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Duality in Digital Discourse: The History and Future of the American Public Forum

Nicholas Weaver
University of Mississippi

DUALITY IN DIGITAL DISCOURSE:
THE HISTORY AND FUTURE OF THE AMERICAN PUBLIC FORUM

By
Nicholas Ryan Weaver

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Approved By

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Advisor: Dr. Charlie Mitchell

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Reader: Dr. Jody Holland

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Reader: Dr. Nidhi Vij Mali

DEDICATION

This thesis is dedicated to the ideals, the dreams, and the hard facts that have created America, with the hope that it will serve as a source of interest and inspiration to all who read it.

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To my loving fiancée who has walked with me and encouraged me throughout this journey: thank you for always being supportive of my dreams. To my family that instilled in me a sense of hard work and character: thank you for pushing me to be my best. To my friends across the nation: thank you for helping forge my ideas in the furnace of debate and speculation. You all have made me the man I am today, and I would certainly be lost without you.

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Most importantly, to the God from whom all good things originate, may I never cease to serve you.

ABSTRACT

NICHOLAS RYAN WEAVER: Duality in Digital Discourse: The History and Future of the American Public Forum (Under the direction of Dr. Charlie Mitchell)

From the onset of the republic, the liberty to speak freely and debate openly has stood guard and helped preserve all other American rights. While this concept has endured, the means by which it exists in society has changed immensely. As the public forum has evolved to fit the modern needs of the citizenry, political discourse has become less a defense against tyranny and more a chaotic space of conflicting opinions.

In the United States, privately-owned social media companies have grown at an unprecedented rate, yet lawmakers have been slow to exercise any authority to regulate these corporations. For public officials posting information and interacting with their constituents on social platforms, the guidelines regulating their actions are, at best, ambiguous and, at worst, dangerous. When officials such as former President Donald Trump began conducting what the courts deemed official state business on their personal Twitter accounts, questions were raised regarding the legal status and legitimacy of government activity on social media websites.

Following a literature review of the history of public fora and potential policy solutions, this paper will present an understanding of the current rules that apply to the communication activities of public officials in digital spaces. The final section will propose a new series of regulations intended to clarify the rights and responsibilities of public officials who desire to communicate with the public over social platforms. Insights from this research should be considered by lawyers, judges, policymakers, and government agents attempting to reap the benefits of mass communication without infringing on the historic and traditional freedom of expression established under the First Amendment and relevant precedents.

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INTRODUCTION

Free speech is a core tenet of American democracy. When the United States was founded, the marketplace of ideas theory served as a primary basis for adoption of the First Amendment. As former Harvard Law Professor Zechariah Chafee, Jr. stated, the freedom of speech "was formed out of past resentment against the royal control of the press" and "hatred of the suppression of thought which went on vigorously on the Continent during the eighteenth century."[1] In early America, the best defense of the truth was free and open debate, and traditional public fora served as the physical locations where the marketplace of ideas existed. Essentially, the marketplace theory asserts that truth emerges from open discussion whereas discussions under government-set control make better ideas or "best practices" less likely to come to fruition. Today, political discourse has moved online where the internet has become home to the modern town square. As more generations of Americans use social media as the focal point of their daily lives, these platforms have evolved from sites of friendship and connection into spaces of advocacy and argument.

The freedom of speech has "matured over the years, growing within new pockets of speech law in areas of technological advancement as courts continue to shape the contours of new speech doctrine."[2] Early on, digital content was deemed to have the same First Amendment protections against government control that applies to individual expression as well as print and broadcast media; however, broadcasters must comply with

[1] Lane, Tyler. (2019). The Public Forum Doctrine in the Modern Public Square. *Ohio Northern University Law Review.* 45 Ohio N.U.L. Rev. 465.
[2] LoPiano, James. (2018). Public Fora Purpose: Analyzing Viewpoint Discrimination on the President's Twitter Account. *Fordham Intellectual Property, Media, & Entertainment Law Journal.* 28 Fordham Intell. Prop. Media & Ent. L.J. 51.

Federal Communications Commission (FCC) licensing standards, generally, to act in the public interest.[3] As Congress and the courts shape the rules of the online marketplace of ideas, defining what is and is not a public forum will be critically important to protecting free speech. The context for addressing the current situation involves a degree of complexity, based on a number of givens.

1. Most social media companies are private, for-profit businesses that "admit members" based on "acceptance of company terms." In the same way a grocer has plenary authority to decide what products to stock, private social media companies hold plenary authority over "membership" and content. The published rationale for social media content management—prohibiting nudity, graphic violence, etc.—mirrors the grocer's interest in attracting and keeping customers.[4] The sites in question are free to members and derive revenue from advertising. The more viewers join the site, the more revenue is earned, so content is policed for the purpose of attracting and retaining visitors.

2. While content policies of social media companies are driven by marketing, social media companies themselves are statutorily exempt from liability for any content their "members" posts. This exemption comes by way of Section 230 of the Communications Decency Act (CDA) of 1996, which, incidentally, predated the advent of most large social media enterprises, including Facebook, Instagram, and Twitter. The applicable section states that "no provider or user of an interactive computer service shall

[3] Sophos, Marc. (1990). The Public Interest, Convenience, or Necessity: A Dead Standard in the Era of Broadcast Deregulation? *Pace Law Review*. digitalcommons.pace.edu/plr/vol10/iss3/5.
[4] Center, Help. The Twitter Rules. *Twitter*. help.twitter.com/en/rules-and-policies/twitter-rules.

be treated as the publisher or speaker of any information provided by another information content provider."[5]

3. A significant legal duality is created here. While large social media companies enjoy protection under Section 230, they simultaneously moderate speech on their platforms using fact checks, removal of content, and suspension of accounts for violating "membership terms." The sheer volume of content posted to these sites exceeds the possibility of individual review except in very high-profile instances, meaning most blocking, tagging, or removal of content deemed improper for the site is performed by mathematical mechanisms—algorithms written and applied by the company's technical staff.[6] Clearly, the public perceives social media sites as the locale of the modern marketplace of ideas, but it's equally clear that the platforms themselves have immense power to manipulate algorithms, censor speech, and control the flow of information while, under Section 230, being immune from legal accountability for any and all published content. Flowing from this duality is the suspicion that the privately-held power to manage content is wielded inconsistently and/or with political bias.

4. While challenges to clarity in the online landscape appear daunting, efforts have been made to enact change. In an Executive Order intended to roll back Section 230 protections, former President Donald Trump stated that "communication through these channels has become important for meaningful participation in American democracy,

[5] Communications Decency Act of 1996. 47 U.S. Code § 230 (2018).
[6] Sehl, Katie. (2020, May 20). How the Twitter Algorithm Works in 2020 and How to Make it Work for You. *Hootsuite*. blog.hootsuite.com/twitter-algorithm.

including to petition elected leaders. These sites are providing an important forum to the public for others to engage in free expression and debate."[7]

5. The prevailing rule of law discriminates between the actions of public officials and the actions of private individuals in a public forum. While a private citizen and a public official may both have their social media posts screened by the platform owners, their speech is treated differently. While a private citizen may remove his or her comments and/or limit or block replies or comments from others, that same right does not apply to public officials who choose to engage, at least, in political speech on social media platforms. In the case of *Knight First Amendment Institute v. Trump,* the court labeled Trump's Twitter account as a designated public forum.[8] As a result, government officials and presumably the government itself may not interfere in the discussion or comment sections connected to their social media accounts.

In summary, a private citizen's social media account is under the exclusive control of the platform and the citizen as to what can be posted and what responses will be allowed; however, a social media account used by a public official for public topics remains at least somewhat under the control of the platform owner but is otherwise a public forum. This precedent is not widely understood, and the inherent duality is confusing for the citizenry and dangerous for the preservation of the marketplace of ideas.

America needs clarity on which digital spaces are public fora and which are not. Continuing with some content on a given platform having First Amendment protection

[7] Trump, Donald. (2020, May 28). Executive Order on Preventing Online Censorship. *White House.* trumpwhitehouse.archives.gov/presidential-actions/executive-order-preventing-online-censorship.
[8] Knight First Amendment Institute at Columbia University v. Trump, No. 18-1691 (2d Cir. 2019).

while other content on the same platform not having protection is not tenable. While many judicial and legislative solutions have been proposed to resolve the duality, a new social contract should focus on creating protected areas of open discussion within social media sites where the marketplace of ideas can thrive. Public officials need to recognize the legal standing of their accounts when they post government speech online in order to protect the free speech of their constituents. Additionally, Congress should act and implement enhanced regulation and oversight that opens social media companies to legal liability when they censor constitutionally protected speech in designated public fora. While there are many issues that should be addressed by policymakers regarding social media, a new social contract is the best course of action to clearly label free speech and encourage political discourse in the marketplace of ideas.

SECTION ONE: A BIT OF HISTORY

"In politics, as in religion, it is equally absurd to aim at making proselytes by fire and sword. Heresies in either can rarely be cured by persecution."

–Alexander Hamilton, Federalist Paper No. 1

I. THE MARKETPLACE OF IDEAS

Public fora preserve the freedom of speech and the spirit of debate in a democratic society. The Bill of Rights was designed to reflect specific colonial-era beliefs and shape the nature in which the rights of Americans are protected and individual freedoms are maximized. As a capitalistic society, the concept of a marketplace with competing organizations was centerstage in economic policy. In a similar manner, a marketplace with competing ideas was a core idea in the governing philosophy on which America was created. The marketplace of ideas theory is rooted in the belief that the best defense against misleading and/or false information is more speech rather than less. Supreme Court Justice Oliver Wendell Holmes wrote in his famous dissent of *Abrams v. United States* that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[9]

[9] Abrams v. United States, 250 U.S. 616 (1919).

A marketplace of ideas not subject to content controls created by any government authority will allow all competing speech to thrive. If the marketplace of ideas functions as designed, American citizens will be able to evaluate all the available viewpoints in order to identify new policy ideas, consider variables, and most importantly, discover truth. The marketplace of ideas offers a remarkably American way of describing debate in terms of our capitalistic nature. Truth, in America, tends to be "a product of those ideas that can withstand competing arguments and viewpoints; ideas with the best logic and evidence behind them—a distillation of truth from survival of the fittest speech."[10] Upon initial consideration, Holmes's marketplace of ideas metaphor may seem to be an inept and overly simplistic comparison; however, a closer look at this theory introduces many of the guiding principles that have influenced First Amendment jurisprudence over the last century. For example, debates in a public forum tend to operate in a similar manner to a commercial marketplace, especially today. Since the rise of the internet, traditional media outlets have lost their dominant gatekeeping role of what information dominates public conversations. Like a very crowded and noisy street fair, "we are blasted with information and different voices fighting for our attention (and, in many cases, financial support). The internet has lowered if not eliminated the barriers to entry so that everyone can have a voice, not just the most powerful or the very rich."[11] Even more so today than in the 18th Century, ideas must break through the noise in the marketplace of ideas in order to gain traction, relevancy, or public acceptance.

[10] LoPiano, James. (2018). Public Fora Purpose: Analyzing Viewpoint Discrimination on the President's Twitter Account. *Fordham Intellectual Property, Media, & Entertainment Law Journal.* 28 Fordham Intell. Prop. Media & Ent. L.J. 51.
[11] Papandrea, Mary-Rose. (2019). The Missing Marketplace of Idea Theory. *Notre Dame Law Review.* 94 Notre Dame L. Rev. 1725.

In the marketplace of ideas theory, the physical market itself has traditionally been classified as a public forum. Public fora are essential in preserving the marketplace of ideas because they are, in theory, spaces open to all, accessible to all, and free from government interference. During his 20 years on the U.S. Supreme Court bench, Justice Anthony Kennedy has expressed his support for the marketplace of ideas theory through his deep faith in the power of counter-speech in public fora. "Kennedy repeatedly asserted that the First Amendment does not tolerate the abridgement of speech in public fora. For Kennedy, these public places are the epicenter of the marketplace of ideas, where all people can share their thoughts and ideas directly with other citizens, and any government efforts to restrict speech in these areas should be regarded with suspicion."[12] Access is an essential element to the preservation of the marketplace of ideas. Without sufficient access, not all ideas have the possibility of acceptance. In *International Society for Krishna Consciousness, Inc. v. Lee*, the Court decided that airport terminals should not be labeled as public fora. In his concurring opinion, Kennedy argued that "one of the primary purposes of the public forum is to provide persons who lack access to more sophisticated media the opportunity to speak."[13] Though he agreed with the ruling in *Krishna*, Kennedy took issue with the majority's static application of the free speech doctrine that could potentially discriminate against less affluent organizations and speakers. Instead, Kennedy argued for an evolving view of the marketplace of ideas that allows the poorest and most vulnerable in society to engage in debate. Ideally, public fora are havens of debate where citizens can come and participate in the glorious American

[12] Papandrea, Mary-Rose. (2019). The Missing Marketplace of Idea Theory. *Notre Dame Law Review.* 94 Notre Dame L. Rev. 1725.
[13] International Soc. for Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

marketplace of ideas. While some lament our nation's inability to live up to this ideal, others advocate for changes to the public forum doctrine that ensure the marketplace of ideas remains as open and accessible as possible.

Over time, the marketplace of ideas theory has changed considerably to account for changes in the nature of public fora. For example, in 1943, the Court declared that a necessary corollary to the freedom of speech was the "right to receive" such speech.[14] Expanding on this doctrine, Supreme Court Justice William J. Brennan, in his concurrence in *Lamont v. Postmaster General*, claimed that "the dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers."[15] According to Brennan, in addition to being accessible, the marketplace of ideas needs to incorporate adequate dissemination of speech in order to be effective. Just as commercial markets face problems without adequate competition, the marketplace of ideas becomes ineffective when Americans fail to encounter a variety of opinions.

Holmes and Kennedy both advocated for counter-speech as an effective remedy for misinformation; however, their judgments "assumed certain facts about the world: namely, that listeners would encounter conflicting positions; that under most circumstances a bit of time and effort would be required before a listener could pass on one or the other of them; and that this time and effort would hopefully expose the listener to contemplation and moderating voices."[16] Today, social platforms and media

[14] Shefa, Mason. (2018). First Amendment 2.0: Revisiting Marsh and the Quasi-Public Forum in the Age of Social Media. *University of Hawaii Law Review.* 41 Hawaii L. Rev. 159.
[15] Lamont v. Postmaster General, 381 U.S. 301 (1965).
[16] Langvardt, Kyle. (2018). A New Deal for the Online Public Square. *George Mason Law Review.* 26 Geo. Mason L. Rev. 341.

companies have the technical capacity and the financial interest to manipulate or totally obliterate these preconditions. As the nature of public fora change and the marketplace of ideas adapts for the times, policymakers must consider the fundamental reasons why protecting speech is important in the first place. After considering different rationales for legally protected speech, the benefits "amount to something like promoting self-fulfillment or self-realization, optimally pursuing truth, promoting universality in decision making, and optimally balancing social conflict and social consensus."[17]

II. HISTORY OF PUBLIC FORA

Much like other elements of American democracy, the American public forum has roots in Rome. By understanding the purpose of the original Roman Forum, known as *Forum Romanum* in Latin, scholars can better understand the purpose of public fora today. The Roman Forum was a "centrally located open area that was surrounded by public buildings and colonnades and that served as a public gathering place. It was an orderly spatial adaptation of the Greek agora, or marketplace, and acropolis."[18] The Forum was considered the heart of Rome, and the home "of important religious, political and social activities. Historians believe people first began meeting in the open-air Forum around 500 B.C., when the Roman Republic was founded."[19]

Over time, the Roman Forum expanded from strictly referring to the space beside the praetorium, encompassing impressive temples and monuments, to a term "applied

[17] Wright, R. George. (2018). Public Fora and the Problem of Too Much Speech. *Kentucky Law Review*. 106 Ky. L.J. 409.
[18] Britannica, Editors of Encyclopedia. (2016, August 19). Forum. *Encyclopedia Britannica.* www.britannica.com/topic/forum-ancient-Rome.
[19] History, Editors. (2018, March 8). Roman Forum. *History.com.* www.history.com/topics/ancient-rome/roman-forum.

generally to the space in front of any public building or gateway."[20] From Roman legends, scholars believe the Roman Forum started as a neutral meeting zone for warriors and leaders, but the space was eventually expanded to become a multi-purpose site for accommodating various functions. Events taking place in the Forum included elections, public speeches, criminal trials, social gatherings, business dealings, and public meetings.[21] Originally, the Roman Forum translated to American's understanding of a traditional public forum as a public place used by citizens for discussion and debate. The essential purpose of these spaces was to serve as a neutral home for people to meet, gather, and engage with each other without threat of persecution. Traditional public fora in the style of the Roman fora were the perfect places for Americans to engage in the marketplace of ideas.

The social and political conditions that surrounded the inception of the Bill of Rights in 1791 serve as a guide to understanding the provisions in context. As a method to protect free speech in the new American forum, the framers of the Constitution crafted the First Amendment in a manner that restricted Congress's ability to make any law abridging the freedom of speech. With knowledge of centuries of conflict between European powers, the framers knew the protection of the marketplace of ideas was essential as a method of discerning truth but also holding government accountable. "The drafters of the First Amendment were concerned with governmental suppression of ideas, as the government has the power to control conversation through punishing ideas that it opposes. The Framers sought to protect the ability to discover and spread truth, which is

[20] Britannica, Editors of Encyclopedia. (2016, August 19). Forum. *Encyclopedia Britannica.* www.britannica.com/topic/forum-ancient-Rome.
[21] History, Editors. (2018, March 8). Roman Forum. *History.com.* www.history.com/topics/ancient-rome/roman-forum.

accomplished 'only through absolutely unlimited discussion,' as it is impossible to ensure truth will win out over falsehood when a powerful force (such as government) has control over the discussion. Thus, the freedom of speech protected by the First Amendment was designed to ensure that a controlling force did not influence societal conversation and skew political debate."[22]

The framers were aware of governments in both England and America that prosecuted people engaged in contrarian political discussion; therefore, the First Amendment specifically limited the ability of Congress to silence dissent. As in Rome, the framers of the American republic recognized inherent worth in preserving spaces designated specifically for open dialogue. The Roman Forum was built with the purpose of promoting free and open gathering for discussion; the same purpose behind the adoption of the First Amendment. In America, by the nature of the public forum itself, all parties have a constitutional right of access.[23] Although the type of access and the spaces encompassing public fora have shifted over the years, the essential purpose of protecting the marketplace of ideas has remained.

Despite clarity in the societal benefits associated with free speech, the law associated with defining public fora has not been static. Prior to 1939, "courts treated public spaces, such as public streets, highways, or parks, as the 'private' property of the government. Both the state and federal governments were, as landowners, afforded the same rights as private landowners."[24] Precedent changed when Jersey City, New Jerey

[22] Lane, Tyler. (2019). The Public Forum Doctrine in the Modern Public Square. *Ohio Northern University Law Review*. 45 Ohio N.U.L. Rev. 465.
[23] Siddique, Bryan. (2018). Tweets That Break the Law: How the President's @realdonaldtrump Twitter Account is a Public Forum and His Use of Twitter Violates the First Amendment and the President Records Act. *Nova Law Review*. 42 Nova L. Rev. 317.
[24] Shefa, Mason. (2018). First Amendment 2.0: Revisiting Marsh and the Quasi-Public Forum in the Age of Social Media. *University of Hawaii Law Review*. 41 Hawaii L. Rev. 159.

Mayor Frank Hague sought to enforce a city ordinance preventing labor meetings in public places and banning the distribution of pro-labor literature. The Committee for Industrial Organization (CIO) filed suit, and the case of *Hague v. CIO* reached the Supreme Court. Keeping in line with the purpose of traditional public fora as places for open debate, the Court ruled that Hague's ban on political meetings violated the First Amendment rights to freedom of speech and assembly. As Justice Owen J. Roberts famously penned:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."[25]

Although the opinion in *Hague* did not refer to the public spaces at issue as public fora, the case is often cited as the origin of the Court's public forum jurisprudence. The term "public forum" was not generally used until Professor Harry Kalven Jr. wrote his influential article, *The Concept of the Public Forum.* In the paper, Kalven opined, "In an

[25] Hague v. Committee for Industrial Organization, 307 U.S. 496 (1939).

open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can commandeer."[26] The idea of the public forum may have been prevalent in America since the founding, but it wasn't until *Hague* that the legal guidelines for what constitutes a public form began to be established.

Legal precedent changed again when private companies claimed that traditional public fora can only exist on public property. In the case of *Marsh v. Alabama,* the Supreme Court ruled that a state trespassing law could not be used to prevent the distribution of religious literature in a company town.[27] Before New Deal legislation put an end to company towns, private corporations would create communities where traditional government services such as police forces, fire protection, and road maintenance were performed by private entities. Although these places traditionally held for public use were owned as private property, *Marsh* stated that the traditional public forum designation still applied. The Court rejected the company's argument that it had a right to regulate the town in the same way a homeowner has "the right ... to regulate the conduct of his guests," and explained 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 statutory and constitutional rights of those who use it."[28]

If a private company executes the authority of a government, it must afford citizens the same protections as the government. The company operated its town as

[26] D'Antonio, Joseph. (2019). Whose Forum Is It Anyway: Individual Government Officials and Their Authority to Create Public Forums on Social Media. *Duke Law Journal.* 69 Duke L.J. 701.
[27] Marsh v. Alabama, 326 US 501 (1945).
[28] Crees, John. (2009). The Right and Wrong Ways to Sell a Public Forum. *Iowa Law Review.* 94 Iowa L. Rev. 1419.

accessible and open to all; therefore, it was fundamentally indistinguishable from other government-owned spaces, except by deed of property. The facilities in a company town were built to serve the public function and, therefore, they are subject to state regulation and constitutional protection for their users. At the time, "the city street and town square were the most effective pubic fora to exchange ideas. Regardless of ownership, the community forum and marketplace of ideas must remain free. In *Marsh*, the town was quasi-governmental because it was privately-owned, but operated as a government municipality. Simply because the ownership rests in private hands does not mean public rights can be overlooked."[29]

This idea was further expanded upon in 1991 with the case of *Bock v. Westminster Mall Co.*[30] In *Bock*, "a group protesting U.S. foreign policy was allowed to distribute pamphlets in a shopping mall because the Colorado Supreme Court found that the mall functioned as a public place. The mall contained a police substation, was patrolled by police officers, was located across the street from city hall, and the city had purchased street and drainage improvements from the mall owners."[31] Once again, when operating private property as a public place, special accommodations must be made to allow for the protection of free speech in the marketplace of ideas. In evaluating current questions, it is important to recognize that private property rights do not inherently strip citizens of their First Amendment rights if the property is open and accessible to the

[29] Everett, Colby. (2019). Free Speech on Privately-Owned Fora: A Discussion on Speech Freedoms and Policy for Social Media. *Kansas Journal of Law & Public Policy.* 28 Kan. J.L. & Pub. Pol'y 113.
[30] Bock v. Westminster Mall Co., 819 P.2d 55 (1991).
[31] Crees, John. (2009). The Right and Wrong Ways to Sell a Public Forum. *Iowa Law Review.* 94 Iowa L. Rev. 1419.

public, traditionally used for discourse and debate, and essential to the preservation of the marketplace of ideas.

In addition to private property, multiple cases have arisen labeling nontraditional spaces as public fora. The Roman Forum was comprised of public, outdoor areas similar to America's sidewalks and parks. As time progressed, this traditional view of public fora has expanded to include other types of fora for speech. In the 1995 case of *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court noted that "the same principles" of the public forum doctrine applied to the University of Virginia's student-activity fund, even though it was "a forum more in a metaphysical than in a spatial or geographic sense."[32] The Court opined that UVA could not withhold funding from student religious publications that was provided to similar secular student publications. Consistent with the First Amendment, the student activity fund was labeled a public forum; therefore, administrators could not discriminate in regard to viewpoint. Because UVA was a "public institution (i.e., a creature of the state), and its school newspapers were public spaces (albeit, metaphysical), the university's rule requiring public officials to sift through and ban certain content because of the viewpoints expressed in them violated students' freedom of speech."[33] This decision, expanding the definition of a public forum outside the bounds of physical space, opened the doors for additional legal challenges and questions regarding what could or couldn't become a public forum.

In recent decades, the most prevalent, popular, and influential metaphysical space in the world is the internet. More than any invention in history, the internet has

[32] Rosenberger v. Rector & Visitors of the University of Virginia, 515 US 819 (1995).
[33] LoPiano, James. (2018). Public Fora Purpose: Analyzing Viewpoint Discrimination on the President's Twitter Account. *Fordham Intellectual Property, Media, & Entertainment Law Journal.* 28 Fordham Intell. Prop. Media & Ent. L.J. 51.

revolutionized the way people communicate with one another. Taking advantage of this incredible tool, public officials have facilitated the movement of the marketplace of ideas from in-person fora to online spaces. Of all the platforms on the internet, none have been more of a perfect fit for the marketplace of ideas than social media. In 2008, President Barack Obama's successful election was famously attributed, at least in part, to his "skillful use of the social media platform Facebook to get his message across to online audiences. His use of his own Facebook account to deliver political posts about his candidacy across the Internet seemed to mark the beginning of this now-popular trend among candidates for political office."[34] By 2016, the Congressional Research Service reported that "all U.S. Senators and almost all U.S. Representatives made use of social media platforms such as Twitter and Facebook to communicate with their constituents and the general public."[35]

In ruling that the government may not prevent convicted criminals from accessing the internet, the court in *Packingham v. North Carolina* acknowledged the landmark shift of the marketplace of ideas from metaphysical spaces to digital spaces.[36] Specifically, the Court struck down a North Carolina law banning sex offenders from joining social media. Writing for the majority, Justice Kennedy faulted the North Carolina statute as "a prohibition unprecedented in the scope of First Amendment speech it burdens," invalidating it as an impermissible limit on lawful speech.[37] Through their

[34] LoPiano, James. (2018). Public Fora Purpose: Analyzing Viewpoint Discrimination on the President's Twitter Account. *Fordham Intellectual Property, Media, & Entertainment Law Journal.* 28 Fordham Intell. Prop. Media & Ent. L.J. 51.
[35] Briggs, Samantha. (2018). The Freedom of Tweets: The Intersection of Government Use of Social Media and Public Forum Doctrine. *Columbia Journal of Law and Social Problems.* 52 Colum. J.L. & Soc. Probs.
[36] Packingham v. North Carolina, 582 U.S. ___ (2017).
[37] Association, H.L.R. (2017). First Amendment: Speech: Packingham v. North Carolina. *Harvard Law Review.* 131 Harv. L. Rev. 233.

reasoning, the Court clearly acknowledged the importance of protecting the marketplace of ideas on social media sites. In today's technological society, social media "provides a platform for all views to be expressed—it presses to every political camp's lips, no matter how minor, a digital megaphone for speakers to blast their viewpoints across endless and international 'market squares' on the Internet."[38] Restricting access to these market squares of speech would fundamentally restrict an individual's First Amendment rights. Justice Kennedy reiterated that "a fundamental First Amendment principle is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. Today, one of the most important places to exchange views is cyberspace, particularly social media."[39]

Such an unequivocal endorsement of social media as the modern marketplace of ideas has significant consequences for free speech. *Packingham*'s expansive language "flung open a Pandora's box, unleashing complications related to the digitization of certain First Amendment precepts. Most notably, the Court's analogizing to public space suggested that the public forum doctrine—whereby the government protects expressive activity on property that it owns or controls—might extend to all or parts of the internet and social media."[40] Specifically, *Packingham* unleashed a variety of theories expounded in litigation and scholarship over what could and could not constitute public fora on social media. The one essential factor *Packingham* failed to address, however, is the presence of multiple different types of speech in the same space. On social media, private

[38] LoPiano, James. (2018). Public Fora Purpose: Analyzing Viewpoint Discrimination on the President's Twitter Account. *Fordham Intellectual Property, Media, & Entertainment Law Journal.* 28 Fordham Intell. Prop. Media & Ent. L.J. 51.
[39] Packingham v. North Carolina, 582 U.S. ___ (2017).
[40] Association, H.L.R. (2017). First Amendment: Speech: Packingham v. North Carolina. *Harvard Law Review.* 131 Harv. L. Rev. 233.

speech, government speech, and public fora intertwine to create the modern idea of the marketplace of ideas. Instead of reclassifying the entirety of a social media platform as a public forum, this paper embraces the multifaceted identity of social media sites and proposes a new legal understanding to address the numerous questions created by the new marketplace of ideas.

In equating online spaces to physical spaces such as streets and parks, the Court created confusion, intrigue, and possibility for the creation of a new public understanding of free speech. Currently, "the First Amendment free speech guarantee, along with all constitutional rights, only protects us against the government;" however, "it's really important not only for our individual freedom of speech to be meaningful, but also for our rights as citizens in a participatory democracy to have equal access to social media platforms."[41] In summary, while individuals have no legal right to join or post to a privately-owned and operated social media platform, *Packingham* declares that social media platforms are key spaces operating the marketplace of ideas. In effect, this decision is easily perceived as the privatization of public fora without the oversight and protections that are guaranteed on government property.

As courts in the future consider new cases involving public fora and the marketplace of ideas, they must consider the enormous role social media plays in American political discourse. Americans have increasingly turned to the internet "to shop, read news, find love, conduct business, communicate and engage with governmental representatives, and discuss politics or current events. Social media sites, in

[41] Strossen, Nadine. Does the First Amendment Apply to Social Media Companies? *TalksOnLaw*. www.talksonlaw.com/briefs/does-the-first-amendment-require-social-media-platforms-to-grant-access-to-all-users.

particular, have risen to vital importance in American discourse. Never before has there been as effective a platform for the communication of ideas as social media. Now, an idea posted to a site such as Facebook, Twitter, or YouTube has the ability instantly to reach hundreds of millions, if not billions, of people around the world. This idea, posted by a single person on social media, enters into the global marketplace of ideas, and competes against millions of alternative ideas. If it gains converts who share the idea, it may spread like wildfire."[42] Viral ideas adopted in the global marketplace of ideas online have prompted revolutions, influenced elections, and dramatically shaped the course of the world. As litigation persists and jurisprudence expands, the fate of free speech will continue to rest in the hands of private companies until impactful legislation is passed.

III. PUBLIC FORA CLASSIFICATIONS

Though the concept of the public forum predates the founding of the U.S. by hundreds of years, American jurisprudence has shaped public fora and placed them generally into one of three categories: traditional, designated, or limited. The first, and most widely considered, category is the traditional public forum. Traditional fora are physical property owned or controlled by the government that have historically been opened to the public for the purposes of assembly and communication. In order for a locale to be classified as a traditional public forum, the property must have, by long tradition or by government fiat, "been devoted to assembly and debate."[43] In the case of

[42] Shefa, Mason. (2018). First Amendment 2.0: Revisiting Marsh and the Quasi-Public Forum in the Age of Social Media. *University of Hawaii Law Review.* 41 Hawaii L. Rev. 159.
[43] Siddique, Bryan. (2018). Tweets That Break the Law: How the President's @realdonaldtrump Twitter Account is a Public Forum and His Use of Twitter Violates the First Amendment and the President Records Act. *Nova Law Review.* 42 Nova L. Rev. 317.

Perry Education Association v. Perry Local Educators' Association, the Court reaffirmed its decision in *Hague* that places such as streets and parks "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[44] The traditional public forum in America is the original home of the marketplace of ideas since it is known for its accessibility and openness to all.

Although the level of access has increased with America's commitment to gender, ethnic, religious, and racial diversity, the traditional public forum has always been a place where communities gather to discuss and debate social change. These quintessential public fora sharply limit the government's ability to restrict communicative activity and debate within them. The state may, however, "enforce reasonable, content-neutral regulations of the time, place, and manner of expression, if such regulations are narrowly tailored to serve a significant government interest and leave open ample alternative means of expression."[45] Examples of potentially acceptable limits to speech in a traditional public forum include limiting noise at certain hours of the night in order to help nearby residents sleep. Even if the action is in protest to the government, "a truck driver's loud and persistent honking on a neighborhood street (a traditional public forum) in the wee hours of the night may not be protected. In such a scenario, where there are alternative channels for a truck driver to protest, and the goal is not to suppress the truck driver's viewpoint, but rather to enforce the content-neutral aim of allowing citizens to sleep in their homes at night, courts are less likely to find impermissible censorship of

[44] Perry Educ. Ass'n v. Perry Educators' Ass'n, 460 U.S. 37 (1983).
[45] Bohanon, Alysha. (2016). Tweeting the Police: Balancing Free Speech and Decency on Government-Sponsored Social Media Pages. *Minnesota Law Review*. 101 Minn. L. Rev. 341.

political speech if the government restricts the honking."[46] When evaluating government policies, the Court balances a citizen's rights against permissible municipality action. "Although citizens have strong free-speech rights" in public fora such as streets, sidewalks, and parks, a municipality can regulate, operate, and change these fora without consulting the citizens entitled to their use.[47] While there are exceptions, restricting speech in a traditional forum is the hardest to justify. As the debate surrounding public fora on the internet continues, the traditional classification seems insufficient due to the fact that traditional fora have been narrowly defined by the Court with no room to extend to newer areas in cyberspace. Traditional fora are easily identifiable with a long series of historical precedence, two factors the internet lacks.

When a public forum does not fit the historical requirements of a traditional forum, governments may create or designate government property as a forum for expressive activity. These designated public fora require courts to examine the government's intent in opening, establishing, and maintaining the property. Additionally, "the Supreme Court has repeatedly held that the government must have an *affirmative intent* to create a public forum" for expressive private speech in order for the forum to qualify as one that is designated.[48] Intent to create a designated forum becomes tricky because courts must consider both explicit statements about intent as well as the policy and practice of the government regarding the property. The nature of the property and its

[46] LoPiano, James. (2018). Public Fora Purpose: Analyzing Viewpoint Discrimination on the President's Twitter Account. *Fordham Intellectual Property, Media, & Entertainment Law Journal.* 28 Fordham Intell. Prop. Media & Ent. L.J. 51.
[47] Crees, John. (2009). The Right and Wrong Ways to Sell a Public Forum. *Iowa Law Review.* 94 Iowa L. Rev. 1419.
[48] Siddique, Bryan. (2018). Tweets That Break the Law: How the President's @realdonaldtrump Twitter Account is a Public Forum and His Use of Twitter Violates the First Amendment and the President Records Act. *Nova Law Review.* 42 Nova L. Rev. 317.

compatibility with communication, debate, and expressive activity are all important issues to consider when determining whether or not there was intent to open a piece of property as a public forum. Good examples of designated public fora include public theaters and meeting rooms at state universities.

The difference between a designated and a limited forum is historically blurry, but the entire distinction boils down to the intent of the government. "Did the state intend to create a 'designated' open public forum that operates as a traditional public forum, or did it intend to establish a designated but 'limited' public forum in which the government retains more control over expressive activity?"[49] Designated fora can basically be classified as any non-traditional public forum that the government specifically makes accessible to the public for assembly and debate. In contrast, a limited forum must be opened for a very specific purpose with rules in place to maintain the intended purpose. To illustrate the difference between a limited forum and a traditional forum, we can analyze a theoretical situation where the U.S. President opens an online forum to the public with two limitations in mind that he regularly enforces: "(1) the topic of discussion is immigration reform; and (2) only users who are respected scholars in the field are permitted to discuss the issue. Content-based restrictions in that forum on topics dealing with issues beyond immigration reform would be permissible under the First Amendment."[50] Additionally, anyone participating in the forum that communicates information unrelated to immigration reform could be blocked or removed since the

[49] Bohanon, Alysha. (2016). Tweeting the Police: Balancing Free Speech and Decency on Government-Sponsored Social Media Pages. *Minnesota Law Review.* 101 Minn. L. Rev. 341.
[50] LoPiano, James. (2018). Public Fora Purpose: Analyzing Viewpoint Discrimination on the President's Twitter Account. *Fordham Intellectual Property, Media, & Entertainment Law Journal.* 28 Fordham Intell. Prop. Media & Ent. L.J. 51.

forum was opened for a limited purpose. People in the forum may also be removed if they are not respected scholars in the field. However, "any respected scholar in the field criticizing the president on his views relating to immigration reform, or posting *content about* immigration reform that the president disagrees with, would be protected from having their viewpoint on the topic censored."[51] Since the president opened a public forum with limited scope, enforceable rules regarding that scope are permissible. Another example of a limited public forum could be university property limited in use to only student organizations. Remaining content-neutral is vitally important. While some regulations are acceptable, "strict scrutiny will still apply to any restrictions based on a speaker's opinions or viewpoint."[52]

When discussing online public fora, most scholars spend time discussing the applicability of designated and limited forum status to different aspect of the internet. In the 2006 U.S. District Court case of *KinderStart.com v. Google*, "KinderStart argued that Google violated its First Amendment rights when its website was removed from Google's search results."[53] The District Court opinion stated that Google did not create a forum by nature of their search engine because a private space does not transform into a public forum merely because it is used for speech.[54] Although private search engines have avoided the forum label thus far, growing outcry from the public has led many

[51] LoPiano, James. (2018). Public Fora Purpose: Analyzing Viewpoint Discrimination on the President's Twitter Account. *Fordham Intellectual Property, Media, & Entertainment Law Journal.* 28 Fordham Intell. Prop. Media & Ent. L.J. 51.
[52] Siddique, Bryan. (2018). Tweets That Break the Law: How the President's @realdonaldtrump Twitter Account is a Public Forum and His Use of Twitter Violates the First Amendment and the President Records Act. *Nova Law Review.* 42 Nova L. Rev. 317.
[53] Lane, Tyler. (2019). The Public Forum Doctrine in the Modern Public Square. *Ohio Northern University Law Review.* 45 Ohio N.U.L. Rev. 465.
[54] Kinderstart.Com, LLC v. Google, Inc., No. 5:2006cv02057 - Document 29 (N.D. Cal. 2006).

policymakers to reevaluate the nature of public fora and consider whether new applications for these categories are warranted.

While some government property has *traditionally* been held as a public forum and some property has been *designated* as a public forum, other property has been held by the government as a *nonpublic* forum. This category of nonpublic fora has been described by the Court as property owned or controlled by the government for purposes other than public communication. Nonpublic classification is essentially the default category for "everything owned by the government that is not identified in the other categories."[55] In nonpublic fora, the Court has stated that the government has the power to implement broad restrictions on speech similar to those of private property owners. Speakers may be excluded from nonpublic fora as long as their exclusion is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[56] One example of a nonpublic forum may be the lobby of a courthouse which is used for facilitating court proceedings, not facilitating public debate. "Protestors may be able to voice their concerns on the courthouse steps or the street beside it, but the lobby within may justifiably prohibit protest within. These fora are thus afforded different gradients of protection from restrictions on speech, are subject to time, place, or manner regulations, and the government can restrict speech within the forum so long as the restriction is reasonable and not a cloaked attempt to silence particular viewpoints."[57]

[55] Siddique, Bryan. (2018). Tweets That Break the Law: How the President's @realdonaldtrump Twitter Account is a Public Forum and His Use of Twitter Violates the First Amendment and the President Records Act. *Nova Law Review.* 42 Nova L. Rev. 317.
[56] Bohanon, Alysha. (2016). Tweeting the Police: Balancing Free Speech and Decency on Government-Sponsored Social Media Pages. *Minnesota Law Review.* 101 Minn. L. Rev. 341.
[57] LoPiano, James. (2018). Public Fora Purpose: Analyzing Viewpoint Discrimination on the President's Twitter Account. *Fordham Intellectual Property, Media, & Entertainment Law Journal.* 28 Fordham Intell. Prop. Media & Ent. L.J. 51.

In nonpublic fora, the government has broad powers to suppress employee speech that it disagrees with. In his majority opinion *Garcetti v. Ceballos,* Justice Kennedy expanded on the marketplace of ideas theory by drawing a line and stating that an employee has no First Amendment rights when speaking regarding their official duties.[58] Although Kennedy acknowledged the governmental interest in allowing employees to engage in public discussion, "he ultimately did not balance the competing interests at stake. Instead, he embraced a bright-line rule that that when an employee speaks as an employee rather than a citizen, the First Amendment does not apply at all."[59] Utilizing these broad censorship powers granted by the courts, "the government has wide discretion in maintaining the nonpublic character" of its fora, and "may regulate in ways that would be impermissible were it to designate a limited public forum."[60] In another Court case, *U.S. v. American Library Association,* restrictions on public library computers were held constitutional because libraries were not classified as public fora.[61] Chief Justice William Rehnquist, writing for the plurality, "held that public library access did not constitute a traditional public forum because the forum was relatively new" and had not been held historically for public assembly or debate.[62] Interpreting Justice Rehnquist's opinion further, the Court found the designated public forum classification inapplicable to internet access in a library because the intent of the library was to facilitate learning and recreation, not create a public forum. In general, if government

[58] Garcetti v. Ceballos, 547 U.S. 410 (2006).
[59] Papandrea, Mary-Rose. (2019). The Missing Marketplace of Idea Theory. *Notre Dame Law Review.* 94 Notre Dame L. Rev. 1725.
[60] Institute, Legal Information. The Public Forum. *Cornell Law School.* www.law.cornell.edu/constitution-conan/amendment-1/the-public-forum.
[61] United States v. American Library Assn., Inc., 539 US 194 (2003).
[62] Lane, Tyler. (2019). The Public Forum Doctrine in the Modern Public Square. *Ohio Northern University Law Review.* 45 Ohio N.U.L. Rev. 465.

property has not traditionally been used as a public forum and it hasn't been clearly designated as a public forum, the property is classified as a nonpublic forum with legal grounds for strict government control.

IV. GOVERNMENT SPEECH DOCTRINE

When a governmental actor or a person representing the government speaks, his or her speech is protected under the government speech doctrine. This relatively new doctrine creates a strict dichotomy between contested speech as either governmental or private. When categorizing speech, "either the public forum doctrine (if speech is private) or the government speech doctrine (if speech is characterized as the government's) can apply, but not both."[63] Although the Court did not mention the term 'government speech' in its opinion in *Rust v. Sullivan*, this case is widely considered the cornerstone of government speech jurisprudence. In *Rust*, federal regulations barred providers at family planning clinics from receiving federal funds under Title X of the Public Service Health Act if they engaged in abortion counseling, referral, or advocacy. Even if a pregnant woman specifically requested this information, a Title X doctor could not refer her to abortion services.[64] The law, the plaintiffs argued, "impermissibly discriminated against all expression related to abortion, even neutral and accurate information, while compelling providers to communicate with pregnant women in a manner that promoted carrying the pregnancy to term. In a five-to-four decision, the majority held that the government was entitled to fund a program that advanced certain goals (to the exclusion

[63] Siddique, Bryan. (2018). Tweets That Break the Law: How the President's @realdonaldtrump Twitter Account is a Public Forum and His Use of Twitter Violates the First Amendment and the President Records Act. *Nova Law Review.* 42 Nova L. Rev. 317.
[64] Rust v. Sullivan, 500 U.S. 173 (1991).

of others) without violating the First Amendment."[65] While the Rust case did not classify Title X doctors as governmental actors, the decision created precedent for the government to establish limits to its own programs that force people to speak within the confines of governmental values. Traditional jurisprudence on this issue insists than any constraint on governmental speech must come from the political process. The Court assumes that "the marketplace of ideas will cause competing viewpoints to emerge, allowing voters to choose which government speech they agree or disagree with."[66] If voters disagree with governmental speech, they should elect leaders who will speak and act according to their values.

In 2015, the case of *Walker v. Sons of Confederate Veterans* determined that license plates on cars constituted government speech, not public fora.[67] A 5-4 majority in the Supreme Court "held that the Texas Department of Motor Vehicles Board could reject a specialty license plate request submitted by the Sons of Confederate Veterans because the presence of a Confederate flag violated its policy against 'offensive' license plates."[68] If the content on license plates constituted public fora, the government could not discriminate which information is permitted, but instead, the close nexus between the government and the content on license plates gives the public the reasonable expectation that the information showed on license plates aligns with government values. Thus, while not directly censoring speech on the basis of viewpoint, "the government may still favor

[65] Bohanon, Alysha. (2016). Tweeting the Police: Balancing Free Speech and Decency on Government-Sponsored Social Media Pages. *Minnesota Law Review.* 101 Minn. L. Rev. 341.
[66] Siddique, Bryan. (2018). Tweets That Break the Law: How the President's @realdonaldtrump Twitter Account is a Public Forum and His Use of Twitter Violates the First Amendment and the President Records Act. *Nova Law Review.* 42 Nova L. Rev. 317.
[67] Walker v. Texas Division, Sons of Confederate Veterans, Inc., 576 US _ (2015).
[68] Papandrea, Mary-Rose. (2019). The Missing Marketplace of Idea Theory. *Notre Dame Law Review.* 94 Notre Dame L. Rev. 1725.

the speech of one speaker over another so long as that speaker's goals conform with its own, even at the detriment to the cause of another speaker's viewpoint."[69]

How the government utilizes its speech is extremely important because it shows the world and the American public the priorities of the administration. In finding that license plates constitute government speech, the Court is expanding on the idea that general public perception can be used to classify speech in one way or another. Justice Stephen Breyer suggested "a whole host of factors might be relevant to determining whether government speech is at issue, but ultimately settled on three factors as the most relevant in this particular case: (1) the history of the program, (2) the government's control over speech, and (3) the perception of a reasonable person."[70] While license plates present a more difficult case, *Walker* presents a strong rationale for classifying social media posts by public officials as government speech. Even if the post does not occur on a government-created social media account, a post made by an elected official on a private account in regards to their official duties may be reasonably viewed by the public as government speech. Moving forward, it is important to note that when a public official speaks, their speech is granted additional protections under the governmental speech doctrine. If the public disagrees with the speech of the government, the best course of action would be to elect different representatives.

The American marketplace of ideas is rooted in the establishment of public fora that permit anyone to speak regardless of their opinion. This policy of viewpoint

[69] LoPiano, James. (2018). Public Fora Purpose: Analyzing Viewpoint Discrimination on the President's Twitter Account. *Fordham Intellectual Property, Media, & Entertainment Law Journal.* 28 Fordham Intell. Prop. Media & Ent. L.J. 51.
[70] Papandrea, Mary-Rose. (2019). The Missing Marketplace of Idea Theory. *Notre Dame Law Review.* 94 Notre Dame L. Rev. 1725.

neutrality must be accompanied, however, by a set of core Constitutional values. Under Constitutional law, the government must permit anti-American sentiment, including discriminatory statements, within public fora. Instead of allowing these ideas to flourish unfettered, the U.S. can permit them to be shared while actively pushing back against them utilizing government speech. First Amendment scholars have debated "between a commitment to epistemic humility, which requires the state to refrain from endorsing any substantive values, and a substantive ideal of free and equal citizenship."[71] The paradox of free speech is that the ability of all individuals to express their own opinions without threat of government censorship also allows individuals to use their free speech to attack rights, democracy, and the public forum itself. Liberal democracies that practice viewpoint neutrality in spaces such as public fora risk being undermined by people who reject the central premises of democracy itself. The free speech paradox can be resolved in many ways, but most effectively by allowing the government to advocate for itself through the government speech doctrine in the marketplace of ideas.

First Amendment protections are not afforded to American citizens the same way in public fora as they are in statements labeled as government speech. The marketplace of ideas is strengthened and cultivated when the government can participate and have an opinion. American values can be defended and preserved when the government criticizes hate speech and other viewpoints that seek to undermine the freedom and equality of citizens. Using its expressive capacity, "the state can respect rights at the same time that it checks the spread of illiberal viewpoints, thus avoiding complicity with the hate speech

[71] Brettschneider, Corey. (2013). Value Democracy as the Basis for Viewpoint Neutrality: A Theory of Free Speech and Its Implications for the State Speech and Limited Public Forum Doctrines. *Northwestern University Law Review.* 107 Nw. U.L. Rev. 603.

it protects."[72] Using expressing capacities such as public holidays, government subsidies, and foreign policies to criticize the hateful and discriminatory speech that it simultaneously protects is known as democratic persuasion. In the 2009 case of *Pleasant Grove City v. Summum*, the Court decided that monuments erected in a public park constitute government speech, not a public forum. While the park itself may be a public forum, the way the government adorns its property can be generally accepted as the speech of the government itself.[73]

Unlike in a public forum, the government is under no obligation to acknowledge or promote different viewpoints. Not only would it be physically infeasible for the government to allow an unlimited number of monuments for every viewpoint on public property, but the government itself has a right to promote the values and ideals the institution stands for. After the Court's decision in *Obergefell v. Hodges*[74] legalized same-sex marriage across the U.S. in 2015, President Obama covered the White House in rainbow lights to show support.[75] Using democratic persuasion, the government may pick and choose what it says and promotes within the marketplace of ideas. Today, the most common use of democratic persuasion is through government speech on social media. Just as in any press release or speech, governments on social media have permission to communicate their views or opinions without including or acknowledging opposing positions.

[72] Brettschneider, Corey. (2013). Value Democracy as the Basis for Viewpoint Neutrality: A Theory of Free Speech and Its Implications for the State Speech and Limited Public Forum Doctrines. *Northwestern University Law Review.* 107 Nw. U.L. Rev. 603.
[73] Pleasant Grove City v. Summum, 555 US _ (2009).
[74] Obergefell v. Hodges, 576 US _ (2015).
[75] Malloy, Allie, and Karl de Vries. (2015, June 30). White House Shines Rainbow Colors to Hail Same-Sex Marriage Ruling. *CNN*. www.cnn.com/2015/06/26/politics/white-house-rainbow-marriage/index.html.

Public entities are entering social media at a rapid pace. Just as the internet has revolutionized the way companies, organizations, and everyday people interact with one another, social platforms "have similarly transformed how the government communicates with its constituents, and vice versa. Government entities ranging from the White House, NASA, and the Pentagon all the way down to the smallest branches of local government increasingly rely on their social media pages to inform and interact with the public in various ways, including policy blogs, behind-the-scenes photos and videos, emergency notifications, and severe weather alerts."[76] Courts analyzing social media protections through the lens of the First Amendment have recognized that social media posts from private individuals constitute protected speech. When a user comments on a government-sponsored page, however, the issue is more complex. Very quickly, a crime update from a police department can devolve into a comments section full of name-calling and heated debate. When government speech and private speech both exist within the same context, "the level of protection the First Amendment provides to the speech depends on the extent to which the social media page is categorized as a public forum, and whether the private speech posted on this forum prevents the government from speaking for itself."[77] In the next section, the intersection of public fora and the government speech doctrine will be dissected more thoroughly, but for now, understand that the legal implications of these two types of speech are yet to be fully determined.

[76] Bohanon, Alysha. (2016). Tweeting the Police: Balancing Free Speech and Decency on Government-Sponsored Social Media Pages. *Minnesota Law Review.* 101 Minn. L. Rev. 341.
[77] See 76

V. SECTION 230

Online social media platforms operate under protections provided by Section 230 of the Communications Decency Act (CDA), passed in 1996. Section 230 was created in response to a New York Supreme Court decision in 1995, *Stratton Oakmont, Inc. v. Prodigy Services Co.,* that held that online service providers could be held liable for the speech of their users.[78] In this case, a securities investment-banking firm sued Prodigy Services over statements posted on their "Money Talk" computer bulletin board. These comments included defamatory remarks that Stratton Oakmont and their president committed criminal and fraudulent acts.[79] The court analyzed Prodigy's liability for these comments through the lens of editorial control over content posted to the site. In their decision, the court found that "Prodigy held itself out to the public and its members as controlling the content of its computer bulletin boards… By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and 'bad taste,' for example, Prodigy is clearly making decisions as to content."[80] Because Prodigy exerted some sort of editorial control over the forum, the company was liable for the comments made on the forum.

This standard changed with the implementation of Section 230. One of the main goals of Congress in passing the CDA was to "provide a legal framework for the Internet to flourish in several areas including political discourse, cultural development, intellectual development, and entertainment."[81] Section 230 was specifically included

[78] Stratton Oakmont, Inc. v. Prodigy Services Co., 1995 WL 323710 (N.Y. Sup. Ct. 1995).
[79] Bolson, Andrew. (2016). Flawed but Fixable. *Rutgers Computer & Technology Law Journal*. 42 Rutgers Computer & Tech. L.J. 1.
[80] See 78
[81] Azriel, Joshua. (2011, July). Using Social Media as a Weapon to Harm Victims: Recent Court Cases Show a Need to Amend Section 230 of the Communications Decency Act. *Journal of Internet Law.*

because Congress did not want online companies to be held back from expanding by an avalanche of lawsuits related to questionable comments made by third parties. In addition to calling the internet "a forum for a true diversity of political discourse," Section 230 specifically states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[82] While publishers can be held legally liable for their speech, internet service providers (ISPs) that simply share, repost, or distribute speech cannot be held liable for the content. Far from the tech startups of previous generations, social media companies today wield immense control over their platforms. Relating to Section 230, scholars are constantly in disagreement over how much editorial control is necessary to move a platform from designation as a distributor to designation as a publisher.

Websites today take advantage of Section 230, often to the detriment of real people. From August 2007 to February 2009, a website called JuicyCampus.com allowed users to post anonymous gossip, rumors, and abusive speech on its platform. Users often published sensitive information such as phone numbers and addresses. "The victims of the harmful speech had little chance of identifying the posters and, because of Section 230 of the CDA, could not hold the website liable for the content posted on the site. Without any recourse, victims of posts, mostly college-aged young adults, were left embarrassed, traumatized and scared that the posts could harm future employment opportunities."[83] Although JuicyCampus.com is no longer operational, the legacy of unnecessary victimization can often be found on modern platforms such as Twitter,

[82] Communications Decency Act of 1996. 47 U.S. Code § 230 (2018).
[83] Bolson, Andrew. (2016). Flawed but Fixable. *Rutgers Computer & Technology Law Journal*. 42 Rutgers Computer & Tech. L.J. 1.

Reddit, Facebook, and Instagram. Recent court cases reflect a growing trend of plaintiffs suing social media companies when their network is used as a public forum for posting harmful content. As some of the fastest growing communication tools, "it is not surprising that Facebook and Twitter are the social networking sources often used for these growing number of incidents. State and federal courts have consistently upheld Section 230… that exempts ISPs and other 'users' from any responsibility related to offensive content posted on the Internet."[84] As the nature of the internet changes, Section 230 has remained consistent as a legal shield for large social media companies to operate their platforms as they see fit.

Understanding Section 230 is important because the future of free speech may not be determined by large constitutional issues, but rather, regulatory statutes regarding online business models. Yale Law School First Amendment scholar Jack Balkin noted that "in the digital age of Internet communication, basic First Amendment values are critical: the freedom to express and promote ideas, opinion, and scholarship. He compared the online environment of blogging, search engines, and social networking to the Enlightenment Era when the printing press was the technology for distributing books and pamphlets across Europe."[85] Section 230 identifies regulatory standards for the internet as a whole, but often, the reality of the situation requires more nuance than the law provides. Although *Packingham* claims that the marketplace of ideas has moved online, social media companies have the right to censor speech on their platforms for arguably any reason. Section 230 states that ISPs cannot be held liable for "any action

[84] Azriel, Joshua. (2011, July). Using Social Media as a Weapon to Harm Victims: Recent Court Cases Show a Need to Amend Section 230 of the Communications Decency Act. *Journal of Internet Law.*
[85] See 84

voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[86] Under this statute, social media companies have free reign to censor any content on their sites deemed incongruent with their terms and conditions, even if that content can be classified as free speech protected under the First Amendment. In the past, social media companies have positioned themselves as open and accessible platforms to connect and communicate with others. With this public perception, it makes sense that media companies would want to claim broad protections under Section 230. In a public forum, the operator of the forum is not legally liable for the speech of individual people. While social media companies want to be viewed as fora for the public to engage with one another, they also want to exert editorial control to maintain some semblance of decency.

Operating under these protections has raised legal questions regarding what users can and cannot do online. On a small scale, public officials such as Dean Browning, a former local commissioner in Pennsylvania, have been accused of attempting deception on social media using fake "burner" accounts (social media accounts used to post anonymously). Browning, a white, pro-life, "Christian conservative" replied to his own tweet claiming to be a "black gay guy" who supports Trump.[87] Had Browning successfully logged into an alternative account as many accuse him of intending to do, he may have been successful in deceiving his constituents. On a large scale, Russian

[86] Communications Decency Act of 1996. 47 U.S. Code § 230 (2018).
[87] Jennings, Rebecca. (2020, November 10). The Incredibly Bizarre Dean Browning and "Dan Purdy" Twitter Drama, Explained. *Vox*. www.vox.com/the-goods/2020/11/10/21559458/dean-browning-dan-purdy-byl-holte-patti-labelle-twitter-gay-black-man.

operatives used social media to conduct an "information warfare campaign" to spread disinformation and sow societal division prior to the 2016 election. "Masquerading as Americans, these operatives used targeted advertisements, intentionally falsified news articles, self-generated content, and social media platform tools to interact with and attempt to deceive tens of millions of social media users in the United States."[88] The same Section 230 that that protects media companies from one type of deception protects them from all types of deception. In upholding Section 230, courts have given users the right to knowingly repost offensive or misleading content even if they were not the original authors. If users actively work with publishers to distribute defamatory materials online, they can cause significant harm both to individuals and our systems of governance. Burner accounts and disinformation campaigns are just a couple ways that people and organizations try to manipulate the marketplace of ideas. "One person could use a pseudonym to electronically publish offensive information while the other person whose identity is not hidden has the legal authority to promote it by reposting and forwarding the content. This issue of user responsibility is a potential 'pandora's box' in the CDA."[89]

Social media companies have responded to this "pandora's box" of deception in slightly different ways, but all of them utilize some forms of filters, censorship, and content-monitoring to create specific atmospheres on their sites. As long as these restrictions are in "good faith," Section 230 provides legal liability for restricting

[88] Intelligence, Committee. (2020). Report on the Select Committee on Intelligence on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election Volume 2: Russia's Use of Social Media. *116th Congress.* www.intelligence.senate.gov/sites/default/files/documents/ Report_Volume2.pdf.
[89] Azriel, Joshua. (2011, July). Using Social Media as a Weapon to Harm Victims: Recent Court Cases Show a Need to Amend Section 230 of the Communications Decency Act. *Journal of Internet Law.*

constitutionally-protected speech. To the public, these platforms are free social media sites used to connect with friends. Under the law, these platforms are not liable for users' posts because they are mere distributors of information. Platforms such as Facebook and Twitter are growing at a tremendous rate in part because they're exploiting the best of both classifications. In reality, social media companies exhibit far more editorial control than they publicize. Certainly, there is a lot of nuance in determining legal liability involved on the internet, but as long as Section 230 remains active, social media companies will be able to reap the commercial benefits of being perceived as public fora while operating as private corporations.

SECTION TWO: A CHANGING ECOSYSTEM

"There is a huge need and a huge opportunity to get everyone in the world connected, to give everyone a voice and to help transform society for the future. The scale of the technology and infrastructure that must be built is unprecedented, and we believe this is the most important problem we can focus on."

-Mark Zuckerberg

VI. CLASSIFYING GOVERNMENT SOCIAL MEDIA

As the marketplace of ideas moves online, which spaces of the internet qualify as public fora has become a significant issue for government officials and their constituents alike. At this point, only a few cases have addressed this question, but so far, none have conclusively answered it in a manner that establishes firm precedent. Until the Supreme Court weighs in, however, these cases make up the basic guidelines for how public officials should engage with constituents on social media platforms. In 2017, the court in *Davison v. Loudoun County Board of Supervisors* issued a "declaratory judgment clarifying that Defendant's 'Chair Phyllis J. Randall' Facebook page operates as a forum for speech under the First Amendment to the U.S. Constitution."[90] In this case, a local resident was blocked from making comments on a Facebook page operated by the Chair

[90] Davison v. Loudoun County Board of Supervisors et al, No. 1:2016cv00932 - Document 132 (E.D. Va. 2017).

of the Loudoun County Board of Supervisors. Although the Facebook page was set up and run specifically by the Chair of the Board and not the Board itself, it was still declared a public forum due to its use for government business and its Facebook label as "Government Official." The Chair went as far as to make a post stating that she wanted "to hear from ANY Loudoun citizen on ANY issues."[91] Blocking citizens from engaging in this forum was deemed a restriction on their freedom of speech. Not only was this decision important in alerting policymakers to the consequences of reckless action on their social media profiles, it set the precedent for a more important decision that took direct aim at reigning in President Donald Trump's authority over his social media account.

In May 2018, the case of *Knight First Amendment Institute v. Trump* was decided in the U.S. District Court for the Southern District of New York. The basis for this case weighed on whether or not the court would uphold the notion that Trump's @realDonaldTrump Twitter account was a public forum.[92] A distinction must be made here between government speech by creation or government speech by designation. Certainly, verified social media accounts such as @POTUS and @WhiteHouse that have been created by the government for dissemination of government speech and handed down between administrations must adhere to stricter rules than other accounts. @realDonaldTrump, however, was the president's personal social media handle created before the 2016 election when he was not legally liable as a government actor. After inauguration, Trump chose to tweet from both his official government-created account

[91] Davison v. Loudoun County Board of Supervisors et al, No. 1:2016cv00932 - Document 132 (E.D. Va. 2017).
[92] Knight First Amendment Institute at Columbia University v. Trump, No. 18-1691 (2d Cir. 2019).

and his personal account which, at the time, collectively numbered over 100 million followers.[93]

Both @POTUS and @realDonaldTrump were perceived to convey official messages from the president given the interchangeable nature of the two and the fact that each account often retweeted and shared posts from the other. On multiple occasions, the president stated that he used his personal Twitter account to express opinions on public policy and talk directly to the people about issues of national importance. In 2017, former Press Secretary Sean Spicer elaborated on the status of @realDonaldTrump by stating that he "is the president of the United States, so they're considered official statements by the president of the United States."[94] Comments such as these supported the claim that an individual's replies to the president on social media deserve First Amendment protection. Less than a week after Spicer's claim that these tweets were official statements, "the Ninth Circuit Court of Appeals cited a tweet from @realDonaldTrump in a decision as evidence to block the travel ban."[95] In the *Knight* case, the court analyzed the previous evidence and established that Trump's tweets from his personal account indeed classify as government speech.

While the tweet itself operates under the government speech doctrine, *Knight* designated the reply section below the tweet as a public forum. Due to the nature of the internet, @realDonaldTrump could not be classified as a traditional public forum; however "precedent set by the Supreme Court clearly indicates that public forum

[93] Trump, Donald. (2020). *Twitter*. twitter.com/realDonaldTrump.
[94] Jenkins, Aric. (2017, June 6). Sean Spicer Says President Trump Considers His Tweets 'Official' White House Statements. *Time.* time.com/4808270/sean-spicer-donald-trump-twitter-statements.
[95] Siddique, Bryan. (2018). Tweets That Break the Law: How the President's @realdonaldtrump Twitter Account is a Public Forum and His Use of Twitter Violates the First Amendment and the President Records Act. *Nova Law Review.* 42 Nova L. Rev. 317.

doctrines may be applied to locations that are *metaphysical*" such as pools of funds to subsidize speech or a school's internal mailing system.[96] In addition to the space being metaphysical, the lack of government ownership over the social media site did not prohibit the page from being classified as a public forum. Professor Lyrissa Lidsky, dean of the University of Missouri School of Law, contends that government ownership or exclusive control "is not a *sine qua non* of public forum status," and that "[j]ust as the government can rent a building to use as a forum for public debate and discussion, so, too, can it 'rent' a social media page for the promotion of public discussion."[97] Just as public officials can rent the ballroom of a hotel in order to host a public forum for their community, government actors can "rent" social media pages as a way to engage with their constituents in the marketplace of ideas.

One factor courts can consider when searching for government intent when creating a forum is the nature of the property and its compatibility with expressive activity. In essence, the property is more likely to be classified as a public forum if the property is suitable for discussion and debate. Given the characteristics of social media, "this is a point that requires little discussion; it is difficult to imagine a space more designed for expressive activities. By its very definition, the nature of a social media page is online expression. Government-sponsored social media pages adopt this open forum atmosphere the same as any other page. It has even been suggested that social media has replaced the quintessential city park as 'the new public square,' as people increasingly

[96] Siddique, Bryan. (2018). Tweets That Break the Law: How the President's @realdonaldtrump Twitter Account is a Public Forum and His Use of Twitter Violates the First Amendment and the President Records Act. *Nova Law Review.* 42 Nova L. Rev. 317.
[97] Association, H.L.R. (2017). First Amendment: Speech: Packingham v. North Carolina. *Harvard Law Review.* 131 Harv. L. Rev. 233.

participate in discussions related to civic engagement online."[98] Without any posted notice or expressed intent to create a limited public forum, the court in *Knight* labeled @realDonaldTrump as a designated public forum. Because the intention of the president was to utilize his personal Twitter account to engage with American citizens in the marketplace of ideas, the comments in this forum are legally protected under the First Amendment; therefore, "when the president attempts to regulate speech in the designated forum that he created, he is bound to the same constitutional standards that apply in a traditional forum."[99] If Trump wanted to regulate his Twitter account, any restrictions he created must be content-neutral and analyzed with strict scrutiny. In *Knight,* the plaintiffs were clearly blocked because they expressed views critical of the president. Although the framers of the Constitution didn't contemplate presidential Twitter accounts, "they understood that the president must not be allowed to banish views from public discourse simply because he finds them objectionable. Having opened this forum to all comers, the president can't exclude people from it merely because he dislikes what they're saying."[100] By preventing people from engaging in his designated public forum on Twitter, Trump violated their First Amendment rights, the court ruled.

Even after *Knight,* some scholars still believe that politicians, including governors and presidents, should be able to monitor their social media accounts in any manner they deem fit. Constitutional law scholar Michael McConnell, director of Stanford's

[98] Bohanon, Alysha. (2016). Tweeting the Police: Balancing Free Speech and Decency on Government-Sponsored Social Media Pages. *Minnesota Law Review.* 101 Minn. L. Rev. 341.
[99] Siddique, Bryan. (2018). Tweets That Break the Law: How the President's @realdonaldtrump Twitter Account is a Public Forum and His Use of Twitter Violates the First Amendment and the President Records Act. *Nova Law Review.* 42 Nova L. Rev. 317.
[100] Savage, Charlie. (2017, June 6). Twitter Users Blocked by Trump Seek Reprieve, Citing First Amendment. *New York Times.* www.nytimes.com/2017/06/06/us/politics/trump-twitter-first-amendment.html.

Constitutional Law Center and a former judge on the U.S. Court of Appeals, told the Washington Post that "the president is entitled to communicate with whoever he wants to whenever he wants to. No one has the right to compel someone else to communicate with them. If Trump or anyone else wants to limit his Twitter audience, he can do that. As can any other public official or any private person."[101] When government actors block users based on non-content-neutral regulations, their actions consist of more than simply limiting their audience or not listening to different speech, they fundamentally restrict an American's ability to debate and discuss their opinion in a public forum.

Indeed, before *Knight,* another federal court looked at similar facts and come to an opposite conclusion. In January 2018, "at least one judge has ruled against the ACLU in its cases against public officials for banning critics. A federal judge for the United States District Court of Eastern Kentucky denied the ACLU's request for an injunction prohibiting Kentucky Governor Matt Bevin from blocking dissenters on his social networking pages."[102] In its decision, the court cited the private ownership of social media sites and the fact that a person's right to speak is not infringed upon when the government simply ignores that person while listening to others. U.S. District Judge Gregory Van Tatenhove made clear that Governor Bevin's accounts were a way for him to communicate his speech, not the speech of his constituents. "No one is being blocked from speaking on Twitter or Facebook," Judge Van Tatenhove wrote. "They are still free to post on their own walls and on friends' walls whatever they want about Governor

[101] Andrews, Travis. (2017, June 7). Trump blocked some people from his Twitter account. Is that unconstitutional? *Washington Post.* www.washingtonpost.com/news/morning-mix/wp/2017/06/07/trump-blocked-some-people-from-his-twitter-account-is-that-unconstitutional-as-they-say.
[102] Lane, Tyler. (2019). The Public Forum Doctrine in the Modern Public Square. *Ohio Northern University Law Review*. 45 Ohio N.U.L. Rev. 465.

Bevin. Governor Bevin only wants to prevent some messages from appearing on his own wall, and, relatedly, to not view those messages he deems offensive."[103]

In August 2020, the ACLU of Kentucky finally settled its highly-publicized lawsuit that challenged former Governor Bevin's practice of permanently blocking social media users who posted comments he deemed off-topic. Through this settlement, the ACLU is working with current Kentucky Governor Andy Beshear to adopt "a new social media policy that will allow for vigorous and robust public discourse on the Governor's official social media platforms consistent with commenters' First Amendment rights. Unlike the previous secret practice, Governor Beshear's social media policy clearly states rules for users and has provisions to provide notice to individuals who are blocked for posting prohibited content to the pages. The policy also outlines an appeal process for users that want to be reinstated."[104]

Utilizing a written social media policy available to the public through a government website is certainly a best practice for politicians operating on the internet's legally murky atmosphere. However, case law in the past has supported the notion that a stated or written policy in the "about" section of a government's social media page is not enough to render the page a limited or nonpublic forum. Simply claiming a legal status does not mean the status automatically applies; therefore, "a written policy stating that 'abusive' comments will be removed is not the end of the analysis, and it does not give

[103] News, VOA. (2018, April 1). Kentucky Governor Wins Round in Social Media Fight. *Voice of America.* www.voanews.com/usa/kentucky-governor-wins-round-social-media-fight.
[104] Duke, Amber. (2020, August 6). Victory: ACLU-KY Reaches Settlement in Social Media Blocking Case. *ACLU Kentucky*. www.aclu-ky.org/en/press-releases/victory-aclu-ky-reaches-settlement-social-media-blocking-case.

the government an unfettered license to delete comments that it determines to be 'abusive.'"[105]

In *One Wisconsin Now v. Kremer, Jesse et al*, the Western District Court of Wisconsin found that three state assembly members violated the First Amendment when they blocked a liberal advocacy group on Twitter. The court ruled that "(1) defendants acted under color of state law in creating and maintaining their respective Twitter accounts in their capacity as members of the Wisconsin State Assembly; (2) the interactive portion of defendants' Twitter accounts are designated public forums; and (3) defendants engaged in content-based discrimination when they blocked the plaintiff's Twitter account."[106] When public officials operate a social media account for disseminating government speech, there is a clear difference between the legal status of their accounts and the accounts of private citizens. As discussed previously, a public forum can only be created by a government actor or agency acting in an official state capacity. By moving "straight to application of the public forum doctrine, the courts seemed to assume that no independent inquiry was necessary to establish the existence of a governmental entity. The primary question considered by the courts in *Davison*, *Knight*, and *One Wisconsin* was whether the defendants' conduct in creating and maintaining their social media pages could be fairly defined as action *by* the government."[107] In all three cases, the courts determined that the actors in question were indeed acting in regard to their official roles.

[105] Bohanon, Alysha. (2016). Tweeting the Police: Balancing Free Speech and Decency on Government-Sponsored Social Media Pages. *Minnesota Law Review.* 101 Minn. L. Rev. 341.
[106] One Wisconsin Now v. Kremer, Jesse et al, No. 3:2017cv00820 - Document 80 (W.D. Wis. 2019).
[107] D'Antonio, Joseph. (2019). Whose Forum Is It Anyway: Individual Government Officials and Their Authority to Create Public Forums on Social Media. *Duke Law Journal.* 69 Duke L.J. 701.

Despite precedent forming in the lower courts, lawyers and judges continue to disagree with what types of social media use by public officials constitute government speech and the creation of a public forum. In the case of *Campbell v. Reisch,* Missouri state representative Cheri Reisch blocked her political opponent Mike Campbell on Twitter after he shared a post criticizing her.[108] Although the account was created before she took office, Campbell argued that the content was official government speech since Reisch frequently shared posts about legislation she supported or pictures of herself on the House floor. The court in this case upheld the fundamental principle established by *Knight* that "a public official who uses a personal social media account for official purposes has opened a public forum and cannot, consistent with the First Amendment, block users from accessing their feed."[109] In a 2-1 decision, however, the U.S. Court of Appeals for the Eighth Circuit parted with precedent and said that Reisch had not used her Twitter account for official purposes, drawing a distinction between a *government account* and a *campaign account.* The court in *Campbell* claimed that "a private account can turn into a governmental one if it becomes an organ of official business, but that is not what happened here. The overall theme of Reisch's tweets—that's she's the right person for the job—largely remained the same after her electoral victory. Her messages frequently harkened back to promises she made on the campaign trail, and she touted her success in fulfilling those promises and in her performance as a legislator, often with the same or similar hashtags as the ones she used while a candidate."[110]

[108] Campbell v. Reisch, No. 19-2994 (8th Cir.).
[109] Ferdman, Soraya. (2021, January 29). Missouri State Official Can Block Users from Her Twitter Account, Eighth Circuit Rules. *First Amendment Watch.* firstamendmentwatch.org/missouri-state-official-can-block-users-from-her-twitter-account-eighth-circuit-rules.
[110] See 108

While there are significant legal differences between the actions of public officials before and after they take office, once a candidate is serving in an elected position of any capacity, it can be near impossible to distinguish between official government speech and campaign speech. With the rise of the 24/7 news media, politicians are constantly in campaign mode. Almost everything public officials say can be interwoven with a campaign or a promise they made at some point in time. Writing in the dissent, Judge Jane Kelly stated, "It is true that public officials acting purely in pursuit of personal interests do not do so 'under color of state law.' This does not mean, however, that an official whose challenged conduct is closely related to her official responsibilities cannot act 'under color of state law' simply because her actions simultaneously further personal goals or motives. Indeed, it seems that the statements of lawmakers carrying out their official duty to communicate information to constituents will very often harken back to some campaign promise or another, so this factor does not merit the outsized importance the court places on it today."[111]

Creating a legal distinction between official speech and campaign speech after a candidate has been elected may be an impractical way to moderate social media. The majority decision in *Campbell* fails to acknowledge that members of the legislature act within the scope of their official employment when they criticize an opponent's supporters on social media sites such as Twitter. Whether the purpose is to win reelection or clarify a policy position, "the act of communicating one's views" to the public falls within the "wide range of legitimate 'errands' performed for constituents."[112] While the Supreme Court has yet to weigh in on this issue, the decision in *Campbell* seems

[111] Campbell v. Reisch, No. 19-2994 (8th Cir.).
[112] Does 1 through 10 v. Haaland et al, No. 2:2019cv00117 - Document 80 (E.D. Ky. 2019).

incongruent with the history of political speech in America and the current state of public fora on the internet.

Although social media sites are inherently private spaces, media companies have recognized the distinction between private speech and government speech on their platforms. Regarding Trump's posts on Facebook, Mark Zuckerberg, co-founder and CEO of Facebook, has claimed that "it's completely fair to say that words of powerful people like the American president should stand on their own no matter what. There is inherent value in seeing the unvarnished comments of world leaders and being able to debate whether those words are right or wrong."[113] Just because the social media pages of public officials have been designated as public fora doesn't mean that the entire social platform has to operate as a public forum. Courts have the authority to find different aspects of a website as containing different levels of legal scrutiny. In the same way that a privately-owned town has sidewalks, parks, and businesses, so too can a digital space contain different types of fora. For example, "Facebook is continually expanding its site to offer services other than pure communication. There is nothing to stop a court from applying different frameworks or tests to the sub-websites within social networking sites, especially while these sites continue to expand."[114] As the internet continues to grow and change, a website could change enough to require a revisit to whether or not it is a public forum.

[113] Ovide, Shira. (2020, June 1). The Power of Bearing Witness. *New York Times*. www.nytimes.com/2020/06/01/technology/george-floyd-protests-twitter.html?searchResultPosition=2.
[114] Lane, Tyler. (2019). The Public Forum Doctrine in the Modern Public Square. *Ohio Northern University Law Review*. 45 Ohio N.U.L. Rev. 465.

VII. PRIVATE GOVERNANCE

The U.S. government's laissez faire attitude toward the expansion of social media companies has resulted in a world where a few Silicon Valley tech executives have unprecedented, and perhaps dangerous, power to control speech in the marketplace of ideas. Traditionally, scholars tend to break down the internet into sectors based upon whether public entities like the government or private entities owned the specific platform. Complexities have arisen when a private entity owns the platform, but the government exhibits control over a particular part of the site. Many scholars have "argued that state action is required to find the existence of a public forum and that the internet is akin to a city in that it is composed of both public and nonpublic areas."[115] If state action is required to create a public forum, private entities clear of government intervention need not worry about being designated as public fora. Once the government exhibits any amount of direct control over the platform, however, debates over the status of the platform begin.

As discussed earlier, courts can classify government property as traditionally public, designated or limited as public, or nonpublic. If the property is private, or not controlled by the government, "the owner has wide latitude to prohibit free speech. In rare situations, however, if the privately-owned property functions as a state actor, courts will deem it a public forum."[116] Scholars who promote this theory have made the case that private property that is marketed to general audiences for debate and controlled with government-like power may be required to operate their platforms as public fora. If this

[115] Lane, Tyler. (2019). The Public Forum Doctrine in the Modern Public Square. *Ohio Northern University Law Review*. 45 Ohio N.U.L. Rev. 465.
[116] Crees, John. (2009). The Right and Wrong Ways to Sell a Public Forum. *Iowa Law Review*. 94 Iowa L. Rev. 1419.

theory becomes enshrined in law, many changes to social media platforms will be needed, but most of all, sites such as Twitter and Facebook will need to begin respecting the freedom of speech of all their users.

Under Section 230 of the Communications Decency Act, social media companies were left to grow unfettered by government interference and without liability for posted content. The framers of the Constitution crafted the language of the First Amendment to prevent intrusion of speech by the government; however, in the 21st Century, large social media companies have just as much, if not more, power than the government to control and limit speech on the internet. In the past decade, tech companies have experienced a significant scale-shift as the nature of their business evolves from that of a large market participant to something more dangerous to the rights of Americans. Zuckerberg has claimed that "in a lot of ways Facebook is more like a government than a traditional company."[117] Just as the definition of a public forum has evolved over time to include metaphysical spaces, perhaps now is the time for the definition of a 'government' to change regarding how the free speech rights of Americans are protected.

Elaborating on his earlier comment, Zuckerberg shared that Facebook's "community of more than 2 billion people all around the world, in every different country, where there are wildly different social and cultural norms" may require regulation beyond standard corporate practices. "It's just not clear to me that us sitting in an office here in California are best placed to always determine what the policies should be for people all around the world. And I've been working on and thinking through: How can you set up a more democratic or community-oriented process that reflects the values

[117] Langvardt, Kyle. (2018). A New Deal for the Online Public Square. *George Mason Law Review.* 26 Geo. Mason L. Rev. 341.

of people around the world?"[118] While politicians sat aside and watched, private media companies consumed and conglomerated power to the point where they are arguably most influential than the robber baron corporations of the Gilded Age.

Many scholars have argued that one of the most pressing concerns facing the U.S. today is the rise of "online private governance structures—Facebook and Google, most prominently—that now regulate online speech with a precision and depth that no government on Earth could have achieved" in the 20th century.[119] Because they are private companies, sites such as Facebook have been able to inhibit the free-flow of content on the internet by stifling unpleasant, yet constitutionally protected, speech. Media corporations moderate user content "by exercising legislative authority through the issuance of community guidelines and executive authority through censorship; all without judicial review."[120] Social networks have almost certainly surpassed the government's power to control a narrative in public discourse since society has become thoroughly dependent on social sites for news and information. Although social networks employ various terms and conditions in order for participants to access their site, these terms are written by the private companies to benefit the private companies, and they are generally agreed upon without critical thought by the public.

Social media platforms "reserve sole power to remove communication that it interprets as against its rules. There is no meaningful appeals process and users are punished (banned) before being given the chance to discuss the reasons for the

[118] Klein, Ezra. (2018, April 2). Mark Zuckerberg on Facebook's Hardest Year, and What Comes Next. *Vox*. www.vox.com/2018/4/2/17185052/mark-zuckerberg-facebook-interview-fake-news-bots-cambridge.
[119] Langvardt, Kyle. (2018). A New Deal for the Online Public Square. *George Mason Law Review.* 26 Geo. Mason L. Rev. 341.
[120] Everett, Colby. (2019). Free Speech on Privately-Owned Fora: A Discussion on Speech Freedoms and Policy for Social Media. *Kansas Journal of Law & Public Policy.* 28 Kan. J.L. & Pub. Pol'y 113.

punishment and sites are vague in explaining why a user was actually banned. These punishments are inconsistent as sites give leeway to governmental actors, satire, scientific advancements, and documentaries."[121] While the government operates with checks and balances, social media companies are run as authoritarian empires, and they regulate speech as such. Facebook and Twitter, for example, claim they can't be arbiters of truth on their platforms; however, on multiple occasions, these platforms have interfered with debate and discourse among their members. Although Facebook has created one of the most effective fora for the marketplace of ideas online, the company "actively disposes of nearly 100 years of free speech jurisprudence."[122] Scholars have advocated for "partnership between government and platforms in which platforms voluntarily agree to limits on their behavior and establish independent bodies capable of true oversight."[123] Small steps in this direction have been taken, but nothing so far has derailed social media from simply acting in their own self-interest and generating as much profit as possible.

As concerns about the freedom of speech on social media grow, tech companies have responded with self-moderation that has largely been ineffective at addressing the larger issues at play. To begin, Facebook and Twitter have handled the topic of political speech on their platforms very differently. In October 2019, Twitter decided to stop accepting political advertisements from politicians or advocacy groups. Jack Dorsey, Twitter's CEO, said political ads, including manipulated videos and the viral spread of misleading information, presented challenges to civic discourse, "all at increasing

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[121] Lane, Tyler. (2019). The Public Forum Doctrine in the Modern Public Square. *Ohio Northern University Law Review*. 45 Ohio N.U.L. Rev. 465.
[122] Everett, Colby. (2019). Free Speech on Privately-Owned Fora: A Discussion on Speech Freedoms and Policy for Social Media. *Kansas Journal of Law & Public Policy.* 28 Kan. J.L. & Pub. Pol'y 113.
[123] Farrell, Henry, Margaret Levi, and Tim O'Reilly. (2018, April 10). Mark Zuckerberg Runs a Nation-State, and He's the King. *Vox.* www.vox.com/the-big-idea/2018/4/9/17214752/zuckerberg-facebook-power-regulation-data-privacy-control-political-theory-data-breach-king.

velocity, sophistication, and overwhelming scale."[124] Dorsey has made public his concerns that political ads had significant ramifications on, what he called, "democratic infrastructure." According to Vijaya Gadde, Twitter's head of legal, policy, trust and safety, ads will classify as political and become banned if they "advocate for or against legislative issues of national importance (such as: climate change, healthcare, immigration, national security, taxes)."[125] Twitter's position with this decision has been that political messages should be earned, not bought, a stance consistent with the American marketplace of ideas. Overall, the ban will not significantly affect Twitter's advertising business. Ned Segal, Twitter's chief financial officer, stated in a tweet that political ad spending for the 2018 midterm elections was less than $3 million, compared to the company's annual ad revenue of approximately $3 billion.[126]

Facebook, in contrast, has continuously allowed politicians to post any claims, including false ones, as updates or ads on its platform. Facing criticism and threats of anti-trust regulation, Zuckerberg went to Georgetown University to reiterate his company's firm belief in its stance as a site for free expression. The speech itself is another attempt by Zuckerberg to "reposition Facebook in a politicized environment where the company had been accused of amplifying disinformation, hate speech and violent content."[127] Facing the issue of advertising, Facebook has chosen to implement a system which allows people in the U.S. to opt out of seeing socially-oriented electoral or political ads from candidates or political action committees. "Everyone wants to see

[124] Conger, Kate. (2019, October 30). Twitter Will Ban All Political Ads, C.E.O. Jack Dorsey Says. *New York Times.* www.nytimes.com/2019/10/30/technology/twitter-political-ads-ban.html.
[125] Gadde, Vijaya. (2019, October 30). *Twitter.* twitter.com/vijaya/status/1189664481263046656.
[126] Sedal, Ned. (2019, October 30). *Twitter.* twitter.com/nedsegal/status/1189651487065923584.
[127] Kang, Cecelia, and Mike Issac. (2019, October 21). Defiant Zuckerberg Says Facebook Won't Police Political Speech. *New York Times.* www.nytimes.com/2019/10/17/business/zuckerberg-facebook-free-speech.html.

politicians held accountable for what they say—and I know many people want us to moderate and remove more of their content," Zuckerberg wrote in a USA Today Op-Ed. "For those of you who've already made up your minds and just want the election to be over, we hear you—so we're also introducing the ability to turn off seeing political ads."[128]

Facebook's attempts to remain neutral have been criticized by people on both sides of the political aisle. As much as Facebook may not desire to be the arbiter of truth in the marketplace of ideas, the power of control the site exhibits over its platform is unparalleled. Although Facebook operates under Section 230 protections and markets itself to the public as a zone of free expression, "tens of millions of times each month, people who work on Facebook's behalf—or computer systems for which Facebook writes the rules—enforce the company's policies that prohibit calling for violence against a person or a group of people, discussions about suicide or self-harm, or posting sexually explicit material about a child."[129] While prohibiting clearly obscene posts is effective for retaining users, many types of content require a more nuanced approach. Without any oversight, Facebook alone determines what qualifies as bullying and what counts as spam to be blocked or deleted. Everything users see on Facebook is because Facebook actively chose to either do or not do something through their content filters and their algorithms. Removing political ads and allowing people to opt out of political ads do not address any of the underlying issues at stake. As long as social media companies utilize private

[128] Zuckerberg, Mark. (2020, June 16). Historic Facebook Campaign Will Boost Voter Registration, Turnout, and Voices. *USA Today.* www.usatoday.com/story/opinion/2020/06/17/facebook-voter-campaign-strengthen-democracy-mark-zuckerberg-column/3191152001.
[129] Ovide, Shira. (2020, June 1). The Power of Bearing Witness. *New York Times*. www.nytimes.com/2020/06/01/technology/george-floyd-protests-twitter.html?searchResultPosition=2.

governance models devoid of significant regulation or oversight, they can control the marketplace of ideas in any manner they see fit.

VIII. POLITICAL BANTER

While bipartisan support exists for regulating social media companies, conservatives in the Republican Party have been the most vocal concerning the dangers of political censorship. Currently, social media companies have the ability to ban any user for expressing speech the platform disagrees with. Nadine Strossen, law professor at New York Law School and former president of the American Civil Liberties Union (ACLU), has said, "Strictly as a matter of First Amendment law, they can do whatever they want. They could say, 'We're only going to publish people who are members of the Republican party.'" Discrimination laws may prevent social media sites from discriminating on the basis of race and other factors, "but certainly not political ideology."[130] Most commonly, bans on users are enforced when speech violates the terms of service; however, terms and conditions on social media platforms are notoriously vague and interpreted differently on different occasions.

As stated before, social media companies have no legal obligation to respect First Amendment rights on their platforms. One person noted that he received "multiple bans following different posts on Facebook, including 'America is for Americans,' 'Nikolas Cruz isn't white; he's Jewish,' 'Non-white males are less than 15% of the population but

[130] Wharton, Knowledge. (2018, September 22). How Can Social Media Firms Tackle Hate Speech? *University of Pennsylvania.* knowledge.wharton.upenn.edu/article/can-social-media-firms-tackle-hate-speech.

commit 50% of the violent crime,' and 'Back to the kitchen, THOT,' among others."[131] Although these comments may be offensive or inappropriate, they are all protected under the First Amendment. Another example of a fringe political voice claiming censorship is Alex Jones, the alt-right host of a show called InfoWars. Jones is a perpetual conspiracy theorist who has floated false claims that child-sex rings are run by prominent Democratic figures and that the Sandy Hook shooting was a hoax staged by gun-control activists. In 2018, social media companies finally stepped in and removed InfoWars from their services. "YouTube took down Jones's channel—with 2.4 million subscribers—saying it violated the firm's policy on hate speech, and Apple dropped some of Jones's InfoWars podcasts from its app for the same reason. Facebook removed some of his pages, saying they were 'glorifying violence' and using 'dehumanizing language to describe people who are transgender, Muslims and immigrants.' Twitter hesitated, but eventually 'permanently suspended' Jones and InfoWars for what it called repeated violations of its policy against abusive behavior."[132] One of the reasons social media companies have been hesitant to take action against Jones is because they want to balance their competing interests in creating an enjoyable environment for their users and also being viewed as upholding free speech. Twitter, Facebook, and Google enjoy the protections held by traditional media, but they don't want the oversight or responsibility of labeling what is true and what it not. Above all else, social media companies want to keep growing so they can market their audience to as many advertisers as possible.

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[131] Lane, Tyler. (2019). The Public Forum Doctrine in the Modern Public Square. *Ohio Northern University Law Review.* 45 Ohio N.U.L. Rev. 465.
[132] Wharton, Knowledge. (2018, September 22). How Can Social Media Firms Tackle Hate Speech? *University of Pennsylvania.* knowledge.wharton.upenn.edu/article/can-social-media-firms-tackle-hate-speech.

Trump has been complaining about biased coverage in the mainstream media and censorship on social platforms since before his campaign for public office began, but only in the latter half of his administration did he decide to fight back through policy changes. In July 2019, Trump hosted a White House Social Media Summit which featured prominent conservative voices including people such as Charlie Kirk, the founder of Turning Point USA. While Kirk and members of his organization have complained about censorship, they have also been criticized by groups such as the Southern Poverty Law Center (SPLC) for tweets containing anti-immigrant and racist views.[133] Judd Deere, a White House spokesman, explained in an email that the origins of the event were rooted in a White House tool that allowed all Americans, regardless of their political views, to share how they have been affected by online bias. According to Deere, "after receiving thousands of responses, the president wants to engage directly with these digital leaders in a discussion on the power of social media."[134] Unfortunately, the event was categorized by activists willing to share unverified smears against their political opponents and disseminate conspiracy theories. Nothing substantial resulted as a product of the White House Social Media Summit, but tensions flared again between Trump and social media companies in May 2020 when Twitter decided to fact-check the president about statements concerning electoral fraud and mail-in voting.

For years, Twitter allowed Trump to bully users and spread falsehoods without repercussions for violating its terms of service. Precedent changed when the president

[133] Kelley, Brendan. (2018, June 15). Turning Point USA Accused of 'Boosting Their Numbers With Racists' By Long-Established Conservative Student Group. *SPLC Center*. www.splcenter.org/hatewatch/2018/06/15/turning-point-usa-accused-%E2%80%98boosting-their-numbers-racists%E2%80%99-long-established-conservative.
[134] Rogers, Katie. (2019, July 11). White House Hosts Conservative Internet Activists at a 'Social Media Summit.' *New York Times.* www.nytimes.com/2019/07/11/us/politics/white-house-social-media-summit.html.

received fierce backlash concerning tweets about Lori Klausutis, a young woman who died in 2001 from complications of an undiagnosed heart condition while working for Joe Scarborough, a Florida congressman at the time. Trump taunted and mocked Scarborough on Twitter while all but accusing him of killing his former staff member.[135] While apologizing to the Klausutis family, Twitter stated that it would not remove Trump's tweets "because they did not violate its policies. Instead, the company added warning labels to other messages" where the president "claimed the mail-in ballots themselves would be illegally printed. Twitter determined that those unsubstantiated assertions could lead to voter confusion and that they merited a correction."[136] Not all false statements receive a label, however. For the vast majority of its users, Twitter hasn't issued any fact-checks, even if the content is offensive or inaccurate. So far, fact-checking has been limited to statements made by public officials that "contain misinformation about civic integrity or the coronavirus" or "tweets from world leaders that violate its policy against promoting violence."[137] In addition to fact-checks, Twitter has made a commitment to addressing fake news by labeling "manipulated media" on its platform. Examples of "manipulated media" include photoshopped images, doctored videos, and deceptive memes. Symbolic gestures such as the White House Social Media Summit were not enough to intimidate social media companies into backing down from their feud with conservatives, and eventually, Trump had enough.

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[135] Grynbaum, Michael, Marc Tracy, and Emily Cochrane. (2020, May 27). 'Ugly Even for Him': Trump's Usual Allies Recoil at His Smear of MSNBC Host. *New York Times.* www.nytimes.com/2020/05/27/business/media/trump-joe-scarborough-conservative-media.html.
[136] Conger, Kate. (2020, May 26). Twitter Refutes Inaccuracies in Trump's Tweets About Mail-In Voting. *New York Times.* www.nytimes.com/2020/05/26/technology/twitter-trump-mail-in-ballots.html.
[137] See 136

In May 2020, Trump released his Executive Order on Preventing Online Censorship. The order took direct aim at Section 230 granting social media companies wide protection from legal liability for their content. In the spirit of *Packingham,* this executive order claimed that social media platforms in particular constitute the 21st century equivalent of the public square. Additionally, the order specifies that Twitter's actions in fact-checking tweets threaten the preservation of the marketplace of ideas in America. According to Trump, "in a country that has long cherished the freedom of expression, we cannot allow a limited number of online platforms to hand pick the speech that Americans may access and convey on the internet. This practice is fundamentally un-American and anti-democratic. When large, powerful social media companies censor opinions with which they disagree, they exercise a dangerous power. They cease functioning as passive bulletin boards, and ought to be viewed and treated as content creators."[138] The effectiveness of this executive order is extremely limited, however. Unless Section 230 is repealed or amended by Congress, social media companies will have a strong legal argument for continued immunity from liability for the content on their platforms. Nevertheless, this order stated that "it is the policy of the United States that the scope of that immunity should be clarified: the immunity should not extend beyond its text and purpose to provide protection for those who purport to provide users a forum for free and open speech, but in reality use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints."[139]

[138] Trump, Donald. (2020, May 28). Executive Order on Preventing Online Censorship. *White House.* trumpwhitehouse.archives.gov/presidential-actions/executive-order-preventing-online-censorship.
[139] See 138

In response, Trump's Justice Department released recommendations to roll back the legal shied of protections over social media; however, substantial change requires congressional action. In its 25-page recommendation, the Justice Department "called on lawmakers to repeal parts of a law that has given sites broad immunity from lawsuits for words, images and videos people have posted on their services."[140] Kate Klonick, an assistant law professor at St. John's University stated that "it's unclear what to make of this because to a certain extent, you can't just issue an executive order and overturn on a whim 25 years of judicial precedent about how a law is interpreted."[141] Since the Executive Order, not much has changed, and at the moment, the future of Section 230 is still up in the air. While tech companies continue to market themselves to the public in one way, they regulate their platforms a different way.

In an unprecedented step against a major news publication, Twitter blocked users from posting links to a New York Post story that criticized then-presidential candidate Joe Biden and his son Hunter Biden for potential illegal action. Users attempting to share the story were shown a notice saying: "We can't complete this request because this link has been identified by Twitter or our partners as being potentially harmful."[142] Not only did Twitter restrict private citizens from posting an article from a reputable news source, but they prevented public officials and government actors from posting the link as well. Acting without regard to its status as government speech or public fora, Twitter

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[140] Kang, Cecelia. (2020, June 17). Justice Dept. Urges Rolling Back Legal Shield for Tech Companies. *New York Times.* www.nytimes.com/2020/06/17/technology/justice-dept-urges-rolling-back-legal-shield-for-tech-companies.html.

[141] Haberman, Maggie, and Kate Conger. (2020, May 28). Trump Prepares Order to Limit Social Media Companies' Protections. *New York Times.* www.nytimes.com/2020/05/28/us/politics/trump-executive-order-social-media.html.

[142] Paul, Kari. (2020, October 14). Facebook and Twitter Restrict Controversial New York Post Story on Joe Biden. *The Guardian.* www.theguardian.com/technology/2020/oct/14/facebook-twitter-new-york-post-hunter-biden.

intentionally limited the circulation of information in the marketplace of ideas. In an even more drastic move, "Twitter temporarily blocked a link to a government website run by the Republicans of the House Judiciary Committee, where the story had been reposted."[143] Although there were clear journalistic problems that allowed reasonable people to question the integrity of the New York Post article, Twitter's actions were problematic for countless reasons. Not only did the ban on the article occur less than a month before the presidential election, but the action signaled a significant escalation from issuing fact checks to banning news and information.

In a letter to the Acting General Counsel of the Federal Election Commission, Senator Josh Hawley cited Twitter's censorship as a potential violation of campaign finance laws. Hawley wrote that "the Post's reporting has understandably attracted substantial public discussion. And countless Americans have sought to discuss and debate that article via the forums in which so much of our political speech occurs: on social media."[144] By restricting what viewpoints and political content can be shared in a public forum, Twitter engaged in unprecedented suppression of public discussion. During his tenure in the Senate, Hawley has not held back his criticism of social media companies. In fact, he is one of few senators to propose legislation repealing the protections of Section 230 through the Ending Support for Internet Censorship Act. This act "removes the immunity big tech companies receive under Section 230 unless they submit to an external audit that proves by clear and convincing evidence that their algorithms and

[143] Tiffany, Kaitlyn. (2020, October 15). Twitter Goofed It. *The Atlantic.* www.theatlantic.com/technology/archive/2020/10/twitters-ban-hunter-biden-story-conservative-bias-paranoia/616726.
[144] Hawley, Josh. (2020, October 14). Letter to Federal Election Commission. *United States Senate.* www.hawley.senate.gov/sites/default/files/2020-10/Hawley-Letter-to-FEC-Biden-New-York-Post-Twitter-Facebook.pdf.

content-removal practices are politically neutral."[145] In the aftermath of the ban on the New York Post article, members of congress on both sides of the aisle have renewed calls for communication oversight. The consensus position is that if social media companies want to control speech and limit viewpoints on their platforms, they are legally allowed to, but they shouldn't be able to simultaneously claim protections as content distributors.

While more communication continues to take place on social media, more people believe social media companies are actively censoring political viewpoints. A Pew Research Center survey conducted in June 2020 "finds that roughly three-quarters of U.S. adults say it is very (37%) or somewhat (36%) likely that social media sites intentionally censor political viewpoints that they find objectionable."[146] If the status quo remains as is, perceived partisan content restrictions will only continue. The division could go as far as splitting users between left-leaning and right-leaning social media sites. Many Republicans have already reached a boiling point with traditional social media companies that has caused them to leave the platforms and encourage their audiences to follow.[147] While some scholars have written that anti-conservative bias on social media is a conspiracy theory, there is ample evidence to prove that Twitter and other social media

[145] Hawley, Josh. (2019, June 19). Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies. *United States Senate.* www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies.
[146] Vogels, Emily, Andrew Perrin, and Monica Anderson. (2020, August 19). Most Americans Think Social Media Sites Censor Political Viewpoints. *Pew Research Center.* www.pewresearch.org/internet/2020/08/19/most-americans-think-social-media-sites-censor-political-viewpoints.
[147] Issac, Mike, and Kellen Browning. (2020, November 11). Fact-Checked on Facebook and Twitter, Conservatives Switch Their Apps. *New York Times.* www.nytimes.com/2020/11/11/technology/parler-rumble-newsmax.html.

platforms are actively manipulating the marketplace of ideas to favor certain messages over others.[148]

In October 2020, Twitter removed a tweet about the border wall and locked the account of the Trump administration's U.S. Customs and Border Protection (CBP) Commissioner Mark Morgan. "The tweet basically read that walls absolutely are an important part of a multi-layer strategy that assist the men and women of CBP to apprehend criminals" Morgan claims. "That's what my tweet said. And Twitter took the tweet down."[149] Although Twitter's decision was later reversed upon internal appeal, the tweet was labeled as "hateful content." On the same day, Dorsey testified before Congress and stated that anti-Semitic tweets circulated by the Iranian Ayatollah "didn't violate company guidelines."[150] One important reason behind this discrepancy is that social media companies give more leeway for controversial speech on accounts run by world leaders. In certain circumstances, Twitter will leave up content that would otherwise be taken down if they deem access to the information in the public interest.[151] Implementation of this principle has raised questions about which public officials receive such protections. While the tweets of the CBP Commissioner were removed, the tweets of the president were given warning labels. While the tweets of congresspeople were removed, the tweets of foreign dignitaries were given warning labels.

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[148] Ingram, Matthew. (2019, August 8). The Myth of Social Media Anti-Conservative Bias Refuses to Die. *Columbia Journalism Review.* www.cjr.org/the_media_today/platform-bias.php.
[149] Sands, Geneva. (2020, October 29). CBP Chief Says Twitter Locked His Account Over Border Wall Tweet. *CNN.* www.cnn.com/2020/10/29/politics/cbp-twitter-locked-account-border-wall/index.html.
[150] Justice, Tristan. (2020, October 29). Twitter Suspends U.S. Border Chief for Celebrating Wall's Protection from Illegal Aliens. *The Federalist.* thefederalist.com/2020/10/29/exclusive-twitter-suspends-u-s-border-chief-for-celebrating-walls-protection-from-illegal-aliens.
[151] Center, Help. About Public-Interest Exceptions on Twitter. *Twitter*. help.twitter.com/en/rules-and-policies/public-interest.

After losing the presidential election by more than 7 million votes in Fall 2020, Trump and his supporters began peddling conspiracy theories that the democratic process was fraudulent.[152] In the days and months following his loss, "the slogan 'stop the steal' quickly became a rallying cry among President Donald Trump's supporters, many of whom were egged on by Trump himself and his allies with false claims of election fraud."[153] Using Twitter as his primary method of communication, Trump called for his supporters to come to Washington D.C. and fight the certification of the election results by Congress. Leading up to the gathering, Trump encouraged his followers with messages on Twitter such as "Big protest in D.C. on January 6th. Be there, will be wild!"[154]

When the day finally arrived, Trump "rallied thousands of his supporters with an incendiary speech. Then a large mob of those supporters, many waving Trump flags and wearing Trump regalia, violently stormed the Capitol to take over the halls of government and send elected officials into hiding, fearing for their safety."[155] This armed insurrection against the U.S. led to Trump's second impeachment and constituted a clear violation of Twitter's terms of service, so much so that the platform finally reached a breaking point and decided that the public's interest in seeing his speech no longer outweighed the harm caused by his language. Twitter stated that "after close review of

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[152] Andre, Michael, et al. (2020, November 3). Presidential Election Results: Biden Wins. *New York Times.* www.nytimes.com/interactive/2020/11/03/us/elections/results-president.html.
[153] Fung, Brian. (2021, January 12). Facebook Bans 'Stop the Steal' Content, 69 Days After the Election. *CNN Business.* www.cnn.com/2021/01/11/tech/facebook-stop-the-steal/index.html.
[154] Goodman, Ryan, Mari Dugas, and Nicholas Tonckens. (2021, January 11). Incitement Timeline: Year of Trump's Actions Leading to the Attack on the Capitol. *Just Security.* www.justsecurity.org/74138/incitement-timeline-year-of-trumps-actions-leading-to-the-attack-on-the-capitol.
[155] Barry, Dan, and Sheera Frenkel. (2021, January 8). 'Be There. Will Be Wild!': Trump All but Circled the Date. *New York Times.* www.nytimes.com/2021/01/06/us/politics/capitol-mob-trump-supporters.html.

recent Tweets from the @realDonaldTrump account and the context around them—specifically how they are being received and interpreted on and off Twitter—we have permanently suspended the account due to the risk of further incitement of violence."[156]

While accounts such as @POTUS and @WhiteHouse remained active, social media companies across the internet made the decision to remove accounts and hashtags associated with Trump and his misinformation campaign. In the final weeks of his presidency, Trump was unable to interact with his supporters on Twitter, Facebook, Instagram, TikTok, Pinterest, Snapchat, YouTube, and other sites.[157] Social media platforms where Trump would have been welcomed like Parler, which was used by white supremacists to organize the riot, were effectively removed by companies seeking to prevent further violence. Apple removed Parler from its App store, Google removed Parler from its search results, and Amazon Web Services removed Parler from its cloud hosting service.[158]

The feud between the former president and the social media companies has resulted in a form of blacklisting that has successfully cut off Trump's voice from the digital marketplace of ideas. While many alt-right and conservative voices remain, the attack on the Capitol forced social platforms to take a stand and protect their business model from users seeking to create a toxic environment both online and offline. In the absence of government oversight, social media companies have unlimited power to monitor their platforms and censor speech that violates their terms of service. Recent

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[156] Inc., Twitter. (2021, January 8). Permanent Suspension of @realDonaldTrump. *Twitter*. blog.twitter.com/en_us/topics/company/2020/suspension.html.
[157] Fischer, Sara, and Ashley Gold. (2021, January 11). All the Platforms That Have Banned or Restricted Trump So Far. *Axios*. www.axios.com/platforms-social-media-ban-restrict-trump-d9e44f3c-8366-4ba9-a8a1-7f3114f920f1.html.
[158] Fung, Brian. (2021, January 11). Parler Has Now Been Booted by Amazon, Apple and Google. *CNN Business*. www.cnn.com/2021/01/09/tech/parler-suspended-apple-app-store/index.html.

court cases such as the decisions in *Knight* and *Packhingham* have left a plethora of unanswered questions that need to be resolved, and many different solutions have been proposed as ways to answer them. While a lot of political banter has taken place between Republicans and social media companies, no substantial new policies have arisen that challenge the way speech is monitored in the new marketplace of ideas.

IX. A SENSE OF TIME AND PLACE

If the internet is the home of the modern public forum, the consequences for the marketplace of ideas are monumental. Speaking before the British House of Commons in 1943 concerning the rebuilding of the House following air raids in London, Winston Churchill claimed that "we shape our buildings, and afterwards, our buildings shape us."[159] When Americans debate and discuss news, policy, and current events, the location, method, and means by which the dialogue takes place has a significant impact on the discourse itself. Public fora have a sense of time and place that influence the exchange of ideas that occur within them. Linguists have been studying this phenomenon for years. As with any period of tremendous disruption, the explosion of informal writing online has changed the way we communicate and affected the subconscious patterns behind the language we produce every day.

In her book *Because Internet: Understanding the New Rules of Language*, Gretchen McCulloch writes that "we can read faster than we can speak, and reading also lets us glance back and check something again, which means that writing naturally supports longer and more complex sentences: if you compare an essay and the transcript

[159] Parliament, UK. Churchill and the Commons Chamber. *About Parliament.* www.parliament.uk/about/living-heritage/building/palace/architecture/palacestructure/churchill.

of a famous speech, the essay will have more subordinate clauses, while the speech will have more repetition."[160] Just as the medium for communication changes the content shared within that medium, systems for speech and writing "are greatly affected by the tools available to make them: it's easier to carve wood or stone in a straight line, but easier to swirl and loop with ink."[161] On the internet, it may be easier to share hateful content, radical platforms, or conspiracy theories knowing that the face-to-face interaction required in traditional public fora has been eliminated. Speech, in turn, affects action. Studies have found that teens born after the adoption of the internet "aren't drinking as much or having as much sex, because their hangouts happen in virtual spaces rather than in care or on street corners."[162] These changes in behavior are notable because they're tangible proof of consequences involved in digitizing the marketplace of ideas. While increased access and scope are benefits to social media, online interactions fundamentally change the way people in America communicate. Many profile pages on social media have changed from being a list of static facts about you to a list of things you've posted recently. This change alone incentivizes consistency and relevancy over substance and accuracy.

As Washington University Law Professor John Inazu explains, "the vast majority of speech on the Internet today occurs within private places and spaces that are owned and regulated by private entities . . . [that] exercise significant discretion to censor expression or terminate service altogether."[163] If political discussions and debate are

[160] McCulloch, Gretchen. (2019). *Because Internet.* Riverhead Books. ISBN: 9780735210943. Page 214.
[161] See 160, Page 13
[162] See 160, Page 227
[163] Association, H.L.R. (2017). First Amendment: Speech: Packingham v. North Carolina. *Harvard Law Review.* 131 Harv. L. Rev. 233.

taking place on platforms manipulated by private for-profit corporations, perhaps the marketplace of ideas theory no longer holds true. Without the ability for all ideas to compete against one another for acceptance in the public square, Americans will have a much more difficult experience trying to determine what is true. Scholars disagree over whether social media sites should function as "public spheres" in which public opinions arise through the exchange of information or "public spaces" in which people rant and rave without contributing to the democratic process. In several studies conducted by South Korean researchers, online public fora were examined to see whether discourse was centered more around emotional ventilation or rational discussion. Results found that "political discussions are more emotional than cognitive and express more anger than anxiety, but it appears that cognitive discussions are more influential than emotional ones. Among cognitive components, assertive and strong discussions have greater influence than analytical ones."[164]

As Americans continue to retreat into online echo-chambers of like-minded individuals, catering to emotions rather than logic tends to illicit more interaction, engagement, and reach. For social media companies, more engagement equates to more growth and more profit. Essentially, sites such as Facebook and Twitter have a financial incentive to maintain politically divisive and emotionally-stimulating platforms. "Studies of the 2016 election cycle have revealed that the top twenty fake news stories on Facebook generated more total engagement than the top twenty mainstream news stories. Is it really so surprising that an omnipresent glow-screen optimized to study peoples' prejudices and push their buttons at all hours of the day—itself the stuff of late twentieth

[164] Choi, Sujin. (2014). Flow, Diversity, Form, and Influence of Political Talk in Social-Media-Based Public Forums. *Kookmin University School of Communication.* doi:10.1111/hcre.12023.

century science-fiction dystopias—would produce a febrile and delusive public discourse?"[165] Visibility on social media sites is promoted by engagement that usually stems from emotional stimulation. Emotions, in turn, are normally aroused by the most radical, outlandish, or absurd content. As fringe content is spread around social media collecting engagement as it goes, fringe ideas are gaining visibility that looks awfully similar to acceptance in the marketplace of ideas.

Users are not immune from desiring this interaction either. "Consciously or not, a lot of our social media posts are optimized around getting some kind of interaction: we may fuss over the precise wording for maximum humor, run a draft post by a friend, message specific people to get them to comment, plan the posting time for the most interactions, or simply like others' posts for moral support, so our friends know they aren't shouting into the void."[166] While many people still believe in the marketplace of ideas, many users do not participate in conversations online because they are looking for truth. People desire feelings of inclusivity, belonging, and connection; social media companies recognize this, so they design their sites accordingly. Private platforms are not concerned with discerning truth or promoting peace; they are concerned with promoting engagement and making money.

As much as social media platforms are labeled as the modern marketplace of ideas, they are more similar to divisive echo chambers than they are free markets of truth and liberty. Today, private companies operating social media have the power to manipulate algorithms and control every bit of content a user interacts with. Facebook's

[165] Langvardt, Kyle. (2018). A New Deal for the Online Public Square. *George Mason Law Review.* 26 Geo. Mason L. Rev. 341.
[166] McCulloch, Gretchen. (2019). *Because Internet.* Riverhead Books. ISBN: 9780735210943. Page 229.

data scientists attempted to test whether emotional contagion was able to spread through social media websites without the presence of physical human contact. The results were astounding. "Facebook's data scientists manipulated the News Feeds of 689,003 users, removing either all of the positive posts or all of the negative posts to see how it affected their moods. If there was a week in January 2012 where you were only seeing photos of dead dogs or incredibly cute babies, you may have been part of the study."[167] Without consulting users for voluntary participation in the study, Facebook directly manipulated the content viewed by hundreds of thousands of people in order to test for a change in their emotions. The results of the study showed that "for people who had positive content reduced in their News Feed, a larger percentage of words in people's status updates were negative and a smaller percentage were positive. When negativity was reduced, the opposite pattern occurred."[168]

If Facebook can successfully tweak its algorithm to manipulate emotions, it can successfully tweak the algorithm to change all sorts of aspects about an individual's worldview. Political party alignment, candidate approval, and religious preference are just three of the innumerable type of content social media companies could potentially manipulate and lead users into changing their opinions. In addition to directly censoring speech, mass scale contagion experiments like this prove that social media companies have the ability to manipulate and seduce users through their own psychology. Platforms such as Facebook and Twitter have the legal ability and power to "interfere with the

[167] Hill, Kashmir. (2014, June 28). Facebook Manipulated 689,003 Users' Emotions for Science. *Forbes.* www.forbes.com/sites/kashmirhill/2014/06/28/facebook-manipulated-689003-users-emotions-for-science/?sh=4aed8869197c.
[168] Kramer, Adam, Jamie Guillroy, and Jeffery Hancock. (2014, June 17). Experimental Evidence of Massive-Scale Emotional Contagion Through Social Networks. *Proceedings of the National Academy of Sciences.* doi.org/10.1073/pnas.1320040111.

structure and flow of public discourse in a way that prevents it from performing its traditional functions. For example, platforms' algorithms might intensify the 'filter bubble' effect in a way that prevents serendipitous encounters with opposing viewpoints. Or their systems may, by optimizing for time spent in-site, bias media production and consumption heavily toward the lurid and conspiratorial."[169] The amount of control social media companies exert through systematic algorithmic changes and their private governance models is dangerous. While the public may view social media as a tool, its true nature is something with far more influence. Most Americans know they cannot trust everything they see or read online, but if the environment as a whole is being controlled or manipulated to project a certain message, Americans may not be able to trust anything on social media.

Every aspect of American life is related in some way to social media or the internet as a whole. "A whopping 77 percent of Americans own a smartphone; another 13 percent have the old-fashioned 'flip' kind. More than two-thirds of Americans are on Facebook, and three-quarters of them use the site every day."[170] If almost everyone has access to the marketplace of ideas at all times, the marketplace may be used for gathering and socialization in addition to robust debate. Just as the freedom of speech is a topic of conversation, other First Amendment rights like the ability to protest are utilizing social media for their benefit. A public forum is very similar to the idea of a "third place," coined by sociologist Ray Oldenburg in his 1989 book called *The Great Good Place.* Oldenburg's third places "are first of all social centers, distinguished by an emphasis on

[169] Langvardt, Kyle. (2018). A New Deal for the Online Public Square. *George Mason Law Review.* 26 Geo. Mason L. Rev. 341.
[170] Wehle, Kim. (2019). *How to Read the Constitution—and Why.* Harper Collins Publishing. ISBN: 9780062896308. Page 169.

conversation and playfulness, regular attendees who set the tone for newcomers, the freedom to come and go as you please, a lack of formal membership requirements, and a warm, unpretentious feeling of home away from home."[171]

Like third places, public fora online aren't entirely harmful to public discourse. In many ways, social media has privatized and individualized the public awareness role previously held by traditional news organizations. Oldenburg also points out how third places and public fora "have been essential to forming the kinds of large, loose-knit social groups that are the core of new social movements, such as the agora in ancient Greek democracy, taverns around the American revolution, and coffeeshops during the Age of Enlightenment, which parallels how Twitter was used for the Arab Spring or the Black Lives Matter protests."[172] Omar Wasow, a professor at Princeton University and co-founder of the social network BlackPlanet.com, said "social media was helping publicize police brutality and galvanizing public support for protesters' goals—a role that his research found conventional media played a half century ago. And he said he believed that the internet was making it easier to organize social movements today, for good and for ill."[173]

Civil rights leaders in the 1960s utilized images in national media publications of Jim Crow violence to propel an often-indifferent white audience to take action. When analyzing the history of this tactic, "news coverage of civil rights rises and falls coincident with waves of nonviolent protest in 1960 during efforts to integrate southern lunch counters and in 1963 during the buildup to the March on Washington. Similarly,

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[171] McCulloch, Gretchen. (2019). *Because Internet.* Riverhead Books. ISBN: 9780735210943. Page 220-1.
[172] See 171, Page 223
[173] Ovide, Shira. (2020, December 17). How Social Media has Changed Civil Rights Protests. *New York Times.* www.nytimes.com/2020/06/18/technology/social-media-protests.html.

the spikes in 1965 co-occur with the 'Bloody Sunday' march in Selma, AL."[174] Clearly, there is a parallel to be made between the TV coverage and newspaper articles of the past and the prevalence of social movements on social media today. Video footage of the Minneapolis death of George Floyd in May 2020 sparked national protests when U.S. citizens stuck in quarantine watched a man beg for his life as he died in police custody.[175] Clearly, there are benefits to the internet as a space for organizing, disseminating information, and arousing public interest; however, public officials must be careful while posting on private fora to make sure citizens' rights are protected. The internet has embedded itself deep into American society with no practical way for U.S. citizens to untangle themselves from its web. Instead of seeking freedom from the internet, modern policymakers must learn to adapt their communication strategies and utilize social media to their advantage.

If James Madison was worried that politically divisive information would spread too easily in 1787, he would be horrified today. As the size of social media companies continue to grow, the threat of increasing censorship and manipulation of the marketplace of ideas poses a significant risk to free speech. "Technological advances continue at an alarming pace, with computers doubling their capacities every twelve to eighteen months, along with the information technologies that utilize them. Already, the digital footprint left by internet use can be harvested and searched to produce detailed dossiers on the intimate details of individuals' daily lives."[176] Media companies such as Google have

[174] Wasow, Omar. (2017, October 31). Agenda Seeding: How 1960s Black Protests Moved Elites, Public Opinion and Voting. *American Political Science Review.* doi:10.1017/S000305542000009X.
[175] Stern, Joanna. (2020, June 13). They Used Smartphone Cameras to Record Police Brutality—and Change History. *Wall Street Journal.* www.wsj.com/articles/they-used-smartphone-cameras-to-record-police-brutalityand-change-history-11592020827.
[176] Wehle, Kim. (2019). *How to Read the Constitution—and Why.* Harper Collins Publishing. ISBN: 9780062896308. Page 169.

unprecedented information and control over the lives of American citizens. Not only is Google using personal information to sell ads, but it's designing every aspect of the internet experience to fit the wants and needs of the individual. While some users may appreciate this customization, it has significantly impacted the function of the marketplace of ideas:

> "Google has every e-mail you ever sent or received on Gmail. It has every search you ever made, the contents of every chat you ever had over Google Talk. It holds a record of every telephone conversation you had using Google Voice, it knows every Google Alert you've set up. It has your Google Calendar with all content going back as far as you've used it, including everything you've done every day since then. It knows your contact list with all the information you may have included about yourself and the people you know. It has your Picasa pictures, your news page configuration, indicating what topics you're most interested in. And so on. If you ever used Google while logged in to your account to search for a person, a symptom, a medical side effect, a political idea; if you ever gossiped using one of Google's services, all of this is on Google's servers. And thanks to the magic of Google's algorithms, it is easy to sift through the information because Google search works like a charm."[177]

Although major online platforms such as Google and Facebook like to sell themselves as providers of free information and connectivity, Americans must remember the old cliché: if you are not paying for the product, you *are* the product. "Consumers are only now

[177] Ghitis, Frida. (2012, February 9). Google Knows Too Much About You. *CNN*. www.cnn.com/2012/02/09/opinion/ghitis-google-privacy/index.html.

developing a widespread awareness that social media and search platforms, just like television networks, are primarily in the business of harvesting user data and selling it to direct advertisers."[178]

People such as Scott Galloway, professor of marketing at the New York University Stern School of Business, have addressed the data harvesting problem by proposing a monetization model that centers around subscription fees to maintain certain social media accounts; however, it is unclear what the legal impact, if any, would be on designated public fora.[179] What is clear, however, is that fundamental change to the status quo is needed. When designing the First Amendment, James Madison "particularly emphasized the role of public opinion in a republic."[180] If he could see society today, Madison may very well be disgusted that Americans are sitting idly by and watching as the marketplace of ideas is moving from traditional public fora where freedoms are protected to private online websites where emotions are being manipulated. In order to preserve the marketplace of ideas in America, policymakers must act in order to hold social media companies accountable and restore the spirit of debate for all U.S. citizens.

[178] Langvardt, Kyle. (2018). A New Deal for the Online Public Square. *George Mason Law Review.* 26 Geo. Mason L. Rev. 341.
[179] Galloway, Scott. (2020, June 12). Major Changes to the World's Largest Social Networks are Coming by the End of 2020, Which Will Further Divide the US Along Blue and Red Political Lines. *Business Insider*. www.businessinsider.com/scott-galloway-facebook-twitter-quibi-predictions-2020-6.
[180] Read, James. (2009). James Madison. *First Amendment Encyclopedia.* www.mtsu.edu/first-amendment/article/1220/james-madison.

SECTION THREE: A PATH FORWARD

"No fundamental social change occurs merely because government acts. It's because civil society, the conscience of a country begins to rise up and demand—demand—demand change."

-President Joe Biden

X. POTENTIAL JUDICIAL SOLUTIONS

A plethora of different solutions have been proposed that would help judicial bodies determine the existence of public fora on social media. First, courts need to clarify when private entities and when government entities are speaking online. So far, any time a government actor is speaking in regard to the official duties of their office, lower courts have labeled it as government speech. The reality, however, is much murkier. Currently, "there are two kinds of speech to which both private and governmental parties lay expressive claim: speech originating from a single speaker but involving multiple parties' interests in expression (combined speech), and speech occurring in the same space with more than one identifiable speaker (separable speech)."[181] Social media platforms tend to be classified as clear and separable; however, some scholars suggest that the courts should perform a government entity inquiry before labeling a space as a public forum. "A

[181] Bohanon, Alysha. (2016). Tweeting the Police: Balancing Free Speech and Decency on Government-Sponsored Social Media Pages. *Minnesota Law Review*. 101 Minn. L. Rev. 341.

'government entity' inquiry would provide not only a much-needed limiting principle to public forum analyses in cases involving individual government actors, but also would better signal to politicians and other public officials the constitutional restraints imposed on their social media presence."[182] Courts and public officials alike are struggling to determine who qualifies as a government actor with the power to create public fora on social media and who does not. The court is positioned to answer this question in coming years; however, in the absence of government oversight, certain social media platforms have begun recognizing the distinction between private speech and government speech in whatever way they deem fit.

Twitter has started labeling certain accounts on their platform with unique tags notifying their status of affiliation with a particular government. A small flag or a symbol under the name of the account indicates whether the person or organization is a political candidate, a government actor, or a foreign propaganda outlet. Outside of their traditional check-mark certification process, Twitter has only been focused on labeling "accounts of key government officials, including foreign ministers, institutional entities, ambassadors, official spokespeople, and key diplomatic leaders" and "accounts belonging to state-affiliated media entities, their editors-in-chief, and/or their senior staff."[183] Regarding U.S. officials, the court has not weighed in one way or another regarding whether or not this flagged designation has any impact on a tweet's status as government speech and an account's status as a public forum. Twitter tends to take a more liberal view in its

[182] D'Antonio, Joseph. (2019). Whose Forum Is It Anyway: Individual Government Officials and Their Authority to Create Public Forums on Social Media. *Duke Law Journal.* 69 Duke L.J. 701.
[183] Support, Twitter. (2020, August 6). New Labels for Government and State-Affiliated Media Accounts. *Twitter*. blog.twitter.com/en_us/topics/product/2020/new-labels-for-government-and-state-affiliated-media-accounts.html.

labeling of government-affiliated accounts; it even labels political candidates with the same flag it gives the president.

Some judges take a very strict, conservative view of government action on social media. These jurists appear "to view a 'government entity' as an institutional body or individual capable of *unilaterally* setting official policy or conducting business on behalf of the government. Taken in conjunction, these sources seem to indicate that a 'government entity,' in the public forum context, denotes some governing body—either federal, state, or local—capable of acting unilaterally to set government policy, conduct official government business, or otherwise change or clarify the rights or obligations of individuals operating within its purview."[184] Over time, the courts have seemed to reject this position in favor of a broader view of government action. If the only government speech on social media was distributed by people with unilateral authority to set public policy, most congresspeople and executive branch officials would be exempt. Fundamentally, this claim lies in stark contract with historical context.

For many people, the most stereotypical image of a public forum is a local congressperson holding a town hall to speak with their constituents. If a government entity inquiry does not account for the general public perception of government actors by the public, it is useless for citizens to understand when their speech is protected and when it is not. In the past few years, it has become widely accepted that, "in the case of government-sponsored social media pages, courts should apply the government speech doctrine to the government's own posts, but uphold stronger protections for private speech by categorizing the comments section as a designated public forum. This solution

[184] D'Antonio, Joseph. (2019). Whose Forum Is It Anyway: Individual Government Officials and Their Authority to Create Public Forums on Social Media. *Duke Law Journal.* 69 Duke L.J. 701.

adequately protects the government's ability to speak for itself while preserving the free-flowing marketplace of ideas with a transparent judicial test."[185] Moving forward, the courts may apply some form of a government entity inquiry but only if that inquiry stays within the precedence begun by *Knight* and allows for a broad range of government actors to open public fora.

The federal judiciary has influenced the designation of public fora greatly throughout the years by issuing opinions that expand on First Amendment jurisprudence. Now, some scholars are calling on an Originalist approach to reading Section 230 that significantly limits its scope. In his article *The Communication Decency Act Gone Wild: A Case for Renewing the Presumption Against Preemption,* Ryan Dyer proposes a judicial solution where courts consider Congress's actual statutory intent when deciding Section 230 cases. According to Dyer, "were courts to reexamine Congress's preemptive intent, it would quickly become apparent that Section 230 was only intended to override publisher theories of liability."[186] Essentially, this article "suggests that in the years since Section 230's passage the courts have used Section 230 to protect websites for conduct that exceeds the scope of Section 230's intended protections."[187] If the scope of the original law is being perverted by social media companies, the courts may be able to reign in their legal liability simply through a more textualist interpretation.

In a 10-page document released by the Supreme Court in October 2020, Justice Clarence Thomas seemed to welcome challenges to Section 230. Citing cases of Section

[185] Bohanon, Alysha. (2016). Tweeting the Police: Balancing Free Speech and Decency on Government-Sponsored Social Media Pages. *Minnesota Law Review.* 101 Minn. L. Rev. 341.
[186] Dyer, Ryan. (2014). The Communication Decency Act Gone Wild: A Case for Renewing the Presumption Against Preemption. *Seattle University Law Review.* 37 Seattle U. L. Rev. 837.
[187] Bolson, Andrew. (2016). Flawed but Fixable. *Rutgers Computer & Technology Law Journal*. 42 Rutgers Computer & Tech. L.J. 1.

230 granting immunity for actions far beyond the law's original intent, Thomas made the argument that a new legal interpretation would allow plaintiffs to bring more complaints about harm committed by social media companies. "Paring back the sweeping immunity courts have read into §230 would not necessarily render defendants liable for online misconduct. It simply would give plaintiffs a chance to raise their claims in the first place. Plaintiffs still must prove the merits of their cases, and some claims will undoubtedly fail."[188] Between implementing a government entity inquiry and reevaluating the reach of Section 230, there are many ways the courts can address legal problems faced by government action on social media.

There are significant flaws, however, with entrusting the courts to create answers to the problems facing online public fora. While a Supreme Court decision would arguably be the fastest way to establish accepted precedent on these issues, only strong congressional action has the ability to hold media corporations accountable and implement clear rules as to what does and what does not classify as a public forum. Regarding social media's vast ability to collect user data, "the Supreme Court knows it needs to figure out what to do about this loophole in the law because Congress isn't regulating how our data trail can be used by the government or by the private sector. Technology is moving so fast, and the Constitution just isn't keeping up."[189] Without Congress taking charge and protecting American data, other branches of government may feel a need to make changes. The same principle is true with free speech. In Thomas's

[188] Thomas, Clarence. (2020, October 13). Malwarebytes, Inc. v. Enigma Software Group USA, LLC: On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. *Supreme Court.* www.supremecourt.gov/orders/courtorders/101320zor_8m58.pdf.
[189] Wehle, Kim. (2019). *How to Read the Constitution—and Why.* Harper Collins Publishing. ISBN: 9780062896308. Page 169.

statement, he wrote, “States and the Federal Government are free to update their liability laws to make them more appropriate for an Internet-driven society.”[190] If Congress does not implement laws that clearly protect public fora and government speech on the internet, the courts will be forced to make decisions that have intense repercussions.

XI. POTENTIAL LEGIALSTIVE SOLUTIONS

While courts possess the ability to read Section 230 with a narrow understanding of the law’s intentions, the more impactful way to approach the problem is through amending or replacing the section entirely. Currently, there appears to be bipartisan support for either revoking or amending Section 230. Not only does former President Donald Trump want to see changes to the law, as evident in his executive order, President Joe Biden has voiced his concerns about the dangers posed by big tech. In an interview with The New York Times editorial board, Biden criticized Facebook and claimed its inaction on dispelling misinformation creates a need for the end of the legal shield created by Section 230.[191] While Republicans want social media companies to be liable for censorship of conservative speech by liberal Silicon Valley executives, Democrats are concerned about foreign governments using social media to spread disinformation and meddle in elections. Even the provision's author, Senator Ron Wyden, has issues. "I just want to be clear. As the author of Section 230, the days when these 'pipes' are considered neutral are over, because the whole point of 230 was to have a shield and a sword, and

[190] Thomas, Clarence. (2020, October 13). Malwarebytes, Inc. v. Enigma Software Group USA, LLC: On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. *Supreme Court.* www.supremecourt.gov/orders/courtorders/101320zor_8m58.pdf.
[191] Kang, Cecelia. (2020, June 11). Biden Prepares Attack on Facebook’s Speech Policies. *New York Times.* www.nytimes.com/2020/06/11/technology/biden-facebook-misinformation.html.

the sword hasn't been used."[192] Although repealing Section 230 will not fix many of the root problems created by public fora on social media, it is an easy point to identify and blame as an issue. As long as social media companies have the luxury of marketing themselves to the public as free and open platforms while simultaneously censoring content and creating echo chambers, avenues for legal recourse will be necessary to hold the platforms accountable when they fail to operate as true content distributors.

Finding pathways to regulate social media companies is a task full of differing theories and ideas, but there are some existing models that could be used to implement regulations. For example, phone companies have been regulated as "dumb pipes" or "common carriers" that simply carry audio from one phone to another, no questions asked. Americans can curse on the phone, issue death threats, slander people, harass others, and do almost anything, and the phone company has zero liability for their actions. Similarly, common carriers must provide service to anyone willing to pay the fee, unless they have significant grounds for refusal. In the early stages of the internet, the phone model was a sufficient analog to social media sites. "Once upon a time, both Facebook and Twitter did more or less work as dumb pipes. You picked who you followed, and the services then displayed whatever the people you follow posted, in order. But that is no longer the case—algorithms on the services determine what you see—and turning social media into dumb pipes would have far-reaching implications."[193] Today, requiring all social media sites to return to the "dumb pipe" model would be unrealistic, not only because it would fundamentally change (and harm) their business

[192] News, Multichannel. (2020, March 9). Section 230: When Policy Becomes Personal; Father of Slain Journalist Pushes Edge Providers to Police Themselves. *Multichannel News.* Pg. 5; Vol. XLI.
[193] Yglesias, Matthew. (2020, October 26). 2 Models for Regulating Social Media Giants, Explained. *Vox.* www.vox.com/21520568/social-media-phone-company-big-three.

model but because it would decrease part of the reason political speech is as effective as it is online. While social algorithms can be destructive, they also do a fairly good job at connecting users with relevant government speech they may be interested in.

Another imperfect analog is to compare social media regulations to television companies. Because "television antennas can't get a clear signal if more than one person is trying to broadcast on the same frequency in a given geographical area," the rise of cable television "was predicated on government-granted monopoly rights to the use of certain frequencies in certain areas."[194] Although there are parallels between CBS/NBC/ABC and Facebook/Twitter/YouTube, the internet does not utilize the same type of public airwaves that allowed the government to issue licenses and monopolies to broadcasting companies. However the government approaches reform, "it is important to keep regulatory burdens manageable. If you make the regulatory burdens too great, you can create barriers to entry for new social media firms, which defeats the regulatory purpose of achieving a wide range of social media companies with different rules, affordances, and innovations."[195] Any legislation that regulates social media should weigh the competing interests of promoting free speech while encouraging innovation. Neither phone nor television companies present perfect guidelines for how the government should proceed in crafting reform, but that does not mean no sufficient pathway exists. Comprehensive social media regulations are necessary, but a new model for oversight may be required.

[194] Yglesias, Matthew. (2020, October 26). 2 Models for Regulating Social Media Giants, Explained. *Vox.* www.vox.com/21520568/social-media-phone-company-big-three.
[195] Balkin, Jack. (2020, March 25). How to Regulate (and Not Regulate) Social Media. *Knight First Amendment Institute.* knightcolumbia.org/content/how-to-regulate-and-not-regulate-social-media.

If Congress wants to implement regulations that provide effective oversight, the first step could be to label large media companies as "nonstate regulators." Implementing this new classification would create a model for regulation that is inherently different than any other media company. Due to the unique position of corporations such as Facebook, Twitter, and Google, regulations applying strictly to either governments or private companies is not a complex enough assessment of legislative jurisdiction. Nonstate regulators have two inherent qualities: "First, they are private entities outside the reach of direct constitutional restriction. But second, their power and scale are sufficiently state-like that extraordinary concerns arise when they exercise power in ways that the Constitution would not allow a state actor."[196] The purpose of identifying "extraordinary concerns" that warrant the label of a nonstate regulator is essential in determining why this distinction is necessary. "How may freedom of speech continue to exist if the doctrines meant to protect it cannot reach those spaces which society has chosen to be the most important for public discourse, namely private social media websites? Public discourse in such spaces could be restricted by the viewpoints and biases of the private owners, or worse, certain subjects or all speech could be prohibited."[197] If the marketplace of ideas has moved online, the online spaces where it exists should be liable to congressional oversight; however, the current status of social media companies as private corporations under Section 230 protections makes this oversight almost impossible.

[196] Langvardt, Kyle. (2018). A New Deal for the Online Public Square. *George Mason Law Review.* 26 Geo. Mason L. Rev. 341.
[197] Shefa, Mason. (2018). First Amendment 2.0: Revisiting Marsh and the Quasi-Public Forum in the Age of Social Media. *University of Hawaii Law Review.* 41 Hawaii L. Rev. 159.

By introducing the label of a nonstate regulator, Congress has the opportunity to exert influence and introduce regulations related to their "extraordinary concerns." In this system, "the government would enjoy more latitude to enact policies addressed to the 'extraordinary concerns' so long as the means-ends fit was adequate. Poorly drawn policies, however, or policies that were not addressed to the 'extraordinary concerns' would remain as vulnerable to First Amendment attack as they are today. In effect, the nonstate regulator analysis would selectively downgrade the largest platforms' First Amendment shield without removing it entirely."[198] Classifying giant social media companies as nonstate regulators would not constitute overreach on the part of the federal government; rather, it would signal a return to the trust-busting age of America's past where policymakers were not scared to stand up for the rights of U.S. citizens against U.S. corporations. Many scholars have argued that "the traditional government function' and 'traditional public forum' components of First Amendment jurisprudence must be reconceptualized to cover internet speech."[199] By instituting a nonstate regulator classification, Congress would allow private corporations to operate their businesses while subject to oversight when they cross over into exhibiting government-like power over individual freedom. Although there are significant details and implementation questions to be answered regarding this solution, a unique label on powerful companies would do a lot to hold them accountable when they exert too much control over the marketplace of ideas.

[198] Langvardt, Kyle. (2018). A New Deal for the Online Public Square. *George Mason Law Review.* 26 Geo. Mason L. Rev. 341.
[199] Lane, Tyler. (2019). The Public Forum Doctrine in the Modern Public Square. *Ohio Northern University Law Review*. 45 Ohio N.U.L. Rev. 465.

Another potential solution to the manipulation of the marketplace of ideas online is to let social media companies fix the issues themselves using whatever solutions they deem appropriate within their unique business models. Facing potential legislative oversight, Twitter has taken the first step toward developing a new community-based approach to combating misinformation on its site. In a similar manner to Reddit or Wikipedia, Twitter is creating a service called Birdwatch that will allow specific users to add comments and notes to posts they determine to have false or misleading statements. According to Twitter Vice President of Product Keith Coleman, "Birdwatch allows people to identify information in Tweets they believe is misleading and write notes that provide informative context. We believe this approach has the potential to respond quickly when misleading information spreads, adding context that people trust and find valuable."[200]

Launching in early 2021 on a separate platform from mainstream Twitter, the company plans to continue improving the product through community feedback and updates. The initial announcement of Birdwatch came with mixed reactions, including a number of valid concerns. Primarily, which users are allowed to add notes and rate notes by other contributors will shape the public perception of the tool by people across the political spectrum. Twitter is taking one step in the right direction by fighting misinformation through a community-driven approach as opposed to the top-down approach utilized in the past. The development of Birdwatch is a positive sign that at least one social media company recognizes quality information as a product of collective

[200] Coleman, Keith. (2021, January 25). Introducing Birdwatch, a Community-Based Approach to Misinformation. *Twitter*. blog.twitter.com/en_us/topics/product/2021/introducing-birdwatch-a-community-based-approach-to-misinformation.html.

understanding in the marketplace of ideas. In gathering data during the development of Birdwatch, Coleman states that "people valued notes being in the community's voice (rather than that of Twitter or a central authority) and appreciated that notes provided useful context to help them better understand and evaluate a Tweet (rather than focusing on labeling content as 'true' or 'false')."[201]

While there are many benefits to building social media sites as community-centered platforms that facilitate the marketplace of ideas instead of circumventing it, the problem remains that the companies themselves have far too much unrestricted power over user content. A combination of the legislative and judicial solutions proposed here should be implemented in tandem with a new social contract that maintains robust debate and conversation within public fora created by government speech.

XII. NEW SOCIAL CONTRACT

While America has changed immensely since its founding, "new technologies rarely give rise to questions we have never addressed before. More often they make the old questions more complex."[202] Today, social media companies exert unprecedented power and control over their platforms which allows them to influence and bend public discourse in any matter they see fit. As politicians and other government actors use social media in the execution of their duties, they spread government speech and create public fora for people to interact and debate within. Recent judicial decisions have classified

[201] Coleman, Keith. (2021, January 25). Introducing Birdwatch, a Community-Based Approach to Misinformation. *Twitter*. blog.twitter.com/en_us/topics/product/2021/introducing-birdwatch-a-community-based-approach-to-misinformation.html.
[202] Solove, Daniel. (2007). *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet.* Yale University Press. ISBN: 9780300124989. Page 105.

certain Facebook comment sections and Twitter replies as designated public fora, and while these opinions have changed the way government actors behave on social platforms, they have not changed the way social platforms moderate content. Thinking of online gathering places in terms of traditional physical gathering places can "provide a way of thinking about the responsibility of a platform to its residents: your local bartenders or baristas don't generally interfere with your conversations, but they do reserve the right to kick people out if they're disturbing other patrons, and this makes the space better as a whole."[203] Despite the existence of public fora on social media, companies such as Facebook and Twitter have continued to censor certain speech, issue fact checks, and interfere in the marketplace of ideas. While these media companies make incredible amounts of money every year, they do so by selling the personal data of their users, marketing themselves as free and open to the public, and hiding behind the protections of Section 230. The current system works well for social media companies and their Silicon Valley executives, but it's destructive for the American people. In order to secure the preservation and integrity of the marketplace of ideas for generations to come, a new social contract is necessary.

Policymakers creating public fora to interact and communicate with their constituents is a practice as old as America itself. Although the marketplace of ideas has historically been hosted in traditional public fora, there are plenty of instances where private property has been the locale for public fora. In a theoretical scenario, a public official wants to host a town hall in their hometown for residents to come and complain about local issues. With no adequate public property available for the event, the public

[203] McCulloch, Gretchen. (2019). *Because Internet.* Riverhead Books. ISBN: 9780735210943. Page 235.

official rents the ballroom of a local hotel for one day. The hotel ballroom, for the duration of the town hall, will be legally classified as a designated public forum. If the owner, manager, or operator of the hotel wanted to participate in the public forum, they could, but the hotel itself nor any of its staff could interfere with the free expression of speech during the town hall. Although the hotel itself is private property, a specific section of that property is being leased by a public official for the purposes of creating a public forum. Just as the public official could not censor speech during the town hall or restrict people from entering the venue, neither can the hotel issue non-content-neutral restrictions. If the hotel wants to factcheck the public official or place warnings on the government speech, the hotel would be liable to a lawsuit. The hotel has no legal right to do so because the private company signed a contract with the public official when they rented the space.

While many physical town halls still take place in venues such as hotels, the marketplace of ideas has transitioned to its primary home on the internet. Public officials today utilize social media as a platform where all people are invited to come, complain, debate, and engage with the issues and topics of the moment. Creating a social media account for official public business is extremely similar to renting a hotel ballroom for a town hall. Recent judicial cases such as *Knight* have shown policymakers that the social media accounts of public officials, when used for public business, will be legally classified as designated public fora. Just like the hotel owners, if the platforms themselves or their CEOs want to participate in the forum, they can, but the social media companies themselves should not be able to interfere with the free expression of speech within the public forum. Unfortunately, they do, and their actions have had significant

consequences for the American public and the legitimacy of the marketplace of ideas. The differences between hotels and social media companies in these circumstances stem from the contracts they create with their customers. The terms of service created by media companies are not written through intense negotiation with the users, they are not favorable for the American public, and they are not read by the vast majority of people. All major internet service providers, search engines, and social media sites restrict speech through comprehensive terms of service without adequate representation from the people that are affected every day by the actions of the platform. Until fundamental alterations are made, the American public will continually be used by these companies without hope for change.

The terms of service on all qualifying social media sites need to allow space for the marketplace of ideas to thrive in sections recognized and treated as legitimate public fora. In political philosophy, the social contract is a written or unwritten agreement between rulers and subjects as to the rights and duties of the governed. For previous generations, "the country's social contract was premised on higher wages and reliable benefits, provided chiefly by employers."[204] While the old social contract revolved around economic reform, a new version of the social contract should focus on modern issues facing Americans today. The new social contract advocated for in this paper is both a legal change to the policies governing social media platforms and a positioning shift in how Americans view their speech online. Whether or not the "nonstate regulator" label is adopted, there is enough precedent for Congress to create impactful regulation.

[204] Freedman, Josh, and Michael Lind. (2013, December 19). The Past and Future of America's Social Contract. *The Atlantic.* www.theatlantic.com/business/archive/2013/12/the-past-and-future-of-americas-social-contract/282511.

While the final text of a Public Forum Restoration Act would be quite lengthy, the core of the new social contract would be this message: *no social media company shall be exempt from legal liability when they act as editors of speech disbursed by government actors or they restrict access to the public fora created therein.* Implementing this rule would be a powerful act to make sure there are consequences for corporations that overstep their bounds and manipulate the flow of ideas in designated public fora.

Through this policy change, social media companies would be required to recognize the distinct difference between government speech and private speech on its platform and identify those spaces accordingly. Where government speech exists, social media companies would not have legal protection to issue content-based restrictions on what public officials can and cannot say. Americans should have the right to know what their elected and appointed representatives are saying without the appearance of any bias filter or screening on the part of the platform itself. When social media companies attempt to serve as the arbiters of truth in a democracy, they fundamentally distort the idea of what truth is and they prevent the marketplace of ideas from acting accordingly. Political advertising is a different issue regulated by different rules, but if a platform allows government speech, it should allow that speech to be disbursed uninterrupted.

Additionally, where government speech exists, social media companies would be required to acknowledge the existence of a public forum. As a measure to preserve the marketplace of ideas within these public fora, social media companies should commit to withholding any content-specific form of restriction. Essentially, the dumb pipe model used by phone companies could be adopted but only for sections of the sites designated as public fora. Platform-wide bans that are content-neutral would be allowed as long as

they are consistent with the same strict scrutiny analysis that would be performed on any government-issued restriction. Ideas for implementing versions of the new social contract have been proposed, including creating specific government social media platforms and allowing government actors to create limited public fora on existing social media by adding additional control measures over who can replies to their posts.[205] Both of these proposals fall short in recognizing the inherent reason why public officials utilize social media: to gain direct access to communication with their constituents.

The new social contract seeks to create a system where the hybrid nature of public and private speech on social media can occur simultaneously. While the vast majority of a platform should be able to continue operating as normal, the designated public fora created by public officials should receive distinct legal designation and recognition. Congress should pass a comprehensive communication oversight bill that opens up social media companies to First Amendment lawsuits when they commit viewpoint discrimination on government posts and the public fora associated with them. How specifically platforms comply with the mixed nature of speech on their platforms is up to the executives of those specific sites. Social media companies will all approach the new social contract differently, but on sites such as Twitter, perhaps a different color certified checkmark could signal to users that this account is government speech and all replies or comments to that post are protected free speech in a public forum.

Other platforms may be faced with the new social contract and decide not to participate. If a company fails to comply, Section 230 would not be sufficient to protect

[205] Briggs, Samantha. (2018). The Freedom of Tweets: The Intersection of Government Use of Social Media and Public Forum Doctrine. *Columbia Journal of Law and Social Problems.* 52 Colum. J.L. & Soc. Probs. 1.

them from lawsuits relating to the First Amendment. An interesting middle ground solution would be for a platform to allow users to opt in or opt out of viewing government speech on the platform. By opting out, users of a platform such as Facebook could be free from worrying about what is and is not government speech or public fora. In this case, the entire platform would be private because government speech would be hidden. Social media companies can be creative in how they optimize their platforms for the new social contract, but the purpose of the idea is to allow companies the maximum control over how their platforms operate while also protecting the freedom of speech in places designated as public fora.

As evidenced by previous congressional communication legislation, the U.S. Congress has the authority to implement the new social contract. Not only does the First Amendment protect the freedom of speech from infringement by the government, but the Commerce Clause (Article I, Section 8) gives Congress the right to regulate commerce between the states. In the early 1900s, the U.S. government passed a series of laws intended to implement telephone and broadcasting regulations through the newly created Federal Communications Commission (FCC). As early as 1910, Congress amended the Interstate Commerce Act to bring "interstate and foreign wire and wireless communication under federal jurisdiction."[206] With communication regulation securely within their legal grasp, the legislature passed laws implementing the original "public interest, convenience, and necessity" (PICON) standards by which licensing and other regulatory decisions are judged. At the time, "Congress felt broadcasting needed regulation, in part because the industry itself had requested it to reduce interference on

[206] Sophos, Marc. (1990). The Public Interest, Convenience, or Necessity: A Dead Standard in the Era of Broadcast Deregulation? *Pace Law Review*. digitalcommons.pace.edu/plr/vol10/iss3/5.

the air, but also because there was (and is) insufficient spectrum to accommodate all who wish to broadcast. Further, the electromagnetic spectrum is held to be a natural public resource, and thus government oversees its use by licensing services needing spectrum."[207]

Unlike radio stations or television providers, the internet is not restricted by the limits of the electromagnetic spectrum; therefore, there is no reason to force all internet providers to acquire a license with the FCC. Similar to traditional media platforms, however, there is a significant public interest to issuing regulations governing behavior online. The federal government had two general goals in creating communication oversight: "to foster the commercial development of the industry and to ensure that broadcasting serves the educational and informational needs of Americans."[208] The new social contract aligns perfectly within these original goals. By securing the existence of designated public fora within social media, companies are allowed to maintain control over their sites while American citizens are allowed to engage in the marketplace of ideas free from platform censorship.

With the rise of social media as the home of modern political discourse, the public has a significant interest in how social media sites are governed. Mark Zuckerberg himself has asked for increased regulation. Writing in an op-ed for the Washington Post, Zuckerberg says, "I believe we need a more active role for governments and regulators. By updating the rules for the Internet, we can preserve what's best about it—the freedom

[207] Sterling, Christopher. (1994). An Unfettered Press: The Electronic Media. *United States Information Agency*. usa.usembassy.de/etexts/media/unfetter/press11.htm.
[208] Advisory Committee on Public Interest Obligations of Digital Television Broadcasters. (1998, November 9). The Public Interest Standard in Television Broadcasting. *U.S. Department of Commerce.* govinfo.library.unt.edu/piac/novmtg/pubint.htm.

for people to express themselves and for entrepreneurs to build new things—while also protecting society from broader harms."[209] Instead of passing legislation in the name of the public interest online, the U.S. government would rather privatize these decisions and hand them over to the platforms themselves.

In the absence of meaningful oversight, social media platforms have gladly taken it upon themselves to self-moderate. When considering whether or not to remove content, Twitter states that "we recognize that sometimes it may be in the public interest to allow people to view Tweets that would otherwise be taken down. We consider content to be in the public interest if it directly contributes to understanding or discussion of a matter of public concern."[210] If Twitter acknowledges a general public interest to access the content on its site and the Court in *Packingham* recognizes social media as the modern home of the marketplace of ideas, Congress has the legal right and responsibility to implement a form of the new social contract. By passing legislation that preserves free speech in designated public fora on social media, the public can have renewed confidence in their ability to communicate with their elected officials online.

The new social contract should also include a significant amount of public awareness to teach the American public when and where their speech is protected. Too often, Americans interact with others and speak without the basic understanding of whether or not the spaces they're in allow for free speech. Through a comprehensive

[209] Zuckerberg, Mark. (2019, March 30). The Internet Needs New Rules. Let's Start in These Four Areas. *Washington Post.* www.washingtonpost.com/opinions/mark-zuckerberg-the-internet-needs-new-rules-lets-start-in-these-four-areas/2019/03/29/9e6f0504-521a-11e9-a3f7-78b7525a8d5f_story.html.
[210] Center, Help. About Public-Interest Exceptions on Twitter. *Twitter*. help.twitter.com/en/rules-and-policies/public-interest.

public relations effort on behalf of the U.S. government, policymakers can teach the general public about the extent of their rights to speak on social media. Specifics of what this campaign for public awareness will look like should be left to marketing professionals in the federal government; however, ideas include press releases, informative videos, news articles, and physical media. Although the public relations aspect is much less important than the legal aspect of the new social contract, it is vital in helping the public make wise decisions in their search for truth in the marketplace of ideas. As explained in a previous section, social media platforms exercise the ability to manipulate the user experience so thoroughly that understanding any sort of objective truth is becoming incredibly difficult. Knowing which speech is unfiltered and which aspects are public fora will help American citizens engage in the marketplace of ideas with renewed confidence.

Unfortunately, the new social contract does not solve all of the issues created by the rise of powerful social media companies; however, it does address the fundamental problem of how the marketplace of idea can be protected in the 21st century. Under the new social contract, media companies still control unparalleled amounts of user data and the ability to manipulate algorithms to control user moods. Additional reforms are necessary, but the new social contract can be the first step in restoring the spirit of debate in America and preserving the freedom of speech on the internet. At the core, the new social contract may not be so new after all. Justice Louis Brandeis wrote that:

> "Those who won our independence… valued liberty both as an end, and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty. They believed that freedom to think as you will

> and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies, and that the fitting remedy for evil counsels is good ones."[211]

If the future of political debate is going to be preserved through public fora on social media, radical changes to the status quo are necessary. As a bright line rule, where public fora exist on social media, the platforms themselves should not have the right to interfere with discussion and censor speech.

XIII. HOW PUBLIC OFFICIALS SHOULD RESPOND

For public officials trying to work on behalf of their constituents during the swift change of legal precedent on social media, determining how to handle their

[211] Whitney v. California, 274 U.S. 357 (1927).

communications can be difficult. Regardless of the legal landscape, expecting government use of social media to do anything but increase in the coming years is unrealistic. One Pew Research study released in July 2020 analyzed every tweet and Facebook post made by members of Congress since 2015. The results found that "compared with a similar time period in 2016, the typical member of Congress now tweets nearly twice as often (81% more), has nearly three times as many followers and receives more than six times as many retweets on their average post. On Facebook, the typical member of Congress produces 48% more posts and has increased their total number of followers and average shares by half."[212]

As social media becomes increasingly engrained in political culture, navigating the new marketplace of ideas and understanding the nature of political discourse is necessary. While the new social contract would clarify many of the ambiguities caused by recent decisions, public officials need a way to proceed until reform is achieved. Even if federal oversight is not passed in coming years and social media companies continue to meddle in debate within public fora, public officials should still recognize the legal distinction of their pages. The best course of action for politicians and federal employees to take would be to ask themselves the following series of questions:

- Is this social media account clearly identifiable with my role as a public official?
- Do I utilize my social media account in the execution of my duties as a public official?

[212] Van Kessel, Patrick, et al. (2020, July 16). Congress Soars to New Heights on Social Media. *Pew Research Center*. www.pewresearch.org/internet/wp-content/uploads/sites/9/2020/07/PDL_07.16.20_congress.social.media_.full_.report.pdf.

– Are there adequate channels through my social media for the general public to comment, interact, and communicate with others?

If the answer to all three of these questions is yes, the public official has successfully opened a designated public forum and all viewpoint discrimination or access restrictions should be removed from the page. Understanding the nature of social media as the new marketplace of ideas is essential for public officials to facilitate communication with their constituents while also respecting their First Amendment rights.

The aftermath of the *Packingham* decision left many government actors hesitant to utilize social media to the fullest extent in fear of legal retribution; however, these fears seem to be overblown.[213] Without directly blocking users from accessing their social media pages, public officials have a variety of tools available to exercise editorial control including hiding messages from their timeline or reporting abusive posts for removal. According to Judge Buchwald, who heard arguments from lawyers for both Trump and the Knight Institute, the simplest course of action to take would be to "mute" rather than "block" critical posts public officials find unwelcome. When one Twitter user "mutes" another Twitter user, **"**the other user's messages are hidden from the account holder without actually blocking or stopping the muted person's access to view or post to the account. Blocking the account, on the other hand, prevents the blocked user from viewing posts, accessing the account, seeing basic information associated with the account, such as the list of people and posts the account is associated with, and

[213] Bohanon, Alysha. (2016). Tweeting the Police: Balancing Free Speech and Decency on Government-Sponsored Social Media Pages. *Minnesota Law Review*. 101 Minn. L. Rev. 341.

information about people following the account for updates."[214] If public officials muted accounts they do not want to see, then the muted constituents could still participate in political discourse within the forum, just without being seen or heard by the public officials themselves.

Muting is a temporary solution to the questions raised in *Knight* and *Packingham*. Until the Supreme Court weighs in on the issue or Congress passes comprehensive oversight for social media companies "lower courts, litigants, government officials, and private social media companies—in addition to the seventy percent of American adults using online social networking—will debate the extent to which cyberspace forms 'the modern public square,' in either its legal or colloquial sense."[215] Several government bodies have issued guidelines to help public officials navigate social media, but so far, these resources are simply recommendations. "Several federal agencies have already disseminated their own best practices as related to social media use by their employees in relation to the agency. For example, the Centers for Disease Control and Prevention has a variety of materials that govern its social media presence, specifically through its employees."[216]

The White House may consider implementing a more extensive policy for employees to follow relating to social media usage. Though such a policy might clear up how the government views its own social media accounts, it is unlikely to clear up the law regarding whether a federal official will be held liable for viewpoint discrimination

[214] LoPiano, James. (2018). Public Fora Purpose: Analyzing Viewpoint Discrimination on the President's Twitter Account. *Fordham Intellectual Property, Media, & Entertainment Law Journal.* 28 Fordham Intell. Prop. Media & Ent. L.J. 51.
[215] Association, H.L.R. (2017). First Amendment: Speech: Packingham v. North Carolina. *Harvard Law Review.* 131 Harv. L. Rev. 233.
[216] See 214

committed on their social media accounts. Under the Presidential Records Act, the White House acknowledges that it archives tweets, mentions, and other content posted to "official White House pages," however, the privacy policy does not clarify how much information on social media it recognizes as official government speech.[217] Knowing how the government classifies the speech of its own actors is essential for public officials to determine how much legal protection they have on social media. Until the rules and recommendations of the federal government are clarified, policymakers should act with an abundance of caution. Overall, public officials censoring speech is an issue worth addressing, but it is small in comparison to the massive consequences that can occur when social media companies themselves interfere in the marketplace of ideas.

[217] House, White. (2020). Privacy Policy. *White House.* www.whitehouse.gov/privacy.

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