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The New-Age Streets and Parks: Government-run Social Media Accounts as Traditional Public Forums

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THE NEW-AGE STREETS AND PARKS: GOVERNMENT-RUN SOCIAL MEDIA ACCOUNTS AS TRADITIONAL PUBLIC FORUMS

ABSTRACT

In 1939, the Supreme Court held in Hague v. Committee for Industrial Organization that citizen speech in government-owned properties such as streets and parks is subject to heightened First Amendment protection. These properties, the Court reasoned, are by their very nature reserved for the public to use for assembly and communication. Over time, these properties were labeled “public forums,” and the Supreme Court divided them into a number of categories, each affording varying levels of protection to private speech. The “streets and parks” from Hague were classified as “traditional public forums,” and received the strongest level of constitutional protection.

While the public forum doctrine has evolved over time to reflect the new technologies and realities of today’s world, courts have resisted expanding the traditional public forum beyond its origins largely due to language in Hague, which suggested that a traditional public forum must be “immemorially . . . held in trust for the use of the public.” This has led to public venues that are critical for assembly and communication in today’s world, such as government-run social media accounts, being classified as “limited’ or “designated public forums,” which offer fewer protections for citizens’ speech. This is an inconsistent standard that has permitted government officials to restrict and censor their constituents’ speech from their official social media pages, sometimes with impunity.

This Comment argues that government-run social media accounts, arguably the most vital government-run venue for assembly and communication today, should be classified as traditional public forums. These accounts encompass nearly all of the historical qualities of the traditional public forum, apart from the “immemorial” standard from Hague. Careful review of public forum jurisprudence throughout the last century, however, shows that the “immemorial” standard should be treated not as a concrete requirement, but as merely one of many factors that weigh in the public forum equation.

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INTRODUCTION

The political fate of the United States in 2020 was decided, in no small part, by social media. As the COVID-19 pandemic limited in-person activity, candidates were forced to take to the internet to reach potential voters.¹ U.S. President Joe Biden, tasked with defeating the “digital behemoth” run by incumbent Donald Trump,² hired a firm to connect him with social media “influencers” on Instagram to target younger demographics.³ U.S. Representatives Alexandria Ocasio-Cortez and Ilhan Omar supported the Biden campaign by arranging a voter outreach event on Twitter—not an in-person meeting, but a livestream of the video game *Among Us* on online broadcasting platform Twitch.⁴ The event drew over 400,000 concurrent viewers, who watched as Ocasio-Cortez simultaneously discussed healthcare in the United States and conducted detective work in space.⁵ In the two decisive Senate races in Georgia, both winning candidates relied heavily on social media: before his runoff election against incumbent David Perdue, thirty-three-year-old Jon Ossoff began regularly posting videos on TikTok,⁶ a social networking platform with over 60% of its U.S. userbase between the ages of sixteen and twenty-four.⁷ Fellow Georgia Senator Raphael Warnock used his Twitter account to post ads and pictures of him with a supporter’s pet dog, which were lauded for attempting to neutralize the use of racial stereotypes against him.⁸

¹ Peter Suci, *Social Media Proved Crucial for Joe Biden – It Allowed Him to Connect with Young Voters and Avoid His Infamous Gaffes*, FORBES (Nov. 17, 2020), <https://www.forbes.com/sites/petersuci/2020/11/17/social-media-proved-crucial-for-joe-biden—it-allowed-him-to-connect-with-young-voters-and-avoid-his-infamous-gaffes/?sh=175ac36e4148>.

² Eric Bradner & Dan Merica, *Biden’s Campaign Rushes to Blunt Trump’s Digital Advantage*, CNN (May 9, 2020), <https://www.cnn.com/2020/05/09/politics/joe-biden-digital-campaign/index.html>.

³ Rebecca Heilwell, *Inside the Biden Campaign’s Surprising Influencer Strategy*, VOX (Sept. 22, 2020), <https://www.vox.com/recode/21429755/influencers-joe-biden-democrats-pacs-social-media-facebook-instagram-campaign>.

⁴ Allegra Frank, *AOC Met More Than 400,000 Young Potential Voters on Their Own Turf: Twitch*, VOX (Oct. 22, 2020), <https://www.vox.com/2020/10/22/21526625/aoc-twitch-stream-among-us-most-popular-twitch-streams-ever>.

⁵ *Id.*

⁶ Christopher Alston, *Ossoff Uses TikTok to Court Young Voters Crucial to Democrats’ Success*, WABE (Dec. 22, 2020), <https://www.wabe.org/ossoff-uses-tiktok-to-court-young-voters-crucial-to-democrats-success>.

⁷ Greg Roumeliotis, Yingzhi Yang, Echo Wang & Alexandra Alper, *Exclusive: U.S. Opens National Security Investigation into TikTok – Sources*, REUTERS (Nov. 1, 2019), <https://www.reuters.com/article/us-tiktok-cfius-exclusive/exclusive-u-s-opens-national-security-investigation-into-tiktok-sources-idUSKBN1XB4IL>.

⁸ Michael Tesler, *Raphael Warnock’s Dog Ads Cut Against White Voters’ Stereotypes of Black People*, FIVETHIRTYEIGHT (Dec. 15, 2020), <https://fivethirtyeight.com/features/raphael-warnocks-dog-ads-cut-against-white-voters-stereotypes-of-black-people/>; Shane Goldmacher, *How Alvin the Beagle Helped Usher in a Democratic Senate*, N.Y. TIMES (Jan. 23, 2021), <https://www.nytimes.com/2021/01/23/us/politics/raphael-warnock-puppy.html>.

Elsewhere, U.S. constituents and voters leaned just as heavily on the same platforms. Social media granted users unprecedented access to their elected officials, which they used to “tag” then-President Donald Trump on Twitter at a rate of 1,000 times per minute, collectively.⁹ It allowed them to instantaneously reach huge number of fellow users; in particular, social media emerged as a crucial tool in publicizing and exposing police violence against Black individuals.¹⁰ It caught the attention of the Supreme Court, who called social media a “principal source[] for knowing current events, . . . speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”¹¹ By any standard, social media is an unprecedented tool for the purposes of speech, assembly, and petition,¹² rights explicitly protected by the First Amendment.¹³

It is surprising, then, that private speech on government-run social media accounts is not afforded the highest level of First Amendment protection.¹⁴ When Trump was sued in 2017 for blocking several users for expressing viewpoints contrary to his,¹⁵ the Second Circuit held that, while Trump’s censorship of private speech was unconstitutional, it was unconstitutional only because of his reasons for blocking the users.¹⁶ Had Trump blocked speech from his account arbitrarily, with no regard as to which speakers or speech were being censored, there is no guarantee that the court would have found his actions unconstitutional. This decision contrasted sharply with the constitutional protections afforded to public venues like streets and parks, in which the Supreme Court has held that the government can only restrict speech if the restriction is “necessary to serve a compelling state interest and . . . narrowly

⁹ Mike McIntire, Karen Yourish & Larry Buchanan, *In Trump’s Twitter Feed: Conspiracy-Mongers, Racists and Spies*, N.Y. TIMES (Nov. 2, 2019), <https://www.nytimes.com/interactive/2019/11/02/us/politics/trump-twitter-disinformation.html>.

¹⁰ Meredith D. Clark, Dorothy Bland & Jo Ann Livingston, *Lessons from #McKinney: Social Media and the Interactive Construction of Police Brutality*, 6 J. SOC. MEDIA IN SOC’Y 284, 285–86 (2017).

¹¹ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017).

¹² *See id.* at 1736. (“While we now may be coming to the realization that the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be.”).

¹³ U.S. CONST. amend. I.

¹⁴ *See Knight First Amend. Inst. at Columbia Univ. v. Trump (Trump II)*, 928 F.3d 226, 239 (2d Cir. 2019).

¹⁵ Blocking a user on Twitter prevents them from viewing, following, or messaging the blocking user’s account. *See Meira Gebel, How to Block or Unblock Someone on Twitter on a Computer or Mobile Device*, BUS. INSIDER (July 23, 2019, 3:41 PM), <https://www.businessinsider.com/how-to-unblock-someone-on-twitter>.

¹⁶ *Trump II*, 928 F.3d at 239–40.

drawn to achieve that end.”¹⁷ Arbitrary censorship of speech in a public park, for instance, would undoubtedly be held unconstitutional.

This dilemma is not unique to Trump. Across the United States, government officials are attracting attention and lawsuits for allegedly infringing on their constituents’ First Amendment rights by blocking or censoring them on official government-run social media pages.¹⁸ Not a single one of these cases has afforded social media the same level of protection afforded to public venues like streets and parks.¹⁹ The reason for this disparity is the public forum doctrine, birthed by the Supreme Court in *Hague v. Committee for Industrial Organization* in 1939²⁰ and developed into a concrete framework in *Perry Education Ass’n v. Perry Local Educators’ Ass’n* in 1982.²¹ The public forum doctrine is split into three categories, each offering varying levels of protection against government censorship of speech: (1) the traditional public forum, (2) the limited or designated public forum, and (3) the nonpublic forum.²² Streets and parks, immortalized by *Hague* as “immemorially . . . held in trust for the use of the public,” are classified as traditional public forums and receive the highest level of First Amendment protection.²³ Government-run social media accounts, in the few instances that they have been classified by courts, have been labeled limited or designated public forums, relegated to a lesser level of protection purely due to their modern origins.²⁴ This “immemorial” standard, drawn from *Hague*, has served as a judicially enforced bar to traditional public forum status for government-run social media accounts, even in light of social media’s importance to the exercise of First Amendment rights.²⁵ This is both practically troubling, given that the Supreme Court has referred to social media as the “modern public square,”²⁶ and legally ambiguous, as inspection of public forum jurisprudence suggests that the “immemorial” standard is less critical to the formation of a traditional public forum than many courts have held. This

¹⁷ *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (citation omitted).

¹⁸ *See Leuthy v. LePage*, No. 1:17-cv-00296-JAW, 2018 U.S. Dist. LEXIS 146894, at *42–43 (D. Me. Aug. 29, 2018); *Robinson v. Hunt Cnty.*, 921 F.3d 440, 449 (5th Cir. 2019); *Davison v. Randall*, 912 F.3d 666, 687 (4th Cir. 2019).

¹⁹ *See Leuthy*, 2018 U.S. Dist. LEXIS 146894, at *42; *Robinson*, 921 F.3d at 448; *Randall*, 912 F.3d at 687.

²⁰ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (plurality opinion).

²¹ *Perry*, 460 U.S. at 45–46.

²² *Id.*

²³ *Hague*, 307 U.S. at 515 (plurality opinion); *Perry*, 460 U.S. at 45.

²⁴ *See Knight First Amend. Inst. at Columbia Univ. v. Trump (Trump I)*, 302 F. Supp. 3d 541, 575 (S.D.N.Y. 2018) (“[W]e conclude that the interactive space of a tweet from the @realDonaldTrump account constitutes a designated public forum.”).

²⁵ *See id.* at 573–74.

²⁶ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

Comment argues that in light of the history and purpose of the public forum doctrine, the “immemorial” standard should not be viewed as a concrete requirement, and thus government-run social media accounts should be classified as traditional public forums.

This Comment proceeds in four parts. Part I first explores the origins and development of the public forum doctrine by examining the Supreme Court’s public forum jurisprudence from 1939 to 1982, with an eye to how the Court’s definition of the public forum expanded from merely “streets and parks” to countless other government properties. It next identifies five “core qualities” of these newly classified public forums: (1) they were among society’s most important places for the exercise of free speech; (2) they provided civilian access to government officials through the First Amendment rights of assembly and petition; (3) they were, in the absence of speech protections, at risk of arbitrary exercise of government power; (4) they could host speech without causing significant disruption; and (5) they had “immemorially” been used for the purposes of speech and assembly. Lastly, it shows how these qualities were both absorbed and rejected by the monumental *Perry* framework, which dramatically changed the contours of the public forum doctrine by creating three strict categories, each receiving a different level of government protection.²⁷

Part II examines how courts have utilized the relatively modern *Perry* framework in the technological age. Particularly, it examines how they have applied the public forum doctrine to government-run social media accounts, and the factors they have considered in assigning these accounts to *Perry*’s second category.

Part III shows that the proper classification for government-run social media accounts is the first *Perry* category: the traditional public forum. First, it examines the implications of classifying a venue as a traditional public forum rather than a limited or designated public forum, and why these implications are particularly important in regard to government-run social media accounts. Next, it shows that government-run social media accounts encompass four of the five “core qualities” of the traditional public forum better than *Hague*’s streets and parks. Lastly, it shows why the fifth core quality—the “immemorial” standard—should not be a concrete requirement to the formation of a traditional public forum, and thus should not be a bar to government-run social media accounts being classified as such.

²⁷ *Perry*, 460 U.S. at 45–46.

Finally, Part IV addresses modern day questions and trends regarding the expansion of the traditional public forum to include government-run social media accounts. It begins by examining concerns about the convergence of the public forum doctrine and government-run social media accounts and concludes by examining the support for reorganization of the traditional public forum and the public forum doctrine as a whole.

I. THE DEVELOPMENT OF THE PUBLIC FORUM DOCTRINE

The legal concept of the public forum—and, by extension, the traditional public forum—traces its roots back to 1939, when the Supreme Court decided *Hague v. Committee for Industrial Organization*.²⁸ Decades earlier, the Court had suggested that the government’s ability to impose restrictions on speech in government-owned areas was largely unfettered,²⁹ but in *Hague*, it opted for a more flexible approach.³⁰ In his plurality opinion, Justice Owen Roberts wrote that an ordinance that forbade citizens to “distribute . . . [in] any street or public place any newspapers, paper, periodical, books, magazine, circular, card or pamphlet” without a permit violated the First Amendment.³¹ In words that would become critical to the Court’s development of the public forum doctrine, Justice Roberts stressed that streets and parks were explicitly established by the government for the use of the people, writing that “[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”³² Key to Justice Roberts’s concept of streets and parks as a bastion for free speech was (1) their typical use for assembly and communication, but also, critically, (2) the fact that they had been designated for such uses since their creation.³³ *Hague* served as both a confirmation that the government did not have free rein to suppress speech in government-owned areas, and a suggestion that in some of these areas, speech was afforded particularly heightened protection from

²⁸ *Hague*, 307 U.S. at 515 (plurality opinion).

²⁹ *See* *Davis v. Massachusetts*, 167 U.S. 43, 47 (1897) (“For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.”).

³⁰ *Hague*, 307 U.S. at 515 (plurality opinion).

³¹ *Id.* at 501, 516.

³² *Id.* at 515.

³³ *Id.*

government interference.³⁴ Depending on the speech at issue and the area in which it was spoken, that level of protection could fluctuate.³⁵

The Court began to apply *Hague* as an informal balancing test, weighing the government's interest in a public venue against citizens' constitutional right to free speech in that same venue.³⁶ The Court's analysis in *Schneider v. State* in 1939 exemplified this newfound approach.³⁷ Faced with several ordinances forbidding the distribution of pamphlets in public streets,³⁸ the Court held that the individuals' First Amendment rights to free speech outweighed the government's interest in the cleanliness of its streets, and thus that the ordinance was unconstitutional.³⁹ Notably, it echoed *Hague* by holding that the individuals' First Amendment rights were bolstered by the fact that the speech occurred on public streets.⁴⁰ The Court noted, however, that even though the individuals' free speech interests became stronger in *Hague*'s "streets and parks," they were not absolute—a stronger government interest than mere cleanliness may have been sufficient to justify the ordinance.⁴¹

The theory advanced in *Hague* and *Schneider* was twofold: (1) some government-owned properties implicate strong levels of First Amendment interests in free speech, and thus, (2) speech in these particular properties receives heightened protection from government restrictions and censorship.⁴² These properties were formally labeled "public forums" by then-University of Chicago law professor Harry Kalven, Jr. in his famous article *The Concept of the Public Forum: Cox v. Louisiana*.⁴³ The Supreme Court eventually adopted Kalven's language, and in the coming decades applied the balancing test honed in *Schneider* to a number of different potential "public forums."⁴⁴ Though the *Schneider* balance was far from a bright-line rule, it served as a guide for the

³⁴ *Id.*

³⁵ *Id.* at 515–16. Justice Roberts made clear that this protection was not absolute, writing that "[t]he privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order. . . ." *Id.* This idea of balancing the individual and state interests would be vital to subsequent Court decisions. *See, e.g., Schneider v. New Jersey*, 308 U.S. 147, 165 (1939).

³⁶ *See Schneider*, 308 U.S. at 161, 165.

³⁷ *See id.*

³⁸ *Id.* at 153–54.

³⁹ *Id.* at 165.

⁴⁰ *Id.* at 160.

⁴¹ *Id.* at 165.

⁴² *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (plurality opinion); *Schneider*, 308 U.S. at 161, 165.

⁴³ Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 12.

⁴⁴ *See infra* Part I.B.

Court over the next forty-three years as it expanded the scope of the public forum doctrine by weighing the government's interest in potential new forums against the individual interests in speech within those forums.⁴⁵ This Part proceeds first by examining five common qualities of the new public forums anointed under the *Schneider* balance by the Supreme Court from 1939 to 1982. It then discusses the landmark *Perry* decision in 1982 and how it forever changed the contours of the public forum doctrine, emphasizing some of these common qualities and deemphasizing others.

A. *The Five Core Qualities of the Public Forum (1939–1982)*

Having confirmed that *Hague*'s streets and parks qualified as public forums that offer heightened constitutional protection, the Court began to utilize the *Schneider* balance to expand the public forum doctrine to similar public venues.⁴⁶ While the level of interest in free speech varied from forum to forum, the forums that received the lofty *Hague* levels of protection generally shared five qualities: (1) they were among society's most important places for the exercise of free speech; (2) they provided civilian access to government officials through the First Amendment rights of assembly and petition; (3) they were, in the absence of speech protections, at risk of arbitrary exercise of government power; (4) they could host speech without causing significant disruption; and (5) they had "immemorially" been used for the purposes of speech and assembly. This section refers to these five points as the "five core qualities" of the public forum and addresses each of them in turn.

1. *Society's Most Important Places for the Exercise of Free Speech*

Protecting speech in society's most important places for the exercise of free speech is the crux of the public forum doctrine birthed in the Supreme Court's *Hague* opinion in 1939. In his *Hague* opinion, Justice Roberts framed the ability to go to streets and parks as a quintessential American privilege, writing that citizens of the United States have a "privilege . . . to use the streets and parks for communication of views on national questions . . . [that] must not, in the guise of regulation, be abridged or denied."⁴⁷ The idea that free speech in America reaches its zenith in streets and parks was reflected in other Supreme Court decisions in the following years.⁴⁸ In *Schneider*, the Court held that "the streets

⁴⁵ See *Grayned v. City of Rockford*, 408 U.S. 104, 116–17 (1972); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552–53 (1975).

⁴⁶ See *Grayned*, 408 U.S. at 116–17; *Conrad*, 420 U.S. at 552–53.

⁴⁷ *Hague*, 307 U.S. at 515–16 (plurality opinion).

⁴⁸ See *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939); *Jamison v. Texas*, 318 U.S. 413, 416 (1943).

are natural and proper places for the dissemination of information and opinion.”⁴⁹ In 1943, Justice Black wrote in *Jamison v. Texas* that “one who is rightfully on a street which the state has left open to the public carries with him . . . the constitutional right to express his views in an orderly fashion.”⁵⁰ When devising the term “public forum,” Harry Kalven, Jr. noted that streets and parks “are an important facility for public discussion and political process.”⁵¹

In the years to come, the Court would apply the “public forum” tag to all types of government properties, but the highest level of constitutional protection was only afforded to forums that shared the same speech-facilitating qualities as streets and parks.⁵² Government venues that failed to clear this preliminary hurdle include prisons,⁵³ letter boxes used by the U.S. Postal Service,⁵⁴ and advertising space on buses.⁵⁵ The Court explicitly used this threshold in *Greer v. Spock* in 1976 to reject the idea of a government military reservation receiving *Hague*-level protection, writing that “[t]he notion that federal military reservations . . . have traditionally served as a place for free public assembly and communication of thoughts by private citizens is . . . historically and constitutionally false.”⁵⁶ Even in modern jurisprudence, where the *Schneider* balancing test has largely been abandoned in favor of a strict classification approach,⁵⁷ this still serves as a threshold question: if a public venue is not critical to the exercise of the free speech, then speech within such a venue undoubtedly will not receive the highest level of constitutional protection.⁵⁸

2. Cost-Free Access to Government Officials Through Assembly and Petition

In the 1960s, the Court regularly used the public forum doctrine as a tool to combat unconstitutional government practices during the civil rights movement.⁵⁹ As citizens took to public spaces to protest, state laws that

⁴⁹ *Schneider*, 308 U.S. at 163.

⁵⁰ *Jamison*, 318 U.S. at 416.

⁵¹ Kalven, *supra* note 43, at 11–12.

⁵² Examples of such forums included sidewalks, public libraries, and public theaters. *See* *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91, 95 (1965); *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (plurality opinion); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552–53 (1975).

⁵³ *See* *Adderley v. Florida*, 385 U.S. 39, 47–48 (1966).

⁵⁴ *See* *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 133 (1981).

⁵⁵ *See* *Lehman v. City of Shaker Heights*, 418 U.S. 298, 301–02 (1974).

⁵⁶ *Greer v. Spock*, 424 U.S. 828, 838 (1976).

⁵⁷ *See* *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

⁵⁸ *See* *Greer*, 424 U.S. at 838 (1976).

⁵⁹ *See* *Edwards v. South Carolina*, 372 U.S. 229, 237–38 (1963); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 91, 95 (1965); *Brown v. Louisiana*, 383 U.S. 131, 133, 142 (1966) (plurality opinion).

prohibited demonstrations and picketing came under fire from plaintiffs who believed these laws violated their First Amendment rights.⁶⁰ The Court often called upon the principles of *Hague* and *Schneider* to find such laws unconstitutional—not only as violations of the First Amendment right to free speech, but also as violations of the rights to assembly and petition.⁶¹ This, in turn, led to the expansion of the public forum doctrine from “streets and parks” to other public venues that facilitated the exercise of these freedoms.⁶²

Sidewalks were among the most logical extensions of the public forum doctrine. In *Shuttlesworth v. City of Birmingham* in 1965, the Court held that application of a city ordinance that prohibited citizens from standing on a sidewalk “as to obstruct free passage” was a violation of the citizens’ First Amendment rights.⁶³ An important factor in the Court’s balance of the state’s interests against the citizens’ interests was the fact that the ordinance restricted not only speech, but also assembly.⁶⁴ The Court noted that the ordinance essentially provided that “a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city.”⁶⁵ A sidewalk, an easily accessible and oft-used public venue, naturally facilitates citizens’ rights to assemble “for communication of views on national questions.”⁶⁶ Thus, the government’s attempt in *Shuttlesworth* to regulate such an area on a mere “whim” could not overcome the high level of individual interest in speech and assembly.⁶⁷

Venues that protected the right to petition were equally important. A year later in *Brown v. Louisiana*, the Court used the *Hague* and *Schneider* analysis to hold that arresting members of a sit-in at a segregated public library violated the members’ First Amendment right “to petition the Government for a redress of grievances.”⁶⁸ In another civil rights case, *Edwards v. South Carolina*, the Court held that police arrests of peaceful protestors on public grounds outside the South Carolina State House were unconstitutional, noting that the protestors

⁶⁰ See *supra* note 59.

⁶¹ See *id.*

⁶² See *id.*

⁶³ *Shuttlesworth*, 382 U.S. at 91, 95.

⁶⁴ See *id.* at 90–91.

⁶⁵ *Id.* at 90.

⁶⁶ *Id.* at 152; see *United States v. Grace*, 461 U.S. 171, 179 (1983) (describing public sidewalks as “among those areas of public property that traditionally have been held open to the public for expressive activities and are clearly within those areas of public property that may be considered, generally without further inquiry, to be public forum property”).

⁶⁷ *Shuttlesworth*, 382 U.S. at 90.

⁶⁸ *Brown v. Louisiana*, 383 U.S. 131, 141–42 (1966) (plurality opinion).

were exercising their “basic constitutional rights” to petition “in their most pristine and classic form.”⁶⁹ The precise location of the forum was not dispositive to the public forum analysis; the First Amendment rights fostered by the forum were more important.⁷⁰ This shift from *Hague*’s streets and parks further demonstrated the public forum doctrine moving beyond its traditional roots, particularly when the venue at issue allowed for the exercise of the First Amendment rights of assembly and petition to “redress grievances” with the government.⁷¹

Modern cases have added another factor to this equation: when a forum allows citizens to “redress grievances” with government officials, the citizens’ interest in speech is further strengthened when the forum provides cost-free access to those officials.⁷² This draws on the rationale underlying *Hague*’s streets and parks: public forums have, since their creation, served as a way for any citizen, regardless of affluence or status, to interact with and air grievances to their government officials.⁷³ In *United States v. American Library Ass’n* in 2002, the Eastern District of Pennsylvania noted that citizen speech on the internet in a public library might be entitled to *Hague* levels of protection, because “[t]he only direct cost to library patrons who wish to receive information, whether via the Internet or the library’s print collection, is the time spent reading.”⁷⁴ A public venue that allows citizens to assemble and petition to access their government officials is likely to be classified as some sort of public forum—and if such access is cost-free, then the venue may receive the highest level of First Amendment protection.

3. *A Need to Curb Arbitrary Exercise of Government Power*

As the *Schneider* balancing test considered both individual and state interests in a public venue,⁷⁵ factors that weakened the government interest were equally important to the classification of new public forums. In *Kunz v. New York* in

⁶⁹ *Edwards v. South Carolina*, 372 U.S. 229, 235, 237–38 (1963).

⁷⁰ *See id.* at 235–36 (comparing the protest in *Edwards* to other protests on public grounds that were more disruptive, and thus implicated a greater government interest); *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (holding that “[t]he mere physical characteristics of the property cannot dictate forum analysis”).

⁷¹ *See supra* note 59.

⁷² *See Am. Libr. Ass’n, Inc. v. United States*, 201 F. Supp. 2d 401, 466–67 (E.D. Pa. 2002).

⁷³ *Brown*, 383 U.S. at 146–47 (Brennan, J., concurring) (noting that “constitutional protection for conduct in a public building” derives from “the First Amendment guarantees of freedom of speech, petition and assembly”); *Am. Libr.*, 201 F. Supp. 2d at 467 (suggesting that public libraries are like traditional public forums because they “do not charge members of the public each time they use the forum”).

⁷⁴ *Am. Libr.*, 201 F. Supp. 2d at 467.

⁷⁵ *Schneider v. State*, 308 U.S. 147, 161, 165 (1939).

1951, the Court identified a critical factor in determining the strength of the government interest: the existence of standards, or lack thereof, for a government official to consider when deciding whether to issue a permit or otherwise authorize speech.⁷⁶ The ordinance at issue in *Kunz*—used to deny a permit to a religious preacher to “hold public worship meetings” on the streets—provided no such standards or guidelines, which was fatal.⁷⁷ The Court held that the ordinance violated the First Amendment and “condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria.”⁷⁸

The Court drew upon this logic in *Shuttlesworth* when it extended public forum protection to sidewalks.⁷⁹ The ordinance in *Shuttlesworth*, which prohibited citizens from “obstruct[ing] free passage” on sidewalks,⁸⁰ granted the state unchecked “moment-to-moment” power.⁸¹ Allowing the state to exercise such power at the expense of its citizens had “ever-present potential for arbitrarily suppressing First Amendment liberties” and “[bore] the hallmark of a police state.”⁸² It was difficult for the government to enforce such loose restrictions on sidewalks, a natural place for assembly and speech, without doing so arbitrarily and indiscriminately.⁸³ Thus, citizens’ speech on sidewalks was subject to additional First Amendment protection.

4. *Limited Disruption*

While the individual interests in the *Schneider* balancing test could be strengthened in venues that (1) were particularly conducive to the exercise of citizens’ speech⁸⁴ and (2) allowed for access to government officials through assembly and petition,⁸⁵ they could be weakened if the speech caused disruption in the venue.⁸⁶ In *Grayned v. City of Rockford* in 1972, protestors gathered on a public sidewalk next to a school and were accused of making “noise that was audible in the school,” distracting “hundreds of students . . . from their school

⁷⁶ *Kunz v. New York*, 340 U.S. 290, 293–95 (1951).

⁷⁷ *Id.* at 290, 295.

⁷⁸ *Id.* at 294 (citing *Cox v. New Hampshire*, 312 U.S. 569 (1941)).

⁷⁹ *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90–91 (1965).

⁸⁰ *Id.* at 90.

⁸¹ *Id.* (quoting *Cox v. Louisiana*, 379 U.S. 536, 579 (1965) (Black, J., concurring in part)).

⁸² *Id.* at 91 (citations omitted).

⁸³ *See id.* at 90–91.

⁸⁴ *See supra* Part I.A.1.

⁸⁵ *See supra* Part I.A.2.

⁸⁶ *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

activities” and disrupting “orderly school procedure.”⁸⁷ Though speech on sidewalks was protected under the public forum doctrine per *Shuttlesworth*,⁸⁸ the Court pivoted from its earlier line of cases and held that the city ordinance under which the protestors were arrested did not violate the Constitution.⁸⁹ Even though the speech occurred within a public forum, it could still be censored because it “materially disrupt[ed] classwork” and “involve[d] substantial disorder or invasion of the rights of others.”⁹⁰ Thus, the *Schneider* balancing test tipped in favor of the government.⁹¹

The Court’s holding in *Grayned* was narrow, as it applied only to the slim category of speech within a public forum that disrupted a public school.⁹² Still, its analysis was significant and was utilized in other cases: the Court analyzed the disruption caused by speech in both *Edwards* (in which a similar protest was permitted outside of a governmental building)⁹³ and *Brown*,⁹⁴ though it found no significant disruption in either case.⁹⁵

5. The “Immemorial” Standard

Perhaps *Hague*’s biggest contribution to modern-day public forum jurisprudence is its language describing the age-old nature of speech and assembly in streets and parks: such venues have “*immemorially* been held in trust for the use of the public and, *time out of mind*, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”⁹⁶ Courts have read this language as imposing a strict standard: for speech in a public venue to receive the maximum level of First Amendment protection, the forum must have some extended history of being used for the exercise of First Amendment rights.⁹⁷

⁸⁷ *Id.* at 105.

⁸⁸ *Shuttlesworth*, 382 U.S. at 91, 95.

⁸⁹ *Grayned*, 408 U.S. at 117–18.

⁹⁰ *Id.* at 118 (quoting *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 514 (1969)). *Grayned* made clear that the right to free speech, even in a public forum, is not absolute and is subject to “reasonable regulation.” *Id.* at 116. For example, the government can limit more than one parade on a public street at a time. *See Cox v. New Hampshire*, 312 U.S. 569, 576 (1941). The government may also be able to limit a demonstration during rush hour. *See Cox v. Louisiana*, 379 U.S. 536, 554 (1965).

⁹¹ *See Grayned*, 408 U.S. at 121.

⁹² *Id.* at 120–21. The Court called the regulation a “modest restriction” that represented a “considered and specific legislative judgment.” *Id.* at 121. A less “modest restriction” may not have passed the *Schneider* balancing test.

⁹³ *Edwards v. South Carolina*, 372 U.S. 229, 231–33 (1963).

⁹⁴ *Brown v. Louisiana*, 383 U.S. 131, 139–40 (1966) (plurality opinion).

⁹⁵ *Edwards*, 372 U.S. at 231–33; *Brown*, 383 U.S. at 139–40 (plurality opinion).

⁹⁶ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (plurality opinion) (emphasis added).

⁹⁷ *See Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998) (“The Court has rejected the

The Supreme Court has wavered on how much history is enough to clear the “immemorial” standard.⁹⁸ One initial view was suggested in *Southeastern Promotions, Ltd. v. Conrad* in 1975, in which the Court declared a government-*rented theater to be a public forum.*⁹⁹ The *Conrad* defendants—municipal board members of a privately owned theater on lease to the city—rejected the plaintiffs’ application to perform a particular musical, claiming that it would not be “in the best interest of the community,” as the play contained nudity and obscene language.¹⁰⁰ The Court held this restriction on the plaintiffs’ speech to be unconstitutional, noting that the censoring effect of the defendants’ actions was “indistinguishable” from the unconstitutional restrictions of private speech on sidewalks or public streets, because the theater was “designed for and dedicated to expressive activities.”¹⁰¹ Essentially, the Court equated a public space being “designed for . . . expressive activities”¹⁰² with one “immemorially . . . used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹⁰³ *Hague’s* “immemorial” qualifier, when viewed through the *Conrad* prism, did not require that a public forum be a bastion of communication since the dawn of time; it was sufficient that the forum be explicitly created for such communication.¹⁰⁴ In 1983, however, the Court seemingly took a different stance in the massively influential *Perry Education Ass’n v. Perry Local Educators’ Ass’n*.¹⁰⁵ *Perry* not only changed the Court’s interpretation of the “immemorial” standard; it changed the contours of the entire public forum doctrine.

B. *The Perry Framework*

Perry was a landmark case, establishing a concrete framework for the public forum doctrine that largely replaced the *Schneider* balancing test and is still utilized by courts today.¹⁰⁶ It consolidated the core qualities of the public forum doctrine into a rigid, three-part structure that applied different levels of judicial

view that traditional public forum status extends beyond its historic confines.”).

⁹⁸ *Compare id.* at 677 (noting that the highest level of protection for speech was afforded to forums with a long history of assembly and debate), *with Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 552, 555–56 (1975) (holding that a forum was entitled to the strongest levels of protection for public speech purely because it was created for the explicit purpose of expressive activities and communication).

⁹⁹ *Conrad*, 420 U.S. at 555.

¹⁰⁰ *Id.* at 548.

¹⁰¹ *Id.* at 552, 555.

¹⁰² *Id.* at 555.

¹⁰³ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (plurality opinion).

¹⁰⁴ *Conrad*, 420 U.S. at 555.

¹⁰⁵ *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983).

¹⁰⁶ *See, e.g., Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

scrutiny to government restrictions on speech depending on the type of forum at issue.¹⁰⁷

The case came about from a dispute between a teacher's union and a public school board, with the union claiming that the board infringed upon its First Amendment rights by not permitting the union to use the school's internal mail system.¹⁰⁸ In determining the level of protection afforded to speech within the mailboxes, the Court split the public forum doctrine into three separate categories, each consisting of a number of examples from prior decisions: (1) "quintessential" or "traditional" public forums, (2) "limited" or "designated" public forums, and (3) nonpublic forums.¹⁰⁹

The first category, the "quintessential" public forum, essentially turned the fifth "core quality" of the public forum into a threshold question.¹¹⁰ This category—now referred to as the "traditional public forum"¹¹¹—consists of government venues that have been "immemorially . . . used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."¹¹² This requirement has effectively limited the traditional public forum to streets, parks, and sidewalks.¹¹³ Speech in these forums receives the highest level of First Amendment protection.¹¹⁴ Any government restrictions on speech in these forums are subject to strict judicial scrutiny; thus, the government can only restrict speech if the restriction is "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end."¹¹⁵

The second category—eventually called the "limited" or "designated public forum"¹¹⁶—represented more of a departure from the Court's pre-*Perry* jurisprudence. This category consists of "public property *which the State has opened for use* by the public as a place for expressive activity," with the key

¹⁰⁷ *Perry*, 460 U.S. at 45–46.

¹⁰⁸ *Id.* at 38–41.

¹⁰⁹ *See id.* at 45–46.

¹¹⁰ *Id.*

¹¹¹ Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 WILLAMETTE L. REV. 647, 652–54 (2010).

¹¹² *Perry*, 460 U.S. at 45 (quoting *Hague v. Comm. of Indus. Org.*, 307 U.S. 496, 616 (1939) (plurality opinion)).

¹¹³ *See Hotel Emps. & Rest. Emps. Union, Loc. 100 v. City of N.Y. Dep't of Parks & Recreation*, 311 F.3d 534, 544 (2d Cir. 2002).

¹¹⁴ *Perry*, 460 U.S. at 45.

¹¹⁵ *Id.* (citation omitted).

¹¹⁶ *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 814 (1985) (Blackmun, J., dissenting) (identifying such forums as "limited public forums"); *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2242 (2015) (identifying such forums as "designated public forums").

aspect being the state's active decision to open the property to the public.¹¹⁷ While judicial treatment of this second category has been inconsistent through the years,¹¹⁸ most courts agree on two main points regarding the second *Perry* category: (1) as in the traditional public forum, restrictions on speech are subject to strict scrutiny; and (2) the government can do either or both of the following: (a) rescind the venue's public forum status at will;¹¹⁹ or (b) at the forum's "opening" to the public, reasonably limit access to certain types of speakers or certain uses.¹²⁰ Essentially, the government may be able to limit the use of a limited or designated public forum at its inception, and may be able to close the forum to the public at its leisure, but as long as it keeps the forum open, "it is bound by the same standards as apply in a traditional public forum."¹²¹ The Court cited designated meeting rooms at a university¹²² and school board meetings¹²³ as examples of this type of forum. Interestingly, the Court also declared the municipal theater from *Conrad* a limited public forum, despite previously having compared it to the "streets and parks" of *Hague*.¹²⁴

The third category, the nonpublic forum, consists of public properties that are not classified as "forum[s] for public communication" whatsoever, but are still subject to basic First Amendment protections.¹²⁵ The government is given much more leeway in imposing restrictions on speech in these properties; the regulation merely has to be reasonable and not an effort to suppress unpopular speech.¹²⁶

The *Perry* Court held that the school mailboxes fell into this third category,¹²⁷ but the decision was ultimately less important for its holding and more important for laying a concrete basis upon which the modern public forum doctrine could be constructed. On the one hand, *Perry* was a natural extension of the Court's public doctrine jurisprudence—an extension of the balancing test

¹¹⁷ *Perry*, 460 U.S. at 45–46 (emphasis added).

¹¹⁸ *Compare* *Davison v. Randall*, 912 F.3d 666, 681 (4th Cir. 2019) (describing the second *Perry* category as "limited (or designated) public forums"), *with* *Walker*, 135 S. Ct. at 2242 (describing the limited and designated public forums as two different entities within the second *Perry* category). This Comment discusses the judicial confusion regarding the second *Perry* category and its implications in Part III.A.

¹¹⁹ *See Perry*, 460 U.S. at 45–46.

¹²⁰ *Id.* at 46 n.7.

¹²¹ *Id.* at 46.

¹²² *See Perry*, 460 U.S. at 45 (citing *Widmar v. Vincent*, 454 U.S. 263 (1981)).

¹²³ *Id.* (citing *Madison Joint Sch. Dist. v. Wis. Emp. Rels. Comm'n*, 429 U.S. 167 (1976)).

¹²⁴ *Id.* at 45–46 (citing *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975)); *Conrad*, 420 U.S. at 552, 555 (holding that the theater was "indistinguishable" from the *Hague* categories).

¹²⁵ *Perry*, 460 U.S. at 46.

¹²⁶ *Id.*

¹²⁷ *Id.* at 48.

utilized in *Schneider*.¹²⁸ While *Schneider* and its progeny used a less rigid formula,¹²⁹ the concept was similar: a “nonpublic forum” like the school mailboxes, if examined under *Schneider*, would likely have a low level of individual interest in free speech. Therefore, it would take a relatively low level of government interest to tip the scales of the balancing test in favor of the government. On the other hand, *Perry* was a strange and inflexible departure from the cases that came before it. While cases like *Hague* and *Schneider* allowed for a sliding scale approach to weigh the relative interests of the speaker and the government,¹³⁰ *Perry* elected to clean up the doctrine by creating a strict three-category approach, with each type of forum having a distinct balancing formula.¹³¹ Despite the abrupt jurisprudential shift and some resulting judicial backlash,¹³² the three-part *Perry* framework is now the starting point for all modern-day public forum analysis.¹³³

II. THE CONVERGENCE OF THE PUBLIC FORUM AND GOVERNMENT-RUN SOCIAL MEDIA ACCOUNTS

Since the birth of the *Perry* framework, the most fascinating developments within public forum doctrine jurisprudence have come when courts have attempted to apply *Perry* to online forums. The internet is a strange fit in the rigid *Perry* triptych. It seems to fit perfectly under the traditional public forum criterion of being “used for purposes of assembly, communicating thoughts between citizens, and discussing public questions,”¹³⁴ but the “immemorial” requirement is a difficult bar to clear—the internet is a modern invention compared to traditional public forums like streets and parks, but it has been intended for similar public uses since its inception.¹³⁵ This Part discusses how courts have applied *Perry* to the internet, beginning with the Supreme Court’s first encounters with intangible public forums and concluding by examining a

¹²⁸ See *Schneider v. State*, 308 U.S. 147, 161 (1939).

¹²⁹ Compare *id.* (utilizing an informal balancing test to weigh an individual’s interest in free speech in a forum against the government interest in the forum), with *Perry*, 460 U.S. at 45–46 (creating a new test that classified the forum into one of three categories based on the individual and government interests in the forum before weighing the interests against each other).

¹³⁰ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939); *Schneider*, 308 U.S. at 165.

¹³¹ *Perry*, 460 U.S. at 45–46.

¹³² See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 826 (1985) (Blackmun, J., dissenting); *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 693, 696 (1992) (Kennedy, J., concurring).

¹³³ See Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1547 (1998).

¹³⁴ *Hague*, 307 U.S. at 515 (plurality opinion)

¹³⁵ See, e.g., *Am. Libr. Ass’n, Inc. v. United States*, 201 F. Supp. 2d 401, 466 (E.D. Pa. 2002) (noting that “[the internet] shares many of the characteristics of these traditional public fora”).

string of cases in which courts extended the public forum to government-run social media accounts.

A. *The Public Forum Doctrine and the Internet*

The idea of an intangible public forum first reached the Supreme Court in *Cornelius v. NAACP Legal Defense & Education Fund* in 1985.¹³⁶ Here, the Court was faced with the issue of whether a federal charity fundraising drive was permitted to exclude organizations from submitting a short written statement in order to join the drive and generate fundraising.¹³⁷ Though the Court held that the fundraising drive was a nonpublic forum entitled to the lowest level of First Amendment protection,¹³⁸ *Cornelius* was still entirely unprecedented in applying the *Perry* framework to intangible government property. The Court explicitly rejected the argument that “a First Amendment forum necessarily consists of tangible government property,”¹³⁹ holding that the relevant inquiry in defining a public forum is not identifying the physical government property at issue, but rather identifying the specific forum to which the speakers sought access.¹⁴⁰ The speakers in *Cornelius* did not seek access to physical government workplaces to promote themselves; they sought access to the government fundraising drive.¹⁴¹ Thus, the fundraising drive, rather than a physical government workplace, was the forum at issue.¹⁴² A decade later, the Court utilized the same logic in *Rosenberger v. Rector & Visitors of the University of Virginia*, but took it a step farther: it held that a student activities fund was not only a public forum that could be analyzed under *Perry*, but a *limited* public forum in which government restrictions on speech received strict scrutiny.¹⁴³

Rosenberger's holding that an intangible forum could receive heightened protection under *Perry* paved the way for *United States v. American Library Ass'n*, in which the concept of the internet as a public forum came before the

¹³⁶ See *Cornelius*, 473 U.S. 788.

¹³⁷ *Id.* at 790–93.

¹³⁸ *Id.* at 806.

¹³⁹ *Id.* at 800.

¹⁴⁰ *Id.* at 801.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995) (holding that the fund was “a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable”). *Rosenberger* was decided on the ground that the restrictions amounted to unconstitutional “viewpoint discrimination,” which cannot pass muster under any of the *Perry* forums, so its public forum analysis was limited. *Id.* at 829–31. It still set a crucial precedent in granting an intangible public forum elevated *Perry* status. *Id.* at 829–30.

Supreme Court.¹⁴⁴ The district court in *American Library* held that a congressional act that aimed to block certain violent and pornographic web content from public library computers was unconstitutional, as libraries would be violating their visitors' First Amendment rights by enforcing it.¹⁴⁵ The district court classified the internet at the public libraries as a designated public forum, noting that internet access is, in the words of *Perry*, "for use by the public . . . for expressive activity."¹⁴⁶ In a bolder step, the district court even suggested that the internet in public libraries could rise to the first *Perry* category: a traditional public forum.¹⁴⁷ It conceded that "the provision of Internet access in a public library does not enjoy the historical pedigree of streets, sidewalks, and parks as a vehicle of free expression," but added that the internet access promoted First Amendment principles in an "analogous manner" to *Hague's* streets and parks.¹⁴⁸ The internet, like public streets and parks, is open to the general public, free of charge, and critically, is dedicated to "freewheeling inquiry" and the free exchange of ideas.¹⁴⁹

The Supreme Court was unmoved by the district court's line of reasoning. The Court's logic in holding that internet access in a public library was not a traditional public forum started and stopped with its failure to meet the "immemorial" standard.¹⁵⁰ As the internet itself "did not exist until quite recently," it did not qualify as a traditional public forum under *Perry*.¹⁵¹ Nor was the Court convinced by the idea that the internet at the public library was a limited public forum.¹⁵² The Court reiterated that to create such a forum, the government needed to "make an affirmative choice" to open its property for public use.¹⁵³ Providing internet at a library, it reasoned, was not an "opening" of the library to the free expression of internet speakers, but merely another resource for its visitors.¹⁵⁴ The Court thus declared that the internet at the library was a nonpublic forum, and the library was permitted to block access to violent and pornographic sites on its publicly available computers.¹⁵⁵

¹⁴⁴ United States v. Am. Libr. Ass'n, Inc., 539 U.S. 194 (2003) (plurality opinion).

¹⁴⁵ *Id.* at 202–03.

¹⁴⁶ Am. Libr. Ass'n, Inc. v. United States, 201 F. Supp. 2d 401, 457 (E.D. Pa. 2002) (quoting *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

¹⁴⁷ *Id.* at 466.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (quoting *Bd. of Educ. v. Pico*, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting)).

¹⁵⁰ *Am. Libr.*, 539 U.S. at 205 (plurality opinion).

¹⁵¹ *Id.*

¹⁵² *Id.* at 206–08.

¹⁵³ *Id.* at 206.

¹⁵⁴ *Id.* at 206–07. The internet at the library was "no more than a technological extension of the book stack," provided for the benefit of the library patrons, not the speakers themselves. *Id.* at 207 (citation omitted).

¹⁵⁵ *Id.* at 208.

As the internet, particularly social media, has gained cultural significance as a means of communication and newsgathering, the Court's views on First Amendment protection for online speech have shifted. The Court took a dramatic leap forward in 2017 in *Packingham v. North Carolina*, which veered from *American Library* and entertained the possibility of the internet as a limited or traditional public forum.¹⁵⁶ The main issue in *Packingham* was the constitutionality of a statute that prohibited registered sex offenders from using social media websites.¹⁵⁷ The Court suggested that no *Perry* classification was necessary, as the statute would not pass muster under any of the three standards; it was an overly broad law that “burden[ed] substantially more speech than [was] necessary to further the government’s legitimate interests.”¹⁵⁸ Nonetheless, the opinion reflected a significant paradigm shift in the Court’s public forum doctrine. Whereas *American Library* explicitly rejected the internet as a limited or designated public forum, *Packingham* not only considered the possibility, but seemed to endorse the internet as the new age “streets and parks” from *Hague*—the very epitome of a traditional public forum.¹⁵⁹ The Court classified the internet, and “social media in particular,” as the most important venue for the exchange of ideas in the modern era.¹⁶⁰ It described social media as “perhaps the most powerful [mechanism] available to a private citizen to make his or her voice heard,” allowing “a person with an Internet connection to ‘become a town crier with a voice that resonates farther than it could from any soapbox.’”¹⁶¹ The implication was clear: the Supreme Court was prepared to allow cyberspace into the first two categories of the *Perry* framework, and perhaps even into the hallowed halls of the traditional public forum.

B. The Public Forum Doctrine and Government-run Social Media Accounts

Perhaps fueled by *Packingham*, a number of cases emerged in 2017 that forced courts to further examine the relationship between the public forum doctrine and social media.¹⁶² While the forum at issue in *Packingham* was the internet and social media as a whole,¹⁶³ these new cases were concerned with

¹⁵⁶ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–36 (2017).

¹⁵⁷ *Id.* at 1733–34.

¹⁵⁸ *Id.* at 1736 (quoting *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014)).

¹⁵⁹ *See id.* at 1735.

¹⁶⁰ *Id.* (“Facebook has 1.79 billion active users. This is about three times the population of North America.”).

¹⁶¹ *Id.* at 1737 (quoting *Reno v. Am. Civ. Liberties Union*, 521 U.S.844, 870 (1997)).

¹⁶² *See Davison v. Plowman (Davison I)*, 247 F. Supp. 3d 767, 770 (E.D. Va. 2017); *Davison v. Loudoun Cnty. Bd. of Supervisors (Davison II)*, 267 F. Supp. 3d 702, 706 (E.D. Va. 2017); *Price v. City of New York*, No. 15 Civ. 5871 (KPF), 2018 U.S. Dist. LEXIS 105815, at *25 (S.D.N.Y. June 25, 2018).

¹⁶³ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1733–34 (2017).

government regulation and restrictions on government-run social media accounts.¹⁶⁴ This section examines courts' treatment of the public forum doctrine as applied to these accounts, and *Packingham* as applied to a new digital frontier.

Among the first cases to challenge the restriction of speech on government-run social media accounts was *Davison v. Plowman* (“*Davison I*”), decided by the Eastern District of Virginia in 2017.¹⁶⁵ In *Davison I*, the plaintiff left a comment on the Loudoun County Commonwealth Attorney’s Facebook page that was deleted by an employee of the county for being “off topic.”¹⁶⁶ The comment was posted in an attempt to raise awareness and apply “political pressure” on the county for failing to prosecute one of its teachers for perjury.¹⁶⁷ In evaluating whether this censorship was an unconstitutional infringement of the plaintiff’s First Amendment rights, the court was quick to apply the *Perry* framework.¹⁶⁸ It labeled the Facebook page a limited public forum;¹⁶⁹ thus, restrictions on the page were subject to strict scrutiny as long as the speech was within the reasonable constraints imposed by the government at the forum’s inception.¹⁷⁰ The court noted that these constraints were determined by the page’s social media policy, which stated that the purpose of the page was to “present matters of public interest in Loudoun County,” and that the government could delete any comments that were “clearly off topic.”¹⁷¹ In a two-part analysis, the court reasoned that (1) the plaintiff’s comments—centered upon his own personal issues with the government—were not sufficiently related to the government’s Facebook post to be permitted under the social media policy, and (2) restricting “clearly off topic” private speech was indeed a reasonable constraint, permissible within the bounds of the second *Perry* category.¹⁷² Thus, the government had acted within the limitations imposed by the limited public forum and did not violate the plaintiff’s First Amendment rights.¹⁷³

The Eastern District of Virginia was faced with a similar issue the same year in *Davison v. Loudoun County Board of Supervisors* (“*Davison II*”), though its

¹⁶⁴ See *Davison I*, 247 F. Supp. 3d at 776; *Davison II*, 267 F. Supp. 3d at 706.

¹⁶⁵ *Davison I*, 247 F. Supp. 3d 767.

¹⁶⁶ *Id.* at 771–74.

¹⁶⁷ *Id.* at 773.

¹⁶⁸ *Id.* at 776 (citing *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983)).

¹⁶⁹ *Id.*

¹⁷⁰ *Perry*, 460 U.S. at 45–46 (1983).

¹⁷¹ *Davison I*, 247 F. Supp. 3d at 776–77.

¹⁷² *Id.*

¹⁷³ *Id.* at 777.

analysis differed.¹⁷⁴ This time, the plaintiff was banned by the Chair of the Loudoun County Board of Supervisors from the Chair’s official Facebook page for twelve hours after he left a comment accusing the Board of corruption and conflicts of interest.¹⁷⁵ Here, like in *Packingham*, the court stopped short of a full-blown public forum analysis, holding that banning the plaintiff from the page for his comment was unconstitutional “viewpoint discrimination,” which would not pass muster under any of the *Perry* forums.¹⁷⁶

At first glance, it might appear that the Eastern District of Virginia’s reasoning in *Davison I* and *Davison II* took two similar comments on two similar Facebook pages and arrived at two different conclusions. In the eyes of the court, however, the different outcomes in *Davison I* and *Davison II* were largely the result of two factors. First, the court believed the comment in *Davison II* was more relevant to the intended uses of the Facebook page than the comment in *Davison I*.¹⁷⁷ The plaintiff’s comment in *Davison II* leveled accusations of corruption against the school board on a post about a public town hall discussion—notably, after the plaintiff had already asked a related question at the town hall.¹⁷⁸ In *Davison I*, the plaintiff commented on a post about the county’s special prosecutors with a complaint about the county’s failure to prosecute one of its officials for perjury.¹⁷⁹ The court considered this connection tenuous, stating that the comment “did not further any dialogue” about the subject of the post nor “engage with the content or topic of the article.”¹⁸⁰ Second, the government subjected the Facebook page in *Davison I* to much stricter content guidelines—in essence, limiting the scope of the limited public forum that it created.¹⁸¹ The Facebook page in *Davison I* was governed by a social media policy that banned any content that was “clearly off topic.”¹⁸² Alternately, the Chair of the Board in *Davison II* held her Facebook page to a much looser standard.¹⁸³ She “deliberately permit[ted] public comment” on her

¹⁷⁴ *Davison II*, 267 F. Supp. 3d 702 (E.D. Va. 2017).

¹⁷⁵ *Id.* at 711.

¹⁷⁶ *Id.* at 716–17.

¹⁷⁷ Compare *Davison II*, 267 F. Supp. 3d at 716 (noting that the plaintiff’s comment related to a topic addressed in the Facebook post on which he commented), with *Davison I*, 247 F. Supp. 3d at 777 (noting that the plaintiff’s comment did not “engage with the content or topic” of the post on which he commented).

¹⁷⁸ *Davison II*, 267 F. Supp. 3d at 710–11.

¹⁷⁹ *Davison I*, 247 F. Supp. 3d at 777.

¹⁸⁰ *Id.*

¹⁸¹ Compare *Davison I*, 247 F. Supp. 3d at 777 (noting that the Facebook page banned any content that was “clearly off topic”), with *Davison II*, 267 F. Supp. 3d at 708 (noting that the Facebook page imposed no concrete content restrictions on Facebook users).

¹⁸² *Davison I*, 247 F. Supp. 3d at 777.

¹⁸³ *Davison II*, 267 F. Supp. 3d at 708 (“Defendant designates her ‘Chair Phyllis J. Randall’ Facebook page as a channel through which her constituents are directed to contact her.”).

page, writing that she “really want[ed] to hear from ANY Loudoun citizen on ANY issues, request, criticism, compliment, or just your thoughts.”¹⁸⁴ This permission of unfettered discussion, the court reasoned, expanded the scope of the public forum, which meant that banning a relevant comment was unconstitutional viewpoint discrimination.¹⁸⁵ The court also noted that “critical commentary regarding elected officials is the quintessential form” of speech that the First Amendment was designed to protect, adding further constitutional weight to the plaintiff’s comment.¹⁸⁶

Though the jurisprudential lines were not entirely black-and-white in the first two *Davison* cases, the court’s attempts to fit the new world of social media into the *Perry* framework validated *Packingham* by explicitly designating government-run social media accounts as limited public forums.¹⁸⁷ Faced with two possible strains of thought to follow regarding public forums and the internet, the opinions also consciously chose to follow *Packingham*¹⁸⁸ rather than the Court’s majority opinion in *American Library*, which rejected the idea of the internet as a public forum.¹⁸⁹ Furthermore, they provided a standard for similar cases in subsequent years. Courts across the country came to similar conclusions as *Packingham* and *Davison II* in 2018 and 2019, holding that a full-blown *Perry* analysis was unnecessary when faced with a government official restricting a private citizen’s speech on the official’s social media page due to a

¹⁸⁴ *Id.* at 716.

¹⁸⁵ *Id.* at 716–17. The court noted that “no policy—whether County-wide or specific to Defendant’s office—played any role in Defendant’s decision to ban Plaintiff” from her Facebook page. *Id.* at 715.

¹⁸⁶ *Id.* at 717.

¹⁸⁷ *Davison I*, 247 F. Supp. 3d at 776.

¹⁸⁸ *Id.* The *Davison I* court actually took it a step beyond *Packingham*, explicitly labeling the Facebook page a limited public forum. *Id.* *Davison II*’s viewpoint discrimination conclusion more precisely mirrored *Packingham*. Compare *Davison II*, 267 F. Supp. 3d at 716–17 (holding that the Chair of the Board had engaged in unconstitutional viewpoint discrimination in censoring the plaintiff’s speech on her Facebook page, thus it was unnecessary to classify the Facebook page as a specific forum), with *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (declining to engage in a full-fledged *Perry* forum analysis because the restrictions at issue would be unconstitutional no matter which forum was analyzed).

¹⁸⁹ *United States v. Am. Libr. Ass’n, Inc.* 539 U.S. 194, 205 (2003) (plurality opinion).

disagreeable comment or post.¹⁹⁰ Such restrictions constituted viewpoint discrimination.¹⁹¹

In May 2018, the debate on the level of First Amendment protection afforded to citizens' speech on government-run social media accounts reached the White House. The Southern District of New York held in *Knight First Amendment Institute at Columbia University v. Trump* (“*Trump I*”) that then-President Donald Trump's efforts to block users from viewing or replying to his Twitter account amounted to unconstitutional viewpoint discrimination.¹⁹² Unlike many of the cases that came before it, however, the court attempted to fit Trump's Twitter account into the *Perry* framework.¹⁹³ The court began by conceding that the Supreme Court had noted the similarities between the internet (particularly social media) and *Hague's* streets and parks insofar as both were “important places . . . for the exchange of views” and “essential venues for public gatherings,” but found the lack of “immemorial” history to be dispositive in preventing Trump's account from being classified as a traditional public forum.¹⁹⁴ However, it held that the account qualified as a designated public forum, in large part because of the governmental intent behind its creation—particularly, the government's “policy and past practice,” as well as the forum's “compatibility with expressive activity.”¹⁹⁵ Key factors in this analysis included that (1) Trump's account was fully viewable, open to the public for comment, and did not impose any specific limits on its accessibility; (2) the account was described by the government as a way for Trump to communicate with the American people; and (3) the interactivity of Twitter is one of its defining features.¹⁹⁶ In fact, the court reasoned that Twitter was explicitly designed for interaction, particularly for private users to “petition their elected representatives and otherwise engage with them in a direct manner.”¹⁹⁷

¹⁹⁰ See *Leuthy v. LePage*, No. 1:17-cv-00296-JAW, 2018 U.S. Dist. LEXIS 146894, at *42–43 (D. Me. Aug. 29, 2018); *Robinson v. Hunt Cnty.*, 921 F.3d 440, 449 (5th Cir. 2019); *Davison v. Randall*, 912 F.3d 666, 687 (4th Cir. 2019); *Price v. City of New York*, No. 15 Civ. 5871 (KPF), 2018 U.S. Dist. LEXIS 105815, at *39 (S.D.N.Y. June 25, 2018). A particularly interesting argument was raised in *Price*: whether government-run social media accounts are subject to the government speech doctrine. *Price*, 2018 U.S. Dist. LEXIS 105815, at *32. This doctrine removes any government speech from public forum analysis under the logic that First Amendment restrictions do not apply when the government itself is speaking. *Id.* The court in *Price* was unconvinced, holding that while the officials' tweets themselves may have been government speech, the replies from the plaintiff were not. *Id.* at *35–36.

¹⁹¹ See *supra* note 190.

¹⁹² *Trump I*, 302 F. Supp. 3d 541, 575 (S.D.N.Y. 2018).

¹⁹³ *Id.* at 573–75.

¹⁹⁴ *Id.* at 574 (quoting *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017)).

¹⁹⁵ *Id.* at 574–75 (quoting *Paulsen v. Cnty. of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991)).

¹⁹⁶ See *id.*

¹⁹⁷ *Id.* (quoting *Packingham*, 137 S. Ct. at 1735–36).

The court's logic in laying out these factors was reminiscent of the Eastern District of Virginia's public forum analysis in *Davison I*, which focused on governmental intent when determining if a designated or limited public forum had been created.¹⁹⁸ While the governmental intent in *Trump I* was not as clear-cut as the social media policy in *Davison II*, the government's statement that Trump was communicating "directly with you, the American people!" through the account served the same purpose: carving out the boundaries of the speech that the government was prepared to permit in its designated public forum.¹⁹⁹ From that point onward, *Trump I* was decided largely in the same fashion as the cases that came before it: with a finding that the government had engaged in viewpoint discrimination that would have been unconstitutional in any type of public forum.²⁰⁰ This application was a simple one. Trump blocked the users after they criticized his policies, so his restrictions on free speech were issued based on ideology and overstepped the free-communication boundaries upon which the government had created its forum.²⁰¹

Trump appealed the case to the Second Circuit, which issued an opinion in July 2019 that affirmed the judgment of the district court and largely affirmed its reasoning ("*Trump II*").²⁰² Most notably, the Second Circuit elected not to go as far as the district court in its *Perry* analysis, instead resting upon the tried-and-true theory that there was no need to determine the type of public forum at issue because the government was engaging in viewpoint discrimination.²⁰³ The court concluded, however, by praising the role that social media has played in the growth of communication and public discourse, noting that as a result, the "conduct of our government and its officials is subject to wide-open, robust debate" to a degree not seen before in American society.²⁰⁴ "This debate," it reasoned, "as uncomfortable and as unpleasant as it frequently may be, is nonetheless a good thing."²⁰⁵

The *Trump* cases left social media in a gray area in the public forum analysis. Courts unanimously agreed that government-run social media accounts constitute some type of public forum and that third-party replies and comments on these social media platforms are protected by the First Amendment, but there

¹⁹⁸ See *id.* at 574–75; *Davison I*, 247 F. Supp. 3d 767, 776–77 (E.D. Va. 2017).

¹⁹⁹ *Trump I*, 302 F. Supp. 3d at 574–75.

²⁰⁰ *Id.* at 575.

²⁰¹ *Id.*

²⁰² *Trump II*, 928 F.3d 226, 239–40 (2d Cir. 2019).

²⁰³ *Id.* at 237–39.

²⁰⁴ *Id.* at 240.

²⁰⁵ *Id.*

was little consensus otherwise. *Davison II*, *Price*, and the Second Circuit in *Trump II* all held that viewpoint discrimination is prohibited on government-run social media accounts, but offered little in terms of concrete additions to the doctrine.²⁰⁶ *Davison I* and the Southern District of New York in *Trump I* both held that government-run social media accounts were limited or designated public forums, entitling speech within them to nearly unlimited protection so long as the speech was within the constraints imposed by the government in creating the forums.²⁰⁷

Each case and each court, however, had one thing in common: an appreciation for social media’s critical role in fostering communication and its similarities to the “streets and parks” that Justice Roberts wrote about in 1939.²⁰⁸ In a memorandum opinion issued before *Davison I*, the Eastern District of Virginia noted that “metaphysical” forums can be formed for the purpose of “engag[ing] . . . local government.”²⁰⁹ In *Davison II*, the court held that in creating a Facebook page, “one generally opens a digital space for the exchange of ideas and information” that can permit “virtually unfettered discussion.”²¹⁰ The Second Circuit in *Trump II* added that the “basic principles of freedom of speech and the press” in the First Amendment “do not vary” when applied to new technology.²¹¹ While these cases ultimately reached no consensus on social media’s place within the public forum doctrine, they undoubtedly reinforced the Supreme Court’s *Packingham* opinion, providing fuel to Justice Kennedy’s theory of the internet as the “modern public square.”²¹²

III. GOVERNMENT-RUN SOCIAL MEDIA ACCOUNTS SHOULD BE CLASSIFIED AS TRADITIONAL PUBLIC FORUMS

The case law surrounding government-run social media accounts as public forums is still hazy and limited. To this day, the Supreme Court is yet to address

²⁰⁶ *Davison II*, 267 F. Supp. 3d 702, 716–17 (E.D. Va. 2017); *Price v. City of New York*, No. 15 Civ. 5871 (KPF), 2018 U.S. Dist. LEXIS 105815, at *39–40 (S.D.N.Y. June 25, 2018); *Trump II*, 928 F.3d at 237–39 (2d Cir. 2019).

²⁰⁷ *Davison I*, 247 F. Supp. 3d 767, 776 (E.D. Va. 2017); *Trump I*, 302 F. Supp. 3d 541, 574–75 (S.D.N.Y. 2018).

²⁰⁸ See *Trump II*, 928 F.3d at 240 (“The irony in all of this is that we write at a time in the history of this nation when the conduct of our government and its officials is subject to . . . a level of passion and intensity the likes of which have rarely been seen.”).

²⁰⁹ *Davison v. Plowman*, No. 1:16cv180 (JCC/IDD), 2017 U.S. Dist. LEXIS 4348, at *9 (E.D. Va. Jan. 10, 2017). The Eastern District of Virginia noted in a memorandum opinion issued before its *Davison I* opinion that it considered the Facebook page a limited public forum. *Id.*

²¹⁰ *Davison II*, 267 F. Supp. 3d at 716.

²¹¹ *Trump II*, 928 F.3d at 237 (quoting *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790 (2011)).

²¹² *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017).

the issue in terms more substantial than its *Packingham* opinion. That said, the last half-decade of lower court decisions has supplied two key principles for further First Amendment jurisprudence that seem unanimously accepted.

First, government-run social media is, at the very least, a limited or designated public forum, and thus restrictions on speech within it will receive strict scrutiny review.²¹³ In the memorandum opinion issued before *Davison I*, the key factor for the Eastern District of Virginia was the “purposeful government action” to make the forum available for public use;²¹⁴ in *Trump II*, the court analyzed the government’s intent, calling it the “touchstone” for determining the existence of a limited public forum.²¹⁵ In both cases, (1) the social media accounts were entirely open to the public, (2) the government had made statements declaring that the accounts were means of communication with the public, and (3) the accounts were interactive by nature and allowed for constituents to respond to their government officials.²¹⁶ In the cases without a full-fledged public forum analysis, no court displayed any reluctance to label government-run social media accounts as limited or designated public forums; they merely stopped their analyses at viewpoint discrimination.²¹⁷

This Comment notes that government-run social media accounts are “*at least*” limited or designated public forums, because several courts have left open the *Packingham* Court’s suggestion that these social media accounts could better be classified as new age traditional public forums.²¹⁸ Even the courts that actively chose not to extend the traditional public forum to include government-run social media accounts devoted little time to the issue beyond noting the accounts’ failure to check *Hague*’s “immemorial” box.²¹⁹ The Southern District of New York noted in *Trump I* that the Supreme Court had “analogized the internet to the ‘essential venues for public gatherings’ of streets and parks,” but pivoted and held that “the lack of historical practice [within social media] is

²¹³ See *Davison I*, 247 F. Supp. 3d at 776; *Trump I*, 302 F. Supp. 3d 541, 574–75 (S.D.N.Y. 2018).

²¹⁴ *Davison*, 2017 U.S. Dist. LEXIS 4348, at *8–9.

²¹⁵ *Trump I*, 302 F. Supp. 3d at 574–75 (quoting *Gen. Media Commc’ns, Inc. v. Cohen*, 131 F.3d 273, 279 (2d Cir. 1997)).

²¹⁶ See *Davison I*, 247 F. Supp. 3d at 776; *Trump I*, 302 F. Supp. 3d at 574–75.

²¹⁷ See *Davison II*, 267 F. Supp. 3d 702, 716–17 (E.D. Va. 2017); *Price v. City of New York*, No. 15 Civ. 5871 (KPF), 2018 U.S. Dist. LEXIS 105815, at *39–40 (S.D.N.Y. June 25, 2018); *Trump II*, 928 F.3d 226, 237–39 (2d Cir. 2019).

²¹⁸ See *Davison II*, 267 F. Supp. 3d at 716 (noting that “the Court would ordinarily endeavor to determine the precise ‘nature of the forum’ at issue—whether it is a traditional, limited, or non-public forum. The Court, however, need not pass on the issue”). The court added that “Facebook pages are designed to be public spaces” that can contain “virtually unfettered discussion.” *Id.*

²¹⁹ See *Price*, 2018 U.S. Dist. LEXIS 105815, at *37–38; *Trump I*, 302 F. Supp. 3d at 574.

dispositive.”²²⁰ A year later, the court in *Price v. New York* was even less definitive, holding that it would be “inclined to find that the City’s official Twitter accounts do not constitute a traditional public forum,” due to the Supreme Court’s reluctance to extend the traditional public forum “beyond its historical confines,” but it elected not to make a classification.²²¹ Otherwise, courts’ language has been largely noncommittal and has often echoed *Packingham*.²²²

Second, the government is not permitted to exercise viewpoint discrimination on its official social media accounts. Viewpoint discrimination occurs when government restrictions on private speech in a public forum are imposed to different degrees depending on the speaker’s expressed viewpoint.²²³ In *Pleasant Grove v. Sumnum*, the Supreme Court held that viewpoint discrimination was not allowed in any of the three *Perry* forums: traditional, limited or designated, or nonpublic forums.²²⁴ Since, as noted above, government-run social media accounts currently rest on an established “limited or designated public forum” baseline, it follows naturally that viewpoint discrimination is prohibited on these accounts. Indeed, *Packingham*,²²⁵ *Davison II*,²²⁶ *Price*,²²⁷ and *Trump II*²²⁸ all explicitly confirmed this.

These two principles are valuable starting points as courts continue to figure out how to fit *Perry* into the digital age. However, to stop the *Perry* analysis of government-run social media accounts here would be to unnecessarily truncate the holdings of a century of public forum jurisprudence. The remainder of this Part argues that government-run social media accounts should be classified as traditional public forums, and thus speech within them should be subject to the same level of protection as speech in *Hague*’s streets and parks. The first section

²²⁰ *Trump I*, 302 F. Supp. 3d at 574 (first quoting *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017); then citing *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998)).

²²¹ *Price*, 2018 U.S. Dist. LEXIS 105815, at *37–38 (quoting *Forbes*, 523 U.S. at 678).

²²² See, e.g., *Davison II*, 267 F. Supp. 3d at 716.

²²³ *Price*, 2018 U.S. Dist. LEXIS 105815, at *39 (“[V]iewpoint discrimination’ is ‘an egregious form of content discrimination’ in which the government ‘targets not subject matter, but particular views taken by speakers on a subject.’” (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995))).

²²⁴ *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 461, 470 (2009) (holding that even in a nonpublic forum, the weakest of the three *Perry* categories, the government may only impose “restrictions on speech that are reasonable and viewpoint neutral” (citing *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106–07 (2001))).

²²⁵ *Packingham*, 137 S. Ct. at 1737.

²²⁶ *Davison II*, 267 F. Supp. 3d at 716–17.

²²⁷ *Price*, 2018 U.S. Dist. LEXIS 105815, at *39–40.

²²⁸ *Trump II*, 928 F.3d 226, 237 (2d Cir. 2019).

examines the practical necessity of labeling these accounts traditional public forums as opposed to limited or designated public forums. The second section shows that government-run social media accounts encompass four of the five “core qualities” of the traditional public forum better than streets and parks. The third and final section shows that courts’ hesitance to extend traditional public forum status to these accounts is based on an overreliance on the fifth core quality: *Hague*’s “immemorial” standard. It suggests that the “immemorial” standard should not be an absolute bar to traditional public forum status, and that a more workable standard can be found in both *Perry* and the cases preceding it.

A. The Implications of the Limited or Designated Public Forum Versus the Traditional Public Forum

Before examining why the traditional public forum doctrine should extend to government-run social media accounts, there is a crucial threshold issue to address, one responsible for much of the post-*Packingham* inertia surrounding social media and public forums: if, as the Supreme Court mentioned in *Perry*, restrictions on traditional public forums and limited or designated public forums are held to the same level of strict scrutiny,²²⁹ then what is the practical difference between labeling government-run social media as a limited or designated public forum instead of a traditional public forum? In more practical terms, if the restrictions on speech by the government in *Trump II* would have been unconstitutional no matter the type of forum,²³⁰ then why does the type of forum matter?

The answer to these questions can be found in *Perry*’s murky second category. While the first and third *Perry* categories have been unanimously adopted and treated nearly identically across jurisdictions, the middle category is unclear and has invited further judicial exploration.²³¹ This confusion began with the language of *Perry*: while *Perry* does hold that its second category, the limited or designated public forum, “is bound by the same standards as apply in a traditional public forum,” it adds two key qualifiers.²³² First, because a forum in the second *Perry* category may be actively opened by the state to the public—as opposed to a traditional public forum that requires no formal government

²²⁹ *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)).

²³⁰ *Trump II*, 928 F.3d at 237, 239.

²³¹ See *Price*, 2018 U.S. Dist. LEXIS 105815, at *30–31 (classifying the limited public forum as a subset of the designated public forum); *Davison v. Randall*, 912 F.3d 666, 681 (4th Cir. 2019) (referring to designated and limited public forums interchangeably).

²³² *Perry*, 460 U.S. at 45–46.

“opening” because it has been a place of public discourse since its inception, such as a park—the state may not be “required to indefinitely retain the open character of the facility.”²³³ Second, a forum in the second *Perry* category may be created for a specific purpose, such as “use by certain groups” or “discussion of certain subjects.”²³⁴

Courts have treated these two qualifiers in two different ways, with some applying both of them to the second *Perry* category²³⁵ and others splitting the second *Perry* category into two separate forums, each subject to one of these qualifiers.²³⁶ This section evaluates these two separate strands of jurisprudence—categorized here as the “hybrid theory” and the “subset theory”—and shows that both, in practice, fail to provide the same First Amendment protection as the traditional public forum.

1. *The Hybrid Theory*

The hybrid theory classifies the second *Perry* category as either one of two interchangeable labels: the “limited public forum” or the “designated public forum.”²³⁷ Courts that follow this line of reasoning view these two forums as merely different ways of referring to the same concept: a middle-ground government forum that allows for government restrictions on private speech, provided that the restrictions fall within the boundaries created by the government when opening the forum for public use.²³⁸ Speech within this forum receives the same strict scrutiny as speech in a traditional public forum, so long as the speech clears the preliminary hurdles imposed by the government (such as restrictions on particular groups or subjects).²³⁹ The Supreme Court seemed to endorse the hybrid theory in *Cornelius*, noting that there were “three types of fora: the traditional public forum, the public forum created by government

²³³ *Id.* at 46.

²³⁴ *Id.* at 46 n.7 (citations omitted).

²³⁵ *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (explaining that a designated public forum may be created “for use by certain speakers, or for the discussion of certain subjects” (citing *Perry*, 460 U.S. at 45, 46 n.7)); *Randall*, 912 F.3d at 687 (finding a Facebook page constituted a public forum when it was created for users to discuss certain issues).

²³⁶ *See Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2242 (2015) (noting that forums are designated “as *either* a designated public forum . . . *or* a limited public forum”) (emphasis added); *Price*, 2018 U.S. Dist. LEXIS 105815, at *31 (“A limited public forum is a subset of the designated public forum.”).

²³⁷ *See, e.g., Randall*, 912 F.3d at 687 (equating the designated public forum and the limited public forum).

²³⁸ *See, e.g., Warren v. Fairfax Cnty.*, 196 F.3d 186, 193–94 (4th Cir. 1999) (describing designated public forum and limited public forum as interchangeable terms).

²³⁹ *See id.*

designation, and the nonpublic forum.”²⁴⁰ The Fourth Circuit did so more explicitly in *Davison v. Randall* in 2019, referring to the second category as “designated or limited public forum[s].”²⁴¹

In theory, government restrictions in a limited or designated forum under the hybrid theory receive the same level of scrutiny as in a traditional public forum.²⁴² In practice, however, there is a massive divide between judicial treatment of these forums. The different outcomes in *Davison I* and *Davison II* are a result of this disparate treatment.²⁴³ In *Davison I*, the Loudoun County Commonwealth Attorney’s Facebook post was about the appointment of new special prosecutors, and the plaintiff’s comment was a question about the county’s failure to pursue a perjury charge.²⁴⁴ The comment was directly addressed to the county,²⁴⁵ and addressed the topic of the post, special prosecutors.²⁴⁶ In *Davison II*, the Chair of the Loudoun County Board of Supervisors posted on her Facebook page about a town hall discussion held by the board, and the plaintiff’s comment on the post alleged unethical conflicts of interest among the board members.²⁴⁷ Both Facebook pages were classified as public forums, as the *Davison I* court explicitly labeled the Facebook page a limited public forum²⁴⁸ and the *Davison II* court stopped short of a full *Perry* classification and ended its analysis at “public forum.”²⁴⁹ Nonetheless, these two cases—both decided by the Eastern District of Virginia—came out differently: in *Davison I*, the court held that the plaintiff’s First Amendment claim was without merit,²⁵⁰ and in *Davison II*, the court held that the government restriction on the plaintiff’s speech was unconstitutional viewpoint discrimination.²⁵¹

The reason for these different outcomes was the governmental intent in creating each Facebook page. While the county’s social media policy in *Davison I* outlawed any content that was “clearly off topic,”²⁵² the chair of the board in

²⁴⁰ *Cornelius*, 473 U.S. at 802.

²⁴¹ *Randall*, 912 F.3d at 687.

²⁴² *See id.* at 681 (noting that government entities are “strictly limited” in their ability to impose restrictions on either type of forum).

²⁴³ *Davison II*, 267 F. Supp. 3d 702, 716–18 (E.D. Va. 2017); *Davison I*, 247 F. Supp. 3d 767, 777–78 (E.D. Va. 2017).

²⁴⁴ *Davison I*, 247 F. Supp. 3d at 771–73.

²⁴⁵ *Id.* at 773 (“So I have a question for the Loudoun County Commonwealth Attorney’s Office . . .”).

²⁴⁶ *Id.* (“[W]ouldn’t you at least assign a special prosecutor in this case?”).

²⁴⁷ *Davison II*, 267 F. Supp. 3d at 710–11.

²⁴⁸ *Davison I*, 247 F. Supp. 3d at 776.

²⁴⁹ *Davison II*, 267 F. Supp. 3d at 716–18.

²⁵⁰ *Davison I*, 247 F. Supp. 3d at 776–78.

²⁵¹ *Davison II*, 267 F. Supp. 3d at 716–18.

²⁵² *Davison I*, 247 F. Supp. 3d at 772.

Davison II posted that she “really want[ed] to hear from ANY Loudoun citizen on ANY issues, request, criticism, compliment, or just your thoughts.”²⁵³ Both of the comments shared a common subject with their respective government Facebook posts (special prosecutors in *Davison I*,²⁵⁴ and comments and complaints for the board in *Davison II*).²⁵⁵ However, the government restriction on speech was able to satisfy the second *Perry* category’s version of strict scrutiny in *Davison I* purely because the county instituted a social media policy banning off-topic content,²⁵⁶ while a similar restriction in *Davison II* was struck down as unconstitutional viewpoint discrimination.²⁵⁷

This disparity reveals a massive practical flaw in the supposedly identical level of scrutiny that traditional public forums and limited or designated public forums receive under the hybrid theory: there is a nearly unfettered ability for governmental intent to control the boundaries of speech in the hybrid theory’s second *Perry* category. Government restrictions on speech in the hybrid theory’s limited or designated public forum do receive strict scrutiny,²⁵⁸ but they receive strict scrutiny only after the limits of the forum have been created by the government. This weakens the effectiveness of strict scrutiny review and undermines its purpose, allowing the government to institute significantly more restrictions on private speech than it can in traditional public forums. Furthermore, it puts pressure on courts to decide the limits and the application of governmental intent. The ban on “off-topic content” in *Davison I* was a broad, non-specific policy that the court held was applicable to a comment directly addressing the subject of the government’s Facebook post.²⁵⁹ This essentially creates two extra hurdles for speech in *Perry*’s second category to clear: not only the government’s intent in creating and maintaining the limits of the forum,²⁶⁰ but also the court’s reading of the scope and applicability of governmental intent.²⁶¹ Neither of these hurdles are applicable to speech in traditional public forums.²⁶²

²⁵³ *Davison II*, 267 F. Supp. 3d at 716.

²⁵⁴ *Davison I*, 247 F. Supp. 3d at 771–73.

²⁵⁵ *Davison II*, 267 F. Supp. 3d at 710–11.

²⁵⁶ *See Davison I*, 247 F. Supp. 3d at 777–78.

²⁵⁷ *Davison II*, 267 F. Supp. 3d at 716–18.

²⁵⁸ *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. at 37, 45–46 (1983).

²⁵⁹ *See Davison I*, 247 F. Supp. 3d at 777–78.

²⁶⁰ *Perry*, 460 U.S. at 45–46.

²⁶¹ *See Davison II*, 267 F. Supp. 3d at 711, 716 (finding the fact that the government intended to allow “virtually unfettered” public discussion on a Facebook page indicated it was a public forum).

²⁶² *Perry*, 460 U.S. at 45.

2. *The Subset Theory*

Some courts have read a possible solution to this unequal treatment into the second category of the *Perry* doctrine by separating the limited and designated public forum into two distinct entities.²⁶³ This view, referred to here as the subset theory, considers the limited public forum to be a subset of the designated public forum, with slight differences in treatment of private speech between the two.²⁶⁴ While the limited public forum under the subset theory is essentially the same as the hybrid theory version, the designated public forum is much different. It is classified as a “place not traditionally open to public assembly and debate . . . that the government has taken affirmative steps to open for general public discourse.”²⁶⁵ This view has been explicitly utilized by the Supreme Court,²⁶⁶ as well as the Southern District of New York in *Price*.²⁶⁷

On the surface, this theory seems to provide a lifeline for speech within the second *Perry* category. Unlike government restrictions on speech in the hybrid theory, restrictions in this designated public forum actually do receive the same scrutiny as speech within a traditional public forum. There is, however, one massive qualifier: this protection only lasts as long as the government continues to designate the “non-traditional” forum for public use.²⁶⁸ While a traditional public forum, like a park, cannot be “closed” for the purposes of private speech by the government, a designated public forum, such as a public school “opened” for a town hall, can be “closed” and become a nonpublic forum in a moment’s notice. This qualification also allows for judicial variability in determining when a forum is “opened” or “closed” by the government. More issues arise when examining an intangible or online forum like social media: how can courts determine when a Twitter account, for instance, is “closed” to the public? Does a Twitter account close if the government official stops using it? Does it close if the government blocks members of the public from viewing the account?

These questions illustrate the lingering uncertainty surrounding the second *Perry* category, and its weakness, no matter the form, when compared to the traditional public forum. The subset theory’s designated public forum undoubtedly provides stronger and more absolute protections for private speech than the hybrid theory’s second *Perry* category, but it still fails to provide the

²⁶³ See *Price v. City of New York*, No. 15 Civ. 5871 (KPF), 2018 U.S. Dist. LEXIS 105815, at *30–31 (S.D.N.Y. June 25, 2018).

²⁶⁴ See *id.* at *31 (“A limited public forum is a subset of the designated public forum.”).

²⁶⁵ *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 626 (2d Cir. 2005).

²⁶⁶ *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2242 (2015).

²⁶⁷ *Price*, 2018 U.S. Dist. LEXIS 105815, at *30–31.

²⁶⁸ *Id.*

same level of protection as the traditional public forum. In particular, it fails to avoid the same pitfalls that plague the second *Perry* category in all its forms, remaining subject to governmental and judicial whims.²⁶⁹ No matter the theory, *Perry*'s second category allows the government to either (1) hold permanent control over the availability of the forum to the public, or (2) shape the boundaries of acceptable speech in the forum through its intention in opening it. While these issues have only rarely come to a head—as many of the public forum cases involving government-run social media accounts have been decided on viewpoint discrimination grounds before reaching a *Perry* analysis²⁷⁰—there have already been warning signs. The divergent outcomes in *Davison I* and *Davison II*, for instance, show that if a forum is not classified as a traditional public forum, the speech within it will be subject to arbitrary levels of protection based on governmental intent and judicial line drawing.²⁷¹ Had the government action in *Trump II*, for instance, not been viewpoint discrimination—or, in practical terms, had Trump blocked users from viewing his Twitter account not because they expressed views that disagreed with him, but merely on an indiscriminate basis—the designated public forum and limited public forum would provide no guarantee that such indiscriminate censorship would be held unconstitutional.

B. The Core Qualities in Government-run Social Media Accounts

Having addressed the practical differences between traditional public forums and limited or designated public forums and the resulting implications for their treatment of private speech, the remainder of this Part shows why government-run social media accounts should be classified as traditional public forums. This section examines four of the “five core qualities” of the traditional public forum and shows that government-run social media accounts *better* encompass these qualities today than *Hague*'s streets and parks.

1. Society's Most Important Place for the Exercise of Free Speech

In 1939, the Supreme Court considered streets and parks among the most important places for the exercise of free speech in the United States²⁷²—if not

²⁶⁹ See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 826 (1985) (Blackmun, J., dissenting) (warning that “if the government’s ability to define the boundaries of a limited public forum is unconstrained, the limited-public-forum concept is meaningless”).

²⁷⁰ See *Davison II*, 267 F. Supp. 3d 702, 716–17 (E.D. Va. 2017); *Price*, 2018 U.S. Dist. LEXIS 105815, at *39–40; *Trump II*, 928 F.3d 226, 237–39 (2d Cir. 2019).

²⁷¹ See *Davison II*, 267 F. Supp. 3d at 716–18; *Davison I*, 247 F. Supp. 3d 767, 777–78 (E.D. Va. 2017).

²⁷² See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939) (plurality opinion).

the most important places. This idea is the bedrock upon which the entire public forum doctrine lies. *Hague* spoke of the importance of these places to the basic First Amendment rights of American citizens, calling it a “privilege of a citizen of the United States to use the streets and parks for communication of views on national questions” that “must not, in the guise of regulation, be abridged or denied.”²⁷³ In subsequent public forum cases, the Court added that “the streets are natural and proper places for the dissemination of information and opinion”²⁷⁴ and suggested that “one who is rightfully on a street which the state has left open to the public carries with him . . . the constitutional right to express his views in an orderly fashion.”²⁷⁵

Over seventy-five years later, the Court suggested that *Hague*’s streets and parks have been eclipsed by social media in importance to private speech.²⁷⁶ *Packingham* acknowledged that social media had become the “most important place[] . . . for the exchange of views” in society, calling it the “modern public square.”²⁷⁷ This is not the only time courts have suggested that social media’s status as a critical facilitator of speech should entitle speech within it to the highest levels of First Amendment protection. In 2002, the Eastern District of Pennsylvania wrote in *American Library* that “[r]egulation of speech in streets, sidewalks, and parks is subject to the highest scrutiny not simply by virtue of history and tradition, but also because [of their] speech-facilitating character,” as “[m]any of these same speech-promoting features of the traditional public forum appear in public libraries’ provision of Internet access.”²⁷⁸ In 2018, in the wake of *Packingham* and *Trump II*, legal commentators labeled social media “the most important public for[um] of our time,”²⁷⁹ and noted that the idea of government-run social media accounts as traditional public forums may be “appropriate given evolving social standards.”²⁸⁰ Refusal to extend the traditional public forum to include these accounts would unnecessarily bind the doctrine to the physical spaces of streets and parks rather than the interests that they protect—an approach that the Court explicitly cautioned against adopting

²⁷³ *Id.*

²⁷⁴ *Schneider v. State*, 308 U.S. 147, 163 (1939).

²⁷⁵ *Jamison v. Texas*, 318 U.S. 413, 416 (1943).

²⁷⁶ *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1735, 1737 (2017).

²⁷⁷ *Id.*

²⁷⁸ *Am. Libr. Ass’n, Inc. v. United States*, 201 F. Supp. 2d 401, 466 (E.D. Pa. 2002).

²⁷⁹ James M. LoPiano, Comment, *Public Fora Purpose: Analyzing Viewpoint Discrimination on the President’s Twitter Account*, 28 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 511, 549–50 (2018).

²⁸⁰ Samantha Briggs, Comment, *The Freedom of Tweets: The Intersection of Government Use of Social Media and Public Forum Doctrine*, 52 COLUM. J.L. & SOC. PROBS. 1, 29 n.142 (2018).

in *United States v. Kokinda* in 1990, when it held that “[t]he mere physical characteristics of the property cannot dictate forum analysis.”²⁸¹

2. *Cost-Free Access to Government Officials Through Assembly and Petition*

Protecting citizens’ right to assemble and protest is a quintessential part of the public doctrine, baked into public forum jurisprudence long before *Perry* arose.²⁸² The Court used the doctrine to defend, among other activities, students peacefully protesting laws on public grounds²⁸³ and protestors engaging in a sit-in at a racially segregated public library.²⁸⁴ In his 1965 article, which essentially coined the term “public forum,” Harry Kalven, Jr. suggested that “in an open and democratic society[,] the streets, the parks, and other public places are an important facility for public discussion and political process,” and noted that most of the civil rights demonstrations of the era had taken place in such forums.²⁸⁵ Even *Hague*, the cornerstone of the doctrine,²⁸⁶ explicitly mentioned that public forums are inherently used for “assembly . . . and communication of views on national questions.”²⁸⁷

Government-run social media accounts facilitate assembly and petition to provide access to government officials in a way that is impossible for *Hague*’s streets and parks to match. Unlike streets or parks, social media (1) grants users an unprecedented ability to exercise their right to assembly with millions of other citizens with no geographical limits,²⁸⁸ and (2) allows citizens to air their grievances via immediate and direct access to almost any official in the country.²⁸⁹

Few if any modern-day venues allow citizens to exercise their freedoms of assembly more effectively than social media. Social media’s unique ability to foster the First Amendment right to assembly lies largely in the fact that it allows

²⁸¹ *United States v. Kokinda*, 497 U.S. 720, 727 (1990).

²⁸² *See* Kalven, *supra* note 43, at 11–12; *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939) (plurality opinion).

²⁸³ *Edwards v. South Carolina*, 372 U.S. 229, 237–38 (1963).

²⁸⁴ *Brown v. Louisiana*, 383 U.S. 131, 133, 142 (1966) (plurality opinion).

²⁸⁵ Kalven, *supra* note 43, at 11–12.

²⁸⁶ *See Hague*, 307 U.S. at 515–16 (plurality opinion).

²⁸⁷ *Id.*

²⁸⁸ *See* Lydrissa Lidsky, *Public Forum 2.0*, 91 B.U.L. REV. 1975, 1977 (2011) (“Interactive social media have the potential to initiate public discourse among citizens who might otherwise never interact . . .”).

²⁸⁹ *See id.* at 1978 (“[I]nteractive social media can foster citizens’ First Amendment rights to speak, receive information, associate with fellow citizens, and petition government for redress of grievances.”).

unprecedented access to other citizens, locally, nationally, and internationally.²⁹⁰ It is no longer necessary for a citizen to go to a town square to exercise her First Amendment right of assembly with other citizens; she is able to reach a huge portion of her community—and even the world at large—merely by making a Facebook post.²⁹¹ On a local level, Facebook groups allow users instantaneous access to and communication with members of their town, city, or school.²⁹² Nationally, social media provides immediate access to nearly three-quarters of the nation: in 2019, over 69% of Americans had some sort of social media profile.²⁹³ Internationally, social media has drawn worldwide attention to local protests and political revolutions.²⁹⁴ As of mid-2018, over 262 million Twitter users were citizens of countries other than the United States.²⁹⁵ It is not hyperbole to say that social media allows U.S. citizens to exercise their freedoms of speech and assembly to a degree that could not have been imagined in 1939, when *Hague* was decided.

Social media also furthers citizens' First Amendment right to petition, as its incredible reach extends not just to fellow citizens, but also to elected government officials.²⁹⁶ Government-run social media accounts allow citizens an unprecedented opportunity to interact with and respond directly to their elected officials, no matter where they live or the time of the day.²⁹⁷ In 2016, every single U.S. Senator and Governor utilized a social media account.²⁹⁸ These accounts have become critical means of communication between the officials and their constituents.²⁹⁹ Donald Trump's Twitter account—which he described as “a modern form of communication” that helped him to win the 2016

²⁹⁰ See *id.* at 1977–78.

²⁹¹ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017) (calling social media “the modern public square”).

²⁹² See Elise Moreau, *Everything You Need to Know About Facebook Groups*, LIFEWIRE (Nov. 10, 2019), <https://www.lifewire.com/facebook-groups-4103720> (“A Facebook Group is a place for group communication and for people to share their common interests and express their opinion. They let people come together around a common cause, issue or activity to organize, express objectives, discuss issues, post photos, and share related content.”).

²⁹³ Elijah Hack, Comment, *The Marketplace of Twitter: Social Media and the Public Forum Doctrine*, 88 U. CIN. L. REV. 313, 315 (2019).

²⁹⁴ Jina Moore, *Social media: Did Twitter and Facebook Really Build a Global Revolution?*, CHRISTIAN SCI. MONITOR (June 30, 2011), <https://www.csmonitor.com/World/Global-Issues/2011/0630/Social-media-Did-Twitter-and-Facebook-really-build-a-global-revolution>.

²⁹⁵ Shannon Tien, *Top Twitter Demographics that Matter to Social Media Marketers*, HOOTSUITE (June 16, 2018), <https://blog.hootsuite.com/twitter-demographics/>.

²⁹⁶ See Lidsky, *supra* note 288, at 1978.

²⁹⁷ See *id.*

²⁹⁸ Briggs, *supra* note 280, at 2.

²⁹⁹ See Lidsky, *supra* note 288, at 1978 (noting “citizens are less likely to seek out a government-sponsored social media presence that does not” offer the interactive features of Facebook groups).

presidential election³⁰⁰—had nearly eighty-nine million followers before its suspension,³⁰¹ and was used for over 11,000 tweets while Trump was in office.³⁰² Joe Biden defeated Trump in the 2020 presidential election in large part because of his voter outreach efforts on social media, which included livestreamed discussions with his supporters.³⁰³ Regular social media use is a logical move for government officials, as “communication with the public via electronic means such as social media is inexpensive, has a wide reach, and is virtually instantaneous.”³⁰⁴ Over the last decade, Twitter and other social media sites have helped spur political revolutions in Iran, Libya, and Egypt, among other countries, by providing citizens with a platform to organize protests, distribute photographs and live videos, and share information with other countries that their government would otherwise censor.³⁰⁵ Peter Hirshberg, a senior fellow at the Annenberg Center on Communication Leadership & Policy at the University of Southern California, described social media as a “catalytic part” of these revolutions.³⁰⁶ Omar Amer, a representative of the Libyan Youth Movement, noted that “[w]ithout social media, . . . the global reaction to [anti-government protests in] Libya would have been much softer, and very much delayed.”³⁰⁷ Social media’s unique capability to give citizens constant access to their elected officials and to communicate with other citizens worldwide serves as a constant check against unconstitutional government overreach.

Government-run social media accounts also satisfy *American Library*’s suggestion that citizens’ interest in a public forum is strengthened if the access the forum provides to government officials is cost-free.³⁰⁸ The Eastern District of Pennsylvania in *American Library* noted that the internet in a public library might qualify as a traditional public forum, in part because “[t]he only direct cost to library patrons who wish to receive information, whether via the Internet or the library’s print collection, is the time spent reading.”³⁰⁹ Similarly, the only cost to the citizen in interacting with government officials is an internet

³⁰⁰ Lesley Stahl, *President-Elect Trump Speaks to a Divided Country*, CBS NEWS (Nov. 13, 2016), <https://www.cbsnews.com/news/60-minutes-donald-trump-family-melania-ivanka-lesley-stahl/>.

³⁰¹ Cristiano Lima, *Twitter Boots Trump*, POLITICO (Jan. 8, 2021), <https://www.politico.com/news/2021/01/08/twitter-suspends-trump-account-456730>.

³⁰² Nicole Lyn Pesce, *Trump Hits Uncharted Territory While Reacting to His Impeachment Trial*, MARKETWATCH (Jan. 23, 2020, 10:57 AM), <https://www.marketwatch.com/story/this-is-trump-unleashed-these-charts-show-that-the-president-is-tweeting-and-speaking-more-than-ever-2019-09-23>.

³⁰³ See Heilwell, *supra* note 3.

³⁰⁴ Briggs, *supra* note 280, at 2.

³⁰⁵ Moore, *supra* note 294.

³⁰⁶ *Id.*

³⁰⁷ *Id.*

³⁰⁸ *Am. Libr. Ass’n, Inc. v. United States*, 201 F. Supp. 2d 401, 466–67 (E.D. Pa. 2002).

³⁰⁹ *Id.* at 467.

connection—and with the ubiquity of the internet, even this cost is fading.³¹⁰ Like other traditional public forums, government-run social media accounts encourage democratic values by being easy to access and not “[charging] members of the public each time they use the forum.”³¹¹

3. *A Need to Curb Arbitrary Exercise of Government Power*

Protection against arbitrary exercise of government power has been a goal of the public forum since its conception.³¹² In *Kunz*, the Court found an ordinance unconstitutional in part because it vested largely unchecked discretion in an administrative official to enforce “broad criteria” as to what speech and speakers were permitted in the forum.³¹³ *Kunz* and other pre-*Perry* cases made clear that the government cannot police a public forum using vague standards, or even interpret concrete standards in a vague or arbitrary manner.³¹⁴ For example, a clear standard proposed and ratified by a legislative body strengthens the government’s interest in a public forum; the interest is strengthened further if the standard is applied rationally and without individual discretion.

Government-run social media accounts are rarely subject to such clear and rational standards.³¹⁵ Policies that govern a social media account, unlike those governing public, physical forums, are often created and enforced by a single person, which leads to arbitrary censorship via vague or nonexistent standards.³¹⁶ In *Davison I*, the government created and followed a social media policy for its Facebook page, but the policy allowed government officials free rein in limiting dialogue on the page to the loose standard of “matters of public interest in Loudoun County,” and restricted comments that were “clearly off topic.”³¹⁷ The policy provided no guidance for determining what was a “matter of public interest” or “clearly off topic,” and the decision to censor private speech ultimately fell to one person.³¹⁸ In *Davison II*, the page was not governed by any social media policy at all, and the government official censored speech purely based on her personal preference.³¹⁹ Affording government-run social

³¹⁰ See *id.* at 466–67 (discussing the availability of the internet in public libraries).

³¹¹ *Id.* at 467.

³¹² See *Kunz v. New York*, 340 U.S. 290, 294 (1951).

³¹³ *Id.*

³¹⁴ *Id.*; *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 90–91 (1965).

³¹⁵ See *Davison I*, 247 F. Supp. 3d 767, 776 (E.D. Va. 2017); *Davison II*, 267 F. Supp. 3d 702, 717 (E.D. Va. 2017).

³¹⁶ See *Davison I*, 247 F. Supp. 3d at 776; *Davison II*, 267 F. Supp. 3d at 717.

³¹⁷ *Davison I*, 247 F. Supp. 3d at 776.

³¹⁸ *Id.*

³¹⁹ *Davison II*, 267 F. Supp. 3d at 717.

media the strongest level of protection under the *Perry* public forum doctrine is critical to ensuring that government officials do not act arbitrarily in censoring the speech of their constituents.

4. *Limited Disruption*

The Supreme Court's pre-*Perry* jurisprudence made clear that the more disruption caused by citizens' speech, the lower the individual interest in speech within the forum, and the less First Amendment protection afforded to the speech.³²⁰ In *Grayned*, the Court held that an ordinance prohibiting a protest that "materially disrupt[ed] classwork" at a public school was not a violation of the First Amendment, as avoiding disruption was a legitimate government interest that weighed against the protection of private speech.³²¹ The disruption was even more concerning in a forum where other legitimate government interests were implicated, such as a public school.³²²

Social media raises no such concerns. Interaction over social media—even a protest—is virtual and often instantaneous.³²³ Users can exercise their First Amendment rights to petition and assembly from their own homes, limiting disruption in a way that cannot be limited in streets or parks.³²⁴ To voice displeasure publicly with a government policy, a citizen need not march on the legislative building as the protestors in *Edwards* did;³²⁵ she can merely, from thousands of miles away, comment on a government official's Facebook post or reply to a tweet. This, in turn, implicates a low level of government interest and bolsters the relative strength of the citizens' interest in private speech.

³²⁰ See *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972); *Edwards v. South Carolina*, 372 U.S. 229, 231–33 (1963); *Brown v. Louisiana*, 383 U.S. 131, 139–40 (1966) (plurality opinion).

³²¹ *Grayned*, 408 U.S. at 118.

³²² *Id.* at 120.

³²³ See Peter Maggiore, Note, *Viewer Discretion Is Advised: Disconnects Between the Marketplace of Ideas and Social Media Used to Communicate Information During Emergencies and Public Health Crises*, 18 MICH. TELECOMMS. & TECH. L. REV. 627, 628 (2012) ("[S]ocial media has become a useful way to disseminate information to a large group of people with little cost in terms of time[.]").

³²⁴ Compare *id.* (discussing the convenience and limited cost of social media), with *Edwards*, 372 U.S. at 237 ("[F]reedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest[.]") (quoting *Terminiello v. Chicago*, 337 U.S. 1, 4–5 (1949)).

³²⁵ *Edwards*, 372 U.S. at 230.

C. *The Missing Link: The Unnecessary Rigidity of the “Immemorial” Standard*

The courts’ main (and often only) objection to expansion of the traditional public forum to social media is a strict adherence to the “immemorial” language from *Hague*.³²⁶ This is the only hurdle that government-run social media accounts cannot easily clear. In *Trump I*, the Southern District of New York held that Donald Trump’s Twitter page could not be classified as a traditional public forum because there was “no historical practice of the interactive space of a tweet being used for public speech and debate since time immemorial, for there is simply no extended historical practice as to the medium of Twitter.”³²⁷ Similarly, in *American Library*, the Supreme Court held that the internet could not be a traditional public forum because it “did not exist until quite recently.”³²⁸ Even outside of the courts, many legal scholars have assumed that this lack of history is dispositive.³²⁹

While this strict application of the “immemorial” requirement is well-intentioned, it is misguided. This section shows that the famous *Hague* language should be treated as less of a rigid standard and more of an important, but not dispositive, factor to be weighed among the other “core qualities” of the traditional public forum. The section is split into two subsections, each of which addresses a different misreading in the development of the public forum doctrine: first, the *Perry* Court’s overly narrow reading of pre-*Perry* jurisprudence, and second, courts’ overly narrow reading of *Perry* itself.

1. *A Misreading of Pre-Perry Jurisprudence: “Designed for and Dedicated to”*

The *Perry* three-part framework is the cornerstone of all public forum analysis today,³³⁰ ubiquitous to the point that it becomes easy to forget that *Perry* was merely a summation of the forty-three years of case law that preceded it.³³¹ In fact, *Perry* was the first time that the Court attempted any sort of classification within the public forum doctrine beyond a binary yes-or-no system for

³²⁶ See *Trump I*, 302 F. Supp. 3d 541, 574 (S.D.N.Y. 2018).

³²⁷ *Id.*

³²⁸ *United States v. Am. Libr. Ass’n, Inc.* 539 U.S. 194, 205 (2003) (plurality opinion).

³²⁹ See Briggs, *supra* note 280, at 29 n.142; Lidsky, *supra* note 288, at 1983.

³³⁰ See *Pleasant Grove City v. Summum*, 555 U.S. 460, 469–70 (2009); *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998).

³³¹ See *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983). *Perry* was an attempt by the Court to group the prior century of public forum cases into lines of best fit. See *id.*

government-owned properties.³³² In determining the grounds for the traditional public forum, the Court in *Perry* relied largely on Justice Roberts’s tried-and-true language from *Hague*: any government properties that had “immemorially been held in trust for the use of the public and, time out of mind, [had] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions” were classified as traditional public forums.³³³ Courts have viewed this temporal standard as an absolute prohibition on expanding the traditional public forum to anything other than streets, parks, sidewalks, or their functional equivalents, regardless of whether the forum in question shares other similarities with this time-honored group.³³⁴ Examples of forums that could not clear this lofty bar under the *Perry* standard include public theaters,³³⁵ the internet in a public library,³³⁶ and, of course, government-run social media accounts.³³⁷

Each of these forums would likely have been afforded the highest standard of constitutional protection under the Supreme Court’s pre-*Perry* jurisprudence.³³⁸ In the Court’s analysis in *Grayned*, eleven years before *Perry*, it did not make a single mention of whether public sidewalks were “immemorially . . . held in trust for the use of the public” when determining whether to extend the *Hague* “streets and parks” standard to include such properties.³³⁹ Instead, it noted that the sidewalk in question, outside of a public school, was likely to be a crucial place for public speech because “public schools in a community are important institutions, and are often the focus of significant grievances.”³⁴⁰ In *Conrad*, which granted the highest level of constitutional protection to private speech within a public theater, the Court did not base its decision on whether theaters “time out of mind, have been used for purposes of assembly”;³⁴¹ it instead held that the key similarity between theaters and “streets and parks” was that they were “*designed for and dedicated to* expressive activities.”³⁴² Here, the time at which the forum was created was ultimately less

³³² Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1749–50 (1987).

³³³ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939); see Post, *supra* note 332, at 1750.

³³⁴ See, e.g., *Trump I*, 302 F. Supp. 3d 541, 574 (S.D.N.Y. 2018); *Forbes*, 523 U.S. at 678.

³³⁵ See *Perry*, 460 U.S. at 45–46 (noting that municipal theaters fall under the second category).

³³⁶ See *United States v. Am. Libr. Ass’n, Inc.*, 539 U.S. 194, 205 (2003) (plurality opinion).

³³⁷ See, e.g., *Trump I*, 302 F. Supp. 3d at 574.

³³⁸ In fact, public theaters already were afforded such protection in *Conrad*. See *Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555–56 (1975).

³³⁹ *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972).

³⁴⁰ *Id.* at 118.

³⁴¹ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939); see *Conrad*, 420 U.S. 546.

³⁴² *Conrad*, 420 U.S. at 555 (emphasis added).

important than a different set of questions: (1) *when the forum was created*, was it designed for expressive activities, and (2) had it been dedicated to such activities ever since?³⁴³

Perry drew unprecedented lines across the public forum doctrine that explicitly separated properties that the Court had previously grouped together. In *Conrad*, the Court held that restricting speech in the theater was “indistinguishable” from cases in which the government restricted speech in public streets.³⁴⁴ Surprisingly, *Perry* explicitly excluded public theaters from its definition of traditional public forums, electing to include them within the second category of public forums alongside venues like meeting rooms in universities and schools.³⁴⁵ This was an odd marriage, as the defining feature of the theater that the Court focused on in *Conrad*—that it was “designed for and dedicated to expressive activities”—was much more similar to streets, parks, or sidewalks than school meeting rooms, which gained their significance purely from government designation, not from any intrinsic quality as a place for discussion.³⁴⁶ The Court in *Perry* chose instead to draw its dividing lines based on the “immemorial” language in *Hague*,³⁴⁷ creating an overly narrow standard for the traditional public forum that did not accurately reflect the progression in the doctrine over the forty-four years between *Hague* and *Perry*.

2. *A Misreading of Perry: “By Government Fiat”*

Of course, *Perry* electing to break with precedent is not cause in itself to revert to the precedent. However, the flexibility of public forum jurisprudence from 1939 to 1982 was actually baked into *Perry* itself—it is *Perry*’s progeny that seems to have left it behind. *Perry* held that traditional public forums are places which “by long tradition or *by government fiat* have been devoted to assembly and debate.”³⁴⁸ Thus, the *Perry* Court’s version of the traditional public forum is not, by its language, limited to *Hague*’s “immemorial” standard.³⁴⁹ Multiple Supreme Court cases have directly quoted this *Perry* language in determining what constitutes a public forum, but none seemed to factor the second prong into their analysis.³⁵⁰ This did not escape the notice of

³⁴³ *Id.*

³⁴⁴ *Id.* at 552–53.

³⁴⁵ *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983).

³⁴⁶ *Conrad*, 420 U.S. at 555.

³⁴⁷ *Perry*, 460 U.S. at 45.

³⁴⁸ *Id.* (emphasis added).

³⁴⁹ *See id.*

³⁵⁰ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 817 (1985) (Blackmun, J., dissenting); *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998).

Justice Blackmun, who in his *Cornelius* dissent noted that, per *Perry*, a traditional public forum could be created by government fiat even if the forum did not have a “long tradition . . . [of] assembly and debate.”³⁵¹

The intended weight of the additional language in *Perry* is unclear, but, in conjunction with the expansive history of the pre-*Perry* public forum doctrine, it suggests that the “immemorial” standard is not the be-all and end-all of the traditional public forum that many courts have claimed it to be. A government forum that was created for the purposes of assembly, debate, and expressive activities and has been used in such a way since its inception—in other words, one that satisfies *Conrad*’s “designed for and dedicated to” standard—could fit the definition of a traditional public forum equally well.³⁵²

Government-run social media accounts certainly clear this standard, as they are created for the purposes of assembly, debate, and expressive activities. Social media platforms have acknowledged this: Twitter’s mission statement is to “give everyone the power to create and share ideas and information instantly without barriers,” vowing to contribute to “a free and global conversation.”³⁵³ Government officials running the social media accounts have acknowledged this.³⁵⁴ Courts have acknowledged this, even those that opted not to classify government-run social media accounts as traditional public forums: in *Trump I*, the Southern District of New York reasoned that Twitter was explicitly designed for interaction, particularly for private users to “petition their elected representatives and otherwise engage with them in a direct manner.”³⁵⁵ That government-run social media accounts do not satisfy the *Hague* “immemorial” requirement should not serve as an absolute bar to their classification as traditional public forums, as they clearly satisfy the “designed and dedicated to” standard suggested by the Court in *Conrad* and *Perry*. It is not only logical to extend the highest level of First Amendment protection to the “most important place[] . . . for the exchange of views” in today’s society,³⁵⁶ it is also legally sound.

³⁵¹ *Cornelius*, 473 U.S. at 825 (Blackmun, J., dissenting).

³⁵² *See id.*

³⁵³ *Investor Relations FAQ*, TWITTER, <https://investor.twitterinc.com/contact/faq/default.aspx> (last visited Feb. 14, 2021).

³⁵⁴ *See Trump I*, 302 F. Supp. 3d 541, 574 (S.D.N.Y. 2018) (quoting the White House Social Media Director as saying that Trump’s Twitter account is a means by which he communicates “directly with . . . the American people”); *Davison II*, 267 F. Supp. 3d 702, 708 (E.D. Va. 2017) (“Defendant designates her ‘Chair Phyllis J. Randall’ Facebook page as a channel through which her constituents are directed to contact her[.]”).

³⁵⁵ *Trump I*, 302 F. Supp. 3d at 574.

³⁵⁶ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

IV. POST-TRUMP QUESTIONS, TRENDS, AND IMPLICATIONS

As the *Trump* litigation caught the collective eye of the nation, various criticisms of the idea of social media as a public forum surfaced.³⁵⁷ In response to the Second Circuit's holding in *Trump II*, multiple legal scholars and commentators wrote that the Second Circuit erred by labeling Trump's Twitter account a public forum because it was ultimately owned by Twitter, rather than the government.³⁵⁸ The essence of this argument is that a public forum must be controlled entirely by the government, or else it cannot be public.³⁵⁹ The idea of a privately owned and controlled public forum, however, has already been addressed by the Supreme Court.³⁶⁰ In *Conrad*, the Court held that a privately owned theater that was leased to the government still amounted to a public forum, even though the private company had control, through its lease agreement, over what speech would be permitted in the theater.³⁶¹ The government did not hold title to the theater in fee simple; it was merely a long-term tenant.³⁶² Nonetheless, its dominion over the forum, even if temporary, was sufficient to make it a publicly owned space for public forum purposes.³⁶³ That private property could be a public forum even in the absence of total government control was also suggested by the Court in *Cornelius*, which held that "a speaker must seek access to public property or to private property devoted to public use to evoke First Amendment concerns."³⁶⁴ Legal ownership and full control of a forum by the government has never been an insurmountable hurdle to public forum status,³⁶⁵ and it should not be an insurmountable hurdle for government-run social media accounts.

Another logical concern about the implications of *Trump II* is that classifying government-run social media as any sort of public forum—let alone a traditional public forum—might allow *too much* speech, leaving the government helpless

³⁵⁷ E.g., Noah Feldman, *The Courts Still Don't Understand Trump's Twitter Feed*, BLOOMBERG (Jul. 9, 2019, 4:24 PM), <https://www.bloomberg.com/opinion/articles/2019-07-09/appeals-court-asks-wrong-question-in-trump-twitter-blocking-case>; John Samples, *Do You Have a Constitutional Right to Follow the President on Twitter?*, CATO INST. (June 13, 2017, 10:03 AM), <https://www.cato.org/blog/do-you-have-constitutional-right-follow-president-twitter>.

³⁵⁸ Feldman, *supra* note 357; Samples, *supra* note 357.

³⁵⁹ Feldman, *supra* note 357 (stating that "[p]roperty can't be 'government-controlled' if someone else can decide what speech happens there").

³⁶⁰ *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975).

³⁶¹ *Id.* at 547–48, 552.

³⁶² *Id.* at 547.

³⁶³ *Id.* at 555.

³⁶⁴ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985) (emphasis added).

³⁶⁵ *See Conrad*, 420 U.S. at 555.

to censor potentially dangerous speech on their page.³⁶⁶ To be sure, if government-run social media accounts were classified as traditional public forums, government officials would be much more restricted in their ability to block and remove private speech from their pages. This restriction, however, would be far from absolute.³⁶⁷ The traditional public forum does not allow for blanket protection of private speech; restrictions that are “necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end” are permitted.³⁶⁸ This leaves untouched the government’s ability to censor, for instance, threatening or harmful speech, while removing its ability to censor speech at will.³⁶⁹

While concerns about social media as a public forum are relatively recent, concerns about the public forum doctrine as a whole have persisted for decades. The *Perry* framework has been severely criticized ever since its creation³⁷⁰ and is ripe for reorganization. Much of this ire has been directed at the muddiness of the second *Perry* category, which even today remains subject to varying judicial interpretations.³⁷¹ In his dissenting opinion in *Cornelius* in 1985, Justice Blackmun noted that the permitted restrictions on speech in a limited public forum were generally determined by the government’s intent in deciding to which parties or subjects the forum should be “open.”³⁷² If the government determines the boundaries of a limited public forum and its “ability to define the boundaries . . . is unconstrained,” he argued, then “the limited-public-forum concept is meaningless.”³⁷³ Justice Kennedy raised similar issues in his concurring opinion in *International Society for Krishna Consciousness v. Lee* in 1992,³⁷⁴ arguing that a system predicated on governmental intent “leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area.”³⁷⁵

³⁶⁶ See Alex Abdo, *@realDonaldTrump and the First Amendment*, KNIGHT FIRST AMEND. INST. COLUMBIA UNIV. (June 19, 2017), <https://knightcolumbia.org/content/realdonaldtrump-and-first-amendment>.

³⁶⁷ See *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

³⁶⁸ *Id.* (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)).

³⁶⁹ See *id.*

³⁷⁰ See, e.g., *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 826 (1985) (Blackmun, J., dissenting).

³⁷¹ See *id.*; *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 693–94 (1992) (Kennedy, J., concurring).

³⁷² *Cornelius*, 473 U.S. at 825 (Blackmun, J., dissenting).

³⁷³ *Id.* at 826.

³⁷⁴ *Lee*, 505 U.S. at 693 (1992) (Kennedy, J., concurring).

³⁷⁵ *Id.* at 695.

Justice Kennedy criticized the idea of the *traditional* public forum as well in *Lee*.³⁷⁶ Confining traditional public forums to the “immemorial” *Hague* venues, he argued, creates an overly rigid doctrine with insufficient room for expansion.³⁷⁷ As an alternative, he suggested a system that evaluates each public property on its merits, with governmental intent not being nearly as important a factor as the “objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government.”³⁷⁸

This line of discourse continues today. Lyrissa Lidsky, Dean of the University of Missouri School of Law, noted in 2011 that “blurred lines between limited public forums and nonpublic forums . . . create category confusion.”³⁷⁹ Courts still disagree on what exactly the second *Perry* category entails.³⁸⁰ Extending the traditional public forum to include government-run social media accounts would not rattle well-established legal precedent; rather, it would add clarity to a muddy doctrine that has been interpreted in different ways by different courts.³⁸¹ It would help to modernize an increasingly antiquated framework that offers the strongest levels of First Amendment protection only to the forums that were hotspots for private speech in 1939.³⁸² Perhaps most importantly, it would strengthen constitutional protection for speech in the most critical modern-day forum for exercising First Amendment rights.³⁸³

CONCLUSION

In 1939, when the Supreme Court decided *Hague v. Committee for Industrial Organization*, public streets and parks were the most crucial government-owned venues for speech and assembly. This is no longer the case. In the Supreme Court’s own words, social media is the “most important place[] . . . for the exchange of views” in today’s society.³⁸⁴ Government-run social media accounts encompass four of the five “core qualities” of the traditional public forum: (1) they are among society’s most important places for the exercise of

³⁷⁶ *Id.* at 696–97.

³⁷⁷ *Id.* at 697–98.

³⁷⁸ *Id.* at 698.

³⁷⁹ Lidsky, *supra* note 288, at 1980.

³⁸⁰ Compare *Davison v. Randall*, 912 F.3d 666, 687 (4th Cir. 2019) (equating the limited public forum and the designated public forum), with *Price v. City of New York*, No. 15 Civ. 5871 (KPF), 2018 U.S. Dist. LEXIS 105815, at *30–31 (S.D.N.Y. June 25, 2018) (“A limited public forum is a subset of the designated public forum.”).

³⁸¹ See *supra* Part III.A.

³⁸² See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (plurality opinion).

³⁸³ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–36 (2017).

³⁸⁴ *Id.* at 1735.

free speech; (2) they provide cost-free civilian access to government officials through the First Amendment rights of assembly and petition; (3) they are, in the absence of speech protections, at risk of arbitrary exercise of government power; and (4) they can host speech without causing significant disruption. The only hurdle between government-run social media accounts and classification as traditional public forums—and, in turn, the highest level of First Amendment protection for private speech—is the “immemorial” requirement imposed by *Hague*.

The “immemorial” requirement, long considered by courts to be a dispositive factor for classification as a traditional public forum, should be loosened when evaluating government social media. This is a logical move for practical reasons, as it would afford the highest level of First Amendment protection to the forum that is most vital for the exercise of First Amendment rights today. It is also logical for jurisprudential reasons, as the Supreme Court in *Southeast Promotions, Ltd. v. Conrad* offered a “traditional public forum-level” of protection to speech in forums without an immemorial history, so long as the “forums [were] designed for and dedicated to expressive activities.”³⁸⁵ Even *Perry Education Ass’n v. Perry Local Educators’ Ass’n*, which is credited with cementing the “immemorial” requirement, defined traditional public forums as forums which “by long tradition *or by government fiat* have been devoted to assembly and debate.”³⁸⁶ Government-run social media accounts, by virtue of government officials’ own words, comfortably clear these standards. Thus, they should be afforded the highest level of First Amendment protection by the courts: the traditional public forum.

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³⁸⁵ *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975).

³⁸⁶ *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (emphasis added).

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