Note

Tweeting the Police: Balancing Free Speech and Decency on Government-Sponsored Social Media Pages

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Imagine that you are the police chief for a small suburban city in the Midwest. The department is considering launching an official Facebook page, where members of the community can receive updates on police business and new city ordinances, read about crime alerts or big cases solved, and interact with the department through public comments or private messages.

You and your officers believe the page could improve community relations by connecting with citizens and showcasing the beneficial work the department does, especially during a time of widespread outrage at police departments.[1] But you are

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1. Fatal police shootings of unarmed civilians—most frequently, young black men—have sparked widespread riots, the Black Lives Matter social justice movement, and ongoing national debate over police use of deadly force. As of this writing, 776 people have been shot and killed by police in the United States in 2016. *See Fatal Force*, WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings-2016 (last visited Oct. 23, 2016). In 2015, police fatally shot nearly 1000 civilians. *See 991 People Shot Dead by Police in 2015*, WASH. POST, https://www.washingtonpost.com/graphics/national/police-shootings (last visited Oct. 23, 2016). One in ten of these civilians were unarmed. *See id.* Although black men make up only six percent of the U.S. population, they accounted for forty percent of the unarmed men fatally shot by police in 2015. *See id.*; Kimberly Kindy, Marc Fisher, Julie Tate, & Jennifer Jenkins, *A Year of Reckoning: Police Fatally Shoot Nearly 1,000*, WASH. POST (Dec. 26, 2015), http://www.washingtonpost.com/sf/investigative/wp/2015/12/26/2015/12/26/a-year-of-reckoning-police-fatally-shoot-nearly-1000; *see also* Paul D. Shinkman, *Outrage at Police Could Bring Return of Dark Ages of Crime*, U.S. NEWS & WORLD REP. (Dec. 23, 2014), http://www.usnews.com/

concerned about maintaining editorial control of your page, especially after a glance at the Minneapolis Police Department's Facebook page reveals numerous hostile, racist, spammy,[2] and off-topic comments. A crime update about a robbery, posted by the Minneapolis Police Department, quickly devolved in the comments section to name-calling and a heated argument about guns, race, and the Black Lives Matter movement: "You can't arrest them there [sic] Black!! Isn't that right 'black lives matter'";[3] "Shocker, black suspect. Lets [sic] hope they get themselves shot";[4] "I can't help it that you're too much of a libtard to understand any intention that doesn't meet your factual vortex libtard agenda. DERP."[5] Another post from a citizen discussing a theft from her mailbox was quickly taken off-topic by a commenter: "We are fucking shit up today! LET'S START A RIOT! FUCK THE POLICE! #Justice4Jamar."[6]

You worry excessively hateful, racist, or potentially inciting comments like these will distract from the message you want to send and prevent productive discourse. You wonder: How much control will you have to moderate posts and delete those you find inappropriate without violating the commenters' First Amendment right to free expression?

news/articles/2014/12/23/outrage-at-police-could-return-cities-to-dark-ages-of-crime ("'It's us versus them.' That's been a repeated refrain from protesters, police officers, experts in law enforcement behavior and some top leaders, in the wake of several incidents of unarmed people dying at the hands of police, followed by an armed man killing two NYPD officers. The tone of frustration from both sides reflects a growing sense of nationwide disenfranchisement between police departments and the communities they are tasked to protect.").

2. This Note will use "spammy" to describe social media posts and comments that constitute Internet spam. Spam includes, among other things, unwanted advertising, phishing, malicious links, or fraudulent reviews.

3. Mitchell Paul, Comment to Post by the Minneapolis Police Department, FACEBOOK (Dec. 11, 2015, 9:46 AM), https://www.facebook.com/MinneapolisPoliceDepartment. For an explanation of the fatal police shooting in Minneapolis that spurred these comments, see Dana Ford, Eliott C. McLaughlin, & Ray Sanchez, *Jamar Clark Death: Protesters Rally After No Charges Filed Against Police*, CNN (Mar. 30, 2016), http://www.cnn.com/2016/03/30/us/minneapolis-jamar-clark-police-shooting-no-charges/index.html.

4. Brandon Swart, Comment to Post by the Minneapolis Police Department, FACEBOOK (Dec. 11, 2015, 9:46 AM), https://www.facebook.com/MinneapolisPoliceDepartment.

5. Monica Christine, Comment to Post by the Minneapolis Police Department, FACEBOOK (Dec. 11, 2015, 9:46 AM), https://www.facebook.com/MinneapolisPoliceDepartment.

6. Cliff McCoy, Comment to Review by Jeannette Chapman, Minneapolis Police Department, FACEBOOK (Oct. 19, 2015), https://www.facebook.com/MinneapolisPoliceDepartment.

The answer: good question. Despite the prevalence of government social media pages, current First Amendment jurisprudence provides no clear rule.

It is increasingly common for public entities to enter the social media realm. Just as the Internet and new platforms of communication have revolutionized the way the public interacts with one another, they have similarly transformed how the government communicates with its constituents, and vice versa. Government entities ranging from the White House,[7] NASA,[8] and the Pentagon[9] all the way down to the smallest branches of local government increasingly rely on their social media pages to inform and interact with the public in various ways, including policy blogs, behind-the-scenes photos and videos, emergency notifications, and severe weather alerts.[10] These posts can attract a wide range of comments from constituents, which can lead to clashes between government and private expression interests.[11]

When posts are truly vulgar and offensive, are the user's speech interests even worth protecting? From a constitutional standpoint, if the posts fall within the purview of the First Amendment, then they must be protected from government censorship.[12] Freedom of expression is a universal human right, and this protection does not wither when speech is tasteless, trivial, or objectionable.[13] This protection for offensive speech is

7. The White House, FACEBOOK, https://www.facebook.com/WhiteHouse (last visited Oct. 23, 2016).

8. NASA, FACEBOOK, https://www.facebook.com/NASA (last visited Oct. 23, 2016).

9. Pentagon Force Protection Agency, FACEBOOK, https://www.facebook.com/PentagonForceProtectionAgency (last visited Oct. 23, 2016).

10. *See, e.g.*, City of Minneapolis Government, FACEBOOK, https://www.facebook.com/cityofminneapolis (last visited Oct. 23, 2016) (using social media page to update followers about, among other things, community programming, snow emergencies, road closures, and the adoptable "Pet of the Week").

11. *See* Lyle Denniston, *Constitution Check: Does the First Amendment Protect Violent Ranting on Facebook?*, CONST. DAILY (June 2, 2015), http://blog.constitutioncenter.org/2015/06/constitution-check-does-the-first-amendment-protect-violent-ranting-on-facebook ("The growth of the digital world has generated a lengthening list of questions about how far free expression should be allowed to remain free in the ubiquitous forums of the Internet.").

12. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

13. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at 19 (Dec. 10, 1948) ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to

especially strong in the United States, where "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[14]

The Supreme Court has not yet considered whether the First Amendment protects private social media users when they comment on a government-sponsored page. Courts considering the First Amendment implications of social media in other contexts have recognized that social media posts from private individuals can constitute protected speech.[15] But when a user comments on a government-sponsored page, the issue is more complex. In this case, the level of protection the First Amendment provides to the speech depends on the extent to which the social media page is categorized as a public forum, and whether the private speech posted on this forum prevents the government from speaking for itself.[16] Courts use the public forum and government speech doctrines to solve comparable is-

seek, receive and impart information and ideas through any media and regardless of frontiers."). Defining what is offensive is also inherently subjective:

> What is "controversial" varies according to circumstances, and just because it is controversial does not make it "bad"—sometimes a controversial statement is precisely what's needed to push conversations in productive directions. . . .
>
> [Controversial speech] must nevertheless be vigorously defended, not just because of the moral imperative to protect free speech—a fundamental human right—but also because to do otherwise would open the doors for further restrictions, not just on "bad" speech but on "good" speech as well.

Asma Uddin, *Even Controversial Views Should Be Protected by Freedom of Speech*, HUFFINGTON POST (July 6, 2010), http://www.huffingtonpost.com/asma-uddin/free-speech-protection-fo_b_563729.html.

14. Texas v. Johnson, 491 U.S. 397, 414 (1989); *see also* Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment . . . . There is no room under our Constitution for a more restrictive view." (citations omitted)).

15. *See, e.g.*, Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013) (holding that "liking" a political candidate's Facebook page constitutes political speech protected under the First Amendment) ("On the most basic level, clicking on the 'like' button literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement.").

16. *See infra* Part I.A.

sues involving both private and governmental parties with offline expression, but these doctrines are notoriously difficult to apply.[17]

This Note explores the extent to which government entities can control and censor private speech posted on government-sponsored social media websites, such as comments on a city police department's Facebook page or a federal agency's Twitter feed. Part I sets forth the foundations of the public forum and government speech doctrines, and discusses the government-versus-private speech dichotomy these doctrines create in First Amendment jurisprudence. Part II analyzes government-sponsored social media as speech under both of the doctrines, exploring the significant limitations in categorizing speech in an online government forum as either purely private or purely government speech. Part III presents a solution that, although especially attuned to speech on social media pages, is designed to fit both traditional[18] and online speech. Although other commenters have called for a middle category for contested speech,[19] this Note proposes that before reaching this middle category, courts should first determine whether the private and government speech within the forum are sufficiently distinct to receive separate First Amendment protections. This framework affords the strongest protection to private speech while respecting the government's interest in speaking for itself.

I. EVOLUTION AND APPLICATION OF EXISTING FIRST AMENDMENT DOCTRINES: PUBLIC FORUM, GOVERNMENT SPEECH, AND RECENT FIRST AMENDMENT JURISPRUDENCE

Although government-sponsored social media pages are a relatively recent development, the difficulty in distinguishing and adequately protecting expression with conflicting speech interests is a much older dilemma. This Part first describes the existing framework for categorizing speech in a government

17. *See infra* Part I.

18. This Note will use the term "traditional speech" to mean offline speech by private parties or the government that courts have analyzed under First Amendment doctrine, such as the spoken and written word, print and electronic media, and creative works.

19. *See generally* Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605 (2008) (proposing a separate middle category for "mixed speech" to receive intermediate scrutiny). This Note will use the phrase "contested speech" to refer to speech claimed by both the government and private speakers.

setting and determining the level of First Amendment protection to afford it, using the public forum doctrine and the government speech doctrine. It then explains how the Supreme Court has applied these doctrines in recent First Amendment cases where both government and private parties lay expressive claim to the same speech.

A. DOCTRINES RECOGNIZING PRIVATE AND GOVERNMENT SPEECH INTERESTS

When speech occurs in a government setting, such as on public property or through a government sponsorship or subsidy, the degree of First Amendment protection provided to the speech depends on whether the speaker is private or governmental.[20] The Supreme Court recognizes that some government property or largesse effectively constitute forums in which private individuals may speak.[21] When the Court concludes that a private person has spoken on government property or with government funds, the Court asks what kind of a forum that property or largesse comprised in order to determine the level of First Amendment protection the speech should receive.[22] This principle is known as the public forum doctrine: the more open and accessible the property is to the public, the fewer limitations the government may place on private expression within the forum.[23] Meanwhile, if the government is characterized as speaking—even if the literal speaker is a private person—the Free Speech Clause of the First Amendment does not apply to protect any private speech interests.[24] This principle is known

20. *See* Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 HARV. L. REV. 2411, 2412 (2004) [hereinafter *Compelled Speech*]. Speech from an entity other than the government is considered private. *Id.* When private entities speak from private property (as opposed to in a government setting), they receive the strictest form of First Amendment protection.

21. *See infra* Part I.A.1.

22. *See infra* Part I.A.1.

23. *See generally* Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975 (2011) (detailing the public forum doctrine and the level of First Amendment protection provided to each category).

24. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 467–68 (2009) ("The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech. A government entity has the right to 'speak for itself.' . . . Indeed, it is not easy to imagine how government could function if it lacked this freedom." (citations omitted)); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005) (stating that the government's own speech is "exempt from First Amendment scrutiny").

as the government speech doctrine.[25] This Section will explain the public forum and government speech doctrines in greater depth.

1. The Public Forum Doctrine

There is widespread confusion regarding how many categories of forums actually exist within the public forum doctrine. Courts and academics vary between finding two and four categories, and the names of the middle levels are not consistent.[26] This Note will describe all four potential categories: traditional public forums, designated public forums, limited public forums, and nonpublic forums.

a. Traditional Public Forums

The first category is the traditional public forum, or the "quintessential" town square.[27] This includes a public street, park, or sidewalk, but is limited to physical property owned by the government that has "by long tradition or by government fiat" been "devoted to assembly and debate."[28] Because of the extensive history of freedom of speech and public assembly in these forums, the government's ability to limit such activity is sharply circumscribed.[29] Any content-based exclusion imposed by the government receives strict scrutiny: it must be "necessary to serve a compelling state interest," and it must be narrowly drawn to meet that purpose.[30] Thus, a restriction based on the content of the expression carries a very heavy burden.

25. *See infra* Part I.A.2.

26. Aaron H. Caplan, *Invasion of the Public Forum Doctrine*, 46 WILLAMETTE L. REV. 647, 653–54 (2010) ("It is a bad sign if the doctrine is so confused that reasonable observers cannot even agree on how many categories of forum exist.").

27. John D. Inazu, *The First Amendment's Public Forum*, 56 WM. & MARY L. REV. 1159, 1162 (2015) ("The quintessential city park . . . reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' The city government owns and manages the land and the physical structures built upon it. But within this space, anyone can say almost anything. Skaters, vagabonds, hipsters, Klansmen, lesbians, Christians, and cowboys—the city park accommodates them all. The city park thus symbolizes a core feature of a democratic polity: the freedom of all citizens to express their views in public spaces free from the constraints of government-imposed orthodoxy." (footnotes omitted)).

28. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); *see also* Lidsky, *supra* note 23, at 1981–83.

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

30. *Id.* (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

The state may, however, enforce reasonable, content-neutral regulations of the time, place, and manner of expression, if such regulations are narrowly tailored to serve a significant government interest and leave open ample alternative means of expression.[31] Traditional public forums receive the strictest protections for speech and assembly, but they are limited to historically open public spaces—seemingly off-limits to any modern development, including social media pages.[32]

b. Designated (Open) Public Forums

Even if a forum is not historically open (as the traditional public forum category requires), governments may create, or designate, a public forum as a place for expressive activity.[33] Examples of designated public forums include municipal theaters and meeting rooms at state universities.[34] Creating a designated public forum requires a clear indication of the government's intent to open a nontraditional forum to the public: "[t]he government does not create a public forum by inaction or by permitting limited discourse . . . ."[35] To find intent, courts may look to the "policy and practice of the government," whether the property was "designed for and dedicated to expressive activities," or whether the property possesses "the characteristics of a traditional public forum."[36]

A designated public forum is open to the general public and operates as a traditional public forum, with very similar First Amendment protections: "[r]easonable time, place, and manner

31. *Id.*

32. *See, e.g.*, United States v. Am. Library Ass'n, 539 U.S. 194, 206 (2003) ("The doctrines surrounding traditional public forums may not be extended to situations where such history is lacking."); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680 (1992) (holding that airport terminals are not traditional public forums because "given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having 'immemorially . . . time out of mind' been held in the public trust and used for purposes of expressive activity. . . . Thus, the tradition of airport activity does not demonstrate that airports have historically been made available for speech activity" (citation omitted)); *see also* Lidsky, *supra* note 23, at 1983.

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

34. Ward v. Rock Against Racism, 491 U.S. 781, 784 (1989) (public stage facility); Widmar v. Vincent, 454 U.S. 263, 264 (1981) (public university facility); Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 547 (1975) (municipal theater).

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

36. *Id.* at 802–03.

regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest."[37] The key constitutional difference between designated public forums and traditional public forums comes not in the regulations, but in the operation of the forum itself: "[a]lthough a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum."[38] In other words, the government cannot make content-based restrictions on speech without meeting strict scrutiny as long as the designated forum is open, but it may completely close the forum if it wishes.

c. Limited Public Forums

A limited public forum is also designated as public by the government, but only for a limited purpose.[39] This may include use by only certain groups, or for the discussion of only certain subjects.[40] Thus, the government may impose some content-based restrictions in order to define and enforce the limits of speech allowed in the limited public forum, so long as these limits are reasonable and viewpoint neutral.[41] However, "[t]he

37. *Perry*, 460 U.S. at 46; *see also* Lidsky, *supra* note 23, at 1983 n.40.

38. *Cornelius*, 473 U.S. at 802; *accord Perry*, 460 U.S. at 46; *see also* Lidsky, *supra* note 23, at 1984 n.46.

39. Lidsky, *supra* note 23, at 1984. The limited public forum, now a massive element of the doctrine (and a source of great frustration), finds its roots in a scant footnote from the Supreme Court's decision in *Perry*. *Id.* at 1983–84. The opinion states, "The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place." *Perry*, 460 U.S. at 45–46. This sentence was followed by a footnote: "A public forum may be created for a limited purpose such as use by certain groups, or for the discussion of certain subjects." *Id.* at 46 n.7 (citation omitted). The ambiguity of the *Perry* decision's seventh footnote is emblematic of the public forum doctrine itself: "[i]t is unclear whether there is a single middle forum category, several subcategories, or whether a forum can be designated one way for one class of speakers and another way for others." Lidsky, *supra* note 23, at 1984 n.48 (quoting Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140, 2142 (2009)); *see also* Bowman v. White, 444 F.3d 967, 975 (8th Cir. 2006) (explaining that the phrase limited public forum "has been used as a synonym for the term 'designated public forum' and also for the phrase 'nonpublic forum.'" (citing Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 76 n.4 (1st Cir. 2004))).

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

41. *See* Christian Legal Soc'y of the Univ. of Cal. v. Martinez, 561 U.S. 661, 679 (2010); Lidsky, *supra* note 23, at 1988–89.

State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.'"[42]

The line between designated open forums and limited public forums is notably blurry.[43] The distinction depends on the government's intent in creating the forum: Did the state intend to create a "designated" open public forum that operates as a traditional public forum, or did it intend to establish a designated but "limited" public forum in which the government retains more control over expressive activity?[44] A frequent critique of the limited public forum is that it is heavily deferential to the government imposing the restriction—for all practical purposes, it is difficult to distinguish a discriminatory content-based restriction from a viewpoint-neutral shaping of the forum's subject matter parameters, especially when the constitutional standard is reasonableness.[45]

d. Nonpublic Forums

The final forum category is the nonpublic forum. This kind of government property includes military bases, airport terminals, and a public school's internal mail system.[46] Here, the government's rights are similar to those of a private property owner, and it retains significant control over expressive activities in the forum.[47] As in a public forum, the government can

42. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (quoting *Cornelius*, 473 U.S. at 806).

43. *See, e.g.*, Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299, 300 (2009) ("Substantial confusion exists regarding what distinction, if any, exists between a 'designated public forum' and a 'limited public forum.'").

44. *See* Lyrissa B. Lidsky, *Government Sponsored Social Media and Public Forum Doctrine Under the First Amendment: Perils and Pitfalls*, 19 PUB. LAW, Summer 2011, at 2, 4 (2011).

45. *See* Caplan, *supra* note 26, at 653 ("The ability of the government to select its own constitutional standard is another chief criticism lodged against the public forum doctrine. Why should the government be able to will away a speech-protective constitutional rule simply by intending that it not apply?" (footnote omitted)).

46. Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 674 (1992) (airport terminals); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 39 (1983) (public school internal mail system); Greer v. Spock, 424 U.S. 828, 830 (1976) (military base).

47. *See Perry*, 460 U.S. at 46 ("[The] First Amendment does not guarantee access to property simply because it is owned or controlled by the government." (quoting U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981))).

make reasonable time, place, and manner restrictions.[48] In nonpublic forums, the government may also exclude a speaker as long as the exclusion is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view"[49]—a much looser standard than the strict scrutiny used for a traditional or designated open public forum.[50] In practice, however, there is very little difference between a nonpublic and a limited public forum.[51] Both require viewpoint neutrality, and state-imposed exclusions are judged according to a reasonableness standard.[52] Some commentators suggest the difference between the two categories may stem from semantics: perhaps a judge will apply the reasonableness inquiry with greater force to a limited public forum, yet approach the same inquiry in a nonpublic forum with deference to the government.[53]

The doctrine used to assess the First Amendment protections afforded to private speech in a public forum is thus difficult to apply, as the lines distinguishing the forums—however many there are—are blurry.[54] This application is increasingly complicated when government speech is involved.

2. The Government Speech Doctrine

The other category of speech, which is considered wholly apart from private speech (and the public forum doctrine), is speech made by the government. The Supreme Court has recognized that the government has a substantial interest in promoting its own programs.[55] This recognition resulted in the government speech doctrine, a fairly recent legal development

48. *Id.*

49. *Id.*

50. *See id.* at 45.

51. *See* Lidsky, *supra* note 23, at 1990 ("The line between the designated 'limited' public forum and the nonpublic forum is maddeningly slippery, and some would even say non-existent, notwithstanding their linguistically opposed labels.").

52. *See id.* at 1991; *supra* notes 41–42 and accompanying text.

53. *See, e.g.*, *id.* at 1991–92, 1991 n.109 (suggesting the reasonableness inquiry is more likely to be applied with "bite" to a limited public forum than to a nonpublic forum).

54. *See* Lidsky, *supra* note 44, at 3 (noting the public forum doctrine was "'virtually impermeable to common sense' even before the internet came along" (quoting ROBERT C. POST, CONSTITUTIONAL DOMAINS 199 (1995))).

55. *See* Rust v. Sullivan, 500 U.S. 173, 194 (1991) ("[W]hen the Government appropriates public funds to establish a program it is entitled to define the limits of that program.").

that gives the government wide leeway to convey its own messages.[56] In some circumstances, this leeway includes accepting speech from some private entities while excluding others with conflicting views.[57] The recourse for such exclusion lies not in the First Amendment, but in the political process: the Supreme Court has reasoned that the government is ultimately accountable to voters for its speech, and voters can elect new officials if they object to the government's advocacy.[58]

The government speech doctrine is used as a defense against speech restrictions, even those based on viewpoint, on the basis that the government may choose exactly what it wishes to say, including when it commissions private individuals to speak on its behalf.[59] In its current form, this relatively new doctrine creates a strict dichotomy between contested speech being governmental or private: either the public forum doctrine (if speech is private) or the government speech doctrine (if speech is characterized as the government's) can apply, but not both.[60] It is hardly surprising that the government's in-

56. Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 904 (2010) (stating that the government speech doctrine "insulates the government's own speech from First Amendment challenges by plaintiffs who seek to alter or join that expression").

57. *See Compelled Speech*, *supra* note 20, at 2415.

58. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 563 (2005) ("[Government messages] are subject to political safeguards more than adequate to set them apart from private messages."); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541–42 (2001) ("The latitude which may exist for restrictions on speech where the government's own message is being delivered flows in part from our observation that, '[w]hen 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.'" (quoting Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000))); *see also* Lidsky, *supra* note 44, at 5. For a criticism of this method of recourse, see Norton & Citron, *supra* note 56, at 909–10 (arguing that political accountability mechanisms provide no meaningful safeguard when the government is not required to identify itself as the speaker).

59. Or, in some cases, when plaintiffs claim their speech was compelled by the government. *See Johanns*, 544 U.S. at 562 (involving beef producers claiming a compelled-subsidy program targeted at the beef industry violated their First Amendment rights). *See generally Compelled Speech*, *supra* note 20 (discussing the relationship between government speech and compelled speech doctrines).

60. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) (stating that the case centers on whether the government was engaging in its own expressive conduct or providing a forum for private speech); *see also Johanns*, 544 U.S. at 574 (Souter, J., dissenting) ("The government-speech doctrine is

terest in speaking for itself is often in tension with its obligation to respect free speech when individuals convey their own messages on government property or through government subsidies.

a. The Creation of the Government Speech Doctrine: The Rust *Framework*

Although the Supreme Court never mentioned the term "government speech" in its opinion in *Rust v. Sullivan*,[61] the case is widely considered the fountainhead of government speech jurisprudence.[62] *Rust* involved federal regulations barring providers at family planning clinics that received federal funds under Title X of the Public Service Health Act from engaging in abortion counseling, referral, advocacy, or other abortion-related expression.[63] Even if a pregnant woman specifically requested it, a Title X doctor could not refer her to an abortion provider.[64] Suing on behalf of themselves and their patients, Title X grantees and doctors contended the regulations violated the First Amendment by imposing conditions on the funds that discriminated on the basis of viewpoint.[65] The law, the plaintiffs argued, impermissibly discriminated against all expression related to abortion, even neutral and accurate information, while compelling providers to communicate with pregnant women in a manner that promoted carrying the pregnancy to term.[66] In a five-to-four decision, the majority held that the government was entitled to fund a program that advanced certain goals (to the exclusion of others) without violating the First Amendment.[67]

relatively new, and correspondingly imprecise.").

61. 500 U.S. 173 (1991).

62. *See, e.g.*, *Velazquez*, 531 U.S. at 541 (identifying *Rust* as a government speech case); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995) ("[In *Rust*, we] recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."); Norton & Citron, *supra* note 56 ("The Supreme Court identifies *Rust v. Sullivan* as the beginning of its government speech jurisprudence.").

63. *Rust*, 500 U.S. at 179–80.

64. *Id.* at 180. Doctors were directed to respond to such a request by informing the patient, "the [Title X] project does not consider abortion an appropriate method of family planning and therefore does not counsel or refer for abortion." *Id.*

65. *Id.* at 192.

66. *Id.*

67. *Id.* at 194 ("When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was

In a spirited dissent, Justice Blackmun characterized the regulations as impermissibly content-based, viewpoint-based, and intended to suppress "dangerous ideas" by manipulating the most private of conversations: "the very words spoken to a woman by her physician."[68]

Although the Court in *Rust* did not expressly classify the regulations as government speech, the decision supports the notion that the government is entitled to establish limits for its own programs, even at the expense of otherwise-private speech, without violating the First Amendment.[69]

Subsequent Supreme Court decisions characterized the regulations at issue in *Rust* as government speech and identified the opinion as creating the "*Rust* framework."[70] Under the *Rust* framework, the only question to be determined is one of fact: Who is speaking?[71] If the speech is private speech taking place in a public forum, it is subject to analysis under the public forum doctrine. This is true regardless of any government interest in the content of the expression. If the government is speaking, however, the government speech doctrine applies, for the government is "'entitled to say what it wishes' in promoting its policies, regardless of the effect that such speech may have on private parties."[72] This framework creates the strict dichotomy between governmental and private speech.

b. An Evolving Doctrine: Subsequent Case Law

In *Legal Services Corp. v. Velazquez*, the Supreme Court confronted a similar subsidy program to that in *Rust* but reached the opposite result.[73] In *Velazquez*, Congress subsidized Legal Services Corporation (LSC) organizations to provide free

not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism." (citation omitted)).

68. *Id.* at 209–11 (Blackmun, J., dissenting) ("This type of intrusive, ideologically based regulation of speech . . . cannot be justified simply because it is a condition upon the receipt of a governmental benefit.").

69. *See id.* at 194, 196.

70. *See* 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 governmental speech; when interpreting the holding in later cases, however, we have explained *Rust* on this understanding."); *see also Compelled Speech*, *supra* note 20 (explaining the *Rust* framework).

71. *Compelled Speech*, *supra* note 20.

72. *Id.* (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 833 (1995)).

73. 531 U.S. 533, 536–37 (2001).

legal assistance for indigent clients seeking welfare benefits, but prohibited such organizations from representing clients in ways that attempted to amend or otherwise challenge existing welfare law.[74] Thus, LSC-funded attorneys could not argue to a court that a state statute conflicted with a federal statute, or that either statute violated the Constitution.[75] LSC attorneys and their indigent clients claimed the funding restriction violated the First Amendment and was intended to discourage challenges to the status quo.[76]

The Court found that the funding condition was an unconstitutional viewpoint-based restriction on private speech.[77] Distinguishing the case from *Rust*, the Court reasoned that the LSC program was designed to facilitate private speech (the attorneys speaking on their clients' behalf), not to promote a government message.[78] The Court determined the restriction "sift[ed] out cases presenting constitutional challenges in order to insulate the Government's laws from judicial inquiry."[79] Unsympathetic to the government's argument that it was ensuring its funds were used within the limits of the program it created, the Court stated: "Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise."[80]

In *Velazquez*, the Court shaped the government speech doctrine by recognizing the differences between government-funded programs wherein (1) the government is itself the speaker (a clear case of government speech, where the government has "virtually boundless discretion to say what it wishes"[81]); (2) the government uses private speakers to transmit specific information about government programs (as in *Rust*, where the government speech doctrine applies); and (3) the government funds a program intended to facilitate *private* speech, not promote a government message (as in *Velazquez*, where the First Amendment, not the government speech doc-

74. *Id.*
75. *Id.*
76. *Id.* at 537, 539.
77. *Id.* at 542.
78. *Id.* at 542–43.
79. *Id.* at 546.
80. *Id.* at 547.
81. *Compelled Speech*, *supra* note 20.

trine, applies).[82] In practice, however, these distinctions can be a difficult pill to swallow with the factual similarities between *Velazquez* and *Rust*.[83]

The final government speech ruling discussed in this Section comes from the Supreme Court's unanimous decision in *Pleasant Grove City v. Summum*.[84] The issue in the case was whether monuments donated by private entities in a city park constituted government speech, or private speech in a public forum.[85] The park contained fifteen monuments, including a Ten Commandments monument that was donated by a religious organization in 1971.[86] Summum, another religious organization, requested permission to donate a religious monument of its own, but the city refused.[87] Summum sued the city, claiming Pleasant Grove violated its First Amendment rights by refusing to accept its monument in a traditional public forum.[88] The Court was forthright in its decision that the monuments were government speech: "There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech, but this case does not present such a situation."[89] The Court reasoned that the permanence of the monument and the

82. *Velazquez*, 531 U.S. at 541–42. The *Velazquez* Court relied on a number of limited public forum cases in its opinion, and it recognized the similarities between the subsidy in this case and limited public forums:

> When the government creates a limited forum for speech, certain restrictions may be necessary to define the limits and purposes of the program. The same is true when the government establishes a subsidy for specified ends. As this suit involves a subsidy, limited forum cases . . . [involving government property] may not be controlling in a strict sense, yet they do provide some instruction.

Id. at 543–44 (citations omitted). This reasoning suggests that despite the government's speech interests, the Court treated the LSC program as analogous to a limited public forum, with the speech restriction failing because it was not reasonable in light of the nature of the program and/or not viewpoint neutral. *See supra* notes 41–42 and accompanying text.

83. *See infra* Part II.B.3.

84. 555 U.S. 460 (2009).

85. *Id.* at 467 ("The parties' fundamental disagreement thus centers on the nature of petitioners' conduct when they permitted privately donated monuments to be erected in Pioneer Park. Were petitioners engaging in their own expressive conduct? Or were they providing a forum for private speech?").

86. *Id.* at 464–65.

87. *Id.* at 465. Pleasant Grove stated that it only accepted monuments that directly related to the history of the city, or were donated by organizations with long-standing ties to the Pleasant Grove community. *Id.*

88. *Id.* at 466.

89. *Id.* at 470.

limited space available meant that the public was likely to attribute the monument's message to the government.[90] Thus, because the government speech doctrine allows the government to choose its own speech and message, it was permissible for the city to accept some privately donated monuments but reject others without violating the First Amendment.[91]

Summum demonstrates the pragmatic underpinnings of the government speech doctrine: if the Court had reached the opposite result, a government who accepted privately donated art would have to accept a similar donation from any other private organization.[92] Using this logic, the Court noted, the United States would have had to either reject France's gift of the Statue of Liberty in 1884, or provide a comparable location in the harbor of New York for similar statues from other countries.[93] The Court determined it was impractical to rule that the statues were private speech in a public forum: if public parks were required to either accept all donated monuments or refuse them all, parks would surely be forced to refuse all donations. As the Court stated, "[W]here the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place."[94]

Not all cases involving a clash of First Amendment doctrines lead to such an "obvious" conclusion. The current dichotomous approach to categorizing contested speech requires courts to disregard the interests of a speaker with a stake in the message, either the private party or government entity,[95] without a predictable or transparent method for balancing those interests.[96] A court can decide contested speech belongs to the government without analyzing what government interests are at play, or why those interests outweigh those of the private

90. *Id.* at 470–71, 479.

91. *Id.* at 481.

92. *Id.* at 479–80.

93. *Id.* at 479.

94. *Id.* at 480.

95. *See* Corbin, *supra* note 19, at 608 ("Classifying mixed speech as purely private or purely governmental masks the competing interests at play. Once mixed speech is labeled government speech, the free speech interests of speakers and audiences are dismissed. Likewise, once mixed speech is labeled private, concerns about state endorsement of offensive, harmful, or religious speech are ignored.").

96. *See id.* at 625–27 (discussing the current framework's lack of clear Supreme Court guidance in the case of mixed speech).

speaker.[97] Further, the current framework does not contemplate that both doctrines could be applied to separate speech occurring in the same forum.[98]

The inability of the doctrines to accommodate speech claimed by both private and government entities is a significant limitation, both for traditional speech as well as government-sponsored social media. Recent jurisprudence further highlights this flaw.

B. RECENT FIRST AMENDMENT JURISPRUDENCE: MAINTAINING THE EXPANSIVE GOVERNMENT SPEECH DOCTRINE IN *WALKER*

Walker v. Texas Division, Sons of Confederate Veterans, Inc. is the most recent Supreme Court case involving government and private entities laying expressive claim to the same speech.[99] In *Walker*, the Court considered whether Texas's specialty license plate program constitutes private or government speech.[100] The program allows private individuals, organizations, and nonprofits to submit license plate design proposals to the Texas Department of Motor Vehicles Board.[101] If the Board approves the design, the state produces the plate.[102] In 2009, the Texas Division of the Sons of Confederate Veterans (SCV) proposed a specialty plate design featuring a Confederate battle flag, which the Board rejected.[103] SCV sued, arguing the Board unconstitutionally discriminated based on viewpoint by refusing to approve the design.[104]

The majority opinion relied on *Rust* and *Summum* to determine that the specialty license plates conveyed government speech, not private; thus, the government speech doctrine applied, and the restriction was not subject to analysis under the public forum doctrine.[105] Similar to the Court's analysis of the

97. *Id.*

98. *Id.*; *see also* David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, 2010 BYU L. REV. 1981, 2028–29 (2010) (explaining that the government speech doctrine assumes—wrongly, in the case of online, interactive speech—that discourse between the government and citizens is asynchronous: the government speaks, and the public listens).

99. 135 S. Ct. 2239 (2015).

100. *Id.* at 2243–44.

101. *Id.* at 2244.

102. *Id.* at 2244–45.

103. *Id.* at 2245.

104. *Id.*

105. *See id.* at 2245–50 (citing Pleasant Grove City v. Summum, 555 U.S.

park in *Summum*, the *Walker* Court noted a long history of communicating governmental messages on license plates, and determined that the public was likely to attribute the speech to the government.[106] The Court surmised this was part of the draw for specialty plates in the first place: to give the appearance of the government's approval with the message.[107] Finally, again comparing the case to *Summum*, the Court found that Texas "effectively controlled" the messages conveyed on its specialty plates by exercising final approval authority and rejecting at least a dozen proposed plates.[108] Thus, the Court determined that Texas was entitled to refuse to issue plates with SCV's Confederate flag design.[109]

The dissent accused the majority opinion of "pass[ing] off private speech as government speech and, in doing so, establish[ing] a precedent that threatens private speech that government finds displeasing."[110] Illustrating the high stakes in the government-versus-private speech dichotomy, the dissent wrote that the Court's decision "categorizes private speech as government speech and thus strips it of all First Amendment protection."[111]

As *Walker* illustrates, the Supreme Court is still grappling with the divide between private and government speech, but the government speech doctrine remains expansive. The stakes of the first step of the *Rust* framework are exceedingly high, since the doctrine cannot accommodate simultaneous private speech while the government is speaking. This doctrinal flaw is particularly unworkable in the context of government-sponsored social media pages, which are intended to foster communication between private and governmental parties. Discussions on these pages occur in online spaces specifically designed to accommodate multiple speakers with separate

460 (2009)); *id.* at 2246 (citing Rust v. Sullivan, 500 U.S. 173, 194 (1991)).

106. *Id.* at 2248.

107. *Id.* ("Indeed, a person who displays a message on a Texas license plate likely intends to convey to the public that the State has endorsed that message. If not, the individual could simply display the message in question in larger letters on a bumper sticker right next to the plate. But the individual prefers a license plate design to the purely private speech expressed through bumper stickers. That may well be because Texas's license plate designs convey government agreement with the message displayed.").

108. *Id.* (quoting *Summum*, 555 U.S. at 473).

109. *Id.* at 2253.

110. *Id.* at 2254 (Alito, J., dissenting).

111. *Id.* at 2255.

speech interests, but the Supreme Court's current framework for categorizing speech on public property requires courts to recognize either the government or the private entity as the speaker, often to the exclusion of the other.

II. THE IMPRACTICABILITY OF APPLYING CURRENT FIRST AMENDMENT DOCTRINES TO SOCIAL MEDIA PAGES

As Part I described, the public forum and government speech doctrines can be difficult to apply. The government-versus-private speech dichotomy is especially troubling in contested speech cases, as the speaker's categorization as a government or private entity yields very different First Amendment protections. Part II of this Note highlights and explores the limitations that arise when both government and private parties lay expressive claim to the same speech. This Part first analyzes the competing speech interests in government-sponsored social media pages if such pages are deemed to constitute public forums. It then follows the same analysis if government-sponsored social media pages constitute government speech. Finally, this Part discusses scholars' calls for middle ground.

A. GOVERNMENT-SPONSORED SOCIAL MEDIA PAGES UNDER A PUBLIC FORUM ANALYSIS

As a preliminary matter, the fact that private corporations own social media platforms like Facebook or Twitter does not preclude a government-sponsored page on that platform from receiving public forum status.[112] Although the government does not own the page, it is nevertheless likely to be considered public property since the government maintains and largely controls it. This is akin to the government leasing physical property from a private owner: when the government uses a space as its own, that space will fall under the realm of public property subject to the public forum doctrine.[113]

112. Lidsky, *supra* note 23, at 1996 ("[G]overnment ownership is not a *sine qua non* of public forum status . . . . The lack of government ownership or exclusive control of the social media forum it establishes, however, should not preclude a finding of public forum status. Just as the government can rent a building to use as a forum for public debate and discussion, so, too, can it 'rent' a social media page for the promotion of public discussion.").

113. *Cf.* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 547 (1975) (designating a privately owned theater leased by a city government as a public forum).

If government-sponsored social media pages constitute public forums, which category of public forum applies? With the confusion surrounding the categories themselves, there is no clear answer. The traditional public forum may be ruled out, as the Supreme Court has made it clear that the property must be devoted to the public by long tradition, an impossibility for social media.[114] The nonpublic forum may also be ruled out, as a Facebook page inviting public comments on posts is unlike an airport terminal, a military base, or a federal prison, where members of the general public are not allowed without an authorized purpose.[115] This leaves the middle categories: the designated public forum or the limited public forum.

Recall that the government's intent when creating the forum is key to distinguishing between these middle categories.[116] A court is likely to consider a government-sponsored social media page as a designated public forum if the site was intended to be open to commentary from all users on all topics,[117] or a limited public forum if the site was created only for commentary related to a specific purpose.[118] The Court has identified two factors that courts may consider to determine the government's intent for creating a forum: the "policy and practice of the government" with respect to the property, and "the nature of the property and its compatibility with expressive activity."[119] This Section explores these two factors.

1. The Policy and Practice of Government-Sponsored Social Media Pages

The Supreme Court has not provided much guidance on what the "policy and practice of the government" means, but a number of circuits have addressed the issue.[120] The inquiry is meant to be factual: a court should not simply defer to the gov-

114. *See supra* note 32 and accompanying text.

115. *See* Lidsky, *supra* note 44, at 6 ("[T]he nonpublic forum . . . is characterized by selective access for chosen speakers.").

116. *See supra* notes 35–36 and accompanying text.

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

118. *See* Lidsky, *supra* note 44, at 5.

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

120. *See, e.g.*, Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 78 (1st Cir. 2004); Air Line Pilots Ass'n, Int'l v. Dep't of Aviation, 45 F.3d 1144, 1152–54 (7th Cir. 1995); Ysleta Fed'n of Teachers v. Ysleta Indep. Sch. Dist., 720 F.2d 1429, 1433 (5th Cir. 1983).

ernment's stated purpose, and "[t]he government may not 'create' a policy to implement its newly-discovered [sic] desire to suppress a particular message."[121] Further, case law supports the notion that a stated or written policy in the "About" section of a government's social media page is not enough to render the page a limited forum: "[o]bjective indicia of intent are instead more telling in forum analysis."[122] Thus, a written policy stating that "abusive" comments will be removed is not the end of the analysis, and it does not give the government an unfettered license to delete comments that it determines to be "abusive."[123]

Because the "policy and practice" factor is intended to be a factual inquiry, the outcome may depend on the comment moderating policies and practices of individual government entities. This makes drawing broad conclusions about government-sponsored social media pages under the public forum doctrine increasingly difficult. Consider two examples: On one end of the spectrum are sites like the White House Facebook page, which includes only a brief description of the page and does not include a comment policy.[124] Commenters can comment on the government's posts, but there is no indication that the government responds to them.[125] On the other end of the spectrum are sites like the University of Minnesota's Facebook page, which includes a link to a website owned by the University explaining its comment policy.[126] The link warns that inappropriate or offensive posts are subject to removal, and disclaims any association between the University and comments posted on the page.[127] The University occasionally responds to these comments.[128] Based on a preliminary assessment, these government

121. *Air Line Pilots Ass'n*, 45 F.3d at 1153 (citing Hays Cty. Guardian v. Supple, 969 F.2d 111, 117–18 (5th Cir. 1992)).

122. *Id.* at 1154 (citing Stewart v. D.C. Armory Bd., 863 F.2d 1013, 1019 (D.C. Cir. 1988)).

123. *See id.* ("A stated or paper policy, without more, does not negate public forum status.").

124. *See* The White House, *supra* note 7 ("This is the White House page on Facebook. Comments posted on and messages received through White House pages are subject to the Presidential Records Act and may be archived. Learn more at WhiteHouse.gov/privacy.").

125. *Id.*

126. Univ. of Minn., FACEBOOK, https://www.facebook.com/UofMN (last visited Oct. 23, 2016).

127. *Facebook House Rules*, U. OF MINN., https://www.ur.umn.edu/brand/requirements-and-guidelines/social-networking/house-rules.php (last visited Oct. 23, 2016).

128. *See* Univ. of Minn., *supra* note 126.

entities have very different policies and practices regarding their pages. Assuming the University actually enforces its stated policy, the University of Minnesota's page may be categorized as a limited public forum,[129] whereas the lack of a written comment policy indicates the White House's page would likely be a designated open public forum.[130] These different categorizations mean an identical comment on each page could receive different levels of First Amendment protection, despite the fact that that both pages are government-sponsored forums on the same social media platform.

2. The Nature of Government-Sponsored Social Media Pages and Expressive Activities

The second factor courts can consider to glean governmental intent for creating a forum is "the nature of the property and its compatibility with expressive activity."[131] This involves whether it was "designed for and dedicated to expressive activities" or has "the characteristics of a traditional public forum."[132] Given the pervasiveness of social media, this is a point that requires little discussion; it is difficult to imagine a space more designed for expressive activities. By its very definition, the nature of a social media page is online expression.[133] Government-sponsored social media pages adopt this open forum atmosphere the same as any other page.[134] It has even been suggested that social media has replaced the quintessential city park as "the new public square," as people increasingly participate in discussions related to civic engagement online.[135]

129. *See supra* Part I.A.1(c).

130. *See supra* Part I.A.1(b).

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

132. *Id.* at 803.

133. *Social Media*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/social%20media (last visited Oct. 23, 2016) (defining social media as "forms of electronic communication (as Web sites for social networking and microblogging) through which users create online communities to share information, ideas, personal messages, and other content (as videos)").

134. *See, e.g.*, Governor Mark Dayton & Lieutenant Governor Tina Smith, FACEBOOK, https://www.facebook.com/GovMarkDayton (last visited Oct. 23, 2016) ("Governor Mark Dayton's official Facebook page is an open forum where anyone with an interest in the State of Minnesota can share information, ask advice, or express responsible, respectful opinions.").

135. Bill Sherman, *Your Mayor, Your "Friend": Public Officials, Social Networking, and the Unmapped New Public Square*, 31 PACE L. REV. 95, 95–96 (2011).

After considering these two factors, the best-case scenario for private speakers on a government-sponsored social media page is the designated public forum, since this category provides essentially the same protections to private speech as a traditional public forum.[136] Arguably, this classification is plausible if both the policy and practice of the government and the nature of the page are conducive to expressive activities, which would suggest that the government intended to fully open a nontraditional forum to the public by creating the page.[137]

Although a designated open forum status would best protect private speech interests, there are many uncertainties with this classification. Even relying strictly on the public forum doctrine, the factors identified in *Cornelius* could lead a court to determine that government-sponsored social media pages fall into a category with less protection for private speech—namely, the limited public forum.[138] This categorization is troubling in at least two respects. First, it affords inadequate protection to private individuals' speech in the context of a social media page. Restrictions must merely be viewpoint neutral and reasonable in light of the purpose of the forum—a standard that, in practice, is virtually indistinguishable from that of a nonpublic forum, where the government retains significant control over speech.[139] Courts considering restrictions in limited public forums also tend to be heavily deferential to the government imposing the restriction,[140] but this practice would undervalue private speech and run counter to the purpose of social media pages: open communication.

Second, courts would still need to conduct the factual inquiry based on the *Cornelius* factors to determine the scope of the forum, thus opening the door for different government-sponsored social media pages to be held to different standards under the First Amendment.[141] This adds an additional layer of uncertainty to the mix for both parties: the government cannot be certain which standard their restrictions must satisfy (those

136. And, thus, the same protections as private speech in a non-government setting. *See supra* Part I.A.1(b).

137. *See Cornelius*, 473 U.S. at 802.

138. Other authors have come to this conclusion. For more discussion on this point, see Lidsky, *supra* note 23, at 1998 (determining interactive, government-sponsored social media sites would most likely be considered a limited public forum).

139. *See supra* notes 51–52 and accompanying text.

140. *See supra* note 45 and accompanying text.

141. *See* Lidsky, *supra* note 23, at 1998.

of a designated public forum or of a limited public forum), and commenters have no way to know how much protection their speech should receive until after it is removed.

These issues aside, applying solely the public forum doctrine to government-sponsored social media pages under the current framework is, to put it mildly, unlikely. Recall that the preliminary question in a contested speech case involving private expression in a government setting is who is speaking: the government or a private party.[142] As one example, consider again the University of Minnesota's Facebook page: government actors created the page; wrote the biography and commenting policy; post statuses, photos, videos, and other content; and even interact with commenters on occasion.[143] Private speech occurs in posts on the page's "Timeline"[144] or in designated comment sections in response to the government's posts.[145] Given the government's clear presence on the page, if a court was forced to choose between solely private speech on one hand, or solely government speech (even at the risk of drowning out corresponding private speech) on the other, could it claim the University's Facebook page involved no government speech? In *Walker*, although private individuals submitted the license plate designs, the government approved, produced, and sold the designs.[146] The government also regulated the content that must appear on all plates, such as the numbers, state name, and registration tabs, and it had a long history of doing so.[147] Despite the presence of some private speech, the Court refused to overlook the government's undeniable connection to the plates and categorized the program as solely government speech.[148] This explains the precarious situation of private commenters on government-sponsored social media pages under the current framework, which tends to prioritize the government's interest in speaking.[149]

142. *See supra* notes 71–72 and accompanying text.

143. Univ. of Minn., *supra* note 126.

144. A "Timeline" is the space on a Facebook page showing posts (such as statuses, videos, or photos) made by the owner of the page or by other users. *See How Do I Post to My Timeline?*, FACEBOOK, https://www.facebook.com/help/1462219934017791 (last visited Oct. 23, 2016).

145. *Id.*

146. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2244–45 (2015).

147. *See id.* at 2248–49.

148. *Id.* at 2250–51.

149. *See* Norton & Citron, *supra* note 56, at 916 ("[The Court] simply ap-

3. Benefits and Risks of Classifying Government-Sponsored Social Media Pages as Private Speech

There are a number of benefits to classifying government-sponsored social media pages as solely private speech and applying the public forum doctrine. First, the main purpose of social media is to create forums for discussion, community building, and friendships.[150] Government actors choose to create Facebook and other social media accounts for that reason—if encouraging discussion in a central forum was not the purpose, governments could opt to create static websites without comment sections.[151] Instead, government agencies moved to Facebook to connect with their constituents, and protecting private speech is central to promoting this goal.

Categorizing government-sponsored social media pages as public forums does create issues for the government, however. As mentioned above, the fact-based inquiry into the government's policy and practice with the page creates uncertainty for government page owners, who cannot know for certain how their page will be classified until a judge considers it.[152] Additionally, although allowing comments does not prevent the government from speaking, excessive off-topic or inflammatory posts may dilute the government's message, or prevent other citizens from having a meaningful exchange in the comments. The government has an interest in keeping its page free from vulgar, obscene, harassing, or spammy posts, just as an individual or entity could do on their own private page.[153] In allowing greater restrictions on private speech, the limited public forum doctrine may address some of these governmental concerns; however, this categorization is unsatisfactory (even for government entities) due to the uncertainty it imposes for contested speech.[154]

There is no dispute that a government entity has an interest in speaking, and does speak, on its social media page.[155] Any

pears to defer to the government, as it has yet to deny government's claim to contested speech as its own.").

150. *See* James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1142–44 (2009) (defining social network sites).

151. *See* Lidsky, *supra* note 23, at 1996.

152. *See supra* note 141 and accompanying text.

153. *Cf.* Corbin, *supra* note 19, at 656–57 ("[T]he harm of certain messages is exacerbated by the government's imprimatur." (footnote omitted)).

154. *See supra* Part III.A.2.

155. *See generally* Norton & Citron, *supra* note 56 (describing the govern-

reframing of First Amendment doctrine to remove the private-versus-government speech dichotomy would have to adequately recognize the government's legitimate interest in speaking, even amid private speakers.

B. GOVERNMENT-SPONSORED SOCIAL MEDIA UNDER A GOVERNMENT SPEECH ANALYSIS

As the previous Section discussed, it is unlikely that a court would categorize a government-sponsored social media page as solely private speech, considering the clear government presence on the page. Following this analysis, this Section applies the government speech doctrine and the Court's holdings in *Walker* and *Summum* to speech on government-sponsored social media pages. In doing so, it discusses the significant harm such an analysis could pose to private speech on government pages. This Section also addresses the impact of pragmatism driving First Amendment jurisprudence.

1. Government-Sponsored Social Media Pages as Solely Government Speech

When the government speaks, it is entitled to take a position or promote a policy or program, even to the exclusion of other viewpoints.[156] Similar to the information found on a government entity's own website, a government's social media posts are created by the government to convey a particular message.[157] A government's posts on its own social media page easily constitute the government speaking for itself, arguably even more apparently than the license plates in *Walker* or the statues in *Summum*.[158] In *Walker*, the holding rested on whether or not the plates amounted to government expression; when

ment speech doctrine's relationship with government-sponsored social media pages).

156. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2246 (2015) ("How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary? How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization?").

157. *See* Norton & Citron, *supra* note 56, at 920–25.

158. *Cf. id.* at 920 ("In our information age, governmental use of networked technologies to express its views is as valuable as it is necessary. Today, the efficacy of government expression depends upon government's use of networked technologies . . . .").

the Court determined they did, the government speech doctrine was the only relevant framework to apply.[159] In the context of government-created social media posts, whether or not the government is speaking is not at issue. Thus, under this framework, a government-sponsored social media page looks like a textbook case of government speech, and the government need not worry about violating private commenters' free speech rights under the First Amendment.[160]

Despite what looks like a straightforward case when viewed solely under the *Rust* framework, government-sponsored social media pages differ from the government speech at issue in *Walker* and *Summum* in several important ways. First, a driving force of the *Walker* and *Summum* decisions was the belief that the public might wrongly attribute messages from private parties to the government.[161] The risk of this mistaken attribution is not an issue in social media posts, where the page owner's speech is larger and more prominent than that of the commenters. More importantly, the speaker's name and profile picture is attached to the message, so there is no confusion as to who is speaking.[162] Further, government page owners can (and many do) readily attach disclaimers to their pages, stating that private comments do not reflect the government's views.[163]

In addition, unlike the park in *Summum*, social media pages are not limited in space.[164] The Internet provides space to hold unlimited viewpoints, so the concern about the government being forced to later accept all similar private expression with limited space does not apply to government-sponsored social media. In *Walker*, although Texas was not limited in the number of license plates it could produce, it was limited in the

159. *Walker*, 135 S. Ct. at 2252–53.

160. *See supra* notes 55–58 and accompanying text.

161. *See Walker*, 135 S. Ct. at 2249.

162. Interestingly, this feature of social media resolves one frequent critique of the government speech doctrine—that because the government is not required to affirmatively identify itself as the source of contested speech, it is able to escape both First Amendment restrictions and political accountability. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005) (Souter, J., dissenting). For further discussion on this critique, see generally Norton & Citron, *supra* note 56.

163. *See, e.g.*, *Facebook House Rules*, *supra* note 127 ("Comments posted to Facebook pages do not represent the opinions of the University of Minnesota.").

164. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 478–80 (2009).

amount of space on each plate—making a viewpoint disclaimer on a license plate much less feasible than on a social media page.[165] Further distinguishing *Walker*, the government does not generally play a role in accepting or approving private posts before they are displayed on the page. Requiring an affirmative action from the government in respect to private speech, such as approving and producing a license plate, is arguably different from passively allowing it to remain in the comments section.[166]

2. Benefits and Risks of Government-Sponsored Social Media as Government Speech

There are potential benefits, even for private individuals, to classifying government-sponsored social media as government speech. First, government use of social media to communicate with constituents is beneficial for society.[167] Improved access to information and communication with elected officials helps build an informed electorate, ensures political accountability, and ultimately supports the democratic process.[168] Governments are arguably more likely to use social media pages when they have some protection against violating private speech rights under the First Amendment.[169] This access to information is valuable to citizens, and perhaps it is worth allow-

165. *See Walker*, 135 S. Ct. at 2249–51.

166. *Id.* at 2251. Some social media sites, such as Facebook, have an optional feature that allows page administrators to block comments that contain certain words, such as profanity, before they are posted on the page; however, administrators cannot approve every individual post or comment. *See Moderation*, FACEBOOK, https://www.facebook.com/help/329858980428740 (select "How Can I Proactively Moderate Content Published on My Page?") (last visited Oct. 23, 2016). Although not relevant under a government speech doctrine analysis, this practice raises additional questions regarding prior restraint under the First Amendment. *See, e.g.*, Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558–59 (1975) (discussing the constitutionality of prior restraints against traditional speech); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (same).

167. *See* Norton & Citron, *supra* note 56, at 939 ("[G]overnment expression is valuable primarily because it gives the public more information with which to assess their government.").

168. *Id.* at 920.

169. *See* Ross Rinehart, *"Friending" and "Following" the Government: How the Public Forum and Government Speech Doctrines Discourage the Government's Social Media Presence*, 22 S. CAL. INTERDISC. L.J. 781, 781 (2013) (discussing the decision of the local government in Redondo Beach, Cal., to abandon its social media presence due to uncertainty of how to manage its social media page without violating commenters' First Amendment rights).

ing government entities greater editorial control over their pages in order to achieve it.[170]

Another important characteristic of a government-sponsored social media page is that because the government does not own Facebook, it does not have control over the entire platform. In *Rust*, the Court determined the Title X restrictions against providing information about abortion were permissible government speech, in part because the patients could receive that information outside of the scope of the program.[171] Facebook pages are similar to this: users who wish to express themselves in a way that conflicts with the focus of a government entity's page are free to simply create their own. Although the user could not take advantage of the government's audience, Facebook is a free service that provides equal access to a platform for expression.[172]

These benefits notwithstanding, categorizing government-sponsored social media as solely government speech would pose significant risks to the free speech interests of private users. First, the government's selective comment editing could distort the marketplace of ideas to artificially portray a position as more popular than it is.[173] There is no real check on the government's editing: even if a user notices his or her comment has been removed, there is very little he or she could do about it. Thus, the public's primary recourse for government speech it disagrees with—political accountability—is significantly undermined.[174] Further, the option for users to create their own pages does not reduce their interest in speaking on the government's page: the Supreme Court has held that the mere fact that a person could speak in some other place does not justify

170. *See generally id.*

171. *See* Rust v. Sullivan, 500 U.S. 173, 203 (1991) ("Under the Secretary's regulations, however, a doctor's ability to provide, and a woman's right to receive, information concerning abortion and abortion-related services outside the context of the Title X project remains unfettered."); *see also* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 546–47 (2001) (distinguishing *Rust* because unlike LSC's indigent clients, a patient in *Rust* had alternative channels from which to receive abortion counseling).

172. *See Create an Account*, FACEBOOK, https://www.facebook.com/help/345121355559712?helpref=page_content (select "Does It Cost Money to Use Facebook?") (last visited Oct. 23, 2016).

173. *See* Corbin, *supra* note 19, at 668–69 ("[A] position perceived as popular is likely to wield greater influence.").

174. *See* Corbin, *supra* note 19, at 663–64 (stating the public's remedy of democratic accountability under the government speech doctrine "is only effective so long as reasonable citizens know when the government speaks").

exclusion from an appropriate forum.[175] As a practical matter, the option for a separate forum is of very little use when the message a private individual is trying to convey requires access to the government's audience in order to be effective—such as when a commenter is responding to something the government posted on its page.

3. Pragmatism as a Driving Force of Contested Speech Determinations

The current government-versus-private speech dichotomy allows courts to resolve cases in ways that address pragmatic concerns, rather than reaching transparent and predictable judicial rulings. The divergent outcomes in *Rust* and *Velazquez* are one example of this pragmatic underpinning. The Court reasoned in *Velazquez* that the subsidized speech was not government speech because subsidized attorneys have a professional obligation to represent the interests of their clients.[176] The doctors in *Rust* also had a professional obligation to serve the interests of their patients; however, the majority there found that the doctors' advice to their patients *did* constitute government speech.[177] These cases introduce a familiar thread running through government speech cases, and First Amendment doctrines as a whole: pragmatism.[178] Perhaps the Court found prohibiting all discussion of abortion between a patient and her doctor palatable under the circumstances, but could not tolerate leaving indigent LSC clients incapable of challenging welfare laws. In this way, the government speech doctrine can sometimes function as a safety net for the most objectionable cases—such as forcing the government to produce Confederate flag license plates.[179] But the contrary outcomes in *Rust*

175. Schneider v. State, 308 U.S. 147, 163 (1939) ("[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.").

176. *Velazquez*, 531 U.S. at 542.

177. *Id.* at 554 (Scalia, J., dissenting) ("If the private doctors' confidential advice to their patients at issue in *Rust* constituted 'government speech,' it is hard to imagine what subsidized speech would *not* be government speech.").

178. Norton & Citron, *supra* note 56, at 915 ("To be sure, pragmatism often drives the Court's First Amendment doctrine."); Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 739 (2002) ("[T]he constitutional law of free speech seems on the whole, though certainly not in every respect, to be a product of the judges' (mainly they are United States Supreme Court Justices) trying to reach results that are reasonable in light of their consequences.").

179. *See* Corbin, *supra* note 19, at 656–59.

and *Velazquez* illustrate the lack of predictability such a system creates, where speech's potential harmful consequences are weighed against its expressive value.[180] A structured, transparent method of balancing competing expressive interests could help avoid the piecemeal, outcome-driven, and unpredictable results of the government-versus-private speech dichotomy.

C. THE CALL FOR MIDDLE GROUND IN THE PRIVATE-GOVERNMENT SPEECH DICHOTOMY

This Note is not the first to call for middle ground between the strict private-versus-government speech dichotomy.[181] Forcing onward with a framework too inflexible to recognize contested speech with joint expressive claims undermines both private and government speech interests, and encourages courts to rule based on a pragmatic view of what the "right" outcome should be.[182] This provides no transparent process to balance the competing interests and instead requires courts to completely disregard the other, legitimate claim to expression.[183]

One scholar wrote at length about a potential middle category, in which deadlocked "mixed speech" cases with private and governmental parties holding equally weighty interests would be subjected to intermediate scrutiny.[184] To satisfy this standard, restrictions on private expression resulting in viewpoint-based discrimination would be allowed only if the government held an important constitutional interest known to the public and the restriction on private speech was not broader than necessary; the government had no alternate means to protect its interest; and private speakers had alternative channels to express their message.[185] Although this Note agrees that a middle category is necessary, it posits that past authors' calls for a softening of the dichotomy have not been nuanced enough

180. For an article in support of conducting a cost-benefit analysis under the First Amendment, see generally Posner, *supra* note 178. *Cf.* Jed Rubenfeld, *A Reply to Posner*, 54 STAN. L. REV. 753, 753 (2002) ("[C]ost-benefit 'reasoning' in free speech law is unnecessary and unacceptable . . . . It turns judges into legislators, evaluating pure policy matters under the guise of constitutional review. Worse, it betrays fundamental First Amendment commitments.").

181. Corbin, *supra* note 19; *see also* Lidsky, *supra* note 23.

182. *See supra* Part II.B.3.

183. Corbin, *supra* note 19, at 608.

184. *Id.* at 675–80.

185. *Id.* at 675.

to capture the intricate differences between traditional and online speech, and have overlooked a preliminary first step that would better serve both private parties and the government: *Can the audience clearly distinguish between the speakers?* The next Part argues for a new framework that integrates this question.

III. A SOLUTION TO MAXIMIZE SPEECH PROTECTION: TREATING SEPARABLE CONTESTED SPEECH IN GOVERNMENT-SPONSORED SOCIAL MEDIA

The current one-doctrine-fits-all approach is ill-suited for any speech to which both private and governmental parties lay expressive claim, but is particularly troublesome with government-sponsored social media, where the design and function of popular websites allows the government and its audience to clearly distinguish between government and private speech. This Note introduces a framework with which to consider contested speech in these cases. This Part first describes the new concepts of separable and combined speech. It then explains how these concepts can be integrated as a preliminary step to the government-versus-private speech analysis to better protect both private and government interests. The final Section addresses potential counterarguments.

A. IDENTIFYING SEPARABLE AND COMBINED SPEECH

This Note argues that there are two kinds of speech to which both private and governmental parties lay expressive claim: speech originating from a *single speaker* but involving multiple parties' interests in expression (combined speech),[186] and speech occurring in the same space with *more than one identifiable speaker* (separable speech).[187] Traditional forms of speech with competing expressive claims largely involve combined speech, where audiences cannot easily separate private

186. *See, e.g.*, Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2250 (2015); Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009); Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553–554 (2005). The Supreme Court viewed the contested speech at issue in these cases as originating from a single speaker, even if multiple parties had expressive interests or played a role in the donation, design, or selection of the speech.

187. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001). This Note will use "separable speech" to refer to contested speech cases where audiences can distinguish between speakers, and "combined speech" where audiences cannot draw such distinctions.

speech from that of the government.[188] Consider specialty license plates as an example: although a person seeing a "Choose Life" plate will likely associate the plate with both the government who created it and the driver who chose to attach it to her car, the plate itself does not distinguish between the competing interests.[189] Other scholars, focusing on traditional and combined forms of speech such as license plates, have thus proposed solutions that deal with the private and government speech interests in the same way.[190] These proposals are overly broad with regard to separable speech.

Government-sponsored social media pages are a unique example of separable speech, where the design and functionality of the website draws a distinct line between speech originating from the government actor and comments from private speakers.[191] The posts from the administrator of a Facebook page (the government entity, in the case of government-sponsored social media pages) are displayed larger and more prominently on the entity's Timeline than are private posts or comments.[192] Users typically must click a link to see more than two comments—users who are not willing to risk seeing offensive or harmful comments may choose to keep scrolling.[193] Most importantly, the name and profile picture of the user is attached to each post, making it inescapably clear in most cases whether the government or a private party is speaking.[194] Finally, governments can (and, indeed, many do) include a disclaimer notice in the "About" section of their Timeline, notifying users that views expressed in the comments do not reflect the views of the government entity maintaining the page.[195]

188. *See supra* note 186 and accompanying text.

189. *See Walker*, 135 S. Ct. at 2248–50. Unlike on a social media page, on a license plate with limited space the government could not easily distinguish itself from the private speech with a disclaimer notice; indeed, the disclaimer itself could substantially interfere with the speech.

190. *See* Corbin, *supra* note 19, at 675–76.

191. For a demonstration of these features, see, for example, The White House, *supra* note 7.

192. *Id.*

193. *See* Cohen v. California, 403 U.S. 15, 21 (1970) ("[People offended by speech may] effectively avoid further bombardment of their sensibilities simply by averting their eyes.").

194. *Id.*

195. *See, e.g.*, The United States Department of Justice, FACEBOOK, https://www.facebook.com/DOJ/about/?entity_point=page_nav_about_item&tab=page_info (last visited Oct. 23, 2016) ("The Department of Justice is pleased to participate in open, un-moderated forums offered by commercial social networks

This option is much less feasible in many combined, traditional speech instances. This Note argues that under these circumstances, there is no reason to treat separable and combined speech alike, as other authors supporting the creation of a middle category seem to suggest.

B. TAILORING FIRST AMENDMENT PROTECTIONS TO SEPARABLE SPEECH

Before applying the blanket intermediate scrutiny other scholars have suggested,[196] this Note contends that courts should first determine whether the private and governmental aspects of the speech can be separated and addressed accordingly. When speech is separable, such as in the case of government-sponsored social media pages, courts should apply the government speech doctrine to the government's own posts, but uphold stronger protections for private speech by categorizing the comments section as a designated public forum. This solution adequately protects the government's ability to speak for itself while preserving the free-flowing marketplace of ideas with a transparent judicial test.

This separate treatment method would prioritize the protection of private speech over the government's by restricting the government's ability to delete posts it did not create; however, in the case of separable speech on a government-sponsored social media page, this "imbalance" is in society's best interest. This Note contends that fears about a lack of government editorial control of social media pages are overblown. Although the government does have an interest in maintaining an orderly page free from harassing or vulgar posts,[197] the features of social media naturally address these government concerns. Users can hide messages they do not want to see from their Timelines, or take the extra step to report an abusive post

sites in order to increase government transparency, promote public participation and encourage collaboration with the department. Please note that the department does not control, moderate or endorse the comments or opinions provided by visitors to this site."). Critics may counter that it would unfairly burden the government to require or expect them to alter their own speech by posting a disclaimer. However, this disclaimer is merely an option for government entities who are concerned about mistaken attribution—it is not a requirement, but a way for the government to ensure it can speak for itself. The same is true for a written comment policy.

196. *See* Corbin, *supra* note 19, at 675–80.

197. *See* Norton & Citron, *supra* note 56, at 920 (explaining the importance of governmental use of social media to convey government opinions).

to Facebook. Facebook's "Community Standards" apply to both private and governmental pages.[198] Crucially, this feature provides an extra layer of protection: because the government does not own the entire platform, there is a non-governmental third party providing baseline protection against abusive, obscene, or spammy posts.[199] Arguably, with this extra protection, the government has even less of an interest in editing private speech on its page: if a post does not violate Facebook's Community Standards, which are not constrained by the First Amendment, it should not be restricted under the government's standards.

Further, when it comes to deleting demeaning, derogatory, or harassing posts, the line between a subject-matter restriction and viewpoint discrimination is difficult to distinguish.[200] Even if a government entity was to adopt an across-the-board ban on profanity, for example, the claim that this ban is viewpoint neutral incorrectly assumes that all viewpoints can be expressed effectively without swearing.[201] Even a seemingly neutral subject matter-ban can be used to suppress unpopular views, and determining what is offensive, demeaning, or derogatory is inherently subjective. This distinction should not be left to government officials.

198. *Community Standards*, FACEBOOK, https://www.facebook.com/communitystandards (last visited Oct. 23, 2016). As one example, Facebook's Community Standards prohibit direct threats: "We carefully review reports of threatening language to identify serious threats of harm to public and personal safety. We remove credible threats of physical harm to individuals. We also remove specific threats of theft, vandalism, or other financial harm."

199. *Id.*

200. *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830–31 (1995) ("[D]iscrimination against one set of views or ideas is but a subset or particular instance of the more general phenomenon of content discrimination. And, it must be acknowledged, the distinction is not a precise one." (citation omitted)); Corbin, *supra* note 19, at 651 ("[T]he line between subject-matter discrimination and viewpoint discrimination is slippery and not always apparent.").

201. Corbin, *supra* note 19, at 650–53. As one illustrative example, consider the case *Cohen v. California*, in which the Supreme Court overturned a man's conviction for disturbing the peace. 403 U.S. 15 (1971). Cohen was criminally charged for wearing a jacket with the phrase "Fuck the Draft" inside of a courthouse. *Id.* at 16. Could Cohen have conveyed the same message as effectively with another phrase? "No to the Draft"? What about "I Dislike the Draft"? Not according to the majority opinion: "[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views." *Id.* at 26.

Finally, consider again the example of the Minneapolis Police Department's Facebook page. If government-sponsored social media pages were analyzed solely under the government speech doctrine, as the *Rust* framework requires, the government would be free to delete comments to stifle the important debate happening on the Department's page in response to recent police shootings of unarmed civilians. Even if the government tried to moderate posts in a viewpoint-neutral way, the *manner* in which these views are presented—offensive, crude, or otherwise—may be equally as important as the views themselves.[202] The language a commenter uses reveals a great deal about the speaker, and adds an additional layer to the debate. Removing this layer would leave citizens with a skewed view of the issues. The comments on the Minneapolis Police Department's Facebook page spurred debate not only about police conduct, but about the comments themselves: the posts provide a glimpse at the divisive and polarizing reactions from the public.[203] These reactions serve an important purpose in the marketplace of ideas.[204] The government does have an interest in maintaining order on its page, but this interest is adequately served through the page administrator's ability to control its own posts on the page; meanwhile, society's interest in a robust marketplace of ideas would be greatly undermined if the comments section of the page were deemed government speech.

It should be up to society to determine what discourse it will accept; it should not be the government's job to protect its

202. As the Court explained in *Cohen*:

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.

Id.

203. *See supra* notes 3–6 and accompanying text.

204. Other authors have identified that listeners, not just speakers, have a First Amendment interest in speech. Applying this approach to posts on government-sponsored social media, not only would the commenter have an interest in speaking, but other individuals viewing the post could have an interest in accurately receiving the speech, unfiltered by the government. For a discussion of this listener-based approach in the context of employer speech, see generally Helen Norton, *Truth and Lies in the Workplace: Employer Speech and the First Amendment*, 101 MINN. L. REV. 31 (2016).

people from hurtful, rude, and racist views.[205] It is this Note's position that the viler the speech, the more important it is that society not be shielded from it—the best cure for bad speech is more speech.[206] The government can clarify its own position in other, more effective channels that do not involve infringing on private speech rights, such as posting a status, including a disclaimer in the page description, or doing outreach on- or offline to try to educate the people who hold these harmful or distasteful beliefs. The government can also choose to turn off commenting features on many of its websites. These forms of expression are all clearly within the governments' speech rights; removing troubling comments to attempt to sweep the issue under the rug should not be.

C. A FEW THOUGHTS ON POSSIBLE COUNTERARGUMENTS

Critics may wonder: If the corporate owner of a social media platform can remove abusive comments, what is the practical difference if it is instead the government that clicks "delete" on the same comment? It may be argued that relying on Facebook to regulate the government's page only serves to outsource the same censorship—the user's speech interests face identical harm. Viewed from an "ends justify the means" perspective, this argument has some facial appeal. But under the First Amendment, it is the means that matter. Consider prior restraints, which are heavily presumed to be unconstitutional except in extremely limited circumstances: rather than prevent speech from occurring, the government must wait until after the expression has taken place to take legal action.[207] Even if the *end* is the same, the First Amendment restricts the *means* the government can take to get to that end.

Only the government is constrained by the First Amendment, not the private corporation who owns the platform—and

205. *Cohen*, 403 U.S. at 25 ("Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. . . . [O]ne man's vulgarity is another's lyric.").

206. *See* Whitney v. California, 274 U. S. 357, 377 (1926) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

207. *See* Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963) (declaring that "any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."); Near v. Minnesota, 283 U.S. 697 (1931) (finding the statute in question to be an unconstitutional prior restraint and an infringement on the freedom of the press).

this distinction is crucial. Facebook's standards of removal are part of the terms and conditions to which every person who creates a Facebook account agrees.[208] Even if a user's comment on a government page *does* violate Facebook's Community Standards, the user entered into the agreement with *Facebook*—not the government. Thus, the risk of removal by Facebook on a government page is no different than on any other page on the platform. Additionally, social media companies such as Facebook and Twitter do not simply remove comments on their own accord; the post must be reported to Facebook by a third party, and verified to violate a Community Standard. This is an arguably more objective process than a government removing speech it considers "abusive" from its own page, especially if that speech happens to be critical of the government.

Next, consider a few hypotheticals. This Note contends that government entities on social media must take the bitter with the sweet; that is, when the government creates a page to connect with constituents, it opens itself up to all public expression, not just those comments it wishes to portray. But what if the government was not intending to connect with constituents at all, but simply to convey information? One might imagine a scenario where the government joined Facebook to broadcast its message to users who were already on the platform, but did not wish to open up a dialogue in the comments section. As such, the argument might go, the page should be considered entirely government speech since the government only intended to convey messages, not to solicit comments from users.

This theory presents a particularly unworkable regime of government censorship of online speech. Here, the amount of protection provided to comments would depend not only on the government's subjective intention for the expression it intended to create, but also the expression it intended to *receive*—the platform's commenting functionalities notwithstanding. It is difficult to see how a court could determine this intent short of simply taking the government at its word in every case. The feasibility of this standard aside, such an analysis would force courts to perform a factual inquiry in each case of contested speech on a government page, leading to the same problems with predictability that governments and commenters currently face.

208. *See Community Standards*, *supra* note 198.

To resolve this issue, this Note instead proposes a bright line rule: when a government claims part of a pre-existing space as its own, such as a page on a social media platform, courts should look to the expressive nature of the space as a whole, not to the government's intention for an individual page. This standard would promote greater predictability, less subjectivity, and would remove the need for an individualized factual inquiry after a forum has been initially established. If a government chose to commandeer a space for itself on a forum that is intended to promote expressive activities, such as a social media platform, the resulting government page should also be considered to promote expressive activity regardless of the government's subjective intention.

A more complex issue arises if a government *did* own the social media forum and created its own page. In this case, there is no third party to provide baseline comment moderation. This Note maintains that the government should be at the mercy of the page it created; that is, if the government created an open comment section on its page, it clearly solicits private speech and should be considered a designated open forum. Does this change if the government implemented a written comment policy similar to Facebook and Twitter? In this scenario, the government may have a stronger interest in preventing the comments on its page from becoming a "cesspool" of potential threats, fighting words, or defamation. However, this Note contends that the recourse in these cases is not government censorship; rather, the injured party may take appropriate legal action against the speaker. The Supreme Court has recognized that these kinds of speech are not protected under the First Amendment, and the fact that the speech occurs in a public forum does not change this.

This remedy is better suited to protect private speech rights. When a government creates a comment policy that allows it to delete "abusive" speech, there is no reliable way to moderate whether or not it abides by the policy. Faced with displeasing speech and likely no consequences for removal, the government would have a perverse incentive to discriminate against speech on its page based on viewpoint. But even if a government was dedicated to following its policy by the book, private speakers are left in a precarious situation. What separates "abusive" speech from online protest speech on an issue of public concern? Thus, the problems of accountability and predictability remain.

Finally, a government entity may argue that by nature of existing, some comments interfere with the government's ability to shape its own message how it wants. Thus, restricting the government's ability to remove such a post detracts from the extensive rights afforded to the main post under the government speech doctrine. This argument has some merit; however, this is a risk the government takes by expanding to a forum with open commenting capabilities. For the separable speech framework to have any meaning, the government speech doctrine cannot be permitted to seep into the public forum comment section. If a government entity is truly concerned that a comment is affecting its message, it may spread its message uninterrupted using a static webpage instead of or in addition to the interactive public forum. Further, if the audience could not separate between the speakers, then under this Note's proposed framework the speech would receive intermediate scrutiny under the private-versus-government speech continuum.

CONCLUSION

As the interactions between government entities and private parties continue to move online, the application of the public forum and government speech doctrines to speech in the digital sphere will become increasingly problematic. The flawed government-versus-private speech dichotomy leaves no room for multiple speakers to receive separate speech classifications, even though the design and function of social media sites makes distinguishing between government and private speakers easier than ever.

Although other commenters have called for replacing the strict dichotomy with a separate category for contested speech, this Note proposes that courts should first determine whether the private and government speech within the forum are sufficiently distinct to receive separate First Amendment protections. If so, courts should treat each category separately—such as in the case of government-sponsored social media pages, where the audience can clearly distinguish between a government page owner's post and a private individual's comment in response. The government page owner's post should receive the protections afforded under the government speech doctrine, whereas the comment section should be considered a designated public forum. This new framework affords adequate protection to private speech while respecting the government's interest in speaking for itself. This is a valuable addition to existing

scholarship, which calls for a middle category to balance governmental and private speech. The public's ability to distinguish between speakers in cases of separable speech, as well as the policy reasons to uphold the marketplace of ideas even for offensive viewpoints, necessitates removing the harmful government-versus-private speech dichotomy and adding the separable speech test before balancing conflicting speech interests in the proposed middle category.