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Your Mayor, Your "Friend": Public Officials, Social Networking, and the Unmapped New Public Square

Bill Sherman*

Introduction

Your City Councilmember wants to connect with you. She wants to hear from you, speak to you, allow you to get to know her, and get to know you. She wants to learn your concerns and interests, and discuss policy, politics, and issues big and small. It is fair to say that she wants to develop a relationship with you—one in which you share family photos, thoughts about movies and the weather, and, of course, your views on issues that will come before the City Council. In short, she wants to be friends. But some local governments say she cannot—at least not on Facebook.

It turns out that there are friends, and there are "friends." The use of online social networks by local public officials has drawn the ire of local governments, some of whom have gone so far as to bar public officials from social networks for fear of violating campaign finance, open meeting, freedom of information, and government ethics laws. These objections overlook the unique nature of civic social networks as an emerging political institution, characterized by a high degree of transparency and intense public pressure for accountability. The nature of this new institution renders the alarmist reaction overblown. Civic social networks are the new public square, and local governments should embrace them as

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consistent with the goals of open government and ethics laws.

This Article seeks to describe this emerging institutional environment, and by doing so help change the ways that policymakers apply open government and ethics rules to civic social networks. Part One identifies the ways local public officials and their constituents are using social networks. Part Two discusses the attempts by some local governments to eliminate or limit that use. Part Three uses public choice theory and rational choice institutionalism to assess the tools and behaviors that have given us the emerging institution of civic social networks—an institution characterized by high demand for transparency and accountability. Part Four argues that the nature of the institution described in Part Three demonstrates that the threatened enforcement of open government and ethics laws would have a perverse effect—reducing transparency and accountability while exposing public officials to greater moral hazard. The Article concludes with recommendations for open government and ethics statutes (or the enforcement thereof) that would allow officials to engage their constituents in the new public square of civic social networks.

I. Welcome to the New Public Square

Local public officials are stampeding to use online social networks. It should come as no surprise that people whose lives are organized around constituent contact are adopting new tools that let them reach large numbers of people at little cost. But this scramble goes far beyond the use of formal, government-created websites with press releases, updates, and photos; today, it seems that there is hardly a mayor or city councilmember in a major American city without a Facebook page, a Twitter account, and a blog.[1] Major policy

1. Of course, Facebook can be found at www.facebook.com; Twitter at www.twitter.com; a "blog," as surely everyone reading this Article knows, is a contraction of the term "web log," and can be hosted at any number of web service companies, notably www.blogger.com. I will not attempt to offer a comprehensive definition of online social media. For a superb and detailed explanation of online social media, see James Grimmelmann, *Saving*

announcements are made by tweet and entire town hall meetings happen in chat rooms.[2] But most interestingly, local public officials have started using social networking in order to connect with their constituents, creating a three-way information flow: from official to constituent; from constituent to official; and among constituents, but in the context of the public official's network.[3]

This Part seeks to describe the use of online social networks by public officials—civic social networks. It develops the contrast between the network use envisioned by the network enthusiasts and the local governments tasked with enforcing open meeting, freedom of information, campaign finance, and ethics laws, some of whom propose prohibiting or limiting civic social network.

A. *Civic Social Networks: Optimists, Visionaries, and the Promise of the New Public Square*

Enthusiasts envision the Internet as the great

Facebook, 94 IOWA L. REV. 1137, 1142-48 (2009). As I comment, *infra*, the pace of change in social media is such that the specific platforms may be quite unrecognizable in just a few years. *See, e.g.*, *Today Now!: Internet Archeologists Find Ruins of "Friendster" Civilization*, THE ONION NEWS NETWORK (Dec. 16, 2009), http://www.theonion.com/video/internet-archaeologists-find-ruins-of-friendster-c,14389/.

2. Bill Dries, *Wharton Vows Overhaul for Fleet Services*, MEMPHIS DAILY NEWS (July 1, 2010), http://www.memphisdailynews.com/editorial/Article.aspx?id=51046 (describing Memphis Mayor A.C. Wharton Jr.'s first virtual town hall meeting); Keith Ervin, *King County Budget Shortfall Rises to $90 million*, THE SEATTLE TIMES (Sept. 5, 2008), http://seattletimes.nwsource.com/html/localnews/2008160413_webkingbudget05m.html ("[King County Executive Ron] Sims chose an unusual place to release the news, through Twitter, an online social-networking service that allows people to instantly post short messages in blog style."); Michael Ray, *The Virtual World of Online Gaming*, *in* ENCYCLOPEDIA BRITANNICA ALMANAC 2008, at 8 (2008) (describing former Virginia Governor Mark Warner's virtual town hall meeting on the social network platform *Second Life* in 2006).

3. This Article focuses on local public officials, a term meant to encompass elected officials such as city council members, and also broad enough to include appointed but still prominent local officials (for example, a police chief or head of a major city department). I do not include in my analysis candidates for public office, unless they are incumbents.

democratizer—a place with free commerce in opinions and ideas, where everyone is welcome, and where people gather to hear announcements, to protest, or to celebrate. In this optimistic conception, civic social networks are each community's new public square.[4]

A physical public square is a common feature in a community; in a city like Washington, D.C., it might be the National Mall, and in a smaller town, it might be the village square or the steps of city hall. Just as the physical public square is many things—the locus of the distribution of official information, part tribune and part question time, a place to exchange information and news (and, yes, gossip, innuendo, and misinformation), and a place where one is exposed to new information—the new public square of civic social networks lets anyone in. Public officials in the physical public square may communicate with constituents or with each other, but such communication occurs in full public view where it may be interrupted, corrected, or seconded by an observing public; just as in the new public square of civic social networks.

Social network sites have developed characteristics distinct from the Internet at large. Danah Boyd and Nicole Ellison define social network sites as "web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system."[5] The elegance of this definition lies in the corresponding three types of social interactions that social networks enable: the creation of an online *identity*; the establishment of *relationships* between users; and the development of layered *communities* defined by the lists of

4. Andrew Chadwick, *Web 2.0: New Challenges for the Study of E-Democracy in an Era of Informational Exuberance,* 5 I/S: J.L. & POL'Y FOR INFO. SOC'Y 9, 15 (2009) (noting that it was assumed in the 1990s that discussion forums "would provide for rich, critical, self-reflective, tolerant, and sustained citizen engagement, elegantly expressed through the medium of the written word").

5. Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship,* 13 J. COMPUTER-MEDIATED COMMC'N 210, 211 (2007).

connections each user establishes.[6]

The importance of these three types of interactions is the story of the commercial Internet for the last ten years. But they are equally important to politics and governance.[7] Public officials craft an online identity in order to provide certain information or convey a certain brand or persona; constituents do the same thing, although their primary target audience in creating their online identity is more likely to be other constituents, rather than the public official. Public officials and constituents establish relationships among each other, and the communities defined by lists of those relationships have both direct communicative value (the ability to send and receive content to/from the list) and secondary communicative value (the ability to convey the size, content, level, and type of activity of a network).[8]

At heart is a recognition that, as Justice Kennedy wrote, "Minds are not changed in streets and parks as they once were. To an increasing degree, the more significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media."[9] This is borne out by empirical evidence suggesting that online discourse has, in some ways, replaced the old public square.[10] Thus, it is up to the states and

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6. *See* Grimmelmann, *supra* note 1, at 1151-59 (analyzing in great detail this tripartite aspect of social networks).

7. Chadwick, *supra* note 4, at 19 (citing Tim O'Reilly, *What is Web 2.0? Design Patterns and Business Models for the Next Generation of Software,* O'REILLY (Oct. 30, 2005), http://oreilly.com/web2/archive/what-is-web-20.html). Among the many discussion of social media or "Web 2.0" in the political context is Tim O'Reilly's definition of the term "Web 2.0," with seven principles: the Internet as a platform for political discourse; the collective intelligence emergent from political web use; the importance of data over particular software and hardware applications; perpetual experimentalism in the public domain; the creation of small scale forms of political engagement through consumerism; the propagation of political content over multiple applications; and rich user experiences on political websites. *Id.*

8. As Chadwick notes, "it seems safe to suggest that web 2.0 rests in part upon a broadly voluntarist model of knowledge creation." *Id.* at 21.

9. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC, 518 U.S. 727, 802-03 (1996) (Kennedy, J., concurring in the judgment); *cf.* United States v. Kokinda, 497 U.S. 720, 737 (1990) (Kennedy, J., concurring in judgment).

10. Optimists believe that use of civic social networks is linked to

municipalities to conclude that, as Cass Sunstein puts it, "a free society requires a right of access to areas where many people meet."[11]

B. *The Realists: Online Political Communication Ranges from Discourse to Dysfunction*

Civic social networks, one should not be surprised to notice, do not look like an Athenian polis with Wi-Fi. But local public officials and their constituents are flocking to social networking tools,[12] and even government agencies that recently resisted have succumbed.[13] The most popular tools appear to be Facebook,[14] Twitter,[15] and blogs[16] (some hosted by a third-party

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greater civic engagement. KAREN MOSSBERGER, ET AL., DIGITAL CITIZENSHIP: THE INTERNET, SOCIETY, AND PARTICIPATION (2007) (finding that chat rooms, political email correspondence, and online news exposure predict higher voting rates); John Brehm & Wendy Rahn, *Individual-Level Evidence for the Causes and Consequences of Social Capital,* 41 AM. J. POL. SCI. 999 (1997); M. Kent Jennings & Laura Stoker, *Social Trust and Civic Engagement Across Time and Generations,* 39 ACTA POLITICA 342 (2004) (finding that political engagement is linked, in part, to a structure that encourages group membership, which in turn encourages trust).

11. CASS R. SUNSTEIN, REPUBLIC.COM 2.0 25 (2007).

12. Carl E. Brody, Jr., *Catch the Tiger by the Tail: Counseling the Burgeoning Government Use of Internet Media*, 84 FLA. BAR J. 52 (2009), *available at* http://www.floridabar.org ("[L]ocal governments are beginning to take advantage of the benefits of social networking."); *see generally* Aaron Smith, *Government Online: The Internet Gives Citizens New Paths to Government Services and Information,* PEW INTERNET (Apr. 27, 2010), http://pewinternet.org/~/media//Files/Reports/2010/PIP_Government_Online_2010_with_topline.pdf [hereinafter *Government Online*].

13. For example, last July, a Naples News story quoted a City of Marco Island public information coordinator, Lisa Douglass, saying that the City doesn't currently have any accounts with Websites, such as Facebook, and "I don't foresee us having any in the future either." Kelly Farrell, *Attorneys, Legislators to Pull Plug on Marco Government's Use of Social Websites?*, NAPLES NEWS (July 7, 2009), http://www.naplesnews.com/news/2009/jul/07/attorneys-legislators-pull-plug-marco-governments-/; *Cf. City of Marco Island Parks and Recreation*, FACEBOOK, http://www.facebook.com/pages/Marco-Island-FL/City-of-Marco-Island-Parks-and-Recreation/107921405922054 (last visited Aug. 15, 2010).

14. *See, e.g.*, Houston Mayor Annise Parker, FACEBOOK, http://www.facebook.com/MayorAnniseParker (last visited Nov. 11, 2010); Seattle Mayor Michael McGinn, FACEBOOK, http://www.facebook.com/michaelpatrickmcginn (last visited Nov. 11, 2010);

service like Blogger, and some hosted directly from government servers).

To be sure, many posts from public officials read like very brief press releases: merely a pronouncement with little genuine interaction between the official and the public.[17] But not all of them. In the snowstorm of 2010, Newark, New Jersey Mayor Cory Booker famously responded to a tweet requesting help removing snow by showing up with shovel in hand and volunteers in tow.[18] Booker, a mayor of a city with less than 300,000 residents, has more than 1,000,000 followers on Twitter.[19] The New York City Council's Twitter account includes links to social networking posts by various councilmembers and other City agencies and general news.[20]

San Antonio Mayor Julián Castro, FACEBOOK, http://www.facebook.com/MayorJulianCastro (last visited Nov. 11, 2010).

15. *See, e.g.*, Los Angeles Mayor Villaraigosa, TWITTER, http://twitter.com/VILLARAIGOSA (last visited Nov. 11, 2010); Chicago Mayor Richard Daley, TWITTER, http://twitter.com/MayorDaley (last visited Nov. 11, 2010); Portland Mayor Sam Adams, TWITTER, http://twitter.com/MayorSamadams (last visited Nov. 11, 2010).

16. *See, e.g.*, Gary Newsom, SAN FRANCISCO MAYOR GAVIN NEWSOM'S BLOG, http://sfmayor.typepad.com/ (last visited Nov. 11, 2010); Manny Diaz, MAYOR'S BLOG, http://mayormannydiaz.blogspot.com/ (last visited Nov. 11, 2010); R.T. Rybak, THE MAYOR BLOG, http://themayorblog.com/ (last visited Nov. 11, 2010); Dave Cieslewicz, MAYOR DAVE'S BLOG, http://www.cityofmadison.com/mayor/blog/ (last visited Nov. 11, 2010); Antonio Villaraigosa, THE BLOG, http://mayor.lacity.org/MeettheMayor/TheBlog/index.htm (last visited Nov. 11, 2010).

17. *See, e.g.*, Antonia Villaraigosa, TWITTER (Aug. 13, 2010, 2:13 PM), http://twitter.com/villaraigosa/status/21088633466 ("It was an honor to share successful anti-gang strategies w the first black Prime Minister of Belize. LA has a big Belizean population!"). Chicago Mayor Richard Daley now has a Twitter account, available at http://twitter.com/MayorDaley, although apparently he does not yet use email. Marcus Gilmer, *Mayor Daley A-Twitter*, CHICAGOIST.COM (Mar. 16, 2005, 11:15 AM), http://chicagoist.com/2010/03/16/mayor_daley_a-twitter.php.

18. Eric Kuhn, *Mayor Digs in After Twitter Appeal*, CNN POLITICS (January 3, 2010), http://politicalticker.blogs.cnn.com/2010/01/03/mayor-digs-in-after-twitter-appeal/.

19. Cory Booker, TWITTER, http://twitter.com/corybooker (last visited Oct. 14, 2010).

20. NYC Council, TWITTER, http://twitter.com/nyccouncil (last visited Oct. 14, 2010).

Houston Mayor Annise Parker's Facebook page includes comment threads by constituents on subjects before the City, and some replies by Mayor Parker (or her staff).[21]

In addition to specific city officials, some cities' agencies or departments have aggressively adopted social media. The City of Chicago lists 33 different social media accounts for its agencies—not including any for City public officials other than the mayor.[22] In some cases, social media chases the officials rather than the other way around. For example, British activist volunteer group MySociety created websites, including TheyWorkForYou and FixMyStreet that, like open source maps, mashup government data with user-generated input to connect constituents with problems, information, or interests to each other and to public officials.[23]

So even if idealists hoping that social networks would enable a high-minded process of deliberative democracy are likely to be disappointed—after all, study after study has demonstrated that online discourse is factually unreliable, consists of opinion rather than objective information, creates "echo chambers" in which people only talk to or hear from those who already agree with them, and therefore reinforce polarization in politics[24]—social networks have successfully enabled low-threshold civic engagement by citizens and public officials. As of 2010, a study showed that nearly one-third (31

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21. Annise Parker, FACEBOOK, http://www.facebook.com/MayorAnniseParker (last visited Oct. 14, 2010).

22. *Connect with the City of Chicago via Social Media*, CITY OF CHICAGO, http://www.cityofchicago.org/city/en/narr/misc/social_media.html (Last visited Oct. 14, 2010). City officials such as Aldermen have Facebook accounts as well. *See, e.g.,* Joe Moore, FACEBOOK, http://www.facebook.com/joemoore49 (last visited Oct. 14, 2010); Danny Alderman, FACEBOOK, http://pt-pt.facebook.com/pages/Alderman-Danny-Solis/112876165410079 (last visited Oct. 14, 2010).

23. MYSOCIETY.ORG, http://www.mysociety.org (Last visited Oct. 14, 2010).

24. *See generally* Sunstein, *supra* note 11; *see also* William H. Dutton & Malcolm Peltu, *Reconfiguring Government-Public Engagements: Enhancing the Communicative Power of Citizens*, OXFORD INTERNET INST., 2007, at 12, *available at* http://www.oii.ox.ac.uk/research/publications/FD9.pdf (noting that "[u]nregulated forums tend to become boxing rings for the extremes of an argument").

percent) of online adults use online platforms such as blogs, social networking sites, email, online video, or text messaging to get government information, and 13 percent of Internet users read a government agency or official's blog.[25] Taken together, nearly a quarter of Internet users have posted comments or interacted with others online around government policies or public issues.[26] Civic social networks, like them or not, are the new public square.

II. Ejecting Public Officials from the New Public Square

The rapid adoption of social networking tools by public officials has left some local governments somewhat shell-shocked. For those tasked with enforcing open meeting, freedom of information, ethics, and campaign finance laws, social networks are not so much a great new venue for deliberative democracy, but more like new tools with which public officials can misbehave. In many cases, local governments have proposed restrictions that, for all intents and purposes, ban public officials from using social networks in their official capacity.[27]

A. *What is Government's Role in Regulating Public Officials' Presence in the New Public Square?*

Policymakers have approached questions about public officials' use of social networks in a manner consistent with their institutional role. The question, for them, is whether the activity occurring on social networks may violate existing law, and if so, how best to stop and/or punish it.[28] Because social

25. *Government Online*, *supra* note 12 at 26, 31.

26. *Id.* at 31.

27. *See, e.g.*, Timothy Burgess, Councilmember, City of Seattle, Speech at the Meeting of the Seattle Ethics and Elections Comm. (Dec. 2, 2009), *available at* http://www.seattlechannel.org/videos/video.asp?ID=5590985. "The draft rules [on social media use by city elected officials] from our staff essentially would prohibit city councilmembers from using social media like Facebook, Twitter, etc., and that's where I have a real objection." *Id.*

28. As I explain in Part III, infra, this is not the only approach to the

networks are, for the most part, third-party applications, their features, format, and rules are not directly controlled by the public officials or government agencies that use them.[29] Consequently, any restrictions on use of social media by public officials can only be enforced by monitoring and enforcement, under threat of some penalty, rather than through design modifications or access limitations.

It is fair to say that public officials cannot be counted upon to govern themselves,[30] especially when a significant portion of the improper use of social networks may be inadvertent, and therefore unlikely to be checked internally. But as with other government regulation of the Internet, there is broad disagreement about the specific role of government and civic social networks.[31]

Local lawmakers and agencies with the responsibility to enforce applicable laws have just begun to grapple with the

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issue, but for policymakers tasked with enforcing existing law, it is to be expected. As I argue below, I believe the issue would be better addressed with an understanding that social networks are not just a tool public officials may use or a venue in which they may act, but rather a set of behaviors that constitute an emerging institution.

29. This stands in contrast to, for example, regulation of the use of a government building, vehicle, or government-hosted website, all of which can be controlled directly.

30. Jerry Mashaw, *Public Law and Public Choice: Critique and Rapprochement*, *in* RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 47 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010). "Constant emphasis on selfish strategic behavior in politics does pose dangers for the public spirit. But designing institutions as if people always attempted to act in the public interest is almost certainly a formula for disaster." *Id.*

31. *See, e.g.*, A. Michael Froomkin, *Building the Bottom Up from the Top Down*, 5 I/S: J.L. & POL'Y FOR INFO. SOC'Y 141, 145 (2009) [hereinafter *Building the Bottom Up*].

> [W]hat role is there for government to play in encouraging the rise of new groups and new self-governing institutions? Does it even make any sense to think of building the bottom up from the top town, or is the role of academics and especially policy-makers limited to that of participant-observers and cheerleaders waiting for the public to spontaneously organize itself?

Id.; *see also* A. Michael Froomkin, *Habermas@discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749, 871 (2003).

problems they see. The first reactions range from outright hostility to any civic social networks to conservative counsel to enthusiastic embrace.[32] As one open-government advocate put it, "[government prohibition on social network use] does exhibit a trend we're seeing—leaders see social media as opening the door for risk. But social media and improving online technology is only going to make government more accessible. It is a challenge but it is a challenge that's necessary for governments to meet."[33]

The challenge for local governments is to identify where civic social networks extend, rather than subvert, valid public goals like transparency and accountability. Thus, although social networks "are occurring without government intervention . . . there remains scope for government to nurture them and especially to facilitate solutions to specific problems that participants have not as yet been able to solve themselves."[34] And as local governments identify problems and facilitate solutions, they must recognize that social networks are a form of engagement that citizens take seriously as a part of their political expression.[35] So far, however, those governments have reacted in precisely the opposite way.

B. *Ejecting Public Officials from the New Public Square*

This is not the first time that a new technology has emerged, forcing policymakers to assess its impact or threat. In the case of social media, agencies have sounded the alarm, in particular, over actual or potential violation of freedom of information laws, open meetings laws, government ethics rules, and campaign finance regulations. Because few (if any) laws deal specifically with social networks, policymakers have had

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32. *See* Brody, *supra* note 12.

33. R.L. Nave, *When Politicians Tweet: Social Media's Role in Open Government*, SEATTLEPI.COM (April 27, 2010, 6:57 PM), http://www.seattlepi.com/local/418990_socialpols27.html (quoting Sarah Schacht, Executive Director for Knowledge as Power).

34. *Building the Bottom Up*, *supra* note 31, at 157.

35. Chadwick, *supra* note 4, at 39.

to extrapolate from existing law, with mixed results.[36]

Policymakers have employed two different approaches. Under the first approach, an agency has faced a specific allegation that a use of civic social networks violates existing law and the agency has then determined whether the existing law applies to the use of social networks. Under the second approach, a policymaking or enforcing agency has raised a general alarm about the potential for mischief, and handed down a series of rules intended to prevent violations. The results have been varied, as demonstrated by the following examples: (1) the City of Redondo Beach was advised to avoid all use of social networks for any purposes;[37] (2) the City of Seattle was advised to adopt regulations that would bar City Councilmembers from "friending" each other on social networks, for fear of allowing inadvertent online meetings in violation of the Open Public Meetings Act, and bar any links that would lead to third-party content that is commercial (like advertisements) or political (like a comment from a constituent in support of a campaign);[38] (3) Attorneys for a Florida municipal planning board told the board that, as a general matter, it should not have a social network profile "under any circumstances";[39] (4) Attorneys for a collection of Washington

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36. Brody, *supra* note 12, at 54.

> Though the realm of Internet media is evolving at light speed, it remains tethered to statutory laws that have been around for decades . . . [and] state courts have yet to fully engage on subjects specific to local government requirements and, therefore, at times there is a need to extrapolate as to the application of state law to Internet social networking.

Id.

37. Sascha Bush, *City Council Wrap*, THE BEACH REP., (Aug. 18, 2010, 5:36 PM), http://www.tbrnews.com/articles/2010/08/19/redondo_beach_news/news11.txt.

38. Ramsey Ramerman & Walter Neary, *Social Media: Stepping Out of the Box. Staying in the Lines,* ASSOCIATION OF WASHINGTON CITIES ANNUAL CONFERENCE 31 (2010), *available at* http://www.awcnet.org/trainmaterials/conference/2010/SocialMediaPresentation.pdf [hereinafter *Stepping Out*].

39. Kelly Farrell, *Attorneys, Legislators to Pull Plug on Marco*

cities advised city councilmembers to avoid posting any content regarding policy or city-related issues;[40] and (5) counsel for the City of Fort Lauderdale discouraged any City participation on Facebook or "any similar interactive communication technology."[41]

Agencies, counsel, and public officials have grappled with at least three types of potential statutory violations that they believe apply to communications among public officials and constituents using social networks.

1. Freedom of Information or Public Records Acts

Skeptics point out that public officials' use of social network sites can create public records that are inaccessible to many members of the public in their original location, and may not be retained or cataloged in the same way as email or written correspondence. Those concerns are well justified. Consider the following scenario: Councilmember Jones posts on Twitter that he opposes Mayor Smith's plan to combat street crime: "I stand against @MayorSmith's faulty, punitive #brokenwindows plan. Let's make our streets #safeforeveryone!" The post would be published online[42] and anyone who had a Twitter account who had signed up to follow Councilmember Jones would instantly receive the message (as would anyone signed up to follow Mayor Smith and anyone searching for the hashtags #brokenwindows or #safeforeveryone). In addition, those who do not have Twitter accounts may view the post for a certain period of time, but would not receive a notification when it was posted.

This raises two questions: First, is Councilmember Jones's

Government's Use of Social Websites?, NAPLESNEWS.COM (July 7, 2009, 1:42 PM), http://www.naplesnews.com/news/2009/jul/07/attorneys-legislators-pull-plug-marco-governments-/?printer=1/.

40. *Stepping Out*, *supra* note 38, at 18-19.

41. Memorandum No. 09-0524 from Harry A. Stewart, City Attorney, Ft. Lauderdale, Fla., to Mayor, Vice Mayor, and Commissioners, Update on the Law—Facebook Pages and Websites (May 14, 2009), *available at* http://weblogs.sun-sentinel.com/news/politics/broward/blog/facebookmemo.rtf.

42. Twitter posts are limited to 140 characters; the above post is 109.

tweet a public record? And second, if so, how would it be found, retained, and produced by the City in response to a public records or Freedom of Information Act request?

All fifty states have public records statutes, many modeled after the Federal Freedom of Information Act (FOIA).[43] These laws were a cornerstone of the "sunshine laws" movement that began in the 1950s and flourished in the post-Watergate era, opening government records to public access on the theory that sunshine is the best disinfectant[44]—that is, public scrutiny exposes, and therefore hampers or remedies, corruption.

Briefly, these statutes require the government to provide public records upon request (with certain enumerated exceptions). Public records are generally defined as any writing or other record containing information relating to the conduct of government prepared, owned, used, or retained by any part of the government.[45]

The key legal questions are well-settled; a public official's writings, regardless whether they are on a government website or not, are public records, so long as the post is pertinent to city business.[46] The harder question, then, is not the legal but the practical one: how best can the government retain a record of officials' posts on social media so that they can be produced upon request under FOIA?

Seen as a collection of written exchanges, the retention and

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43. Daniel J. Solove, *Access and Aggregation: Public Records, Privacy and the Constitution*, 86 MINN. L. REV. 1137, 1161 (2002). "Today, all fifty states have open records statutes, a majority of which are modeled after the [Federal Freedom of Information Act]." *Id.*

44. This phrase is attributed to Justice Louis Brandeis. *See* LOUIS BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT (1914) ("Sunlight is said to be the best of disinfectants.").

45. *See, e.g.*, WASH. REV. CODE § 42.56.010(2) (2007).

46. The common reasoning is well described by the Florida Attorney General's Office—when a public official chooses to use a non-government means of communication (whether email or social networks), then he or she agrees that they have supervision and control over the document, and has a duty of preservation and disclosure. Brody, *supra* note 12, at 55; *see also* Nave, *supra* note 33. "Most states, including Washington, have determined that social media activity by government agencies—despite the fact that it takes place on privately owned third-party Web services—does fall under the purview of the state's Public Records Act." Nave, *supra* note 33.

production of social network posts is not conceptually difficult—they are not distinguishable from email. "An ordinary email is nothing more than a piece of written correspondence transmitted through an efficient and inexpensive means. . . . [T]he public's interest in overseeing the workings of local government is protected in the same way that it is for call other types of written correspondence—the public may review such correspondence by making a records request under the open records provision of state law."[47]

A trickier problem arises due to the lack of permanency of social network posts. Consider this scenario: A port commissioner criticizes a city councilmember's policy proposal in a post on Facebook; the other councilmember responds by posting something on the port commissioner's Facebook page. For some reason (perhaps the commissioner regrets his tone, or decides that this disagreement need not be public, or realizes he was wrong), he removes the original Facebook post, and deletes the response posted by the city councilmember.[48]

Now, it may be good for the tone of public discourse, and maybe even for policy, for these officials to be able to turn back the clock to the moment before they hit the "post" or "share" button. But the law is clear that both the original post and the response are public records, and it is certainly in the public interest for voters to have access to the writings of their elected officials on policy matters.

Difficult as these questions are, they are essentially technical problems. The right retention tools can ensure that all of these writings, wise and unwise, are available for production in response to FOIA requests. Inexpensive solutions exist that would allow a public official (or her staff) save a weekly log of Facebook, Twitter, and blog posts.[49]

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47. John F. O'Connor & Michael J. Baratz, *Some Assembly Required: The Application of State Open Meeting Laws to Email Correspondence*, 12 GEO. MASON L. REV. 719, 722 (2004).

48. This example is not hypothetical. *See, e.g.*, Erica C. Barnett, *The Disappearing O'Brien-Creighton Facebook Flap*, PUBLICOLA (July 30, 2010), http://www.publicola.net/2010/07/30/the-disappearing-obrien-creighton-facebook-flap/.

49. *See, e.g.*, PAGE FREEZER, http://pagefreezer.com/ (last visited Nov. 15,

2. Open public meetings

A knottier problem arises under open meeting statutes. Because public officials can read each others' tweets, blog posts, and Facebook updates in real time and respond to them instantaneously, they may engage in communication that is more similar to a meeting than it is to ordinary correspondence. Consider a slight twist on the hypothetical Twitter post above: City Councilmember Jones posts his opposition to the mayor's public safety policy on Facebook. Among two dozen reader comments are the following: Councilmember Nguyen clicks the "like" button on the post—signaling to all readers that he agrees with Councilmember Jones; Councilmember Diaz comments on the post that she thinks the mayor's policy does not go far enough; Councilmember Rogers writes that he disagrees with Councilmember Jones but is open to persuasion; and Councilmember O'Connor links to Councilmember Jones's post on her own Facebook page and comments that the entire question is moot because the public safety budget is strapped.[50] Did a city council meeting just take place on Facebook?

Open meeting statutes have existed in every state and the District of Columbia for over thirty years.[51] These laws require that most meetings of city or county councils, as well as government-authorized boards and commissions, be held with notice to and access for the public. The laws can have quite powerful enforcement mechanisms; commonly, the remedies for violation include individual penalties for the officials, municipal liability for any costs and fees, and reversal of the government action that was the subject of the meeting.[52]

2010); BACKUPIFY, http://www.backupify.com/ (last visited Nov. 15, 2010).

50. I use Facebook purely as an example; a nearly identical exchange could take place on Twitter or in the comments section of a blog post.

51. *See, e.g.*, Susan T. Stephenson, Note, *Government in the Sunshine Act: Opening Federal Agency Meetings*, 26 AM. U. L. REV. 154, 154 n.3 (1976); Teresa D. Pupillo, Note, *The Changing Weather Forecast: Government in the Sunshine in the 1990s—An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165, 1167 (1993).

52. *See, e.g.*, WASH. REV. CODE § 42.30.060 & .120 (2006).

Open meeting statutes are universally interpreted to cover not only in-person, face-to-face meetings but also so-called "serial" meetings and meetings at which communication is done in writing or by telephone.[53] More recently, comparable communication by email—when it is interactive, deliberative, or decisionary in nature, occurs close in time and involves a quorum of the relevant government body—has been held to violate open meeting laws.[54]

While few, if any, court decisions apply open meeting laws to social networking, local governments see social networks as a particular risk because their structure is designed to facilitate casual interaction. For example, posts from "friends" or contacts automatically appear on an official's profile and it takes only a single click to interact with the author. Thus, if open meeting laws were applied to civic social networks, a "meeting" could occur without any single official intending it. After all, these sites were developed, in part, to create virtual space in which users could "meet" with a minimum of effort.[55]

The first state supreme court to address the applicability of open meeting laws to email focused its analysis on whether the email exchange had "indicia of simultaneity" that indicate government deliberation occurring in real time, but virtual space.[56] Some other courts do not appear to find significant the

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53. *See* Stockton Newspapers, Inc. v. Members of The Redevelopment Agency, 214 Cal. Rptr. 561, 562, 564 (1985) (holding that series of telephone calls between individual members and attorneys constitute a "meeting" so as to violate the California public meeting law).

54. *See* Wood v. Battle Ground Sch. Dist., 27 P.3d 1208 (Wash. Ct. App. 2001); *but see* Beck v. Shelton, 593 S.E.2d 195, 201 (Va. 2004) (holding that the e-mail communications in this case "did not constitute a meeting").

55. Arguably, the hosting sites are fully open to the public for most online posts, insofar as the interested citizen can access the post without registration, such as for Twitter or a blog, of if registration is free and simple (the case with Facebook). But the user agreements for Facebook are not simple; one gives up a certain amount of valuable information to Facebook, and agrees to terms of use that some find objectionable. Furthermore, in order to obtain the desired level of access, one may have become a "follower" (on Twitter) or a "friend" or "fan" (on Facebook) of a public official, essentially declaring support before even seeing what they have to say.

56. O'Connor, *supra* note 47, at 721; *see also Beck*, 593 S.E.2d at 198 (stating that the "e-mail communications did not involve virtually simultaneous interaction").

differences between written communication and in-person deliberations.[57] Generally, however, state courts agree that electronic communications like conference calls and email exchanges can constitute a meeting under certain circumstances.[58]

In some significant ways, an exchange between officials on a civic social network such as Facebook or Twitter is different from an email exchange. For example, an exchange in the comments to a blog post on Facebook or Twitter is available for anyone to see or join at any time, although there may not be a "feasible way for any and all interested members of the public to 'attend' an email communication."[59] In fact, the transparency of the exchange and its openness to public participation is arguably as great or greater than most traditional public meetings. And, as a general matter, the overlapping purposes of FOIA laws (ensuring that government records, including correspondence, is available to the public) and open meetings laws (ensuring that deliberation is public and that constituents can engage in the deliberation) are fully accomplished in the social networking context in a way that they are not in an email exchange, which must be requested formally to be

57. *See Wood*, 27 P.3d at 1216 (in which the court did not place great significance in the immediacy of the exchange); *see also* O'Connor, *supra* note 47, at 745-46 ("The *Wood* court gave no apparent consideration to the fact that email communications differ from orthodox meetings in that the participants are not deliberating at the same time or in the same place. Rather, the result depended entirely on the substance of the communications and whether the communications involved 'the active exchange of information and opinions' on a matter of public business—which would be illegal—or 'the mere passive receipt of information'—which would not be illegal.").

58. *See, e.g.*, 5 ILL. COMP. STAT. 120/1-20 (West 2010) (Illinois includes any event with "contemporaneous interactive communication" as a meeting under the Open Meetings Act); CONN. GEN. STAT. ANN. § 1-200(2) (West 2010) (Connecticut defines "meeting" as "any hearing or other proceeding of a public agency, any convening or assembly of a quorum of a multimember public agency, and any communication by or to a quorum of a multimember public agency, whether in person or by means of electronic equipment, to discuss or act upon a matter over which the public agency has supervision, control, jurisdiction or advisory power.").

59. O'Connor, *supra* note 47, at 753.

received.[60]

Under the current interpretations of open public meeting statutes, exchanges like the hypothetical above would almost certainly be prohibited. But rather than seek an alternative interpretation of the law, or even merely train members to avoid a violation, social media skeptics are throwing the baby out with the bathwater. The City of Seattle, for example, is considering a policy that would "strongly discourage[]" city Councilmembers from "friending" each other at all—a solution akin to preventing email exchanges or telephone calls between members.[61] Other governments are advising officials to stay off social networks altogether.[62]

3. Misuse of Public Resources and Political Content

Policymakers are particularly concerned about the potential for government links to social network sites that contain political, non-government, or advertising content. Although social network sites are not owned by the government, if the government's website has a direct link to the social network, then government resources can be interpreted as supporting the content of the social network site. This creates a risk of the illegal use of government resources.[63]

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60. *See, e.g.*, Stephen Schaeffer, Comment, *Sunshine in Cyberspace? Electronic Deliberation and the Reach of Open Meeting Laws*, 48 ST. LOUIS U. L.J. 755, 778 (2004) (discussing 00-906 Cal. Op. Att'y Gen. 1 (2001) and 2001-66 Fla. Op. Att'y Gen. 1 (2001)).

61. "Communication between Councilmembers via social media, as with telephone and email, may constitute a 'meeting' under the Open Public Meetings Act. For this reason, Councilmembers are strongly discouraged from 'friending' other Councilmembers." *Sample Policy: Use of Social Media by City Council Members,* SEATTLE LEGISLATIVE DEP'T, http://www.mrsc.org/policyprocedures/s42ccsocialmedia.pdf [hereinafter *Sample Policy*] (last visited Nov. 15, 2010).

62. *See, e.g.*, Bush, *supra* note 37; Farrell, *supra* note 39; Memorandum No. 09-0524, *supra* note 41; *Stepping Out*, *supra* note 38.

63. Memorandum from Wayne Barnett, Executive Director, Seattle Ethics and Elections Commission on Social Media and the Ethics and Elections Codes 2 (Nov. 24, 2009), *available at* http://www.seattle.gov/ethics/meetings/2009-12-02/item7.pdf (noting that government websites are public facilities, and that "using state facilities to provide a direct electronic link to a private web page which contains

Consider this scenario: Mayor Smith has an official web page at his city's main website. On that page, there is a sidebar encouraging readers to follow the mayor on his blog, Twitter, Facebook, and Flickr, with links to those sites.[64]

For the purpose of our analysis, assume that the mayor's blog, Twitter feed, Facebook page, and Flickr account are not managed using government funds but by the mayor himself or a volunteer. Further, assume that the blog is on Blogger or a similar third-party site. May the mayor endorse a candidate for office on his Twitter feed? May he post a photo of himself at a political rally on Flickr? These examples seem pretty straightforward; he may not, because doing so would result in city resources directly linking to campaign content posted by a city official.[65]

But civic social networks, by design, invite participation from the public, not just dispatches from officials, and are supported by advertising revenues. If the main city website includes direct links to the mayor's Facebook page, is it permissible for the Facebook page to feature commercial advertisements? What if a constituent posted a campaign-related message on the mayor's Facebook page, or tagged the mayor in a campaign-related Twitter post or photo on Flickr?

State laws universally bar the use of government resources to support a private individual or enterprise, or a political campaign.[66] Because government websites are maintained with public funds, a link from a government website to a social network site can run afoul of this prohibition—depending on the content of the social network site.[67]

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materials and advertisements that support, or oppose, passage of a ballot initiative would also violate" state law).

64. *Seattle Mayor Michael McGinn*, SEATTLE.GOV, http://seattle.gov/mayor/ (last visited Oct. 20, 2010).

65. Barnett, *supra* note 63, at 2.

66. *See*, *e.g.*, FLA. CONST. art. VII, § 10 (barring the government from using, giving, or lending its taxing power or credit to aid any private interest or individual).

67. Brody, *supra* note 12, at 57. "Most Internet networking created by elected officials is in some way intended to advance the private interests of the official in retaining his or her current position or for obtaining greater support at the polls." *Id.* "Local government Web sites require public funds to

Local governments raise a number of serious concerns. Consider the following scenarios: (A) A city's official web page includes links to Facebook pages maintained by public officials or city agencies. Facebook, as a private company, is enjoying the benefit of any user traffic driven to its site; (B) a city's official web page includes links to a blog or Facebook page maintained by a public official or city agency. The blog or Facebook page includes commercial advertising, and therefore is promoting certain businesses; and (C) A city councilmember's official web page includes a link to his or her Facebook page. The councilmember is fastidious about avoiding posting any campaign-related content on that site. But, without the consent of the councilmember, Facebook displays political ads for various candidates along the right margin of the page, and constituents of the councilmember post material on the page promoting certain candidates.[68] For each of these scenarios, does the city's link constitute an improper use of government resources?

Policymakers and enforcers tend to view scenarios A and B as allowable for any or all of three reasons: (1) any support of the social network site or advertiser is de minimis; (2) any support is unintentional; and (3) any support is a byproduct of an allowable government activity or a government purpose (in this case, the purpose would be public outreach and communication). From a practical standpoint, this makes good sense—after all, if a government link to a corporate website or a website containing advertising was prohibited, then a county could never link to an online newspaper article.

Scenario C, however, is problematic because support of a political campaign can never be a permissible government

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be maintained. Therefore, any elected official desiring to link his or her Web site to the site of any public entity could potentially be in violation of Fla. Const. Art VII, § 10 . . . as arguably the elected official would be exploiting public funds for his or her own private benefit. Particularly in an election year where campaign material and messages will undoubtedly be promoted partially through networking sites, the risk for inadvertently violating these provisions is high." *Id.*

68. Facebook's placement of ads is more likely to be tied to the profile of the viewer, not the Councilmember.

purpose.[69] The difficulty of this scenario lies in the notion that the political content can appear on the public official's social network site without being posted or approved by the public official. Moreover, depending on the social network's specific features, the public official may not even be able to remove the material from the social network.

Regulators indicate that their preferred solution would require public officials to moderate the content on their social network pages to prevent political content from appearing. This assumes, first, that the public official has some control over the content—which he may not—and second, imposes on the public official the need to police the social network site for inappropriate material. The analogy used by some regulators was summarized by the executive director of the Seattle Ethics and Elections Commission:

> Just as it would violate the Elections Code for a City officer or employee to authorize a campaign rally in a City conference room, so too would it violate the elections Code if a City officer or employee permitted the public to hold a virtual campaign rally in the comments thread on a blog accessible from a City site. In both cases, City resources are being used for unlawful purposes, which the City official has authorized.[70]

Thus, a public official would be prohibited from using any civic social network that could allow other users to post political material.

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69. The scenario described is not unique to Facebook. A constituent (or anyone) could post campaign-related material on Twitter and, by tagging the public official, it would show up in the official's Twitter feed; similarly, a constituent could post campaign-related material in the comments thread of a blog post.

70. Barnett, *supra* note 63, at 5.

C. *Why the Solutions Offered by Local Governments Do not Work*

Ill-crafted approaches offered by policymakers and enforcers, such as barring social network use at all, prohibiting councilmembers from "friending" each other, or holding public officials responsible for third-party content, result in impractical solutions. Regulators have addressed social networks by applying existing law to a possible problem, and attempting to extrapolate a solution based on previous applications of the law to email, conference calls, and conference rooms in government buildings.

The result of such extrapolations has been a contradictory collection of rules attempting to patch specific problems. For example, the U.S. Senate Internet Services Usage Rules and Policies permit Senators to maintain a third-party website—such as a blog or Facebook page—but only one that does not permit "personal, promotional, commercial or partisan political/campaign-related content or links to an Office-maintained website or channel."[71] Thus, a senator cannot maintain a social network site with personal information and it cannot link back to his or her official Senate website. Such a policy, in an attempt to avoid possible conflicts with existing rules, establishes new rules that are certain to be ignored; it takes seconds to find a senator's Facebook page featuring promotional, commercial, and personal content or with links to an office-maintained website.[72]

Local governments' solutions are also often internally inconsistent. For example, Seattle's draft policy encourages city councilmembers to use social media that can record the identity of a commenter and restrict users' ability to comment, most often done by requiring registration (i.e., Blogger/Google's

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71. *U.S. Senate Internet Services Usage Rules and Policies*, SENATE.GOV, http://www.senate.gov/usage/internetpolicy.htm (last visited Oct. 20, 2010).

72. *See, e.g.*, *Senator Mitch McConnell*, FACEBOOK, http://www.facebook.com/#!/pages/Senator-Mitch-McConnell/20163125303?ref=ts (last visited Nov. 15. 2010); *Mitch McConnell*, FACEBOOK, http://www.facebook.com/mitchmcconnell (last visited Nov. 15, 2010).

registration requirement). Yet the policy, mere lines later, states that, "[s]ites requiring membership or subscription should be avoided."[73] This not only contradicts the desire for control that can only come with registration, but also rules out the majority of popular social networking sites, such as Facebook, MySpace, or Twitter.

Fundamentally, the failure of open meeting and campaign laws to address social networks stems from these local laws' approach: they deal with social networks as if they are only a tool with which officials act in ways similar to the tools available in 1976. Consequently, it is a mistake to assume that our existing rules will apply to social networks with a couple of tweaks. Scenario C described above (dealing with the regulation of third-party content) demonstrates that the existing rules fail to address much of the most problematic, and hardest to police, behavior. I suggest that the challenge is not to develop micro-rules that would prevent this behavior, but instead to step back and take a close look at the behavioral norms and pressures that are developing around this institution, and see what it is we are dealing with.

The failure of policymakers to develop guidelines that make sense for civic social networks is not surprising since it is impossible to predict the specific shape of social networks or how they will interact with public officials in the future. As Jerry Mashaw put it, "we do not really have much information about how to design institutions that take the taste-shaping aspects of public action seriously. We know very little about how institutional taste shaping works."[74] Nevertheless, if we are to understand the opportunities and risks that social networks offer public officials and their constituents, we have to understand the environment that has led to their extremely rapid adoption and the patterns of behavior that have developed around their use. As I argue in Part III, these behaviors have become so pronounced that they have begun to take the shape of a new unstructured institution—not an

73. *Sample Policy*, *supra* note 61.

74. JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW 28 (1997).

organization, but rather a set of interrelated strategic behaviors that, in turn, affects the behavior around it.

III. Social Networks Are a New Institutional Environment

Social networking by public officials and their constituents has exploded in the last four years,[75] but the most astonishing aspect of civic social network is not their rapid adoption, usefulness, or ability to facilitate different kinds of communication. The most striking aspect of this phenomenon is that the behaviors on all sides of the communication matrix—that is, among both officials and constituents—already have recognizable patterns and norms of such consistency that they constitute an emerging unstructured institution. This Part argues that policymakers must understand the characteristics of this institution if they are to regulate public officials' use of social networks.

A. *Social Networking as a Public Choice and Rational Choice Institutionalism Topic*

An analysis of the pressures on and behavior of public officials and their constituents demonstrates that social networks are more than simply new venues in which public officials and their constituents act. Rather, social networks have a distinct social logic driven by the self-interested behavior of users.[76]

Although there are many ways to examine political behavior, social networking is especially appropriate for the use of public choice theory and rational choice institutionalism; the environment involves a very large number of low-threshold but distinct decisions, and each of these decisions indicates an

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75. *See generally* Smith, *supra* note 12. The timing has many sources, but the single largest contributor is apparently the expansion of Facebook in 2006 from college students (or anyone with a .edu email address) to the public at large.

76. *See generally* CLAY SHIRKY, HERE COMES EVERYBODY: THE POWER OF ORGANIZING WITHOUT ORGANIZATIONS (2008). Shirky's book describes in great and entertaining detail the underlying logic of social networks.

expression of specific desires on behalf of the user. When a public official or a constituent decides to begin, continue, or expand the use of online social networking—whether to sign in, to send a message, to post information, or to organize a group—the decisions involve individual calculations about the use of time, attention, and communication. And because the specific sites and tools employed today are certain to change quickly and dramatically, it is important to apply tools of analysis that do not take as a constant any feature of this environment other than the aggregated preferences and decisions of the users.

Consequently, this Part applies tools from public choice theory and rational choice institutionalism[77] to assess the incentives, costs, and emerging institutional characteristics driving the behavior of public officials and their constituents when using social networks. Public choice theory takes some well-deserved criticism for its assumption of purely rational and selfish behavior; Professor Mashaw demonstrates (with devastating effectiveness) the frequent inability of public choice to explain even common political behavior.[78] By applying these

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77. I do not mean to suggest that public choice or rational choice is the only way to understand public officials and social networks. "Public choice is not the sole method of analysis of a given legal problem. However, it can serve to enrich the analytical framework of law and legal institutions. Some features of law that seem puzzling to traditional analytical approaches can be explained by public choice analysis." D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. (forthcoming 2011) (reviewing MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (2009)).

78. Mashaw, *supra* note 30. Mashaw demonstrates that public choice theory does not appear to describe how law actually gets made at all, and fails to agree on enough of the key questions to not be of much use. But I think that Mashaw takes public choice theory perhaps too seriously, in a way (or maybe it is the theorists who take their own work too seriously, and Mashaw does them the honor of responding in kind). I view public choice as a series of theories that seek to describe forces at work in law and democracy, but do not claim to be the only forces or the only applicable theories. By analogy, Newton's Law of Gravity is no less true for the fact that mountains rise and clouds stay aloft, unexplained by gravity; it is just that those phenomena require more than one theory to explain their existence and behavior. In the same way, public choice theory can help explain why social networks, as applied to public officials, has developed as an unstructured institution. It can help explain the ways that institution may change in the future, and the ways that government may police the ways that it is used by

tools, I do not suggest that they are the only way to look at this problem, or that they explain everything. But public choice does identify and explain a number of the more interesting features of the use of social networks by public officials, and the deficiencies and potential of policymakers' efforts to regulate it.[79]

The most basic assumptions of public choice theory are that the relevant actors have an identifiable set of preferences or tastes, that they behave so as to maximize the attainment of those preferences, and that they do so strategically.[80] In this case, the key actors are public officials and their constituents, both of whom use (or are interested in using) social networks. The actors share some of the same incentives in their behavior, and are divergent in others. But primary among those shared are what Professor Grimmelmann refers to as the "social imperatives" of "identity, relationships, and community."[81] It is those "imperatives" and the underlying logic of social networks that makes them important to understand for policymakers seeking to regulate public officials' conduct. As Grimmelmann notes, "[w]e cannot and should not beat these social urges out of people; we cannot and should not stop people from acting on them. . . . New technologies matter when they change the dynamics of how people do things together; the challenge for technology law is always to adapt itself to these changing dynamics."[82]

Even with those "social imperatives," any individual's decision to use social networking faces questions familiar to

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public officials.

79. As Sokol explains, "[u]nderstanding public choice allows actors in the legal and political systems to better understand policy trade-offs and implications. With this knowledge, such actors can make decisions more likely to maximize social welfare." Sokol, *supra* note 77 (citing Mashaw, *supra* note 74, at 31).

80. Mashaw, *supra* note 30 ("As has been noted, the crucial unifying thread in public choice theory is the assumption that all actors in political life—voters, interest groups, representatives, legislative committees, bureaucrats or courts—behave rationally to maximize or optimize some objective function (wealth, status, power).").

81. Grimmelman, *supra* note 1, at 1206.

82. *Id.*

public choice. Rational choice institutionalists see politics as a set of collective action dilemmas, or situations in which a group of individuals trying to maximize their own desired outcome are likely, through their aggregated individual action, to produce an outcome that is collectively less than optimal. The question then is framed as how institutions are created or governed that affect the collective action problem (whether by overcoming it, changing the type of problem, or exacerbating it). In our example—online social networking—the questions are: how and why did online social networks arise in the political context? Why do people find them useful? And what does their growth say about the wisdom of restrictions on their use by public officials?

The best way to understand how social networks function in conjunction with public officials is to understand the behavior of the two types of actors in the relationship: public officials and their constituents.

B. *Why Do Public Officials Want to Use Social Networks?*

Social scientists who examine social networking by public officials sometimes view the dynamic between the government and the public as a relationship between supply of information (by public officials) and demand (by constituents).[83] Although that framework may help describe certain ways that the government and public interact on the Internet, it bears little resemblance to the social networking environment, which features much more give-and-take on both sides. In fact, an analysis of social network sites that fails to recognize the demand by officials of others in the network will miss the ways that officials' behavior helps solve many of the collective action problems that may otherwise stymie widespread use by the public. Consequently, this subsection assesses values and tastes that prompt public officials to use social networks; the specific behavior in which those values and tastes are

83. *See* Chadwick, *supra* note 4, at 26. Chadwick refers to the "demand side—the perspective of citizens" and the "supply side—the perspective of government organizations." *Id.*

manifested; the forces that their behavior brings to bear on other users of social networks; and the ways that behavior of public officials is restrained (by themselves or other factors).

1. Why Do Public Officials Use Social Networks?

Public choice theory traditionally takes a very dim view of the motivations of public officials. Generally, elected officials are portrayed as valuing re-election above all else; for appointed officials, the expansion of budget and power is paramount.[84]

Debunking, explaining, and expanding this view of the motivations of public officials has been a minor industry for decades. The upshot of this research, both theoretical and empirical, has been that re-election, budget, and power are all important goals of public officials, but that such a view oversimplifies a very complex and layered collection of values. For example, in his books *Congressmen in Committees* and *Home Style*, Richard Fenno, Jr. highlighted as additional goals the desire for reputation among other elected officials, the hope of election to higher office, and the accomplishment of stated legislative goals (in the abstract), and the notion of a legacy.[85]

Surely it is not difficult to identify behavior of public officials that appears to satisfy these goals, whether cynical or laudably civic in nature. But what specifically does a public official value that might prompt him or her to use social networks and affect how he or she might use them?

Most obviously, officials value the ability to distribute information to a large number of people. There are specific qualities or types of mass communication that carry greater value; for example, public officials value in particular the ability to send a desired message; the ability to send it to a

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84. WILLIAM A. NISKANEN, JR., BUREAUCRACY AND REPRESENTATIVE GOVERNMENT (1971).

85. RICHARD F. FENNO, JR., CONGRESSMEN IN COMMITTEES (1973); RICHARD F. FENNO, JR., HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS (1978); *see also* Edward L. Rubin, *Public Choice, Phenomenology, and the Meaning of the Modern State: Keep the Bathwater, but Throw out that Baby*, 87 CORNELL L. REV. 309, 322 (2002).

specific group of people (supporters, persuadable voters, people in a particular geographic area); and the ability to get the recipients to actually read/view/hear the message. Closely related is the effectiveness of the message—in other words, the ability to get the recipient to act in the manner intended.

All of the above examples, however, deal only with outbound connections, or the broadcast from the public official to constituents. But public officials value more than merely outbound messages, no matter how targeted and effective; they also value inbound connections. An inbound connection or communication is valued at several levels. First, it has value for the information that the content conveys—for example support or opposition on a particular issue, or substantive information about a matter that may come before the official for a decision. Second, it has value for the information conveyed by the sender's identity; public officials want to know who, specifically, is in contact with their office and why. Third, the inbound connection may have secondary power that the receipt of such messages gives the public official (that is, a public official may value the ability to claim he has received a number of inquiries or communications on a subject). Fourth, the connection may be valuable because of the opinion or information it delivers. And fifth, the inbound connection carries significance as an indicator of a much stronger relationship between the constituent and the public official.

In addition, public officials value highly their reputation or public image and the ability to control that public image. Among the aspects of image that a public official may value are the appearances of sincerity, deliberation, principle, and interest or concern in any individual problem or issue. To the extent that a public official can fine-tune his or her reputation or public image, he or she will value the tools that allow it.

From a public choice perspective, a public official's behavior should demonstrate that he or she also wants to fulfill all of these goals, values, and desires, to the extent possible, without a minimum of effort or expense—and, if at all possible, shifting any effort or expense onto someone else.[86] In other

86. In the parlance of public choice theory, public officials (and everyone

words, to the extent that the public official can obtain her goals without having to give up anything, all the better. Thus, we should expect to see public officials use social networks only to the extent that: (a) they can free ride on others' efforts, thus avoiding a collective action problem; (b) they can capture the fruits of others' labor, therefore making any remaining effort or expenditure lesser than the projected benefit; or (c) the remaining potential benefits still outweigh the costs of full individual efforts.

2. How Do Public Officials Use Social Networks?

To a significant degree, the private sector has invested in the software infrastructure that greatly lowers the threshold for public officials (or anyone) to use social networking. Companies like Facebook, Twitter, News Corp. (owner of MySpace), and Google (owner of Blogger) have made available social networking software at no or very low cost and established business models that benefit primarily from large numbers of users (generally, advertising). These two factors—the establishment multiple social networking platforms and the existence of a large number of people to connect to on those platforms—remove two of the most obvious investment problems for public officials (who could not individually create the software and would have no use for social networks if they were not already populated).

The wide spectrum of possible social networking activity for public officials shows the various ways that officials have confronted the remaining collective action problems. This section aims to describe specifically how public officials are using social networks in relation to their desires and values, described above.

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else in the political landscape) try to "free ride" by enjoying public goods produced by others, and seek "rents," or the ability to capture any excess value that is produced by someone else's (or the public's) investment. The theory is often summarized in the public choice context as the notion that private, selfish interest, rather than public interest, drives the actions of both individuals and groups. *See, e.g.,* George Stigler, *The Theory of Economic Regulation*, 2 BELL J. OF ECON. & MGMT. SCI. 3 (1971).

First, public officials have adopted social networks for outbound connections and communications—by which one transmits information in a one-way manner to constituents. The lowest-threshold options for this type of communication are the establishment of a "profile" with information about oneself and outward-directed posts viewable by either other network members or the public at large.

More specifically, public officials use the "profile" portion of social networking sites to craft a public image more textured than possible in most traditional media. The mere act of establishing a Facebook page, a blog, or a Twitter account sends a message suggesting modernity, openness, and a willingness to surrender some amount of privacy to viewers. Identity is also conveyed by frequency and content of posts; a public official can convey a hardworking image of a ubiquitous or omnipresent public servant, for example, by posting about her geographic location.

Outbound connections featuring only material that could be found elsewhere are the lowest-threshold social network communications and have many similarities to bulk emails or mass mailings. Correspondingly, they are not valued highly by other users. More complex are the combinations of outbound and inbound connections that really distinguish social media from traditional junk mail. As described above, public officials attach significant value to inbound connections. The reason is easy to identify—it is that an outbound connection includes information about *identity*, but an inbound connection suggests the existence of a *relationship*. Most commonly, public officials use inbound connections to establish relationships with constituents, and carry on those relationships in an exchange of comments and posts on the public official's profile (whether on Facebook, Twitter, or a blog). Although it is clear that the dialogue between public officials and constituents establishes and strengthens relationships, public officials have been reluctant to incorporate online discourse into their formal decision-making process.[87]

87. Chadwick states that "there is a marked reluctance on the part of elected officials and public sector bureaucrats to enshrine deliberative online

In addition, public officials appear interested in using social networks to inform and motivate constituents around specific issues—in other words, to generate the sense of community that draws value from the cross-constituent relationships.

As a general matter, public officials benefit from the concentration (or concentrated availability) of information about and generated by constituents that appears in social networks.[88] In this way, public officials capture rents from the concentration of individuals volunteering information about themselves. But the capture is non-exclusive; public officials merely enjoy to an unusual degree this information as a public good. And once the structure has been established, individual users sign up without incremental cost, and each additional user adds value to the network at large (value accruing to both the elected official and the other users—the elected official gets information from more sources and distributes more information to more sources, while the individual user enjoys a larger community of like-minded individuals).[89]

3. Dynamics Driven by Public Officials Using Social Networks

The interests and activities of public officials on social networks creates certain dynamics that affect other users within the system. For example, public officials are bound to have more inbound than outbound connections, placing a strain on the officials' attention and driving her to use higher-efficiency tools to maintain an online presence. In addition, many of the benefits of social networks (such as access to

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consultation into their routine modes of operation." Chadwick, *supra* note 4, at 16.

88. *Id.* ("[I]nformational value emerges from the confluence of distributed user generated content and its centralized exploitation . . . In the realm of political campaigns, e-government, and e-democracy, social networking sites thus offer political actors many advantages over the open web.").

89. Kenneth A. Shepsle, *Rational Choice Institutionalism, in* THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 23-38 (R.A.W. Rhodes et al. eds., 2006).

others' personal information or access to their attention) are concentrated in public officials in much the same way they are concentrated in other "nodes."

The activity patterns of public officials also create incentives for other users. A public official who encourages constituents to interact (whether by explicitly asking them to or implicitly, by engaging with them when they do) is expressing a demand that often provokes its own supply. Similarly, a public official who cultivates a large collection of constituents online may create a community of easily organized users who may overcome other collective action problems.

In this way, public officials who initiate the use of social networks are "political entrepreneurs" or leaders that offer their constituencies an opportunity to overcome collective action problems by engaging in the civic social network.[90] These dynamics encourage a pattern of behavior in which, in Shepsle's words, "particular individuals may make unusually large contributions of time and energy and financial and (especially) logistical resources not (only) because they care passionately about the group's objective but (also) because they see an opportunity to parlay this investment into something personally (read: selectively) rewarding."[91]

C. *Why Do Constituents Interact with Public Officials in Civic Social Networks?*

Public officials use online social networks simply because constituents use them; without the ability to interact with voters, the networks are useless. But why do constituents use social networks to interact with public officials? The motivations of users in general has been studied and described at length elsewhere, and surely is the subject of intense, around-the-clock advertising research.[92] But do people take

90. *Id.* (*citing* Robert Wagner, *Pressure Groups and Political Entrepreneurs, in* 1 PAPERS ON NON-MARKET DECISION MAKING 161 (Gordon Tolluck ed., 1966) and N. Frohlich et al., POLITICAL LEADERSHIP AND COLLECTIVE GOODS (1971)).

91. *Id.* at 31.

92. For a detailed analysis of user's general motivations in using social

time away from playing Farmville, tagging photos, watching piano-playing-cat videos, and stalking former significant others to read and respond to a tweet from their city councilmember? We know that they *do*[93]—but *why*?

The question is both theoretical and empirical. The theoretical question is a familiar collective action problem—the story of rational voter apathy, or the notion that low-level political participation like voting or emailing an elected official is a fundamentally irrational behavior. This story is an old one. It goes like this:

If a citizen took the time to calculate the odds that her vote would make the difference in any given election, she would find that the possible benefit of having his or her views expressed by the victor is far outweighed by the inconvenience of voting. And if that citizen then took into account the possibility that the elected official would, in fact, express the citizen's preferences, and that the individual legislator's vote on that matter would also make the difference in the legislature's action, then the citizen's calculation of possible benefit would be further reduced.[94]

The same reasoning applies to other low-threshold political activities, such as writing a letter to elected officials or participating in a rally—or connecting with public officials on civic social networks. In nearly all cases, the probability that an individual will have influence on actual policy is so small that it cannot be justified by the individual effort required to participate politically. Further exacerbating the situation is the tendency of rational voters to free ride on the efforts of others: if two voters want the same policy, each would do best to let the other do the work of getting the policy adopted.[95] At the same

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networks, see Grimmelmann, *supra* note 1, at 1151.

93. Smith, *supra* note 12, at 26.

94. *See generally* JAMES BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT; LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962).

95. All potential political action is beset by the free rider problem. *See, e.g.*, Mashaw, *supra* note 30, at 22 ("The crucially important question then is, 'Which groups will form and engage in political action?' Or to put it in other terms, 'How can the free rider problem be solved for groups who would be better off if they could all act together to pursue policies that benefit the group?'").

time that public choice theory posits that rational voters will refrain from low-threshold, low-reward political activity, it predicts that constituents (or groups or corporations) will seek to capture benefits created by others, especially where benefits can be concentrated and costs distributed.

The rational choice argument against political participation is worth repeating here not because it describes what we observe in the real world; rather, it is helpful because the differences between the rational model and the real world tell us significant things about how the real world works and how it can be governed. In the context of social networks, why do people participate?

1. What Do Constituents Value When They Engage Public Officials on Social Networks?

As with public officials, supra, this section first asks what constituents value—essentially, what are they looking for when they consider "friending" their mayor?[96] The environment a constituent encounters when considering the use of civic social networks, however, is quite different. Unlike public officials, most users of social networks were not prompted to join them in order to communicate about politics or policy, and therefore their social networking experience includes public officials as a part, but not the most important part, of their experience. This section, then, focuses only on those aspects of constituents' social networking that concern interaction between public officials and their networks.

a. *Identity and Expression*

The first step in joining a social network is the creation of an online profile, but a constituent's identity in the network goes beyond basic personal information to include everything the user does on the network. Users create and manage their online identity as a means of expressing opinions, exercising

96. For a more detailed exploration of the motivations on an individual user, see Grimmelmann, *supra* note 1, at 1151.

influence, and distributing information.

The aspect of identity and expression that bears on civic social networks is the fundamentally narcissistic behavior of constituents—that is, the portion of the user's activity that appears entirely self-absorbed or self-interested (in a way that would make any public choice theorist proud). A self-interested user will value anything that allows her to craft her identity specifically and increases the power of her individual voice relative to others. What makes this interesting from a public choice perspective is that this narcissism creates public goods because certain self-expressive (or self-indulgent) behaviors have an identifiable connection to civic engagement: the exercise of speech, self-governance, and associational liberty. Papacharissi, drawing upon Inglehart and Welzel, wrote of a "civically motivated narcissism," based on the idea that "self-expression values are connected to the desire to control one's environment, a stronger desire for autonomy, and the need to question authority" and that "self-expression values are not uncivic."[97] Consequently, the exercise of purely self-interested or narcissistic behavior can create public goods.

b. *Relationships*

Second, constituents greatly value the creation of relationships, both with public officials and with other users. The act of adding someone as a contact (or friend, or followee) can have layers of significance: it can mean that the two users are actually friends; that they are merely acquaintances; that one is a "connector" or hub to many other users; a potential business contact; or a fan or supporter.

Relationships have value, as well, because of their reciprocal nature. As Grimmelmann points out, "[p]eople reciprocate because it helps them solve collective-action problems, because participation in a gift culture demands that

97. Chadwick, *supra* note 4, at 32 (citing Zizi Papacharissi, *The Virtual Sphere 2.0: The Internet, the Public Sphere and Beyond*, *in* THE HANDBOOK OF INTERNET POLITICS 236-39 (Andrew Chadwick & Philip N. Howard, eds., 2008)).

gifts be returned or passed along, because it's disrespectful to spurn social advances, because there's a natural psychological instinct to mirror what one's conversational partner is doing, and because we learn how to conduct ourselves by imitating others."[98]

The creation of a relationship with a public official is significant in distinct ways. It indicates an increase in expressive power or voice, it also feeds the vanity or ego of the user. In addition, it increases the perceived status of the individual over those who do not share the same relationship. In the context of such user-official connections, a user will value authenticity, attention, responses, the prestige that comes with a personal relationship, and real or perceived influence.

Empirical research indicates that the connections on civic social networks are not purely online or "virtual"; rather, they tend to continue, further develop, or deepen a relationship from offline.[99]

c. *Community*

Third, constituents value the community that arises from the creation of relationships in civic social networks. For the purposes of this analysis, the most salient characteristic of community as developed by civic social networks is that they reduce the costs of organizing among individuals in the network to the vanishing point.[100] The opportunity to create affinity or advocacy groups with hardly any identifiable costs has led to an explosion of lasting and temporary groups. Although there is evidence that those participating in political activities online are no different than those doing so offline, the

98. Grimmelman, *supra* note 1, at 1156.

99. Boyd, *supra* note 5 (citing Nicole B. Ellison et al., *The Benefits of Facebook "Friends": Exploring the Relationship Between College Students' use of Online Social Networks and Social Capital*, J. OF COMPUTER-MEDIATED COMM.(1997), *available at* http://jcmc.indiana.edu/vol12/issue4/ellison.html).

100. Shirky, *supra* note 76, at 22 ("[M]ost of the barriers to group action have collapsed, and without those barriers, we are free to explore new ways of gathering together and getting things done.").

availability of impulsive or casual group formation is quite different than what can take place offline.[101]

Communities are particularly easy to develop in this environment because the indicia of commonality that can prompt organization and grouping—politics, government, or public affairs—is much stronger in the subgroup of people using civic social networks than in the population at large.[102] And the ease of group formation and organization, together with the incentives for joining civic social networks, snowball the benefits for joining the network for each new user, reinforcing the "comedy of the commons"[103] scenario. Any given individual has incentive to increase his voice, gain attention, and strengthen networks and community by creating an online community.

d. *Information*

Constituents also use civic social networks for one purpose distinct from voice, relationships, or community, but one that feeds into all three: constituents value the availability and acquisition of information. Much of this information stems from the other aspects of social networking—the awareness of who is in Councilmember Jones's network, or what issues are significant to another constituent. And the somewhat voyeuristic aspect of this access to information about civic social networks arises from the desire for transparency and accountability of public processes.

A few aspects of this are worth emphasizing: the nature of information, when openly accessible, as a public good; the need to filter or prioritize content in the event of information overload; and the value of information for the twin public goals

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101. *Cf.* Jessica T. Feezell et al., *Facebook is . . . Fostering Political Investment: A Study of Online Social Networking Groups and Offline Participation*, APSA TORONTO MEETING PAPER (2009), *available at* http://ssrn.com/abstract=1451456.

102. Shirky, *supra* note 76, at 199-200.

103. Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 768 (1986) (describing social situations in which a "the more the merrier" dynamic prevails).

of transparency and accountability.

Significantly, access to information is not a secretive or private benefit in the context of civic social networks; because a connection between two users must include a certain level of access to information posted by each user, information is integrated into every relationship in the network. Users may value being the first to discover or post information, but the value comes from the distribution of the information, not from possessing it to the exclusion of others. In this way, the things that public choice theorists might consider costs (becoming informed about public issues, organizing groups) are actually benefits that citizens enjoy when they act politically, and things that public choice theorists might consider valuable only if managed as a private good or rent, in fact, gain value when treated as a public good.[104]

The access to information, however, has a downside in its ubiquity; civic social networks simply contain too much information for users to process. But the nature of the network also creates value because it can prioritize, filter, or contextualize the information. In other words, civic social networks, by allowing users to see what is popular within their network, help users mediate, sort, or personalize what is otherwise an information overload.[105]

The type of information present on civic social networks reveals a second downside, as well. As Feezell et al. noted, Facebook encourages political *participation* but does not appear to improve political *knowledge*: "Our content analysis indicates that political Facebook group users often do not share much new information and the information they do share tends to be somewhat inaccurate, incoherent, or not very well supported with evidence. As a forum for people to easily engage and share their opinions, online groups are beneficial; however as a forum

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104. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

105. This is not seen by all scholars as an unqualified good; as Perez notes, such use of network recommendations leads to only reinforcing existing beliefs, rather than deliberation or a better-informed citizenry. Oren Perez, *Complexity, Information Overload and Online Deliberation*, 43 I/S: J.L. & POL'Y FOR INFO. SOC'Y 57 n.39 (2008).

to learn new political information online groups are ineffective due in part to low quality wall discussion."[106]

Regardless of the attempts to measure accuracy of political knowledge, the availability of information on social networks is valued highly by constituents for its role in accountability and transparency. The information a user gleans from observing a public official's activity in the civic social network helps the constituent understand the official's behavior. In turn, the information helps the user vote and make other political decisions accordingly.[107]

The desire for information, and the drive to share it with others on one's network, is closely related to the other values expressed by constituents—identity, relationships, and community. But, as discussed in part IV, infra, it has a significant independent impact on the shape of the emerging institution of civic social networks.[108]

2. Dynamics Driven by Constituent Behavior in Civic Social Networks.

The values and activity patterns of constituents in civic social networks create pressures and demands on other actors in the networks. For example, the low costs or barriers to group formation help overcome standard collective action obstacles to cooperation, but also render group formation so easy that the resulting organizations often have little impact as aggregators; they have much greater impact as distributors.

Most prominently, the presence of millions of constituents

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106. Feezell et al, *supra* note 101, at 14.

107. Perez, *supra* note 105, at 45 (Perez notes that "the increasing importance of transparency in the common understanding of legitimate governance. The doctrine of transparency has also become one of the more influential principles of modern administrative law, greatly increasing the amount of information available for democratic reflection.").

108. Another part of this phenomenon is both the vagueness and the specificity of the targeting of messages in social media. Even messages that aren't directed at you gain a sort of personal content when they are publicly available on social networking sites. For a general discussion of how user-generated content is meaningful because of targeting, see Shirky, *supra* note 76, at 87-88.

(and potential voters) on social networks, and the interest or willingness of a substantial subset of those constituents to engage with public officials online, creates a very strong incentive for public officials to join the networks.

Once the official is in the network, however, the behavior of constituents puts severe demands on public officials. The ease with which constituents or organizations may access a public official's attention using a social network leads to a very high demand on the public official's attention and time; consequently, officials themselves will seek to offer authenticity and relationship-strengthening interaction only at a level that is worth the time and effort. This behavior, in turn, reduces the value of the interaction; just as public officials discount the value of form emails, constituents discount the value of inauthentic or impersonal communications by public officials.[109]

In addition, the desire of constituents for transparency, information, and accountability can put severe demands on public officials and agencies that either cannot or would prefer not to put all communications and documents online for use by the network. Constituents will value highly all disclosure. Indeed, they will resist efforts by public officials to shield information from public view.

The use of civic social networks by constituents creates a strong temptation for public officials to use the networks for campaign activity as well. Constituents may not recognize the distinction between official activity and political activity, but, as discussed in section III.B.3, supra, the distinction is critical for the prevention of corruption. There is no internal check on such activity—neither public officials nor constituents will punish or disincentivize campaign activity using a social network account connected to a government link—and therefore such behavior can only be prevented or punished by external enforcement.

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109. *See, e.g.*, Chadwick, *supra* note 4, at 28 ("Trust is one of the most valuable and one of the most elusive forces in online politics."); *see also* Perez, *supra* note 105, at 58 (discussion of discount of email or webform-generated comments).

D. *Social Networks Represent an Emerging Institutional Environment*

The rapid development of civic social networks belies the existence of strong patterns of behavior by both constituents and public officials in those networks. Those patterns, in turn, demonstrate ways that civil social networks reinforce and channel certain behaviors.[110] Although the exact features and brand names of social networks are bound to change, their effect on interactions among constituents and public officials is here to stay. The ways that civil social networks and behaviors interact indicates that the networks are not just a tool, like email or the telephone, but instead resemble an unstructured institution like the press or lobbyists.[111]

1. What is an Unstructured Institution?

Public choice theory has developed at least two major ways to think about institutions (often discussed under the subject "rational choice institutionalism"). Under the first, institutions are the set of rules and regulations constraining individuals', groups', and firms' activities; the focus of inquiry is how players choose to act under certain rules.[112] The second view does not assume the institutions as a given at all—instead, the rules are agreed upon by the players themselves and can be changed based on their pressures, preferences, and biases.[113] The first

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110. Clay Shirky quotes publisher Tim O'Reilly calling social networks "an architecture of participation." Shirky, *supra* note 76, at 17.

111. Peter A. Hall & Rosemary C.R. Taylor, *Political Science and the Three New Institutionalisms*, 44 POL. STUD. 936, 951 (1996), *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1467-9248.1996.tb00343.x/pdf (noting that "[a]nyone who has waited at a traffic light when no-one else was around, however, has to admit that there are dimensions to the relationship between institutions and actions that may not be highly instrumental or well-modeled by rational choice theories.").

112. Under this view, Kenneth Shepsle says that institutions are taken "as *exogenous constraints*, or as an exogenously given *game form*." Shepsle, *supra* note 89, at 24.

113. *Id.*; *see generally,* THOMAS SCHELLING, THE STRATEGY OF CONFLICT (1960) (discussing "focal" institutional arrangements).

view describes a more specific, formal, structured institution, like a government agency, a nonprofit organization, or a body of law. The second view describes a conceptual, unstructured institution, such as the press or the aggregated efforts of advocacy organizations.[114]

Unstructured institutions are not established in any formal sense; they emerge when parties' behavior is affected or channeled by others' behavior and the demands and pressures that the behavior creates. Under this theory, institutions are changeable sets of norms that all or most people involved agree upon; there are no rules per se, but actors behave as if there are because they act strategically in response to their expectations of others' behavior and other factors in the environment. When expectations of behavior become particularly clear and become less temporary, then this behavior starts to look like an institution. This sort of institution is a sort of equilibrium of behavior which, although subject to change, is an identifiable pattern.[115]

2. Why is Civic Social Networking an Unstructured Institution, and Why Should it Matter?

The behavior patterns and pressures discussed in sections III.B and III.C indicate that civic social networks constitute an emerging unstructured institution because they describe not

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114. Shepsle uses the terms "structured" and "unstructured" institutions. Shepsle, *supra* note 89, at 27-32. Of course, there are as many ways to think about institutions as there are people who want to think about institutions. *See, e.g.*, Hall, *supra* note 111, at 949 ("If rational choice theorists often posit a world of individuals or organizations seeking to maximize their material well-being, sociologists frequently posit a world of individuals or organizations seeking to define and express their identity in socially appropriate ways . . . [S]ociological institutionalists argue that organizations often adopt a new institutional practice, not because it advances the means-ends efficiency of the organization, but because it enhances the social legitimacy of the organization or its participants.").

115. Shepsle, *supra* note 89, at 24-25 (noting the importance of Calvert and Schotter to this second conception). *See generally* Randall L. Calvert, *Rational Actors, Equilibrium, and Social Institutions*, *in* EXPLAINING SOCIAL INSTITUTIONS 57 (Jack Knight & Itai Sened eds., 1995); Andrew Schotter, THE ECONOMIC THEORY OF SOCIAL INSTITUTIONS (1981).

just the use of a new communication tool, but a set of strategic behaviors and pressures. Those behaviors and pressures are critical to understand for local governments attempting to regulate public officials' use of civic social networks.

Not all the "rules" of civic social networking are provided by the public officials and constituents; of course, the structure and the features of the software itself establish constraints on behavior.[116] But the existence of such third-party rules does not limit the voluntariness or strategic nature of the parties' activity. This is especially true given the many different social networking options available.[117]

The recognition of the institutional nature of civic social networks is not just an exercise in labeling, but rather has significant implications for policymakers seeking to regulate public officials' use of those networks. Civic social networking is not just another tool to which the existing laws may apply, like email or text messaging; rather, it is an environment that has an impact on the behavior of the actors surrounding it.[118]

The interdependent strategic behaviors of public officials and constituents in civic social networks guarantee, for example, that there will always be a strong incentive for a public official to join social networks, but that such an incentive will lag behind constituent adoption of the social network site unless the public official takes on the burden of the political entrepreneur. Similarly, there will be strong incentives for public officials to engage in some actual

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116. For example, to connect to a public official on Facebook, a user must list that person as a "friend" or become a "fan" of that official—labels that a critical constituent might resist. One constituent testified before the Seattle Ethics & Elections Commission that he resented declaring himself a "friend" of a public official merely to have access to that official's Facebook feed. Timothy Burgess, Councilmember, City of Seattle, Speech at the Meeting of the Seattle Ethics and Elections Comm. (Dec. 2, 2009), *available at* http://www.seattlechannel.org/videos/video.asp?ID=5590985.

117. *See, e.g.*, Hall, *supra* note 111, at 945 ("The process of institutional creation usually revolves around voluntary agreement by the relevant actors; and, if the institution is subject to a process of competitive selection, it survives primarily because it provides more benefits to the relevant actors than alternate institutional forms.").

118. MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 10 (2009).

interactive behavior on the social network site, lest constituents ignore the public official the same way they ignore junk mail and unsolicited bulk email (spam). To the extent public officials engage in interactive communication, the overwhelming incentive is for the public official to display the communication to other users so that the maximum exposure is achieved for the spent effort. Similarly, constituents engaged in civic social networks experience low-threshold group formation and organizational tools, as well as a certain incentive for acquiring information and sharing it with other users. Constituents can frame their civic social network as any portion (or no portion) of their overall social network according to their preferences.

Institutions behave differently than mere tools because these bargains or strategic behaviors by public officials and constituents tend to funnel activity in certain directions. In the case of civic social networks, it indicates that transparency and accountability will be highly incentivized.

IV. Transparency and Accountability in the New Public Square

A. *Civic Social Networks Foster Transparency and Accountability*

Our idealized notion of "the public sphere" conceives of public discourse as a deliberative, rational conversation that contributes to public policy and the practical structure necessary to carry it out. Habermas famously envisioned the public sphere as an arena where people collectively form public opinion in an environment without the interference of the government or the economy.[119] Despite the high hopes of some early Internet enthusiasts that the web would realize Habermas's vision of universal access and pure discourse, the web's record on elevating or deepening discourse is decidedly

119. Jurgen Habermas, THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY (Thomas Burger Trans., The MIT Press 1989) (1962).

mixed.[120]

But if the Internet (including civic social networks) has not produced a more reasoned and balanced public debate, then consider a narrower and more limited claim: civic social networks, by bringing public officials and constituents into an open public square, foster government transparency and accountability.[121]

The metaphor of civic social networks as the "new public square" does not aim for the loft of the public sphere; it makes no claim to heighten discourse. Rather, its defining feature is open space in full view of the public for anyone who wants it. If one chooses to enter the public square, one consciously exposes oneself to anything else there—music, speech, governance, politics. And in particular, those public officials who enter the public square do so with much at stake: reputation, familiarity, ridicule, and re-election. By entering the public square, whether to stand on a soapbox and preach or sit on a bench and listen, a public official is engaging in her job, which under even a jaded vision of informed democracy involves some combination of transparency and accountability. In civic social networks, public officials hear from and speak to constituents in full view of the online world. Constituents can deliver information, opinions, support, and opposition to those officials, and constituents can interact with each other, forming groups to advance shared interests. The ease with which communications from and interactions with public officials are available to the public demonstrates that, in this environment, the contours of the institution itself make FOIA requests obsolete, and includes constituents in the deliberative process at a much deeper level than notice of or attendance at a formal meeting would.

The access to information and the tools to hold officials accountable is not an accident. The description of the institutional environment, supra at sections III.A through

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120. *See generally* Sunstein, *supra* note 11.

121. By "transparency," I mean the ability of any citizen to obtain information about what his government is doing or considering doing. By "accountability," I mean the ability of that citizen to affect the actions or considerations of the government.

III.D, indicates that public officials will be under constant pressure for more disclosure, more information, and more attention to constituents and groups. The advantages of group formation will easily outweigh the obstacles and the incentives for public sharing of information and announcements are high.

B. *Ejecting Public Officials from the New Public Square Reduces Transparency and Accountability*

It is particularly perverse, then, that objections to public officials' use of civic social networks are based on the fear of violating open meeting and public records laws. Prohibitions or certain limits on the use of civic social networks—that is, ejecting public officials from the new public square—would result in less public deliberation, fewer publicly accessible records, and elimination of valuable tools to hold public officials accountable for their actions.

As discussed in Part II, open meeting, public records, and misuse of government resource laws exist in every state, and with good reason. The statutes work on two levels. Their immediate goals are to make information about what the government does and considers accessible, and to ensure that government funds are not misused.[122] But those immediate

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122. *See, e.g.*, Wash. Open Public Meetings Act, WASH. REV. CODE § 42.30.010 (1971) ("The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and all other public agencies of this state and subdivisions thereof exist to aid in the conduct of the people's business. It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly."); NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978) ("[t]he basic purpose of [the] FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."). FOIA is "often explained as a means for citizens to know 'what their government is up to.'" NARA v. Favish, 541 U.S. 157, 171-72 (2004) (quoting DOJ v. Reporters Comm. For Freedom of the Press, 489 U.S. 749, 773 (1989)); Wash. Public Records Act, WASH. REV. CODE § 42.56.030 (2007) ("The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.").

goals also advance other important aims; making information accessible is important, but the information only takes on meaning when it is used to hold public officials accountable, or to prevent a monopoly on inside information that would give some citizens an exclusive advantage other others. Similarly, the restrictions on the use of government resources for private or political gain have, at one level, a fiscally prudent purpose (that is, barring spending that does not advance a legitimate purpose of government). However, the more important consideration is preventing an environment where a private corporation or a campaign can enjoy a limited benefit to the exclusion of others.

Civic social networks advance all of these primary and secondary goals. Communications that would go unrecorded outside of the new public square (such as a face-to-face discussion or a telephone conversation) are not only documented but instantly accessible to the public when they occur in a civic social network. Attempts to get a public official's attention to hold her accountable are easily accessible, and the threshold expense to organize a group of constituents is virtually zero. In short, civic social networks substantially improve public access to deliberative discussion and the records created by it.[123]

Importantly, the use of civic social networks by public officials also helps reduce moral hazard associated with hidden action. This hazard appears where a strategic agent—the public official—may take action that isn't observable by the principal—the constituency.[124] Civic social networks cannot, of course, eliminate the many ways that public officials can hide actions or statements (for example, in a private conversation), but to the extent that communications in the network are available to the public, the opportunity for constituents to investigate officials' actions and statements is greatly improved.

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123. Communication, after all, is hydraulic—it will flow where it is unrestricted. And to bar communication from a forum in which it is transparent would only have the effect of hiding such communication from public view.

124. For a more complete discussion, see Shepsle, *supra* note 89.

C. *Local Governments Need to Adapt*

Where an attempt to apply existing laws to a new institutional environment would run counter to the purposes of those laws, local policymakers should adapt. It is beyond the scope of this Article to prescribe specific adaptations—and I expect that it may take some experimentation for local governments to arrive at a comprehensive solution, if there is one—but the general outlines of a near-term adaptation are clear.

First, local governments can solve the practical problems associated with public records statutes. Retention and storage of Facebook and Twitter feeds, for example, are no more complicated than saving screen shots, web page images, or even printing out a paper copy on a routine schedule. Inexpensive or free software solutions already exist for most such applications.

Second, policymakers should adopt interpretations of Open Meetings statutes (or amend the statutes themselves) to make clear what aspects of written communication constitute a "meeting." The twin purposes of open meeting and public record statutes overlap significantly and raise interesting questions about when the availability of records is sufficient, and when actual presence at an exchange of those records is necessary. The doctrinal question—resolved by the Virginia court by a close analysis of the immediacy of the exchange of emails—also involves what we mean by "deliberation" and what types of government action trigger meeting requirements. But policymakers should ensure that when city councilmembers interact with each other or the public in full view of a civic social network, but no votes are taken or collective decisions are made, the purposes of the open meeting statutes are fulfilled to a greater extent than they would be if that interaction was barred.

Third, local governments should recognize that, to the extent public officials allow government resources to connect to constituent posts (or third-party advertising), the content of

that posting and advertising constitutes a limited public forum and is not imputed to the government.[125] As civic social networks are the new public square, the mere presence of public officials in the square should not impute authorship of all third-party content in the square to the government any more than signs on the sidewalk or constituent letters received and retained by agencies are imputed to the government. Certainly minimal standards of civility can be enforced, as in any limited public forum, but forbidding third-party political content is neither wise nor practical—and barring public officials from civic social networks where such content is possible would have the effect of ejecting them from the public square.

Conclusion

A revolution is underway, and it is changing the ways that constituents and their public officials interact. It is not just a change in the tools used—from the letter to the email—but it is a change in the methods and incentives and costs that underlie that interaction in a more fundamental way. Just as the sunshine laws evolved with the ability of government to retain and produce information, those laws must again evolve to permit public officials and constituents to engage in the new public square of civic social networks.

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125. *See, e.g.*, Noah D. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149 (1998). For a comprehensive analysis of public forum law on civic social networks, see Lyrissa Lidsky, *Public Forum 2.0* (forthcoming 2011).