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Cover Page Footnote

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D E M O C R A T I C C O M M U N I Q U É

Public Forum Doctrine and the Internet: A Neoliberal Approach to Speech Protection

Chris Demaske

This analysis critically examines the U.S. Supreme Court's reliance on neoliberal thought in the affordance of First Amendment freedoms on Internet-based media platforms. The critique focuses on instances where Internet speech conflicts with traditional democratic values and how the Court's jurisprudence ignores unfettered political and corporate power on social media outlets.

Key words: Internet, free expression, neoliberalism, public forum doctrine, First Amendment, social media

In the 1997 case *Reno v. ACLU*, the U.S. Supreme Court shaped the future of Internet speech law when it determined that as a medium, the Internet functioned more like print than broadcast, thus giving wide latitude of protection to it.[1] Twenty years later in *Packingham v. North Carolina*, the U.S. Supreme Court has again weighed in on the parameters of free speech protection on the Internet and again offers far-reaching, almost absolutist protection of speech.[2] In this article, I argue that much as it did 20 years ago, the Court has failed to adequately assess the power of the Internet in the United States (this time by likening it to a public park). I place my analysis of the *Packingham* ruling within the larger context of Internet speech issues and conclude that the Court went too far in its ruling, offering what seems to give unfettered power to social media outlets such as Facebook and Twitter to determine what speech should be free and what can be restricted and when. This approach to Internet speech runs counter to traditional democratic values, downplays the social harms caused by certain types of internet speech (such as hate speech, cyberbullying, revenge porn, etc.), ignores the significance of recent political incidents (such as the election tampering through ad placement on Facebook) and endows corporations with unfettered discretion over content decisions.

This article uses *Packingham* to highlight the problematic implications of the Supreme Court's reliance on neoliberal thought and its lack of understanding of the corporate nature and societal power of the Internet. As described by Communication Scholar Victor Pickard, neoliberalism works in support of "laissez fair capitalism, whereby markets are expected to govern all sectors of society, and government intervention not in line with commercial interests is viewed as inherently suspect."[3] Neoliberalism can be understood as "not simply an economic framework but an overarching political reality."[4] It functions as a "mode of government which consumes freedom, and to do so, it must first produce and organize it."[5] In this article, I explore how First Amendment rulings by the U.S. Supreme Court serve as a space where this production and organization is managed and perpetuated. To that end, this article first briefly reviews *Reno* and its implications in today's social media climate. It then describes the Court's opinion in *Packingham*, offering a critique of the ruling with an emphasis on its adherence to ill-fitting First Amendment tests and neoliberal thought.

The First Amendment and the Internet

The first Supreme Court case to look at the relationship between the First Amendment and the internet was *Reno v. ACLU*. In 1997 in *Reno*, the Court reviewed the Communication Decency Act, examining the issue of whether the indecency provision and the patently offensive provision in the CDA were unconstitutional under the free speech clause in the First Amendment. In order to address that question, the Court first had to determine what type of medium the Internet should be treated as. In what the New York Times at the time hailed as "as messy a product as the court has brought forth in years," Justice Steven's majority opinion focused not on the

[1] Reno v. ACLU, 521 U.S. 844 (1997).
[2] Packingham v. North Carolina, 137 S. Ct. 1730 (2017).
[3] Victor Pickard, "Neoliberal Visions and Revisions in Global Communications Policy From NWICO to WSIS," *Journal of Communication Inquiry* 31 (2007): 121.
[4] Luke Winslow, Alec Baker and Charles Goehring, "The Neoliberal Conquest of the Supreme Court," *Communication and the Public* 3 (2018): 205.
[5] Maurizio Lazzarato, "Neoliberalism in action: Inequality, Insecurity and the Reconstruction of the Social," *Theory, Culture & Society* 26 (2009):120.

indecency cases regarding minors, but instead on determining whether or not the Internet should be treated more like broadcast or more like print. The majority found that the Internet did not have the qualities of broadcast – there was no scarcity of frequencies and the Internet was as not invasive as radio and television.[6] As a result, the Court applied strict scrutiny and struck down both of the CDA provisions in question, finding them to be content-based and overly broad.[7] In its dicta, the Court noted at the time that "the growth of the internet has been and continues to be phenomenal."[8] Despite this recognition, the Court did not attempt to address the more subtle differences between the Internet and existing communication mediums.

Several scholars, myself included, have argued that the *Reno* ruling was out of touch with the power of the internet.[9] Broadly speaking, there were two serious problems with the Court's failure to think more complexly about the Internet. First, the Court's focus on the either/or approach to how to define the internet – it is either like broadcast or like print – left no need to discuss a third option – it is neither. As a result, the Court applied standards that arguably do not account for the way in which the Internet actually operates. Secondly, the Court's reliance on a hackneyed exultation of the need for unfettered free speech did not allow for a more nuanced critique of the possible detrimental impacts. As a result of this lack of precision by the Supreme Court, lower courts have struggled to make sense of the parameters of free speech protection in relation to Internet speech.

Following *Reno*, the U.S. Supreme Court has ruled on relatively few cases involving questions about Internet content despite the fact that Internet usage has continued to grow exponentially since 1997. For example, in the mid to late 1990s, less than one percent of the world population had an Internet connection.[10] As of June 2018, that number is approximately 55 percent.[11] In 2015, according to the U.S. Census Bureau, 78 percent of all households had a desktop or laptop, 75 percent had a handheld computer (such as a smartphone) and 77 percent had a broadband internet subscription.[12] Overall, 62 percent of American households reached the status of "high connectivity," meaning they had three key computer and internet items.[13] Perhaps even more important are the number of people participating on social media sites. In 2016, 185 million

[6] *Reno*, 870.

[7] Strict scrutiny is a legal standard used to evaluate the constitutionality of government discrimination. In First Amendment analysis, content-based restrictions are only permitted in very limited circumstances and laws must not burden more speech (be overly broad) than necessary to meet the government's proven need.

[8] *Reno*, 885.

[9] For example, see Stephen J. Shapiro, "One and the Same: How Internet Non-Regulation Undermines the Rationales Used to Support Broadcast Regulation Fall," *Media Law & Policy* 8 (1999): 1 (arguing that the Internet should be regulated like broadcast media); Vickie S. Byrd , "Reno v. ACLU – A Lesson in Juridical Impropriety Winter," *Howard Law Journal* 42 (1999): 365 (finding that the technology, not constitutional principles, drove the Court's decision in *Reno*); Debra M. Keiser, "Regulating the Internet: A Critique of Reno v. ACLU," *Albany Law Review* 62 (1998): 769 (claiming the Court misclassified the medium of the Internet); and Louis John Seminski, Jr., "Tinkering with Student Free Speech: The Internet and the Need for a New Standard," *Rutgers Law Journal* 33 (2001): 165 (critiquing the Court for not giving a more extensive review of the way in which Internet operates).

[10] "Internet Users," Internet Live Stats, accessed December 6, 2017, http://www.internetlivestats.com/internet-users/.

[11] "World Stats," Internet World Stats, accessed December 12, 2018 http://www.internetworldstats.com/stats.html.

[12] "Computer and Internet Use in the United States: 2015," United States Census Bureau, accessed December 6, 2017 https://www.census.gov/library/publications/2017/acs/acs-37.html.

[13] Ibid.

Americans used social media. That number is predicted to reach 200 million by 2020.[14] According to the Pew Center, seven in ten Americans use social media sites.[15] The Pew Center in a recent study found that 69 percent of Americans are using at least one social media site, a considerably higher number than the five percent from 2005.[16] This percentage increases depending on age. Ninety-five percent of teens report having a smart phone and of that group, 45 percent say they are online almost constantly.[17]

This increased reliance on social media in everyday life, coupled with the Supreme Court's relative silence on the matter, has led to a proliferation of tensions concerning where, when and who should be responsible for monitoring possible problematic speech on the Internet, such as hate speech, cyberstalking, fake news, and obscenity. For much of the first decade following *Reno*, the Supreme Court would focus most of its attention on cases dealing with internet pornography, and would do so primarily in reaction to an onslaught of congressional acts intended to protect children from sexual images and content on the Internet.[18] Immediately following the ruling in *Reno*, Congress would fashion multiple federal laws attempting to sidestep the First Amendment concerns. The first of these legislative attempts was the Child On-Line Protection Act (COPA) in 1998 which spawned three U.S. Supreme Court rulings and was finally resolved in 2004 when the Court ruled 5 to 4 that COPA failed the strict scrutiny analysis by not offering the least restrictive means available.[19] In short, the First Amendment has served as a barrier for most of those laws protecting children with few exceptions, including Congress' most recent legislation on the topic, the PROTECT ACT, which focused on restricting the sharing of images depicting sexual acts with minors.[20] In 2008, the Court ruled to uphold the PROTECT Act in *U.S. v. Williams*, distinguishing that Act from similar previous attempts to restrict child pornography online because the law prohibited the proposal to distribute "rather than targeting the underlying material."[21]

In addition to the stream of Internet pornography cases, courts have considered other speech-related issues as well such as employee rights, broadband classification, academic freedom, and privacy. For example, since the early 2000s, the FCC and the lower courts have addressed the question of net neutrality with most those battles focused on what level of authority the FCC has in setting the rules for Internet service providers.[22] The lower courts also have weighed in on the issue of government officials restricting posting on their sites. In *Knight First Amendment Inst. at Columbia Univ. v. Trump*, the Second Circuit Court of Appeals found that President Trump's

[14] Katie Miller, "Constitutional Law – Sex Offenses and Free Speech: Constitutionality of Ban on Sex Offenders' Use of Social Media: Impact on States with Similar Restrictions," *North Dakota Law Review* 93 (2018): 135.

[15] "Social Media Fact Sheet," Pew Research Center, accessed December 12, 2018 http://www.pewinternet.org/fact-sheet/social-media.

[16] Ibid.

[17] "Teens, Social Media & Technology 2018," Pew Research Center, accessed December 12, 2018 http://www.pewinternet.org/2018/05/31/teens-social-media-technology-2018/.

[18] Brian G. Slocum, "Virtual Child Pornography: Does it Mean the End of the Child Pornography Exception to the First Amendment," *Alabama Law Journal of Science and Technology* 14 (2004): 639. ("From its inception, child pornography law has attempted to reconcile two powerful interests: the First Amendment and the prevention of sexual exploitation of children.")

[19] 47 USCS 231 (2004). (prohibited "commercial websites from knowingly transmitting to minors (under the age of 17) material that is harmful to minors").

[20] United States v. Williams, 553 U.S. 285 (2008).

[21] Ibid, 293. Scalia also cautioned, though, that the ruling not be read to cover abstract advocacy of illegal ideas.

[22] *See,* Comcast Corp. v. FCC, 600 F.3d 642, 644 (2010), Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014), and United States Telecom Ass'n v. FCC, 359 F.3d 554 (2016).

Twitter account constituted a public forum and, as such, he was practicing viewpoint-based restrictions when he blocked certain users from accessing the account.[23] Similar cases have been heard at the lower court level, but none of have made their way to the Supreme Court yet. One recent Supreme Court ruling of significance is a non-Internet case, *Manhattan Community Access Corp. v. Halleck,* where the Court found that private operators of public access stations should not be considered state actors and so are not held liable under the state action doctrine.[24] The implications for social media providers such as Facebook seem direct and clear. Those social media providers occupy a similar space to the private operations of broadcast stations and so likely would be treated the same. However, the Court in *Halleck* did not directly address the implications for the internet. Only the Supreme Court's ruling in *Packingham* has revisited the legal questions raised in *Reno*. As one legal scholar noted recently, the law to date has been "inept at keeping up technological advances ..."[25] The remainder of this article focuses on the *Packingham* ruling, finding that it illustrates the lack of sophistication being practiced by the Court in assessing the Internet.

The *Packingham* Ruling

In 2017, the Supreme Court delivered a key ruling in the area of Internet speech.[26] At issue in *Packingham v. North Carolina* was a 2008 North Carolina law that made it a felony for a registered sex offender "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." The Court of Appeals of North Carolina struck down the statute on First Amendment grounds. The appeals court found that the law was not narrowly tailored to meet the state's legitimate interest in protecting minors from sexual abuse.[27] The North Carolina Supreme Court, on the other hand, reversed the appeals court decision, finding the statute "constitutional in all respects."[28] The state supreme court argued that there were alternative means of communication available to those registered sex offenders and that the law was "carefully tailored…to prohibit registered sex offenders from accessing only those Web sites that allow them the opportunity to gather information about minors."[29] Two justices dissented, stating that the law "creates a criminal prohibition of alarming breadth."[30]

The U.S. Supreme Court ruled unanimously that the law violated the First Amendment because it was not narrowly tailored; however, there was disagreement on how sweeping the First Amendment protections should be in relation to internet speech. Writing for the majority, Justice Kennedy started his opinion by pointing out the historic significance of having access to public spaces to speak:

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[23] 928 F.3d 226 (2019).

[24] 139 S.Ct. 1921, 1926 (2019). "To draw the line between governmental and private, this Court applies what is known as the state-action doctrine. Under that doctrine, as relevant here, a private entity may be considered a state actor when it exercises a function 'traditionally exclusively reserved to the State.'"

[25] Ashley Barton, "Oh Snap!: whether Snapchat Images Quality as 'Fighting Words' under Chaplinsky v. New Hampshire and how to address Americans' Evolving Means of Communication," *Wake Forest Law Review* 52 (2017): 1300.

[26] Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

[27] Ibid.

[28] Ibid, 1735.

[29] Ibid.

[30] Ibid.

> A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right speak in this spatial context. A basic rule, for example, is that a street or park is a quintessential forum for the exercise of First amendment rights. Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire.[31]

He asserted that the most important place for the exchange of ideas today is "the vast democratic forums of the Internet and social media in particular."[32] He labeled the internet "the modern public square," equating it with traditional public forums such as streets or parks where speech has historically been granted the highest protection.[33] Relying on language from *Reno*, he explained that today cyberspace is one of "the most important places for the exchange of views."[34] In short, despite the majority's warning that this case required the Court to "exercise extreme caution" in assessing the parameters of speech protection in this medium, the majority would assign the internet the highest level of protection previously afforded only to physical public forums.

In the concurring opinion, Justice Alito, joined by Chief Justice Roberts and Justice Thomas, took the majority to task for its "undisciplined dicta."[35] The concurring justices explained: "The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks. And, this language is bound to be interpreted by some to mean that the States are largely powerless to restrict even the most dangerous sexual predators from visiting any internet sites…"[36] Alito explicitly warned of the comparison being made by the majority between the cyber world and the physical world. He advised that, "The Court should be more attentive to the implications of its rhetoric for, contrary to the Court's suggestion, there are important differences between cyberspace and the physical world."[37] Given that this case is so recent, it is impossible to determine the overall implications that it will have for future speech restrictions on the internet.[38] However, the concurring justices raised concerns that this could stifle states' abilities to construct laws to protect against dangerous sex offenders.

While sex offenders' access to children through social media platforms is an important issue, the focus of this article is examining the broader implications raised by the sweeping language used by the Court in proclaiming social media space to be the same as a public park. I am concerned that the Court took this expansive view despite Justice Kennedy's own acknowledgement of the need for careful consideration; despite the fears raised by the concurring opinion that the sweeping language in the majority opinion could cause confusion at the lower court level; and

[31] Ibid.
[32] Ibid.
[33] Ibid, 1737.
[34] Ibid, 1735.
[35] Ibid, 1738.
[36] Ibid.
[37] Ibid, 1743.
[38] As of October 2019, the ruling in *Packingham* was cited in 112 lower court cases, followed in 24 cases, distinguished from the fact patterns in 49 cases, and mentioned in 24 cases.

despite concerns raised by Justice Kagan during oral arguments that the law needs to catch up with digital communication.[39]

Critiquing *Packingham*

Since the ruling, scholars have raised a myriad of concerns about the possible long-term effects of the case. For example, Richard Hasen in his review of what he terms "cheap speech" critiqued the majority opinion, noting: "Loose optimistic dicta in Justice Kennedy's majority opinion for the Court in 2017s *Packingham v. North Carolina* case also may have unintended consequences with its infinitely capacious language about FA [First Amendment] protection for social media."[40] He would go on to assert that the ruling "raises concerns about how excessively broad readings of the First Amendment application to social media might harm democracy-enhancing efforts."[41] An article in *Harvard Law Review* took an even more critical stance, warning "[B]ut Packingham's expansive language – particularly its framing of the internet as a public space – opened a Pandora's box, with repercussions for certain First Amendment precepts."[42] That author found the reasoning in the case to be "crucially incomplete" by failing to address questions around the unique public/private nature of social media.[43] Approximately 100 lower court cases have referenced the *Packingham* ruling with those cases focusing on applying the Court's expansive language to a variety of areas including government-sponsored pages, anonymous on-line speech, juvenile parole conditions and terms of service agreements.[44]

My critique of the *Packingham* ruling will focus on three distinct but related problems: (1) how application of public forum doctrine is increasingly problematic both in its standard (non-Internet) usage and in its more recent articulation in Internet cases; (2) how social media spaces are not actually a public forum at all, but are instead commercial spaces owned and operated by large corporations, and (3) connected to the previous point, how the *Packingham* ruling is adding to a body of law that is giving increasing control to the corporate sector to decide which speech will or will not be acceptable in the public sphere.

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[39] U.S. Supreme Court. "Oral Arguments – Packingham v. North Carolina." U.S. Supreme Court, accessed January 10, 2019 https://www.supremecourt.gov/oral_arguments/argument_transcripts/2016/15-1194_0861.pdf.

[40] Richard L. Hasen, "Cheap Speech and What It Has Done (to American Democracy)," *First Amendment Law Review* 16 (2017): 202.

[41] Ibid, 223.

[42] Reporter Note. "The Supreme Court 2016 Term. Leading Case: Constitutional Law: First Amendment – Freedom of Speech – Public Forum Doctrine – *Packingham v. North Carolina*," *Harvard Law Review* 131 (2017): 233.

[43] In addition, scholars have started to question the application of *Packingham* in other on-line related speech areas. For example, see Eric Emanuelson Jr., "Fake Left, Fake Right: Promoting an Informed Public in the Era of Alternative Facts," *Administrative Law Review* 70 (2018): 209 (discussing impact on possible restrictions on fake news) and Katherine A. Ferry, "Reviewing the Impact of the Supreme Court's Interpretation of 'Social Media' as Applied to Off-Campus Student Speech," *Loyola University of Chicago Law Journal* 49 (2018): 717 (reviewing how *Packingham* might be applied to student speech in the public school setting).

[44] These cases include Knight First Amendment Inst. At Columbia Univ. v. Trump, 302 F. sup. 3d 541 (2018); Davison v. Loudoun City Bd. of Supervisors, No. 1:16cv932, 2017 WL 3158389 (E.D. Va. July 25, 2017); Hargis v. Bevin, 298 F. Supp. 3d 1003 (2018); DeAngelis v. Protective Parents Coal., 556 S.W. 836 (2018); In re L.O., 27 Cal. App. 5th 706 (2018); People v. J. Lavon T., 2018 IL App (1st) 180228 (2018); and Sandvig v. Sessions, 315 F. Supp. 3d 1 (2018).

Problem #1: An already-flawed Doctrine

In *Packingham*, the Court invoked the public forum doctrine. Before discussing the problems associated with this application, a brief overview of the development of public forum doctrine in First Amendment cases is necessary. Public forum doctrine has its origins in the case *Hague v. Committee for Industrial Organization*, a case in which the Court concluded for the first time that a right existed for the public to use government property for speech purposes.[45] In an oft cited plurality opinion, Justice Roberts wrote:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[46]

In other words, speech occurring in those types of spaces should warrant the highest level of First Amendment protection. In the 1960s, renowned constitutional law scholar Harry Kalven coined the phrase "public forum doctrine" to describe this area of analysis.[47] During that same time period, the Warren Court would give shape to the doctrine, developing four discrete categories of public forum and creating a time, place and manner test to determine when speech could legally be restricted in those forums. Generally speaking, the four types of forums are categorized as traditional, designated, limited or nonpublic (private).[48] The traditional public forum category includes streets, parks and other public spaces that constitute "an important facility for public discussion and political processes" and, as such, those spaces are the most highly protected speech locations.[49] In 1941, the Court found that speech restrictions within those types of spaces can be based only on reasonable time, place or manner restrictions.[50] Over the course of the next several decades, the Court would flesh out the different forum categories and develop a test for determining the constitutional validity of speech restrictions within those spaces.[51] One of the primary keys to determining the level of restriction allowed is whether the space in question is publicly-owned or privately owned. Speech in privately-owned spaces is controlled by the owner of that space and so the content-neutral rules that the government abides by are not in play in those locations.

While a substantial amount of case law has dealt with establishing the criteria, tests, and exceptions, public forum doctrine in application is riddled with contradictions and complications.

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[45] 307 U.S. 496 (1939).
[46] Ibid, 515.
[47] Harry Kalven. "The concept of the Public Forum: Cox v. Louisiana," *Supreme Court Review* 1 (1965):1.
[48] For a discussion of the types of formats, see Alysha L. Bohanon, "Tweeting the Police: Balancing Free Speech and Decency on Government-Sponsored Social Media Pages," *Minnesota Law Review* 101 (2016): 347-351.
[49] Kalven, "Cox," at 11-12.
[50] Cox v. New Hampshire, 312 U.S. 569, 576 (1941).
[51] Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972); Lehman v. City of Shaker Heights, 418 U.S. 298 (1974); Southeastern Promotions Ltd. V. Conrad, 420 U.S. 546 (1975); Greer v. Spock, 424 U.S. 828 (1975); Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980); Carry v. Brown, 447 U.S. 455 (1980); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788 (1985); Ward v. Rock Against Racism, 491 U.S. 781 (1989); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992); United States v. Am. Library Ass'n, 539 U.S. 194 (2003); Pleasant Grove City v. Summum 129 S.Ct. 1125 (2009).

Legal scholar Aaron Caplan likened its development to kudzu, an "invasive, creeping vine that covers much of the American south," because of how over the decades it has spread from "explaining why the government cannot engage in prior restraint or content discrimination with regard to speaking, picketing, or leafleting on city parks and sidewalks" and is now "taking root in such disparate locations as inter-office mailboxes, government publications, specialty license plates, and television broadcasts."[52] In addition to its sprawling nature, there is also increasing confusion over the number of discrete types of forums – are there three or four – and how to define the types of forums – for example, what is the difference between a designated public forum and a limited public forum?[53] He notes, "It is a bad sign if the doctrine is so confused that reasonable observers cannot even agree on how many categories of forum exist."[54] This confusion is not merely academic but has led to indiscriminate application at the lower court level, leading one scholar to consider the entire doctrine "unworkable in practice."[55]

In addition, some are raising concerns that public forum doctrine application is increasingly limiting access for citizens to speak on public property. For example, law scholar Ronald Krotoszynski, wrote in regard to public speaking areas: "Today, the baseline has shifted – and shifted rather dramatically. Would-be speakers are largely limited to using property of the government's own choosing for their speech activity – and must do so at a time when the government deems it convenient to make the property available for speech activity."[56] He explains that while the Warren Court (1953 to 1969) protected vast amounts of space for free speech, today that space is increasingly smaller.[57] Communication law scholar Laura Stein levied similar concerns about the extent of government control over speech through the application of public forum doctrine. She argued that while the doctrine started as a way to ensure open dialogue, "current public forum law negates the public's speech rights in public spaces."[58] Stein focused her analysis on the 2003 *U.S. v. American Library Association*, a Supreme Court ruling concerning filtering software in publicly funded libraries.[59] The ALA case focused on a regulation in the Child Internet Protection Act that required libraries to use filtering software in order to be eligible for certain government funding. The ALA felt that the requirement constituted a prior restraint on speech and violated public forum standards. The Court disagreed, finding instead that Internet access in public libraries did not constitute a traditional public forum. Ultimately, Stein called for a reformulation of the law that would enable it to be applicable to the Internet and protect speech rights for citizens in public spaces.

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[52] Aaron Caplan, "Invasion of the Public Forum Doctrine," *Willamette Law Review*, 46 (2010): 647.
[53] Ibid, 654.
[54] Ibid, 653-654.
[55] Suzanne Stone Montgomery, "When the Klan Adopts-a-Highway: The Weaknesses of the Public Forum Doctrine Exposed," *Washington University Law Review* 77 (1999): 558. "While the Court has explicitly described the limits a government may place on speech in each type of forum, the Court has offered lower courts virtually no guidance in determining what analysis applies to any given location. The courts do not know whether to define the location scrutinized broadly or narrowly. Therefore, they do so indiscriminately, based, at least in part, on the decision they wish to reach."
[56] Ronald J. Krotoszynski, Jr., "Our Shrinking First Amendment: On the Growing Problem of Reduced Access to Public Property for Speech Activity and Some Suggestions for a Better Way Forward," *Ohio State Law Journal* 78 (2017): 786-787.
[57] Ibid, 789.
[58] Laura Stein, "Censoring Speech in Public Space: United States v. American Library Association and The Negation of Public's Speech Rights Online," *International Communication Association Annual Meeting* (2006): top three paper.
[59] 539 U.S. 194 (2003).

Applying public forum doctrine to the Internet raises several concerns, concerns that were not addressed whatsoever by the majority opinion in *Packingham*. For example, *Packingham's* reliance on the public/private distinction in assessing whether or not the Internet is a public forum for First Amendment purposes creates a false dichotomy that ignores the possibility of social media sites being situated in an entirely different arena. Legal Scholar Jonathan Peters discussed this point in his 2017 article "The 'Sovereigns of Cyberspace' and State Action," finding that this type of categorization "provides an artificially clear line that can minimize the merits of competing rights."[60] In other words, the reliance on the public/private distinction fails to take into account other multitude of factors that need to be addressed in each specific case. As Peters notes, this issue is further complicated when considering the internet because "so much speech of public concern occurs in privately owned spaces like Facebook and YouTube."[61] Two other concerns in relation to application of public forum doctrine to the Internet include (1) the doctrine's reliance on a specific understanding of a common physical space between where the speech is spoken and where it is heard and (2) the courts seemingly ad hoc assessment of determining which speech is protected and which isn't.[62] The critiques of public forum doctrine application, both in general and in relation to the Internet, serve as guiding criteria in assessing the ruling in *Packingham*. Specifically, those previous critiques introduce questions concerning the spatial component of the doctrine and the public/private space divide. Following, I address how *Packingham*, by ignoring those concerns, has created an even greater problem for internet speech.

One significant element ignored by the majority opinion in *Packingham* is that public forum doctrine is a spatial-based analysis with time, place and manner restrictions guiding its application. As such, the contours of the legal development of public forum doctrine over the last 80 years have applied to physical spaces such as parks and streets. Application to the Internet would require a much more nuanced discussion of the doctrine and its applicability to this different communication format. However, Justice Kennedy avoided any substantive discussion. Instead, he asserted that the internet is where "the most important places to exchange views" and that cyberspace is the equivalent of "the modern public square." While this imagery is intriguing, it fails to actually address the nuances of the differences between the real world and the online world. Most disconcerting is that the Court completely disregarded the dual public and private nature of social media. As a result, it failed to recognize the distinction, for example, between a predator in an actual public park that can be seen and a predatory in the metaphorical cyber park who might be completely hidden or masquerading as someone of a different age or gender. Justice Alito alluded to this concern in his concurrence when he noted that "there are important differences between cyberspace and the physical word." However, he also failed to elaborate on what those differences might look like in relation to application of public forum doctrine. This lack of nuance in applying the spatially-based doctrine onto the Internet has raised concerns by other scholars as well in regard to application of other doctrinal areas including fighting words[63]

[60] Jonathan Peters, "The 'Sovereigns of Cyberspace' and State Action: The First Amendment's Application – or Lack Thereof – to Third-Party Platforms," *Berkeley Technical Law Journal* 32 (2017): 1007-1008.
[61] Ibid, 1008.
[62] Enrique Armijo, "Kill Switches, Forum Doctrine, and the First Amendment's Digital Future," *Cardoza Art and Entertainment Law Journal* 32 (2014): 440. "We are thus left with a doctrine that protects only those speech channels that the State, in its own judgment, deems either sufficiently time-honored or sufficiently worthy of protection."
[63] Barton, "Oh Snap!," 1309. "In effect, a speaker in South Carolina or Kansas can take a photo of themselves in "blackface" using a Snapchat filter and send it to a targeted person in California without such speech qualifying as fighting words. In a

and true threats.[64] Ultimately, this spatial incongruity illustrates that the Internet is not like other traditional media and so any doctrines developed for those media will need to be adjusted if they are going to be applicable in this new space. The Court in *Packingham* made a major misstep by failing to think more complexly about this situation.

Problem #2: Corporate Products, not Public Forums

The free speech concerns surrounding the question of who controls content on the Internet were alluded to in the previous section and will be expanded on the following section as well. I've singled the issue out on its own here as way to add emphasis to the importance of clearly identifying who has the power to control what content is permitted or restricted on the Internet. Much of the Internet, for example social media spaces, are not actually public forums in the legal sense, but are instead commercial spaces owned and operated by large corporations such as Facebook or Alphabet Inc., which owns, among other things, Google. Internet law scholar David Ardia made this point succinctly and pervasively when he wrote: "What many consider the largest public space in human history is not public at all."[65] It is instead a landscape "layered on privately owned Web sites, privately owned servers, privately owned routers, and privately owned backbones."[66] Kennedy does not acknowledge this fact, glossing over the ownership question completely. He not only equates the internet with a "modern public park," an historically quintessential public space, but he also claims that social media spaces are "vast democratic forums." This issue will be address in more detail later in the paper.

By assigning the internet those qualities, the Court also is offering a contradictory position. On the one hand, if the internet is truly "a modern public park" then the government would have some ability to set the guidelines for the speech restrictions applied to it. On the other hand, given that the spaces are owned and operated by private entities, the First Amendment, which operates as a negative liberty, does not apply at all. By not dealing with the complexity of the internet as a dually public and private space, the *Packingham* Court not only missed an opportunity to begin to develop new doctrine more applicable to this type communication system, but has added to an already confusing situation. In other words, the Court should have acknowledged that "new forums for public expression are developing apart from the classic public square."[67] As a result of the uniqueness of the Internet as a communication medium, this new area demands new doctrine.

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situation such as this - where the offensiveness of the content would provoke a person to violence if not for the physical distance between them - the traditional fighting words doctrine is completely ill-equipped to address twenty-first century communication."

[64] William Funk, "Intimidation and the Internet," *Penn State Law Review* 110 (2006): 580: "…current First Amendment doctrine does not directly address the problem raised by the Nuremberg Files site: speech that is neither a direct threat nor an incitement, but nevertheless-because of its particular character, including its publication on the Internet-is intended to and does have the immediate effect of intimidating persons from engaging in lawful, even constitutionally protected, behavior."

[65] David S. Ardia, "Free Speech Savior or Shield of Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act," *Loyola of Los Angeles Law Review* 43 (2010): 377.

[66] Ibid.

[67] Peters, "Sovereigns," 999-1000.

Problem #3: Frees Speech, Democracy and Corporate Motivation

Finally, the *Packingham* ruling is adding to a body of law that is giving increasing control to the corporate sector to decide which speech will or will not be acceptable in the public sphere. Before discussing the implications of this level of corporate control, it is first essential to understand the neoliberal underpinnings in the Court's ruling. The concept of neoliberalism arrived in the 1970s and 1980s and held at its core the idea that competitive markets combined with limited state intervention would solve the problems of inflation, un(der)employment and stagnated economic growth.[68] Neoliberalism operates as ideology that privileges the market and conflates democracy with capitalism and freedom with consumerism.[69] In connection specifically to mediated forms of communication, neoliberalism allows that "the newspaper reader, the television viewer, the radio listener are free to consumer culture as active, empowered, resistant audiences in a marketplace of ideas underpinned and sustained by liberal democratic ideology."[70] This "freedom" assumes that speech rights are best served by limited government involvement in speech regulation. This position holds regardless of "Whether or not the majority of individuals find real opportunities to exercise free speech… [and] assumes that governments alone, and never competitive markets, have the power to coerce."[71] The Supreme Court has whole-heartedly embraced this notion. It does so in part by determining which theories regarding social and political life are important and which ones, "such as alternative conceptions of liberty and equality" should be rejected.[72] A 2018 study shed light on this practice by comparing rulings during the Warren Court Era (1953-1969) with more recent rulings in cases such as Citizen's United.[73] The study explained: "The Warren Court…prioritized equality over liberty, and thus, rationalized active legal interventions on behalf of society's most marginalized. Conversely, the [later] US Supreme Court cases…reflect a rolled back version of neoliberalism where protecting the free speech of corporations is more important than protecting the wellbeing of consumers."[74] The Court's support of neoliberalism is most notable in its continuing reliance on the market place of ideas rhetoric.

That phrasing, which first appeared in *Abrams v. United States*, said that the "best test of truth is the power of the thought to get itself accepted into the competition of the market."[75] In other words, the metaphorical free speech market would operate in a similar fashion to the actual economic market. Since its inception in *Abrams*, the marketplace of ideas concept has been reaffirmed by the Court many times over. In *Packingham*, the Court relied heavily on this concept both by emphasizing the laissez-fair approach to government intervention and granting control over regulation of social media content solely to internet companies. This approach raises

[68] For a more in-depth look at the concept of neoliberalism, see Alfredo Saad-Filho and Deborah Johnston, *Neoliberalism: A Critical Reader* (Pluto Press, 2005).
[69] George Moinbiot, "Neoliberalism – the ideology at the root of all of our problems," *The Guardian*, April 15, 2016, https://www.theguardian.com/books/2016/apr/15/neoliberalism-ideology-problem-george-monbiot and Christian Garland and Stephen Harper, "Did Somebody Say Neoliberalism?: On the Uses and Limitations of a Critical Concept in Media and Communication Studies," *tripleC* 10, no. 2 (2012): 413.
[70] Garland, "Uses and Limitations," 413.
[71] Stein, "Censoring Speech," 107.
[72] David Singh Grewal and Jedediah Purdy, "Introduction: Law and Neoliberalism," *Law and Contemporary Problems* 77 (2014): 15.
[73] Winslow, "Neoliberal Conquest," 208-214.
[74] Ibid, 214.
[75] 250 U.S. 616 (1919), 630.

four concerns in terms of the role of media corporations who are by their very nature profit driven serving as free speech guardians on the internet.

First, because the neoliberal approach conflates democracy with capitalism, the Court's reliance on it in *Packingham* has serious implications for the role of the internet in supporting and advancing democracy. In effect, *Packingham* declares entities like Facebook and Google the "new governors" of online speech, emboldening them with the ability to set, sway and direct political debate.[76] While in some ways similar concerns were lobbied in the past against mainstream broadcast media, the level of apprehension deepens in relation to the internet, particularly social media, because the actions of the directors or "governors" of the content are hidden from social media users. Justice Kennedy began the Court's opinion by noting that "A fundamental principle of the First Amendment is that all person have access to places where they can speak and listen, and then, after reflection, speak and listen once more."[77] The reason for the necessity of these spaces is they are "essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire."[78] In other words, according to the Court, we must protect speech at the highest level in certain public spaces -- now including the Internet -- in order to foster open debate. However, many examples exist countering the reality of this perspective when applied to the Internet. The issue with presidential election tampering offers perhaps the most egregious illustration. Another example is the way in which Facebook actually determines for the user which of their "friends'" posts show up in their feed. The social media users are, in fact, not hearing or speaking to the audience that they think they are, thus inhibiting their ability to "become a town crier with a voice that resonates farther than it could from any soapbox."[79] The soap box is instead owned by a corporation and, as a result, the town criers voice can only resonate in the ways in which that corporation will allow or promote.

In other words, despite the assertion by the Court in *Packingham*, Internet platforms are not necessarily the best stewards of democratic participation. By giving them this role, the Court has in effect given the companies free reign in "developing a de facto free speech jurisprudence."[80] Announcing the corporate owners as the "sovereigns of cyberspace"[81] leads to a second concern raised as a result of the *Packingham* ruling. In terms of First Amendment law, private entities, such as Facebook or Google, do not have to follow the same rules concerning content restriction that the government does. Government entities, when choosing to restrict speech in a public forum, must abide by the rule of content neutrality. Either the law must be content neutral or the government must prove a substantial need for the restrictions. Corporations do not need to follow either of those guidelines. The Court in *Packingham* concluded that for the government "to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights."[82] However, Internet platform providers are exercising their abilities to engage in the prevention of users from posting certain content. The examples of this behavior run the gambit from Facebook removing the videos posted to her page by Korryn

[76] Kate Klonick, "The New Governors: The People, Rules, and Processes Governing On-line Speech," *Harvard Law Review* 131 (2018): 1603.
[77] Packingham v. North Carolina, 137 S.Ct. 1730, 1732.
[78] Ibid, 1735.
[79] Ibid, 1737.
[80] Peters, "Sovereigns," 991.
[81] Ibid, 993.
[82] Packingham, 1737.

Gaines before she was shot and killed by Maryland police to Twitter banning conservative spokespersons Milo Yiannoploulos and Alex Jones to Facebook deleting a user's account due to the posting of a famous nude painting. While it is open to debate whether some material, such as hate speech, should be regulated on the media, it should not be left up to corporations to decide which content is acceptable and which is not. This practice runs counter to a commitment to free speech and open public discourse.

The third concern raised ties directly to the problem of allowing companies to make decisions about speech restrictions with little to no government oversight. Social media sites are owned by highly profitable corporations. For example, Facebook brought in $16.6 billion in ad revenue in the second quarter of 2019 and its CEO Mark Zuckerberg has a net worth of approximately $55 billion. Because corporations are money making entities, their decision-making process is likely to be driven by profit, not public good. They are more likely to make their decisions about user generated content based on the bottom line instead of the citizen's right to engage in open public discourse. Presidential hopeful Elizabeth Warren noted: "America's big tech companies provide valuable products but also wield enormous power over our digital lives. Nearly half of all e-commerce goes through Amazon. More than 70 percent of all Internet referral traffic goes through sites owned or operated by Google or Facebook."[83] Her assessment is being wrestled with by legal scholars. Some have employed neoliberal arguments to promote the position that platform owners are no less capable of creating speech policies for the Internet than government agencies would be. Those scholars contend that the corporations have a financial incentive to uphold democratic values.

Kate Klonick proclaimed these companies to be one component of a new tri-part communication system that places platform owners in the middle between the state and speakers-publishers.[84] She found that the platforms are "economically and normatively driven to reflect the democratic culture and free speech expectations of their users," and as a result they will "moderate content because of a foundation in American free speech norms, corporate responsibility, and the economic necessity of creating an environment that reflects the expectations of their users."[85] Hasen also proposed that non-governmental actors, rather than courts and governments, are "in the best position to ameliorate some of the darker effects of [what he calls] cheap speech."[86] However, he added the caveat that those companies will need "a commercial reason to do so" and he conceded that "it is not clear whether Facebook and Google will go far enough, especially given the market dominance each holds over social media and search markets respectively."[87] These neoliberal arguments reproduce sentiments that have been made in terms of corporations in other areas of the business world, such as the environment and health care, for decades and they ignore the fact that the arguments didn't hold true in those areas either. What happens if, as Hasen alludes to, there is no market pressure? Or, what if the market pressure driven by the majority is detrimental to non-majority members? Prominent legal scholar Richard Delgado broached this question in relation to the proliferation of hate speech on the Internet and concluded that "…organizations that run the Internet, including Google, Microsoft, Facebook,

[83] Elizabeth Warren, "Here's How We Can Break Up Big Tech," in *Medium* https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c.
[84] Klonick, "New Governors," 1602.
[85] Ibid.
[86] Hasen, "Cheap Speech," 202.
[87] Ibid.

and Twitter, are unlikely to take forceful and continuing action against hate speech, at least without firm public pressure."[88] In addition, even if Facebook or Google decided to make what they determine to be restrictions grounded in society's best interest, why do they become arbiters of what the majority of the citizenry wants? How will they determine, for example, what constitutes regulable hate speech or obscenity? These questions were also ignored by the Court.

The fourth concern emerging from the *Packingham* ruling in relation to corporate control is one of practicality of application. Even if we could concede that Internet providers are at least as competent, if not better suited, to deal with content issues on the Internet, there still exists the complication of multiple Internet platform owners each making their own rules. As one legal scholar noted: "…relying on private companies to develop proprietary solutions will only create a patchwork of protections that vary in strength and effectiveness."[89] This ad hoc approach could lead to some content being restricted on one site but allowed on another and, as a result, could exacerbate the mystery already in place around how, why and when those companies choose to block or remove content. In addition, Justice Kennedy made special note in his opinion about the power and newness of the Internet and its role in society. He cautioned that it is "so new, so protean, and so far-reaching that courts must be conscious that what they say today might be obsolete tomorrow."[90] I think that his caution might have best been extended to allowing what currently amounts to a free for all in the development of content policy on the Internet.

Conclusion

Twenty years' worth of lower court opinions and scholarly analysis of the role of the internet in modern society did not stop the Court in *Packingham* from simply reproducing the same lack of finesse that the Court did in *Reno* in 1997. Despite stating that "the Courts must exercise extreme caution," the majority then went on to pen an opinion that was anything but cautious. And, in a similar vein of the *Reno* ruling, *Packingham* again applied a doctrine, this time public forum doctrine, to a medium that bears little actual resemblance to a traditional public forum. One could go so far as to argue that the ruling in *Packingham* is even more problematic as the internet has grown exponentially in the past 20 years.

By incorrectly identifying the Internet as akin to a public park, the Court has ushered in possible long-term and highly detrimental consequences. Overall, the suggestion of the neoliberal solution of allowing the corporate sector to uphold and champion societal norms in the best interested of society is high problematic in the area of speech just as it has been in other areas in the past. In addition, the Court's lack of any real assessment of the Internet as a public forum for First Amendment purposes is bound to lead to confusion among the lower courts and will be compounded as we move past the specific law in question in *Packingham* to a broader application in cases dealing with topics such as fake news, hate speech, or government-sponsored social media sites.

[88] Richard Delgado and Jean Stefancic, "Hate Speech in Cyberspace," *Wake Forest Law Review* 49 (2014): 327-328.
[89] Emanuelson, "Fake Left, Fake Right," 223.
[90] Packingham, 1732.

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