

2021

Technological Transformation of the Public Square: Government Officials Use of Social Media and The First Amendment

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Recommended Citation

Beety, Patricia and Zepcewski, Joline (2021) "Technological Transformation of the Public Square: Government Officials Use of Social Media and The First Amendment," *Mitchell Hamline Law Review*. Vol. 47 : Iss. 2 , Article 4.

Available at: <https://open.mitchellhamline.edu/mhlr/vol47/iss2/4>

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TECHNOLOGICAL TRANSFORMATION OF THE PUBLIC SQUARE: GOVERNMENT OFFICIALS USE OF SOCIAL MEDIA AND THE FIRST AMENDMENT

Patricia Beety and Joline Zepcevski[†]

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I. INTRODUCTION

Social media has opened a whole new world of opportunity for government officials to communicate with citizens and receive feedback in a timely and cost-effective manner. Gone are the days where local officials personally connected with constituents only through pounding the pavement, running county fair booths, and hosting town hall meetings. When and how they use social media sites for official versus private purposes has created a technology-led evolution in First Amendment jurisprudence, but this evolution is one that is providing slow and confusing legal guidance to elected leaders. At the same time, online applications and new social media platforms are being launched at breakneck speeds. This Article will describe the public forum and government speech doctrines, provide an analysis of internet-based communications using these First Amendment principles, and discuss blocking and comment deletions in the context of recent court decisions involving government officials on social media.

II. FORUM DESIGNATIONS AND THE FIRST AMENDMENT

The First Amendment and the public forum doctrine have been inextricably linked since the early decades of the twentieth century. Prior to the United States Supreme Court's 1925 recognition of the freedom of speech as a personal right, the government could abridge an individual's right to speak on government property in the same manner as that of a private owner.¹ However, while an individual's First Amendment freedoms cannot be abridged or reduced, they are not absolute where government property is concerned. Just as we cannot bust our lungs singing opera in a public library, we must also recognize a societal need to balance the competing uses of government property with the individual's right to free speech. This is the purpose of the forum analysis, where courts categorize government property as a type of forum.² When a court is deciding if a government regulation burdening speech is constitutional, the court will first categorize the location to which a speaker seeks access for the purpose of expressive activity as a type of forum, and then analyze the government's restriction on speech against the constitutional standard that governs in that forum.

A. *The Three Categories of Forums*

There are three categories of forums—the first is the traditional public forum: the streets and parks.³ The government has the least control over an individual's expressive conduct in this traditional public forum.⁴ The contours of the public forum emerged in the 1970s when the United States Supreme Court used “public forum” as a legal term and stated that any restrictions must be “carefully scrutinized.”⁵ By contrast, during this period, the Court defined a non-public forum, places like military bases, in *Greer v. Spock*.⁶ In a non-public forum, the government has the most authority to control an individual's expressive conduct.⁷ The third category is limited

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²Ronnie J. Fischer, Comment, “*What’s in a Name?: An Attempt to Resolve the “Analytic Ambiguity” of the Designated and Limited Public Fora*,” 107 DICK. L. REV. 639, 646 (2003) (quoting *Davis v. Massachusetts*, 167 U.S. 43, 47 (1897)).

³Note, *Strict Scrutiny in the Middle Forum*, 122 HARV. L. REV. 2140, 2140–41 (2009).

⁴*Id.* at 2145 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

⁵*See id.* at 2145.

⁶*Id.* at 2144 (quoting *Police Dep't v. Mosley*, 408 U.S. 92, 98–99 (1972)).

⁷*Greer v. Spock*, 424 U.S. 828, 829 (1976) (upholding military regulations banning political speech on military bases).

⁸*Strict Scrutiny in the Middle Forum*, *supra* note 2, at 2145.

and designated public forums, which arose as a middle ground and are created by purposeful government action.⁸ The designated or limited public forum is an attempt to determine what happens when the government allows some people the freedom of expression on its property, but selectively denies access to others.⁹

B. Forum-based Regulations

The category of forum then defines how government regulation of expressive activity will be reviewed by the court. A traditional public forum will be subject to strict scrutiny.¹⁰ This usually means the regulation must be content neutral and only address the time, place, and manner of the expressive speech, leaving open ample alternative avenues for expression.¹¹ If the regulation is not content neutral, rather based on the content of the speech, the government will need to prove that the regulation is narrowly tailored to accomplish a compelling government interest.¹² If a court finds that the forum is a non-public forum, the court will look to whether the regulation is a reasonable limitation of expressive activity that does not discriminate based on viewpoint.¹³ Finally, if a court finds that the forum is limited or designated, the court will determine whether the limits are reasonable based on the purpose of the forum and whether the restriction is viewpoint neutral—restrictions based on viewpoint are always subject to strict scrutiny.¹⁴

C. The Public Forum Doctrine in Digital Spaces

Historically, the United States Supreme Court's public forum cases focused on either physical places or resources that were under the government's exclusive control and were rooted in the idea that a public forum is one traditionally open to expressive activity.¹⁵

⁸ See generally William Howard, Annotation, *Constitutionality of Restricting Public Speech in Street, Sidewalk, Park, or Other Public Forum—Characteristics of Forum*, 70 A.L.R.6TH 513 (2011) (reviewing cases regarding the constitutionality of public speech restrictions based on the characteristics of the forum involved).

⁹ Seth D. Rogers, Case Note, *Constitutional Law - A Forum by Any Other Name . . . Would Be Just As Confusing: The Tenth Circuit Dismisses Intent from the Public Forum*. First Unitarian Church v. Salt Lake City Corp., 308 F.3d 1114 (10th Cir. 2002), 4 WYO. L. REV. 753, 765 (2004).

¹⁰ Howard, *supra* note 8, at 3.

¹¹ *Id.*

¹² *Id.*

¹³ See *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983).

¹⁴ See *Pleasant Grove City v. Summum*, 555 U.S. 460, 469-70 (2009) (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001)).

¹⁵ See Lyrrisa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1994 n.129 (2011).

As recently as 2010, commenters argued that the public forum doctrine could not apply to the internet because public forums are places that have “inmemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”¹⁶ Because of the recent nature of internet communications, this would place the internet outside of the definition of a traditional public forum.

Instead, courts have applied the definition from *Cornelius v. NAACP*—that a public forum exists when a principal purpose of the fora is the free exchange of ideas.¹⁷ This is the underpinning of the internet, from a time even prior to the creation of what we now describe as the internet, as reflected in J.C.R. Licklider and Robert Taylor’s *The Computer as a Communication Device*.¹⁸

Current jurisprudence further makes it clear that the court defines a public forum as more amorphous than a geographical location and not dependent on ownership. In *Rosenberger v. Rector*, the United States Supreme Court stated that a forum could be more metaphysical than geographic, and the same principles will apply.¹⁹ In *Reno v. ACLU*, plaintiffs challenged the constitutionality of the Communications Decency Act.²⁰ In this case, the Court stated that because the internet has vast democratic forums and is distinguished from broadcast television, there is “no basis for qualifying the level of First Amendment scrutiny” applied to the internet.²¹ The Court, comparing users to town criers or pamphleteers, foreshadowed the later circuit decisions that currently define social media as a public forum.

Moreover, in *Southeastern Promotions, Ltd. v. Conrad*, the Court held that public or private ownership of property was not dispositive of whether the property was a public forum.²² This was further supported in *Cornelius v. NAACP*,²³ and later reiterated in *Denver Area Telecommunications Consortium v. FCC*,²⁴ where the Court found that public access channels were a traditional public forum because the privately-

¹⁶ David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, 2010 BYU L. REV. 1981, 1998 (2010) (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

¹⁷ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

¹⁸ J.C.R. Licklider & Robert W. Taylor, *The Computer as a Communication Device*, SCI. & TECH. 21, 21–22 (Apr. 1968).

¹⁹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995).

²⁰ *Reno v. ACLU*, 521 U.S. 844, 861 (1997).

²¹ *Id.* at 870.

²² *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555–56 (1975).

²³ 473 U.S. 788 (1985).

²⁴ 518 U.S. 727 (1996).

owned stations were controlled by the government and opened by the government for use by the public.²⁵

This line of analysis is important in a discussion of government officials' use of social media because it must be first asserted that the forum analysis is appropriately applied to social media. As social media platforms are privately owned, not a geographic location, and not rooted in tradition, on its face, the application of the public forum doctrine appears inapplicable. Recent cases have addressed the threshold question of whether forum analysis applies in this context, and trending precedent indicates that the First Amendment does indeed apply to government controlled digital spaces and a forum analysis is appropriate.

D. The Government Speech Exception

There is “no constitutional right as members of the public to a government audience for their policy views.”²⁶ Government property used by the government for its own speech is not subject to these public fora limitations because the First Amendment does not apply to the government's own speech—the government is not attempting to control the speech of its citizens when it speaks. The government, when acting as the speaker, may express viewpoints.²⁷

Prior to the widespread introduction of social media, it would have been fair to characterize government use of the internet, as opposed to regulation of the internet, as government speech. Public-facing websites, controlled by governmental bodies or officials, that provide information to the public about governmental functions, rules, or policies with little to no interactive capability were the norm throughout the 1990s and early 2000s.²⁸ This shifted dramatically as we moved into the 2008 election season.²⁹ A 2009 Pew survey showed that twenty-five percent of internet users engaged interactively with the government over the internet.³⁰ Today, the number of

²⁵ *Cornelius*, 473 U.S. at 801; *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 774 (1996) (Kennedy, J., concurring). For further discussion of ownership and the public forum doctrine, see Dawn Carla Nunziato, *From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital*, 25 B.U.J. SCI. & TECH. L. 1, 62-64 (2019).

²⁶ *Minn. State Bd. For Cmty. Colleges v. Knight*, 465 U.S. 271, 286 (1984).

²⁷ *Andy G. Olree, Identifying Government Speech*, 42 CONN. L. REV. 365, 368-70 (2009).

²⁸ See *Ardia*, *supra* note 16, at 1986.

²⁹ See *id.* at 1986-88; Aaron Smith, *The Internet's Role in Campaign 2008*, PEW RESEARCH CTR. INTERNET & TECH. (Apr. 15, 2009), <https://www.pewresearch.org/internet/2009/04/15/the-internets-role-in-campaign-2008/> [https://perma.cc/EW2N-YLH5].

³⁰ Aaron Smith, *Government Online*, PEW INTERNET & AMERICAN LIFE PROJECT 1, 2 (Apr. 27, 2010), <https://www.pewresearch.org/internet/2010/04/27/government-online-2/> [https://perma.cc/GQ9A-QU5K].

government-controlled websites, social media accounts, and other online interactive forums is innumerable.³¹

While the scale of communication has changed, what is more important is that this is a revolution in how Americans are able to engage with their government. The internet provides direct engagement. It has broken down physical barriers to entering the public discourse, removing the middleman of mass media. However, this does not mean that there is no longer a middleman. Instead, the intermediary is now the content providers—whether that be the government itself, through apps and websites on government-controlled servers, or private networks like Facebook and Twitter. The internet is not a public medium.³²

When addressing social media specifically, the intimacy of this private medium allows both individuals and government agents to behave as though the conversations they are having are not mediated by the same set of norms and regulations as they would be in a city council meeting or an in-person town hall. This illusion of private conversation allows government agents, like a local city council member, to act as they would privately: blocking an acquaintance they disagree with or deleting a comment they find distasteful. In their personal use of these mediums, these acts are almost reflexive because of the nature of the medium itself.

These private networks encourage blocking, deleting, and reporting posts that violate their terms of service. As intermediaries, the private networks may act *sua sponte*, banning or limiting accounts for violating the terms of service as interpreted by an automated algorithmic function.³³ Even assessing whether the comment or post was deleted or hidden by a government agent or the private network is not necessarily straightforward. The individual usually is not informed who deleted or hid the content, so they must request the information from the private network.³⁴

Yet, when acting as a representative of the government, these acts of deletion and blocking can impact and potentially burden the exercise of the speech and expression of their constituents. Because of the shift in both the scale and manner of communication between government agents and

³¹ This is not tracked, but for context, in 2017, the Information Technology and Innovation Foundation found that the federal government had more than 6,000 websites on government servers, not including social media accounts or forums hosted on other platforms. See Alan McQuinn & Daniel Castro, *Benchmarking U.S. Government Websites*, ITIF (Mar. 8, 2017), <https://itif.org/publications/2017/03/08/benchmarking-us-government-websites> [https://perma.cc/H22M-E2PC].

³² For a broader, but somewhat dated discussion of this, see Ardia, *supra* note 16, at 1989.

³³ See *id.* at 1991.

³⁴ For a conversation about how the private nature of social media companies shapes the public discourse, see Daphne Keller, *Facebook Restricts Speech by Popular Demand*, ATLANTIC (Sept. 2, 2019), <https://www.theatlantic.com/ideas/archive/2019/09/facebook-restricts-free-speech-popular-demand/598462/> [https://perma.cc/ESR7-U4FF].

citizens, the question of how that communication can and should be regulated is now coming before the courts.

III. WHAT TYPE OF FORUM WAS THE INTERNET AND WHAT HAS IT BECOME?⁹

A. *First Evolution: The Appropriate Doctrine—Government Speech or the Forum Analysis?*⁹

Prior to 2010, there was virtually no standard for defining how the government could regulate speech on the internet.³⁵ Early cases revolved around government websites, with limited interactivity—pages that contained “local links,” online forums for job seekers to exchange information, or informational pages that presented the point of view of a local government sub-unit. The discussion trended towards asking whether these websites presented government speech or if the government had created a non-public forum.

In *Putnam Pit, Inc. v. City of Cookeville*, the city operated a website that included a “local links” page that promoted local businesses.³⁶ An independent newspaper, The Putnam Pit, known for its critical view of the local government, requested that its website be added to the local links page.³⁷ Cookeville created a policy limiting links to non-profit entities and organizations that “would promote the economic welfare, tourism, and industry of the city.”³⁸ The paper sued, calling the page a designated public forum and arguing that this policy was impermissible viewpoint discrimination.³⁹ The Sixth Circuit held that the website was a non-public forum.⁴⁰

Similarly, in *Cahill v. Texas Workforce Commission*, the plaintiff sought to post comments and other information about employers on the Texas Workforce Commission’s website.⁴¹ Cahill was excluded because the website limited access to people seeking workers or jobs; he argued that this was viewpoint discrimination.⁴² The court held that the website was a non-public forum, and therefore, the state had properly limited access to

³⁵ See generally Alissa Ardito, *Social Media, Administrative Agencies, and the First Amendment*, 65 ADMIN. L. REV. 301 (2013) (presenting an analysis of the conflict between the free speech rights of the government and of its citizens created by the social media forum); Ardita, *supra* note 16, at 2019.

³⁶ *Putnam Pit, Inc. v. City of Cookeville*, 76 F. App’x 607, 610 (6th Cir. 2003).

³⁷ *Id.*

³⁸ *Id.* at 610–11.

³⁹ See *id.* at 611–12.

⁴⁰ *Id.* at 612.

⁴¹ *Cahill v. Texas Workforce Comm’n*, 198 F. Supp. 2d 832, 833 (E.D. Tex. 2002).

⁴² *Id.*

speakers who were members of the class of speakers for whose benefit the website was created.⁴³

However, in *Page v. Lexington County School District One*, a school district opposing a tax credit bill for private and parochial tuition and homeschooling expenses expressed their discontent on the school's website and included links to emails and letters written by private citizens who also opposed the bill.⁴⁴ The plaintiff argued this created a public forum because of the links to documents by private citizens.⁴⁵ The court found the website was government speech, regardless of the links to other documents, but stated in dicta that had the website been interactive, where individuals could express opinions or post information, the issue would be different.⁴⁶ A small consensus seemed to have formed that interactive websites were likely non-public forums, where viewpoint discrimination would still be unconstitutional, while static websites were likely to be government speech. However, this consensus was indeed small and did not predict the wave of "blocking" litigation that was soon to arise.

B. "Blocking" Litigation: How Unfriending Someone Really is a "Federal Case"

The 2016 election cycle was clear in at least one respect: no level of government or candidate could afford to ignore the power of social media.⁴⁷ During this contentious election season, incumbent candidates, as seated governmental officials, found out that they could not block their opponents on social media.⁴⁸ This allowed political opponents to comment, troll,⁴⁹ and self-promote as much as they pleased on opposing candidate's pages. As nerves frayed, cases arose that forced district courts to balance individual rights to freedom of speech with government officials' rights to present a coherent message on social media platforms.

Before these cases made their way through federal district and appellate court systems, the United States Supreme Court heard and ruled on *Packingham v. North Carolina*.⁵⁰ The *Packingham* case centered not on

⁴³ *Id.* at 836.

⁴⁴ *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275, 277-78 (4th Cir. 2008).

⁴⁵ *Id.* at 279-280.

⁴⁶ *See id.* at 284.

⁴⁷ Marissa Lang, *2016 Presidential Election Circus: Is Social Media the Cause?*, SAN FRANCISCO CHRON. (Apr. 5, 2016), <https://www.govtech.com/social/2016-Presidential-Election-Circus-Is-Social-Media-the-Cause.html> [<https://perma.cc/4736-32N4>].

⁴⁸ *See infra* text accompanying notes 58-61.

⁴⁹ "Troll: to antagonize (others) online by deliberately posting inflammatory, irrelevant, or offensive comments or other disruptive content." *Troll*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/troll> [<https://perma.cc/GV4Q-4G4C>].

⁵⁰ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737-38 (2017).

electioneering, but on a North Carolina law preventing registered sex offenders from accessing any commercial social networking sites where minor children may become members.⁵¹ The Court held that the law was not narrowly tailored to the significant government interest in protecting children from abuse.⁵² In dicta for this case, the Justices stated that social networking sites are the equivalent of the modern public square.⁵³ Numerous circuits then began using this language in the blocking cases to apply a public forum analysis to the use of social media by government officials.

1. *The First Wave of Blocking Litigation: 2018*

The first of the blocking cases heard in district court was *Morgan v. Bevin*.⁵⁴ In this case, two constituents alleged violations of their First Amendment rights due to being blocked from commenting on the Kentucky Governor's Twitter and Facebook pages, which the plaintiffs argued were traditional public fora.⁵⁵ The Governor disagreed, stating that neither social media account was meant to be an "open forum for general discussion of all issues by the public," but he did label them as limited public fora.⁵⁶ Using a Minnesota case challenging the application of the Public Employment Labor Relations Act (PELRA), the district court in *Bevin* disagreed with the parties' application of the public forum doctrine and held that the Governor's social media pages were not subject to a forum analysis.⁵⁷

The court found the Governor was engaging in government speech, which allowed for the government to advance its own speech without viewpoint neutrality.⁵⁸ In particular, the court held the Governor's Twitter and Facebook accounts were a means for communicating his own speech, not for the speech of his constituents.⁵⁹ In this way, the accounts were unlike a traditional public forum meant for group discussion. The court was moved by the Governor's argument that the consequence of allowing anyone to access and post on these social media accounts could shut down the pages altogether.⁶⁰ This is because without culling comments on a government official's social media accounts, the court reasoned the communication

⁵¹ *Id.* at 1731.

⁵² *Id.* at 1737.

⁵³ *Id.*

⁵⁴ *Morgan v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018).

⁵⁵ *See id.* at 1006.

⁵⁶ *Id.* at 1006, 1010-11.

⁵⁷ *Id.* at 1010-11 (referencing *Minnesota State Bd. for Cmty. Colleges v. Knight*, 465 U.S. 271 (1984)).

⁵⁸ *Id.* at 1011.

⁵⁹ *Id.*

⁶⁰ *Id.* at 1012.

could be so overtaken with unrelated expressive activity that the accounts would be useless and abandoned, much like a public park if every statue or monument must be accepted as protected, expressive activity.⁶¹

At the same time, the Southern District of New York had two cases on similar facts. The first case the Southern District of New York ruled on was *Knight First Amendment Institute at Columbia University v. Trump*, later affirmed by the Second Circuit.⁶² Briefly put, the case revolved around whether it was constitutional for President Trump to block Twitter users from his account.⁶³ At the district level, the court in *Knight* set out that if an account is owned or controlled by the government, and contains an interactive space, that portion of the account is a designated public forum.⁶⁴ As such, blocking users from that space is impermissible viewpoint discrimination.⁶⁵

This was quickly followed by *Price v. City of New York*.⁶⁶ In *Price*, the plaintiff believed police officers and the district attorney's office mishandled a series of domestic assault complaints.⁶⁷ The plaintiff addressed her complaints in-person, and later, using social media.⁶⁸ The plaintiff was then blocked from the NYPD's 28th Precinct Twitter account (@NYPD28Pct); an account managed by the New York City Mayor's Office dedicated to combating domestic violence (@NYCagainstabuse); and an account named @RPLNYC, allegedly moderated by Commissioner Pierre-Louis.⁶⁹ Plaintiff sued the City, ten city employees—including all three moderators—and two MTA employees.⁷⁰ The City did not dispute that Brooks and Obe (moderators of @NYCagainstabuse and @NYPD28Pct, respectively) acted under the color of law, arguing that the curation of the account was in the service of government speech.⁷¹

Here, the court pushed back against this government speech argument, stating that reasonable observers would understand that the plaintiff's reply tweets criticizing the government were not the City's own speech.⁷² The court reiterated the First Amendment analysis undertaken by

⁶¹ *Id.*

⁶² *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D. N.Y. 2018) [hereinafter this case and the Second Circuit case will be collectively referred to as *Knight v. Trump* or *Knight*].

⁶³ *Id.* at 549.

⁶⁴ *Id.* at 574.

⁶⁵ *See id.* at 577.

⁶⁶ *Price v. City of New York*, No. 15 Civ. 5871 (KPF), 2018 WL 3117507 (S.D. N.Y. June 25, 2018).

⁶⁷ *Id.* at *2.

⁶⁸ *Id.* at *2-3.

⁶⁹ *Id.* at *3.

⁷⁰ *Id.* at *1, *4.

⁷¹ *Id.* at *10.

⁷² *Id.* at *14.

the district court in the *Knight* case, setting out that the account must be owned or controlled by the government, limiting the forum analysis to the interactive space, and concluding that it was a public forum.⁷³ However, unlike in *Knight*, the *Price* court did not extend the notion of a traditional public forum to encapsulate the City's Twitter account, nor exclude the Twitter accounts by defining them as non-public forums.⁷⁴ The court held it did not need to resolve the issue because the evidence so strongly suggested that the plaintiff was blocked to prevent public criticism, which is impermissible viewpoint discrimination in any forum subject to the Free Speech Clause.⁷⁵

Meanwhile, in the First Circuit, constituents filed a complaint alleging that Maine Governor Paul LePage restricted access to, and deleted comments from, a social media page that the Governor managed, violating their right to free speech.⁷⁶ In *Leuthy v. LePage*, the Governor filed an interlocutory appeal after the lower court declined to dismiss, arguing that a government official is acting as a speaker, not as the regulator of a public forum, when they exercise editorial discretion over the content on a social media page.⁷⁷ When the State is the speaker, it may make content-based choices.⁷⁸ The court held that the matter was not appropriate for interlocutory appeal because the parties disagreed on a central fact: is the webpage the Governor's official webpage or a third-party webpage over which the Governor posts comments and exercises some control.⁷⁹ This factual decision would impact what standard would apply.⁸⁰ The case settled without reaching the underlying question: was this a public forum analysis or government speech?

At the end of the 2018 spate of litigation, there was no clear consensus. The Sixth and First Circuits still entertained the idea that the use of social media accounts were government speech and, therefore, able to discriminate against viewpoint. However, the Second Circuit set a stronger precedent for finding that the interactive portions of social media accounts should be subject to a public forum analysis, even if there was no holding on what type of forum category should be applied.

⁷³ *Id.* at *10.

⁷⁴ *Id.* at *15.

⁷⁵ *Id.* at *16.

⁷⁶ *Leuthy v. LePage*, No. 1:17-CV-00296-JAW, 2018 WL 4955194, at *1 (D. Me. Oct. 12, 2018).

⁷⁷ *Id.* at *1.

⁷⁸ *Id.* at *3.

⁷⁹ *Id.* at *11–12.

⁸⁰ *Id.* at *5.

2. 2019: An Early Consensus

As a wave of these cases began to hit the courts in 2019, the Fourth Circuit released a strong opinion, *Davison v. Randall*,⁸¹ reinforcing the Southern District of New York's opinion in *Knight v. Trump*.⁸²

The plaintiff brought a section 1983 action against Randall, the Chair of the Loudoun County Board, for violating his freedom of speech by banning him from Randall's Facebook page.⁸³ One element of this case that is important for municipal law is that, at the district level, Randall was denied qualified immunity.⁸⁴ Randall argued that she was entitled to qualified immunity because the law surrounding social media and First Amendment rights is unsettled.⁸⁵ The court recognized the Supreme Court's rejection of the proposition that online speech is subjected to a different standard than other protected speech and, therefore, found that Randall was not entitled to qualified immunity.⁸⁶ The court held that if the underlying allegations were true, Randall substantially violated a clearly established constitutional right of which a reasonable government official would have known.⁸⁷

On appeal, the Fourth Circuit did not address qualified immunity. Instead, the court focused on whether the plaintiff had established an injury in fact sufficient to justify prospective declaratory relief and that Randall's "purportedly private actions bear a 'sufficiently close nexus' with the state to satisfy . . . [the] color of law requirement."⁸⁸ In so holding, the factors the court examined included whether: (1) the conduct is such that the actor could not have behaved in the challenged way but for the authority of the actor's office; (2) it occurs in the course of performing an actual or apparent duty of the actor's office; (3) the official used the power and prestige of the office to damage the plaintiff; and (4) the challenged action by a governmental official is fairly attributable to the state when the sole intention of taking the action was to suppress speech critical of the actor's conduct of official duties or fitness for public office.⁸⁹ The Fourth Circuit found that

⁸¹ 912 F.3d 666 (4th Cir. 2019).

⁸² 302 F. Supp. 3d 541 (S.D. N.Y. 2018).

⁸³ *Davison*, 912 F.3d at 676. Note: Plaintiff had also brought an earlier claim against the Loudoun County Board for violating Plaintiff's freedom of speech, first for actions taken by the board on the Board's official page, which was found in dicta to be a limited public forum and as a respondeat superior claim for the actions of Randall. The court granted summary judgment for the board dismissing the suit.

⁸⁴ *Davison v. Loudoun Cty. Bd. of Supervisors*, 227 F. Supp. 3d 605, 613–614 (E.D. Va. 2017).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Davison*, 912 F.3d at 679–80.

⁸⁹ *Id.*

Randall clothed the Facebook page in the “power and prestige” of her office, used the page to perform actual or apparent duties, that the specific action (banning plaintiff) was linked to events arising out of her official status, and that the ban was an effort to suppress critical speech.⁹⁰

In analyzing whether the Facebook page was a public forum, the court focused on the distinction between the interactive portion of a social media account and that of the official’s posts or tweets, ultimately rejecting Randall’s argument that the account was government speech and therefore not susceptible to forum analysis.⁹¹ The court did not address what type of forum the account should be categorized as, but held that the ban, under any designation, was viewpoint discrimination.⁹² The court also rejected the claim of municipal liability by holding that the plaintiff could not establish that Randall was the final municipal policymaker with regard to the ban, and instead the record established that the Board retained authority and had an established social media policy.⁹³

Simultaneously, in *One Wisconsin Now v. Kremer*, a nonprofit, One Wisconsin Now, alleged that three representatives of the Wisconsin State Assembly violated the First Amendment when they blocked a constituent from their respective Twitter accounts.⁹⁴ In cross motions for summary judgment, the court held that the officials acted under color of law in creating and maintaining their respective Twitter accounts in their capacity as members of the Wisconsin State Assembly; the interactive portion of these Twitter accounts are designated public forums using the *Knight, Randall, and Packingham* analysis (*supra*); and content-based discrimination occurred when plaintiff’s Twitter account was blocked.⁹⁵ The court followed precedent and accepted that the interactive portion of a Twitter account results in a designated public forum and, as such, the government cannot exclude speech based on content unless the exclusion can satisfy strict scrutiny.⁹⁶ The court found the restrictions could not survive this high level of scrutiny and thus were impermissible and a violation of the plaintiff’s First Amendment rights.⁹⁷

Later that same year, California broke with this analysis in *McKercher v. Morrison*, determining this was not settled law and that the official was entitled to qualified immunity.⁹⁸ In *McKercher*, the plaintiff was

⁹⁰ *Id.* at 681.

⁹¹ *Id.* at 684–86.

⁹² *Id.* at 687.

⁹³ *Id.* at 689.

⁹⁴ *One Wisconsin Now v. Kremer*, 354 F. Supp. 3d 940, 941 (W.D. Wis. 2019).

⁹⁵ *Id.* at 949, 951–57.

⁹⁶ *Id.* at 955.

⁹⁷ *Id.* at 956.

⁹⁸ *McKercher v. Morrison*, No. 18CV1054JM(BLM), 2019 WL 1098935 at *4–5 (S.D. Cal. Mar. 8, 2019).

blocked from what the court described as a city official’s “personal” social media account.⁹⁹ Although, the plaintiff argued this was an official account.¹⁰⁰ After the case’s filing, the city official created additional social media accounts and clearly identified them as official accounts.¹⁰¹ The district court conducted no analysis of what would define a public versus official account. The court found the matter moot and that there was no standing because the official changed the original offensive behavior by unblocking all constituents and creating official accounts.¹⁰² The court noted the current contradictory district court cases and engaged in a discussion of qualified immunity.¹⁰³ The court held that the issue of a public official’s private use of social media platforms, like Facebook, to communicate with constituents, among others, is not well-settled, to say nothing of “clearly established.”¹⁰⁴ Therefore, the official was entitled to qualified immunity.¹⁰⁵

At the same time as the California case was decided in 2019, *Robinson v. Hunt County* was heard in the Fifth Circuit.¹⁰⁶ Plaintiff, a social media user, brought a section 1983 action against Hunt County, the county sheriff, and Hunt County employees, alleging that the office’s censorship of its social media page violated the First Amendment.¹⁰⁷ The district court granted Hunt County’s motion to dismiss for failure to state a claim.¹⁰⁸ On appeal, the Fifth Circuit analyzed whether the plaintiff had stated a claim for municipal liability, stating the “plaintiff must allege ‘(1) an official policy (or custom), of which (2) a policy maker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose “moving force” is that policy (or custom).”¹⁰⁹

The court held that deleting plaintiff’s Facebook comments and banning her from the page was impermissible viewpoint discrimination because comments that are inappropriate are still protected speech.¹¹⁰ The court *assumed* the Facebook page was a public forum.¹¹¹ Because viewpoint discrimination is impermissible in any public forum, no further analysis was deemed necessary to find a constitutional violation.¹¹² Hunt County argued

⁹⁹ *Id.* at * 1.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at * 2.

¹⁰² *Id.*

¹⁰³ *Id.* at * 3.

¹⁰⁴ *Id.* at * 4.

¹⁰⁵ *Id.* at * 5.

¹⁰⁶ *Robinson v. Hunt Cnty.*, 921 F.3d 440 (5th Cir. 2019).

¹⁰⁷ *Id.* at 444–45.

¹⁰⁸ *Id.* at 446.

¹⁰⁹ *Id.* at 447 (internal citation omitted).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 448.

¹¹² *Id.*

that it had not delegated social media authority to the sheriff, but the court rejected this argument, holding that the sheriff's authority derived from his elected position, not by virtue of delegation.¹¹³ Therefore, the sheriff was found to be the final policymaker.¹¹⁴ The court also held that the plaintiff sufficiently pleaded an official policy of viewpoint discrimination because the written policy (an informal post published on the social media account) allowed for the deletion of inappropriate comments, and as a result, there was support for the claim that Hunt County had an explicit policy of viewpoint discrimination.¹¹⁵

One month after the Fifth Circuit ruling, Virginia ruled on another blocking case, again applying a public forum analysis. In *Windom v. Harshbarger*, the plaintiff claimed that West Virginia House of Delegates Representative Harshbarger violated the plaintiff's First Amendment rights when Harshbarger deleted the plaintiff's comments and blocked the plaintiff from accessing Harshbarger's Facebook page, which was used for official governmental communication.¹¹⁶ The plaintiff commented on the page to express opposition for a bill that Harshbarger supported.¹¹⁷ Accordingly, the plaintiff alleged that "Harshbarger imposed a viewpoint-based restriction of speech" in a "limited public forum," with no opportunity to appeal, further violating plaintiff's rights under the Due Process Clause.¹¹⁸

The court reasoned that private property, such as a Facebook page, can constitute a public forum if it was created by "purposeful government action."¹¹⁹ Moreover, the court used a totality of the circumstances analysis¹²⁰ and the factors in *Randall* to find that Harshbarger's conduct could bear a sufficiently close nexus with the state to be fairly treated as that of the state itself, and denied Harshbarger's motion to dismiss.¹²¹

It was at this juncture that the *Knight v. Trump* appeal was heard in the Second Circuit.¹²² The Second Circuit held "the First Amendment does not permit a public official who [uses] a social media account for . . . official

¹¹³ *Id.* at 448–49.

¹¹⁴ *Id.* at 449.

¹¹⁵ *Id.*

¹¹⁶ *Windom v. Harshbarger*, 396 F. Supp. 3d 675, 679 (N.D. W. Va. 2019).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 684.

¹²⁰ Using *Rossignol v. Voorhaar*, F.3d 516 (4th Cir. 2003), the Court found that while Harshbarger's conduct did not meet all of the factors laid out in *Randall*, the question of "what is fairly attributable [to the State] is a matter of normative judgment, and the criteria lack rigid simplicity." *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001).

¹²¹ *Harshbarger*, 396 F. Supp. 3d at 684–85.

¹²² *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019).

purposes to exclude persons from an otherwise-open online dialogue because they expressed views with which the official disagrees.”¹²³ The defendant, President Trump, made three arguments: (1) the account at issue is a vehicle for his own, personal speech; (2) the account is not a public forum, and even if it were, blocking comments does not prevent access; and (3) the posts are government speech to which the First Amendment does not apply.¹²⁴

The Second Circuit asserted that even if government control over the property is temporary, this does not determine whether the property is a public forum.¹²⁵ “Temporary control by the government can still be control for First Amendment purposes.”¹²⁶ The contention that the account is private was rejected because: (1) the record reflects substantial pervasive government involvement and control; (2) it is clothed in the trappings of the President; and (3) the account is used to communicate and interact with the public about matters related to official government business.¹²⁷ The court reasoned that if the President is acting in an official capacity when he speaks from the account, he is also acting in an official capacity when blocking those who disagree with him.¹²⁸

Having established that the President is a government actor, the court applied a public forum analysis.¹²⁹ The court found the President opened “an instrumentality of communication ‘for indiscriminate use by the general public’ creat[ing] a public forum,” which would preclude viewpoint discrimination.¹³⁰ The court found that activities associated with Twitter are expressive conduct and held that, while the plaintiffs cannot require the President to listen, the government may not burden the plaintiffs’ ability to converse not only with the President but with the thousands of other users speaking to or about the President.¹³¹ The President was not entitled to censor viewpoints with which he disagreed, and the fact that the plaintiffs could post messages elsewhere did not alleviate the burden created.¹³²

The court rejected the argument that the speech should be evaluated under the government speech doctrine, which does not require the government to maintain viewpoint neutrality when the government speaks about its endeavors.¹³³ The court distinguished between the

¹²³ *Id.* at 230.

¹²⁴ *Id.* at 234.

¹²⁵ *Id.* at 235.

¹²⁶ *Id.*

¹²⁷ *Id.* at 235–36.

¹²⁸ *Id.* at 236.

¹²⁹ *Id.* at 236–37.

¹³⁰ *Id.* at 237.

¹³¹ *Id.* at 237–38.

¹³² *Id.* at 239.

¹³³ *Id.* at 239–40.

President's tweets and that of user-generated content, deciding on a narrow interpretation of the government speech doctrine to apply only to the content of the President's posts and identifying the interactive elements of the account as part of a public forum.¹³⁴

In September, two months after the *Knight v. Trump* decision, the California Southern District Court ruled on *Garnier v. Poway Unified School District*.¹³⁵ The defendants (Board members) created social media accounts to campaign for the school board.¹³⁶ After the election, they repurposed these accounts to communicate school board activities to constituents.¹³⁷ Both Board members maintained private accounts to communicate with friends and family.¹³⁸ The plaintiffs were blocked from accounts for posting what the Board members characterized as "repetitive and unrelated" comments.¹³⁹ The plaintiffs claimed they were blocked as retaliation for disagreeing with school board policies.¹⁴⁰

Board members argued that the plaintiffs did not have standing because they were not injured in fact and alternative means of communication with the board were available.¹⁴¹ However, the court, relying on *Knight v. Trump*, found an injury in fact because the plaintiff's ability to communicate using social media was limited, and their injuries were "virtually certain" to continue because the plaintiffs remain blocked.¹⁴² The plaintiffs' injuries were found to be concrete and particularized because, like the Twitter users in *Knight*, they own the accounts that were blocked and were each affected in a "personal and individual way."¹⁴³ However, finding no clear constitutional right to comment on government officials' social media posts, Board members were found to be entitled to qualified immunity.¹⁴⁴

The court conducted a public forum analysis in this case and, relying on the factors used in *Knight*, noted that Board members had not adopted a comment policy to limit constituents' interactions and had created a designated public forum.¹⁴⁵ Board members argued that blocking is a time, place, and manner restriction because the plaintiffs' posts were

¹³⁴ *Id.* at 239.

¹³⁵ *Garnier v. Poway Unified Sch. Dist.*, No. 17-CV-2215-W JLB, 2019 WL 4736208 (S.D. Cal. Sept. 26, 2019).

¹³⁶ *Id.* at *1.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at *2.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at *4.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at *5.

¹⁴⁵ *Id.* at *8.

repetitive and disrupted discussion.¹⁴⁶ The court denied summary judgment of injunctive and declaratory relief because there was a dispute of material fact: finding that if the posts were not actually disruptive, the reason for blocking was pretextual and would therefore be a violation of plaintiffs' First Amendment rights.¹⁴⁷

3. *2020: In the Shadow of the Supreme Court*

As government official social media cases continue to percolate up through the appellate level, they do so in the shadow of *Knight v. Trump*.¹⁴⁸ The timeline for this case is as follows: after the U.S. Court of Appeals for the Second Circuit unanimously affirmed the district court's holding that President Trump's practice of blocking critics from his Twitter account violates the First Amendment, a petition for rehearing en banc was denied by a vote of 7-2; President Trump filed a writ of certiorari to the United States Supreme Court on August 20, 2020;¹⁴⁹ and Knight submitted its opposing brief on September 21, 2020.¹⁵⁰ While it is unclear whether *Trump v. Knight* will be heard by the Supreme Court, what is clear is that the circuits are relying heavily on a line found only in dicta in the *Packingham* case, which compares social media to the public square, a position that could be explicitly rejected once one of these cases is heard by the United States Supreme Court.

*Wagschal v. Skoufis*¹⁵¹ illustrates how quickly the position that social media is subject to a public forum analysis has become cemented. In this case, the defendant, a New York State Senator, blocked a private citizen after the individual criticized the defendant's policy positions.¹⁵² The court affirmed the test in *Knight* stating the court must determine: (1) whether the plaintiffs' interactions with the state actor's social media account are protected speech; (2) whether the social media account is a forum subject to First Amendment protections; (3) which type of forum analysis applies; and (4) whether the action was impermissible viewpoint discrimination.¹⁵³ The defendant conceded that, under *Knight*, his actions were unconstitutional.¹⁵⁴ While the court never reached the case's merit because

¹⁴⁶ *Id.* at *11-12.

¹⁴⁷ *Id.* at *12.

¹⁴⁸ 928 F.3d 226 (2d Cir. 2019).

¹⁴⁹ Petition for Writ of Certiorari, *Trump v. Knight* First Amendment Inst. at Columbia Univ., 928 F.3d 226 (2d Cir. 2019) (No. 20-197).

¹⁵⁰ Brief of Respondents, *Trump v. Knight* First Amendment Inst. at Columbia Univ., 928 F.3d 226 (No. 20-197).

¹⁵¹ *Wagschal v. Skoufis*, 442 F. Supp. 3d 612 (S.D.N.Y. 2020).

¹⁵² *Id.* at 615.

¹⁵³ *Id.* at 618.

¹⁵⁴ *Id.* at 622.

the senator unblocked the plaintiff before trial, making the issue moot, the court did emphasize that *Knight* “only protects ‘the blocked user’s right to speak in a discrete, measurable way,’” and that “[a] public official may choose to ‘selectively amplify the voices’ of certain users while hiding—or in the case of Twitter, muting—the voices of others.”¹⁵⁵

Similarly, the Sheriff of Sacramento County deleted comments by two leaders of Black Lives Matter Sacramento from the sheriff’s Facebook page, and later banned one of the plaintiffs from the page.¹⁵⁶ In *Lewis v. Jones*, the plaintiffs were granted preliminary injunctions, preventing the defendant from banning the plaintiffs because the plaintiffs met the *Winter*’s test: that the plaintiff is likely to succeed on the merits; that the plaintiff is likely to suffer irreparable harm without the injunction; whether the balance of equities and hardships is in the plaintiff’s favor; and whether an injunction is in the public interest.¹⁵⁷

The court then relied on *Knight* and *Davison* to show that the plaintiffs were likely to succeed on the merits because: (1) the defendant acted under the color of law because the administration of the Facebook page bore a sufficiently close nexus with the state because the defendant’s account bore the trappings of an official state run account and the action was related to events that arose out of the defendant’s official status; (2) the defendant’s page is a public forum because the defendant intentionally opened the public comment section for public discourse; (3) the defendant engaged in viewpoint discrimination because it was undisputed that the defendant banned plaintiffs after the plaintiffs commented on posts that they disagreed with and the defendant offered no alternative explanation.¹⁵⁸ The court rejected the argument that the defendant was engaged in government speech and therefore entitled to curate that speech because, as discussed in both *Knight* and *Davison*, the plaintiffs’ speech was not government speech.¹⁵⁹

In *Attwood v. Clemons*, the defendant, a Representative in the Florida House of Representatives, took a different approach.¹⁶⁰ After a constituent posted a comment opposing Representative Clemons’s policy on gun control, Representative Clemons blocked the constituent on both Facebook and Twitter.¹⁶¹ The plaintiff sued for declarative and injunctive

¹⁵⁵ *Id.* at 623.

¹⁵⁶ *Lewis v. Jones*, 440 F. Supp. 3d 1123, 1130 (E.D. Cal. 2020).

¹⁵⁷ *Id.* at 1131 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). *See also id.* at 1137 (applying the analysis of the *Winter*’s test).

¹⁵⁸ *Id.* at 1131-37.

¹⁵⁹ *Id.*

¹⁶⁰ *Attwood v. Clemons*, 818 F. App’x 863, 866 (11th Cir. 2020).

¹⁶¹ *Id.*

relief.¹⁶² The defendant argued he was entitled to both Eleventh Amendment immunity and absolute legislative immunity.¹⁶³ The court found that “the Eleventh Amendment provides no shield for a state official confronted by a claim that he had deprived another of a federal right under the color of state law,” and cited to the Second and Fourth Circuit decisions that social media accounts are a public forum.¹⁶⁴ The court also found that legislative immunity is confined to the activities that further an elected official’s legislative duties but “Representative Clemons’s [use of] Twitter and Facebook . . . [were] not ‘an integral part of the deliberative and communicative processes by which [elected officials] participate in committee and House proceedings.’”¹⁶⁵

Even in a 2021 decision finding that a government official did not violate the First Amendment when blocking a constituent on Twitter, there is still a consensus on the general framework. In *Campbell v. Reisch*, the Eighth Circuit stated that a private account, in this case one devoted primarily to campaign activities, “can turn into a governmental one if it becomes an organ of official business.”¹⁶⁶ In this case, however, the court found that Reisch did not meet the factors in *Knight* or *Randall* and that “she did not intend her Twitter page ‘to be like a public park, where anyone is welcome to enter and say whatever they want.’”¹⁶⁷ The court instead likened the account to a campaign newsletter, and therefore, found that there was no state action.¹⁶⁸ Without state action, there can be no violation of the First Amendment.

IV. GOVERNMENT OFFICIALS AND LESSONS LEARNED TO DATE

In *Packingham*, Justice Anthony Kennedy wrote that the internet in general, and social media in particular, have become the most important spaces in modern society for public discourse.¹⁶⁹ More and more elected officials are relying on Facebook, Twitter, and other social media accounts to share information with constituents and receive important feedback in return in a cost-effective, efficient, and—especially during public emergencies such as the COVID-19 pandemic—safe and responsible manner. It is important for these government leaders to recognize the ways a personal (non-government sanctioned) social media page can quickly and inadvertently transform into a First Amendment battleground. Whether a

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 868, 870.

¹⁶⁵ *Id.* at 869.

¹⁶⁶ *Mike Campbell v. Representative Cheri Toalson Reisch*, 986 F.3d 822, 826 (8th Cir. 2021).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Packingham v. North Carolina*, 137 S. Ct 1730, 1735 (2017).

social media account will be viewed as an official as opposed to a private account will depend on how a court views the totality of the circumstances. Multiple factors will be considered, including whether the social media account was operated for primarily a private or public purpose. To determine the underlying purpose, questions will be asked such as:

- Is the government official's title and public office contact information on the page?
- Is it being used primarily as a tool of governance to communicate about government activities?
- Does it rely on the help of government employees and public resources to maintain the account?
- Does the government official use the account while carrying out official responsibilities, such as tweeting about events the official is attending in an official capacity?

The trend in First Amendment jurisprudence is to find social media accounts that are used for official purposes to be some type of public forum primarily because interactive features of social media enable members of the public to speak by replying to tweets or posting comments. Therefore, in general, when public comment is invited on a government official's social media site, comments should not be blocked, deleted, or hidden based on the content or viewpoint expressed.

A public official does not surrender their own First Amendment rights by entering public service. They can have private social media accounts that stay private. To do so, the government official should not use the account for any official purpose or in a way that appears an extension of the public office in which they serve.

V. CONCLUSION

Just a short time ago, in 2018, the court in *Morgan v. Bevin* explicitly recognized that it was one of the first to “wrestle with the intersections of the application of free speech to developing technology and First Amendment rights of access to public officials using privately-owned channels of communication.”¹⁷⁰ This reflection still rings true today, as a trickle of First Amendment cases make their way through the circuit courts and, eventually, to the United States Supreme Court. In the meantime, the importance and urgency of developing clear legal principles related to social media platforms escalates. There needs to be better guidance for elected officials who have no choice but to embrace this new technology to communicate and serve communities across the nation. As the *Morgan* court eloquently stated:

¹⁷⁰ *Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1009 (E.D. Ky. 2018).

Since 1791, we have given voice to a national value in favor of protecting robust political discourse in the words and promise of the First Amendment to the Constitution. This case requires the Court to test that value in an age in which citizens have never had more platforms to speak. Voice is no longer measured in only parchment or paper or access to the airwaves but also in the exponential potential of the internet.¹⁷¹

While we wait to see when the United States Supreme Court will take up the issue of social media in the context of a public forum analysis, there seems to be an existing consensus among the circuit courts that if accounts are being used by officials, in a manner that suggests they are the official account of a government agent, the interactive portion of the account is a public forum. It is not clear what category of forum it may be, but it is not likely to matter because courts are analyzing blocking and deleting comments as viewpoint discrimination, and the acts would therefore need to pass strict scrutiny to be upheld as constitutional.

The alternative argument, that this is government speech and can therefore promote a viewpoint, seems to have disappeared in the wake of the Fourth and Second Circuits' opinions in *Randall* and *Knight v. Trump*, respectively. However, the nature and use of social media platforms are unique and ever-evolving. If best used as means for communicating a government official's own visions, policies, and activities—the platform created tools for public viewing and input aside—there may still be a case for applying the government speech doctrine in some capacity.

¹⁷¹ *Id.* at 1005.

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