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**COMMENTARY**

*PRUNEYARD AND THE “REVOLVING DOOR”:  
THE GROWING CASE TO HOLD BIG TECH COMPANIES LIABLE FOR  
ABRIDGING THE FREEDOM OF SPEECH*

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It is well known that the First Amendment protects the freedom of speech.<sup>1</sup> Many understand that traditionally the prohibition on abridging freedom of speech applied only to the federal government (“Congress shall make no law...”).<sup>2</sup> Some are familiar with the 14th Amendment and its doctrine of incorporation, which imposed most of the restraints of the Bill of Rights on the states.<sup>3</sup> Few, however, know that the Supreme Court has held that the ban on abridging the freedom of speech can sometimes extend to private actors as well.<sup>4</sup>

In *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), the Court held that individuals’ speech and petition rights extended onto the property of a private shopping center.<sup>5</sup> Although the shopping center could adopt “time, place, and manner regulations,” orderly expressive activities in the common areas of the shopping center would generally be protected under the state constitution.<sup>6</sup> The Court reasoned that the shopping center was “open to the public to come and go as they please,” there was no danger of governmental viewpoint

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<sup>1</sup> U.S. CONST. amend. I.

<sup>2</sup> *Id.*

<sup>3</sup> U.S. CONST. amend. XIV. *See also Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the freedoms of speech and the press to the states through the Due Process Clause of the Fourteenth Amendment).

<sup>4</sup> *See* K.S. Bruce, *To Save Free Speech, Let ‘Marsh’ Beat a Swamp*, REALCLEARPOLITICS (Jan. 23, 2021), [https://www.realclearpolitics.com/articles/2021/01/23/to\\_save\\_free\\_speech\\_let\\_marsh\\_beat\\_a\\_swamp\\_\\_145107.html#!](https://www.realclearpolitics.com/articles/2021/01/23/to_save_free_speech_let_marsh_beat_a_swamp__145107.html#!).

<sup>5</sup> While it is worth noting that these were speech and petition rights under the California state constitution, a similar (albeit inconsistent) line of cases also exists under the U.S. Constitution. *See supra* note 4.

<sup>6</sup> *Pruneyard*, 447 U.S. at 83–84. *See supra* note 5.

discrimination, and “[t]he views expressed by members of the public . . . [were] not likely [to] be identified with those of the owner.”<sup>7</sup>

Recently, some scholars and politicians have argued that the *Pruneyard* holding should be extended to “Big Tech” companies.<sup>8</sup> They argue that the internet has effectively replaced the street corner or the market square as the primary place of public discourse. If a private shopping center can be required to allow speakers to disseminate messages and gather signatures for petitions, then why shouldn’t private tech companies be treated the same way?<sup>9</sup>

It is true that both a shopping center and a tech company are private entities and actors,<sup>10</sup> and the same factors underlying the Court’s opinion in *Pruneyard* seem relevant in the context of “Big Tech” companies.<sup>11</sup> However, there may be an even stronger rationale for imposing First Amendment-like regulations on social media companies, internet search engines, server hosts, and other tech companies that did not exist in the *Pruneyard* case—more direct and growing ties between “Big Tech” and government entities.

As mentioned, the First Amendment was designed to restrain government. But what happens when government becomes so entangled with a private entity that it becomes difficult to distinguish the two?

Observers on both sides of the political spectrum have sounded the alarm about a “revolving door” between “Big Tech” and government.<sup>12</sup> Former tech employees make their way into administrations of both parties, then use their positions to gain access to government contracts<sup>13</sup> or influence laws and regulations.<sup>14</sup> Similarly, former government employees are hired—even actively recruited—by tech companies, then share their knowledge and network with their new employers.<sup>15</sup> While this practice may empirically be more common among Democrat administrations, both major political parties share responsibility.<sup>16</sup> Even supposedly independent agencies such as the Federal Trade Commission are not immune.<sup>17</sup>

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<sup>7</sup> 447 U.S. at 87.

<sup>8</sup> Scott Shackford, *Florida Gov. Ron DeSantis Wants \$100,000 Fines for Social Media Companies That Deplatform Politicians*, REASON (Feb. 4, 2021, 12:50 PM), <https://reason.com/2021/02/04/florida-gov-ron-desantis-wants-100000-fines-for-social-media-companies-that-deplatform-politicians/> (quoting UCLA law professor Eugene Volokh, who said, “I think it’s a pretty good argument that the platforms could be treated like the law treats shopping malls.”).

<sup>9</sup> *Id.*

<sup>10</sup> See Emily Bazelon, *Why Is Big Tech Policing Speech? Because the Government Isn’t*, N. Y. TIMES (Jan. 26, 2021), <https://www.nytimes.com/2021/01/26/magazine/free-speech-tech.html> (noting that social media platforms are similar to private shopping malls in that they set and enforce private rules for their respective operations)

<sup>11</sup> *Supra* note 8.

<sup>12</sup> Compare Kyle Sammin, *How Big Government And Big Tech Conspire Against Voters*, THE FEDERALIST (Jan. 15, 2021), <https://thefederalist.com/2021/01/15/how-big-government-and-big-tech-conspire-against-voters/>, with Jane Chung, *Biden Must Halt Big Tech From Revolving Into Government*, PUBLIC CITIZEN (Dec. 17, 2020), <https://www.citizen.org/article/biden-big-tech/>, and Hal Singer, *As the Revolving Door Swings*, THE AMERICAN PROSPECT (July 17, 2020), <https://prospect.org/power/as-the-revolving-door-swings-big-tech-regulation/>.

<sup>13</sup> April Glasser, *Thousands of contracts highlight quiet ties between Big Tech and U.S. military*, NBC NEWS (July 8, 2020), <https://www.nbcnews.com/tech/tech-news/thousands-contracts-highlight-quiet-ties-between-big-tech-u-s-n1233171>.

<sup>14</sup> *Supra* note 13.

<sup>15</sup> Carlotta Alfonsi, *Taming Tech Giants Requires Fixing the Revolving Door*, KENNEDY SCHOOL REV. (Feb. 18, 2020), <https://ksr.hkspublications.org/2020/02/18/taming-tech-giants-requires-fixing-the-revolving-door/>.

<sup>16</sup> *Supra* note 13.

<sup>17</sup> Rick Claypool, *The FTC’s Big Tech Revolving Door Problem*, PUBLIC CITIZEN (May 23, 2019), <https://www.citizen.org/article/ftc-big-tech-revolving-door-problem-report/>.

Despite calls for the Biden Administration to stop the revolving door,<sup>18</sup> the ties between government and “Big Tech” appear to be getting stronger as the new president has already hired many former “Big Tech” lawyers, lobbyists, and executives to join not only his administration, but his “inner circle” of White House staff.<sup>19</sup>

As the web of connections between government and “Big Tech” grows, the second rationale for extending *Pruneyard* becomes apparent. Not only is the internet and social media today’s quasi-public square, but the companies themselves are quietly becoming quasi-government entities. If both the legal protections and culture of free speech in the United States are to survive, it may be necessary to hold these “private” actors to a similar standard as the government.

As society increasingly turns to online interaction over older forms of communication, courts should strive to protect individual liberties—especially political and self-expression—from new attacks. If they fail to do so, the Bill of Rights may become meaningless as government actors learn to circumvent it and silence opposition indirectly through their connections in the “private” sector. It might be that the courts are the only source left for such protections, as tech companies wield their growing influence on the political branches to resist significant changes to the law.

Some wish to attempt to combat online censorship by repealing Section 230 of the 1996 Communications Decency Act.<sup>20</sup> Alternatively, it is possible that the “revolving door” could also implicate principles of agency or contract law and provide additional grounds for extending First Amendment protections to the digital realm. The federal government’s involvement in the creation of the internet should also be discussed further. Perhaps a modified public forum analysis could be developed to handle online platforms. Additional research and analysis in these areas is warranted.

For our purposes here, it suffices to recognize 1) that free speech protections can and have sometimes been extended to private entities, 2) that *Pruneyard* and related cases provide courts with at least persuasive authority upon which they could rely in adopting newer rules protecting online political and self-expression from “Big Tech” censorship, and 3) that there are likely stronger rationales for requiring tech companies to allow political speech than shopping malls, given the “revolving door” between tech and government employment and contracts.

In short, if neither the government nor “Big Tech” wants to close the “revolving door,” they should be prepared to be treated equally (or at least similarly) under the law.

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<sup>18</sup> 33 Groups Urge Biden to Reject Big Tech Appointments to His Cabinet, PUBLIC CITIZEN (Nov. 30, 2020), <https://www.citizen.org/article/32-groups-urge-biden-to-reject-big-tech-appointments-to-his-cabinet/>.

<sup>19</sup> Steven Nelson, *Big Tech alums flow into Biden administration amid crackdown on Trump allies*, N. Y. POST (Jan. 11, 2021), <https://nypost.com/2021/01/11/big-tech-alums-fill-biden-posts-amid-crackdown-on-trump-allies/>; G. McConway, *Biden Appointments Include Numerous Big Tech Officials and Lobbyists*, CONSERVATIVE JOURNAL REVIEW (Nov. 21, 2020), <https://www.conservativejournalreview.com/biden-appointments-include-numerous-big-tech-officials-and-lobbyists/>; Drew Johnson, *What Joe Biden’s Chumminess with Big Tech Means for Tech Accountability*, PJ MEDIA (Dec. 5, 2020), <https://pjmedia.com/columns/drew-johnson/2020/12/05/what-joe-bidens-chumminess-with-big-tech-means-for-tech-accountability-n1192708>. *But see* Trip Brennan, *Biden is Shunning Silicon Valley. Can Big Tech Rebuild the Revolving Door?*, BLUE TENT (Feb. 8, 2021), <https://bluetent.us/arenas/governing/biden-silicon-valley-political-appointments/>.

<sup>20</sup> Dan Patterson, *What is “Section 230” and why do many lawmakers want to repeal it?*, CBS NEWS (Dec. 16, 2020), <https://www.cbsnews.com/news/what-is-section-230-and-why-do-so-many-lawmakers-want-to-repeal-it/>.