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Elijah Hack

University of Cincinnati, hackeh@mail.uc.edu

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Recommended Citation

Elijah Hack, *The Marketplace of Twitter: Social Media and the Public Forum Doctrine*, 88 U. Cin. L. Rev. 313 ()

Available at: <https://scholarship.law.uc.edu/uclr/vol88/iss1/9>

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THE MARKETPLACE OF TWITTER: SOCIAL MEDIA AND THE PUBLIC FORUM DOCTRINE

Elijah Hack

I. INTRODUCTION

From before the United States' inception, the nation's leaders and thinkers placed high value on the protection of speech. The framers' believed that by permitting uninhibited political discourse, the best ideas would emerge and be refined so that truth could prevail. In his book *On Liberty*, John Stuart Mill summarized this belief in a doctrine that has come to be known as the "marketplace of ideas."¹ Mill believed that human beings ought to be free to make their own judgements on ideas, not have ideas and opinions filtered through government.² He believed that ideas can be fully discussed and matured through debate in the marketplace.³ Mill believed that ideas evolved in conflict, so that the best parts of divergent ideas contributed to a whole truth.⁴

Additionally, Mill believed that when opinion is silenced, humanity suffers: "The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it"⁵ Mill believed that when government extinguishes opinions before they reach the marketplace, free individuals are unable to make their own judgements in seeking truth.⁶ True opinions, however, are resilient according to Mill: "[The] real advantage which truth has [is] that when an opinion is true it may be extinguished once, twice, or many times, but in the course of ages there will generally be found persons to rediscover it, until [eventually] it has made such head as to withstand all subsequent attempts to suppress it"⁷

Moreover, Mill believed that ideas could be fully and freely articulated until they developed to truth through the marketplace. Even if an opinion

1. It must be noted that the "marketplace of ideas" metaphor was never coined in *On Liberty*, and scholars debate whether it properly portrayed Mill's liberalism or his philosophy on free speech. See Jill Gordon, *John Stuart Mill and the 'Marketplace of Ideas,'* 23 SOCIAL THEORY AND PRACTICE, 235, 235-249, (1997), <https://www.jstor.org/stable/23559183> [<https://perma.cc/UDK4-KP3D>].

2. See GEOFFERY R. STONE, LOUIS M. SEIDMAN, CASS R. SUNSTEIN, & MARK V. TUSHNET, *Constitutional Law*, (4th ed., 2001), 998-999.

3. See *id.*

4. See *id.*

5. John Stuart Mill, *On Liberty*, in Geoffery R. Stone, Louis M. Seidman, Cass R. Sunstein, and Mark V. Tushnet, *Constitutional Law*, (Fourth Edition, 2001) (Casebook Author's emphasis).

6. See *id.*

7. *Id.*

was true, Mill believed the test of the marketplace added invaluable opportunity: “[However true an opinion] may be, if it is not fully, frequently, and fearlessly discussed it will be held as a dead dogma, not a living truth.”⁸ Knowledge and appreciation of all sides of an issue, Mill theorized, is essential to the truth-seeking function of free speech: “[He] who knows only his own side of the case knows little of that. [Even if] the received opinion [is] true, a conflict with the opposite error is essential to a clear apprehension and deep feeling of its truth”⁹

Further, Mill believed that conflicting opinions are valuable in the construction of a whole truth. “[T]he conflicting doctrines, instead of being one true and the other false, [may] share the truth between them; and the nonconforming opinion [may be] needed to supply the remainder of the truth, of which the received doctrine embodies only a part.”¹⁰ According to Mill, all opinions are necessary in the marketplace in order to provide nuance and find truth: “[Every] opinion which embodies somewhat of the portion of truth which the common opinion omits, ought to be considered precious.”¹¹

Mill likely did not envision the state of truth and speech in 2019. His ideas, however, resonate in the era of “fake news” and partisan reporting.¹² In July 2016, a Pew Research study showed that seventy-four percent of Americans believe that the news media is biased in their coverage of politics and social issues.¹³ The distrust of media is particularly alarming given the current polarization of Americans in their news consumption; a 2014 Pew Research study found that consistent liberal and conservative Americans are likely to receive their news from likeminded sources.¹⁴ The poll shows that consistent liberals and conservatives are more likely to trust likeminded news sources as opposed to those expressing views which conflict with or challenge their own.¹⁵

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. “Fake News” is a term popularized by President Donald Trump used to refer to news sources or stories he believes mislead the public or are incorrect.

13. Amy Mitchell, Jeffery Gottfried, Michael Barthel, & Elisa Shearer, *The Modern News Consumer*, PEW RESEARCH CENTER, (July 7, 2016) <http://www.journalism.org/2016/07/07/trust-and-accuracy/> [<https://perma.cc/M5EP-CAVG>].

14. Amy Mitchell, Jeffery, Gottfried, Jocelyn Kiley, & Katerina Eva Masta, *Political Polarization & Media Habits*, PEW RESEARCH CENTER, (October 21, 2014) <http://www.journalism.org/2014/10/21/political-polarization-media-habits/> [<https://perma.cc/7RKU-V9K6>]; In particular the research shows that 47% of consistent conservatives receive their political news from Fox News, while consistent liberals name CNN (15%), NPR (13%), MSNBC (12%), and the New York Times (10%) as their main sources for political news.

15. *Id.* The poll found that 88% of consistently conservative individuals trust Fox News, while consistent liberals are more likely to trust public news sources like NPR (72%), PBS (71%) and BBC (69%).

In this era of siloed news, social media has come to occupy a particularly interesting role in exposing individuals to conflicting ideas. More than sixty-nine percent of Americans use social media, and only twenty-three percent say that the political posts they see on Facebook are in line with their own views.¹⁶ In particular, Twitter CEO Jack Dorsey expressed the site's commitment to neutrality in his testimony before the House Energy and Commerce Committee amid claims that Twitter had an anti-conservative bias.¹⁷ Dorsey claimed that “[W]e don’t consider political viewpoints, perspectives, or party affiliation in any of our policies or enforcement decisions . . . [i]mpartiality is our guiding principle.”¹⁸ Dorsey believed that Twitter occupies an important role in the shaping of political discourse. Dorsey tweeted:

We believe many people use Twitter as a digital public square. They gather from around the world to see what’s happening and have a conversation about what they see. Twitter cannot rightly serve as a public square if it’s constructed around the personal opinions of its makers. We believe a key driver a thriving public square is the fundamental human right of freedom of opinion and expression. Our early and strong defense of open and free exchange as enabled Twitter to be THE platform for activists, marginalized communities, whistleblowers, journalists, governments and the most influential people around the world. Twitter will always default to open and free exchange.¹⁹

Dorsey’s idyllic perception of the role of his company in the marketplace of ideas reflects the enduring power and popular assumption of Mill’s philosophy. Like the theoretical marketplace of ideas envisioned by Mill, it seems Dorsey believes Twitter’s space in the larger community of political discourse is crucial because of its impartiality and openness.

Implicit in Dorsey remarks is the importance of the space in which speech takes place. The Supreme Court has interpreted the First Amendment to protect speech on government property historically used for public expression.²⁰ The so-called “public forum” doctrine protects speech in places which have been traditionally devoted to public debate.²¹ The application of the public forum doctrine has typically been a

16. *Social Media Fact Sheet*, PEW RESEARCH CENTER, (February 8, 2018), <http://www.pewinternet.org/fact-sheet/social-media/> [https://perma.cc/2G4U-FDM4], (finding that numbers of social media users are particularly high for young adults- 88% for ages 18-29); *Political Polarization & Media Habits*, PEW RESEARCH CENTER, <http://www.journalism.org/2014/10/21/political-polarization-media-habits/> [https://perma.cc/SS69-TNU6]

17. Jack Dorsey, @jack, (September 5, 2018, 12:31 pm), <https://twitter.com/jack/status/1037422913819959298> [https://perma.cc/SM3J-GML6].

18. *Id.*

19. *Id.*

20. *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992), [hereinafter *ISKCON*].

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

historical exercise—consisting of an analysis of the history of using a particular space, or category of spaces, for communicative purposes.²² However, the Supreme Court has interpreted the doctrine to expand beyond spatial limitations.²³ While the Supreme Court has not discussed whether the doctrine expands to social media, the rapid expansion of the internet and online forums like Twitter and Facebook demands that the traditional notions of forums and speech must evolve in order to properly protect political speech.

As Dorsey mentions, Twitter has become the platform for political leaders.²⁴ Two of these leaders are United States President Donald Trump and Kentucky Governor Matt Bevin, who frequently use Twitter and Facebook as a means of communicating with their constituents. Both Bevin and Trump have been sued for “blocking” users on Twitter who replied to their tweets with unfavorable opinions.²⁵ This article will explore the two lawsuits, their conflicting opinions, and what these opinions mean for the evolution of speech in the internet age. Part II will explore the history of the public forum doctrine, the government speech doctrine, and the competing approaches of Justice Rehnquist and Justice Kennedy in *ISKCON v. Lee*.²⁶ Part III will outline the reasoning of the district courts in the *Hargis v. Bevin* and *Knight First Amendment Institute at Columbia University v. Trump* cases.²⁷ Part IV will apply Justice Rehnquist’s categorical analysis to find that the interactive spaces of Twitter and Facebook should constitute a designated public forum. Part V will apply Justice Kennedy’s analysis and advocate for its adoption because of its flexibility and focus on the actual uses of forums as opposed to their historical attributes.

II. BACKGROUND

In order to properly analyze the importance of social media in today’s marketplace, it is crucial to understand the history of the various doctrines that have played a role in American free speech doctrine over the nation’s

22. See *ISKCON*, 505 U.S. at 672.

23. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995), [hereinafter *Rosenberger*].

24. See Dorsey, *supra* note 17.

25. See *Hargis v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018), [hereinafter *Trump*]; When a user “blocks” another user on Twitter, the “blocked” user is unable to view anything on the page of the blocking user, including any posts of the blocking user or any replies to those posts. A Facebook page differs from a profile in that it is public to other Facebook users. The administrator of a particular page may “ban” users from the page which will still allow them to view posts on the page, but a banned user is unable to comment or post on the banning user’s page.

26. See *ISKCON*, 505 U.S. at 678, 694.

27. See *Bevin*, 298 F. Supp. 3d at 1003; *Trump*, 302 F. Supp. 3d at 541.

history. This Part provides this needed background. First, section A will explore the evolution of the categorical approach to the public forum doctrine. Next, section B will discuss the divergent approaches of Chief Justice Rehnquist's categorical analysis and Justice Kennedy's more case specific approach that have been presented by the justice in various Supreme Court opinions. Finally, section C will outline the government speech doctrine which becomes relevant when speakers are government actors.

A. Categories of Government Property

In analyzing speech on government property, the Supreme Court has adopted a categorical analysis, first defining the nature of the property and then deciding whether a limitation on speech is permissible.²⁸ Justice White introduced this categorical approach to speech regulations on government property in *Perry Education Association v. Perry Local Educators Association*, differentiating between (1) traditional or quintessential public fora, (2) designated public fora, and (3) nonpublic fora.²⁹

The first category of public fora is the traditional public forum. Traditional public fora, according to *Perry*, are places “which by long tradition or by government fiat have been devoted to assembly and debate”³⁰ The Court recognizes that traditional public fora include streets, parks, and other things “immemorially . . . held in trust for the use of the public and [that], time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”³¹ Past Supreme Court cases have shown the Court's propensity to limit the application of the traditional public forum designation, but the Court does afford traditional public fora the protection of strict scrutiny due to their historical and political importance.³² In this context, strict scrutiny means that time, place, manner, and content-neutral restrictions on speech are permissible in a traditional public forum only when they are narrowly tailored to achieve a significant governmental interest and leave open alternative communicative channels.³³ In *Cornelius v. NAACP Legal Defense &*

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

29. *Id.* at 45-46.

30. *Id.* at 45.

31. *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515 (1939).

32. See *ISKCON*, 505 U.S. 672, 678 (1992),

33. *Perry*, 460 U.S. at 45; Professor A. Chris Bryant, University of Cincinnati Rufus King Professor of Constitutional Law, introduced a test for whether a speech restriction is content-based or content-neutral. Referencing “The Andy Griffith Show,” Professor Bryant suggested the following “Mayberry” test: Suppose Barney Fife were to come into Sheriff Andy Taylor's office and proclaim,

Education Fund, the Court established that “[b]ecause a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary.”³⁴

Hague v. Committee for Industrial Organization was the first instance in which the Court introduced these special protections for government property that have traditionally been used as a means of discourse.³⁵ Under the Fourteenth Amendment’s privileges and immunities clause and Due Process clause, the *Hague* Court invalidated a city ordinance prohibiting street meetings and public assembly.³⁶ The Court held that certain special protections are afforded to streets and parks due to their role as a medium for public discourse.³⁷ “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 Court concluded that the special role of streets and parks in the tradition of public discussion means that such spaces are subject to a higher level of scrutiny when speech is regulated or denied.³⁸

The second category of fora is a designated public forum. Designated public fora, also known as limited-purpose public fora, come into existence when the government intentionally opens its property for public discourse.³⁹ Designated public fora differ from traditional public fora in that their existence depends more on the intention of government than the historical significance of a particular space.⁴⁰ According to *Cornelius*, “the government does not create a public forum by inaction or by permitting limited discourse but only by intentionally opening a nontraditional forum for public discourse.”⁴¹ Once government decides to use its property in a way that creates a designated public forum, “[t]he Constitution forbids a State to enforce certain exclusions from a forum... even if it was not required to create the forum in the first place.”⁴² Designated public fora are not limited by the same spatial or geographic bounds of a traditional public forum.⁴³ For example, the Court has employed the designated public forum analysis to the funding of printing

“Andy, there are troublemakers handing out pamphlets on the courthouse lawn.” If Andy Taylor responds, “Pamphlets on the courthouse lawn? That is not allowed!” then the restriction is likely content-neutral. If Andy Taylor instead were to respond, “What did the pamphlets say, Barney?” before deciding whether to act, then it is likely that the restriction is content-based. *THE ANDY GRIFFITH SHOW*, CBS (1961).

34. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985).

35. *See Hague*, 307 U.S. at 515-516.

36. *See id.* at 516.

37. *Id.* at 515.

38. *Id.*

39. *See ISKCON*, 505 U.S. 672, 678 (1992).

40. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

41. *Id.*

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

43. *See Rosenberger*, 515 U.S. at 830.

student publications at a public university.⁴⁴ The government may set limits on designated public fora to exclude a class of speech, also known as content-discrimination, in order to preserve the forum for the purpose for which it was created.⁴⁵ However, viewpoint-discrimination, which is regulation that excludes speech due to its particular opinion or perspective on a subject matter, is impermissible within a designated public forum just like it is impermissible in a traditional public forum.⁴⁶

In *Rosenberger v. Rector & Visitors of the University of Virginia*, the Court found that the University's refusal to fund the publication of *Wide Awake Productions*, a student-run, Christian newspaper, was impermissible viewpoint discrimination.⁴⁷ The Court found that the University, through its student activity fund, "[did] not exclude religion as a subject matter, but select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints."⁴⁸ The prohibition of a "specific premise, perspective or standpoint," was not a permissible content-based restriction for the preservation of the forum, but instead amounted to impermissible viewpoint-discrimination according to the Court.⁴⁹

A third category of government property is nonpublic fora. Private individuals are not guaranteed access to government property for speech purposes simply because the property is owned or controlled by government.⁵⁰ If government property does not fall within the limited scope of a traditional public forum or if the government does not intentionally open the space for public discourse, then the property is outside the scope of forum analysis.⁵¹ In a nonpublic forum, the government "may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's point of view."⁵² If the intended purposes of the government property are not compatible with expressive activity, then the government, like any property owner, is not required to allow expressive activity.⁵³

The Supreme Court applied the nonpublic forum analysis to an

44. *Id.*

45. *Id.* at 829-830.

46. *Id.* at 830.

47. *Id.* at 831.

48. *Id.*

49. *Id.*

50. *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981).

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

52. *Id.*

53. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 819 (1985).

interschool mailing system in *Perry*.⁵⁴ The Court found that because the “normal and intended function of the school mail facilities is to facilitate internal communication of school-related matters to teachers,” the mailing system was not a public forum under the First Amendment.⁵⁵ The Perry School District did not open its mail system to the general public for communicative purposes and, therefore, did not create a public forum.⁵⁶ Consequently, to allow indiscriminate access to the mail system would frustrate the intended purposes of the property; therefore, the Court held that the restrictions on access were permissible under the First Amendment.⁵⁷

B. Competing Approaches to Public Forum Doctrine in ISKCON v. Lee

The Court’s use of a categorical approach in application of the public forum doctrine has resulted in a static, unresponsive doctrine heavily focused on an inflexible and literal interpretation of fora and speech and a lack of sensitivity to the values of the First Amendment.⁵⁸ But the doctrine has not developed without serious opposition within the Court.⁵⁹ This disagreement was first introduced in *ISKCON v. Lee*. The plaintiffs in *ISKCON*, a Krishna religious group, sued the police superintendent seeking an injunction to a regulation limiting solicitation within an airport terminal.⁶⁰ The group argued that the regulation violated the right to free speech in a forum context.⁶¹ Chief Justice Rehnquist’s majority opinion and Justice Kennedy’s concurring opinion best display the disagreement between members of the Court.⁶² Rehnquist’s opinion best exemplifies the governing categorical approach, while Kennedy’s opinion offers an alternative case-by-case approach to public forum doctrine.⁶³

Rehnquist’s approach strictly followed the categorical method developed in *Perry*, *Cornelius*, and subsequent cases.⁶⁴ Rehnquist first

54. *Perry*, 460 U.S. at 46.

55. *Id.* at 47-48; However, it is important to note that the mailing system was opened to select private organizations such as the Cub Scouts, YMCA’s, and parochial schools. The Court conceded that such action did create a forum, but even if it did, the forum analysis was only applicable to other similar groups, such as the Girl Scouts or other similar organizations.

56. *Perry*, 460 U.S. at 47.

57. *See id.* at 49.

58. *See* Lillian R. BeVier *Rehabilitating Public Forum Doctrine: In Defense of Categories*, 1992 THE SUPREME COURT REVIEW, 79-122, 81-82 (1992), www.jstor.org/stable/3109668 [<https://perma.cc/9GND-DD7C>].

59. *Id.* at 96.

60. *ISKCON*, 505 U.S. 672, 674 (1992).

61. *Id.*

62. *See* BeVier *supra* note 58, at 96-99.

63. *Id.*

64. *See ISKCON*, 505 U.S. at 678-679.

dismissed any notion that airport terminals could be considered a traditional public forum citing *Hague*—“[G]iven the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having ‘immemorially . . . time out of mind’ been held in the public trust and used for purposes of expressive activity.”⁶⁵ Because airports, and particularly the use of airports as a forum for the distribution of religious material, is a recent phenomenon, Rehnquist argued that the practice does not “demonstrate that airports have historically been made available for speech activity.”⁶⁶ Likewise, Rehnquist rejected the argument that airport terminals would qualify as a designated public forum because they were not “internationally opened by their operators to such activity.”⁶⁷ According to Rehnquist, airports are a nonpublic forum—they are government property opened for “the purpose of . . . facilitat[ing] air travel, not the promotion of expression.”⁶⁸ After reaching this conclusion, the Court specified that speech restrictions in any nonpublic forum need to only meet the reasonableness standard of the Court and are not subject to strict scrutiny.⁶⁹ Rehnquist explained that due to “the disruptive effect that solicitation may have on business,” the regulation is reasonable.⁷⁰

Kennedy began his concurring opinion by challenging the established categorical analysis of the public forum doctrine. Kennedy claimed it “ought not be a jurisprudence of categories rather than ideas or convert what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat.”⁷¹ According to Kennedy, under the categorical method, government is free to restrict speech on its property so long as it articulates a non-speech-related purpose for the area.⁷² This makes it nearly impossible for the development of new public forums, Kennedy argued.⁷³ Kennedy claimed that under the Court’s categorical forum analysis, “in almost all cases the critical step in the Court’s analysis is a classification of the property that turns on the government’s own definition or decision, unconstrained by an independent duty to respect the speech its citizens can voice there.”⁷⁴ In regards to traditional public fora, Kennedy argued that “[t]he Court’s

65. *Id.* at 680 (quoting *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515 (1939)).

66. *Id.*

67. *Id.*

68. *Id.* at 682.

69. *Id.* at 683.

70. *Id.*

71. *Id.* at 694.

72. *Id.* at 695.

73. *Id.*

74. *Id.*

analysis rests on an inaccurate view of history.”⁷⁵ Kennedy argued that even the most basic of recognized traditional public fora have a principal purpose other than speech.⁷⁶ “It would seem apparent,” Kennedy stated, “that the principal purpose of streets and sidewalks, like airports, is to facilitate transportation, not public discourse, and we have recognized as much.”⁷⁷ Kennedy urged the Court to reconsider the First Amendment as “a limitation on government, not a grant of power.”⁷⁸

As an alternative, Kennedy offered a new standard to judge public fora—“[i]f the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum.”⁷⁹ Kennedy suggests that the proper method would be to analyze

whether the property shares physical similarities with more traditional public forums, whether the government has permitted or acquiesced in broad public access to the property, and whether expressive activity would tend to interfere in a significant way with the uses to which the government has . . . dedicated the property.”⁸⁰

In response to the category of designated public fora, Kennedy conceded that “government always retains authority to close a public forum, by selling the property, changing its physical character, or changing its principal use.”⁸¹

Applying his own standard to the case at bar, Kennedy concluded that “it is evident that the public spaces of the Port Authority’s airports are public forums.”⁸² Kennedy found that the airport terminals were physically similar to streets in that they were “broad, public thoroughfares full of people and lined with stores and other commercial activities.”⁸³ Second, Kennedy cited that the areas are open to the public and frequently used by over 78 million passengers per year.⁸⁴ “It is the very breadth and extent of the public’s use of airports that makes it imperative to protect speech rights there,” he argued.⁸⁵ Third, Kennedy found that any disruptive effect speech could have on the airport’s primary purpose can

75. *Id.* at 696.

76. *See id.*

77. *Id.* at 696-697.

78. *Id.* at 695.

79. *Id.* at 698.

80. *Id.* at 699-700.

81. *Id.*

82. *Id.* at 700.

83. *Id.*

84. *Id.*

85. *Id.*

be curtailed with adequate time, place, and manner restrictions without limiting expression.⁸⁶ “The Authority has for many years permitted expressive activities by the petitioners and others,” Kennedy wrote, “without any apparent interference with its ability to meet its transportation purposes.”⁸⁷ Applying this somewhat novel approach to the forum doctrine, Kennedy found that the restriction on the distribution of materials in the airport was overbroad and did not survive the Court’s strict scrutiny on restrictions of speech.⁸⁸ However, he concluded that the ban on solicitation of funds survived the test as “either a reasonable time, place, and manner restriction, or as a regulation directed at the nonspeech element of expressive conduct.”⁸⁹

Kennedy believed the public forum doctrine left “almost no scope for the development of new public forums” and would lead to a “serious curtailment of our expressive activity.”⁹⁰ Despite Kennedy’s proposal, Rehnquist’s application of the categorical reasoning of *Perry* is followed by lower courts today.⁹¹ While certainly inflexible, the public forum doctrine provides district courts with a workable standard for judging speech rights on government property.⁹²

C. Government Speech Doctrine

While the First Amendment prohibits government from restricting the speech of private individuals, the prohibition does not apply when government speaks for itself.⁹³ Two cases, *Pleasant Grove v. Summum* and *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, summarize the government speech doctrine.⁹⁴

In *Pleasant Grove*, a unanimous Supreme Court found that in a public forum, government may limit expressive activity when it is determined that the government is speaking for itself and is not limiting the speech of others.⁹⁵ In *Pleasant Grove*, a religious organization requested that the City of Pleasant Grove erect a donated monument containing “the Seven Aphorisms of SUMMUM,” the major tenets of their religion which are

86. *See id.* at 701.

87. *Id.*

88. *See id.* at 703.

89. *Id.*

90. *Id.* at 695, 698.

91. *See Hargis v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018).

92. *See BeVier*, *supra* note 58, at 121.

93. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009).

94. *Id.* at 460; *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015).

95. *Pleasant Grove*, 555 U.S. at 464.

similar to Ten Commandments.⁹⁶ The park already contained eleven other donated permanent structures including a Ten Commandments monument and a September 11th monument.⁹⁷ The city denied the request. The Court held that the city was able to deny the request without violating the First Amendment because the erection amounted to government speech, not the restriction of private speech.⁹⁸ “The Free Speech Clause,” the Court wrote, “restricts government regulation of private speech; it does not regulate government speech.”⁹⁹ Government has the right to speak and may select which views that it wants to express.¹⁰⁰ The Court admitted that while in some cases it may be difficult to determine whether or not the government was the speaker, the erection of a permanent monument clearly fell within the realm of government speech.¹⁰¹

Walker presented the Court with exactly the problem that was previously foreshadowed in *Pleasant Grove*. In a 5-4 decision written by Justice Breyer, the Court determined that Texas did not violate the First Amendment by not permitting the Sons of Confederate Veterans to create and use a specialty license plate featuring a Confederate flag.¹⁰² The Court interpreted *Pleasant Grove* to create a three-part test that it used to determine that the specialty license plate was government speech—(1) whether there is a history of government using a medium to convey government speech, (2) whether the speech is “often closely identified in the public mind” with the government, and (3) whether government maintains direct control over the messages conveyed.¹⁰³ Applying this test to the specialty license plate program, the Court found, first, that States have a long history of using license plates to convey government speech such as “slogans urging action, promoting tourism and touting local industries.”¹⁰⁴ Second, the Court found that Texas license plates are closely identified with government because the plate was a government identification article and contained the name of the state – “TEXAS.”¹⁰⁵ Third, the Court found that because Texas Motor Vehicles Board approved each design, they effectively controlled the messages conveyed on the license plates.¹⁰⁶

96. *Id.* at 465.

97. *Id.*

98. *Id.* at 467.

99. *Id.*

100. *Id.* at 467-468.

101. *Id.* at 470.

102. *Walker v. Tex. Div. Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2241 (2015).

103. *Id.* at 2242 (quoting *Pleasant Grove*, 555 U.S. at 472).

104. *Id.*

105. *Id.*

106. *Id.*; Justice Alito’s dissenting opinion seemed to scoff at the idea that the specialty license plates could be government speech, and offered the following anecdote to prove the absurdity:

III. SOCIAL MEDIA AS A PUBLIC FORUM

Public officials' use of social media presents an interesting Constitutional question under the public forum and government speech analyses. Two conflicting cases, *Hargis v. Bevin*,¹⁰⁷ and *Knight First Amendment Institute at Columbia University v. Trump*,¹⁰⁸ illustrate a current circuit split considering whether a public official violates the First Amendment by "blocking" an individual from commenting on the public official's social media account. In Section A, this Article analyzes the *Bevin* case and demonstrates how the *Bevin* court found that a public official's use of social media is not subject to the forum analysis at all because it consists of government speech, not private speech.¹⁰⁹ In Section B, this Article summarizes the *Trump* court's use of Rehnquist's categorical approach to conclude that the interactive space on social media was a designated public forum, not government speech.¹¹⁰

A. *Hargis v. Bevin*

In *Bevin*, Kentucky Governor Matt Bevin "blocked" plaintiff Drew Morgan on Twitter after Morgan made comments regarding Bevin's overdue property taxes.¹¹¹ Similarly, Bevin banned Mary Hargis from his

Here is a test. Suppose you sat by the side of a Texas highway and studied the license plates on the vehicles passing by. You would see, in addition to the standard Texas plates, an impressive array of specialty plates. (There are now more than 350 varieties.) You would likely observe plates that honor numerous colleges and universities. You might see plates bearing the name of a high school, a fraternity or sorority, the Masons, the Knights of Columbus, the Daughters of the American Revolution, a realty company, a favorite soft drink, a favorite burger restaurant, and a favorite NASCAR driver.

As you sat there watching these plates speed by, would you really think that the sentiments reflected in these specialty plates are the views of the State of Texas and not those of the owners of the cars? If a car with a plate that says "Rather Be Golfing" passed by at 8:30 am on a Monday morning, would you think: "This is the official policy of the State—better to golf than to work?" If you did your viewing at the start of the college football season and you saw Texas plates with the names of the University of Texas's out-of-state competitors in upcoming games—Notre Dame, Oklahoma State, the University of Oklahoma, Kansas State, Iowa State—would you assume that the State of Texas was officially (and perhaps treasonously) rooting for the Longhorns' opponents? And when a car zipped by with a plate that reads "NASCAR - 24 Jeff Gordon," would you think that Gordon (born in California, raised in Indiana, resides in North Carolina) is the official favorite of the State government? *Id.* at 2255.

107. *Hargis v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018).

108. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018).

109. *Bevin*, 298 F. Supp. 3d at 1010.

110. *Trump*, 302 F. Supp. 3d at 549.

111. *Bevin*, 298 F. Supp. 3d at 1006.

Facebook page after Hargis criticized Bevin's right-to-work policies.¹¹² Hargis and Morgan sued for declaratory and injunctive relief in the Eastern District of Kentucky asserting that Bevin's actions on social media violated their First Amendment rights.¹¹³

The district court first recognized that this "is a case of first impression in the Sixth Circuit and, if appealed, would be a case of first impression to the Supreme Court of the United States as well."¹¹⁴ The Court recognized the novel legal issue at bar and decided to exercise caution when proceeding, heeding Justice Alito's words to "'proceed circumspectly, taking one step at a time,' when applying the Constitution to social media."¹¹⁵

The Court began by reflecting the positions of the parties: the plaintiffs argued that Twitter and Facebook are traditional public fora, subject to strict scrutiny for any content-based discrimination.¹¹⁶ Bevin countered by arguing that Twitter and Facebook are limited fora, and that restrictions of speech in this context were permissible because they were viewpoint neutral and reasonable for the purpose of the forum.¹¹⁷ The Court then proceeded to summarize Rehnquist's categorical approach to public forum doctrine.¹¹⁸

The Court, however, was unconvinced by both arguments, and proceeded to analyze the claim under the government speech doctrine of *Walker*.¹¹⁹ The Court noted that it "is convinced that Governor Bevin's use of privately owned Facebook and Twitter pages is personal speech, and, because he is speaking on his own behalf, even on his own behalf as a public official, 'the First Amendment strictures that attend the various types of government-established forums do not apply.'"¹²⁰ The Court asserted that "privately owned channels of communication," such as social media, "are not converted to public property by the use of a public official."¹²¹ If Governor Bevin had sought to open a forum to allow public discourse, and allow everyone's comments, he could have done so. But, the Court argued, he did not set up his accounts to allow for such

112. *Id.*

113. *Id.* at 1008.

114. *Id.* at 1009.

115. *Id.* (quoting *Packingham v. North Carolina*, 137 S. Ct. 1730, 1744 (2017) (Alito, J., concurring)).

116. *Id.* at 1010.

117. *Id.*

118. *Id.* at 1010.

119. *Id.* at 1010-1011.

120. *Id.* at 1010-1011 (quoting *Walker v. Tex. Div. Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015)).

121. *Id.* at 1011.

commentary and “the First Amendment does not require him to do so.”¹²² The Court held that “Governor Bevin is under no obligation to listen to Plaintiffs, and Plaintiffs have no Constitutional right to be heard in this precise manner.”¹²³ If Governor Bevin’s social media accounts were susceptible to forum analysis, and he was unable to block constituents from the accounts, “his accounts could be flooded with internet spam such that the purpose of conveying his message to his constituents would be impossible and the accounts would effectively, or actually, be closed.”¹²⁴

Instead of working through Rehnquist’s categorical forum analysis, the Court decided the government speech doctrine is applicable in this case.¹²⁵ Because Governor Bevin is speaking as the Governor, the Court argued, he is “permitted to cull his desired message through his Facebook and Twitter page”¹²⁶ Analogizing to *Pleasant Grove* and *Walker*, the Court held that when the government speaks, it is not engaging in viewpoint discrimination by preferring some speech over others.¹²⁷ The Court concluded that “Governor Bevin is not required to allow the public to speak for him.”¹²⁸

The Court ended its analysis of Bevin’s social media by proposing a political, and not legal solution.¹²⁹ In the end, the Governor, and all other elected public officials are accountable to the public.¹³⁰ In this case, “[t]he public may view his Page and account if they wish and they may choose to re-elect him or choose to elect someone else if they are unhappy with how he administers his social media accounts.”¹³¹ The ballot box and not the judicial system, the Court believed, is the proper mechanism for plaintiffs to obtain relief.¹³²

B. Knight First Amendment Inst. at Columbia Univ. v. Trump

In *Trump*, the Southern District of New York used Rehnquist’s categorical approach to conclude that the interactive comment space created when President Donald Trump posted to Twitter was a designated

122. *Id.* at 1012.

123. *Id.* at 1011.

124. *Id.* at 1012.

125. *Id.* at 1012-1013.

126. *Id.*

127. *Id.* at 1012.

128. *Id.* at 1013.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

public forum.¹³³

The Court began by explaining the interactive features of Twitter as a social media platform, and specifically the President's Twitter page @realDonaldTrump and the plaintiffs' relation to the account.¹³⁴ The Court explained that a "defining feature of Twitter" was a user's ability to interact with the posts or "tweets" of other Twitter users.¹³⁵ Users are able to repost or "retweet" another user's tweet, "like" or "favorite" another's tweet, or "reply" to another user's tweet.¹³⁶ A user also has the option to "mention" another user's profile in a tweet of their own to make reference to the other user.¹³⁷ Once mentioned, the mentioned user will receive a notification that they were mentioned by the mentioning user.¹³⁸ In addition to all of the interactive features, the court recognized that Twitter has two primary features meant to limit interaction—"blocking" and "muting."¹³⁹ When a user blocks another user, the blocked user is unable to view or interact with any of the blocking user's tweets or view their "followers" or "following" lists.¹⁴⁰ The blocked user can still mention the blocking user, but the blocking user will not receive a notification nor be able to view the blocked user's tweets.¹⁴¹ Muting, on the other hand, does not prohibit a muted user from replying, retweeting, or favoriting the muting user's tweets.¹⁴² A muted user's tweets are simply not visible to the muting user, and the muted user does not receive any sort of notification that they have been muted.¹⁴³

The Court then turned its analysis to President Trump's account and recognized that "[s]ince his inauguration in January 2017, President Trump has used @realDonaldTrump as a channel for communicating and interacting with the public about his administration."¹⁴⁴ In particular, the Court found:

133. Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 549 (S.D.N.Y. 2018).

134. *See id.* at 550-553.

135. *Id.* at 550.

136. *Id.* at 550-551.

137. *Id.* at 551.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 552, 576; It is important to note that, in dicta, the court seems to assert that the act of muting an account may not violate an individual's First Amendment rights. Muting, instead of blocking does not prohibit an account from replying to the President's tweet, even when the reply is eventually ignored. A muted tweet may be viewed and replied to by others, therefore, allowing the essential interactive feature. Facebook also contains a similar function known as "unfollowing." For more information on "unfollowing," see Facebook, *How do I Unfollow a Person, Page or Group?*, (2019), <https://www.facebook.com/help/190078864497547>.

143. *Trump*, 302 F. Supp. 3d at 552, 576.

144. *Id.*

President Trump uses @realDonaldTrump, often multiple times a day to announce, describe, and defend his policies; to promote his Administration's legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; to challenge media organizations whose coverage of his Administration he believes to be unfair; and for other statements, including on occasion statements unrelated to official government business.¹⁴⁵

Some announcements relating to official government business, in particular the nomination of Christopher Wray for FBI director, and the removals of then-Secretary of State Rex Tillerson and then-Secretary of Veterans Affairs David Shulkin, were announced on @realDonaldTrump before other channels of communication.¹⁴⁶ President Trump's account is generally accessible to the public at large without regard to political affiliation or other limiting criteria.¹⁴⁷ The Court found that @realDonaldTrump's tweets typically generated thousands of replies, favorites, and retweets.¹⁴⁸

The plaintiffs in the case, Rebecca Buckwalter, Philip Cohen, Holly Figuero, Eugene Gu, Brandon Neely, Joseph Papp and Nicholas Pappas, each tweeted a message critical of the President in a reply to a tweet from @realDonaldTrump.¹⁴⁹ In response, the account blocked each of the plaintiffs for their criticism of the President and his policies.¹⁵⁰ While the plaintiffs were blocked by @realDonaldTrump, the Court recognized that the plaintiffs are not totally unable to interact with the President's tweets—for example they may create a second account to view the tweets or they may view or reply to replies of the President's tweet.¹⁵¹

After an overview of the plaintiffs and organization's standing, the Court analyzed whether the plaintiffs' speech was protected under the First Amendment, why the government speech exception is not invoked, and how the forum doctrine applies under the circumstances.¹⁵²

The Court found that the plaintiffs wished to engage in political speech which "fall[s] within the core of First Amendment protection."¹⁵³ The Court continued by noting that the plaintiffs' speech did not fall within the limited categories of speech outside the protection of the First Amendment and instead fit squarely within the realm of protected

145. *Id.*

146. *Id.* at 553.

147. *Id.* at 572.

148. *Id.* at 552-553.

149. *Id.* at 553.

150. *Id.* at 554.

151. *Id.*

152. *See id.* at 564, 572.

153. *Id.* at 565 (quoting *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 600 (2008)).

speech.¹⁵⁴

Next, the Court found that a forum analysis could be limited to certain aspects of the @realDonaldTrump account, not the account as a whole.¹⁵⁵ The Court did not suggest that plaintiffs should have access to the @realDonaldTrump account as a whole, but acknowledged that the interactive space of each tweet by the President is susceptible for the forum analysis.¹⁵⁶ The Court found that the content of the @realDonaldTrump tweets was government speech because it met the three prong test of *Walker*.¹⁵⁷ However, the Court disagreed with the *Bevin* court and found that the “interactive space for replies and retweets created by each tweet” was not government speech and was instead the private speech of the replying or retweeting user.¹⁵⁸ The replies to @realDonaldTrump’s tweets were not controlled by the account and they were most directly associated with the replying user.¹⁵⁹

Finally, the Court found that forum doctrine applied because the interactive space associated with each tweet was government property, and individual speech was consistent with the intended purpose of the forum.¹⁶⁰ The Court found that while Twitter was a privately-owned company, the control exercised by the President amounted to government ownership.¹⁶¹ Unlike *ISKCON*, the government property was more metaphysical than spatial or geographic, but, like *Rosenberger*, that distinction did not defeat a forum analysis.¹⁶² In addition, private speech would not defeat the essential function of the forum.¹⁶³ The interactive space associated with each tweet could accommodate virtually an unlimited number of replies and retweets and, as the Court recognized, the essential function of the interactive space in the tweet was to allow private users the opportunity to engage with @realDonaldTrump’s speech.¹⁶⁴

After concluding that a forum analysis was appropriate for the interactive space of @realDonaldTrump’s tweets, the Court decided that it was best classified as a designated public forum.¹⁶⁵ The Court held that the space was not a traditional public forum because there was no

154. *Id.* at 565.

155. *Id.* at 566.

156. *Id.* at 566.

157. *Id.* at 571.

158. *Id.* at 572.

159. *Id.*

160. *Id.* at 572-573.

161. *Id.* at 566-567.

162. *Id.* at 566.

163. *Id.* at 573.

164. *Id.* at 573.

165. *Id.* at 574-575.

extended historical practice of using the interactive space of a tweet for speech primarily because there was not an extended historical practice of using Twitter or other social media.¹⁶⁶ The Court concluded that the space was a designated public forum because the government allowed anyone, regardless of political affiliation, to access the tweets and used the tweets “as a means through which the President ‘communicates directly with you, the American people!’”¹⁶⁷

Because the Court found that the interactive space created by the President’s tweets was a designated forum, any restriction of speech was only permissible if the restriction was narrowly drawn to achieve a compelling state interest and did not engage in view-point or content-based discrimination under the *ISKCON* standard.¹⁶⁸ The Court found that @realDonaldTrump’s blocking of users was impermissible viewpoint discrimination primarily because the parties actually stipulated to the fact that the users were blocked due to the viewpoints expressed in their posts.¹⁶⁹ Similar to the holding of *Bevin*, Trump argued that the President retained a personal First Amendment interest in choosing the people he associates with and that the individual plaintiffs had no right to have their views amplified by the government.¹⁷⁰ The Court responded by recognizing that by blocking users on Twitter, the government went beyond merely amplifying the voice of one speaker and instead actively restricted the rights of individuals to advocate ideas.¹⁷¹ While injunctive relief was requested by the plaintiffs, the Court concluded that a declaratory judgement would likely achieve the same purpose¹⁷²

IV. RE-APPLYING THE REHNQUIST APPROACH

This Part will analyze whether public officials who use social media, in particular Twitter and Facebook, and block individuals while using the

166. *Id.* at 574.

167. *Id.* at 574 (quoting Stipulation ¶ 37).

168. *Id.* at 575.

169. *Id.* (citing Stipulation ¶ 53).

170. *Id.* at 575.

171. *Id.* at 576.

172. *Id.* at 579; President Trump appealed the District Court’s decision which was affirmed by the Second Circuit Court of Appeals on July 9, 2019. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F. Supp. 3d 226 (2d Cir. 2019). Similar to the Southern District of New York, the Second Circuit focused on President Trump’s intent in operating the account, and how the features of Twitter enabled users replying to the President to be heard by a wide audience. *See Id.* at 238. The Court rejected President Trump’s argument that the speech may be controlled as government speech because the speech in question concerned the speech of multiple users, not just the government. *See Id.* at 239. The Court ended its opinion alluding to the marketplace of ideas rationale by reminding the litigants (and the public) that the best response to disfavored speech on matters of public concern was more speech, not less. *Id.* at 240.

platform limit speech in a way that violates the First Amendment. In Section A, this Article will explain why the government speech exception should not be invoked under these circumstances and why a political solution is inadequate. In Section B, this Article applies the Rehnquist approach to public fora to conclude that a public official's use of social media to disseminate information and connect with constituents should constitute a designated public forum and therefore be subject to a strict scrutiny analysis.

A. Blocking Individuals Does Not Invoke the Government Speech Exception

In *Bevin*, the court did not analyze the blocking of individual users from the Governor's Facebook and Twitter because it found that the government speech exception was invoked.¹⁷³ The *Bevin* court determined that because the public official was speaking for the government, he was permitted to favor some speech over others.¹⁷⁴ The court decided that constituents unhappy with Governor Bevin's use of social media should seek a political solution rather than a legal one.¹⁷⁵

While this analysis may be applicable to the content of the Governor's messages, invoking the government speech exception to individuals' comments and replies is wholly inconsistent with the government speech doctrine. The *Bevin* court argues that because the governor is using Twitter and Facebook to communicate his own message, he is able to curtail this message by silencing the speech of individuals wishing to engage with his speech. The court fails to properly recognize that in reply tweets and Facebook comments, there are clearly two independent speakers engaged—the public official who wrote the tweet or post, and the private individual engaging with the post. Applying the *Pleasant Grove* test as interpreted in *Walker*, it is clear that the government speech exception cannot apply to comments or replies to the social media post of a public official.

In applying the *Pleasant Grove* test, a court should first look at whether there is a history of government use of the medium to convey government speech. Though the history is short, government officials have begun to use social media extensively as a means of connecting with voters and rationalizing political acts.¹⁷⁶ But to say that there has been any history of

173. See *Hargis v. Bevin*, 298 F. Supp. 3d 1003, 1010-11 (E.D. Ky. 2018).

174. See *id.* at 1011.

175. See *id.* at 1013.

176. It would seem functionally inconsistent to claim that there is a long history of government using social media in the government speech context, while discounting that same history in a traditional public forum analysis when individual speech is involved. The court in *Bevin*, however, reasoned so.

public officials managing the responses to their own messages would directly contradict the purpose of the First Amendment and the established history of its application. Individuals and organizations responding to a Tweet or Facebook post cannot be considered government speech in the same way that a news source's criticism of a public official's action is not government speech. By blocking individual speech replying to government announcements, a public official is significantly limiting the marketplace of ideas as envisioned by Mill and the framers of the First Amendment.

Second, the court should examine whether the speech is “often closely identified in the public mind” with the government.¹⁷⁷ Within the social media arena, it would be functionally impossible for this prong to be met because the limited speech is *a reaction* to government speech, not government speech itself. Unlike *Walker*, where license plates were closely associated in the public mind with government, an individual's private critique of government in the form of a social media post is not. A reply tweet on Twitter is a unique message which features the replier's profile name and photo, while the original Tweet from a public official features their own profile name and photo. Similarly, on Facebook a comment features the commenter's name and picture, while the original post features the name and picture of the public official. The speech of government and the response of the individual are not conflated as it was in *Walker* where the message of the interest group appeared on the same license plate as the state name. Therefore, it would be improper to claim that a reply or comment to an original post, which is an independent message, would be closely identified in the public mind with a government official or government in general.

Third, the court should examine whether the government maintains direct control over the messages conveyed. On Twitter and Facebook, a public official is able to control the content of his or her own messages but has no control over the reply or comments of individuals. Unlike *Walker*, there is no government office that approves the comments or replies of individual users on social media. The critical or supportive tweets are not approved by an administrative office nor are they ratified by the public official who initially tweeted.

While the content of a public official's Tweets and Facebook posts would clearly seem to invoke the government speech doctrine, applying the doctrine to the replies and comments of private individuals is inconsistent with the Supreme Court's interpretation of *Pleasant Grove* in *Walker* because (1) there is no history of blocking individuals as a

177. *Walker v. Tex. Div. Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2242 (2015) (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 472 (2009)).

means of promoting a government's message, (2) the speech is closely identified with the individual commenter, not the government, and (3) the government has no control over the messages conveyed in the replies or comments.

B. The Interactive Space is a Designated Public Forum

First, a court using the Rehnquist approach of *ISKCON* should conclude that the interactive space created when a public official posts on social media is not a traditional public forum. Traditional public fora are notoriously rigid, and the court must find that the government property is "immemorially . . . held in trust for the use of the public . . . used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," in order to qualify as a public forum.¹⁷⁸ Under this standard, it is highly unlikely that Twitter, Facebook, or any other Internet forum would qualify as a traditional public forum. Despite the extensive use of internet fora as a means of promoting political objectives, there is not the same history associated with internet fora as streets, parks, and other traditional public fora. Similar to the airport terminals in *ISKCON*, social media is too modern of a development in human history to qualify as a traditional public forum.

Continuing with the Rehnquist approach, a public official's social media post does create a designated public forum because when a public official posts to social media, they are intentionally opening a space for the purpose of public discussion and speech. Every tweet or post sent by a public official is an individual outward act of opening a space for discourse. When a public official posts she is not creating a public forum by inaction, but is "intentionally opening a nontraditional forum for public discourse."¹⁷⁹

In fact, Trump's own rationale for creating a Twitter account was "as a means through which the President 'communicates directly with you, the American people!'"¹⁸⁰ The President set up his Twitter page for the purposes of communicating with his electorate. A public official's affirmative act in creating a tweet goes further than mere acquiescence; instead, it is an invitation for discourse which may not be rescinded simply because the public official is unhappy with the response of the constituents.

In addition, individuals' speech on social media is not incompatible for the purpose for which the forum was created because the forum *was*

178. *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515 (1939).

179. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

180. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 574 (S.D.N.Y. 2018) (quoting Stip, ¶ 37).

created for communicative purposes. It would be logically incoherent to conclude that a public official creating a social media account in order to communicate with her constituents would have the purpose of the forum compromised by communication. Nor is the number of speakers problematic for the purposes of the forum analysis. Twitter and Facebook are able to accommodate virtually an unlimited number of speakers; there is no problem of some speakers frustrating the purposes of the forum.

Governor Bevin argued, and the *Bevin* district court agreed, that the problem of spam made it necessary for a public official to maintain the ability to silence commenters in order to use the pages for their intended purpose. While this may be a valid concern, it can be cured through means which do not violate the First Amendment as impermissible viewpoint discrimination. A public official may use permissible content-based restrictions in order to limit a class of speech as spam. If replies to a post are truly off base to a point where they have no communicative value, a public official may remove them as long as she does so regardless of viewpoint.

If this standard was to be applied, however, it is not difficult to imagine how a public official's definition of spam may be politically motivated. Consequently, it may be difficult to draw a bright-line rule with a content-based restriction. However, with the mute function on Twitter and the unfollow function on Facebook, a public official may essentially ignore any individuals' posts or comments on their tweet or post without infringing upon their right to free speech. As the *Bevin* court correctly described, "Governor Bevin is under no obligation to listen to Plaintiffs, and Plaintiffs have no Constitutional right to be heard in this precise manner."¹⁸¹ But the right to be heard is not the same as the right to speak. A public official may limit her own *hearing* of an individual's free speech, but she may not inhibit an individual from speaking once a forum has been created.

In conclusion, when a public official intentionally opens a space online for the purpose of facilitating communication, she has created a designated public forum and may not limit speech based on viewpoint. The act of creating this forum is intentional and the forum may support an unlimited number of speakers without compromising the purpose for which it was created. Spam can be addressed using permissible content-based restrictions.

181. *Hargis v. Bevin*, 298 F. Supp. 3d 1002, 1011 (E.D. Ky. 2018).

V. KENNEDY'S APPROACH AFFORDS BETTER PROTECTION TO INTERNET
PUBLIC FORA

The difficulties of categorizing and defining public fora, and particularly internet fora, could be addressed by replacing Rehnquist's categorical analysis with Kennedy's approach in *ISKCON*. Kennedy believed that the "physical characteristics of the property at issue" and the "actual public access and uses that have been permitted by the government" should determine whether or not a particular space is protected under a forum analysis.¹⁸² Kennedy believed that by looking at how government property was similar to existing fora, how the fora was actually used, and whether expressive activity would interfere with the purposes of the property, courts could more accurately protect expression on government property. Kennedy's test provides flexibility for the evolution of technological advances and future internet fora while focusing on the actual uses of a forum rather than its uses in the past.

First, the Kennedy approach would allow for more flexibility in forum analysis which is particularly useful in the internet age. By permitting a court to analogize speech within a new space to existing fora, Kennedy's method is unlike Rehnquist's approach in that it does not close the door to the evolution of new spaces used primarily for speech. Rehnquist's categorical method will never afford the same protections to emerging communicative spaces, such as airport terminals or social media, as those provided to existing traditional public fora. Rehnquist's method will always disfavor new technologies and spaces simply because of their recency. However, under Kennedy's approach, if a court determines that a new forum shares enough similarities with an existing forum, speech in the space can be protected. Given the rapid rise of social media in the last decade, it is impossible to predict what new platforms may emerge in even the next five years. Given the recent history, however, one could safely assume that public officials will use any emerging internet platforms as a means of spreading their message and connecting with their constituents. If government intends to continue to use social media as a means of sharing its message, speech that disagrees with or challenges such action must be permitted. The analogization exercise proposed by Kennedy will give litigants the opportunity to argue that a new forum is similar to or different from those fora already recognized. A judge can then assess the arguments of both sides and use her discretion to determine whether or not the forum is similar enough to existing ones to afford it special protection. The analogization exercise of the Kennedy approach does not foreclose the possibility of emerging fora and provides more flexibility in

182. *ISKCON*, 505 U.S. 672, 698 (1992).

assessing the merits of the government property through its analogization exercise.

Second, the Kennedy method focuses more on the actual uses of a forum than its historical significance. Today, as more than 69% of Americans use social media, the political speech presented in replies to government posts should be more protected because of the popularity and uses of the platforms. As more people use social media for the purposes of political expression, traditional spaces for political expression are being replaced with virtual ones. Public officials have recognized this shift, and have begun to use social media sites in order to spread their messages and connect with voters. By allowing and encouraging interactive activity on social media sites, it is clear that public officials have at least “acquiesced in the broad public access” to the property.¹⁸³ Through the social media accounts of public officials like Trump and Bevin, the government has intentionally opened virtual property for the purposes of communicating and millions of Americans are taking the opportunity to use the space for expression. By intentionally opening government property for communicative purposes, the Kennedy approach dictates that the interactive space on social media must be protected as a public forum. The actual uses of government property should be more dispositive than a historical analysis of the property. While history can provide guidance and stability in a forum analysis, it can also hinder the development and protection of new fora. If adopted, the Kennedy method would allow government property that has been used for communicative purposes to be protected as a public forum.

Third, Kennedy’s test would look at whether expressive activity would undermine the purposes of the property as it was created. It is logically incoherent to conclude that expressive activity in response to a public official’s social media posts would interfere with the purposes for which the property is used because the property *was created for* expressive activity. The government cannot be permitted to open up virtual property in order to communicate with constituents and then claim that the communicative activity of those constituents undermines the purposes of the forum. By permitting expressive activity, the government is not ratifying the speech of dissidents as their own. Public officials are not even required to read or respond to that speech. But if a public official opens up a virtual profile for the purpose of communicating with the American public, pursuant to the First Amendment, they must be required to allow expressive responses and not discriminate on the basis of viewpoint.

183. *Id.* at 699.

VI. CONCLUSION

The circuit split displayed by *Bevin* and *Trump* illustrates the difficulty of applying Rehnquist's categorical analysis to emerging internet fora. Rehnquist's analysis focuses on the historical attributes of a given forum which leads to an inherently conservative application of the public forum status. This approach does not consider the real uses of the space relating to speech; instead, it protects government more than it ensures the protection of speech. Nevertheless, the Court's use of the Rehnquist approach in *Trump* shows the approach's potential for a more malleable categorical method that could adapt to speech associated with new technologies and spaces.

However, replacing Rehnquist's approach with Kennedy's approach would provide more flexibility for the emergence of new public fora by focusing on the actual uses of the forum rather than the historical significance of a space. Kennedy's approach would also better adhere to the spirit and purpose of the First Amendment as described in Mill's marketplace of ideas. At their best, social media networks like Twitter and Facebook can be used to debate political issues pulling from an international range of perspectives and experiences. In fact, there is no better place to engage in this political discussion than on a platform intentionally opened up by a public official for the purposes of announcing policy and defending political viewpoints. Dorsey's vision of Twitter as a virtual public square may be idyllic, but by properly protecting speech in this narrow space and prohibiting viewpoint discrimination, it could be realized.