

PRIVATE OPEN FORUMS

by
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Traditional public forums for the exercise of First Amendment rights are vanishing for four reasons: communication has migrated online, where private actors control digital spaces; private actors readily censor their forums, either for profit or at the government's behest; public forums can be "privatized" for certain events, which permit organizers to engage in viewpoint exclusion; and the list of public forums, which the Supreme Court is loath to expand, has never been a long one.

This is a problem because the expression of First Amendment rights cannot exist in isolation, but has effect only in a larger system of interacting rights. When an individual speaks, a hearer listens, often at an organization's event. Local press may be covering the speech, and listeners may be there in person, or tune in by television, radio, or the Internet. The legal status of the forum matters greatly because it facilitates all of these interconnected instances of First Amendment activity.

This Article responds to the constitutional crisis entailed in vanishing traditional public forums and their persistent importance to First Amendment interests. It does so by proposing a "Private Open Forums" doctrine. A Private Open Forum is any space (digital, physical, or otherwise) that is privately owned; substantially open to the public; substantially non-selective/non-discriminatory; functions primarily to facilitate users' First Amendment activities; and intended to facilitate those activities. I argue that operators of Private Open Forums constitutionally have and normatively should have the free-standing First Amendment right to maintain their forums and facilitate users' First Amendment activities, as well as standing to defend their users' First Amendment rights exercised on the forum.

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I. INTRODUCTION

First Amendment jurisprudence is one of atomization; it protects discrete instances of First Amendment activity, but does not account for the fact that these activities are given force through their interaction with other instances of such activity and through many communicative layers. For example, when an individual speaks, a hearer listens. If this conversation is a public debate, an organization may be sponsoring the debate. The local press might be covering it. An audience will be present, either in person or through tuning in by television, radio, or the Internet. First Amendment jurisprudence recognizes that every person in this scenario has individual rights, but says little about the interactions among these isolated rights.¹ It should, because the First Amendment is given force in such interactions.²

¹ See Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1638 (2007) (describing First Amendment doctrine as “institutionally oblivious”); Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 84 (1998) (“American free speech doctrine has never been comfortable distinguishing among institutions.”).

² See Richard W. Garnett, *The Story of Henry Adams’s Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841 (2001). Professor Garnett states that associations “transmit values and loyalties to us, and mediate between persons and the state.” *Id.* at 1842. This “nest of associations” creates us, and “while it is true that we

Public-forum doctrine has come closest to recognizing the importance of this interaction because it concerns spaces in which individuals congregate and create a First Amendment event. Public forums, however, are vanishing habitats³ for four reasons. First, communication has migrated online,⁴ where private actors—Internet service providers, network service providers, data-hosting and search companies, and operators of websites—are not restricted by the First Amendment. Second, these private actors may censor online First Amendment activity when profitable or as an expedient response to government pressure or demands.⁵ Third, traditional public forums such as city parks may be “privatized” for certain political activities such as campaign speeches, which permit campaign organizers to exclude dissenting voices.⁶ Fourth, the list of traditional public forums has always been a short one that the Supreme Court has generally refused to expand.⁷ This is a problem not only because public forums are important loci of speech, but also because they encourage assembly, which is just as important to democracy but has often been discounted by the law.⁸

Jurists and scholars have offered three approaches to reinvigorating public forums. Some have argued that the Internet itself is a major public forum.⁹ Another approach is to apply intermediate scrutiny to all limited public forums.¹⁰ Finally, Justice Kennedy has suggested that the Court ought to recognize novel types of physical public forums.¹¹ Each of these

speak and express ourselves through associations, we are also spoken to and formed by them and by *their* expression.” *Id.* at 1849.

³ Jamin B. Raskin & Clark L. LeBlanc, *Disfavored Speech About Favored Rights: Hill v. Colorado, the Vanishing Public Forum and the Need for an Objective Speech Discrimination Test*, 51 AM. U. L. REV. 179, 181–82, 228 (2001).

⁴ Sara E. Brown, Note, *An Illusory Expectation of Privacy: The ECPA Is Insufficient to Provide Meaningful Protection for Advanced Communication Tools*, 114 W. VA. L. REV. 277, 281 (2011).

⁵ Patrick G. Crago, Note, *Fundamental Rights on the Infobahn: Regulating the Delivery of Internet Related Services Within the European Union*, 20 HASTINGS INT’L & COMP. L. REV. 467, 470 (1997).

⁶ Kevin Francis O’Neill, *Privatizing Public Forums to Eliminate Dissent*, 5 FIRST AMEND. L. REV. 201, 201 (2007).

⁷ *Id.* at 202–03.

⁸ See JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* 56–57 (2012).

⁹ Steven G. Gey, *Reopening the Public Forum—from Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1611 (1998); see also Mark P. Smith, *The Distortion of the Internet as a Public Forum*, 2003 UCLA J.L. & TECH. NOTES 29, http://www.lawtechjournal.com/notes/2003/29_030810_Smith.php.

¹⁰ See Matthew D. McGill, Note, *Unleashing the Limited Public Forum: A Modest Revision to a Dysfunctional Doctrine*, 52 STAN. L. REV. 929, 955 (2000).

¹¹ *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 697–98 (1992) (Kennedy, J., concurring in the judgments) (“In a country where most citizens travel by automobile, and parks all too often become locales for crime rather than social

approaches is infirm. The first is simply untrue; the Internet, as a collection of private spaces, is not a public forum as the law now defines such forums. The second does not address the problem, which is that public forums are disappearing. The third assumes that the only valuable public forums are physical spaces; the migration of First Amendment activity to online and other digital spaces suggests otherwise.

In this Article, I address the law's inattention to the First Amendment's interconnectedness and respond to the three infirm approaches to public-forum doctrine. I do so by proposing the creation of what I call the "Private Open Forum" doctrine. A Private Open Forum ("POF") is any space (digital, physical, or otherwise) that is privately owned, substantially open to the public, substantially non-selective/non-discriminatory, and that functions primarily to facilitate users' First Amendment activities and is intended to facilitate those activities.

Participants in POFs include forum owners or operators ("operators") and the individuals or groups that engage in First Amendment activity via the POF ("users"). While extant First Amendment law protects users wherever they exercise their rights—on a POF or elsewhere—the Private Open Forum doctrine would give operators stand-alone First Amendment rights to maintain their POFs and facilitate users' First Amendment activities. Operators would also have standing to defend their users' First Amendment rights exercised on the POF. As with all constitutional issues, POFs' First Amendment rights would not be absolute; POF doctrine therefore also describes the level of scrutiny the government must satisfy to limit POF operation.

The POF doctrine is important for four reasons. First, digital-age pressures on the First Amendment require novel responses like the POF doctrine.¹² Second, with individuals' First Amendment rights well-established, state actors have begun to target private actors who are communication intermediaries.¹³ Third, private actors have an incentive

intercourse, our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity.").

¹² Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 427–30 (2009) (arguing that the First Amendment is becoming "increasingly irrelevant" and therefore "the future of the system of free expression will require other sources of assistance"). One source is private network providers, who are "conduits for the speech of others." *Id.* at 430.

¹³ Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 14 (2006) ("[S]tate actors who seek to control Internet communications have begun to explore strategies that target neither speakers nor listeners. . . . [G]overnments have sought to enlist private actors within the chain as proxy censors to control the flow of information.").

both to accede to these moves and to over-censor.¹⁴ Fourth, POFs are sites of important First Amendment activity, and they are in fact being censored. This includes, for example, moves against peer-to-peer technology,¹⁵ the temporary disabling of cell phone service to thwart anticipated political protests,¹⁶ and restrictions on student groups to associate.¹⁷ As Professor Richard Garnett put it, we should “attend not only to the ways that government, by regulating associations’ activities, burdens the expression of individuals. We should also think and worry . . . about whether and how government supervision of associations’ expression threatens, crowds out, and commandeers their educational, soul-making role.”¹⁸

This Article takes up Professor Garnett’s invitation to “focus more on associations themselves and on the role mediating institutions play in safeguarding political liberty and restraining government power.”¹⁹ It also responds to Professor Jack Balkin’s observation that freedom of expression requires “more than mere absence of government censorship or prohibition to thrive; [it] also require[s] institutions, practices and technological structures that foster and promote [it].”²⁰

POF doctrine is normatively, legally, and politically grounded. Normatively, the doctrine responds to the democratic norms of self-governance and diversity of viewpoints. POFs could operate as local, regional, or national habitats for First Amendment activity, largely unconstrained by government censorship and run by private actors. The cost of creating digital POFs would be low, eliminating barriers to entry that would discriminate based on wealth. Operators could determine for themselves the extent to which their POFs are open and the purposes to which their POFs are dedicated. Legally, POF operators probably already have stand-alone First Amendment rights and standing to defend the First Amendment rights of their users. Politically, the POF doctrine is

¹⁴ *Id.* at 28–31 (stating that if an internet service provider hosts a website with some illegal conduct, it is easier to drop the entire website than to excise the offending portions found therein).

¹⁵ Brief of Professor Edward Lee et al. as Amici Curiae in Support of Respondents at 2, *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (No. 04-480), 2005 WL 508111, at *2 (observing that peer-to-peer technology “facilitates the widespread dissemination of speech”). As a speech-facilitating technology, peer-to-peer software implicates important First Amendment interests that must be considered when applying copyright doctrine to the technology. *See id.*

¹⁶ *See* Melissa Bell, *BART San Francisco Cut Cell Services to Avert Protest*, WASH. POST (Aug. 12, 2011), http://www.washingtonpost.com/blogs/worldviews/post/bart-san-francisco-cut-cell-services-to-avert-protest/2011/08/12/gIQAFLCgBJ_blog.html.

¹⁷ *See* Ashutosh Bhagwat, *Associations and Forums: Situating CLS v. Martinez*, 38 HASTINGS CONST. L.Q. 543 (2011).

¹⁸ Garnett, *supra* note 2, at 1849–50.

¹⁹ *Id.* at 1853.

²⁰ Jack M. Balkin, *The Infrastructure of Religious Freedom*, BALKINIZATION (May 5, 2007), <http://balkin.blogspot.com/2007/05/infrastructure-of-religious-freedom.html>.

conservative because it enhances private-property rights and localizes self-governance; liberal because it enhances First Amendment rights; and libertarian because it promotes limited government and “privatized” constitutional rights. Finally, private actors, whether individual bloggers or large companies like Google, should welcome the opportunity to manage their property with fewer restrictions.

POF doctrine also addresses four persistent theoretical gaps. First, it reconciles *Sony Corp. of America v. Universal City Studios*, in which copyright holders lost an infringement suit against Sony for producing video tape recorders,²¹ with *A&M Records v. Napster*, in which copyright holders won an infringement suit against Napster for creating a computer-networking program that facilitated the distribution of copyrighted material.²² Second, it addresses whether an umbrella organization can sue for its own, as opposed to its members’, associational rights.²³ Third, it harmonizes provisions of the Digital Millennium Copyright Act (DMCA),²⁴ which require operators to take action in some cases against users’ illegal conduct, and Section 230 of the Communications Decency Act (CDA), which provides that users’ conduct is not attributable to operators.²⁵ Fourth, it provides a middle ground between divergent approaches to Internet regulation, one of which encourages regulation to maximize First Amendment freedoms and the second of which stresses the importance of unregulated communication intermediaries.²⁶

This Article proceeds in the following way: Part II provides a taxonomy of POFs, including categories of POFs as well as specific examples and ways that the government has censored POFs. Part III offers the argument that the First Amendment already protects POFs and, if it does not, normatively should. Part IV describes the contours of this protection, including operators’ and users’ First Amendment interests, operator standing to defend users’ rights, approaches to understanding the scope of POF protection, and a grounded explanation of the doctrine. Part V

²¹ *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 419–21 (1984).

²² *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011 (9th Cir. 2001).

²³ This is an unanswered question, arising from two Supreme Court cases. In *Board of Directors of Rotary International v. Rotary Club of Duarte*, Rotary International sued a local branch for opening its roles to women. The Supreme Court held that the International branch could not restrict the local branch in this case because it had no right of association. 481 U.S. 537, 545 n.4 (1987). In *New York State Club Ass’n v. City of New York*, the umbrella organization was suing on behalf of its members and could therefore claim the right to association. 487 U.S. 1, 8–10 (1988).

²⁴ Digital Millennium Copyright Act, 17 U.S.C. § 512(c)(1) (2012).

²⁵ Communications Decency Act, 47 U.S.C. § 230(c)(1) (2012).

²⁶ Professor Balkin would maximize online First Amendment activity by imposing regulations such as network neutrality. See Balkin, *supra* note 12, at 428–30. Professor Christopher Yoo, in turn, argues that “intermediaries’ editorial discretion should be regarded as inviolable.” Christopher S. Yoo, *Free Speech and the Myth of the Internet as an Unintermediated Experience*, 78 GEO. WASH. L. REV. 697, 771 (2010).

addresses how the POF doctrine reconciles the four theoretical gaps mentioned above.

II. A TAXONOMY OF POFs

To illustrate what POFs are, how they are being censored, and when it should be permissible to censor them, this Part describes six types of POFs in order from what should be the most protected to the least protected. To be clear, the evaluation of POFs' protection should depend upon underlying facts, and not formal categorization. Such categorization, however, does provide a rough illustration of how POFs should be more or less protected.

A. *Parasite Hosts*

Parasite-host POFs are forums that are not primarily dedicated to facilitating users' communicative activity, but allow for and attract such activity as a subsidiary function. The *Washington Post* is a good example of a parasite-host POF because, while the operator's content maintains standards of journalistic professionalism, users' comments, attached to the *Post's* articles, are often racist, biased, and uninformed.²⁷ Customer reviews on Amazon.com provide another good example because they illustrate the potential First Amendment value even of commercial parasite-host POFs.²⁸

²⁷ See, for example, comments to an article about protests following the acquittal of George Zimmerman for shooting Trayvon Martin. Dan 99999, Comment to Max Ehrenfreund, *Mayhem in Calif. Follows Zimmerman's Acquittal in Death of Trayvon Martin*, WASH. POST (July 16, 2013), https://www.washingtonpost.com/national/mayhem-in-calif-follows-zimmermans-acquittal-in-death-of-trayvon-martin/2013/07/16/05e5975a-ee19-11e2-bed3-b9b6fe264871_story.html ("Good way to show that they don't belong caged in a jail cell like animals. Yeah civil rights is really getting a boost with this."); joeradder, Comment to Ehrenfreund, *supra* ("Let them burn Crenshaw down! Who cares."); Roxy Murphy, Comment to Ehrenfreund, *supra* ("The people that broke windows and looted WalMart were not interested in justice. They were interested in free shopping and Breaking stuff.").

²⁸ In 2011, the Bic pen company introduced the "Bic For Her" line of pens. Samantha Felix, *Here Are the Bic Pens for Women that Everyone Is Laughing at*, BUS. INSIDER (Aug. 28, 2012), www.businessinsider.com/the-bic-pens-for-women-that-everyone-is-laughing-at-2012-8. The product description on Amazon.com read: "The BIC For Her is a pen designed just for her. It is a sleek pen silhouette and jeweled accents add style. It has a soft contoured grip for all day comfort and also features the Easy-Glide System . . . for beautifully smooth writing. Also available in Fashion Inks." *BIC For Her Retractable Ball Pen, Medium Point, 1.0 mm, Black Ink, 2 Count (FHAP21-Black)*, AMAZON.COM [hereinafter *BIC For Her*], <http://www.amazon.com/BIC-Retractable-Medium-Point-FHAP21-Black/dp/B005PFESMG/>. Reviews of the Bic for Her were ironic, sarcastic, and certainly valuable First Amendment speech. They included Sierra, *I'm Literate Now, Thanks Bic!!*, Customer Review of *BIC For Her*, *supra* ("I cannot begin to express my gratitude at your product. You have obviously worked

Because parasite hosts are clearly distinct from users' conduct, they should enjoy the highest amount of protection.

B. Innocent Intermediaries

Innocent-intermediary POFs are those that are intended to connect other people, are not designed to facilitate illegal conduct any more than they are designed to facilitate legal conduct, and whose operators obtain no special benefit when illegal conduct occurs on the forums. Craigslist is a good example of an innocent-intermediary POF. Craigslist provides a panoply of free classified ad sections and discussion forums worldwide.²⁹ Millions of people use Craigslist to advertise or find various products and services.³⁰ Nevertheless, Craigslist has often been the target of attempted censorship.

In *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist*, Craigslist was sued for violating the Fair Housing Act by hosting users' discriminatory housing ads.³¹ Craigslist claimed protection under § 230(c) of the CDA, which provides that operators of interactive computer services are not to be treated as the publisher or speaker of material provided by another party.³²

Craigslist argued that § 230(c) provides for "broad immunity from liability for unlawful third-party content."³³ Although the Seventh Circuit,

very hard to incorporate both colors that attract women and a smaller, more manageable size for our dainty palms. But that's not all. You see, Bic, more than comfort, mine was an issue of illiteracy. Before the release of your pens, I could not write. All other pens were just too bulky, and the manly colors (black, blue) were just too masculine. Sometimes I could eek out a word or two, but only if it was using a Glitter Pen or frosting while I was baking in the kitchen."); Leah P. Axelrod, *Most Incredible Day of My Life. . . Thanks to Bic For Her!!!*, Customer Review of *BIC For Her*, *supra* ("I was never really a girly girl per se, but this morning one of my coworkers gave me a Bic For Her pen and I could barely contain my excitement. At first I was slightly disappointed that there were no 'Jeweled accents' like the packaging claimed until shortly it turned into an all out crying fit. I'm just so emotional! It was only about an hour or so later when my biological clock started ticking so fast it was unbearable. I couldn't wait for my 2 1/2 kids and my white picket fence!"); and acketon, *All my life*, Customer Review of *BIC For Her*, *supra* ("All my life I've been looking for pens that will allow me to get in touch with my feminine side. I'm probably breaking some rules by using these but hopefully I won't get caught. Nothing worse than being identified in the paper as a man using pens for women.").

²⁹ *Craigslist, Inc. v. Branley*, No. 11-3545 SC, 2012 WL 929847, at *1 (N.D. Cal. Mar. 19, 2012).

³⁰ *Id.*

³¹ *Chi. Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist*, 519 F.3d 666 (7th Cir. 2008).

³² 47 U.S.C. § 230(c)(1) (2012) ("No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.").

³³ *Chi. Lawyers' Comm.*, 519 F.3d at 669.

which heard the appeal, questioned how broad this immunity really was, it found in Craigslist's favor because the website was not designed to help people violate the law.³⁴ It thus distinguished websites like Grokster (Napster's heir) because they intentionally facilitate violations, whereas sites like Craigslist are innocent intermediaries.³⁵ The latter are, according to the Seventh Circuit, not unlike common carriers, which are not liable for their users' conduct.³⁶

In *Gibson v. Craigslist*, a shooting victim sued Craigslist, claiming it breached its duty of care because the victim was shot by a gun purchased through a Craigslist advertisement.³⁷ Craigslist again invoked § 230(c) for protection and won because Craigslist was an interactive computer service and the gun ad was provided by a third party.³⁸

In *Dart v. Craigslist*, it was alleged that Craigslist's "erotic" services section facilitated prostitution and constituted a public nuisance, even though Craigslist made attempts to excise all ads for prostitution in this section.³⁹ Craigslist again won based on § 230(c)'s protection, and the court noted that Craigslist merely hosted the speech of another and did not create any content itself.⁴⁰

While Craigslist invoked § 230(c) protection, it also argued that the plaintiff's requested injunction to "close" the erotic services subcategory would be an invalid prior restraint on speech⁴¹ and would violate the First Amendment principle that a communication intermediary is liable for the speech of users only when the intermediary knows or should know of the harmful content.⁴²

This knowledge criterion determined the limits of First Amendment protection for operators in *Cubby, Inc. v. CompuServe, Inc.*⁴³ In that case, CompuServe operated an information aggregation and distribution ser-

³⁴ *Id.* at 669–72.

³⁵ *Id.* at 670.

³⁶ *Id.* at 668 (observing that common carriers are not liable for users' conduct "because they neither make nor publish any discriminatory advertisement, text message, or conversation that may pass over their networks").

³⁷ Decision & Order, *Gibson v. Craigslist, Inc.*, No. 08 Civ. 7735(RMB), 2009 WL 1704355, at *1 (S.D.N.Y. June 15, 2009).

³⁸ *Id.* at *2–4.

³⁹ *Dart v. Craigslist, Inc.*, 665 F. Supp. 2d 961, 961–62 (N.D. Ill. 2009) ("Users browsing the 'erotic' subcategory . . . receive an additional 'warning & disclaimer' stating that users . . . agree to 'flag 'prohibited'' any content that violates Craigslist's Terms of Use including 'offers for or the solicitation of prostitution.'").

⁴⁰ *Id.* at 968–69 (citing *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1162–63 (9th Cir. 2008)).

⁴¹ Memorandum in Support of Craigslist's Motion for Judgment on the Pleadings at 7, *Dart*, 665 F. Supp. 2d 961 (No. 09 CV 1385), 2009 WL 1370729.

⁴² *Id.* at 24.

⁴³ *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135, 139–41 (S.D.N.Y. 1991).

vice, publishing nothing of its own.⁴⁴ One user published defamatory material through Compuserve.⁴⁵ Compuserve escaped liability, with the court looking to the First Amendment value of Compuserve as a neutral content distributor.⁴⁶

Absent unusual circumstances, innocent intermediaries should be highly protected.

C. *Intentional Avoiders*

Intentional-avoider POFs are those that structure forums in order to avoid knowledge of illegal conduct taking place on them and thereby enjoy safe-harbor status. The implicit goal is, for some POFs, to facilitate illegal conduct, most often the exchange of copyrighted materials. The website Mega, a descendent of Megaupload, is an intentional-avoider POF.

Styled as a “file storage” facility,⁴⁷ Megaupload in fact enabled users to upload and share pirated content worth billions of dollars.⁴⁸ It actively facilitated this sharing.⁴⁹ In 2012, the United States indicted Megaupload executives for conspiring to engage in copyright infringement and money laundering.⁵⁰ It claimed that Megaupload depended upon pirated ma-

⁴⁴ *Id.* at 137.

⁴⁵ *Id.* at 138.

⁴⁶ *Id.* at 144; *see id.* at 140 (describing Compuserve as “at the forefront of the information industry revolution” and with little or no editorial control over the contents of its “vast number of publications”).

⁴⁷ *Perfect 10, Inc. v. Megaupload Ltd.*, No. 11cv0191-IEG (BLM), 2011 WL 3203117, at *1 (S.D. Cal. July 27, 2011), *vacated pursuant to settlement*, 2011 WL 10618723 (S.D. Cal. Oct. 11, 2011).

⁴⁸ *Id.* at *2.

⁴⁹ *Id.* at *4 (noting that Megaupload created websites to “streamline users’ access to different types of media”; encouraged and sometimes paid users “to upload vast amounts of popular media”; “disseminate[d] URLs for various files”; paid affiliate websites to “maintain a catalogue of all available files”; and was “plausibly aware of the ongoing, rampant infringement taking place on its websites.”).

⁵⁰ *Superseding Indictment at 2, United States v. Kim Dotcom*, No. 1:12CR3 (E.D. Va. Feb. 16, 2012), 2012 WL 517537 (alleging that Megaupload executives were part of the “Mega Conspiracy,” which was “a worldwide criminal organization whose members engaged in criminal copyright infringement and money laundering on a massive scale with estimated harm to copyright holders well in excess of \$500,000,000 and reported income in excess of \$175,000,000”).

terials to ensure a successful business model⁵¹ and provided financial incentives to users to upload copyrighted material.⁵²

Since the indictment issued, Megaupload executives created Mega.⁵³ Presenting a possible new threat to copyright,⁵⁴ Mega is uniquely encrypted⁵⁵ so that even its operators are not aware of the nature of the materials shared on its network.⁵⁶ This encryption is supposed to protect users who violate copyright law⁵⁷ as well as Mega executives.⁵⁸ The site appears to have been an initial success; quickly after its launch, it had millions of users, hundreds of millions of files,⁵⁹ and it received hundreds of takedown notices from copyright holders in the first three weeks of operation.⁶⁰ In May 2013, Hollywood studios sent to Google a takedown notice to remove Mega's home page, even though that page has no links to any file.⁶¹ While Mega appears to be complying with takedown notices

⁵¹ *Id.* The Mega Conspiracy depended upon premium subscriptions and online advertising for its revenue. Premium subscriptions allowed users to quickly download files from Megaupload's servers, and online advertising was heavily dependent on the popularity of copyright infringing content to attract website visits. *Id.*

⁵² *Id.* at 32–33. The Mega Conspiracy also promised to premium subscribers cash payouts to upload popular works, including copyrighted works. An early version of the "Uploader Rewards" program promised more money for more uploads, announcing, "You deliver popular content and successful files[.] We provide a power hosting and downloading service. Let's team up!" *Id.* (alteration in original).

⁵³ Mike Masnick, *No, Kim Dotcom's New Mega Service Does Not 'Dismantle Copyright Forever,'* TECHDIRT (Jan. 18, 2013), <https://www.techdirt.com/articles/20130118/13174221730/no-kim-dotcoms-new-mega-service-does-not-dismantle-copyright-forever.shtml>.

⁵⁴ *Id.* ("Gizmodo . . . claim[ed] that 'this service could dismantle copyright forever.'").

⁵⁵ See Lee Hutchinson, *Megabad: A Quick Look at the State of Mega's Encryption*, ARS TECHNICA (Jan. 21, 2013), <http://arstechnica.com/business/2013/01/megabad-a-quick-look-at-the-state-of-megas-encryption/>.

⁵⁶ See Masnick, *supra* note 53.

⁵⁷ Max Eddy, *Dotcom's Mega: Privacy and Security Woes*, PCMAG.COM: SECURITYWATCH (Jan. 31, 2013) ("What's most troubling . . . is how the service is being marketed. It should be clear from the start; it's not designed to protect *you*, it's designed to protect *them*."), <http://in.pcmag.com/opinion/77299/dotcoms-mega-privacy-and-security-woes>.

⁵⁸ *Id.*

⁵⁹ Eric Limer, *Mega Passed Its First Copyright Takedown Test*, GIZMODO (Jan. 27, 2013), <http://gizmodo.com/5979336/mega-passed-its-first-copyright-takedown-test>; David Murphy, *Kim Dotcom's Mega Hits One Million Users Within 24 Hours*, PCMAG.COM (Jan. 20, 2013), <http://www.pcmag.com/article2/0,2817,2414529,00.asp>.

⁶⁰ Tom Pullar-Strecker, *Mega Lures 2.5 Million Users but Few Pay*, DOMINION POST (Feb. 9, 2013), 2013 WLNR 3217021.

⁶¹ Mike Masnick, *Hollywood Studios Send DMCA Takedowns over Kim Dotcom's Mega Service*, TECHDIRT (May 28, 2013), <https://www.techdirt.com/articles/20130528/07105123227/hollywood-studios-send-dmca-takedowns-over-kim-dotcoms-mega-service.shtml>.

so that it can keep its safe-harbor status,⁶² it has manufactured its own ignorance with its encryption system.⁶³ Since its launch, Mega has introduced additional technology to facilitate copyright violations.⁶⁴

The protection afforded to intentional avoiders should vary. For example, the purposes for avoiding knowledge of users' conduct and function of the forum should be important. If the purpose is to create a secure forum for sharing important and sensitive news, and if a substantial amount of forum conduct is legal, then the intentional avoider should be protected. If, however, the purpose of avoidance is to facilitate illegal conduct and escape DMCA takedown requirements, then the intentional avoider should enjoy less or no protection.

D. Knowing, Unintentional Facilitators

Knowing, unintentional-facilitator POFs are those whose operators know that illegal speech or conduct may be taking place on their forum, but who do not intend to facilitate such speech or conduct. The video posting site YouTube is a good example of a knowing, unintentional-facilitator POF.

Founded in 2005,⁶⁵ by 2010 YouTube facilitated "more than 1 billion daily video views, with more than 24 hours of new video uploaded to the site every minute."⁶⁶ In order to upload a video, a user had to register and agree not to submit copyrighted material.⁶⁷ There is evidence that the company's founders wanted to keep infringing material off of the site.⁶⁸

⁶² See Limer, *supra* note 59.

⁶³ See Paul Wagenseil, *Mega's Encryption Protects Its Business, Not Your Files*, NBC NEWS (Jan. 21, 2013), <http://www.nbcnews.com/id/50541347>; see also Limer, *supra* note 59 ("[S]mart use of encryption by users should make infringing files harder to find, and significantly throttle the flow of takedowns Mega has to perform.").

⁶⁴ Press Release, MegaFiles, MegaFiles Introduces Convenient Mega.co.nz Search Engine, (Apr. 17, 2013), <http://marketersmedia.com/megafiles-introduces-convenient-mega-co-nz-search-engine/10200>. Mega's search engine was introduced in April 2013 and is "designed to make it faster, more convenient, and easier for users to search for files and download them through Mega. The facility has been designed to make both finding and indexing Mega files simpler, thus providing increased speed and convenience for users. The Mega search engine is able to search the web for links to Mega files, and once files are found, they are scanned so that the relevant data can be extracted and indexed in the database." *Id.*

⁶⁵ *Viacom Int'l, Inc. v. YouTube, Inc.* (*Viacom II*), 676 F.3d 19, 28 (2d Cir. 2012).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Viacom Int'l Inc. v. YouTube, Inc.* (*Viacom III*), 940 F. Supp. 2d 110, 119 (S.D.N.Y. 2013). Internal YouTube discussions indicated that the company's founders wanted to identify and remove infringing materials from the site to avoid looking "like a dumping ground for copyrighted stuff" . . . without risking drops in 'site traffic and virality.'" YouTube therefore would remove whole movies, entire TV

They knew, however, that copyrighted material drew users, and so they prevented users from flagging copyrighted material, declined to send automated email alerts to copyright holders, and removed infringing material only after receiving takedown notices.⁶⁹

Viacom International Inc. and other copyright holders sued YouTube for direct and secondary copyright infringement based on the posting of tens of thousands of allegedly infringing videos.⁷⁰ YouTube claimed it was entitled to “safe harbor” protection under the DMCA,⁷¹ which would allow YouTube to escape liability if it had no actual or constructive knowledge of the infringing material or acted to remove such material when it became aware of its presence, received no financial benefit directly attributable to the infringing material, and upon notification of its presence, acted to remove the material.⁷²

Viacom claimed that YouTube had actual knowledge and did not act to remove the material.⁷³ YouTube had, however, designated a copyright-notification agent and swiftly removed any copyrighted material after specific notice.⁷⁴ The district court sided with YouTube, holding that it fell within the safe harbor.⁷⁵ It held—and the Second Circuit affirmed—that general knowledge of infringing material was not enough to remove a party from the safe harbor.⁷⁶ The district court even held that general knowledge coupled with welcoming infringing material posted by users was not enough to lose safe-harbor protection.⁷⁷ Knowledge of *specific* instances of infringement was necessary.⁷⁸

This case was by no means easy for YouTube. As much as 60–80% percent of content may have been copyrighted, with most of that content

shows, “nudity/porn and any death videos,” but would leave on the site music videos, news programs, sports, commercials, and comedy clips. *Id.*

⁶⁹ *Id.* at 119–20. This policy tightened when Google acquired YouTube. It streamlined the notification process for certain content owners by providing access to YouTube’s Content Verification Program, which “allowed content owners to check boxes to designate individual videos for take down.” *Id.* at 120. For other content owners, YouTube would agree to use automatic blocking technology only if the owners agreed to licensing and revenue sharing deals with YouTube. *Id.*

⁷⁰ *Viacom II*, 676 F.3d at 25–26.

⁷¹ *Viacom Int’l Inc. v. YouTube, Inc. (Viacom I)*, 718 F. Supp. 2d 514, 516 (S.D.N.Y. 2010), *vacated in part*, 676 F.3d 19 (2d Cir. 2012).

⁷² 17 U.S.C. § 512(c)(1) (2012).

⁷³ *Viacom I*, 718 F. Supp. 2d at 518–19.

⁷⁴ *Id.* at 519.

⁷⁵ *Id.* at 529.

⁷⁶ *Viacom II*, 676 F.3d at 29 (“Mere knowledge of [the] prevalence of such [infringing] activity in general . . . is not enough.”).

⁷⁷ *Id.* (“[A] jury could find that [YouTube] not only [was] generally aware of, but welcomed, copyright-infringing material being placed on [its] website.”).

⁷⁸ *Id.* at 31.

infringing,⁷⁹ and there was evidence that YouTube had the requisite actual knowledge of specific infringing materials.⁸⁰ In the end, however, YouTube won because Viacom failed to produce evidence that it had notified YouTube of specific infringing materials.⁸¹ The court also found that YouTube had not willfully blinded itself to specific infringements,⁸² that the DMCA did not require YouTube to perform searches for infringing materials,⁸³ and that YouTube did not have the “right and ability to control” infringing materials⁸⁴ in the absence of specific infringing activity.⁸⁵ To lose safe-harbor status, YouTube had to influence or participate in the infringement.⁸⁶

As with intentional avoiders, the protection afforded to knowing, unintentional facilitators will vary. For example, if a POF’s forum is so overrun with illegal conduct, governmental action that shuts the entire forum down may be justified, even under strict scrutiny. But if there remains a substantial amount of legal conduct on the forum, the POF should remain largely protected, and more surgical approaches to rooting out the illegal conduct should be required.

E. Intentional Facilitators

Intentional-facilitator POFs are those whose creators or operators act with the intent to facilitate specific legal or illegal conduct. Napster is the prototypical example of an intentional-facilitator POF. As the first peer-

⁷⁹ *Id.* at 32–33.

⁸⁰ *Id.* at 33–34. Internal YouTube communications indicate that the company took down infringing Premier League football material only in advance of a meeting with the heads of several major sports teams and leagues. *Id.* at 33. One YouTube executive listed a number of TV shows that were available on YouTube, and opined that “although YouTube is not legally required to monitor content . . . and complies with DMCA takedown requests, we would benefit from *preemptively* removing content that is blatantly illegal and likely to attract criticism.” *Id.* When one executive stated that YouTube needed to reject a series of popular commercials, another executive responded, “[C]an we please leave these in a bit longer? [A]nother week or two can’t hurt.” *Id.* at 33–34. Another clip—the “[CNN] clip of the shuttle”—may have been known by YouTube executives to be infringing, but they debated whether to keep it on the site. One executive wanted to keep it up, saying, “the CNN space shuttle clip, I like. [W]e can remove it once we’re bigger and better known, but for now that clip is fine.” *Id.* at 34.

⁸¹ *Viacom III*, 940 F. Supp. 2d. 110, 116–17 (S.D.N.Y. 2013).

⁸² *Id.* at 117.

⁸³ *Id.*

⁸⁴ *Id.* at 122.

⁸⁵ *Id.* at 117–19.

⁸⁶ *Id.* at 118 (“[T]he governing principle must remain clear: knowledge of the prevalence of infringing activity, and welcoming it, does not itself forfeit the safe harbor. To forfeit that, the provider must influence or participate in the infringement.”).

to-peer network for sharing music files, at its height millions of users⁸⁷ shared 10,000 files per second.⁸⁸ In a sample of files on Napster, 87% of these files were copyrighted and were shared without the copyright holders' authorization.⁸⁹ Napster's intent was to undermine the music industry;⁹⁰ it knew of and facilitated the copyright violations occurring on its network.⁹¹

In a lawsuit initiated by A&M Records, a district court enjoined Napster from engaging in or facilitating the copying, downloading, uploading, or transmission of copyrighted works.⁹² Because Napster was so complicit in the violations, it was required to ensure that no copyrighted work was distributed by its users.⁹³ The Ninth Circuit affirmed the injunction based on Napster's facilitation of copyright infringement;⁹⁴ the percentage of music files on Napster's network that consisted of copyrighted works;⁹⁵ Napster's actual and constructive knowledge of direct infringement⁹⁶ of specific material;⁹⁷ and "[t]he ability to locate infringing material . . . [and] terminate users' access to the system."⁹⁸

Intentional facilitators will usually resemble users' accomplices or aiders and abettors, and should therefore normally receive no protection when they intend to facilitate illegal conduct.

F. Partners

A partner POF is one whose purpose is virtually identical to that of its users, and whose structure is intentionally shaped and devoted to pursuing that purpose to the exclusion of all others. The now-defunct At-

⁸⁷ See *A&M Records, Inc. v. Napster, Inc.*, 114 F. Supp. 2d 896, 902 (N.D. Cal. 2000), *rev'd in part*, 239 F.3d 1004 (9th Cir. 2001); John Logie, *Partying Like It's 1999: On the Napsterization of Cultural Artifacts Via Peer-to-Peer Networks*, in *THE INTERNATIONAL HANDBOOK OF VIRTUAL LEARNING ENVIRONMENTS* 1271, 1271 (Joel Weiss et al. eds., 2006).

⁸⁸ *A&M Records*, 114 F. Supp. 2d. at 902.

⁸⁹ *Id.* at 903.

⁹⁰ *Id.* (stating that Napster sought to "take over, or at least threaten, [music producers'] role in the promotion and distribution of music" and citing internal Napster documents suggesting that the company "should focus on [its] realistic short-term goals while wooing the industry before [it] tr[ies] to undermine it").

⁹¹ *Id.* (quoting internal documents that stated, "[W]e are not just making *pirated* music available but also pushing demand").

⁹² *Id.* at 927.

⁹³ *Id.*

⁹⁴ *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir. 2001).

⁹⁵ *Id.*

⁹⁶ *Id.* at 1020.

⁹⁷ *Id.* at 1022.

⁹⁸ *Id.* at 1024.

Tibyan Publications is an example. Referred to as a jihadist web forum⁹⁹ and possibly connected to Al Qaeda,¹⁰⁰ like-minded people used it to have online discussions.¹⁰¹ While most users were probably looking for an extremist forum to reinforce their own views, the site has also been used as a source for scholarly research.¹⁰² Users' participation in the Tibyan forum has been used as evidence to prosecute them,¹⁰³ deny them pre-trial release,¹⁰⁴ and reject motions to vacate a sentence.¹⁰⁵

Partner POFs can usually be analogized to co-conspirators or at least accomplices to users' illegal conduct, and as such should normally receive no protection when their purpose is aimed at illegal conduct.

III. FIRST AMENDMENT PROTECTION FOR POFs

This Part advances the legal argument for the POF doctrine. It first discusses how the Court's jurisprudence on operators' limited First Amendment right to *exclude* users implies a POF's right to *include* users. It then argues that, because associations have *standing* to assert stand-alone First Amendment rights, they indeed *do* have such rights. It then connects these general stand-alone rights with the argument that POFs have the specific right to facilitate users' speech. Finally, it analogizes the POF doctrine to traditional public forums, and discusses how the legal structures arranged in the DMCA and CDA suggest the POF doctrine.

⁹⁹ George D. Brown, *Notes on a Terrorism Trial—Preventive Prosecution*, “Material Support” and the Role of the Judge After *United States v. Mehanna*, 4 HARV. NAT'L SECURITY J. 1, 16 (2012) (describing Tibyan as a “British jihadist website”).

¹⁰⁰ See Christopher Pochon, Recent Development, *Applying the Holder Standard to Speech that Provides Material Support to Terrorism in United States v. Mehanna*, No. 09-10017-GAO (D. Mass. 2012), 36 HARV. J.L. & PUB. POL'Y 375, 377 (2013).

¹⁰¹ See Laura Rovner & Jeanne Theoharis, *Preferring Order to Justice*, 61 AM. U. L. REV. 1331, 1354 (2012).

¹⁰² See generally Farhani Ali & Jerrold Post, *The History and Evolution of Martyrdom in the Service of Defensive Jihad: An Analysis of Suicide Bombers in Current Conflicts*, 75 SOC. RES. 615 (2008).

¹⁰³ *Path of a Jihadi*, BOS. HERALD (June 28, 2013), http://www.bostonherald.com/news_opinion/local_coverage/2013/06/path_of_a_jihadi (listing federal prosecutors' allegations that Boston Marathon bomber Dzhokhar Tsarnaev downloaded, among other works, “Jihad and the Effects of Intention Upon It” from the “extremist” Tibyan website).

¹⁰⁴ *United States v. Mehanna*, 669 F. Supp. 2d 160, 162, 166 (D. Mass. 2009).

¹⁰⁵ *United States v. Shah*, Nos. H-06-428 & H-10-3796, 2012 WL 1098387, at *8, *32 (S.D. Tex. Mar. 29, 2012) (noting that the defendant's computer “was found to contain multiple documents relating to Jihad, some which were from At-Tibyan Publications”).

A. *Private Rights of Exclusion*

When private forums assert their First Amendment rights as forums, they usually do so based on what I call an “exclusion paradigm,” meaning that they want to exclude others and the Court will decide the extent to which they have the First Amendment right to do so. This jurisprudence implies the negative, that forum operators who want to *include* people have the First Amendment right to do so.¹⁰⁶

In *Marsh v. Alabama*,¹⁰⁷ a Jehovah’s witness had been convicted of trespass because he entered a town owned entirely by the Gulf Shipbuilding Corporation to distribute religious materials.¹⁰⁸ The Supreme Court reversed the conviction, finding that the First Amendment right of the town’s citizens to receive religious literature, and thereby enjoy the freedom of the press and religion, trumped the company’s private property rights.¹⁰⁹ The Court reasoned that when a forum operator opened his property for public use, his rights to exclude gave way to the rights of the forum’s users.¹¹⁰

In *PruneYard v. Robins*, the Court held that a shopping-mall-owner’s First Amendment rights were not violated by a state constitutional provision that permitted mall visitors to reasonably exercise their own speech-and-petition rights on private mall property.¹¹¹ The owner had opened his property to others, its users’ views would not be identified with the mall owner, and the owner was free to disavow any of the users’ messages.¹¹² This holding was particularly vital to First Amendment principles because citizens had begun to congregate in suburban malls, leaving behind the

¹⁰⁶ This right of inclusion has never squarely been addressed by the Supreme Court. This author has, moreover, found only two published cases that consider it. In *City of Akron v. Molyneaux*, an Ohio appeals court held that an ordinance prohibiting a private property owner from distributing handbills on vehicles on his property restricted his “right to include” speech on his own property. 760 N.E.2d 461, 466 (Ohio Ct. App. 2001). In *South Boston Allied War Veterans Council v. City of Boston*, parade organizers claimed rights to include or exclude any units or individuals from participating in their parade. 297 F. Supp. 2d 388, 390 (D. Mass. 2003). The parade organizers in that case were the same ones who obtained the right to exclude in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995).

¹⁰⁷ *Marsh v. Alabama*, 326 U.S. 501, 502–04 (1946).

¹⁰⁸ *Id.* at 502–04.

¹⁰⁹ *Id.* at 509–10.

¹¹⁰ *Id.* at 506 (“The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.”).

¹¹¹ *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 76–77, 88 (1980); *see also* *Amalg. Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) (holding that the First Amendment protected the union’s right to protest in a shopping center), *limited by* *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

¹¹² *PruneYard Shopping Ctr.*, 447 U.S. at 87.

urban public property of streets, sidewalks, and parks.¹¹³ Nevertheless, this was a ruling based on a state constitution. In *Lloyd Corp. Ltd. v. Tanner*, the Court found in favor of a shopping mall's right to exclude protestors from its private property, with no federal First Amendment right to protect the protestors.¹¹⁴

In *Rumsfeld v. FAIR*, a consortium of law schools and faculties sought to enjoin enforcement of a federal law that denied funding to schools that prevented military recruiters from enjoying equal access during employment events.¹¹⁵ FAIR members all had policies opposing discrimination based on sexual orientation, and the military, at the time, engaged in such discrimination.¹¹⁶ FAIR argued that being forced to give discriminatory employers equal access would violate the schools' First Amendment freedoms of speech and association.¹¹⁷ The Supreme Court upheld the law, offering that the schools could oppose the presence of recruiters with speech of their own.¹¹⁸

Marsh, the shopping-mall cases, and *FAIR* suggest that even though private forums do not have the absolute right in all cases to exclude users, private forums have stand-alone First Amendment rights that courts must consider.¹¹⁹ As they support a limited right to exclude, these cases also support—a fortiori, it would seem—First Amendment rights for POFs that wish to establish *inclusive*, not *exclusive*, forums.¹²⁰

¹¹³ See *id.* at 89–91 (Marshall, J., concurring) (supporting the protestors' right to free expression because "[t]he large-scale movement of this country's population from the cities to the suburbs has been accompanied by the advent of the suburban shopping center," and because these malls "opened their centers to the public at large, effectively replacing the State with respect to such traditional First Amendment forums as streets, sidewalks, and parks").

¹¹⁴ *Tanner*, 407 U.S. at 570.

¹¹⁵ *Rumsfeld v. Forum for Acad. & Inst'l Rights, Inc.*, 547 U.S. 47, 52, 55 (2006) [hereinafter *FAIR*].

¹¹⁶ *Id.* at 52 & n.1.

¹¹⁷ *Id.* at 53.

¹¹⁸ *Id.* at 60 ("The [law] neither limits what law schools may say nor requires them to say anything. . . . It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.").

¹¹⁹ The *PruneYard* and *FAIR* Courts, for example, treated the forum operators as First Amendment actors, offering that the solution to complainants' problem was to engage in their own speech. See *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

¹²⁰ Consider what the probable outcome would have been if the Gulf Shipbuilding Corporation company in *Marsh* wanted to allow religious speakers into the company town, but was prevented by state law; if the shopping mall owner in *PruneYard* hosted "Free Speech Fridays" outside the food court that were given dispersal orders by the police department; or if the Ku Klux Klan was hiring lawyers

B. Standing Implies Associations' Stand-Alone Rights

The company town, shopping malls, and law schools all had standing because they have stand-alone First Amendment rights. In addition, FAIR had associational standing to sue on behalf of its members.¹²¹ This associational standing implicitly supports the POF doctrine, as illustrated in other cases that demonstrate forums' First Amendment right to manage their forums largely as they see fit.

In *Dallas v. Stanglin*, a skating rink owner challenged an ordinance that restricted admission to his rink of people between ages 14 and 18.¹²² The Fifth Circuit found that the rink owner had standing to assert the associational rights of his teenage patrons.¹²³ Although the Supreme Court rejected this First Amendment claim, it did observe that the right to associate encompassed the right of "groups organized to engage in speech."¹²⁴ Similarly, in *Miami Herald Publishing Co. v. Tornillo*, the Court held that a newspaper owner could not be forced to include in his newspaper items that he dislikes.¹²⁵ In *Lehman v. City of Shaker Heights*, furthermore, the Court held that a city could refuse to run political ads on city buses.¹²⁶ Finally, in *Lamb's Chapel v. Center Moriches Union Free School District*, the Court held that a public school's refusal to host after-hours programming for a church violated the First Amendment.¹²⁷ It did so, however, because the school hosted other similar programming and was thus engaged in unconstitutional viewpoint discrimination.¹²⁸ However, short of viewpoint discrimination, the Court held that even a public school could manage the speech on its property for purposes it determined.¹²⁹

If, as these cases demonstrate, entities have standing to challenge incursions on their interest in managing their forum as they see fit, then the necessary implication is that the entities have *some* right to so manage their forums.

and, contrary to the FAIR members' desire, a local anti-discrimination ordinance prevented the KKK from recruiting on law school campuses.

¹²¹ *FAIR*, 547 U.S. at 52 n.2.

¹²² *City of Dallas v. Stanglin*, 490 U.S. 19, 20 (1989).

¹²³ *Id.* at 22 n.3.

¹²⁴ *Id.* at 21, 25.

¹²⁵ *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 243, 258 (1974).

¹²⁶ *Lehman v. City of Shaker Heights*, 418 U.S. 298, 299, 304 (1974).

¹²⁷ *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 387, 390 (1993).

¹²⁸ *Id.* at 393, 396–97.

¹²⁹ *Id.* at 390 ("[L]ike the private owner of property, [the district] may legally preserve the property under its control for the use to which it is dedicated.")

C. *Associations' Stand-Alone Rights*

Beyond the indirect argument that standing implies a right, the Supreme Court has directly addressed associations' stand-alone right to manage their forums.

In *Roberts v. United States Jaycees*, the National Jaycees sued on behalf of their branches because a state law required the Jaycees to admit women, contrary to the Jaycees' discriminatory policy.¹³⁰ The Court held the law to be constitutional because, based on case-specific facts, it did not undermine the Jaycees' associational rights,¹³¹ but reaffirmed that implicit in the exercise of First Amendment rights is the corresponding right to associate, which can be infringed in a number of ways.¹³²

In *Board of Directors of Rotary International v. Rotary Club of Duarte*,¹³³ Rotary International had revoked the charter of a local club because that club admitted women in compliance with the state's anti-discrimination law.¹³⁴ The local club sued to enjoin the International branch from enforcing its prohibition against admitting women members and revoking the local's charter.¹³⁵ The Court upheld the state law and found for the local club.¹³⁶

In *Jaycees* and *Rotary*, the Court was operating under the assumption that umbrella organizations have stand-alone First Amendment rights. As in *Marsh*, the shopping mall cases, and *FAIR*, the national Jaycees and Rotary International had exclusionary policies. In these opinions, the Court often limited the right to exclude, but reaffirmed the entities' general right to manage their forums as they saw fit, within reason. Laws that limit entities' right to *exclude* have often been appropriately upheld. Governmental action that infringes upon entities' right to *include* users are of a different sort, and should be more likely to fail than laws that limit exclusion. Put another way, entities' right to *include* should be more robust than their right to *exclude*.

D. *POFs' Associational Rights*

Umbrella organizations have First Amendment rights because they facilitate a structure that magnifies and makes effective the First

¹³⁰ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 612–13 (1984).

¹³¹ *Id.* at 620–23.

¹³² *Id.* at 622 (“[I]mplicit in the right to engage in activities protected by the First Amendment [is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends. . . . Government actions that may unconstitutionally infringe upon this freedom can take a number of forms.”).

¹³³ *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

¹³⁴ *Id.* at 541.

¹³⁵ *Id.* at 541–42.

¹³⁶ *Id.* at 546–47.

Amendment goals of their individual members. POFs are, in this sense, no different, and should be treated as First Amendment actors. It will, however, take a bit of legal work to translate organizations' rights into POFs' rights.

The associational right at issue in *Jaycees* and *Rotary* was a public, democratic one rather than a private one that protects intimate relationships.¹³⁷ As an organization's size, purpose, policies, inclusion, and congeniality broaden, it enjoys a decreased associational right to exclude.¹³⁸ A large, unselective membership implies little or no associational right¹³⁹ because such groups are unlikely to have any coherent purpose or message that would be altered by allowing in all comers.¹⁴⁰

This is a potential problem for POFs because the more inclusive they are, the larger and less selective they become, and therefore the less likely they are to have stand-alone First Amendment rights. This problem, however, is not insurmountable. Associational jurisprudence grew out of forums' interest in excluding certain people from their forums.¹⁴¹ This exclusion paradigm necessitated the associational public-private spectrum to ensure that people in their private lives could associate with whomever they pleased, even if they did so discriminatorily, and to ensure that all people had access to large organizations on a non-discriminatory basis, in part because these organizations can be important entrées to career fields and influential networks.

Where a forum wants to *include* users, the bases for limiting the right to *exclude* do not apply. Inclusion entails no concern with protecting individuals' right to associate intimately with whomever they choose, nor does it lock people out of important networks. Under what I call an "inclusion paradigm," the public-private spectrum of associational rights

¹³⁷ See *City of Dallas v. Stanglin*, 490 U.S. 19, 20 (1989).

¹³⁸ *Roberts v. U.S. Jaycees*, 468 U.S. 609, 620 (1984). The Court described a spectrum, weighing heavily in favor of associational protections for private groups, compared to relatively unprotected public organizations. "Between these poles . . . lies a broad range of human relationships that may make greater or lesser claims to constitutional protection Determining the limits of state authority over an individual's freedom to enter into a particular association therefore unavoidably entails a careful assessment of where that relationship's objective characteristics locate it on a spectrum from the most intimate to the most attenuated of personal attachments. . . . [F]actors that may be relevant include size, purpose, policies, selectivity, congeniality, and other characteristics that in a particular case may be pertinent." *Id.*

¹³⁹ See *id.* at 621.

¹⁴⁰ *Id.* at 632 (O'Connor, J., concurring) ("[T]he Jaycees' right of association depends on the organization's making a 'substantial' showing that the admission of unwelcome members 'will change the message communicated by the group's speech.'").

¹⁴¹ See also, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*, 515 U.S. 557 (1995).

and the reduced right to exclude as associations get larger no longer makes sense. The interests in protecting intimacy and democratic opportunity that justify *limiting* the right to exclude under the exclusion paradigm are served under the inclusion paradigm by *maximizing* the right to include.

E. POFs' Facilitation Rights

While POFs should, and probably do, have a stand-alone right to include, they should, and probably do, also have the right to facilitate users' First Amendment speech. While never made explicit, the Supreme Court and other courts have implied this right.¹⁴² In the Supreme Court's campaign-finance cases, the Court has held that regulations implicate First Amendment interests because money facilitates political speech.¹⁴³ Similarly, the New Mexico District Court noted that facilitating the registration of voters may acquire First Amendment protection.¹⁴⁴ The California appeals court has read Supreme Court jurisprudence to mean that facilitation of free speech has First Amendment protection.¹⁴⁵

More to the point, the Supreme Court has held that the First Amendment protects news racks because they facilitate the exercise of free speech.¹⁴⁶ It also protects the collection by public universities of activity fees from students to facilitate extracurricular student speech.¹⁴⁷ The Ninth Circuit has held that the erection of tables in a public forum was protected because they facilitate the dissemination of First Amendment speech.¹⁴⁸

¹⁴² See *Disabato v S.C. Ass'n of Sch. Adm'rs*, 746 S.E.2d 329, 335 (S.C. 2013) ("The right to associate is recognized due to the inextricable link between association and the enumerated rights of the First Amendment and the role of association in facilitating self-governance." (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958))); *People v. Santiago*, 800 N.Y.S.2d 883, 886 (N.Y. Crim. Ct. 2005) ("The First Amendment is intended to protect the creators of speech and those who facilitate its dissemination . . ."). It appears that only one judge has doubted the First Amendment right to facilitate speech. See *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 289 (2d Cir. 2010) (Livingston, J., dissenting) ("I question whether First Amendment protection should be afforded to what amounts to a business method or practice, one that itself has no expressive quality, but is instead meant at most to facilitate the delivery of other expressive conduct." (citation omitted)).

¹⁴³ *ACLU of Ill. v. Alvarez*, 679 F.3d 583, 596 (7th Cir. 2012) (citing *Buckley v. Valeo*, 424 U.S. 1, 19 (1976)).

¹⁴⁴ *Am. Ass'n of People with Disabilities v. Herrera*, 690 F. Supp. 2d 1183, 1188–89 (D.N.M. 2010).

¹⁴⁵ *Tichinin v. City of Morgan Hill*, 99 Cal. Rptr. 3d 661, 681–82 (Ct. App. 2009) (although the court's citation to *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 160 (1939), is of dubious support for the proposition).

¹⁴⁶ *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 768 (1988).

¹⁴⁷ *Bd. of Regents. v. Southworth*, 529 U.S. 217, 221 (2000).

¹⁴⁸ *ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 799–800 (9th Cir. 2006).

There seems to be little functionally different between POFs and news racks, tables, and a system of activity fees. They all are structures that do not themselves engage in First Amendment conduct, but are necessary, or at least useful, to support the First Amendment conduct of others.

F. The Public Forum Analogy

The POF concept is derived from government-owned public forums, which are state-operated spaces for the expression of First Amendment rights.¹⁴⁹ The status of such forums also supports the POF doctrine. Professor Dawn Nunziato has argued that the government's role in facilitating First Amendment rights by providing public forums is an important one.¹⁵⁰ Jack Balkin, in turn, has argued that network neutrality does not violate the First Amendment because neutrality accepts that network providers are "conduits for the speech of others."¹⁵¹ Nunziato, for her part, has observed that online speech occurs almost exclusively through private intermediaries.¹⁵²

The government therefore plays two roles that can be mutually inclusive—that of regulator and that of rights enhancer. Both of these roles converge in the POF doctrine. POFs have already played important roles in democratic movements; YouTube, for example, distributed news of the Arab Spring from dissidents' viewpoints.¹⁵³ Examples such as this point to First Amendment protection for speech facilitation.¹⁵⁴

Legal precedent does as well. In *Arkansas Educational Television Commission v. Forbes*, the Supreme Court held that a public television station was not required to invite a low-polling third party candidate to a tele-

¹⁴⁹ Two types of public forums illustrate their role as sites of First Amendment activity. Traditional public forums are comprised of "property that has traditionally been available for public expression" where restrictions on speech "[are] subject to the highest scrutiny." Regulations on traditional public forums "survive only if they are narrowly drawn to achieve a compelling state interest." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Designated public forums are comprised of "property that the State has opened for expressive activity by part or all of the public." *Id.* Designated public forums can be limited if they are dedicated to only certain forms of expression, or unlimited if they are open for all types of protected expression. *See Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677–78 (1998).

¹⁵⁰ *See* Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 *BERKELEY TECH. L.J.* 1115, 1117 (2005).

¹⁵¹ *See* Balkin, *supra* note 12, at 429–30.

¹⁵² Nunziato, *supra* note 150, at 1116.

¹⁵³ *See* Nassim Nazemi, Comment, *DMCA § 512 Safe Harbor for Anonymity Networks amid a Cyber-Democratic Storm: Lessons from the 2009 Iranian Uprising*, 106 *Nw. U. L. REV.* 855, 856 (2012).

¹⁵⁴ *Id.* at 889–90 (arguing that "speech-facilitation" is protected speech).

vised political debate.¹⁵⁵ Although the television station was a government-owned forum, the Court implied that the rights of this station and a private one were no different.¹⁵⁶ Similarly, in *United States v. Grace*, the Court affirmed the government's right to close certain forums from First Amendment activity, or at least impose reasonable time, place, and manner regulations on them.¹⁵⁷ As in *Forbes*, the Court suggested that both public and private forum operators had the right to manage their properties to facilitate First Amendment activity.¹⁵⁸ In his concurrence, Justice Marshall made this suggestion explicit.¹⁵⁹

G. DMCA and CDA

Taken together, the DMCA and the CDA provide two types of immunity from liability that support the POF doctrine. The DMCA provides a safe harbor for POFs if they lack actual knowledge of the infringement occurring on their forums, if they are unaware of facts or circumstances from which the infringement would be apparent, and if they receive no financial benefit when they have a right and ability to control the infringing conduct.¹⁶⁰ Section 230 of the CDA gives a broader, but more vague immunity to POF operators, providing that they will not be considered the publishers or speakers of any information provided by a POF user.¹⁶¹

Section 230 assumes that POF operators are separate from users and should not be liable for their illegal conduct. In one sense, this restates the pervasive norm that individuals are responsible only for their own conduct.¹⁶² In another sense, it provides the constitutional baseline for POFs' First Amendment rights.

¹⁵⁵ Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 669 (1998).

¹⁵⁶ *Id.* at 673 ("Public and private broadcasters alike are not only permitted, but indeed required, to exercise substantial editorial discretion in the selection and presentation of their programming.").

¹⁵⁷ United States v. Grace, 461 U.S. 171 (1983).

¹⁵⁸ *Id.* at 178 ("The government, 'no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated.'" (quoting *Adderley v. Florida*, 385 U.S. 39, 47 (1966))).

¹⁵⁹ *Id.* at 184–85 (Marshall, J., concurring in part and dissenting in part) ("Every citizen lawfully present in a public place has a right to engage in peaceable and orderly expression that is not incompatible with the primary activity of the place in question, whether that place is . . . a private lunch counter . . . a bus terminal, an airport, [or other government-owned forums]." (footnote omitted)).

¹⁶⁰ 17 U.S.C. § 512(c)(1) (2012).

¹⁶¹ 47 U.S.C. § 230(c)(1) (2012).

¹⁶² See FED. R. EVID. 801, 802 (statements of others generally not attributable to another); *Healy v. James*, 408 U.S. 169, 186 (1972) (no guilt by association); *Jacksonville Terminal Co. v. Ry. Express Agency, Inc.*, 296 F.2d 256, 263 n.4 (5th Cir. 1961) (no tort liability without fault).

The DMCA's safe-harbor provision suggests exceptions to this baseline immunity. When POFs are partners and intentional facilitators of illegal conduct, or are intentional avoiders with some material stake in the illegal conduct and intent to facilitate it, First Amendment protection for facilitating this conduct should fall away. In such cases, imposing liability produces little or no constitutional or normative problem.

The DMCA and the CDA are approximations, not perfect facsimiles, of the POF doctrine, which could provide more rights to operators than these statutes currently do. The DMCA imposes takedown requirements for all POF operators, including those that are knowing, unintentional facilitators, innocent intermediaries, parasite hosts, and intentional avoiders. Although courts could read the DMCA notification and takedown requirements as narrowly tailored laws (that therefore do not violate the First Amendment), the regulations can, in cases in which POFs are honest actors, conflict with Section 230. Put another way, why should an innocent POF be required to take action based on the culpable behavior of an unrelated other? The POF doctrine could protect such POFs, returning the system of intermediary liability under the DMCA and CDA to the pervasive norm of individual responsibility.

IV. A CONSTITUTIONAL POF DOCTRINE

As protected by the First Amendment, POFs are like public forums. They can be completely open to all First Amendment comers or designated for certain categories of First Amendment activity. If the government wishes to limit the operation of a completely open POF, it would have to satisfy strict scrutiny. If it wishes to limit the operation of a designated POF, it would have to satisfy strict scrutiny with regard to the purpose for which the POF was open, and rational basis with regard to other purposes. POFs would also be permitted to shut down their forums or alter them whenever they wished.¹⁶³

A. *Three-Step Process*

To determine whether the POF doctrine applies, the forum at issue should satisfy five elements. The forum must be privately owned; substantially open to the public; open on a substantially non-selective basis; function primarily to permit users to engage in First Amendment activity; and

¹⁶³ This is, in fact, consistent with current designated public forum law. The Supreme Court has stated that "a State is not required to indefinitely retain the open character" of a designated public forum. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983); *see also* McGill, *supra* note 10, at 938 ("[A] designated public forum remains open for expressive activity only at the pleasure of the government.").

be intended for users to engage in such activity. If these five elements are met, the forum is a POF and can claim First Amendment protections.

Next, the court would determine whether the POF is limited or unlimited the same way it would do so for a public forum. This would be based on the operator's intention, and would determine the level of scrutiny given to state actions against the POF.

Finally, the court would apply the appropriate level of scrutiny to determine whether the state action violates the First Amendment. This state action can take many forms and, depending upon the impact of the action and its purpose, it will have different outcomes.

B. Six Approaches

Case-specific facts will determine the outcome of this three-step process, but there are six relevant and important approaches to understanding the scope of protections for POFs.

First, if the POF is entwined with users who violate the law or is complicit in violations, the POF may not successfully claim First Amendment protection. This is an obvious factor, but not necessarily easy to apply; POFs that are merely aware of illegal conduct should not automatically lose protection because that would result in the infringement of other, valuable speech.¹⁶⁴ The entwinement–complicity approach helps to explain why the outcome in *Napster* was normatively untroubling, while government threats to proceed against *Craigslist* had potential First Amendment contours.

Second, and similar to the entwinement–complicity approach, a POF operator's mens rea should play a part in determining the POF's protection.

Third, the proportion of legal to illegal conduct on the POF matters. If a large amount of conduct is illegal, an injunction against operating the entire forum, as opposed to excising the offending material, may satisfy strict scrutiny, even if the operator has no knowledge of or intent to facilitate the illegal conduct.¹⁶⁵

Fourth, whether a forum is partisan or neutral matters. Partisan forums that are dedicated to facilitating core First Amendment speech

¹⁶⁴ See Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 329 (2011) (“[T]here are likely to be real speech losses that would result from imposing liability on message board operators for the defamatory content they carry.”).

¹⁶⁵ Although in rendering its opinion the *Napster* court explicitly discounted the large proportion of illegal conduct to legal conduct existing on the *Napster* POF, it did so only in preference to considering *Napster*'s complicity in copyright violations. In addition, the court did so in the context of applying statutory, rather than constitutional law. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013–15, 1027–28 (9th Cir. 2001).

should be protected because of the type of speech they facilitate. Neutral forums, which facilitate all types of users' speech, should be protected because they facilitate this broad exercise of First Amendment rights. On the other hand, neutral forums that are open to illegal conduct and partisan forums that are dedicated to low-First-Amendment-value or non-protected activity should receive less protection.

Fifth, if a POF operator creates a POF that is particularly suited to illegal conduct, the operator may assume the risk that the POF will be used for crime. A website like Cafemom.com¹⁶⁶ would not be said to assume a risk, but YouPorn.com—a facsimile of YouTube that is dedicated to crowd-sourced pornography—might be said to have assumed the risk of hosting child pornography or obscenity in jurisdictions that prohibit it.

Sixth, if an operator's primary motive in operating a POF is to turn a profit, and has evinced little or no desire to facilitate First Amendment activity, then it would receive less protection than an operator who intends to facilitate such activity.

V. CONCLUSION: RESOLVING THEORETICAL GAPS

POFs play an important role in facilitating the exercise of users' First Amendment rights. Congress has provided them with some protection through the DMCA and CDA, but those laws are conflicting and do not extend protections to the extent that the First Amendment might. Furthermore, state and federal executive branches have moved against POFs, and courts have given their imprimatur to POF censorship. Defendants have marshaled First Amendment arguments in their defense, most of which have been unsuccessful.

This Article favors POFs by making a legal argument that they have a First Amendment right to facilitate others' speech, a normative argument that they *should* have this right, and a policy argument that such a right is important for democracy and is politically palatable. This argument also helps to resolve four persistent issues.

First, it theorizes the divergent holdings in *Sony* and *Napster*. Both companies created a technology that could be used to violate copyright, but the former escaped liability where the latter did not. These results can be explained because Napster intended to gain financially from violations, whereas Sony did not,¹⁶⁷ Napster intended to facilitate violations, whereas Sony intended to allow users to time-shift their own viewing,¹⁶⁸ and Napster had constructive (and probably actual) knowledge of its us-

¹⁶⁶ CAFEMOM, <http://www.cafemom.com> (“[T]he meeting place for moms”).

¹⁶⁷ *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 421 (1984); *A&M Records*, 239 F.3d at 1015–16.

¹⁶⁸ *A&M Records*, 239 F.3d at 1019.

ers' infringement, whereas Sony did not.¹⁶⁹ The POF doctrine encompasses these elements and advances a theory of law applicable beyond the factual circumstances in *Sony* and *Napster*.

Second, the POF doctrine addresses whether umbrella organizations can sue in support of their own, rather than their branches', First Amendment rights, a question left unanswered in *Rotary*¹⁷⁰ and *New York Club Ass'n*.¹⁷¹ In both of those cases, the umbrella organization was suing. In the former, it was suing a local branch, and in the latter it was suing on behalf of a local branch. The POF doctrine would allow them to advance their own stand-alone First Amendment rights.

Third, the POF doctrine would reconcile divergent provisions in the DMCA and CDA. The former grants to operators limited immunity from liability for the conduct of their users, and places the burden on them to establish certain facts. The latter grants broad immunity and places the burden on the opposing party to show why operators should be liable. The DMCA is based on the idea that the Internet is a conduit for information, and because much of it violates copyright, it must be regulated. The CDA aligns more closely with the idea that the Internet is an important site of First Amendment activity.

The POF doctrine reconciles these two approaches. It recognizes that the Internet is a First Amendment-laden space and offers CDA-like protection to POF operators, but it also offers a structure that can regulate online communication to address illegal conduct while respecting users' exercise of First Amendment rights.

Fourth, the POF doctrine would add to the debate on whether POFs are intermediaries that can be regulated without concern for the First Amendment¹⁷² or whether POFs have First Amendment rights because they exercise editorial discretion.¹⁷³ Neither of these positions has considered the rights of POFs that engage in little or no editorialization. The POF doctrine would satisfy the need for both effective regulation and constitutional protection of intermediaries.

The exercise of First Amendment rights has always been interactive and layered, unlike the atomized theory of individual rights that courts recognize. The need to recognize this networked theory of the First Amendment is more pressing than ever, as so much speech has migrated online, away from public forums and onto private property. POF opera-

¹⁶⁹ *Id.* at 1020.

¹⁷⁰ *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 537 n.2 (1987) (stating that an umbrella association has no right of private association).

¹⁷¹ *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 8–10 & n.4 (1988) (withholding consideration whether umbrella association itself had standing in a case upholding an antidiscrimination law).

¹⁷² Balkin, *supra* note 12, at 429–30.

¹⁷³ Yoo, *supra* note 26, at 772.

tors have become important links in individuals' ability to communicate ideas, associate with others, and assemble into groups. Legislative, executive, and judicial actions have not adequately validated these links. The POF doctrine would do so, providing a structure that both serves First Amendment principles and respects the need to address violations of copyright and other law.