

SOCIAL MEDIA, ADMINISTRATIVE AGENCIES, AND THE FIRST AMENDMENT

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INTRODUCTION

With unprecedented alacrity, federal agencies have heeded the President’s call to open government and embrace social media.¹ Now, the public can communicate with federal agencies in multiple ways. The Pentagon sponsors the Pentagon Channel on YouTube.² Citizens interested in physical activity can “like” the Department of Health and Human Services’s (HHS’s) “Let’s Move” campaign Facebook page.³ Concerned about terrorism? TheBlog@HomelandSecurity.org is only a few clicks away.⁴ A citizen angered because socks are no longer made in

1. Following President Barack Obama’s signal memorandum “Transparency and Open Government,” the Office of Management and Budget (OMB) issued its “Open Government Directive,” which required federal agencies to take specific steps to implement the Administration’s commitments to “transparency, participation, and collaboration.” Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685 (daily ed., Jan. 26, 2009), *available at* http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-10-16, OPEN GOVERNMENT DIRECTIVE (2009), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf.

2. *The Pentagon Channel*, YOUTUBE, <http://www.youtube.com/user/ThePentagonChannel> (last visited May 14, 2013).

3. *Let’s Move: The Department of Health and Human Services*, FACEBOOK, <http://www.facebook.com/letsmove> (last visited Feb. 2, 2013).

4. *TheBlog@HomelandSecurity*, DEP’T OF HOMELAND SECURITY, <http://blog.dhs.gov/>

the United States can contact Tradeology, the International Trade Administration's Blog.⁵ For citizens concerned about the environment, the Environmental Protection Agency (EPA) maintains "Greenversations"—a collection of nine blogs and seven discussion fora on a variety of environmental topics.⁶ Given the continued housing crisis, someone curious about what the U.S. Department of Housing and Urban Development (HUD) is doing to address it can go to HUDdle, the HUD blog, the HUD Facebook page, HUD on Twitter, and the HUD YouTube channel.⁷ Significantly, if a citizen is dissatisfied or impressed with present attempts to address the housing crisis, he or she can convey as much on the HUD Facebook page or on the agency YouTube channel or on Twitter, all of which are open for comments. The abundant opportunities for public comment that "Agency Web 2.0" provides appear to be an uncomplicated good—a veritable efflorescence of democracy. This commitment to online participation, commendable in principle, is rife with pitfalls in practice. Foremost among them is the First Amendment's freedom of speech guarantee.⁸

Of the twenty-three major federal departments and agencies maintaining social media sites inviting public comment, not one site contains a statement about the First Amendment's free speech clause. Naturally, federal agency attorneys are aware of the First Amendment, but what constitutes compliance when an agency invites public comment on its social media sites is not self-evident. Few agency attorneys have had to brave the contentious realm of First Amendment jurisprudence, and no high court has opined on the application of free speech doctrines to social media sites. Multiple agencies restrict comments on their social media sites in a variety

(last visited May 14, 2013).

5. *Tradeology*, INT'L TRADE ADMIN., <http://blog.trade.gov/> (last visited May 14, 2013).

6. *Greenversations*, ENVTL. PROTECTION AGENCY, www.epa.gov/greenversations (last visited May 14, 2013). For the entire range of Environmental Protection Agency's (EPA's) social media activities, see *Social Media*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/epahome/socialmedia.html> (last visited May 14, 2013).

7. *The HUDdle*, DEP'T OF HOUSING AND URBAN DEV. (HUD), <http://blog.hud.gov/> (last visited May 14, 2013); *U.S. Department of Housing and Urban Development*, FACEBOOK, <http://www.facebook.com/HUD> (last visited May 14, 2013); *HUD News*, TWITTER, <http://twitter.com/HUDNews/> (last visited May 14, 2013); *U.S. Department of Housing and Urban Development*, YOUTUBE, <http://www.youtube.com/user/HUDchannel> (last visited May 14, 2013).

8. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of people peaceably to assemble, and to petition the government for a redress of grievances."). Arguably, online public comment also involves the right to petition the Government, but this Article will focus on freedom of speech.

of ways. Are such restrictions permissible? If the agency is seeking to send a message and speak to the public about its activities, may it exert more control?

As state and local governments and their agencies open social media sites inviting public comment, in addition to the twenty-three federal agencies already doing so, questions about whether the government can censor public comments will only grow more clamorous. Interactive technologies offer opportunities for citizen participation at an unprecedented scale, but such opportunities could be stifled if agencies and courts prioritize the government's free speech rights over those of its citizens. A new forum for citizen participation may be subverted into an arena for acclamation. Given the number of agencies engaging in social media, this is a significant area of emerging practice, yet legal scholars have almost entirely ignored not only the phenomenon but also the significant First Amendment challenges it raises.

This Article argues that the public forum doctrine, which limits the government's ability to restrict speech on public property, provides the appropriate framework to address the First Amendment's application to agency social media sites. The alternative, to which some agencies appear to subscribe, is to argue that government speech is the controlling doctrine. The government speech doctrine holds that the free speech clause is irrelevant when the government itself is the speaker. Therefore, an agency has the discretion to censor citizen speech that is inconsistent with its message. Determining when the government is speaking remains opaque, as the doctrine is comparatively new and its lineaments somewhat vague. Because agencies open sites to publicize their mission and policies to the public and to invite public comment, speech on federal agency social media sites is a hybrid of agency speech and private speech on public issues. The question then becomes which type of speech predominates. Given the Administration's statement that the purposes of such sites are to engage the public and to increase participation, and the fact that public comment dominates the sites, private speech prevails. The classic description of a public forum, often used to determine if the doctrine should be applied to particular circumstances, characterizes it as a First Amendment easement.⁹ Permitting the public to comment on agency activities on an agency-sponsored site resembles nothing so much as providing speakers with an easement to use public property for expressive purposes. Although agency social media sites are located on third-party, private platforms, the

9. Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 13 (stating that the Free Speech Clause gave citizens "a kind of First-Amendment easement").

state acts affirmatively to open the sites and to maintain them so they are, in effect, public property for purposes of the public forum doctrine, which has been applied to intangible, communicative realms. A federal agency social media site is a limited public forum, which, while not offering the government free reign to restrict or censor public comments, does offer some permissible restrictions while protecting the First Amendment rights of citizen speakers.

Only one other article has addressed a similar issue, arguing, in the context of public comments on government websites, that the appropriate framework is the government speech doctrine.¹⁰ This is not likely to be the way courts approach this issue, however, because recent Federal Circuit and Supreme Court opinions demonstrate that courts use a contextual, pragmatic analysis when forced to choose between the government speech doctrine and the public forum doctrine. A finding of government speech depends upon whether the government can prove it established a message and maintained effective control over the content and communication of the message. A study of federal agency social media sites does not evince a clear message. However, in *Pleasant Grove City v. Summum*, the Supreme Court held that the government can speak through its selection of private speech, a decision that echoed the D.C. Circuit's holding in *People for the Ethical Treatment of Animals, Inc. v. Gittens*.¹¹ A close reading of the opinions cautions against applying the government speech doctrine to private speech on an agency social media site. The selection of private speech is held to be government speech only when the government is acting in an institutionally specific manner, as a government enterprise—be it as a library, art patron, broadcaster, or university—which is not the case on agency social media sites opened to encourage participation and dialogue.

In addition to the doctrinal argument, a theoretical analysis offers a decisive reason to favor the public forum doctrine. An overlooked strand of republican political thought held that negative liberty is more than the absence of interference; it is the absence of dependence on the will of another. Ancient and early modern political thought emphasized the close connection between free speech and non-dependence. Speech can only be free in a self-governing republic where the exercise of the right is not dependent on the arbitrary will of another. This venerable understanding of liberty as non-dependence, also known as neo-Roman liberty, clarifies

10. See generally David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, 2010 BYU L. REV. 1981, 1983 (2010).

11. *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009); *People for the Ethical Treatment of Animals, Inc. [PETA] v. Gittens*, 414 F.3d 23, 29–31 (D.C. Cir. 2005).

the much-debated relationship between democratic self-government and individual autonomy in First Amendment theory. Multiple scholars have criticized the democratic view's instrumentalism. They have overlooked the lesson history imparts, that autonomy, or more accurately, negative liberty as non-dependence, entails collective self-government. The republican aversion to arbitrary power clarifies the startling gulf separating the public forum doctrine from the government speech doctrine. Should government speech be the controlling doctrine, a citizen's speech on an agency social media site is subject to the same unaccountable, discretionary power that prevails elsewhere online. There will be no place, no refuge online from the possibility of arbitrary censorship. Because there need to be some realms online where people can speak as citizens, public comments on agency social media sites should be protected by the First Amendment.

Part I of this Article surveys the purpose and use of administrative agency social media, its location on private third-party domains, agency comment policies, and the "privatization" of cyberspace. Part II summarizes the debate between democratic and autonomy-based views of free speech and offers a historical understanding of neo-Roman liberty, which imparts the lesson that autonomy entails collective self-governance. Part II also reviews the public forum doctrine and the government speech doctrine. One doctrine holds governmental restrictions on speech on public property to the highest level of judicial scrutiny; the other frees the government from the First Amendment in specific situations. Part III acknowledges that citizen speech on agency social media sites, which at once encourage public comment and convey messages about agency activities, can be considered a hybrid of government and private speech. Part III then proceeds to examine relevant court opinions, which indicate that a pragmatic analysis of context and purpose is determinative. Finally, Part III deploys the concept of liberty as non-dependence to argue that the public forum doctrine is the correct choice based upon principle as well as precedent. Part IV applies the public forum doctrine to agency social media sites, which are limited public fora, and evaluates subject matter restrictions, civility codes, and various types of protected and unprotected speech, from hate speech to cyberharassment to false statements of fact. Part IV also discusses issues specific to federal agencies, such as liability under state tort law, sovereign immunity, and endorsement.

Though these questions may interest a narrow stratum of federal attorneys and judges, the answers have significant consequences. Because the vast majority of websites and social media sites are in private hands, public space online, the equivalent of sidewalks and parks, which receive

the highest level of First Amendment protection, is next to nonexistent.¹² Opportunities for individuals to express themselves online on civic or political matters without the possibility of restriction by private parties are slim. Hence, the level of First Amendment protection public comments receive on federal social media sites is important as a matter of incremental constitutional law. There are calls to reconceptualize free speech values to remedy the fact that unregulated Internet service providers (ISPs), free to engage in content discrimination or to steer user attention toward consumption, oversee nearly all online expression.¹³ It may well be time for such sweeping changes.

Generally, constitutional law proceeds carefully, with ostensibly narrow holdings, before a doctrine, after a long unobserved germination, emerges to address a new phenomenon. Arguably, the judicial recognition of rights will take a back seat to administrative regulation and legislation of technology in the twenty-first century,¹⁴ but here is an issue which merges the traditional concept of free speech rights as limits on discriminatory state action with the new realm of digital interactive technology, as yet barely touched by First Amendment doctrine. Resolution of this issue will be a significant first step in addressing the theoretical and doctrinal implications of free speech in the era of social media. In this case, a doctrine does not need to be cut out of whole cloth. The public forum doctrine can be renovated slightly to apply to social media sites. Agencies, through self-regulation, and courts, through the traditional recognition of free speech rights on public property, merely need to choose the proper doctrine. This choice of doctrine is one of a series of small decisions of enormous import. Whether there are places online where political speech expressed is free of both government and private censorship or not, whether interactive technology enables wider participation in political discourse or enhances the simulacra of it, hang in the balance.

12. See Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1116 (2005).

13. *Id.*; see also Jack M. Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 20–21, 49 (2004). Balkin offers a theory of freedom of speech as democratic culture intended to counter a property based theory, which equates the right to free speech with ownership of telecommunications networks. The network owner speaks through editorial judgments about content. *Id.* at 20. Balkin worries less than Nunziato about overt content discrimination by telecommunications companies controlling online access and more about the “diversion and co-optation of audience attention” towards the purchase of goods and services. *Id.* at 22. Notably, the view that a property owner speaks through editorial judgments or content-based discrimination of speech is also found in the government speech doctrine.

14. *Id.* at 50–51.

I. FEDERAL AGENCY SOCIAL MEDIA

Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information. Executive departments and agencies should also solicit public input on how we can increase and improve opportunities for public participation in Government.¹⁵

President Obama's Memorandum, "Transparency and Open Government," was intended to herald a new era of openness in government, an openness that would at once nourish democracy and ensure effectiveness and efficiency in government. To that end, the President instructed the Director of the Office of Management and Budget (OMB) to direct agencies on specific steps to effectuate the principles of transparency, participation, and collaboration outlined in the memorandum. OMB specifically directed agencies to develop open government plans and stated that such plans should include "proposals for new feedback mechanisms," including innovative tools and practices creating new methods for public engagement.¹⁶ In practice, "innovative tools for public engagement" has meant social media and web-based interactive technologies, which fall under the aegis of "Web 2.0" technologies.¹⁷ Recognizing this fact, OMB acted swiftly and issued clarifying guidance to executive departments and agencies on social media, in particular on compliance with the Paperwork Reduction Act and Privacy Act.¹⁸ The Government Accountability Office (GAO) has testified before

15. Memorandum on Transparency and Open Government, *supra* note 1.

16. OFFICE OF MGMT. & BUDGET, *supra* note 1, at 9.

17. *Government 2.0, Part I: Federal Agency Use of Web 2.0 Technologies: Hearing Before the Subcomm. on Info. Policy, Census, & Nat'l Archives of the H. Comm. on Oversight & Gov't Reform*, 111th Cong. 42, 48 (2010) [hereinafter Wilshusen Testimony] (statement of Gregory C. Wilshusen, Director, Information Security Issues). Wilshusen explained that the United States Government Accountability Office (GAO) defines Web 2.0 technology as follows:

[Web 2.0] technologies refer to a second generation of the World Wide Web as an enabling platform for Web-based communities of interest, collaboration and interactive services. Internet-based services using these technologies include blogs, social networking sites, video Web sites, and wikis . . . which allow individual users to directly collaborate on the content of Web pages; 'podcasting,' which allows users to download audio content; and 'mashups,' which are Web sites that combine content from multiple sources.

18. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, SOCIAL MEDIA, WEB-BASED INTERACTIVE TECHNOLOGIES, AND THE PAPERWORK REDUCTION ACT (2010) [hereinafter SOCIAL MEDIA], available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-10-23, GUIDANCE FOR AGENCY USE OF THIRD-PARTY WEBSITES AND APPLICATIONS (2010), available at

Congress on “Challenges in Federal Agencies’ Use of Web 2.0 Technologies” and reported to Congress that federal agencies using social media need procedures for managing and protecting information.¹⁹ Nevertheless, Congress has left federal agencies to their own devices with respect to how to handle this new wave of public interaction in ways that comply with the First Amendment’s freedom of speech guarantee.

The use of Web 2.0 technology may not revolutionize the way in which citizens interact with federal, state, and local governments, but it surely will bring striking changes. Previously, a citizen had to write a letter, make a phone call, or attend a public meeting to make one’s voice or opinion heard by a federal agency. With the advent of federal agency social media, a citizen can post comments, post a video, as well as edit, organize, and share content with federal agencies. Similarly, federal agencies communicated their messages through press releases in the mainstream media. Now, agencies are able to reach citizens directly in an unprecedented way. They have been doing so through websites for years, but with the advent of social media, the communication of the agency message and interaction with the public are blurred in ways that will prove problematic in light of free speech doctrines.

While Web 2.0 encompasses everything from wikis, mashups, blogs on agency websites, video sharing, and podcasts to agency Facebook pages and Twitter accounts, the most popular Web 2.0 technologies are the social networking sites Facebook and Twitter.²⁰ According to GAO, twenty-three of the twenty-four major federal agencies have established pages on Facebook, Twitter, and YouTube.²¹ As previously mentioned, the problem

http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-23.pdf.

19. See Wilshusen Testimony, *supra* note 17, at 42–43; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-605, SOCIAL MEDIA: FEDERAL AGENCIES NEED POLICIES AND PROCEDURES FOR MANAGING AND PROTECTING INFORMATION THEY ACCESS AND DISSEMINATE (2011).

20. The Nielsen Company reports that Facebook was the most popular global social networking site. Twitter is the fastest-growing social networking website, increasing over 200 percent in December 2009. *Led by Facebook, Twitter, Global Time Spent on Social Media Sites Up 82% Year Over Year*, NIELSEN, Jan. 22, 2010, <http://www.nielsen.com/us/en/newswire/2010/led-by-facebook-twitter-global-time-spent-on-social-media-sites-up-82-year-over-year.html>.

21. As of June 28, 2011. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 19, at 2, 4–5. The twenty-four major federal departments and agencies covered by the Chief Financial Officers Act are the Departments of Agriculture (USDA), Commerce, Defense, Education, Energy, Health and Human Services (HHS), Homeland Security, HUD, the Interior, Justice, Labor, State, Transportation, the Treasury, Veterans Affairs, the EPA, General Services Administration (GSA), National Aeronautics and Space Administration (NASA), National Science Foundation, Nuclear Regulatory Commission (NRC), Office of

this Article addresses is not limited to federal administrative agency social media. State and local governments and their agencies have launched social media sites, and citizen speech on those sites implicates the same First Amendment issues. This Article will focus on public comments on federal agency Facebook pages, Twitter accounts, and YouTube sites and blogs, but the analysis and conclusion also apply to state and local government agency social media sites.²²

Facebook is a social networking site that lets its over 950 million members, or “users,” create profiles and connect with other users.²³ Facebook permits each federal agency to establish a “Page,” rather than a “Profile,” which is reserved for individuals, on Facebook to convey information about the agency and to receive public comments posted by users in response.²⁴ In the federal agency context, the other users are invariably members of the public rather than other agencies. Twitter is another social networking site that conveys information through “tweets,” which are messages less than 140 characters in length. Account users post messages to profile pages and reply to the tweets of other users. Moreover, Twitter users can subscribe to the tweets of other users. YouTube permits users to upload videos and share them for other users to watch and respond to via posed comments. While federal agencies have yet to attract the legions of “friends” or “likes” attached to celebrity Facebook and Twitter accounts, the number of citizen “friends” has risen at a respectable pace. As of August 2012, the U.S. Department of State had over 146,680 “likes” on its Facebook page; the National Aeronautics and Space Administration had over 2.5 million Twitter followers, while the White House had 1,409,286 “likes” on its Facebook page.

A. *Third-Party Providers*

For purposes of a First Amendment analysis, two points are relevant.

Personnel Management, Small Business Administration (SBA), Social Security Administration (SSA), and U.S. Agency for International Development (USAID). Only the NRC does not use Facebook, Twitter, or YouTube. Fourteen departments are considered “executive agencies.” Seven agencies are “independent agencies,” while the NRC is classified as one of the “boards, commissions, and committees” that form part of the executive branch.

22. Provided such state and local government and government agency social media sites are opened to encourage citizen participation and engage the public.

23. Brief for Facebook, Inc., as Amicus Curiae Supporting Plaintiff-Appellant, Daniel Ray Carter, Jr. and Vacatur, *Bland v. Roberts*, 857 F. Supp. 2d 599 (E.D. Va. 2012), *appeal docketed*, No. 12-1671 (4th Cir. Aug. 6, 2012).

24. See *Create a Page*, FACEBOOK, <http://www.facebook.com/pages/create.php> (last visited May 14, 2013).

One is the fact that Facebook, Twitter, and YouTube are third-party commercial service providers. While an agency blog posted on an agency website is on public property because the .gov domain is owned and operated by the government, an agency Facebook page, for example, is on Facebook's platform, not that of the government. A .com domain is a private piece of cyberspace. Recognizing that federal agencies have distinct requirements that render them unable to sign the common terms of service (TOS) agreement, the General Services Administration's (GSA's) Center for Excellence in Digital Government negotiated TOS agreements with third-party service providers on behalf of federal agencies.²⁵ GAO refers to agency social media sites on third-party platforms as "agency sponsored," a description that will prove consequential.²⁶ The second point is the purpose of agency blogs, Facebook pages, and Twitter and YouTube accounts. Based on the President's Memorandum, the purpose of this foray into social media is to engage the public by conveying information about agency activities as well as facilitating public discourse on those activities.²⁷ Former Office of Information and Regulatory Affairs Administrator Cass R. Sunstein captured the duality inherent in public engagement in his memorandum to the heads of federal agencies: "To engage the public, Federal agencies are expanding their use of social media and web-based interactive technologies. For example, agencies are increasingly using web-based technologies, such as blogs, wikis, and social networks, as a means of 'publishing' solicitations for public comment and for conducting virtual public meetings."²⁸ As will be seen, whether social media sites provide an arena for the government to speak or a forum for citizens to make their voices heard determines the level of First Amendment protection public comments receive.

25. *Federal-Compatible Terms of Service Agreements*, GSA'S OFFICE OF CITIZEN SERV. & INNOVATIVE TECH., <http://www.howto.gov/web-content/resources/tools/terms-of-service-agreements> (last visited May 14, 2013).

26. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 19, at 1. HUD's Policies and Procedures for Use of Social Media include sites internal and external to HUD in the departmental definition of social media, thus also eliding the distinction between .com and .gov. DEP'T OF HOUS. AND URBAN DEV., DEPARTMENTAL POLICIES AND PROCEDURES FOR USE OF SOCIAL MEDIA SITES BY HUD OFFICES AND STAFF, *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=social-media-policy.pdf>.

27. Both purposes are captured in the following: "Executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public. Executive departments and agencies should also solicit public feedback to identify information of greatest use to the public." Memorandum on Transparency and Open Government, *supra* note 1.

28. SOCIAL MEDIA, *supra* note 18, at 1.

B. *The Purpose and Use of Agency Social Media*

While federal agencies have used social media sites to repost information available on agency websites, post new content, and provide links to non-government websites, soliciting comments from the public and responding to comments comprise a substantial part of federal agencies' activities online. According to a recent GAO survey, twenty-two of the twenty-three agencies with social media sites have used social media to solicit public comment.²⁹ Agencies on Facebook solicit public comment both on the site and sometimes direct the public to comment on the agency website. When inviting public comment on Twitter, agencies commonly direct public comment to blogs on agency websites. Surprisingly, YouTube has been used as often as Facebook to solicit public comment.³⁰ In contrast to Facebook, YouTube, and Twitter, federal agency blogs are located on official agency websites. However, blogs also encourage the public to comment on specific topics relevant to a particular agency's mission. There was a time, not so long ago, when agencies received a majority of public feedback through the mail. Online comments on proposed rules are replacing formal letters.³¹ But public comments on proposed rules are something with which federal agencies have long been familiar and established procedures provide a certain level of bureaucratic reassurance. For better or worse, public comments on social media sites are something altogether different.

C. *The Public Realm Online*

Increasingly ubiquitous, the Internet is celebrated for liberating commerce and communication from the comparatively sedate pace of the recent past. Enchanted by the wealth of information available, few Americans have noticed that the vast majority of websites and social media sites are in private hands. In the 1990s, the U.S. government surrendered control of the Internet backbone network and the domain name system to

29. "Twenty-two of 23 agencies used social media to solicit comments from the public. Of the 22 agencies soliciting feedback, most used Twitter for this purpose." U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 19, at 13. Agencies sought feedback through Facebook for both public comment directly on the social media site and for public comment on an agency website. *Id.* Agencies used Twitter to solicit public comment on an agency website. *Id.* YouTube has also been used to solicit public comment. *Id.*

30. *See id.* at 11.

31. *See REGULATIONS.GOV*, <http://www.regulations.gov/> (last visited May 14, 2013); *see also* Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 ADMIN. L. REV. 893, 898 (2011); Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers' Attitudes about E-Rulemaking*, 62 ADMIN. L. REV. 451, 452 (2010).

private companies.³² Attendant upon this transfer, the Federal Communications Commission chose not to regulate ISPs as common carriers, which are restricted from engaging in content discrimination.³³ As a consequence, public space online is next to non-existent. Given that sidewalks and public parks remain, the dearth of public space online may seem unimportant. However, one consequence of private control is that free speech rights are not guaranteed online. Courts have decided that when a private company regulates speech on the Internet, such regulation is not state action and is not protected by the First Amendment's Free Speech Clause.³⁴ Hence, most Internet service companies that provide e-mail, chat rooms, and social media sites are free to discriminate against speech should they choose to do so. One result is the common requirement for users to agree to speech and civility codes through terms of service agreements. This agreement to engage in civilized discourse may seem harmless, even laudable, given the extent to which pornography, vulgar language, and hostile speech flourish online. However, ISPs have proven willing to restrict political speech.³⁵ Examples of ISPs regulating and censoring speech abound.³⁶ While the U.S. Postal Service may not censor

32. See Jay P. Kesan & Rajiv C. Shah, *Fool Us Once Shame on You—Fool Us Twice Shame on Us: What We Can Learn from the Privatizations of the Internet Backbone Network and the Domain Name System*, 79 WASH. U. L.Q. 89, 131–32 (2001); see also Ardia, *supra* note 10, at 1990 (“While the government owns and maintains some websites and computer networks, most public discourse occurs on private websites and is facilitated by private Internet service providers.”).

33. Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 428 (2009). The telephone service is subject to common carriage requirements that prohibit content discrimination. See, e.g., 47 U.S.C. § 202 (2006); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975 (2005) (stating that the Federal Communications Act “regulates telecommunications carriers, but not information-service providers, as common carriers”).

34. Nunziato, *supra* note 12, at 1135–41; see, e.g., *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436, 452 (E.D. Pa. 1996); see also *Island Online, Inc. v. Network Solutions, Inc.*, 119 F. Supp. 2d 289, 306 (E.D.N.Y. 2000).

35. Speaking of censorship of sponsored links on Google's search engine, Nunziato observes, “Google has refused to host a range of politically-charged, religious, and critical social commentary in the form of advertisements themselves, as well as the websites to which these advertisements link.” Nunziato, *supra* note 12, at 1123. In 1998, America Online (AOL) shut down an “Irish Heritage” discussion group and removed the earlier postings. *Id.* at 1126. Facebook locked down a political advocacy page in 2010. See Ardia, *supra* note 10, at 1991 n.46.

36. As David Ardia writes: “Because these private intermediaries are not constrained by the First Amendment's free speech protections, it is perilous for society to rely on them to provide forums for public discourse.” Ardia, *supra* note 10, at 1991; see also David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 379 (2010).

the mail, Google has free reign to censor e-mail.³⁷ Although Google appears to be exercising its power over free speech with restraint, it cannot be denied that the deputy general counsel of Google has more power over free speech than any Supreme Court justice or president, Jeffrey Rosen recently observed.³⁸

“Accordingly, for the great majority of Internet speakers, it is not the First Amendment, but AOL’s (or other ISPs’) terms of service, that determine the contours of protection accorded to their Internet expression.”³⁹ And that protection is unreliable. For instance, amateur journalists accused Facebook of censoring reports on the Occupy Wall Street movement, while Google initially declined to run anti-abortion advertisements.⁴⁰ In a recent article, Seth Kreimer argued the government’s decision to privatize speech regulation to “proxy censors” endangers free expression because private intermediaries can and do make

37. Nunziato, *supra* note 12, at 1122–23 (“While the U.S. Postal Service is subject to the dictates of the First Amendment when performing its duties, the private entities that are predominantly responsible for relaying billions of e-mails per day are not, thus these entities are free to monitor and censor the content of the e-mails that they are responsible for delivering.”). Section 230(2) of the Telecommunications Act of 1996, as amended (47 U.S.C. § 230(c)(2) (2000)) permits owners of online conduits to censor online traffic. *See also* Balkin, *supra* note 33, at 437 (stating “censorship is as likely to come from private entities that control telecommunications networks and online services as from the government”).

38. In Rosen’s telling, Google, under political pressure, retreated from guidelines on YouTube which prohibited videos “intended to incite violence,” which tracked the Supreme Court’s First Amendment doctrine. Jeffrey Rosen, *The Deciders: Facebook, Google, and the Future of Privacy and Free Speech*, The Future of the Constitution Series, No. 12, BROOKINGS INSTITUTION (May 2, 2012), <http://www.brookings.edu/research/papers/2011/05/02-free-speech-rosen>. From a different but equally troubling angle, Dawn Nunziato has argued that the authority of the Internet Corporation for Assigned Names and Numbers (ICANN) over the infrastructure of the Internet enables it to “enact regulations affecting speech within the most powerful forum for expression ever developed.” Dawn C. Nunziato, *Freedom of Expression, Democratic Norms, and Internet Governance*, 52 EMORY L.J. 187, 188 (2003).

39. Nunziato, *supra* note 12, at 1127.

40. David Badash, *Has Facebook Censorship Gone Too Far?*, THE NEW CIVIL RIGHTS MOVEMENT (Nov. 7, 2011), <http://thenewcivilrightsmovement.com/has-facebook-censorship-gone-too-far/politics/2011/11/07/29714>. The Christian Institute, which sought to run the anti-abortion ads, was based in the United Kingdom and sued Google for discrimination under the Equality Act of 2006, which forbids religious discrimination. In response to the lawsuit, Google agreed to revise its policy. Ki Mae Heussner, *Google OKs Religious Groups’ Abortion Ads*, ABC NEWS (Sept. 18, 2008), http://abcnews.go.com/Technology/story?id=5827418#.T3sTMvA1_5s. After receiving a takedown notice from the Church of Scientology, Google temporarily removed pages of a website critical of the church. Seth Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 32 n.64 (2006) (citing *Google Restores Church Links*, WIRED NEWS (Mar. 22, 2002), <http://www.wired.com/news/ebiz/0,1272,51257,00.html>).

mistakes. Furthermore, private intermediaries offer no due process guarantees when mistakes, such as confusing a parody with a copyright violation, are made. Incentives, as well as the limitations of current technology, push ISPs to be overbroad in blocking content.⁴¹ “Putting the censorship decision in the hands of the intermediary allows commercially powerful blocs of customers a potential veto on the speech of others.” Equally disturbing, corporations can pressure intermediaries to block speech by sending “cease and desist” notices.⁴² A large amount of speech on the Internet is anonymous speech, and the ability to speak anonymously has expanded free speech opportunities. However, the ability to engage in anonymous speech is dependent on the favor of the service provider and the fact that the provider is insulated from liability, a situation that could change.⁴³ Facebook, for example, does not permit anonymous speech.⁴⁴

A handful of private companies through which an ever-greater amount of speech travels are permitted to engage in content discrimination even if they do not avail themselves of the privilege, being more interested in distracting and entertaining than overtly censoring political speech.⁴⁵ How long this state of affairs remains and whether it is advisable remains to be seen, but the salient point is that for legal purposes the Internet is civil space, not a public one. It is a place for civil society, in between private and public, a place where people mingle in public on private property, much like a shopping center or coffee shop. For this reason, though there is much public discourse online, there is next to no real public space. A series of small decisions on the part of federal agencies and courts, when the issue is

41. Kreimer notes, “It is almost always easier to drop a marginal website than to employ counsel.” Kreimer, *supra* note 40, at 28. Speakers then engage in self-censorship. Moreover, an intermediary is likely to choose the mechanism that is cheaper rather than more precisely tailored thus inflicting what Kreimer terms “collateral damage” on protected expression. *Id.* at 31–32. As Kreimer relates, “Thus, for example, in *Center for Democracy & Technology v. Pappert*, the court found that ISPs blocked access to around 1.2 million ‘innocent’ websites in response to demands by law enforcement to disable four hundred targeted URLs.” *Id.* at 31. As many corporations have demonstrated, it is easier to engage in censorship by pressuring a proxy intermediary than it is to suppress speakers or listeners. *Id.* at 31–33.

42. *Id.* at 32 (“Google is reported to respond to ‘cease and desist’ notices in most cases by simply removing search results, a reaction that can be used to suppress access to websites of critics.”). Kreimer focuses on the state’s use of Internet intermediaries as “proxy censors.”

43. Section 230(c)(1) of the Telecommunications Act of 1996 provides Internet intermediaries with immunity against lawsuits based on the content of the speech that passes through their networks.

44. See *Statement of Rights and Responsibilities*, FACEBOOK, https://www.facebook.com/note.php?note_id=183538190300 (last visited May 14, 2013).

45. Balkin *supra* note 13, at 22 (“Once again, the goal is not necessarily censorship of unpopular ideas but rather diversion and co-optation of audience attention.”).

litigated, will play a role in shaping the future of free speech by determining whether there are some places online where speech receives First Amendment protection.⁴⁶

D. Agency Comment Policies

No statement about the First Amendment's Free Speech Clause appears on the twenty-three major federal agency social media sites inviting public comment.⁴⁷ Under the First Amendment, speech is presumptively protected unless it falls into a narrowly carved exception. A citizen about to comment on a government-sponsored Facebook page, for instance, probably assumes his or her comments are protected by the First Amendment, but many agencies offer no such guarantees. The GSA's Center for Excellence in Digital Government negotiated "Federal Compatible Terms of Service Agreements" on behalf of agencies anxious to pursue the call to open government.⁴⁸ As expected, the Negotiated Amendment to the Facebook Terms of Use changes the governing law and liability clause to one that privileges federal law and eliminates the standard indemnity clause.⁴⁹ Facebook acknowledges that the government entity is bound by applicable federal laws and regulations "including those related to ethical standards, limitations on indemnification, fiscal law constraints, advertising and endorsements, freedom of information, governing law, and dispute resolution forum and processes."⁵⁰ Conspicuous in its absence is the First Amendment and whether section 5 of Facebook's "Statement of Rights and Responsibilities," which covers its user comments, applies to a government entity's Facebook page or, in the alternative, if agencies are entitled to take a more or less restrictive approach to public comments.⁵¹ In

46. Net neutrality legislation, provided it becomes law, and Federal Communication Commission (FCC) regulations will likely be challenged on constitutional grounds as well. Should the argument that the government's free speech right to make editorial judgments on its own property prevail in the case of agency social media, a precedent will have been set in favor of the property based vision of free speech supporting the argument that the structural regulation of telecommunications networks interferes with a company's right to speak through its content based choices.

47. This survey is based on the "major federal departments and agencies" covered by the Chief Financial Officer Act, which GAO uses when it surveys agency activities in reports or testimony before Congress. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 19.

48. *Negotiated Terms of Service Agreements*, HOWTO.GOV, <http://www.howto.gov/web-content/resources/tools/terms-of-service-agreements/negotiated-terms-of-service-agreements> (last visited May 14, 2013).

49. *See Amendment to Facebook Terms of Use*, HOWTO.GOV, <http://www.howto.gov/sites/default/files/facebook-tos-amendment.pdf> (last visited May 14, 2013).

50. *Id.*

51. Facebook's Statement of Rights and Responsibilities was initially more restrictive.

fact, it appears many agencies have chosen to restrict public comment on their social media sites in striking ways.

A study of twenty-three agency social media comment policies reveals a vast range of approaches. Focusing on Facebook, at one end are the Departments of Justice (DOJ), HUD, Interior, Treasury, Labor, Transportation, Energy, Education, the National Science Foundation, the Office of Personnel Management, and the U.S. Agency of International Development, which post no comment policy and by default appear to follow the Facebook “Statement of Rights and Responsibilities,” which now tracks First Amendment jurisprudence to some extent in stating that only statements believed to violate the law will be removed.⁵² For example, based on a view of some of the comments that remain posted on the DOJ and the HUD sites, it appears these agencies are not removing comments that are offensive or rude or false and thus recognize commenters’ First Amendment rights. At the other end, one finds the U.S. Department of State Facebook Terms of Service:

The U.S. Department of State on Facebook is moderated. That means all comments will be reviewed before posting. In addition, the U.S. Department of State on Facebook expects that participants will treat each other, as well as U.S. Department of State employees, with respect. The U.S. Department of

After its revision on April 26, 2011, section 5, “Protecting Other People’s Rights,” more closely tracks First Amendment jurisprudence. There is no admonition to avoid vulgar or offensive language or any civility requirement. A user agrees to “not post content or take any action on Facebook that infringes or violates someone else’s rights or otherwise violates the law.” Facebook states that it will remove content that it believes violates the law or other people’s rights. Therefore, if a comment does not violate the law or another person’s rights, it will remain posted. *See Statement of Rights and Responsibilities*, FACEBOOK, https://www.facebook.com/note.php?note_id=183538190300 (last visited May 14, 2013).

52. Section 5. Protecting Other People’s Rights. We respect other people’s rights and expect you to do the same. 5.1. You will not post content or take any action on Facebook that infringes someone else’s rights or otherwise violates the law. 5.2. We can remove any content you post on Facebook if we believe that it violates this Statement. 5.3. We will provide you with tools to help you protect your intellectual property rights. . . . 5.4. If we removed your content for infringing someone else’s copyright, and you believe we removed it by mistake, we will provide you with an opportunity to appeal. 5.5. If you repeatedly infringe other people’s intellectual property rights, we will disable your account when appropriate. 5.6. You will not use our copyrights or trademarks (including Facebook, the Facebook and F logos, FB, Face, Poke, Wall and 32665) without our written permission. 5.7. If you collect information from users, you will: obtain their consent, make it clear you (and not Facebook) are the one collecting their information, and post a privacy policy explaining what information you collect and how you will use it. 5.8. You will not post anyone’s identification documents or sensitive financial information on Facebook.”

See id.

State on Facebook will not post comments that contain vulgar or abusive language; personal attacks of any kind; or offensive terms that target specific ethnic or racial groups. The U.S. Department of State on Facebook will not post comments that are spam, are clearly “off topic” or that promote services or products. Comments that make unsupported accusations will also be subject to review.⁵³

Treating one another with respect seems reasonable, but is it consonant with the First Amendment? When posting a comment on Israel and Palestinian Territories, how does a commenter know what expressions the Department of State considers “offensive terms that target specific racial or ethnic groups?” The line between offensive and controversial is a fine one, and the Department of State may well open itself to charges of unconstitutional viewpoint discrimination if it censors such comments by refusing to post them.⁵⁴

HHS has a comment policy applicable to each social media site or “managed forum” where personal attacks, profanity, and aggressive behavior are also prohibited. HHS also instructs the public to “[t]ell the truth. Spreading misleading or false information is prohibited.”⁵⁵ In conclusion, “We encourage your participation in our discussion and look forward to an active exchange of ideas.”⁵⁶

The U.S. Department of Agriculture’s (USDA’s) comment policy, which applies to users on the USDA blog on the USDA website as well as on Facebook, Twitter, Flickr, and YouTube, is typical of the middle ground of agency comment policies. It reads:

We encourage discussion and comments on posts. Your insights are important to ensure Americans nationwide are informed and can be a part of the USDA’s work, every day.

We will review all comments before posting them. For the benefit of a robust

53. *U.S. Department of State Facebook Terms of Service*, FACEBOOK, http://www.facebook.com/usdos/app_11007063052 (last visited May 14, 2013). In the intervening months the Department of State appears to have changed its comment policy and now directs users to the Facebook Terms of Service (TOS). However, a very similar quoted comment policy still appears on the Department’s Dipnote Blog TOS, <http://blogs.state.gov/state-department-blog-content/about-state-department-blog> (last visited May 14, 2013).

54. *See* *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”); *see also* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381, 395–96 (1992) (invalidating a ban on bias-motivated fighting words as viewpoint discrimination).

55. *Comment Policy*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://www.hhs.gov/open/discussion/commentpolicy.html> (last visited May 14, 2013).

56. *Id.*

and constructive conversation, we will post comments only if they relate to the topic discussed within the corresponding blog post. We want to publish your comments, but expect participants to show respect, civility and consideration to the blog authors and other blog visitors who include persons of all ages. Therefore, we will not post comments that: make personal attacks, are far off-topic, promote services or products, contain abusive, profane, or vulgar language, contain sexual content, overly graphic, disturbing, obscene or offensive material, or material that would otherwise violate the law if published here, include offensive language targeting specific ethnic or racial groups.

We will not edit your comments to remove objectionable or inappropriate content, so please ensure that your comment complies with this policy.⁵⁷

There are multiple variations on a similar theme. The modest beginning of the Department of Homeland Security (DHS) comment policy belies the broad sweep with which it ends: “DHS does not moderate comments on the DHS Facebook page prior to posting, but reserves the right to remove materials that pose a security or privacy risk.” DHS will remove any comments that contain:

profanity, personal attacks of any kind, spam, refer to Federal Civil Service employees by name, contain offensive terms that target specific ethnic or racial groups, promote commercial products, are geared towards the success or failure of a partisan political party, group, or candidate, incite hate, or are subject to a claim of infringement or deemed to be an infringement of intellectual property, or that is otherwise objectionable.⁵⁸

DHS does not offer guidance on what it means by inciting hate or what encompasses “otherwise objectionable” comments. The Small Business Administration will delete profanity and “implied profanity,” as well as “defamation to a person or group of people.”⁵⁹ The Department of

57. *USDA Comment Policy*, U.S. DEP’T OF AGRICULTURE, http://www.usda.gov/wps/portal/usda/usdahome?contentid=comment_policy.xml&contentidonly=true (last visited May 14, 2013).

58. It continues, “Any opinions expressed by commentators on the DHS Facebook page, except as specifically noted, are solely those of the individual offering commentary, and does not reflect any DHS component policy, endorsement, or action.” *Department of Homeland Security: Facebook Comment Policy*, FACEBOOK, http://www.facebook.com/homelandsecurity/app_139229522811253 (last visited May 14, 2013). The Federal Emergency Management Agency (FEMA), a division of DHS, explicitly states that its Facebook page is “a moderated channel, meaning all comments will be reviewed for appropriate content.” *FEMA Federal Emergency Management Agency: About*, FACEBOOK, <http://www.facebook.com/FEMA/info> (last visited May 14, 2013).

59. The SBA’s comment policy states that it will remove “other comments that the SBA Social Media Team deems inappropriate.” *SBA Privacy Policy: Facebook*, SBA.GOV, <http://www.sba.gov/content/sba-privacy-policy-facebook> (last visited May 14, 2013).

Defense (DOD) asks participants to agree to stay on topic and to refrain from abusive, defamatory, obscene material, and material that would violate the law. DOD will delete submissions with obscene language, threatening language, hate speech, commercial speech, personal information, or operational security.⁶⁰ GAO (though not a federal agency) reserves the right to remove “name calling” as well as threats or personal attacks. The National Aeronautics and Space Administration (NASA) employs an interesting comment policy, which states, “[t]o encourage free-flowing discussion while maintaining the decorum appropriate to a taxpayer-funded organization, we will moderate comments.” While NASA’s comment policy encourages relevant comments, it moderates profanity, spam, sexually-explicit material, discriminatory material, and personal attacks. The stricture against personal attacks contains some useful guidance, “[n]o personal attacks. Criticism of decision-making and operational management, including the names of individuals involved, is legitimate. Criticism on a purely personal level is not.” In addition, “[C]omments about politics and politicians must, like everything else, be on-topic and free from personal attacks.”⁶¹

Of the eleven agencies and departments that have comment policies, five have a general comment policy which applies to comments posted to blogs on the official agency (.gov) website as well as social media sites including Facebook, Twitter, and YouTube.⁶² Nine agencies state they moderate comments.⁶³ Nine prohibit “offensive” speech, which includes “profanity”

60. *Social Media User Agreement*, U.S. DEPARTMENT OF DEFENSE, <http://www.defense.gov/socialmedia/user-agreement.aspx/> (last visited May 14, 2013).

61. NASA, *Basic Info*, FACEBOOK, <https://www.facebook.com/NASA/info> (last visited May 14, 2013).

62. *Comment Policy*, COMMERCE.GOV, <http://www.commerce.gov/comment-policy> (last visited May 14, 2013); GSA, *General Services Administration: About*, FACEBOOK, <http://www.facebook.com/GSA/info> (last visited May 14, 2013); *Disclaimer: Comment Policy*, DODLIVE, <http://www.dodlive.mil/index.php/disclaimer/> (last visited May 14, 2013); *USDA Comment Policy*, *supra* note 57; *EPA Comment Policy*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/epahome/commentpolicy.html> (last visited May 14, 2013).

63. *About the State Department Blog*, DIPNOTE: U.S. DEP’T OF ST. OFFICIAL BLOG, <http://blogs.state.gov/index.php/site/about> (last visited May 13, 2013); *SBA Privacy Policy: Facebook*, *supra* note 59; *EPA Comment Policy*, *supra* note 62; *Disclaimer*, VANTAGEPOINT: DISPATCHES FROM THE U.S. DEP’T OF VETERANS AFF., <http://www.blogs.va.gov/Vantage/disclaimer/> (last visited May 13, 2013); U.S. DEP’T OF VETERANS AFF. [VA], *Disclaimer*, https://www.facebook.com/VeteransAffairs/app_174701229285682 (last visited May 14, 2013); *HHS Comment, Privacy, and Link Policies*, HHS CENTER FOR NEW MEDIA, http://newmedia.hhs.gov/standards/comment_policy.html (last visited May 14, 2013); *United States Social Security Administration*, FACEBOOK, <https://www.facebook.com/notes/social-security-administration/our-comment-policy/369096638815> (last visited May 13, 2013); NASA, *supra* note 61. *Compare USDA Comment Policy*, *supra* note 62, and

or “vulgar and abusive language.”⁶⁴ Nine of the eleven agency comment policies prohibit hate speech variously described as discriminatory language or offensive language targeted at racial or ethnic groups.⁶⁵ The EPA and the DOD prohibit sexist hate speech.⁶⁶ Relevance is another issue, and

COMMERCE.GOV, *supra* note 62 (stating that both the USDA and Department of Commerce review comments before posting but do not use the term “moderate”), and FEMA, *supra* note 58 (stating that its Facebook page is a “moderated channel, meaning all comments will be reviewed for appropriate content”), with DHS, *supra* note 58 (explaining that DHS does not moderate or review comments before they are posted while reserving the right to remove comments after they are posted).

64. The Department of State will “not post comments that contain vulgar or abusive language.” Department of State, *supra* note 63. GSA will remove “vulgar or abusive language.” GSA, *supra* note 62. NASA states “irrelevant, inappropriate, or offensive comments may be edited and/or deleted[,]” and “[n]o profanity.” NASA, *supra* note 61. DHS will remove “profanity,” as well as “offensive terms that target specific ethnic or racial groups.” DHS, *supra* note 58. The USDA will not post “abusive, profane, or vulgar language.” *USDA Comment Policy*, *supra* note 57. HHS prohibits “personal attacks, profanity, and aggressive behavior,” as well as “[i]nstigating arguments in a disrespectful way.” HHS, *supra* note 63. Veterans Affairs will remove “abusive or vulgar language.” VA, *supra* note 63. The SBA will delete “profanity, implied profanity, obscenity or vulgarity.” SBA, *supra* note 59. The Department of Commerce will not post comments that “contain vulgar language.” COMMERCE.GOV, *supra* note 62. The EPA will not post comments that “contain obscene, indecent, or profane language.” EPA, *supra* note 62. DOD bars “vulgar or abusive language.” DOD, *supra* note 60. The SSA does not mention offensive language. SSA, *supra* note 63.

65. The Department of State will not post “offensive terms that target specific ethnic or racial groups.” Department of State, *supra* note 63. DHS will remove comments that “contain offensive terms that target specific ethnic or racial groups.” DHS, *supra* note 58. The USDA will not post comments that “include offensive language targeting specific ethnic or racial groups.” USDA, *supra* note 62. The EPA will delete comments that “contain hate speech directed at race, color, sex, sexual orientation, national origin, ethnicity, age, religion, or disability.” EPA, *supra* note 62. DOD will delete comments that contain “hate speech or offensive language targeting any specific demographic.” DOD, *supra* note 62. The Department of Commerce will not post comments that contain “offensive terms that target specific ethnic or racial groups.” COMMERCE.GOV, *supra* note 62. The SSA will delete comments that contain “discriminatory language (including hate speech) based on race, national origin, age, gender, sexual orientation, religion or disability.” SSA, *supra* note 63. The SBA will delete “defamation to a person or group of people.” SBA, *supra* note 63. The GSA will delete comments that contain “offensive terms targeting individuals or groups.” GSA, *supra* note 62. Though not an executive branch agency or department, GAO may delete comments that contain “offensive terms or statements targeting individuals or groups.” *Government Accountability Office Facebook Terms of Use*, https://www.facebook.com/usgao/app_250336418365488 (last visited May 13, 2013). FEMA will delete “abusive or vulgar language.” FEMA, *supra* note 58.

66. The EPA will delete comments that “contain hate speech directed at race, color, sex, sexual orientation, national origin, ethnicity, age, religion, or disability.” EPA, *supra* note 62. DOD will delete comments that contain “hate speech or offensive language targeting any specific demographic.” DOD, *supra* note 62.

again approaches vary. Some agencies will delete off-topic comments, while others will delete comments considered “far off-topic.”⁶⁷ Other agency policies simply encourage the public to submit on-topic comments.

The multifarious variations among the eleven agencies with comment policies, not to mention the agencies which have no comment policy, cause one to wonder which agencies are correctly following First Amendment doctrine and which may potentially be violating a citizen’s right to free speech and expression. Do “otherwise objectionable” or “inciting hate” include a comment that mentions or praises the Confederate States of America? In that case, federal agencies would be at odds with the Fourth Circuit.⁶⁸ Agencies that have no comment policy and leave offensive and vulgar comments posted certainly do not want to be seen to be endorsing hateful or offensive speech. Intriguingly, no comment policy mentions religion or religious speech. The government cannot endorse religion or religious beliefs,⁶⁹ and should an agency believe that leaving comments posted amounts to endorsement, as many seem to think based on comment policies enjoining vulgar and offensive speech, avoiding endorsement might lead an agency to delete or refuse to post such a comment. In attempting to follow the Establishment Clause of the First Amendment, the agency may find itself in the unenviable position of violating two other First Amendment Clauses, the citizen commenter’s rights to free speech and free exercise of religion. The answers to such conundrums are not straightforward. First Amendment jurisprudence is not celebrated for its lucidity, but it is the only place to start.

67. The Department of State and VA will not post “off topic” comments. Department of State, *supra* note 63; VA, *supra* note 63. NASA will delete or edit “irrelevant” comments. NASA, *supra* note 61. USDA and Commerce will not post comments that “are far off-topic.” COMMERCE.GOV, *supra* note 62; USDA, *supra* note 57. DOD, HHS, and GSA merely encourage the public to post on-topic or relevant comments. DOD, *supra* note 60; HHS, *supra* note 63; GSA, *supra* note 62. GAO will remove “[m]ultiple successive off-topic posts by a single user.” GAO, *supra* note 65.

68. *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles (Sons of Confederate Veterans II)*, 288 F.3d 610, 621–22, 626 (4th Cir. 2002) (holding that the State of Virginia’s refusal to allow a Confederate flag on its “Sons of Confederate Veterans” specialty license plates is unconstitutional viewpoint discrimination because the license plates are private speech).

69. “Congress shall make no law respecting an establishment of religion . . .” U.S. CONST. amend. I.

II. THE DOCTRINAL AND THEORETICAL FRAMEWORK

A. *Theories of Free Speech and Neo-Roman Liberty*

Why the Constitution protects freedom of speech has spurred a long train of theories. Like so much else in modern constitutional thinking, we owe Oliver Wendell Holmes for the most suggestive and enduring theory of the purpose of the Free Speech Clause. In a series of dissents, long celebrated as much for their rhetorical style as for their legal substance, Holmes argued that the central purpose of the Free Speech Clause is to protect the battleground of combative theories from which truth will emerge victorious.⁷⁰ Without the vivifying effects of competition, truth might remain half-grown or hidden in shadows. This provocative fusion of social Darwinism and a major argument of John Stuart Mill's *On Liberty* would later be christened the "marketplace of ideas"—a phrase redolent of a central tenet of laissez-faire capitalism that has exercised a hold over the collective legal imagination.⁷¹ In the 1960s, due to the influence of Alexander Meiklejohn, civic republicanism was the prism through which the Free Speech Clause could be appreciated.⁷² The extent to which the "Madisonian tradition," as identified by Cass Sunstein, can be described as "civic republican" is, of course, open to debate. The emphasis on civic virtue and the quality of public deliberation on political questions bears much in common with the civic republican tradition. However, the Madisonian emphasis on the cultivation of informed deliberation among citizens in order to improve the selection of leaders through election in a representative republic, rather than on the citizenry participating directly in government, is a product of Madison's modernization of republics through the use of representation. Nevertheless, the vision of citizens engaged in self-government, which harkens back to ancient Athenians disputing and deliberating in the agora, can be discerned in the Court's opinion in *New*

70. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

71. JOHN STUART MILL, *On Liberty*, in *ON LIBERTY AND OTHER ESSAYS* 24–26, 40–45, 59 (John Gray ed., Oxford Univ. Press 1998) (1859) (arguing the most credible beliefs are the ones continually open to challenge and that unless truth is debated it will not be comprehended but taken on faith).

72. See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* xvi–xvii (1993) (tracing a lineage for Meiklejohn's work on the First Amendment in Louis Brandeis and ultimately in James Madison, claiming all as examples of the "Madisonian Tradition" of First Amendment theory in contrast to the Holmesian "marketplace" theory); see also *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (describing the Founding Fathers' view of freedom of speech as a liberty used as both a means, in discourse, and an end, in spreading truth).

York Times Co. v. Sullivan.⁷³ Of late, the civic republican and liberal theories have merged in the work of Robert Post, who argues that the purpose of the Free Speech Clause is to preserve the structures and processes of communication necessary for democracy.⁷⁴ Other approaches to free speech suggest its animating principle is individual self-realization, or the cultivation of the ability to think for oneself—along the lines of Kantian autonomy, or as a check on government power.⁷⁵ Also worth mentioning is the recurring theme of suspicion of government, which manifests itself in a skepticism toward official discretion, a conviction that vagueness is anathema and that chilling effects are the delicate nerve ends of tyranny, that haunts First Amendment thought. The fear that freedom of speech is perennially vulnerable to subversion translates into a preference for general principles and capacious rules.⁷⁶

The cursory sketch above belies the deep disagreement about the history and purpose of the Free Speech Clause and its relationship to democratic self-government that pervades contemporary scholarship. The

73. 376 U.S. 254, 270 (1964) (“[D]ebate on public issues should be uninhibited, robust, and wide-open.”); see also ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 75 (1960) (“The primary purpose of the [Free Speech Clause] is . . . that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them.”); Balkin, *supra* note 13, at 32 (referring to the civic republican approach as “progressivist/republican”).

74. See generally Robert C. Post, *A Progressive Perspective on Freedom of Speech*, in *THE CONSTITUTION IN 2020* 179 (2009); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2366–69 (2000); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 279–82 (1991).

75. See, e.g., Aditi Bagchi, *Deliberative Autonomy and Legitimate State Purpose Under the First Amendment*, 68 ALB. L. REV. 815, 815–16 (2005) (arguing that the government must not deny individuals the right to engage in independent deliberation about their own opinions); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (describing the “checking argument”); Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 653 (2002) (establishing that the doctrine of content neutrality is grounded in the normative principle of autonomy, which means the government may not interfere with individual exercise of autonomy or with the collective autonomy of citizens through restrictions on speech or debate); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 616–19 (1982) (arguing that the First Amendment’s primary purpose is to protect self-realization).

76. See Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 111 (1998) (writing that the ideas central to First Amendment thinking and the slippery slope rhetoric that characterizes First Amendment culture “all exemplify an attitude that distrusts particularity and insists that rules that are simultaneously broad and concrete are the essential conditions of a strong First Amendment”). Given such an attitude, it is to be expected “that a medium- or institution-specific First Amendment jurisprudence is thought inconsistent with the First Amendment itself.” *Id.*

conventional understanding among most judges and legal scholars is that the Free Speech Clause guards the dialogue, debate, and deliberation necessary for democracy.⁷⁷ An individual's right to free speech is a means to a broader political purpose, be that the pursuit of truth or the discourse required for democracy to function properly. This view, variously called "democratic,"⁷⁸ "collectivist,"⁷⁹ and "progressivist,"⁸⁰ claims a special provenance, finding its origins in John Milton's stirring *Areopagitica*.⁸¹ James Madison figures prominently as the founder of the tradition, which went into abeyance, then reappeared after the First World War in the scholarly writing of Zechariah Chafee and in the dissents, and later the opinions, of Justices Oliver Wendell Holmes and John Louis Brandeis.⁸² The democratic/progressive approach appeared to influence the Supreme Court's jurisprudence in succeeding decades and received renewed scholarly attention in the influential work of philosopher Alexander Meiklejohn.⁸³ According to Meiklejohn, the Free Speech Clause "has no concern about the needs of many men to express their opinions."⁸⁴ Rather, the purpose of the First Amendment is to protect "the thinking process of the community,"⁸⁵ which in turn provides that the government will make "wise decisions" based on the votes of its citizens.⁸⁶ Furthermore, it is possible to assess the deliberative discourse of the community. The traditional town meeting, with its procedural rules and purposeful objective, provides the standard for measuring the quality of discussion, and the regulation of speech in light of that standard.⁸⁷ Meiklejohn sharply distinguishes his town meeting model from the ebullient and chaotic

77. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION* 39 (2008); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) [hereinafter MEIKLEJOHN, *FREE SPEECH*]; MEIKLEJOHN, *supra* note 73; SUNSTEIN, *supra* note 72; Alexander Meiklejohn, *Free Speech and its Relation to Self-Government*, in *IDEAS OF THE FIRST AMENDMENT* 752–53 (Vincent Blasi ed., 2d ed. 2006); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 262 (1992).

78. Charles L. Barzun, *Politics or Principle? Zechariah Chafee and the Social Interest in Free Speech*, 2007 BYU L. REV. 259, 262.

79. Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1109 (1993).

80. Balkin, *supra* note 13, at 29.

81. See, e.g., HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (1988).

82. *Id.*

83. MEIKLEJOHN, *FREE SPEECH*, *supra* note 77; MEIKLEJOHN, *supra* note 73.

84. MEIKLEJOHN, *supra* note 73, at 55 (internal quotation marks omitted).

85. *Id.* at 27.

86. *Id.* at 26.

87. *Id.* at 24–26.

counter-model of Hyde Park with its tumultuous chatter.⁸⁸ Speech in support of public decisionmaking is essential to the First Amendment, not the street corner agitator or the amateur park orator.

Of late, legal scholars as distinguished as Cass Sunstein and Owen Fiss have promoted theories of the First Amendment that owe a debt to Meiklejohn's version of the democratic free speech tradition. Sunstein has argued that the First Amendment protects democratic self-government for which free speech rights are instrumental and should be regulated in order to enhance the "quality and diversity" of public discourse.⁸⁹ Speaking of his vision of the First Amendment, Sunstein writes, "Instead it emphasizes the need to promote democratic self-government by ensuring that people are presented with a broad diversity of views about public issues."⁹⁰ In a similar vein, Fiss would substitute the "enrichment of public debate" for the "protection of autonomy" so that the Free Speech Clause would permit the state to "restrict political expenditures by the rich or corporations" to let the voices of the less wealthy be heard, or to prioritize the right of citizens to protest at privately owned public shopping centers over the property rights of owners.⁹¹ The work of Sunstein and Fiss exemplify a broader trend in scholarship, which brings attention to the impoverished state of public discourse and seeks remedies ranging from discrete and limited proposals for campaign finance reform to the regulation of hate speech and pornography by importing equal protection principles into free speech theory.⁹²

Lest we too readily accept the narrative, to which proponents and opponents of the democratic/progressive theory ascribe, that the justification for the Free Speech Clause along public interest lines dominates First Amendment jurisprudence and scholarship, Fiss has argued that individual autonomy pervades First Amendment doctrine and theory. "Under the [tradition] extolled by Kalven, the freedom of speech guaranteed by the first amendment amounts to a protection of autonomy—it is the shield around the speaker."⁹³ For Fiss, the unrelenting focus on the

88. *Id.* at 25.

89. Sunstein, *Free Speech Now*, *supra* note 77, at 263, 277.

90. *Id.* at 276 (explaining that the democratic theory would stress the need for people to receive diverse views on public issues rather than the "autonomy of broadcasters with current ownership rights").

91. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1419–20 (1986).

92. See, e.g., Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFF. 293, 314 (1993); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 625–26 (1982).

93. Fiss, *supra* note 91, at 1409 (discussing the result of the doctrinal process of affording

individual and the state as censor is the legacy of classical liberalism.⁹⁴ To be clear, Fiss claims that the “tradition” in doctrine and theory protects autonomy for instrumental reasons, in order to guarantee robust debate, and the assumption that protecting autonomy will produce rich public debate has proven false. The point to be taken is the claim that the traditional democratic view does protect autonomy, and the “autonomy” that it protects is more precisely described as negative liberty: the democratic view “assumes that by leaving individuals alone, free from the menacing arm of the policeman, a full and fair consideration of all the issues will emerge.”⁹⁵ The problem for Fiss is that “collective self-determination” and autonomy are not complimentary, but in tension. The protection of autonomy, especially when used to shield powerful private institutions, “might not enrich, but rather impoverish, public debate and thus frustrate the democratic aspirations of the Tradition.”⁹⁶

Objecting to the incursion of equality into First Amendment theory, though sympathetic to the dysfunctions that distress Fiss, Robert Post finds the individual to be the foundation of free speech doctrine. “The ideal of autonomy essentially distinguishes First Amendment jurisprudence from other areas of constitutional law.”⁹⁷ Both Fiss and Post agree that the protection of the street corner speaker is the foundational principle of First Amendment jurisprudence, which remains preoccupied with the space between the speaker and the government to the exclusion of any other considerations. For Fiss, the focus on autonomy is a doctrinal error of profound consequence. Not so for Post, who argues instead that the principle of autonomy cannot be cleaved from collective self-determination as “it is intrinsically connected to democratic self-governance.”⁹⁸ As evidence for the doctrinal focus on autonomy, Post points to multiple First Amendment decisions that cannot be justified solely on a public interest

more and more protection to the street corner speaker as the rule against content discrimination).

94. *Id.* at 1413–14 (analyzing the impoverished free speech doctrine as ill-equipped to face the inequalities in resources and social structures that drown innumerable voices, suffocate meaningful debate, and make free speech a legal fiction for the majority of the population).

95. *Id.* at 1410; *see, e.g.*, ISAIAH BERLIN, LIBERTY 177 n.1 (Henry Hardy ed., 2002).

96. Fiss, *supra* note 91, at 1410, 1412 (“[I]n a capitalist society, the protection of autonomy will on the whole produce a public debate that is dominated by those who are economically powerful.”).

97. Post, *supra* note 79, at 1123.

98. Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1524 (1997) (reviewing OWEN FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER (1996)).

rationale. When the Court prohibited restrictions on “offensive,”⁹⁹ “outrageous,”¹⁰⁰ or “insulting”¹⁰¹ speech, speech that cannot be construed as primarily deliberative or contributing to effective debate, it recognized that in the free speech arena the individual has a presumptive right against the government.¹⁰² It is not unworthy of mention that Meiklejohn criticized Chafee and Holmes, often classified as democratic instrumentalists in free speech, for including individual interest in the realm of the First Amendment doctrine and for excessive individualism respectively.¹⁰³

Despite the evidence that free speech doctrine has focused on the individual speaker, arguably to a fault, a flurry of scholarship in recent decades casting itself as revisionist claims that individual autonomy should be the sole justification for free speech protections.¹⁰⁴ Yet, autonomy can be an amorphous concept in legal scholarship.¹⁰⁵ Suffice it to say that autonomy is related to, but is not the equivalent of, freedom—either positive or negative.¹⁰⁶ While the conventional understanding of autonomy as self-government or self-mastery bears something in common with positive freedom as discussed by Isaiah Berlin, and as such embraces both positive and negative liberty, multiple discussions of autonomy in legal scholarship appear to equate autonomy solely with negative liberty understood as the absence of constraint.¹⁰⁷ As such, the “shield around the

99. *Cohen v. California*, 403 U.S. 15, 16 (1971).

100. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988).

101. *Boos v. Barry*, 485 U.S. 312, 315–16, 318–22 (1988).

102. “Traditional First Amendment jurisprudence uses the ideal of autonomy to insulate the processes of collective self-determination from such preemption.” Post, *supra* note 79, at 1122.

103. MEIKLEJOHN, *supra* note 73, at 55, 57.

104. See Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 236 (1992); John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 51–52 (1996); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 334–35 (1991).

105. See Richard H. Fallon Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 875–76 (1994). Fallon argues that the two leading concepts of autonomy in legal scholarship, positive and negative liberty, are simplistic. *Id.* at 875–77. This is quite true because autonomy is not coterminous with either positive or negative liberty.

106. Provided one believes the distinction Berlin made between positive and negative liberty is one worth making. For the argument that both positive and negative liberty assume the absence of constraint, and that the additional qualities Berlin attributed to his concept of positive freedom have little to do with freedom, see generally Eric Nelson, *Liberty: One Concept Too Many?*, 33 POL. THEORY 58–59 (2005).

107. Autonomy is a concept that underlies theories of freedom. Classical liberals who believe that liberty is only the absence of constraint also believe that the will is autonomous so long as it is free of external coercion or the threat of coercion.

speaker” Fiss described as autonomy is more accurately captured by the term “negative liberty.” “Positive liberty” by contrast is more than the absence of external and internal constraints. It is self-realization, or more accurately, self-perfection.¹⁰⁸ Given that, it may be helpful to characterize this vein of legal scholarship as individualist or by reference to the specific concept of the freedom each espouses. Many proponents of the autonomy/individualist view or varieties thereof take umbrage at the free speech tradition’s emphasis on “self-governance” for treating an individual’s right to speech as instrumental to the furtherance of a public good. Not unsurprisingly, this revisionist view offers its own narrative of decline and fall. Progressive era jurists, long considered heroes of free speech on both individualist and democratic grounds, devised an unprecedented rationale for free speech based on public interest and obscured the original understanding of free speech as a natural property right of the individual.¹⁰⁹ Alarmed that the self-governance theory of free speech offers only a “contingent liberty,” John McGinnis has argued that “the right of free speech could be understood as intimately connected to the [individual’s] natural right of property.”¹¹⁰ Similarly, Mark Graber has argued that a “conservative libertarian” nineteenth century jurisprudence defended free speech on individualist grounds.¹¹¹

In multiple articles, Robert Post has attempted to reconcile the individualist and democratic views suggesting that free speech doctrine is grounded in autonomy, and in that manner, traditional doctrine protects what the Court has termed public discourse, or as Post describes it “the communicative process” constitutive of democratic identity.¹¹² This theory

108. Quentin Skinner, *A Third Concept of Liberty*, 117 PROC. BRIT. ACAD. 237, 239–40 (2002).

109. See, e.g., MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* (1991); Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1302 (1998); McGinnis, *supra* note 104, at 50–51. For an argument that Chafee’s free speech theory developed from the private law of defamation and its protections of speech rather than an external ideology, see generally Barzun, *supra* note 78.

110. McGinnis, *supra* note 104, at 64. McGinnis asserts that James Madison’s National Gazette essay, *Property*, published on March 27, 1792, “make[s] it obvious that he adapted Lockean principles to defend freedom of speech on the grounds that it was an aspect of the individual’s property right in his information.” *Id.* at 59–60 & n.45.

111. GRABER, *supra* note 109.

112. Post, *supra* note 79, at 1116. While other scholars focused on deliberation or good decisionmaking, Post looked to doctrine and its use of the more capacious term “public discourse,” and cast a wider net. With its nod to Rawls and Habermas, Post’s notion of communicative processes is more wide-ranging than the deliberation or decisionmaking common in the democratic/public interest theory. Through participation in the formation of public opinion and its unending discussion about national identity, a public opinion that

acknowledges the link between free speech and democratic self-government, but does so in a manner that refuses to treat autonomy instrumentally. Rather, autonomy is “intrinsically connected to democratic self-governance.”¹¹³ However, Post’s conception of the autonomy embodied in First Amendment doctrine is a capacious one. He freights it with active participation, which Fiss, by insisting the autonomy protected was purely negative liberty, sedulously avoided.¹¹⁴ This expansive notion of autonomy, autonomy “properly understood,” makes his fusion vulnerable to those insisting that free speech has roots in property rights having nothing to do with participation in civil society discourse or formalized deliberation.¹¹⁵

Delineating how the history of ideas relates to analytic theory and to legal doctrine is a complex piece of intellectual fretwork beyond the scope of this Article; nevertheless, history may serve to clarify the unresolved relationship between self-government and free speech in particular by offering an alternative account of negative liberty.¹¹⁶

After J.G.A. Pocock’s magisterial *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* transformed the discipline, no student of American political thought doubts that the Atlantic republican tradition, embodied in the English Civil War and American Founding, owes a critical debt to the political thought of the Italian Renaissance.¹¹⁷ The traditional history of free speech in legal scholarship begins with John Milton’s *Aeropagitica*, but that does not go back far enough. The connection between free speech and popular government was a familiar trope in the Renaissance, beginning when Florentine civic humanists of the early fourteenth century theorized and defended the value of their unusual political system, which offered its citizens liberty and the opportunity to participate in rule.¹¹⁸ Florentine liberty had two meanings,

sets the agenda for deliberation, akin to the chatter in coffee shops and salons so critical to the Enlightenment, democratic self-government acquires legitimacy.

113. Post, *supra* note 98, at 1524.

114. *Id.* at 1526. “Participation is at the core of the ‘free-speech tradition’ that *Liberalism Divided* repudiates. The tradition renders the American citizen as active.” *Id.*

115. Post, *supra* note 79, at 1122.

116. I will confine myself to making points that are relevant only because they have not, to my knowledge, appeared before in legal literature.

117. J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975).

118. HANS BARON, *THE CRISIS OF THE EARLY ITALIAN RENAISSANCE: CIVIC HUMANISM AND REPUBLICAN LIBERTY IN AN AGE OF CLASSICISM AND TYRANNY* (1966). Quentin Skinner has argued that the republican ideology civic humanists developed in the early *quattrocento* had roots in older traditions of rhetoric and scholastic thought. QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT I: THE RENAISSANCE*

the political independence of the city from an overlord, and a republican constitution that assured freedom of speech and equality under law.¹¹⁹ In 1479, freedom of speech as “the right to say openly what [one] thinks” was essential to the Florentine definition of liberty.¹²⁰ Free speech in Florence accounts for the low reputation of ordinary people according to the Florentine Republic’s most famous, or infamous, son, “everyone speaks ill of people without fear and freely, even while they reign; princes are always spoken of with a thousand fears and a thousand hesitations.”¹²¹ Niccolò Machiavelli warned generations of readers that the ability to speak freely vanishes when “only the powerful propose laws, not for the common freedom, but for their own power; and for fear of them nobody can speak against them.”¹²²

Moreover, Renaissance political theorists believed that liberty was only possible in republics. Subjects of princes, monarchs, or potentates could never be free in any sense of the word. We, today, associate “republican freedom” with active participation—so it seems natural to assert such freedom cannot be enjoyed in a monarchy—but Florentines were making a very different argument. Liberty, meaning the freedom to speak, a classic instance of negative liberty—liberty as freedom from constraint—could only be enjoyed in a self-governing republic. This argument is based on a concept of liberty fundamental to Roman law and its distinction between master and slave.¹²³ Liberty is not only the absence of interference, but the absence of dependence on the will of another. This “alternative vision of negative liberty” familiar to Roman political theory appears in the medieval common law texts of Bracton and Littleton, in addition to Florentine political thought, and was central to the defense of the commonwealth

(1978).

119. Alison Brown, *De-masking Renaissance Republicanism*, in *RENAISSANCE CIVIC HUMANISM: REAPPRAISALS AND REFLECTIONS* 179, 187 (James Hankins ed., 2000).

120. Election by lot, the right to attend public assemblies, and equality that involves preventing “the rich from oppressing the poor or the poor, for their part, from violently robbing the rich,” were also essential to the definition of liberty. Alamanno Rinuccini, *Liberty*, in *HUMANISM AND LIBERTY: WRITINGS ON FREEDOM FROM FIFTEENTH CENTURY FLORENCE* 204 (Renee Neu Watkins ed., trans., Univ. of South Carolina Press 1978).

121. NICCOLÒ MACHIAVELLI, *DISCOURSES ON LIVY* 119 (Harvey C. Mansfield & Nathan Tarcov trans., Univ. of Chicago Press 1996).

122. *Id.* at 50–51.

123. “Certainly the great divide in the law of persons is this: all men are either free men or slaves.” *THE DIGEST OF JUSTINIAN*, I.V.3.35 (Theodor Mommsen & Paul Krueger eds., Alan Watson trans., Univ. of Pennsylvania Press 1985). As Machiavelli writes of the benefits of living in a free republic, “[h]e does not fear that his patrimony will be taken away, and he knows not only that [his children] are born free and not slaves, but that they can, through their virtue, become princes.” MACHIAVELLI, *supra* note 121, at 132.

during the English Civil War.¹²⁴

The eminent historian of political thought, Quentin Skinner, has excavated this concept of liberty, which he terms “neo-Roman,” and charted its course up to the English Civil War. Liberty as non-dependence means that liberty is more than the absence of interference or the threat thereof. It means the absence of dependence on the will of someone else and, in addition, the absence of the awareness of such dependence, because even the awareness of the tentative status of one’s rights restricts one’s actions.¹²⁵ This is an alternative account of the negative liberty native to classical liberalism because its focus is not on being free to be one’s true nature or participate in politics, but on the absence of any constraint on individual action.¹²⁶ This way of thinking about freedom expands the horizon of possible constraints on action. Thus, at the start of hostilities with the Crown in the early seventeenth century, Parliamentarians argued that as long as their rights and liberties were dependent on the prerogative of the king, such rights were just licenses or privileges, and they were merely servants.¹²⁷ “They insisted, in other words, that freedom is restricted not only by actual interference or the threat of it, but also by the mere knowledge that we are living in dependence on the goodwill of others.”¹²⁸

The intimate connection between non-dependence and free speech was made early and often. Sallust, and above all Tacitus, analyzed how being aware of dependence on an arbitrary power constrains speech. First, an individual will refrain from speech or actions that might be misconstrued. John Milton repeatedly quoted and paraphrased Sallust’s warning that the subjects of princes must be cautious and hide their talents.¹²⁹ Second, as Tacitus relates, an individual will be unable to avoid saying things he does not believe.¹³⁰ The only alternative to flattery is suicide or silence.¹³¹

124. Skinner, *supra* note 108, at 247–48. The common law treatises of Henry de Bracton and Sir Thomas Littleton exemplify the analysis of freedom and slavery that commences the *Digest* of Roman law. *Id.* at 248.

125. *Id.* at 247, 254, 256–57.

126. Neo-Roman negative liberty is the absence of interference and the absence of the awareness of dependence on an arbitrary power. One cannot enjoy the freedom to speak, move, or write if at any time that freedom might be withdrawn; even the awareness of such a situation leads to self-censorship. The intuition at the core of this concept of negative freedom is that freedom can be limited by servitude as well as by coercive threat. *Id.* at 257.

127. The objection developed in the Petition of Right of 1628 is that if the Crown possesses a prerogative right in times of necessity, property and personal liberties “are held not ‘of right’ but merely ‘of grace,’ since the crown is claiming that it can take them away without injustice at any time.” *Id.* at 250.

128. *Id.* at 247.

129. John Milton, *The Tenure of Kings and Magistrates*, in POLITICAL WRITINGS 3, 3 (1991).

130. CORNELIUS TACITUS, THE ANNALES OF CORNELIUS TACITUS, THE DESCRIPTION

The point is that even if one is not directly threatened or constrained, the awareness of dependency limits one's actions. This analysis of the stultifying effects of dependency, which appear most clearly in the constraints on freedom of speech, greatly influenced the republican parliamentarians who overthrew the government of Charles I.¹³² The writings of James Harrington, Algernon Sidney, and John Milton, as well as the great Whig and Stuart parliamentary debates of the seventeenth century, were well known to the American founders, many of whom were also directly or indirectly familiar with Roman and Florentine political thought.¹³³ They inherited the claim that only in a self-governing republic will speech be truly free, because only there will the exercise of such a right not be dependent on the arbitrary will of another.¹³⁴

How this historical digression bears on contemporary debates about free speech theory is not immediately apparent. It does tell us something about how one might reconcile individual freedom of speech and democratic self-government in First Amendment theory. To recapitulate, the criticism of the democratic view is that it treats an individual's freedom of speech as instrumental to the broader purpose of democratic self-government. The individualist/autonomy view recognizes an individual's right to speak freely as a core moral imperative, but it discounts the precise way an individual

OF GERMANIE 84 (1591).

131. *Id.* at 125, 139.

132. Skinner, *supra* note 104, at 257. The argument that dependence starves liberty appears in the debates of 1628 over the right to imprison without cause, and in debates from the 1610s to the 1640s over the prerogative right to impose taxes without parliamentary consent. *Id.* at 251. Furthermore, Henry Parker used the neo-Roman argument to great effect in his response to Charles I's claim that the veto, "the Negative Voice," was a prerogative right. *Id.* at 254. Defenses of parliament's decision to take military action in 1642 routinely argued that if the king is allowed the veto, England will consist only of a king, a parliament, and slaves. *Id.*

133. See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1992); PAUL A. RAHE, *REPUBLICS ANCIENT AND MODERN: CLASSICAL REPUBLICANISM AND THE AMERICAN REVOLUTION* (1992); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* (1969).

134. Speech, as well as property and conscience and so forth. Again, the claim made is not merely that in a republic speech will be free from interference from another because a monarch could provide such a guarantee. The claim is that in a republic no one will be able to suppress or regulate speech on an arbitrary basis. Only in a republic of equal citizens under the rule of law is arbitrary power likely to be minimized. See PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997). As far as what is meant by arbitrary power, it can be defined as power unlimited by established procedures, such as the rule of law, or substantively by its lack of consideration of the needs and views of affected individuals. See *id.* at 56. It may be more accurate to state that this is a claim eighteenth-century Americans may have inherited. Hobbes's account of negative liberty as purely freedom from external interference dominated subsequent discourse.

right relates to democratic self-government. Dismissing democratic self-government as instrumental to the pursuit of private rights, however, cannot account for extensive areas of First Amendment doctrine that emphasize protection of speech on public grounds.¹³⁵ Robert Post has gone to great lengths to discipline the democratic view's instrumentalism, "collective self-determination thus entails the value of individual autonomy."¹³⁶ True, but history imparts the lesson that autonomy, or to be more accurate negative liberty as non-dependence, if it is to be real, entails collective self-governance.¹³⁷ Of this, James Madison was well aware when he wrote that, in the new republic, Americans were no longer subjects of the crown but citizens with sovereignty.¹³⁸ And so Justice Brandeis articulated the relationship between individual liberty and democratic self-government in the context of free speech when writing of the Founders of the American Republic, "They valued liberty both as an end and as a means."¹³⁹

Individual liberty and democratic self-government are bound to one another in First Amendment theory and in doctrine.¹⁴⁰ Both are valued as ends, and as means. "Individual human dignity" as Justice Harlan described it, is not instrumental to the purpose of self-government, but the reason for it. Thus, the First Amendment protects more than informed

135. Post argues that these areas of doctrine "express the normative aspirations" of democracy "which seeks to sustain the value of self-government by reconciling individual and collective autonomy through the medium of public discourse." Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1275 (1995).

136. Post, *supra* note 98, at 1525. Individualists attuned to negative freedom may not ascribe to Post's capacious notion of autonomy, which contains elements of positive and negative liberty. In addition, Post's talkative public sphere "public discourse," which performs the mediating function between individual and collective, assumes an absence of dependence. A republican would argue that civil society may contain arbitrary private power, which forces other people into a state of dependence. No free and equal talkative public sphere can exist prior to the institution of a democratic self-government, and the rule of law prevails. As Locke observed, "Where there is no law, there is no freedom." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 242 (1690).

137. Put another way, the lesson is that an individual can only enjoy full negative liberty if one is free from interference and free from dependence on someone else or even the awareness of it. Liberal freedoms are only protected in a free state where individuals participate in self-government.

138. 4 ELLIOTT'S DEBATES ON THE FEDERAL CONSTITUTION (1876). Individual Americans were no longer dependent on the will of an external sovereign.

139. *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring). Liberty, arguably, as non-interference and non-dependence. Brandeis also states that the Founders knew "the greatest menace to freedom is an inert people," a statement with which Tacitus would surely have agreed.

140. This does not mean there are not portions of First Amendment doctrine outside the sphere of public discourse where other values come into play.

decisionmaking, the pursuit of truth or rational deliberation; it protects the individual: “The right to speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets us apart from totalitarian regimes.”¹⁴¹ The special solicitude the doctrine pays to public discourse, participation, and debate cannot be discounted, however, and this solicitude is justified because it serves self-government. “[T]he First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.”¹⁴² First Amendment doctrine is republican in a profound sense, in its awareness that the enjoyment of individual liberty depends on a republican state, which in turn depends on an engaged and talkative citizenry.

Recognizing that both individual liberty and democratic self-government are intertwined in First Amendment doctrine does not entail that any specific law or regulation is constitutionally valid or invalid. The point I wish to make is that an exclusive focus on one value at the expense of the other impoverishes any analysis. Neither individual liberty nor the interest of collective self-governance can be ruled out in assessing constitutionality.¹⁴³ The historical apprehension that freedom is constrained by dependence on the will of another in addition to interference will appear again to inform the discussion of which doctrine judges and agencies should choose when addressing free speech issues on social media sites—the public forum doctrine or government speech.

B. *The Public Forum Doctrine*

In the early years of the twentieth century the Supreme Court viewed questions of free speech on public property through the *pince nez* of the common law, holding that the government possessed property rights over

141. *Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949).

142. *Globe Newspaper, Co. v. Superior Court of Norfolk*, 457 U.S. 596, 604 (1982) (citing *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940)); *see, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (“The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (commenting that the First Amendment’s Free Speech Clause “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people”); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”).

143. At times both values may appear to operate at cross purposes, but neither should be dispensed with lightly.

public places and, like a private owner, could decide when and how its property was used.¹⁴⁴ Needless to say, in practice this approach did not lend itself to a robust recognition of citizens' free speech rights.¹⁴⁵ Then, in 1939, came *Hague v. CIO*, which recognized that citizens' right to exercise freedom of speech in streets and parks overrode the government's common law property rights.¹⁴⁶ "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."¹⁴⁷ In succeeding years, as the Court struck down ordinances banning leafleting on streets and sidewalks, a new doctrine began to take shape, more abstract, rigorous, and friendly to free speech than the old common law view.¹⁴⁸ Explicitly it gave citizens the presumptive right to exercise rights to free speech and expression on streets, sidewalks, and parks, public places dedicated to the exchange of views and discussion by citizens since time immemorial, subject to time, place, and manner restrictions.¹⁴⁹ From 1972, when the Court first used the term "public forum" in *Mosley*, to 1976's *Greer* decision, the doctrine matured. Essentially, the Court held some public properties have special status; this status is created by traditional usage or a decision by the government to make those properties accessible to such activity.¹⁵⁰ Never entirely abandoned, the concept of easement and old

144. Steven G. Gey, *Reopening the Public Forum from Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1539 (1998).

145. In *Davis v. Massachusetts*, the Court upheld a conviction for making a public speech in the Boston Common without obtaining a permit. 167 U.S. 43, 47 (1897). The city argued that it had proprietary rights over the common, therefore, requiring a citizen to obtain a permit was constitutional.

146. *Hague v. CIO*, 307 U.S. 496, 515–16 (1939). The Hague plurality did not explicitly reject the common law governmental property rights approach. Instead, the Court recognized that the free speech clause gave citizens an easement of sorts. *See id.*

147. *Id.* at 515.

148. *See Schneider v. New Jersey*, 308 U.S. 147 (1939). In *Schneider*, the Court held that a local government could not prohibit the distribution of pamphlets on public streets and sidewalks. *Id.* at 162. The Court deciding *Jamison v. Texas*, 318 U.S. 413, 417 (1943), held a similar regulation unconstitutional. Whether the public forum doctrine took shape in the 1940s or later in the 1970s is the subject of some debate. *See Gey, supra* note 144, at 1539–42 for the first view and Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987), for the latter.

149. *Grayned v. City of Rockford*, 408 U.S. 104, 115–17 (1972).

150. *See Post, supra* note 148, at 1731–32. *Grayned*, as Post sees it, in subjecting all government property to one uniform First Amendment test (the "basic incompatibility test") attempted to dispense with classifications of public space as proprietary or non-proprietary or government as property owner or not in order to focus on the First Amendment principle of free discussion. *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), which found a Chicago ordinance prohibiting picketing on a public street near a public school

common law proprietary rights lurked in the background of successive public forum cases, and returned in *Greer v. Spock*, which would influence the formulation of the public forum doctrine that continues to hold sway.¹⁵¹

Perry Education Ass'n v. Perry Local Educators Ass'n offered the Court the opportunity to stop adding a room here and there and organize its developing public forum jurisprudence into an immobile tripartite doctrine to be deployed whenever courts were asked to review questions of state regulation of speech on public property.¹⁵² The first level consists of traditional public fora, where the Court guarantees the strongest First Amendment protection to speech and expression.¹⁵³ In parks, streets, and on sidewalks, a content-based restriction of speech is permissible only if it meets a strict scrutiny test, meaning the restriction is “necessary to serve a compelling state interest,” and is “narrowly drawn to achieve that end.”¹⁵⁴ Restrictions on viewpoint are likewise forbidden.¹⁵⁵ Only limited time, place, and manner restrictions may be imposed to prevent incompatible activities, such as two parades marching on a street at the same time.

The next level comprises the designated or limited public forum: “public property which the State has opened for use by the public as a place for expressive activity.”¹⁵⁶ As in a traditional public forum, any content-based restriction must satisfy strict scrutiny. “[A] content-based prohibition must

unconstitutional, replaced proprietary and non-proprietary with a similar distinction between a public forum and other government property (forums that are not public) with different rules applying to each. *See id.* at 94, 96, 99. The purpose may have been to recognize that some public places have a special connection to communication and such a connection warrants a more rigorous First Amendment analysis.

151. *Greer v. Spock*, 424 U.S. 828, 838 (1976), defined a public forum as government property that had “traditionally served” as a place for free speech and expression rather than adopting *Mosley*’s definition of a public forum as one that is “opened up to assembly or speaking.” *See Mosley*, 406 U.S. at 96. In *Grayned*, the Court analyzed whether speech outside a public school was incompatible with the school’s primary use as an educational institution. “The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.” 408 U.S. at 116. *Greer* focused not on whether a free speech activity would interfere with the functioning of a public place, but on various kinds of government property, concluding that the public areas on military bases were government property reserved for functions other than speech, hence they were not public forums. *See Post*, *supra* note 148, at 1740.

152. 460 U.S. 37 (1983).

153. *Id.* at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

154. *Id.* (citing *Carey v. Brown*, 447 U.S. 455, 461–62 (1980)). Courts have not recognized any additional traditional public fora and exactly what time constitutes immemorial has not been fully explained.

155. *Carey*, 447 U.S. at 463.

156. *Perry*, 460 U.S. at 45; *see also* *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

be narrowly drawn to effectuate a compelling state interest.”¹⁵⁷ Thus, “[g]overnment restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum.”¹⁵⁸ While “limited forum” and “designated public forum” are often used interchangeably, the Court has on occasion drawn a distinction between the designated public forum, which carries with it all the burdens of tradition, and the limited public forum (or the designated that is then limited), which the state opens up for expressive activity. However, because the state from the start limits the forum to certain speakers or subjects, strict scrutiny no longer applies, and the forum is then closed to outside groups or subjects. In 2009’s *Pleasant Grove City v. Summum*, the Court attempted to clarify the distinction between a designated and limited public forum based on a note in the *Perry* opinion, and to create a provenance to legitimate a forum created by the government “limited to use by certain groups or dedicated solely to the discussion of certain subjects.”¹⁵⁹ In such a forum, reasonable and viewpoint-neutral restrictions on speech may be permissible.¹⁶⁰ While the Court has yet to find a designated public forum, examples of the genus “limited public forum” have been found to exist. A public university’s student activities fund, public school facilities, and a public library are some examples of limited public fora.¹⁶¹

157. *Perry*, 460 U.S. at 46.

158. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469–70 (2009) (citing *Cornelius*, 473 U.S. at 800). The designated public forum is also mentioned in *United States v. Kokinda*, 497 U.S. 720, 726–27 (1990). As Fred Schauer notes, “it is telling that the Court has never found such a designated public forum to exist.” See Schauer, *supra* note 76, at 98 n.74.

159. *Pleasant Grove*, 555 U.S. at 470; see also *Perry*, 460 U.S. at 46 n.7.

160. *Pleasant Grove*, 555 U.S. at 470; see also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001).

161. In *Perry*, 460 U.S. at 49, the Court held that a school district’s inter-office mail system was a non-public forum. In *Rosenberger*, the Court held that a public university’s refusal to fund a student publication from a religious perspective violated the Free Speech Clause because a student activities fund, a non-spatial or metaphysical arena, was a limited public forum. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30, 837 (1995). In *Good News Club v. Milford Central School*, 533 U.S. at 106, the Court treated a public school auditorium as a limited public forum. In *Lamb’s Chapel v. Center Moriches Union Free School District.*, 508 U.S. 384 (1993), the Court held that a school district violated the Free Speech Clause when it excluded a private group from screening films at a school because the films discussed family values from a religious perspective. *Id.* at 393. The Court did not actually hold that the school had created a limited public forum, holding only that the school district had engaged in viewpoint discrimination impermissible in even a non-public forum. *Id.* at 394; see also *Widmar v. Vincent*, 454 U.S. 263 (1981). In *Widmar*, the Court held that the university had created a limited public forum by allowing registered student groups to use school facilities. See *id.* at 272. As a consequence, religious student groups had to be allowed access to the same facilities according to the rules applied to non-religious student groups. See *id.* at 276; see also *Brown v. Louisiana*, 383 U.S. 131, 142 (1966)

Public property, which is neither by tradition nor designation a forum for public discourse, is considered a non-public forum. In a non-public forum the government's old common law property rights come to the fore, and the government as owner can regulate access to and expression on the property, as long as any restrictions are viewpoint neutral and reasonable.¹⁶² A ban on soliciting is considered reasonable and viewpoint neutral. Examples of such non-public fora include, ironically, the sidewalk in front of a post office, and, more sensibly, an airport terminal, charity campaigns in federal government offices, and residential mailboxes.¹⁶³ The difference between a public and non-public forum is critical because when a public forum is found, a citizen is entitled to access as a matter of constitutional law.¹⁶⁴ A public property with the potential to be a new public forum, meaning one not sanctified by time and usage, is evaluated according to the government's intended use.¹⁶⁵ Once the forum has been classified, the court then applies the corresponding level of scrutiny.¹⁶⁶ Tradition and intent are the Court's guiding stars.¹⁶⁷ Disparaging the

(applying the rules established for sidewalks and parks to a public library).

162. *Perry*, 460 U.S. at 46; see also Gey, *supra* note 144, at 1547–48.

163. In *Kokinda*, 497 U.S. at 730, the Court found that the sidewalk outside a post office was not a public forum. In *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680–81 (1992), the Court found that a publicly owned airport terminal was not a public forum. In *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 806 (1985), the Court held that the Combined Federal Campaign was not a public forum so the government could refuse to allow the NAACP Legal Defense and Education Fund to be one of the charities funded by the campaign. The Court declared federal mailboxes non-public fora in *U.S. Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129–31 (1981).

164. See Kalven, *supra* note 9, at 29–30.

165. Some scholars have argued courts should find more traditional public fora or places that must offer mandatory access as a matter of constitutional law. The Court has repeatedly been offered arguments that places other than sidewalks, streets, and parks (walkways, mailboxes, military bases, shopping centers, city buses) were the “constructive equivalent” of quintessential public fora because people communicate in such places. The Court has consistently rejected such arguments and continues to insist on government intent as a critical factor. See *Perry*, 460 U.S. at 45–46.

166. Justice Kennedy has suggested the Court look to “the actual, physical characteristic and uses of the property” rather than to abstract government intent or historical factors to determine if a property is a public forum. See *Lee*, 505 U.S. at 695 (Kennedy, J., concurring).

167. And at times intent can carry more weight than tradition in finding a public forum. See *Kokinda*, 497 U.S. at 727–30 (reiterating that the purpose of a postal sidewalk is not to be open to expressive activity but to assist the patrons of the post office). Justice Kennedy has been critical of the present public forum doctrine's focus on governmental intent: “It leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area, and it leaves almost no scope for the development of new public forums absent the rare approval of the government.” *Lee*, 505 U.S. at 695 (Kennedy, J., concurring).

public forum doctrine for its formalistic inadequacies appears to be a popular judicial and scholarly pastime; however imperfect the doctrine may be, it remains operative.¹⁶⁸ Despite the unfriendly speech potential some scholars have found in the public forum doctrine, should a federal agency social media site be found to be a public forum, it would mean any content-based restriction would face strict scrutiny and much language presently restricted on multiple federal agency sites, such as offensive language or hate speech, would have to be permitted.

C. *The Government Speech Doctrine*

It is generally understood that the Free Speech Clause bars the government from suppressing some speakers while allowing others to speak based on the views expressed.¹⁶⁹ In striking contrast, the government speech doctrine holds that the Free Speech Clause is irrelevant when the government is itself the speaker.¹⁷⁰ Determining when exactly the government is speaking remains opaque as the Court, in part because the doctrine is of recent vintage, has yet to elaborate a clear standard.¹⁷¹ To be new is not necessarily to be novel, however, and the roots of the doctrine lie in the so-called “government enterprise” cases that came before the Court in the decades leading to government speech’s leading role debut in *Johanns v. Livestock Marketing Ass’n*.¹⁷² At issue in the government enterprises cases was the recognition that there were functions of government on public property where the public forum doctrine was unwieldy at best or, at worst,

168. *E.g.*, Post, *supra* note 148, at 1715–16 (explaining the public forum doctrine has received “nearly universal condemnation from commentators”). *See generally* 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) (demonstrating that the public forum doctrine serves to obscure rather than illuminate the interests at stake); Gey, *supra* note 144 (contending that courts have applied the public forum doctrine in a way that discounts the public’s right to free speech and privileges government interests in suppressing speech).

169. The government cannot engage in viewpoint discrimination. “[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

170. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (“We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker.”).

171. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) (“The government-speech doctrine is relatively new, and correspondingly imprecise.”).

172. *Id.* at 553. The D.C. Circuit identified *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), and *United States v. American Library Ass’n*, 539 U.S. 194 (2003) as progenitors of government speech in *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23, 29 (D.C. Cir. 2005).

yielded bizarre results. In such contexts, the government was fulfilling a role as time-honored as the use of streets for political protest—as patron of the arts, as librarian, or as educational institution—a role that by its nature entailed viewpoint discrimination. A sit-in at a public library may demand deployment of the public forum doctrine, but the constitutionality of a public librarian to engage in viewpoint discrimination while selecting books is something else altogether.¹⁷³ The distinctions inherent in various government roles, which take place on government property, would seem to call for institution-specific First Amendment rules, the application of distinct rules for each institution or role, government as broadcaster or government as patron of the arts, where the consequences of government selection, rather than access, are at issue.¹⁷⁴ The obvious ineffectuality of the public forum doctrine in determining whether the denial of a grant by the National Endowment for the Arts constituted unlawful viewpoint discrimination, for instance, inclined the Court to start constructing a new doctrine for such circumstances. Although there were sound reasons to develop multiple institution-specific doctrines, the preference, endemic in First Amendment thought, for a broad, categorical rule prevailed.¹⁷⁵

In 1991's *Rust v. Sullivan*, the Court held that prohibiting doctors receiving government funds from discussing an alternative view was not an exercise in viewpoint discrimination, but a funding decision. At issue was a regulation that forbade subsidized doctors from discussing abortion while counseling patients. Because the government appropriated funds for family planning but not abortion clinics, the Court reasoned that the doctors who worked there were bound by the program's limits when working in their official capacity.¹⁷⁶ The Court plucked *Rust* from comparative obscurity in *Legal Services Corp. v. Velazquez*, which explained that *Rust* should be understood to have relied on government speech even if the Court's

173. *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (applying the rules established for sidewalks and parks to a public library in the context of a sit-in protest). With respect to a public librarian engaging in viewpoint discrimination while selecting books, the current doctrinal framework would classify such an act as the state speaking. Whether this classification precisely captures the activity at issue and the free speech interests at stake remains debatable.

174. The Public Broadcasting System, or its employees, must engage in viewpoint discrimination every day in choosing its program schedule; likewise, the National Gallery, more accurately its curators, when selecting artworks.

175. Schauer, *supra* note 76, at 120. In 1998, Schauer asked if the Court would build on the hints in *Forbes* and *Finley* and develop institutional-specific principles in “content oriented government enterprises cases.” Rather than make institutional-specific decisions, the Court devised another institutionally neutral doctrine—government speech.

176. *Rust v. Sullivan*, 500 U.S. 173, 193–94 (1991).

opinion did not use the precise term.¹⁷⁷ The statute challenged in *Legal Services* violated the First Amendment because the “[Legal Services Corporation] program was designed to facilitate private speech, not to promote a governmental message.”¹⁷⁸

If *Legal Services* baptized the doctrine, *Johanns* was its confirmation.¹⁷⁹ In *Johanns*, the Court held that the Department of Agriculture’s “Beef. It’s What’s for Dinner.” advertising campaign was government speech, thus confirming the doctrine and furthermore holding that citizens have no First Amendment right to opt out of funding government speech.¹⁸⁰ With respect to the all-important question of how government speech is identified, the operative terms are message and control. If the government can prove that it developed a message and exercised control over the communication of that message, it has satisfied the two prongs of government speech.¹⁸¹ Authorship does not mean that government officials must develop the message. A private third party can do so as long as a government official maintains veto power.¹⁸² More controversially, the government is not obligated to reveal itself as the author of the message. The fact that the Court gave the government *carte blanche* to evade accountability by neglecting to require the government to reveal itself as the author unleashed a torrent of criticism, beginning with Justice Souter’s dissent.¹⁸³ The mechanism to distinguish government speech from viewpoint discrimination in favor of private speech, of which the

177. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (“We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker.”). The developing doctrine makes a brief appearance in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 833 (1995). In *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 235 (2000), the Court held that students who paid a required activity fee should not be considered private speakers, and that the University had not created a public forum. Rather, the University used the funds to support specific organizations in order to advance a message.

178. *Legal Servs. Corp.*, 531 U.S. at 533–34. The statute in question prohibited the federally funded Legal Services Corporation from accepting clients who sought to contest welfare laws. *Id.* at 536.

179. See generally *Johanns v. Livestock Mktg. Ass’n.*, 544 U.S. 550 (2005).

180. *Id.* at 562–63. A mandatory fee from beef producers paid for the advertisements, and some producers did not wish to participate. *Id.* at 555.

181. *Id.* at 564.

182. In his opinion, Justice Scalia stated that the Secretary of Agriculture oversaw the program, appointed officials, and retained veto power over the content of the advertisement. Congress’s oversight authority and power of the purse gave it the ability to alter the program at any time. *Id.* at 563–64.

183. *Id.* at 570–80 (Souter, J., dissenting); see also Ardia, *supra* note 10, at 2013–14 (discussing the majority opinion in *Johanns* and Justice Souter’s dissent).

government approves, remains opaque.¹⁸⁴ According to the Court, periodic elections enable the government to be held accountable for its speech.¹⁸⁵ This contention of course assumes the electorate can identify the government as the source of speech it approves or rejects, an assumption many observers have found questionable.¹⁸⁶ *Pleasant Grove City v. Summum* made it clear that the public forum doctrine and government speech inhabit different spheres. Although the case involved private expression in a public park, the quintessential traditional public forum, the public forum doctrine was irrelevant. The Court concluded that for purposes of selecting monuments in a public park, government speech is the proper analytic apparatus.¹⁸⁷ Taken out of context, the Court's opinion in *Pleasant Grove*, that the government can speak through its selection of *private* speech, is particularly tempting for federal agencies facing unpleasant comments on social media sites.¹⁸⁸

As applied to federal agency social media sites, both doctrines have problematic consequences. If an agency embraces the public forum doctrine and permits offensive speech, hate speech, or false statements on its social media sites, it may give the appearance of endorsing such speech or face civil liability for contributory negligence. Should an agency choose government speech and refuse to post or remove comments to which it objects, which a court may find to be protected speech, an agency will be

184. See Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2d 413, 426 (2009). According to Chemerinsky, the government could engage in viewpoint discrimination simply by adopting private speech as its own speech. Justice Alito did admit that the possibility of the government speech doctrine being used as a “subterfuge for favoring certain private speakers over others based on viewpoint” was a concern. *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009).

185. The government is “accountable to the electorate and the political process for its advocacy.” Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 235, 235 (2000). “If the citizenry objects, newly elected officials later could espouse some different or contrary position.” *Id.*

186. An assumption Justice Souter examined critically in his dissent in *Johanns*, 544 U.S. at 577–79. See Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1387–88 (2001) (asserting that the government’s right to engage in viewpoint discrimination depends on it being held accountable); see also Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1052 (2005) (reiterating the importance of the recipients’ knowledge that the government is responsible for the speech so they know when to hold the government accountable).

187. *Pleasant Grove*, 555 U.S. at 480 (“And where the application of forum analysis would lead almost inexorably to the closing of the forum, it is obvious that forum analysis is out of place.”).

188. *Id.* at 473 (“The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park.”). The importance of context in choice of doctrine will be discussed in Part III *infra*.

guilty of a First Amendment violation. Denial of a constitutional right is a serious matter, and the adverse publicity attendant upon it is well worth considering, in addition to the potential drain on agency resources. Given the gravity of the choice, the following section will examine which doctrine is more appropriate for federal agencies seeking to comply with the Free Speech Clause.

III. CHOICE OF DOCTRINE

A. *Relevant Factors: Mixed Speech on Web 2.0*

There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech.¹⁸⁹ The first step in a First Amendment analysis is to classify speech as either public or private. Under current standards, if the speech is determined to be that of the government, courts apply the government speech doctrine. Speech made to advance a federal agency's viewpoint or in support of an agency's agenda is likely to be treated as government speech. If the speech in question is that of private individuals on government property, courts apply the public forum doctrine. Speech in the context of a government program is the subject of debate and likely to be what has been termed hybrid or "mixed speech," namely "speech that contains both private and governmental components."¹⁹⁰ Some examples of mixed speech, which do not fall neatly into the public forum or government speech categories, include speech by government employees, advertisements on public buses and trains, specialty license plates, and artistic expression when funded by a government grant.¹⁹¹ Although the Supreme Court has not recognized mixed speech, it is helpful to acknowledge that federal agency social media sites, established to promote agency activities and to provide a forum for private speakers to discuss

189. *Id.* at 470 ("[B]ut this case does not present such a situation.").

190. Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 610 (2008); see, e.g., Jacobs, *supra* note 186, at 1358–59 (providing examples of mixed speech, such as when the government edits compiled private speech into a publication).

191. Corbin, *supra* note 190, at 624–35. For an analysis of public employee speech, see generally Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007 (2005) and *Garcetti v. Ceballos*, 547 U.S. 410 (2006). For political advertising on public transit, see generally *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). For a discussion of specialty license plates, see Corbin, *supra* note 190, at 619–23. For artistic grants and decency regulations as possible viewpoint discrimination, see generally *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

public issues, are examples of mixed speech.¹⁹² However, given that free speech jurisprudence continues to view speech in mutually exclusive categories, agencies must make a choice. This decision is difficult because the Supreme Court has yet to devise a theory to distinguish government from private speech. Viewing speech on a spectrum, with private speech on one end and government speech on the other, the choice depends on where federal agency social media lands on the continuum, more specifically, which type of speech predominates.¹⁹³ In a classic free speech case, a state actor prevents a citizen speaker from engaging in a speech activity in a public forum or on private property with the permission of the non-state owner.¹⁹⁴ More commonly, however, free speech cases involve controversies over the government's authority to control speech in its "speech-related enterprises," such as schools, libraries, museums, funding for the arts and humanities, and public television, which now fall under the rubric of government speech.¹⁹⁵

Social media, or Web 2.0, comprises web-based interactive technologies.¹⁹⁶ The Supreme Court has not had occasion to consider applying either doctrine to the Internet or to specific websites on the Internet. Lower courts have applied both doctrines to Internet websites offering approaches of limited guidance.¹⁹⁷ In *Reno v. American Civil Liberties*

192. Corbin claims that the public forum doctrine has always implicitly recognized mixed speech. See Corbin, *supra* note 190, at 624.

193. Put another way, the question is whether the private speech on a federal agency social media site, hosted by a third party, is a public forum situation or a case of government speech.

194. See Schauer, *supra* note 76, at 92–93 (contending that many First Amendment cases concern the state's ability to regulate content in its "intrinsically content-based enterprises"). Although the division between state action and private action is an oft-questioned one, it remains relevant for purposes of a First Amendment analysis. See, e.g., CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 36–38 (1993) (articulating that some regulations that promote freedom of speech intrude on the rights of private actors, which can lead to First Amendment issues).

195. Schauer, *supra* note 76, at 93.

196. See Wilshusen Testimony, *supra* note 17, at 42.

197. In *Putnam Pit, Inc. v. City of Cookeville*, the Sixth Circuit held a local government website was a non-public forum after an independent newspaper alleged the City of Cookeville's refusal to add a link to the paper was viewpoint discrimination impermissible in a designated public forum. 221 F.3d 834, 841–42 (6th Cir. 2000). In *Page v. Lexington County School District One*, the Fourth Circuit determined that the school district's website was government speech even though the site contained links to other websites. 531 F.3d 275, 284–85 (4th Cir. 2008). *Page* was argued after *Johanns*, but some lower courts continue to apply the public forum doctrine to government websites. In both *Hogan v. Township of Haddon*, 278 Fed. Appx. 98 (3d Cir. 2008) and *Vargas v. City of Salinas*, 205 P.3d 207 (Cal. 2009), courts held local government websites were non-public fora. Case law on social media and the Free Speech Clause is negligible.

Union, a case in which the Supreme Court invalidated two provisions of the Communications Decency Act, the Court made some major points. The Internet resembled “vast democratic forums.” In language redolent with public forum imagery, the Court observed that chat rooms enabled any person with a phone line to become a town crier “with a voice that resonates farther than it could from any soapbox.”¹⁹⁸ To be clear, the precise issue under consideration involves not the Internet as a whole but specific interactive social media sites on the Internet, which include Facebook pages, blogs, wikis, mashups, podcasts, and RSS feeds operated, maintained, and sponsored by the federal government. Nonetheless, *Reno* remains fundamental because in it the Court emphasized the growing role the Internet plays in shaping public opinion—once the exclusive preserve of print, radio, and television media—and the unique way the Internet provides citizens with the ability to contribute to public opinion. In addition, the Court stated that “the Internet is not as ‘invasive’ as radio or television” and the Internet user is not a passive recipient of distressing messages, unlike a radio listener or television viewer. For that reason, the Court refused to include the Internet alongside broadcast or cable communications where speech is regulated in the public interest. Significantly, the Court declined to elucidate “the level of First Amendment scrutiny that should be applied to this medium.”¹⁹⁹

B. *The Government Speech Test*

Johanns established that speech by a third party may be attributed to the government and encompassed by government speech, and the case put forth a test to determine the government’s ownership and control of the message.²⁰⁰ For purposes of federal agency social media, the question is

198. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 869, 870 (1997) (“Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”); see Cass Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1763 (1995) (providing an early analysis of the relevance of First Amendment doctrines to the Internet).

199. *Reno*, 521 U.S. at 870. The Court declined to elaborate, in part because doing so would have been outside the ambit of the case, which involved the regulation of indecent speech over the Internet in the interest of protecting minors. The majority opinion held that the central provisions of the Communications Decency Act, 47 U.S.C. § 223, were unconstitutional.

200. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560–62 (2005) (“When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.”).

whether government speech applies only when government advances its own message or whether it can also extend to government selection of private messages. Scholarly debate, as one would expect, is not one-sided. A few scholars have concluded that government speech replaces the public forum doctrine in its entirety in the government website context.²⁰¹ Some scholars argue that the government speech doctrine should apply solely when the government is expressing a specific message, while others suggest that the government selection of speech constitutes expression on the government's part and thus the panoply of government speech applies.²⁰² It has also been argued that setting the boundaries of a nonpublic forum can convey a message and that the government has an expressive interest in disassociating from messages with which it does not agree.²⁰³ Given that the focus of this analysis is not what ought to be but what an agency is permitted to do, examining cases may prove a more fruitful line of inquiry.

1. Page, Gittens, and Pleasant Grove: Context, Pragmatism, and Purpose

The test articulated in *Johanns* focuses on the government's establishment of a message and its effective control over the content and dissemination of the message.²⁰⁴ Two recent federal appellate cases offer some assistance.

201. See Ardia, *supra* note 10, at 130; see also Helen Norton, *Not for Attribution: Government's Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. DAVIS L. REV. 1317, 1319–23 (2004) (discussing the difficulties presented by cases involving government and private speech and the government's interest in not appearing to express or endorse certain kinds of speech).

202. See Jacobs, *supra* note 186, at 1360–63; Randall P. Bezanson and William G. Buss argue for limiting government speech to particular situations when it is clear the government is conveying an identifiable message. See Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1431 (2001). In contrast, Helen Norton finds situations in which the selection of messages should be viewed as government speech. Norton, *supra* note 201, at 1338. Jacobs notes that subsidized speech, for instance, is viewed as government speech by the Court if expression is the predominant purpose of the program, and more like private speech if the purpose is to create a forum for private speech. See Jacobs, *supra* note 186, at 1358–59.

203. For the first argument, see Jacobs, *supra* note 186, at 1375. For the second argument, see Norton, *supra* note 201, at 1323–26.

204. *Johanns*, 544 U.S. at 560–62. Before *Johanns*, federal appellate courts developed their own tests, commonly asking: “who is the literal speaker, who exercises editorial control, what is the purpose of the program, and who bears ultimate responsibility[?]” Corbin, *supra* note 190, at 627 n.118; see also *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 792–93 (4th Cir. 2004); *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001); *Knights of the KKK v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093–94 (8th Cir. 2000). Despite the Supreme Court's distillation of these tests into the two-pronged test of *Johanns*, the Sixth Circuit continues to emphasize editorial control. See *ACLU of Tenn. v. Bredeesen*, 441 F.3d 370, 375–76 (6th Cir. 2006).

In *Page v. Lexington County School District One*, the Fourth Circuit applied government speech to a website, and in *People for the Ethical Treatment of Animals, Inc. v. Gittens*, the D.C. Circuit applied government speech to the selection of private art for a public sculpture program.²⁰⁵

In *Page*, the Fourth Circuit reviewed whether a school board website with links was government speech or a limited public forum. After passing a resolution opposing a bill before the South Carolina legislature, the school district communicated its opposition through its website, which contained links to other websites, its e-mail system, and school newsletters. The plaintiff alleged that the school district had engaged in impermissible viewpoint discrimination when it denied his request for access to the school district's "informational distribution system."²⁰⁶ The court, in its turn, announced that the matter involved two connected questions: namely, whether the school district's "campaign" against the Put Parents in Charge Act was government speech and whether the school district created a limited public forum by inviting private speech to be conveyed on its website and through its e-mail and newsletters. If the school district had created a limited public forum, denying the plaintiff access constituted viewpoint discrimination. The court applied the *Johanns* test and easily found an identifiable "established" message, in this case opposition to the Put Parents in Charge Act. More relevant was the issue of effective control with respect to links on the district's website. The court held that because the links on the school district's website all led to sites that supported the district's own message, the district had maintained control over its own website and the ability to exclude links at all times. "It thus retained *sole control* over its message."²⁰⁷

With a finding of an established message and effective control, the court concluded that a public forum had not been created, government speech prevailed, and *Page* could not avail himself of the district's website, e-mail system, and newsletters to communicate his support of the bill.²⁰⁸ However, the court did observe that had the website been a chat room or

205. *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275, 277–78 (4th Cir. 2008); *PETA v. Gittens*, 414 F.3d 23 (D.C. Cir. 2005).

206. *Page*, 531 F.3d at 277–78.

207. *Id.* at 285. The Court based this conclusion on five factors: (1) the school district selected links "that supported its own message"; (2) the school district maintained control over its own website and could exclude a link "at any time"; (3) the district never incorporated any information from a linked website "on its own website"; (4) the district continuously communicated its opposition and, in providing references to other supporters, buttressed its message; and (5) the "disclaimer" stated that only the speech on its website was the school district's. *Id.* at 284.

208. *Id.* at 285.

message board, it likely would have concluded that a limited public forum had been established.²⁰⁹ As additional evidence that the public forum doctrine has not been jettisoned entirely, the court deployed it to analyze individual school newsletters, which it concluded were either limited or non-public fora.²¹⁰ Of more consequence was the court's dictum stating that inviting private speech on a variety of viewpoints perforce creates a public forum. The crucial interactive qualities of a chat room or message board do characterize social media sites.²¹¹

In *People for the Ethical Treatment of Animals v. Gittens*, the D.C. Circuit held that in some contexts the selection of private messages can be government speech. But before federal agencies embrace government speech, the circumstances that give the case its particular atmosphere must be admitted. The case involved the District of Columbia's Commission on the Arts and Planning's selection of private entries for an art exhibit entitled "Party Animals," which would install sculptures of donkeys and elephants at locations around the city. People for the Ethical Treatment of Animals (PETA) submitted multiple designs featuring a shackled or crying elephant, which the Commission rejected as incompatible with the "festive and whimsical" theme of the exhibit.²¹² PETA argued that the Commission had not followed its official whimsical design criteria by accepting serious designs with social or political messages.²¹³ PETA claimed, plausibly, that

209. *Id.* at 284:

Had a linked website somehow transformed the School District's website into a type of 'chat room' or 'bulletin board' in which private viewers could express opinions or post information, the issue would, of course, be different. But nothing on the School District's website as it existed invited or allowed private persons to publish information or their positions there so as to create a limited public forum.

210. *Id.* at 285–86.

211. In *Sutcliffe v. Epping School District*, the First Circuit found the town of Epping's website to be government speech despite the fact that the town had not developed a formal policy for the content of the website or its links. 584 F.3d 314, 331–32 (1st Cir. 2009). Final approval authority sufficed for effective control; however, the issue again was a basic website with no public discourse or comment permitted. *Id.* at 322, 331. The court's finding of government speech despite the absence of a policy articulating the types of private speech permitted has the "potential of permitting a governmental entity to engage in viewpoint discrimination," or at least obscures whether private speech is rejected in order to maintain a consistent message or merely because the views expressed are unpopular. *See id.* at 337 (Torruella, J., concurring in part and dissenting in part). As David Ardia has observed, "As government websites become more interactive, thereby allowing the public to add its own voice to that of the government's, courts will face an increasing challenge in determining when government is itself speaking and when it is simply abusing its power over private speech." Ardia, *supra* note 10, at 2026.

212. *PETA v. Gittens*, 414 F.3d 23, 26 (D.C. Cir. 2005).

213. *Id.* at 27.

the Commission had created a limited public forum, and the rejection of submissions that satisfied the published criteria amounted to impermissible viewpoint or content discrimination.²¹⁴ The court's opinion is ostensibly about the newfangled government speech doctrine, and the court takes pains to try to identify precisely what kind of speech is involved.²¹⁵ By analogy with a public library, the court reasoned that the government speaks through its selection of books and, in this instance, speaks through the selection of art. Tellingly, the court quoted *Arkansas Educational Television Commission v. Forbes*: "In using its 'editorial discretion in the selection and presentation of' the elephants and donkeys, the Commission thus 'engaged in speech activity.'"²¹⁶ The extensive use the court made of *Forbes*, *NEA v. Finley*, and *United States v. American Library Ass'n*—the so-called "government enterprise" cases—rather than the cases that make up the pedigree of government speech—*Rust*, *Southworth*, *Velazquez*, etc.—reveals the real substance of *Gittens*.

Cases such as *Finley*, *Forbes*, and *American Library* involved the selective choices the government must make as a patron of the arts, television broadcaster, and librarian. These cases concerned the government performing institutional roles for which some discrimination on the basis of viewpoint is inherent in their very functioning.²¹⁷ To take the simplest of examples, no sensible person would argue that his speech rights are violated should the National Gallery refuse to hang his painting on its walls. Selectivity is inherent in some types of institutional decisionmaking.²¹⁸ If the National Gallery had to hang every painting offered, the Gallery would cease to function. The bulk of the opinion in *Gittens* discusses the decisions in *Finley*, *Forbes*, and *American Library* that Schauer terms "government enterprise cases" and whether the "Party Animals" program can be considered as such.²¹⁹ The case at hand, the court reasoned, does not

214. PETA cited *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), in support of its contention that a limited public forum was at issue. *Gittens*, 414 F.3d at 27.

215. *Id.* at 28 ("We think it important to identify precisely what, if anything, constituted speech of the government.").

216. *Id.* (alteration omitted).

217. *Id.*

218. Schauer, *supra* note 76, at 114–15. Some scholars argue that the necessities of institutional decisionmaking and functioning should not grant the government carte blanche to make content-related distinctions. See David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675 (1992) (making the case for viewing public schools, the arts, and the press as "spheres of neutrality").

219. "Instead, the question we face is whether the 'Party Animals' program, or at least the sponsorship portion of it, was 'one of the government enterprises which may control for content or viewpoint,' and as to this question the public forum doctrine offers no assistance."

resemble providing private speakers with an easement to use government property, and here the venerable expression of Kalven with the lingering scent of common law property rights invites the public forum doctrine to enter by the back door. The easement analogy does not fit, the court reasons, because something else is going on, and this something is the government acting as patron, a role that requires it to engage in otherwise impermissible viewpoint discrimination. In essence, the choice between the government speech or public forum doctrine depends on a contextual analysis, as the opinion quotes from the Supreme Court's opinion in *American Library Ass'n*: "We believe that public forum principles 'are out of place in the context of this case.'"²²⁰ As Schauer has demonstrated, the First Amendment tradition, the Court, and the legal profession remain ill at ease with legal categories based on empirical reality rather than juridical abstraction.²²¹ Hence, after a profoundly contextual analysis of the role the government is playing, the Court cloaks its institutionally specific reasoning under the capacious doctrine of government speech.²²² The Free Speech Clause does not apply to the government as communicator, and it did not restrict the Commission in its decision about PETA's elephants.²²³ Lest this tacked-on conclusion drive federal agencies into an impetuous marriage with government speech, let us remember the case turned on a contextual analysis.²²⁴

In a similar vein, the Supreme Court's opinion in *Pleasant Grove* does not suggest a wholesale adoption of government speech in all cases under the guise that the government is always speaking on its property.²²⁵ The Court's opinion does suggest a contextual and purposive analysis in

Gittens, 414 F.3d at 29 (quoting Schauer, *supra* note 76, at 99).

220. *Id.* at 28 (quoting *United States v. Am. Library Ass'n*, 539 U.S. 194, 205 (2003)).

221. See Schauer, *supra* note 76, at 107–08:

Although the salience of institutionally specific factors is apparent in most such cases, the Court's refusal to make institution-specific decisions is supported not only by most of existing First Amendment doctrine, but also, and more importantly, by a battery of extraordinarily well-entrenched views about the nature and function of law itself, views that are especially concentrated in the First Amendment context.

222. As it had previously cloaked its contextual reasoning in *Forbes* and *Finley* under abstractions, the difference between a factor and a categorical rule in *Finley* and the public forum doctrine in *Forbes*. "The Court peered down the path of institutional specificity in both cases, but when all was said and done it refused to do much more than peer." Schauer, *supra* note 76, at 119.

223. *Id.* at 140.

224. *Id.* at 28–29. Some courts have ignored the analysis in *Gittens*, and taken its conclusion to extremes, and reasoned that selection as a speech act is automatically government speech and thus a school district bulletin board is government speech. See *Ardia*, *supra* note 10, at 146.

225. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

determining which doctrine applies. Public forum analysis applies to the use of a park for the purpose of speeches and “other transitory expressive acts.”²²⁶ The Court acknowledged the difficulties that attend determining when “a government entity is speaking on its own behalf or is providing a forum for private speech.”²²⁷ In the end, the Court narrowly held that even a traditional public forum may be the locus of viewpoint discrimination on the part of the government, but only for the purpose of erecting permanent monuments. Whether it was advisable to proffer a broad categorical rule with respect to monuments in parks, Justice Souter found it premature to do so, and the analysis turned, albeit obliquely, on context and purpose. Time has sanctified the use of parks as arenas of protest and discussion, yet the venerable tradition of monumental civic art reaches back into the distant past. Quoting again from *American Library*’s call to context, the Court stated the public forum doctrine is applied when the government property or program is able to accommodate a large number of speakers. Public parks have limited space for permanent monuments, and furthermore, orators do not monopolize space in the manner of permanent monuments. Because the circuit court had analogized the installation of monuments to speeches, marches, and demonstrations, the Court addressed why that analogy was inapposite, and, based on a pragmatic analysis, the Court concluded that the public forum doctrine was inappropriate for this case because it would lead to the closing of the forum due to monumental clutter.²²⁸ In essence, the Court in *Pleasant Grove* found that for the purpose of selecting permanent monuments, the government resembles a patron of the arts and is therefore able to make decisions that would amount to viewpoint discrimination in other circumstances.²²⁹ However, once again the contextual nature of the analysis was subsumed under “government speech,” and a discussion of the various kinds of meanings monumental art may express.²³⁰

226. *Id.* at 464.

227. *Id.* at 470.

228. “And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.” *Id.* at 480; *see also id.* at 478–79 (explaining that the erection of monuments in public parks would consume space permanently and crowd out other forms of public expression).

229. For the argument that the *Pleasant Grove* opinion has the potential to subvert the public forum doctrine, see Timothy Zick, Summum, *the Vocality of Public Places, and the Public Forum*, 2010 BYU L. REV. 2203, 2208 (arguing that the permanent–transitory distinction the Court draws is untenable).

230. Essentially attempting to discuss basic principles of art history, in particular that human beings perceive art through empathy and association. See HENRICH WÖFFLIN, *CLASSIC ART: AN INTRODUCTION TO THE ITALIAN RENAISSANCE* (Phaidon Press 1953), for the classic study of empathy. John Ruskin remains the most eloquent exponent of

The opinions in *Page*, *Gittens*, and *Pleasant Grove* caution against assuming that the extension of government speech to the selection of private speech in some contexts means that an agency may freely remove comments on its own social media sites under the cover of government speech. The reasoning in such cases indicates that one cannot lift the framework of government speech and drop it on private speech on a social media site based on a quick association with selection or editorial discretion. Context is all-important. The precise nature of the government's role, be it analogous to running an institution such as a school, library, university, or television station or actually providing a venue for discourse, lurks behind the decision to apply one doctrine over another.

2. *Analysis of Application to Federal Agency Social Media*

If the decision to apply one doctrine or the other is context driven and pragmatic, it is difficult to extract a clear standard. Because both government and private speech may appear on agency social media sites, the question becomes whether government speech or private speech predominates. The first prong in the *Johanns* test is to find that the government has established a message. In *Page*, this was easy because there was a clear message of opposition to a bill before the state legislature. In *Gittens*, the court was willing to dispense with a clear message because editorial discretion or, more truly, connoisseurship, sufficed.²³¹ Some agencies have offered statements for their social media sites. The EPA states that its sites are intended to further its mission.²³² EPA's comment policy states, "We encourage you to share your thoughts as they relate to the topic being discussed."²³³ The U.S. Department of State Facebook Terms of Service state, "The purpose of the U.S. Department of State on Facebook is to engage audiences on issues relevant to U.S. foreign policy."²³⁴ The USDA "is using 'social media' and 'Web 2.0' to interact with people around the globe. USDA is an every day, every way

association. *See generally* JOHN RUSKIN, THE STONES OF VENICE II (1851–1853).

231. *PETA v. Gittens*, 414 F.3d 23, 30 (D.C. Cir. 2005) ("As a speaker, and as a patron of the arts, the government is free to communicate some viewpoints while disfavoring others, even if it is engaging—to use PETA's words—in 'utter arbitrariness' in choosing which side to defend and which side to renounce.").

232. "EPA is using social media technologies and tools in the firm belief that by sharing and experimenting with information we greatly increase the potential for everyone to gain a better understanding of environmental conditions and solutions." *Social Media at EPA*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/epahome/socialmedia.html> (last visited May 14, 2013).

233. EPA Comment Policy, *supra* note 62.

234. *U.S. Department of State Facebook Terms of Service*, *supra* note 53.

Department and we want to connect with people in ways that are the most convenient and effective for them.”²³⁵ NASA’s Facebook page invites Americans to “[s]hare our passion for space, aeronautics and science!”²³⁶ The SBA’s official social media statement reads, “Social media outlets help the U.S. Small Business Administration share ideas and information with members of the small business community. Your feedback, questions, and comments through social media allow us to better serve the needs of small business owners and entrepreneurs.”²³⁷ A clear message does not evince itself though; as we have seen, the messages conveyed may be obscure, so that is no bar. An agency could argue it wants to convey a message of civilized engagement and respectful discourse, though selecting and rejecting private speech to convey a message about dialogue stretches the limits of government speech alarmingly close to absurdity. However, the use of “engage” and providing a forum for public comment complicates matters. Of course, the real issue is whether a federal agency may, under the cover of government speech, selectively remove comments for any reason. Selection as government speech arises when the government acts in an institutionally specific manner as a government enterprise, library, university, broadcaster, or art patron. By identifying itself as the “U.S. Dept. of State on Facebook” rather than the “U.S. Department of State,” the Department could be attempting to cast itself as a government enterprise in anticipation of a contextually specific analysis.

As for effective control over the content and dissemination of the message, it would appear that the more an agency moderates comments or screens beforehand, thus risking a First Amendment violation should a public forum analysis prevail, the closer the agency’s message gets to meeting the second prong of government speech. Very few agencies—only three—admit to screening before posting, the highest level of speech control. Of the agencies stating that they moderate comments, it appears they may remove comments at some point after the comments are posted.²³⁸ Meeting the bar for control requires an outlay of agency manpower and resources few agencies are willing or able to offer.

235. *Social Media Tools and Resources*, U.S. DEP’T OF AGRICULTURE, http://www.usda.gov/wps/portal/usda/usdahome?navid=USDA_STR (last visited May 14, 2013).

236. NASA, *supra* note 61.

237. *Social Media*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/social-media> (last visited May 14, 2013).

238. In *Downs v. Los Angeles Unified School District*, the Ninth Circuit leniently determined the school had control over a bulletin board because, even though its control was inconsistent, the school had authority over the bulletin board at all times. 228 F.3d 1003, 1011 (9th Cir. 2000).

Few agencies wish to be associated with offensive, hateful, vulgar, or extremist speech, and naturally would like the dialogue on their social media sites to be substantive as well as decorous. Thus, there are recognizable government speech interests, but such an admission is not conclusive. The primary question is whether such interests should override the free speech interests of private citizens invited to comment on agency sites and blogs.²³⁹ In the absence of a clear message, government speech embraces the selection of private speech only when the government is acting in a specific institutional role that perforce entails selectivity. Admittedly, even private speech in a traditional public forum can be curtailed, but only for a specific purpose—for the purpose of permanent monuments, a curatorial purpose, as it were. In the case of social media, failure to select would not necessitate the closing of the forum, a conclusion based on the distinction between the permanence of monumental art and the evanescence of oratory and protests that proved decisive in *Pleasant Grove*. The term easement, which the Court in *Gittens* used to decide if the circumstances of the case resembled a classic public forum case or the institutional functions consonant with government speech, is a helpful heuristic. Public fora give private speakers an easement to use public property. Permitting the public to comment on agency activities on an agency-sponsored site is akin to providing speakers with an easement.

Given the above, a plausible conclusion to draw is that, although an agency has a recognizable interest in not endorsing certain types of speech, that interest does not mean an agency may freely engage in viewpoint discrimination because its social media site will fall under the aegis of government speech. Because considerations of context, purpose, and pragmatism appear to guide federal appellate courts and the Supreme Court when deciding which doctrine to apply, and a contextually specific analysis in the case of social media does not guarantee a finding of government speech, agencies and judges faced with such a case should look to the public forum doctrine. At this point returning to theory might provide a decisive reason for recommending one doctrine over another.

3. *Argument from Principle: Liberty As Non-Dependence*

Returning to the distinction between master and slave that animated Roman jurisprudence and early-modern political thought in its aversion to arbitrary power, a stronger claim begins to take shape. The neo-Roman

239. See Norton, *supra* note 201, at 1323–26; see also Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 97–100 (2004) (admitting that the government has expressive goals when it opens various fora, but arguing for a modification of the public forum doctrine).

concept of liberty as non-dependence, that an individual is constrained when vulnerable to the will of another as surely as by external threat, may resolve some tensions in First Amendment theory and, in addition, may present a decisive argument in favor of the public forum doctrine. Recall the central claim that a person is not free when under the authority or control of an arbitrary power—arbitrary in the sense of discretion unbridled by due process of law. Although the arbitrary power republicans militated against in history most often was governmental power, the analysis of freedom and servitude was also applied to situations of private power, as evinced by the republican obsession with corruption, ranging from Tacitus to Jefferson, a situation that prevails when arbitrary private power swallows the fragile concordat among equals ruling together under a constitution. Were it not for this awareness that conditions of servitude are possible in civil as well as in political society, republicanism would have little to offer the modern world. But it does; it can clarify the relevant normative considerations and the startling gulf separating the two doctrines.

Few would deny that negative liberty as the absence of arbitrary power and interference is a human good or a natural right as others might describe it.²⁴⁰ As a good or a natural right, liberty has been interpreted as a moral obligation to limit arbitrary political power and conditions of legal servitude. The neo-Roman concept of liberty heightens awareness of conditions of arbitrary power and dependence that may prevail in civil society.²⁴¹ A prime example of this situation prevails in the context of online speech. An individual's online speech is at the mercy of an ISP with the prerogative power to censor any speech at any time. Free speech on Facebook, for instance, is not a right but a privilege. The only recourse available to contest censorship is a private version of due process, enshrined in terms of service agreements devised by the ISP. An online speaker, even when speaking on a political topic, is a customer, not a citizen. This power dynamic works in some arenas of society, but not in all.

As the Supreme Court recognized in *Reno*, the Internet may perform a significant role in the formation of public opinion. The fact that anyone speaking online on a political topic is subject to censorship by a private actor may impact an individual's ability to participate in public discourse.²⁴²

240. There are exceptions of course. The arbitrary power of parents over children can be considered a positive rather than a negative force, although legal changes in family law have limited this once entirely arbitrary power. The freedom of an addict to indulge an addiction is not necessarily a good state of affairs.

241. Contemporary republican political theorists have analyzed civil society from such a perspective. See PETTIT, *supra* note 134.

242. I follow Post in equating the term "public discourse," which regularly appears in

Whether the government should take steps to remedy this lack of protection for online speech is a broader question.²⁴³ Here, the question is discrete. Given the predominance of arbitrary private power online, does it make a difference if government agencies use, and courts approve, the government speech doctrine to address speech on government-sponsored social media sites? The government speech doctrine gives the government the right to censor speech as it wishes in order to convey its own message. Should government speech be the controlling doctrine, then a citizen's speech on an agency social media site is dependent on the same unaccountable discretionary power that prevails elsewhere online. There will then be no place or refuge online where an individual's speech, on political as well as nonpolitical issues, is not subject to the unbridled discretion of another.

Government is not always the enemy of free speech. In a complex society, threats to free speech appear in a variety of guises.²⁴⁴ Provided that individual liberty as non-dependence and democratic self-government are the twin values at the core of the free speech tradition, nothing in the tradition prevents the government from being a friend of speech in theory.²⁴⁵ When one descends from theory to doctrine, such an assertion becomes more ambiguous.²⁴⁶ Nevertheless, current doctrine has a

First Amendment jurisprudence, with individual participation in the formation of public opinion or "protection of the communicative processes necessary for the maintenance of democracy." See Post, THE CONSTITUTION IN 2020, *supra* note 74, at 179.

243. It may be the case that providing private companies with precisely this sort of discretionary power, essentially having ISPs function as proxy censors, is the most efficient option. For reasons of principle, some people may be more comfortable leaving censorship to the private market rather than to the government.

244. Fiss, *supra* note 91, at 1414 ("The state of affairs protected by the first amendment can just as easily be threatened by a private citizen as by an agency of the state. A corporation operating on private capital can be as much a threat to the richness of public debate as a government agency . . ."). Again, what Fiss means by "richness of public debate," how that can be ascertained, and whether rich debate is the goal of the Free Speech Clause is open to dispute.

245. It is also possible to argue that the application of the public forum doctrine to agency social media sites is consonant with both autonomy-based theories of the First Amendment and democratic theories. Attempting to justify the application of government speech through an appeal to a natural right, Kantian, or property based vision of free speech is difficult. Government speech may be justified as an attempt to enhance discourse and ensure the functioning of the democratic system through wise decisions and deliberation and, in that manner, comports with the democratic view, but the extensive regulation of speech it entails is at cross purposes with much First Amendment doctrine justified on democratic grounds.

246. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969). Whatever its merits, the fairness doctrine upheld by *Red Lion* remains controversial. The "heckler's veto" permits state intervention in order to protect a citizen's opportunity to speak when threatened by a mob. See *Feiner v. New York*, 340 U.S. 315, 322–29 (1951) (Black, J., dissenting); Fiss, *supra*

resource, however imperfect, to address the situation at hand. The zealous protection the Supreme Court offers to political speech points toward the public forum doctrine.²⁴⁷ To be clear, the argument is not that the government has an interest in enriching or elevating the quality of public discourse through subsidizing speech or some other action; the claim is simply that, if a government agency opens a space for public discourse online, citizen speech should be free of arbitrary censorship.²⁴⁸ If government speech is the controlling doctrine, the government agency has absolute discretionary power to censor citizen speech that does not comport with its message. In such a case, the First Amendment would not afford an individual's speech any protection. Although the space carved out is minimal, there should be some realms online, however small, where people can express themselves on public topics free of fear of censorship, protected by the First Amendment, with due process rights as citizens.²⁴⁹

The objection might be raised that an agency social media site opened to discuss agency issues is a "managerial" function akin to a town meeting.²⁵⁰ A town meeting is a structured institution with a distinct objective: "to act upon matters of public interest."²⁵¹ In light of this goal, speech may be regulated by an agenda, rules of order, and the authority of a moderator. From this perspective, an agency social media site opened to discuss agency topics is an institutional function for which the government speech doctrine is more appropriate. The answer is that the Court's expansive notion of the discourse constitutive of freedom, "robust and uninhibited" should control, and it should do so because comments on social media sites are not a formalized public comment process or opened, like a town meeting, for a

note 91, at 1416–18.

247. See, e.g., *Connick v. Myers*, 461 U.S. 138, 145 (1983) ("The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' 'Speech concerning public affairs is more than self-expression; it is the essence of self-government.' Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.") (citations omitted).

248. Not least because of the possibility that self-censorship might stultify and impoverish discourse over time. To be clear, the government can act positively to subsidize speech to improve public discourse and remain within the bounds of the doctrinal tradition. See, e.g., Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 158–63 (1996).

249. "Public forum doctrine is essential in staking out an important area of mandatory access, especially for those speakers who might otherwise be unable to secure some forum for their speech." Schauer, *supra* note 76, at 106. The public forum doctrine provides a public arena for ordinary people, often lacking influence or resources, not only to speak, but to be heard.

250. See, e.g., Post, *supra* note 79, at 135–37 (discussing managerial functions in a First Amendment context).

251. MEIKLEJOHN, *supra* note 73, at 24.

limited period of time to act on a public matter. Regulations.gov provides a formalized comment process for citizens interested in commenting on proposed rules online. Social media sites opened for purposes of transparency and participation do not present the characteristics of a formalized structure or institutional function.

C. *The Public Forum Test*

The test for a public forum clarified in *Perry* consists of intent and historical use. With respect to intent, the government must take affirmative steps to open a forum for private speech.²⁵² The government's statements regarding its preferences for the forum are relevant as is any evidence that the forum has in practice been used for expression with the government's tacit approval. In *United States v. Kokinda*, the Supreme Court held that a sidewalk outside a post office was not a public forum because the "Postal Service has not expressly dedicated its sidewalks to any expressive activity."²⁵³ Courts often view government intent narrowly, permitting the government to define very specific parameters for acceptable expression.²⁵⁴

252. A non-traditional public forum is one "which the State has opened for use by the public as a place for expressive activity." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

253. 497 U.S. 720, 730 (1990). Justice Kennedy has criticized the *Perry* test's reliance on government intent to identify a designated public forum. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 694–95 (1992) (Kennedy, J., concurring) (arguing that the test grants the government too much authority to restrict speech on its property and advocating for an objective inquiry rooted in the actual characteristics and uses of the property). The *Perry* test sometimes encompasses compatibility between speech and the purpose or function of the forum. See *Greer v. Spock*, 424 U.S. 828, 839 (1976) (applying the test to demonstrate that the practice of members of a military establishment being permitted to attend political rallies on their own time off-site did not conflict with the tradition of a politically neutral military); *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (arguing that the issue in a public forum case is whether the method of expression is directly at odds with the ordinary activity of a place).

254. If there is evidence the government has opened a forum for expression, despite its protestations to the contrary, the government then argues that it intended the forum to be limited to specific speakers or topics. In *Perry*, the Court permitted the government to deny a union access to an inter-office mail system while allowing another union to have access based on the government's argument that the favored union was the intended speaker. 460 U.S. at 55. As Steven Gey has argued, the flexibility of the *Perry* standard works to the favor of the government. Courts can define the forum narrowly or describe the subject matter permitted so narrowly that the proposed expression falls outside the intended scope of the forum. See Gey, *supra* note 144, at 1551–52. However, Gey also admits that this flexibility permits speech-friendly courts to describe fora in ways conducive to speech. See *id.* at 1552 n.87 (contrasting the Eleventh Circuit's refusal to recognize a highway rest stop as a limited public forum, *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1207 (11th Cir. 1991), with a district court's holding that "[t]he State's interests in meeting the safety, rest, and

In the case of federal agency social media, there are express statements of intent. The President's Memorandum on Open Government, which urges agencies to use social media to encourage participation, is a fairly clear statement of intent to open a public forum. However, a public forum is usually found on public property. The public comments (private speech) on blogs on agency websites, classified as social media for their interactive quality, have the strongest argument for applying the public forum doctrine. In this case, many federal agency social media sites are on private sites. Facebook, for instance, is a private site, unlike an agency blog, which is on public property (.gov). The use of private property for a public purpose does not nullify a finding of a public forum, though it adds a complication.²⁵⁵

Because neither doctrine is a perfect fit, the task is to determine whether government or private speech predominates on agency social media sites. One argument in favor is to analogize that a federal agency in effect is leasing or renting space from Facebook or Twitter to invite private speech for a public purpose, as it might lease space for a town meeting, or for government business, as GSA leases space for government offices. The sites are described as "agency sponsored," which indicates the government's primary role in operating and administering the sites. In advocating for heightened First Amendment protections by private ISPs such as Google or AOL, plaintiffs have used the state action principle to argue that ISPs effectively take on the role of the state for purposes of e-mail delivery and Internet communications regulation. These arguments have failed because courts do not consider e-mail delivery or Internet communication a

information needs of its interstate travelers are not jeopardized if newspaper publishers are permitted to engage in their constitutionally protected activities at interstate rest areas." *Jacobsen v. Howard*, 904 F. Supp. 1065, 1070 (D.S.D. 1995)).

255. A person's free speech rights on private property are governed by rules devised in reference to protests and picketing at privately owned shopping centers. The cases turned on an incompatibility analysis with the Court holding that speech at a shopping center is not within the scope of the purposes of the activity. A free speech claim "misapprehends the scope of the invitation extended to the public There is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve." *Lloyd Corp. v. Tanner*, 407 U.S. 551, 564-65 (1972); *see also* *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976) (holding that picketers were not protected by the First Amendment when advertising their strike at a shopping center). Steven Gey has argued that private companies offering the public access to the internet through the ISP servers, which they own, should not be permitted to censor speech. *See* Gey, *supra* note 144, at 1619-20 n.373. Essentially, because speech is the purpose of the property, the incompatibility assumption that guided the speech-unfriendly rulings in *Lloyd* and *Hudgens*, are inapplicable. *Id.* If the Internet is considered a public forum, speech carried by privately owned servers, essentially through or using private property, should be constitutionally protected. *Id.*

“traditional state function.”²⁵⁶ In this instance, the state action principle need not be invoked because we already have the state acting affirmatively to open a site and possibly acting to regulate, chill, or otherwise prohibit certain types of private speech it has invited onto that site.²⁵⁷ This situation is novel, but its novelty should not obscure the core issue at stake and the resources available within the current doctrinal framework. When private speech predominates on a site or property effectively controlled by the government, the public forum doctrine is likely the most appropriate. Such a provisional conclusion does not mean the public forum doctrine would not need to be renovated or extended to fully address private speech on government sponsored social media sites in the future but, for present purposes, the doctrine is where common sense and informed speculation inexorably lead.

As previously mentioned, despite the fact that the Internet backbone is privatized, *Reno* emphasized the Internet’s public character as an open communicative sphere akin to traditional public fora.²⁵⁸ More concretely, in *Reno*, the Court clarified that speech on the Internet is protected by the First Amendment, though it went no further. As a consequence, the fact that Facebook and Twitter are privately owned sites is not conclusive because the specific question involves federal agencies as operators and regulators of sites on private property. The issue is which free speech protections are incumbent upon the government in operating the site and what rights attach to private speech made at the government’s behest. It bears repeating that Facebook’s comment policy provides more free speech protection than do the comment policies of multiple federal agencies. It is true that First Amendment rights receive the highest level of protection on one’s own private property, but recognizing free speech rights on public property, which the government may restrict under certain carefully prescribed circumstances, has long been viewed as critical to the purposes of the First Amendment, both for the right of access it provides for those lacking the private property or for private resources necessary to express opinions and communicate ideas.²⁵⁹

256. See Nunziato, *supra* note 12.

257. It is conceivable Facebook could argue that, as a private property owner, its comment policy should control. This is an additional reason for terms of service agreements between federal agencies and social media providers such as Facebook to be amended to clarify that these government-operated and maintained sites are public spaces where First Amendment protections apply to the comments made by members of the public.

258. Despite the privatization of Internet services, the communicative medium itself maintains its public character.

259. According to affirmative conceptions of the First Amendment, which include the theory that the free speech clause nurtures the public opinion indispensable for democracy, it

The second factor in the test for a public forum is historical use. This factor comes into play when the Court is asked to consider regulations, laws, or government actions on speech that occurs in streets, sidewalks, parks, or other civic places that might be considered as such. If historical use demonstrates that a physical location has been used for expressive purposes, then the location is classified as a traditional public forum, and the most rigorous free speech protections apply.²⁶⁰ However, intent appears to carry more weight with the Court, as *Kokinda* demonstrated, and intent takes the lead when considering potential candidates for non-traditional public forum status. Because neither the Internet nor social media are sanctified by time and the approbation of generations, they are not likely to be considered traditional public fora, although there are arguments in favor of so doing.²⁶¹

At first glance, public forum jurisprudence appears rooted in place, a logical outgrowth of human activity in the city and town, and an instance of ordinary real world categories imposing themselves on airy and introverted legal thought. However anchored in history and empirical reality the public forum doctrine may appear, it has proven amenable to evolution. In *Cornelius*, the Court applied the public forum doctrine to a “means of communication”—a federal employee charity drive.²⁶² *Rosenberger* likewise extended the public forum framework to another intangible forum, a student activity fund. Using the currency of philosophy, the majority opinion declared that the activity fund “is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.”²⁶³ Given these precedents applying the public forum doctrine

is vital for the government to provide some spaces, venues, and places where citizens can speak freely, and such rights are guaranteed by the government, rather than by the whim or public spirit of a corporation. This last argument in favor of using public forum analysis to guide questions concerning free speech on government-sponsored social media, of course, is an argument from constitutional principle rather than from settled law.

260. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983).

261. Justice Kennedy's concurrence in *Lee* indicated a willingness to consider opening the category of traditional public forum beyond streets, parks, and sidewalks, provided physical similarities with traditional public fora remained an “important consideration.” See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695–99 (1992) (Kennedy, J., concurring).

262. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800–02 (1984). The Court concluded that the intangible forum was a non-public forum based on an analysis of government intent. *Id.* at 805–06.

263. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995). In moving the public forum doctrine beyond its origins in the built environment, Kennedy's majority opinion evokes Justice's Brennan's suggestion that the public forum doctrine apply to any means “specifically used for the communication of information and ideas.” *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 137–38 (1981) (Brennan,

to “metaphysical” or intangible communicative fora, it is reasonable to conclude that the public forum doctrine would be extended to social media sites. Moreover, the interactive character of social media/Web 2.0, within the “vast democratic fora” of the Internet writ large, cuts in favor of a public forum classification.²⁶⁴

In some cases, the public forum test includes an incompatibility analysis. The Court asks whether the expression under consideration is “incompatible with the normal activity of a particular place at a particular time.”²⁶⁵ Expression can be found incompatible with a forum with comparative ease.²⁶⁶ The government’s stated intent is a determining factor in any incompatibility analysis. In this instance, the President’s Memorandum is a clear statement of intent. Facebook, Twitter, YouTube, and blogs are opened by the government for speech activity to be used for communicative purposes. To hold speech incompatible with the government’s intended use, given the express wording of the Open Government Memorandum, would be a tautology.

If the argument that the public forum doctrine is the more appropriate framework in which to consider public comments on agency social media sites is persuasive, given that private speech predominates over any government speech that may be found on such sites, the next step is to identify precisely which kind of public forum such sites would be.²⁶⁷

J., concurring). The Court viewed the facts in *Rosenberger* to be similar to those in *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Widmar v. Vincent*, 454 U.S. 263 (1981), which both involved access to public school property. *Rosenberger*, 515 U.S. at 842–43. Thus, the extension of the public forum doctrine from physical to metaphysical was remarkably nonchalant. *Id.* at 830.

264. Broadcast media is a channel of communication that the Court has recognized as subject to increased regulation and less First Amendment protection. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 400–01 (1969). Subsequent Court decisions, especially *Reno*, declined to extend to the Internet the doctrine that scarcity permits heightened regulation of speech.

265. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

266. In the shopping center cases of the 1970s, the Court deployed a version of the incompatibility analysis to limit free speech rights on private property in the public realm.

267. The Supreme Court tends to use either the public forum doctrine or government speech to address questions about mixed or hybrid speech (“speech that is both private and governmental” as defined by Corbin). In *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006), the Court treated mixed speech or, more precisely, private speech by public employees while working, as government speech. In other cases, the Court found the public forum doctrine more suitable for balancing the competing speech interests at stake. See, e.g., *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678–80 (1998) (noting previous Court precedent had designated the Arkansas state agency operating a network of noncommercial television stations as a public forum). Although this Article follows Fred Schauer in viewing *Forbes* as a “government enterprise” case, the Court ostensibly used the public forum doctrine to determine the debate was a non-public forum. See *supra* note 76. *Rosenberger*

Clearly, an agency Facebook page or blog is not a traditional public forum. A non-public forum is easy enough to find, but a forum open to all citizens with an Internet connection could hardly be considered a non-public forum. An agency social media site could be described as a forum open to all viewpoints on topics related to that agency's mission. As previously stated under *Perry*, midway between the venerable free-for-all of the traditional forum and the odd but plentiful closed forum lies the limited or designated public forum.²⁶⁸ While the two are classified together and to some extent originated together, they have since parted ways. A designated public forum is one created for expression by the express designation of the government.²⁶⁹ While lower courts have found designated fora, the Supreme Court has yet to acknowledge one. More common is the limited public forum, which received its most comprehensive discussion by the Court in the *Rosenberger* opinion. A limited public forum is created by the government, so like a designated forum and unlike a traditional forum, intent, rather than history, carries the day, but it was constrained at the moment of creation "to use by certain groups or dedicated solely to the discussion of certain subjects."²⁷⁰ It is reasonable to conclude that a federal agency social media site is likely a limited public forum, a conclusion which, while not offering the government carte blanche to restrict, remove, or limit public comments, does offer some permissible restrictions while providing

could also be classified as a case that involved governmental and private speech that was viewed through the public forum prism. See 515 U.S. at 845–46 (analyzing the University of Virginia student activities fund as a limited public forum). Lower courts illustrate a similar inconsistency, treating private advertisements on public transportation, participation in government civic programs, and Adopt-A-Highway signs as public forum cases. See *Hopper v. City of Pasco*, 241 F.3d 1067, 1081 (9th Cir. 2001) (holding that an art exhibit in the city hall was a designated public forum); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978, 980–81 (9th Cir. 1998) (holding that bus advertising panels were nonpublic fora); *Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 252 (3d Cir. 1998) (holding private advertisements as non-public or designated public fora respectively); *Texas v. Knights of the KKK*, 58 F.3d 1075, 1080 (5th Cir. 1995) (holding the Adopt-A-Highway program a non-public forum).

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

269. Expression in such a venue receives the same protections it would in a traditional public forum, which means that any restrictions are subject to strict scrutiny. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469–70 (2009) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1984)).

270. *Id.* at 470 (citing *Perry*, 460 U.S. at 46 n.7). In a limited public forum, the government may impose reasonable and viewpoint-neutral restrictions. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (holding that the government could not discriminate against the Good News Club's evangelical Christian club since the club's free speech was being held in the limited public forum of a public school).

heightened protection of citizens' First Amendment rights.²⁷¹

IV. APPLICATION TO FEDERAL AGENCY SOCIAL MEDIA

The Supreme Court has interpreted the First Amendment's sweeping stricture against the regulation of speech to mean "that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."²⁷² Essentially, restricting the manner of expression, its timeliness, or its sound level, for example, is permissible, but the substance of what a person says or does—the "content" of that expression—has a significant degree of immunity or, put in terms more congenial to legal analysis, is presumptively protected. Courts treat laws attempting to restrict speech or expression based on its content, otherwise known as content-discriminatory laws, with a high degree of skepticism manifested in the strict scrutiny test, which requires the government to show the regulation at issue is necessary to achieve a compelling government interest. The parameters of content discrimination and its obverse, the principle of content neutrality, remain imprecise.²⁷³ Nonetheless, a recent analysis persuasively demonstrated that the Court's concept of content discrimination embraces both viewpoint and subject matter discrimination, while generally excluding discrimination related to message or forms of communication.²⁷⁴ Likewise, in various opinions the Court has explained that the accompanying principle of content neutrality means that the government must be viewpoint neutral and subject matter neutral when regulating speech.²⁷⁵ To flesh out legal abstractions, "subject

271. While some scholars have argued that a limited public forum permits so much expression the government speech doctrine is a better fit, it has also been argued that the public forum doctrine has not only become an obstacle to a coherent analysis but is hostile to speech.

272. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

273. For an illuminating discussion of how the Supreme Court's jurisprudence on content discrimination is less haphazard than it appears, see Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 260–62 (2012) (claiming that the Court has evinced a consistent definition of content discrimination that covers both subject matter and viewpoint discrimination).

274. *Id.* at 254–56.

275. See *Perry*, 460 U.S. at 45 (asserting that a state must demonstrate that its regulation is necessary to serve a compelling state interest and that its regulation is narrowly drawn in order to implement a content-based exclusion); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 640–41 (1994) (emphasizing that laws that furnish special treatment upon the media are subject to more intense scrutiny); see also Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 201–03 (1994) (emphasizing content neutrality partakes of the view that equality is fundamental to the First Amendment).

matter” generally means the topic of the speech, while “viewpoint” generally means the perspective, opinion, or ideology of the message.²⁷⁶

A. Subject-Matter Restrictions

Content neutrality and the impermissibility of content discrimination acquire a distinct color in public space. When a court finds a public forum, certain rules apply. A law or regulation restricting the content of speech, meaning on the basis of its subject or viewpoint, in a public park or on a sidewalk must pass strict scrutiny.²⁷⁷ Restrictions in a designated public fora shoulder the same burden.²⁷⁸ In a limited public forum, by contrast, the court cuts an aperture. When the state establishes a limited public forum, “[i]t may be justified in reserving its forum for certain groups or the discussion of certain topics.”²⁷⁹ Laws that restrict speech based on the views or opinion expressed remain subject to strict scrutiny. Subject-matter limitations, however, are viewed under the less stringent intermediate scrutiny standard. The restrictions must be viewpoint neutral and reasonable in light of the purpose served by the forum.²⁸⁰ *Good News Club v. Milford Central School District* provides a helpful example of a subject-matter

276. Chemerinsky, *supra* note 275, at 203; *see also* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 51 (2000) (stating that a viewpoint neutral requirement indicates that the government cannot regulate speech on the basis of the ideas behind the message, while a subject matter-neutral requirement necessitates that the government cannot regulate speech based on the topic of the speech). For a discussion of the differences between subject matter- and viewpoint-based restrictions, see Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 239–42 (1983) (arguing that the Supreme Court has been inconsistent in its analysis of subject-matter restrictions by treating it as viewpoint-based in certain cases while regarding it as content-neutral in other cases).

277. In a traditional or designated public forum, a content restriction must pass strict scrutiny. *See Perry*, 460 U.S. at 45–46 (declaring that a state must show that its narrowly tailored restriction is required to serve a compelling state interest).

278. In theory, such restrictions are permissible, but demonstrating a compelling government interest sets a high bar.

279. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 99 (2001); *see also* *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (“The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”).

280. *Good News Club*, 533 U.S. at 99 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)). Viewpoint-based restrictions have to meet strict scrutiny and must be narrowly tailored to serve a compelling state interest. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (maintaining that the government cannot ban expressions of free speech merely because society believes those expressions are offensive).

restriction in a limited public forum that did not meet intermediate scrutiny. In *Good News*, the Court determined that a school engaged in viewpoint discrimination by excluding a religious club from an after-school forum. Although the club otherwise engaged in a permissible purpose, namely the teaching of morals and character development allowable under Milford's policy, the club was excluded for its religious approach or viewpoint, essentially for being non-secular.²⁸¹ The Court's analysis gives a fair indication of how hard it is to refrain from viewpoint discrimination and how carefully decisions must be made in order to be considered viewpoint neutral even under the apparently more lenient standard of intermediate scrutiny.

If the Department of State explicitly establishes a limited public forum for the discussion of foreign policy topics, it may be able to remove comments that fall outside the stated scope of the forum in theory, although several caveats must be kept in mind in practice. The Department of State may exclude or restrict or refuse to post comments that are obviously off-topic.²⁸² But drawing the line in grey areas is always more a matter of careful judgment. The employee time required to maintain subject-matter restrictions may absorb agency resources. Agencies have to be consistent, because failing to moderate the forum to practice such limitations opens later restrictions to strict scrutiny. Arguing such a restriction is reasonable in light of the purposes of the forum may prove problematic.²⁸³ It may be

281. The Court based its analysis on two prior opinions, *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Rosenberger*, 515 U.S. 819. In *Lamb's Chapel*, the Court determined that a school district violated the Free Speech Clause when it excluded a private group from presenting films at a school based solely on the films' discussion of family values from a religious perspective. 508 U.S. at 393–94. In *Rosenberger*, the University of Virginia's denial to fund a student publication focused on religion violated the Free Speech Clause. 508 U.S. at 842, 845–46.

282. At present, the Department of State will not post comments that "are clearly 'off topic.'" However, the Department does not provide a definition or examples of permissible topics.

283. Put another way, given the fact that social media sites are neither scarce nor limited by time, is it reasonable to argue that an irrelevant or off-topic statement must be removed? The standard is not simply reasonable, but reasonable in view of the purpose of the forum. The government does have a significant degree of discretion under public forum doctrine depending on how it defines the purpose of the forum. In *Cornelius*, a public forum case in which the forum at issue was found to be non-public, the Court stated: "The federal workplace . . . exists to accomplish the business of the employer." 473 U.S. at 805. The salient point is that the primary purpose of the forum at issue was something other than discussion. In *Perry*, access to an inter-office mail system was denied based on speaker identity, rather than subject matter, even though the purpose was communication, because the government's contention that one union had a different relationship to the public school teachers appeared reasonable to the Court. 460 U.S. at 39–41. In the case of agency

more reasonable for agencies to move irrelevant comments into an off-topic category rather than remove them from the site entirely. A key point is that subject-matter restrictions must be applied consistently and neutrally, and viewpoint neutrality can be deceptive. For example, excluding religious speech runs afoul of the intermediate scrutiny standard because it is not viewpoint neutral based on *Good News*.²⁸⁴ It should be stressed that the ability to remove comments that are off-topic, provided an agency has explicitly stated what is topical for purposes of the forum, does not provide cover to remove controversial or inflammatory statements. Attempts to cast exclusions on degrading or offensive or rude speech as subject-matter limitations rather than viewpoint restrictions have occasionally been successful in lower courts.²⁸⁵ However, courts are alert to covert viewpoint discrimination under the guise of subject-matter limitations.²⁸⁶ Take a facile example: if an agency removed “to hell with the Secretary’s policy” as off-topic, the agency will likely have engaged in unconstitutional viewpoint discrimination under the aegis of a subject-matter restriction, because the comment was not off topic. Agencies must remove off-topic comments, no matter how eloquent or erudite, and should retain topical comments, be they crude or ill-conceived. The issue of profane, rude, or uncivil speech invites discussion of civility codes, which multiple agencies have adopted on their social media sites.

1. *Civility Codes and Viewpoint Neutrality*

Ten federal agencies post civility codes or comment policies on their social media sites. “We want to publish your comments, but expect

sponsored social media, the primary purpose of the forum is to encourage discussion on topics relevant to the agency’s mission, based on a general survey of agency statements and the President’s Open Government Memorandum. Given the lack of time or space limitations on agency social media sites, removing off-topic comments may be unnecessary; however, even if removing comments absorbs the time of agency staff, doing so may not be unreasonable should an agency want the discussion to remain focused and relevant.

284. *Good News*, 533 U.S. at 112 (“[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.”).

285. In *Perry v. McDonald*, 280 F.3d 159, 170–71 (2d Cir. 2001), the Second Circuit held that refusing to license vanity plates with scatological topics was a viewpoint-neutral regulation. In *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 90 (1st Cir. 2004), the First Circuit held that the Massachusetts Bay Transportation Authority’s policy of rejecting derogatory advertisements was viewpoint neutral.

286. The fact that courts are aware of the possibility a subject-matter restriction may be a cover for impermissible viewpoint discrimination does not discount the difficulties involved in identifying viewpoint discrimination. See Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 33 (2000).

participants to show respect, civility and consideration to the blog authors and other blog visitors who include persons of all ages,” is a typical example.²⁸⁷ More than a few of these civility codes are problematic both on their face and potentially as applied. A vague standard, such as “otherwise objectionable” or “vulgar” certainly chills speech and has the effect of a prior restraint on speech.²⁸⁸ Restricting speech that is “offensive” or that “incites hate” leaves extensive discretion to the government to determine what is acceptable—a grant of authority antithetical to the First Amendment tradition.²⁸⁹ As the Supreme Court recently held, speech in a public place on matters of public concern is protected, even if crude, rude, or insensitive.²⁹⁰ “Narrow, objective, and definite standards” are the imperative of the Court, which leaves little to agencies’ discretion. Banning profanity appears to be objective, narrow, and definite and thus a policy that may be implemented in a viewpoint-neutral manner.²⁹¹ Of course, the Supreme Court has cautioned that forbidding particular words may cause collateral damage, namely the suppression of ideas.²⁹² It is not unreasonable to contend that some views can only be conveyed by the use of strong, even profane language. When applying civility policies, agency attorneys must use extraordinary care. Even the most narrowly tailored and objective policy will fail if applied improperly.²⁹³ For example, a policy forbidding profanity would not include offensive speech, although such speech may appear equally distasteful.

A civility policy has to satisfy intermediate scrutiny, meaning it should be reasonable in light of the purpose of the forum as well as viewpoint neutral.

287. *USDA Comment Policy*, *supra* note 57.

288. The First and Fifth Amendments shield citizens from the arbitrary enforcement of vague standards. *See Reno v. ACLU*, 521 U.S. 844, 875 (1997); *see also Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (holding that a county ordinance requiring public speakers, parades, or assemblies to apply for a permit was a prior restraint on speech). A law subjecting speech to a prior restraint must include “narrow, objective, and definite standards to guide the licensing authority.” *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969).

289. *See Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 512 (1996) (claiming the government is unable to distinguish true ideas from false).

290. *Snyder v. Phelps*, 131 S. Ct. 1207, 1217 (2011). Precisely how protected personally offensive and hurtful speech on a matter of public concern remains unclear.

291. Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 140 (1981).

292. *Cohen v. California*, 403 U.S. 15, 26 (1971) (“[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”).

293. In *Cohen*, the Court invalidated the application of a breach of the peace law, which was neutral on its face.

Civility requirements in the context of advertisements in public fora have been found constitutional, but such holdings rest on the captive audience doctrine, which does not appear applicable to the social media context.²⁹⁴ A “captive audience” is one that cannot escape the speech at issue and is confronted with the potentially offensive messages in a place with a strong expectation of privacy. Online speech can be considered the functional equivalent of written speech, and the Court is more likely to find an audience confronted with offensive sound to be captive. Readers “may escape exposure to objectionable material” by looking away.²⁹⁵ Members of the public who visit agency social media sites may do so from the privacy of home, where one has the right to be spared from offensive speech, or from public places with Internet connections.²⁹⁶ Notwithstanding the fact that the majority of public commenters do so from the privacy of their own homes, the fact that people may avoid or escape unwanted or offensive comments with comparative ease by averting their eyes is likely to be dispositive.²⁹⁷

2. *Time, Place, and Manner Restrictions*

If broad civility policies may be suspect, what about incivility that actually disrupts the forum? Time, place, and manner restrictions comprise another realm of permissible regulation of speech. Such restrictions must

294. See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (Douglas, J., concurring); *AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d. 1, 13 (1st Cir. 1994). A municipal ban on political advertising on commuter buses is permissible because riders can be considered a captive audience.

295. See *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 447 U.S. 530, 542, 544 (1980) (arguing that customers who are offended by material in a billing insert can “escape exposure” by throwing the insert in the trash).

296. See *Carey v. Brown*, 447 U.S. 455, 471 (1980) (regarding the government’s interest in protecting the privacy of the home); see also *Frisby v. Schultz*, 487 U.S. 474, 487–88 (1988) (addressing the same issue); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (holding that the FCC could prohibit some kinds of offensive speech because people receiving the broadcasts were in the privacy of their own homes and thus a captive audience).

297. See *Consol. Edison Co. of N.Y.*, 477 U.S. at 530. Even at home a person is not a captive audience if one can avoid or get rid of the offensive message easily. It is not clear when an audience is considered “captive” or receiving messages under coercion or duress. “The ability of government . . . to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.” *Cohen*, 403 U.S. at 21. In *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–12 (1975), the Court held that the limited privacy interests of individuals on the streets means it is incumbent upon them to avoid offensive expression. Communicating via blogs and Facebook walls is akin to walking down a street in that one opens oneself to a variety of comments and experiences. However, one enters the public sphere while remaining at home where privacy interests are strong.

be narrowly tailored to serve the government's legitimate, content neutral interest, but the regulation need not be the least intrusive or the least restrictive means of doing so.²⁹⁸ Moreover, it must leave open ample alternative channels of communication. Context is determinative in applying time, place, and manner restrictions to a public forum. The Court focuses on whether the expression is incompatible with the "normal activity of a particular place at a particular time." If the government can point to an activity or a purpose for a place that involves something other than the expression at issue, the time, place, and manner restriction will usually be held constitutional.²⁹⁹ Scholars have claimed that the Court has watered the time, place, and manner test down to a pro forma exercise.³⁰⁰ In the case of federal agency social media, expression actually is the normal activity of the place at a particular time, so the focus would be on types of expression that would interfere with the normal activity of the site. Of course the preeminent example of a public forum involving speech as its primary activity is a public meeting.³⁰¹ What counts as disruptive in the context of a city, town, or public meeting is unclear as a matter of law.³⁰² Profane speech alone is not enough.³⁰³ However, restrictions on speech are permissible if used specifically and neutrally as to preserve the functioning of the meeting. If booing, jeering, and interruptions interfere so much that the meeting cannot continue, a time, place, and manner restriction could pass constitutional muster. Hostile questions are permitted, even in a public meeting, as is the expression of opposition and making obnoxious

298. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

299. *See Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."). In *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981), the Court drew a distinction between people assembled on public streets and those assembled at a fair to uphold time, place, and manner regulations of speech at a public fair.

300. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (establishing that the modern standard requires time, place, and manner regulations to be "narrowly tailored to serve a significant governmental interest"). *See generally Gey, supra* note 144.

301. A public meeting is a limited public forum opened for the discussion of a specific topic or specific topics.

302. 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, 594-95 (2009).

303. *Leonard v. Robinson*, 477 F.3d 347, 352, 359-60 (6th Cir. 2007); *see also Norse v. City of Santa Cruz*, 586 F.3d 697, 701 (9th Cir. 2009) (Tashima, J., concurring in part and dissenting in part). On appeal for the second time before the Ninth Circuit, a three-judge panel justified the City of Santa Cruz's expulsion of a citizen from a city council meeting for parading around the council chambers. Whether a Nazi-style salute alone constituted disruption divided the panel.

statements in a rude manner. The First Amendment protects protests and symbolic speech, but it does not protect interference that prevents all public discourse and, in effect, silences it.

Working with a rough analogy to a public meeting, if an agency Facebook wall or blog is similar to a public meeting, spamming is the equivalent of mobbing a meeting or continued jeers that make discussion impossible. Given that a twenty-four-hour interactive virtual site is not subject to space or time limitations, it is more difficult to interfere with a social media site than it is to render a meeting nonfunctional, and for that reason any time, place, or manner restriction based on such an analogy should be undertaken with care. In all probability, a federal agency can regulate spam or similar interruptions or repeated statements that render blogs or sites unusable. A content-neutral time, place, or manner restriction, narrowly tailored to ensure that an agency can maintain discussions, will likely pass muster.³⁰⁴

B. *Unprotected Speech*

1. *Obscenity*

Two types of speech, obscenity and fighting words, fall outside the protective purview of the First Amendment. Agencies can remove both types of speech from postings, boards, or walls or refuse to post them altogether. In order to be properly characterized as obscene, rather than merely indecent or vulgar, speech must pass the three-part *Miller* test, which asks:

- (a) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as whole, lacks seriously artistic, political, or scientific value.³⁰⁵

Naturally, the use of “contemporary community standards” has come into question in the Internet age; but for the time being, it remains

304. *See* *United States v. Grace*, 461 U.S. 171 (1983) (holding a complete restriction on flags or banner displays on the public sidewalks outside the Supreme Court was unconstitutional because it was not narrowly tailored); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (holding an ordinance that prohibited the residential display of signs was unconstitutional because it failed to leave open alternative channels of communication).

305. *Miller v. California*, 413 U.S. 15, 24 (1973) (internal citations and quotations omitted); *see* *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987) (emphasizing that the first and second parts of the *Miller* test are issues of fact for a jury to determine when applying contemporary community standards).

constitutionally valid. In addition, child pornography receives no protection from the First Amendment and need not meet the *Miller* test to be banned.

As previously mentioned, multiple agency comment policies forbid vulgarity and indecency. Indecent speech, if made in a public forum on an issue of public concern, is protected by the First Amendment and should remain posted.³⁰⁶ Indecent speech that does not reference an issue of public concern or speak to the stated subject matter or topic of a social media site, board, or wall may be moved or removed in the process of maintaining the site for the use of established topics in a limited public forum. In this case, the speech is moved because it is off-topic—not because it is indecent. The Department of Agriculture mentions that people of all ages use the site. The agency could argue that there is a government interest in protecting minors and that removing an indecent YouTube video post is consonant with that interest.³⁰⁷

2. *Fighting Words: The Brandenburg Test*

Chaplinsky v. New Hampshire is the classic statement of what is commonly known at the “fighting words” doctrine—words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”³⁰⁸ Such speech, which includes “epithets or personal abuse” that “are no essential part of any exposition of ideas,” may be removed from an agency social media site. Hence, comment policies prohibiting “personal attacks” are constitutionally sound with the caveat that such a personal attack must have no ideological component. If an attack speaks to a public issue or has a public component, the speech may be protected. The fighting words doctrine received its present formulation in the 1969 case of *Brandenburg v. Ohio*, where the Court held that the government may “forbid or proscribe advocacy of the use of force or of law violation . . . where such advocacy is directed to incit[e] or produc[e] imminent lawless action and is likely to incite or produce such action.”³⁰⁹ The test focuses on preventing unlawful conduct rather than policing provocative speech and distinguishes between vociferous advocacy and advocacy likely to produce harmful

306. The Court has repeatedly struck down laws targeting indecent or sexual speech. *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004); *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 811 (2000); *Reno v. ACLU*, 521 U.S. 844, 868 (1997); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989).

307. *See Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2771 (2011) (Breyer, J., dissenting).

308. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

309. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

action.³¹⁰ Advocacy is perforce protected unless it is “intended to produce, and likely to produce, *imminent* disorder.”³¹¹

At the risk of clumsy simplification, the more speech advocates an imminent crime, the less likely it is to be protected, but the more ideological or abstract the advocacy, the more likely the speech, even if extreme, offensive, or provocative, is protected. One way to distinguish between the two is to consider the audience. Speech, however offensive or provocative, when directed at a mass or general audience, especially if it is grounded in what Kent Greenawalt describes as an “ideological motive” is probably not a solicitation to commit a crime. Speech encouraging lawless action aimed at a particular person or group without any panoply of principle is likely to meet the *Brandenburg* test and be unprotected.³¹² In *NAACP v. Claiborne Hardware*, the Court held highly charged statements with threatening connotations were protected as “emotionally charged rhetoric” that did not meet the *Brandenburg* test.³¹³ However, the Court has held that “true threats” do exist and are not protected.³¹⁴ Most noteworthy is the fact that the test applies to Internet speech, and lower courts have used it to distinguish between direct threats online and websites that may imply the encouragement of harm.³¹⁵

C. Protected Speech

1. Offensive, Extremist, and Profane Speech

Nine agencies proscribe “offensive” speech, which is variously described

310. Daniel T. Kobil, *Advocacy On Line: Brandenburg v. Ohio and Speech in the Internet Era*, 31 U. TOL. L. REV., 227, 235 (2000). In *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973), the Court stressed the imminence element of the test and concluded that when a speaker advocates an illegal action that may take place several hours in the future, the imminence requirement of the *Brandenburg* test is not satisfied.

311. *Hess*, 414 U.S. at 109.

312. KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 260, 266 (1989).

313. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) (concerning statements by the leader of a boycott of white-owned businesses).

314. See *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (defining a “true threat” as one that conveys the danger of physical harm).

315. See *United States v. Carmichael*, 326 F. Supp. 2d 1267, 1288 (M.D. Ala. 2004) (holding that a website with the names and photos of government agents with “wanted” underneath the photos did not satisfy the imminence requirement and the case was similar to *Claiborne Hardware*); *Sheehan v. Gregoire*, 272 F. Supp. 2d 1135, 1149–50 (W.D. Wash. 2003) (holding that release of the personal information of individuals online even to encourage intimidation by third parties was not unlawful advocacy).

as including “profanity” or “vulgar and abusive language.”³¹⁶ For example, the HHS prohibits “[p]ersonal attacks, profanity, and aggressive behavior,” as well as “[i]nstigating arguments in a disrespectful way.”³¹⁷ The Department of Commerce will not post comments that contain “offensive terms that target specific ethnic or racial groups.” Nor will the Department of Homeland Security.³¹⁸ It bears repeating that there is no category for offensive or controversial speech, whether on the Internet or elsewhere, within First Amendment jurisprudence.³¹⁹ As a result, a comment cannot be regulated or removed from an agency-sponsored social media site “simply because it is upsetting or arouses contempt.”³²⁰ It is not unworthy of mention that speech on public issues rests on an empyrean height in the First Amendment firmament.³²¹ At best, agency prohibitions presume the messages and words encompassed by “offensive,” “disrespectful,” and “vulgar and abusive” are self-evident. At worst, they appear to countenance, even sanction, disregard of the First Amendment by agency employees administering social media sites. The Court consistently holds restrictions on controversial speech discriminatory on the basis of viewpoint or subject matter either on its face or as applied, so such speech is protected.³²² It bears repeating that the law distinguishes extreme and offensive speech from speech intended to produce imminent harm.³²³ Because such restrictions on offensive or controversial speech likely

316. See *supra* note 64 and accompanying text.

317. *Comment Policy*, DEP’T OF HEALTH AND HUMAN SERVS., *supra* note 55.

318. COMMERCE.GOV, *supra* note 62; *Department of Homeland Security*, *supra* note 58.

319. It should be noted that some scholars believe offensive messages, especially ones motivated by bias or likely to produce intolerance, should be illegal. See Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 VA. J.L. & TECH. 5, 5 (2002). Even violent speech (without incitement) has been held to be protected. See generally *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2732 (2011).

320. *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011). The Court has repeatedly disavowed the regulation of offensive speech as impermissible content discrimination. See, e.g., *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 135 (1992); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality opinion). Whether the Court does so because regulation of offensive speech is intrinsically wrong, or wrong because it conceals viewpoint discrimination is not obvious. For a discussion, see Kendrick, *supra* note 273, at 250–51.

321. *Connick v. Myers*, 461 U.S. 138, 145 (1983) (“[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” (internal quotation marks omitted)).

322. Put another way, restrictions on controversial speech have been found to be biased on the basis of subject matter or viewpoint, and as such, are prime examples of content discrimination. See *supra* note 273.

323. See *Boos v. Barry*, 485 U.S. 312, 322 (1988) (“[I]n public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment.” (internal quotation marks omitted)).

constitute impermissible content discrimination, they are inherently suspect and subject to strict scrutiny. An agency would need to persuade a court that a restriction on “vulgar,” “disrespectful,” or “offensive” comments is narrowly drawn to serve a compelling state interest, a singular feat given the slippery and subjective meanings of such terms.

Six agencies explicitly enjoin profanity.³²⁴ Restrictions against particular words appear content-neutral because they can be applied uniformly to speech on any subject or speech evincing any conceivable viewpoint.³²⁵ Nevertheless, profanity is presumptively protected. In *Cohen v. California*, the Court applied a neutral disorderly conduct statute to a profane expression on Cohen’s jacket.³²⁶ Harlan’s opinion gives every indication of abjuring the right of the government to decide that specific words are vulgar or offensive either in facially discriminatory laws or in the application of a facially neutral law.³²⁷ Following *Cohen*, it appears that agency restrictions on profanity may violate the First Amendment on its face or as applied through removal of a particular comment from the site. The type of scrutiny such a restriction on profanity would receive is not abundantly clear. While a neutral classification would seem to call for intermediate scrutiny, it is possible to draw a tentative conclusion from *Cohen* that a restriction against profanity, both on its face and as applied, is subject to strict scrutiny.³²⁸

2. *Hate Speech*

Nine agencies with comment policies forbid hate speech, variously described as discriminatory or offensive language targeted at racial or

324. NASA states “No profanity.” The DHS asserts it will remove “profanity.” The USDA will not post “abusive, profane, or vulgar language.” HHS prohibits “personal attacks, profanity, and aggressive behavior.” The SBA will delete “profanity, implied profanity, obscenity or vulgarity.” The EPA will not post comments that “contain obscene, indecent, or profane language.” See *supra* notes 55, 57–59, 61–62.

325. “To hell with [federal agency’s] policy” and “[t]o hell with opponents of [federal agency’s] policy” are examples of a restriction on a particular word that can be applied neutrally.

326. The Court held that Cohen’s jacket could be worn inside a federal courthouse, a public forum, although the opinion did not engage the public forum doctrine extensively. The Court concluded that although the law was neutral, it applied to Cohen because of the offensiveness of the words on his jacket, and because the application was content-based, it was subject to strict scrutiny. 403 U.S. 15, 18 (1971) (“The conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public.”).

327. *Id.* at 25.

328. See Kendrick, *supra* note 273, at 271.

ethnic groups.³²⁹ While no agency wishes to harbor or appear to condone hate speech, the difference between hate speech and hate crime is relevant for First Amendment purposes. Hate speech without an incitement to violence is protected speech, however intolerant or antithetical to the principles of an open and democratic society, and cannot be removed or censored on an agency social media site.³³⁰ *R.A.V. v. City of St. Paul*, which combined hate speech and fighting words, is instructive in this regard.³³¹ The Supreme Court ruled on a St. Paul ordinance that outlawed fighting words on the basis of race, color, creed, religion, or gender. Four teenagers were convicted under the ordinance for burning a cross in an African-American family's yard. The Court held the law was unconstitutional because it purported to regulate only specific fighting words based on prejudice.³³² Although hate speech is constitutionally protected, hate crimes are not.

Hate crimes are criminal acts such as assault, battery, and harassment motivated by the victim's racial group, gender, ethnicity, or orientation.³³³ Verbal or online threats of violence, coercion, or intimidation that meet the *Brandenburg* test are criminal acts and can be prosecuted. There is a critical point at which hate speech can elide into a hate crime; the advocacy of a hate crime, provided it is imminent and likely to produce action, can be prosecuted. For instance, comments that threaten an imminent and likely hate crime or comments that amount to online harassment on the basis of a racial group or gender may be considered a hate crime, and an agency has a duty to remove such comments or to refrain from posting them.

The posting of hate speech on government-sponsored social media sites is a sensitive matter because it may give the impression of endorsement and because agency employees monitoring sites may feel personally offended and justified in removing such comments.³³⁴ The claim that reprehensible

329. For each agency's precise phrasing, see *supra* note 324 and accompanying text.

330. The First Amendment's protection of controversial, minority, or intolerant speech helps society as a whole to appreciate tolerance and become more tolerant. LEE BOLLINGER, *THE TOLERANT SOCIETY*, 237–48 (1986).

331. See generally 505 U.S. 377 (1992) (finding that the hate speech must be on-topic or address some matter relevant to the agency or its mission to remain posted).

332. *Id.* at 386. The city could outlaw all fighting words or none, but could not prohibit only those fighting words offensive to certain groups. Essentially, the law was under-inclusive and concealed viewpoint discrimination.

333. Hate crimes are illegal in forty-five states and in the District of Columbia. Hate crimes can be federal crimes if they occur on federal property or meet other requirements.

334. Multiple legal scholars believe hate speech should comprise an actionable offense. See Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 143–47 (1982); see also Mari J. Matusda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2378–79 (1989)

views outside the mainstream do not belong in legitimate public debate has a moral appeal, but moral appeal is not legally enforceable. However, by taking a strong First Amendment stance and leaving hate speech posted, agencies may be under-inclusive. An offended reader could file a civil suit against another commenter for the tort of intentional infliction of emotional distress.³³⁵ The First Amendment can be deployed as a defense to tort claims as it was recently in *Snyder v. Phelps*, exemplifying the tension between the First Amendment and egalitarian values legal scholars began to explore in the wake of *Hustler Magazine, Inc. v. Falwell*.³³⁶

D. Unlawful Speech

1. Cyberstalking and Cyberharassment

Several comment policies target “abusive speech,” but fail to distinguish between speech that may be protected even if obnoxious or hateful, and speech that may be criminal. Cyberstalking is the use of online communication, including the Internet and e-mail, to stalk an individual, and usually evinces a pattern of threatening behavior.³³⁷ Thirty-five states have cyberstalking laws, meaning the laws either explicitly include references to electronic communication or contain language broad enough to encompass it.³³⁸ Cyberharassment involves harassing messages or entries

(claiming that the toleration of hate speech amounts to state action).

335. For a discussion of whether a federal agency could be potentially liable under contributory negligence and the likelihood of immunity under Section 230 of the Telecommunications Act of 1997, see *infra* Part IV.F.

336. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215–16 (2011). The speech must touch upon a matter of public concern and not be purely private. The First Amendment does not shield purely private speech from tort liability because such speech does not contribute to the discourse on public issues essential to democracy, and the chilling effects of regulation are less insidious in consequence. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 472 U.S. 749, 758 (1985)). The Court applies a public concern test to determine whether the speech in question is directed to a matter of public or private concern. The test’s parameters appear loosely defined. Speech that relates to a political, social, or community concern, or addresses topics of general interest to the public meet the public concern standard. See *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004) (per curiam); *Connick v. Myers*, 461 U.S. 138, 146 (1983); see also *Bartnicki v. Vopper*, 532 U.S. 514, 528–29 (2001) (noting a federal wiretapping statute, as applied, regulated disclosure of a matter of public concern).

337. See *State Cyberstalking and Cyberharassment Laws*, NAT’L CONF. OF ST. LEGISLATURES (NCSL), <http://www.ncsl.org/issues-research/telecom/cyberstalking-and-cyberharassment-laws.aspx#Laws> (last visited May 14, 2013).

338. Generally through language that refers to stalking by any device or means. The behaviors encompassed by cyberstalking may be prosecuted under stalking laws in the states without cyberstalking laws.

or other forms of electronic communications used to torment an individual.³³⁹ Unlike cyberstalking, cyberharassment does not require a credible threat. Thirty-eight states have cyberharassment protections, either in specific statutes or by including electronic harassment under preexisting statutes.³⁴⁰ Cyberstalking or harassment on an agency social media site may be easier to spot than other types of non-protected speech because such comments appear repeatedly and are directed to a specific individual. Comments that approach a crime, even a non-federal crime, should be removed, especially if a victim requests it.

2. *Defamation, Libel, and Slander*

The Department of State asserts, “Comments that make unsupported accusations will also be subject to review.” The USDA, HHS, and DHS follow suit, while NASA contains a nuanced gloss on the prohibition.³⁴¹ These strictures against personal attack obfuscate protected speech from forms of libel, defamation, and slander. Plaintiffs can file tort actions for defamation, libel, or slander in state court. The basic elements of defamation require a false and defamatory statement, communicated or “published” to a third party, a publisher acting negligently, and damages.³⁴² Libel is permanent defamation, and slander is the cause of action for oral “published” statements.³⁴³ From appearances, some agencies enjoin speech that falls outside the narrow boundaries of defamation. The factual requirement of a falsity is not only hard to prove but hard to identify because it excludes opinions, ideas, ruminations, even accusations related to a person. Furthermore, defamation for public figures requires an additional element of malice.³⁴⁴ Accusations or potentially libelous statements on agency social media sites are especially problematic. An agency may fear potential liability for not removing a potentially libelous comment, although the Telecommunications Act may insulate a federal

339. NCSL, *supra* note 337.

340. *Id.*

341. *See* NASA, *supra* note 61 (“No personal attacks. Criticism of decision-making and operational management, including the names of individuals involved, is legitimate. Criticism on a purely personal level is not.” Moreover, “[c]omments about politics and politicians must, like everything else, be on topic and free from personal attacks.”).

342. RESTATEMENT (SECOND) OF TORTS: DEFAMATION § 577 (1977). The plaintiff must prove falsity as part of a prima facie case in defamation cases involving public figures or private individuals and public concerns.

343. “Published” is a euphemism for communication to an audience in this context.

344. The fault standard of malice requires knowing falsity or a reckless disregard for truth.

agency from liability.³⁴⁵ On the other hand, removing a comment preemptively may violate the free speech rights of a commenter. Decisions must be made, case-by-case, based on an analysis of the context of the comment. Given the vague and overbroad statements on some agency social media comment policies, it is advisable to remember that statements concerning public figures, such as agency heads or officials, are likely to be protected speech given the especially stringent standards the Supreme Court set out for public figures attempting to prove defamation.³⁴⁶ Statements, including offensive, hyperbolic, or ludicrous claims about private individuals on matters of public concern, comprise yet another category that is often protected.³⁴⁷

E. Problematic Speech

1. False Statements of Fact

As discussed, libel is a false statement that is not only unprotected by the First Amendment but also punishable by law. However, false ideas or false facts by themselves are not illegal, and the dominant theme of the First Amendment is one of benign neglect with respect to falsehoods.³⁴⁸ For the most part the First Amendment shields people who make false statements, even intentionally, in the public sphere from punishment.³⁴⁹ Holocaust denial is one instance of a falsehood that exists undisturbed. However, does the First Amendment protect false statements in a public forum such as an

345. 47 U.S.C. § 230(c)(1) (2006).

346. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (establishing constitutional restrictions on tort actions involving defamation and public figures).

347. For the public concern test the Court applies to determine whether the First Amendment is a proper defense to tort liability, see *id.* In tort actions involving private individuals and public concerns, states can permit private plaintiffs to sue for damages for “actual injury,” which includes humiliation and mental anguish. The fault standard of malice is suitable for cases in which the plaintiff sues for presumed or punitive damages. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

348. With the exception of commercial fraud. For more on the First Amendment and falsehood, see Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897 (2010).

349. Defamation and fraud are examples of false factual statements that are unprotected or for which the First Amendment does not offer a defense. *United States v. Stevens*, 559 U.S. 460 (2010) did not explicitly name false statements of fact as unprotected speech. The Court’s precedent varies as to whether factual falsity is protected speech. *N.Y. Times Co.*, 376 U.S. at 254, implied that false speech was protected under the First Amendment. In *Gertz*, 418 U.S. 323, the Court stated false statements of fact fall outside the ambit of the First Amendment. Given the Court’s most recent opinion in *Stevens* and the general tenor of First Amendment doctrine, it would appear false statements of fact are protected speech, with a possible caveat for intentional or knowingly false statements of fact based on *Garrison v. Louisiana*, 379 U.S. 64 (1964).

agency social media site? Uniquely among agencies, HHS enjoins falsehood on its social media sites.³⁵⁰ The precise wording of the warning implies that making a false comment may be a punishable offense, which is problematic in itself, in addition to the probable chilling of speech likely to result. Furthermore, relying on the government to distinguish truth from falsehood is at odds with the principles of popular government and robust deliberation at the heart of the First Amendment tradition, in both doctrine and popular perception, which leave it to the people or the marketplace of ideas to judge the veracity of claims.³⁵¹ For those reasons, other agencies are ill-advised to follow HHS's example. False statements or claims should remain posted on sites, and the agency may respond. However, because HHS's agency mission involves public health, which critically depends on accurate information on health issues, and it maintains its site to encourage dialogue about health-related issues, HHS could argue that it has a substantial interest in preventing harm and false statements of fact, about the efficacy of medicines or the spread of disease or the effects of vaccines, that have a credible potential to cause harm through misinformation. Thus, the agency's interest in conveying accurate information about public health hypothetically could justify refusing to post false statements that have the potential to cause harm, given the Court's apparent ambivalence about the status of false statements in First Amendment doctrine.³⁵²

2. *Commercial Speech and Discrimination*

While commercial speech is likely to be considered off-topic on agency social media sites, it should be added that restrictions on commercial speech are governed by a more lenient standard than are other forms of speech.³⁵³ The Fair Housing Act and comments that purport to advertise dwellings or rooms provide an occasion to consider commercial speech, discriminatory

350. See *supra* note 55 and accompanying text (“Tell the Truth. Spreading misleading or false information is prohibited.”).

351. See Stone, *supra* note 276, at 228 (asserting that the people are the proper judges of the value of speech in a democracy); see also Kagan, *supra* note 289, at 512 (contending that the government is prone to “err, as a result of self-interest or bias, in separating the true and noble ideas from the false, abhorrent ones”).

352. This justification would be more persuasive in the absence of a strong disclaimer clearly separating the HHS official website as a source of information from the interactive social media sites open to public comment.

353. *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980); *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (“Even under the First Amendment’s somewhat more forgiving standards for restrictions on commercial speech, a State may not curb protected expression without advancing a substantial governmental interest.”).

statements, and illegal statements in light of the First Amendment. Section 804 of the Act forbids, among other things, advertisements for sale or rental that indicate preference or discrimination with respect to race, color, religion, sex, handicap, familial status, or national origin.³⁵⁴ Discriminatory statements on a HUD social media site that violate the Fair Housing Act can be removed and prosecuted. Such statements would be de facto advertisements or comments functioning as classified ads that offer, for instance, “apartment available willing to rent whites only, no children.” An illegal statement can be removed and HUD’s Office of General Counsel, along with the DOJ’s Civil Rights Division, can consider prosecution. However, statements that advocate repeal of the Fair Housing Act, voice objections to it, or counsel disobedience on an ideological level, even if offering discriminatory prejudice as a justification for disobedience, should remain posted because such statements do not violate Section 804.³⁵⁵ Advocacy of the violation of the law is protected unless it passes the *Brandenburg* test of intent, incitement, lawless action, and likely effect.³⁵⁶ Thus, if a non-commercial comment so advocates a violation of the Fair Housing Act it amounts to “fighting words,” to use the old-fashioned expression, it may be removed. Distressing as it may be, and contrary to the purposes of the Act, discriminatory comments made in a fair housing context such as “single whites without kids make the best tenants,” should remain posted.

F. *Liability, Immunity, and Endorsement*

1. *Agency Liability*

Federal agencies want their social media sites to comply with the First Amendment, but liability under state tort law looms in the background. Should a member of the public take offense at a comment the agency did not remove because it appeared to be protected speech, the offended citizen could sue the source of the comment under various torts and the agency’s failure to remove the comment could open it to a claim of contributory negligence. The most likely scenario involves hate speech or vituperative,

354. 42 U.S.C. § 3604(c) (2006).

355. Section 804(c) states that it shall be unlawful “[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.”

356. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (stating that “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

prejudicial statements that do not rise to the *Brandenburg* test and are protected, so an agency leaves them posted because they are, however offensive, on-topic. A member of the public, if so outraged, could sue in state court for intentional infliction of emotional distress. Fear of liability could induce an agency to be overbroad in the speech it removes or refuses to post. Such a fear is more phantasm than reality. Agency liability may be precluded by § 230(c)(1) of the Telecommunications Act of 1996, which states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”³⁵⁷ Section 230(c)(1) exempts Internet service providers, search engines, social-networking sites, and individual bloggers from liability for the speech of other users.³⁵⁸ As a user of an interactive computer service, a federal agency, in all likelihood, cannot be held liable under state tort law for public comments.³⁵⁹

Should § 230 not apply to the federal government, it should be noted that the United States waives sovereign immunity for torts. However, the intentional infliction of emotional distress is not listed among the qualifying tort actions. There are statutory exemptions to this waiver, which include libel and slander.³⁶⁰ Furthermore, any claim based on an employee acting in a discretionary function, which can encompass reviewing public comments in a limited public forum, is another exception to the waiver of sovereign immunity for torts.³⁶¹ The First Amendment, of course, can be used as a defense to claims of tortuous speech. Agency liability then should not be cause for excessively zealous patrolling and overly broad removal of speech, nor should immunity be cause to condone criminal or tortuous speech on agency social media sites. There is no shortcut for reasoned and informed judgment on a case-by-case basis. An agency may choose to wait and remove comments based on a received complaint for tortuous speech and opt to use more alacrity in patrolling its sites for actual crimes by preemptively removing speech that appears to be cyberstalking or cyberharassment.

357. 47 U.S.C. § 230(c)(1) (2006).

358. The immunization from liability applies to injunctive relief as well as damages. 47 U.S.C. § 230(e)(3); *see, e.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (finding AOL not liable for defamatory statements published by one of its users and upholding the dismissal of state law claims for injunctive relief in addition to damages).

359. At least one state court has held that § 230(c)(1) confers immunity on governmental entities. *See Kathleen R. v. City of Livermore*, 104 Cal. Rptr. 2d 772 (Cal. App. 4th 2001).

360. 28 U.S.C. §§ 2674, 2680(h) (2006).

361. *Id.* § 2680(a).

2. *Sovereign Immunity for Constitutional Claims*

An additional concern is delineating the precise First Amendment claim a citizen could bring should an agency remove or refuse to post comments the citizen believes are protected First Amendment speech. A citizen could argue that by refusing to post or repeatedly taking down comments the agency has denied him access to a public forum to which he is entitled as a matter of law.³⁶² Moreover, a citizen could claim that the repeated denial of access and any accompanying coercion or persuasion by government officials chilled or silenced the exercise of First Amendment rights. Agencies that moderate comments and refuse to post comments open themselves to an additional claim of censorship.³⁶³ A citizen's constitutional claim against a government agency would proceed through a lawsuit seeking limited, non-monetary relief, for example, an injunction compelling the federal agency to post the comment or comments.³⁶⁴ In response to such a claim, a federal agency would argue, as it has in the past, that sovereign immunity for constitutional claims precludes the claim.³⁶⁵ Section 702 of the Administrative Procedure Act (APA) waives sovereign immunity for any person suffering legal wrong or adversely affected by agency action seeking non-monetary relief.³⁶⁶ Whether agency action in removing a public comment from its social media site can be considered an "agency action" under the APA for purposes of waiving immunity is not

362. A claim of denial of access is common in public forum cases. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 40–41 (1983), is a classic example.

363. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). When reviewing questions involving the First Amendment, courts must "look through forms to the substance" of government action. Casual statements including "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" can contravene the First Amendment. *Id.* at 67. The Ninth Circuit interpreted this opinion to mean that the First Amendment is violated when the acts of government officials "would chill or silence a person of ordinary firmness from future First Amendment activities." *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

364. Most commonly, injunctive and declaratory relief.

365. The federal government has argued that the Constitution does not waive sovereign immunity and that a plaintiff bringing a constitutional claim involving an administrative agency must rely on the Administrative Procedure Act's (APA's) waiver provision.

366. 5 U.S.C. § 702 (2006):

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

obvious.³⁶⁷ Agencies have argued that the waiver under § 702 applies only to agency actions as defined by the APA and are limited by § 704, but federal circuit courts have held that the requirement that the agency action be final or “reviewable by statute” applies only to claims arising under the APA, not the Constitution itself.³⁶⁸ Hence, suits for injunctive relief against the federal government for which the First Amendment, not the APA, is the cause of action may proceed. An agency employee’s removal of a comment or refusal to post a comment on a federal agency social media site, sponsored and maintained by the agency, satisfies the requirement “that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.”³⁶⁹

3. *Endorsement*

If an agency social media site is a limited public forum where public

367. Debate turns on the role of and legislative history behind the first and second sentence of 5 U.S.C. § 702. The second sentence, which contains the waiver of sovereign immunity, was added to the statute in 1976. If a court interprets the second sentence as limiting the waiver to instances of “judicial review of agency action” in the first sentence and “agency action” as defined by the APA, a claim such as the one considered here would not proceed because taking down a comment is not an agency action under the APA. Thus, a waiver of sovereign immunity would be subject to § 704, which would limit claims to agency action made reviewable by statute and final agency action such as a final rule. The Ninth Circuit and the D.C. Circuit have rejected such arguments and held that a constitutional challenge does not depend on the cause of action found in the first sentence of § 702. Thus, any action in court seeking non-monetary relief for federal agency action (not necessarily defined by the APA) that arises under the Constitution itself may proceed via a waiver of sovereign immunity. *Veterans for Common Sense v. Shinseki*, 644 F.3d 845 (9th Cir. 2011); *Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006). Basically, the first sentence offers constitutionally aggrieved citizens a cause of action. The second sentence waives immunity for all causes of action involving agencies seeking non-monetary relief, which includes judicial review for federal agency action. The waiver is more expansive and embraces a variety of causes of action.

368. See *Veterans for Common Sense*, 644 F.3d at 865 (“But § 704 in no way limits § 702’s broad waiver of sovereign immunity with respect to suits for injunctive relief against the federal government—suits for which the APA itself is not the cause of action.”).

369. 5 U.S.C. § 702 (2006). Based on a generous reading of § 702’s waiver of sovereign immunity, the Ninth Circuit permitted a First and Fourth Amendment challenge to INS surveillance even though the agency actions did not fall within the APA’s definition of “agency action.” See *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989). In *Trudeau*, 456 F.3d 178, the FTC argued that § 702’s waiver applies only to actions arising under the APA and since the APA limits judicial review to final agency action in § 704, sovereign immunity was not waived because the agency’s conduct was not a final agency action. The court held that the plaintiff’s First Amendment claim could proceed regardless of whether the conduct was final agency action because § 702 was not restricted to suits brought under the APA.

comment is shielded by the Free Speech Clause, a variety of inane, insipid, offensive, even hateful comments must remain posted.³⁷⁰ Concerns about agency endorsement are not unwarranted, but such concerns do not justify a turn to government speech. The government speech doctrine offers agencies the option of editing public comment to suit an agency's articulated message; however, as previously discussed, suffocating the First Amendment on agency social media sites explicitly opened to encourage participation is unwise for a variety of principled, legal, and prudential reasons. Avoiding the appearance of governmental endorsement of hate speech and discriminatory speech is a valid interest, but as of yet, unrecognized by the courts. Under the public forum doctrine, private speech on public property is not attributed to the government, which is consonant with conventional understandings and traditional uses of parks, sidewalks, and streets. In cases implicating the Establishment Clause and the public forum doctrine, disclaimers have featured significantly to clarify that the government is neither a speaker nor endorsing the private speech at issue.³⁷¹ Even in a public forum, the government's failure to act can give the impression of endorsement.³⁷² Given that social media sites are a new free speech arena for which traditional understandings cannot be assumed, posting a disclaimer which clearly states that the agency does not endorse the private speech found on its site and that the site is a limited public forum where citizens' comments are protected by the First Amendment should allay concerns about the appearance of endorsement.

CONCLUSION

New technologies and new government endeavors often give rise to calls for changes to legal doctrine, but, more often than not, legal doctrine does not need to change drastically to accommodate novel enterprises. Agency-sponsored social media sites appear to be terra incognita for application of the First Amendment, but a closer look demonstrates that the

370. As long as such comments are topical. A purely private insult or slur would be of doubtful relevance to any subject-matter category on an agency social media site.

371. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 783–84 (1995) (Souter, J., concurring) (“I vote to affirm in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it.”). The plurality in *Pinette* advocated for the adoption of a per se rule that private speech in a public forum could never be attributed to the government and implicate the Establishment Clause. *Id.* at 767–70 (plurality opinion). For a discussion of the role of endorsement in *Pinette*, see Corbin, *supra* note 190, at 636–39, 660. Printed disclaimers also figured prominently in the Court's discussion of the student publication in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 823–24 (1995).

372. *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring).

public forum doctrine provides the most suitable and useful compass. Viewing such sites as limited public fora enables the sites to function as intended—as arenas for public discourse, not governmental pontification, where free speech rights are not dependent on the discretion of a private corporation or administrative agency, but are instead guaranteed by the Constitution.