Public Forum 2.0:
Social Media Guidance for Government Lawyers

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Perhaps inspired by President Barack Obama's successful use of social media in his 2008 campaign, government actors are eager to jump on the social media bandwagon. But legal concerns have deterred some and have even prompted Redondo Beach, California to take down a Facebook page it had maintained for a year. According to the city's attorney, the city is waiting for the law regarding government social media use to settle out, but in the meantime, "I would just prefer that the case law not have city of Redondo Beach in the title."[1]

Government sponsored social media present a number of legal issues, not least of which are public records and public meetings law. However, one of the thorniest issues is whether a government sponsored social media site is a public forum.

Consider the following hypothetical: Suppose the Mayor of Jonesville, Florida sets up a Facebook page to allow residents to discuss a city-wide initiative to reduce energy usage. A heated Facebook discussion ensues about whether global warming is a hoax. The Mayor then orders the removal of posts discussing global warning on the grounds that they do not relate to city business. He also orders the removal of all profanity and "hate speech" directed at Muslim Americans. Are the mayor's actions constitutional?

It ought to be easy to answer this question, but it isn't. The answer requires close examination of public forum doctrine, an area of law that was "virtually impermeable to common sense" even before the Internet came along.[2] A few propositions can be stated with confidence. A government actor who creates a purely informational Facebook page, such as a "We Love Jonesville" fan page, engages in "government speech" and therefore retains editorial control of the page. At the other end of the spectrum, a government actor who creates a completely open, interactive Facebook page without any explicit statement of purpose probably cedes all but the most limited forms of editorial control over that forum.

Between the extremes of no interactivity and complete interactivity, it is difficult to predict whether courts will label a government-sponsored social media site a public forum or not. But it is precisely "in between" where government actors are likely to wish to engage citizens and where citizens are most likely to benefit from government social media initiatives. The goal of this article, therefore, is to provide guidance to lawyers trying to navigate the morass that is the Supreme Court's public forum jurisprudence to advise government actors wishing to establish social media forums.

First, though, it is worth asking whether the game is worth the candle. Government actors have a variety of incentives to use social media to reach their constituencies. Willie Sutton was reported to have said that he robbed banks because that's where the money is, and governments are turning to social media because that's where the citizens are. Not only can

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[1] Kristen S. Agostini, Redondo Beach Does About Face on FAceboo, DailyBreeze.com, Aug. 22, 2010.

[2] ROBERT C. POST, CONSTITUTIONAL DOMAINS 199 (1995) (noting also that public forum doctrine has received "nearly universal condemnation from commentators").

social media deliver large audiences; they can deliver demographically desirable ones. Social media are also cheap and fast tools to reach and mobilize citizens. They may even help humanize government by giving citizens the sense that their voices are being heard, and even governance itself may be improved by "crowdsourcing" information gathering or problem solving to citizens willing to volunteer their expertise online.[3]

Luckily, government social media use, even when motivated purely by self-interest, often benefits citizens. Citizens benefit from receiving government information quickly, cheaply, and without distortion. More significantly, interactive social media have the potential to foster citizens' First Amendment interests in free speech, free association, and petitioning government for redress of grievances. Interactive social media can serve as a virtual public squares, encouraging interactions among citizens who might never meet in a real one. Interactive social media also encourage the exchange of information between governments and the governed, providing the "continuous process of consultation" that democratic theory envisions.[4] More to the point, social media create pressures for government officials to respond to public demands.

The current state of the law, however, may deter realization of social media's full potential to foster First Amendment values.[5] Public forum doctrine governs the rights of citizens to speak on government property. Public forum doctrine is a "complex maze of categories and subcatgeories" that determine whether government speech restrictions are subject to strict or lax constitutional scrutiny. The choice of category—whether traditional public forum, limited public forum, non-public forum, or government speech—often determines the outcome of cases, but the lines between the categories are so blurry that they make it difficult for government actors to know how to establish social media forums without relinquishing all editorial control over abusive, indecent, or off-topic speech.

Traditional Public Forums

The starting point for examining modern public forum doctrine is *Perry Education Association v. Perry Local Educators' Association*.[6] *Perry* involved a union seeking to communicate with teachers via a school mail system. The school already had granted access to a competing union, but the school contended that it granted access based on that union's status as the exclusive collective bargaining representative of the teachers in the district. The Supreme Court ultimately determined by a 5-4 vote that the school had not designated its internal mail system as a public forum, and it therefore upheld the school's grant of preferential access to the incumbent teachers' union as "reasonable"[7] and viewpoint neutral. Along the way, however, the Court used *Perry* as an opportunity to impose order on public forum doctrine by delineating three forum categories.

The first category is the traditional public forum, which includes government property such as streets or parks that have been devoted to public expressive use "by long tradition or by

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[3] For an illustration, see Beth Simone Noveck's WIKIGOVERNMENT (2009), which describes an innovative social media program that enables "crowdsourcing" of the patent examination process.

[4] MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 16 (University of California Press 1983).

[5] Government lawyers must worry not just about First Amendment law but about public records and privacy laws as well. I shall leave the latter topics to other authors.

[6] 460 U.S. 37 (1983).

[7] *Id.*

government fiat."[8] In the traditional public forum, the State may not impose content-based restrictions on speech there unless they are "necessary to achieve a compelling state interest and . . . narrowly drawn to achieve that end."[9] Content-neutral "time, place, and manner" restrictions are permissible, but only if they are "narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication."[10] Though one might assume that social media could become traditional public forums by "fiat," the Supreme Court has restricted the category to property "historically" used for public expression, thereby closing it to online forums.

Designated Public Forums

The designated public forum "consists of public property which the state has opened for use by the public as a place for expressive activity."[11] Courts will not find a designated public forum absent a clear indication of government intent to open the forum, though such intent can be determined in part based on "policy and practice" and whether the property is of a type compatible with expressive activity.[12] The government may either open a "designated" forum to the public as a whole, in which case it operates no differently than the traditional public forum and is subject to the same constitutional restraints, or it may establish a designated but "limited" public forum. The limited public forum is where things start to get messy doctrinally. Indeed, even subdividing the forum categories in this manner is arguable. Although the Supreme Court used the three categories of forums--traditional, designated, and limited--in its most recent decision on the issue,[13] it never mentions the "non-public forum" discussed in prior decisions,[14] making it unclear whether this is a separate category, or whether it has finally collapsed into the limited public forum.

Limited Public Forums

The limited public forum is a vexed constitutional category. The limited public forum is a place or space designated for speech by "certain groups" or for "discussion of certain subjects."[15] For example, a university can limit a public forum it establishes to use by student groups, and a school district can limit a public forum to the discussion of "school board business."[16] "If the government excludes a *speaker* who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny."[17]

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[8] *Id.* at 45.
[9] *Id.*
[10] *Id.*
[11] *Perry*, 460 U.S. at 45.
[12] Cornelius v. NAACP Legal Defense and Edu. Fund, 473 U.S. 788, 802 (also noting that courts may look to whether the property was "designed for and dedicated to expressive activities").
[13] *Christian Legal Society v. Martinez*, 130 S.Ct.2971, 2984 n.11 (2010).
[14] *See, e.g., Forbes*, 532 U.S. 666 (describing categories as including traditional public forums, designated public forums opened to either "all or part of the public", and nonpublic forums).
[15] *Perry*, 360 U.S. at 46 n.7
[16] *Perry*, 360 U.S. at 46 n.7(citing Widmar v. Vincent, 454 U.S. 263 (1981) , which struck down a school's exclusion of religious groups from facilities opened to all other student groups, and City of Madison Joint School Dist. v. Wisconsin Public Employment Relations Comm'n, 429 U.S. 167 (1976).
[17] Forbes, 532 U.S. 666. Presumably, therefore, if a state university opens a forum for students to discuss "environmental issues," any exclusion of a student who is clearly discussing an environmental issue is subject to

However, the government's establishment and application of content parameters in the limited public forum must be "reasonable in light of the purposes of the forum" and viewpoint neutral.

One might assume that a constitutional standard that demands only reasonableness and viewpoint neutrality gives the government essentially *carte blanche* to exclude speakers based on subject matter. But the Supreme Court has often applied reasonableness with "bite" in the limited public forum.[18] Moreover, the Supreme Court decisions in this area are almost always decided by 5-4 votes, making it even harder to predict how much leeway governments have to exert editorial control in a limited public forum.

Nonpublic Forums

A nonpublic forum is government property, such as a military base, that "is not by tradition or designation a forum for public communication."[19] Within nonpublic forums, governments may impose time, place, and manner restrictions, and may exclude speakers so long as exclusion is "reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[20] In practical effect, a determination that a forum is "nonpublic" will almost always result in deference to the discretion of the government actor in deciding who may speak and what shall be discussed.

The line between the designated "limited" public forum and the non-public forum is maddeningly slippery, and some would even say non-existent, notwithstanding their linguistically opposed labels. A distinguishing factor between them seems to be whether the government grants selective access on a case-by-case basis as opposed to holding the property generally open for a limited class of speakers. Nonetheless, the real differences are slight. In both categories, the State must maintain viewpoint neutrality, and application of state-imposed content parameters for the forum will be judged by a reasonableness standard for the most part. One possible difference is as follows: The Supreme Court has said, albeit in dicta, that when the State excludes speakers who meet "identity" criteria from entrance to a limited public forum, strict scrutiny should apply. An arguably more relevant distinction is that the labels are likely to trigger different attitudes of deference in the judges deciding the cases. Arguably, the reasonableness inquiry is more likely to be applied with "bite" to a limited public forum than to a nonpublic one, but without empirical verification, this is pure speculation. Reading too much into the labels may obfuscate other contextual factors that shape outcomes in public forum cases.

Government Speech

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strict scrutiny, but exclusion of the student because his topic is not truly an "environmental issue" is subject to only a reasonableness standard.

[18] *See, e.g.,* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 825 (1995), a 5-4 decision in which the Court struck down the University's exclusion of religious groups from a funding program for student groups that served "educational purposes." The Court gave little deference to the University's application of forum criteria, instead stretching to find viewpoint discrimination. One commentator notes that among lower courts "A common means of avoiding the implications of finding that speech falls within the hazy middle [limited public] forum is for courts to find that exclusion of the speaker from the forum is viewpoint discriminatory." *Strict Scrutiny in the Middle Forum* at 2151 (citing examples).

[19] P*erry*, 460 U.S. at 46.

[20] *Id.* at 46

The final constitutional category into which government sponsored social media might be slotted is "government speech," [21] and, indeed, this category clearly applies to tweets and other non-interactive government social media The heart of government speech doctrine is the realization that governments must speak in order to govern, and that governments speak through agents whom they hire, pay, select, facilitate or subsidize.[22] Whether online[23] or off, the government is permitted to use media to communicate its views to citizens, and when it does so, it need not include opposing viewpoints. Constraints on government speech come not from the First Amendment's Speech Clause, but rather from the political process, with voters or other political actors ostensibly "checking" government speech (and government actions) with which they disagree.[24]

Applying the Categories to Interactive, Government-Sponsored Social Media

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

Which Category?

As a threshold matter, government ownership is not a sine qua non of a public forum status. A social media forum is neither owned nor exclusively controlled by the government actor who establishes it.[25] If the mayor of Jonesville establishes a Facebook page, he presumably receives a license from Facebook to use its proprietary software. Once the Facebook page is established, the mayor does not own or control the underlying software. Indeed, the mayor does not even retain complete editorial control of the page, since Facebook conditions use of its software on a user's agreement to certain terms and conditions. However, the lack of government ownership or exclusive control of the social media forum it establishes should not preclude a finding of public forum status. Just as the government can rent a building to use as a

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[21] The government speech doctrine began with Rust v. Sullivan in 1991, 500 U.S. 173 (1991), though the decision does not use the term government speech. The most recent and fullest articulation is Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125 (2009).

[22] *See, e.g.,* Johanns v. Livestock Marketing Ass'n, 544 U.S. 550 (2005) (holding, 6-3, that the First Amendment does not prevent the federal government from requiring beef producers to pay for government-directed beef advertising).

[23] *See* Page v. Lexington County School District One, 531 F.3d 275 (4th Cir. 2008); Downs v. Los Angeles Unified School District 228 F.2d 1003 (9th Cir. 2000), cert. denied, 532 U.S. 994 (2001); Sutliffe v. Town of Epping, 584 F. 3d 314 (1st Cir. 2009). *See also* R. Johan Conrod, *Linking Public Websites to the Public Forum*, 87 VA. L. REV. 1007 (2001) (pull article & read thoroughly); *but see* Putnam Pit, Inc. v. City of Cookville, 221 F.3d 834 (6th Cir. 2000) (determining city website was nonpublic forum but denying city summary judgment for denying plaintiff's requires for hyperlink on website) (Putnam I); Putnam Pit, Inc. v. City of Cookeville, 76 Fed. Appx. 607, (6th Cir. 2003) (Putnam II) (declining to overturn jury verdict for city because plaintiff did not meet requirements for being allowed a hyperlink) .

[24] Pleasant Grove City, Utah v. Summum, 129 S. Ct. 1125 (2009). For more on this topic, see Helen Norton and Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899 (2010)

[25] Compare Southeastern Promotions Ltd v. Conrad, 420 U.S. 546 (1975), which involved a privately owned theater under a long-term lease to the city of Chattanooga, Tennessee

forum for public debate and discussion, so too can it "rent" a social media page for the promotion of public discussion.

With this issue settled, it remains unclear whether an interactive government sponsored social media site is a public forum or not. A *non-interactive* Facebook page controlled by a government actor is undoubtedly government speech, meaning that private speakers have no First Amendment rights to speak in those forums. But more and more government actors seem to appreciate the fact that social media's primary attraction for citizens is interactivity. Consider the White House's Facebook page.[26] The White House clearly identifies the page as an official site subject to the Presidential Records Act, and there is no mistaking that the White House is using it to convey messages and videos to citizens. However, the site is also set up to allow comments from users, although these comments can be "flagged" by other users as abusive. It is not clear what happens to "flagged" comments. There appears to be no official editorial policy regarding comments, and there is no indication that an administrator from the White House ever responds to them.

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

Unfortunately, current First Amendment doctrine does not contemplate the possibility that the page might involve both government speech and a public forum.[27] Instead, it forces a choice between whether the page involves government speech and some form of private speech. And yet, the Supreme Court has given little guidance regarding how to determine whether speech is "government speech" or "private speech" in a case like an interactive social media site, which clearly contains elements of both.[28] In these situations, the government is clearly identifiable as a speaker conveying its own message with regard to its contributions to the site, but it seems just as clear that it is soliciting input from citizens speaking from a variety of different perspectives.[29] With regard to the "comment" portion of the site, then, the government can also be viewed as creating either a designated public forum open to commentary from all users on all topics, or a limited public forum for commentary related to the conduct of the government actor establishing the forum. Given that the interactive social media forum is likely to contain elements of government speech and designated public forums, it makes it hard to predict what label courts will ultimately attach.

Even so, if a government actor is very careful in setting up its social media site, it can usually guarantee that it is either government speech or a non-public forum and can therefore

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[26] http://www.facebook.com/WhiteHouse?ref=ts&v=wall#!/WhiteHouse?ref=ts

[27] Caroline Mala Corbin, Mixed Speech: When Speech is Both Private and Governmental, 83 N.Y.U. L. Rev. 605, 605 (2008).

[28] Lower courts have developed a variety of tests to deal with this issue in the case of specialty license plates. See Corbin, supra note __, at 627 n.118 (citing cases).

[29] A crucial determinant of the relevant speech category is government intent, which the Court may discern from circumstantial evidence such as the structure of the program or policy at issue. *See* Rosenberger, 515 U.s. at 834 (finding that the University had created a limited public forum because it had "expend[ed] funds to encourage a diversity of views from private speakers"); Bd. Of Regents of the Univ. of Wis. Sys. V. Southworth, 529 U.S. 217, 229 (finding that the University had charged students fees "for the sole purpose of facilitating the free and open exchange of ideas by, and among, its students").

retain maximum control over speech that occurs there. The Supreme Court has made "intent" the key determinant of whether speech is the government's or whether a forum is public or non-public. Recall that in order for a non-traditional public forum to exist, the government must *designate* it as "opened for use by the public as a place for expressive activity."[30] Moreover, not only has the Court required the decision to open a forum to be intentional; that intent must also be "demonstrably clear."[31] The practical effect is the creation of a presumption *against* a finding of public forum status. Thus, if a government actor makes a very clear and concrete statement on its social media page that it does not intend to create a public forum, and it reserves the right to eliminate comments entirely or edit them, it can maximize the ability to edit citizen commentary on that takes place on government sponsored social media. Nonetheless, there are clearly political reasons government actors might not want to take this course of action, thus making it more likely that courts will be forced to discern intent or purpose from the nature of the site itself.

From this perspective, many interactive social media sites ultimately are likely to be categorized as limited public forums. There is little doubt that these sites are forums, at least with regard to the comments portion of the site. The government designates or sets aside this portion of its social media site for expressive activity by its citizens. Unlike the nonpublic forum, which is characterized by selective access for chosen speakers, the typical government site will be open to any social media user who seeks it out. But unlike the truly open designated public forum, many social media sites are likely to place constraints on the topics of speech simply by its design and name. Citizens comments typically are linked to specific "status updates" by the government actor. Like a city council meeting, the discussion that occurs in the social media context is designed to be a "bounded conversation," inherently limited to discussion of the policies and actions of the government actor who sponsors the site. Even if the label of limited public forum status can confidently be attached, however, it remains unclear how much the government may regulate comments to preserve relevant and orderly discourse.

Policing Decency and Decorum in Online Public Forums

Similar uncertainty surrounds the question of how much deference government actors will receive in regulating profane or "abusive" speech in online forums. This question is particularly pressing because computer mediated communications are more likely than those in the "real world" to become profane or abusive,[32] particularly when speakers believe they are anonymous. Government arguably has pressing interests in regulating profane and abusive speech in online contexts simply because the prevalence of such speech may hinder the use of social media site as a forum for public discourse. Moreover, the government can ensure that regulation of profanity is not a cloak for censorship by setting up filtering programs that operate "neutrally" and "transparently" once put into place. In fact, some social media sites conduct their own monitoring and filtering of profane and abusive speech, thereby largely eliminating in government role in censoring such commentary.

The constitutional limits on the government's attempts to preserve orderly and civil discourse within limited public forums are not entirely clear. Although the Supreme Court announced, in the celebrated case of Cohen v. California, that the proper remedy for an audience

[30] Perry
[31] Hazelwood
[32] Cite Lidsky & Tom Cotter, Authorship, Audience, and Anonymous Speech.

member offended by a the use of the word "fuck" on a jacket was to avert his or her eyes,[33] the Court has never addressed directly the standard applicable to regulation of profanity or abusive speech in a *limited* public forum. The Court did address the issue obliquely in Southeastern Promotions Ltd v. Conrad,[34] but the facts and procedural posture of the case are such that its holding gives little guidance for government actors wishing to control profanity in online public forums. In *Conrad,* two Tennessee municipal theaters refused to allow performances of the musical Hair because it involved nudity and "obscenity."

The Supreme Court held that the municipality's denial of permission to use the theaters constituted "a prior restraint" issued without "minimal procedural safeguards." It is unclear whether the municipality could have excluded the musical if it had jumped through the correct procedural hoops, though one suspects the answer is "no," since the Court emphasized that the case did involved neither a "captive audience" nor a time, place or manner regulation. Still, *Conrad* gives little indication of whether editing profanity after it appears in an online public forum would be acceptable. Presumably, the government's attempts to regulate decorum in the limited public forum should be evaluated as an attempt to preserve the forum for its intended purpose, and should therefore be judged by whether they are reasonable and viewpoint neutral. Application of this test, however, should be responsive to the nature or context of the forum, and a municipal theater dedicated to public performances of aesthetic works is hardly analogous to a social media forum.

Lower courts that have addressed the issue in the contexts of city council and planning commission meetings have struggled to balance the government's interest with preserving civility in the limited public forum with the interests of speakers in addressing government actors in the manner of their choosing.[35] However, most circuit courts that have addressed the issue have given great deference to government actors attempting to preserve order and decorum. In *Steinburg v. Chesterfield County Planning Commission*, for example, the Fourth Circuit upheld a county's "content-neutral policy against personal attacks" against a facial challenge because it promoted the "legitimate public interest . . . of decorum and order." *Steinburg* involved a citizen who was stopped from speaking at a planning commission meeting because his remarks were "off topic" and contained mild personal attacks against the commissioners. Because the meeting at issue was classified as a limited public forum, the Fourth Circuit evaluated the county

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[33] *See Cohen*, 403 U.S. at 25 ("Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us."). But see Hill v. Colorado, 531 U.S. at 718 (explaining that "the interests of unwilling listeners" may sometimes predominated "where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure'").

[34] The Supreme Court has allowed regulation of profanity over the public airwaves, see FCC v. Pacifica Foundation, 438 U.S. 726 (1978), and in schools, Bethel School Dist. No. 403 v. Fraser ___ U.S. ___ (1986). However, these contexts are clearly distinguishable. In the broadcast context, the Supreme Court allows regulation of indecent speech largely because a "captive audience," including minors, may be exposed to without warning. See Pacifica, 438 U.S. at 749-51; *but see* FCC v. Fox, cite. In the high school context, the school has the authority to inculcate young people with values of civility. *See also* Gooding v. Wilson, 405 U.S. 518 (1972) (striking down as overbroad a criminal statute punishing speech directed at another and containing "opprobrious words of abusive language.")

[35] Steinburg v. Chesterfield County Planning Commission, 527 F.3d at 385 (4th Cir. 2008); see also Eichenlaub v. Township of Indiana, (upholding town's ability to remove "repetitive and truculent" speaker form town meeting, even though he was speaking during a "citizens' comments" portion of that meeting); White v. City of Norwalk, 900 F.2d 1421 (9th Cir. 1990); Norse, 586 F.3d 697 (9th Cir. 2009) (. *See generally* Paul D. Wilson and Jennifer K. Alcarez, *But It's My Turn to Speak! When Can Unruly Speakers at Public Hearings Be Forced to Leave or Be Quiet?*, 41 URB. LAW. 579 (2009).

commission's policy against personal attacks only for reasonableness and viewpoint neutrality, concluding the Commission was "justified in limiting its meetings to discussion of specified agenda items and in imposing reasonable restrictions to preserve the civility and decorum necessary to further the forum's purpose of conducting public business." Compare the Fourth Circuit's deferential tone to that of the Sixth Circuit in *Leonard v. Robinson*,[36] which reversed summary judgment in favor of a police officer who arrested a citizen "solely for uttering 'God damn'" while speaking at a township board meeting. Citing *Cohen v. California*, the court asserted that prohibiting the speaker from "coupling an expletive to his political speech is clearly unconstitutional." The Sixth Circuit, unlike its sister circuits, did not find profanity inherently disruptive to the conducting of public business.

It is not clear, however, that public discussion on a social media site is sufficiently similar to public discussion in a city council meeting to make this precedent a good predictor of how far governments can go in controlling profanity online. The user of the online forum ordinarily must take some kind of affirmative step to seek out comments by fellow users; even once a user decides to read the comments, she can easily scroll past the ones that appear to be offensive. In addition, the abusive speaker in the online forum poses little danger of disrupting a government process or impairing its efficiency. Thus, there is arguably little justification for deferring to government attempts to protect the sensibilities of citizens who come to its social media site.

Regardless of how courts ultimately resolve this issue, one thing should be abundantly clear by this juncture. Public forum doctrine does not foster an optimal level of government engagement in social media. The lack of clarity in public forum doctrine may deter government actors from setting up interactive forums in the first place, lest they lose control of their sites to hateful and incoherent speakers. Paradoxically, however, if government actors actually spend the time to piece through the minutiae of existing public forum doctrine before setting up an interactive social media site, they may be able to preserve a high degree of control over citizens whose speech is perceived to jeopardize order, decency, and civility. Either result, however, is not optimal from a First Amendment or public policy perspective.

Convert the following into a sidebar on the limited public forum

Just last term in *Christian Legal Society Chapter of the University of California v. Martinez*,[37] the Supreme Court articulated the constitutional standards governing the establishment of limited public forums. In *Martinez*, the Court held (5-4) that a state law school may condition funding of a student organization on its willingness "to open eligibility for membership and leadership to all students."[38] The forum in question was a student-organization program established by Hastings College of Law, which set the parameters of the forum to include only student organizations that complied with a "nondiscrimination policy."[39] The law school interpreted the policy as requiring student organizations to accept "all comers." In other words, student organizations had to allow any Hastings student to join "or seek leadership

[36] 477 F.3d 347 (6th Cir. 2007).
[37] 130 S.Ct. 2971 (2010).
[38] *Martinez,* 130 S.Ct. at 2978.
[39] *Id.* at 2979. The eligible organization also had to be non-commercial.

positions in the organization, regardless of . . . status or beliefs."[40] The Christian Legal Society (CLS) restricted membership to students who agreed that they believed in Jesus Christ as savior and would eschew homosexual conduct.[41] Hastings Law School therefore denied CLS funding and other privileges. CLS sued, claiming violation of its rights to freedom of association and expression.

On appeal, the Court majority addressed the constitutionality of the "all-comers" policy as a restriction on forum parameters,[42] stating: "Any access barrier must be reasonable and viewpoint neutral."[43] Applying this standard, the Court deemed Hastings' various justifications for the all-comers policy to be reasonable in light of the educational purposes of the forum. For example, the Court credited Hastings' assertion that the policy ensured that the "leadership, educational, and social opportunities afforded by" participation in student organizations were equally available to all students.[44] The Court also found the all-comers policy to be viewpoint neutral because it required "*all* student groups to accept *all* comers."[45] Even if the policy had a greater effect on religious student organizations, the target of the all-comers policy was the discriminatory conduct of religious organizations rather than their religious perspective.[46]

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[40] *Id.*
[41] *Id.* at 2980.
[42] *Id.* at 2984. The dissent, on the other hand, questioned whether Hastings Law School even had an all-comers policy at the time CLS was denied recognition. *Id.* at 3005 (Alito, J., dissenting).
[43] *Id.* at 2984.
[44] *Id.* at 2990. The Court also found that CLS has "substantial alternative channels," some extended by the law school itself, to get its message out.
[45] *Id.* at 2993.
[46] *Id.* at 2994.