

The Freedom of Tweets: The Intersection of Government Use of Social Media and Public Forum Doctrine

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In recent years, American presidents and other government actors have moved much of their communications with the general public online, through their use of social media. President Donald Trump is particularly known for his use of Twitter and his extensive communications via his account, @realDonaldTrump. Such government social media usage has historically gone unchecked by the courts, but that changed when the Knight Institute brought suit against President Trump for violating the First Amendment rights of users blocked by @realDonaldTrump.

This litigation is an illuminating example of why First Amendment analysis must extend to government social media pages, and yet raises new challenges. There are logical reasons why government actors may want to exert certain controls over their social media pages, though these controls will potentially run against the First Amendment. As such, this Note not only argues why First Amendment analysis must extend to government use of social media, but also proposes methods for how government actors might structure their online presences to avoid First Amendment rebuke.

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I. INTRODUCTION

On May 18, 2015, then-President Barack Obama posted on the Twitter account, “@POTUS” (now “@POTUS44”), “Hello, Twitter! It’s Barack. Really! Six years in, they’re finally giving me my own account.”¹ Although elected officials had been using Twitter for years — President Obama included, having used his “@BarackObama” account since 2007² — this was the first time that a sitting president had created a Twitter account for the exclusive purpose of official government communication with the public. And President Obama was not the only government official to do so. In May of 2016, the Congressional Research Service reported that all U.S. Senators and almost all U.S. Representatives made use of social media platforms such as Twitter and Facebook to communicate with their constituents and the general public.³ Additionally, governors in all fifty states have created and made use of social media accounts for public communication.⁴ The explanation for elected officials’ mass move to social media is simple: communication with the public via electronic means such as social media is inexpensive, has a wide reach, and is virtually instantaneous.⁵ However, government use of social media poses challenges, brought to light by the way in which President Donald Trump uses his Twitter account, “@realDonaldTrump.”

Though President Trump was given control of the @POTUS account upon assuming office,⁶ he continues to use his personal account, @realDonaldTrump, as his primary mode of

1. Barack Obama (@POTUS44), TWITTER (May 18, 2015, 8:38 AM), <https://twitter.com/POTUS44/status/600324682190053376> [<https://perma.cc/29Z7-MXXU>].

2. Barack Obama (@BarackObama), TWITTER, <https://twitter.com/barackobama> [<https://perma.cc/9NTN-YXNP>].

3. Jacob R. Straus & Matthew E. Glassman, Cong. Research Serv., R44509, *Social Media in Congress: The Impact of Electronic Media on Member Communications*, (May 26, 2016), <https://fas.org/sgp/crs/misc/R44509.pdf> [<https://perma.cc/LX5J-TH36>].

4. Complaint at 2, Knight First Amendment Inst. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 17-CV-5205 (NRB)).

5. Straus & Glassman, *supra* note 3, at 8–10.

6. President Obama’s tweets were transferred to the @POTUS44 archival account. See Chris Welch, *How the White House Will Hand Over Social Media Accounts to President Trump*, THE VERGE (Jan. 19, 2017, 11:00 AM), <https://www.theverge.com/2016/10/31/13481720/white-house-twitter-account-social-media-followers-digital-transition> [<https://perma.cc/XZ27-36VY>]. See Barack Obama (@POTUS44), TWITTER, <https://twitter.com/potus44> [<https://perma.cc/ZN8G-JE2Q>].

communication.⁷ President Trump has used @realDonaldTrump since 2009,⁸ many years before his formal entry into politics,⁹ but there are indications that President Trump now uses @realDonaldTrump for official government purposes: stated alternately, that President Trump's conduct via @realDonaldTrump constitutes state action.¹⁰ First, President

7. See Vlad Savov, *Donald Trump Will Reportedly Keep Tweeting From His Personal Account*, THE VERGE (Jan. 16, 2017, 4:54 AM), <https://www.theverge.com/2017/1/16/14283886/donald-trump-realdonaldtrump-potus-twitter-handle> [<https://perma.cc/8ZLC-E2BQ>]; Gemma Joyce, *@realDonaldTrump vs. @POTUS: The Curious Habits of the Tweeting President*, BRANDWATCH (Aug. 2, 2017), <https://www.brandwatch.com/blog/react-realdonaldtrump-vs-potus/> [<https://perma.cc/TQB6-ZMZF>].

8. Donald Trump (@realDonaldTrump), TWITTER, <https://twitter.com/realDonaldTrump> [<https://perma.cc/3PHZ-NF9A>].

9. Donald Trump ran for president or publicly considered a run for president several times before, but did not experience widespread support until his 2016 campaign. As such, he did not become a full-time political figure until his 2016 campaign. See *Here's a Guide to Every Time Donald Trump Ran for President*, TV GUIDE (July 28, 2015 4:52 PM), <http://www.tvguide.com/news/donald-trump-presidential-campaign-timeline/> [<https://perma.cc/KD55-D4AH>].

10. State action is a critical component of a First Amendment claim. The text of the First Amendment reads: "Congress shall make no law respecting an establishment of a religion, or prohibiting the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST., amend. I. The Supreme Court has interpreted this text to mean that neither the federal government nor any state or local government may abridge the right to freedom of religion, speech, press, assembly, and to petition the government. See *Gitlow v. United States*, 268 U.S. 652 (1925). Individuals may silence one another, but a state actor cannot. See, e.g., Robert J. Glennon, Jr. & John E. Nowak, *A Functional Analysis of the Fourteenth Amendment "State Action" Requirement*, 1976 SUP. CT. REV. 221 (1976). Thus, in order to sustain a lawsuit against President Trump for his use of @realDonaldTrump, a court must find that President Trump's use of @realDonaldTrump constitutes state action.

This very idea was disputed in *Knight Institute* at the lower level and may continue to be disputed on appeal. Defendants explained that not all conduct of public officials is state action and argued that plaintiffs would not be able to meet their burden of proving that President Trump's operation of @realDonaldTrump constitutes state action. Mem. of Law in Supp. of Mot. for Summ. J. at 10, *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 17-CV-5205 (NRB)). Plaintiffs responded that given the totality of the circumstances and relevant precedent, President Trump's use of @realDonaldTrump does constitute state action. Pls.' Cross-Mot. for Summ. J. and Opp'n to Defs.' Mot. for Summ. J. at 12, *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 17-CV-5205 (NRB)).

The question of whether state actors' use of social media constitutes state action has not yet been answered by the Supreme Court, and the court in *Knight Institute* declined to make such a broad ruling. However, Judge Naomi Reice Buchwald did rule that President Trump's present use of @realDonaldTrump constitutes state action. *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d at 569 (S.D.N.Y. 2018) ("Here, the President and Scavino's present use of the @realDonaldTrump account weighs far more heavily in the analysis than the origin of the account as the creation of private citizen Donald Trump. The latter fact cannot be given the dispositive weight that defendants would ascribe to it. Rather, because the President and Scavino use the @realDonaldTrump account for governmental functions, the control they exercise over it is accordingly governmental in nature."). President Trump may specifically dispute this part of the

Trump uses @realDonaldTrump to make exclusive official announcements,¹¹ such as his nomination of Christopher Wray for the position of FBI Director,¹² his ban of transgender individuals from serving in the U.S. military,¹³ his replacement of Reince Priebus as White House Chief-of-Staff with General John F. Kelly,¹⁴ and his replacement of Rex Tillerson as Secretary of State with Mike Pompeo.¹⁵ Second, the National Archives and Records Administration preserves all @realDonaldTrump tweets

decision, but this author agrees with Judge Buchwald that the plaintiffs present a stronger argument, given the extent to which President Trump uses Twitter for official announcements and communication of his views to the public rather than simply as a mouthpiece for press releases, as with politicians in the past. Regardless, the more compelling question at issue in *Knight Institute* is whether @realDonaldTrump should be considered a First Amendment public forum. Thus, this Note assumes, arguendo, that President Trump's operation of @realDonaldTrump constitutes state action even if a reviewing court ultimately decides otherwise.

11. Pls.' Cross-Mot. for Summ. J. and Opp'n to Defs.' Mot. for Summ. J. at 13, *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 17-CV-5205 (NRB)).

12. Donald J. Trump (@realDonaldTrump), TWITTER (June 7, 2017, 4:44 AM), <https://twitter.com/realDonaldTrump/status/872419018799550464> [<https://perma.cc/7JT2-EY9G>] ("I will be nominating Christopher A. Wray, a man of impeccable credentials, to be the new Director of the FBI. Details to follow.")

13. Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 5:55 AM), <https://twitter.com/realDonaldTrump/status/890193981585444864> [<https://perma.cc/582W-66D5>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), <https://twitter.com/realDonaldTrump/status/890196164313833472> [<https://perma.cc/2W2E-VVRG>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:08 AM), <https://twitter.com/realDonaldTrump/status/890197095151546369> [<https://perma.cc/598Q-3XCD>]. ("After consultation with my Generals and military experts, please be advised that the United States Government will not accept or [sic] allow . . . Transgender individuals to serve in any capacity in the U.S. Military. Our military must be focused on decisive and overwhelming . . . victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail. Thank you").

14. Donald J. Trump (@realDonaldTrump), TWITTER (July 28, 2017, 1:49 PM), <https://twitter.com/realDonaldTrump/status/891038014314598400> [<https://perma.cc/4CZR-3PHE>]; Donald J. Trump (@realDonaldTrump), TWITTER (JULY 28, 1:54 PM), <https://twitter.com/realDonaldTrump/status/891039237319143424> [<https://perma.cc/5X4J-Y749>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 28, 2017, 2:00 PM), <https://twitter.com/realDonaldTrump/status/891040645581873152> [<https://perma.cc/8QT5-RM7W>] ("I am pleased to inform you that I have just named General/Secretary John F Kelly as White House Chief of Staff. He is a Great American . . . and a Great Leader. John has also done a spectacular job at Homeland Security. He has been a true star of my Administration. . . . I would like to thank Reince Priebus for his service and dedication to his country. We accomplished a lot together and I am proud of him!").

15. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 13, 2018, 5:44 AM), <https://twitter.com/realDonaldTrump/status/973540316656623616> [<https://perma.cc/44MW-WE5P>] ("Mike Pompeo, Director of the CIA, will become our new Secretary of State. He will do a fantastic job! Thank you to Rex Tillerson for his service! Gina Haspel will become the new Director of the CIA, and the first woman so chosen. Congratulations to all!").

as “presidential records”¹⁶ under the Presidential Records Act.¹⁷ Third, foreign leaders such as Russian President Vladimir Putin reportedly consider President Trump’s tweets via @realDonaldTrump to be official White House statements.¹⁸ Finally, on June 6, 2017 the White House itself, via then-Press Secretary Sean Spicer, stated that, “[t]he President is the President of the United States, so [his tweets] are considered official statements by the President of the United States.”¹⁹

All of this seems to indicate that President Trump’s tweets on @realDonaldTrump constitute official government communication. If this is true, what does it mean when @realDonaldTrump blocks another Twitter user from seeing @realDonaldTrump’s tweets and interacting with the account? If @realDonaldTrump is considered what has been termed a “public

16. 44 U.S.C. § 2202 (2012) (“The United States shall reserve and retain complete ownership, possession, and control of Presidential records; and such records shall be administered in accordance with the provisions of this chapter.”); *see also* 44 U.S.C. § 2201 (2012) (“The term ‘Presidential records’ means documentary materials, or any reasonably segregable portion thereof, created or received by the President, the President’s immediate staff, or a unit or individual of the Executive Office of the President whose function is to advise or assist the President, in the course of conducting activities which relate to or have an effect upon the carrying out of the constitutional, statutory or other official or ceremonial duties of the President . . .”).

17. *See* Stephen Braun, *National Archives to White House: Save All Trump Tweets*, THE SPOKESMAN-REVIEW (Apr. 3, 2017, 12:58 PM), <http://www.spokesman.com/stories/2017/apr/03/national-archives-to-white-house-save-all-trump-tw/> [<https://perma.cc/34PQ-SU2F>]. For comparison, President Obama’s Tweets via @BarackObama were not similarly preserved. Only communications via “official” White House social media pages — i.e. @POTUS — were preserved. Macon Phillips, *Reality Check: The Presidential Records Act of 1978 Meets Web-Based Social Media of 2009*, THE WHITE HOUSE, PRESIDENT BARACK OBAMA: BLOG, <https://obamawhitehouse.archives.gov/blog/2009/09/19/reality-check-presidential-records-act-1978-meets-web-based-social-media-2009> [<https://perma.cc/Y2E5-YMLS>] (“These new types of communications from individuals in the White House, even though they take a different form, are governed by the [Presidential Records Act]. Working with [the National Archives and Records Administration], we’ve concluded that comments and messages the White House receives on its *official* pages are presidential records.”) (emphasis added).

18. *See* Sabra Ayres, *When Trump Tweets, Putin Is Briefed*, LOS ANGELES TIMES (Dec. 12, 2017, 9:30 AM), <http://beta.latimes.com/politics/washington/la-na-pol-essential-washington-updates-when-trump-tweets-putin-is-briefed-1513094902-htm1story.html> [<https://perma.cc/FP6A-MHDY>] (“Trump’s tweets are presented to Putin every day in his daily briefings and considered White House statements, according to Kremlin spokesman Dmitry Peskov. ‘Moscow considers all statements made on his [Trump’s] official twitter account to be official, so reports are presented to President Putin about them, as well as about official statements that politicians make in other countries,’ Peskov said Tuesday in his daily phone call with the press.”).

19. Elizabeth Landers, *White House: Trump’s Tweets Are “Official Statements,”* CNN POLITICS (June 6, 2017, 4:37 PM), <http://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html> [<https://perma.cc/8LME-NG94>].

forum,”²⁰ and if the action of blocking these users is considered state action, then President Trump may only constitutionally block users on the basis of a countervailing government interest.²¹ If not, then the blocking is unconstitutional as a violation of these users’ First Amendment rights. So, is @realDonaldTrump a public forum?

The answer to this question was recently explored in a lawsuit instituted against President Trump by the Knight First Amendment Institute at Columbia University and seven Twitter users who were blocked by @realDonaldTrump.²² Plaintiffs argued that, given the way that President Trump uses his @realDonaldTrump account, President Trump has created a designated public forum (a specific classification of public forum, also known as a “limited” public forum) out of @realDonaldTrump. If @realDonaldTrump is a designated public forum, then blocking certain users due to the content of those users’ speech — a fact that President Trump admitted²³ — violates those users’ First Amendment rights to freedom of speech and to petition the government for a redress of grievances.

The district court ultimately ruled in favor of Plaintiffs, holding that each plaintiff had standing, that President Trump’s use of @realDonaldTrump constitutes state action,²⁴ that the “interactive spaces” associated with President Trump’s tweets on @realDonaldTrump comprise a designated public forum, and that President Trump engaged in impermissible viewpoint

20. Fundamentally, a public forum is a location which has traditionally been preserved for the general public’s use for speech-related purposes, such as a public park or a town hall building. Since this doctrine was first proposed in the early twentieth century, it has undergone significant evolution. There are now several different categories of public forum, each with different characteristics and implications for how the government may limit public speech. *See infra* Part III.

21. The various nuances present in the standards of review for government restriction of speech in public fora depend on the type of forum. The analysis of what types of speech may be restricted in each type of forum is subject to a distinct First Amendment analysis. *See infra* Part III.

22. Knight First Amendment Inst. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018).

23. Stipulation at 1, Knight First Amendment Inst. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 16-CC-5205 (NRB)) (“The parties have agreed that this Stipulation applies exclusively to this litigation and does not constitute an admission for purposes of any other proceeding, and Defendants have agreed that they will not contest Plaintiffs’ allegation that the Individual Plaintiffs were blocked from the President’s Twitter account *because the Individual Plaintiffs posted tweets that criticized the President or his policies.*”) (emphasis added).

24. *See supra* note 10.

discrimination by blocking the seven plaintiffs.²⁵ President Trump appealed this decision — an unsurprising choice given President Trump’s reputation for litigiousness²⁶ and pride in his social media use.²⁷ Even if President Trump chose not to appeal this decision, this ruling would not have closed the door on the question of how to interpret government social media pages under the First Amendment.²⁸ This question will require further consideration as modern communication and social interaction become ever more digital.

This Note argues that, in order to protect speech in the digital, government social media pages such as @realDonaldTrump must be classified as public fora era. Yet government actors must still retain the ability to police their accounts in order to prevent their highly-followed²⁹ pages from becoming platforms for abusive or hateful speech. Thus, if and when government social media pages are classified as public fora, government actors will need to change how they use them.

Part II of this Note provides background to the *Knight Institute* litigation. Part III explores the evolution of public forum doctrine in order to predict how current public forum jurisprudence will map onto government social media accounts. Part IV argues that government social media pages should be classified as public fora, particularly given public policy concerns and the Supreme Court’s recent intimations on the issue. If government social media pages were classified as such,

25. *Knight First Amendment Inst.*, 302 F. Supp. 3d at 549 (S.D.N.Y. 2018) (“We hold that portions of the @realDonaldTrump account — the ‘interactive space’ where Twitter users may directly engage with the content of the President’s tweets — are properly analyzed under the ‘public forum’ doctrines set forth by the Supreme Court, that such space is a designated public forum, and that the blocking of the plaintiffs based on their political speech constitutes viewpoint discrimination that violates the First Amendment.”).

26. See Nick Penzenstadler et al., *Donald Trump: Three Decades, 4,095 Lawsuits*, USA TODAY, <https://www.usatoday.com/pages/interactives/trump-lawsuits/> [<https://perma.cc/5HYZ-RN6Y>]; Nick Penzenstadler & Susan Page, *Exclusive: Trump’s 3,500 Lawsuits Unprecedented for a Presidential Nominee*, USA TODAY (June 1, 2016), <https://www.usatoday.com/story/news/politics/elections/2016/06/01/donald-trump-lawsuits-legal-battles/84995854/> [<https://perma.cc/A67H-EHXZ>]; Caroline Halleman, *Here’s What You Need to Know About Trump’s Lawsuits*, TOWN & COUNTRY (Aug. 28, 2017), <https://www.townandcountrymag.com/society/politics/a9962852/lawsuits-against-donald-trump/> [<https://perma.cc/JF87-ZACV>].

27. See Donald J. Trump (@realDonaldTrump), TWITTER (July 1, 2017, 3:41 PM), <https://twitter.com/realDonaldTrump/status/881281755017355264> [<https://perma.cc/77R2-2NT4>] (“My use of social media is not Presidential - it’s MODERN DAY PRESIDENTIAL. Make America Great Again!”).

28. See *infra* Part IV.

29. See *infra* note 30.

government actors would risk running afoul of the First Amendment by blocking users, even if a user's behavior seems to warrant blocking. Social media platforms give users the luxury of relative anonymity, and can inspire abusive speech, hateful speech, and even speech that incites violence. In order to avoid giving such speech a bigger platform, government actors will need to prevent deplorable speech from appearing on government social media pages. Accordingly, this Note finally suggests strategies that government actors can employ in structuring their social media presence in order to avoid First Amendment challenges while maintaining the ability to police their accounts, both in the case that government social media accounts are classified as designated public fora and in the case these accounts are classified as nonpublic fora.

II. *KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY, ET AL. V. DONALD J. TRUMP, ET AL.*

The Knight First Amendment Institute at Columbia University [hereinafter, the "Knight Institute"] initiated its lawsuit against President Donald Trump on behalf of seven named plaintiffs [hereinafter, "Plaintiffs"], each of whom were blocked by @realDonaldTrump for criticizing President Trump on their Twitter accounts.³⁰ REBECCA BUCKWALTER, under the Twitter handle @rpbp, was blocked after responding to a @realDonaldTrump tweet decrying the news media for its attempt to prevent President Trump from winning the 2016 election with "To be fair you didn't win the [White House]: Russia won it for you."³¹ PHILIP COHEN, under the Twitter handle @familyunequal, was blocked after tweeting a photo of President Trump with "Corrupt Incompetent Authoritarian. And then

30. Twitter is an online social media platform in which users may create their own accounts from which they may post "tweets," short statements of up to 280 characters in length which are made visible to other Twitter users. Each Twitter account is associated with a unique username called a "handle," indicated by the @ symbol. When a user posts a tweet, only the users that have subscribed to, or "followed," that user's account may see the tweet. When user A "blocks" user B, user A makes it impossible for user B to see user A's tweets. For example, when "@realDonaldTrump" blocks another Twitter user, President Trump has prevented that Twitter user from seeing and interacting with the tweets that he posts on his @realDonaldTrump account. For more information on how Twitter works, see, Stipulation, *supra* note 23, at 3–12.

31. Complaint, *supra* note 4, at 17.

there are the policies. Resist.” superimposed over the image.³² HOLLY FIGUEROA, under the Twitter handle @AynRandPaulRyan, was blocked after posting a series of tweets, one of which was an image of the Pope looking quizzically at President Trump with the caption “This is pretty much how the whole world sees you. #AMJoy #SundayMorning.”³³ EUGENE GU, under the Twitter handle @eugenegu, was blocked after tweeting “Covfefe³⁴: The same guy who doesn’t proofread his Twitter handles the nuclear button.”³⁵ BRANDON NEELY, under the Twitter handle @BrandonTXNeely, was blocked after tweeting, in response to a tweet by @realDonaldTrump celebrating the opening of a new coal mine in Pennsylvania, “Congrats and now black lung won’t be covered under #TrumpCare.”^{36,37} JOSEPH PAPP, under the Twitter handle @joepabike, was blocked after tweeting, in response to a video posted by @realDonaldTrump of President Trump’s weekly presidential address, “Why didn’t you attend your #PittsburghNotParis rally in DC,³⁸ Sir?”³⁹ NICHOLAS

32. *Id.* at 18.

33. *Id.* at 19.

34. Referring to a now-deleted tweet posted on @realDonaldTrump on May 31, 2017 in which President Trump, presumably inadvertently, posted an incomplete tweet which misspelled “coverage” and read, “Despite the negative press covfefe.” Donald J. Trump (@realDonaldTrump), TWITTER (May 31, 2017, 12:06 AM), <https://web.archive.org/web/20170531052959/https://twitter.com/realDonaldTrump> [<https://perma.cc/9YRS-9PAR>]. This sparked an uproar as President Trump’s critics used the opportunity to further disparage President Trump for what many see as his careless and at times, reckless use of Twitter. See Chris Cillizza, ‘Covfefe’ Tells You All You Need to Know About Donald Trump, CNN: THE POINT (June 1, 2017, 8:29 AM), <https://www.cnn.com/2017/05/31/politics/donald-trump-covfefe/index.html> [<https://perma.cc/Z2PB-YK36>].

35. Complaint, *supra* note 4, at 20.

36. Referring to President Trump’s proposed amendments to the 2010 Patient Protection and Affordable Care Act (ACA). The ACA was championed by the Obama administration, ultimately signed by President Obama, and has widely been referred to as “ObamaCare.” As such, President Trump’s proposed changes to or threatened repeal of the ACA have been referred to as “TrumpCare.” See Atul Gawande, *Trumpcare vs. Obamacare*, THE NEW YORKER (Mar. 6, 2017), <https://www.newyorker.com/magazine/2017/03/06/trumpcare-vs-obamacare> [<https://perma.cc/B399-72S3>].

37. Complaint, *supra* note 4, at 21.

38. Referring to a June 3, 2017 rally supporting President Trump’s decision to pull out of the Paris Climate Accords. The name of the rally was derived by a statement from President Trump made when he announced his intention to withdraw from the international agreement: “I was elected to represent the citizens of Pittsburgh, not Paris.” See Alicia Cohn, ‘Pittsburgh Not Paris’ Rally at White House Thanks Trump, THE HILL (June 3, 2017, 12:03 AM), <http://thehill.com/homenews/administration/336219-group-gathers-at-white-house-for-pittsburgh-not-paris-rally-thanking> [<https://perma.cc/CTP8-MG4X>]; Zeeshan Aleem, *Trump: I Was Elected to Represent Pittsburgh, Not Paris*, Pittsburgh: Uh, We’re With Paris, VOX (June 1, 2017, 5:53 PM), <https://www.vox.com/policy-and-politics/2017/6/1/15726656/pittsburgh-mayor-trump-paris> [<https://perma.cc/D2ZG-PZQX>].

PAPPAS, under the Twitter handle @Pappiness, was blocked after tweeting in response to a tweet by @realDonaldTrump demanding a tougher version of the Trump Administration's travel ban⁴⁰ after the ban had been struck down by several courts, "Trump is right. The government should protect the people. That's why the courts are protecting us from him."⁴¹

The Knight Institute initiated litigation against President Trump on behalf of these named plaintiffs on June 6, 2017, with a letter demanding that President Trump unblock these seven Twitter users.⁴² When President Trump failed to do so, the Knight Institute filed a complaint in the U.S. District Court for the Southern District of New York for declaratory and injunctive relief, asking that the court declare President Trump's behavior in blocking the seven identified users for their expressed viewpoints unconstitutional, enter an injunction requiring President Trump to unblock these users, and prevent him from blocking these users or any other users on the basis of viewpoint.⁴³ The crux of Plaintiffs' argument was that @realDonaldTrump acts as "a kind of digital town hall in which the President . . . use[s] the tweet function to communicate news and information to the public, and members of the public use the reply function to respond to the President . . . and exchange views

39. Complaint, *supra* note 4, at 22.

40. Referring to the Trump administration's restriction on travel from a series of mainly Muslim-majority countries. The restriction came in two different Executive Orders, the first included restrictions on travel from seven Muslim-majority nations, the second included restrictions on travel from six Muslim-majority nations. These bans were highly criticized and were heavily challenged in court. Several federal district and appeals courts struck down these bans in 2017, either in whole or in part. In June 2018, the U.S. Supreme Court upheld an amended ban. See, Dara Lind, *How Trump's Travel Ban Became Normal*, VOX (Apr. 27, 2018, 11:00 AM), <https://www.vox.com/2018/4/27/17284798/travel-ban-scotus-countries-protests> [<https://perma.cc/HMUG-YXGX>]; Kaitlyn Schallhorn, *Trump Travel Ban: Timeline of a Legal Journey*, FOX NEWS: JUDICIARY (June 26, 2018), <http://www.foxnews.com/politics/2018/04/25/trump-travel-ban-timeline-legal-journey.html> [<https://perma.cc/2QWL-DCJS>].

41. Complaint, *supra* note 4, at 23.

42. The letter was sent to President Trump, White House Counsel Donald F. McGahn, then-White House Press Secretary Sean Spicer, and White House Director of Social Media Daniel Scavino. The district court opinion identified as defendants President Trump, now-White House Press Secretary Sarah Huckabee Sanders, then-Acting White House Director of Communications Hope Hicks, and White House Director of Social Media and Assistant to the President Daniel Scavino all of whom exercise a certain level of control over @realDonaldTrump as senior members of the Trump White House communications team. For purposes of clarity, this Note refers to both the letter recipients and the defendants in the litigation as simply President Trump.

43. Complaint, *supra* note 4, at 25.

with one another.”⁴⁴ In other words, @realDonaldTrump is what Supreme Court jurisprudence has termed a “designated public forum.” And as such, “[d]efendants’ viewpoint-based blocking of the Individual Plaintiffs from the @realDonaldTrump account infringes on the Individual Plaintiffs’ First Amendment rights . . . by impos[ing] an unconstitutional restriction on their participation in a designated public forum.”⁴⁵

In response, defendants filed a motion for summary judgment, challenging plaintiffs on the grounds that @realDonaldTrump is not a public forum but rather an avenue for government speech. The core of defendants’ argument was as follows:

The President uses the [@realDonaldTrump] account for *his* speech, not as a forum for the private speech of others. And his decision to block certain users allows him to choose the information he consumes and the individuals with whom he interacts — expressive choices that public officials retain the right to make, even when those choices are made on the basis of viewpoint.⁴⁶

Plaintiffs responded with an opposition motion and a cross motion for summary judgment.⁴⁷ Specifically, Plaintiffs argued that although the President may use @realDonaldTrump as a platform for his speech, Twitter is inherently interactive and President Trump makes use of these interactive features.⁴⁸ As Plaintiffs argue, President Trump could have chosen to use a different mechanism as a platform for his speech or structured his Twitter account differently to downplay the inherent interactivity of the platform.⁴⁹ Plaintiffs claim that the choice to

44. Complaint, *supra* note 4, at 16.

45. *Id.*

46. Mem. of Law in Supp. of Mot. for Summ. J. at 14, Knight First Amendment Inst. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 17-CV-5205 (NRB)).

47. Pls.’ Cross-Mot. for Summ. J., *supra* note 11.

48. For instance, as described in the complaint, “Defendants have made the [@realDonaldTrump] account accessible to all, taking advantage of Twitter’s interactive platform to directly engage the President’s [then-] 33 million followers. The President’s tweets routinely generate tens of thousands of comments in the vibrant discussion forums associates with each of the President’s tweets.” Complaint, *supra* note 4, at 2.

49. Pls.’ Cross-Mot. for Summ. J., *supra* note 11, at 18–19 (“The account is accessible to anyone with a Twitter account without regard to political affiliation or any other limiting criteria. Defendants have not published any rule or policy purporting to restrict, by form or subject matter, the speech of those who participate in the forum. Nor have they sought to limit the forum to specific classes of speakers based on their status — *e.g.*,

use Twitter and to use it in an interactive manner is “powerful evidence of an intent to create a forum open to speech by the public at large.”⁵⁰ In sum:

Plaintiffs do not contend that the First Amendment requires Defendants to make the @realDonaldTrump account accessible to the public at large. Having decided to make the President’s statements generally available, however, Defendants cannot constitutionally restrict the Individual Plaintiffs from accessing those statements simply because the President disagrees with their views.⁵¹

These arguments were echoed in several amicus briefs filed on behalf of Plaintiffs.

Oral argument on the motions for summary judgment took place on March 8, 2018⁵² and District Court Judge Naomi Reice Buchwald handed down her decision in favor of Plaintiffs on May 23, 2018.⁵³ On June 4, 2018, President Trump filed a notice of appeal to the United States Court of Appeals for the Second Circuit.⁵⁴

III. THE EVOLUTION OF THE PUBLIC FORUM DOCTRINE

As a public forum case, *Knight Institute* has its weaknesses. The case could have been dismissed in the district court — and may be reversed in a future appellate court — based on the argument that President Trump’s conduct on @realDonaldTrump is not state action⁵⁵ or even dismissed on standing grounds.⁵⁶ Moreover, the public forum issue was relatively easily disposed of given the facts of this case: Plaintiffs were quite clearly engaging

to the President’s family, friends, or business colleagues. They have permitted anyone who wants to follow the account to do so. Over forty million Twitter users now follow it. The only users who cannot participate in the forum are those whom the President and his aides have selectively blocked.” (citations omitted).

50. *Id.* at 24.

51. *Id.* at 23.

52. Scheduling Order, *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 17-CV-5205 (NRB)).

53. *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 542 (S.D.N.Y. 2018).

54. Notice of Appeal, *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 17-CV-5205 (NRB)).

55. *See supra* note 10.

56. For defendants’ argument against plaintiffs’ standing, *see* Mem. of Law in Supp. of Mot. for Summ. J., *supra* note 46, at 4–10.

in political speech in criticizing President Trump in his official capacity and President Trump admitted that he blocked Plaintiffs on the basis of their expressed viewpoints. Nonetheless, *Knight Institute* is an illuminating example of a novel application of an abstract doctrine that will undoubtedly recur.⁵⁷ Public forum doctrine evolved through a series of heavily factual judicial determinations of what does and does not qualify as a public forum of a certain type. As a result, public forum doctrine is constructed of relatively vague, case-specific articulations. *Knight Institute* provides a concrete example of how public forum theory could be mapped onto a new type of “forum”: a government social media page.

This Part delves into the fundamentals of public forum doctrine. The historic public forum is a piece of publicly owned property, implicitly protected for speech-related purposes.⁵⁸ The quintessential example is the public park or town square, in which the State may not restrict a soapbox preacher or local grassroots organizer’s speech without running up against the First Amendment. However, public forum doctrine has evolved to capture more and more types of publicly owned property within its ambit. As the doctrine currently stands, there are three different categories of public fora: traditional public fora, designated public fora, and nonpublic fora.⁵⁹ The choice of classification is important because the categorization indicates the standard under which the government may constitutionally restrict speech within the forum. In traditional public fora, the government must show that there was a compelling governmental interest in restricting the speech, and that the restriction was narrowly tailored to achieve that end. In a designated public forum, the government may institute additional restrictions on speech, as long as they are content-neutral, based on the way that the government structures the forum. Finally, in a nonpublic forum, the government may institute restrictions on the content of the speech so long as these restrictions are viewpoint-neutral.⁶⁰

57. See *infra* Part IV.

58. See *infra* Part III.A.

59. Some scholars argue that there are a greater number of categories of public fora that should be part of the conversation. See *infra* note 87.

60. A restriction can be viewpoint-neutral while still restricting the type of content that may be expressed. See *infra* Part III.B.

This Part explores these differences in fora and provides a history of the doctrine which created them. This doctrinal background is necessary for an understanding of the conflicting claims at issue in *Knight Institute v. Trump* and for an understanding of the First Amendment implications of government use of social media.

A. *DAVIS AND HAGUE*: DEFINING A “PUBLIC FORUM”

Public forum doctrine began its long evolution toward the categorical formulation in use today with two formative cases: *Davis v. Commonwealth of Massachusetts* and *Hague v. Committee for Industrial Organization*.⁶¹ *Davis* stands for the notion that the State had the right to restrict speech within state-owned property. *Hague* effectively, though not explicitly, overturned *Davis*, and in so doing paved the way for modern public forum doctrine by establishing what has come to be known as the “traditional” public forum.

In *Davis v. Commonwealth of Massachusetts*, petitioner Davis was arrested for making a speech on the Boston Commons, a public park in downtown Boston, without a permit.⁶² Davis challenged his arrest on the grounds that the municipal ordinance which required him to obtain a permit from the mayor of Boston before preaching in the Commons violated his First Amendment rights.⁶³ The Supreme Judicial Court of Massachusetts upheld the constitutionality of the ordinance and, accordingly, Davis’ arrest; the U.S. Supreme Court then agreed with the lower courts.⁶⁴ Justice White in the majority stated: “[f]or the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.”⁶⁵ White explained, “[t]he right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser,”⁶⁶ and

61. *Davis v. Commonwealth of Massachusetts*, 167 U.S. 43 (1897); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

62. *Davis*, 167 U.S. at 44.

63. *Id.*

64. *Id.* at 47.

65. *Id.*

66. *Id.* at 48.

thus the ordinance was well within the legislature's power to enact.

Hague v. Committee for Industrial Organization presented a similar set of facts, but came to a different conclusion. In 1937, a group gathered at the Committee for Industrial Organization in Jersey City, New Jersey for a public meeting to discuss the National Labor Relations Act, only to have the meeting broken up by police under orders from the mayor for the group's failure to obtain a permit.⁶⁷ The Committee for Industrial Organization sued, claiming the ordinance requiring a permit violated the group's First Amendment rights to freedom of assembly.⁶⁸ In this case, the petitioners prevailed. In finding the ordinance unconstitutional, Justice Roberts famously wrote:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and . . . have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions . . . [The privilege] to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.⁶⁹

In so writing, Justice Roberts — perhaps unwittingly — jumpstarted the evolution of modern public forum doctrine in providing the description for a “public forum.” This description would be used by scholars and Supreme Court justices to construct the doctrine as it exists today.

Harry Kalven laid additional groundwork for the premise of the public forum with his article, *The Concept of the Public Forum*.⁷⁰ In this piece, Kalven examined the then-recent Supreme Court jurisprudence on matters concerning free speech in public places: cases such as *Hague*, *Cox v. Louisiana*,⁷¹ and

67. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 501 (1939).

68. *Id.* at 503.

69. *Id.* at 515–16.

70. Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1 (1965).

71. *Cox v. Louisiana*, 379 U.S. 539 (1965).

Edwards v. South Carolina.⁷² While making his analysis, Kalven set out the theory behind what would later be called the “traditional” public forum. Kalven stated:

[I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief, a *public forum* that the citizen can commandeer; the generosity of which such facilities are made available is an index of freedom.⁷³

Kalven later elaborated that “[w]hen the citizen goes to the street, he is exercising an immemorial right of a free man, a kind of First-Amendment easement.”⁷⁴ The Supreme Court would come to borrow this concept in honing its definition of a traditional public forum, abandoning its confusing distinction between “speech pure” and “speech plus”⁷⁵ to determine whether public speech may be curtailed and instead opting for public forum analysis.

With these formative cases and scholarship, the stage was set for the modern iteration of public forum doctrine, which was codified in *Perry Education Association v. Perry Local Educators’ Association*.⁷⁶

B. PERRY AND ITS PREDECESSORS: CREATING CATEGORIES

1. *The Battle of the Perry Teachers’ Unions*

The animating idea behind public forum doctrine in general is that the government may not limit speech within a public forum

72. *Edwards v. South Carolina*, 372 U.S. 229 (1964). Both *Cox* and *Edwards* concerned the constitutionality of arresting civil rights activists for non-violence protests.

73. Kalven, Jr., *supra* note 70, at 11–12 (emphasis added).

74. *Id.* at 13.

75. This theory rested on a distinction between spoken and/or written speech, or “speech pure,” and parades, pickets, and other demonstrations, or “speech plus,” and posited that “speech pure” could not be limited in public locations but “speech plus” could be limited. This theory was disavowed in *Cox v. Louisiana*, 378 U.S. 536 (1965), in which Justice Goldberg held: “[w]e emphatically reject the notion urged by the appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.” *Id.* at 555.

76. *Perry Educ. Assoc. v. Perry Local Educators’ Assoc.*, 460 U.S. 37 (1983).

absent a countervailing government interest. However, the standard of review for determining whether the governmental suppression of speech is constitutional is more nuanced than a simple judicial balancing of the countervailing government interest. The range of acceptable government suppressive activity depends on the classification of the forum at issue. The case which established the framework for these classifications and characteristics is *Perry Education Association v. Perry Local Educators' Association*.⁷⁷

In *Perry*, two competing teachers' unions were in dispute over access to teacher mailboxes in the Metropolitan School District of Perry Township, Indiana.⁷⁸ Perry Education Association (PEA) won an election to serve as the sole union representing teachers employed by the Perry Metropolitan School District.⁷⁹ In this capacity, PEA negotiated a collective bargaining agreement with the Board of Education which gave the union exclusive access to the interschool mail system and teacher mailboxes in all thirteen Perry Township schools.⁸⁰ As such, access to this system and the mailboxes was denied to a rival union: Perry Local Educators' Association (PLEA).⁸¹ PLEA sued for violation of the First and Fourteenth Amendment, arguing that the mailboxes were "designated public fora" and that preventing PLEA from using the mailboxes thereby constituted a free speech violation. The Supreme Court held that the teacher mailboxes were not public fora and that denying PLEA access to the mailboxes was therefore permissible. Justice White took the opportunity to explain the Court's categorical approach to public forum doctrine in detail.

The first type of public forum is the "traditional" public forum, the forum that resembles the "public forum" as described in *Hague*: "streets and parks [which have] immemorially been held in trust for the use of the public."⁸² Traditional public fora are "places which by long tradition or by government fiat have been devoted to assembly and debate, [where] the rights of the state to limit expressive activity are sharply circumscribed."⁸³ In

77. *Id.*

78. *Id.* at 39.

79. *Id.* at 40.

80. *Id.*

81. *Id.*

82. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

83. *Perry*, 460 U.S. at 45.

traditional public fora, the government may not impose content-based regulations on speech unless the regulation is necessary to serve a compelling state interest and narrowly tailored to serve that interest. The government may impose content-neutral time, place, and manner restrictions on speech as long as those restrictions are narrowly tailored to serve a significant government interest while leaving open alternative channels of communication.⁸⁴

The second type of public forum is the “designated” or “limited” public forum, the category into which PLEA attempted to slot the teacher mailboxes. Designated public fora consist of “public property which the state has opened for use by the public as a place for expressive activity.”⁸⁵ Although the State is not required to create these fora, once they have been created, the State may not then impose certain types of restrictions — the same types as prohibited in traditional public fora. As explained by Justice White, “[r]easonable time, place and manner regulations are permissible, and a content-based prohibition must be narrowly drawn to effectuate a compelling state interest.”⁸⁶ In designated public fora, restrictions based on viewpoint alone will never be permitted, since disagreement with an expressed viewpoint is not a compelling state interest.

The third and final type of public forum is the oxymoronically-titled “non-public” forum.⁸⁷ Non-public fora consist of “[p]ublic property which is not by tradition or designation a forum for public communication,” and thus, non-public fora are governed by different standards.⁸⁸ The State may impose time, place, and

84. *Id.*

85. *Id.*

86. *Id.* at 46.

87. There is some confusion in the doctrine with regard to how many types of public fora truly exist. Some scholars posit that there may actually be up to five categories: traditional, designated, designated limited, limited, and non-public. See, e.g., Lyriisa Barnett Lidsky, *Government Sponsored Social Media and Public Forum Doctrine Under the First Amendment: Perils and Pitfalls*, 19 PUB. L. 2 (2011). However, by Lidsky’s own admission, the “limited” public forum may simply be a subcategory of the “designated” public forum, and, using her words, “[t]he line between the designated limited public forum and the non-public forum is maddeningly slippery — and some would say even nonexistent, notwithstanding their linguistically opposed labels.” *Id.* at 4. This Note subscribes to the notion that the “designated” category includes the “limited” category and that the “non-public” and “designated limited” categories are one and the same. This is not only supported in the case law and relevant scholarship, but has the benefit of relative simplicity. Furthermore, if the Supreme Court decides otherwise in the future, the core analysis will remain the same, even if the choice of label becomes inaccurate.

88. *Perry*, 460 U.S. at 46.

manner restrictions just as it may do in designated public fora, but, importantly, the State may also impose additional restrictions on speech: “the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s view.”⁸⁹ In other words, the State may impose additional restrictions to ensure that the forum is used for the purpose for which it was created, as long as the restriction is viewpoint-neutral. In *Perry*, the court held that the school mailboxes constituted a non-public forum and that the restrictions imposed on the forum, forbidding PLEA’s use of the mailboxes, were reasonable and compatible with the intended use of the mailboxes. PLEA’s suit failed.

2. *The “Public-ness” of Jails, Military Bases, Public Schools, and More*

These categories, which largely remain in force today, grew out of a series of cases that bridged the gap between *Hague*, Kalven’s landmark article, and *Perry*. A complete discussion of public forum doctrine’s development demands a brief examination of some of the more prominent cases that brought the doctrine to the present day.

After *Hague* and Kalven’s article, there was only one “category” in public forum doctrine: the traditional public forum. The general understanding was simply that “the streets, the parks, and other public property”⁹⁰ were public fora wherein speech could not be limited by state actors, presumably absent a compelling government interest. The Supreme Court very quickly invalidated this idea, further developing the modern categorical formulation with *Adderley v. Florida*⁹¹ and later, *Greer v. Spock*.⁹²

Both of these cases came to the conclusion that there are types of publicly-owned property which should not be categorized as public fora. In *Adderley*, a group of student protestors was arrested for demonstrating at the entrance of a Florida jail under

89. *Id.*

90. Kalven, Jr., *supra* note 70 at 11–12.

91. *Adderley v. Florida*, 385 U.S. 39 (1966).

92. *Greer v. Spock*, 424 U.S. 828 (1976).

Florida's general trespass statute.⁹³ The students argued that since the jailhouse steps were public property, the steps should be considered a public forum, and so using the general trespass statute to arrest the students for demonstrating violated the students' First Amendment rights.⁹⁴ The Supreme Court disagreed, and 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 to which it is lawfully dedicated."⁹⁵ In so doing, the Court revived some of the *Davis* reasoning and laid the preliminary groundwork for non-public fora by placing jails in the non-public category.

Greer added military bases to this category as well. In *Greer*, several minor party candidates for the U.S. presidency informed the commanding officer of the Fort Dix military base of their plans to come onto the base to distribute campaign materials.⁹⁶ The commanding officer denied the request, and the candidates sued, claiming that since the military base was public property it was a public forum, and that prohibiting entry violated their First Amendment rights.⁹⁷ As in *Adderley*, the Supreme Court did not agree with the plaintiffs and held that the First Amendment does not support "the principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government . . . that place becomes a 'public forum.'"⁹⁸ Justice Black in the majority further stated, "[s]uch a principle of constitutional law has never existed, and does not exist now."⁹⁹ After *Adderley* and *Greer*, both jails and military bases were considered non-public fora. Together, these cases stand for the notion that public fora are not simply streets, parks, and other publicly-owned property, but distinct legal creations with malleable boundaries.

After *Hague*, *Adderley*, and, *Greer*, it was clear that there were two types of public fora: traditional public fora and non-public fora. However, *Perry* had also indicated that there is a third type of public forum: the designated public forum. *Grayned v. City of*

93. *Adderley*, 385 U.S. at 40–41.

94. *Id.* at 44.

95. *Id.* at 47.

96. *Greer*, 424 U.S. at 832.

97. *Id.* at 833–34.

98. *Id.* at 836.

99. *Id.*

*Rockford*¹⁰⁰ was the first case to explore the designated public forum. In this case, a group of student civil rights protestors publicly demonstrated in front of a Rockford, Illinois high school and were arrested for violating Rockford's anti-picketing and anti-noise ordinances.¹⁰¹ In upholding the constitutionality of the ordinances, the Supreme Court wrote:

Just as *Tinker*¹⁰² made clear that school property may not be declared off limits for expressive activity by students, we think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public. . . . Rockford's antinoise ordinance goes no further than *Tinker* says a municipality may go to prevent interference with its schools. It is narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning, and does not unnecessarily interfere with First Amendment rights. . . . Peaceful picketing which does not interfere with the ordinary functioning of the school is permitted. And the ordinance gives no license to punish anyone because of what he is saying.¹⁰³

While the *Grayned* decision did not exactly describe a designated public forum, it did begin to examine the grey area between public and non-public fora. After *Grayned* it was not clear what types of publicly owned property were public fora and what were not, given that — as was the case with the Rockford public sidewalk in *Grayned* — some property seemed to possess qualities of both. The same year as *Grayned*, the Supreme Court decided *Police Department of Chicago v. Mosley*,¹⁰⁴ which further described the contours of designated public fora. This case

100. *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

101. *Id.* at 106.

102. Referring to *Tinker v. Des Moines Sch. District*, 393 U.S. 503 (1969) in which the Supreme Court held that a public school could not discipline students for wearing black arm bands to protest the Vietnam War without proving that wearing the arm bands would seriously interfere with the operation of the school. Disciplining students for wearing the arm bands without this showing would violate the students' First Amendment rights. *Id.*

103. *Grayned*, 408 U.S. at 118–20.

104. *Police Dep't of Chicago v. Mosley*, 408 U.S. 92 (1972) (questioning the constitutionality of a Chicago city ordinance which prohibited picketing outside of a public school generally, but allowed peaceful labor protests).

presented very similar facts to *Grayned*, but here, the Court struck down the ordinance at issue, famously explaining:

Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.¹⁰⁵

This passage clarifies the doctrine a bit: the key factor in determining what is a designated public forum is the government's behavior. *Mosley* explains that the government is not under an obligation to open a forum to assembly or speaking, but, once it does, there are some limitations on the restrictions that the government can impose on speech.

Adderley, *Greer*, *Lehman*, and *Mosley* came far in providing the background for designated public fora and non-public fora as described in *Perry*. Additionally, *Adderley* explained the legal contours of non-public fora which survive today in holding that the State may limit the use of public property to the purpose for which the property was created. Still missing, however, were more specific limitations on state restrictions on speech in designated public fora.

Grayned and *Mosley* began to explore some of these limitations by noting prohibitions on content-based restrictions on speech in designated public fora. *Lehman v. City of Shaker Heights* added more nuance to these prohibitions in its discussion of the status of public advertising space.¹⁰⁶ In *Lehman*, the Supreme Court found no First Amendment violation because the limitations placed on the public advertising space furthered reasonable legislative objectives.¹⁰⁷ Thus, *Lehman* added to the

105. *Id.* at 96.

106. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). In *Lehman*, a candidate for state office's attempted purchase of advertising space in the city of Shaker Heights' public rapid transit system. The candidate's request was denied based on the city's policy of not allowing political advertising. The candidate claimed that the public transit system's advertising space was a public forum and thus, that the city violated his First Amendment rights.

107. *Id.* at 304 ("The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience. These are reasonable legislative objectives advanced by the city in a proprietary capacity.").

doctrine that the government may impose content-based restrictions on speech as long as that regulation is reasonable and in furtherance of a government interest. Finally, *Southeastern Promotions, Ltd. v. Conrad* cemented the requirement that all content-based restrictions in any public forum be viewpoint-neutral in its examination of use restrictions in a public theater.¹⁰⁸ In deciding the case, the Supreme Court declined to answer the question of what type of forum the theatre constituted. Highly concerned about the dangers of censorship¹⁰⁹ and convinced that the theatre company's denial in this case was almost certainly based on the viewpoints espoused in the rejected production,¹¹⁰ the Court found a First Amendment violation.

C. PERRY'S PROGENY: PAVING THE PATH TO PACKINGHAM

In the thirty years since *Perry*, further litigation has honed the doctrine, but the basic categorical framework remains the same. However, certain cases following *Perry* deserve attention because of their discussion of intangible public fora, particularly *Packingham v. North Carolina*,¹¹¹ the Supreme Court's most recent opinion on the topic.

Of note in the pre-*Perry* era is that all public fora found by the Supreme Court shared a particular quality: they were all physical spaces. *Davis* involved a public square, *Hague* involved a building used for union headquarters, *Adderley* involved the entrance to a jail, *Greer* involved a military base, *Grayned* and *Mosley* involved sidewalks outside of public high schools, *Lehman*

108. See *Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). A theatre company under long-term lease to the city of Chattanooga, Tennessee denied an individual's request to use the theatre for the musical *Hair*. *Id.* Petitioner claimed that the theatre company violated his First Amendment rights in denying his request to use the theatre because the theatre was a public forum. *Id.*

109. *Id.* at 553 ("The reasoning has been, simply, that the danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship — reflecting the natural distaste of a free people — is deep-written in our law.")

110. *Hair* is a rock-and-roll musical that is well-known for its depiction of "hippie culture" and the sexual revolution of the 1960s. It was controversial when it was first written and performed in the late 1960s due to its portrayal of illegal drug use, embrace of what was then considered to be deviant sexual behavior, and on-stage nudity. See, e.g., Peter Libbey, *When 'Hair' Opened on Broadway, It Courted Controversy From the Start*, N.Y. TIMES (Apr. 29, 2018), <https://www.nytimes.com/2018/04/29/theater/when-hair-opened-on-broadway-it-courted-controversy-from-the-start.html> [https://perma.cc/C3Q4-9R3D].

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

involved advertising space on a public train, and *Conrad* involved a public theatre. *Rosenberger v. Rector and Visitors of the University of Virginia* was the first Supreme Court case to expand this doctrine beyond physical spaces.¹¹² In *Rosenberger*, the University of Virginia Student Council refused to fund the student group Wide Awake Productions (WAP) with funds from the Student Activities Fund (SAF). WAP claimed that this denial of funding violated the group's First Amendment rights to freedom of speech and of the press.¹¹³ In order to address the First Amendment question, however, the justices of the Supreme Court first had to answer a preliminary question: does public forum doctrine apply to a forum — such as the SAF — which is intangible and does not physically exist? The majority answered in the affirmative, holding: “[t]he SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same [public forum] principles are applicable.”¹¹⁴

The final, crucial case for understanding the current stance of public forum doctrine is the Supreme Court's 2017 judgment: *Packingham v. North Carolina*.¹¹⁵ At issue in *Packingham* was a North Carolina statute which prohibited registered sexual offenders from using certain social media websites in an effort to prevent them from using the websites to contact potential future victims.¹¹⁶ The petitioner was a registered sex offender who in 2010 posted a status update on Facebook¹¹⁷ in celebration of a court dismissing a traffic ticket against him.¹¹⁸ This status triggered a local police investigation and petitioner was ultimately arrested and convicted for violating the state statute. Petitioner challenged his conviction on the grounds that though the state had a valid interest in protecting minors from sexual abuse that could be initiated via online communication with prior offenders, the statute was not narrowly tailored to serve this

112. *Rosenberger v. Rector and Visitors*, 515 U.S. 819 (1995).

113. WAP was established to publish a student magazine designed for Christian readership. *Id.* at 845–46. The Student Council refused to authorize funding from the SAF due to the university guideline that “religious activities” be exempted from SAF funding. *Id.* Ultimately, the Court held that the denial was a violation of the Free Speech Clause for discriminating on the basis of viewpoint, but did not offend the Establishment Clause. *Id.*

114. *Id.* at 830.

115. *Packingham*, 137 S. Ct. 1730.

116. *Id.* at 1733.

117. A “status update” on Facebook resembles a “tweet” on Twitter. *See supra* note 30.

118. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1734 (2017).

end.¹¹⁹ The justices of the Supreme Court agreed, holding that the statute was overly broad and burdened substantially more speech than was necessary to further the government's legitimate interest of protecting minors.¹²⁰

Justice Kennedy, in what the concurrence termed “undisciplined dicta,”¹²¹ may have signaled the direction the Supreme Court is moving with regard to public forum doctrine and social media. He wrote that “we now may be coming to the realization that the Cyber Age is a revolution of historic proportions”¹²² and set forth an argument that nearly suggested the world wide web is a traditional public forum. In criticizing the breadth of the North Carolina statute, Justice Kennedy wrote:

By prohibiting sex offenders from using those [social media] websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the *modern public square*, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to “become a town crier with a voice that resonates farther than it could from any soapbox.”¹²³

Though not binding, this passage forms the basis for a strong argument that social media websites should be protected by the First Amendment as public fora, and perhaps that they should be protected under the strict safeguards inherent in the traditional public forum classification. Social media is the “modern public square” in which a town crier can preach from their digital soap box and reach more listeners than ever. In Justice Kennedy's conception it would appear that social media websites are now used — to borrow the famous words from *Hague* — “for purposes of assembly, communicating thoughts between citizens, and

119. *Id.* at 1734–35.

120. *Id.* at 1736.

121. *Id.* at 1738 (Alito, J., concurring).

122. *Id.* at 1736.

123. *Id.* at 1737 (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 970 (1997)) (emphasis added).

discussing public questions.”¹²⁴ Only time will tell if the Court will ultimately agree with this dicta in a majority holding, but the fact that four other justices¹²⁵ signed onto Justice Kennedy’s *Packingham* opinion may indicate that the Court is willing to hand down that decision.

IV. GOVERNMENT SOCIAL MEDIA AS PUBLIC FORA: HOW TO AVOID “LAWYERING UP” TO BLOCK ONLINE ABUSERS

The history of public forum jurisprudence lays out a framework within which social media could fit. And in order to preserve free speech in a digital age, courts should be willing — as the Southern District of New York was — to find that social media pages are public fora of some kind. Public forum doctrine does not exist only as a method of classifying state-owned or state-run property, be it physical or metaphysical. As Daniel A. Farber and John E. Nowak explain, the purpose of public forum doctrine is to vindicate the values informing First Amendment analyses in the first place.¹²⁶ Farber and Nowak argue that “there are not three types of public for[a], but rather three basic types of first amendment problems . . . [and e]ach type of problem should be addressed in a manner that openly evaluates the particular nature of the threat to first amendment values.”¹²⁷ Under this analysis, the biggest threat to First Amendment values is censorship.¹²⁸ Content-neutral regulations of time, place, or manner of speech are the least threatening, and hybrid regulations, such as situational restraints, occupy a middle tier. Thus, under the Farber-Nowak test, the question to consider is “whether the limitation of public access to this medium of communication so inhibit[s] the communication of ideas as to be inconsistent with the first amendment.”¹²⁹

In this case of blocked Twitter users and @realDonaldTrump, the answer seems clear due to the fact that blocking a Twitter

124. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 516 (1939).

125. The other justices in the majority were Justices Ginsburg, Breyer, Sotomayor, and Kagan. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1733 (2017).

126. See Daniel A. Farber and John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219, 1220 (1984).

127. *Id.* at 1224.

128. *Id.* at 1224–25.

129. *Id.* at 1223.

user prevents that user from interacting with the government actor.¹³⁰ One of the animating ideas behind social media is to enable individuals to speak freely with one another, and a main purpose of government social media accounts is to allow the public to have access to elected officials. If government social media accounts are exempt from the protections that would attach upon declaring the accounts to be public fora — of one variety or another — then a government official could easily censor discordant voices. Government officials could inhibit the communication of ideas in such a way that is entirely inconsistent with the First Amendment.

There is even an argument for why the Internet should be considered a new traditional public forum. Justice Kennedy accurately noted that the Internet and social media websites are “the modern public square.” On Twitter’s “about” page, the platform self-describes by proclaiming: “Twitter is what’s happening in the world and what people are talking about right now.”¹³¹ Facebook’s asserted mission is to “[g]ive people the power to build community and bring the world closer together.”¹³²

It is safe to say that these platforms have succeeded; much, if not most, of modern communication and social and professional networking has moved online. In November 2016, the Pew Research Center reported that 69% of American adults use at least one social media platform, with an inverse relationship between social media use and age. A staggering 88% of Americans ages eighteen to twenty-nine reported using at least one social media platform, 78% of Americans ages thirty to forty-nine, 64% of Americans ages fifty to sixty-four, and 37% of Americans ages sixty-five and over.¹³³ Pew researchers

130. Because this is a question of the First Amendment, it does not matter if a blocked Twitter user could create a new Twitter account under a different name and then interact with @realDonaldTrump. Blocking a user on the basis of their expressed viewpoint is still censorship constituting a violation of their First Amendment rights. To compare, the government banning a Marxist book because it espouses Marxist ideas is censorship, even if the author could publish the same book under a different title and avoid re-censorship. If President Trump blocks a Twitter user on the basis of their expressed viewpoint, even if they could create a new account and continue to express these viewpoints and avoid re-blocking.

131. *About*, TWITTER, https://about.twitter.com/en_us.html [https://perma.cc/3W5U-UG59] (last visited May 19, 2018).

132. *About*, FACEBOOK, <https://www.facebook.com/pg/facebook/about/> [https://perma.cc/8VZF-6CP8] (last visited May 19, 2018).

133. *Social Media Fact Sheet*, PEW RESEARCH CENTER (Feb. 5, 2018), <http://www.pewinternet.org/fact-sheet/social-media/> [https://perma.cc/SS2R-MLWV].

remarked, “[f]or many users, social media is part of their daily routine.”¹³⁴

Moreover, Pew reported in 2017 that 43% of American adults consume their news online, as compared to 50% consuming news on the television, 25% consuming news on the radio, and a scant 18% consuming news via print media.¹³⁵ Traditional news media is dying;¹³⁶ the general public no longer needs to pay for print newspaper subscriptions to stay informed. Social media has made it simple to consume news in the same place as one checks in with one’s digital community.¹³⁷

Finally, in 2015, 79% of American adults reported using online resources and information in their most recent employment search to Pew;¹³⁸ in 2016, a Stanford University study showed that by 2010, over 20% of couples met online using online dating websites or mobile applications;¹³⁹ and, in 2013, Pew reported that American adults engage in political activity¹⁴⁰ in equal

134. *Id.*

135. Kristen Bialik & Katerina Eva Matsa, *Key Trends in Social and Digital News Media*, PEW RESEARCH CENTER (Oct. 4, 2017), <http://www.pewresearch.org/fact-tank/2017/10/04/key-trends-in-social-and-digital-news-media/> [https://perma.cc/MA6C-49Z].

136. *See, e.g.*, Jeff Desjardins, *Chart: The Slow Death of Traditional Media*, VISUAL CAPITALIST (Oct. 7, 2016), <http://www.visualcapitalist.com/chart-slow-death-traditional-media/> [https://perma.cc/MB2M-F98L].

137. This phenomenon of consuming news on social media is so pronounced that it may have had an impact on the 2016 U.S. presidential election: Russian hackers allegedly created hundreds of fake profiles in order to promote the spread of disingenuous news stories designed to discredit 2016 Democratic presidential candidate Hillary Clinton. *See, e.g.*, Peter Kafka, *The U.S. Government Says Russia Infiltrated Facebook with Fake Users, Accounts and Groups Supporting Donald Trump*, RECODE (Feb. 16, 2018), <https://www.recode.net/2018/2/16/17021048/robert-mueller-russia-facebook-social-media-donald-trump-presidential-campaign-2016-hillary-clinton> [https://perma.cc/E6EQ-A67Q]; *see also* Olivia Solon & Sabrina Siddiqui, *Russia-Backed Facebook Posts ‘Reached 126m Americans’ During U.S. Election*, THE GUARDIAN (Oct. 30, 2017), <https://www.theguardian.com/technology/2017/oct/30/facebook-russia-fake-accounts-126-million> [https://perma.cc/C8RL-RR4Y]. Such a charge would have been unthinkable thirty years ago, but it is the reality that we currently live in and exemplifies modern attachment to digital media.

138. Aaron Smith, *Searching for Work in the Digital Era*, PEW RESEARCH CENTER (Nov. 19, 2015), <http://www.pewinternet.org/2015/11/19/searching-for-work-in-the-digital-era/> [https://perma.cc/J58U-JD73].

139. Michael J. Rosenfeld & Reuben J. Thomas, *Searching for a Mate: The Rise of the Internet as a Social Intermediary*, 77 AMER. SOCIOLOGICAL R. 4 (2012).

140. Pew defined “political activity” as “civic engagement” which included such activities as: attending a political meeting on local, town, or school affairs; being an active member of a group that tries to influence the public or government, attending a political rally or speech, and working or volunteering for a political party or candidate. Aaron Smith, *Civic Engagement in the Digital Era*, PEW RESEARCH CENTER (Apr. 25, 2017), <http://www.pewinternet.org/2013/04/25/civic-engagement-in-the-digital-age/> [https://perma.cc/J4AC-2KZV].

proportions both online and offline.¹⁴¹ In short, the age of community bulletin boards, newspaper boys shouting the news, keeping pen pals, and being set up for blind dates by mutual friends is largely over. Americans live on the Internet. The sidewalk soapbox has been replaced with tweets, and picketing has been replaced with a well-worded Facebook status: the Internet is truly a new traditional public forum.

Of course, a judicial declaration that the Internet is a new traditional public forum seems unlikely,¹⁴² given this nation's romanticism of the town square as the bulwark of a democracy.¹⁴³ Social media platforms are also privately-owned,¹⁴⁴ which could be at odds with the traditional public forum doctrine. Customarily, traditional public fora exist in publicly-owned property; the quintessential example being the public park or the public square.¹⁴⁵ Even if social media platforms may have all of the accoutrements of public fora, they lack the fundamental quality of being owned by the public itself. This may be too high of a doctrinal hurdle to overcome.

Moreover, there are very good reasons why government actors may want to exert a certain amount of control over those who can

141. *Id.*

142. Judge Buchwald dismissed this argument outright in her *Knight Institute* decision, writing, “we can [] conclude that the interactive space of a tweet sent by @realDonaldTrump is not a traditional public forum. There is no historical practice of the interactive space of a tweet being used for public speech and debate since time immemorial, for there is simply no extended historical practice as to the medium of Twitter [and] the lack of historical practice is dispositive[.]” *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541, 574 (S.D.N.Y. 2018). While, as stated above, this argument may merit more credence than Judge Buchwald intimated, her conclusion is likely in line with precedent. Moreover, declaring government social media pages to be traditional public fora would be a bold statement, even if such a claim is appropriate given evolving social standards, and such departure from settled practice would be inappropriate at the district court level.

143. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 45–46 (Bruce Frohnen, ed., Henry Reeve, trans., Regnery Publishing, Inc. 2003) (1889) (“[L]ocal assemblies of citizens constitute the strength of free nations. Town-meetings are to liberty what primary schools are to science; they bring it within the people’s reach, they teach men how to use it and how to enjoy it. A nation may establish a system of free government, but without the spirit of municipal institutions it cannot have the spirit of liberty.”).

144. While Twitter and Facebook are both owned “publicly” in the sense that both Twitter and Facebook are publicly traded on national securities exchanges, they are owned “privately” in the sense that neither Twitter or Facebook is owned by the state. See, e.g., *Twitter, Inc.: Ownership Summary*, NASDAQ, <https://www.nasdaq.com/symbol/twtr/institutional-holdings> (last visited Aug. 28, 2018); *Facebook, Inc. Ownership Summary*, NASDAQ, <https://www.nasdaq.com/symbol/fb/ownership-summary> (last visited Aug. 28, 2018).

145. See *supra* Part III.A.

access and interact with their social media pages — they may be barred from using such methods as blocking if social media pages were declared to be traditional public fora. Government approval ratings fluctuate widely, and approval of government¹⁴⁶ and trust in government¹⁴⁷ are currently at a low. This, combined with the fact that online profiles allow relative anonymity, can often embolden online abuse, hate speech, and even speech inciting violence which can lead to dangerous outcomes. A user could take advantage of government actors' higher-than-average number of social media followers to make threats, broadcast vitriol, or even promote terror.¹⁴⁸

It is true that threatening speech, or speech inciting violence, is not protected by the First Amendment.¹⁴⁹ Moreover, if a

146. See, e.g., *Congress and the Public*, GALLUP: NEWS (Dec. 4, 2017), <http://news.gallup.com/poll/1600/congress-public.aspx> [<https://perma.cc/64VH-LYJ4>].

147. See, e.g., *Public Trust in Government: 1958–2017*, PEW RESEARCH CENTER (May 3, 2017), <http://www.people-press.org/2017/05/03/public-trust-in-government-1958-2017/> [<https://perma.cc/NB6C-GMTZ>].

148. Some terrorist organizations have been known to take advantage of certain “trending hashtags” in order to artificially promote their tweets. Twitter users can use the # symbol, or “hashtag,” to categorize their tweet, so that users may use hashtag “categories” to find similar tweets. For example, a Twitter user could write, “Let’s go, Patriots! #patriots,” and if another user were to click the hashtag “#patriots,” that user would be able to find the tweets posted by other users which also contained #patriots. The idea behind hashtag use is for the hashtag to relate to the subject matter of the tweet itself, but certain terrorist organizations have manipulated this idea. For instance, when the 2015 Technology Inclusion Conference was taking place in San Francisco, the use of the hashtag #techinclusion2015 spiked, because conference attendees were including the hashtag in their tweets about the event. Terrorist organizations began to use the same hashtag, on tweets completely unrelated to the conference, in order to garner greater publicity for their messages of terror. Elizabeth Weise, *Trending Hashtags Co-Opted by Pro-Terrorist Accounts*, USA TODAY (Sept. 11, 2015, 4:38 PM), <https://www.usatoday.com/story/tech/2015/09/11/pro-isis-twitter-commandeering-hijack-hashtags/72078270/> [<https://perma.cc/FWU9-7FUH>]. In theory, the same artificial tweet promotion could be achieved by including another Twitter user’s handle in one’s tweet. For instance, if a user tweets “Happy Birthday, Mr. President, @realDonaldTrump,” then that tweet will not only be seen by that user’s Twitter followers, but all of President Trump’s tens of millions of followers. (On September 10, 2018, @realDonaldTrump’s followers count stood at 54.3 million, making @realDonaldTrump the seventeenth most-followed account on Twitter. See Donald J. Trump, *@realDonaldTrump*, TWITTER, <https://twitter.com/realDonaldTrump> [<https://perma.cc/3PHZ-NF9A>] (last visited Sep. 10, 2018); *Twitter: Most Followers, Friend or Follow*, <http://friendorfollow.com/twitter/most-followers/> [<https://perma.cc/XT2A-6GZ4>] (last visited May 28, 2018)). Certainly this is not a problem if a Twitter user is simply wishing the President a happy birthday, but it would be a very different story if “@realDonaldTrump” were to be used to promote a terrorist message. And the only way for President Trump to prevent a user from exploiting his high number of followers would be to block that user, which would make the user incapable of interacting with @realDonaldTrump in any way.

149. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (“These later decisions have fashioned the principle that the constitutional guarantees of free speech and free press do

Twitter user were to use a government actor's social media page in order to promote a terrorist cause, even if the tweet itself did not incite violence, a court would almost certainly find that blocking that user served a compelling state interest. However, the issue is not whether a government actor would prevail in court after blocking a certain Twitter user, it is whether a government actor can block a Twitter user without hiring a lawyer. A government actor would struggle to police their social media pages if every time that actor chooses to block a user whose behavior undeniably merits digital silencing, that actor risks a court challenge. Since traditional public fora offer the greatest amount of protection for speech, this classification may not be appropriate for government social media pages. For these reasons, a court is likely to classify government social media pages as either designated or nonpublic fora.

Of course, a court has already classified a government social media as a public forum. The Southern District of New York classified the interactive spaces surrounding President Trump's tweets on @realDonaldTrump as a designated public forum. However, as explained in Part I, the district court decision in *Knight Institute* has been appealed by President Trump. Furthermore, *Knight Institute* was limited to @realDonaldTrump rather than government social media pages at large, and it may be easily distinguished in future cases given the weaknesses in the defendant's First Amendment arguments. As Judge Buchwald explained, Plaintiffs were clearly engaged in protected political speech¹⁵⁰ and President Trump clearly engaged in viewpoint discrimination in blocking Plaintiffs.¹⁵¹ *Knight*

not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).

150. *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541, 565 (2018) (“Indeed, there is no suggestion that the speech in which the individual plaintiffs engaged and seek to engage fall within the ‘well-defined and narrowly limited classes of speech,’ such as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct, ‘the prevention and punishment of which have never been thought to raise any constitutional problem.’ We readily conclude the speech in which individual plaintiffs seek to engage is protected speech.”) (citations omitted).

151. *Id.* at 575 (“Here, the individual plaintiffs were indisputably blocked as a result of viewpoint discrimination. The record establishes that ‘[s]hortly after the Individual Plaintiffs posted the tweets . . . in which they criticized the President or his policies, the President blocked each of the Individual Plaintiffs,’ and defendants do ‘not contest Plaintiffs’ allegation that the Individual Plaintiffs were blocked from the President’s tweets that criticized the President or his policies.’ The continued exclusion of the

Institute may not offer much guidance in future suits if the speech is not so clearly protected or if the viewpoint discrimination is less obvious. Yet, given the increasing importance of social media in the digital age, as explained above, future suits are bound to arise.

The question for those suits becomes, if government social media pages are classified as public fora of some kind, how can government actors police those pages? This classification seems likely, given the crucial role of the Internet in American life and our nation's commitment to zealous protection of free speech,¹⁵² but a court will need to balance the countervailing considerations expressed above in classifying the type of public forum. The methods of policing available to government actors will depend on whether their social media pages are declared designated public fora or nonpublic fora.

individual plaintiffs based on viewpoint is, therefore, impermissible under the First Amendment.”) (citations omitted).

152. See Richard Wike, *Americans More Tolerant of Offensive Speech Than Others in the World*, PEW RESEARCH CENTER: FACT TANK (Oct. 12, 2016), <http://www.pewresearch.org/fact-tank/2016/10/12/americans-more-tolerant-of-offensive-speech-than-others-in-the-world/> [https://perma.cc/R2K4-JHPG] (“Enshrined in the Bill of Rights, free expression is a bedrock American principle, and Americans tend to express stronger support for free expression than many others around the world. A 38-nation Pew Research Center survey conducted in 2015 found that Americans were among the most supportive of free speech, freedom of the press, and the right to use the internet without government censorship. Moreover, Americans are much more tolerant of *offensive* speech than people in other nations. . . . Americans don’t necessarily like offensive speech more than others, but they are much less inclined to outlaw it.”); Richard Wike & Katie Simmons, *Global Support for Principle of Free Expression, but Opposition to Some Forms of Speech*, PEW RESEARCH: GLOBAL ATTITUDES AND TRENDS (Nov. 18, 2015), <http://www.pewglobal.org/2015/11/18/global-support-for-principle-of-free-expression-but-opposition-to-some-forms-of-speech/> [https://perma.cc/2XRQ-LZ44] (“While free expression is popular around the globe, other democratic rights are even more widely embraced. In Western and non-Western nations, throughout the global North and South, majorities want freedom of religion, gender equality, and honest, competitive elections. Yet the strength of commitment to individual liberties also varies. Americans are among the strongest supporters of these freedoms.”); Amy Mitchell, Elizabeth Grieco, & Nami Sumida, *Americans Favor Protecting Information Freedoms Over Government Steps to Restrict False News Online*, PEW RESEARCH CENTER: JOURNALISM & MEDIA (Apr. 19, 2018), <http://www.journalism.org/2018/04/19/americans-favor-protecting-information-freedoms-over-government-steps-to-restrict-false-news-online/> [https://perma.cc/C9XB-9WUB] (“When asked to choose between the U.S. government taking action to restrict false news online in ways that could also limit Americans’ information freedoms, or protecting those freedoms even if it means false information might be published, Americans fall firmly on the side of protecting freedom.”).

A. POSSIBILITY #1: DESIGNATED PUBLIC FORUM CLASSIFICATION

The first possibility is that government social media pages are classified as designated public fora. There is a strong argument in favor of this classification, which can be illustrated using the facts of *Knight Institute*. In fact, this was the Plaintiffs' argument that the court accepted: @realDonaldTrump is a designated public forum, and thus the exclusion of the blocked users from viewing and interacting with @realDonaldTrump was unconstitutionally unreasonable or viewpoint-based. As a reminder, according to *Perry*, designated public fora consist of "public property which the state has opened for use by the public as a place for expressive activity."¹⁵³

An issue, of course, is that government social media pages like @realDonaldTrump are not public property. Rather, Twitter, Inc. owns @realDonaldTrump and all other Twitter accounts, retaining control in order to protect the safety of Twitter users.¹⁵⁴ However, unlike traditional public fora, which seem to depend on the prerequisite that the property in question is publicly owned, designated public fora are more flexible. In *Conrad*, the theatre in question was not truly publicly-owned, but rather was on lease to the city by a private company.¹⁵⁵ The same logic could be imported to government social media pages, as happened in *Knight Institute*.¹⁵⁶ Even though President Trump need not pay any user fees to operate @realDonaldTrump, the @realDonaldTrump page is effectively "leased" to him for his use until if or when he chooses to relinquish the page.¹⁵⁷ As such,

153. *Perry Educ. Assoc. v. Perry Local Educators' Assoc.*, 460 U.S. 37, 45 (1983).

154. See *Enforcing Our Rules*, TWITTER, https://about.twitter.com/en_us/safety/enforcing-our-rules.html [<https://perma.cc/78XS-26VV>]. For discussion of freedom of the press, pertaining to traditional journalism sources, see *Freedom of the Press: A Brief Primer*, PBS: FRONTLINE (Feb. 20, 2007), <https://www.pbs.org/wgbh/pages/frontline/newswar/part1/primer.html> [<https://perma.cc/UVV6-R42S>].

155. *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 547 (1975) ("Petitioner, Southeastern Promotions, Ltd., is a New York corporation engaged in the business of promoting and presenting theatrical productions for profit. On October 29, 1971, it applied for the use of the Tivoli, a privately owned Chattanooga theater under long-term lease to the city, to present 'Hair' there for six days beginning November 23.")

156. *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541, 566 (2018).

157. *Twitter User Agreement*, TWITTER, <https://twitter.com/en/tos#usUsing> [<https://perma.cc/966E-TU8C>] ("Twitter gives you a personal, worldwide, royalty-free, non-assignable and non-exclusive license to use the software provided to you as part of the

even though @realDonaldTrump is not formally government-owned, it should be considered as such for purposes of public forum doctrine.¹⁵⁸ And given the way that President Trump uses @realDonaldTrump to express his opinions, retweet the opinions of others, and reply to the opinions of others, @realDonaldTrump has certainly been opened “for use by the public as a place for expressive activity.”¹⁵⁹

If @realDonaldTrump and government social media pages are designated public fora, then users may not be blocked on the basis of their expressed viewpoints, per the First Amendment. In designated public fora, the State may impose content-neutral time, place, and manner restrictions, but can only impose content-based restrictions if those restrictions are narrowly drawn to achieve a compelling state interest.¹⁶⁰ There is no compelling state interest in silencing dissidents. In fact, there is an essential state interest in just the opposite, given that the First Amendment explicitly guarantees the right to petition the government for a redress of grievances.¹⁶¹ The First Amendment prohibits viewpoint discrimination within designated public fora, and so, blocking users from viewing and interacting with government social media pages violates their First Amendment rights.

In the event that a court classifies government social media pages as designated public fora, government actors will have to structure their social media accounts differently in order to police their pages without violating the First Amendment. One option would be for government actors to “lock” their Twitter pages, which would mean that a government actor would have to grant other Twitter users a right of access in order to view and interact with the account. This semi-private Twitter account would have the benefit of allowing government actors to screen users before allowing access to their pages, but would also destroy one of the major benefits of government use of social media in the first place: communication with the public at large. In addition,

Services. . . . You may end your legal agreement with Twitter at any time by deactivating your accounts and discontinuing your use of the Services.”).

158. This, again, depends on the idea that President Trump’s conduct via @realDonaldTrump constitutes state action, and thus, that his effective ownership of @realDonaldTrump is equivalent to government ownership. *See supra* note 10.

159. Whether President Trump likes it or not.

160. *See supra* Part III.B.

161. U.S. CONST. amend. I.

individually screening prospective followers would likely be a very time-intensive and potentially costly process, especially given the potential expense of litigation: the very grounds upon which users are either accepted or denied access to the forum could face anti-discrimination and free speech challenges.

Another option would be for a government actor to create content-neutral “rules” for their pages. *Mosley* states that “[o]nce a forum is opened up to assembly or speaking by some groups, [the] government may not prohibit others from assembling or speaking on the basis of what they intend to say.”¹⁶² Thus, once a government social media account is live it may be difficult for government actors to implement retrospective controls in order to block online abusers. Government actors could head off this problem by placing reasonable restrictions on the page at its inception. Perhaps a restriction that anyone may view the page, but only verified¹⁶³ political leaders and journalists may interact with the page, perhaps basing this restriction on the compelling government interest that the risk of online abuse and hateful speech is too high to allow use of the account by the public at large. The only problem with this option may be that it conflicts with Twitter’s governing policies, and thus may be a bit chaotic to implement. Twitter users would have to comply with Twitter’s terms of use along with the various terms attached to each government actor’s individual Twitter page. This may be too confusing in practice. Moreover, it would require an agreement with Twitter to allow this sort of accommodation.

Perhaps the answer then will be to create a “government Twitter” platform subject to its own terms of service. If there were a platform only available for use by government actors, then the “rules of the road” could be formulated in such a way as to allow government actors to reap the benefits of social media use while avoiding the pitfalls of being unable to effectively police their accounts.¹⁶⁴ Twitter could integrate a specific government

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

163. A “verified” Twitter page is one to which the blue verified badge has been applied by Twitter, used to “le[t] people know that an account of public interest is authentic.” Twitter has explained that “[a]n account may be verified if it is determined to be an account of public interest. Typically this includes accounts maintained by users in music, acting, fashion, government, politics, religion, journalism, sports, business, and other key interest areas.” *About Verified Accounts*, TWITTER, <https://help.twitter.com/en/managing-your-account/about-twitter-verified-accounts> [<https://perma.cc/CK2N-JMPT>] (last visited May 19, 2018).

164. Although public desire to use such a platform is not guaranteed.

verification process that attaches certain rules to accounts that are verified as government accounts, or government Twitter accounts could be accessible on an entirely different website.

B. POSSIBILITY #2: NON-PUBLIC FORUM CLASSIFICATION

The other possibility is that government social media pages are classified as non-public fora. The Plaintiffs in *Knight Institute* did not make this argument, likely because the argument is weaker. Since a finding that government social media pages are governed by public forum doctrine would be charting new territory, one might think a court would be more likely to find that the pages are non-public fora — the designation that offers the fewest protections for speech. However, as is explained below, government social media pages do not fit as well within the non-public forum doctrine as they do within the designated public forum doctrine.

The *Perry* majority describes non-public fora as “[p]ublic property which is not by tradition or designation a forum for public communication.”¹⁶⁵ *Adderley*¹⁶⁶ and *Greer*¹⁶⁷ offer examples of such property: jails and military bases, respectively. Government social media pages, and Twitter pages in particular, do not seem to fall into this category. First, there is the complication of Twitter’s private ownership. Even if that were surmounted, there is the even greater challenge of the fact that social media — Twitter in particular — was created for the exclusive purpose of communication. Twitter proclaims as one of its highest values that “[w]e believe in free expression and think every voice has the power to impact the world.”¹⁶⁸ It would be difficult to argue that government social media pages constitute government property which is neither by history nor designation a forum for public communication. That being said, government social media accounts are so new, and application of public forum doctrine to government social media accounts so unprecedented, that perhaps a court would decide to place government social media within a sub-category of non-public fora. This would

165. *Perry Educ. Assoc. v. Perry Local Educators’ Assoc.*, 460 U.S. 37, 45 (1983).

166. *Adderley v. Florida*, 385 U.S. 39 (1966).

167. *Greer v. Spock*, 424 U.S. 828 (1976).

168. *About: Values*, TWITTER, https://about.twitter.com/en_us/values.html [https://perma.cc/4ZY2-TUMY] (last visited Sep. 10, 2018).

preserve for the government actor the ability to reserve the forum for its intended purposes, and the license to impose further viewpoint-neutral restrictions.

Assuming that government social media pages such as @realDonaldTrump are non-public fora, then users may not be blocked on the basis of their expressed viewpoint, for the same reasons as if they were categorized as designated public fora, discussed above.

If government social media pages are classified as nonpublic fora, then many of the strategies government actors could implement in order to retain policing powers over their pages may mirror the strategies suggested in the designated public forum scenario. Government actors could create content-neutral “rules” for their pages. These rules would have even more teeth for non-public social media pages than designated public social media pages, because in non-public fora, government actors can preserve the forum for its intended purpose. If a government actor were to impose governing rules for their pages, then they would have the ability to exclude the speech of users who violated those rules. However, as above, implementation of governing rules on a platform like Twitter, which already imposes governing rules on all accounts could be challenging. Thus, the cleaner option may again be the “government Twitter.”

V. CONCLUSION

Government actor use of social media poses new challenges to the First Amendment. Those challenges were put to the test in *Knight Institute v. Trump*. In the modern digital age, it is of the utmost importance that courts, like the Southern District of New York, are willing to identify public fora that do not fit the traditional mold. Americans live on the Internet, and if their speech is not protected by the First Amendment — particularly in the context of government social media pages, where not only freedom of speech but also the freedom to petition the government for redress of grievances is implicated — then it is a slippery slope to censorship.

Given the history of public forum doctrine, it is likely that if courts declare government social media accounts to be public fora, government social media accounts will be declared either designated or nonpublic fora. In the event that this declaration

takes place, government actors will be forced to adjust the way that they use social media in order to maintain the ability to police their accounts without infringing on the First Amendment rights of other users. Such adjustments may be bothersome, but they will be crucial for government actors in order to prevent abusive or hateful speech from exploiting these platforms.

Our rights to free speech, free expression, and to petition the government for a redress of grievances enshrine some of our most treasured constitutional values. In order to protect these rights in an evolving digital age, public forum doctrine must also evolve.