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Reconsidering the Public Square

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Reconsidering the Public Square

Author : Helen Norton

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Mary Anne Franks, [Beyond the Public Square: Imagining Digital Democracy](#), 131 **Yale L.J. Forum** 427 (2021).

When (if ever) should we decline to apply longstanding First Amendment doctrine to technologies and practices unknown to, and unknowable by, the 20th-century Court that developed that doctrine? This question requires us to consider whether and when 21st-century expressive technologies are distinguishable from—or instead analogous to—older forms of expression in meaningful ways. As Genevieve Lakier [observed](#) in a related context, “analogies will prove useful only to the extent they are used thoughtfully, to illuminate the similarities and dissimilarities that matter for the purposes of the law.”

As courts and legislatures engage with such analogical questions with growing intensity, their high stakes become increasingly clear. Examples include the debate—[now before the Supreme Court](#)—as to whether social media platforms’ content moderation practices are (or are not) similar to the curatorial discretion exercised by newspaper editors, such that they do (or don’t) deserve the same First Amendment protections. So too are courts and policymakers now struggling with whether the products of artificial intelligence (including, but not limited to, chatGPT) are similar to or meaningfully different from human expression for First Amendment purposes (consider, for example, [here](#), [here](#), and [here](#)).

In *Beyond the Public Square: Imagining Digital Democracy*, Mary Anne Franks challenges efforts to analogize social media to the traditional public square as exemplified by the Athenian agora or New York’s Times Square. In so doing, she demonstrates the value of analytical rigor when evaluating analogies between speech environments old and new.

As a stepping-off point, Franks recalls the Supreme Court’s 2017 decision in [Packingham v. North Carolina](#). There the Court described social media as “the modern public square,” emphasizing that social media serve as “the principal sources for knowing current events” and “otherwise exploring the vast realms of human thought and knowledge.” Franks disputes this analogy as both misleading and misguided.

Franks first argues that this analogical claim is descriptively inaccurate. The public square as contemplated by the Court is a physical space that is open to the public and managed (if not owned) by the government. In contrast, social media platforms create speech environments that are virtual, operated for profit, and privately owned and controlled. Franks shows how these variations make for very different speech environments, each with distinct advantages and limitations.

Consider, for instance, how physical spaces—unlike virtual spaces—sometimes require us to encounter views we might otherwise avoid. As the Court itself observed in [McCullen v. Coakley](#) (just a few years before *Packingham*):

Even today, [public streets and sidewalks] remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the

page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There a listener often encounters speech he might otherwise tune out.

In this way, the public square's physicality creates expressive opportunities unavailable in virtual spaces.

To be sure, the converse is also sometimes true. As Franks recognizes, online (and often asynchronous) speech environments free participants from the restraints of physical space and time and thus enable them to communicate quickly and inexpensively. This means more speakers engaged in dialogue and contributing to the marketplace of ideas, with more ideas and information available to listeners. At the same time, however, social media platforms—and the cheap, speedy, and abundant speech they make possible—also create unprecedented opportunities for speakers to threaten, deceive, manipulate, troll, and otherwise undermine meaningful public discourse.

Consider next the different speech environments facilitated by spaces that are managed by the government as opposed to those instead controlled by private actors. Government actors, of course, are constrained by the First Amendment when they regulate speech in the spaces they control, including certain public squares. Social media platforms, like other private actors, are not. Instead, they have First Amendment rights of their own. That the platforms themselves are free from constitutional constraint means they are free to moderate the speech environments they create and control—ideally to improve democratic discourse—even though they're not constitutionally required to do so.

Indeed, private actors' ability to moderate content can improve the speech environment, even as we can and will disagree about when and how they should go about doing so. Franks thus asserts that "protecting free speech in a private forum requires the exact opposite of what it takes to protect free speech in a public forum: private actors must be allowed to exercise their free-speech rights to counter, ignore, or exclude speech as they see fit, even when state actors would be restrained from doing so."

Finally, think of the difference between speech environments that are—and are not—operated for profit. As Franks observes, "while social-media forums may feel like public spaces, and the companies that own them might exploit this perception to their advantage, their relationship to the public is fundamentally commercial and contractual." Social media platforms' primary objective is often to do whatever it takes to keep users online for as long as possible to spend more money and shed more data—see, for example, [here](#), [here](#), and [here](#).

For all these reasons, Franks counsels us to resist the descriptive claim that social media platforms are simply an updated version of the public square. The two are instead meaningfully different—each with their own distinct advantages and limitations—in ways that matter to their ability to facilitate, or instead frustrate, public discourse.

Franks next challenges the normative claim that the public square (at least as imagined by the Court) is something we should want to replicate without qualification. To be sure, many of the most iconic moments in our nation's history involve speech in this space. Think, as just one example, of the 1963 March on Washington for Jobs and Freedom and its culmination at the Lincoln Memorial. Like most histories, however, the history of the public square is complicated, and Franks reminds us of those complexities. As she recounts, this public square has too often excluded the less powerful—like women long relegated to the private sphere of home and family, like the unhoused and unemployed often removed from that square, like Black people denied entrance to that square by slavery, segregation, and more. For this reason, Franks writes: "[T]he public square, like all public spaces, has never been unregulated. It has always been *selectively* regulated, and in ways that tend to benefit more powerful

members of society at the expense of less powerful members.”

Indeed, Tabatha Abu El-Haj [has shown](#) how some of these regulatory dynamics have worsened with time. During the 18th and 19th centuries, she explains, “[p]olitical assemblages were considered ordinary uses of public places and one was not required to obtain permission from local authorities prior to engaging in street politics. Legal regulation was limited to responding to breaches of the peace.” In contrast, El-Haj writes, “today the state typically regulates all public assemblies, including those that are both peaceful and not inconvenient, before they occur, through permit requirements.”

So Franks questions First Amendment rhetoric’s largely celebratory history of the public square, observing instead that these spaces have not been equally open (much less welcoming) to all. Given these complexities, Franks closes by imagining where else we might identify, cultivate, and celebrate spaces that contribute to healthy democratic dialogue. She urges that we “craft[] law and policy to ensure that no single host or forum, or even single medium, dominates the shaping of public opinion,” with at least some of these spaces “designed for reflection instead of performativity; accessibility instead of exclusion; and intellectual curiosity, humility, and empathy.”

In so doing, Franks aspires to replicate [the curb-cut effect](#), where design choices intended to accommodate members of vulnerable groups turn out to benefit everyone. Just as those without mobility impairments—like parents with strollers, travelers with luggage, shoppers with carts, and runners with aching knees—prefer the curb cuts initially intended to support wheelchair users, so too does she hope that speech environments designed to accommodate those previously excluded will be more attractive to all. As an example, she suggests [MetaFilter](#), a blog that permits anyone to view the site’s content but requires users to register and pay a one-time five-dollar fee before posting content, with mandatory waiting periods between posts. In this way, MetaFilter designs a space to encourage expressive reflection rather than impulsiveness. As Julie Cohen [noted](#) in a related context, we need not “privilege design for automaticity and reflexive amplification.”

First Amendment law and rhetoric have long celebrated the public square as the physical embodiment of the marketplace of ideas. And in recent years, the Court has described social media in similar terms. But are the public square and social media really so parallel, much less laudatory? Franks asks us to consider these questions anew, and urges us to design and support a variety of other spaces—physical and otherwise—where democratic dialogue can thrive.

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