@SOCIALMEDIA: SPEECH WITH A CLICK OF A BUTTON? #SOCIALSHARINGBUTTONS·

> "The reality of today's world is that social media, whether it be Twitter, Facebook, Pinterest, Google+ or any other site, is the way people communicate . . . ."[1]

INTRODUCTION

It is well settled that even the newest media are protected by the oldest American values—those embodied in the Constitution and the Bill of Rights.[2] Although the Supreme Court has established that whether speech is made offline or online it is entitled to the same level of constitutional protection,[3] the Court has not yet addressed how traditional First Amendment doctrine can be applied to and reconciled with twenty-first century digital communications.

"[T]he content on the Internet is as diverse as human thought."[4] As such, the Internet provides a forum for communication of all kinds, and social media platforms enable personal expression beyond purely textual "actual statements."[5] Instead of sharing individual opinions online through written commentary, many Internet users opt to express their views by engaging with content created by others. Social sharing buttons have become an increasingly popular way for Internet users to communicate and voice their opinions. For example, an article about the 2012 Presidential election on *The Huffington Post* can be disseminated by merely clicking one of many social media "share" buttons,[6] which allow a reader to "like" or "share" the article on Facebook, "share" it on LinkedIn, "tweet" it, "favorite" it, "g +1" it, or "pin" it.[7] Thus, Facebook users are not limited to writing "posts" but also may "like" content posted by others, Twitter users do not only "tweet" but also may "retweet" or "favorite" posts of other users, and Pinterest users do not only upload their own content but also may "re-pin" the content of others. The extensive use of social share buttons and the power of voicing ones own opinion with merely a click of a button can be seen through their adoption by essentially every online social network ("OSN"). In light of this newfound ability to express opinions without

1 People v. Harris, 945 N.Y.S.2d 505, 507 n.3 (Crim. Ct. 2012).
2 Reno v. ACLU, 521 U.S. 844 (1997).
3 *Id.* at 850.
4 *Id.* at 870.
5 Bland v. Roberts, 857 F. Supp. 2d 599, 603 (E.D. Va. 2012), *aff'd in part, rev'd in part, and remanded*, 730 F.3d 368 (4th Cir. 2013). "Social media, in our current age, is a very common activity that the people engage in to communicate with others, share ideas, protest, lobby, and generally express their views on topics to others." Complaint at 7, Hawaii Defense Found. v. City and Cnty. of Honolulu, No. CV-12-00469 (D. Haw. Aug. 21, 2012).
6 *See* Olivia Roat, *A Hot Button Issue: Do Social Sharing Buttons Work?*, MAINSTREETHOST.COM (July 25, 2012), http://blog.mainstreethost.com/a-hot-button-issue-do-social-sharing-buttons-work.
7 *Id.*

making actual statements, whether nonverbal communications are regarded as "speech" under the First Amendment is an extremely important "hot-button" issue.

"When the Framers of the First Amendment prohibited Congress from making any law 'abridging the freedom of speech,' they were not thinking about computers, computer programs, or the Internet," and they could not envision the First Amendment issues that the cyber revolution would bring into play.[8] While First Amendment doctrinal principles remain useful in analyzing statements published online, these principles do not provide complete guidance on how to evaluate expressions such as a Facebook "like"—communications that are typical today, but to which classic First Amendment doctrine cannot be readily applied.

The law in this area is outdated and has not kept pace with technological and societal changes. Indeed, the United States Court of Appeals for the Fourth Circuit's recent decision in *Bland v. Roberts*[9] has set the stage for a re-evaluation of "speech" and for the establishment of a framework that reconciles traditional First Amendment doctrine with twenty-first century online communications. This Note uses *Bland* to analyze the current state of free speech jurisprudence in cyberspace and the limitations that emerge when courts fail to understand new forms of communication. The proposed framework is tailored to ensure that the law protects, rather than censors, digital communications, for "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears."[10]

Part I provides an overview of the First Amendment, focusing on symbolic and political speech. Part II explores twenty-first century online communications; in particular "speech" made with the click of a button, and analyzes how courts have addressed First Amendment issues raised by the widespread use of social media and new technologies. Part III then evaluates the Fourth Circuit's decision in *Bland*, the amicus briefs filed by Facebook and the American Civil Liberties Union ("ACLU"), and why the district court's holding,[11] although reversed in part, must not be overlooked. Part IV highlights the difficulty that inheres in applying traditional First Amendment doctrine

8 Universal Studios, Inc. v. Corley, 273 F.3d 429, 434 (2d Cir. 2001). Despite the vexing First Amendment questions raised by online speech, the Internet has provided what the Framers longed for: a truly unfettered marketplace of ideas.

9 Bland v. Roberts, 730 F.3d 368 (4th Cir. 2013).

10 Brown v. Entm't Merchs. Ass'n, 131 S.Ct. 2729, 2733 (2011) (quoting Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)).

11 Bland v. Roberts, 857 F. Supp. 2d 599 (E.D. Va. 2012) (holding that a Facebook "Like" is not speech), *aff'd in part, rev'd in part, and remanded*, 730 F.3d 368 (4th Cir. 2013).

to twenty-first century online communications and demonstrates the import of the decision in *Bland*. This Note concludes that although *Bland* is only binding within the Fourth Circuit's jurisdiction, other jurisdictions should adopt the reasoning and methodology employed. Accordingly, Part V incorporates the principles underlying the holding in *Bland* to propose a new framework for analyzing Internet-based First Amendment claims, recommending that courts look at context, content, mode of communication, and meaning to determine whether communications made over the Internet constitute "speech." The proposed framework utilizes a factor-driven approach that not only addresses the features of new and emerging media, but also remains faithful to the traditional First Amendment "speech" determination. Thus, the framework reconciles twenty-first century speech—specifically speech made with the click of a button—with traditional First Amendment doctrine.

I. THE FIRST AMENDMENT: WHAT "SPEECH" IS CONSTITUTIONALLY PROTECTED?

The First Amendment provides an avenue for individuals to speak freely. However, the First Amendment does not protect all speech, and even protected speech is not protected equally.[12] Thus, courts are often tasked with demarcating speech and non-speech, as well as separating speech that is fully protected by the First Amendment[13] from speech that is granted lesser protection,[14] and speech that the First Amendment does not protect.[15] With regard to the advent of the Internet, the pivotal question as to what constitutes speech is what *nonverbal*

[12] *See, e.g.*, Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring in part and concurring in the judgment). As O'Connor provided in her *Grumet* concurrence:

> But the same constitutional principle may operate very differently in different contexts. We have, for instance, no one Free Speech Clause test. We have different tests for content-based speech restrictions, for content-neutral speech restrictions, for restrictions imposed by the government acting as employer, for restrictions in nonpublic fora, and so on. This simply reflects the necessary recognition that the interests relevant to the Free Speech Clause inquiry—personal liberty, an informed citizenry, government efficiency, public order, and so on—are present in different degrees in each context.

Id.

[13] The First Amendment "has its fullest and most urgent application" to political speech. Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

[14] The Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 563 (1980).

[15] The First Amendment, for example, does not protect obscenity. *See* Roth v. United States, 354 U.S. 476, 483 (1957) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene.").

communications are considered "speech."[16] With the rise of social media, the relationship between the First Amendment and the Internet is increasingly at issue.[17] The First Amendment questions raised by the use of social media will only increase as speech and expression continue to move online and as the features of social media advance to meet society's thirst for easy and quick modes of communication.[18] Consequently, the threshold issue of whether the click of a button can constitute "speech" must be addressed.

In looking for a way forward, it is important to take heed of traditional First Amendment principles. Thus, when an Internet-based First Amendment claim is brought, the court must first determine whether the communication at issue constitutes speech. If it does, the court must conclude whether the speech is protected or unprotected by the First Amendment. Second, the court must decide whether the law restricting speech is content based or content neutral.[19] While in general, the First Amendment precludes the government from proscribing speech or expressive conduct based on a disapproval of the ideas conveyed; content-based restrictions have been allowed in limited areas.[20] Finally, the level of protection that is traditionally granted to this type of speech and whether the speech may be limited in certain situations must be considered.[21] Although the Supreme Court has reaffirmed the importance of free expression countless times, it has emphasized that "not all speech is of equal First Amendment

16 The question of what nonverbal communications constitute "speech" is not a new one; the use of symbolism to convey messages has been recognized for more than half a century as an "effective way of communicating ideas." W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

17 *See* Pedram Tabibi, *How Deleting A Facebook Post May Violate Free Speech (and Lead to a Lawsuit)*, LIBN.COM (Aug. 31, 2012), http://libn.com/youngisland/2012/08/31/how-deleting-a-facebook-post-may-violate-free-speech-and-lead-to-a-lawsuit/.

18 *Id.*

19 Whether a law is content-based or content-neutral is a crucial distinction, as the government cannot regulate speech based on its content. *See, e.g.*, Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95–96 (1972); R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382 (1992).

20 *See R.A.V.*, 505 U.S. at 382–83. These exceptions remain limited to categories such as fighting words, obscenity, and defamation, and even these categories have continuously been narrowed. *Id.* at 383. Additionally, they remain limited to categories where the slight social value that can be derived from the speech is clearly outweighed by the social interest in order and morality. Chaplinsky v. N.H., 315 U.S. 568, 572 (1942). If a law regulating speech is unduly vague or is overbroad it is unconstitutional. *See* Grayned v. City of Rockford, 408 U.S. 104 (1972); Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985); Virginia v. Am. Booksellers Ass'n, 484 U.S. 383 (1988).

21 The Supreme Court has distinguished between places where the government may regulate speech and where it cannot, drawing distinctions between types of government property for First Amendment purposes. *See* Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983) (distinguishing between traditional public forums, nonpublic forums, and designated public forums).

importance,"[22] establishing that certain types of speech are entitled to special protection,[23] others are entitled to less protection,[24] and still others are entitled to no protection.[25]

A. *The First Amendment and Symbolic Speech*[26]

It is well established that symbolic speech[27]—"speech" that communicates—is protected by the First Amendment.[28] Thus, in addition to the written or spoken word (i.e., "pure speech"), the First Amendment also protects symbolic speech.[29] The Court has held that flag burning,[30] wearing armbands,[31] picketing,[32] saluting or refusing to salute a flag,[33] signing petitions,[34] participating in sit-ins,[35] and taking photographs[36] are symbolic speech deserving of First Amendment

22 Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985).

23 Connick v. Myers, 461 U.S. 138, 145 (1983); Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011). Notably, political speech is afforded the utmost constitutional protection and is thus subject to the most rigorous scrutiny. *See* Buckley v. Valeo, 424 U.S. 1, 14 (1976); *see also* Mills v. Alabama, 384 U.S. 214, 218–19 (1966).

24 Less protected categories of speech that the government has greater latitude in regulating, include, commercial speech, broadcasting, symbolic speech, and the speech of government employees. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 562–63 (1980) (commercial speech); FCC v. Pacifica Found., 438 U.S. 726, 748–51 (1978) (broadcasting); United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (symbolic speech); Pickering v. Bd. of Educ. of Twp. High Sch. Dist., 391 U.S. 563 (1968) (speech of government employees).

25 For example, obscenity, incitement of imminent lawless action, and fighting words have been deemed to be unprotected speech. *See* Roth v. United States, 354 U.S. 476, 484 (1957) (obscenity); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (incitement); Chaplinsky v. N.H., 315 U.S. 568, 572 (1942) (fighting words).

26 "Symbolic Speech" is also referred to as "symbolic expression" throughout this Note.

27 *See generally* James M. McGoldrick, Jr., *Symbolic Speech: A Message From Mind to Mind*, 61 OKLA L. REV. 1, 5–6 (2008) (noting "symbolic speech cases [fall] within three categories: (1) gestures and symbols whose meanings are almost instantly known; (2) things closely associated with speech, like marching and picketing, which are better classified as aids in communicating than communication itself; and (3) play acting or theater pieces, like the burning of the flag, which grab our attention like few other things can").

28 *See* Stromberg v. California, 283 U.S. 359, 369 (1931) (granting First Amendment protection to symbolic speech for the first time and holding that a California statute prohibiting the display of a red flag as a "sign, symbol or emblem of opposition to organized government" was unconstitutional because it curtailed "the opportunity for free political discussion . . . .").

29 Virginia v. Black, 538 U.S. 343, 358 (2003); Texas v. Johnson, 491 U.S. 397 (1989). "Symbolic speech" is defined as "[c]onduct that expresses opinions or thoughts." *See* BLACK'S LAW DICTIONARY (9th ed. 2009).

30 *Johnson*, 491 U.S. at 397.

31 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding that wearing a black armband to protest the Vietnam War is constitutionally protected "speech").

32 NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760, 377 U.S. 58, 63 (1964).

33 W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 632, 642 (1943).

34 John Doe No. 1 v. Reed, 130 S. Ct. 2811, 2812, 2818 (2010).

35 Brown v. Louisiana, 383 U.S. 131, 141–42 (1966) (holding that participation in *silent* sit-in is protected "speech").

36 *See* Mass. v. Oakes, 491 U.S. 576 (1989); *see also* T.V. *ex rel.* B.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767 (N.D. Ind. 2011) (holding that posting photographs to Facebook is protected "speech").

protection. Words on clothing,[37] bumper stickers,[38] and signs[39] are likewise protected as symbolic speech. Even if many consider the communicative conduct repugnant, First Amendment protection does not waver.[40]

Based on well-established precedent it is clear that First Amendment protection extends beyond "pure speech"—when sufficient communicative elements are present, "speech" that is not written or spoken remains within the purview of the First Amendment.[41] This remains true in the twenty-first century, as courts have found various new technologies, media, and modes of communication to be deserving of constitutional protection. For example, video games,[42] posting hyperlinks to the Internet,[43] sharing photographs on Facebook,[44] and uploading videos to YouTube[45] have been held to be "speech" protected by the First Amendment.

A few key cases elucidate the Supreme Court's approach to determining whether conduct constitutes "speech" and under what circumstances non-speech conduct is afforded constitutional protection.[46] In short, when there is intent to convey a specific message and a substantial likelihood that those who receive the message will understand it, conduct is evaluated as "speech" under the First

37 *See* Bd. of Airport Comm'rs of L.A. v. Jews for Jesus, Inc., 482 U.S. 569 (1987) (holding that words on clothing can have symbolic meaning in certain contexts (e.g., as religious symbols)). However, it is important to note that words printed on clothing can also qualify as "pure speech" protected by the First Amendment. *See* Cohen v. California, 403 U.S. 15, 18 (1971) (refusing to allow censorship of the message "Fuck the Draft" printed on the back of a jacket and worn inside a Los Angeles courthouse).

38 Aiello v. City of Wilmington, 623 F.2d 845 (3d Cir. 1980) (holding that the use of bumper stickers and wearing of political buttons is "speech" protected by the First Amendment).

39 City of Ladue v. Gileo, 512 U.S. 43 (1994) (holding that a city's ban of residential street signs violated the First Amendment).

40 *See* Texas v. Johnson, 491 U.S. 397 (1989) (burning of an American flag); United States v. Eichman, 496 U.S. 310 (1990) (same); *see also Cohen*, 403 U.S. 15 (wearing a jacket bearing the words "Fuck the Draft" in a courthouse). The First Amendment even shields such acts as "(m)arching, walking or parading" in neo-Nazi regalia. Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43, 43 (1977). Even hurtful speech that "inflict[s] great pain" is entitled to full First Amendment protection. Snyder v. Phelps*,* 131 S. Ct. 1207, 1220 (2011).

41 Spence v. State of Wash., 418 U.S. 405, 410–11 (1974) (per curiam).

42 Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011) (holding that video games qualify for First Amendment protection because they "communicate ideas—and even social messages . . . .").

43 Universal City Studios, Inc. v. Corley, 273 F.3d 429, 445 (2d Cir. 2001) (holding that posting a hyperlink is "speech," and emphasizing that in the context of the First Amendment "[c]ommunication does not lose constitutional protection as 'speech' simply because it is expressed in the language of computer code.").

44 T.V. *ex rel.* B.V. v. Smith-Green Cmty. Sch. Corp., 807 F. Supp. 2d 767 (N.D. Ind. 2011). In addition, posting photographs to other OSNs such as MySpace has been held to be "speech." *See, e.g.*, Greer v. City of Warren, No. 1:10-cv-01065, 2012 WL 1014658 (W.D. Ark. Mar. 23, 2012) (holding that the posting of a Confederate flag to MySpace is "speech").

45 J.C. *ex rel.* R.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094 (C.D. Cal. 2010).

46 *See, e.g.*, United States v. O'Brien, 391 U.S. 367 (1968); *Spence*, 418 U.S. at 410–11 (1974).

Amendment.[47] However, establishing that conduct communicates does not end the inquiry. Symbolic speech, like "pure speech," is subject to government regulation. Thus, the question becomes whether the government has a sufficient justification for regulating the expression at issue.[48] Furthermore, the Supreme Court's approach to determining whether government regulation is sufficiently justified is applicable whether what is being regulated is conduct,[49] expression,[50] or an action combining both speech and non-speech elements.[51]

B. *The First Amendment and Political Speech*

Political speech lies at the very core of the First Amendment.[52] The importance of political speech cannot be understated, as "speech concerning public affairs is more than self-expression; it is the essence of self-government."[53] The First Amendment affords the broadest protection to "[d]iscussion of public issues and debate on the qualifications of candidates,"[54] reflecting "a profound national

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[47] *Spence*, 418 U.S. at 415. However, years later, the Court explained, "a narrow, succinctly articulable message is not a condition of constitutional protection . . . ." Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).

[48] In *United States v. O'Brien*, the Supreme Court articulated a test for evaluating whether or not conduct that communicates is afforded constitutional protection:

> [A] government[al] regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

[49] *Id.* at 376–77.

[50] *See* Ward v. Rock Against Racism, 491 U.S. 781, 790 (1989) ("Music, as a form of expression and communication, is protected under the First Amendment.").

[51] *Spence*, 418 U.S. at 409–10 (applying the *O'Brien* test to the display of an American flag hung upside down and decorated with a peace symbol).

[52] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (holding that "government may not, under the First Amendment, suppress political speech on the basis of the speaker's corporate identity**"**); *see also* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270, 279–80 (1964) (noting our profound national commitment to uninhibited public discourse and holding that the constitutional guarantees require a federal rule prohibiting a public official from recovering damages for a defamatory falsehood relating to their official conduct unless they prove that the statement was made with actual malice).

[53] Garrison v. Lousiana, 379 U.S. 64, 74–75 (1964). As stated by the Supreme Court in *Mills v. Alabama*:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

384 U.S. 214, 218–19 (1966).

[54] Buckley v. Valeo, 424 U.S. 1, 14 (1976); *accord* Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989) ("[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office.") (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[55] For these reasons, the First Amendment provides expansive protection to speech uttered during the course of a political campaign.[56]

In recent years there has been a sea change in how citizens in this country communicate, receive information, and formulate opinions. Increasingly, social media plays a significant role in contemporary elections.[57] While the nexus of political discourse was once the town square and the streets,[58] today, OSNs serve as primary forums for political discussion and debate, and these sites have had a profound impact on recent elections.[59] The Internet has completely transformed how citizens participate in public debate and therefore how public officials participate in the political process. Just five years ago the Obama campaign's use of the Internet was unprecedented and played a large role in upending how elections are fought (and perhaps won).[60] Notably, it was only twenty years ago that the Supreme Court emphasized the importance of residential signs in elections:

> Residential signs are an unusually cheap and convenient form of communication. Especially for persons of modest means or limited mobility, a yard or window sign may have no practical substitute. Even for the affluent, the added costs in money or time of taking out a newspaper advertisement, handing out leaflets on the street, or standing in front of one's house with a handheld sign may make the

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55 *N.Y. Times Co.*, 376 U.S. at 270.

56 *Eu*, 489 U.S. at 223; *see also* Connick v. Myers, 461 U.S. 138, 146 (1983) (defining speech on a matter of public concern as "relating to any matter of political, social, or other concern to the community . . . .").

57 Jenna Wortham noted the suddenness and scope of this shift:

> If the presidential campaigns of 2008 were dipping a toe into social media like Facebook and Twitter, their 2012 versions are well into the deep end. They are taking to fields of online battle that might seem obscure to the non-Internet-obsessed—sharing song playlists on Spotify, adding frosted pumpkin bread recipes to Pinterest and posting the candidates' moments at home with the children on Instagram.

Jenna Wortham, *Campaigns Use Social Media to Lure Younger Voters,* N.Y. TIMES (Oct. 7, 2012), http://www.nytimes.com/2012/10/08/technology/campaigns-use-social-media-to-lure-younger-voters.html. And it appears to be working, as "[t]hose who keep up with the Obama campaign on Tumblr seem to approve of the approach—with some posts attracting close to 70,000 'notes,' or likes and reposts from users." *Id.*; *see also* Jane S. Schacter, *Digitally Democratizing Congress? Technology and Political Accountability*, 89 B.U. L. REV. 641, 659 n.79 (2009).

58 *See* Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.").

59 *See* Schacter, *supra* note 57, at 655–56.

60 *See* Claire Caine Miller, *How Obama's Internet Campaign Changed Politics*, N.Y. TIMES (Nov. 7, 2008), http://bits.blogs.nytimes.com/2008/11/07/how-obamas-internet-campaign-changed-politics/?_r=0 ("One of the many ways that the election of Barack Obama as president has echoed that of John F. Kennedy is his use of a new medium that will forever change politics. For Mr. Kennedy, it was television. For Mr. Obama, it is the Internet.").

> difference between participating and not participating in some public debate. Furthermore, a person who puts up a sign at her residence often intends to reach neighbors, an audience that could not be reached nearly as well by other means.[61]

Thus, although much has changed since 1994, when the Supreme Court highlighted the role residential signs can play in elections, the basic tenets underlying the import of "unusually cheap and convenient form[s] of communication"[62] have not. Today, while residential signs may still have an impact, OSNs provide citizens with the ability to disseminate their opinions cheaply and effectively, and to a much broader audience than was ever previously imaginable.[63] A report on the 2012 presidential election found that "[s]ocial media is a significant part of the process by which voters are *talking* about their ballot selections."[64] The reasoning underlying the Supreme Court's protection of residential signs extends to the Internet and use of OSNs; indeed, most social networking sites are free, and anyone who posts a message—or endorses a message by clicking a button—can disseminate his opinion to an audience once unreachable. Therefore, taking into account the various ways Internet users can utilize OSNs to express their political opinions, not only through their own words but also with a click of a button, *Bland v. Roberts* is set to take on new importance.

II. SOCIAL MEDIA AND SPEECH

Much of the activity that occurs over the Internet is not traditional "speech." However, as discussed above,[65] the non-traditional nature of

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61 City of Ladue v. Gileo, 512 U.S. 43, 57 (1994) (footnotes omitted) (citations omitted).

62 *Id.*

63 Currently, nearly all local public officials in major U.S. cities have a Facebook page, a Twitter account, and a blog, and it is common for them to make major policy announcements via Twitter, and to connect with constituents via social networks. Bill Sherman, *Your Mayor, Your "Friend": Public Officials, Social Networking, and the Unmapped New Public Square*, 31 PACE L. REV. 95, 96 (2011). These "civic social networks" have, in many ways, become the new public square. *Id.*

> [A]s 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." This is borne out by empirical evidence suggesting that online discourse has, in some ways, replaced the old public square.

Id. at 99. As one article noted, "the Internet provides any person with any opinion the ability to reach a virtually unlimited audience without the formidable barriers previously posed by costly and inaccessible mainstream visual or print media." Bruce Braun, Dane Drobny & Douglas C. Gessner, *www.Commercial_Terrorism.com: A Proposed Federal Criminal Statute Addressing the Solicitation of Commercial Terrorism Through the Internet*, 37 HARV. J. ON LEGIS. 159, 159 (2000), *quoted in* John P. Cronan, *The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard*, 51 CATH. U. L. REV. 425, 442 (2002).

64 Lee Rainie, *Social Media and Voting*, PEW INTERNET & AMERICAN LIFE PROJECT (Nov. 6, 2012), http://pewinternet.org/Reports/2012/Social-Vote-2012/Key-Findings.aspx (emphasis added).

65 *See supra* Part I.A.

online "speech" does not preclude affording First Amendment protection to online discourse. Online expressions are wide-ranging: some actions include "pure speech," such as substantive blog and Facebook posts, whereas other actions combine speech and non-speech elements and seem more closely aligned with "symbolic speech," such as "liking" a political candidate's Facebook campaign page.

While the precedents of the past remain important, useful and applicable to the social media platforms and communications of today, traditional First Amendment doctrine can be applied to these novel media wholesale. Components of these doctrines, however, must be reconciled with technologies that "make[] it possible with unprecedented ease to achieve world-wide distribution of material."[66] Because of the "unprecedented" nature of this change, courts must be cautious in their approach to new media—the use of these platforms must be understood before doctrine can be tailored.[67] Thus, with the development and growth of new media of expression, lower courts must be mindful that the Court's decisions regarding offline conduct are to be applied with equal force to online conduct.[68]

A. *Social Media and Social Share Buttons: It's How We Communicate*

Social networking is unlike other forms of communication, and this is partially due to the inherently distinct features these platforms incorporate.[69] Online social networks have "revolutionized the way people of an entire generation self-identify, socialize, and communicate online and offline,"[70] and these OSNs are "usually designed to mirror

66 United States v. Baker, 890 F. Supp. 1375, 1390 (E.D. Mich. 1995).

67 *See generally* Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 777–78 (1996) (Souter, J., concurring) ("Because we cannot be confident that for purposes of judging speech restrictions it will continue to make sense to distinguish cable from other technologies, . . . we should be shy about saying the final word today about what will be accepted as reasonable tomorrow.").

68 Reno v. ACLU, 521 U.S. 844 (1997). The Internet, with its rapid development and varied usage, "poses challenges for the common-law adjudicative process—a process which, ideally while grounded in the past, governs the present and offers direction for the future based on understandings of current circumstances." Name.Space, Inc. v. Network Solutions, Inc., 202 F.3d 573, 584 (2d Cir. 2000).

69 Although some features are similar to past forms of communications, others are unique:

> Much like a written letter, a single individual initiates an online post. That isolation changes, however, once the author hits "post," "send," or "share." With the click of a mouse, hundreds of friends and countless others are immediately privy to the author's thoughts, which simultaneously become permanent. What began as an isolated communication now mirrors the reach of television, radio, or a mass email.

Robert J. Rojas, *The NLRB's Difficult Journey Down the Information Super Highway: A New Framework for Protecting Social Networking Activities Under the NLRA*, 51 WASHBURN L.J. 663, 683 (2012).

70 *See* Patricia Sánchez Abril, *Recasting Privacy Torts in a Spaceless World*, 21 HARV. J.L. & TECH. 1, 15 (2007). "Friends can 'wink,' 'poke,' or even give 'e-kudos' to friends. Presumably, these technological features aim to simulate intimacy in cyberspace." *Id.*

the nonverbal nuances of human interaction."[71]

While Facebook remains the most popular social media site, it is not without rivals. For example, MySpace continues to function as a Facebook alternative; Twitter has become a main source of news as well as a forum for communication for users worldwide;[72] LinkedIn has amassed a vast user base for business sector social media users; Pinterest connects users through shared interests and the pinning of images; and YouTube is the most popular site for video sharing. In addition, other social media platforms, including Google+, Tumblr, and Instagram see increasing traffic and new users daily.[73] The use of these platforms and the consequences of such use is amplified further by their counterparts: the hard-to-ignore social share buttons that can be found alongside virtually every news article, blog, and website on the Internet.

B. *Facebook and the Infamous Facebook "Like" Button*

Facebook is not merely a forum where users create their own content—it also encourages users to participate by engaging with content created by others, such as by joining groups, interacting with pages, and through the use of the social share buttons that Facebook incorporates.[74] Facebook's renowned social share button—the "Like" button—is represented by the "thumbs-up" icon,[75] which provides a way for Facebook users to share information. When a user "likes" content, either on Facebook or elsewhere,[76] a connection to that content is made.[77] While it takes only a single click to "like" content, when that

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[71] *Id.*

[72] People v. Harris, 945 N.Y.S.2d 505, 507 (Crim. Ct. 2012).

[73] Due to ongoing technological developments, the constant introduction of new social media platforms, and the individual predilections of Internet users, a comprehensive list of social media platforms is not feasible.

[74] Brief of Facebook, Inc. as Amicus Curiae in Support of Plaintiff-Appellant Daniel Ray Carter, Jr. and in Support of Vacatur at *1, Bland v. Roberts, No. 12-1671 (4th Cir. Aug. 6, 2012), 2012 WL 3191379 [hereinafter Brief of Facebook]. Facebook provides a free Internet-based service that enables its members, to "share and publish their opinions, ideas, photos, and activities to audiences ranging from their closest friends to Facebook's over 950 million Users, giving every User a voice within the Facebook community." *Id.* Facebook was launched with the hope of creating an environment "in which Users can engage in debate and advocate for the political ideas, parties, and candidates of their choice." *Id.* Thus, Facebook asserts it "has a vital interest in ensuring that speech on Facebook and in other online communities is afforded the same constitutional protection as speech in newspapers, on television, and in the town square." *Id.*

[75] *The Like Button: Share the Things you Like*, FACEBOOK, https://www.facebook.com/like (last visited Nov. 11, 2013).

[76] Brief of Facebook, *supra* note 74, at *6–7 (many websites have incorporated the "Like" button, thus enabling the "liking" of content elsewhere on the Internet).

[77] When a Facebook user clicks the "Like" button it generates an announcement, a "Like Story," that is posted to the user's profile and displayed for the user's chosen audience. *Id.* at *6–8. Additionally, the "Liked" page is added to a list of Facebook pages the user has "Liked," and the user's name and profile photo are added to the page's list of "People (Who) Like This." *Id.* at *8. Along with this "Story," the title of the page and an icon are posted to the user's profile in the form of a link, enabling other users to click and be taken directly to the "Liked" page. *Id.* at *6.

content is a campaign Facebook page, "liking" conveys a clear message to those following the user or the page on Facebook: a message that the user supports the political campaign and the specific candidate.[78] "Liking a Facebook page (or other website) is core speech: it is a statement that will be viewed by a small group of Facebook Friends or by a vast community of online users."[79] By "liking" content on Facebook, a user not only generates a story stating what they "like," but also increases the visibility of that content by bringing it to the attention of a larger audience.

Social share buttons enable the distribution of virtually any and all content with the click of a button. As explained *infra*,[80] these buttons are significant not only because of how frequently they are used but also because they serve as social cues,[81] advertising tools,[82] and a way to circulate information to new and exponentially larger audiences.[83] If in this new Internet era civic social networks are the new public square[84] and social media sites are the new water cooler,[85] then a click of a button surely constitutes speech.

III. *BLAND V. ROBERTS*

A. *Background*

In *Bland v. Roberts*, the United States District Court for the Eastern District of Virginia addressed whether "liking" a campaign Facebook page of a candidate running for the office of Sheriff is constitutionally protected speech.[86] In *Bland*, a suit was brought against the recently reelected, Sheriff B.J. Roberts, which alleged that the

78 *Id.* at *9–10.

79 *Id.* at *2.

80 *See infra* Part IV.A.

81 *See* Kenneth Chang, *'Like' This Article Online? Your Friends Will Probably Approve, Too, Scientists Say*, N.Y. Times (Aug. 8, 2013), http://www.nytimes.com/2013/08/09/science/internet-study-finds-the-persuasive-power-of-like.html?_r=1& ("If you 'like' this article on a site like Facebook, somebody who reads it is more likely to approve of it, even if the reporting and writing are not all that great.").

82 *See* Fraley v. Facebook, Inc., 830 F. Supp. 2d 785, 792 (N.D. Cal. 2011).

83 Martin v. Daily News, L.P., 35 Misc. 3d 1212(A) at *3 (N.Y. Sup. Ct. Feb. 10, 2012) (No. 103129/11). *Martin* involved the single publication rule, and the "plaintiff emphasize[d] that when the 2007 Article originally appeared on the DNLP website in 2007 it lacked 'share buttons' permitting readers to share it on social media and networking sites such as Facebook and Twitter." *Id.* Thus, the plaintiff argued that the restored article, since it contained "sharing functions," could be circulated to "a new audience on a potentially exponential basis." *Id.*

84 *See* Sherman, *supra* note 63, at 96–97, 99–100.

85 Dieter C. Dammeier, *Fading Privacy Rights of Public Employees*, 6 HARV. L. & POL'Y REV. 297, 308 (2012) (noting that "[t]hese types of cases [involving privacy and free speech related to postings on social media websites by public employees] have led to the characterization of Facebook as the new 'water cooler.'").

86 Bland v. Roberts, 857 F. Supp. 2d 599 (E.D. Va. 2012), *aff'd in part, rev'd in part, and remanded*, 730 F.3d 368 (4th Cir. 2013).

Sheriff violated the plaintiff's[87] First Amendment rights to freedom of speech and freedom of association when he fired them for supporting the candidacy of his election opponent through their "speech" on Facebook.[88] Specifically, "the suit alleges Roberts retaliated against the plaintiffs in violation of their First Amendment rights by choosing not to reappoint them because of their support of his electoral opponent."[89]

In the fall of 2009, Sheriff B.J. Roberts was up for re-election to the office of Sheriff of the City of Hampton, Virginia.[90] In the summer of 2009, while campaigning for re-election, Roberts learned that the plaintiffs were supporting Jim Adams, his election opponent.[91] Two of the plaintiffs, Daniel Carter and Robert McCoy alleged that they "affirmatively expressed their support for Adams" through their conduct on Facebook: Carter "liked" Adams Facebook campaign page and McCoy posted a message on the page, which he later took down.[92] Subsequently, the plaintiffs all received warnings from senior officers regarding their support, and Sheriff Roberts "indicated that Adams's train was the 'short train' and that those who openly supported Adams would lose their jobs."[93]

On November 3, 2009, Roberts was re-elected.[94] Within one month, Roberts fired all of the plaintiffs.[95] As a result, the plaintiffs filed suit against Roberts in both his individual and official capacities,[96] asserting they were terminated in retaliation for not supporting the Sheriff's candidacy, for supporting his election-opponent, and for

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87 Six plaintiffs, all former employees who were terminated by Roberts within a month of his reelection, brought suit. This Note focuses on plaintiffs Daniel Carter and Robert McCoy, as both "allege that they engaged in constitutionally protected speech when they 'made statements' on Adams' Facebook page." *Id.* at 603. The First Amendment claims of the other four plaintiffs' do not involve online speech, and therefore are outside the scope of this Note.

88 *Id.* at 602.

89 *Bland*, 730 F.3d at 371.

90 Complaint ¶ 12, Bland v. Roberts, 857 F. Supp. 2d 599 (E.D. Va. Mar. 4, 2011) (No. 4:11-CV-45) [hereinafter Complaint].

91 *Bland*, 857 F. Supp. 2d at 603.

92 *Id.* at 601.

93 *Bland*, 730 F.3d at 381. All of the plaintiffs received similar warnings from senior officers, who in essence told the plaintiffs, "'If you don't support the Sheriff, you are going to be out of here.'" Complaint, *supra* note 90, ¶ 22. Upon discovering that Carter and McCoy were supporting Adams' candidacy on Facebook, Roberts called together groups of employees, including the plaintiffs, and made a statement to the following effect:

> I am going to have this job as long as I want it. My train is the long train. I will be Sheriff until I don't want to be Sheriff. If you want to get on the short train with the man I fed for 16 years, you are going to be out of here.

Id. ¶ 22. After making this statement, Roberts approached Carter and stated "'[y]ou made your bed, now you're going to lie in it—after the election you're gone.'" *Id.* ¶ 23.

94 Complaint, *supra* note 90, ¶ 26.

95 *Id.*

96 *Id.* ¶¶ 26–35. Roberts' qualified and Eleventh Amendment immunity claims are not considered in this Note, for they have no bearing on the initial analysis of the plaintiffs' First Amendment claims.

exercising their constitutionally protected rights of free speech and political association.[97]

B. *The Plaintiffs' Claims and the District Court's Ruling*

The plaintiffs asserted two separate First Amendment claims: (1) a political affiliation claim, and (2) a claim for protected employee speech on a matter of public concern.[98] Political affiliation claims are analyzed under the standard espoused by the Supreme Court in both *Elrod v. Burns* and *Branti v. Finkel*.[99] Political expression claims of public employees are analyzed under *Pickering v. Board of Education of Township High School District* and *Connick v. Meyers*,[100] and in the Fourth Circuit under the three-prong test established in *McVey v. Stacy* as well.[101]

Finding that the first prong of the test elucidated in *McVey* requires, as a threshold matter, that speech exist before evaluating the remaining prongs, the district court held that the plaintiffs' claims failed as a matter of law.[102] The court did not hold or suggest that Facebook

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[97] *Id.*

[98] Brief of Appellants at 2, Bland v. Roberts, No. 12-1671 (4th Cir. July 30, 2012), 2012 WL 3072139 [hereinafter Brief of Appellants]. The political affiliation claim is asserted by all six plaintiffs, whereas only Carter, McCoy, Dixon, and Woodward asserted the claim for protected employee speech. *Id.*

[99] Based on two Supreme Court decisions, the plaintiffs are entitled to relief for their political affiliation claim. *See* Elrod v. Burns, 427 U.S. 347, 350 (1976) (holding that the First Amendment prohibits the dismissal of public employees because they are not affiliated with or sponsored by a certain political entity); *accord* Branti v. Finkel, 445 U.S. 507, 517 (1980). This rule is subject to one exception—when political affiliation is an acceptable requirement for government employment:

> "[W]hen a public employee holds a 'confidential' position, a 'policy making' position or holds a unique position of trust, his employer may be justified in discharging him because of his political affiliation or refusal to affiliate, but *only* if the employer can show that the political affiliation is an appropriate and necessary job requirement for the effective performance of the office."

Brief of Appellants, *supra* note 98, at 21–22 (citing *Branti*, 445 U.S. at 518). Thus, due to the nature of their employment, the exception is inapplicable here.

[100] Pickering v. Bd. of Educ. of Twp. High Sch. Dist., 391 U.S. 563 (1968); Connick v. Myers, 461 U.S. 138 (1983). When a public employee brings a political expression claim, the preliminary question is whether the employee spoke on a matter of public concern. *Id.* at 142. If the answer is no, the First Amendment provides no protection from the discipline or discharge. If yes, the court must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568.

[101] McVey v. Stacey, 157 F.3d 271, 277–78 (4th Cir. 1998) (involving a claim for First Amendment retaliatory discharge). Pursuant to this binding precedent, the Court in *Bland* had to determine: (1) whether the public employee was speaking as a citizen on a matter of public concern; (2) whether the employee's interest in speaking on said matter outweighed the government's interest in providing effective and efficient services to the public; and (3) whether the employee's speech was a substantial factor in the termination decision. *See* Bland v. Roberts, 857 F. Supp. 2d 599, 603 (E.D. Va. 2012), *aff'd in part, rev'd in part, and remanded*, 730 F.3d 368 (4th Cir. 2013).

[102] *Bland*, 857 F. Supp. 2d at 603.

communications can never be speech; rather, in a decision authored by Judge Raymond A. Jackson, the court contrasted the "liking" of Adams' campaign Facebook page with substantive posts made on Facebook that have formed the basis of other retaliation claims.[103] Specifically, the court cited *Gresham v. City of Atlanta*[104] and *Mattingly v. Milligan*[105] as illustrations of the fact that "[i]n cases where courts have found that constitutional speech protections extended to Facebook posts, actual statements existed within the record;" as distinguished from the mere "click" it took to "like" Adams' Facebook campaign page in the present case.[106] Consequently, the district court found the click insufficient to merit constitutional protection.[107] Specifically, the court held: "Facebook posts *can* be considered matters of public concern; however, the Court does not believe Plaintiffs Carter and McCoy have alleged sufficient speech to garner First Amendment protection."[108] The opinion further provides that

> It is clear, based on the Sheriffs own admissions, that at some point he became aware of McCoy and Carter's presence on Adams' Facebook page. . . . However, the Sheriff's knowledge of the posts only becomes relevant if the Court finds the activity of liking a Facebook page to be constitutionally protected. It is the Court's conclusion that merely "liking" a Facebook page is insufficient speech to merit constitutional protection.[109]

C. *The District Court's Failure to Understand the Significance of Supporting Adams' Candidacy on Facebook*

Prior to being terminated in December 2009, Daniel Carter and Robert McCoy were Deputy Sheriff's in the Hampton Sheriff's Office.[110] Throughout the 2009 campaign season Carter and McCoy did not support their boss, the incumbent, Sheriff B.J. Roberts' candidacy; rather, they endorsed his election opponent, Jim Adams.[111]

Carter supported Adams the same way many Americans currently support the political candidates of their choice, by advocating for his candidacy online by "liking" his Facebook campaign page.[112]

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103 *Id.* at 603–04.
104 No. 1:10–CV–1301–RWS–ECS, 2011 WL 4601022 (N.D. Ga. Aug. 29, 2011).
105 4:11CV00215 JLH, 2011 WL 5184283 (E.D. Ark. Nov. 1, 2011).
106 *Bland*, 857 F. Supp. 2d at 603–04.
107 *Id.*
108 *Id.* at 604. In so holding, the court emphasized: "Both *Gresham* and *Mattingly* involved actual statements. No such statements exist in this case." *Id.*
109 *Id.* at 603 (citations omitted).
110 Complaint, *supra* note 90, ¶¶ 5, 7, 26. The Sheriff is the most senior executive officer within the office and is responsible for the hiring and firing of all employees. *Id.* ¶ 13 ("[The Sheriff] is elected every four years . . . and is accountable only to the electorate.").
111 *Id.* ¶ 18.
112 *Id.*; Bland v. Roberts, 857 F. Supp. 2d 599, 603 (E.D. Va. 2012), *aff'd in part, rev'd in part,*

Unfortunately for Carter, on November 3, 2009, Roberts was re-elected; approximately one month later, Carter was terminated.[113] Even more unfortunate for Carter, the district court held that merely "liking" the Facebook campaign page of a candidate for the public office of Sheriff is not constitutionally protected speech, for it is so inconsequential that it is not speech at all.[114] In so doing, the court emphasized that, "merely 'liking' a Facebook page is insufficient speech,"[115] as it is "not the kind of substantive statement that has previously warranted constitutional protection."[116]

Like Carter, McCoy had also supported Adams' candidacy online—he visited Adams' campaign Facebook page and "'posted an entry on the page indicating (his) support for (Adams') campaign.'"[117] McCoy's presence on Adams' campaign Facebook page, like Carter's, was well known in the Office.[118] McCoy testified that he was approached by ten to fifteen people who asked him "why he would risk his job with the posting when he was only 18 months away from becoming eligible for retirement;"[119] thereafter, McCoy took his Facebook post down.[120] However, the district court did not find McCoy's case persuasive:

> McCoy's barebones assertion that he made some statement at some time is insufficient evidence for the Court to adequately evaluate his claim. Without more, the Court will not speculate as to what McCoy's actual statement might have been. McCoy has not sufficiently alleged any constitutionally protected speech.[121]

Accordingly, the district court granted the Sheriff's motion for summary judgment and dismissed the plaintiffs' claims.[122] Both the district court's ruling and Judge Jackson's dicta regarding "click speech" contradict established First Amendment jurisprudence. The district court held that the conduct at issue was not speech, without ever addressing what Internet-based communications besides actual statements can constitute speech. Moreover, the court's reasoning was problematic, as it intentionally avoided the issues of context and

and remanded, 730 F.3d 368 (4th Cir. 2013).

113 Complaint, *supra* note 90, ¶ 26. Including Carter, six plaintiffs brought suit. *Id.* All six plaintiffs are former employees who were terminated within a month of Roberts' re-election. *Id.*

114 *Bland*, 857 F. Supp. 2d at 603–04.

115 *Id.* at 603.

116 *Id.* at 604.

117 Bland v. Roberts, 730 F.3d 368, 380 (4th Cir. 2013).

118 *Id.* at 381.

119 *Id.* at 380 n.8.

120 *Id.*

121 Bland v. Roberts, 857 F. Supp. 2d 599, 603 (E.D. Va. 2012), *aff'd in part, rev'd in part, and remanded*, 730 F.3d 368 (4th Cir. 2013).

122 *Id.* at 602.

content:

> The Court will not attempt to infer the actual content of Carter's posts from one click of a button on Adams' Facebook page. For the Court to assume that the Plaintiffs made some specific statement without evidence of such statements is improper. Facebook posts *can* be considered matters of public concern; however, the Court does not believe Plaintiffs Carter and McCoy have alleged sufficient speech to garner First Amendment protection.[123]

This flawed reasoning, if followed, would erode existing First Amendment protections and chill free speech. Therefore, the Fourth Circuit's holding—including its reversal of the portion of the decision touching on the merits of Carter and McCoy's free speech claims[124]—should be embraced as a blueprint for reformulating traditional First Amendment doctrine to meet the unique features of twenty-first century online communications.[125]

D. *An Analysis of the Arguments on Appeal and the Fourth Circuit's Decision*

On September 18, 2013, the United States Court of Appeals for the Fourth Circuit reversed, in part, the district court's grant of summary judgment in favor of Sheriff Roberts.[126] In so doing, the Fourth Circuit held that there were genuine issues of material fact as to whether the Sheriff violated Carter and McCoy's free speech rights, precluding the dismissal of these claims as a matter of law.[127] Thus, the court remanded the case for further proceedings to determine whether Sheriff Roberts violated Carter and McCoy's association rights when he fired them as well as whether the Sheriff violated their free-speech rights.[128]

1. The Amicus Briefs Filed by Facebook and the ACLU

On appeal, Facebook as well as the ACLU submitted amicus briefs in which they argued that the district court's decision should be reversed.[129]

Facebook asserted that the district court's holding "betrays a misunderstanding of the nature of the communication at issue and

123 *Id.* at 604.
124 *Bland*, 730 F.3d at 380–82.
125 *See infra* Part IV.
126 *Bland*, 730 F.3d 368.
127 *Id.* at 372, 384.
128 *Id.* at 376, 384. The court also found summary judgment unwarranted as to Dixon's freedom of association and free speech claims; however, since not Internet-based, Dixon's claims are not addressed within this Note.
129 Brief of Facebook, *supra* note 74; Brief of Amici Curiae ACLU and ACLU of Virginia in Support of Plaintiffs-Appellants' Appeal Seeking Reversal, Bland v. Roberts, No. 12-1671 (4th Cir. Aug. 6, 2012), 2012 WL 3191380 [hereinafter Brief of ACLU].

disregards well-settled Supreme Court and Fourth Circuit precedent."[130] In fact, it does more. By somersaulting over relevant case law, the district court's opinion distorts established precedent and perverts traditional First Amendment doctrine, resulting in a circumvention of First Amendment guarantees and a grave curtailing of free speech rights.[131] In *Reno v. American Civil Liberties Union*, the Supreme Court established that merely because speech is made online does not mean that it is entitled to a lesser degree of First Amendment protection.[132] Moreover, when online speech is political speech, First Amendment protection is at its zenith.[133] Thus, the district court's holding that a public employee's "liking" of the campaign Facebook page of sheriff's election opponent was insufficient to constitute "speech,"[134] is in direct contradiction with the well-established principle that online speech is deserving of the same level of constitutional protection as other forms of speech.

As both Facebook and the ACLU assert by "liking" Adams' campaign Facebook page, Carter conveyed his approval of Adams' candidacy.[135] As the ACLU accurately noted,

> "Liking" a political candidate on Facebook -- just like holding a campaign sign -- is constitutionally protected speech. It is verbal expression, as well as symbolic expression. Clicking the "Like" button announces to others that the user supports, approves, or enjoys the content being "Liked." Merely because "Liking" requires only a click of a button does not mean that it does not warrant First Amendment protection. Nor does the fact that many people today choose to convey their personal and political views online, via Facebook and other social media tools, affect the inquiry.[136]

Accordingly, it is speech at the core of the First Amendment and it is speech deserving of the utmost constitutional protection.[137] Thus,

130 Brief of Facebook, *supra* note 74, at *2.

131 As stated by the Fourth Circuit in *Rice v. Paladin Enters., Inc.*, "[w]ithout the freedom to criticize that which constrains, there is no freedom at all." 128 F.3d 233, 243 (4th Cir. 1997).

132 521 U.S. 844, 870 (1997) ("[O]ur cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to [the Internet]."). See Ostergren v. Cuccinelli, 615 F.3d 263, 272 (4th Cir. 2010), for a Fourth Circuit case recognizing the Internet standard espoused in *Reno*.

133 *See* Meyer v. Grant, 486 U.S. 414, 425 (1988).

134 Bland v. Roberts, 857 F. Supp. 2d 599, 603 (E.D. Va. 2012), *aff'd in part, rev'd in part, and remanded*, 730 F.3d 368 (4th Cir. 2013).

135 Carter clicking the "like" button triggered the publication of: "Daniel Carter likes Jim Adams for Hampton Sheriff." *See* Brief of Facebook, *supra* note 74, at *7; *see also* Brief of ACLU, *supra* note 129, at *6 ("Clicking the "Like" button announces to others that the user supports, approves, or enjoys the content being "Liked." In this way, an individual who uses the "Like" button is making a substantive statement. That is especially the case when a user "Likes" a political candidate, as that is a clear sign of support for that candidate.").

136 Brief of ACLU, *supra* note 129, at *3.

137 *See* Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989); *see also* Buckley v.

when Carter "liked" Jim Adams Facebook campaign page he issued an endorsement "'at the core of our electoral process and [our] First Amendment freedoms.'"[138] "Liking" something on Facebook shares the message that the particular user supports, enjoys, or literally *likes* that content.[139] Additionally, if anyone were to access Adams' Facebook campaign page, Carter's name and profile picture would appear on the Page in a list of people who "Liked" the page."[140] Plainly, by "liking" a campaign page, a Facebook user becomes an endorser of that page and thus an endorser of the political candidate—engaging in precisely the acts of pure speech and symbolic expression that stand at the core of the First Amendment. As the ACLU argued in its amicus brief:

> The statements by plaintiffs on Facebook . . . are also protected by the First Amendment because they involved matters of immense public concern -- the merits of a candidate for political office. That political speech implicates the very core of the First Amendment. Far from expressing personal grievances, plaintiffs were voicing their opinions about the virtues -- or lack thereof -- of an elected official.[141]

Speech does not need to be any particular length to be protected by the First Amendment.[142] The district court's finding that a click is "insufficient speech to merit constitutional protection" rests on the notion that length or ease of speech is determinative of its value, and whether it receives FA protection.[143] This idea—that short speech is worthless—finds no support in First Amendment case law, and is thus without merit. While the exact message is not always clear, it does not need to be: "[A] narrow, succinctly articulable message is not a condition of constitutional protection . . . ."[144] Nonetheless, the message produced here: that Carter "likes" Adams for the position of Sheriff was "succinctly articulable;" indeed, as the record proves, "clicks count."[145]

Valeo, 424 U.S. 1, 14 (1976) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression . . . ."); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (finding political speech is central to both the meaning and purpose of the First Amendment).

138 *Eu*, 489 U.S. at 222–23 (quoting William v. Rhodes, 393 U.S. 23 (1968)).

139 Brief of ACLU, *supra* note 129, at *6.

140 Brief of Facebook, *supra* note 74, at *3.

141 Brief of ACLU, *supra* note 129, at *4.

142 Ken Paulson, *Is 'Liking' on Facebook a First Amendment Right?*, FIRST AMENDMENT CENTER (May 31, 2012), http://www.firstamendmentcenter.org/is-liking-on-facebook-a-first-amendment-right (emphasizing that when weighing questions of First Amendment protection it must be remembered that: "Communication does not have to be lengthy or difficult to come under the protective umbrella of the First Amendment. A tweet is as protected as a tome.").

143 Bland v. Roberts, 857 F. Supp. 2d 599, 603 (E.D. Va. 2012), *aff'd in part, rev'd in part, and remanded*, 730 F.3d 368 (4th Cir. 2013).

144 *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 569 (1995).

145 *See* Paulson, *supra* note 142.

Surely, Roberts thought so. After learning Carter "liked" Adams' Facebook page, he specifically warned Carter, "[y]ou made your bed, now you're going to lie in it—after the election you're gone."[146] That is precisely what happened: one month after Roberts was re-elected, Carter was terminated. Thus, by clicking the "like" button Carter evinced his support for Roberts' political opponent, and Roberts clearly understood Carter's "speech" as conveying such support.[147]

The implications of the district court's holding are far-reaching even though the key weakness of the decision has been overturned. That a court could reach a decision that "[a]t its core [contains] a flawed view of the First Amendment and a lack of respect for emerging media,"[148] suggests that a framework tailored to address the specifics of twenty-first century online communications is needed. In light of established First Amendment doctrine, the district court's ruling ignored well-established precedent and the fact that one court could come to this erroneous conclusion indicates that the law has not yet fully recognized that online communications—even those made with the click of a button—can constitute "speech."

2. The Fourth Circuits Praiseworthy Decision: "Liking" Content on Facebook is "Pure Speech" as well as "Symbolic Expression"

In *Bland v. Roberts*, which reversed the district court's holding that "liking" a political candidate's Facebook campaign page is not speech, the Fourth Circuit showed the technological savvy required to address First Amendment claims that involve communications made over new media. In an opinion authored by Chief Judge Traxler, the court held that "liking" a campaign Facebook page is not only "pure speech" but also "symbolic expression."[149]

Following the court's consideration of "what it means to 'like' a Facebook page," the court concluded:

> Once one understands the nature of what Carter did by liking the Campaign Page, it becomes apparent that his conduct qualifies as speech. On the most basic level, clicking on the "like" button literally causes to be published the statement that the User "likes" something, which is itself a *substantive statement*. In the context of a political campaign's Facebook page, the meaning that the user approves of the candidacy whose page is being liked is unmistakable. That a user may use a single mouse click to produce that message

146 Complaint, *supra* note 90, ¶ 23.
147 Spence v. Wash., 418 U.S. 405, 415 (1974).
148 *See* Paulson, *supra* note 142.
149 Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013).

> that he likes the page instead of typing the same message with several individual key strokes is of no constitutional significance.[150]

In so doing, the court reversed the district court's holding that "merely 'liking' a Facebook page is insufficient speech to merit constitutional protection" and the district court's emphasis on the fact that "[i]n cases where courts have found that constitutional speech protections extend[] to Facebook posts, actual statements existed within the record."[151]

With regard to the merits of McCoy's free speech claim, the Fourth Circuit likewise reversed the district court's holding.[152] The district court held that because the record failed to sufficiently describe the alleged statement McCoy made on Adams' campaign Facebook page, which McCoy later removed, his allegations were insufficient as a matter of law.[153] However, the Fourth Circuit held that the fact "[t]hat the record does not reflect the exact words McCoy used to express his support for Adams's campaign is immaterial as there is no dispute in the record that that was the message that McCoy conveyed."[154]

Notably, the Fourth Circuit went further, emphasizing that "[a]side from the fact that liking the Campaign Page constituted pure speech, it also was symbolic expression."[155] As the Fourth Circuit correctly found, "[t]he distribution of the universally understood 'thumbs up' symbol in association with Adams's campaign page, like the actual text that liking the page produced, conveyed that Carter supported Adams's candidacy."[156] Thus, clicking the "like" button was found to be "the Internet equivalent of displaying a political sign in one's front yard, which the Supreme Court has held is substantive speech."[157]

"Liking" something on Facebook produces the "thumbs up" symbol, an icon universally recognized by social media users to communicate a specific message.[158] Just as "[t]he use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind,"[159] so too is the "thumbs up" symbol.

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150 *Id.* (emphasis added).

151 Bland v. Roberts, 857 F. Supp. 2d 599, 603 (E.D. Va. 2012), *aff'd in part, rev'd in part, and remanded*, 730 F.3d 368, 386 (4th Cir. 2013).

152 *Bland*, 730 F.3d at 388.

153 Bland v. Roberts, 857 F. Supp. 2d 599, 603 (E.D. Va. 2012).

154 *Bland*, 730 F.3d at 388.

155 *Id.* at 386.

156 *Id.*

157 *Id.* (citing City of Ladue v. Gilleo, 512 U.S. 43, 54–56 (1994)).

158 *Liking Things on Facebook: What Does it Mean to "Like" Something?*, FACEBOOK, https://www.facebook.com/help/452446998120360/ (last visited Nov. 11, 2013) ("Clicking Like under something you or a friend posts on Facebook is an easy way to let someone know that you enjoy it, without leaving a comment. Just like a comment though, the fact that you liked it is noted beneath the item.").

159 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) ("Symbolism is a primitive

Furthermore, "discussion can be nonverbal; 'liking' a comment constitutes a discussion."[160] "Liking" a political candidate's Facebook page is expressive speech on a topic of public concern.[161]

Although the Fourth Circuit reversed the parts of the decision relating to Carter and McCoy's speech, this does not alter the fact that the district court found that the plaintiffs did not allege sufficient speech to garner First Amendment protection. By sidestepping the constitutional inquiry, the district court's decision in *Bland*, until it was reversed, hindered First Amendment rights and chilled free speech.[162] As litigation over social media is increasingly common and the Supreme Court has not yet addressed how traditional First Amendment doctrine should be applied to twenty-first century communications, courts have rendered decisions with varied results. This Note concludes that the astute reasoning employed by the Fourth Circuit in *Bland* can be formulated into a framework to help determine when Internet-based communications qualify as speech.

IV. THE CHALLENGE OF APPLYING THE OLD TO THE NEW

First Amendment doctrine must evolve to address the novel legal issues that have accompanied the use of online social networks, social media, and social share buttons.[163] In particular, for a "generation raised with blogging, webcams, and icons of smiley faces that act as digital proxies for personal interactions, the distinction between private conversation and public disclosure has become increasingly blurred."[164]

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but effective way of communicating ideas.").

160 *Drafting Social Media Policies to Minimize Legal Risk of an NLRB Complaint*, KYLE-BETH HILFER, P.C. (Oct. 12, 2011), http://kbhilferlaw.com/drafting-social-media-policies-to-minimize-legal-risk-of-an-nlrb-complaint/; *see also* Three D LLC, No. 34-CA-12915, 2012 WL 76862 (NLRB Div. of Judges, Jan. 3, 2012). *Three D LLC* involved two employees who were discharged after participating in a Facebook conversation initiated when their former coworker posted a statement on her Facebook page. *Three D*, 2012 WL 76862. One of the employees joined the conversation by "liking" the original statement. *Id.* The A.L.J found that clicking the "like" button was sufficiently meaningful to qualify as "concerted activity" under the NLRA. *Id.*

161 Bland v. Roberts, 730 F.3d 368, 387 (4th Cir. 2013).

162 Moreover, it did so in spite of the fact that since 1969, the Supreme Court has been highly protective of free speech. *See generally* Brandenburg v. Ohio, 395 U.S. 444 (1969); Reno v. ACLU, 521 U.S. 844 (1997).

163 Robert Sprague argues that settlement of these issues is a business necessity:

> Online social networking is becoming more ingrained into the personal lives of individuals, as well as being adopted as a communications tool by businesses. As the use of online social networks matures, so should their associated legal issues. Employers will need to maintain vigilance as the online social network landscape evolves and the legal system adjusts to its presence in the workplace.

Robert Sprague, *Invasion of the Social Networks: Blurring the Line Between Personal Life and the Employment Relationship*, 50 U. LOUISVILLE L. REV. 1, 34 (2011).

164 David Rosenblum, *What Anyone Can Know: The Privacy Risks of Social Networking Sites*, 5 IEEE Security & Privacy 40, 46 (2007), *available at* http://team2kaalicia.wikispaces.com/file/view/j3040.pdf. The line between private and public and between which individuals are private or public figures is becoming increasingly distorted by the use of the Internet and social media. This

Thus, in the case of speech communicated via the Internet, "context matters and the context of the medium may be as important as the message."[165] This is especially true with online "speech,"[166] for great care "must be adopted when addressing the one-dimensional medium of text, unassociated with the other aspects of oral communication such as facial expression, tone, inflexion, body language and other visual aids to communication"[167] which traditionally lend meaning to the substance orally communicated.

A. *The Need for the Law to Play Catch Up*

"No part of American society has changed as much as its media component, and the law must adjust to this change."[168] Although there have been profound changes to the Internet over the past two centuries, "First Amendment doctrines have failed to confront the realities of the modern media culture and of the role of the individual in that culture."[169] When law ceases to reflect reality, there is a risk that essential rights will fall by the wayside. The right of free expression is at risk if we fail to recognize that digital communication—now the norm—can itself be a form of speech. The Internet and the use of social media have transformed the way an entire generation communicates, and part of this transformation includes communicating with the click of a button. When judges fail to recognize these changes, there is a danger that legitimate communications will no longer be analyzed under the First Amendment, and as a result, "speech" will no longer be adequately protected.[170] To diminish First Amendment protection would increase fear of retaliation, chilling free speech.[171]

notion applies to the use of social share buttons, as the number of Facebook friends a user has when they "like" something or how many users follow a specific Twitter handle that "retweets" content also distorts the line between private conversation and public discourse.

165 *The Medium is the Message: Twitter and YouTube Prosecutions*, THE IT COUNTREY JUSTICE (Aug. 5, 2012), http://theitcountreyjustice.wordpress.com/category/digital-speech-harms/ [hereinafter *The Medium is the Message*]. "Once the medium and its impact has been considered the context of the message must be considered." *Id.*

166 The availability of new media poses many issues, especially when each medium may present its own unique problems. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975) (noting that for First Amendment purposes every medium of expression must be assessed "by standards suited to it, for each may present its own problems).

167 *See The Medium is the Message*, *supra* note 165.

168 Patrick M. Garry, *The First Amendment in a Time of Media Proliferation: Does Freedom of Speech Entail a Private Right to Censor?*, 65 U. PITT. L. REV. 183, 186 (2004).

169 *Id.*; *see also id.* at 214.

170 Before determining what level of protection is warranted, the court must first determine, as a threshold matter, whether the particular expression at issue is "speech." Thus, the district court's decision in *Bland*, insofar as it found the "liking" of a political candidate's Facebook page was not speech, has the potential to inhibit speech. *See* Bland v. Roberts, 857 F. Supp. 2d 599, 603 (E.D. Va. 2012), *aff'd in part, rev'd in part, and remanded*, 730 F.3d 368 (4th Cir. 2013).

171 When the short-term benefits of sharing one's support for someone or something online is so heavily and clearly outweighed by the consequences such a revelation can have, it is easy to see why many would pause before "liking" something or why one would choose not to click the

The failure of the law to adapt swiftly to Internet use makes sense—traditional First Amendment doctrine cannot be applied wholesale to this novel platform.[172] Cyberspace is not the public town hall, the street corner, or the water cooler—but it has become the twenty-first century equivalent. Thus, although cyberspace is different in a physical sense, the First Amendment protects more than merely the physical spaces that these traditional forums occupy. Accordingly, a new framework that takes into account the nature of the Internet and the features of Internet-based communications is essential.[173] The need for this framework is further exacerbated by the court's lack of expertise in this new arena, especially since it is quite possible that the next judge to decide a precedent-setting social media case in a particular circuit will have absolutely no familiarity with the functionality or common practice of the technology at issue.[174] In order to protect Internet users and their "speech," we must establish a new baseline for assessing the nature of OSNs and the varied communications users make on these platforms. However, in order for such a baseline to be valuable the underlying nature of these sites, as well as how and why they are used must be understood. Thus, to ensure free speech rights are not curtailed merely because a communication is made using novel media, the nature of these sites and the features they incorporate must be understood. This baseline will result in the protection of "speech," for only with an appreciation of how the very context of online communications can effect the ultimate "speech" determination can judges assess whether the conduct at issue in a specific case is "speech."

B. *Before the Law Can Start Playing Catch Up, the Generation Gap Must be Filled*

An understanding of the digital world we live in is required before traditional First Amendment doctrine can be reconciled with and applied to "click speech." While the analogy between offline speech and certain online speech works extremely well, the analogy between offline speech and "click speech" breaks down. For example, saying "I like Jim Adams" on a street corner and typing "I like Jim Adams" online are

"like" button at all. The result is silence, not more speech, which is in direct conflict with the purpose of the First Amendment and the rights it guarantees.

172 *See, e.g.*, Abril, *supra* note 70, at 45 ("This proposed gestalt approach deemphasizes reliance on a single philosophical conception of privacy and thus facilitates a retreat from the tort's traditional spatial linchpins. In our new, wired world, the law must evolve to interpret these concepts as possible manifestations of privacy, but not its necessary prerequisites.").

173 *See, e.g.*, Stephen G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1535 (1998).

174 Transcript of Oral Argument at 29, City of Ontario, Cal. v. Quon, 130 S. Ct. 2619 (2010) (No. 08-1332), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-1332.pdf (Chief Justice Roberts) ("Maybe—maybe everybody else knows this, but what is the difference between a pager and e-mail?").

analogous.[175] However, when "pure speech" is compared to "click speech" the analogy becomes slightly strained, since the user must rely on a third party website to produce the meaningful content. Herein lies the issue.

The issue is further complicated by the large generation gap between who uses online social networks and how.[176] There is an online community that some are deeply involved in, others know little about, and others still do not understand; and this wide disparity has potent ramifications when the issue is brought before a judge or a jury who cannot fathom the norms of the media in question. To illustrate, consider the fact that some judges and jurors may have no idea what it means to "connect" via LinkedIn,[177] what the words "tweet" or "retweet" denote,[178] or what a "+1"[179] means outside of the context of mathematics. Although most have heard of MySpace[180] and

175 Likewise, both constitute "pure speech" covered by the First Amendment.

176 In *Recasting Privacy Torts in a Spaceless World*, Patricia Sánchez Abril dubbed users who grew up with the use of the Internet "digital natives," while classifying those who came to the Internet as adults "digital immigrants." *See* Abril, *supra* note 70, at 16–17. Abril notes that "[w]hile digital immigrants may view the Internet as a tool for mass dissemination, digital natives use the Internet as a tool for communication that is essential to the development of strong community, interpersonal relationships, and identity." *Id.* at 16.

177 LinkedIn, currently the largest online professional network, is a social network where professionals can make business contacts. As of September, 2013 LinkedIn amassed a worldwide membership of over 238 million professionals. *About Us*, LINKEDIN, http://press.linkedin.com /about (last visited Sept. 28, 2013). Furthermore, "[t]here are more than 1.5 million unique publishers actively using the LinkedIn Share button on their sites to send content into the LinkedIn platform." *Id.*

178 "Twitter is a service provider of electronic communication." People v. Harris, 945 N.Y.S.2d 505, 511 (Crim. Ct. 2012). It's an online, "real-time information network that connects [users] to the latest stories, ideas, opinions and news . . . ." *About Twitter*, TWITTER, https://twitter.com /about (last visited Sept. 28, 2013). Twitter allows users to "tweet" (post), "retweet" (repost), and read posts created and shared by others. Furthermore, Twitter users select other users to "follow." If user A follows user B, then when user B tweets or retweets, B's posts (or reposts) appear on user A's home page. *Id.*

179 Google+ is a social networking platform and the +1 button allows users to start conversations. *See The +1 Button*, GOOGLE+, http://www.google.com/+1/button/ (last visited Sept. 28, 2013). When a user clicks the +1 button, whether on Google or on a website that has incorporated the social share button, that user is giving that page or its content his public stamp of approval. *Id.* A +1 button may appear next to an article you are reading on your favorite news website, perhaps about the political candidate you support. If that user has chosen to share their +1's, the user has *with a click of a button* given the article and thus the candidate it endorses, his public "stamp of approval." This is no different than "liking" that article or candidate on Facebook; hence, a Facebook "like" is also a "stamp of approval."

180 MySpace is "a place where people come to connect, discover, and share." *See Myspace Services Terms of Use Agreement*, MYSPACE.COM, https://myspace.com/pages/terms (last visited Nov. 6, 2013). In *Greer v. City of Warren*, the plaintiff displayed a Confederate flag both at his home and on his private MySpace page. Greer v. City of Warren, No. 1:10-CV-01065, 2012 WL 1014658 (W.D. Ark. Mar. 23, 2012). The court did not question whether the plaintiff's exhibition of this flag at either his home or on his MySpace page was protected speech under the First Amendment. *Id.* at *7. Rather, the court found the display to be protected "speech," even though there was a dispute as to whether the plaintiff or one of his MySpace "friends" posted the Flag to his page. *Id.* at *1 n.3 ("Because Plaintiff claims this was his protected speech, this Court presumes that by keeping this flag on his page, he was adopting this speech as his own.").

YouTube,[181] many do not know that Pinterest,[182] Tumblr,[183] or Instagram[184] exist, much less how they are used.

Undoubtedly, these sites serve different functions for different people. The user, the communication, and the overall context must be taken into account when online conduct impacts people offline. Traditional First Amendment principles shed light on these contemporary issues, and parts of various free speech doctrines can be utilized to produce a coherent and applicable framework that reconciles the current law with the foundational principles on which the free speech tradition rests. Thus, in order to successfully modernize First Amendment jurisprudence for the Digital Age, judges must not only grasp the realities of Internet communications, but also must be able to perceive analogues between new communications and traditional "speech."

V. TOWARDS A TWENTY-FIRST CENTURY FREE SPEECH FRAMEWORK

When assessing First Amendment free speech claims arising from

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181 YouTube, with the slogan "Broadcast Yourself," is an online social networking and video-sharing website. YouTube allows billions of users and non-users to share videos and provides a forum to "connect, inform and inspire . . . ." *About YouTube*, YOUTUBE, http://www.youtube.com/yt/about/ (last visited Sept. 28, 2013). It is a distribution platform for original content creators, both large and small. *Id.* In *J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, the Court held that the posting of a YouTube video is speech. 711 F. Supp. 2d 1094 (C.D. Cal. 2010). In that case, a student posted a video to YouTube of a group of students bad mouthing a fellow student, and the Court held that the posting of a YouTube video was speech and did not rise to the level of a "substantial disruption" under *Tinker*. *Id.* If uploading a YouTube video is speech, it follows that posting videos to Instragam, and other users "liking" that video, are also speech.

182 Pinterest's goal is to connect everyone in the world through the "things" they find interesting. *See About*, PINTEREST, http://pinterest.com/about/ (last visited Sept. 28, 2013). These connections are often made through a "pin," which is an image added to Pinterest. *See Pinning 101*, PINTEREST, http://pinterest.com/about/help/ (last visited Sept. 28, 2013). A pin can be added either from a website using the social share, "Pin It" button, or can be uploaded from the user's computer. *Id.* In addition, the "Pin It" button allows users to take an image from any website and add it to their "pinboard." In essence, the "Pin It" button is the Pinterest equivalent of the Facebook "like." Moreover, any "pin" can be "repinned." *Id.* Therefore, if User A "pinned" or "repinned" an image with a political slogan on it other users viewing A's "pinboard" would likely interpret this to mean that user A approves and endorses the slogan and the respective candidate. Substantively, this is no different than "liking" that candidates Facebook campaign page.

183 Tumblr allows its users to "effortlessly share anything," including "text, photos, quotes, links, music, and videos, from . . . wherever [they] happen to be." *See About*, TUMBLR, http://www.tumblr.com/about (last visited Sept. 28, 2013). The Tumblr site itself has a page devoted solely to "buttons." On this page is a section entitled "Share buttons," which states that these buttons "[m]ake it easy for more than 16 million Tumblr users to promote your content on their blogs." *See Buttons*, TUMBLR, http://www.tumblr.com/buttons (last visited Nov. 6, 2013).

184 "Instagram is a fun and quirky way to share your life with friends through a series of pictures." *See FAQ*, INSTRAGRAM, http://instagram.com/about/faq/ (last visited Sept. 28, 2013). When an Instagram user likes content, a heart appears momentarily on the picture, and then the user's Instagram name and photo are listed along with others who also "liked" the photo. Similar to the thumbs up symbol, a heart is universally recognized, and both symbols are a "short cut from mind to mind" for the expressions they convey. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943).

social media interactions, traditional First Amendment doctrine and long standing precedent must be re-interpreted in light of the unique features of online communications. The First Amendment does not distinguish between online and offline behavior—when speech is restricted, the First Amendment is implicated. Thus, in order to create a workable system, courts must be willing to become learned in this new arena. Other courts should follow the lead of the Fourth Circuit in *Bland v. Roberts*, and take the time to understand what a Facebook "like" (or other digital communication) means so that the court is able to appreciate the import of their use.[185] Taking into account the complexity of communicating through online social networks, the court did more than declare a "like" to be speech: "Aside from the fact that liking the Campaign Page constituted pure speech, it also was symbolic expression."[186] The court's opinion reflects an understanding of the potential power of the Internet and specifically of online social networks in enabling the "interchange[] of ideas and [the] shaping of public consciousness . . . ."[187]

Using *Bland* as a guide, courts must first assess context when determining whether a digital communication constitutes speech. An examination of context begins with a baseline understanding of the medium.[188] Thereafter, the analysis is shaped by looking at three specific aspects of the communication at issue, specifically: (1) the content of the communication; (2) the mode of the communication; and (3) whether the method by which the communication was made detracts from or alters the meaning ultimately conveyed.

A. *Context-Dependent Meaning: A Picture is Worth a Thousand Words and a Button Can Actually Speak*

As *Bland* made clear, clicking the "like" button on Facebook can be sufficient to merit constitutional protection. However, the free publicity a "like" and its corresponding "like story" generate is unprecedented and cannot be overlooked.[189] Since the "like" button is used as an advertising tool,[190] and since "members are often enticed to

185 Bland v. Roberts, 730 F.3d 368, 385 (4th Cir. 2013). In addition, after unpacking the function of the "like" button, the court explicitly and implicitly recognized the power of social networking sites such as Facebook, and the social share buttons Facebook and other OSNs incorporate.

186 *Id.* at 386.

187 *See* Sherman, *supra* note 63, at 99.

188 *See supra* Part IV.A.

189 *See* Fraley v. Facebook, 830 F. Supp. 2d 785, 792 (N.D. Cal. 2011) ("According to Facebook, members are twice as likely to remember seeing a Sponsored Story advertisement compared to an ordinary advertisement without a Friend's endorsement and three times as likely to purchase the advertised service or product.").

190 In the context of social media marketing, the "like" button is often used to unlock content. Companies frequently use it as a condition—a user must click "like" if the user wants to gain access to certain offers and deals.

click on a 'Like' button simply to receive discounts on products, support social causes, or to see a humorous image,"[191] the importance accorded to clicking it must be conditional. In other words, at times a "like" is a meaningful expression, while at others it is simply used as a quid pro quo—the meaning is *context-dependent*.[192]

With "speech" being broadcast over the Internet at record rates and with the wide range of social media users[193] and the various ways they use the Internet,[194] context must not be overlooked. This context-dependent meaning calls for a framework that looks to the circumstances surrounding online conduct when determining whether a specific online communication is "speech" and whether it is deserving of constitutional protection.[195]

By clicking the "like" button, Carter was endorsing Adams for Sheriff—he was not clicking to unlock a deal or out of sheer curiosity.[196] Accordingly, the very context in which Carter clicked "like" conveys why he did so. As the Fourth Circuit provided, "[i]n the context of a political campaign's Facebook page, the meaning that the user approves of the candidacy whose page is being liked is unmistakable."[197] Based on context, the message is clear: "liking" Jim Adams Facebook campaign page—just like wearing a pin that says "I

191 *Fraley*, 830 F. Supp. 2d at 792.

192 This is true in traditional (offline) forums as well; it is not a new concept—traditional offline speech has long been examined under standards that consider context. *See* Spence v. Wash., 418 U.S. 405, 410 (1974); Snyder v. Phelps, 131 S. Ct. 1207, 1216–18 (2011).

193 Patricia Abril's classification of online social network users into "digital natives" and "digital immigrants" highlights the underlying differences between the two groups; thereby proving why context is vital to assess. In part, this is due to the reality of what these classifications mean in the context of legal claims and those assessing them. For instance, "[l]abeled the greatest generation gap since the early days of rock and roll, some commentators have suggested that the cut-off age for digital natives is about thirty. The average age of U.S. federal judges at appointment is around fifty, and the average age of justices on the U.S. Supreme Court is sixty-seven." *See* Abril, *supra* note 70, at 16–17.

194 As stated in *The Facebook Like Button: What It Really Means and How Much It's Worth*, Facebook likes are used in social media marketing in three ways: "Facebook fan-gating[,] . . . Generating engagement[,] . . . [and] Social sharing buttons." Olivia Roat, *The Facebook Like Button: What It Really Means and How Much It's Worth,* MAINSTREETHOST.COM (Aug. 7, 2012), http://blog.mainstreethost.com/the-facebook-like-button-what-it-really-means-and-how-much-its-worth#.UI2yXaA1aII.

195 The argument asserted by Jeff Rosen, one of Roberts' lawyers in *Bland* illustrates the danger of ignoring context when determining meaning:

> "[L]iking" a Facebook page means many things and was too obscure an act to warrant protection. People may "like" Target's page to get a coupon or because they're curious about something that can only be seen by hitting the feature . . . . "It's like opening a door into a room," . . . . "You can't see what's in there until you click on the button. That's not speech."

See Tom Schoenberg, *Facebook Tells Court 'Like' Feature Vital to Free Speech*, BLOOMBERG.COM (May 16, 2013, 4:20 PM), http://www.bloomberg.com/news/2013-05-16/facebook-s-like-faces-free-speech-test-in-u-s-court.html.

196 *See Jim Adams for Hampton Sheriff*, FACEBOOK, https://www.facebook.com/pages/Jim-Adams-for-Hampton-Sheriff/101482822031 (last visited Oct. 16, 2013).

197 Bland v. Roberts, 730 F.3d 368, 386 (4th Cir. 2013).

Like Jim Adams" or affixing a sign that says "I Like Jim Adams" to one's property—is "substantive speech."[198]

1. The Content Communicated

The content, that is, the substance, of Internet-era communications is extremely important. Since offline speech is afforded constitutional protection equal to that afforded online speech, but not all content is constitutionally protected or receives the same degree of protection, the examination of content is a critical element of First Amendment inquiry.[199] In other words, what is being communicated—the message—must be examined in order to determine whether the communication deserves constitutional protection in the first place.

Because political speech is deserving of the utmost constitutional protection and "[t]he First Amendment protects public employees from termination of their employment in retaliation for the[] exercise of speech on matters of public concern,"[200] the content of the speech itself must be scrutinized in order to determine if the speech is political or touches upon a matter of public concern. Furthermore, speech of public employees may be protected or unprotected depending on the circumstances.[201] While public employees do not forfeit their constitutional rights at work, their right to speak as private citizens needs to be balanced against the government's interest in ensuring its efficient operation.[202]

As Ken Paulson argued, "'[l]iking' a political candidate encompasses freedom of speech and press, [and] also illustrates the First Amendment rights of assembly (gathering virtually) and petition (signing on in support of a cause). Clearly clicks count."[203] In addition to clicks, clearly content counts too.[204]

2. The Mode of Communication

When speech is communicated on the Internet, the specific channel of communication should be scrutinized. Internet communications are extremely diverse, and the scope of the legal protection afforded to

198 *Id.* at 386–87.
199 Reno v. ACLU, 521 U.S. 844 (1997).
200 McVey v. Stacy, 157 F.3d 271, 277 (4th Cir. 1998).
201 *See* Pickering v. Bd. of Educ. of Twp. High Sch. Dist., 391 U.S. 563, 568 (1968) ("The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."); Connick v. Myers, 461 U.S. 138, 146–47 (1983) (modifying the *Pickering* test by emphasizing that employee speech must be related to a matter of public concern before the *Pickering* balancing test is even employed).
202 *See* cases cited *supra* note 201.
203 *See* Paulson, *supra* note 142.
204 *Id.*

communications may be affected by the medium itself.[205] Therefore, the mode of the communication must be carefully analyzed, as the channel itself may have an impact on interpretation such that it alters the meaning of the message ultimately expressed. While the meaning of communication might be static from medium to medium, it is also possible that it might change.[206] In order for courts to fully assess the meaning of any digital communication, the method of communication should be analyzed to determine whether it alters the interpretation. For example, when one posts something to Facebook, the meaning of the post will most likely be the same whether the person posts it as a status or to a "friend's" Facebook wall. But that same post can carry a different meaning if it is posted in response to a previous post, perhaps by a co-worker, or if the same content was posted to a political candidate's Facebook Campaign Page. Furthermore, if one did not personally write a post, but rather "liked" content posted by someone else; if one "retweeted" someone else's "tweet" via Twitter; or if one "repinned" the image someone else originally posted on Pinterest, different meanings may attach to the communication. However, a different meaning is not equivalent to a meaning that is categorically unprotected by the First Amendment. Yet, by extension, the district court's decision seems to suggest just that; for example, if Carter had donated money to Adams' campaign by clicking a "contribute" button online,[207] by the district court's reasoning, that would not be speech. However, the case law is clear that political expenditures *are themselves* speech.[208]

The inquiry into the specific mode of communication is particularly important when analyzing online speech because "the content on the Internet is as diverse as human thought."[209] In an age where symbols online correlate with expressions offline, the specific symbol and the context in which it is employed may be sufficiently expressive to warrant protection as symbolic speech: "[T]he context in which a symbol is used for purposes of expression is important, for the

[205] *See The Medium is the Message*, *supra* note 165 ("The internet, and especially email, encourages a new kind of language that is more clipped, blunt and capable of misinterpretation. [Some commentators] warn that words can be coloured by their surroundings and thus may be defamatory or not depending upon the context in which they occur . . . .").

[206] *See* Spence v. Wash., 418 U.S. 405, 410 (1974).

[207] Google has a feature titled "Google Checkout for Political Contributions," whereby campaigns or political action committees (PACs) can collect contributions via a Google Wallet account linked to a political contribution *button*. *See Political Contributions for Federal Candidates*, GOOGLE CHECKOUT, http://checkout.google.com/seller/contribute/index.html (last visited Sept. 28, 2013).

[208] Buckley v. Valeo, 424 U.S. 1 (1976) (spending money in connection with a campaign is political speech). Moreover, if Carter instead contributed money so online with the "click" of a "contribute" button, that would not render his conduct any less deserving of First Amendment protection.

[209] Reno v. ACLU, 521 U.S. 844, 852 (1997).

context may give meaning to the symbol."[210] Thus, the mode of transmission lends meaning based on an analysis of context and content, but it also can produce meaning on its own, for it can alter the ultimate message conveyed by a nonverbal, Internet-based communication.

3. The Resulting Meaning of Internet Communications

The very character of the Internet necessitates that courts look to context, content, and mode of transmission in order to accurately and fairly determine, within our First Amendment jurisprudence, the types of online communications that constitute speech. Whether or not a person is communicating in a private or public capacity, and whether speaking on a matter of private or public concern, can alter the entire analysis.[211]

The framework that this Note fashions is not limited to Facebook or its "like" button; it is meant to apply to "click speech" on a multitude of platforms. For instance, the same analysis can be applied to Twitter. Indeed, Twitter has become widely used and is the way many receive up-to-the-second news information.[212] "Tweets"—regardless of how long or short they may be—are speech.[213] Users themselves do not have to compose their own, 140-character tweets; rather, "[w]ith a *click of the mouse* or now with *even the touch of a finger*, Twitter users are able to transmit their personal thoughts, ideas, declarations, schemes, pictures, videos and location, for the public to view."[214] Thus, when a user "tweets" a political statement, or better yet, when a user merely "retweets," with a *click of a mouse* or *the touch of a finger*, a political candidate's "tweet," that user is not only communicating with other Twitter users but also is conveying a message about his personal views. To illustrate, consider the following example. On September 24, 2012 at

210 Spence v. Wash., 418 U.S. at 410.

211 *See* Connick v. Myers, 461 U.S. 138, 147–48 (1983) ("Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.").

212 *About Twitter*, TWITTER, https://twitter.com/about (last visited Sept. 30, 2012). By default, tweets are public and the Library of Congress archives all public tweets, explaining that "'[i]ndividually tweets might seem insignificant, but viewed in the aggregate, they can be a resource for future generations to understand life in the 21st century.'" *See* Jason Mazzone, *Facebook's Afterlife*, 90 N.C. L. REV. 1643, 1660 (2012). With one million accounts added per day and 175 million tweets broadcast daily, it is not surprising that the use of Twitter has been accompanied by a multitude of legal concerns in the twenty-first century. *See* Tabibi, *supra* note 17. Currently, these issues include whether an employer or employee "owns" a Twitter account; endorsements made via Twitter and the Federal Trade Commission's guidelines; use of Twitter during jury trials; and copyright infringement suits brought based on tweets or the content such tweets *share* with the public. *Id.*

213 United States v. Cassidy, 814 F. Supp. 2d 574, 582 (D. Md. 2011), *appeal dismissed* (Apr. 11, 2012).

214 People v. Harris, 36 Misc. 3d 613, 618 (N.Y. Crim. Ct. 2012). As stated in *Harris,* "it is evident that Twitter has become a significant method of communication for millions of people across the world." *Id.* at 616.

2:57 PM, amidst the 2012 presidential campaign, @BarackObama[215] tweeted, "FACT: Romney's plan to give tax breaks to millionaires and raise taxes on the middle class would lead to endless deficits, not job creation."[216] If a Twitter user retweeted this that user would be making the statement and/or communicating the message that he agrees with President Obama, and his campaign staff, that Romney's tax plan would lead to endless deficits and not to job creation. One could type out the exact words and tweet them independently, but the First Amendment analysis is not altered merely because the user elected to disseminate this message with the click of a mouse. Social share buttons on other OSNs function similarly to Facebook's "like" button, and in general, courts should consider the entire circumstances of a communication when deciding if it is worthy of First Amendment protection.

CONCLUSION

In an age defined by the use of the Internet, online social networks, and the ease of "connecting" at home, at work, and on the go, the use of symbols to represent emotions, feelings, and opinions has become commonplace. In the world of cyberspace individuals often employ symbols—using digital proxies such as smiley faces and hearts to represent their feelings. Additionally, many frequently utilize the social share buttons found practically everywhere on the Internet that correlate with these digital proxies. For example, countless Internet users click the thumbs-up icon associated with the Facebook "like" button, thereby broadcasting that the user gives the content his "thumbs-up," that is, his approval. With the ability to use symbols to convey feelings, and the growth of social share buttons that correspond directly with the expressions those symbols convey, has come great ease and the unprecedented ability to communicate with the click of a button. However, alongside these benefits have come grave consequences for individuals because the law is currently in flux, and offers little guidance as to what online "speech" is protected. As a result, which online communications are deemed to be speech, and particularly, under what circumstances a click of a button can constitute speech, are ripe for discussion.

Although it may be a challenge to apply Constitutional protection to communications that are taking place in a realm of ever-advancing technology and evolving discourse, courts must render decisions consistent with the fact that "'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when

215 *Barack Obama*, TWITTER, https://twitter.com/BarackObama (last visited Sept. 30, 2013). "This account is run by Organizing for Action staff. Tweets from the President are signed —bo." *Id.*

216 *Id.*

a new and different medium for communication appears."[217] Thus, although social share buttons can be classified as "a new and different medium for communication,"[218] the protection granted by the U.S. Constitution does not waver. Accordingly, the new framework proposed by this Note is not intended to replace or overshadow the analysis that would occur if an expression were made offline. Rather, it is intended to aid in applying traditional doctrine to new and emerging technologies in order to modernize free speech jurisprudence.

Traditional doctrine should continue to lead the inquiry, for the principles of the First Amendment and the protection that it affords have not changed; only the very nature of communications have. Consequently, the content, context, and mode of the communication must lead the inquiry, for online communications are not only varied but also not fully understood. Therefore, before traditional doctrine can provide any meaningful direction, an understanding of online social networks and the novel "share" features they utilize must be understood. Furthermore, following the proposed factor-based approach will ensure not only that the unique features of new and emerging media are taken into account but also that online communications are assessed in a way that faithfully applies traditional First Amendment doctrine.

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217 Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2733 (2011).

218 *Id.*

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