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PUBLIC FORUM 2.0

LYRISSA LIDSKY*

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INTRODUCTION

Imagine you are the mayor of Jonesville, Florida. You instruct your staff to set up a Facebook page to showcase a city-wide energy conservation initiative. Your staff dutifully sets up the page, titling it simply “City of Jonesville.” On the page, they post pictures of you and other city officials, together with a paragraph describing the new initiative. Almost as soon as the page goes online, local Democratic and Republican Party leaders begin a heated discussion in the comments section about whether global warming is a hoax. You immediately order the discussion removed on the grounds that it is not related to city business. You also order several other comments removed because they contain profanity and anti-Semitic hate speech. Are your actions constitutional?¹

This question ought to have an easy answer, but it does not.² The answer requires close examination of the U.S. Supreme Court’s public forum and government speech doctrines, both of which are lacking in coherence – to put it mildly.³ At one end of the spectrum, a government actor who creates a

¹ Another common hypothetical undoubtedly will involve a social media presence established by a state university or a department thereof, such as a law school.

² See discussion Part I *infra* regarding the uncertainty created by the Supreme Court’s public forum jurisprudence. The city of Redondo Beach, California recently cancelled its Facebook page after the City Attorney issued cautions about the First Amendment and open meetings law ramifications. See Debra Cassens Weiss, *California Town Abandons Facebook Page Amid Legal Concerns*, Posting to *Daily News*, A.B.A. J. (Aug. 24, 2010, 5:30 AM), http://www.abajournal.com/news/article/california_town_abandons_facebook_page_amid_legal_concerns.

³ For a sampling of the criticism of public forum doctrine, see, for example, ROBERT C. POST, *CONSTITUTIONAL DOMAINS* 199 (1995) (contending that the public forum doctrine is “virtually impermeable to common sense” and that it has received “nearly universal condemnation from commentators”), CASS SUNSTEIN, *REPUBLIC.COM* 53-54 (2001) (contending that the decline of physical public forums will decrease tolerance for different viewpoints), Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 *IOWA L. REV.* 1377, 1381 (2001) (describing “public forum analysis” as “an edifice now so riven with incoherence and fine distinctions that it is on the verge of collapse”), David S. Day, *The End of the Public Forum Doctrine*, 78 *IOWA L. REV.* 143, 186 (1992) (“The modern forum doctrine has proven difficult to apply with any internal consistency.”), C. Thomas Dienes, *The Trashing of the Public Forum: Problems in First*

purely informational Facebook page, such as a “We Love Jonesville” fan page,⁴ retains complete editorial control over that page.⁵ At the other end of the spectrum, a government actor who purposefully creates a completely open and interactive public forum, whether in real space or cyberspace, probably cedes all but the most limited forms of editorial control over that forum.⁶

Between the extremes of no interactivity and full interactivity, it is difficult to predict whether courts will label a government-sponsored social media presence a public forum or not. Indeed, this legal uncertainty has led at least some government actors to avoid social media use altogether.⁷ The chilling effect of legal uncertainty on government social media use is unfortunate, because the “in between” realm is where government actors should be encouraged to establish social media presences. Interactive social media have the potential to initiate public discourse among citizens who might otherwise never interact, as well as discourse between citizens and government.

Amendment Analysis, 55 GEO. WASH. L. REV. 109, 119-20 (1986) (criticizing the Court for deferring to the label the government gives to a forum to differentiate between public and nonpublic forums rather than adopting a clearer balancing standard), Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984), Steven G. Gey, *Reopening the Public Forum – From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535 (1998), Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1363 (2001), Calvin Massey, *Public Fora, Neutral Government, and the Prism of Property*, 50 HASTINGS L.J. 309, 309 (1999) (describing public forum doctrine as “a labyrinth of conflicting rules”), Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 88-99 (1987), Keith Werhan, *The Supreme Court’s Public Forum Doctrine and the Return of Formalism*, 7 CARDOZO L. REV. 335, 367-70 (1986), and Timothy Zick, *Clouds, Cameras, and Computers: The First Amendment and Networked Public Places*, 59 FLA. L. REV. 1, 24-26 (2007). Even Supreme Court Justices criticize public forum doctrine. See, e.g., *United States v. Kokinda*, 497 U.S. 720, 741 (1989) (Brennan, J., dissenting) (questioning whether public forum analysis “serves to obfuscate rather than clarify the issues at hand”).

⁴ See Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 920-27 (2010) (discussing government uses of social media).

⁵ For a discussion of government speech doctrine, see the seminal decision in *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 466-70 (2009). Presumably, legislatures could statutorily limit the executive’s ability to exercise editorial control in some instances.

⁶ For a discussion of why a Facebook page can be a public forum even though it is not owned or exclusively controlled by the government, see *infra* notes 130 and 139.

⁷ See *supra* note 2 and accompanying text (discussing the city of Redondo Beach’s abandonment of a Facebook page after the city attorney issued warnings about potential legal ramifications). In a perceptive article on government use of social media, attorney Bill Sherman gives a variety of examples of local governments curtailing social media usage due to legal uncertainty. Bill Sherman, *Your Mayor, Your “Friend”: Public Officials, Social Networking, and the Unmapped New Public Square*, 31 PACE L. REV. 95, 106-07 (2011). He states that some local governments “have gone so far as to bar public officials from social networks for fear of violating campaign finance, open meeting, freedom of information, and government ethics laws.” *Id.* at 95.

Moreover, interactive social media can foster citizens' First Amendment rights to speak, receive information, associate with fellow citizens, and petition government for redress of grievances.

First Amendment concerns aside, a purely informational Facebook page utterly misses the point of this type of social media. People flock to sites like Facebook because they allow interactive, spontaneous, and loosely structured communication. Citizens are less likely to seek out a government-sponsored social media presence that does not allow for this kind of engagement.⁸ Current doctrine, however, may deter government actors from establishing this type of interactive forum for fear they will lose the ability to convey their own messages or prevent the forum from being "hijacked" by abusive speakers. To overcome this problem, what is needed is a clearly delineated middle ground between the all-or-nothing choices forced on government actors by current First Amendment doctrines.

That said, the first goal of this Article is a pragmatic one, namely to provide guidance for government actors who wish to use social media by navigating the doctrinal morass that is the Supreme Court's public forum and government speech jurisprudence.⁹ Thus, in Part I, this Article gleans from Supreme Court doctrine the paltry guidance available as to what factors transform a government actor's Facebook page into a public forum. Then, Part I explains what the "public forum" designation means for the regulation of speech within social media.

The second goal of this Article is more ambitious. It seeks to recalibrate public forum doctrine to support what scholar Mark Yudof has called "a continuous process of consultation"¹⁰ between citizens and their governments. Part II, therefore, examines the benefits to governments and citizens that might flow from enhanced government social media usage. Part III then outlines both the doctrinal and conceptual flaws that prevent the realization of optimal social media policy. Doctrinally, the Supreme Court's jurisprudence assumes that either the government is speaking or citizens are speaking, but it ignores

⁸ See Jason Baumgarten & Michael Chui, *E-government 2.0*, 4 MCKINSEY Q. 26, 30 (2009) (arguing that government actors must "shift from a 'publishing' to a 'sharing' mindset – one that embraces user participation" in order to maximize the potential of e-governance initiatives), available at http://www.mckinseyquarterly.com/E-government_20_2408.

⁹ With little guidance from the Supreme Court, lower courts have developed an assortment of unpredictable multi-factor tests to decide whether the government has or has not established a public forum and, if so, what kind. Lilia Lim, *Four-Factor Disaster: Courts Should Abandon the Circuit Test for Distinguishing Government Speech from Private Speech*, 83 WASH. L. REV. 569, 585 (2008) (describing one public forum test used by several federal courts as "inherently nebulous and susceptible to manipulation"). This phenomenon is troubling from a jurisprudential standpoint, but it is also troubling to anyone who values vibrant public discourse.

¹⁰ MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* 178 (1983).

the possibility that the two could be engaged in a mutually beneficial two-way communication or conversation. Current doctrine also gives too much deference to the government's desire to control its "property" and ignores the important role government plays in configuring communication spaces in ways that either foster or inhibit public discourse.¹¹ These flaws stem from the Supreme Court's more fundamental conceptual error: its reliance on a linear model of government-citizen communication.

Borrowing from communications theory, Part III advances the final goal of this Article, urging the Supreme Court to embrace an interactive model of government-citizen discourse that is both more sophisticated than the outmoded linear model currently underpinning its jurisprudence and also more consonant with democratic theory. Under that model, government actors should be *presumed* to have created a designated public forum any time they establish a presence on an *interactive* social medium such as Facebook. In order to encourage government actors to opt for interactive forums, however, they must be given sufficient editorial discretion to filter their social media sites to remove profanity, defamatory, or abusive speech designed to detract from the forum's goal of fostering public discourse. Although some will no doubt contend that ceding more editorial control in an internet forum is no more necessary than in a physical forum, the unique nature of internet discourse, and particularly the prevalence of anonymous speech, justifies ceding more editorial control in this venue.

I. CATEGORY CONFUSION: THE PUBLIC FORUM AND GOVERNMENT SPEECH DOCTRINE

Although the Supreme Court recognized a right to speak on public property in 1939,¹² it only recognized the "public forum" as a legal category in 1972.¹³

¹¹ See Day, *supra* note 3 at 187.

¹² *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 518 (1939) (holding a ban on meetings in public places to be unconstitutional).

¹³ The term was first used in *Police Department of Chicago v. Mosley*, a case in which the Court struck down an ordinance prohibiting picketing on a public way within 150 feet of a school because it contained a content-based exemption for "peaceful picketing of any school involved in a labor dispute." 408 U.S. 92, 93 (1972). The Court stated, "Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone." *Id.* at 96. On the same day, the Court decided another case in which it found a noisy demonstration near a school incompatible with the school environment. *Grayned v. City of Rockford*, 408 U.S. 104, 120 (1972). The term appeared first in Harry Kalven's 1965 article, *The Concept of the Public Forum: Cox v. Louisiana*, in which he found "the concept of the public forum implicit" in extant Supreme Court cases. 1965 SUP. CT. REV. 1, 3; see also ROBERT POST, *CONSTITUTIONAL DOMAINS* 205 (1995) ("In 1972 the Supreme Court, explicitly acknowledging its debt to Kalven, began to use the phrase 'public forum' as a term of art."); Kenneth L. Karst, *Public Enterprise and Public Forum: A Comment on Southern Productions, Ltd. v. Conrad*, 37 OHIO ST. L.J. 247, 248 n.7 (suggesting public forum doctrine was influenced by Kalven's article).

Since then, the Supreme Court has developed a “complex maze of categories and subcategories”¹⁴ to determine whether a government restriction on expressive use of a government place or resource is subject to strict or lax constitutional scrutiny. The constitutional category often determines the outcome of cases,¹⁵ so one might naturally expect the lines between categories to be sharply drawn. Instead, blurred lines between limited public forums and nonpublic forums and between government speech and private speech create category confusion.¹⁶ This doctrinal incoherence frustrates any lawyer attempting to advise government actors about how to design a social media presence.¹⁷ Incoherent law also invites future litigation, which will force courts to grapple with applying the maze of categories to the many conceivable variants of government social media presences or sites.¹⁸

A. *The “Maze of Categories”*

The starting point for examining modern public forum doctrine is *Perry Education Ass’n v. Perry Local Educators’ Ass’n*.¹⁹ *Perry* involved a union seeking to communicate with teachers via a school mail system.²⁰ The school already had granted access to a competing union, ostensibly based on that union’s status as the teachers’ exclusive collective bargaining representative in the district.²¹ The Supreme Court determined by a five-to-four decision that the school had not designated its internal mail system as a public forum,²² and the Court therefore upheld the school’s grant of preferential access to the

¹⁴ MELVILLE B. NIMMER, NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE THEORY OF THE FIRST AMENDMENT § 409[d], at 4-70 (2d ed. 1984). The imposition of categories on different types of public forums began in *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983). See Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140, 2141 (2009) [hereinafter *Strict Scrutiny*] (“[E]ver since the first formal categorization of the three types of fora . . . courts and commentators alike have attacked forum analysis as an excessively semantic and complex judicial invention that supplants a sensible balancing approach with myriad irrelevant categorizations.”).

¹⁵ See Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 368 (2009) (explaining that classification of speech “becomes a crucial question – often *the* crucial question – in deciding . . . speech cases.”).

¹⁶ See *supra* note 14 and accompanying text.

¹⁷ The tests for determining whether the speech at issue is the government’s are also by no means clear. For more information, see the discussion at note 149 *infra* and its accompanying text.

¹⁸ See *Strict Scrutiny*, *supra* note 14, at 2141. (“As public speech shifts from traditional locations such as streets and parks to harder-to-define realms such as the internet, the need for a flexible and finely tuned doctrine to balance free expression with the government’s reasonable need to regulate becomes even more pressing.”).

¹⁹ 460 U.S. 37 (1983).

²⁰ *Id.* at 41.

²¹ *Id.* at 39.

²² *Id.* at 46.

incumbent teachers' union as "reasonable"²³ and viewpoint neutral. Along the way, however, the Court attempted to impose order on public forum doctrine by delineating various forum categories.²⁴

1. The Traditional Public Forum

The first category is the "quintessential"²⁵ or traditional public forum. The traditional public forum is a public street,²⁶ park,²⁷ or sidewalk.²⁸ In other words, it is a piece of physical property owned or controlled by the government²⁹ that has "by long tradition or by government fiat" been "devoted

²³ *Id.* at 50. The dissenting Justices contended that the school district engaged in viewpoint discrimination by excluding the competing union. *Id.* at 64-65 (Brennan, J., dissenting).

²⁴ See Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299, 303 (2009) ("Not until 1983 in the *Perry* decision, did the Court attempt to impose structure and clarity upon th[e] body of case law involving access by speakers to non-traditional governmentally controlled fora."). In *Perry* the Court recognized the traditional public forum, the designated public forum, and the nonpublic forum. 460 U.S. 37, 45-46 (1983). The Court recognized that a state might make a designated public forum "generally open to the public," *id.* at 45, or open only "for a limited purpose such as use by certain groups, . . . or for the discussion of certain subjects . . ." *Id.* at 45 n.7. In the Court's most recent public forum doctrine decision, the Court refers to only three categories of public forums: traditional, designated, and limited and never mentions the "nonpublic forum," making it unclear whether it remains a separate category or whether it has been subsumed in the limited public forum. *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2984 n.11 (2010); see also, e.g., *Ark. Educ. Television Comm'n v. Forbes*, 532 U.S. 666, 677 (1998) (describing the public forum categories as including traditional public forums, designated public forums opened to either "part or all of the public," and nonpublic forums).

²⁵ *Frisby v. Schultz*, 487 U.S. 474, 480 (1988); *Perry*, 460 U.S. at 45.

²⁶ See, e.g., *Jamison v. Texas*, 318 U.S. 413, 417 (1943) (reversing conviction for handing out literature on public street).

²⁷ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). But see *Pleasant Grove City, Utah v. Summum*, 129 S. Ct. 1125, 1129 (2009) (holding that placement of permanent monuments in public parks is "government speech and is therefore not subject to scrutiny under the Free Speech Clause").

²⁸ See *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 377 (1997) (asserting that sidewalks are a "prototypical" public forum); *Boos v. Barry*, 485 U.S. 312, 318 (1988) (observing that "public streets and sidewalks [are] traditional public fora"); *United States v. Grace*, 461 U.S. 171, 183 (1983) (holding that sidewalks outside courthouse were public forums). But see *Int'l Soc'y for Krishna Consciousness v. Lee*, 505 U.S. 672, 679 (1992) (holding that walkways in an airport terminal are not traditional or designated public forums but also holding that leafleting was nonetheless permitted); *United States v. Kokinda*, 497 U.S. 720, 722-23, 738 (1990) (splitting four to four on whether a sidewalk connecting a parking lot to a U.S. Post Office was a public forum, with the ninth, Justice Kennedy, stating that it was unnecessary to address the issue because the restrictions imposed by the Post Office on solicitation were valid time, place and manner restrictions).

²⁹ See *Perry*, 460 U.S. at 44 (defining the case as involving a claim of a "right of access

to assembly and debate.”³⁰ The definition of the traditional public forum is drawn from dicta in the 1939 case of *Hague v. Committee for Industrial Organization*: “Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”³¹ Indeed, reflecting the origin of public forum doctrine in the physical realm, some have described the public forum doctrine as recognizing an “easement” for speech by citizens on government property.³²

In recognition of the vital role that traditional public forums play as loci for public discussion, debate, and protest, the Supreme Court has held that a state may not close the forum or enforce content-based restrictions on speech there unless the restriction is “necessary to achieve a compelling state interest and . . . narrowly drawn to achieve that end.”³³ Content-neutral “time, place, and manner” restrictions are permissible, but only if they are “narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication.”³⁴

The traditional public forum is “defined by the objective characteristics of the property”³⁵ and is one of the easiest public forum categories to apply, but only because the Supreme Court has defined its boundaries so narrowly that it leaves little room for expansion to “new” forums such as those created in

to *public property*”) (emphasis added); *Grayned v. City of Rockford*, 408 U.S.104, 118 (1972). Early cases analogized public property to private property and gave government full rights to exclude citizens at will. See *Commonwealth v. Davis*, 39 N.E. 113, 113 (Mass. 1895) (“[T]o forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for an owner of a private house to forbid it in his house.”), *aff’d*, 167 U.S. 43 (1897). The Supreme Court rejected this approach in *Hague*, 307 U.S at 516 (striking down an ordinance requiring speakers to obtain a permit to engage in public assembly or parades on the grounds that it allowed for arbitrary suppression of speech). The Court did not use the term “public forum” to describe these types of cases until 1972. See *supra* note 13.

³⁰ See *Perry*, 460 U.S. at 45.

³¹ *Hague*, 307 U.S. at 515.

³² *Kalven*, *supra* note 13, at 13.

³³ *Perry*, 460 U.S. at 45.

³⁴ *Id.* The “crucial question” in assessing time, place, and manner restrictions is “whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.” *Grayned*, 408 U.S. at 116. As formulated, the test for judging time, place, and manner restrictions sounds fairly stringent. Dan Farber has pointed out, however, that in application, “the Court’s review of time, place, and manner restrictions normally is not particularly vigorous.” DANIEL FARBER, *THE FIRST AMENDMENT* 181-82 (2d ed. 2003); see also Ronald Krotoszynski, Jr. & Clint Carpenter, *The Return of Seditious Libel*, 55 UCLA L. REV. 1239, 1260 (2008) (observing that the courts are treating the Supreme Court’s criteria for time, place, and manner restrictions as “mere speed bumps along the path to suppression of even core political speech”).

³⁵ *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998).

cyberspace.³⁶ Traditional public forums arise “by long tradition or by government fiat.”³⁷ While obviously no forum in cyberspace can possibly be a product of “long tradition,” one might assume that governmental “fiat” could turn a Facebook page into a traditional public forum. The Supreme Court, however, has signaled clearly that the category is defined by the historical use of government property,³⁸ which for all practical purposes means that the category is closed to new places or spaces.³⁹

2. The Designated (Open) Public Forum

Even with the first category closed, speakers using government-sponsored social media could still receive stringent First Amendment protection, but only if the site is determined to be a designated public forum.⁴⁰ The designated public forum is a vexed First Amendment category⁴¹ thanks to an ambiguous footnote in the Supreme Court’s *Perry* decision.⁴² The designated public

³⁶ See *id.* at 678 (“The Court has rejected the view that traditional public forum status extends beyond its historic confines.”).

³⁷ *Perry*, 460 U.S. at 45.

³⁸ See *Forbes*, 523 U.S. at 678.

³⁹ See *Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680 (1992) (holding that airports are not public forums because, given the “lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having ‘immemorially . . . time out of mind’ been held in the public trust and used for purposes of expressive activity”); *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (holding that a sidewalk providing access to a Postal Service parking lot was not a traditional public forum).

⁴⁰ See, e.g., *Pleasant Grove City, Utah, v. Summum*, 129 S. Ct. 1125, 1132 (2009) (“Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum.”). One key difference between a traditional public forum and a designated public forum is that a state may not close a traditional public forum absent a compelling interest, whereas the state “is not required to indefinitely retain the open character” of the designated public forum. *Perry*, 460 U.S. at 46. As in the traditional public forum, “[r]easonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.” *Id.*

⁴¹ See Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 77 (2004) (demonstrating that the limited public forum category has caused confusion in the lower courts).

⁴² *Perry*, 460 U.S. at 45, 46 n.7 (attempting to clarify the definition of the supposed second category of public forum identified by observing that “[a] public forum may be created for a limited purpose”); see also Robert L. Waring, *Wide Awake or Half-Asleep? Revelations from Jurisprudential Tailings Found in Rosenberger v. University of Virginia*, 17 N. ILL. U. L. REV. 223, 242 (1997) (calling the *Perry* footnote the “Achilles heel” of limited public forum doctrine). The Court had previously referred to the concept of limited public forum in *Widmar v. Vincent*, which held that it was unconstitutional for a state university to exclude students in a religious club from using facilities it had opened to other

forum “consists of public property which the state has opened for use by the public as a place for expressive activity.”⁴³ Courts will not find a designated public forum absent a clear indication of government intent to open the forum,⁴⁴ though such intent can be determined in part based on “policy and practice” and whether the property is of a type compatible with expressive activity.⁴⁵ The government may either open a “designated” forum to the public as a whole, in which case it operates no differently from the traditional public forum,⁴⁶ or it may establish a designated but “limited” public forum.⁴⁷ The limited public forum is the third forum category and where, doctrinally, things start to get messy.⁴⁸

3. The Limited Public Forum

The “limited” public forum,⁴⁹ as defined in an ambiguous footnote in *Perry*, is “designated” or “created” by the government, but only “for a limited purpose such as use by certain groups, . . . or for the discussion of certain subjects.”⁵⁰ In other words, the government may engage in *some* types of content-based discrimination to define the (limited) range of subjects to be discussed in the forum and to preserve those limits once established.⁵¹ For example, a

student groups. 454 U.S. 263, 277 (1981). Having created a forum for use by students, the university was required to show the exclusion of a religious club was “necessary to serve a compelling state interest.” *Id.* at 270.

⁴³ *Perry*, 460 U.S. at 45.

⁴⁴ For criticism of the focus on government intent, see Day, *supra* note 3, at 187.

⁴⁵ *Comelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 802-03 (1984) (finding that courts may look to whether the property was “designed for and dedicated to expressive activities”).

⁴⁶ The only constitutional difference is that a state can close a designated (open) public forum completely if it wishes. See *Perry*, 460 U.S. at 46 (“Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum. Reasonable time, place, and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.”).

⁴⁷ *Id.* at 46 n.7.

⁴⁸ See *Strict Scrutiny*, *supra* note 14, at 2142 (“[I]t is unclear whether there is a single middle forum category, several subcategories, or whether a forum can be designated one way for one class of speakers and another way for others.”).

⁴⁹ The term first appeared in *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, which involved a regulation that banned distributing leaflets at a state fair except at pre-assigned booths. 452 U.S. 640, 655 (1981).

⁵⁰ *Perry*, 460 U.S. at 46 n.7.

⁵¹ See Matthew D. McGill, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 STAN. L. REV. 929, 931 (2000) (criticizing the limited public forum doctrine on the grounds that “within a limited public forum it is impossible for one to differentiate between a presumptively invalid content-based restriction on speech and a legitimate adjustment of the content parameters that define the forum”).

university can limit a public forum it establishes for use by student groups, and a school district can limit a public forum to the discussion of a particular topic, such as school board business.⁵²

Both the State's establishment and its application of content parameters in the limited public forum must be reasonable and viewpoint neutral.⁵³ In *Christian Legal Society Chapter of the University of California v. Martinez*,⁵⁴ the Supreme Court articulated the constitutional standards governing the establishment of content parameters for the limited public forum.⁵⁵ In *Martinez*, the Court held by a five-to-four decision that a state law school may condition funding of a student organization on its willingness "to open eligibility for membership and leadership to all students."⁵⁶ The "forum" in question was a student organization program established by Hastings College of the Law, which set the forum parameters to include only student organizations that complied with a "nondiscrimination policy."⁵⁷ The law school interpreted the nondiscrimination policy as requiring student organizations to open themselves to "all comers."⁵⁸ In other words, student organizations had to allow any Hastings student "to participate, become a member, or seek leadership positions in the organization, regardless of . . . status or beliefs."⁵⁹ The Christian Legal Society refused to adopt an all-comers policy, instead restricting membership to students who agreed that they believed in Jesus Christ and would eschew homosexual conduct.⁶⁰ Hastings therefore denied it funding and other privileges normally accorded to registered student organizations.⁶¹ The Christian Legal Society sued, claiming violation of its rights to freedom of association and expression.⁶²

On appeal, the Supreme Court majority treated the issue as involving solely the constitutionality of the law school's all-comers policy as a restriction on

⁵² *Perry*, 460 U.S. at 46 n.7 (citing *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (striking down a university's exclusion of religious groups from facilities opened to all other student groups); *City of Madison Joint Sch. Dist. v. Wis. Pub. Emp'l Relations Comm'n*, 429 U.S. 167, 175 n.8 (1976)).

⁵³ *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2984 (2010).

⁵⁴ 130 S. Ct. 2971 (2010).

⁵⁵ *Id.* at 2984 (holding that reasonableness and viewpoint neutrality are the constitutional standards). For an illustration of the application of those parameters, see the discussion of *Rosenberger v. Rectors & Visitors of the University of Virginia*, *infra* notes 71-87 and accompanying text.

⁵⁶ *Martinez*, 130 S. Ct. at 2978.

⁵⁷ *Id.* at 2979. The eligible organization also had to be non-commercial. *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.* (internal quotations omitted).

⁶⁰ *Id.* at 2980.

⁶¹ *Id.* at 2981.

⁶² *Id.*

forum parameters.⁶³ The Court stated the constitutional standard as follows: "Any access barrier must be reasonable and viewpoint neutral."⁶⁴ Applying this standard, the Court found the all-comers policy constitutional.⁶⁵ The Court first stated that "extracurricular programs are, today, essential parts of the education process" and then observed that "Hastings' decisions about the character of its student-group program are due decent respect,"⁶⁶ in light of its expertise in making educational policy choices.

Hastings justified its all-comers policy on a variety of grounds. For example, the law school asserted that the policy ensured that the "leadership, educational, and social opportunities afforded by" participation in student organizations were equally available to all students.⁶⁷ The Court found this justification was reasonable in light of the educational purpose of the student organizations forum.⁶⁸ The Court also found the all-comers policy to be viewpoint neutral because it required "all student groups to accept all comers."⁶⁹ Even if the policy had a greater effect on religious student organizations, the target of the all-comers policy was the discriminatory conduct of religious organizations rather than their religious perspective.⁷⁰

Martinez illustrates the constitutional rules applicable to a state's establishment of a limited public forum. Another five-to-four decision, *Rosenberger v. Rector & Visitors of the University of Virginia*, illustrates the standards that govern a state's application of its forum parameters.⁷¹ *Rosenberger* involved a Christian student group at the University of Virginia

⁶³ *Id.* at 2984. The dissent, on the other hand, questioned whether Hastings Law School even had an all-comers policy at the time CLS was denied recognition. *Id.* at 3005 (Alito, J., dissenting). The dissent contended that "there is strong evidence that Hastings abruptly shifted from the Nondiscrimination Policy to the accept-all-comers policy as a pretext for viewpoint discrimination." *Id.* at 3009 n.2.

⁶⁴ *Id.* at 2984 (majority opinion). The Court majority refused to treat this as a case involving forced or compelled association because the Christian Legal Society, "in seeking what is effectively a state subsidy, faces only indirect pressure to modify its membership policies; CLS may exclude any person for any reason if it forgoes the benefits of official recognition." *Id.* at 2986.

⁶⁵ *Id.* at 2995.

⁶⁶ *Id.* at 2989.

⁶⁷ Press Release, University of California Hastings College of the Law, U.S. Supreme Court Affirms University of California Hastings' Policy in Christian Legal Society v. Martinez, et al. Decision (June 28, 2010), available at <http://www.uchastings.edu/news/docs/clsvmartinez-release-6-28.pdf>.

⁶⁸ *Martinez*, 130 S. Ct. at 2990. The Court also found that CLS has "substantial alternative channels," some extended by the law school itself, to get its message out. *Id.* at 2991.

⁶⁹ *Id.* at 2993.

⁷⁰ *Id.* at 2994.

⁷¹ *Rosenberger v. Rectors and Visitors of Univ. of Va.*, 515 U.S. 819, 828-37 (1995).

that published a “magazine of philosophical and religious expression.”⁷² The University refused to grant the group access to a fund maintained to support student activities “related to the educational purpose of the University,”⁷³ including publishing, because the group’s purpose was to “promote[] or manifest[] a particular belief in or about a deity or an ultimate reality.”⁷⁴ The Court determined that the University had created a limited public forum, despite the fact that the student activities fund “[wa]s a forum more in a metaphysical than in a spatial or geographic sense.”⁷⁵ The Court then held that the University of Virginia could not limit its public forum in a way that excluded a student organization based on its religious purpose.⁷⁶

In the course of reaching this conclusion, the Court indicated that “[o]nce [the State] has opened a limited forum, . . . [it] must respect the lawful boundaries it has itself set. The State may not exclude where its distinction is not ‘reasonable in light of the purpose served by the forum.’”⁷⁷ One might assume that a constitutional standard that demands only that the government act in a reasonable, viewpoint-neutral way in applying its forum parameters gives the government *carte blanche* to exclude speakers based on subject matter. And, indeed, some have criticized *Rosenberger* and its progeny for watering down the stringent protections normally accorded to speakers in

⁷² *Id.* at 825-26.

⁷³ *Id.* at 824 (internal quotation marks omitted).

⁷⁴ *Id.* at 827 (internal quotation marks omitted).

⁷⁵ *Id.* at 830.

⁷⁶ *Id.* at 845.

⁷⁷ *Id.* at 829 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)). The cases *Rosenberger* cites for this proposition deal with the “nonpublic forum” category. *See, e.g., Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (“[T]he state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.” (citing *U.S. Postal Serv. v. Greenburgh Civic Ass’ns*, 453 U.S. 114, 131 n.7 (1981))). The Court, however, subsequently reiterated that within the limited public forum reasonable, viewpoint neutral restrictions are permissible. *Summum v. Pleasant Grove City, Utah*, 129 S. Ct. 1125, 1132 (2009); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) (“If the forum is a traditional or open public forum, the State’s restrictions on speech are subject to stricter scrutiny than are restrictions in a limited public forum.”) Note, however, that the Court is referring to the subject matter parameters of the forum rather than the parameters set based on speaker identity. The Court has clearly stated, “If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny.” *Ark. Educ. Television Co. v. Forbes* 523 U.S. 666, 677 (1988). The Court has never explained why the State gets less deference in applying speaker identity criteria than applying subject matter criteria. It may be that speaker identity criteria are more objective – either a person is a registered student or he is not – and thus any discrimination against a speaker who falls within the criterion is more likely to reflect the State’s intent to suppress the speaker’s viewpoint or even to violate his right to equal protection.

public forums to mere reasonableness.⁷⁸ In *Rosenberger*, however, the University of Virginia received no deference in applying its “educational purpose” criteria.⁷⁹ This was not because the Court found either the establishment or the application of the criteria unreasonable but because it found that the application was not viewpoint neutral.⁸⁰ The Court reached the conclusion that the University was discriminating on the basis of viewpoint, even though the limited public forum it created appeared to exclude payments on behalf of student groups of all religious persuasions, even atheist.⁸¹ The University argued that it was engaging merely in content-based discrimination designed to preserve the limited purpose of the forum.⁸² Nevertheless, the Supreme Court stretched to find viewpoint discrimination because the University permitted discussion of religion per se in the forum but not discussion of general topics from a religious “perspective.”⁸³ Hence, “[t]he prohibited perspective, not the general subject matter,”⁸⁴ resulted in the denial of access to the limited public forum. The Court further stated that the “exclusion of several views on [a] problem is just as offensive to the First Amendment as only one.”⁸⁵ To the Court, the problem with the University’s exclusion of religious perspectives was that it “skewed” public debate.⁸⁶ This definition blurs the line between viewpoint and content neutrality, suggesting the Court might scrutinize a government’s establishment or application of content parameters in a limited public forum more strictly than the “reasonableness” language might at first suggest.⁸⁷

Where, then, does this leave the lower courts? Frankly, it leaves them “confused.”⁸⁸ It might therefore be helpful to summarize what can and what cannot be said for sure about the limited public forum category. When the

⁷⁸ See, e.g., *Strict Scrutiny*, *supra* note 14, at 2148-49.

⁷⁹ *Rosenberger*, 515 U.S. at 819.

⁸⁰ *Id.* at 820; see also *Good News Club*, 533 U.S. 98 at 107 (finding that because a public school’s exclusion of religious speech from its limited public forum was “viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum”). The *Rosenberger* decision might have been more coherent if the Court had simply held that the University was unreasonable in determining that educational purposes and religious purposes were at odds.

⁸¹ *Rosenberger*, 515 U.S. at 831.

⁸² *Id.* at 833.

⁸³ *Id.* at 831.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 832.

⁸⁷ One commentator remarks that among lower courts “[a] common means of avoiding the implications of finding that speech falls within the hazy middle [limited public] forum is for courts to find that exclusion of the speaker from the forum is viewpoint discriminatory.” *Strict Scrutiny*, *supra* note 14, at 2151 (citing examples).

⁸⁸ *Id.* at 2150 (explaining that circuit courts struggle to determine the distinction between designated and limited public forum, as well as what standard should apply in each case).

State decides to open a public forum but limits it to certain speakers and topics, the State's establishment of forum parameters is constitutional, so long as the parameters are reasonable and viewpoint neutral.⁸⁹ When the State applies the forum criteria and excludes a speaker based on the subject matter of his speech, the exclusion need only be "reasonable in light of the purposes served by the forum"⁹⁰ and viewpoint neutral, though there is some indication that the Court may be especially stringent in examining viewpoint neutrality if religious viewpoints are involved.⁹¹ Finally, when a State opens a public forum but excludes a speaker whose speech obviously falls within the subject matter constraints of the forum, the exclusion is subject to strict scrutiny.⁹²

4. The Nonpublic Forum

The remaining forum category is the nonpublic forum, which the Court has defined as property owned or controlled by the government, "which is not by tradition or designation a forum for public communication."⁹³ In other words, the nonpublic forum is the default category. Governments have broad powers to control speech in nonpublic forums. Time, place, and manner restrictions are permissible, and the State may exclude a speaker from a forum, even if its purpose is communicative, as long as exclusion is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."⁹⁴ The Supreme Court explained, "Implicit in the concept of the nonpublic form is the right to make distinctions in access."⁹⁵ In a nonpublic forum the State has rights similar to those of a private property owner to "preserve the property under its control for the use to which it is lawfully dedicated."⁹⁶ In practical effect, a determination that a forum is "nonpublic"

⁸⁹ *Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2984 (2010).

⁹⁰ *Rosenberger*, 515 U.S. at 829 (internal quotation marks omitted) (citing *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 806 (1984)).

⁹¹ *See id.* at 832.

⁹² *Ark. Educ. Television Co. v. Forbes*, 523 U.S. 666, 677 (1988) ("If the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny."). Therefore, if the State opens up a forum for students to discuss "environmental issues," any exclusion of a student who is clearly discussing an environmental issue presumably is subject to strict scrutiny, but exclusion of the student because his topic is not truly an "environmental issue" is subject to only a reasonableness standard. Mark Tushnet explains that this standard does not necessarily mean that the State must automatically admit all speakers who fall within the forum category, even when funds or resources are scarce; rather, the concern when the State discriminates among speakers who fall within established forum criteria is "whether awards within the eligible group are made on an 'objective' basis." Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L.J.* 1225, 1248-49 (1999).

⁹³ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983).

⁹⁴ *Id.*

⁹⁵ *Id.* at 49.

⁹⁶ *United States v. Grace*, 461 U.S. 171, 177 (1983) (internal quotation marks omitted)

will almost always result in deference to the discretion of the government actor in deciding who may speak and what shall be discussed.⁹⁷

The line between the designated "limited" public forum and the nonpublic forum is maddeningly slippery, and some would even say non-existent, notwithstanding their linguistically opposed labels. To see why, it is important to look again at *Perry* and its progeny. In *Perry*, the Supreme Court determined that teacher mailboxes to which a union sought access were not a public forum, despite the fact that the school had allowed a variety of private speakers and groups, including a rival union, to use them.⁹⁸ The Court emphasized that the "mail system, *at least by policy*, is not held open to the general public."⁹⁹ The Court conceded that a "practice" of permitting "indiscriminate use by the general public" might create a public forum but found that permission in this instance was granted by each building principal on a case-by-case basis to groups such as the Cub Scouts and the YMCA.¹⁰⁰ "This type of selective access does not transform government property into a public forum."¹⁰¹

Moreover, the Court stated, even if the school district's practices had created a limited forum for "organizations that engage in activities of interest and educational relevance to students," they had not created a forum "open to an organization such as PLEA [the union], which is concerned with the terms and conditions of teacher employment."¹⁰² The Court thus allowed the State to define narrowly the permissible topics of discussion within the (limited) forum to those it deemed of "educational" relevance and to to exclude the union based on the content of its speech.¹⁰³ The Court also rejected the argument that the school district was discriminating based on viewpoint in allowing one union access and not the other, finding instead that the discrimination was based on whether the union had the *status* of bargaining representative for the teachers and therefore was a participant in the "official business" of a school in the district.¹⁰⁴ When one compares the great deference given the school district in *Perry* in defining forum parameters with the limited deference given the University in *Rosenberger*, one might be tempted to contend that the cases

(citing *Adderley v. Florida*, 385 U.S. 39, 47 (1966)).

⁹⁷ As Professor Robert Post has written, the Court has used the nonpublic forum to "demarcate a class of government property in which the first amendment claims of the public are radically devalued and immune from independent judicial scrutiny." Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1766 (1987).

⁹⁸ *Perry*, 460 U.S. at 47.

⁹⁹ *Id.* (emphasis added).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 48.

¹⁰³ *See id.* at 49.

¹⁰⁴ *Id.* at 52-53.

illustrate the importance of constitutional labels: *Perry* involved a “nonpublic forum,” whereas *Rosenberger* involved a “limited public forum.” But the Court in *Perry* stated that even if the mailboxes were a limited public forum, the union would still lose its claim of access.¹⁰⁵ Thus, it is hard to escape the conclusion that the decisions are more determined by results than labels, especially since *Rosenberger* involved a claim of infringement of religious expression, a category of speech to which the Supreme Court has been especially solicitous.

This analysis suggests that the differences between the constitutional rules applicable to limited public forums versus nonpublic forums are slight. In both categories, the State must maintain viewpoint neutrality, and application of state-imposed content parameters for the forum will be judged by a reasonableness standard. One possible difference is as follows: The Supreme Court has stated, albeit in dicta, that when the State excludes speakers who meet “identity” criteria from entrance to a limited public forum, strict scrutiny should apply.¹⁰⁶ Thus, if a university sets up a limited public forum for students, any exclusion of students who meet the content or subject matter criteria of the forum will be subject to strict scrutiny,¹⁰⁷ whereas exclusions from a nonpublic forum would presumably be judged only by whether they were reasonable and viewpoint neutral.¹⁰⁸ However, this difference in standards of scrutiny – if it exists – between limited public forums and nonpublic forums is unlikely to come into play very often. A more relevant distinction is that the labels are likely to trigger different attitudes of deference in the judges deciding the cases. Arguably, the reasonableness inquiry is more likely to be applied with “bite” to a limited public forum than to a nonpublic one, but without empirical verification, this is pure speculation.¹⁰⁹ Reading

¹⁰⁵ *Id.* at 48.

¹⁰⁶ *Id.* at 49.

¹⁰⁷ See *Ark. Educ. Television Co. v. Forbes*, 523 U.S. 666, 677 (1988).

¹⁰⁸ Professor Randall Bezanson describes the nonpublic forum as “a space reserved by the government where no individual free speech is to take place” and explains that within the nonpublic forum, “[t]he government cannot close off a time or place or space from individual speech and then open it up solely for a viewpoint the government favors.” Randall P. Bezanson, *The Manner of Government Speech*, 87 *DENV. U. L. REV.* 809, 810 (2010).

¹⁰⁹ See David J. Goldstone, *The Public Forum Doctrine in the Age of the Information Superhighway*, 46 *HASTINGS L.J.* 335, 365 (1995) (explaining that *Lee* is an example in which the Supreme Court applied a reasonableness requirement with “some bite” to a nonpublic forum case, indicating that a limited public forum case is likely to receive more bite). Another possible distinction between the limited public forum and the nonpublic forum is as follows: Once a limited public forum is established and topics of discussion set, the State presumably must justify any other types of content restrictions by showing that the restrictions were necessary to serve a compelling state interest. See *Perry*, 460 U.S. at 46. In contrast, in a nonpublic forum, any and all content restrictions would only have to be reasonable and viewpoint neutral. *Id.* at 46. An example might help to clarify this

too much into the labels may obfuscate other contextual factors that shape outcomes in public forum cases.¹¹⁰

5. Government Speech

The final constitutional category into which government sponsored social media might be slotted is “government speech.” The government speech doctrine is a relatively recent Supreme Court innovation.¹¹¹ The heart of the government speech doctrine is the realization that governments must speak in order to govern¹¹² and that governments speak through agents whom they hire, pay, select, facilitate or subsidize.¹¹³ Whether online or off, the government is permitted to use media to communicate its views to citizens, and when it does so, it need not include opposing viewpoints.¹¹⁴ In other words, the First

distinction. Assume a state establishes a limited public forum, such as a government-sponsored conference, with the express purpose of allowing medical professionals from across the country to discuss issues concerning women’s reproductive choices. Since the topic of abortion cannot reasonably be excluded from the forum parameters, any attempts by the State to restrict speech on the topic of abortion within the limited public forum would be subject to strict scrutiny. *See Hopper v. City of Pasco* 241 F.3d 1067, 1076-77 (9th Cir. 2001). By contrast, if the State allowed *selected* speakers to come to a nonpublic forum such as a military base on a case-by-case basis to discuss women’s reproductive health, it could presumably exclude all discussions of abortion, so long as the exclusion was even-handed as to viewpoint. *See id.* at 1075-81 (discussing the distinction between limited public forums and nonpublic forums).

¹¹⁰ For example, *Rosenberger*’s outcome seems to be influenced by the fact that it involved a restriction on religious speech. *See* discussion *supra* notes 79-86 and accompanying text; *see also* Geoffrey Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 93 (1987) (criticizing public forum doctrine for its “myopic focus on formalistic labels”).

¹¹¹ The government speech doctrine began in 1991 with *Rust v. Sullivan*, 500 U.S. 173 (1991), though the decision does not use the term government speech. *See Olree, supra* note 15, at 374 (stating that “accepted wisdom” attributes the origin of the doctrine to the *Rust* case). Stevens referred to it in *Sumnum* as “recently minted.” *Sumnum v. Pleasant Grove City, Utah*, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring).

¹¹² *See YUDOF, supra* note 10, at 42.

¹¹³ *See, e.g., Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 557-67 (2005) (holding, six to three, that the First Amendment does not prevent the federal government from requiring beef producers to pay for government-directed beef advertising).

¹¹⁴ *See Sutcliffe v. Town of Epping*, 584 F.3d 314, 334-35 (1st Cir. 2009) (holding that town officials could set up a website and bar others from expressing themselves on that website); *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275, 278 (4th Cir. 2008) (holding that the school district’s campaign constituted free speech and that it could deny page access to its “informational distribution system”); *Downs v. L.A. Unified Sch. Dist.* 228 F.2d 1003, 1016-17 (9th Cir. 2000) (holding that school district bulletin boards were not free speech zones, but instead were vehicles of government speech upon which viewpoint neutrality was not a restraint), *cert. denied*, 532 U.S. 994 (2001); R. Johan Conrod, Note, *Linking Public Websites to the Public Forum*, 87 VA. L. REV. 1007, 1032 (2001). *But see*

Amendment limits imposed within public forums do not apply to expression that can be labeled government speech.¹¹⁵

The government speech doctrine rears its head in a variety of contexts,¹¹⁶ but probably the fullest explication for the purposes of evaluating government sponsored social media is *Sumnum v. Pleasant Grove City, Utah*.¹¹⁷ That case arose because a Utah municipality refused to erect a monument containing the “Seven Aphorisms” of the Sumnum religion in a public park, even though the park already had a Ten Commandments monument.¹¹⁸ Although the Sumnum religious organization claimed that the park was a public forum,¹¹⁹ the Supreme Court concluded that “[p]ermanent monuments displayed on public property typically represent government speech.”¹²⁰ Unlike a speech or a rally in a public park,¹²¹ a permanent monument conveys a “government message,” even if it is initially donated by a private organization.¹²² Thus, when the Utah municipality accepted the Ten Commandments monument, it was “engaging in [its] own expressive conduct,” and “the Free Speech Clause ha[d] no application.”¹²³ As the Court summarized, “A government entity has the right to speak for itself. It is entitled to say what it wishes, and to select the views that it wants to express.”¹²⁴

Putnam Pit, Inc. v. City of Cookeville (*Putnam I*), 221 F.3d 834, 846 (6th Cir. 2000) (determining that the city website was a nonpublic forum but denying the city summary judgment for disallowing plaintiff to post a link to the city’s website); Putnam Pit, Inc. v. City of Cookeville (*Putnam II*), 76 Fed. Appx. 607, 614 (6th Cir. 2003) (declining to overturn a jury verdict for the city because the plaintiff did not meet the requirements for being allowed a hyperlink).

¹¹⁵ See *Bezanson*, *supra* note 108, at 809 (“It is now a largely uncontroversial rule that when the government is speaking, its expressive actions are immune from First Amendment freedom of speech limits.”).

¹¹⁶ See *Johanns*, 544 U.S. at 559 (compelling funding of government speech); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (involving compelled speech and holding that government-funded attorneys could not be restricted from counseling clients regarding pursuing welfare claims); *Rust*, 500 U.S. at 177-78 (involving compelled speech and holding that government-funded doctors could be restricted from counseling patients about abortion as a “method of family planning”).

¹¹⁷ See *Sumnum v. Pleasant Grove City, Utah*, 129 S. Ct. 1125, 1130-38 (2009). The Court was unanimous in reaching the conclusion that the rejection of the Sumnum monument did not violate the Free Speech Clause of the First Amendment. *Id.* at 1138-42.

¹¹⁸ *Id.* at 1129-30.

¹¹⁹ *Id.* at 1131.

¹²⁰ *Id.* at 1132.

¹²¹ In the latter situations, the park could be deemed a public forum because it was “capable of accommodating a large number of public speakers without defeating the essential function of the land.” *Id.* at 1137.

¹²² *Id.* at 1134.

¹²³ *Id.* at 1131.

¹²⁴ *Id.* at 1131 (citations omitted) (internal quotation marks omitted).

Summum stands for the proposition that the government can select a message to convey to its citizens and need not consider conflicting views or accommodate other speakers when it does so.¹²⁵ The Court insists that constraints on government speech come not from the First Amendment, or at least not from the Speech Clause, but rather from the political process.¹²⁶ The Court assumes that competing viewpoints will emerge from the marketplace of ideas, allowing voters or other political actors to check government speech (and government actions) with which they disagree.¹²⁷ Whether this faith is misplaced or not,¹²⁸ the “new” category of government speech gives government actors a powerful tool for excluding speakers from its “property” – physical or otherwise.

B. *Navigating the Maze: Applying the Categories to Interactive, Government-Sponsored Social Media*

The above categories do not track simply and easily onto interactive government sponsored social media. Under current doctrine, it is not immediately clear into which of these exclusive categories most government social media sites will fit. Even where a site is clearly a forum of some sort, it is not clear how much discretion the government actor will have in limiting profane and abusive speech, which is an issue of special concern in online environments.

1. Threshold Issues

Before attempting to apply the speech categories discussed above to government sponsored social media, it is important to address two threshold issues. The Supreme Court’s public forum cases predominantly involve either physical places or resources owned or exclusively controlled by the government.¹²⁹ Yet neither the fact that a social media forum is

¹²⁵ *Id.*

¹²⁶ *Id.* at 1132.

¹²⁷ *Id.* at 1131.

¹²⁸ See generally Nathan Murphy, *Context, Not Content: Medium Based Press Clause Restrictions on Government Speech in the Internet Age*, 7 U. DENVER SPORTS & ENT. L.J. 26 (2009).

¹²⁹ The cases involving compelled subsidy of government speech through taxation or targeted assessments are of little relevance to the issue of whether a government sponsored social media presence is a public forum and hence will not be dealt with here. See, e.g., *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 566-69 (2005) (holding that a “beef checkoff program” requiring beef producers to support government advertisements promoting beef consumption did not violate the First Amendment). Regarding compelled subsidy cases, see generally Mark Champoux, *Uncovering Coherence in Compelled Subsidy of Speech Doctrine: Johanns v. Livestock Marketing Ass’n*, 29 HARV. J. L. & PUB. POL’Y 1107 (2006), and Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329 (2008).

“metaphysical” nor the fact that the government does not “own” the social media it uses should prevent social media sites from becoming public forums.

First, the fact that a social media site has neither a spatial nor geographical existence should not preclude it from becoming a public forum.¹³⁰ Supreme Court precedent makes clear that a public forum may be “metaphysical”¹³¹ in nature, and several cases have involved not “places” but pools of funds to subsidize speech or access to email lists on campus servers.¹³² It is hardly a stretch to characterize an interactive social media site as a public forum when it is designed explicitly for providing a locus of discussion and debate. Indeed, the Supreme Court has described the internet as including “vast democratic forums”¹³³ and has compared the use of internet distribution mechanisms to pamphleteering,¹³⁴ explicitly citing public forum case law.¹³⁵ While Justice O’Connor’s assertion that “[c]yberspace undeniably reflects some form of geography”¹³⁶ may be overly broad when applied to the internet as a whole,¹³⁷ it is certainly true of social media sites like MySpace and Facebook. From a

¹³⁰ See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 827 (1995) (discussing a student activity fund, which is neither spatial or geographical); *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2979 (1985) (discussing access to the communications system and the student group funding, which are neither spatial or geographical); *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 791 (1985) (adjudicating over a charitable fund drive). Steve Gey argues that the internet as a whole can be considered a public forum. Steven G. Gey, *Reopening the Public Forum – From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1611 (1998). He contends that the internet was originally created by the government and it operates as a place. *Id.* at 618-19. Moreover, as it has evolved, it has taken on an “essentially public character” comparable to a public park. *Id.* at 19. Gey’s argument, however, errs in assuming that one characterization can capture the diversity of the internet. Some spaces, like public chat rooms, function as public spaces. Other spaces, such as private email, private chat rooms, private bulletin boards, or even Facebook pages with privacy protections enabled, do not function as public spaces. Thus, Gey’s broad brush approach is insufficiently nuanced to diagnose whether any particular cyber-space is a public forum.

¹³¹ See *Rosenberger*, 515 U.S. at 830 (finding the university’s funding policy for student newsletters to be “a [limited public] forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable”).

¹³² See, e.g., *id.* at 827; *Martinez*, 130 S. Ct. at 2979.

¹³³ *Reno v. ACLU*, 521 U.S. 844, 868 (1997).

¹³⁴ *Id.* at 870.

¹³⁵ *Id.* at 880 (quoting *Schneider v. State of New Jersey (Town of Irvington)*, 308 U.S. 147, 163 (1939)). It should be noted, however, that *Reno*, which involved an attempt to regulate pornography in various internet contexts, did not apply public forum analysis to the internet as a whole. *Reno*, 521 U.S. at 849.

¹³⁶ *Id.* at 890.

¹³⁷ See Tim Wu, *Application-Centered Internet Analysis*, 85 VA. L. REV. 1163, 1170 (1999).

functional standpoint, there seems little reason to treat these sites differently from meeting rooms or other kind of physical “place[s].”¹³⁸

Second, government ownership is not a *sine qua non* of public forum status. A social media forum is neither owned nor exclusively controlled by the government actor who establishes it.¹³⁹ If the mayor of Jonesville establishes a Facebook page, he presumably receives a license from Facebook to use its proprietary software. Once the Facebook page is established, the mayor does not own or control the underlying software. Indeed, the mayor does not even retain complete editorial control of the page because Facebook conditions use of its software on a user’s agreement to certain terms and conditions. The lack of government ownership or exclusive control of the social media forum it establishes, however, should not preclude a finding of public forum status. Just 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.

2. Which Category?

Even with these threshold issues settled, it is not clear into what First Amendment category an interactive government sponsored social media site falls. A *non-interactive* Facebook page controlled by a government actor would doubtless be treated as government speech,¹⁴⁰ meaning that private speakers have no First Amendment rights to speak in those forums. But more and more government actors seem to appreciate the fact that social media’s primary attraction is its interactivity.¹⁴¹ For instance, the White House clearly identifies its Facebook page¹⁴² as an official site subject to the Presidential Records Act, and there is no mistaking that the White House is using the site to convey messages in the form of press releases and videos to citizens.¹⁴³ The site, however, is also set up to allow comments from all political perspectives, although these comments can be “flagged” by other users as abusive.¹⁴⁴ It is not clear what, if anything, happens to “flagged” comments. There does not

¹³⁸ See Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439, 494 (exploring the use of geographical metaphors to describe cyberspace and contending that “courts and commentators have adopted the cyberspace as place metaphor”). One difference, of course, is that interactions between participants in internet forums may be asynchronous rather than simultaneous, but this distinction seems too inconsequential to disqualify social media sites from public forum status automatically.

¹³⁹ *Cf. Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 547 (1975) (involving a privately owned theater under a long-term lease to the city of Chattanooga, Tennessee).

¹⁴⁰ See Norton, *supra* note 4, at 922.

¹⁴¹ See *id.* at 922-23.

¹⁴² The White House, *Facebook Page of the White House*, FACEBOOK, <http://www.facebook.com/#!/WhiteHouse> (last visited Mar. 4, 2011).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

appear to be an official statement regarding editorial control over comments,¹⁴⁵ and in contrast to the General Services Administration's Facebook page, there is no indication that an administrator from the White House ever responds to comments.¹⁴⁶

Is this government speech, a designated public forum, or a nonpublic forum? If it is government speech, the government need not worry about violating the speech rights of those who post comments, even if the result is the creation of an illusion of public consensus by selective editing of criticism. But if the site is deemed a limited public forum or nonpublic forum, the government has much less control over citizens who choose to speak on the site.

Unfortunately, current First Amendment doctrine does not contemplate the possibility that the page might involve both government speech and a public forum.¹⁴⁷ Instead, it forces a choice between whether the page involves government speech or some form of private speech.¹⁴⁸ And yet, the Supreme Court has given little guidance regarding how to determine whether speech is "government speech" or "private speech" in a case like an interactive social media site, which contains elements of both.¹⁴⁹ In these situations, the government is clearly identifiable as a speaker conveying its own message with regard to its contributions to the site,¹⁵⁰ but it seems just as clear that the government is soliciting input from citizens speaking from a variety of perspectives.¹⁵¹ In the "comment" portion of the site, then, the government can

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*; see also General Services Administration, *Facebook Page of the General Services Administration*, FACEBOOK, <http://www.facebook.com/GSA> (last visited Sept. 14, 2011).

¹⁴⁷ See Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 607 (2008).

¹⁴⁸ See *id.*

¹⁴⁹ Lower courts have developed a variety of tests to deal with this issue in the case of specialty license plates. See *id.* at 627 n.118 (citing cases). Corbin identifies "five factors that should be considered in deciding who is speaking" for purposes of categorizing speech as either government speech, private speech, or a new category she advocates called "mixed speech." *Id.* at 627. These are the factors: (1) Who is the literal speaker? (2) Who controls the message? (3) Who pays for the message? (4) What is the context of the speech (particularly the speech goals of the program in which the speech appears)? (5) To whom would a reasonable person attribute the speech? *Id.* at 627. She ultimately advocates application of intermediate scrutiny to cases of "mixed speech" – speech that involves both government and private messages where neither predominates. *Id.* at 675.

¹⁵⁰ See, e.g., *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("When the government disburses public funds to private entities to convey a government message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee." (citing *Rust v. Sullivan*, 500 U.S. 173, 194 (1991))).

¹⁵¹ A crucial determinant of the relevant speech category is government intent, which the Court may discern from circumstantial evidence such as the structure of the program or policy at issue. See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229 (1999) (finding that the university had charged students fees "for the sole purpose of

be viewed as creating either a designated public forum open to commentary from all users on all topics or a limited public forum for commentary related to the conduct of the government actor establishing the forum. Given that the interactive social media forum is likely to contain elements of government speech and designated public forums, it is difficult to predict what label courts will ultimately attach.

Even so, if a government actor is very careful in setting up its social media site, it can usually guarantee that the site is either government speech or a nonpublic forum and can therefore retain maximum control over speech that occurs there. The Supreme Court has made “intent” the key determinant of whether a forum is public or nonpublic.¹⁵² Recall that for a non-traditional public forum to exist, the government must *designate* it as “opened for use by the public as a place for expressive activity.”¹⁵³ Moreover, not only has the Court required the decision to open a forum to be intentional, but that intent must also be “demonstrably clear.”¹⁵⁴ The practical effect is the creation of a presumption *against* a finding of public forum status. Thus, if a government actor makes a clear and concrete statement on its social media page that it does not intend to create a public forum, and it reserves the right to eliminate comments entirely or edit them, it can maximize the ability to edit citizen commentary. Nonetheless, there are political reasons government actors might not want to take this course of action, thus forcing courts to discern intent or purpose from the nature of the site itself.

From this perspective, many interactive social media sites are likely to be categorized as limited public forums. There is little doubt that these sites are forums, at least with regard to the comments portion of the site. The government designates or sets aside this portion of its social media site for expressive activity by citizens.¹⁵⁵ Unlike the nonpublic forum, which is characterized by selective access for chosen speakers,¹⁵⁶ the typical government site will be open to any social media user who seeks it out. But unlike the truly open designated public forum, many social media sites are likely to place constraints on the topics of speech simply by their design and name. The Facebook page of the General Services Administration (GSA), for example, describes the mission of the GSA and then issues “status updates” about things the GSA is doing.¹⁵⁷ Citizens can then make comments, but the

facilitating the free and open exchange of ideas by, and among, its students”); *Rosenberger*, 515 U.S. at 834 (finding that the university had created a limited public forum because it “expend[ed] funds to encourage a diversity of views from private speakers”).

¹⁵² *Perry Educ. Ass’n v. Perry Local Educators Ass’n*, 460 U.S. 37, 37 (1982).

¹⁵³ *Id.* at 45.

¹⁵⁴ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988).

¹⁵⁵ *See id.*

¹⁵⁶ *Perry*, 460 U.S. at 46.

¹⁵⁷ General Services Administration, *supra* note 146.

comments are linked explicitly to a specific “status update” of the GSA.¹⁵⁸ Thus, the purpose of the GSA’s Facebook page is presumably both to inform citizens about its policies and programs and to solicit feedback about them. Like that in a city council meeting, the discussion that occurs in the social media context is designed to be a bounded conversation, inherently limited to discussion of the policies and actions of the government actor who sponsors the site.¹⁵⁹ Therefore, the government arguably should be able to delete off-topic comments as long as such deletions are reasonable and viewpoint neutral. Even if the label of limited public forum status can confidently be attached, however, it remains unclear how heavy-handed the government may be in regulating comments on social media sites to preserve decency and decorum.

3. Policing Decency and Decorum in the Limited Public Forum

The constitutional limits on the government’s attempts to preserve civility within limited public forums are not entirely clear. For example, the Supreme Court has never directly addressed the scope of the government’s authority to eliminate profanity from limited public forums.¹⁶⁰ Although the Supreme Court announced, in the celebrated case of *Cohen v. California*, that the proper remedy for an audience member offended by the use of the word “fuck” on a jacket was to avert his or her eyes,¹⁶¹ the Court never addressed the

¹⁵⁸ *Id.*

¹⁵⁹ See *Steinburg v. Chesterfield Cnty. Planning Comm’n*, 527 F.3d 377, 384-85 (4th Cir. 2008).

¹⁶⁰ *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546, 552-53 (1975), implicates indecency regulation in a limited public forum. In *Conrad*, government officials wished to bar use of a Tennessee municipal theater by the producers of the musical *Hair* because they feared it would contain indecent or even obscene content. *Id.* at 548. The Supreme Court held that the city’s concerns were an insufficient basis for refusing to allow the musical to be performed in the theater. *Id.* at 562. The Supreme Court, however, has allowed regulation of profanity over the public airwaves, see *FCC v. Pacifica Found.*, 438 U.S. 726, 750 (1978), and in schools, see *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 687 (1986). These contexts, however, are clearly distinguishable. In the broadcast context, the Supreme Court allows regulation of indecent speech largely because of what a “captive” audience, including minors, may be exposed to without warning. See *Pacifica*, 438 U.S. at 749-51. The Supreme Court is revisiting the constitutionality of the Federal Communications Commission’s broadcast indecency regulatory regime this term. *F.C.C. v. Fox Television Stations, Inc.*, 131 S. Ct. 3065 (2011); see also *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800 (2009) (holding that the fleeting expletives policy was not arbitrary and capricious). In the high school context, the school has the authority to inculcate young people with values of civility. See *Gooding v. Wilson*, 405 U.S. 518, 526-27 (1972) (striking down as overbroad a criminal statute punishing speech directed at another and containing “opprobrious words of abusive language”); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974) (striking down ordinance making it unlawful “wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty”).

¹⁶¹ See *Cohen v. California*, 403 U.S. 15, 25 (1971) (“Surely the State has no right to

constitutional standard applicable in a nonpublic forum or a *limited* public forum whose purpose arguably could be thwarted by profane speech. Presumably, government regulations of decorum in the limited public forum should be evaluated as attempts to preserve the forum for its intended purpose and should therefore be judged by whether they are reasonable and viewpoint neutral. Applications of this test, however, should be responsive to the nature or context of the forum.

Lower courts that have addressed the issue in the somewhat analogous contexts of city council and planning commission meetings have struggled to balance the government's interest in preserving civility with the speakers' interests in addressing government actors in the manner of their choosing.¹⁶² Most circuit courts that have addressed the issue, however, have given great deference to government actors attempting to preserve order and decorum. An instructive example is the Ninth Circuit Court of Appeals decision in *White v. City of Norwalk*.¹⁶³ That case dealt with the constitutionality of a city's "rules of decorum" for city council meetings, which forbade "personal, impertinent, slanderous or profane" remarks that "disrupt[ed], disturb[ed] or otherwise impede[d] the orderly conduct of [city council] meeting[s]."¹⁶⁴ The Ninth Circuit stated, "[A] City Council meeting is . . . a governmental process with a governmental purpose."¹⁶⁵ The court then gave the city council a great deal of leeway in regulating decorum, going so far as to say that the city "certainly may stop [a speaker] if his speech becomes irrelevant or repetitious."¹⁶⁶ The

cleanse public debate to the point where it is grammatically palatable to the most squeamish among us." *But see* *Hill v. Colorado*, 530 U.S. 703, 718 (2000) (explaining that "the interests of unwilling listeners" may sometimes predominate "where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure'" (quoting *Erzoznik v. Jacksonville*, 422 U.S. 205, 209 (1975))).

¹⁶² *Steinburg*, 527 F.3d at 385 (finding that a planning commission meeting was a limited public forum, and thus "a governmental entity such as the Commission is justified in limiting its meeting to discussion of specified agenda items and in imposing reasonable restrictions to preserve the civility and decorum necessary to further the forum's purpose of conducting public business"); *Eichenlaub v. Twp. of Ind.* 385 F.3d 274, 281 (3d Cir. 2004) (upholding the town's ability to remove a "repetitive and truculent" speaker from a town meeting, even though he was speaking during a "citizens' comments" portion of that meeting); *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990). *See generally* Paul D. Wilson & Jennifer K. Alcaez, *But It's My Turn to Speak! When Can Unruly Speakers at Public Hearings Be Forced to Leave or Be Quiet?*, 41 URB. LAW. 579 (2009).

¹⁶³ 900 F.2d 1421, 1426 (9th Cir. 1990). *But see* *Norse v. City of Santa Cruz*, 629 F.3d 966, 966 (9th Cir. 2010) (reversing the dismissal of a case brought by a speaker contending that his First Amendment rights were violated when he was removed from a city council meeting after he gave a Nazi salute to the mayor who had just ruled that public comment on an issue was ended).

¹⁶⁴ *City of Norwalk*, 900 F.2d at 1424 (emphasis omitted).

¹⁶⁵ *Id.* at 1425.

¹⁶⁶ *Id.*

court strongly tipped the balance in favor of allowing the council to “accomplish[] its business in a reasonably efficient manner,”¹⁶⁷ giving short shrift to the rights of speakers to address the forum in the manner of their choosing.¹⁶⁸

The Fourth Circuit was similarly deferential to government interests in *Steinburg v. Chesterfield County Planning Commission*.¹⁶⁹ That case involved a citizen who had been stopped from speaking at a planning commission meeting because his remarks were allegedly off topic and contained very mild “personal attacks” against the commissioners for not paying attention.¹⁷⁰ Because the county planning commission meeting at issue was classified as a limited public forum, the Fourth Circuit evaluated the County Commission’s policy against personal attacks only for reasonableness and viewpoint neutrality.¹⁷¹ The court concluded that “a governmental entity such as the Commission is justified in limiting its meetings to discussion of specified agenda items and in imposing reasonable restrictions to preserve the civility and decorum necessary to further the forum’s purpose of conducting public business.”¹⁷² The court therefore upheld the county’s “content-neutral policy against personal attacks” against a facial challenge because the policy promoted the “legitimate public interest . . . of decorum and order.”¹⁷³

The Sixth Circuit sounded a less deferential note in *Leonard v. Robinson*, when it reversed summary judgment in favor of a police officer who arrested a citizen “solely for uttering ‘God damn’ while addressing the township board.”¹⁷⁴ *Robinson* differs from the cases discussed above because the police officer arrested the speaker even though the public official conducting the meeting had not ruled that he was out of order, and there was no indication he had disrupted the government proceedings.¹⁷⁵ Nonetheless, the Sixth Circuit clearly had a different view of the potential disruptiveness of profanity from its sister circuits. Citing *Miller v. California*, the court asserted that prohibiting the speaker from “coupling an expletive to his political speech is clearly unconstitutional.”¹⁷⁶

This question about how much deference to give government actors in regulating profane or “abusive” speech in online forums is particularly pressing because computer mediated communications are more likely than

¹⁶⁷ *Id.*

¹⁶⁸ See Howard Wasserman, *Fans, Free Expression, and the Wide World of Sports*, 67 U. PITT. L. REV. 525, 531-32 (2006).

¹⁶⁹ 527 F.3d 377, 385 (4th Cir. 2008).

¹⁷⁰ *Id.* at 382.

¹⁷¹ *Id.* at 385.

¹⁷² *Id.*

¹⁷³ *Id.* at 387.

¹⁷⁴ *Leonard v. Robinson*, 477 F.3d 347, 351 (6th Cir. 2007).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 360 (citing *Miller v. California*, 413 U.S. 15, 24 (1973)).

those in the “real world” to become profane or abusive,¹⁷⁷ particularly when speakers believe they are anonymous. Thus, it might be argued that the government has more pressing interests in regulating profane and abusive speech in online contexts simply because the prevalence of such speech may hinder the use of a social media as a forum for public discourse.¹⁷⁸ Moreover, the government can also help to ensure that its regulation of such speech is not a cloak for censorship by setting up filtering programs that operate “neutrally” once put into place. Some social media sites, such as Facebook, conduct their own monitoring and filtering of profane and abusive speech, thereby largely eliminating the government’s role in censoring such commentary.¹⁷⁹ Despite these persuasive arguments, however, public discussion that takes place on a social media site is fundamentally different from public discussion in a city council meeting. The user of the online forum ordinarily must take affirmative steps to seek out comments by fellow users; even once a user decides to read the comments, she can scroll past the ones that appear to be offensive. In addition, the abusive speaker in the online forum poses less danger of disrupting a government process or impairing its efficiency than would the same speaker in a physical forum. Thus, the justifications for allowing the government to preserve decorum in public meetings do not apply as strongly in the social media context.

Regardless of how courts ultimately resolve this issue, one thing should be abundantly clear: Public forum doctrine does not foster an optimal level of government engagement in social media. The lack of clarity in public forum doctrine may deter government actors from setting up interactive forums in the first place, lest they lose control of their sites to hateful and incoherent speakers. Nevertheless, if government actors actually spend the time to piece through the minutiae of existing public forum doctrine before setting up an interactive social media site, they may be able to preserve a high degree of control over citizens whose speech is perceived to jeopardize order, decency, and civility. Neither result is optimal from a First Amendment or public policy perspective, as the next Part demonstrates.

II. WHY PROMOTE GOVERNMENT SOCIAL MEDIA USE?

Governments have a variety of incentives to use social media to connect with citizens. Any attempt to apply public forum doctrine to government sponsored social media must take into account both existing incentives and how they align with the needs and interests of citizens. In other words, the recalibration of public forum doctrine to social media technologies must

¹⁷⁷ Lyriisa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audience, and Anonymous Speech*, 82 NOTRE DAME L. REV. 1537, 1575 (2007); Helen Norton & Danielle Keats Citron, *supra* note 4, at 937 n.211.

¹⁷⁸ See discussion *infra* Part III.

¹⁷⁹ *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/#!/terms.php> (last revised Apr. 26, 2011).

account for why governments use social media, and more importantly, why they should.

A. *Government Incentives*

Governments must speak in order to govern.¹⁸⁰ Governments speak to educate and to inculcate democratic values, as well as to shape behavior and norms. Governments seek to persuade, manipulate, coerce, nudge, wheedle, and imprecate.¹⁸¹ Governments tell citizens to say no to drugs, to vote, to return the census, to get flu shots, to pay taxes, to wear seatbelts, and to volunteer. Indeed, effective government communication is essential to effective policy implementation.¹⁸² Without the acquiescence of the governed, it is almost impossible for a democratic government to perform its roles and functions – and acquiescence is secured through communication.¹⁸³ Traditionally, the government has spoken through mass media using advertisements and position pages, interviews and pamphlets, public art and press conferences. Now, however, the government has begun to convey its message through emails, websites, Facebook pages, tweets, and text messages.¹⁸⁴

1. Access to Citizens

The government has a host of practical reasons for using “new media” to communicate with citizens. Willie Sutton was reported to have said that he robbed banks because “that’s where the money is,”¹⁸⁵ and governments turn to social media because that’s where the citizens are.¹⁸⁶ A Pew study found that more and more citizens are using social media as an avenue for public

¹⁸⁰ *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) (“To govern, government has to say something . . .”). This Part attempts to address why and how government actors use social media as a tool of governance; it goes without saying that political actors see many uses of social media for campaign purposes. Seema Mehta, *The Rise of the Internet Electorate*, L.A. TIMES, April 18 2011 at A5.

¹⁸¹ Government motives are neither uniformly benign nor reprehensible.

¹⁸² YUDOF, *supra* note 10, at 14 (“The greater government’s ability to reach mass audiences and to communicate successfully with those audiences, the greater the potential for effective implementation of government policy.”).

¹⁸³ *Id.*

¹⁸⁴ See GENERAL SERVICES ADMINISTRATION, *Social Media*, <http://www.howto.gov/social-media> (last visited Sept. 15, 2011).

¹⁸⁵ See Paul Krugman, *Willie Sutton Wept*, NY TIMES, Feb. 18, 2011, at 31 (stating that Sutton claimed that a reporter who interviewed him invented the quote). Thanks to my friend David Coale for bringing this quote to my attention.

¹⁸⁶ See Murphy, *supra* note 128 at 53 (discussing various e-government initiatives and asserting that “[t]he internet is rapidly becoming the government’s prime method of communicating with the public”).

discussion and debate.¹⁸⁷ Facebook, for example, is the dominant social networking platform in the United States. It accounts for a quarter of online page views,¹⁸⁸ boasts over 750 million active users worldwide,¹⁸⁹ and is one of the “world’s most popular brands online.”¹⁹⁰ In addition, both the number of social media users and the time spent on social media sites grew explosively in 2010.¹⁹¹ Sheer audience size, however, is only part of the picture.

2. Desirable Audiences or Constituencies

Audience demographics are also important.¹⁹² The audience of citizens¹⁹³ that the government reaches via social media is likely different from the audience that the government reaches via traditional mass media. These differences may make social media especially desirable for government communication purposes. For example, because Facebook users skew younger than, say, citizens who attend city commission meetings or watch the network news, social media provide a better platform for informing college freshmen about the benefits of the meningitis vaccine.¹⁹⁴ Another reason government actors may target social media audiences is that they may be more politically

¹⁸⁷ See, e.g., Amanda Lenhart & Mary Madden, *Social Networking Websites and Teens: An Overview* (Jan. 3, 2006), available at http://www.pewinternet.org/~media/Files/Reports/2007/PIP_SNS_Data_Memo_Jan_2007.pdf.

¹⁸⁸ Henry Blogett, *Facebook Now Accounts for 1 in 4 Internet Pageviews*, BUS. INSIDER (Oct. 22, 2009), <http://www.businessinsider.com/henry-blodget-facebook-accounts-for-1-in-4-internet-pageviews-2009-10>.

¹⁸⁹ *Statistics*, FACEBOOK, <http://www.facebook.com/press/info.php?statistics> (last visited Sept. 15, 2011).

¹⁹⁰ *Social Networks/Blogs Now Account for One in Every Four and a Half Minutes Online*, NIELSENWIRE (June 15, 2010), http://blog.nielsen.com/nielsenwire/online_mobile/social-media-accounts-for-22-percent-of-time-online/

¹⁹¹ *Id.*; see also *Led by Facebook, Twitter, Global Time Spent on Social Media Sites up 82% Year Over Year*, NIELSENWIRE (Jan. 22, 2010), <http://blog.nielsen.com/nielsenwire/global/led-by-facebook-twitter-global-time-spent-on-social-media-sites-up-82-year-over-year/>.

¹⁹² Studies indicate that “[t]hose who visited government websites were more affluent, better educated, and more likely to be White than other members of the online population.” See Ramona McNeal, Kathleen Hale & Lisa Dotterweich, *Citizen-Government Interaction and the Internet: Expectations and Accomplishments in Contact Quality, and Trust*, 5 J. INFO. TECH. & POL. 213, 217 (2008).

¹⁹³ Government actors may also desire to influence non-citizens.

¹⁹⁴ A study by Royal Pingdom, a company that offers website monitoring, indicated that the highest proportion of social media users fall into the 35-44 age group but that some sites, such as Bebo and MySpace, attract much younger users on average than do others, such as LinkedIn and Classmates.com. See *Study: Ages of Social Network Users*, ROYAL PINGDOM (Feb. 16, 2010), <http://royal.pingdom.com/2010/02/16/study-ages-of-social-network-users/>. The study’s authors observe that “social media isn’t dominated by the youngest, often most tech-savvy generations, but rather by what has to be referred to as middle-aged people (although at the younger end of that spectrum).” *Id.*

engaged than their fellow citizens.¹⁹⁵ It is not far-fetched to presume that the same initiative that leads social media users to seek out government information online may lead them to other types of political engagement. Indeed, social media may be a particularly good tool for government to reach “niche” audiences of the most interested or most engaged citizens, such as farmers interested in sustainable agriculture or parents interested in improving the quality of children’s television programming.¹⁹⁶

3. Community-Building and Political Engagement

Government actors have not been slow to appreciate that social media are not just a tool for communication but also are a tool for community-building and engagement. Social media create social relationships; they “bring[] people together.”¹⁹⁷ Communicating via social media makes it easier for government actors to mobilize citizens from different walks of life and strata of society.¹⁹⁸ A government-sponsored social media forum has the capacity to unite citizens, who might never encounter one another in the public square, along shared interests and concerns, enhancing the likelihood that they will engage in other types of political participation. Social media may thus foster engagement in ways that other media do not.¹⁹⁹ Social media may even help humanize government by giving citizens the sense that their voices are being heard by those in power, thereby defusing social tensions.

4. Crowdsourcing and Improving Governance

The sense of community sometimes fostered by social media may improve not only the relationships between governors and the governed but also the processes and outcomes of governance. Social media can serve many of the functions of town hall meetings without the expense or constraints of time and geography. Indeed, social media can create communities of citizens and even communities of “experts” who can share their knowledge to improve the

¹⁹⁵ As attorney Bill Sherman explains, “Public officials craft an online identity in order to provide certain information or convey a certain brand or persona; constituents do the same thing, although their primary target audience in creating their online identity is more likely to be other constituents, rather than the public official.” Sherman, *supra* note 7, at 99.

¹⁹⁶ Jennifer Mattern, *The Future of Niche Social Networking*, SOCIAL IMPLICATIONS (May 20, 2010), <http://socialimplications.com/the-future-of-niche-social-networking/>.

¹⁹⁷ See Janna Quitney Anderson & Lee Rainie, *The Future of Social Relations*, PEW RESEARCH CENTER (July 2, 2010), http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Future_of_Internet_%202010_social_relations.pdf (citing one of the benefits of social internet use as “open information sharing that brings people together”).

¹⁹⁸ *Best Practices for Local Government Social Media Usage in North Carolina*, NORTH CAROLINA DEPARTMENT CULTURAL RESOURCES (April 2010), http://www.records.ncdcr.gov/guides/bestpractices_socialmedia_local_2010412.pdf.

¹⁹⁹ See BETH SIMONE NOVECK, WIKI GOVERNMENT: HOW TECHNOLOGY CAN MAKE GOVERNMENT BETTER 142-44 (2009) (giving examples of uses of social media for collective organizing).

decisions made by government actors. Consider a bold social media experiment enacted to assist the U.S. Patent and Trademark Office (USPTO) in performing the process of patent review.²⁰⁰ The experiment, called The Peer to Patent Project, sought to harness the knowledge of the public to benefit government patent examiners in deciding whether an invention is “novel” and “non-obvious” – the criteria for granting a patent.²⁰¹ To make this determination, patent examiners must conduct research to compare the invention with “prior art, or earlier patents and patent applications, scientific journal article, and product descriptions.”²⁰² Patent examiners are expected to perform this difficult task and write up findings as quickly as possible to combat the backlog of pending patent applications,²⁰³ currently a million strong.²⁰⁴ To assist this process, Beth Simone Noveck proposed in 2005 that the USPTO use social networking to “enlist the help of smaller, collaborating groups of dedicated volunteers to help decide whether a particular patent should be granted.”²⁰⁵ In 2007, New York Law School, in cooperation with the USPTO, launched a pilot program to do just that.²⁰⁶ They created a website to solicit the public – primarily interested scientists and others with technical expertise – to identify prior art and comment on its relevance to patents voluntarily submitted by inventors.²⁰⁷ In its first year, the pilot program enlisted the aid of 2,000 volunteers, and eighty-nine percent of patent examiners stated that the program had identified helpful information.²⁰⁸ The Peer to Patent Project illustrates how “crowdsourcing” can improve government decision-making. The USPTO is now set to make it an official part of the patent examination process.²⁰⁹ Indeed, the White House lauded the program as part of its Open Government Initiative, and similar peer-to-patent initiatives have been launched in Australia and Japan.²¹⁰ What these

²⁰⁰ *Id.* at 12. The project can be viewed at www.peertopatent.org. I am grateful to my former student Christopher Harbin for bringing this experiment to my attention – via Facebook.

²⁰¹ *Id.* at 48.

²⁰² *Id.*

²⁰³ *Id.* at 48-49.

²⁰⁴ *Id.* at 12.

²⁰⁵ *Id.* at 18. David Kappos was a co-creator of the project. Beth Simone Noveck describes the project as an experiment in “collaborative democracy,” which “emphasizes shared work by a government institution and a network of participants” and involves “open-source volunteer participation with government’s central coordination, issue framing, and bully pulpit.” *Id.* at 18.

²⁰⁶ *Id.* at 9.

²⁰⁷ *Id.* at 12.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 13.

²¹⁰ Mark Webbink, *Collaborating on Patent Examinations*, OPENSOURCE.COM (July 22, 2010), <http://opensource.com/law/10/7/collaborating-patent-examinations>.

experiments suggest is that interactive media use allows governments to leverage the power of crowdsourcing to improve governance.

5. Speed, Economy, and Elimination of Intermediaries

In addition to the virtues of interactive social media listed above, all social media, whether interactive or not, have the advantages of allowing government speakers to introduce messages quickly and cheaply into the public information stream without having to rely on intermediaries.²¹¹ Social media are ideal for communicating during emergencies because government can issue messages to citizens at rapid speed.²¹² Moreover, social media create a direct line of communication between governor and governed. Social media decrease government reliance on the traditional mass media to relay (and potentially distort) government messages.²¹³ In an age when citizens are highly skeptical of the mainstream media, eliminating their role in the communication process is tremendously beneficial to government actors. A skeptic could argue that social media may make it easier for the government to disseminate propaganda; this argument, however, is misplaced. The mainstream media can still perform a watchdog role by discussing and interpreting government messages, but citizens will have more ability to determine whether these interpretations are faithful to what their governments actually said.

6. Responsiveness

To maintain legitimacy, democratic governments must appear responsive to the needs of citizens.²¹⁴ Interactive social media allow governments to gather information from citizens, to listen to their needs and interests, and to respond directly to them quickly and efficiently.²¹⁵ Indeed, the desire to appear responsive to the needs of citizens is a key impetus behind government use of social media.²¹⁶

²¹¹ Thomas B. Nachbar, *Paradox and Structure: Relying on Government Regulation to Preserve the Internet's Unregulated Character*, 85 MINN. L. REV. 215, 215 (2000) ("The Internet allows people to communicate quickly, across the globe, and at extremely low cost.").

²¹² See, e.g., Eric Gorski, *Gunfire at UT Highlights Colleges' Response*, HUFFINGTON POST (Sept. 29, 2010), http://www.huffingtonpost.com/2010/09/29/gunfire-at-ut-highlights-n_743402.html (stating that universities have moved to a "mobile notification system" for threats to campus safety, including "land line, text, e-mail, websites, message boards, campus cable TV networks and loudspeakers").

²¹³ Jessica Clark, *Public Media 2.0: Dynamic, Engaged Publics*, AM. U. CENTER FOR SOCIAL MEDIA (Feb. 2009), <http://www.centerforsocialmedia.org/sites/default/files/whitepaper.pdf>.

²¹⁴ See C. EUGENE STEUERLE ET AL., *THE GOVERNMENT WE DESERVE: RESPONSIVE DEMOCRACY AND CHANGING EXPECTATIONS* 125 (1998).

²¹⁵ *Social Networks and Government*, HOWTO.GOV, http://www.usa.gov/webcontent/technology/social_networks.shtml (last updated July 15, 2011).

²¹⁶ Some evidence validates the assumption that online interaction with government

B. *Citizens' Interests: Speech, Political Association, and Petitioning*

Luckily, government social media use, even when motivated by pure self-interest, often benefits citizens. Citizens have an interest in receiving government information quickly, cheaply, and without distortion. They also have a strong interest in a government that is responsive to their needs and interests.²¹⁷ However, it is worth examining how government use of social media fosters the First Amendment interests of citizens. The word “interests” rather than “rights” is appropriate because the Supreme Court has never explicitly interpreted First Amendment doctrine to *require* governments to enable citizens’ exercise of First Amendment freedoms. That said, the effect of public forum doctrine is to create “a right of speakers’ access, both to places and to people.”²¹⁸ Public forum doctrine acts as a government subsidy for speech.²¹⁹ The government must hold open the traditional forums such as streets and parks for the benefit of speakers who would otherwise lack the resources to reach a mass audience.²²⁰ Yet, the Supreme Court has been oddly reluctant to extend this understanding to places that have not been open to the public since “ancient times.”²²¹

Social media forums, especially those sponsored by the government, have the potential to advance the First Amendment values of free speech, free association, and the petitioning of government for redress of grievances. With regard to speech and association, social media bring citizens together across boundaries of space and time that often separate them in the offline world.²²² Government sponsored social media provide speakers with a particularly valuable commodity. Just as governments use social media to reach desirable audiences, citizens can use these same social media outlets to address audiences that would otherwise be difficult or impossible to reach. A citizen

increases citizens’ perceptions that government is responsive to their needs. See Caroline J. Tolbert & Karen Mossberger, *The Effects of E-Government on Trust and Confidence in Government*, 66 PUB. ADMIN. REV. 354, 366 (2006).

²¹⁷ *Id.* at 357.

²¹⁸ SUNSTEIN, *supra* note 3, at 28; see also Thomas I. Emerson, *The Affirmative Side of the First Amendment*, 14 GA. L. REV. 795, 808 (1981) (contending that the “system of freedom of expression . . . demands access to an audience”).

²¹⁹ Rebecca Tushnet, *Domain and Forum: Public Space, Public Freedom*, 30 COLUM. J.L. & ARTS 597, 600 (2007) (“Public forums allow speech supporting the ‘poorly financed causes of little people’ to be disseminated where it is likely to be heard, in public spaces where the public often goes.” (quoting *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943))).

²²⁰ Philip M. Napoli & Sheena T. Sybblis, *Access to Audiences as a First Amendment Right: Its Relevance and Implications for Electronic Media Policy*, 12 VA. J. L. & TECH. 1, 5 (2007).

²²¹ Tushnet, *supra* note 219, at 600.

²²² Melissa Bell, *Social Media Brings Us Together, but too Fleetingly*, WASH. POST (Sept. 2, 2011), http://www.washingtonpost.com/lifestyle/style/social-media-brings-us-together-but-too-fleetingly/2011/08/29/gIQAtdv0wJ_story.html.

may seek out the U.S. Coast Guard's Facebook page, for example, in order to register a complaint about its handling of British Petroleum's oil spill in the Gulf of Mexico.²²³ Although the same citizen would be free to set up his own Facebook page to complain about the Coast Guard's clean-up efforts, the Coast Guard's Facebook page provides him access to a receptive audience that likely already knows something about the Coast Guard and cares about its performance.²²⁴

Not only can the Coast Guard sponsored page provide speakers a unique and valuable platform to reach interested fellow citizens, but it can also increase the likelihood that speakers and audiences will unite to engage in political action. Again, audience members who seek information on government sites may be especially interested in the policies discussed there and thus more likely than others to engage in action to change or improve them.²²⁵ In the Coast Guard example, a citizen might use the government site to invite fellow citizens to take collective action, such as attending a rally or volunteering to assist with clean up of polluted beaches. No other online forum is likely to reach quite as interested an audience or foster political association as effectively as the government sponsored one.

Perhaps the most compelling argument supporting government creation of social media forums is that they give meaning to the often neglected constitutional right of citizens to petition government for redress of grievances. In his new book on the Petition Clause, Professor Ronald Krotoszynski, Jr. explains that "at its core, the Petition Clause stands for the proposition that government, and those who work for it, must be accessible and responsive to the people."²²⁶ Even if governments create interactive social media sites only to create the appearance that they are responsive,²²⁷ citizens can still use such sites to demand actual responses, as the First Amendment entitles them to do.²²⁸ Indeed, the use of social media may create pressure for government to be responsive to citizen demands.²²⁹ This feature of social media forums

²²³ United States Coast Guard, *Facebook Page of the United States Coast Guard*, FACEBOOK, <http://www.facebook.com/UScoastguard> (last updated Sept. 23, 2011).

²²⁴ *See id.* The speech that takes place in such settings is likely to be political speech, the very kind that democratic theory brands as crucial to democratic self-governance. *See* Krotoszynski, *supra* note 34, at 1301-04.

²²⁵ *See* KAREN MOSSBERGER ET. AL., *DIGITAL CITIZENSHIP: THE INTERNET, SOCIETY, AND PARTICIPATION* 59-66 (2007).

²²⁶ RONALD KROTOSZYNSKI, JR., *RECLAIMING THE PETITION CLAUSE* (forthcoming 2011) (manuscript on file with author) (arguing that the Petition Clause should be "reclaimed as a source of substantive constitutional liberties").

²²⁷ *See* Tolbert & Mossberger, *supra* note 161, at 366.

²²⁸ James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 905 n.22 (1997).

²²⁹ Current sources of such pressure include the Administrative Procedure Act's imposed duty on agencies to respond to petitions for changes in agency rules; although the agency

distinguishes them from streets and parks, which may sometimes be used to protest government practices and policies in ways that demand action but do not provide a direct conduit to the government officials in charge of those practices and policies.²³⁰ Although the right to petition is doctrinally underdeveloped,²³¹ it plays a role not filled by the rights of speech or association. The Petition Clause guarantees not just a right to speak but a right to speak to those empowered to take action in response.²³² It therefore helps guarantee governmental accountability to the electorate, which is the essence of democratic self-governance.²³³

In light of the many benefits of social media use for governments and their constituencies, First Amendment doctrine should support rather than deter the creation of public forums within social media. As detailed previously, however, the lack of clarity in public forum jurisprudence creates incentives for government actors not to set up interactive social media sites for fear they will lose all control over what goes on there. The next Part identifies critical flaws in First Amendment doctrine and, more importantly, explains the origin of those flaws, namely the Supreme Court's reliance on a flawed model of discourse between citizens and their government.

need not act in response to the petition, it is required to respond, and judicial review forces government to take the statutory duty seriously. 5 U.S.C. § 555(e) (2006).

²³⁰ Petitioning speech is speech that demands some change in government policies or practices. Krotoszynski, *supra* note 34, at 1256. Professor Krotoszynski explains the importance of petitioning activity as follows: "The ability to access and engage government, in a meaningful way, remains central to the success of the project of democratic self-government. For government to address successfully the wants and desires of 'We, the People,' it must listen and engage popular concerns on a timely basis." KROTOSZYNSKI, *supra* note 226. For further discussion of the right to petition, see James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 905 n.22 (1997), Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15, 51 (1993), and Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 165-66 (1986).

²³¹ The Supreme Court has tended to treat the petitioning right as coextensive with other First Amendment rights. See *McDonald v. Smith*, 472 U.S. 479, 482, 485 (1985) (holding that the Petition Clause is "cut from the same cloth" as the rights to free speech and free press and thus gives no greater protection for false factual assertions).

²³² Pfander, *supra* note 228, at 905.

²³³ See Emily Calhoun, *Voice in Government: The People*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 427, 427-28 (1994) (arguing that the Petition Clause protects "the voice of the people," and more specifically that it protects a value distinct from the Speech Clause, namely "speech synthesized and transformed through the processes of government").

III. TOWARD A NEW DISCOURSE MODEL FOR THE ONLINE PUBLIC FORUM

The problem of government sponsored social media highlights serious doctrinal flaws in public forum doctrine. Most egregious, perhaps, are a Boolean approach to the determination of whether government or citizens are speaking, undue focus on government intent as determinative of public forum status, and failure to recognize the affirmative role governments play in configuring public discourse. The more fundamental problem, though, is a conceptual one. Specifically, the model of discourse underlying the public forum and government speech doctrines views communication as a linear process. Not only does this model fail to account for the complexity of government-citizen discourse, particularly as that discourse occurs in online forums, but more critically, the model also is inconsistent with the demands of democratic theory. Replacing the linear model of government-citizen discourse with a more complex one should, paradoxically, lead to doctrinal simplification. More significantly, it should enable that doctrine to adapt to public discourse as it is practiced today.

A. *Doctrinal Flaws*

Ideally, public forum doctrines should foster a rich public discourse. Governments should be encouraged to create forums for citizens to speak, engage politically with others, and communicate their wishes to those tasked with representing them. Currently, the difficulty of applying doctrinal categories may make governments reluctant to create new forums for expression or may lead to undue censorship within forums already created. The problem of applying current doctrine to social media forums highlights existing flaws within First Amendment doctrine.

1. The Problem of Mixed Speech

One of the most significant flaws of current doctrine relative to interactive social media is that it forces a false choice: either the government is speaking, in which case it controls the message, or a private individual is speaking, in which case government control is limited.²³⁴ But this either-or approach is not faithful to how speech actually operates in interactive social media. Scholars have previously identified the inadequacy of the either-or choice in the context of state sponsored license plates containing messages like “Choose Life.”²³⁵ The problem in the license plate cases often is that the states initially approve the sale of the license plates, including the individual messages they contain, but then individual purchasers of the plates select them on the basis of their messages.²³⁶ Thus, the license plates sometimes involve government and private speakers sending essentially the same message. But the either-or

²³⁴ Olree, *supra* note 15, at 368.

²³⁵ See Corbin, *supra* note 147, at 608; Olree, *supra* note 15, at 369.

²³⁶ Corbin, *supra* note 147, at 608-09.

approach has a different dimension with regard to social media. Interactive social media usually do not involve citizen and government simultaneously using one forum to communicate to the world at large, as do the license plates. Instead, social media involve the government's communicating to citizens from whom it solicits further input. In this case, citizens, communicating with other social media users, provide the government with feedback or even petition the government to take action. Social media therefore involve an ongoing dialogue or conversation with clearly identifiable government and private speech comprising distinctive elements of that conversation. Any forced choice between government speech and private speech will inevitably mislabel a portion of that conversation and, consequently, apply the wrong constitutional standard in judging the government's editorial decisions.²³⁷

2. Undue Focus on Government Intent

Another problem with current doctrine is that government intent exclusively determines whether a non-traditional forum is public or nonpublic.²³⁸ According to the Supreme Court, the key to designated public forum status is whether the place at issue is one "which the State has opened for use by the public as a place for expressive activity."²³⁹ Not only has the Court required that the decision to open a forum be intentional, but the Court has also required that the intent be "demonstrably clear."²⁴⁰ The practical effect is to create a presumption *against* a finding of public forum status in "non-traditional" spaces.²⁴¹ In these spaces, existing doctrines strike the balance between government control of property and freedom of speech definitively in favor of the former, regardless of what manner of property is at issue.²⁴² This approach means that speakers are sometimes silenced even if their speech is "basically compatible with the activities otherwise occurring at the locale."²⁴³

²³⁷ See *id.* at 623.

²³⁸ See David S. Day, *The Public Forum Doctrine's "Government Intent Standard": What Happened to Justice Kennedy*, 2000 MICH. ST. L. REV. 173, 174 (criticizing Justice Anthony Kennedy for embracing the "speech restrictive" government intent standard in *Forbes*).

²³⁹ *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*, 460 U.S. 37, 45 (1983).

²⁴⁰ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988).

²⁴¹ See *id.*

²⁴² In *Brown v. Louisiana*, the Supreme Court upheld the speakers' right "to protest by silent and reproachful presences, in a place where the protestant has every right to be," even though that place, a public library, was not a traditional public forum. 383 U.S. 131, 142 (1966). In a subsequent case, however, the Court refused to recognize a right to speak in a private driveway of a jail, since jails are "built for security purposes." *Adderley v. Florida*, 385 U.S. 39, 41 (1966). Similarly, the Court refused to recognize a right to hand out campaign literature on a military base generally open to the public because the "purpose" of the base was "to train soldiers, not to provide a public forum." *Greer v. Spock*, 424 U.S. 828, 838 (1976).

²⁴³ *Greer*, 424 U.S. at 860 (Brennan, J., dissenting).

Concededly, the focus on government intent may be advantageous in certain circumstances. It means, for example, that courts are less likely to second guess the determination of executive branch officials about the compatibility of speech with the government's preferred uses of its property. It unduly tips the balance, however, against the free speech interests of citizens, even in situations where these rights could be accommodated without endangering governmental functions.

Current doctrine also skews incentives against government creation of public forums. The government can easily guarantee complete control within a forum simply by granting only selective access and expressing its intent not to create a forum, even if the objective characteristics of the forum make it an appropriate venue for freedom of expression by citizens and even if one might ordinarily expect it to be used for such a purpose. All the government need do to guarantee that a forum is not public is to discriminate routinely against speech and speakers who might want to use it. As Robert Post has stated, the focus on government intent as the determinant of public forum status creates a "vicious circularity" encouraging more censorship of speech.²⁴⁴

Although the constitutional standards applicable to limited public forums and nonpublic forums are almost identical, the deck still seems stacked against finding the former. Even where the government has previously allowed speech to take place on its property, the default position is that it has not created a public forum.²⁴⁵ In effect, current doctrine creates a presumption that "non-traditional" government property is not a forum, and only a definitive and clear indication of government intent can overcome that presumption.

3. Failure to Apprehend the Government's Role in Configuring Communication Spaces

This undue focus on government intent is symptomatic of an even deeper doctrinal flaw: the failure to appreciate the crucial role that non-traditional public forums play in fostering the vitality and diversity of public discourse.²⁴⁶ The First Amendment arguably demands "the government to create at least some public forums that provide effective means of communication."²⁴⁷ Currently, however, the Supreme Court treats public forums as "artifact[s] of government property ownership" rather than as necessary subsidies for speakers who might not otherwise be able to speak to or associate with their

²⁴⁴ Post, *supra* note 97, at 1784.

²⁴⁵ *Hazelwood*, 484 U.S. at 270.

²⁴⁶ "The issue that then arises is whether the public forum doctrine exists to implement an underlying principle about the ability of poorly financed speakers to reach willing listeners, or whether it is merely an artifact of government property ownership." Tushnet, *supra* note 219, at 601.

²⁴⁷ J.M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 412.

fellow citizens.²⁴⁸ In doing so, the Court has ignored the necessary and important role governments play in “configuring”²⁴⁹ communications spaces in ways that either foster or thwart public discourse. This role is even more vital as traditional public forums lose their vitality and citizens congregate more often in cyberforums than in physical ones.²⁵⁰

B. *Conceptual Flaws: The Linear Model of Communication*

Supreme Court decisions about the limits of free speech reflect a theory, though often only an implicit one, about the communications process. The Court has labeled public parks and streets “quintessential”²⁵¹ public forums and has even stated that public streets are “the *archetype* of a traditional public forum.”²⁵² The Court has also invoked the metaphor of London’s Hyde Park Speakers’ Corner to describe how public forums operate.²⁵³ Whether explicitly or implicitly, this metaphor comprises the measure against which all other forums are measured. In some instances, the Court has even declined to find public forum status simply by finding the proposed forum did not match the archetype: “Here, we have no open spaces, no meeting hall, park, street corner, or other public thoroughfare.”²⁵⁴ By definition, a non-physical forum is unlikely to match the archetype, making it less likely that the Court will find it to be a public forum – at least in the absence of definitive government intent to designate it as such.

The model of discourse the Supreme Court’s public forum decisions reflect is “a linear one.”²⁵⁵ In essence, the “quintessential” public forum encapsulated

²⁴⁸ Tushnet, *supra* note 219, at 601.

²⁴⁹ Noah D. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 173 (1998) (arguing for “creation of state-administered public forums” in cyberspace).

²⁵⁰ Timothy Zick has extensively criticized the demise of physical forums as places for public discourse and the contributions of First Amendment doctrine to that demise. TIMOTHY ZICK, *SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES* 12 (2009). He explains that scholarly critiques of public forum doctrine manifest a “debate regarding whether the First Amendment ought to be concerned, as some suggest, solely with preventing government ‘distortion’ of speakers’ messages rather than affirmatively ‘enhancing’ or facilitating (public) expression.” *Id.* at 12.

²⁵¹ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

²⁵² *Frisby v. Schultz*, 487 U.S. 474, 480 (1988) (emphasis added).

²⁵³ *See, e.g., Perry*, 460 U.S. at 49 n.9 (rejecting the argument that the teacher mailboxes at issue were a public forum because to do otherwise would turn various government controlled properties into “Hyde Parks open to every would-be pamphleteer and politician” (quoting *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 130 n.6 (1981))); Hunter, *supra* note 138, at 488 (“Archetypal public forums include the Athenian Senate and Hyde Park’s Speaker’s Corner, and the myth of their influence and importance is hard to dispel.”).

²⁵⁴ *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974).

²⁵⁵ Bezanson, *supra* note 108 at 814.

by the Hyde Park metaphor involves speakers as “senders” transmitting messages to “receivers” consisting of the audience physically present. In this relatively static model of communication, the dominant First Amendment interest is that of the speaker. The audience has only secondary interests in receiving information. For example, the Court has recognized that traditional public forums may “be used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”²⁵⁶ Even so, the audience is cast mainly in a passive role, and most cases involve relatively little discussion of how audiences might be affected by restrictions on speech.²⁵⁷

1. Insights from Communications Theory

The Supreme Court’s model of communication within the public forum has some obvious affinities with the “mathematical” or “linear” model of communications – a model that is still dominant within the field of communications, or “information theory,”²⁵⁸ and has been highly influential within other social science fields.²⁵⁹ Engineers Claude Shannon and Warren Weaver developed this mathematical model of communication in the 1940s to maximize efficient transmission of content through radio waves and television cables.²⁶⁰ The Shannon-Weaver model envisioned communication as a linear process comprised of (1) an information source, (2) a transmitter that encodes a message into signals, (3) a channel of communication, (4) a receiver or decoder, and (5) a destination.²⁶¹ Shannon and Weaver recognized that “noise” within the system might distort or block the signal and/or interfere with decoding of the message, but their original model paid no attention to the semantic aspects of communications.²⁶² Instead, their dominant concern, and

²⁵⁶ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

²⁵⁷ Most Supreme Court cases involving public forum doctrine contain little or no discussion of how a restriction on speech will affect the putative audience of the speech. *See, e.g.*, *United States v. Kokinda*, 497 U.S. 720 (1989).

²⁵⁸ JOHN FISKE, *INTRODUCTION TO COMMUNICATION STUDIES* 6 (2010).

²⁵⁹ *See* DAVID D. WOODS & ERIK HOLLNAGEL, *JOINT COGNITIVE SYSTEMS: FOUNDATIONS OF COGNITIVE SYSTEMS ENGINEERING* 11 (2005) (calling the Shannon-Weaver model the “mother of all models”). *But see* JOHN GAMMACK, VALERIE HOBBS, & DIARMIUD PIGOTT, *THE BOOK OF INFORMATICS* 72 (2007) (acknowledging that the model has been “influential” but noting that its failure to address “meaning” has led to it being “largely discredited as applicable to human communication”).

²⁶⁰ *See* FISKE, *supra* note 259, at 5 (“For [Shannon and Weaver], the main channels were the telephone cable and the radio wave.”); CLAUDE SHANNON & WARREN WEAVER, *THE MATHEMATICAL THEORY OF COMMUNICATIONS* (1949); Claude Shannon, *A Mathematical Theory of Communication*, 27 *BELL SYS. TECH. J.* 379 (1948).

²⁶¹ SHANNON & WEAVER, *supra* note 260, at 33-35.

²⁶² *See* FISKE, *supra* note 258, at 8-9. This is not necessarily a criticism of the model, which was explicitly about the technical process of communication rather than meaning. *See id.* Indeed, Everett Rogers suggests that the problem with the model was how later

indeed a dominant metaphor underlying their model, is message transmission.²⁶³

Criticisms of Shannon and Weaver's linear model are instructive because similar criticisms arguably apply to *all* linear models of communication. One obvious flaw of any linear model of communication is that it oversimplifies a complex process, potentially distorting rather than enhancing one's ability to analyze that process.²⁶⁴ A second flaw is that linear models envision communication as a static rather than a dynamic process,²⁶⁵ thereby assigning a primary role to the sender of messages and only a secondary, passive role to the receiver – or audience.²⁶⁶ Focusing primarily on the sender means that the receiver's role in decoding, interpreting, interacting with, or reacting to the speaker's message tends to be overlooked.²⁶⁷ The static aspect of linear models also leads them to ignore context²⁶⁸ and the frames of references different audiences bring to bear in interacting with a received message.²⁶⁹ A

theorists tried to use it. See EVERETT M. ROGERS, COMMUNICATION TECHNOLOGY: THE NEW MEDIA IN SOCIETY 88 (1986) (“‘To criticize Shannon’s model as inapplicable to the complexities of human communication is to criticize a rowboat because it is not a whale.’ Later-day communication scholars basically misunderstood the Shannon rowboat because they never looked at it carefully enough.” (quoting David Ritchie, *Shannon and Weaver: Unraveling the Paradox of Information*, 1986 COMM. RES. 278, 280)).

²⁶³ SHANNON & WEAVER, *supra* note 260, at 33-35.

²⁶⁴ ROGERS, *supra* note 262, at 89 (observing, with regard to the Shannon-Weaver model, that “[a] paradigm is also an intellectual trap, enmeshing the scientists who inherit it in the web of assumptions that they often do not recognize”); PAMELA J. SHOEMAKER, JAMES WILLIAM TANKARD, JR. & DOMINIC L. LASORSA, HOW TO BUILD SOCIAL SCIENCE THEORIES 120 (2004) (suggesting that linear models such as Shannon and Weaver’s “may have lingered well beyond their usefulness”). My colleague Mark Fenster has criticized advocates of government transparency for relying on a linear model of communication, stating that “this model fails because of its simplistic, inaccurate conception of how communication actually works.” Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 915 (2006).

²⁶⁵ See C. DAVID MORTENSEN, COMMUNICATION: THE STUDY OF HUMAN INTERACTION 13-16 (1972).

²⁶⁶ See WILL BARTON & ANDREW BECK, GET SET FOR COMMUNICATION STUDIES 30 (2005) (“Some of the early criticisms leveled at Shannon and Weaver’s early theorization were that it lacks feedback, and that it is monologic (that is, it conceives of communication as flowing only one way).”); Anne Maydan Nicotera, *Constitutive View of Communication*, in 1 ENCYCLOPEDIA OF COMMUNICATION THEORY 175, 176 (Stephen W. Littlejohn & Karen A. Foss eds., 2009) (asserting that linear models were deemed “unsatisfactory because they were too heavily focused on the sender or source of the originating message”).

²⁶⁷ Cf. Michael J. Reddy, *The Conduit Metaphor – A Case of Frame Conflict in Our Language About Language*, in METAPHOR AND THOUGHT 284, 292-97 (A. Orthony, ed., 1979).

²⁶⁸ FISKE, *supra* note 258, at 7 (“[T]he meaning is at least as much in the culture as in the message.”).

²⁶⁹ Corman, Trethewey, and Goodall explain these frames of references:

third and more fundamental complaint about linear models is that they tend to elide the fact that communication is a shared social construct, consisting of individuals coming together in a shared process of making meaning.²⁷⁰ Finally, though linear models may be useful in describing mass communications via traditional media, they are ill suited to describe the communication process that takes place using Web 2.0 technologies – technologies that enable participatory, interactive, many-to-many communications both “in real time” and asynchronously.

These general criticisms of linear models of communication help highlight some of the conceptual flaws in the Supreme Court’s public forum jurisprudence. As detailed below, the Supreme Court’s public forum jurisprudence suffers from the flaws that plague all linear models of communication. By oversimplifying the communication process, public forum jurisprudence seriously undervalues the interests at stake in that process. In particular, the Court’s tendency to view the process as static leads to almost exclusive focus on speakers’ interests in reaching others present in the public forum, to the detriment of other interests of the speaker and the interests of other participants in the process. More critically, however, the linear model underpinning public forum jurisprudence neglects the demands of democratic theory, which requires that citizens engage in discourse on an ongoing basis with those whom they have chosen to govern them. Only through this process can shared social meanings about our collective fate emerge and democratic theory’s vision be realized. Public forum jurisprudence should foster, rather than thwart, the use of social media to realize that vision. A necessary first step in that realization is the adoption of a model that better accounts for how discourse occurs in social media.

2. Inadequate Consideration of Speaker Interests

The linear model of speech gives inadequate consideration to the interest of speakers in (a) reaching a target audience other than the one physically present in the forum and (b) reaching audiences for the purpose of association and

[L]isteners create meanings from messages based on factors like autobiography, history, local context, culture, language/symbol systems, power relations, and immediate personal needs. We should assume that meanings listeners create in their minds will probably not be identical to those intended by the receiver. As several decades of communication research has shown, the message *received* is the one that really counts.

STEVEN R. CORMAN, ANGELA TRETHERWEY & BUD GOODALL, A 21ST CENTURY MODEL FOR COMMUNICATION IN THE GLOBAL WAR OF IDEAS: FROM SIMPLISTIC INFLUENCE TO PRAGMATIC COMPLEXITY 7 (Consortium for Strategic Communication, 2007), available at <http://www.commops.org/article/114.pdf>.

²⁷⁰ WOODS & HOLLNAGEL, *supra* note 259, at 13 (“Whereas the Shannon-Weaver model is appropriate to describe the transmission of information between two systems, it is not necessarily equally appropriate to describe how two people communicate or two systems work together.”).

petitioning.²⁷¹ In the context of physical forums, the Supreme Court has refused to recognize a speaker's interest in reaching her target audience, even where the government could give her access to the forum without significant compromise of government functions.²⁷² The 2010 decision in *Christian Legal Society Chapter of the University of California v. Martinez*²⁷³ suggests that the Court will be no more receptive to a speaker's interest in reaching a chosen audience in the social media context. Recall that *Martinez* involved a student organization that wished to access a limited public forum created by Hastings College of the Law.²⁷⁴ The Christian Legal Society (CLS) sought, in part, to use channels of communication established by the law school, including a law school newsletter and "e-mails using a Hastings organization address."²⁷⁵ Presumably these channels would have enabled CLS to reach effectively the target audience of all Hastings law students.²⁷⁶ The Court, however, rejected the argument that denial of access would disadvantage CLS because the group could use other methods – such as social media – to reach the target audience.²⁷⁷ The Court stated, "Although CLS could not take advantage of [Registered Student Organization]-specific methods of communication, *the advent of electronic media and social-networking sites* reduces the importance of those channels."²⁷⁸ This statement totally ignored the fact that CLS's use of the law school newsletter and e-mails identifying it as a student organization might be far more effective than a Facebook page and that the access to the preferred communication channels would not interfere with the law school's control over its property.

If the linear model undervalues a speaker's interest in reaching a target audience by the most expeditious means, it also fails to consider how speakers sometimes use public forums to further rights of association and petitioning. A

²⁷¹ See David Goldberger, *A Reconsideration of Cox v. New Hampshire: Can Demonstrators Be Required to Pay the Costs of Using America's Public Forums?*, 62 TEX. L. REV. 403, 412-13 (1983) (arguing that the Court has assumed "that the speaker is the primary beneficiary of his use of a public forum [and that] [t]his assumption ignores the benefit of the speaker's activities for the entire society").

²⁷² See *Greer v. Spock*, 424 U.S. 828, 838-40 (1976); *Adderley v. Florida*, 385 U.S. 39, 44-48 (1966). But see *Brown v. Louisiana*, 383 U.S. 131, 133-43 (1966); Geoffrey Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 245 ("In the absence of an effective and meaningful opportunity to reach the relevant audience, the theoretical right of expression would be hollow. Yet under the Roberts theory of the public forum, the individual may be denied access . . . simply because the state chooses to exercise its prerogatives as owner of the property.").

²⁷³ 130 S. Ct. 2971 (2010).

²⁷⁴ *Id.* at 2978-81.

²⁷⁵ *Id.* at 2979.

²⁷⁶ See *id.*

²⁷⁷ *Id.* at 2991.

²⁷⁸ *Id.* (emphasis added) (citation omitted) (observing that CLS had a Yahoo! message group of its own that it could use to contact students).

speaker in a public forum often seeks to reach not only the audience that is physically present but also the broader public and government actors not present in the forum.²⁷⁹ This explains why protest organizers seek out mass media coverage to expand the reach of their message: the broader the reach, the more likelihood of government action to remedy the protestors' grievances. Although the Supreme Court has paid lip service to the role of public forums in fostering rights of association, the Court appears to envision only the association taking place in the physical forum itself. Its decisions manifest little or no recognition that a speaker may be trying to forge associations beyond the forum or even petitioning the government to redress grievances.

3. Inadequate Consideration of Audience Interests

If the full range of speaker interests are not comprehended by the model of discourse underlying public forum jurisprudence, neither are the interests of audiences in (a) receiving information or (b) joining a crowd in the public square to express solidarity or disagreement with speech taking place there.²⁸⁰ The Supreme Court has previously acknowledged the right of citizens to receive information,²⁸¹ but the right's contours are ill-defined.²⁸² Perhaps understandably, the right to receive information in a public forum has been treated as a mere corollary of a speaker's right to disseminate information.²⁸³ Nonetheless, the Supreme Court should fully consider this corollary right in determining whether a given space is a public forum instead of indulging, as it

²⁷⁹ The Supreme Court has recognized, with regard to parades, that "marchers" may use them to make "some sort of collective point, not just to each other but to bystanders along the way." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Bos., Inc.*, 515 U.S. 557, 568 (1995). Thus, the Court seems to conceptualize parades more fully as an interactive communication than it does other types of speech within the public forum.

²⁸⁰ As Justice Douglas stated in his dissent in *Lathrop v. Donohue*, "Joining is one method of expression." 367 U.S. 820, 882 (1961) (Douglas, J., dissenting).

²⁸¹ *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (holding that the First Amendment "embraces the right to distribute literature and necessarily protects the right to receive it").

²⁸² Thomas I. Emerson, *Legal Foundation of the Right to Know*, 1976 WASH. U. L.Q. 1, 3 (calling the boundaries of the right "obscure"); William E. Lee, *The Supreme Court and the Right to Receive Expression*, 1987 SUP. CT. REV. 303, 307 (stating that "[a]lthough the [Supreme] Court claims that the right to receive is well established, the Court has done little more than point to the right" and has never explained its "theoretical basis").

²⁸³ *See, e.g., Kleindienst v. Mandel*, 408 U.S. 753, 762-70 (1972) (upholding the denial of a visa to a foreign speaker, despite the assertion of a First Amendment right by the putative audience to receive information and ideas); *Thomas v. Collins*, 323 U.S. 516, 534 (1945) (describing the right to receive information as "necessarily correlative" to the right to speak); Susan Nevelow Mart, *The Right to Receive Information*, 95 LAW LIBR. J. 176, 176 (2003).

currently does, a presumption in favor of government control of non-traditional forums.²⁸⁴

The Court should also consider the role of public forums in fostering assembly for social and political purposes. The Supreme Court has recognized that the right to assemble and join with fellow citizens is instrumental to the exercise of First Amendment rights.²⁸⁵ Specifically, the Court has acknowledged that assembly fosters “engag[ement] in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion.”²⁸⁶ Nevertheless, the Court has not completely recognized the role of the public forum in enabling audiences to exercise these rights. Engagement with fellow citizens in a public forum is not merely an important form of political participation; it also plays a role in individual self-realization and self-fulfillment. As one scholar has stated, “Expressive meaning comes through the performance of communal acts, and communicative possibility exists in joining, excluding, gathering, proclaiming, engaging, or not engaging.”²⁸⁷ A person who sees a large crowd gathered attentively around a speaker, perhaps yelling encouragement for his words, reasonably interprets the audience as expressing agreement with the speaker; likewise, a person who sees a large crowd booing and hissing a speaker may assume the crowd is assembling to express its disagreement. These interests should be acknowledged in any model of public discourse within a public forum.²⁸⁸

4. Inadequate Consideration of Democratic Theory

In addition to its other deficits, the linear model of communication is not consonant with democratic theory.²⁸⁹ This is because it largely ignores the

²⁸⁴ See analysis *supra* Part I.

²⁸⁵ See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618 (1984).

²⁸⁶ *Id.*

²⁸⁷ John D. Inazu, *The Unsettling “Well-Settled” Law of Freedom of Association*, 43 CONN. L. REV. 149, 177 (2010).

²⁸⁸ In *Martinez*, the Court refused to consider the associational claims of the student organization plaintiff as “discrete” from their speech claims, apparently concluding that the associational dimension of the case did not add any weight to the constitutional scales. *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2985 (2010). For criticism of the Court’s conclusion, see Inazu, *supra* note 287, at 195-96.

²⁸⁹ As Robert Dahl once observed, “there is no single theory of democracy – only theories.” ROBERT DAHL, PREFACE TO DEMOCRATIC THEORY 1 (1965). All democratic theories “share a vision of government by free and equal citizens who participate in their own governance.” THEORIES OF DEMOCRACY: A READER xiv (Ronald J. Terchek & Thomas C. Conte, eds., 2001). The vision of democracy advocated here has affinities with deliberative theories of democracy, in which the deliberative procedure itself is a source of democratic legitimacy. Joshua Cohen, *Deliberation and Democratic Legitimacy*, in THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 17, 21 (Allan Hamlin & Philip Pettit eds., 1991). Full discussion of deliberative democracy and debates among democratic

possibility that the government might have an interest in receiving information and petitions from its citizens. In liberal democracies, government derives both power and legitimacy from the (informed)²⁹⁰ “consent of the governed.”²⁹¹ Meaningful democratic self-governance requires the “governed” to make their will known, not just periodically, by voting in elections, but on an ongoing basis.²⁹² In the words of government speech scholar Mark Yudof, democratic theory envisions government engaging citizens in “a continuous process of consultation.”²⁹³ As he states, “In a well-ordered democracy, communications flow both ways – between the governors and the governed, each mutually affecting the judgments, perceptions, and communications of the other.”²⁹⁴ Put another way, a model of government-citizen communication ought to at least contemplate that speakers in public forums might sometimes be attempting to initiate an ongoing, “intersubjective” dialogue with government rather than speaking predominantly for their own satisfaction.

C. *Social Media and an Interactive Model*

Social media are ideal forums for putting an interactive discourse theory into practice. Web 2.0 technologies enable, but by no means guarantee, an interactive and dynamic discourse between governments and citizens. In government-sponsored social media forums, speakers do not have to depend on the acquiescence of newspaper editors, broadcasters, or similar intermediaries to convey messages to government officials and fellow citizens. Instead, speakers can direct messages to the government actor they select – or at least to staff members who monitor the site on the government actor’s behalf²⁹⁵ – simply by posting comments on the relevant social media page. Moreover, speakers can respond directly to the policy or agenda posted by the

theorists is beyond the scope of this Article.

²⁹⁰ Democratic self-governance depends fundamentally on an informed citizenry capable of making rational decisions. For extended discussion, see Lyrrisa Barnett Lidsky, *Nobody’s Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 839.

²⁹¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); see also Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1407 (1986) (discussing the process of “collective self-determination” within democracies).

²⁹² See AMY GUTMANN & DENNIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* 3 (2004) (describing deliberative democracy as imposing a “reason-giving requirement” on both governments and citizens engaged in the deliberative process).

²⁹³ MARK G. YUDOF, *WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA* xv (1983) (“Informing such democratic aspirations as majority rule and representative government are notions of informed consent of the governed and of a continuous process of consultation with the people.”).

²⁹⁴ *Id.* at xvi.

²⁹⁵ It is doubtful whether President Barack Obama reads the comments on the Facebook page of the White House, but staffers most likely monitor it and can gauge speakers’ responses to government policies or messages announced on the page.

government actor to maximize the chance of reaching other citizens interested in the issue. Speakers can also try to rouse fellow citizens to take to the streets in protest of government policy. Though speakers might accomplish similar objectives through other means, the government-sponsored site obviously provides direct and effective access to multiple, potentially receptive audiences. Regardless, discussion on the government site cultivates, or at least has the potential to cultivate, the formation of public opinion through a deliberative process.

Even those who never choose to “speak” within a social media forum have a First Amendment stake in receiving and responding to information posted there, as witnessed by the use of Facebook sites to galvanize regime changes in Tunisia in 2010²⁹⁶ and Egypt in 2011.²⁹⁷ With regard to Egypt, Facebook “was an integral part”²⁹⁸ of the mobilization of citizens to flood the streets to demand change.²⁹⁹ As U.N. Ambassador Susan Rice stated, the revolution in Egypt made it “impossible to escape the recognition that Twitter and Facebook and other forms of social media have had an enormous impact on the emergence and coalescence of . . . social movements, and governments are increasingly cognizant of their power and their importance.”³⁰⁰ Indeed, she touted “the power of social networking to channel and champion public sentiment.”³⁰¹ In the aftermath of Egypt’s revolution, the government that replaced Hosni Mubarak took heed of the lessons of the revolution about the power of Facebook. The group of military officers set up its own Facebook page and began using it to communicate with Egyptian citizens.³⁰² The group even used the page, rather than a press conference, to announce the resignation of Egyptian Prime Minister Ahmed Shafiq.³⁰³ Obviously, the new Egyptian government learned from the revolution that it must try to reap the benefits of social media for enhancing government-citizen discourse.

As this example illustrates, governments benefit when citizens feel heard, and social media are a powerful tool to foster an ongoing dialogue between governors and governed. This type of discourse has the potential to enhance

²⁹⁶ Emily Banks, *How Facebook Supported the Egyptian Revolution*, MASHABLE.COM (Feb. 25, 2011), <http://mashable.com/2011/02/25/facebook-egypt/>.

²⁹⁷ Kristen Chick, *The New Egypt, Where the PM Resigns on Facebook*, CHRISTIAN SCI. MONITOR (Mar. 3, 2011), <http://www.csmonitor.com/World/Backchannels/2011/0303/The-new-Egypt-where-the-PM-resigns-on-Facebook>.

²⁹⁸ Mike Giglio, *Inside Egypt’s Facebook Revolt*, NEWSWEEK (Jan. 27, 2011, 11:45 AM EST) <http://www.newsweek.com/2011/01/27/inside-egypt-s-facebook-revolt.html>.

²⁹⁹ Craig Whitlock, *Mubarak Steps Down, Prompting Jubilation in Cairo Streets*, WASH. POST, Feb. 12, 2011 (Met 2 Ed.), at A01.

³⁰⁰ Alexia Tsotsis, *UN Secretary Rice on Facebook and Twitter: “Governments Are Increasingly Cognizant of Their Power” [Video]*, TECHCRUNCH (Feb. 10, 2011), <http://techcrunch.com/2011/02/10/un-secretary-rice-facebook-twitter/>.

³⁰¹ *Id.*

³⁰² Chick, *supra* note 297.

³⁰³ *Id.*

democratic governance at all levels of administration. Acting as speaker, the government can provide citizens with current and accurate information about its activities and policy initiatives. As listener, government can use comments made by citizens to identify new agenda items, determine how certain topics or policies resonate, get suggestions for policy or program modifications, and even get a rough sense of public opinion.³⁰⁴ By fostering a reciprocal process of communication, social media may enable joint decision-making between governors and governed, thereby realizing the ideal of discourse envisioned by democratic theory.

If government-sponsored social media are to foster a more interactive government-citizen discourse, it must be by design, and there is reason to fear government actors will require some nudging to realize this goal. When left to their own devices, government actors have tended to structure “e-government” initiatives along “managerial” rather than “participatory” lines.³⁰⁵ Managerial initiatives prioritize government’s control of its message and “‘efficient’ delivery of government information to citizens.”³⁰⁶ Information is presumed to be “relatively simple and unilinear, rather than complex and discursively generated.”³⁰⁷ Although managerial communications have their place in disseminating government information, to the extent that they dominate online discourse between governments and citizens, “the democratic possibilities of the Internet are likely to be marginalized.”³⁰⁸

D. *Reframing Public Forum Doctrine to Find a Middle Ground*

Governments, alas, are unlikely to simply see the wisdom of an interactive, “participatory”³⁰⁹ discourse and design their social media sites to further it, such wisdom is unlikely to predominate. Nevertheless, by adopting a new paradigm of government-citizen discourse, courts can begin to reframe public

³⁰⁴ This is an obviously imperfect measure of public sentiment. Many citizens’ voices will be lost due to the digital divide, and the people who are most frequent or vociferous in their speech may not represent the “silent” majority.

³⁰⁵ Andrew Chadwick & Christopher May, *Interaction Between States and Citizens in the Age of the Internet: “e-Government” in the United States, Britain, and the European Union*, 16 GOVERNANCE 271, 295 (2003).

³⁰⁶ *Id.* at 272.

³⁰⁷ *Id.* at 278.

³⁰⁸ *Id.* at 272. The authors also outline a “consultative” model of government-citizen communication. Under this model, citizens provide government with important information upon which to base policy and administrative decisions. *Id.* at 278-80. Although the consultative model values citizen inputs into the decision-making process, it treats information supplied by citizens “as a passive resource” to be solicited when needed. *Id.* at 279-80. The consultative model, like the managerial model, emphasizes the “vertical flows of state-citizen communication” and stops short of a truly interactive model. *Id.* at 280.

³⁰⁹ *Id.* at 280. The participatory model envisions “multidirectional interactivity” and recognizes “that knowledge is discursive, contingent, and changeable – that it emerges through interaction.” *Id.* at 280-81.

forum doctrine to nudge government actors towards designs that foster democratic values.

The threshold condition for reframing public forum jurisprudence is explicit recognition that communication between governor and governed can be a multidirectional and continuous process. Replacing the linear model underlying current doctrine with a multidirectional, interactive one will not automatically cure existing doctrinal flaws. It will, however, *enable* the necessary changes to modernize government-citizen discourse.

Doctrinally, change must begin with the acknowledgement that interactive government-sponsored social media sites often contain both government speech and citizen speech (or so-called “private” speech). The public forum inquiry should, therefore, be a functional one based on the way citizens actually use the site. It should not hinge on whether the site contains predominantly government speech, for even that should not defeat a finding that the “comments” portion of the site is a public forum. Nor should it hinge entirely on the government’s intent in setting up the site. Instead, the inquiry should focus on the nature of the forum. This means, in practical terms, that governments should be presumed to create public forums whenever they establish interactive social media sites, at least with regard to the portions of the sites containing commentary from citizens.

A key advantage of this presumption is that it would lend predictability to public forum determinations. Every interactive social media presence would be treated the same, regardless of how sophisticated the government actor establishing it. Even if the actor were savvy enough to disclaim any intent to create a forum when setting up the site, social media treatment would remain equal. In establishing social media policy, governments would know the ground rules in advance: they would be able to make the relevant trade-offs in opting for interactive versus non-interactive social media, and they would be able to avoid lawsuits triggered by unpredictable ground rules governing social media forums.

Concededly, the presumption of public forum status would curtail government control in editing social media sites. But that is precisely the point. Where the medium lends itself to use as a public forum, it should be treated as such regardless of government intent. If the government wishes to maintain complete control, it must forego interactivity. If the site is interactive, citizens will be able to discern which portion is government speech and which portion is private speech, minimizing the danger that exists currently that the government will manipulate or eliminate comments to make it look as if its preferred positions have citizen support even when they do not.

In operation, the presumption of public forum status will not be as bitter a pill for government to swallow as it sounds because the presumption should be coupled with a limited degree of editorial control to preserve decorum in the online forums established by government. Online forums are subject to their own “disorders” of discourse, and governments must have the tools to remedy these disorders in the forums they sponsor. What form do these disorders

take? Studies reveal that speakers are more prone to be profane or abusive when communication is “computer-mediated.”³¹⁰ The use of the computer imposes a separation between speaker and audience and thus creates a “disinhibiting” effect.³¹¹ This disinhibiting effect is magnified in instances where the speaker believes himself to be anonymous.³¹² The disinhibiting effect is both a virtue and vice of online discourse. On one hand, it leads to a discourse that is “uninhibited, robust, and wide-open.”³¹³ On the other, it leads to more profane and abusive speech. As this type of speech becomes more prevalent, and particularly when it targets private citizens rather than government officials, it may deter many citizens from accessing (or allowing their children to access) social media forums. Indeed, profane and abusive speech ultimately may thwart the use of social media as forums for public discourse.³¹⁴ As a consequence, governments have a substantial interest in regulating profane speech and abusive speech that targets private individuals in online Hyde Parks, and a degree of editorial control should be granted in the name of preserving decorum.

Doubtless, to some readers this piece of the proposal will be very controversial or at a minimum seem contradictory. This Article’s purpose is to broaden the use of social media as public forums and to maximize citizen interactions with government in these forums. By ceding a degree of editorial control to governments over the forums they create, there is a risk that government will edit only negative commentary about its own plans, policies, or personnel. With editorial control comes the risk that government sponsored social media will simply become tools to propagate government propaganda.

One response is that the proposal here is a necessary and minimal compromise to achieve the broader goal of opening social media forums for government-citizen interactions. In the hypothetical that began this Article, the mayor of a small city wanted to open a social media forum to interact with citizens.³¹⁵ As a public official, a mayor has very little incentive to open such

³¹⁰ John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAV. 321, 321, 325 (2004); see also Lidsky & Cotter, *supra* note 177, at 1559.

³¹¹ Suler, *supra* note 310, at 322.

³¹² *Id.* at 322.

³¹³ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

³¹⁴ In this Article I have argued that the courts should allow governments leeway to regulate speech that “hijacks” the forum and prevents or seriously impairs its use for expressive purposes by other citizens. One might argue that government regulation to prevent forum hijacking, particularly where that “hijacking” involves filling the forum with a large *quantity* of abusive speech, is a regulation of conduct rather than content and subject only to intermediate scrutiny under *United States v. O’Brien*, 391 U.S. 367 (1968). Andrea Matwyshyn has contended, for example, that government regulation of “unsafe” computer code, such as code that enables identify theft or “zombie botnets,” should be judged by the *O’Brien* standard even though the unsafe code is tethered to data or speech. Andrea M. Matwyshyn, *Hidden Engines of Destruction*, 62 FLA. L. REV. 109, 146-47 (2009).

³¹⁵ See *supra* INTRODUCTION.

a forum if it is likely to be overrun by profane or abusive speech.³¹⁶ The mayor may also fear, reasonably or not, that sponsoring such a forum is a discredit to the city.³¹⁷ When the forum is “hijacked” in this fashion, its value as a public forum is diminished, and reasonable government officials might well decide that the costs of opening such forums are greater than their benefits.³¹⁸ Ceding a limited degree of editorial control to preserve decorum within the government sponsored forum is an essential compromise to maintain incentives for forum creation.

Moreover, the government can help to ensure that its regulation of profane speech is not a cloak for censorship by setting up filtering programs that operate “neutrally” once put into place. Some social media sites, such as Facebook, conduct their own monitoring and filtering of profane and abusive speech, thereby largely eliminating the government role in censoring to eliminate such commentary.³¹⁹ Thus, for example, the word “fuck” could be changed to “f%#k” or even “—” with little risk that the vigor of discourse within the forum would be diminished or that those who oppose the government would be driven out of the marketplace of ideas. Even profane invective and name-calling could be limited through “neutral” filtering.

Admittedly, it would be harder to use filtering technology for abusive, defamatory speech, which is why editorial control should only be granted to eliminate invective and defamation targeted at private citizens. As the Supreme Court has recognized, public officials typically assume the risk of defamation as part of their job duties,³²⁰ but private citizens do not.³²¹ Moreover, defamatory speech has typically been an “unprotected” category of speech; the Supreme Court has only extended protections to defamatory speech because a degree of error is inevitable in free debate and thus some protection is necessary to provide “breathing space” for protected speech.³²² Such is not the case in the social media context described here, since the only penalty is removal, rather than civil or criminal penalties. Moreover, as an added procedural safeguard against government censorship, the government ought to post its comment removal policy on its social media site, and every “private” post removed from the site should be denoted or “tagged” that it has been removed for inappropriate content. These requirements would help offset the

³¹⁶ *See id.*

³¹⁷ *See id.*

³¹⁸ *See id.*

³¹⁹ *See Facebook Pages: How Can I Proactively Moderate Content Posted on My Page?*, FACEBOOK, <http://www.facebook.com/help/?faq=131671940241729> (last visited Sept. 22, 2011).

³²⁰ *Sullivan*, 376 U.S. at 279.

³²¹ *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-48 (1974).

³²² *See id.* at 384-85 (White, J., dissenting).

risks of government manipulation of the forum or distortion of the marketplace of ideas.³²³

CONCLUSION

Federal, state, and local governments across America are clamouring to jump on the social media bandwagon.³²⁴ Social media have the potential to

³²³ In arguing for the compromise advocated here, I have avoided analogizing social media forums to public meetings, a context in which government does have a degree of editorial control to police decorum. See discussion *supra* Part I.B.3. Public discussion that takes place on a social media site is fundamentally different from public discussion in, say, a city council meeting. The user of the online forum ordinarily must take some kind of affirmative step to seek out comments by fellow users and can easily scroll past the ones that appear to be offensive. Thus, the “captive audience” problem is present to a lesser degree online than in a physical forum such as a city council meeting. In addition, a profane or abusive speaker in an online forum poses less danger of disrupting a government process or impairing its efficiency. Thus, there is arguably less justification in the online forum for deferring to government attempts to protect the sensibilities of citizens who come to its social media site. This Article nonetheless contends that justification exists for allowing government actors a degree of discretion in eliminating profane comments from social media sponsored by the government. The justification is largely pragmatic: without this discretion, government actors may be deterred from using social media for fear that the resulting discourse is both less productive and that it will reflect badly on the government that “sponsors” the discourse. Moreover, the harms attendant to according discretion can largely be eliminated by using technological filtering for profanity and by having the editorial policy clearly stated on the government social media site.

³²⁴ Some of these government actors are doubtless inspired by President Barack Obama’s example. As a presidential candidate, Barack Obama famously used social media to take his message directly to voters. The Obama campaign established “presences” on MySpace, LinkedIn, Facebook, Twitter, YouTube, MiGente, BlackPlanet, Asian Avenue, Glee and other social media sites. More than three million people became “fans” of Obama on Facebook. As President, he has reached out to the public through a blog, a wiki, a website, and a Facebook page. Press Release, White House Press Secretary, White House Announces Open Government Website, Initiative (May 21, 2009), available at <http://www.whitehouse.gov/the-press-office/white-house-announces-open-government-website-initiative>. Cf. <http://www.whitehouse.gov/blog>. For further examples, see generally Norton & Citron, *supra* note 4. In addition, President Obama has urged federal agencies to “use innovative tools, methods, and systems” to conduct their business. Memorandum on Transparency and Open Government, 2009 DAILY COMP. PRES. DOC. 10 (Jan. 21, 2009) (“Executive departments and agencies should use innovative tools, methods, and systems to cooperate among themselves, across all levels of Government, and with nonprofit organizations, businesses, and individuals in the private sector.”). The use of social media in political campaigns is a fascinating topic but is outside the scope of this Article. Early indications during the 2010 federal congressional elections suggested that Republicans learned the lessons of the Obama campaign and were using social media more extensively than were Democrats. See Geoff Livingston, *Social Media: The New Battleground for Politics*, MASHABLE.COM (Sept. 23, 2010), <http://mashable.com/2010/09/23/congress-battle-social-media/>.

revolutionize discourse between citizens and their governments, but public forum jurisprudence currently frustrates rather than fosters that potential.

This Article has navigated the Supreme Court's notoriously complex public forum jurisprudence and, in the process, uncovered doctrinal and conceptual flaws that block adaptation of current doctrine to Web 2.0 technologies. The doctrinal flaws include a misplaced focus on government intent, a failure to apprehend that the government and private speakers might be speaking simultaneously within a forum, and a failure to appreciate the role of governments in configuring communication spaces for democratic discourse. The critical conceptual flaw is the Supreme Court's continued reliance on a linear model of communication, a model that is particularly ill-suited to describe discourse conducted between multiple speakers and audiences interacting simultaneously via social media. Reliance on this linear model obscures the multiple First Amendment interest of speakers, audiences, and even governments themselves in conversing with one another in online public forums.

This Article offers an alternate path for public forum jurisprudence. The first step down that path is embracing a participatory model of discourse – for this step enables all subsequent ones. The next step is to set the ground rules for interactive government-sponsored social media with due regard for the unique characteristics of the forum. On one hand, interactive social media are designed to function as forums for the mutual exchange of ideas and information, and courts should recognize this by presuming that interactive government-sponsored social media are public forums. On the other hand, speakers may be tempted to engage in abusive speech in social media to a greater extent than in physical forums. Thus, public forum rules for social media forums must give governments the necessary editorial freedom to prevent hijacking of the forums by abusive speakers. Such editorial freedom, coupled with a requirement of editorial transparency, is a necessary compromise to spur forum creation and preserve the rights of all participants within a forum to participate in meaningful democratic discourse.