First Amendment — Freedom of Speech — Public Forum Doctrine — Packingham v. North Carolina

In *Southeastern Promotions, Ltd. v. Conrad*,[1] the Supreme Court advised that "[e]ach medium of expression . . . be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."[2] The Court heeded this instruction in its first major decision broaching the relationship between the internet and the First Amendment, 1997's *Reno v. ACLU*,[3] in which it declared that the "special justifications for regulation of the broadcast media" did not apply to "the vast democratic forums of the Internet."[4] After a twenty-year hiatus, the Court revisited this relationship last Term in *Packingham v. North Carolina*.[5] *Packingham* held unconstitutional a state statute prohibiting registered sex offenders from accessing "commercial social networking Web site[s]"[6] that permit use by minors.[7] In denominating the internet — with pride of place for social media[8] like Facebook and Twitter — as "the modern public square,"[9] the Court full-throatedly committed to analyzing this communicative mode in a "spatial context."[10] But *Packingham*'s expansive language — particularly its framing of the internet as a public space — opened a Pandora's box, with repercussions for certain First Amendment precepts. Most notably, the Court's public space rhetoric implied that the public forum doctrine might be pliable enough to encompass the internet and social media — even as such rhetoric, in failing to account for the hybrid public and private nature of digital realms, was crucially incomplete. In so doing, *Packingham* neglected the instruction of *Southeastern Promotions*, as well as its own internal warning of "extreme caution"[11] in digitizing First Amendment precedents.

In 2008 North Carolina criminalized the accessing of "a commercial social networking Web site" by a registered sex offender in instances "where the sex offender knows that the site permits minor children to

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[1] 420 U.S. 546 (1975).

[2] *Id.* at 557 (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)).

[3] 521 U.S. 844 (1997).

[4] *Id.* at 868.

[5] 137 S. Ct. 1730 (2017).

[6] N.C. GEN. STAT. § 14-202.5 (2015).

[7] *Packingham*, 137 S. Ct. at 1738.

[8] Although the *Packingham* Court did not offer a definition of "social media," *Merriam-Webster* defines it as "forms of electronic communication (such as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (such as videos)." *Social Media*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/social%20media [https://perma.cc/Z32T-9HME].

[9] *Packingham*, 137 S. Ct. at 1737.

[10] *Id.* at 1735.

[11] *Id.* at 1736.

become members or to create or maintain personal Web pages."[12] The statute defined "a commercial social networking Web site" through four requirements: first, the site "[i]s operated by a person who derives revenue from membership fees, advertising, or other sources related to the operation of the Web site";[13] second, it "[f]acilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges";[14] third, it "[a]llows users to create Web pages or personal profiles" that include information like a user's name or nickname, photographs posted by a user, and accessible links to the personal profiles of a user's "friends or associates" on the same site;[15] and fourth, it "[p]rovides users or visitors . . . mechanisms to communicate with other users."[16]

Petitioner Lester Gerard Packingham was one of approximately 20,000 registered sex offenders covered by the North Carolina statute and among more than 1000 individuals prosecuted for violating it.[17] In 2002 the twenty-one-year-old Packingham pleaded guilty to taking indecent liberties with a thirteen-year-old girl and registered as a sex offender per North Carolina law.[18] In 2010 the Durham Police Department began actively investigating profiles on social media platforms as part of its campaign to enforce North Carolina's ban on the use of commercial social networking sites by sex offenders.[19] Around the same time, Packingham posted a statement on Facebook following a state court's dismissal of a traffic ticket against him.[20] An officer later came across this posting on the profile of a "J.R. Gerrard," which he confirmed as an alias of registered–sex offender Packingham.[21] A grand jury then indicted Packingham "for maintaining at least one personal Web page or profile on *Facebook.com*," in violation of the ban.[22]

Packingham unsuccessfully moved to dismiss the charge, arguing that the prohibition on accessing commercial social networking sites violated the First Amendment.[23] He was convicted in 2012 following a jury trial.[24] On appeal, Packingham again challenged the statute's constitutionality, assailing it as "overbroad, vague, and not narrowly

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12 N.C. GEN. STAT. § 14-202.5(a) (2015).
13 *Id.* § 14-202.5(b)(1).
14 *Id.* § 14-202.5(b)(2).
15 *Id.* § 14-202.5(b)(3).
16 *Id.* § 14-202.5(b)(4). The statute countenances two exceptions. *See id.* § 14-202.5(c).
17 *Packingham*, 137 S. Ct. at 1734.
18 *Id.*
19 State v. Packingham, 748 S.E.2d 146, 149 (N.C. Ct. App. 2013).
20 *Packingham*, 137 S. Ct. at 1734.
21 *Id.*
22 *Packingham*, 748 S.E.2d at 149.
23 *Packingham*, 137 S. Ct. at 1734.
24 *Packingham*, 748 S.E.2d at 149. Packingham received a suspended prison sentence, in addition to twelve months' supervised probation. *Id.*

tailored to achieve a legitimate government interest."[25] The North Carolina Court of Appeals vacated the conviction, holding the ban unconstitutional facially and as applied.[26] Finding the statute content neutral,[27] the court determined that it was not narrowly tailored, as it "prevent[ed] a wide range of communication and expressive activity"[28] — even potentially reaching Google searches[29] — that was unconnected to its admittedly legitimate goal of protecting children from online predation.[30]

Viewing the ban as a regulation of conduct rather than speech,[31] the North Carolina Supreme Court reversed, agreeing with the Court of Appeals that the statute was content neutral but finding it sufficiently narrowly tailored to survive intermediate scrutiny.[32] Deeming the law "constitutional in all respects,"[33] the court dispatched Packingham's facial and as-applied challenges.[34] With respect to the former, the court concluded that the ban left untouched adequate alternate channels of communication.[35] In dismissing the latter, it heeded Packingham's previous conviction for a sexual offense involving a minor and noted his failure to make "good faith efforts to comply with the statute."[36]

The U.S. Supreme Court reversed and remanded. Writing for the majority, Justice Kennedy[37] faulted the North Carolina statute as "a prohibition unprecedented in the scope of First Amendment speech it burdens,"[38] invalidating it as an impermissible limit on lawful speech. The Court reiterated the "fundamental" First Amendment principle "that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more."[39] Justice Kennedy emphasized the Court's past efforts "to protect the right to speak in this spatial context," reciting the "basic rule . . . that a street or

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[25] *Id.* at 149–50.

[26] *Id.* at 154.

[27] *Id.* at 150.

[28] *Id.* at 154.

[29] *Id.* at 153.

[30] *Id.* at 154. The court also noted that the ban "burden[ed] more people than necessary to achieve its purported goal," in that it failed to target sex offenders whose previous crimes had involved minors or the use of the internet. *Id.* at 152.

[31] State v. Packingham, 777 S.E.2d 738, 744 (N.C. 2015).

[32] *Id.* at 748.

[33] *Id.* at 741.

[34] The North Carolina Supreme Court likewise rejected Packingham's overbreadth and vagueness claims. *See id.* at 750–51.

[35] *Id.* at 747. To illustrate this point, the court referenced, inter alia, a commercial social networking site called the Paula Deen Network, which bars access to minors and "allows registered users to swap recipes and discuss cooking techniques." *Id.*

[36] *Id.* at 749.

[37] Justice Kennedy was joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.

[38] *Packingham*, 137 S. Ct. at 1737.

[39] *Id.* at 1735.

a park is a quintessential forum for the exercise of First Amendment rights."[40] With respect to "identifying the most important places (in a spatial sense) for the exchange of views," the Court described that task as relatively easier nowadays than it was in the past, for "today the answer is clear": "[i]t is cyberspace" writ large, "and social media in particular."[41] The Court also counseled "extreme caution before suggesting that the First Amendment provides scant protection for access to [the] vast networks" of the internet, "[t]he forces and directions" of which "are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow."[42]

Having unfurled this backdrop, the Court turned to analysis of the statutory ban. The Court declined to resolve the parties' dispute on whether the statute was content neutral,[43] since even assuming that it were — and thus warranted intermediate rather than strict scrutiny — the statute failed.[44] Intermediate scrutiny demands that a law be "narrowly tailored to serve a significant governmental interest,"[45] meaning that it "must not 'burden substantially more speech than is necessary to further the government's legitimate interests.'"[46] In affirming the validity of the government's interest,[47] Justice Kennedy alluded to the general tendency of "the criminal mind" to "exploit[]" technological innovations, as occurred with the railroad and the telephone.[48] He also echoed the lower courts' determinations that North Carolina has a legitimate interest in shielding children from sexual abuse.[49] This interest, however, was insufficient to justify the promulgation of a "complete bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture."[50]

To arrive at its holding, the majority made two assumptions. First, the Court presumed that the "broad wording"[51] of the ban reached, at the very least, core social media sites like Facebook, LinkedIn, and Twitter.[52] Second, the Court posited that, although not an issue before the Court, a "specific, narrowly tailored law[]" barring a sex offender from, for example, "contacting a minor or using a website to gather

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40 *Id.*
41 *Id.* (citing Reno v. ACLU, 521 U.S. 844, 868 (1997)).
42 *Id.* at 1736.
43 *See id.*; *see also id.* at 1739 (Alito, J., concurring in the judgment).
44 *Id.* at 1736 (majority opinion).
45 *Id.* (quoting McCullen v. Coakley, 134 S. Ct. 2518, 2534 (2014)).
46 *Id.* (quoting *McCullen*, 134 S. Ct. at 2535).
47 *See id.*
48 *Id.*
49 *Id.*
50 *Id.* at 1738.
51 *Id.* at 1736.
52 *Id.* at 1737.

information about a minor" would not violate the First Amendment.[53] But even given these narrowing assumptions, Justice Kennedy called the extent of the ban "unprecedented," finding it "instructive that no case or holding of this Court has approved of a statute as broad in its reach."[54] Social media, said the Court, provides the opportunity to access and share information "on any subject," thus offering "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[55] A statute ostracizing sex offenders from this "modern public square" — where they might learn about current events, view job postings, or merely "speak[] and listen[]" — must founder.[56]

Lastly, the majority made quick work of the state's invocation of *Burson v. Freeman*,[57] in which the Court upheld a ban on campaigning near the entrance of a polling place, by distinguishing the restrictions at issue in *Burson* as "far less onerous" than those exacted by the North Carolina statute.[58] Additionally, the ban in *Burson* curtailed freedom of speech so that the government might guard "another fundamental right — the right to vote."[59] Per the majority, *Board of Airport Commissioners v. Jews for Jesus, Inc.*[60] offered a more apt comparison. In that case, the Court invalidated an ordinance banning all First Amendment expression at Los Angeles International Airport.[61] The Court reasoned that since that ban was unconstitutional even in the limited scope of "a single airport," North Carolina's law could not stand.[62]

Writing separately, Justice Alito[63] concurred in the judgment but criticized the majority's "loose rhetoric."[64] While agreeing that the ban's "extraordinary breadth" rendered it unconstitutional, Justice Alito chided the Court for "its undisciplined dicta" — that is, its inability "to resist musings that seem to equate the entirety of the internet with public streets and parks."[65] Emphasizing the threat posed by "recidivist sex offenders,"[66] the concurrence feared that the majority's language swept unnecessarily broadly, prone to the interpretation "that the States are largely powerless" to keep sex offenders off of "teenage dating sites" and

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[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] 504 U.S. 191 (1992).
[58] *Packingham*, 137 S. Ct. at 1738.
[59] *Id.*
[60] 482 U.S. 569 (1987).
[61] *Packingham*, 137 S. Ct. at 1738.
[62] *Id.*
[63] Chief Justice Roberts and Justice Thomas joined the concurrence. Justice Gorsuch took no part in the consideration or decision of the case.
[64] *Packingham*, 137 S. Ct. at 1743 (Alito, J., concurring in the judgment).
[65] *Id.* at 1738.
[66] *Id.* at 1739.

similar social media.[67] In closing, Justice Alito lamented the Court's failure to "heed[] its own admonition of caution" with respect to retrofitting First Amendment precedents for the internet.[68] He implored the Court to "be more attentive to the implications of its rhetoric" likening social media — and potentially all of cyberspace — to public streets and parks.[69]

Although there is an appeal to concretizing the internet, and especially social media, as "the modern public square,"[70] Justice Alito's misgivings about "the implications of the Court's unnecessary rhetoric"[71] were well founded. While making for soaring prose, *Packingham*'s expansive language flung open a Pandora's box, unleashing complications related to the digitization of certain First Amendment precepts. Most notably, the Court's analogizing to public space suggested that the public forum doctrine — whereby the government protects expressive activity on property that it owns or controls — might extend to all or parts of the internet and social media. Specifically, the Court's rhetoric furthered a nascent theory expounded in recent litigation and scholarship: that government-administered Facebook pages and Twitter timelines constitute public fora. But in likening social media to quintessentially public spaces like streets, parks, and squares, the Court's language was crucially incomplete, in that it — like the aforementioned theory — glossed over the dual public and private nature of digital arenas. As one particularly glaring repercussion unloosed by *Packingham*, the public forum example illustrates how the Court's public space dicta foment confusion, inviting the application of such dicta beyond the factual context of *Packingham*.

With its analogies to public space, *Packingham* implicated the Court's public forum jurisprudence, even as such precedents fail to map neatly onto hybridized digital realms. Although the Court first used the term "public forum" in 1972,[72] its categorical approach to the public forum doctrine emerged over a decade later.[73] From then onward, the Court has distinguished among the rights appertaining to three categories of public fora: the traditional public forum, like a public street

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[67] *Id.* at 1738.

[68] *Id.* at 1744.

[69] *Id.* at 1743.

[70] *Id.* at 1737 (majority opinion) (noting that "[s]even in ten American adults use at least one Internet social networking service," *id.* at 1735); *see also* Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization, Mandatory Arbitration, and the Internet: Directing Law to Serve Human Needs*, 52 HARV. C.R.-C.L. L. REV. 145, 166 (2017) ("[T]he Internet substitutes for so many public squares and people increasingly take their self-expression, purchasing, and activities of assembly and association to digital environments.").

[71] *Packingham*, 137 S. Ct. at 1738 (Alito, J., concurring in the judgment).

[72] Police Dep't v. Mosley, 408 U.S. 92, 96 (1972).

[73] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–46 (1983).

or park, where the government's ability to restrict expressive activity is at its lowest ebb; the intermediate zone of the "designated" or "limited" public forum; and the "closed" or "nonpublic" forum, where government restrictions on expression garner considerable deference.[74] Although the Court has held that the public forum doctrine reaches "metaphysical" fora, such as a public university's student activities fund,[75] it has almost uniformly resisted extending the doctrine beyond "physical places or resources *owned or exclusively controlled by the government*."[76] But with its doggedly public-spatial rhetoric, *Packingham* now begs the question of whether the public forum doctrine can stretch to reach all or parts of privately owned social media platforms.

Recently, litigants and judges in federal district courts have marshaled *Packingham*'s brand of public space language to argue that government-administered social media accounts constitute public fora. Less than a month after *Packingham*, Columbia University's Knight First Amendment Institute, together with seven Twitter users who were blocked by the Trump Administration from the President's @realDonaldTrump account, filed suit in the Southern District of New York, claiming that the account is a designated public forum.[77] In language reminiscent of *Packingham*'s "modern public square," the complaint called the account "a kind of digital town hall,"[78] owing to the fact that, although created in 2009, the West Wing now uses the account "as a key channel for official communication."[79] Mere weeks after that suit commenced, the District Court for the Eastern District of Virginia held that a county official who banned an individual from her Facebook page violated the First Amendment, since the official's page — established for communication with constituents — was a public forum.[80] In reaching its holding, the court noted that the official had "open[ed] a digital space for the exchange of ideas and information," citing *Packingham*'s "compari[son of] social media to traditional public fora."[81] With its reading, the Eastern District hazarded the fairly radical — but not insupportable — proposition that *Packingham* not only sanctioned categorization of government-administered pages as designated public fora, but also signaled an expansion of the traditional public forum category, which the Court has heretofore refused to open

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[74] *See, e.g.*, Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1979–92 (2011).

[75] Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995).

[76] Lidsky, *supra* note 74, at 1994 (emphasis added).

[77] Complaint for Declaratory & Injunctive Relief at 16, Knight First Amendment Inst. at Columbia Univ. v. Trump, No. 1:17-cv-05205 (S.D.N.Y. July 11, 2017).

[78] *Id.*

[79] *Id.* at 2.

[80] Davison v. Loudoun Cty. Bd. of Supervisors, No. 1:16cv932, 2017 WL 3158389 (E.D. Va. July 25, 2017).

[81] *Id.* at *10.

to new fora like airports.[82] As both cases illustrate, *Packingham*'s public space language, in deemphasizing the private dimensions of cyberspace, elicits invocation of the public forum doctrine.

Commentators have also argued that government-administered social media profiles fit within the scope of the public forum doctrine.[83] Professor Lyrissa Lidsky contends that government ownership or exclusive control "is not a *sine qua non* of public forum status," and that "[j]ust as the government can rent a building to use as a forum for public debate and discussion, so, too, can it 'rent' a social media page for the promotion of public discussion."[84] Likewise, Amanda Shanor argues that "[d]etermining whether there are sufficient indicia of official use or control" to trigger the public forum doctrine "requires a more nuanced analysis" than merely "say[ing] as a categorical matter, 'the First Amendment doesn't apply to private companies like Twitter.'"[85] Both Lidsky and Shanor cite *Southeastern Promotions*, in which the Court treated as a public forum a privately owned theater leased long term to Chattanooga,[86] to support the claim that the absence of government ownership or exclusive control does not foreclose a court's finding of a public forum.

But such proposed (or, in the case of the Eastern District of Virginia, actualized) extensions of the public forum doctrine have failed to grapple with the government's somewhat tenuous control over these pages — a consequence of both their hybrid status as privately owned yet publicly administered, and the governance structure of online spaces. For example, neither Lidsky nor Shanor addresses the possibility that Chattanooga, as lessee of a private theater, exercised a considerably greater degree of control over that space than do government officials over their social media accounts; thus, while the former constitutes a public forum, perhaps the latter do not. Indeed, Lidsky shifts from discussing such private grants to public officials first as licenses and then

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[82] *See, e.g.*, David J. Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway (Where Are the Public Forums on the Information Superhighway?)*, 46 HASTINGS L.J. 335, 360–61 (1995). Goldstone observes that although "the Court has not demonstrated a willingness to find a traditional public forum by analogy," *id.* at 361, Justice Kennedy has at times "show[n] more of a willingness to draw analogies on a functional basis," *id.* at 361 n.119.

[83] *See, e.g.*, Eugene Volokh, *More on the First Amendment and @RealDonaldTrump*, WASH. POST: VOLOKH CONSPIRACY (June 14, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/14/more-on-the-first-amendment-and-realdonaldtrump/ [https://perma.cc/HBC9-5TNT]; Lidsky, *supra* note 74, at 1994–96.

[84] Lidsky, *supra* note 74, at 1996.

[85] Amanda Shanor, *The President's Twitter Account & the First Amendment*, TAKE CARE (June 12, 2017), https://takecareblog.com/blog/the-president-s-twitter-account-and-the-first-amendment [https://perma.cc/9R2B-BVTJ].

[86] Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 547 (1975); *see also id.* at 555 (describing said theater as a "public forum[] designed for and dedicated to expressive activities").

as leases — but without probing the differences therein or their ramifications for her public forum argument.[87] As Professor John Inazu explains, "the vast majority of speech on the Internet today occurs within private places and spaces that are owned and regulated by private entities . . . [that] exercise significant discretion to censor expression or terminate service altogether."[88] Similarly, Kate Klonick describes social media platforms like Facebook as active in moderating content posted by users, although the parameters of such censorship are "murky";[89] she notes that no major social media company has willingly disclosed its internal content moderation guidelines.[90] As such, private social media platforms maintain more ongoing control over others' use of their property than does a private theater's lessor, whose ability to interfere with a tenant's use of its property shrinks while the lease is in force.

In light of the control that private social media companies retain over government users' accounts, it is probable that Lidsky's first analogy — to a license — is more apt than her second, but also that such analogy is less likely to result in a court's finding of a public forum. In invoking *Southeastern Promotions* without interrogating the degree to which private actors share control over online spaces with — rather than transfer control to — public actors, commentators overlook a wrinkle that complicates the public forum doctrine's application to government-administered social media profiles. Likewise, *Packingham*'s suppression of the dual public and private nature of the internet and social media inheres in its persistent analogizing to quintessential public fora like parks and streets, instead of — as one observer suggests — comparison to more complex spaces like cities, which intermingle public and private zones.[91] Hence *Packingham*, too, fell prey to oversimplification in its use of spatially one-dimensional language.

Notwithstanding its own failure to promote a more nuanced or realistic understanding of online spaces, *Packingham* counseled "extreme caution" in confronting the relationship between the First Amendment and the internet. But as the concurrence feared, such warning will likely prove insufficient to forestall repurposing of the opinion's broad dicta in the public forum context. Indeed, Justice Kennedy's admonition evinced a concern not that the Court would too hastily extend First Amendment doctrines to the internet, but that the Court would provide

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87 Lidsky, *supra* note 74, at 1996.

88 John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093, 1128 (2013).

89 Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. (forthcoming 2018) (manuscript at 46), https://ssrn.com/abstract=2937985 [https://perma cc/7BX3-9VTV].

90 *Id.* (manuscript at 47).

91 Goldstone, *supra* note 82, at 337.

only "scant protection" for expressive activity online.[92] Moreover, the considerable "power of dictum in vertical precedents"[93] means that *Packingham*'s public space rhetoric will likely hold sway in lower courts. For example, a 2005 Fourth Circuit decision, in which the court dismissed a challenge to a public-school rule requiring recitation of the Pledge of Allegiance,[94] relied on dicta from a 2004 Supreme Court case, where the Court opined on the purposes of such rules before dismissing the First Amendment claim on standing grounds.[95] As lower courts there seized on the Court's broad statements in the absence of more direct guidance, they will likely similarly invoke *Packingham*'s public space dicta in resolving claims premised on the public forum doctrine.

Recalling the twenty-year gap between the Court's decisions in *Reno* and *Packingham*, one hopes that another two decades will not transpire before the Court again addresses the relationship between the First Amendment and the internet. As one particularly jarring reverberation of *Packingham*,[96] the public forum example demonstrates how the opinion's broad public space dicta invite use in contexts outside the factual confines of the case. For now, the uncertain scope of such rhetoric will likely beget litigation, and some government officials, fearful of legal liability, may forfeit social media as a tool for connecting with constituents[97] — an ironic result in light of *Packingham*'s celebration of the internet as a means of civic engagement. With *Packingham*'s analogy of social media to public — rather than dual public and private — space, the Court provoked confusion on whether all or parts of the internet fall within the public forum doctrine, but failed to resolve this looming question. Until it does, lower courts, litigants, government officials, and private social media companies — in addition to the seventy percent of American adults using online social networking[98] — will debate the extent to which cyberspace forms "the modern public square," in either its legal or colloquial sense.

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

93 BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 55 (2016).

94 *Id.* (citing Myers v. Loudoun Cty. Pub. Sch., 418 F.3d 395 (4th Cir. 2005)); *see also* Croft v. Perry, 624 F.3d 157, 164 (5th Cir. 2010) ("The closest case to deciding the issue . . . was resolved on standing grounds, but three [J]ustices would have upheld the pledge . . . . Although dicta, we do take such pronouncements from the Supreme Court seriously.").

95 GARNER ET AL., *supra* note 93, at 55 (citing Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004)).

96 In addition to its effect on the public forum doctrine, *Packingham*'s public space rhetoric could reinvigorate the argument that certain digital platforms qualify as state actors, pursuant to the exception to the state action doctrine in *Marsh v. Alabama*, 326 U.S. 501 (1946). Although courts previously rejected this claim, *see, e.g.*, Green v. Am. Online, 318 F.3d 465 (3d Cir. 2003), recent technological expansion, together with *Packingham*'s insistent public space language, could prompt reconsideration — yet another example of a consequence unloosed by *Packingham*. For a similar argument in favor of applying *Marsh* to virtual worlds, see Jason S. Zack, *The Ultimate Company Town: Wading in the Digital* Marsh *of Second Life*, 10 U. PA. J. CONST. L. 225, 227 (2007).

97 *See* Lidsky, *supra* note 74, at 1976–77.

98 *Packingham*, 137 S. Ct. at 1735.