

FACEBOOK: THE NEW TOWN SQUARE

I. INTRODUCTION

Once only a part of science fiction and the imagination, the idea of a virtual community is now a reality.¹ The question, however, is how the First Amendment applies to this new reality.² Centered on self-expression and the sharing of content,³ social networking sites (SNS) are now one of the strongest avenues for self-expression and are dependent upon freedom of speech.⁴

Since SNS exploded onto the technology scene in the late 1990s, people have flocked to them, and they have become increasingly prevalent.⁵ Of the SNS available, Facebook has become far and away the most popular.⁶ In fact, Facebook has become so well-liked and so important in

1. Peter Sinclair, *Freedom of Speech in the Virtual World*, 19 ALB. L.J. SCI. & TECH. 232 (2009).

2. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

3. *Social Networking*, Investopedia, <http://www.investopedia.com/terms/s/social-networking.asp> (last visited Oct. 12, 2014).

4. Pialamode314, *Web Event 1: Self-Expression and Gender Identity on Facebook*, SERENDIP STUDIO (Oct. 05, 2013, 1:07 PM), <http://serendip.brynmawr.edu/exchange/critical-feminist-studies-2013/pialamode314/web-event-1-self-expression-and-gender-identity-facebook> (noting that people use Facebook to express themselves, and have “freedom to customize their Facebook profiles to portray the person they believe themselves to be, or aspire to be . . . I have found a way to proudly express my identity to my ‘friends’ as it changes”).

5. *Social Networking Statistics*, STATISTIC BRAIN (Jan. 1, 2014), <http://www.statisticbrain.com/social-networking-statistics/> (Facebook has 1.4 billion users); *see also* Maeve Duggan and Aaron Smith, *Social Media Update 2013*, PEW RESEARCH INTERNET PROJECT (Dec. 30, 2013), <http://www.pewinternet.org/2013/12/30/social-media-update-2013/> (73% of online adults now use social media, and 71% of online adults use Facebook daily); *see also More Than 2 Billion People Use the Internet, Here’s What They’re Up to Infographic*, THE CULTURE–IST (May 9, 2013), <http://www.thecultureist.com/2013/05/09/how-many-people-use-the-internet-more-than-2-billion-infographic/> (three of the top five viewed websites in the world are SNS, and Facebook is number three overall).

6. *See* Duggan & Smith, *supra* note 5 (73% of online adults now use social media, and 71% of online adults use Facebook daily); *see also* THE CULTURE–IST, *supra* note 5 (three of the top five viewed websites in the world are SNS, and Facebook is number three overall); *see also Top 15 Most Popular Social Networking Sites*, EBIZ MBA (Mar. 2014), <http://www.ebizmba.com>

American culture that in 2010, *Time Magazine* awarded Facebook founder, Mark Zuckerberg, with the magazine's Person of the Year honor.⁷ In doing so, *Time* cited the online network's ability to connect more than half a billion people worldwide, reshape relationships, and expand the ability for people to express themselves and share information.⁸

In the four years since the award, the number of Facebook users nearly tripled, and as of January 2014, Facebook had 1.4 billion active users.⁹ These statistics evidence that nearly 20% of the world's population uses Facebook.¹⁰ Facebook use has become so widespread it is credited with bringing down despotic administrations and putting budding revolutions into the public eye after being ignored by mainstream media.¹¹ Facebook gives people "a tool to speak freely, loudly, and instantly, to neighbors and friends in the streets of crumbling capitals as well as to a worldwide audience."¹²

Every day, over 100 million Americans log in to Facebook and are inundated with the remarks, comments, photographs, and ideas of others, while also sharing their own with the entire Facebook community.¹³ Some users, unfortunately, are even bullied, leading to a recent increase in teen suicides linked to Facebook.¹⁴ In response, organizations are calling for the regulation of speech online, and specifically, on SNS.¹⁵ The question

/articles/social-networking-websites (Facebook, which ranks number one most popular social network, has three times more monthly users than number two, Twitter).

7. See Lev Grossman, *Person of the Year 2010: Mark Zuckerberg*, TIME (Dec. 15, 2010), available at http://content.time.com/time/specials/packages/article/0,28804,2036683_2037183,00.html.

8. See *id.*

9. See STATISTIC BRAIN, *supra* note 5.

10. *U.S. and World Population Clock*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/popclock/> (the world's population is just over seven billion) (last visited Oct. 19, 2014).

11. See Leigh Ellen Gray, *Thumb War: Facebook Like Button and Free Speech*, 7 CHARLESTON L. REV. 447 (citing Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, 90 FOREIGN AFF. 28, 30 (2011)).

12. *Id.*

13. Kurt Wagner, *More Than 40% of Americans Use Facebook Every Day*, MASHABLE (Aug. 13, 2013), <http://mashable.com/2013/08/13/40-percent-americans-use-facebook-every-day/>.

14. Harriet Akrell, *Coroner Warns of Dangers of Facebook After Student, 19, Targeted by Young Women Bullies Online Hanged Himself*, THE DAILY MAIL (Nov. 26, 2013), <http://www.dailymail.co.uk/news/article-2513782/Facebook-bullies-led-suicide-student-19-hanged-himself.html>.

15. Ellen Coyne, *Cyberbullying Websites Should be Boycotted, Says Cameron*, THE GUARDIAN (Aug. 8, 2013), <http://www.theguardian.com/society/2013/aug/08/cyberbullying-websites-boycotted-david-cameron>; see Jillian C. York, *Facebook Should Not be in the Business of Censoring Speech, Even Hate Speech*, SLATE (May 30, 2013, 9:58 AM), http://www.slate.com/blogs/xx_factor/2013/05/30/facebook_and_hate_speech_the_company_sho

remains, however, the extent to which Facebook could and should be able to actually regulate its users' speech.

Some argue certain types of digital correspondence on Facebook, such as Likes and Comments, should be free speech and protected from third-party regulation.¹⁶ These writers often argue from a viewpoint that assumes Facebook is a public forum, without actually analyzing that issue.¹⁷ Moreover, courts have held that users' Likes and Comments on Facebook are protectable speech, free from third-party regulation.¹⁸ They, too, however, have not determined whether users' speech is free from regulation by Facebook.¹⁹ These writers and courts glance over one of the most important issues of free speech on Facebook – whether Facebook should be analyzed under the quasi-municipality doctrine and be treated as a public forum for First Amendment purposes.

Conceptual problems arise because of the emergence of virtual communities and their integration into our current legal system.²⁰ The problem is in determining how “real world legal concepts of property and citizenship apply to an intangible world made up of zeros and ones.”²¹ Like a corporate town,²² Facebook has created a community – through its environment and user experience – that has taken on quasi-municipal characteristics and become a public forum. Thus, Facebook should be analyzed under the quasi-municipality doctrine, which allows for the

uld_not_be_in_the_business_of_censorship.html (“The recent campaign by a number of women’s rights groups, most prominently Women, Action & the Media, to push Facebook to take anti-woman hate speech more seriously was, as Amanda Marcotte wrote yesterday, incredibly swift and effective, garnering a response from the social media giant in less than a week.”).

16. See Clay Shirky, *The Political Power of Social Media: Technology, the Public Sphere, and Political Change*, 90 FOREIGN AFF. 28, 30 (2011); see also Gray, *supra* note 11, at 449.

17. See generally Gray, *supra* note 11.

18. See *Bland v. Roberts* 730 F.3d 368 at 386 (holding Liking something on Facebook qualifies as pure speech); see also *Mattingly v. Milligan*, No. 4:11CV00215, 2011 WL 5184283, at 2-3, 5, 8 (E.D. Ark. Nov. 1, 2011) (the court denied summary judgment reasoning that the Facebook user’s posts were protected speech). A number of other courts have also held that comments posted to Facebook qualify as speech. See, e.g., *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 523 (Minn. 2012); *United States v. Michael*, No. 2:12-cr-1-WTL-CMM, 2012 WL 4796629, at 2 (S.D. Ind. Oct. 9, 2012); *R.S. ex rel. SS v. Minnewaska Area Sch. Dist.* No. 2149, No. 12-588, 2012 WL 3870868, at 10 (D. Minn. Sept. 6, 2012); *Stein v. Dowling*, 867 F. Supp. 2d 1087, 1096-98 (S.D. Cal. 2012); *United States v. Elonis*, No. 11-13, 2011 WL 5024284, at 1-3 (E.D. Pa. Oct. 20, 2011); *Gresham v. City of Atlanta*, No. 1:10-CV-1301-RWS, 2011 WL 4601020, at 2 (N.D. Ga. Sept. 30, 2011).

19. After searching Westlaw, Lexis, and Google, I have been unable to find any case law that touches on the subject of speech regulation between Facebook and its users.

20. See Sinclair, *supra* note 1, at 233.

21. *Id.*

22. See generally Marsh v. Alabama, 326 U.S. 501, 508 (1946).

application of freedom of speech protection on certain private property.²³ As will become evident, Facebook's scope and control, coupled with the nature of the users, the users' speech within the platform, and the lack of any reasonable alternative avenues of speech, warrant extending the quasi-municipality doctrine.²⁴ This protection would require Facebook's regulations be content-neutral or pass strict scrutiny.²⁵

Section II of this note gives a background on Facebook, inspects the large-scale adoption of the platform within the United States, and discusses the potential uses of the community. Section III examines the evolution of the quasi-municipality doctrine. Section III begins in Part A with an analysis of *Marsh v. Alabama*, which introduced the quasi-municipality doctrine and laid the groundwork for a private company being considered a public forum. In Part B, the cases following *Marsh v. Alabama* – referred to as the *Shopping Mall Cases* – are analyzed and the rollercoaster ride that has been the quasi-municipality doctrine continues. Section IV subjects Facebook to the factors of the quasi-municipality test, and determines that Facebook is the appropriate place for the application of freedom of speech protection. Additionally, Section IV discusses why federal jurisdiction is more apt to handle the quasi-municipality doctrine when related to Facebook. Moreover, Section IV touches on policy concerns regarding Facebook, and why its purpose distinguishes it from the Shopping Mall Cases, and considers how Facebook has changed the Internet experience from a unilateral to a multilateral interaction.

23. See *id.* at 509.

24. See *infra* Part IV.

25. See generally Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in Federal Courts*, 59 VAND. L. REV. 793, 800-1 (2006) (providing a general overview of strict scrutiny: if a restriction on speech is content based, i.e., a restriction on the actual content on the speech, the restriction must pass strict scrutiny, the most stringent standard of judicial review. Strict scrutiny requires the restriction to justify a compelling government interest, be narrowly tailored to achieve that interest, and be the least restrictive means for achieving that interest; see also Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987) (providing a general overview of content-neutral restrictions: if the restriction is content neutral, it must be a reasonable time, place, manner restriction that serves an important government interest and leaves open ample alternative means of expressions; if a licensing scheme or permit, the regulation must serve an important government purpose, provide adequate criteria to limit discretion of those executing it, and must provide procedural safeguards such as judicial oversight; and the regulation must be narrowly tailored, though not necessarily the least restrictive means); it is important to note Facebook's regulations of speech will almost always be content based because they will be restricting the content of the expression.

II. FACEBOOK: WHAT IT IS, WHERE IT CAME FROM, AND HOW IT IS USED

Conceived in a Harvard University dorm room in 2004 by Mark Zuckerberg,²⁶ Facebook, or “The Facebook”²⁷ as it was originally titled, was created in order to allow people “to share and connect with people . . . in the world’s biggest community online.”²⁸ Originally considered “a place for friends,”²⁹ enrollment was limited to the Harvard community; however, that soon changed and enrollment expanded immediately.³⁰ Starting in August 2005, high school students could sign up, and by September 2005 it spread to university students worldwide.³¹ Finally by September 2006, the network was open to anyone with a registered e-mail address and free to join.³² Since opening its doors to the general public, Facebook has become the premier online destination for connection and self-expression.³³

A. *How the Flagship SNS Operates*

Today, each Facebook user has his or her own “Timeline,”³⁴ which Facebook defines as, “your collection of the photos, stories, and experiences that tell your story.”³⁵ The story the users tell on their Timelines is done through sharing photos, personal information, or ideas through status updates.³⁶ When a user shares an idea through picture or text by updating her status, that idea is shared with the entire Facebook community, unless the user limits the audience to a specified group.³⁷ Once

26. See *Mark Zuckerberg Biography*, BIOGRAPHY.COM, <http://www.biography.com/people/mark-zuckerberg-507402> (last visited Oct. 19, 2014).

27. Sarah Phillips, *A Brief History of Facebook*, THE GUARDIAN (July 25, 2007), <http://www.theguardian.com/technology/2007/jul/25/media.newmedia>.

28. Mark Zuckerberg, *Our Commitment to the Facebook Community*, THE FACEBOOK BLOG, (Nov. 29, 2011, 9:39 AM), <https://www.facebook.com/notes/10150378701937131>.

29. Selena Larson, *Is Facebook the Last Great Social Network?*, READWRITE (Feb. 4, 2014), <http://readwrite.com/2014/02/04/facebook-10-anniversary-last-great-social-network#awesm=~oyCEGeKI5h6Vnc>.

30. See Phillips, *supra* note 27 (“the network was promptly extended to . . . all US universities.”).

31. See *id.* (UK university students were eligible to sign up).

32. See *id.*

33. See EBIZ MBA, *supra* note 6; see Alexia Tsotsis, *Pinterest Joins Twitter and Facebook as the Newest Self-Expression Engine*, TECH CRUNCH (Oct. 3, 2011), <http://techcrunch.com/2011/10/03/the-self-expression-engine/> (Facebook is a “self-expression engine”).

34. Timelines are also sometimes referred to as Walls.

35. *Get Started: What is Facebook Timeline?*, FACEBOOK, <http://www.facebook.com/help/timeline> (last visited Oct. 16, 2014).

36. See *id.*

37. See *id.*

a user shares a photo, video, or piece of information, it has the capability to spread instantaneously to every corner of the community.³⁸

Right at their fingertips, users have numerous incredible avenues for expressing themselves. Users are able to send each other private messages individually or as a group,³⁹ “chat online with people the users have identified as ‘friends,’”⁴⁰ create and promote events;⁴¹ join groups;⁴² share a link, photo, or video on a friend or group’s Timeline;⁴³ tag themselves or friends in photos and videos;⁴⁴ comment on another individual’s status or photo;⁴⁵ create a call to action for a political or social issue; and Like another user’s or public policy organization’s Facebook Page, status, comment, or photo.⁴⁶ All of an individual’s actions (and those of friends or public community posts) are eligible to become part of a continuously scrolling content stream called the “News Feed,” which functions as a user’s homepage after login.⁴⁷ The streaming content on a user’s News Feed is a diverse bag of ideas and expression that she has chosen to share or receive.⁴⁸

38. See Catharine Smith, *Egypt’s Facebook Revolution: West Ghonim Thanks the Social Network*, HUFFINGTON POST (Feb. 11, 2011, 3:36 PM), http://www.huffingtonpost.com/2011/02/11/egypt-facebook-revolution-wael-ghonim_n_822078.html (quoting a Google executive who stated, “We would post a video on Facebook that would be shared by 60,000 people on their walls within a few hours.”).

39. *Managing Messages*, FACEBOOK, <http://www.facebook.com/help/messages> (last visited Oct. 16, 2014).

40. Gray, *supra* note 11, at 452-53 (citing *Chat Basics*, FACEBOOK, <http://www.facebook.com/help/chat> (last visited Oct. 16, 2014); *Adding Friends & Friend Requests*, FACEBOOK, <http://www.facebook.com/help/friends> (last visited Oct. 16, 2014)).

41. See *Creating & Editing Events*, FACEBOOK, <https://www.facebook.com/help/events> (last visited Oct. 16, 2014).

42. See *Groups*, FACEBOOK, <https://www.facebook.com/about/groups> (last visited Oct. 16, 2014).

43. See *How Sharing Works*, FACEBOOK, <https://www.facebook.com/about/sharing>, (last visited Oct. 16, 2014).

44. *What Is Tagging and How Does it Work*, FACEBOOK, <https://www.facebook.com/help/124970597582337> (last visited Oct. 16, 2014).

45. *Comments*, FACEBOOK, <https://developers.facebook.com/docs/plugins/comments/> (last visited Oct. 16, 2014, 2014).

46. See *Like*, FACEBOOK, <https://www.facebook.com/help/like> (last visited Oct. 20, 2014).

47. Gray, *supra* note 11, at 453.

48. See *How News Feed Works*, FACEBOOK, <https://www.facebook.com/help/327131014036297/> (last visited Ma. 8, 2014), (users can control what they put out into the community, which lands on their and other users’ News Feeds, but in order to control what they see on their own News Feed, beyond their own posts, they must interact with content they enjoy or hide content they do not want, which is then automatically set into Facebook’s filtering software.); see also Gregory S. McNeal, *Facebook NewsFeed Manipulation Prompts FTC Complaint, Investigation Possible*, FORBES (July 4, 2014 5:45 PM), <http://www.forbes.com/sites/gregorymcneal/2014/07/04/facebook-faces-possible-ftc-investigation-for-manipulation-study/>

Once a user logs in to Facebook, she is stepping into a virtual community that is constantly being updated with its inhabitants' self-expression.⁴⁹ Beyond the opportunities for expression on the Timeline, News Feed, or within messages or group pages, Facebook has apps,⁵⁰ such as Pages,⁵¹ Games,⁵² and the Marketplace,⁵³ which allow users to delve even deeper into the community. Pages allow a user to "connect to [her] favorite . . . interests, affiliations, activities, celebrities, musicians and businesses on Facebook" – all of which say something about who the user is and what things that user cares about.⁵⁴ Users can play a multitude of games, including virtual world games, like *Second Life*,⁵⁵ which arguably deserves quasi-municipality analysis on its own.⁵⁶ In the Marketplace, users find an online classifieds listing where they can buy and sell things, and "get a sense of everything available or desired within [their] networks."⁵⁷ The Facebook community, like a real-world community, provides an incredible amount of features, which allow its users to live, work, transact, and play on the platform.

B. Usage

Facebook has created a full-service community with enough features to allow users to live in the community in nearly the same way they live

(Facebook's recent research project that involved the manipulation of users' NewsFeeds by bypassing the set algorithm and determining what users would see when they logged in, opened the door to a jarring potential new reality: Facebook inviting users to join on the promise of free expression, only to take away all real choice those users have in determining what content they experience. Luckily, Facebook claims it was simply a research project. If it were a long-term change in the operation of the network, though, it would call into question whose expression it really is: Facebook's or the user's?).

49. See Erick Schonfeld, *Facebook CTO Bret Taylor on "Trying to Find the Balance Between Self-Expression and Sharing"*, TECHCRUNCH (Oct. 22, 2011), <http://techcrunch.com/2011/10/22/facebook-bret-taylor-self-expression-sharing/>.

50. See *App Settings*, FACEBOOK, <https://www.facebook.com/settings?tab=applications> (last visited Oct. 23, 2014).

51. See Alex Li, *Connecting to Everything You Care About*, FACEBOOK, (Apr. 19, 2010, 12:03 PM), <https://www.facebook.com/notes/facebook/connecting-to-everything-you-care-about/382978412130>.

52. See *Games*, FACEBOOK, <https://www.facebook.com/games/> (last visited Oct. 19, 2014).

53. See *Marketplace*, FACEBOOK, <https://www.facebook.com/pages/Marketplace/231693550250356> (last visited Oct. 23, 2014).

54. See Li, *supra*, note 51.

55. See *Second Life*, FACEBOOK, <https://www.facebook.com/secondlife> (last visited Oct. 19, 2014).

56. See generally Sinclair, *supra* note 1.

57. See Jared Morgenstern, *The Marketplace Is Open*, FACEBOOK, (May 14, 2007, 12:32 PM), <https://www.facebook.com/notes/facebook/the-marketplace-is-open/2383962130>.

outside of it.⁵⁸ Due to this, usage rates have skyrocketed. 85% of American adults are online,⁵⁹ and of that group, 71% are Facebook users⁶⁰ – that is 146.3 million adults in the United States with an active Facebook account.⁶¹ These users log on daily, and do so at length. The average user logs on for twenty minutes at a time,⁶² for a total of nearly three and a half hours per day.⁶³ Facebook has penetrated United States culture so greatly that more Americans check Facebook per day than the number of Americans who consult all religious texts combined.⁶⁴ Indeed, the time spent on Facebook is incredible, and so, too, is what is done with that time.

On a daily basis, Facebook users take full advantage of the opportunity to share and receive information, opinions, ideas, and connect with others in the community.⁶⁵ Typically, every time users log in, they are potentially exposed to 1,500 different pieces of content.⁶⁶ In fact, 30% of Americans even use Facebook as their news source.⁶⁷ The staggering usage numbers of Facebook prove it has become the principal destination for content sharing and consumption. Certainly, Facebook has gone from social network to social identity.⁶⁸

58. See generally Charles Miller, *Like: How We Are Living the Facebook Life*, BBC NEWS BUSINESS (Dec. 6, 2011 12:34 AM), <http://www.bbc.co.uk/news/business-16038855>.

59. See Kathryn Zickuhr, *Who's Not Online And Why*, PEW RESEARCH INTERNET PROJECT (Sept. 25, 2013), <http://www.pewinternet.org/2013/09/25/whos-not-online-and-why/>.

60. See Duggan & Smith, *supra* note 5.

61. See *State & County Quick Facts*, UNITED STATES CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/00000.html> (last visited Oct. 19, 2014) (the 2013 United States population was 316,128,839, 23.3% being under 18. To determine the number of adults who used Facebook, I subtracted 23.3% of 316,128,839 from 316,128,839, which equaled 242.5 million, the number of Adults in the US, then multiplied that number by 85% and finally by 71% - ((316,128,839-(316,128,839*.233))*0.85)*0.71).

62. See Craig Smith, *By the Numbers: 89 Amazing Facebook User Statistics*, DIGITAL MARKETING RAMBLINGS, <http://expandedramblings.com/index.php/by-the-numbers-17-amazing-facebook-stats> (last updated Oct. 30, 2014).

63. See THE CULTURE—IST, *supra* note 5.

64. See Billy Hollowell, *Facebook vs. The Bible: Which Do Americans Use More on a Daily Basis?*, THE BLAZE (Feb. 5, 2014 8:56 AM), <http://www.theblaze.com/stories/2014/02/05/which-gets-more-daily-usage-facebook-or-the-bible/>.

65. See Smith, *supra* note 62 (on an average day, 350 million photos are uploaded, 4.75 billion items are shared, 10 billion messages are sent, and 4.5 billion items are Liked).

66. See *id.*

67. See *id.*

68. See Rebecca Spence, *Do You Want to Spend Your Life Checking Facebook Updates?*, J WEEKLY (Jan. 5, 2012), <http://www.jweekly.com/article/full/63898/do-you-want-to-spend-your-life-checking-facebook-updates/>.

III. THE QUASI-MUNICIPALITY DOCTRINE AND THE DILEMMA OF FACEBOOK.

Until now, legal issues involving Facebook have mainly revolved around determining whether activities within the community are considered speech.⁶⁹ These cases have all involved third parties restricting a Facebook user's speech, though, and have done nothing to clarify Facebook's own role in regulating its users' speech. One reason could be Facebook is a private, non-governmental organization, while another could be the idea that the Internet, to this point, has largely been self-policed.⁷⁰ Both possible reasons, however, are likely due to the fact that the Internet poses an interesting quandary for free speech analysis.⁷¹

69. See *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013) (holding Liking something on Facebook qualifies as pure speech); see also *Mattingly v. Milligan*, No. 4:11CV00215 JLH, 2011 WL 5184283, at *2-3, *5, *8 (E.D. Ark. Nov. 1, 2011) (the court denied summary judgment reasoning that the Facebook user's posts were protected speech). A number of other courts have also held that comments posted to Facebook qualify as speech. See, e.g., *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 523 (Minn. 2012); *United States v. Michael*, No. 2:12-cr-1-WTL-CMM, 2012 WL 4796629, at *2 (S.D. Ind. Oct. 9, 2012); *R.S. ex rel. SS v. Minnewaska Area Sch. Dist.* No. 2149, 894 F. Supp. 2d 1128, 1141 (D. Minn. 2012); *Stein v. Dowling*, 867 F. Supp. 2d 1087, 1096 (S.D. Cal. 2012); *United States v. Elonis*, No. 11-13, 2011 WL 5024284, at *1-3 (E.D. Pa. Oct. 20, 2011); *Gresham v. City of Atlanta*, No. 1:10-CV-1301-RWS, 2011 WL 4601020, at *2 (N.D. Ga. Sept. 30, 2011).

70. See *Sinclair*, *supra* note 1, at 243.

71. See *id.*

Facebook is privately owned, seemingly giving the owner full control over the entire platform, including the intellectual property within, as private property.⁷² This control has the potential to manifest in surprising ways.⁷³ For example, in November 2013, Facebook removed this photo Maria Kang posted because it was deemed “hate speech”:



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While Kang claimed she was advocating a healthy lifestyle, others argued the photo was hate speech because it labeled obese people as lazy.⁷⁵ Facebook removed the post as hate speech and locked Kang out of her account.⁷⁶ Facebook later admitted to making a mistake, and unlocked

72. *See id.*

73. *See, e.g., 15 Photos That Were Banned by Facebook*, FUNNIE.ST, <http://funnie.st/364534/photos-banned-by-facebook/> (last visited Oct. 19, 2014) (fifteen everyday photos that Facebook banned for unknown reasons); *see also* David McCormack, *Facebook Banned My Weight Loss Photo*, DAILY MAIL (Jan. 12, 2014, 5:47 PM), <http://www.dailymail.co.uk/news/article-2538259/Facebook-banned-weight-loss-photo-claims-woman-lost-120lbs.html> (Facebook banned a woman’s picture of her fully clothed standing in pants she used to wear before losing 120 pounds, because it promoted “an idealized body image”).

74. Sadie Whitelocks, *Why Should Overweight Women Be Proud of Their Bodies?*, DAILY MAIL (Nov. 26, 2013 11:53 AM), <http://www.dailymail.co.uk/femail/article-2513919/Why-overweight-women-proud-bodies-Controversial-fitness-mom-lands-trouble-Facebook-hate-speech.html>.

75. *See id.*

76. *See id.*; *see also Facebook Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards> (last visited Oct. 19, 2014) (Facebook defines hate speech as: “Facebook does not permit hate speech, but distinguishes between serious and humorous speech.

Kang's account, but never put the picture back on Kang's Timeline.⁷⁷ The removal of this innocuous photo shows just how much control owners have; further, evident is the dilemma that has been created with massive online communities claiming to be for self-expression and connection, and the typical freedom of speech analysis.⁷⁸ Censoring Kang and others like her is dangerous and creates a slippery slope for speech protection on Facebook. If one unprotected class is supported in a way to censor another's speech today, which unprotected class will gain support tomorrow, and how will users ever gain clarity on how they are allowed to express themselves within the community?

As Facebook continues to grow, its population now exceeds the largest of cities worldwide.⁷⁹ In fact, if Facebook were a country, it would be the most populous country in the world.⁸⁰ Highlighted by the enormous population, amount of time and data shared and consumed, and the "staggering amount of real world-like activities" provided, Facebook has become so "pervasive, and so intertwined with many people's lives," it acts as a present day town square.⁸¹ As town squares perform the public function of being open public spaces for community gatherings, music, shopping, or political and social rallies, so too does Facebook. To this point, however, where Facebook fits within the quasi-municipality doctrine remains an open question.

A. *Overcoming the Hurdle of Private Ownership: Marsh v. Alabama.*

Since the U.S. Constitution's First Amendment only extends far enough to limit the government's ability to regulate speech, private actors are generally not required to provide individuals with the freedom of speech.⁸² As a private company, Facebook seemingly falls into this category; however, the landmark case *Marsh v. Alabama*, opened the doors

While 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.”)

77. See Whitelocks, *supra* note 74.

78. See *About*, FACEBOOK, <https://www.facebook.com/facebook/info> (last visited Oct. 19, 2014).

79. See *Largest Cities of the World*, WORLDTLAS, <http://www.worldatlas.com/city pops.htm> (last visited Oct. 19, 2014) (Tokyo is the most populated city in the world with 37,126,000 people).

80. See *Countries of the World*, WORLDTLAS, <http://www.worldatlas.com/aatlas/populations/ctypopls.htm> (last visited Oct. 19, 2014).

81. Sinclair, *supra* note 1, at 243.

82. See Kevin Fayle, *Free Speech, Protesting and Your Rights*, FINDLAW, <http://news.findlaw.com/features/protester-rights.html> (last visited Oct. 20, 2014).

for extending constitutional responsibilities to private actors with the quasi-municipality doctrine.⁸³

In *Marsh v. Alabama*, Gulf Shipbuilding Corporation (Gulf) created and owned company town in Alabama called Chickasaw.⁸⁴ The Appellant, a Jehovah's Witness, was arrested after she ignored Gulf's requests to stop distributing religious materials in town.⁸⁵ The Appellant challenged her arrest on First Amendment grounds, arguing Gulf did not have the authority to restrict speech in Chickasaw.⁸⁶ The Respondent argued the mere fact all the property interests in the town were held by a single company was enough to give that company power, enforceable by a state statute, to abridge the freedom of speech.⁸⁷

The Supreme Court agreed with the Appellant and found that Gulf could not restrict the Appellant's speech in Chickasaw.⁸⁸ In its holding, the Court stated:

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the First Amendment 'lies at the foundation of free government by free men' and we must in all cases 'weigh the circumstances and appraise the reasons in support of the regulation of [those] rights.'⁸⁹

Based on Chickasaw's size, and because Gulf's influence on the resident-employees was so pervasive, the Court determined Gulf was acting as a government and deemed the company town a quasi-municipality.⁹⁰ With this distinction, the town, and its governing body, Gulf, could not restrict all avenues for Appellant to exercise the First Amendment.⁹¹ Here, Gulf's performance of a "public function," i.e., a function that has been

83. *Marsh v. Alabama*, 326 U.S. 501, 508-09 (holding that the importance of the rights of citizens who live in "company-owned towns" are equal to the rights of "residents of municipalities").

84. *Id.* at 502.

85. *See id.* at 503-04.

86. *See id.* at 504.

87. *Id.* at 505.

88. *See id.* at 509.

89. *Id.*

90. *See id.* at 508 ("[T]he town of Chickasaw does not function differently from any other town.").

91. *See id.* at 508-09.

traditionally and exclusively performed by the state, transformed Gulf from private actor to state actor.⁹²

B. *Continued Evolution: The Shopping Mall Cases*

Beginning a decade after *Marsh v. Alabama* and spanning nearly 50 years, the Court explored a string of cases – collectively known as the Shopping Mall Cases – that transformed the quasi-municipality doctrine to what it is today. The maturation of the doctrine came on the heels of, and in response to, Americans leaving behind conventional “town squares and market places” to the newly developed, large-scale shopping malls.⁹³

1. *NLRB v. Babcock & Wilcox*

The Supreme Court began in 1956 by narrowing the scope of the quasi-municipality doctrine in *National Labor Relations Board v. Babcock & Wilcox Co.* (*NLRB v. Babcock & Wilcox*).⁹⁴ This case arose from three separate cases where the NLRB challenged employers who were banning labor unions from distributing literature in the employers’ private parking lots.⁹⁵ NLRB won at the lower court, and after the Sixth Circuit upheld the rulings, the Supreme Court granted certiorari and consolidated the cases.⁹⁶

The Court distinguished the cases from *Marsh* and found for Babcock & Wilcox. Holding First Amendment protections did not apply,⁹⁷ the Court noted several factors in its reasoning, highlighted by the fact that the unions had reasonable alternative avenues for speech available to them.⁹⁸ Next, the court looked at whether the employers discriminated against any particular class of people, which favored Babcock & Wilcox because it maintained a consistent policy refusing all pamphleteering due to concerns about litter.⁹⁹

92. *Id.* at 506.

93. Sinclair, *supra* note 1, at 247 (citing Lizabeth Cohen, *From Town Center to Shopping Center: The Reconfiguration of Community Marketplaces in Postwar America*, 101 AM. HIST. REV. 1050, 1068 (1996), available at <http://www.jstor.org/stable/pdfplus/2169634.pdf> (discussing how regional shopping centers, which had opened in the 1950s, were recognized as public spaces, and further, how shopping centers began to displace the traditional town square as public forums)).

94. *See* Sinclair, *supra* note 1, at 247.

95. *See* *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 106 (1956).

96. *See id.* at 109.

97. *See id.* at 106-07 (here, access to company-owned parking lots was at issue, and the test requires a balancing between First Amendment considerations and the rights of owners of private property).

98. *See id.* at 111-12 (telephone, mail, postings in nearby towns, and the homes of workers were all available).

99. *See id.* at 107, 112.

Although the Court decided NLRB's First Amendment concerns were outweighed by the property owner's rights, in dicta, the Court noted had the employers barred all avenues of speech, the reasoning in *Marsh v. Alabama* could apply here.¹⁰⁰

Thus, after *NLRB v. Babcock & Wilcox*, "the quasi-municipality analysis examined the scope of the private property, the pervasiveness of the owner's influence on the public, the degree to which reasonable alternatives for expressing speech existed, and whether the owner discriminated against a certain person or group in restricting access to the private property."¹⁰¹

2. Amalgamated Food Employees Union v. Logan Valley Plaza

The evolution of the quasi-municipality doctrine continued in 1968 with *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.* with an expansion of the doctrine.¹⁰² After the Supreme Court of Pennsylvania upheld a shopping mall owner's injunction that prevented the union from protesting employment practices of a store inside the mall, the Supreme Court granted certiorari and reversed.¹⁰³

Noting that the shopping center was open to the public and extremely popular, the Court analogized it to the corporate town in *Marsh*.¹⁰⁴ Further, the Court found the public spent a considerable amount of time at the mall, and the owner had cut off all reasonable avenues of speech available to the union.¹⁰⁵ The Court also expanded on the factors analyzed in the test for quasi-municipality, finding the purpose and concern of the speech was "consonant with the use to which the property is actually put."¹⁰⁶ Based on this reasoning, the Court held the shopping mall, though privately owned, had become the equivalent of a public forum. As such, the quasi-municipality doctrine was further expanded beyond corporate towns.¹⁰⁷

100. *See id.* at 113.

101. Sinclair, *supra* note 1, at 247.

102. *See Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 324-25 (1968), *abrogated by* *Hudgens v. NLRB*, 424 U.S. 507 (1976).

103. *Id.* at 309.

104. *See id.* at 317, 319.

105. *See id.* at 319-22 (citing *Marsh*, 326 U.S. at 508) (holding members of the public must be able to exercise their free speech rights on the shopping mall premises since speech was directed at a store and its patrons, and concerned operation of the store and mall).

106. *Id.* at 319-20 (noting the speech was specifically directed at patrons of the store and concerned the operation of the store).

107. *See id.* at 325.

3. Lloyd Corporation v. Tanner

Just four years later in *Lloyd Corp. v. Tanner*, the Court reversed course and held Vietnam War protestors had no right to hold a demonstration in a privately owned shopping center.¹⁰⁸ Based on facts similar *Logan Valley Plaza*, the District and Circuit Courts found against the shopping mall owner who refused to allow Vietnam War protestors to distribute anti-war leaflets in the shopping center;¹⁰⁹ the Supreme Court granted certiorari.¹¹⁰

The Court reasoned private property rights of the owner should not be curtailed simply because the mall was open to the general public for shopping.¹¹¹ The Court distinguished from *Logan Valley Plaza* and stated: (1) other reasonable avenues of speech were available to the protestors; (2) there was “no open-ended invitation to the public to use the Center for any and all purposes”; and (3) the speech of the protestors was not consonant with the use of the property, since the speech was not about the mall or any of its stores.¹¹² Further, the Court noted the public’s general accessibility to private property is not enough on its own to trigger the quasi-municipality doctrine.¹¹³

4. Hudgens v. NLRB

The about-face continued in *Hudgens v. NLRB* as the Court expressly overruled *Logan Valley Plaza*, further narrowing the quasi-municipality doctrine.¹¹⁴ After the owner of a shopping mall threatened arrest if employee-protestors did not stop picketing inside the shopping center, NLRB sued, arguing the protests were allowed under *Logan Valley Plaza*.¹¹⁵ The Circuit Court found for NLRB and the Supreme Court granted certiorari.¹¹⁶

The Court held the First Amendment does not guarantee free speech rights on privately owned property, noting the tension created between *Lloyd Corp.* and *Logan Valley Plaza* would otherwise be irresolvable.¹¹⁷ Since the Court determined the shopping mall was not a quasi-municipality,

108. See *Lloyd Corp. v. Tanner*, 407 U.S. 551, 563-65 (1972).

109. See *id.* at 556.

110. See *id.* at 552.

111. See *id.* at 565-67.

112. See *id.* at 563-65.

113. See *id.* at 563.

114. See *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976).

115. See *id.* at 508-10.

116. See *id.* at 508.

117. See *id.* at 518.

there was no reason to analyze the reasonably available alternative avenues of speech.¹¹⁸

5. Pruneyard Shopping Center v. Robbins

The Court reconsidered the Shopping Mall Cases five years later in *Pruneyard Shopping Center v. Robbins*, even though *Hudgens* seemed to bar First Amendment claims on most private property.¹¹⁹ In *Pruneyard Shopping Center* a group of high school students sued shopping mall owners after they refused to allow the students to set up a table in the shopping center to distribute information about a United Nations resolution.¹²⁰ The Supreme Court of California found for the students because the refusal violated the California Constitution, and the Supreme Court granted certiorari.¹²¹

The Court found for the students and held States could create constitutional rights of access to shopping centers for free speech purposes and would not violate a property owner's First or Fifth Amendment right.¹²² The Court reasoned the shopping center's patrons were unlikely to infer the students' speech was representative of the owners' opinions.¹²³ Further, the Court held state Constitutions could expand First Amendment protections to certain private property.¹²⁴

6. Lechmere, Inc. v. NLRB

The back and forth continued ten years after *Pruneyard Shopping Center* in *Lechmere, Inc. v. National Labor Relations Board*.¹²⁵ The case arose when NLRB sued after the union was refused entry to a shopping mall's parking lot in order to distribute windshield fliers.¹²⁶ NLRB, arguing there were no other reasonably available avenues of speech, won at the lower levels, and the Supreme Court granted certiorari.¹²⁷

The Court reversed, holding the parking lot owners were not required to grant access for the flier distribution.¹²⁸ Although NLRB tried to show

118. *See id.* at 525.

119. *See Pruneyard Shopping Ctr. v. Robbins*, 447 U.S. 74 (1980).

120. *See id.* at 77.

121. *See id.* at 78-79.

122. *See id.* at 88.

123. *See id.* at 87.

124. *See id.* at 88.

125. *See Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

126. *See id.* at 529-30.

127. *See id.* at 531.

128. *See id.* at 541.

its efforts to reach the employees were thwarted, the Court reasoned the employees did not live on the property, so they could likely be reached by other means.¹²⁹

IV. FACEBOOK AND QUASI-MUNICIPALITY: WHERE DOES THE COMMUNITY FIT?

The lines drawn by the Court have been ambiguous and contradictory at times. After much back and forth, the Supreme Court left us with a five-factor quasi-municipality analysis: (1) whether the private property is like a corporate town; (2) the scope of the private property; (3) the pervasiveness of the owner's influence on the audience; (4) the reasonable alternative avenues for speech; and (5) the consonance of the speech with private property.¹³⁰ Although a bit muddled, the upshot of the case law suggests the Supreme Court's current viewpoint is that First Amendment protections do not extend to private property unless there is a corporate town involved where the audience members are essentially resident-employees,¹³¹ or a state constitution expands freedom of speech protections to cover private property.¹³² While Facebook has yet to be analyzed under quasi-municipality by an Article III court, when the five-part test is applied, it becomes evident Facebook is much more like the company town in *Marsh* than the Shopping Mall Cases, and thus worthy of an extension of First Amendment Protection.¹³³

A. *Whether the Private Property Is Like a Corporate Town*

Much like the city sidewalks and town squares at issue in *Marsh*, the Timelines, News Feeds, and Pages of Facebook have become a public forum where users go to voice their opinions, tell their stories, express ideas, and receive information from the rest of the community.¹³⁴ When Facebook was created, Zuckerberg set out to create a community “to share and connect with people . . . in the world's biggest community online.”¹³⁵

129. *See id.* at 540.

130. *See* Sinclair, *supra* note 1, at 252.

131. *See id.*

132. *See Pruneyard*, 447 U.S. at 88.

133. After searching Westlaw, Lexis, Bloomberg, and Google, I have been unable to find a case in which quasi-municipality is a subject for a social network.

134. *See generally* Alicia Eller, *Study: Why Do People Use Facebook?*, READWRITE (Jan. 16, 2012), http://readwrite.com/2012/01/16/study_why_do_people_use_facebook#awesm=~oyNA4prAdAx0iR.

135. Zuckerberg, *supra* note 28.

What started as a “place for friends” has developed into a virtual community with all the features of a real world community.¹³⁶ When a user enters the platform, they are greeted with friends, partners, entertainment, stores, businesses, advertisements, and more.¹³⁷ The creation and management of this vast community fulfills Facebook’s mission: “[T]o give people the power to share and make the world more open and connected.”¹³⁸

Zuckerberg’s goals for Facebook have come to fruition, and people are using Facebook for its intended purpose.¹³⁹ Just like people use communities in the real world, users on Facebook go to the community for everything from information to entertainment and shopping.¹⁴⁰ Further, Facebook allows users to fulfill their “need to belong”¹⁴¹ to a community by creating a “social identity.”¹⁴² In fact, Facebook measures its own success “based on how much—not how many—people enjoy sharing and consuming stories” on the platform.¹⁴³ In other words, Facebook’s success is self-measured based on how users enjoy experiencing the social identity they are able to create.¹⁴⁴ Moreover, though subtle, the fact Facebook considers *itself* “a community” cannot be overlooked.¹⁴⁵ Facebook does not consider itself a primary place of commerce, like shopping malls do; rather, it sees itself as a community full of social identities it has enabled the creation of.

One of the defining features of a company town is the presence of resident-employees, and one can argue that is not evident with Facebook.¹⁴⁶ The social identity Facebook allows users to create, however, arguably

136. Larson, *supra* note 29.

137. See *Popular Features*, FACEBOOK, <https://www.facebook.com/help/393277774048285> (last visited Feb. 25, 2014).

138. *About Facebook*, *supra* note 78.

139. See Britney Fitzgerald, *Facebook Study Explains Why We Still Spend So Many Hours Stalking Each Other*, HUFFINGTON POST (July 05, 2012 9:46 AM), http://www.huffingtonpost.com/2012/07/04/facebook-study-shows-we-u_n_1644061.html; see also Aaron Smith, *6 New Facts About Facebook*, PEW RESEARCH CENTER (Feb. 3, 2014) <http://www.pewresearch.org/fact-tank/2014/02/03/6-new-facts-about-facebook/>; Alexis C. Madrigal, *Why Do People Use Facebook?*, THE ATLANTIC (Apr. 05, 2013 8:54 AM), <http://www.theatlantic.com/technology/archive/2013/04/why-do-people-use-facebook/274721/>; see generally Eller, *supra* note 132.

140. See *supra* Part III.B.

141. Eller, *supra* note 134.

142. Larson, *supra* note 29.

143. *Id.*

144. See *Id.*

145. See generally *Facebook Community Standards*, *supra* note 76.

146. See *Marsh v. Alabama*, 326 U.S. 501, 508 (1946); see also *Lechmere v. NLRB*, 502 U.S. 527, 540 (1992).

gives them resident-employee status. As demonstrated in Section III Part B, users spend so much of their lives on Facebook they essentially live on the platform.¹⁴⁷ Facebook makes money through advertising sales, which are derived from usage numbers of the site.¹⁴⁸ Although shopping malls also make money in a similar fashion, there remain distinguishing features.

Shopping mall owners are able to see profit as relational – the more time a potential customer spends on site, the odds of spending money increase because, at some point, that person will likely come across something she thinks she wants or needs. Thus, the owner can use the fact that a lot of people frequent the mall and many of them shop at the mall, to negotiate for higher rent prices.

While on the surface there are similarities, deeper there lays a difference. Facebook asks users to create a social identity by divulging personal information to the company.¹⁴⁹ Facebook then uses that personal information to create targeted advertisements that show up on your News Feed,¹⁵⁰ and sells this advertisement space at a high cost.¹⁵¹ Facebook solicits users' information to make money off of it. Thus, by creating and using a profile, the user's Facebook identity becomes so intertwined with Facebook's business, the user's identity becomes both the job and the person. In order for "Facebook to succeed, it simply must collect increasing amounts of information about you. More information = more ad revenues. Pretty simple."¹⁵²

This is clearly distinguishable from a mere shopping mall, which does not require personal information to shop on the premises, as the owners care not about who the shoppers are, but that they are shopping. Though stores and malls have recently begun to collect shoppers' personal information by asking for a phone number and zip code at check out, providing this data remains optional, unlike Facebook where it is required to join the

147. See *supra* Part III.B.

148. See Nicholas Carlson, *How Does Facebook Make Money?*, BUSINESS INSIDER (May 18, 2010), <http://www.businessinsider.com/how-does-facebook-make-money-2010-5>.

149. See *Information We Receive and How it is Used*, FACEBOOK, <https://www.facebook.com/about/privacy/your-info> (last visited Oct. 21, 2014).

150. See Thorin Klosowski, *How Facebook Uses Your Data to Target Ads, Even Offline*, LIFEHACKER (Apr. 11, 2013 8:00 AM), <http://lifehacker.com/5994380/how-facebook-uses-your-data-to-target-ads-even-offline> (Facebook uses a user's Likes, basic demographics, major life events, and the likes of her friends' to create user specific ads that she will see).

151. See Carlson, *supra* note 148.

152. Mark Schaefer, *Why Facebook Will Become the Most Dangerous Company on Earth*, BUSINESS GROW (April 10, 2013), <http://www.businessesgrow.com/2012/04/10/why-facebook-will-become-the-most-dangerous-company-on-earth/>.

community.¹⁵³ Even more, an increasing amount of state legislatures have banned stores from requesting personal information.¹⁵⁴ Another subtle difference to note is malls close, but Facebook is always open. The Facebook experience is perpetual—both work and home—just like the resident-employees in Chickasaw, Alabama.

B. *Scope of the Private Property*

The scope of Facebook as a virtual community exceeds that of any actual or possible corporate town. Using just the numbers for American adults on Facebook, 145.9 million, Facebook would be the ninth largest country in the world, and far bigger than any single city.¹⁵⁵ Further, like its population, Facebook's revenue is also quite sizeable.¹⁵⁶ In 2013, Facebook's revenue was up 63%, to \$2.59 billion,¹⁵⁷ and the company was valued at \$67.8 billion.¹⁵⁸ The large scope of Facebook does not end in numbers, though, because users spend substantial amounts of time and are afforded significant opportunities on the platform, including employment.¹⁵⁹ The vast scope of Facebook makes it more like a municipality because the owner acts like a government, which the Court in *Marsh* noted as another distinguishing feature of a corporate town.¹⁶⁰ Facebook, as the governing body of the community, provides users with the same opportunities available to them in a large real world community.

C. *Pervasiveness of the Owner's Influence*

Online owners have complete control over speech of all types within virtual communities, like Facebook. Facebook uses contractual authority to

153. See Aditi Mukherji, *Is it Legal to Ask for Customer ZIP Codes?*, FINDLAW (Apr. 4, 2013 5:47 AM), http://blogs.findlaw.com/free_enterprise/2013/04/is-it-legal-to-ask-for-customer-zip-codes.html.

154. See *id.*; see also Greg Botelho, *California High Court: Retailers Can't Request Cardholders' ZIP Code*, CNN (Feb. 10, 2011 9:43 PM), <http://www.cnn.com/2011/US/02/10/california.credit.zip.code/>.

155. See *supra* text accompanying notes 75-77.

156. See generally Jim Edwards, *Facebook Shares Surge on First Ever \$1 Billion Mobile Ad Revenue Quarter*, BUSINESS INSIDER (Jan. 29, 2014 5:11 PM), <http://www.businessinsider.com/facebook-q4-2013-earnings-2014-1>; see also Greg Satell, *How Much Is Facebook Really Worth?*, FORBES (Feb. 21, 2013 10:30 AM), <http://www.forbes.com/sites/gregsatell/2013/02/21/how-much-is-facebook-really-worth/>.

157. Edwards, *supra* note 156.

158. See Satell, *supra* note 156.

159. See *supra* Part II.

160. See *Marsh v. Alabama*, 326 U.S. 501, 508 (1946).

ban access to any prospective user through its Community Standards¹⁶¹ and Terms of Service.¹⁶² Thus, Facebook has the power to completely ban a person from reaching a user on its platform, or simply ban any particular type of speech on the platform, including speech that seemingly fits within the Community Standards.¹⁶³

Unlike a state actor, Facebook has unbridled authority. Facebook has the ability to promise users one thing, but do another, and face no consequence. With those capabilities in mind, it is counterintuitive to allow Facebook to invite users to join the community based on promises of connection, self-expression, and idea sharing and consumption, and then provide Facebook with full control to deny certain speech without reason.

D. Avenues of Speech

Another point of contention through the evolution of quasi-municipality has been the reasonable availability of alternative avenues for the speech at issue.¹⁶⁴ Online owners have “complete control over avenues of speech” in virtual communities, like Facebook.¹⁶⁵ One could argue users are inevitably real people who, presumably, have a telephone number and mailing address in the real world, which would provide reasonable alternative avenues. These may not constitute as reasonable alternative avenues of speech, though, because Facebook may be the only reasonable avenue for speech for its users.

As will be discussed more in depth below in Part IV. E, if the purpose of Facebook is to promote communication and social connection through a social identity created for Facebook, then, arguably, the platform is the only reasonable avenue for the speech.¹⁶⁶ A user’s identity on Facebook is Facebook-specific, and does not necessarily correlate to the user’s offline identity. Due to this, that avenue must remain open, because it is the only avenue open to the identity of the user while on Facebook. Moreover, given the potential for an anonymous identity through the use of a

161. See *Facebook Community Standards*, *supra* note 76.

162. See *Statement of Rights and Responsibilities*, FACEBOOK (last updated Nov. 15, 2013), <https://www.facebook.com/legal/terms>; see also *Facebook Terms and Policies*, FACEBOOK, <https://www.facebook.com/policies/> (last visited Oct. 22, 2014).

163. See *supra* image accompanying note 74 (image was removed as hate speech); see also *Facebook Community Standards*, *supra* note 76.

164. See *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

165. Sinclair, *supra* note 1, at 253.

166. See *infra* Part IV.E.

pseudonym,¹⁶⁷ the private nature of the speech may be important, and Facebook would be the only avenue available for that speech.¹⁶⁸ Otherwise, that user may face ostracism or physical or emotional dangers if expressing herself in the real world.¹⁶⁹

E. Consonance of Speech with the Property

As the final factor in the analysis, manner and purpose of the speech as consonant with purpose of the property remains important.¹⁷⁰ As mentioned, based on the specific identity a user has created, it may be important to reach the audience on the platform, as the real world counterpart may not share the identity.¹⁷¹ Facebook is inviting users to create the identity they would like the rest of the community to see, and must leave open the opportunity to reach an audience from that identity. Further, Facebook allows for people to create and maintain entire relationships exclusively within the community. Thus, speech emanating from that relationship is naturally related to the platform. By creating and shaping the constructs of the identities and relationships within the community, all speech that flows from or within those connections is inherently interrelated with Facebook.

Further, this analysis depends on how broadly the purpose of the virtual community is viewed.¹⁷² While some could argue Facebook is limited to short discussion between friends, in actuality the bounds are limitless. Facebook was created to provide people with a global community for social interaction and self-expression.¹⁷³ Thus, any speech through the platform for purposes of social interaction becomes consonant with the purpose of Facebook, because the brevity of the communication bears no necessary relationship to the importance of its contents.

167. See generally Robin Welles, *How to Set Up an Anonymous Facebook Account (and Why You Should Want to)*, IDCLOAK, <http://www.idcloak.com/learning-center/how-to-set-up-an-anonymous-facebook-account-and-why-you-should-want-to/a174.html> (last visited Oct. 22, 2014).

168. See Sinclair, *supra* note 1, at 255-56.

169. See *id.*

170. See *Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 319-20 (1968).

171. See *supra* text accompanying notes 166-69.

172. See Sinclair, *supra* note 1, at 256.

173. See Pialamode314, *supra* note 4 (noting people use Facebook to express themselves, and have “freedom to customize their Facebook profiles to portray the person they believe themselves to be, or aspire to be . . . I have found a way to proudly express my identity to my ‘friends’” as it changes.”).

F. Jurisdiction

With the exception of *Marsh*, the quasi-municipality doctrine has been solely within the purview of state courts and constitutions.¹⁷⁴ This, however, is unworkable for Facebook and other SNS that function as virtual communities. States simply do not have the capabilities to handle free speech issues within a virtual community.¹⁷⁵ It would be unmanageable, both economically and legislatively, if every state had different free speech regulation for virtual communities, such as Facebook. The scope of Facebook creates issues of “real world versus virtual citizenship,” due to users from all over the country, and FCC issues because the site is accessed through telecommunications lines that span multiple states.¹⁷⁶

Unlike a typical corporate town or shopping mall, Facebook and the Internet have no boundaries. Logging into Facebook potentially puts a user through multiple different states, and once on the platform, the user is in contact with people from all over the United States. Thus, the United States Constitution should apply to Facebook for free speech purposes. Federal jurisdiction, and not a state constitution, is the most workable solution, as an extension of a state constitution is not available to Facebook,¹⁷⁷ leaving no other protection available for a speaker in the Facebook Community. Without federal jurisdiction, free speech protection could not exist in a virtual community.¹⁷⁸

G. Other Concerns: Purpose of Creation

The purpose for creation of the private property at issue should be a serious concern when applying the quasi-municipality test. Logically, it would be against public policy to allow a private individual or company to create a forum, and lull people into joining through promises of self-expression and content consumption, and then provide that person or company with unheralded power to regulate the speech in the forum.

The distinguishing feature between Facebook and the Shopping Mall Cases is the purpose of creating the private company or forum in question. Unlike shopping malls, where the main purpose is commerce, Facebook has created a forum with the purpose of bringing consumers in to express

174. See *Pruneyard*, 447 U.S. at 79-80, 88.

175. See Sinclair, *supra* note 1, at 256.

176. *Id.*

177. See *Pruneyard*, 447 U.S. at 79-80, 88 (holding State constitutions could expand constitutional rights but not limit them). A solution like the one in *Pruneyard* is unworkable for Facebook because it operates beyond the boundaries of one particular state.

178. See Sinclair, *supra* note 1, at 257.

themselves and view the ideas of others. If shopping malls and Facebook were in the same sphere, the shopping mall would represent the Internet, and invite people to come shop within the stores on its premises, while Facebook would be one of the shops within the shopping mall, where guests are invited to come hangout, meet others, and share ideas.

The commerce aspect of Facebook, which is user-targeted advertising,¹⁷⁹ is secondary to Facebook's main function and purpose.¹⁸⁰ For example, Facebook claims, "Facebook gives people around the world the power to publish their own stories, see the world through the eyes of many other people, and connect and share wherever they go. The conversation that happens on Facebook – and the opinions expressed here – mirror the diversity of the people using Facebook."¹⁸¹ Facebook's self-proclaimed mission is to "give people the power to share and make the world more open and connected."¹⁸²

Facebook has, quite literally, created a space with the intent to invite users to freely use the platform as a host to exercise their First Amendment rights.¹⁸³ In other words, Facebook has created a public forum for the distinct purpose of speech, expression, and the exchange of ideas. The purpose of Facebook—expression on a global platform¹⁸⁴—is immensely different than the purposes of the shopping malls in the cases above, which are primarily for commerce. Accordingly, justice requires Facebook to be analyzed like the corporate town in *Marsh*, and not the shopping malls in the Shopping Mall Cases.

V. CONCLUSION

In 2004, Facebook set out to create a fully connected global community built on the shoulders of social interaction. Mission accomplished. Facebook changed the Internet from a unilateral experience where a user logs in to view a static webpage, to a multilateral, fully immersive experience shared between people around the world. Indeed, Facebook has become the alternate reality.

The development of Facebook's virtual community has blurred the lines between users' rights offline and users' rights in the community.

179. See *Advertising on Facebook*, FACEBOOK, <https://www.facebook.com/advertising> (last visited Oct. 22, 2014).

180. See *About Facebook*, *supra* note 78 (Facebook's mission is to "give people the power to share and make the world more open and connected.").

181. *Facebook Community Standards*, *supra* note 76.

182. *About Facebook*, *supra* note 78.

183. See *id.*

184. *Facebook Community Standards*, *supra* note 76.

Facebook built its community around Americans' favorite freedom – the freedom of speech.¹⁸⁵ As the company's power continues to increase, the only way to protect the rights of its users is for the Supreme Court to extend freedom of speech protection to Facebook through the quasi-municipality doctrine.

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185. Ken Paulson, *America's Favorite Freedom*, FIRST AMENDMENT CENTER (Jul. 16, 2013), <http://www.firstamendmentcenter.org/americas-favorite-freedom> (noting survey data showed freedom of speech was considered the most important freedom among Americans. Five times as many survey respondents chose freedom of speech as number one over the second-choice, freedom of religion).

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