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## Merging the Social and the Public: How Social Media Platforms Could Be a New Public Forum

Amélie P. Heldt

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## MERGING THE SOCIAL AND THE PUBLIC: HOW SOCIAL MEDIA PLATFORMS COULD BE A NEW PUBLIC FORUM

Amélie P. Heldt\*

### *Abstract*

*When Facebook and other social media sites announced in August 2018 that they would ban extremist speakers, such as conspiracy theorist Alex Jones, for violating their rules against hate speech, reactions were strong.<sup>1</sup> People either criticized the ban by saying that such measures were only a drop in the bucket with regard to toxic and harmful speech online, or they despised Facebook for penalizing only right-wing speakers, censoring political opinions and joining some type of anti-conservative media conglomerate.<sup>2</sup> This anecdote foremost begged the question: should someone like Alex Jones be excluded from Facebook?<sup>2</sup> Moreover, may Facebook exclude users for publishing political opinions?<sup>2</sup>*

*As social media platforms take up more and more space in our daily lives, enabling not only individual and mass communication but also offering payment and other services, there is still a need for a common understanding regarding the social and communicative space social media platforms create in cyberspace. This common understanding is needed on a global scale since this is the way most social media platforms operate.<sup>3</sup> While in the social science realm a new digital sphere was proclaimed<sup>4</sup> and social media platforms can be*

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<sup>1</sup> James Vincent, Facebook Removes Alex Jones Pages, Citing Repeated Hate Speech Violations, *The Verge* (Aug. 6, 2018), <https://www.theverge.com/2018/8/6/17655102/facebook-bans-alex-jones-infowars-pages> [<https://perma.cc/Q9BN-V244>].

<sup>2</sup> Id.; Robert H Lande & Chris Sagers, Who Should Conservatives Blame for Alex Jones' Ban From Social Media? Themselves. *Slate* (Aug. 24, 2018), <https://slate.com/technology/2018/08/donald-trump-and-conservatives-should-blame-themselves-for-alex-jones-facebook-ban.html> [<https://perma.cc/9CJS-KVQP>]; Paris Martineau, Facebook Bans Alex Jones, Other Extremists—but Not as Planned, *Wired* (2019) <https://www.wired.com/story/facebook-bans-alex-jones-extremists> [<https://perma.cc/6AL2-UH4V>].

<sup>3</sup> See Facebook's mission statement, <https://www.facebook.com/pg/facebook/about> [<https://perma.cc/T8VU-XXA5>].

<sup>4</sup> Manuel Castells, *The New Public Sphere: Global Civil Society, Communication Networks, and Global Governance*, 616 *The Annals of the Am. Academy of Pol. & Soc. Science* 78, 93 (2008).

categorized as “personal publics,”<sup>5</sup> there is still no such denomination in legal scholarship that is globally agreed upon for social media.

Public space can generally be defined as a free room between the state and society,<sup>6</sup> a space for freedom. Generally, it is where individuals are protected by their fundamental rights while operating in the public sphere. However, terms like forum, space, and sphere may not be used as synonyms in this discussion. Under the First Amendment, the public forum doctrine mainly serves the purposes of democracy and truth and could be perpetuated in communication services that promote direct dialogue between the state and citizens.<sup>7</sup> But where and by whom is the public forum guaranteed in cyberspace? The notion of the public space in cyberspace is central, and it constantly evolves as platforms become broader in their services. Hence, it needs to be examined more closely. When looking at social media platforms, we need to take into account how they moderate speech and subsequently, how they influence social processes. If representative democracies are built on the grounds of deliberation, it is essential to safeguard the room for public discourse to actually happen.<sup>8</sup> Are constitutional concepts for the analog space transferable into the digital? Should private actors such as social media platforms be bound by freedom of speech without being considered state actors?<sup>9</sup> Accordingly, do they create a new type of public forum?

The goal of this article is to provide answers to the questions mentioned. First, it will give an overview of the doctrinal concept of public forum doctrine in U.S. constitutional scholarship and its choke points related to cyberspace. Second, it will introduce the notion of “public” in German constitutional jurisprudence as a point of reference and the outcome of the comparative analysis. It will answer whether the public forum doctrine and the definition of “public” in Germany serve the same function in both systems, and, if so, how the doctrine needs to be taken into account by non-state actors. The focus will be on the consequences of this comparison for the digital sphere,

<sup>5</sup> Jan-Hinrik Schmidt, *Social Media* 30 (2013).

<sup>6</sup> Klaus Eder, *Öffentlichkeit und Demokratie*, in *EUROPÄISCHE INTEGRATION* 85-120 (Markus Jachtenfuchs & Beate Kohler-Koch eds., 2003).

<sup>7</sup> Lyrrisa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1978 (2011).

<sup>8</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1. ed. 1960); Jack M. Balkin, *Digital Speech and Democratic Culture: a Theory of Freedom of Expression for the Information Society*, 79 N.Y. U. L. REV. 1, 27. (2004); JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS: AN ESSAY IN POLITICAL INQUIRY* 105 (Melvin L. Rogers ed., 2012).

<sup>9</sup> Frank Pasquale, *Platform Neutrality: Enhancing Freedom of Expression in Spheres of Private Power*, 17 THEORETICAL INQUIRIES IN L. 487, 512 (2016); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1658 (2018); Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1386 (2018).

*such as for the intermediaries that globally connect users and provide platforms to share content. The fundamental question is to which extent platforms can factually be the hosts of public discourse and at the same time enforce their own rules on the basis of their contractual relationship with users, such as moderating content. Gaining more clarity about these questions would serve the purpose of possibly revising our current expectations towards platforms, which are based on their role in modern society rather than on legal obligations. It would also show that judicial review can serve as a flexible tool if the doctrine is open to changes in society. Finally, this article proposes an extension of the public forum doctrine that would be based on the findings of the first parts and could serve as potential guidance to the courts that are applying the public forum doctrine in practice.*

I. INTRODUCTION.....	1001
A. <i>The Issue: The Public Forum Doctrine in Cyberspace....</i>	1001
B. <i>What is “Public”?</i> .....	1002
II. THE PUBLIC FORUM DOCTRINE AND ITS LIMITS.....	1003
A. <i>The Public Forum Doctrine.....</i>	1004
1. <i>Traditional and Designated Public Forum .....</i>	1004
2. <i>Spaces on the Edge or Outside.....</i>	1006
B. <i>Not So Public?</i> .....	1007
1. <i>Can There Be a Public Forum Owned by a Private Party?</i> .....	1008
2. <i>Spaces Designed for Shopping, Not Speaking.....</i>	1009
C. <i>From Shopping Malls to Cyberspace .....</i>	1010
III. THE PUBLIC FORUM IN GERMAN CONSTITUTIONAL LAW ....	1014
A. <i>The “Public”.....</i>	1015
B. <i>The “Public” as a Space for Deliberation .....</i>	1017
1. <i>The FCC’s Fraport Ruling.....</i>	1017
2. <i>A Horizontal Effect in Privately-Owned Spaces.....</i>	1019
3. <i>Defining the Public in Cyberspace.....</i>	1021
C. <i>Interim Conclusion of the Comparative Approach .....</i>	1022
IV. WHAT IS SO DIFFERENT ABOUT SPEECH ON SOCIAL MEDIA PLATFORMS?.....	1024
A. <i>Content Moderation is Necessary .....</i>	1024
B. <i>If Social Media Platforms Were Considered State Actors</i>	1027
C. <i>At Least Partly: Social Media Profiles as Designated Public Forum .....</i>	1028
V. SOLUTION STATEMENT.....	1029
A. <i>Necessity for a New Public Forum Category?.....</i>	1030
B. <i>A New Public Forum Category? .....</i>	1031
1. <i>Connecting the Dots .....</i>	1032
2. <i>A “Social” Public Forum.....</i>	1032

1000	MITCHELL HAMLINE LAW REVIEW [Vol. 46:5
	<i>3. Potential Pitfalls</i> ..... 1037
	VI. CONCLUSION ..... 1040

## I. INTRODUCTION

*A. The Issue: The Public Forum Doctrine in Cyberspace*

Hardly any constitutional right has been in the public debate on the future of technology as much as freedom of speech. When social media platforms advocate for a connected world and more global communication, does the First Amendment favor or disfavor their users? Can the public forum doctrine still guarantee spaces where citizens enjoy their First Amendment rights in the digital age? The answer is: not really. While the First Amendment offers almost absolute protection against governmental intervention in analog state-owned spaces, it fails to keep pace with the combined and increasing privatization and digitization of society. Coping with the fact that communication on the Internet mostly takes place on social media platforms and that these platforms offer their users some form of public sphere or place to exchange thoughts and viewpoints is a major challenge for First Amendment scholarship and the public forum doctrine.<sup>10</sup>

Platforms are online services that “host and organize user content for public circulation, without having produced or commissioned it.”<sup>11</sup> Because they do not produce content but monitor and control the content generated by their users, platforms are also called intermediaries.<sup>12</sup> It is this combination of intermediaries that connect users among each other and users who themselves become “producers” of the platform’s content that makes this ecosystem special and complex. Traditional media enables public discourse by supplying curated content that fuels discussion among the audience. Sometimes print media will interact with its audience by allowing letters to the editor, but it remains a communicative one-way street. Via social media platforms, anyone can react, comment, share, and discuss—without the boundaries of the offline world.

This article attempts to provide an answer to the problem described by using functional comparison. In doing so, this paper offers a solution statement by analyzing how citizens can exercise their free speech rights in public spaces, in the U.S., and in the German context. The goal is to contribute to the debate on how to adapt the public forum doctrine to the needs of today’s communication

<sup>10</sup> Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace Contents*, 20 BERKELEY TECH. L.J. 1115, 1117–18 (2005).

<sup>11</sup> Tarleton Gillespie, *Governance of and by Platforms*, SAGE HANDBOOK OF SOCIAL MEDIA 254–1 (Jean Burgess, Thomas Poell & Alice Marweck eds., 2017).

<sup>12</sup> See *id.* at 3.

environment on an individual and societal level.<sup>13</sup> To achieve that, we need to get a more granular sense of what is meant by “public” and to be more specific about our understanding of “public spaces” on social media platforms. Indeed, the word public can have different meanings and different normative effects according to the context.<sup>14</sup> Part II describes the public forum doctrine and its limits in protecting speech in the digital sphere. Part III presents the notion of public in German constitutional scholarship and the takeaways of the comparative approach. Part IV is dedicated to the challenge of protecting speech online, while Part V offers a solution statement.

### *B. What is “Public”?*

To avoid confusion, a brief introduction to the variations of the word “public” used in this article is necessary. When speaking of the public forum doctrine in U.S. constitutional law, this article will refer to it as “public forum.” The public forum doctrine does not include all places considered publicly accessible; instead, it has a restrictive conception of what is a public forum. Places that are accessible to or shared by all members of the community will be referred to as “public spaces.” “The Public” refers to the concept used by the German Federal Constitutional Court (hereinafter FCC) to describe places devoted to the general welfare (“Öffentlichkeit”). It is difficult to distinguish the different meanings of the word public in a clearer way because the terminology used in this area is so similar, and this similarity of the terms used is part of the problem described above. This article will, therefore, provide an overview of the U.S. public forum doctrine and its limits with regard to digital communication and conduct a functional comparison with German constitutional law. The result of the comparison will demonstrate that, in light of the heavy use of social media platforms, a doctrinal update of the public forum doctrine is necessary. Part of a more contemporary interpretation and suitable conceptualization of the public forum could be a new category, which this article calls the social public forum and which could be integrated into the current doctrinal model between the designated public forum and the nonpublic public forum.

The term “public forum,” used for privileged speech protection under the First Amendment, is very similar to the German term “public” (“Öffentlichkeit”) as a space dedicated to the exchange of

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<sup>13</sup> Rikke Frank Jørgensen, *When Private Actors Govern Human Rights*, RESEARCH HANDBOOK ON HUMAN RIGHTS AND DIGITAL TECHNOLOGY 346, 363 (Ben Wagner, Matthias C. Kettemann, & Kilian Vieth eds., 2019).

<sup>14</sup> *Public*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/public> [https://perma.cc/WE6F-2YTE].

information and opinions. However, their respective jurisprudence shows that not only the interpretation of freedom of speech differs between western democratic states<sup>15</sup> but also that of the forum.<sup>16</sup> A comparative approach can be helpful when identifying a doctrinal cul-de-sac such as the challenge of applying the public forum doctrine in cyberspace. The FCC defined the notion of “Public” as follows: “[i]t is characterized by the fact that a multitude of different activities and concerns can be pursued in it, creating a versatile and open network of communication.”<sup>17</sup> In its ensuing decision, the FCC made it clear that privately-owned but publicly-accessible spaces cannot evade a human rights protection of speech and social actions.<sup>18</sup> The FCC partly based its definition on *ISKCON v. Lee*.<sup>19</sup> And yet, the Supreme Court ruled that a publicly accessible yet privately-owned terminal is not such a public forum.

The Supreme Court has recognized the societal importance of the Internet in *Reno v. ACLU*<sup>20</sup> and of social media platforms in *Packingham v. North Carolina*,<sup>21</sup> but only insofar as the State was not allowed to restrict access to such services. Calling social networks “essential venues for public gatherings”<sup>22</sup> does not provide sufficient guidance on how to handle the power private actors have over these “venues.” Recent cases such as *Prager University v. Google*,<sup>23</sup> *Knight Institute v. Trump*,<sup>24</sup> and *Davison v. Randall*<sup>25</sup> have shown that we need a more granular understanding of social media platforms in relation to the communicative space they create. It is so far unclear to what extent newsfeeds, profiles, and groups can be treated the same way under the doctrine, although their functionalities and settings differ.<sup>26</sup>

## II. THE PUBLIC FORUM DOCTRINE AND ITS LIMITS

<sup>15</sup> Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225 (1999).

<sup>16</sup> ROBERT POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 199 (1995).

<sup>17</sup> BVerfGE, 128, 226, 253.

<sup>18</sup> BVerfG, July 18, 2015 - 1 BvQ 25/15.

<sup>19</sup> *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992).

<sup>20</sup> *Reno v. ACLU*, 521 U.S. 844 (1997).

<sup>21</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).

<sup>22</sup> *Id.* at 1735.

<sup>23</sup> *Prager Univ. v. Google LLC.*, No. 19-CV-340667, 2019 Cal. Super. LEXIS 2034 (Super. Ct. Cal. Nov. 19, 2019).

<sup>24</sup> *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019).

<sup>25</sup> *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019).

<sup>26</sup> Moran Yemini, *Missing in “State Action”: Toward a Pluralist Conception of the First Amendment*, 23 LEWIS & CLARK L. REV. 1149 (2019).

### A. *The Public Forum Doctrine*

This brief overview of the public forum doctrine within First Amendment theory provides a basis for the discussion around the problem of speech on social media platforms. It can by no means reflect the many layers and nuances of a doctrine that was developed through extensive jurisprudence and scholarship. However, a basic understanding of its main features and its limits is a prerequisite for this article's argument. Through its negative formulation, "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble,"<sup>27</sup> the Free Speech Clause of the First Amendment to the Bill of Rights has a broad scope of protection for the rights enshrined, namely the freedoms of speech and assembly. Regulatory interventions by the state are supposed to be kept as minimal as possible in order to preserve the marketplace of ideas, a place of deliberation and public discourse in which the most valid ideas will prevail. This protection from governmental intervention also touches on the physical location of the speaker—the public forum doctrine was developed to define where citizens could exercise their right to use public spaces for communication.<sup>28</sup> If the expressive activity occurs on a government-owned property, the level of First Amendment protection depends on the type of space.<sup>29</sup> Not all public spaces are *per se* public forums with the highest protection of free speech. Instead, according to the doctrine of the Supreme Court, only traditional and designated public forums will be protected from regulation by means of scrutiny.

#### 1. *Traditional and Designated Public Forum*

The public forum doctrine was developed by the Court to guarantee First Amendment rights in spaces that "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."<sup>30</sup> These spaces ought to be protected from regulatory intervention in communicative activities in the strongest way. In *Perry Education Ass'n v. Perry Educators' Ass'n*,<sup>31</sup> the Court developed three types of public forums, limiting the use of the public property for expressive purpose when

<sup>27</sup> U.S. CONST. amend. I (hereinafter First Amendment).

<sup>28</sup> *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

<sup>29</sup> ALLAN IDES, CHRISTOPHER N. MAY & SIMONA GROSSI, CONSTITUTIONAL LAW: INDIVIDUAL RIGHTS 424 (Seventh ed. 2016).

<sup>30</sup> *Hague*, 307 U.S. at 515.

<sup>31</sup> *Perry Educ. Ass'n v. Perry Educators' Ass'n*, 460 U.S. 37 (1983).

not a traditional or designated public forum.<sup>32</sup> A traditional public forum is a public facility that has, by long tradition, been dedicated to “the free exchange of ideas.”<sup>33</sup> This category includes public parks, sidewalks, and areas that have been traditionally open to political speech and debate.<sup>34</sup> The state is only allowed to enforce a content-based exclusion if its regulation is necessary to serve a compelling state interest and it is narrowly drawn to achieve that end.<sup>35</sup> It may also enforce content-neutral regulation with regard to time, space, and manner of the place’s use,<sup>36</sup> such as opening hours or other reasonable restrictions on the use of public property.<sup>37</sup>

The same applies to the second doctrinal category: the so-called designated public forum. It “consists of public property which the state has opened for use by the public as a place for expressive activity.”<sup>38</sup> Designated public forums enjoy the same level of protection as traditional ones, but they will only be a public forum according to the doctrine if the state chooses to open the property for expressive activity for part or all of the public.<sup>39</sup> Furthermore, the state is not obliged to keep the designated forum open as such.<sup>40</sup> Examples of a designated public forum are a seminar room in a public university or a municipal theatre.

The third category—limited public forum—can be described as a subcategory of designated public forums, since it is designated for expressive activities by “certain groups” or for “discussion of certain subjects.”<sup>41</sup> Here, the government may reserve the forum for certain groups or the discussion of certain topics, but the restriction must not discriminate against speech based on viewpoint and must be reasonable in light of the forum’s purpose.<sup>42</sup> It is not strictly content-neutral but should not restrict speakers on the basis of their opinion.

<sup>32</sup> *ACLU v. Mote*, 423 F.3d 438, 443 (4th Cir. 2005).

<sup>33</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800–02 (1985).

<sup>34</sup> See *id.*

<sup>35</sup> *Carey v. Brown*, 447 U.S. 455, 461 (1980).

<sup>36</sup> *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 132 (1981).

<sup>37</sup> DANIEL A. FARBER ET AL., *CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION’S THIRD CENTURY 805* (Daniel A. Farber et al. eds., 5th ed. 2013).

<sup>38</sup> *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

<sup>39</sup> Lyrissa Barnett Lidsky, *Government Sponsored Social Media and Public Forum Doctrine Under the First Amendment: Perils and Pitfalls*, 19 UF PUB. L. 2, 4.

<sup>40</sup> *Perry Educ. Ass’n v. Perry Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

<sup>41</sup> *Id.*

<sup>42</sup> *Good News Club v. Milford Central School*, 533 U.S. 98, 99 (2001).

## 2. *Spaces on the Edge or Outside*

Spaces that are neither a traditional nor a designated public forum, but government-owned, can be a nonpublic forum. According to the Court, in a nonpublic forum the government may restrict the content of speech, as long as the restriction is reasonable and the restriction does not discriminate based on speakers' viewpoints.<sup>43</sup> A nonpublic forum is "one that has not traditionally been open to the public, where opening it to expressive conduct would 'somehow interfere with the objective use and purpose to which the property has been dedicated.'" Hence, any regulation that goes beyond time, space, or manner will be subject to a lower scrutiny than in the other types of forum mentioned above. In *Good News Club v. Milford*, the Court held that "it may be justified in reserving its forum for certain groups or the discussion of certain topics. The power to restrict speech, however, is not without limits. The restriction must not discriminate against speech based on viewpoint and must be reasonable in light of the forum's purpose."<sup>44</sup>

Finally, some public property is not a public forum at all and thus is not subject to this forum analysis. For example, public television broadcasters are not subject to the forum analysis when they decide what shows to air. In sum, for a space to be "a public meeting place for open discussion," it needs to meet various requirements. Additionally, it must be a government-owned property space traditionally dedicated to the free exchange of ideas or dedicated to this purpose by the government.<sup>45</sup> Ultimately, it is a governmental decision as to whether a place shall be such a public forum and accordingly to decide whether the government will be allowed to regulate speech or not.<sup>47</sup> Apart from the ancient agora or forum, hardly any space in the public sphere only serves the purpose of dialogue. Government property generally serves other public purposes like education, trade, and security, which can always be preferred when it comes to the purpose the special entity is primarily dedicated to. This was proven true by decisions of the Court on facilities like jails or military bases.<sup>48</sup>

<sup>43</sup> *Perry Educ. Ass'n*, 460 U.S. at 49; see generally *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876 (2018).

<sup>44</sup> *Warren v. Fairfax Cty.*, 196 F.3d 186, 190-91 (4th Cir. 1999).

<sup>45</sup> *Good News Club v. Milford Central School*, 533 U.S. 98, 99 (2001).

<sup>46</sup> *Forum*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/forum> [<https://perma.cc/B752-6Y3C>].

<sup>47</sup> See Lidsky, *supra* note 7, at 2012.

<sup>48</sup> *Adderley v. Florida*, 385 U.S. 39, 41 (1966); *Greer v. Spock*, 424 U.S. 828, 838 (1976).

Because of this, the public forum doctrine has a restrictive effect on free speech.<sup>49</sup> This is partly due to the inconsistent approach the Court has taken and it is leading to one result—narrowing down the scope of what is considered a public forum. Although the primary function of the public forum doctrine is to guarantee spaces where one may enjoy their freedom of speech, it is factually restricting speakers in their choice of place. As demonstrated so far, traditional and designated forums are by no means the dominant category of public forums nowadays (in terms of share), especially when we think of the increasing privatization of property (which will be examined below). If the status of a traditional or designated public forum is accorded only a limited number of spaces, the doctrine has—to a certain extent—and will increasingly have a restrictive effect on freedom of speech.

### *B. Not So Public?*

Private property is not considered a public forum and private parties are not subject to the First Amendment's protections for free speech, leaving it to the owner's discretion to what extent a property can be used for expressive purposes. The relationship (contractual or not<sup>50</sup>) between the owner and the user of the property is exempt from First Amendment scrutiny unless the private owner is considered a state actor—a status which can be attributed to the owner by a court according to the state action doctrine. The state action doctrine has a long tradition in Court jurisprudence and constitutional scholarship. In this article, the state action doctrine can and shall only be summarized briefly accordingly to the scope of the problem—its intertwinement with the public forum doctrine. Indeed, the overlap of both is crucial for the understanding of the argument above. The public forum doctrine can have an even more restrictive effect on free speech if its application on private parties is minor although the public sphere becomes increasingly private. Scholars have been warning about this trend since the 1990s,<sup>51</sup> and although the fear expressed back then did not fully become reality, the discussion is ongoing on a global scale.<sup>52</sup>

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<sup>49</sup> Hereinafter, the word speech is used to refer to protected and non-commercial speech. It might, in certain cases, be non-verbal when speakers use pictures or videos to express their opinions, but this paper will essentially look at non-symbolic speech.

<sup>50</sup> Whether governed by an agreement in a formal sense or any other form of consensus.

<sup>51</sup> MICHAEL SORKIN, *VARIATIONS ON A THEME PARK: THE NEW AMERICAN CITY AND THE END OF PUBLIC SPACE* (1992).

<sup>52</sup> Judit Bodnar, *Reclaiming Public Space*, 52 *URBAN STUD.* 2090 (2015).

*1. Can There Be a Public Forum Owned by a Private Party?*

Under the state action doctrine, private parties are exempt from applying third-party fundamental rights enshrined in the Bill of Rights.<sup>53</sup> The rationale behind the state action doctrine is to preserve private autonomy, leaving the relationship between private parties immune to the application of the Constitution.<sup>54</sup> Private parties may only be subject to the same obligations as the government if they fall under the public function or the entanglement exception. In its landmark case of *Marsh v. Alabama*, the Court declared that a company-town was a state actor under the public function exception, which resulted in the protection of speech on the company-town's streets as in any other city, with the following reasoning: "[m]any people in the United States live in company-owned towns . . . [t]here is no more reason for depriving these people of the liberties guaranteed by the First and Fourteenth Amendments than there is for curtailing these freedoms with respect to any other citizen."<sup>55</sup> In *Jackson v. Edison Co.*, the Court restricted the public function exception to activities that had been *traditionally* carried out *exclusively* by the state.<sup>56</sup> Later, it defined the "entanglement constellation" as a sufficiently close nexus between the State and the challenged action of the (private) entity so that the action of the latter may be fairly treated as that of the State itself.<sup>57</sup>

In these two cases, the private actor can be treated as a state actor and, in the context of the First Amendment, can be subject to the scrutiny of traditional or designated public forums. The courts need to perform a detailed inquiry to determine if a private actor meets the test.<sup>58</sup> However, the Court's broad interpretation of a state actor in *Marsh v. Alabama* was unique in its kind, and one should refrain from applying the company-town analogy to other private properties used for expressive activities.<sup>59</sup> In no other case has the Court expanded governmental principles to that extent to a private actor—a development for which it has been largely criticized, not least because its jurisprudence in that question is considered inconsistent.<sup>60</sup>

<sup>53</sup> Civil Rights Cases, 109 U.S. 3 (1883).

<sup>54</sup> ERWIN CHEREMINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 524 (4th ed. 2011).

<sup>55</sup> *Marsh v. Alabama*, 326 U.S. 501 (1946).

<sup>56</sup> *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974).

<sup>57</sup> GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 1536 (8th ed. 2018); CHEREMINSKY, *supra* note 54, at 529.

<sup>58</sup> STONE ET AL., *supra* note 57, at 1536; CHEREMINSKY, *supra* note 54, at 529.

<sup>59</sup> STONE ET AL., *supra* note 57, at 1574.

<sup>60</sup> Charles L. Black Jr., *Foreword: "State Action," Equal Protection and California's Proposition 13*, 81 HARV. L. REV. 69, 95 (1967); Mark Tushnet, *The Issue of State*

Indeed, the Court has been reluctant to widen the scope of application to private spaces both in the analog and the digital world.<sup>61</sup> This goes in the opposite direction of an increasing privatization over the past decades: from the company-town (*Marsh v. Alabama*), to restricted public spaces within private property in big cities (e.g., New York City zoning resolutions<sup>62</sup>) to private shopping malls (*Lloyd v. Tanner*), public life is no longer happening in solely traditional public spaces like streets, sidewalks, and parks.<sup>63</sup> The consequences of this development on freedom of speech are substantial, and this article shall look at them more closely after clarifying how to classify a space that is not considered a traditional or designated public forum.

## 2. Spaces Designed for Shopping, Not Speaking

The First Amendment does not apply to privately-owned spaces unless the space meets either the public function or entanglement test under the state action doctrine.<sup>64</sup> If the privately-owned space meets either of those tests, it must fulfill the same obligations as a state-owned space.<sup>65</sup> Private owners may dispose of their property as they wish (while still respecting the law) and exclude any third-party from trespassing or using the property for expressive use.<sup>66</sup> If a right to enter the property is granted to the general public (because of commercial activity, for example), this permission does not implicitly grant a right to use it beyond the intent of the private owner as a public forum.<sup>67</sup>

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*Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT'L J. CONST. L. 79, 80 (2003).

<sup>61</sup> Space (public or private) is intended to mean the physical space, distinguished from the term “sphere” which is sometimes used interchangeably but in fact refers to a social concept. The agora as the public sphere can and traditionally does take place in a public space but does not need to.

<sup>62</sup> Stephen Tower, Not In My Front Yard: Freedom of Speech and State Action In New York City’s Privately Owned Public Spaces, 22 J. L. & Pol’y 476, 480 (2014); Jerold S. Kayden, Privately Owned Public Space: The New York City Experience (2000).

<sup>63</sup> John Fee, The Formal State Action Doctrine and Free Speech Analysis, 83 N.C.L. Rev. 569, 609 (2004).

<sup>64</sup> Id. at 583–85 (referring to the tests as “government function” and “nexus,” respectively). See *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995) (finding Amtrak served a government function because it furthered government objectives, for which it was statutorily created, and was subject to government control); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 399 (2001) (finding entanglement when State Board members sat on the Association’s committees and Association’s ministerial employees were treated as state employees).

<sup>65</sup> Josh Mulligan, Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of Pruneyard Note, 13 Cornell J. L. & Pub. Pol’y 533, 543 (2004).

<sup>66</sup> Private owners are also protected under the Takings Clause of the Fifth Amendment from eminent domain without just compensation. U.S. Const. amend. V.

<sup>67</sup> See Mulligan, *supra* note 65, at 551.

Shopping malls are a good example of a space open to the general public but privately-owned and not subject to First Amendment rights. In *Lloyd Corp. v. Tanner*, the Court ruled that shopping malls were not public forums and that protesters did not enjoy the right to express themselves under the First Amendment therein.<sup>68</sup> They may “very well function as de facto urban centers, they do not take over the function of the city square.”<sup>69</sup> The owner may restrict the use for expressive purposes in the same way she can exercise any other property rights.<sup>70</sup> Opening a private property to the general public does not come with the obligation to guarantee freedom of speech (except in cases of state action), marking a clear separation between private and public space in relation to the freedom of speech.<sup>71</sup>

However, this strict separation of public and private spaces can have negative effects according to the First Amendment rationale—to enable as much speech as possible.<sup>72</sup> Enabling as much speech as possible might not be necessarily commendable for the purposes of freedom of speech, but it has been the steady interpretation of the First Amendment’s Free Speech Clause.<sup>73</sup> Not only should content-based governmental intervention be restricted to the minimum, but the chilling effect of other non-governmental measures should be a concern as well.<sup>74</sup>

### *C. From Shopping Malls to Cyberspace*

The question of how to balance the protection of private property and free speech has become even more urgent since digitization. In *Denver Area v. Federal Communications Commission*, Justice Kennedy stressed the importance of adapting the existing doctrine to the challenges of new facts: “[w]hen confronted with a threat to free speech in the context of an emerging technology, we ought to have the discipline to analyze the case by reference to existing elaborations of constant First Amendment principles.”<sup>75</sup> If television

<sup>68</sup> *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1971).

<sup>69</sup> Bodnar, *supra* note 52, at 2097.

<sup>70</sup> Mulligan, *supra* note 65, at 551.

<sup>71</sup> *Tanner*, 407 U.S. at 569–70.

<sup>72</sup> Cass R. Sunstein, *Free Speech Now Symposium: The Bill of Rights*, 59 U. CHI. L. REV. 255, 277 (1992); Fee, *supra* note 63, at 609.

<sup>73</sup> Sunstein, *supra* note 72.

<sup>74</sup> Gregory P. Magarian, *The First Amendment, the Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 124 (2004).

<sup>75</sup> *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727 (1996).

stations are deemed non-state actors, they can limit free speech.<sup>76</sup> This was recently confirmed in *Manhattan Community Access Corp. v. Halleck*.<sup>77</sup> The Court held that private entities running public access channels were not state actors, and therefore not subject to the constraints imposed on state action by the First Amendment.<sup>78</sup> This decision was expected to deliver guidance on how to deal with social media platforms.<sup>79</sup> Although the Court strictly stuck to the television channel's case, one could interpret the ruling as a step away from possibly subsuming social media platforms under the state action doctrine. This would subsequently mean that they could not be considered public forums under the current doctrine.

While the Internet enables communication at a larger scale, it has, at the same time, fostered new, private gatekeepers with unseen powers over public communication.<sup>80</sup> Social media platforms and other intermediaries are on the one hand aiming at providing a service of communication and information ("bringing the world closer together"<sup>81</sup>), but they also impose the strict rules under which this communication process is allowed. They represent the main speech infrastructure online and may restrict the platform's use in accordance with the rights of a private owner to do so.<sup>82</sup> What cannot be forbidden in a public forum because of the broad protection under the Free Speech Clause can be banned because of the private nature of the relationship between users and platforms.<sup>83</sup> This matter has been raised by scholars before, although it has, until recently, rather been perceived as a positive effect for free speech, namely the ultimate remedy from government interference.<sup>84</sup> The dilemma of the First Amendment can be summarized as follows: in cyberspace, communication platforms are not public forums since cyberspace is in

<sup>76</sup> *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1926 (2019).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1934.

<sup>79</sup> Colin Lecher, *First Amendment Constraints Don't Apply to Private Platforms, Supreme Court Affirms*, THE VERGE (June 17, 2019), <https://www.theverge.com/2019/6/17/18682099/supreme-court-ruling-first-amendment-social-media-public-forum> [https://perma.cc/T29C-3BAY].

<sup>80</sup> Philip M. Napoli, *Social Media and the Public Interest: Governance of News Platforms in the Realm of Individual and Algorithmic Gatekeepers*, 39 TELECOMM. POL'Y 751, 757 (2015).

<sup>81</sup> See Facebook's mission statement, <https://www.facebook.com/pg/facebook/about> [https://perma.cc/T8VU-XXA5].

<sup>82</sup> Luca Belli & Jamila Venturini, *Private Ordering and the Rise of Terms of Service as Cyber-Regulation*, IPR (Dec. 29, 2016), <https://policyreview.info/articles/analysis/private-ordering-and-rise-terms-service-cyber-regulation> [https://perma.cc/CG63-7A4M].

<sup>83</sup> *Id.*

<sup>84</sup> Richard A. Epstein, *Cybertrespass*, 70 U. CHI. L. REV. 73, 88 (2003).

its structure mostly privately owned, leaving it to each platform's discretion to what extent it will provide a space for free speech.<sup>85</sup>

This does not mean that the Court does not recognize the importance of the Internet in today's communication structure. In fact, in *Reno v. ACLU* and *Packingham v. North Carolina*, the Court asserted the great importance of online services and having access to them. In the first case, the Court stated that First Amendment rights were applicable in the context of communications undertaken via the Internet and called cyberspace the "vast democratic forums of the Internet."<sup>86</sup> *Packingham v. North Carolina* confirmed the importance of cyberspace for the First Amendment and for social media in particular.<sup>87</sup> However, the Court has been reluctant to apply the state action doctrine to private parties in general,<sup>88</sup> which makes it unlikely that the providers of online communication infrastructure will be considered state actors.<sup>89</sup> The prevailing opinion is that—according to the principles and the wording of the First Amendment—only the government needs to be watched when it comes to the speech-related interventions, not social media platforms.<sup>90</sup> As non-state actors, the latter are free to define the terms of use of their service (including communicating by means of sharing, tweeting, and messaging), just like any private party offering services to the general public.<sup>91</sup>

A competing school of thought pushes a more affirmative and speech-protective role of the government, declaring that the government ought to set the conditions of the digital marketplace of ideas in order for it to serve democratic values.<sup>92</sup> This would underline

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<sup>85</sup> Nunziato, *supra* note 10, at 1125; Jacquelyn Fradette, *Online Terms of Service: A Shield for First Amendment Scrutiny of Government Action*, 89 NOTRE DAME L. REV. 947, 957 (2014).

<sup>86</sup> *Reno v. ACLU*, 521 U.S. 844, 868-70 (1997); IDES ET AL., *supra* note 29, at 398.

<sup>87</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

<sup>88</sup> STONE ET AL., *supra* note 57, at 1578; IDES ET AL., *supra* note 29, at 18.

<sup>89</sup> Nunziato, *supra* note 10, at 1130; MORAN YEMINI, *FREE SPEECH FOR ALL: A JUSTICE-INFUSED THEORY OF SPEECH FOR THE DIGITAL ECOSYSTEM* (2017); Langvardt, *supra* note 9, at 1366; Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMENDMENT INSTITUTE: EMERGING THREATS SERIES (2017), <https://s3.amazonaws.com/kfai-documents/documents/5d8a0f848d/Is-the-First-Amendment-Obsolete-.pdf> [<https://perma.cc/3EE9-U4GZ>].

<sup>90</sup> Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to Private Regulation Symposium - Part IV: How (If at All) to Regulate the Internet*, 71 U. COLO. L. REV. 1263, 1266 (2000).

<sup>91</sup> *Id.*

<sup>92</sup> See Cass R. Sunstein, *State Action Is Always Present*, 3 CHI. J. INT'L L. 465, 469 (2002); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 964 (2nd ed. 1988); Nunziato, *supra* note 10, at 1143-44; Noah D. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. JL & TECH. 149

the democracy-based theories of free speech,<sup>93</sup> making cyberspace eventually indispensable for our democratic culture and system.<sup>94</sup> This position does not, by any means, represent the prevailing opinion among First Amendment scholars, partly because this school relies more on free speech values than on First Amendment rights. Generally speaking, values and rights do not conflict with each other, as the values conveyed by the First Amendment are obviously overlapping with the rights enshrined. They are, however, technically not the same because the interpretation of the First Amendment is broader than its wording. The jurisprudence and the scholarship around free speech have contributed to the development of our First Amendment understanding—such as the public forum doctrine—and are as much part of this fundamental right as the wording.

It is also important to note that there is no absolute consensus on the issue of a more affirmative interpretation of the First Amendment protection. As stated by Dawn Nunziato: “[t]o remedy this problem, we need to introduce spaces in which individuals’ free speech is constitutionally protected instead of leaving the protection of free speech at the mercy of private speech regulators.”<sup>95</sup> One way could be to reevaluate the “traditionality” component of the traditional public forum doctrine as Nunziato suggests. Nunziato argues for a reinterpretation by the courts; courts could intervene on the state level and interpret their respective constitutions’ free speech clause.<sup>96</sup> This would detach the subsuming of a public forum as traditional from the restrictive jurisprudence. Courts could also try to reinterpret standards of the traditional public forum such as the “principal and historical purpose” and the “unfettered access,” but as long as the standards stay as such, there will be no contemporary (and yet) traditional public forum.<sup>97</sup>

The preceding section shows that the public forum doctrine is supposed to guarantee each citizen a space to express thoughts, ideas, and criticism, which cannot be restricted by the government beyond neutral time, space, and manner rules. Due to the broad scope of protection of the Free Speech Clause, this shall only apply to public property under certain conditions and not to private property where owners have the right to govern the use of their property for expressive

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(1998); Ari Ezra Waldman, *Durkheim’s Internet: Social and Political Theory in Online Society*, 7 N.Y.U. J. L. & LIBERTY 345, 420 (2013).

<sup>93</sup> MEIKLEJOHN, *supra* note 8.

<sup>94</sup> Balkin, *supra* note 8, at 32.

<sup>95</sup> Nunziato, *supra* note 10, at 1161.

<sup>96</sup> *Id.* at 1166–67; *see also* *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

<sup>97</sup> IDES ET AL., *supra* note 29, at 426.

conduct.<sup>98</sup> This, in turn, has substantial effects on communication in the digital sphere, which underlines this article's argument that the public forum doctrine has a restrictive effect as far as traditional public forums diminish de facto. What is the way to go, if the categories above will not allow adequate protection of speech in the context of social media platforms and if the components and standards of traditional doctrine do not leave room for a contemporary application?<sup>99</sup> Cass Sunstein called for a "reevaluation in the light of free speech principles" which shall be the guiding principle for the comparative analysis below.<sup>100</sup>

### III. THE PUBLIC FORUM IN GERMAN CONSTITUTIONAL LAW

Germany and the U.S. are often used as cases in comparative constitutional law since their respective principles of protecting freedom of speech are quite divergent.<sup>101</sup> The First Amendment offers broad protection from the coercive power of the state as described above, while the German concept of freedom of speech is more affirmative and a less general proviso. The main difference between the two is that the limits of free speech in Germany are stipulated in Article 5 (2) Basic Law.<sup>102</sup> According to this law, the government is allowed to restrict speech in a content-based manner under specific circumstances.<sup>103</sup> The First Amendment, on the other hand, precisely forbids this type of law because it would potentially restrict an individual's freedom of expression.<sup>104</sup> Thus, concepts cannot be transferred from one legal system to another without certain adaptations. They can nevertheless contribute mutually helpful elements when dealing with the same issue, such as defining proportionate rules for new types of communication. The scholarship in this area is large and touches on the interpretations of both constitutional courts on the limits of free speech. Free speech, of course, has to do with the foundations of each constitution and the respective cultures of both countries.<sup>105</sup> The Free Speech Clauses of the

<sup>98</sup> *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972).

<sup>99</sup> See Michael L. Taviss, *Dueling Forums: The Public Forum Doctrine's Failure to Protect the Electronic Forum* Editorial Comment, 60 U. CIN. L. REV. 757, 778 (1991).

<sup>100</sup> Sunstein, *supra* note 72.

<sup>101</sup> Tushnet, *supra* note 15, at 1279; Winfried Brugger, *Ban On or Protection Of Hate Speech-Some Observations Based on German and American Law*, 17 TUL. EUR. & CIV. LF 1 (2002).

<sup>102</sup> The German Basic Law is equivalent to a constitution and treated as such.

<sup>103</sup> See Art. 5 (2) Basic Law.

<sup>104</sup> See *supra* note 27, the First Amendment.

<sup>105</sup> Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations* Essay, 3 CHI. J. INT'L L. 435 (2002); Claudia E. Haupt,

First Amendment and of Article 5(1) Basic Law can therefore not be compared without further analysis.

Under Article 5(1) Basic Law “[e]very person shall have the right freely to express and disseminate his opinions in speech, writing, and pictures, and to inform himself without hindrance from generally accessible sources. . . . There shall be no censorship.”<sup>106</sup> This includes the right to choose where and how to express his opinions.<sup>107</sup> The limits to these rights are set in Article 5(2) Basic Law: “[t]hese rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons, and in the right to personal honor.”<sup>108</sup> Such general laws include property law, which is relevant to the question of the public forum analyzed here. There is no direct equivalent in German constitutional law to the U.S. public forum doctrine, which confirms the functional method to look for an equivalent concept fulfilling a similar task.<sup>109</sup> Based on the functional principle, namely: “[t]he incomparable cannot be meaningfully compared, and comparable in law is only what fulfills the same task, the same function.”<sup>110</sup> The objective here is to find an equivalent to the U.S. public forum in the jurisprudence of the FCC<sup>111</sup> and, by pointing out similarities and differences between both, to find an approach to the problem of the public doctrine in cyberspace.

#### A. The “Public”

There is no direct equivalent of the public forum doctrine in German constitutional law. Instead, a space in which the speaker can

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*Regulating Hate Speech - Damned if You Do and Damned if You Don't: Lessons Learned from Comparing the German and US Approaches*, 23 BU INT'L LJ 299, 300 (2005).

<sup>106</sup> Grundgesetz für die Bundesrepublik Deutschland [GG] [Constitution] Jul. 11, 2012, art. 5, § 1 (Ger.). Official translation by: Professor Christian Tomuschat and Professor David P. Currie.

<sup>107</sup> Franz Schemmer, *GG Art. 5 [Recht der freien Meinungsäußerung]*, BECKOK GRUNDGESETZ 9 (Volker Epping & Christian Hillgruber eds., 37 ed. 2018).

<sup>108</sup> GG Jul. 11, 2012, art. 5 § 2.

<sup>109</sup> Tushnet, *supra* note 15, at 1238; Francesca Bignami, *Formal Versus Functional Method in Comparative Constitutional Law*, 53 OSGOODE HALL L.J. 442, 464 (2016); Ralf Michaels, *The Functional Method of Comparative Law*, THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 368, 381 (Mathias Reimann & Reinhard Zimmermann eds., 2006); UWE KISCHEL, RECHTSVERGLEICHUNG 93 (2015); Mark Van Hoecke, *Methodology of Comparative Research*, LAW AND METHOD 9 (2015).

<sup>110</sup> KONRAD ZWEIGERT & HEIN KÖTZ, EINFÜHRUNG IN DIE RECHTSVERGLEICHUNG: AUF DEM GEBIETE DES PRIVATRECHTS 33 (3., neubearb. Aufl. ed. 1996).

<sup>111</sup> The Federal Constitutional Court, in German: Bundesverfassungsgericht, is the highest court in Germany, but strictly limited to constitutional matters and not an appellate court in other matters.

choose to speak free from governmental intervention is “the Public,”<sup>112</sup> which in general refers to an area of people seen as a whole, in which something has become generally known and accessible to all.<sup>113</sup> Legally speaking, “public” means a place where individuals need to respect the law but are, at the same time, protected by fundamental rights from unjustified law enforcement or any restrictive action by the state that is not covered by constitutional proviso.<sup>114</sup>

The Public, as defined by the FCC, fulfills the function of a public forum but is not limited to the rights enshrined in Article 5(1) Basic Law, such as freedom of speech or the freedom to assemble.<sup>115</sup> The Public (as a translation of the concept of “Öffentlichkeit”) is closely related to the concept of the public sphere in social science, which is the space in which the formation of public opinion takes place.<sup>116</sup> According to Habermas, the public sphere is “a network for communicating information and points of view.”<sup>117</sup> Although Habermas himself warned against equating the Public and the public sphere,<sup>118</sup> the notion of Public cannot be perceived without the element of people gathering to exchange ideas and thoughts, and therefore participating in the public discourse. The Public can also be summarized as a free room between the state and society, a space for freedom.<sup>119</sup> This article will take a closer look at the Public as a space for communication below.

Even though the public is a space in which citizens will mostly enjoy their “societal” freedom (the freedoms of speech, assembly, and voting) it is not strictly limited to the latter in German constitutional law. Instead, the public allows all rights the citizen owns to be protected from the power of the state. The freedoms of movement, of informational self-determination, of religious belief, of the protection of the family, of property, and of profession are granted as well. Hence, the Public can, as well, be defined by delimiting it from private

<sup>112</sup> The Public as translated from “die Öffentlichkeit.”

<sup>113</sup> Translated from Die Öffentlichkeit als Gesamtheit gesehener Bereich von Menschen, in dem etwas allgemein bekannt [geworden] und allen zugänglich ist., <https://www.duden.de/rechtschreibung/Oeffentlichkeit> [https://perma.cc/KG53-GG2F].

<sup>114</sup> See, e.g., Art. 5 (2) Basic Law.

<sup>115</sup> See *supra* notes 17–18.

<sup>116</sup> Jürgen Habermas, Sara Lennox & Frank Lennox, *The Public Sphere: An Encyclopedia Article (1964)*, NEW GERMAN CRITIQUE 49 (1974); Zizi Papacharissi, *The Virtual Sphere: The Internet as a Public Sphere*, 4 NEW MEDIA & SOCIETY 9, 10 (2002).

<sup>117</sup> JÜRGEN HABERMAS & WILLIAM REHG, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 360 (1996).

<sup>118</sup> *Id.* at 49.

<sup>119</sup> Eder, *supra* note 6, at 85.

spaces which will, on the contrary, be governed by the owner's rights. Its relationship with third parties will be based on some type of consensus: contractual or quasi-contractual nature (*culpa in contrahendo*, if preliminary to a contract).

### B. The "Public" as a Space for Deliberation

Without using the Public as a synonym for the public sphere, the notion is still closely connected to the use of public spaces in order to participate in societal activities, such as the formation of public opinion.<sup>120</sup> To serve this purpose the Public is protected—amongst other laws—by Article 5(1) Basic Law. The close relationship between the scope of protection of free speech and the concept of Public is best explained by a concrete example. The *Fraport* decision demonstrates the close link between the legal and the social concepts of the public in the FCC's jurisprudence.<sup>121</sup> The FCC's holdings are particularly clear in this decision, showing that the FCC leans on the societal function of public spaces to define them as public.<sup>122</sup> In the *Fraport* decision, the FCC sets its standards for public communication, a truly remarkable decision, striking in its clarity regarding the risks inherent to privatization and its outlook with regard to digitization.

#### 1. The FCC's *Fraport* Ruling

The defendant in *Fraport* was a company operating the airport of Frankfurt, the Fraport AG.<sup>123</sup> It had prohibited a demonstration in the airport's terminal.<sup>124</sup> The latter was publicly accessible, as it was open to the general public without any security check and hosted various stores and services, similar to a shopping mall.<sup>125</sup> The complainant was the organizer of a demonstration against deportation at the Frankfurt airport,<sup>126</sup> and her complaint was directed at the judgments of the civil courts affirming a ban, which prevented her

<sup>120</sup> Habermas et al., *supra* note 117, at 50.

<sup>121</sup> Bundersverfassungsgericht [BVerfG] [Federal Constitutional Court] Feb. 22, 2011, 1 BvR 699 (Ger.), [http://www.bverfg.de/e/rs20110222\\_1bvr069906en.html](http://www.bverfg.de/e/rs20110222_1bvr069906en.html) [<https://perma.cc/GMS7-7XRS>].

<sup>122</sup> *Id.* at para. 72.

<sup>123</sup> Frankfurt is the biggest airport in Germany and considered an international hub. The Fraport AG is a stock corporation, majority-owned by the state, which was the first question the FCC had to clarify in this case. *Id.* at para. 2. The FCC, however, stated that whether the company was considered publicly owned or not did not matter for the question of the public as a forum. *Id.* at paras. 51–52.

<sup>124</sup> *Id.* at para. 10.

<sup>125</sup> *Id.* at para. 3.

<sup>126</sup> *Id.* at para 9.

from using the airport for expressing her opinion and for demonstrations without the Fraport AG's permission.<sup>127</sup> The FCC ruled in favor of the complainant, arguing that a space such as an airport terminal represented a public forum and was therefore subject to the freedoms of speech and assembly set out in Article 5(1) and 8(1) Basic Law.<sup>128</sup>

In its decision, the FCC referred to the U.S. Supreme Court, holding that “[t]he question of whether such a place that is located outside public streets and places can be deemed a public space for communication can be answered according to the concept of the public forum.”<sup>129</sup> The FCC cited two decisions by the Supreme Court of Canada and the U.S. Supreme Court as “examples” for “similar criteria.”<sup>130</sup> It did not endorse the U.S. public forum doctrine, but rather mentioned it as one possibility to define the Public as a forum in the broader sense. The FCC used the foreign rulings to underline its traditional case law on the protection of the Public and its use for public opinion.<sup>131</sup> This detour seems almost unnecessary, especially in light of its constant jurisprudence on the horizontal effect of fundamental rights.<sup>132</sup> However, it showed that the FCC is attentive to foreign jurisprudence, especially when it comes to fundamental questions for German society.

The FCC justified its positive answer to the question “of whether such a place . . . can be deemed a public space for communication . . .”<sup>133</sup> by emphasizing the role that private companies assume when taking over “the provision of public communications and thus assume functions which were previously allocated to the state as part of its services of general interest.”<sup>134</sup> By way of analogy to the “public street space,” the FCC concluded that a public space for communication is a place “open to public traffic and where places of general

<sup>127</sup> *Id.* at para. 2.

<sup>128</sup> *Id.* at paras. 98–99, 105–06.

<sup>129</sup> *Id.* at para. 70.

<sup>130</sup> *Id.*; see Supreme Court of Canada: Committee for the Commonwealth of Canada v. Canada, 1 S. C. R. 139 (1991); Supreme Court of the United States: Int'l Soc'y for Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

<sup>131</sup> See Bundersverfassungsgericht [BVerfG] [Federal Constitutional Court] May 14, 1985, 1 BvR 233 (Ger.), <https://germanlawarchive.iuscomp.org/?p=70> [<https://perma.cc/X9N3-GUCR>]; Michael Kniesel, *Die Versammlungs- und Demonstrationsfreiheit - Verfassungsrechtliche Grundlagen und versammlungsgesetzliche Konkretisierung*, NJW 857, 861 (1992).

<sup>132</sup> Jan Philipp Schaefer, *Neues vom Strukturwandel der Öffentlichkeit - Gewährleistungsverwaltung nach dem Fraport-Urteil des Bundesverfassungsgerichts.*, 51 DER STAAT 251, 276 (2012).

<sup>133</sup> 1 BVerfG 699, at para. 70.

<sup>134</sup> *Id.* at para. 59; see also *Versammlungsfreiheit im Flughafen*, 2011 NJW 1201, 1204 (2011).

communication develop.”<sup>135</sup> The public street space is “the natural forum that citizens have used historically to express their concerns especially effectively in public and to thus prompt communication.”<sup>136</sup> It expanded this concept to places outside public streets, stating that “a public forum is characterized by the fact that it can be used to pursue a variety of different activities and concerns leading to the development of a varied and open communications network.”<sup>137</sup> According to the FCC, once space is made available for communicative uses, “political debate in the form of collective expressions of opinion through assemblies” may not be excluded from it.<sup>138</sup> It concluded this type of space was “the basis for the democratic formation of will and a constitutive element of the democratic governmental order.”<sup>139</sup>

The FCC emphasized the structural function of the Public for representative democracies and therefore based its definition on whether or not it was open to public traffic and to communicative activities.<sup>140</sup> It was not decisive whether the government had traditionally opened airport terminals for expressive purposes or designated them as such.<sup>141</sup> On the contrary, it stressed that if a property owner opened her space to the general public, she could not limit the communicative activities of the people entering this space.<sup>142</sup> The defendant argued that the airport terminal was different from the traditional public street space because the shops and services only served the main purpose of the space, which was to be an airport.<sup>143</sup> The FCC clearly pushed back on this argument, which could potentially be a loophole for similar cases.<sup>144</sup> By doing so, it shifted the definition of “the Public” from state-owned to a space defined by *de facto* communicative use.<sup>145</sup>

## 2. A Horizontal Effect in Privately-Owned Spaces

The *Fraport* decision is special because the FCC expressed the need to protect the freedoms of speech and assembly beyond the boundaries of classical public spaces, expanding the protection of Articles 5 and 8 Basic Law to spaces considered “public” due to the

<sup>135</sup> Versammlungsfreiheit im Flughafen, 2011 NJW at 1204.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 1205.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> 1 BVerfG 699, at para. 70.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at para. 36.

<sup>144</sup> *Id.* at paras. 68–70.

<sup>145</sup> *Id.* at para. 70.

way citizens would use them for communicative purposes.<sup>146</sup> This decision is also relevant in light of the horizontal effect on fundamental rights.<sup>147</sup> This principle was established in an early landmark decision of the FCC, in which it stated that fundamental rights may come into effect between private parties if the court of lower instance did not sufficiently observe the fundamental rights of a party when deciding its verdict.<sup>148</sup> Although fundamental rights primarily serve the purpose of defending citizens against the state, they may under certain circumstances come to affect private parties via the verdict of a court.<sup>149</sup> The horizontal effect is highly relevant to the question of public forums: if private property is accessible to the general public and meets the requirements above, it can potentially be subject to similar obligations as the state. In addition to the *Fraport* ruling, the FCC explicitly addressed the issue of privately-owned spaces in two recent decisions and confirmed the above.

In the first case (“*Bierdosenflashmob*”), the FCC decided that a privately owned but publicly accessible square in the city center could be part of the Public as defined above and could therefore be a space for communication and assembly, regardless of the fact that it was privately owned.<sup>150</sup> As a result, the owner had to allow a demonstration even if there was no substantive link between the square and the cause of the demonstration. The complainant did not need to prove she could only achieve her expressive purpose when demonstrating on that specific square. The decision mostly confirmed what the FCC had decided in *Fraport*, while extending it to properties that are exclusively private.<sup>151</sup>

In the second relevant case (“*Stadionverbot*”), the complainant had been excluded permanently from a football stadium because he

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<sup>146</sup> *Id.*

<sup>147</sup> In German scholarship it is referred to as the “indirect application of fundamental rights” as a translation of the German term “mittelbare Drittwirkung der Grundrechte.” In the international context however, most refer to it as the “horizontal effect of fundamental rights.” For the sake of clarity, the latter will be used throughout the rest of the paper.

<sup>148</sup> Bundersverfassungsgericht [BVerfG] [Federal Constitutional Court] Jan. 15, 1958, 7 BvR 198 (Ger.), <https://germanlawarchive.iuscomp.org/?p=51> [<https://perma.cc/NV4D-TNLD>].

<sup>149</sup> *Id.*

<sup>150</sup> Bundersverfassungsgericht [BVerfG] [Federal Constitutional Court] July 18, 2015, 1 BvQ 25 (Ger.).

<sup>151</sup> In *Fraport*, the FCC explained that it was not relevant for its decision that the state owned the majority of shares of the corporation, but it was hypothetical because Fraport was in fact a public company.

was suspected to have been a hooligan in the past.<sup>152</sup> The FCC declared that the defendant, a limited liability corporation running the stadium, was obliged to respect the complainant's fundamental right to nondiscrimination under Article 3(1) Basic Law.<sup>153</sup> It held that there needs to be a substantial reason to exclude someone from an activity relevant to life in society, such as major football games.<sup>154</sup> Such an exclusion would require granting a right to appeal a (private) decision when excluding an individual from the public (sphere).<sup>155</sup> By doing so, the FCC surpassed its broad interpretation of the Public in *Fraport* and *Bierdosenflashmob* and expanded its protection to the opportunity of each individual taking part in societal life.<sup>156</sup>

### 3. Defining the Public in Cyberspace

The jurisprudence of the FCC shows that it considers the Public a space for activities relevant to society, without the requirement of core political speech (assuming that watching football games is not a political activity). The FCC bases its decision on the way citizens use the space to take part in public life and public discourse.<sup>157</sup> There is currently no decision by the FCC regarding the application of these principles in cyberspace. However, it has indicated in *Fraport* and in another decision concerning public broadcasting and the formation of public opinion (*Rundfunkbeitrag II*)<sup>158</sup> that there was no apparent reason to exempt social media platforms from this principle. In general, German scholarship relies on the principle of applying the same rules "offline and online."<sup>159</sup> To what extent the FCC will apply the horizontal effect of freedom of speech and subsequently restrict a platform's right to moderate user-generated content remains to be seen.

There is a high probability that the FCC will fall back on scholarship in social science, just as it previously did with *Habermas*

<sup>152</sup> Bundersverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 11, 2018, 1 BvR 3080, paras. 1–58, [http://www.bverfg.de/e/rs20180411\\_1bvr308009en.html](http://www.bverfg.de/e/rs20180411_1bvr308009en.html) [<https://perma.cc/MXC3-2REW>].

<sup>153</sup> *Id.* at para. 41.

<sup>154</sup> *Id.* at para. 45.

<sup>155</sup> *Id.* at para. 58.

<sup>156</sup> Amélie Heldt, BVerfG, 11.4.2018 - 1 BvR 3080/09 - Ausstrahlungswirkung des allgemeinen Gleichheitssatzes in das Zivilrecht, 2018 NVwZ 813–19 (2018); Christoph Smets, *Die Stadionverbotsentscheidung des BVerfG und die Umwälzung der Grundrechtssicherung auf Private*, NVwZ 34–37, 35 (2019).

<sup>157</sup> *Id.*

<sup>158</sup> Bundersverfassungsgericht [BVerfG] [Federal Constitutional Court] July 18, 2018, 1 BvR 1675 d from [http://www.bverfg.de/e/rs20180718\\_1bvr167516en.html](http://www.bverfg.de/e/rs20180718_1bvr167516en.html) [<https://perma.cc/FE8D-U8FX>].

<sup>159</sup> See 1 BVerfG 699; 1 BVerfG, 1675.

and others. The court has never been reluctant to ground its decisions on the findings of other disciplines when applicable. While legal scholars are still struggling with the issue of content moderation due to the lack of clarity about how to transfer constitutional concepts in cyberspace, the scholarship in other fields is more advanced. In sociology, cyberspace is considered a “new public space for political discussion,”<sup>160</sup> or even a “new public sphere”:

To harness the power of the world’s public opinion through global media and Internet networks is the most effective form of broadening political participation on a global scale, by inducing a fruitful, synergistic connection between the government-based international institutions and the global civil society. This multimodal communication space is what constitutes the new global public sphere.<sup>161</sup>

This perception of the Internet as a whole is very broad but insightful. Social media platforms have been categorized as “personal publics,”<sup>162</sup> since they are accessible to the general public but categorized in an individual manner for each user. This kind of conceptual transfer from the analog to the digital seems quite natural when looking at the proportion of communication taking place in cyberspace and, in particular, on social media platforms. The takeaways for legal scholars are that our doctrinal categories need to be more permeable to societal changes.

### *C. Interim Conclusion of the Comparative Approach*

From the definition of the Public in German constitutional law and its close link to other social sciences, we can draw several conclusions regarding the comparison with the U.S. public forum doctrine. The two concepts overlap in some aspects, but there is an important difference in substance. Formally, fundamental rights are applicable to public spaces as state-owned spaces in both jurisdictions. Both concepts serve the same purpose and can be considered equivalent. As much as the First Amendment rights are protected in traditional and designated public forums, the Public in Germany is a space where citizens enjoy the protection of their fundamental rights (“Grundrechte”) but where the law is applicable nonetheless and might restrict their rights by the constitutional proviso. The designation of a place as part of the Public does not grant more freedom than under the public forum doctrine because the lawmakers in Germany are

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<sup>160</sup> Papacharissi, *supra* note 116, at 22.

<sup>161</sup> Castells, *supra* note 4, at 90.

<sup>162</sup> SCHMIDT, *supra* note 5, at 30.

allowed to restrict freedom of speech. The limits of freedom of speech under Article 5(2) Basic Law might even be more restrictive than the categories of non-protected speech under the First Amendment because they may be content related. However, it does not appear that the Public has a restrictive effect similar to the public forum doctrine. The reason for this conclusion lies in the difference between the two.

The difference is substantive in nature. In Germany, the Public is a space defined by its societal function. For this, the social use of space and social norms shall be taken into account at a great scale to preserve the societal function for public discourse. As demonstrated, the FCC clearly prioritizes the societal function of public spaces, especially as a place where public discourse happens, regardless of it being private or state-owned property. In doing so, the concept of the Public is open to new developments in society. It adapts to where its members actually choose to express their opinions and exchange ideas. Within this open concept, the limits of free speech in the Public are defined by law, whereas under the public forum doctrine there cannot be such content-based restrictions. Nonetheless, the Public is more prompt to fulfill the need of citizens for an ideal agora—a public forum in a non-legal sense because it responds to a reality in society and does not need a governmental intervention as the public forum doctrine does with its requirements of traditionality and designation.

While it might seem experimental and audacious to use a constitutional comparison, this idea is not completely alien to the First Amendment doctrine. As the Court articulated in *Red Lion v. Federal Communications Commission* with regards to the fairness doctrine:

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here.<sup>163</sup>

In order to guarantee access to the marketplace of ideas, one needs to consider adopting a definition of spaces that somehow integrates the infrastructure of our deliberative spaces. While public space in the analog world is by default the sphere we naturally operate in, this no longer applies to the Internet and the dominating social media platforms.

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<sup>163</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 389-90 (1969).

#### IV. WHAT IS SO DIFFERENT ABOUT SPEECH ON SOCIAL MEDIA PLATFORMS?

Having clarified the main difference between the public forum doctrine and its functional equivalent in German scholarship—the Public—it is necessary to elaborate on the issues encountered with user-generated content on social media platforms. What is so different about speech on intermediaries that makes it difficult to subsume under the current First Amendment theory?

##### *A. Content Moderation is Necessary*

Some opinions under the First Amendment are protected although they might be considered undesirable for the majority, like toxic or hate speech.<sup>164</sup> In the marketplace of ideas, they will compete with other opinions, and, so the rationale goes, the truth will emerge.<sup>165</sup> According to Mill, the argument is important not because it refers to the survival theory of truth. Instead, it is the exchange of knowledge that leads to the truth:

Allowing contrary opinions to be expressed is the only way to give ourselves the opportunity to reject the received opinion when the received opinion is false. A policy of suppressing false beliefs will, in fact, suppress some true ones, and therefore a policy of suppression impedes the search of truth.<sup>166</sup>

While the argument of knowledge enhancement through dialogue remains valid, it is possible to question its viability in the current social media environment based on user-generated content and the engagement it generates.<sup>167</sup> User-generated speech is generally written and published by users via a post, a tweet, or a comment. It can also be recorded and uploaded in a video or audio file. What matters here is that it stays—it is not volatile. Speech that is protected by the First Amendment within the rationale of the marketplace of ideas could potentially cause more harm online than if pronounced on the streets or in a park.<sup>168</sup> Social media platforms are flooded with speech

<sup>164</sup> FREDERICK F. SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 17 (1982); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 *YALE L.J.* 882 (1962); see also Mary Ann Franks, *Fearless Speech*, 17 *FIRST AMEND. L. REV.* 294, 308 (2018) (arguing the marketplace of ideas is a myth to protect privileged speech).

<sup>165</sup> *Id.*

<sup>166</sup> SCHAUER, *supra* note 165, at 19–22.

<sup>167</sup> One might also question its applicability to speakers not aiming at the quest for truth, when only spreading content such as spam or when deliberately spreading untrue fact statements for misinformation purposes.

<sup>168</sup> Franks, *supra* note 165, at 310.

of different types, and speakers do not always have the intent of participating in the quest for truth. Extremists have access to an audience they did not reach in times before the social web.<sup>169</sup> Therefore, when the Internet is used “as a vehicle for hate,”<sup>170</sup> the effects on the public discourse are different and they last because people can engage with the content in many ways. These issues are not limited to certain platforms. It is still unclear what the consequences of online hate speech could be offline, but when specific groups and minorities are targeted on social media it could lead to hatred and violence in the “real world.”<sup>171</sup>

When looking at the reasons why social media platforms need content moderation and perhaps also need support from algorithms or machine learning, numbers tell more than words: four hundred hours of content are uploaded on YouTube per minute.<sup>172</sup> On one hand, it shows how many people use social media to express themselves and how platforms offer people a medium to articulate what was not heard in traditional media outlets.<sup>173</sup> On the other hand, platforms are a display for disturbing, unwanted, and sometimes illegal content that users do not want to be confronted with and expect the platforms to remove.<sup>174</sup> YouTube, for instance, removed 2,398,961 channels from October 2018 to December 2018, and the three main reasons for removal were (in order of importance): (1) spam, misleading or collusive content; (2) nudity or sexually explicit content; and (3) child protection.<sup>175</sup> At the same time, people would rather engage with content that they react to emotionally, such as moral outrage.<sup>176</sup> The complexity of the connections between platforms and users adds to

<sup>169</sup> Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1849 (1995).

<sup>170</sup> NATHAN HALL, HATE CRIME 204 (2013).

<sup>171</sup> Imran Awan, *Islamophobia On Social Media: A Qualitative Analysis Of The Facebook's Walls Of Hate*, 10 INT'L J. CYBER CRIMINOLOGY 1, 17 (2016).

<sup>172</sup> J. Clement, *YouTube - Statistics & Facts*, STATISTA (June 25, 2019) <https://www.statista.com/topics/2019/youtube/> [<https://perma.cc/9BGC-2TDP>] (providing statistics since 2015).

<sup>173</sup> Joshua A. Tucker et al., *From Liberation to Turmoil: Social Media And Democracy*, 28 J. DEMOCRACY 46, 47 (2017).

<sup>174</sup> Miriam Greis et al., *I Can Wait a Minute: Uncovering the Optimal Delay Time for Pre-Moderated User-Generated Content on Public Displays*, PROCEEDINGS OF THE 32ND ANNUAL ACM CONFERENCE ON HUMAN FACTORS IN COMPUTING SYSTEMS - CHI '14 1435-38, (2014); TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA 8-9 (2018).

<sup>175</sup> GOOGLE TRANSPARENCY REPORT, <https://transparencyreport.google.com/youtube-policy/removals> [<https://perma.cc/SE8J-JXD7>].

<sup>176</sup> M. J. Crockett, *Moral Outrage in the Digital Age*, 1 NATURE HUM. BEHAV. 769, 771 (2017).

the underlying moral and legal questions.<sup>177</sup> Content moderation is a challenging task, but one that cannot be ignored. As Langvardt rightly put it: “[i]magine your email without spam filtering, or your Facebook feed if it were populated daily with beheading videos and violent pornography.”<sup>178</sup> Daily news and recent events, such as the live stream of the shooting in New Zealand as the most recent and horrible example,<sup>179</sup> show that, although users want to be informed (“the information society”), they do not wish to be exposed to raw content, which in turn has economic consequences for the platforms.<sup>180</sup>

If it is agreed that content moderation is a necessity, subsequent questions are related to its implementation and enforcement: who should moderate what type of content, according to which rules, and with the help of which tools? These questions and the answers to them are not trivial.<sup>181</sup> Although a majority of users are not confronted with the problem of moderation—because they do not break the rules—community guidelines and their enforcement are the backbone of the social web. Nonetheless, the platforms’ *modus operandi* is still very opaque.

This opacity is also linked to the implementation of content moderation. Some platforms rely on their users and use peer-based moderation systems. Others use a commercial content moderation system where moderators are paid to review user-generated content.<sup>182</sup> As the teams of content moderators grew, the task was outsourced to places where labor is cheaper; commercial content moderators are now working from different parts of the world.<sup>183</sup> Problematic content (not “manifestly” unlawful or unwanted) will be outsourced to teams according to the degree of complexity and/or novelty.<sup>184</sup> They will review the content, partly flagged by users, on the basis of community rules and regulatory frameworks, if applicable.<sup>185</sup>

If the decision to take down the content or to withhold the account needs more policy or legal input, the case will be escalated to

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<sup>177</sup> José Van Dijck & Thomas Poell, *Understanding Social Media Logic*, 1 MEDIA & COMM. 2, 11 (2013).

<sup>178</sup> Langvardt, *supra* note 9, at 1359.

<sup>179</sup> This raises questions as to the way how to moderate live streams, which is another issue in itself and cannot be addressed in this paper.

<sup>180</sup> Klonick, *supra* note 9, at 1625–30.

<sup>181</sup> GILLESPIE, *supra* note 175, at 9, 17; Kate Klonick, *Facebook v. Sullivan*, KNIGHT FIRST AMENDMENT INSTITUTE: EMERGING THREATS SERIES 16 (2018).

<sup>182</sup> Sarah T. Roberts, *Content Moderation*, in ENCYCLOPEDIA OF BIG DATA 1, 1–4 (Laurie A. Schintler & Connie L. McNeely eds., 2017).

<sup>183</sup> Klonick, *supra* note 9, at 1640.

<sup>184</sup> Sarah T. Roberts, *Commercial Content Moderation: Digital Laborers’ Dirty Work*, FIMS WESTERN UNIVERSITY MEDIA STUDIES PUBLICATIONS, 2016, at 8–9.

<sup>185</sup> Gillespie, *supra* note 11, at 262–63.

the respective teams. With regard to the large amounts of data uploaded on the major platforms, the task of moderating surpasses any dimension of what a human reviewer can handle. Platforms, therefore, use technology as tools to recognize unwanted content and will eventually be a replacement for human reviewers, although so far there are no capable systems of that scale.<sup>186</sup>

### *B. If Social Media Platforms Were Considered State Actors*

An increasing number of scholars discuss whether subsuming social media platforms under the public function exception and turning them into state actors could solve the dilemma.<sup>187</sup> According to them, social media platforms could be categorized as the public square of cyberspace, such as in *Marsh v. Alabama*, and the First Amendment rights of their users should be protected.<sup>188</sup> This argument comes not only from the platforms offering an infrastructure for communication, but also from the fact that platforms gain their value from the participation of their users.<sup>189</sup> Social media platforms turned traditionally passive media consumers into active producers of content.<sup>190</sup> Without user-generated content, the business model of intermediaries would no longer function because they, by definition, do not produce their own content. Without their users, they would be as empty as a vacant town square, solely animated by billboards. Is the risk too big that without such regulation they “will trample on free speech values in the relentless pursuit of profit”?<sup>191</sup> Should social media platforms subsequently be regulated to serve the public interest?

There are two main reasons why social media platforms cannot, and perhaps should not, be subject to First Amendment obligations as was the case for the company-town in *Marsh v. Alabama*. First, making social media platforms state actors would result in prohibiting content moderation as it is now since the platforms would be subject to the strict scrutiny of the First Amendment, making content-based

<sup>186</sup> YouTube does claim that, as of 2016, 99.5% of music claims on YouTube were matched automatically by Content-ID. See Lyor Cohen, *Five Observations From My Time at YouTube*, OFFICIAL YOUTUBE BLOG, <https://youtube.googleblog.com/2017/08/live-observations-from-my-time-at.html> [https://perma.cc/C7S3-HY3F].

<sup>187</sup> Benjamin Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N. M. L. REV. 121, 147, 151 (2014); Daniel Rudofsky, *Modern State Action in the Age of Big Data*, 71 N.Y.U. ANN. SURV. AM. L. 741, 777 (2017); Ruthann Robson, *The Cyber Company Town*, FIRST AMENDMENT NEWS 200 (2018).

<sup>188</sup> Jackson, *supra* note 188; Rudofsky, *supra* note 188; Robson, *supra* note 188.

<sup>189</sup> Balkin, *supra* note 8, at 22.

<sup>190</sup> Tucker et al., *supra* note 174, at 48.

<sup>191</sup> Balkin, *supra* note 8, at 22.

restrictions of protected speech invalid. That means they would be deprived of the right to take down user-generated content on the basis of their respective community guidelines and because of what this content actually expresses. Second, they are themselves speakers under the currently prevailing opinion, which makes a speech-related regulation difficult.<sup>192</sup> Other options are in discussion at the moment, namely breaking up the biggest companies in an anti-trust interest.<sup>193</sup> This would have consequences on the underlying business model and prevent companies from using their users' data to fuel the attention economy.<sup>194</sup> This, in turn, would make it less attractive for the platforms to algorithmically push hateful or shocking content on top of newsfeeds, perhaps leading to a decrease of that type of content. However, it remains to be seen whether the next administration takes action in that direction.

*C. At Least Partly: Social Media Profiles as Designated Public Forum*

While the Court is reluctant to expand the company-town analogy to other private actors, there has been a noticeable change at the level of district courts with regard to digital forums, at least in part.<sup>195</sup> For instance, the U.S. District Court of the Southern District of New York recently subsumed President Donald J. Trump's Twitter feed as a designated public forum, and the decision was confirmed by the U.S. Court of Appeals for the Second Circuit in July 2019.<sup>196</sup> In this case, filed by the Knight First Amendment Institute at Columbia University, the Court was asked "to consider whether a public official may, consistent with the First Amendment, "block" a person from his Twitter account in response to the political views that person has expressed, and whether the analysis differs because that public official is the President of the United States."<sup>197</sup> The answer to both questions was no. The Court considered "whether forum doctrine can be appropriately applied to several aspects of the @realDonaldTrump

<sup>192</sup> Langvardt, *supra* note 9, at 1364; Klonick, *supra* note 9, at 1664.

<sup>193</sup> Mitch Stoltz & Shahid Buttar, *Antitrust Enforcement Needs to Evolve for the 21st Century*, ELECTRONIC FRONTIER FOUNDATION (Feb. 27, 2019) <https://www.eff.org/de/deeplinks/2019/02/antitrust-enforcement-needs-evolve-21st-century> [https://perma.cc/6MML-57YB].

<sup>194</sup> Van Dijk and Poell, *supra* note 178, at 6.

<sup>195</sup> Robson, *supra* note 188.

<sup>196</sup> Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018); Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226 (2d Cir. 2019).

<sup>197</sup> *Knight First Amendment Inst.*, 302 F. Supp. 3d at 549.

account rather than the account as a whole”<sup>198</sup> and came to the conclusion, that, yes, the tweets sent by the President qualified as a designated public forum because the requirements for a governmental forum were met.<sup>199</sup> To reach this conclusion, the Court relied on externalities, such as the description of the account (the @realDonaldTrump account is presented as being “registered to Donald J. Trump, ‘45th President of the United States of America, Washington, D.C.’”) and on the actual usage to communicate policies and appointments via this account.<sup>200</sup>

This decision can serve as an indicator but should not be overestimated.<sup>201</sup> Categorizing the U.S. President as a state actor and subsequently subject to First Amendment limitations is not overwhelmingly surprising and only notable because it was embedded in a social media setting. However, it shows that it is not sufficient to invoke private property as a “shield” from any protection of speech. Following the reasoning of the Court in *Knight Institute v. Trump*, parts of a privately-owned infrastructure, such as social media platforms, can be opened as designated public forums and provide appropriate protection of free speech. In similar cases, users were blocked from accessing government officials’ social media profiles, or their comments were deleted.

Governmental communication via private digital actors, such as social media platforms, is an area of research in itself. It begs the question of government officials using the whole “toolbox” offered by social media platforms, including preventing citizens from interacting via their Facebook pages or Twitter profiles. Because Facebook pages, for example, do not offer the ability to turn off the commenting option, government officials sometimes struggle to find the appropriate reaction to people contacting them over this medium. Researchers found that some public figures prefer to hide comments than to delete them because of the users’ reactions.<sup>202</sup> Here again, there is a constant dilemma between the advantages of fostering communication between lawmakers and the people, and the downsides of state actors potentially circumventing First Amendment restraints when they use non-state actors for communicative purposes.

## V. SOLUTION STATEMENT

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<sup>198</sup> *Id.* at 566.

<sup>199</sup> *Id.* at 575.

<sup>200</sup> *Id.* at 567.

<sup>201</sup> See Yemini, *supra* note 26, at 1179.

<sup>202</sup> Karoline Andrea Ihlebæk, Bente Kalsnes, *Hiding hate speech – a study of political parties’ use of Facebook’s toolbox for comment moderation* (forthcoming 2020–21).

In light of the issues encountered by the public forum doctrine and the current developments of online speech, this article proposes a solution based on the learnings from the comparative approach. Representative democracy needs spaces for deliberation where citizens can express political opinions and exchange views.<sup>203</sup> The perspective proposed below also builds on the fact that social media platforms are governed not only by legislative rules but also largely by social norms,<sup>204</sup> similar to life in analog public spaces. Instead of holding on to doctrinal categories from the past, the principles guiding the application of constitutional norms can be adapted to societal changes.<sup>205</sup>

#### *A. Necessity for a New Public Forum Category?*

A goal of comparative law can be to change perspectives and perhaps to question dogmas that seem at first hand irrevocable. When looking at the public forum doctrine, the strict separation between public and private is legitimate because it restricts governmental action on free speech. The perception of governmental power is very different in the U.S. than in Germany, which is why this article does not argue for a simple transfer of the FCC's holdings to U.S. jurisprudence. However, the reasoning behind the holdings in *Fraport*, *Bierdosenflashmob*, or *Stadionverbot* can be helpful. The German constitutional jurisprudence is highly influenced by Habermas and his model of a deliberative democracy,<sup>206</sup> which elevates the social dimension on a higher level than in the U.S. where the priority of an individual's liberty is in line with the First Amendment's principle of autonomy. There is nevertheless some common ground between both approaches, as the Court's decision *Packingham v. North Carolina* shows.

In *Packingham v. North Carolina*, the Court stressed that the importance of analog public forums had not diminished (“[e]ven 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”), but that new places for people to listen and to speak have emerged.<sup>207</sup> The Court recognized the central role that social

<sup>203</sup> Bodnar, *supra* note 52, at 2095.

<sup>204</sup> Tal Z. Zarsky, *Social Justice, Social Norms and the Governance of Social Media*, 35 PACE L. REV. 154, 157 (2014).

<sup>205</sup> Wilson Ray Huhn, *The State Action Doctrine and the Principle of Democratic Choice*, 34 HOFSTRA LAW REVIEW 1379, 1394 (2006); Waldman, *supra* note 92, at 430.

<sup>206</sup> JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (1989).

<sup>207</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

media plays in the daily lives of average citizens and how barring access to these platforms constitutes a severe restriction:

By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.<sup>208</sup> These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.<sup>209</sup>

By calling social media platforms the “modern public square” (and explicitly naming Facebook, LinkedIn and Twitter in its holdings), the Court acknowledged the reality of how most people use the Internet and communicate digitally.

This decision confirmed what has been discussed for many years amongst scholars arguing in favor of solutions that could serve both free speech and the platforms’ rights, including the freedom to contract. Regulating social media platforms might not be possible because of the platforms’ own rights as speakers, but governmental action could include providing more opportunities for public communication.<sup>210</sup> Courts could resolve the tension between users’ and platforms’ free speech rights by prioritizing users’ rights over those of companies.<sup>211</sup> This could be underlined by the argument that there is a need to “preserve a free society.”<sup>212</sup> Other scholars invoke a more affirmative protection of speech, similar to the Californian model, “in recognizing the right of the public to engage in expressive conduct, wherever the public freely gathers.”<sup>213</sup>

### *B. A New Public Forum Category?*

In this last part, this article presents an idea of a “social” public forum based on the findings above. By combining the problem of the public forum doctrine that this article has called a “dilemma” with the comparative analysis and the challenges emerging out of online

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<sup>208</sup> *Id.* at 1737.

<sup>209</sup> *Id.*

<sup>210</sup> Fee, *supra* note 63, at 615.

<sup>211</sup> Erwin Chemerinsky, *More Speech Is Better*, 45 UCLA L. REV. 1635, 1643 (1998).

<sup>212</sup> LARRY W. BEEFERMAN, IMAGES OF THE CITIZEN AND THE STATE: RESOLVING THE PARADOX OF PUBLIC AND PRIVATE POWER IN CONSTITUTIONAL LAW 80 (1996).

<sup>213</sup> Josh Mulligan, *Finding a Forum in the Simulated City: Mega Malls, Gated Towns, and the Promise of Pruneyard Note*, 13 CORNELL J. L. & PUB. POL’Y 533, 562 (2004).

communication, it shows that the public forum doctrine is not equipped for speech expressed in the digital sphere.

### *1. Connecting the Dots*

The public forum doctrine was developed to delimit and consequently to guarantee places where citizens could speak freely, and it is out of the question that public forums are necessary to enjoy the freedom of speech. They must meet requirements defined by the doctrine and be consistent with the purpose of the place.<sup>214</sup> Only traditional or designated public forums are subject to strict scrutiny under the First Amendment; hence, a governmental act is a prerequisite. In other constitutional traditions, such as Germany, a space for free speech can also be defined by social norms or by their social function for democracy. If a place is open to the general public for the purpose of communication, it might be considered part of “the public.” This allows more flexibility with regard to the spaces where people actually meet and speak, such as social media platforms.

In the U.S., the lack of adaptability is, strictly speaking, not only due to the public forum doctrine but also to the state action doctrine. As long as the terms outlining which action can be recognized as state action remain the same, no further exception will be added. As a result, social media platforms are not state actors (and only to an extremely limited extent designated public forums), which allows them to moderate speech. On the other hand, they are not bound by fundamental rights, although their role in online communication is decisive, and the necessity of having access to the Internet and to intermediaries has been acknowledged by the U.S. Supreme Court.

### *2. A “Social” Public Forum*

Combining these findings, this article proposes a new category of public forums which would merge the right of platforms to moderate speech with the First Amendment freedoms that are necessary to use the intermediaries’ services in a reasonable manner. It would be applied by courts when interpreting a platform’s terms and services—that is when users bring an action against a take-down decision in a case of content moderation. The role of the judiciary will be crucial to address the challenges described in this article. Judicial review has already proven to provide answers to some of the questions raised. Moreover, judicial review allows a dialogue between courts and scholars that can be particularly fruitful because it offers entry points for tradeoffs and flexibility. The idea of an additional category within the public forum doctrine is therefore based on the observation that

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<sup>214</sup> *Pleasant Grove City v. Summum*, 555 U.S. 460, 480 (2009).

while the hands of legislative power are tied, the judiciary is playing an important role in the process of defining the responsibilities of social media platforms.<sup>215</sup>

Courts can strike a new path by proposing a category of the public forum that could potentially overcome doctrinal obstacles. Although a new category in the doctrine implies a judicial review in the first place, the chances are high that the jurisprudence will develop a spillover effect and find its way into the internal content moderation policies of large social media companies.<sup>216</sup> The doctrine can only be truly effective if companies apply it to more than just the single case that was litigated.

The definition of this type of “social” public forum could be based on the concept of the Public in German constitutional scholarship, as well as on that of the public sphere, and on the holdings of the U.S. Supreme Court.<sup>217</sup> It would need to fulfill the following criteria: (1) be a digital space open to the general public; (2) serve the purpose of digital communication; and (3) be essential to the public discourse in the digital age. Publicly accessible or open to the general public means there are no special requirements for the person registering. Requiring registration is not in itself sufficient to dismiss the criterium. If a platform fulfills these criteria it would not be such a social public forum as a whole. To be more concrete, the publicly accessible part of a social media platform, such as its newsfeed with public posts, would still be subject to the platform’s terms and conditions, including its community guidelines regarding unwanted user-generated content. Additionally, the platform would need to consider the speaker’s free speech rights if the content is protected speech under the First Amendment and does not fall in the categories of unprotected speech. The review process for this type of unwanted but not illegal user-generated content would require a more balanced approach. The First Amendment restraints would only be applicable to the parts described above and only to a certain extent.

One of the main challenges in this context is the question of how we draw the line between private and public when it comes to communication on platforms. To address this, we can rely on jurisprudence but not completely. For example, in *Packingham v.*

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<sup>215</sup> *Cf.* Wu, *supra* note 89, at 23 (considering new laws or regulations that would probably be unconstitutional according to the First Amendment).

<sup>216</sup> Practical examples can already be found on larger platforms such as YouTube which claims to balance four freedoms in their content moderation process, namely: freedom of speech, freedom of information, freedom to act, and freedom to belong. *See* Youtube About, <https://www.youtube.com/intl/en/yt/about/> [<https://perma.cc/5FEZ-2MV7>].

<sup>217</sup> *See, e.g., Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).

*North Carolina*, the Court has somehow overlooked the necessity for more specific guidance.<sup>218</sup> All platforms named in this decision were summarized as a “modern town square” without acknowledging the different services and functions they offer.<sup>219</sup> This gap could be filled by the social public forum category by applying the criteria presented here. Accordingly, the scope of application would include public posts, public events, public groups, and public pages of businesses that are visible to all users of the platform, in continuity with the marketplace analogy.

The parts used in *Packingham* as a “public modern square” with public announcements would be considered such a social public forum. Because of the private legal nature of the platform, its users, and their relationship, the platform would still be allowed to moderate content but in a way that would be more transparent and respectful of individual rights.<sup>220</sup> This hybrid category between public and nonpublic forums would only be applicable to platforms of a certain size at the courts’ discretion. Just as the creation of “the Public” as described in the German cases requires a space to be open to the general public, to be designed for people to communicate, and to be used as a host for public discourse, the social public forum would only be open when meeting all the requirements. This would prevent overburdening small platforms that are only used to communicate about specific topics or are not open to everybody.

Another point that requires clarification is whether social platforms could be required to provide equal access to their services within the scope of application and whether it should be somehow guaranteed. They could, for example, be subject to the Equal Access Act of 1948 (EAA), which is a federal law applicable to schools receiving federal aid and opening limited public forums for non-curriculum related activities.<sup>221</sup> The EAA states that equal access must be provided to other interest groups when allowing a club or an association to use the school’s premises for their activities.

The EAA was ruled constitutional in *Board of Education of the Westside Community v. Mergens*.<sup>222</sup> In this case, the Court held that a group of students could form a religious study group and hold their meetings in the school because the school opened limited public forums.<sup>223</sup> Formally, social media platforms are not subject to the EAA because they are neither education facilities receiving federal aid nor are they somehow governmental, which means they do not open

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<sup>218</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).

<sup>219</sup> *Id.* at 1732.

<sup>220</sup> *Id.*

<sup>221</sup> 20 U.S.C. 4017 (1984).

<sup>222</sup> *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990).

<sup>223</sup> *Id.* at 291.

public forums as state actors do. One could consider transferring this principle to social media platforms by requiring them to allow all registrants to their services access to the forum created or to allow the creation of user groups without any limitation if a similar group has been created before. The function called “groups” can, for example, be found on Facebook. Any user can create a group, name it, and invite others to join. The founder can decide what level of privacy the group should have: public, closed, or secret. Public groups, their names, and their respective descriptions, as well as public posts, are available to everyone visiting Facebook without being logged in. The names of members and administrators of public groups are only visible to Facebook users.<sup>224</sup> If provisions similar to the EAA were applicable to such Facebook groups, users would still be allowed to create secret groups, the most private form of group. It would, however, require Facebook to treat the public groups equally.

There are nevertheless limits to the idea of a social public forum within platforms: the content moderation would still happen according to the standards set by the platforms’ policies. Only in specific cases could a court rule that the take-down decision or the exclusion of users by the platform was not respectful enough of its role as a host of public discourse. There are only a few exemptions to the broad scope of protection of the free speech clause, and platforms should be able to limit user-generated content beyond these few categories of unprotected speech. It will be the judges’ task to elaborate what the threshold for speech protection under the social public forum will be.<sup>225</sup> They will have to form case law for the digital age in which the offline limits between public and private spaces disintegrate. Hate speech and misinformation are probably categories of unwanted content that can be sanctioned, especially when directed at individuals. Other cases could be less obvious, such as content categories forbidden by a platform’s community standards but protected by the First Amendment and sometimes not harmful per se. Nudity is an example of content that might not be suitable to all ages but is not harmful per se.<sup>226</sup> The same argument could be made for other types of

<sup>224</sup> Facebook, *What are the privacy settings for groups?*, <https://www.facebook.com/help/220336891328465#What-are-the-privacy-options-for-groups> [https://perma.cc/YB28-Z6AN].

<sup>225</sup> For examples where courts had to decide similar kinds of disputes, see *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016) (addressing student’s expulsion from professional school based on a Facebook comment: “stupid bitch”); *Hunt v. Bd. of Regents of the Univ. of N. M.*, 388 F. Supp. 3d 1251 (D.N.M. 2018) (discussing school punishment for publishing political views on Facebook).

<sup>226</sup> Amélie Heldt, *#NSFW? Be Yourself But Don’t Undress*, DIGITAL SOCIETY BLOG (Jan. 1, 2019), <https://www.hiig.de/en/nsfw-be-yourself-but-dont-undress> [https://perma.cc/W36E-5X33].

content including political speech which enjoys special protection under the First Amendment, especially in a public forum.<sup>227</sup>

Then again, political speech is probably the most difficult category to delimit from others—what is political and what is not? Even if jurisprudence and scholarship on how to define political speech, as opposed to commercial or ordinary speech, exists, digitization has generated new forms of expressions and trends in political activism. The latter include memes (“an amusing or interesting item (such as a captioned picture or video) or genre of items that is spread widely online especially through social media”<sup>228</sup>), pictures of naked body parts to advocate for gender equality, and other forms of text or images sometimes combined. The imitation of cultural codes to convey a political message has become an important part of Internet culture, just as a caricature in print media is more than a drawing.<sup>229</sup> Not only are these new communicative conduits open for external creative input, they are also more participatory than traditional media outlets and in a sense more democratic.<sup>230</sup> Keeping in mind the ideal of a deliberative democracy, it is of high priority to take digital forms of expression seriously. This includes being aware of the potentially political messages they contain as well as their impact on the digital sphere. Drawing the line(s) between different types of speech, such as political, entertainment, satire, and commercial, is a task that courts have been performing, which is another reason to plead for a way forward that includes a judicial review.

This idea of a social public forum should not be misunderstood as a form of “public use” of private property.<sup>231</sup> Although this article uses terms such as property and space to elaborate on the idea of a new public forum on social media that moves closer to the public sphere, this domain-related vocabulary is not intended to advocate eminent domain on social media platforms. Nonetheless, this article would push back on the arguments brought against the use of private shopping malls and transferred on social media platforms. Shopping

<sup>227</sup> Meyer v. Grant, 486 U.S. 414 (1988); Heffron v. Int’l Soc’y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

<sup>228</sup> “Meme”, *Merriam-Webster.com*, <https://www.merriam-webster.com/dictionary/meme> [https://perma.cc/UDH9-9QDK].

<sup>229</sup> Lorenz Grünewald-Schukalla & Georg Fischer, *Überlegungen zu einer textuellen Definition von Internet-Memes.*, 19 KOMMUNIKATION @ GESELLSCHAFT 1 (2018); Lorenz Grünewald-Schukalla, *Run-DMC logo: When is a Meme a Meme?*, DIGITAL SOCIETY BLOG (June 14, 2019), <https://www.hiig.de/en/run-dmc-logo-when-is-a-meme-a-meme/> [https://perma.cc/7AAE-5JQG].

<sup>230</sup> Kate M. Miltner, *“There’s No Place for Lulz on LOLCats”: The Role of Genre, Gender, and Group Identity in the Interpretation and Enjoyment of an Internet Meme*, 19 FIRST MONDAY (2014).

<sup>231</sup> See Kohl v. United States, 91 U.S. 367 (1875).

malls are considered as open to the general public, even if they have opening hours, especially in the U.S. where shops are usually open every day. A space open to all customers cannot be considered closed to public use simply based on opening hours.<sup>252</sup> In the same way, an invitation to visit a neighbor does not make her house or garden a public space, allowing someone to use it according to their own wishes.<sup>253</sup> Users are capable of differentiating between private and public spheres within a platform, such as a private messenger-service and a public post appearing in a platform's newsfeed. The size argument, on the other hand, is more valid:<sup>254</sup> A small social media platform might, but does not have to be, such a social public forum if the number of users is relatively small. This was addressed in the scope of application of the social public forum.

### 3. *Potential Pitfalls*

#### a. *The Problem of Scale*

Of course, there could be a problem of scale: it is unlikely that all cases of disagreement about content moderation can be decided by national courts, at least in a satisfying timespan. There are two answers to that allegation. One is the spillover effect which has already been described and can be witnessed in some cases that arise in relation to public outcry about platforms' role in, for example, election campaigns. Platforms are increasingly allowing internal remedy mechanisms which can be interpreted as a reaction to the pressure of governmental regulation and user mistrust. Some are even actively asking governments to regulate platforms, such as Facebook and Microsoft, perhaps to be held less responsible by users when in fact there are already rules they could refer to.

So far, companies are not directly bound by human rights as states are, but there are standards for companies, such as the United Nations Guiding Principles on Business and Human Rights (UNGPs).<sup>255</sup> According to the UNGPs, private actors must avoid infringing on individual rights and be aware of their potential influence on human rights.<sup>256</sup> This principle could, for example, intend to implement as far as possible the UNGP's framework "Protect, Respect and Remedy" to areas such as freedom of speech and information. The second response to the aforementioned allegation is that

<sup>252</sup> Richard A. Epstein, *Takings, Exclusivity and Speech: The Legacy of PruneYard v Robins*, 64 U. CHICAGO L. REV. 21, 38 (1997).

<sup>253</sup> *Id.* at 40.

<sup>254</sup> *Id.* at 34.

<sup>255</sup> Jørgensen, *supra* note 13, at 351.

<sup>256</sup> *Id.*

platforms also use the argument of scale to reject access to remedies. One should refrain from dismissing a proposed solution on the grounds of lacking feasibility—even more, if it is used by both sides. Again, the proposed solution should not necessarily be applicable to small-sized platforms (although it could), but certain minimum standards would not be overburdening for services with a large number of users.<sup>237</sup>

*b. Consequences for Publishers*

When making sense of the digital sphere and the applicable legal concepts, we often fall back on ideas and rules we know from the analog world. It is often asked why social media platforms are not treated as traditional mass media. Legally speaking, intermediaries are exempt from editorial responsibility under Section 230 of the Communications Decency Act.<sup>238</sup> Furthermore, they cannot be held liable for restricting content “whether or not such material is constitutionally protected.”<sup>239</sup> The proposed solution could, therefore, fit into the current framework of intermediary liability, such as a different regime than publishers.

However, the question should also be asked the other way around: if platforms are obliged to put back user content due to their categorization as a hybrid form of a public forum, would that also be applicable to traditional media? Facebook, for instance, has been under scrutiny for playing an ambiguous role when it comes to curating content and for eventually becoming more similar to a publisher than it claims to be.<sup>240</sup> One could wonder if traditional media have lost some of their editorial power through digitization and apply this reasoning to them. Hence, they would also offer a similar type of social public forum and could be forced to publish.

Although the idea is worth mentioning, social media platforms and traditional mass media are so fundamentally different that they should not be treated equally. Social media platforms rely on user-generated content and provide a medium for every user regardless of their personality, which is fundamentally different from newspapers and broadcasting stations. When it comes to the comment section of traditional media on social media platforms, it would be conceivable to consider an additional forum within the social public forum. In practice, user-generated content in the publicly accessible part of the platform would be moderated by the platform’s moderation team whereas the comment section below an article posted by a newspaper

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<sup>237</sup> Pasquale, *supra* note 9, at 500–01.

<sup>238</sup> 47 U.S.C. § 230(c)(1) (2018).

<sup>239</sup> 47 U.S.C. § 230(c)(2) (2018).

<sup>240</sup> Klonick, *supra* note 182.

may be subject to their own moderation rules and overseen by their community manager. This raises a whole other set of questions as to the areas of responsibility for different actors within this new social public forum category.

*c. How to Adapt to Changes*

The proposed solution relies on the premise that most social media platforms offer the possibility for every user to make a somehow public appearance and to share their content with the whole network.<sup>241</sup> The concrete forms vary between platforms, but there is a similar idea of the “modern town square” in the form of posts as well as events and groups that can, in theory, be seen by all users. How flexible would the social public forum be to changes if platforms change formally and/or substantively? What if social media platforms turn to a different model? To be more specific, given the difficulty to moderate speech due to the formal requirements of a public forum, what if platforms remove the newsfeed? Facebook has recently announced it would move to a more private type of service.<sup>242</sup> In its pledge to “privacy,” the world’s largest social media platform would focus more on one-on-one communication and move away from the model of users contributing to the newsfeed.<sup>243</sup>

If Facebook introduces a more private model of social media platform, does the new category of a social public forum become obsolete? Not really. The discussion about the online public sphere and how to subsume it under preexisting legal concepts does not minimize its importance. Changing the service delivered by platforms is not an answer to these questions, only a divergence. Whether it is in “newsfeeds,” “groups,” “channels,” or other forms of social networks, platforms connect people and enable communication. Giving up that type of service would mean restricting the communication between users to a one-on-one communication. Subsequently, social media platforms would eventually resemble telecommunication providers and be subject to, if not the same, at least very similar rules.

A substantive change by social media platforms would bear more consequences. If they change their purpose by, for example, moving to a model describable as a theme-based communication platform, the

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<sup>241</sup> Nota bene: every user sees a different algorithmic sortation of content and has a different user experience. Nevertheless, content that was published without privacy limitations is visible to all if not geo-blocked by the platform.

<sup>242</sup> Mike Isaac, *Facebook Unveils Redesign as It Tries to Move Past Privacy Scandals*, THE N.Y. TIMES (Apr. 30, 2019) <https://www.nytimes.com/2019/04/30/technology/facebook-private-communication-groups.html> [<https://perma.cc/8RML-QFU4>].

<sup>243</sup> *Id.*

consequences would be more significant than after a formal change in the form to communication. If private actors, like a club or an association, choose a topic, they cannot be forced to deal with other topics because of a possible violation of their own First Amendment rights.<sup>244</sup> The obligation to deal with a certain topic is a typical content-based regulation that is not allowed under the free speech clause.<sup>245</sup> A reading club with an emphasis on Simone de Beauvoir cannot be forced to discuss Marvel comics or Tolkien's *Lord of the Rings*.

With regard to social networks, a substantive change could, for instance, mean that platforms no longer strive to form global communities and eventually connect the whole world. Instead, they would limit their scope to topics and build communities around these topics. Accordingly, they would no longer reflect the modern town square because they would not be as general as before and would be less bound by their users' First Amendment rights. In theory, a change to a platform model with a substantive focus would correlate with a reduced, if not restrained, application of the social public forum. Even though the platform would still fulfill the criteria of the category's scope of application, it would be under the condition that users want to communicate about that specific topic. The platform could, therefore, limit the users' communication adequately. In practice, the substantive focus would need to be narrow enough to effectively limit user-generated content. It would need to be a network no longer fulfilling the following generic definition: "[s]ocial media allows users to gain access to information and communicate with one another about it on any subject that might come to mind."<sup>246</sup> A platform like LinkedIn that solely promotes itself as a professional network would still fall under the public social forum because the topic of work is very broad.<sup>247</sup>

## VI. CONCLUSION

The public forum doctrine is not entirely apt to respond to contemporary issues such as the one of content moderation on platforms that are perceived as a public space by users but do not fall under the definition of a First Amendment's public forum.<sup>248</sup> The shift from analog space to cyberspace entails a shortening in the protection intended to be provided by the public forum doctrine.

<sup>244</sup> IDES ET AL., *supra* note 29, at 414.

<sup>245</sup> *Id.* at 354.

<sup>246</sup> *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

<sup>247</sup> The Supreme Court in *Packingham* also mentioned LinkedIn as one of the platforms constituting the modern town square, although LinkedIn has a self-defined substantive focus as a professional and work-related network. *See generally, id.*

<sup>248</sup> Nunziato, *supra* note 10, at 1161.

This shift is a significant obstacle for speakers, particularly when their speech is within the First Amendment's scope of protection and not necessarily violating community standards. When the interpretation of such user-generated content is left to the moderators' discretion, under the principle of taking it down when in doubt, there is high risk of over blocking.<sup>249</sup> Exploring foreign concepts of "the Public" (such as in German constitutional jurisprudence) helps to think beyond classical categories and to evaluate the necessity of a new way to go for the public forum doctrine. In the present case, the conclusions from the functional comparison even seem to support the principles of First Amendment theory when referring to the social function of free speech.<sup>250</sup> It might also be reminiscent of Roosevelt's second bill of rights project, where he advocated a more social perception of fundamental rights.<sup>251</sup> The latter should serve not only as a protection of liberty against the state but also as a duty to preserve social cohesion.<sup>252</sup> Given the offline consequences of harmful online speech, such as extremism and terror, we need more clarity about the role of public discourse in our society.

What are the basic points to bear in mind when thinking of a deliberative space online? This article shows that one cannot simply import traditional concepts into a new socio-technical infrastructure without adapting the doctrine to a certain extent. In order to enable a space for more speech without violating the rights of private actors, such as platforms, the way forward is to ask ourselves how to build a system that preserves democratic principles. It is necessary to preserve the checks and balances of the current legal framework, maintaining a clear separation of powers. This mainly translates into an ongoing discussion of the notion of power beyond the separation of private and public.

If we limit this debate to intermediary liability, there is a serious risk of overlooking the intertwinement of state actors and non-state actors in the context of online speech. Legal innovation through judicial review can combine the social reality of concrete cases, the voices of academia, and the flexibility of a case-by-case approach. Ad hoc doctrinal application might not be desirable in terms of legal uncertainty;<sup>253</sup> however, it does provide a more open framework than

<sup>249</sup> Josh Constine, *Instagram Now Demotes Vaguely 'Inappropriate' Content*, TECHCRUNCH (Apr. 10, 2019) <http://social.techcrunch.com/2019/04/10/instagram-borderline> [<https://perma.cc/3KJC-CJMB>].

<sup>250</sup> Emerson, *supra* note 165, at 882-84.

<sup>251</sup> CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (Basic Books ed., 2004).

<sup>252</sup> *Id.*; COREY L. BRETTSCHEIDER, *GOVERNMENTAL POWERS: CASES AND READINGS IN CONSTITUTIONAL LAW AND AMERICAN DEMOCRACY* (Wolters Kluwer Law & Business ed. 2014).

<sup>253</sup> See Black Jr., *supra* note 60, at 95; Tushnet, *supra* note 60, at 80.

regulatory interventions by the state. All in all, adding a hybrid category to the public forum doctrine—a social public forum—could help to overcome the current obstacles. It would not require a regulatory act and could be integrated into the existing public forum doctrine, leaving up to the courts’ discretion when to apply it.