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# Government Speech and Online Forums: First Amendment Limitations on Facilitating and Moderating Public Discourse on Government Websites,

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Government Speech and Online Forums: First  
Amendment Limitations on Moderating Public  
Discourse on Government Websites

*David S. Ardia\**

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## I. INTRODUCTION

In order to function, government must speak. And in order to remain relevant, government must speak through the same channels that its citizens do. In today's networked world, that means speaking on and through the Internet. When government engages in expressive activities online, however, it raises difficult questions about the limits of the government's ability to control its own message, to subsidize the speech of others, and to restrict private parties from speaking.

Courts typically apply the First Amendment's public forum doctrine to answer these questions, but that doctrine is ill-suited to deal with online forums because it has not kept pace with the changes in public discourse in our increasingly networked world. As Justice Kennedy observed in *Denver Area Education Telecommunications Consortium v. FCC*, “[m]inds are not changed in streets and parks as they once were”; instead, “the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media,” especially online media.<sup>1</sup> Yet the public forum doctrine, with its formalistic categories and arcane rules, provides neither judicial nor governmental flexibility in dealing with the myriad ways the public—and, increasingly, the government—speak online.

While public forum analysis has become a “mainstay” in the Supreme Court's First Amendment jurisprudence,<sup>2</sup> where it has been applied in such disparate circumstances as signs on public property<sup>3</sup> and charitable fundraisers in government workplaces,<sup>4</sup> it has faced “nearly universal condemnation from commentators.”<sup>5</sup> Indeed, courts<sup>6</sup> and commentators<sup>7</sup> alike have criticized the doctrine as

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1. 518 U.S. 727, 802–03 (1996) (Kennedy, J., concurring in part and dissenting in part).

2. Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140, 2145 (2009).

3. See *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 813–15 (1984).

4. See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799–806 (1985).

5. Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1715–16 (1987).

6. See, e.g., *United States v. Kokinda*, 497 U.S. 720, 741 (1990) (Brennan, J., dissenting) (“I have questioned whether public forum analysis, as the Court has employed it in recent cases, serves to obfuscate rather than clarify the issues at hand.”); *Del Gallo v. Parent*,

excessively formalistic, “serv[ing] only to distract attention from the real stakes’ at issue in disputes over public use of government resources for communicative purposes.”<sup>8</sup>

To overcome the public forum doctrine’s shortcomings, courts are looking to the “recently minted”<sup>9</sup> government speech doctrine to deal with conflicts over speech on government websites. Unlike the public forum doctrine, which is premised on the idea that “all citizens have an equal right to speak in the public forum and a right to equal treatment from the government,”<sup>10</sup> the government speech doctrine is based on the assumption that government not only can, but must, privilege some viewpoints over others. In the Supreme Court’s most recent pronouncement on the government speech doctrine, *Pleasant Grove City v. Summum*,<sup>11</sup> the Court made this distinction clear: “If government entities must maintain viewpoint neutrality in their selection of donated monuments, . . . most parks would have little choice but to refuse all such donations. And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.”<sup>12</sup>

The government speech doctrine, however, grants the government nearly carte blanche ability to exclude speakers and

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557 F.3d 58, 69 n.6 (1st Cir. 2009) (“The utility and coherence of the forum analysis doctrine have been the subject of criticism.”), *cert. denied*, 130 S. Ct. 740 (2009).

7. See, e.g., Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1381 (2001) (describing “public forum analysis” as “an edifice now so riven with incoherence and fine distinctions that it is on the verge of collapse”); Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1266 (1984) (“Unless the Supreme Court transcends its geographical approach to the first amendment and abandons formal public forum analysis, it will continue to hand down decisions that fail to analyze thoughtfully the nature and role of first amendment principles in our society.”); Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1555 (1998) (“The post-*Perry* public forum doctrine may not be the most fractured area in modern constitutional law, but it comes close.”).

8. Post, *supra* note 5, at 1716 n.7 (quoting Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 93 (1987)).

9. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring) (“To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit.”).

10. Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 GONZ. L. REV. 113, 114 (2010).

11. 129 S. Ct. 1125.

12. *Id.* at 1138.

speech on the basis of viewpoint so long as the government can show that it “effectively controlled” the message being conveyed.<sup>13</sup> Because the government speech doctrine rewards the government for achieving the very things it is prohibited from doing under the public forum doctrine, it should come as no surprise that many scholars have criticized the doctrine as “unprincipled,”<sup>14</sup> “nefarious,”<sup>15</sup> and the “ugly stepchild” of First Amendment jurisprudence.<sup>16</sup> These criticisms are particularly apt when the doctrine is applied to expressive activities on the Internet, a medium that is growing increasingly important to public discourse.

This Article describes in Part II how public discourse has moved from our streets and parks to virtual spaces hosted on the Internet. It then surveys the growing extent of government involvement in online speech platforms. Over the past decade, both federal and state governments have moved with alacrity to engage with their citizens online, launching thousands of government websites, including blogs, discussion boards, and other interactive platforms. Part II also highlights the challenges of applying public forum analysis to these digital forums, concluding that courts have constrained the doctrine to such a degree that it serves the interests of neither the public nor the government.

Part III traces the short history of the government speech doctrine. Although the Supreme Court has yet to apply the doctrine to a government website, lower courts have been looking to the Court’s government speech cases for guidance in deciding disputes over speech restrictions on government websites. Part III reviews these cases, noting that the government speech doctrine as it is currently formulated fails to ensure that citizens can hold their government accountable for its expressive activities. Given government’s expanding use of online forums, it is likely that future

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13. *Id.* at 1134. “[T]he Government’s own speech . . . is exempt from First Amendment scrutiny.” *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005). Under the government speech doctrine, the government “is entitled to say what it wishes,” *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995), and to select the messages that it wants to convey, *see Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

14. Kelly Sarabyn, *Prescribing Orthodoxy*, 8 *CARDOZO PUB. L. POL’Y & ETHICS J.* 367, 372 (2010).

15. Steven G. Gey, *Why Should the First Amendment Protect Government Speech When the Government Has Nothing to Say?*, 95 *IOWA L. REV.* 1259, 1314 (2010).

16. Note, *The Curious Relationship Between the Compelled Speech and Government Speech Doctrines*, 117 *HARV. L. REV.* 2411, 2432 (2004).

disputes will only add to the strain on a doctrine that has yet to find a coherent home within First Amendment theory.

Part IV concludes by suggesting that the government speech doctrine should be grounded in meaningful governmental accountability.<sup>17</sup> That is to say, the government speech doctrine should ensure that the recipients of government speech have enough information about the government's expressive activities that they will be capable of holding the government accountable when it overreaches. For this accountability to be possible, the government must be required to clearly communicate its intent to claim speech as its own at the point of communication. Making such governmental transparency a touchstone for the government speech doctrine will bring many advantages. First, it will constrain a doctrine that is dangerously close to subverting core First Amendment principles. Second, ensuring that government is transparent about its expressive activities will improve government-public discourse.

## II. PUBLIC DISCOURSE AND ONLINE FORUMS

### A. *Government's Growing Online Presence*

Throughout most of the Internet's history, government was slow to adapt to the new electronic medium as a place for public discourse. This is changing. The Internet is rapidly becoming government's primary method of communicating with the public. A recent study by the Pew Internet & American Life Project found that "82% of internet users (representing 61% of all American adults) looked for information or completed a transaction on a government website in the twelve months preceding [Pew's survey in December 2009]."<sup>18</sup> Moreover, these Internet users were not simply looking for government data and information; they wanted to engage with others and their government in order to express their views on government policy. According to Pew, "[n]early one quarter (23%)

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17. The only limit on the government speech doctrine that the Supreme Court has identified is the government's "accountab[ility] to the electorate and the political process for its advocacy." *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000); see also *Johanns*, 544 U.S. at 563-64 (noting that "Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time").

18. Aaron Smith, *Government Online: The Internet Gives Citizens New Paths to Government Services and Information*, PEW INTERNET & AMERICAN LIFE PROJECT 1, 2 (Apr. 27, 2010), [http://www.pewinternet.org/~media/Files/Reports/2010/PIP\\_Government\\_online\\_2010\\_with\\_topline.pdf](http://www.pewinternet.org/~media/Files/Reports/2010/PIP_Government_online_2010_with_topline.pdf).

of internet users participate in the online debate around government policies or issues” on both government and private websites.<sup>19</sup>

And government is listening. Within twenty-four hours after his election in 2008, President-elect Barack Obama’s transition team announced the creation of Change.gov, a website intended to be the central source for news and announcements about the new administration.<sup>20</sup> Shortly after taking office, the new President directed all executive departments and agencies “to harness new technologies to put information about their operations and decisions online and readily available to the public.”<sup>21</sup> And on March 26, 2009, the White House held its first “online town hall,” where President Obama answered questions submitted via the Internet.<sup>22</sup>

Today, federal, state, and local governments operate thousands of websites.<sup>23</sup> Many government websites are strictly informational, without any opportunity for the public to engage with government officials or with each other. These sites range from the very simple municipal website operated by Bonner Springs, Kansas, that provides

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19. *Id.* Interestingly, “[n]early one-third of online adults use digital tools other than websites to get information from government agencies or officials.” *Id.* at 26.

20. See Alina Cho, *Obama Launches Web Site To Reach Public*, CNN (Nov. 10, 2008, 4:17 PM), <http://www.cnn.com/2008/TECH/11/10/obama.wired/index.html>.

21. Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009); see also Press Release, *White House Announces Open Government Website Initiative* (May 21, 2009), [http://www.whitehouse.gov/the\\_press\\_office/White-House-Announces-Open-Government-Website-Initiative/](http://www.whitehouse.gov/the_press_office/White-House-Announces-Open-Government-Website-Initiative/) (announcing “an unprecedented process for public engagement in policymaking on the White House website”). While the Obama Administration’s objectives have received praise, open government organizations have criticized the government’s implementation. See, e.g., Elizabeth Montalbano, *Gov 2.0 Summit: Advocate Calls USA Spending Data ‘Useless’*, INFORMATIONWEEK (Sept. 7, 2010), <http://www.informationweek.com/news/government/infomanagement/showArticle.jhtml?articleID=227300266&subSection=News>.

22. John D. Sutter, *Obama Answers Handful of 104,000 Web Questions*, CNN (Mar. 27, 2009, 11:17 AM), <http://www.cnn.com/2009/TECH/03/26/online.obama/>; Sheryl Gay Stolberg, *Obama Makes History in Live Internet Video Chat*, N.Y. TIMES (Mar. 26, 2009), <http://www.nytimes.com/2009/03/27/us/politics/27obama.html>.

23. Over 500 federal agency websites are listed on General Services Administration’s website at USA.gov, as well as a large number of state government websites. See [http://www.usa.gov/Agencies/State\\_and\\_Territories.shtml](http://www.usa.gov/Agencies/State_and_Territories.shtml). Government is also using online platforms provided by private parties such as Facebook and Twitter to communicate with citizens. See, e.g., Chris Snyder, *Government Agencies Make Friends with New Media*, EPICENTER (Mar. 25, 2009, 4:11 PM), <http://www.wired.com/epicenter/2009/03/government-agen/>. Many of the issues raised here would also apply to these other forms of government communication, but this article’s focus is on government-owned or operated websites.

basic information about the city and its services<sup>24</sup> to the richly detailed Recovery.gov, the federal government's effort to provide comprehensive information about the American Recovery and Reinvestment Act of 2009.<sup>25</sup>

A growing number of government sites do much more than simply provide information; they solicit public input and foster public discussion—and debate—on the issues facing government. For example, the State Department operates Exchanges Connect, an “online community managed by the U.S. Department of State's Bureau of Educational & Cultural Affairs that highlights first-person stories about cultures, commonalities, and exchange program experiences.”<sup>26</sup> And in Manor, Texas, the city maintains an active blog where the public can post comments, as well as an interactive calendar and extensive social media tools.<sup>27</sup>

Another example of the government's use of interactive features on its websites is the Federal Communications Commission's Broadband.gov, which allows citizens to follow and participate in the development of the FCC's National Broadband Plan, to share information with others, and to interact with the agency in real

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24. BONNER SPRINGS, <http://www.bonnerrsprings.org/> (last visited Feb. 21, 2011).

25. RECOVERY.GOV, <http://www.recovery.gov/> (last visited Feb. 21, 2011). According to the “about page” on recovery.gov, “[t]he American Recovery and Reinvestment Act of 2009 required that a website be created to ‘foster greater accountability and transparency in the use of funds made available in this Act.’” <http://www.recovery.gov/About/Pages/Recoverygov.aspx>. The website went live on February 17, 2009, the day President Obama signed the Act into law and is operated by the Recovery Accountability and Transparency Board, an oversight group established by the American Recovery and Reinvestment Act. *Id.* “Although it is characterized as an informational resource, the site is unquestionably designed to persuade. The website features a video of the president explaining and promoting the Act, and describes how it will ‘save or create good jobs immediately.’” Nathan Murphy, *Context, Not Content: Medium-Based Press Clause Restrictions on Government Speech in the Internet Age*, 7 DENV. U. SPORTS & ENT. L.J. 26, 55 n.196 (2009).

26. EXCHANGES CONNECT, U.S. Department of State, <http://connect.state.gov/> (last visited Feb. 21, 2011). The site describes itself as an “international social network” and allows the public to “share” and “chat” about exchange programs. *Id.*

27. CITY OF MANOR, <http://cityofmanor.org/> (last accessed Feb. 21, 2011). While the federal government “has earned the lion's share of attention” around its open government initiatives, there has been considerable “momentum toward open government at the state and local level.” Alexander Howard, *Harnessing the Civic Surplus for Open Government*, HUFFINGTON POST (Sept. 23, 2010, 10:58am), [http://www.huffingtonpost.com/alexander-howard/harnessing-the-civic-surp\\_b\\_734928.html](http://www.huffingtonpost.com/alexander-howard/harnessing-the-civic-surp_b_734928.html) (reporting that “innovation [at the state and local level] has been driven by tight budgets and the availability of inexpensive, lightweight tools for communication, collaboration and crowdsourcing”).



time.<sup>28</sup> Broadband.gov is part of a set of websites developed by the FCC, including Reboot.FCC.gov and OpenInternet.gov, which also solicit public input on similar issues. In addition to operating the Broadband.gov domain, the FCC utilizes Broadband.ideascale.com, which is operated on behalf of the FCC by a private company and provides additional social media tools to solicit public feedback and discussion on the agency's broadband initiatives.<sup>29</sup>

As these examples attest, governments at all levels are launching websites and using interactive social media to communicate with their citizens. This is not surprising, given that communication is essential to governing and government has long sought to speak directly to the public.<sup>30</sup> In the past, however, government typically had to communicate through the mediating influence of mass media.<sup>31</sup> The Internet now gives government the ability to reach its citizens far more directly—and intimately—than it ever could in the past.<sup>32</sup> Fortunately, government's use of online media is benefiting citizens by breaking down the physical barriers to public discourse. But there is no guarantee that the government will continue to keep these online spaces open to private speech or that it will maintain them in such a way that robust public discourse can flourish.

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28. *The FCC and Broadband: The Next 230 Days*, FCC COMMISSION MEETING, July 2, 2009, [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-291879A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-291879A1.pdf).

29. At [broadband.ideascale.com](http://broadband.ideascale.com), users can contribute "ideas on the National Broadband Plan," "brainstorm ideas with others to make them even better," and "check out other people's ideas, and vote on the ones you like best." When submitting ideas, users can attach documents to posts, which other users can view online or download. Broadband Idea Scale, FCC, <http://broadband.ideascale.com/> (last accessed Feb. 21, 2011). The user interface for each post contains a comment button, "I agree" and "I disagree" buttons to submit votes, the total number of votes cast per post, an overall ranking assigned to the post, and a Twitter "Retweet" button and a Facebook "like" button for individual posts. *Id.*

30. As Justice Kagan noted before her elevation to the Supreme Court, "the more recent the president, the more often he goes public." Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2300 (2001).

31. See CAROL GELDERMAN, *ALL THE PRESIDENT'S WORDS: THE BULLY PULPIT AND THE CREATION OF THE VIRTUAL PRESIDENCY passim* (1997); SAMUEL KERNELL, *GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP* vii (1986) (noting that "modern presidents routinely appear before the American public on evening television on all kinds of issues ranging from national crises to the commemoration of a presidential library").

32. See Bezanson & Buss, *supra* note 7, at 1381 (noting that "the use of speech by government is expanding and taking new forms"); Anthony E. Varona, *Toward a Broadband Public Interest Standard*, 61 ADMIN. L. REV. 1, 8 (2009) (observing that "[i]t is the Internet, and not broadcasting, that today is considered the technology that is revolutionizing politics, democratic engagement, and society as a whole").

*B. Private Speech and Online Forums*

When we talk about freedom of speech, we need to pay careful attention to how public discourse actually occurs. We have long operated under an idealized misconception of free speech in which everyone has equivalent access to the organs of speech. The truth is that most people, because they do not own property that is conducive to public expression, do not have access to the means of speech or to the forums where they can effectively reach others.<sup>33</sup> As Jerome Barron observed in 1967 when he argued that the First Amendment embraces a right of access to “the press,” historically we have been faced with a lack of access to the means of speech due to economic and institutional impediments.<sup>34</sup>

Some would say that the Internet has changed this, but, in fact, “we’ve simply exchanged one set of intermediaries (e.g., newspaper publishers and broadcast stations) for another set of intermediaries (e.g., Internet service providers, content hosts, and search providers).”<sup>35</sup> These intermediaries host, index, and distribute tens of billions of pages of online content.<sup>36</sup> And this flow of digital speech is only increasing, as more and more expressive activity shifts from the physical world to the virtual world.<sup>37</sup> While these changes have

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33. See Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1117 (2005) (observing that “many individuals do not own property, much less property from which they can effectively express themselves on matters of importance within our democratic system”).

34. Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1641 (1967) (remarking that “[o]ur constitutional theory is in the grip of a romantic conception of free expression, a belief that the ‘marketplace of ideas’ is freely accessible”). The journalist A.J. Liebling captured this sentiment in his oft-repeated quote: “Freedom of the press is guaranteed only to those who own one.” A.J. Liebling, *The Wayward Press: Do You Belong in Journalism?*, THE NEW YORKER, May 14, 1960, at 105, 109.

35. David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L. REV. 373, 383–84 (2010) [hereinafter Ardia, *Intermediary Immunity*].

36. *Id.* at 377. For example, much speech happens on privately-owned sites such as YouTube, Blogger, Facebook, and Flickr.

37. See CASS SUNSTEIN, *REPUBLIC.COM 2.0*, at 24 (2007) (observing that the “mass media and the Internet as well have become far more important than streets and parks as arenas in which expressive activity occurs”); Judge Lynn Adelman & Jon Deitrich, *Extremist Speech and the Internet: The Continuing Importance of Brandenburg*, 4 HARV. L. & POL’Y REV. 361, 365 (2010) (noting that “the internet comprises a substantial portion of that public sphere”). According to a Pew Research Center survey, “one in five Americans use digital tools to communicate with neighbors and monitor community developments.” Aaron Smith, *Neighbors Online*, Pew Research Center (June 9, 2010), <http://www.pewinternet.org/~media/Files/Reports/2010/PIP-Neighbors-Online.pdf>. Pew Research Center studies also indicate

“fundamentally altered the capacity of individuals, acting alone or with others, to be active participants in the public sphere,”<sup>38</sup> they also have made the Internet an indispensable medium for public discourse.<sup>39</sup>

Contrary to widely held belief, however, the Internet is not a *public* medium. It is, instead, a network of largely private networks, running on privately owned servers, routers, and backbones.<sup>40</sup> After its initial role in creating the progenitors of the Internet,<sup>41</sup> government largely exited the scene, leaving private parties to take on the responsibility of serving as facilitators of public discourse online.<sup>42</sup> While the government owns and maintains some websites and computer networks, most public discourse occurs on private websites and is facilitated by private Internet service providers.<sup>43</sup> As a result,

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the Internet is ahead of national print newspapers, local print newspapers and radio as a source of news. Kristen Purcell, et. al, *Understanding the Participatory News Consumer*, PEW RESEARCH CENTER (March 2010), [http://www.pewinternet.org/-/media//Files/Reports/2010/PIP\\_Understanding\\_the\\_Participatory\\_News\\_Consumer.pdf](http://www.pewinternet.org/-/media//Files/Reports/2010/PIP_Understanding_the_Participatory_News_Consumer.pdf).

38. YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 212 (2006).

39. See David S. Ardia, *Reputation in a Networked World: Revisiting the Social Foundations of Defamation Law*, 45 HARV. C.R.-C.L. L. REV. 261, 272 (2010) [hereinafter Ardia, *Networked World*] (observing that “[v]irtual communities have sprung up, social networks have bloomed, and people are rushing onto the Internet to engage, argue, and disparage each other”).

40. Ardia, *Intermediary Immunity*, *supra* note 35, at 384–89.

[T]he Internet has no central authority that determines what content can transect the network, or even who can connect to the network. This decentralized structure is intentional, and many believe it has been instrumental to the Internet’s widespread adoption as a communication tool and to the rapid pace of third-party innovation online. This lack of a central point of control also has made it possible for private intermediaries to take on a range of communication tasks and, not unexpectedly, they have proliferated.

*Id.* at 384 (internal citations omitted).

41. See Barry M. Leiner et al., *A Brief History of the Internet*, INTERNET SOCIETY, <http://www.isoc.org/internet/history/brief.shtml> (last accessed Feb. 21, 2011).

42. See Jay P. Kesan & Rajiv C. Shah, *Fool Us Once Shame on You—Fool Us Twice Shame on Us: What We Can Learn from the Privatizations of the Internet Backbone Network and the Domain Name System*, 79 WASH. U. L.Q. 89, 131–32 (2001); Nunziato, *supra* note 33, at 1116.

43. See Ardia, *Intermediary Immunity*, *supra* note 35, at 387–88 (“While anyone can set up a blog or Web site on a home server, few people do. Instead, the majority of the speech that occurs online is stored on or made available from servers owned by private intermediaries, the largest of which are operated by well-known brand names like Google and Yahoo!.”); Nunziato, *supra* note 33, at 1121–28.

when an anonymous blogger covering police corruption speaks to the world, he likely does so via a blog-hosting service such as Blogger. Groups espousing unpopular views assemble on social networking sites such as Facebook. Citizen journalists publish photos and videos via hosting sites such as Flickr and YouTube. Activists organize protests using microblogs such as Twitter. And artists perform music and poetry in virtual worlds such as Second Life.<sup>44</sup>

Because these private intermediaries are not constrained by the First Amendment's free speech protections, it is perilous for society to rely on them to provide forums for public discourse.<sup>45</sup> Indeed, there are many examples of communication and content providers who have made viewpoint-based decisions over what speech to allow on their private networks and websites.<sup>46</sup> When this private censorship happens, the public has little recourse because private parties have the power to determine—subject only to the voluntary limitations they may take on through their terms of use—when, how, and whether to make speech available to others.<sup>47</sup>

Yet for democratic government to function—and for free speech rights to have meaning—citizens must have public spaces in which to express themselves.<sup>48</sup> As Stephen Gey eloquently explains:

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44. Ardia, *Intermediary Immunity*, *supra* note 35, at 388 (footnotes omitted).

45. *See id.* at 379 (observing that private intermediaries “do not always share society’s interest in ensuring a vibrant landscape for speech and often are unwilling to act as champions for the speech of third parties”); Seth Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 28 (2006) (noting that online intermediaries have a “fragile commitment to the speech that they facilitate”).

46. For example, after 78,000 Facebook users joined the “Boycott Target Until They Cease Funding Anti-Gay Politics” page on the social networking service, Facebook reportedly “locked down portions of the page—banning new discussion threads, preventing members from posting videos and standard Web links to other sites and barring the page’s administrator from sending updates to those who signed up for the boycott,” claiming that the page violated the company’s terms of service. Josh Gerstein, *Activists Upset with Facebook*, POLITICO (Sept. 18, 2010, 7:07 AM), <http://www.politico.com/news/stories/0910/42364.html>. In 2007, Verizon rejected a request from the abortion rights group, Nara Pro-Choice America, to allow people to sign up for the organization’s text alerts, “saying it had the right to block ‘controversial or unsavory’ text messages.” Adam Liptak, *Verizon Rejects Text Messages from an Abortion Rights Group*, N.Y. TIMES, Sept. 27, 2007, at A1.

47. Ardia, *Intermediary Immunity*, *supra* note 35, at 388.

48. A rich history of philosophical and legal scholarship exists on this topic. *See generally* JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* (Swallow Press 1954) (1927); JURGEN HABERMAS, *BETWEEN FACTS AND NORMS* (William Rehg trans., MIT Press 1999) (1992).

The larger reality behind the myth of the debate on the public street-corner is that every culture must have venues in which citizens can confront each other's ideas and ways of thinking about the world. Without such a place, a pluralistic culture inevitably becomes Balkanized into factions that not only cannot come to agreement about the Common Good, but also will not even know enough about other subcultures within the society to engage effectively in the deal-making and horse-trading that is the key to every modern manifestation of democratic government.<sup>49</sup>

Gey laments the loss of public forums where citizens can engage in robust discourse. But his concern underlies a larger critique of modern society, which many commentators believe has become fractured and balkanized due to long-term changes in the structure of the media environment.<sup>50</sup> While the Internet did not start this trend, recent research appears to support the view that it “may be making communication *less* democratic.”<sup>51</sup> This is due, at least in part, to the fact that although there are millions of websites,<sup>52</sup> only a few are well known and well trafficked. This “long tail”<sup>53</sup> phenomenon means that very few online speech platforms provide meaningful public reach, whereas the vast majority of sites are nearly invisible, except to the small niche audiences they serve.<sup>54</sup> Given the

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49. Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1538–39 (1998).

50. See ROBERT PUTNAM, *BOWLING ALONE* 216–46 (2000).

51. Murphy, *supra* note 25, at 52; see also Aaron Smith, *Government Online: The Internet Gives Citizens New Paths to Government Services and Information*, PEW INTERNET & AMERICAN LIFE PROJECT 5 (Apr. 27, 2010) [http://www.pewinternet.org/~/media//Files/Reports/2010/PIP\\_Government\\_Online\\_2010\\_with\\_topleveline.pdf](http://www.pewinternet.org/~/media//Files/Reports/2010/PIP_Government_Online_2010_with_topleveline.pdf) (finding that “Whites are significantly more likely than either African Americans or Latinos to participate in the online debate around government issues or policies (25% of online whites do this, compared with 14% of African Americans and Latinos) and are also much more likely to go online for data about government activities such as stimulus spending or campaign finance contributions”).

52. By some estimates, there are more than 227 million web servers responding to requests on the Internet. See *September 2010 Web Server Survey*, NETCRAFT (Sept. 17, 2010), <http://news.netcraft.com/archives/2010/09/17/september-2010-web-server-survey.html>.

53. “Long tail” was first coined by Chris Anderson who observed that “culture and economy are increasingly shifting away from a focus on a relatively small number of hits (mainstream products and markets) at the head of the demand curve, and moving toward a huge number of niches in the tail.” CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* 52 (2008).

54. See BENKLER, *supra* note 38, at 241 (observing that “there is a tiny probability that any given Web site will be linked to by a huge number of people and a very large probability that for a given Web site only one other site, or even no site, will link to it”); Oren Bracha &

way online discourse is currently facilitated by private parties, the structural inequalities that many had hoped the Internet would eliminate are in danger of being further entrenched.

If, as Gey and others believe, public spaces for discourse are essential to a healthy society, we have reason to be concerned that the Internet lacks a true public forum. Dawn Nunziato, in her prescient article, *The Death of the Public Forum in Cyberspace*, argues convincingly that public forums play an essential role in ameliorating “the inequalities that disparities in private property ownership would otherwise impose on individuals’ free speech rights.”<sup>55</sup> The public forum doctrine occupies an essential place in the First Amendment firmament because it requires that the government “subsidize the speech of those who otherwise would not be able to express themselves effectively.”<sup>56</sup>

Of course, government itself could provide a place for public discourse to occur online, as it has in the past through the maintenance of public streets and parks, but it remains an open question whether these virtual spaces will inherit the same protections for speech that we take for granted in the physical world.

### *C. Applying Public Forum Analysis to Online Forums*

Long before the Internet reshaped our capacity to communicate, speakers who wanted to reach others typically made their way to the local public park, climbed up on a soapbox, and began speaking in the hope of attracting an audience.<sup>57</sup> The First Amendment’s public forum doctrine reflects this history of physical spaces that “have been

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Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1159 (2008) (observing that “the topology of the Web prevents us from seeing anything but a mere handful of the billion documents out there”).

55. Nunziato, *supra* note 33, at 1117.

56. *Id.*; see also SUNSTEIN, *supra* note 37, at 23–24; Rebecca Tushnet, *Domain and Forum: Public Space, Public Freedom*, 30 COLUM. J.L. & ARTS, 101, 104 (2007).

57. One of the best-known locations for public speech is Speakers’ Corner in Hyde Park, London.

Officially sanctioned in 1872 by the Royal Parks and Gardens Regulation Act, Speakers’ Corner is a site for people to exercise their right of free speech. You can turn up, stand on a makeshift platform (the simplest being a milk crate), and speak about any topic you like, provided that your utterances do not contravene the Regulations.

John Michael Roberts, *The Enigma of Free Speech: Speakers’ Corner, The Geography of Governance and a Crisis of Rationality*, 9 SOC. & LEGAL STUD. 271, 272 (2000).

used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>58</sup>

The public forum doctrine, which saw its modern elaboration in *Perry Education Ass’n v. Perry Local Educators’ Ass’n*,<sup>59</sup> divides the speech landscape into three categories of forums.<sup>60</sup> First, there is the “traditional” public forum, which consists of streets and parks where content-based exclusions must be “necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end.”<sup>61</sup> Second, there is the “designated” or “limited” public forum, “consist[ing] of public property which the State has opened for use by the public as a place for expressive activity.”<sup>62</sup> “Although a State is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.”<sup>63</sup> Third, those locations that do not fall into the other two categories are denominated “non-public forums.”<sup>64</sup> In this third category, the government “may reserve the forum for its intended purposes . . . as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”<sup>65</sup>

Not surprisingly, non-public forums “constitute[] the largest class of government property.”<sup>66</sup> In a non-public forum, the government has many of the powers of a private owner, including the “power to preserve the property under its control for the use to

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58. *Hague v. CIO*, 307 U.S. 496, 515 (1939).

59. 460 U.S. 37 (1983).

60. *Id.* at 45–49.

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

62. *Id.* at 45. In the public forum context, it is generally believed that the terms “limited” and “designated” refer to the same type of forum. See Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140, 2142 n.11 (2009). Although the Court has on occasion indicated that there might be a difference between the two “middle forums” in that the government might by its words or deeds “designate” a public forum that carries the same obligations as the traditional public forum, see *Christian Legal Soc’y v. Martinez*, 130 S. Ct. 2971, 2984 n.11 (2010); *United States v. Kokinda*, 497 U.S. 720, 726–27 (1990); *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985); *Perry*, 460 U.S. at 45, “the Court has never found such a designated public forum to exist,” Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 98 n.74 (1998).

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

64. *Id.* at 46–47.

65. *Id.* at 46 (citing *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 131 n.7 (1981)).

66. Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 GONZ. L. REV. 113, 120 (2010).

which it is lawfully dedicated.”<sup>67</sup> This includes the right to control access and to make distinctions on the basis of subject matter and speaker identity.<sup>68</sup> The government’s ability to constrain speech on these bases, however, is not unlimited. The restrictions must be “reasonable in light of the purpose which the forum at issue serves.”<sup>69</sup> And, as with all three public forum categories, the government cannot discriminate based on a speaker’s viewpoint unless it can satisfy strict scrutiny.<sup>70</sup>

Judicial application of the public forum doctrine typically entails a two-step process. First, the court decides which type of forum is implicated.<sup>71</sup> Second, the court applies the appropriate level of First Amendment scrutiny to the challenged restrictions on speech. As with so much constitutional law, the choice of category often determines the outcome in a public forum case. And it is at this stage that the application of the public forum doctrine to government websites gets tricky.

Given that online forums lack the tangible characteristics—but share many of the expressive capabilities—of the physical locations we are accustomed to, we start by asking what the appropriate analogy is for understanding these virtual “places.”<sup>72</sup> Over its short

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67. *Perry*, 460 U.S. at 46 (quoting *Greenburgh Civic Ass’n*, 453 U.S. at 129–30 (internal quotations omitted)).

68. *Id.* at 49.

69. *Id.*

70. *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) (“Discrimination against speech because of its message is presumed to be unconstitutional.”).

71. If a legal challenge were directed at different parts of a government website, a court would likely evaluate each distinct part of the website separately to determine the appropriate levels of judicial scrutiny. *Cf. Neinast v. Bd. of Trs. of Columbus Metro. Library*, 346 F.3d 585, 591–92 (6th Cir. 2003) (concluding that various aspects of public library warranted separate analysis); *Ill. Dunesland Pres. Soc. v. Ill. Dept. of Natural Res.*, 587 F. Supp. 2d 1012 (N.D. Ill. 2008) (holding that although state park was a traditional public forum, a display rack in the park was a nonpublic forum), *aff’d on other grounds*, 584 F.3d 719 (7th Cir. 2009); *see also Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1137–38 (concluding that although parks are a traditional public forum, monuments placed in them are not subject to forum analysis).

72. Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439, 473 (2003) (noting that the “cyberspace as place metaphor is . . . clearly evident in legal material”). We have always tried to understand something new through analogy and the public forum doctrine is rife with this approach. *See Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 749 (1996) (noting the search for analogies in public forum jurisprudence and cautioning that “we are wary of the notion that a partial analogy in one context, for which we have developed doctrines, can compel a full range of



life, the Internet and its expressive locales have been likened to an “information superhighway,”<sup>73</sup> a “bulletin board,”<sup>74</sup> a “park,”<sup>75</sup> and a “series of tubes.”<sup>76</sup> Another metaphor that has recently come into popular usage is that of a “platform.”<sup>77</sup> Tarleton Gillespie, professor of communications at Cornell University, states that use of the term “platform” has “emerged in reference to online content-hosting intermediaries,” such as YouTube and Facebook, and points “to a common set of connotations: a ‘raised, level surface’ designed to facilitate some activity that will subsequently take place.”<sup>78</sup> It is a wonderfully evocative term, suggesting, as Gillespie notes, “a progressive and egalitarian arrangement, promising to support those who stand upon it.”<sup>79</sup>

As anyone who has browsed the Internet can attest, the medium is highly conducive to public discourse.<sup>80</sup> Some of the most visceral

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decisions in such a new and changing area”). Of course, the choice among competing analogies has important implications beyond the public forum and government speech contexts. See Susan P. Crawford, *Internet Think*, 5 J. ON TELECOMM. & HIGH TECH. L. 467, 467 (2007) (suggesting that “how ‘the Internet’ is understood has substantial legal, social, and cultural consequences”).

73. See, e.g., *Maritz, Inc. v. Cybergold, Inc.*, 947 F. Supp. 1328, 1330 (E.D. Mo. 1996) (noting that the Internet has been referred to as “the information superhighway”).

74. See, e.g., James Pooley, *The Top Ten Issues in Trade Secret Law*, 70 TEMP. L. REV. 1181, 1185 (1997) (“The Internet is, in many ways, like the notices you see on the bulletin board at your local supermarket.”).

75. See, e.g., Edward J. Naughton, *Is Cyberspace A Public Forum? Computer Bulletin Boards, Free Speech, and State Action*, 81 Geo. L.J. 409, 431 (1992) (noting that computer networks share many of the characteristics of “sidewalks, streets, and parks”).

76. Alex Curtis, *Senator Stevens Speaks on Net Neutrality*, PUBLIC KNOWLEDGE (June 28, 2006), <http://www.publicknowledge.org/node/497> (Senator Stevens speaking during a full committee markup); see also Jim Puzzanghera, *Weighing High-Tech Bills in Analog: Political Issues Pile up in the Fast-Evolving Sector, but Congress' Expertise Isn't up to Date*, L.A. TIMES, Aug. 7, 2006, at C1 (noting the ridicule directed at former Senator Ted Stevens for describing the Internet as “a series of tubes”).

77. Tarleton Gillespie, *The Politics of “Platforms,”* 12 NEW MEDIA & SOC. 347, 347–48 (2010). Gillespie observes that the term has especially “gain[ed] traction around user generated content, streaming media, blogging, and social computing.” *Id.* at 351. But it has also found use in other contexts as well. See Tim O’Reilly, *Gov 2.0: It’s All About the Platform*, TECHCRUNCH (Sept. 4, 2009), <http://techcrunch.com/2009/09/04/gov-20-its-all-about-the-platform/> (envisioning “government as a platform” and suggesting that “government agencies shouldn’t just provide web sites, they should provide web services”).

78. Gillespie, *supra* note 77, at 350. Gillespie notes, however, that “[platform] [is] a claim that arguably misrepresents the way YouTube and other intermediaries really shape public discourse online.” *Id.* at 349.

79. *Id.* at 350.

80. See, e.g., Lincoln Dahlberg, *The Internet and Democratic Discourse: Exploring the Prospects of Online Deliberative Forums Extending the Public Sphere*, 4 INFO. COMM. & SOC’Y

illustrations of the Internet's capacity for public discourse can be seen in what are called virtual worlds, which are three-dimensional computer-based simulated environments where people interact with others through personal avatars that are capable of, among other things, shouting, articulating, and throwing up their hands.<sup>81</sup> The most popular virtual worlds are massive multiplayer online games, but Second Life, which claims several million members, has been used for various forms of civic engagement by the government.<sup>82</sup> The U.S. State Department, for example, created a three-dimensional "embassy" in Second Life that visitors can enter and that the department uses to "inform, influence, and engage with the world."<sup>83</sup>

The fact that the public is actually using a government-furnished online forum for public discourse, however, does not make that

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615, 620 (2001) (noting that "many spaces of discourse exist online" and describing "numerous forums of informal public interaction on Usenet groups, e-mail lists, web boards and chat groups where participants enter into rational-critical debate").

81. See, e.g., David Assalone, *Law In The Virtual World: Should The Surreal World of Online Communities Be Brought Back to Earth By Real World Laws?*, 16 VILL. SPORTS & ENT. L.J. 163, 166 (2009) ("From its inception, Second Life has allowed individuals to create their own personal characters and control these characters' movements in a virtual world filled with grass, trees, buildings, streets and rivers."); Adam Chodorow, *Tracing Basis Through Virtual Spaces*, 95 CORNELL L. REV. 283, 288 (2010) ("Virtual worlds are online spaces that permit people to interact with one another through characters they create, often called avatars.").

82. See Ardia, *Networked World*, *supra* note 39, at 275; Cheryl Pellerin, *U.S. Government Presence Grows in Second Life Online World*, AMERICA.GOV (May 8, 2007), <http://www.america.gov/st/washfileenglish/2007/May/20070508163536lcniellep0.2645075.html> (reporting that federal agencies that are interacting with the public through Second Life "include the National Oceanic and Atmospheric Administration (NOAA), NASA, the National Institutes of Health and its National Library of Medicine (NLM), the Centers for Disease Control and Prevention (CDC) and the U.S. House of Representatives").

83. Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 900 (2010) (quoting Victor E. Riche, Presentation to the U.S. Dep't of Homeland Sec., *Government 2.0: Privacy and Best Practices Workshop* (June 22, 2009)); L. Gordon Crovitz, *Information Age: From Wikinomics to Government 2.0*, WALL ST. J., May 12, 2008, at A.13. Users can also create parks, buildings, and even virtual towns. The City of Allston, MA used Second Life to build a virtual city park that residents could access; it then solicited feedback from residents to help with the design of the actual park. Julia Galef, *Q&A: Eric Gordon on Community Planning with Second Life*, METROPOLIS MAG., (June 8, 2009, 1:31pm) <http://www.metropolismag.com/pov /20090608/qa-eric-gordon-on-community-planning-with-second-life>. Not only did the virtual park serve as a locus for conversation about the park's design, the city, by suggesting that residents take on avatars that were disabled, appears to have impacted public perceptions of the importance of accommodations for the handicapped. Interview with Gene Koo, Fellow at the Berkman Ctr. for Internet & Soc'y, in Cambridge, Mass. (Aug. 19, 2008).

forum a traditional public forum for First Amendment purposes. In *Hague v. CIO*, the touchstone for this category of public forum, the Supreme Court instructed that traditional public forums are places that have “immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>84</sup> Given the Internet’s short history, there is little chance that a website, or indeed anything on the Internet, would be considered a traditional public forum under the *Hague* test.<sup>85</sup>

Can this definition expand over time, taking into account how people actually assemble and communicate? The Supreme Court faced this question in *International Society for Krishna Consciousness, Inc. v. Lee*, where it had to determine whether an airport terminal operated by a public authority was a public forum.<sup>86</sup> Although the Court seemed willing to take into account that the public was using the airport for expressive purposes, it refused to grant an airport terminal traditional public forum status because, “given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having immemorially . . . been held in the public trust and used for purposes of expressive activity.”<sup>87</sup> If the Court deems an airport terminal to be too modern to be considered a traditional public forum, then it should come as no surprise that it views the provision of Internet access at a public library to be equally unqualified for such categorization.<sup>88</sup>

In the end, it is likely that a government website that allows private speech will be viewed under the public forum doctrine as a

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84. *Hague v. CIO*, 307 U.S. 496, 515 (1939). In *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, the Court stated that a traditional public forum is property that has as “a principal purpose . . . the free exchange of ideas.” 473 U.S. 788, 800 (1985).

85. See Nunziato, *supra* note 33, at 1161 (“No expressive forum on the Internet will ever be deemed a ‘traditional’ public forum—one that has ‘immemorially’ and ‘time out of mind’ been held in trust for the use of the public for expressive purposes—under the public forum doctrine as it is currently conceived.”).

86. 505 U.S. 672 (1992).

87. *Id.* at 680 (internal quotation marks omitted). Concurring, Justice Kennedy criticized the majority opinion for its myopic focus on history rather than function, warning that “[w]ithout this recognition our forum doctrine retains no relevance in times of fast-changing technology.” *Id.* at 697 (Kennedy, J., concurring).

88. See *United States v. Am. Library Ass’n*, 539 U.S. 194, 204–05 (2003) (holding that libraries’ provision of Internet access did not constitute a traditional public forum because “this resource . . . did not exist until quite recently”). Recent cases involving municipal websites bear this out. See *infra* notes 195–204 and accompanying text.

limited public forum<sup>89</sup>—that is, “public property which the State has opened for use by the public as a place for expressive activity.”<sup>90</sup> Given that the level of First Amendment scrutiny courts apply to speech restrictions in a limited public forum is the same as in a traditional public forum, the choice between those categories may seem inconsequential. But this ignores the fundamental difference between the two categories: in a traditional public forum, the government must keep the forum open for public expression.<sup>91</sup> In a limited public forum, the government can close the forum at its choosing.<sup>92</sup>

This distinction matters a great deal because, although public discourse has moved from our streets and parks to virtual forums hosted on the Internet, these online forums exist at the whim of private parties and are therefore ephemeral.<sup>93</sup> Consequently, government has an important role to play in ensuring that the public has access to online venues where citizens can confront each other’s ideas and ways of thinking about the world. In fact, some scholars have gone so far as to argue that, where private media fails to foster adequate public dialogue, “the First Amendment requires the government to create at least some public forums that provide effective means of communication.”<sup>94</sup>

As noted previously, both federal and state governments are beginning to embrace this role by opening their websites to various forms of public discourse. In doing so, government—just like private website operators—must make choices about who can speak, what

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89. For a discussion of whether a court might view the content on the website as government speech, see *infra* Part II.B.

90. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). To determine whether a limited public forum exists, the Court analyzes the government’s intent to create such a forum by examining its “policy and practice” as to the forum as well as “the nature of the property and its compatibility with expressive activity.” *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

91. See CASS R. SUNSTEIN, *supra* note 37, at 23 (“A distinctive feature of [the traditional public forum] is that it creates a *right of speakers’ access, both to places and to people*. Another distinctive feature is that the public-forum doctrine creates a right, not to avoid governmentally imposed *penalties* on speech, but to ensure government *subsidies* of speech.”).

92. See *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 814–15 (1984); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 970 (9th Cir. 1999).

93. See *infra* Part II.B.

94. J. M. Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 412; see also Barron, *supra* note 34, at 1641.

expressive activities to allow, and whether to moderate the speech of third parties. Unlike private website operators, however, the government's choices must comport with the First Amendment.

*1. Speaker-based restrictions in a public forum*

The first question facing all website operators is who they should permit to speak. Of course, the government can choose not to allow any private speech on its website, thus creating a non-public forum.<sup>95</sup> If, however, the government allows members of the public to post comments or otherwise engage in expressive activities, it will likely have created a limited public forum, and its discretion to exclude speakers will be constrained.

When the government establishes a limited public forum, it is not required to allow all persons access to the forum. The government may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics,"<sup>96</sup> as long as the restrictions are reasonable in light of the purpose of the forum and "not an effort to suppress expression merely because public officials oppose the speaker's view."<sup>97</sup> Thus, if a public school were to voluntarily open its website only to students—and that limitation were reasonable in light of the website's purpose—it would not have to provide access to adults.<sup>98</sup>

One of the most pressing concerns facing website operators is whether they should allow speakers who are associated with groups that advocate or incite discrimination, hate, or violence. The government's power to impose such speaker-based restrictions in any type of forum is quite limited. In fact, as one scholar notes, "[u]se restrictions on groups who discriminate or may incite violence . . .

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95. Many government websites do not permit the public to post comments or otherwise engage in speech on the site, but instead are reserved for the posting of government data and communications from government employees. *See supra* notes 23–25 and accompanying text.

96. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

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

98. *See Rosenberger*, 515 U.S. at 829 (noting "[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics"); *Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 806–07 (1985) (allowing the federal government to limit participation in a federal employee charity drive to direct service charities, while excluding legal defense and political advocacy organizations, because the government's rationale of avoiding disruptive controversy was reasonable in light of revenue-raising purpose of the program).

consistently have been struck down on the basis of viewpoint discrimination as well as other constitutional norms.”<sup>99</sup>

For example, in *Cuffley v. Mickes*, the Eighth Circuit held that Missouri’s attempt to exclude the Ku Klux Klan from participation in its Adopt-a-Highway Program was unconstitutional.<sup>100</sup> Under the Missouri program, groups that agreed to keep a section of highway clean received public acknowledgment of their participation on a sign posted adjacent to the highway. The court held that Missouri’s refusal to allow the KKK to participate based on the state’s policy of prohibiting groups that discriminate<sup>101</sup> was a violation of the organization’s First Amendment rights.<sup>102</sup> The court concluded that “[r]equiring the Klan essentially to alter its message of racial superiority and segregation by accepting individuals of other races, religions, colors, and national origins in order to adopt a highway would censor its message and inhibit its constitutionally protected conduct.”<sup>103</sup>

In summary, while the government has some discretion under the public forum doctrine to impose speaker-based restrictions on its websites, those restrictions must be reasonable in light of the purpose of the forum. Furthermore, the government may not exclude speakers on the basis of their viewpoints unless it can satisfy strict scrutiny.<sup>104</sup>

## 2. Content-based restrictions in a public forum

Government confronts even more limits when it seeks to impose content-based restrictions on the speech of private parties. Given that content-based restrictions are quite common on private websites, it is likely that government will want to apply them as well. The types of

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99. Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 85 (2004).

100. 208 F.3d 702, 711 (8th Cir. 2000).

101. The Missouri program stated: “Applicants must adhere to the restrictions of all state and federal nondiscrimination laws. Specifically, the applicant must not discriminate on the basis of race, religion, color, national origin or disability. Such discrimination disqualifies the applicant from participation in the program.” MO. CODE REGS. ANN. tit. 7, § 10-14.030(2)(B) (1995), *quoted in Cuffley*, 208 F.3d at 707 n.4.

102. *Cuffley*, 208 F.3d at 705–06.

103. *Id.* at 708.

104. *See Cornelius v. NAACP Legal Def. Fund*, 473 U.S. 788, 811 (1985). Content-neutral restrictions are analyzed under the less restrictive time, place, and manner test. *See Grayned v. City of Rockford*, 408 U.S. 104, 116–17 (1972).

restrictions that private website operators impose are varied, but they often take the form of subject-matter limitations,<sup>105</sup> bans on indecent material,<sup>106</sup> and civility policies that prohibit certain profane, personal, or contentious comments from users.<sup>107</sup>

In regulating expressive activities in a limited public forum, the government has some latitude to set limits on the basis of subject matter, so long as the limitations are “reasonable in light of the purpose served by the forum.”<sup>108</sup> A subject-matter restriction will be subject to strict scrutiny, however, if the government has opened up the forum to a wide variety of subjects or communicative purposes.<sup>109</sup> For example, if the U.S. State Department were to create a website dedicated only to discussing student exchange programs, it would likely be permitted to limit speakers to that issue. But if the government is not vigilant in maintaining the forum’s focus or otherwise opens the forum for general discussion, it cannot exclude speakers based on subject matter without satisfying strict scrutiny.<sup>110</sup>

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105. For example, the forum rules for MacRumors, a site that reports on news about Apple, states that “[o]ff-topic posts will be deleted/edited. . . . Threads and posts on controversial political, religious, and social issues are to be limited to the *Politics, Religion, Social Issues* forum, and made only by those eligible for that forum.” MACRUMORS, *Help: Forum Rules*, [http://guides.macrumors.com/Help:Forum\\_Rules#Things\\_Not\\_to\\_Do](http://guides.macrumors.com/Help:Forum_Rules#Things_Not_to_Do) (last visited Feb. 21, 2011); see also Ken Fisher, *Ars OpenForum Posting Guidelines and General Information*, ARS TECHNICA (Jan. 1, 2000, 2:00pm), <http://arstechnica.com/old/content/2000/01/postguide.ars> (“No commercial-oriented posts, and no flooding with useless content or content designed to engage readers into forum wars or trolling other sites.”).

106. For example, YouTube’s Terms of Service state that prohibited forms of expression include “pornography or sexually explicit content” and “animal abuse, drug abuse, under-age drinking and smoking, or bomb making.” YOUTUBE, *Terms of Service*, <http://www.youtube.com/t/terms> and [http://www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines) (last visited Feb. 21, 2011).

107. For example, Wikipedia’s civility policy states that “[c]ivility is part of Wikipedia’s code of conduct” and defines incivility as “personal attacks, rudeness, disrespectful comments, and aggressive behaviours that disrupt the project and lead to unproductive stress and conflict.” WIKIPEDIA, *Wikipedia: Civility* (Feb. 17, 2011, 9:22pm), <http://en.wikipedia.org/wiki/Wikipedia:Civility>.

108. *Cornelius*, 473 U.S. at 806; see also *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (“Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set.”).

109. See, e.g., *United Food & Commercial Workers Union v. Sw. Ohio Reg’l Transit Auth.*, 163 F.3d 341, 352–53 (6th Cir. 1998).

110. See *Chabad-Lubavitch of Ga. v. Miller*, 5 F.3d 1383, 1394 (11th Cir. 1993) (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983)) (“The state cannot constitutionally penalize private speakers by restricting either their right to speak or the

Furthermore, some subject-matter restrictions are particularly problematic. For example, courts have been skeptical of government policies that restrict the discussion of religious<sup>111</sup> or political<sup>112</sup> subjects because such policies invariably involve distinctions that blur the line between content and viewpoint discrimination. Similarly, governmental attempts to impose “no public controversy policies” in public forums have been uniformly struck down.<sup>113</sup> Indeed, whenever the government attempts to prohibit or restrict controversial subjects, it opens itself up to charges of viewpoint discrimination because often “the line between content and viewpoint is quite faint.”<sup>114</sup>

In addition to establishing subject-area limits, many private websites also prohibit the posting of indecent material. As history has shown, the regulation of indecency is a topic of perpetual interest to the government,<sup>115</sup> although its efforts to ban indecent speech on the Internet have seen little success.<sup>116</sup> If the government sought to

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content of their speech simply because the state exhibited dubious wisdom in creating, or has been slovenly in its maintenance of, its public fora.”); *Planned Parenthood Ass’n/Chi. Area v. Chi. Transit Auth.*, 767 F.2d 1225, 1232 (7th Cir. 1985) (holding that because transit authority maintained “no system of control” and accepted a broad range of advertisements it had created a public forum in its bus advertising space and could not reject an advertisement relating to abortion).

111. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) (instructing that “speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint”); *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 569 (7th Cir. 2001) (“By restricting the plaintiffs from using the means of expression that best reflects their views on how to address civic problems or best provides the reasons (albeit grounded in Christianity and the Bible) as to why they believe their viewpoint to be persuasive, the Village is requiring a ‘sterility of speech’ from the plaintiffs that it does not demand of other groups with regard to this requirement.”).

112. *See Air Line Pilots Ass’n, Int’l v. Dep’t of Aviation of Chi.*, 45 F.3d 1144, 1159–60 (7th Cir. 1995) (invalidating policy that prohibited political advertisements in O’Hare Airport and noting that a “view labeled as ‘political’ (presumably because it is controversial or challenges the status quo) may nevertheless exist in opposition to a view that has otherwise been included in a forum”).

113. *See Dolan*, *supra* note 99, at 84 (observing that “[e]very court to consider the issue has struck down government attempts to limit forum content by a ‘no public controversy’ policy”).

114. *Id.* at 72.

115. *See* KIMBERLY A. ZARKIN & MICHAEL J. ZARKIN, *THE FEDERAL COMMUNICATIONS COMMISSION: FRONT LINE IN THE CULTURE AND REGULATION WARS* 128–32 (2006) (describing the “long and complicated” history of the FCC’s regulation of indecency).

116. *See Ashcroft v. ACLU*, 542 U.S. 656 (2004) (finding Child Online Protection Act to be unconstitutional); *Reno v. ACLU*, 521 U.S. 844, 875 (1997) (finding large sections of



prohibit such speech on its own websites, it would need to show that indecent speech is disruptive to the purpose of the forum.<sup>117</sup> Even if the government were able to show that this disruption would occur, however, its ability to limit material that is indecent—but not obscene—is doubtful.<sup>118</sup> Courts have repeatedly held that the term “indecent” lacks objective and definite standards.<sup>119</sup> As Erwin Chemerinsky has noted, “[w]hat is decent or indecent depends entirely on the evaluator’s views.”<sup>120</sup>

Another common way that private websites limit speech is through “civility” or “decorum” policies. These codes of conduct typically prohibit certain types of profane, personal, or contentious comments from users. If the government were to implement such a policy on its websites, it would likely face significant First Amendment challenges. As a threshold matter, the civility requirements would need to contain “narrow, objective, and definite standards” to ensure that the government does not engage in viewpoint discrimination.<sup>121</sup> Courts have consistently invalidated

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the Communications Decency Act to be unconstitutional). *But see* United States v. Am. Library Ass’n, 539 U.S. 194 (2003) (upholding Children’s Internet Protection Act that required public schools and libraries receiving E-Rate discounts to install Internet filtering software as a condition of receiving federal funding).

117. *See* Nat’l Endowment for the Arts v. Finley, 524 U.S. 569, 582 (1998) (rejecting facial challenge to law that allowed the National Endowment for the Arts to take “decency and respect” for public values into consideration when providing grants to artists). *But see* Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 553–59 (1975) (finding municipal theater’s refusal to allow production of musical “Hair” because it “would not be ‘in the best interest of the community’” was unconstitutional content discrimination in a public forum).

118. Obscene expression falls outside the scope of First Amendment protection and is defined by the Supreme Court’s three-part test in *Miller v. California*, 413 U.S. 15, 24 (1973). Unlike obscenity, indecent speech is protected by the First Amendment. Accordingly, government can regulate such speech only if its interests are sufficiently compelling. *See Reno*, 521 U.S. at 870–74 (rejecting effort to ban indecent speech on the Internet).

119. *United States v. Williams*, 553 U.S. 285, 306 (2008) (noting “we have struck down statutes tied to criminal culpability to whether the defendant’s conduct was ‘annoying’ or ‘indecent’—wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.”). Under the First and Fifth Amendments, speakers are protected from arbitrary and discriminatory enforcement of vague standards. *See, e.g., Reno*, 521 U.S. at 875 (invalidating provisions in Communications Decency Act that would have prohibited posting “indecent” or “patently offensive” materials in a public forum online); *see NAACP v. Button*, 371 U.S. 415, 432–33 (1963).

120. Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court’s Application*, 74 S. CALIF. L. REV. 49, 58–59 (2000).

121. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (finding that an ordinance requiring a permit before authorizing public speaking, parades, or assemblies was a prior restraint and instructing that “a law subjecting the exercise of First Amendment

government efforts to limit speech pursuant to policies that merely leave it to the government's discretion to determine what is acceptable.<sup>122</sup>

Furthermore, as with the other restrictions discussed in this Section, the government would need to show that its civility policy was reasonable in light of the purpose served by the forum. The government is most likely to have success if its policy targets depictions of graphic violence and sex. Several cases suggest that it would be acceptable for the government to bar such content if it specifically describes the prohibited material so that officials can apply the restrictions neutrally.<sup>123</sup> As to speech that is merely in bad taste or offensive, however, it is unlikely that the government could prohibit such speech without satisfying strict scrutiny. As the Court admonished in *FCC v. Pacifica Foundation*, "the fact that society may find speech offensive is not a sufficient reason for suppressing it."<sup>124</sup>

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freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority'" (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–151 (1969)).

122. See *Amandola v. Town of Babylon*, 251 F.3d 339 (2d Cir. 2001) (invalidating town's implementation of policy for use of its meeting rooms where policy contained no enumerated limitations on content); *Int'l Union of Operating Eng'rs, Local 150 v. Vill. of Orland Park*, 139 F. Supp. 2d 950 (N.D. Ill. 2001) (invalidating village ordinance that merely stated that banners on light poles must be approved by Village Board, without providing any standards for acceptance).

123. See *Hopper v. City of Pasco*, 241 F.3d 1067, 1080 (9th Cir. 2001) (stating that city art gallery could reject overtly sexual art if it did so pursuant to objective standards that carefully describe the types of art that would be rejected); *AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d 1, 13 (1st Cir. 1994) (remarking that transit authority could prohibit certain types of explicit sexual advertising if it did so through a precise standard that it applied neutrally). Mary Jean Dolan suggests, however, that "captive audiences, combined with the inescapable visuals and the low value of such speech, probably accounts for courts' suggestions that such content limits could pass muster." Dolan, *supra* note 99, at 88.

124. 438 U.S. 726, 745 (1978). In *Cohen v. California*, where the defendant challenged his conviction for "wearing a jacket bearing the words 'Fuck the Draft,'" Justice Harlan explained why offensive speech should be accorded First Amendment protection:

To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.

403 U.S. 15, 24–25 (1971).

Even if the government were able to show that the uncivil speech it seeks to prohibit would be disruptive to the purpose of its forum, it is not entirely clear whether and how far the government can go in proscribing such speech in an online public forum. The Supreme Court has not yet addressed this issue,<sup>125</sup> and lower courts have offered conflicting guidance in the somewhat analogous context of city council, school board, and planning commission meetings.<sup>126</sup>

Take, for example, the Sixth Circuit's decision in *Leonard v. Robinson*, where the court ruled in favor of a citizen arrested for saying "god damn" while addressing a local township board meeting.<sup>127</sup> Even though the township supervisor apparently took offense at the speaker's use of "the Lord's name in vain," the court found that the supervisor had not ruled the speaker was out of order and that profane speech alone was not sufficiently disruptive to justify its curtailment.<sup>128</sup> The court did not explain, however, how much disruption a speaker must cause in order for government to prohibit profane speech in a limited public forum. Instead, the court simply admonished that "[p]rohibiting Leonard from coupling an expletive to his political speech is clearly unconstitutional,"<sup>129</sup> and noted that "[e]ven those who advocate the most narrow interpretation of the freedom of speech agree that in a democratic forum like a township meeting, the state should abstain from regulating speech."<sup>130</sup>

Another recent example is the Ninth Circuit's decision in *Norse v. City of Santa Cruz*.<sup>131</sup> In *Norse*, a divided three-judge panel held that the city did not violate a citizen's First Amendment rights by ejecting him from two city council meetings: one in 2004 where he paraded around the council chambers in protest and another in 2002 where he silently gave a Nazi-style salute after the Mayor ordered

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125. Other than in the school context, *see, e.g.*, *Bethel School District v. Fraser*, 478 U.S. 675 (1986), the Supreme Court has not decided a limited public forum case involving restrictions on speech directed at incivility.

126. *See* Paul D. Wilson & Jennifer K. Alcaez, *But It's My Turn to Speak! When Can Unruly Speakers at Public Hearings Be Forced to Leave or Be Quiet?*, 41 URB. LAW. 579, 594–95 (2009).

127. 477 F.3d 347, 351 (6th Cir. 2007).

128. *Id.* at 352, 359–60.

129. *Id.* at 360.

130. *Id.* at 357.

131. 586 F.3d 697 (9th Cir. 2009), *reh'g en banc granted*, *Norse v. City of Santa Cruz*, 598 F.3d 1061 (9th Cir. 2010).

that the time for open comment had expired.<sup>132</sup> The case went up to the Ninth Circuit twice. Initially the Ninth Circuit held that Norse's § 1983 claim could proceed because the city had not shown that his actions were disruptive.<sup>133</sup> On appeal the second time, the panel unanimously found that the city had acted reasonably in ejecting Norse when he led a parade in the council chambers. The panel was divided, however, on whether Norse's Nazi-style salute was disruptive. Dissenting Judge A. Wallace Tashima explained why he deemed the ejection to be impermissible viewpoint discrimination:

It is uncontroverted that Norse's Nazi salute lasted only a second or two and, in the course of rendering that salute, Norse uttered no word or other sound . . . . In fact, a close reading of the majority opinion shows that it does not hold that Norse's conduct was, itself, disruptive. Thus, there was no justification for the Mayor to eject Norse from the meeting for being disruptive. On the contrary, the record clearly supports the inference that Norse was ejected from the 2002 meeting because the Mayor and Council disagreed with (and intensely and overtly disliked) his viewpoint. . . . [T]here is ample evidence in the record to support a finding that Norse was removed because of his viewpoint—because Council members detested being characterized as acting Nazi-like.<sup>134</sup>

Apart from their disagreement over whether the city's actions constituted viewpoint discrimination, neither the majority nor the dissent in *Norse* defined what "disruption" entails in the public meeting context or offered guidance as to what constitutes reasonable government restrictions aimed at ensuring decorum. Given that the Ninth Circuit recently announced that it would rehear the case en banc,<sup>135</sup> perhaps the *Norse* case will provide such guidance.

It may very well be that public meetings are unique in the way that private speech can be disruptive to the government's purpose in opening the forum. While many public bodies have opened up their meetings to private speakers, the meetings have a larger—and

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132. *Id.* at 698–99.

133. *Norse v. City of Santa Cruz*, 118 F. App'x 177, 178 (9th Cir. 2004). The council's rules authorized removal by the Sergeant at Arms of any person who uses "language tending to bring the council or any council member into contempt, or any person who interrupts and refuses to keep quiet . . . or otherwise disrupts the proceedings of the council." *Id.*

134. *Norse*, 586 F.3d at 701 (Tashima, J., concurring in part and dissenting in part).

135. *Norse*, 598 F.3d 1061 (9th Cir. 2010).

perhaps more pressing—purpose: to conduct the government’s business. At public meetings, officials must take in new information, debate the government’s business, and vote on how to proceed. When the expressive activities of private individuals occur within close physical proximity to the public body, it is reasonable to conclude that those activities can be disruptive to the purpose of the forum. Norse’s parade in the Santa Cruz City Council’s chamber is one such example.

In the online context, however, disruption is rarely an all-or-nothing affair. Although commentators have observed an increase in profane and abusive speech online, especially when speakers believe they are anonymous,<sup>136</sup> it is unlikely that such speech will defeat the purpose of the online forum. Like water flowing around a rock, speech typically continues unabated online.<sup>137</sup> Moreover, the “captive audience” rationale,<sup>138</sup> which sometimes justifies greater deference to the government, is absent in the online context because participants in an online forum can simply ignore or “read past” the problematic speech.

As discussed above, in order to be able to impose content-based limitations in a public forum, the government must be vigilant in applying its putative restrictions. In other words, the government must ensure that the forum contains only speech that is within the stated content boundaries. If it fails to do so, it will no longer be

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136. See Adam N. Joinson, *Disinhibition and the Internet*, in *PSYCHOLOGY AND THE INTERNET* 75, 79–81 (Jayne Gachenback ed., 2d ed. 2007); Lyrrisa Barnett Lidsky & Thomas F. Cotter, *Authorship, Audiences, and Anonymous Speech*, 82 *NOTRE DAME L. REV.* 1537, 1575 (2007) (observing that “[s]ince the Internet magnifies the number of anonymous speakers, it also magnifies the likelihood of false and abusive speech”).

137. Some scholars, however, are examining whether certain forms of degrading and harassing speech online are causing individuals to curtail their participation in online forums. See Danielle Keats Citron, *Law’s Expressive Value in Combating Cyber Gender Harassment*, 108 *MICH. L. REV.* 373, 391 (2009).

138. The “captive audience” rationale underlies the claim that a state may legitimately restrict speech where distasteful expression is thrust upon an unwilling or unsuspecting recipient “in order to protect the sensitive from otherwise unavoidable exposure.” *Cohen v. California*, 403 U.S. 15, 21 (1971). The Court has applied the rationale to uphold speech restrictions on sending mail to citizens’ houses, *Rowan v. U.S. Post Office Dep’t.*, 397 U.S. 728 (1970), radio broadcasts, *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), and face-to-face speech directed at people entering an abortion clinic, *Hill v. Colorado*, 530 U.S. 703 (2000). However, the Court has instructed that “[t]he ability of government . . . to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.” *Cohen*, 403 U.S. at 21.

able to enforce those limitations.<sup>139</sup> Because even the most precise civility guidelines suffer from some degree of vagueness and invariably require subjective assessment, it would be exceedingly difficult for the government to show that it has been consistent in keeping out uncivil speech. This challenge is especially pronounced in the online context where the volume of private speech can be overwhelming for website administrators to monitor.<sup>140</sup>

In sum, the public forum doctrine presents significant challenges for the government when it restricts private speech on its websites. Not unlike private website operators, the government does not want its online forums to be used for discriminatory, violent, partisan, or otherwise inflammatory speech. Given the prevalence of profane, abusive, and irrelevant speech on the Internet,<sup>141</sup> this is no idle concern for government officials who are tasked with maintaining online forums.<sup>142</sup> But unlike private website operators, the government's efforts to moderate public discourse must comport with the First Amendment and other constitutional limitations.<sup>143</sup>

The public forum doctrine has faced considerable criticism over the years because of its arcane rules and inflexible categories,<sup>144</sup> which leave courts with little ability to calibrate the doctrine to account for a forum's specific context and purpose. This has left the government with some unappealing alternatives when it evaluates

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139. See *supra* note 110.

140. See generally Cliff Lampe & Paul Resnick, *Slash(dot) and Burn: Distributed Moderation in a Large Online Conversation Space*, Paper presented at CHI 2004, Vienna, Austria (April 24–29, 2004), <http://presnick.people.si.umich.edu/papers/chi04/LampeResnick.pdf> (last accessed Feb. 21, 2011).

141. See, e.g., Diane Mapes, *Anonymity Opens Up Split Personality Zone*, MSNBC (Sept. 24, 2008, 8:50m), <http://www.msnbc.msn.com/id/26837911/>; Mattathias Schwartz, *The Trolls Among Us*, N.Y. TIMES MAG., Aug. 3, 2008, at 24, available at [http://www.nytimes.com/2008/08/03/magazine/03trolls-t.html?\\_r=1](http://www.nytimes.com/2008/08/03/magazine/03trolls-t.html?_r=1).

142. This is not to say that such speech is not an important and continuing issue for government in the offline context as well. See, e.g., Andrea Damewood, *Council May Clarify Rules After Outburst*, THE COLUMBIAN (Sept. 17, 2010), <http://www.columbian.com/news/2010/sep/17/council-may-clarify-rules-after-outburst/> (reporting that the City Council in Vancouver, WA is discussing revamping its guidelines about content and decorum in the way citizens address elected officials).

143. Given government's uniquely powerful position within society, it is entirely proper to hold it to a higher standard.

144. See, e.g., Post, *supra* note 5, at 1715 (“[T]hese rules [governing the public forum doctrine] have proliferated to such an extent as to render the doctrine virtually impermeable to common sense. The doctrine has in fact become a serious obstacle not only to sensitive First Amendment analysis, but also to a realistic appreciation of the government's requirements in controlling its own property.”).

whether to allow private speech on its websites: it can exclude private speech entirely,<sup>145</sup> leave its online forums unmoderated,<sup>146</sup> or create very narrow subject- and purpose-based categories in order to avoid claims of viewpoint discrimination.

While there may be compelling reasons to adapt the public forum doctrine to account for how people actually assemble and communicate,<sup>147</sup> the Supreme Court has not been willing to entertain such a reconceptualization of the doctrine. Instead, the Court has created a whole new doctrine to deal with the problems created by the public forum doctrine.

### III. THE EVOLVING GOVERNMENT SPEECH DOCTRINE

The general principle that the government may not engage in viewpoint discrimination in a public or non-public forum does not apply when the government *itself* is speaking.<sup>148</sup> Pursuant to the government speech doctrine, when the speech is the government's, the First Amendment's limitations on government censorship fall away.<sup>149</sup> Indeed, "it is plausible to view the development of the 'government speech doctrine' in large part as an effort to relieve the government of the suffocating demands of the prohibition on viewpoint discrimination."<sup>150</sup> Yet the government speech doctrine presents a paradox. While non-neutral speech by the government is "integral to democratic society," it is also "potentially subversive of

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145. This draconian approach also applies in the social networking context as well. See Debra Cassens Weiss, *California Town Abandons Facebook Page Amid Legal Concerns*, ABA JOURNAL (Aug. 24, 2010, 4:30am), [http://www.abajournal.com/news/article/california\\_town\\_abandons\\_facebook\\_page\\_amid\\_legal\\_concerns](http://www.abajournal.com/news/article/california_town_abandons_facebook_page_amid_legal_concerns) (reporting that city of Redondo Beach cancelled its Facebook page due to First Amendment concerns).

146. The government can, of course, prohibit speech that falls outside First Amendment protection, such as obscenity.

147. See, e.g., Dolan, *supra* note 99, at 97–100; Gey, *supra* note 7, at 1538–39; Nunziato, *supra* note 33, at 1160–70.

148. See, e.g., *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1132 (2009).

149. Other constitutional limitations, however, apply to the government when it is speaking. See *id.* at 1139 (Stevens, J., concurring) (“[E]ven if the Free Speech Clause neither restricts nor protects government speech, government speakers are bound by the Constitution’s other proscriptions, including those supplied by the Establishment and Equal Protection Clauses.”).

150. Steven D. Smith, *Why is Government Speech Problematic? The Unnecessary Problem, the Unnoticed Problem, and the Big Problem*, 87 DENV. U. L. REV. 945, 949 (2010).

core First Amendment values.”<sup>151</sup> “The power to teach, inform and lead is also the power to indoctrinate, distort judgment, and perpetuate the current regime.”<sup>152</sup>

One would think that such a powerful and potentially distortive doctrine must have developed over many years, through thoughtful consideration of the respective interests and policies involved. This is not, however, how the government speech doctrine arose.

#### *A. The Doctrine’s Genesis*

The constitutional principles we refer to today as the government speech doctrine saw their genesis in 1991 in *Rust v. Sullivan*, where the Supreme Court addressed whether the government could prohibit doctors who worked in federally-funded family planning clinics from providing advice about abortion.<sup>153</sup> The Court held that the restrictions did not violate the First Amendment because the doctors were not private speakers entitled to free speech protections; rather, they spoke on behalf of the government and “when the Government appropriates public funds to establish a program it is entitled to define the limits of that program.”<sup>154</sup>

Intriguingly, the phrase “government speech” is absent from the four opinions that comprised the *Rust* decision.<sup>155</sup> Nevertheless, over the next decade the Court clarified its nascent doctrine in two cases involving challenges directed at university funding of student activities. In *Rosenberger v. Rector & Visitors of University of Virginia*, the Court held that the university’s refusal to fund a

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151. David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 702 (1992).

152. Mark G. Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863, 865 (1979).

153. 500 U.S. 173 (1991). There were some hints of the doctrine in earlier decisions, *see, e.g.*, *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 139 n.7 (1973) (Stewart, J., concurring) (“Government is not restrained by the First Amendment from controlling its own expression.”); *Keller v. State Bar of Cal.*, 496 U.S. 1, 12–13 (1990) (“If every citizen were to have a right to insist that no one paid by public funds express a view with which he disagreed, debate over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.”), but it was largely inchoate until *Rust*.

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

155. Chief Justice Rehnquist authored the majority opinion and Justice Blackmun filed a dissenting opinion in which Justice Marshall joined and in which Justices Stevens and O’Connor joined in part. Justices Stevens and O’Connor also filed separate dissenting opinions.



student-run Christian newspaper was unconstitutional viewpoint discrimination.<sup>156</sup> While the Court acknowledged in *Rosenberger* that the government cannot compel private speech, it cited *Rust* for the proposition that “[w]hen the government disburses public funds to private entities to convey a governmental message,” it is “entitled to say what it wishes.”<sup>157</sup> In *Board of Regents of the University of Wisconsin System v. Southworth*, the Court rejected a challenge brought by students who claimed that the university violated their First Amendment rights because it used their mandatory student activity fee to support student organizations whose viewpoints they found objectionable.<sup>158</sup> Relying on *Rust*, the Court held that the university was not seeking to encourage diverse private speech; rather, it was using the student funds to advance its own message and therefore was not constrained by the First Amendment’s free speech protections. According to Justice Kennedy, “[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.”<sup>159</sup>

Ten years after its decision in *Rust*, the Court made clear that the principles it had articulated in *Rust* and developed in *Rosenberger* and *Southworth* were based on the concept of government speech.<sup>160</sup> In *Legal Services Corp. v. Velazquez*, the Court considered the constitutionality of a statute that prohibited the Legal Services Corporation (“LSC”), a federally-funded legal aid program, from representing clients who sought to challenge existing welfare laws.<sup>161</sup> Like *Rust*, *Velazquez* involved a compelled-speech challenge. Unlike *Rust*, however, the Court held that the restrictions on speech were unconstitutional:

We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker, or instances, like *Rust*, in which the government “used private

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156. 515 U.S. 819, 834–35 (1995).

157. *Id.* at 833.

158. 529 U.S. 217, 220–21 (2000).

159. *Id.* at 235.

160. *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.”).

161. *Id.* at 536.

speakers to transmit specific information pertaining to its own program.” . . . [T]he LSC program was designed to facilitate private speech, not to promote a governmental message. Congress funded LSC grantees to provide attorneys to represent the interests of indigent clients. . . . The advice from the attorney to the client and the advocacy by the attorney to the courts cannot be classified as governmental speech even under a generous understanding of the concept. In this vital respect this suit is distinguishable from *Rust*.<sup>162</sup>

Although the Court held that the restrictions at issue in *Velazquez* were not entitled to permissive treatment pursuant to the government speech doctrine, it reaffirmed *Rust*'s special treatment of government speech under the First Amendment.<sup>163</sup>

Four years later, the Court further clarified this carve-out in *Johanns v. Livestock Marketing Ass'n*, where it considered a First Amendment challenge to the Department of Agriculture's "Beef. It's What's for Dinner" promotional campaign that was funded by a mandatory assessment paid by beef producers.<sup>164</sup> In *Johanns*, the Court unanimously held that the government can compel private speakers to pay for government speech, noting that "[c]itizens may challenge compelled support of private speech, but have no First Amendment right not to fund government speech."<sup>165</sup> The justices disagreed, however, on the question of whether the government must identify itself as the source of that speech in order to claim protection under the government speech doctrine.<sup>166</sup>

Justice Scalia, writing for the majority, concluded that the government had no affirmative duty to identify itself as the source. Instead, he reasoned that government need only demonstrate that it established the overall message to be communicated and controlled what was ultimately disseminated;<sup>167</sup> "[n]o more is required."<sup>168</sup>

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162. *Id.* at 541–43 (internal citations omitted).

163. *Id.* at 542.

164. 544 U.S. 550, 554 (2005). Some beef producers did not want to participate in the generic promotional campaign, believing that they could be more effective on their own. *Id.* at 555.

165. *Johanns*, 544 U.S. at 562; *id.* at 574 (Souter, J., dissenting) ("The first point of certainty is the need to recognize the legitimacy of government's power to speak despite objections by dissenters whose taxes or other exactions necessarily go in some measure to putting the offensive message forward to be heard.")

166. The ads at issue in *Johanns* did not mention the government, but instead included the tag line, "Funded by America's Beef Producers." *Id.* at 555 (majority opinion).

167. *Id.* at 560–62, 564.

According to Justice Scalia, the promotional campaign was government speech because “[t]he Secretary of Agriculture, a politically accountable official, oversees the program, appoints and dismisses the key personnel, and retains absolute veto power over the advertisements’ content, right down to the wording.”<sup>169</sup> Justice Scalia also noted that “Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time.”<sup>170</sup>

In dissent, Justice Souter took the majority to task for its willingness to cast the First Amendment’s safeguards aside without requiring that the government take any meaningful actions to ensure that it could be held accountable for its expressive activities: “It means nothing that Government officials control the message if that fact is never required to be made apparent to those who get the message.”<sup>171</sup> Justice Souter, who had joined the majority in *Rust*, went on to make it clear that he viewed political accountability as essential to the doctrine’s favorable treatment under the First Amendment. “Unless the putative government speech appears to be coming from the government, its governmental origin cannot possibly justify the burden on the First Amendment interests of the dissenters targeted to pay for it.”<sup>172</sup>

But the problem with the Court’s decision in *Johanns* goes even deeper. Not only did the majority not require that the government make plain that it was the source of the speech at issue,<sup>173</sup> it countenanced outright dissembling by the government. As Justice Souter observed in his dissent:

[E]xperience under the Act demonstrates how effectively the Government has masked its role in producing the ads. Most obviously, many of them include the tagline, “[f]unded by America’s Beef Producers,” which all but ensures that no one reading them will suspect that the message comes from the National Government. . . . Why would a person reading a beef ad

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168. *Id.* at 564.

169. *Id.* at 563.

170. *Id.* at 563–64.

171. *Id.* at 578 (Souter, J., dissenting).

172. *Id.* at 578–79.

173. On this point, the majority in *Johanns* was arguably following *Rust*, where the Court appears to have been unconcerned with the fact that the regulations did not require that the health care providers explain to patients that the government was dictating their response to questions about abortion. *See Rust v. Sullivan*, 500 U.S. 173, 180 (1991).

think Uncle Sam was trying to make him eat more steak? . . . [T]he Court nowhere addresses how, or even whether, the benefits of allowing government to mislead taxpayers by concealing its sponsorship of expression outweigh the additional imposition on First Amendment rights that results from it. Indeed, the Court describes no benefits from its approach and gives no reason to think First Amendment doctrine should accommodate the Government's subterfuge.<sup>174</sup>

Indeed, the test for government speech the Court articulated in *Rust* and clarified in *Johanns* requires almost nothing from the government beyond what it is already doing—controlling or restricting speech—while at the same time significantly undercutting the rationale for granting the government favorable treatment under the First Amendment in the first place, namely, accountability to the electorate as a check on government overreaching.<sup>175</sup>

Any possibility that the court would rethink its approach and require that the government take affirmative steps to identify itself as the source of speech for which it claims entitlement under the government speech doctrine was put to rest in *City of Pleasant Grove v. Summum*.<sup>176</sup>

In *Summum*, a Utah-based religious order requested permission to erect a “stone monument” inscribed with the “Seven Aphorisms of SUMMUM” in Pioneer Park in the City of Pleasant Grove, Utah.<sup>177</sup> Although the park contained fifteen permanent displays at the time, at least eleven of which were donated by private groups or individuals, the city denied the request, claiming that “its practice was to limit monuments in the Park to those that ‘either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community.’”<sup>178</sup> The following year, the city passed a resolution formally adopting this practice while adding other criteria, such as safety and aesthetics,

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174. *Johanns*, 544 U.S. at 577–79 & n.8 (Souter, J., dissenting) (internal citations omitted).

175. For a discussion of why transparency and government accountability are essential, see *infra* Part IV.

176. 129 S. Ct. 1125 (2009).

177. *Id.* at 1129. “According to Summum doctrine, the Seven Aphorisms were inscribed on the original tablets handed down by God to Moses on Mount Sinai.” *Id.* at 1129 n.1.

178. *Id.* at 1130. The permanent monuments in the park included “an historic granary, a wishing well, the City’s first fire station, a September 11 monument, and a Ten Commandments monument donated by the Fraternal Order of Eagles in 1971.” *Id.* at 1129.

to its monument policy. After the district court denied Summum's request for a preliminary injunction ordering the city to permit it to erect the monument, the Tenth Circuit reversed, concluding "that public parks have traditionally been regarded as public forums, [and] the City could not reject the Seven Aphorisms monument unless it had a compelling justification that could not be served by more narrowly tailored means."<sup>179</sup>

The Supreme Court, in its first unanimous decision applying the government speech doctrine, held that the city's selection of permanent monuments in the park was entitled to special treatment as government speech. In doing so, the Court instructed that the public forum doctrine was the wrong lens through which to view the case.<sup>180</sup> Speculating as to the results that would follow if courts applied public forum principles, the Court warned:

If government entities must maintain viewpoint neutrality in their selection of donated monuments, they must either "brace themselves for an influx of clutter" or face the pressure to remove longstanding and cherished monuments. . . . The obvious truth of the matter is that if public parks were considered to be traditional public forums for the purpose of erecting privately donated monuments, most parks would have little choice but to refuse all such donations. And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.<sup>181</sup>

This being the case, the Court was left with what it perceived to be a stark choice: either give the city freedom to engage in viewpoint discrimination or face a world without permanent monuments on government property. Perhaps not surprisingly,<sup>182</sup> the Court chose

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179. *Id.* at 1130 (citing *City of Pleasant Grove v. Summum*, 483 F.3d 1044, 1054 (10th Cir. 2007)). The Tenth Circuit had previously found a similar Ten Commandments monument in a different city park in Utah to be private rather than government speech. *See Summum v. Ogden*, 297 F.3d 995 (10th Cir. 2002).

180. *See Summum*, 129 S. Ct. at 1137 ("public forum principles . . . are out of place in the context of this case") (quoting *United States v. Am. Library Ass'n., Inc.*, 539 U.S. 194, 205 (2003)).

181. *Id.* at 1138 (internal citation omitted).

182. *See Norton & Citron*, *supra* note 83, at 915 (noting that "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) (observing that "the 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").

the former approach, concluding that the city's decisions regarding which monuments to approve were government speech.<sup>183</sup>

While the Court's holding characterizing the city's selection of monuments as government speech received unanimous support from the justices, they did not agree on whether the government must take steps to identify itself as the speaker or even whether the doctrine requires that a reasonable observer would understand the expression to be the government's speech. Instead, Justice Alito, who authored the opinion for the Court, appears to have cobbled together several rationales in order to garner support from the concurring justices.

Citing *Johanns*, Justice Alito wrote that the city "effectively controlled" the messages sent by the monuments in the Park by exercising "final approval authority" over their selection.<sup>184</sup> Although he did not state that anything more was required, he went on to note that park visitors would likely conclude that the city "intends the monument to speak on its behalf" because the city "owns and manages" the park where the monuments are located and the park "is linked to the City's identity."<sup>185</sup> But Justice Alito did not require that the government take any affirmative steps to identify itself as the speaker,<sup>186</sup> nor did he state that the Court's holding was based on an assessment of the circumstances involved in the display of monuments in the park, such as the location of the monuments, past practice by the city, or other cues that might lead a reasonable

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183. In fact, the Court saw the decision as an easy one: "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. Permanent monuments displayed on public property typically represent government speech." *Summum*, 129 S. Ct. at 1132.

184. *Id.* at 1134 (quoting *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 560–61 (2005)).

185. *Id.*

186. The Court rejected *Summum's* suggestion that it "require a government entity accepting a privately donated monument to go through a formal process of adopting a resolution publicly embracing 'the message' that the monument conveys." *Id.* at 1134. This conclusion also seems to be driven, at least in part, by pragmatic concerns. *See id.* ("The parks of this country contain thousands of donated monuments that government entities have used for their own expressive purposes, usually without producing the sort of formal documentation that respondent now says is required to escape Free Speech Clause restrictions. Requiring all of these jurisdictions to go back and proclaim formally that they adopt all of these monuments as their own expressive vehicles would be a pointless exercise that the Constitution does not mandate.").

observer to conclude that the government was acting in its capacity as speaker.

While Justice Alito conceded that it was a “legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint,”<sup>187</sup> he did not seek to reduce that danger by infusing the government speech doctrine with requirements that would actually lead to meaningful governmental accountability. Nor did he embrace the approach proposed by Justice Souter in his concurring opinion: that the Court “ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land.”<sup>188</sup>

As a result, the *Summum* decision “seemingly opens the door for the government to engage in viewpoint discrimination in any public forum just by adopting a private message as its own.”<sup>189</sup> Erwin Chemerinsky describes how this subterfuge on the part of the government might play out:

Imagine that a city allowed pro-war demonstrators to use a public park, but refused access to anti-war demonstrators. This would be clearly unconstitutional viewpoint discrimination. . . .

After the *Summum* decision, though, there is nothing to keep the government from announcing that it was adopting the private pro-war demonstrators’ message as its own speech. Once it did so, then the First Amendment would not apply and the requirement for content-neutrality would have no application. Justice Alito’s opinion would in no way preclude the government from engaging in this blatantly unconstitutional form of viewpoint discrimination.<sup>190</sup>

Extending Professor Chemerinsky’s hypothetical, it is not difficult to imagine the *Summum* case with a slightly different set of facts. Parks are expensive to maintain. So, instead of owning a public

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187. *Id.* at 1134.

188. *See id.* at 1142 (Souter, J., concurring) (“[T]he best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige by allowing the monument to be placed on public land.”).

189. Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2d 413, 426 (2009).

190. *Id.* at 426–27.

park, imagine that the city creates a virtual park, complete with pictures of trees and grass.<sup>191</sup> On one part of the website the city invites members of the community to post their own virtual “monuments,” in the form of text, audio, or video. Of course, it is likely that some of these virtual monuments will contain speech that the city will want to reject. Are there any limits to what our hypothetical city can do in selecting, editing, or removing these contributions from the public? Can the city engage in viewpoint discrimination simply by adopting the private messages as its own?

### *B. Government Speech on Government Websites*

Surprisingly, there are only a few judicial decisions addressing First Amendment challenges directed at speech on government websites, and none of the Supreme Court’s government speech cases to date have involved online speech. In fact, the Court’s government speech decisions have largely dealt with government restrictions in conventional forms of media such as print,<sup>192</sup> broadcast,<sup>193</sup> and the spoken word.<sup>194</sup> Lower courts, however, have had to deal with disputes over speech restrictions on government websites and they have been increasingly looking to the Court’s government speech cases for guidance.

In the two earliest cases to address speech restrictions on government websites, the courts applied public forum analysis and concluded that the government websites at issue were non-public forums. In *Putnam Pit, Inc. v. City of Cookeville*, the City of Cookeville operated a website that included a “local links” page containing a list of hyperlinks to local businesses.<sup>195</sup> *The Putnam Pit*,

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191. The City of Pleasant Grove does in fact have a website with pictures of trees, grass, and, given that the city is in Utah, mountains. PLEASANT GROVE, <http://www.plgrove.org/> (last visited Feb. 21, 2011).

192. See *Summum*, 129 S. Ct. at 1131 (dispute over whether selection of monuments with engraved speech was government speech); *Garcetti v. Ceballos*, 547 U.S. 410, 413–14, 425–26 (2006) (dispute over whether prosecutor’s memorandum criticizing the police was government speech); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005) (dispute over whether advertising campaign in print and on television was government speech).

193. See *Johanns*, 544 U.S. at 553 (television and print advertising).

194. See *Rust v. Sullivan*, 500 U.S. 173, 202–03 (1991) (health care providers’ discussion of abortion with patients at family planning clinics).

195. 221 F.3d 834, 841 (6th Cir. 2000) (*Putnam Pit I*). “A hyperlink (or link) is a word, group of words, or image that you can click on to jump to a new document or a new section within the current document.” *HTML Links*, W3SCHOOLS, [http://www.w3schools.com/HTML/html\\_links.asp](http://www.w3schools.com/HTML/html_links.asp) (last visited Feb. 21, 2011).



an independent newspaper and website that criticized corruption and malfeasance in Cookeville, requested that the city add a link to its website. In response to the request, the city, which at the time had no policy regarding hyperlinks, devised a policy that limited links first to non-profit entities and then to organizations that “would promote the economic welfare, tourism, and industry of the city.”<sup>196</sup> When the city continued to refuse to add the requested link to *The Putnam Pit*, the plaintiff sued, claiming that the city had established a designated public forum when it posted links to private websites and its refusal to link to his website constituted impermissible viewpoint discrimination.<sup>197</sup>

Following the prevailing approach for dealing with disputes over speech on government property, the Sixth Circuit looked to the public forum doctrine to decide the case.<sup>198</sup> The court ultimately determined that the city’s website was a non-public forum, but it worried that the city’s purported policy left too much discretion to the government. Because the Sixth Circuit found that evidence existed that the city refused to link to *The Putnam Pit* because it did not like the “controversial views” espoused on the website, the court remanded the case to the district court to determine if the city had engaged in viewpoint discrimination.<sup>199</sup> After a jury returned a verdict for the city, finding that the plaintiff did not meet the city’s criteria for inclusion on the city’s links page, the Sixth Circuit declined to overturn the verdict.<sup>200</sup>

Another early case involved a state employment website. In *Cahill v. Texas Workforce Commission*, the plaintiff sought to post comments and other information about employers on the Texas Workforce Commission’s physical bulletin boards and website.<sup>201</sup> As in *Putnam Pit*, the court held that the website was a non-public

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196. *Putnam Pit I*, 221 F.3d. at 841.

197. *Id.* at 841–42.

198. *Id.* at 842 (“The public forum analysis, which has traditionally applied to tangible property owned by the government, is an appropriate means to analyze [the plaintiff’s] claim.”).

199. *Id.* at 845.

200. *Putnam Pit, Inc. v. City of Cookeville*, 76 F. App’x 607, 614 (6th Cir. 2003) (*Putnam Pit II*) (“Because we hold that the jury’s finding that The Putnam Pit website was not eligible under the City’s criteria was supported by the evidence, we need not address whether Cookeville denied a link to The Putnam Pit solely on the basis of viewpoint.”).

201. 121 F. Supp. 2d 1022, 1024 (E.D. Tex. 2000), *aff’d sub nom.*, *Cahill v. Texas*, 263 F.3d 163 (5th Cir. 2001).

forum and the state had properly limited access to “people seeking workers or jobs.”<sup>202</sup> The court rejected the plaintiff’s contention that the exclusion of former employees was viewpoint discrimination because such speakers were not “member[s] of the class of speakers for whose especial benefit the forum was created.”<sup>203</sup> While the court noted that “Mr. Cahill may have a helpful suggestion” for the operation of the state’s website—presumably a suggestion that would have allowed job seekers to better evaluate employers—the court concluded that his exclusion was a content-neutral restriction based on speaker-status, not viewpoint discrimination.<sup>204</sup>

Both *Putnam Pit* and *Cahill* would likely have been even easier wins for the government under the government speech doctrine. Recall that pursuant to the government speech doctrine, the government is free to engage in viewpoint discrimination so long as it can show that it “effectively controls” the message being conveyed.<sup>205</sup> Because the City of Cookeville chose to use its website to promote local tourism and economic welfare, albeit a purpose it offered after the fact,<sup>206</sup> under the government speech doctrine it would have been free to link to any websites that it thought best promoted its message. Even if the city were to refuse to link to *The Putnam Pit* because it disfavored the newspaper’s viewpoint, it would be able to do so. Similarly, the Texas Workforce Commission, which maintained full control over the content on its website, could have refused Mr. Cahill’s request for any reason, including pursuant to a policy that allowed former employees to post only positive reviews about their employers.

A shift away from public forum principles to the far more lenient government speech doctrine occurred several years later, after the Supreme Court’s decision in *Johanns* demonstrated the utility of the Court’s government speech principles to government websites.<sup>207</sup> In

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202. *Id.* at 1026.

203. *Id.* (quoting *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 806 (1985)).

204. *Id.* at 1027.

205. Note, however, that both cases predated the Supreme Court’s decisions in *Johanns* and *Summum*.

206. Given the Supreme Court’s decision in *Summum*, post-hoc rationalizations do not appear to preclude the government from asserting that its expressive decisions are government speech.

207. Even after the Supreme Court’s decisions in *Johanns* and *Summum*, however, lower courts still occasionally applied the public forum doctrine to speech on government websites

*Page v. Lexington County School District One*, a South Carolina school district passed a resolution opposing pending legislation that the district believed would undermine funding for public education.<sup>208</sup> The district communicated its position on the school's website, where it also posted links to documents that expressed opposition to the bill, and through email and letters to parents and school employees that included information written by private citizens who opposed the legislation.<sup>209</sup> Randall Page, a vocal proponent of the legislation, requested "equal access" to the district's "informational distribution system," including its email system and website.<sup>210</sup>

When the school district rejected his request, Mr. Page filed suit claiming, *inter alia*, that the district's website was a public forum because it contained links to private organizations.<sup>211</sup> On appeal after the district court's dismissal of the claims, the Fourth Circuit turned immediately to the government speech doctrine.<sup>212</sup> Citing *Johanns*, the court focused on whether the school district had *established* the message being conveyed and exercised *effective control* over the content and dissemination of the message.<sup>213</sup> Finding that the school district "continuously and unambiguously communicated a consistent message" and "wholly controlled its own website, retaining the right and ability to exclude any link at any time," the court held that the links on the district's website were government speech.<sup>214</sup> Perhaps foreshadowing cases to come, the Fourth Circuit remarked in dicta that had the district's website been "a type of 'chat room' or 'bulletin board' in which private viewers could express

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without addressing the government speech doctrine, presumably because the defendants in those cases did not raise the issue of government speech. *See Hogan v. Twp. of Haddon*, 278 Fed. Appx. 98 (3rd Cir. 2008) (holding that township website was a non-public forum); *Vargas v. City of Salinas*, 205 P.3d 207 (Cal. 2009) (holding that city website was a non-public forum).

208. 531 F.3d 275 (4th Cir. 2008).

209. *Id.* at 278.

210. *Id.* at 277-78.

211. *Id.* at 279-80. The plaintiff also argued that "[b]y disseminating varying opinions from non-District employees via its e-mail system, website, facsimile machines, and newsletters, the District has created and has continuously maintained public fora." *Id.*

212. *Id.* at 280 (remarking that "Government's own speech . . . is exempt from First Amendment scrutiny") (quoting *Johanns v. Livestock Mktg. Ass'n*, 554 U.S. 550, 553 (2005)).

213. *Id.* at 281.

214. *Id.* at 284-85.

opinions or post information, the issue would, of course, be different.”<sup>215</sup>

Although courts often grapple with how to characterize a government website containing hyperlinks—primarily due to a lack of understanding about how the “Web” works<sup>216</sup>—the facts in *Page* made for a relatively straightforward application of the government speech doctrine. When a governmental entity states a clear position on a public issue and creates pages on its website supporting that position, the fact that those pages link out to private websites should not change the nature of who is doing the communicating.

The harder case arises when the government has taken no public position, communicated no policy, and provided no objective cues as to its intent to express a message. Indeed, this creates the potential for government subterfuge that Professor Chemerinsky identified after the Court’s decision in *Sumnum*.<sup>217</sup> Chemerinsky’s concern was that the government could freely engage in viewpoint discrimination merely by offering post hoc rationalizations to justify its discrimination.

We see this danger manifest itself in a recent case involving a town website in New Hampshire. In *Sutcliffe v. Epping School District*,<sup>218</sup> the town maintained a website that provided information about the town’s government, including its boards and commissions, town meetings, and other government-sponsored activities. The town’s Board of Selectmen determined what materials would appear on the website and over the years added hyperlinks “to the websites of ‘governmental agencies and certain civic organizations.’”<sup>219</sup> Although the town had been operating its website since the 1990s, the Board of Selectmen had no written or other formal policy that dictated what content was acceptable or unacceptable for the website.<sup>220</sup>

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215. *Id.* at 284.

216. See Jeff Jarvis, *The Link Economy v. The Content Economy*, BUZZ MACHINE (June 18, 2008, 10:00am), <http://www.buzzmachine.com/2008/06/18/the-link-economy-v-the-content-economy> (observing that “the real value . . . is not content and information—both of which are now quickly commodified—but links, which are the new currency of media”).

217. Chemerinsky, *supra* note 189, at 426–27.

218. 584 F.3d 314 (1st Cir. 2009).

219. *Id.* at 322.

220. *Id.* at 338 (Torruella, J., concurring in part and dissenting in part).

In 2006, a local citizens group that advocated reduced spending and described itself as “‘a perennial thorn in [the Town’s] side,’”<sup>221</sup> along with its chairman Thomas Sutcliffe and other members of the community, demanded that the Board of Selectmen provide the group with the opportunity to distribute its materials opposing town spending through the same channels the town was using, including the town’s website. When the board refused, the plaintiffs filed “suit alleg[ing] that [the] defendants violated [their] First and Fourteenth Amendment rights by ‘creating fora . . . for the expression of their viewpoints regarding spending, while failing and refusing to allow the [plaintiffs] access to such fora in order to communicate their contrary viewpoints regarding spending.’”<sup>222</sup>

While the town conceded that it did not have a formal policy for deciding what links to include, it argued that its practice in making such decisions “was always to ‘provide information to the citizenry of the Town on Town business.’ The only links that were permitted were ones that ‘would promote providing information about the Town,’ and any links that were ‘political or advocate[d] for certain candidates’ were not allowed.”<sup>223</sup> After the plaintiffs filed their lawsuit, however, “the town adopted a written . . . policy that limited hyperlinks on [its] website to those for governmental agencies or ‘events and programs that are coordinated and/or sponsored by the Town of Epping.’”<sup>224</sup>

On appeal, the First Circuit focused on the town’s actions in setting up the website and its control over the content and hyperlinks, noting that “[t]he Town created a website to convey information about the Town to its citizens and the outside world and, by choosing only certain hyperlinks to place on that website, communicated an important message about itself.”<sup>225</sup> Citing to *Summum* and *Johanns*, the First Circuit concluded that “like the city in *Summum*, the Town defendants effectively controlled the content

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221. *Id.* at 318.

222. *Id.* at 321. In their second amended complaint, the plaintiffs added a new set of allegations based on the town’s decision in 2007 to add a link on its website to the website for *Speak Up, Epping!*, a community event that “was intended to foster community spirit, civic discourse, and the organization of community-defined projects and action groups.” *Id.* at 322–23.

223. *Id.* at 322.

224. *Id.*

225. *Id.* at 331.

of this message by exercising “final approval authority” over the[ ] selection’ of the hyperlinks on the website.”<sup>226</sup>

The *Sutcliffe* case is similar to *Summum* in other respects as well. Like the City of Pleasant Grove, the Town of Epping’s lack of a clear policy regarding what private speech it permitted raised the danger that its refusal to link to the citizen group’s website was motivated by its distaste for the group’s viewpoint, rather than the town’s desire to maintain the purity of its own message—which in both *Sutcliffe* and *Summum* was opaque at the time the government refused to allow the private parties to express themselves on government property. In dissent, Judge Torruella made this concern explicit:

[T]he majority extends the doctrine to a situation where, in my view, it was not clear that the government was engaging in speech at the time it was acting, and only justified its actions after the fact. The majority’s position has the potential of permitting a governmental entity to engage in viewpoint discrimination in its own governmentally-owned channels so long as the governmental entity can cast its actions as its own speech after the fact. . . . It is nearly impossible to concoct examples of viewpoint discrimination on government channels that cannot otherwise be repackaged ex post as “government speech.”<sup>227</sup>

Judge Torruella also criticized the majority for relying on political accountability as a restraint on government overreaching, noting that the government speech doctrine itself makes accountability less effective because it allows the government “to silence opposition by narrowing the fora in which opposing views may be expressed.”<sup>228</sup> Indeed, “[t]his is akin to allowing the government ‘to fight freestyle, while requiring the other [side] to follow Marquis of Queensberry rules.’”<sup>229</sup> Echoing Justice Souter’s concurrence in *Summum*, Judge Torruella stated that the government speech doctrine should turn on whether a “reasonable observer would construe the Town’s actions as government speech,

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226. *Id.* (quoting *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1134 (2009)).

227. *Id.* at 337 (Torruella, J., concurring in part and dissenting in part).

228. *Id.* (arguing that “relief through political processes becomes further constrained by expanding the government’s ability to silence opposition by narrowing the fora in which opposing views may be expressed.”)

229. *Id.* at 338 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992)).

as opposed to the designation of a public forum or simple run-of-the-mill viewpoint discrimination.”<sup>230</sup>

*Putnam Pit, Cabill, Page*, and *Sutcliffe* involved simple websites with no discernable means for direct public input. Yet even these relatively easy cases demonstrate the “legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint.”<sup>231</sup> As government websites become more interactive, thereby allowing the public to add its own voice to that of the government’s, courts will face an increasing challenge in determining when government is itself speaking and when it is simply abusing its power over private speech. The Fourth Circuit alluded to this challenge in *Page v. Lexington County School District One*,<sup>232</sup> but no court has yet had to apply the government speech doctrine to an interactive government website.

We can, however, draw some guidance from how courts have applied the government speech doctrine in analogous contexts. In fact, courts have been quite generous in finding the doctrine applicable where the government exercises control over which private speech is presented to the public.<sup>233</sup> The Ninth Circuit’s decision in *Downs v. Los Angeles Unified School District* illustrates this point.<sup>234</sup> In *Downs*, a school district established a bulletin board to celebrate Gay and Lesbian Awareness Month and invited faculty and staff to post material on the board.<sup>235</sup> After the school district refused to allow a teacher to post materials questioning the morality of homosexuality, the Ninth Circuit held that the bulletin board’s contents were government speech, noting that school officials had

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230. *Id.* at 338 n.16.

231. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1134 (2009).

232. 531 F.3d 275, 284 (4th Cir. 2008) (suggesting that in “a type of ‘chat room’ or ‘bulletin board’ in which private viewers could express opinions or post information, the issue would, of course, be different”).

233. *See, e.g., Summum*, 129 S. Ct. at 1134 (selection of donated monuments held to be government speech); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 561 (2005) (approval of privately created advertising materials); *Illinois Dunesland Pres. Soc’y v. Illinois Dept. of Natural Res.*, 584 F.3d 719, 725 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 2367 (2010) (selection of brochures for display racks in Illinois Beach State Park); *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23, 30 (D.C. Cir. 2005) (selection of “party animal” statutes placed around Washington, DC); *Downs v. Los Angeles Unified School District*, 228 F.3d 1003, 1013 (9th Cir. 2000) (oversight over postings on school bulletin board celebrating Gay and Lesbian Awareness Month).

234. 228 F.3d 1003.

235. *Id.* at 1005–06.

engaged in expressive activity by “either choosing not to speak or speaking through the very act of [removing the speech of others].”<sup>236</sup>

The question, of course, is how much control over private speech must the government exercise in order to bring a case within the ambit of the government speech doctrine. According to the Ninth Circuit in *Downs*, it was sufficient that school officials “had authority over the bulletin boards’ content at all times,” even though there was evidence that they had not consistently exercised that authority.<sup>237</sup>

Similarly, in *People for the Ethical Treatment of Animals, Inc. v. Gittens*,<sup>238</sup> the D.C. Circuit held that the District of Columbia’s Commission on the Arts and Humanities was entitled to claim protection under the government speech doctrine because it retained the authority to approve the design of private art displayed throughout the city as part of its “Party Animals” sculpture program.<sup>239</sup>

In *Gittens*, the city rejected an entry from the People for the Ethical Treatment of Animals (PETA) that showed “a sad, shackled circus elephant” on the grounds that its portrayal of cruelty did not meet the city’s criterion that the sculptures be “festive and whimsical.”<sup>240</sup> PETA argued that because the city had accepted other sculptures that were not festive, including tributes to the heroes and victims of the September 11 terrorist attacks and designs commemorating civil rights leaders, the city’s rejection was viewpoint discrimination.<sup>241</sup> The D.C. Circuit found the city’s allegedly inconsistent application of its approval standards to be immaterial, holding that the city’s refusal to allow PETA’s sculpture was government speech:

The Commission spoke when it determined which elephant and donkey models to include in the exhibition and which not to include. In using its “editorial discretion in the selection and presentation of” the elephants and donkeys, the Commission thus

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236. *Id.* at 1012.

237. *Id.* at 1011.

238. 414 F.3d 23 (D.C. Cir. 2005).

239. *Id.* at 30. The “Party Animals” program involved a city initiative to create temporary sidewalk sculpture displays of donkeys and elephants and was intended to showcase local artists, attract tourists and enliven the streets “with creative, humorous art.” *Id.* at 25.

240. *Id.* at 26–27.

241. *Id.* at 27.



“engage[d] in speech activity”; “compilation of the speech of third parties” is a communicative act.<sup>242</sup>

As *Downs* and *Gittens* demonstrate, the government speech doctrine grants the government broad power to impose viewpoint-based limitations on private speech in what would otherwise be public forums subject to strict First Amendment oversight.

### *C. The Nature of Public-Government Discourse*

As courts begin to address disputes over government speech on interactive websites, they will quickly discover that the government speech doctrine rests on a set of questionable assumptions about how public discourse occurs. One such assumption is that speech must be either private or governmental. As discussed above, the characterization of speech as governmental is usually dispositive under the government speech doctrine. The problem with this binary approach, however, is that “much speech is the joint production of both government and private speakers and exists somewhere along a continuum, with pure private speech and pure government speech at each end.”<sup>243</sup> As government websites become more interactive, the line between government and private speech will further blur.

A second assumption underlying the government speech doctrine is that public discourse is asynchronous; that is, the speaker and audience do not interact in any meaningful way. This is a conception of government speech in which the government speaks and citizens listen. Embodying this mindset, the government speech doctrine is concerned only with a single moment in time when courts are expected to ask whether the government established and controlled what was disseminated.<sup>244</sup> The doctrine is not concerned with how context and the passage of time shape the public’s understanding of who is speaking or what is being communicated.

Unlike the broadcast model of speech (i.e., one-to-many) that predominates in the Court’s government speech cases, online speech

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242. *Id.* at 28 (quoting *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998)).

243. Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 607 (2008) (demonstrating the mixed nature of private and governmental speech in the context of specialty license plates).

244. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560–62, 564 (2004).

is considered a many-to-many form of synchronous communication that involves complex, multi-directional and multi-modal conversations.<sup>245</sup> As Yochai Benkler observes in his seminal work on the *Wealth of Networks*:

We are witnessing a fundamental change in how individuals can interact with their democracy and experience their role as citizens. . . . They are no longer constrained to occupy the role of mere readers, viewers, and listeners. They can be, instead, participants in a conversation. . . . The network allows all citizens to change their relationship to the public sphere. They no longer need be consumers and passive spectators. They can become creators and primary subjects. It is in this sense that the Internet democratizes.<sup>246</sup>

While there is little interaction between the government and the public once the government has installed a monument on public property or broadcast an advertisement on television, the view that government speaks and the public merely listens makes little sense in the context of many government websites. The FCC's Broadband.gov, which allows citizens to use real-time discussion tools to engage in a *conversation* with government officials, is an example of this profoundly important change in the nature of public-government discourse and highlights the danger of extending the government speech doctrine to mixed private and governmental speech without adequate assurances of government accountability.<sup>247</sup>

#### IV. LIMITING THE GOVERNMENT SPEECH DOCTRINE

As discussed in Part III, the Supreme Court's government speech cases do not require that the government take affirmative steps to identify itself as the source of speech that it later claims as its own under the government speech doctrine. In fact, the circularity of the Court's test for government speech is astonishing. If the government were not engaged in compelling or limiting private speech, there would be no dispute in the first place. The current test for government speech, which turns on whether the government

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245. See BENKLER, *supra* note 38, at 241–72.

246. *Id.* at 272.

247. See Corbin, *supra* note 243, at 671 (concluding that “treating mixed speech as government speech upsets free speech values by allowing the government to escape accountability for its speech and by distorting the marketplace of ideas”).

“effectively controlled” the message,<sup>248</sup> simply requires that the government be *effective* in doing the very thing that is the subject of the plaintiff’s First Amendment challenge. Indeed, the more rapacious the government is in controlling private speech, the greater will be its entitlement to claim special treatment under the government speech doctrine.

The only limit on the doctrine that the Court has identified is the government’s “accountab[ility] to the electorate and the political process for its advocacy.”<sup>249</sup> Yet the Court’s government speech cases do not explain what accountability means in this context, nor do they contain mechanisms for ensuring that any accountability is possible. The forms of accountability the Court likely envisions, namely voting, lobbying, and petitioning, will restrain the government from overreaching only if citizens are aware that the contested expression is the government’s. Without this knowledge on the part of the electorate, accountability is nothing but a hollow aspiration that serves only to mask the Court’s abdication of the First Amendment’s core free speech principles.

This is all the more disturbing because the government has a long history of trying to obscure its role in influencing and controlling private speech.<sup>250</sup> The government’s opportunities for

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248. *Johanns*, 544 U.S. at 560. Because the Supreme Court “has provided very little guidance as to what constitutes government speech,” *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1140 (10th Cir. 2001), some lower courts have come up with their own tests that examine:

- (1) the central “purpose” of the program in which the speech in question occurs;
- (2) the degree of “editorial control” exercised by the government or private entities over the content of the speech; (3) the identity of the “literal” speaker; and (4) whether the government or the private entity bears the “ultimate responsibility” for the content of the speech . . .

*Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles*, 288 F.3d 610, 618 (4th Cir. 2002); *see also Wells*, 257 F.3d at 1140–41. *But see Chiras v. Miller*, 432 F.3d 606, 618 (5th Cir. 2005) (declining to apply the four-factor test).

249. *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000); *see also Johanns*, 544 U.S. at 563–64 (noting that “Congress, of course, retains oversight authority, not to mention the ability to reform the program at any time”).

250. *See, e.g., Johanns*, 544 U.S. at 577–78 (Souter, J., dissenting) (observing that “experience under the Act demonstrates how effectively the Government has masked its role in producing the ads”); Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 983–88 (2005) (noting government’s covert efforts to influence public debate); Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 233 (2008) (describing the government’s strategic use of leaks to influence public debate). For example, George W. Bush’s aides secretly paid \$240,000 to columnist Armstrong Williams to promote the No Child Left Behind Act and

subterfuge will only increase as more speech moves from the physical to the virtual world, where there is truth to the adage captured in Peter Steiner's famous cartoon in *The New Yorker*: "On the Internet, nobody knows you're a dog."<sup>251</sup> Given the government's increasing use of "emerging technologies that have dramatically altered expression's speed, audience, collaborative nature, and anonymity,"<sup>252</sup> it is critically important that the government speech doctrine ensure that government can actually be held accountable for its expressive activities.

*A. Ensuring that Government Can Be Held Accountable for Its Expressive Activities*

As other scholars have noted, to make accountability possible the government speech doctrine should be limited to situations where the government can demonstrate that those who receive the speech at issue understand it to be the government's speech.<sup>253</sup> Helen Norton, one of the proponents of this approach, offers a two-part test to assess whether the government has met its burden in showing that meaningful accountability is possible:

[T]he government can establish its entitlement to the government speech defense only when it establishes itself as the source of that expression both as a *formal* and as a *functional* matter. In other words, government must expressly claim the speech as its own when it authorizes or creates a communication *and* onlookers must

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staged a fake press conference with public affairs staffers at the Federal Emergency Management Agency in 2007. See Al Kamen, *FEMA Meets the Press, Which Happens to Be . . . FEMA*, THE WASHINGTON POST, Oct. 26, 2007, at A.19; Howard Kurtz, *Administration Paid Commenter*, THE WASHINGTON POST, Jan. 8, 2005, at A01.

251. Peter Steiner, *Cartoon*, THE NEW YORKER, July 5, 1993, at 61, available at [http://en.wikipedia.org/wiki/On\\_the\\_Internet,\\_nobody\\_knows\\_you're\\_a\\_dog](http://en.wikipedia.org/wiki/On_the_Internet,_nobody_knows_you're_a_dog).

252. Norton & Citron, *supra* note 83, at 902 (citations omitted).

253. See Bezanson & Buss, *supra* note 7, at 1384 (stating that "government speech should be limited to purposeful action by government, expressing its own distinct message, which is understood by those who receive it to be the government's message"); Leslie Gielow Jacobs, *Who's Talking? Disentangling Government and Private Speech*, 36 U. MICH. J.L. REFORM 35, 57, 61 (2002); Lee, *supra* note 250, at 1052 (noting that accountability requires that "a reasonable recipient understands that the government bears responsibility for a communication"); Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587, 599 (2008) (concluding that "meaningful accountability [must be] a key measure of government speech").

understand the message to be the government's at the time of its delivery.<sup>254</sup>

Norton goes on to explain why the government must satisfy both a formal and functional test and how courts should evaluate these requirements.<sup>255</sup> Her contention that the government speech doctrine must be concerned with how the recipients of speech understand its source is clearly in keeping with Justice Souter's concurrence in *Summum*, where he stated that "the best approach . . . is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige."<sup>256</sup>

After *Johanns* and *Summum*, however, it is not clear that the Court considers it relevant whether the public know their government is claiming the speech as its own; in fact, the Court's decision in *Johanns* casts considerable doubt on such a requirement. Nevertheless, this approach is gaining acceptance in the lower courts, which "appear reluctant to embrace the Court's focus on government's establishment and control of contested expression largely because of its troubling implications that the more government controls speech, the more speech it will be permitted to control."<sup>257</sup> The Seventh and Eighth Circuits,<sup>258</sup> for example, have adopted tests that are similar to the approach Justice Souter outlined in his dissent in *Johanns* and his concurrence in *Summum*.<sup>259</sup>

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254. Norton, *supra* note 253, at 599.

255. *See id.* at 599–618.

256. 129 S. Ct. 1125, 1142 (2009) (Souter, J., concurring). It is not clear, however, that Justice Souter would require that the government take affirmative steps to identify itself as the speaker if the context and circumstances are insufficient to lead a reasonable observer to conclude the speech at issue is the government's. *See id.* (finding that the circumstances surrounding the monuments gave a sufficient indication that they were government speech).

257. Norton & Citron, *supra* note 83, at 916–17 n.89 (citing *Sutcliffe v. Epping Sch. Dist.*, 584 F.3d 314, 337 (1st Cir. 2009) (Torruella, J., dissenting) ("The majority's position has the potential of permitting a governmental entity to engage in viewpoint discrimination in its own governmentally-owned channels so long as the governmental entity can cast its actions as its own speech after the fact. What is to stop a governmental entity from applying the doctrine to a parade? Or official events? It is nearly impossible to concoct examples of viewpoint discrimination on government channels that cannot otherwise be repackaged ex post as 'government speech.'" (citations omitted))).

258. *Roach v. Stouffer*, 560 F.3d 860 (8th Cir. 2009); *Choose Life Ill., Inc. v. White*, 547 F.3d 853 (7th Cir. 2008), *cert. denied*, 130 S. Ct. 59 (2009).

259. In *Choose Life Illinois, Inc. v. White*, the Seventh Circuit addressed the question whether Illinois' decision not to allow an anti-abortion advocacy group to issue a "choose life" specialty license plate was a violation of the group's First Amendment rights. 547 F.3d at 858.

The tests adopted by these appellate courts are in keeping with the rationale for granting government speech special status under the First Amendment in the first place: namely that an informed electorate can hold government accountable for its speech. In fact, both the Seventh and Eighth Circuits made a point of distinguishing *Johanns*, choosing instead to embrace the approach espoused by Justice Souter that the inquiry be centered on what a reasonable and fully informed observer would conclude with regard to whether the speech is private or governmental.

From a government accountability perspective, a test that focuses on whether a reasonable recipient would conclude that the government is speaking may be enough to ensure that meaningful accountability is possible. However, Professor Norton's other prong, which requires that the government also "make clear its intent to communicate its own views at the time it creates or authorizes the expression,"<sup>260</sup> would accomplish several laudable objectives in addition to increasing the likelihood that meaningful government accountability will occur.

Demanding that government take formal steps to claim speech as its own will "force[] the government to articulate, and thus think carefully about, its expressive decisions."<sup>261</sup> It also improves the information available to the recipients of government speech who will be in a better position to assess the information's reliability and

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In deciding whether messages on specialty license plates are private or government speech, the Seventh Circuit stated that the "test can be distilled (and simplified) by focusing on the following inquiry: Under all the circumstances, would a reasonable person consider the speaker to be the government or a private party?" *Id.* at 863. The Seventh Circuit went on to note that the "[f]actors bearing on this analysis include, but are not limited to, the degree to which the message originates with the government, the degree to which the government exercises editorial control over the message, and whether the government or a private party communicates the message." *Id.* After analyzing these factors, the Seventh Circuit rejected the state's contention that its specialty-license plate program was government speech. *Id.*

260. Norton, *supra* note 253, at 599.

261. *Id.* at 601–02. Requiring that the government articulate its expressive choices may also improve the functioning of democratic society. As Mark Fenster notes:

[T]ransparent reasoning and decisionmaking by a representative body enable public discussion and the broadening of citizens' and officials' moral and political perspectives. A deliberative understanding of the publicity principle requires that government give public justifications for its policies and promote rational, critical public debate and unrestricted communication in order to enable development of a functional, democratic public sphere.

Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 897 (2006) (internal citations omitted).

potential biases. For example, if the women who received pregnancy counseling in *Rust* were made aware of the government's intrusion into the doctor-patient relationship, they could assess whether they were receiving appropriate medical advice—and whether they needed to seek additional information elsewhere.

Demanding that government be transparent about its expressive activities at the point of communication also prevents the government from engaging in subterfuge by manufacturing the kind of after-the-fact justifying policies and programs that Justice Alito conceded in *Summum* were a legitimate concern when government seeks special treatment under the government speech doctrine.<sup>262</sup> Moreover, it will force government to be more transparent about its actions in a broad range of areas, impacting both the design of government websites and the development of Internet architecture more generally.

### *B. Accountability, Transparency, and Website Design*

The challenge lies in translating the aspirational goal of government accountability into practical measures the government can implement if it wishes to engage in viewpoint discrimination under the auspices of the government speech doctrine. Fortunately, the government has a number of options available that permit it to be transparent about its expressive activities. This is particularly so when the government speaks online, where many of the cost and space constraints it faces in the physical world fade away.

Even in the physical world, imposing a requirement on government that it take steps to identify itself as a speaker would be an insignificant burden on the government. In *Summum*, for example, the city need only have added a plaque stating that it selected the monuments that were installed in the park.<sup>263</sup> Similarly, in *Johanns* the tag line at the bottom of each advertisement could have mentioned that the “Beef. It's What's For Dinner” campaign

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262. *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1134 (2009) (noting that “Respondent voices the legitimate concern that the government speech doctrine not be used as a subterfuge for favoring certain private speakers over others based on viewpoint”).

263. It would have been even more beneficial from the perspective of government accountability if the city also included on its plaque its selection criteria: that it selected monuments that “either (1) directly relate to the history of Pleasant Grove, or (2) were donated by groups with longstanding ties to the Pleasant Grove community.” *Id.* at 1130.

was conducted at the behest of the Department of Agriculture.<sup>264</sup> There is little, if any, additional cost to the government in being transparent about its role as speaker in these contexts.

In the online world, the marginal cost to the government of being transparent about its expressive activities is nearly zero. In fact, the government has access to a powerful set of tools that it can use to identify itself as the speaker or to disclaim the speech of private parties. These tools give the government great flexibility in designing its websites, including the ability to use graphics, audio, video, and hyperlinks to create online discussion spaces that reinforce governmental transparency.

### *1. Government-authored speech*

The first decision the government faces when it creates a website is how to identify the website. All websites have what is called a uniform resource locator (URL) that essentially serves as the website's address.<sup>265</sup> For example, the FCC's website on broadband policy resides at [Broadband.gov](http://Broadband.gov). The ".gov" portion of the URL, which is called a top level domain (TLD), indicates that the website is operated by or on behalf of the government.<sup>266</sup> Use of ".gov" and other government TLDs such as ".mil" and ".fed.us" are only available to state and federal government entities and are administered by the General Services Administration.<sup>267</sup>

In 2004, the Office of Management and Budget (OMB) issued a memorandum informing all federal agencies with public-facing websites that they must comply with certain transparency requirements.<sup>268</sup> On the topic of URLs, the OMB instructed that all agencies must clearly indicate the government's involvement in the website:

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264. Instead, the government dissembled. *See supra* notes 173-174 and accompanying text. Moreover, the government never offered a reason why it was interested in having Americans eat more steak.

265. *See generally* Tim Berners-Lee, Roy T. Fielding, & Larry Masinter, *Uniform Resource Identifier (URI): Generic Syntax*, INTERNET SOCIETY, <http://labs.apache.org/webarch/uri/rfc/rfc3986.html> (last visited Feb. 21, 2011).

266. *See* WIKIPEDIA, *Top-Level Domain*, (Feb. 22, 2011 5:03pm) [http://en.wikipedia.org/wiki/Top-level\\_domain](http://en.wikipedia.org/wiki/Top-level_domain) (last visited Feb. 14, 2011).

267. *See* 41 C.F.R. § 102-73.

268. Clay Johnson III, *Memorandum for the Heads of Executive Departments and Agencies* (Dec. 17, 2004), <http://www.whitehouse.gov/omb/memoranda/fy2005/m05-04.pdf>.



Your agency must use only .gov, .mil, or Fed.us domains unless the agency head explicitly determines another domain is necessary for the proper performance of an agency function. . . . This requirement recognizes the proper performance of agency functions includes an obligation for clear and unambiguous public notification of the agency's involvement in or sponsorship of its information dissemination products including public websites.<sup>269</sup>

Like a sign indicating that one has entered government property, the website's URL communicates to the public that they have accessed a communication space that is under government control. While this might be a sufficient signal to readers when the government's website is relatively simple and contains only government authored content, many government websites include both government authored pages and pages where private parties can engage in expressive activities. For these more complicated websites, the government should do more than simply rely on the website's URL as an indication of its role; it should unambiguously identify which speech it claims as its own and which speech it does not.

Government has at its disposal a variety of source indicators that it can use to communicate authorship to the public. The most effective way the government can do this is through express cues.<sup>270</sup> For example, when government employees are speaking on behalf of the government, they can signal government authorship by attaching their name and government position to the material they are disseminating or by adding other clear indicators of government authorship that are akin to the way government letterhead communicates governmental origin.<sup>271</sup> In addition to express cues, contextual cues such as the location of speech and past government practices can also be effective ways of signaling that government is speaking.<sup>272</sup> Because express cues are the most effective way to signal government authorship, however, "governments seeking to protect

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269. *Id.* at 4.

270. *See* Norton, *supra* note 253, at 607–09.

271. Government employees speaking on behalf of the government are also likely to be able to easily satisfy the control test for government speech because they "exercise final approval authority over every word used." *See* *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 561 (2005); *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

272. *See* *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1133 (2009) (observing that the monument's location "on public property" and "the general government practice with respect to donated monuments" would serve to indicate the identity of the speaker); Norton, *supra* note 253, at 607, 610.

the integrity of their own expression should design their communications in a way that enhances, rather than obscures, transparency by employing express cues whenever possible.”<sup>273</sup>

Again, the website design tools available to the government make the inclusion of express cues a simple matter. The Federal Web Managers Council, “an inter-agency group of about 40 web managers from every cabinet-level agency and many independent agencies,” provides guidance to government website operators on how they can achieve this level of transparency.<sup>274</sup> The group, which operates USA.gov, instructs federal agencies to

clearly display the name of your agency or organization on every web page to show visitors who sponsors the website. Be sure it's clear on every page that the site is maintained by the U.S. government. . . . By clearly displaying your agency's name and sponsorship on every page of your website, you're clearly telling the public that your agency is accountable for the website's content. Visitors do not always come to your website through the “front door.” Many enter at a second, third, fourth, or lower level. So you need to be sure that visitors can identify the sponsorship of your website, no matter where they are within your site.<sup>275</sup>

## 2. *Mixed governmental and private speech*

The challenge for government website operators arises when the website includes not just government-authored speech, but also expression provided by private parties, whether in the form of user comments, links to private websites, or other third-party content. Indeed, it is becoming increasingly common for government websites to incorporate such speech alongside government-authored content.<sup>276</sup> Because it can be very difficult for the public to distinguish between governmental speech and private speech in this context, it is imperative that the government speech doctrine be

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273. Norton, *supra* note 253, at 605 (suggesting that “[a]n incentive for governments to engage in such transparency, express cues might trigger a rebuttable presumption that a contested message is governmental in origin and thus free from Free Speech Clause scrutiny, while their absence may be presumed to signal a nongovernmental source”).

274. WEBCONTENT.GOV, *About Us*, <http://www.howto.gov/about-us> (last visited Feb. 14, 2011).

275. WEBCONTENT.GOV, *Showing U.S. Government Sponsorship*, [http://www.usa.gov/webcontent/reqs\\_bestpractices/best\\_practices/sponsorship.shtml](http://www.usa.gov/webcontent/reqs_bestpractices/best_practices/sponsorship.shtml) (last visited Feb. 14, 2011).

276. *See supra* Part II.A.

predicated on the requirement that the government be transparent about its intent and actions with regard to such private speech.

Recall that even as to speech created by private parties, the government is not precluded from claiming the speech as government speech if the government's intent is to promote its own message rather than to facilitate private speech, and it exercises sufficient control over the message being conveyed.<sup>277</sup> While at first blush it may seem unlikely that the government could successfully claim that the comment section on its website—with multiple and varied messages from private speakers—is government speech,<sup>278</sup> the government speech doctrine contains no bar to its application in such a context. To the contrary, the Supreme Court has stated that private input does not obviate a finding of government speech.<sup>279</sup>

Moreover, the government may be able to demonstrate the requisite degree of control over user comments by showing either that it maintained editorial control over the content of the messages,<sup>280</sup> or that it had authority to determine which messages were ultimately published.<sup>281</sup> The latter form of control is actually

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277. See *supra* notes 156–86 and accompanying text.

278. See Norton, *supra* note 253, at 615 (“Some courts contend that the presence of a variety of messages within a particular setting undermines the conclusion, as a functional matter, that the government could be the author of them all.”). Given the paucity of government speech cases, it is likely that a court would look to both the public forum and government speech doctrines to address these questions. The public forum and government speech doctrines are intertwined in that they define the ends of a continuum. Moreover, the government speech doctrine gestated within the public forum doctrine, as several of the early decisions that the Court now characterizes as government speech cases were not understood to be so at the time. See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 217 (2000); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 819 (1995); 515 U.S. at 819; *Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

279. See *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1131 (2009) (stating “[a] government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message”); *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562 (2005) (where the government controls the message, “it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources”); *Rosenberger*, 515 U.S. at 833 (government may “regulate the content of what is or is not expressed . . . when it enlists private entities to convey its own message”).

280. See *Johanns*, 544 U.S. at 561 (finding government speech because government controlled “every word” of the promotional materials).

281. See *Summum*, 129 S. Ct. at 1134 (selection of donated monuments); *Johanns*, 544 U.S. at 561 (approval of privately created advertising materials); *Illinois Dunesland Pres. Soc’y*, 584 F.3d at 725 (selection of brochures for display racks in Illinois Beach State Park); *Gittens People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23, 30 (D.C. Cir. 2005) (selection of statues placed around Washington, DC); *Downs v. L.A. Unified Sch. Dist.*,

quite common on private websites, where moderation tools give website operators the ability to approve every comment before it is publicly accessible.<sup>282</sup>

Because these tools make it relatively easy for the government to exercise control over private speech – and there are strong pressures on the government to do so – it is likely that government will use them to implement content-based restrictions. For example, the government will undoubtedly want to impose civility guidelines on its websites, as many private website operators do. As discussed in Part II, the government would face significant First Amendment challenges under the public forum doctrine if it were to prohibit profane and contentious speech in a public forum.<sup>283</sup> Unlike the public forum doctrine, however, the government speech doctrine does not demand that the government demonstrate that such speech would be disruptive to the purpose of its forum. Nor does the government speech doctrine require that the government articulate narrow, objective standards or even that it be consistent in applying its putative limitations.<sup>284</sup> The government speech doctrine’s only demand is that the government show that it “effectively controlled” the speech of third parties.<sup>285</sup> Accordingly, under existing government speech jurisprudence, the government would have wide latitude to restrict, remove, or otherwise moderate private speech.

That a court might hold that the government speech doctrine permits the government to exercise such broad discretion over public comments on a government website reinforces the importance of

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228 F.3d 1003, 1013 (9th Cir. 2000) (oversight over postings on school bulletin board); *cf.* *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 674 (1998) (observing that public broadcasters engage in expressive activities when they “facilitate the expression of some viewpoints instead of others”); *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Bost., Inc.*, 515 U.S. 557, 569–70 (1995) (expressive choice in selection of parade participants).

282. Almost all website content management systems provide built-in tools for moderating conversations or comments created by third-party users of the website. For example, vBulletin, a popular software product for forum websites, allows a website operator to manipulate user discussions (or “threads”) by editing, deleting, or moving user submissions through a menu interface only accessible to the operator. *See* Wayne Luke, *BULLETIN, A Quick Guide to Moderating Your Forum*, <http://www.vbulletin.com/forum/content.php?243-Quick-Guide-to-Moderating-Your-Forum> (last visited Feb. 14, 2011). Similarly, in WordPress, a widely used blog publishing platform, website operators can moderate comments submitted by website visitors on a post-by-post basis. *WORDPRESS, Comment Moderation*, [http://codex.wordpress.org/Comment\\_Moderation](http://codex.wordpress.org/Comment_Moderation) (last visited Feb. 14, 2011).

283. *See supra* Part II.C.

284. *See supra* Part III.B.

285. *Sumnum*, 129 S. Ct. at 1134.

requiring that the government be transparent about its intentions and activities when it plans to assert that its actions are exempt from First Amendment scrutiny. While there may be countervailing reasons why the government should not be given the power to claim private speech as government speech in this context, political accountability can at least serve as a check against government overreaching and as a remedy for those speakers who have been excluded—if the government is required to be transparent about its expressive activities.

If, however, the government is permitted to remove or restrict private speech on the basis of viewpoint and is not required to communicate to the public that it is doing so, there is a danger that the government's systematic exclusion of certain viewpoints will distort public discourse, including giving the appearance of consensus on issues where disagreement exists.<sup>286</sup> Indeed, the more government manipulates public debate in this fashion, the greater the harm to free-speech values.<sup>287</sup> Furthermore, as Judge Torruella warned in *Sutcliffe v. Epping School District*, government can—under the guise of the government speech doctrine—actually make accountability less effective because it can “silence opposition by narrowing the fora in which opposing views may be expressed.”<sup>288</sup>

Should government choose to be transparent about its intentions, it will find that its website designers have a number of options available that permit it to communicate what actions it is taking with regard to private speech. The Federal Web Managers Council, for example, provides helpful guidance on how government officials can do this. In the context of hyperlinks, the Council advises that agencies should “[d]evelop and post a clear and comprehensive

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286. See *City of Ladue v. Gilleo*, 512 U.S. 43, 60 (1994) (O'Connor, J., concurring) (cautioning that “content-based speech restrictions . . . are particularly susceptible to being used by the government to distort public debate.”). Government subterfuge also raises other “risks to First Amendment interests,” including “distortion of the private marketplace for expression; displacement of private speech through conversion or alteration of meaning; and deception about who authored a message.” Bezanson & Buss, *supra* note 7, at 1384.

287. See Howard M. Wasserman, Bartnicki as Lochner: *Some Thoughts on First Amendment Lochnerism*, 33 N. KY. L. REV. 201, 216 (2005) (observing that “the more the law looks like governmental censorship or governmental manipulation of public debate, thus the greater the harm to free-speech values”); Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1122 (2002) (“It is not that content-based regulation of speech is inherently despotic, but that it inherently lends itself to despotism.”).

288. 584 F.3d. at 337 (Torruella, J., concurring in part and dissenting in part).

policy for linking to other websites.”<sup>289</sup> It also suggests that federal websites should clearly indicate that a link goes to a private website by: “Placing an icon next to the link; Identifying the destination website in the link text or description itself; Inserting an intercepting page that displays the notification, after the user selects the link; and Displaying all non-federal links in a separate listing from federal links.”<sup>290</sup>

The express cues the Council identifies, including icons, explanatory link text, segregated content, and interstitial pages, can be implemented by government website designers to indicate to readers that the government has restricted, edited, or removed private speech.<sup>291</sup> Even better, government can use these tools to explain what it has done and what its policy is regarding the moderation or removal of private speech. Of course, government should be just as transparent when it is disclaiming private speech,<sup>292</sup> whether that speech is in the form of user comments or links to the websites of private parties.<sup>293</sup>

Accordingly, if the government wishes to protect the integrity of its expression and ensure robust public discourse, it should clearly designate what portions of its website contain speech that it claims as its own and which portions it disclaims. Again, some government websites are already implementing this approach. For example, Business.gov, which is operated by the U.S. Small Business Administration (SBA), contains a number of government authored and private party pages that cover such topics as starting a business and writing a business plan.<sup>294</sup> At the bottom of each page authored

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289. WEBCONTENT.GOV, *Establish a Link Policy*, [http://www.usa.gov/webcontent/managing\\_content/organizing/links/policy.shtml](http://www.usa.gov/webcontent/managing_content/organizing/links/policy.shtml) (last visited Feb. 14, 2011).

290. *Id.*

291. Google does this very effectively when it takes users to an interstitial page notifying them that content has been removed pursuant to a takedown request from a copyright holder under the Digital Millennium Copyright Act. See Wendy Seltzer, *Unsafe Harbors: Abusive DMCA Subpoenas and Takedown Demands*, ELECTRONIC FRONTIER FOUNDATION, [http://www.eff.org/IP/P2P/20030926\\_unsafe\\_harbors.php#\\_edn3](http://www.eff.org/IP/P2P/20030926_unsafe_harbors.php#_edn3) (last visited Feb. 21, 2011).

292. See Norton, *supra* note 253, at 602 (noting that “the government can decline to claim certain speech as its own as a formal matter” and providing examples).

293. When the government does this, however, the restrictions it imposes on private speech will be evaluated under the public forum doctrine, including that doctrine’s prohibition on viewpoint-based discrimination. See *supra* Part II.C.

294. The SBA states that the website provides “small business owners with information and resources they need to comply with laws and regulations, and to take advantage of

by the government, the SBA states: “Business.gov is an official site of the U.S. Small Business Administration.”<sup>295</sup>

The SBA website also contains an extensive community forum “where entrepreneurs and small business owners [can] learn, share, and discuss practical solutions to everyday business problems.”<sup>296</sup> Although the link to the website’s “Community Rules of Conduct and Disclaimer” could be more prominently featured on each page, the SBA makes clear that it is disclaiming the private speech in the forums: “Except when specifically noted, any views or opinions expressed on the Business.gov Community forums, blogs or member-contributed resources are those of the individual contributors. The views and posted comments do not necessarily reflect those of the Business Gateway Program Office, the U.S. Small Business Administration, partner agencies, or the Federal government.”<sup>297</sup>

When it comes to government speech on government websites, it is clear that government already has access to the tools it needs to be transparent about its expressive activities. The real question is whether government has the will to do so and whether the law provides sufficient incentives when that will is lacking. The fact is that many government websites currently implement features that indicate government authorship and disclaim private speech. Making this a requirement of the government speech doctrine would simply enshrine a set of practices that already are extant across many government websites.<sup>298</sup>

## V. CONCLUSION

Over the past decade, governments at all levels have moved with alacrity to engage with their citizens online, launching thousands of government websites, including blogs, discussion boards, and other

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government programs and services to help them start, expand and run their businesses.” BUSINESS.GOV, *About Us*, <http://www.business.gov/about/> (last visited Feb. 21, 2011).

295. *Id.*

296. BUSINESS.GOV, *Community Rules of Conduct and Disclaimer*, <http://www.business.gov/about/policies/community/> (last visited Feb. 21, 2011).

297. *Id.*

298. This is not to say, however, that government does not sometimes act in ways that reduce transparency. *See, e.g.*, Chris Soghoian, *Recovery.gov Blocked Search Engine Tracking*, CNET.NEWS (Feb. 19, 2009, 5:41am), [http://news.cnet.com/8301-13739\\_3-10167373-46.html](http://news.cnet.com/8301-13739_3-10167373-46.html) (reporting that the “Obama administration has apparently opted to forbid Google and other search engines from indexing any content on the newly launched Recovery.gov”).

online platforms that solicit public participation. Not unlike private website operators, the government does not want these platforms to be used for discriminatory, abusive, and profane speech. But unlike private website operators, the government's efforts to moderate public discourse must comport with the First Amendment. Given that the public forum doctrine presents significant challenges for the government when it restricts private speech, it is likely that the government—and the courts—will look to the government speech doctrine to provide flexibility in dealing with disputes over speech on government websites.

While it may be the case that granting the government this flexibility will actually increase the opportunities for public discourse, there are reasons to be concerned that the government speech doctrine accords government too much discretion to claim private speech as its own. This problem is exacerbated by the Supreme Court's present unwillingness to require that the government take affirmative steps to ensure that political accountability can serve as a check on government overreaching. In the context of government websites, where governmental speech is often intertwined with private speech, this lack of accountability raises the danger that government subterfuge will distort public discourse and subvert core First Amendment principles.

Echoing Justice Souter's concurrence in *Summum*, this Article argues that the government speech doctrine should be grounded in *meaningful* governmental accountability. At the very least, the doctrine should be predicated on government demonstrating that a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government chooses to oblige. Translated into practical terms, the government must demonstrate that it claimed the disputed speech as its own when it authorized or created the expression and that a reasonable observer would understand the expression to be the government's speech.

Fortunately, government already has the means to be transparent about its expressive activities, especially in the context of government websites. Insisting that the government do so in order to obtain the benefits of the government speech doctrine will reinforce the importance of government transparency not just in its communication, but also across other government functions. It also will inspire the design and development of communication



technologies that allow for more effective attribution and identity systems on both governmental and private websites and networks.<sup>299</sup>

As more speech migrates from the physical to the digital, the government speech doctrine—if it is grounded in meaningful accountability—can help to ensure that government leads the way in configuring these new virtual town squares as places that support robust public discourse. Indeed, as Jack Balkin predicted, it may be that “the most important decisions affecting the future of freedom of speech will not occur in constitutional law; they will be decisions about technological design, legislative and administrative regulations, the formation of new business models, and the collective activities of end-users.”<sup>300</sup>

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299. Jack M. Balkin, *The Future of Free Expression in A Digital Age*, 36 PEPP. L. REV. 427, 441 (2009) (“Digital technologies, like the Internet itself, do not have to be structured in any particular way. We can design them so that they promote participation and innovation by large numbers of people. Or we can design them so that they are far less participatory, so that the Internet becomes a locked-down content delivery system designed for large enterprises, like broadcast and cable television are today.”).

300. *Id.* at 427.