

FACEBOOK USED TAKEDOWN AND IT WAS SUPER EFFECTIVE! FINDING A FRAMEWORK FOR PROTECTING USER RIGHTS OF EXPRESSION ON SOCIAL NETWORKING SITES*

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Introduction	892	R
I. Facebook, I Choose You: A Description of Social Networking Sites	903	R
A. Social Networking Sites Have Become Important Sites for Communication in Contemporary Society Due to Rapid Growth	904	R
B. Social Networking Sites Act as Censors and Filter Both Content and Users	911	R

* This title draws inspiration from a popular meme called “It’s Super Effective!” based on the widely popular Pokémon videogame. See Felipe Almeida Mendes, *It’s Super Effective!*, KNOW YOUR MEME, <http://knowyourmeme.com/memes/its-super-effective> (last visited Dec. 31, 2013). Memes are cultural units that gain value through expression. See *Meme*, Wikipedia, <http://en.wikipedia.org/w/index.php?title=Meme&oldid=586747709> (last updated Dec. 19, 2013, 5:56 AM). “It’s Super Effective!” is an example of the cultural unit called the “meme,” defined by Jack Balkin as a form of speech that competes for recognition and retention in the audience’s memory. See Jack Balkin, *Freedom of Speech, From a Meme’s Point of View 2* (no date) (unpublished manuscript) (on file with author).

The section headings throughout this Note continue the theme of the Pokémon meme invoked in the title by drawing on other references from the original Pokémon television show, including the title of the first episode (“Pokémon, I Choose You!”) and Team Rocket mottos (“Prepare for trouble!” “Make it double!” “To protect the world from devastation!”). See *Pokémon, I Choose You!*, WIKIPEDIA, http://en.wikipedia.org/w/index.php?title=Pok%C3%A9mon,_I_Choose_You!&oldid=566053545 (last updated July 27, 2013, 7:04 PM); *Team Rocket Mottos*, BULBAPEDIA, http://bulbapedia.bulbagarden.net/w/index.php?title=Team_Rocket_mottos&oldid=2047638 (last updated Dec. 30, 2013, 11:35 AM).

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II. Prepare for Trouble and Make It Double: Analyzing Two Frameworks for Protecting User Rights on Social Networking Sites 914 R

A. The First Amendment Does Not Provide Users with Direct Protection Against Censorship by Social Networking Sites 915 R

B. Consumer Protection Rationales Provide a Basis for Intervention When Market Failures Exist.... 925 R

C. Market Failures Arise in the Social Networking Site Market, Allowing Consumer Protection to Provide a Basis for Protecting User Rights of Expression Without the First Amendment 929 R

D. Social Networking Sites Are More Aptly Characterized as Common Carriers Than Newspapers, Although in Reality They Fall Somewhere in Between Those Poles 936 R

III. To Protect the World from Censorship: Evaluating Potential Regulations of Social Networking Sites Within a Consumer Protection Framework..... 944 R

A. Establishing Clearer Content Regulation Standards..... 946 R

B. Forcing Greater Disclosure on Censorship Policies 947 R

C. Implementing Non-Litigation-Based Remedies ... 949 R

D. Creating a Cause of Action 951 R

E. Eliminating Censorship Authority..... 952 R

Conclusion 955 R

INTRODUCTION

In October 2011, Facebook¹ deactivated Courtney Stodden’s account.² The takedown e-mail alleged that Stodden, an eighteen-

1. This Note focuses on Facebook because it is the largest social networking website and the social networking site on which most people spend their time. See Alex Fitzpatrick, *Pew: Social Media Not Yet Driving News Traffic*, MASHABLE (Mar. 19, 2012), <http://mashable.com/2012/03/19/pew-state-of-media-technology> (indicating that social networking users spent, on average, 423 minutes on Facebook during the month of December 2011, in comparison to 151 minutes on Tumblr and 80 minutes on Pinterest); see also *infra* Part I.A. This Note will largely draw on the types of services that Facebook offers when considering social networking site issues. I recognize that other social networking sites are structured differently, but I would argue that they all seek the same goals with differences arising largely in the specific tools utilized.

2. See Sarah Ann Hughes, *Courtney Stodden’s Facebook Taken Down, Restored*, WASH. POST BLOG (Oct. 14, 2011, 8:04 AM), <http://www.washingtonpost.com/>

year-old quasi-celebrity best known for marrying Doug Hutchison,³ had posted “inappropriate sexual conduct” on her fan page.⁴ This “conduct” consisted of self-portraits in which Stodden wore only a bikini and stood in sexually suggestive poses, a type of photo that is actually fairly common on the site.⁵ When Facebook deleted Stodden’s account, it cut off her ability to connect to other people on the platform and to express herself by sharing self-generated content. The social networking site took away Stodden’s access without providing her with any notice or opportunity to contest the decision. In response, Stodden’s mother drew media attention to the takedown, leading to the reactivation of Stodden’s account and to an apology from Facebook claiming that the account deletion had occurred in error.⁶

While Stodden’s scenario may appear trivial, it illustrates one way in which a social networking site can limit an individual’s self-expression on the Internet.⁷ Facebook and other social networking platforms allow users to post information and communicate with

blogs/celebrityology/post/courtney-stoddens-facebook-taken-down-restored/2011/10/14/gIQAN12bjL_blog.html.

3. Stodden’s marriage to Doug Hutchison was particularly notable due to the 35 year age difference. Angela Ellis & Sabina Ghebremedhin, *Exclusive: Doug Hutchison, 51, and Courtney Stodden, 16, Dish on Controversial Marriage*, ABC NEWS (July 15, 2011), <http://abcnews.go.com/Entertainment/doug-hutchison-courtney-stodden-controversial-marriage-exclusive/story?id=14073130#.UImO2Ibme3w>. Hutchison achieved fame for his roles in *The Green Mile*, *The X-Files*, *Lost* and *24*. See *Doug Hutchison*, WIKIPEDIA, http://en.wikipedia.org/w/index.php?title=Doug_Hutchison&oldid=586078143 (last updated Dec. 14, 2013, 6:35 PM).

4. See Hughes, *supra* note 2.

5. See Danica Daniel, *Teen Bride Courtney Stodden Kicked off Facebook for Being “Too Sexy.” Mom Blames “Jealousy.”*, DRJAYS.COM (Oct. 19, 2011, 2:05 PM), <http://live.drjays.com/index.php/2011/10/19/teen-bride-courtney-stodden-kicked-off-facebook-for-being-too-sexy-mom-blames-jealousy>.

6. See *id.* (describing Facebook’s response as an “oops”).

7. Social networking sites exist along a continuum of different models. See Tal Z. Zarsky, *Law and Online Social Networks: Mapping the Challenges and Promises of User-Generated Information Flows*, 18 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 741, 746–47 (2008) (describing various metrics for categorizing social networking sites and adopting the “strength of ties” metric); Alex Iskold, *Evolution of Communication: From Email to Twitter and Beyond*, READWRITEWEB (May 30, 2007), http://readwrite.com/2007/05/30/evolution_of_communication (providing a graphic breakdown of social media and Internet tools generally based on speed and type of communication); Dan Saffer, *The Continuum of Online Communication*, ADAPTIVE PATH (May 21, 2007), <http://www.adaptivepath.com/ideas/the-continuum-of-online-communication> (placing social media sites on a spectrum from dictation-based to conversation-based).

other account holders.⁸ In addition to self-generated content, social networking sites also allow users to link content from other places on the Internet and to comment on other users' activity, creating a highly interactive online environment.⁹ Users can post content in a variety of forms, including text and videos,¹⁰ and preserve discussions for the future.¹¹ Social networking sites and other Internet media have changed the way that people communicate with each other by increasing the ease of long-distance communication, compressing communication into short entries, establishing the expectation of quicker responses, and allowing people to create virtual identities that use different social cues from real life.¹² Social networking sites have also changed the content of communication, as these platforms encourage users to share personal information, sometimes even information that would previously have been considered taboo or sensitive.¹³

8. See *Social Networking Service*, WIKIPEDIA, http://en.wikipedia.org/w/index.php?title=Social_networking_service&oldid=587124250 (last updated Dec. 21, 2013, 6:28 PM).

9. See *How to Post & Share*, FACEBOOK, <http://www.facebook.com/help/sharing> (last visited Dec. 31, 2013) (explaining how users can share information on Facebook). Other sites provide more limited types of sharing (e.g. Twitter) or focus on particular types of content, such as the professional connections offered by LinkedIn. See *The Beginner's Guide to LinkedIn*, MASHABLE, <http://mashable.com/2012/05/23/linkedin-beginners/> (last updated Oct. 2013) (providing an overview of how to use LinkedIn and directing its focus to professional network development); *The Beginner's Guide to Twitter*, MASHABLE, <http://mashable.com/2012/06/05/twitter-for-beginners/> (last updated Nov. 2013) (noting that Twitter focuses primarily on short, text-based information sharing).

10. Robert Young, *Social Networks are the New Media*, GIGAOM (May 29, 2006, 10:00 PM), <http://gigaom.com/2006/05/29/social-networks-are-the-new-media> (mentioning the existence of video-sharing platforms as far back as 2006).

11. Cf. Robert Young, *The Future of Social Networks – Communication*, GIGAOM (Oct. 9, 2006, 7:00 AM), <http://gigaom.com/2006/10/09/the-future-of-social-networks-communication> (describing Facebook's "wall" concept as a type of "bulletin board").

12. See THE NEW MEDIA CONSORTIUM, SOCIAL NETWORKING, THE "THIRD PLACE," AND THE EVOLUTION OF COMMUNICATION 1–3 (2007), available at <http://www.nmc.org/pdf/Evolution-of-Communication.pdf>. For more discussion of the characteristics of social networking sites, see *infra* Part I.A.

13. See, e.g., Maureen Linke, *Women Turn to Social Media for Support After Pregnancy Loss*, USA TODAY (Mar. 28, 2012, 6:52 PM), <http://yourlife.usatoday.com/parenting-family/story/2012-03-28/Women-turn-to-social-media-for-support-after-pregnancy-loss/53837714/1> (describing how more women are sharing the sensitive topic of pregnancy loss on online social networks to find support).

In order to communicate with others, users “friend” or follow other account holders, creating an online social network.¹⁴ Users most often make connections with other people that they know from the real world.¹⁵ Users can build a more extensive network both by finding new first-point contacts and by identifying second-point contacts from their existing friends.¹⁶ In other instances, users connect to others based solely on common interests, such as politics or hobbies, or similar life experiences.¹⁷ Occasionally, users even connect with complete strangers.¹⁸ As membership in social networking sites grows, these websites are becoming more of a central means of communication.

Social networking sites have also gained greater importance by providing communication tools for more than just social interaction. Businesses use social networking sites to reach consumers through exclusive online-only deals,¹⁹ and to increase brand expo-

14. *Social Network*, OXFORD DICTIONARIES, <http://www.oxforddictionaries.com/definition/english/social-network> (last visited Dec. 31, 2013); *Social Networking Services*, *supra* note 8.

15. *See, e.g., Sign Up*, FACEBOOK, <https://en-gb.facebook.com/> (last visited Dec. 31, 2013) (“Facebook helps you connect and share with the people in your life.”).

16. *See* Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. OF COMPUTER-MEDIATED COMM. 210, 211–14 (2007), *available at* <http://onlinelibrary.wiley.com/store/10.1111/j.1083-6101.2007.00393.x/asset/j.1083-6101.2007.00393.x.pdf?v=1&t=hpvfa786&s=76d95ae56f5d21c489446cadd3f0916878716e6> (detailing how social networking websites help people create networks and find contacts).

17. *See, e.g., Linke, supra* note 13 (noting that some online forums cater to women who have gone through pregnancy loss to connect them with each other for support); *see also What is Social Networking?*, WHATISSOCIALNETWORKING.COM, <http://www.whatissocialnetworking.com> (last visited Dec. 31, 2013) (suggesting that people connect based on common interests such as golfing or gardening).

18. *See, e.g., Social Networking with Strangers*, LOUISGRAY.COM (Dec. 22, 2011), <http://blog.louisgray.com/2011/12/social-networking-with-strangers.html> (indicating how users can encounter strangers on social networking sites). Some social networking sites are even built on the idea of connecting users to complete strangers. *See, e.g., Friends & Strangers*, TWITTER.COM, <https://twitter.com/friend-strangers> (last visited Dec. 31, 2013) (Twitter page of the former social networking site, Friends & Strangers, which explicitly promoted using the network to make “new connections”).

19. *See, e.g., Macy’s, Exclusive Offer for Macy’s Fans!*, FACEBOOK, <http://www.facebook.com/events/151914784852726> (last visited Dec. 31, 2013) (giving Facebook users an extra 10% or 20% discount); *The Resort at the Mountain, May Facebook Exclusive Offer*, FACEBOOK (Apr. 29, 2011, 2:58 PM), http://www.facebook.com/note.php?note_id=10150164011661780 (offering a buy one, get one free offer for Facebook fans).

sure.²⁰ Employers have also started to conduct social networking background checks before tendering offers of employment.²¹ Moreover, social networking sites play a role in political elections by providing candidates with a new medium to reach the electorate and by tending to increase users' levels of engagement with political discourse.²² Twitter, in particular, allows users to react to political debates and discussions in real time, to share their thoughts on the candidates, and to engage more generally in the political process.²³ These functions illustrate that social networking sites provide individuals both with an important forum for self-expression and with a platform for connecting to a broad array of speech in society at large. Congruently, access to social networking sites is vital to an individual's ability to obtain information in an increasingly digital society.²⁴

20. See Dan Schawbel, *Major Findings from the 2010 Social Media Marketing Industry Report*, SOCIAL MEDIA TODAY (May 1, 2010), [hereinafter Schawbel, *Major Findings*], <http://socialmediatoday.com/danshwabel/101703/major-findings-2010-social-media-marketing-industry-report>.

21. See Craig Kanalley, *The Growth of Social Media*, HUFFINGTON POST, http://www.huffingtonpost.com/2011/09/01/growth-social-media-infographic_n_945256.html (last updated Nov. 1, 2011, 6:12 AM) (infographic providing statistics on various uses of social networking sites).

Some states have proposed or enacted legislation that limits the ability of employers to require social networking background checks or release of social networking site login information from applicants. See, e.g., 820 ILL. COMP. STAT. 55/10 (2013).

22. Harrison Weber, *Social Media Matters More Than Ever in This US Presidential Election*, THE NEXT WEB (Jan. 31, 2012), <http://thenextweb.com/us/2012/01/31/social-media-matters-more-than-ever-in-this-us-presidential-election> (stating that 62% of social networking site users expected the 2012 presidential candidates to have some social networking site presence); see Lauren Dugan, *Social Media in the 2010 US Midterm Election: What Worked (and What Didn't)*, SOCIAL TIMES (Nov. 3, 2010, 2:03 PM), http://socialtimes.com/social-media-in-the-2010-us-midterm-election-what-worked-and-what-didnt_b27242 (describing how social networking sites contributed to the 2010 midterm elections, most notably finding that numerous social networking sites focused on encouraging voter turnout).

23. See Joann Pan, *Twitter to Play Crucial Role in South Carolina Republican Debate*, MASHABLE (Jan. 16, 2012), <http://mashable.com/2012/01/16/fox-twitter-republican-debate>.

24. See, e.g., Chris Godley, *THR's Social Media Poll: How Facebook and Twitter Impact the Entertainment Industry*, THE HOLLYWOOD REPORTER (Mar. 21, 2012, 11:53 AM), <http://www.hollywoodreporter.com/gallery/facebook-twitter-social-media-study-302273#12> (citing a study by THR and Penn Schoen Berland in which 19% of respondents said that social networking sites are their primary source of breaking news); see also Fitzpatrick, *Pew: Social Media Not Yet Driving News Traffic*, *supra* note 1 (indicating that social media is not yet the primary source of news information for social media users but that these websites have the potential to become huge sources of information).

Despite their significant communication-enabling functions, social networking sites sometimes limit communication by filtering content or even users. In order to obtain access to a social networking site, users must agree to terms of service that give the platform certain types of control, including the right to take down material or to delete user accounts.²⁵ Although the ability to take down content or to delete accounts raises concerns about censorship, existing law is fairly settled on allowing social networking sites to engage in such behavior without consequence.²⁶ This censorial authority exists because the federal government has created a safe harbor for “interactive computer service” providers who voluntarily take down certain types of material from the Internet.²⁷ Section 230(c)(2) of the Communications Decency Act of 1996 states:

No provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected²⁸

This statute originally was enacted to resolve ambiguity on the question of online service provider liability for defamatory statements published by a user that harmed another private party and on what steps a website could take to insulate itself from legal action.²⁹ Prior to the statute, some scholars were concerned that web-

25. See *Facebook Community Standards*, FACEBOOK, <http://www.facebook.com/communitystandards> (last visited Dec. 31, 2013) (providing an overview of Facebook’s content guidelines); *Statement of Rights and Responsibilities*, FACEBOOK (Nov. 15, 2013), <http://www.facebook.com/legal/terms>. The right to take down material is usually reserved in the terms of service to which users agree when creating an account. See, e.g., *id.*

26. See Communications Decency Act of 1996, 47 U.S.C. § 230(c)(2) (2006) (providing interactive service providers with immunity for good faith takedowns of certain content); Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 11 (2006) (describing how the government has used private actors to regulate the Internet); cf. Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 702 (2010) (indicating that Internet intermediary use is inevitable).

27. 47 U.S.C. § 230(c)(2).

28. *Id.*

29. See Susan Freiwald, *Comparative Institutional Analysis in Cyberspace: The Case of Intermediary Liability for Defamation*, 14 HARV. J.L. & TECH. 569, 588–96 (2001) (detailing pre-1996 liability for Internet entities and the enactment of the Communications Decency Act of 1996 as a response); see also Anthony Ciolli, *Chilling Ef-*

sites would attempt to avoid liability by over-censoring and taking down all content that appeared to be even marginally defamatory or problematic.³⁰ Internet provider industry lobbyists also presented legislators with the other extreme possibility of complete content non-discrimination, as an earlier district court case had found such non-intervention could avoid treatment as publishers of particular content.³¹ The statute rectified this scenario by providing a safe harbor for takedown of certain types of content done in good faith on particular types of websites and by mandating that websites would not be treated as “publishers” of third-party content.³² However, the broad statutory language allowed courts to expand the group of websites eligible for immunity, including online social networking sites, and to apply immunity to causes of action other than defamation.³³ The statute also permits websites to make their own content-regulation norms without external oversight.³⁴

facts: The Communications Decency Act and the Online Marketplace of Ideas, 63 U. MIAMI L. REV. 137, 146–47 (2008) (providing background for the *Cubby* and *Stratton Oaks* cases). Compare *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, 137–38, 140, 143 (S.D.N.Y. 1991) (finding no liability because CompuServe did not exercise editorial control over its content (i.e., it was a passive service provider)), with *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710, at *4–5, *7 (N.Y. Sup. Ct. May 24, 1995) (finding a message board liable as a publisher of defamatory statements because it actively monitored site content).

The language of the statute mentions “users” of interactive computer service providers as also having immunity. 47 U.S.C. § 230(c). However, court cases have generally focused on “providers” rather than “users.” See sources cited *infra* note 33.

30. See Ciolli, *supra* note 29, at 148 (explaining that scholars at the time were concerned about the risk of over-censorship to prevent publication of any potentially harmful content).

31. See *Cubby*, 776 F. Supp. at 139–40; Freiwald, *supra* note 29, at 594 (noting that Internet service providers told Congressmen that they would adopt a policy of complete nondiscrimination in order to obtain “passive” website status).

32. See 47 U.S.C. § 230(c). Scholars did not completely agree on the specific purpose of the statutory immunity provision. Compare Ciolli, *supra* note 29, at 147–48 (stating that immunity was intended to discourage either or both under- or over-censorship), with Freiwald, *supra* note 29, at 595 (stating that the Communications Decency Act of 1996 was intended to allow intermediaries to choose their own level of monitoring, in the hopes of increasing it).

33. See, e.g., *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 849–50 (W.D. Tex. 2007) (finding that MySpace was entitled to application of the Communications Decency Act of 1996 immunity provision); see also H. Brian Holland, *In Defense of Online Intermediary Immunity: Facilitating Communities of Modified Exceptionalism*, 56 U. KAN. L. REV. 369, 373–75 (2008) (describing how courts have interpreted “interactive computer services” broadly and expanded the application of the immunity provisions beyond simple third-party defamation cases).

34. See Holland, *supra* note 33, at 369–70 (arguing that immunity provisions allow for online communities to develop their own standards).

Once a social networking site takes down content or deletes an account, the user has limited recourse. These limitations are usually incorporated into the platform's terms of service. For instance, Facebook's terms of service state that claims against it must be litigated in "state or federal court located in Santa Clara County."³⁵ Due to the high costs of litigation, a user is more often limited to an informal appeal to the social networking site. (The media pressure that appears to have caused the reversal by Facebook in Courtney Stodden's case is probably not an avenue of response available to non-celebrities.) Such an appeal may be effective in certain cases, such as when Facebook deletes a user's account on the belief that the user has assumed a false name,³⁶ but not in more difficult cases when the issue involves a judgment about whether certain content falls into the amorphous category of "otherwise objectionable" subject matter. These appeals are not subject to any type of external review, making it difficult to check the social network's decision-making process for consistency and fairness.

For constitutionally unprotected speech, the social networking site's censorial power seems acceptable. For instance, if a user were to upload hardcore pornographic images to his or her Facebook

Many people agree that social networking sites should have the ability to take down defamatory or obscene material, particularly because of the risk that children can come across such content. *See, e.g.,* Ciolli, *supra* note 29, at 265 (stating that "immunity from vicarious liability in [defamation] tort actions . . . remains necessary"); Usman Qazi, *The Internet Censorship Controversy* (May 9, 1996) (unpublished manuscript), available at <http://courses.cs.vt.edu/cs3604/lib/Censorship/notes.html> (noting concerns about children's access to pornography and violent material through the Internet).

Some level of censorship may provide positive benefits in helping to filter the amount of information available on the Internet. That discussion is beyond the scope of this Note, and I will assume that some level of censorship will exist for the online social networking context due to the existing case law. For a further discussion on the debate over censorship, see Holland, *supra* note 33, at 369–70, 391 (immunity to censor allows online communities to develop their own standards and engage in collaborative production); Zarsky, *supra* note 7, at 778–79 (stating that filtration of content helps users sift through massive amounts of information and limits manipulation).

35. *Statement of Rights and Responsibilities*, *supra* note 25. Terms may also restrict users to non-litigation-based remedies. *See generally* Amalia D. Kessler, *Stuck in Arbitration*, N.Y. TIMES, Mar. 6, 2012, <http://www.nytimes.com/2012/03/07/opinion/stuck-in-arbitration.html> (noting that many commercial contracts include arbitration provisions).

36. *See, e.g., Facebook Asks Aaditya Thackeray for ID Proof*, NDTV.COM (Feb. 24, 2012), <http://www.ndtv.com/article/cities/facebook-asks-aaditya-thackeray-for-id-proof-179437> [hereinafter *Facebook Asks*] (detailing the deletion and restoration by Facebook of an Indian politician's account).

profile, neither the courts nor the general population is likely to deny that Facebook has a general right to remove such content, and perhaps even the user's account. However, social networking sites take down even constitutionally protected forms of speech.³⁷ In those cases, despite contractually limited options, users may believe that the First Amendment protections for freedom of expression provide a basis to challenge a social networking site's censorship decision. However, the First Amendment applies to only state action.³⁸ Therefore it will only apply to a private entity's actions in limited situations, such as when its actions meet the state action doctrine, which requires "the conduct allegedly causing the deprivation of a federal right [to be] fairly attributable to the State."³⁹ Under the current state of free speech doctrine, it is unlikely that a private social networking site would be considered a state actor.⁴⁰

Alternatively, a user could attempt to invoke the "public forum doctrine," which limits speech restrictions for particular types of fora.⁴¹ However, that doctrine would also be insufficient to provide a basis for applying First Amendment protections to social networking sites, as the websites clearly are not traditional public fora and

37. Compare *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245–46 (2002) (outlining the categories of unprotected speech for purposes of the First Amendment), with *Facebook Community Standards*, *supra* note 25 (providing general categories of objectionable content). In particular, terms in the Facebook Community Standards such as "bullying," "abusive behavior," "harassment," "hate speech," or "graphic content" are not traditionally used to describe unprotected speech. See *Ashcroft*, 535 U.S. at 245–46; *Facebook Community Standards*, *supra* note 25. For an example of constitutionally protected speech that has been taken down or punished, see *supra* notes 2–4 and accompanying text regarding Courtney Stodden's nonobscene self-portraits.

For both the *Ashcroft* and Facebook categories, the line between acceptable and unacceptable content appears to be clear. However, the case law suggests that in reality the lines are difficult to determine. See, e.g., *Miller v. California*, 413 U.S. 15, 20–25 (1973) (outlining the Supreme Court's difficulties in defining "obscenity" and declaring a new multi-part test). At least part of Facebook's inconsistency in applying its own terms of service (discussed *infra* Part I) stems from this problem.

38. See U.S. CONST. amend. I ("Congress shall make no law . . .") (emphasis added); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the First Amendment against the states via the Fourteenth Amendment).

39. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936–37 (1982).

40. See discussion *infra* Part II.A.

41. The public forum doctrine can attach government control to certain types of locations, which then implicates government responsibilities and constitutional protections. See, e.g., *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983) (discussing the distinctions between traditional public fora, designated public fora, and nonpublic fora).

do not have the traits of designated public fora.⁴² Even if the First Amendment were to apply under either of these doctrines, there would be an issue of competing speech rights between the individual user and the social networking site.⁴³ The social networking site would claim that its right to expression should give it control over the entire platform and should allow it to determine what content is permissible and what content should be taken down.⁴⁴ The competing claims to free expression and the lack of direct First Amendment protections thus raise an important question: How can the free speech interests of users on social networking sites be protected?

This Note contributes to the scholarship on Internet regulation⁴⁵ by engaging in two discussions. First, I argue that the First

42. See *id.* at 39, 45–46 (distinguishing between traditional public fora—such as streets and parks, designated public fora—such as university meeting facilities, and nonpublic fora—such as public school mail facilities); see also discussion *infra* Part II.A.

43. See, e.g., Jack M. Balkin, *Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds*, 90 VA. L. REV. 2043, 2043, 2074 (2004) [hereinafter Balkin, *Virtual Liberty*] (noting the conflicts between rights of users and online game providers).

The issue of competing rights is not unique to this scenario and arises in other First Amendment contexts, such as that of art, where an artist's interests can come into conflict with those of other private entities (galleries or curators) while not being able to invoke the First Amendment. See Richard Woodward, *Color Bind*, VILLAGE VOICE, June 25, 1996, at 78 (discussing a scenario where David Levinthal's Polaroids of "blackface memorabilia" show was censored by the Institute of Contemporary Art in Philadelphia for being "controversial").

44. Alternatively social networking sites could invoke their property rights to the platform to argue that they have the right to determine who may enter or use their property. However, property rights can give way to free speech issues in some cases. See, e.g., *Marsh v. Alabama*, 326 U.S. 501, 503, 508–09 (1946) (a private company town invoked its property right to exclude a Jehovah's Witness, but the Supreme Court held that the individual's free speech interest outweighed this property right).

The more problematic conflict, in my view, would be between the competing First Amendment rights of the sites and the users. Thus I will focus on that tension.

45. The overarching question of how the Internet should be regulated has been the subject of much academic debate. One issue surrounds the "network neutrality" debate for Internet Service Providers. "Network Neutrality" refers to the concept that Internet service providers should not be able to censor any content that passes through their servers. See Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847, 1847, 1855–60 (2006) (providing a brief history of the network neutrality debate). For further information on the network neutrality debate, see generally Rob Frieden, *Assessing the Merits of Network Neutrality Obligations*, 115 PENN ST. L. REV. 49, 53 (2010) (conceptually dividing the Internet into three layers and analyzing the applicability of network neutrality for each level); Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified*

Amendment does not provide users of social networking sites with free speech protections because neither the state action doctrine nor the public forum doctrine clearly applies to social networking sites. Then, because of the importance of protecting user rights of expression, I recommend an alternative analytic model—a consumer protection framework⁴⁶—to achieve the same goal of protecting user free-expression rights without adding any new distortions to First Amendment doctrine. This framework allows us to protect free speech values by focusing on the particular market failures that exist for social networking sites, which may then justify governmental intervention to protect user rights of expression independently of constitutional rights. At the same time, social networking sites may be able to invoke First Amendment protections to challenge governmental action to limit the sites' censorial power. The effect of this latter issue will depend on how social networking sites are characterized in terms of First Amendment media, as courts provide different levels of editorial rights to different

Transparency in Internet Intermediaries, 104 Nw. U. L. REV. 105, 109 (2010) (suggesting regulations increasing transparency as the first step to addressing intermediation issues); Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, 94 GEO. L.J. 1847, 1904 (2006) (proposing a new framework for analyzing network neutrality restrictions and suggesting that a network diversity principle might be effective in obtaining policy objectives). A second point of much debate has been the FCC's recent regulations regarding whether Internet access provisions fall into the same category as broadband and cable. See generally Samuel L. Feder & Luke C. Platzer, *FCC Open Internet Order: Is Net Neutrality Itself Problematic for Free Speech?*, COMM. LAW., June 2011, at 1 (2011) (outlining the development of the FCC order and raising First Amendment issues of the order related to government purpose and chilling effects); Hannibal Travis, *The FCC's New Theory of the First Amendment*, 51 SANTA CLARA L. REV. 417, 421 (2011) (discussing FCC regulatory history and theorizing four new articulations of the First Amendment based on this history). Additionally, scholars have also discussed search engine bias. See generally Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1151 (2008) (arguing that search engines should be subject to some nondiscrimination regulation to prevent search engine manipulation); Jennifer A. Chandler, *A Right to Reach an Audience: An Approach to Intermediary Bias on the Internet*, 35 HOFSTRA L. REV. 1095, 1096–97 (2007) (positing that search engine and other Internet regulations should be based on the relationship between speakers and listeners).

In addition, scholarly literature on Internet regulation in the context of social networking sites has largely focused on third-party torts and liability for Internet intermediaries under the CDA. See, e.g., Ciolli, *supra* note 29; Freiwald, *supra* note 29.

46. See Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1747–50 (2003) (consumer protection rationales focus on how consumers act in particular markets to protect consumer interests).

types of media.⁴⁷ Determining whether social networking sites are more similar to newspapers or telephones will affect what rights a social networking site could invoke against regulation and how the site's rights would be balanced against a user's interests.

The structure of this Note is as follows: Part I discusses the nature of social networking sites, including their importance in social interaction today and their role as censors. Part II outlines my suggested framework for analyzing social networking sites. This Part begins by explaining why social network users probably will not be able to invoke First Amendment protections against social networking sites. Then I articulate consumer protection principles as an alternate basis for regulating social network censorship. I describe general consumer protection rationales, followed by an explanation of how these rationales apply to the social networking site market. This Part concludes with a discussion characterizing social networking sites in the context of existing First Amendment media categories. I argue that social networking sites generally do not exercise the same type of editorial discretion over content as newspapers, and should be characterized more as general pipelines of communication, resulting in a smaller amount of editorial discretion, if any. In Part III, I suggest and evaluate potential types of regulations or legal protections that could promote user rights on social networking sites within the backdrop of consumer protection rationales. This Part should not be seen as advocating for any of these specific "solutions," but rather as a call for more transparency from social networking sites, and an argument as to why a consumer protection framework that incorporates First Amendment principles should be used in discussing free speech issues related to the Internet.

I.

FACEBOOK, I CHOOSE YOU: A DESCRIPTION OF SOCIAL NETWORKING SITES

This Part provides the background information necessary to engage in the First Amendment and consumer protection analysis in Parts II and III. This Part begins by describing the growth of social networking sites and then demonstrates their increasing societal importance through examples of the myriad services they now provide. Then, this Part illustrates the role of social networking sites as censors by surveying a number of recent examples of censorship.

47. See discussion *infra* Part II.D.

A. *Social Networking Sites Have Become Important Sites for Communication in Contemporary Society Due to Rapid Growth*

Over the past few years, social networking sites have grown to become significant actors in society and interpersonal communication. Recent studies estimate that Facebook, the top social networking site based on user traffic, has over 750 million unique visitors per month.⁴⁸ As of October 2012, Facebook counted over 1 billion individuals as active monthly users globally, with approximately 190 million in the United States and Canada.⁴⁹ Twitter, the second most popular social networking site,⁵⁰ has an estimated 250 million unique monthly visitors and 500 million registered users globally.⁵¹ These sites have grown at an accelerated rate. In 2009, Facebook became the top social networking site based on user traffic, just five years after its creation.⁵² Between November 2009 and November 2011, the number of hits by unique visitors increased by nearly 50%

48. Albert Rox, *Top Social Networking Sites*, SOCIAL NETWORKS PLANET (Sept. 9, 2012), <http://www.affilatenetworking.com/top-social-networking-sites/>; *Top 10 Social Networking Sites*, DISCOVERY NEWS (Dec. 12, 2012), <http://news.discovery.com/tech/top-ten-social-networking-sites.html>; *Top 15 Most Popular Social Networking Sites*, eBizMBA, <http://www.ebizmba.com/articles/social-networking-websites> (last updated Dec. 1, 2013); *Top Sites*, ALEXA, <http://www.alexa.com/topsites> (last visited Dec. 30, 2013) (listing Facebook as the number two website globally).

However, social networking statistics should be viewed with some amount of skepticism. See Matt Rhodes, *93% of the World is Not on Facebook*, SOCIAL MEDIA TODAY (July 21, 2010), <http://socialmediatoday.com/matrhodes/149640/93-world-not-facebook> (arguing that Facebook's impressive growth statistics often overlook the fact that most of the world is not on Facebook, and that in some countries where Facebook is used, it is not the most popular way for people to connect online); Zoe Siskos, *Where Social Media Measurement Falls Short*, SOCIAL MEDIA TODAY (June 4, 2010), <http://socialmediatoday.com/zoesiskos/110625/where-social-media-measurement-falls-short> (noting that statistics regarding social media, while they can be useful, are often not used in the most beneficial manner and that they ignore the human aspects behind the number).

49. See *Key Facts*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Dec. 31, 2013) ("1.19 billion monthly active users as of September 30, 2013 Approximately 80% of our monthly active users are outside the U.S. and Canada.").

50. See *Top 15 Most Popular Social Networking Sites*, *supra* note 48.

51. *Id.*; Lisa O'Carroll, *Twitter Active Users Pass 200 Million*, THE GUARDIAN (Dec. 18, 2012, 12:51 PM), <http://www.guardian.co.uk/technology/2012/dec/18/twitter-users-pass-200-million>.

52. See Andy Kazeniak, *Social Networks: Facebook Takes Over Top Spot, Twitter Climbs*, COMPLETE PULSE (Feb. 9, 2009, 2:01 PM), <http://blog.compete.com/2009/02/09/facebook-myspace-twitter-social-network> (noting when Facebook overtook MySpace as the top social networking site, as measured by unique visitors and monthly visits).

on Facebook and nearly doubled on Twitter.⁵³ Users are also spending more time on social networking sites, with an average increase from 4.6 to 6.3 hours per month among U.S. users between 2010 and 2011.⁵⁴ Social networking site users also skew toward the young (under fifty), relatively affluent (annual income of \$90,000+), and educated (college graduates).⁵⁵ In fact, from September 2005 to May 2010, the largest rates of growth have come from the eighteen to twenty-nine and the thirty to forty-nine age groups, respectively increasing from 16% to 86% and from 12% to 61%.⁵⁶

These statistics indicate that more and more people are using social networking sites as a means of communicating with others. Rather than calling, sending a letter, or even writing an e-mail, people are choosing to engage with others through a social networking site. Thus social networking sites operate as an infrastructure of communication in a similar way to the telephone and post office. They provide the same services as these other entities, just for the online environment. The increasing growth of account holders suggests that social networking sites may become the primary mode of communication for the general public in the future, especially because of the exponential growth rate of social networking site usage among younger users. Moreover, social networking sites are largely built on positive externalities—the addition of a user to a social network in turn spurs other members of that user’s non-Internet-based

53. See Alyssa Maine, *Are 20-Somethings Too Connected? Or Not Connected Enough?*, COMPLETE PULSE (Dec. 19, 2011, 4:11 PM), <http://blog.compete.com/2011/12/19/are-20-somethings-too-connected-or-not-connected-enough> (publishing a graph showing unique visitors per month, with Facebook increasing from approximately 110 million to approximately 160 million and Twitter increasing from approximately 20 million to approximately 40 million).

54. See Dan Nelms, *Social Networking Growth Stats and Patterns*, SOCIAL MEDIA TODAY (June 16, 2011), <http://socialmediatoday.com/amzini/306252/social-networking-growth-stats-and-patterns>.

Part of this increased time spent on social networking sites may be attributed to the growth of smart phone use generally and, in particular, to the increase in mobile access to social networking sites, which grew by more than 200% from 2010 to 2011. See Kanalley, *supra* note 21.

55. See Lymari Morales, *Google and Facebook Users Skew Young, Affluent, and Educated*, GALLUP ECONOMY (Feb. 17, 2011), <http://www.gallup.com/poll/146159/facebook-google-users-skew-young-affluent-educated.aspx>.

56. See Kanalley, *supra* note 21. Another study estimates that 96% of 18–35 year olds are using a social networking site. See *Social Media Growth Statistics*, KISSMETRICS, <http://blog.kissmetrics.com/social-media-statistics/> (last visited Jan. 11, 2013).

social network to join that specific online network;⁵⁷ this then increases the benefits for other users as more members of physical social networks become part of online social networking sites. Thus as entire friend groups or industries come to rely on particular sites, users may become locked into one platform.⁵⁸

Social networking sites also provide services beyond a simple platform for communication. Today, businesses, employers, educational institutions, medical institutions, news organizations, and political figures all use social networking sites to expand their reach.

Social networking sites allow businesses to communicate with consumers in a faster and more efficient way.⁵⁹ A 2011 report revealed that 71% of companies used Facebook and 59% used Twitter.⁶⁰ Companies have learned that they can use social media to increase exposure for their company or brand, gain business partnerships,⁶¹ and optimize their web presence.⁶² On Facebook, for example, companies can set up an official company page to provide users with regular updates and create online events.⁶³ Companies often create offers that are only available on a specific social networking site.⁶⁴ Many companies also create software applications

57. Cf. *The Power of Social Networks*, GALLUP BUSINESS JOURNAL (Mar. 8, 2007), <http://businessjournal.gallup.com/content/26770/power-social-networks.aspx> (discussing the power of friends in social networking site dynamics).

58. The lock-in effect would occur due to the nature of social networking sites: users tend to join a social networking site based on access to their physical social network. *See id.*

59. *See* Bryant Ott, *Marketing to Tweeters and Their Facebook Friends*, GALLUP BUSINESS JOURNAL (Apr. 11, 2011), <http://businessjournal.gallup.com/content/146990/marketing-tweeters-facebook-friends.aspx> (discussing how social media provides a way for companies to respond to buyers' desire for speed).

60. Kanalley, *supra* note 21.

The growth of marketing events and conferences related to digital media suggests that the percentage of companies using social networking sites as part of business practices will continue to grow. *See, e.g.*, Jennifer Shore, *Facebook Marketing Strategy and 60+ More Events in Digital Media*, MASHABLE (Sept. 27, 2012), <http://mashable.com/2012/09/27/events-9-27>.

61. *See* Schawbel, *Major Findings*, *supra* note 20.

62. *See, e.g.*, Deborah M. Todd, *Small Business Owners Get Free Help Improving Their Web Presence*, PITTSBURGH POST-GAZETTE, Apr. 11, 2012, <http://www.post-gazette.com/stories/business/news/small-business-owners-get-free-help-improving-their-web-presence-630830> (describing Google-sponsored events that provide advice for small business owners).

63. John Rampton, *5 Tips to get More Exposure for Business Using Facebook*, MAPLE NORTH (Feb. 28, 2012), <http://www.maplenorth.com/2012/02/28/5-tips-to-get-more-exposure-for-business-using-facebook>.

64. *See, e.g.*, Antioquia, *Just 2 More Sleeps! Facebook Exclusive Offer. . . Read. . . on*, FACEBOOK (Apr. 1, 2010, 7:08 PM), http://www.facebook.com/note.php?note_id=395086852368; Macy's, *supra* note 19; The Resort at the Mountain, *supra* note 19.

(known as “apps”) that use social networking platforms in an attempt to reach more consumers.⁶⁵

Employers also use social networking sites when considering applicants for purposes such as verifying credentials or identifying potentially problematic information about prospective hires.⁶⁶ Examples of issues that have arisen from social network background checks include: using Craigslist to search for OxyContin, putting up naked photos on an image-sharing site, and making anti-Semitic comments online.⁶⁷ A social networking background check has become so important that there are even companies, such as Social Intelligence, whose purpose is to provide this service.⁶⁸ Additionally, law schools are providing students with information on how to protect their online personas, precisely to prevent any social networking information from affecting a student’s job search.⁶⁹

Additionally, social networking sites play a role in medicine. The sites have been used to raise funds for medical projects, conduct digital diagnoses of patients in foreign countries, and expand awareness about diseases.⁷⁰

65. See Jon Swartz, *Facebook Rolls out 60 Apps for Timeline*, USA TODAY, <http://usatoday30.usatoday.com/tech/news/story/2012-01-18/facebook-lifestyle-apps/52653014/1> (last updated Jan. 18, 2012, 9:12 PM); *Facebook Adding More Than 60 New Apps for Its Timeline*, PEREZHILTON.COM (Jan. 22, 2012, 10:40 AM), <http://perzhilton.com/2012-01-22-facebook-announces-that-they-are-adding-more-than-sixty-new-apps-for-their-timeline#.T1bCfHJSQU9> (providing examples of Facebook apps, including a fitness app from Nike and a movies app from Rotten Tomatoes). Information also flows in other directions, such as when social networking sites allow consumers to communicate with each other and to respond to companies. See Ott, *supra* note 59 (discussing how companies engage in discussions with “Millenials”).

66. See Kanalley, *supra* note 21.

67. Jennifer Preston, *Social Media History Becomes a New Job Hurdle*, N.Y. TIMES, July 20, 2011, <http://www.nytimes.com/2011/07/21/technology/social-media-history-becomes-a-new-job-hurdle.html?pagewanted=all>.

68. See *id.* (stating that Social Intelligence only uses publicly available information when conducting a background check). The legality of these searches is no longer a question; in 2011, the FTC approved Social Intelligence’s actions as being in compliance with the Fair Credit Reporting Act. See Vivian Luckiewicz, *Could You Survive a Social Media Background Check?*, OI PARTNERS (Oct. 2011), http://aka-oi.com/newsroom/newsletter/october-2011-newsletter/11-10-14/Could_You_Survive_a_Social_Media_Background_Check.aspx.

However, as mentioned earlier, some states are placing limits on the use of social networking information in employment contexts. See, e.g., 820 ILL. COMP. STAT. 55/10 (2013).

69. See, e.g., Office of Career Services, New York University School of Law, *Protecting Your Online Persona* (no date) (on file with author).

70. See Catherine A. Brownstein et al., *The Power of Social Networking in Medicine*, 27 NATURE BIOTECHNOLOGY 888, 888–89 (2009) (discussing development

For educational institutions, social networking sites provide services such as announcements, blogs about student life, online message or bulletin boards for classes, and professional development.⁷¹ Social networking sites also allow education providers to communicate with each other to discuss teaching techniques and to share resources.⁷² In addition, just as social networking may be changing societal views of communication, social networking may be changing the way that students learn, encouraging educators to experiment with and develop their teaching methods.⁷³

of the “PatientsLikeMe,” a medical social networking site); Lauren Hockenson, *How a Team of Doctors Uses Social Media to Drive Awareness and Save Lives*, MASHABLE (Feb. 27, 2012), <http://mashable.com/2012/02/27/doctors-twitter-social-media>.

In some cases, medical institutions or organizations develop their own purpose-specific social media or networking sites. *See, e.g.*, Brownstein et al., *supra*, at 888–89. These websites have allowed doctors to obtain data about patient populations and speed up patient recruitment for clinical research trials. *See id.* at 890. Some primary care facilities have also started experimenting with web-based social media such as weblogs, instant messaging platforms, and social networking sites to provide low-cost services. *See* Carleen Hawn, *Take Two Aspirin and Tweet Me in the Morning: How Twitter, Facebook, and Other Social Media Are Reshaping Health Care*, 28 HEALTH AFF. 361, 361, 363 (2009).

71. *See* Bryan Alexander, *Social Networking in Higher Education*, in THE TOWER AND THE CLOUD: HIGHER EDUCATION IN THE AGE OF CLOUD COMPUTING 197, 199 (Richard N. Katz ed., 2008), *available at* <http://net.educause.edu/ir/library/pdf/PUB7202s.pdf> (describing examples of social media uses in higher education, such as blogging or wiki projects); Matt Silverman, *How Higher Education Uses Social Media*, MASHABLE (Feb. 3, 2012), <http://mashable.com/2012/02/03/higher-education-social-media> (infographic surveying uses of social media in higher education, providing examples such as tweeting class announcements and creating a school Facebook page). As in the medical context, educational institutions use both pre-existing social networking sites and self-developed websites. *See* Alexander, *supra*, at 198–200 (discussing examples including educational uses of *Wikipedia* and course-specific blogs and podcasts).

72. *See* *List of Networks*, EDUCATIONAL NETWORKING, <http://www.educationalnetworking.com/List+of+Networks> (last visited Dec. 31, 2013) (providing lists of educational resource pages on Facebook and LinkedIn, and of separate education-specific pages and networks).

73. *See* Lorenzo Franceschi-Bicchierai, *Twitter Boosts College Grades and Class Engagement*, MASHABLE (Oct. 20, 2012), <http://mashable.com/2012/10/20/twitter-students-writers>; *cf.* *NMC Initiatives*, THE NEW MEDIA CONSORTIUM, <http://www.nmc.org/about/initiatives> (last visited Jan. 12, 2013) (describing the core initiatives of the New Media Consortium, including how technology contributes to dynamic knowledge production and initiating collaborations with other organizations to encourage digital literacy).

At least one study has found that use of Twitter in education led to students who “[were] more engaged and [had] higher grades.” Franceschi-Bicchierai, *supra*.

Journalists and news organizations use social networking as a means of obtaining, verifying, and disseminating up-to-date information about ongoing events.⁷⁴ For example, newspapers post headline feeds in Twitter, create online events to attract readers, and customize delivery of information to a reader's interests.⁷⁵ *The Washington Post* and *The New York Times* have gone so far as creating social readers compatible with Facebook that encourage Facebook users to read articles.⁷⁶ Yet perhaps the "Trending Articles" feature on Facebook is the most telling example of how news and social networking sites are connecting, as it allows a user to see news articles based on what the user's friends are reading.⁷⁷

Finally, social media and social networking sites play a role in politics. These websites played a significant role in the "Arab Spring" revolutions, particularly in Egypt and Tunisia.⁷⁸ Protestors utilized social networking sites like Facebook and Twitter to accelerate protests,⁷⁹ publicly discuss political issues,⁸⁰ and link activist

74. See Dan Schawbel, *How a Journalist Uses Social Media*, FORBES (Oct. 24, 2011, 10:04 AM), <http://www.forbes.com/sites/danschawbel/2011/10/24/how-a-journalist-uses-social-media>.

75. See Woody Lewis, *10 Ways Newspapers are Using Social Media to Save the Industry*, MASHABLE (Mar. 11, 2009), <http://mashable.com/2009/03/11/newspaper-industry>.

76. See Josh Catone, *New York Times Launches Facebook App*, READWRITEWEB (Sept. 12, 2007), http://www.readwriteweb.com/archives/new_york_times_launches_facebook_app.php (describing *The New York Times*' daily short news quiz Facebook app, which encourages quiz-takers to open news articles on a *New York Times* webpage, unlike *The Washington Post* app, which allows users to read articles without leaving Facebook); Jennifer Van Grove, *The Washington Post Launches Social Reader as a Newspaper for Facebook*, MASHABLE (Sept. 22, 2011), <http://mashable.com/2011/09/22/social-reader>.

77. See Lauren Indvik, *Facebook Tests Smaller Version of 'Trending Articles' in Newsfeed*, MASHABLE (Apr. 26, 2012), <http://mashable.com/2012/04/26/facebook-trending-articles-test>.

78. See Raymond Schillinger, *Social Media and the Arab Spring: What Have We Learned?*, HUFFINGTON POST (Sept. 20, 2011, 3:59 PM), http://www.huffingtonpost.com/raymond-schillinger/arab-spring-social-media_b_970165.html.

79. *Twitter, Facebook, and YouTube's Role in Arab Spring (Middle East Uprisings)*, SOCIAL CAPITAL BLOG, <http://socialcapital.wordpress.com/2011/01/26/twitter-facebook-and-youtubes-role-in-tunisia-uprising/> (last updated Oct. 12, 2012).

80. See Kate Taylor, *Arab Spring Really Was Social Media Revolution*, TG DAILY (Sept. 13, 2011, 5:00 AM), <http://www.tgdaily.com/software-features/58426-arab-spring-really-was-social-media-revolution>; Robert F. Worth, *Twitter Gives Saudi Arabia a Revolution of Its Own*, N.Y. TIMES, Oct. 20, 2012, http://www.nytimes.com/2012/10/21/world/middleeast/twitter-gives-saudi-arabia-a-revolution-of-its-own.html?pagewanted=all&_r=0.

groups in different locations.⁸¹ Social networking sites also played a role in the 2008 U.S. presidential election as a tool for candidates to reach greater portions of the U.S. population, and they featured prominently in the 2012 presidential election.⁸²

All of these examples demonstrate the extent to which social networking sites pervade areas of social activity beyond communication or self-expression.⁸³ The expansive growth of social networking sites into areas from business to medicine to politics suggest that a user's ability to access social networking sites is becoming more important and that either having content taken down or an account deleted would have serious negative ramifications for a user's social experience. Further, I argue that this consolidation of the social experience gives rise to user rights, which while not protectable under the U.S. Constitution are, as will be further explicated, protectable under a consumer protection framework.

81. See Natana J. DeLong-Bas, *The New Social Media and the Arab Spring*, OXFORD ISLAMIC STUDIES ONLINE, http://www.oxfordislamicstudies.com/Public/focus/essay0611_social_media.html (last visited Dec. 31, 2013).

82. See Alex Fitzpatrick, *Second Presidential Debate: Less Twitter, More Facebook*, MASHABLE (Oct. 17, 2012), <http://mashable.com/2012/10/17/hofstra-debate-twitter-facebook>; Electron Libre, *The Role of Social Networks in the 2012 Presidential Election*, FRANCE 24 <http://www.france24.com/en/20121107-2012-11-07-1319-wb-en-webnews> (last updated Nov. 8, 2012); Weber, *supra* note 22.

The 2010 U.S. Midterm Elections demonstrated the use of Twitter to remind people to vote, monitor the voting process, and communicate about electoral issues. See Dugan, *supra* note 22.

83. This Note does not rely on any assumption that social networking sites are a net positive phenomenon. Instead, the purpose of this Section is to demonstrate that social networking sites have become a pervasive element of social interaction. Though it is beyond the scope of this Note, there is much debate over the effects of social networking sites on communication and social interaction. Compare James Gurd, *Does Social Media Kill Communication Skills?*, ECONSULTANCY (Sept. 18, 2009, 10:52 AM), <http://econsultancy.com/us/blog/4636-does-social-media-kill-communication-and-people-skills> (arguing that social media enhances communication), with Melissa Bell & Elizabeth Flock, *'A Gay Girl in Damascus' Comes Clean*, WASH. POST, June 12, 2011, http://www.washingtonpost.com/lifestyle/style/a-gay-girl-in-damascus-comes-clean/2011/06/12/AGkyH0RH_story.html (reporting the worries of gay bloggers that their ability to use pseudonyms could be jeopardized after the revelation that a beloved Syrian lesbian blogger's identity was completely fabricated—the true blogger was an American man), and Megan Puglisi, *Social Networking Hurts the Communication Skills of College Students*, THE DAILY ATHENAEUM (Oct. 13, 2010), <http://www.thedaonline.com/opinion/social-networking-hurts-the-communication-skills-of-college-students-1.1689315> (arguing that social networking sites are ruining the communication skills of college students), and Nick Stamoulis, *Is Social Networking Slowing Down the Generational Lines of Communication?*, MARKETING PILGRIM (Mar. 20, 2009), <http://www.marketingpilgrim.com/2009/03/social-networking-generations.html> (arguing that rapidly evolving social networking sites are exacerbating generational divides).

*B. Social Networking Sites Act as Censors and Filter
Both Content and Users*

Although social networking sites provide many important services and serve expressive purposes, they engage in censorship when they take down content or delete user accounts.⁸⁴ As mentioned in the Introduction, it is relatively settled law that social networking sites have some ability to censor due to the fact that they now qualify as “interactive computer service” providers and thus obtain the immunity protections of § 230 of the Communications Decency Act of 1996.⁸⁵ Although the immunity provision was originally intended to provide a small exception to Internet service provider liability, courts have expanded the immunity to apply to a greater variety of actors, including employers or people who repost the material of others.⁸⁶

One style of censorship is account deletion. The opening illustration of the deletion of Courtney Stodden’s fan page provides an example of when Facebook took such action against a user for posting allegedly inappropriate self-portraits.⁸⁷ A seemingly less problematic example of account deletion is that of Aaditya Thackeray, whose account was taken down because Facebook believed that he was not using his real name and was therefore violating Facebook’s terms of use.⁸⁸ Mr. Thackeray was able to prove his identity, and his account was reactivated after an internal appeal to Facebook.⁸⁹

However, full account deletion is not the only means that social networking sites use to censor user content. Another perhaps more common form of censorship is when a social networking site takes down particular content rather than delete a user’s account.

84. The right to take down material is usually reserved in the terms of service that users agree to when creating an account. *See, e.g., Statement of Rights and Responsibilities, supra* note 25.

85. *See, e.g., Zeran v. America Online, Inc.*, 129 F.3d 327, 330, 332 (4th Cir. 1997) (interpreting provisions of the CDA and finding that the statute applied to early multi-purpose sites like AOL); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 849–50 (W.D. Tex. 2007) (finding MySpace to be entitled to immunity under the CDA).

86. Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. ON TELECOMM. & HIGH TECH. L. 101, 102–03 (2007). However, the actual scope of the immunity provision remains unclear. *Id.* at 106–07.

87. *See Hughes, supra* note 2.

88. *See Facebook Asks, supra* note 36; *Statement of Rights and Responsibilities, supra* note 25.

89. *See Facebook Asks, supra* note 36.

For example, in 2011 Facebook took down a set of pro-rape pages.⁹⁰ Although Facebook initially declined to remove the content, stating that “[i]t is very important to point out that what one person finds offensive another person can find entertaining, just as telling a rude joke won’t get you thrown out of your local pub, it won’t get you thrown off Facebook,” an online petition garnering 186,000 signatures and a Twitter campaign pressured the site into removing some, but not all, of the sexual assault pages.⁹¹ Facebook has also removed user content that is arguably less offensive, such as pictures of breastfeeding mothers.⁹² The breastfeeding picture issue also created a large online movement in support of allowing these pictures, however this movement did not cause an immediate change in Facebook’s community standards.⁹³ It is only recently that Facebook has changed its position regarding these images.⁹⁴

Part of the content take-down guidelines that Facebook provides to external censoring companies was leaked to the public, allowing the online community a glimpse into what content Facebook finds objectionable and what content the website permits.⁹⁵ The guidelines demonstrate many oddities. For example, Facebook does not allow any form of sexual activity, even simulated, whereas depictions of deep wounds and excessive blood are allowed, “as long as no insides are showing.”⁹⁶ The guidelines provided to the external company that Facebook employs to review flagged content are much more specific and in-depth than the standards available to users on Facebook’s help section.⁹⁷ Yet even these

90. See Adrian Chen, *Facebook Removes Pro-Rape Pages, Kicking and Screaming*, GAWKER (Nov. 9, 2011, 4:21 PM), <http://gawker.com/5858000/facebook-removes-pro+rape-pages-kicking-and-screaming>.

91. See *id.*

92. See Jenna Wortham, *Facebook Won’t Budge on Breastfeeding Photos*, N.Y. TIMES (Jan. 2, 2009, 6:34 PM), <http://bits.blogs.nytimes.com/2009/01/02/breastfeeding-facebook-photos>.

93. See *id.*

94. *Facebook Community Standards*, *supra* note 25 (“We aspire to respect people’s right to share content of personal importance, whether those are photos of a sculpture like Michelangelo’s David or family photos of a child breastfeeding.”).

95. See *No Sex, but Crushed Heads Are OK. Leaked Facebook Document Reveals Website’s Secretive and Bizarre “Graphic Content” Policy*, DAILY MAIL ONLINE (Feb. 21, 2012, 7:56 PM), [hereinafter *No Sex, But Crushed Heads are OK.*], <http://www.dailymail.co.uk/sciencetech/article-2104424/Facebooks-bizarre-secretive-graphic-content-policy-revealed-leaked-document.html>

96. See *id.*

97. *Compare No Sex, but Crushed Heads are OK.*, *supra* note 95 (revealing Facebook’s guidelines to the external company that prohibit “[c]ontent showing Poster’s delight in/involvement in/promoting of/encouraging of violence against humans or animals for sadistic purposes (e.g. torture, staged animal fights, animal

started a protest.¹⁰¹ This protest has not yet led to a change in Twitter's policy.¹⁰²

These policies raise the question of what level of censorship authority social networking sites should have over user content. To resolve this question, it is necessary to discuss what legal doctrines and rights would apply to online social networking sites.

II.

PREPARE FOR TROUBLE AND MAKE IT DOUBLE: ANALYZING TWO FRAMEWORKS FOR PROTECTING USER RIGHTS OF EXPRESSION ON SOCIAL NETWORKING SITES

This Part determines what framework of analysis will best protect user rights of expression in order to evaluate possible governmental interventions for protecting user rights of free expression discussed in Part III. First, I explain why users will likely be unsuccessful in invoking First Amendment protections against social networking sites. The biggest obstacles for individuals in this framework are the state action and public forum doctrines. I therefore suggest a consumer protection framework as an alternative.¹⁰³ I provide an overview of consumer protection rationales and turn to how traditional market failures exist in the social networking site context. This conclusion invites government intervention as a solution to these market failures. However, application of the consumer protection framework may run into problems in practice. Specifically, social networking sites could invoke their First Amendment rights against attempts to limit their censorial authority. Yet the

101. Hayley Tsukayama, *Twitter Faces Accusations of Censorship; Users Plan Saturday Boycott*, WASH. POST, Jan. 27, 2012, http://www.washingtonpost.com/business/technology/twitter-faces-accusations-of-censorship-users-plan-saturday-boycott/2012/01/27/gIQAJ8dHWQ_story.html?wpisrc=nl_headlines; Tsukayama, *Twitter's Country-Specific Censorship Tool*, *supra* note 100.

102. *Country Withheld Content*, TWITTER, <http://support.twitter.com/groups/33-report-abuse-or-policy-violations/topics/148-policy-information/articles/20169222-country-withheld-content#> (last visited Dec. 31, 2013).

103. My discussion will focus on existing doctrines used to apply the First Amendment against private entities. For alternate views on how the First Amendment could be applied to extend free speech protections to prevent censorship by private entities, see Chandler, *supra* note 46, at 1097–98 (suggesting that the right to reach an audience could provide for First Amendment protections to be applied against Internet intermediaries); Hannibal Travis, *Of Blogs, eBooks, and Broadband: Access to Digital Media as a First Amendment Right*, 35 HOFSTRA L. REV. 1519, 1526 (2007) (arguing that an originalist reading of the First Amendment would allow courts to apply First Amendment protections against private entities that hold government-sponsored monopolies).

amount of editorial or censorial power given to a particular form of media varies depending on the type of media. The final Section of this Part will discuss how social networking sites should be characterized to determine what amount of editorial power and First Amendment protection they warrant.

A. *The First Amendment Does Not Provide Users with Direct Protection Against Censorship by Social Networking Sites*

The First Amendment states: “Congress shall make no law . . . abridging the freedom of speech, or of the press”¹⁰⁴ In effect, the First Amendment prevents the government from taking any action that would restrict an individual’s speech or expression.¹⁰⁵ However, the First Amendment generally does not proscribe actions by a private non-state actor that affect another private non-state actor’s expressive ability.¹⁰⁶ There are two main exceptions to this general rule. The First Amendment can apply to private actors, including social networking sites, if the state action requirement is met¹⁰⁷ or if the forum is characterized as a public forum.¹⁰⁸ I address each doctrine in turn.

104. U.S. CONST. amend. I.

I will restrict my analysis to the free speech protections of the federal Constitution. State constitutions may provide broader free speech protections and may not contain a state action requirement. *See, e.g.,* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 80–81 (1980); *Melvin v. Reid*, 297 P. 91, 91, 93–94 (Cal. Dist. Ct. App. 1931) (applying California state constitution provisions against nongovernmental actors).

105. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (“The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed.”) (citations omitted).

106. *See* Helen Hershkoff, *Horizontality and the “Spooky” Doctrines of American Law*, 59 BUFF. L. REV. 455, 455 (2011) [hereinafter Hershkoff, *Horizontality*] (“That the federal Constitution does not apply to private relations ranks among the most entrenched principles of American law.”); Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1138 (1984).

107. *See* *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (affirming the state action requirement when invoking the First Amendment).

108. *See, e.g.,* *Amalgamated Food Emp. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 315–19 (1968) (finding private shopping center to be public for the purposes of the First Amendment and applying early “public forum” doctrine cases, although the specific term “public forum” is not used). *But see* *Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972), *extended by* *Hudgens v. NLRB*, 424 U.S. 507, 514–21 (1976) (recognizing that *Lloyd* overturned *Logan Valley*). The issue of whether the public forum doctrine actually can be applied to private actors is discussed later in this Part. For further information on the public forum doctrine, see Nancy J. Whitmore, *First Amendment Showdown: Intellectual Diversity Mandates and the Academic Marketplace*, 13 COMM. L. & POL’Y 321, 339 (2008)

The essential inquiry for state action is whether “the conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State.”¹⁰⁹ The case law governing the issue of what conduct meets the state action doctrine is unclear, and no court has formulated any generally accepted metric.¹¹⁰ In the most obvious cases, government officials acting within the scope of their authority meet the state action requirement.¹¹¹ Yet even indirect government involvement can trigger state action.¹¹² In perhaps one of the least obvious state action cases, the Supreme Court found that the mere application of state law in a libel lawsuit between an individual and *The New York Times* met the state action requirement and allowed the newspaper to bring a First Amendment defense.¹¹³ How-

[hereinafter Whitmore, *First Amendment Showdown*] (discussing the public forum doctrine and how it restricts government control over speech).

109. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

Some scholars argue that the doctrine as a whole should be scrapped. However, courts are likely to continue applying the state action doctrine in order to determine when constitutional protections can be applied against nonstate actors. For criticisms of the state action doctrine, see generally Dilan A. Esper, Note, *Some Thoughts on the Puzzle of State Action*, 68 S. CAL. L. REV. 663, 670–77 (1995) (describing various criticisms of the state action doctrine, such as the rise of the corporation and the arguable incoherence of the public/private distinction).

110. See Erwin Chemerinsky, *Rethinking State Action*, 80 Nw. U. L. REV. 503, 503–05 (1985) (quoting other scholars describing state action doctrine as a “conceptual disaster” and citing sources that point to the incoherence of the state action doctrine).

111. See, e.g., *Harris v. City of Roseburg*, 664 F.2d 1121, 1127 (9th Cir. 1981) (indicating that police intervention in a repossession is state action).

112. See, e.g., *Soldal v. Cook Cnty.*, 506 U.S. 56, 72 (1992) (finding state action when alleged debtor’s mobile home was seized with support of deputy sheriffs). Government-created entities can also meet the state action requirement if the entity is established in furtherance of governmental objectives and the government retains some degree of control over the entity. See *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995).

In at least one extreme case, a court held that government inaction—in that case, a county policy that prevented unauthorized citizens from saving a drowning child—violated constitutional protections. See *Ross v. United States*, 910 F.2d 1422, 1425, 1430 (7th Cir. 1990) (holding that the policy violated the Fourteenth Amendment).

113. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 262–65 (1964) (finding that the First Amendment applied because of state enforcement and judicial proceedings). In another case involving rights of publicity, the Eighth Circuit also found that court enforcement of state-created obligations met the state action requirement. See *C.B.C. Distribution & Mktg., Inc. v. Major League Baseball Advanced Media, L.P.*, 505 F.3d 818, 823 (8th Cir. 2007).

ever, courts have not been consistent in finding state action in every case where similar facts are alleged.¹¹⁴

More problematic cases arise when the action involves only private entities. In fact, the state action doctrine was created precisely to protect private individuals from having their rights and liberty subject to governmental obligations when engaging with other private parties.¹¹⁵ Despite that concern, in some cases private actions are attributed to the state.¹¹⁶

114. See, e.g., *Flagg Bros. v. Brooks*, 436 U.S. 149, 153–55, 163 (1978) (holding that the proposed sale of respondent’s property by a creditor was not state action, even though the sale was authorized by a state statute); *Harley v. Oliver*, 539 F.2d 1143, 1144–46 (8th Cir. 1976) (denying recovery to a mother who temporarily lost custody of her child pursuant to a court order because the father’s actions in seeking court action did not constitute a “scintilla of state action”).

115. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936–37 (1982) (stating that the state action limitation “preserves an area of individual freedom by limiting the reach of federal law”); William M. Burke & David J. Reber, *State Action, Congressional Power, and Creditors’ Rights: An Essay on the Fourteenth Amendment*, 46 S. CAL. L. REV. 1003, 1012–14, 1016–17 (1973) (arguing that the state action doctrine was intended to protect individual autonomy); Chemerinsky, *supra* note 110, at 506.

For an alternate view of state action doctrine, see Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1492–1506 (1982) (arguing that the theory underlying state action in cases involving “hybrid actors” should be a “moral exemplar” theory—that public organizations must meet a higher standard because they set an example for others).

116. See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 716–17, 723–26 (1961) (finding state action when a restaurant leasing governmental property engaged in discrimination).

My view of state action focuses on two categories of state action, public function and entanglement, which are supported by multiple scholars. See, e.g., Hershkoff, *Horizontality*, *supra* note 106, at 499–500 (discussing the public function and “entanglement” exceptions); cf. Peter M. Shane, *The Rust that Corrodes: State Action, Free Speech, and Responsibility*, 52 LA. L. REV. 1585, 1586–87, 1589–90 (1992) (noting that cases tend to fall into one of three versions of state action, and using the example of *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), to illustrate the Supreme Court’s focus on concepts such as “significant participation of the government” and “traditional function of the government” to support finding state action (internal quotation marks omitted)). My reason for focusing on these two categories is that they appear to encompass the majority of state action cases. The more nuanced distinctions in other discussions subdivide these major categories into more specific groupings. For alternate and additional conceptions of when private action becomes state action, see, e.g., G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333, 344–354 (1997) (dividing state action into six “issues”); Esper, *supra* note 109, at 709–13 (describing three situations where state action is found: (1) when the right at issue is “so important to the functioning of the government that the state has a . . . duty to protect it;” (2) when “the state has delegated significant authority to a private entity;” or (3) when private actors become too powerful).

One type of private-entity state action occurs when a governmental entity delegates authority over a public function to a private actor. While the point at which governmental delegation creates state action is not clear, one general rule of thumb has been that where the function provided by the private entity serves the general public, the entity's action is considered a public function,¹¹⁷ and therefore state action.¹¹⁸ Courts have used this doctrine to hold that the delegation of public functions was sufficient to confer state action in contexts such as company towns,¹¹⁹ but not for shopping malls.¹²⁰

However, both of these sources—and many others—include both categories in their discussions of state action that I focus on here.

Finally, for a specific discussion of private networks revolving around the congressionally created National Research and Education Network (“NREN”), see Michael I. Meyerson, *Virtual Constitutions: The Creation of Rules for Governing Private Networks*, 8 HARV. J.L. & TECH. 129, 134–39 (1994) (discussing the NREN government-sponsored network in the context of a variety of state action cases). NREN is not a social networking site, but Meyerson's article may provide some useful insight on state action and Internet infrastructure. However, as NREN is a government-sponsored program, it does not present the same scenario as a purely private entity.

117. The actual definition of “public function” is not clear from the case law. Some cases have defined “public function” as a function traditionally *exclusively* performed by the state. *See, e.g.*, *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 544 (1987). However, other cases have found a public function for actions such as a pre-primary election, which are not exclusive or traditional functions performed by the state. *See, e.g.*, *Terry v. Adams*, 345 U.S. 461, 462–63, 468–69 (1953). For a broader discussion of the problems defining public function in the case law, see Esper, *supra* note 109, at 690 n.132, 692–708.

Additionally, the public function issue within the state action doctrine closely relates to the question of whether a location is a public forum, which will be discussed further below.

118. *See Buchanan, supra* note 116, at 346 (discussing how serving a public function establishes state action).

119. *See Marsh v. Alabama*, 326 U.S. 501, 502–03, 508–10 (1946). In *Marsh*, the Supreme Court found that a private company town was subject to First Amendment limitations without identifying the town as a state actor. *Id.* at 502–03. Further cases define the scope of this decision and explain that the case stands as a “paradigmatic” example of the state action question despite no language in the case itself referring to the state action doctrine. *See Marsh*, 326 U.S. 501; Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years after Marsh v. Alabama*, 6 WM. & MARY BILL RTS. J. 461, 472–74 (1998). The Supreme Court also noted that the private town performed a public function. *Marsh*, 326 U.S. at 506.

120. *See Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972), *extended by* *Hudgens v. NLRB*, 424 U.S. 507, 514–21 (1976) (recognizing that *Lloyd* overturned *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968)—by extension, limiting the scope of *Marsh*).

Alternatively, courts have sometimes applied an entanglement or nexus test.¹²¹ For example, in *Burton v. Wilmington Parking Authority*,¹²² the Supreme Court found a lease of private property from the government could require enforcement of constitutional rights against the private leaseholder because of the relationship between the state and the private entity.¹²³ Once again, the amount or quality of contacts sufficient to establish state action is unclear. However, cases suggest that some type of contract or legally recognized relationship may be sufficient for a nexus to exist.¹²⁴

Although the government does not directly act when a private website takes down content or deletes a user's account, individuals who desire to invoke the First Amendment could make various arguments as to how censorship by a social networking site meets the state action doctrine. In the public function version of state action, a user could argue that social networking sites provide a communication infrastructure—a public function like that provided by the postal service. Thus the government has delegated control of this public communication function to private entities. This argument may be augmented by the fact that social networking websites, like Facebook or Twitter, now allow anyone to join their networks and publish content on the Internet for consumption by the general public. For the nexus test, a user could argue that social networking sites are using the government-granted immunity provisions¹²⁵ to engage in censorship. Therefore these sites function as proxies for government action. Finally, a user could argue that the immunity legislation can be conceived of as a contract or agreement between the government and interactive service providers regarding censorship policies.

Given the uncertainty in the state action doctrine, it would be difficult to say that any of these arguments would convince a court

121. See generally Samuel Estreicher, Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 451–61 (1974) (examining the development of the entanglement test in relation to private discrimination actions).

122. 365 U.S. 715 (1961).

123. *Id.* at 716–17, 723–26.

124. See *Evans v. Newton*, 382 U.S. 296, 299–302 (1966) (city operation of a park “for whites only” was tainted by state action both when the state acted as trustee and when private trustees were substituted); *Burton*, 365 U.S. at 723–24 (discussing how leased areas were “a physically and financially integral and, indeed, indispensable part of the State’s plan”). However, the *Evans* Court also believed that the “public function” test was met. See *Evans*, 382 U.S. at 302.

125. See Communications Decency Act of 1996, 47 U.S.C. § 230(c)(2) (protecting from liability providers or users of interactive computer services who, in good faith, restrict access to materials that are considered offensive).

to apply the First Amendment, especially since there are compelling arguments on the opposite side.¹²⁶ Although social networking sites provide a platform of communication to the general public, these websites can choose to restrict access to particular groups of users, as Facebook did when it started,¹²⁷ and change membership criteria at will. Additionally, users must create an account and agree to terms of service that give the website control over content, among other things.¹²⁸ The private contractual relationships between users and social networking sites undermine the argument that Facebook provides a public function akin to the post office. In addition, whether posts are open to the entire Internet public or not results from the individual user's choice, partially mitigating the argument that Facebook connects users to the public sphere.¹²⁹ Finally, the government did not explicitly delegate control of these platforms to the social networking sites, and social networking sites are private entities. If an implied delegation of a public function to a private entity were accepted, many other scenarios where the gov-

126. Cf. Balkin, *Virtual Liberty*, *supra* note 44, at 2074–75 (discussing conflicts between gamers and game designers for virtual games and suggesting that the First Amendment might not apply). See generally Neil Weinstock Netanel, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 CALIF. L. REV. 395, 459 (2000) (suggesting that the private nature of regulation on the Internet calls into question the availability of First Amendment protections).

Additionally, some scholars note that the most expansive applications of state action to private entities have come in the context of racial discrimination, which is not an issue in the case of online social networking sites. See Terri Peretti, *Constructing the State Action Doctrine, 1940–1990*, 35 LAW & SOC. INQUIRY 273, 287 (2010) (suggesting that, in some cases, the presence of a racial discrimination claim was an important element in finding state action); David A. Strauss, *State Action After the Civil Rights Era*, 10 CONST. COMMENT. 409, 409 (1993) (emphasizing the role of state action in racial discrimination cases). For examples of outlier cases where racial discrimination may have led to a finding of state action, see *Burton*, 365 U.S. at 716–17, 723–26 (finding state action when restaurant leasing governmental property engaged in discrimination) and *Shelley v. Kraemer*, 334 U.S. 1, 19 (1948) (finding state action in state enforcement of a racially restrictive covenant). If true, this would be another reason why courts would be unwilling to find state action in this context.

127. See Adam Pash, *Facebook Opens Registration to All*, LIFEHACKER (Sept. 26, 2006, 3:00 PM), <http://lifelife.com/203315/facebook-opens-registration-to-all> (announcing that Facebook opened membership to people who were not students or corporations); Rachel Rosmarin, *Open Facebook*, FORBES (Sept. 11, 2006, 5:30 PM), http://www.forbes.com/2006/09/11/facebook-opens-up-cx_fr_0911facebook.html (announcing the preliminary decision by Facebook to open the site to the general public).

128. *Statement of Rights and Responsibilities*, *supra* note 25.

129. See *How to Post & Share*, *supra* note 9 (including specific information on how to limit who can see a particular post).

ernment does not act, but allows for private action, would also become state action.

As for the nexus test, governmental immunity provisions do not constitute an actual contract or any other type of legal relationship between the government and social networking sites. Moreover, the backdrop of the immunity provisions indicates that the statute was enacted amid concerns of both non- and overcensorship.¹³⁰ The government did not create these provisions to obtain any kind of agreement from social networking sites, but rather gifted certain Internet entities with immunity from civil liability. Treating this relationship as sufficient to satisfy the nexus test would mean that all websites falling within the § 230 immunity provisions could be state actors for purposes of First Amendment analysis, as could any other private entity that receives some sort of government protection, incentive, or subsidy.¹³¹ Extending this position to its extreme conclusion, any copyright holder or patentee could also be considered a state actor because they too benefit from government protection and incentives to partake in certain actions, namely legal monopolies in exchange for innovation. Such a broad interpretation of state action would effectively apply the First Amendment and other constitutional protections to a huge number of private interactions and defeat the purpose of the doctrine as a limit on the U.S. Constitution.

Even if the state action argument fails, users could next argue that social networking sites are public fora, which the government must generally keep open for expressive activities.¹³² Free speech fora generally fall into one of three categories: traditional public fora, designated public fora, or non-public fora.¹³³ Traditional public fora are those locations “which by long tradition or government fiat have been devoted to assembly and debate.”¹³⁴ In these

130. See discussion *supra* notes 29–32 suggesting that the law may have been intended to provide interactive computer service providers with space to develop their own policies rather than to create government intervention.

131. The immunity provision serves as an incentive for social networking sites to engage in some level of censorship and functionally subsidizes social networking site action because it prevents the websites from having to payout liability in civil suits.

132. See Whitmore, *First Amendment Showdown*, *supra* note 108, at 339 (discussing the public forum doctrine).

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

134. See *id.* at 45 (providing streets and parks as examples); see also *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (“[S]treets and parks . . . have immemorially been held in trust for the use of the public and . . . have been used

fora, the government's ability to restrict speech is very limited and subject to strict or heightened scrutiny, depending on whether the regulation is content-based or content-neutral.¹³⁵ Designated public fora are "property which the State has opened for use by the public as a place for expressive activity."¹³⁶ As long as the government keeps these areas open—and it is not required to do so—these fora are subject to the same conditions as traditional public fora.¹³⁷ Non-public fora consist of "[p]ublic property which is not by tradition or designation a forum for public communication."¹³⁸ For these fora, the government has essentially the same rights as a private owner to limit activity and speech, as long as any government regulation of speech meets the less stringent rational basis test.¹³⁹

Social networking sites are clearly not traditional public fora because they did not exist until very recently and thus cannot have the long "tradition" of existing as a space for communication and expression. However, users could argue that social networking sites are designated public fora.¹⁴⁰ In *Marsh v. Alabama*, the Supreme Court held that an individual could invoke First Amendment protections against a private company town because the company town looked and acted like any other municipal entity.¹⁴¹ The Supreme

for purposes of assembly, communicating thoughts between citizens, and discussing public questions.")

135. See *Perry Educ. Ass'n*, 460 U.S. at 45 ("For the State to enforce a content-based exclusion [in a traditional public forum] it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. . . . The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." (citation omitted)).

136. See *id.* at 45–46 (providing examples such as university meeting facilities, school board meetings, and municipal theaters).

137. *Id.* at 46.

138. See *id.* at 46; see, e.g., *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 128–29 (1981) (finding that postal service mailboxes are not public fora); *Greer v. Spock*, 424 U.S. 828, 838 (1976) (holding that a military base is not a public forum).

139. See *id.* (indicating that government regulations for nonpublic fora need only be reasonable and not aimed at suppression speech).

140. One possible argument users could make is to analogize social networking sites to video games, and then borrow Jack Balkin's comparison of video game platform owners to the company town in *Marsh*. See Balkin, *Virtual Liberty*, *supra* note 43, at 2076–77, 2081.

141. 326 U.S. 501, 507–09 (1946).

As discussed, *Marsh* did not clearly state whether the case was decided under the state action doctrine or the public forum doctrine. Given the similarity of the

Court focused on the importance to an individual's free speech rights of being able to speak in traditionally public areas, like a street or city center.¹⁴² Even though in *Marsh* the streets were owned by a private entity, the significant similarity between the private company town and traditional public fora pushed the Supreme Court to find that the private entity violated the First Amendment when it arrested a Jehovah's Witness for passing out brochures.¹⁴³ The Supreme Court later extended the metaphor of the city center in other cases to find designated public fora in other private locations, including private malls,¹⁴⁴ although the application of this line of cases to private malls was later overturned.¹⁴⁵

To invoke the public forum doctrine, a user could argue that social networking sites are becoming the new city center precisely because these sites are a central location for communication.¹⁴⁶ Social networking sites allow people to communicate with their friends, as well as the general public, about any topic of their choice. As mentioned in Part I, these sites are already being used to disseminate information about commerce, politics, the news, and everyday events. Social networking sites are comparable to other designated public fora, such as school board meetings or municipal

public function prong of the state action doctrine and the public forum doctrine, any resulting confusion is not surprising. For example, some scholars characterize the "public function" prong of state action as being the same as the "public forum" test. *See, e.g.*, Michael L. Taviss, Editorial Comment, *Dueling Forums: The Public Forum Doctrine's Failure to Protect the Electronic Forum*, 60 U. CIN. L. REV. 757, 766 (1992) ("The public property-only restriction on the public forum doctrine is merely an application of the state action doctrine . . .").

However, later cases that drew on *Marsh* narrowed the definition of commercial private entities in the physical world against which First Amendment protections could apply, eventually allowing restrictions on speech by private entities. *See, e.g.*, *Hudgens v. NLRB*, 424 U.S. 507, 520–21 (1976) (recognizing that *Lloyd* limited the scope of *Marsh* to apply only when "a private enterprise" takes on "all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions" (quoting *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972))).

For information on the confused and uncertain legacy of *Marsh*, see Esper, *supra* note 109, at 692.

142. *See Marsh v. Alabama*, 326 U.S. 501, 503–04, 507–09 (1946).

143. *Id.*

144. *See Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 325 (1968).

145. *See Hudgens*, 424 U.S. at 514–21 (recognizing that *Lloyd* overturned *Logan Valley*).

146. *See supra* Part I.A; *cf.* Balkin, *Virtual Liberty*, *supra* note 43, at 2076–77 (focusing on communication related concerns as an important point for analogizing virtual cities to the company town in *Marsh*).

theaters, precisely because they are necessary for engaging in commerce and obtaining information in today's world. Social networking sites fit even more closely with the idea of the new city center because they provide more opportunities for speech than the other examples of designated public fora. If social networking sites were designated as public fora, the sites may have only limited and indirect ability to regulate speech.¹⁴⁷

However, the public forum cases refer to when *government* property can be characterized into one of the public forum categories based on various criteria.¹⁴⁸ Social networking sites are not government property. This means that the government does not have the ability to control social networking sites as a forum. Thus as a threshold matter, the public forum doctrine cannot be applied to social networking sites without changing the existing doctrine. Moreover, the public forum doctrine's applicability to private property now appears much more restricted and unlikely given that the Supreme Court has shifted away from *Marsh*, having found that various forms of private property are not public fora.¹⁴⁹

Even if social networking sites were somehow considered government property, individuals invoking the First Amendment in the context of public fora generally challenge *government attempts* to restrict access.¹⁵⁰ In other words, in order for their private actions to be attributed to the government, social networking sites must also be state actors.¹⁵¹ As discussed earlier, censorship decisions by private social networking sites are not made by the government, limiting access to the state action doctrine.

Thus a social networking site user who attempts to invoke either the state action or the public forum doctrine would run into quite a few obstacles, suggesting that the First Amendment cannot

147. For public and designated fora, the regulating entity cannot engage in content- or viewpoint-based discrimination. See Dawn C. Nunziato, *The First Amendment Issue of Our Time*, 29 YALE L. & POL'Y REV. INTER ALIA 1, 14–16 (2010) (discussing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995)).

148. See *Warren v. Fairfax Cnty.*, 196 F.3d 186, 190–91 (4th Cir. 1999) (noting the use of the following criteria in distinguishing between the different types of fora: “the physical characteristics of the property, including its location; the objective use and purposes of the property; and government intent and policy with respect to the property” (citations omitted)).

149. See, e.g., *Hudgens*, 424 U.S. at 518 (recognizing that a prior case applying public forum doctrine to privately-owned shopping malls had been overturned).

150. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 788, 791 (1989).

151. The problems of applying state action were mentioned *supra* Part II.A. The state action and public forum questions can be very closely intertwined, and a court may reach an outcome without clearly stating which doctrine it is using.

successfully be invoked in this context. Given the irregularity in application of both of these doctrines, it is not easy to predict how a court would decide these issues. However, for the aforementioned reasons, it is unlikely that a user would prevail under either a state action or a public forum framework.

*B. Consumer Protection Rationales Provide a Basis for Intervention When Market Failures Exist*¹⁵²

Consumer protection analysis can provide an alternate basis for finding that government intervention into the social networking site market is appropriate. The most cited view of consumers depicts them as rational calculators seeking an optimal mix of goods and services in the marketplace.¹⁵³ In an ideal market, rational suppliers, market competition, and rational consumers with rational preferences lead to efficiency and to an economically optimal outcome.¹⁵⁴ In this view, government intervention is justified only when a market failure exists.¹⁵⁵ There are two common types of market failure: information disparity and power disparity.

152. This Part is only intended to provide a brief overview of consumer protection rationales. For a more in depth analysis of these general principles, see the discussion *infra* notes 153–55.

153. Kysar, *supra* note 46, at 1747–49 (this conclusion relies on a number of assumptions about consumers including the idea that consumers rationally pursue their self-interest and that social welfare is maximized when individual consumers are allowed to pursue their own interests). See generally George J. Stigler & Gary S. Becker, *De Gustibus Non Est Disputandum*, 67 AM. ECON. REV. 76, 76 (1977) (proposing that “widespread and/or persistent human behavior can be explained by a generalized calculus of utility-maximizing behavior, without introducing the qualification ‘tastes remaining the same’”).

I will assume this model is accurate; the discussion of whether consumers act rationally or not goes beyond the scope of this Note. For a critique of this view of people as rational actors, see generally Thorstein Veblen, *Why is Economics not an Evolutionary Science?*, 12 Q.J. ECON. 373, 392–93 (1898) (arguing that a purely economic account of consumer actions ignores psychological and other factors).

154. See Kysar, *supra* note 46, at 1747–50; W. Kip Vicusi, *Using Warnings to Extend the Boundaries of Consumer Sovereignty*, 23 HARV. J.L. & PUB. POL’Y 211, 212 (1999).

155. See Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 801–02 (2008).

Most scholars agree that these types of market failures exist and instead debate the issue of what form market intervention should take. See Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803, 806 & n.16 (2008) [hereinafter Epstein, *The Neoclassical Economics of Consumer Contracts*]. For those who believe that market forces such as consumer learning or seller education efforts minimize information and power imbalances, intervention should be modest. See, e.g., *id.* at 810–17. In contrast, scholars who see these market forces as

An information disparity exists when one group within the market has more information than other groups.¹⁵⁶ Information is essential to the functioning of a market because it is the basis on which actors make rational decisions.¹⁵⁷ For example, when consumers do not have enough information, they cannot make decisions that accurately reflect their preferences.¹⁵⁸ Information disparities may exist for a number of different reasons, including manipulative marketing and a lack of incentives for suppliers.¹⁵⁹

less powerful advocate for steps that go beyond simple disclosure mechanisms or nonintervention. *See, e.g.,* Bar-Gill, *supra*, at 753–54.

For discussion of forms of consumer protection other than government intervention, see Robert Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 HARV. L. REV. 661, 669–70 (1977).

156. *See* ALAN STONE, REGULATION AND ITS ALTERNATIVES 153 (1982) (discussing what information disparities are and how they develop); *cf.* Pitofsky, *supra* note 155, at 663–67 (describing situations where sellers and buyers in the marketplace have differing amounts of information about products).

157. *See* STEPHEN BREYER, REGULATION AND ITS REFORM 26 (1982); Howard Beales, Richard Craswell & Steven C. Salop, *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 492 (1981).

158. Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 770 (1993); *see* Pitofsky, *supra* note 155, at 664. These authors acknowledge that consumers will never have complete information but suggest that there is certain information that is essential to consumer decision making. *See* Croley & Hanson, *supra*, at 770–71 (indicating that it would be “very unlikely . . . for consumers to be perfectly informed” because rational consumers will only obtain information when the marginal gains are greater than the marginal costs of gathering information); Pitofsky, *supra* note 155, at 663 (noting that constantly changing products and the self-interest of sellers will likely prevent “perfect information”).

Information disparities can arise on the other side when producers are unaware of consumer preferences and therefore unable to respond by providing the appropriate goods or services. *See* Croley & Hanson, *supra*, at 779. In some situations, companies may rely on models of “average” customers. *See* A. Michael Spence, *Monopoly, Quality, and Regulation*, 6 BELL J. ECON. 417, 417–18 (1975). Since companies only obtain a profit margin based on the decisions of marginal consumers, the “average consumer” assumption may not result in products that appeal to the margin, creating less than optimal outcomes. *See id.* at 418. Moreover, even average consumers may deviate from “average” preference levels, thereby affecting consumption preferences. *Cf.* Croley & Hanson, *supra*, at 783–84 (discussing marginal and average consumers). If Croley and Hanson are correct, then modeling of “average” consumers would not necessarily result in accurate information for the majority of consumers.

159. *See* Pitofsky, *supra* note 155, at 663–67. In some cases, companies may engage in marketing and advertising campaigns that manipulate consumers into believing certain ideas, even possibly manufacturing demand. *See* JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY 124–31 (4th ed. 1998); Thomas A. Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077, 1087 (1965). *But see* Stigler & Becker, *supra* note 153, at 83–84 (indicating that advertising does not change pref-

When such an information disparity exists, government intervention may be appropriate to force disclosure, which then improves the efficiency of the market because consumers have a better foundation for choosing among products.¹⁶⁰

Power disparity, the second type of market failure, exists when consumers and producers are not symmetrically situated.¹⁶¹ When one side/party has superior bargaining power or control over the market, they can take advantage of the other side/party through contracting tactics.¹⁶² For example, standard form contracts often require the consumer to take or leave the entire contract “as is.”¹⁶³ Consumers cannot negotiate to obtain their preferred terms, lead-

erences by affecting consumer tastes, but rather by affecting the price of goods). In other cases, producers may simply not have an incentive to provide full information to prevent competition or discourage new market entrants. *See* Pitofsky, *supra* note 155, at 665.

Consumer information disparities can arise from consumer missteps as well. In some cases, consumers misunderstand or misperceive accurate information, resulting in choices that do not accurately reflect rational preferences. *See* Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1431–45 (1983) [hereinafter Schwartz & Wilde, *Imperfect Information*]. In other situations, consumers may not be able to overcome the cost of obtaining information or may choose not to do so because the rational consumer may believe that the marginal utility of gaining the information does not outweigh the cost. *See* Croley & Hanson, *supra* note 159, at 770–71.

160. *See* Pitofsky, *supra* note 155, at 664, 674–75, 701 (providing numerous examples of information that was not disclosed until the government intervened); Schwartz & Wilde, *Imperfect*, *supra* note 160, at 1456.

161. *Cf.* Epstein, *The Neoclassical Economics of Consumer Contracts*, *supra* note 156, at 805 (discussing monopolies). *See generally* Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 192–223 (2005) (discussing the legal concept of inequalities of bargaining power).

162. *See* Bar-Gill, *supra* note 156, at 791. For example, producers may strategically redesign their products to play off of consumer misperceptions. *Id.* at 801.

163. *See, e.g.,* *Statement of Rights and Responsibilities*, *supra* note 25. These types of standard form contracts are often referred to as “contracts of adhesion.” *See* Andrew A. Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 28 YALE J. ON REG. 313, 346 (2011) [hereinafter Schwartz, *Consumer Contract Exchanges*] (providing the example of Google Terms of Service as a contract of adhesion).

Standard form contracts are not bargained for and usually contain terms that are significantly more advantageous for the more powerful party, resulting in less than socially optimal outcomes. *See* Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943). *But see* Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1057–58 (1977) (arguing that exploitative contracts may be in line with consumer preferences).

ing to a less than socially optimal outcome.¹⁶⁴ This problem is compounded further when producers have the ability to unilaterally change the terms of a standard form contract¹⁶⁵ or to dominate a thin market.¹⁶⁶ As a result, many courts and legislators have viewed standard form contracts with some degree of skepticism and have intervened to prevent enforcement.¹⁶⁷ However, other courts have upheld standard form contracts, including in the context of new technology,¹⁶⁸ except where the contracts have been found to be

164. See Schwartz, *Consumer Contract Exchanges*, *supra* note 163, at 346–47, 351 (discussing the lack of bargaining for standard form contracts and that such contracts “force[] consumers to submit to organizational domination” (internal quotation marks omitted) (alteration in original)).

165. See David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 608–09 (2010).

166. Thin markets are situations where consumers do not have adequate alternatives for comparison-shopping such that spot prices are not readily available. See Ian Ayres & F. Clayton Miller, “I’ll Sell It to You at Cost”: *Legal Methods to Promote Retail Markup Disclosure*, 84 NW. U. L. REV. 1047, 1057–61 (1990) (discussing thick and thin markets). In such markets, monopolists can make markups resulting in less than socially optimal allocations of goods and services, and likely contract terms. See generally Spence, *supra* note 158, at 420–21. In contrast, markets where consumers can comparison shop and obtain competitive reactions from sellers allow for contract terms to closely align with consumer preferences. See Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 638 (1979).

But see Richard A. Epstein, *Behavioral Economics: Human Errors and Market Corrections*, 73 U. CHI. L. REV. 111, 127 (2006) [hereinafter Epstein, *Behavioral Economics*] (arguing that efficient markets will result in standard form contracts that accurately reflect market preferences); Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 858 (2006) (discussing how standard form contracts provide benefits beyond lowering the cost of contracting and noting that companies will forgive many violations of terms).

167. See, e.g., *Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165, 1177 (N.D. Cal. 2002); see also Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1097–98 (2006) (finding that successful unconscionability challenges more often involved a standard form contract than a negotiated one); Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1204 & n.9 (2003) (indicating that many scholars object to the enforcement of standard form contracts); Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 553 (1967) (arguing that the disfavor of contracts of adhesion may stem from the view that nonnegotiability and unequal bargaining power are involved); Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, *supra* note 163, at 347–48.

168. See, e.g., *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1448–49 (7th Cir. 1996) (upholding a shrink wrap license as binding on software purchaser); *Nw. Nat’l Ins. Co. v. Donovan*, 916 F.2d 372, 377–78 (7th Cir. 1990) (defending stan-

too one-sided and therefore unconscionable.¹⁶⁹ Where power disparities exist, government intervention could take the form of broadening the doctrine of unconscionability to prevent unequal bargaining power from creating inefficient outcomes.¹⁷⁰ Alternatively, equity-based default rules could be created to reduce instances of unequal bargaining power.¹⁷¹

*C. Market Failures Arise in the Social Networking Site Market,
Allowing Consumer Protection to Provide a Basis for
Protecting User Rights of Expression Without
the First Amendment*

As mentioned in Part I, social networking sites create a platform for communication and provide tools for users to express themselves. Despite intuitive concerns that communicative media do not function in accordance with traditional economic principles,¹⁷² the Federal Communications Commission (“FCC”) nevertheless treats media infrastructure as an economic market when

dard form contracts because they decrease the cost of contracting); Feldman v. Google, Inc., 513 F. Supp. 2d 229, 235 (E.D. Pa. 2007).

169. See 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.28, at 581 (3d ed. 2004); Schwartz, *Consumer Contract Exchanges*, *supra* note 163, at 354–55 (discussing current court unconscionability doctrine).

170. Alternatively, courts could also apply an “objective” theory of contracting. See Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263, 1265–66 (1993) (stating that courts applying an objective view will not assume there has been consent merely based on a signature).

171. See W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530, 554–56 (1971) (suggesting that beneficial default rules can be derived from the parties’ conduct and broader equity considerations); *cf.* Kevin E. Davis & Helen Hershkoff, *Contracting for Procedure*, 53 WM. & MARY L. REV. 507, 549–50, 560 (2011) (indicating that parties might exploit the system to their advantage by seeking short-term rents when opportunities allow, and that empirical review of contracting could allow for the identification of what rules can adequately serve as default procedures and what rules would have to be changed).

172. Some scholars argue that economic analyses of free speech are inappropriate because the premises of economic actions are not the same as the premises which motivate free speech decisions. See Whitmore, *First Amendment Showdown*, *supra* note 108, at 334–35. However, even if economic analysis may not fit free speech models generally, it may be appropriate within the context of social networking. *Cf.* Ellen P. Goodman, *Media Policy Out of the Box: Content Abundance, Attention Scarcity, and the Failures of Digital Markets*, 19 BERKELEY TECH. L.J. 1389, 1421–61 (2004) (discussing how media market failures in analog markets exist and apply to digital media).

promulgating regulations.¹⁷³ In doing so, the FCC appears to have adopted the “marketplace of ideas” theory of free speech, where the goal of the First Amendment is to provide “an open and competitive market that can supply consumers with the content they want.”¹⁷⁴ Although social networking sites often do not charge a membership fee,¹⁷⁵ the relationship between the user and the site is still governed by a contract, and these sites provide many of the same purposes and fee models as other forms of media.¹⁷⁶ Thus as a threshold issue, traditional consumer protection concerns appear relevant and appropriate for social networking sites as a method of identifying market failures and justifying government intervention, particularly with respect to issues of content takedown and user ac-

173. See, e.g., Report and Order and Notice of Proposed Rulemaking, 18 FCC Rcd. 13,620, 13,631 (2003) (stating that the FCC’s “core policy objective” of democratic discourse is based on the idea that “the free flow of ideas undergirds and sustains our system of government”).

The FCC’s view of communications regulation is relevant as it would most likely be the government entity with the authority and ability to regulate Internet media. Although the FCC’s views are not controlling, they suggest that economic analysis can be applied.

174. See Goodman, *supra* note 172, at 1400.

In addition, although the First Amendment may not directly apply in this scenario, the values established through constitutional free speech doctrine may influence decisions by legislators and courts. See Helen Hershkoff, “Just Words”: *Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1526, 1547 (2010) (discussing the effect of constitutional norms outside of constitutional jurisprudence).

Also, the marketplace of ideas theory is widely accepted in First Amendment scholarship. See, e.g., JOHN STUART MILL, ON LIBERTY ch. 2 (Longmans, Green, & Co. 1921) (1859); Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878–79, 902 (1963) (outlining four values in free speech theory, including the marketplace of ideas); Eugene Volokh, *In Defense of the Marketplace of Ideas/Search for Truth as a Theory of Free Speech Protection*, 97 VA. L. REV. 595, 595 (2011) (defending the marketplace of ideas); Whitmore, *First Amendment Showdown*, *supra* note 108, at 326.

175. See Jonathan Strickland, *How Do Social Networking Sites Make Money?*, HOWSTUFFWORKS, <http://computer.howstuffworks.com/internet/social-networking/information/how-social-networking-sites-make-money.htm> (last visited Dec. 31, 2013) (noting that most social networking sites do not use a membership fee model). The membership fee concern probably does not pose an obstacle to applying economic analysis to social networking markets because the market consensus is to provide these services for free. See *id.*

176. See *Statement of Rights and Responsibilities*, *supra* note 25. For a discussion of the purposes of other media and social networking sites, see Strickland, *supra* note 175 (noting that social networking sites function primarily by collecting ad revenue and developer fees); *infra* Part II.D.

count deletion.¹⁷⁷ When viewed in the consumer protection framework, social networking sites present both types of market failures—information and power disparities—described in Part II.B.

Facebook’s censorship policies exhibit the information disparity market failure. For example, Facebook did not publicly share its specific guidelines for content takedown until the guidelines were leaked to the public.¹⁷⁸ Until then, users only had access to the general community standards.¹⁷⁹ The examples outlined in Part I demonstrate that Facebook users did not and still do not have a clear understanding of what content would violate the general community standards, signaling an information disparity.¹⁸⁰ For example, Courtney Stodden was surprised when her bikini photos led not only to content takedown but also to full account deletion.¹⁸¹ Moreover, bikini pictures are relatively common on the site, and Facebook clearly does not remove all similar images.¹⁸² The breastfeeding mothers encountered a similar issue where they too did not expect their pictures to be taken down.¹⁸³ In contrast, Facebook allowed pro-rape pages to stay active, even after receiving notice that many people were disturbed, only deciding to take down some of this content later on.¹⁸⁴ Also when Facebook took action against the breastfeeding pictures or pro-rape pages, it appears that the site only deleted the content, not the individual user accounts. When juxtaposed with the pro-rape page, Stodden’s punishments are disproportionate; the pro-rape page contained more

177. Traditional consumer protection models may need to be modified to include some fairness concept to account for the fact that platforms both provide services and act as governors. See Balkin, *Virtual Liberty*, *supra* note 43, at 2082–83 (discussing dual roles in context of online video game platform owners).

178. See *No Sex, But Crushed Heads O.K.*, *supra* note 98. The leak only provided a portion of Facebook’s content guidelines. *Id.*

179. See *supra* notes 91–95 and accompanying text.

180. The particular reason why Facebook, or any other social networking site, does not share specific content regulation information is not important for this discussion. However, see Part II.C for a discussion of various reasons why information disparities may exist.

181. Cf. Hughes, *supra* note 2 (Stodden described herself as the victim of “cyber-bullying” when her Facebook fan page—primarily comprised of bikini pictures—was removed for “inappropriate sexual conduct”).

182. See, e.g., *Bikini Babes Photos*, FACEBOOK, <http://www.facebook.com/pages/Bikini-babes-photos/188537394505550> (last visited Dec. 31, 2013) (a Facebook page dedicated to pictures similar to those Stodden had taken down by the social networking site).

183. See Wortham, *supra* note 92.

184. See Chen, *supra* note 90.

disturbing content than a scantily clad girl. Facebook's censorship decisions do not provide any coherent pattern for users to predict when their materials will be taken down versus when they will face account deletion.

The unpredictability of Facebook content takedowns and account deletions may be further complicated by a risk of error. In Stodden's case, Facebook claimed that it had taken down the account in error.¹⁸⁵ In another case, Facebook took down the cover art of Nirvana's iconic album, *Nevermind*—which shows a naked baby swimming—for violating the site's "obscenity" policy; Facebook later restored the image and alleged a mistake.¹⁸⁶ If both of these claims are true, then Facebook has explicitly recognized that in at least some cases, its censorship policy leads to mistakes, resulting in the takedown of nonproblematic content and perhaps even the deletion of innocent users' accounts. The existence of error could provide one explanation for some of the irregularities in Facebook's censorship decisions. However, as the breastfeeding and pro-rape pages show, in other situations Facebook intentionally makes decisions to allow or disallow content or user access, and it is unclear which censorship decisions are made upon close review and which are the result of error.

Facebook enjoys a power imbalance relative to its users, which compounds the information disparity market failure. Facebook has an extremely strong market position, as it controls a significantly larger share of the social networking market than its competitors.¹⁸⁷ Social networking sites are more prone to monopolies than other forms of media due to the fact that users connect to other people through their social circles.¹⁸⁸ This network phenomenon creates an additional obstacle to competition because the value of a particular social networking site to an individual user is often tied to the other users present on that site.¹⁸⁹ Facebook's users likely have no sufficient alternative platforms because other social networking sites do not contain all of the same friends or services that are available on Facebook. As the largest social networking site, Facebook controls the bottleneck to a platform of mass communi-

185. Hughes, *supra* note 2.

186. See Weiss, *supra* note 98.

187. See *supra* notes 48–53 and accompanying text. For additional information on power imbalances in free speech markets, see Whitmore, *First Amendment Showdown*, *supra* note 108, at 327–34 (describing the market imbalance in higher education).

188. See discussion *supra* notes 57–58.

189. See Dwight R. Lee & Richard B. McKenzie, *A Case for Letting a Firm Take Advantage of "Locked-In" Customers*, 52 HASTINGS L.J. 795, 796 (2001).

cation, both to a particular social network and to the public more generally because of its market control.¹⁹⁰ The site can thus take advantage of users through the creation of terms of service that give Facebook an even higher degree of censorial power. Complicating matters further, Facebook retains the ability to change terms post hoc, and the site has unilaterally changed its terms of service on multiple occasions.¹⁹¹

Government intervention could correct the information disparity by providing users with more information about what content social networking sites are likely to take down and about which speech actions could result in user account deletion. Additionally, intervention could help remedy the existing power imbalances by providing users with more tools to use as leverage against a social network's decisions to censor. However, it should be noted that courts have struck down many attempted regulations of media by the government for insufficient empirical findings or analytic argumentation.¹⁹² Thus even when governmental regulation may be warranted, intervention still needs to be narrowly tailored to withstand judicial scrutiny.

In addition to basic market failures, the free speech policy considerations that underlie First Amendment protections also arise in the social networking context and bolster arguments for government intervention in media markets, even when the First Amendment itself is not applicable. The use of these media is closely related to the First Amendment goal of a diverse public discourse and empowers various sectors of society to speak.¹⁹³ Communica-

190. Cf. Zarsky, *supra* note 7, at 765 (“[E]xisting media concentration rules are justified . . . to prevent instances in which very few entities control the crucial bottlenecks to the public’s attention.”).

191. See, e.g., Elinor Mills, *Facebook Changes “Privacy Policy” to “Data Use”*, CBS NEWS (Mar. 23, 2012, 10:44 AM), http://www.cbsnews.com/8301-501465_162-57403181-501465/facebook-changes-privacy-policy-to-data-use/; *Facebook Changes Terms of Use Over Privacy Concerns*, BUSINESS TODAY (Apr. 21, 2012, 12:00 AM), <http://businesstoday.intoday.in/story/facebook-changes-terms-of-use-over-privacy-concerns/1/24222.html> (indicating that Facebook takes user input but retains the final decision regarding any changes to terms).

192. See Howard A. Shelanski, *Antitrust Law as Mass Media Regulation: Can Mergers Standards Protect the Public Interest?*, 94 CAL. L. REV. 371, 391, 419 (2006) (discussing cases striking down governmental regulations); see also *infra* note 204 and accompanying text.

193. See Yochai Benkler, *From Consumers to Users: Shifting the Deeper Structures of Regulation Toward Sustainable Commons and User Access*, 52 FED. COMM. L.J. 561, 563 (2000); cf. *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (finding that the First Amendment is best served by “the widest possible dissemination of information from diverse and antagonistic sources”).

tion platforms also implicate issues such as “truth and understanding” that are not at issue in purely economic markets.¹⁹⁴ If a social network discriminated against particular users or types of content, the result would be a biased dissemination of certain kinds of information and speech over others. Government intervention would be important to ensure both that people could express themselves and that the social networking user base would receive relatively unbiased information.¹⁹⁵

Free speech values within the First Amendment are often articulated along three metrics: (1) assuring individual self-fulfillment, (2) as a means of attaining truth, and (3) contributing to political participation and good governance. *See* Emerson, *supra* note 174, at 878–79. Emerson divides the values into four categories. *Id.*

However, more recent theorists have turned the discussion to these three categories and tend to argue that one particular value among these three is the only or the most important free speech value rather than focusing on all of them as Emerson does. *Compare* C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 251, 265 (2011) (arguing for the centrality of the autonomy and self-realization rationale), C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 964, 966 (1978) (arguing for the liberty model), and David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 62 (1974) (adopting a moral theory of the First Amendment that rests the value of free speech “on its deep relation to self-respect arising from autonomous self-determination”), *with* Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477 (2011) (advocating for the participatory democracy theory), James Weinstein, *Free Speech and Political Legitimacy: A Response to Ed Baker*, 27 CONST. COMMENT. 361, 361 (2011) (emphasizing participatory democracy), James Weinstein, *Participatory Democracy as the Basis of American Free Speech Doctrine: A Reply*, 97 VA. L. REV. 633, 633 (2011) (same), Nancy J. Whitmore, *Facing the Fear: A Free Market Approach for Economic Expression*, 17 COMM. L. & POL’Y 21, 27–28 (2012) (advocating for the participatory democracy theory, noting that “expression of popular political sentiment” is necessary for representative democracy), MILL, *supra* note 174, at ch. 2 (arguing that the marketplace of ideas allows truth to emerge), and Volokh, *supra* note 174 (defending marketplace of ideas).

194. *See* Goodman, *supra* note 172, at 1422 (internal quotation marks omitted).

195. I recognize that this statement draws on an assumption that objective information or truth is somehow attainable. *See generally* FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL INQUIRY* 19–30 (1982) (noting that the marketplace of ideas theory assumes that some type of objective truth exists and can be found). However this is not a universally agreed upon assumption as some scholars posit that objective truth through the marketplace of ideas simply is unattainable. *See, e.g.*, CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 155 (1987) (arguing that the marketplace theory allows the powerful to win, not necessarily the truth).

An alternative conception is that the government should help ensure a variety of perspectives, even if not an “unbiased” form of information.

In addition, at least some First Amendment case law suggests that the Supreme Court may not always be persuaded by an anti-distortion position with re-

Some scholars argue that the traditional market failures of information disparities and consumer exploitation either do not exist or are less prominent in the case of the Internet because the Internet facilitates more dialogue and lowers costs of transacting and gathering information.¹⁹⁶ The Internet also has eliminated many problems of scarcity that justified intervention in earlier media markets.¹⁹⁷ These scholars argue that the markets would be able to approach efficient levels on their own,¹⁹⁸ therefore eliminating the traditional bases of government intervention in neoclassical economics discussed in Section B.

However, these claims are not sufficient to eliminate the relevance of consumer protection rationales to social networking sites/speech platforms. The argument that information is efficiently and evenly dispersed holds true only if the platforms are impartial and rational.¹⁹⁹ For this to be the case, social networking sites would have to use some type of rational decision-making calculus to determine that taking down content or eliminating a user outweighs the free speech benefits of that particular content or user. Given the importance of social networking sites as a medium of communication, the Supreme Court's recognition of the importance of commercial information,²⁰⁰ and the sites' continuing growth in society

spect to freedom of expression. *See* *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 903–04, 917 (2010) (striking down laws limiting political spending by corporations, even though other cases upheld similar laws based on an anti-distortion rationale).

196. *See, e.g.*, YOCHAI BENKLER, *THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM* 30, 99–116 (2006) [hereinafter BENKLER, *THE WEALTH OF NETWORKS*], available at http://www.benkler.org/Benkler_Wealth_Of_Networks.pdf (lauding the informational benefits of modern “social transactional frameworks”); Zarsky, *supra* note 7, at 762–63 (“Within [social] networks data are provided by experienced consumers, advisors and public-interest groups, and even by the vendors themselves (regarding their and their competitors’ product) [C]onsumers in e-commerce . . . tend to consult search engines, forums, and social networks.”).

197. *See* Goodman, *supra* note 172, at 1392–93.

198. *See, e.g.*, BENKLER, *THE WEALTH OF NETWORKS*, *supra* note 196, at 114–16; Zarsky, *supra* note 7, at 763.

199. *See* BENKLER, *THE WEALTH OF NETWORKS*, *supra* note 196, at 399–408 (discussing Internet service providers and net neutrality). For a critique of the idea that speech can ever be impartial, see MACKINNON, *supra* note 195, at 155.

200. The Supreme Court's more recent cases on “commercial speech” have recognized its importance within the context of the First Amendment. *See* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976) (“As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.”).

overall, it does not seem appropriate to defer to a private entity's decisions about when the costs of speech outweigh the benefits, especially when the social networking sites have not demonstrated a rational pattern of action.²⁰¹ Also while scarcity may not exist for the Internet in general, social networking markets demonstrate first-mover gains, such as monopolistic tendencies and high costs of switching.²⁰² As mentioned earlier, social networking sites are partially premised on the ability to connect to other people and create a network. Once a network has been established, however, a user would not gain the same benefits by switching to another platform unless a large portion of the same people were present and the alternate platform provided the same or similar services to the initial platform. The nature of social networks artificially creates scarcity in the market by locking users into a particular website even when there may be alternatives.

D. Social Networking Sites Are More Aptly Characterized as Common Carriers Than Newspapers, Although in Reality They Fall Somewhere in Between Those Poles

Although consumer protection provides a useful foundation for government intervention in social networking site markets, regulation under this framework would still run into some obstacles. Most significantly, social networking sites could invoke First Amendment protections to resist government intervention and counter free speech claims by users.²⁰³ In fact, the Supreme Court has

201. The examples from Part I provide strong evidence that social networking sites have not been following any pattern of censorship that measures the value of speech against censorship.

In addition, some court decisions could be interpreted as rejecting deference to private entity decision calculus. For example, in *Marsh*, the Supreme Court did not want a company town to be able to decide what speech residents should hear, specifically mentioning the importance of listeners in deciding that a Jehovah's Witness' free speech interests outweighed a company town's property rights. *Marsh v. Alabama*, 326 U.S. 501, 503, 507–09 (1946).

202. See *supra* notes 187–91. First-mover gains refer to when the first entrant within a market gains advantages against later entrants due to various factors including the nature of the market, resource preemption, and switching costs. See Marvin B. Lieberman & David B. Montgomery, *First-Mover Advantages*, 9 STRATEGIC MGMT. J. 41, 41–42 (1988). In this case, the nature of social networks provides a first-mover advantage because social networking sites rely on the connections between users. See Pasquale, *supra* note 45, at 153 (noting the existence of “switching costs” on social networking sites). The high switching costs lead to the development of social networking site monopolies. See discussion *supra* notes 187–91.

203. As a general matter, it appears that the issue of competing rights between two private entities arises in cases where both entities engage in expression.

struck down many government regulations of the Internet as violative of the First Amendment.²⁰⁴

Within traditional First Amendment doctrine, different types of media are given different scopes of protection and deference with respect to censorship and content control.²⁰⁵ On one end of the spectrum, newspapers are given a high degree of editorial discretion in choosing what content they publish.²⁰⁶ These actions tend not to raise concerns of censorship. At the other end, telephone companies—characterized as common carriers—cannot regulate the content that passes through their lines at all.²⁰⁷ Broadcast, cable, and other media are placed between these two extremes and receive some amount of discretionary control.²⁰⁸

I suggest that social networking sites also fall somewhere in between the two poles. Just as broadcast and cable media have special

See, e.g., Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos., Inc., 515 U.S. 557, 559–62, 581 (1995) (resolving free speech conflict that arose when a private organization authorized to put together a St. Patrick's day parade excluded the Irish-American Gay, Lesbian and Bisexual Group of Boston).

In this case, it is not true that social networking sites actually speak or engage in expression. Thus a court might perhaps find that there is no actual conflict. However, it is difficult to predict whether a court would view the social networking site as speaking in some way or simply acting as a conduit, and various scholars have found such conflicting rights scenarios to exist in analogous cases. *See* discussion *supra* note 43.

204. *See, e.g.,* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 239–40, 244, 258 (2002) (finding portions of the Child Pornography Prevention Act to be overbroad and violative of the First Amendment); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 849, 858–61 (1997) (striking down portions of the Communications Decency Act of 1996, which sought to protect minors from harmful material on the Internet); Am. Civil Liberties Union v. Mukasey, 534 F.3d 181, 184 (3d Cir. 2008) (affirming injunction against enforcement of Child Online Protection Act), *cert denied*, 555 U.S. 1137 (2009). *But see* United States v. Am. Library Ass'n, 539 U.S. 194, 198–99 (2003) (upholding Children's Internet Protection Act).

205. *See, e.g.,* Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 656 (1994) (distinguishing discretion of cable operators from that of newspapers); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 110, 117–18 (1973) (explicitly recognizing that broadcasters do not receive the same amount of editorial discretion as a private newspaper).

206. *See* Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations, 413 U.S. 376, 391 (1973) (“reaffirm[ing] unequivocally the protection afforded to editorial judgment” for newspapers).

207. *See generally* James B. Speta, *A Common Carrier Approach to Internet Interconnection*, 54 FED. COMM. L.J. 225, 254–55, 261–68 (2002) (describing common law “common carrier” duties and the application of such duties to telephone companies).

208. *Columbia Broad. Sys.*, 412 U.S. at 110, 117–18 (recognizing that broadcasters do not receive the same amount of editorial discretion as a private newspaper but that they still exercise a “large measure of journalistic freedom”).

considerations that require treating them differently from newspapers and telephones, social networking sites also have concerns that require an intermediate approach. This characterization implies that social networking sites should receive less than full editorial discretion but greater than a complete ban on content regulation and therefore that some forms of government intervention should not be struck down as infringing on the social networking sites' First Amendment rights.

Newspapers have traditionally been allowed to exercise editorial discretion in choosing what stories to publish and what content to withhold or censor. More specifically:

The power of a privately owned newspaper to advance its own political, social, and economic views is bounded by only two factors: first, the acceptance of a sufficient number of readers—and hence advertisers—to assure financial success; and, second, the journalistic integrity of its editors and publishers.²⁰⁹

The wide discretion given to newspapers was primarily grounded in the newspapers' importance as a medium for political discussion and critique of the government.²¹⁰ Providing newspapers with a wide berth of discretion in what to publish was necessary to foster political discussion and to prevent individual actors from being able to force newspapers to self-censor potentially contentious subject matter.²¹¹ Historically an individual denied access to one newspaper could go to another because there were so many to choose from.²¹²

In contrast to newspapers, broadcast media presented a different problem because of the physical restriction of limited frequen-

209. *Id.* at 117.

210. *See* *New York Times Co. v. Sullivan*, 376 U.S. 254, 266, 272, 278 (1964) (protecting a newspaper that published an inaccurate civil rights advertisement against liability). The wide discretion given to newspapers is also derived, at least in part, from the history of prior restraints in England, which had been used by the crown to silence dissenting speech. *See generally* David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 463–64, 488–93 (1983).

211. *See Sullivan*, 376 U.S. at 300 (Goldberg, J., concurring) (“And if newspapers, publishing advertisements dealing with public issues, thereby risk liability, there can be little doubt that the ability of minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished.”).

212. *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 251 (1974). Even when the number of newspapers decreased, the Supreme Court continued to uphold broad editorial discretion for newspapers. *See id.* at 251, 258.

cies.²¹³ As such, not all people who desired to share content with others through television and radio could do so, regardless of their financial resources. The Supreme Court's concern over monopolies in the context of broadcasting resulted in government intervention through practices such as the fairness doctrine.²¹⁴ The fairness doctrine recognized that broadcasters have more limited First Amendment protections because the "right of the viewers and listeners . . . is paramount."²¹⁵ Both the rights of viewers and the scarcity of available frequencies justified the placement of the government as a public trustee of the airwaves, giving rise to the FCC's authority to regulate broadcast media more than newspapers.²¹⁶ In the context of cable, the Supreme Court found that regulations requiring cable companies to carry broadcast frequencies did not violate the First Amendment because the regulations were content-neutral (implicating lesser scrutiny)²¹⁷ and served a substantial government interest (Congress had acted in order to ensure the viability of broadcast

213. See *Red Lion Broad. Co. v. Fed. Commc'ns Comm'n*, 395 U.S. 367, 376 (1969) (recognizing that broadcast frequencies were physically limited).

214. See, e.g., *id.* at 375–86 (outlining the historical development of the fairness doctrine amidst concerns of the public interest and ineffective control by the private sector).

However, in 2011, the FCC formally deleted the language allowing the fairness doctrine from media industry rules, finally solidifying the repeal of the doctrine begun in 1987. See Brooks Boliek, *FCC Finally Kills off Fairness Doctrine*, POLITICO (Aug. 22, 2011, 3:22 PM), <http://www.politico.com/news/stories/0811/61851.html>.

215. See *Red Lion*, 395 U.S. at 390; see also *Columbia Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 453 U.S. 367, 377–79, 397 (1981) (upholding statutory right of access under the Federal Election Campaigns Act allowing FCC to revoke licenses from stations that refused to allow access to qualified candidates).

In addition, regulation of broadcast media has also been justified by its "pervasive" nature. See Christopher S. Yoo, *The Rise and Demise of the Technology-Specific Approach to the First Amendment*, 91 GEO. L.J. 245, 293–95 (2003) (noting that one concern about broadcast was its ability to intrude upon citizens, in contrast to newspapers, which a reader had to actively seek out). This concern about media intrusion provided a second justification for government intervention, especially as the scarcity arguments became less valid. See *Fed. Commc'ns Comm'n v. Pacifica Found.*, 438 U.S. 726, 729, 748–49 (1978) (upholding FCC regulation of George Carlin's "Filthy Words" monologue, in part because of the "pervasive" nature of broadcast media).

216. See *Columbia Broad. Sys., Inc.*, 453 U.S. at 394–95 (citing earlier decisions indicating that the government is the "ultimate arbiter and guardian of the public interest" and that the government's role is to ensure that the rights of the public are protected (internal quotation marks omitted)).

217. *Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 643–45, 662 (1994).

media for people who did not have cable access).²¹⁸ These special considerations grounded the Supreme Court's decision to allow regulation of cable media. However, *TBS v. FCC*²¹⁹ noted that regulations singling out one type of media would normally be subject to heightened scrutiny.²²⁰ Thus even though the Supreme Court allowed regulation in these contexts, it determined that Congress' purpose was still to encourage these media to develop with the "widest journalistic freedom consistent with its public obligations" and refused to characterize these media as common carriers, thereby limiting the scope of governmental regulatory power.²²¹

Telephones have a long history of being categorized as common carriers.²²² At common law, a common carrier was initially defined as "one who holds himself out to the public . . . offering his services to the public generally."²²³ "The distinctive characteristic of a common carrier [was] that he under[took] to carry for all people indifferently, and hence [was] regarded in some respects as a pub-

218. *Id.* at 661–62 (explaining that the must-carry provisions were justified because of two special characteristics: "the bottleneck monopoly power exercised by cable operators and the dangers this power poses to the viability of broadcast television").

219. *Id.*

220. *See id.* at 640–41 (noting that "laws that single out the press, or certain elements thereof . . . 'pose a particular danger of abuse by the State' . . . and so are always subject to at least some degree of heightened First Amendment scrutiny" (citation omitted)).

221. *See Fed. Comm'n v. League of Women Voters of Cal.*, 468 U.S. 364, 366, 402 (1984) (invalidating a law that prevented any noncommercial educational broadcasting station from exercising editorial discretion); *Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 110, 117–18 (1973).

222. *See Fed. Trade Comm'n v. Verity Int'l, Ltd.*, 443 F.3d 48, 57 (2d Cir. 2006) (noting that Congress passed the Mann-Elkins Act in 1910 designating telephones as common carriers).

Common carrier arguments also require some discussion of Equal Protection and/or Due Process, which is beyond the scope of this Note. For further discussion, see David S. Bogen, *Why the Supreme Court Lied in Plessy*, 52 VILL. L. REV. 411, 413 (2007) (discussing cases where the Supreme Court encountered Equal Protection issues in common carrier situations).

223. *Lone Star Steel Co. v. McGee*, 380 F.2d 640, 643 (5th Cir. 1967) (quoting *Kelly v. Gen. Elec. Co.*, 110 F. Supp. 4, 6 (E.D. Pa.), *aff'd*, 204 F.2d 692 (3d Cir. 1953), *cert. denied*, 346 U.S. 868 (1953) (internal quotation marks omitted). In contrast, private carriers were those who provided services by engaging in individualized contracts with each customer. *See Kieronski v. Wyandotte Terminal R.R.*, 806 F.2d 107, 109 (6th Cir. 1986) ("Another category of carriers that are not considered to be 'common carriers,' is that of private carriers . . . Private carriers haul for others, but only pursuant to individual contracts, entered into separately with each customer." (citation omitted)).

lic servant.”²²⁴ The Supreme Court then stepped in, providing a definition of a common carrier as “one that makes a public offering to provide communications facilities whereby all members of the public who choose to employ such facilities may communicate or transmit intelligence of their own design and choosing,” essentially serving as a pipeline of communication.²²⁵ As such, the government has broad authority to regulate common carriers and ban content discrimination.²²⁶

Social networking sites are somewhat difficult to categorize because they have characteristics that could place them under any of these labels. First, social networking sites are open to the public. Anyone who wants an account can create one, the only condition being that the prospective user has an e-mail account.²²⁷ Even if the

224. *Kieronski*, 806 F.2d at 108.

225. *Fed. Comm’n v. Midwest Video Corp.*, 440 U.S. 689, 701, 703 (1979) (internal quotation marks omitted) (noting that Congress did not intend to treat broadcast companies as common carriers and allowed those entities to engage in access and content selection to some extent).

However, these definitions should not be taken as being clear statements of the law. The FCC, for example, has had much difficulty defining “common carrier” for the purpose of the Communications Decency Act. *See* Phil Nichols, Note, *Redefining “Common Carrier”: The FCC’s Attempt at Deregulation by Redefinition*, 1987 DUKE L.J. 501, 512–13 (1987). In some instances, the FCC has adopted the common law definition of common carriers mentioned above, but the FCC has also sought to create a definition that focuses on the “situation of the provider within the market.” *See id.* (stating that the FCC’s more economic definition looks at whether a particular entity has competition in the market or is largely a monopoly). Also the FCC “has long held that all those who provide some form of transmission services are not necessarily common carriers” and “did not subject to common-carrier regulations those service providers that offered enhanced services over telecommunications facilities, but that did not themselves own the underlying facilities.” *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 993 (2005) (internal quotation marks omitted). The FCC’s difficulty in creating a definition is due in part to the fact that the FCC’s definition must fit with legislative directives that designate certain entities as common carriers and others as not. *See Midwest Video*, 440 U.S. at 702–04 (discussing the limitations on the FCC’s attempts to treat certain entities as common carriers due to restrictions embedded in Congressional legislation). Moreover, attempting to change the status of a technology can incite serious debate. *See supra* note 45. The inclusion of new technology within the ambit of the FCC’s competence further complicates the agency’s search for a definition. *See supra* note 45.

226. Speta, *supra* note 207, at 110, 117–18.

227. *See Create an Account*, FACEBOOK, <http://www.facebook.com/help/create-account> (follow “How do I sign up for Facebook?” hyperlink) (last visited Dec. 31, 2013) (“To sign up for a brand new account, enter your name, birthday, gender, and email address”); *id.* (follow “How old do you have to be to sign up for Facebook?”) (noting the minimum age of thirteen); *How to Create an Account on LinkedIn*, EHow, http://www.ehow.com/how_2030914_account-linkedin.html (last

sites had more restrictive conditions in the past, they have changed their practices to be more open, essentially serving the public.²²⁸ Second, social networking sites generally post content exactly as the user submits it.²²⁹ The sites provide a platform on which users can communicate with each other, appearing to “serve as conduits for the speech of others.”²³⁰

These factors might suggest that social networking sites should be treated as common carriers. However, the relationship between users and a site is governed by private contracts, a factor pointing against common carrier status.²³¹ Moreover, most modern instances of common carrier status have resulted from Congressional action.²³² Finally, social networking sites do take some steps to censor content or account holders, distinguishing these sites from traditional common law common carriers.²³³

visited Dec. 31, 2013) (noting that LinkedIn only requires a name and an email address); *How to Sign Up on Twitter*, TWITTER, <http://support.twitter.com/articles/100990-how-to-sign-up-on-twitter> (last visited Dec. 31, 2013) (only requiring a name and an e-mail address). Although Facebook was originally limited to university students, the website is now open to anyone over the age of thirteen. See sources cited *supra* note 127.

228. I realize that my discussion of a service to the public in the context of the common carrier doctrine may appear to be in tension with my discussion of public function for the purposes of state action in Part II. However, these two concepts are not the same; an entity may be open to the public to the extent that it provides services to a significant number of people (the general public) while at the same time not providing a “public function.” As discussed earlier, “public function” is a term of art within state action discourse, distinct from my use of the term “public” here in its more general sense.

229. See *How to Post a Tweet*, TWITTER, <http://support.twitter.com/groups/31-twitter-basics/topics/109-tweets-messages/articles/15367-how-to-post-a-tweet> (last visited Dec. 31, 2013) (stating that when a user clicks the “Tweet” button, the user “will immediately see [the] Tweet in the timeline on [the user’s] homepage”); *How to Post & Share*, *supra* note 9; *Share, Star and Hide Stories*, FACEBOOK, <http://www.facebook.com/help/106105072867502/> (last visited Feb. 19, 2013) (describing Facebook Timeline and what happens when a user posts content).

230. *Denver Area Educ. Telecomms. Consortium, Inc. v. Fed. Comm’n*, 518 U.S. 727, 793 (1996) (Kennedy, J., concurring) (describing cable providers as conduits for the speech of others when they provided service for public access channels under franchise agreements).

231. See *Kieronski v. Wyandotte Terminal R.R.*, 806 F.2d 107, 109 (6th Cir. 1986) (noting that carriers who carried for others based on separate contracts were not considered common carriers).

232. See Speta, *supra* note 207, at 258–68.

233. See *id.* at 254, 261 (noting that the common carrier doctrine “required those engaged in serving the public to, in fact, serve the entire public with reasonable care” and as applied to communication carriers like telephone companies, this included a duty of nondiscrimination (nonsensorship)).

Social networking sites' censorship authority might then suggest that these sites should most appropriately be treated like newspapers. However, the basic premise of social networking sites is that users can share whatever information they want with their network. And it appears that the vast majority of content is posted directly and is not subject to any kind of censorship.²³⁴ Moreover, even when the platforms take down material, that content often is unprotected speech under the First Amendment.²³⁵ As such, social networking sites do not have the same history of broad editorial discretion of only accepting limited content among protected speech, as newspapers have traditionally done. Instead, all of these factors point to the conclusion that social networking sites should be treated similarly to cable and broadcast media. Although the Supreme Court has held that the special circumstances justifying intervention in the broadcast and cable context do not apply in the context of the Internet generally,²³⁶ the largest social networking sites control a significant part of the user market such that transferring to another network is difficult and switching to another site would not realize the same benefits unless a substantial portion of a user's network also moved to the new network.²³⁷ As a result, the social networking site market may have an artificially created scarcity of suppliers. Additionally, Internet services implicate the same communications concerns that pushed telephony to be categorized as a common carrier in the first place: an important connection to

234. This claim cannot be supported by direct evidence because social networking sites do not publicize every instance in which they take down material or delete a user's account for violating the content guidelines. Additionally, given the sheer number of users who have accounts on these websites, the number of instances of takedown or account deletion that are publicly available is very low.

235. See *Facebook Community Standards*, *supra* note 25; see, e.g., Weiss, *supra* note 98 (listing examples of material removed by Facebook for alleged obscenity). Facebook is not alone in making these allegations, as other social networking sites such as Twitter also claim to only take down illegal content, which would not be protected under the First Amendment. See Alex Howard, *On Twitter, Censorship and Internet Freedom*, GOV20.GOVFRESH (Jan. 26, 2012, 7:12 PM), <http://gov20.govfresh.com/on-twitter-censorship-and-internet-freedom> (Twitter's new censorship policy claims to only take down content that is illegal in other countries); George Stahl, *Twitter CEO: New Policy for Transparency, Not Censoring*, WALL ST. J., Jan. 31, 2012, <http://online.wsj.com/article/SB10001424052970204740904577194021894304072.html> (same).

236. See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997) (noting that scarcity and invasiveness concerns "are not present in cyberspace").

237. See Pasquale, *supra* note 45, at 153 (noting the existence of "switching costs" on social networking sites); cf. *The Power of Social Networks*, *supra* note 57 (identifying the role of friends as an important element in seeking membership on social networking sites).

economic growth, popular support for basic access to communication, and the difficulty of using post hoc solutions to resolve disputes over content control.²³⁸ Some of these communication concerns also came up in the context of broadcast and cable, serving as at least part of the justification for restricting editorial discretion for those media.²³⁹ In the case of social networking sites, these concerns are more prevalent because of the sizeable portion of the population obtaining news through these sites, the depth of users' reliance on these sites as platforms for communicating and expressing themselves, and the growing importance of access to commercial information.

Thus the overall balance of the current nature of social networking sites, with particular emphasis on the First Amendment goal of ensuring free speech, firmly distinguishes social networking sites from newspapers, placing the sites between broadcast/cable and common carriers. As a result, some amount of regulation affecting censorship by social networking sites may be able to withstand judicial scrutiny.

III.

TO PROTECT THE WORLD FROM CENSORSHIP: EVALUATING POTENTIAL REGULATIONS OF SOCIAL NETWORKING SITES WITHIN A CONSUMER PROTECTION FRAMEWORK

This Part will analyze the following types of potential government intervention: establishing clearer content regulation standards, forcing greater disclosure of censorship policies, implementing non-litigation-based remedies, creating a cause of action, and eliminating censorship authority entirely. All of these eval-

238. See Susan P. Crawford, *Transporting Communications*, 89 B.U. L. REV. 871, 884–86, 913–14 (2009) (identifying traditional principles for government involvement in communication and infrastructure and demonstrating how they arise in the context of the Internet).

239. See, e.g., *Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 663–64 (1994) (justifying cable regulations in part because “broadcasting is demonstrably a principal source of information and entertainment for a great part of the Nation’s population” and “assuring that the public has access to a multiplicity of information sources . . . promotes values central to the First Amendment” (internal quotation marks omitted)); cf. *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 112–13 (1973) (indicating that the “Fairness Doctrine” was premised on the importance of “the right of the public to be informed”).

uations will take place in a theoretical context, as there is not yet any comprehensive data on social network censorship.²⁴⁰

The first two interventions—establishing clearer content censorship standards and forcing disclosure—address the issue of information disparities by creating tools that would provide users with more information about what content the social networking sites find objectionable and the resulting penalties, if any, for posting that content. Additionally, the highly limited nature of these government interventions makes them more feasible from a practical standpoint. However, these solutions do not change the nature of user rights with respect to social networking sites.

The third and fourth types of intervention—creating a non-litigation-based remedy and creating a cause of action—respond to the issue of unequal bargaining power. By providing users with some mechanism of dispute resolution external to the social networking site, there would be more oversight of the relationship between users and the sites. Moreover, the threat of external oversight could put pressure on social networking sites to be more responsive to users' concerns about speech restrictions. While these interventions would give users more power, they would import more cost to the social networking site model and would be much more difficult to enact than the first two interventions.

The final suggestion—completely eliminating censorship power—would in essence treat social networking sites as a common carrier, like the telephone. Social networking sites would not be able to censor any content that is posted on their platform and would only serve as a conduit for communication. The websites would not need to be concerned with liability, as the Communications Decency Act of 1996 immunity provision would still apply, preventing social networking sites from being treated as a speaker or publisher of user-generated content. However, this intervention would negate whatever benefits there are to allowing social networking sites to censor²⁴¹ and would be the most difficult to enact.

240. At least one of these suggestions already exists to a limited degree. Google and Twitter voluntarily post some but not all of the removal requests they receive on Chilling Effects (located at <http://www.chillingeffects.org>). See Sengupta, *supra* note 99. However, it is not clear what criteria these sites use when deciding what requests to post, and other sites do not post their takedowns. For further discussion of Chilling Effects, see *infra* notes 246–50 and accompanying text.

241. See Holland, *supra* note 33, at 369–70, 391 (describing service provider community developments which could result from censorship immunity); Zarsky,

A. Establishing Clearer Content Regulation Standards

Of all of the potential interventions considered, establishing clearer standards is the least disruptive to the existing systems. Social networking sites would simply be required to provide fairly comprehensive, although perhaps not exhaustive, guidelines for which types of content are permissible and which penalties would be imposed for violating content standards. Social networking sites would not necessarily have to change their content takedown policies as long as users knew the bounds of these policies. In terms of feasibility, even individuals who oppose government intervention would be willing to accept clarification or disclosure of content regulation terms.²⁴²

Clarification or disclosure of content regulation terms would not be difficult for Facebook. As shown by the recent leak of the website's content restriction guidelines,²⁴³ Facebook already has fairly specific standards in place that its censors should follow when deciding whether content violates Facebook's terms of use. Additionally, Facebook has provided clear information in other contexts, such as in its privacy policies.²⁴⁴ For new or potential users, these standards will provide more information as they decide whether to even create an account on Facebook. For some existing users, the standards would help them decide whether to stay on the site or to try to shift their social network to a different website.²⁴⁵ For other existing users, the clearer standards would simply help them make decisions about whether to share certain content. However, this government intervention would not change the ability of users to influence the social networking site's censorship policies,

supra note 7, at 778 (describing the benefits of and need for filtration of information by online social networks by methods including accreditation).

242. See, e.g., Epstein, *Behavioral Economics*, *supra* note 166, at 128 (approving of the Truth in Lending Act disclosure provisions for credit card companies but unwilling to advocate any further steps).

243. See *supra* notes 95–98 and accompanying text.

244. See Kevin J. O'Brien, *Facebook Offers More Disclosure to Users*, N.Y. TIMES, Apr. 12, 2012, http://www.nytimes.com/2012/04/13/technology/facebook-offers-more-disclosure-to-users.html?_r=2 (providing users with information about what data Facebook collects from users).

245. Although I discuss the lock-in potential for social networking sites, at least some recent cases suggest that both individual users and sometimes entire social circles have moved social networking sites in response to changes in social networking site policies. See, e.g., Peter Panchal, *Why Facebook is Losing U.S. Users*, PCMAG.COM (June 14, 2011), <http://www.pcmag.com/article2/0,2817,2386884,00.asp> (one possible explanation for users leaving Facebook may be the website's changing privacy policies). However, it does not appear that this is a normal response to changes in social networking site policies. See *id.*

and therefore the benefits would be limited. Rather it would provide information for users and regulators to engage in a dialogue about the actual content standards applied by social networking sites. This would benefit users if, as a result of this dialogue, social networking sites changed their policies to align with either general community standards or underlying free speech values.

B. Forcing Greater Disclosure on Censorship Policies

Requiring social networking sites to disclose certain types of information regarding their censorship activities is a slightly stronger form of intervention. Social networking sites could be forced to provide some kind of information report when they take down material or delete a user account.²⁴⁶ One model would require social networking sites to enter information into a censorship database; for each censorship decision, the site would create a database entry noting the date, time, user name, a description of the content, and reason for taking down the content.

Some could argue that such a censorship database already exists. The reporting website Chilling Effects attempts to gather and catalogue censorship decisions by social networking sites.²⁴⁷ As mentioned earlier, some websites such as Google and Twitter voluntarily provide information about some of their takedown requests to Chilling Effects.²⁴⁸ However, a quick view of Chilling Effects shows that the reports are based on cease-and-desist letters, which Facebook does not use. Reports for takedown of user-generated content or account deletion for reasons such as indecency or violence by social networking sites would probably fall into the “uncategorized” entries, which are not easily searchable.²⁴⁹ Therefore the information provided by this website is not very useful for analyzing social networking site censorship behavior. Instead the Chilling Effects website appears to be focused more on takedowns related to

246. Cf. Urs Gasser, *Regulating Search Engines: Taking Stock and Looking Ahead*, 8 YALE J.L. & TECH. 201, 233–34 (2006) (suggesting disclosure notification requirements when search engines block or remove content).

247. See CHILLING EFFECTS, <http://chillingeffects.org> (last visited Dec. 31, 2013).

248. See Sengupta, *supra* note 99.

249. See *Report Receiving a Cease & Desist Notice*, CHILLING EFFECTS, <http://chillingeffects.org/input.cgi> (last visited Dec. 31, 2013). The designation as “uncategorized” is based on the classification structure currently used on Chilling Effects, which does not have a designated category for content takedown by social networking sites or other Internet platforms. *Id.*

copyright or trademark concerns.²⁵⁰ In addition, this website appears to be mostly driven by voluntary submissions.²⁵¹ Thus a centralized list of takedowns and user account deletions due to social networking site content regulations would provide benefits beyond existing resources. By compiling all the relevant information in one place with an organizational structure specifically designed to optimize censorship analysis, a mandatory censorship database would overcome the shortcomings of Chilling Effects.²⁵²

Forcing disclosure of content takedown and account deletions would provide scholars with the data necessary to identify trends and industry practices regarding how social networking sites approach sensitive or controversial topics.²⁵³ As with clearer standards of content regulation, this intervention would provide users with more information about which types of content would be likely to be taken down.²⁵⁴ In contrast to clearer guidelines, however, empirical data could also provide legislators or agencies with a strong foundation to create social networking site regulations that could withstand judicial scrutiny.²⁵⁵

250. *Id.* The search function on Chilling Effects focuses on categorizing cease-and-desist letters for copyright and trademark issues. *Search the Database, CHILLING EFFECTS*, <http://chillingeffects.org/search.cgi> (last visited Dec. 31, 2013).

251. *See* CHILLING EFFECTS, *supra* note 246 (“In addition, we want your help. We are gathering a searchable database of Cease and Desist notices sent to Internet users like you. We invite you to input Cease and Desist letters that you’ve received into our database, to document the chill.”)

252. *Cf.* Chandler, *supra* note 45, at 1117 (suggesting a central reporter for search engine content removal).

The FCC is moving toward creating such a centralized registry for television political ad spending, suggesting that it could do the same for website censorship. *See* Brian Stelter, *F.C.C. Pushes for Web Site on TV Political Ad Spending*, N.Y. TIMES, Apr. 8, 2012, http://www.nytimes.com/2012/04/09/business/media/fcc-pushes-for-web-site-on-political-ad-spending-on-tv.html?_r=3 (suggesting that the registry would be approved by the FCC later in April 2012).

253. *Cf.* Alexander Reynolds, *Enforcing Transparency: A Data-Driven Alternative for Open Internet Regulation*, 19 COMM.LAW CONSP. 517, 520–21 (2011) (advocating for information collection mechanisms from Internet service providers (ISPs) to learn more about ISP practices).

254. *Cf.* Alexander Reicher, *Redefining Net Neutrality After Comcast v. FCC*, 26 BERKELEY TECH. L.J. 733, 736 (2011) (suggesting that transparency in broadband service would empower consumers).

255. An empirical basis could potentially provide enough support to avoid the overbreadth problems that have plagued previous government regulations of the Internet. *See* cases cited *supra* note 204. *But see* Nunziato, *supra* note 147, at 10–11 (arguing that a disclosure mandate without a nondiscrimination mandate would not sufficiently protect Internet users’ free speech rights and that transparency provisions do not protect unpopular speech).

A reporting system would have to take into account additional considerations to prevent harm to the platforms or other parties. For example, social networking sites may need immunity from being held liable as speakers if the reports are made public. A user whose content was taken down as being obscene could arguably bring suit against the social networking site for defamation if the report falsely stated that the user's content was obscene. Although some immunity from defamation actions is provided by the Communications Decency Act of 1996 § 230, this provision may not apply to database entries because the content of a report would not have been "provided by another information content provider" but rather by the "interactive computer service" itself.²⁵⁶ Access to the reporting system may also need to be limited to regulators or to another subset of actors if there are legitimate needs for secrecy.²⁵⁷

C. Implementing Non-Litigation-Based Remedies

A third option would be to create some type of non-litigation-based remedy subject to review. There are two primary models for this kind of alternative dispute resolution ("ADR") strategy that could work for social networking site censorship. On the one hand, social networking sites could provide private ADR. eBay provides an example of this type of remedy. eBay users who have grievances against other users can opt for the services of SquareTrade, an online dispute resolution provider.²⁵⁸ In adopting an online dispute resolution provider, eBay has recognized that the costs of litigation, and even traditional ADR, are often prohibitive and would leave users with no other means of obtaining a remedy.²⁵⁹ The main benefit of online dispute resolution services is that all of the communication takes place on the Internet, eliminating many of the costs associated with litigation and traditional ADR, which both require physical presence.²⁶⁰ An online dispute resolution provider should be external to the social networking site; this would be better than an internal review due to a lesser risk of bias. However, there would

256. See Communications Decency Act of 1996, 47 U.S.C. § 230(c)(1). Websites that create their own content cannot access the immunity provisions of § 230(c)(1). See *id.*

257. Pasquale, *supra* note 45, at 109–10 (discussing how to tailor reporting systems, providing Internet carrier networks and search engines as examples). Greater need for privacy could arise in cases such as when proprietary material or trade secrets were at risk for disclosure. See *id.* at 109.

258. Orna Rabinovich-Einy, *Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 HARV. NEGOT. L. REV. 253, 253 (2006).

259. *Id.* at 254.

260. See *id.* at 255.

probably need to be some degree of government oversight to ensure that the decisions of private ADR bodies are fair.²⁶¹

On the other hand, ADR could occur through a governmental organization. Public ADR could be structured along the same lines as existing government-provided mediation services. The Office of the Attorney General of Maryland, for example, provides mediation for consumer disputes between individual consumers and businesses.²⁶² An aggrieved customer files a complaint with the Office of the Attorney General, who reviews the complaint and determines whether the issue is one that can be mediated by the office.²⁶³ However, this procedure is voluntary and cannot bind the parties to any particular resolution unless both sides agree.²⁶⁴ As such, if the government were to provide some kind of ADR for aggrieved social networking site users, it may need to be mandatory and binding, thereby having greater legal effect.

This type of non-litigation-based remedy could affect the amount of information users have regarding the practices a social networking site uses in regulating content by providing particular cases of censorship as well as creating patterns of censorship over time. More directly, ADR would provide users with more leverage and bargaining power when content takedown or account deletion occurs. Since the final decision regarding the takedown or deletion would be left to a (presumptively) neutral third-party, users would have a tool to check censorship decisions by social networking sites. At the same time, however, imposing this additional process would raise the cost of maintaining the platform, and the social networking site might choose to shift the costs to the users by turning social networking sites into primarily pay sites or by increasing commercial content. Such an outcome could be harmful to user rights of

261. The risk then would be that the close connection between the repeat player website and the dispute resolution body could foster bias in favor of the repeat player. Cf. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, in *LAW AND SOCIETY* 165 (R. Cotterrell ed., 1994), available at <http://www.marcgalanter.net/Documents/papers/WhytheHavesComeOutAhead.pdf> (discussing how repeat players can gain advantages in the legal system). But cf. Rabinovich-Einy, *supra* note 257, at 256, 269 (suggesting that experience can produce accountability without external review).

262. *File a Consumer Complaint*, MARYLAND ATTORNEY GENERAL, <http://www.oag.state.md.us/Consumer/complaint.htm> (last visited Dec. 31, 2013).

Government arbitration is another option, which may have fewer problems regarding legal enforceability.

263. *About the Complaint Mediation Process*, MARYLAND ATTORNEY GENERAL, <http://www.oag.state.md.us/Consumer/complaintmediation.htm> (last visited Dec. 31, 2013).

264. *See id.*

expression because it would restrict an important and effective medium of communication currently available to the large majority of Internet users for free.

D. *Creating a Cause of Action*

Moving along the spectrum of remedies, the step beyond non-litigation-based remedies would be to create a cause of action that allows users to bring lawsuits against social networking sites for content takedowns or account deletions. Perhaps the simplest way of establishing a cause of action would be to legislatively decree or judicially find that social networking sites are engaged in state action, thereby allowing users to invoke First Amendment protections directly against a social networking site. Users could then challenge individual instances of censorship or a site's broader content regulation policies under doctrines such as overbreadth²⁶⁵ or as content- or viewpoint-based regulations.²⁶⁶ Given the aforementioned problems with this approach, courts or the legislature could alternatively create a *sui generis* law giving users a cause of action against social networking sites. One example of this type of claim is the right of publicity, which was essentially created by courts and then adopted through statutes to protect against invasions of privacy.²⁶⁷ In this case, courts could recognize that users should have some type of expressive or property right that would allow suits against social networking sites (or other Internet entities) that take down content or delete user accounts.²⁶⁸

A cause of action sounds appealing because it would provide users with the greatest amount of procedural protections in com-

265. See *United States v. Stevens*, 559 U.S. 460, 473 (2010) (“[A] law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” (internal quotation marks omitted)).

266. See *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323, 325 (7th Cir. 1985) (striking down anti-pornography law as an invalid viewpoint restriction).

267. See *Haelan Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866, 868–69 (2d Cir. 1953). In *Haelan*, Judge Frank essentially created the right to publicity as a way of allowing people who became public figures to still have a means of protecting themselves against privacy invasions when their image was misappropriated. See Diane Leenheer Zimmerman, *Who Put the Right in the Right of Publicity?*, 9 DEPAUL-LCA J. ART & ENT. L. & POL’Y 35, 43–44 (1998).

States then adopted the right of publicity through statutory enactments. See, e.g., McKinney’s Civil Rights Law § 50, NY CIV RTS § 50.

268. For a discussion of issues that may arise due to “legislative imposition of free speech norms to private parties,” see Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1539, 1580–1600 (1998).

parison to all of the other remedies previously discussed. However, a cause of action would also come with the most significant costs because it invokes the legal system.²⁶⁹ Moreover, even if a cause of action existed, there may also be a problem of insufficient incentives to bring suit. Although a violation of First Amendment rights may be considered an injury for the purposes of obtaining a preliminary (and potentially permanent) injunction,²⁷⁰ it is unclear whether courts would also find damages substantial enough to induce users to incur the costs of litigation. Thus creating a cause of action might realistically create a right in name with no actual method of enforcement. To remedy this problem, legislatures could also create a statutory damages scheme. The scheme would have to allow for relatively high damage awards and possibly attorneys fees in order to overcome the cost barriers.

E. Eliminating Censorship Authority

The final and most extreme solution would be to prevent social networking sites from censoring any posted content. This intervention would functionally treat social networking sites as common carriers, which cannot discriminate based on content at all.²⁷¹ Current discussions about nondiscrimination on the Internet occur in the context of the “net neutrality” debate—the issue of whether Internet connectivity providers may discriminate amongst consumers with regard to costs of carriage and preferences for carriage.²⁷² Although the point of tension for “net neutrality” partisans is not

269. See generally JAMES S. KAKALIK & NICHOLAS M. PACE, *THE RAND CORP., COSTS AND COMPENSATION PAID IN TORT LITIGATION*, vii–x (1986), available at <http://www.rand.org/content/dam/rand/pubs/reports/2006/R3391.pdf> (discussing the sources of high litigation costs in tort cases). But see generally Danya Shocair Reda, *The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions*, 90 OR. L. REV. 1085, 1085–86 (2012) (arguing that the costs of litigation are not as high as “common wisdom” claims).

270. See, e.g., *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (finding that “[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury”). However, this argument assumes that the courts have found some way of adopting the First Amendment in the social networking site context or that they are willing to find a similar harm without explicitly invoking the First Amendment.

271. See *supra* Part II.D.

272. See Christopher S. Yoo, *Network Neutrality and the Economics of Congestion*, *supra* note 45, at 1855–60 (providing an overview of the net neutrality debate); see, e.g., Carol M. Hayes, Note, *Content Discrimination on the Internet: Calls for Regulation of Net Neutrality*, 2009 U. ILL. J.L. TECH. & POL’Y 493, 499–500 (2009) (discussing net neutrality issues such as content-based censorship).

based on content, some of the arguments from the access nondiscrimination debate resonate with content censorship issues.²⁷³

Proponents of “net neutrality” argue that the benefits of communication and discussion on the Internet can only be attained if Internet intermediaries do not discriminate in granting access to the Internet.²⁷⁴ In the same vein, preventing social networking sites from restricting user speech may further communication and free speech by ensuring that all views are heard. Proponents also argue that Internet intermediaries function as communication conduits and therefore should be treated similarly to other common carriers that cannot engage in any discrimination.²⁷⁵ As described in Part II, social networking sites usually post user content without modification and also appear to function as conduits of communication, suggesting that there would be some basis in the nature of social networking sites to suggest that they too should not be allowed to discriminate based on content.

Opponents, on the other hand, argue that the market will provide sufficient incentives to facilitate communication.²⁷⁶ For social networking sites, the desire to draw the largest number of individual users, businesses, and public traffic could incentivize the sites to put forward policies that most closely reflect the interests of users. Moreover, opponents of “net neutrality” claim that intervention in the market could result in negative consequences, such as forcing Internet service providers (“ISPs”) to engage in wasteful activities, such as bureaucratic checkpoints or expansion of regulation beyond simple assurance of nondiscrimination due to administrative mission creep.²⁷⁷ Analogously, preventing social networking sites

273. At least one scholar has found analogies between the two contexts and started to include social networking sites in access discrimination discussions. See Pasquale, *supra* note 45, at 152.

274. See Tim Wu, *The Broadband Debate, A User's Guide*, 3 J. ON TELECOMM. & HIGH TECH. L. 69, 72–73 (2004) (describing the Openist view that suggests openness as the basis for innovation and positive externalities).

275. See Nunziato, *supra* note 147, at 2–3 (discussing how broadband providers are common carriers and conduits for communication and that free speech issues should not be left to the market).

276. See Wu, *supra* note 273, at 76 (outlining the Deregulationist view that believes the Internet developed well in part due to little intervention by the government).

277. See TIMOTHY B. LEE, CATO INST., POLICY ANALYSIS NO. 626: THE DURABLE INTERNET: PRESERVING NETWORK NEUTRALITY WITHOUT REGULATION 30–32 (2008), available at <http://www.cato.org/sites/cato.org/files/pubs/pdf/pa-626.pdf> (providing examples of bureaucratic cost and mission creep—the expansion of agency power beyond the purpose for which it was given—in the context of the Interstate

from being able to censor any content would undermine the value of censorship²⁷⁸ and could add similar costs.

As mentioned earlier, we do not have full information about how social networking sites engage in censorship. At least one net neutrality scholar has argued that the resolution of whether or how to apply net neutrality should be decided after enforcing transparency so that regulators know how networks are discriminating.²⁷⁹ The information-sharing interventions mentioned above may be prerequisites to determining whether nondiscrimination is desirable or even necessary. Assuming that content nondiscrimination was proposed, it would encounter implementation issues.²⁸⁰ Additionally, since social networking sites have access to existing immunity provisions, it may be difficult to fully remove social network censorship powers, as the Communications Decency Act of 1996 would also have to be amended.

Commerce Commission's regulation of railroad rates and the FCC telephone regulations).

278. Reducing or eliminating social networking site censorship capabilities would undermine the benefits of censorship. *See* Zarsky, *supra* note 7, at 778 (describing the benefits of and need for accreditation of information by online social networks).

Social networking site censorship may even help prevent physical harm in some cases. *Cf.* Amy Summers, *Is Social Networking More Dangerous to Teens Than "Stranger Danger"?*, SOCIAL TIMES (Jan. 7, 2011, 9:46 AM), http://socialtimes.com/is-social-networking-more-dangerous-to-teens-than-stranger-danger_b33468 (noting certain dangers on social networking sites such as cyber-bullying and incidents of murders that have occurred from sharing information on social networking sites).

279. *See* Reicher, *supra* note 253, at 734–35.

280. The net neutrality debate demonstrates that there is conflicting authority on which government actor is the most appropriate to regulate the Internet, which may also arise in the context of regulating social networking sites. *See* Hayes, *supra* note 271, at 494. Congress has previously considered net neutrality regulation, although it did not enact any of the proposals. *See id.* at 501–02. Courts have also stepped in to the extent that the Supreme Court has reviewed the FCC's categorizations, which affected the scope of the FCC's authority to regulate different types of services. *See, e.g.*, Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 984–97 (2005) (finding that the *Chevron* doctrine applied and analyzing FCC regulations against that backdrop). Federal agencies, the FCC in particular, have taken somewhat active steps that gesture toward network neutrality. *See, e.g.*, Adelphia Commc'ns Corp., 21 FCC Rcd. 8203, 8299 para. 223 (2006) (indicating that the FCC would consider net neutrality concerns); Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Policy Statement, 20 FCC Rcd. 14,986, 14,987–88 para. 4 (2005) (adopting a stance that broadband networks should be "widely deployed, open, affordable, and accessible to all consumers").

CONCLUSION

The continuing publication of stories outlining social networking site censorship suggests that there is a valid concern about this issue, especially as these sites become more integral to commercial, social, and political activities. Moreover, the unclear availability of First Amendment protections due to the threshold eligibility issues and the fairly clear market failures in the social networking site market, including information and power disparities, leave users largely vulnerable to the whims of private entities. Thus a consumer protection-based approach may be an appropriate foundation for justifying governmental intervention to protect user rights.

Additionally, my discussions regarding consumer protection are not limited to social networking sites. The factors that make social networking sites amenable to consumer protection theory arise in other online contexts where individuals also sign user agreements on expressive platforms. While this view can potentially include any Internet website, as most are governed by a user agreement and involve expression, the consumer protection rationale appears to fit best in cases where the user creates a profile and the purpose of the website is to function as a site of communication (as opposed to providing games or other services). Examples of Internet activity comparable to Facebook could include Pinterest,²⁸¹ Blogger,²⁸² or Tumblr.²⁸³

Once a consumer protection framework becomes applicable, it opens up a range of possible government interventions from those that are minimally invasive, such as requiring social networking sites to provide clear content regulation guidelines, to those that are heavily invasive, such as mandating complete content nondiscrimination. Each of the interventions discussed in Part III have advantages and drawbacks, and are targeted to respond to slightly different problems. Yet it is not possible to propose any of these interventions as an appropriate solution without further information about how social networking sites (or other Internet entities)

281. Pinterest is basically an online cork board where users can ‘pin’ images, videos, and other objects to their pin board. PINTEREST, www.pinterest.com (last visited Dec. 31, 2013).

282. Blogger is a Google-owned website that allows users to create, write, and share blogs on the Internet. See BLOGGER, <http://www.blogger.com> (last visited Dec. 31, 2013); *Blogger Tour*, BLOGGER, https://www.blogger.com/tour_start.g (last visited Dec. 31, 2013).

283. Tumblr is another blog-hosting platform that allows users to “effortlessly share anything.” *About*, TUMBLR, <http://www.tumblr.com/about> (last visited Dec. 31, 2013).

956 NYU ANNUAL SURVEY OF AMERICAN LAW [Vol. 68:891

engage in censorship practices. Thus the first step will be to obtain more information on these practices to obtain a better view of the situation. Then, based on that information, we can determine what regulatory approaches, if any, are necessary to protect user rights of expression.