



RUTGERS LAW RECORD

The Digital Journal of Rutgers Law School

lawrecord.com

Volume 46

2018-2019

THE GOVERNMENT'S POWER TO BLOCK ON TWITTER: A FIRST AMENDMENT ANALYSIS

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I. Introduction

Social media platforms have significantly changed the way people communicate.¹ From sending snail mail to speaking over the phone to sending emails, now with a click of a button anyone can “tweet,” “post,” or “direct message” any person that has an open and public social media account. Before the internet, government officials were often viewed as intimidating and unapproachable.² However, the power of social media has transformed the relationship between elected officials and constituents.³ Now, almost all state and federal government officials use Twitter, Facebook, and/or other social media platforms “to supplement their overall office communication strategies and [to] disseminate information.”⁴

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¹ JACOB R. STRAUSS & MATTHEW E. GLASSMAN, CONG. RESEARCH SERV., R44509, SOCIAL MEDIA IN CONGRESS: THE IMPACT OF ELECTRONIC MEDIA ON MEMBER COMMUNICATIONS 1 (2016).

² BRADFORD FITCH & KATHY GOLDSCHMIDT, CONG. MGMT. FOUND., #SOCIALCONGRESS2015 7 (2015).

³ STRAUSS & GLASSMAN, *supra* note 1 (“In less than 20 years, the entire nature of Member–constituent communication has transformed, perhaps more than any period in American history.”). According to a 2015 survey analyzing how social media influences public policy, it takes less than 30 posts on a government official’s social media account for a government official to take notice of an issue. FITCH & GOLDSCHMIDT, *supra* note 2, at 7, 12.

⁴ STRAUSS & GLASSMAN, *supra* note 1.

Today, the vast exchange of political ideas occurs on forums like Twitter and Facebook.⁵ When scrolling on social media, the public has become “entitled to believe [] that they are viewing something of a representative cross-section” between the public’s reactions and the government’s reaction to their pronouncements.⁶ A government official’s social media account is used as a means to communicate with the public, thereby creating an appearance of a public forum.⁷ Electronic communication of this nature is so popular because it is “inexpensive,” “fast,” and “reaches a wide audience.”⁸ However, this new way to communicate comes with increased constitutional responsibilities.⁹

In January 2018, Mayor Curt Ritter of Chatham, New Jersey blocked from his Facebook page about a dozen individuals who opposed his proposal to allow bear hunting in the township.¹⁰ The page was created to address all municipal matters and to engage with his constituents.¹¹ However, by preventing certain people from accessing his Facebook page, he was violating their First Amendment rights.¹² The American Civil Liberties Union (“ACLU”) quickly became involved, and Ritter unblocked people with opposing views.¹³ Similarly, in October 2018, a lawsuit was filed against Jersey City, New Jersey Mayor Steve Fulop for blocking critics on social media.¹⁴ While Fulop insisted that he did not block people who were critical of him, but only blocked people who

⁵ Joshua Geltzer & Amy Marshank, *Why the First Amendment Constrains Trump’s Use of Twitter*, JUST SECURITY (Nov. 6, 2017), <https://www.justsecurity.org/46760/trump-twitter-amendment/>.

⁶ *Id.*

⁷ *Id.*

⁸ STRAUSS & GLASSMAN, *supra* note 1, at 8-10.

⁹ *Id.* at 12.

¹⁰ Rob Jennings, *ACLU calls out mayor who blocked critics from Facebook page*, NJ.COM (Jan. 11, 2018), https://www.nj.com/morris/2018/01/aclu_to_mayor_stop_blocking_residents_from_your_fa.html.

¹¹ *Id.*

¹² *Id.* Staff attorney Tess Borden sent a letter to Ritter in which she said to him: “As a result of being blocked, these residents were unable to see your posts in community forums on topics of community concern and were unable to engage in public discourse about them.” “By contrast,” she said, “other community members whom you had not blocked have replied to your posts and engaged in back-and-forth conversations with you on these pages.” *Id.*

¹³ *Id.* In further addressing Ritter, Borden warned him: “While truly personal social media accounts that do not involve official activity would not raise the same speech concerns or requirements, as long as you use your personal social media site at least in part for official mayoral business, you should not block persons from access or commenting.” *Id.*

¹⁴ Terrence T. McDonald, *Fulop catches heat for blocking critics on Facebook*, NJ.COM (Oct. 3, 2017), http://www.nj.com/hudson/index.ssf/2017/10/should_steve_fulop_block_critics_on_social_media.html.

were spamming his page with personal promotions and irrelevant comments,¹⁵ he recognized that “the law is the law” and unblocked those individuals.¹⁶

From small-town mayors to governors¹⁷ to the President of the United States,¹⁸ many public officials have been accused of silencing critics on social media. Before pursuing litigation, the Knight First Amendment Institute at Columbia University (“Institute”) sent President Donald Trump a demand letter urging him to unblock multiple individuals¹⁹ who were prevented from accessing the @realDonaldTrump Twitter account.²⁰ The Institute warned Trump that by blocking users from his account, he was suppressing speech and thereby violating the First Amendment in a number of ways.²¹

Although the Supreme Court of the United States has discussed the importance of the internet, the government has no guidelines it must follow when opening and using a Twitter account

¹⁵ *Id.*

¹⁶ Terrence T. McDonald, *Mayor unblocks critics on social media after ruling on Trump's Twitter*, NJ.COM (May 25, 2018), https://www.nj.com/hudson/2018/05/fulop_unblocks_critics_on_twitter_facebook.html. After unblocking constituents from this Twitter account, Fulop tweeted, “Anti-Semites, racists, trolls, fake accounts, former family members, [people] that hate Jersey City – all are welcome now.” *Id.*

¹⁷ The ACLU filed suits against the governors of Maine and Maryland in federal court for silencing and blocking their critics’ rights of free speech. *ACLU of Maine Sues Lepage Over Facebook Censorship*, ACLU OF MAINE, (Aug. 8, 2017), <https://www.aclumaine.org/en/press-releases/aclu-maine-sues-lepage-over-facebook-censorship>; Ovetta Wiggins, *Gov. Larry Hogan Sued by ACLU for Deleting Comments, Blocking Facebook Users*, WASH. POST (Aug. 1, 2017), https://www.washingtonpost.com/local/md-politics/md-aclu-sues-governor-for-deleting-comments-and-blocking-facebook-users/2017/08/01/9723d4a6-76d8-11e7-9eac-d56bd5568db8_story.html.

¹⁸ Charlie Savage, *Twitter Users Blocked by Trump File Lawsuit*, N.Y. TIMES (July 11, 2017), <https://www.nytimes.com/2017/07/11/us/politics/trump-twitter-users-lawsuit.html>.

¹⁹ The Institute represents seven individuals: (1) Rebecca Buckwalter, writer and political consultant; (2) Philip Cohen, professor of sociology at the University of Maryland; (3) Holly Figueroa, political organizer and songwriter; (4) Eugene Gu, surgical resident and CEO of Ganogen Research Institute; (5) Brandon Neely, police officer; (6) Joseph Papp, anti-doping advocate and author; and (7) Nicholas Pappas, comic and writer. Complaint at 3-4, *Knight First Amendment Inst. at Colum. Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 1:17-cv-05205-NRB), ECF No. 1. However, President Trump has blocked many other people ranging from writers to advocates to teachers to athletes and actors. Some notable names include Stephen King, Chrissy Teigen, and Rosie O’Donnell. Julia Mead, *26 People Who’ve Been Blocked by Trump on Twitter*, NEW YORK MAG. (Sept. 17, 2017), <http://nymag.com/daily/intelligencer/2017/09/who-donald-trump-has-blocked-on-twitter.html>.

²⁰ Savage, *supra* note 17.

²¹ Letter from Jameel Jaffer, Katie Fallow, and Alex Abdo, Knight First Amendment Institute at Columbia University, to Donald J. Trump, President of the U.S. (July 6, 2017), *available at* <https://www.documentcloud.org/documents/3859469-White-House-Twitter-Letter-FINAL.html>. The letter explained:

Users who have been blocked cannot follow you on Twitter, and they are limited in their ability to view your tweets, find your tweets using Twitter’s search function, and learn which accounts follow you. They are also limited in their ability to participate in comment threads associated with your tweets.

Id.

or any other social media account. Unlike traditional public forums, social media platforms are a modern development. However, under the public forum doctrine, government officials cannot operate their accounts in any way they please. The First Amendment prohibits “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the [g]overnment for a redress of grievances.”²² Each person is “guaranteed the right to express any thought, free from government censorship . . . [or] content control,”²³ and when such a person seeks access to government controlled or government owned property dedicated to public use, First Amendment concerns arise.²⁴

A government official’s social media account is the modern-day equivalent to town hall and city council meetings. Instead of the public physically attending a meeting to voice their concerns and to communicate their thoughts with government officials, the public may now do so by sending a tweet or by posting a comment.²⁵ Just like individuals cannot be thrown out of town hall meetings for disagreeing or criticizing a government official, individuals cannot and should not be blocked from accessing a government official’s social media account.²⁶

Although the analysis in this note likely applies to most interactive social media platforms, this note will focus exclusively on Twitter. Although government leaders also use Facebook to engage with the public, Twitter is the most popular network amongst government leaders throughout the world.²⁷ Since elected in 2016, Trump’s unprecedented use of Twitter as President

²² U.S. CONST. amend. I.

²³ *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

²⁴ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985).

²⁵ *See Packingham v. North Carolina*, 137 S. Ct. 1730, 1735, 1738 (2017); *see also Twitter, Inc. v. Sessions*, 236 F. Supp. 3d 803, 815 (N.D. Cal. 2017).

²⁶ *See Packingham*, 137 S. Ct. at 1735, 1738.

²⁷ Of the 193 United Nations member states, 97 percent of the countries have an official Twitter presence. Matthias Lufkens, *Twiplomacy Study 2018*, TWIPLOMACY (July 10, 2018), <https://twiplomacy.com/blog/twiplomacy-study-2018/>. Only six countries, namely Laos, Mauritania, Nicaragua, North Korea, Swaziland and Turkmenistan, lack such a presence. *Id.*

has generated a wide array of media coverage.²⁸ Akin to Franklin D. Roosevelt’s radio addresses to Dwight Eisenhower’s fireside chats to Ronald Reagan’s prime time news conferences, Trump uses Twitter as his primary means of communication.²⁹ Politics in the United States has become correlated with Twitter and as the numbers of government officials who use the platform grows, an in depth analysis of the public’s rights within this newly developed public square is necessary.³⁰

This note will proceed with Part II, which will discuss what Twitter is and will briefly discuss some of the features of the social media platform. Part III explains the public forum doctrine and differentiates the level of scrutiny applied to a public forum versus government speech. Part IV offers a public forum analysis, classifying a government official’s Twitter account as a designated public forum and Part V demonstrates how this analysis is currently being applied by federal courts. Part VI analogizes Twitter to town hall and city council meetings and demonstrates what limitations the government may impose in such fora. Part VII concludes that a government official does not have the power to block an individual from accessing his or her Twitter account.

II. What is Twitter?

Twitter is “[w]hat’s happening in the world and what people are talking about right now.”³¹ The social media platform, which was developed in 2006, now has over 328 million subscribers worldwide.³² Upon creating a free account, people can follow each other and join conversations by sending a tweet—a message of 280 characters or less.³³ With the mission to “[g]ive everyone the

²⁸ Nicholas Carr, *Why Trump Tweets (And Why We Listen)*, POLITICO (Jan. 26, 2018), <https://www.politico.com/magazine/story/2018/01/26/donald-trump-twitter-addiction-216530>.

²⁹ Tamara Keith, *Commander-In-Tweet: Trump’s Social Media Use And Presidential Media Avoidance*, NPR (Nov. 18, 2016), <https://www.npr.org/2016/11/18/502306687/commander-in-tweet-trumps-social-media-use-and-presidential-media-avoidance>.

³⁰ Carr, *supra* note 28.

³¹ *About*, TWITTER, <https://about.twitter.com/> (last visited Mar. 9, 2019).

³² Lahle Wolfe, *Twitter User Statistics 2008 Through 2017*, THE BALANCE CAREERS (Nov. 4, 2018), <https://www.thebalance.com/twitter-statistics-2008-2009-2010-2011-3515899>.

³³ *Let’s go Twitter*, TWITTER, https://about.twitter.com/en_us/lets-go-twitter.html (last visited Mar. 9, 2019); *How to Tweet*, TWITTER, <https://help.twitter.com/en/using-twitter/how-to-tweet> (last visited Mar. 9, 2019); Aliza Rozen, *Tweeting Made Easier* (Nov. 7, 2017), https://blog.twitter.com/en_us/topics/product/2017/tweetingmadeeasier.html.

power to create and share ideas and information instantly, without barriers,”³⁴ Twitter strongly believes in the freedom of expression.³⁵ However, Twitter imposes some limitations and content boundaries that are binding on all subscribers.³⁶ The company reserves the right to suspend or remove accounts that violate the rules against posting graphic, violent, illegal, or adult content, being abusive to another user, or tampering with the website by sending spam or creating a security threat.³⁷

Twitter users have a personal webpage on which they can provide a short biography or headline and post a profile and banner picture.³⁸ Unless a user’s account is private, anyone, including individuals without a Twitter account, can view the user’s Twitter page; however to interact with that person, a Twitter account must be made.³⁹ All accounts are public by default, but a user has the ability to protect his or her tweets by changing the account’s settings.⁴⁰ Once the account is made private, new followers must submit a request to that user to see his or her tweets and page.⁴¹

Upon logging into Twitter, users are directed to their home timeline. A timeline is where all the tweets generated by the user and accounts which the user follows are collected and displayed.⁴² A Twitter user can then choose to reply, retweet, and/or favorite an already published tweet.⁴³ While a reply is where one user responds to another,⁴⁴ a retweet is a re-posting of a tweet onto the user’s

³⁴ *Our company*, TWITTER, https://about.twitter.com/en_us/company.html (last visited Mar. 9, 2019).

³⁵ *Our values*, TWITTER, https://about.twitter.com/en_us/values.html (last visited Mar. 9, 2019) (“We believe in free expression and think every voice has the power to impact the world.”).

³⁶ *The Twitter Rules*, TWITTER, <https://help.twitter.com/en/rules-and-policies/twitter-rules> (last visited Mar. 9, 2019).

³⁷ *Id.*

³⁸ *How to customize your profile*, TWITTER, <https://help.twitter.com/en/managing-your-account/how-to-customize-your-profile> (last visited Mar. 9, 2019).

³⁹ *About public and protected tweets*, TWITTER, <https://help.twitter.com/en/safety-and-security/public-and-protected-tweets> (last visited Mar. 9, 2019).

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *About your Twitter timeline*, TWITTER, <https://help.twitter.com/en/using-twitter/twitter-timeline> (last visited Mar. 9, 2019).

⁴³ *Id.*

⁴⁴ *About replies and mention*, TWITTER, <https://help.twitter.com/en/using-twitter/mentions-and-replies> (last visited Mar. 9, 2019).

own timeline.⁴⁵ To favorite a tweet, a person simply clicks on the heart icon under the original tweet.⁴⁶

A Twitter user has the ability to block or mute a person from his or her account. While blocking restricts specific accounts from contacting users, seeing their Tweets, or following them,⁴⁷ muting allows users to remove an account's tweets from their timeline without unfollowing or blocking that account.⁴⁸ When choosing to block or mute an account, that account's user will not be notified.⁴⁹ However, if a person who is blocked attempts to visit an account he or she no longer has access to, a message will appear saying that he or she is blocked.⁵⁰ Thus, blocked accounts cannot follow, view, send messages, nor tag a person whose account they do not have access to.⁵¹

III. The Doctrines

A. The Public Forum Doctrine

The public forum doctrine is a relatively recent legal innovation adopted by the Supreme Court of the United States.⁵² The doctrine's origin can be traced back to 1939 when the Court recognized the right to speak on public property.⁵³ However, the phrase "public forum"⁵⁴ was not

⁴⁵ *Retweet FAQs*, TWITTER, <https://help.twitter.com/en/using-twitter/retweet-faqs> (last visited Mar. 9, 2019).

⁴⁶ *How to like a Tweet*, TWITTER, <https://help.twitter.com/en/using-twitter/liking-tweets-and-moments> (last visited Mar. 9, 2019).

⁴⁷ *How to block accounts on Twitter*, TWITTER, <https://help.twitter.com/en/using-twitter/blocking-and-unblocking-accounts> (last visited Mar. 9, 2019).

⁴⁸ *How to mute accounts on Twitter*, TWITTER, <https://help.twitter.com/en/using-twitter/twitter-mute> (last visited Mar. 9, 2019).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Lyrisa Barnett Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1979-80 (2011).

⁵³ See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) (holding that a city ordinance banning political meetings in public places violated the First Amendment) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."); Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140, 2143 (2009); Lidsky, *supra* note 52.

⁵⁴ The term "public forum" is attributable to Henry Kalven's 1965 article, *The Concept of the Public Forum: Cox v. Louisiana*, in which he addresses "the problems of speech in public places." 1965 SUP. CT. REV. 3.

used by the Court until 1972.⁵⁵ By 1983, the Court formalized the doctrine and divided public forums into “three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum.”⁵⁶

Generally, “[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”⁵⁷ However, First Amendment protections are not absolute.⁵⁸ The government has the authority to restrict the use of speech and expression to the extent that the relevant forum permits.⁵⁹ Thus, when evaluating whether an individual can use “government property for communicative purposes,”⁶⁰ a court must perform a forum analysis in which it first “categoriz[es] the location . . . to which a speaker seeks access . . . and then . . . analyz[es] the government’s restriction on speech against the constitutional standard that governs in that forum.”⁶¹

1. The Traditional Public Forum

The first category is the traditional public forum. Derived from Justice Roberts’ dicta in *Hague v. Committee for Industrial Organization*, traditional public forums are a place or space “by long tradition or by government fiat . . . which ‘have immemorially been held in trust for the use of the

⁵⁵ See *Police Dep’t of Chicago v. Mosley*, 408 U.S. 93, 96 (1972) (“Selective exclusions from a *public forum* may not be based on content alone, and may not be justified by reference to content alone.”) (emphasis added). Four years later, the Court gave some insight as to what would not be considered a public forum. *Greer v. Spock*, 424 U.S. 828, 838 (1976) (upholding a military regulation banning campaign speeches at military base because “the business of a military installation . . . [is] to train soldiers, not to provide a public forum”). The Court then developed a middle ground for forums which could not be categorized as streets or parks. *Widmar v. Vincent*, 454 U.S. 263, 278 (1981) (holding that although colleges and universities “are not open to the public the same way that streets and parks are,” the content based policy was unconstitutional); Note, *supra* note 53.

⁵⁶ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985); see *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45-46 (1983).

⁵⁷ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (holding that the University engaged in unconstitutional viewpoint discrimination by providing funding for all student publications, except for student religious magazine).

⁵⁸ William M. Howard, Annotation, *Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum – Characteristics of Forum*, 70 A.L.R. 6th 513, *2 (2015).

⁵⁹ *Cornelius*, 473 U.S. at 797.

⁶⁰ Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1715 (1987).

⁶¹ Note, *supra* note 53.

public.”⁶² Such places are quintessentially recognized to include the public street,⁶³ the park,⁶⁴ and the sidewalk.⁶⁵ Traditional public forums are “defined by the objective characteristics of the property”⁶⁶ and are known as an “important facility for public discussion and political process . . . that the citizen can commandeer.”⁶⁷ Time and time again, individuals assemble in the street, park, or sidewalk to communicate their ideas and to discuss issues of public concern.⁶⁸ Although society may now use other forums for assembly and debate, the Court refuses to expand this category.⁶⁹ Since a traditional public forum is defined and limited within history’s boundaries, no new place or space may be added to the list.⁷⁰

Unlike the proprietary interests of the owner of a home, the government cannot infringe upon an individual’s right to the freedom of speech and expression by virtue of its interests in the land.⁷¹ Traditional public forums promote the free exchange of ideas, thus the government is severely limited in its ability to restrict expressive activity.⁷² Unless the government can demonstrate that the content based restriction is necessary to serve a compelling state interest and that the restriction is narrowly drawn, a court will find the restriction to be unconstitutional.⁷³ In other

⁶² *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

⁶³ *See, e.g., Jamison v. Texas*, 318 U.S. 413, 417 (1943) (holding that the ordinance prohibiting the distribution of religious literature unconstitutional).

⁶⁴ *Hague*, 307 U.S. at 515 (1939). *But see Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1129 (2009) (distinguishing the placement of monuments in public parks as government speech, “therefore not subject to scrutiny under the Free Speech Clause”).

⁶⁵ *See, e.g., Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 377 (1997) (holding that “speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum.”).

⁶⁶ *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998).

⁶⁷ *Kalven*, *supra* note 54, at 11-13.

⁶⁸ *Hague*, 307 U.S. at 515; *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 43-45 (1983).

⁶⁹ *Ark. Educ. Television Comm’n*, 523 U.S. at 678 (“The Court has rejected the view that traditional public forum status extends beyond its historic confines.”).

⁷⁰ *See e.g., Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680 (1992) (holding that airports are not public forums “[g]iven the lateness with which the modern air terminal has made its appearance, it hardly qualifies as a property that has ‘immemorially . . . time out of mind’ been held in the public trust and used for the purposes of expressive activity”).

⁷¹ *Post*, *supra* note 60.

⁷² *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985); *Perry Educ. Ass’n*, 460 U.S. at 45.

⁷³ *Perry Educ. Ass’n*, 460 U.S. at 45.

words, any content based restriction in a traditional public forum is subject to strict scrutiny.⁷⁴ However, the government may enforce content neutral time, place, and manner restrictions, so long as a significant government interest is served and ample alternative methods for communication are available.⁷⁵

2. The Designated Public Forum

In contrast to a traditional public forum, a designated public forum “consists of public property which the state has opened for use by the public as a place for expressive activity.”⁷⁶ Thus, even when a speaker is seeking access to a location other than a street, park, or sidewalk, stringent First Amendment protections may still apply.⁷⁷ However, absent clear intent by the government to open a forum previously closed, a court will not find a designated public forum.⁷⁸

The mere fact that expressive activity occurs in a certain place is insufficient to establish the creation of a designated public forum.⁷⁹ Rather, to determine whether the requisite intent is present, the nature and compatibility of the property wherein the expressive activity occurred must be examined in addition to the government’s policies.⁸⁰ The forum need not be spatial or geographic in nature; so long as the intent is established, a metaphysical or virtual space may be categorized as a designated public forum.⁸¹ If evidence of a contrary intent exists or if the main purpose or function of the property would be disturbed by expressive activity, the creation of a designated public forum will not be inferred.⁸²

⁷⁴ *Id.* at 55.

⁷⁵ *Id.* at 45.

⁷⁶ *Id.*

⁷⁷ Lidsky, *supra* note 52, at 1983.

⁷⁸ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

⁷⁹ *Id.* (holding that although expressive activity did occur in the forum, the government lacked the intent to open the charitable contribution program as a designated place for expressive activity, thus no public forum was created).

⁸⁰ *Id.*

⁸¹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (holding the Student Activities Fund to be a public forum).

⁸² *Cornelius*, 473 U.S. at 803.

While a traditional public forum always remains open, a designated public forum is not required to be created or to remain open.⁸³ However, while it is open, “[g]overnment restrictions on speech in a designated public forum are subject to the same strict scrutiny restrictions [as] in a traditional public forum.”⁸⁴ Thus, “[r]easonable time, place, and manner regulations are permissible and content based prohibitions must be narrowly drawn to effectuate a compelling state interest.”⁸⁵ As in a traditional public forum, the government may not select one speaker over another nor discriminate against speech.⁸⁶ Although college campuses, school board meetings, and government owned theatres are not traditional public forums, they may be designated as such and are therefore afforded considerable First Amendment protections.⁸⁷

3. The Limited Public Forum

While the formal public forum doctrine only recognizes three categories of fora,⁸⁸ the middle category has been subdivided to include limited public forums.⁸⁹ Unlike traditional or designated public forums which must be open to all, limited public forums are “created for a limited purpose . . . [for] use by certain groups,”⁹⁰ selected “either by their identity or the subject matter upon which they will speak.”⁹¹ Thus, the government is permitted to partake in some content based discrimination when establishing the parameters of the limited forum; however “any access barrier

⁸³ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

⁸⁴ *Pleasant Grove City v. Summum*, 555 U.S. 460, 469-70 (2009) (citing *Cornelius*, 473 U.S. at 800).

⁸⁵ *Perry Educ. Ass’n*, 460 U.S. at 37.

⁸⁶ *Rosenberger*, 515 U.S. at 828.

⁸⁷ *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (holding the university policy established a clear intent to create a public forum); *Madison Joint Sch. Dist. v. Wisconsin Emp’t Relations Comm’n*, 429 U.S. 167, 174 (1976) (holding the state statute for open school board meetings was sufficient to create a public forum); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (holding the municipal auditorium and city-leased theatre to be dedicated to expressive activities, thereby creating a designated public forum).

⁸⁸ See *Perry Educ. Ass’n*, 460 U.S. at 45-46.

⁸⁹ The term “limited public forum” was first used by the Supreme Court in 1981 when discussing a regulation that banned the distribution of the leaflets at a state fair. Lidsky, *supra* note 52, at n.49; see *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc*, 452 U.S. 640, 655 (1981). For extensive criticism of the confusion created between designated and limited public forums, see Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299 (2003); Note, *supra* note 53, at 2143.

⁹⁰ *Perry Educ. Ass’n*, 460 U.S. at 46 (1983).

⁹¹ Note, *supra* note 53, at 2143.

must be reasonable and viewpoint neutral.”⁹² Whereas designated public forums function like traditional public forums,⁹³ limited public forums operate like nonpublic forums.⁹⁴

4. The Nonpublic Forum

If public property does not fall within the categories of a traditional or designated public forum, then “the communication is governed by different standards.”⁹⁵ Nonpublic forums are subject to broad state controls.⁹⁶ If the regulation of speech is reasonable and is not a means by a public official to suppress a speaker’s contrary or different views, the forum may be used for its intended purposes.⁹⁷ Although the restriction need not be the most reasonable or the only reasonable option, the reasonableness of the government’s constraint on the nonpublic forum must take into consideration “the purpose of the forum and all surrounding circumstances.”⁹⁸

The Supreme Court has repeatedly held that “[t]he state, no less than a private owner of property, has power to preserve the property under its control for the use of which it is lawfully dedicated.”⁹⁹ Subject matter and speaker identity distinctions are permissible, so long as the restricted access is reasonable and viewpoint neutral.¹⁰⁰ After all, “[i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access.”¹⁰¹ Although the government is given more authority to exclude someone from a nonpublic forum if the person is speaking off topic or is

⁹² *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 679 (2010). In contrast to traditional and designated public forums which are subject to strict scrutiny, a lower level of scrutiny is required when analyzing limited public forums. *Id.*

⁹³ Lidsky, *supra* note 52, at 1984.

⁹⁴ *Compare Christian Legal Soc’y*, 561 U.S. at 679 (holding that restrictions on access of limited public forums are permissible if they are reasonable and viewpoint neutral), *with Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985) (holding that the subject matter and speaker identity distinctions are permissible in nonpublic forums so long as they are reasonable and viewpoint neutral).

⁹⁵ *Perry Educ. Ass’n*, 460 U.S. at 46.

⁹⁶ Lidsky, *supra* note 52, at 1981.

⁹⁷ *Perry Educ. Ass’n*, 460 U.S. at 46.

⁹⁸ *Cornelius*, 473 U.S. at 808-09.

⁹⁹ *Perry Educ. Ass’n*, 460 U.S. at 46 (quoting *United States Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 121-130 (1981)).

¹⁰⁰ *Cornelius*, 473 U.S. at 806.

¹⁰¹ *Perry Educ. Ass’n*, 460 U.S. at 49.

not part of the selected class of speakers, denial of activity to suppress a point of view violates the First Amendment.¹⁰²

B. The Government Speech Doctrine

When an individual or group alleges that the government has impermissibly discriminated on the basis of viewpoint, the government speech doctrine may be used as a defense against such a First Amendment challenge.¹⁰³ The government speech doctrine, a legal category established about ten years ago,¹⁰⁴ only applies when the government speaks on its own behalf.¹⁰⁵ Unlike private speech in which the government is subject to First Amendment scrutiny, government speech is not restricted by the Free Speech Clause.¹⁰⁶ Thus, “when the government speaks[,] it is entitled to promote a program, espouse a policy, or to take a position,” without including opposing viewpoints;¹⁰⁷ otherwise many “government programs [would become] constitutionally suspect.”¹⁰⁸

Therefore, the distinction between government and private speech is critical.¹⁰⁹ To determine whether the public forum doctrine or government speech doctrine should apply, courts consider the

¹⁰² *Cornelius*, 473 U.S. at 806.

¹⁰³ Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENVER U. L. REV. 899, 899 (2010); see, e.g., *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 139-40 (1973) (Stewart, J., concurring) (“Government is not restrained by the First Amendment from controlling its own expression.”).

¹⁰⁴ “According to accepted wisdom, the government speech doctrine, as articulated by the U.S. Supreme Court, had its genesis in *Rust v. Sullivan*,” despite the fact the opinion does not use the term “government speech.” Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 374 (2009). Although the opinion does not use the term “government speech,” *Rust* stands for the proposition that “the [g]overnment has not discriminated on the basis of viewpoint [when] it has merely chosen to fund one activity to the exclusion of the other.” *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (rejecting the claim that the government selectively withheld funds from entities that encouraged abortions or provided abortion counseling or referrals because it disfavored this viewpoint). In 2009, the Supreme Court referred to the doctrine as “recently minted.” *Pleasant Grove City v. Summum*, 129 S. Ct. 1125, 1139 (2009) (Stevens, J., concurring).

¹⁰⁵ *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015). The government has the right to “speak for itself.” *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000). The government is “entitled to say what it wishes.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). And it may select the views it wishes to express. See *Rust*, 500 U.S. at 194; see also *Nat’l Endowment for Arts v. Finley*, 524 U.S. 569, 598 (1998) (“It is the very business of the government to favor and disfavor points of view[s].”).

¹⁰⁶ *Walker*, 135 S. Ct. at 2250.

¹⁰⁷ *Id.* at 2246.

¹⁰⁸ *Rust*, 500 U.S. at 194 (“[T]o hold that the [g]overnment unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals because the program, in advancing those goals necessarily discourages alternate goals would render numerous government programs constitutionally suspect.”).

¹⁰⁹ *Walker*, 135 S. Ct. at 2254 (Alito, S., dissenting).

following three factors: (1) whether the government historically communicated in this manner; (2) whether the public “routinely and reasonably” interprets the message as conveying government speech rather than a private message; and (3) whether the government maintains direct control over the messages conveyed.¹¹⁰ If these factors are affirmatively met, the government’s display of expression in an otherwise traditional public forum will be subject to the government speech doctrine; not the public forum doctrine.¹¹¹ In the former, the government is provided with broad authority and flexibility to discriminate on the basis of viewpoint. The latter doctrine, however, is bound to the principles of the First Amendment, which holds viewpoint distinctions to be unconstitutional.

The Supreme Court holds that if the government “‘lacked th[e] freedom’ to select the messages it wish[ed] to convey,” our government would be unable to function efficiently.¹¹² However, government speech is still subject to constitutional and statutory restraints outside the Free Speech Clause.¹¹³ Ultimately, the government is “accountable to the electorate and the political process for its advocacy,”¹¹⁴ with the general democratic electoral process providing a check on government speech.¹¹⁵ Once the public is informed of a policy or initiative, competing viewpoints may emerge with which the public can voice their opinions to the government to influence change.¹¹⁶ Government speech promotes programs, supports policies, and takes positions while

¹¹⁰ *Id.* at 2247-49.

¹¹¹ *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009) (“[A]lthough a park is a traditional public forum for speeches and other transitory expressive acts, the display of a permanent monument in a public park is not a form of expression to which forum analysis applies. Instead, the placement of a permanent monument in a public park is best viewed as a form of government speech and is therefore not subject to scrutiny under the Free Speech Clause.”).

¹¹² *Walker*, 135 S. Ct. at 2246 (quoting *Pleasant Grove City*, 555 U.S. at 468) (“How could a city government create a successful recycling program if officials, when writing householders asking them to recycle cans and bottles, had to include in the letter a long plea from the local trash disposal enterprise demanding the contrary? How could a state government effectively develop programs designed to encourage and provide vaccinations, if officials also had to voice the perspective of those who oppose this type of immunization?”).

¹¹³ *Id.*

¹¹⁴ *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000).

¹¹⁵ *Pleasant Grove City*, 555 U.S. at 467-69.

¹¹⁶ *Id.*

representing the average citizen.¹¹⁷ Thus, when the government speaks or receives private assistance to help deliver its message, it has free range to determine the contents of its speech.¹¹⁸

IV. Government Sponsored Twitter Accounts

A. The Threshold Issue

The internet, and more specifically, social media, has been designed for broad access and public dialogue.¹¹⁹ Over two decades ago, the Supreme Court recognized the internet as “a vast platform from which to address and hear from a worldwide audience.”¹²⁰ The platform allows users to “become a town crier with a voice that resonates farther than it could from any soapbox.”¹²¹ Communication that historically occurred on streets and sidewalks, now occur on the “vast democratic forums of the internet . . . and social media in particular.”¹²² For example, Facebook allows users to debate questions of religion and politics while also sharing family pictures.¹²³ LinkedIn is a platform where people can network and find job opportunities.¹²⁴ Twitter is a way “users can petition their elected representatives, and otherwise engage with them in a direct manner.”¹²⁵ Generally, “social media users employ these websites to engage in a wide array of

¹¹⁷ *Walker*, 135 S. Ct. at 2246.

¹¹⁸ *Id.* at 2245; *Pleasant Grove City*, 555 U.S. at 468.

¹¹⁹ Brief of Amici Curiae First Amendment Legal Scholars in Support of Plaintiff’s Motion for Summary Judgment at 11, *Knight First Amendment Inst. at Colum. Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 1:17-cv-05205-NRB), ECF No. 47.

¹²⁰ *Reno v. ACLU*, 521 U.S. 844, 853 (1997).

¹²¹ *Id.*

¹²² *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (quoting *Reno*, 521 U.S. at 868).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

protected First Amendment activity¹²⁶ on topics ‘as diverse as human thought’¹²⁷ and political debate.¹²⁸

“One of the prerogatives of American citizenship is the right to criticize public men and measures.”¹²⁹ The First Amendment encourages political debate, which “is bound to produce speech that is critical of those who hold public office.”¹³⁰ As American citizens, individuals have a right to criticize public figures and as technology advances with the development of platforms like Twitter, such “vehement, caustic, and sometimes unpleasantly sharp attacks” will be tweeted or posted directly to the figure.¹³¹ However, so long as any statement made about the figure is not “false or [made] with reckless disregard,” the government official acting as a public figure has put him or herself in a position for his or her “spotless record and sterling integrity” to be attacked.¹³²

Twitter is the “modern, electronic equivalent of a public square.”¹³³ Unlike private emails, private chat rooms or private bulletin boards, Twitter is concerned with promoting an uninhibited and transparent means to share information and ideas.¹³⁴ However, the very nature of a Twitter account is dispositive. Although the Supreme Court recognizes that “[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more,”¹³⁵ not all of Twitter is a public forum.¹³⁶ The

¹²⁶ However, not all speech is protected by the First Amendment. Before determining whether Twitter is a public forum, an inquiry into whether the speech individuals seek to have with government officials on such platforms is subject to constitutional protections is necessary. The First Amendment does not apply to speech in a few limited areas including “obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *United States v. Stevens*, 559 S. Ct. 460, 468-69 (2010) (citations omitted).

¹²⁷ *Packingham*, 137 S. Ct. at 1735-36 (citation omitted).

¹²⁸ *See* *Baumgartner v. United States*, 322 S. Ct. 665, 673-674 (1944).

¹²⁹ *Id.*

¹³⁰ *Hustler Magazine, Inc. v. Falwell*, 485 S. Ct. 46, 51 (1988).

¹³¹ *See id.* at 51-52 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

¹³² *See id.* (citation omitted).

¹³³ *Twitter, Inc. v. Sessions*, 236 F. Supp. 3d 803, 815 (N.D. Cal. 2017) (finding that because “[i]n some ways, Twitter acts as the modern, electronic equivalent of a public square,” the restrictions imposed on Twitter are subject to strict scrutiny).

¹³⁴ *Our values*, TWITTER, https://about.twitter.com/en_us/values.html (last visited Mar. 9, 2019);

Our company, TWITTER, https://about.twitter.com/en_us/company.html (last visited Mar. 9, 2019).

¹³⁵ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

concept of free expression is embedded within the values of the company.¹³⁷ But, unless a government official's Twitter account is a public forum, no First Amendment protections may apply.¹³⁸

B. Applicability of the Forum Doctrine

The current First Amendment doctrine does not account for a situation where a space may involve both government speech and a public forum.¹³⁹ Thus, a government official's Twitter account can either be government speech or private speech, but not both.¹⁴⁰

Within the last few years, the Supreme Court attempted to distinguish the government speech doctrine from the public forum doctrine within the context of monuments in a park¹⁴¹ and personalized license plates.¹⁴² In *Pleasant Grove City v. Summum*, the City denied a religious organization's request to erect a monument displaying its main tenants in a park where at least 11 other privately donated monuments were displayed.¹⁴³ The religious organization argued that the park constituted a public forum for private speech and that the City infringed upon its First Amendment rights.¹⁴⁴ However, the Court held that the "City's decision to accept certain privately donated monuments while rejecting respondent's [was] best viewed as a form of government speech," and thus not subject to a First Amendment analysis.¹⁴⁵ The City selected what monuments

¹³⁶ See Lidsky, *supra* note 52, at 1995 n.130 (2011) ("[O]ne characterization can[not] capture the diversity of the internet. Some spaces, like public chat rooms, function as public spaces. Other spaces, such as private email, private chat rooms, private bulletin boards, or even Facebook pages with privacy protections enabled, do not function as public spaces. Thus . . . [a] broad brush approach is insufficiently nuanced to diagnose whether any particular cyber-space is a public forum."). *But see* Steven G. Gey, *Reopening the Public Forum – From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1611 (1998) (noting that as the internet has evolved, it has become comparable to a public park because of its "essentially public character").

¹³⁷ *Our values*, *supra* note 35.

¹³⁸ See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

¹³⁹ Lidsky, *supra* note 52, at 1997.

¹⁴⁰ *Id.*

¹⁴¹ *Pleasant Grove City v. Summum*, 555 U.S. 460, 460 (2009).

¹⁴² *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2239 (2015).

¹⁴³ *Pleasant Grove City*, 555 U.S. at 464-65 (noting that one of the monuments in the park displayed the Ten Commandments).

¹⁴⁴ *Id.* at 481.

¹⁴⁵ *Id.* at 461.

were displayed in the park thereby effectively controlling the “image [and message] . . . that is wish[ed] to project.”¹⁴⁶ Because the monuments spoke on behalf of the City, the Court held that the City could accept or reject what it would like to convey without violating the First Amendment.¹⁴⁷

Similarly, in *Walker v. Texas Division, Sons of Confederate Veterans*, the Court determined whether the Texas Department of Motor Vehicles Board engaged in viewpoint discrimination upon denial of the plaintiff’s proposal for a specialty license plate featuring the confederate flag.¹⁴⁸ The plaintiff argued that a license plate was a forum provided by the government for private speech.¹⁴⁹ However, the Court disagreed with the plaintiff’s contention that “the State . . . engage[d] in expressive activity through such slogans and graphics.”¹⁵⁰ Since the Court understood messages conveyed from license plates to constitute government speech, the government was not required to create a plate representing an opposing viewpoint.¹⁵¹

In holding in favor of the defendant in both cases, the Court held that based upon the (1) history, (2) reasonable interpretation, and (3) direct control of the City over the park and the motor vehicle board over the license plates, no public forum was intended to be created.¹⁵² When applying these three factors to a government official’s Twitter account, each appears to be established. In recent history, Twitter has become a prominent means for communication. When a government official tweets, a reasonable person is likely to interpret the post as a message conveying government speech. The government official maintains direct control over his or her account. Thus, a government official’s tweets, in and of themselves, are not susceptible to a forum analysis.¹⁵³

¹⁴⁶ *Id.* at 472-73.

¹⁴⁷ *Id.*

¹⁴⁸ *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2243-44 (2015).

¹⁴⁹ *Id.* at 2250.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 2245.

¹⁵² *Pleasant Grove City*, 555 U.S. at 470-73; *Walker*, 135 S. Ct. at 2250-51.

¹⁵³ *See Knight First Amendment Inst. at Colum. Univ. v. Trump*, 302 F. Supp. 3d 541, 571-72 (S.D.N.Y. 2018).

However, “the same cannot be said . . . of the interactive space for the replies and retweets created by each tweet sent by the [government official’s] account.”¹⁵⁴ “Just as the parkland surrounding monuments in *Pleasant Grove* continued to constitute a public forum, even though the monuments themselves constituted government speech,” the interactive portion of a government official’s social media account constitutes a public forum, even though the official’s own tweets and posts are government speech.¹⁵⁵ Thus, the content of a government official’s tweet must be distinguished from the interactive space of each tweet.¹⁵⁶

Within the interactive space, an individual may tweet at a government official or reply to a government official’s tweet.¹⁵⁷ The individual controls the content of that message, not the government.¹⁵⁸ After all, “the essential function of a given tweet’s interactive space is to allow private speakers to engage with the content of the tweet.”¹⁵⁹ By disseminating the government’s message on an interactive platform like Twitter, the government official’s tweets become a communicative

¹⁵⁴ *Id.* at 572; *See* Lidsky, *supra* note 52, at 2024 n.130 (“Where the medium lends itself to use as a public forum, it should be treated as such regardless of government intent. If the government wishes to maintain complete control, it must forego interactivity. If the site is interactive, citizens will be able to discern which portion is government speech and which portion is private speech.”); *see also* Rose Rinehart, *Note: “Friending” and “Following” the Government: How the Public Forum and Government Speech Doctrines Discourage the Government’s Social Media Presence*, 22 S. CAL. INTERDISC. L. J. 781, 816 (2013) (“While the government’s dissemination of a tweet might be considered government speech, the responses to the tweet from other Twitter users can take a variety of forms.”).

¹⁵⁵ *Davison v. Randall*, No. 17-2002, 2019 U.S. App. LEXIS 406, at *38 (4th Cir. Jan. 7, 2019).

¹⁵⁶ *See Knight*, 302 F. Supp. 3d at 572-73; *Davison*, 2019 U.S. App. LEXIS 406, at *11 (recognizing that portion on the government official’s Facebook page on which the public could comment, reply, and like posts as “materially different” from the portion which contains the government official’s own post); *One Wis. Now v. Kramer*, No. 17-cv-0820-wmc, 2019 U.S. Dist. LEXIS 8828, at *31 (W.D. Wis. Jan. 18, 2019) (“[I]t is easy to distinguish the parts of Twitter that reflects the [government official’s] respective views (e.g., their own tweets and reactions to other tweets), from the action of other citizens on their feeds) . . . [T]he interactive portion is severable from the rest of the Twitter account and not subject to the government speech exception.”). *But see* *Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1010-11 (E.D. Ky. 2018) (making no distinction between the government official’s posts and the interactive space, instead finding that a forum analysis does not apply to the government official’s Facebook and Twitter accounts, which are used to communicate his own speech, rather than the speech of his constituents, who can only comment on the posts he wrote).

¹⁵⁷ *See Knight*, 302 F. Supp. 3d at 572-73; *Davison*, 2019 U.S. App. LEXIS 406, at *11; *One Wis. Now*, 2019 U.S. Dist. LEXIS 8828, at *31.

¹⁵⁸ *See Knight*, 302 F. Supp. 3d at 572-73; *Davison*, 2019 U.S. App. LEXIS 406, at *11; *One Wis. Now*, 2019 U.S. Dist. LEXIS 8828, at *31.

¹⁵⁹ *See Knight*, 302 F. Supp. 3d at 573.

forum generally accessible to all Twitter users.¹⁶⁰ Therefore, the individual's communication with the government official constitutes private speech, subject to a forum analysis.¹⁶¹

Just because the government does not personally own Twitter, the application of the public forum doctrine is not restricted because “government ownership is not a *sine qua non* of public status.”¹⁶² In other words, simply because the government does not own the underlying Twitter software or the company, the account does not fall outside the confines of protection provided by the public forum doctrine.¹⁶³ For the public forum doctrine to apply, the government may either own or control the space.¹⁶⁴ Like the government can rent a building to conduct public debates or discussions, which are considered public forums, a government official's Twitter account may similarly be “rented . . . for the promotion of public discussion” and be considered a public forum.¹⁶⁵ Government officials, nonetheless, “exercise control over various aspects of [their] accounts,” such as the content of their tweets,¹⁶⁶ and thus, the government possesses the requisite intent to create an interactive forum and the public forum doctrine applies.

Due to use of the forum and the interactive nature of the Twitter account, government officials are intrinsically inviting speech by public citizens.¹⁶⁷ If government officials use their Twitter

¹⁶⁰ *Id.* at 574.

¹⁶¹ *Id.* at 575.

¹⁶² Lidsky, *supra* note 52, at 1996.

¹⁶³ *Id.* The Supreme Court has not limited a forum analysis to government owned property. *See, e.g.,* *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985) (recognizing that a forum analysis applies “to public property or to private property dedicated to public use”); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547, 555 (1975) (holding that the privately owned theatre leased to the city to be a “public forum[]] designed for and dedicated to expressive activities”); *Marsh v. Alabama*, 326 U.S. 501, 507 (1946) (holding that the streets in a company owned town to be a public forum since “[w]hether a corporation or a municipality owns or possesses the town the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free.”). *But see* *Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1011 (E.D. Ky. 2018) (“Twitter and Facebook accounts are privately owned channels of communication and are not converted to public property by the use of a public official.”).

¹⁶⁴ *See, e.g.,* *Cornelius*, 473 U.S. at 801; *Southeastern Promotions, Ltd.*, 420 U.S. at 547, 555; *Marsh*, 326 U.S. at 507. *But see* *Morgan*, 298 F. Supp. 3d at 1011.

¹⁶⁵ *See* Lidsky, *supra* note 52, at 1996 n.130.

¹⁶⁶ *Knight First Amendment Inst. at Colum. Univ. v. Trump*, 302 F. Supp. 3d 541, 566-67 (S.D.N.Y. 2018).

¹⁶⁷ Plaintiff's Reply Memorandum of Law in Support of Plaintiff's Cross-Motion for Summary Judgment at 1-2, *Knight First Amendment Inst. at Colum. Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 1:17-cv-05205-NRB), ECF No. 56.

accounts as non-interactive tools, their accounts “would doubtless be treated as government speech.”¹⁶⁸ However, by allowing for feedback in the form of comments and the tendency of government officials to respond by either replying back or acknowledging the comment by retweeting or liking the tweet, officials are not solely engaging in his or her own speech.¹⁶⁹

If a government official intends for its account to be limited to government speech, the official has the authority to change the setting of the account, making it accessible only to his or her followers.¹⁷⁰ The official can make the account private to select who may access the information posted to the account.¹⁷¹ However, when the forum is left open and no “clear and concrete statement on its social media page [is made] that it does not intend to create a public forum,” the government creates a public forum.¹⁷²

C. A Public Forum Analysis

The Supreme Court recognizes the internet, including social media platforms, to be the modern world’s “most important place[] (in a spatial sense) for the exchange of views,” equating the internet with public streets and parks.¹⁷³ However, the cyberspace forum is not supported by long tradition or government fiat.¹⁷⁴ The traditional public forum category is closed.¹⁷⁵ If the place was not historically used as a public forum, then it may not be considered a traditional public forum.¹⁷⁶ Although recent Supreme Court decisions signal that the Court may be willing to open the category and modify it as society has technologically advanced, without clear case law allowing the expansion

¹⁶⁸ Lidsky, *supra* note 52, at 1996.

¹⁶⁹ *Id.*

¹⁷⁰ *About public and protected tweets*, TWITTER, <https://help.twitter.com/en/safety-and-security/public-and-protected-tweets> (last visited Mar. 9, 2019).

¹⁷¹ *Id.*

¹⁷² Lidsky, *supra* note 52, at 1996.

¹⁷³ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735, 1738 (2017).

¹⁷⁴ Lidsky, *supra* note 52, at 1983.

¹⁷⁵ *See Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998); *see also Int’l Soc’y for Krishna Consciousness v. Lee*, 505 U.S. 672, 680 (1992).

¹⁷⁶ *Id.*

of traditional public forums, a government official's Twitter account cannot be categorized as a traditional public forum.¹⁷⁷

If a Twitter account restricts the topics discussed on the forum, then the account would be labeled as a limited public forum.¹⁷⁸ However, no such limitation is placed on most, if not all, government officials' Twitter accounts. Based upon the nature of the Twitter feed, a designated public forum is the appropriate public forum category.

A government official's Twitter account is made available and accessible to the public. Although no government official is "required to create the forum in the first place," once it is created, it must be "open for use by the general public."¹⁷⁹ However, before determining whether a forum is designated, courts assess whether the government clearly intended to open a forum for the purpose of communication and debate.¹⁸⁰ If government officials have not made their Twitter accounts private nor prevented the public from communicating on it, the intent requirement is satisfied.¹⁸¹ Had the official wanted to place some limitations on the forum, he or she could write a disclaimer in the biography section of the account.¹⁸² Without clearly imposing restrictions, a reasonable person is likely to assume that a forum seeking a variety of perspectives is created.¹⁸³

To determine intent, the Court also examines the nature and compatibility of the forum with expressive activity.¹⁸⁴ Twitter explains on its website that the forum is for "[p]eople [to] come to Twitter to freely express themselves," to "[s]park a global conversation," and to "[s]ee every side of

¹⁷⁷ *Packingham*, 137 S. Ct. 1730 at 1735, 1738 (citation omitted).

¹⁷⁸ For example, in 2011, the General Services Administration Facebook page provided status updates to followers. Although followers could make comments, their discussions were linked to the specific updates. Followers were thus constrained from posting anything they wanted. Lidsky, *supra* note 52, at 1998-99 (citing General Services Administration, Facebook Page of the General Service Administration, Facebook).

¹⁷⁹ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 47 (1983).

¹⁸⁰ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985).

¹⁸¹ *See id.* at 800-02.

¹⁸² *See id.*

¹⁸³ *See* Lidsky, *supra* note 52, at 1997-98.

¹⁸⁴ *Cornelius*, 473 S. Ct. at 802.

the story.”¹⁸⁵ Even the Supreme Court recognizes that Twitter is a tool for the public to speak and voice their concerns with their elected officials or representatives.¹⁸⁶

Whether the government sponsored communication forum is Facebook or Twitter or any other social media platform, “[t]hese websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.”¹⁸⁷ As designated public forums, the government “may not . . . bar . . . the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture. It is well established that, as a general rule, the government ‘may not suppress lawful speech as the means to suppress unlawful speech.’”¹⁸⁸ Thus, any content based or view point based restriction is subject to strict scrutiny.¹⁸⁹

V. Recent Developments

A. A Parallel Case: Twitter

Upon filing suit in the Southern District of New York, the Institute alleged that Trump violated the First Amendment by excluding people from his Twitter account because of their views. The complaint stated that “the @realDonaldTrump account infringes . . . the First Amendment . . . [because] it imposes an unconstitutional restriction on [the plaintiffs] participation in a designated public forum.”¹⁹⁰ However, the Government argued that Trump has the power to choose who to interact with on Twitter because his power to block people does not interfere with their access to information nor their ability to communicate.¹⁹¹ However, the court concluded that “no government

¹⁸⁵ *Intersectionality, Culture & Diversity*, TWITTER, <https://careers.twitter.com/en/diversity.html> (last visited Mar. 9, 2019); *Enforcing our rules*, TWITTER, https://about.twitter.com/en_us/safety/enforcing-our-rules.html (last visited Mar. 9, 2019).

¹⁸⁶ *See* *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

¹⁸⁷ *Id.* at 1737.

¹⁸⁸ *Id.* at 1738 (quoting *Ashcroft v. Free Speech Coalition*, 535 S. Ct. 234, 255 (2002)).

¹⁸⁹ *Cornelius*, 473 S. Ct. at 800.

¹⁹⁰ Complaint at 47, *Knight First Amendment Inst. at Colum. Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 1:17-cv-05205-NRB), ECF No. 1.

¹⁹¹ *See* Defendants’ Memorandum. of Law In Opposition to Plaintiffs’ Cross-Motion for Summary Judgment and Reply Memorandum in Further Support of Defendants’ Motion for Summary Judgment. at 13, *Knight*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 1:17-cv-05205-NRB), ECF No. In the brief, the Government argued:

When an elected official is out in public, he is free to choose with whom he does, and does not, speak. He can talk politics with a supporter in a park, and he can discuss policy with a critic on a public

official—including the President—is above the law” and thus Trump’s “blocking of the individual plaintiffs from [his Twitter] account because of their expressed political views” was unconstitutional.¹⁹² Although every Twitter user has the ability to block people from accessing their account, different rules apply to a government official’s Twitter account that is created for the purpose to interact with the public.¹⁹³ Since Trump was elected into office,¹⁹⁴ he has used his Twitter account “as a channel for communicating and interacting with the public about his administration.”¹⁹⁵ Thus, when individuals were blocked from the @realDonaldTrump Twitter account for criticizing Trump and/or his policies, First Amendment concerns arose.¹⁹⁶

Despite Twitter maintaining some control over the @realDonaldTrump account—as it does with all Twitter accounts—and Twitter not being a government-owned company,¹⁹⁷ Trump was found to have sufficient control of the account and a thus a forum analysis was warranted.¹⁹⁸ However, the analysis only applies to the interactive space created within the account.¹⁹⁹ Trump’s tweets are government speech and cannot be susceptible to First Amendment scrutiny, but the

street. But he can also do none of the above—he can decide not to take photos with supporters, and therefore wave away anyone who expresses agreement with his views, and he can refrain from engaging with constituents that he knows to be unpleasant critics, reasoning that there are better uses of his time. Moreover, the official can repeat the same choices over time—he can choose to always steer clear of an overly enthusiastic supporter, and he can make a practice of ignoring an especially unpleasant critic that he knows he will never persuade.

Id. at 13.

¹⁹² *Knight*, 302 F. Supp. 3d at 580.

¹⁹³ *Id.* at 567. If a government official’s Twitter account is not “impress[ed] with the trappings of [his or] her officer and . . . [is] not use[d] to exercise the authority of [his or] her position,” a forum analysis would not be required. *Id.* at 569.

¹⁹⁴ *Id.* at 569. The fact Trump first created his @realDonaldTrump account in 2009 in his capacity as a private person is irrelevant to the analysis. *Id.* at 568-69 (“[T]he entire concept of a designated public forum rests on the premise that the nature of a (previously closed) space has been changed.”).

¹⁹⁵ *Id.* at 552.

President Trump uses [the] @realDonaldTrump [account], often multiple times a day, to announce, describe, and defend his policies; to promote his Administration’s legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; to challenge media organizations whose coverage of his Administration he believes to be unfair; and for other statements, including on occasion statements unrelated to official government business.

Id. at 553. “Twitter users engage frequently with the President’s tweets,” which frequently generate around 15,000 to 20,000 retweets and tens of thousands of replied. *Id.* at 554.

¹⁹⁶ *Id.* at 554-55.

¹⁹⁷ *See id.* at 567.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

content of a tweet, retweet, or reply sent by an individual directly to Trump, is protected by the First Amendment.²⁰⁰

The interactive space within Trump’s Twitter account is a designated public forum.²⁰¹ The account, “designed to allow users ‘to interact with other Twitter users,’” is generally accessible to everyone regardless of political affiliation and anyone who wants to follow, tweet, retweet, or reply @realDonaldTrump may do so.²⁰² Viewpoint discrimination in designated public forums is forbidden; yet in blocking individuals who criticized him or his policies from his Twitter account, Trump restricted their speech and infringed upon their First Amendment rights.²⁰³ The court found that the blocking of the individuals is unconstitutional and ordered a declaratory judgment against Trump to unblock the plaintiffs he prevented from accessing his account.²⁰⁴ Although Trump unblocked the accounts, the Government appealed this issue to the Second Circuit.²⁰⁵

B. A Parallel Case: Facebook

Brian Davison, a resident of Loudon County Virginia, filed suit against Phyllis Randall,²⁰⁶ the Chair of the Loudon County Board of Supervisors, after he was banned from her official “Chair Phyllis J. Randall” Facebook page.²⁰⁷ Randall admitted that, in “acting out of ‘censorial motivation,’”²⁰⁸ she banned Davison from her social media page because she was offended by his

²⁰⁰ *Id.*

²⁰¹ *See id.* at 574.

²⁰² *Id.* at 574-75.

²⁰³ *See id.* at 576.

²⁰⁴ *See id.* at 579-80.

²⁰⁵ Charlie Savage, *White House Unblocks Twitter Users Who Sued Trump, but Appeals Ruling*, N.Y. TIMES (June 5, 2018), <https://www.nytimes.com/2018/06/05/us/politics/trump-twitter-account-lawsuit.html>. The case will be argued in the Second Circuit on March 26, 2019. *Knight Institute v. Trump – Lawsuit Challenging President Trump’s Blocking of Critics on Twitter*, KNIGHT FIRST AMENDMENT INST., <https://knightcolumbia.org/content/knight-institute-v-trump-lawsuit-challenging-president-trumps-blocking-critics-twitter> (last visited Mar 9, 2019). This article went into publication before the Second Circuit’s opinion was filed.

²⁰⁶ Davison sued Randall in her official and private capacity. However, the Court found that since the Board of Supervisors was not Randall’s superior, a free speech claim could not be brought against her in her official capacity. Thus, the analysis pertains to the claim against Randall in her individual capacity. *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 715 (E.D. Va. 2017).

²⁰⁷ *Davison*, 267 F.3d at 706-07.

²⁰⁸ *Id.* at 714.

post on her account criticizing her colleagues.²⁰⁹ Davison thus alleged that his right of free speech was violated upon being discriminated against on the basis of viewpoint in a limited public forum.²¹⁰

The district court was thus tasked with answering the legal question of “when . . . a social media account maintained by a public official [is] considered ‘governmental’ in nature [for purposes of the First Amendment] and thus subject to constitutional constraints?”²¹¹ Under a “color of state” law analysis, Randall was found to have “operated [her] Facebook page while ‘purporting to act under the authority vested in [her] by the state.’”²¹² A “sufficiently close nexus” existed between Randall’s unofficial conduct and her public office.²¹³ Randall argued that the page was operated in a private manner because she was not required to create the page per her duties on the Board of Supervisors, she was not limited to using the account in her office or normal working hours, and that the Facebook page would not revert to the county after she left office.²¹⁴ However, these factors were not dispositive.²¹⁵ Ultimately, the court found Randall’s “action ‘arose out of public, not personal, circumstances.’”²¹⁶ The page was developed as a “tool of governance” developed for the purpose of “addressing her . . . constituents.”²¹⁷

²⁰⁹ *Id.* at 711.

²¹⁰ *Id.* at 706.

²¹¹ *Id.* at 712.

²¹² *Id.* at 714 (quoting *Hughes v. Halifax Cnty. Sch. Bd.*, 855 F.2d 183, 186-87 (4th Cir. 1988)).

²¹³ *Id.* at 712 (citation omitted); *see* *Rossignol v. Voorhaar*, 316 F.3d 516, 523-24 (4th Cir. 2003) (holding that the “requisite nexus” existed between the off duty officers and their public office when they bought all available copies of the newspaper in which the Sheriff was criticized).

²¹⁴ *Davison*, 267 F. Supp. 3d at 712.

²¹⁵ *Id.*

²¹⁶ *Id.* at 713 (citation omitted).

²¹⁷ *Id.* at 713-14. The court took into consideration the following facts in finding state action: (1) the title of the page; (2) instead of providing her personal contact information, Randall listed her County email address and phone number; (3) page includes link to Randall’s official County website; (4) most of the posts are expressly addressed to Randall’s constituents; (5) Randall has posted about issues on behalf of the whole Loudoun County Board on her page; (6) Randall explained that the purpose of the page is to have “back and forth constituent conversations” and would solicit participation (7) the content posted is strongly related to Randall’s office; (8) coordinate relief efforts; (9) announce Board’s budget; and (10) invite attendance to events. *Id.* at 707-10; 713-14.

In criticizing the Board of Supervisors on social media, Davison’s speech “was not just protected by the [First Amendment], but [laid] at the very ‘heart’ of [it].”²¹⁸ The Fourth Circuit has recognized “that the government may open a forum for speech by creating a website that includes a ‘chat room’ or ‘bulletin board’ in which private viewers can express opinions or post information; or that otherwise ‘invite[s] or allow[s] private persons to publish information or their position.’”²¹⁹ A Facebook page inherently promotes the exchange of ideas and information and thus, when used by the government, such a forum is clearly a designated place of communication.²²⁰ The “Chair Phyllis J. Randall” page was a public forum since Randall “allowed virtually unfettered discussion . . . [and] affirmatively solicited comments from her constituents.”²²¹

Whether categorized as a traditional, designated, limited, or nonpublic forum, viewpoint discrimination is prohibited.²²² The First Amendment clearly prohibits the government from prohibiting speech because it is offensive.²²³ However, Randall was acting in her capacity as a government official, thus she violated the First Amendment by barring Davison from her Facebook page, a designated forum.²²⁴

VI. Parallel to City Council and Town Hall Meetings

²¹⁸ *Id.* at 716 (quoting *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275, 284 (4th Cir. 2008) (holding that the school district website including links to third-party content constituted government speech however a public forum could be created if the website was interactive)).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.* at 708, 716. Randall’s intent to create a designated public forum is supported by the following post:

Everyone, could you do me a favor. I really want to hear from ANY Loudoun citizen on ANY issues, request, criticism, compliment, or just your thoughts. However, I really try to keep back and forth conversations (as opposed to one time information items such as road closures) on my county Facebook page (Chair Phyllis J. Randall) or County email (Phllis.randall@loudoun.gov). Having back and forth constituent conversations are Foiable (FOIA) so if you could reach out to me on these mediums that would be appreciated. Thanks much, Phyllis[.]

Id.

²²² *Id.* at 717.

²²³ *Id.* (“Indeed, the suppression of critical commentary regarding elected officials is the quintessential form of viewpoint discrimination against which the First Amendment guards.”).

²²⁴ *Id.* at 718, *aff’d sub nom. Davison v. Randall*, No. 17-2002, 2019 U.S. App. LEXIS 406, at *40-41 (4th Cir. 2019) (affirming the judgment of the district court holding that “interactive component of the Chair’s Facebook Page constituted a public forum, and Randall engaged in unconstitutional viewpoint discrimination when she banned Davision[.]”).

Twitter and other social media platforms serve many of the same functions as public meetings, such as town halls and city council meetings with public comment sessions.²²⁵ Without the expenses, time constraints, or geographical limitations of public meetings, social media creates groups of concerned citizens that voice their opinions and share their views over the internet to help improve upon the decisions the government makes.²²⁶ Presumably, that is why former President Barack Obama hosted the first Twitter town hall through the official White House Twitter account in 2011.²²⁷ Both social media and public meetings “open[] a forum for direct citizen involvement,”²²⁸ which, once created, impose constitutional limitations against government interference.²²⁹

So long as constitutional rights are not infringed, each Twitter user has the ability to choose who to communicate with.²³⁰ However, to the extent no Twitter policy is violated, the topic of the communication cannot be controlled. While Twitter encourages people to “join the conversation,”²³¹ public meetings are not required to provide a public comment session.²³² The government may “limit or preclude citizen participation in [such] meetings,” but once “state and local laws create a forum for citizen input at public meetings, constitutional guarantees apply.”²³³

Although the Supreme Court has not decided what type of forum a public meeting is,²³⁴ most of the circuit courts have held such meetings to be limited public forums.²³⁵ Rather than be

²²⁵ Lidsky, *supra* note 52.

²²⁶ *Id.*

²²⁷ The White House: Office of the Press Secretary, *White House to Host Twitter @ TOWNHALL* (June 30, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/06/30/white-house-host-twitter-townhall> (last visited May 21, 2019); *Twitter Town Hall*, TWITTER (July 5, 2011), https://blog.twitter.com/en_us/a/2011/twitter-town-hall.html (last visited Mar. 9, 2019).

²²⁸ *City of Madison Joint Sch. Dist. v. Wisconsin Emp’t Relations Comm’n*, 429 U.S. 167, 175 (1967).

²²⁹ Terri Day & Erin Bradford, *Civility in Government Meetings: Balancing First Amendment, Reputational Interests, and Efficiency*, 10 FIRST AMEND. L. REV. 57, 74 (2011).

²³⁰ *Id.* at 63-64; *Help With Follow Limits*, TWITTER (Feb. 23, 2017), <https://help.twitter.com/en/using-twitter/twitter-follow-limit>.

²³¹ *About*, *supra* note 31.

²³² Day & Bradford, *supra* note 229, at 62.

²³³ *Id.* at 73.

²³⁴ The Supreme Court held that prohibiting a nonunion teacher from speaking at an open board of education meeting violated the First Amendment. However, the Court did not address what kind of public forum an open meeting is. *City of Madison Joint Sch. Dist. v. Wisconsin Emp’t Relations Comm’n*, 429 U.S. 167, 175-76 (1976).

open “for endless public commentary,” public meetings are limited platforms, which only discuss particularly selected topics.²³⁶ As required in designated public forums, the government cannot “regulat[e] speech [in limited public forums] when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”²³⁷ However, “content[] based restraints are permitted, so long as [they are] designed to confine the forum to the limited and legitimate purposes for which [it was] created.”²³⁸

Like Twitter, the purpose of public meetings is to “foster[] citizen participation and [to] ensure the efficient accomplishment of public business.”²³⁹ To achieve these goals at public meetings, disturbances²⁴⁰ must be controlled.²⁴¹ Thus, “repetitive,” “harassing,” or “frivolous” speech is often prohibited.²⁴² In limited public forums, reasonable time, place, and manner of speech restraints are permissible if they serve the purpose of the forum.²⁴³ Beyond the basic requirement that the government cannot silence any viewpoint it disfavors, the government “has the power to limit speech through the imposition of agendas and rules of order and decorum.”²⁴⁴ Most

²³⁵ Day & Bradford, *supra* note 229, at 77-78.

It is fair to say that the circuit courts' jurisprudence in this area is a morass of confusion. The First, Second, Third, Fifth, Eighth, and Tenth Circuit Courts of Appeals have struggled with the distinction between a "designated public forum" and a "limited public forum," and consequently, remain unclear how to categorize public comment sessions. The Eleventh Circuit Court of Appeals seemingly categorized citizen comment sessions as "limited public forums," but applied the standard of scrutiny for a "designated public forum." In contrast, the Fourth and Ninth Circuit Courts of Appeals have applied, without equivocation, the current standard articulated by the Supreme Court for limited public forums, thereby, permitting speech restrictions on citizen comments in public meetings which are reasonable and viewpoint neutral.

Id.

²³⁶ Rowe v. City of Cocoa, 358 F.3d 800, 803 (11th Cir. 2004).

²³⁷ Galena v. Leone, 638 F.3d 186, 199 (3d Cir. 2011) (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 US 819, 829 (1995)).

²³⁸ *Id.* (quoting Eichenlaub v. Twp. of Indiana, 385 F.3d 274 (3d Cir. 2004)).

²³⁹ Day & Bradford, *supra* note 229, at 67.

²⁴⁰ “Actual disruption means actual disruption. It does not mean constructive disruption, technical disruption, virtual disruption, *nunc pro tunc* disruption, or imaginary disruption.” Norse v. City of Santa Cruz, 629 F.3d 966, 976 (9th Cir. 2010) (holding that “[t]he City cannot define disruption so as to include non-disruption to invoke the aid of [precedent]”).

²⁴¹ Day & Bradford, *supra* note 229, at 67.

²⁴² *Id.*

²⁴³ Pleasant Grove City v. Sumnum, 555 U.S. 460, 469 (2009).

²⁴⁴ Day & Bradford, *supra* note 229, at 63; White v. Norwalk, 900 F.2d 1421, 1425 n.3 (9th Cir. 1990) (citation omitted).

states have open meeting laws, also called sunshine laws, which specify the rights of individuals at public meetings.²⁴⁵ “Almost all states that allow some form of public participation allow the public body to impose reasonable regulations on the public's participation.”²⁴⁶

Courts have been tasked with deciding whether an individual's First Amendment rights have been implicated when he or she is silenced at a public meeting or required to leave. The courts have repeatedly held that when the speaker (1) “exceed[s] his allotted time limit”; (2) “debate[s] irrelevancies”; (3) “pursue[s] repetitive debate”; (4) “discusse[s] matters of private concern; or (5) “deliver[s] comments in a harassing, insulting manner,” the government has reasonable grounds to silence him or her.²⁴⁷

Walter White and James Griffin sought injunctive and declaratory relief against the City of Norwalk and various city officials²⁴⁸ after they were removed from multiple city council meetings.²⁴⁹ Subject to the governing ordinance, the Norwalk City Council offered the public the opportunity to speak at public meetings; however the Council had the authority to stop someone from speaking if the speech became irrelevant or repetitious.²⁵⁰ Thus, when White and Griffin refused to stop talking and their speech became unduly repetitive and disruptive, the Council ruled them out of order.

²⁴⁵ “Open meeting laws, also called sunshine laws, require that, with notable exceptions, most meetings of federal and state government agencies and regulatory bodies be open to the public, along with their decisions and records.” Alex Aichinger, *Open Meeting Laws and Freedom of Speech*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/1214/open-meeting-laws-and-freedom-of-speech> (last visited March 9, 2019).

²⁴⁶ Day & Bradford, *supra* note 229, at 69-74. While North Carolina statutorily grants the right to participate in public meetings, New York, and Washington have no such rights. *Id.* at 70, 72. Instead, the relevant statutes in those two states only guarantee the right to watch and listen to public meetings. *Id.* at 72. In Texas and Minnesota, any rights or limitations that an individual may have at public meetings is determined by the court alone, but in Florida, both the court and legislature determine the extent to which public participation at public meetings is permissible. *Id.* Arizona allows for public communication only if an open call is made at the meeting, and while Nebraska grants the public the right to participate at meetings, the governing public body has the authority not to open the floor. *Id.* at 71. In contrast, California requires that the public have an opportunity to speak on agenda items. *Id.*; see also *State sunshine laws*, BALLOTOPEdia, https://ballotpedia.org/State_sunshine_laws_and_State_open_meetings_laws, BALLOTOPEdia, https://ballotpedia.org/State_open_meetings_laws (last visited Mar. 9, 2019).

²⁴⁷ Day & Bradford, *supra* note 229, at 68.

²⁴⁸ *White*, 900 F.2d at 1421. In addition to the City of Norwalk, the defendants include two city administrators, a city councilman, and the city attorney. *Id.*

²⁴⁹ See *id.* at 1423.

²⁵⁰ See *id.* at 1425.

White and Norwalk alleged that their First Amendment rights were violated; however because their conduct “imped[ed] the orderly conduct” of the meeting, the Ninth Circuit held that no such violation occurred.²⁵¹

Similarly, the presiding official at the Key West City Commission meeting had Douglas Jones removed from the meeting when he refused to limit his concern to the relevant topic at hand and became antagonistic.²⁵² Although the district court found that Jones was silenced because of the content of his speech, the Eleventh Circuit disagreed, holding that Jones was removed because he was disruptive and failed to adhere to the agenda, not because the Commission was discriminating against him.²⁵³ The Commission had a significant interest in conducting an orderly and efficient meeting. Thus, confining Jones to address only the agenda item did not constitute a First Amendment violation.²⁵⁴

However, when Robert Norse was ejected from a public city council meeting for silently giving the Nazi salute, the Ninth Circuit held that his First Amendment rights were violated.²⁵⁵ Although Norse saluted after the public comment period, “a city council may not . . . close an open meeting by declaring that the public has no First Amendment right whatsoever once the public comment period has closed . . . the entire city council meeting held in public is a limited public forum.”²⁵⁶ The salute did not disrupt the decorum or order of the meeting; therefore the Council’s motivation behind removing Norse was to silence a viewpoint it disfavored.²⁵⁷ The court explained that finding otherwise would prove to be dangerous since the Council would then have broad authority to restrict and limit speech after the comment period closed.²⁵⁸ Essentially, “the Council

²⁵¹ *Id.* at 1426.

²⁵² *Jones v. Heyman*, 888 F.2d 1328, 1329 (11th Cir. 1989).

²⁵³ *Id.* at 1332.

²⁵⁴ *See id.*

²⁵⁵ *Norse v. City of Santa Cruz*, 629 F.3d 966, 976 (9th Cir. 2010).

²⁵⁶ *Id.* at 975-76.

²⁵⁷ *See id.* at 979.

²⁵⁸ *See id.* at 976.

could [then] legitimately eject members of the public who made a ‘thumbs down’ gesture, but allows members of the public who made a ‘thumbs up’ gesture to remain,” thereby encouraging viewpoint discrimination.²⁵⁹

When Jose Surita was intentionally barred from speaking during the audience portion of a city council meeting, the Seventh Circuit held that the motivation to restrict Surita’s speech was not content neutral.²⁶⁰ The mayor who presided over the meeting told Surita that he could not speak until he apologized to the city employee he had allegedly threatened a few days earlier.²⁶¹ Surita was not disruptive during the meeting nor did he violate any rules of decorum. Rather, the mayor unconstitutionally “used Surita’s prior speech [from an unrelated incident] to prohibit subsequent protected speech.”²⁶² The court recognizes that such “retaliation for the exercise of free speech” clearly violated the First Amendment.²⁶³ Restrictions that are based on the speaker rather than the content are still content based.²⁶⁴

Although a government official’s Twitter account is comparable to a public meeting,²⁶⁵ being disruptive in person versus on social media varies. Public meetings are open to the public with the intention to encourage participation, but to also efficiently discuss and determine public business.²⁶⁶ When the purpose of the meeting is compromised by an individual whose speech is disruptive because it is irrelevant, too long, and/or antagonistic, the presiding official may silence or eject that individual.²⁶⁷ However, the equivalent of such behavior on Twitter may be an individual who tweets

²⁵⁹ *Id.*

²⁶⁰ *See* Surita v. Hyde, 665 F.3d 860, 871 (7th Cir. 2011).

²⁶¹ *See id.* at 866.

²⁶² *Id.* at 872.

²⁶³ *Id.* at 874.

²⁶⁴ *Id.* at 870.

²⁶⁵ *Free Speech Rights in Government Social Media Sites*, COATES’ CANONS: NC LOCAL GOVERNMENT LAW, <https://canons.sog.unc.edu/free-speech-rights-in-government-social-media-sites/> (last visited Mar. 9, 2019).

²⁶⁶ Day & Bradford, *supra* note 229, at 67-68.

²⁶⁷ *Id.*

at a government official constantly.²⁶⁸ Unlike in a public meeting when one person has the floor, another person cannot speak, tweeting at a government official does not diminish another person’s ability to tweet at the same official at the same time.²⁶⁹

Unless otherwise expressly stated, a government official’s Twitter account is not structured or limited to a certain time or subject.²⁷⁰ The official has the discretion to decide whether he or she wants to respond to the tweet or simply ignore it,²⁷¹ but the government official cannot decide to block the individual’s access from his or her Twitter account if the only motivation behind doing so is the content or viewpoint of the tweet.²⁷² The government may not silence any individual for merely voicing his or her opinion.²⁷³ A forum, once opened, “cannot be confined to one category of interested individuals . . . [because] [t]o permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees.”²⁷⁴ Just like an individual cannot be silenced or ejected from a public meeting for voicing his or her opinion, a government official cannot and should not block someone on Twitter for voicing his or her opinion.²⁷⁵

VII. Conclusion

When a forum is categorized as designated, any content or viewpoint based exclusions are subject to strict scrutiny.²⁷⁶ As the Supreme Court held, the “government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less

²⁶⁸ See *Enforcing our rules*, *supra* note 185 (emphasizing that under Twitter’s rules if an account is found to be: abusive, intimate, hateful, glorifying violence, violent, spam, suicidal, sensitive, private, or an impersonation it can be blocked).

²⁶⁹ See *About different types of Tweets*, TWITTER, <https://help.twitter.com/en/using-twitter/types-of-tweets> (last visited Mar. 9, 2019).

²⁷⁰ *How to customize your profile*, TWITTER, <https://help.twitter.com/en/managing-your-account/how-to-customize-your-profile> (last visited Mar. 9, 2019).

²⁷¹ *How to mute accounts on Twitter*, TWITTER, <https://help.twitter.com/en/using-twitter/twitter-mute> (last visited Mar. 9, 2019).

²⁷² *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985).

²⁷³ *Id.*

²⁷⁴ *Madison Joint School Dist. v. Wisconsin Emp’t Relations Comm’n*, 429 U.S. 167, 175-76 (1976).

²⁷⁵ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735, 1738 (2017).

²⁷⁶ *Cornelius*, 473 U.S. at 800; *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

avored or more controversial views.”²⁷⁷ If a government official retains the ability to block individuals from his or her Twitter account, the official will be given authority to discriminate based upon content or viewpoint. Because government officials have little to no reason to block their supporters and the positive comments on their timeline, the ability to block would be the ability to block dissent and criticism. “[D]ebate on public issues should be uninhibited, robust, and wide-open,”²⁷⁸ since by preventing the dissent from having a voice on Twitter, the debate will be repressed, ineffective, and closed.

Whether a local politician or city council member or the President of the United States blocks an individual from his or her Twitter account, they are guilty of violating “the quintessential form of viewpoint discrimination against which the First Amendment guards.”²⁷⁹ Without a compelling state interest that is narrowly drawn, the restriction will fail strict scrutiny and be found unconstitutional.²⁸⁰ Although the town hall cases demonstrated that an individual may be restricted from participating if a disturbance would be caused,²⁸¹ on Twitter, no such compelling interest exists. Twitter is not limited to certain threads or topics. The beauty of the forum is its flexibility, “provid[ing] perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.”²⁸²

Although other forums and social media sites may be available to the blocked individual to voice his or her opinion and to communicate with the government official, the constitutional violation of blocking the person from Twitter is not remedied.²⁸³ The blocking prevents the individual from engaging in an “interactive, real-time dialogue,” with a government official that Twitter provides. The individual’s constitutional rights are, thereby, infringed upon and “[i]f

²⁷⁷ *Police Dep’t. of Chicago v. Mosely*, 408 U.S. 92, 96 (1972).

²⁷⁸ *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

²⁷⁹ *Davison v. Loudon Cty. Bd. of Supervisors*, 2017 WL 3158389 at *11 (2017).

²⁸⁰ *Perry Educ. Ass’n*, 460 U.S. at 45.

²⁸¹ *Reza v. Pearce*, 806 F.3d 497, 506 (9th Cir. 2015).

²⁸² *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

²⁸³ *See Reno v. ACLU*, 521 U.S. 844, 865 (1997).

restrictions on access to a . . . public forum are viewpoint discriminatory, the ability of a group to exist outside the forum would not cure the constitutional shortcoming.”²⁸⁴ By blocking an individual on Twitter, he or she would be forced to express his or her views elsewhere; however “there is a significant benefit to public debate in allowing a citizen to express his or her views in the same place as the government.”²⁸⁵

Ultimately, a government official’s Twitter is a designated public forum and an official cannot and should not block people from accessing his or her account.

²⁸⁴ *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 690 (2010).

²⁸⁵ *Sutcliffe v. Epping Sch. Dist.*, 584 F.3d 314, 339 (1st Cir. 2009) (“To force a citizen to express his or her views elsewhere on the internet would be akin to banishing a citizen from making his views known in city hall, but instead on a street corner outside the building.”).