The Pennsylvania State University

The Graduate School

A LITTLE BIRD TOLD EVERYONE BUT ME:

ESTABLISHING PUBLIC FORUMS IN THE TWITTERSPHERE

A Thesis in

Media Studies

by

Adilson E. González Morales

Submitted in Partial Fulfillment
of the Requirements
for the Degree of

Master of Arts

December 2020

The thesis of Adilson E. González Morales was reviewed and approved by the following:

Matthew Jackson
Associate Professor of Communications
Thesis Advisor

Robert Frieden
Pioneers Chair and Professor of Telecommunications and Law

Matthew P. McAllister
Professor of Communications

ABSTRACT

In *Knight v. Trump*, a group of seven individual Twitter users, represented by the Knight First Amendment Institute at Columbia University, sued President Donald Trump for blocking them and preventing them from interacting with his @realDonaldTrump account. The plaintiffs claimed that this blocking effectively 1) suppressed their capacity to engage in the digital political discourse taking place through comment threads, 2) denied them equal access to important digital public spaces, and 3) violated their right to petition the government.

This thesis focuses on *Knight v. Trump* as an example of the increasing use of Internet-based platforms as the primary sites of public debate and the implications of this for democratic discourse. The main question that I seek to answer is whether the blocking of users on social media platforms by government officials violates users' constitutional rights under the First Amendment. More broadly, this work will explore what role should the First Amendment play in establishing a robust public sphere on social media where members of marginalized communities are provided an equal opportunity to participate in democratic debate. In addition to traditional legal analysis, this thesis will draw from feminist legal scholarship and critical race theory to highlight the importance of these public forums for marginalized communities. Through a combination of legal analysis and intersectional feminist critique, this thesis will evaluate how public officials' control over social media accounts impacts the ability of individuals to participate in the public sphere. Moreover, this thesis makes a case for the radical, yet well-grounded argument that just like parks and public squares, digital public forums should also be classified as traditional public forums with the highest level of protection for First Amendment rights.

TABLE OF CONTENTS

LIST OF FIGURES

ACKNOWLEDGEMENTS

While the words in these pages are of my authorship, I'm not the only who made this master's thesis a reality.

First, I thank each and every one of my professors at the Pennsylvania State University for their valuable contributions to my intellectual development. Throughout my time at the Donald P. Bellisario College of Communications, I had the privilege to meet brilliant minds that helped me become a better scholar and thinker.

In particular, I would like to thank Professor Matthew P. McAllister. His committed support and caring mentorship throughout my academic journey allowed me to flourish and become a confident writer. Professor McAllister was present in every step on my master's career and his constant advice helped me succeed in all aspects of my education.

I thank Professor Robert Frieden for guiding me through the complex, yet intellectually stimulating world of telecommunications law and policy. His ability to pose exciting and thought-provoking questions never ceased to inspire me. One day, I hope I can too, inspire others through challenging questions.

A special demonstration of gratitude goes to the head of my committee, Professor Matthew Jackson. I couldn't have asked for a better thesis advisor. I am eternally grateful for the opportunity to discuss thousands of pages of legal writings with a scholar with such a sincere and contagious passion for First Amendment law. And, I can't thank Professor Jackson enough for his countless revisions and encouraging feedback.

Thank you to my friends, Professors Galarza, Kang, and Del Río, who entertained dozens of late-night monologues. Their emotional support and kind disposition to listen kept me going and helped me through writer's blocks, rainy days, and even global pandemics.

Para cerrar con broche de oro, el agradecimiento más grande va a mi familia. En las páginas de esta tesis viven la curiosidad e insaciable sed de mi padre – por el conocimiento, así como comprehender y cuestionar el mundo y sistemas de su entorno. De mi madre, aquí se encuentran los sueños más grandes y las palabras más bonitas de superación y fe – aquí grita el corazón de una mujer admirable, y los esfuerzos de una guerrera sin desvelo. De mis hermanas y hermano, estas páginas se cubren de cariño e inspiración – espero vayamos juntos por muchas metas más.

¡Gracias!

PART I

Introduction

Although not yet 20 years old, by 2020, social media had already become huge phenomena with rapid adoption worldwide. Facebook, which began in 2004, has gained more than 2.4 *billion users* worldwide who use the service on a monthly basis.[1] Seven in ten adults in the United States have a Facebook account.[2] Twitter has more than 320 million global users, including 22 percent of U.S. adults.[3] Just as important, more Americans now get their news from social media than from print newspapers.[4] In 2016, about $1 billion dollars was spent on digital political advertising, with that number expected to possibly double in 2020.[5] It is clear that social media will continue to play an increasingly influential role in politics, both in the United States and around the world. Social media provide spaces where individuals can debate ideas, organize and advocate for political campaigns, and more. Social media have arguably created the most open and democratic public sphere in the history of humanity.

---

[1] Andrew Hutchinson, *Facebook Posts Strong Revenue Result in Q2, MAU Increases to 2.4 Billion*, SocialMediaToday, (2019). https://www.socialmediatoday.com/news/facebook-posts-strong-revenue-result-in-q2-mau-increases-to-24-billion/559473/

[2] John Gramlich, *10 Facts about Americans and Facebook*, Pew Research Center, (2019). https://www.pewresearch.org/fact-tank/2019/05/16/facts-about-americans-and-facebook/

[3] J. Clement, *Number of monthly active Twitter users worldwide from 1st quarter 2010 to 1st quarter 2019 (in millions)*, Statista (2019). https://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/

[4] Elisa Shearer, *Social media outpaces print newspapers in the U.S. as a news source*, Pew Research Center (2018). https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/

[5] Brad Adgate, *The 2020 Elections Will Set (Another) Ad Spending Record*, Forbes (2019). https://www.forbes.com/sites/bradadgate/2019/09/03/the-2020-elections-will-set-another-ad-spending-record/#22c4719d1836

Holly Figueroa O'Reilly is one of the millions of Twitter users taking advantage of social media platforms to participate in political debate. O'Reilly, who uses the Twitter handle @AynRandPaulRyan,[6] suddenly found her account blocked by President Donald Trump because he disagreed with her viewpoint.[7] She became one of the few individuals, out of 66.1 million @realDonaldTrump followers on Twitter, who have been #BlockedByTrump.[8] Soon, O'Reilly found out she was not alone. Aided by the Knight First Amendment Institute at Columbia University, O'Reilly and six other individuals came together to sue President Donald Trump for violating their First Amendment rights and asked the court to order Trump to unblock her and the others. The case in question, *Knight First Amendment Institute v. Trump*, would unchain a series of important questions for the future of First Amendment rights.

Have Ms. O'Reilly's First Amendment rights been violated by this blocking? Or, is the President's action to block her protected by his personal First Amendment rights - as the actions of most individuals would be? Moreover, does this blocking advance or hinder any compelling state interests? These questions provide a starting point to unpack the multiple First Amendment concerns that I will explore throughout this thesis. As social media and online forums become the primary means for democratic discussion and participation, the ability of individuals to interact with public officials on social media becomes increasingly important. How the First Amendment applies to these online interactions is a crucial, as yet unanswered, question. This thesis aims to explore this question both from a doctrinal and normative perspective. I particularly address the ability of government officials to restrict access of individuals to the digital forums that these officials control. I aim to complicate these First Amendment issues by incorporating, through my

---

[6] Holly Figueroa O'Reilly (@AynRandPaulRyan), Twitter, https://twitter.com/AynRandPaulRyan?s=17

[7] Rebecca Pilar Buckwalter-Poza, Philip Cohen, Eugene Gu, Holly Figueroa, Nicholas Pappas, and Brandon Neely, *I Was Blocked by @realDonaldTrump*, Knight First Amendment Institute at Columbia University (2019). https://knightcolumbia.org/content/i-was-blocked-realdonaldtrump

[8] #BlockedByTrump, Twitter, https://twitter.com/search?q=%23blockedbytrump&src=typed_query

methodology, intersectional feminism and critical race theory – two research traditions with roots in legal critique. In order to incorporate the diverse lens of these fields, I draw from Hector Amaya's critique of public sphere theory[9] and Kimberlé Crenshaw's work on intersectionality.[10] Through these theories, I make a case for the vital role that social media platforms have had in helping historically marginalized communities gain access to mainstream public sphere spaces. In addition, I analyze whether granting government officials the right to censor users harms civic participation and the ability of groups to gain political power to generate social change. Further, I discuss the ways in which restricting access to the digital public sphere may disproportionately affect the ability of communities with multiple intersecting marginalized identities to assemble and petition for the redress of grievances as guaranteed by the First Amendment.

By focusing on the evolution of *Knight v. Trump*,[11] a legal case involving the current President of the United States, and by providing a brief overview of similar disputes, I will ultimately propose a normative analysis that aligns with the fundamental values of the First Amendment to safeguard "the discovery and spread of political truth"[12] by protecting the "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,"[13] even when "society finds [those ideas] offensive or disagreeable,"[14] and to preserve democracy by "be[ing] eternally vigilant against attempts to check the expression of opinions that we loathe."[15]

---

[9] Hector Amaya, *Citizenship Excess: Latinas/os, Media, and the Nation* (2013).

[10] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 Stan. L. Rev. 1241 (1991).

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

[12] *Whitney v. California,* 274 U.S. 357, 375, 47 S. Ct. 641, 648, 71 L. Ed. 1095 (1927), *overruled in part by Brandenburg v. Ohio,* 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969).

[13] *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 84 S. Ct. 710, 721, 11 L. Ed. 2d 686 (1964).

[14] *Texas v. Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533, 2545, 105 L. Ed. 2d 342 (1989).

[15] *Abrams v. United States*, 250 U.S. 616, 630, 40 S. Ct. 17, 22, 63 L. Ed. 1173 (1919).

First Amendment Issues in Cyberspace

Addressing First Amendment issues in digital spaces is not uncharted territory. In *Reno v. ACLU*, 521 U.S. 844 (1997) (content-based prohibitions in the Communications Decency Act violated the First Amendment), a landmark case in the regulation of speech in cyberspace, the Supreme Court affirmed the lower court's opinion that "as the most participatory form of mass speech yet developed, the Internet deserves the highest protection from governmental intrusion."[16] This decision would set the basis for today's view of the internet as a space for democracy and a multiplicity of opinions. Since then, the Supreme Court has reviewed and ruled in dozens of cases involving this relatively new communication medium.[17] Social media platforms have been no exception to these carefully crafted freedoms and regulations. From copyright[18] to obscenity,[19] and from hate speech[20] to privacy,[21] social media platforms have been under the spotlight of the court of public opinion and the judiciary.

Given the ever-growing popularity of social media amongst individuals from all walks of life, the increased attention to legal cases involving these platforms does not come as a surprise. In *Packingham v. North Carolina,* 582 U.S. ___ (2017) (federal government can't prevent individuals with criminal conviction from using the internet), for example, the Supreme Court discussed people's right to participate in social media platforms. In a unanimous opinion, the court "sought to protect the right to speak in this spatial context" and recognized these spaces as

---

[16] *Am. Civil Liberties Union v. Reno,* 929 F. Supp. 824, 883 (E.D. Pa. 1996), aff'd, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).

[17] *See* Lyombe Eko, *Many Spiders, One Worldwide Web: Towards A Typology of Internet Regulation*, 6 Comm. L. & Pol'y 445 (2000).

[18] *See* David A. Bell, *Social Media Accounts and Ownership Rights*, 33 Corp. Couns. Rev. 1, 2 (2014).

[19] *See* Kathryn R. Taylor, *"Anything You Post Online Can and Will Be Used Against You in A Court of Law": Criminal Liability and First Amendment Implications of Social Media Expression*, 71 Nat'l Law. Guild Rev. 78 (2014).

[20] *See* Johnny Holschuh, *#civilrightscybertorts: Utilizing Torts to Combat Hate Speech in Online Social Media*, 82 U. Cin. L. Rev. 953 (2014).

[21] *See* Stephen E. Henderson, *Expectations of Privacy in Social Media*, 31 Miss. C. L. Rev. 227 (2012).

"essential venues to celebrate some views, to protest others, or simply to learn and inquire."[22] Further, the majority opinion identified "cyberspace" and "social media in particular" as "the most important places (in a spatial sense) for the exchange of views."[23]

Social Media and Political Participation

Social media have also gained status among government officials. The unprecedented social-media presence of the 44th (Barack Obama) and 45th (Donald Trump) presidents of the United States, and their respective administrations, illustrates the migration of public matters into the digital spaces. Additionally, it highlights the role of social media platforms – particularly Twitter - in promoting civic engagement and political participation.

President Barack Obama's successful election campaign, which relied heavily on the use of interactive social media platforms, gave rise to scholarly research on the "emergence of digital governance."[24] Throughout his campaign, Obama had a large presence on social media in comparison to his opponents, and during his time in office, he led the very first social media presidency.[25] He utilized these communication channels in innovative ways to accomplish the mission "to reach Americans and people around the world"[26] and, as shown by exploratory analyses on microblogging, Obama significantly tweeted more often than other international political leaders.[27] Additional studies have looked into Obama's use of Twitter to cultivate international diplomatic relationships.[28] Even Twitter discussions around programs such as

---

[22] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017).

[23] *Packingham v. North Carolina,* 137 S. Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017) (parentheses in original).

[24] *See* Ann Macintosh, *The emergence of digital governance*, 5 Significance. 176, (2008).

[25] Joshua Miller, *New Lenses on the First Social Media Presidency*, WHITEHOUSE.GOV (2017), https://obamawhitehouse.archives.gov/blog/2017/01/05/new-lenses-first-social-media-presidency (last visited Oct 22, 2019).

[26] *Id.*

[27] Noa Aharony, *Twitter use by three political leaders: an exploratory analysis*, 36 Online Information Review, 587 (2012).

[28] Jane O'Boyle, *Twitter Diplomacy between India and the United States: Agenda-Building Analysis of Tweets during Presidential State Visits.* 15 Global Media and Communication, 121 (2018).

Obamacare have been subject to enlightening research with regard to online political participation and viewpoint polarization.[29] Overall, President Obama's use of Twitter established a digital public sphere that allowed for individuals to engage in important conversations for the future of their society.

While Obama paved the road for the incorporation of Twitter into American politics, President Donald Trump has also engaged the *Twitterverse*. From advocating for the executive order 13769, the "TRAVEL BAN,"[30] to announcing the decision to not allow "Transgender individuals to serve in any capacity in the U.S. Military,"[31] the 45th President of the United States has discussed many of the world's most-pressing issues on Twitter. His presidency has been characterized by an unorthodox governing style and his election use of Twitter as his preferred method of communication attests to it.[32]

Holding control over three different Twitter accounts, @realDonaldTrump, @POTUS[33] and @WhiteHouse,[34] President Trump's use of Twitter has been the center of controversies,[35] political parodies,[36] journal articles, and a couple dozen books.[37] From the start of Trump's

---

[29] Gina Mendez Rico, Arthur G. Cosby, and Somya D. Mohanty, *Obamacare on Twitter: Online Political Participation and its effects on polarisation*. 55 Teorija in Praksa, 419 (2018).

[30] Donald J. Trump (@realDonaldTrump), Twitter (Jun. 5, 2017, 6:25 AM), https://twitter.com/realDonaldTrump/status/871674214356484096?s=20

[31] Donald J. Trump (@realDonaldTrump), Twitter (Jul. 26, 2017, 9:04 AM), https://twitter.com/realDonaldTrump/status/890196164313833472?s=20

[32] *See* Nate Rattner, *President Trump is tweeting more than ever as the impeachment probe heats up*, CNBC, (2019).https://www.cnbc.com/2019/10/02/president-trump-tweets-more-than-ever-as-impeachment-probe-heats-up.html

[33] President Trump (@POTUS), Twitter, https://twitter.com/potus

[34] The White House (@WhiteHouse), Twitter, https://twitter.com/whitehouse

[35] Arwa Mahdawi, *Should Trump be banned from Twitter?*, The Guardian, (2019). https://www.theguardian.com/us-news/2019/oct/04/should-trump-be-banned-from-twitter

[36] *See* Ashley Hoffman, *11 Parody Twitter Accounts Dedicated to Trolling President Trump,* TIME, (2017). https://time.com/4741267/donald-trump-parody-twitter/ (last visited Oct 23, 2019).

[37] *See* Tony Robson, *Trump Tweets: A Collection of Donald Trump's Most Outrageous, Offensive, and Deleted Tweets from Trump's Twitter Page,* (2016); Christian Fuchs, *Digital demagogue: Authoritarian capitalism in the age of Trump and Twitter*, (2018); Christopher Galdieri, Lucas Jennifer, and Sisco Tauna, *The Role of Twitter in the 2016 US Election*, (2018); Brian Ott, and Greg Dickinson, *The Twitter Presidency: Donald J. Trump and the Politics of White Rage,* (2019).

campaign, scholars paid attention to the role of Twitter in his "unconventional campaign."[38] Some articles have focused on Trump's personal branding strategies used to create an attractive political image on Twitter[39] and on the effects of these strategies on media and users.[40] Researchers have also highlighted the ways in which the use of Twitter by the President has "begun to transform [...] the character of public discourse."[41]

Moreover, Trump has consistently engaged in promoting diplomacy via Twitter, and this has come to be known and understood through the concept of Twiplomacy.[42] Law review articles have recently also joined the conversation and some have proposed "legislative policy recommendations for regulating the President's use of Twitter."[43]

The vast research around this particular platform speaks to its crucial role in governance in the United States. By providing a space for the discussion of multiple views and political opinions from individuals of all walks of life, the Twittersphere helps individuals partake in the democratic process that is the basis of not only building but of maintaining freedom in society.

The significance of this sort of digital platform for political life is also supported by the opinion in *Packingham v. North Carolina,* written by Justice Kennedy: "on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner."[44]

---

[38] Peter Francia, *Free Media and Twitter in the 2016 Presidential Election: The Unconventional Campaign of Donald Trump*, 36 Social Science Computer Review, 440 (2018).

[39] Andrea Schneiker, *Telling the Story of the Superhero and the Anti-Politician as President: Donald Trump's Branding on Twitter*, 17 Political Studies Review, 210 (2019).

[40] Concha Pérez-Curiel, and Pilar L. Naharro, *Influencers De La Política. Estudio De La Marca Personal De Donald Trump En Twitter y Efectos En Medios y Usuarios*, 32 Comunicación y Sociedad, 57, (2019).

[41] Brian L. Ott, *The Age of Twitter: Donald J. Trump and the Politics of Debasement*, 34 Critical Studies in Media Communication, 59, (2017).

[42] Maja Šimunjak, and Alessandro Caliandro, *Twiplomacy in the Age of Donald Trump: Is the Diplomatic Code Changing?*, 35 The Information Society, 13, (2019).

[43] Kristina T. Bodnar, *'SHEER FORCE OF TWEET': TESTING THE LIMITS OF EXECUTIVE POWER ON TWITTER*, 10 Journal of Law, Technology and the Internet, 1, (2019).

[44] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735, 198 L. Ed. 2d 273 (2017).

Kennedy also noted that, "Governors in all 50 States and almost every Member of Congress ha[d] set up accounts for this purpose."[45]

Thus, it is crucial to ensure that the people in the United States can preserve the ability to freely and fairly engage within such valuable space for discussion and self-governance. "[T]he greatest menace to freedom is an inert people,"[46] so there's no better measure to protect freedom than to invigorate political participation and protect the expression of critical opinions.

Knight v. Trump

Knight v. Trump,[47] a 2017 case involving President Donald J. Trump's personal Twitter account, @realDonaldTrump, provides us with an excellent case study to explore the extent to which digital spaces, available on social media platforms to engage with government officials, equate to designated public forums where the public retains a right to speak.

In *Knight v. Trump*,[48] a group of seven individual Twitter users, represented by the Knight First Amendment Institute at Columbia University, sued President Donald Trump for blocking them and preventing them from interacting with his @realDonaldTrump account. The plaintiffs claimed that this blocking effectively suppressed their capacity to engage in the digital political discourse taking place through comment threads, denied them equal access to important digital public spaces, and violated their right to petition the government.[49]

The government, acting as the defendant in this suit, maintained that the President's account, @realDonaldTrump, was personal rather than an official government forum, and therefore the decision to block certain users did not constitute state action. Thus, the account was not subject to First Amendment restrictions. Further, the defense claimed that, even if the account

---

[45] *Id.*

[46] *Whitney v. California*, 274 U.S. 357, 375, 47 S. Ct. 641, 648, 71 L. Ed. 1095 (1927), overruled in part by *Brandenburg v. Ohio*, 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969).

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

[48] *Id.*

[49] *Id.*

were to constitute a public forum and be subject to the First Amendment, the blocking of individuals fell under the government speech doctrine, which allows government officials to express their views without having to "maintain viewpoint neutrality."[50]

In a lower court's ruling, U.S. District Judge Naomi Buchwald identified "the interactive space of a tweet" of the President's Twitter @realDonaldTrump account as "a designated public forum."[51] This decision was unanimously affirmed by the U.S. Circuit Court of Appeals for the Second Circuit on July 9th of 2019.[52] In the majority opinion, Judge Parker wrote that "the First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise–open online dialogue because they expressed views with which the official disagrees."[53] The courts also held that the particular conduct and repeated use of the Twitter account by the President as "an official vehicle for governance […] created a public forum."[54]

Knight v. Trump is an early harbinger of the legal battles that will determine the role of social media and emerging platforms in facilitating democratic dialogue and participation. This case highlights how digital technology is rapidly transforming the public sphere and our notions of a public forum. How the First Amendment is applied to these "spaces" will determine to what extent they can fulfill the promise of a more inclusive public sphere that allows all individuals to participate in democratic debate in a meaningful way. New communication technologies have long been embraced for their potential to widen democratic participation and give all individuals a voice. Yet most communication technologies have fallen short of their democratic promise, often due to a combination of commercialization and regulatory decisions that constrain their

---

[50] *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 479, 129 S. Ct. 1125, 1138, 172 L. Ed. 2d 853 (2009).

[51] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 575 (S.D.N.Y. 2018), aff'd, 928 F.3d 226 (2d Cir. 2019).

[52] *Knight First Amendment Inst. at Columbia Univ. v. Trump,* 928 F.3d 226, 240 (2d Cir. 2019).

[53] *Id.* at 230.

[54] *Id.* at 237.

potential. Rapid, wide-spread adoption of social media facilitated by access through mobile devices provides a new opportunity to apply First Amendment principles in a way that embraces the democratic promise of these new forums. As *Knight v. Trump* continues to unfold, this case will produce an important precedent that will impact individuals' fundamental constitutional rights and shape the future of civic engagement.

This thesis focuses on *Knight v. Trump* as an example of the increasing use of internet-based platforms as the primary sites of public debate and the implications of this for democratic discourse. The main question that I seek to answer is whether the blocking of users on social media platforms by government officials violates users' constitutional rights under the First Amendment. In addition to traditional legal analysis, this thesis will draw from feminist legal scholarship and critical race theory to highlight the importance of these public forums for marginalized communities.

Using the concept of intersectionality from feminist legal theory and critical race theory, I argue that laws and court decisions that restrict access to the public sphere, whether it be physically or in cyberspace, will disproportionately affect historically marginalized communities. As government officials and the public shift to online platforms to communicate and debate ideas, it is essential that these spaces be protected as public forums where all individuals can exercise their First Amendment rights to speak and seek redress of grievances.

Research Questions

General framework

- What role should social media platforms play in fostering public debate and providing individuals with access to government officials?

Specific research questions

- Does the blocking of users on social media platforms by government officials violate users' constitutional rights under the First Amendment?

- Under what circumstances should social media accounts administered by public officials be considered traditional or designated public forums?
- What are the implications for free speech when the primary means of participating in democracy and interacting with public officials take place on privately operated platforms? Can the concept of a public forum survive when those forums are privately controlled rather than publicly operated spaces like parks and sidewalks?
- How are historically marginalized communities impacted by the blocking of speech that is seen as disagreeable by government officials?
- To what extend do the cultural concepts of racialized critiques of the public sphere and intersectionality complicate interpretations of First Amendment law?

Methodology

This thesis will utilize legal research methods to determine how the First Amendment should be applied to social media accounts administered by public officials. Much of the research will be done through detail-oriented, close textual analysis of historical precedents and recent court cases. Studying the legal holdings in prior appellate cases, particularly Supreme Court cases, is an established method for discerning the legal principles that will be applied in future cases. This will include analysis of cases dealing with public forum doctrine, government speech, access theory, and how the First Amendment is applied in light of unique technological characteristics.

In addition, because this thesis will include a normative approach that argues for what the correct First Amendment status should be, I will also draw from feminist legal theory and critical race theory to highlight the unique impact of law and technology on the free speech rights of members of marginalized communities. In particular, I will use the concept of intersectionality to demonstrate that restrictions on speech often have a disproportionately negative effect on members of those communities.

Kimberlé Crenshaw's legal research on intersectionality will guide the feminist critique. Crenshaw's scholarship takes into account power dynamics and the impact of intersecting systems of oppression in the development of the law. This is relevant to our study as it connects our legal analysis to the effects of exclusion based on viewpoint discrimination. The work of Hector Amaya on public sphere theory will highlight the existing inequities in physical and digital public spheres and thus make a case for why we need to promote and guarantee access for all different opinions to partake in public discourse.

Given the nature of this paper, references, and citations for this project will follow *The Bluebook: A Uniform System of Citation*, 20th Edition by the Columbia Law Review.

PART II

Theoretical Framework

In this chapter, I introduce the legal concept of intersectionality, coined by Kimberlé Crenshaw in 1989, and I provide a brief explanation of how a feminist intersectional approach can helps us account for the rights and guarantees of historically disenfranchised communities. In line with the tradition of critical race theory, I also elaborate on the work of Hector Amaya, whose studies on public sphere theory and citizenship – also rooted in legal theory – will serve as a conceptual tool in understanding power dynamics in terms of excess and deficit of rights. I place Amaya's critique within the large public-sphere framework.

Intersectionality

The ideas that have fueled intersectionality are far from novel. Early icons from black feminism, such as Sojourner Truth and Anna Julia Cooper, raised their voices lifetimes before the civil rights era and even before the suffragette movement to invoke the sentiments encompassed by this concept. Their words urged us to direct the spotlight of advocacy not toward individual sectors of the population but toward those in the community whose disenfranchisement occurred because of the multiple experiences of exclusion that they suffered. "Ain't I a woman?" protested Truth in her famous speech.[55] In this phrase, as Crenshaw succinctly notes, Truth challenged early feminist movements that centered on the experiences of white women who attempted to dismantle patriarchal structures of oppression while continuing to deny racial equity to their black peers.[56] Effectively by 1920, not *all* women, but specifically white women acquired the right to participate in shaping the democratic course of the nation by casting their ballots.

---

[55] Truth, Sojourner. *Ain't I a Woman?*, Speech pronounced at the Women's Rights Convention, Ohio. Vol. 29. (1851).

[56] Kimberlé Crenshaw, *Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics*, U. Chi. Legal F., 139, 153-154 (1989).

As a young woman at Harvard Law, Crenshaw experienced first-hand dynamics similar to those of Truth. Her experiences with blackness and womanhood placed her in social spaces where she could fit in as either of these two equally-important axes of her identity but not both simultaneously. She struggled to find spaces where the intersection of her identities was fully welcomed. Galvanized by these experiences, Crenshaw elaborated on this social issue and its ramification within the legal system. In her 1989 essay, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics," Crenshaw coined the concept of intersectionality. Her critical analysis looked at a series of case studies where she illustrated how by looking at an individual axis of identity in the fights against racism and sexism, the most vulnerable groups of the population often fell through the cracks.

DeGraffenreid v. General Motors (1976)

Crenshaw utilized *DeGraffenreid v. General Motors* as a brief case study to illustrate the gap that she referenced in her writing. In this case, a group of five black women attempted to bring a discrimination suit against their employer. In their claim, the plaintiffs argued that a particular policy to lay off employees based on seniority had exclusively targeted black women. The layoffs resulting from this policy had, indeed, led to the firing of black women while leaving the jobs of black men and white women unaffected. The court refused to evaluate the case as a discrimination case against black women and rationalized that they would examine the discrimination claim under each one of the protected categories of this claim: sex and race. Noting that white women continued to be employed by the company, the court dismissed the claim under sex. A similar rationalization was used to dismiss their claim under the category of race. [57]

[57] *DeGraffenreid v. General Motors,* 413 F. Supp 142, 143 (E.D. Mo. 1976).

Crenshaw points out that the court's failure to look at the intersection of these two categories left these women unprotected. Ironically, this same intersection that the court refused to acknowledge was the factor that led to their discrimination. Overall, the message that such rationalizations gave was that, even though their experiences are unique and distinct, "Black women are protected only to the extent that their experiences coincide with those of either of the two groups."[58]

Thus, intersectionality, as a legal lens of analysis, places the most vulnerable groups of the population at the center. The idea is that if advocacy efforts "began with addressing the needs and the problems of those who are most disadvantaged… then the others who are singularly disadvantaged would also benefit."[59] In short, recognizing the intersections of our axes of identity can help our institutions to more efficiently address the issues that many individuals face due to the complexity of their identities, while continuing to address the issues of those who are marginalized due to a single axis of oppression.

Precedent

Almost three decades have passed since Crenshaw first brought forth the notion of intersectionality and proposed this lens that could better serve the needs of both individuals who are singularly disadvantaged, and individuals who experience oppression due to their multiple points of marginalization. However, at this point in time, virtually no cases at the federal level have explicitly applied this lens to a discrimination case. Yet the recent majority opinion in *Bostock v. Clayton County* (2020)[60] took a first step in establishing a precedent – at the highest jurisdictional level in the country – that supports the application of intersectionality as a lens.

---

[58] Kimberlé Crenshaw, *Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics*, U. Chi. Legal F., 139, 143 (1989).

[59] *Id.* at 187.

[60] *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1737 (2020).

This case resolved the question of whether the "sex" category, as one of the types of discrimination types prohibited under Title VII, extended to sexual orientation and gender expression of individuals. The U.S. Supreme Court opinion, written by Justice Gorsuch, concluded that it did. In this case, one of the employers discriminated against an individual whose sex assigned at birth was male but who self-identified their gender as woman. The employer did not discriminate against every individual who self-identified her gender as woman, and he did not discriminate against every individual who was assigned male at birth. It was the intersection of these two identities that he discriminated against. While the opinion did not fully recognize that gender, sexuality, and sex were all separate protected categories, it did acknowledge the complex connections existing between all of these identity markers.

I highlight this new precedent not to argue that intersectionality has a long and well-established precedent, but to make a case for the application of analyses that follows this lens. Intersectionality is clearly no longer a radical idea that we can only envision for the far future, but a lens of the present that is here to stay.

Public Sphere Theory and Citizenship

Habermas describes the public sphere as "a realm of our social life in which something approaching public opinion can be formed," and access to this realm, he adds, "is guaranteed to all citizens."[61] Thus, Habermas notes that the public sphere is important for democracy and governance because it provides a venue for the development of public opinion. Other scholars, such as Hauser, expand on this idea by adding that the public sphere plays a crucial role in democracy and argues that good governance, in fact, can be evaluated by looking at the leadership's consideration of the public sphere's collective opinion.[62]

---

[61] Jürgen Habermas, et al. *The Public Sphere: An Encyclopedia Article (1964).*, New German Critique, JSTOR, (3) , 49–55. (1974). www.jstor.org/stable/487737.

[62] Gerard A. Hauser, *Vernacular Voices: The Rhetoric of Publics and Public Spheres*, Columbia: University of South Carolina Press, 61, (1999).

Nancy Fraser, a feminist critic, also extends this analysis by stating that there's not one public sphere, but multiple parallel public spheres occupied by different populations. And, in addition to the dominant public sphere, there are counter-public spheres with their own distinct voices and opinions. In regards to Habermas' work, Fraser notes that the realm that he described was limited to a "network of clubs and associations – philanthropic, civic, professional, and cultural," which, in fact, "was anything but accessible to everyone."[63] Instead, Fraser described this dominant public sphere as a space for the elite to "assert their fitness to govern," which was actually rooted in the exclusion of every group that did not belong to this "universal class" conformed and defined by white males of the aristocracy in power.

In the book *Citizenship Excess*,[64] Hector Amaya carefully reviews these and many other perspectives on public sphere theory and comes to recognize the importance of these perspectives. Yet he believes these descriptions and critiques fail to account for more complex connections, such as the systemic obstacles that make it almost impossible for a minoritarian opinion to gain access to the majoritarian public sphere. Thus, he argues, the opinions of the minoritarian public spheres are not recognized by the majoritarian political markets – which only listen to the dominant or majoritarian public sphere. He goes as far as arguing that, "[t]he very juridical center of the nation-state, which is the notion that rights are given life by (politics) and for (law) the citizen, is a juridical-subjectivity born out of colonialism and slavery."[65] A juridical-subjectivity that we must keep in consideration.

More specifically, Amaya's work focuses on the dynamics experienced by the Spanish-speaking/Latinx population. He notes that while Latinxs occupy a minoritarian public sphere that is parallel to the majoritarian public sphere, the latter is controlled by the English-speaking

---

[63] Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, Social Text, (25/26), 56-80 (1990). doi:10.2307/466240.

[64] Hector Amaya, *Citizenship Excess: Latinas/os, Media, and the Nation* (2013).

[65] *Id.* at 61.

population. Amaya argues that the majoritarian political markets do not recognize the public opinion of the Spanish-speaking minoritarian public sphere. Consequently, the opinions of this minoritarian population cannot systemically transform the political markets and, ironically, they cannot gain access to the majoritarian public sphere.

For the purposes of this thesis, I extend the same rationale that Amaya applies to the Latinxs/Spanish speaking populations to other groups that have historically occupied minoritarian public spheres, which by default tend to lack political power. Much like Amaya's example, the opinions of these groups – which comprise their particular social and political thoughts and needs – have not been heard by the majoritarian political markets who favor the opinions of the majoritarian public spheres.

Amaya frames these issues in terms of perceived deficits and citizenship. Latinxs, for instance, are different in that they speak a non-majoritarian language, which is perceived by some as a deficit in ethno-linguistic capital. This deficit in ethno-linguistic capital translates into a deficit in Latinxs' ability to have political agency. In other words, Latinxs are perceived as lacking the ability for de facto citizenship – even if/when they possess citizenship de jure.

While Amaya's critique only focuses on Latinxs, there are many other minoritarian groups with differences from those who navigate the dominant public sphere. These differences are also perceived as creating a sort of capital deficit that prevent them from having political agency. To list a few examples, women, Black people, and differently abled individuals have been perceived as having emotional, cultural, and physical/cognitive deficits. While rooted in false and bigoted rationales, these perceptions have translated into a deficit in citizenship de facto for those individuals. In short, the characteristics that make minority groups different from those in power are used to perpetuate the hegemonic structures of power that caused the disenfranchisement of these groups in the first place. By setting a framework that perceives differences as deficits in a group's worth to obtain political agency and exercise de jure

citizenship, the dominant public sphere ensures that "the other" always ends with a deficit in de facto citizenship.

Within this conversation, I pay particular attention to citizenship. Although de jure and de facto citizenship are different, these two notions are interconnected; often, de jure citizenship serves as the first step for individuals to gain de facto citizenship. Take, for instance, women during the eighteenth and nineteenth centuries. Their legal (de jure) citizenship was established by birth or marriage to a man: in 1907, a U.S.-born woman would lose citizenship upon marrying a foreign man but only women (not men) born abroad would gain citizenship when marrying a U.S. citizen. Yet, even though these women were considered U.S. citizens (de jure) before the law, they did not have voting rights – they were perceived as lacking the emotional and intellectual capital needed for political agency, which, in practice, led them to be deficient in terms of (de facto) citizenship. Over the last century, women's citizenship de jure has been affirmed: they have gained voting rights, autonomy over their bodies, and protections against employment discrimination. However, although we have witnessed some progress, de facto, women continue to experience a citizenship deficit. This de facto citizenship gap between men and women is evident in the level of power that each group has in the majoritarian public sphere and, by extension, in the majoritarian political markets.

Besides women, other historically marginalized groups have experienced a similar past of disenfranchisement that continues to extend to our present. Black, Indigenous, and people of color, members of the LGBTQA+ community, and differently abled individuals constitute just some of the many disenfranchised communities that suffer a deficit in de facto citizenship. This de facto citizenship gap is even more pronounced for people with multiple intersecting marginalized identities and, even more significantly, for those who lack legal (de jure) citizenship.

On the opposite end of the spectrum, those who fit the profile of the majoritarian public sphere end up with citizenship excess, both de jure and, by extension, de facto. Going back to the example of sex, we can see that in the 116th Congress of the United States, men occupy more than 75% of all seats - even though they constitute less than 49% of the population. [66] When you add race as a factor into the equation, the political power than white men occupy in Congress is even more pronounced – of the 335 seats, white men occupy more than 63% of these important positions in the legislative branch. This number is twice as much as the number of white men (31%) in the population.[67] Beyond holding citizenship, these individuals exert power over the ability of others to gain citizenship de facto.

Public Sphere and Public Forums

While often used interchangeably, the notions of public sphere and public forum are quite distinct from each other.

The public sphere occurs wherever individuals share and discuss their ideas and beliefs, and it serves as an important mechanism through which the public opinion forms. The public sphere transcends the notions of public and private property and it can take place across multiple channels, media, and cultural texts. In regard to control, the realm of the public sphere can be both influenced and heard by the government. Yet, the government does not exert actual control over the public sphere.

Much like the public sphere, public forums are characterized for hosting the exchange of ideas and beliefs amongst individuals. However, public forums are found in concrete physical or metaphysical spaces. And, regarding control, a public forum is, in fact, defined by the degree to

---

[66] Claire Hansen, *116th Congress by Party, Race, Gender, and Religion: The 116th Congress has the most women and people of color than ever before.*, U.S. News, (2019). Retrieved from: https://www.usnews.com/news/politics/slideshows/116th-congress-by-party-race-gender-and-religion

[67] German Lopez, *This is the most diverse Congress ever. But it's still pretty white*, (2019). Retrieved from https://www.vox.com/policy-and-politics/2019/2/8/18217076/congress-racial-diversity-white

which the government owns and/or controls it. Hence, in these publicly controlled spaces, citizens are protected from violations and restrictions on their speech from both the government and private entities.

The public sphere is a theoretical construct that describes how public opinion forms through dialogue among groups and individuals. Public forums are physical and virtual spaces controlled by the government that facilitate dialogue and establish protected spaces where the public sphere can flourish free governmental or private interference. Overall, the public sphere is a broad social notion that predated and inspired the establishment of legal public forums. In a way, public forums are a materialized subset of the larger notion of public sphere.

Thus, an understanding of the social and political dynamics of the public sphere can provide us with important insight on similar dynamics that occur in public forums.

The following chapter delves into a detailed historical and legal account of public forums as government-controlled spaces that are subject to constitutional protections under the celebrated First Amendment.

PART III

Legal Framework

Public Forums

Contrary to popular belief, the First Amendment is and has always been far from absolute. For centuries, the Government has imposed restrictions on when, how, and where free expression can take place. While individuals are free to engage in expressive activities in their own homes and other private spaces, the courts have developed a separate analysis for when the state is permitted to restrict speech in a public location. Although quite common in today's courts, the notion of public forum is relatively a recent development of First Amendment law. However, a couple of older landmark cases make reference to the idea of public forum without using this specific terminology.

In 1897, the U.S. Supreme Court reviewed a case where Rev. William F. Davis attempted to use a public park, Boston Common, as a space to preach. Davis was arrested for his violation of an ordinance that prohibited public addresses without a prior permit from the mayor.[68] Davis claimed that his arrest had violated the Fourteenth Amendment by depriving him, without due process, of his right to public property. In a unanimous decision, written by Justice White, the court rejected such right to public property and reinforced the State's authority to "end the right of the public to enter upon the public place by putting an end to the dedication to public uses."[69] Further, the court noted that the legislature may "take the less step of limiting the public use to certain purposes."[70] In brief, the Supreme Court determined that the State could, at will, limit and even terminate people's access to public spaces to exercise free expression.

---

[68] *Commonwealth v. Davis*, 140 Mass. 485, 486, 4 N.E. 577, 578 (1886)
[69] *Davis v. Com. of Massachusetts,* 167 U.S. 43, 47, 17 S. Ct. 731, 733, 42 L. Ed. 71 (1897).
[70] *Id.*

The decision from *Davis v. Massachusetts* stood for almost half a century. In 1939, Jersey City's Mayor, Frank Hague, ordered police forces to remove and detain individuals participating in public meetings organized by the Committee for Industrial Organization, by accusing such gatherings of promoting communist conduct in connection to their labor organization activities. Such labor meetings had been forbidden under a city's ordinance. The issue in question was whether such an ordinance violated rights of free assembly under the First Amendment. In a plurality opinion, the court found the ordinance to violate the organizations' First Amendment rights. The opinion, authored by Justice Roberts, was pivotal in the protection of expression in public spaces. The opinion read, "[w]herever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[71] Moreover, by emphasizing that "[s]uch use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens,"[72] *Hague v. CIO* overturned the previous doctrine established in *Davis v. Massachusetts* with regards to use of public spaces. *Hague* significantly curtailed the previous, almost-absolute, authority of the State and favored the rights of citizens over public spaces.

A similar decision but regarding the rights of private property owners in relation to individual citizens' free speech rights took place in *Marsh v. Alabama.* In this case, Grace Marsh, a member of the Jehovah's Witnesses and ordained minister, visited the suburb of Chickasaw, Alabama to distribute religious literature among the residents of the community. To do so, she stood in the sidewalk of the business block of the town right by the city's post office. However, Chickasaw was a company-owned town. Hence, Marsh was asked to leave the town unless she

---

[71] *Hague v. Comm. for Indus. Org*., 307 U.S. 496, 515, 59 S. Ct. 954, 964, 83 L. Ed. 1423 (1939) (emphasis added).

[72] *Id.*

was given explicit permission by the company, who also owned the sidewalks. She refused to do so and protested that the company could not prevent her to exercising her constitutional rights. As a result, Marsh was arrested by the deputy sheriff and was convicted for trespassing.[73]

The lower courts sided with the township but, in a landmark review, the Supreme Court reversed the decision in favor of Marsh and concluded that the conviction had clearly violated the First and Fourteenth Amendments.[74] In the opinion, Justice Black wrote that "Ownership does not always mean absolute dominion," and that "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[75] Thus, the fact that the company held a property title over the sidewalk did not equip the manager of the property with the right to curtail the civil liberties of those residing or even visiting the spaces serving a public function in Chickasaw.

Even though these cases established the basis for the conceptual idea of public forum, the conventional concept did not appear in literature until 1965 through the writings of legal scholar Harry Kalven.[76] Throughout the 1970s, the term public forum was used with more frequency in cases brought to the Supreme Court.

In 1972, in *Southeastern Promotions v. Conrad,*[77] a theater group submitted a request to lease the Tivoli theater for the production of the rock musical *Hair*. Although the Tivoli was a private theater, the lease was managed by the municipality of Chattanooga, Tennessee. Under the grounds that leasing the space to Southeastern Promotions would not be "in the best interest of

---

[73] *Marsh v. State of Ala.,* 326 U.S. 501, 503–04, 66 S. Ct. 276, 277, 90 L. Ed. 265 (1946).

[74] *Id. at 508.*

[75] *Id. at 506* (referencing *Cf. Republic Aviation Corp. v. N.L.R.B*., 324 U.S. 793, 65 S.Ct. 982, 985, 987, note 8, 157 A.L.R. 1081).

[76] Harry Kalven, Jr., "The Concept of the Public Forum: Cox v. Louisiana," 1965 Supreme Court Review 1 (1965).

[77] *Se. Promotions, Ltd. v. Conrad,* 420 U.S. 546, 571, 95 S. Ct. 1239, 1253, 43 L. Ed. 2d 448 (1975).

the community,"[78] the municipal board rejected the application submitted by the theatrical group. The city claimed that the musical depicted nudity and obscenity that violated a city ordinance, and thus, the musical was effectively kept off stage.

Evoking the free speech clause under the First Amendment, Southeastern Promotions sued the municipal board for imposing a prior restraint. The U.S. Supreme Court opinion, written by Justice Blackmun, held that "[the municipal board's] rejection of [Southeastern Promotions'] application to use this public forum accomplished a prior restraint under a system lacking in constitutionally required minimal procedural safeguards."[79] Beyond reversing the District Court's ruling, the opinion noted that the municipal auditoriums were "public forums designed for and dedicated to expressive activities."[80]

Through an opinion dissenting in part and concurring in the result in part, Justice Douglas added that a "municipal theater is no less a forum for the expression of ideas than is a public park, or a sidewalk," and noted that in spite of the nature of the speech taking place in theaters, such spaces were "no less entitled to the shelter of the First Amendment." [81] Further, Justice Douglas warned the court of the dangers of allowing government officials to determine that which is "clean and healthful and culturally uplifting" in content and that which is not. Were that the case, he claimed, the path would be paved for "a regime of censorship under which full voice can be given only to those views with the approval of the powers that be."[82] This decision further strengthened the protections to free speech even in spaces managed by the government.

Spock v. David discussed the rights of civilians to make political speeches and distribute partisan literature at military reservations that were generally open to the public. Benjamin Spock,

---

[78] *Se. Promotions, Ltd. v. Conrad,* 420 U.S. 546, 554, 95 S. Ct. 1239, 1244, 43 L. Ed. 2d 448 (1975).
[79] *Id.*
[80] *Id.* at 555.
[81] *Id.* at 563.
[82] *Id.*

accompanied by other independent candidates running in the presidential elections, wrote a petition to General David, the commanding officer at Fort Dix, notifying him of their intent to enter the base to hold rallies and political speeches. David responded by refusing the request of the politicians on the basis that existing regulations at Fort Dix prohibited these acts at the base. In addition, David noted that these activities could interfere with military personnel duties. In turn, Spock et al. brought the issue to court alleging that their First Amendment rights had been violated by the ban on political speech and demonstrations.[83] The case, with a different commanding officer at the base, was reviewed by the Supreme Court to determine the constitutionality of the allegations brought by the plaintiffs.

The court found no constitutional violation and rejected the notion that when "members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a 'public forum' for purposes of the First Amendment."[84] The opinion, delivered by Justice Stewart, focused on the function of the military installation as a place to provide training rather than promoting expressive activities.[85] However, the court opined that we should look at more than a public property's purpose at the time of its creation to determine if it can be used as a public forum. Instead, we should look at the compatibility between the primary activity of the location and the communication at stake. In this case, the military base represented "a system [standing] apart from and outside of many of the rules that [governed] ordinary civilian life in our country."[86] Given the particular function of the military base and its nature, which excludes and limits participation from ordinary civilian life, the base cannot be regulated in the same manner as other spaces of civil life.

---

[83] *Spock v. David*, 349 F. Supp. 179, 180 (D.N.J.), *rev'd,* 469 F.2d 1047 (3d Cir. 1972).
[84] *Greer v. Spock*, 424 U.S. 828, 836, 96 S. Ct. 1211, 1216, 47 L. Ed. 2d 505 (1976).
[85] *Id. at 831.*
[86] *Id. at 843.*

Although other cases continued to reference public forums, a formal doctrine was not established until 1983, through *Perry Educ. Ass'n v. Perry Educators' Ass'n*.[87] Two teachers' associations, Perry Education Association (PEA) and Perry Local Educators' Association (PLEA), contended in an election to become the sole representative of the Perry Township teachers. Upon winning the election, PEA was "formally certified as exclusive bargaining representative,"[88] and the losing union, PLEA, lost access to teachers' mailboxes and the inter-school mailing system. Consequently, PLEA sought relief by claiming that such exclusion from the mailing system violated the First Amendment.

The U.S. Supreme Court observed that the school board had not opened the mailbox system "for indiscriminate use by general public." Instead, the board granted access on a one-by-one basis to some organizations, a "type of selective access [that] does not transform government property into a public forum."[89] Thus, the court found that the mailboxes were a nonpublic forum. However, other organizations were granted access to the mailbox system. Thus, in his opinion Justice White distinguished that these additional organizations were different in that they were student-focused and did not compete with the official teachers' union. White wrote that even if, for the sake of argument, the mailbox system were a limited public forum, "the constitutional right of access would in any event extend only to other entities of similar character."[90] Under this rationale, PLEA could have only gained access to the mailboxes had it been an organization engaging in "activities of interest and educational relevance to students."[91]

---

[87] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 954, 74 L. Ed. 2d 794 (1983).

[88] *Perry Local Educators' Ass'n v. Hohlt*, 652 F.2d 1286, 1288 (7th Cir. 1981), *rev'd sub nom. Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983).

[89] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47, 103 S. Ct. 948, 956, 74 L. Ed. 2d 794 (1983).

[90] *Id.*

[91] *Id.*

Public Forum Doctrine

The opinion in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n* listed three distinct categories to classify property or forums where "expressive activity"[92] or "public communication"[93] takes place. The three categories are quintessential public forums, limited-purpose public forums, and nonpublic forums. The description of these forums created a doctrine that has served as a guiding tool in establishing restrictions as to where, how, and when expression can occur.

The first category, quintessential or traditional public forums, includes spaces that have been traditionally dedicated to "assembly and debate," such as streets and parks and public sidewalks, as delineated in *Hague v. CIO*.[94] Out of the three types of forum, traditional public forums have the highest protection from government interference. As written in the opinion by Justice White, in these spaces "the rights of the state to limit expressive activity are sharply circumscribed."[95] The government may only prohibit expressive activity in the spaces when doing so furthers "a compelling state interest" and that is "narrowly drawn to achieve that end."[96] Even such restrictions on communication must be content-neutral, follow the "time, place, and manner" guidelines, and "leave open ample alternative channels of communication."[97]

When the state opens a public property for use by the public "as a place for expressive activity," it creates a limited public forum.[98] In this type of forum, the state may not exclude certain entities from a forum open to the public, "even if it [the government] was not required to

---

[92] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794 (1983).

[93] *Id.*

[94] *Hague v. CIO*, 307 U.S. 496, 515, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939).

[95] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 954, 74 L. Ed. 2d 794 (1983).

[96] *Id. at 955.*

[97] *Id.*

[98] *Id.*

create the forum in the first place."[99] While there's no requirement for a state to "indefinitely retain the open character of the facility," the state is bound, for as long as the forum remains open, to follow the same standards that "apply in a traditional public forum"[100] – including reasonable time, place, and manner regulations that are narrowly defined to achieve a compelling interest. Meeting facilities at state universities and public theaters managed by the state would be examples of forums that have been opened by the state and thus, cannot exclude access without regard to First Amendment protections.[101]

The last category, nonpublic forum, covers public property that neither by tradition or designation is considered a public forum. Citing the decision in *USPS v. Greenburgh*, the opinion highlighted that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[102] However, although the "state may reserve the forum for its intended purposes," [103] it is not justified for the government officials in control of the forum to suppress expression or discriminate against views that are opposite to theirs.

Since then, dozens of cases have made use of this public forum doctrine to evaluate the forum status of a given space. In 1985, NAACP Legal Defense and Educational Fund applied to be part of the Combined Federal Campaign (CFC) – a government charity drive created to reduce the level of interference that daily requests for contributions had on federal employees and their ability to perform their duties. Director Cornelius, who was in charge of managing the CFC excluded NAACP by claiming that a recent presidential executive order forbade political

---

[99] *Id.*

[100] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794 (1983).

[101] *Widmar v. Vincent*, 454 U.S. 263, 267 (1981) (The University created a limited public forum by opening their facilities for use by student groups). *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) ("The Memorial Auditorium and the Tivoli were public forums designed for and dedicated to expressive activities.").

[102] *U. S. Postal Serv. v. Council of Greenburgh Civic Associations*, 453 U.S. 114, 129, 101 S. Ct. 2676, 2685, 69 L. Ed. 2d 517 (1981).

[103] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794 (1983).

advocacy groups from participating. The NAACP, along with other excluded legal funds, brought suit against the government alleging that the exclusion had violated their First Amendment rights to communicate in the CFC.

The Supreme Court found the CFC to be a nonpublic forum.[104] The opinion, authored by Justice O'Connor, followed a public forum analysis that took into account whether "the policy and practice of the government" originally intended to designate a space "not traditionally open to assembly and debate as a public forum."[105] The CFC was created with the intent to reduce interference within the workplace and restrict access on whom could request contributions of their employees. This meant that the government had no intent, in the first place, to open the space of the CFC for public use. The government made the "reasonable argument" that granting access to advocacy groups to the CFC would "disrupt a nonpublic forum and hinder its effectiveness for its intended purpose."[106] Further, O'Connor added that, in addition to the regulations being reasonable and in line with the purpose of the forum, these needed to be "viewpoint neutral."[107]

In *Rosenberger v. University of Virginia*, [108] the court created an important precedent in the application of the public forum analysis discussed in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*. Since 1970, the Student Activities Fund (SAF) of the University of Virginia had provided funding to student organizations with the goal of supporting a variety of student activities and publications at the institution. In 1991, Wide Awake Productions (WAP), a Christian student organization, submitted a request for funding to pay for the printing of Wide

---

[104] *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 805, 105 S. Ct. 3439, 3451, 87 L. Ed. 2d 567 (1985).

[105] *Id. at 3449.*

[106] *Id. at 3442.*

[107] *Id. at 3451.*

[108] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830, 115 S. Ct. 2510, 2517, 132 L. Ed. 2d 700 (1995).

Awake Magazine, a student-edited journal with a religious perspective.[109] The SAF refused to make the payment to the printing company that had produced the magazine. The SAF argued that the publication by WAP went against the school's goal not to endorse a specific religious view. WAP maintained that rejecting monetary support to their publication constituted viewpoint discrimination because other publications, which included secular and atheist ideas, had previously received funding from SAF. Upon following the formal channels of appeal at the school level, the members of WAP sued the school alleging a violation of their First Amendment rights. The plaintiffs argued that the fund itself constituted a limited public forum and that given its purpose and nature, the school could not discriminate against publications with a religious perspective. The committee in charge of the fund claimed that the SAF was a nonpublic forum and thus, they could effectively set limitations and exclude certain types of expression given a larger interest.

In 1992, the District Court concluded their public forum analysis: "[t]he consistent, purposeful exclusion of certain groups indicates that the SAF is indeed a nonpublic forum."[110] The court found that the previous history of the SAF excluding some groups and publications from receiving funding had demonstrated that the SAF was not a public forum of any kind. Consequently, the court rule in favor of the school. The members of WAP, led by Rosenberger, asked for a review by the Court of Appeals. The opinion, issued in 1994, affirmed the previous decision granted by the District Court and rejected the idea that a public forum analysis should be conducted beyond physical and geographical spaces: "The long line of public forum cases have taken "forum" in a fairly literalistic way involving physical space."[111] Further, the opinion went

---

[109] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 795 F. Supp. 175, 177 (W.D. Va. 1992), *aff'd,* 18 F.3d 269 (4th Cir. 1994), *rev'd,* 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995).

[110] *Rosenberger v. Rector & Visitors of Univ. of Virginia,* 795 F. Supp. 175, 180 (W.D. Va. 1992), *aff'd,* 18 F.3d 269 (4th Cir. 1994), *rev'd,* 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995).

[111] *Rosenberger v. Rector & Visitors of Univ. of Virginia,* 18 F.3d 269, 287 (4th Cir. 1994), *rev'd,* 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995).

as far as to declare such debate unhelpful for the development of the law. "[W]e do not see how it advances the jurisprudence to wrench that word out of its accepted form to encompass this type of case already subject to First Amendment scrutiny."[112]

The U.S. Supreme Court granted certiorari and reversed the decision by the lower courts. In the opinion, Justice Kennedy articulated that even though the nature of the fund (SAF) did not align with the literal understanding of forum, a public forum analysis was still applicable. "The SAF is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."[113] The opinion also echoed the opinion in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n* and added that "even when the limited public forum is one of its own creation"[114] the government may not engage in viewpoint discrimination. The SAF was, in conclusion, a limited public forum. Finally, the court made an important distinction between "content discrimination, which may be permissible if it preserves the purposes of that limited forum" and "viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations."[115]

In 1998, the opinion in *Arkansas Educational Television Commission v. Forbes* expanded the understanding of public forums by emphasizing the role of scarcity in conducting a forum analysis. The Arkansas Educational Television Commission (AETC), a state-owned public television broadcaster, held a debate for the most popular candidates running for the Third Congressional District of Arkansas in the 1992 elections. Ralph P. Forbes, an independent candidate with little support from the public, requested to be granted a spot in the debate. When

---

[112] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 18 F.3d 269, 287 (4th Cir. 1994), *rev'd,* 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995).

[113] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830, 115 S. Ct. 2510, 2517, 132 L. Ed. 2d 700 (1995).

[114] *Id. at 829*.

[115] *Id. at 830*.

the AETC refused to include him, Forbes filed a suit claiming that he had a First Amendment right to participate because the debate was a limited public forum.[116]

Forbes' claim was rejected by the District Court' forum analysis, but the Eighth Circuit Court of Appeals reversed the ruling, determining that the debate was indeed a limited public forum and subject to First Amendment regulations. In 1997, the U.S. Supreme Court granted certiorari to the AETC and, in turn, reversed the Court of Appeals' decision. In brief, the court concluded that the debate was a nonpublic forum.

In the Supreme Court opinion, Justice Kennedy focused on the medium and the intent. Taking into account the nature of television broadcasting, which requires editorial and journalist discretion from the staff in charge, the court said that "broad right of access for outside speakers would be antithetical" to the purpose of this space.[117] In fact, the debate did not follow an "open-microphone format"[118] and it did not provide an invitation to all candidates to participate. It was also noted that, while sometimes possible, in many instances "it is not feasible for the broadcaster to allow unlimited access to a candidate debate."[119] The court proceeded by reiterating the opinion in *Rosenberger*, which pointed out that when the demand surpasses the supply, the state may "ration or allocate the scarce resources on some acceptable neutral principle."[120] Under this rationale, the forum in dispute – a television-broadcasted debate – could be considered a scarce resource, a finite supply that needed to be properly allocated in the best interest of the public. Accordingly, the AETC managed at their discretion this "nonpublic forum."

---

[116] *Forbes v. Arkansas Educ. Television Commc'n Network Found*., 22 F.3d 1423 (8th Cir. 1994)

[117] *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 673, 118 S. Ct. 1633, 1639, 140 L. Ed. 2d 875 (1998)

[118] *Id. at 1642.*

[119] *Id. at 1640.*

[120] *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 835, 115 S. Ct. 2510, 2519, 132 L. Ed. 2d 700 (1995).

Nevertheless, the Court stated that the government still needed to demonstrate viewpoint neutrality.[121] In this case, given that the candidate was excluded based on his lack of popular support and not on his particular political affiliation or lack thereof, the court saw no violation of the viewpoint neutrality provision. In brief, this case emphasized that not every space managed by the government, even if is dedicated to expressive activities, constitutes by default a public forum. A public forum analysis must consider ownership, function, intent, and even scarcity.

In 2006, the Christian Legal Society (CLS), a religious student group at Hastings College of the Law, brought suit against the school by alleging that the school's requirement for membership in the Registered Student Organization (RSO) program violated their First and Fourteenth Amendment rights of free expression, association, and exercise of religion.[122] Student organizations granted status by the RSO program became eligible for funding, access to school facilities, and other official channels of communication.[123] However, in order to have access to these benefits, organizations needed to abide by all university policies and regulations. One of these conditions, a nondiscrimination policy at Hastings, was interpreted by the school to mandate all RSO-related groups "acceptance of all comers"[124] seeking membership in their organizations. CLS sought membership in the RSO program but petitioned for an exemption against the nondiscrimination policy. The school denied the petition but offered alternative channels and limited use of facilities to CLS. Upon the school's denial of the petition, CLS took the issue to court claiming that the RSO program was limited public forum from which they could not be excluded based on their religious beliefs.

---

[121] *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 676, 118 S. Ct. 1633, 1640, 140 L. Ed. 2d 875 (1998).

[122] *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 668, 130 S. Ct. 2971, 2978, 177 L. Ed. 2d 838 (2010).

[123] *Id. at 2979.*

[124] *Id.*

The claim was rejected by the 9th Circuit. The Court of Appeals affirmed and found the membership conditions to be "viewpoint neutral and reasonable."[125] Justice Ginsburg wrote the opinion of the Supreme Court that continued to affirm the lower courts' ruling. The opinion, however, stated an important distinction regarding the effect of viewpoint neutrality on permissible restrictions. "If restrictions on access to a limited public forum are viewpoint discriminatory, the ability of a group to exist outside the forum would not cure the constitutional shortcoming. But when access barriers are viewpoint neutral, our decisions have counted it significant that other available avenues for the group to exercise its First Amendment rights lessen the burden created by those barriers."[126] In brief, the state does not have a responsibility to offer alternative channels of communication to excluded speakers, if their exclusion from the limited public forum was viewpoint neutral. Yet, First Amendment violations based on viewpoint discrimination cannot be cured by the provision of alternative channels of communication. In *Christian Legal Soc. v. Martinez*, the school's decision to willingly provide other channels of communication to the CLS "is all the more creditworthy" because the viewpoint-neutral exclusion of the CLS from the RSO forum did not require such accommodation.

Welcoming Public Forum Doctrine into the Cyberspace

While legal matters involving the public forum doctrine traditionally focused on physical and tangible spaces, a lot has changed over the years. In 2010, Lester Packingham, a registered sex offender who had served his criminal conviction, was arrested by the police of Durham, North Carolina after making a post on his Facebook profile. The post simply read, "Man God is Good! How about I got so much favor they dismissed the ticket before court even started? No

---

[125] *Christian Legal Soc'y Chapter Of Univ. Of California v. Kane,* 319 F. App'x 645, 646 (9th Cir. 2009), *aff'd and remanded sub nom. Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 130 S. Ct. 2971, 177 L. Ed. 2d 838 (2010)

[126] *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez,* 561 U.S. 661, 690, 130 S. Ct. 2971, 2991, 177 L. Ed. 2d 838 (2010).

fine, no court cost, no nothing spent..... Praise be to GOD, WOW! Thanks JESUS!"[127] However, North Carolina law made it a felony for registered sex offenders "to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages." N.C. Gen. Stat. Ann. §§ 14–202.5(a), (e) (2015).[128]

The lower courts affirmed the conviction, but the U.S. Supreme Court granted certiorari and reversed the decision in favor of Packingham. In a unanimous opinion, written by Justice Kennedy, the court "sought to protect the right to speak in this spatial context" by recognizing social media as "essential venues to celebrate some views, to protest others, or simply to learn and inquire,"[129] including individuals with prior convictions. In brief, Kennedy referred to social media as "the modern public square,"[130] and identified the "cyberspace" and "social media in particular" as "the most important places (in a spatial sense) for the exchange of views."[131] The Court held that North Carolina's law failed the intermediate scrutiny test because it was not narrowly tailored.

Across several circuits, courts have continued to discuss the notion of public forums in cyberspace. In a 2019 case in 4th Circuit, Phyllis Randall, Chair of the Loudoun County Board of Supervisors in Virginia banned one of her constituents, Brian Davison, from a Facebook account that she administered, "Chair Phyllis J. Randall."[132] Davison was an avid participant in the conversations that took place in this forum. As did many other participants, he criticized the work of the board and Randall as government officials.[133] In one instance, Davison commented on a post made by Randall, and accused her of corruption. In response to Davison's accusation,

---

[127] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1734, 198 L. Ed. 2d 273 (2017).
[128] *Id. at 1733.*
[129] *Id. at 1735.*
[130] *Id. at 1732.*
[131] *Id. at 1735.*
[132] *Davison v. Randall,* 912 F.3d 666, 673 (4th Cir. 2019), *as amended* (Jan. 9, 2019).
[133] *Id. at 674.*

Randall deleted the post and banned Davison from the Chair's page. About twelve hours later, Randall unbanned him. Davison claimed that the Chair Randall had violated his First Amendment rights by banning him without respect for his due process rights.[134]

The court found that Randall had acted "under color of state law"[135] because she created the Facebook page to "further her duties" and as a "tool of governance."[136] The judge held that "interactive component of the Chair's Facebook Page constitute[d] a public forum."[137] However, the court refused to determine the type of public forum under which these interactive components would fall and did not conduct a public forum analysis. The judge's rationale was that regardless of the type of public forum, Randall's blocking of her constituent constituted blatant viewpoint discrimination which would be proscribed in all instances.

The court also rejected that Randall's action was government speech – a doctrine that protects the government's ability to express its own opinions and beliefs, even if the messages in its speech is biased. For example, if the government produces speech encouraging vaccinations, civility, recycling or energy conservation, it does not have to fund speech that is counter to its messages. The court rejected the notion that government speech doctrine extended to actions such as excluding and preventing individuals from accessing a forum controlled by the government. Instead, the judged noted that there was a meaningful difference between the speech of the government and that of the public and that preventing the public from putting forth their own speech did not amount to the government's own speech.[138] Further, the court concluded that Randall had created "an electronic marketplace of ideas" through her open invitation to "ANY" constituent to post on "ANY issues."[139] In the judgment, through declaratory relief, the court

---

[134] *Id. at 676.*
[135] 42 U.S.C. § 1983.
[136] *Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019), *as amended* (Jan. 9, 2019).
[137] *Id. at 687.*
[138] *See infra* pp. 37-39.
[139] *Davison v. Randall*, 912 F.3d 666, 687 (4th Cir. 2019), *as amended* (Jan. 9, 2019).

sided with the plaintiff and ruled that Randall's blocking of Davison had violated his First Amendment rights.

A similar situation took place in *Robinson v. Hunt Cty. Texas* (5th Cir., 2019). The Hunt County Sheriff's Office (HCSO) controlled a Facebook page that invited people to express their opinion and "POSITIVE comments" regarding the office. Although the page encouraged the submission of comments, it explicitly made a note stating that the page was "NOT a public forum."[140] In 2017, the HCSO posted a message stating that any comments "considered inappropriate" would be "removed and the user banned."[141] Through the comment thread under the post, Deanne Robinson condemned the HCSO's action for attempting to chill dissent and speech that the office found unfavorable. Robinson's comment was removed, and her account was banned from the HCSO's page.

Robinson claimed, *inter alia*, that the HCSO had violated her constitutional First Amendment rights without due process because the deletion of her comments and ban of her profile constituted viewpoint discrimination in a designated public forum. The Court of Appeals agreed that the "HCSO Facebook page" was "a forum subject to First Amendment protection,"[142] and restated that "[o]fficial censorship based on a state actor's subjective judgment that the content of protected speech is offensive or inappropriate is viewpoint discrimination."[143] However, in the absence of factual evidence regarding some of the disputes, the court only reversed in part, affirmed in part (regarding the dismissal of Robinson's claim against defendants in both their official and individual capacitates), and remanded to the District Court.[144]

---

[140] *Robinson v. Hunt Cty., Texas,* 921 F.3d 440, 445 (5th Cir. 2019), *reh'g denied* (May 16, 2019).
[141] *Robinson v. Hunt Cty., Texas,* 921 F.3d 440, 445 (5th Cir. 2019), *reh'g denied* (May 16, 2019).
[142] *Id. at 448.*
[143] *Id. at 447.*
[144] *Id. at 452.*

In the cases presented above, government authorities, as state actors, have designated public forums through their nature as state actors and the functions they carried in the property. However, state action is not always clear. In *Community Access Corp. v. Halleck* (2019), the United States Supreme Court examined whether the Manhattan Neighborhood Access Corporation (MCAC also known as MNN), a nonprofit responsible of operating public access channels on a local cable system, becomes a state actor through its performance of a public function, and thus subject to First Amendment regulations.[145]

Generally, public-access channels are open at no cost on a first-come, first-served basis. DeeDee Halleck and Jesus Melendez produced a film that was critical of MNN. MNN aired the film but upon a series of complaints, and subsequent disputes, MNN permanently suspended Halleck and Melendez from "all MNN services and facilities."[146] Claiming a First Amendment violation, Halleck and Melendez brought suit against the MNN. The District Court held that the MNN did not create a public forum, but upon review, the Court of Appeals disagreed and stated that public access channels in Manhattan were public forums subject to the First Amendment.[147]

The United States Supreme Court granted certiorari. Recognizing that state action is present when a private entity exercises "powers traditionally reserved to the State,"[148] the court concluded that although the MNN's operation of the public access channel served a public function or interest, that was not enough to consider the MNN a state actor.[149] The court added that for an action "to qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally *and* exclusively performed the function."[150] Given that the function of managing public access channels had not traditionally and

---

[145] *Manhattan Cmty. Access Corp. v. Halleck,* 139 S. Ct. 1921, 1926, 204 L. Ed. 2d 405 (2019).
[146] *Id. at 1927.*
[147] *Halleck v. Manhattan Cmty. Access Corp.,* 882 F.3d 300, 301-302 (2d Cir.), *cert. granted,* 139 S. Ct. 360, 202 L. Ed. 2d 261 (2018), and *rev'd in part,* 139 S. Ct. 1921, 204 L. Ed. 2d 405 (2019)
[148] *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352, 95 S. Ct. 449, 454, 42 L. Ed. 2d 477 (1974)
[149] *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928, 204 L. Ed. 2d 405 (2019)
[150] *Id. at 1929.*

exclusively fallen under the state, the MNN, by extension, did not perform a public function. This also meant that public access channels were not public forums. The dissent, written by Justice Sotomayor, and joined by three other Justices, opined that the function of public access channels rendered them a "public forum" and that when the MNN "stepped into the City's shoes" it became a state actor "subject to the First Amendment like any other."[151]

In a more recent case, Prager University, a nonprofit producing media and educational content to promote conservative viewpoints on public issues, brought suit against two media platforms that hosted its content, Google LLC and YouTube LLC.[152] The plaintiff claimed that the platforms' censorship and restrictions on some of their media content had violated their First Amendment rights, the Lanham Act, and several other state laws.[153]

Invoking the Communications Decency Act (CDA) 47 U.S.C. § 230(c), the District Court dismissed most claims by the University, and the Court of Appeals affirmed the decision. Much like the opinion in *Manhattan Cmty. Access Corp. v. Halleck,* the judge in the Court of Appeals noted that it was true that "a private entity may be deemed a state actor when it conducts a public function,"[154] however, the simple act of hosting speech by others does not "transform private entities into state actors."[155] The defendants, YouTube and Google, simply hosted speech by others and their actions did not carry out any official public function that was traditional and exclusive to the state.[156]

Government Speech

Despite the First Amendment protections for private individuals engaging in expression in public forums, the government itself can be considered a speaker and "is entitled to say what

---

[151] *Id. at 1934.*
[152] *Prager Univ. v. Google LLC,* No. 18-15712, 2020 WL 913661 (9th Cir. Feb. 26, 2020).
[153] *Id.* at *2.
[154] *Id.* at *3.
[155] *Id.*
[156] *Id.* at *3.

it wishes,"[157] in the public forum as well. *Pleasant Grove City, Utah v. Summum* (2009) provides an excellent example. A public park in the city had about a dozen permanent monuments on display, some of which included religious messages. Summum, a religious organization, requested the inclusion of a monument representing their religious beliefs. The request was denied and Summum sued the city claiming that the exclusion of their monument from the park – a traditional public forum – violated their First Amendment rights of free speech.[158]

The lower courts issued opposing rulings and the United States Supreme Court granted certiorari. The opinion, authored by Justice Alito, highlighted that the display of a monument in a public park would be perceived by an ordinary person as "government speech," even though the meaning-making process and interpretation would be up to the observer.[159] Alito pointed out that although a park is a public forum, "the placement of a permanent monument" would be viewed by the people "as a form of government speech," effectively declaring the tailoring of monuments "not subject to scrutiny under the Free Speech Clause."[160] Moreover, the rationale for the opinion took into account the scarce nature of space in a public park. Echoing the dissent of the Court of Appeals, the opinion stated that, were the city to accept all monuments, soon they would have to "brace themselves for an influx of clutter"[161] and highlighted that "public parks can accommodate only a limited number of permanent monuments."[162] Note that this ruling focuses on "permanent speech" (a statue) in a public park being attributed to the state rather than a private actor. Since

---

[157] *Rosenberger v. Rector & Visitors of Univ. of Virginia,* 515 U.S. 819, 833, 115 S. Ct. 2510, 2519, 132 L. Ed. 2d 700 (1995).

[158] *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 464, 129 S. Ct. 1125, 1129, 172 L. Ed. 2d 853 (2009).

[159] *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 477, 129 S. Ct. 1125, 1136, 172 L. Ed. 2d 853 (2009).

[160] *Id.* at 1129.

[161] *Summum v. Pleasant Grove City*, 499 F.3d 1170, 1175 (10th Cir. 2007)

[162] *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 478, 129 S. Ct. 1125, 1137, 172 L. Ed. 2d 853 (2009).

most visitors would assume the state is endorsing the speech in question, the state has the right to control the speech with which it is "associated" by the audience.

In *Walker v. Texas Div.* (2015), the Texas Department of Motor Vehicles Board (DMVB) was sued by the Texas Division of the Sons of Confederate Veterans (SCV). The DMVB is in the organization in charge of reviewing proposal for specialty license plates. Upon their approval of a proposed design and slogan combination, that plate becomes an available choice to all registered vehicles.[163] Following the established procedure, the SCV proposed a plate design displaying the Confederate battle flag, but the DMVB unanimously voted against the approval of the design. The SCV claimed that the rejection of their design was a violation of their freedom of speech rights under the First Amendment because the license plate constituted private speech.

The United States Supreme Court reversed the lower courts' ruling noting that the policies and nature behind the DMVB decision indicated "that the State did not intend is specialty license plates to serve as either a designated public forum or a limited public forum."[164] Instead, the court's analysis found that the licenses plates conveyed "government speech,"[165] which was supported by the state's history of utilizing the plates to communicate its own message, the association made by the people between licenses and the State, and the level of legal control that the state generally had over the designs and messages in the plates.[166] In addition, the opinion, written by Justice Breyer, concluded that the license plates in this case were "similar enough to the monuments in *Summum* to call for the same result."[167] Finally, the court indicated that "[t]he fact that private parties take part in the design and propagation of a message does not extinguish the governmental nature of the message or transform the government's role into that of a mere

---

[163] *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2243, 192 L. Ed. 2d 274 (2015).

[164] *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2251, 192 L. Ed. 2d 274 (2015).

[165] *Id.* at 2248.

[166] *Id.* at 2248-2249.

[167] *Id.* at 2249.

forum-provider."[168] Thus, that the DMVB accepted proposals from private parties in their tailoring of license plates did not mean that the messages conveyed in the plates became disassociated with the government.

Ongoing Developments

As I stated at the beginning of this chapter, the First Amendment is far from absolute, it evolves with society. The courts have already established important precedent on the application of forum doctrine in the cyberspace, but the law is not set on stone. As new spaces and technologies continue to emerge, the courts will have to address more questions of constitutionality that are unique to particular mediums and subjects. Such is the case of *Knight v. Trum*p, a case involving Twitter, the 45th President of the United States, and a group of plaintiffs seeking access to engage in the forums created under the posts of the president. The following chapter provides a step-by-step summary of the development of this case.

[168] *Id.* at 2251.

PART IV

Knight v. Trump

Among cases discussing the application of public forum doctrine to online speech, one recent case particularly stands out, *Knight v. Trump*. The legal question in this case, *whether a public official may block a person from the official's social media account in response to that commenter's political views*, has previously been discussed by lower courts. However, even though prior cases have engaged this interrogation, two elements make this case worth scrutinizing. First, among cases involving social media platforms and the notion of designated public forum, this is the first case revolving around Twitter, and second, this case involved the current president of the United States, Donald J. Trump. Thus, even in absence of a U.S. Supreme Court opinion, a ruling that sets authority over the president of the nation may lead to the establishment of a strong persuasive precedent over the actions of public officials nationwide.

Unlike most of the cases presented in section III of this thesis, *Knight v. Trump* was significant for hundreds of users beyond the actual plaintiffs. Much like the plaintiffs, these users had shared the experience of being blocked by the president. The original plaintiffs in this proceeding were Holly Figueroa O'Reilly and Joseph M. Papp.[169] Both plaintiffs had posted comments on President Trump's @realDonaldTrump Twitter account in response to some of his tweets. The President then blocked them, meaning they could no longer "follow" his account to see his tweets or post additional comments on his account. Before filing a lawsuit against the state, these two plaintiffs reached out to the Knight First Amendment Institute at Columbia University. On June 6, 2017, on behalf of O'Reilly and Papp, the attorneys of the Knight Institute wrote a letter to President Trump asking him to "immediately unblock" the accounts of these two

[169] Ashley Feinberg, *A Running List of People Donald Trump Has Blocked on Twitter*, WIRED, (June 14, 2017, 3:38 PM), https://www.wired.com/story/donald-trump-twitter-blocked.

plaintiffs as well as the accounts of other users who had been blocked.[170] In the letter, the Knight Institute alleged a violation of their clients' First Amendment rights and sustained that the president had created a designated public forum.[171] The letter also included a description of the plaintiffs' posts, which is summarized below.

In response to one of Trump's posts, O'Reilly posted a GIF of Pope Francis, in which the Pope made a face that showed disapproval or disbelief, O'Reilly accompanied the GIF with the caption "This is pretty much how the whole world sees you."[172] Later, O'Reilly found that her account, @AynRandPaulRyan, had been blocked.

The other plaintiff, Joseph M. Papp, had a similar story. Papp commented in response to Trump's post of his weekly address of June 3, 2017, "Greetings from Pittsburgh, Sir." Papp continued the thread with a second reply, "Why didn't you attend your #PittsburghNotParis rally in DC, Sir? #fakeleader."[173] Instead of an answer, Papp found himself blocked and no longer able to view the president's page.

In spite of the letter, the president did not unblock the plaintiffs' accounts, and on July 11, 2017, the Knight Institute proceeded to file a formal complaint before the U.S. District Court for the Southern District of New York.[174] Five other plaintiffs joined the complaint, which requested declaratory and injunctive relief. A total of seven individuals, plus the Knight Institute as an additional entity, appeared as the affected parties seeking relief in the complaint.

The complaint provided an overview of the seven individual plaintiffs and the Twitter interactions that led them to be blocked by the president. It continued with a comprehensive

---

[170] *Plaintiffs' Letter to President Trump*, Knight First Amendment Institute at Columbia University, 3 (June 6, 2017), https://knightcolumbia.org/documents/709727f9ce/2017.06.06_Letter-to-President-Trump-and-Aides.pdf

[171] *Id.*

[172] Holly Figueroa O'Reilly (@AynRandPaulRyan), Twitter (May 28, 2017, 7:53 AM), https://twitter.com/AynRandPaulRyan/status/868842669069422592.

[173] Joseph M. Papp (@joepabike), Twitter (June 3, 2017, 12:36 PM), https://twitter.com/joepabike/status/871088288202928128.

[174] Complaint, *Knight v. Trump*, 302 F. Supp. 3d 541, (S.D.N.Y. 2017) (No. 17-cv-05205).

explication of Twitter architectural design and allowances. The plaintiffs also included a breakdown of Donald Trump's usage of the @realDonaldTrump handle and concluded by outlining their cause of action and the relief that they were seeking for.

Regarding the cause of action, the petitioners claimed that the defendants' blocking of individuals plaintiffs constituted a violation of the First Amendment rights because it had imposed a viewpoint discrimination restriction on their ability to partake in a public forum, to access official statements available to the general public, and to ask for the redress of grievances. Additionally, the plaintiffs claimed that the restriction on the individual plaintiffs had also infringed upon the Knight Institute's right to hear the speech of those who had been blocked from the forum.

As a remedy, the complaint asked the court to hold the blocking of individual plaintiffs from the president's Twitter handle @realDonald Trump to be unconstitutional, and to issue an injunction to require the defendants to unblock the plaintiffs while prohibiting the future blocking of the plaintiffs and other users merely based on their viewpoints.

An Undisputed Stipulation

Consequently, the Knight Institute proceeded by submitting a proposed stipulation of facts to the government. Surprisingly, the parties had no major disagreements regarding the factual information in the case, and on September 28, 2017, they formally filed a joint stipulation.[175] The stipulation outlined a comprehensive description of the plaintiffs' injuries and the defendants' role in the allegations. A detailed breakdown of the platform (Twitter) hosting the forum was also included. Last, the stipulation provided an in-depth summary of the @realDonaldTrump handle's usage, function, and operators, as well as an explication of the blocking and its effects on the plaintiffs.

[175] Joint Stipulation of Facts, *Knight Institute, et al. v. Trump et al*. Case No. 17-cv-5205 (NRB), ECF No. 30-1.

Here, I highlight crucial elements in the stipulation to understand the issues discussed in *Knight v. Trump*.

Plaintiffs

At the time of this dispute, hundreds of users had been blocked by the @realDonaldTrump Twitter handle, both before and after Donald Trump assumed office as the President of the United States. Thus, we must clarify that all the plaintiffs in this case were blocked by Trump at the time of his presidency. The petition to unblock users began with two plaintiffs, Holly Figueroa O'Reilly and Joseph M. Papp. However, five other individuals who reached out to the Knight Institute were added during the complaint. These plaintiffs include Rebecca Buckwalter, Phillip Cohen, Eugene Gu, Brandon Neely, and Nicholas Pappas. The plaintiffs came from different walks of life, resided in different states, and had different occupations and even distinct political affiliations from each other. In addition to the seven individual plaintiffs, the Knight First Amendment Institute at Columbia University also identified itself as a plaintiff. While the Knight Institute was not blocked by the @realDonaldTrump handle, it asserted that blocking the other plaintiffs harmed it by preventing it from reading the comments the other plaintiffs would have posted.[176]

Defendants

Although Donald J. Trump, in his official capacity as president, is the main defendant in this case, four defendants were identified due to their role in managing government communications. The additional defendants included two officials with no access to the @realDonaldTrump account: Hope Hicks, White House Acting Communications Director; and Sarah Huckabee Sanders, White House Press Secretary.[177] Daniel Scavino, White House Social

[176] Joint Stipulation of Facts, *Knight Institute, et al. v. Trump et al*. Case No. 17-cv-5205 (NRB), 1-2, ECF No. 30-1.

[177] This position was occupied by Mr. Sean Spicer at the time that the blockings and original filing occurred.

Media Director, was the fourth defendant. Unlike Hicks and Sanders, Mr. Scavino had access not only to the @realDonaldTrump account but also to the Twitter handles @POTUS and @WhiteHouse.[178]

Twitter

Drawing at large from the Twitter website sections on policies, usages, and technical support from 2017, the stipulation pointed out some of the structural elements and allowances of the platforms. In regard to the structure, the following elements were noted.

Users

An individual who has created an account is considered to be a Twitter "user." Each user is identified by an account name that consists of a unique name that follows the symbol @. For instance, Donald J. Trump's account name is @realDonaldTrump. The account name is also known as the user's "handle." Each user counts with a webpage that displays general information including their handle, a profile picture, a header image, a biographical information section, and the location of the user. Many of these elements are optional; for example, not all Twitter users choose to include a header and biographical information. During 2017, all accounts also displayed a button with the message "Tweet to [username]" and another labeled as "Message." The first button allowed users to publicly message others, while the latter gave users the opportunity to privately hold a two-person conversation. Users who wish to establish their identity may do so by "verifying" their accounts. Once they have proved that they are who they claimed to be under their handle, a blue badge will appear next to their profile.

Tweets

All users can generate posts that contain words, images, videos, links, etc. These posts are known as "tweets" and were limited to 140 characters (the limit was expanded to 280

[178] Joint Stipulation of Facts, *Knight Institute, et al. v. Trump et al*. Case No. 17-cv-5205 (NRB), 2-3, ECF No. 30-1.

characters in 2017).[179] There are a few elements composing a tweet. Besides the content of the tweet, each tweet presents the username of the author, the date and time of creation, the number of replies that the tweet has received, the number of times that the tweet has been retweeted, and the number of users that have favorited/liked it.

Timelines

The user's main page shows a list in reverse chronological order of all the tweets and retweets that the user has generated. This list is known as a "timeline" and it is visible to anyone who can see the user's webpage. By default, when the user's webpage is public, anyone with internet access can see the user's timeline, even if they don't have an account of their own. However, only those with a Twitter account can interact with other users.

These elements create interactive spaces that, in turn, generate allowances for Twitter users. Although many allowances are listed in the stipulation, I limit my description to the most prominent, as well as those that are of relevance to the case.

Besides generating their own content, Twitter users may interact with others in several ways:

Following

Twitter users have the ability to subscribe to the messages posted by other users by "following" their accounts. When a user follows another user's account, they can generally see all the content that the followed account has generated and retweeted. The tweets and retweets generated by the accounts that a user follows are presented under a section titled "Home" that is commonly known as a user's "feed."

---

[179] See. *Twitter to expand 280-character tweets*, BBC News (2017). https://www.bbc.com/news/technology-41900880#:~:text=Twitter%20plans%20to%20increase%20the,information%20in%20a%20single%20character.

Retweeting

A user may share a tweet generated by another user by "quoting" them or "retweeting" their tweet. This is equivalent to reposting. This function displays a notation that indicates that the original tweet was generated by another user. When a user retweets a post, this post will also appear in the user's timeline, just as regular tweets do.

Replying

If a user wishes to respond to a tweet generated by another user account, they may choose to "reply." Much like a regular tweet, the content of a reply can include words, images, videos, and links, and is limited to 280 characters. The reply will appear under the original tweet along with all other replies that the tweet receives. When a tweet receives a reply it triggers what Twitter calls a "conversation."

Comment threads

In turn, a user may want to respond to the replies on a tweet or engage in the "conversation." The responses will aggregate under the original tweet, the response to responses will aggregate under the response that they are replying to, and so on. The collection of responses nested under each other is referred to as the "comment thread." The responses in the comment thread are algorithmically organized by the number of likes and retweets that the reply, or response to the reply, has generated. Additionally, responses made by users whose accounts have been "verified" will appear earlier in the comment thread.

Favoriting

If a user wants to convey approval or simply acknowledge a tweet or a response, they may do so by clicking the heart icon that appears under it. This action is known as liking or favoriting.

Mentioning

The platform also gives the ability to "mention" other users in your posts. In order to do so, users must reference that user's handle. Twitter will notify users when they are mentioned in the posts or responses generated by other user accounts.

Blocking

Twitter allows users to prevent other users from interacting with them. The choice to make use of this function relies on the users themselves and it's called "blocking." When a user blocks another user, the individual who is blocked is not able to see or reply to the tweets of the user blocking them, and while logged-on to the blocked account, the blocked user cannot search for the tweets of the user who blocked them. Blocked individuals who attempt to view the Twitter webpage of the individual blocking them will see a notification indicating that they have been blocked by the user and that they may not follow the handle or view their tweets. However, blocked individuals can still view and respond to replies that other users have posted, but not the original tweet from the user who blocked them. In addition, blocked users can view any public tweets by using a web browser or creating or using a different Twitter account that has not been blocked.

@realDonaldTrump

The @realDonaldTrump account was created by Donald Trump in March 2009. Upon assuming the presidency of the country on January 20, 2017, President Trump has used the account as "a channel for communicating and interacting with the public about his administration."[180] Occasionally, Trump has also continued to use this account to communicate regarding other issues that are not considered "official government business."[181] Paired with the

[180] Joint Stipulation of Facts, *Knight Institute, et al. v. Trump et al*. Case No. 17-cv-5205 (NRB), 12, ECF No. 30-1.

[181] *Id.*

stipulation, the parties included an appendix of all tweets made by the @realDonaldTrump account from January 20th to September 24th, 2017. The stipulation also noted some general features of the @realDonaldTrump account, including the descriptive line "45th President of the United States of America, Washington, D.C.," a verification badge, the sort of images commonly displayed in the profile and the header of the webpage.

The stipulation highlighted that the account has remained public and accessible to everyone regardless of their "political affiliation" and without regard to any other criteria.[182] Further, President Donald Trump has not chosen to protect his tweets, meaning that even users who don't have a Twitter account may still be able to see his tweets. Additionally, by the time that the stipulation was filed, President Trump had not made any attempts to issue any "rule or statement purporting to limit (by form or subject matter) the speech of those who reply to his tweets."[183]

The government acknowledged that although Donald Trump was mostly in charge of the account, in some instances, Mr. Scavino, White House Social Media Director, assisted him in managing the account. Among other tasks, Mr. Scavino helped with drafting, tweeting, retweeting, transcribing, and even suggested content.

Last, it is noted that the content generated by this account is preserved as part of the official records of the White House. These tweets have also been cited by courts as official announcements by the president.[184]

Blocking of the Individual Plaintiffs

The last section of the stipulation provided a detailed account of the tweet and reply that led each one of the seven individual plaintiffs to be blocked from following the

---

[182] *Id.* at 13.
[183] *Id.* at 12.
[184] *Hawaii v. Tru*mp, 859 F. 3d 741, 773 n.14 (9th Cir. 2017), *cert. granted sub nom. Trump v. Int'l Refugee Assistance Projec*t, No. 16-1436, 2017 WL 2722580 (U.S. June 26, 2017).

@realDonaldTrump account. All of the responses made by the plaintiffs offered a critical perspective of either the President or his policies. The blocking occurred shortly after these individuals made those replies. Consequently, the seven plaintiffs in this case were prevented from viewing, retweeting, and replying to any tweets made by @realdDonaldTrump.

While logged-on, the plaintiffs also lacked the ability to view the comment threads associated with the president's account. Thus, in order to view the president's tweets, some of the plaintiffs have taken additional steps such as incognito browsing but they still may not reply to the president's tweets and will not be notified when the account posts new content. Other approaches that the plaintiffs have followed include establishing a second account or using third-party apps. However, when a user creates a new account, they begin with zero followers and the impossibility of verifying the second account. Third-party apps, on the other hand, impose a series of additional steps and the plaintiffs reported that the service that they had used in the past no longer worked at the time of the complaint. The plaintiffs have expressed that, beyond burdensome, these "workarounds" have delayed their ability to engage with the @realDonaldTrump tweets.[185] On their side, the Knight Institute states that it "desires to read comments that otherwise would have been posted" [186] not only by the blocked plaintiffs but by the other users who have also been blocked.

Upon the submission of the stipulation of facts, the government made an unsuccessful motion for summary judgment. On March 8, 2018, the court heard oral argument. Posteriorly, on May 23, 2018, District Judge Naomi Reice Buchwald ruled in favor of the plaintiffs.

---

[185] Joint Stipulation of Facts, *Knight Institute, et al. v. Trump et al*. Case No. 17-cv-5205 (NRB), 24, ECF No. 30-1.

[186] *Id.*

United States District Court, S.D. New York Ruling

Although the facts presented above could potentially unchain a number of issues, the District Court limited its analysis to two questions. First, the court asked whether a public official may "block" a person from their Twitter account in response to the political views that the person has expressed? As a follow-up question, the order resolved whether the analysis should defer because the person involved is the president of the United States. The ruling found the answer for both questions to be no.

The court provided a recapitulation from the stipulation of facts. This background covered statistics, use, and functions of Twitter, as well as a review of the parties involved and the procedural history of the case.

Twitter as a Forum for First Amendment Purposes

Upon having established that the organizational and individual plaintiffs satisfied all the requirements for standing, the court focused on whether the blocking of an individual by a public official on Twitter implicated a forum for First Amendment purposes?[187] The analysis proceeded in four parts, which focused on the type of speech, the existence of a putative forum, its classification, and the legality of viewpoint discrimination.

Part I

First, the analysis asked whether the type of speech in which the plaintiffs sought to engage was protected by the First Amendment. As per the stipulation, the type of speech was political, which in accordance with precedent, the court found to "fall within the core of First Amendment protection."[188] Additionally, the court noted that the speech in which the plaintiffs sought to engage did not fall within any of the narrowly limited classes of speech defined by the

[187] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 564 (S.D.N.Y. 2018), *aff'd,* 928 F.3d 226 (2d Cir. 2019).

[188] *Engquist v. Ore. Dep't of Agric.*, 553 U.S. 591, 600, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008).

courts, "such as obscenity, defamation, fraud, incitement, and speech integral to criminal conduct."[189] In brief, the speech at issue is protected.

Part II

Second, the judge determined whether the Forum Doctrine was applicable to this forum. The court began by identifying the actual putative forum to which the plaintiffs sought access. Succinctly, the opinion outlined that the plaintiffs did not seek access to the @realDonaldTrump account, but instead, that the forum that they hoped to partake in was far narrower. The forum at issue was comprised of several elements, which included "the content of the tweets sent, the timeline comprised of those tweets, the comment threads initiated by each of those tweets, and the 'interactive space' associated with each tweet in which other users may directly interact with the content of the tweets by, for example, replying to, retweeting, or liking the tweet" (See Figure 1).[190] Thus, these elements, and not the account as whole, were tested for the applicability of the forum doctrine.

Drawing largely from the precedent established in *Cornelius v. NAACP*, (1985) and *Pleasant Grove City v. Summum*, (2009), the analysis followed two prongs in evaluating whether these spaces in Twitter were susceptible to the application of Forum Doctrine. The first prong, from *Cornelius*, refers to ownership of the space and indicates that in order to evoke First Amendment concerns, the space must be owned or controlled by the government. "[A] speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns."[191] Second, and in line with *Pleasant Grove City*, the judge wrote that "the

[189] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 565 (S.D.N.Y. 2018), *aff'd,* 928 F.3d 226 (2d Cir. 2019).

[190] *Id.* at 566.

[191] *Cornelius*, 473 U.S. at 801, 105 S.Ct. 3439.

application of forum doctrine must be consistent with the purpose, structure, and intended use of the space."[192]

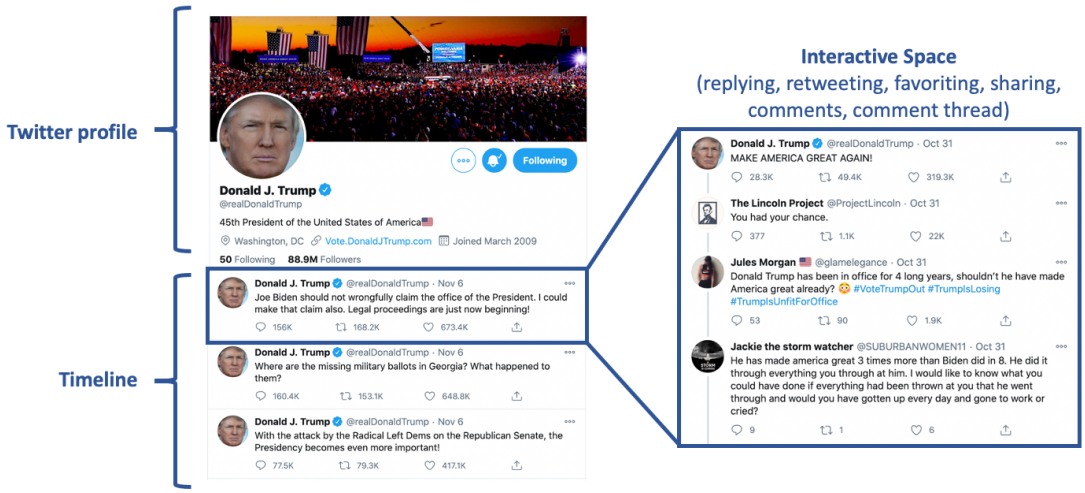

Figure 1: Diagram of putative forums in the @realDonaldTrump account.

1.- Government Control

Citing the decision from Cornelius, the judge wrote that rather than requiring full ownership over a space, government control was sufficient to satisfy the first requirement for applicability of Forum Doctrine. The opinion emphasized that, additionally, this analysis would better reflect and adapt to the notion that a space can be "a forum more in a metaphysical than in a spatial or geographic sense,"[193] which in turn, also challenged traditional conceptions of ownership.

The court acknowledged that Twitter had absolute control over the @realDonaldTrump account – as well as all other accounts on Twitter – but the judge concluded that this was not in

[192] Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 565 (S.D.N.Y. 2018), aff'd, 928 F.3d 226 (2d Cir. 2019).

[193] *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

opposition with prior precedent.[194] In fact, the judge concluded that the prong on government-control was met through the various functions and interactive spaces through which the President and Mr. Scavino had and exercised control over within the @realDonaldTrump account.[195]

Additionally, the judge noted that the stipulation further established the governmentality of the account through the government's explicit acknowledgment of this connection in their treatment of the account. First, the account was registered to "Donald J. Trump, '45th President of the United States of America, Washington, D.C.,'" and second, the government kept official records of the account as "Presidential records" – defined as "[those] which relate to or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President."[196] In short, even though the defendants claimed this account to be a personal account, the usage established under the record indicated otherwise.

The defendants also invoked the "under color of state law"[197] precedent and argued that the action of blocking was not granted to the President as a result of his particular position or the authority within this role. Hence, the defendants believed that "blocking" did not constitute a "state action" because such function was available to all users. The court found this argument unpersuasive and explained that the precedent did not require for the analysis to prove that the action taken by the government official was "possible only because the wrongdoer [was] clothed with the authority of state."[198] Citing the decision in *Halleck v. Manhattan*, the judge pointed out

---

[194] See. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975).

[195] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 567 (S.D.N.Y. 2018), *aff'd,* 928 F.3d 226 (2d Cir. 2019).

[196] 44 U.S.C. § 2202.

[197] 42 U.S.C. § 1983.

[198] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 567 (S.D.N.Y. 2018), aff'd, 928 F.3d 226 (2d Cir. 2019) (citing *West v. Atkins*, 487 U.S. 42, 49, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988)).

that deeming a space "a public forum usually suffices to render the challenged action taken there to be state action subject to First Amendment limitations."[199]

Instead of focusing on the action itself, the judge elaborated on the context of the property where the exclusion took place. For instance, were the context of the situation be a purely personal account, a public forum analysis would not apply. Nonetheless, the court believed that in this case, the record clearly showed that the nature of the @realDonaldTrump account was governmental. Even though @realDonaldTrump was created as a personal account back in 2009 – years before Trump became president – the ongoing governmental use of the account @realDonaldTrump by the President and Mr. Scavino "weight[ed] far more heavily in the analysis than the origin of the account" (as an account for Trump as a private citizen).[200]

In line with *Rosenberger*'s opinion, which notes that by legally taking control over a property "for the use to which it is dedicated" the government behaves "like the private owner of property,"[201] the judge determined that the government had acted as the owner of property by exercising control over spaces of the account. However, the judge made a clear distinction between the spaces over which the president and Mr. Scavino had or did not have control – and could, then, be potentially considered fora. While the officials had control over the "the content of tweets sent by @realDonaldTrump, the @realDonaldTrump timeline, and the interactive space associated with each tweet,"[202] they had no control over the comments and threads originated under the tweet beyond the "first-order replies."

---

[199] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 568 (S.D.N.Y. 2018), *aff'd,* 928 F.3d 226 (2d Cir. 2019) (citing Halleck v. Manhattan Cmty. Access Corp., 882 F.3d 300, 306–07 (2d Cir. 2018)).

[200] See. Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 77 (1st Cir. 2004) ("The past history of characterization of a forum may well be relevant; but that does not mean a present characterization about a forum may be disregarded").

[201] *Rosenberger*, 515 U.S. at 829, 115 S.Ct. 2510; *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 568 (S.D.N.Y. 2018), *aff'd,* 928 F.3d 226 (2d Cir. 2019).

[202] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 570 (S.D.N.Y. 2018), *aff'd,* 928 F.3d 226 (2d Cir. 2019).

The timeline, the tweets, and the "interactive space" associated with each tweet by the @realDonaldTrump account met the first criterion, government-control, to qualify as a forum because the Trump and Scavino as government officials had the ability to manage these spaces at will.[203] In contrast, the comment thread, which refers to the collection of responses and comments (beyond the initial tweet and the replies on it), does not meet the first threshold for a forum because it is not controlled by any user. We must note that although "interactive space" and "comment thread" are defined in relation to the responses, interactions, and replies under a tweet, they are quite distinct from each other. While "interactive space" refers specifically to the actual space under a tweet where other users can engage with it, the "comment thread" refers to the collection of the responses generated by other users, as well as the replies to these responses. In this case, the government lacks the ability to curate the responses that go into the comment thread, but it has the ability to open and close the interactive space where the comment thread is generated.

2.- Purpose, Structure, and Intended Use

These three spaces, identified as government-controlled, were assessed to see if their intended function aligned with that of a forum – the second threshold.

A straightforward analysis looked at the tweets and at the timeline of the @realDonaldTrump and found that these two spaces were government speech. The judge echoed the ruling in *Walker v. Texas*, which established that when the government speaks "on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply."[204] The stipulation remarked that the content of these two spaces was created by the officials for purposes that rendered them both *not* subject to Forum Doctrine.

---

[203] *Id.* at 569.

[204] *Walker v. Tex. Div., Sons of Confederate Veterans, Inc*., —— U.S. ——, 135 S.Ct. 2239, 2250, 192 L.Ed.2d 274 (2015).

The stipulation highlighted, for instance, that Mr. Scavino and the President used these two spaces "to announce, describe, and defend his policies; to promote his Administration's legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; to challenge media organizations whose coverage of his Administration he believes to be unfair; and for other statements, including on occasion statements unrelated to official government business."[205] Thus, the judge simply added that unlike situations where it would be difficult to tell apart government speech from that of a forum,[206] that was not the case for these two spatial elements. In these two spaces (the timeline and the tweets), the content was clearly government speech. In order words, the purpose, structure, and use that the government gave to these two spaces demonstrated that the government merely had the goal to speak and that in no moment did it attempt (whether consciously or not) to establish a forum.

In contrast with the individual tweets and the timeline, the court found that "the interactive" space created under each individual tweet required a closer look. To evaluate this space, the court first looked at the "essential function" of the space in question and noted that for the forum doctrine to be applied, it may not defeat the essential function of the space. For instance, forum doctrine cannot be applied to spaces that would not be able to accommodate "a large number of public speakers without defeating the essential function of the land or the program."[207]

As per the joint stipulation, the "*essential function a given tweet's interactive space* is to allow private speakers to engage with the content of the tweet"[208] (emphasis added). Thus, a forum doctrine analysis would not be at odds with the essential function of this space. Further,

---

[205] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 571 (S.D.N.Y. 2018), *aff'd,* 928 F.3d 226 (2d Cir. 2019).

[206] *Pleasant Grove City*, 555 U.S. at 470, 129 S.Ct. 1125.

[207] *Pleasant Grove City*, 555 U.S. at 478, 129 S.Ct. 1125.

[208] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 573 (S.D.N.Y. 2018), *aff'd,* 928 F.3d 226 (2d Cir. 2019).

even if the function is not at odds with the forum doctrine analysis, precedent has indicated that forum analysis would be out of place if its application "would lead almost inexorably to closing of the forum."[209] Given the architectural nature of Twitter and its ability to freely accommodate "an unlimited number of replies and retweets" without having to worry about constraints of "inherent selectivity and scarcity," the court maintained that the application of forum doctrine would not jeopardize the forum's ability to remain open.[210]

Beyond the function of the forum, the court asked whether the speech in the "interactive spaces of each tweet" was government speech. Given that the government had no control over the crafting of the messages posted in these interactive spaces, the court made it clear that the comments in the interactive space of each tweet could not be government speech. In line with *Walker*, the analysis also mentioned that for the speech to be considered government speech, there was also a threshold of whether it was "often closely identified in the public mind" with the government.[211] Given the layout on Twitter, each comment and reply is directly attributed and associated with the creator. This analysis effectively tackled the defendant's argument that it could be otherwise.

In addition to this, the court highlighted that "speech that is otherwise private does not become speech of the government merely because the government provides a forum for the speech or in some way allows or facilitates it."[212] In other words, even though the comments and replies under each tweet can be generated because the government crafted an initial tweet that led to the emergence of a forum, the private speech contained in the replies under each tweet does not become government speech (See Figure 2).

---

[209] *Supra*. note 207 at 480.

[210] *Supra*. note 208 at 572.

[211] *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, at 2246-49, 192 L. Ed. 2d 274 (2015).

[212] *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 34 (2d Cir. 2018) (citing *Cornelius*, 473 U.S. at 811–13, 105 S.Ct. 3439).

To sum up, the interactive space under each tweet passed both thresholds required for the application of a forum doctrine analysis.

Figure 2: Diagram explaining the nature of interactive spaces and comment threads in a tweet.

Part III

The third step was for the court to conduct a forum analysis to determine the classification of the interactive space under a tweet. Accordingly, the court evaluated this space under three potential classifications: traditional public forum, designated public forum, and non-public forum.

Given the lack of "historical" precedent for Twitter, the court immediately ruled that the space in question (the interactive space under a tweet) could not qualify as a traditional public

forum – a category consisting of "places which by long tradition or by government fiat have been devoted to assembly and debate."[213] Nonetheless, it was noted that recent precedent has hinted at social media being analogous to traditional forums through opinions that describe the internet and social media as "vast democratic forums,"[214] "essential venues for public gatherings,"[215] and even as "the most important places (in a spatial sense) for the exchange of views."[216]

Instead, the court found that the interactive space of a tweet was a designated public forum. Referencing the decision in *Gen. Media Commc'ns, Inc. v. Cohen*, the analysis sustained that governmental intent was the key factor in determining the emergence of a public forum and that "[i]ntent is not merely a matter of stated purpose" but rather the sum of a number of factors that include "[the government's] policy and past practice, as well as the nature of the property and its compatibility with expressive activity."[217]

The general disposition of the account being accessible to "the public at large," Mr. Scavino's holding of the President's use of the account as a means through which he "communicates directly with you, the American people!," and the nature of Twitter as a platform to allow individuals "to interact with other Twitter users in relation to [their tweets]" [218] strongly supported that this space constituted a designated public forum.

Part IV

As the fourth step, the analysis looked into the legality of viewpoint discrimination in this particular designated public forum. In this type of forum, restrictions by the government are only

---

[213] *Perry Educ. Ass'n*, 460 U.S. at 45, 103 S.Ct. 948.
[214] *Reno v. ACLU*, 521 U.S. 844, 868, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).
[215] *Forbes*, 523 U.S. at 678, 118 S.Ct. 1633.
[216] *Packingham v. North Carolina*, ––– U.S. ––––, 137 S.Ct. 1730, 1735, 198 L.Ed.2d 273 (2017).
[217] *Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991).
[218] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 574 (S.D.N.Y. 2018), *aff'd,* 928 F.3d 226 (2d Cir. 2019).

permissible "if they are narrowly drawn to achieve a compelling state interest."[219] Yet, even if restrictions are permissible, viewpoint discrimination "is presumed impermissible when directed against speech otherwise within the forum's limitations."[220] In other words, the government could restrict access but it had to do so in a viewpoint-neutral manner. Doing so otherwise would be forbidden.[221] In a footnote, the court noted that even if the interactive space was held to be a nonpublic forum, viewpoint discrimination would still be unconstitutional.[222]

In this case, the defendant conceded that each one of the individual plaintiffs was blocked by the President shortly after of writing replies that "in which they criticized the President or his policies."[223] As previously stated, the First Amendment does not permit such exclusion – based on viewpoint – within designated public forums.

The court also clarified that while government officials in office do retain their First Amendment rights, their right to speak does not grant the blocking of individual users permissible. This clarification also added that even though officials could exercise their First Amendment rights through their choice of which voices they chose to amplify or ignore, they could not choose to actively restrict "the right of an individual to speak freely [and] to advocate ideas."[224]

Defendants argued that blocking was a form of ignoring individuals which was permissible in designate public forums, but the court made a distinction between muting and blocking. On one hand, muting on Twitter allows account holders to ignore other users, while

---

[219] *Knight First Amendment Inst. At Columbia Univ*., 302 F. Supp. 3d 541, 575 (S.D.N.Y. 2018), *aff'd,* 928 F.3d 226 (2d Cir. 2019) (quoting Int'l Soc'y for Krishna Consciousness, Inc. v. Lee (ISKCON), 505 U.S. 672, 678-79 (1992)). *ISKCON*, 505 U.S. at 678–79, 112 S.Ct. 2701.

[220] *Rosenberger*, 515 U.S. at 830, 115 S.Ct. 2510.

[221] *Id.* at 830-831.

[222] *Knight First Amendment Inst. At Columbia Univ. v.* Trump, 302 F. Supp. 3d 541, 575 n.22 (citing *Wandering Dago, Inc. v. Destito*, 879 F.3d 20 (2d Cir. 2018)).

[223] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 575 (S.D.N.Y. 2018), *aff'd,* 928 F.3d 226 (2d Cir. 2019).

[224] *Id. at 576* (citing Minn. State Bd. For *Cmty. Colls. v. Knight*, 465 U.S. at 286, 104 S.Ct. 1058).

blocking completely takes away individual users' ability and "right to speak in a discrete, measurable way."[225]

More importantly, the court rejected the defendant's assumption that users replied to the @realDonaldTrump's tweets merely to engage with the president. Instead, the court noted that "[t]he audience for a reply extend[ed] more broadly than the sender of the tweet being replied to, and blocking restricts the ability of a blocked user to speak to that audience."[226] In other words, blocking prevents individuals from partaking in the public sphere.

This part of the analysis concluded that this type of infringement upon the First Amendment was not of "the highest magnitude," but it acknowledged that even the smallest – "de minimis" – harms qualified for recognition and protection under the First Amendment.[227] In sum, blocking restricted "a real, albeit, narrow slice of speech" but "[n]o more is needed to violate the Constitution."[228] Thus, the court held the blocking on individual Twitter users to be unconstitutional.

Relief

Given the nature of the speech, the type of form, and its classification, it was concluded that although the court *could* grant injunctive relief against Scavino, it would not do so. Instead, the court found it germane to grant declaratory relief – which they view as capable of achieving the same purpose: "we must assume that the President and Scavino will remedy the blocking we have held to be unconstitutional."[229]

---

[225] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 577 (S.D.N.Y. 2018), *aff'd,* 928 F.3d 226 (2d Cir. 2019)

[226] *Id.*

[227] *Id.* (citing *Six Star Holdings, LLC v. City of Milwaukee*, 821 F.3d 795, 805 (7th Cir. 2016)

[228] *Id.*; *See*. *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

[229] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 580 (S.D.N.Y. 2018), *aff'd,* 928 F.3d 226 (2d Cir. 2019).

Conclusion

In an important case of first impression, the District Court held that the "interactive" portion of Donald Trump's personal Twitter account (the space where other Twitter users can reply to Trump's tweets and to each other) is a designated public forum and that blocking users because of their political views violated their First Amendment rights. This is true even though (1) Twitter as a social media platform is private property not controlled or operated by the government, and (2) Donald Trump's tweets as President constitute government speech. Twitter is free to block any user that violates its terms of service and Donald Trump is free to control the content of his own tweets. But once a government official uses a Twitter account for government business and allows the general public access, they cannot engage in viewpoint discrimination when blocking users.

The decision concluded that the plaintiffs have demonstrated standing solely against Mr. Scavino and Trump, and not against any other members of the Trump administration. Likewise, it was found that the speech in question was protected, violated, and that the injuries identified were redressable via declaratory relief. Under the lens of the forum doctrine, the court found that the interactive space of a tweet was susceptible to analysis as a designated public forum – a type of forum where viewpoint discrimination is forbidden and cannot be justified as part of Trump's "First Amendment interests."[230] To sum up, motions for summary judgments from both parties were granted in part and denied in part.

United States Court of Appeals, Second Circuit Review

On July 9, 2019, a three-judge panel of the Court of Appeals for the Second Circuit affirmed the District Court's decision in a unanimous decision. The opinion, written by judge Barrington, D. Parker, reviewed the two main arguments by the government. First, the court

[230] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 580 (S.D.N.Y. 2018), *aff'd,* 928 F.3d 226 (2d Cir. 2019).

discussed whether the government created a public forum and excluded the individual plaintiffs from it. And second, whether the control exercised by the government over the account qualified the account as government speech – and thus, not subject to First Amendment restrictions.

First Amendment in Social Media

Much like the District Court, the Court of Appeals focused on the precedents from *Packingham*, *Rosenberger*, and *Cornelius* to explain that the metaphysical nature of social media was not an impediment for the establishment of a public forum. Additionally, in this review the court referenced important precedent from *Brown v. Entertainment Merchants Association*, which states that "whatever the challenges of applying the Constitution to ever-advancing technology, 'the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary' when a new and different medium for communication appears."[231]

Public Forum

After affirming the constitutionality of public forum doctrine in digital spaces, the court evaluated the conduct of the president in relation to the @realDonaldTrump account in order to determine whether a public forum had been created. The intermediate court followed the same three-part analysis[232] than the District Court and, likewise, it held that Trump's management of the account as "an official vehicle for governance" coupled with the fact that he "made its interactive features accessible to the public without limitation" created a public forum.[233]

The government argued that even if the account had created a public forum, there was no First Amendment violation because the individual plaintiffs had not been excluded when they were blocked. In fact, the government contended that "blocking did not ban or burden anyone's

---

[231] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019) (quoting *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011).

[232] See. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802, 105 S. Ct. 3439, 3449, 87 L. Ed. 2d 567 (1985).

[233] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019).

speech" and that the individual plaintiffs could still "engage in various 'workarounds' such as creating a new account, logging out to view the President's tweets, and using Twitter's search function to find tweets about the President posted by other users with which they can engage."[234] This argument was rejected.

The court made it clear that the only difference between the burdens imposed by these "workarounds" and an outright ban was the degree of exclusion. In doing so, the court emphasized the vast precedent that proscribed the imposition of such burdens over protected speech.[235] Additionally, the opinion referenced the decision in *United States v. Playboy Entm't Grp., Inc.,* which stated that the "[g]overnment's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans,"[236] meaning that indirect proscriptions of speech through added burdens should not be looked at differently from those directly banning it. Further, the opinion warned the government from confusing the individuals' ability to engage in burdensome workarounds with a cure to the constitutional violation in question.

Government Speech

The second argument that the court revisited involved the distinction between government speech (which is not subject to First Amendment restrictions) and the private speech of citizens. In line with *Matal v. Tam*, the president claimed that the account, which is controlled by the government, constituted government speech.[237] This claim was refuted and it was stated that although the President's initial tweets constituted government speech, there was a discernable difference when it came to "the interactive features of the Account." Nowhere in the records of

---

[234] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 238 (2d Cir. 2019).

[235] See. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000); *Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 690, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010).

[236] *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 812, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000).

[237] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 239 (2d Cir. 2019).

this case did anyone claim – not even the defense - that the President exercised control over these interactive features. In fact, "[w]hen a Twitter user posts a reply to one of the President's tweets, the message is identified as coming from that user, not from the President."[238] Hence, any speech taking place beyond an initial tweet does not fall within the lines of government speech.

Before concluding, the court echoed the words of the Supreme Court in *Matal v. Tam,* which urged "great caution" regarding the government speech doctrine, so that the government may not wrongly use it to "silence or muffle the expression of disfavored viewpoints"[239] – a result that would be produced had the court extended this doctrine in the way the Trump administration suggested. [240]

The judgment granted by the District Court was affirmed. The appeals court noted that while Trump may exercise full control over the account as a private citizen before and after his term in office, his use of the account for official government business while president renders it a government-controlled forum while in office. His tweets constitute government speech. However, his decision to allow general public access for other Twitter users to follow and reply to his tweets renders those interactive spaces a designated public forum subject to constitutional speech protections.

Rehearing Request (*en banc*)

On August 23, 2019, the government filed a petition for a rehearing *en banc*. Finally, on March 23, 2020, this petition was denied by the Second Circuit in a 7 to 2 decision. In regard to the petition, the court referenced new tweets that the president had posted since the District Court's decision. The judge wrote that even these new tweets continued to support the court's ruling, which indicated that the account was not personal in nature and that it was, indeed, subject

---

[238] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 239 (2d Cir. 2019).
[239] *Matal v. Tam*, —— U.S. ——, 137 S. Ct. 1744, 1758, 198 L.Ed.2d 366 (2017).
[240] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 240 (2d Cir. 2019).

to the First Amendment. In regard to a particular tweet about Iran, Judge Barrington D. Parker even wrote that "under no rational view [could] tweets such as these be considered 'personal.'"[241]

A New Framework for Social Media Accounts

The District Court and appellate decisions in this case established an important framework for future public forum cases involving social media. First, though social media platforms like Twitter, Facebook, YouTube and TikTok are generally considered private property not subject to First Amendment restrictions, specific social media accounts maintained and operated by government officials and entities may be subject to First Amendment scrutiny—especially if those accounts are used for official governance and outreach.

Second, if a social media account is used by government officials, posts by those officials are likely to be considered government speech and not subject to First Amendment scrutiny. The government has the right to determine the content of its own speech. The government is under no obligation to promote speech which it disfavors.

However, if the government makes the interactive features of the account generally available to the public, such as retweets, replies and likes, then the government has established those interactive features as a designated public forum and any viewpoint discrimination is an unconstitutional infringement on First Amendment rights.

Finally, while blocking users does not completely silence or censor them, burdening speech based on viewpoint is nonetheless unconstitutional.

This new framework presents a unique opportunity to engage further the classification of digitally mediated forums its impact on different groups of society – particularly, on individuals with intersecting points of marginalization. Thus, in the next chapter, I offer an alternative normative analysis that places individuals with intersectional identities at the center of my work.

---

[241] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 953 F.3d 216, 222 (2d Cir. 2020).

Part V

Normative Analysis

This normative analysis goes back to our main question, *whether public officials utilizing social media platforms should have the right to block users from accessing the interactive spaces in their social media accounts*. I specifically examine the outcome of the case *Knight v. Trump* to illustrate how a legal intersectional feminist lens would alter elements in the ruling of this and future cases.

I begin with a four-part analysis of the outcomes of *Knight v. Trump*. This analysis follows the same structure that the lower courts used in their evaluation of the case. My thesis pays special attention to Part III, the Forum Analysis, and Part IV, which focused on the legality of viewpoint discrimination and other plausible restrictions in the putative forum in question. Additionally, throughout this evaluation, I weave in commentary that emphasizes how this alternative analysis could help even the playing field for those who systemically experience First Amendment rights deficiencies due to their multiple, intersecting points of marginalization.

Last, I conclude this chapter with an overview of public sphere and citizenship notion in digital spaces in relation to disenfranchised communities.

Part I and Part II

My normative analysis agrees with the first two parts of the analysis conducted by the lower courts. Part I examined whether the speech in question was protected, while Part II answered whether the forum doctrine was applicable in this case. The District Court's answer for both questions was positive. The judge stated that the speech, which was political in nature, was protected speech, and regarding the space, the court believed that the two prongs needed to satisfy the application of forum doctrine were met. The Court of Appeals affirmed this opinion and my thesis agrees with these two parts of the analysis.

As noted by the courts, the joint stipulation concluded that the speech in question was clearly political in nature, which traditionally has fallen under the highest protection under First Amendment law. The precedent was straight forward, the "speech on matters of public concern" "falls within the core of First Amendment protection."[242] I concur with this first part of the courts' analysis. Moreover, I believe that it is important to emphasize that a conclusion that protects political speech or "speech on matter of public concern" is *intersectional* in nature and aligns with the lens of this thesis. Recognizing that political speech deserves the highest level of protection helps ensure – by extension – that the rights of those who are most marginalized can be protected. After all, granted their position in society, the opinions of marginalized individuals tend to be perceived as political because they are likely to lie far from the center of the status quo. In turn, protecting this type of speech helps to create a path for the cultivation of change and a healthier democracy for all.

Regarding the applicability of forum doctrine, we are presented with two prongs: (1) government-control, and (2) the consistency of the forum with purpose, structure, and intended use. For this part, the District Court broke down the different spaces within the @realDonaldTrump account and found that the "interactive space" generated under each initial tweet met both prongs for the applicability of forum doctrine. I particularly concur with this *government-control test* performed by the court. Rather than limiting its analysis to a stark dichotomy between control vs. no control, the court followed a nuanced analytical approach that looked at the bigger picture. The court, for instance, examined whether there were indicators of government control or ownership that extended beyond explicit statements. As a result, this analysis rendered the original nature of the forum irrelevant.

---

[242] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 565 (S.D.N.Y. 2018), aff'd, 928 F.3d 226 (2d Cir. 2019), (quoting Engquist v. Ore. Dep't of Agric., 553 U.S. 591, 600, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008)).

In this case, @realDonaldTrump was opened in 2009 as a personal account in a public social media platform but its use by the President "for governmental functions,"[243] indicated that the account was far from personal. Hence, the court concluded that, given the function, the account should be evaluated as government-controlled regardless of its origin. I find that this perspective prevents public officials from simply stating that an account should be personal because they say so or because they have added a disclaimer telling people that access under all and/or any of the interactive spaces will be limited to those who may put forth positive commentary. Ensuring that the nature is determined by the function, rather than by the origin or the labels, also represents a step forward toward protecting dissenting voices that could be excluded by arguments based on statements rather than de facto behaviors.

The second prong examined the *compatibility of the expressive activity with function, structure and purpose of the space*. The court properly concluded that the essential function of the interactive space under each tweet was compatible with the expressive activity and that allowing for the application of the forum doctrine would not inexorably lead to the closing the forum.[244] I do not disagree with this conclusion. Yet, we must note that the court simply referenced the record established in the stipulation, as opposed to conducting an actual evaluation of the essential function of the forum. [245] An in-depth evaluation would have been in line with the precedent used in the first prong, where the court looked at how the President used and managed the account, as opposed to merely looking at what the parties involved said about it.[246]

---

[243] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 569 (S.D.N.Y. 2018), aff'd, 928 F.3d 226 (2d Cir. 2019).

[244] *Id.* at 573.

[245] *Id.* (referencing Stip. ¶ 13).

[246] *Id.* at 567.

Part III

Having established that the forum doctrine was applicable to the interactive spaces of an initial tweet, the courts set to determine what type of forum the space constituted. The District Court concluded that the features of the space in question made this space a designated public forum and the Court of Appeals affirmed the decision. While my analysis disagrees, I see this classification as a positive second-best resolution.

Although the District Court claimed to conduct a step-by-step forum analysis, its evaluation focused almost exclusively on answering whether the space in question constituted a designated public forum. In turn, both courts were quick to dismiss that the interactive spaces could even remotely constitute a traditional public forum. Thus, my analysis centers in explaining how this space could be considered a traditional public forum. I argue that this classification is not only intersectional but also abides by precedent. At the very least, I hope to elucidate some of the nuances in this analysis and the significance that it may have in setting a fair interpretation of the law when evaluating spaces that – at least at first sight – seem to be fall out of the scope of settled precedent.

Traditional Public Forums

Contrary to the District Court's analysis, which was affirmed by the Court of Appeals, I argue that the interactive spaces or the "streets" of communication under the interactive space of tweet of the @realDonaldTrump account constitute a traditional public forum.

The District Court's analysis noted the numerous cases characterizing the interactive spaces in social media platforms as important forums for the exchange of ideas. From *Reno v. ACLU*, they court referenced the recognition of "the vast democratic forums of the Internet,"[247]

[247] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 574 (S.D.N.Y. 2018), aff'd, 928 F.3d 226 (2d Cir. 2019) (Quoting Reno v. ACLU, 521 U.S. 844, 868, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997)).

from *Packingham v. North Carolina*, they quoted the description of social media platforms as one of "the most important places (in a spatial sense) for the exchange of views,"[248] and from *Ark. Educ. Tv Comm'n v. Forbes*, it was noted that the Supreme Court had "analogized the internet to the 'essential venues for public gatherings' of streets and parks."[249]

Yet, despite listing this series of cases, the court ignored their perspective by quoting Justice Roberts' opinion in *Hague v. C.I.O*. This well-known opinion states that traditional public forums, "like streets and parks, *'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'*"[250] In a literal interpretation, the court concluded that any spaces in Twitter, by extension, failed this prerequisite of having an "immemorial" role in the meditation of assembly, communication, and discussion of public questions, which the court deemed necessary to be considered a traditional public forum. More specifically, the court concluded that there was "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."[251] For their part, the Court of Appeals did not add any discussion regarding the type of forum constituted by the space. Rather, it simply stated that whether a forum was public or otherwise, viewpoint discrimination was proscribed.[252]

---

[248] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 574 (S.D.N.Y. 2018), aff'd, 928 F.3d 226 (2d Cir. 2019) (quoting Packingham v. North Carolina, —— U.S. ——, 137 S.Ct. 1730, 1735, 198 L.Ed.2d 273 (2017)).

[249] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 574 (S.D.N.Y. 2018), aff'd, 928 F.3d 226 (2d Cir. 2019) (quoting Forbes, 523 U.S. at 678, 118 S.Ct. 1633.).

[250] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 573 (S.D.N.Y. 2018), *aff'd,* 928 F.3d 226 (2d Cir. 2019) (quoting Hague, 307 U.S. at 515, 59 S.Ct. 954 (opinion of Roberts, J.)).

[251] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 574 (S.D.N.Y. 2018), *aff'd,* 928 F.3d 226 (2d Cir. 2019).

[252] *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 237 (2d Cir. 2019).

I dissent with this interpretation of precedent for two reasons. First, I argue that "time immemorial," "immemorially," and other iterations[253] of this idea implying historical existence beyond mind have never been interpreted in a literal, textual, or semantic sense. Instead, these notions of time have been interpreted contextually in relation to those individuals forming the citizenry of the country. Second, in addition to being unfeasible, a literal interpretation excludes historically marginalized groups; to believe that only historical existence (in a literal sense) can validate the legitimacy of a forum evokes segregationist, racist, and other discriminatory rhetoric that has had the goal of maintaining a status quo that is disparate in nature.

If we went back in time, we would find that one of the first appearances of "time immemorial" in the legal context took place almost a thousand years ago in English law. In 1275, it was established that "time immemorial" was not literally out of mind, but a very specific period that encompassed anything dating up to 1189 or the reign of King Richard I in the United Kingdom.[254] The past of the United States as a colony of the United Kingdom certainly influenced the acquisition of this legal term. Yet, despite this influence, it would be ridiculous for anyone to argue that within the post-colonial United States (1787) context, time immemorial should still extend to 1189 – a time that preceded the civil protections for democracy that were core (at least in theory) of the foundation of the United States. Likewise, in the context of public forums, it is difficult to argue that this interpretation of time immemorial looks solely at the *immemoriality* of a place as a space for the exchange of ideas. If this were true, spaces used by Native American communities for expressive activities would have been taken into account in the

[253] See. Forbes, 523 U.S. at 678, 118 S.Ct. 1633 (citing ISKCON, 505 U.S. at 680–81, 112 S.Ct. 2701) ("The Supreme Court has 'rejected the view that traditional public forum status extends beyond its historic confines.'").

[254] Time Immemorial, Black's Law Dictionary Free 2nd Ed. and The Law Dictionary, (2018), https://thelawdictionary.org/time-immemorial/

characterization of public forums.[255] Instead, the immemoriality of public forums was constructed upon the use of spaces for expressive activity by those composing the citizenry.

To illustrate this idea, we can take a look at public parks, one of the quintessential examples of traditional public forums (as established in 1939 in *Hague v. C.I.O.*)[256] and the status of public parks as traditional public forums for different groups of society. By 1939, individuals from many disenfranchised groups of society had been granted legal citizenship. Although in 1787, at the foundation of the United States, only white wealthy men[257] had citizenship rights, by 1939, that had drastically changed; citizenship had been granted to black men in 1868, the Cable Act of 1922 had given women the right to a nationality independently of their husbands;[258] and Native Americans had been granted citizenship in 1924. However, their citizenships were quite different. Some of these groups experienced a legal citizenship deficit and were *legally* treated as second-class citizens. Thus, in 1939, public parks – as forums for the exchange of ideas – were reserved for those with the longest history of legal citizenship: wealthy white men; Jim Crow laws across the nation, which extended until 1965, prevented black individuals from even accessing many public spaces such as public parks[259] – one of the indisputable traditional public forums. In brief, by 1939, traditional public forums were defined, not in terms of *literal immemoriality*, but in terms of *contextual immemoriality* in relation to the space in question and

---

[255] Native Americans have been present since "ancient" times and do have written history that predated the foundation of the U.S. See. Bryan Hill, *Blythe Intaglios: The Impressive Anthropomorphic Geoglyphs of the Colorado Desert*, Ancient Origins: Reconstructing the Story of Humanity's Past, (2015) (Blythe Intaglios), http://www .ancient-origins.net/ancient-places -americas/blythe-intaglios-impressive-anthropomorphic-geoglyphs-colorado-desert-003003.; Eric R. Wolf, *Europe and the People Without History*, U. of Cal. Press, 1-3, (1982) (Wampum belts); Candace S. Greene and Russell Thornton, eds., *The year the stars fell: Lakota winter counts at the Smithsonian*, U of Nebraska Press, 42, (2007) (Winter Counts).

[256] *Hague v. Comm. for Indus. Org.,* 307 U.S. 496, 515, 59 S. Ct. 954, 964, 83 L. Ed. 1423 (1939).

[257] Only white men with enough wealth under their name had all the rights of a first-class citizen.

[258] See. Subcommittee of the United States on Immigration, *American Citizenships Rights of Women*, (1933). Retrieved from https://www.loc.gov/law/find/hearings/pdf/0014160126A.pdf

[259] Susan Shumaker, *Untold Stories from America's National Parks: Segregation in the National Parks*, https://www.pbs.org/nationalparks/media/pdfs/tnp-abi-untold-stories-pt-01-segregation.pdf

the first-class citizenry de jure. In other words, public parks were immemorial places for the exchange of ideas only for elite first-class citizens. These were primarily wealthy white men because these spaces have immemorially served the purpose of a public forum for that group.

Nonetheless, a lot has changed since 1939 regarding the guarantees and status of citizens who are not white wealthy men, and a view which only qualifies parks, government plazas, and streets as traditional public forums no longer works with today's citizenry. Over the last eight decades, many disenfranchised groups have rightfully been given the first-class citizenship rights that they deserve. As an example, we can take a look at voting rights, a good litmus test to determine whether an individual is truly considered a citizen.[260] As of the writing of this thesis, the United States has granted voting rights to individuals who don't meet the previous wealth requirements,[261] Black people,[262] young adults (18-21),[263] individuals living overseas,[264] individuals with felony convictions,[265] among others. Thus, traditional public forums should no longer be defined solely in context with the particular sector of the population that was considered worthy of first-class citizenship eighty years ago. This view on whether a space qualifies as a historical ground for the exchange of ideas fails to take into account spaces – beyond parks, streets, and public squares – that welcome the exchange of ideas and the conduction of expressive activity of individuals at the margins of society.

What about all of the individuals for whom these places have never been a space "for purposes of assembly, communicating thoughts between citizens, and discussing public

---

[260] In fact, in terms of legal guarantees, voting rights are one of the only factors that set apart U.S. citizens from immigrants who hold a green card; See. I.N.A. § 8 USC 1101(a)(20).

[261] *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966).

[262] Voting Rights Act of 1965. See. 52 U.S. Code § 10101.

[263] U.S. Const. amend. XXVI.

[264] The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), P.L. 99-410, 42 U.S.C. §§ 1973ff–1973ff-6, 39 U.S.C. § 3406, 18 U.S.C. §§ 608–609.

[265] See. Felon Voting Rights: https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx

questions"?[266] And, how are the spaces that grant disenfranchised citizens these allowances any different from streets and public parks? Moreover, what about individuals who face experience not one but multiple layers of systemic disenfranchisement? Evoking Sojourner Truth, Ain't they citizens?

A contextual interpretation of immemoriality regarding public forums should align with precedent but should also make space for new spaces to receive the First Amendment protections needed by our society. Applying this interpretation, it is not hard to see how the interactive spaces in a social media platform like Twitter can also be considered traditional public forums. Refusing to recognize these digital spaces as public forums leaves those at the margin with an even greater citizenship deficit. Even if they legally continue to be first-class citizens (de jure), in practice (de facto), their abilities as "citizens" to assemble, exchange ideas, and discuss question of public matter are effectively tampered. Likewise, while classifying a digital public forum as designated forum grants it the same speech protections against viewpoint discrimination than a traditional public forum, the message conveyed by such classification is that digital public fora and the citizens using these spaces for the exchange of ideas and exercise of their First Amendment rights are not deserving of the highest speech protection available. Recognizing digital spaces as traditional public forum sends a strong message of inclusivity and a presumption that these spaces are as deserving of protection as the physical ones.

Here, the significance of the precedent from Reno,[267] Packingham, [268] and Forbes[269] cannot be emphasized enough. In the opinions of these cases, the courts addressed a systemic issue perpetuating the status quo. By recognizing social media platforms as "the vast democratic

---

[266] *Hague*, 307 U.S. at 515, 59 S.Ct. 954 (opinion of Roberts, J.).
[267] *Reno v. ACLU*, 521 U.S. 844, 868, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).
[268] *Packingham v. North Carolina*, —— U.S. ——, 137 S.Ct. 1730, 1735, 198 L.Ed.2d 273 (2017).
[269] *Forbes*, 523 U.S. at 678, 118 S.Ct. 1633.

forums of the Internet,"[270] one of "the most important places (in a spatial sense) for the exchange of views," [271] and as "essential venues for public gatherings,"[272] the courts acknowledged the purposes served by these spaces for the exercise of expressive activity. The opinion in *Hudgens v. NLRB* (tenants don't have a First Amendment right to picket a store within a privately owned shopping mall) also supports this line of thought. The case centered on labor union rights and didn't recognize the entrance of a shopping mall as a public forum. However, it acknowledged that traditional public forums are not to be limited solely to the quintessential examples: "The essence of those opinions is that streets, sidewalks, parks, and *other similar public places* are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely."[273] Again, throughout the history of social media platforms, these places have indeed been associated with the exercise of First Amendment activities. Whether those drafting the precedent for traditional public forums today imagined that one day the public sphere would be hosted in digital public squares rather than physical ones should be irrelevant. After all, as the Supreme Court recently noted, times change, and "the limits of the drafters' imagination supply no reason to ignore the law's demands."[274]

In addition to interpretations of immemoriality, conceding that the interactive spaces in Twitter can be traditional public forums does not conflict with prior precedent. For example, contrary to *ISKCON, Inc. v. Lee* (an airport terminal is not a public forum), where the court correctly noted that there was no historical evidence that airports have been "made available for speech activity,"[275] the interactive spaces in Twitter were made available to the public at large for

---

[270] *Reno v. ACLU*, 521 U.S. 844, 868, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).
[271] *Packingham v. North Carolina*, ––– U.S. ––––, 137 S.Ct. 1730, 1735, 198 L.Ed.2d 273 (2017).
[272] *Forbes*, 523 U.S. at 678, 118 S.Ct. 1633.
[273] *Hudgens v. N.L.R.B.*, 424 U.S. 507, 515, 96 S.Ct. 1029, 1034, 47 L.Ed.2d 196 (1976).
[274] *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1737 (2020).
[275] *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680, 112 S. Ct. 2701, 2706, 120 L. Ed. 2d 541 (1992).

speech activity from their conception. Unlike the space for political debates in *AETC v. Forbes* (public broadcasters can exclude political candidates from debates),[276] there are no issues of scarcity within the interactive spaces under each tweet.

Beyond the Law

Overall, and beyond legal arguments, there are important societal reasons to apply this contextual interpretation. Today, women, people of color, and members of the LGBTQA+ community can mostly access the currently established physical traditional public forums. However, people with disabilities, elderly, many teenagers, low-income individuals, immigrants, and many other communities continue to be structurally excluded.[277] This issue is even more prominent for individuals who lie at the intersection of multiple points of marginalization. Let's take for instance, a low-income transgender woman with physical disabilities. The intersection of her identity markers places her at a particular crossroad where she ends up with a large *de facto* citizenship deficit that prevents her from safely and physically accessing traditional, physical spaces. Further, even if a space is physically accessible, it may not be safe for her as a transgender woman to enter these spaces.

The virtual streets and public squares in social media platforms provide more-inclusive spaces that are more accessible and, oftentimes, safer than the physical ones. As the year 2020 has unfolded, millions have learned about the obstacles, volatility, and challenges of reclaiming physical traditional public forums. During the late-May 2020 Black Lives Matter rallies in Lafayette Park in D.C., for instance, protestors found themselves targets of government forces precisely for exercising their First Amendment rights of assembly. Regarding this incident, Garret Epps, professor of constitutional law at the University of Baltimore, wrote that "The dispersal of

---

[276] *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 694, 118 S. Ct. 1633, 1649, 140 L. Ed. 2d 875 (1998) (Citing Rosenberger, 515 U.S., at 835, 115 S.Ct., at 2519).

[277] See. Lawrence Lessig, *Code is law*, Harvard magazine, 1, (2000). Retrieved from: https://davelevy.info/wiki/wp-content/uploads/2014/05/Code-is-Law.pdf

the peaceful protesters in Lafayette Square was a monstrous violation of America's venerable right of assembly."[278] Yet hearings and investigations[279] have not remedied the fact that the voices of these dissenting individuals were silenced. The global health crisis that we currently face has exacerbated a number of challenges in the exercising of our First Amendment rights.

The venues of assembly in social media platforms provide alternative safe spaces for the discussion of questions of public concern and cater to sectors of the population that often don't get to join the conversation. These new dynamics, in turn, further a healthy and democratic society, and a free nation, where all individuals, regardless of their citizenship, socio-economic status, language, gender, race, and how these sociocultural elements intersect in their personas, can freely express with unprecedented plenitude.[280]

As discussed earlier in this thesis, a vast body of social scientific research explores the role of social media platforms in civic engagement. This research supports the idea that these digital forums have opened the doors for new communities and new voices that, historically, have been structurally excluded from public forums. De Zúñiga et al. highlight "connections between social uses of technology and civic engagement,"[281] Weber et al.'s analysis of citizens on the internet concludes that "participation on the Internet exerts a positive influence on political participation,"[282] and even decades earlier, Dr. Helen Meekosha had written about the

---

[278] Garrett Epps, *Trump's Grotesque Violation of the First Amendment: The government cannot strip all Americans of their right to assemble, even if some demonstrations are violent*, The Atlantic, (June 2, 2020). Retrieved from: https://www.theatlantic.com/ideas/archive/2020/06/trumps-grotesque-violation-first-amendment/612532/

[279] See. Written Statement of Adam DeMarco Hearing Before the Committee on Natural Resources, U.S. House of Representatives (July, 2020), https://naturalresources.house.gov/imo/media/doc/Mr.%20Adam%20DeMarco%20-%20Written%20Testimony_.pdf

[280] Brooke Auxier, *Activism on social media varies by race and ethnicity, age, political party*, Pew Research Center (July 13, 2020). https://www.pewresearch.org/fact-tank/2020/07/13/activism-on-social-media-varies-by-race-and-ethnicity-age-political-party/

[281] Homero Gil De Zúñiga, L. Copeland, & B. Bimber. *Political Consumerism: Civic engagement and the social media connection*, 16 (3) New Media & Society, 488, 504, (2013).

[282] Weber, L. M., Loumakis, A. and Bergman, J., *Who Participates and Why?: An Analysis of Citizens on the Internet and the Mass Public*, 21 (1) *Soc. Sci. Comp. Rev.* 26, 39 (2003).

unprecedented ability that social media platforms had granted disabled women to engage in change-making processes through virtual activism. Meekosha's article paid special attention to the spaces and the human connections that these women were not able to access prior to these new technologies due to the various physical and verbal limitations constraining traditional activism.[283]

As more contemporary examples, movements such as #BlackLivesMatter[284] and #MeToo[285] have flourished through and within social media platforms and have brought together millions of citizens in a way that the Boston Common would have never dreamed of. An often forgotten marginalized group is individuals who are differently-abled.[286] Sohum Pal writes about the ways in which social media platforms provide "new avenues for engagement and organizing work by allowing disabled persons in disparate places to connect with each other."[287] Moreover, Pal points out that for many individuals, the goal is to exchange their opinions, discuss public questions, and assemble in more than a spatial sense, and that we need to move away from civic engagement that is anchored to tangible physical actions.

---

[283] Meekosha, Helen. *Virtual Activists? Women and the Making of Identities of Disability*, 17 (3) Hypatia, 67, 67-88, (2002).

[284] Monica Anderson, Michael Barthel, Andrew Perrin and Emily A. Vogels, *#BlackLivesMatter surges on Twitter after George Floyd's death*, Pew Research Center (June 10, 2020).

[285] Monica Anderson, and Skye Toor, *How social media users have discussed sexual harassment since #MeToo went viral*, Pew Research Center, (October 11, 2018). Retrieved from: https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/

[286] Bronwyn Hemsley, Stephen Dann, Stuart Palmer, Meredith Allan & Susan Balandin, *"We definitely need an audience": experiences of Twitter, Twitter networks and tweet content in adults with severe communication disabilities who use augmentative and alternative communication (AAC), Disability and Rehabilitation*, 37:17, 1531-1542, (2015). doi: 10.3109/09638288.2015.1045990 ("Twitter might be particularly useful for adults who cannot rely on natural speech to communicate but wish to exchange information for increased participation and contribute to knowledge creation in the broader community on disability.").

[287] Sohum Pal, *Crip Twitter and Utopic Feeling: How Disabled Twitter Users Reorganize Public Affects*, Lateral, (2), 8, (2019). doi: 10.25158/l8.2.7

All things considered, it is clear that classifying the interactive spaces under the president's account as traditional public forums not only aligns with precedent but also provides a more-inclusive outcome that protects the First Amendment rights of the overall citizenry.

On top of this, a view that protects spaces utilized by individuals who face multiple social disadvantages is consistent with the intersectional lens of this thesis. As noted by Crenshaw, intersectionality should place the most vulnerable groups of the population at the center of any advocacy efforts. She reminds us that when we begin by "addressing the needs and the problems of those who are most disadvantaged… then, the other who are singularly disadvantaged would also benefit."[288] Thus, public forum doctrine should offer the highest protections possible to the spaces that are already leveling the playing field for those who are most disadvantaged in society and, by extension, in the public sphere. At the end of the day, by protecting the forums hosting the speech of the most disenfranchised members of society from government intervention, we protect important spaces for all.

Designated Public Forums

Even if this forum couldn't constitute a traditional public forum, it is unquestionable that, at the very least, it does constitute a designated public forum. Here, my analysis agrees with the District Court's analysis as a second-best outcome. The court stated that this interactive space met the threshold to be considered a designated public forum. I found this analysis to be positive in that it was comprehensive and took into account factors such as intent, nature of the forum, past policies, and practices of the government in relation to the space. Yet, the overall rationale in the analysis erred in the way it characterized the interactive spaces under the @realDonaldTrump account.

---

[288] Kimberlé Crenshaw, *Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics*, U. Chi. Legal F., 139, 143 (1989).

The court seemed to have applied the rationale of *Southeastern Promotions v. Conrad*, equating the interactive spaces to a privately owned theater leased by the municipality.[289] But the nature of the elements of a Twitter account is quite different than that of a theater. Just for starters, a theater has a series of limitations in terms of time, capacity, audience, etc. that are simply not present in the interactive spaces of Twitter. Plus, unlike theaters, the interactive spaces in Twitter have always been dedicated to free expression and the exchange of ideas and opinions among individuals. On top of this, the theater analogy fails to consider the many flows of communication occurring simultaneously on the interactive spaces of Twitter, which don't always respond directly to the entity controlling the space or the message sent by this entity.

A better analogy for the interactive spaces under each tweet and the @realDonaldTrump account would be a public square within a company-owned town, as in *Marsh v. Alabama*. Although Trump technically holds ownership over his private Twitter account, he has opened the interactive spaces for everyone to gather, interact with each other, and engage in discussions around (but not limited to) the tweets that he creates. The interactive spaces, thus, serve the same function as the "business block" in *Marsh* but, given Trump's position as a government official, these spaces better resemble a public square. Thus, the president should have a similar level of control over his Twitter handle than he has over a physical public square.

Part IV

In this fourth part, I look at the validity of viewpoint discrimination in this particular forum and at the plausible restrictions that the government can implement. In *Knight v. Trump*, the lower courts concluded that viewpoint discrimination was proscribed in designated public forums and that the same rationale would apply even if the forum were found to be a nonpublic forum. In my analysis, I argued that the interactive spaces are a sort of digital traditional public

---

[289] *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 563, 95 S. Ct. 1239, 1249, 43 L. Ed. 2d 448 (1975).

forum. Precedent is clear regarding this sort of space, "Because a principal purpose of traditional public fora is the free exchange of ideas, speakers can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest."[290] Thus, nothing would change from the conclusion reached by the lower courts. The only restrictions plausible would be those that can be fitted within reasonable and narrowly defined "time, place, and manner" regulations set in *Perry v. Local Educators*.[291] In this case only the goal of achieving a compelling interest would supersede the interest of maintaining the forum fully accessible. Hence, blocking individuals from accessing these spaces based on their political views is a clear violation of their First Amendment rights.

Also, given that the forum in question is located inside a private account, @realDonaldTrump, in Twitter, it is imperative to emphasize the decision in *Marsh v. Alabama*, which states that "the more an owner, for his advantage, opens up his property for use by the public in general the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[292] In accordance with the very nature of Twitter, which has opened its property for use by the public since its inception to support freedom of speech, assembly, and the exchange of ideas, public officials like the President have continued to increasingly opened up their property to the public in general, and thus their rights to curate access to the interactive spaces in their accounts should be limited.

Last, while a similar argument could be made regarding Twitter as a platform, I identify this idea as a separate and more complex argument that will not be covered in this discussion.

---

[290] *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc*., 473 U.S. 788, 800, 105 S. Ct. 3439, 3448, 87 L. Ed. 2d 567 (1985).

[291] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45, 103 S. Ct. 948, 955, 74 L. Ed. 2d 794 (1983).

[292] *Marsh v. State of Ala.*, 326 U.S. 501, 506, 66 S. Ct. 276, 278, 90 L. Ed. 265 (1946).

Conclusion

In summary, the interactive spaces created under each the @realDonaldTrump account qualify as traditional public forums or - at the very least – as designated public forums. This analysis has also determined that, regardless of the classification of these spaces, viewpoint discrimination is unconstitutional. Thus, the blocking of individuals based on their political beliefs is a clear infringement upon these individuals' rights to exercise their First Amendment rights.

Issues of the Public Sphere

A few other issues can be addressed beyond the legal questions in thesis. Here, I provide a brief overview of some important issues involving digital spaces and the public sphere.

Citizenship and Public Sphere

As I discussed in chapter II, in his view of the public sphere, Habermas did not take into account how power dynamics and systemic inequalities affected individuals' ability to plentifully participate in the conversation of the public sphere. Since then, many scholars have come forward with conceptual tools that better help explain the dynamics of this abstract space. Hector Amaya is no exception, and his work on citizenship and the public sphere provides an insightful perspective.

The work of Amaya suggests that, in the public sphere, *de jure* citizenship provides a pathway into *de facto* citizenship. In turn, this symbolic citizenship helps individuals gain the political capital needed to access the main public sphere and influence the larger public opinion.

In the case of public forums, I see the protection of digital spaces that are important to individuals with multiple layers of marginalization to be equivalent to granting *de jure* citizenship. This "legal" citizenship is not legal in the sense that it makes an individual an

American citizen, but it that it grants them access to legal speech protections that traditionally only the elite has enjoyed.

Public Forum Analysis in Private Property

Although several social and legal concerns were brought up by the plaintiffs and the defense, ultimately, the courts focused solely on answering the narrow legal question of whether Donald Trump's Twitter handle @realDonaldTrump became a public forum through Trumps' use of the handle for governance. In order to answer this question, the courts had to distinguish between the actions of President Trump (a public official) and citizen Trump (a private citizen). Yet, the issue that this question aimed to solve was whether the blocking of Twitter followers by President Trump represented a constitutional violation.

The courts carefully focused on limiting their analysis to the character of Donald Trump in Twitter, as a public or private actor. In setting these limits to their analysis, the courts abstained from potentially ruling on any cases where social media accounts could be considered purely private or public.

Even though the citizens of the United States will not hesitate to invoke their First Amendment rights when it comes to speech taking place on private property, the scope of these protections has its limitations. First Amendment scholars have analyzed the ongoing battle between property rights and First Amendment rights. In *Property Rights and First Amendment Rights: Balance and Conflict,* Henely summarizes some of the issues that emerge from trying to balance these conflicting rights and proposed the notion of quasi-public property to address this issue.[293] In *Property Rights, the First Amendment, and Judicial Anti-Urbanism,* Don Mitchell believes that for good or for bad, property rights seem to frequently trump the First Amendment rights in these conflicts. Hence, Don Mitchell argues that "legal geographies need to examine

[293] Bernard D. Henely, *Property Rights And First Amendment Rights: Balance And Conflict*, 62 (1) American Bar Association Journal, 76-83, (1976).

more than just final court decisions" and that they should take into account the complex "twists and turns" of the cases examined. In doing it otherwise, he argues, we set at risk the rights of some people "simply to be present in public space."[294]

Historically, the courts have also struggled to produce a set of clear precedents that makes it easier to weight the interests of these two rights. In *Clark v. Community,* the Supreme Court ruled that the government had "compelling interests" in protecting its property from speech acts generally protected under First Amendment law. Such "compelling interests," it was stated, could "outweigh the expressive value" of particular speech conduct.[295] *Marsh v. Alabama* showed the opposite outcome, where the courts ruled that individuals did not lose their First Amendment guarantees even in a town whose full ownership was under private control.[296] And, in *PruneYard Shopping Center v. Robins*, California's Supreme Court affirmed the lower court's decision to allow "speech and petitioning, reasonably exercised, in shopping centers even when the centers [were] privately owned."[297]

In their initial response in *Knight v. Trump*, the government refused to engage in a discussion that involved the First Amendment. The defense maintained that Twitter, as a privately owned space, should not be subject to any First Amendment regulations that would normally apply in public spaces. In addition, their argument insisted that such imposition of First Amendment rules on private spaces had no precedent. However, the plaintiffs brought to the table a recent case decided by the United States Supreme Court, *Packingham v. North Carolina*, 582 U.S. ___ (2017), in which Justice Kennedy referred to social media as "the modern public square."[298] In *Packingham*, the court held that the government could not proscribe individuals

---

[294] Don Mitchell, *Property Rights, The First Amendment, And Judicial Anti-Urbanism: The Strange Case Of Virginia v. Hicks*, 26 (7) Urban Geography, 565-586 (2005).

[295] *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 308, 104 S. Ct. 3065, 3076, 82 L. Ed. 2d 221 (1984).

[296] *Marsh v. State of Ala*., 326 U.S. 501, 503, 66 S. Ct. 276, 277, 90 L. Ed. 265 (1946).

[297] *Pruneyard Shopping Center v. Robbins*, 447 U.S. 74 (1980).

[298] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1732, 198 L. Ed. 2d 273 (2017).

from using the platform, but it did not hold that individuals had a right of access to social media platforms. Thus, Kennedy's statement created ambiguity and instigated discussion on whether metaphysical private property or elements within can, at times, be considered public forums where First Amendment regulations would be accepted.

MacKinnon's work may be helpful in thinking about the potential implications of private ownership of the public sphere. While her work looks at the "state's abdication of women in the name of freedom and self-determination,"[299] a similar line of thought could be amplified and applied to the state's abdication of private citizens in the name of freedom and self-determination.

In MacKinnon's example, the reluctance of the state to regulate the private sphere (represented by family and the home) has a negative impact on women. This left women as subjects of abuse and subjugation in favor of men's right of freedom and self-determination in the "privacy" of their homes. Similarly, the government's initial position in *Knight v. Trump*, that the courts should not interfere in the executive branch's use of a privately owned social media platform can be seen as the state's abdication of citizens' rights in favor of corporate property rights for the advantage of public officials. MacKinnon calls for state intervention into the private sphere. Should we be asking for state's intervention into the privately owned public sphere?

Overall, this chapter had delved into a legal analysis that advocates for an intersectional lens – placing individuals with multiple points of marginalization at the center of our discourse. My four-part analysis argues that, if we provide the highest of protection to the spaces that are valuable to free speech of individuals with multiple points of marginalization, by extension, we will protect the speech of all individuals. Classifying digital public forums as traditional public forums represents a first step toward granting every individual citizenship and political power to continue to influence the public opinion formed in the main public sphere.

---

[299] Catharine A. MacKinnon. *Women's lives, men's laws,* Harvard University Press, 126, (2007).

Part VI

Conclusion

This thesis has touched upon a number of issues and challenges that the people in the United States face regarding their First Amendment rights. I began this thesis by focusing on the story of individual Twitter users who found themselves blocked from the discussions hosted under the interactive spaces of President Trump's personal account. This incident eventually evolved into the legal case *Knight v. Trump*, which I used throughout my piece as a case study to engage a much larger discussion involving the protection of First Amendment rights in digital spaces.

While there were merely eight plaintiffs listed on the case, the implications of this dispute extend over the much-larger citizenry of the United States. The ability of individuals to freely engage with others or to exchange their ideas and opinions in government-controlled spaces should never be curtailed – especially not by public officials, who have a duty to serve and protect the best interest of the people of this nation. This case was particularly important because, beyond arguing for a right to reply to the government official, it argued for a right of citizens to be a part of the larger public sphere. There is no question that as a nation, and regardless of political affiliation, each and every individual can benefit from the privilege of being exposed to a multiplicity of ideas and opinions – even if those opinions express anger and dissent.

Recognizing the significance of this case for historically marginalized individuals, in Part II, I provided a general summary of the theoretical frameworks guiding my research. I particularly elaborated upon the concept of intersectionality, the advantages of embracing this lens that considers the way in which our identities intersect; and I offer a quick view of how such a lens has gained traction within our legal atmosphere. In addition to this, I dived into a general discussion that focuses on the intersection of public sphere theory and notion of citizenship.

Throughout this section, I highlighted the connections between de jure and de facto citizenship, access to the public sphere, and the effects of exclusion on stalling positive change. I described how a healthy democracy occurs where all voices have an equal chance to be heard and generate change, and how treating individuals as second-class citizens imposes a number of systemic challenges that prevent marginalized individuals from speaking up and catalyzing the change needed to take down these barriers.

As a powerful subsector of the public sphere, public forums have the ability to level the playing field. Thus, Part III focused on a comprehensive literature review that encapsulates the legal framework of public forums. Here, I followed a chronological narrative that began with the recognition of parks and streets as public forums and that concluded with current developments of the law regarding the establishment of public forums in digital spaces. While I listed several legal cases, I focused on the legal precedent that referenced the application of public forum doctrine to non-physical spaces. My research for this review illuminated the many legal dilemmas that the courts and the legislative authorities of the country need to address. As emerging technologies continue to develop at unprecedented rates, our leaders need to step up and help the law move forward in a way that it protects the rights of the citizens in the digital world as well.

The case study of this thesis was outlined in Part IV. Throughout this section, I gave a step-by-step summary of the path of *Knight v. Trump*. I start with the plaintiffs' unsuccessful letter to the president, and I conclude with the Court of Appeals refusal to granting a rehearing in banc to the government, effectively concluding that the spaces in question were designated public forums and that blocking was unconstitutional. The two-year period over which this case unfolded was particularly striking because, as the case moved through appeals and motions for additional evidence, the platform itself experienced several architectural and policy changes that could have shifted the path of this case.

In Part V, I proposed an alternative normative analysis to the one conducted by the District Court and affirmed by the Court of Appeals for the Second Circuit. Throughout my analysis, I made a case to argue that the interactive spaces under the president's account could qualify as traditional public forums. In brief, I pointed out the courts' quick decision to dismiss this classification as feasible given a lack of an established history of Twitter as a forum. As a response, I argued that this interpretation was too literal and inconsistent in practice, and I offered an alternative contextual interpretation of immemoriality that is consistent with the establishment of physical and digital public forums. I drew from an amalgamation of socio-cultural critique and legal theory to support my claims. At last, I concede that, while not ideal, classifying these spaces as designated public forums serves as a crucial first step to providing every member in our citizenry the First Amendment protections that they need and deserve.

Overall, as more elements of social and civic engagement in our nation migrate to digital spaces, it is important for us to keep an eye open for those at the margins of society. Historically, physical public forums have been predominantly controlled by the elite, by the white and cisgender male aristocracies. Digitally-mediated fora have challenged these power roles. Beyond spaces to chat or vent, today's digital fora represent blank slates where communities are already reimagining and rewriting the social hierarchies that have suppressed the least powerful voices. We ought to take on the challenge and ensure that these more-inclusive spaces can continue to serve as a tool for women to organize, black communities to protest without fear, for disabled individuals to have their voices hear and let their opinions and belief reach places that their bodies may not.

In order to preserve these spaces, I hereby make a case for the consideration and prioritization of the rights of the most disenfranchised members of our communities, particularly the rights of those whose complex identities place them at the intersection of multiple points of marginalization. This mission cannot be achieved without privileging the spaces that have granted

these individuals unprecedented access to partake in the national public sphere. Whether these spaces are physical or digital should not be an imperative to recognize the crucial role that they have served in welcoming new thoughts and voices to the conversation.

While the interactive spaces on social media accounts controlled by public officials are not the only spaces for free expression, they are indeed key forums that the government has the ability and duty to protect on behalf of its citizens. *Knight v. Trump* is just one of many cases to come. Yet, the details of the case attest to the significance that such spaces have in the lives of the average individual who seeks to broaden their horizons or to engage in the further development of a healthy democracy. The impact that these spaces have in providing access and safer environments for many historically marginalized communities is even greater, and such is the impact that curtailing speech rights through viewpoint discrimination can have for these groups.

The classification of the interactive spaces in a government-controlled social media account as a traditional public forum will be just one of many steps that our country must take to improve the conditions of civic engagement and political participation for all citizens alike. After all, where freedom is not for all, none of us can be free.

All things considered, I hope that the ideas and critiques posed in this thesis serve to illuminate the intricacies of the law surrounding legal public forums and the numerous possibilities that may become available to our democracy if we care for those at the margins of the square.

BIBLIOGRAPHY

Abrams v. United States, 250 U.S. 616, 630, 40 S. Ct. 17, 22, 63 L. Ed. 1173 (1919).

Am. Civil Liberties Union v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996), aff'd, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed. 2d 874 (1997).

Andrea Schneiker, *Telling the Story of the Superhero and the Anti-Politician as President: Donald Trump's Branding on Twitter*, 17 Political Studies Review, 210 (2019).

Andrew Hutchinson, *Facebook Posts Strong Revenue Result in Q2, MAU Increases to 2.4 Billion*, SocialMediaToday, (2019). https://www.socialmediatoday.com/news/facebook-posts-strong-revenue-result-in-q2-mau-increases-to-24-billion/559473/

Ann Macintosh, *The emergence of digital governance*, 5 Significance. 176, (2008).

Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666, 673, 118 S. Ct. 1633, 1639, 140 L. Ed. 2d 875 (1998).

Arwa Mahdawi, *Should Trump be banned from Twitter?*, The Guardian, (2019). https://www.theguardian.com/us-news/2019/oct/04/should-trump-be-banned-from-twitter.

Ashley Feinberg, *A Running List of People Donald Trump Has Blocked on Twitter*, WIRED, (June 14, 2017, 3:38 PM), https://www.wired.com/story/donald-trump-twitter-blocked.

Ashley Hoffman, *11 Parody Twitter Accounts Dedicated to Trolling President Trump,* TIME, (2017). https://time.com/4741267/donald-trump-parody-twitter/ (last visited Oct 23, 2019).

Bernard D. Henely, *Property Rights and First Amendment Rights: Balance and Conflict*, 62 (1) American Bar Association Journal, 76-83, (1976).

Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731, 1737 (2020).

Brad Adgate, *The 2020 Elections Will Set (Another) Ad Spending Record*, Forbes (2019). https://www.forbes.com/sites/bradadgate/2019/09/03/the-2020-elections-will-set-another-ad-spending-record/#22c4719d1836.

Brian L. Ott, *The Age of Twitter: Donald J. Trump and the Politics of Debasement*, 34 Critical Studies in Media Communication, 59, (2017).

Brian Ott, and Greg Dickinson, *The Twitter Presidency: Donald J. Trump and the Politics of White Rage,* (2019).

Bronwyn Hemsley, Stephen Dann, Stuart Palmer, Meredith Allan & Susan Balandin, *"We definitely need an audience": experiences of Twitter, Twitter networks and tweet content in adults with severe communication disabilities who use augmentative and alternative communication (AAC), Disability and Rehabilitation*, 37:17, 1531-1542, (2015). doi: 10.3109/09638288.2015.1045990.

Brooke Auxier, *Activism on social media varies by race and ethnicity, age, political party*, Pew Research Center (July 13, 2020). https://www.pewresearch.org/fact-tank/2020/07/13/activism-on-social-media-varies-by-race-and-ethnicity-age-political-party.

Brown v. Entm't Merchants Ass'n, 564 U.S. 786, 790, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011).

Bryan Hill, *Blythe Intaglios: The Impressive Anthropomorphic Geoglyphs of the Colorado Desert*, Ancient Origins: Reconstructing the Story of Humanity's Past, (2015), http://www.ancient-origins.net/ancient-places -americas/blythe-intaglios-impressive-anthropomorphic-geoglyphs-colorado-desert-003003.

Candace S. Greene and Russell Thornton, eds., *The year the stars fell: Lakota winter counts at the Smithsonian*, U of Nebraska Press, 42, (2007) (Winter Counts).

Catharine A. MacKinnon. *Women's lives, men's laws,* Harvard University Press, 126, (2007).

Christian Fuchs, *Digital demagogue: Authoritarian capitalism in the age of Trump and Twitter*, (2018).

Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 668, 130 S. Ct. 2971, 2978, 177 L. Ed. 2d 838 (2010).

Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 690, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010).

Christopher Galdieri, Lucas Jennifer, and Sisco Tauna, *The Role of Twitter in the 2016 US Election*, (2018).

Claire Hansen, *116th Congress by Party, Race, Gender, and Religion: The 116th Congress has the most women and people of color than ever before.*, U.S. News, (2019). Retrieved from: https://www.usnews.com/news/politics/slideshows/116th-congress-by-party-race-gender-and-religion.

Clark V. Cmty. For Creative Non-Violence, 468 U.S. 288, 308, 104 S. Ct. 3065, 3076, 82 L. Ed. 2d 221 (1984).

Commonwealth v. Davis, 140 Mass. 485, 486, 4 N.E. 577, 578 (1886).

Complaint, *Knight v. Trump*, 302 F. Supp. 3d 541, (S.D.N.Y. 2017) (No. 17-cv-05205).

Concha Pérez-Curiel, and Pilar L. Naharro, *Influencers De La Política. Estudio De La Marca Personal De Donald Trump En Twitter y Efectos En Medios y Usuarios*, 32 Comunicación y Sociedad, 57, (2019).

Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 805, 105 S. Ct. 3439, 3451, 87 L. Ed. 2d 567 (1985).

David A. Bell, *Social Media Accounts and Ownership Rights*, 33 Corp. Couns. Rev. 1, 2 (2014).

Davis v. Com. of Massachusetts, 167 U.S. 43, 47, 17 S. Ct. 731, 733, 42 L. Ed. 71 (1897).

Davison v. Randall, 912 F.3d 666, 673 (4th Cir. 2019), *as amended* (Jan. 9, 2019).

DeGraffenreid v. General Motors Assembly Div., Etc., 413 F. Supp. 142 (E.D. Mo. 1976).

Don Mitchell, *Property Rights, The First Amendment, and Judicial Anti-Urbanism: The Strange Case of Virginia V. Hicks*, 26 (7) Urban Geography, 565-586 (2005).

Donald J. Trump (@realDonaldTrump), Twitter (Jul. 26, 2017, 9:04 AM), https://twitter.com/realDonaldTrump/status/890196164313833472?s=20

Elisa Shearer, *Social media outpaces print newspapers in the U.S. as a news source*, Pew Research Center (2018). https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source.

Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

Engquist v. Ore. Dep't of Agric., 553 U.S. 591, 600, 128 S.Ct. 2146, 170 L.Ed.2d 975 (2008).

Eric R. Wolf, *Europe and the People Without History*, U. of Cal. Press, 1-3, (1982).

Felon Voting Rights: https://www.ncsl.org/research/elections-and-campaigns/felon-voting-rights.aspx.

Forbes v. Arkansas Educ. Television Commc'n Network Found., 22 F.3d 1423 (8th Cir. 1994).

42 U.S.C. § 1983.

44 U.S.C. § 2202.

Garrett Epps, *Trump's Grotesque Violation of the First Amendment: The government cannot strip all Americans of their right to assemble, even if some demonstrations are violent*, The Atlantic, (June 2, 2020). Retrieved from: https://www.theatlantic.com/ideas/archive/2020/06/trumps-grotesque-violation-first-amendment/612532.

Gerard A. Hauser, *Vernacular Voices: The Rhetoric of Publics and Public Spheres*, Columbia: University of South Carolina Press, 61, (1999).

German Lopez, *This is the most diverse Congress ever. But it's still pretty white*, (2019). Retrieved from https://www.vox.com/policy-and-politics/2019/2/8/18217076/congress-racial-diversity-white.

Gina Mendez Rico, Arthur G. Cosby, and Somya D. Mohanty, *Obamacare on Twitter: Online Political Participation and its effects on polarisation*. 55 Teorija in Praksa, 419 (2018).

Greer v. Spock, 424 U.S. 828, 831, 96 S. Ct. 1211, 1214, 47 L. Ed. 2d 505 (1976).

Hague v. CIO, 307 U.S. 496, 515, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939).

Halleck v. Manhattan Cmty. Access Corp., 882 F.3d 300, 301-302 (2d Cir.), *cert. granted,* 139 S. Ct. 360, 202 L. Ed. 2d 261 (2018), and *rev'd in part,* 139 S. Ct. 1921, 204 L. Ed. 2d 405 (2019).

#BlockedByTrump, Twitter, https://twitter.com/search?q=%23blockedbytrump&src=typed_query

Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

Harry Kalven, Jr., "The Concept of the Public Forum: Cox v. Louisiana," 1965 Supreme Court Review 1 (1965).

*Hawaii v. Tru*mp, 859 F. 3d 741, 773 n.14 (9th Cir. 2017), *cert. granted sub nom. Trump v. Int'l Refugee Assistance Projec*t, No. 16-1436, 2017 WL 2722580 (U.S. June 26, 2017).

Hector Amaya, *Citizenship Excess: Latinas/os, Media, and the Nation* (2013).

Holly Figueroa O'Reilly (@AynRandPaulRyan), Twitter (May 28, 2017, 7:53 AM), https://twitter.com/AynRandPaulRyan/status/868842669069422592.

Hudgens v. N.L.R.B., 424 U.S. 507, 515, 96 S.Ct. 1029, 1034, 47 L.Ed.2d 196 (1976).

I.N.A. § 8 USC 1101(a)(20).

Int'l Soc. for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680, 112 S. Ct. 2701, 2706, 120 L. Ed. 2d 541 (1992).

J. Clement, *Number of monthly active Twitter users worldwide from 1st quarter 2010 to 1st quarter 2019 (in millions)*, Statista (2019). https://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/

Jackson v. Metro. Edison Co., 419 U.S. 345, 352, 95 S. Ct. 449, 454, 42 L. Ed. 2d 477 (1974).

Jane O'Boyle, *Twitter Diplomacy between India and the United States: Agenda-Building Analysis of Tweets during Presidential State Visits.* 15 Global Media and Communication, 121 (2018).

John Gramlich, *10 Facts about Americans and Facebook*, Pew Research Center, (2019). https://www.pewresearch.org/fact-tank/2019/05/16/facts-about-americans-and-facebook/

Johnny Holschuh, *#civilrightscybertorts: Utilizing Torts to Combat Hate Speech in Online Social Media*, 82 U. Cin. L. Rev. 953 (2014).

Joseph M. Papp (@joepabike), Twitter (June 3, 2017, 12:36 PM), https://twitter.com/joepabike/status/871088288202928128.

Joshua Miller, *New Lenses on the First Social Media Presidency*, WHITEHOUSE.GOV (2017), https://obamawhitehouse.archives.gov/blog/2017/01/05/new-lenses-first-social-media-presidency (last visited Oct 22, 2019).

Jürgen Habermas, et al. *The Public Sphere: An Encyclopedia Article (1964).*, New German Critique, JSTOR, (3), 49–55. (1974). www.jstor.org/stable/487737.

Kathryn R. Taylor, *"Anything You Post Online Can and Will Be Used Against You in A Court of Law": Criminal Liability and First Amendment Implications of Social Media Expression*, 71 Nat'l Law. Guild Rev. 78 (2014).

Kimberlé Crenshaw, *Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics*, U. Chi. Legal F., 139, 153-154 (1989).

Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, 43 Stan. L. Rev. 1241 (1991).

Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 577 (S.D.N.Y. 2018), *aff'd,* 928 F.3d 226 (2d Cir. 2019).

Kristina T. Bodnar, *'SHEER FORCE OF TWEET': TESTING THE LIMITS OF EXECUTIVE POWER ON TWITTER*, 10 Journal of Law, Technology and the Internet, 1, (2019).

Lawrence Lessig, *Code is law*, Harvard magazine, 1, (2000). Retrieved from: https://davelevy.info/wiki/wp-content/uploads/2014/05/Code-is-Law.pdf.

Lyombe Eko, *Many Spiders, One Worldwide Web: Towards A Typology of Internet Regulation*, 6 Comm. L. & Pol'y 445 (2000).

Maja Šimunjak, and Alessandro Caliandro, *Twiplomacy in the Age of Donald Trump: Is the Diplomatic Code Changing?*, 35 The Information Society, 13, (2019).

Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926, 204 L. Ed. 2d 405 (2019).

Marsh v. State Of Ala., 326 U.S. 501, 503, 66 S. Ct. 276, 277, 90 L. Ed. 265 (1946).

Matal v. Tam, —— U.S. ——, 137 S. Ct. 1744, 1758, 198 L.Ed.2d 366 (2017).

Monica Anderson, and Skye Toor, *How social media users have discussed sexual harassment since #MeToo went viral*, Pew Research Center, (October 11, 2018). Retrieved from: https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/.

Monica Anderson, Michael Barthel, Andrew Perrin and Emily A. Vogels, *#BlackLivesMatter surges on Twitter after George Floyd's death*, Pew Research Center (June 10, 2020).

Nancy Fraser, *Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*, Social Text, (25/26), 56-80 (1990). doi:10.2307/466240.

Nate Rattner, *President Trump is tweeting more than ever as the impeachment probe heats up*, CNBC, (2019). https://www.cnbc.com/2019/10/02/president-trump-tweets-more-than-ever-as-impeachment-probe-heats-up.html.

New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S. Ct. 710, 721, 11 L. Ed. 2d 686 (1964).

Noa Aharony, *Twitter use by three political leaders: an exploratory analysis*, 36 Online Information Review, 587 (2012).

Packingham v. North Carolina, —— U.S. ——, 137 S.Ct. 1730, 1735, 198 L.Ed.2d 273 (2017).

Paulsen v. County of Nassau, 925 F.2d 65, 69 (2d Cir. 1991).

Perry Local Educators' Ass'n v. Hohlt, 652 F.2d 1286, 1288 (7th Cir. 1981), *rev'd sub nom. Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983).

Peter Francia, *Free Media and Twitter in the 2016 Presidential Election: The Unconventional Campaign of Donald Trump*, 36 Social Science Computer Review, 440 (2018).

Plaintiffs' Letter to President Trump, Knight First Amendment Institute at Columbia University, 3 (June 6, 2017), https://knightcolumbia.org/documents/709727f9ce/2017.06.06_Letter-to-President-Trump-and-Aides.pdf.

Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 464, 129 S. Ct. 1125, 1129, 172 L. Ed. 2d 853 (2009).

Prager Univ. v. Google LLC, No. 18-15712, 2020 WL 913661 (9th Cir. Feb. 26, 2020).

President Trump (@POTUS), Twitter, https://twitter.com/potus.

Pruneyard Shopping Center V. Robbins, 447 U.S. 74 (1980).

Rebecca Pilar Buckwalter-Poza, Philip Cohen, Eugene Gu, Holly Figueroa, Nicholas Pappas, and Brandon Neely, *I Was Blocked by @realDonaldTrump*, Knight First Amendment Institute at Columbia University (2019). https://knightcolumbia.org/content/i-was-blocked-realdonaldtrump.

Reno v. ACLU, 521 U.S. 844, 868, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997).

Ridley v. Mass. Bay Transp. Auth., 390 F.3d 65, 77 (1st Cir. 2004) ("The past history of characterization of a forum may well be relevant; but that does not mean a present characterization about a forum may be disregarded").

Robinson v. Hunt Cty., Texas, 921 F.3d 440, 445 (5th Cir. 2019), *reh'g denied* (May 16, 2019).

Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 830, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995).

Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 552, 95 S. Ct. 1239, 1243, 43 L. Ed. 2d 448 (1975).

Six Star Holdings, LLC v. City of Milwaukee, 821 F.3d 795, 805 (7th Cir. 2016).

Sohum Pal, *Crip Twitter and Utopic Feeling: How Disabled Twitter Users Reorganize Public Affects*, Lateral, (2), 8, (2019). doi: 10.25158/l8.2.7.

Sorrell v. IMS Health Inc., 564 U.S. 552, 566, 131 S.Ct. 2653, 180 L.Ed.2d 544 (2011).

Spock v. David, 349 F. Supp. 179, 180 (D.N.J.), *rev'd,* 469 F.2d 1047 (3d Cir. 1972).

Stephen E. Henderson, *Expectations of Privacy in Social Media*, 31 Miss. C. L. Rev. 227 (2012).

Subcommittee of the United States on Immigration, *American Citizenships Rights of Women*, (1933). Retrieved from https://www.loc.gov/law/find/hearings/pdf/0014160126A.pdf.

Summum v. Pleasant Grove City, 499 F.3d 1170, 1175 (10th Cir. 2007).

Susan Shumaker, *Untold Stories from America's National Parks: Segregation in the National Parks*, https://www.pbs.org/nationalparks/media/pdfs/tnp-abi-untold-stories-pt-01-segregation.pdf.

Texas v. Johnson, 491 U.S. 397, 414, 109 S. Ct. 2533, 2545, 105 L. Ed. 2d 342 (1989).

The Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), P.L. 99-410, 42 U.S.C. §§ 1973ff–1973ff-6, 39 U.S.C. § 3406, 18 U.S.C. §§ 608–609.

The White House (@WhiteHouse), Twitter, https://twitter.com/whitehouse.

Time Immemorial, Black's Law Dictionary Free 2nd Ed. and The Law Dictionary, (2018), https://thelawdictionary.org/time-immemorial.

Tony Robson, *Trump Tweets: A Collection of Donald Trump's Most Outrageous, Offensive, and Deleted Tweets from Trump's Twitter Page,* (2016).

Truth, Sojourner. *Ain't I a Woman?*, Speech pronounced at the Women's Rights Convention, Ohio. Vol. 29. (1851).

Twitter to expand 280-character tweets, BBC News (2017). https://www.bbc.com/news/technology-41900880#:~:text=Twitter%20plans%20to%20increase%20the,information%20in%20a%20single%20character.

U. S. Postal Serv. v. Council of Greenburgh Civic Associations, 453 U.S. 114, 129, 101 S. Ct. 2676, 2685, 69 L. Ed. 2d 517 (1981).

U.S. Const. amend. XXVI.

United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 812, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000).

Voting Rights Act of 1965. See. 52 U.S. Code § 10101.

Walker v. Tex. Div., Sons of Confederate Veterans, Inc., —— U.S. ——, 135 S.Ct. 2239, 2250, 192 L.Ed.2d 274 (2015).

Wandering Dago, Inc. v. Destito, 879 F.3d 20, 34 (2d Cir. 2018).

West v. Atkins, 487 U.S. 42, 49, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988).

Whitney v. California, 274 U.S. 357, 375, 47 S. Ct. 641, 648, 71 L. Ed. 1095 (1927), *overruled in part by Brandenburg v. Ohio,* 395 U.S. 444, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969).

Written Statement of Adam DeMarco Hearing Before the Committee on Natural Resources, U.S. House of Representatives (July 2020). https://naturalresources.house.gov/imo/media/doc/Mr.%20Adam%20DeMarco%20-%20Written%20Testimony_.pdf.