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Stifling Dissent or Enforcing Rules? The State of Speech Rights in Online Forums

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Introduction

It is undeniable that internet platforms such as social media, search engines, and online commercial markets have become enormous players in the lives of the American public. Facebook alone caters to 190 million American users.¹ Twitter hosts a smaller, yet vast, 73 million active daily users in the United States.² Extensive use of these platforms by the American public has made them fertile grounds for political organization, engagement, and misinformation. In recognition of their substantial power, the owners have begun to take steps to combat misinformation spread on their platforms. This includes automatically marking posts with content that is commonly associated with misinformation, as well as removing accounts that participate in the misinformation spread.³ However, sometimes account removal is met with chagrin and complaints of restrictions of free speech by these private companies.

Generally, private companies need not comply with any rights guaranteed by the United States Constitution.⁴ However, calls for application of those rights in various ways against the enormous social media platforms have increased in popularity. In particular, Justice Clarence Thomas suggested some methods of control that might be exercised in his concurrence in *Biden v. Knight First Amendment Institute at Columbia University*, 141 S. Ct. 1220 (2021). This note will examine Justice Thomas' suggestions for how the power of the social media platforms will

¹ Jenn Chen, *20 Facebook stats to guide your 2021 Facebook strategy*, SPROUT SOCIAL (Oct. 20, 2021, 12:23 PM), <https://sproutsocial.com/insights/facebook-stats-for-marketers/>.

² *Leading countries based on number of Twitter users as of July 2021*, STATISTA, (Oct. 20, 2021, 12:30 PM), <https://www.statista.com/statistics/242606/number-of-active-twitter-users-in-selected-countries/>.

³ Monika Bickert, *How We're Taking Action Against Vaccine Misinformation Superspreaders*, FACEBOOK NEWSROOM (Oct. 22, 2021, 2:30 PM), <https://about.fb.com/news/2021/08/taking-action-against-vaccine-misinformation-superspreaders/>.

⁴ *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 620 (1991).

be regulated, along with competing visions which invoke the same purpose, but through different means.

The Case

Justice Thomas specified two theories comparing social media and other internet services to highly regulated industries, such as railroads and communication networks, in his concurrence.⁵ Under either comparison, social media sites might be regulated to a greater degree than they presently are. First, social media platforms' practice of holding their services out as available to the general public makes them comparable to common carrier industries, which are not allowed to discriminate in their offering of services. Second, social media platforms are close in description to public accommodations, such as those covered under Title II of the Civil Rights Act of 1964.⁶ Justice Thomas reasoned that under either legislative regime, Congress could limit the power of internet forum providers to exercise power to remove content from its platform.⁷

Background

The U.S. Supreme Court case, *Biden v. Knight First Amendment Institute*, known in the U.S. Court of Appeals for the Second Circuit as *Knight First Amendment Institute at Columbia University v. Trump*, 928 F.3d 226 (2d Cir. 2019), was dismissed from the Supreme Court, with the Second Circuit's judgment vacated due to the change of presidential administration.⁸

In Justice Clarence Thomas' concurrence in *Biden v. Knight First Amend. Inst.*, he went beyond the reasoning required to dismiss the case and explained his theories regarding how

⁵ Biden, 141 S. Ct. at 1224.

⁶ 42 U.S.C. 2000(a)(1).

⁷ Biden, 141 S. Ct. at 1225 (Thomas, J., concurring).

⁸ Biden, 141 S. Ct. at 1220.

future legislative action might seek to control the industry of social media and the behemoths that control that market, especially Amazon, Facebook, Google, and Twitter.⁹ Specifically, Justice Thomas discussed 47 U.S.C. § 230 (“Section 230”), which gives internet platforms some protections from civil liability that could arise from users’ posts.¹⁰ Section 230 includes the express intentions of Congress to ensure that the development of platforms on the internet and the internet itself continue.¹¹ This note will address the suitability of Justice Thomas’s proposals for regulating this industry, along with other potential avenues for fulfilling the express policy goals of Congress, and the conflicts that have arisen between Congressional policy goals and the present landscape of social media.

Congressional Power to Protect Rights to Free Speech and Equal Protection

I. Evolution of the Commerce Clause

Starting with the Constitutional Amendments that make up the Bill of Rights, speech rights of people in the United States were only protected from intrusion by the federal government.¹² However, the passage Fourteenth Amendment empowered the federal government to pass laws restricting the ability of the states to infringe on the rights of citizens. In the years following the passage of the Fourteenth Amendment, Congress passed several laws based on their new authority, including the Civil Rights Act of 1866 and the Civil Rights Act of 1875. Congress encountered a problem with some of the provisions in the Civil Rights Act of 1875 and the limitations of its power under the Fourteenth Amendment. In the Civil Rights Act of 1875, Congress attempted to prevent inns, public conveyances, and theatres from denying entry to

⁹ Biden, 141 S. Ct. 1220, 1224-1225.

¹⁰ 47 U.S.C. § 230(c)(2).

¹¹ 47 U.S.C. § 230(b).

¹² U.S. CONST. amend. I (specifying that its protections are limited to laws made by Congress).

potential customers on the basis of race or previous enslavement. This provision was contested in a series of cases known as the Civil Rights Cases.¹³ In the Civil Rights Cases, the Supreme Court held in an 8-1 decision that due to the state action requirement of the Fourteenth Amendment, Congress did not have the power to impose the rights guaranteed by the Fourteenth Amendment on the actions of private citizens. Rather, the Amendment granted Congress the power to enforce the prohibition against States' infringements on individual rights.¹⁴ Therefore, at the time of the Civil Rights Cases, the Supreme Court did not recognize any power Congress had, either under its original Article I powers or included in the new civil right amendment, to prohibit individual discrimination through legislation.¹⁵

However, there have been significant changes in the 138 years since the Court heard the Civil Rights Cases. Most notably for Congress' continued desire to prevent individual discrimination, the Congress' Commerce Clause powers have been broadly expanded. Under the Commerce Clause, Congress has "[t]he power to regulate commerce ... among the several states."¹⁶ At the time of the Civil Rights Cases decision, the Commerce Clause power was much weaker than what Congress exercises today. At the time, the Court severely limited the extent of power Congress claimed in order to preserve federalism principles in service of the Tenth Amendment. One such example of the Supreme Court's unwillingness to allow Congress extensive power over interstate commerce is its decision in *Hammer v. Dagenhart*, the Court found that it was outside Congress' power to enact prohibitions on child labor laws under its commerce power, as the permissibility of child labor in a state was not an issue of interstate

¹³ Civ. Rights Cases, 109 U.S. 3, 4 (1883).

¹⁴ *United States v. Stanley*, 109 U.S. 3, 11, 3 S. Ct. 18, 21 (1883).

¹⁵ *Id.*

¹⁶ U.S. Const. Art. I, §8, cl. 3.

commerce, but “a matter purely local in character.”¹⁷ Congress and the Court at the time of the Civil Rights Cases were working under a similar interpretation of the Commerce Clause, which led both institutions to consider the prohibitions on individual behavior under exclusively the provisions of the Fourteenth Amendment. However, as the United States changed and the needs of the nation evolved, the Commerce Clause doctrine changed.

In the New Deal era, the Court significantly changed its interpretation on the extent of power the Commerce Clause affords Congress. Rather than the restrictive interpretation seen in the *Civil Rights Cases* and in *Hammer*, the Court opted for a more permissive interpretation of the Commerce Clause. In the 1941 case *United States v. Darby*, the Court demonstrated the extent of the power that Congress possessed under the Commerce Power by extending Congress’ authority to include the ability to set minimum wages and maximum hours for businesses that work in interstate commerce or who produce goods meant to move in interstate commerce.¹⁸ Under this change of Commerce Clause doctrine, Congress was given significant powers to regulate commerce even within states, including regulations that were impermissible before this change in doctrine.¹⁹

In Title II of the Civil Rights Act of 1964, Congress accomplished much of what it set out to in the Civil Rights Act of 1875. The development of Supreme Court doctrine over the preceding ninety years allowed Congress to accomplish those goals under the Commerce Clause, rather than the Fourteenth Amendment. Title II provided that public accommodations, such as lodging, cafeterias, gasoline stations, and places of entertainment may not discriminate on the

¹⁷ *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918).

¹⁸ *United States v. Darby*, 312 U.S. 100, 118 (1941).

¹⁹ See the Civil Rights Cases, 109 U.S. 3, 10 (1883) (“Of course, no one will contend that the power to pass [the Civil Rights Act of 1975] was contained in the Constitution before the adoption of [Amendments 13, 14, and 15].”).

basis of race, color, religion, or national origin.²⁰ The expansion of Congressional power made this wide-sweeping civil rights law a Constitutional exercise of Congress's power, as opposed to an improper regulation of non-state actors under the Fourteenth Amendment.²¹

II. Application of the Commerce Clause

The first pertinent area of law to Justice Thomas's concurrence is that of common carriers. Generally, a carrier is any organization that enters into contracts to transport goods or people for payment,²² whereas a common carrier is a carrier that holds itself out to the public to serve that purpose.²³ Under U.S. law, common carriers are required by law to accept any paying passenger, disallowing discrimination in the offering of their services.²⁴ Pursuant to 47 U.S.C. § 202, common carriers also include lines of communication, such as telephone companies, under the United States statute.²⁵

A second area of legal importance to the analysis is public forum doctrine, which is a method of categorization by the Court to determine what level of permissiveness a state entity must have in the restriction of speech in a particular forum. Under the public forum doctrine, forums are divided into three categories: (1) traditional public forums, (2) designated public forums, and (3) non-public forums.²⁶ The pertinent category for this line of cases is the designated public forum, which is found by a court when a state actor opens a place to the public for speech purposes.²⁷ As long as the State retains a designated public forum, the State must

²⁰ 42 U.S.C. § 2000a.

²¹ *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 268 (1964).

²² *Carrier*, BLACK'S LAW DICTIONARY (11th ed. 2019).

²³ *Common Carrier*, BLACK'S LAW DICTIONARY (11th ed. 2019).

²⁴ 47 U.S.C. § 202(a)

²⁵ *Id.*

²⁶ *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 45 (1983).

²⁷ *Id.*

adhere to the rules governing a traditional public forum, as if the designated public forum was such a traditional public forum.²⁸ In traditional public forums and designated public forums, state actors are prohibited from content-based speech regulation, absent a showing from the government that the regulation of speech was narrowly tailored to serve a compelling governmental interest.²⁹ However, a state actor may impose content-neutral regulations on speech in these forums, such as time, place, and manner restrictions, which are narrowly tailored to serve a significant governmental interest.³⁰

Case Analysis

In the Second Circuit's now-vacated opinion, the court found that through President Trump's use of his Twitter account as a government actor, he created a designated public forum, rather than a personal account, which might amount to a non-public forum over which he would have more latitude to exercise control.³¹ Thus, the Second Circuit found that the President's act of blocking users whose messages he found distasteful to be an abuse of the blocked citizens' First Amendment rights to free speech, as it denied them proper access to a public forum designated for speech without a narrowly-tailored purpose serving a compelling governmental interest.³²

Justice Thomas's Criteria Comparing Public and Private Control

²⁸ *Id.* at 46.

²⁹ *Id.*

³⁰ *Id.* at 45.

³¹ *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 236 (2d Cir. 2019), *cert. granted, judgment vacated sub nom.*, *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021).

³² *Id.*

In his concurrence, Justice Thomas questioned whether then-President Trump's use of his Twitter account did indeed change the character of his personal Twitter account from a non-public forum into a designated public forum. In his reasoning, Justice Thomas pointed to case law concerning the ability of state actors to turn private spaces into public forums.³³ Justice Thomas compared the control Twitter and President Trump had over the President's account. Justice Thomas noted that while President Trump blocked a few users from the forum of his own creation, Twitter exerted significantly greater control over the account through its terms of service, which allowed Twitter to remove accounts whenever the company wished, and for any reason or for no reason.³⁴ Justice Thomas analogized the apparent disparity of control to two examples. In the first, Justice Thomas explained that when a government agency rents a room from a hotel to survey the public on proposed regulations, it is an affront to the First Amendment to remove any participants from the hotel for expressing their viewpoints on those regulations. Clearly, such an act by a governmental agency would amount to state regulation of speech on a non-content-neutral basis in a designated public forum. This act is unconstitutional despite the private nature of the hotel, as the government has transformed the non-public forum of a hotel conference room into a public forum by holding a meeting in that space meant to propose a regulation to the public.³⁵ In the second example, Justice Thomas found that when a group of government officials, meeting with constituents in a space which is privately controlled but open to the public, are approached by a disruptive member of the public who wishes to be heard, the

³³ Biden, 141 S. Ct. at 1222.

³⁴ *Id.*

³⁵ *Id.*

government officials are permitted to ask the hotel staff to remove the disruptor without fear of violating their First Amendment rights.³⁶

From these free speech examples, Justice Thomas reasoned that the difference between the scenarios is a question of private versus governmental control. When the government controls the space, as was the case in the first scenario, removal of a citizen from the forum purely based on his stated discontent for a proposed government action, the government officials have committed a violation of the citizen's First Amendment rights. Conversely, when a government official requests a similar removal for similar reasons in a space overwhelmingly controlled by private parties, the rights of the citizen dissenter are not violated. Analogizing the hotel hypothetical to social media platforms such as Twitter, Justice Thomas reasoned that due to the power Twitter exercises over its platform and the accounts of its users, the social media platform is closer in character to the second hypothetical than the first, and while President Trump (and any owner of a Twitter account) has the ability to block other users from seeing his tweets, Twitter itself exercises far greater control over any one account, as it has the power to ban any account, thereby effectively preventing anyone from seeing the speech from the banned account.³⁷

Applying Justice Thomas's Criteria

³⁶ *Id.*

³⁷ *Id.*

However, Justice Thomas's analogy does not hold up against the technical realities of a social media platform. First, in analyzing the power a private organization holds over a forum for speech, Justice Thomas compares the exclusion that the governmental and private actors *actually* exercise, rather than the power that the actors *may* exercise over the forum. This appears to be a misapplication of his own hypothetical. In terms of the hypothetical hotel, under common carrier law, the private hotel is within its rights to evict any renter of its property if the hotel has a just and reasonable purpose for doing so, including individual citizens who are too rambunctious or government forums.³⁸ Likewise, the control a single company exerts over many separate non-public forums (that may be turned into a public forum) does not impact the analysis. In the same way, it does not matter that the owner of the hotel owns many hotels with many conference rooms, it is immaterial that there are 206 million average monetizable users³⁹ over whom Twitter exerts control.⁴⁰ Therefore, if a direct comparison is made between the power that Twitter has to exercise over a Twitter account and the power that the account owner has to exercise over their own account, a fair comparison would find the extent of control of the two entities are nearly identical. In the same way that Twitter has the ability to permanently suspend an account for any or no reason, the owner of the account has the same power to delete his account and end any interaction in what would have been that forum.⁴¹ Therefore, like the equal power that the hotel owner and the public officials hold over attendance to the public forum in the first hypothetical, Twitter and President Trump held equal power over the public forum in question.

³⁸ 47 U.S.C. § 202.

³⁹ Twitter uses and publishes the statistic "Monetizable Daily Average Users," or mDAU, for its reporting to shareholders.

⁴⁰ Twitter Investor Relations (@TwitterIR), TWITTER (July 22, 2021 4:14 PM), <https://twitter.com/twitterir/status/1418303576368054273?s=21>.

⁴¹ Twitter Terms of Service, (accessed Sep. 24, 2021), <https://twitter.com/en/tos>.

The matter of disparity in public or private control is not a factor that weighs in favor of declaring President Trump’s Twitter account a non-public forum. Rather, as the Second Circuit held in *Knight First Amend. Inst. at Columbia Univ. v. Trump*, the character of the forum is dependent upon the way President Trump used the forum to conduct official government business.⁴² Because President Trump used his Twitter account in an official capacity, such as tweeting official statements and conducting official business, the Second Circuit was correct to conclude that President Trump’s Twitter account was a designated public forum, and that his blocking of United States citizens constituted a violation of their First Amendment right to free speech.

Accuracy of Comparisons between Social Media and Highly-Regulated Industries

I. Common Carriers

Justice Thomas also considered whether it would be appropriate to include Twitter and other large social media and internet sites as “common carriers” due to the way they hold themselves out for business to the public and by reason that they possess substantial market power. Justice Thomas asserted that such a classification would mean that online platforms are prohibited from participating in any kind of discrimination in catering to its users. This proposal is based on the assertion that typically, businesses recognized as common carriers are granted immunity from certain suits in exchange for the creation of different liabilities, such as a requirement to not discriminate on any basis, as specified in 47 U.S.C. § 202.⁴³ Justice Thomas repeatedly alluded to this exchange that is emphasized by Professor Adam Candeub.

⁴² See also, *Davison v. Randall*, 912 F.3d 666, 679 (4th Cir. 2019) (a public official who uses her Facebook profile as a tool of her office exercises state action by blocking a constituent).

⁴³ Adam Candeub, *Bargaining for Free Speech: Common Carriage, Network Neutrality, and Section 230*, 22 Yale J. L. & Tech. 391, 403 (2020).

⁴⁴Specifically, Justice Thomas points to the immunities provided to the then-nascent internet platforms by Congress to promote the growth of the internet as a place for political, educational, cultural, and entertainment purposes in Section 230.⁴⁵ Section 230 allows providers of services on the internet to be not treated as a publisher or speaker of information provided by another user, and to be immune from civil liability when they act in good faith to remove obscene, excessively violent, or harassing material, regardless of the speech's Constitutionally protected status.⁴⁶ Professor Candeub and Justice Thomas suggest that this immunity granted to online service providers is similar to that granted to common carriers, and thus it may be proper to impose common carrier rules prohibiting denial of service to any class of people on the providers such as Twitter and other social media and large companies functioning on the internet.⁴⁷

II. Public Accommodations

In a similar vein, Justice Thomas suggested that social media sites and other large companies operating on the internet may be fairly defined as “public accommodations.”⁴⁸ Justice Thomas pointed to the definition of a public accommodation in the Black Law dictionary: “[a] business that provides lodging, food, entertainment, or other services to the public, especially (as defined by the Civil Rights Act of 1964) one that affects interstate commerce.”⁴⁹ If service providers such as Twitter fit into this categorization, then it would allow Congress to pass

⁴⁴ *Id.* at 396.

⁴⁵ Biden, 141 S. Ct. at 1226.

⁴⁶ 47 U.S.C. §230.

⁴⁷ Biden, 141 S. Ct. at 1226.

⁴⁸ *Id.* at 1225.

⁴⁹ Biden, 141 S. Ct. at 1225. *See also*, *Public Accommodation*, BLACK'S LAW DICTIONARY (11th ed. 2019).

legislation restricting the private businesses's ability to permanently suspend the accounts of public figures such as President Trump's account.⁵⁰

Presumably, when Justice Thomas and Professor Candeub allude to discrimination on these private platforms, they are not using the same definition as what Congress used in implementing the Civil Rights Act of 1964. For example, Professor Candeub, in his assertion that social media is seen as playing a large, unaccountable role in the shaping of political discourse,⁵¹ points to articles positing that large online companies such as Google are using their algorithm to paint conservatives in a bad light.⁵² Therefore, it is safe to say that when Justice Thomas wrote that common carrier or public accommodation law might be applied to social media giants to curb discrimination, he means that these companies are discriminating on the basis of users' speech and affiliation.

However, it is difficult to conclude based on the available data that such discrimination is truly present and affecting public discourse. While Congress may not need evidence of such discrimination to enact legislation prohibiting it under either common carrier or public accommodation law, it is important to scrutinize such assertions before they are used to justify legislation, despite how that legislation might be a Constitutional exercise of Congress's commerce power.

The Question of Unfair Treatment of President Trump

⁵⁰ Biden, 141 S. Ct. at 1225.

⁵¹ Candeub, *supra*, at 394.

⁵² Sue Halpern, The Search for Anti-Conservative Bias on Google, *NEW YORKER*, (Dec. 19, 2018), <https://www.newyorker.com/tech/annals-of-technology/the-search-for-anti-conservative-bias-on-google>.

In the instant case of an accusation of a deplatformed conservative, it is valuable to look to what ended President Trump's tenure on Twitter, and whether he was given less berth by the rule enforcers at Twitter before permanently suspending his account. On the last day before he was banned, President Trump tweeted:

“The 75,000,000 great American Patriots who voted for me, AMERICA FIRST, and MAKE AMERICA GREAT AGAIN, will have a GIANT VOICE long into the future. They will not be disrespected or treated unfairly in any way, shape or form!!!”⁵³

This tweet was followed shortly by a second tweet, “[t]o all of those who have asked, I will not be going to the Inauguration on January 20th.”⁵⁴ Twitter reported that these tweets amounted to further suggestion that the election was not legitimate, and encouragement to his supporters considering violent acts.⁵⁵ Whether Twitter's analysis of President Trump's final tweets was a fair characterization is a matter for debate, but if legislation would be passed to prevent discrimination in social media on the basis of political viewpoint, it seems that a court would be hard-pressed to conclude that Twitter did not engage in a good-faith analysis of the former President's tweets, and instead banned him for his political views. Twitter based their suspension decision on the last two tweets from the account. Those tweets, at the very least, implied that the election may not have been fairly executed. Such an assertion does not seem to be a conservative view as much as it is a conspiracy theory.⁵⁶

⁵³ Jessica Guynn, *What was Trump's Last Tweet before he got Banned?*, LOUISVILLE COURIER JOURNAL, <https://www.courier-journal.com/story/news/local/2021/01/09/twitter-bans-trump-what-tweet-got-president-banned/6607968002/> (last visited Sep. 29, 2021).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Hope Yen, *AP FACT CHECK: Yes, Trump Lost Election Despite what he Says*, AP NEWS, <https://apnews.com/article/donald-trump-michael-pence-electoral-college-elections-health-2d9bd47a8bd3561682ac46c6b3873a10> (last visited Sep. 29, 2021).

Further, the permissiveness that social media giants such as Facebook and Twitter showed the former President is evidence that he was not specifically deprived a platform for his political views. President Trump spent many years sharing his thoughts with the public via social media, and for at least five of those years, he was a leader of the Republican Party. It was not until the former President continually violated the rules of the platform by denying the legitimacy of the election that he finally lost access to his account. It is even fair to say that President Trump was given more latitude with breaking Twitter's rules than if he was not the leader of a political party. For example, one experimental account was made to repeat every tweet that President Trump sent, word for word. Following a tweet from the President on June 20, 2020, saying that his former National Security Advisor, John Bolton, would "have bombs dropped on him," the experimental Twitter account was suspended after repeating the tweet word for word. Twitter policy also explains that Twitter will elect to allow tweets that would otherwise be taken down to remain posted if the tweet came from an elected official, so that the public may view those tweets.⁵⁷

Given the totality of the circumstances, it seems inappropriate to suggest that President Trump was banned from Twitter for his political views. The prevalence of political actors from all belief systems that are active and popular on platforms such as Twitter and Facebook also suggests that, rather than presenting roadblocks to free speech, popular platforms are filling the same role Congress envisioned for internet platforms when it passed Section 230. Political, cultural, intellectual, and entertainment discussion are all robust, and millions of people with differing views on all the topics gather to participate in the marketplace of ideas.

⁵⁷ Jason Murdock, *Twitter Account that Copies Trump Word-for-Word Suspended for 'Abuse'*, Newsweek, <https://www.newsweek.com/twitter-donald-trump-post-abuse-harassment-suspendthepres-social-media-policies-1512443> (last accessed Oct. 1, 2021).

Extending Free Speech Protections to Private Spaces

I. Company Town Analogy

Some commenters have proposed that the First Amendment free speech protections extend to online private platforms based on notable cases that addressed possible exceptions to the state action requirement.⁵⁸ Specifically, some have pointed to a case which extended First Amendment Speech rights to the streets of a company-owned town.⁵⁹ In *Marsh*, the Defendant had been convicted of trespassing when she distributed religious pamphlets in a privately-owned town after being asked to leave. The town was owned by the Gulf Shipbuilding Corporation and was similar in makeup to other American towns.⁶⁰ Because the town was owned by a private entity, the lower courts had previously found that the Defendant had trespassed, and her First Amendment rights did not extend so far to allow trespass in pursuit of the guarantee of freedom of speech.⁶¹ However, the Supreme Court found that the public has identical interests in using property open to the public, regardless of whether the town square is owned by a municipality or by a private corporation.⁶² Therefore, the Court weighed the property interests of the corporation against the speech interests of the public. In such a comparison, the Court gives preference to the speech rights of the public, as those rights are essential. Thus, the Court concluded that it is an infringement on a person's First Amendment rights to criminalize speech on private property if that private property is functionally equivalent to a town that is owned by a municipality or other

⁵⁸ Alex B. Berezow & Stephan Neidbach, *Facebook Is Censoring Science and Journalism*, NATIONAL REVIEW, <https://www.nationalreview.com/2016/08/facebook-censors-science-journalism-removes-pro-gmo-page/> (Aug. 31, 2016)

⁵⁹ *Marsh v. Alabama*, 326 U.S. 501, 507 (1946).

⁶⁰ *Id.* at 502.

⁶¹ *Marsh v. State*, 21 So. 2d 558, 563 (Ala. Ct. App. 1945).

⁶² *Marsh*, 326 U.S. at 507.

state actor.⁶³ Because a state actor cannot prohibit all distribution of literature on a street corner, neither may a private entity that owns a town.⁶⁴

It is a difficult task to fit the idea of a privately-owned, publicly available forum into the Court's analysis of a privately-owned town that has all the characteristics of a typical town. In the instance of the company town, there is a clear intrusion of a private actor into the realm of a traditionally state-controlled aspect of citizens' lives. Where a state allows a private entity to take on the roles traditionally left to the government, it is inappropriate to allow the private entity to restrict the actions of the citizens in ways that the state could not. No social media site has taken on the role of the state on its platform to the extent that the Gulf Shipbuilding Corporation did in the circumstances leading to the *Marsh* case. Providing a forum for citizens to use to engage with each other does not match the extent to which the Gulf Shipbuilding Corporation stepped into the realm of a typical American town. As the Court explained, Chickasaw was comprised of residences, sewers, a policeman hired by the company, and a U.S. post office.⁶⁵ In the extreme circumstances of *Marsh*, it was appropriate for the Court to treat a private entity as if it were a state actor, because as far as the citizens living in Chickasaw were concerned, the corporation had taken on the roles of what would have been their local municipality. Social media, on the other hand, does not approach the standards that made the ruling in *Marsh* tenable. Rather, social media sites serve a less extensive function of providing a forum for discussion and connections to its users. While one function of state actors may be to establish similar places for discussion to occur, it was not one similarity that drove the decision in *Marsh*, but many. If private entities were subjected to the state action doctrine for having a purpose in common with a government

⁶³ *Id.* at 509.

⁶⁴ *Id.* at 504.

⁶⁵ *Id.* at 502-503.

entity, the state action doctrine would become defunct. The Fourteenth Amendment explicitly requires that it limits the actions of a state.⁶⁶ The actions of social media companies certainly do not rise to the level of control of a state actor, as did the owner and operator of a town in *Marsh*. Therefore, it would be inappropriate to apply First Amendment guarantees to private social media companies as an extension of *Marsh v. Alabama*.

II. Application of *Marsh* to Smaller Scale Private Property

For a short time, the Court did apply the *Marsh* ruling to private owners who restricted speech on their property, finding that the First Amendment rights of picketers to protest a particular store in a mall took precedence over the mall's ability to enforce its property rights by using the state's trespass laws against the picketers.⁶⁷ In *Logan Valley*, the Court held that a private mall was the same as a business block of a town that has consistently been required to be open to public speech. Because of this similarity, the Court found that, as in *Marsh*, the property rights of a private owner do not allow that owner to have absolute dominion over the property and must cater to the rights to speech provided under the First Amendment when the property matches the function of a public space that traditionally has been open to the speech of the public.⁶⁸

Notably, Justice Black, who authored the *Marsh* opinion, dissented from the Court's opinion in *Logan Valley*, arguing that the facts of *Logan Valley* did not meet the high standard that the town of Chickasaw reached when it effectively established a town that was owned by a

⁶⁶ U.S. Const. amend. XIV, § 1.

⁶⁷ *Amalgamated Food Emp. Union Loc. 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 325 (1968), abrogated by *Hudgens v. N. L. R. B.*, 424 U.S. 507 (1976)

⁶⁸ *Id.*

private company, but was otherwise the same as any other Alabama town in the area. Justice Black applied the same requirements to the mall in *Logan Valley*, and because the mall lacked residences, streets, and sewers, decided the reasoning in *Marsh* did not apply.⁶⁹ Further, Justice Black reasoned that although the mall could be said to contain a business district, the inclusion of one feature normally found in a town in a privately-owned property should not render the private property subject to the state action doctrine.⁷⁰

However, the Court abandoned the reasoning in *Logan Valley* shortly after, when it found that private property does not lose its private nature when the public is generally invited to use the space.⁷¹ The facts in *Lloyd Corp.* were similar to those in *Logan Valley*. The citizens who sought to enforce a right to free speech were distributing leaflets in a mall, similar in setting to the mall in *Logan Valley*.⁷² The facts of the case were similar enough to compel the lower Courts to rely on the Supreme Court's rulings in *Marsh* and *Logan Valley* to conclude that the First Amendment rights of the leaflet distributors were infringed by requiring them to leave the mall, which was equivalent to a public business district, as in *Logan Valley*.⁷³ The Supreme Court disagreed. Following Justice Black's dissent in *Logan Valley*, the *Lloyd Corp.* Court held that the private mall did not fall under the purview of the *Marsh* precedent. Rather, the mall definitively did not exercise the functions of a municipality to the extent that the company town of Chickasaw did in *Marsh*.⁷⁴ Further, under *Lloyd Corp.*, neither a general invitation to the public to use private property for designated purposes nor the fact that such an open space is large

⁶⁹ *Logan Valley*, 424 U.S. at 332 (Black, J., dissenting).

⁷⁰ *Id.* at 333.

⁷¹ *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 570 (1972).

⁷² *Id.* at 556.

⁷³ *Id.*

⁷⁴ *Lloyd Corp.*, 407 U.S. at 569.

renders the private owner subjected to the same restrictions as states, as such a finding would conflict with the rights of property owners.⁷⁵ The Court in *Lloyd Corp.* made many distinctions between the case before it and the facts in *Logan Valley*, such as the differences between picketing and distributing fliers, as those activities related to public access to private property.⁷⁶ Thus, the *Lloyd Corp.* court did not specifically abrogate the *Logan Valley* decision, instead opting to distinguish *Lloyd Corp.* from the *Logan Valley* precedent. However, four years after the *Lloyd Corp.* decision, the Court held that it was impossible to reconcile the two decisions, and officially abrogated the *Logan Valley* precedent.⁷⁷

Therefore, the principle under *Logan Valley* that a private property owner who shares one aspect of operation with a municipality, such as a business district, could be subjected to the same First Amendment restrictions that apply to a municipality is no longer law that courts recognize. Rather, the *Marsh* exception to the state action doctrine is very narrow, limited to instances of private organizations substantially stepping into functions that have been “exclusively reserved to the state.”⁷⁸

In line with the Court’s decisions in *Lloyd Corp.* and *Hudgens*, it is inappropriate to find that the *Marsh* precedent applies to social media companies or large online platforms such as Amazon or Google. None of the companies take on roles that have been exclusively reserved to the state, which the Court required in *Flagg Bros.* While these private companies may have aspects that are similar to some functions of state governments, it is not appropriate to assert that, based on those similarities, they should be subject to First Amendment restrictions. While

⁷⁵ *Id.* at 570.

⁷⁶ *Id.* at 566.

⁷⁷ *Hudgens v. N. L. R. B.*, 424 U.S. 507, 518 (1976).

⁷⁸ *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158 (1978).

Facebook and Twitter provide enormous forums for their users to communicate on topics of politics and government, the fact that such forums bear a resemblance to forums created by municipalities for the public's free speech does not lead to a conclusion that the private actors are reaching into a sphere previously reserved to the government. So far, the only areas the Court has concluded are such government-dominated zones of operation are government towns and elections.⁷⁹ It also would be inappropriate to extend the doctrine to any forum that is open to the public, especially when compared to the areas of elections and running a town. While the recognized categories are unmistakably the domain of the State, the operation of a forum open to the public is not so entwined with the functions of the government that First Amendment restrictions should apply. It is clear under Justice Black's reasoning in his dissent to the Court's opinion in *Logan Valley* that the state action requirement is not fulfilled when a private actor is similar to a government actor in only one aspect of its operation.⁸⁰ Further, as explained in *Lloyd Corp.*, a large size of a private operation does not favor a finding that the private actor is restrained by the First Amendment.⁸¹ Therefore, the enormous population that utilizes the products of Facebook, Twitter, Amazon, Google, and other similar online providers is not relevant to an analysis to determine whether the First Amendment applies to those private entities.

The *Marsh* exception to the state action doctrine for private actors who enter into functions previously performed exclusively by the state does not apply to the companies at hand. Therefore, the First Amendment cannot bind the actions of these privately-operated forums,

⁷⁹ See *Terry v. Adams*, 345 U.S. 461, 468-470 (1953); *Marsh v. Alabama*, 326 U.S. 501, 505-509 (1946); *Smith v. Allwright*, 321 U.S. 649, 662-666 (1944); *Nixon v. Condon*, 286 U.S. 73, 84-89 (1932).

⁸⁰ *Logan Valley*, 424 U.S. at 332 (Black, J., dissenting).

⁸¹ *Lloyd Corp.*, 407 U.S. at 569.

regardless of the extent of their outreach to the public. However, while the United States Constitution provides minimum requirements for states in protecting the rights of their citizens, the federal Constitution does not prohibit States from granting more extensive rights if the State wishes.⁸²

Free Speech Protections Beyond the Federal Constitution

Although large online platforms are not subject to the restrictions of the Federal Constitution because they are not State actors, States themselves may pass laws or include in their constitutions restrictions that go beyond the protections of the Federal Constitution.⁸³ One such state whose constitution provides more speech protections than the Federal Constitution is California, which protects speech similar in character to *Logan Valley* and *Lloyd Corp.* under its Constitution.⁸⁴ In *Pruneyard*, a group of high school students were soliciting signatures for a petition in the shopping center of the appellant; this is protected activity under the California Constitution, regardless of whether the person who tries to prohibit such activity is a private or state actor.⁸⁵ Therefore, because the California Constitution enforced that restriction on the private owner of the shopping center, the limits of the First Amendment of the United States Constitution did not determine the outcome of the case.⁸⁶ Because the restrictions on the owner of a private shopping center went further than what was guaranteed by the First Amendment, the United States Supreme Court analyzed whether those restrictions infringed on the rights of the shopping center owner. The Court held that the California Supreme Court did not infringe on the

⁸²Cooper v. State of Cal., 386 U.S. 58, 62 (1967).

⁸³*Id.*

⁸⁴PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 79 (1980).

⁸⁵*Id.* at 79.

⁸⁶*Id.* at 81.

rights provided to the owner of a shopping center by the Federal Constitution, specifically, the owner's free speech rights under the First Amendment had not been violated, nor had his property rights under the Takings Clause of the Fifth Amendment.⁸⁷ The First Amendment analysis of the private owner in *Pruneyard* was limited to the principle that the State cannot compel a private citizen to make some statement or participate in some speech.⁸⁸ However, the Court found that because there would be no confusion between the speech of the public who used the shopping center as a venue, and because the private owner was not being compelled by the state to make any affirmation or publication, his First Amendment rights were not infringed.⁸⁹ Further, the Court found that there was no evidence that leads to a conclusion that the value of the private property would be unreasonably impaired by not allowing the owner to remove the students collecting petition signatures. Because of the lack of harm done, there was no unconstitutional taking under the Fifth Amendment.⁹⁰ Therefore, a state may adopt in a statute or incorporate into their constitution a provision that restricts a private property owner's right to exclude the public on the basis of their speech if that speech would not be confused with that of the owner and the regulation would not unreasonably impair the use or value of the property.⁹¹

The Federal Constitution does not reach far enough to protect the speech of the public in private shopping malls, but the state statutes and constitutions may. Therefore, such a state statute is a plausible avenue for individual states to protect the speech of their constituents on social media and other large online platforms. In much the same way *Pruneyard* displayed how the California Constitution can extend the speech rights of the public in private spaces, other

⁸⁷ *Id.* at 88.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 83.

⁹¹ *Id.* at 88.

states may also extend protections past what is plausible under the *Marsh* standard for free speech protections. For example, a state may pass a law prohibiting social media platforms from excluding the state's constituents on the grounds of their political affiliation. However, that state statute will undergo the same analysis as the guarantee of the California Constitution in *Pruneyard*: the statute must not infringe on any rights guaranteed to the private property owner under the Federal Constitution.

It is unlikely that such a statute would fail on the grounds of the First Amendment rights of a social media company. In *Pruneyard*, the Court found that there was no likelihood that the intention of the petitioners would be confused with the views of the owner of the shopping center because the nature of public access to the shopping center meant that the two groups are not likely to be confused with each other, and the private owner can post placards expressly disavowing the messages of the people seeking petition signatures.⁹² Likewise, it is extremely unlikely that a court would find that such a law that applies to social media would be invalid for those First Amendment reasons. In the same way the Court believed there would be no confusion between the speech of the private owner and the public handbillers in *Pruneyard*, there is even less reason to believe that large online platform companies would endorse any particular person posting their thoughts to the forum, especially if such a large online provider hosts members with opposing viewpoints, as is currently the case.

The question of whether such a statute would fail on Fifth Amendment grounds is more difficult to predict, and would likely be determined on a case-by-case basis, rather than as an entire category. It is impossible to know how far any particular statute would go, so while some

⁹² *Id.* at 87.

statutes may have little to no impact on the value and use of the private property, it is possible that a statute would lead to a diminution in value that is unreasonable enough to be considered an unconstitutional taking under the Fifth Amendment.

While state statutes providing speech protections beyond what is required by the First Amendment may be constitutionally feasible, it is also important to ask how such a policy would impact the use of global online platforms in piecemeal fashion. If some states impose additional requirements on social media platforms to demonstrate that a user was suspended for good reason, but others leave the private platforms unregulated, will the legislation create confusion on the internet, making it difficult for users in different states to interact without having extensive knowledge of the effects of such statutes? Such confusion could stymie speech, achieving the exact opposite result from the statute's goal.

Conclusion

In his concurrence in *Biden v. Knight First Amend. Inst.*, Justice Thomas expounded a theory for finding that President Trump's use of Twitter did not create a public forum and that social media platforms might rightfully be classified as common carriers or public accommodations. In the first assertion, Justice Thomas incorrectly weighed Twitter's control over an individual account against the control the individual owner has over their own account. Thus, the Second Circuit's determination that the character of the forum was public as a result of the former President's actions was the correct conclusion.

Justice Thomas's implication that Congress would be within its power to declare social media platforms and other large companies operating primarily on the internet to be common carriers or public accommodations so that viewpoint discrimination on those platforms could be curbed is a solution in search of a problem. The lack of evidence that any viewpoint is discriminated against, especially by Twitter, is a difficult assertion to support, especially in the instance case of the permanent suspension of the former president, who was given significant leeway in the face of consistent violation of the Twitter terms of service. Therefore, while it may be within Congress's power to declare social media platforms common carriers or public accommodations, there is insufficient evidence that there is a need for such a measure.

Other commentators mistakenly look to old Supreme Court precedent on company towns in an attempt to analogize social media companies to the companies of days past who took upon themselves to perform the role of the government. There is no viable argument for speech to be protected from private control on social media platforms by the First Amendment, similar to how speech rights are not protected by the Federal Constitution in shopping centers.

There is good reason to believe that individual states could step into the discussion and pass legislation extending speech rights on these online platforms, but confusion between the laws of states and how the users of the platforms would be affected by other states' laws may lead to such laws creating more difficulty in participation in speech than if the platforms were allowed to retain their current operations.

Underlying all these potential answers to the question of how to regulate social media platforms lies a quandary: how much would uniform, restrictive legislation actually change the internet and social media as we know it? In the current state, when one commenter takes the disagreement too far, the rule breaker is often suspended, in much the same way an overserved

patron at a restaurant or a rowdy taxi rider are shown the door when the operator of the respective public accommodation or common carrier reasonably removes them. Even if Congress succeeded in passing legislation classifying social media and other large internet-based companies as public accommodations or common carriers, or states managed to pass a uniform expansion of speech rights on social media platforms, the law or system of laws would likely change very little about the current climate of the internet, so long as the companies enforce their rules even-handedly and those rules are reasonable and just.⁹³

⁹³ 47 U.S.C. §202.