RECENT CASES

FIRST AMENDMENT — SOCIAL MEDIA COMMENTS — D.C. CIRCUIT HOLDS NIH KEYWORD FILTERS UNREASONABLY RESTRICT ANIMAL RIGHTS ACTIVISTS' SPEECH. — *People for the Ethical Treatment of Animals v. Tabak*, 109 F.4th 627 (D.C. Cir. 2024).

How to regulate speech on social media platforms has been the subject of vigorous debate[1] and recent Supreme Court opinions.[2] In particular, government agencies communicating with the public via digital platforms must balance the need to moderate comments with users' First Amendment rights.[3] Recently, in *People for the Ethical Treatment of Animals (PETA) v. Tabak*,[4] the D.C. Circuit held that keyword filters used by the National Institutes of Health (NIH) to hide "off-topic" comments on its social media posts constituted unreasonable speech restrictions.[5] Although the court reached the correct outcome in this case, the D.C. Circuit failed to consider how speech regulations may function differently in digital spaces. Failures to analyze online regulations in light of their unique digital context may have negative consequences for free speech in the long term. Adopting a form of internet exceptionalism that balances technological characteristics with traditional First Amendment considerations may result in more uniform free speech protections online, while preserving interactivity between government agencies and the public.

NIH is the nation's foremost federal agency conducting biomedical and other public health research.[6] Like many government entities nowadays,[7] NIH has verified social media accounts.[8] On its Facebook and Instagram pages, NIH shares research and news updates with the public "to communicate and interact with citizens" about the agency's work.[9] Any member of the public may leave a comment on NIH's posts.[10]

---

[1] *See, e.g.*, Lee C. Bollinger & Geoffrey R. Stone, *Opening Statement* to SOCIAL MEDIA, FREEDOM OF SPEECH AND THE FUTURE OF OUR DEMOCRACY xv, xv (Lee C. Bollinger & Geoffrey R. Stone eds., 2022) ("One of the most fiercely debated issues of the current era is what to do about 'bad' speech on the internet, primarily speech on social media platforms such as Facebook and Twitter.").

[2] *See, e.g.*, Moody v. NetChoice, LLC, 144 S. Ct. 2383 (2024); Lindke v. Freed, 144 S. Ct. 756 (2024); Murthy v. Missouri, 144 S. Ct. 1972 (2024).

[3] *See* Alissa Ardito, *Social Media, Administrative Agencies, and the First Amendment*, 65 ADMIN. L. REV. 301, 303–04 (2013).

[4] 109 F.4th 627 (D.C. Cir. 2024).

[5] *Id.* at 630.

[6] *Id.*

[7] *See* Ardito, *supra* note 3, at 302–03.

[8] *See Tabak*, 109 F.4th at 630.

[9] Joint Stipulation of Facts ¶ 36, PETA v. Tabak, No. 21-2380 (D.D.C. Mar. 31, 2023) (quoting *Web Policies and Notices*, NAT'L INSTS. OF HEALTH (Jan. 10, 2023), https://www.nih.gov/web-policies-notices [https://perma.cc/P5N2-5RHX]); *see id.* ¶ 44.

[10] *See id.* ¶¶ 39, 45.

Indeed, the NIH Comment Guidelines "encourage[] [the public] to share [their] thoughts and ideas" in a "respectful and constructive dialogue," while clarifying that "NIH blogs are not intended to serve as public forums."[11] The Guidelines also set etiquette standards around post engagement, prohibiting certain types of language and content in the comments, including "[o]ff-topic posts."[12] To monitor comments according to their Comment Guidelines, NIH takes advantage of Facebook's and Instagram's default filters,[13] as well as custom keyword filters which automatically hide any comment containing a flagged keyword.[14] Due to resource constraints, the keyword filters "in practice" comprise the entirety of NIH's moderating efforts.[15]

Among NIH's frequent commenters are animal rights advocates, including PETA, a nonprofit organization that works to advance animal rights.[16] PETA often commented on NIH's social media posts to protest the agency's use of animal testing in its research.[17] Inundated with such comments,[18] NIH implemented keyword filters to moderate the comment threads on their posts. The keyword filters, which included PETA, PETALatino, animal(s), cruel, cruelty, and hashtags #stopanimaltesting, #stoptesting, and #stoptestingonanimals, automatically hid many comments critical of NIH from public view.[19] In response, PETA and two animal rights activists sued to challenge NIH's use of keyword filters, arguing that the filters infringed on their First Amendment rights.[20] After NIH removed several of the keyword filters from their social media platforms, both parties moved for summary judgment.[21]

The district court granted summary judgment for NIH, holding that the keyword filters were viewpoint neutral and constituted a reasonable speech restriction.[22] Looking to the publicly available NIH Comment Guidelines, the district court found that NIH intended its social media pages to be used to discuss only certain subject matters, as the

---

[11] *NIH Comment Guidelines*, NAT'L INSTS. OF HEALTH (Mar. 13, 2019), https://www.nih.gov/news-events/social-media-outreach/nih-comment-guidelines [https://perma.cc/YN6J-8GFH].

[12] *Id.* ("ask[ing] that . . . comments be respectful and relevant to the specific topic").

[13] *Tabak*, 109 F.4th at 631. Facebook's and Instagram's default filters hide any comments containing offensive language, including profanity. *Id.*

[14] *Id.*

[15] Joint Stipulation of Facts, *supra* note 9, ¶ 61.

[16] *Tabak*, 109 F.4th at 631.

[17] *Id.*

[18] *See* PETA v. Tabak, No. 21-cv-2380, 2023 WL 2809867, at *11 (D.D.C. Mar. 31, 2023); *see also* Joint Stipulation of Facts, *supra* note 9, ¶¶ 47–50 (describing NIH posts that garnered numerous animal rights comments).

[19] Joint Stipulation of Facts, *supra* note 9, ¶ 58.

[20] *Tabak*, 109 F.4th at 631. Both parties stipulated to the fact that the social media pages were government property. *See* Brief for Plaintiffs-Appellants at 33, *Tabak*, 109 F.4th 627 (No. 23-5110); Brief for Appellees at 26, *Tabak*, 109 F.4th 627 (No. 23-5110). NIH also did not dispute that the plaintiffs' comments warranted First Amendment protection. *Tabak*, 2023 WL 2809867, at *5.

[21] *Tabak*, 109 F.4th at 632.

[22] *Tabak*, 2023 WL 2809867, at *1.

Guidelines required comments to stay on topic.[23] Given this clear and consistent policy, the district court held that NIH's social media pages were limited public forums[24] where the agency may "exclude speakers on the basis of . . . subject matter" if the exclusions are "viewpoint neutral and reasonable in light of the purpose served by the forum."[25] The district court found the policy to be reasonable because the "clutter of off-topic comments" was disruptive and distracted from NIH's "purpose of fostering productive dialogue."[26] Additionally, the district court found that the exclusions did not discriminate against any particular viewpoint because the keyword filters screened out comments based on content, not perspective.[27]

The D.C. Circuit reversed.[28] Writing for a unanimous panel,[29] Judge Garcia first conducted his own forum analysis and agreed with the district court that the comment threads on NIH's posts were limited public forums.[30] Applying factors from *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*[31] to elucidate the government's intent, Judge Garcia considered "objective indicia" like "the nature of the [government] property, its compatibility with expressive activity, and the consistent policy and practice of the government."[32] He noted that the "stated purpose"[33] and "categorical[] . . . subject matter regulations"[34] in NIH's Comment Guidelines and keyword filters clearly indicated that NIH aimed to limit discussion on its social media pages to topics relevant to the agency's research.[35] That NIH inconsistently enforced its

---

[23] *See id.* at *8.

[24] *Id.* at *8–10. The Supreme Court created the public forum doctrine to "determin[e] when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800 (1985). In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983), the Court outlined three categories of forum, delineated by the forum's purpose or historic use: (1) traditional public forums, like public parks and streets; (2) designated public forums, or property that the government has opened to the public for expressive purposes; and (3) nonpublic forums, which are "not by tradition or designation" a public forum. *Id.* at 45–46. Limited public forums, which are forums that the government opens to certain groups or to discuss certain topics, are a subset of designated public forums. *Id.* at 46 n.7 (citing, inter alia, Widmar v. Vincent, 454 U.S. 263 (1981)).

[25] *Tabak*, 2023 WL 2809867, at *7 (quoting Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 189 (2007)).

[26] *Id.* at *11.

[27] *See id.* at *13.

[28] *Tabak*, 109 F.4th at 638.

[29] Judge Garcia was joined by Judge Henderson and Judge Millett. *Id.* at 630.

[30] *Id.* at 632–36.

[31] 473 U.S. 788 (1985). The *Tabak* court cited *Stewart v. District of Columbia Armory Board*, 863 F.2d 1013 (D.C. Cir. 1988), throughout its factors analysis, but the *Stewart* court had adopted its public forum test from *Cornelius*. *See id.* at 1016–17.

[32] *Tabak*, 109 F.4th at 633 (quoting Bryant v. Gates, 532 F.3d 888, 896 (D.C. Cir. 2008)).

[33] *Id.* (quoting *Bryant*, 532 F.3d at 896).

[34] *Id.* (quoting Archdiocese of Wash. v. Wash. Metro. Area Transit Auth., 897 F.3d 314, 324 (D.C. Cir. 2018)).

[35] *Id.*

policy was immaterial to the question of intent because the agency did not "affirmatively" adopt a stance of nonenforcement.[36] Rather, Judge Garcia relied on the existence of the keyword filters as proof that NIH did not abdicate its subject matter policy.[37] Pointing to *United States v. American Library Ass'n*,[38] he asserted that underinclusive censorship is not determinative where the government makes some effort to restrict certain subject matters.[39] While conceding that "social media is inherently compatible with expressive activity,"[40] he concluded that the *Cornelius* factors taken together weighed toward classifying the comment threads as limited public forums.[41]

Judge Garcia's reasoning, though, parted ways with the district court's when assessing whether NIH's keyword filters constituted a reasonable speech restriction. Again relying on the *Cornelius* factors, he noted that because the forum's primary purpose was "compatible with expressive activity"[42] — that is, encouraging dialogue with citizens — "a more demanding test" for reasonableness was required than if the forum's purpose had been "less compatible with expressive activity."[43] In his analysis, Judge Garcia identified three problems with NIH's off-topic policy: First, the keyword filters were too vague and overbroad.[44] NIH did not employ "objective, workable standards"[45] to define the distinction between on- and off-topic subjects.[46] Nor could NIH "articulate some sensible basis" for why some comments were blocked by the keyword filters.[47] This overinclusion, Judge Garcia asserted, "d[id] not 'ring[] of common-sense,'"[48] as many of NIH's posts directly related to research involving animal testing.[49] For example, the filters were set up to block "a comment like 'animal testing on zebrafish is cruel'" on a post about zebrafish research.[50] NIH also failed to define "off-topic," leaving its social media moderators without clear guidance on what was or wasn't an acceptable comment.[51] Second, the keyword filters were

---

[36] *See id.* at 634–35.
[37] *See id.* at 634.
[38] 539 U.S. 194 (2003).
[39] *Tabak*, 109 F.4th at 635.
[40] *Id.* at 635 (citing Packingham v. North Carolina, 582 U.S. 98, 104 (2017)).
[41] *See id.* at 635–36.
[42] *Id.* at 635 (quoting Stewart v. D.C. Armory Bd., 863 F.2d 1013, 1019 (D.C. Cir. 1988)).
[43] *Id.* at 636 (citing *Stewart*, 863 F.2d at 1019–20).
[44] Here, Judge Garcia applied traditional vagueness and overbreadth doctrines. *See id.* at 636–37.
[45] *Id.* at 636 (citing Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1981 (2018)).
[46] *See id.* at 636–37.
[47] *Id.* (quoting *Mansky*, 138 S. Ct. at 1888).
[48] *Id.* (alteration in original) (quoting United States v. Kokinda, 497 U.S. 720, 734 (1990) (plurality opinion)).
[49] *See id.*
[50] *Id.*
[51] *Id.* at 637. NIH also said that part of the issue with PETA's comments was their sheer volume, which made it difficult to foster constructive dialogue and detracted from the forum's purpose.

"inflexible and unresponsive to context."[52] Unlike the website-blocking filters at issue in *American Library*, the keyword filters applied automatically without regard to context, and NIH did not follow up with any manual review.[53] The lack of recourse available to blocked commenters and the undiscerning nature of the off-topic policy's implementation "reinforce[d]" the keyword filters' "unreasonableness."[54] Lastly, Judge Garcia expressed skepticism toward NIH's off-topic policy because the keyword filters "skew[ed] sharply against the appellants' viewpoint."[55] Such targeted censorship was unreasonable because of its "potential to distort public discourse"[56] by disparately impacting a relevant, but critical, perspective.[57] As such, Judge Garcia held that the keyword filters were unconstitutional.[58]

Although the D.C. Circuit reached the right outcome, its analysis ignored the differences between virtual speech online and spoken speech offline. Rather, the court's approach in *PETA v. Tabak* is emblematic of a general trend across the judiciary to analyze virtual forums as simply another type of public forum,[59] even though public forums have historically been *physical* spaces.[60] This preference for doctrinal consistency may, in fact, come at the cost of consistent speech protection, as what may be reasonable in a physical forum may not exist or be possible online. A balancing inquiry that takes into account the unique characteristics of virtual forums would both better ensure uniform First Amendment protections across forums of vastly different characters and help preserve interactivity between the government and the public on social media.[61]

See id. However, Judge Garcia pointed out that NIH also failed to provide a clear standard by which to determine "what is too much." *Id.*

52 *Id.* at 638.

53 *See id.*; United States v. Am. Libr. Ass'n, 539 U.S. 194, 208–09, 214 (2003) (holding overinclusive website blocking reasonable where librarians had discretion to disable blocking software upon request).

54 *Tabak*, 109 F.4th at 638.

55 *Id.*

56 *Id.*

57 *See id.*

58 *Id.*

59 *See, e.g.*, Krasno v. Mnookin, 638 F. Supp. 3d 954, 974–77 (W.D. Wis. 2022); Charudattan v. Darnell, No. 18cv109, 2019 WL 12043587, at *6 (N.D. Fla. Feb. 7, 2019); Davison v. Plowman, 247 F. Supp. 3d 767, 776 (E.D. Va. 2017), *aff'd*, 715 F. App'x 298 (4th Cir. 2018).

60 *See, e.g.*, Amalgamated Food Emps. Union Loc. 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 309 (1968) (shopping mall); United States v. Kokinda, 497 U.S. 720, 723 (1990) (plurality opinion) (sidewalk).

61 Admittedly, this argument takes a somewhat positive approach to the First Amendment, whereas the modern approach takes a more negative one, focusing on limiting government control and regulation. *See* Evelyn Douek & Genevieve Lakier, *The Supreme Court, 2023 Term — Comment: Lochner.com?*, 138 HARV. L. REV. 100, 114–16 (2024).

Advocating that virtual forums may sometimes necessitate different treatment constitutes a type of exceptionalism.[62] Others have discussed internet exceptionalism generally. Professor Mark Tushnet, for example, has noted how — because of the internet's distinctive qualities — a standardized balancing test can produce exceptional outcomes when indiscriminately applied online.[63] Instead of a generalized approach, this comment proposes adopting an ad hoc balancing test, termed *functional internet exceptionalism*. Functional internet exceptionalism would look at only one particular online regulation and corresponding speech problem at a time to determine the regulation's effect on free speech.[64] Building exceptional characteristics into the balancing analysis on the front end would paint a clearer picture of the regulation's proportionality. Then, based on how the regulation operates in the virtual forum, one can better assess whether any exceptional treatment is warranted. This approach could be incorporated into the existing doctrinal framework.

Exceptionalism in the First Amendment context is not a new concept. In a concurrence, Justice Robert Jackson once extolled that "[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers" such that "[e]ach . . . [may be] a law unto itself."[65] Moreover, there is some precedent that different media may require exceptions to certain general rules. In *Red Lion Broadcasting Co. v. FCC*,[66] the Supreme Court "strongly suggested" that the limited access to broadcasting channels warranted exceptional regulation of radio broadcasters to ensure that power imbalances did not impinge the rights of listeners and speakers.[67] Similarly, the Court upheld federal must-carry regulations for cable television providers in *Turner Broadcasting System, Inc. v. FCC*[68] even though it had struck down parallel regulations for the newspaper industry.[69] These exceptions for broadcasting systems and cable television were justified, in part, by how those technologies made it possible for a limited number of providers to control the dissemination

---

[62] *Cf.* Tim Wu, *Is Internet Exceptionalism Dead?*, *in* THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 179, 179 (Berin Szoka & Adam Marcus eds., 2010).

[63] *See* Mark Tushnet, *Internet Exceptionalism: An Overview from General Constitutional Law*, 56 WM. & MARY L. REV. 1637, 1641 (2015) ("Balancing can produce the following outcome: a regulation that would be constitutionally impermissible if invoked against print media would be constitutionally permissible when invoked against Internet dissemination." *Id.* "And vice versa . . . ." *Id.* n.13.).

[64] *See id.* at 1662–63.

[65] Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Jackson, J., concurring).

[66] 395 U.S. 367 (1969).

[67] Douek & Lakier, *supra* note 61, at 113; *Red Lion*, 395 U.S. at 378, 388–89 (upholding right of reply regulations requiring radio broadcasters to give political candidates and individuals criticized on air a free opportunity to reply likewise).

[68] 520 U.S. 180 (1997).

[69] *See* Mia. Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 243, 258 (1974) (holding right of reply law unconstitutional as applied to newspapers).

of information over the airwaves or cable network.[70] To ensure proper protections, the Court treated these technologies differently than other media or forums.

So far, the Court has rejected the notion of internet exceptionalism, at least in principle. The principle of internet exceptionalism is "the idea that the network has its own sovereignty . . . or is an exception to law,"[71] an idea that has likely died out, particularly in First Amendment law.[72] Instead, lower courts have largely taken a nonexceptionalist approach, interpreting dicta in Supreme Court opinions like *Packingham v. North Carolina*[73] and *Reno v. ACLU*[74] to presume that virtual forums should be treated the same as physical forums.[75] But although the Supreme Court has "unequivocally rejected" the *principle* of internet exceptionalism,[76] the question lingers whether some other form of internet exceptionalism — such as functional exceptionalism — may still be viable.[77]

Last Term, the Court heard five social media cases[78] but avoided resolving any of the questions raised.[79] In *Lindke v. Freed*,[80] the case perhaps most analogous to *PETA v. Tabak* as it involved comment blocking, the Court announced a straightforward test for determining when state action occurs on private social media accounts.[81] Yet the Court declined to apply the test or find that the government official in *Lindke* acted unconstitutionally.[82] By remanding the case instead, the

---

[70] *See* FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 656–57 (1994).

[71] Wu, *supra* note 62, at 181.

[72] *See id.*; Douek & Lakier, *supra* note 61, at 132 ("The project of internet exceptionalism, insofar as it applies to the First Amendment, appears to be dead.").

[73] 137 S. Ct. 1730 (2017) (describing social media platforms as "the modern public square," *id.* at 1737).

[74] 521 U.S. 844 (1997) (purporting that online "any person . . . can become a town crier with a voice that resonates farther than it could from any soapbox," *id.* at 870, and referring to "the vast democratic forums of the Internet," *id.* at 868).

[75] *See, e.g.*, Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 237 (2d Cir. 2019), *vacated sub nom.* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220 (2021) (mem.).

[76] Douek & Lakier, *supra* note 61, at 132 ("[A]ll three [platform trilogy] cases purported to simply apply the standard offline rules to the online context." *Id.* at 105.); *see also* cases cited *supra* note 2.

[77] *See* Douek & Lakier, *supra* note 61, at 132 ("The Court's decision to leave things uncertain suggests that some, and perhaps a majority, of the Justices are uneasy with the conclusions that the most absolutist reading of the precedents lead to.").

[78] *See* cases cited *supra* note 2. The final "platform trilogy," Douek & Lakier, *supra* note 61, at 104, was comprised of *Moody v. NetChoice, LLC*, 144 S. Ct. 2383 (2024); *Lindke v. Freed*, 144 S. Ct. 756 (2024); and *Murthy v. Missouri*, 144 S. Ct. 1972 (2024). *Moody* was consolidated with *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439 (5th Cir. 2022), and *Lindke* was argued the same day as *O'Connor-Ratcliff v. Garnier*, 144 S. Ct. 717 (2024) (per curiam), which was remanded for further proceedings consistent with the decision in *Lindke*. *Id.* at 718.

[79] *See* Douek & Lakier, *supra* note 61, at 105.

[80] 144 S. Ct. 756 (2024).

[81] *See id.* at 770.

[82] *See id.*

Court "left significant questions open" about how online speech issues should be analyzed.[83]

These questions are all the more pertinent because of the unique challenges posed by virtual forums.[84] The internet lowers the cost of information dissemination while providing amplification and anonymity to any member of the general public.[85] Social media can also be "interactive and dialogic, rather than monologic, as traditional media ha[s] been."[86] These technological features can result in a plethora of postings that drown out important information and diverse voices.[87] Given the volume of comments possible on virtual forums, efforts to capture problematic material will undoubtedly be both overbroad and vague, at least under traditional conceptions of those terms.[88] Applying functional internet exceptionalism, the court could account for the uniquely large volume of speech made possible by virtual forums. The court could balance the volume of comments possible with the overbreadth and vagueness of a restriction to determine the restriction's reasonableness.

The spatial differences between virtual and physical forums should also be taken into account. *PETA v. Tabak* is illustrative on this point. The D.C. Circuit distinguished NIH's keyword filters from the reasonable filtering software in *American Library* "because library patrons could easily disable the filtering software by asking a librarian to unblock" sites that were "erroneously blocked."[89] This reasoning poses obstacles when applied to cyberspace. The sheer volume of comments possible online renders *American Library*-esque manual, on-the-spot corrections infeasible. Moreover, online commentators may enter and post on digital forums from any location, at any time, outside the moderators' presence (unless the moderator is a 24/7 filter).[90] Unbounded by physical constraints, digital platforms possess a fundamentally different spatial quality than physical forums: Time and space don't pose

---

[83] Douek & Lakier, *supra* note 61, at 150.

[84] *See* PETA v. Tabak, No. 21-cv-2380, 2023 WL 2809867, at *1 (D.D.C. Mar. 31, 2023) (describing the internet "environment . . . [as] challenging to navigate under the strict categorization and spatial reasoning of First Amendment doctrine" and likening "cyberspace . . . to the shifting sands of the Sahara"); *see also* Jill I. Goldenziel & Manal Cheema, *The New Fighting Words?: How U.S. Law Hampers the Fight Against Information Warfare*, 22 U. PA. J. CONST. L. 81, 100–02 (2019).

[85] *See* Tushnet, *supra* note 63, at 1640.

[86] Douek & Lakier, *supra* note 61, at 125.

[87] *See* Goldenziel & Cheema, *supra* note 84, at 100–01. Disruptive comments on social media also may remain long after they are posted, unlike words spoken in physical forums. *See id.* Their enduring quality exacerbates issues around numerous comments burying the forum owner's or other participants' speech.

[88] This problem arose in *PETA v. Tabak*. *See Tabak*, 109 F.4th at 636–37; *see also* Joint Stipulation of Facts, *supra* note 9, ¶ 87 (noting various user complaints about "bombardment" of PETA comments on NIH social media pages).

[89] *Tabak*, 109 F.4th at 638 (citing United States v. Am. Libr. Ass'n, 539 U.S. 194, 209 (2003)).

[90] *Cf.* Goldenziel & Cheema, *supra* note 84, at 100 (describing limitations on how visitors are able to enter and engage with others in the physical public square).

the same kind of constraints online that they do in the physical world. As with comment volume, courts employing functional internet exceptionalism could weigh spatial dissimilarities when applying traditional First Amendment analyses to digital forums.[91] This balancing act would produce greater uniformity by acknowledging the distinct characteristics of online forums to achieve well-calibrated free speech protections — even if, at first glance, they may seem inconsistent across different mediums of communication.[92]

Because of cyberspace's practical shortcomings, failure to adopt functional internet exceptionalism could increase difficulties in moderating online forums and frustrate interactivity between government actors and the public.[93] Ever since federal agencies flocked to social media during the Obama administration,[94] interaction between the citizenry and government has increased.[95] But how to moderate disruptive comments remains an intractable problem. Curtailing government use of moderation tools like keyword filters may lead agencies to reduce interactivity on their social media pages, resulting in less overall expressive liberty.[96] If faced with a flood of disruptive comments degrading discourse, agencies may choose to disable commenting, rather than expend limited resources on manual review or grapple with a First Amendment headache.[97]

Although at first blush a victory against unreasonable censorship, *PETA v. Tabak* should give free speech proponents pause. The court applied traditional vagueness and overbreadth doctrines to reach the correct outcome, yet disregarded problems posed by social media's distinct technological characteristics. A continued failure to consider the distinct challenges posed by virtual forums could result in less free speech, rather than more.[98] In order to consistently protect the rights of speakers and listeners on social media while preserving interactivity between the public and federal agencies, courts should embrace functional internet exceptionalism — and nonexceptionalism should be the exception, not the norm.

---

91 *See* Tushnet, *supra* note 63, at 1662.

92 *See id.* at 1641.

93 *See* Lyrissa B. Lidsky, *Government Sponsored Social Media and Public Forum Doctrine Under the First Amendment: Perils and Pitfalls*, PUB. LAW., Summer 2011, at 2, 7.

94 Ardito, *supra* note 3, at 302.

95 *See id.* at 308–10.

96 *Cf. id.* at 309 ("[T]he communication of the agency message and interaction with the public are blurred in ways that will prove problematic in light of free speech doctrines."); Lidsky, *supra* note 93, at 7.

97 The Court has contended with self-censorship before. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court struck down a right of reply regulation partly out of fear that the law would "prompt[] newspapers to censor themselves in order to avoid having to give precious column space to political candidates they disliked." Douek & Lakier, *supra* note 61, at 118 (citing *Tornillo*, 418 U.S. at 257).

98 Douek & Lakier, *supra* note 61, at 132.