

“FRIENDING” AND “FOLLOWING” THE GOVERNMENT: HOW THE PUBLIC FORUM AND GOVERNMENT SPEECH DOCTRINES DISCOURAGE THE GOVERNMENT’S SOCIAL MEDIA PRESENCE

ROSS RINEHART*

I. INTRODUCTION

In 2010, City Attorney Mike Webb of Redondo Beach, California, persuaded the beachside community to shut down its official Facebook page, citing potential legal problems.¹ Webb expressed concern over whether the city had authority to regulate comments made on the page, such as removing vulgar, misinformed, or hateful speech expressed in comments without encroaching on the commenters’ First Amendment right to free expression.²

This concern, and the subsequent abandonment of a social media presence, is not atypical for governments. In 2009, counsel for the City of Ft. Lauderdale, Florida circulated a memorandum discouraging both the City and its Commissioners from maintaining Facebook pages, raising concerns over possible violations of Florida’s public records law.³ Similarly, attorneys for a Marco Island, Florida planning board dissuaded the board from establishing a Facebook page “under any circumstances” and precluded city officials from using their social media presence to

*Class of 2013, University of Southern California Gould School of Law, B.A. 2009, University of California, Los Angeles.

1. Debra Cassens Weiss, *California Town Abandons Facebook Page Amid Legal Concerns*, ABA JOURNAL, Aug. 24, 2010, 5:30 AM, http://www.abajournal.com/news/article/california_town_abandons_facebook_page_amid_legal_concerns.

2. *Id.*

3. MEMORANDUM FROM HARRY A. STEWART, CITY ATTORNEY, ON UPDATE ON THE LAW – FACEBOOK PAGES AND WEBSITES (MAY 14, 2009) (warning that discussion of city business with members of Facebook might constitute “public records” for purposes of Florida’s Public Records Law, which would require the city to keep comprehensive records of said exchanges).

discuss any city business.⁴ Attorneys for cities in Washington advised city councilmembers to refrain from using social media to discuss policy and city issues. This caused the City of Seattle to bar councilmembers from “friending” each other on social networks and from posting links to commercial or political third-party content.⁵

At the core of these concerns is the extent to which the information posted on social media sites represents official statements from government bodies or public officials. The First Amendment concerns expressed by Webb likely stem from the fact that First Amendment law has yet to contemplate the interaction between the government and citizens through social media. Without such a determination, First Amendment law leaves wide judicial latitude to determine the extent to which governments can regulate citizens’ comments on their social media pages without violating the First Amendment’s prohibition of government abridgment of the freedom of speech.⁶ As summarized by Webb: “There’s going to be case law on this. . . . I’d prefer it not be case law with the city of Redondo Beach in the title.”⁷ However, these concerns have prompted some governments to close this avenue of communication altogether, effectively limiting the speech opportunities for their citizens. Similarly, public record laws such as Florida’s Public Records and Sunshine Law,⁸ which flourished partially as a response to the clandestine government operations involved in the Watergate scandal, were designed to make the business of government visible to the citizens by requiring that official business be documented and retained by the government and open to public scrutiny.⁹ Yet, strict fidelity to these laws in a digital era has led some governments to remove their social media presence, obscuring the public’s ability to view daily

4. Kelly Farrell, *Attorneys, Legislators to Pull Plug on Marco Government’s Use of Social Web Sites?*, NAPLES DAILY NEWS (July 7, 2009, 1:42 PM), <http://www.naplesnews.com/news/2009/jul/07/attorneys-legislators-pull-plug-marco-governments-/?printer=1/> (citing concerns regarding the difficulty of maintaining public records of discussions made about city business through social media platforms such as Facebook, MySpace, and Twitter).

5. Bill Sherman, *Your Mayor, Your “Friend”: Public Officials, Social Networking, and the Unmapped New Public Square*, 31 PACE L. REV. 95, 106–07 (2011).

6. U.S. CONST. amend. I.

7. Sascha Bush, *City Council Wrap*, THE BEACH REPORTER (Aug. 19, 2010, 12:00 AM), http://www.tbrnews.com/articles/2010/08/19/redondo_beach_news/news11.txt.

8. FLA. STAT. § 286.011 (1995).

9. Sherman, *supra* note 5, at 108. For a thorough historical and constitutional analysis of the public records movement in the United States, see Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137 (2002).

government operations through the Internet and foreclosing the possibility for continuous, responsive public scrutiny through social media.

This phenomenon is not limited to local governments. A report regarding the U.S. Congress’s use of social media determined that lawmakers have not utilized technology’s capacity to actively engage and communicate with young voters. Instead, it uses social media like Facebook and Twitter ads as “another one-way communication tool to tout their latest talking points.”¹⁰ Professors Andrew Chadwick and Christopher May argued that governments’ slow embrace of an interactive social media presence is systemic.¹¹ They found that governments continued to embrace the “managerial” model of web technologies—a model that focuses on the capacity of web technologies to efficiently provide information to constituents—rather than embrace a participatory model that values interaction and communication with constituents.¹²

While some governments have been slow to embrace the civic and political uses of social media, citizens have utilized social media to promote their own political goals in new and innovative ways. The most prominent example of citizens in the U.S. using social media as a polemic tool has been the Occupy Wall Street movement, which came to the attention of the mass media in late 2011. The movement’s roots were in social media. For instance, the publication of an invective entitled “#OCCUPYWALLSTREET” on the Canadian activist group Adbuster’s blog galvanized the movement by encouraging its readers to peacefully protest Wall Street’s alleged use of the financial industry to disproportionately influence American politics.¹³ Soon thereafter, protestors began descending on Wall Street in lower Manhattan, amassing their numbers and organization through Facebook pages, Twitter updates, and homemade videos posted to YouTube, Vimeo, and Livestream.¹⁴ Supporters of the movement also contributed to the movement’s Tumblr

10. David Charns, Kelly F. Zimmerman & Kristen Barbaresi, *Congress Still a Bit Short on Social Media Savvy*, YAHOO! NEWS (Sept. 29, 2011), news.yahoo.com/congress-still-bit-short-social-media-savvy-065925328.html.

11. Andrew Chadwick & Christopher May, *Interaction between States and Citizens in the Age of the Internet: “e-Government” in the United States, Britain, and the European Union*, GOVERNANCE: AN INT’L J. OF POL’Y, ADMIN., AND INST., Apr. 2003, at 271, 295.

12. *Id.* at 277, 295.

13. #OCCUPYWALLSTREET, ADBUSTERS (July 13, 2011), <http://www.adbusters.org/blogs/adbusters-blog/occupywallstreet.html>.

14. Chenda Ngak, *Occupy Wall Street Uses Social Media to Spread Nationwide*, CBS NEWS (Oct. 13, 2011, 4:41 PM), http://www.cbsnews.com/8301-501465_162-20117291-501465.html.

page, *We Are the 99 Percent*, to share their stories of economic difficulties.¹⁵ Occupy Wall Street's prominence in social media helped the movement coalesce into a global crusade, prompting protests in numerous metropolitan centers.¹⁶

The Occupy Wall Street movement's use of social media was inspired in part by the Arab Spring, a wave of revolutionary demonstrations, protests, and uprisings that began in late 2010.¹⁷ During the Arab Spring, protestors used considerable social media in order to organize, inform, and promote their protests, which were particularly successful in Egypt and Tunisia.¹⁸

These techniques were then adopted in successive revolutions around the world. For instance, the 15-M Movement in Spain took advantage of Twitter, Facebook, and its own social network called *Democracia Real YA!* to organize protests against the incumbent Spanish political system.¹⁹ Additionally, in reaction to the ban of foreign journalists from the country, supporters of Syria's 2012 rebellion against its incumbent regime have

15. G.L., *Social Media and the Wall Street Protests: #Occupytheweb*, THE ECONOMIST (Oct. 11, 2011, 1:31 PM), <http://www.economist.com/node/21532071>.

16. Joanna Walters, *Occupy America: Protests Against Wall Street and Inequality Hit 70 Cities*, THE GUARDIAN (Oct. 8, 2011, 9:30 AM), <http://www.guardian.co.uk/world/2011/oct/08/occupy-america-protests-financial-crisis> (citing branches of the Occupy Wall Street movement in Seattle, Los Angeles, Chicago, Boston, Memphis, Vancouver, Toronto, Calgary, and other major cities).

17. #OCCUPYWALLSTREET, *supra* note 13 ("Tahrir succeeded in large part because the people of Egypt made a straightforward ultimatum – that Mubarak must go – over and over again until they won. Following this model, what is our equally uncomplicated demand?").

18. See Philip N. Howard, *The Arab Spring's Cascading Effects*, PACIFIC STANDARD (Feb. 23, 2011), <http://www.miller-mccune.com/politics/the-cascading-effects-of-the-arab-spring-28575/> (arguing that Tunisia and Egypt were particularly well-suited to take advantage of social media in order to organize powerful networks of political dissenters); Helen A.S. Popkin, *Power of Twitter, Facebook in Egypt Crucial, Says U.N. Rep.*, TECHNOLOGY ON MSNBC (Feb. 11, 2011), http://www.technology.msnbc.msn.com/_news/2011/02/11/6033340-power-of-twitter-facebook-in-egypt-crucial-says-un-rep (quoting U.N. Ambassador Susan Rice's claim that "the power of social networking to channel and champion public sentiment[] has been more evident in the past few weeks than ever before"); Mike Giglio, *Inside Egypt's Facebook Revolt*, THE DAILY BEAST (Jan. 27, 2011, 11:45 AM), <http://www.thedailybeast.com/newsweek/2011/01/27/inside-egypt-s-facebook-revolt.html> (quoting a protestor's argument that online activism through social media "was an integral part of the overall effort"); Neal Ungerleider, *Massive Egyptian Protests Powered by YouTube, Twitter, Facebook, Twitpic*, FAST COMPANY (Jan. 25, 2011), <http://www.fastcompany.com/1720692/egypt-protests-mubarak-twitter-youtube-facebook-twitpic> (referring to protestors as "tech-savvy demonstrators are using Twitpic, Facebook and YouTube to disseminate videos and photographs").

19. Joseba Elola, *El 15-M Sacude el Sistema*, EL PAÍS (May 22, 2011), http://elpais.com/diario/2011/05/22/domingo/1306036353_850215.html.

turned to Facebook, YouTube, and Twitter to expose the military’s brutal crackdown on protestors.²⁰

At a time when the public’s use of social media to organize networks to petition the government has reached unprecedented levels—when citizens utilize social media as a tool to affect political change—governments are still reluctant to fully embrace social media. Used appropriately, social media has the potential to enable federal, state, and local governments to have meaningful discourse with constituents, to hear petitions for legitimate grievances, and to respond and react to public outcries. Despite the fact that these networks are formed and the channels for communication are in place, governments frequently appear unwilling to embrace social media.

This Note analyzes the local, state, and federal government’s slow embrace of the communicative possibilities afforded by social media through the development of the public forum and government speech doctrines of First Amendment law. Further, this Note argues that the imprecision and incompatibility of both the public forum and government speech doctrines to social media speech create significant uncertainty over government authority to regulate and maintain its own social media pages. This uncertainty deters governments from establishing dynamic, responsive presences in social media that would allow them to inform citizens, field questions, promote discussion, and address and respond to individuals’ grievances. The failure to accommodate robust public interaction through social media represents a significant missed opportunity to effectuate citizens’ First Amendment interests. This failure may also compel citizens with legitimate and unanswered grievances, who are unable to petition the government online, to protest the government in physical spaces.

Part II of this Note provides a description of social media in the contemporary United States, focusing specifically on the two most prominent social media platforms, Facebook and Twitter. Part II also discusses the concerns that governments might have in establishing an interactive social-media presence, such as the ability to regulate their social media pages for decorum and order without offending users’ First Amendment rights. Part III addresses the doctrines under which courts would assess the government’s authority to regulate its social media sites: the public forum, and government speech doctrines. Part III argues that the

20. Jennifer Preston, *Seeking to Disrupt Protestors, Syria Cracks Down on Social Media*, N.Y. TIMES, May 22, 2011, <http://www.nytimes.com/2011/05/23/world/middleeast/23facebook.html>.

categories established in these doctrines have become imprecise, making it exceedingly difficult for governments to predict which category would apply to social media. Part IV discusses two presumptions that underlie the public forum and government speech doctrines and will argue that these presumptions are incompatible with the type of speech that occurs through social media. This fundamental incompatibility makes these doctrines ill-equipped to assess government-sponsored social media, thereby creating even more uncertainty with respect to predicting how the courts will address the government's authority to regulate social media. Part V considers the potential consequences that may occur if governments refuse to establish a social media presence.

This Note concludes by advocating for a new judicial approach to the public forum and government speech doctrines with respect to speech facilitated by government-sponsored social media sites. This new approach draws on existing doctrine but modifies the approach to better reflect the nature of social media enabled speech. The approach promotes citizens' First Amendment interests through utilizing a direct channel of communication to the government, while providing the government with both clear guidance in establishing a robust social media presence and the ability to regulate for decorum and order.

II. SOCIAL MEDIA IN CONTEMPORARY AMERICA

Social media refers to web and mobile technologies that facilitate the creation and exchange of user-generated content through the networks provided by various social media platforms. These social media platforms—including Facebook, Twitter, YouTube, and Tumblr—enable users to connect with one another to form networks, communicate, and share stories, photos, videos and other information through the Internet. “Web 2.0” is the term commonly used to describe the underlying technologies that collectively enable the proliferation of online sites that foster the creation and dissemination of user-generated content.²¹

For the purposes of this Note, Facebook and Twitter are the most relevant social media applications. Facebook is the massively popular social networking platform that enables its users to customize individual profiles and create personalized networks comprised of other users, known

21. Prashant Sharma, *Characteristics of Web 2.0 Technology*, TECHPLUTO (Nov. 28, 2008), <http://www.techpluto.com/web-20-services/>.

as their Facebook “friends.”²² Currently, Facebook is the dominant social media network, and it reaches sixty-seven percent of adult U.S. internet users,²³ and accounts for one-quarter of all page views on the Internet.²⁴ Further, a recent Pew study found that Facebook is increasingly being used as a means for political discussion, debate, and participation.²⁵

Particularly relevant to this Note, Facebook also allows users to “subscribe” to and interact with the Facebook pages maintained by celebrities, public officials, journalists, commercial brands, publications, and other well-known entities.²⁶ These pages disseminate updates, more frequently called Facebook “posts,” to subscribers. The pages also typically allow the subscribers to comment on the posts and contribute original posts to the page. When creating Facebook pages to which others can subscribe, Facebook users are granted access-controls that allow them to limit who can comment on their posts and who can contribute original posts on the pages.²⁷ For instance, Facebook users can restrict those who can comment on their Facebook pages to their Facebook friends, a feature that effectively allows the creator of a Facebook page to control, which users can and cannot post a comment.²⁸ Finally, Facebook users can “block” unwanted users, preventing blocked users from viewing or commenting on their Facebook pages.²⁹

Twitter’s services are slightly more limited than Facebook, but its increasing popularity has made it an important platform in the current social media landscape.³⁰ Twitter provides a network that allows users to disseminate short bursts of information, known as “tweets,” in 140

22. *Products Overview*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=21> (last visited Oct. 25, 2012).

23. Maeve Duggan & Joanna Brenner, *The Demographics of Social Media Users – 2012*, PEW RES. CTR. (Feb. 14, 2013), http://pewinternet.org/~media/Files/Reports/2013/PIP_SocialMediaUsers.pdf.

24. Henry Blodget, *Facebook Now Accounts for 1 In 4 Internet Pageviews*, BUSINESS INSIDER (Oct. 22, 2009), http://articles.businessinsider.com/2009-10-22/tech/29959145_1_facebook-accounts-google-total-page-views.

25. See Press Release, *The Social Side of the Internet*, PEW RES. CTR.’S INTERNET & AM. LIFE PROJECT (Jan. 18, 2011), pewinternet.org/Reports/2011/The-Social-Side-of-the-Internet.aspx.

26. *Id.*

27. *Explore Popular Features: Subscribe*, FACEBOOK, <https://www.facebook.com/help/subscribe> (last visited Oct. 25, 2012).

28. *Id.*

29. *Manage Your Account: Blocking People*, FACEBOOK, <https://www.facebook.com/help/privacy/blocking> (last visited Oct. 25, 2012).

30. See Mark Hachman, *Twitter Continues to Soar in Popularity, Site’s Numbers Reveal*, PCMAG (Sept. 8, 2011, 3:24 PM), <http://www.pcmag.com/article2/0,2817,2392658,00.asp>.

characters or less.³¹ Each user also has a Twitter profile page, which displays the user's tweets and other activity in chronological order.³² Importantly, Twitter publicizes tweets in real-time, allowing quick and efficient circulation of tweets.³³ This has resulted in Twitter breaking news stories before traditional media outlets can, as seen during the Iranian protests of 2009.³⁴ Additionally, many public figures and brands use Twitter to promulgate short, unmediated messages to users.³⁵

Twitter is a relatively straightforward social media application compared to Facebook, but it also offers its users a variety of possibilities for interactive communication, along with certain access controls. In addition to promulgating tweets, Twitter users can also respond to others' tweets. These responses can take a variety of forms. A user can respond directly to another's tweet, in which case the response, accompanied by the username of the person who tweeted initially, and original tweet are displayed on the responder's Twitter page.³⁶ Twitter users can also directly link to any other user's tweet with a URL³⁷ and add their own commentary.³⁸ Moreover, any Twitter user can "retweet" another user's tweet and add the user's own comments, space permitting.³⁹ Users who retweet essentially co-opt other users' tweets by displaying them on their own pages, although information identifying the original source of the tweet remains affixed to retweets.⁴⁰ With respect to access controls, users may "protect" their tweets, preventing any other Twitter users from

31. *About Twitter*, TWITTER, <http://twitter.com/about>, (last visited Oct. 25, 2012).

32. *The Twitter Glossary*, TWITTER, <http://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/166337-the-twitter-glossary#p> (last visited Oct. 25, 2012).

33. *About Twitter*, *supra* note 31.

34. Lev Grossman, *Iran Protests: Twitter, the Medium of the Movement*, TIME WORLD (June 17, 2009), <http://www.time.com/time/world/article/0,8599,1905125,00.html>.

35. See Nate Silver, *The Influence Index*, TIME SPECIALS (Apr. 29, 2010), http://www.time.com/time/specials/packages/article/0,28804,1984685_1984713,00.html.

36. *What are @Replies and Mentions?*, TWITTER, <http://support.twitter.com/articles/14023-about-replies-and-mentions#> (last visited Oct. 25, 2012).

37. A URL is a "uniform resource locator," or the characters used as a reference to a particular Internet resource.

38. *How to Link Directly to an Individual tweet*, TWITTER, <http://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/80586-how-to-link-directly-to-an-individual-tweet#> (last visited Oct. 25, 2012).

39. *Retweeting Another Person's Tweet*, TWITTER, <http://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/20169873-how-to-retweet-a-tweet#> (last visited Oct. 25, 2012).

40. *Id.*

viewing or responding to their tweets without the user’s approval.⁴¹ Finally, like with Facebook, Twitter users may block other users from interacting with them through Twitter.⁴²

Communicative activity on Facebook, Twitter, and other social media platforms can be characterized as dynamic and multidirectional because social media affords users the ability to reach multitudes of other users in real time, and allows those users to respond, comment, co-opt, and otherwise interact with the speech produced through these media. These media outlets do not merely focus on the speakers who are transmitting information, but also focus on the reciprocal relationship between speakers and their audiences. Facebook encourages its users to “like,”⁴³ share,⁴⁴ or comment on information posted by other users,⁴⁵ and gives users the option to “tag” other users—to include a reference to others—in their posts.⁴⁶ In addition, Twitter makes responding and retweeting an integral part of the user interface.⁴⁷ These features expand Twitter’s communicative possibilities beyond merely concatenations of 140-character messages. Rather, by allowing users to comment, provide new context, or distort others’ tweets, Twitter enables users to provide new meaning and interpretations to others’ tweets; these changes in meaning are directed back to the authors of the initial tweets as an update on their profile pages.⁴⁸ On these social media sites, meaning is created not only through the individual speaker but also through the interaction of the speaker and an active, participating audience.

41. *About Public and Protected Tweets*, TWITTER, <http://support.twitter.com/groups/31-twitter-basics/topics/107-my-profile-account-settings/articles/14016-about-public-and-protected-tweets#> (last visited Oct. 25, 2012).

42. *How to Block Users on Twitter*, TWITTER, <http://support.twitter.com/groups/31-twitter-basics/topics/108-finding-following-people/articles/117063-how-to-block-users-on-twitter#> (last visited Oct. 25, 2012).

43. *Explore Popular Features: Like*, FACEBOOK, <http://www.facebook.com/help/like> (last visited Oct. 25, 2012).

44. *Explore Popular Features: How to Post and Share*, FACEBOOK, <http://www.facebook.com/help/?page=125122004234100> (last visited Oct. 25, 2012).

45. *Explore Popular Features: Commenting*, FACEBOOK, <http://www.facebook.com/help/commenting> (last visited Oct. 25, 2012).

46. *Managing Your Account: Tagging*, FACEBOOK, <https://www.facebook.com/help/tagging> (last visited Oct. 18, 2012).

47. *Retweeting Another Person’s Tweet*, *supra* note 39.

48. *FAQs About Retweets (RT)*, TWITTER, <http://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/77606-faqs-about-retweets-rt#> (last visited Oct. 18, 2012).

Given the amount of users on Facebook, Twitter, and other social media platforms, as well as the variety of communicative possibilities they can provide, a government's social media presence may offer an efficient and effective way to connect with constituents and promote policies and goals. However, social media presents several concerns that can prompt governments to curtail their presence online. Counsel for the Federal Chief Information Officers released *Guidelines for Secure Use of Social Media by Federal Departments and Agencies*, which identified spear phishing, social engineering, and web application attacks as threats to the government's use of social media.⁴⁹ Beyond these threats, which affect all users of social media, the government has a significant interest in regulating its social media presence for decorum, order, and relevance. Creating an interactive and participatory social media presence invites other users to post information in a forum, such as a Facebook or Twitter page, that will likely be associated with the government. This allows users to post incendiary or offensive speech, to disseminate false or unreliable information, or to share otherwise irrelevant content. Several commentators have noted that this kind of behavior is especially prevalent on the Internet,⁵⁰ making the government's concern over its authority to regulate its social media sites particularly acute.

Although Facebook and Twitter have mechanisms that allow the government to block others from being able to further communicate on its "forum," utilizing this mechanism might offend users' First Amendment rights thereby risking government liability for impermissible viewpoint discrimination. As such, a risk-adverse government would want to ensure that it could regulate its Facebook page or Twitter profile in order to remove offensive, slanderous, or false information without encroaching on users' First Amendment rights. The Supreme Court considered this quandary in *Arkansas Educational Television Commission v. Forbes*, albeit in the context of television broadcasts.⁵¹ The Court reasoned that opening

49. These threats generally involve the use of surreptitious efforts to gather and exploit information that social media users offer. See FEDERAL CHIEF INFORMATION OFFICERS COUNCIL, GUIDELINES FOR SECURE USE OF SOCIAL MEDIA BY FEDERAL DEPARTMENTS AND AGENCIES, VERSION 1.0 (2009), available at https://cio.gov/wp-content/uploads/downloads/2012/09/Guidelines_for_Secure_Use_Social_Media_v01-0.pdf.

50. See, e.g., Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. REV. 1435 (2011); Lyrrisa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH L. REV. 147 (2011).

51. *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1998).

televised debates to all potential candidates might in fact limit the amount of political speech:

Were it faced with the prospect of cacophony, on the one hand, and First Amendment liability, on the other, a public television broadcaster might choose not to air candidates’ views at all. A broadcaster might decide “the safe course is to avoid controversy,’ . . . and by so doing diminish the free flow of information and ideas.”⁵²

In the new frontier of social media communication, the government may look to lawyers for counsel on how to establish a social media presence that would permit such regulation. Unfortunately, the First Amendment doctrines that govern the government authority to do so—the public forum and government speech doctrines—are murky judicial creations that provide relatively limited insight into the permissible levels of regulation for a government-sponsored social media site.

III. THE IMPRECISE DIMENSIONS OF THE PUBLIC FORUM AND GOVERNMENT SPEECH DOCTRINES

A. THE NORMATIVE VALUE OF PUBLIC FORUMS

In the 1939 case *Hague v. Committee for Industrial Organization*, Justice Owen Roberts recognized in dictum a right to speak and assemble in parks and streets.⁵³ In doing so, Justice Roberts set forth the origins of the public forum doctrine—a doctrine central to First Amendment jurisprudence since the second-half of the twentieth-century.⁵⁴ In a frequently cited passage, Justice Roberts observed that a citizen’s liberty to speak in public places is subject to a balancing of private interests in freedom of expression and the public’s interest in order and decorum:

52. *Id.* at 681.

53. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939).

54. See, e.g., Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140, 2143 (2009) [hereinafter *Strict Scrutiny*] (stating that Justice Roberts’s dictum in *Hague* represents the “origin of the public forum [doctrine] in the Supreme Court’s jurisprudence”); Ronald A. Cass, *First Amendment and Access to Government Facilities*, 65 VA. L. REV. 1287, 1289–90 (1979) (referring to a passage in Justice Roberts’s majority opinion in *Hague* as the “formulation” and “accepted statement of the speech access concept”); Harry Kalven, Jr., *The Concept of Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 13 (1965) (arguing that *Hague* is “a good starting point for the argument” for the First Amendment right to speak in public places). *But see* Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1724 (1987) (reasoning that “*Hague* did not recognize the concept of a public forum as “government property where speech merits unusual protection.”).

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. . . . The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.⁵⁵

Therefore, the public forum doctrine reflects the Supreme Court's concern with citizens' access to public places that allow engagement in expressive activities, as well as the state's interest in managing the uses of public property. The doctrine further represents the balancing of citizens' First Amendment interests against the government's managerial interest in regulating its property.⁵⁶ On the one hand, the doctrine recognizes that citizens customarily have communicated freely, unencumbered by government regulation, in some forums and those forums should favor citizens' interests.⁵⁷ On the other hand, the doctrine also recognizes that the government has a greater vested interest in managing activity in some forums more than others, therefore, some forums should be more regulated in order to favor the government's managerial interest.⁵⁸ Thus, the government's authority to regulate speech changes according to the characteristics of the forum, such as the extent to which the forum has been held out as open and inclusive of speech, thereby creating a balancing test.⁵⁹

55. *Hague*, 307 U.S. at 515–16. Justice Roberts's dictum outlined the requisite balancing that would eventually define the characteristics of the public forum doctrine, although the Court would not recognize the "public forum" as a formal legal category until 1972. *See* *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 98–99 (1972) ("[J]ustifications for selective exclusions from a public forum must be carefully scrutinized."). In striking down an ordinance prohibiting all picketing within 150 feet of a school except "peaceful picketing of any school involved in a labor dispute," *Mosley* was also the first case to hold that content-selective regulation in a public forum warranted heightened judicial scrutiny, stating that, "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Id.* at 93, 96.

56. *Post*, *supra* note 54, at 1781–82.

57. *Id.*

58. *Id.*

59. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44–45 (1983).

In order to make this balancing test more predictable for both citizens and governments,⁶⁰ the Court eventually conceptualized the public forum doctrine as a classificatory scheme that categorized different types of forums and provided the standards governing the state’s authority to regulate speech in each.⁶¹ Public forum analyses, therefore, should ideally outline both the extent to which a citizen can speak and the extent to which the government can manage its property.⁶² However, while the public forum doctrine should provide clarity and predictability in determining the government’s authority to regulate private speech, it has devolved into a fractured and convoluted doctrine that over-emphasizes categorical divisions while failing to clearly define the boundaries of each category.⁶³ When courts utilize a series of ad hoc balancing tests, both the individuals and governments attempting to apply the doctrine become frustrated,⁶⁴ as do lawyers advising governments on how to devise an appropriate social media presence.⁶⁵

B. THE CATEGORIZATION OF PUBLIC FORUMS

Modern public forum doctrine and the categorization of forums begin with *Perry Education Association v. Perry Local Educators’ Association*.⁶⁶ *Perry* involved citizens’ access to a mail system established in the Metropolitan School District of Perry Township, Indiana, which transmitted official messages amongst the teachers and school

60. See Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299, 303 (2009) (arguing that the *Perry* decision represented the Court’s first attempt to “impose structure and clarity” on the public forum doctrine); *Strict Scrutiny*, *supra* note 54, at 2140–41 (arguing that forum analysis provides “a procedure for analyzing speech problems” and “shared expectations about the type of expression that will be allowed” in each forum).

61. *Perry*, 460 U.S. at 45–46.

62. *Strict Scrutiny*, *supra* note 54, at 2140–41.

63. See Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 368 (2009) (arguing that identifying the category of speech frequently “becomes a crucial question—often the crucial question—in deciding . . . speech cases.”); Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1555 (1998) (“The post-*Perry* public forum doctrine may not be the most fractured area in modern constitutional law, but it comes close.”); 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, 1266 (1984) (“Unless the Supreme Court transcends its geographical approach to the first amendment and abandons formal public forum analysis, it will continue to hand down decisions that fail to analyze thoughtfully the nature and role of first amendment principles in our society.”).

64. *Strict Scrutiny*, *supra* note 54, at 2141.

65. Lyrisa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1979 (2011).

66. *Perry*, 460 U.S. 37.

administration.⁶⁷ The Supreme Court considered a provision of the collective bargaining agreement between the Perry Education Association (“PEA”) and the school district that restricted access to the mail system to the incumbent teachers union, thereby preventing a rival teacher organization, the Perry Local Educators’ Association (“PLEA”), from accessing the mail system.⁶⁸ The Court held that the school district could permissibly restrict the PEA from accessing the mail system because the district did not designate the mail system as a public forum.⁶⁹ The district also restricted access on the “reasonable” basis of PEA’s status as the exclusive collective bargaining representative in the district.⁷⁰ In reaching its conclusion, the Court attempted to clarify the public forum doctrine by categorizing different forums according to the government’s authority to regulate speech in each.⁷¹

1. The Traditional Public Forum

The first category the Court delineated in *Perry* was the “traditional public forum.” Referencing Justice Roberts’s dictum in *Hague*,⁷² the Court characterized this category as the “quintessential” public forum—a place that “by long tradition or by government fiat ha[s] been devoted to assembly and debate.”⁷³ In traditional public forums, any attempt by a state to enforce a content-based exclusion requires the state to “show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”⁷⁴ Additionally, any attempt to regulate the time, place, or manner of one’s expression in a traditional public forum must be “content-neutral . . . [and] narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”⁷⁵

Thus, the forums most protected by the public forum doctrine are physical areas that have been historically treated as loci of public

67. *Id.* at 39–40.

68. *Id.*

69. *Id.* at 47.

70. *Id.* at 49–50. *But see id.* at 63–64 (Brennan, J., dissenting) (arguing that the “exclusive access provision amounts to viewpoint discrimination”).

71. *Id.* at 45–46.

72. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939).

73. *Perry*, 460 U.S. at 45.

74. *Id.*

75. *Id.*

discourse.⁷⁶ The traditional public forum category is the simplest to categorize, because the Supreme Court has narrowed the boundaries of this category to encompass only streets, parks, and sidewalks.⁷⁷ Therefore, there is little opportunity to extend the traditional public forum status to new realms, such as social media.⁷⁸

2. The Designated or Limited Public Forum

The second category of public forums delineated by *Perry* is the “designated or limited public forum.”⁷⁹ The Court described this category as “public property which the State has opened for use by the public as a place for expressive activity.”⁸⁰ However, this category has been described as “vexed”⁸¹ due to an ambiguous footnote in *Perry*, which stated that the forum could be “created for a limited purpose such as use by certain groups” or “for the discussion of certain subjects.”⁸² This addendum seemingly bifurcated the second category into two subcategories: (1) designated public forums, or forums opened and designated by the government for general expressive activity, and (2) limited public forums, or forums opened by the government and made available only to certain groups or for the discussion of certain subjects.⁸³

The *Perry* Court held that a state may withdraw the “open character” of a designated public forum, but when the forum remains open to public expression, the state is “bound by the same standards as apply in a traditional public forum.”⁸⁴ Therefore, regulation in this forum should be

76. *Id.* at 44 (conceptualizing public forums analysis as involving “a right of access to public property”) (emphasis added). *See also* Kalven, *supra* note 54, at 13 (describing streets as “a kind of First-Amendment easement” that affords a right to free speech).

77. *See, e.g.*, Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666, 678 (1998) (citing Int’l Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680–81 (1972)) (“The Court has rejected the view that traditional public forum status extends beyond its historic confines.”).

78. Lidsky, *supra* note 65, at 1983. *See also* Lee, 505 U.S. at 680 (declining to view airport terminals as traditional public forums, despite the analogous function to sidewalks, because the advent of airport terminals is too recent to have been “immemorially . . . time out of mind . . . held in the public trust and used for purposes of expressive activity”).

79. *Id.*

80. *Perry*, 460 U.S. at 45.

81. Lidsky, *supra* note 65, at 1983.

82. *Perry*, 460 U.S. at 46 n.7.

83. *Strict Scrutiny*, *supra* note 54, at 2146–47. For extensive criticism of the Supreme Court’s failure to adequately resolve the ambiguity regarding what constitutes a designated and limited public forum, see Rohr, *supra* note 60.

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

assessed under strict scrutiny.⁸⁵ Additionally, time, place, and manner restrictions must be reasonable, and any content-based prohibitions “must be narrowly drawn to effectuate a compelling state interest.”⁸⁶ The Court appeared to support this standard of scrutiny in the dicta of several post-*Perry* decisions,⁸⁷ which provided that the government intended to open the forum to communicative activity.⁸⁸

The Court formally recognized the subcategory of the “limited public forum” in *Rosenberger v. Rector and Visitors of the University of Virginia*.⁸⁹ In *Rosenberger*, Justice Kennedy’s majority opinion held that the University of Virginia’s student activity fund was a limited public forum, and the denial of resources from that fund to a Christian-themed student newspaper represented impermissible viewpoint-discrimination.⁹⁰ In reaching this conclusion, however, Justice Kennedy did not apply the strict scrutiny standard that the Court alluded to in its post-*Perry* cases but rather held that “[t]he State may not exclude speech where its distinction is not ‘reasonable in light of the purpose served by the forum.’”⁹¹

By recognizing the limited public forum subcategory and employing a reasonableness standard, Justice Kennedy’s decision in *Rosenberger* created several ambiguities in the second category of public forums. First, the opinion failed to articulate how the standard governing limited public forums should be appropriately applied. Before concluding that the denial of funds constituted viewpoint-discrimination,⁹² Justice Kennedy admitted that the distinction between “reasonable” subject-matter restrictions and viewpoint-restrictions was blurry.⁹³ But, as viewpoint-discrimination is

85. *See id.* at 45.

86. *Id.*

87. *See, e.g.,* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 769 (1995) (suggesting that the same standards apply to traditional and designated public forums); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392 (1993) (stating that designated public forums are “open for indiscriminate public use”).

88. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (indicating that courts should look to “the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum” and to “the nature of the property and its compatibility with expressive activity to discern the government’s intent”).

89. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

90. *Id.* at 829–31.

91. *Id.* at 829.

92. *Id.*

93. *Id.* at 831 (“[I]t must be acknowledged [that] the distinction is not a precise one. It is, in a sense, something of an understatement to speak of religious thought and discussion as just a viewpoint, as distinct from a comprehensive body of thought.”).

impermissible in any forum, this prevented the majority from elaborating on how the reasonableness standard operates in limited public forums. Second, the demand that the regulation in a limited public forum be “reasonable” and viewpoint-neutral blurred the distinction between limited public forums and nonpublic forums, as the same standards govern both.⁹⁴ Significantly, in supporting the application of the reasonableness test to the limited public forum subcategory, Justice Kennedy cited *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*, which found that the reasonable test applied to a nonpublic forum.⁹⁵ In discussing permissible content discrimination that “preserve[s] the purpose of the limited forum,” Justice Kennedy also cited *Perry*’s discussion of nonpublic forums.⁹⁶ Justice Kennedy’s citation of these cases suggests that he failed to consider what boundaries separate limited and nonpublic forums. Third, the opinion did not discuss designated public forums, and therefore failed to address the characteristics of forums to which different standards of review would apply.⁹⁷ Thus, *Rosenberger* utilized a standard of review reserved for nonpublic forums in its analysis of limited public forums without articulating how the standard should be applied or how limited public forums should be distinguished from designated and nonpublic forums.

The Court attempted to clarify the confusion surrounding the designated and limited public forums in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*.⁹⁸ The relevant forum in *Martinez* was a Hastings College of the Law (“Hastings”) student organization program that required all student organizations to comply with the school’s “Nondiscrimination Policy” in

94. *Strict Scrutiny*, *supra* note 54, at 2148–49.

95. *Rosenberger*, 515 U.S. at 829 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 804–06 (1985) (“Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”)).

96. *Id.* at 829–30 (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (“Public property which is not by tradition or designation a forum for public communication is governed by different standards. . . . [T]he state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”)).

97. *See, e.g.*, *United States v. Kokinda*, 497 U.S. 720, 751 (1990) (Brennan, J., dissenting) (“[T]here is only a semantic distinction between the two ways in which exclusions from a limited-purpose forum can be characterized, although the two options carry with them different standards of review.”).

98. *Christian Legal Soc’y Chapter of the Univ. of Cal. Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971 (2010).

order to be eligible for financial assistance.⁹⁹ Hastings interpreted the policy as a mandate that student organizations must accept any student that seeks “to participate, become a member, or seek leadership positions in the organization, regardless . . . of status or beliefs.”¹⁰⁰ The Hastings chapter of the Christian Legal Society, which had limited its composition to members who professed a sincere belief in Jesus Christ and vowed to eschew homosexuality, challenged this requirement as a violation of its rights of free expression and freedom of religion.¹⁰¹

The Supreme Court considered whether Hastings’s interpretation of the Nondiscriminatory Policy was a constitutionally permissible restriction on forum parameters.¹⁰² The Court reasoned that “the strict scrutiny we have applied in some settings to laws that burden expressive association would, in practical effect, invalidate a defining characteristic of limited public forums”—the government’s ability to limit access to certain groups.¹⁰³ The Court held that the appropriate constitutional standard for limited public forums requires that “[a]ny access barrier must be reasonable and viewpoint neutral.”¹⁰⁴ Unlike *Rosenberger*, however, the Court found that this access restriction was viewpoint neutral.¹⁰⁵

The following summarizes what the Supreme Court has held concerning the designated and limited public forums categories. In order to create a designated or limited public forum, the government must intend to open such a forum to expressive activity.¹⁰⁶ If a government intends to open a public forum, it may limit that forum to certain speakers or topics, provided that the limitations are reasonable and viewpoint neutral.¹⁰⁷ In such a scenario, the government creates a limited public forum,¹⁰⁸ although the Court has occasionally stated that this might be a nonpublic forum.¹⁰⁹ When a state opens a limited public forum but excludes a speaker who falls

99. *Id.* at 2979.

100. *Id.*

101. *Id.* at 2980–81.

102. *Id.* at 2984.

103. *Id.* at 2985.

104. *Id.* at 2984.

105. *Id.* at 2993 (“It is . . . hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers.”).

106. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802–03 (1985).

107. *Martinez*, 130 S. Ct. at 2984.

108. *Id.*

109. *See Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 679 (1998) (“These cases illustrate the distinction between ‘general access,’ which indicates the property is a designated public forum, and ‘selective access,’ which indicates the property is a nonpublic forum.”).

within the class of speakers to whom the forum is made available or whose speech concerns a subject matter for which the forum is dedicated, the state’s exclusion is subject to strict scrutiny.¹¹⁰

However, several issues still linger. A primary issue is whether designated public forums remain a separate category governed by a less deferential standard of scrutiny, and, if so, what measure of access or content-limitations is required to change the forum from a designated to a limited public forum.¹¹¹ This inquiry is particularly important for the purposes of this Note, as most social media sites grant governments the ability to control access to them.¹¹² Notably, the amount of control that governments exert via social media may affect how courts characterize the forum in the future.

3. Nonpublic Forums

The third category of public forums, “nonpublic forums,” is characterized as public property owned or controlled by the government that “is not by tradition or designation a forum for public communication.”¹¹³ Unsurprisingly, the government has broad discretion to limit the access to this forum and the content of the expressive activity therein. The government may institute time, place, and manner regulations and restrict access and speech in order to “reserve the forum for its intended purposes, communicative or otherwise” so long as the regulation is reasonable and viewpoint-neutral.¹¹⁴

Some commentators argue that the government’s extensive ability to regulate nonpublic forums seriously diminishes citizens’ First Amendment interests in these places by nearly immunizing government regulations

110. *Id.* at 677.

111. *See, e.g.,* Pleasant Grove City v. Summum, 555 U.S. 460, 469–70 (2009) (recognizing designated and traditional public forums as separate categories and designated public forums as open generally); Int’l Soc’y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678 (1972) (suggesting that designated public forums need not be open generally).

112. For instance, a local government may create a Facebook page but restrict access to the majority of the information contained on the page to those who subscribe to the government’s page. Further, it could restrict the opportunity to post on said page to only those who subscribe, or to only those whom the government approves, thereby limiting the interaction between the government and Facebook members. Similarly, a local government may set its Twitter feed to “Private,” limiting those who view the government’s tweets to the Twitter members it approves.

113. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 46 (1983).

114. *Id.*

from judicial scrutiny.¹¹⁵ It is troubling, then, that the boundaries defining nonpublic forums are not clearly demarcated. As discussed above, the determination of whether the government intended to create a public forum separates the designated or limited public forum category from the nonpublic category.¹¹⁶ However, the Court's inquiry into government intent has been inconsistent and arguably result-driven.¹¹⁷ This inconsistency in the Court's approach to government intent creates additional uncertainty in the public forum doctrine by failing to provide a predictable test to determine when the government lacks the requisite intent to create a public forum.

The Court outlined the government's intent inquiry in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, a case that examined the extent to which the federal government could limit the participants in a charity drive conducted in the federal workplace.¹¹⁸ In determining whether the charity drive constituted a public or nonpublic forum, the Court found that the government only establishes a public forum when it "intentionally open[s] a nontraditional forum for public discourse."¹¹⁹ To ascertain the government's intent, the Court looked to the federal government's practice, as well as its policy of managing its workplace and regulating the participants in the charity drive, as well as the nature of the federal offices and the charity drive.¹²⁰ Although the Court noted that "[t]he decision of the Government to limit access to the [charity drive] is not dispositive in itself," it found that the extensive regulations decreased "the amount of expressive activity occurring on federal property," and the nature of the federal workplace as a place to "accomplish the business of the employer."¹²¹ These findings suggested that the government did not create a public forum.¹²²

115. See Post, *supra* note 54, at 1766 (arguing that nonpublic forums are "property in which the First Amendment claims of the public are radically devalued and immune from independent judicial scrutiny").

116. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802–03 (1985).

117. See Lidsky, *supra* note 65, at 1991–92 (arguing that disparate treatment of the schools in *Perry* and *Rosenberger* makes it "hard to escape the conclusions that the decisions are more determined by results than labels").

118. *Cornelius*, 473 U.S. at 791.

119. *Id.* at 802.

120. *Id.* at 804–05.

121. *Id.* at 805.

122. *Id.*

The Court in *Cornelius* also summarized decisions that found public forum characteristics on government property.¹²³ The Court cited *Widmar v. Vincent*, which held that a public university was a public forum partly because the campus “possesse[d] many of the characteristics of a public forum,” such as providing an opportunity for its students and faculty “to participate in the intellectual give and take of campus debate.”¹²⁴ *Cornelius* also referenced *Madison Joint School District v. Wisconsin Employment Relations Commission*, where the Court found that school board meetings open to the public were characteristic of public forums,¹²⁵ and *Southeastern Promotions, Ltd. v. Conrad*, where the Court held that a municipal auditorium and city-leased theater were “designed for and dedicated to expressive activities,” and therefore analogous to public forums.¹²⁶ The majority in *Cornelius* likely cited these cases to illustrate that the Court frequently evaluated the nature and characteristics of government property in order to ascertain whether the government intended to open a public or nonpublic forum.¹²⁷

Notably, however, the Court has not always addressed both the policy and practice of the government and the nature of forum, as it did in *Cornelius*. In *United States v. Kokinda*, the Court addressed the Postal Service’s prohibition on public solicitation on a walkway that extended from a public sidewalk to a freestanding Postal Service building.¹²⁸ Although the walkway appeared to function as a sidewalk for pedestrian movement, the plurality declined to treat it as a traditional public forum.¹²⁹ Instead, the plurality reasoned that the walkway was a nonpublic forum because it neither functioned as a traditional sidewalk would, nor was it opened by the Postal Service to promote First Amendment activity.¹³⁰ Although some postal property was open to “the posting of public notices on designated bulletin boards,” and the Postal Service previously allowed some groups to “leaflet, speak, and picket on postal premises,”¹³¹ the

123. *Id.* at 802–03 (explaining that the Court had considered a state university campus, open school board meetings, and a municipal auditorium and a city-leased theater were public forums, in part because each possessed characteristics analogous to public forums).

124. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981).

125. *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp’t Relations Comm’n*, 429 U.S. 167, 174 n.6 (1976).

126. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975).

127. *Cornelius*, 473 U.S. at 802.

128. *United States v. Kokinda*, 497 U.S. 720, 722–23 (1990).

129. *Id.* at 727.

130. *Id.* at 730.

131. *Id.*

plurality found that the walkway had not been “expressly dedicated . . . to any expressive activity.”¹³² The plurality cited the discussion of government intent in *Cornelius* to explain away the fact that the walkway had been used for some expressive activity.¹³³ In ascertaining the Postal Service’s intent, the Court looked to the Postal Service’s history of regulating solicitation on postal premises as evidence that it had by policy and practice regulated the use of its premises for expressive activity.¹³⁴

When discerning the government’s intent to open a public forum, the *Cornelius* decision looked to “the nature of the property and its compatibility with expressive activity” in addition to the “policy and practice of the government.”¹³⁵ However, the plurality in *Kokinda* declined to look to the nature and characteristics of the property in question—a sidewalk outside of a Postal Service building. Since sidewalks are traditional public forums,¹³⁶ and therefore have “immemorially” and “time out of mind” been used for expressive activity,¹³⁷ considering the walkway’s characteristics would have likely complicated the plurality’s analysis. The fact that the government did not open this walkway to the general public does not necessarily preclude a determination that the walkway is a limited public forum.¹³⁸ Although the same standard of scrutiny applies to both limited and nonpublic forums,¹³⁹ the plurality in *Kokinda* avoided the discussion of the nature of sidewalks as traditional loci of private expression. Instead, it ostensibly defaulted to the nonpublic forum category.

Similarly, in *International Society for Krishna Consciousness, Inc. v. Lee* (“*ISKCON*”), the majority held that airport terminals, which are arguably analogous to sidewalks, were nonpublic forums.¹⁴⁰ While the majority in *ISKCON*, unlike the plurality in *Kokinda*, analyzed the nature of

132. *Id.*

133. *Id.* (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985)).

134. *Kokinda*, 497 U.S. at 731–32.

135. *Cornelius*, 473 U.S. at 802.

136. *United States v. Grace*, 461 U.S. 171, 177 (1983).

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

138. *See Kokinda*, 497 U.S. at 749 (Brennan, J., dissenting) (“I would find that it is a ‘limited-purpose’ forum from which respondents may not be excluded absent a showing of a compelling interest to which any exclusion is narrowly tailored.”).

139. *Id.* at 730 (“Even conceding that the forum here has been dedicated to some First Amendment uses, and thus is not a purely non-public forum, under *Perry*, regulation of the reserved non-public uses would still require application of the reasonableness test.”).

140. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1972).

the property, its analysis was narrower than the analysis of the cases outlined in *Cornelius*. According to the majority, “given the lateness with which the modern air terminal has made its appearance, [the terminal] hardly qualifies for the description of having ‘immemorially . . . [sic] time out of mind’ been held in the public trust and used for purposes of expressive activity,” and “the purpose of the terminals [is] to be the facilitation of passenger air travel, not the promotion of expression.”¹⁴¹

This, of course, ignores the obvious fact that although the primary purpose of sidewalks and roads is the facilitation of public mobility, they are nonetheless compatible with expressive activity. In considering the government’s intent, the Court focused narrowly on the primary function and purpose of the forum. This is a more narrow approach than that taken in *Widmar*, *Madison Joint School District*, and *Conrad*, which focused on how a university campus, open school board meetings, and a municipal auditorium operated analogously to public forums. If the Court had expanded its focus to include the nature and characteristics of the forum, the Court might have addressed how terminals serve a role similar to roads and sidewalks in facilitating speech and found that the terminals are compatible with expressive activity. In limiting its inquiry to the primary function and purpose of forum, the Court deviated from its previous inquiries into government intent and understated the forum’s compatibility with expressive activity.

Additionally, the Court has found that forums are nonpublic by examining the government’s discretion in defining the boundaries of speech activities in a forum. This issue came before the court in *Arkansas Educational Television Commission v. Forbes*.¹⁴² In *Forbes*, the Court considered the forum category of a televised political debate amongst candidates for Arkansas’ Third Congressional District.¹⁴³ The debate was broadcasted by a state agency that owned and operated noncommercial television stations.¹⁴⁴ The Court upheld the agency’s exclusion of a candidate with limited public support from participation in the debate.¹⁴⁵ In reaching its decision, the Court found that the debate constituted a nonpublic forum because the agency retained the ability, as part of its

141. *Id.* at 680, 682.

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

143. *Id.* at 669–70.

144. *Id.*

145. *Id.* at 669.

journalistic discretion, to limit the scope of the forum.¹⁴⁶ The Court highlighted the agency's discretion to make "candidate-by-candidate determinations as to which of the eligible candidates would participate in the debate."¹⁴⁷ In addition to the policy and practices of the government, the nature of the forum, and the forum's compatibility with expressive activity, the Court also examined the government's discretion in limiting access as a means to find nonpublic forums.

Therefore, the Court has utilized a variety of different standards to determine government intent. If the inquiry into government intent continues to be emphasized but not standardized by the Supreme Court, the distinction between public and nonpublic forums will remain obscure. Justice Blackmun's dissent in *Cornelius* summarizes the confusing, perhaps incoherent, boundaries that separate limited and nonpublic forums when government intent is the inquiry's main focus:

The Court makes it *virtually* impossible to prove that a forum restricted to a particular class of speakers is a limited public forum. If . . . the exclusion of some speakers is evidence that the Government did not intend to create such a forum . . . no speaker challenging denial of access will ever be able to prove that the forum is a limited public forum. The very fact that the Government denied access to the speaker indicates that the Government did not intend to provide an open forum for expressive activity, and under the Court's analysis that fact alone would demonstrate that the forum is not a limited public forum.¹⁴⁸

The focus on intent also dramatically limits the possibility that the Court will value citizens' First Amendment interests in government property.¹⁴⁹ If intent continues to distinguish public and nonpublic forums, however, the test should be standardized and reflective of the balancing of the citizen's interest in engaging in expressive activity and the government's interest in managing its property. The test would at least provide clarity and predictability for those seeking to speak on government property that has not been explicitly designated as open for expressive activity but shares public forum characteristics. Unless the inquiry into government intent is

146. *Id.* at 680–83.

147. *Id.* at 680.

148. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 825 (1985) (Blackmun, J., dissenting).

149. *See Post*, *supra* note 54, at 1783–84 (stating that the focus on government intent creates a "vicious circularity" that undervalues private speech).

standardized into such a test, the nonpublic forum category will continue to lack clarity and undervalue citizens’ interests in expression.

C. GOVERNMENT SPEECH

Government-sponsored social media may also fall within the category of “government speech.” Government speech is a relatively new Supreme Court development that has significantly impacted the public forum doctrine.¹⁵⁰ The doctrine developed from the principle that the government must speak in order to govern effectively, and therefore has the sole right to control the message it conveys.¹⁵¹ The government speech doctrine effectuates this principle by insulating the government’s speech from the constitutional standards that govern public forum analysis—namely permitting the government to regulate speech on the basis of viewpoint.¹⁵² Therefore, when the government speaks to the public, it does not need to include opposing viewpoints that may alter, distort, or negate the message that the government seeks to convey.¹⁵³ This, in turn, can benefit the public. Government expression allows citizens to identify and assess their government’s policies and priorities, which improves the public’s ability to make informed and reasoned choices in its political participation.¹⁵⁴

The Supreme Court first articulated the principles of the government speech doctrine in *Rust v. Sullivan*,¹⁵⁵ which essentially laid the foundation for the government speech doctrine.¹⁵⁶ The Court in *Rust* upheld a federal

150. See Randall P. Bezanson, *The Manner of Government Speech*, 87 DENV. U. L. REV. 809, 811 (2010) (arguing that “government speech” analysis has granted the government a forum in which its speech is insulated from First Amendment scrutiny).

151. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995) (“When the government disburses public funds to private entities to convey a governmental message, it may take legitimate and appropriate steps to ensure that its message is neither garbled nor distorted by the grantee.”). See also Post, *supra* note 54, at 1825 (arguing that viewpoint discrimination is a “regular and unavoidable aspect” to the managerial speech that government organizations must engage in to govern).

152. Olree, *supra* note 63, at 379.

153. *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (“Petitioners’ assertions ultimately boil down to the position that if the Government chooses to subsidize one protected right, it must subsidize analogous counterpart rights. But the Court has soundly rejected that proposition.”).

154. See Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 909 (2010); *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (“When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.”).

155. *Rust*, 500 U.S. 173 (1991).

156. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (“The Court in *Rust* did not place explicit reliance on the rationale that the counseling activities of the doctors under Title X amounted to

regulation that forbade family planning clinics that received federal funding from counseling women on abortion and from encouraging, promoting, or advocating abortion as a method of family planning.¹⁵⁷ This regulation was initially challenged as impermissible viewpoint-discrimination, as it prevented “all discussion about abortion as a lawful option” while compelling counselors to provide information about continuing a pregnancy to term.¹⁵⁸ Although the majority opinion did not use the term “government speech,” it held that the government was not suppressing a viewpoint but merely funding a program to advance a constitutionally permissible goal—providing a form of family planning counseling that favored childbirth to abortion.¹⁵⁹ The Court reasoned that “[t]o hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals . . . would render numerous Government programs constitutionally suspect.”¹⁶⁰

Rust thus stands for the principle that when the government seeks to convey a constitutionally permissible message, it may restrict its constituent speakers from expressing alternative viewpoints. Where a restriction on the private speech of counselors would risk violating the First Amendment’s prohibition on viewpoint discrimination, the regulation only applied to counselors who received funds from the federal government. These counselors spoke for the government by proxy, and therefore were constrained to advance the government’s message to the public. This reasoning was apparent in *Board of Regents of the University of Wisconsin System v. Southworth*, which addressed whether students could succeed on a First Amendment challenge to a compulsory student activity fee.¹⁶¹ The challengers objected to speech of student organizations funded by the fee.¹⁶² In reaching its conclusion, the Court distinguished government speech from a government program that fostered private speech:

Our decision ought not to be taken to imply that in other instances the University, its agents or employees, or—of particular importance—its

governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding.”).

157. *Rust*, 500 U.S. at 178–81.

158. *Id.* at 192.

159. *Id.* at 192–94.

160. *Id.* at 194.

161. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 230 (2000).

162. *Id.*

faculty, are subject to the First Amendment analysis which controls in this case. Where the University speaks, either in its own name through its regents or officers, or in myriad other ways through its diverse faculties, the analysis likely would be altogether different.¹⁶³

This distinction also guided the reasoning in *Legal Services Corp. v. Velazquez*.¹⁶⁴ *Velazquez* invalidated a federal funding condition that barred the Legal Services Corporation from providing grants to any legal organization that represented indigent clients in “an effort to amend or otherwise challenge” existing welfare law.¹⁶⁵ As in *Southworth*, the Court found that the federal funding was “designed to facilitate private speech, not to promote a governmental message.”¹⁶⁶ The funding was intended to promote the private speech of the indigent clients, not the message of the government. Therefore, the government could not defend the funding condition under the deferential standards of the government speech doctrine.

These early government speech cases outlined the theory justifying the doctrine’s deferential standard: the government has a managerial interest in controlling its own speech.¹⁶⁷ Therefore, the government speech doctrine, which permits the government to exclude alternative viewpoints, ensures that the government can clearly convey its message. The government speech doctrine applies when the government itself speaks to the public, for instance, to “promote its own policies or to advance a particular idea,” and when the government “use[s] private speakers to transmit specific information pertaining to its own program.”¹⁶⁸ However, the government speech doctrine does not apply when the government “does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.”¹⁶⁹

In *Johanns v. Livestock Marketing Association*,¹⁷⁰ however, the Court began to deviate from the principles underlying the government speech doctrine, and in effect, broadened its scope. *Johanns* involved a federal statute that required beef producers to pay an assessment fee to finance an

163. *Id.* at 234–35 (citing *Rust*, 500 U.S. 173).

164. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001).

165. *Id.* at 537–38, 549.

166. *Id.* at 542.

167. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

168. *Velazquez*, 531 U.S. at 541.

169. *Rosenberger*, 515 U.S. at 834.

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

advertising campaign for beef products.¹⁷¹ The campaign was promulgated by a nongovernmental board of beef producers and overseen by the Secretary of Agriculture.¹⁷² Several beef producers alleged that the compulsory assessment fee was in violation of the First Amendment because the campaign impeded their efforts to promote their own specialty beef products.¹⁷³ Additionally, most advertisements used in the campaign included the transcript “Funded by America’s Beef Producers,” which prompted a debate over whether the audience would attribute the advertisements to the government.¹⁷⁴ The majority held that the government could compel private speakers to finance a government message with which the private speakers disagreed and that the government did not need to overtly make it clear that it was the speaker in order to claim the government speech defense.¹⁷⁵ Instead, to establish the defense, the government only needed to establish the overall message, approve it, and control the message that was disseminated.¹⁷⁶ Notably, the *Velazquez* Court reasoned that the government speech doctrine exists to ensure that the government can speak clearly and without distortion.¹⁷⁷ However, by not requiring the government to make explicit its role as the source of its messages, as was the case in *Johanns*, the Court allows distortion of government speech by risking that the public will misattribute the government’s speech to private speakers.¹⁷⁸

Johanns signaled a significant expansion of the government speech doctrine. The Court’s approach following *Johanns* relied less on the principles it articulated in *Rust* and applied in *Southworth* and *Velazquez*, and instead allowed government speech to encompass the government’s expressive activity even when the government did not necessarily intend to disseminate a message. This is problematic because when the government does not convey its own message to the public, its interest in controlling its

171. *Id.* at 553.

172. *Id.* at 553–55.

173. *Id.* at 556.

174. *Id.* at 555.

175. *Id.* at 562–65. *But cf. id.* at 578–79 (Souter, J., dissenting) (“Unless the putative government speech appears to be coming from the government, its governmental origin cannot possibly justify the burden on the First Amendment interests of the dissenters targeted to pay for it.”).

176. *Id.* at 562–64.

177. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001)(quoting *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995)).

178. *Johanns*, 544 U.S. at 578 (Souter, J., dissenting).

speech is limited.¹⁷⁹ Without a strong vested interest in conveying a particular message clearly to the public, there is less justification in having a deferential government speech standard. *Johanns* also crystallized a binary approach to the doctrine—speech either belongs to the public or to the government, but never to both—which has particular importance to government-sponsored social media.¹⁸⁰

Unmoored from the theoretical foundation of the government speech doctrine after *Johanns*, the Supreme Court began to display great deference to the government in cases involving competing claims of government and private speech. In *Garcetti v. Ceballos*, the Court considered a First Amendment challenge brought by a deputy district attorney who alleged retaliatory employment treatment from his superiors because he circulated a memorandum that raised concerns about a police search warrant obtained with an affidavit containing several serious misrepresentations.¹⁸¹ The Court rejected the attorney’s First Amendment challenge, holding that when “employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”¹⁸² The Court reasoned that this does not limit the First Amendment rights of the citizen, as “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”¹⁸³

The Court therefore treated speech made by a public official pursuant to his official duties as speech the government has purchased and may control free from First Amendment scrutiny.¹⁸⁴ This seemingly ignores the theoretical foundation of government speech. Rather than insulate government speech from First Amendment scrutiny in order to allow the

179. *Velazquez*, 531 U.S. at 542 (“Neither the latitude for government speech nor its rationale applies to subsidies for private speech in every instance, however. As we have pointed out, “[i]t does not follow . . . that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.”).

180. See, e.g., Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U.L. REV. 605, 662–67 (2008).

181. *Garcetti v. Ceballos*, 547 U.S. 410, 413–15 (2006).

182. *Id.* at 421.

183. *Id.* at 421–22.

184. Norton & Citron, *supra* note 154, at 911.

government to convey a clear, uncompromised message, the Court employed the doctrine to allow the government to control speech made by an employee to his superiors, completely internal to the government's affairs. Where its analysis of government speech had previously focused on the government's transmission of a message to the public,¹⁸⁵ the Court in *Garcetti* applied principles of the government speech doctrine to a memorandum that was not intended to leave the government's control.

Pleasant Grove City v. Summum involved competing claims of government and private speech, and the Court unanimously characterized the speech as belonging to the government.¹⁸⁶ The City of Pleasant Grove, Utah, maintained a park that featured fifteen permanent displays, eleven of which were donated by private parties, including a "Ten Commandments monument" donated by the Fraternal Order of Eagles.¹⁸⁷ Summum, a religious organization, sought to donate a stone monument of similar size to the Ten Commandments monument, featuring Summum's own religious doctrine.¹⁸⁸ The City denied their request, explaining that it sought to limit monuments in the Park to those that "either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with long-standing ties to the Pleasant Grove community."¹⁸⁹ The City later incorporated these limitations into a municipal resolution.¹⁹⁰ The Court rejected Summum's First Amendment challenge, easily finding that permanent monuments erected on public property represent government speech.¹⁹¹ After a brief discussion of the public forum and government speech doctrine, the majority opinion focused on the criteria that it had set forth in *Johanns*,¹⁹² finding that Pleasant Grove "effectively controlled" and exercised "final approval authority" over the monuments displayed.¹⁹³

185. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 561 (2005) (holding that the message in the beef promotions was "set out" by the federal government); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (discussing the government speech that "transmit[s] specific information" and "convey[s] a governmental message"); *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000) (discussing government speech that promotes the government's policies and ideas, and the citizens that hear that speech).

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

187. *Id.* at 465.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 470–72.

192. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562–64 (2005).

193. *Summum*, 555 U.S. at 473.

Although the outcome in *Summum* seems eminently reasonable, the reasoning underlying the decision requires further inquiry. It is impractical to hold that governments must accept and display all monuments donated. As the Court notes in the decision, such a holding would force New York, upon receiving the Statue of Liberty as a gift from France in 1884, to either decline or accept the gift on the condition that it provide space to display every other monument donated.¹⁹⁴ However, the Court does not sufficiently explain why government speech is the right doctrine to effectuate this pragmatic approach to public displays. Moreover, the Court does not provide a compelling reason as to why donated monuments are categorized as “government speech,” rather than as private speech in a limited public forum. Instead, the Court focuses on a history of “selective receptivity” in the government’s approach to donated monuments,¹⁹⁵ but this could also be understood as the government designation of a limited public forum.¹⁹⁶ The Court also suggests that forum analysis is not applicable because permanent monuments take up significant space, so the government must be able to limit the number of monuments to conserve space in its parks.¹⁹⁷ However, the Court’s explanation seems to squarely categorize donated monuments as limited public forums—limited public forums exist because it is not in the state’s interest to include all private speakers.¹⁹⁸ The Court stated in *Summum* that regulations in limited public forums only need to be “reasonable and viewpoint neutral.”¹⁹⁹ Under this relatively deferential standard, the Court could have still upheld the city’s rejection of *Summum*’s monument as a reasonable, viewpoint neutral attempt to enforce the contours of its limited public forum. This process might be a preferable alternative to potential sub rosa viewpoint discrimination under government speech analysis.

194. *Id.* at 479. See also Mary Jean Dolan, *Why Monuments Are Government Speech: The Hard Case of Pleasant Grove City v. Summum*, 58 CATH. U. L. REV. 7, 10–11 (2008) (discussing why the court’s ruling in *Summum* is necessary to prevent hate speech from accompanying displays at public parks).

195. *Summum*, 555 U.S. at 471.

196. In fact, the majority briefly discussed limited public forums, and then declined to clarify why limited public forum analysis was inapplicable. See *id.* at 470; *Strict Scrutiny*, *supra* note 54, at 2152–53 (suggesting that the Court in *Summum* may have applied a “broad understanding of what constitutes government speech” to avoid applying the ambiguous standards that govern designated and limited public forums).

197. *Summum*, 555 U.S. at 478–79.

198. See *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.”).

199. *Summum*, 555 U.S. at 470.

Such an approach to public monument cases would also provide a viable alternative to the rigid binary approach intrinsic to government speech analysis. When analyzing government speech, the Court often categorizes expressive activity that contains both private and governmental speech into purely governmental speech.²⁰⁰ The problem of applying the government speech doctrine to speech that involves both private and governmental aspects is that it allows the government to co-opt the speech of private speakers that it agrees with and to discriminate against alternative viewpoints without the public's knowledge.²⁰¹ In dictum, Justice Alito acknowledged that government speech might not apply "if a town created a monument on which all of its residents (or all those meeting some other criterion) could place the name of a person to be honored or some other private message."²⁰² In other words, the government cannot defend its viewpoint discrimination as government speech when it creates a designated public forum generally open to the public. Again, this ignores the possibility that the park was a limited public forum. The Court has not adequately articulated the limits of the government speech doctrine in a case that involves both private and governmental speech.

As the Court's treatment of the government speech doctrine has continued to deviate from its theoretical justifications, the contours of the doctrine have become more difficult to determine. The Court has employed the government speech doctrine to address expressive activity that failed to disclose the government's role as the source of the speech, that was only circulated within the government, and that had elements of both private and governmental speech. The problematic expansion of the doctrine makes it increasingly difficult to determine when, where, and how the government "speaks," and therefore, when the doctrine applies. Therefore, it is especially difficult to predict whether courts will apply this doctrine to government-sponsored social media, a forum that embodies competing claims of government and citizen speech.

200. Corbin, *supra* note 180, at 608. Additionally, commentators observed that in the four instances in which the Supreme Court was presented a case concerning speech with both elements of private and governmental speech, the Court classified the speech as purely governmental. Norton & Citron, *supra* note 154, at 916 n.87.

201. Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2D 413, 426-27 (2009) (arguing that the Court in *Sumnum* did not explain how to keep the government from using the government speech doctrine as "a subterfuge for favoring certain private speakers over others based on viewpoint").

202. *Sumnum*, 555 U.S. at 480.

D. THE PROBLEM OF APPLYING THE PUBLIC FORUM AND GOVERNMENT SPEECH DOCTRINES TO GOVERNMENT-SPONSORED SOCIAL MEDIA

Attorneys who counsel governments on the extent to which the First Amendment permits the government to regulate its social media sites will undoubtedly have to contend with the doctrinal issues of public forums and government speech. The public forum doctrine consists of four categories of forums with ill-defined boundaries. While the traditional public forum is clearly limited to parks, roads, and sidewalks,²⁰³ the other categories are less clearly demarcated. Although the designated public forum is theoretically clear, the relationship between designated public forums, limited public forums, and nonpublic forums is not. Designated public forums and limited public forums are apparently distinguished by a measure of access-control: designated public forums must be opened generally to the public, while limited public forums may be restricted to certain speakers or subject matters.²⁰⁴ However, designated public forums are something of a nonentity, as the Court has seldom recognized the existence of the designated public forum and has often conflated designated and limited public forums.²⁰⁵ If limited public forums are a distinct category, it is unclear what amounts of access- or content-limitations are necessary to change the forum from a designated to a limited public forum. Additionally, the Court distinguishes between public and nonpublic forums by examining whether the government intended to open a forum to public expression.²⁰⁶ The inquiry into government intent is not standardized. The Court has variably examined the policy and practice of the government regarding the forum,²⁰⁷ the nature and characteristics of the forum,²⁰⁸ and the compatibility of the forum with expressive activity,²⁰⁹ but has not provided a uniform test or inquiry. This imparts little guidance for those who wish to speak on government property that has not been explicitly

203. See, e.g., *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) (“The Court has rejected the view that traditional public forum status extends beyond its historic confines.”).

204. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 n.7 (1983).

205. See, e.g., *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1972) (suggesting that designated public forums need not be open generally, but are still governed by strict scrutiny).

206. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

207. *United States v. Kokinda*, 497 U.S. 720, 731–32 (1990).

208. *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981).

209. *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302–03 (1974) (holding that the commercial nature of advertisements featured on a city's rapid transit vehicles is incompatible with the forum open for general expressive activity).

designated as open for expressive activity but shares features of a traditional public forum.

Further, the public forum doctrine coexists uncomfortably with the government speech doctrine. Recent developments to the government speech doctrine have deviated from the original purpose and justification of the doctrine. Additionally, as *Summum* illustrates, the Court's increasing reliance on the doctrine has allowed it to label speech that contains elements of both private and governmental expression as government speech. In doing so, the Court has expanded the government speech doctrine and failed to properly articulate why the public forum analysis should not apply to expression that contains competing claims of private and government speech. Therefore, the Court's expanding conception of government speech makes it increasingly difficult to predict when, where, and how the government "speaks," and therefore, when the doctrine applies.

This raises the question, what forum category would apply to government-sponsored social media? Consider a public official's Facebook page, which transmits updates to any Facebook user that subscribes to it. Any Facebook user can comment on that page, either by responding to a particular update posted by the public official or by posting a new comment to the page. Such a social media presence might be considered a designated public forum; it is ostensibly a forum opened by the government and designated for the purpose of the exchange of ideas and other general expressive activity, open to the public at large.²¹⁰ However, the page may also be considered a limited public forum, particularly if the government only posts information relating to relevant government business and deletes all posts and responses by other members that do not relate to the official's government business. Support for treating a government official's social media page as a limited public forum is bolstered if the government actor takes advantage of Facebook's access controls to limit those who can view, comment, and respond to posts on its page to only those who subscribe to its page.²¹¹ In this case, the government official would be explicitly limiting access to its forum to certain speakers—Facebook users who subscribe to its page—and limiting communication in its forum to certain

210. Or at least open to the segment of the public that uses Facebook, which is available to anyone with internet access.

211. *Explore Popular Features: Subscribe*, *supra* note 27.

topics—speech pertaining to its government business.²¹² However, the page could also be considered a nonpublic forum. Courts could conclude the government official regulates the forum pervasively by maintaining a policy to limit the discussion therein and retaining the ability to block any user subscribing to the official’s page by the official’s own discretion.²¹³

Further, the government speech doctrine may also affect the Facebook page’s forum analysis. Although a Facebook page may appear to be a forum opened to promote discourse between government officials and citizens, what the government official actually posts on the page might be considered government speech. After all, a government official would presumably establish a Facebook page to open a channel of communication to disseminate the official’s policies, priorities, and ideas. But, how would conceptualizing the official’s Facebook page as government speech affect speech by other, non-governmental Facebook users on that page? As the Court’s expanding conception of government speech has had an effect on its treatment of speech that involves claims of both private and governmental speech, this is exceedingly difficult to predict. As the Court previously treated a privately donated monument in a park that a municipal government maintained as subject to the governmental speech standards,²¹⁴ it seems as though the Court could hypothetically treat all speech on the government’s Facebook page as government speech. However, this would seemingly undervalue a citizen’s interest in expression without the justification of limited space and resources as seen in *Summum*.²¹⁵ Perhaps the information posted by the government official may be considered government speech, while information posted to the page by other Facebook users may be considered private speech, subject to the constitutional standards that govern public or nonpublic forums. But would the comments citizens make in response to the government’s posts be treated differently, as these comments might be associated more closely with the government official? The Court’s current approach to this question of association, as articulated in *Johanns*, does not satisfactorily address the issue. The focus on the government’s need to establish and control the message disseminated does not seem to reflect the dynamic speech fostered by social media,²¹⁶ where the message the government chooses and

212. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 n.7 (1983).

213. *Explore Popular Features: Subscribe*, *supra* note 27.

214. *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009).

215. *Id.* at 478–79.

216. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562–64 (2005).

disseminates may be changed through subsequent comments by other users. When the government creates and controls the initial message, the message may change as citizens comment on, enlarge, distort, or alter the topic initially discussed.

Determining the relevant doctrine for a government official's Twitter profile might be less complicated than a Facebook page, as Twitter allows fewer access controls than Facebook,²¹⁷ but pertinent issues remain. While the government's dissemination of a tweet might be considered government speech, the responses to the tweet from other Twitter users can take a variety of forms. One could respond directly to the tweet, in which case the response is displayed on the responder's Twitter page, accompanied by the government official's Twitter username.²¹⁸ Twitter also displays the government official's original statement on the responder's page, beneath the response.²¹⁹ The responder could also link directly to the governmental official's tweet and add the user's own commentary on the official's tweet.²²⁰ Finally, space permitting, a Twitter user could also retweet a government official's tweet and add the private citizen user's own comments.²²¹

In each of these scenarios, the response to the government official's tweet contains elements of both a private citizen's speech and the government's speech. The government official's initial tweet is strongly characteristic of government speech, as the official disseminates the government's message. However, by allowing users to comment on, critique, or promote the government's message, one could also conceptualize tweets, and responses to tweets, as a designated public forum, where the government's tweets become a communicative forum generally open to all Twitter users. However, the government official's ability to block users, which prevents responses from blocked users from appearing on the official's Twitter page, may evidence sufficient discretionary control over the forum to be considered a nonpublic forum under the *Forbes* analysis. These conceptions are hard to reconcile, especially as different standards of review apply to each. Further, what if the official "protects" its tweets, preventing any Twitter user who has not

217. Unlike Facebook, you cannot block what other users post on Twitter. *How to Block Users on Twitter*, *supra* note 42.

218. *What are @Replies and Mentions?*, *supra* note 36.

219. *Id.*

220. *How to Link Directly to an Individual tweet*, *supra* note 38.

221. *Retweeting Another Person's Tweet*, *supra* note 39.

been approved by the government from viewing or responding to the official’s tweets? As in an access-protected Facebook page, this may evidence the intent to create a limited public forum, or a nonpublic forum where the government official has significant discretion to approve who may respond to its tweets. It also may be government speech, where the government, by regulating who may respond to tweets, establishes and sufficiently controls its message under the *Johanns* standard.²²²

These uncertainties of characterizing the government’s social media presence can have the effect of chilling speech for government-sponsored social media. Regardless of how the government establishes its social media presence, government officials will want to regulate their Facebook or Twitter pages for decorum, order, truthfulness, and relevance. However, if it is unclear whether their social media presence creates a designated, limited, or nonpublic forum, or is an expression of their own speech, government officials have no way of ascertaining to which standard of review their regulation within that forum will be subject. As a result of this ambiguity, government officials may elect to make their social media presence non-interactive or forgo a social media presence altogether. Thus, the ambiguity involved in the public forum and government speech doctrines might stymie a valuable channel of communication between government and citizen. Assessing speech made in government-sponsored social media sites through the lens of public forums and government speech is doctrinally problematic, even before considering the incompatibilities of social media speech with the speech that the Court has adjudicated through these doctrines.

IV. DOCTRINAL ASSUMPTIONS TO PUBLIC FORUM AND GOVERNMENT SPEECH DOCTRINES AND THEIR INCOMPATIBILITY WITH SOCIAL MEDIA

As argued above, the Court’s current analysis of public forums and government speech reveals several shortcomings. Aside from their inherent imprecisions, the focus of these doctrines on unilateral speech and the insistence that mixed speech be categorized as either entirely private or governmental betrays an incompatibility with the speech typical to social media. This adds an additional layer of ambiguity for those attempting to predict how speech in a government-sponsored social media site would be

222. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562–64 (2005).

analyzed under the current approach, which further deters the government from establishing a robust, interactive social media presence.

A. THE DOCTRINES' FOCUS ON UNILATERAL SPEECH

The public forum and government speech doctrines suggest a model of speech that involves a transmission of expression that flows from a speaker to an audience. This model of communication belies the reality that speech, especially the speech facilitated by social media, is often interactive and involves a reciprocal relationship between speaker and audience.²²³

To date, the Court's approach to speech in its First Amendment jurisprudence has implicitly embraced a conception of speech as "unilateral."²²⁴ This model of communication reflects speech that involves an "information source" that chooses and produces a message, a transmission of the message into signals and through a channel, and an audience that receives and decodes the signals into the message the speaker initially sent.²²⁵ The primary concern of this model is the transmission of messages and the predictability of that message being understood as the source intended.²²⁶ Therefore, speech is understood as the speaker's unilateral dissemination of a message to an audience, which is a passive decoder of that message.²²⁷

The Court's implicit conception of speech in its First Amendment jurisprudence has always been consistent with this model.²²⁸ Further, the

223. Lidsky, *supra* note 65, at 2017.

224. This Note uses the term "unilateral" speech to describe communication that flows from a source through a medium to a recipient. Elsewhere, this speech has been characterized as "mathematical" or "linear." This conception of speech was first put forth by engineers Claude Shannon and Warren Weaver, and their insights remain prominent in contemporary communication theory. *See* JOHN FISKE, INTRODUCTION TO COMMUNICATION STUDIES 6 (2d ed. 1990). This Note uses the term "unilateral" to emphasize that the conception of speech implicitly adopted by the Supreme Court reflects the belief that messages and meanings are made through the process of a speaker (or several speakers acting collectively) and sending a message of the speaker's choice to an audience. This Note will later argue that a unilateral transmission of a message is not reflective of the communication occurring in social media, where meaning is created by a reciprocal, participatory relationship between speaker and audience.

225. CLAUDE SHANNON & WARREN WEAVER, THE MATHEMATICAL THEORY OF COMMUNICATION 33–35 (1949).

226. *Id.*; Fiske, *supra* note 224, at 7, 9–10.

227. *See* C. DAVID MORTENSEN, COMMUNICATION: THE STUDY OF HUMAN INTERACTION 13–16 (1972).

228. Bezanson, *supra* note 150, at 814–15.

Court’s “fighting words” doctrine, announced in *Chaplinsky v. New Hampshire*,²²⁹ is indicative of this approach. The *Chaplinsky* Court found that “fighting words”—words that “by their very utterance inflict injury or tend to incite an immediate breach of the peace”—are outside the protections of the First Amendment.²³⁰ The conception of “fighting words” indicates that certain messages transmitted by a speaker will reasonably and predictably be interpreted by the audience as a provocation to violence. In that case, the Court found that exclamations that a city marshal was a “damned racketeer” and a “damned Fascist” constituted fighting words, as they were “epithets likely to provoke the average person to retaliation.”²³¹ The assumption underlying this doctrine is that this provocation will be formulated and sent by the speaker, transmitted as “fighting words,” and understood as a provocation by the audience. This is consistent with the unilateral speech doctrine, as it assigns a primary role in the transmission of a message—in this case the transmission of “fighting words”—from an active speaker to a passive audience. The primary role assigned to the speaker’s choice of message and the predictability that the message will be interpreted as incitement to violence reflect the concerns of the unilateral model of speech. The audience’s role in interpreting the message, and its contributions to the creation of meaning, is likewise de-emphasized in this doctrine, which stresses the innate capacity of fighting words to provoke, treats an objective audience’s response as an ancillary concern, and eschews analysis of the audience’s actual response to the words. Therefore, this doctrine implicitly recognizes the unilateral speech model.

Moreover, the early public forum and government speech cases seemed to suggest the unilateral conception of speech. The “quintessential” public forums—parks, streets, and sidewalks—provided a place for citizens to communicate their thoughts to audiences present.²³² Traditional public forums historically hosted unilateral speech, places that facilitated the transmission of ideas from speakers to audiences.²³³ The constitutional

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

230. *Id.* at 571–72.

231. *Id.* at 570, 574.

232. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

233. *Hague*, 307 U.S. at 515 (“[S]treets and parks . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”).

protections governing these forums were intended to protect the opportunities for speakers to transmit their ideas to an audience.²³⁴

Similarly, this model fit naturally with the ways that the government spoke during the period in which the government speech doctrine developed.²³⁵ Early examples of government speech comported with the unilateral model of speech, such as counsel provided to citizens about family planning through clinics that received federal funds,²³⁶ or advertisements that promoted beef products to audiences through television and print media.²³⁷ These messages were specifically selected by the government to be transmitted to the public. In fact, affording the government sufficient control to promulgate its message without compromise or distortion—or, in the parlance of unilateral model of communication, “noise”²³⁸—was the very reason for the doctrine.²³⁹ Implicit in the interaction between the unilateral model and the two doctrines is the notion that the speaker has the dominant First Amendment interest, while the “passive” audience has only a limited, secondary interest.²⁴⁰

As *Garcetti* displayed, however, the theory justifying the government speech doctrine became strained when the form of communication failed to neatly match the unilateral model of communication. *Garcetti* involved the speech of a government employee, transmitted through a memorandum to his superiors.²⁴¹ The Court held that because the employee was a public official performing duties related to his position, the speech actually belonged to the government.²⁴² Therefore, the speech in *Garcetti* did not quite follow the unilateral model—the memorandum was not transmitted from a speaker to an audience but instead remained in the control of the

234. See *Hudgens v. NLRB*, 424 U.S. 507, 515 (1978) (quoting *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315, 330–31 (1968)) (“[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.”).

235. Bezanson, *supra* note 150, at 814–15 (“[The linear model of communication] closely fits the ideal of purposeful, cognitive, and rational discourse in which the government should be engaged when informing, explaining, and persuading in the open marketplace of political debate and discussion.”).

236. *Rust v. Sullivan*, 500 U.S. 173, 178–81 (1991).

237. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553–55 (2005).

238. SHANNON & WEAVER, *supra* note 225, at 8.

239. *Rust*, 500 U.S. at 194.

240. Lidsky, *supra* note 65, at 2015.

241. *Garcetti v. Ceballos*, 547 U.S. 410, 413–14 (2006).

242. *Id.* at 421–22.

“speaker.” Viewing this scenario through the lens of unilateral communication, the source was still selecting the message that it would convey, and no transmission of the message had actually been made. Although the government did not promulgate a message, the Court nonetheless held that the government speech doctrine applied. Thus, in analyzing the employee’s First Amendment rights under the government speech doctrine, the Court applied a doctrine modeled on unilateral communication to assess a situation that involved a different type of communication.

It follows that doctrines based on the unilateral model of communication seem ill-equipped to analyze social media, which facilitates a dynamic, participatory, and interactive communicative process. The message conveyed by the speaker through a social media channel is not merely decoded by the audience in the manner the unilateral model of communication conceptualizes.²⁴³ Social media allows the audience to effectively alter or change perception of the speaker’s message. For example, a government official may outline a new policy through an update on its Facebook page. If a vocal critic of the government official “likes” the update or provides a positive comment, the critic is essentially endorsing the policy. This, in turn, may affect how other members of the government official’s message view that message. For instance, some may see the endorsement by a vocal critic as proof of the policy’s legitimacy, in which case they will view the policy more favorably than they may have initially. Likewise, the publication of a similar message by a government official on Twitter allows the audience to respond to or retweet the message.

One might view a vocal critic’s positive response to the government official’s tweet as affecting the legitimacy of the initial message. Further, retweeting provides audiences with the ability to alter the context of that message. For instance, the Twitter profile of an organization dedicated to promoting immigrant rights might retweet a message, originally tweeted by a political candidate who publicly advocates a strict enforcement of the removal and deportation of immigrants, which praises the United States’ foundation as a nation of immigrants. What was intended by the candidate as a sincere message might be perceived by those who view the organization’s retweet as that candidate’s gaffe or hypocrisy, even though the content of the message remains the same.

243. SHANNON & WEAVER, *supra* note 225, at 33–35.

Therefore, in social media, meaning is made not solely through the speaker, but through the interaction of the speaker and the participating, active audience. As one commentator noted, employing a unilateral model of communication risks oversimplification.²⁴⁴ Specifically, attempting to analyze social media communication under a model that assumes speech is static and unilateral compounds the difficulties in predicting how speech in a government-sponsored social media would be adjudicated, which may further discourage government actors from establishing a social media presence.

B. SPEECH MUST BE ENTIRELY PRIVATE OR ENTIRELY GOVERNMENTAL

Corresponding to the use of the unilateral model of speech is the Court's unwillingness to classify expressive activity that involves competing claims of both private and governmental speech as "mixed speech." Instead, this type of speech is classified as either government or private speech—more likely as the former.²⁴⁵ The Court's reluctance to treat expressive activity not involving either purely private or government speech as mixed speech reflects the incompatibility of the public forum and government speech doctrines with the speech facilitated by government-sponsored social media. This reluctance contributes to the imprecision of the doctrines, making it particularly difficult for the lower courts to classify speech when speech involves both private and governmental speech.

The ongoing split amongst the federal circuit courts regarding how to classify specialty license plates exemplifies the problem of mixed speech in the current approach to public forums and government speech. These cases all involve the state-approved creation of specialty license plates, which are generally purchased to display one's affiliation with an organization and to promote awareness of the organization's goals or policies. However, federal circuit courts are split on both their classification of the speech and the test used to classify the speech. This lack of uniformity illustrates the diminished guidance current public forum and government speech doctrines provide in determining when governments speak. Until a test is devised by the Supreme Court, lower courts' treatment of government-sponsored social media will not be sufficiently predictable to assuage governments concerned with their ability to regulate their social media sites for order and decorum.

244. See Lidsky, *supra* note 65, at 2017.

245. See Norton & Citron, *supra* note 154, at 916 n.87.

The first ruling a federal circuit court issued on specialty license plates was the Fourth Circuit’s decision in *Sons of Confederate Veterans v. Commissioner of the Virginia Department of Motor Vehicles*.²⁴⁶ The case involved a Virginia program that allowed the state to issue license plates inscribed with an organization’s logo and motto to members and supporters of that organization.²⁴⁷ The state was involved in establishing the license plates in at least two distinct ways. First, issuing a specialty-license plate required the General Assembly of Virginia to introduce and enact a bill that authorized the plate. Second, the design of the plate was subject to the discretion and approval of the Commissioner of the Department of Motor Vehicles.²⁴⁸ The Sons of Confederate Veterans brought a First Amendment challenge against the statute that authorized the issuance of their specialty license plate, alleging that the statute’s refusal to incorporate their logo, which included the image of a Confederate flag, amounted to viewpoint-discrimination.²⁴⁹ Therefore, at issue in *Sons of Confederate Veterans* was whether the license plates were private speech subject to a prohibition of viewpoint-discrimination or government speech not restricted by a prohibition on viewpoint-discrimination.²⁵⁰

The Fourth Circuit noted that “[n]o clear standard has yet been enunciated in our circuit or by the Supreme Court for determining when the government is ‘speaking’” and that “there exists some controversy over the scope of the government speech doctrine,” before holding unanimously that the license plates were private speech.²⁵¹ To reach this decision, the Fourth Circuit announced a four-prong test, adapted from the Eighth and Ninth Circuits, examining (1) the central purpose of the program; (2) the degree of editorial control exercised over the content by either the private speaker or the government; (3) the identity of the literal speaker; and (4) the party that bears the ultimate responsibility for the content of the speech.²⁵² The Fourth Circuit found that all factors suggested the license plates were private rather than governmental speech, and concluded that the government had engaged in impermissible viewpoint-discrimination by restricting the organization from incorporating its logo onto its specialty

246. *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm’r of Va. Dep’t of Motor Vehicles*, 288 F.3d 610 (4th Cir. 2002).

247. *Id.* at 614.

248. *Id.*

249. *Id.* at 613–14.

250. *Id.* at 616.

251. *Id.* at 618, 621.

252. *Id.* at 618.

plates.²⁵³ Because the denial was viewpoint-discrimination, the Fourth Circuit did not need to determine the inquiry of which category of public forums was involved.²⁵⁴

The Ninth Circuit also formally adopted this test in the context of specialty license plates in *Arizona Life Coalition Inc. v. Stanton*.²⁵⁵ The Ninth Circuit used the four-factor test stated in *Sons of Confederate Veterans* to determine that Arizona's denial of the organization's application for a specialty license plate, inscribed with the motto "Choose Life," constituted impermissible viewpoint-discrimination of private speech.²⁵⁶ The Ninth Circuit also held that Arizona had created a limited public forum with the specialty license plate program.²⁵⁷

Notably, other circuits have modified or redefined the four-pronged test used by the Fourth and Ninth Circuits. In *Choose Life Illinois, Inc. v. White*, which also addressed a denial of an organization's application for a specialty license plate containing the motto "Choose Life," the Seventh Circuit intimated that it was adopting the four-pronged test, but instead focused its inquiry on the more general assessment of whether a reasonable observer would believe the government or a private entity was speaking.²⁵⁸ The court purported to look to the four factors articulated by the Fourth and Ninth Circuits to guide this inquiry, but in its brief analysis of the issue, reasoned that "specialty-plate messages are most closely associated with drivers and the sponsoring organizations, and the driver is the ultimate communicator of the message."²⁵⁹ Thus, although the messages were private speech, the Seventh Circuit also held that the rejection of the specialty plate at issue was a viewpoint-neutral and reasonable restriction within a nonpublic forum.²⁶⁰

The Eighth Circuit also adopted the Seventh Circuit's approach, in *Roach v. Stouffer*.²⁶¹ The *Stouffer* Court held that the analysis focused on "one key question: whether, under all the circumstances, a reasonable and fully informed observer would consider the speaker to be the government

253. *Id.* at 621, 626–27.

254. *Id.* at 625.

255. *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 965 (9th Cir. 2008).

256. *Id.* at 965–68, 973.

257. *Id.* at 971.

258. *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863 (7th Cir. 2008).

259. *Id.* at 863–64.

260. *Id.* at 865–67.

261. *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009).

or a private party.”²⁶² However, unlike the Seventh Circuit, the Eighth Circuit explicitly examined the four factors from the Fourth and Ninth Circuit tests to conclude that the specialty license plates were private speech.²⁶³ The Eighth Circuit also focused on two additional factors that suggested the speech was private: the state had approved over 200 specialty license plates, and the state did not compel anyone to purchase a specialty license plate.²⁶⁴ The Eighth Circuit found that a reasonable observer could not credibly believe that the state was communicating all 200 messages and would understand that those displaying a specialty message did so by their own initiative.²⁶⁵

In *ACLU of Tennessee v. Bredesen*, another lawsuit involving a Tennessee statute that authorized a specialty plate with the motto “Chose Life,” the Sixth Circuit came to a different conclusion.²⁶⁶ The Sixth Circuit held that *Johanns* established a standard for determining when governments speak: “[W]hen the government determines an overarching message and retains power to approve every word disseminated at its behest, the message must be attributed to the government for First Amendment purposes.”²⁶⁷ Because the Tennessee legislature chose the license plate’s overarching message and approved the words on the plates, the Sixth Circuit held the license plate program constituted government speech.²⁶⁸ Notably, the Sixth Circuit’s reasoning directly contradicted the Eighth Circuit’s reasoning in *Roach*. The Court found that it was plausible that Tennessee would use its specialty license plate program to adopt the messages advocated by each group to which it issued a license plate and that because “every reasonable person knows” that specialty license plates are issued by the government, it “a fortiori conveys a government message.”²⁶⁹

Finally, some judges have advocated that their circuit should adopt a “mixed” or “hybrid” speech approach that recognizes that specialty license plates involve both government and private speech. When the Fourth Circuit denied a request for rehearing en banc for the *Sons of Confederate*

262. *Id.*

263. *Id.* at 867–68.

264. *Id.* at 868.

265. *Id.*

266. *ACLU of Tenn. v. Bredesen*, 441 F.3d 370 (6th Cir. 2006).

267. *Id.* at 375.

268. *Id.* at 375–76.

269. *Id.* at 376–77.

Veterans case, Judge Michael Luttig wrote separately from the majority to suggest while the Supreme Court and other circuit courts had oversimplified speech by categorizing speech as either private or governmental, this was merely a result of “doctrinal underdevelopment.”²⁷⁰ Judge Luttig went on to assert, “[A]lthough the doctrine may not have previously recognized such, speech in fact can be, at once, that of a private individual and the government . . . I believe that, with time, intellectual candor actually will force the Court instead to fully recognize this fact doctrinally.”²⁷¹ Two years later, in another case involving specialty plates in the Fourth Circuit, Judge Luttig again asserted that the Court should recognize a mixed speech category.²⁷² This time, he was able to convince two other Fourth Circuit judges.²⁷³ The decision, announced by Judge Blane Michael, recognized the existence of a mixed speech category and held that specialty license plates involve both private and government speech.²⁷⁴ The decision held that the state created a limited forum for the abortion debate and engaged in impermissible viewpoint discrimination by acting as a “privileged speaker” when it promoted an anti-abortion message while partially obscuring its role in creating the message.²⁷⁵

Thus, several circuit courts have disagreed on whether specialty license plate programs constitute government, private, or mixed speech; what test to apply to make this determination; and, if the speech is private, which type of public forum the state created. This disagreement is indicative of the doctrinal incompatibility regarding speech that contains both elements of private and governmental expression. Unlike the problems regarding the incompatibility of the unilateral model of communication with social media, the various circuit court decisions concerning mixed speech offer some guidance to those seeking to establish government-sponsored social media sites. However, there are several distinctions between specialty license plates and social media that might give those establishing a government-sponsored social media presence pause.

270. *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm’r of Va. Dep’t of Motor Vehicles*, 305 F.3d 241, 244–45 (4th Cir. 2002)(denying rehearing en banc).

271. *Id.* at 245.

272. *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 800–01 (4th Cir. 2004) (3-0 decision) (Luttig, J., concurring).

273. *Id.* at 794.

274. *Id.*

275. *Id.* at 798.

The circuit courts’ varying approaches to speech involving competing claims of private and government speech developed around a medium defined by static communication. For example, in the specialty license plates context, the government and citizens collaborate to create a message embodied in a license plate.²⁷⁶ The contours of what the license plates “say” is established before the plates are issued. However, government-sponsored social media facilitates dynamic speech, where the government and citizens engage in an ongoing discussion that is subject to change in scope, topic, and participants. As discussed above, the “message” promulgated through social media is decidedly non-static.

It is unsurprising, then, that forcing a court to choose between private or government speech in the context of an ongoing dialogue with distinct elements of both private and government speech will likely misattribute at least a portion of such conversation.²⁷⁷ Consequently, that court may apply a constitutional standard that emphasizes one’s First Amendment interests at the expense of another’s.²⁷⁸ As this type of speech increases with the growing use of social media technology, the Court may feel pressure to rethink its binary approach to categorizing speech.²⁷⁹ Until it does, the belief that speech cannot emanate from both citizens and the government remains a layer of ambiguity that impedes one’s ability to predict how the Courts will treat speech in the context of government-sponsored media.

V. THE MISSED OPPORTUNITIES AND POTENTIAL CONSEQUENCES OF THE CURRENT APPROACH

The current approach to the public forum and government speech doctrines presents numerous uncertainties to the individuals counseling governments seeking to establish interactive and participatory social media sites. Absent clarification of these doctrines and their application to social media, governments concerned about their authority to constitutionally regulate their social media sites may maintain a limited social media presence or may abandon their plans altogether.

276. See *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm’r of Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 614 (4th Cir. 2002) (“[S]pecial plate designs ordinarily are settled upon by a cooperative process between the Commissioner . . . and the group authorized to receive a special plate.”).

277. Lidsky, *supra* note 65, at 2012.

278. *Id.*

279. See Norton & Citron, *supra* note 154, at 919.

This outcome is particularly troublesome, both for the missed opportunities to actualize First Amendment values through social media and for the potential consequences that governments' absence in social media can portend. By establishing an interactive and participatory social media presence, the government can simultaneously advance its own goals of educating the public about its priorities, values, and commitments, while also allowing citizens to promote their First Amendment interest in participating and contributing to the political process. Further, robust government-sponsored social media can effectuate the Petition Clause—which states that citizens have a constitutional right to petition the government for redress of their grievances²⁸⁰—by providing citizens direct access to the government. Citizens' direct access to the government can increase their faith in the political process. Additionally, since many individuals have become accustomed to using social media to assemble groups to promote various political causes, the absence of government-sponsored social media may augur unfavorable results for the government. The government's failure to establish a channel for robust interaction between government and citizen through social media may compel citizens with legitimate and unanswered grievances to protest the government in physical spaces, thus likely disrupting physical property.

A. MISSED OPPORTUNITIES

Many commentators have argued that the Internet can potentially provide a new public forum that enables First Amendment values, even during the nascent stages of the medium.²⁸¹ Professor Noah D. Zatz argues that the Internet should be structured to provide citizens with access to audiences, just as sidewalks, streets, and parks function as traditional public forums.²⁸² Structuring the Internet this way, Zatz argues, would help citizens further realize their First Amendment interests “by allowing ‘uninhibited, robust, and wide-open’ debate.”²⁸³ He further explains that “a healthy democracy respectful of individual rights requires protection for

280. U.S. CONST. amend. I.

281. See, e.g., Noah D. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 153 (1998); Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619, 1626–29 (1995).

282. Zatz, *supra* note 281, at 151–52.

283. *Id.* at 169.

forms of social participation in the economic and cultural life of the nation”—a function that could be fulfilled by the fledging Internet.²⁸⁴

The Internet has developed considerably since Zatz’s 1998 article, and social media has arguably provided the infrastructure to promote these First Amendment values. While social media has created new means for citizens to engage in expressive activity that allows for meaningful participation Zatz advocated, its potential has not yet been fully realized. A more expansive vision of government-sponsored social media would enhance the democratic process by sustaining an ongoing and engaged discourse between citizens and their elected officials. This could potentially benefit both the government and its citizens.

Social media’s facilitation of dialogue between the government and citizens can promote government interests. For instance, the government’s use of social media could provide a “one-way mirror” that allows the government to “educat[e] the public about the government’s values and commitments” and “express to the public that civic participation and collaboration is its highest priority.”²⁸⁵ This, in turn, promotes healthy democratic participation by enhancing the citizen’s ability to engage in informed discourse.²⁸⁶ In addition to establishing an efficient channel to educate the public and promote democratic participation, a robust government social media presence can improve government decisions by allowing the quick and efficient crowd sourcing of communities of “experts” on the Internet for novel solutions to government business. Likewise, government actors can appear more responsive to their constituents by using social media to respond directly to the needs and interests of citizens.²⁸⁷

The establishment of an interactive and participatory social media presence could also promote individuals’ First Amendment interests. Professor Jack M. Balkin argues that in the age of interactive technology, freedom of speech should be interpreted to promote a democratic culture

284. *Id.*

285. Danielle Keats Citron, *Fulfilling Government 2.0’s Promise with Robust Privacy Protections*, 78 GEO. WASH. L. REV. 822, 842–43 (2010).

286. *Id.* at 842. *See also* Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000) (“When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.”).

287. *See* Lidsky, *supra* note 65, at 2005–07.

that values the opportunity for individuals to participate in and contribute to the spreading of ideas and the creation of meaning in society.²⁸⁸ Therefore, modern freedom of speech must reflect the capacity for digital technology to improve individual liberty and self-autonomous expression.²⁸⁹ The Internet enables this benefit to individuals, but its potential has not yet been fully realized.²⁹⁰ Professors Jerry Berman and Daniel J. Weitzner also recognize the ability for an “open, decentralized network” to promote individuals’ First Amendment interests.²⁹¹ Whereas the mass media of the late twentieth-century offered few speech opportunities to most people,²⁹² an open and interactive network can advance the First Amendment principles of a diverse marketplace of ideas.²⁹³

Finally, a significant government social media presence could also effectuate the principles underlying the Petition Clause, which provides that citizens have a constitutional right to petition the government for redress of their grievances.²⁹⁴ Professor Emily Calhoun argued that the Petition Clause embodies two concerns: securing accountability through direct citizen access to and control of government, and protecting minority interests that may be overlooked in the political process.²⁹⁵ Therefore, the Petition Clause reflects the view that the government should create “conditions that maximize opportunities for a common voice to emerge from and to transcend adversary, free speech advocacy.”²⁹⁶ A direct line from the citizen to the government could actualize this goal by allowing the government to be accountable and responsive to citizens’ needs that are usually obscured in the political process. Professor James E. Pfander argues that even if this potential is not fully realized—if governments use their social media presence only to appear responsive—citizens are not

288. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 1 (2004).

289. *Id.* at 1–2.

290. *Id.* at 3.

291. Berman & Weitzner, *supra* note 281, at 1626.

292. For an extensive discussion of this twentieth-century phenomenon and an argument for a First Amendment right to access speech opportunities, see Jerome A. Barron, *Access to the Press: A New First Amendment Right*, 80 HARV. L. REV. 1614 (1967).

293. Berman & Weitzner, *supra* note 281, at 1626–29.

294. U.S. CONST. amend. I.

295. Emily Calhoun, *Voice in Government: The People*, 8 NOTRE DAME J.L. ETHICS & PUB. POL’Y 427, 428–29 (1994).

296. *Id.* at 429.

precluded from using the government-sponsored social media sites to demand actual responses, as the Clause entitles them to do.²⁹⁷

Thus, a public forum and government speech analysis that deters governments from establishing an interactive and participatory social media presence represents a missed opportunity. These sites could be used to advance the government’s ability to speak to its citizens about its priorities, to promote citizens’ First Amendment interests in participating and contributing to the political and cultural landscape, and to effectuate the Petition Clause.

B. POTENTIAL CONSEQUENCES

In addition to missed opportunities, a limited government social media presence has potential repercussions. These repercussions derive from the fact that individuals who take advantage of the communicative possibilities afforded by social media have become accustomed to the efficiency with which they can interact, organize, and reach out to others to address what they perceive as problems. Consequently, when these citizens mobilize and attempt to elicit a response from the government, their familiarity with social media creates an expectation that social media will provide channels to petition the government. Absent these channels, and when burdened with legitimate and unanswered grievances, citizens will feel thwarted and may protest the government in physical spaces, such as capital buildings, city halls, public parks, and other areas associated with government behavior.

Many scholars have hypothesized that a significant government presence in social media can improve citizens’ trust in government; citizens will view their government as responsive, accessible, transparent, responsible, effective, and participatory.²⁹⁸ Evidence confirms this argument. For instance, an academic analysis of public surveys has shown that the government’s expansive and interactive web presence can have a positive effect on citizens’ attitudes about both federal and local government, including increasing citizen trust in the political process and

297. See James E. Pfander, *Sovereign Immunity and the Right to Petition: Toward a First Amendment Right to Pursue Judicial Claims Against the Government*, 91 NW. U. L. REV. 899, 905–06 (1997).

298. See, e.g., Caroline J. Tolbert & Karen Mossberger, *The Effects of E-Government on Trust and Confidence in Government*, 66 PUB. ADMIN. REV. 354, 355–58 (2006) (summarizing various scholars’ views on how government’s use of interactive technologies can improve citizen trust in government).

the government's responsiveness.²⁹⁹ However, there is also a growing body of evidence that supports the obverse of this claim—that the absence of a robust government online presence contravenes citizens' trust in the government.

This insight may not be particularly surprising considering U.S. citizens' current attitudes about social media. Balkin argues that digital technologies instill and make salient new ideals of freedom of expression to individuals, which include not merely the freedom to speak, but the freedom to interact and exchange ideas.³⁰⁰ Included in this freedom is the ability to dissent, a powerful form of expression that must exist "in an interactive and interdependent relationship to the object of its criticism."³⁰¹ Some empirical evidence also suggests that the ability to dissent to and advocate for political change now comprises citizens' understanding of the freedom of expression. The Pew Internet and American Life Project performed a survey that found that fifty-nine percent of Americans and sixty-four percent of Internet users in America believe that the Internet has had a major impact on the ability of groups to impact society at large.³⁰² Further, out of the people who participated in a social media group that assembled to accomplish a goal or voice an opinion, sixty-nine percent believed that groups that are organized through social media could have a significant or moderate impact on making their community a better place to live.³⁰³ These figures suggest that many people who use social media to interact, assemble, and participate in the political process believe that social media can drive social and political change.

Accompanying these beliefs is the expectation that government will also use social media to address and respond to their demands for change. Another Pew survey found that many supporters of President Barack Obama's 2008 presidential campaign, a campaign that relied on social media to reach supporters, expected the Obama administration to not only continue to communicate through social media, but also to communicate

299. *Id.* at 355–56.

300. Balkin, *supra* note 288, at 45.

301. *Id.* at 47–48.

302. LEE RAINIE, KRISTEN PURCELL & AARON SMITH, THE SOCIAL SIDE OF THE INTERNET, PEW INTERNET & AM. LIFE PROJECT (Jan. 18, 2011), available at <http://pewinternet.org/Reports/2011/The-Social-Side-of-the-Internet.aspx>.

303. *Id.*

through social media more frequently than mail, telephone, or other traditional forms of government outreach.³⁰⁴

With an increased demand for government use of social media, the absence of government presence could understandably frustrate politically-minded social media users. Some social scientists have tested this hypothesis in response to the civil unrest that accompanied the shutdown of Internet services during the protests in Egypt³⁰⁵ and the threat of a shutdown in London.³⁰⁶ Using an agent-based social simulation, Professors Antonio A. Casilli and Paola Tubaro found that net censorship aggravated violence during a sustained period of civil unrest.³⁰⁷ This is evidence that government hostility to or repression of the use of social media can bring negative consequences for the government when citizens are already sufficiently upset enough to engage in mass unrest. Further, Professors Michael Garlick and Maria Chli used a similar agent-based social simulation to show that a free and open society will find limitations to their communicative opportunities objectionable, which may lead to increasing violence levels.³⁰⁸ These studies support the inference that government hostility or repression of social media, or even disengagement with social media, can frustrate, thwart, and even anger citizens when citizens harbor legitimate and unanswered grievances. The expectation that social media can promote social and political change is confounded if governments fail to establish interactive social media sites. This frustration may lead to citizens moving their protests to the physical world, petitioning areas traditionally associated with governments such as capital buildings, city halls, and public parks.

304. AARON SMITH, PEW INTERNET PROJECT DATA MEMO: POST ELECTION VOTER ENGAGEMENT, PEW INTERNET & AM. LIFE PROJECT (Dec. 30, 2008), available at <http://www.pewinternet.org/Reports/2008/PostElection-Voter-Engagement.aspx>.

305. Spencer Ackerman, *Egypt's Internet Shutdown Can't Stop Mass Protests*, WIRED (Jan. 28, 2011, 8:48 AM), <http://www.wired.com/dangerroom/2011/01/egypts-internet-shutdown-cant-stop-mass-protests/>.

306. Christopher Williams, *Cameron Told Not to Shut Down Internet*, THE TELEGRAPH (Nov. 1, 2011, 12:32 PM), <http://www.telegraph.co.uk/technology/news/8862335/Cameron-told-not-to-shut-down-internet.html>.

307. Antonio A. Casilli & Paola Tubaro, *Why Net Censorship in Times of Political Unrest Results in More Violent Uprisings: A Social Simulation Experiment on the UK Riots* 4–5 (Telecom Paris Tech, Working Paper, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1909467.

308. Michael Garlick & Maria Chli, *The Effect of Social Influence and Curfews on Civil Violence (Extended Abstract)*, 2 PROCEEDINGS OF THE 8TH INTERNATIONAL CONFERENCE ON AUTONOMOUS AGENTS AND MULTIAGENT SYSTEMS 1335, 1336 (2009).

Thus, by discouraging government actors from creating interactive and participatory social media sites, the public forum and government speech doctrines fail to promote the interests of both the individual and the government. Further, the doctrines may limit individuals' ability to reach out to the government for redress of legitimate grievances while creating potential discord and disorder for the state. The constitutional standards that govern the government's establishment of its social media presence should not discourage the government's attempt to do so. The missed opportunities and potential consequences resulting from the doctrines' lack of clarity are significant enough to urge a new judicial approach that will better address the new speech interests afforded by social media and attempt to offer governments guidance and security in establishing channels of communication in social media.

VI. A NEW JUDICIAL APPROACH TO SPEECH MADE THROUGH SOCIAL MEDIA

Since the extant judicial approach to the public forum and government speech doctrines is both imprecise and incompatible for speech through social media, the Supreme Court should refine these doctrines, at least in their application to social media. A refinement of the public forum and government speech doctrines should clarify under what standards government regulation of speech in government-sponsored social media sites would be evaluated. The approach should also address the incompatibilities between the current doctrines and the speech facilitated by social media. This Part postulates a new approach to evaluating government regulation of speech in government-sponsored social media. This approach is derived from the present doctrines, but it is modified to address the nature of speech in social media. This approach also presents a new requirement that standardizes the distinction between designated, limited, and nonpublic forums that should clarify how governments can establish each forum in social media and provide citizens with notice of the government's ability to regulate each.

A. IS THE FORUM CHARACTERIZED BY GOVERNMENTAL, PRIVATE, OR MIXED SPEECH?

The first question the new approach asks is whether the forum involved is characterized as governmental, private, or mixed speech. This question will determine whether the government speech or the public forum doctrine is applicable. In order to present a settled, clear standard to address this question, courts should adopt a three-factor test derived from

the previous four-factor test advanced by the Fourth and Ninth Circuits.³⁰⁹ This three-factor test is adjusted to better address the nature of speech in social media. Additionally, this test recognizes the existence of mixed speech in order to address the fact that speech in social media will often consist of both governmental and private elements.³¹⁰ Thus, to determine whether the government’s social media site is characteristic of governmental, private, or mixed speech, courts should weigh the following factors: (1) the central purpose of the social media site; (2) the government’s degree of control over its social media presence; and (3) the identity of the person to whom a reasonable or average social media user would attribute the speech involved.³¹¹

1. The Central Purpose of the Social Media Site

The first factor courts should consider is the central purpose of the social media site. This requires that courts view the government’s social media site as a whole³¹² and determine whether the purpose of that site was the promotion of government speech, private speech, or both. For example, the central purpose of a government-sponsored social media site that only disseminated the government’s messages and severely limited the opportunities for non-government members to comment would likely be to promote the government’s message. Therefore, the site’s purpose would be strongly suggestive of government speech. On the other hand, the central purpose of a government-sponsored social media site that only solicited opinions or ideas from private citizens, and provided virtually no original

309. *Ariz. Life Coal. Inc. v. Stanton*, 515 F.3d 956, 965, 973 (9th Cir. 2008); *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm’r of Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002).

310. Recognition of mixed speech is not novel. Judges in the Fourth Circuit have recognized mixed speech. *Sons of Confederate Veterans, Inc. ex rel. Griffin v. Comm’r of Va. Dep’t of Motor Vehicles*, 305 F.3d 241, 244–45 (4th Cir. 2002) (denying rehearing en banc); *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 794 (4th Cir. 2004).

311. Note that the third factor in the test originally adopted by the Fourth and Ninth Circuits—the identity of the “literal speaker”—is omitted here. This is because for the purposes of adjudicating government-sponsored social media, the identity of the speaker whose speech is being regulated would always be the private speaker, while the identity of the speaker who established the forum will always be the government. Instead, this test adopts a determination of the speaker’s identity based on the opinion of a “reasonable or average social media user.” This factor is derived from Seventh and Eighth Circuit’s treatment of this question in *Roach v. Stouffer* and *Chose Life Illinois, Inc. v. White*. See *Roach v. Stouffer*, 560 F.3d 860, 867 (8th Cir. 2009); *Choose Life Ill., Inc. v. White*, 547 F.3d 853, 863–64 (7th Cir. 2008). Additionally, the final factor in the Fourth and Ninth Circuits’ test has been omitted, as this test is inappropriate for government-sponsored social media. See *supra* Part IV.B; *Olee, supra* note 63, at 396–97.

312. See *Stanton*, 515 F.3d at 965; *Sons of Confederate Veterans*, 288 F.3d at 619.

messages from the government, such as a government official's Twitter profile that was established only to ask other users for their opinions, would likely be suggestive of the promotion of private speech. The central purpose of a government-sponsored social media site that permitted citizens to interact with the government's messages, such as a government official's Facebook page that allowed commenting from other users, would likely facilitate the interaction of government and private speech. This would suggest that the speech involved was mixed—both private and governmental.

2. The Government's Degree of Control over Its Social Media Presence

The second factor addresses how the government maintained its social media presence. Courts should examine the degree of access controls that the government used to limit its social media presence and whether the government maintained a policy to regulate, block, or remove certain forms of speech. If the government established a social media presence defined by severe access controls, this factor would suggest that the presence is governmental speech. For example, a government Twitter profile that only publicized its tweets to the followers approved, and maintained a strict policy of regulating the speech that occurred within its social media site, such as blocking any user who made an offensive, slanderous, or irrelevant comment from commenting thereafter, would favor governmental speech. However, anything less than strict regulation would likely suggest either mixed or private speech. As the government cannot constitutionally exclude a speaker who falls within the class of speakers to whom the forum is made available without satisfying strict scrutiny,³¹³ the First Amendment mandates that it relax its editorial control and establish a social media site that allows private comments. Thus, the government must accept that it cannot control the words expressed by private citizens in this forum. By opening up a social media site to private comments, even when it limits the scope of the site to certain topics, the government must relinquish a strong degree of editorial control in order to obtain the benefits of citizen interaction.

3. The Identity of the Person to Whom a Reasonable Social Media User Would Attribute the Speech

The third factor asks to whom a reasonable or average social media user would attribute the comment that the government regulated. This

313. See *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998).

factor differs from the factor used in the test originally adopted by the Fourth and Ninth Circuits because it does not address the “literal” speaker whose speech is being regulated,³¹⁴ which for the purposes of a government-sponsored social media would always be the private speaker. Instead, this factor allows the courts to make a more flexible determination. The courts can consider whether the comment contained mostly government speech (as might be the case for a retweet), mostly private speech (as might be the case for a citizen’s response to a government official’s tweet), or a combination of the two (as might be the case for a retweet with additional commentary provided by the citizen). The courts could also consider contextual clues that may suggest the origins of the speech. For example, a court could consider whether a citizen’s retweet of a government’s message provides a sufficiently new or unique context, such that a reasonable social media user would not consider the retweet the government’s speech, but instead the citizen’s, or both the government’s and the citizen’s. This approach gives courts a framework to address whose speech they are adjudicating, while allowing sufficient latitude to address how messages and meanings can change in the dynamic, interactive environment of social media.

4. The Court’s Balancing of the Three Factors

After weighing the three factors, courts then must make a determination: whether the speech is governmental, private, or both. Several characteristics could point toward government speech, such as (1) if the government established the social media site only to promulgate its message; (2) if it maintained strict access control over who could participate in the site and regulated what speech occurred therein; (3) if a reasonable social media user would believe that the speech at issue was merely ancillary to the government’s message. If some or all of these characteristics apply, then the government speech doctrine would likely apply. The government can then continue to regulate its social media site extensively in order to ensure that its message is not distorted. However, if the factors point toward private speech, such as (1) the government established the social media site to open a channel of communication with citizens; (2) it maintained a forum without significant access controls; and (3) that a reasonable social media user would believe the speech at issue was a citizen’s, then the public forum doctrine applies. Finally, if the factors generally point toward mixed speech, or if the three factors do not

314. See *Sons of Confederate Veterans*, 288 F.3d at 621.

consistently point to either private or government speech, then the speech is considered mixed, and the public forum doctrine applies.

It should be noted that analyses under these factors makes it particularly difficult for the government to establish a social media presence in which the government speech doctrine applies. Thus, the approach deliberately attempts to ensure that government actors who wish to maximize control over their social media presence have the option and guidelines necessary to do so, but creating such presence requires a conscious decision to only promote the government's messages. This preserves the use of the government speech doctrine for its original purpose—that the government can only engage in viewpoint-discrimination in order to control the message on its behalf. Likewise, limiting the application of the government speech doctrine in the context of government-social media ensures that citizens' First Amendment interests will not be diminished by the government's considerable ability to regulate speech unless the government makes it clear that it is not opening a forum for private speech.

B. WHAT FORUM DID THE GOVERNMENT CREATE?

If the above three factors suggest that speech is private or mixed, the public forum analysis should apply. This raises the next issue in the court's inquiry—what forum applies to government-sponsored social media? Because the Supreme Court has held that the government's explicit intent to open a forum for expressive activity distinguishes public and nonpublic forums,³¹⁵ the question of intent should also guide courts' analysis in the realm of government-sponsored social media. However, although the Court considers a variety of factors to determine government intent,³¹⁶ this Section proposes that the inquiry with respect to government-sponsored social media should be standardized. This will provide clear guidelines to government actors and clear expectations to citizens about what speech will be permitted within these sites. The inquiry into government intent should

315. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

316. See, e.g., *Forbes*, 523 U.S. at 680 (examining a state agency's discretion to make "candidate-by-candidate determinations as to which of the eligible candidates would participate in the debate"); *United States v. Kokinda*, 497 U.S. 720, 731–32 (1990) (examining the Postal Service's history of regulating of solicitation on postal premises as evidence of its policy and practice of regulating expressive activity on its premises); *Cornelius*, 473 U.S. at 804–05 (examining the practice and policy of the federal government in managing its workplace and the nature of the federal offices and the charity drive); *Widmar v. Vincent*, 454 U.S. 263, 267–68 (1981) (examining whether a university campus "possesse[d] many of the characteristics of a public forum").

focus on whether the government clearly expressed the intent to limit the parameters of speech within its social media site. This requires affixing a statement to its social media site that provides notice to citizens participating that the government retains the ability to regulate the speech in the forum. In the absence of such a statement, courts should presume that the government intended to create a designated public forum for general expressive activity by deliberately establishing a social media presence with minimal access controls. A requirement that the government affix a statement outlining its ability to regulate its site for decorum and relevance adequately balances First Amendment interests of citizens and the government. Citizens are put on notice that they can contribute to the forum if their speech complies with the government’s reasonable limitations. The government is afforded clear guidelines to establish a social media site and to regulate the speech on those sites without running afoul of the First Amendment. Finally, this Section proposes that, for the purposes of analyzing speech in government-sponsored social media, the categories of limited public forums and nonpublic forums should be conflated.

1. Creation of a Designated Public Forum

If a government actor creates a social media presence by setting up a Facebook page or Twitter profile, and enacts only minimal access controls such that the forum does not constitute government speech, courts should presume that the actor intended to create a designated public forum, open generally to all speakers and all topics. As the Supreme Court has noted, “The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”³¹⁷ By taking the steps to establish a social media presence, and not limiting access to the forum to constrain the site’s use to government speech, courts can reasonably assume that the government intentionally opened a nontraditional forum for public discourse. The open nature of social media platforms further supports the conclusion that the government opened a designated public forum for general expressive activity when it established a social media presence without posting a notice that it retained the right to limit citizens’ speech.³¹⁸

317. *Cornelius*, 473 U.S. at 802.

318. *See, e.g., About*, FACEBOOK, <http://www.facebook.com/facebook?sk=info> (last visited Oct. 18, 2012) (“Facebook’s mission is to give people the power to share and make the world more open and connected.”).

Therefore, when the government attempts to regulate speech in a designated public forum, it is “bound by the same standards as apply in a traditional public forum.”³¹⁹ Regulation in this forum should be assessed under strict scrutiny, requiring that the government show that its limitation was necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.³²⁰ This standard may allow the government to regulate the forum for abusive or offensive speech, but attempts to limit speech for relevance would likely fail. Additionally, restrictions must be reasonable and viewpoint-neutral.³²¹

2. Creating a Limited Public or Nonpublic Forum

In order to establish its social media site as a limited or nonpublic forum, the government must post notice on its site that it reserves the right to remove some measure of citizens’ speech. As the same standard of scrutiny applies to both forums,³²² and both limited and nonpublic forums involve forums dedicated to a limited amount of speech,³²³ courts should conflate these categories for the purpose of analyzing government-sponsored social media. Courts therefore should analyze regulations made in this category of forum by examining the limitations on the forum that the government outlines in the notice it posts. If the limitations and discretion to enforce those limitations are “reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view,”³²⁴ and the regulation was consistent with the limitations, then the regulation will stand. Reasonable regulations, therefore, will be those that attempt to “preserve[] the purposes of that limited forum,” not those that block the “speech otherwise within the forum’s limitations.”³²⁵

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

320. *See id.* at 45.

321. *Id.*

322. *See United States v. Kokinda*, 497 U.S. 720, 730 (1990) (“Even conceding that the forum here has been dedicated to some First Amendment uses, and thus is not a purely nonpublic forum, under *Perry*, regulation of the reserved nonpublic uses would still require application of the reasonableness test.”).

323. *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995) (discussing limited public forums and finding that “[t]he 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”). *Cf. Perry*, 460 U.S. at 46 (discussing nonpublic forums and finding that the government may restrict access and speech in order to “reserve the forum for its intended purposes”).

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

325. *Rosenberger*, 515 U.S. at 829–30.

For example, if a member of the U.S. Congress posted a notice on her social media site stating that she reserves the right to limit abusive or offensive speech and that she intends to limit speech to topics relevant to Congress, she would likely create a limited public forum. Such a post would probably evince the Congressman’s intent to open a forum to a wide range of constituents and topics, but still limit discussion to topics relevant to the Congressman’s government business. The limitations the Congressman enacted would likely be considered a reasonable and viewpoint neutral attempt to limit the scope of the social media site, provided the Congressman was not using the limitations as a means to suppress speech by those who oppose the Congressman’s views. Likewise, if a government official on a municipality planning board establishes a social media presence in order to solicit “experts” within the official’s community for advice or contributions on a new municipal project, that official could likely reasonably limit discussion in the forum to only those whose expertise would be valuable to the project.

Thus, government actors who wish to limit the scope of their social media presence and regulate speech in order to maintain those limitations are given the opportunity to do so, provided that they explicitly define and adhere to those limitations. This requirement serves a dual purpose: it provides an easily implemented requirement that should assuage the concerns of risk-adverse government actors regarding their ability to regulate speech in social media, and it gives citizens who seek to participate in government-sponsored social media sites notice that their comments must conform to these limitations. Therefore, this requirement promotes both the managerial interests of the government, by providing clear guidelines for establishing a social media presence that can be regulated, and the First Amendment interests of citizens, by encouraging the creation of robust social media sites that allow citizens access to their governments.

VII. CONCLUSION

This Note attempted to address the reluctance of certain governments to establish a dynamic, participatory, and interactive social media presence through the perspective of a government actor or a lawyer attempting to establish such a presence while maintaining the ability to regulate the speech therein for decorum, order, and relevance. By examining the history of the public forum and government speech doctrines, this Note argued that there exists sufficient uncertainty in the doctrines to dissuade risk-adverse government actors from establishing interactive social media presences.

Outside the uncertainties and imprecision inherent in the doctrines, the public forum and government speech doctrines were established with the presumptions that citizens' and government speech conform to the unilateral model of communication, and consequently, that speech can only belong to either the citizen or the government. These presumptions are at odds with the speech facilitated by social media. This makes the current iterations of public forum and government speech doctrines ill-suited to serve the First Amendment interests of both the government and individuals in the modern Web 2.0 era. The government's reluctance to establish a robust social media presence fails to actualize certain important values that First Amendment law should promote. Further, under the current doctrine, disenfranchised citizens with legitimate and unanswered grievances, unable to petition the government online, might occasionally reach a point of frustration that will compel them to protest the government in physical spaces.

Therefore, by discouraging the government from establishing a robust presence in social media, the extant public forum analysis actually fails to promote the interests of both the individual and the state that it was designed to advance. Current public forum analysis limits the individual's capacity to be heard and discuss his or her views amongst others, while creating discord and disorder in the state. Therefore, this Note proposed a new approach to these doctrines with respect to government-sponsored social media.

This approach first asks whether the site involved was characteristic of governmental, private, or mixed speech by balancing a three-factor test modeled on the circuit courts' approach to this question. Next, if the site involved is characteristic of private or mixed speech, the new approach asks what forum the government intended to create by asking whether the government posted notice on its social media that it reserved the right to regulate speech. In the absence of such notice, it is presumed that the government intended to create a designated public forum. If the government posted such notice, and the limitations are reasonable and viewpoint-neutral, the approach concludes that the government created a limited or nonpublic forum, and any regulations consistent with the posted limitations will stand. This approach promotes the managerial interest of the government, by providing clear guidelines that encourage the creation of robust social media sites that can be regulated for decorum and order, and the First Amendment interests of citizens, who can access their governments through social media.