

# IS THERE A RIGHT TO TWEET AT YOUR PRESIDENT?

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*The U.S. Supreme Court has developed the public forum doctrine to protect the First Amendment rights of speakers in places of assembly and expression. The doctrine facilitates free expression by restricting the government's ability to discriminate against or regulate speech in state-controlled public forums. In 2019, two federal courts of appeals extended the doctrine to protect speakers who express themselves in the interactive spaces that elected politicians control on their personal social media accounts. In Davison v. Randall, the Fourth Circuit held that a local official's Facebook page was a public forum and, therefore, the official could neither block any Facebook users for posting critical comments nor delete any such comments. In Knight First Amendment Institute at Columbia University v. Trump, the Second Circuit held that President Trump had created a public forum on his Twitter account and likewise could not block users for criticizing him. This Note proposes that the respective circuit courts misapplied the public forum doctrine to the elected officials' social media accounts and that their rulings unconstitutionally compelled the speech of Facebook and Twitter. This Note argues that viewing these rulings as compelled speech adequately protects social media companies' First Amendment right to enable users to screen content and that such a right prevails over the public's free speech interest in commenting on politicians' social media accounts.*

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## INTRODUCTION

In most circumstances, the First Amendment protects private individuals from government restrictions or regulations on the content of their speech.<sup>1</sup> In furtherance of this right, the U.S. Supreme Court has established the public forum doctrine as a subset of First Amendment jurisprudence, whereby speakers on state-owned and state-controlled property are free from government regulation of the content of their speech.<sup>2</sup> Although the Supreme Court recognizes that a public forum may be “metaphysical,”<sup>3</sup> the Court has not yet resolved the extent to which the doctrine may apply to social media.<sup>4</sup> As elected officials continue to utilize social media to express themselves and host opinions from other social media users, the extent to which the Constitution protects a social media user’s speech from a government official’s restriction on his or her own social media account is yet unanswered.

Unlike the protection it provides from government speech restrictions, the First Amendment does not restrain privately owned entities from using their powers to restrict and regulate speech as they see fit.<sup>5</sup> As privately owned entities, social media companies retain such First Amendment rights to regulate speech on their sites.<sup>6</sup>

In 2019, federal courts were confronted with how to apply the First Amendment when government officials use social media accounts to exclude users. In *Davison v. Randall*,<sup>7</sup> the Fourth Circuit held that a Loudoun County supervisor had created a public forum when she used her official Facebook page for official government business, and she thereafter violated the First Amendment when she blocked a constituent from viewing that page and deleted his disparaging comments.<sup>8</sup> A few months later, the Second Circuit held in *Knight First Amendment Institute at Columbia University v. Trump*<sup>9</sup> that President Donald Trump had created a public forum on his Twitter account and thereafter violated several Twitter users’ First Amendment rights when he blocked them from viewing that account.<sup>10</sup> The day after the Second Circuit issued its ruling, a plaintiff brought suit against New York Congresswoman Alexandria Ocasio-Cortez, claiming she had abridged the

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1. See U.S. CONST. amend. I.

2. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983); see *infra* Part I.C.3 (explaining which categories of content the government may regulate).

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

4. See generally Kathleen McGarvey Hidy, *Social Media Use and Viewpoint Discrimination: A First Amendment Judicial Tightrope Walk with Rights and Risks Hanging in the Balance*, 102 MARQ. L. REV. 1045, 1081–82 (2019).

5. See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019).

6. Benjamin F. Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M. L. REV. 121, 121 (2014).

7. 912 F.3d 666 (4th Cir. 2019).

8. *Id.* at 682, 687.

9. 928 F.3d 226 (2d Cir. 2019).

10. *Id.* at 237–38.

plaintiff's First Amendment rights by blocking him on Twitter.<sup>11</sup> Thus, aggrieved parties from across the political spectrum are seeking to use the public forum doctrine to prevent elected officials from excluding them on social media.

It is important to examine the countervailing First Amendment rights at issue in these lawsuits. When politicians use their social media accounts, it is unclear whether they create public forums in which the First Amendment protects the public's right to express viewpoints without restriction. Alternatively, the public's First Amendment interest may ultimately yield to privately owned social media companies' First Amendment right to decide what speech to allow or restrict on their websites, including on politicians' accounts. If the latter is the better way to analyze these scenarios, then rulings that require elected officials to preserve disparaging speech on their social media accounts may violate the social media companies' First Amendment right against compelled speech.

Part I of this Note provides a background on the relevant First Amendment law at issue: the public forum doctrine, government speech, constitutional content-based regulations of speech, and compelled speech. Part II explains the facts of *Knight* and *Davison* and details the circuit courts' application of the public forum doctrine in each case. Part III presents the competing arguments over whether the courts appropriately applied the public forum doctrine and assesses the claim that social media companies have a private First Amendment right that protects their content from government intrusion. Part IV details why the circuit courts misapplied the public forum doctrine to the social media accounts of elected officials, explains why the rulings may have unconstitutionally compelled the speech of social media companies, and explores why such ramifications matter in the modern world of politics on social media.

#### I. FIRST AMENDMENT LAW: PUBLIC FORUM , COMPELLED SPEECH, AND RELATED DOCTRINES

The public forum doctrine is a subset of First Amendment jurisprudence that protects speakers from government curtailments of speech in places traditionally devoted to expression or in places that are maintained by the government for expressive purposes.<sup>12</sup> Part I.A explains how and why government action is necessary for a court to find that speech regulation violates the First Amendment. Part I.B discusses the public forum doctrine

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11. Kate Sullivan, *Ex-NY Assemblyman Suing Ocasio-Cortez for Blocking Him on Twitter Cites Trump Case*, CNN (July 10, 2019, 2:26 PM), <https://www.cnn.com/2019/07/10/politics/alexandria-ocasio-cortez-sued-twitter-user/index.html> [https://perma.cc/G99Y-26XY]. The plaintiff subsequently settled the lawsuit after Representative Ocasio-Cortez relented and unblocked him from viewing her account. Michael Gold, *Ocasio-Cortez Apologizes for Blocking Critic on Twitter*, N.Y. TIMES (Nov. 4, 2019), <https://www.nytimes.com/2019/11/04/nyregion/alexandria-ocasio-cortez-twitter-dov-hikind.html> [https://perma.cc/F2FM-L3HD].

12. Dawn Carla Nunziato, *From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital*, 25 B.U. J. SCI. & TECH. L. 1, 21 (2019).

in detail and outlines the tripartite framework the Supreme Court has developed to apply the public forum doctrine in different factual circumstances. Part I.C explores the modern application of the doctrine in telecommunications settings, its overlap with the concept of government speech, and the categories of speech that are amenable to content-based government regulation. Finally, Part I.D explains the compelled speech doctrine and the First Amendment's protection of editorial control and judgment.

#### A. State Action

A speaker who claims her First Amendment rights have been violated must demonstrate that the state acted to violate her constitutional rights.<sup>13</sup> The First Amendment only protects speakers when their speech has been curtailed through government action.<sup>14</sup> A state acts not only through its legislature and executive but through “judicial authorities” as well.<sup>15</sup> Therefore, a court may find sufficient state action in a First Amendment case when a court issues a ruling.<sup>16</sup>

First Amendment claims will fail if a plaintiff cannot show that the state was somehow active in the infringement of her expression.<sup>17</sup> The First Amendment does not ordinarily constrain private entities from curtailing speech<sup>18</sup> because private curtailment alone is insufficient to raise a viable First Amendment claim.<sup>19</sup> A private entity can only be considered a state actor amenable to First Amendment constraints if it (a) performs a “traditional, exclusive public function,” (b) is compelled by the government to take a particular action, or (c) acts jointly with the government.<sup>20</sup> If, however, in the context of a public forum First Amendment claim, the government controls a privately owned venue, then any speech infringement that occurs at the venue carries sufficient state action for a First Amendment claim.<sup>21</sup>

#### B. The Public Forum Doctrine

Public forums are certain locations or communication channels where free expression is so fundamental that the government has sharply limited powers to regulate speech therein.<sup>22</sup> In all public forums, no viewpoint

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13. See Alex Hadjian, Comment, *Social Media and the Government: Why It May Be Unconstitutional for Government Officials to Moderate Their Social Media*, 51 LOY. L.A. L. REV. 361, 369 (2018).

14. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 566 (1995).

15. *Ex parte Virginia*, 100 U.S. 339, 347 (1879).

16. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

17. See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1928 (2019).

18. *Id.*

19. *Hurley*, 515 U.S. at 566.

20. *Halleck*, 139 S. Ct. at 1928.

21. See, e.g., *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554–55 (1975).

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

discrimination is allowed.<sup>23</sup> In other words, the government is forbidden from discriminating against or suppressing speech simply because the government opposes the speaker's viewpoint.<sup>24</sup> The Supreme Court has recognized three different categories of forums under its public forum analysis: traditional public forums, designated public forums, and nonpublic or "limited" public forums.<sup>25</sup> Each category retains different characteristics, and each category permits varying levels of speech restrictions.<sup>26</sup>

### 1. Traditional Public Forums

The most protected category is the traditional public forum.<sup>27</sup> Traditional forums are places that, either by tradition or government approval, have long been devoted to assembly or free expression.<sup>28</sup> Parks and streets are the "quintessential" examples of traditional public forums.<sup>29</sup>

The Supreme Court has recognized that all persons have a constitutionally protected right to access and express themselves in traditional public forums.<sup>30</sup> Therefore, the government is sharply limited from discriminating against the content of speech—either its subject matter or viewpoint—in traditional public forums.<sup>31</sup> Except for a narrow group of speech categories amenable to content-based regulations, the Court applies strict scrutiny when analyzing content-based government restrictions on speech in traditional public forums.<sup>32</sup> Any such restrictions of speech content in traditional public forums must be narrowly tailored to serve a compelling government interest.<sup>33</sup> The government may, however, regulate the time, place, or manner of speech in traditional public forums without violating the First Amendment.<sup>34</sup> Therefore, there are very few circumstances in which the government may regulate expression within these traditional forums.<sup>35</sup>

### 2. Designated Public Forums

Beyond traditional public forums like parks and streets, the Supreme Court has also recognized "designated" public forums. Designated public forums are physical locales or channels of communication that have been created or

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23. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985).

24. *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 829 (1995); *Cornelius*, 473 U.S. at 806.

25. *Cornelius*, 473 U.S. at 802.

26. *See Perry*, 460 U.S. at 45–46.

27. *Id.* at 45.

28. *Cornelius*, 473 U.S. at 802.

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

30. *Id.* at 45, 55.

31. *Id.* at 45.

32. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). *See infra* Part I.C.3 for an explanation of government restrictions of certain speech categories that the Court has deemed constitutional under the First Amendment.

33. *See Perry*, 460 U.S. at 45.

34. Abner S. Greene, *The Concept of the Speech Platform: Walker v. Texas Division*, 68 ALA. L. REV. 337, 345 (2016).

35. *See Summum*, 555 U.S. at 469–70.

designated by the government as places for expression.<sup>36</sup> When the government seeks to regulate speech in designated public forums, it is subject to the same limitations as it is in traditional public forums.<sup>37</sup> Therefore, the government may regulate time, place, and manner of speech restrictions within designated public forums, but any content-based restrictions must be narrowly tailored to achieve a compelling government interest.<sup>38</sup>

Once it has created a designated public forum, the government is not obliged to keep it open indefinitely for discussion and communication.<sup>39</sup> But as long as it preserves a location as a public forum for free expression, the government is bound by those First Amendment restrictions.<sup>40</sup>

For instance, the Court held in *Southeastern Promotions, Ltd. v. Conrad*<sup>41</sup> that, as a place of expression, a privately owned municipal theater under lease to the City of Chattanooga was a designated public forum so long as it was controlled by the city.<sup>42</sup> Thus, private ownership of a location or channel did not preclude a finding that the theater was a designated public forum.<sup>43</sup> The city's leasehold of the privately owned theater created state control sufficient to apply the public forum doctrine.<sup>44</sup>

A key determination in many public forum analyses is whether the government has actively designated a place as a public forum.<sup>45</sup> The Court has examined both the government's intentions in creating the location and the presence of expressive activity within the location to determine if it has been designated as a public forum.<sup>46</sup> This section will examine these two analyses in turn.

A government may only establish a designated public forum through affirmative action, accompanied by government intent.<sup>47</sup> Designated forums are not created through inaction or by merely permitting some sort of limited discussion.<sup>48</sup> The Court will not find that a designated public forum exists if it concludes that the government had no intention to establish a public forum.<sup>49</sup> Therefore, if a piece of government property organically becomes the site of debates and discussions, the Court will not deem it a public forum without a concurrent finding of government intent to establish it as a place for expression.<sup>50</sup>

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36. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985); *Perry*, 460 U.S. at 45.

37. *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

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

39. *Id.*

40. *Id.*

41. 420 U.S. 546 (1975).

42. *Id.* at 555–56.

43. *Id.* at 556.

44. *Id.* at 556–58.

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

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 803.

50. *Id.* at 802–04.

To determine if the necessary intent existed to designate a forum for public assembly and debate, the Supreme Court has looked to the “policy and practice” of the government in the creation of the forum.<sup>51</sup> In *Widmar v. Vincent*,<sup>52</sup> the Court concluded that, because a state university had made its meeting facilities available to all student groups, the university had intended to open the university’s spaces to all students regardless of viewpoint.<sup>53</sup> Therefore, the Court found the university had exhibited the intent necessary to designate the meeting facility as a public forum.<sup>54</sup>

By contrast, in *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*,<sup>55</sup> the Court found that a federal employee charity drive was not a designated public forum because the government had not intended to create a medium for expressive activity when it initiated the drive.<sup>56</sup> In *Perry Education Ass’n v. Perry Local Educators’ Ass’n*,<sup>57</sup> the Court held that, because a public school had only allowed select organizations to access its internal mailboxes, which were otherwise unreachable by the general public, the government had not intended to make the mailboxes public forums.<sup>58</sup> Therefore, without the requisite intent, the school had not created a designated public forum.<sup>59</sup>

Designated public forums are places the government has created for free expression.<sup>60</sup> The Court thus examines the nature of the property and its “compatibility with expressive activity” to determine if it has been designated as a public forum.<sup>61</sup> If a nontraditional forum has qualities characteristic of a place for free expression, the Court is more likely to deem it a designated public forum.<sup>62</sup> Places that the Court has found to be designated public forums because they facilitated expressive activity include theaters,<sup>63</sup> university meeting facilities,<sup>64</sup> and school board meetings.<sup>65</sup>

However, the presence of expressive activity alone does not transform a place or communication channel into a public forum with First Amendment protections.<sup>66</sup> If the government limits access to a particular forum, implements policies in the forum that limit free expression, or otherwise operates the forum for a purpose other than expressive activity, the Court will

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51. *Id.* at 802.

52. 454 U.S. 263 (1981).

53. *Id.* at 267–68.

54. *Cornelius*, 473 U.S. at 802.

55. 473 U.S. 788 (1985).

56. *Id.* at 805.

57. 460 U.S. 37 (1983).

58. *Id.* at 47.

59. *See id.*

60. *Id.* at 45.

61. *Cornelius*, 473 U.S. at 802.

62. *See id.* at 802–03.

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

64. *Widmar v. Vincent*, 454 U.S. 263, 267–70 (1981).

65. *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp’t Relations Comm’n*, 429 U.S. 167, 175–76 (1976).

66. *Cornelius*, 473 U.S. at 805.



not hold that the location is a public forum, even if expression occurs therein.<sup>67</sup>

### 3. Limited Public Forums

The final category of public forum recognized by the Court is the nonpublic or “limited” public forum.<sup>68</sup> A limited public forum is a piece of government property that is not traditionally used for free expression and has not been designated by the government for such use.<sup>69</sup> As in traditional and designated public forums, the government may effectuate time, place, and manner regulations in limited public forums without violating the First Amendment.<sup>70</sup> But unlike traditional and designated forums, the government may limit expression in limited public forums to a circumscribed set of *topics* or for a particular set of speakers.<sup>71</sup> Therefore, the government may impose reasonable content restrictions on expression to conform to the forum’s predetermined subject matter parameters.<sup>72</sup>

Such government restrictions on expression in limited public forums need not be narrowly tailored to serve a compelling government interest because the First Amendment does not mandate unfettered access to or use of limited public forums.<sup>73</sup> Restrictions on a limited public forum for certain speakers or to particular topics need not be “the most reasonable” to be constitutionally permissible.<sup>74</sup> Rather, they can merely be reasonable exclusions.<sup>75</sup>

Nonetheless, viewpoint discrimination is prohibited in limited public forums, as it is in traditional and designated forums.<sup>76</sup> If a speaker addresses a topic that is otherwise allowed under the content parameters of the limited public forum, the government cannot exclude that speaker from expressing herself merely because she presents an opinion contrary to the government’s preferences.<sup>77</sup> Such a restriction would be an instance of impermissible viewpoint discrimination.<sup>78</sup> This prohibition of viewpoint discrimination remains true even if the government has created the forum itself.<sup>79</sup>

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67. *See id.* at 803–05 (holding that a charity campaign for federal employees was not a designated forum even though it involved open expression for charitable solicitations).

68. Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez, 561 U.S. 661, 679 n.11 (2010); *Cornelius*, 473 U.S. at 802.

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

70. *Id.*

71. *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009).

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

73. *Cornelius*, 473 U.S. at 809.

74. *Id.* at 808.

75. *Id.*

76. *See id.* at 806.

77. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993).

78. *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 829 (1995).

79. *Id.*

C. *The Public Forum Doctrine's Application to Telecommunications and Its Intersection with Other First Amendment Doctrine*

The public forum doctrine is an intricate subset of First Amendment law, and its application in court has only grown more complex as technology has shifted society's understanding of forums. This section describes how the Supreme Court has applied the doctrine to emerging technological forums like cable television and the internet, how the doctrine intersects with the government speech doctrine, and the content-based government speech regulations the Court has held to be constitutional.

1. Public Forums in Telecommunications

The Supreme Court's public forum analysis applies most clearly to speech that occurs in settings that individuals physically occupy, such as parks,<sup>80</sup> university facilities,<sup>81</sup> or theaters.<sup>82</sup> It also applies to discrete spaces where speech can be distributed in physical form, like school mailboxes.<sup>83</sup> The Court even applied it to events, such as a fundraising charitable drive.<sup>84</sup>

The Court has expanded its public forum analysis and applied it to "metaphysical" areas or channels where people exchange ideas.<sup>85</sup> Nevertheless, the Court has struggled to apply the public forum doctrine as modern technology has created new channels of communication that operate as forums of speech. Although the Court held as early as 1997 that speech communicated via the internet constituted speech protected by the First Amendment,<sup>86</sup> it has not yet solidified the extent to which the public forum doctrine protects speech over the internet or other modern avenues of communication.

Writing for the majority in *Packingham v. North Carolina*,<sup>87</sup> Justice Anthony Kennedy left open the possibility that social media sites may eventually be viewed as a public forums because they are the most effective modern vehicle for expressing ideas.<sup>88</sup> Concurring twenty-one years earlier in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*,<sup>89</sup> Justice Kennedy wrote that, because they had been established by the government to induce the free exchange of ideas, public access cable channels are designated public forums, even though their communications are transmitted over privately owned cables.<sup>90</sup> Despite Justice Kennedy's

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80. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939).

81. *Widmar v. Vincent*, 454 U.S. 263, 267–70 (1981).

82. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554–55 (1975).

83. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 39 (1983).

84. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 790 (1985).

85. *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 830 (1995); *see also* LyriSSa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1995 (2011).

86. *Reno v. ACLU*, 521 U.S. 844, 870 (1997).

87. 137 S. Ct. 1730 (2017).

88. *See id.* at 1737.

89. 518 U.S. 727 (1996).

90. *Id.* at 792 (Kennedy, J., concurring).

reasoning, the Court declined to answer the question of whether public access channels were public forums.<sup>91</sup>

However, in 2019, the Court held in *Manhattan Community Access Corp. v. Halleck*<sup>92</sup> that a public access cable channel was not a public forum, although the channel provided a medium for anyone who wanted to produce content and air it on the channel.<sup>93</sup> Consistent with past precedent, the Court held that the cable company's provision of a forum for expression did not automatically create a public forum.<sup>94</sup> The Court held that even if a private entity provides a forum for communication, as the local cable company had, it does not create a public forum because it is neither a state actor nor acting with the government to provide the forum.<sup>95</sup> Therefore, because it is not a public forum, the private cable company did not violate the First Amendment when it restricted or regulated speech on its forum.<sup>96</sup>

## 2. Government Speech

Another First Amendment doctrine deserves explanation for greater context: government speech. The Free Speech Clause of the First Amendment restricts government regulation and abridgment of private speech.<sup>97</sup> It does not, however, restrict the regulation of the government's own speech or messaging.<sup>98</sup> Therefore, the government does not engage in unconstitutional viewpoint discrimination if it selectively determines the content of its messages at the explicit exclusion of contrary messages.<sup>99</sup> For example, when the government publicly encourages vaccination or recycling programs, it need not include the views of antivaccination or antirecycling advocates.<sup>100</sup>

It is not always clear when expression comes directly from the government—and is protected from First Amendment scrutiny—and when expression is merely hosted by the government in a public forum—and is amenable to claims of viewpoint discrimination.<sup>101</sup> A recent Supreme Court case highlights the importance of this distinction.

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91. *Id.* at 742–43 (majority opinion).

92. 139 S. Ct. 1921 (2019).

93. *Id.* at 1930–31.

94. *Id.* at 1930.

95. *Id.* at 1930–31.

96. *Id.* at 1934.

97. U.S. CONST. amend. I.

98. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009).

99. *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2245–46 (2015). Some scholars contend that the government is nonetheless constrained from advocating certain viewpoints by the First Amendment's Establishment Clause. *See, e.g.*, Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 747 (2011); *see also* Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648, 648–50 (2013).

100. *Walker*, 135 S. Ct. at 2246.

101. *See Summum*, 555 U.S. at 470.

In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*,<sup>102</sup> a social group in Texas called the Sons of Confederate Veterans applied to the state's Department of Motor Vehicles Board to have the state produce a specialty license plate displaying the Confederate flag.<sup>103</sup> After the board rejected the proposed plate, the group sued, arguing that the rejection constituted unconstitutional viewpoint discrimination because the application process was a public forum.<sup>104</sup>

The Court rejected the notion that the license plate application process was a public forum.<sup>105</sup> The Court instead found that the license plate process was an instance of government speech because, along with a few other factors, the state directly controlled the production and distribution of the plates.<sup>106</sup> Because it was government speech, no First Amendment violation could be implicated.<sup>107</sup>

Thus, the key factor distinguishing the government speech doctrine from the public forum doctrine is that the former covers speech expressed by the government, whereas the latter covers instances of speech expressed by a private person within a space under government control.<sup>108</sup>

### 3. Free Speech Exceptions

Not all private speech is protected from government interference.<sup>109</sup> Although the First Amendment protects the content of most private speech from government regulation and subjects most such regulations to strict scrutiny, a few narrow and well-defined categories of private speech are constitutionally amenable to content-based government regulation.<sup>110</sup>

The categories of speech that a state may restrict include incitements to violence, obscenity, libelous words, and "'fighting' words."<sup>111</sup> The Supreme Court has made clear that a government restriction of the content of speech must address one of these excludable categories to comply with the First Amendment<sup>112</sup> and that a statute that regulates such speech must be narrowly drawn and strictly limited to survive judicial scrutiny.<sup>113</sup>

The state may make content-based restrictions on these categories of speech in public forums as well, where most private speech is usually

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102. 135 S. Ct. 2239 (2015).

103. *Id.* at 2245.

104. *Id.* at 2245, 2250.

105. *Id.* at 2248–50.

106. *Id.* at 2248–49.

107. *Id.* at 2245–46; *see also* *Pleasant Grove City v. Summum*, 555 U.S. 460, 465, 481 (2009) (holding that a town did not violate the First Amendment when it rejected a proposed erection of a religious monument in a public park because such privately financed projects displayed on public property are government speech, not private expression within a public forum).

108. *See Summum*, 555 U.S. at 469.

109. *Cohen v. California*, 403 U.S. 15, 19 (1971).

110. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

111. *Id.* at 572.

112. *Cohen*, 403 U.S. at 24.

113. *Chaplinsky*, 315 U.S. at 573.

protected from government encroachment.<sup>114</sup> For example, the government may restrict “‘fighting’ words” expressed on a sidewalk—a traditional public forum—because such speech is not protected by the First Amendment.<sup>115</sup>

The Court has emphasized that these exceptions to the First Amendment’s protection from state regulation of speech content are narrow.<sup>116</sup> In *Cohen v. California*,<sup>117</sup> the Court explicitly rejected a state’s ability to restrict “offensive” speech in public places if it does not fall into one of the aforementioned categories.<sup>118</sup> In other words, the First Amendment protects against government regulation of private speech that is merely offensive.<sup>119</sup>

But because the First Amendment does not apply to private curtailments of speech, nothing in the Constitution limits private entities from restricting speech as they see fit or setting their own rules about tolerable speech.<sup>120</sup> Speech does not have to fall into one of these narrow categories if a private entity wishes to restrict it.<sup>121</sup> A private entity may restrict speech merely because the entity finds it offensive.<sup>122</sup>

#### D. Compelled Speech

The final First Amendment doctrine relevant to assess whether elected officials may constitutionally block users on social media is the compelled speech doctrine.

##### 1. Prohibition Against Compulsion to Display Certain Content

The crucial case to understand the compelled speech doctrine is *Miami Herald Publishing Co. v. Tornillo*,<sup>123</sup> in which the Supreme Court held unconstitutional a Florida statute aimed at giving political candidates equal space to voice their opinions in print newspapers.<sup>124</sup> Florida’s “right of reply” statute gave a candidate for elected office the right to demand that a newspaper print the candidate’s own opinion if the newspaper had previously published opinion pieces that criticized the candidate.<sup>125</sup> The *Miami Herald* challenged the statute’s constitutionality after a candidate for the Florida House of Representatives brought suit when the newspaper refused to print his editorial after publishing one by his opponent.<sup>126</sup>

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114. *See id.* at 574 (permitting government restrictions on “fighting words” espoused on a sidewalk).

115. *Id.* at 569–70, 573–74.

116. *Id.* at 571–72.

117. 403 U.S. 15 (1971).

118. *Id.* at 26.

119. *Id.* at 18, 26.

120. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972).

121. *See* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1853–54 (1992).

122. *See id.*

123. 418 U.S. 241 (1974).

124. *Id.* at 244, 258.

125. *Id.*

126. *Id.* at 243–44.

In finding the statute unconstitutional, the Court emphasized that the First Amendment not only protected the press from government restrictions on what they could print but also insulated them from government intervention to force them to print a particular message.<sup>127</sup> Applying strict scrutiny, the Court found that the statute effectively directed a publisher to print a particular opinion, intruding impermissibly into the editorial discretion of the newspaper's editors.<sup>128</sup>

The Supreme Court has extended First Amendment protections from compelled speech beyond print publishing to several other circumstances and settings. In *West Virginia State Board of Education v. Barnette*,<sup>129</sup> the Court struck down a West Virginia resolution compelling students and teachers to physically salute the American flag and verbally recite the Pledge of Allegiance.<sup>130</sup> The Court found that the resolution was unconstitutional because the First Amendment forbids a state from compelling conformity to any particular belief or ideology.<sup>131</sup> On similar grounds, the Court has held that the government cannot compel a person to display an ideological sign on private property.<sup>132</sup> Such a compelled expression of ideology or viewpoint is prohibited by the First Amendment.<sup>133</sup>

In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,<sup>134</sup> the Court found that the organizers of Boston's Saint Patrick's Day parade were protected by the First Amendment when they selectively chose the parade's participants.<sup>135</sup> When the organizers of the parade excluded a local gay, lesbian, and bisexual group from marching in the parade, the group brought suit under a Massachusetts antidiscrimination statute.<sup>136</sup> On appeal, the Supreme Court found that, because marching in such a parade is an expressive activity, state law could not require parade organizers to include groups whose views the organizers did not wish to disseminate.<sup>137</sup> Thus, even if a state disapproves of a "speaker's" exclusion of another's expression, the First Amendment prohibits the state from compelling that speaker to include the expression.<sup>138</sup>

In *Pacific Gas & Electric Co. v. Public Utilities Commission*,<sup>139</sup> the Court held that the First Amendment protects corporations' freedom of editorial discretion from intrusion into their dissemination of information.<sup>140</sup> The Court ruled that a regulation requiring a public utility company to include in

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127. *Id.* at 252.

128. *Id.* at 258.

129. 319 U.S. 624 (1943).

130. *Id.* at 642.

131. *Id.*

132. *Wooley v. Maynard*, 430 U.S. 705, 713 (1977).

133. *Id.*

134. 515 U.S. 557 (1995).

135. *Id.* at 570.

136. *Id.* at 561.

137. *Id.* at 576.

138. *See id.* at 581.

139. 475 U.S. 1 (1986).

140. *Id.* at 16.

its quarterly newsletter an advocacy group's criticisms of the company impermissibly interfered with the discretion of the corporation to choose what *not* to say.<sup>141</sup>

However, the Court applies the doctrine differently to different channels of communication depending on the relevant technological considerations. In *Red Lion Broadcasting Co. v. FCC*,<sup>142</sup> the Court rejected a radio broadcaster's allegations that the fairness doctrine violated the First Amendment.<sup>143</sup> The fairness doctrine was a set of regulations issued by the Federal Communications Commission (FCC) that, in part, required broadcasters to provide equal airtime to individuals if they wished to respond to personal attacks aired by the broadcaster.<sup>144</sup> Although the regulation at issue was strikingly similar to the statute the Court would find unconstitutional in *Tornillo* five years later, the Court held that, in the context of radio broadcasting, it did not unconstitutionally compel the broadcasters' speech.<sup>145</sup>

These diverging holdings on similar speech-regulating statutes depend in part on the different science of the media involved. The science and technology of radio waves is such that only one radio frequency can carry a particular broadcast in a geographic region.<sup>146</sup> Due to this technological reality, the government must award a monopolistic license to one broadcaster for each frequency in a geographic area.<sup>147</sup> The Court in *Red Lion* reasoned that in return for granting a broadcaster a monopoly on a scarce resource, such as a radio frequency, the government could require the broadcaster to give public issues equal airtime.<sup>148</sup> In essence, because radio broadcasters' monopolistic power could potentially preclude a free exchange of ideas, the fairness doctrine was a necessary and constitutional compulsion of speech.<sup>149</sup> The scarcity and licensing at issue in *Red Lion* is absent for publishing and newspapers, which is a critical reason why the Court reached a different conclusion in *Tornillo*.<sup>150</sup>

Similarly, the Court held in *Turner Broadcasting System, Inc. v. FCC*<sup>151</sup> that the government could constitutionally compel speech and interfere in

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141. *Id.* at 11–13.

142. 395 U.S. 367 (1969).

143. *Id.* at 386, 389–90.

144. *Syracuse Peace Council v. FCC*, 867 F.2d 654 (1989). The FCC later repealed the fairness doctrine in a 1987 administrative decision that was upheld by the D.C. Circuit. *See generally id.*

145. *Red Lion*, 395 U.S. at 391.

146. Adrian Cronauer, *The Fairness Doctrine: A Solution in Search of a Problem*, 47 FED. COMM. L.J. 51, 58 (1994).

147. *Red Lion*, 395 U.S. at 391.

148. *Id.*

149. *See id.*

150. *Id.* at 386. *See generally* *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241 (1974).

151. 512 U.S. 622 (1994).

editorial discretion if such compulsion was authorized to ensure market competition, rather than to dictate the content of such speech.<sup>152</sup>

Such compulsion was also at the heart of the Court's decision in *PruneYard Shopping Center v. Robins*.<sup>153</sup> In *PruneYard*, the Court rejected a claim that California had violated a private shopping mall's First Amendment rights by requiring the mall to host petitioners and canvassers.<sup>154</sup>

California's state constitution prohibited private properties, such as the mall, from excluding pamphlet distributors.<sup>155</sup> The Court distinguished this state compulsion from past findings of unconstitutional compelled speech because the California constitution neither forced the mall owner to display a particular ideological message nor "intru[ded] into the function of editors" that was at issue in *Tornillo*.<sup>156</sup> The Court came to this conclusion because the owner of a commercial space commands no such editorial function.<sup>157</sup>

In addition, the Court recognized the state's authority to expand individual free speech rights onto private property, beyond what the First Amendment requires.<sup>158</sup> Therefore, because the pamphlet distributors were exercising speech protected by the California constitution, if not by the First Amendment, the Court rejected the mall owner's contention that he had been unconstitutionally compelled to host their speech on his property.<sup>159</sup>

## 2. Compelled Speech in the Age of Social Media

Just as it has in the application of the public forum doctrine, the digital era has presented new challenges for the application of the compelled speech doctrine. The Communications Decency Act of 1996<sup>160</sup> (CDA) was enacted in 1996 to grant immunity to internet platforms ("internet computer services" or ICSs) for illegal content posted by third-party users ("internet content providers" or ICPs) on their sites.<sup>161</sup> The CDA states that no ICS will "be treated as a publisher or speaker of any information provided by another" ICP.<sup>162</sup> For example, internet platforms do not incur liability for defamatory

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152. *Id.* at 643 (holding that content-neutral regulations requiring cable television companies to carry broadcast television stations were constitutional because the regulations did not compel speech according to the speech's content).

153. 447 U.S. 74 (1980).

154. *Id.* at 88.

155. *Id.* at 79.

156. *Id.* at 88.

157. *Id.*

158. *Id.* at 81.

159. *Id.*

160. Pub. L. No. 104-104, tit. V, 110 Stat. 56, 133-43 (codified as amended in scattered sections of 18 and 47 U.S.C.).

161. 47 U.S.C. § 230(c)(1) (2018). An ICS or internet platform merely provides the online forum for other users (i.e., the ICPs) to create content and communicate with other ICPs but does not produce content itself. See TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA 18-19 (2018).

162. 47 U.S.C. § 230(c)(1).



or libelous content posted by ICPs on their sites.<sup>163</sup> Traditional publishers, on the other hand, are subject to such tort claims as creators of their own content.<sup>164</sup>

In addition to granting immunity for the tortious conduct posted by third-party ICPs, the CDA immunizes platforms from any liability they might incur for removing or restricting content posted by ICPs that the platforms deem obscene, harassing, or excessively violent.<sup>165</sup> This ability to remove unwanted content allows platforms to moderate the content posted on their sites and recognizes the editorial discretion platforms possess over such material.<sup>166</sup>

A social media website is an ICS that allows its users to create their own personal accounts and interact with other site users who have accounts.<sup>167</sup> These sites, such as Facebook and Twitter, enable users with accounts to express themselves and to interact and communicate with other users.<sup>168</sup>

In recent years, lower courts have begun to recognize the editorial discretion held by ICSs and have extended the compelled speech doctrine to protect the expression of both private social media companies and search engine companies. In *Langdon v. Google, Inc.*,<sup>169</sup> the District of Delaware held that Google, the search engine, did not violate the plaintiff's speech when it declined to place advertisements for his website on its search results.<sup>170</sup> The court rejected the plaintiff's argument that Google is a public forum where his speech could only be narrowly restricted because no state action existed when Google removed his ads.<sup>171</sup> More important, the court held that compelling Google to place the plaintiff's ads would trample the company's own First Amendment rights.<sup>172</sup> Because the First Amendment protects the editorial discretion to choose "what not to say," Google could reject the plaintiff's ads.<sup>173</sup>

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163. Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 1001–02 (2008).

164. *Id.* at 988 n.9.

165. 47 U.S.C. § 230(c)(2)(A).

166. *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 630 (D. Del. 2007).

167. Michael Hirschorn, *About Facebook: By Bringing Order to the Web, Facebook Could Become as Important to Us as Google*, ATLANTIC (Oct. 2007), <https://www.theatlantic.com/magazine/archive/2007/10/about-facebook/306181/> [<https://perma.cc/93HL-T8QE>].

168. *See, e.g.*, Daphne Keller, *Facebook Restricts Speech by Popular Demand*, ATLANTIC (Sept. 22, 2019), <https://www.theatlantic.com/ideas/archive/2019/09/facebook-restricts-free-speech-popular-demand/598462/> [<https://perma.cc/A2D5-WE7M>]; *see also* Jenny Rooney, *Twitter's Brand New Work "Twitter Is" Furthers Platform's Transparency, Support of People's Authentic Expression*, FORBES (Sept. 9, 2019, 5:54 PM), <https://www.forbes.com/sites/jenniferrooney/2019/09/09/twitters-new-brand-work-twitter-is-furthers-platforms-transparency-support-of-peoples-authentic-expression/> [<https://perma.cc/T68T-RJFX>].

169. 474 F. Supp. 2d 622 (D. Del. 2007).

170. *Id.* at 631.

171. *Id.* at 629–30.

172. *Id.*

173. *Id.* (quoting *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988)).

In *Jian Zhang v. Baidu.com Inc.*,<sup>174</sup> a district court rejected a plaintiff's request seeking a court order to penalize a search engine's search results algorithm.<sup>175</sup> The court recognized that the decisions made by the company's programmers about what information appears on their site and how to rank and prioritize their search results amounted to editorial discretion protected from government interference.<sup>176</sup> Therefore, issuing the requested court order would intrude into the search engine's editorial judgment and violate its First Amendment rights.<sup>177</sup>

In *La'Tiejira v. Facebook, Inc.*,<sup>178</sup> a district court applying Texas state law dismissed a defamation suit against Facebook after the company failed to take down a harassing statement a third party had posted and directed at the plaintiff.<sup>179</sup> Citing *Tornillo*, the court recognized Facebook's First Amendment rights to decide what to publish and what not to publish on its platform and accordingly dismissed the plaintiff's claims.<sup>180</sup>

Thus, lower courts have begun to give social media companies the editorial discretion to moderate their content that had traditionally been afforded to newspapers and publishers.

## II. THE SECOND AND FOURTH CIRCUITS HOLD THAT CERTAIN PUBLIC OFFICIALS' SOCIAL MEDIA ACCOUNTS ARE PUBLIC FORUMS

Part II describes the Second and Fourth Circuits' recent decisions that applied the public forum doctrine to the social media accounts of elected officials. Part II.A details the Fourth Circuit's reasoning in *Davison* and Part II.B details the Second Circuit's reasoning in *Knight*. Then, Part II.C briefly summarizes a similar case from the Eastern District of Kentucky regarding former Kentucky Governor Matt Bevin.

### A. *Davison v. Randall*

In 2019, the Fourth Circuit found that the comments section of a Loudoun County, Virginia official's Facebook page was a public forum.<sup>181</sup> Because the official used the page to make official announcements and allowed any Facebook user to post comments, she used state action to create a space for expression.<sup>182</sup> Accordingly, the court ruled that when the official deleted a negative comment posted by a Loudoun County resident critical of the official and then prevented the resident from viewing the page, the official

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174. 10 F. Supp. 3d 433 (S.D.N.Y. 2014).

175. *Id.* at 440.

176. *Id.* at 438–39.

177. *Id.* at 440, 442.

178. 272 F. Supp. 3d 981 (S.D. Tex. 2017), *appeal dismissed*, No. 17–20565, 2018 WL 1224417 (5th Cir. Feb. 15, 2018).

179. *Id.* at 995. For an analysis of the difficulty of assessing tort liability for posts on social media sites and a critique on such sites' immunity from tort liability, see generally Tushnet, *supra* note 163.

180. *La'Tiejira*, 272 F. Supp. 3d at 991.

181. *Davison v. Randall*, 912 F.3d 666, 682, 687 (4th Cir. 2019).

182. *Id.* at 687.

had engaged in unconstitutional viewpoint discrimination prohibited in a public forum.<sup>183</sup>

Phyllis Randall is a local elected official in Northern Virginia's Loudoun County.<sup>184</sup> On January 1, 2016, Phyllis Randall was sworn in as the chair of the Loudoun County Board of Supervisors.<sup>185</sup> When she became chair, Randall created a Facebook page separate from both her personal Facebook account and the account her campaign used for her election.<sup>186</sup> Facebook's "pages" are similar to Facebook accounts used by individuals but are specifically meant to "help businesses, organizations, and brands share their stories and connect with people."<sup>187</sup>

The page listed Randall's official government email account as an additional method of contact.<sup>188</sup> Given the option to describe the Facebook page, Randall designated it as a "government official" page.<sup>189</sup> She wrote a post on the page stating that she had established the page to solicit feedback from "ANY Loudoun citizen."<sup>190</sup> While Randall and her chief of staff controlled the page's posted content, Randall "almost exclusively" controlled the page.<sup>191</sup> During her tenure as chair, she posted on the page to notify followers of forthcoming public meetings and to make official government announcements.<sup>192</sup> Because of Facebook's interactive features and the public nature of her account, any Facebook user who followed Randall's page could reply directly to Randall's posts.<sup>193</sup>

Randall attended a Loudoun County town hall on February 3, 2016.<sup>194</sup> Plaintiff Brian Davison attended the town hall as a private citizen and asked Randall a question about school funding that Randall said was a "set-up question."<sup>195</sup> After the town hall, Randall posted a summary of the meeting on her Facebook page.<sup>196</sup> As a follower of Randall's page, Davison posted a comment directly responding to Randall's post from his personal Facebook account.<sup>197</sup> At trial, neither party could remember the specifics of the comment.<sup>198</sup> However, Randall remembered feeling that Davison's

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183. *Id.*

184. Ann E. Marimow, *What Does an Elected Official in Virginia Have to Do with Whether President Trump Can Block People on Twitter?: A Lot.*, WASH. POST (Nov. 9, 2018, 5:30 AM), [https://www.washingtonpost.com/local/public-safety/what-does-an-elected-official-in-virginia-have-to-do-with-whether-president-trump-can-block-people-on-twitter-a-lot/2018/11/08/e7bdde58-d635-11e8-aeb7-ddcad4a0a54e\\_story.html](https://www.washingtonpost.com/local/public-safety/what-does-an-elected-official-in-virginia-have-to-do-with-whether-president-trump-can-block-people-on-twitter-a-lot/2018/11/08/e7bdde58-d635-11e8-aeb7-ddcad4a0a54e_story.html) [<https://perma.cc/MYG8-SE56>].

185. *Davison*, 912 F.3d at 673.

186. *Id.*

187. *Id.*

188. *Id.* at 673–74.

189. *Id.* at 674.

190. *Id.* at 686.

191. *Id.* at 673.

192. *Id.*

193. *Id.* at 686.

194. *Id.* at 675.

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

comment was unnecessarily accusatory and deleted it along with all other comments replying to her post.<sup>199</sup> Randall then banned Davison's Facebook account from commenting further on her official page.<sup>200</sup> The next day, Randall rescinded and removed the ban.<sup>201</sup> Davison then sued Randall in the Eastern District of Virginia for viewpoint discrimination.<sup>202</sup>

The Fourth Circuit affirmed the district court's finding that Randall had violated Davison's First Amendment rights by blocking him.<sup>203</sup> The court further held that Randall had opened a designated public forum through her Facebook page and thereby engaged in viewpoint discrimination in violation of Davison's First Amendment rights by deleting his accusatory comment.<sup>204</sup>

The Fourth Circuit held that there was sufficient state action to bring a First Amendment claim because Randall used the page as a tool of governance to further her municipal office, even though she had created the page as an individual.<sup>205</sup> Further, because Randall's page displayed her official title and government email address, provided important information to the public, and solicited input on public policy issues, Randall had "clothed the [page] in the 'power and prestige of [her] state office'" enough to make the page a public forum.<sup>206</sup>

Further, and more crucially, the Fourth Circuit held that the comments section on Randall's page constituted a designated public forum.<sup>207</sup> The court's finding turned on two key considerations. First, Randall had created the page as a vehicle for discussing public issues and explicitly invited commentary without placing any restrictions on the public's access to comment.<sup>208</sup> Second, the interactive space that allows any Facebook user to post a comment on Randall's page was a classic form of "expressive activity" that the public forum doctrine is intended to protect.<sup>209</sup> Therefore, (1) the intentional opening of the page (2) by a government official (3) as a place for free and open expression (4) made the page and its comments section a public forum.<sup>210</sup>

The court rejected the notion that the page remained private because of Facebook's status as a private entity—rather than a state actor.<sup>211</sup> The court reasoned that because Randall, a public official, maintained significant control over the page and the comments posted thereon, the page was not

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199. *Id.*

200. *Id.*

201. *Id.* at 676.

202. *Id.*

203. *Id.* at 677, 691.

204. *Id.* at 679–80, 682.

205. *Id.* at 680.

206. *Id.* (quoting *Harris v. Harvey*, 605 F.2d 330, 337 (7th Cir. 1979)).

207. *Id.* at 682.

208. *Id.*

209. *Id.* (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

210. *Id.* at 688.

211. *Id.* at 683.

private property beyond the scope of a public forum analysis.<sup>212</sup> Although Facebook, a private entity, allowed Randall to create the page, the court found that the page was a public forum due in part to a state official's significant control.<sup>213</sup>

*B. Knight First Amendment Institute at Columbia University v. Trump*

Similarly, the Second Circuit found that President Trump engaged in impermissible viewpoint discrimination when he blocked seven Twitter users from viewing his account because of the political views they expressed.<sup>214</sup> Because President Trump had intentionally used his Twitter account for official government announcements, Trump had created a public forum with his Twitter account.<sup>215</sup>

President Trump set up his Twitter account, @realDonaldTrump, in 2009, six years before he announced his candidacy for president.<sup>216</sup> He frequently tweeted in an individual capacity before and throughout his candidacy<sup>217</sup> and continues to post personal opinions as president.<sup>218</sup> However, the "biography" section of President Trump's account has identified him as the "45th President of the United States of America" since he took office.<sup>219</sup> His first press secretary stated that Trump's tweets should be interpreted as official statements of the president.<sup>220</sup> He has used the account to announce major government personnel decisions<sup>221</sup> and changes in executive branch policy.<sup>222</sup> President Trump is primarily responsible for producing the content of his tweets, although the White House social media director Dan Scavino also has access to the account and has written many of the tweets sent from the account.<sup>223</sup> There is a separate Twitter account, @POTUS, that the

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212. *Id.*

213. *Id.* at 683–85.

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

215. *Id.*

216. *Id.* at 231.

217. Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 28, 2014, 8:21 PM), <https://twitter.com/realdonaldtrump/status/516382177798680576> [<https://perma.cc/9VYB-8LFD>]; Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 22, 2012, 4:48 PM), <https://twitter.com/realdonaldtrump/status/260482827458592768> [<https://perma.cc/4GG3-YP7N>].

218. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 27, 2019, 8:06 AM), <https://twitter.com/realdonaldtrump/status/1122109651087241216> [<https://perma.cc/U5AV-B9LT>].

219. *Knight*, 928 F.3d at 231.

220. *Id.*

221. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 13, 2019, 8:44 AM), <https://twitter.com/realdonaldtrump/status/973540316656623616> [<https://perma.cc/B6XB-XTFG>].

222. *Knight*, 928 F.3d at 232; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 9:04 AM), <https://twitter.com/realdonaldtrump/status/890196164313833472> [<https://perma.cc/3GRD-PMZ5>]; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 8:55 AM), <https://twitter.com/realdonaldtrump/status/890193981585444864> [<https://perma.cc/A4PY-RYJ7>].

223. *Knight*, 928 F.3d at 232.

Trump White House assumed from the Obama administration after President Trump's inauguration.<sup>224</sup> Nevertheless, President Trump has continued to use his initially private @realDonaldTrump account as his primary vehicle for tweeting.<sup>225</sup>

Twitter has interactive features that allow a user to post a tweet and in turn allows "followers"<sup>226</sup> of the user's account to reply directly to the tweet.<sup>227</sup> This is called a "reply."<sup>228</sup> If the account is public, anybody with a Twitter account can reply to the tweet with their own comment.<sup>229</sup> President Trump tweets frequently from his public account<sup>230</sup> and, with over sixty million accounts following him, he receives thousands of replies to each tweet he sends.<sup>231</sup>

In early 2017, each of the seven plaintiffs individually posted replies critical of President Trump in direct response to some of his tweets.<sup>232</sup> Because of their critical replies, President Trump blocked each of the plaintiff's accounts from viewing his account in May and June of 2017.<sup>233</sup> Blocking these individual accounts rendered the plaintiffs unable to use those accounts to read the president's tweets, read what other Twitter users were writing in response to the president's tweets, or write a reply to either the president or those other users who reply to those tweets.<sup>234</sup> As the Second Circuit noted, blocking the plaintiffs thereby limited their "ability to converse" with other Twitter users in the long thread of comments that result from the replies to the president's tweets.<sup>235</sup>

Similar to the Fourth Circuit's holding in *Davison*, the Second Circuit held that there was sufficient state action to create a public forum on President Trump's Twitter account and that President Trump had engaged in viewpoint discrimination by blocking his critics.<sup>236</sup> The Second Circuit held that President Trump's personal Twitter account is government controlled.<sup>237</sup> Trump had argued that the account could not be government controlled

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224. *Id.* at 235 n.6.

225. *Id.* at 235–36.

226. A person "follows" another on Twitter when she can view that other person's tweets in her own personal Twitter feed. See Vangie Beal, *Twitter Following*, WEBOPEDIA, [https://www.webopedia.com/TERM/T/Twitter\\_following.html](https://www.webopedia.com/TERM/T/Twitter_following.html) [https://perma.cc/KKF7-VA6U] (last visited Feb. 14, 2020).

227. *Knight*, 928 F.3d at 230.

228. *About Different Types of Tweets*, TWITTER, <https://help.twitter.com/en/using-twitter/types-of-tweets> [https://perma.cc/K9CL-Y57C] (last visited Feb. 14, 2020).

229. Leslie Walker, *How to Use the Twitter @Reply*, LIFEWIRE (Nov. 18, 2019), <https://www.lifewire.com/what-is-twitter-reply-3476763> [https://perma.cc/V6EY-7586].

230. Michael D. Shear et al., *How Trump Reshaped the Presidency in over 11,000 Tweets*, N.Y. TIMES (Nov. 2, 2019), <https://www.nytimes.com/interactive/2019/11/02/us/politics/trump-twitter-presidency.html> [https://perma.cc/3JJN-2K7R].

231. *Knight*, 928 F.3d at 231. At the time of the Second Circuit's decision, President Trump's Twitter account had "more than 50 million followers." *Id.*

232. *Id.* at 232.

233. *Id.*

234. *Id.*

235. *Id.* at 238.

236. *Id.* at 236–39; *Davison v. Randall*, 912 F.3d 666, 680 (4th Cir. 2019).

237. *Knight*, 928 F.3d at 235–36.

because he had created it in a personal capacity before he ran for president.<sup>238</sup> But the Second Circuit found that because Trump had “repeatedly used the [a]ccount *as an official vehicle for governance*,” there was sufficient state action to make the case amenable to judicial review.<sup>239</sup>

After finding sufficient state action for a First Amendment inquiry, the court found that, by making its interactive features accessible to public Twitter users, Trump had “intentionally opened” the account for public discussion.<sup>240</sup> Because he had so opened his account for discussion, Trump had made that interactive space a public forum.<sup>241</sup>

The court conceded that the tweets Trump posted himself for governance are government speech.<sup>242</sup> Thus, Trump is under no obligation to maintain neutrality when he tweets.<sup>243</sup> However, the court maintained that Trump’s tweets themselves are not the public forum at issue.<sup>244</sup> Instead, the interactive thread of replies where public Twitter users can post *in response to* a Trump tweet was what the court considered a public forum.<sup>245</sup> President Trump had therefore created a public forum through his Twitter account because he set up the account to allow other users to reply to and converse with other such repliers.<sup>246</sup>

The court then concluded that, because Trump had created a public forum, he had engaged in viewpoint discrimination when he blocked the plaintiffs for posting critical replies within the public forum.<sup>247</sup> By blocking the plaintiffs, President Trump had burdened not only their ability to express themselves directly to him but also their ability to converse with the thousands of other Twitter users who post replies in the interactive thread created by his tweets.<sup>248</sup> By excluding users based on their viewpoints from conversing with himself and others in the public forum of the interactive Twitter threads, President Trump had discriminated against them in a public forum.<sup>249</sup>

### C. Morgan v. Bevin

In 2018, the Eastern District of Kentucky took on a similar case in *Morgan v. Bevin*,<sup>250</sup> when two plaintiffs sued Kentucky Governor Matt Bevin for blocking them on Twitter and banning them from viewing his Facebook account.<sup>251</sup> Unlike the circuit courts in the *Davison* and *Knight* cases, the

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238. *Id.* at 234.

239. *Id.* at 237 (emphasis added).

240. *Id.*

241. *Id.*

242. *Id.* at 239.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.* at 237.

247. *Id.* at 238.

248. *Id.* at 238–39.

249. *Id.* at 238.

250. 298 F. Supp. 3d 1003 (E.D. Ky. 2018).

251. *Id.* at 1006.

court in *Morgan* held that Governor Bevin had not violated the plaintiffs' First Amendment rights by prohibiting them from viewing his social media accounts.<sup>252</sup> The court concluded that the public forum analysis was inapposite because Facebook and Twitter are "privately owned channels of communication," and a public official's use of his accounts did not make them public property subject to First Amendment restrictions.<sup>253</sup> Thus, unlike the Fourth Circuit in *Davison*, the court did not find that a government official's "significant control" over a privately owned account rendered the account a public forum.<sup>254</sup>

### III. RECONCILING THE CIRCUIT COURTS' FINDINGS WITH THE COMPELLED SPEECH DOCTRINE

Part III examines the First Amendment policy underlying the circuit courts' findings regarding public forums on politicians' social media accounts and assesses the private First Amendment rights of social media companies in light of their internal structures. Part III.A assesses the arguments about whether social media accounts of politicians are public forums. Part III.B analyzes how these social media companies exercise the sort of editorial control that the Supreme Court has held to be protected from government interference.

#### *A. Merits of Finding Public Forums in Elected Officials' Social Media Accounts*

There are several legal and policy reasons to view the social media accounts of politicians as public forums that provide protection from viewpoint discrimination. However, some observers have rejected viewing these accounts as public forums.

##### 1. Arguments for Holding That Politicians' Social Media Accounts Are Public Forums

Proponents of extending the public forum doctrine to the interactive spaces hosted on public officials' social media accounts rest their arguments on several bases. One argument for extending the doctrine is that social media is now as essential for public discourse as town squares once were.<sup>255</sup> Therefore, the interest in providing public forums to facilitate the free exchange of ideas that foster democratic self-governance extends to social media.<sup>256</sup> In this view, the law must place greater restrictions on politicians who wish to curtail the expression of critical viewpoints on social media sites.<sup>257</sup> Second, proponents of adopting the public forum doctrine contend

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252. *Id.* at 1010.

253. *Id.* at 1011.

254. *Davison v. Randall*, 912 F.3d 666, 683 (4th Cir. 2019); *Morgan*, 298 F. Supp. 3d at 1011.

255. *See Nunziato, supra* note 12, at 59.

256. *See id.*

257. *See id.*



that if public servants were allowed to block public followers or delete those followers' comments, it would restrict an important tool of citizenry in modern America.<sup>258</sup> Similarly, one of the attorneys representing the plaintiffs in their suit against President Trump feared that failing to extend the doctrine would allow public officials to “[pick] and choos[e] who is allowed to speak” and thus engage in the most fundamental example of viewpoint discrimination by choosing only the voices of their supporters.<sup>259</sup>

## 2. Arguments Against Social Media as Public Forums

Opponents of the courts' adoption of the public forum doctrine for social media accounts wielded by elected officials point to several reasons. Noah Feldman, a professor at Harvard Law School, notes that Twitter and Facebook are private entities, as are the individual accounts and pages of each of their users.<sup>260</sup> Thus, because these companies are privately owned, there is no state action when a user deploys the privately created tools at her disposal to block other users or delete content.<sup>261</sup>

In addition, at least one critic argues that insufficient state action exists if an individual continues to use a previously private account once she assumes elected office.<sup>262</sup> In other words, if government officials have control over their social media accounts, those accounts can only be public forums if they were initially created by government officials.<sup>263</sup> Lastly, and in a similar vein, Eugene Volokh, a professor of First Amendment law at the UCLA School of Law, argues that elected officials who run accounts in a personal capacity do not act on behalf of the government to create a public forum.<sup>264</sup>

### B. Social Media Companies Exercising Editorial Judgment

Facebook and Twitter exhibit their editorial discretion in four ways: (1) through algorithms created by programmers that orient the information on users' accounts and feeds; (2) through algorithms that give users the tool to remove certain content themselves; (3) removing accounts or banning users entirely; and (4) by having employees directly remove and police content that violates their policies. This section discusses each of these instances of

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258. Robert Loeb, *Blocking Twitter Users from the President's Account*, LAWFARE (June 13, 2017, 5:31 PM), <https://www.lawfareblog.com/blocking-twitter-users-presidential-account-0> [<https://perma.cc/BB6N-5GGW>]; see also Marimow, *supra* note 184.

259. Marimow, *supra* note 184.

260. Noah Feldman, *Constitution Can't Stop Trump from Blocking Tweets*, BLOOMBERG OPINION (June 7, 2017, 12:39 PM), <https://www.bloomberg.com/opinion/articles/2017-06-07/constitution-can-t-stop-trump-from-blocking-tweets> [<https://perma.cc/23L9-S6TF>].

261. *Id.*

262. See Lauren Beausoleil, Comment, *Is Trolling Trump a Right or a Privilege?: The Erroneous Finding in Knight First Amendment Institute at Columbia University v. Trump*, 60 B.C. L. REV. ELECTRONIC SUPPLEMENT II-31, II-43 (2019).

263. *Id.*

264. Eugene Volokh, *More on the First Amendment and @realDonaldTrump*, WASH. POST: VOLOKH CONSPIRACY (June 14, 2017, 8:44 PM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/14/more-on-the-first-amendment-and-realdonaldtrump> [<https://perma.cc/U35H-GEDE>].

discretion in turn, explores the private speech rules social media companies institute for their websites, and analyzes the extent to which the First Amendment protects these aspects of social media discretion.

Websites and search engines create algorithms to populate users' searches.<sup>265</sup> Even though search results are automated by an algorithm, the search engine's programmers have written the algorithm and selected how to prioritize search results.<sup>266</sup> Facebook and Twitter also have algorithms to sort how users see content posted by their friends and family.<sup>267</sup> This digitized discretion is akin to human publishers deciding what to print and not to print and is an instance of editorial judgment protected by the First Amendment.<sup>268</sup>

Similarly, social media companies like Twitter and Facebook have programmed tools that allow users to remove content, report content that these users do not wish to see on their own accounts, and block other users from viewing the information they post.<sup>269</sup> This is what enabled Phyllis Randall to delete Brian Davison's comment and ban him from viewing her page and what allowed President Trump to block his critics on Twitter.<sup>270</sup> The companies' programmers consciously designed these user tools as another way to regulate the information that will appear on their sites.<sup>271</sup> Therefore, the ability of any given user to block a follower or delete a comment ultimately results from the *companies'* editorial judgment to create such an ability on their sites.<sup>272</sup>

Another relevant tool of editorial discretion that social media companies can exercise is removing accounts or banning users. Twitter, for example, has banned several prominent conspiracy theorists who posted hateful or misleading content on the site.<sup>273</sup> Twitter therefore inhibits and removes the people who write and post such content.

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265. Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Search Results*, 8 J.L. ECON. & POL'Y 883, 884, 888 (2012).

266. *See id.* at 888.

267. GILLESPIE, *supra* note 161, at 7.

268. *See* Volokh & Falk, *supra* note 265, at 887.

269. *Basic Privacy Settings & Tools: Selecting an Audience for Stuff You Share*, FACEBOOK, <https://www.facebook.com/help/325807937506242> [https://perma.cc/D4TQ-GTAY] (last visited Feb. 14, 2020); *How to Control Your Twitter Experience*, TWITTER, <https://help.twitter.com/en/safety-and-security/control-your-twitter-experience> [https://perma.cc/72PR-M4SH] (last visited Feb. 14, 2020).

270. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 231 (2d Cir. 2019); *Davison v. Randall*, 912 F.3d 666, 683–85 (4th Cir. 2019).

271. Feldman, *supra* note 260.

272. *See id.*

273. Elle Hunt, *Milo Yiannopoulos, Rightwing Writer, Permanently Banned from Twitter*, GUARDIAN (July 20, 2016, 12:43 AM), <https://www.theguardian.com/technology/2016/jul/20/milo-yiannopoulos-nero-permanently-banned-twitter> [https://perma.cc/3D44-66SZ]; Avie Schneider, *Twitter Bans Alex Jones and InfoWars; Cites Abusive Behavior*, NPR (Sept. 6, 2018, 5:34 PM), <https://www.npr.org/2018/09/06/645352618/twitter-bans-alex-jones-and-infowars-cites-abusive-behavior> [https://perma.cc/TU2M-6VD5].

Social media companies also pay employees or contractors to rearrange or remove posts themselves, rather than through algorithms or users.<sup>274</sup> Facebook employs workers who select and prioritize the news stories and content its users receive on their “news feeds.”<sup>275</sup> Facebook also hires contractors to monitor the site and decide “which videos count as hate speech” or “are too violent to be broadcast” and thereafter remove such posts.<sup>276</sup> The employees at YouTube, the video-sharing platform, similarly determine if certain videos are too graphic to be displayed to users who enable “restricted mode.”<sup>277</sup> Lower federal courts have begun to recognize this direct removal as an exercise of editorial discretion protected by the First Amendment.<sup>278</sup>

Facebook has its “community standards” and Twitter has terms of service that function as the rules of engagement on the respective websites.<sup>279</sup> When social media companies set community standards and terms of service, they define what sorts of speech the companies will permit on their websites and what posts they will remove.<sup>280</sup> Posts that violate these rules may be removed directly by the companies’ employees or contractors.<sup>281</sup>

Some of these rules prohibit users from posting content that would be unprotected by the First Amendment, like incitement to violence.<sup>282</sup> For example, Facebook will likely remove a post intended to incite violence because such a post violates its community standards.<sup>283</sup> This is analogous to the power the government has to restrict the same inciting speech if it was shouted in a public place.<sup>284</sup>

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274. Chris Hughes, Opinion, *It’s Time to Break Up Facebook*, N.Y. TIMES (May 9, 2019), <https://www.nytimes.com/2019/05/09/opinion/sunday/chris-hughes-facebook-zuckerberg.html> [<https://perma.cc/G7GY-ARPB>]; Sam Thielman, *Facebook News Selection Is in Hands of Editors Not Algorithms, Documents Show*, GUARDIAN (May 12, 2016, 12:51 PM), <https://www.theguardian.com/technology/2016/may/12/facebook-trending-news-leaked-documents-editor-guidelines> [<https://perma.cc/9JMD-6M8B>].

275. Ramya Sethuraman, *Why Am I Seeing This?: We Have an Answer for You*, FACEBOOK NEWSROOM (Mar. 31, 2019), <https://newsroom.fb.com/news/2019/03/why-am-i-seeing-this/> [<https://perma.cc/6XRX-3V4E>]; Thielman, *supra* note 274.

276. Hughes, *supra* note 274.

277. Answering Brief of Appellees at 39–40, *Prager Univ. v. Google LLC*, No. 18–15712 (9th Cir. Oct. 31, 2018).

278. *See La’Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017); *Jian Zhang v. Baidu.com Inc.*, 10 F. Supp. 3d 433, 440 (S.D.N.Y. 2014); *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631 (D. Del. 2007).

279. GILLESPIE, *supra* note 161, at 7.

280. *See, e.g., Community Standards: Violence and Criminal Behavior*, FACEBOOK, [https://www.facebook.com/communitystandards/violence\\_criminal\\_behavior](https://www.facebook.com/communitystandards/violence_criminal_behavior) [<https://perma.cc/HUZ2-DRKK>] (last visited Feb. 14, 2020); *see also Hateful Conduct Policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> [<https://perma.cc/3YKC-P3HE>] (last visited Feb. 14, 2020).

281. *See Hughes, supra* note 274.

282. *See, e.g., Community Standards: Violence and Incitement*, FACEBOOK, [https://www.facebook.com/communitystandards/credible\\_violence](https://www.facebook.com/communitystandards/credible_violence) [<https://perma.cc/YL7U-89MV>] (last visited Feb. 14, 2020).

283. *See Community Standards: Violence and Criminal Behavior, supra* note 280.

284. *See Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

However, these internal company rules restrict some categories of speech on their sites that would be immune from government censorship.<sup>285</sup> For example, Facebook states in its community standards that it will remove content posted on the site if it is “cruel and insensitive.”<sup>286</sup> Specifically, Facebook will remove posts that are “explicit attempts to mock victims.”<sup>287</sup> Such “cruel and insensitive” speech is likely protected by the First Amendment from government interference.<sup>288</sup> It does not belong in one of the narrow, well-defined categories unprotected from government intrusion by the First Amendment.<sup>289</sup> Thus, by instituting a rule allowing the company to remove “cruel and insensitive” speech, Facebook has decided that it may restrict some content that is constitutionally protected from state restriction.<sup>290</sup>

A theoretical example from the political world clarifies the gray area of rules here. A Facebook user could have posted a comment on Representative Gabby Giffords’s Facebook account after she was the victim of a shooting in 2011, seeking to humiliate her for the attack.<sup>291</sup> That user likely would have engaged in “cruel and insensitive speech” because she mocked a shooting victim.<sup>292</sup> Therefore, because the post would have violated its rule against cruel and insensitive speech, Facebook could have deleted the post.<sup>293</sup> But if that same user orally mocked Gabby Giffords in a public park, government officials could not stop that user because even cruel and insensitive speech is likely protected by the First Amendment, unless the speech is obscene, libelous, inciting, or uses fighting words.<sup>294</sup> But because it is a private entity that may choose its own speech rules, Facebook is permitted to remove that content.<sup>295</sup> Therefore, cruel and insensitive speech represents a category of speech that is constitutionally protected from government intrusion when uttered in public but may be amenable to Facebook’s own restrictions because it violates the company’s private rules.

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285. *Compare* *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (holding that the First Amendment even protects speech that “demeans on the basis of race, gender, religion, age disability, or any similar ground”), with *Community Standards: Hate Speech*, FACEBOOK, [https://www.facebook.com/communitystandards/hate\\_speech/](https://www.facebook.com/communitystandards/hate_speech/) [https://perma.cc/E3DQ-DE7K] (last visited Feb. 14, 2020) (prohibiting hate speech on Facebook).

286. *Community Standards: Cruel and Insensitive*, FACEBOOK, [https://www.facebook.com/communitystandards/cruel\\_insensitive/](https://www.facebook.com/communitystandards/cruel_insensitive/) [https://perma.cc/PJ4A-6NR9] (last visited Feb. 14, 2020).

287. *Id.*

288. *See, e.g.,* *Cohen v. California*, 403 U.S. 15, 19–20 (1971).

289. *See* *Miller v. California*, 413 U.S. 15, 20 (1973).

290. *Matal*, 137 S. Ct. at 1764; *Miller*, 413 U.S. at 20.

291. Marc Lacey & David M. Herszenhorn, *In Attack’s Wake, Political Repercussions*, N.Y. TIMES (Jan. 8, 2011), <https://www.nytimes.com/2011/01/09/us/politics/09giffords.html> [https://perma.cc/BRT7-XHPG].

292. *See Community Standards: Cruel and Insensitive*, *supra* note 286.

293. *Id.*; *see also* 47 U.S.C. § 230 (2018).

294. *See* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

295. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019).

IV. POLITICIANS' SOCIAL MEDIA ACCOUNTS ARE NOT PUBLIC FORUMS,  
AND RULING OTHERWISE MAY COMPEL SOCIAL MEDIA COMPANIES'  
SPEECH

Part IV concludes by assessing the circuit courts' rulings and proposing a resolution. Part IV.A argues that the Second and Fourth Circuits misapplied the public forum doctrine to the social media accounts of government officials because Twitter and Facebook are private entities that retain ultimate control over the content on their sites. Part IV.B further argues that these rulings have effectively undermined social media companies' First Amendment rights by restricting the ability of political users to remove content or block users, an ability that the companies have created with their editorial judgments. Part IV.C then offers policy reasons for why we must understand these rulings as instances of unconstitutionally compelled speech in the modern political environment taking shape on social media.

*A. The Circuit Courts Misapplied the Public Forum Doctrine to Trump's  
and Randall's Social Media Accounts*

Twitter and Facebook are private entities.<sup>296</sup> They are neither branches of government nor controlled by the government; when they act, they do so privately.<sup>297</sup> Even if one assumes that Trump and Randall acted on behalf of the state to block followers and delete comments, respectively, Twitter and Facebook retain ultimate control over those decisions.<sup>298</sup> It was the active choice of those companies to give all users—including Trump and Randall—the tools to block other users or delete comments.<sup>299</sup> If these companies so chose, they could remove those tools entirely.<sup>300</sup> That a government official exerts “significant control” over her account does not change the fact that the blocking and deleting tools are ultimately the companies' decisions.<sup>301</sup>

The decisions about what content will remain on the sites ultimately lie with the companies themselves, even though independent users can block others or remove content. Therefore, there is insufficient state action to overcome the social media companies' private status and to designate a public forum when politicians delete comments or block users.<sup>302</sup> The control that public officials exert over the expression permitted on their accounts is ultimately illusory because the companies possess such control.<sup>303</sup> The companies could even use their own discretion to remove Trump or Randall from their sites completely.<sup>304</sup> Twitter banned conspiracy theorist Alex Jones in 2018 for violating company policies, completely

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296. See Jackson, *supra* note 6, at 131–32.

297. See Kyle Langvardt, *Regulating Online Content Moderation*, 106 GEO. L.J. 1353, 1355–57 (2018).

298. Feldman, *supra* note 260.

299. See *supra* Part III.B.2.

300. Feldman, *supra* note 260.

301. See *Davison v. Randall*, 912 F.3d 666, 683 (4th Cir. 2019).

302. See *supra* Part I.B.2.

303. See Feldman, *supra* note 260.

304. See *id.*

eliminating any expressive interactions that could occur on his account.<sup>305</sup> Twitter could likewise decide to remove President Trump's account, too.<sup>306</sup> In this way, social media companies are much like the parade organizers in *Hurley*, whom the Supreme Court held had a First Amendment right to exclude marchers they did not wish to include.<sup>307</sup> This removal power demonstrates that these private companies retain ultimate control over what expression may occur on their websites, not the politicians using blocking or deleting tools.

Further, a private entity such as Facebook or Twitter does not become a public forum merely because it is used frequently for expression.<sup>308</sup> Just as the private cable network in *Halleck* did not become a public forum by offering a medium for expressive activity on its public access channels, the provision of an expressive vehicle to users does not make politicians' Facebook and Twitter accounts public forums.<sup>309</sup>

### *B. Why These Rulings Are Instances of Unconstitutional Compelled Speech*

Even though the circuit court decisions may have protected some social media users from retribution for criticizing politicians on social media, these decisions may have been instances of unconstitutional compelled speech because of the centrality of expression to social media and the editorial discretion social media companies possess.

#### 1. Expression Is Central to Compelled Speech Protection

In addition to the role it plays in the public forum analysis, the centrality of expression on social media affects these companies in another realm of First Amendment law: compelled speech. Litigants such as the plaintiffs in *Knight* and *Davison* may contend that social media sites are analogous to the shopping center in *PruneYard*.<sup>310</sup> That is, like the shopping center, Twitter and Facebook are the types of private entities that the government may compel to host speech without violating the First Amendment.<sup>311</sup> However, Facebook and Twitter are distinguishable from the shopping center in *PruneYard* for one crucial reason: their purpose is to provide an expressive outlet.

The Court explained this distinction in *Pacific Gas & Electric Co.*, stating that the law at issue in *PruneYard* was not an instance of unconstitutional compelled speech because it did not burden the mall owner's own speech.<sup>312</sup> Although the mall hosted pamphlet distribution, its purpose was commercial

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305. See *Schneider*, *supra* note 273.

306. See *Feldman*, *supra* note 260.

307. See *supra* Part I.D.1; see also *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 573 (1995).

308. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 805 (1985).

309. *Manhattan Cmty. Access Corp. v. Halleck*, 139 S. Ct. 1921, 1930 (2019).

310. See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87–88 (1980).

311. *Id.*

312. *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 12 (1986).

activity, not expressive activity.<sup>313</sup> It was unlike a company newsletter,<sup>314</sup> a parade,<sup>315</sup> or a newspaper,<sup>316</sup> which are all inherently expressive in nature. The fact that expression was not at the center of the mall's purpose meant that there was no editorial function or editorial judgment at the mall owner's disposal.<sup>317</sup> Therefore, the California constitution compelling the mall owner to host the canvassers could not violate the First Amendment in the way the Court articulated in *Tornillo*—by “intru[ding] into the function of editors.”<sup>318</sup>

This is precisely what distinguishes Twitter and Facebook from the mall in *PruneYard*.<sup>319</sup> Speech and expressive activity are at the heart of these social media companies' business.<sup>320</sup> As inherently expressive outlets, these companies should be accorded the same protection for their editorial functions as newspapers or company newsletters.

## 2. Why the First Amendment Protects Social Media's Editorial Discretion

The editorial judgment protected from government interference is the right to decide what content a company will and will not publish.<sup>321</sup> When social media sites algorithmically sort information, create tools for users to delete comments or block followers, directly remove content, and suspend personal accounts, they decide what to publish or not to publish on their sites.<sup>322</sup> Through these various mechanisms, the content that remains on Facebook or Twitter is at the discretion of the companies themselves.<sup>323</sup> Therefore, Twitter and Facebook exercise the “editorial control and judgment” over expressive content that is protected from government interference by the First Amendment.<sup>324</sup> Lower courts have recognized that social media companies have a First Amendment right to choose what to say or not to say, and they can decide what their users can say or not say on their platforms.<sup>325</sup> The Southern District of Texas applied this principle to social media best when it recognized that Facebook has a “First Amendment right to decide what to publish and what not to publish on its platform.”<sup>326</sup>

One of the primary editorial judgments social media companies have made is to bestow their users with the abilities to block other users or delete

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313. *Id.*

314. *Id.* at 8.

315. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 568–69 (1995).

316. *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 248 (1974).

317. *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 88 (1980).

318. *Tornillo*, 418 U.S. at 258.

319. *PruneYard*, 447 U.S. at 88.

320. *See supra* Part I.D.2.

321. *Tornillo*, 418 U.S. at 258.

322. *See supra* Part III.B.

323. *See supra* Part III.B.

324. *Tornillo*, 418 U.S. at 258.

325. *La'Tiejira v. Facebook, Inc.*, 272 F. Supp. 3d 981, 991 (S.D. Tex. 2017), *appeal dismissed*, No. 17–20565, 2018 WL 1224417 (5th Cir. Feb. 15, 2018); *see also* *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 631 (D. Del. 2007).

326. *La'Tiejira*, 272 F. Supp. 3d at 991.

comments from other users.<sup>327</sup> Twitter and Facebook consciously designed these tools to regulate what content users can see and whom they can connect with.<sup>328</sup> If they stand, the holdings of the circuit courts could intrude into this editorial judgment. Politicians may no longer be permitted to block followers or delete comments from other users.<sup>329</sup> The rulings would therefore compel a social media experience for elected officials that diverges from what the sites have designed through their editorial discretion. Further, politicians may be unable to remove abusive content, even if it violates the companies' rules. Therefore, if the company does not remove the content itself, abusive content may remain on political accounts. The rulings would thus compel the sites to host speech that they have explicitly banned, further abridging their independent judgments of what to publish or what not to publish on their sites.<sup>330</sup>

The physical medium of the internet also means that these sites do not fall into the category of companies amenable to regulation like the broadcaster in *Red Lion*.<sup>331</sup> Because there is no scarcity of space or wave length on the internet that requires a government-licensed monopoly, Facebook and Twitter are not subject to anything like the fairness doctrine to compel equal space to all sides of an argument.<sup>332</sup> If users are unhappy with the content they observe on one social media site, they can simply go to another website for the information.<sup>333</sup> Therefore, these sites are much more like the newspaper in *Tornillo*, the parade organizers in *Hurley*, or the company in *Pacific Gas & Electric Co.*, all of which were protected by the First Amendment from intrusions into their expressive activities or editorial decisions.<sup>334</sup>

### C. Why Social Media's Editorial Control over Content Is Important

The tools that social media companies use to exercise editorial control over content are not merely niceties that should be legally respected due to their private nature. They are critical functions that keep the sites healthy for users.

Harassment and hate are rampant problems that users frequently face on social media platforms.<sup>335</sup> Harassment is a particular problem for women in

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327. See *supra* Part III.B.2.

328. Feldman, *supra* note 260.

329. *Id.*

330. See *supra* Part III.B.

331. *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 386–89 (1969).

332. *Id.*; see also *Reno v. ACLU*, 521 U.S. 844, 868 (1997) (recognizing that the internet lacks the scarcity that justified regulations on the content of broadcast media).

333. See *Reno*, 521 U.S. at 868–69.

334. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 576 (1995); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 16 (1986); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

335. Debbie Chachra, *Twitter's Harassment Problem Is Baked into Its Design*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/technology/archive/2017/10/twitters-harassment-problem-is-baked-into-its-design/542952/> [https://perma.cc/4DXW-NLZT]; Taylor Lorenz, *Instagram Has a Massive Harassment Problem*, ATLANTIC (Oct. 15, 2018),



the public eye. A recent study found that over 7 percent of all tweets directed at female politicians and journalists in the United States were either “abusive” or “problematic.”<sup>336</sup> This amounted to one abusive tweet directed at these women every thirty seconds.<sup>337</sup> Black women, in particular, were 84 percent more likely to be targeted by such speech than their white counterparts.<sup>338</sup>

Another study showed that in the weeks leading up to her first election to Congress, Representative Ilhan Omar, a Muslim refugee from Somalia, received over 90,000 tweets directed at her Twitter account.<sup>339</sup> Almost 60 percent of them contained either Islamophobic or xenophobic hate speech.<sup>340</sup> The problem extends beyond abuse directed at women of color and immigrants. A study by the Anti-Defamation League found that social media users disproportionately harassed the Jewish community, including Jewish politicians, in the months before the 2018 midterm elections.<sup>341</sup>

Because abuse directed at politicians on social media is such a substantial problem, these companies need to retain discretion to police such abuse. Given the sheer quantity of posts on their websites each day, it is nearly impossible for Twitter and Facebook to remove all intolerable content through their own employees and contractors.<sup>342</sup> To compensate for their inability to police all such content themselves, Twitter and Facebook have made the editorial judgment to enable independent users to remove hateful content or block discriminatory users.<sup>343</sup>

Therefore, by ruling that these accounts are public forums in which elected officials cannot remove content or block users, the circuit courts have disabled a necessary tool for politicians to combat hate. As social media companies’ efforts to sanitize their content garners heightened scrutiny,<sup>344</sup> taking away these discretionary tools, at least as they pertain to public officials, is an unwarranted restriction of the companies’ First Amendment rights.

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<https://www.theatlantic.com/technology/archive/2018/10/instagram-has-massive-harassment-problem/572890/> [<https://perma.cc/U8F9-PHXB>].

336. *Troll Patrol Findings*, AMNESTY INT’L, <https://decoders.amnesty.org/projects/troll-patrol/findings> [<https://perma.cc/XCT5-BQ3U>] (last visited Feb. 14, 2020).

337. *Id.*

338. *Id.*

339. Lawrence Pintak et al., Opinion, *The Online Cacophony of Hate Against Ilhan Omar and Rashida Tlaib*, N.Y. TIMES (Nov. 5, 2019), <https://www.nytimes.com/2019/11/05/opinion/ilhan-omar-rashida-tlaib.html> [<https://perma.cc/FZ4B-CC5L>].

340. *Id.*

341. SAMUEL WOOLLEY, COMPUTATIONAL PROPAGANDA, JEWISH-AMERICANS AND THE 2018 MIDTERMS: THE AMPLIFICATION OF ANTI-SEMITIC HARASSMENT ONLINE 7, 12 (2018), <https://www.adl.org/media/12028/download> [<https://perma.cc/Y3CA-882Y>].

342. See, e.g., GILLESPIE, *supra* note 161, at 7; see also Adrian Chen, *The Laborers Who Keep Dick Pics and Beheadings out of Your Facebook Feed*, WIRED (Oct. 23, 2014, 6:30 AM), <https://www.wired.com/2014/10/content-moderation/> [<https://perma.cc/2S8F-DZCV>].

343. Feldman, *supra* note 260.

344. See, e.g., GILLESPIE, *supra* note 161, at 39–42; see also Steven Levy, *The Guy Who Wrote Facebook’s Content Rules Says Its Politician Hate Speech Exemption Is “Cowardice,”* WIRED (Sept. 30, 2019, 3:45 PM), <https://www.wired.com/story/facebook-content-standards-politicians-exemption-dave-willner/> [<https://perma.cc/8PFY-TANS>].

A potential consequence will be that social media users will gain a right to “troll” politicians in bad faith, knowing that their posts cannot be removed by the politicians.<sup>345</sup> It is not as though these harassing users are necessarily political constituents engaging in good-faith criticisms of their targets’ politics. The study of Representative Omar’s Twitter account found that users from outside of her district had posted most of the harassing content in the weeks before her election.<sup>346</sup> Thus, the courts’ rulings may make politicians more vulnerable to abuse and harassment from bad-faith actors, not merely constituents seeking to provide honest criticism.<sup>347</sup> Consequently, the circuit court holdings may deter politicians from ever utilizing social media to communicate with constituents<sup>348</sup> or might pose steeper challenges to disadvantaged groups seeking to assert their voices in the political process.<sup>349</sup>

Therefore, while there is merit to the argument that politicians should not “[pick] and choos[e]” whom they will allow to interact with their online accounts,<sup>350</sup> it is ultimately more important to allow social media companies to enable these politicians to police their accounts and prevent hateful rhetoric that is of no civic value. The free speech interests of ordinary users that these rulings protect must yield to the social media companies’ First Amendment right to create a tool that enables users to protect and monitor their accounts.

Therefore, if appealed to the Supreme Court, the Court should find that the interactive sections of politicians’ social media accounts are not public forums and that requiring politicians to permit all criticism on their accounts unconstitutionally compels the speech of the social media companies who have decided to create the tool to block users or delete comments. If similar claims are brought in other district courts or appealed to other circuit courts, such courts should reach similar conclusions.

#### CONCLUSION

As the circuit courts’ decisions stand, politicians who use social media for governance cannot exclude social media users from commenting on or viewing their accounts. These holdings significantly impact politicians’ ability to screen content, which necessarily impacts the ability of social media companies to grant that power to their users. Acknowledging that these decisions unconstitutionally compel speech would properly recognize that social media companies possess editorial independence as private companies and are protected from government intrusion by the First Amendment. Protecting such independence under the compelled speech

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345. Alexis Grenell, *Should We Have a Right to Troll Politicians on Twitter?*, NATION (July 18, 2019), <https://www.thenation.com/article/troll-twitter-aoc-saladino/> [<https://perma.cc/V5DW-HBPY>].

346. Pintak et al., *supra* note 339.

347. Grenell, *supra* note 345.

348. See Hidy, *supra* note 4, at 1083.

349. See Pintak et al., *supra* note 339.

350. See Marimow, *supra* note 184.

doctrine is necessary to allow vulnerable political targets to screen abusive content and to allow social media companies to facilitate healthy political dialogue on their platforms.