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INTRODUCTION

On April 28, 1935, President Franklin D. Roosevelt communicated a message to the American public about the government's efforts to combat the unemployment crisis during the Great Depression.[1] President Roosevelt told his constituents that "[t]he program for social security now pending before the Congress is a necessary part of the future unemployment policy of the government."[2] On September 15, 2015, President Barack Obama communicated a similar message to the American public regarding the government's efforts to combat the unemployment crisis following the Great Recession.[3] In his message, President Obama told his constituents, "We've cut the unemployment rate in half – from a high of 10% down to 5.1%. And we're not done."[4]

Although 80 years elapsed between President Roosevelt's message and President Obama's message, the fundamental principles of the two messages were the same; both messages informed the American public about government efforts to combat high unemployment rates. A key difference between the two, however, was how the Presidents

1. *President Franklin Delano Roosevelt's Fire-Side Chats: On the Works Relief Program* (April 28, 1935) (on file with the Franklin D. Roosevelt Presidential Library and Museum), http://docs.fdrlibrary.marist.edu/042835.html [https://perma.cc/8AJP-LABT].

2. *Id.*

3. *See* President Obama (@POTUS44), TWITTER (Sept. 15, 2015, 3:24 PM), https://twitter.com/POTUS44/status/643883096689913856 [https://perma.cc/76V9-TWWF].

4. *Id.*

communicated the messages. In 1935, President Roosevelt communicated his message to the American public by radio during one of his famous Fireside Chats.[5] Although the radio was an available outlet in 2015, President Obama instead chose to communicate his message through his Twitter account.[6] While both Presidents were able to immediately communicate with constituents, Twitter allowed President Obama's constituents to immediately respond back. Specifically, President Obama's tweet received 5,650 likes, 4,290 retweets, and 14 quote tweets.[7] President Roosevelt received no such immediate communication back from the public.

Social media has changed the way public officials and their constituents communicate with one another. In fact, the United States Supreme Court has even described social media as the "modern public square."[8] Despite having very specific terms of service for users,[9] social media sites such as Facebook and Twitter have become primary communication tools for public officials and constituents.[10] However, in recent years, public officials have begun blocking constituents from viewing and interacting with their social media accounts.[11] When a public

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5. *President Franklin Delano Roosevelt's Fire-Side Chats: On the Works Relief Program*, *supra* note 1. President Roosevelt's Fireside Chats were a series of radio broadcasts from 1933 to 1944. In these radio broadcasts, President Roosevelt discussed his politics and policies in an informal and intimate fashion, which made the American public feel as if the President was in their homes with them while discussing these topics. *See Fireside Chats of Franklin D. Roosevelt*, FRANKLIN D. ROOSEVELT PRESIDENTIAL LIBR. AND MUSEUM, http://docs.fdrlibrary.marist.edu/firesi90.html [https://perma.cc/ZP 4X-EZ9A] (last visited Feb. 14, 2023); JASON LOVIGLIO, RADIO'S INTIMATE PUBLIC: NETWORK BROADCASTING AND MASS-MEDIATED DEMOCRACY 1–8 (2005).

6. *See* Obama, *supra* note 3.

7. *Id.* These statistics are accurate as of February 9, 2023.

8. Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

9. *See, e.g.*, *Terms of Service*, FACEBOOK, https://www.facebook.com/terms.php [https://perma.cc/S9MZ-US4A] (last visited Feb. 14, 2023) [hereinafter *Terms of Service*, FACEBOOK].

10. *See generally* QUORUM, CONGRESS ON SOCIAL MEDIA 2020: PANDEMIC YEAR BRINGS INCREASE IN SOCIAL DIALOGUE, DECREASE IN LITIGATION (2020). While public officials use many social media sites, this Comment will focus on public official use of Facebook and Twitter, as these are the most used social media sites by today's public officials.

11. *See, e.g.*, Davison v. Randall, 912 F.3d 666 (4th Cir. 2019); Knight First Amend. Inst. at Colum. Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019); Campbell v. Reisch, 986 F.3d 822 (8th Cir. 2021); Garnier v. O'Connor-Ratcliff, 41 F.4th 1158 (9th Cir. 2022); Lindke v. Freed, 37 F.4th 1199 (6th Cir. 2022). This

official blocks a constituent, that constituent no longer has access to the communicative functions of that public official's account.[12] Specifically, blocked constituents have no access to the response forum attached to a public official's post—a forum where constituents can respond to the public official's message and see other constituents' responses.[13] The act of blocking constituents controverts the fundamental First Amendment principle that "all persons have access to places where they can speak"[14] because blocked constituents do not have access to the response forum attached to a public official's post. However, constituents only have First Amendment protections on a public official's account on a privately owned social media platform if the account, along with its response forums, qualifies as a public forum under the public forum doctrine.[15]

The public forum doctrine is a judicial mechanism that "governs the rights of citizens to speak on government property . . . ."[16] Before conducting a public forum analysis, courts must first determine that the space where the speech takes place is either property the government owns or private property the government controls.[17] Once courts have determined that the space at issue is either government-owned or government-controlled property, courts then conduct a public forum analysis by analyzing the actual space where the speech takes place to determine what restrictions the government may impose on speech in that

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Comment specifically addresses public officials acting in their official capacities. The state action doctrine as it relates to public officials and social media—specifically the issue of whether a public official is in his or her official or personal capacity when blocking constituents—will not be discussed in this Comment.

12. *See generally Blocking*, FACEBOOK, https://www.facebook.com/settings?tab=blocking [https://perma.cc/Y8NU-GGHD] (last visited Feb. 14, 2023).

13. *Id.*

14. Packingham v. North Carolina, 137 S. Ct. 1730, 1735–36 (2017).

15. *See generally Davison*, 912 F.3d 666; *Knight*, 928 F.3d 226; Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220 (2021) (Thomas, J., concurring).

16. Lyrissa Barnett Lidsky, *Government Sponsored Social Media and Public Forum Doctrine Under the First Amendment: Perils and Pitfalls*, 19 PUB. LAW. 2, 3 (2011) [hereinafter Lidsky, *Government Sponsored Social Media*].

17. *See generally* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981); Perry Educ. Ass'n v. Perry Local Educators' Ass'n 460 U.S. 37 (1983). *See also Biden*, 141 S. Ct. at 1222 (quoting Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885 (2018)) ("[T]he Second Circuit's conclusion that Mr. Trump's Twitter account was a public forum is in tension with, among other things, [the Court's] frequent description of public forums as 'government-controlled spaces.'").

space.[18] Since social media companies are private entities, a public official's account must qualify as a government-controlled space for courts to have the ability to perform a public forum analysis.[19] However, the barrier in determining whether a public official's account is government-controlled is that control over this space is coexistent: while a public official can control his or her account, so can the social media company according to the company's terms of service.[20]

The Supreme Court developed the public forum doctrine to protect speech in physical locations,[21] so the doctrine has not translated well as the "modern public square"[22] gradually shifted from the streets to the Internet. For courts to perform a public forum analysis on privately owned digital communication platforms, the Supreme Court must set a clear framework for determining which party, either the government or the private entity, is in control of the space. In his concurrence in *Biden v. Knight First Amendment Institute at Columbia University*, Justice Clarence Thomas proposed that, to address this issue of coexistent control on privately owned digital communication platforms, perhaps Congress could limit the control of these private entities by subjecting them to either common carrier or place of public accommodation legislation—two traditional ways that Congress has limited a private entity's control by limiting its right to exclude.[23] Thus, limiting the control of the private entity would allow the government to truly be in control of the space.[24] However, Justice Thomas's proposal is too narrow of an approach to solve this issue of control because it cannot withstand the future unknowns of digital communication. Congress cannot pass common carrier or place of public accommodation legislation every time litigation arises concerning whether a new privately owned communication platform constitutes a public forum when used by a public official.

Courts often look to the Supreme Court's 1975 decision of *Southeastern Promotions, Ltd v. Conrad*[25]—in which the Supreme Court

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18. Joseph A. D'Antonio, *Whose Forum is it Anyway: Individual Government Officials and Their Authority to Create Public Forums on Social Media*, 69 DUKE L.J. 701, 704 (2019).

19. *See generally Biden*, 141 S. Ct. 1220.

20. *See generally id.*; *Twitter Terms of Service*, TWITTER (effective June 10, 2022), https://twitter .com/en/tos#update [https://perma.cc/B9RS-W752].

21. *See* discussion *infra* Part I.

22. Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

23. *Biden*, 141 S. Ct. at 1222–23. See discussion *infra* Parts III.C.1 & 2 for a discussion of common carriers and places of public accommodation.

24. *See Biden*, 141 S. Ct. at 1222–23.

25. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

held that a privately owned theater under long-term government lease constituted a public forum—as an example of government control over private property.[26] In this decision, the Court implied that the government is in control of a forum when the government: (1) has the ability to control the forum; and (2) acts on that ability to control the forum.[27] To account for public officials' current use of digital communication platforms and their potential use of future communication technologies, the Supreme Court should explicitly adopt this ability/action standard for control that it implied in *Conrad* to set a clear framework for determining government control on digital communication platforms. Thus, only when a public official has the ability to control his or her social media account and acts on that ability through blocking constituents will that public official's account be subject to a public forum analysis.

Part I of this Comment provides an overview of the public forum doctrine by discussing the origins of the doctrine, the applicability of the doctrine to private property, and Justice Anthony Kennedy's expansive view of the public forum doctrine. Part II of this Comment touches on public officials' use of Facebook and Twitter as forums of communication, control over user accounts on Facebook and Twitter, and the future of digital communication. Part III of this Comment then goes on to explore how courts have applied the public forum doctrine to Facebook and Twitter by focusing on the United States Court of Appeals for the Fourth Circuit's decision in *Davison v. Loudoun County Board of Supervisors*,[28] the United States Court of Appeals for the Second Circuit's decision in *Knight First Amendment Institute at Columbia University v. Trump*,[29] and Justice Thomas's concurrence in *Biden v. Knight First Amendment Institute at Columbia University*.[30] Part IV of this Comment argues that the Supreme Court must alter the public forum doctrine for it to apply in the "modern public square[s]"[31] of today and tomorrow. To do so, Part IV proposes that the Court expand the bounds of the doctrine by adopting the ability/action standard for control it first implied in *Conrad*.

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26. *See, e.g.*, Davison v. Randall, 912 F.3d 666 (4th Cir. 2019); Knight First Amend. Inst. at Colum. Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019); *Biden*, 141 S. Ct. 1220.

27. *See generally Conrad*, 420 U.S. 546.

28. *Davison*, 912 F.3d 666.

29. *Knight*, 928 F.3d 226.

30. *Biden*, 141 S. Ct. 1220.

31. Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

I. THE HISTORICAL DEVELOPMENT OF THE PUBLIC FORUM DOCTRINE

The First Amendment expressly prohibits the government from abridging its citizens' rights to speak freely.[32] However, freedom of speech under the First Amendment is not absolute.[33] The government may regulate protected speech depending on where the speech takes place, when the speech takes place, and in what manner the speech takes place.[34] During the turn of the twentieth century, the government had broad authority under the First Amendment to regulate the public's speech on government property.[35] After World War I, the United States Supreme Court began to reevaluate the scope of the First Amendment to narrow the government's authority to do so.[36] Through a progression of mid-twentieth century First Amendment case law, the Supreme Court created the public forum doctrine[37] to "govern[] the rights of citizens to speak on government property . . . ."[38]

Scholars often attribute the origin of the public forum doctrine to Justice Owen Roberts's dicta in his 1939 plurality opinion in *Hague v. Committee for Industrial Organization*.[39] In *Hague*, the Supreme Court addressed the question of whether a Jersey City, New Jersey, ordinance that prevented a particular group of citizens from assembling and advocating in a public place violated the Privileges and Immunities Clause of the Fourteenth Amendment.[40] In deciding that the City's actions did

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32. William M. Howard, *Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum—Manner of Restriction*, 71 A.L.R.6th 471 (2012).

33. *Id.*

34. *Id.*

35. D'Antonio, *supra* note 18, at 707. *See also* Verlo v. Martinez, 820 F.3d 1113, 1144 (10th Cir. 2016); Davis v. Massachusetts, 167 U.S. 43, 48 (1897).

36. D'Antonio, *supra* note 18, at 707.

37. *Id.*

38. Lidsky, *Government Sponsored Social Media*, *supra* note 16, at 3.

39. *See* D'Antonio, *supra* note 18, at 707.

40. Hague v. Comm. for Indus. Org., 307 U.S. 496, 512 (1939). Although the Supreme Court did not decide this case on First Amendment grounds, the Court determined that peaceful assembly, discussion of federal law, and communication either verbally or in writing are all privileges inherent in United States citizenship. Thus, the Court held that denying these citizens their inherent privileges would violate the Privileges and Immunities Clause of the Fourteenth Amendment. *See* U.S. CONST. amend. XIV, § 1:

> 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

violate the Fourteenth Amendment, Justice Roberts noted that the ordinance at issue concerned the right of assembly in the context of speakers communicating specific views.[41] Justice Roberts went on to famously state:

> 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.[42]

While Justice Roberts's dicta recognized the public's right to be free from government censorship of political speech in traditional places of communication and public discourse, Justice Roberts did not use the term *public forum* when describing these places.[43]

Professor Harry Kalven Jr. coined the term *public forum* in 1965 in his article *The Concept of the Public Forum:* Cox v. Louisiana.[44] The Supreme Court first used Kalven's "public forum" language as a term of art in its 1972 case *Police Department of the City of Chicago v. Mosley*.[45] In *Mosley*, the city of Chicago passed an ordinance that prevented a federal postal employee from peacefully picketing on a public sidewalk adjoining

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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.

41. *Hague*, 307 U.S. at 515.

42. *Id.* at 515–16.

43. D'Antonio, *supra* note 18, at 708.

44. *Id.*; Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 35 (1975); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1718 (1987).

45. D'Antonio, *supra* note 18, at 709; *see* Police Dept. of City of Chi. v. Mosley, 408 U.S. 92 (1972).

a school.[46] In finding that excluding certain expressive conduct from a public sidewalk violated the Equal Protection Clause of the Fourteenth Amendment, the Court recognized the concept of a public forum in stating, "Selective exclusions from a *public forum* may not be based on content alone, and may not be justified by reference to content alone."[47]

After *Mosley*, the Supreme Court gradually developed the public forum doctrine to permit varying degrees of speech regulation depending on the type of government property at issue.[48] For example, the Supreme Court made the distinction between public forums and nonpublic forums in the 1976 case of *Greer v. Spock*.[49] The Court determined that, like a private property owner, the state has the power to control its property in accordance with its dedicated use.[50] In *Greer*, the dedicated use of a government-owned military base was to "provide for the common defen[s]e" and "train soldiers."[51] Since the dedicated use of the government property at issue was not for public discourse or communication, the Court held that the military base was a non-public forum.[52] Thus, the Court drew a distinction between public forums, which are traditionally dedicated for public discourse or communication, and nonpublic forums, which are traditionally dedicated for some other use.[53] However, the Court expanded this framework in the years following *Greer*.

A. The Current Categorization: Traditional Public Forums, Designated Public Forums, and Nonpublic Forums

In *Perry Education Association v. Perry Local Educators' Association*, the Supreme Court addressed whether a public school's internal mailing system was a public forum that warranted First Amendment protections to those who were denied access to it.[54] In finding that the internal mailing system was a non-public forum, the *Perry* Court

46. *Mosley*, 408 U.S. at 93.

47. *Id.* at 96 (emphasis added). Although decided on Equal Protection grounds, "the equal protection claim in [*Mosely* was] closely intertwined with First Amendment interests." *Id.* at 95.

48. *See generally* Greer v. Spock, 424 U.S. 828 (1976).

49. *Id.* at 836–38.

50. *Id.* at 836 (citing Adderley v. Florida, 385 U.S. 39, 47 (1966)).

51. *Id.* at 837–38.

52. *Id.* at 836–38.

53. *See id.*

54. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44 (1983).

recognized that courts must evaluate government restrictions of the public's speech on government property differently depending on the nature of the government property at issue.[55] The Court then expanded on *Greer*'s categorization of forums as traditional or nonpublic by describing a third type of forum known as a *designated public forum*.[56] Courts today still use these three categories of forums that *Perry* recognized when conducting a public forum analysis: (1) traditional public forums; (2) designated public forums; and (3) nonpublic forums.[57]

1. Traditional Public Forums

The *Perry* Court first began by describing traditional public forums.[58] While drawing inspiration from Justice Roberts's plurality in *Hague*, the Court recognized that "in places [that] by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed."[59] Examples of such include streets and parks.[60] In traditional public forums, if the government infringes on one's First Amendment rights through a content-based speech restriction, the government must overcome strict scrutiny for its restriction to be lawful.[61] According to the *Perry* Court, to overcome strict scrutiny the government must prove that its content-based restriction is narrowly tailored to achieve a compelling state interest.[62]

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55. *Id.*

56. *See id.* at 45–47; *Greer*, 424 U.S. at 836–38.

57. *See Perry Educ. Ass'n*, 460 U.S. at 45–47. Courts categorize spaces as either traditional, designated, or nonpublic forums to determine what scrutiny level—strict, intermediate, or rational basis—it should hold government censorship of speech in the space to. To overcome strict scrutiny, the government's censorship of speech must be narrowly drawn to achieve a compelling state interest. *See id.* at 45. Generally, to overcome intermediate scrutiny, the government's censorship of speech "must be substantially related to an important governmental objective." Clark v. Jeter, 486 U.S. 456, 461 (1988). To overcome rational-basis scrutiny, the government is sufficiently justified in censoring speech if it can prove "any reasonably conceivable state of facts that could provide a rational basis" for censoring speech. F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993).

58. *Perry Educ. Ass'n*, 460 U.S. at 45.

59. *Id.*

60. *See* Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 GONZ. L. REV. 113, 120 (2010).

61. *Perry Educ. Ass'n*, 460 U.S. at 45.

62. *Id.*

Take, for example, the government stopping Jehovah's Witnesses from passing out pamphlets on a public sidewalk near a government building, an area which likely constitutes a traditional public forum.[63] In this scenario, the government would most likely be violating the religious group's First Amendment rights because the government would be regulating speech in a traditional public forum based on its content or subject matter: religion. The regulation would be lawful, however, only if the government could overcome strict scrutiny by proving that its regulation is narrowly drawn to achieve a compelling state interest. Perhaps the government could argue that its prohibition on the Jehovah's Witnesses' speech is a narrowly tailored way to carry out its compelling interest of regulating anything that may suggest that the government endorses religion.[64]

2. Designated Public Forums

The *Perry* Court then went on to recognize what subsequent courts have described as *designated public forums*.[65] A designated public forum is property that the government has opened up for the public's expressive activity,[66] such as a library on a state university's campus that the university designated as a free-speech zone.[67] Although the state is not required to open this type of property to the public, courts hold speech restrictions in designated public forums to the same standards as traditional public forums[68]—meaning that speech restrictions in designated public forums are subject to strict scrutiny.[69] However, unlike traditional public forums, designated public forums have not been "*immemorially* [] held in trust for the use of the public and, time out of

63. The facts of the following hypothetical are loosely based off the facts of *Marsh v. Alabama*, 326 U.S. 501 (1946).

64. See, for example, *Smith v. Cnty. Of Albemarle, Virginia*, 895 F.2d 953 (4th Cir. 1990), in which the Fourth Circuit determined that requiring the removal of a nativity scene that a religious group put on the lawn of a government building was a narrowly tailored means of carrying out the compelling state interest of removing things from government property that suggest the government endorses religion.

65. *See generally* Knight First Amend. Inst. At Colum. Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019).

66. *Perry Educ. Ass'n*, 460 U.S. at 45.

67. Lidsky, *Government Sponsored Social Media*, *supra* note 16, at 4.

68. *Perry Educ. Ass'n*, 460 U.S. at 46.

69. *Id.*

mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[70]

The *Perry* Court also recognized a subcategory of designated public forums that later courts have described as *limited public forums*.[71] In *Perry*, the Court explained that the government can create certain forums for limited purposes, such as the discussion of certain topics or the use by certain groups.[72] Limited public forums are subject to different speech restrictions than traditional and other designated public forums.[73] In a limited public forum, the government can limit a forum to certain groups or for discussions of certain topics but cannot partake in viewpoint-based censorship.[74] Further, courts hold government censorship of speech based on viewpoint to strict scrutiny while holding content-based censorship to rational-basis scrutiny "with 'bite.'"[75]

Consider the previous example in a different context.[76] Instead of the public sidewalk, the Jehovah's Witnesses attempt to pass out pamphlets inside a state university's student center. Suppose as well that the state university permits all groups to come in the student center to pass out pamphlets except religious groups. If the Jehovah's Witnesses were to pass out pamphlets in the student center, the state university would need a rational basis to censor the religious group's speech because the state university's regulation is based on a certain content or subject matter: religion. However, if the state university were to permit all groups to come into the student center to pass out pamphlets except Jehovah's Witnesses, the state university would be discriminating based on a specific viewpoint. For this viewpoint-discriminative regulation to be lawful, the state university would have to overcome strict scrutiny.

3. Nonpublic Forums

Perry also recognized nonpublic forums, which the Supreme Court first recognized in *Greer*.[77] Like a limited public forum, in a nonpublic forum, a court holds government censorship of speech based on viewpoint

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70. Hague v. Comm. For Indus. Org., 307 U.S. 496, 515 (1939) (emphasis added).

71. Lidsky, *Government Sponsored Social Media*, *supra* note 16, at 4.

72. *Perry Educ. Ass'n*, 460 U.S. at 45 n.7.

73. Lidsky, *Government Sponsored Social Media*, *supra* note 16, at 4.

74. *Id.*

75. *Id.*

76. *See* discussion *supra* Part I.A.1. The facts of the following hypothetical are also loosely based off the facts of *Marsh v. Alabama*, 326 U.S. 501 (1946).

77. *See* discussion *supra* Part I.

to strict scrutiny, while it holds content-based censorship to rational-basis scrutiny.[78] The main difference between limited public forums and nonpublic forums, however, is that in a limited public forum, the government, *on a case-by-case basis*, holds the forum open to a limited class of speakers, while in a nonpublic forum, the government *generally* holds the forum open to a limited class of speakers.[79]

Drawing back to the previous example, the Jehovah's Witnesses now attempt to pass out their pamphlets on a military base.[80] If those working at the military base were to have a policy preventing religious groups from passing out pamphlets on its base, the content-based policy would be lawful so long as it passed rational-basis scrutiny. Due to this low scrutiny level, a court would give great deference to the military officials' regulation.[81] However, if the military officials were to have a policy that specifically prevents Jehovah's Witnesses from passing out pamphlets on its base, then the military officials would have to overcome strict scrutiny for this viewpoint-based regulation to be lawful. While this example may sound like the university student center example, this example differs because, as evidenced in *Greer*, military bases are *generally* open to a limited class of speakers, and a military base's dedicated use is not for communication or public discourse.[82] Conversely, the university student center is only limited to certain speakers on a *case-by-case basis*.

B. The Public Forum Doctrine Applied to Private Property

Although the term *public forum* was not coined until 1965,[83] Justice Roberts's 1939 *Hague* opinion set the foundation for the public forum doctrine to apply to both public and private property.[84] This foundation was further laid in the 1946 case of *Marsh v. Alabama* when the Supreme Court found that a sheriff arresting a Jehovah's Witness for attempting to distribute religious material on a sidewalk of a privately owned town violated the Jehovah's Witness's First Amendment rights.[85] The Court

78. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

79. *See* Lidsky, *Government Sponsored Social Media*, *supra* note 16, at 4.

80. *See* discussion *supra* Part I.A.1. The facts of the following hypothetical are also loosely based off the facts of *Marsh*, 326 U.S. 501.

81. Lidsky, *Government Sponsored Social Media*, *supra* note 16, at 4.

82. *See generally* Greer v. Spock, 424 U.S. 828, 836–38 (1976).

83. *See* D'Antonio, *supra* note 18, at 708.

84. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939) ("*Wherever the title of streets and parks may rest*, they have immemorially been held in trust for the use of the public . . . ." (emphasis added)).

85. *Marsh*, 326 U.S. at 509–10.

explained 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 statutory and constitutional rights of those who use it."[86] Thus, although the term *public forum* was not coined until 1965,[87] *Marsh* stood for the early proposition that if property functions as a public forum, then the property is a public forum.[88]

However, in the 1972 case of *Lloyd Corporation v. Tanner*, the Supreme Court stated that its *Marsh* holding is limited to cases involving speech restrictions in privately owned towns that function the same as government-owned towns, and this limited holding is only applicable to other factual scenarios in rare circumstances.[89] In *Lloyd*, the Court decided that a private shopping center banning the distribution of handbills within its complex does not violate the First Amendment.[90] In its analysis, the Court rejected the respondents' argument that because a shopping mall is open to the public like a "'business district' of a municipality," the mall has been dedicated for certain types of public use and should be subject to First Amendment protections like city streets.[91] The Court determined that "the Constitution by no means requires such an attenuated doctrine of dedication of private property to public use[,]" and private property does not "lose its private character merely because the public is generally invited to use it for designated purposes."[92] After *Lloyd* restricted the *Marsh* rule, there was uncertainty as to the public forum doctrine's applicability to private property. However, in the 1975 case of *Southeastern Promotions, Ltd v. Conrad*, the Supreme Court revisited the issue.[93]

In *Conrad*, a New York theater production corporation applied to use a privately owned theater in Chattanooga, Tennessee, for its production of the Broadway musical *Hair*.[94] Although owned by a private company, the theater was under a long-term lease to the city of Chattanooga.[95] The directors of the Chattanooga municipal theater met to discuss the New York corporation's application and ultimately rejected the application due

86. *Id.* at 506.
87. *See* D'Antonio, *supra* note 18, at 708.
88. *Marsh*, 326 U.S. at 507–08.
89. *See* Lloyd Corp. v. Tanner, 407 U.S. 551, 556–61 (1972).
90. *Id.* at 570.
91. *Id.* at 568–69.
92. *Id.* at 569.
93. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).
94. *Id.* at 547.
95. *Id.*

to rumors that *Hair* contained nude and obscene content.[96] The New York production corporation filed suit against the directors alleging that, as representatives of the city, the directors violated the corporation's First Amendment rights by rejecting its application.[97] In deciding that the privately owned theater under long-term government lease was a public forum, the Court made clear that "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great *where officials have unbridled discretion over a forum's use*."[98]

Six years after the Court in *Conrad* applied the public forum doctrine to a space "where officials ha[d] unbridled discretion over [the] forum's use[,]"[99] the Supreme Court in *United States Postal Service v. Greenburgh Civic Associations* confronted the issue of whether a federal statute that prohibited a civic association from putting unstamped material in private individuals' letterboxes violated the civic association's First Amendment rights.[100] In this case, the Court concluded that the private individual's letterboxes were not public forums and upheld the statute's content-neutral regulation.[101] Before concluding so, the Court recognized that the private-letterbox owners designated their letterboxes to the United States Postal Service, and, in exchange, the Postal Service would deliver and pick up the private-letterbox owners' mail.[102] The Court then noted that "the First Amendment does not guarantee access to property simply because it is *owned or controlled by the government*."[103] Through this use of the phrase *owned or controlled by the government*, the Supreme Court clarified that courts can conduct a public forum analysis on property the government owns or private property the government controls.[104] Some scholars have

96. *Id.* at 548.
97. *Id.* at 548–49.
98. *Id.* at 552–53 (emphasis added).
99. *Id.* at 553.
100. U. S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 116–17 (1981).
101. *Id.* at 129–34.
102. *See id.* at 128 ("[W]hen a letterbox is so designated, it becomes an essential part of the Postal Service's nationwide system for the delivery and receipt of mail. In effect, the postal customer, although he pays for the physical components of the 'authorized depository,' agrees to abide by the Postal Service's regulations in exchange for the Postal Service agreeing to deliver and pick up his mail.").
103. *Id.* at 129 (emphasis added).
104. *See id. See also* Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 801 (1985) ("[A]s an initial matter a speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns . . . .").

described a court's initial determination of whether property is either government owned or controlled as a threshold inquiry of the public forum doctrine.[105] This initial determination will be referred to as such throughout the following Parts of this Comment.

C. Justice Kennedy's Expansive View of the Public Forum Doctrine

Justice Anthony Kennedy's view of the public forum doctrine has played an integral role in expanding the doctrine in regards to new and future communication forums.[106] The Justice's view dates back to the Supreme Court's 1992 decision in *International Society for Krishna Consciousness v. Lee*.[107] In *Lee*, members of the International Society for Krishna Consciousness sought to distribute religious pamphlets and solicit funds in three government-owned airports.[108] Chief Justice William Rehnquist, writing for the majority, rejected the extention of public fora status to airports.[109] According to Justice Rehnquist, "Given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description [in *Hague*] of having 'immemorially . . . time out of mind' been held in the public trust and used for purposes of

105. Peter Kourkouvis, *You're Blocked! Should Public Officials Be Allowed to Stifle Speech On Social Media?*, TIMELY TECH, J.L. TECH. & POL'Y, UNIV. ILL. COLL. L. (Apr. 22, 2019), http://illinoisjltp.com/timelytech/youre-blocked-should-public-officials-be-allowed-to-stifle-speech-on-social-media/#_edn38 [https://perma.cc/2G9P-KDX2] ("The court then considered the threshold issue that for a place to be subject to forum analysis, it must be owned or controlled by the government."); Lyrissa Barnett Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1994–96 (2011) [hereinafter Lidsky, *Public Forum 2.0*] ("Before attempting to apply the speech categories discussed above to government sponsored social media, it is important to address two threshold issues. The Supreme Court's public forum cases predominantly involve either physical places or resources owned or exclusively controlled by the government."); Lauren Beausoleil, *Is Trolling Trump A Right or A Privilege?: The Erroneous Finding in* Knight First Amendment Institute at Colombia University v. Trump, 60 B.C. L. REV. E-SUPPLEMENT II.-31, II.-40 (2019) ("The court first evaluated the control that President Trump and Mr. Scavino exercised over the account and concluded that it was sufficient to meet the public forum doctrine's threshold requirement of ownership or control.").

106. Dawn Carla Nunziato, *From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital*, 25 B.U. J. SCI. & TECH. L. 1, 30 (2019).

107. Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

108. *Id.* at 675–76.

109. *Id.* at 680.

expressive activity."[110] Further, the Chief Justice noted that the airports were not designated public forums because the space had not been intentionally opened for expressive activity.[111]

In a concurring opinion, Justice Kennedy criticized Justice Rehnquist's view of the public forum doctrine.[112] Justice Kennedy argued that the Chief Justice's view made it difficult for new public fora to develop without the rare occurrence of government approval.[113] Justice Kennedy went on to emphasize that when applying a narrow approach rather than a functional one, the public forum doctrine becomes irrelevant in the age of fast ever-evolving technology.[114] In particular, Justice Kennedy noted:

> The liberties protected by [the public forum] doctrine . . . are essential to a functioning democracy. . . . Public places are of necessity the locus for discussion of public issues, as well as protest against arbitrary government action. At the heart of our jurisprudence lies the principle that in a free nation citizens must have the right to gather and speak with other persons in public places.
>
> . . .
>
> [T]he policies underlying the [public forum] doctrine cannot be given effect unless we recognize that open, public spaces and thoroughfares that are suitable for discourse may be public forums, whatever their historical pedigree and without concern for a precise classification of the property.[115]

Justice Kennedy continued to express his views on expanding the public forum doctrine four years later in *Denver Educational Telecommunications Consortium v. Federal Communications Commission*.[116]

In *Denver*, the Federal Communications Commission implemented a provision of the Cable Television Consumer Protection and Competition Act that allowed cable providers to remove patently offensive or indecent

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110. *Id.* (quoting Hague v. Comm. For Indus. Org., 307 U.S. 496, 515 (1939)).
111. *Id.*
112. *Id.* at 693–709 (Kennedy, J., concurring).
113. *Id.* at 695.
114. *Id.* at 697.
115. *Id.* at 695–97.
116. Denver Area Edu. Telecomms. Consortium v. F.C.C., 518 U.S. 727, 780–812 (1996).

programs on public access channels.[117] The Court found it "unnecessary and unwise" to apply the public forum doctrine to the public access channels.[118] However, Justice Kennedy concurred in *Denver* and again emphasized that the public forum doctrine must extend to new technologies for the First Amendment to remain applicable on modern communication forums that government actors attempt to use to stifle expression.[119] Although only concurring in *Denver*, Justice Kennedy's expansive view of the public forum doctrine became that of the majority in 2017 when he authored *Packingham v. North Carolina*.[120]

In *Packingham*, Justice Kennedy emphasized his expansive view of the public forum doctrine in the context of social media.[121] The issue before the Supreme Court in *Packingham* was whether a North Carolina statute that prevented a registered sex offender from using a social media platform—a digital space that the registered sex offender knew permitted minor children to create accounts—violated the First Amendment.[122] The Court determined that the North Carolina statute was overbroad; thus, the statute violated the First Amendment.[123] Although the specific issue in this case was not whether social media is a public forum under the public forum doctrine, Justice Kennedy described the public-forum nature of social media.[124]

Justice Kennedy noted that "[s]ocial media allows users to gain access to information and communicate with one another on any subject that might come to mind."[125] Further, Justice Kennedy also stated, "These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[126] Justice Kennedy then went on to describe social media as the "modern public square."[127] With social media's public-forum nature in mind, Justice Kennedy warned

117. *Id.* at 732–33; Nunziato, *supra* note 106, at 32 (These public access channels were "channels that were available at low or no cost to members of the public.").
118. *Denver Area Edu. Telecomms. Consortium*, 518 U.S. at 729.
119. *See id.* 791–94 (Kennedy, J., concurring).
120. Packingham v. North Carolina, 137 S. Ct. 1730 (2017).
121. *See generally id.*
122. *Id.* at 1733.
123. *Id.* at 1737–38.
124. *See generally Packingham*, 137 S. Ct. 1730.
125. *Id.* at 1732.
126. *Id.* at 1737.
127. *See id.*

future courts about the implications of these platforms.[128] In his warning, Justice Kennedy stated:

> While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that *courts must be conscious that what they say today might be obsolete tomorrow*.[129]

As illustrated by the increases in digital communication following *Packingham*—specifically the increase in public official use of Facebook and Twitter[130]—Justice Kennedy's warning about the vast implications of digital spaces as platforms for speech and expression is not just an issue for courts, but an issue with a fast-ticking timeclock.

II. DIGITAL PLATFORMS AS COMMUNICATION FORUMS FOR PUBLIC OFFICIALS

Public officials' use of Facebook and Twitter to communicate with constituents dramatically increased in 2020.[131] For example, in 2020, 99% of the members of the United States Senate posted on Twitter; 98% of the members of the United States House of Representatives posted on Twitter; and 100% of members in both the House and Senate posted on Facebook.[132] According to the Pew Research Center, congressional members' average monthly Facebook use in early 2020 increased 48% from early 2016.[133] Likewise, congressional members' Twitter use increased by 81% during this same time period.[134] As compared to legislating, congressional members tweeted 98 times per one bill introduced and 17,912 times per one bill enacted.[135] State officials also

128. *Id.* at 1736.
129. *Id.* (emphasis added).
130. *See generally* Patrick Van Kessel et al., *The congressional social media landscape*, PEW RSCH. CTR. (July 16, 2020), https://www.pewresearch.org/internet/2020/07/16/1-the-congressional-social-media-landscape/ [https://perma.cc/8LHY-RPK2]; QUORUM, *supra* note 10.
131. *See generally* Van Kessel et al., *supra* note 130; QUORUM, *supra* note 10.
132. QUORUM, *supra* note 10, at 5.
133. Van Kessel et al., *supra* note 130.
134. *Id.*
135. QUORUM, *supra* note 10, at 7.

frequent social media.[136] In fact, as the Supreme Court noted in *Packingham v. North Carolina*, the governors of all 50 states had Twitter accounts in 2017.[137] In Louisiana, State Senator Karen Peterson was the most active Louisiana public official on Facebook and Twitter within the eight-month span of January 1, 2021, to August 25, 2021.[138] During that time, Senator Peterson totaled 3,267 posts between the two social media sites, which equates to approximately 13 posts per day.[139]

As these statistics indicate, Facebook and Twitter have become fundamental communication models for public officials.[140] Public officials use these digital platforms for a variety of purposes, including conveying messages to the public, sharing positions on certain issues, and speaking directly to constituents in a way that allows the constituents to respond back.[141] However, no matter a public official's purpose behind a Facebook post or a tweet, the public official's message will automatically create a forum where other users can respond. To address the issues that these automatically generated response forums present to the threshold inquiry

136. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

137. *Id.*

138. QUORUM, 2021 STATE LEGISLATIVE TRENDS REPORT 17 (2021).

139. *Id.*

140. *See* KENDRA KUMOR ET AL., IMPROVING COMMUNICATION WITH PUBLIC OFFICIALS ON SOCIAL MEDIA: PROPOSALS FOR PROTECTING SOCIAL MEDIA USERS' FIRST AMENDMENT RIGHTS 3–4 (2021), https://www.fordham.edu/download/downloads/id/15275/improving_communication_with_public_officials_on_social_media.pdf [https://perma.cc/NUS6-HBP5].

141. *See, e.g.*, Scott Walker – Jefferson Parish Councilman At-Large, FACEBOOK (Sept. 30, 2021), https://www.facebook.com/100063871653905/posts/247033427435711/?d=n [https://perma.cc/37HP-R6RS] ("River Birch Renewable Energy has established a lost tipper cart hotline for residents in Lafitte, Barataria and Crown Point. Residents in areas that are accessible can call the Lafitte Area Cart Request Hotline at 504-272-2889."); Gov. John Bel Edwards (@LouisianaGov), TWITTER (Oct. 13, 2021, 6:26 PM), http://www.twitter.com/louisianagov/status/1448429873832280067?s=21 [https://perma.cc/N9YB-HDX3] ("Today, I joined Renewable Energy Group Geismar to break ground on their expansion project. REG's investment in Louisiana is not only good for our economy, but it's good for our climate as we work towards a cleaner energy future."); President Obama (@POTUS44) TWITTER (May 28, 2015, 11:21 AM), https://twitter.com/potus44/status/603959253334822913?s=21 [https://perma.cc/46ER-M2TE] ("Just got hurricane preparedness briefing in Miami. Acting on climate change is critical. Got climate Qs? I'll answer at 1pm ET. #AskPOTUS").

of a public forum analysis,[142] courts must first understand the control that both users and these social media companies have over user accounts.

A. Control Over User Accounts on Facebook

According to Facebook's terms of service, users make various commitments to Facebook in exchange for Facebook's services.[143] For example, a user cannot post content that violates Facebook's terms of service, policies, or community standards.[144] Facebook can, according to its community standards, censor users' content to protect authenticity, safety, privacy, and dignity.[145] Further, Facebook can "suspend or permanently disable [] access to Meta Company Products" if the user "clearly, seriously or repeatedly breache[s]" either Facebook's terms of service or policies.[146] Additionally, Facebook "reserve[s] all rights not expressly granted to [users]."[147]

Although Facebook has the ability to control user accounts through these terms of service, users exhibit control over their accounts as well. For example, users can customize their profiles, post statuses or photos, and connect with other users by adding them as friends.[148] In addition, users have the discretion to control the comment section attached to their

142. *See* Kourkouvis, *supra* note 105 ("The court then considered the threshold issue that for a place to be subject to forum analysis, it must be owned or controlled by the government."); Lidsky, *Public Forum 2.0*, *supra* note 105 ("Before attempting to apply the speech categories discussed above to government sponsored social media, it is important to address two threshold issues. The Supreme Court's public forum cases predominantly involve either physical places or resources owned or exclusively controlled by the government."); Beausoleil, *supra* note 105 ("The court first evaluated the control that President Trump and Mr. Scavino exercised over the account and concluded that it was sufficient to meet the public forum doctrine's threshold requirement of ownership or control.").

143. *See generally Terms of Service*, FACEBOOK, *supra* note 9.

144. *Id.*

145. *See Facebook Community Standards*, META, https://transparency.fb.com/policies/community-standards/?from=https%3A%2F%2Fwww.facebook.com%2Fcommunitystandards [https://perma.cc/U5X4-G9GS] (last visited Feb. 14, 2023).

146. *Terms of Service*, FACEBOOK, *supra* note 9.

147. *Id.*

148. *See generally Louisiana Law Review*, FACEBOOK, https://www.facebook.com/Louisiana-Law-Review-177303748973757 [https://perma.cc/2AH5-2NE5] (last visited Feb. 14, 2023).

posts.[149] If User A does not like User B's comment that appears in the comment section attached to User A's post, then User A has the discretion to delete User B's comment.[150] User A could also utilize Facebook's block feature to block User B.[151] By doing so, User A would be denying User B the ability to view and use the communicative functions associated with User A's posts and profile; thus, Facebook would delete User B's comment from the comment section attached to User A's post.[152]

B. Control Over User Accounts on Twitter

According to Twitter's terms of service, a user can create an account "only if [the user] agree[s] to form a binding contract with Twitter . . . ."[153] By accepting its terms of service and entering into this contract, users allow Twitter to reserve the right to control the accessibility and transmission of their content. [154] Specifically, Twitter "reserve[s] the right to remove Content that violates [its] User Agreement . . . ."[155] In addition, Twitter reserves control over the functions of users' accounts:

> Our Services evolve constantly. As such, the Services may change from time to time, at our discretion. We may stop (permanently or temporarily) providing the Services or any features within the Services to you or to users generally. We also retain the right to create limits on use and storage at our sole discretion at any time. We may also remove or refuse to distribute any Content on the Services, limit distribution or visibility of any Content on the service, suspend or terminate users, and reclaim usernames without liability to you.[156]
>
> . . .
>
> We may suspend or terminate your account or cease providing you with all or part of the Services at any time for any or no

149. *See generally id.*; *Blocking*, *supra* note 12.
150. *See generally Louisiana Law Review*, *supra* note 148.
151. *See generally Blocking*, *supra* note 12.
152. *See generally Louisiana Law Review*, *supra* note 148.
153. *Twitter Terms of Service*, *supra* note 20.
154. *Id.* ("You retain your rights to any Content you submit, post or display on or through the Services. What's yours is yours — you own your Content (and your incorporated audio, photos and videos are considered part of the Content).").
155. *Id.* Violations of the User Agreement include "copyright or trademark violations or other intellectual property misappropriation, impersonation, unlawful conduct, or harassment." *Id.*
156. *Id.*

reason . . .[157]

While Twitter may have the ability to control user accounts according to its terms of service, Twitter users can also control their own accounts. For example, users can customize their profiles,[158] post tweets,[159] and connect with others by following them.[160] In addition, users have the discretion to control the reply section attached to their tweets.[161] Twitter, unlike Facebook, does not give users the discretion to filter their tweets' reply sections through deleting other users' replies.[162] To remove User A's reply from the reply section of User B's tweet, User B would have to block User A from his or her account, thus denying User A all ability to view and use the communicative functions associated with User B's profile.[163]

C. The Metaverse: A Glimpse into the Future of Digital Communication

On October 28, 2021, Facebook founder Mark Zuckerberg announced that Facebook changed its company's name to Meta.[164] To Zuckerberg, this rebrand represents his company's plan for the future of digital communication: the metaverse—"the successor to the mobile Internet."[165] According to Zuckerberg, the metaverse will be a virtual world that will allow users to feel as if they are physically present with one another no

157. *Id.* This language gives Twitter the ability to take down user accounts as it sees fit. *See, e.g.*, Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring) ("Any control Mr. Trump exercised over the account greatly paled in comparison to Twitter's authority, dictated in its terms of service, to remove the account 'at any time for any or no reason.' Twitter exercised its authority to do exactly that.").

158. *See generally Personalization and data*, TWITTER, https://twitter.com/settings/profile [https://perma .cc/B6S4-W6C9] (last visited Feb. 14, 2023).

159. *See generally How to Tweet*, TWITTER, https://help.twitter.com/en/using-twitter/how-to-tweet [https://perma.cc/9LGV-MGLV] (last visited Feb. 14, 2023).

160. *See generally About following on Twitter*, TWITTER, https://help.twitter.com/en/using-twitter/twitter-follow-limit [https://perma.cc/E2BM-YZ7U] (last visited Feb. 14, 2023).

161. *See generally How to Tweet*, *supra* note 159.

162. *See generally id.*

163. *See generally id.*

164. Meta, *The Metaverse and How We'll Build It Together -- Connect 2021*, YOUTUBE (Oct. 28, 2021), https://www.youtube.com/watch?v=Uvufun6xer8 [https://perma.cc/T2FH-8ZZD].

165. *Id.*

matter how far apart they may be in reality.[166] Specifically, this virtual reality will represent users through 3D avatars, which will allow users to communicate not only through words but also through facial expressions and body language.[167] Users will be able to experience the metaverse through virtual reality goggles.[168] Once users put on these goggles, users will be transported to their "homes" in the metaverse—users' own spaces they can invite others to or from where they can teleport to others' "homes."[169]

Although this technology is in the works, Meta has laid out both short-term and long-term potentials for this communicative space.[170] In his announcement, Zuckerberg explained that Meta believes the metaverse will be mainstream, and the public "will be creating and inhabiting worlds that are as detailed and convincing" as the world around them within the next five to ten years.[171] Meta also envisions that in the next decade, the metaverse will reach a billion people, host hundreds of billions of dollars in digital commerce, and provide millions of jobs for creators and developers.[172] Just as courts today are trying to find ways to apply the public forum doctrine to digital communication platforms like Facebook and Twitter, courts will soon have to do the same if the metaverse Zuckerberg envisions comes to life.

III. HOW COURTS HAVE APPLIED THE PUBLIC FORUM DOCTRINE TO DIGITAL COMMUNICATION PLATFORMS

The United States Court of Appeals for the Fourth Circuit addressed the issue of whether a public official's Facebook account constitutes a public forum that warrants First Amendment protections to constituents.[173] Similarly, the United States Court of Appeals for the Second Circuit addressed the issue of whether the response forum attached to a public official's tweet constitutes a public forum that warrants First Amendment protections to constituents.[174] Both courts determined that public officials

166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*
173. *See* Davison v. Randall, 912 F.3d 666 (4th Cir. 2019).
174. *See* Knight First Amend. Inst. at Colum. Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019).

create public forums when using these social media sites.[175] Until the Supreme Court formally takes up this issue, these decisions—along with other Circuits' decisions that looked to these decisions' analyses and reasonings[176]—are the highest authorities to which courts can look to for guidance when applying the public forum doctrine to social media.

A. Davison v. Loudoun County Board of Supervisors

On July 25, 2017, the District Court for the Eastern District of Virginia in *Davison v. Loudoun County Board of Supervisors* was the first court to face the "novel legal question" of whether a public official created a public forum through the use of her Facebook page.[177] In *Davison*, a public official created an official Facebook account and did not utilize any of Facebook's privacy settings; thus, all Facebook users had access to the public official's account and its communicative functions.[178] After a town hall, the public official posted on her Facebook account and got into a dispute with a constituent about the town hall in the comment section attached to the public official's post.[179] The public official deleted the post and blocked the constituent, thus denying the constituent access to the public official's profile and its communicative functions.[180] The constituent sued the public official alleging that the public official violated his First Amendment rights when the public official blocked him.[181]

In its analysis, the trial court reasoned that "the government may open a forum for speech by creating a website that includes a '"chat room" or "bulletin board" in which private viewers could express opinions or post information' or that otherwise 'invite[s] or allow[s] private persons to publish information or their positions.'"[182] However, the trial court did not

175. *See generally Davison*, 912 F.3d 666; *Knight*, 928 F.3d 226.

176. *See, e.g.*, Campbell v. Reisch, 986 F.3d 822 (8th Cir. 2021); Garnier v. O'Connor-Ratcliff, 41 F.4th 1158 (9th Cir. 2022). *See also* Lindke v. Freed, 37 F.4th 1199 (6th Cir. 2022). While the Sixth Circuit in *Lindke v. Freed* discussed *Knight* and *Davison*, the question before the court in *Lindke* dealt with the state action doctrine, specifically whether a public official was acting in his official capacity when using Facebook—an issue not directly addressed in this Comment. *See id.*

177. Davison v. Loudoun Cty. Bd. of Supervisors, 267 F. Supp. 3d 702, 711 (E.D. Va. 2017).

178. *Id.* at 707–08.

179. *Id.* 710–11.

180. *Id.* at 711.

181. *Id.* at 706.

182. *Id.* at 716 (alterations in original) (quoting Page v. Lexington Cty. Sch. Dist. One, 531 F.3d 275, 284 (4th Cir. 2008)).

directly address whether the public official's Facebook page was a government-controlled space.[183] However, the trial court found that by using her Facebook page to solicit comments from constituents, the public official designated a place or channel for public communication, which is a sufficient act to create a forum for speech.[184]

On de novo review, the Fourth Circuit affirmed the district court's decision on January 7, 2019, noting that "what renders the fora 'public'—is that the government has made the space available"[185] and that even though Facebook is a private entity, if sufficiently controlled by the government, a private entity can still host a public forum.[186] The Fourth

183. *See Davison*, 267 F. Supp. 3d 702.

184. *Id.* at 716 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985)).

185. *Davison*, 912 F.3d at 681 (citing ACLU v. Mote, 423 F.3d 438, 443 (4th Cir. 2005)).

186. Specifically, the court explained:

> Even assuming the intangible space at issue is "private property," as Randall claims—which is not at all clear from the record before us—the Supreme Court never has circumscribed forum analysis solely to government-owned property. For example, in *Cornelius*, the Court recognized that forum analysis applies "to *private property* dedicated to public use." *Cornelius*, 473 U.S. 801 [ ] (emphasis added); *see also Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 679 [ ] (2010) ("[T]his Court has employed forum analysis to determine when a governmental entity, in regulating *property in its charge*, may place limitations on speech." (emphasis added)). And the Supreme Court and lower courts have held that private property, whether tangible or intangible, constituted a public forum when, for example, the government retained substantial control over the property under regulation or by contract. *See, e.g.*, *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547 [ ] (1975) (holding that "a privately owned Chattanooga theater under long-term lease to the city" was a "public forum[ ] designed for and dedicated to expressive activities"); *Halleck v. Manhattan Community Access Corp.*, 882 F.3d 300, 306–07 (2d Cir. 2018) (holding that public access television channels operated by a private non-profit corporation constituted public forums) . . . ; *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1122 (10th Cir. 2002) ("[F]orum analysis does not require that the government have a possessory interest in or title to the underlying land. Either government ownership or regulation is sufficient for a First Amendment forum of some kind to exist."); *Freedom from Religion Foundation, Inc. v. City of Marshfield, Wis.*, 203 F.3d 487, 494 (7th Cir. 2000) (holding that private property abutted by public park constituted public forum).

Id. at 682–83 (footnote omitted).

Circuit found that the public official had sufficient control over the parts of her Facebook account that were at issue because she created her Facebook account, designated her profile as belonging to a "government official," and exercised authority over various features on her account that gave rise to the litigation.[187] For example, the public official exercised control over her account because she was the one who actually blocked the constituent.[188]

B. Knight First Amendment Institute at Columbia University v. Trump

On May 23, 2018, the District Court for the Southern District of New York in *Knight First Amendment Institute at Columbia University v. Trump* answered a similar legal question as the court did in *Davison*.[189] In *Knight*, the court determined whether President Donald Trump blocking constituents from his Twitter account because of the constituents' political views violated the First Amendment.[190] In its analysis, the trial court noted that for the public forum doctrine to be applicable, President Trump's Twitter account must have been owned or controlled by the government.[191] Additionally, applying the public forum doctrine had to be "consistent with the purpose, structure, and intended use" of the account.[192] The trial court determined that President Trump's Twitter account was controlled by the government because his use of the account was in part for executive functions; President Trump portrayed his Twitter account as an account for the forty-fifth President of the United States; and the Presidential Records Act required President Trump's tweets to be preserved.[193] Further, even though Twitter maintained control over President Trump's account, because President Trump exercised control over his account to the extent that he could, he satisfied the public forum doctrine's initial government-control element.[194] Thus, President Trump's Twitter account was subject to a public forum analysis.

187. *Id.* at 684.
188. *Id.*
189. *See id.* at 666; Knight First Amend. Inst. at Colum. Univ. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018).
190. *Knight*, 302 F. Supp. 3d at 549.
191. *Id.* at 566.
192. *Id.* at 570.
193. *Id.* at 567.
194. *Id.*

On July 9, 2019, the Second Circuit affirmed the district court's judgment.[195] In its analysis, the appellate court, found that President Trump had control over his account for the same reasons the district court cited to.[196] The case made its way to the Supreme Court one year later.[197]

C. Biden v. Knight First Amendment Institute at Columbia University

The Supreme Court granted a writ of certiorari and heard *Knight* on April 5, 2021.[198] The Court vacated the judgment and remanded the case back to the Second Circuit to dismiss as moot[199]—presumably because President Trump was no longer in office and Twitter had taken down his account.[200] However, Justice Clarence Thomas wrote a concurring opinion addressing issues the case presented regarding the public forum doctrine.[201] In his concurrence, Justice Thomas argued that the Second Circuit's determination that President Trump's account was a public forum did not reconcile with the public forum doctrine's requirement that private property be controlled by the government.[202] Justice Thomas justified his argument by explaining that President Trump's control over his account "greatly paled in comparison" to Twitter's control over his account because according to Twitter's terms of service, Twitter can remove a user's account "at any time for any or no reason."[203]

Justice Thomas proposed that if "private, concentrated control over online content and platforms available to the public" impedes the government's ability to have a government-controlled space, then perhaps "part of the solution [to this problem] may be found in doctrines that limit the right of a private company to exclude."[204] The Justice went on to

195. Knight First Amend. Inst. at Colum. Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019).

196. *See id.* at 235.

197. *See* Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220 (2021) (Thomas, J., concurring).

198. *Id.*

199. *Id.* at 1220.

200. *See id.* at 1221 ("Twitter has permanently removed the account from the platform."); Bernie Gabrielle Toledano, *If You Can't Beat Them, Get Even: A Proposal to Level the Playing Field Between Social Media Platforms and Their Wrongfully Removed Users*, 88 BROOK. L. REV. 311, 323–24 (2022) ("[T]he Court held the challenge as moot after President Biden won the 2020 election . . . .").

201. *Biden*, 141 S. Ct. at 1220–21.

202. *Id.* at 1222.

203. *Id. See also Twitter Terms of Service*, *supra* note 20.

204. *Biden*, 141 S. Ct. at 1222.

suggest that if digital communication platforms are considered either: (1) common carriers; or (2) places of public accommodation, then the government could limit these private companies' right to exclude users from certain actions according to these companies' terms of service.[205] Although unclear, presumably under Justice Thomas's view, this government regulation over digital platforms would elevate public officials to being in sufficient control of their social media accounts, thus classifying these platforms as government-controlled spaces subject to a public forum analysis.[206] The following Subparts explain common carrier and public accommodations law to shed light on Justice Thomas's proposal.

1. Justice Thomas's View on Digital Communication Platforms as Common Carriers

Justice Thomas first suggested that digital communication platforms be considered common carriers.[207] Historically, a common carrier was a transportation entity, such as the railroad, that carried goods and had a duty to serve all customers on a non-discriminatory basis.[208] In the early twentieth century, Congress extended this common-carrier status to communication entities such as the telegraph and telephone.[209] Congress subjects common carriers, including communication networks, to certain legal duties.[210] Although a common carrier is a private company with its own First Amendment rights, courts have held that there is a general "absence of any First Amendment concern" with equal access obligations because private communication networks "merely facilitate the transmission of the speech of others rather than engage in speech in their own right."[211] Since there is no clear definition of what constitutes a common carrier,[212] Justice Thomas focused on the following three factors when drawing a comparison between digital communication platforms and

205. *Id.* at 1222–23.
206. *See id.* at 1222–27.
207. *Id.* at 1222.
208. Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 878–79 (2009).
209. *Id.* at 879–80.
210. *See, e.g.*, Communications Act of 1934 §§ 1–5, 47 U.S.C. §§ 151–155.
211. U.S. Telecom Ass'n v. F.C.C., 825 F.3d 674, 741 (D.C. Cir. 2016).
212. *Cf., e.g.*, Daniel T. Deacon, *Common Carrier Essentialism and the Emerging Common Law of Internet Regulation*, 67 ADMIN. L. REV. 133, 134 (2015) ("[I]t is far from clear what comprises the essence of a common carrier . . . .").

traditional common carriers: (1) holding out to the public; (2) market power; and (3) control over speech.[213]

Courts have found that a company holding itself out as serving the public as a whole is a key indication that the company is a common carrier.[214] Likewise, Justice Thomas noted that digital platforms such as Twitter "hold themselves out to the public [as] traditional common carriers" because these platforms are "communication networks . . . [that] 'carry' information from one user to another."[215] Although scholars debate whether monopoly power is needed for a company to be a common carrier,[216] Justice Thomas raised the argument that digital platforms, like common carriers, have a dominant market share.[217] For example, 3 billion people use Facebook-owned apps, and Google generated $182.5 billion in total revenue in 2020, giving it a 90% market share for search engines.[218] Although these companies are not monopolies, Justice Thomas argued that there are substantial barriers to enter these industries because companies such as Facebook and Google do not have comparable competitors.[219] In drawing a connection between digital communication platforms and common carriers in regards to control over speech, Justice Thomas went on to raise the argument that, like communication utilities, digital communication platforms have significant control over speech.[220] Specifically, companies such as Google, Facebook, and Twitter have control over what content users can and cannot see.[221]

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213. Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220, 1222–25 (2021) (Thomas, J., concurring).

214. Nat'l Ass'n of Broad. v. F.C.C., 740 F.2d 1190, 1203 (D.C. Cir. 1984) ("[T]he sine qua non of a common carrier is the obligation to accept applicants on a non-content oriented basis.").

215. *Biden*, 141 S. Ct. at 1224.

216. Christopher S. Yoo, *The First Amendment, Common Carriers, and Public Accommodations: Net Neutrality, Digital Platforms, and Privacy*, 1 J. FREE SPEECH 463, 466 (2021). *See also* Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 YALE J.L. & TECH. 391, 404–05 (2020); Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1332–34 (1998); James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMMS. L.J. 225, 255–58 (2002).

217. *Biden*, 141 S. Ct. at 1224.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.* at 1224–25.

2. Justice Thomas's View on Digital Communication Platforms as Places of Public Accommodation

According to Title III of the Americans with Disabilities Act, a place of public accommodation may not discriminate based on a person's disability.[222] Justice Thomas pointed out in *Knight* that neither party identified any sort of discrimination based on disability that would violate Title III of the Americans with Disabilities Act.[223] However, Justice Thomas still discussed how digital communication platforms may be considered places of public accommodation.[224]

The scope of what constitutes a place of public accommodation has changed over time. Before the Civil War, the common law recognized innkeepers and common carriers as places of public accommodation but left the scope open to include potential entities that share similar characteristics.[225] However, after the Civil War, the Supreme Court narrowed the scope of public accommodations law to only innkeepers and common carriers.[226] Today, public accommodations law is mostly statutory.[227] In his concurrence, Justice Thomas noted that while the definition of a place of public accommodation may vary depending on the jurisdiction, a place of public accommodation provides "lodging, food, entertainment, or other services to the public . . . in general."[228] Although Twitter and other digital communication platforms alike may fit this definition, the federal circuit courts of appeals are split as to whether federal public accommodations law applies to an entity without a physical location.[229]

222. Americans with Disabilities Act, 42 U.S.C. § 12182.
223. *Biden*, 141 S. Ct. at 1226.
224. *Id.* at 1225–26.
225. *Yoo*, *supra* note 216, at 476.
226. *Id.* at 477.
227. *Id.* at 478–79.
228. *Biden*, 141 S. Ct. at 1225.
229. See, for example, *Doe v. Mutual of Omaha Insurance Company*, 179 F.3d 557, 559 (7th Cir. 1999), in which the Seventh Circuit determined Title III of the Americans with Disabilities Act applies to websites and *Parker v. Metropolitan Life Insurance Company*, 121 F.3d 1006, 1010–11 (6th Cir. 1997), in which the Sixth Circuit determined that Title III of the Americans with Disabilities Act only applies in physical locations.

IV. CHANGE IS NEEDED FOR THE PUBLIC FORUM DOCTRINE TO APPLY IN THE "MODERN PUBLIC SQUARE[S]" OF TODAY AND TOMORROW

When speech takes place on government property, courts apply the fundamental First Amendment principle that "all persons have access to places where they can speak"[230] by evaluating the actual space where the speech takes place.[231] Throughout the history of the public forum doctrine, the Supreme Court struggled with "identifying the most important places . . . for the exchange of views . . . ."[232] However, Justice Kennedy emphasized in *Packingham* that social media presents no problem to answering this question.[233] Social media is the "modern public square"[234] that fosters "free and global conversations"[235] to "empower [the public] to express [oneself] and communicate about what matters to [them]."[236]

Modern public officials rely heavily on social media platforms such as Facebook and Twitter to communicate with constituents.[237] When a public official utilizes blocking features on these social media platforms, the public official consequently denies blocked constituents access to the automatically generated response forum attached to his or her post or tweet.[238] By doing so, the public official fundamentally violates the First Amendment because the public official denies constituents access to a place where they can speak. Therefore, in theory, courts should not allow public officials to block constituents. However, a public official's social media account must be a public forum under the public forum doctrine for First Amendment protections to be warranted in this private space.

To be a public forum under the public forum doctrine, public officials' accounts on privately owned social media platforms must be government-controlled spaces.[239] However, the barrier here is that social media

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230. Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).

231. *See* D'Antonio, *supra* note 18, at 704.

232. *Packingham*, 137 S. Ct. at 1735.

233. *Id.*

234. *Id.* at 1737.

235. *Healthy conversations*, TWITTER, https://about.twitter.com/en/our-priorities/healthy-conversations [https://perma.cc/9258-T5X2] (last visited Feb. 14, 2023).

236. *Terms of Service*, FACEBOOK, *supra* note 9.

237. *See* KUMOR ET AL., *supra* note 140.

238. *See generally Blocking*, *supra* note 12.

239. *See generally* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114 (1981); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983). *See also* Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220, 1222 (2021) (Thomas, J., concurring) (quoting Minn. Voters All. V. Mansky, 138 S. Ct. 1876,

platforms are unlike any other private spaces to which courts have traditionally applied the public forum doctrine's government-control prong. Unlike traditional physical spaces, social media platforms' terms of service afford these private entities the ability to control user accounts. While in traditional physical spaces only one party is in control of the forum at a given time, on social media, two parties are in control of the forum at a given time: the user and the social media company. Courts must now consider the coexistence of private control and government control before conducting a public forum analysis on privately owned social media platforms.

A. Davison *and* Knight*: Flawed Analyses*

Since the Supreme Court was not able to rule on the issue of whether the response forum attached to a public official's social media post constitutes a public forum, *Davison*, *Knight*, and progeny[240] are the highest authorities to which courts can look to for guidance when attempting to apply the public forum doctrine to digital communication platforms.[241] Although both courts applied the public forum doctrine in the "modern public square,"[242] both courts' analyses are flawed because neither court considered the immense control that Facebook and Twitter reserved in their terms of service over the public officials' accounts.[243] In *Davison*, the Fourth Circuit briefly mentioned Facebook's terms of service in a footnote.[244] However, the footnote failed to adequately address the public official's control over her account as compared to Facebook's control over that same space. Likewise, the Second Circuit in *Knight* discussed Twitter's terms of service in a footnote, but the footnote did not mention Twitter's control over user accounts, nor did it adequately analyze President Trump's control over his account as compared to Twitter's.[245]

1885 (2018)) ("[T]he Second Circuit's conclusion that Mr. Trump's Twitter account was a public forum is in tension with, among other things, [the Court's] frequent description of public forums as 'government-controlled spaces.'").

240. *See, e.g.*, Campbell v. Reisch, 986 F.3d 822 (8th Cir. 2021); Garnier v. O'Connor-Ratcliff, 41 F.4th 1158 (9th Cir. 2022). *But cf.*, Lindke v. Freed, 37 F.4th 1199 (6th Cir. 2022).

241. *See generally* Knight First Amend. Inst. At Colum. Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019); Davison v. Randall, 912 F.3d 666 (4th Cir. 2019).

242. Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

243. *See* discussion *supra* Parts II.A–B.

244. *Davison*, 912 F.3d at 682 n.4.

245. *See Knight*, 928 F.3d 231 n.2.

In his *Knight* concurrence, Justice Thomas acknowledged the Second Circuit's flawed analysis.[246] He also explained how courts must find a way to determine how a public official can be in control of his or her account when a social media company can also control the account according to its terms of service.[247] However, Justice Thomas's proposed solution of subjecting digital communication platforms to either common carrier or place of public accommodation legislation so that the government is truly in control of the space is too narrow of an approach to make this determination. Assuming that Congress can subject digital communication platforms to common carrier or place of public accommodation legislation,[248] Justice Thomas's solution would only put a band-aid on this issue of control.

Technology develops at an exponentially higher rate than the law does.[249] When addressing this issue of control, the Supreme Court's solution cannot be so narrow as to only apply to current digital communication platforms when new digital communication technologies are constantly on the horizon. Under Justice Thomas's proposed solution, Congress would have to pass common carrier or place of public accommodation legislation every time litigation arises concerning whether a new privately owned communication platform constitutes a public forum when used by a public official. In the age of fast technological advancements, Congress doing so would be impractical. In the time it would take Congress to pass common carrier or place of public accommodation legislation for one communication platform, new communication platforms could emerge that present the same issues to the public forum doctrine but do not fall within the bounds of Congress's legislation. Thus, while common carrier or place of public accommodation legislation may potentially solve the issue as it pertains to current social media platforms, the issue will continue to reemerge because the digital age has created a clear hole in the public forum doctrine that only the judiciary can fill.

Following Justice Thomas's concurrence, the United States Court of Appeals for the Fifth Circuit in *NetChoice L.L.C. v. Paxton* held that large social media platforms constitute common carriers.[250] If other circuits and the Supreme Court were to follow suit by deeming large social media

246. *Biden*, 141 S. Ct. at 1222.

247. *Id.* at 1221.

248. *See* discussion *supra* Parts III.C.1 & 2.

249. Daniel Malan, *The law can't keep up with new tech. Here's how to close the gap*, WORLD ECON. F. (June 21, 2018), https://www.weforum.org/agenda/2018/06/law-too-slow-for-new-tech-how-keep-up/ [https://perma.cc/FW44-FNH8].

250. *See* NetChoice, L.L.C. v. Paxton, 49 F.4th 439 (5th Cir. 2022).

companies as common carriers, this would still not fill the hole in the public forum doctrine. As this Comment has emphasized, ever-evolving technology can easily subvert narrow jurisprudential holdings; thus, the Supreme Court must address this government-control inquiry with the unknowns of future digital communication in mind. Broadly addressing the public forum doctrine's threshold inquiry through modernizing the doctrine's analytical framework can withstand the test of time. Piling on other, unrelated doctrines will not; doing so would merely act as a temporary fix.

B. A Need for Expanding the Bounds of the Public Forum Doctrine

The Supreme Court has made clear that "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears."[251] Public forums were originally spaces such as streets and parks that "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."[252] Years later, the Court went on to expand the public forum analysis of government-owned property to nonpublic forums, designated public forums, and limited public forums.[253] The Court even went as far as extending the doctrine to private property that the government controls.[254] The Supreme Court's evolution of the public forum doctrine illustrates its willingness to extend First Amendment protections on new communication medias as they emerge. In alignment with Justice Kennedy's expansive view, the public forum doctrine must be an adaptable doctrine rather than a rigid set of rules to preserve rights protected by the First Amendment in the age of digital communication.[255]

To effectively uphold the First Amendment, the Supreme Court must expand the bounds of the public forum doctrine for it to apply in the modern and future ages of digital expression. The current state of the public forum doctrine's government-control prong presents a significant

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251. Brown v. Entm't Merch. Ass'n, 564 U.S. 786, 790 (2011) (quoting Joseph Burstyn, Inc., v. Wilson, 343 U.S. 495, 503 (1952)).

252. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

253. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

254. *See* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

255. See discussion *supra* Part I.C of this Comment for a discussion of Justice Kennedy's expansive view of the public forum doctrine.

barrier to subjecting both current social media platforms and unknown future communication technologies to a forum analysis. The concept of a public official's communication to constituents being subject to a private company's control is a business model that has woven itself into modern society. Today, social media companies such as Facebook and Twitter act as an in-between—an intermediary of sorts—to a public official and a constituent's communication. Although different companies and technologies will come and go in the future, the business model of a private entity exercising intermediary control over a public official's communication will continue for years to come, as digital communication intermediaries have developed into a billion-dollar industry.[256] As this industry continues to grow, public officials' use of digital intermediary communication models that have immense control over user accounts will also grow. However, despite an apparent need for First Amendment protections in these spaces, there is currently no clear mechanism by which courts can protect speech on digital communication intermediaries because the public forum doctrine developed before digital communication, and the Supreme Court has not adapted the doctrine to protect speech in the "modern public square."[257]

A continued delay in addressing the current threat social media poses to the public forum doctrine's government-control prong will cause this issue to grow as digital communication intermediaries evolve. When Meta publicly announced the metaverse and its new vision for its company, Meta gave the Supreme Court and Congress a forewarning about the future legal issues the metaverse will inevitably bring.[258] In the company's announcement video, a Meta representative said, "The speed that new technologies emerged sometimes left policymakers and regulators playing catch up. . . . I really think that it doesn't have to be the case this time around because we have years until the metaverse we envision is fully realized."[259] If society shifts to communicating through the metaverse, public officials will follow. The urgency and need to solve this government-control issue is present. Now, the Supreme Court must find a way to address it.

256. *See* Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220, 1224 (2021) (Thomas, J., concurring).

257. Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017).

258. *See* Meta, *supra* note 164.

259. *See id.*

1. Applying Conrad *to Social Media*

The Supreme Court often relies on *Conrad*—in which the Court held that a privately owned theater under long-term government lease constituted a public forum—to illustrate government control over a forum.[260] Although *Conrad* and cases such as *Knight* and *Davison* may differ factually, there are key parallels to draw between traditional forum cases that involve private entities such as *Conrad* and social media forum cases such as *Knight* and *Davison*. Even though there is no contract of lease or exchange of money involved in the case of a public official creating a social media account, there is a sort of contract involved.[261] For example, when a user makes a Twitter account, that user "form[s] a binding contract with Twitter" according to Twitter's terms of service.[262] This type of contract would fall in line with some Supreme Court Justices' view that "when a local government contracts to use private property for public expressive activity[,]" the government has created a public forum.[263]

While one can draw parallels through the idea of a binding contract, the most significant parallel to draw between traditional privately owned forum cases like *Conrad* and social media forum cases like *Knight* and *Davison* is the fundamental idea of control over the forum. As evidenced by *Conrad* and Justice Thomas's concurrence in *Knight*, the Court has long viewed control over public forums as a binary concept.[264] For example, Justice Thomas's view in his *Knight* concurrence is that either Twitter can have control over the forum or President Trump can have control over the forum; both entities cannot have control over the forum at the same time.[265] Further, in *Conrad*, the Court concluded that even though a private entity owned the forum, the government was the party in control over the forum; both entities could not have control over the forum at the same time.[266]

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260. *See* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); *see also* discussion *supra* Part I.B.

261. *See Conrad*, 420 U.S. 546; Davison v. Randall, 912 F.3d 666 (4th Cir. 2019); Knight First Amend. Inst. at Colum. Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019); *Biden*, 141 S. Ct. 1220 (2021).

262. *Twitter Terms of Service*, *supra* note 20.

263. Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C., 518 U.S. 727, 794 (1996).

264. *See Conrad*, 420 U.S. 546; *Biden*, 141 S. Ct. 1220.

265. *See generally Biden*, 141 S. Ct. 1220.

266. *See Conrad*, 420 U.S. at 562.

The Supreme Court's binary view of control is outdated. Due to the rise of digital communication intermediaries, control over a forum is now coexistent. The Supreme Court in *Conrad* defined government control when stating the following: "The danger of censorship and of abridgment of our precious First Amendment freedoms is too great where [government] officials have unbridled discretion over a forum's use."[267] In *Conrad*, only one party had *unbridled discretion*, or control, over the forum: the government.[268] Conversely, in cases like *Knight* and *Davison*, two parties have control over the forum: the government and the private entity.[269] The issue that then arises is whether the idea of government control in *Conrad* can apply to a public official's social media account.

2. Proposal: An Ability/Action Standard for Control

In its 1975 *Conrad* decision, the Supreme Court found that a privately owned space is subject to a public forum analysis if the government controls the space.[270] As evidenced by *Knight* and *Davison*, the Court in *Conrad* did not provide a clear standard for control that courts can use when determining whether the government controls a privately owned space.[271] The *Conrad* Court determined that the government was in control of the forum when presented with the factual scenario that the government had the ability to control the forum and exercised that ability.[272] Although the Supreme Court in *Conrad* did not provide a clear standard for control, *Conrad*'s facts and holding imply that ability and action play key roles in determining whether the government has control over a forum.

Analyzing ability and action as the Court implicitly did in *Conrad* can help courts determine whether the private entity or the government is the party in control on digital communication platforms. In cases like *Knight* and *Davison*, two parties have the ability to control the forum, but only one of those parties can exercise that control at a given time. Thus, when public officials block constituents, both the social media company and the public official have the ability to control the public official's account. However, the public official exercises that control while the social media company reserves it. Therefore, to expand the bounds of the public forum

267. *See id.* at 553.

268. *See Conrad*, 420 U.S. 546.

269. *See* Davison v. Randall, 912 F.3d 666 (4th Cir. 2019); Knight First Amend. Inst. at Colum. Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019); *Biden*, 141 S. Ct. 1220.

270. *See Conrad*, 420 U.S. at 562.

271. *See Davison*, 912 F.3d 666; *Knight*, 928 F.3d 226; *Biden*, 141 S. Ct. 1220.

272. *See Conrad*, 420 U.S. 546.

doctrine for it to apply to a public official's social media account, the Supreme Court should explicitly adopt an ability/action standard for control, which it first it implied in *Conrad*: the government is in control of a forum when the government (1) has the ability to control the forum; and (2) acts on that ability to control the forum.[273]

As evidenced by *Knight* and *Davison*, public officials deleting comments and blocking users to frame the narrative of their account is an ongoing problem for constituents and courts alike.[274] By utilizing these exclusivity features, public officials censor viewpoints and only allow in information that they prefer on their accounts. Such censorship violates the fundamental principles and values of the First Amendment.[275] Under an ability/action standard for control, a public official's social media account would be a government-controlled space when the public official blocks a constituent because the public official had the ability to control the account and acted on that ability through blocking the constituent. Thus, adopting an ability/action standard for control would give courts an outlet to perform a public forum analysis on a public official's social media account, thereby ensuring that courts have the ability to safeguard the true exchange of ideas in the "modern public square."[276]

In addition, the proposed ability/action standard for control will withstand the test of time, ensuring that courts can continue to perform public forum analyses as future digital communication platforms emerge. With the metaverse on the horizon, the Supreme Court must address these holes in the public forum doctrine very carefully. While it is unclear what the metaverse or other future communication platforms will look like, it is apparent that private companies will continue to own these platforms and public officials will continue to use them to communicate with constituents. Adopting an ability/action standard for control will not only prevent the need for congressional action every time a new digital communication platform arises but will also broadly address the holes in the public forum doctrine, thus modernizing the doctrine and ensuring its applicability in the future.

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273. *See generally id.*

274. *See, e.g.*, *Davison*, 912 F.3d 666; *Knight*, 928 F.3d 226; Campbell v. Reisch, 986 F.3d 822 (8th Cir. 2021); Garnier v. O'Connor-Ratcliff, 41 F.4th 1158 (9th Cir. 2022); Lindke v. Freed, 37 F.4th 1199 (6th Cir. 2022).

275. Packingham v. North Carolina, 137 S. Ct. 1730, 1735–36 (2017).

276. *Id.* at 1737.

CONCLUSION

Public officials use social media now more than ever before.[277] Due to public officials' use of private digital communication platforms, the First Amendment rights of digital media users are at risk. Public officials are blocking their constituents on social media, thus denying constituents access to speak freely on a platform that is used by the majority of the general public.[278] The public forum doctrine's government-control prong as it stands today presents a barrier to solving this issue. Justice Thomas has recognized this problem;[279] however, his proposed solution is too narrow of an approach and will not cover the future unknowns of digital communication. This Comment's proposed ability/action standard presents the best option for creating a clear framework for analyzing control, which modern and future courts can easily apply when determining whether a space constitutes government-controlled property subject to a public forum analysis. The Supreme Court should explicitly adopt this ability/action standard for control that it first implied in *Conrad* or else the public forum doctrine will soon become inapplicable as the "modern public square"[280] continues to evolve.

277. *See generally* QUORUM, *supra* note 10.

278. *See, e.g.*, *Davison*, 912 F.3d 666; *Knight*, 928 F.3d 226; *Campbell*, 986 F.3d 822; *Garnier*, 41 F.4th 1158; *Lindke*, 37 F.4th 1199.

279. *See* Biden v. Knight First Amend. Inst. at Colum. Univ., 141 S. Ct. 1220 (2021) (Thomas, J., concurring).

280. *Packingham*, 137 S. Ct. at 1737.