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## CYBER-REPUBLICANISM

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### ABSTRACT

*In 1787 at the dawn of our nation, the Founding Fathers were embroiled in a raging debate over the role citizens and special interest groups should play in our political system. The Founding Fathers viewed influence from interest groups as a threat to government decision making, but they differed in their responses to this perceived problem. Proponents of republicanism, one of the dominant conceptions of politics at that time, adopted an optimistic approach. They anticipated that government leaders and citizens, guided by their education and civic virtue, would not allow factional tyranny to flourish. This republican optimism continues to markedly influ-*

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*ence ongoing debates about the ability of rent-seeking actors to influence or “capture” government policymakers today.*

*This Article examines how the revolution in social media communications reshapes the centuries-old debate about capture. I argue that social media communications hold the potential to create two fundamental, but previously overlooked, benefits for our government system. Social media sites can create breeding grounds for so-called republican moments—periods in which an agitated public overcomes the power of special interest groups—to arise. This is true even though research suggests that social media communications tend to be shallow and unreliable.*

*The social media age also holds the potential to upgrade the relationships between citizens, government actors, and special interest groups during periods of politics-as-usual, the periods between republican moments. The threat of a viral uprising can motivate government actors and special interest groups to listen more closely to public concerns. It can further entice them to spend more resources on educating the public about issues of national, regional, and local concern. Such dialogue and education promotes the development of the republicans’ utopian citizenry—citizens instilled with education and civic virtue. These two phenomena have profound implications for a variety of issues in public policy and government affairs.*

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*“Enlighten the people generally, and tyranny and oppressions of body and mind will vanish like evil spirits at the dawn of day.”*<sup>1</sup>

## INTRODUCTION

A blogger, concerned about the quality of her children’s school lunches, helped successfully pressure Congress and the U.S. Department of Agriculture (USDA) into letting schools choose for the first time whether children must consume “pink slime”<sup>2</sup> in their school lunches.<sup>3</sup> The U.S. Environmental Protection Agency (EPA)<sup>4</sup> and the U.S. Department of the Interior (DOI)<sup>5</sup> tightened their oversight of the hydraulic fracturing (fracking) industry<sup>6</sup> after YouTube videos of homeowners lighting their tap water on fire

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1. 14 THE WRITINGS OF THOMAS JEFFERSON 491 (Andrew Lipscomb & Albert Ellery Bergh eds., 1904).

2. Pink slime refers to ammonia-treated Lean Finely Textured Beef (LFTB), a meat filler. See James Andrews, *BPI and ‘Pink Slime’: A Timeline*, FOOD SAFETY NEWS (Apr. 9, 2012), <http://www.foodsafetynews.com/2012/04/bpi-and-pink-slime-a-timeline/>. For examples of the corporate response to the controversy, see John Norton, *Pueblo School Districts, Local Eatery Don’t Use the Treated Meat*, PUEBLO CHIEFTAIN (Apr. 21, 2012 12:00 AM), [http://www.chieftain.com/news/local/pueblo-school-districts-local-eatery-don-t-use-the-treated/article\\_1ec6b28a-8b6a-11e1-be1e-001a4bcf887a.html?mode=story](http://www.chieftain.com/news/local/pueblo-school-districts-local-eatery-don-t-use-the-treated/article_1ec6b28a-8b6a-11e1-be1e-001a4bcf887a.html?mode=story) (depicting a sign in front of a restaurant indicating that the restaurant did not serve food with LFTB); Schuyler Velasco, *Pink Slime Bankruptcy: After the Backlash, What’s Next for Beef?*, CHRISTIAN SCI. MONITOR (Apr. 2, 2012), <http://www.csmonitor.com/Business/2012/0402/Pink-slime-bankruptcy-After-the-backlash-what-s-next-for-beef> (showing a display at the Fresh and Easy supermarket in Los Angeles California that informed customers that the market “never uses ... ‘pink slime’ in our ground beef because we believe in fresh quality products you can trust.”).

3. See Andrews, *supra* note 2; see also Stephanie Armour, *Kellogg’s Kashi Targeted as Web Food Fighting Escalates*, BLOOMBERG (May 7, 2012), <http://www.bloomberg.com/news/2012-05-07/kellogg-s-kashi-latest-target-as-web-food-fight-spreads-health.html>.

4. See Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, 77 Fed. Reg. 49,490, 49,497 (Aug. 16, 2012) (to be codified at 40 C.F.R. pts. 60 & 63).

5. See Oil and Gas: Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, 77 Fed. Reg. 27,691 (proposed May 11, 2012) (to be codified at 43 C.F.R. 3160).

6. See, e.g., Charles G. Groat & Thomas W. Grimshaw, *The Energy Institute, Fact-Based Regulation for Environmental Protection in Shale Gas Development*, 13-17 (Feb. 2012), [http://energy.utexas.edu/images/ei\\_shale\\_gas\\_reg\\_summary1202.pdf](http://energy.utexas.edu/images/ei_shale_gas_reg_summary1202.pdf) (discussing how social media communications are pressuring the government to adopt more stringent regulations for the fracking industry); *Media & Stakeholder Relations: Hydraulic Fracturing Initiative 2011*, UNCONVENTIONAL OIL & GAS SERIES, <http://www.media-stakeholder-relations-hydraulic-fracturing.com/> (last visited Oct. 16, 2013) [hereinafter *Media & Stakeholder Relations*] (“[T]he power of social media is allowing misinformation and the environmentalist agenda to be spread at an increasingly rapid rate.”).

gained widespread publicity.<sup>7</sup> The Susan B. Komen Foundation abandoned its plan to eliminate funding for Planned Parenthood and saw five of its high-ranking executives resign while protests about the Foundation's plan went viral on social media sites like Twitter and Facebook.<sup>8</sup>

Each of these incidents reflects an ever increasing trend: the use of social media<sup>9</sup> as tools for ordinary citizens to influence policy-makers.<sup>10</sup> These incidents defy the basic principles of public choice theory.<sup>11</sup> According to public choice theory, three obstacles prevent individuals from working together to achieve a public good: (1) the costs of organizing to achieve social benefits are high, (2) if a public good is attained, each individual will enjoy only a relatively small portion of the resulting benefits, and (3) each individual has an incentive to try to free ride off the sacrifices of others.<sup>12</sup> As a result,

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7. See, e.g., 911sheeple, *Faucet Water Ignites! Natural Gas in Well Water! THANKS [!]*, YOUTUBE (June 22, 2010), <http://www.youtube.com/watch?v=PRZ4LQSonXA&feature=related>; see also *infra* App. (displaying the lyrics of a song entitled "My Water's On Fire Tonight" that has been viewed hundreds of thousands of times on YouTube).

8. See Geoffrey A. Fowler, *Social Media Flex Muscles Again, Amplifying Protests*, WALL ST. J. (Feb. 4, 2012), <http://online.wsj.com/article/SB10001424052970204662204577201470729446582.html>; Jamie Stengle, *Susan G. Komen Execs Resign: At Least 5 Officials Leave After Planned Parenthood Controversy*, HUFFINGTON POST (Mar. 22, 2012, 8:30 PM), [http://www.huffingtonpost.com/2012/03/22/susan-g-komen-execs-resign-planned-parenthood\\_n\\_1373891.html](http://www.huffingtonpost.com/2012/03/22/susan-g-komen-execs-resign-planned-parenthood_n_1373891.html).

9. Social media is defined as "a group of Internet-based applications that build on the ideological and technological foundations of Web 2.0, and that allow the creation and exchange of User Generated Content." Andreas M. Kaplan & Michael Haenlein, *Users of the World, Unite! The Challenges and Opportunities of Social Media*, 53 BUS. HORIZONS 59, 61 (2010).

10. There is a growing literature suggesting a linkage between other social movements, such as Occupy Wall Street in New York and the Arab Spring revolution in Egypt, and social media. See Craig Kanalley, *Occupy Wall Street: Social Media's Role in Social Change*, HUFFINGTON POST, [http://www.huffingtonpost.com/2011/10/06/occupy-wall-street-social-media\\_n\\_999178.html](http://www.huffingtonpost.com/2011/10/06/occupy-wall-street-social-media_n_999178.html) (discussing how social media amplified the efforts for change with regard to the Occupy Wall Street Movement and protests in Egypt) (last updated Dec. 6, 2011, 5:12 AM). This Article, however, is the first to apply the substantial theoretical framework of republicanism to identify the value of social media for the American political system.

11. Public choice theory has become one of the predominant tools for explaining political decision making. A search conducted on LexisNexis Research for law review articles published in the United States between January 1, 1995 and August 21, 2012 with "public choice" in the title retrieved 108 articles. See also *infra* Part I.B (discussing the influence of public choice theory over the past fifty years).

12. See, e.g., Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1173-75 (2009) (explaining the

concentrated interests, rather than diffuse interests, such as those of individual citizens, are expected to “capture,” or influence, policymakers.<sup>13</sup>

The idea that an impassioned citizenry can prompt policymakers to pay more attention to citizen interests is not new. Republican theorists at the dawn of our nation celebrated citizen engagement as a means of limiting the power of factions or special interest groups.<sup>14</sup> More recently, in 1990 James Gray Pope developed the concept of a “republican moment.”<sup>15</sup> A republican moment occurs when an agitated public temporarily overcomes the political clout that organized groups otherwise have over policy decisions.<sup>16</sup> In other words, during a republican moment, the public choice model is momentarily suspended. Politics becomes characterized by widespread citizen engagement, rather than concentrated engagement by special interest groups. For instance, the environmental movement of the 1970s and the global climate change crisis of the early 21<sup>st</sup> century, which were periods in which an engaged citizenry prompted Congress to enact a series of pro-environment statutes and assist in the emergence of new social norms, have been thought to represent republican moments.<sup>17</sup>

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challenges to persons and entities who may favor stronger environmental protection laws); see also *infra* Part I.B.

13. See THEODORE J. LOWI, *THE END OF LIBERALISM* 57-58 (2d ed. 1979) (asserting that interest groups block necessary government action); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 32-33 (1985) (explaining the concern that powerful private groups may dominate government decision-making).

14. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1540-41, 1548 (1988) (discussing republicanism and the renewed interest in it among scholars); Sunstein, *supra* note 13, at 31-32 (“[T]hrough discussion people can, in their capacities as citizens, escape private interests and engage in pursuit of the public good.”).

15. See James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 *U. PA. L. REV.* 287, 310-13 (1990).

16. See *id.* at 312-13; see also Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 *J.L. ECON. & ORG.* 59, 66-69 (1992) (adapting the republican moment concept to environmental politics); David B. Spence, *Federalism, Regulatory Lags, and the Political Economy of Energy Production*, 161 *U. PA. L. REV.* 431, 467-70 (2013) (analyzing the federalism implications for the hydraulic fracturing industry that stem from republican moments).

17. See Hope M. Babcock, *Global Climate Change: A Civic Republican Moment for Achieving Broader Changes in Environmental Behavior*, 26 *PACE ENVTL. L. REV.* 1, 3 (2009); Farber, *supra* note 16, at 66-67.

There is little reason to worship the eighteenth-century republican philosophy, and this Article does not purport to do so. The beauty of the republican moment concept is that it does not require one to blindly accept every republican aspiration as truth. Instead, it embraces the key virtues of eighteenth-century republican theory—such as a commitment to deliberation, universalism, political equality, and citizenship—that are still highly valuable and relevant today.

Despite the substantial literature on republicanism and republican moments, no legal scholar has fully explored whether new social media platforms affect the development of republican moments. This Article fills this critical gap. To do so, I situate the capture literature among empirical studies and debates about the role the Internet and social media platforms play in our government system.<sup>18</sup> This produces several insights.

First, social media can create breeding grounds for republican moments to arise. With over half of all adult Americans already connected to Facebook<sup>19</sup> and almost all government institutions actively maintaining a site, social media provides increasingly unparalleled platforms for discourse among citizens and government actors.<sup>20</sup> This discourse gives citizens of every political persuasion the ability to contribute toward a perceived common good when an issue, such as the safety of meat additives in school

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18. See, e.g., LAWRENCE LESSIG, *CODE: VERSION 2.0*, at 4-5 (2006) (proposing that governments have broad regulatory powers over the internet); JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 7 (2000) (arguing that Internet communications create new opportunities for invasion of privacy); CASS SUNSTEIN, *REPUBLIC.COM 2.0*, at 1-5 (2007) (arguing that the increasing availability of Internet tools that personalize information for consumers may limit viewpoint diversity detrimentally); Jeffrey Bellin, *Facebook, Twitter, and the Uncertain Future of Present Sense Impression*, 160 U. PA. L. REV. 331, 334, 338 (2012) (arguing that new communication practices, like Facebook and Twitter interactions, should not fall within the existing legal framework governing the admission of out-of-court statements due to their unreliability); Stuart Minor Benjamin, *Evaluating E-Rulemaking: Public Participation and Political Institutions*, 55 DUKE L.J. 893, 920-36 (2006) (finding “reasons to believe” the costs of e-rulemaking initiatives outweigh their benefits); Meredith Conroy et al., *Facebook and Political Engagement: A Study of Online Political Group Membership and Offline Political Engagement*, 28 COMPUTERS HUM. BEHAV. 1535 (2012).

19. GfK ROPER PUB. AFFAIRS & CORPORATE COMM’NS, *THE AP-CNBC POLL 6* (May 2012), available at [http://ap-gfkipoll.com/main/wp-content/uploads/2012/05/AP-CNBC-Poll-May-2012-Topline-final\\_Facebook.pdf](http://ap-gfkipoll.com/main/wp-content/uploads/2012/05/AP-CNBC-Poll-May-2012-Topline-final_Facebook.pdf).

20. See *infra* Part II.A.1.

lunches or the environmental implications of fracking, goes viral on social media platforms.<sup>21</sup>

Second, social media holds the potential to upgrade politics-as-usual, the period between republican moments.<sup>22</sup> They create incentives for government actors and special interest groups, such as the fracking industry, to invest more time and resources in educating and engaging the public about issues of local, regional, or national concern rather than focus on influencing or capturing government policymakers.<sup>23</sup> This shift in incentives promotes the development of our republican Founding Fathers' utopian citizenry—citizens instilled with education and resulting civic virtue who can deliberate on political issues and work toward a common good.<sup>24</sup> But more important than the fulfillment of eighteenth-century republican dreams is the fact that our society upgrades when deliberation, universalism, viewpoint diversity, and citizenship, rather than self-interested rent-seeking, underlie its political processes.

This Article focuses on the positive side of cyber-republicanism and its implications. I do not mean to promote a view that the emergence of platforms like Facebook and Twitter are entirely cause for celebration.<sup>25</sup> With more weight placed on social media communications, special interest groups face a greater temptation to spread false or misleading propositions on social media to further their own agendas. For instance, in the past two years alone, two multi-billion dollar companies, Facebook and Google, have succumbed to the temptation to mislead consumers on social media sites.<sup>26</sup> Such

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21. *See infra* Part II.A.2.

22. *See infra* Part II.B.

23. *See infra* Part II.B.

24. *See infra* Part II.B.

25. For an engaging argument that technology can contribute to social progress if and only if the imperfections of liberal democracy are first recognized, see EVGENY MOROZOV, *TO SAVE EVERYTHING, CLICK HERE* (2013).

26. *See* Fed. Trade Comm'n, *FTC Approves Final Settlement With Facebook* (Aug. 10, 2012), <http://www.ftc.gov/opa/2012/08/facebook.shtm> (describing how the Federal Trade Commission charged Facebook with deceiving “consumers by telling them they could keep their information on Facebook private, and then repeatedly allowing it to be shared and made public.”); Fed. Trade Comm'n, *FTC Charges Deceptive Privacy Practices in Google's Rollout of Its Buzz Social Network* (Mar. 30, 2011), <http://www.ftc.gov/opa/2011/03/google.shtm> (“Google Inc. has agreed to settle Federal Trade Commission charges that it used deceptive

deceptive practices erode critical components of republicanism—including trust, education, and citizenship—and make it more difficult for republican moments to occur. It is also highly unlikely that socially-beneficial decisions will emerge based on deceptive information.<sup>27</sup> A related concern is that certain government institutions, such as administrative agencies, will succumb to the temptation to use social media to inappropriately promote policies, take political sides, and advance their own agendas.<sup>28</sup> However, the implications that arise from these negative aspects of cyber-republicanism, such as the need for greater checks on corporate and government self-promotion, share little common ground with the issue of valuing citizen-centered reform. This in mind, the negative aspects of cyber-republicanism warrant close examination in a separate work in the future.

This Article proceeds in three parts. Part I briefly traces the historical development of capture theory. It identifies the roots of contemporary capture theory in republican and pluralist conceptions of politics in the late eighteenth century. It then jumps ahead to the rise of public choice theory in the wake of the New Deal period and highlights concerns that government actors are overly susceptible to influence from special interest groups. It explains how active citizen engagement may create republican moments in which citizens temporarily overcome the power of special interest groups and contribute to fundamental social progress.

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tactics and violated its own privacy promises to consumers when it launched its social network, Google Buzz, in 2010.”).

27. Cf. Joshua Sarnoff, *The Continuing Imperative (But Only From a National Perspective) For Federal Environmental Protection*, 7 DUKE ENVTL. L. & POLY F. 225, 240 n.54 (1997) (asserting that it is obvious that “the ability to spend wealth to influence policy does not provide an objective measure of value” and “that policies adopted in response to campaign contributions do not necessarily increase social welfare”).

28. See STAFF OF H. COMM. ON OVERSIGHT AND GOV'T REFORM, 111TH CONG., ANALYSIS OF THE FIRST YEAR OF THE OBAMA ADMINISTRATION: PUBLIC RELATIONS AND PROPAGANDA ACTIVITIES 9-20 (Comm. Print 2010) (discussing how seven agencies allegedly engaged in inappropriate public relations and propaganda activities). However, it is beyond the scope of this Article to explore this possibility. See generally Melanie Marlowe, *The Unitary Executive and Review of Agency Rulemaking*, in THE UNITARY EXECUTIVE AND THE MODERN PRESIDENCY 77, 97-98 (Ryan J. Barilleaux & Christopher S. Kelley eds., 2010) (discussing the unitary executive theory, which suggests agencies are merely tools of the president and should not exercise independent policymaking discretion).

In Part II, I argue that the ever-increasing availability and use of social media, such as Twitter,<sup>29</sup> has enabled the voices of ordinary citizens to overcome organizational costs and express collective concerns. As a result, social media sites can serve as breeding grounds for republican moments. The social media revolution can further upgrade the basic form of politics-as-usual by creating incentives for government actors and special interest groups to engage and educate citizens about social issues. These two phenomena create profound implications for a variety of issues in public policy and government affairs.

Part III of this Article responds to potential counterarguments. One might argue that many social media communications, such as photographs of fluffy puppies, are shallow and do not contribute to meaningful deliberation. Yet the ability of social media users to post about any topic of interest promotes feelings of trust and community among users and contributes to viewpoint diversity. This, in turn, fosters an environment conducive to citizen engagement and mobilization. Additionally, the proliferation of online communications creates incentives for government actors and special interest groups to pay more attention to public concerns and to engage in richer dialogue with citizens about issues of public interest. For instance, a surge in ill-informed posts about food safety could prompt government and industry actors to increase citizen education about food safety and ultimately raise the level of public education. By recognizing the value of social media platforms in our political system, the government can find new ways to embrace its social media citizens.

### I. DEVELOPMENT OF CAPTURE THEORIES

To understand how the social media age reshapes concerns about capture, it is first helpful to understand how capture theory evolved. This Part briefly explores the constitutional roots of capture theory. It then delves into several contemporary theories about capture,

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29. *See generally About Twitter*, TWITTER, <http://twitter.com/about> (last visited Oct. 17, 2013) (“Twitter is a real-time information network that connects you to the latest stories, ideas, opinions and news about what you find interesting. Simply find the accounts you find most compelling and follow the conversations.”).

including public choice theory and republican moment theory, which have both enjoyed prominence among scholars.

#### A. *Constitutional Roots*

Long before the first tweet<sup>30</sup> or Facebook friend request was sent, long before Congress created the EPA or any other New Deal Agency, long before there were fifty states, the Founding Fathers of the United States Constitution were embroiled in a passionate debate over the roles individual citizens and special interest groups should play in the governance of the new nation.<sup>31</sup> Two conceptions of politics dominated the discussions surrounding the framing and ratification of the Constitution: republican and pluralist.<sup>32</sup> The republican and pluralist conceptions of politics remain important today for two reasons. First, they shed light on the structure and purpose behind the government system this nation enjoys, and thereby provide a litmus test for judging how well the vision of the Founding Fathers has been achieved. Second, they continue to profoundly influence ongoing debates about the ability of rent-seekers to capture government policymakers in our political system.<sup>33</sup>

The key difference between republican and pluralist conceptions of politics is their view of human nature. The republican conception of politics takes a particularly sunny view of human nature: “[I]t assumes that through discussion people can, in their capacities as citizens, escape private interests and engage in pursuit of the public good.... Moreover, this conception reflects a belief that debate and discussion help to reveal that some values are superior to others.”<sup>34</sup>

A variety of different approaches toward politics have been associated with this optimistic republican conception, ranging from

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30. A “tweet” is a message sent out via Twitter. *See id.* (“At the heart of Twitter are small bursts of information called tweets. Each tweet is 140 characters long, but don’t let the small size fool you—you can discover a lot in a little space.”).

31. *See* DAVID J. SIEMERS, RATIFYING THE REPUBLIC 1 (2002) (“The ratification debate was extremely divisive.... Proponents of the Constitution argued that popular government could not be sustained without ratification; Antifederalists countered that the document itself was destructive of popular rule.”).

32. *See* Sunstein, *supra* note 14, at 1542, 1547.

33. *See infra* Part II.

34. Sunstein, *supra* note 13, at 31-32.

the classical republicans' emphasis on civic virtue as a "central organizing principle of ... politics"<sup>35</sup> to Madison's broader view of a republic as "a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior."<sup>36</sup> Yet all republican theories contain four central political commitments: deliberation, universalism, political equality, and citizenship.<sup>37</sup> The republicans believed government leaders and citizens, guided by these commitments, would not allow factional tyranny to flourish.<sup>38</sup>

Pluralists adopted a more skeptical view of human nature than the republicans.<sup>39</sup> Rather than presuming that virtuous citizens would work together to achieve a discernible common good, pluralists presumed that individuals "come to the political process with preselected interests that they seek to promote through political conflict and compromise."<sup>40</sup> Pluralists perceived factions as a threat to such bargaining. Specifically, pluralists feared a "group, or an alliance of groups," would dominate the political processes and thereby inhibit the ability of others to voice their preferences.<sup>41</sup> From the pluralists' perspective, the common good consisted of unimpeded bargaining that revealed an aggregation of individual preferences.<sup>42</sup>

Ultimately, debates between the federalists and anti-federalists over pluralist and republican principles led to the basic structure of the American system of government today. To alleviate concerns about factional tyranny, the Founding Fathers tried to create a system of representative government with civic-minded leaders who

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35. Sunstein, *supra* note 14, at 1548; *see also* DAVID HELD, *MODELS OF DEMOCRACY* 17, 43, 52 (2d ed. 1996).

36. THE FEDERALIST NO. 39, at 241 (James Madison) (Clinton Rossiter ed., 1961).

37. Sunstein, *supra* note 14, at 1548-58. This Article discusses these principles at length. *See infra* Part II.

38. *See* Sunstein, *supra* note 14, at 1540.

39. *See* ARTHUR F. BENTLEY, *THE PROCESS OF GOVERNMENT* 158-61 (Transaction Publishers 1995); ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 159, 161-63 (2006); DAVID B. TRUMAN, *THE GOVERNMENTAL PROCESS* 46-50 (1962).

40. Sunstein, *supra* note 13, at 32.

41. *Id.* at 32-33.

42. *See id.* ("The [pluralists'] common good consists of uninhibited bargaining among the various participants, so that numbers and intensities of preferences can be reflected in political outcomes. The common good amounts to an aggregation of individual preferences.").

are constrained by an engaged electorate and by a system of checks and balances.<sup>43</sup> As the next section discusses, the ability of this government system to guard against disproportionate influence from special interest groups has been a source of much debate among contemporary scholars.

### *B. Contemporary Capture Theory*

Although the Founding Fathers attempted to design a government system that would serve the interests of the public, rather than special interest groups, concerns about special interest groups persist today. This section highlights the central concern of a number of judges and scholars—namely, that government actors are overly susceptible to influence from interest groups. It next explains how republican moments may temporarily alleviate this government vulnerability.<sup>44</sup>

The rise of the administrative state during the New Deal period preceded the rise of critics of the administrative processes during the 1960s.<sup>45</sup> Public choice theory, one of the dominant theories used to criticize the administrative state, adopts the traditional pluralist notion that politics is characterized by interest group bargaining.<sup>46</sup> Public choice theorists take an even more cynical view of representative government than the traditional pluralists. To the public choice theorists, policy making typically reflects the interests of powerful groups rather than broader public interests.<sup>47</sup> The public choice theorists view administrative agencies, in particular, as being overly susceptible to influence from business interests and vulnera-

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43. For a thorough dissection of the ways in which these debates shaped our political system, see Sunstein, *supra* note 13, at 46 (“The federalists ... achieved a kind of synthesis of republicanism and the emerging principles of pluralism. Politics rightly consisted of deliberation and discussion about the public good. But that process could not be brought about in the traditional republican fashion; such an effort, in light of human nature, would deteriorate into a struggle among competing factions. A partial solution lay in principles of representation.”).

44. See *infra* Part II.A.

45. See STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 19-21, 24-27 (7th ed. 2011).

46. See, e.g., Steven P. Croley, *Theories of Regulation: Interpreting the Administrative Process*, 98 COLUM. L. REV. 1, 34-35 (1998).

47. See Spence, *supra* note 16, at 465-66.

ble to being “captured” by the entities they are supposed to regulate.<sup>48</sup>

Scholars have articulated an assortment of ways through which special interest groups can capture government decision makers. According to one version of capture theory, regulatory agencies gradually become sympathetic to the industry they regulate due to their repeated interactions.<sup>49</sup> Another version is that regulatory policies are set behind closed-door meetings between rich lobbyists and powerful legislators, such as those on congressional committees who control regulatory agencies.<sup>50</sup> The bottom line is that governmental actors often generate larger benefits for rent-seekers than for the public.<sup>51</sup>

Public choice criticisms of the administrative state have contributed to radical changes in our legal system. Between 1962 and 1980, courts increased their control over agency decision making.<sup>52</sup> They expanded the availability of judicial review, embraced procedural formalities to empower interested parties to challenge agency decisions, and began to carefully scrutinize the “factual and analytical bases for [agency] decisions.”<sup>53</sup> These changes shifted the purpose of courts from protecting private interests to ensuring that agencies considered the interests of all stakeholders.<sup>54</sup>

The judicial role in oversight started to soften in 1980. Since the election of President Ronald Reagan in 1980, judges and scholars, including now Supreme Court Justice Elena Kagan, have voiced preferences for a “unitary executive” model in which presidential

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48. *Id.* at 466.

49. *See, e.g.*, MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 185-86 (1955); GABRIEL KOLKO, RAILROADS AND REGULATION 1877-1916, at 3-6 (1965); John A. Ferejohn, *The Structure of Agency Decision Processes*, in CONGRESS: STRUCTURE AND POLICY 456-58 (Matthew D. McCubbins & Terry Sullivan eds., 1987); *see also* David B. Spence, *Managing Delegation Ex Ante: Using Law to Steer Administrative Agencies*, 28 J. LEGAL STUD. 413, 417 n.19 (1999) (providing a comprehensive summary of the capture theory literature); Spence, *supra* note 16, at 466-67 (same).

50. *See, e.g.*, DOUGLASS CATER, POWER IN WASHINGTON 205-06, 208-09, 217-20, 222 (1964); JOHN LEIPER FREEMAN, THE POLITICAL PROCESS: EXECUTIVE BUREAU-LEGISLATIVE COMMITTEE RELATIONS (1965).

51. *See* BREYER ET AL., *supra* note 45, at 27.

52. *See id.* at 24-27.

53. *Id.* at 26.

54. *Id.*

oversight, rather than judicial review, limits agency discretion.<sup>55</sup> The shift toward a unitary executive model represents a new institutional approach to alleviating the capture problem but not a means of solving it entirely. As a result, public choice theory and concerns about capture remain strong.<sup>56</sup>

Although public choice theorists paint a gloomy picture of American government, there is a silver lining. In 1990, James Pope introduced a rejoinder to capture theory—the idea that civic republicanism had produced moments, including the Jeffersonian upsurge, the Age of Jackson, the Populist Era, and the 1960s, in which an engaged public had overcome the influence of special interest groups.<sup>57</sup> Pope explained:

Strong democracy comes in pulses. During republican moments, large numbers of normally quiescent citizens enter the public arena to struggle for their visions of the common good. Passion and moral commitment set the tone for public discourse. Groups that are underrepresented in special interest bargaining use mass protest and other forms of direct power to place their concerns on the public agenda. Aroused citizens disrupt cozy relationships among politicians, administrators, and interest group lobbyists.<sup>58</sup>

He further explained:

Our history has from the outset been characterized by periodic outbursts of democratic participation and ideological politics.

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55. See, e.g., Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2383 (2001) (describing how scholars have shifted from viewing “judicial review and other aspects of legal doctrine as if they were the principal determinants of both administrative process and administrative substance” to “the emergence of enhanced methods of presidential control over the regulatory state”).

56. See, e.g., Frank H. Easterbrook, *The State of Madison’s Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328 (1994); Kagan, *supra* note 55, at 2383.

57. Pope, *supra* note 15, at 304-06. Pope’s work built on the prior scholarship of Bruce Ackerman. Ackerman has argued that American democracy operates with long periods of ordinary lawmaking interrupted by “constitutional moments” in which one or more of the political branches create a new constitutional regime with the overwhelming support of the People. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6-7 (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 3-6 (1998); Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984).

58. Pope, *supra* note 15, at 366-67.

And if history is any indicator, the legal system's response to these "republican moments" may be far more important than its attitude toward interest group politics. The most important transformations in our political order ... were brought on by republican moments.<sup>59</sup>

Pope noted that republican moments are not strictly republican. Direct citizen self-government does not "entirely displace the interest group process," and a deliberative republic is not implemented in a permanent or comprehensive form.<sup>60</sup> But republican moments are "republican" in the sense that they embody the key republican ideals.<sup>61</sup> The ideals of republicanism and republican moments—deliberation, universalism, political equality, and citizenship—remain as relevant today as in the eighteenth century.

In summary, public choice theorists presume that government actors primarily cater to special interest groups rather than to the general public. When citizens engage in widespread protest to achieve a common good, however, government actors can be motivated to take action that does indeed advance public interests during republican moments.

## II. RETHINKING CAPTURE THEORY

Drawing upon the historical and theoretical insights of Part I, this Part evaluates how technological changes reshape contemporary capture theory. Using the key ideals of republicanism and republican moments that many still consider highly relevant and valuable today, this Article identifies, for the first time, two means by which social media communications can help correct the

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59. *Id.* at 292-93 (footnote omitted).

60. *Id.* at 310-11 ("Republican moments are not, of course, republican in the strict sense. At no time did direct citizen self-government entirely displace the interest group process. Nor was the classical ideal of the deliberative republic implemented in any recognizable form. These periods were, however, republican in the same sense that the ... everyday liberal priorities of autonomy over community, acquisitiveness over civic virtue, and instrumental rationality over moral choice were reversed, albeit only partially and temporarily."). Scholars have also used the republican moment concept to explain the passage of environmental legislation. See Farber, *supra* note 16, at 66-67.

61. See Farber, *supra* note 16, at 66; Pope, *supra* note 15, at 311.

perceived failures of the administrative state.<sup>62</sup> First, social media create low-cost means for ordinary citizens to organize and express collective concerns to policymakers. As a result, republican moments may increase in frequency. Second, the social media age can upgrade politics during periods of politics-as-usual between republican moments because it gives special interest groups and government actors incentives to better educate and engage citizens about issues of public concern.

#### *A. Facilitating Republican Moments*

The dawn of the Internet Age produced optimism that cyberspace would lead to greater civic participation in political affairs. For instance, in 1999, Paul Schwartz used republican theory to predict “that cyberspace has the potential to emerge as an essential center of communal activities and political participation.”<sup>63</sup> But it was not until the development of social media platforms that citizen-centered dialogue became a reality. As social media sites surge in popularity, they enable ordinary citizens to work together in record numbers to achieve a common good. In so doing, the sites empower citizens to advance the four central political commitments of republicanism: deliberation, universalism, political equality, and citizenship.<sup>64</sup> Although Mark Zuckerberg<sup>65</sup> and Jack Dorsey<sup>66</sup> likely did not have these commitments in mind when they founded Facebook and Twitter respectively, they unwittingly created breeding grounds for republican moments to arise.

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62. See *infra* Figure 3.

63. Paul M. Schwartz, *Privacy and Democracy in Cyberspace*, 52 VAND. L. REV. 1609, 1612-13 (1999).

64. See Sunstein, *supra* note 14, at 1548-58.

65. See Mark Zuckerberg, *An Open Letter from Facebook Founder Mark Zuckerberg*, THE FACEBOOK BLOG (Dec. 1, 2009, 6:23 PM), <http://www.facebook.com/notes/190423927130>.

66. See David Sarno, *Twitter Creator Jack Dorsey Illuminates the Site's Founding Document, Part I*, L.A. TIMES (Feb. 18, 2009, 5:04 PM), <http://latimesblogs.latimes.com/technology/2009/02/twitter-creator.html>.

### 1. *Deliberation*

*“Emerging technologies open new forms of communication between a government and the people.”*<sup>67</sup>

The first commitment of republicanism is deliberation. Under the principle of deliberative politics, republicans viewed dialogue and discussion among citizens as critical features in the governmental process.<sup>68</sup> Rather than have self-interested and politically powerful groups shape political outcomes, republicans hoped that deliberation would enable political participants, guided by their education and resulting civic virtue, to put aside their personal interests and bring to light alternative perspectives and information.<sup>69</sup> Today, we continue to prize deliberation for its potential to be inclusive and to produce well-reasoned decisions, not decisions marked by corruption, close-mindedness, or rash thinking.

The radical transformation in communication practices over the past ten years has created new opportunities for ordinary citizens to deliberate on politics, government policies, and any other topic of national or local interest. The “new” electronic media, social media, has not changed the speed a single message can be communicated. “Old” electronic media, such as email and internet bulletin boards, as well as earlier technological breakthroughs, such as the facsimile and telephone, enabled individuals to communicate ideas with persons on the other side of the globe instantaneously. What is important to recognize is that (1) social media platforms include mechanisms that enable ideas to be discussed more rapidly and diffusely than previously possible, and (2) people are using social media to communicate from a fundamentally different approach than they used old electronic media. Social media now provides individuals a low-cost means of sharing ideas as participants in citizen-centered communities. As a result, discussion on the platforms is more open and free flowing. Indeed, the amount of discussion that takes place on social media sites is jaw-dropping. Twitter

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67. Memorandum from Peter R. Orszag, Director, Office of Management and Budget, to the Heads of Executive Departments and Agencies, Open Government Directive 5 (Dec. 8, 2009), available at [http://www.whitehouse.gov/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf).

68. Sunstein, *supra* note 14, at 1554.

69. *Id.* at 1548-51.

users send out an average of 400 million tweets per day,<sup>70</sup> and the amount of user activity on Facebook far surpasses that of Twitter. Facebook users generate an average of 3.2 *billion* “likes” and “comments” each day.<sup>71</sup> By giving and receiving information, commenting on it, and forwarding it on to a new network, individuals can critique and assess an unlimited variety of ideas and issues with expanding circles of communities.<sup>72</sup>

The leading social media platforms provide exceptional forums for citizen-centered dialogue to occur. Twitter claims it is the “fastest, simplest way to stay close to everything you care about.... [W]ith just a Tweet, millions of people learn about or show their support for positive initiatives that might have otherwise gone unnoticed.”<sup>73</sup> Facebook’s mission statement indicates it also serves as a tool for dialogue and discussion: “People use Facebook ... to discover what’s going on in the world, and to share and express what matters to them.”<sup>74</sup> Similarly, YouTube, a site that purports to enable “billions of people to discover, watch and share originally-created videos,” aspires to help individuals “connect, inform, and inspire others across the globe.”<sup>75</sup>

Beyond their mission statements, social media sites have built-in mechanisms for discussion and debate among citizens. A Facebook user can broadcast her “status” update to her network of “friends,” which generally includes friends, family members, colleagues, groups, government bodies, and even persons whom the user hardly

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70. *What is Twitter?*, TWITTER FOR BUSINESS, <https://business.twitter.com/whos-twitter> (last visited Oct. 17, 2013).

71. *The Power of Facebook Advertising*, FACEBOOK, <http://www.facebook.com/business/power-of-advertising> (last visited Oct. 17, 2013). These are not soliloquies but rather responses to other persons’ posts.

72. See *Understanding the Viral Marketing Power of Social Media*, PRWEB, <http://service.prweb.com/learning/article/understanding-the-viral-marketing-power-of-social-media/> (last visited Oct. 17, 2013) (“People who actively engage in social networking tend to utilize the sites and groups they participate in as resources for giving and receiving information. Social networkers who find useful information like to share it with their online contacts, and they also like to seek tips and suggestions from the individuals they network with in cyberspace.”).

73. *About Twitter*, *supra* note 29.

74. *Key Facts*, FACEBOOK NEWSROOM, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Oct. 17, 2013).

75. *About YouTube*, YOUTUBE, [http://www.youtube.com/t/about\\_youtube](http://www.youtube.com/t/about_youtube) (last visited Oct. 17, 2013).

knows, to let them know what the user is thinking.<sup>76</sup> The friends can then comment on the status, indicate that they “like” it, or share it with their friends. Once a friend comments on, likes, or shares a status, all of the friends in that person’s network can generally see the status update and the responses.<sup>77</sup> With each additional response to a status update, the number of individuals who can see the status and respond to it expands exponentially.

Twitter provides a comparable service to Facebook in which users “follow” individuals, such as friends, family members, celebrities, and government institutions.<sup>78</sup> After an individual “tweets” his thoughts and observations to his followers, the followers can reply to the “tweet,” mark it as a “favorite,” or “retweet” it to their own followers.<sup>79</sup>

Social media users are not limited to written dialogues but can also share pictures, news articles, videos, and images. The Appendix, for instance, depicts the lyrics to an informative, yet humorous, song expressing concerns about fracking.<sup>80</sup> The value of such media diversity should not be underappreciated. Images and videos have long been known to amplify public sentiments about an issue. For instance, scholars have suggested that graphic photographs taken during the Vietnam War triggered outrage about the war:

Images can end wars.... Like the photo taken after the My Lai massacre, showing dead babies piled half-naked in a dirt road atop their slain mothers and brothers and sisters, or the photo of the Saigon police chief pulling the trigger on a wincing Viet

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76. See *Who Should I Send Friend Requests to?*, FACEBOOK, <http://www.facebook.com/help/360212094049906> (last visited Oct. 17, 2013); see also Randall Stross, *Social Networks, Small and Smaller*, N.Y. TIMES (Apr. 14, 2012), <http://www.nytimes.com/2012/04/15/business/path-familyleaf-and-pair-small-by-design-social-networks.html> (reporting that the average Facebook user has 245 friends).

77. See *Sharing and Finding You on Facebook*, FACEBOOK, <http://www.facebook.com/about/privacy/your-info-on-fb> (last visited Oct. 17, 2013). Alternatively, Facebook users can choose to make their posts public, which enables anyone to view and respond to any comment or post, or they can customize who can view each post. See *What Audiences Can I Choose from when I Share?*, FACEBOOK, <http://www.facebook.com/help/459934584025324> (last visited Oct. 17, 2013).

78. See *About Twitter*, *supra* note 29.

79. See *The Twitter Glossary*, TWITTER, <http://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-twitter-support/articles/166337-the-twitter-glossary> (last visited Oct. 17, 2013).

80. See *infra* App.

Cong officer, or the image of a little Vietnamese girl running naked, screaming, her clothes burnt off by the horrible, hot blast of a napalm attack.<sup>81</sup>

Videos can trigger similar reactions. In 1991, a video depicting the beating of a man named Rodney King by police officers enflamed racial tensions and, after the acquittal of the officers, led to a week of violent riots.<sup>82</sup>

Not only do social media sites enable citizens to discuss issues among themselves more readily and in a variety of mediums, the sites enhance citizen-government dialogue. Numerous government institutions, including administrative agencies, the White House, and the State Department, maintain Facebook pages,<sup>83</sup> Twitter accounts,<sup>84</sup> and blogs<sup>85</sup> in which they actively discuss ongoing government initiatives with interested citizens. Indeed, all of the president's fifteen Cabinet agencies maintain at least one Twitter account.<sup>86</sup> And a survey conducted by the Government Accountability Office reported that, as of April 2011, twenty-three of the twenty-four federal agencies surveyed had a presence on Facebook, Twitter, and YouTube.<sup>87</sup> Another 2011 survey found that 26 percent of 3000

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81. Dan Carlin, 2004 Winner of the Elie Wiesel Foundation for Humanity Prize in Ethics Essay Contest, *Chasing Images of the Dead: The Unreality of the Iraq War in American Media 2* (2004), available at [http://eliewiesel.org/cm\\_images/uploadedimages/winnersesays/dan\\_carlin.pdf](http://eliewiesel.org/cm_images/uploadedimages/winnersesays/dan_carlin.pdf).

82. See Jennifer Medina, *Rodney King Dies at 47; Police Beating Victim Who Asked 'Can We All Get Along?'*, N.Y. TIMES (June 17, 2012), <http://www.nytimes.com/2012/06/18/us/rodney-king-whose-beating-led-to-la-riots-dead-at-47.html>.

83. See, e.g., *Facebook Page of U.S. Dep't of Agric.*, FACEBOOK, <http://www.facebook.com/#!/USDA> (last visited Oct. 17, 2013) (depicting the Facebook page for the USDA); *Facebook Page of U.S. Evtl. Prot. Agency*, FACEBOOK, <http://www.facebook.com/#!/EPA> (last visited Oct. 17, 2013) (depicting the Facebook page for the EPA); *Facebook Page of U.S. Food and Drug Admin.*, FACEBOOK, <http://www.facebook.com/#!/FDA> (last visited Oct. 17, 2013) (depicting the Facebook page for the FDA).

84. See, e.g., *Greenversations: The Official Blog of the U.S. Evtl. Prot. Agency*, TWITTER, <https://twitter.com/greenversations> (last visited Oct. 17, 2013); *U.S. Dept. of State Twitter Page*, TWITTER, <https://twitter.com/StateDept> (last visited Oct. 17, 2013).

85. See, e.g., DIPNOTE, <http://blogs.state.gov/> (last visited Oct. 17, 2013); IT'S OUR ENVIRONMENT, <http://blog.epa.gov/blog/> (last visited Oct. 17, 2013); WHITE HOUSE BLOG, <http://www.whitehouse.gov/blog/> (last visited Oct. 17, 2013).

86. KEVIN R. KOSAR, CONG. RESEARCH SERV., R42406, CONGRESSIONAL OVERSIGHT OF AGENCY PUBLIC COMMUNICATIONS 6 (2012), available at <http://www.fas.org/sgp/crs/misc/R42406.pdf>.

87. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-605, SOCIAL MEDIA: FEDERAL AGENCIES NEED POLICIES AND PROCEDURES FOR MANAGING AND PROTECTING INFORMATION THEY ACCESS

federal managers used Facebook to communicate with colleagues, 17 percent used it to communicate with the public, 8 percent used it to communicate with other agencies, 4 percent used it for recruiting purposes, and 26 percent used it for conducting research.<sup>88</sup>

Part of the government enthusiasm for new media comes from presidential initiative. On President Obama's first day in office, he issued a memorandum urging agencies to use new technologies to promote "transparency, public participation, and collaboration."<sup>89</sup> He directed: "executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public. Executive departments and agencies should also solicit public feedback to identify information of greatest use to the public."<sup>90</sup> The Office of Management and Budget then issued the "Open Government Directive," which required executive departments and agencies to make government information available online in a format that citizens can find through web search applications,<sup>91</sup> as well as guidance documents to help agencies use social media.<sup>92</sup> These developments will likely contribute to further growth in government activity on social media.

The high level of government involvement online does not necessarily mean that government actors monitor all public social media communications. It would likely be physically impossible for any single organization to read every tweet or Facebook post. Even if it was technically possible, it would be an enormously inefficient use of resources as persons would need to spend countless hours

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AND DISSEMINATE 4-5 (2011).

88. William Matthews, *Facebook-Using Federal Managers "Surge," Survey Finds*, GOV'T EXEC. (Mar. 29, 2011), <http://www.govexec.com/dailyfed/0311/032911wm1.htm>.

89. Memorandum on Transparency and Open Government, 74 Fed. Reg. 15, 4685 (Jan. 21, 2009).

90. *Id.*

91. See Memorandum from Peter R. Orszag, Director, Office of Management and Budget, to the Heads of Executive Departments and Agencies, Open Government Directive 2 (Dec. 8, 2009), available at [http://www.whitehouse.gov/omb/assets/memoranda\\_2010/m10-06.pdf](http://www.whitehouse.gov/omb/assets/memoranda_2010/m10-06.pdf).

92. See Memorandum from Cass R. Sunstein, Administrator, Office of Management and Budget, to the Heads of Executive Departments and Agencies and Independent Regulatory Agencies, Social Media, Web-Based Interactive Technologies, and the Paperwork Reduction Act (Apr. 7, 2010), available at [http://www.whitehouse.gov/sites/default/files/omb/assets/infocore/SocialMedia\\_Guidance\\_04072010.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/infocore/SocialMedia_Guidance_04072010.pdf).

reviewing social media communications only to reap few rewards in terms of new ideas or information.<sup>93</sup>

Nonetheless, when a debate involving a government position or policy starts to spread virally around the Internet, it would be difficult for the government and relevant industries not to notice. Much of the communication on social media sites is accessible to the general public.<sup>94</sup> Additionally, with many comments in writing in a permanently retrievable form,<sup>95</sup> the number of individuals who publicly “like,” comment on, or “tweet” about a particular issue that is spreading virally is readily determinable through search engines.<sup>96</sup>

These numbers reveal useful information about individuals’ private interests. For instance, the Facebook page “Stop Bullying: Speak Up,” which “seeks to raise awareness of the simple, yet powerful actions that parents, kids, and educators can take to prevent bullying,” garnered 2,236,796 likes by October 30, 2013.<sup>97</sup> In contrast, the United States government’s Facebook page entitled “Health Care Reform” received only 42,040 likes by the same date.<sup>98</sup> Given that the government’s page was twenty-six months older than the bullying page, the discrepancy between the number of likes could be interpreted as suggesting differences in citizen preferences

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93. Cf. Jim Rossi, *Participation Run Amok, The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 NW. U. L. REV. 173, 178 (1997) (“A threshold amount of participation is necessary to deliberative decisions, but at some point participation creates significant institutional costs for deliberative administrative process.”).

94. For instance, unless a Twitter user affirmatively chooses to make her tweets available only to pre-approved followers, Twitter will enable anyone to view the tweets. See *About Public and Protected Tweets*, TWITTER, <http://support.twitter.com/articles/14016-about-public-and-protected-tweets> (last visited Oct. 17, 2013). Interested persons can search for tweets of interest via Twitter’s search engine. See *What’s Happening Right Now*, TWITTER, <http://search.twitter.com/> (last visited Oct. 17, 2013).

95. For instance, the Library of Congress archives all public tweets. *Tweet Preservation*, TWITTER BLOG (Apr. 14, 2010), <http://blog.Twitter.com/2010/04/tweet-preservation.html> (announcing agreement with Library of Congress).

96. For instance, tweets are also readily retrievable through search engines provided by Twitter and third parties. See *See What’s Happening Right Now*, *supra* note 94 (Twitter’s search engine); *Social Search*, TOPSY, <http://topsy.com/> (last visited Oct. 17, 2013) (publicly accessible search engine powered by the largest searchable index of Twitter data).

97. *Stop Bullying: Speak Up*, FACEBOOK, <http://www.facebook.com/stopbullyingspeakup> (last visited Oct. 17, 2013).

98. *Health Care Reform*, FACEBOOK, <http://www.facebook.com/HealthReform> (last visited Oct. 17, 2013).

that may merit further investigation.<sup>99</sup> Thus, through the interactions on social media sites, government actors can learn about public concerns and interests, and engage in better dialogue with the public.

Social media sites thus provide a means for citizens to deliberate on an unlimited range of policy issues among themselves and with government actors. Through these forums, information relevant to government policy making can come to light when a debate spreads virally. The debates prompt government actors and special interest groups to better understand public concerns and address them.

## 2. *Universalism*

The second commitment of republican theories, universalism, intertwines closely with deliberation, but it focuses more on the end product of deliberation: the belief that through deliberation, general agreement about the common good can sometimes be achieved.<sup>100</sup> The republican belief in universalism explains why government actors today continue to select and pronounce values to support, such as environmental protection and anti-discrimination.<sup>101</sup>

Social media constitute effective tools for furthering the republican commitment to universalism, as the pink slime story illustrates. The government's role in the story started in 2001 when the Food and Drug Administration (FDA) and the USDA approved the process for making ammonia-treated Lean Finely Textured Beef (LFTB).<sup>102</sup> Fast food chains like McDonald's, Burger King, and Taco Bell; supermarket chains like Safeway, Kroger, and Food Lion; and elementary schools across the nation all added the cheap meat filler to their beef products.<sup>103</sup> In 2011 and 2012, however, the tide of

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99. To a large degree, this example is overly simplistic. For instance, the bullying page may appeal to persons in other countries, which explains its large number of "likes." However, the example shows how readily statistics can be found and compared.

100. See Sunstein, *supra* note 14, at 1554.

101. See *id.* at 1555.

102. See Andrews, *supra* note 2; see also Letter from Philip S. Derfler, Deputy Adm'r, Office of Policy, Program Dev. & Evaluation, U.S. Dep't. of Agric. to Dennis R. Johnson, Olsson, Frank & Weeda, P.C. (May 11, 2001), available at [http://www.pulitzer.org/files/works\\_images/meatindustrydocs.pdf](http://www.pulitzer.org/files/works_images/meatindustrydocs.pdf).

103. See JOEL L. GREENE, CONG. RESEARCH SERV., R42473, LEAN FINELY TEXTURED BEEF: THE "PINK SLIME" CONTROVERSY 5-7 (2012), available at <http://www.fas.org/sgp/crs/misc/R42473.pdf>.

public opinion turned rapidly against the product that had been notoriously dubbed “pink slime.”<sup>104</sup> After news reports and other media highlighted a few controversial aspects of the product,<sup>105</sup> anti-pink slime sentiments spread like wildfire across popular social media sites, including Facebook, Twitter, and blogs.<sup>106</sup>

One blogger in particular played a key role in feeding the anti-slime fire. On March 6, 2012, Bettina Elias Siegel, a mother concerned about the quality of food being served in schools, started a petition on Change.org calling for the cessation of pink slime in school food.<sup>107</sup> The petition soon garnered the support of over 258,000 people.<sup>108</sup>

Less than two weeks after Siegel started her petition, the government began to rethink its approach towards LFTB. By March 14, 2012, forty-one members of Congress signed a letter asking the USDA to disallow the use of LFTB in school lunches.<sup>109</sup> Just one day later, the USDA announced it would provide more options to schools and allow them to make an informed choice as to whether to continue their use of LFTB.<sup>110</sup> After approximately two more weeks,

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104. See Andrews, *supra* note 2.

105. The reports revealed that the products were being labeled “100% ground beef” even though they contained significant amounts of LFTB. For instance, public schools added up to 15 percent LFTB to the meat served in school lunches, and some reports suggested that pink slime was present in 70 percent of the ground beef sold in nationwide grocery stores. See *id.* But the properties of LFTB are notably different than ground beef. Unlike pure beef, LFTB contains ammonium hydroxide, essentially ammonia and water, which sometimes gives off strong ammonia odors and has a pH as high as 9.5 whereas beef has a pH of around 6. There were also reported incidents of *E. coli* and salmonella contamination involving LFTB. See *id.*

106. Although there were only negligible references to “pink slime” in 2011, hundreds of thousands of tweets and Facebook posts about pink slime were sent in February and March of 2012. Particularly, communications over social media in reference to “pink slime” surged in February 2012, and they peaked in March 2012. According to Topsy.com, a Twitter tracking site, as of July 2, 2012, over 150,000 tweets contained a reference to “pink slime,” and over 4000 referenced the acronym, LFTB. Search Tweets, TOPSY, <http://www.topsy.com/s/pink+slime/tweet?window=a> (last visited June 1, 2013), (showing 154,524 tweets for search “Pink Slime”); *id.* at <http://www.topsy.com/s/LFTB/tweet?window=a> (last visited June 1, 2013) (showing 4863 tweets for search of “LFTB”). Even as the hysteria has died down, over one hundred new tweets about LFTB are being generated on an average basis each single day.

107. See Armour, *supra* note 3.

108. Bettina Siegel, *Tell USDA to STOP Using Pink Slime in School Food*, CHANGE.ORG, <http://www.change.org/petitions/tell-usda-to-stop-using-pink-slime-in-school-food> (last visited Oct. 17, 2013).

109. See Andrews, *supra* note 2.

110. See News Release, U.S. Dep’t of Agric., USDA Announces Additional Choices for Beef Products in the Upcoming School Year (Mar. 15, 2012), available at <http://www.usda.gov/>

the USDA agreed to allow clearer labeling for meat products, so consumers would know whether the beef they consumed contained LFTB.<sup>111</sup>

As the government responded to the controversy, the meat industry did as well. Most of the major grocery chains, including Kroger and Giant, announced they would no longer sell LFTB.<sup>112</sup> Other chains, such as Whole Foods and Costco, informed customers that they did not carry products with LFTB.<sup>113</sup> Yet others, like Walmart and Hy-Vee, decided to offer their customers a choice of products with and without LFTB.<sup>114</sup> The decreased demand for LFTB forced the largest producer of LFTB, BPI, to close down three of its four plants and prompted AFA Foods, a Pennsylvania ground beef processor, to file for bankruptcy.<sup>115</sup>

Whether one views the pink slime story as one of an ill-informed public meddling with science-based decisions<sup>116</sup> or as a story of David, an individual consumer, bringing down a Goliath-sized industry, the meat industry,<sup>117</sup> the story has an important lesson: individuals can use social media sites to work toward a perceived common good. Siegel was not a member of the food industry; she was a concerned mother. If all she cared about was her own children, she could have sent them to school each day with home-made peanut butter and jelly sandwiches for lunch. Her petition attracted hundreds of thousands of signatures because she appealed to a general principle that others valued: protecting the welfare of the nation's children. Similar appeals to public values through social media sites have prompted hundreds of thousands of individuals to

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wps/portal/usda/usdahome?contentid=2012/03/0094.xml&navid=NEWS\_RELEASE&navtype=RT&parentnav=LATEST\_RELEASES&edeployment\_action=retrievecontent.

111. See GREENE, *supra* note 103, at 9.

112. *See id.* at 7.

113. *See id.*

114. *See id.* at 7-8.

115. *See id.*

116. *See id.* at 1 (“The meat industry saw media sensationalism as a campaign of misinformation to undermine a product used for more than ten years to supplement lean beef supplies used in ground beef.”).

117. The analogy to David and Goliath refers to a biblical story involving a battle between the Israelites and the Philistines. 1 *Samuel* 17. In the story, the Israelites are afraid of Goliath, a giant Philistine. David, an Israelite youth, confronts and kills Goliath by hitting him in the center of his forehead with a stone shot from his slingshot. *Id.* The story is often used to symbolize triumph by an underdog.

sign up to become organ donors,<sup>118</sup> to support an array of nonprofit organizations,<sup>119</sup> to donate over \$700,000 for a bus monitor who was bullied by seventh-grade boys,<sup>120</sup> to quickly raise concern about the atrocities committed by a Ugandan rebel leader,<sup>121</sup> and to even help take down a powerful dictator in Egypt.<sup>122</sup> Social media communications have further enabled millions to pressure Congress to put aside bills that might censor Internet sites<sup>123</sup> and to pressure the Susan B. Komen Foundation to abandon its plan to eliminate funding for Planned Parenthood.<sup>124</sup>

Interestingly, the universalism goal of republican theories closely resembles the stated aspirations of certain social media sites. For instance:

[Twitter states that it] lends itself to cause and action. Every day, we are inspired by stories of people using Twitter to help make the world a better place in unexpected ways....

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118. See, e.g., Mike Stobbe, *Facebook Organ Donor Initiative Prompts 100,000 Users To Select New Option*, HUFFINGTON POST (May 2, 2012, 5:57 PM), [http://www.huffingtonpost.com/2012/05/02/facebook-organ-donor-users\\_n\\_1471821.html](http://www.huffingtonpost.com/2012/05/02/facebook-organ-donor-users_n_1471821.html).

119. See Brad Stone, *Clicking for a Cause*, N.Y. TIMES (Nov. 12, 2009), <http://www.nytimes.com/2009/11/12/giving/12FACE.html>.

120. See Indiegogo, *Lets Give Karen-The bus monitor-H Klein A Vacation!*, <http://www.indiegogo.com/projects/lets-give-karen-the-bus-monitor-h-klein-a-vacation--6> (indicating that as of June 1, 2013, the site had raised \$703,168 for the bullied bus monitor, even though it had a stated goal of raising only \$5000); *Strangers Pitch in to Help Bullied Bus Monitor*, S.F. CHRON. (June 22, 2012), <http://www.sfgate.com/nation/article/Strangers-pitch-in-to-help-bullied-bus-monitor-3657160.php>.

121. See Josh Kron & J. David Goodman, *Online, a Distant Conflict Soars to Topic No. 1*, N.Y. TIMES (Mar. 8, 2012), <http://www.nytimes.com/2012/03/09/world/africa/online-joseph-kony-and-a-ugandan-conflict-soar-to-topic-no-1.html>.

122. See Sharon Gaudin, *Social Networks Credited with Role in Toppling Egypt's Mubarak*, COMPUTERWORLD (Feb. 11, 2011), [http://www.computerworld.com/s/article/9209159/Social\\_networks\\_credited\\_with\\_role\\_in\\_toppling\\_Egypt\\_s\\_Mubarak](http://www.computerworld.com/s/article/9209159/Social_networks_credited_with_role_in_toppling_Egypt_s_Mubarak).

123. See, e.g., Julianne Pepitone, *SOPA and PIPA Postponed Indefinitely After Protests*, CNN MONEY (Jan. 20, 2012 7:54 PM), [http://money.cnn.com/2012/01/20/technology/SOPA\\_PIPA\\_postponed/index.htm](http://money.cnn.com/2012/01/20/technology/SOPA_PIPA_postponed/index.htm) (“Google ... drew more than 7 million signatures for an anti-SOPA and PIPA petition that it linked on its highly trafficked homepage.”).

124. See Jamie Stengle, *Susan G. Komen Execs Resign*, HUFFINGTON POST (Mar. 22, 2012, 8:30 PM), [http://www.huffingtonpost.com/2012/03/22/susan-g-komen-execs-resign-planned-parenthood\\_n\\_1373891.html](http://www.huffingtonpost.com/2012/03/22/susan-g-komen-execs-resign-planned-parenthood_n_1373891.html).

As more community-centric organizations join the platform, citizens will increasingly engage with the efforts taking place to move their community forward.<sup>125</sup>

According to Twitter, tweets have helped “make the world a better place in unexpected ways” by heating a dorm room, promoting public health, saving a dog’s life, and even opening African courts to direct communication with the public.<sup>126</sup> Twitter’s assertions that it is helping “make the world a better place” and enabling citizens to “move their community forward” embody two tenets of universalism. They imply, first, that Twitter is a forum for citizens to pursue the public good and, second, that some values are more important to the world and communities than others.

Despite the universalism aspirations and achievements of certain social media sites, it is important to recognize that social media sites do not in and of themselves promote universalism. The sites can lead to the sharing of negative ideas just as well as positive ones.<sup>127</sup> Individuals have used the sites to share child pornography, fuel terrorism activities, and bully others.<sup>128</sup> Nonetheless, because citizens can use social media sites as *mechanisms* for promoting universalism, the sites provide value to our political system. Additionally, the negative messages that are shared via social media sites can stimulate dialogue and discussion of appropriate behavior and shared values.

This is precisely what happened when the Public Relations Department of ASUSTEK Computer, Inc. (ASUS) posted a public tweet that included a photograph of a woman, taken from behind, with reference to a nice looking rear.<sup>129</sup> This tweet was widely

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125. *About Twitter*, *supra* note 29.

126. *Stories*, TWITTER, <http://stories.twitter.com> (last visited Oct. 17, 2013). Facebook has similarly attempted to facilitate efforts to further social values by promoting organ donation and non-profit activities on its site. *See, e.g., Share Your Organ Donor Status*, FACEBOOK, <http://www.facebook.com/help/organ-donation> (last visited Oct. 17, 2013).

127. *See* Sarah Joseph, *Social Media, Political Change, and Human Rights*, 35 B.C. INT’L & COMP. L. REV. 145, 173 (2012) (“Social media can also spread bad ideas and content just as it can spread good ideas and content.”).

128. *See id.* at 151, 173.

129. *See* Bianca Bosker, *ASUS’ ‘Rear’ Tweet Puts Sexism Front and Center*, HUFFINGTON POST (June 4, 2012), [http://www.huffingtonpost.com/2012/06/04/asus-rear-tweet\\_n\\_1567696.html](http://www.huffingtonpost.com/2012/06/04/asus-rear-tweet_n_1567696.html) (discussing how one Twitter user responded, “so the official @Asus account wins the award for ‘most misogynistic PR tweet of 2012’” and stating, “The blatant ogling of her

condemned on social media sites as offensive to women. ASUS subsequently deleted the tweet from its site, issued an apology on Twitter for its “inappropriate comment,” and committed to not repeat its mistake again.<sup>130</sup> But the incident has brought the male-dominated technology industry into the spotlight and raised awareness of the importance of promoting gender equality in the industry.<sup>131</sup> The widespread denouncement of the ASUS tweet, thus, exemplifies how social media users may use offensive communications as teaching moments to promote universalism.

In summary, social media constitutes a tool for promoting universalism. Through social media sites, citizens have engaged in the pursuit of what they see as the common good, even when they have little private interest at stake in the issues, and have contributed to monumental changes in government and corporate policies.

### 3. *Political Equality*

The third principle of republican theories is political equality. To some republican theorists, the commitment to political equality required direct public participation in the political processes. To others, like James Madison, political equality could be achieved by having government representatives who were “derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it.”<sup>132</sup> The basic thrust of the commitment to political equality was that government should not be controlled by elite individuals and interest groups.<sup>133</sup> Instead, all individuals and

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appearance in the reference to her rear sounds like a dirty joke that would be shouted between boys over beers at a bar, a seemingly odd choice for a professional company that presumably hopes to attract women, as well as men, to its products”).

130. *See id.*

131. *See* Claudine Zap, *Asus Tweet Stirs Controversy*, YAHOO! FIN. (June 5, 2012), <http://finance.yahoo.com/news/asus-tweet-stirs-controversy.html>.

132. THE FEDERALIST NO. 39, *supra* note 36, at 241 (James Madison).

133. Many, but not all, republicans carried political equality a step farther and viewed economic equality as also fundamental to sound politics. *See* Sunstein, *supra* note 14, at 1553 (“Some of the American antifederalists emphasized the threats of commercialism and argued in favor of material equality.”); *see also* THE COMPLETE ANTI-FEDERALIST 16 (Herbert Storing ed., 1985) (“[R]epublican, or free government, can only exist where ... property is pretty equally divided[;] in such a government the people are the sovereign and their sense or opinion is the criterion of every public measure; for when this ceases to be the case, the nature of the government is changed, and an aristocracy, monarchy or despotism will rise on its

groups should have the ability to influence the political processes.<sup>134</sup> A fundamental premise behind the republican commitment to political equality is that viewpoint diversity is good. In recent years this premise has been considered essential to our democracy.<sup>135</sup>

It would likely be difficult to think of a forum more conducive to political equality than a social media site. American adults of any race, age, gender, economic status, diet, sexual preference, religion, or other defining characteristic can influence the political processes by contributing their input on social media sites to an issue that goes viral. A primary reason that social media sites encompass such diverse segments of the population is that social media sites have few entry costs; membership and use of most services are free.<sup>136</sup> Additionally, popular social media sites impose few restrictions on eligibility. For instance, although Facebook started out as a network for college students in February 2004,<sup>137</sup> since September 2006 any person over the age of thirteen who is not a convicted sex offender and has access to a computer may create a Facebook account.<sup>138</sup>

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ruin.”); 3 JOHN TRENCHARD, CATO’S LETTERS 139 (Liberty Fund 1995) (Berwick 1754) (“An Equality of Estate will give an Equality of Power; and an Equality of Power is a Commonwealth, or Democracy.”).

134. See Sunstein, *supra* note 14, at 1552.

135. See SUNSTEIN, *supra* note 18, at xi (“In a democracy, people do not live in echo chambers or information cocoons. They see and hear a wide range of topics and ideas. They do so even if they did not, and would not, choose to see and to hear those topics and those ideas in advance.”).

136. See Joseph, *supra* note 127, at 149 (“One common characteristic among social media sites is that they tend to be free and are therefore widely accessible across socioeconomic classes. Anyone can create a Facebook or Twitter account, upload a YouTube video, or write a WordPress blog without cost. Of course, access to social media depends upon access to the Internet, which is ubiquitous in the West but less available in the developing world.”).

137. See *Timeline*, FACEBOOK, <http://newsroom.fb.com/timeline> (last visited Oct. 17, 2013) (depicting the timeline of Facebook’s development).

138. *Statement of Rights and Responsibilities*, FACEBOOK, <http://www.facebook.com/legal/terms> (last modified Dec. 11, 2012) (prohibiting persons under the age of thirteen and convicted sex offenders from using Facebook). Facebook requires registrants to provide their age when they create their accounts. See *Why do I need to provide my birthdate?*, FACEBOOK, <http://m.facebook.com/birthday-help.php> (last visited Oct. 17, 2013) (“Facebook requires all users to provide their real date of birth to encourage authenticity and provide only age-appropriate access to content.”). But there does not appear to be a policing mechanism to prevent persons from creating accounts using fictitious information. Even Zuckerberg’s own dog has a Facebook account. See *Facebook Page of Beast the Dog*, FACEBOOK, <http://www.facebook.com/beast.the.dog> (last visited Oct. 17, 2013) (depicting Facebook page for Beast, Zuckerberg’s dog).

As a result of low barriers to entry, a diverse and rapidly growing segment of the U.S. population takes advantage of social media sites. Whereas a 2011 survey indicated 43 percent of American adults had a Facebook page,<sup>139</sup> a 2012 survey reports that a whopping 56 percent of the adult population now have a page and that over one-third of its users access Facebook at least once a day.<sup>140</sup> Additionally, as the chart below depicting the results of a 2011 survey shows, adult users of Facebook are not limited to specific age groups, sexes, or economic classes.<sup>141</sup> Although certain groups like younger adults tend to be more involved in social media sites than others, the sites have attracted robust numbers of all groups.<sup>142</sup> For instance, 17 percent of adults aged 65+ using Facebook in 2011, the lowest statistic reported, correlates to well over six million seniors on Facebook.<sup>143</sup> Given that the older population is projected to double by 2030,<sup>144</sup> and that the large percentage of adults in the fifty to sixty-four age range who currently use social media sites—33 percent—will next constitute the older population, the number of older adults using social media sites in the next couple of decades will likely grow in rapid clips.

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139. *See infra* Figure 1.

140. GFK ROPER PUB. AFFAIRS & CORP. COMM'NS, *supra* note 19.

141. Lymari Morales, *Google and Facebook Users Skew Young, Affluent, and Educated*, GALLUP (Feb. 17, 2011), <http://www.gallup.com/poll/146159/facebook-google-users-skew-young-affluent-educated.aspx>.

142. *Id.*

143. This is a highly conservative estimate based on the population of persons over the age of 65 in 2003. *See* WAN HE ET AL., 65+ IN THE UNITED STATES: 2005, at 6 (2005), *available at* <http://www.census.gov/prod/2006pubs/p23-209.pdf>.

144. *Id.*

Figure 1<sup>145</sup>

*Self-Reported Usage of Google and Facebook*  
By demographic group

	Yes, use Google in a typical week %	Yes, have a Facebook page %
National adults	60	43
Aged 18 to 29	83	73
Aged 30 to 49	69	55
Aged 50 to 64	54	33
Aged 65+	34	17
\$90,000+ annual income	85	55
Less than \$90,000 annual income	56	41
Postgraduates	87	53
College grads	85	58
Some college	66	51
High school or less	35	28
Men	63	42
Women	56	45

USA Today/Gallup poll, Jan. 28-30, 2011  
GALLUP

The diversity of social media users contrasts with the homogeneity of political representatives in government. Congress, which was specifically designed to represent the people, tends to be homogeneous in terms of gender, race, age, and socio-economic factors.<sup>146</sup> Government forums for public participation also tend to draw from a concentrated pool. With conventional rule making, participants tend to be major stakeholders rather than concerned citizens.<sup>147</sup> Studies of electronic rule making indicate that the availability of

145. See Morales, *supra* note 141.

146. For instance, although merely 7 percent more men than women reported using Google, *see id.*, about 66 percent more men than women served in the 111th Congress and even that was a record achievement for women. JENNIFER E. MANNING, CONG. RESEARCH SERV., R40084, MEMBERSHIP OF THE 111TH CONGRESS: A PROFILE at 5 (2010), available at <http://www.fas.org/sgp/crs/misc/R40086.pdf>.

147. See CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 183-191 (2d ed. 1999); Cary Coglianese, *Citizen Participation in Rulemaking: Past, Present, and Future*, 55 DUKE L.J. 943, 949-52 (2006).

online commenting has not changed the situation much thus far.<sup>148</sup> Social media sites cannot supplant rulemaking mechanisms or elected officials. They complement the nation's governmental institutions, however, by serving as forums for diverse members of the public to express their views.

In summary, social media sites provide low-cost opportunities for adults of all interests, races, genders, ages, and economic classes to express diverse viewpoints that can be heard by and influence policymakers. Although the sites are not perfectly diverse, they create mechanisms for the republican commitment to political equality to be better realized.

#### 4. *Citizenship*

*The periods of creation or renewal [of civilization] occur when [people] for various reasons are led into a closer relationship with each other, when reunions and assemblies are most frequent, relationships better maintained and the exchange of ideas most active.*<sup>149</sup>

Citizenship represents the final central commitment of republican theories.<sup>150</sup> Republicans viewed political participation as a means of limiting the risks of factionalism and self-interested representation while instilling values of empathy, virtue, and feelings of community among citizens.<sup>151</sup> Republicans considered the size of the republic as a critical component of citizenship.<sup>152</sup> They saw larger populations as tending to decrease opportunities for public participation as well as the connection between the rulers and the ruled parties. The small town meeting epitomized the republicans' ideal model for governance.<sup>153</sup> At a town meeting, virtuous citizens, guided by their education and morality, could put aside their private

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148. See Benjamin, *supra* note 18, at 933.

149. EMILE DURKHEIM, *SOCIOLOGY & PHILOSOPHY* 91 (1953).

150. See Sunstein, *supra* note 14, at 1555-56.

151. Contemporary scholars continue to value public participation for these reasons. See, e.g., JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP* 25-26 (1991).

152. See Pope, *supra* note 15, at 298 ("Classical republicanism assumed a polity small enough for the entire citizenry to engage in face-to-face political discussion.").

153. See *THE COMPLETE ANTI-FEDERALIST*, *supra* note 133, at 67-69.

interests and preferences to collaboratively discover the best solutions to social issues through practical reason.<sup>154</sup>

It is commonly assumed that the republican model of small communities deliberating on political issues is “impossible on the national level” as “[o]bviously, the United States is too large for a general assembly of the whole people.”<sup>155</sup> But had the social media age predated the American Revolution, the republicans may very well have decided that the social media age satisfies the republican commitment to citizenship. Despite the fact that millions of persons access social media on a daily basis, the sites help inculcate the very values of empathy, virtue, and feelings of membership in a small community that republican theorists prized in small town meetings.<sup>156</sup>

Persons connected to each other through Facebook are called “Friends.” Merriam-Webster’s Collegiate Dictionary defines a friend as a person who is “attached to another by affection or esteem” or is a “favored companion.”<sup>157</sup> Although naming conventions are often arbitrary, research suggests that persons connected through social media sites truly act like friends or members of a small community. Individuals share recent stories, pictures of pets, personal goals, and other information that strengthens relationships among users.<sup>158</sup> They also trust and value the opinions of members of their social media communities.<sup>159</sup> For instance, Sam Altman, the co-founder of the social media site Loopt, has reported that Loopt’s users “are 20

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154. See Sunstein, *supra* note 13, at 31-32.

155. Pope, *supra* note 15, at 298.

156. The authors of a study performed in 2001 concluded that use of the Internet for information exchange fosters civic engagement, trust, and life contentment more than use of traditional print and broadcast news media, but social recreation on the Internet negatively correlates with trust and life contentment. Dhavan V. Shah et al., “Connecting” and “Disconnecting” With Civic Life: Patterns of Internet Use and the Production of Social Capital, 18 POL. COMM. 141, 154-55 (2001). However, this study predated the launches of Friendster in 2003, LinkedIn in 2003, Myspace in 2004, Flickr in 2004, Twitter in 2006 and the opening of Facebook to the public in 2006. See *Social Media Timeline 2000-2009*, TIMERIME, <http://timerime.com/en/timeline/218543/Social+Media+Timeline+2000-2009/> (last visited Oct. 17, 2013). The rise of the social media age has led to a surge in optimism about digital democracy. See *generally* SOCIAL MEDIA AND DEMOCRACY: INNOVATIONS IN PARTICIPATORY POLITICS (Brian D. Loader & Dan Mercea eds., 2012).

157. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 501 (11th ed. 2004).

158. See, e.g., *infra* note 195.

159. Cf. Jenna Wortham, *Search Takes a Social Turn*, N.Y. TIMES (Sept. 10, 2010), [http://www.nytimes.com/2010/09/13/technology/13search.html?\\_r=2&ref=todayspaper](http://www.nytimes.com/2010/09/13/technology/13search.html?_r=2&ref=todayspaper).

times more likely to click on a place their friends had liked or visited than a place that simply ranked higher in search results.”<sup>160</sup> And a survey of over 25,000 consumers from 50 countries indicated that consumers trust recommendations from people they know more than any other form of advertising.<sup>161</sup>

Beyond fostering feelings of community, new technologies lower the opportunity costs of citizenship. Individuals do not need to miss work to be engaged citizens but can participate in discussion and debate at a time that is most convenient for them. Citizens can chime in from home, work, or anywhere they take their portable and increasingly affordable devices, like laptops, iPhones, or other cellphones.<sup>162</sup>

This online citizenship has not hindered offline citizenship. To the contrary, participation on social media sites appears to correlate with more civic-minded behavior offline. As Ben Rattray, the founder of Change.org, has explained: “The best way to get people away from their computer is through the computer; you can’t organize thousands of people in New York City [the way Occupy Wall Street has] without the web.”<sup>163</sup> A 2012 study found that people who actively use social media websites volunteered or participated in community organizations in greater numbers than those who

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160. *Id.*

161. *Global Advertising Consumers Trust Real Friends and Virtual Strangers the Most*, NIELSEN (July 7, 2009), <http://www.nielsen.com/us/en/newswire/2009/global-advertising-consumers-trust-real-friends-and-virtual-strangers-the-most.html>.

162. See Jacob Livingston, *Mixed Messages: Educators Blame Students’ Errors on Texting Lingo*, SPOKESMAN-REV. (Nov. 15, 2009), <http://www.spokesman.com/stories/2009/nov/15/mixed-messages/> (noting that “the percentage of the U.S. population who are always connected has skyrocketed” and reporting on a Nielsen survey that showed “77 percent of teenagers have their own mobile phones and more than 80 percent of those teens use text messaging,” and that “[d]uring the first quarter of 2009, American teens sent or received an average of 2,899 text messages per month - an increase of 566 percent in just over two years”); John Timpane, *Years of Change for Web, World*, PHILA. INQUIRER (Dec. 28, 2010), [http://www.articles.philly.com/2010-12-28/news/26356104\\_1\\_social-media-sree-sreenivasan-web](http://www.articles.philly.com/2010-12-28/news/26356104_1_social-media-sree-sreenivasan-web) (quoting Lee Rainie, director of the Pew Research Center’s Internet and American Life Project, in reporting that “today about 57 percent of adults are mobilely connected with smart phones and other devices to the Internet” and “[i]ncreasingly, social media such as Facebook and Twitter are mobile, not deskbound” so that “[m]obile phoners do almost anything you can do on a desktop: e-mail, Web surf, upload content, download podcasts”); cf. Bellin, *supra* note 18, at 352.

163. Craig Kanalley, *Occupy Wall Street: Social Media’s Role in Social Change*, HUFFINGTONPOST (Oct. 6, 2011, 8:58 PM), [http://www.huffingtonpost.com/2011/10/06/occupy-wall-street-social-media\\_n\\_999178.html](http://www.huffingtonpost.com/2011/10/06/occupy-wall-street-social-media_n_999178.html).

were not social media users.<sup>164</sup> A separate study conducted in 2011 determined that Internet users in general were more likely than those who did not utilize the Internet to belong to and participate in some sort of community group, such as a church group, political group, sports league, or charitable organization.<sup>165</sup> These studies undermine assertions by some Internet critics that activism online leads to “slacktivism.”<sup>166</sup>

In summary, from the very beginning of our nation, republican theorists have viewed civic participation in national governance as a public good—one that should be cherished and held sacred. Social media now amplifies the ability of adult citizens of any age, race, economic class, and gender to deliberate on policy issues among their social media communities and work towards a perceived common good. By doing so, they create opportunities for republican moments to arise more frequently and temporarily alleviate the concern of public choice theory that government actors primarily cater to lobbyists.<sup>167</sup>

### *B. The New Politics-As-Usual*

In addition to increasing the ease with which a republican moment may arise, the extraordinary popularity of social media sites has the potential to upgrade the relationships between

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164. Allstate/Nat'l Journal, Heartland Monitor Poll XIII, NATIONAL JOURNAL 14 Fig. 20 (2012), <http://syndication.nationaljournal.com/communications/Allstate%20National%20Journal%20Heartland%20Monitor%20XIII%20TOPLINE.pdf>.

165. Lee Rainie et al., *The Social Side of the Internet*, PEW RESEARCH CENTER'S INTERNET & AMERICAN LIFE PROJECT 23 (Jan. 18, 2011), [http://www.pewinternet.org/~media/Files/Reports/2011/PIP\\_Social\\_Side\\_of\\_the\\_Internet.pdf](http://www.pewinternet.org/~media/Files/Reports/2011/PIP_Social_Side_of_the_Internet.pdf).

166. “Slacktivism” is a pejorative term suggesting that individuals who use low-cost means to express their support for an issue, such as Internet platforms, will not make the effort to take substantive actions to further that issue. See Perry Chiaramonte, *Slacktivism: Changing the World With 'Likes', Clicks and Tweets?*, FOXNEWS.COM (Apr. 13, 2012), <http://www.foxnews.com/tech/2012/04/13/slacktivism-changing-world-with-likes-clicks-and-tweets/>; see also MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 62-65 (1965) (cautioning that a lack of face time lowers accountability among members of a community).

167. While there is evidence that citizen-centered reforms are on the rise—such as the passage of historical health care reforms, patent reforms, and education reforms in recent years—it is too early to empirically examine whether republican moments have increased in frequency. This will be an inquiry best made a few decades into the future when scholars have the benefit of hindsight and can perform a detailed empirical study of the influence of social media communications on government and corporate reforms.

government actors, special interest groups, and citizens. Specifically, as the cost of dialogue among these parties decreases and the potential frequency of social uprisings increases, social media create more incentives for government actors and special interest groups to engage and educate citizens about relevant issues than in prior times. Whereas Pope viewed republican moments as a temporary respite from politics-as-usual, I argue that the social media age may permanently enhance the basic form of politics, as depicted in Figures 2 and 3.

Figure 2 (Pope)<sup>168</sup>

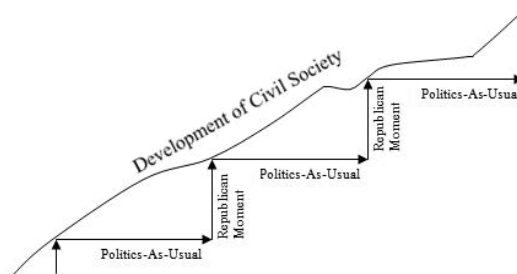


Figure 2 shows Pope's interpretation of the effect of republican moments on the development of civil society.<sup>169</sup> As depicted on the figure, civil society develops as a consequence of republican moments. Politics-as-usual, the periods between republican moments, do not contribute to the development of civil society.

168. Pope, *supra* note 15, at 319 n.134.

169. Pope did not define civil society. For the purpose of this Article, I presume that a civil society is one that fulfills the republican vision of having citizens, guided by civic virtue and education, actively engaged in politics.

Figure 3 (Tran)

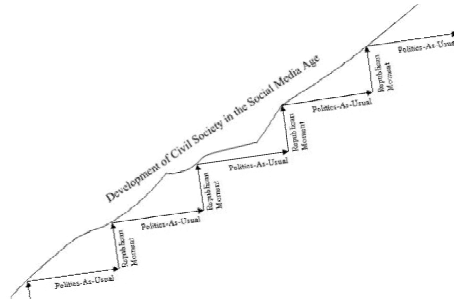


Figure 3 shows my assessment of the impact new social media communications can have on the development of civil society. The politics-as-usual lines are no longer horizontal but tilt upwards slightly to indicate that politics-as-usual can now contribute to the development of civil society. Additionally, the politics-as-usual lines are shorter, reflecting my argument in Part II.A that republican moments can increase in frequency. As a net result of the increase in republican moments and incline of politics-as-usual between republican moments, civil society can develop faster as indicated by the steeper incline of the “Development of Civil Society” line in Figure 3 than in Figure 2.

The social media age motivates government actors and special interest groups to spend more of their precious resources learning about consumer preferences and educating the public because it is increasingly in their best interests to do so. First, as consumers shift from traditional print and television media towards social media for news gathering and entertainment purposes,<sup>170</sup> the costs of sharing and receiving information decrease. Thus, an oil and gas company can put videos on YouTube that demonstrate how it performs fracking to over 290,000 viewers<sup>171</sup> and the EPA can issue tweets to

170. See, e.g., Kenny Olmstead et al., *Digital: News Gains Audience But Loses Ground in Chase for Revenue*, THE STATE OF THE NEWS MEDIA 2012, <http://stateofthemediamedia.org/2012/digital-news-gains-audience-but-loses-more-ground-in-chase-for-revenue> (last visited Oct. 17, 2013) (discussing the losses in revenue that news media outlets are struggling to overcome as a result of social media’s proliferation as a news source).

171. See, e.g., MarathonOilCorp, *Animation of Hydraulic Fracturing (Fracking)*, YOUTUBE (April 26, 2012), <http://www.youtube.com/watch?v=VY34PQUiwOQ> (displaying how hydraulic fracturing is performed). As of October 17, 2013, this video had been viewed over 290,000 times. *Id.*

its 137,351 followers in which it provides a link to data showing “what chemicals are released into the environment where you live”<sup>172</sup> for free. At the same time, citizens can publish an unlimited assortment of information about their preferences and interests on the Internet, and government actors and special interest groups can readily access that information.<sup>173</sup>

In addition, the cost of not engaging the public is great because citizens are more mobilized than ever before.<sup>174</sup> As two marketing consultants have observed with respect to the technological changes: “For the first time the consumer is boss, which is fascinatingly frightening, scary and terrifying, because everything we used to do, everything we used to know, will no longer work.”<sup>175</sup> From the perspective of an industry or government body that favors a particular regulation or law, it is frequently more cost-effective to reach out to the public while members of the public are still open-minded rather than try to pacify an already agitated public.<sup>176</sup> In essence, an ounce of prevention is worth a pound of cure.

A number of industries have already realized the importance of using social media to engage the public before viral uprisings occur. For instance, in the fall of 2011, the energy industry held a confer-

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172. *Search Tweets*, TOPSY, <http://www.topsy.com/s?type=tweet&q=what+chemicals+are+released+into+the+environment+where+you+live> (last visited Oct. 17, 2013) (showing the tweet from the EPA sent on August 9, 2012).

173. See Joshua A. T. Fairfield, “*Do-Not-Track*” as Contract, 14 VAND. J. ENT. & TECH. L. 548-554 (2012) (“US corporations have unfettered access to information about every aspect of their customers’ lives.”); Roy E. Hadley, Jr., *Thinking of Having a Business Presence on Facebook? Consider all of the Possibilities*, NAT’L L. REV. (Aug. 10, 2012), <http://www.natlawreview.com/article/thinking-having-business-presence-facebook-consider-all-possibilities> (discussing how consumers “are constantly posting personal information that can be leveraged for pinpoint targeting of information and advertising”).

174. The same study of Facebook that concluded that Facebook communications tend to be shallow also noted that the site promoted more discussion, dialogue, and mobilization among Facebook users. See Meredith Conroy et al., *supra* note 18, at 1544; see also *supra* Part II.A.2 (providing examples of social media communications that have influenced government and corporate decision makers).

175. *Special Report: Consumer Power, Crowned at Last*, THE ECONOMIST (Mar. 31, 2005) <http://www.economist.com/node/3785166> (quoting Kevin Roberts, chief executive of Saatchi & Saatchi, part of Publius).

176. See, e.g., Douglas Sylvester et al., *Not Again! Public Perception, Regulation, and Nanotechnology*, 3 REG. & GOVERNANCE 165, 168 (2009) (describing how a number of commentators believe “public opinion is crucial to the success and integration of new technologies. If the public turns against a technology, its likelihood of success (however defined) is greatly reduced”).

ence entitled “Working Together as an Industry to Leverage Mass Media, Social Media & Community Support to Overcome Public Concern Over Hydraulic Fracturing.” According to the conference advertisement:

[T]he power of social media is allowing misinformation and the environmentalist agenda to be spread at an increasingly rapid rate. The need for a united front to project a transparent and accurate account of the process has never been more important to ensuring the sustainability of the industry and protect it from calls for intrusive regulation.<sup>177</sup>

An example of a social media communication that may have triggered the energy industry’s ire is presented in the Appendix. The song argues, in a humorous way, that “current regulation [of fracking] is severely lacking” and that more information about fracking needs “to come to light.”<sup>178</sup> To respond to the perceived threat that communications like this create for the industry, the conference organizers promised to explain “how to use social media as an efficacious tool for educating and engaging stakeholders, providing case studies of the most advanced social media programs in the industry.”<sup>179</sup> Other energy institutes also studied how to use social media to better educate the public about fracking.<sup>180</sup>

While surely the information the oil and gas industry hoped to convey to the public favored its own interests, what is key is that the industry felt an incentive to use social media to better engage the public. It wanted to provide the public with more “accurate” information as well as more information responsive to the “environmentalist agenda.”<sup>181</sup> Doing the latter would involve discussing the balance between environmental protection, job creation, and energy independence. In other words, the industry would need to partici-

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177. *Media & Stakeholder Relations*, *supra* note 6. Some might view the rapid spread of the “environmentalist agenda” as a positive sign that we are in the midst of a republican moment.

178. Studio 20 NYU & ProPublica.org, *My Water’s On Fire Tonight*, YOUTUBE (May 10, 2011), [http://www.youtube.com/watch?v=timfvNgr\\_Q4](http://www.youtube.com/watch?v=timfvNgr_Q4) (on October 17, 2013, the song had been viewed 371,574 times); *see also The Fracking Song*, EXPLAINER.NET <http://www.explainer.net/thefrackingsong/> (last visited June 9, 2013) (for lyrics).

179. *Media & Stakeholder Relations*, *supra* note 6.

180. *See, e.g.*, Groat & Grimshaw, *supra* note 6, at 13-17.

181. *Media & Stakeholder Relations*, *supra* note 6.

pate in a debate of what constitutes the “common good,” a central republican concept.<sup>182</sup>

The energy industry’s efforts to engage public discourse might have been more effective if the industry had initiated efforts earlier. Just six months after the industry held its conference on social media, the EPA issued its first final fracking regulations requiring drillers to capture emissions of certain air pollutants from new wells.<sup>183</sup> The DOI also issued proposed rules requiring public disclosure of the chemicals used in certain hydraulic fracturing processes and strengthening regulations related to well-bore integrity and flowback water.<sup>184</sup> Similarly, the meat industry learned that once concerns about LFTB went viral on social media sites, it was more difficult to convince the public that the product was safe.<sup>185</sup> Not even a showing of support for the product by the governors of Texas, Iowa, and Kansas could halt the public’s momentum.<sup>186</sup>

There is nothing novel about saying that it is challenging to stop public momentum. That is a well-studied phenomenon.<sup>187</sup> What is new in the social media age is that (1) citizens can mobilize more readily than ever before and (2) special interest groups and government entities can engage and educate the public more easily than ever before. These two factors foster an environment in which special interest groups and government actors are incentivized to

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182. Sunstein, *supra* note 14, at 1541 (discussing how the republican commitment to universalism is “exemplified by the notion of a common good”).

183. See Oil and Natural Gas Sector: New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants Reviews, 77 Fed. Reg. 49,490 (Aug. 16, 2012) (to be codified at 40 C.F.R. pts. 60-63).

184. Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, 77 Fed. Reg. 27,691 (May 11, 2012) (to be codified at 43 C.F.R. pt. 3160).

185. See Velasco, *supra* note 2 (discussing how the pink slime controversy lead to reduced demand for all ground beef products, which in turn caused AFA foods, a ground beef processor, to seek bankruptcy protection).

186. See *id.*

187. See, e.g., Douglas J. Sylvester, *Not Again! Public Perception, Regulation, and Nanotechnology*, in 3 REGULATION & GOVERNANCE 165, at 167-71 (2009) (describing the conventional wisdom about the public’s response to genetically-modified food, including how Zambian President Mwanawasa, who was offered genetically-modified food for his starving citizens, avowed “I would rather let my people starve than eat ... toxic [genetically-modified] food,” despite there being no “real scientific evidence that GMOs pose serious dangers to health or safety”).

engage in dialogue with citizens and educate them about important or controversial issues before a viral uprising occurs.

*C. Implications of Cyber-Republicanism*

The prior two sections highlighted the benefits of the social media age for politics, such as the promotion of a more engaged and educated citizenry that can limit the power of special interest groups. This section identifies a few of the fundamental ways in which these benefits impact the legal system. It then focuses on the most important reform needed to reap maximum reward from republican moments: altering the level of deference policymakers receive for their statutes and regulations when those statutes and regulations are a product of a republican moment. Given the sheer diversity of bills and regulations that are issued every year, this proposal to alter the deference standard impacts virtually every area of law and policy.

The insights developed in this Article about cyber-republicanism create an assortment of implications for the legal system. For instance, it suggests that government bodies, such as courts and administrative agencies, should increase their efforts and initiatives to engage the public through social media. It also indicates that judicial review may not be as necessary as once thought to protect administrative agencies against inappropriate influence from special interest groups given the presence of an educated and mobilized citizenry and the ease with which a republican moment may arise. But it may be more important than ever that judges look through the records to ensure that legislatures and agencies are not catering to a misinformed public without applying their own expertise. I cannot address every impact in this Article. Instead, I confine this section to identifying one of the most urgent and simple judicial and regulatory reforms needed to enhance the benefits of cyber-republicanism in the age of Facebook and Twitter: altering the level of deference a policymaker receives for a statute or regulation based on whether it was prompted by a republican moment.

Citizenship engagement through social media can and should affect the deference a lawmaking institution, such as a state or federal legislative body or a regulatory agency, receives for a

particular law or regulation. James Pope has explained that to reap the maximum gain from higher lawmaking, courts and administrative agencies should broadly construe “statutes resulting from a process of heightened political participation and public awareness.”<sup>188</sup> I agree. Failing to do so would render our nation a government of special interest groups, rather than a government of the people. But I believe this principle should be extended further than Pope may have anticipated. To maximize the benefits to society of higher lawmaking, I argue courts should broadly construe regulations that an administrative agency issues in response to a republican moment as within the agency’s authority.

Pope suggested that republican statutes could be identified by the following factors: “(1) widespread and serious public discussion; (2) debate framed in terms of principle and public good; (3) an intention to bring about major changes in the legal order; (4) direct citizen action, such as social protest; and (5) extensive activity by voluntary associations and social movements.”<sup>189</sup> These principles generally track the republican commitments to deliberation—*widespread and serious public discussion*; universalism—*debate framed in terms of principle and public good*; political equality—*direct citizen action, such as social protest*; and citizenship—*an intention to bring about major changes in the legal order and extensive activity by voluntary associations and social movements*. Thus, this test is suitable for determining whether a particular bill or regulation advances the spirit of these valuable republican virtues and correspondingly provides a workable framework for courts and administrative bodies to use in determining whether a statute or regulation deserves a broader or heightened level of deference.

In summary, the social media age has the ability to introduce a host of new considerations for judges, administrative agencies, and legislators. Among other impacts, cyber-republicanism in the social media age suggests judges need to rethink deference standards. By considering whether a particular law or regulation derived from a period of intense public agitation and discourse on social media and granting heightened or broader deference to those that do, judges will amplify the benefits of cyber-republicanism.

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188. Pope, *supra* note 15, at 358.

189. *Id.* at 361.

### III. COUNTERARGUMENTS

The prior section established that the social media age holds the potential to promote a more engaged and educated citizenry that can limit the power of special interest groups and improve deference standards. The purpose of this section is to mitigate concerns that social media communications are too shallow or similar to echo chambers to add value to our political system.

#### A. *Shallow, Misinformed Deliberation?*

Republicans took deliberation seriously; through deliberation, political participants could critique and assess the merits of governmental issues. One could argue that social media communications lack the serious nature required for republican deliberation.<sup>190</sup> But I argue that the benefits of these communications—including more engagement, more discourse between government actors and citizens, and stronger feelings of citizenship—outweigh this concern.

##### 1. *Rational Ignorance*

A key insight from public choice theory is that people free ride off the efforts of others.<sup>191</sup> This means that people have little incentive to actively participate in political processes; it also means that, when they do participate, they do not invest the effort to know what they are talking about and instead subscribe to fads and fashionable views.<sup>192</sup> For instance, individuals might vote for protecting cute animals because it feels good to do so, while they ignore the concrete costs of such protection. As a result, they get the full psychological and reputational benefits of publicly saying “I support cute animals,” while the costs of an actual pro-cute-animal policy such as

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190. See MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 157, at 329 (defining “deliberate” as “to think about or discuss issues and decisions carefully”).

191. See Lazarus, *supra* note 12, at 1183 (explaining the public choice concerns regarding free riding).

192. See Ilya Somin, *Knowledge About Ignorance: New Directions in the Study of Political Information*, 18 CRITICAL REV. 255, 255 (2006) (“For decades, scholars have recognized that most citizens have little or no political knowledge, and that it is in fact rational for the average voter to make little or no effort to acquire political information.”).

reducing gross domestic product are not internalized by any individual supporter because each individual supporter's vote, voice, or donation has almost no chance of affecting an election outcome.

A recent study confirms the possibility that social media communications do not reflect serious discourse. The authors of the study concluded that Facebook communications among members of political groups were fairly shallow:

The information content and quality of most wall posts were found to be very poor, generally lacking support for their claims, incoherent, or simply opinionated. In other words, group members are exposed to little new or well-articulated information about the political causes around which these groups form.<sup>193</sup>

These results are not surprising. Many people join social media sites not to engage in serious policy debates, but rather to connect with friends and family members through comments, videos, and images.<sup>194</sup> Certainly millions of comments posted on social media sites, like the comments posted on the public Facebook page for Beast, the pet dog of Facebook founder Mark Zuckerberg, are not meant to be part of any serious political discourse.<sup>195</sup>

## 2. *Citizenship, Diversity, and Signals*

I do not deny that social media communications extend beyond serious discourse, but I argue that even shallow and ill-informed communications advance republican values. They promote increased citizenship and viewpoint diversity, while sending signals to policymakers about public sentiments.

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193. Conroy et al., *supra* note 18, at 1544.

194. See, e.g., Lynssa Barnett Lidsky & Donald C. Friedel, *Legal Pitfalls of Social Media Usage*, in *SOCIAL MEDIA: USAGE AND IMPACT* 237, 237 (Hana S. Noor Al-Deen & John Allen Hendricks eds. 2012) ("One reason, undoubtedly, that so many users flock to social media is that they are ideal venues for spontaneous and informal communication with seemingly sympathetic audiences."); *Key Facts*, *supra* note 74 ("People use Facebook to stay connected with friends and family.").

195. *Facebook Page of Beast the Dog*, FACEBOOK, <http://www.facebook.com/beast.the.dog> (last visited Oct. 17, 2013) (depicting Facebook page for Beast, Zuckerberg's dog, which includes a photograph of Beast sitting in a bathroom sink).

By sharing images of a fluffy, oversized dog sitting in a sink and other communications of a less serious nature that express humor or relate to personal, rather than public, affairs, citizens build their sense of trust and ties to each other. In doing so, they foster the very sense of community that republicans prized.<sup>196</sup> When citizens feel like their discourse is occurring in a safe community, they can engage in more honest discourse and mobilize more readily.

Additionally, the ability of individuals to post on any issue that interests them contributes to the diversity of persons and opinions expressed on social media sites.<sup>197</sup> The staggering number of individuals participating on social media platforms like Facebook ensures that a diverse array of viewpoints will be represented. Although photographs of cute dogs and babies often proliferate on these sites without contributing to a deeper political message,<sup>198</sup> the prevalence of such lighthearted posts does not taint the serious nature of other social media communications.

Finally, posts that are ill-informed or heavily opinionated also carry value for cyber-republicanism. These posts can help motivate the government as well as special interest groups to better understand common misconceptions or biases and can motivate them to better educate the public.<sup>199</sup> I do not mean to suggest that the rants of a grossly misinformed public should defeat the reasoned insights of an expert regulator. Yet public outrage over a misunderstanding suggests more citizen education is appropriate. For instance, even if it turns out that the anti-pink slime movement had no scientific justification, the level of public concern about the safety of food suggests that more citizen education, with regard to the safety of our food products rather than more regulation of the meat industry, would be beneficial to society. The same is true of a pro-cute animal policy that is costly for the government. By increasing the incentives for transparency by government actors and special interest groups, the citizens become better educated and more capable of engaging in meaningful deliberation.

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196. See *supra* Part II.A.4 (discussing the role of citizenship in republicanism).

197. See *supra* Part II.A.3 (discussing the role of political equality in republicanism).

198. Beast's Facebook page has been liked by over 1.5 million users. See *Facebook Page of Beast the Dog*, *supra* note 195.

199. See *supra* Part II.B.

In summary, even social media communications that are shallow and ill-informed may promote progress in the development of civil society. By fostering an environment conducive for community-mindedness, by promoting an open space for vibrant and diverse dialogue, and by signaling to policymakers popular misconceptions, they enable our political system to grow.

### *B. Internet Echo Chambers?*

Another conceivable concern is that social media communications may promote viewpoint uniformity. At least one commentator has expressed concern that the increased personalization of online news, videos, and podcasts underexposes members of the public to competing views.<sup>200</sup> Specifically, Cass Sunstein has asserted: “In a democracy, people do not live in echo chambers or information cocoons. They see and hear a wide range of topics and ideas. They do so even if they did not, and would not, choose to see and to hear those topics and those ideas in advance.”<sup>201</sup> To Sunstein, online personalization is a danger to a democratic society.

Viewpoint diversity is inarguably valuable in a democratic society. But social media communications on the leading social media sites do not resemble echo chambers or information cocoons. Individuals tend to communicate on the leading social media with an eclectic mix of relatives, celebrities, co-workers, classmates, and other persons they meet randomly in their lives. These individuals share news articles, videos, and personal opinions with each other. As a result, individuals, rather than official news sources, are a major source of news and information to each other. Given that the average Facebook user has 190 friends, and that users of Facebook in the United States are on average only four friend connections away from every other American user,<sup>202</sup> the chances that all of a person’s friends will share the same views on every issue is quite slim. More likely than not, Facebook users will encounter an article or news idea that they would never have sought out themselves and those ideas will represent a range of individual biases. With an

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200. SUNSTEIN, *supra* note 18, at 1-5.

201. *Id.* at xi.

202. Lars Backstrom, *Anatomy of Facebook*, FACEBOOK (Nov. 21, 2011), [http://www.facebook.com/note.php?note\\_id=10150388519243859](http://www.facebook.com/note.php?note_id=10150388519243859).

online newspaper, however, one can expect to get one's entire fill of news from one site, a site that likely has a narrow and distinct political bias.

Other social media sites may be more susceptible to the risk of becoming self-reinforcing echo chambers, however. Unlike Facebook and other popular social media networks, where inclusivity is the norm, there are social media sites that limit membership and where individuals tend to be more selective about the people they talk with. For instance, to join the "ultra-elite"<sup>203</sup> network ASmallWorld, which purports to be "the world's leading private online community of like-minded people across the globe," one must be invited by an existing member.<sup>204</sup> One might worry that if every individual found a social network that aligned neatly with his or her personal views of the world, no one would be forced to confront contrary viewpoints or alternative sources of evidence and argument unless he or she really wanted to do so. This issue has been studied by leading scholars in the comparable context of the explosion of conventional news media outlets. According to Richard Posner, "the vertiginous decline in the cost of electronic communication and the relaxation of regulatory barriers to entry, leading to the proliferation of consumer choices" has caused political polarization and has caused the "news media [to] become more sensational, more prone to scandal and possibly less accurate."<sup>205</sup> In other words, when consumers have a wide range of options for news sources, they tend to select sources that mesh best with their personal views of the world and that have exciting or sensational, rather than accurate or complete, news.

Although I recognize that certain social media sites may contribute to some of the ills of electronic diversification identified by Sunstein and Posner, I argue that the rise of social media is not likely going to usher in a new age of unprecedented polarization, scandal, sensationalism, inaccurate reporting, and narrow-mindedness. Even if a hundred new social media sites pop up overnight,

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203. See Nicola Ruiz, *Five Social Networking Sites of the Wealthy*, FORBES (May 2, 2008), [http://www.forbes.com/2008/05/02/social-networks-vip-tech-personal-cx\\_nr\\_0502style.html](http://www.forbes.com/2008/05/02/social-networks-vip-tech-personal-cx_nr_0502style.html).

204. *About ASmallWorld*, ASmallWorld, <https://www.asmallworld.com/about-us> (last visited Oct. 17, 2013).

205. Richard Posner, *Bad News*, N. Y. TIMES (Jul. 31, 2005), <http://www.nytimes.com/2005/07/31/books/review/31POSNER.html>.

these sites are not mutually exclusive. A person can be a member of the most exclusive club or social media network in the world and still be a member of Facebook and five other networks. Indeed, given that over half of the U.S. population is a member of Facebook,<sup>206</sup> it is likely that most members of exclusive social media platforms are also members of Facebook. Thus, they still have exposure to diverse ideas that they would not have sought out on their own.

Rather than stymie viewpoint diversity, as online personalization of a news website might do, the leading social media platforms likely stimulate the growth of viewpoint diversity due to their inclusive design. This in turn enables richer dialogue and deliberation among citizens to occur.

#### CONCLUSION

Almost fifty years ago, Walt Disney World began offering musical boat rides accompanied by a song with the repetitive lyrics “it’s a small world after all” in its theme parks.<sup>207</sup> The Disney ride and accompanying song now seem prophetic. With more than 526 million daily active Facebook users,<sup>208</sup> it truly appears to be a small world after all. This resizing effect has been particularly pronounced in the United States where over half of all adults in America use Facebook,<sup>209</sup> and each Facebook user is now merely an average of four friend connections away from every other American user.<sup>210</sup>

As our connections to one another grow, ordinary Americans are discovering new ways to use their social media communities to produce good for their nation. This is happening in two ways. First, the widespread availability of low-cost means for ordinary citizens to organize and express collective concerns to policymakers makes it easier for republican moments to arise. As a result, legislative and regulatory reforms that occur during republican moments reflect

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206. GFK ROPER PUB. AFFAIRS & CORPORATE COMM’NS, *supra* note 19.

207. See Wade Sampson, *The History of It’s a Small World*, MOUSE PLANET (May 7, 2008), [http://www.mouseplanet.com/8343/The\\_History\\_of\\_its\\_a\\_small\\_world](http://www.mouseplanet.com/8343/The_History_of_its_a_small_world).

208. Robert Hof, *Profits Down, Everything Else Up in Facebook’s Latest IPO Filing*, FORBES (Apr. 23, 2012, 4:19 PM), <http://www.forbes.com/sites/roberthof/2012/04/23/profits-down-everything-else-up-in-facebooks-latest-ipo-filing/> (citing user statistics from 2012).

209. GFK ROPER PUB. AFFAIRS & CORPORATE COMM’NS, *supra* note 19.

210. Backstrom, *supra* note 202.

widespread citizen interests, rather than special interest group interests. It therefore makes sense for courts and administrative bodies to grant a broader or heightened level of deference to the legislative bills and administrative rules that embody these higher lawmaking efforts.

Second, the evolving social norms prompt government actors and special interest groups to listen to public sentiments and better educate the public about issues of national, regional, and local concern. This education is a form of beneficial citizen-government dialogue and citizen-special interest group dialogue. In other words, the social media revolution is building citizenship, expanding viewpoint diversity, and enhancing deliberation. Thus, with the arrival of a new age of citizen-centered government comes an opportunity for extraordinary political and legal progress.

## APPENDIX

Lyrics to “My Water’s On Fire Tonight” (The Fracking Song)<sup>211</sup>

Fracking is a form of natural gas drilling  
An alternative to oil cause the oil kept spilling  
Bringing jobs to small towns so everybody’s willing  
People turn on their lights and the drillers make a killing  
Water goes into the pipe, the pipe into the ground  
The pressure creates fissures 7,000 feet down  
The cracks release the gas that powers your town  
That well is fracked..... Yeah totally fracked  
But there’s more in the water than just H<sub>2</sub>O  
Toxic chemicals help to make the fluid flow  
With names like benzene and formaldehyde  
You better keep ‘em far away from the water supply  
The drillers say the fissures are a mile below  
The groundwater pumped into American homes  
But don’t tell it to the residents of Sublette Wy-O  
That water’s fracked.... We’re talking Benzene...  
What the frack is going on with all this fracking going on  
I think we need some facts to come to light  
I know we want our energy but nothing ever comes for free  
I think my water’s on fire tonight  
So it all goes back to 2005  
Bush said gas drillers didn’t have to comply  
with the Safe Drinking Water Act, before too long  
It was “frack, baby, frack” until the break of dawn.  
With the EPA out it was up to the states  
But they didn’t have the money to investigate  
Sick people couldn’t prove fracking was to blame  
All the while water wells were going up in flames  
Cause it’s hard to contain all the methane released  
It can get into the air, it can get into the streams.  
It’s a greenhouse gas, worse than CO<sub>2</sub>  
Fracking done wrong could lead to climate change too

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211. Studio 20 NYU & ProPublica.org, *supra* note 178. The Fracking Song was released under a Creative Commons Attribution-Share Alike license. *Id.*

Now it's not that drillers should never be fracking  
But the current regulation is severely lacking  
Reduce the toxins, contain the gas and wastewater  
And the people won't get sick and the planet won't get hotter  
What the frack is going on with all this fracking going on  
I think we need some facts to come to light  
I know we want our energy but nothing ever comes for free  
I think my water's on fire tonight