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Jacquelyn E. Fradette

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ONLINE TERMS OF SERVICE: A SHIELD FOR  
FIRST AMENDMENT SCRUTINY OF  
GOVERNMENT ACTION

*Jacquelyn E. Fradette\**

INTRODUCTION

In *Red Lion Broadcasting Co. v. FCC*,<sup>1</sup> the Supreme Court of the United States declared that the purpose of the First Amendment of the United States Constitution is “to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.”<sup>2</sup> Broadly speaking, courts have understood that they were preserving this marketplace of ideas primarily in the face of government interference.<sup>3</sup> The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.”<sup>4</sup> That language invokes the colloquial image of the quintessential speaker in America: a person standing on a soap box in the town square speaking her mind into a megaphone with Congress restrained by the text of the First Amendment and unable to interfere. Partnered with this image is the idea of common, public, and shared spaces where people are concentrated and, thus, become the audience for the paradigmatic speaker.

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\* Candidate for Juris Doctor, Notre Dame Law School, 2014; Bachelor of Arts, The Great Books Program, St. John’s College, Annapolis, 2007. I would like to thank Professor Patricia Bellia for her excellent suggestions and feedback throughout the entire writing process. I would also like to thank my fiancé, Lee, for being my sounding board and unwavering supporter. I owe an eternal thank you to my parents, Michael and Debra, and my sister Nicole, for their never-ending belief in me and for sharing my goals, as well as the Goldsmith family for cheering me on during all my endeavors. Finally, I thank the *Notre Dame Law Review* staff members and editors for all their excellent assistance during the editing process.

1 395 U.S. 367 (1969).

2 *Id.* at 390.

3 See LAWRENCE LESSIG, CODE VERSION 2.0, at 233 (2006) (“Strictly speaking—legally speaking—the right to free speech in the United States means the right to be free from punishment by the government in retaliation for at least some (probably most) speech. . . . [Speech’s] constitutional protection is a protection against the government.”).

4 U.S. CONST. amend. I.

Advances in technology have shaped the way that citizens “speak,” both to the polity at large and to one another individually. As each development in media technology arises, it brings with it many benefits, such as expanding the scope of one’s audience and the ability to target a narrow, yet specific, audience more precisely. The move to new media platforms for speech—Twitter,<sup>5</sup> Facebook,<sup>6</sup> BlogSpot,<sup>7</sup> YouTube,<sup>8</sup> and others—has changed the legal landscape that protects such speech because speakers are largely no longer operating in public or in publicly owned spaces. Instead, by using Internet forums for their expression, modern speakers are communicating in a forum that is governed by contract.<sup>9</sup>

Internet users, however, by and large still have the impression that they have the same constitutional protections when speaking on the Internet that they do in the proverbial town square.<sup>10</sup> In some circumstances that intuition is correct. The government cannot pass legislation limiting speech on the Internet, without such legislation being subject to constitutional scrutiny.<sup>11</sup> In addition, government actors cannot escape scrutiny for firing someone in retaliation for speech made on the Internet.<sup>12</sup> Many of the same limitations on government action that exist in real space also exist on the Internet.<sup>13</sup> But those popular intuitions are incorrect in two main ways. First, many consumers and media commentators believe that when an

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5 TWITTER, [www.twitter.com](http://www.twitter.com) (last visited Oct. 18, 2013).

6 FACEBOOK, [www.facebook.com](http://www.facebook.com) (last visited Oct. 18, 2013).

7 BLOGSPOT, [www.blogspot.com](http://www.blogspot.com) (last visited Oct. 18, 2013).

8 YOUTUBE, [www.youtube.com](http://www.youtube.com) (last visited Oct. 18, 2013).

9 See *infra* Part II.

10 See *infra* Section I.A.

11 See generally *Ashcroft v. ACLU*, 542 U.S. 656, 673 (2004) (holding that the challenged provisions of the Child Online Protection Act were content-based speech restrictions and also not the least restrictive means to achieve the goal of the regulation among effective alternatives); *Reno v. ACLU*, 521 U.S. 844, 859, 874, 879 (1997) (holding that section 223(a) and section 223(d) of the Communications Decency Act are content-based restrictions on speech and that the act as written lacks the precision the First Amendment requires for such restrictions).

12 See, e.g., *Gresham v. City of Atlanta*, No.1:1–CV–1301–RWS, 2011 WL 4601020, at \*2 (N.D. Ga., Sept. 30, 2011) (upholding the magistrate’s determination that under the first prong of the *Pickering* test, the public employee’s Facebook posting “addressed a matter of public concern, specifically, ‘the integrity of the law enforcement services’” of the local police department, and thus is “entitled to First Amendment protection”), *rev’d*, 2013 WL 5645316, at \*2 (11th Cir. 2013) (finding that although the plaintiff had a speech interest in her Facebook postings it was “not a strong one” and that the department’s interest in minimizing disruption to the department outweighed the plaintiff’s speech interests).

13 See *infra* Part III.

Internet speech forum provider, like Google or Twitter, interferes with or limits their speech, the forum provider has infringed upon their First Amendment rights.<sup>14</sup> Second, users believe that Terms of Service agreements only affect their relationship to the Internet speech forum provider.<sup>15</sup> While it may be formalistically true that a contract only affects the rights of the two contracting parties, in practice these Terms of Service contracts may have wider reaching consequences. Users by and large do not contemplate that Terms of Service contracts can affect their ability to redress some types of government action against some of their speech acts online.

Part I of this Note will canvas popular opinions and perceptions about First Amendment rights on the Internet using examples of public outcry over recent instances of speech limitation. It will also discuss the state action doctrine generally and how the presence of this doctrine most likely renders certain popular public constitutional intuitions about the First Amendment erroneous.

Part II will provide an overview of how courts have taken an expansive and protective view of private ordering between online parties. It will discuss how courts have developed a robust freedom to contract jurisprudence in the Internet context. Because courts essentially have a presumption in favor of the enforceability of the contract so long as it meets basic formal requirements, it is difficult for users to challenge the Terms of Service between themselves and an Internet speech forum provider substantively or procedurally. Coupled with this doctrinal presumption is an ideological inclination in favor of private ordering on the Internet as the best way for parties to organize themselves to reduce bargaining and transaction costs.

Part III will examine how this robust freedom to contract has affected online speech. Particularly, this Note will discuss the rise of government take-down requests made to Internet speech forum providers regarding non-copyrighted material. This Note will contend that Internet Terms of Service contracts effectively shield the government from constitutional scrutiny of its take-down requests. The fact that users and the government now have to act through the intermediary of both the Internet speech forum provider and its Terms of Service has limited speakers' ability to challenge government action concerning their speech directly.

Part IV will focus on the lasting implications of the Terms of Service regime on speech rights. First, it will argue that the government's use of the Terms of Service as a potential shield from constitutional

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14 See *infra* Part I.

15 See *infra* Part I.

scrutiny puts the Internet speech forum provider in the position of having to vindicate users' rights on their behalf. Given that the ratifiers of the Constitution likely did not contemplate that one day citizens would need to rely on private companies for this function, this Note will examine whether there are sufficient market incentives in place to ensure that an Internet speech form provider will execute this newly developed responsibility with sufficient transparency and to the extent that users desire. Second, it will argue that the Terms of Service regime in the speech context has created the rough equivalent of the third party doctrine in the privacy context, but with significantly fewer formal limitations on government action. Finally, this Note will propose two solutions to this problem: (1) a statutory regime requiring more legal process in order for the government to make a take-down request to an Internet speech form provider regarding a private citizen's speech; and (2) greater scrutiny of contract terms which will consider the free speech implications of some Terms of Service provisions.

In addressing these arguments, this Note will not focus on Internet speech acts that are subject to copyright law and the Digital Millennium Copyright Act (DMCA).<sup>16</sup> Rather, this Note will consider user-generated speech that does not implicate copyright claims. Additionally, this Note does not focus on speech content that is on a website an individual builds and maintains for herself since in that circumstance there is unlikely to be a Terms of Service contract. It will instead focus on speech such as an originally composed posting on Twitter ("tweet") or Facebook ("status update" or "newsfeed post" or "wall post") or a blog posting hosted by a central blog site such as BlogSpot, etc. The reason for this limitation is to focus on the kinds of speech that the average, technically unsophisticated speaker engages in using popular Internet speech platforms. Most commonly these are social media sites, blogs, and search engines. While copyright issues and speech issues overlap, this Note exclusively focuses on speech issues that do not raise substantial or controlling copyright issues in order to examine the effect of a site's Terms of Service contract on ordinary Internet speech.

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16 For in-depth treatments of the effect of copyright law, digital rights management systems, and the DMCA on free speech and fair use, see generally Julie E. Cohen, Lochner in Cyberspace: *The New Economic Orthodoxy of "Rights Management,"* 97 MICH. L. REV. 462 (1998); Margaret Jane Radin, *Regulation by Contract, Regulation by Machine*, 160 J. INST'L & THEOR. ECON. 1 (2004); Wendy Seltzer, *Free Speech Unmoored in Copyright's Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171 (2010).

## I. STATE ACTION DOCTRINE AND PUBLIC FIRST AMENDMENT NORMS

### A. *YouTube and the White House Inquiry*

In mid-September 2012 a trailer for a movie entitled “Innocence of Muslims,” which was posted to the video sharing website YouTube, sparked some anti-American protests abroad.<sup>17</sup> As reports that the video’s anti-Islamic content was inciting these protests increased, the White House contacted YouTube to determine whether the video violated YouTube’s Terms of Service.<sup>18</sup> Google, which owns YouTube, responded that the video “was clearly within [YouTube’s] guidelines” and thus “will stay on YouTube.”<sup>19</sup> YouTube took steps to block access to the video in several countries, most notably India, Indonesia, Egypt, and Libya.<sup>20</sup>

In the United States, many news outlets picked up the report of the White House’s request to have the validity of the video’s posting and content reviewed under the Terms of Service. An article on the Politico website reported that many speech activists were deeply troubled by the White House’s inquiry.<sup>21</sup> In the article, Eva Galperin of the Electronic Frontier Foundation expressed concern that asking YouTube if the video violated its Terms of Service “sends a message and has a certain chilling effect.”<sup>22</sup> Ben Wizner of the American Civil Liberties Union recognized that although “[there is] no indication that the government is questioning the right of these idiots to make that repellent film . . . it does make us nervous when the government throws its weight behind any requests for censorship.”<sup>23</sup>

These quotations focus on the symbolic statement of such a request, rather than the legal validity of the government’s inquiry. Nevertheless, even a brief look at the user comments section of the various Internet articles on this story reveals a very different sense of the speech implications resulting from the White House’s inquiry. Rather than being concerned about a “chilling effect” the inquiry

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17 David Makamura, *White House Asked YouTube to Review Anti-Muslim Film*, WASH. POST (Sept. 14, 2012, 1:06 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2012/09/14/white-house-asked-youtube-to-review-anti-muslim-film/>.

18 *Id.*

19 John Clarke, *Google, YouTube Refuse White House Request to Pull Anti-Islamic Film*, FORBES (Sept. 15, 2012, 12:14 PM), <http://www.forbes.com/sites/johnclarke/2012/09/15/google-refuses-white-house-request-to-pull-anti-islamic-film/>.

20 *Id.*

21 Josh Gerstein, *Activists Troubled by White House Call to YouTube*, POLITICO (Sept. 14, 2012, 4:49 PM), <http://www.politico.com/blogs/under-the-radar/2012/09/activists-troubled-by-white-house-call-to-youtube-135618.html>.

22 *Id.*

23 *Id.*

could have, some commenters remarked that the inquiry itself was a limit on free speech.<sup>24</sup> Others thought that so long as the government only inquired into the validity of the video posting under YouTube's Terms of Service, but did not demand that the video be removed, no speech infringement had occurred.<sup>25</sup> Many other commenters were outraged at what they identified as the government's double standard in asking about the validity of this video, but not requesting that other similarly offensive videos targeted at other religious or ethnic groups be reviewed.<sup>26</sup> Some disagreed altogether with YouTube's assessment that the video was permissible under its Terms of Service's hate speech prohibition: "[YouTube] encourage[s] free speech and defend[s] everyone's right to express unpopular points of view. But we do not permit hate speech (speech which attacks or demeans a group based on race or ethnic origin, religion, disability, gender, age, veteran status, and sexual orientation/gender identity)."<sup>27</sup> Regardless of which specific position was taken, the comments generally reflect a strong sense that speech such as the video should not be subject to an inquiry of this sort, or if there is an inquiry, there should be a clearer or more consistent policy of not targeting one unpopular or highly offensive viewpoint over others.

While these circumstances of a video having been associated with violent public protests affecting national security were extraordinary, the interaction that took place between the White House and YouTube was quite ordinary for the social media era. The typical process, as indicated in website Community Standards pages,<sup>28</sup> is as follows: one user posts content that another person, either an individual, corporation or government entity, finds problematic or offensive. The offended person contacts the Internet speech forum provider regarding the validity of the posting or requests that the material be taken down. The Internet speech forum provider will then review its Terms of Service to determine if the use or posting violated some provision. Based on this assessment, the content is then either left to stand or is taken down. In the "Innocence of Muslims" case, it was the White House that made an inquiry, but this template of events occurs with

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24 Given that on many of these websites both users and the websites themselves retain the right to delete user comment postings, I have not directly quoted the comments here. See generally the comments section of the articles in *supra* notes 17, 19, and 21.

25 See generally the comments section of the articles in *supra* notes 17, 19, and 21.

26 See generally the comments section of the articles in *supra* notes 17, 19, and 21.

27 *Community Guidelines*, YOUTUBE, [http://www.youtube.com/t/community\\_guidelines](http://www.youtube.com/t/community_guidelines) (last visited Oct. 13, 2013).

28 See *infra* notes 89–94 and accompanying text.

governmental actors and private actors alike.<sup>29</sup> While it may be fair to criticize the White House in this instance for taking action that could chill speech, it would be hard to argue that the government lacked “standing” to contact YouTube. The White House or a private party or a local law enforcement department can make a take-down request because most commercial Internet speech forum Terms of Service agreements allow for these types of complaints from essentially any party.<sup>30</sup>

The user comments mentioned above about the White House’s inquiry reflect a sense that this episode was an example of government intrusion into free speech. That general sense, however, does not parallel the actual legal status of the interaction between the White House and YouTube. The “community standards” that govern appropriate uses and postings in a speech forum like YouTube or Twitter are governed by the Terms of Service, a contract. These contracts stand firmly in the realm of private law, with different legal consequences and different analysis than constitutional law.<sup>31</sup>

*B. The State Action Doctrine Generally and Its Effect  
on Cyberspace Actions*

In the above example, user-commentators expressed the sense that had YouTube removed the “Innocence of Muslims” trailer from its site—though in this particular case it did not—it would have been an infringement on free speech. Legally speaking, that belief is incorrect due to the state action doctrine: “[I]n its least nuanced form, [the state action doctrine] rests on the observation that most constitutional

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29 Erik Wemple, *Twitter-Banned NBC Critic Talks!*, WASH. POST (July 31, 2012, 12:30 AM), [http://www.washingtonpost.com/blogs/erik-wemple/post/twitter-banned-nbc-critic-talks/2012/07/31/gJQA30npLX\\_blog.html](http://www.washingtonpost.com/blogs/erik-wemple/post/twitter-banned-nbc-critic-talks/2012/07/31/gJQA30npLX_blog.html); Amy Willis, *London Olympics 2012: Twitter ‘Alerted NBC to British Journalist’s Critical Tweets,’* TELEGRAPH (July 31, 2012, 8:01 AM), <http://www.telegraph.co.uk/technology/twitter/9440137/London-Olympics-2012-Twitter-alerted-NBC-to-British-journalists-critical-tweets.html>.

30 See, e.g., *General Policy Enforcement*, YOUTUBE, <http://support.google.com/youtube/bin/answer.py?hl=en&answer=92486> (last visited Oct. 13, 2013).

31 It is important to note that there may be very different implications from a public policy or market standpoint if private users are making take-down requests that are being honored. The current Terms of Service regime treats both government take-down requests and private party take-down requests the same. This Note, however, will only focus on the implications of government requests. In either case the user who has content removed will have to challenge the removal on the underlying contract rather than directly against the party who made the take-down request. Private handling (i.e., Internet speech forum take-down actions) of private party requests may be just as problematic for preserving a robust speech culture as government requests.



commandments proscribe only the conduct of governmental actors.”<sup>32</sup> Broadly speaking, though there are some exceptions, only governmental actors have their conduct limited by the prohibitions of the amendments. A private party is able to tell a guest on her land to leave if she does not like something the guest has said, whereas a government employee would face constitutional scrutiny if she were to similarly eject a person from government lands based on things the person was saying.

The First Amendment of the Constitution provides textual support for the state action doctrine by specifying that “Congress shall make no law . . . abridging the freedom of speech.”<sup>33</sup> The Fourteenth Amendment makes the First Amendment enforceable against the states in addition to the federal government.<sup>34</sup> The First Amendment limits the ability of Congress to act, but it makes no mention of private and individual actors. As a result, “the activities of private corporations . . . are not subject to the Constitution because they are not state actors”<sup>35</sup> and courts, with rare exceptions, have refused to enforce constitutional limitations against private actors or to invalidate private agreement provisions on constitutional grounds.

The most notable exception was the case of *Shelley v. Kraemer*<sup>36</sup> where the Supreme Court held that, although private agreements to exclude persons of a certain race from occupying designated real estate does not violate the Fourteenth Amendment, it does violate the Equal Protection Clause of the Fourteenth Amendment for a state court to enforce these racially restrictive covenants. The implication of the *Shelley* holding is that a state court is a “state actor” in this narrow circumstance insofar as it enforces private contract provisions that would be unconstitutional if the legislature had enacted a law with the same substance.<sup>37</sup> Thus, court enforcement of the racially restrictive covenant is “state action” sufficient to satisfy the state action doc-

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32 Paul Schiff Berman, *Cyberspace and the State Action Doctrine Debate: The Cultural Value of Applying Constitutional Norms to “Private” Regulation*, 71 U. COLO. L. REV. 1263, 1266 (2000).

33 U.S. CONST. amend. I (emphasis added).

34 *Id.* amend. XIV; see also *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (making First Amendment guarantees binding on the states by assuming that “freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States”).

35 Berman, *supra* note 32, at 1266.

36 334 U.S. 1, 20 (1948).

37 *Id.* at 11.

trine.<sup>38</sup> This is one of the rare instances where a provision of a private agreement is held to be *unenforceable*—though not invalid—for constitutional reasons.

It is important to note, however, that the court is careful not to say that the provision *itself* violates the Fourteenth Amendment.<sup>39</sup> To so hold would extend constitutional liability to a private actor. The court avoids this and holds that *enforcement* of the provision by the courts would violate the Constitution.<sup>40</sup> In the final result in *Shelley*, the Court left the substance of the private agreement intact, even as it held that it would be unconstitutional for a court to enforce those provisions.<sup>41</sup> The Court explained, “So long as the purposes of [the racially restrictive covenants] are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the [s]tate and the provisions of the [Fourteenth] Amendment have not been violated.”<sup>42</sup> This framing reinforces the status of private agreements and “voluntary” adherence to their terms as being largely outside the scope of constitutional scrutiny.

In light of the state action doctrine, courts have long struggled with the question of whether to enforce constitutional commandments against owners of spaces that *appear* to be public, but are in fact privately owned. In *Marsh v. Alabama*<sup>43</sup> the Supreme Court held that although the town of Chickasaw, Alabama was privately owned, “the corporation’s right to control the inhabitants of Chickasaw is [not] coextensive with the right of a homeowner to regulate the conduct of his guests.”<sup>44</sup> Generally, private property owners are free to exclude others from their land, but Chickasaw was so much like a public town in appearance and function that the court determined that the owners of Chickasaw had limitations on them similar to that of a governmental actor.<sup>45</sup> The operation of “facilities [that] are built and operated primarily to benefit the public . . . is essentially a public func-

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38 *Id.* at 13–16 (discussing the jurisprudence supporting and establishing the idea that the judiciary is one arm through which “the state” acts).

39 *Id.* at 13 (“We conclude . . . that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment.”).

40 *Id.* at 19 (“The difference between judicial enforcement and non-enforcement of the restrictive covenants is the difference . . . between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.”).

41 *Id.* at 13.

42 *Id.*

43 326 U.S. 501 (1946).

44 *Id.* at 505–06.

45 *Id.* at 505–07.

tion.”<sup>46</sup> This holding suggests that if a privately owned space is sufficiently public in character, then the owner of that space might be subject to certain constitutional limitations on use of the property, such as a prohibition on suppressing the speech of people on or using the property.

In practice, however, *Marsh’s* holding has not been construed so expansively. Courts of all levels regularly distinguish from *Marsh* and apply its holding as narrowly as possible.<sup>47</sup>

In the Internet context, this already difficult line between public and private spaces continues to blur.<sup>48</sup> As the user base to any Internet service grows—whether it is America Online, Facebook, or Google—the space where the users most often interact often appears to be more public than private.<sup>49</sup> Users often describe the things they post in these spaces—like a Facebook status update or a YouTube video they made—as something said “in public” as opposed to the colloquially more private interaction of email.<sup>50</sup> Indeed, even the Twitter Terms of Service, essentially a private space with a vast user base, helpfully warn: “What you say on Twitter may be viewed all around the world instantly. You are what you Tweet!”<sup>51</sup> Nevertheless, courts have explicitly declined to apply the de facto public space characterization in *Marsh* to the Internet.<sup>52</sup> Although the Internet

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46 *Id.* at 506.

47 *See, e.g.,* Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 161 (1978) (distinguishing *Marsh* on the basis that “the settlement of disputes between debtors and creditors is not traditionally an exclusive public function,” and quoting Justice Black’s dissent in *Food Employees v. Logan Valley*, 391 U.S. 308, 332 (1968), for the proposition that private property can be treated as though it were public only “when that property has taken on *all* the attributes of a town”); González-Maldonado v. MMM Healthcare, Inc., 693 F.3d 244, 247–48 (1st Cir. 2012) (distinguishing *Marsh* on the basis that, although some governments provide health care, the public function exception applied only to traditionally exclusive public functions, not ones in which the public and private have both been engaged).

48 *See generally* Cyber Promotions, Inc. v. America Online, 948 F. Supp. 436 (E.D. Pa. 1996) (rejecting the notion that America Online was a de facto public space because it did not perform a traditional government function).

49 *People v. Harris (Harris II)*, 949 N.Y.S.2d 590, 592 (N.Y. Crim. Ct. 2012) (“Twitter is a public, real-time social and information network . . .”).

50 Even courts use this language to describe user activity on Internet speech forums. *See id.* at 597–98 (“The Constitution gives you the right to post, but as numerous people have learned, there are still consequence for your public posts. What you give to the public belongs to the public.”). By “public” the court in *Harris II* means widely available with no or low barriers to access or control, not that Twitter is publicly owned by the state or a municipality. Here the court displays the same colloquial usage of public that users do: anything said on Twitter is said “in public.”

51 *Terms of Services*, TWITTER, <https://twitter.com/tos> (last visited Oct. 18, 2013).

52 *Cyber Promotions*, 948 F. Supp. at 451.

“involves public characteristics,” it does not “involve the exercise of any of the municipal powers or public services traditionally exercised by the State so as to constitute a *public system for purposes of the First Amendment*.”<sup>53</sup>

Despite the fact that Internet speech forums are often treated by users and providers alike as public, because the space is privately owned and because media is not a public service traditionally exercised by the state, the state action doctrine will control. Although the users negatively commenting on the White House-YouTube event have the sense that free speech would have been infringed if YouTube had taken the video down, legally speaking, that notion is incorrect. YouTube, as a private and not a *de facto* public actor, would have been free to remove the video since the First Amendment would not apply. A user who wanted to contest YouTube’s hypothetical take-down of the video and sue alleging a violation of Due Process and First Amendment rights would have been very unlikely to be successful since YouTube has not been deemed to be a *de facto* public space and would not fall into the narrow holding of *Shelley*. Because a user agrees to YouTube’s Terms of Service when using the site, the Terms of Service govern the relationship between the user and YouTube. The user’s only recourse to challenge this hypothetical take-down would have been to demonstrate that YouTube breached its Terms of Service agreement by removing something it did not reserve the right to remove.<sup>54</sup>

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53 *Id.*

54 An open question that has remained since *Shelley v. Kramer*, but one that this Note does not address, is: If a court enforcing the racially restrictive covenants at issue in *Shelley* would have violated the Constitution by doing so, does a court similarly violate the Constitution if it enforces contract terms that restrict speech beyond the bounds that a legislature would be able to, even though it is permissible for parties to contract to such terms? So far courts have declined to extend the *Shelley* holding beyond the bounds of that general fact pattern. There are most likely strong and sound policy reasons for courts to decline to extend the holding beyond the racially restrictive covenants in the housing context. Nevertheless, the logical consequence of that holding could seemingly restrict judicial enforcement of contract terms that a legislature could not prescribe without constitutional scrutiny. See PATRICIA L. BELLIA ET AL., *CYBERLAW: PROBLEMS OF POLICY AND JURISPRUDENCE IN THE INFORMATION AGE* 158 (4th ed. 2011) (“*Shelley*’s logic ‘consistently applied, would require individuals to conform their private agreements to constitutional standards whenever, as almost always, the individuals might later seek the security of potential judicial enforcement.’” (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1697 (2d ed. 1988)).

## II. THE EFFECT OF ROBUST PRIVATE LAW IN THE INTERNET CONTEXT

### A. *The Substance and Form of Contracts on the Internet*

There are two main types of contracts a user will encounter on the Internet: “browsewrap” contracts and “clickwrap” contracts. Browsewrap contracts are passive forms of displaying and asserting the Terms of Service.<sup>55</sup> A website will display a link, usually on its homepage or other prominent page, that will take the user to the Terms of Service agreement.<sup>56</sup> The Terms of Service will usually state that by simply using the website, the user agrees to be bound by the stated terms which outline acceptable use of the site and any legal rights the website owner and operators reserve.<sup>57</sup> If the user does not want to accept the terms, her only option is to cease using that site.

“Clickwrap” contracts embody more classical aspects of contract formation, but this is more in form rather than substance.<sup>58</sup> With clickwrap contracts a user will be required to click an “I Accept” button or box before she is able to continue using the site or before she can download software.<sup>59</sup> This puts the user on more formal notice that she is being bound by a Terms of Service agreement. It has been widely noted that very few users actually read such agreements or follow the “terms” link on a webpage.<sup>60</sup> But courts have generally determined that, so long as the user is on notice that terms exist, failure to

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55 See Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 460 (2006) (describing browsewrap contracts as ones “in which the user does not see the contract at all but in which the license terms provide that using a Web site constitutes agreement to a contract whether the user knows it or not”).

56 See *id.*

57 See, e.g., *Terms of Service*, GOOGLE, (last modified Mar. 1, 2012), <https://www.google.com/intl/en/policies/terms/> (“By using our services, you are agreeing to these terms.”).

58 Lemley, *supra* note 55, at 466 (stating that the formalities of clickwrap contracts stretch the traditional notions of a bargained-for exchange with a manifestation of assent since “they substitute a blanket, take-it-or-leave-it assent for the classical notion that the parties actually thought about and agreed to the terms of the deal”).

59 *Id.*

60 See *id.* at 463; see also *7,500 Online Shoppers Unknowingly Sold Their Souls*, FOXNEWS (April 15, 2010), <http://www.foxnews.com/tech/2010/04/15/online-shoppers-unknowingly-sold-souls/> (reporting that the online retailer GameStation updated their Terms of Service on April Fools’ Day 2010 to include an “immortal soul clause” as a spoof about how “[n]o one reads the online terms and conditions”); Matt Warman, *Will You Read Google’s New Privacy Policy?*, TELEGRAPH (Jan. 26, 2012, 7:00 AM), <http://www.telegraph.co.uk/technology/google/9039551/Will-you-read-Google-s-new-privacy-policy.html> (“[Y]ou’re asked merely to confirm that you’ve read [the Terms and Conditions], even though you almost certainly haven’t.”).

read the Terms of Service does not excuse the user from being bound under those terms.<sup>61</sup>

*B. Judicial Deference and the Robust Right of Freedom to Contract*

Thus far in its development, Internet contract jurisprudence is marked by a strong deference to the enforceability of these types of online contracts.<sup>62</sup> Initially these relatively new types of contract formation received a fair amount of judicial scrutiny. In *Specht v. Netscape Communications Corp.*,<sup>63</sup> the Second Circuit determined that an arbitration clause in a license agreement was unenforceable because the way Netscape presented the terms did not put the user on proper notice that the user was assenting to those terms.<sup>64</sup> The court stated that the “contractual nature [of the terms] [was] not obvious” and that the plaintiffs were “unaware that the defendant intended to attach license terms to the use of [the downloaded software].”<sup>65</sup> While this case is still good law, there are differentiating factors of the Netscape license agreement that explain why courts do not generally reach the same result in ruling on the validity of more current Terms of Service agreements. In *Specht*, the user downloaded free software after receiving a prompt or advertisement, but there was no indication to the user that there were terms contained in another window, nor did the software require that the user “accept” the terms by clicking a button.<sup>66</sup> The court held that the mere act of downloading the software did not constitute acceptance of the license terms because the user did not have notice that such terms existed.<sup>67</sup>

Today, companies cure this procedural infirmity by providing a box or button that the user must click when he or she signs up for the service indicating agreement to the Terms of Service. In *Fteja v. Facebook, Inc.*,<sup>68</sup> the court distinguished the Netscape license agreement in *Specht* from the Facebook Terms of Service by noting that Facebook’s “second Sign-Up page’s reference to the Terms of Use appeared immediately below the ‘Sign-Up’ button,”<sup>69</sup> whereas in

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61 *See infra* Section II.B.

62 *See generally* Cohen, *supra* note 16, at 463–97 (comparing the current Internet contract regime to the *Lochner* era of contract ideology and jurisprudence).

63 306 F.3d 17 (2d Cir. 2002).

64 *Id.* at 20.

65 *Id.* at 31–32 (second alteration in original) (quoting *Windsor Mills, Inc. v. Collins Aikman Corp.*, 101 Cal. Rptr. 347, 351 (1972)).

66 *Id.* at 21–22.

67 *Id.* at 32, 35.

68 841 F. Supp. 2d 829 (S.D.N.Y. 2012).

69 *Id.* at 835.

*Specht*, the agreement required the user to scroll down before the term at issue was noticeable.<sup>70</sup> In *Fteja*, the user “was informed of the consequences of his assenting click and he was shown, immediately below, where to click to understand those consequences.”<sup>71</sup> Additionally, the court reasoned that, because social networking users are savvy enough to know what a hyperlink labeled “Terms of Service” will contain, failure to click on the hyperlink and read the terms simply means that the user has failed to inform herself of the contract obligations.<sup>72</sup> The court in *Fteja* offered the opinion that “courts appear to share [the view that clicking ‘I Agree’ is a manifestation of assent], for [c]lickwrap agreements ‘have been routinely upheld by circuit and district courts.’”<sup>73</sup> In dicta, the court in *Fteja* went on to note a difference between Terms of Service agreements, where the user must click a button to assent to the terms, and pure browsewrap agreements, where “the user does not see the contract at all but in which the license terms provide that using a Web site constitutes agreement to a contract whether the user knows it or not.”<sup>74</sup> The court did not opine if it would have held a browsewrap agreement to be unenforceable since that type of agreement was not at issue in the case. Other courts, however, have held even browsewrap agreements to be enforceable despite the very informal nature of “notice” and “acceptance” in that form.<sup>75</sup>

The current regime of contract enforcement on the Internet appears to go beyond a simple adherence to the facial formalities of classic contract law. Several commentators have noted that a strong deference to the agreements of private parties underlies the decisions

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<sup>70</sup> *Specht*, 306 F.3d at 31–32.

<sup>71</sup> *Fteja*, 841 F. Supp. 2d at 840.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 837 (second alteration in original) (quoting *United States v. Drew*, 259 F.R.D. 449, 462 n.22 (C.D. Cal. 2009)).

<sup>74</sup> *Id.* at 837 (quoting Lemley, *supra* note 55, at 460) (internal quotations marks omitted).

<sup>75</sup> *See id.* at 836–39 (summarizing a range of cases that have held browsewrap contracts to be enforceable generally, and specifically the kind of forum selection clause at issue in *Fteja*). One commentator has suggested that a court may be more likely to deem a business user to be on notice of a browsewrap agreement where they might not deem an individual user to be on notice based on the difference of sophistication. *See* Lemley, *supra* note 55, at 477 (positing that the “awareness” of contract terms necessary to make them binding “may be more likely with corporations than individuals, perhaps because . . . they themselves employ terms of use and therefore should expect that others will”).

to uphold these procedurally weak methods of contract formation.<sup>76</sup> Professor Cohen has likened current Internet contract jurisprudence to that of the highly deferential contract jurisprudence in the *Lochner*<sup>77</sup> era. She argues that the same premises of “the sanctity of private property and freedom of contract, [and] the sharply delimited role of public policy in shaping private transactions” are present in “scholarship concerning the relative superiority . . . of common law property and contract rules.”<sup>78</sup> Professor Radin and Professor Wagner note that the arguments for the clear superiority of private ordering in the Internet context stem from a “stylized distinction between bottom-up and top-down ordering.”<sup>79</sup> These types of comments speak not just to the procedure of contract formation, but also to any potential terms within the contract. Because courts, and Internet businesses, most often view private ordering as a way for a complicated web of people to organize their obligations to each other, a court is going to be very hesitant to engage in scrutiny of the substantive terms unless they are egregious. There are sound policy reasons for this deference since courts are less likely than an Internet speech forum provider to know the precise challenges that a global business like Google faces. Thus, so long as a term is not facially unconscionable, it is likely that courts simply do not think it is their role to heavily scrutinize the content of these agreements.<sup>80</sup>

When taken together, these comments describe a system of contract where the scales tip heavily in favor of private ordering because it represents an efficient market at work and a system where the party

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76 See Margaret Jane Radin & R. Polk Wagner, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 CHL-KENT L. REV. 1295, 1297 (1998) (“Some advocates of private ordering . . . argue that cyberspace must either be governed entirely by state-backed law or entirely by non-legal (anarchic) norms, then vote for the latter.”).

77 *Lochner v. New York*, 198 U.S. 45 (1905).

78 Cohen, *supra* note 16, at 464.

79 Radin & Wagner, *supra* note 76, at 1297.

80 The substantive contract terms courts have been willing to scrutinize mainly pertain to a party’s ability to seek legal redress, rather than a term relating to what the user can or cannot do with the product or what action the business can or cannot take in regards to content. See *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593 (E.D. Pa. 2007) (applying California state law and finding substantive unconscionability due to lack of mutuality); *Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165, 1174–77 (N.D. Cal. 2002) (applying California state law and finding substantive unconscionability due to lack of mutuality in part because Paypal reserves the right to alter or amend the provisions while the user is subject to these provisions so long as they are a customer); *Brower v. Gateway*, 246 A.D.2d 246, 255 (N.Y. App. Div. 2000) (finding that the “portion of the arbitration provision requiring arbitration before the ICC to be unconscionable” and remanding for further proceedings).



proffering the standard form contract only needs to follow basic formalities to create a binding “agreement” that lowers friction for both the customer and business. While this slant towards enforceability may be justified by a desire to keep transaction costs on the Internet as low as possible in order to facilitate growth,<sup>81</sup> the effect of this deferential ideology is that users have a steep uphill battle challenging these kinds of contracts in court.

The result is that if our hypothetical YouTube user from the example above wanted to challenge YouTube’s removal of her content, she would face a body of common law on contracts and a deferential stance that favor both the enforceability of the contract formation and its substantive terms. Under the current regime just described it is unlikely—though certainly not impossible depending on the circumstances—that a user would prevail in a Terms of Service challenge.

### III. TERMS OF SERVICE AS A SHIELD TO CONSTITUTIONAL SCRUTINY

#### A. *First Amendment Primacy in Government Direct Action*

When the government directly acts in response to or against speech, such as a government actor firing a public employee for remarks made on the Internet, the use of a contract-governed speech forum does not appear to alter the court’s First Amendment analysis.<sup>82</sup> The broader form of government action against speech is legis-

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81 Lemley, *supra* note 55, at 465 (noting that standard form contracts “can serve useful purposes in reducing transaction costs in mass-market, repeat-play settings”).

82 See *Mattingly v. Milligan*, No. 4:11CV00215(JLH), 2011 U.S. Dist. LEXIS 126665, at \*10 (E.D. Ark. Nov. 1, 2011) (holding that although the Facebook postings at issue took place “primarily to further [the plaintiff’s] private interest in receiving emotional support and affirmation,” the speaker “does not give up her right to free speech simply because her speech is private” (quoting *Sparr v. Ward*, 306 F.3d 589, 595 (8th Cir. 2002))). The more troubling analysis has been when the court engages in the question of whether something done on the Internet counts as a “[ ]sufficient speech to merit constitutional protection.” *Bland v. Roberts*, 857 F. Supp. 2d 599, 603 (E.D. Va. 2012), *aff’d in part, rev’d in part*, 730 F.3d 368 (4th Cir. 2013). In *Bland*, the district court held that someone “liking” a page on Facebook (in that case it was a political candidate’s Facebook page) did not “involve[ ] actual statements” and that “liking” a page “is not the kind of substantive statement that has previously warranted constitutional protection.” *Id.* at 604. While the plaintiff contended that “liking” the page “was a statement of support,” the court states that they would “not attempt to infer the actual content of [plaintiff’s] posts from one click of a button on [the candidate’s] Facebook page.” *Id.* at 603–04. The media attention this holding received indicates that most users’ intuitions about what is occurring when they are “liking” something on Facebook is that they are manifesting their assent and are performing a legally cognizable speech act. See, e.g., Mary Quinn O’Connor, *Lawyer Vows to Appeal*

lation, but thus far there have been few attempts from Congress or the states to expressly limit speech content on the Internet through legislation. Those that have been enacted have been generally unsuccessful. Most notably, in *Reno v. ACLU*,<sup>83</sup> the Supreme Court of the United States invalidated the indecency provisions of the Communications Decency Act of 1996 (“CDA”) for being overbroad.<sup>84</sup> The CDA made criminal the “knowing transmission of obscene or indecent messages to any recipient under 18 years of age.”<sup>85</sup> Justice Stevens, writing for the majority, noted that, “the many ambiguities concerning the scope of the [CDA’s] coverage render it problematic for the purposes of the First Amendment.”<sup>86</sup> Through this ruling, the Supreme Court acknowledged that what takes place on the Internet can be protected speech, and that any congressional attempts to regulate speech on the Internet will receive full First Amendment scrutiny.<sup>87</sup> Provisions in the Providers’ Terms of Service that already restricted the dissemination of the content targeted by the CDA received no attention in the Court’s analysis of the constitutionality of the statute.<sup>88</sup>

*B. Primacy of Contract Law and Terms of Service in Government Indirect Action Through Forum Providers*

Given that the courts apply First Amendment constitutional scrutiny to direct government action that limits speech on the Internet (either through legislation like the CDA or through a tort action for retaliation for speech), the movement of speech from the metaphorical and literal town square to the contract-governed space of Facebook, Twitter, or Google has not substantially affected users’

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*Ruling That Says Facebook ‘Like’ is Not Free Speech*, FOXNEWS (Aug. 14, 2012), <http://www.foxnews.com/politics/2012/08/14/lawyer-vows-to-appeal-ruling-that-facebook-like-is-not-free-speech/>; Jeff John Roberts, *Facebook Says ‘Likes’ Are Free Speech in Sheriff Case*, GIGAOM, (Aug. 7, 2012, 9:23 AM), <http://gigaom.com/2012/08/07/facebook-says-likes-are-free-speech-in-sheriff-case/>; Joanna Stern, *Is a Facebook ‘Like’ Protected Under the First Amendment?*, ABC NEWS, (August 9, 2012, 5:21 PM), <http://abcnews.go.com/blogs/technology/2012/08/is-a-facebook-like-protected-under-the-first-amendment/>. The Fourth Circuit has since disagreed with the district court and stated that “[o]nce one understands the nature of what [the plaintiff] did by liking the campaign page, it becomes apparent that his conduct qualifies as speech,” and described clicking the like button as “pure speech” and “symbolic expression.” *Bland*, 730 F.3d at 386.

83 521 U.S. 844 (1997).

84 *Id.*

85 *Id.* at 859.

86 *Id.* at 871.

87 *Id.* at 874–75, 877–78.

88 *Id.* at 850–51.

rights in those kinds of cases. The user is directly aware of the government's interference, either through the criminal sanction or through the job termination, and so the user can challenge that interference. The Terms of Service play little role, if any, in the analysis. When the government acts indirectly, however, through a request made to the Internet speech forum provider, the Terms of Service stand in between the speakers and the governmental actor.

### 1. Indirection Action and the Role of Forum Providers

Social media platforms and search engines regularly include in their Terms of Service a provision reserving the right to remove content for various purposes.<sup>89</sup> Usually an Internet speech forum pro-

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<sup>89</sup> The following is a snapshot of various content removal reservations in the Terms of Service of popular sites.

Bing:

When you upload your content to the services, you agree that it may be used, modified, adapted, saved, reproduced, distributed, and displayed to the extent necessary to protect you and to provide, protect and improve Microsoft products and services. For example, we may occasionally use automated means to isolate information from email, chats, or photos in order to help detect and protect against spam and malware, or to improve the services with new features that makes them easier to use.

*Microsoft Services Agreement*, BING, § 3.3 (effective Oct. 19, 2012), <http://windows.microsoft.com/en-US/windows-live/microsoft-services-agreement>. The Bing Terms of Service further state:

We may ask you to remove your content from the services if it violates this agreement or the law. Failure to comply may result in loss of access to, or cancellation of, the services or your Microsoft account. Additionally, Microsoft may remove your content without asking you if we determine it's in violation of this agreement or the law, or if we receive a notice of intellectual property infringement from a third party.

*Id.* § 3.6.

Facebook:

If you violate the letter or spirit of this Statement, or otherwise create risk or possible legal exposure for us, we can stop providing all or part of Facebook to you. We will notify you by email or at the next time you attempt to access your account.

*Statement of Rights and Responsibilities*, FACEBOOK (last modified Dec. 11, 2012), <https://www.facebook.com/legal/terms>.

Google:

We may review content to determine whether it is illegal or violates our policies, and we may remove or refuse to display content that we reasonably believe violates our policies or the law . . . . When you upload or otherwise submit content to our Services, you give Google (and those we work with) a worldwide license to use, host, store, reproduce, modify, create derivative works (such as those resulting from translations, adaptations or other

vider will reserve the right to remove content that infringes on copyrights, that violates the community standards guidelines for acceptable use, or that violates a local law.<sup>90</sup> There is often a provision allowing users to make removal requests to the Internet speech forum provider.<sup>91</sup> Although the forums do not provide much data about take-down requests or forum violation reports they receive, the Google transparency report provides one small glimpse, revealing that these requests can come from a number of sources—mainly other users, affected parties, or the government.<sup>92</sup> Based on Google’s report, government take-down requests most commonly take the form of a court order or a request from an executive branch, law enforcement agency, or police department.<sup>93</sup> The take-down system is on the whole a complaint-based system where the forum provider reacts to requests received rather than proactively monitoring content.<sup>94</sup>

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changes we make so that your content works better with our Services), communicate, publish, publicly perform, publicly display and distribute such content.

*Terms of Service*, GOOGLE (last modified Mar. 1, 2012), <https://www.google.com/intl/en/policies/terms/>.

Twitter:

We reserve the right at all times (but will not have an obligation) to remove or refuse to distribute any Content on the Services, to suspend or terminate users, and to reclaim usernames without liability to you. We also reserve the right to access, read, preserve, and disclose any information as we reasonably believe is necessary to (i) satisfy any applicable law, regulation, legal process or governmental request, (ii) enforce the Terms, including investigation of potential violations hereof, (iii) detect, prevent, or otherwise address fraud, security or technical issues, (iv) respond to user support requests, or (v) protect the rights, property or safety of Twitter, its users and the public.

*Terms of Service*, TWITTER (effective June 25, 2012), <https://twitter.com/tos>. For the guidelines of Facebook permissible uses, violation of which could prompt take-down or termination measures, see Community Standards, FACEBOOK, <https://www.facebook.com/communitystandards> (last visited Oct. 26, 2013).

<sup>90</sup> See *supra* note 89.

<sup>91</sup> See, e.g., *How to Report Violations*, TWITTER, <https://support.twitter.com/groups/33-report-abuse-or-policy-violations/topics/122-reporting-violations/articles/15789-how-to-report-violations#> (last visited Oct. 26, 2013) (outlining the procedures that a user must go through to submit a report of a violation).

<sup>92</sup> *Transparency Report, From Governments, FAQ*, GOOGLE, <http://www.google.com/transparencyreport/removals/government/faq/> (last visited Oct. 26, 2013).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* The sole exception to the transparency report and removal request procedures Google lists is for child pornography. Google states it has systems in place to identify and remove such content as soon as Google is made aware of its existence. *Id.* (“[Google’s] policies and systems are set up to identify and remove child pornography whenever [Google] become[s] aware of it, regardless of whether that request comes from the government.”).

Google releases a semiannual “transparency report” intended to provide the public with a better understanding of who is requesting content removal and for what purposes. The rough breakdown tracks both copyright removal requests and government removal requests.<sup>95</sup> Of the government removal requests, Google groups the requests as either emanating from “Court Orders” or from “Executive, Police, etc.”<sup>96</sup> The report categorizes the requests by Google product<sup>97</sup> and the reason for the request.<sup>98</sup> A single request can ask for multiple items to be removed, so Google tracks both requests made and items actually removed.<sup>99</sup>

Focusing on the government take-down requests—which include court orders, as well as informal requests from the executive branch and law enforcement—from July to December of 2009, Google fully or partially complied with 80% of the 123 removal requests it received.<sup>100</sup> From January to June 2010, Google complied with 83% of 128 removal requests.<sup>101</sup> This rose to the high water mark of 87% compliance, with 54 take-down requests, from July to December 2010.<sup>102</sup> The percentage of compliance has dramatically decreased as content removal requests have steeply increased. From January to June 2011, Google received 92 requests to have a total of 757 items removed, and it partially or fully complied with 63% of the requests.<sup>103</sup> For the remainder of 2011, Google received 187 requests to have 6192 items removed and it partially or fully complied with

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95 *Transparency Report, From Governments, United States, Overview*, GOOGLE, <http://www.google.com/transparencyreport/removals/government/US/> (last visited Oct. 26, 2013).

96 *Id.*

97 List of products Google cites: Web Search, Google Earth, Google Maps, Panoramio, Google Places, Google Groups, Google+, YouTube, Blogger, Google Sites, Google Adwords, Gmail, Google Apps. *Id.*

98 List of reasons Google provides: defamation, privacy and security, other, violence, pornography, copyright, trademark, national security, and impersonation. *Id.*

99 *Id.*

100 Each removal request can contain multiple individual items of content to be removed. However, there can be multiple requests within the six-month period to have a single content item removed, and the data as reported does not distinguish that circumstance. Thus this data provides an interesting, rough snapshot into the volume of requests and compliance, but precise delineations from the data are not advisable. *Transparency Report, From Governments, United States, By Compliance Rate*, GOOGLE, <http://www.google.com/transparencyreport/removals/government/US/?metric=compliance&p=2009-12> (last visited Oct. 26, 2013).

101 *Id.*

102 *Id.*

103 *Id.*

42% of the take-down requests.<sup>104</sup> In the first half of 2012, Google received requests to have 4167 items removed, which is an increase of 46% compared to the second half of 2011.<sup>105</sup> Google partially or fully complied with 45% of these requests.<sup>106</sup> Google noted the same compliance rate, 45%, for the second half of 2012.<sup>107</sup>

The transparency report does “not include content removals that [Google] regularly process[es] every day . . . across [Google’s] products for violation of [its] content policies . . . (for example, [Google] do[es] not permit hate speech in Blogger and other similar products)” in response to user complaints.<sup>108</sup> Although Google provides a rough outline of the purpose of the content removal request and the type of governmental entity that requests it, Google does not provide information about which requests in particular it did or did not comply with. As a result, this Note cannot draw any conclusions about the type of requests Google more regularly complies with and from whom.

## 2. The Burden Shifts to Users and Forum Providers

By using any of Google’s (or Facebook’s or Twitter’s, etc.) services, the user agrees to allow Google to make a judgment about whether certain content will be removed. Rather than engaging with the speaker directly and issuing the court order or request for removal to the speaker,<sup>109</sup> the government has the choice simply to go to Google and make its take-down request to the company.<sup>110</sup> The provider may choose not to comply. Most Terms of Service agreements,

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104 *Id.*

105 *Transparency Report, From Government, United States, By Items*, GOOGLE, <http://www.google.com/transparencyreport/removals/government/US/?metric=items> (last visited Oct. 26, 2013).

106 *Transparency Report, By Government, United States, By Compliance Rate*, *supra* note 100.

107 *Id.*

108 *Transparency Report, From Governments, FAQ*, *supra* note 92. If Google were to remove content that it deemed to be hate speech on the request of a user, such a removal would not be included in the transparency report.

109 Based on the Terms of Service of the most popular platforms, most users do have the power and right to delete their own content. *See supra* note 89.

110 There may be policy and practical reasons why a police agency or government actor would choose to go through the Internet forum provider rather than engage with the speaker directly. For example, if someone posted an opinion or rumor that the government believes could threaten national security or would threaten an ongoing criminal investigation, they may not want the user to know that it was their particular agency that requested the content to be removed. Thus Google could provide an anonymity shield for the government actor.

however, state that the provider will comply with lawful processes.<sup>111</sup> Any speech forum provider will most likely be operating within the scope of its Terms of Service agreement if it complies with a court order.<sup>112</sup> If the Internet speech forum provider decides it should not comply with the court order, it will have to push back on its own initiative since the court order will not have been made to the user directly. Obviously an Internet speech forum provider does not have to choose to push back against such a court order and could easily comply with all the ones they receive. As a result, any decision an Internet speech forum provider makes on whether to take legal action in contravention of a court order, or not to comply with an informal request from the government, will reflect some independent policy the company has already adopted or intends to adopt.<sup>113</sup>

A company would have to have sufficient market incentives to be discerning about which court orders it chooses to comply with and which ones it does not. Ultimately, while the practical effect of the request may be the same, compliance or noncompliance with the request, the legal remedies available to the user are significantly altered when the government chooses to make its request to the provider rather than to the user directly.<sup>114</sup> If the government approaches the user directly and requests that the user remove content she has posted or presents a court order requiring removal, then the *user*, not the Internet speech forum provider, can choose not to comply and deal with the consequences; the *user* can subsequently raise her speech rights as a defense to the removal order; or the *user* can sue the government for a First Amendment violation. With no Terms of Service to deflect the inquiry, all of these avenues would provide the user an opportunity to challenge the government's action directly and potentially within a constitutional framework.

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111 See *supra* note 89 and accompanying text.

112 See, e.g., *Terms of Service*, TWITTER, <https://twitter.com/tos> (last visited Oct. 26, 2013) (“We reserve the right at all times (but will not have an obligation) to remove . . . any Content on the Services . . . . We also reserve the right to access, read, preserve, and disclose any information we reasonably believe is necessary to (i) satisfy any applicable law, regulation, legal process or governmental request . . . .”).

113 Unless of course a company is acting arbitrarily with regard to these requests, or on a whim, which is highly unlikely given the nature of the requests involved. If a company has little time and resources to devote to reviewing the requests, the more likely scenario is that the company will simply comply with all requests received.

114 See *infra* subsections III.B.3–4.

### 3. The Insufficiency of the Contract Remedies Available

By making the take-down request to Google or any Internet speech forum provider, the government does not directly act upon the speaker. If the Internet speech forum provider chooses to comply with the request and the user notices the content is missing and wants to challenge the Internet speech forum provider's action, the court's analysis will be rooted in the relationship between the user and the Internet speech forum provider.<sup>115</sup> The court will analyze whether, under the Terms of Service, the Internet speech forum provider reserved the right to remove the content. Since an Internet speech forum provider like Google or Twitter is not a state actor, the user will have to challenge the Internet speech forum provider's removal of the content under a contract theory.<sup>116</sup> The user's ability to vindicate his or her rights under a contract theory will be limited, both by the causes of action available and the court's history of strong deference to contract terms.<sup>117</sup> Under this approach, users will be limited to (a) challenging the Internet speech forum provider's power to remove the content under the contract, (b) arguing the procedural or substantive unconscionability of the contract terms or the underlying contract itself, or (c) contending that the terms should be void for reason of public policy.

First, the user could argue that the terms of the contract did not include the authority to remove the kind of content at issue. Most Internet speech forum providers have some version of a "community standards" policy that governs the limits of acceptable activity on the site.<sup>118</sup> Facebook's policy, for example, reserves the right to remove content in the following categories: violence and threats, self-harm, bullying and harassment, hate speech, graphic content, nudity and pornography, identity and privacy, intellectual property, and phishing

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115 See Berman, *supra* note 32, at 1265–66 (“[I]f America Online wishes to censor a user’s speech from its chatrooms, it can simply eliminate the user’s on-line privileges, regardless of whether the First Amendment would protect that speech.”).

116 *Id.* at 1267–68. Professor Berman notes that in *Cyber Promotions v. America Online*, 948 F. Supp. 436 (E.D. Pa. 1996), the court rested its reasoning in part on the idea that American Online was “not the state and therefore . . . not subject to the commands of the First Amendment.” Berman, *supra* note 32, at 1267–68. This is an example of how the state action doctrine “poses a significant challenge to those who see private regulatory power as a threat to individual rights and public discourse online.” *Id.* at 1268.

117 See *supra* Part II.

118 See *supra* note 89.



and spam.<sup>119</sup> Each category is accompanied by a definition of the offending activity. For example, concerning hate speech, Facebook provides that “[w]hile we encourage you to challenge ideas, institutions, events and practices, we do not permit individuals or groups to attack others based on their race, ethnicity, national origin, religion, sex, gender, sexual orientation, disability or medical condition.”<sup>120</sup> “Attack” is not defined, so this could turn out to be a broad discretionary reservation.<sup>121</sup> The user would have to argue that the removed content could not reasonably be interpreted as constituting one of these categories. This argument is unlikely to be successful given the fairly broad reservation of removal power<sup>122</sup> and the robust deference to freedom of contract most courts have displayed.<sup>123</sup>

Next, a user could argue that the contract term, or that the contract as a whole, was procedurally unconscionable. As discussed in Part II, however, this is a difficult avenue for any user to pursue, because courts have generally held both browsewrap and clickwrap contracts to be enforceable. Given that forum providers take care to present their Terms of Service agreements in such a way as to cure the procedural issues present in early Internet contract cases such as *Specht*, users challenging the Terms of Service on procedural grounds face a formidable task.<sup>124</sup>

The user could also argue that contract terms that substantially limit his or her free speech, especially political speech, should be unenforceable due to public policy. The *Restatement (Second) of Contracts* provides that a provision is unenforceable on public policy grounds “if . . . the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”<sup>125</sup> In weighing the circumstances that could lead to voiding the term, courts take account of “the parties’ justified expectations” and “any special public interest in the enforcement of the particular

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119 *Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards> (last visited Oct. 26, 2013) (“[T]hese standards . . . will help you understand what type of expression is acceptable, and what type of content may be reported and removed.”).

120 *Id.*

121 Or Facebook may be interpreting this reservation narrowly. However, due to the lack of transparency the public cannot know what the extent of this reservation of removal power is or how Facebook is exercising it. And even if Facebook itself interprets this narrowly, a court might not.

122 *See supra* note 89.

123 *See supra* Part II.

124 *See supra* Part II.

125 RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981).

term.”<sup>126</sup> A user could attempt to argue that shifting speech norms—most notably a common shift to speech expression in contract-governed spaces—implicate a need to hold terms that could have a chilling effect on speech to greater scrutiny.<sup>127</sup> Given, however, the vast responsibility that Internet speech forum providers have in maintaining a space that serves a global base of users, limiting the provider’s ability to comply with local law enforcement on an international scale might be unduly burdensome on the provider, and thus public policy would probably cut against the user-speech argument. The difficulty of the public policy considerations present in the Internet speech context is coupled with the high burden required for holding a contract term void for public policy.<sup>128</sup> Given Internet forums’ relative novelty and given the potentially strong countervailing arguments for keeping speech restricting provisions intact, these arguments are unlikely to be successful for a user challenging the substance of the terms in a Terms of Service agreement.

#### 4. Contract Law as a Replacement for First Amendment Scrutiny

This Note has shown that a user will have to attempt to vindicate her right not to have content removed through the filter of the Terms of Service. There are two key implications to this: (1) the burden has effectively shifted to the user to demonstrate his or her ability to post the speech under the Terms of Service, rather than a focus on the power of the government to remove such content; and (2) the change in the legal framework under which the claim will be analyzed from First Amendment scrutiny to a contract law analysis will make it very difficult for a speaker to win.

If an Internet speech forum provider decides not to comply with a government take-down request, it will have to take the action of chal-

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126 *Id.* § 178(2)(a), (c).

127 Professor Radin has proposed that legal decision makers should give great scrutiny to any contractual provision that waives legal rights in the following categories: “(1) rights related to legal enforcement; (2) human rights; (3) rights that are politically weak.” Radin, *supra* note 16, at 9.

128 See CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW 643–47, 654–58 (6th ed. 2007) (explaining that “there is a strong public interest in the freedom to contract and there must be a well established basis for any public policy that would deny enforcement of a contract”). Generally public policy arguments have been in the context of restraints on trade, restraints on legal and medical practices, reasonableness of the covenant, family relations, and legislative declarations. *Id.* at 642–46, 654–55. Private limitations on free speech would appear to be a new area for this argument.

lenging the validity of the government request.<sup>129</sup> There is some evidence that Internet speech forum providers have chosen to do so, but there is little information available regarding these requests. Google occasionally provides anecdotal evidence of its pushback against such requests. For example, in the January to June 2012 report Google stated that they “received five requests and one court order to remove seven YouTube videos for criticizing local and state government agencies, law enforcement or public officials. We did not remove content in response to these requests.”<sup>130</sup> The Google report does not mention if the user was notified that such a request had been made. Further, because requests such as these are made to the Internet speech forum provider and not the user, any dispute over the validity of the take-down request (which could often implicate First Amendment rights in addition to simple procedural mistakes on the part of the government) will take place between the Internet speech forum provider and the government, not the speaker and the government.

Because of the shift to the Terms of Service regime, users of these popular forums are no longer in a position to subject the government’s action to constitutional scrutiny. If the action the Internet speech forum provider took in removing the user’s content was consistent with a valid and enforceable contract, and if a user challenges in court that removal of content, the user’s speech will not be analyzed in light of the First Amendment, but rather under general contract principles. If the government makes the request to the Internet speech forum provider, it will be the Internet speech forum provider, rather than the user, who challenges the government action. The problem with this process is that the forum provider has a very different stake in the outcome of the action than the individual speaker. As a result, a governmental actor may be able to remove more content by interacting with the service provider than it would by approaching the user. This informal process has the potential to broaden the practical reach of the government without subjecting its action to appropriate scrutiny.<sup>131</sup> Effectively, the government can send its request through

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129 See, e.g., *infra* notes 144–48 and accompanying text.

130 *Google Transparency Report, January to June 2012*, GOOGLE, <http://www.google.com/transparencyreport/removals/government/US/?p=2012-06> (last visited Oct. 26, 2013).

131 Given the anecdotal evidence that Google provides in its Transparency Report, it seems as if such overbroad requests may already be taking place. “[Google] received five requests and one court order to remove seven YouTube videos for criticizing local and state government agencies . . . . We did not remove content in response to these requests.” *Id.* The anecdotes do not contain much factual detail and only very few anecdotes are given. From the standpoint of the general public, it is

the washing machine that is the forum provider's Terms of Service and the court's state action doctrine, and it will emerge on the other end as a simple contract claim.

#### IV. THE TERMS OF SERVICE REGIME AND CONSTITUTIONAL VINDICATION

##### A. *Transparency and Market Incentives*

One of the key problems with the current system is that, as the general public, we do not know if the requests the government has been making are constitutionally valid or not. And although Google's Transparency Report has all the indicia of a company sensibly shouldering a responsibility, we do not know if it is making the same pushback choices that those whose speech is implicated would make. As limited as the Google Transparency Report is, Google is one of the only Internet speech forum providers that even creates and disseminates such a report. The majority of Internet speech forum providers do not disclose the requests they have received and the action they took on those requests.<sup>132</sup> All of the companies involved might be acting reasonably given the circumstances. Without more transparency or constitutional scrutiny, however, we do not know if there have been requests made and carried out that, if the governmental actor had made them directly to the user, would have infringed on the user's First Amendment rights.

Thus far, Internet speech forums and search engines have shown they are trying to balance competing global interests. Such competing interests include protecting children and accommodating domestic government interests as well as differing international legal standards.<sup>133</sup> Through pursuing key litigation on behalf of users, filing amicus briefs, and providing transparency reports, Twitter,

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hard to know how broad or reasonable such government requests may be, or how frequent they may be.

<sup>132</sup> Interestingly, in the related context of user information and privacy, rather than removal of user postings, many of the Internet forums expressed a desire to be able to disclose publicly information about government requests for user information. See John Koetsier, *The Full PRISM Letter Google, Yahoo, Apple, Facebook, and Microsoft are Sending Congress*, VENTUREBEAT (July 18, 2013, 12:23 PM), <http://venturebeat.com/2013/07/18/the-full-prism-letter-google-yahoo-apple-facebook-and-microsoft-are-sending-congress/> (noting that many companies have asked for "greater transparency on PRISM, NSA surveillance of Americans, and government requests for data about their customers").

<sup>133</sup> For example, see Facebook's community standards page. *Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards> (last visited, Oct. 4, 2013).

Facebook, and Google have manifested a desire to preserve a robust speech culture on their forums.<sup>134</sup> For example, in an attempt to balance the differing global speech norms, Facebook provides a “community standards” list that is quite similar to the types of restrictions one might find in a homeowners’ association handbook.<sup>135</sup> When one considers the over one billion users Facebook had as of October 4, 2012,<sup>136</sup> having a community standards policy seems to be a fair way to balance competing free speech norms in a global community.

In addition to setting these standards, even when an Internet speech forum provider is not a party to a case that arose on its platform, it often has a strong interest in the judicial determinations that result from controversies arising on its forums.<sup>137</sup> In *Bland v. Roberts*,<sup>138</sup> the district court in the Eastern District of Virginia held that a user clicking the “like” button was not speech.<sup>139</sup> In its amicus brief to the Fourth Circuit, Facebook argued that “liking” something on Facebook is indeed speech because of the way the action manifests the user’s opinion on the forum.<sup>140</sup> Facebook also asserted that in general it “has a vital interest in ensuring that speech on Facebook and in other online communities is afforded *the same constitutional protection* as speech in newspapers, on television, and in the town square.”<sup>141</sup>

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134 See *supra* Part II & Section III.B.

135 For a more in-depth discussion of the similarity of common interest communities and virtual worlds, see Jason S. Zack, Note, *The Ultimate Company Town: Wading in the Digital Marsh of Second Life*, 10 U. PA. J. CONST. L. 225 (2007) (arguing that Second Life serves substantially the same functions to its users that a company-owned town does to its residents, and thus Second Life users should be afforded some constitutional protections).

136 Barbara Ortutay, *Facebook Tops 1 Billion Users*, USA TODAY (Oct. 4 2012, 4:44 PM) <http://www.usatoday.com/story/tech/2012/10/04/facebook-tops-1-billion-users/1612613/>.

137 See *infra* notes 143–48 and accompanying text.

138 857 F. Supp. 2d 599 (E.D. Va. 2012).

139 *Id.* at 603 (“It is the Court’s conclusion that merely ‘liking’ a Facebook page is insufficient speech to merit constitutional protection.”).

140 Brief for Facebook, Inc. as Amicus Curiae Supporting Plaintiff-Appellant Daniel Ray Carter Jr. And in Support of Vacatur at 5–7, *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013) (No. 12-1671), 2013 WL 5228033 [hereinafter Facebook Amicus Brief] (explaining how the “like” button generates content on Facebook “newsfeeds” and how that content manifests a connection between the user the item “liked”). On appeal the Fourth Circuit quoted with approval the Facebook Amicus Brief for its explanation of what message a “like” sends and how the system disseminates that message. *Bland*, 730 F.3d at 385, 386. The Fourth Circuit found that in light of the explanation “it becomes apparent that [liking a Facebook page] qualifies as speech.” *Id.* at 386.

141 Facebook Amicus Brief, *supra* note 140, at 7 (emphasis added).

While these efforts and sentiments may be welcome, ultimately we as a polity should consider if in fact we want the operators of these Internet communities to have to shoulder the responsibility and the burden of guarding free speech on the Internet. Should Google's lawyers have to make these judgment calls about which court orders it should comply with and which take-down requests are reasonable on behalf of the user? Is it optimal for the marketplace of ideas that these Internet communities often have to shoulder the burden of speech related litigation? For example, if at the request of a government entity Google takes down certain content and the user wants to challenge it, the user will have to challenge Google's actions under the Terms of Service rather than sue the government directly.<sup>142</sup> This places a financial burden on the Internet forums of having to be the intermediary, not just for purposes of the requests, but also with respect to subsequent litigation that might arise.

In light of these developments, the key consideration is whether there are sufficient market incentives for Internet speech forum providers to continue to push back against government encroachments on user speech. One such market incentive would be a clear business advantage to being perceived as a forum provider with robust speech policies. Given that users and public commentators have so frequently raised the issue of speech rights, it is highly likely that Internet speech forum providers will want to provide a product that its consumers feel protects their speech norms.<sup>143</sup>

Conversely, an Internet speech forum provider might decide the cost of pushing back against such government requests is too high and so decides to comply with most requests. It is unclear whether these sorts of incentives are going to encourage the kind of action on the part of the Internet speech forum provider that would approximate the level of protection a speaker would receive if the government were to act against the speaker directly under the First Amendment. The lack of transparency in the industry regarding take-down requests and government action seems to suggest that currently it is in the Internet speech forum provider's best business interest not to make this information public, though it may not be in the user's best interest. The reasons for this could be that Internet speech forum providers worry about consumer backlash in instances where the Internet speech

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142 See *supra* Part III.

143 See Facebook Amicus Brief, *supra* note 140, at 1 (stating that Facebook seeks to provide a product "in which Users can engage in debate and advocate for the political ideas, parties, and candidates of their choice").

forum provider chose to comply or the provider has concern for international implications of differing speech norms and laws.

There are a few cases in the privacy context, most notably *People v. Harris*,<sup>144</sup> where an Internet speech forum provider—in that case Twitter—chose to push back against a subpoena and subsequent judicial determination that it felt was contrary to Twitter’s corporate objectives. Currently, speech issues, and even privacy issues, are still very much unsettled law. So long as new and favorable determinations can still be won—such as Facebook advocating for a ruling that the “like” button is speech—Internet speech forum providers have an incentive to stay in the fight. Once the law becomes more settled, and if the emerging doctrine cuts against Internet speech forum providers’ interests, these providers may no longer see the benefit in constantly challenging the government in these areas. Some incentives that currently exist may not last long. Although the Internet speech forum providers have thus far shown some level of willingness to take up the fight for free speech, it is unlikely that those who ratified the First Amendment envisioned that vindication of robust free speech rights against government action would depend on the benevolence of private business entities.

### B. *Free Speech and the Rise of Intermediary Doctrines*

As described in the preceding sections, the Terms of Service contract creates a shield against constitutional scrutiny of some speech-related claims. The effect of this shield is a regime that is roughly analogous to the third party doctrine in the privacy sphere. By choosing to “speak” in a privately governed space, no matter how much that space approximates a public forum, the user relinquishes a whole host of legal rights that, had the user spoken in a public town square, would not have been abrogated. In the privacy context, when a person chooses to entrust her information to a third party, the general rule is that she no longer has a reasonable expectation of privacy in such information.<sup>145</sup> In both of these circumstances, the individual’s

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144 *Harris II*, 949 N.Y.S.2d 590 (N.Y. Crim. Ct. 2012).

145 *See* *United States v. Miller*, 425 U.S. 435, 443 (1976) (“This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third parties will not be betrayed.”). *But see* *United States v. Warshak*, 631 F.3d 266, 287 (6th Cir. 2006) (holding that the defendant did have a reasonable expectation of privacy in his personal emails stored with a third party Internet Service Provider and distinguishing from *Miller* in that personal emails are not simple business records).

rights are altered by entrusting her information or speech to a third party.

In the non-Internet context, using a publishing intermediary such as a newspaper or broadcast news does not result in the abrogation of a constitutional analysis of attempts to interfere with that speech.<sup>146</sup> In the online context, however, because of the Terms of Service,<sup>147</sup> the contract analysis will govern.<sup>148</sup> This contract analysis would not govern speech in the context of a town square, in a published op-ed, or in a broadcast editorial because there is no contract at issue.<sup>149</sup> Once a speaker decides to use the Internet as the medium for her speech, by clicking on the Terms of Service she is essentially agreeing that in the vast majority of circumstances the contract, not the Constitution, will control with respect to interference with that speech.<sup>150</sup>

In the privacy context, it is an open question to what extent putting your personal information in the hands of a third party, like Gmail, does or does not allow for a reasonable expectation of privacy.<sup>151</sup> The use of the Internet medium may limit some privacy rights because by using this technology, which necessitates the use of a third

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146 See, e.g., *FCC v. Pacifica Found.*, 438 U.S. 726, 749–50 (1978) (holding that, of all the popular forms of communication available at the time, broadcasting has the most limited First Amendment protection because of the inherent scarcity of the medium); *Bazaar v. Fortune*, 476 F.2d 570, 580–81 (5th Cir. 1973) (holding that the university could not censor the contents of an English literary magazine); *Dean v. Utica Cmty. Sch.*, 345 F. Supp. 2d 799, 813–14 (E.D. Mich. 2004) (holding that a student newspaper was a limited public forum and that suppression of an article in that newspaper constituted a violation of the First Amendment).

147 Of course, those terms must fit the current jurisprudence of what constitutes a reasonable Internet contract term. Given the robust reading of freedom to contract currently applied towards clickwrap or browsewrap contracts it is highly likely most terms will be enforceable. See Cohen, *supra* note 16, at 480–90.

148 See Radin, *supra* note 16, and Seltzer, *supra* note 16, for a discussion of the superseding power of Terms of Service, particularly in the context of copyrighted speech.

149 *C.f.* Lemley, *supra* note 55, at 466 (noting that in the offline context most consumer transactions, such as those in a grocery store, do not involve contracts, whereas almost all Internet consumer transactions do).

150 Arguably, that a contract could have this effect on the user without the user realizing the speech implications is at least as troubling as an arbitration clause that is essentially hidden within the contract. See *Bragg v. Linden Research, Inc.*, 487 F. Supp. 2d 593, 606–11 (E.D. Pa. 2007) (holding that the arbitration clause in the Second Life Terms of Service was procedurally and substantively unconscionable both because the Terms of Service agreement was a contract of adhesion and because the arbitration clause forced the weaker party to arbitrate but gave the stronger party the choice of forum, and thus had a lack of mutuality).

151 See *supra* note 145 and accompanying text.



party,<sup>152</sup> users put their information into the hands of others, which places the secrecy or dissemination of that information at the mercy of that third party.

In effect, the Terms of Service regime seemingly imports this notion into the First Amendment context. In choosing to use an Internet platform owned by someone else for the dissemination of her speech, the user involves a third party, which almost invariably means the user agrees to some kind of contract. This contract creates the First Amendment equivalent of the privacy third party doctrine. It does so through the Internet speech forum provider's reservation of the right to store and remove content for certain reasons, including the removal of content pursuant to government take-down requests.

By speaking in a contract-governed space, free speech is subject to a buyer-beware regime where users must pick which third party to entrust their speech to, which third party will be most likely to protect their speech against government intrusion, and which third party will be least likely to interfere with the speech themselves.<sup>153</sup> This begins to resemble the "reasonable expectation of privacy" analysis in Fourth Amendment jurisprudence.<sup>154</sup> Do users have a reasonable expectation of protection from non-interference with their speech when they entrust it to an Internet speech forum and agree to a Terms of Service contract? While this Note is not suggesting that this is the way a court should analyze a First Amendment case concerning the Internet, since expectations are not a factor in First Amendment inquiries, it is a question that is being raised in the public discussion on Internet speech.<sup>155</sup>

The effects of using an intermediary become more apparent if one imagines a scenario in which an Internet speaker acts without an Internet speech forum provider of any kind. If a user owned a

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152 Unless of course the user is the owner of a fiber-optic network and Internet service provider, which is highly unlikely to say the least.

153 See Berman, *supra* note 32, at 1281 ("Such private law [like Terms of Service] will create, in effect, a free market in law. People will vote with their browsers by flocking to those sites or providers whose law they find acceptable.").

154 See *Katz v. United States*, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring) (articulating the reasonable expectation test later courts widely adopt: "first . . . a person [must] have exhibited an actual (subjective) expectation of privacy and second, that the expectation be one that society is prepared to recognize as 'reasonable'").

155 Matt Buchanan, *Freedom of Speech Doesn't Exist on Twitter (or Any Social Network)*, BUZZFEED (July 30, 2012, 5:49PM), <http://www.buzzfeed.com/mattbuchanan/freedom-of-speech-doesnt-exist-on-twitter-or-any> (arguing that speech is not free on the Internet because social networks can take down or limit speech as they see fit and at the request of private parties who might dislike what was said).

domain name, designed, developed, and programmed her own website, and if the government had an issue with content on that site, the government would have to make their take-down request, or issue a court order, to *the speaker herself*. The speaker, if she wanted to challenge the government's take-down request or court order, could bring an action against the government. In this scenario, the speaker has the full arsenal of First Amendment jurisprudence and legal remedies available to challenge the government's action.<sup>156</sup>

If that same speaker puts the same content on Twitter, however, by using the third party the speaker can only challenge *the provider's* take-down of the speech in the context of the Terms of Service and under general contract law principles.<sup>157</sup> And only *the provider* would be in a position to push back against the government.<sup>158</sup> In effect, by putting the speech in the hands of the Internet speech forum, the user may be unknowingly abrogating speech rights, given that subsequent interference with her speech is unlikely to be analyzed as a First Amendment issue.<sup>159</sup>

For most ordinary citizens, owning and developing their own website is not a realistic possibility due to lack of technical education, time, or access to resources. But the effect of the user agreement, the state action doctrine, and private ordering functionally may require speakers to be web developers and independent operators in order to have full speech protection on the Internet. By using these platforms

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156 See *supra* Section III.A.

157 See *supra* Section III.B.

158 In the privacy context one court has explicitly rejected the user's common notion that any party who sought disclosure of their content would have to make the request of the user themselves. This furthers the crystalizing norm that on the Internet, the forum provider is not just the content intermediary but the legal intermediary: "The widely believed (though mistaken) notion that any disclosure of a user's information would first be requested from the user and require approval by the user is understandable, but wrong." *People v. Harris (Harris I)*, 945 N.Y.S.2d 505, 509 (N.Y. Crim. Ct. 2012).

159 Interestingly, in the privacy context courts are still willing to analyze the user's reasonable expectation in light of what the Terms of Service agreement provides. As a result, the Terms of Service agreement is still only an element of one's expectation of privacy. Analytically, it does not replace it. However, functionally, the Terms of Service agreement has begun to supplant reasonable expectations because so long as the contract is drawn broadly and the contract is enforceable, the user cannot have a reasonable expectation in privacy they did not contractually retain. So while the Terms of Service agreement is powerful in Fourth Amendment Internet jurisprudence, it has not replaced it. See *Harris II*, 949 N.Y.S.2d 590, 593 (N.Y. Crim. Ct. 2012) ("[In the previous case t]he court's decision [that the user did not have standing to quash the subpoena] was partially based on Twitter's then terms of service agreement.").

and involving an outside party, the user limits her access to First Amendment analysis and protection. This happens in a medium currently most apt to give life to the stated purpose of the First Amendment: to preserve a “marketplace of ideas.”<sup>160</sup>

The comparison to the privacy context also illuminates the concern about the burden of litigation being placed on the Internet speech forum provider. This burden has already emerged with respect to privacy litigation surrounding Internet speech forum providers. In *Harris I*, the court rejected the defendant’s attempt to block the production of his Twitter posts, holding that a criminal defendant does not have standing to quash a subpoena made to Twitter, a third party, for production of his tweets.<sup>161</sup> It is up to Twitter to challenge such information production requests in court. With hundreds of millions of users, can Twitter effectively review all subpoenas issued for users’ tweets and move to quash all those that it does not feel it should comply with?<sup>162</sup>

Additionally, there is a key difference between the ability of the government to act in the Internet privacy context on one hand and the Internet speech context on the other. The Stored Communications Act (“SCA”) provides a framework and a process to which any government actor must adhere if it seeks access to electronic records.<sup>163</sup> The legislative process has ensured a level of legal formal-

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160 *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

161 *Harris I*, 945 N.Y.S.2d at 510–11.

162 At least one court has not felt that the sheer volume of an Internet speech forum like Twitter merits legal distinction or a reconsidering of the standing analysis in light of technological advancement. In *Harris II*, the court stated that Twitter’s burden of supplying the information or attempting vindicate user rights in court “is placed on *every* third-party respondent to a subpoena.” *Harris II*, 949 N.Y.S.2d at 593.

163 See 18 U.S.C. §§ 2701–2711 (2006). The SCA states:

(1) A governmental entity may require a provider of remote computing service to disclose the contents of any . . . electronic communication . . . (A) without required notice to the subscriber or customer, if the governmental entity obtains a warrant issued using the procedures . . . or (B) with prior notice from the governmental entity to the subscriber or customer or if the governmental entity (i) uses an administrative subpoena . . . or (ii) obtains a court order for such disclosure under subsection (d) of this section . . .

*Id.* § 2703(b)(1). The court in *Warshak* held that “to the extent that the SCA purports to permit the government to obtain such emails warrantlessly, the SCA is unconstitutional.” *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010). Though the ultimate fate of § 2703 at issue in *Warshak* is undecided, the larger point is that both the legislature and the courts have imposed significant process requirements on a governmental entity seeking a person’s electronically stored information from a third party. No such procedural requirements have been enacted for a governmental entity seeking removal of content from an Internet speech forum provider.

ity to which government requests to obtain information from third party providers must adhere that is absent in the government take-down request context.<sup>164</sup> As the regime now stands, the Terms of Service agreement provides the government the opportunity to make a very informal request to the Internet speech forum provider and see if it will comply. Currently there is no requirement in the general Terms of Service regime that government entities must seek some sort of judicial process to request the removal of content.<sup>165</sup> There is certainly no statutory regime, outside of the copyright context, requiring legal process before the government makes a take-down request to an Internet speech forum provider.

Courts can bypass the First Amendment implications present in such speech entirely in favor of analyzing it as an information storage issue because on the Internet all speech is committed to a digital form of “information.” In *Harris I*, the court addressed the question of “whether a criminal defendant has standing to quash a subpoena issued to a third-party on-line social networking service seeking to obtain the defendant’s user information and postings.”<sup>166</sup> In that case, the Twitter user posted tweets that could have potentially served as evidence of the user’s alleged participation in the Occupy Wall Street protests.<sup>167</sup> The user was charged with disorderly conduct after he allegedly marched on the roadway of the Brooklyn Bridge.<sup>168</sup>

In its analysis in *Harris I*, the court subsumed the relevant First Amendment considerations into a privacy analysis. The *Harris I* court likened Twitter’s role to that of a bank holding a customer’s bank records, as in the famous Fourth Amendment case *United States v. Miller*.<sup>169</sup> After the court in *Harris I* ruled that the user had no standing to quash the subpoena in light of the third party doctrine, Twitter itself then sought to quash the subpoena in *Harris II*.<sup>170</sup> In analyzing the privacy issue, the *Harris II* court framed it slightly differently, while still citing *Miller* as authority<sup>171</sup>: “[p]ublication to third parties is the issue” since there can be “no reasonable expectation of privacy in a

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164 See *supra* note 95. As the Google transparency report shows, some government requests do come in the form of a court order of some type, but many are simply take-down requests pursuant to the Terms of Service.

165 See *supra* note 89.

166 *Harris I*, 945 N.Y.S.2d at 507.

167 *Id.* at 506.

168 *Id.*

169 425 U.S. 435 (1976).

170 *Harris II*, 949 N.Y.S.2d 590, 591 (N.Y. Crim. Ct. 2012).

171 *Id.* at 594–95.

tweet sent around the world.”<sup>172</sup> Taking this further, the *Harris II* court gives an example of a man shouting a statement that could indicate criminal activity into the street and a passerby being asked to testify as a witness at trial.<sup>173</sup> In this analogy “the street is an online, information superhighway, and the witnesses can be the third-party providers like Twitter, Facebook, Instagram, Pinterest, or the next hot social media application.”<sup>174</sup>

In the context of shouting into a street, while it cannot reasonably be contended that such speech is private, the hypothetical passerby is also not being held out as the owner or storage facility of the information they have heard. Their role is merely that of a witness to the speech, not a repository of information. Twitter, in the eyes of the *Harris II* court, is both. Twitter, and by reasonable extension any Internet speech forum or social networking site, plays the role of megaphone, street, passerby, tape recorder, and archivist. In the court’s reasoning “information” begins to sound like a euphemism obscuring the issue that this “information” is actually the digital manifestation of the user’s speech.<sup>175</sup> This is significant because a relevant consideration in most First Amendment cases is whether a regulation or government action will have a chilling effect on speech. In the bank-records case, *Miller*,<sup>176</sup> it was not a legal or social concern for the court whether denying a person standing to quash production of their bank records would have a chilling effect on citizens’ availing themselves of banks. Denial of standing to quash a subpoena to produce one’s tweets or Facebook posts, and having to rely on the forum provider to act on the user’s behalf, may make users think twice about using an Internet speech forum to disseminate their speech. By failing to recognize some key differences between speech postings on a private but quasi-public forum and bank records, the court did not take into account the unique speech implications present and the potential chilling effects its holding could produce.

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172 *Id.* at 593.

173 *Id.* at 594.

174 *Id.*

175 As noted by the court, the information at issue is both “non-content information such as IP addresses, physical locations, browser type, subscriber information, etc. and content information such as tweets.” *Id.* at 593.

176 425 U.S. 435 (1976).

C. *Potential Solutions: Statutory Regime, Expanded Contract Analysis, or Both*

In light of the increasing similarities between the role the third party Internet speech forum provider plays in both privacy and content take-down requests, one possible solution to regain the balance of speech rights in the Internet context is some statutory regime that operates similar to the Stored Communications Act.<sup>177</sup> Under the SCA, a governmental entity seeking action on the part of the Internet speech forum provider is required by law to take certain formal steps.<sup>178</sup> The governmental actor can obtain either an undisclosed warrant or a disclosed court order or subpoena.<sup>179</sup> In the hypothetical speech process statute, the government could be required to submit actual notice to the user when the government requests a take-down of content from the third party Internet speech forum provider.<sup>180</sup> Or, similar to the SCA, the government could be required to first seek a court order for the take-down, with a requirement that it would have to show certain statutorily prescribed elements demonstrating the legal authority to remove the speech at issue. Given the attention that Congress has given to restraining government action in the Fourth Amendment context, more formal requirements for the government with regard to First Amendment rights on the Internet could similarly be prescribed.

The other option is for courts to consider a wider expanse of public policy considerations when ruling on the substantive elements of online Terms of Service. Given the high level of deference courts give to the enforceability of Terms of Service, and in the absence of congressional restraints on government take-down requests, contract law as it stands provides very little relief for a user who seeks to bring the contract terms in line with his or her constitutional rights.

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177 18 U.S.C. §§ 2701–11 (2006).

178 *See supra* note 163.

179 *Id.*

180 There are of course complications that would arise in this. The government may not know the actual name or contact information of the user but rather just a username. Thus the Internet speech forum provider would have to be willing or would have to be required to “unmask” the user so that the government could provide the user with notice of their take-down request. This might implicate and infringe upon the so-called “right to be anonymous.” We will want to consider as a polity whether the right to be anonymous trumps the desire to enforce speech rights against the government. These considerations would ultimately need to be balanced in the effort to give users the ability to push back against government take-down requests.

## CONCLUSION

As a descriptive matter, the users mentioned in Part I of this Note were incorrect in believing that the White House's request to have the "Muslim Innocence" video reviewed under the YouTube Terms of Service was an infringement upon Free Speech. As a normative matter, however, those user intuitions closely track the present need to protect both individual speech acts on the Internet and a robust speech culture generally. In today's online context, the proverbial "town square" now exists on Twitter, on Facebook, on YouTube, and on future speech platforms not yet invented. As a result so much of our speech occurs in a "private law" space—that is, a sphere where the Internet speech forum provider has the power to dictate what speech it deems appropriate and what speech it reserves the right to remove, even when this decision does not align with the First Amendment. This has created a system where the government, by making take-down requests, can effectively reach speech that it would be unconstitutional for it to reach directly. The fact that the user has the ability to challenge the take-down through the contract terms is cold comfort. Nevertheless, it is beneficial for the legal system and our speech culture that users continue to raise the issue of "speech rights" on the Internet whether or not the Constitution technically controls in the instant case, as in the White House-YouTube incident described in Part I. As Professor Berman has urged, "we should focus on the Constitution's constitutive role in our cultural life, regardless of whether that life is lived in the public or private sphere."<sup>181</sup> We should not allow our norms in favor of the freedom to contract to impede our ability to vindicate basic constitutional rights against government overreach, regardless of how that interference is effectuated.

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181 Berman, *supra* note 32, at 1289.