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You Can't Say That!: Public Forum Doctrine and Viewpoint Discrimination in the Social Media Era

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YOU CAN'T SAY THAT!: PUBLIC FORUM DOCTRINE AND VIEWPOINT DISCRIMINATION IN THE SOCIAL MEDIA ERA

Micah Telegen*

ABSTRACT

The growing prevalence of privately-owned social media platforms is changing the way Americans and their governments communicate. This shift offers new opportunities, but also requires a reinterpretation of the First Amendment's proscription of government limitations of speech. The public forum doctrine and its proscription of viewpoint discrimination seem particularly stretched by the digital revolution and the development of social media. In ongoing cases, litigants and courts have invoked the doctrine to limit the government's ability to 'block' those who comment critically on government pages—much to the chagrin of those who note the private status of the companies hosting the pages and easy work-arounds to 'blocks.'

This Note argues that, given recent Supreme Court expansion of the concept of viewpoint discrimination, courts may be stretching the doctrine too far. These decisions call into question the constitutionality of government use of platforms that incorporate viewpoint discriminatory rules—such as hate speech bans—into their terms of service.

This Note concludes by proposing a solution: returning to the roots of the public forum doctrine. It argues that the question undergirding public forum analysis should be whether speech is consistent with the maintenance of the forum in which it occurs. If speech can occur without preventing the regular use of a forum, government regulation should be prohibited. If not, the government can—and should—take reasonable steps to maintain the forum for use by all.

TABLE OF CONTENTS

ABSTRACT.....	235
INTRODUCTION.....	236
PART I: THE PUBLIC FORUM DOCTRINE IS AT A CROSSROADS	238
A. <i>The Basics of the Public Forum Doctrine Analysis</i>	238

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B. <i>Applying the Public Forum Doctrine to the Digital Age</i>	240
PART II: THE DOCTRINE IS DOOMED	245
A. <i>Government won't be leaving social media any time soon.</i>	246
B. <i>. . . but it may not be able to stay there under the public forum doctrine.</i>	253
PART III: WHERE DO WE GO FROM HERE?	254
CONCLUSION	263

INTRODUCTION

The 2016 election cycle made it clear that social media plays a prominent role in the American psyche. At some point, we may experience another digital revolution; until then, the privately-owned social media platform is here to stay.¹

Nowhere is this demonstrated more clearly than in the sphere of government and politics. True, White House briefings, long the vehicle by which the federal government spoke to the people, continue.² But, some of President Donald J. Trump's most memorable statements have been made via his two Twitter accounts.³ These accounts, @realDonaldTrump and @POTUS, reach more than 55.7 and 24.5 million 'followers,' respectively.⁴ The Department of Jus-

1. See Mike Isaac & Sydney Ember, *For Election Day Influence, Twitter Ruled Social Media*, N.Y. TIMES (Nov. 8, 2016), <https://www.nytimes.com/2016/11/09/technology/for-election-day-chatter-twitter-ruled-social-media.html>.

2. See Callum Borchers, *10 Memorable White House Press Briefing Moments of 2017*, WASH. POST: THE FIX (Dec. 27, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/12/27/10-memorable-white-house-press-briefing-moments-of-2017/?utm_term=.9e78801c7265.

3. See *Donald Trump's Noteworthy Tweets as President*, NEWSDAY (Nov. 30, 2017, 5:40 PM), <https://www.newsday.com/news/nation/donald-trump-s-noteworthy-tweets-as-president-1.12632966>.

4. Donald J. Trump (@realDonaldTrump), TWITTER, <https://twitter.com/realDonaldTrump> (last visited Oct. 26, 2018); President Trump (@POTUS), TWITTER, <https://twitter.com/POTUS> (last visited Nov. 16, 2018). Numbers are approximate and are accurate as of November 16, 2018. To provide some context for these numbers: presumably, there is some overlap between followers of the two pages. Additionally, some percentage of these 'followers' are institutional accounts, multiple accounts run by the same individual, and fake accounts. Numerous reports suggest that many of President Trump's 'followers' are fake accounts, or 'bots.' See, e.g., Ryan Bort, *Nearly Half of Donald Trump's Twitter Followers Are Fake Accounts and Bots*, NEWSWEEK (May 30, 2017, 4:43 PM), <http://www.newsweek.com/donald-trump-twitter-followers-fake-617873>. Finally, there is no requirement that followers on any platform be American citizens.

tice has made it clear that President Trump's tweets are official statements.⁵ The White House has said the same.⁶

In recent months, President Trump's decision to block a number of critics from his Twitter page has drawn significant attention.⁷ It has also sparked a wave of litigation—brought by the ACLU, the Knight Institute, and like-minded organizations—aimed at President Trump and other government officials engaged in similar behavior.⁸ In the highest-profile case decided to date, the Southern District Court of New York ruled that President Trump's use of Twitter's blocking feature—in connection with his @realDonaldTrump account—violated blocked individuals' First Amendment rights.⁹ Regardless of how similar cases are decided, the problems with government presence on privately-owned social media pages run even deeper than the blocking phenomenon.

Lower courts' interpretations of recent Supreme Court jurisprudence regarding the public forum doctrine and related First Amendment concepts are leading us down a dangerous path. Under these new interpretations, the doctrine cannot be reconciled with the reality that government actors rely on privately-owned platforms to engage with the public.¹⁰

5. See Lorelai Laird, *DOJ Says Trump's Tweets are Official Presidential Statements*, ABAJOURNAL (Nov. 14, 2017, 2:49 PM), http://www.abajournal.com/news/article/government_says_trumps_tweets_are_official_presidential_statements.

6. See Elizabeth Landers, *White House: Trump's Tweets are 'Official Statements'*, CNN (June 16, 2017, 4:37 PM), <http://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html>.

7. See Issie Lapowsky & Louise Matsakis, *Trump Can't Block Critics on Twitter. What This Means for You*, WIRED (May 23, 2018, 6:29 PM), <https://www.wired.com/story/donald-trump-blocking-on-twitter-unconstitutional/>. "Blocking" refers to a number of mechanisms, used by most prominent social media sites, that allow a user to prevent another user from interacting with their page. Depending on the site, the "blocked" user will either not be able to see the first user's page or will be prohibited from commenting on it. Similar features generally present allow users to delete individuals' messages from their page, or to hide them from view of other users.

8. See *Knight Institute v. Trump – Lawsuit Challenging President Trump's Blocking of Critics on Twitter*, KNIGHT INST. (updated Dec. 1, 2017), <https://knightcolumbia.org/content/knight-institute-v-trump-lawsuit-challenging-president-trumps-blocking-critics-twitter>; *ACLU of Maine Sues LePage Over Facebook Censorship*, ACLU (Aug. 8, 2017), <https://www.aclu.org/news/aclu-maine-sues-lepage-over-facebook-censorship>. In one of the most advanced suits to date, a federal court in Virginia held that a local official had violated a constituent's First Amendment rights by blocking him on Facebook. See Mark Joseph Stern, *Federal Court: Public Officials Cannot Block Social Media Users Because of Their Criticism*, SLATE: FUTURE TENSE (July 28, 2017, 2:07 PM), http://www.slate.com/blogs/future_tense/2017/07/28/federal_court_rules_public_officials_cannot_block_social_media_users.html. The decision is discussed extensively in Part I *infra*.

9. *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018), *appeal docketed*, No. 18-1691 (2d Cir. June 5, 2018).

10. See *Social Media Usage within Local Government*, PUB. TECH. INST., <http://www.pti.org/news/displaynews.asp?NewsID=280&TargetID=3> (last visited Oct. 26, 2018) [hereinafter PUB. TECH. INST.] (documenting the degree to which local government makes use of social media).

Part I of this Note provides a brief primer on the public forum doctrine as it stands and explains how courts have applied it to social media in the wake of *Packingham*, *Matal*, *Davison*, and other recent First Amendment cases. Part II explains the problem: it argues that the public forum doctrine in its current state cannot effectively be applied to private networks that lack an alternative platform. It also addresses the ramifications of applying the public forum doctrine and concurrently deeming bans on offensive speech to be viewpoint discrimination. Part III acknowledges the most troubling implications of this conclusion and then offers a solution. How do we reconcile the government's need to use social media platforms for communication with our desire to enjoy First Amendment protections in the digital space? Perhaps the answer can be found in a return to the intuition at the roots of the public forum doctrine: the notion that speech within forums should be allowed so long as it is consistent with the forum's operation.

PART I: THE PUBLIC FORUM DOCTRINE IS AT A CROSSROADS

In the wake of the decisions discussed below, government entities may begin devoting their energies to curating their online presence so as to avoid viewpoint-discrimination. Still, based on the facts presented in *Davison*—a case where a government-operated social media page was found to be a public forum—and similar litigation around the country, it seems likely that government entities will continue to engage in practices that are conceivably at odds with the doctrine.¹¹

A. *The Basics of the Public Forum Doctrine Analysis*

The public forum doctrine—a doctrine which prescribes rules limiting the government's ability to regulate speech in areas created for the purpose of speech¹²—devotes significant attention to evaluating what 'type' of forum has been created.¹³ And while "viewpoint discrimination is prohibited in all forums,"¹⁴ rendering

11. See, e.g., *Davison v. Loudon Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va. 2017) (appeal pending).

12. The point of the public forum doctrine is to weigh our desire to protect public speech against the need of the government to function.

13. See, e.g., *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 802–03 (1985).

14. *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 n.2 (4th Cir. 2006). Viewpoint discrimination is a rule that suggests different outcomes for speech on the basis of the view expressed.

this analysis less important for evaluating the constitutionality of hate speech bans, it may be helpful to provide a brief outline of the types of forum envisioned by the doctrine. In *Perry Education Association v. Perry Local Educators' Association*, the Supreme Court laid out three basic types of forums: the traditional public forum, the designated public forum, and the nonpublic or closed forum.¹⁵ The Court also acknowledged the possibility of a 'limited public forum'—a type of designated public forum opened only for certain classes or types of speech.¹⁶

First, the Court identified "public forums" as places which "by long tradition or by government fiat have been devoted to assembly or debate."¹⁷ Streets and parks are typical examples of this type of 'traditional public forum.'¹⁸ In these forums, "the rights of the state to limit expressive activity are sharply circumscribed."¹⁹ Even content-based restrictions (as opposed to viewpoint-based) are subject to strict scrutiny.²⁰ Content-neutral restrictions are permissible, but they are subject to a similar analysis.²¹

The Court also identified a category of "public property which the state has opened for use by the public as a place for expressive activity."²² Typical examples of this category include university meeting facilities, school board meetings, and municipal theaters.²³ While these 'designated public forums' may not be traditional public forums, they are treated as such for the duration of their existence—that is, for as long as they are used as public forums.²⁴ The

15. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983) (This case involved a dispute over access by rival unions to teacher mailboxes and an inter-school mailing system); *see also Pleasant Grove City v. Summum*, 555 U.S. 460, 469–70 (2009).

16. *See Perry Educ. Ass'n* 460 U.S. at 46 n.7, 47 ("A public forum may be created for a limited purpose such as use by certain groups for the discussion of certain subjects."); *see also Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (offering an example of the Court analyzing a limited public forum).

17. *Perry Educ. Ass'n*, 460 U.S. at 45.

18. *Id.*

19. *Id.*; *see also, e.g., Bible Believers v. Wayne Cty., Michigan*, 805 F.3d 228, 246–47 (6th Cir. 2015 (quoting *Perry* and applying the standard)).

20. *See Perry Educ. Ass'n*, 460 U.S. at 45; *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) (describing how content discrimination triggers strict scrutiny because it "poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or manipulate the public debate through coercion rather than persuasion.").

21. *See Perry Educ. Ass'n*, 460 U.S. at 45.

22. *Id.* at 45–46; *see also, e.g., Keister v. Bell*, 879 F.3d 1282, 1289 (11th Cir. 2018) (citing *Perry* and acknowledging the standard).

23. *Perry Educ. Ass'n*, 460 U.S. at 45.

24. *Id.* at 46; *see also G. Sidney Buchanan, The Case of the Vanishing Public Forum*, 1991 U. ILL. L. REV. 949, 958 (1991) (acknowledging the consequences of the doctrine).

government's ability to limit speech here is subject to the same restrictions as in traditional forums.²⁵

The Court also acknowledged an argument from a group of teachers that the inter-school mailing system (at issue in *Perry Education Association*) was a "limited public forum" from which they could not be excluded.²⁶ As the Court explained in a later opinion, "[w]hen the State establishes a limited public forum, [it] is not required to . . . allow persons to engage in every type of speech."²⁷ Still, limitations on speech in these forums may not be viewpoint-based.²⁸

The Court contrasted these public forums with nonpublic forums: government-owned property opened for a particular purpose not involving speech.²⁹ In these forums, "distinctions in access on the basis of subject matter and speaker identity," impermissible in public forums, are generally allowed.³⁰ Viewpoint discrimination remains impermissible.³¹ An example of a nonpublic forum is a mailbox.³²

It should be noted that some types of public property or services are excluded from this category and, for one reason or another, are not subject to forum analysis.³³ Network television channels are an example of such a property where, communicative nature notwithstanding, no forum exists—and therefore the doctrine does not apply.³⁴

B. *Applying the Public Forum Doctrine to the Digital Age*

Even before the wave of "blocking" litigation that commenced in 2016 (described *supra* Introduction), there was some doctrinal support for the notion that a government-run, online, interactive

25. *Perry Educ. Ass'n*, 460 U.S. at 46; *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

26. *Perry Educ. Ass'n*, 460 U.S. at 47.

27. *Good News Club v. Milford Cent. School*, 533 U.S. 98, 106 (2001); *see also* *Barrett v. Walker Cty. School Dist.*, 872 F.3d. 1209, 1225 (citing *Good News Club* and applying the rule to a school board meeting).

28. *Good News Club*, 533 U.S. at 106; *see also, e.g., Gerlich v. Leath*, 861 F.3d. 697, 715 (8th Cir. 2017) (citing *Good News Club* and finding impermissible viewpoint discrimination).

29. *Perry Educ. Ass'n*, 460 U.S. at 49.

30. *Id.*

31. *See* *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114 (1981). The distinction between subject-matter restrictions and viewpoint-discrimination can be blurry. By way of example, limiting the subject covered in a forum to a specific proposal would be a subject-matter restriction. Excluding those who oppose the proposal would be viewpoint-discrimination.

32. *See id.* at 132.

33. *See* *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1043 (5th Cir. 1982).

34. *Id.*

forum might be, at the very least, a limited public forum. In *Page v. Lexington County School District One*, the Fourth Circuit held that a school website did not become a limited public forum (and thus its operators were not limited by the constraints of the public forum doctrine) by linking to external sites.³⁵ In making its decision, the court leaned heavily on the school district's exclusive control over the content of the page.³⁶ The court also posited that, had some facet of the site "transformed [it] into a type of 'chat room' or 'bulletin board' in which private viewers could express opinions or post information, the issue would, of course, be different."³⁷ The court's implication is that enabling the public to 'post' or modify the content of a webpage would suggest the creation of some sort of forum.³⁸

In a 2017 case about access to social media, Justice Kennedy equated social media to the modern town square.³⁹ In *Packingham*, the Court unanimously invalidated a North Carolina statute that prohibited registered sex offenders from accessing social networking sites used by minors.⁴⁰ Justice Kennedy wrote at length about the importance of social media in modern discourse: "Today, one of the most important places to exchange views is cyberspace, particularly social media, which offers 'relatively unlimited, low-cost capacity for communication of all kinds.'"⁴¹ Justice Kennedy went on to call social media "the modern public square."⁴² Justice Alito, in his concurrence, complained that the Court's "undisciplined dicta" consisted of "musings that seem to equate the entirety of the internet with public streets and parks."⁴³ Still, it seems likely, especially given his opinion in *Matal*, discussed below,⁴⁴ that Justice Alito's disagreement with the majority's language was motivated largely by the specter of pedophiles preying on adolescents.⁴⁵

35. See 531 F.3d 275, 285 (4th Cir. 2008).

36. See *id.* The court noted that the district controlled the website and its content.

37. *Id.*

38. See *id.* at 284.

39. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732 (2017). Justice Gorsuch did not hear the case.

40. *Id.* at 1731.

41. *Id.* at 1732. And Justice Kennedy was not the first person to pick up on this aspect of the digital revolution. See e.g., *ACLU v. Reno*, 929 F. Supp. 824, 881 (E.D. Pa. 1996) (Dalzell, J., supporting) ("It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen."), *aff'd*, 521 U.S. 844, 852 (1997).

42. *Packingham*, 137 S. Ct. at 1737.

43. *Id.* at 1738 (Alito, J., concurring).

44. *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

45. *Packingham*, 137 S. Ct. at 173 (Alito, J., concurring) ("[T]his 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, including, for example,

Packingham also suggested that social media technology might be moving too quickly for the Court to keep up.⁴⁶ This raises the possibility that the Court might decline to lay down any clear jurisprudence on the matter for fear of wasted efforts caused by changes in the landscape. As Justice Kennedy explained, “[t]he Internet’s forces and directions are so new, so protean, and so far reaching that courts must be conscious that what they say today may be obsolete tomorrow.”⁴⁷

In *Matal v. Tam*, a First Amendment challenge to a Trademark Office determination, Justice Alito—speaking for four members of the Court and announcing its decision—made it clear that ‘hate speech’ is a viewpoint.⁴⁸ And while Justice Kennedy (joined by Justices Ginsburg, Sotomayor, and Kagan) wrote a separate opinion to address the possibility of some government speech contexts where the viewpoint discrimination rule might not apply, he agreed that that rules “reflect[ing] the Government’s disapproval of a subset of messages it finds offensive . . . [are] the essence of viewpoint discrimination.”⁴⁹ The respondent was the Asian-American leader of a band who had applied for a trademark for their name: “The Slants.”⁵⁰ After the Patent and Trademark Office rejected the application as offensive, The Slants successfully appealed the decision to the Federal Circuit.⁵¹ The government then petitioned for certiorari.⁵² Affirming the Circuit’s decision, Justice Alito explained that, in this context, ‘viewpoint discrimination’ is used in a broad sense.⁵³ It mattered little that the “clause evenhandedly prohibit[ed] disparagement of all groups.”⁵⁴ “Giving offense,” Justice Alito concluded, “is a viewpoint.”⁵⁵

teenage dating sites and sites designed to permit minors to discuss personal problems with their peers.”).

46. *See id.* at 1736.

47. *Id.* Justice Kennedy seems to see this as militating for an approach that favors protections for speech. “[T]he Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.” *Id.*

48. 137 S. Ct. 1744, 1763 (2017). All eight members of the Court who heard the case agreed that the relevant regulation was unconstitutional viewpoint discrimination. *See id.* Merriam-Webster defines hate speech as “speech expressing hatred of a particular group of people.” *Hate Speech*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/hate%20speech> (last visited Oct. 26, 2018).

49. *Id.* at 1766. Justice Kennedy also explicitly rejected an argument that the statute in question was viewpoint neutral because it applied in equal measure to any offending or demeaning material covered. *See id.*

50. In this context, ‘Slants’ is a derogatory term for those of Asian descent.

51. *Id.* at 1754.

52. Petition for Writ of Certiorari, *Lee v. Tam*, 137 S. Ct. 1744 (2016) (No. 15-1293), 2016 WL 1593780.

53. *Matal*, 137 S. Ct. at 1763.

54. *See id.*

55. *Id.*

Matal is particularly relevant for cases involving government action on social media. In *Davison v. Loudoun County Board of Supervisors*, a federal court in Virginia held that a local official, Randall, had violated a constituent's First Amendment rights by blocking the constituent from Randall's government social media page.⁵⁶ Judge Cacheris' opinion in this Section 1983 suit provides a framework for how judges might navigate similar situations going forward.

Judge Cacheris first concluded that Randall acted under the color of state law in creating and operating her "Chair Phyllis J. Randall" Facebook page.⁵⁷ This ruling was necessary to find the constitutional violation required in a Section 1983 claim. The court listed more than ten factors in reaching this conclusion, including that Randall was "an elected official who answers only to her constituents" and that "[n]o [county] policy . . . played any role in [Randall's] decision to ban [the plaintiff]."⁵⁸ The court summarized that the page "arose out of public, not personal, circumstances," and that Randall had used it as a "tool of governance."⁵⁹

Next, Judge Cacheris concluded that the constituent's First Amendment rights had been violated.⁶⁰ The court first examined whether the blocked post was constitutionally protected.⁶¹ The court concluded it was, as the comment that drew Randall's ire was a critique of her official conduct.⁶²

The court proceeded to evaluate whether the creation of the Facebook page had opened a forum for speech.⁶³ Citing *Page*, the court opined that this was just the sort of "'chat room' or 'bulletin board'" that the Fourth Circuit had in mind.⁶⁴ The court explained that "[w]hen one creates a Facebook page, one generally opens a

56. See *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 702 (E.D. Va. 2017), *appeal docketed*, *Davison v. Randall*, No. 17-2002 (4th Cir. Aug. 29, 2017). Note that the appeal has generated a number of amicus briefs.

57. *Id.* at 711.

58. See *id.* at 714, 719.

59. *Id.* at 713. This seems to be an application of the analysis in an earlier 4th Circuit First Amendment case which reversed a ruling below holding that sheriff's deputies who drove around on the eve of Election Day, removing from circulation newspapers that they suspected would be critical of the sheriff, were not acting under color of state law. See *Rosignol v. Voorharr*, 316 F.3d 516, 519 (4th Cir. 2003).

60. *Id.* at 714.

61. See *id.* at 717.

62. *Id.* The plaintiff, after confronting the defendant at a public meeting, had accused her colleagues in county government of corruption.

63. See *id.* at 716.

64. *Id.*

digital space for the exchange of ideas and information.”⁶⁵ The court also suggested that the fact Randall had affirmatively asked her constituents to weigh in with their thoughts indicated the creation of a forum.⁶⁶

The type of forum Randall created with her page is unclear, as the court declined to reach a ruling on this matter.⁶⁷ It explained that this was unnecessary in light of its determination that Randall engaged in viewpoint discrimination, which is prohibited in all forums.⁶⁸ The court cited *Matal*'s “giving offense is a viewpoint” language and pointed to a portion of Randall's testimony stating that she found the constituent's accusations “slanderous.”⁶⁹ The court then deemed the constituent's comment to be just the sort of offensive speech which *Matal* suggested could not be restricted and found that Randall had committed a “cardinal sin under the First Amendment.”⁷⁰

Confusingly, the court then attempted to retreat across some of the jurisprudential ground it had just covered by questioning the reach of its holding. It cautioned that “a degree of moderation is necessary to preserve social media websites as useful forums for the exchange of ideas.”⁷¹ It then suggested that “[n]eutral . . . social media policies . . . may provide vital guidance” in avoiding a First Amendment disaster.⁷² This is confusing because *Matal* seems to eliminate the possibility that such a policy, at least to the extent it proscribes certain sentiments, could be both effective and constitutionally sound: if hate speech is a viewpoint, then even broad limitations on all hate speech are viewpoint discriminatory and therefore unacceptable under the First Amendment.⁷³

In a recently-decided case, the Southern District of New York used similar logic to find that President Trump, and his social media director, could not block respondents on his @realDonaldTrump Twitter account without violating their First Amendment rights.⁷⁴ While the basic logic is similar to *Davison*, the case is noteworthy for two reasons: first, because of the public offi-

65. *Id.* To support this proposition, the court cited Justice Kennedy's *Packingham* dicta. *Id.* Whatever else is true of Justice Alito's concurrence in *Packingham*, this citation seems to suggest that he was correct in suggesting that Justice Kennedy opened a big door.

66. *See id.*

67. *See id.* at 716–17.

68. *Id.*

69. *See id.* at 717.

70. *Id.* at 718.

71. *Id.*

72. *Id.*

73. *See Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

74. *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018), *appeal docketed*, No. 18-1691 (2d Cir. June 5, 2018). The case is currently being appealed.

cial in question; and second, because the court attempts to apply the public forum doctrine to the confusing mechanics of a Twitter thread.⁷⁵

While the limiting dicta in *Davison* suggests that government entities should be able to create social media policies that avoid violating the First Amendment, the jurisprudential problems are deeper than they might appear at first glance. If courts continue to deploy *Packingham* and *Matal* to prohibit viewpoint discrimination on government-controlled social media pages,⁷⁶ blocking unruly individuals may be the least of the government's worries. The government may find all use of private social media under attack.

PART II: THE DOCTRINE IS DOOMED

The open-ended nature of Justice Kennedy's remarks in *Packingham* brought the question of how to characterize social media profiles within the public forum framework, and the appropriate indicia to use in such an analysis, to the forefront.⁷⁷ But so long as Justice Kennedy's remarks are understood to support the proposition that at least *some* government social media profiles are public forums,⁷⁸ then the government's continued presence on social media is under threat.

If the government may not discriminate based on viewpoint against individuals once they have 'spoken',⁷⁹ it stands to reason that the government may not preemptively do the same before they have spoken.⁸⁰ By choosing to host these pages on private plat-

75. See *id.* at *42 (attempting to identify the actual forum in question in the context of a Tweet and the threads that emerge from it). Twitter's "muting" function also led to some confusion. See *id.* at *8–9.

76. And at least some commentators believe it will. See *First Amendment—Freedom of Speech—Public Forum Doctrine—Packingham v. North Carolina*, 131 HARV. L. REV. 233, 238 (“[T]he Court’s rhetoric furthered a nascent theory expounded in recent litigation . . . that government-administered Facebook pages and Twitter timelines constitute public fora.”) [hereinafter *Packingham Casenote*].

77. See *Davison*, 267 F. Supp. 3d at 718; *Packingham Casenote*, *supra* note 76, at 233 (“*Packingham*’s . . . framing of the internet as a public space . . . opened a Pandora’s box, with repercussions for certain First Amendment precepts . . . [T]he Court’s public space rhetoric implied that the public forum doctrine might be pliable enough to encompass the internet and social media[.]”).

78. See, e.g., *Packingham Casenote*, *supra* note 75 (repeatedly citing and quoting *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017), to reach this conclusion).

79. See *id.*

80. Such action resembles a prior restraint on speech. Prior restraints tend to be found when there is “an administrative system . . . that prevents speech from occurring.” ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 11.2.3 (5th ed. 2015). There is a strong presumption against the constitutionality of such measures. See *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976) ([P]rior restraints on speech . . . are the most serious and the least tolerable infringement on First Amendment rights.”).

forms which include viewpoint discriminatory language in their terms of service agreements (e.g., bans on hate speech),⁸¹ the government is doing just that. These service agreements present significant doctrinal difficulties and policy problems. Public forum doctrine as currently articulated effectively demands that the government abandon social media altogether to avoid a First Amendment violation or limit its presence in some significant but indeterminate way.⁸² This is an impossible choice which demands a revision of the doctrine.

A. *Government won't be leaving social media any time soon . . .*

Given the popularity of social media in America, it seems likely that the government is on social media to stay. A recent study found that seven out of ten Americans use social media.⁸³ About seventy five percent of Facebook users and fifty percent of Instagram users visit these sites at least once a day.⁸⁴ And while Facebook is far-and-away the most popular platform, Pinterest, Instagram, LinkedIn, and Twitter each have millions of users in the United States.⁸⁵ And where Americans go, their government will follow. From President Donald J. Trump to the Ann Arbor Police Department, government officials and departments have raced to establish a presence online.⁸⁶ As of November 2018, President Trump reaches more than eighty million followers through his two Twitter accounts, to say nothing of those he reaches on other platforms.⁸⁷ But it's not just President Trump. An early 2017 survey conducted by the Public Technology Institute found that eighty-five percent of local government agencies have some sort of social media presence.⁸⁸ New York City's municipal government utilized 348 social media channels on at least ten platforms as of November

81. See, e.g., *Hateful Conduct Policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> (last visited Oct. 26, 2018) (banning speech that "directly attack[s] . . . other people on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease.").

82. See Part B *infra*.

83. *Social Media Fact Sheet*, PEW RESEARCH CTR. (Jan. 12, 2017), <http://www.pewinternet.org/fact-sheet/social-media/> [hereinafter PEW RESEARCH CTR.].

84. *Id.*

85. *Id.*

86. See, e.g., City of Ann Arbor - Police Department, FACEBOOK, <https://www.facebook.com/annarborpolice/> (last visited Oct. 26, 2018); President Trump (@POTUS), TWITTER, <https://twitter.com/potus?lang=en> (last visited Oct. 26, 2018).

87. Donald J. Trump (@realDonaldTrump), TWITTER, <https://twitter.com/realDonaldTrump/memberships?lang=en> (last visited Nov. 16, 2018); President Trump, *supra* note 86. These numbers should be viewed with the caveats offered in note 4, *supra*, in mind.

88. PUB. TECH. INST., *supra* note 10.

2018,⁸⁹ and a Twitter account set up by NASA for the sole purpose of providing updates from the Curiosity Rover has more than 3.9 million followers.⁹⁰ Indeed, social media presence has become such a ubiquitous element of government operations and strategy that an entire industry has sprung up to service needs in that space.⁹¹

Social media presence has become a critical part of government officials' communications efforts. A 2015 study surveying congressional staffers found that seventy-six percent of respondents believed social media "enable[s] us to have more meaningful interactions with constituents."⁹² Local and state governments have found numerous uses for social media.⁹³ Government officials rely on social media not only to spread their message but also as a vehicle to allow for constituent input and two-way communication.⁹⁴ Accepting constituent input via social media enables government officials and agencies to appear receptive and responsive to constituents.⁹⁵

But, the government's use of social media is not limited to facilitating constituent input, though. As early as 2011, federal and state agencies recognized social media's potential as a tool for coordinating and targeting emergency services, both routine and during disasters.⁹⁶ Indeed, federal laws call for the Department of Homeland Security to develop a robust presence on social media for such purposes.⁹⁷ This emergency response use of social media was critical to coordination efforts during the 2017 hurricane season,

89. See *Social Media*, NYC.GOV, <http://www1.nyc.gov/connect/social-media.page> (last visited Nov. 16, 2018).

90. Curiosity Rover (@MarsCuriosity), TWITTER, <https://twitter.com/MarsCuriosity> (last visited Nov. 16, 2018).

91. See GSMCON GOVERNMENT SOCIAL MEDIA CONFERENCE, <http://gsmcon.com/agenda> (last visited Oct. 26, 2018) (outlining the agenda for an upcoming industry conference).

92. *New Report Outlines How Congress and Citizens Interact on Social Media*, CONG. MGMT. FOUND. (Oct. 14, 2015) <http://www.congressfoundation.org/news/press-releases/1123-new-report-outlines-how-congress-and-citizens-interact-on-social-media> [hereinafter CONG. MGMT. FOUND.].

93. See, e.g., *How a Local Government Team of 30+ Serves 1.1 Million Constituents on Social Media*, HootSuite, <https://hootsuite.com/resources/case-study/the-six-steps-fairfax-county-government-took-to-scale-social-media-across-departments> (last visited Oct. 26, 2018) (documenting the numerous ways Fairfax County utilizes social media).

94. *Id.*

95. See Ross Rinehart, Note, "Friending" and "Following" the Government: How the Public Forum and Government Speech Doctrines Discourage the Government's Social Media Presence, 22 S. CAL. INTERDISC. L.J. 781, 831–32 (2013) (summarizing expert research on the subject).

96. See *Understanding the Power of Social Media as a Communication Tool in the Aftermath of Disasters: Hearing Before the Subcomm. on Disaster Recovery and Intergovernmental Affairs of the S. Comm. on Homeland Sec.*, 112th Cong. (2011) (written statement of Craig Fugate, Administrator, Federal Emergency Management Agency) ("[S]ocial media is extremely valuable to the work we do.").

97. DHS Social Media Improvement Act of 2015, 6 U.S.C.A. § 195d (West 2018).

when a series of storms battered Texas, Florida, and the Caribbean.⁹⁸

None of these social-media uses are problematic on their own. But a closer examination of the terms of service and other limitations on speech that most major social media platforms employ suggests that viewpoint discrimination occurs long before the first official clicks “block.” Facebook prohibits, among other things, “hate speech.”⁹⁹ Instagram bars content that is “hateful.”¹⁰⁰ Twitter bans “hateful conduct,” a category of content including speech that “directly attack[s] . . . other people on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease.”¹⁰¹ Twitter has also acknowledged that it considers the “newsworthiness” of a post when evaluating whether it violates content rules and should be removed.¹⁰² Even if every other restriction the platforms use is deemed acceptable, it seems post-*Matal* that these hate speech bans are viewpoint discriminatory.¹⁰³ As Justice Alito explained in *Matal*, “giving offense is a viewpoint” that cannot be restrained, even by rules that “evenhandedly prohibit[ed] disparagement of all groups.”¹⁰⁴

Consequently, any time a government page is found to be a public forum, and is therefore subject to the prohibition on viewpoint discrimination, the government automatically and impermissibly limits citizens’ ability to speak in the first instance based on their viewpoint. This is either direct government discrimination—by choice of a viewpoint discriminatory forum—or, at best, censorship by proxy—if the specific violation is the platform’s removal of the offending content from the government-created public forum.¹⁰⁵

98. See Brian Stelter, *How Social Media is Helping Houston Deal with Harvey Floods*, CNN (Aug. 28, 2017, 12:21 AM), <http://money.cnn.com/2017/08/28/media/harvey-rescues-social-media-facebook-twitter/index.html> (outlining the use of social media to coordinate rescue and recovery efforts during Hurricane Harvey).

99. *Community Standards III.12: Hate Speech*, FACEBOOK, https://www.facebook.com/communitystandards/objectionable_content (last visited Oct. 26, 2018).

100. *Community Guidelines*, INSTAGRAM, [https://help.instagram.com/477434105621119/?helpref=hc_fnav&bc\[0\]=368390626577968&bc\[1\]=285881641526716](https://help.instagram.com/477434105621119/?helpref=hc_fnav&bc[0]=368390626577968&bc[1]=285881641526716) (last visited Oct. 26, 2018).

101. *Hateful Conduct Policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> (last visited Oct. 26, 2018).

102. Catherine Shu, *Twitter Says It Hasn’t Deleted Trump’s Provocative North Korea Tweet Because of “Newsworthiness”*, TECHCRUNCH (Sep. 27, 2017) <https://techcrunch.com/2017/09/25/twitter-says-it-hasnt-deleted-trumps-provocative-north-korea-tweet-because-of-newsworthiness/>.

103. See *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

104. *Id.*

105. While the Communications Decency Act of 1996 explicitly protects “Good Samaritan” blocking and screening of objectionable material from civil liability regardless of constitutional status, 47 U.S.C. § 230(c) (2012), this would not be implicated in a constitutional

Some might suggest that, despite their viewpoint discriminatory nature, these bans are acceptable because those blocked have access to other forums.¹⁰⁶ Those blocked could, for example, express their views in a letter, or at a protest. But even assuming that there is a replacement forum equivalent to posting on Twitter,¹⁰⁷ this argument falls short. The public forum doctrine strongly suggests that the government cannot get away with viewpoint discrimination by pointing to a hypothetical alternative forum.¹⁰⁸

While there is limited precedent regarding public forums created on privately-owned digital platforms, one pre-digital analogy may be useful for thinking about the relevance of platform-ownership: a town meeting hosted by a local official at a private venue.¹⁰⁹ It is plausible that the private location of an event might inform the analysis of whether the public forum doctrine should apply—perhaps suggesting that the official is not holding the event in her public capacity—or inform the analysis evaluating the type of forum—suggesting that the forum is, if anything, limited in nature.¹¹⁰ However, to the extent that the government creates a public forum on privately-held property, it seems unlikely that the property's owner would be able to effectively grant the ability to trample on the rights of those using the forum to the government.¹¹¹ After all, the government cannot free itself of the constraints of the Establishment Clause by proselytizing on private

claim regarding the government's use of such a webpage. It would be a funny thing if Congress could pass laws explicitly abrogating the Constitution.

106. See, e.g., Thomas Wheatley, *Why Social Media is Not a Public Forum*, WASH. POST: ALL OPINIONS ARE LOCAL (Aug. 4, 2017), https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2017/08/04/why-social-media-is-not-a-public-forum/?utm_term=.30845de8feb0 (arguing that social media pages are not public forums in part because affected constituents may post “essentially the same thing on multiple pages”). Wheatley also notes in passing the potential consequences of this ruling for government presence on social media moving forward, before summarily dismissing it as an unacceptable outcome that would be “unfair” to social media platforms. Maybe so, but I am unsure of the doctrinal significance of the outcome's unfairness.

107. This is another situation where the unusual character of social media makes for imperfect comparisons. One could imagine a compelling argument that social media offers wider exposure and more effective dissemination of views for users commenting on government pages. It might then be argued that no in-person protest or letter to an official can provide the user a comparable opportunity to speak. This is an interesting question, but not one that needs to be answered here given the doctrine laid out above.

108. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 519 U.S. 819, 829 (1995); *CHEMERINSKY*, *supra* note 80, § 11.4.2 (“Viewpoint restrictions of speech are virtually never allowed.”).

109. Wheatley envisions a similar scenario, though his is a private event on private property open to the public. Wheatley, *supra* note 106.

110. See *supra* note 58 and accompanying text.

111. See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 548, 552 (1975) (finding a violation of the First Amendment where plaintiff was denied the right to use a privately-owned theatre leased by the government).

property.¹¹² By holding a public forum with viewpoint discriminatory rules in place, the government would be violating the First Amendment rights of those muzzled.¹¹³ The practical consequences of building such a loophole into the public forum doctrine would be disastrous: public meetings about controversial topics could easily find their way to private venues operated by those in simpatico with the government.¹¹⁴

It is worth drawing a distinction between individual government officials and government agencies, if only to highlight why the distinction does not change the outcome. A city's fire department and an alderman holding public meetings might or might not be treated differently for purposes of determining whether they are in fact acting in a government capacity.¹¹⁵ It might be more likely that an individual legislator is acting as a candidate or a private citizen and is not subject to the public forum doctrine at all. But to the extent that a public forum has been found to exist, as in *Davison*,¹¹⁶ the identity of the government entity seems less material to a determination of viewpoint discriminatory behavior. Whether the entity responsible for hosting the meeting is a department or an individual is irrelevant to the silenced citizen, and the policy problems raised by an alternative rule that distinguishes forums based on entity type are numerous. If the government can simply hold public meetings in private venues with restrictive policies by ascribing the event to a single official, what would stop the government from conducting most of its public business in such a manner? While proponents of the rule are sure to argue that such an outcome is unlikely, the threat seems to undercut the very protections the First Amendment affords.

112. See *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1823 (2014).

113. While not the subject of this Note, the application of public forum doctrine to government social media pages raises another important First Amendment question. Could the Establishment Clause be interpreted as prohibiting government officials from tweeting bible verses or otherwise expressing religious views? For an excellent summary of the issue, see Eugene Volokh, *Would Ruling Against Trump in Twitter User Blocking Lawsuit Also Bar Elected Officials From Including Bible Verses in Their Political Twitter Accounts?*, WASH. POST: VOLOKH CONSPIRACY (Aug. 25, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/08/25/would-ruling-against-trump-in-twitter-user-blocking-lawsuit-also-bar-elected-officials-from-including-bible-verses-in-their-political-twitter-accounts/?utm_term=.8f314e9317fb.

114. While not the subject of this Note, the strengthening of open meeting laws with clauses limiting acceptable venues might be an effective countermeasure.

115. See generally *Davison v. Loudon Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 708 (E.D. Va. 2017) (walking through this analysis for an elected official), *appeal docketed*, *Davison v. Randall*, No. 17-2002 (4th Cir. Aug. 29, 2017).

116. *Id.* at 716. It's worth noting that the identity of the government entity may well be relevant for purposes of identifying whether a public forum exists. See *supra* notes 57–66 and accompanying text.

The state action doctrine is a logical shield to which the courts might turn. The state action doctrine dictates that private parties are incapable of violating the First Amendment, which proscribes only government action.¹¹⁷ Therefore, as long as the private platform is the entity limiting speech, no First Amendment claim exists.¹¹⁸

If we perceive the First Amendment violation as occurring when the government opens a forum that will inherently and necessarily be viewpoint discriminatory because of the platform's terms of service, then the government action requirement is satisfied.¹¹⁹ If, as proponents of applying the public forum doctrine must argue, there are situations in which *ex post* viewpoint discrimination by the government is impermissible, then why should the same viewpoint discrimination be acceptable *ex ante*? Furthermore, the fact that almost all platforms rely on user reports to rapidly respond to terms of service violations highlights another flaw in the state action requirement argument.¹²⁰ If, again, there are situations where a government official violates an individual's First Amendment rights by blocking his speech directly *ex post*, the *very same government official* should not be able to achieve the same outcome by utilizing the platform's reporting feature.¹²¹ That these actions should produce different doctrinal results defies common sense.¹²²

117. CHEMERINSKY, *supra* note 80, § 6.4.

118. See, e.g., Jacquelyn E. Fradette, Note, *Online Terms of Service: A Shield for First Amendment Scrutiny of Government Action*, 89 NOTRE DAME L. REV. 947, 957 (2013).

119. While some might suggest that social media platforms in particular have such 'public characteristics' that the First Amendment might apply directly to them, courts have explicitly rejected this reasoning. See *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436, 451 (E.D. Pa. 1996). Such an argument would likely try to apply *Marsh v. Alabama*, a decision where the Court applied the First Amendment to activity on private property in a company town. 326 U.S. 501 (1946). For this argument, see Jonathan Peters, *The "Sovereigns of Cyberspace" and State Action: The First Amendment's Application – Or Lack Thereof – to Third-Party Platforms*, 32 BERKELEY TECH. L.J. 989, 1015–24 (2017) (arguing that the time has come for a new test "allow[ing] courts to compare public and private spaces more generally to assess whether a private space is functionally public.").

120. See *supra* notes 99–101 (outlining the policing processes used by the various platforms).

121. It is possible to imagine circumstances where a governmental body could argue that private restraints on speech apply to what would otherwise qualify as a general-purpose public forum. Professor Leonard Niehoff offers the example of a local government entity that needs to rent a space within the community that can hold 500 people for a specific meeting at which issues of public importance will be discussed. Conversation with Leonard Niehoff, Professor from Practice, Univ. Mich. Law Sch. (Apr. 6, 2018). It turns out that the only such space in town is a church auditorium, and the church rental agreement provides that anti-religious speech is not allowed on the premises. On one hand, Niehoff observes, the government might argue that it "can only rent what it can rent" and that the rental agreement terms therefore allow it to impose a viewpoint-based restriction on the forum that would otherwise be impermissible. *Id.* On the other hand, he points out, there is a difference between the church enforcing those terms (by asking someone who engages in such speech to leave) and the government doing so (transforming the rental terms into state action). *Id.* In any event, a Twitter account is easily distinguishable from this hypothetical. Twitter accounts

Another potential policy problem looms: the retreat of government from social media. Even future caselaw holding that the public forum doctrine is only applicable when the government explicitly articulates that a social media page is meant for a government purpose would pose significant problems for government entities. As discussed earlier, one of the primary reasons government entities have established a presence online is to give citizens a way to discuss their political beliefs.¹²³ It is possible that some government entities (emergency departments come to mind) might be able to use language on their pages stating that the page exists solely to allow the public report emergencies or for the agency to provide public service announcements, possibly taking them outside the realm of the public forum doctrine. But for those government officials and agencies using social media more broadly, it is hard to imagine a page that *would not* exist for the purpose of hearing public opinions. After all, the precise appeal of social media pages to government entities is the opportunity they afford to engage with constituents where they spend most of their time: on the platforms.¹²⁴ To the extent a page exists to solicit individual speech, a ban on hate speech would be viewpoint discrimination.¹²⁵ A Section 1983 or *Bivens* plaintiff could also argue that, even if a page purports to have a limited purpose, the page's very existence on a platform that allows for open feedback belies that purpose.¹²⁶

Neither would a holding that social media platforms are closed public forums defeat the problem posed by the platforms' terms of

generally do not exist for short periods to address exigent circumstances. And, as Niehoff's hypothetical helps demonstrate, it is one thing for Twitter to act based on its own conclusion that its terms of use have been violated and another thing for a state actor to make that viewpoint-based judgment. *See id.*

122. Further lending credence to this conception of state action is the abundance of situations in which indirect state action, for one reason or another, satisfies the requirement. *See* Kevin Park, Note, *Facebook Used Takedown and it Was Super Effective! Finding a Framework for Protecting User Rights of Expression on Social Networking Sites*, 68 N.Y.U. ANN. SURV. AM. L. 891, 916 (2013). *But see* Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 503–04 (1985) (“There . . . are no clear principles for determining whether state action exists.”).

123. *See* CONG. MGMT. FOUND., *supra* note 92.

124. *See id.*

125. *See* *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

126. It is worth noting that Facebook allows users to disable two-way communication. Were a government official to utilize this feature in a robust manner, they could effectively create a webpage that does little more than host statements and other content. *See* FACEBOOK, *supra* note 99; *see also* *Blocking People*, FACEBOOK, <https://www.facebook.com/help/290450221052800> (last visited Nov. 5, 2018). While this might defeat any concerns about public forum doctrine, not all platforms allow it, and it seems likely given the previously mentioned statistics that this is not the use government entities have in mind. *See* PEW RESEARCH CTR., *supra* note 83.

service.¹²⁷ Even in these most restricted of public forums, there are limitations to censorship.¹²⁸ Specifically, speech in closed public forums cannot be restricted by a desire to suppress certain viewpoints.¹²⁹ Again, *Matal* suggests that restrictions on hate speech are viewpoint discriminatory and therefore in violation of the First Amendment when utilized by the government.¹³⁰

B. . . . *but it may not be able to stay there under the public forum doctrine.*

Thus, even without *Packingham* and *Davison*, it is clear that if the public forum doctrine is applied to government pages on social media platforms, *some* of those pages will be found to be public forums.¹³¹ Consequently, government entities may find their ability to manage their social media presence constrained. What options do they have in the face of this reality, then?

A total government withdrawal from social media is hard to fathom. As previously noted, a large number of government entities have a presence on social media¹³² and many rely on it heavily.¹³³ The total withdrawal of all government entities from social media profiles would represent a sea change, at odds with the increasingly digital nature of American life. This would be an ironic blow to the millions of Americans utilizing these platforms to follow and communicate with their governments.¹³⁴

It is plausible that government entities might remove all social media presence that suggests the creation of a public forum. The government could limit its presence on social media platforms to the public-safety related uses previously discussed, making it clear that the pages exist solely to facilitate effective communication be-

127. And while not the subject of this Note, it seems unlikely that, having decided that public forum doctrine applies to social media pages, courts would then find them to be closed public forums. As previously mentioned, this is a category generally reserved for such facilities as schools, military installations, and jails. *See supra* notes 15–32 and accompanying text. While Justice Kennedy's language in *Packingham* comparing social media to the town square would seem to suggest a traditional forum, rulings that the pages constitute limited public forums would also make sense. *See supra* note 42 and accompanying text.

128. *See supra* note 31 and accompanying text.

129. *Id.*

130. *See Matal*, 137 S. Ct. at 1763.

131. *Davison v. Loudon Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 716 (E.D. Va. 2017), *appeal docketed*, *Davison v. Randall*, No. 17-2002 (4th Cir. Aug. 29, 2017); *see generally* *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (suggesting that these pages are hosted in the modern equivalent of the town square).

132. *See* PUB. TECH. INST., *supra* note 10.

133. *See, e.g.*, HOOTSUITE, *supra* note 93.

134. *See* PEW RESEARCH CTR., *supra* note 83.

tween government and constituents during emergencies.¹³⁵ This would still represent a significant retreat from the digital world at a time when it has become a major component of daily life for many Americans.¹³⁶ This alternative would also impose significant costs on government entities as they attempt to determine what type and degree of presence they can maintain without creating a public forum. Asking the government to predict how courts will apply a largely fact-driven balancing test to any given fact pattern is setting them up for failure.

Government entities may respond by abandoning their social media presence entirely, as the city of Redondo Beach did in the face of similar concerns.¹³⁷ Other cities may follow Seattle's lead in prohibiting officials from posting content related to city issues.¹³⁸ A 2013 note by Ross Rinehart compellingly argues that the threatened application of the public forum doctrine to social media is already chilling government uses of platforms.¹³⁹

PART III: WHERE DO WE GO FROM HERE?

We are at a crossroads. We run a risk that the public forum doctrine, designed to balance the right of the people to speak in public places with the need to maintain these forums, will instead lead to the forums' elimination altogether. Social media is important and should be protected.¹⁴⁰ However, we lack a doctrinal technique for reconciling this value with our desire to let platform-owners set rules to limit offensive uses of their platforms, which is expressed in the state action doctrine. Put another way, government use of

135. For purposes of the hypothetical, this Note will assume that an effective doctrinal filter could be created that would exclude the subject's hate speech from the definition of "emergencies."

136. See PEW RESEARCH CTR., *supra* note 83 (highlighting the significant amount of time many Americans spend on social media platforms every day).

137. Debra Cassens Weiss, *California Town Abandons Facebook Page Amid Legal Concerns*, ABA JOURNAL (Aug. 24, 2010), http://www.abajournal.com/news/article/california_town_abandons_facebook_page_amid_legal_concerns (noting that the City Attorney was concerned about potential First Amendment violations).

138. Bill Sherman, *Your Mayor, Your "Friend": Public Officials, Social Networking, and the Unmapped New Public Square*, 31 PACE L. REV. 95, 106 (2011).

139. Rinehart, *supra* note 95, at 785. Rinehart's note offers a glimpse at what may come in the wake of more decisions acknowledging the possibility that government social media pages are public forums. Even if the government does not abandon social media entirely, the opportunity to engage with citizens may be limited significantly. Rinehart also argues that the removal of this venue for speech will "contravene citizens' trust" in their government. *Id.* at 832. Rinehart cites Pew research indicating that most Americans "believe that the Internet has had a major impact on the ability of groups to impact society at large." *Id.*

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

privately-owned social media presents both practical and conceptual First Amendment problems.

Part III examines potential solutions that maintain the public forum doctrine's current framework. These solutions include a government-operated platform, legislated restrictions on hate speech, and a redefinition of the undesirable speech. This analysis ultimately concludes, however, that these solutions are either impractical, facially unconstitutional, or underinclusive of problematic speech. Instead, Part III identifies a simple test as the best path forward into the digital age. This approach represents a return to the roots of the public forum doctrine: an "apprais[al of] the substantiality of the reasons advanced in support of the [speech] regulation" in the context in which the regulation occurred.¹⁴¹

First, let's examine some possibilities that maintain the doctrinal status quo. If the need to protect private rights is eliminated, then protection for speech can be enshrined. A dedicated, publicly-owned social media platform would solve the doctrinal problems presented by the application of the public forum doctrine to social media. Since a government entity would be operating the platform, there could be no argument that *ex ante* viewpoint discriminatory restrictions were private acts that failed to satisfy the state action requirement.¹⁴²

The government-operated platform works conceptually because it removes the wrinkle caused by private ownership of a conduit for government engagement with the public. The public forum doctrine envisions, unsurprisingly, government-owned, -operated, and/or -sponsored forums.¹⁴³ It assumes that the state action requirement will screen out claims arising from private action. By removing the question of whether a platform-wide restriction constitutes government action, a government-operated social platform would lend itself to a more traditional application of the public forum doctrine.

And from a doctrinal standpoint, there is a lot to like about this government-operated platform approach. If government entities limited themselves to one platform or a few platforms that were similar in set-up, early litigation could identify factors delineating

141. *Schneider v. New Jersey*, 308 U.S. 147 (1939). See Carl E. Brody Jr., *Considering the Public Forum Status of Government Internet Sites*, 44 STETSON L. REV. 389, 393 (2015) (explaining that this is "the root of our public forum analysis.").

142. It is hard to imagine what government entity would be responsible for maintaining the platform. The task would be too great for most local entities. Would they instead rely on a Federal or State platform? This cross-government platform might complicate matters.

143. See *supra* notes 15–32 and accompanying text.

types of forums.¹⁴⁴ Government officials and agencies could take cues from the courts and create pages with a reasonable sense of how the First Amendment would apply. This would then allow officials to make informed decisions about how to use the platform.¹⁴⁵ Officials would also have a clear sense of what limitations could be imposed *ex ante*. Litigation could similarly make clear what sort of platform-wide content rules would be constitutional.

But a government platform approach is impractical and unlikely to be implemented. The task seems monumental and would likely be controversial. The federal government is not known for its efficiency and effectiveness as an operator of widely-used websites.¹⁴⁶ And many state and local governments might find the cost of creating and operating their own platforms hard to bear,¹⁴⁷ forcing them to rely on a federal platform over which they would have little control.¹⁴⁸

Still more problematic is the reality that such a platform would likely be unappealing to government officials and agencies because it would struggle to attract the public. As discussed earlier, government presence on privately-owned social media platforms is

144. These determinations can focus on very specific fact patterns. *See, e.g.*, *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (finding that utility poles on public property were nonpublic forums).

145. *Cf.* Kristy Dalton, *Why Most Government Social Media Policies Suck*, GOV. TECH.: GOVGIRL (2017), <http://www.govtech.com/govgirl/Why-Most-Government-Social-Media-Policies-Suck.html> (observing that “[t]he reality is that there is very little case law to guide us in the area of government social media policies.”).

146. Amy Goldstein, *HHS Failed to Heed Many Warnings That HealthCare.gov Was in Trouble*, WASH. POST (Feb. 23, 2016), https://www.washingtonpost.com/national/health-science/hhs-failed-to-heed-many-warnings-that-healthcaregov-was-in-trouble/2016/02/22/dd344e7c-d67e-11e5-9823-02b905009f99_story.html?utm_term=.ec9173bd5597 (chronicling the Federal government’s lengthy misadventures in trying to roll out a website to serve those seeking healthcare following the passage of the Affordable Care Act).

147. By way of illustration: Ann Arbor, Michigan’s FY 2018 budget noted a little more than \$15.3 million in unassigned general funds for the year, a rosy fiscal picture. CITY OF ANN ARBOR, FY 2018 ADOPTED BUDGET 37 (2018), <https://www.a2gov.org/departments/finance-admin-services/accounting/Documents/FY18%20Adopted%20Budget%20Book%20-6.20.17%20FINAL.pdf>. Facebook, as of June, 30, 2018, had 30,275 employees. *Stats*, FACEBOOK, <https://newsroom.fb.com/company-info/> (last visited Oct. 26, 2018). Its total costs and expenses for FY 2017 were reported as \$20.45 billion. Facebook, Inc., Annual Report (Form 10-K) 34 (Feb. 1, 2018), <http://d18rn0p25nwr6d.cloudfront.net/CIK-0001326801/c826def3-c1dc-47b9-99d9-76c89d6f8e6d.pdf>. Obviously not every town needs to create a platform the size of Facebook. Nonetheless, this is a significant undertaking.

148. For just one example of difficulties getting Federal resources on the same page as municipal, state, and regional needs, see the history of the Gateway tunnel project. Despite wide understanding that major upgrades to the train tunnels under the Hudson River are long overdue, and that the current situation poses a real threat of catastrophic failure, the project, announced in 2011, is just now getting funded. *See* Patrick McGeehan, *Spending Deal May Breathe New Life Into Gateway Rail Tunnel Project*, N.Y. TIMES (Mar. 21, 2018), <https://nyti.ms/2FPwFGe>.

largely a response to the public's preferences.¹⁴⁹ Where Americans go, their governments will follow. The start-up costs involved in drawing the public to a social media platform are significant; many platforms fail due to a lack of interest.¹⁵⁰ Government entities may well struggle to attract users to a government-only platform.¹⁵¹ Platforms that have 'made it' have done so by being hip.¹⁵² What could possibly be less hip than a government social media site?¹⁵³ And even if some erstwhile letter writers move to the platform, others may still be deterred by a perceived lack of privacy.¹⁵⁴

At the other end of the spectrum, government entities could conceivably avoid offending the First Amendment by withdrawing altogether from social media. But this is unappealing for practical reasons. As noted earlier, Americans live on social media¹⁵⁵ and they enjoy interacting with their elected officials in this space.¹⁵⁶ Simply put, *we* want government on social media.

What middle ground can be found between protecting speech on social media and maintaining its viability as a conduit for government activity? Some might suggest that privately-held platforms should not be in the business of regulating speech in the first place and that this job is better left to the federal legislature. The theory that risk of oppression of minority voices decreases as a democratic constituency increases in size predates the Constitution.¹⁵⁷ This concept resonates in modern-day opinions authored by Justices across the ideological spectrum, from Stevens to Scalia.¹⁵⁸ Perhaps

149. See *supra* notes 92–95 and accompanying text.

150. See Amelia Tait, *Mastodon.Social: Why Does Every New "Twitter" Fail?*, NEW STATESMAN (Apr. 10, 2017), <https://www.newstatesman.com/science-tech/social-media/2017/04/mastodonsocial-why-does-every-new-twitter-fail>.

151. See Fang Wang, *Explaining the Low Utilization of Government Websites: Using a Grounded Theory Approach*, 31 GOV'T INFO. Q. 610, 610, 619 (2014) (documenting low usage of official government websites worldwide, even as internet use expands, and suggesting, presciently, investigation of social media platforms as a remedy).

152. See Tait, *supra* note 150.

153. See 6. *Perceptions of Elected Officials and the Role of Money in Politics*, PEW RESEARCH CTR. (Nov. 23, 2015), <http://www.people-press.org/2015/11/23/6-perceptions-of-elected-officials-and-the-role-of-money-in-politics/> ([L]arge majorities of the public view elected officials as out of touch"); see also Josh Butler, *Is this the Most Awkward Government Recruitment Ad Ever?*, HUFFINGTON POST (Mar. 1, 2017, 10:03 AM), https://www.huffingtonpost.com.au/2017/02/28/is-this-the-most-awkward-government-recruitment-ad-ever_a_21862845/ (offering a typical reaction to government outreach efforts).

154. See Tiffany Hsu, *For Many Facebook Users, a 'Last Straw' that Led Them to Quit*, N.Y. TIMES (Mar. 21, 2018), <https://nyti.ms/2FXZdJS> (recounting a wave of backlash and exodus from the Facebook platform after reports that a third-party political firm working on behalf of President Trump was able to access private data about platform users).

155. See *supra* notes 83–84 and accompanying text.

156. See *supra* notes 87–90 and accompanying text.

157. See THE FEDERALIST NO. 10 (James Madison).

158. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 251 (1995) (Stevens, J., dissenting) (quoting THE FEDERALIST NO. 10 (James Madison)); *City of Richmond v. J.A. Croson*, 488 U.S. 469, 523 (1989) (Scalia, J., concurring) (quoting same section of THE

some speech regulation by a large enough constituency might not be as worrisome as it would seem at first blush.

From a practical perspective, this approach appears workable. Gone is our concern about relying on private entities to police public speech, as government would take direct responsibility for the job. Speakers, platform owners, and courts will all have clear direction as to what restrictions are permissible. Legislators will be able to take into consideration their usage needs when drafting legislation and will be able to clarify the rules should courts run afoul of their intent. There is also some conceptual appeal to this approach. After all, the legislature is the vessel through which the people maintain their sovereignty.¹⁵⁹ If the legislature is the voice of the people, a strong argument can be made that it is best positioned to make decisions about appropriate regulation for the digital world.¹⁶⁰ The legislature is responsible for making laws, after all.¹⁶¹

But doctrinally, legislative regulation of hate speech on social media is dead in the water. The amendment states, “Congress shall make no law . . . abridging the freedom of speech.”¹⁶² And as previously discussed, recent caselaw makes it clear that prohibitions on hate speech are viewpoint discriminatory, which the First Amendment cannot tolerate.¹⁶³ So how can we enable the legislature to regulate the harm we think it should prevent without running afoul of the First Amendment? To answer this question, we must understand what it is we are trying to prevent. As previously discussed, the problematic speech that seems to raise the most obvious constitutional concern is hate speech.¹⁶⁴

Black’s Law Dictionary defines hate speech as “[s]peech that carries no meaning other than the expression of hatred for some group, such as a particular race, especially in circumstances in which the communication is likely to provoke violence.”¹⁶⁵ Justice Alito’s opinion in *Matal* seems to define protected hate speech as

FEDERALIST NO. 10 (James Madison)). While *Croson* and *Adarand* are 14th Amendment cases, the prevalence of Madison’s logic in the justices’ thinking is clear.

159. See Enrique Schaerer, *Justice Scalia and the Proper Role of a Judge*, FEDERALIST SOC. (Mar. 7, 2016), <https://fedsoc.org/commentary/blog-posts/justice-scalia-and-the-proper-role-of-a-judge> (laying out Justice Scalia’s view on the roles of the branches).

160. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 2.143 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

161. Cf. *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”).

162. U.S. CONST. amend. I.

163. See *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

164. See Part II.B *supra*.

165. *Hate Speech*, BLACK’S LAW DICTIONARY (10th ed. 2014).

“[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground. . . .”¹⁶⁶

These definitions leave some wiggle room, particularly as it pertains to speech with the potential to threaten or incite violence. Justice Alito’s opinion makes no mention of such speech.¹⁶⁷ Black’s Law Dictionary seems to suggest that speech inciting violence is “[especially]” hateful.¹⁶⁸ Unsurprisingly, speech that may incite or threaten violence (let’s call it ‘dangerous speech’) is of particular concern to the proprietors of social media platforms.¹⁶⁹ It is also a category targeted by many platforms’ policies.¹⁷⁰

Crucially, the First Amendment protects neither speech that is likely to incite violence or true threats. While the Supreme Court’s jurisprudence has grown steadily more protective of speech,¹⁷¹ even the narrow test set forth in *Brandenburg v. Ohio* denies protection to speech that “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁷² The Court has also held that “true” threats are not protected by the First Amendment.¹⁷³ There is play in both of these standards. What is ‘likely’ to incite lawless action is not a static concept. As for what constitutes a “true” threat, the circuits have split about the appropriate standard to apply.¹⁷⁴

This suggests that narrowed restrictions might not offend the First Amendment, even if the public forum doctrine is applied. Perhaps government entities could contract with platforms and reach specific agreements to prohibit only speech which is left unprotected by *Brandenburg* and *Watts*. Platforms might be willing to change their policies to avoid losing some of their highest-profile pages or users.¹⁷⁵ Perhaps the state or federal government could try to pass laws banning violent speech on the internet, though these statutes would have to be carefully constructed to avoid being found unconstitutionally vague.

166. *Matal*, 137 S. Ct. at 1765.

167. *Id.*

168. BLACK’S LAW DICTIONARY, *supra* note 165.

169. See *Update on the Global Internet Forum to Counter Terrorism*, FACEBOOK (Dec. 4, 2017), <https://newsroom.fb.com/news/2017/12/update-on-the-global-internet-forum-to-counter-terrorism/> (reiterating Facebook’s commitment to curbing the effects of violent speech).

170. See *supra* notes 99–101.

171. See, e.g., *Matal v. Tam*, 137 S. Ct. 1744 (2017).

172. 395 U.S. 444, 447 (1969).

173. See *Watts v. U.S.*, 394 U.S. 705, 708 (1969).

174. See CHEMERINSKY, *supra* note 80, § 11.3.2.

175. See Aric Jenkins, *Facebook Just Revealed 3 Major Changes to its Privacy Settings*, TIME (Mar. 28, 2018, 8:09 AM), <http://time.com/5218395/facebook-privacy-settings-changes-cambridge-analytica/> (outlining changes made by Facebook to stop an exodus of users following revelations of improper access to user data by a political firm employed by the Trump campaign).

Similar work may be done by the fighting words doctrine.¹⁷⁶ In *Chaplinsky v. New Hampshire*, the Court made it clear that ‘fighting words,’ “those which by their very utterance inflict injury or tend to incite an immediate breach of the peace[,]” are not protected by the First Amendment.¹⁷⁷

But while these solutions make a lot of sense (perhaps even independent of the problems raised by this Note), they remain incomplete.¹⁷⁸ Platforms may have very good reasons for wanting to ban non-dangerous speech. Perhaps they fear boycotts by offended users. Perhaps certain views simply are not in line with ownership’s ideology. Making sure that platforms can remove violent speech is important, but it hardly seems like an adequate answer to the larger issue.

Another possibility is to shield government pages on private social media platforms from scrutiny under the public forum doctrine. This would require judicial acknowledgment of the limitations of the doctrine. The cases could perhaps be distinguished by citing the informal nature of the forum or by noting that the format of the platforms changes quickly.¹⁷⁹ A carve out of this kind acknowledges the importance of maintaining social media as a forum for communication between the government and the public and prevents an outcome that might induce the government to withdraw from the field altogether. From a practical standpoint, this seems to work.

But how dissatisfying! This approach saves social media as a forum for individuals to speak to their government by granting their government limitless power to constrain their speech. And a significant portion of the public clearly expects some protection for speech online.¹⁸⁰

176. See Shikha Parikh, *Your Right to Speak on Government Sponsored Social Media Sites*, 50 MD. B.J. 14, 18 (2017).

177. 315 U.S. 568, 572 (1942).

178. And the potential effectiveness of the fighting words doctrine in this context may be limited. Some courts have restricted the doctrine’s application to face-to-face interactions. See, e.g., *State v. Dugan*, 303 P.3d 755, 767 (Mont. 2013) (finding that the doctrine has a face-to-face requirement that was not satisfied by a phone conversation in which the defendant called another individual a “f—— c—.”); see also *State v. Drahota*, 788 N.W.2d 796, 802, 804 (Neb. 2010) (refusing to apply the doctrine to e-mails sent to a professor and political candidate accusing him of being an Al-Qaida sympathizer because the target “could not have immediately retaliated” and the inflict-injury prong of the doctrine cannot support the criminalization of speech “solely because it inflicts emotional injury.”).

179. See *supra* notes 46–47 and accompanying text.

180. See Shine Cho, *State of the First Amendment? Many Americans Say it Shouldn’t Protect Divisive Campus Speakers, Hate Speech on Social Media*, STUDENT PRESS LAW CTR. (June 30, 2017, 2:28 PM), <http://www.splc.org/article/2017/06/newseum-first-amendment-2017-survey>. While a narrow majority of respondents said that the First Amendment should not protect hate speech on social media, the results suggest considerable dispute.

Still, criticism of the public forum doctrine and its current inflexible form is widespread.¹⁸¹ Criticism is not limited to the doctrine's application to the digital space,¹⁸² with the rigidity of the categorical approach coming under fire as label-driven.¹⁸³ Courts have struggled to distinguish between categories,¹⁸⁴ despite much riding on the outcomes of their decisions. Recent criticism has singled out the consequences of the doctrine's inflexibility in applications to the digital space.¹⁸⁵

Perhaps then what is needed, at least in the digital context, is a simplification that remains true to the underlying principles of the doctrine while providing much-needed flexibility to deal with the particulars of a given situation.¹⁸⁶ Scholars have advocated for such an approach for decades.¹⁸⁷ This would finally restore to prominence a principle, present throughout early public forum jurisprudence, that has been obscured in recent years. The point of the public forum doctrine is to weigh our desire to protect public speech against the need of the government to function. As the Court explained in *Grayned v. City of Rockford*: “[t]he crucial ques-

181. See e.g., Brody Jr., *supra* note 141, at 391 (“Unfortunately, certain . . . attempts to define the field [of public forum doctrine] have broadened the scope of public forum analysis and created confusion as to its proper application.”).

182. See, e.g., *U.S. v. Kokinda*, 497 U.S. 720, 741 (1990) (Brennan, J., dissenting) (“I have questioned whether public forum analysis, as the Court has employed it in recent cases, serves to obfuscate rather than clarify the issues at hand.”).

183. See, e.g., C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First Amendment Analysis*, 55 GEO. WASH. L. REV. 109, 110 (1987) (positing that the doctrine yields “an inadequate jurisprudence of labels” where “[l]egal outcomes depend . . . on what pigeonhole of law is determined to apply.”); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 93 (1987) (“Existing doctrine, with its myopic focus on formalistic labels, serves only to distract attention from the real stakes in these disputes.”). The doctrine also struggles with other types of digital *ex ante* speech controls. See Enrique Armijo, *Kill Switches, Forum Doctrine, and the First Amendment's Digital Future*, 32 CARDOZO ARTS & ENT. L.J. 411, 433 (2014) (arguing that the doctrine “leaves courts ill-equipped to deal with *ex ante* speech controls over digital communications.”).

184. See Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299, 300 (2009) (“Substantial confusion exists regarding what distinction, if any, exists between a ‘designated public forum’ and a ‘limited public forum.’”); see, e.g., *Justice For All v. Faulkner*, 410 F.3d 760, 765 n.6 (5th Cir. 2005) (noting that the “precise taxonomic designation of the [limited public forum] remains elusive.”).

185. See, e.g., David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse*, 2010 BYU L. REV. 1981, 1982 (2010) (arguing that the doctrine’s “formalistic categories and arcane rules” limits “judicial . . . flexibility in dealing with” online speech).

186. Members of the Supreme Court have been noting the need for such flexibility for some time. See *Greer v. Spock*, 424 U.S. 828, 859–60 (1976) (Brennan, J., dissenting) (noting that “the notion of ‘public forum’ has never been the touchstone of public expression” and calling for “a flexible approach to determining when public expression should be protected.”).

187. See, e.g., Stone, *supra* note 183, at 93 (“Whether the first amendment guarantees individuals a right to engage in expressive activities on public property should turn . . . on a reasonable accommodation of the competing speech and governmental interests.”).

tion is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.”¹⁸⁸

Distilling the doctrine down to this basic question of compatibility yields results that seem to work rather well for social media. ‘Mean words,’ such as the ones posted by the plaintiff in *Davison*,¹⁸⁹ would likely be protected. As many readers of this Note are no doubt aware, social media can be very rough and tumble.¹⁹⁰ While this may be viewed as a downside, general name-calling is not incompatible with the forum.¹⁹¹ This is a good thing normatively: our sense that letting officials screen out mean words is wrong brought us here in the first place.¹⁹² But while we also aim to protect unpopular opinions,¹⁹³ we do not protect them when they are incompatible with the normal usage of forum in which they are expressed.¹⁹⁴ Here, protecting hate speech and other types of protected speech banned by platforms would be incompatible with their continued use as a forum by the government.¹⁹⁵ And so, the government does not run afoul of this simplified version of the doctrine by creating a page where users must adhere to the platform’s rules.

Put another way, applying the simplified public forum doctrine to this fact pattern yields two principles: (1) individual, non-government persons are constitutionally entitled to interact with government social media pages as long as they stay within the bounds of “normal usage” of the platform; and (2) government actors on social media may (indirectly, at least) constrain what would otherwise be constitutionally protected speech as long as the constraint is necessary to maintain their presence on the platform.

188. 408 U.S. 104, 116 (1972).

189. See *Davison v. Loudon Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 711 (E.D. Va. 2017), *appeal docketed*, *Davison v. Randall*, No. 17-2002 (4th Cir. Aug. 29, 2017).

190. See Maeve Duggan, *Online Harassment 2017*, PEW RESEARCH CTR.: INTERNET & TECH., (July 11, 2017), <http://www.pewinternet.org/2017/07/11/online-harassment-2017/> (offering statistics on internet users encounters with harassment and unkind words).

191. See notes 99–101 *supra* (laying out the rules for the various platforms).

192. See *supra* note 140 and accompanying text.

193. See *Grayned*, 408 U.S. at 117 (noting our inability to restrict “unpopular viewpoints” out of “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969))).

194. See *Grayned*, 408 U.S. at 118 (clarifying that activity which materially disrupts the forum, in that case a classroom, may be forbidden).

195. This conclusion, of course, assumes that the private platforms are not state actors also subject to the constraints of the First Amendment. See Part II *supra*. While some have argued that this should not be the case, most acknowledge that it is the current state of the law. See *e.g.*, Peters, *supra* note 119, at 1015–24 (concluding that under the current doctrine “Facebook could not be described as a state actor,” but also that the time has come for a new test “allow[ing] courts to compare public and private spaces more generally to assess whether a private space is functionally public.”).

The proposed solution will not end debate. It interprets “normal usage” to mean “usage that is not prohibited usage.” An argument could certainly be made that ‘normal’ means something narrower than that: perhaps usage consistent with some normative interpretation of what is appropriate for the forum. This is a reasonable interpretation, but one that would yield a rule both difficult to administer and at odds with the notion that speech should not be prohibited merely because it is offensive.¹⁹⁶

The solution also allows for the possibility that the government might limit its presence online to a privately-owned platform with restrictive terms of use that limit speech significantly—achieving the very end-run around speech protections that we aim to avoid. While the worst of these scenarios—a situation where the platform’s terms of use are tailored to the government’s preferences—might be interpreted by viewing the platform as a state actor performing state functions,¹⁹⁷ it is easy to imagine situations where social media platforms, while truly independent, have uncomfortably narrow use restrictions.¹⁹⁸ The proposed new digital public doctrine admittedly encompasses a normative judgment that allowing such a possibility is an acceptable cost of maintaining government presence on social media.

It is unclear how the courts will decide to deal with the public forum doctrine in the digital context. However, it seems likely that any decision will be in part the result of a balancing act where our desire to limit the harmful effects of dangerous speech is weighed against our respect for the protections enshrined in the Constitution. Given the importance of popular interaction with the government to our society, we can ill afford missteps.

CONCLUSION

Our Founding Fathers enshrined the protection of speech in the Bill of Rights; our fondness for ‘Free Speech’ has resulted in

196. See *Grayned*, 408 U.S. at 117 (noting our inability to restrict “unpopular viewpoints” out of “mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969))).

197. The state-actor test currently in use asks the court to examine “(1) ‘the extent to which the actor relies on governmental assistance and benefits’; (2) ‘whether the actor is performing a traditional governmental function’; and (3) ‘whether the injury caused is aggravated in a unique way by the incidents of governmental authority.’” See *Georgia v. McCollum*, 505 U.S. 42, 51 (1992) (quoting *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621–22 (1991)).

198. A platform with a ban on ‘mean words’ is a plausible example. Many thanks to Paul Hoversten for developing the notion of this hypothetical platform, which he would name “Snowflake.”

jurisprudence creating heightened protections for it. Still, the digital revolution has carried us into a new age. In many ways, the average citizen is capable of speaking like never before: her 'voice' transiting the globe online, reaching people she has never heard of and will never meet. These newfound powers are heady and we have seen them used both for good and for evil. We are at a crossroads and we must evaluate the meaning of 'Free Speech' in this digital context. What should be protected and in what forum? I submit that building consensus around the answer we do reach will be just as important as the answer itself.