MITCHELL | HAMLINE School of Law

Mitchell Hamline Law Review

Volume 50 | Issue 1 Article 2

2024

Social Media, the Modern Public Forum: The State Action Doctrine and Resurrection of Marsh

Erika L. Andersen

SOCIAL MEDIA, THE MODERN PUBLIC FORUM: THE STATE ACTION DOCTRINE AND RESURRECTION OF MARSH

Erika L. Andersen

I. INTRODUCTION

It is a foundational right, protected by the First Amendment, that citizens of the United States have freedom of speech and expression in public fora. However, traditional public fora have become obsolete and archaic in the digital age. Social media platforms are the modern-day equivalent of the public town square where anyone with an internet connection may exchange their ideas publicly and freely. Individuals have the ability to connect with a multitude of people across the globe like never before. Because social media is the primary space in which people engage in discourse, consume news, and take in other information, it has become increasingly essential to protect First Amendment rights in this modern-day public forum.

As private entities, social media companies have unlimited censorship control over platform users' speech. A private entity is traditionally not required to abide by constitutional requirements unless they qualify as a state actor, like a company town.[1] Although no longer as prevalent as they once were, company towns are more closely related to social media platforms than they may seem. Just as company towns are required to follow constitutional restrictions to allow individuals their fundamental liberties, so too should social media platforms be subject to First Amendment requirements as they act as the modern-day public forum.

Divided into four main parts, this Note will discuss the scope of the First Amendment, the state action doctrine, landmark free speech cases, and how social media became the modern public forum. Part II of this paper discusses what foundational rights the First Amendment protects, as well as the public forum doctrine. Part III discusses the origin and evolution of the state action doctrine, focusing on cases such as *Marsh v. Alabama* and *Manhattan Community Access Corp. v. Halleck*.[2] Part IV addresses the rise of social media, how it became the modern public forum, significant cases pertinent to social media as a public forum, and the intentions behind social media policies and mission statements. Finally, Part V discusses the significance of *Marsh* in relation to social media platforms, the protection of free speech, and the marketplace of ideas.

---

[1] *See* Marsh v. Alabama, 326 U.S. 501 (1946).
[2] *Id.*; 139 S. Ct. 1921 (2019).

II. THE FIRST AMENDMENT IN A NUTSHELL

The First Amendment of the U.S. Constitution, ratified in 1791, reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[3] The First Amendment protects speech conducted in a public forum, including political, religious, commercial, and symbolic speech as well as artistic expression.[4] However, the First Amendment does not protect speech that causes incitement to immediate lawless action, true threats, fighting words, obscenity, or defamation, even if such speech is conducted in a public forum.[5]

---

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

[4] Citizens United v. FEC, 558 U.S. 310 (2010) (holding that political spending by corporations is political expression under the First Amendment); Engel v. Vitale, 370 U.S. 421 (1962) (holding that public schools mandating student participation in prayer violated the First Amendment); Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding that the First Amendment prevents a state from compelling formal school attendance through age sixteen if school attendance is in conflict with sincerely held religious beliefs); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980) (holding that commercial speech is protected under the First Amendment); Sorrell v. IMS Health Inc., 564 U.S. 552 (2011) (holding that a statute banning transmission or sale of prescriber-identifying data violates the First Amendment rights of pharmaceutical companies); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding that students are entitled to First Amendment protection at school so long as expressive conduct does not substantially interfere with school operation); Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37 (1983) (holding that differential access between unions to public school mail facilities does not violate the First Amendment because those facilities are a designated forum); *Marsh*, 326 U.S. 501 (holding that company towns may not restrict the exercise of First Amendment rights in public spaces owned by the company).

[5] Miller v. California, 413 U.S. 15 (1973) (holding that obscene material is not protected by the First Amendment); Brandenburg v. Ohio, 395 U.S. 444 (1969) (holding that speech may be prohibited if it is directed at inciting imminent lawless action and it is likely to incite such action); Virginia v. Black, 538 U.S. 343 (2003) (holding that cross burning may be banned when carried out with intent to intimidate amounting to true threats); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (holding that insulting or fighting words that inflict injury or immediate breach of peace "by their very utterance" are not protected by the Constitution); Roth v. United States, 354 U.S. 476 (1957) (holding that obscene materials constitute speech that may be constitutionally prohibited); *see* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (holding that false statements of fact about public figures are constitutionally prohibited if they are made with actual malice or reckless disregard for the truth); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (holding that damages are available for actual harm to

The First Amendment protects freedom of speech "[i]n places which by long tradition or by government fiat have been devoted to assembly and debate."[6] In these protected places, "the rights of the State to limit expressive activity are sharply circumscribed."[7] This is referred to as the public forum doctrine.[8] There are three types of public fora under the public forum doctrine: (1) traditional public fora, (2) designated public fora, and (3) limited public fora.[9] In addition to these types of fora, other considerations such as time, manner, and place may justify restrictions as long as the restrictions are narrowly tailored to serve the government's legitimate, content-neutral interests.[10]

III. STATE ACTION DOCTRINE AND SPEECH

The state action doctrine is derived from the Fourteenth Amendment of the U.S. Constitution.[11] This doctrine relies on Section 1 of the Amendment, which reads as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[12]

The Fourteenth Amendment prevents states from creating any law that may interfere with the rights and liberties of individuals as provided by the Constitution.[13]

---

reputation by defamatory false statements made with actual malice). *But see* Texas v. Johnson, 491 U.S. 397 (1989) (declining to create an exception to First Amendment protection for burning of the American flag).

[6] *Perry Educ. Ass'n*, 460 U.S. at 45.

[7] *Id.*

[8] *See id.* at 62 n.6.

[9] *Id.* at 45–47.

[10] *Id.* at 45.

[11] *See* U.S. CONST. amend. XIV.

[12] *Id.* § 1.

[13] *See id.*

The U.S. Supreme Court has determined that the Fourteenth Amendment does not allow the federal government to prohibit discriminatory behavior by private entities, as seen in the *Civil Rights Cases*.[14] The Court's majority opinion in these consolidated cases stated that the original intention behind the Fourteenth Amendment was to regulate state action, not private conduct.[15] Justice Harlan's dissent called for extending the interpretation of the Fourteenth Amendment to private places and entities that serve a public function.[16]

The issue of private entities as state actors was analyzed by the Court in *Manhattan Community Access Corp. v. Halleck*.[17] The Court stated that there are three categories in which a private entity may qualify as a state actor under the state action doctrine.[18] These categories include "(i) when the private entity performs a traditional, exclusive public function, . . . (ii) when the government compels the private entity to take a particular action, . . . or (iii) when the government acts jointly with the private entity."[19] The Court noted that there are only a rare number of instances in which a function provided by a private entity is considered a traditional public function, such as running elections or operating a company town.[20] The state action doctrine ensures the preservation of individual constitutional rights when private entities provide or administer traditional public fora, regardless of whether those entities are associated with the government.[21]

---

[14] 109 U.S. 3, 24–25 (1883).
[15] *Id.* at 11.
[16] *Id.* at 26–27 (Harlan, J., dissenting).
[17] 139 S. Ct. 1921 (2019).
[18] *Id.* at 1928.
[19] *Id.* (citations omitted).
[20] *Id.* at 1929.
[21] Places of public accommodation are another category under which a private entity may fall and be subject to constitutional requirements. *See* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., 37 F.3d 12 (1st Cir. 1994); *see also* Boy Scouts of Am. v. D.C. Comm'n on Hum. Rts., 809 A.2d 1192 (D.C. 2002). A place of public accommodation means "a facility operated by a private entity whose operations affect commerce" that falls within certain enumerated categories. 28 C.F.R. § 36.104 (2023). In places of public accommodation, no person may be discriminated against or segregated from others based on "race, color, religion, or national origin." Civil Rights Act of 1964, 42 U.S.C. § 2000a(a) (1964). Some examples of such places include places of lodging, restaurants, bars, theaters, auditoriums, lecture halls, places of public gathering, bakeries, grocery stores, shopping centers, hospitals, museums,

A. Private Entities as State Actors: The Halleck Mistake

Three points were at issue in *Manhattan Community Access Corp. v. Halleck*[22]: (1) whether public access channels fall under the definition of a public forum;[23] (2) whether the Manhattan Neighborhood Network (MNN) stood in the shoes of the city as a state actor;[24] and (3) whether the city had a property interest in the public access channels.[25]

1. The Halleck *Majority Opinion*

First, the Court did not consider public access channels to fall within a traditional public forum as the government had not "traditionally and exclusively" performed this function.[26] In holding that creating public access channels was not a traditional and exclusive function of the government, the Court cited *Hudgens v. NLRB*.[27] *Hudgens* established that a private entity may provide a forum for speech without transforming that private entity into a state actor because providing a forum for speech is not an activity exclusive to

libraries, galleries, parks, places of education, and places of exercise or recreation, among many others. 28 C.F.R. § 36.104 (2023); *see also* 42 U.S.C. § 2000a(b) (1964); 42 U.S.C. § 12181(7) (2023). Public accommodations are not limited to physical structures and may include clubs and membership groups. *See Carparts*, 37 F.3d at 19; *see also Boy Scouts*, 809 A.2d at 1192. First Amendment issues may arise in places of public accommodation instead of under the state action doctrine. Such was the case in *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, in which a bakery shop owner, Phillips, refused to make a custom wedding cake for a same-sex couple, but offered to sell them other premade baked goods. 138 S. Ct. 1719, 1724 (2018). Phillips refused to make the custom cake because he felt it violated his religious beliefs and his right to free expression to be required to create the design and message of a cake when he disagreed with its message. *Id.* at 1724, 1726. The Court noted that there is a difference between a baker refusing to sell a cake with messaging inconsistent with the baker's beliefs to a same-sex couple and a baker refusing to sell any baked goods at all to a same-sex couple. *See id.* at 1723. The Court concluded that had Phillips been required to create the custom cake that the couple requested, this would have violated Phillips's First Amendment rights through the message on the cake. *Id.* at 1731–32. While it is not the opinion of this Note that the places of public accommodation doctrine applies to social media platforms, it is an important doctrine to be aware of when discussing the state action doctrine.

[22] *Halleck*, 139 S. Ct. at 1926.
[23] *Id.* at 1930.
[24] *Id.*
[25] *Id.* at 1933.
[26] *Id.* at 1929.
[27] *Id.*

governmental entities.[28] The Court specifically stated in *Halleck* that it reaffirmed the *Hudgens* holding."[29]

However, this did not solve the issue where a private entity is selected by a governmental entity to operate a public access channel free of charge and on a first come, first served basis.[30] MNN was subject to state regulation when New York City designated it to operate the public access channels.[31] On this second issue, the Court concluded that state regulation does not automatically transform private entities into state actors.[32] Rather, MNN's designation as operator of the public access channels served more as a government-granted license, contract, or monopoly, similar to when the government provides funds or subsidies to private entities.[33] A private entity does not become a state actor simply because the government has provided a designation, license, or subsidy. The Court reasoned that if this were the case, "a large swath of private entities in America would suddenly be turned into state actors and be subject to a variety of constitutional constraints on their activities."[34]

The Court's final inquiry was whether the public access channels were the property of New York City.[35] The cable network was owned by Time Warner and operated by MNN, both of which were private entities.[36] Additionally, although the city allowed Time Warner to lay the cable system along public rights-of-way, that fact did not affect the state action doctrine analysis as the Court reasoned it was necessary for physical cable infrastructure to be laid upon public rights-of-way.[37] The Court concluded that the city did not have a property interest in the cable system laid by Time Warner.[38]

---

[28] *Id.* at 1930 (citing Hudgens v. NLRB, 424 U.S. 507, 520–21 (1976)).
[29] *Id.* at 1931.
[30] *Id.* at 1926–27 (The Cable Communications Policy Act of 1984 allowed state or local government, a designated private entity, or a cable operator to operate such channels.).
[31] *Id.* at 1932.
[32] *Id.*
[33] *Id.* at 1931–32.
[34] *Id.* at 1932. The Court made a parallel comparison to *Jackson v. Metro. Edison Co.*, where it stated that although the electric utility company in that case was subject to heavy regulation, those regulations did not transform the electric company into a state actor. *Id.* (citing Jackson v. Metro. Edison Co., 419 U.S. 345 (1974)).
[35] *Id.* at 1933.
[36] *Id.*
[37] *Id.*
[38] *Id.*

Ultimately, the Court found that MNN was not a state actor because (1) public access channels do not serve a traditional government function, even though they provide a forum for speech;[39] (2) the designation given by the state did not automatically require categorizing MNN as a state actor;[40] and (3) the State did not own the cable system the public access channel was operated on, nor did it have any other kind of property interest or easement in MNN.[41] The Court concluded that MNN was not a state actor under the state action doctrine.[42]

The conclusion reached by the Court is problematic as it allows a governmental entity to delegate its responsibilities to a private entity without requiring the private entity to comply with the First Amendment, creating a loophole that allows the entity to engage in viewpoint discrimination. The dissent written by Justice Sotomayor, with whom Justices Ginsburg, Breyer, and Kagan joined, illustrates this point.

2. *The* Halleck *Dissent*

Justice Sotomayor began her dissent with a biting critique of the Court's reasoning in this case, as she stated, "[t]he Court tells a very reasonable story about a case that is not before us."[43] She explained that the Court misunderstood what was at issue in the case in suggesting it was simply about a private entity opening up its property to others, when in fact the case concerned a designated private entity appointed to "administer a constitutional public forum."[44]

First, the Cable Communications Policy Act of 1984 simply authorized local governments to require that public access channels be reserved on cable systems by cable operators but did not compel any states to actually enact the requirement.[45] When the State of New York created such a

[39] *Id.* at 1930.
[40] *Id.* at 1932.
[41] *Id.* at 1933.
[42] *Id.* at 1934.
[43] *Id.* (Sotomayor, J., dissenting).
[44] *Id.*
[45] *See id.* at 1926.

requirement through state law, it created a duty to provide a public forum for speech via public access channels.[46]

Before *Halleck* reached the Supreme Court, the Second Circuit found that public access channels were a public forum under the First Amendment.[47] The Second Circuit held that MNN was a state actor subject to First Amendment constraints and that New York City had delegated its duty to operate the public access channels to MNN.[48] In her dissent, Justice Sotomayor agreed with the Second Circuit's decision that New York City created a duty for itself when the cable franchise was established and thus the franchise was under an obligation to form such a public forum under state law.[49] After such a duty was created, New York City was required to abide by First Amendment restrictions, regardless of whether a private entity was designated to fulfill the city's duty.[50] Justice Sotomayor concluded on this issue that "[t]he channels are clearly a public forum."[51]

Second, the majority in this case effectively left open the loophole in which a governmental entity may escape the restrictions of the First Amendment by contracting out its constitutional obligations to a private entity.[52] However, the dissent strongly opined that MNN should be subject to the same constitutional obligations as the State.[53] The dissent employed two legal principles from *West v. Atkins*.[54] In *Halleck*, Justice Sotomayor interpreted *Atkins* as stating, "[w]hen a government (1) makes a choice that triggers constitutional obligations, and then (2) contracts out those

---

[46] *See id.* at 1937. Justice Sotomayor notes that in *Denver Area Educ. Telecomms. Consortium v. FCC*, Justice Kennedy, in his concurrence, noted that public access channels act as a public forum. *Id.* (citing Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 791 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part)). In *Denver Area*, the Court held that cable television operators regulating public access channels were allowed to block patently offensive channels without violating the First Amendment. *Denver Area*, 518 U.S. at 733.

[47] Halleck v. Manhattan Cmty. Access Corp., 882 F.3d 300, 306–07 (2d Cir. 2018), *rev'd in part*, 139 S. Ct. 1921 (2019).

[48] *Halleck*, 139 S. Ct. at 1927.

[49] *Id.* at 1936 (Sotomayor, J., dissenting).

[50] *Id.*

[51] *Id.*

[52] *See id.* at 1940.

[53] *Id.* at 1940–41.

[54] *Id.* at 1940 (citing West v. Atkins, 487 U.S. 42 (1988)). *Atkins* determined that a physician contracted by the State to provide medical services to inmates acted "under color of state law" and was therefore a state actor. *Atkins*, 487 U.S. at 57. Justice Sotomayor states that the legal principles in both that case and *Halleck* are the same. *Halleck*, 139 S. Ct. at 1940 (Sotomayor, J., dissenting).

constitutional responsibilities to a private entity, that entity—in agreeing to take on the job—becomes a state actor . . . ."[55] Similarly, in *Halleck*, the city was not required to contract out its obligations and could have administered the public access channels itself.[56] Despite handing off its duties to MNN, the First Amendment's restrictions did not disappear, and MNN should have been subject to the same constitutional requirements as the city had the city administered the public access channels itself.[57]

In fact, MNN was incorporated for the very purpose of running and administering the public access channels on behalf of the city.[58] MNN received initial funding from Time Warner and other Manhattan cable franchises, which the city arranged in advance for MNN's benefit.[59] The dissent concluded that MNN, in fact, stood in the shoes of the city as a state actor and accepted the city's obligations.[60]

The final issue was whether the city had a property interest in the public access channels.[61] While the wires for the cable system that run the public access channels are owned by a private entity like Time Warner, a governmental entity may have a property interest in the wires.[62] It is not a novel concept that a private or governmental entity may be given a contract, such as a lease, for the right to convey expressive speech through the physical infrastructure owned by another.[63] The dissent likened the public access channel to that of a billboard, which a governmental entity may rent out to display expressive content.[64]

In *Halleck*, the city contracted with Time Warner to administer public access channels in exchange for Time

---

[55] *Halleck*, 139 S. Ct. at 1940.
[56] *Id.* at 1940–41.
[57] *Id.* at 1941.
[58] *Id.* at 1935.
[59] *Id.*
[60] *Id.* at 1939–40.
[61] *Id.* at 1937–38. Justice Sotomayor notes that in Justice Breyer's opinion in *Denver Area*, he equated public access channel agreements with cable companies to public easements. *Id.* at 1937 (citing Denver Area Educ. Telecomms. Consortium, Inc., 518 U.S. 727, 760–61 (1996)). She assumes for the sake of argument, quoting Justice Thomas's concurrence, "that public-forum analysis is inappropriate where the government lacks a 'significant property interest consistent with the communicative purpose of the forum.'" *Id.* at 1937 (quoting *Denver Area*, 518 U.S. at 829 (Thomas, J., concurring in part and dissenting in part)).
[62] *See id.* at 1938.
[63] *Id.*
[64] *Id.*

Warner laying the wires along public rights-of-way to sell cable television.[65] As such, the city's right to convey expressive content amounts to a property interest in the public access channels that is directly held by the governmental entity and "consistent with the communicative purpose of the [public] forum."[66]

Justice Sotomayor concluded that the majority's opinion here is "misguided" as it ignored the fact that this case is "about principals and agents[,]" not simply private entities acting of their own accord.[67] She stated that MNN is, in fact, a state actor because (1) the city created a public forum on public access channels, (2) MNN accepted the city's delegation to administer such channels, and (3) the city had a property interest in the channels.[68]

3. Halleck*'s Error*

The Court's majority opinion in *Halleck* confuses what a public forum is, as well as the status of the parties in the case. The Court chose to not address whether traditional public fora could ever change. It is erroneous of the Court to think that a communicative forum would not transform into a public forum when a governmental entity avails itself to using newer technologies to communicate with its citizens.

Furthermore, the Court viewed the case as concerning a private entity that has opened itself up to public speech but is not bound by the First Amendment. Instead, this case concerns a governmental entity that contracted and delegated its responsibilities to a private entity, which accepted the offer. The Court made a considerable error in determining that public access channels were not a public forum and that MNN was not a state actor.

B. The Importance of Marsh v. Alabama

The analysis in *Halleck* discusses when a governmental entity compels a private entity to perform on its behalf in a public forum but does not become a state actor. However,

[65] *Id.* at 1939.
[66] *Id.* (quoting *Denver Area*, 518 U.S. at 829 (Thomas, J., concurring in part and dissenting in part)).
[67] *Id.* at 1945.
[68] *Id.*

private entities may become state actors when they take it upon themselves to perform a public function that is traditionally and exclusively performed by the state.[69] The key case discussing the public function exception is *Marsh v. Alabama*.[70]

1. Marsh v. Alabama

The issue in *Marsh* was whether "people who live in or come to [a company town may] be denied [their First Amendment rights] simply because a single company has legal title to all [of] the town."[71] Private entities and spaces, such as businesses and privately owned real estate, are generally not subject to First Amendment restrictions.[72] However, this changes when an owner opens up their property to the benefit of the public by performing a public function.[73] Generally, when a space is opened for public use, the rights of the owner diminish in comparison to the statutory and constitutional rights of those who use it.[74] In other words, an owner does not have absolute power and dominion over the conduct of their guests.[75]

Here, the private entity was a company town, not a business.[76] A company town is a property owned by a private corporation that closely resembles a town (with features like houses, stores, sidewalks, and streets).[77] The town here, Chickasaw, consisted of "residential buildings, streets, a system of sewers, a sewage disposal plant, and a 'business block'" where the residents did their regular shopping, as well as a U.S. Postal Service post office.[78] Except for the fact that the town was owned by a private corporation, it was virtually identical to the surrounding towns.[79] In addition, the town's roads, which were owned by the private corporation, intersected and ran parallel to public roadways.[80] Thus, the

[69] *See id.* at 1926.
[70] 326 U.S. 501 (1946).
[71] *Id.* at 505.
[72] *Id.* at 503.
[73] *Id.* at 506.
[74] *Id.*
[75] *Id.*
[76] *Id.* at 502.
[77] *See id.*
[78] *Id.* at 502–03.
[79] *Id.* at 503.
[80] *Id.*

town's facilities, such as the business block, shopping center, sidewalks, and streets, were all freely accessible to travelers passing through, just as would be true in any public town.[81]

In *Marsh*, the Court implied that there is a correlation between being informed and being a good citizen.[82] The people living in company towns must be able to access information to be "properly informed" by uncensored communications.[83] This part of the opinion is a short paragraph comprised of a few sentences, but it is profoundly significant. The Court implies that not only is there a correlation between being informed and being a good citizen, but that it is necessary to be informed in order to be a good citizen.[84] The Court found that there is no reason to deprive company town residents of their First and Fourteenth Amendment rights.[85] The Court held that although a private entity may own real estate and the premises making up a company town, ownership does not permit the deprivation of constitutional liberties of a community of people.[86]

Marsh asserts that if a private entity performs a traditional public function, it must abide by constitutional requirements.[87] This extends to not only sidewalks, stores, streets, parks, and other traditional public fora, but also public accommodations such as businesses.[88] *Marsh* was further strengthened by *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza*.[89] In *Logan Valley*, the Court held that a privately owned shopping mall should be considered a public forum, just as the company town's business block in *Marsh* was considered to be open to the general public, and so like the company town in *Marsh*, the mall could not deny constitutional rights to its guests.[90] The Court in this case relied heavily on *Marsh* and quoted the opinion stating, "[o]wnership does not always mean absolute dominion. The more an owner . . . opens up his property for

---

[81] *Id.* at 503, 508.
[82] *Id.* at 508.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 508–09.
[86] *Id.* at 509.
[87] *See id.* at 506.
[88] *See id.* at 506–07.
[89] 391 U.S. 308 (1968); *see* Mason C. Shefa, *First Amendment 2.0: Revisiting* Marsh *and the Quasi-Public Forum in the Age of Social Media*, 41 U. HAW. L. REV. 159, 172–73 (2018).
[90] *Logan Valley*, 391 U.S. at 324–25.

use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[91]

2. *The Weakening of* Marsh

Fewer than thirty years later, the Court would change course in *Lloyd Corp. v. Tanner*, where it determined that a shopping center had not opened its property for general use by the public, but rather for the specific use of shopping.[92] A few years later in *Hudgens v. NLRB*, the Court reinforced the *Lloyd Corp.* decision, further weakening *Marsh*.[93] The Court in *Hudgens* held that *Marsh* did not apply to business shopping centers as it had in *Logan Valley*.[94] The Court distinguished *Lloyd Corp.* in *United States v. Kokinda* when it held that a sidewalk leading up to a post office was not a public forum because it was used solely to access the post office.[95] Both *Lloyd Corp.* and *Kokinda* considered the purpose by which the property was meant to be used rather than if the property was simply open for general use by the public.[96]

C. *The Resurrection of* Marsh

While the *Marsh* decision has weakened, lower courts have begun to resurrect *Marsh* in recent years.[97] Specifically, the Ninth Circuit concluded in *Venetian Casino Resort, LLC v. Local Joint Executive Board of Las Vegas* that the sidewalk outside of a resort was a public forum.[98] The sidewalk was used "to facilitate pedestrian traffic in daily commercial life along the Las Vegas Strip generally" and was the only route on which pedestrians could walk past the Venetian.[99] The

[91] *Id.* at 325 (quoting *Marsh*, 326 U.S. at 506).
[92] 407 U.S. 551, 568–70 (1972); Shefa, *supra* note 89, at 173–74.
[93] Hudgens v. NLRB, 424 U.S. 507, 516–21 (1976).
[94] *Id.* at 520.
[95] *See* Shefa, *supra* note 89, at 174 (citing United States v. Kokinda, 497 U.S. 720, 729–30 (1990)).
[96] *Id.* at 174–75.
[97] *Id.* at 175.
[98] 257 F.3d 937, 939 (9th Cir. 2001); Shefa, *supra* note 89, at 175.
[99] Venetian Casino Resort, LLC v. Loc. Joint Exec. Bd. of Las Vegas, 45 F. Supp. 2d 1027, 1035 (D. Nev. 1999).

sidewalk was used by the public generally, not solely by the guests of the Venetian Resort.[100]

California state courts have also been liberal in their interpretation of what constitutes a public forum, especially in light of the First Amendment issues arising on social media platforms.[101] The state's courts have defined a public forum as "a place that is open to the public where information is freely exchanged."[102] Furthermore, California courts have determined that internet websites are in fact public fora when they are "'open and free to anyone' without 'controls.'"[103]

The courts in California have taken a leap forward in considering that the internet, and more specifically social media platforms, act like public town squares despite being owned by private entities.[104] It is important for courts to consider that new public fora may emerge due to the ever-evolving nature of technology. California demonstrates how the public forum doctrine should not remain stagnant but should evolve along with society's use of technology for communication.

IV. HOW CYBERSPACE BECAME THE MODERN PUBLIC FORUM

As technology and society evolve, public fora will transform since fewer people will flock to traditional public fora for expression and consumption of speech. The latest public fora to emerge in our society are social media platforms. In *Halleck*, the dissent acknowledged that public fora do not have to take a physical form as a public forum may exist on a public access channel, which is open to the public in general via television.[105] A governmental entity does not need to delegate authority to contract or compel a private entity for that entity to become a state actor.[106] Instead, a private entity

---

[100] *Venetian Casino Resort*, 257 F.3d at 945.
[101] *See* Shefa, *supra* note 89, at 176.
[102] *Id.* (quoting Damon v. Ocean Hills Journalism Club, 102 Cal. Rptr. 2d 205, 209 (Ct. App. 4th Dist. 2000)).
[103] *Id.* at 176 (first quoting Glob. Telemedia Int'l, Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1264 (C.D. Cal. 2001), and then quoting ComputerXPress, Inc. v. Jackson, 113 Cal. Rptr. 2d 625, 638 (Ct. App. 4th Dist. 2001)).
[104] *Id.*
[105] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1934 (2019) (Sotomayor, J., dissenting); *see also* Carparts Distrib. Ctr., Inc. v. Auto. Wholesaler's Ass'n of New Eng., 37 F.3d 12 (1st Cir. 1994); Boy Scouts of Am. v. D.C. Comm'n on Hum. Rts., 809 A.2d 1192 (D.C. 2002).
[106] *See* Marsh v. Alabama, 326 U.S. 501, 509 (1946).

may be considered a state actor when it voluntarily "performs a traditional, exclusive public function."[107]

While the Court has recognized the significant role that social media and the internet play in the expression of speech, it is hesitant to designate social media platforms as modern public fora.

A. *The Prophecy of* Reno v. ACLU

Reno v. ACLU is one of the earliest landmark cases that discusses speech on the internet and the internet's function as a public forum.[108] The issue in *Reno* concerned the constitutionality of statutory provisions from the Communications Decency Act of 1996 (CDA), which prohibited any intentional transmission of obscene or indecent messages to any person under eighteen years of age.[109] The Court ultimately held that the CDA was unconstitutional, but the CDA provisions are less concerning than the reasoning the Court used in reaching its decision.[110]

The Court's reasoning in this case is significant as the opinion is peppered with comparisons between the internet and a public forum in 1996, when the internet was still relatively new.[111] The Court stated that (1) the internet is a unique medium,[112] (2) it is available to anyone,[113] (3) many people use it,[114] and (4) it offers a free exchange of ideas.[115] The prophecy implied by the Court in *Reno* was that the internet would continue to expand and become the primary public forum for communication.[116]

The Court described the internet as "a unique and wholly new medium of worldwide human communication,"[117] with content "as diverse as human thought."[118] The Court also highlighted the internet's uniqueness in that users engage in a vast range of subjects via email, newsgroups, and chat

---

[107] *Halleck*, 139 S. Ct. at 1928.
[108] 521 U.S. 844 (1997).
[109] *Id.* at 849, 857–59.
[110] *Id.* at 885.
[111] *Id.* at 850–54, 870.
[112] *Id.* at 850–53.
[113] *Id.* at 868–70.
[114] *Id.* at 870.
[115] *Id.* at 885.
[116] *Id.* at 885.
[117] *Id.* at 850 (quoting ACLU v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996)).
[118] *ACLU v. Reno*, 929 F. Supp. at 842.

rooms.[119] Chat rooms were novel in that users, for the first time ever, could discuss subjects in real time with other users.[120] The Court noted that the World Wide Web acts as a massive database holding information stored on remote computers around the globe, which internet users can search for and retrieve via a search engine.[121]

The Court noted that the internet, World Wide Web, electronic mail, newsgroups, and chat rooms are available to anyone with access to the internet in any location, as the internet does not have a specific geographical location.[122] The Court also commented that the internet is available to any person or entity that wishes to publish communication of some kind.[123] Anyone who publishes may restrict access to their publications through selected access, or they may choose to make their publications available to anyone online.[124]

The Court stated that the internet is used by many people and has a large network of "host" computers.[125] From 1981 to 1996, host computers increased from 300 to 9,400,000.[126] At the time of the *Reno* trial, approximately 40 million people were using the internet, which was expected to increase to 200 million users by 1999.[127] The Court recognized that the internet was not considered a "'scarce' expressive commodity," as it had the potential for unlimited communication.[128]

Finally, the Court described the internet as if it were a public forum.[129] Speech on the internet includes "traditional print and news services, . . . audio, video, and still images, as well as interactive, real-time dialogue."[130] Internet chat rooms were likened to soapboxes, upon which any user may become a town crier with users' speech received farther than in a traditional town square.[131] In its conclusion, the Court stated that any regulation of the content of speech on the internet would interfere with the marketplace of ideas and public

[119] *Reno v. ACLU*, 521 U.S. at 851.
[120] *Id.* at 851–52.
[121] *Id.* at 852.
[122] *Id.* at 851.
[123] *Id.* at 853.
[124] *Id.*
[125] *Id.* at 850.
[126] *Id.*
[127] *Id.*
[128] *Id.* at 870.
[129] *See id.*
[130] *Id.*
[131] *Id.*

discourse.[132] Even when the internet was still in its infancy, the Court could see its potential to become a public forum, if it was not one already.

B. The Right to Access Social Media

In *Packingham v. North Carolina*, the Court determined that all citizens—including convicted criminals—have a right to access social media.[133] In this case, a North Carolina statute criminalized the use of certain social media by registered sex offenders.[134] The State of North Carolina enacted this statute in order to protect minor children from possibly interacting with sex offenders.[135] However, the Court held that the statute violated the First Amendment, was overly broad, and was not "necessary or legitimate to serve [its] purpose."[136] Further, the Court clarified that "the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from . . . contacting a minor . . . ."[137]

> The Court stated that
> [b]y prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.[138]

The Court recognized that social media use is vital to exercising one's First Amendment rights and referred to social media platforms as the "modern public square."[139]

In *Marsh*, the Court stated that citizens must be informed in order to make educated decisions.[140] Similarly, the Court in *Packingham* stated that social media platforms

---

[132] *Id.* at 885.
[133] 582 U.S. 98, 108–09 (2017).
[134] *Id.* at 101.
[135] *See id.*
[136] *Id.* at 108.
[137] *Id.* at 107.
[138] *Id.*
[139] *Id.*
[140] Marsh v. Alabama, 326 U.S. 501, 508 (1946).

"provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[141] Here, it is clear the Court viewed social media websites as the modern public forum and concluded that "foreclos[ing] access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights."[142]

C. Social Media Platforms as Self-Proclaimed State Actors

Looking at three of the most prevalent social media platforms—Facebook, YouTube, and Twitter—one will find that these platforms already have language within their policies stating their intention to provide a space for free speech.[143] In 2016, Facebook made a statement through its vice president and general counsel that Facebook "remains a platform that is open and welcoming to all groups and individuals" and is "a platform for all ideas."[144] The former vice president of Search at Facebook stated that "Facebook is a platform for people and perspectives from across the political spectrum[,] . . . [and Facebook's] guidelines do not permit the suppression of political perspectives. Nor do they permit the prioritization of one viewpoint over another . . . ."[145]

Twitter's policies page states it has a "two-part commitment to freedom of expression and privacy[] . . . grounded in the United States Bill of Rights and the European Convention on Human Rights[.]"[146] Based on the intended purpose of public forum doctrine, Facebook and Twitter have

---

[141] *Packingham*, 582 U.S. at 107.
[142] *Id.* at 108.
[143] Shefa, *supra* note 89, at 185 (identifying such language in Facebook and Twitter's policy pages); *see also* Irina Ivanova, *Twitter Is Now X. Here's What That Means.*, CBS NEWS, (July 31, 2023), https://www.cbsnews.com/news/twitter-rebrand-x-name-change-elon-musk-what-it-means [https://perma.cc/Q6P7-RCGS] (Twitter rebranded and is now named X.).
[144] Colin Stretch, *Response to Chairman John Thune's Letter on Trending Topics*, META (May 23, 2016), https://about.fb.com/news/2016/05/response-to-chairman-john-thunes-letter-on-trending-topics [https://perma.cc/TSK3-HQJT].
[145] Tom Stocky, FACEBOOK (May 9, 2016), https://www.facebook.com/tstocky/posts/10100853082337958 [https://perma.cc/ZG5H-SRGN].
[146] *Defending and Respecting the Rights of People Using Our Service*, TWITTER, https://help.twitter.com/en/rules-and-policies/defending-and-respecting-our-users-voice [https://perma.cc/8X9V-EDQH]; *see also* Shefa, *supra* note 89, at 185.

opened themselves up to the restrictions of the First Amendment by transparently stating they have opened their websites for use by the general.[147]

Similarly, YouTube holds itself out to the general public stating, "Our mission is to give everyone a voice and show them the world."[148]

1. Social Media Platforms' Mission Statements and Policies

Twitter, YouTube, and Facebook have all made statements about their intent to be outlets for anyone to express themselves online. To understand what this means, consider each platform's mission statement and policy.

Facebook, owned by Meta, lists its mission statement on Meta's website. It reads as follows: "Originally founded in 2004 as Facebook, Meta's mission is to give people the power to build community and bring the world closer together. Our products empower more than 3 billion people around the world to share ideas, offer support and make a difference."[149]

YouTube has a similar mission statement. It provides, "We believe that everyone deserves to have a voice, and that the world is a better place when we listen, share and build community through our stories."[150]

Finally, Twitter's proclamation of the right to free speech on its platform is found on several subpages within its "About" page.[151] Under the "Healthy Conversations" subpage, Twitter states it is "working to make Twitter a safe place for free expression" and that "[y]ou should be able to speak your mind and find credible information easily."[152] Furthermore, it states that "Twitter is an open service that's home to a world of diverse people, perspectives, ideas and information. We're

---

[147] Shefa, *supra* note 89, at 185–86; *see* Marsh v. Alabama, 326 U.S. 501, 506 (1946); *see also* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019).
[148] *About YouTube*, YOUTUBE, https://about.youtube [https://perma.cc/4T9U-K6X6].
[149] *FAQs*, META, https://investor.fb.com/resources/default.aspx [https://perma.cc/7W43-HNUD].
[150] YOUTUBE, *supra* note 148.
[151] *Healthy Conversations*, TWITTER, https://web.archive.org/web/20230726072532/https:/about.twitter.com/en/our-priorities/healthy-conversations (last visited Oct. 22, 2023).
[152] *Id.*

committed to protecting the health of the public conversation—and we take that commitment seriously."[153]

Additionally, Twitter also wrote a position paper on "Protecting the Open Internet" which may be downloaded from its "About" page.[154] The paper includes five "guiding principles for regulation."[155] The principles are as follows:

> (1) The Open Internet is global, should be available to all, and should be built on open standards and the protection of human rights.
> (2) Trust is essential and can be built with transparency, procedural fairness, and privacy protections.
> (3) Recommendation and ranking algorithms should be subject to human choice and control.
> (4) Competition, choice, and innovation are foundations of the Open Internet and should be protected and expanded, ensuring incumbents are not entrenched by laws and regulations.
> (5) Content moderation is more than just leave up or take down. Regulation should allow for a range of interventions, while setting clear definitions for categories of content.[156]

The paper expands on these five principles and the various issues associated with the "open internet."[157] Ultimately, the paper calls a shift from self-regulation of online websites to government intervention to help resolve regulatory issues.[158] Twitter, interestingly, does not view the current self-regulation model as a positive; instead, it views it as fostering biased content and manipulation, especially with the ability to control political debate and advertising.[159]

---

[153] *Id.*
[154] TWITTER, PROTECTING THE OPEN INTERNET: REGULATORY PRINCIPLES FOR POLICY MAKERS 3 https://about.twitter.com/content/dam/about-twitter/en/our-priorities/open-internet.pdf [https://perma.cc/MYE7-9QBX].
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.* at 4–5, 9–10.
[159] *Id.* at 10.

2. California's Recognition of a Modern Public Forum

By publishing its "open internet" position paper, Twitter effectively called upon governments to standardize the regulations imposed upon cyberspace in order to better protect the interests of the people. As far back as 2005, some California courts were doing just that.[160]

California state courts and laws liberally protect written and oral speech conducted in any "place open to the public or a public forum in connection with an issue of public interest."[161] California's Constitution states, "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."[162] In comparison, the language of the First Amendment to the U.S. Constitution pertaining to speech reads as follows: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[163] The differences between the two constitutions are slight but important in understanding the distinctions in interpreting individual speech protections between the California and U.S. governments.

The U.S. Constitution simply prohibits the government from regulating speech, which places emphasis on what the government may or may not do, whereas the California Constitution emphasizes the individual's right to expression via speech, free from restraint. While it is a seemingly minor difference, it has triggered California courts to view speech protections through a different lens, resulting in decisions holding that online sites open to the public are public fora as long as they are "'open and free to anyone' without 'controls.'"[164]

An example of this approach is found in the California First District Court of Appeal case, *Ampex Corp. v. Cargle*.[165]

---

[160] *See, e.g.*, Ampex Corp. v. Cargle, 27 Cal. Rptr. 3d 863, 869 (Ct. App. 1st Dist. 2005) (holding that a Yahoo! message board was a public forum as it pertained to a matter of public interest and was maintained for the publicly traded company Ampex).
[161] Shefa, *supra* note 89, at 176; *see, e.g.*, CAL. CIV. PROC. CODE § 425.16(e)(3) (West 2023).
[162] CAL. CONST. art. I, § 2(a); Shefa, *supra* note 89, at 176 n.118.
[163] U.S. CONST. amend. I.
[164] Shefa, *supra* note 89, at 176; *see, e.g.*, Glob. Telemedia Int'l, Inc. v. Doe 1, 132 F. Supp. 2d 1261, 1264 (C.D. Cal. 2001); *see also, e.g.*, ComputerXpress, Inc. v. Jackson, 113 Cal. Rptr. 2d 625, 638 (Ct. App. 4th Dist. 2001).
[165] 27 Cal. Rptr. 3d 863 (Ct. App. 1st Dist. 2005).

This case concerned messages posted on a Yahoo! Message board for Ampex by Scott Cargle, a former disgruntled Ampex employee.[166] Ampex filed a suit against Cargle for messages he had posted concerning his experience working for the company.[167] One of the issues raised during the case was whether the online message board was a public forum.[168] Under California law, it was determined that the message board was a public forum as it met the requirements of section 425.16.[169] The court concluded that the message board was an electronic communication medium that was accessible by any member of the public, free of charge, where anyone might view or post opinions, and therefore was a public forum.[170]

Unlike Twitter, YouTube, or Facebook, Yahoo! does not have any language in its mission statement and policies regarding freedom of speech or expression.[171] On Yahoo!'s "About" page, the company makes references to inclusivity, accessibility, and support without directly referencing free speech or expression.[172] It is significant that even without Yahoo!'s stated intent to make their platform open to the general public for speech, the California First District Court of Appeals still found that the message board was a public forum.[173] It is likely California courts would find that platforms with intentional free speech language in their policies and mission statements would qualify as public fora, such as Twitter, YouTube, and Facebook.

V. SOCIAL MEDIA PLATFORM POWER

It should come as no surprise that social media platforms have become extremely powerful in recent years.[174] Due to their power, these sites have a profound impact on expression of speech and, as such, have metamorphized the

---

[166] *Id.* at 867.
[167] *Id.* at 867–68.
[168] *Id.* at 869.
[169] *Id.*; *see* CAL. CIV. PROC. CODE § 425.16(e)(3) (West 2023).
[170] *Ampex Corp.*, 27 Cal. Rptr. 3d at 869.
[171] *About*, YAHOO! INC., https://www.yahooinc.com/about [https://perma.cc/5JRX-99AF].
[172] *Id.*
[173] *Ampex Corp.*, 27 Cal. Rptr. 3d at 869.
[174] Joseph C. Best, *Signposts Turn to Twitter Posts: Modernizing the Public Forum Doctrine and Preserving Free Speech in the Era of New Media*, 53 TEX. TECH. L. REV. 273, 294–95 (2021).

engagement and reach of communication.[175] As discussed above, many social media platforms tout their websites as havens for free speech.[176] These are not just simple mission statements or lists of policies and rules. Sites such as Twitter have gone out of their way to align themselves with freedom of speech as outlined in the U.S. Constitution.[177]

During an onstage interview at the Vancouver TED conference in 2022, Elon Musk described Twitter as the "de-facto town square."[178] He went on to say, "Twitter should match the laws of the country" and that "it's . . . important that people have both the reality and the perception that they are able to speak freely within the bounds of the law."[179]

It is unsurprising that the trifecta of social media platforms—Twitter, YouTube, and Facebook—have had impactful effects on virtual speech.[180] They hold a power similar to the authority held by government.[181] While social media platforms may have similarities to the government in their power to host a public forum, they also hold the right to remove any content or users from their sites: an unlimited power that the government does not have.[182]

A. The Specific Use Test

The speech issues addressed in *Marsh* closely correspond to those on social media platforms today.[183] However, those who are not sympathetic to resurrecting *Marsh* may still find that cases like *Lloyd Corp.* and *Kokinda* provide support for proclaiming social media platforms as the modern public forum.[184]

Looking at the mission statements and policies of social media platforms, one may argue that a platform is not a public forum simply because it describes itself as a public

---

[175] *See* Michael Patty, *Social Media and Censorship: Rethinking State Action Once Again*, 40 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 99, 117 (2019).
[176] Best, *supra* note 174, at 293–95; Shefa, *supra* note 89, at 185.
[177] TWITTER, *supra* note 154; *see also* Shefa, *supra* note 89, at 185.
[178] Andrew Marantz, *Elon Musk Thinks Social Media Isn't Rocket Science*, NEW YORKER (Apr. 27, 2022), https://www.newyorker.com/news/daily-comment/elon-musks-confusing-twitter-grab [https://perma.cc/N7H7-DSCD].
[179] *Id.*
[180] Best, *supra* note 174, at 293.
[181] *Id.*
[182] *Id.*
[183] Marsh v. Alabama, 326 U.S. 501 (1946).
[184] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); United States v. Kokinda, 497 U.S. 720 (1990).

forum. Allowing the public to access its website does not give the public the right to express any and all views on the private entity's platform. The *Lloyd Corp*. case is evidence of this.[185] A private entity appearing to perform a traditional public function does not always mean the private entity is actually providing a traditional public forum.[186] Furthermore, there is an argument that the impact and reach that social media platforms have on society is a compelling factor in determining if they are a public forum.[187] However, the Court in *Lloyd Corp*. quells this theory by stating, "Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue of being large or clustered with other stores . . . ."[188] In other words, it does not matter how impactful and far-reaching social media platforms are as size does not factor into whether they are considered state actors.

Even if this is a convincing argument, the specific use test applied in *Lloyd Corp*. and *Kokinda* still supports the conclusion that social media platforms are state actors.[189] The specific use test looks to the primary purpose of privately-owned spaces open to the public to determine whether that purpose is subject to constitutional restrictions.[190] In *Lloyd Corp*. and *Kokinda*, the specific use test determined that a shopping mall was intended for shopping and a post office was intended for sending and receiving mail.[191] Neither private entity in either case opened their businesses for the purpose of speech.[192] However, social media sites such as Twitter, YouTube, and Facebook created their platforms for the very purpose of enabling speech, like a traditional public forum.[193] Applying the specific use test, one finds that the specific use of social media is to facilitate the public's expression and consumption of free speech. This is the primary function that social media platforms provide. Therefore, since the specific use of social media platforms is for the expression of speech, social media platforms would be considered state actors and subject to constitutional restrictions.

---

[185] *Lloyd Corp*., 407 U.S. 551.
[186] *See id*. at 569.
[187] *See* Patty, *supra* note 175, at 117.
[188] *Lloyd Corp*., 407 U.S. at 569.
[189] *See id*.; *see Kokinda*, 497 U.S. 720.
[190] *See Lloyd Corp*., 407 U.S. at 569.
[191] *Id*. at 564–65; *Kokinda*, 497 U.S. at 735.
[192] *See Lloyd Corp*., 407 U.S. at 564–65; *see also Kokinda*, 497 U.S. at 735.
[193] Best, *supra* note 174, at 293.

Although the specific use test does work, it does not parallel social media platform issues in quite the same way *Marsh* does. The specific use test only pertains to a limited part of free speech and social media platforms, whereas *Marsh* relates to social media as a whole. Had the Court in *Marsh* only looked at the company town with a limited view, they might have found that the streets and sidewalks were only used to travel between buildings and not as a public space where free speech may take place, like in *Kokinda*.[194]

Here, the approach to determining whether social media platforms act as the modern public forum must be addressed holistically. When taken as a whole, social media platforms have done everything to act like a traditional public forum. As the famous saying goes, "If it walks like a duck, looks like a duck, and quacks like a duck, it's a duck." [195]

B. Modernizing Marsh *in the Age of Social Media*

Marsh has been weakened over the years by cases such as *Lloyd Corp*. and *Kokinda*.[196] However, there is no other case more closely paralleled with the speech issues associated with social media than *Marsh*.[197] Historically, company towns held total control and power over their citizens, including the right to free speech.[198] Even though company towns were private entities, they acted and held power in the same manner as a governmental entity or municipality.[199] By comparison, a similar situation is occurring with social media platforms as they too have complete control and power over users' speech on their platforms.[200]

In *Marsh*, the Court stated that "[o]wnership does not always mean absolute dominion. 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

---

[194] *Kokinda*, 497 U.S. at 727.
[195] AH73, *If It Walks Like a Duck, Looks Like a Duck, and Quacks Like a Duck, It's a Duck*, URBAN DICTIONARY (Oct. 18, 2013), https://www.urbandictionary.com/define.php?term=If%20it%20walks%20like%20a%20duck%2C%20looks%20like%20a%20duck%2C%20and%20quacks%20like%20a%20duck%2C%20it%27s%20a%20duck [https://perma.cc/JZB7-2ZDP].
[196] *See* Marsh v. Alabama, 326 U.S. 501 (1946); *Lloyd Corp.*, 407 U.S. 551; *Kokinda*, 497 U.S. 720.
[197] *See* Best, *supra* note 174, at 293–94.
[198] *Id.* at 295; *see also Marsh*, 326 U.S. at 509.
[199] *Marsh*, 326 U.S. at 508.
[200] Best, *supra* note 174, at 295.

statutory and constitutional rights of those who use it."[201] Similarly, social media platforms by their very nature open themselves up for use by the public as evidenced by the intent of their owners.[202] Sites like Twitter, Facebook, and YouTube explicitly state in their mission statements and policies that they hold themselves open to the public as spaces for free expression.[203]

In recent years, *Marsh* has been referenced and analyzed in courts as well as numerous law review articles.[204] States like California have interpreted their state constitutions to include protection of online speech through cases such as *Ampex Corp. v. Cargle*.[205] Various law review articles have wrestled with the current interpretation and application of the state action doctrine. These articles have strongly voiced that the analysis used in *Marsh* should be resurrected as company towns and social media platforms share many parallels to one another; both are owned by private entities that perform a traditional public function.[206] Hence, the analysis in *Marsh*, where company towns are state actors, rings true for social media platforms as well.[207]

C. The Marketplace of Ideas

The "marketplace of ideas" is an integral facet of the First Amendment.[208] In order for society to advance in its philosophies, inventions, and discourse, we must protect the marketplace of ideas.[209] With censorship and political correctness imbued in today's societal norms, the marketplace

---

[201] *Marsh*, 326 U.S. at 506.
[202] *See* Shefa, *supra* note 89, at 185.
[203] *See* TWITTER, *supra* note 154; META, *supra* note 149; YOUTUBE, *supra* note 148; *see also* Ampex Corp. v. Cargle, 27 Cal. Rptr. 3d 863 (Ct. App. 1st Dist. 2005).
[204] *See* Venetian Casino Resort, LLC v. Loc. Joint Exec. Bd. of Las Vegas, 257 F.3d 937, 946 (9th Cir. 2001); Shefa, *supra* note 89; Best, *supra* note 174; Patty, *supra* note 175.
[205] *See* CAL. CONST. art. I, § 2; CAL. CIV. PROC. CODE § 425.16(e)(3) (West 2023); *Ampex Corp.*, 27 Cal. Rptr. 3d at 863; *see also* Shefa, *supra* note 89, at 176.
[206] *See* Shefa, *supra* note 89; *see also* Best, *supra* note 174; *see also* Patty, *supra* note 175; *see also* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019).
[207] *See* Marsh v. Alabama, 326 U.S. 501 (1946); *see also Halleck*, 139 S. Ct. 1921; Shefa, *supra* note 89; Best, *supra* note 174; Patty, *supra* note 175.
[208] Patty, *supra* note 175, at 100.
[209] *Id.* at 100–01.

of ideas risks falling into an echo chamber.[210] Should this occur, society would undoubtedly halt in its steady advancement, and the endless potential that once was would be silenced.[211] Silencing opposing views inevitably fosters a contagious fear of speaking outside societal norms, which in turn deprives society of the value of understanding differing points of view.[212] Not only does society benefit from understanding opposing viewpoints, but it also increases its tolerance for debate and discussion without ending arguments by fisticuffs.

The Court in *Packingham v. North Carolina* understood the need to preserve the marketplace of ideas when it found that a North Carolina statute prohibiting sex offenders from accessing social media violated the First Amendment.[213] During oral argument, Justice Ginsburg stated that "these people are being cut off from a very large part of the marketplace of ideas. And the First Amendment includes not only the right to speak, but the right to receive information."[214] Additionally, Justice Kagan pointed out that many individuals use social media, such as Twitter, to communicate.[215] This includes the "President . . . , [a]ll 50 governors, all 100 senators, [and] every member of the House . . . ."[216] Justice Kennedy expanded on Justice Kagan's point by stating "the sites that Justice Kagan has described and their utility and . . . [the] extent of their coverage are . . . greater than the communication you could ever ha[ve], even in the paradigm of public square."[217]

Looking to *Marsh*, the Court stated in its opinion that in a municipality, "an ordinance completely prohibiting the dissemination of ideas on the city streets cannot be justified on the ground that the municipality holds legal title to

---

[210] An echo chamber (noun) is "a room with sound-reflecting walls used for producing hollow or echoing sound effects." *Echo Chamber*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/echo%20chamber [https://perma.cc/P4YK-TK47]. It is often used figuratively, and as James Surowiecki states in reference to society at large, "[l]iving in a kind of *echo chamber* of their own opinions, they pay attention to information that fits their conclusions and ignore information that does not." *Id.*

[211] *See* Best, *supra* note 174, at 280.

[212] *Id.* at 279–80.

[213] 582 U.S. 98, 109 (2017).

[214] Oral Argument at 49:59, Packingham v. North Carolina, 582 U.S. 98 (2017) (No. 15-1194), https://www.oyez.org/cases/2016/15-1194 [https://perma.cc/SWE7-6XXK].

[215] *Id.* at 26:58.

[216] *Id.* at 27:00.

[217] *Id.* at 27:38.

them."[218] The Court discussed that since the company town was identical in all characteristics to a municipality, except for the fact that it was privately owned, speech may not be prohibited in its public spaces, such as streets.[219] By prohibiting such speech, the "preservation of a free society" is threatened as it is every individual's right to receive information he or she so desires.[220] In other words, the marketplace of ideas is essential to ensure citizens are informed. As the Court states, "To act as good citizens they must be informed . . . [and] to be properly informed their information must be uncensored."[221]

As a nation, we can only advance if the marketplace of ideas is not located within an echo chamber. Social media platforms are used by private individuals, as well as by public officials and the government, who use it as a "primary method of communicating with the public."[222] Unlike the public street of a town, speech found on social media platforms may reach millions or billions of people almost instantaneously.[223] The traditional town square has become archaic and, for all intents and purposes, has been replaced by social media.[224]

VI. CONCLUSION

It is undisputed that social media platforms have transformed the landscape of the expression and consumption of speech. The significant role these sites play in modern communication has moved the traditional town square online. Social media platforms as private entities have unbridled power to control speech posted on their platforms, as well as the ability to influence public discourse. Used as the primary means of communication by a multitude of private citizens, politicians, and governmental entities, it is not unreasonable to consider whether social media platforms should be held to constitutional requirements as state actors.

---

[218] Marsh v. Alabama, 326 U.S. 501, 504–05 (1946).
[219] *Id.* at 504–06.
[220] *Id.* at 505.
[221] *Id.* at 508.
[222] David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, 2010 B.Y.U. L. REV. 1981, 1985 (2010); *see also* Patty, *supra* note 175, at 117.
[223] Shefa, *supra* note 89, at 165.
[224] *Id.* at 166.

After all, social media platforms appear to intentionally perform a traditional public function.

While this argument certainly seems reasonable, it is unlikely the Supreme Court—at this point in time—would find that social media platforms are state actors and is likely hesitant to proclaim social media platforms as the modern public forum. While the Court has made remarks on the significance that social media has in relation to modern communication, it has refrained from outright stating these sites are the modern public forum. This abstention is likely due to the Court endeavoring to protect private business autonomy as opening these sites to constitutional restrictions under the public forum doctrine may prevent private businesses from operating free from government intervention.

To firmly categorize social media platforms as state actors, the Court would need to resurrect *Marsh*.[225] Despite its diminutive state, *Marsh* has begun to regain strength in lower courts and law review articles, calling for a resurrection of its interpretation and application of the state action doctrine. In the future, the Court may choose to re-adopt *Marsh*'s holding. However, this will undoubtedly take many years, though it is certainly possible given the prominence of social media and the subsequent dwindling of traditional public fora.

Freedom of speech is one of the most important and fundamental freedoms provided by the U.S. Constitution. It allows the citizens of our country to share, debate, and discover. To neglect this right and allow it to be censored, shaped, and tailored to each individual's personal preferences robs society of something invaluable—the ability to understand and tolerate different views. Allowing unregulated censorship of online speech holds dire consequences that result in an online echo chamber. Free speech is precious and should be protected, dearly.

[225] *Marsh*, 326 U.S. 501.