring free speech values in the digital age will be legislatures, administrative agencies, and technologists.").

97. Lamparello, *supra* note 51, at 287.

98. *See* Brian Naylor, *As FCC Prepares Net-Neutrality Vote, Study Finds Millions of Fake Comments*, NPR (Dec. 14, 2017, 5:00 AM), https://www.npr.org/2017/12/14/570262688/as-fcc-prepares-net-neutrality-vote-study-finds-millions-of-fake-comments [https://perma.cc/6PJK-99ZW] (discussing the irregularities of the public comments submitted during the FCC's net-neutrality rule-making period).

99. Nicol Turner Lee, *Why Net Neutrality Needs a Congressional Solution*, BROOKINGS INSTITUTION (May 17, 2017), https://www.brookings.edu/blog/techtank/2017/05/17/why-net-neutrality-needs-a-congressional-solution [https://perma.cc/S866-HETW].

100. *See, e.g.*, Avery Anapol, *Oregon Passes Net Neutrality Law*, HILL (Apr. 10, 2018, 7:49 AM), https://thehill.com/policy/technology/382412-oregon-passes-net-neutrality-law [https://perma.cc/8TGV-WLYL] (reporting that Oregon passed its own net-neutrality law in response to the FCC's repeal of federal net-neutrality rules); Cecilia Kang, *Washington Governor Signs First State Net Neutrality Bill*, N.Y. TIMES (Mar. 5, 2018), https://www.nytimes.com/2018/

lead to customer confusion and unnecessary spending by ISPs in order to ensure their services comply with each state's legislation. A federal solution is needed to ensure consistency across jurisdictions and to adequately vindicate First Amendment rights for all citizens. Potential legislation will have the difficult task of balancing protection for First Amendment principles and the property rights of ISPs. However, in the words of *Marsh*, "[w]hen we balance the Constitutional rights of owners of property against those of the people to enjoy [First Amendment freedoms] . . . we remain mindful of the fact that the latter occupy a preferred position."[101] Congress should follow this missive and ensure that the Internet remains free, or else society's greatest forum for free and open speech may cease to exist.

Conclusion

The Internet is an exceptional technology that has severely impacted the values underlying the First Amendment. While the Internet has lowered barriers to participate in public discourse, it has also served to move a significant portion of public speech onto privately owned and controlled systems. As long as ISPs have the power to block speech, there is no guarantee that the Internet will remain "uninhibited, robust, and wide-open."[102] Therefore, in order to protect First Amendment values, current law must be reconsidered. Technology exceptionalism provides an argument for an expansion of the state-action doctrine in order to recognize ISPs as state actors and thus protect Internet speech. However, despite the recent embrace of technology exceptionalism at the Supreme Court, and the exceptional nature of the Internet, the Court is still unlikely to take such a radical step. Yet, the story does not end there. In making this argument, the current failings of the state-action doctrine as applied to the First Amendment become clear. Therefore, in order to protect free speech values, technology exceptionalism provides strong policy support for legislative changes in the law.

03/05/business/net-neutrality-washington-state.html [https://perma.cc/N2MX-NU3N] (reporting that Washington State passed its own net-neutrality law in response to the FCC's repeal of federal net-neutrality rules).

101. Marsh v. Alabama, 326 U.S. 501, 509 (1946).

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