SIGNPOSTS TURN TO TWITTER POSTS: MODERNIZING THE PUBLIC FORUM DOCTRINE AND PRESERVING FREE SPEECH IN THE ERA OF NEW MEDIA

Comment

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I. INTRODUCTION

Our nation is driven by technology. Our economy, transportation, education, and communication all depend on constant technological advances in their respective fields to continue developing and improving. Amazingly, technology has been able to keep up with such demands. The law, however, often struggles to keep up with technology. Tech giants like Google, Facebook, and Twitter have established a stranglehold over the social media landscape. Individually, these companies have great influence over how we discuss public issues, but collectively, they have established an oligopoly over online speech. The power to decide which speech is and is not allowed online rests largely in the hands of these tech giants, whose policies and viewpoints are substantially aligned. "The price [of failing to act] is not in dollars but rather to personal privacy, the free flow of information, human safety, the First Amendment[,] and our democracy itself."[1]

This distribution of power, or lack thereof, offends one of the bedrock principles on which our nation was built—the right to free speech. "Facebook, Twitter and Google have grown so powerful that they can—whether through intent or incompetence—unleash serious threats to our society and political system."[2] As this Comment will discuss, free speech is a principle we as a nation should work to promote generally, not only when it is convenient to do so.

To achieve this goal, this Comment asks the Supreme Court to extend the public forum doctrine to include the most highly trafficked online forums whose purposes are to encourage the sharing of ideas and speech, such as YouTube, Facebook, and Twitter. Such an extension would indeed be a monumental leap in both public forum and First Amendment jurisprudence; however, as this Comment discusses, the shift of discussion to online platforms has been likewise monumental, and monumental problems often demand equally monumental solutions.

Part II of this Comment will follow the rapid and explosive emergence of social media as the primary medium through which to exercise speech across the board.[3] Part II.A will further establish the dire problem our nation faces due to the despotic control these companies have over online speech, specifically describing actual examples of speech-silencing that occur on the most popular online speech platforms.[4] Part II.B will explain certain historical sociological consequences that are generally linked to the neglect

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1. Steve Shillingford, *Facebook, Twitter and Google Have Too Much Power*, FOX NEWS (Sept. 5, 2018), https://www.foxnews.com/opinion/facebook-twitter-and-google-have-too-much-power-we-cant-just-legislate-ourselves-out-of-this-mess.

2. *Id.*

3. *See infra* Part II (discussing the emergence of the internet as a primary medium of speech).

4. *See infra* Part II.A (discussing the problem with social media companies having control over free speech).

of free speech.[5] Parts III and IV will analyze the development of the public forum and state action doctrines, respectively.[6] They will further establish the most recent tests the Supreme Court uses to designate public forums and determine state actors.[7]

Part V then proposes a solution to the tech giants' dominating control over online speech—a modernization of the Court's *Marsh v. Alabama* ruling to include the online platforms most widely used for expression and discussion.[8] Part VI further emphasizes the importance of promoting free speech generally, not only as a fundamental constitutional right, but also as a bedrock principle of our nation.[9] Part VI will also tie these issues back to platforms like Twitter, showing how addressing the problem of free speech online will help alleviate the current tension across viewpoints, and perhaps more importantly, avoid even worse consequences in the future.[10] Part VII both proposes alternative legislation and endorses United States Senator Hawley's legislative proposal,[11] either of which would more thoroughly and definitively address the issue of speech on internet platforms.

To better illustrate the various forms of opinion we have in society, this Comment will refer to the opinion that, in the public eye, is thought to be most socially acceptable as the *majority opinion*. Likewise, this Comment will refer to any contrary opinion as a *minority opinion*. On any given issue, there will be only one majority opinion, contrasted by at least one minority opinion. Each of these minority opinions may or may not be considered socially acceptable.

Going forward, this Comment will also distinguish between the different parties involved in online speech. A *user* is an individual or entity that uses a particular social media platform to voice an opinion, while a *consumer* is an individual or entity that reads, consumes, or is otherwise influenced by the user's speech. Users may choose to target a certain audience for their speech, *intended consumers*, but typically their content will also end up reaching consumers outside their target audience, *unintended consumers*—both are equally important. Furthermore, there often will be a substantial overlap between users and consumers—a user in one scenario may be a consumer in another.

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5. *See infra* Part II.B (discussing the sociological problems with neglecting free speech).

6. *See infra* Part III and IV (analyzing the development and implementation of both the public forum doctrine and state action doctrine).

7. *See infra* Part III and IV (outlining the most recent cases on this topic to come before the Supreme Court).

8. *See infra* Part V (proposing legislative and judicial reform options).

9. *See infra* Part VI (emphasizing the importance of free speech).

10. *See infra* Part VI (outlining the dire consequences of not upholding the fundamental right to free speech).

11. *See* Ending Support for Internet Censorship Act, S. 1914, 116th Cong. § 2 (2019).

II. AN OUTDATED PUBLIC FORUM DOCTRINE IN THE ERA OF NEW MEDIA

To begin, it is important that we understand both where we have come from and where we are going as a society. We must realize the gravity of the ever-changing technological landscape around us. The past two decades have seen a whirlwind of developments, none more consequential than the internet, and even more recently, social media. Companies like Google, Facebook, and Twitter have not only emerged with the most prominent social media platforms in the United States, but as a result, they have further secured a stranglehold over the social media landscape. With such a hold, they possess the power to influence the public discussion in significant ways, going as far as to censor users, or even entire viewpoints, from their respective platforms. Part II.A will take a closer look at this development and outline a few points of controversy that have surfaced in turn.

Although we venture into uncharted waters, this does not mean that we should abandon principles of the past to help us navigate the challenges of the future. Society and the individual exist in a cyclical relationship—variables of society shape the individual as much as variables of the individual shape society.[12] One such variable, a founding principle of our nation, is freedom of speech. As Part II.B discusses, neglecting this principle can have dire consequences on society and the individual alike.

A. The Internet's Rise as the Primary Medium for Discussion

In 2007, a computer engineer named Jack Dorsey introduced his revolutionary, online platform called Twitter, which Dorsey designed to be used primarily for messaging and social networking.[13] However by 2009, Twitter had quickly become a place for discussion and news-reporting, thanks in part to a growing presence of heavily influential individuals on the platform, such as then-presidential candidate Barack Obama.[14] Twitter's identity as a legitimate source of news developed largely due to its ability to provide real-time updates.[15] Additionally, certain catastrophic world events, such as the Haitian earthquake of 2010, helped establish Twitter as a means of fundraising.[16]

Above all else, however, Twitter is a self-proclaimed medium for expression.[17] Twitter states that its "purpose is to serve the public

12. TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES 16 (Harvard Univ. Press eds., 1st ed. 1995).

13. *Twitter*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/Twitter (last visited Dec. 14, 2020).

14. *Id.*

15. *Id.*

16. *Id.*

17. *The Twitter Rules*, TWITTER, https://help.twitter.com/en/rules-and-policies/twitter-rules (last visited Dec. 14, 2020).

conversation."[18] One way it has attempted to accomplish this goal is by introducing updates that better enable people to express themselves. In 2017, Twitter introduced an update doubling the maximum number of characters allowed in a tweet[19] from 140 to 280.[20] In an official blog posted by Twitter's Product Manager and Senior Software Engineer, Twitter stated that the primary reason for the update was to facilitate more open and higher quality discussion.[21] "We want every person around the world to easily express themselves on Twitter[.]"[22]

But, this is not merely expression for the sake of expression—it does not fall on deaf ears.[23] We are seeing more and more how influential this free and open online expression can be, and Twitter, together with the other major social media platforms, is, in many ways, the reason this online expression is so influential.[24] If the users are the engine that drives online expression, Twitter and other social media platforms are the highway that leads users to their end goal—to influence as many people as possible.

Twitter allows users to reach audiences they would never be able to otherwise. "[Twitter] has become the most important public sphere for a global, inclusive audience."[25] Not only are eighty-four million Americans[26] regularly using—and being influenced by—Twitter, but the strong presence of government officials on the platform means that such expression is having real legislative and electoral impact.[27] "[O]n Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner."[28] Nearly all of our public officials have Twitter accounts to encourage this very interaction.[29] Twitter has completely reimagined how we as a nation discuss current social, political, and international issues, and it has done so all within the past twelve years.[30]

Facebook and YouTube have had a similar history. They both currently top the charts in number of users in the U.S.: YouTube having over 180

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18. *Id.*

19. Individual posts on the Twitter platform are commonly referred to as "tweets."

20. Aliza Rosen & Ikuhiro Ihara, *Giving You More Characters to Express Yourself*, TWITTER (Sept. 26, 2017), https://blog.twitter.com/en_us/topics/product/2017/Giving-you-more-characters-to-express-yourself.html.

21. *Id.*

22. *Id.*

23. *See* Alysha Khodaiji, *Twitter as the Medium and the Message*, PUB. SEMINAR (Apr. 6, 2017), http://www.publicseminar.org/2017/04/twitter-as-the-medium-and-the-message/.

24. *See id.*

25. *Id.*

26. J. Clement, *Most Popular Mobile Social Networking Apps in the United States as of June 2019, by Monthly Users (in Millions)*, STATISTA, [hereinafter *Most Popular Social Media*] https://www.statista.com/statistics/248074/most-popular-us-social-networking-apps-ranked-by-audience/ (last edited Sept. 9, 2019).

27. *See* Khodaiji, *supra* note 23.

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

29. *Id.*

30. ENCYCLOPEDIA BRITANNICA, *supra* note 13; *see* Khodaiji, *supra* note 23.

million[31] and Facebook having over 170 million.[32] YouTube also has a similar purpose to Twitter, advertising itself as a "platform[] for free expression"[33] where "people should be able to speak freely, share opinions, [and] foster open dialogue."[34]

These platforms' rise to dominance has not been without controversy, however. Twitter reserves its right to remove posts, or entire accounts, that violate its community rules or Terms of Service.[35] Its rules prohibit posts that contain violence, private information, illegal goods, suicide, and most controversially, hateful conduct.[36] Twitter's lack of consistency in enforcing these rules has spurred the majority of the controversy surrounding them.[37]

Most notable was the removal of political commentator Alex Jones, and the entire network of Twitter accounts connected to his brand Infowars.[38] At the time of his banning, he had amassed well over 800,000 followers.[39]

Other examples of controversial Twitter bans include Meghan Murphy and Jesse Kelly.[40] Twitter banned Meghan Murphy, a popular journalist and podcaster, for misgendering a transsexual woman, which Twitter deemed hateful conduct per its usage policies and guidelines.[41] Twitter also banned Jesse Kelly, an Iraq War veteran and a popular conservative radio talk show host, in November of 2018.[42] His account was later reinstated, however, after appearing on Tucker Carlson's Fox News show and gathering sufficient public attention.[43] Some political commentators have noticed a trend among

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31. Geoffrey Migiro, *Which Countries Watch the Most YouTube?*, WORLDATLAS (Nov. 30, 2018), worldatlas.com/articles/which-countries-watch-the-most-youtube.html.

32. *Most Popular Social Media*, *supra* note 26.

33. INTERNET ARCHIVE, web.archive.org/web/20191101001836/www.youtube.com/about/policies (last visited Dec. 14, 2020); *cf. Community Guidelines*, YOUTUBE, www.youtube.com/howyoutubeworks/policies/community-guidelines/#community-guidelines (last updated July 2020).

34. *About*, YOUTUBE, https://www.youtube.com/about/ (last visited Dec. 14, 2020).

35. *The Twitter Rules*, *supra* note 17.

36. *Id.*

37. *See* Richard Hanania, *It Isn't Your Imagination*, QUILLETTE (Feb. 12, 2019), https://quillette.com/2019/02/12/it-isnt-your-imagination-twitter-treats-conservatives-more-harshly-than-liberals/; *see also* Kalev Leetaru, *Is Twitter Really Censoring Free Speech?*, FORBES (Jan. 12, 2018, 5:06 PM), https://www.forbes.com/sites/kalevleetaru/2018/01/12/is-twitter-really-censoring-free-speech/#679d937c65f5 (discussing Twitter and other social media companies' ability to control what people see on their respective platforms).

38. *Twitter Bans Alex Jones and Infowars for Abusive Behavior*, BBC (Sept. 6, 2018), https://www.bbc.com/news/world-us-canada-45442417.

39. *Id.*

40. *See* Joe Concha, *Conservative Pundit Jesse Kelly's Twitter Ban Sparks Outrage: 'New Low'*, HILL (Nov. 26, 2018, 7:38 AM), https://thehill.com/homenews/media/418186-conservative-pundit-jesse-kellys-twitter-ban-sparks-outrage-new-low; Julia Manchester, *Self-Described Feminist Banned from Twitter Says Platform Is Setting 'Dangerous' Precedent*, HILL (Dec. 6, 2018), https://thehill.com/hilltv//420033-self-described-feminist-banned-from-twitter-says-platform-is-setting-a.

41. Manchester, *supra* note 40.

42. Concha, *supra* note 40.

43. *Id.*

these bans and have accused Twitter of favoring one side of the political spectrum when enforcing its rules.[44]

The controversies on YouTube have been perhaps even more alarming. One YouTube channel,[45] Prager University, saw hundreds of its videos inexplicably labeled "restricted" on the platform by YouTube itself.[46] What makes this example shocking is Prager's videos are not nearly as polarizing as figures such as Alex Jones and Jesse Kelly can be. Prager is certainly a conservatively leaning channel, but its videos are largely presented in a tame and objective manner. Yet this restricted label hides Prager's videos from appearing in searches by consumers—the same label given to videos containing violence or nudity.

Twitter has also been accused of a less visible form of silencing, known as "shadow-banning."[47] A study from Vice News found strong evidence suggesting that Twitter's promotion and content-suggestion algorithms were specifically tailored to hide certain—typically vocal, conservative—users from appearing on more people's Twitter feeds, a practice which has been called shadow-banning.[48] While accusers have provided evidence of this lesser-known phenomenon, proving that it was intentional would be far more difficult, likely requiring some form of external audit to ensure politically-neutral moderation.[49] It is worth noting, however, that Twitter has apparently stopped using the algorithm that triggered these accusations.[50]

The current remedy for speakers silenced through the system, either actually or effectively, is to make their own forum where they are able to share their ideas freely. The idea is that other people will be able to visit the forum and consume their speech if they want to.[51]

B. The Sociological Consequences of Neglecting Free Speech

Who gives someone the right to silence another? To quote John Stuart Mill's famous essay *On Liberty*, "[i]f all [of] mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."[52] If that lone opinion is

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44. *See* Hanania, *supra* note 37.

45. YouTube users who regularly post videos are often known as "channels."

46. *See* Prager Univ. v. Google LLC, 2018 WL 1471939 (N.D. Cal. Mar. 26, 2018).

47. *See* Alex Thompson, *Twitter Appears to Have Fixed "Shadow Ban" of Prominent Republicans Like the RNC Chair and Trump Jr.'s Spokesman*, VICE NEWS (July 25, 2018), https://www.vice.com/en_us/article/43paqq/twitter-is-shadow-banning-prominent-republicans-like-the-rnc-chair-and-trump-jrs-spokesman.

48. *See id.*

49. *See id.*; Ending Support for Internet Censorship Act, S. 1914, 116th Cong. § 2 (2019).

50. *See* Thompson, *supra* note 47.

51. *See infra* note 210 and accompanying text (discussing the availability of free internet forums).

52. JOHN STUART MILL, ON LIBERTY 33 (The Lawbook Exchange Lt. eds., 2002).

right, society loses out on the endless potential that could come of new thoughts and ideas.[53] But even if that lone opinion is wrong, silencing that opinion causes society to lose something nearly as valuable—a greater understanding of why the majority opinion is correct.[54] Strong opinions develop through steady repudiation, discussion, and correction over time, not through silencing opposing points until no one dares to speak to the contrary.[55]

Fear of speaking outside the boundaries of social acceptability is oppressive, and worse, contagious, having fostered two schools of thought regarding the societal consequence thereof: the spiral of silence[56] and preference falsification.[57]

1. The Spiral of Silence

The aforementioned hypothetical by John Stuart Mill likely stuck out as extremely outlandish. Who would possibly want to stand as the lone dissenter against all of society? We human beings, because of our very nature, find comfort in the thought of fitting in. We naturally gravitate towards the idea of being a part of something. In fact, we are more likely to side with a popular choice that goes contrary to our own judgment, than to stand true to our own judgment if it means standing alone.[58]

An experiment conducted in 1951 by social psychologist Solomon Asch illustrates this very point.[59] Asch lined up ten individuals and tasked them with identifying which line out of a group of three (*A*, *B*, and *C*) was most similar to a fourth line (*D*).[60] In every iteration of the study, one of the three lines was always the exact same length as the fourth line, which made the task extremely simple.[61]

However, Asch introduced a twist—the first nine people lined up were all instructed to give the same *wrong* answer.[62] The tenth person was ignorant of this instruction and was always the last to answer.[63] As the only unsuspecting person in the group, he was the true subject of the test.[64] It was

53. *Id.*
54. *Id.* at 39–40.
55. *Id.*
56. *See* ELISABETH NOELLE-NEUMANN, THE SPIRAL OF SILENCE 5 (Univ. of Chi. Press, Ltd. eds., 2d ed. 1993).
57. *See* KURAN, *supra* note 12, at 17.
58. *See* NOELLE-NEUMANN, *supra* note 56, at 37.
59. *Id.* at 37–39.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*

a test to see how a person would react when faced with choosing between the clearly correct answer or the popular answer.[65]

For example, lines *A*, *B*, and *C* are on a paper, with line *D* off to the side. Lines *D* and *B* are obviously the exact same length; however, persons one through nine all say that the answer is *C*. Would the subject—as the last to speak—answer *B* in accordance with his own judgment, or would he answer *C* in an attempt to avoid looking stupid in front of his peers?

Asch conducted this same test with over fifty different subjects, and he found that more than 80% of them in fact answered with the majority—the *wrong* answer.[66] This task had no bearing on the subjects at all.[67] Yet so many felt compelled to align their answer with the majority, even when it was so clearly incorrect.[68] Asch concluded that people often "[d]read[ed] isolation more than error."[69]

It is this fear of isolation that sets in motion what Elisabeth Noelle-Neumann calls the "spiral of silence."[70] She defines the spiral of silence as the phenomenon that occurs when minority-opinion supporters one-by-one stop vocalizing their support, causing a chain reaction, or a "spiraling process," for more and more minority supporters to follow until the majority opinion dominates the public landscape, while the minority opinion fades from public awareness altogether.[71] Each individual is motivated to revert to silence by the fear of being isolated against all of society.[72] This causes the majority opinion to continually grow stronger until it sees no opposition at all.[73]

The first to succumb to the spiral of silence are those with weaker self-confidence or less interest in public issues.[74] For them, there is little benefit to maintaining their vocal opposition. It is far easier to simply revert to silence than to fight against a majority opinion, especially when the minority opinion grows weaker all the time—due to others' succumbing to the spiral.[75] Seeing no opposition, their silence will be interpreted as agreement, which in turn makes the majority opinion appear much stronger than it really is.[76] All of this results in an environment of discourse where status quos are rarely challenged and still more rarely overthrown.[77]

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65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 38.
69. *Id.* (quoting Tocqueville's commonly known generalizations).
70. *Id.* at 5.
71. *Id.*
72. *Id.* at 6.
73. *Id.* at 5.
74. *Id.* at 6.
75. *Id.*
76. *Id.* at 5.
77. *See* KURAN, *supra* note 12, at 118–30.

Neumann cites the decline of religion in France during the nineteenth century as one notable example of the spiral of silence.[78] In his account of the French Revolution, historian Alexis de Tocqueville explains the widespread animosity towards religion among the French populous at the time.[79] However, fearing isolation, the French church failed to speak out against this animosity and instead reverted to silence.[80] The result was an open disdain for religion that was "regarded as the will of all," when this in fact was not the case.[81]

2. Preference Falsification

Professor Timur Kuran, an economics and political science professor at Duke University, takes Neumann's model a step further in his renowned book *Private Truths, Public Lies*.[82] He claims that when an individual takes an opinion contrary to that of the majority, not only will the individual silence her true beliefs, but she will openly support the opinion she disagrees with.[83] To illustrate this, Kuran distinguishes between the opinion an individual expresses openly, her *public preference*, and the opinion she would express absent any social pressure at all, her *private preference*.[84] Thus, the *public opinion* is the collection of public preferences across society, and the *private opinion* is that of private preferences.[85]

At times, one's public preference and private preference will be the same. Consider a woman, Jane, having dinner with her husband of twenty years, when her husband asks what she thought of the new *Star Wars* movie they had just watched. Here, Jane likely feels little-to-no social pressure to hide the fact that she did not enjoy the movie—her public and private preferences are aligned.

However, imagine a different situation where it is Jane's boss at work, a known *Star Wars* fan, asking what she thought of the movie. Jane, who is in the running for a prominent promotion in the company, will likely feel more inclined to change, or "falsify," the preference she chooses to express openly. Jane, in this second situation, has likely experienced *preference falsification*, which Kuran defines as the "selection of a public preference that differs from one's private preference."[86]

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78. *See* NOELLE-NEUMANN, *supra* note 56, at 7.

79. *Id.* (citing ALEXIS DE TOCQUEVILLE, THE OLD REGIME AND THE REVOLUTION (Alexis de Tocqueville eds., 1856)).

80. *Id.*

81. *Id.* (quoting ALEXIS DE TOCQUEVILLE, THE OLD REGIME AND THE REVOLUTION (Alexis de Tocqueville eds., 1856)).

82. KURAN, *supra* note 12, at 113.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 17.

But what causes someone to falsify their own thoughts and beliefs? Kuran describes it as an internal analysis weighing the benefits or punishments of expressing one's true preference against the benefits of being viewed as someone with the "correct" preference.[87] The point at which the benefits of one factor outweigh the other is known as the person's *political threshold*.[88] This test is, of course, subjective; thus, preference falsification will not affect everyone equally.[89] Jane may put great value on expressing her true thoughts of the movie, in which case she may not feel compelled to falsify her beliefs.

Preference falsification may also have varying degrees of effect.[90] For instance, if Jane truly hated the movie, she may choose to tell her boss that she thought it was just okay, or she may choose to say that she loved it. It all depends on how Jane weighs the different factors in play.[91]

The consequences of preference falsification can also vary greatly. On a daily basis, most people will experience harmless instances of preference falsification similar to the example with Jane and *Star Wars*. However, preference falsification may have severe negative consequences when it occurs on a large scale and regards subject matter of serious public concern, such as elections, or political and social issues. Kuran highlights two consequences that are of particular interest: widespread ignorance and explosive public revolt.[92]

Over time, societies plagued by preference falsification begin to lose their sense of progress and improvement.[93] Dissenters of the status quo feel less and less confident in their ability to express their dissent without bringing serious social harm upon themselves. These dissenters are thus gradually shut out of the discussion, and with them, so is public discourse regarding the status quo's disadvantages.[94] Further, when these dissenters reach their political threshold, not only must they publicly falsify their preference for the minority opinion, but, because they are aware of the disadvantages of the public opinion, they are also forced to falsify their *knowledge* in order to successfully hide their preference.[95] "In so doing, we distort, corrupt, and impoverish the knowledge in the public domain."[96]

Eventually, fear of isolation evolves into genuine acceptance—and even approval—of the status quo.[97] Public discourse surrounding the issue quickly

87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 19.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*

becomes an echo chamber of ideas supporting the public opinion. No one sees a need to propose alternatives to the status quo because no one can think of any downsides to it.[98] Progress then stagnates, and society finds itself too ignorant to change.[99]

For example, how was communism, an exceedingly inefficient and unpopular economic system, able to sustain itself in Eastern Europe for so many decades? During this time, few people dared speak out against the communist regime and its political leaders.[100] Those who did were imprisoned, tortured, or even executed.[101] The Soviets would at times even choose to harm a dissenter's loved ones in order to set an example.[102] Those who dissented in large groups were placed in forced-labor camps, never to be seen or heard from again.[103]

These punishments, though cruel and inhumane, were extremely effective.[104] Vaclav Havel, in his essay titled "The Power of the Powerless," uses the example of a hypothetical greengrocer who shows public support for the communist regime by displaying in his window a sign with the slogan "Workers of the World, Unite!"[105] Such support, which was widespread throughout the Soviet Union at the time, was motivated by a fear of being ousted as a lone dissenter.[106] "He does it because these things must be done if one is to get along in life."[107] The greengrocer cannot merely be silent—failure to exhibit such a sign would be seen as an opposition to the communist regime.[108] He must, in order to survive, falsify his beliefs.[109]

Two Soviet poets, Aleksander Wat and Anna Akhmatova, documented similar experiences.[110] After facing persecution, Wat explains: "I acted like a coward. I lied. I knew that they would arrest me, that [my family] would go under. I was trembling in my boots. I pretended that, yes, I had regained my faith in communism."[111] Similarly, Akhmatova, who had been publishing religious poems that were then banned, saw her son arrested by the Soviets.[112] They threw him in prison and tortured him until he admitted to a false conspiracy—that Akhmatova, his mother, was planning to assassinate a

98. *Id.*
99. *Id.*
100. *Id.* at 118–19.
101. *Id.* at 123.
102. *Id.*
103. *Id.* at 119.
104. *See id.* at 119–21.
105. *Id.* at 119.
106. *See id.* at 120.
107. *Id.*
108. *See id.*
109. *See id.*
110. *See id.* at 120–21.
111. *Id.*
112. *Id.* at 120.

Soviet official.[113] Defeated, Akhmatova changed her tone dramatically and published a poem in support of Stalin, which read "[w]here Stalin is, there too are freedom[,] [p]eace and earth's grandeur."[114]

The other consequence of preference falsification can be far more severe. Some dissenters, when they reach their political threshold, and are less willing to accept the public opinion, will falsify their public preference but maintain their dissent in private. This creates the illusion of a more unified state. In reality, however, the state is being lulled asleep. "Deceptive stability and explosive change are thus two sides of a single coin."[115] This is precisely how sudden politically or socially charged revolts occur. Some of these revolts are more civil, but others are quite violent, resulting in death, destruction, and sometimes even a collapse of entire nations. Although this process may eventually bring about something resembling the desired change, it often would have been much more effective—and humane—to do so by promoting a culture of free speech in the first place.

In nations with true private ballots, such revolts typically come in the form of elections, as seen in BREXIT[116] or the 2016 United States Presidential Election.[117] However, when citizens feel that their ballots are not truly private or that they are not free to vote on their own accord, they may turn to other more violent measures, such as rioting or forming militant resistance groups.[118]

For example, in 1979, Iran held a vote to determine, by popular consensus, whether the citizens supported the Iranian Revolution, which would result in adopting a new theocratic constitution and turning Iran into an "Islamic Republic."[119] The results were overwhelmingly in favor of the proposal—gathering over 98% of the vote.[120] However, these results were tainted with the fear that those who voted in the opposition would be branded infidels, as the Revolution's campaign threatened.[121] There was a widespread fear that campaign leaders would somehow be able to trace specific ballots back to their respective voters.[122]

Some Iranians who opposed the Revolution, believing their voices were silenced both through a fear of consequence and an illegitimate poll, took matters into their own hands.[123] They formed The People's Mujahedin of

113. *Id.*
114. *Id.*
115. *Id.* at 21.
116. *See EU Referendum: Full Results and Analysis*, THE GUARDIAN, https://www.theguardian.com/politics/ng-interactive/2016/jun/23/eu-referendum-live-results-and-analysis (last visited Dec. 14, 2020).
117. *See Presidential Election Results: Donald J. Trump Wins*, N.Y. TIMES, (Aug. 9, 2017), https://www.nytimes.com/elections/2016/results/president.
118. KURAN, *supra* note 12, at 14.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. Jonathan Masters, *Mujahadeen-e-Khalq (MEK)*, COUNCIL ON FOREIGN RELS., https://www.cfr.

Iran, a militant resistance organization, to stand violently against this new form of Iranian government.[124] The People's Mujahedin was subsequently exiled from Iranian soil only a few short years after the 1979 poll.[125]

III. THE DEVELOPMENT OF THE PUBLIC FORUM DOCTRINE

The public forum doctrine was born from necessity—people needed to have a viable forum through which to exercise their First Amendment right to free speech.[126] Thus, in those forums that are deemed public forums, the government's power to control, abridge, or censor speech is severely limited.[127] The quintessential examples of these public forums are public parks, sidewalks, and streets.[128]

The Supreme Court's decision in *Hague v. Committee for Industrial Organization* was the first to recognize the implications of the First Amendment and formally adopt the public forum doctrine.[129] The Court held that freedom of speech and assembly for any lawful purpose is a fundamental right incorporated and guaranteed to all persons under the Fourteenth Amendment.[130] Thus, in *Hague*, the Court ruled that it was unconstitutional for Jersey City, as a governmental entity, to prevent otherwise lawful protest and expression by the Committee for Industrial Organization on the public streets and sidewalks of the city.[131]

The Court stated that the right to gather and discuss ideas was essential to "[t]he very idea of a government, republican in form" and that the government had a duty to facilitate such discussion.[132] This duty is discharged by designating certain places for open speech—places that have historically been used for "assembly, communicating thoughts between citizens, and discussing public questions" regardless of who owns these places.[133] In *Schneider v. New Jersey*, the Court further explained the designation of public forums, stating that they must be "natural and proper places for the dissemination of information and opinion."[134]

The Court has also held that privately-owned property can likewise be a public forum.[135] The landmark case for this development, *Marsh v.*

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org/backgrounder/mujahadeen-e-khalq-mek (last modified July 28, 2014).

124. *Id.*

125. *Id.*

126. *See generally* Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37 (1983).

127. *Id.* at 45.

128. *See generally* Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

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

130. *Id.*

131. *Id.*

132. *Id.* at 513; *see* Dawn Carla Nunziato, *From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital*, 25 B.U. J. SCI. & TECH L. 1 (2019).

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

134. Schneider v. New Jersey, 308 U.S. 147, 163 (1939).

135. Marsh v. Alabama, 326 U.S. 501, 506 (1946).

Alabama, dealt with a company-owned city, Chickasaw, Alabama, which attempted to restrict open speech and arrested the plaintiff for failing to comply with their restrictions.[136] The Court stated that such restriction was unconstitutional, notwithstanding Chickasaw's status as privately-owned property.[137] "Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[138]

However, the Court declined to extend this ruling in *Lloyd Corp. v. Tanner*. In this case, the Court held that a privately-owned mall retained its right to exclude individuals who were violating its policy against distributing pamphlets, despite the fact that the mall was freely open to the public.[139]

On its face, *Lloyd* appears inconsistent with *Marsh*, especially because we have seen other examples of privately-owned property treated as public forums, such as in *Freedom from Religion Found., Inc. v. City of Marshfield* and *Venetian Casino Resort, L.L.C. v. Local Joint Executive Board of Las Vegas*.[140] Seemingly, the distinction between *Lloyd*, *Freedom from Religion*, and *Venetian Casino* is the purpose and historical use of the property in question.[141] *Venetian Casino* involved a privately-owned sidewalk that was built by a casino on land that was once publicly-owned.[142] *Freedom from Religion* involved a park that was once fully publicly owned, until a portion of it was sold to a private entity.[143] In both cases, the respective circuit courts held that the privately-owned sidewalk and the privately-owned portion of the park were public forums because of their historical use as places for public expression.[144]

The advent of the internet has only served to further confound the public forum analysis. Certain Justices, such as Justice Rehnquist, have held a more narrow and limited view on the public forum doctrine, while others, such as Justice Kennedy, have had a more functional and progressive view.[145] Justice Kennedy continually sought to preserve the public forum doctrine's role in an ever-changing technological world.[146] He was concerned about the Court's dismissive attitude towards the First Amendment amid new emerging

136. *Id*. at 503–04.

137. *Id*. at 507.

138. *Id.* at 506.

139. Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); *see* Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 494 (7th Cir. 2000); Venetian Casino Resort, L.L.C. v. Loc. Joint Exec. Bd. of Las Vegas, 257 F.3d 937, 948 (9th Cir. 2001).

140. *Freedom from Religion*, 203 F.3d at 494; *Venetian Casino*, 257 F.3d at 948.

141. *Compare Lloyd*, 407 U.S. at 551, *with Freedom from Religion*, 203 F.3d at 494; *and Venetian Casino*, 257 F.3d at 948.

142. *See Venetian Casino*, 257 F.3d at 940–41.

143. *See Freedom from Religion*, 203 F.3d at 489–90.

144. *Id.* at 494; *Venetian Casino*, 257 F.3d at 948.

145. Nunziato, *supra* note 132.

146. *Id.*

technologies, and he warned that when operating public forums, the government and its actors should err on the side of promoting free speech, not discouraging it.[147]

IV. THE STATE ACTION DOCTRINE

When the Supreme Court began interpreting the Fourteenth Amendment as it applied to the Bill of Rights protections, it held that, because of the language of the Amendment,[148] such protections applied only to government actions, not to actions of private entities.[149] "That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."[150] However, the line between government and private action has since become more blurred.[151] The Supreme Court was left to decide exactly what kind of government acts qualified as state action and how significant such acts needed to be.[152]

The Court began by implementing a simple test. It held in an 1879 decision, *Ex parte Virginia*, that the state can act only through its executive, legislative, or judicial departments.[153] But, such a black and white test insufficiently addressed state actions that were not so obviously conducted by the state itself.[154]

In *Jackson v. Metropolitan Edison Co.*, the Court attempted to define the parameters for significant state participation regarding private entities.[155] It held that there must be a strong nexus between the state and the private entity's challenged action, as if the action was conducted by the state itself.[156] In other words, "the state action, not the private action, must be the subject of the complaint."[157] This nexus may not be obvious at first glance, often requiring a more thorough, fact-intensive analysis to notice.[158]

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147. *See* Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C., 518 U.S. 727, 787 (1996); Nunziato, *supra* note 132, at 33–34.

148. The Fourteenth Amendment states that "[n]o *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1 (emphasis added). The Bill of Rights protections are more commonly understood to have been incorporated under the Equal Protection Clause of the Fourteenth Amendment, as opposed to under the Privileges and Immunities Clause. *See* Legal Info. Inst., *State Action*, CORNELL L. SCH., https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/state-action (last visited Dec. 14, 2020).

149. Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

150. *Id.*

151. *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921 (2019).

152. *See, e.g.*, *id.*

153. *Ex parte* Virginia, 100 U.S. 339, 346 (1879).

154. Legal Info. Inst., *supra* note 148.

155. Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

156. *Id.*

157. Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968).

158. *Jackson*, 419 U.S. at 351.

However, the State Action Doctrine has since split into three separate categories, defining state action to be: "(i) when the private entity performs a traditional, exclusive public function, (ii) when the government compels the private entity to take a particular action, or (iii) when the government acts jointly with the private entity."[159] The category most relevant to this Comment, and also the most open-ended, is the public function category. Public function state actors can be traced back to *Marsh*, where the Court held that the privately-owned city of Chickasaw was a state actor because operating a city is a traditional and exclusive public function.[160]

The Court has held that few functions will ever pass this public function test.[161] Private participation in the jury-selection process has been deemed a public function.[162] However, many other seemingly public functions have not been treated similarly, such as operation of private utilities,[163] operation of publicly-funded nursing homes,[164] and provision of schooling for children referred by detention centers.[165] The Court held that these actions were not powers "traditionally and exclusively reserved to the State."[166]

In the most recent case regarding state action, *Manhattan Cmty. Access Corp. v. Halleck*, the Court addressed whether providing forums for speech was a public function.[167] Plaintiff Halleck brought a § 1983 claim[168] against privately-owned Manhattan Neighborhood Network (MNN) for suspending him from all public access channels after he aired a movie that was critical of MNN.[169] By law, cable TV providers are required to set aside a certain number of channels as public access channels—channels that are open for private citizens to use.[170] Time Warner had assigned MNN to operate these channels, which were heavily regulated by the New York government.[171] Still, the Court held that providing a forum for speech by itself did not qualify as a public function that was traditionally and exclusively performed by the state, regardless of how regulated it was.[172]

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159. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019) (citations omitted).
160. *See* Marsh v. Alabama, 326 U.S. 501 (1946).
161. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 158 (1978).
162. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).
163. *See Jackson*, 419 U.S. 345.
164. *See* Blum v. Yaretsky, 457 U.S. 991 (1982).
165. *See* Rendell-Baker v. Kohn, 457 U.S. 830 (1982).
166. *Flagg Bros.*, 436 U.S. at 157 (quoting *Jackson*, 419 U.S. at 352).
167. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019).
168. Section 1983 gives plaintiffs a cause of action to bring against private entities who are deemed state actors and have deprived the plaintiffs of their constitutional rights. 42 U.S.C. § 1983.
169. *See Halleck*, 139 S. Ct. at 1926.
170. *See id.*
171. *See id.*
172. *Id.* at 1930.

V. MODERNIZATION OF THE PUBLIC FORUM DOCTRINE FOR THE ERA OF NEW MEDIA

The evolution of communicative expression in the United States, facilitated by the emergence and prevalence of the internet, demands that the Supreme Court modernize their ruling in *Marsh* to include the most prominent social media platforms, such as Twitter, YouTube, and Facebook, as privately-owned public forums, thus nullifying their right to exclude—or ban—users. Part V.A will discuss the Supreme Court's opinion in *Packingham v. North Carolina*, which has provided powerful dicta indicating that the evolution of discussion in our society will soon force courts to treat the largest online platforms as public forums.[173] Part V.B will discuss how the most powerful social media companies are state actors of the internet. Part V.C will discuss how the internet itself is analogous to a city that only has privately-owned forums for speech, and how Twitter and other social media platforms meet the most important public forum criteria.

Part VI will discuss how the current state of oligopoly-like control over speech on the internet demands some form of government intervention, and how the right to speak freely is an important principle that our public policy should work to promote and protect as a society. Part VII will endorse Senator Hawley's bill promoting viewpoint neutral content moderation and will propose new legislation that the United States Congress should enact in order to preserve free speech online.[174]

A. In Packingham v. North Carolina*, the Supreme Court Viewed Social Media Platforms as Public Forums*

The Supreme Court believes that social media platforms should eventually be treated as public forums. In Justice Kennedy's capstone opinion regarding the public forum doctrine, *Packingham v. North Carolina*, the Supreme Court provided a helpful framework through which we may analyze the legal intersection of the public forum doctrine and the internet.[175] Although not outright holding that particular social media sites are in fact public forums, Justice Kennedy's opinion foreshadowed that this could soon be the case.[176] "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 . . . and social media in particular."[177]

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173. *See* Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017).
174. *See infra* Part VII (discussing legislation that works towards a solution).
175. *See Packingham*, 137 S. Ct. at 1735.
176. *See id.*
177. *Id.*

Admittedly, this part of his opinion is mainly dicta, but it gives us, at the very least, important perspective as to where we are heading as a society.[178] Because of how society is evolving, traditional public forums are becoming more and more obsolete as mediums for expression.[179] We are instead turning towards online platforms for our expression and discussion.[180] "[W]e cannot appreciate yet [the internet's] full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be."[181]

However, the companies that run these platforms each have their own restrictions on speech that may be used on their respective platform.[182] In a sense, this creates an oligopoly over speech[183] and effectively leaves people without a viable platform on which to exercise their rights. Recognizing this, Justice Kennedy pointed out that social media platforms should be considered the new-era public forums out of necessity birthed simply from a lack of options.[184] He stresses that the ability for all people to access "places where they can speak and listen, and then, after reflection, speak and listen once more" is a cornerstone principle of the First Amendment.[185]

The *Packingham* opinion is a compelling glimpse into what First Amendment jurisprudence could look like in the coming years.[186] Admittedly, such a conclusion would indeed be a monumental leap for the First Amendment, but the rapid, unrelenting development of the internet throughout the past few decades has been likewise monumental,[187] and monumental developments often require monumental solutions. This Comment lays out the legal roadmap that guides public forum analysis to this necessary conclusion.

B. Google, Facebook, and Twitter are the State Actors of Online Speech

In *Halleck*, Justice Kavanaugh addressed the issue of whether a cable TV operating company was a state actor by holding that "when a private entity provides a forum for speech, the private entity is not *ordinarily*

178. *Id.*

179. Raes Mohamed, *What's a Public Forum in the Age of the Internet?*, RM WARNER (Apr. 25, 2009), https://www.rmwarnerlaw.com/whats-a-public-forum-in-the-age-of-the-internet/.

180. *Id.*

181. *Packingham*, 137 S. Ct. at 1736.

182. *See Terms of Service*, YOUTUBE, https://www.youtube.com/static?template=terms (last updated Dec. 10, 2019); *Twitter Terms of Service*, TWITTER, https://twitter.com/en/tos (last updated June 18, 2020); *Terms of Service*, FACEBOOK, https://www.facebook.com/terms.php (last updated Oct. 22, 2020).

183. *See infra* note 291 and accompanying text (explaining the creation of an oligopoly).

184. *See Packingham*, 137 S. Ct. at 1735.

185. *Id.*

186. *See id.*

187. *See* Micha Kaufman, *The Internet Revolution is the New Industrial Revolution*, FORBES (Oct. 5, 2012, 3:42 PM), https://www.forbes.com/sites/michakaufman/2012/10/05/the-internet-revolution-is-the-new-industrial-revolution/#31ef20b447d5.

constrained by the First Amendment."[188] "[M]erely *hosting* speech by others is not a traditional, exclusive public function and does not *alone* transform private entities into state actors subject to First Amendment constraints."[189] Justice Kavanaugh's word choice here is deliberately withholding. Clearly, the *Halleck* decision leaves the door open for some circumstance where a speech-promoting entity may indeed be a state actor. Hosting speech alone may not be a traditional, exclusive public function, but he implies that an entity that goes beyond merely hosting speech may at some point become a state actor.[190]

Such a circumstance would need to be extraordinary, however, to trigger the powerfully binding constitutional restrictions that come with being a state actor.[191] Perhaps the situation Justice Kavanaugh had in mind was one whose power has only just come to fruition over the last few decades,[192] whose potential visits us only in our most fantastical imaginations,[193] and whose complexity and popularity has left Congress thoroughly out of touch.[194] This of course refers to the internet.[195] It is no secret that Congress is truly out of its element when it comes to dealing with this mass of information, communication, and commerce we call the internet.[196] As such, they have often refrained from intervening.[197]

But by actively avoiding government intervention in such a large cyberspace, has Congress actually designated a circle of state actors? The public forum doctrine has shown us that the First Amendment creates an affirmative duty for the government to facilitate speech. But, it has been the three private, tech-giant companies, Google, Facebook, and Twitter, who have emerged over the last decade to facilitate online speech, thus fulfilling the government's role.[198] This void existed largely because of the government's unwillingness to designate and regulate online forums properly.[199] Instead, such power has been left to these private entities, not "merely hosting"[200] speech on their platforms but *facilitating* and *policing* it.

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188. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019) (emphasis added).

189. *Id.* (emphasis added).

190. *See id.*

191. *See id.*

192. *See* Kaufman, *supra* note 187.

193. *See* Rebecca O. Bagley, *What's the Real Potential of the Internet of Things?*, FORBES (June 2, 2014, 11:58 AM), https://www.forbes.com/sites/rebeccabagley/2014/06/02/whats-the-real-potential-of-the-internet-of-things/#375d75131611.

194. *See* Shara Tibken, *Questions to Mark Zuckerberg Show Many Senators Don't Get Facebook*, CNET (Apr. 11, 2018, 5:00 AM), https://www.cnet.com/news/some-senators-in-congress-capitol-hill-just-dont-get-facebook-and-mark-zuckerberg/.

195. *See id.*; Bagley, *supra* note 193; Kaufman, *supra* note 187.

196. *See* Tibken, *supra* note 194.

197. *See id.*

198. *See supra* Part III (discussing the public forum doctrine in the modern era).

199. *See* Valerie C. Brannon, CONG. RSCH. SERV., R45650, *Free Speech and the Regulation of Social Media Content* (2019).

200. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019).

YouTube and Twitter's purposes since the launch of their respective platforms have been to facilitate more open speech. Twitter's self-proclaimed purpose "is to serve the public conversation."[201] Twitter also doubled the maximum number of characters in a tweet in order to facilitate better quality discussion about relevant, public issues.[202] Similarly, YouTube advertises itself as a "platform[] for free expression[,]"[203] stating that it believes "people should be able to speak freely, share opinions, [and] foster open dialogue."[204] But, these are not just their mission statements—Twitter and YouTube have had a real, active effect on online speech.[205] This is a power that historically has been held by the government, hence the creation of the public forum doctrine.

Twitter polices speech on its platform through deleting tweets and banning users that appear to disturb the peace. In a recent policy update, Twitter sought to police speech on its platform even further, removing tweets that "'glorify' or 'condone' violence."[206] State governments, on the other hand, keep the peace pursuant to their constitutional police power, a power traditionally and exclusively held by the government.

Google, Facebook, and Twitter's power to facilitate and police speech goes far beyond what Justice Kavanaugh called merely hosting speech, and transcends any other online entity's ability to do so. Thus, these three tech-giants must be considered state actors for purposes of facilitating and policing online speech.

C. The Analogy Between Marsh v. Alabama *and Online Discussion Today*

Imagine Jane lives in Blackcrest, an imaginary city with no publicly-owned parks at all. If Jane wishes to discuss a recent political issue with others, she must go to one of three privately-owned public parks located in Blackcrest. But what if the owners of these parks decide that they do not like Jane's opinions? Presumably, they would be able to exclude Jane with no repercussion because they are each privately-owned. But with no other options, what is Jane to do? Public parks are the quintessential examples of public forums, but there are none available to her.

This hypothetical is reminiscent of the situation in *Marsh v. Alabama*, where the entire city of Chickasaw, Alabama was privately owned by a company.[207] But it should also feel reminiscent of a more modern situation—

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201. *The Twitter Rules*, *supra* note 17.

202. *See* Rosen & Ihara, *supra* note 20.

203. *See Community Guidelines*, *supra* note 33.

204. *See About*, *supra* note 34.

205. *See supra* Part III (describing the impact that silencing voices in heavily used forums can have).

206. Sara Ashley O'Brien, *Twitter's Plan to Police Hate Speech and Symbols*, CNN BUSINESS (Oct. 17, 2017, 7:00 PM), https://money.cnn.com/2017/10/17/technology/business/twitter-content-moderation-policy/index.html.

207. Marsh v. Alabama, 326 U.S. 501, 503 (1946).

the internet. Currently, online discussion is overwhelmingly conducted on three privately-owned platforms—YouTube, Facebook, and Twitter.[208] The Supreme Court in *Marsh* held that certain forums within privately-owned cities were considered public forums because, otherwise, citizens within such cities would have no medium through which to exercise their First Amendment rights.[209] However, similarly, there are no government-provided platforms for expression on the internet either. Thus, the Court must modernize this holding by expanding it to include the most highly trafficked online platforms that have been used historically as mediums for expression.

Of course, one major difference between the city of Chickasaw and the internet is the fact that users on the internet can create their own forums through sites like Wix.com.[210] However, the claim that this somehow gives them a viable platform for speech is wildly impractical. These tech-giants have simply grown too big for competition.

For instance, several video-posting platforms have attempted to compete with YouTube, but they have each failed to even remotely approach YouTube's success. If someone wishes to watch a particular video, the first place—and perhaps the only place—she will think to search is YouTube. Likewise, if someone wishes to post a video, she will first think to post that video to YouTube in order to maximize the number of people who watch. Many users at this point believe that YouTube is simply too big to be overtaken.

Each person has the right to hear what her peers have to say.[211] However, under this current "remedy," not only are silenced speakers forced to compete with companies like Google, but those who wish to listen are practically unable to do so. It is unrealistic to expect people who were once consumers of a certain speaker to go find that speaker on their new platform, especially if they are just starting out. This problem is less evident with speakers like Alex Jones, who have a strong presence outside of the main platforms. However, consumers of smaller speakers will effectively lose their right to listen if those speakers are de-platformed. They will not be big enough for their presence to be known outside the social media sphere.

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208. *See* J. Clement, *Leading Countries Based on Facebook Audience Size as of July 2020 (in Millions)*, STATISTA (Oct. 29, 2020), https://www.statista.com/statistics/268136/top-15-countries-based-on-number-of-facebook-users/; J. Clement, *Leading Countries Based on Number of Twitter Users as of October 2020 (in Millions)*, STATISTA (Oct. 29, 2020), https://www.statista.com/statistics/242606/number-of-active-twitter-users-in-selected-countries/; Mansoor Iqbal, *YouTube Revenue and Usage Statistics (2020)*, BUSINESS OF APPS, https://www.businessofapps.com/data/youtube-statistics/ (last updated Oct. 30, 2020) (stating that 73% of adults in the U.S. use YouTube).

209. *Marsh*, 326 U.S. at 507–08.

210. Matt Ahlgren, *How to Create a Website Free of Cost?*, WEBSITE HOSTING RATING https://www.websitehostingrating.com/how-to-create-a-website-free-of-cost/ (last updated Oct. 4, 2020).

211. Hague v. Comm. for Indus. Org., 307 U.S. 496, 512 (1939).

Prior to *Marsh*, companies that owned entire cities essentially had complete control over speech within the city.[212] They reasoned that they had the power to set all the restrictions they wanted because it was their property.[213] The same can be said, however, regarding the internet. The tech-giants' respective platforms are their property. By default, they have been given free reign over the parameters of what is allowed and disallowed on their respective platforms.[214]

They have largely done this through their terms of service[215]—adhesion contracts that require the user to agree to a whole host of clauses prior to being allowed to even use the platform.[216] Among these items is an agreement that the user will adhere to all rules and policies set forth by the particular company, and further, that the user agrees that any violation of such rules and policies may, at the company's sole discretion, lead to a suspension of the user, be it temporary or permanent.[217] However, if a modern individual wishes to discuss or consume discussion about a particular topic, such an individual has virtually no choice but to turn to one of these four platforms. Thus, by extension, such an individual has no choice but to agree to that platform's terms of service.

This is no different from an individual living in Chickasaw, Alabama prior to 1946, who had no choice but to visit a park or street corner in order to participate in discussion.[218] But in both cases, anything that individual said, wrote, read, or watched would be first filtered by a private party.[219] The Chickasaw authorities had the power to shut down speech they did not agree with, and in some cases, these speakers could even be arrested.[220]

Twitter's current usage policies mirror this same power.[221] It reserves the right to silence speech that violates its policies often by temporarily or permanently banning offenders.[222] Such unacceptably absolute power over the content of speech required the Supreme Court to intervene and reserve certain forums within Chickasaw for free speech.[223] As the Court held: "The

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212. *See Marsh*, 326 U.S. at 503–05.

213. *See id.*

214. *See* Hudgens v. N.L.R.B., 424 U.S. 507, 513 (1976).

215. *See* YOUTUBE *supra* note 182; *see* TWITTER *supra* note 182; *see* FACEBOOK *supra* note 182.

216. *See* Andrew Tutt, *On the Invalidation of Terms in Contracts of Adhesion*, 30 YALE J. REGUL. 439, 440–42 (2013) (explaining that contracts of adhesion are generally entered into on a "take-it-or-leave-it basis" where the offeror has nearly all the bargaining power). Terms of a contract of adhesion are almost always fully enforceable unless a court deems a particular term—or the contract as a whole—to be unconscionable. *See* Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 983–84 (9th Cir. 2007).

217. *See* YOUTUBE *supra* note 182; *see* TWITTER *supra* note 182; *see* FACEBOOK *supra* note 182.

218. *See Marsh*, 326 U.S. at 504–05.

219. *See id.* at 503–04; YOUTUBE *supra* note 182; TWITTER *supra* note 182; FACEBOOK *supra* note 182.

220. *See Marsh*, 326 U.S. at 503–04.

221. *See* TWITTER, *supra* note 182.

222. *See id*.

223. *See Marsh*, 326 U.S. at 509.

more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[224] The same should be done regarding the internet. The Court applied the public forum doctrine to the areas of Chickasaw that, but-for the fact that the city was privately-owned, would be considered traditional public forums.[225]

But how should we bridge the gap between physical forums and online forums? In a recent law review article, Tyler Lane attempted to do so by proposing a three-factor test.[226] This test would have courts consider "the size of the website, [] the purpose of the website, and [] the similarities the website shares with a physical forum" in order to determine which online platforms should be considered public forums.[227] These factors, while useful, could be refined to better encompass public forum analysis and apply it to online communicative expression.

The most important factors, and the factors that courts look to most when considering the issue of privately-owned property as a public forum are whether the forum is historically a medium of expression, whether the forum is open to the public, and whether it is highly trafficked.[228] Thus, considering Twitter specifically, this Comment will analyze its (1) barrier to entry, (2) purpose and use as a medium for communicative expression, and (3) number of users and consumers. These factors attempt to capture root concepts of the historical public-forum factors and adapt them to fit our ever-growing shift towards online forums.

1. Barrier to Entry

Twitter has satisfied one of the most important factors of public forums, being open to the public,[229] because it has a low barrier to entry and comes with an assumption of open access. Twitter is a social media site on which nearly anyone can post—the only requirement is that the user first have an account with Twitter.[230] This is a one-time barrier that currently involves entering a name, entering a valid email address or phone number, and accepting Twitter's Terms of Service Agreement, in which the creator verifies that the creator is thirteen years of age or older, and agrees to Twitter's rules and policies regarding posting restrictions and the penalties

224. *Id.* at 506.

225. *See id.*

226. *See* Tyler Lane, *The Public Forum Doctrine in the Modern Public Square*, 45 OHIO N.U.L. REV. 465, 495 (2019).

227. *Id.*

228. Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 494 (7th Cir. 2000); Venetian Casino Resort, L.L.C. v. Loc. Joint Exec. Bd. of Las Vegas, 257 F.3d 937, 948 (9th Cir. 2001).

229. *See Venetian Casino*, 257 F.3d at 948.

230. *See* TWITTER, *supra* note 182.

for violations thereof.[231] This process also requires an internet connection and a device on which to access the internet, both of which are fairly easy to come by in our modern age. A recent survey shows that eighty-one percent of Americans now own a smartphone,[232] and ninety percent of American adults use the internet.[233]

Although this barrier to entry is higher than that of physical, public forums, it is virtually the same across the board for all online forums. Online forums such as YouTube, Facebook, Instagram, or Snapchat all require users first to create an account before they are able to make a post on the platform.[234] Furthermore, all online forums require both an internet connection and an appropriate device in order to have access because of their online nature. However, there are no restrictions regarding *who* may make an account, aside from the age restriction.[235] Anyone may make an account regardless of credentials, income, education, gender, race, beliefs, politics, etc.[236] In essence, all of these forums have the lowest barrier to entry possible for an online forum. Thus, the barrier to entry for such forums should not be compared directly to that of physical forums, but instead to those physical forums with the equivalent barrier to entry. In other words, forums with the minimum barrier to entry for online forums should be compared to forums with the minimum barrier to entry for physical forums.

One of the most basic principles of property law is that private property comes with an assumption that there is not open access to the public.[237] However, there are plenty of examples of private property where the assumption is the exact opposite.[238] Certain private properties, such as malls and restaurants, are open to the public freely, albeit at certain times.[239] Twitter is also private property, but nearly anyone can make a post on it at any time, and the bar is even lower for people who only wish to see or consume content on Twitter.[240] This is one of the defining characteristics of online social media

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231. *See id*.

232. *Mobile Fact Sheet*, PEW RSCH. CTR. (June 12, 2019), https://www.pewresearch.org/internet/fact-sheet/mobile/.

233. Monica Anderson, Andrew Perrin, Jingjing Jiang & Madhumitha Kumar, *10% of Americans Don't Use the Internet. Who Are They?*, PEW RSCH. CTR. (Apr. 22, 2019), https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/.

234. *See* YOUTUBE *supra* note 182; *see* FACEBOOK *supra* note 182.

235. *See* YOUTUBE *supra* note 182; *see* TWITTER *supra* note 182; *see* FACEBOOK *supra* note 182.

236. *See id*.

237. In cases of tortious trespass, the fact that a defendant may have had permission to enter the property is typically an *affirmative* defense that the defendant may raise. *See Trespass: Defenses*, U.S. LEGAL, https://trespass.uslegal.com/defenses/ (last visited Dec. 14, 2020). This means that the assumption, absent any indication to the contrary, is that the defendant did not have permission to enter the premises. *See id*.

238. *See* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) (holding the Lloyd shopping center extended an invitation to conduct business on the mall's premises with its tenants, though no open invitation exists for the public to use the forum for any given purpose).

239. *See id.*

240. *About Public and Protected Tweets*, TWITTER, https://help.twitter.com/en/safety-and-security/

sites—the fact that they are open to anyone.[241] In this way, Twitter is very similar to a public park, where anyone can walk up and visit.

Many physical forums enjoy barriers to entry that are nearly nonexistent. Areas such as public streets, public parks, and sidewalks have no restrictions on who may enter and speak their mind—they may only have restrictions on when such speech can be made.[242] "[S]ocial media sites—like traditional public forums such as streets, sidewalks, and parks—offer 'relatively unlimited, low-cost capacity for communication of all kinds[.]'"[243] Such designation is the very root of the public forum doctrine.[244] Traditional public forums are those physical forums with the minimum barrier to entry.[245] Thus, Twitter's barrier to entry is the online equivalent to the barrier to entry of traditional public forums.

2. Medium for Expression

Twitter has satisfied one of the most important factors of public forums, historically being a medium for expression,[246] because since its very inception, it has not only been used as one of the most popular mediums for expression we have,[247] but Twitter has actually actively encouraged such expression on the platform.[248] One defining characteristic of social media sites is their focus on enabling expression.[249] Written and spoken expression have always been selling points of Twitter.[250] This is in contrast to social media sites such as Instagram or YouTube, which focus more on visual expression through pictures and videos. In fact, Twitter provides people the ability to view posts, despite their not having an account. This further entices people to choose Twitter over other similar sites to express their ideas because they know they will have the potential to reach a larger audience.

Not only has Twitter been historically used as a medium for communicative expression, but Twitter itself has actually, actively encouraged such expression on its site. One example of this is when Twitter doubled its character limit per post from 140 to 280 characters, claiming that

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public-and-protected-tweets (last visited Dec. 14, 2020).

241. Maddie Russell, *Social Media Is for Everyone*, SOC. MEDIA EXP. (Mar. 19, 2014), https://socialmediaexplorer.com/social-media-marketing/social-media-is-for-everyone/.

242. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984).

243. Nunziato, *supra* note 132.

244. *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 514–15 (1939).

245. *See id.*

246. Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 494 (7th Cir. 2000).

247. *See infra* note 255 and accompanying text (describing usage and demographics of YouTube users in the United States from 2015–2018).

248. Rosen & Ihara, *supra* note 20.

249. *See* Harper Wilcox, *Self Expression on Social Media*, TRINITY VOICE (Oct. 15, 2018), https://thetrinityvoice.com/focus/2018/10/15/self-expression-on-social-media/.

250. *See supra* Part II (discussing Twitter's service to public communication, its goals to facilitate high quality conversation, and its success in influencing audiences through free and open expression).

the newly expanded feature would help encourage more open and thoughtful discussion among parties.[251]

In *Marsh*, the Court felt compelled to step in and regulate privately-owned property as a federal governmental force because there was no public property within the whole city.[252] Hence, those aspects of the city that had been historically used by the citizens as mediums for expression were then set aside as public forums.[253]

The situation online is strikingly similar. There are no government-owned and -run alternatives to Twitter. So, the same problem arises on the internet as it did in Chickasaw. Where there is no public alternative to expression of speech, the government must create such a forum, and it should do so by treating those forums historically used for expression as public forums, as the Court did in *Marsh*.[254]

3. Number of Users and Consumers

In order to maintain the balance between owners' private property rights and users' constitutional rights, this extension of the public forum doctrine should only apply to a very select few online forums—only the most highly trafficked social media platforms. That being said, YouTube, Facebook, and Twitter completely dwarf all other online platforms in terms of usage in the United States.[255] YouTube tops the charts in the United States with over 180 million active users.[256] Facebook and Twitter have amassed over 170 million and 80 million monthly users in the U.S., respectively, overshadowing similar platforms such as Reddit and Tumblr.[257]

This traffic shows that not only are these platforms influential on speech over the internet, but they are the *most* influential online platforms for speech. Because these platforms are the ones most open to the public, their owners are likewise most subject to their users' fundamental rights. "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[258] Limiting this extension of the public forum doctrine to only these platforms maintains the balance between the owners' private property rights and the users' constitutional rights.

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251. Rosen & Ihara, *supra* note 20.

252. *See* Marsh v. Alabama, 326 U.S. 501, 506–07 (1946).

253. *See id.*

254. *See id.*

255. *See Most Popular Social Media*, *supra* note 26; Geoffrey Migiro, *Which Countries Watch the Most YouTube?*, WORLDATLAS (Nov. 30, 2018), worldatlas.com/articles/which-countries-watch-the-most-youtube.html.

256. Migiro, *supra* note 255.

257. *See Most Popular Social Media*, *supra* note 26.

258. *Marsh*, 326 U.S. at 506.

D. Distinguished from Lloyd Corp. v. Tanner

In *Lloyd Corp.*, the Supreme Court refused to extend its ruling on public forums in *Marsh* to include a privately-owned mall.[259] Their reasoning was that property does not lose its privately-owned nature simply because it is open to the public.[260] However, this ruling does not apply to the instant problem, and should not preclude the Supreme Court from treating highly trafficked social media sites, such as Twitter, as public forums because these forums have radically different purposes.[261]

The primary purpose of the mall in *Lloyd Corp.* was to provide a marketplace for individuals to buy goods.[262] Twitter, on the other hand, exists almost exclusively as a medium for communicative expression.[263] Of course, there are other smaller aspects to Twitter's microcosm, such as advertising products or promoting individuals, but the fundamental cornerstone to Twitter's model is the ability to post written messages for other people to read.[264] Thus, the holding from *Lloyd Corp.* should be construed as only applying to forums that do not exist generally to be a medium for communicative expression.[265] This conclusion is further supported by two federal circuit court of appeals cases decided since *Lloyd Corp.*, the Ninth Circuit's decision in *Venetian Casino*[266] and the Seventh Circuit's decision in *Freedom from Religion*,[267] where those courts held that privately-owned property is a public forum due to its historic use as mediums for expression.

VI. WHEN IN DOUBT, PRESERVE FREE SPEECH

The fundamental constitutional right to free speech is in essence valueless if not also accompanied by a national culture of free speech. Opponents of promoting widespread free speech often cite the multitude of Supreme Court decisions holding that First Amendment protections are only protections against action from the government, not action from other private individuals or entities. But this does not mean that these First Amendment protections are not also principles we should promote generally. The two are not mutually exclusive.

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259. *See* Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

260. *See id.*

261. *See supra* notes 188–98 and accompanying text (explaining the government's unwillingness to regulate forums on the internet).

262. *See Lloyd*, 407 U.S. at 555.

263. *See supra* notes 188–206 and accompanying text (explaining that an entity that does host speech could become a state actor).

264. *See supra* Part III (discussing the public forum doctrine in the modern era).

265. *See Lloyd*, 407 U.S. 551; Hudgens v. N.L.R.B., 424 U.S. 507, 520–21 (1976).

266. Venetian Casino Resort, L.L.C. v. Local Joint Exec. Bd. of Las Vegas, 257 F.3d 937, 948 (9th Cir. 2001).

267. Freedom from Religion Found., Inc. v. City of Marshfield, 203 F.3d 487, 494 (7th Cir. 2000).

It seems odd to think that the once commonly cherished right to free speech has been relegated to being *merely* a constitutional right—but in many ways so it has. The great misfortune here is that the right to free speech at one time held its own weight as a fundamental principle of our society. Furthermore, the consequences of forsaking this principle, which our nation should fear, may not be fully evident until too late. It is reminiscent of the famous quote by Pastor Martin Niemöller:

> First they came for the socialists, and I did not speak out—because I was not a socialist. Then they came for the [t]rade [u]nionists, and I did not speak out—because I was not a [t]rade [u]nionist. Then they came for the Jews, and I did not speak out—because I was not a Jew. Then they came for me—and there was no one left to speak for me.[268]

History should be of at least some warning, lest society needs another destructive reminder, such as the Soviet Union's post-Stalin era.

As this Comment discussed in Part II.B, the Soviet Union under Stalin severely punished those who dared speak out against the regime—blatantly opposing the freedom of speech.[269] Yet by the 1960's, their tone changed drastically, when they claimed to be a "people's democracy."[270] On paper, this was largely true, complete with private-ballot elections to select representatives democratically.[271] In 1977, the Soviet Union even passed a new constitution, which provided basic human rights never before legally granted to Soviet citizens—including the freedom of speech.[272]

However, this right to free speech, while an improvement over the barbarous punishments of the Stalin regime, was truly a right in name only. Soviet citizens were provided with the *legal* right to free speech, but they were not provided with the culture to support it.[273] Dissenters who spoke out were harassed, lost their jobs, and subjected to financial hardship.[274] The private-ballot system was a sham, as choosing to hide one's ballot was seen as a direct opposition to the Soviet government.[275] Thus, voters tended to side with the public opinion out of fear.[276] Their right to free speech was worthless.

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268. R.T. Smith, *"First They Came…" by Martin Niemöller*, SHENANDOAH, https://shenandoah literary.org/blog/2017/08/first-they-came-by-martin-niemoller/ (last visited Dec. 14, 2020) (quoting Martin Niemöller).

269. *See supra* notes 52–125 and accompanying text (explaining that there is value in not silencing opinions).

270. KURAN, *supra* note 12, at 124.

271. *Id.*

272. *Constitution (Fundamental Law) of the Union of Soviet Socialist Republics*, BUCKNELL, https://www.departments.bucknell.edu/russian/const/77cons02.html#chap07 (last visited Dec. 14, 2020).

273. *See* KURAN, *supra* note 12, at 124.

274. *Id.*

275. *Id.*

276. *Id.*

By 1985, a survey taken in Hungary, among the most liberal of the Soviet satellites, found that only 10% of Soviet citizens felt as though they had power to affect a change in their government.[277] Contrast this with the United States, where 75% of citizens felt the same.[278]

Yet even if the Soviet citizens had the power to indeed affect a change, it would have been too late. The silencing and oppressing had gone on too long—the nation was now ignorant of any alternatives.[279] Not only were the people unable to utilize what little rights they had, but by then no one had any idea *how* or *in what way* to utilize those rights.[280] They had fallen victim to widespread ignorance—one of the major consequences of preference falsification.[281] Thus, the Soviet Union went out with a whimper in 1991—dissolving as a shell of its former self.[282]

Our nation must learn from the Soviet Union's mistakes and recognize threats to free speech before they reap disastrous consequences. The examples of silencing on social media illuminate these precise threats.[283] Our nation must realize the sheer power that companies like Twitter and Google possess. Twitter can simply silence a user whenever they wish, and YouTube can restrict hundreds of a user's videos without repercussion.[284] Perhaps to this point, people have not considered—or have whimsically ignored—this possibility.

When dealing with companies of such magnitude, mere citizens have little choice but to trust in these companies' good faith. But such trust now seems ignorant of reality. Twitter has proven itself to be unable to police speech on their site through a neutral lens.[285] It is no coincidence that the overwhelming majority of Twitter's questionable bans are to individuals on a certain side of the political spectrum.[286]

Why is Twitter allowed to decide what is productive speech and what is not? It was not elected into any sort of office. It is not subject to the same checks and balances as our branches of government. Yet, it is able to

277. *Id.* at 125.

278. *Id.*

279. *See id.*

280. *See id.*

281. *See supra* notes 93–114 and accompanying text (explaining the effect on societies when dissenters lose their voice).

282. *Fall of the Soviet Union*, HISTORY, https://www.history.com/topics/cold-war/fall-of-soviet-union (last modified Sept. 11, 2020).

283. *See supra* notes 13–51 and accompanying text (highlighting the unique threats posed by Facebook, Twitter, and YouTube when silencing content).

284. *See supra* notes 13–51 and accompanying text (providing examples of how companies like Twitter and YouTube silence speech on social media).

285. *See supra* notes 13–51 and accompanying text (discussing Twitter's and YouTube's power to freely regulate speech on their respective platforms).

286. *See supra* notes 13–51 and accompanying text (discussing Twitter's lack of consistency in policing speech on its website).

dominate online speech practically unimpeded.[287] Currently, so long as Twitter's ideas of what is healthy and productive speech conforms with the majority, the rest of the nation just has to deal with it.

Consider again the city of Blackcrest example from Part V.C and its three massive privately-owned parks, where everyone goes to express themselves and discuss issues.[288] Think of these parks as Twitter, Facebook, and YouTube. Further, recall that there are no publicly-owned parks in Blackcrest, like the city of Chickasaw in *Marsh*.[289] Thus, citizens of Blackcrest would have few options where they could engage in discussion. But, under the theory of market competition,[290] if one group found themselves silenced in the Twitter park, for instance, they could simply move to the YouTube or Facebook parks, causing those parks to grow. Thus, Twitter is encouraged to remain competitive by keeping their speech policies around the same level as the two other parks.

If, however, all three parks, perhaps motivated by some sense of moral obligation, decided collectively to bolster their restrictions on speech, they could effectively shut out entire groups, classes, viewpoints, opinions, etc. without any one park suffering much loss at all. This is possible because of the small number of parks available. They have essentially created an oligopoly[291] over speech.

In large part, this is precisely what is happening online today. The nature of these tech giants is such that their viewpoints are substantially aligned.[292] As a result, viewpoints contrary to theirs are often subject to stricter standards—viewpoints that are typically in the minority opinion to begin with.[293] This is happening across the board on all three of the major platforms for online discussion. Thus, the claim that Twitter should be treated as a public forum is birthed not only from public forum jurisprudence, but also from pure necessity facilitated by the tech-giants' dominating control over online speech.

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287. *See supra* notes 13–51 and accompanying text (proving examples of Twitter favoring one side of the political spectrum when enforcing its rules).

288. *See supra* notes 208–58 and accompanying text (proposing a hypothetical scenario about an imaginary city with no publicly owned parks for citizens to discuss a recent political issue with others).

289. *See supra* notes 208–58 and accompanying text (comparing an imaginary city, Blackcrest, to an actual city that a company privately owned in its entirety).

290. *Market Competition*, POVERTY CURE, https://www.povertycure.org/learn/issues/market-competition (last visited Dec. 14, 2020).

291. Jim Chappelow, *Oligopoly*, INVESTOPEDIA, https://www.investopedia.com/terms/o/oligopoly.asp (last modified May 1, 2019).

292. Sean Captain, *Politics Are Tearing Tech Companies Apart, Says New Survey*, FAST COMPANY (Feb. 28, 2019), https://www.fastcompany.com/90313045/politics-are-tearing-tech-companies-apart-says-new-survey.

293. *See supra* Part II (discussing in full how companies like Twitter, Facebook, and YouTube tend to favor one side of the political spectrum when policing speech on their respective platforms).

Let us consider again the Blackcrest example.[294] If the owners of these parks began removing targeted individuals for voicing opinions contrary to their own, would the Supreme Court not rule that such viewpoint discrimination vigorously offends the very fabric of our country? Some may say that it depends how bad the speech was. But, herein lies the problem. Majority rule for acceptable speech is a perpetually moving goalpost, and to silence contrary viewpoints assumes the infallibility of the majority.[295] Each reasonable individual, when left to his own regards, would admit himself fallible.[296] But somehow when multiple of same opinions are collected together in a majority, that majority feels empowered to silence speech deemed unacceptable, as if a majority opinion has never before been faulty.[297]

History is often in the habit of portraying the majority opinion as the morally just opinion, over time establishing the phrase *vox populi—vox dei* (meaning: voice of the people, voice of god) as a maxim for majority rule.[298] Critics, however, have since realized the fallacy of such a phrase. "[M]en of every past generation held many opinions now known to be erroneous, and did or approved numerous things which no one will now justify."[299] Some critics have even found phrases such as "[v]oice of the people—voice of cattle"[300] or "[v]oice of the people—voice of stupidity"[301] to be more fitting.

But why should we be concerned about consequences of ignoring minority opinions—consequences like the spiral of silence or preference falsification?[302] We live in the greatest nation of any era in human history. The freedom we have today as individuals is unprecedented across the board. Of course, this is true—and it is for these very reasons that we must be extra critical of our realities and the consequences of the decisions we now make. Should we not work to promote the very principles that brought us to this point in the first place?

Google, Facebook, and Twitter have amassed unparalleled strength in the world of discussion. They each have sole discretion regarding what is and is not allowed on their platform.[303] They have the power to silence entire

294. *See supra* notes 288–90 and accompanying text (discussing an imaginary city with no publicly owned parks, leaving citizens few options where they can engage in discussion).

295. MILL, *supra* note 44, at 34–36.

296. *See id.*

297. *See* NOELLE-NEUMANN, *supra* note 56, at 175.

298. *Id.*

299. MILL, *supra* note 44, at 38.

300. NOELLE-NEUMANN, *supra* note 56, at 175 (quoting German Chancellor of the Reich, von Bethmann Hollweg).

301. *Id.* (quoting Pierre Charron).

302. *See supra* notes 52–125 and accompanying text (discussing in full the consequences of social media websites favoring one side of the political spectrum).

303. *See supra* notes 13–51 and accompanying text (discussing Twitter and YouTube's power to freely regulate speech on their websites).

viewpoints.[304] Further, their goalpost for what is acceptable speech is constantly moving, which leaves many users weighing the pros and cons of speaking out and risking saying something across that volatile, imaginary line for fear of being removed from the platform. Thus, the spiral of silence begins.[305]

We have seen examples of explosive public revolt as well.[306] Lack of certain viewpoints on Twitter creates an echo chamber of users praising one another on their having the same viewpoint with no opposition to speak of. Instead, the dissenters made their voice heard in the 2016 presidential election—for many, a truly explosive and unexpected result. Who are all these people who voted for Donald Trump? Judging from the public climate at the time, it seemed clear that Hilary Clinton should have won in a landslide victory. Few people spoke favorably of Donald Trump, so how could he have possibly won? The answer is clear—preference falsification.[307] People who voted for Donald Trump likely saw the social backlash public supporters faced and the loathsome category they were placed in. Few were willing to bring that upon themselves. Thus, they falsified their preference, choosing not to openly support Donald Trump and instead making their voice heard through the election.[308]

Consider another example—the abortion debate. In large part, preference falsification has prodded many people into one of two camps: pro-choice or pro-life. More nuanced positions are often skewered by the vocal supporters on both sides. People who suggest a middle ground, such as only banning third-trimester abortions, are labeled baby killers by the right and misogynists by the left.

Now, imagine that Twitter, perhaps motivated by some sense of moral obligation, deemed it a violation of its policies to make posts in support of the pro-life position because it violates women's rights. Suddenly, supporters of nuanced positions are caught in limbo. The first to run silent will be the true pro-life supporters. Yet, at that point, what was once the middle ground is now a far more extreme position in the public discourse that would trigger a cascade effect. Supporters of those nuanced positions will begin to fear that their opinion is no longer socially acceptable, and they too will falsify their preference. As a result, society will have lost both of the reasons for choosing

304. *See supra* notes 13–51 and accompanying text (explaining how companies like Twitter reserve the right to remove posts and entire accounts that violate their rules).

305. *See supra* notes 52–125 and accompanying text (discussing how minority-opinion supporters stop vocalizing their support until the majority opinion dominates the landscape).

306. *See supra* notes 52–125 and accompanying text (providing examples of how societies in the past have turned to explosive public revolts, such as rioting or forming militant resistant organizations).

307. *See supra* notes 52–125 and accompanying text (defining preference falsification as the selection of public views that differ from one's private views).

308. *See supra* notes 52–125 and accompanying text (discussing the internal analysis of weighing the benefits or punishments of expressing an individual's preference against the benefits of adopting the majority's preference).

a nuanced position and the disadvantages of choosing the pro-choice position. "Because people are not expressing their mind, the system of knowledge development and production, and therefore solving problems, gets corrupted."[309]

To take this example a step further, imagine that both Google and Facebook followed Twitter and implemented similar policies. With one simple policy change, those companies would have effectively deleted an entire viewpoint from public discourse, both through their actual policy and the preference falsification that follows. It is simply unacceptable for such power to lay in the hands of a few private companies. Our nation and government must act before it is too late.

In the U.S. today, the primary fault line among citizens is political ideology.[310] One's public opinions can affect job prospects, friendships, and even marriage prospects.[311] As a nation, we are left unable to have quality discussion and relationships to lead us forward.[312] Too many people deem those of opposite politics as simply inhumane and unworthy of even speaking to.[313] We must, as often as possible, avoid policies that hinder free speech.[314] We must promote free speech as a foundational principle of our nation. We must do this in the name of a nation bleeding out.

VII. PROPOSED LEGISLATION

For better or worse, the Supreme Court tends only to address issues as broadly and comprehensively as necessary in order to decide each particular case. In theory, this method avoids the Court's overreaching its power as law-interpreters and venturing into the realm of lawmakers, which is a power meant to be primarily reserved for Congress. In practice, however, the Court often struggles to walk the line between addressing only the legal issues of their particular case and addressing the legal issues comprehensively enough to be useful to lower courts deciding subsequent cases.

Unfortunately, this makes for a rather slow and fact-specific development of the law, the latter of which proves especially unhelpful in future litigation. Thus, in order to both address the issues described herein and provide courts an effective framework to work with, Congress should enact legislation that protects free speech for United States citizens. This Comment outlines two different forms such legislation could take.

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309. ERIC WEINSTIEN, *Timur Kuran — The Economics of Revolution and Mass Deception*, THE PORTAL (Aug. 20, 2019) (downloaded using iTunes).

310. *See id.*

311. *See id.*

312. *See id.*

313. *See id.*

314. *See id.*

A. The Online Free Speech Protection Act

If the Supreme Court fails to modernize the public forum doctrine, this Comment, understanding the magnitude of such a request, also calls for the United States Congress to enact legislation to protect people's rights to speech on popular online forums. The legislative branch is the sector of government best equipped to orchestrate this huge advancement in legal online regulation because it is elected by the people for the purpose of enacting laws. The core provisions of such legislation, which this Comment has dubbed The Online Free Speech Protection Act (Act),[315] should read:

(a) Equal Access[316]

> All persons shall be entitled to the full and equal enjoyment of the services, privileges, advantages, and accommodations of any place of online communicative expression, as defined in this section, without discrimination, segregation, silencing, or removal on the grounds of political, ideological, or commercial speech.[317]

(b) Place of Online Communicative Expression[318]

> A Place of Online Communicative Expression shall mean every online entity that is a state actor by performing the public function of facilitating and policing speech through a platform that, by way of its:
>
> (1) public nature;
> (2) purpose and use for communicative expression; and
> (3) large number of users; is to be considered a public forum for purposes of exclusion.

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315. The framework for this doctrine is based on the Civil Rights Act of 1964, which similarly had the purpose of preventing business owners of certain "place[s] of public accommodation" from denying people access or service based on their race, color, religion, or national origin. 42 U.S.C. § 2000a. Places of public accommodation are defined as "[e]stablishments affecting interstate commerce" such as hotels, restaurants, and theaters or similar "facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; [or] other covered establishments[.]" *Id.*

316. Congress has the power to pass this Act because the United States Constitution merely sets the floor for people's fundamental individual rights. Congress is free to raise that floor by passing legislation. Select states, such as California, have similarly raised the floor of the freedom of speech rights guaranteed in the First Amendment through their state constitution. *See* PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 82 (1980).

317. The imminent lawless action doctrine, as adopted by the Supreme Court in *Brandenburg v. Ohio*, will provide one exception to freedom of speech in which protections will not apply to speech that is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Further exceptions may be added as other compelling state or public interests appear.

318. The factors determining a place of online communicative expression are derived from the privately-owned public forum analysis discussed in Part V.C.

> (c) Liability
>
> Any online entity that violates this section shall be liable to those affected persons under 42 U.S.C. § 1983.

The Act would prevent big tech companies from censoring and banning users unfairly. The Act imposes liability on big tech companies by providing victims of online censorship with a cause of action under § 1983.[319] Perhaps more importantly, the Act strips big tech companies of their ability to inconsistently enforce their arbitrary content restrictions.[320] Instead, the types of speech protected by this Act align with the Supreme Court's categories of protected speech from both *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* and *West Virginia State Board of Education. v. Barnette*.[321] Thus, under the Online Free Speech Protection Act, users will enjoy the same protections they would if they were speaking at a physical public forum.[322]

Opponents of such a bill may contend that courts will still have litigation concerning online speech. This, however, is true after nearly any major legislation is passed. There will always be a need for courts to interpret certain aspects of legislation—that is why they exist. The Online Free Speech Protection Act is not intended to eliminate all litigation surrounding online speech—it is meant to give courts a framework to use when deciding such cases. Currently, when deciding these cases, lower courts are forced to rely upon a few cryptic Supreme Court decisions and an outdated public forum doctrine from the pre-internet era.[323] It is time Congress step in and provide the courts some guidance.

In response to the Act, big tech companies may argue that its requirements violate their fundamental right to silence as implied from the First Amendment. However, this argument would fail under the Supreme Court's decision in *PruneYard*, where the Court held that the individual's speech within a supermarket is not considered the supermarket's speech.[324] Thus, requiring a supermarket to allow individuals to speak freely inside its store did not violate the supermarket's right to silence.[325] The same can be said about the dynamic between—for instance—Twitter's users and Twitter.

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319. *See supra* note 168.

320. *See supra* notes 13–51 and accompanying text (discussing the power of Twitter and YouTube to remove content from its website).

321. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557 (1980); West Virginia State Bd. of Educ v. Barnette, 319 U.S. 624 (1943).

322. *See supra* Part III (discussing new legislation in public forum doctrine).

323. *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928 (2019); Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017); *supra* Part III (discussing new legislation in public forum doctrine).

324. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 82 (1980).

325. *Id.*

Under *PruneYard*, requiring Twitter to allow individuals to speak freely on its platform would not violate Twitter's right to silence because the user's speech is not considered Twitter's speech.[326]

B. Ending Support for Internet Censorship Act

Recently, United States Senator Josh Hawley proposed a bill to Congress that takes a slightly different approach to preserving free speech online.[327] Instead of imposing liability on tech companies for violating users' First Amendment rights, his bill, called the Ending Support for Internet Censorship Act (ESICA), imposes liability on the tech companies for all content on their respective sites if certain requirements are not met.[328]

Currently, the Communication Decency Act (CDA) absolves tech companies of all liability for removing posts they, in good faith, deem to be "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[329] The CDA essentially treats the applicable sites as merely *platforms* for content, as opposed to *publishers* of content.[330] Congress originally passed the CDA during the infancy stages of the internet as a way to protect and promote its growth.[331] Rightfully, Congress was fearful that treating big tech companies—like Twitter—as publishers of all content on their site would open them up to insurmountable amounts of liability, stunting their growth forever.[332] Yet, thanks to the CDA, social media platforms were able to flourish into what they are today.[333]

Now, however, the big tech companies are taking for granted their protections under the CDA, something that Senator Hawley's bill would change.[334] The ESICA would amend the CDA to strip all "covered compan[ies]"[335] of their platform-type liability protections unless they were able to prove that they practice viewpoint-neutral content moderation.[336] Proving such practices would involve the company's consenting to an external audit, during which the company would have the burden of

326. *Id.*

327. *See* Ending Support for Internet Censorship Act, S. 1914, 116th Cong. § 2 (2019).

328. *See id.*

329. 47 U.S.C. § 230(c)(2)(A).

330. *See id.* § 230(c)(1).

331. *Senator Hawley Introduces Legislation to Amend Section 230 Immunity for Big Tech Companies*, JOSH HAWLEY (June 19, 2019), https://www.hawley.senate.gov/senator-hawley-introduces-legislation-amend-section-230-immunity-big-tech-companies.

332. *See id.*

333. *See id.*

334. *See id.*

335. The ESICA defines a "covered company" as "a provider of an interactive computer service . . . that, at any time during the most recent 12-month period—(A) had more than 30,000,000 active monthly users in the United States; (B) had more than 300,000,000 active monthly users worldwide; or (C) had more than $500,000,000 in global annual revenue." Ending Support for Internet Censorship Act, S. 1914, 116th Cong. § 2 (2019).

336. *Id.*

providing "clear and convincing" proof to the Federal Trade Commission that their content moderation is not "biased against a political party, political candidate, or political viewpoint."[337]

Through this amendment, covered companies would be forced to choose between implementing viewpoint-neutral moderation and undertaking enormous liability for all content on their sites.[338] In truth, however, there is no choice at all. The amount of content that is uploaded each day on sites like YouTube and Twitter is simply astronomical—and so would be the liability.[339] Thus, if Congress passes the ESICA, these companies would have no choice but to adopt viewpoint-neutral content moderation practices.

VIII. CONCLUSION

The right to free speech is not only a constitutional right. It is a bedrock principle on which our nation was built, and we should work to protect it whenever possible. When faced with issues threatening encroachment upon this right, both our courts and our legislators should err on the side of preserving individuals' right to speak freely. If we do not, our nation could face similar consequences to those seen in Iran and the Soviet Union.

Importantly, one such issue is before us today—online censorship. In the era of new media, the vast majority of discussion takes place over the internet, particularly on sites such as YouTube, Facebook, and Twitter. As a result, these sites have acquired tremendous power to censor entire viewpoints from the public discourse through their content policies. No company should possess the power to steer the discussion about important ideological, political, and social issues by shutting out viewpoints that they do not agree with. As a nation, we must take action.

The Supreme Court's decisions in *Halleck*, *Packingham*, and *Marsh* provide the framework by which we may legally extend the public forum doctrine to include the most highly trafficked and dominating online platforms for speech. As Justice Kennedy explained, sites such as YouTube, Facebook, and Twitter are today's online equivalent of physical public forums—like public parks and sidewalks—and they should be treated as such.

Alternatively, Congress should pass legislation to protect free speech online, either by giving affected users a cause of action under § 1983, or by imposing liability on the companies for content posted through their respective sites. One way or the other, companies such as Google, Facebook, and YouTube should not be able to remove users of their respective platforms on the basis of viewpoint or speech content. Their control over the online

337. *Id.*

338. *See id.*

339. Jimit Bagadiya, *309 Social Media Statistics You Must Know in 2020*, SOCIALPILOT, https://www.socialpilot.co/blog/social-media-statistics#fb-usage-stats (last visited Dec. 14, 2020).

conversation is far too dominating to continue standing on the sidelines. Likewise, the consequences for failing to act are far too dire. Free speech must be protected.