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Free speech is the bedrock of a functioning democracy, and Twitter is the digital town square where matters vital for the future of humanity are debated.[1]

E. Musk

Lo que en la democracia ateniense fue el ágora, la plaza pública a la que se iba para ver y escuchar a los demás, lo constituyen hoy los periódicos impresos, las televisiones, las radios y los blogs y todo el abigarrado complejo de internet.

F. Savater

I. Introduction

Using metaphors to explain or illustrate abstract or complex concepts is not new. As early as the 4th century BC, in his work *The Republic*, Plato used various metaphors in the famous allegory of the cave to explain people's relationship with knowledge and truth. The use of metaphors to discuss knowledge is not accidental. They can function as useful tools that facilitate understanding and, therefore, have cognitive value.[2] This is true particularly because "the essence of metaphor is understanding and experiencing one kind of thing in terms of another."[3]

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1 Retrieved from: https://twitter.com/elonmusk/status/1518677066325053441, last accessed: May 25, 2024.

2 Lakoff, George and Johnson, Mark, *Metaphors We Live By*, Chicago, The University of Chicago Press, 1980.

3 Ibid.

In fact, as George Lakoff and Mark Johnson explain:

> Metaphor is for most people a device of the poetic imagination and the rhetorical flourish, a matter of extraordinary rather than ordinary language (...) a matter of words rather than thought or action. For this reason, most people think they can get along perfectly well without metaphor (...). [However] metaphor is pervasive in everyday life, not just in language but in thought and action. Our ordinary conceptual system, in terms of which we both think and act, is fundamentally metaphorical in nature.[4]

This last point is important because it will allow us to understand how metaphors operate conceptually and thus, avoid the temptation of thinking of them merely as language operations that link two originally non-metaphorical elements.[5] As mentioned earlier, the authors state that our conceptual system is metaphorical in nature; therefore, our thinking is structured by metaphors. For example, Lakoff and Johnson invite us to think about the metaphorical expression "time is money." Here, "time" is linked to another concept, "money", and other expressions are derived from this connection, such as: wasting time, saving time, giving time, investing time, running out of time, etc. These expressions allow us to see that time in our Western society seems to be a commodity that can be used to pursue other goals. What is interesting is that by acting as if time were a commodity, we conceive of time in that way, and, therefore, we experience and perceive time through that lens. If time is money, then it is a limited resource and, therefore, it is a valuable commodity that must be cared for. We see in this way that the metaphor "time is money" conditions and shapes our experience of time.

Likewise, while the metaphor allows us to understand one aspect of a concept in terms of another, it also "hides" other aspects of the concept that are inconsistent with that metaphor. In other words, the metaphor has a double operation: just as it can help us understand or shed light on a particular concept, it can also conceal or obscure aspects. We will return to the topic of concealment later.

The systematicity that allows us to understand one aspect of a concept in terms of another (for example, understanding one aspect of a discussion in terms of a

[4] Ibid.

[5] This link is unnecessary, in the sense that the link could be another or not exist at all.

battle) will necessarily obscure other aspects of the concept. By allowing us to focus on one aspect of a concept (for example, the conflictive aspects of the discussion), a metaphorical concept can prevent us from focusing on other aspects of the concept that are inconsistent with that metaphor (the discussion as a collaborative construction). In fact, the meaning of a metaphor is not only given by the relationship between the concepts but also by the context or field in which they are built and by the meanings of the words and sentences that compose them.[6]

This probably explains why metaphors abound so much in the field of law and, particularly, in discussions about the right to freedom of expression.[7] In fact, as Roberto Saba observes, when analyzing three specific metaphors about freedom of expression, these metaphors contain assumptions about a certain type of exercise of freedom of expression and a particular conception of democracy that may prioritize individual autonomy, on the one hand, or collective self-government, on the other. In this sense, metaphors, in addition to having a rhetorical and cognitive function, also have legal implications that outline the scope of action for individuals and the state. This work will address in depth a metaphor that has been gaining relevance in recent years and that has been repeated by scholars, judges, governments and private companies alike, namely: social media as the new public forums or public squares.

Specifically, the objective of this work is to specify the scope of the public forum doctrine in the United States and evaluate its applicability to social media. Although this research is conducted in Latin America, the focus on the United States is justified for two reasons. First, one of the first explicit references to social media as public forums emerged in the United States. Second, the United States has a solid jurisprudential framework on the public forum doctrine, where its nuances and complexities have been thoroughly analyzed. These perspectives can be valuable to enrich debates on freedom of expression on the internet in Latin America and, especially, to understand why we increasingly encounter, both in media and academic contexts, references to social media as the new public forums or public squares.

First, the function of this metaphor in law will be analyzed, including the characteristics of spaces designated as public forums and, particularly, how discourse

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6 Lakoff and Johnson, (n 3).

7 Saba, Roberto, "Las metáforas de la libertad de expresión. Estudio preliminar," *Libertad de expresión: un ideal en disputa*, Bogotá, Siglo del Hombre Editores, 2021.

circulates (or should circulate) in these spaces. This section is based on an analysis of U.S. jurisprudence, where this concept has been more extensively developed. The next section will discuss the various cases in which the metaphor of social media as a public forum has been used. The objective of this review is to identify whether there are uniformities in its use or if it adopts specific meanings depending on the particular case. The final section will analyze whether the metaphor fits what it attempts to metaphorize and whether there are possible adjustments or inconsistencies in the scope of the metaphor. This exercise aims to illuminate the implications of thinking of social media as a public forum, specifically for the exercise of the right to freedom of expression and deliberation in a democratic society. The ultimate goal of the work is to determine whether this metaphor makes substantive contributions to discussions on the regulation of online discourse.

II. The Public Forum Doctrine in the United States

The public forum doctrine has been extensively developed in United States constitutional law. It is characterized as an open space for citizens to express themselves freely under the right enshrined in the First Amendment of the country's Constitution. According to this doctrine, there are various types of public forums with distinct characteristics that modify the conditions for expression. At the end of this work, there is a table summarizing the types of public forums that will be described below.

First, we can mention the "traditional public forums" such as streets, sidewalks and parks (we could evoke here the image of the *agora* in ancient Greece). The presumption there is that anyone can express themselves freely within the limits granted by the First Amendment and, therefore, cannot be prevented from exercising this right since public speech must circulate. Likewise, the content expressed in these forums cannot be limited, except when "its regulation [is] necessary to serve a compelling state interest and that is narrowly tailored to achieve that end."[8] In public forums, the state can regulate issues of "time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative chan-

[8] Nickodem, Kristi and Wilson, Kristina, "Responding to First Amendment Audits: What is a 'Forum' and Why Does it Matter?" in: *Coates' Canons NC Local Government Law*, 2022.

nels of communication."[9] Content-based restrictions must pass strict scrutiny, and viewpoint-based restrictions are prohibited.[10]

Secondly, there are "designated public forums." Here, the government intervenes by creating a non-traditional forum for public discourse to be expressed. In these cases, the government decides to intentionally open a property (which was not traditionally accessible to the public) so that the public can express themselves. The government is not obliged "to create such a forum or to keep it open, but as long as such a forum is open, the government is subject to the same limitations that apply to a traditional public forum."[11] Examples include the use of a municipal auditorium or theater for public expression. The possible restrictions are similar to those of a traditional public forum.

Thirdly, the doctrine distinguishes "limited public forums," which are spaces created for citizen deliberation that are not traditionally public, but are specifically designated by the government to be open for certain groups of people or specific topics. In these cases, the government establishes initial access restrictions to that forum depending on the topic or the speaker. Examples of this type of forum include "public school facilities during school hours and the interior of a town hall."[12] In these spaces, the government can impose restrictions on expression as long as they are viewpoint-neutral and reasonable in light of the purpose of the forum. Once a government entity opens a public forum limited to certain speakers or topics, "it must respect the legal limits that it has established." However, the government is not required to create a limited public forum or keep it open for expressive activities indefinitely. Some consider that this type of forum is a derivation of the so-called "nonpublic" ones, the last category within the doctrine.

In these cases we are dealing with a space that neither by tradition nor by designation has been considered a forum for public communication. Furthermore, opening the nonpublic forum to expressive conduct somehow interferes with the objective use and purpose of this property.[13] Therefore, the government has much more flexibility to create rules that limit expression and can reserve such a forum for its intended purposes, communicative or otherwise, as long as the regulation of

9 Supreme Court of the United States, "Frisby v. Schultz," 487 U.S. 474, decision of June 27, 1988.

10 United States Court of Appeals, Eighth Circuit, "Minnesota Voters Alliance v. Mansky," 585 U.S., decision of June 14, 2018.

11 Nickodem and Wilson, (n 9).

12 Ibid.

13 United States Court of Appeals, Fourth District, "Warren v. Fairfax County," 196, F.3d 186, decision of June 9, 1999.

expression is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.[14][15] "Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral."[16] In fact, a United States court ruled in favor of the University of Virginia after it denied funding through the Student Activities Fund (SAF)[17] to a religious student organization. The court found that the SAF was a "nonpublic forum" and not a limited public forum. Furthermore, it held that the denial of financing was reasonable because the university had limited funds to disburse and that, moreover, it had done so with the objective of complying with federal and state constitutional mandates of religious neutrality. However, this position was later contradicted by the Fourth Circuit Court of Appeals. Here, the court considered that the university had discriminated against students and that the SAF was actually a limited public forum so "[o]nce the limited public forum is opened, the government must respect its restrictions (…) and not discriminate against speech when its distinction is not 'reasonable in light of the legitimate purposes for which it was created.'"[18]

We see here that the ownership of the space that functions as a forum is important, since, as the courts in the United States have identified, public property becomes a "nonpublic forum" when "the purpose of the property is to conduct or facilitate government affairs, not to provide a forum for public hearing."[19] Some examples of what courts have considered as this type of forum are government employees' offices, the interior of polling places, public school teachers' mailboxes, lobby areas of government buildings, terminals of publicly operated airports, and military bases, among others.[20]

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[14] Supreme Court of the United States, "Perry Educ. Ass'n v. Perry Educators' Ass'n," 460 U.S., 37, decision of February 23, 1983.

[15] United States Court of Appeals, Eighth Circuit, "Minnesota Voters Alliance v. Mansky," (n 11).

[16] My emphasis. Supreme Court of the United States, "Cornelius v. NAACP Legal Def. & Educ. Fund," 473 U.S., 788-806, decision of July 2, 1985.

[17] The SAF had been created with the purpose of allocating funding to organizations whose purpose was consistent with the educational mission of the university. The SAF charged a mandatory fee to each full-time student at the university. Salzberg, Mark Daniel, "Rosenberger v. Rector & Visitors of the University of Virginia: The Myth of the Content Neutral Establishment Clause," in: *Fordham Intellectual Property, Media and Entertainment Law Journal*, Vol. 6, No. 2, 1996, retrieved from: https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1116&context=iplj, last access: May 25, 2024.

[18] United States Court of Appeals, Fourth Circuit, "Rosenberger v. Rector & Visitors of the Univs. of Va.," 515 U.S., 819, 829, decision of June 29, 1995.

[19] United States District Court for the Western District of Washington in Seattle, "Freedom Found. v. Sacks," Case No. 3:19-cv-05937-BJR, decision of May 4, 2021.

[20] Nickodem and Wilson, (n 9).

So, according to United States law, the designation of a forum determines the obligations and powers the state will have regarding them. Broadly speaking, we can say that in "traditional public forums" and in "designated public forums," restrictions on time, place, and manner of expression are allowed, as long as they are content-neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication. When content is regulated, the requirements for valid restrictions become more burdensome: the government interest must not be just significant, but necessary or compelling, and the restriction must be "very narrowly tailored" to meet strict scrutiny. Restrictions on expression are permitted in "limited public forums" or "nonpublic forums" as long as they are viewpoint-neutral and reasonable in light of the purpose of the forum.[21]

The "Pruneyard" case, decided by the Supreme Court of the United States, is important for analyzing the metaphor that is the subject of this work. In this case, a group of high school students set up a booth at the entrance of the Pruneyard shopping center to gather signatures for a petition against a United Nations resolution on Zionism. The mall guards asked the students to leave because they did not have authorization from the mall owners. The students subsequently sued Pruneyard on the grounds that their right to free speech under the California Constitution had been violated. The Santa Clara County Superior Court ruled against the students, but the California Supreme Court reversed this decision, and, finally, upon appeal by the shopping center, which argued that its rights under the First Amendment were affected (by forcing the shopping center to allow certain types of speech on its premises), the case reached the Supreme Court of the United States. The court upheld the decision of the state Supreme Court. Under the California Constitution, people can peacefully exercise their right to free speech in parts of private shopping centers that are regularly kept open to the public, subject to reasonable regulations adopted by the shopping centers. This greater protection compared to the federal First Amendment is compatible with federal law, as long as those state rights do not infringe on any federal constitutional right. In this case, the court held that allowing students to express themselves around the shopping center did not force Pruneyard to speak or endorse a specific speech as its own.[22]

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[21] Ibid.

[22] Whitney, Heather, "Search Engines, Social Media, and the Editorial Analogy," *The Perilous Public Square*, New York, Columbia University Press, 2020.

III. Social Media as Public Forums or Public Squares

1. Jurisprudence and Legislation in the United States

As can be seen from the citations in the previous section, American jurisprudence on public forums is extensive and long-standing. However, the introduction of the metaphor of social media as a public forum in judicial decisions is relatively new.

In the 2014 case "McCullen v. Coakley," the subject was the Massachusetts State Legislature's creation of 35-foot buffer zones around entrances, exits, and accesses to abortion clinics in that state. Eleanor McCullen, who used to go to these clinics to offer help and religious support to women attending them, considered that this restriction unlawfully affected her right to freedom of expression. Along with other plaintiffs, she sued the state of Massachusetts. The case reached the Supreme Court of the United States, which ruled in favor of the plaintiffs, considering that the law was unconstitutional. While the Court noted that the law was not based on content or viewpoint and therefore did not need to be analyzed under strict scrutiny, it did find that it was not narrowly tailored to serve a particular significant state interest, as it restricted expression more than was necessary to promote that interest. Beyond the facts of the case, this decision is important for the purposes of this investigation because it incidentally mentions social media as websites. In one paragraph, the Court states that "It is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out (…) this aspect of traditional public fora is a virtue."[23] The statement included in this *obiter dictum* suggests that the court was not willing, at that time, to include the internet within the metaphor under analysis.

The metaphor of social media as public forums was first used in "Packingham v. North Carolina" in 2017. There, the United States Supreme Court ruled that a North Carolina statute, which prohibited registered sex offenders from using social media, was unconstitutional for violating the First Amendment. The Court stated that "Social media allows users to gain access to information and communicate

[23] My emphasis. Supreme Court of the United States, "McCullen v. Coakley," 573 U.S., 464, 12-1,168, decision of June 26, 2014.

with one another about it on any subject that might come to mind. North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge."[24] It continues, "A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights (…). While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace —the 'vast democratic forums of the Internet' in general (…) *and social media in particular.*"[25] This comparison is interesting because, while we are dealing with a metaphor in which social media outlets are seen as streets or parks, it is not clear whether this is a careless rhetorical turn or the invocation, albeit tentatively, of the public forum doctrine. Furthermore, unlike "McCullen v. Coakley," this decision seems to privilege the place that social media occupy regarding the exercise of freedom of expression and democratic deliberation.[26]

Another relevant case is "Davison v. Loudoun County Board of Supervisors *et al.*"[27] from 2017. In this instance, we find a dispute between the defendant, Phyllis Randall, chair of the Loudoun County Board of Supervisors, and the plaintiff, Brian Davison. Randall reportedly banned Davison from accessing her Facebook page titled "Chair Phyllis J. Randall" after Davison posted comments in an online forum that the defendant deemed "defamatory." Davison argued that such a ban violated his right to free speech under the First Amendment. The Virginia District Court agreed with Davison, holding that Randall had acted in her governmental capacity by hosting a Facebook forum open to the public and that, by banning only Davison, she had engaged in viewpoint discrimination. The court did not delve into what type of public forum this was, as viewpoint discrimination is prohibited in all forums.[28] However, the court also mentioned that its decision should not be interpreted as a prohibition on public officials from moderating comments on their social media or that when they do so it will always constitute a violation of the First

[24] My emphasis. Supreme Court of the United States, "Packingham v. North Carolina," 582 U.S., 98, decision of June 19, 2017.

[25] My emphasis.

[26] Franks, Mary Anne, "Beyond the Public Square: Imagining Digital Democracy," in: *The Yale Law Journal* Forum, Vol. 131, 2021, pp. 427-52; Whitney, (n 23).

[27] United States District Court for the Eastern District of Virginia, "Davison v. Loudoun County Board of Supervisors *et al*.," 42 U.S.C., § 1983, decision July 25, 2017.

[28] Ibid.

Amendment. In that sense, the court expressed that a certain degree of moderation is necessary to preserve useful forums for the exchange of ideas.

One of the most relevant cases in recent years was "Knight First Amendment Institute v. Trump"[29] in 2019. Here are the facts of the case: then-President of the United States, Donald Trump, blocked a group of seven users from his personal Twitter account (@realDonaldTrump). Consequently, these users were no longer able to see or respond to his tweets. These users, represented by the Knight First Amendment Institute (KFAI) at Columbia University (which also acted as a party in the process), sued Trump on the grounds that his actions violated the First Amendment. They argued, first, that the personal Twitter account of the president of the United States was considered a "public forum"[30] and, second, that viewpoint discrimination is prohibited in public forums.[31] Trump argued that he had had that account since 2009 and that, since it was his private account, it was not subject to the requirements of the First Amendment. However, the KFAI argued that not only was the right to freedom of expression of the blocked users affected by not being able to access the content in the president's account, but it also impaired the collective dimension of the right to freedom of expression of the rest of the citizens, as they would be deprived of hearing voices critical of the government.[32] In May 2018, the judge in the court of first instance ruled that Donald Trump's personal account was an official account and, as a "designated public forum," he could not block users based on their political orientation. The government appealed this decision, and in 2019, the United States Court of Appeals for the Second Circuit upheld the lower court's decision.

In turn, that year, the Supreme Court of the United States resolved a case that, although it was not about social media, was relevant: "Manhattan Community Access Corp. v. Halleck." This case discussed whether a publicly accessible television station could be considered a state actor and, therefore, be subject to the restrictions of the First Amendment. [33] The United States Court of Appeals for the Second Circuit

[29] United States Court of Appeals, Second Circuit, "Knight First Amendment Institute v. Trump," 928, F.3d 226, decision of September 9, 2019.

[30] For example, in its motion for an injunction, the KFAI stated that: "Because of the way the President and his aides use the @realDonaldTrump Twitter account, the account is a public forum under the First Amendment."

[31] Whitney, (n 23).

[32] Beck, Melinda, "Knight Institute v. Trump," Knight First Amendment Institute at Columbia University, 2021, retrieved from: https://knightcolumbia.org/cases/knight-institute-v-trump, last access: May 25, 2024.

[33] This is not the first case in which the United States Supreme Court ("SCOTUS" hereinafter) has had to decide what type of obligations private cable operators have when they have a service concession. In "Denver Area Ed. Telecommunications Consortium, Inc. v. FCC", the SCOTUS reached a highly controversial and divided decision with six separate opinions. For a detailed analysis of the case see: S.L.S., "Pluralism on the Bench: Understanding Denver Area Educational Telecommunications Consortium v.

ruled in favor of the plaintiffs, holding that the New York City public access channel was a "public forum." Because the city had delegated authority to manage it to a private nonprofit organization – the Manhattan Community Access Corporation – the station had acted as a governmental organization and therefore had to respect viewers' First Amendment rights. However, this decision was reversed by SCOTUS (Supreme Court of the United States). The Supreme Court held that "when a private entity provides a forum for expression, the private entity is not normally limited by the First Amendment because the private entity is not a state actor. The private entity will thus be able to exercise editorial discretion over the speech and speakers at the forum."[34] Consequently, private companies could only be subject to the restrictions of the First Amendment when they exercise powers traditionally exclusive to the state. It is important to note that, as the KFAI expressed in the *amicus curiae* it submitted to the court,[35] this conclusion could be extended analogically to social media platforms. As Mary Anne Franks explains, it seems that protecting free speech in a private forum requires exactly the opposite of what is needed to protect free speech in a public forum: "Private actors must be allowed to exercise their rights to freedom of expression to counteract, ignore or exclude expression when they consider it convenient, even in those cases in which state actors are prohibited from doing so."[36]

Another relevant case is "Prager University v. Google LLC" of 2020. On this occasion, Prager University Foundation ("PragerU" hereinafter), a nonprofit educational and media organization, sued Google, arguing that the company, through its subsidiary YouTube, had exercised discriminatory censorship by restricting at least 21 of its videos with conservative content on the website through age restrictions and the "restricted mode" settings. In 2017, PragerU went to court to request that YouTube be compelled to declassify[37] the restricted videos. YouTube, for its part, also filed a petition to dismiss PragerU's complaint. In 2018, the United States District Court denied PragerU's petition, and PragerU appealed the decision by arguing that YouTube was subject to judicial scrutiny under the First Amendment.

FCC," in: Columbia Law Review, Vol. 97, No. 4, 1997, pp. 1.182-1.201, retrieved from: https://doi.org/10.2307/1123319, last accessed: May 25, 2024.

[34] Supreme Court of the United States "Manhattan Community Access Corp. v. Halleck," 587 U.S., decision of June 17, 2019.

[35] Fallow, Katie, "As Public Forums Move Online, So Does the First Amendment," Knight First Amendment Institute at Columbia University (blog), 2019, retrieved from: https://knightcolumbia.org/content/public-forums-move-online-so-does-first-amendment, last access: May 25, 2024.

[36] Franks, (n 27).

[37] Although the term used in English is declassify and, in technical terms, declassify refers to "lifting the secrecy" that weighs on a public document, in this particular case it refers to YouTube allowing the video to be accessible to the general public.

In 2020, the United States Court of Appeals for the Ninth Circuit issued a ruling. First, it argued that "despite YouTube's ubiquity and its role as a public platform, it is a private forum"[38] and therefore is not subject to strict scrutiny under the First Amendment. Furthermore, the Court expressed that the restrictions imposed by the First Amendment, as well as its guarantees, are only against the government (federal or state), not against private entities. In turn, it mentioned that PragerU never disputed that YouTube was a private entity operating without any state intervention, so it would not be affected by said restrictions; this principle, according to the Court, remains central in the digital age.

The court also recalled its decision from 20 years prior in the case "Howard v. Am. Online Inc.," where it recognized that a private entity that hosts speech on the internet is not a state actor nor an instrument or agent of the state (in line with the definition in "Halleck"). In fact, the Court highlighted that although YouTube can be considered a "paradigmatic public square" on the internet, that does not transform it into a state actor simply by providing a forum for expression.

Similarly, PragerU had argued that YouTube should be considered a state actor for fulfilling a "public function." Consequently, the Court responded that although a private entity can become a state actor when it performs a public function, said relevant function must be both traditional and exclusively governmental and that hosting speeches on a private platform cannot be considered an activity that is traditionally only performed by government entities. The Court also held that characterizing YouTube as a public forum would imply a paradigm shift.[39] In fact, the state action doctrine precludes constitutional scrutiny of YouTube's content moderation under its Terms of Service and Community Guidelines.

Subsequently, the Court rejected another argument by PragerU that was based on a case that we will address later, "Marsh v. Alabama."[40] In that case, it was decided that the more a property owner opens their property for the use of the general public for their benefit, the more their rights become circumscribed by

[38] My emphasis. United States Court of Appeals, Ninth Circuit, "Prager University v. Google LLC," 18-15,712, decision of February 26, 2020.

[39] Ibid.

[40] PragerU used this case to advance its point, forgetting that that doctrine was later limited by the Supreme Court to the specific situations of industrial colonies and those other circumstances in which the private entity exercises a spectrum of municipal powers (see cases "Lloyd Corp." and "Hudgens"). In fact, the Court responded by saying that "YouTube does not meet the requirements. Unlike the industrial colony in Marsh, YouTube simply operates a platform for user-generated video content; it does not perform all the necessary municipal functions [to be considered as such nor does it have] all the characteristics of any other American city."

the constitutional rights of those who use it. However, the Court ruled that this assertion had no support and that for this to occur, the government must intentionally open the property for public discourse.[41] This situation does not apply to YouTube (a private company that is not owned, leased, or controlled by the government), so it cannot be considered a designated public forum. The Court also dismissed the argument that YouTube had become a public forum by autonomously declaring that it was,[42] since the nature of a property as a public forum is not a matter of choice by a private entity.

Another interesting case is "Campbell v. Reisch" from 2021. In 2018, Mike Campbell retweeted another Missouri state representative's comment on one of Rep. Cheri Toalson Reisch's posts. Reisch then blocked Campbell (a registered voter in the representative's district) from accessing or commenting on her Twitter account.[43] In response to this decision, Campbell sued Reisch, arguing that his right to free speech under the First Amendment had been affected by having been discriminated against based on his viewpoint under the color of state law. The term *color of state law* refers to instances where a public official performs an illegal action that is masked under an appearance of legality. For example, when acting under the authority of state law but exceeding the legal limits of that authority (similar to what is known in civil law tradition as "*ultra vires* liability.")

The Court of First Instance ruled in favor of Campbell, considering that his retweet was protected speech under the First Amendment and that the interactive spaces of Representative Reisch's tweets were a "designated public forum" (since the official had used her account to promote her campaign and legislative agenda) and that she could not discriminate based on viewpoint.[44]

However, the United States Court of Appeals for the Eighth Circuit reversed this decision. The court, when analyzing the "Davison" and "Trump" cases, determined that Reisch had not acted under the color of state law and, more importantly, that the representative had used her account mainly to promote her campaign, so her account was private, since running for public office is not a state

[41] Since, according to the Court, the government does not create a public forum by inaction or allow speech, it only does so by intentionally opening a non-traditional forum to public speech.

[42] United States Court of Appeals, Ninth Circuit, "Prager University v. Google LLC," (n 39).

[43] Xu, Eric, "Campbell v. Reisch: Blocking Constituents on Twitter," Jolt Digest (blog), 2021, retrieved from: https://jolt.law.harvard.edu/digest/campbell-v-reisch-blocking-constituents-on-twitter, last access: May 25, 2024.

[44] "Campbell v. Reisch. Eighth Circuit Finds State Representative Not a State Actor When Blocking Constituents on Twitter," in: *Harvard Law Review*, Vol. 135, No. 6, 2022, retrieved from: https://harvardlawreview.org/print/vol-135/campbell-v-reisch/#-footnote-ref-4, last access: May 25, 2024.

action.[45] In addition, the Court held that Reisch created the account privately and that, even after being elected, she continued to use it for campaign-related issues, as tweets about laws or legislative processes were sporadic. Although the banners and handles used gave indications of being an official account, they could also be interpreted as belonging to a personal account. Likewise, it stated that Reisch's Twitter account looked more like a campaign newsletter than an official media outlet.[46] Thus, the Court granted public officials more leeway to justify censoring dissenting opinions on their social media when these are related to campaign activities,[47] since they are not subject to the doctrine of state action.[48]

Finally, there are two legislative developments in the United States that have referred to social media in these terms that are worth mentioning. On the one hand, we find the law of the state of Texas, H.B. 20[49](currently under review by the Supreme Court of the United States), which states that social media platforms function as common carriers, are affected by a public interest and are "central public forums" for public debate. On the other hand, Florida bill SB 7.072 (currently under review by the United States Supreme Court) on social media platforms holds that they have become the "new public square" of the community.[50]

2. Recently Resolved Cases and Cases Pending Before the Supreme Court of the United States

In this section, we will briefly mention two recently resolved cases and one pending before the United States Supreme Court in which the categorization of social media as public or private forums is at stake. The first one is "Murthy v. Missouri." Here, the plaintiffs claimed that the United States government exerted pressure on the platforms through the jawboning mechanism to silence the conservative opinions that some users shared on social media, questioning the origin of COVID-19, as well as the mandatory nature of vaccines and isolation

[45] United States Court of Appeals, Eighth Circuit, "Campbell v. Reisch," 986, F.3d 822, decision of January 27, 2021.

[46] Ibid. In the original text: "In short, we think Reisch's Twitter account is more akin to a campaign newsletter than to anything else, and so it's Reisch's prerogative to select her audience and present her page as she sees fit."

[47] "Campbell v. Reisch. Eighth Circuit Finds State Representative Not a State Actor When Blocking Constituents on Twitter," (n 45).

[48] United States Court of Appeals, Eighth Circuit, "Campbell v. Reisch," (n 46).

[49] Texas Legislature Online, "H.B. No. 20," retrieved from: https://capitol.texas.gov/tlodocs/872/billtext/html/HB00020F.HTM, last access: May 25, 2024.

[50] The Florida Senate, SB 7.072, 1st Engrossed, retrieved from: https://www.flsenate.gov/Session/Bill/2021/7072/BillText/er/PDF, last access: May 25, 2024.

measures promoted by the U.S. government. According to the Attorneys General Schmitt and Landry, of Missouri and Louisiana respectively, the government had engaged in acts of censorship and discrimination based on the viewpoint of these users, thereby violating the right to freedom of expression enshrined in the First Amendment. From what can be inferred from the statements made by the attorneys general, they consider that social media platforms are private forums protected under the First Amendment, with which the government should not interfere as if it were a public forum. Since it was not argued by the attorneys general, it remains uncertain whether it is possible, under the doctrine of state action, to characterize social media (i.e., private actors) as state actors. This interpretation would be based on the close interrelation between the public forum doctrine and the state action doctrine.[51]

Finally, there are two other cases that were heard by SCOTUS in March 2024: "O'Connor-Ratcliff v. Garnier" and "Lindke v. Freed." In both cases, we find a conflict similar to "Campbell v. Reisch" of 2021. The first of them refers to the case of two parents, Christopher and Kimberly Garnier, who frequently posted critical comments on the personal Facebook and Twitter accounts of two members of the California School Board, Michelle O'Connor-Ratcliff and T.J. Zane, who used their social media to publish matters related to school activities and news. Both O'Connor-Ratcliff and Zane hid or deleted the Garniers' critical and often repetitive comments, and subsequently, in October 2017, decided to block them from their social media pages.

The Garniers sued them, alleging that their pages constituted public forums and that by blocking them they had violated their First Amendment rights. The case reached the Ninth Circuit Court of Appeals, which, after analyzing the existing types of public forums, determined that the Facebook and Twitter pages that the defendants had originally created constituted "designated public forums" and that they later, with the addition of word filters that prohibit comments and restrict users' non-verbal reactions, had become "limited public forums." Since viewpoint-based restrictions are not admissible in either type of forum, the defendants argued that they had blocked the Garniers because of the repetitive nature of their comments, not because their comments were critical of their management.

[51] Heldt, Amélie P., "Merging the Social and the Public: How Social Media Platforms Could Be a New Public Forum," in: *Mitchell Hamline Law Review*, Vol. 46, No. 5, 2020, retrieved from: https://open.mitchellhamline.edu/mhlr/vol46/iss5/1, last access: May 25, 2024.

While the Court was not convinced by O'Connor-Ratcliff and Zane's arguments about the discriminatory nature of their blocks, it held that even if the removal of repetitive comments were considered to be a neutral type of time, place, or manner restriction as to the content, it still violated the First Amendment.[52] This is because in a "designated public forum," the restrictions must be narrowly tailored with the objective of pursuing a significant government interest, they must allow ample options for alternative channels of communication, and must not restrict expression more than necessary. The Court considered that the decision to block the Garniers had not met this standard and that, furthermore, by not having established rules on how the exchanges on their pages should occur, the plaintiffs had no way of knowing that they could be blocked for repetitive comments.[53] This case was not resolved before the Supreme Court, but was remanded to the Court of Appeals to apply the new test developed in the case "Lindke v. Freed," which we will describe below.

In the second case, Kevin Lindke, a citizen of Port Huron, Michigan, sued the City Manager, James R. Freed, for blocking him from his personal Facebook page (which the plaintiff characterized as a traditional public forum) and deleting his comments in which he criticized the administrator's response to the COVID-19 pandemic. As in the case "Campbell v. Reisch," Lindke argued that Freed had acted under the color of state law to violate his rights protected by the First Amendment. However, unlike the previous case, the United States Court of Appeals for the Sixth Circuit ruled in favor of the defendant.

The Court considered that not all actions undertaken by a state actor occur under the color of state law. To be classified in this manner, the public official must intend to act in an official capacity or to abuse the authority granted by the state.

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[52] Howe, Amy, "Justices Weigh Rules for When Public Officials Can Block Critics on Social Media," 2023, retrieved from: https://www.scotusblog.com/2023/10/justices-weigh-rules-for-when-public-officials-can-block-critics-on-social-media, last access: May 25, 2024.

[53] The conclusion of the decision recalls the precedent in "Packingham" and reinforces the analogy between traditional public forums and new digital forums: "First Amendment protections apply no less to the 'vast democratic forums of the Internet' than to the bulletin boards or town halls of the corporeal world. Packingham, 137 S. Ct. in 1735 (citing Reno, 521 U.S. In 868, 117 S. Ct. 2329). That is not to say that all social media accounts created by public officials are subject to constitutional scrutiny or that, having created an online public forum, public officials cannot manage the public's interaction with their profiles. As this case shows, analogies between physical public forums and present-day virtual public forums are sometimes imperfect, and courts applying First Amendment protections to virtual spaces must take into account the nuances of how those online forums work in practice. Regardless of the nuances, we have little doubt that social media will continue to play an essential role in public debate and facilitating free expression under the First Amendment. When state actors enter the virtual world and invoke their governmental status to create a forum for expression, the First Amendment enters with them. United States Court of Appeals, Ninth Circuit, "Garnier v. O'Connor-Ratcliff," 41 F.4ta 1.158, decision of July 27, 2022.

The Court stated that when state officials act within the scope of their personal activities, their actions cannot be classified as acts of the state. To reach this conclusion, the Court weighed various considerations and, in particular, highlighted that there was not sufficient state or government involvement in Freed's Facebook page (unlike in the case of "Knight First Amendment Institute v. Trump") and that it should be understood as a personal page since it was not the result of his official duties nor dependent on his state authority. In short, although he posted about his work, Freed operated his Facebook page in his personal capacity, not his official capacity. Unlike the first case, the Court made no mention of whether the page could be considered a public forum.

Finally, in March 2024, the case was heard by the Supreme Court of the United States. The Court expressed that the distinction between private conduct and state action revolves around substance and not around form or labels: just as private individuals can act with the authority of the state, state officials have private lives and their own constitutional rights, including the First Amendment right to speak about their jobs and exercise editorial control over speech and speakers on their personal platforms.[54] To determine whether the activity of a public official on social media constitutes state action, SCOTUS indicated that it is necessary to carry out a detailed analysis of the conduct using a two-part test. First, identify if the official has actual authority to speak on behalf of the state and, second, determine if they intend to exercise that authority when speaking on behalf of the state on social media. The appearance and function of social media activity are relevant in the second step, but cannot compensate for the lack of actual state authority in the first.

Regarding the first step, the initial investigation to establish state action does not consist of determining whether making official announcements can fit within the job description, but rather determining whether making such announcements on social media is genuinely part of the work that the state entrusted the official to perform. As for the second step, for the activity on social media to constitute a state action, the official must not only have state authority, but must also intend to wield it.[55] If the official does not speak while carrying out their official responsibilities, they speak with their own voice. In this case, if Freed's account had carried a label, for example, "this is the personal page of James R.

[54] Supreme Court of the United States, "Lindke v. Freed," 22-611, decision of March 15, 2024.

[55] Ibid.

Freed," there could have been a strong presumption that all of his posts were in his personal capacity. However, since it was not designated as "personal" or "official," determining its nature requires a specific investigation of the facts where the content and function of the posts are considered.

Furthermore, the Court stated:

> A post that expressly invokes state authority to make an announcement not available elsewhere is official, while a post that merely repeats or shares otherwise available information is more likely personal. Lest any official lose the right to speak about public affairs in his personal capacity, the plaintiff must show that the official purports to exercise state authority in specific posts. The nature of social-media technology matters to this analysis. For example, because Facebook's blocking tool operates on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment.[56]

Concluding the analysis, SCOTUS, as it did in the case "O'Connor-Ratcliff v. Garnier," remanded the case to the Sixth Circuit Court of Appeals for further review.

IV. Adjustments and Inconsistencies of the Metaphor

As we have seen, both at the jurisprudential and legislative levels, there are differences regarding whether social media platforms can (or under what circumstances they should) be considered public forums. The development of the public forum doctrine and its nuances is primarily American, while in other jurisdictions the same problem is approached from a different perspective.

1. The Conception of the Interstitial Public Forum

Likewise, at a doctrinal level, the characterization of social media as a public forum does not seem to be peaceful either. For example, in a 2005 article, Dawn Nunziato argues that there are virtually no places on the internet that serve as public forums because those spaces where expression takes place are overwhelmingly privately

[56] Ibid.

owned.[57] The author considers that the absence of public forums in cyberspace portends the absence of significant protection for freedom of expression under the First Amendment. This contrasts with the real physical spaces where the state has public forums that guarantee the protection of people's freedom of expression by allowing them to reach broader audiences even when they cannot compete within the "marketplace of ideas" or express unpopular opinions. However, for Nunziato, citizens' increasing preference for virtual spaces to express themselves and the government's refusal to control online speech could jeopardize the constitutional guarantees of speech on the internet, particularly, because regulation of speech in private forums is exempt from scrutiny under the First Amendment.

At the end of her article, Nunziato proposes resorting to "interstitial public forums" to deal with the lack of protection under the First Amendment. These are spaces that, due to their physical proximity to private property, allow for protests against the property owner. However, since physical proximity or adjacency does not have a direct counterpart in the internet realm, the author suggests looking for other characteristics that allow people to effectively direct their speech at private entities. For example, allowing the use of tags, metatags, or brand names in search engines or internet sites to protest against private companies, just as a protester is allowed to protest against General Motors on the sidewalk adjacent to that company. To achieve this, courts should grant broad protection to critical speech on the internet by giving ample latitude to the use of other people's intellectual property in cyberspace for the purposes of criticism.[58]

Likewise, in the book *The Perilous Public Square*, David Pozen incidentally mentions that a group "of digital companies exercise enormous power over a virtual public square,"[59] but without analyzing or explaining in detail whether it is a rhetorical or legal reference.

2. The Concept of Social Public Forum

For her part, Amélie Heldt mentions[60] that the predominant opinion in the United States seems to be that, according to the principles and text of the First

[57] Nunziato, Dawn, "The Death of the Public Forum in Cyberspace," in: *Berkeley Technology Law Journal*, Vol. 20, No. 2, p. 1.115, retrieved from: https://scholarship.law.gwu.edu/faculty_publications/838, last access: May 25, 2024.

[58] Ibid.

[59] My emphasis. Pozen, David E. (ed.), *The Perilous Public Square*, New York, Columbia University Press, 2020.

[60] Heldt, (n 52).

Amendment, the government should only be monitored when it comes to interventions related to speech and not to social media platforms (which as "speakers" are protected by the First Amendment). In any case, she explains that there is a growing body of doctrinal thought that demands a more active role on the part of the government in protecting online speech. Along these same lines, she proposes a new category of forum which she calls "social public forum." To develop this category, Heldt draws inspiration from the jurisprudential developments of the United States and the developments of the German Federal Constitutional Court related to the legal concept of "the public" (*die Öffentlichkeit*, in German).

The author points out that the U.S. public forum doctrine was developed to delimit and "ensure places where citizens could speak freely"[61] and that traditional or designated public forums are subject to strict scrutiny under the First Amendment, which requires state action. However, unlike the United States, in the German constitutional tradition, the spaces established for freedom of expression can also be defined by social norms or by their social function for democracy. This feature makes the criteria for defining what constitutes a forum for expression more flexible.

Heldt believes that this new theoretical category of "social public forum" should be applied by the courts when interpreting the terms of services of a platform in response to a user's complaint over the removal of content as a result of the company's moderation. It is interesting that the author weighs the role of the Judicial Branch positively versus the potential role of the Legislative Branch when developing a regulation for this type of forum. For her, the legislative power is constrained when it comes to enacting regulations that are contrary to the First Amendment, whereas the judiciary is not.

3. The Self-Perception of Companies

For their part, companies resort to the metaphor of the public forum to describe themselves. For example, in 2018, then-Twitter CEO Jack Dorsey expressed that the company is "used as a global square, where people from around the world come together in an open and free exchange of ideas. We must be a trusted and healthy place that supports free and open debate."[62] Also, Meta CEO Mark Zuck-

[61] Ibid.

[62] United States House Committee on Energy and Commerce, "Testimony of Jack Dorsey," Chief Executive Officer, Twitter, Inc., 2018, retrieved from: https://perma.cc/UJ89-935S, last access: May 25, 2024.

erberg expressed something similar in a personal post, in 2019, in which he said that "for the past 15 years, Facebook and Instagram have helped people connect with friends, communities and interests in the digital equivalent of a public square."[63] Similarly, in 2018, YouTube Deputy General Counsel Juniper Downs, in a Senate committee meeting, when asked by Senator Ted Cruz whether the company considered itself a neutral public forum, responded affirmatively, explaining that the company applied its terms and conditions in a politically neutral manner.[64] Finally, the new CEO of Twitter, Elon Musk, stated that "Free speech is the bedrock of a functioning democracy, and Twitter is the digital town square where matters vital to the future of humanity are debated."[65] Likewise, he expressed something similar in a TED conference in which he mentioned that Twitter was the *de facto* new town square.[66]

Interestingly, the metaphor used, apparently for rhetorical rather than legal purposes, is that of the public square and not that of the forum. For Twitter and Meta, the spatial element of the square seems to have some similarity with the virtual world, with the virtual "space" that social media platforms want to provide for their users to express themselves. However, although these statements can help us identify how social media perceive themselves and what role they play in the circulation of online discourse, they do not explain the situation in relation to whether these are indeed the "new public squares."

As we have seen so far, the issue is complex and there still does not seem to be a consensus on whether the metaphor is useful or its implications, particularly when its use is no longer rhetorical but legal. If we focus particularly on the latter, we face the possibility that a private space is comparable to a public forum or that it fulfills a public function and, thus, is affected by the regulations that apply and govern the restriction on freedom of expression.[67]

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[63] Zuckerberg, Mark, "A Privacy-Focused Vision for Social Networking," Facebook, 2019, retrieved from: https://perma.cc/2FS4-XS8H, last access: May 25, 2024.

[64] United States District Court, Northern District of California, San Jose Division, "Divino Group LLC *et al*. v. Google LLC *et al*.," retrieved from: https://www.courthousenews.com/wp-content/uploads/2019/08/Censorship.pdf, last access: May 25, 2024.

[65] Retrieved from: https://twitter.com/elonmusk/status/1518677066325053441, last access: May 25, 2024.

[66] Elliott, Rebecca, "Elon Musk Urges Greater Transparency at Twitter, Calling Platform The 'De Facto Town Square,'" 2022, retrieved from: https://www.wsj.com/articles/elon-musk-urges-greater-transparency-at-twitter-calling-platform-the-de-facto-town-square-11649959658, last access: May 25, 2024.

[67] Klonic, Kate, "The New Governors: The People, Rules, and Processes Governing Online Speech," in: *Harvard Law Review*, Vol. 131, No. 6, 2018, retrieved from: https://harvardlawreview.org/print/vol-131/the-new-governors-the-people-rules-and-processes-governing-online-speech, last access: May 25, 2024.

On the other hand, if we focus on its rhetorical use, we might understand why we increasingly find references outside the legal world that describe social media as the new forums or public squares. It is important to remember that while the metaphor allows us to understand one aspect of a concept in terms of another, it also "hides" other aspects of the concept that are inconsistent with that metaphor. Keeping this in mind, we might ask ourselves: in what sense are social media public forums?[68] If the relationship is possible, then there is some kind of continuity or similarity between the two. One possibility is that it resides in the circulation of public discourse. In both social media and public forums, participants have the right to exercise their freedom of expression. Additionally, both concepts are linked by an imaginary spatial relationship; in both cases, there is a "space" that "gives place" or "hosts" the discourse that must circulate. The homonymy at play with the word "forum" is also relevant, since if the concept of a public forum has had any influence on debate and theorizing, it may be because on the internet we refer to various spaces of interaction with others using that word.

Returning to the legal use, the jurisprudence reviewed in the previous section seems to suggest that the public forum doctrine and the state action doctrine cannot be easily and simply applied to social media. First, because, as Anne Marie Franks says, we are dealing with two types of "spaces," one virtual and one physical. In "McCullen v. Coakley," the Supreme Court considered that, unlike virtual space, physical space (streets and sidewalks) allows ideas to circulate because listeners are confronted with speeches they cannot ignore. This difference between virtuality and the physical world has implications for freedom of expression according to United States jurisprudence.

The second reason is that social media (understood as companies whose business model consists of connecting people, as opposed to the activities carried out by the state) are owned by private actors who conduct a profit-driven activity that is itself protected by the right to freedom of expression. These interests provide the necessary counterbalance to the public forum doctrine which is the existence of private forums where the owners have the sovereignty to determine who can or cannot use them as an expressive platform.

Third, because in the case of traditional public forums, we are dealing with a space (traditionally physical) that, due to structural or functional reasons, is de-

[68] As we said at the beginning of this work, we should not think of metaphors as mere language operations that link two elements not originally metaphorized. Both the expression "social media" and "public forum" are metaphors in themselves.

fined by its "non-private" characteristics and, therefore, is subject to rules regarding speech regulation that, depending on the case, vary in their strict requirements. In contrast, social media platforms are not defined by their public nature, but by their private character. Although they allow and facilitate the circulation of online discourse (which could resemble the functionality of a public forum), this does not seem sufficient to characterize them as such or to assimilate them to state actors. Furthermore, the public forum doctrine does not offer a solution for those who believe that the prerogatives of platform owners should be limited, because, even in historical practice, access to these forums was not always equal or unrestricted, as we saw in the first part of this work.

Franks mentions that "the public square has never truly been public: laws and regulations have always served the powerful at the expense of the vulnerable. In fact, public squares have always served more to reinforce legal and social hierarchies than to facilitate open and inclusive democratic deliberation."[69] At different times, people have been excluded from it based on their origin, gender and "race," among other factors. This also seems to occur in the digital sphere. Misogyny, online violence, discrimination, digital harassment, and many other reprehensible behaviors abound online. Indeed, numerous claims have been raised in recent years against technology companies to more vigorously moderate such content through the exercise of the prerogatives of those who control "private forums."

As Franks explains, protecting freedom of expression in a private forum requires exactly the opposite of what is needed to protect freedom of expression in a public forum. If social media platforms, as private companies, are protected under the right to freedom of expression and association enshrined in the First Amendment —which includes the right not to express oneself and not to associate,[70] and encompasses the power to decide what content they allow and choose to show, as well as who they allow to participate on their property— considering them as public forums could undermine this power, since they would be subject to rules similar to those applied to the government in a public forum.

Finally, the metaphor seems to overlook or obscure some relevant aspects of how social media function on the internet. As Robert Post explains, when differentiating social media from traditional media, they are characterized by zero marginal information cost (given by scale, virality, and cosmopolitanism), in-

[69] Franks, (n 27).

[70] Ibid.

tegration with everyday tasks, and interactivity: communication is no longer unidirectional, and is characterized by the disappearance of an epistemological authority and increased polarization.[71] None of the previously described features seem to fit the concept of a public forum.

4. Private Entities Performing Public Functions and Private Entities as State Agents

The issue becomes even more complex when we consider that the distinction between public and private actors is somewhat elusive. In "Pruneyard Shopping Center v. Robins," the United States Supreme Court ruled that people can peacefully exercise their right to freedom of expression in parts of private shopping centers that are regularly open to the public, subject to reasonable regulations adopted by the shopping centers. Also, in that case, the Court considered that allowing students to express themselves in the shopping center did not compel Pruneyard to speak or endorse a certain type of speech as their own, so their rights under the First Amendment were not violated.[72] The image of a private company whose spaces are open to the public (subject to conditions) seems to closely resemble social media.

From this perspective, we could conceive of social media platforms as private spaces that perform "public functions," as in the landmark case "Marsh v. Alabama" in 1945 before the United States Supreme Court regarding company towns.[73] The facts of this case took place in the company town of Chickasaw, Alabama, particularly on sidewalks owned by the Gulf Shipbuilding Corporation. The town was surrounded by neighborhoods not owned by the company, where the plaintiff, Grace Marsh, lived. One day, Marsh stood on the sidewalk and began distributing religious literature. The town authorities warned her that she needed a permit to do so and that none would be granted, so they asked her to leave. When she refused, the town sheriff arrested Marsh under Alabama's trespassing law. Both the trial court and the Court of Appeals found Marsh guilty and convicted her. However, when the case reached the United States Supreme Court, it was overturned. The Supreme Court stated that if it were a traditional town, the prohibition on distributing religious

[71] Post, Robert, "Democracy and the Internet," Balkinization (blog), 2023, retrieved from: https://balkin.blogspot.com/2023/01/democracy-and-internet.html, last access: May 25, 2024.

[72] Whitney, (n 23).

[73] These are colonies or towns built by a company where the workers live and carry out their activities.

material would be a clear violation of Marsh's right to freedom of expression. Nevertheless, since these private facilities were built and operated primarily to benefit the public, and given that their operation is essentially a public function, they are subject to state regulation. The Court emphasized that the more a property owner opens their property to the general public the more their rights are limited by the legal and constitutional rights of those invited to enter.[74] In particular, it highlighted that in this case, private property rights had to yield to fundamental rights such as freedom of expression and religion. The company performed a "public function," and its actions constituted state action, especially since the company town had the characteristics of any other town in the United States.[75]

It would not be difficult to follow this jurisprudence to argue that social media, while being private companies, also function as public forums because by moderating the circulation of online discourse, they perform a public function central to democracy. Of course, maintaining this stance (which United States jurisprudence has rejected) poses challenges. For example, content moderation, which makes the services provided by these companies viable for their users, would be hindered. Social media, as part of their business model, constantly categorize, organize, recommend, and prioritize content relevant to their users. How would converting these services into "public forums" affect this activity of moderation and recommendation? Furthermore, they also decide what type of content can circulate on their services and make removal decisions when content violates any of their terms of service or community guidelines. If social media sites were public forums, they would then be subject to the strict rules described in the first section of this article, and much of their activity would become illegal, as they could not impose content-based restrictions.[76] Moreover, as Eric Goldman explains, platforms have the right to exercise their editorial function under the First Amendment regarding the publication and removal of third-party content on their websites.[77] The conversion of social media into "public forums" would

[74] Supreme Court of the United States, "Marsh v. Alabama," 326 U.S., 501, decision of January 7, 1946. The Court stated: "A state can not, consistently with the freedom of religion and the press guaranteed by the First and Fourteenth Amendments, impose criminal punishment on a person for distributing religious literature on the sidewalk of a company-owned town contrary to regulations of the town's management, where the town and its shopping district are freely accessible to and freely used by the public in general, even though the punishment is attempted under a state statute making it a crime for anyone to enter or remain on the premises of another after having been warned not to do so."

[75] Whitney, (n 23).

[76] Heldt, (n 52).

[77] Goldman, Eric, "Of Course the First Amendment Protects Google and Facebook (and It's Not a Close Question)," in: Pozen, David E. (ed.), *The Perilous Public Square*, New York, Columbia University Press, 2020.

destroy that prerogative and —possibly— the business model that sustains them.

On the other hand, subjecting platforms to the requirements of the public forum doctrine and state action would likely be impractical. As Evelyn Douek explains, the scale, volume, and speed of content moderation that social media undertake is inconceivable and always involves errors.[78] Requiring the application of such strict rules to content moderation would be the final blow. However, authors like Matthew Kramer consider that although Facebook is not obliged to create or maintain a platform, having created it as a public forum and assumed the role of operating as such, the company is morally obligated to comply with the limitations of forum neutrality.[79] This position directly contradicts the decision in "Prager University v. Google LLC," where the court stated that hosting speech on a private platform cannot be considered an activity traditionally performed only by governmental entities. Therefore, companies do not perform a public function and cannot be assimilated to state actors.

5. The Use of Social Media by Public Officials

The other meaning of the metaphor that seems to reappear in jurisprudence is more closely linked to what doctrine refers to as the "designated public forum." Particularly, those cases where a public official, in using their social media, adopts discriminatory attitudes based on the viewpoints of users, as in the case "Davison v. Loudoun County Board of Supervisors *et al.*" In fact, in the case "Knight First Amendment Institute v. Trump," the court stated that Donald Trump's Twitter account during his presidency constituted a designated public forum and, as such, was subject to the rules for that type of forum. For example, the KFAI has expressed in various *amicus curiae* briefs that cases involving the blocking of individuals by public officials on their social media accounts require a "direct application of the state action and public forum doctrines."[80]

However, unlike the rulings in the previously mentioned cases, as we have seen, al-

[78] Douek, Evelyn, "Governing Online Speech: From 'Posts-As-Trumps' to Proportionality and Probability," in: *Columbia Law Review*, Vol. 121, No. 3, 2020, pp. 759-834. In fact, as James Grimmelman argues, Section 230 of the Communications Decency Act (CDA) is a regulation designed for a world of errors. Grimmelman, James, "To Err Is Platform," Knight First Amendment Institute at Columbia University (blog), 2018, retrieved from: https://knightcolumbia.org/content/err-platform, last access: May 25, 2024.

[79] Kramer, Matthew, *Freedom of Expression as Self-Restraint*, Oxford, Oxford University Press, 2021.

[80] United States Court of Appeals, Eighth Circuit, "Mike Campbell v. Cheri Toalson Reisch," Knight First Amendment Institute *amicus curiae,* March 30, 2020, 19-2994.

though in the initial decision of the case "Campbell v. Reisch" the court considered that the interactive spaces of Representative Reisch's tweets were a "designated public forum" and therefore she could not discriminate based on viewpoint, this was not upheld by the Court of Appeals. Unlike the other cases, it does not seem to be the status or capacity of the account holder (President of the United States, legislative representative, etc.) that determines its characterization as a public forum, but rather how they use their account and for what purpose (personal or public). Thus, the fact that the social media of public officials are not public forums by default or subject to the state action doctrine grants officials greater leeway to censor opinions on their social media. The same can be said of the precedent "Lindke v. Freed."

A similar situation occurred in the case "People for the Ethical Treatment of Animals (PETA) v. National Institutes of Health (NIH)" in 2023, where the issue was whether the removal or blocking of public comments on a government agency's social media constitutes censorship. The NIH had blocked PETA's comments against animal testing in scientific research on the agency's Facebook and Instagram pages, which PETA argued violated its right to freedom of expression under the First Amendment. The NIH explained that, as an agency, it applies a general rule that prohibits public comments that are "off-topic" on the agency's social media posts. Additionally, it mentioned that it implements this rule by using keyword filters (provided by Facebook and Instagram, along with lists of words created by the agency) such as: cruelty, animal torture, mice, animals, killing, PETA, among others. As a result, comments containing these terms are blocked from the general public. To resolve the conflict, the trial court conducted a three-part analysis: first, determining whether the First Amendment protects the speech in question; then, identifying the nature of the forum; and finally, evaluating whether the government's justifications for restricting speech in the forum meet the required standard.[81] During its analysis, the court stated that the concept of a "limited public forum" is derived from the concept of a "nonpublic forum," which is subject to the same protections and demands as the former. Therefore, since it is not a "traditional public forum" or a "designated public forum," the government can exclude speakers based on the topic as long as it does so in a viewpoint-neutral manner and such exclusion is reasonable in light of the purpose served by the forum.[82] Furthermore, it highlighted that the com-

[81] United States District Court, District of Columbia, "People for the Ethical Treatment of Animals (PETA) v. National Institutes of Health (NIH)," 23-5.110, decision of March 31, 2023.

[82] Ibid.

ment threads under analysis are limited public forums: virtual spaces opened by the government to the public for the purpose of discussing only certain topics. To distinguish a limited public forum from a designated public forum, the focus was placed on the government's intent to establish and maintain that forum.

Referring to the Trump case, it stated that unlike that case, where comments by the then-President were available to the public without limits, here the NIH did not open its Instagram and Facebook pages for indiscriminate public participation but publicly announced the existence of rules and guidelines for posting comments. It also emphasized that errors or inconsistencies in applying these policies did not change their classification as a limited public forum. In fact, it warned that requiring perfect application could undermine the very existence of the forum because it would discourage the government from opening its property to any expressive activity "in cases where, if faced with an all-or-nothing choice, it might not open the property at all."[83]

The court also analyzed the reasonableness of the measure and concluded that restrictions in "limited public forums" only need to be reasonable in light of the purpose served by the forum in question (remember that these can be based on the topic or the identity of the speaker). The NIH's restriction is reasonable because keyword filtering promotes the government's interest in preventing disruptive comments that could deter citizens interested in viewing the NIH pages where important health information is published. Furthermore, it noted that the inability to post comments in this forum did not prevent PETA from posting its comments on other internet pages. Finally, the court analyzed whether the neutrality principle had been violated. According to the findings, identifying and blocking content related to animal testing does not constitute viewpoint-based restriction (which is not allowed in this type of forum), but rather content-based restriction (which is allowed). The fact that these content restrictions represent certain perspectives or viewpoints does not make them illegal, as the exclusion of their viewpoints is a consequence of the exclusion of a topic. However, as explained by the Electronic Frontier Foundation (EFF), these words could be commonly found in comments expressing the viewpoint of people opposed to animal testing and, therefore, should not be censored.[84]

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[83] Ibid.

[84] Cope, Sophia, "EFF to D.C. Circuit: Animal Rights Activists Shouldn't Be Censored on Government Social Media Pages Because Agency Disagrees with their Viewpoint," Electronic Frontier Foundation (EFF), 2023, retrieved from: https://www.eff.org/deeplinks/2023/09/eff-dc-circuit-animal-rights-activists-shouldnt-be-censored-government-social, last access: May 25, 2024.

The court's decision was appealed by the plaintiffs and is currently pending.

This case is interesting because it presents an additional nuance in the public forum doctrine applied to social media pages maintained by public officials or government agencies. The decision at the trial level allows for a broader scope of action to restrict certain types of expression or participation in online public forums.

Finally, as I explained earlier, in the "Lindke" case, SCOTUS stated that the distinction between private conduct and state action revolves around substance rather than form or labels. Therefore, to determine whether a public official's activity on social media constitutes state action, the Court expressed that a detailed analysis of the conduct is necessary using a two-part test. First, identify whether the official has actual authority to speak on behalf of the state, and second, whether the official intends to exercise that authority when speaking on behalf of the state on social media.

V. Conclusion

As we have seen in the previous sections, the metaphor of social media as a public forum has rhetorical, conceptual, and legal implications. Not all public forums are the same (there are traditional, designated, limited, and nonpublic forums), and therefore, the obligations arising from them will also differ. The scope of action and the scrutiny with which actions carried out in those forums by the state are evaluated vary. If these rules are also applied to companies, the variety of consequences will be similarly replicated according to the type of forum in question.

At the beginning of this work, we observed that the metaphor of social media[85] as public forums is not entirely inaccurate because, like forums, social media sites allow for the circulation of ideas and expressions and the interaction of users in ways that were unknown until a few years ago. However, the metaphor is not entirely

[85] As already mentioned, the same systematicity of metaphors that helps us understand one aspect of a concept in terms of another will also hide other aspects of that concept. We might ask, then, how this occurs here. "Social media" is itself a metaphor related to another metaphor: "public forum." When we talk about social media, do we think about the connections between people, the myriad relationships that can be established between individuals through a connection service provided by a private entity, or the companies that provide that service? If we think about the companies, we think about the private sector. If we think about the users, we also think about the private sector. What would the "network" be? Remember that we can also refer to the internet as the network. What would the "social" aspect be? Is it merely the connection between people, or is something more required? Something immaterial seems to be at play here. However, at no other time in history have social media had as much materiality as they do now. Additionally, social media are linked to expression and what is displayed. Bassini, Marco, "Social media as New Public Forums?," in: *The Italian Review of International and Comparative Law*, Vol. 1, No. 2, 2022.

accurate either because that circulation is not completely free, as the platforms, protected under the First Amendment, can take unilateral measures regarding content or their users when they violate their terms of service or community guidelines, as with the suspension of Trump's accounts on Twitter and Facebook.[86] In fact, on some occasions, these decisions have been the culmination of obligations established in laws that require platforms to take certain measures against specific content that might not meet the requirements for speech restriction in a public forum.

On social media, as in public forums, people communicate with one another. In this sense, it becomes evident what insights this metaphor can provide. In both "spaces" there is circulation of discourse. However, the metaphor also conceals something.[87] In public forums, there may be certain types of rules (of time, place, and manner) and state intervention must be limited to what is permitted by law (for example, in relation to content and viewpoint). In social media, in principle, the relationship is between private parties and the rules that can govern the exchange and the intervention of companies are not subject to the same strict limitations as state interventions. Social media sites remove hate speech,[88] misinformation, manipulated content,[89] and sensitive information,[90] among other things. The metaphor seems to conceal this difference by assimilating or completely identifying these private spaces with public forums. If the metaphor was applied strictly (particularly in relation to the concept of "public forum" as a legal term), this could seriously affect the functioning of what we know today as social media and, ultimately, the exercise of the right to freedom of expression by their users and the companies that provide this service.

Additionally, we can draw some provisional conclusions about the public forum doctrine from the analyzed jurisprudence. According to the precedent set by "Prager University v. Google LLC," it is not possible to assert that social media sites are public forums strictly speaking, at least not in legal terms. However, in the cases of "Davison v. Loudoun County Board of Supervisors *et al.*," "Knight First Amendment Institute v. Trump," and "O'Connor-Ratcliff v. Garnier," some courts have considered that

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[86] Ibid.

[87] Lakoff and Johnson, (n 3).

[88] "Lenguaje que incita al odio: Normas para editores y creadores," Meta, retrieved from: https://es-la.facebook.com/business/help/170857687153963?id=208060977200861, last access: May 25, 2024.

[89] "Información errónea," Meta, retrieved from: https://transparency.fb.com/es-la/policies/community-standards/misinformation, last access: May 25, 2024.

[90] "Rules Enforcement," Twitter, retrieved from: https://transparency.twitter.com/en/reports/rules-enforcement.html#2021-jul-dec, last access: May 25, 2024.

when public officials use social media to communicate government actions, these can be considered "designated public forums." Nevertheless, the precedents set by "Campbell v. Reisch" and "Lindke v. Freed" require a detailed analysis in light of the state action doctrine to determine the obligations of the officials and the potential characterization as a public forum with greater requirements. It remains to be seen how lower courts will apply the two-part test in cases remanded by SCOTUS to determine if a public official's activity on social media constitutes state action. It seems that characterization as a public forum will only be possible after identifying state action. In other words, first, it must be determined if the official has actual authority to speak on behalf of the state and, second, if the official intends to exercise that authority when speaking on behalf of the state on social media.

Of all the cases analyzed, the first one in which the metaphor of social media as a public forum was used, without reference to the use made of them by public officials, was "Packingham." There, the court stated that "social media [are] one of the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge."[91] However, this mention does not seem to correspond to a legal use but rather a rhetorical one. The language used is descriptive and does not seem to intend to legally characterize social media in light of the U.S. public forum doctrine. Nevertheless, the idea has gained some traction since the metaphor of social media as public forums appears as a possible response to the need to create governance mechanisms to safeguard the right to freedom of expression against content moderation by companies. Heldt's proposal on social public forums is an example of this, not only because it explicitly mentions "Packingham" as a precedent where such forums can be found, but also because it seeks to address the tension between the platforms' right to moderate speech and the freedoms guaranteed by the First Amendment to its users in the face of moderation.[92]

While it is an interesting approach, I believe other governance mechanisms for online content moderation can be explored without resorting to an artificial category whose development and implementation would fall to the judiciary. It seems more reasonable to investigate the scope of the public forum doctrine in cases involving public officials, and for this, SCOTUS has provided some guidance that, while necessary, is not sufficient.

[91] My emphasis. Supreme Court of the United States, "Packingham v. North Carolina," (n 25).

[92] Heldt, (n 52).

Appendix. Public Forums Table

Traditional Public Forums	• Anyone can express themselves freely within the limits granted by the First Amendment. • Content in these forums cannot be limited unless regulation is necessary to pursue a compelling state interest and is narrowly tailored to achieve that end. • The state can regulate issues of time, place, and manner of expression as long as it does so in a content-neutral manner and the regulations are designed to pursue a significant governmental interest, leaving open ample alternative channels of communication. • Content-based restrictions must pass strict scrutiny and pursue a compelling state need. • Viewpoint-based restrictions are prohibited.
Designated Public Forums	Non-traditional forums created by the government for public discourse. • The government intentionally opens a property (not traditionally open to the public) for public expression. • The government is not obliged to create or keep the forum open, but while it is open, the government is subject to the same limitations as in a traditional public forum. • Content-based restrictions are similar to those in traditional public forums.
Limited Public Forums	• Spaces created for citizen deliberation that are not public but are specifically designated by the government for certain groups or topics. • The government can establish initial access restrictions based on the theme or speaker. • The government can impose content-based restrictions as long as they are viewpoint-neutral and reasonable in light of the forum's purpose. • Once a government entity opens a limited public forum to certain speakers or topics, it must respect the legal limits it has established. • The government is not obliged to create or keep a limited public forum open for expressive activities indefinitely.
Nonpublic Forums	• Spaces that are not considered forums for public communication either by tradition or designation. • The government has much more flexibility to create rules that limit expression and can reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation of expression and content is reasonable and not aimed at suppressing expression simply because public officials oppose the speaker's viewpoint. • Access control to this type of forum can be based on the topic and the identity of the speaker, as long as the distinctions made are reasonable in light of the forum's purpose and viewpoint-neutral.