

12-27-2019

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Recommended Citation

Liz Grefrath, *#LosingTheThread: Recognizing Assembly Rights in the New Public Forum*, 85 Brook. L. Rev. (2019).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol85/iss1/9>

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#LosingTheThread

RECOGNIZING ASSEMBLY RIGHTS IN THE NEW PUBLIC FORUM

*“Free Country
Means You Get to Connect
Means the Right to Expect
That You’ll Have an Effect
That You’re Gonna Connect”¹*

INTRODUCTION

The specter of banishment from the vibrant public forum of social media to the empty streets and deserted sidewalks is a matter of increasing political, social, and cultural importance.² Today, nearly every government official maintains a social media presence on Facebook or Twitter, generally to promote initiatives, share ideological positions, engage constituents, and tangle with critics.³ Privacy controls and content moderation tools, however, offer government officials tantalizing opportunities to discretely and effectively muffle disapproval, stifle dissent, and shield themselves from criticism on their public social media accounts with “blocking” features.⁴ At the end of 2017, responses to public records requests showed that U.S. governors—Democrat and Republican—and federal agencies had blocked “at least 1,298” individual accounts from their official Facebook and Twitter

¹ STEPHEN SONDEHEIM, *Everybody’s Got the Right (Reprise)*, on ASSASSINS (1991).

² See Nicholas Carr, *How Social Media Is Ruining Politics*, POLITICO (Sept. 2, 2015), <https://www.politico.com/magazine/story/2015/09/2016-election-social-media-ruining-politics-213104> [<https://perma.cc/C5E5-88ML>] (“Social media favors the bitty over the meaty, the cutting over the considered. It also prizes emotionalism over reason. The more visceral the message, the more quickly it circulates and the longer it holds the darting public eye.”).

³ See Transcript of Oral Argument at 28, *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) (No. 15-1194) (Justice Kagan) (“[E]verybody uses Twitter. All [fifty] governors, all [one hundred] senators, every member of the House has a Twitter account. So this has become a crucial—crucially important channel of political communication.”).

⁴ See *How to Block Accounts on Twitter*, TWITTER: HELP CTR., <https://help.twitter.com/en/using-twitter/blocking-and-unblocking-accounts> [<https://perma.cc/EVB4-48VU>]; *What Is Blocking and How Do I Block Someone*, FACEBOOK: HELP CTR., <https://www.facebook.com/help/168009843260943> [<https://perma.cc/WJW3-79SN>].

accounts.⁵ Though most of these blocked accounts belong to individual constituents who recognize themselves as “sassy” critics, some have “no idea why” they were blocked from commenting on or viewing their elected official’s social media page.⁶

The proclivity of politicians to block critical, dissenting, or hostile speech expressed on social media by citizens extends from a relatively modest local government official from Loudoun County, Virginia to the office of the President of the United States.⁷ A most infamous Twitter user, counting over sixty-six million followers as of October 20, 2019,⁸ President Donald J. Trump frequently blocks critics from viewing his @realDonaldTrump Twitter feed.⁹ Such

⁵ Leora Smith & Derek Kravitz, *Governors and Federal Agencies Are Blocking Nearly 1,300 Accounts on Facebook and Twitter*, PROPUBLICA (Dec. 8, 2017, 12:43 p.m. EST), <https://www.propublica.org/article/governors-and-federal-agencies-are-blocking-accounts-on-facebook-and-twitter> [<https://perma.cc/AG7W-E92B>].

⁶ *Id.* Unwilling to accept exile from political discourse, some of the 492 account holders blocked from Maryland Governor Larry Hogan’s official Facebook Page started a Group of their own, “[o]pen to all registered Maryland voters who have been blocked by Supreme Benevolent Governor Larry Hogan for criticizing or not sufficiently praising him.” Marylanders Blocked By Larry Hogan on Facebook, FACEBOOK, <https://www.facebook.com/groups/254061628339792> [<https://perma.cc/HXF3-Y7Y9>].

⁷ See Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 549 (S.D.N.Y. 2018) (holding that the interactive space of the President’s Twitter account is a public forum under the First Amendment and that he cannot selectively exclude disfavored voices and critics by using the platform’s blocking feature), *aff’d*, 928 F.3d 226 (2d. Cir. 2019); Davison v. Loudoun Cty. Bd. of Supervisors, 267 F. Supp. 3d 702, 703, 724 (E.D. Va. 2017) (holding that a local county official who used a Facebook Page to engage with her constituents exercised state action when banning a constituent for alleging impropriety in the local school board elections), *aff’d sub nom.* Davison v. Randall, 912 F.3d 666, 666–67 (4th Cir. 2019); see also Robinson v. Hunt County, 921 F.3d 440, 445–47, 449 (5th Cir. 2019) (finding that a sheriff is a final policymaker with regard to a county sheriff’s Facebook Page and that plaintiff could bring claims for viewpoint discrimination in violation of the First Amendment after her critical comments were deleted and she was banned from the Page by the sheriff); Morgan v. Bevin, 298 F. Supp. 3d 1003, 1005, 1010 (E.D. Ky. 2018) (holding that the Kentucky governor’s official Facebook and Twitter accounts are government speech immune from First Amendment coverage because they are private platforms used by him to communicate his own speech and that he is under no obligation to listen or respond to critical constituents); Leuthy v. LePage, No. 1:17-cv-00296-JAW, 2018 WL 4134628, at *1 (D. Me. Aug. 29, 2018) (refusing to dismiss a lawsuit challenging the Maine governor’s practice of blocking constituents from his official Facebook Page because plaintiffs plausibly stated a claim for violation of their First Amendment rights); Complaint, Laurenson v. Hogan, No. 8:17-cv-02162-DKC (D. Md. Aug. 1, 2017) (complaint against Maryland governor Larry Hogan for blocking critics on Facebook).

⁸ See Donald J. Trump (@realDonaldTrump), TWITTER, <https://twitter.com/realDonaldTrump> [<https://perma.cc/2BKP-VE8T>]. President Trump’s tweets are official Presidential records, which must be preserved. See Letter from David S. Ferriero, Archivist of the U.S., Nat’l Archives and Records Admin., to Sen. Claire McCaskill 2 (Mar. 30, 2017), <https://www.archives.gov/files/press/press-releases/aotus-to-sens-mccaskill-carper.pdf> [<https://perma.cc/J9G8-4X7B>] (“NARA has advised the White House that it should capture and preserve all tweets that the President posts in the course of his official duties, including those that are subsequently deleted, as Presidential records, and NARA has been informed by White House officials that they are, in fact, doing so.”).

⁹ Ashley Feinberg, *A Running List of People Donald Trump Has Blocked on Twitter*, WIRED (June 14, 2017, 03:38 PM EST), <https://www.wired.com/story/donald-trump-twitter-blocked/> [<https://perma.cc/P8QG-FJ5K>].

critics are not only deprived of the opportunity to easily view President Trump's tweets; they are denied the ability to congregate with others in conversational retweets and threads regarding their reactions to his various assertions.¹⁰

Courts are just starting to grapple with the First Amendment implications of exclusion from these new spaces of political discourse and are deliberating whether social media accounts created and controlled by government officials are constitutionally-protected public forums.¹¹ The modern public forum doctrine, however, is dominated by a vision of public forums as places where people speak directly to the government, rather than as spaces where citizens congregate.¹² The speech rights of the loudmouth, the rabble-rouser, the disrupter, and the provocateur are easy to protect, with the help of a willing lawyer.¹³ But what about the rights of the quiet ones to gather and bear witness to the conduct of fellow citizens and government officials in space dedicated to public use? If courts are willing to protect a constitutional right to speak in the interactive spaces of government officials' Twitter threads and Facebook comments, litigators should consider fighting to define a related right to assemble in those spaces. This note builds on recent scholarship dedicated to the "lost" and "forgotten" Assembly Right¹⁴ and applies the concept to equally protect a thoroughly modern right to congregate in virtual spaces for social and political purposes. "More speech, not less"¹⁵ will not happen if the people are prevented from entering the public square and assembling together, regardless of whether they are impeded by police barricades or by Twitter blocks.

¹⁰ See *Retweet FAQs*, TWITTER: HELP CTR., <https://help.twitter.com/en/using-twitter/retweet-faqs> [<https://perma.cc/SLF3-4KHB>].

¹¹ See cases cited *supra* note 7.

¹² See, e.g., *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

¹³ See, e.g., *Lozman v. City of Rivera Beach*, 138 S. Ct. 1945, 1948–49 (2018) (where the Stanford Law School Supreme Court Clinic represented local gadfly Fane Lozman in his lawsuit against the municipality for ordering police to arrest him during the public comment session of an open meeting in retaliation for engaging in speech critical of local politicians); *Texas v. Johnson*, 491 U.S. 397, 398–99 (1989) (where the Center for Constitutional rights represented Gary Lee Johnson in his lawsuit against Texas' prohibition on politically-expressive flag burning); *ACLU v. Wash. Metro. Area Transit Auth.*, 303 F. Supp. 3d 11, 13 (D.D.C. 2018) (where the ACLU represented itself and conservative commentator Milo Yiannopoulos in a lawsuit against the Authority for content-based advertising restrictions).

¹⁴ JOHN D. INAZU, *LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* 2, 21, 22, 61 (2012); see Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 547, 589 (2009).

¹⁵ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 240 (2d. Cir. 2019) ("[I]f the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less.").

Part I of this note offers a short primer on how private social media companies build and engineer responsive interfaces where the potential to connect with others is both easy and limitless.¹⁶ Part II briefly examines the First Amendment public forum doctrine, which sets the level of protection granted to individual speech in forums opened by the government for public comment and discussion. Part III dives into the recent application of traditional public forum analysis to social media, considering two federal court cases where First Amendment advocates have successfully articulated a claim that viewpoint-based social media blocking by government officials on Facebook and Twitter is anathema to those who value individual free speech rights. And Part IV proposes a revitalized use of the Assembly Clause as another path to defining the rights available to individuals who wish to engage with their government officials on private social media platforms as the assembled members of a public collective of citizens and residents.

I. SOCIAL MEDIA: A SHORT PRIMER

A. *Why Use Social Media?*

Social media corporations develop private networking platforms that allow registered users to post information, photos, and videos to their own individual accounts so that others may see, respond to, and engage with their content.¹⁷ People use social media platforms like Facebook, YouTube, Twitter, Instagram, and Snapchat to satisfy a variety of human needs and desires.¹⁸ Friends and family use social media to stay in touch and keep each other

¹⁶ Beyond the scope of this note is the issue of whether private online platform owners, such as Facebook and Twitter, are sufficiently government-like to implicate the state-action doctrine or are self-regulating private entities charged with designing and enforcing a system of governance not at odds with Americans' general expectation of free speech rights. See generally Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598 (2018) (arguing that private social media platforms are private, self-regulating entities that normatively reflect the free speech expectations of their users and encourage participation in a democratic culture).

¹⁷ See *Social Networking Service*, WIKIPEDIA, https://en.wikipedia.org/wiki/Social_networking_service [<https://perma.cc/T2GV-2KLH>].

¹⁸ According to a 2018 Pew Research Center poll, nearly sixty-eight percent of U.S. adults use Facebook; seventy-three percent use YouTube; thirty-five percent use Instagram; twenty-seven percent use Snapchat; and twenty-four percent use Twitter. In total, nearly seven out of ten U.S. adults use at least one social media platform. Most users visit these social media sites multiple times per day either with a computer or on their mobile device. Aaron Smith & Monica Anderson, *Social Media Use in 2018*, PEW RES. CTR. (Mar. 1, 2018), <http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/> [<https://perma.cc/8S9V-756W>].

informed about the major and day-to-day events in their lives.¹⁹ Free online emotional support groups offer succor to people struggling with the hard realities of their lives.²⁰ Some look for comrades to inspire and teach them how to free themselves from the shackles of capitalism and travel the United States in retro-fitted vans,²¹ or achieve financial independence to retire early.²² Some people with disabilities create avatars who live in virtual worlds where some of the most important relationships and moments of their lives unfold and develop.²³ Grassroots organizers have turned to the promise of social media as a tool to link calls for social change and acts of cultural protest, most saliently exemplified in the United States by the #BlackLivesMatter and #MeToo movements.²⁴

People also increasingly use social media to debate and discuss issues of local and national political importance, both with each other as a body politic and directly with their government officials.²⁵ More than 10,000 U.S. federal agencies and sub-agencies, all 100 senators, almost all of the 435 representatives, and thousands of state and local officials and agencies have multiple active social media accounts to serve and engage their constituents and share official information.²⁶

¹⁹ *Facebook Connects Friends and Families That Have Drifted*, FACEBOOK (Aug. 26, 2010, 12:12 AM), <https://www.facebook.com/notes/facebook/facebook-connects-friends-and-families-that-have-drifted/148766578476617/> [https://perma.cc/MGK8-JGZ2].

²⁰ Sarah Zhang, *Facebook Groups as Therapy*, ATLANTIC (Oct. 26, 2018), <https://www.theatlantic.com/technology/archive/2018/10/facebook-emotional-support-groups/572941/> [https://perma.cc/969N-L2J7].

²¹ See Rachel Monroe, *#Vanlife, the Bohemian Social-Media Movement*, NEW YORKER (Apr. 17, 2017), <https://www.newyorker.com/magazine/2017/04/24/vanlife-the-bohemian-social-media-movement> [https://perma.cc/75M8-S9ZT].

²² See Steven Kurutz, *How to Retire in Your 30s with \$1 Million in the Bank*, N.Y. TIMES (Sept. 1, 2018), <https://www.nytimes.com/2018/09/01/style/fire-financial-independence-retire-early.html> [https://perma.cc/T2YU-7G6P].

²³ It is estimated that twenty to fifty percent of the active members of online virtual world Second Life are people living with disabilities, many of whom have joined the platform's utopian Virtual Ability Island. Kristen French, *First They Got Sick, Then They Moved into a Virtual Utopia*, WIRED (Feb. 13, 2017, 12:00 AM), <https://www.wired.com/2017/02/first-they-got-sick-then-they-moved-into-a-virtual-utopia/> [https://perma.cc/ZE4Z-JCAX].

²⁴ See Bijan Stephen, *Get Up, Stand Up: Social Media Helps Black Lives Matter Fight the Power*, WIRED (Nov. 2015), <https://www.wired.com/2015/10/how-black-lives-matter-uses-social-media-to-fight-the-power/> [https://perma.cc/YVW7-5GTL]; Audrey Carlson et al., *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women*, N.Y. TIMES (Oct. 23, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [https://perma.cc/VXT5-P66H].

²⁵ A 2016 Pew Research Center poll found that political debate and discussion is “a regular fact of digital life for social media users” who enjoy posting, debating, and discussing government and politics; however, more than one-third of social media users report being “worn out” by the political content they encounter. MAEVE DUGGAN & AARON SMITH, PEW RESEARCH CTR., *THE POLITICAL ENVIRONMENT ON SOCIAL MEDIA 3* (2016), http://assets.pewresearch.org/wp-content/uploads/sites/14/2016/10/24160747/PI_2016.10.25_Politics-and-Social-Media_FINAL.pdf [https://perma.cc/S229-LLVE].

²⁶ See Brief of Electronic Frontier Foundation as Amicus Curiae in Support of Plaintiffs-Appellees at 4–9, *Knight First Amendment Inst. at Columbia Univ. v. Trump*,

People now expect to participate in political discussions with their elected officials and government institutions online, and public officials have responded by using social media as critical tools of official communication and constituent engagement.²⁷ Local, state, and federal government officials livestream town hall meetings, coordinate emergency responses to natural disasters, issue public service announcements, and advertise government job application periods.²⁸ The government is also using social media to modernize voter registration and enrollment.²⁹ Viewed in the most positive light, the government's embrace of such inexpensive and accessible technology—particularly on the local level—increases “small-d democracy” by facilitating two-way conversations between elected and government officials with previously unreachable constituents.³⁰

Cheap speech, however, is not free.³¹ Social media has been implicated in a wide range of twenty-first century ills, ranging from the digital divide and youth screen addiction,³² to the radicalization

302 F. Supp. 3d 541, 549 (S.D.N.Y. 2018) (No. 17-cv-5205); see also JACOB R. STRAUS, CONG. RESEARCH SERV., R45337, SOCIAL MEDIA ADOPTION BY MEMBERS OF CONGRESS: TRENDS AND CONGRESSIONAL CONSIDERATIONS 3 (2018), [https://perma.cc/4WC3-3XE5](https://fas.org/sgp/crs/misc/R45337.pdf)].

²⁷ See Brief of Amici Curiae First Amendment Legal Scholars in Support of Plaintiff's Motion for Summary Judgment at 17, Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 549 (S.D.N.Y. 2018) (No. 17-cv-5205).

²⁸ See 7 Ways Local Government Can Use Social Media, CIVICPLUS, <https://www.civicplus.com/blog/ce/seven-ways-local-government-can-use-social-media> [<https://perma.cc/N6XE-NYZ9>].

²⁹ See *Social Media Toolkit*, NAT'L VOTER REGISTRATION DAY, <https://nationalvoterregistrationday.org/partner-tools/social-media-assets/> [<https://perma.cc/6GDW-HHK2>].

³⁰ See Laura Royden, *Now Trending: #CityHall on Social Media: New Ways That Cities Are Leveraging Social Platforms*, DATA-SMART CITY SOLUTIONS (Apr. 28, 2016), <https://datasmart.ash.harvard.edu/news/article/now-trending-cityhall-on-social-media-824> [<https://perma.cc/3UTF-EDFJ>].

³¹ In 1995, Eugene Volokh, a prominent First Amendment scholar, wrote that new media and the internet would democratize speech by reducing economic barriers to distributing speech, with the result that “far more speakers—rich and poor, popular and not, banal and avant garde—will be able to make their work available to all.” Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806–07 (1995); see also Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200, 201 (2018) (“No doubt cheap speech has increased convenience, dramatically lowered the costs of obtaining information, and spurred the creation and consumption of content from radically diverse sources. But the economics of cheap speech also have undermined mediating and stabilizing institutions of American democracy including newspapers and political parties, with negative social and political consequences.”).

³² See Nellie Bowles, *The Digital Gap Between Rich and Poor Kids Is Not What We Expected*, N.Y. TIMES (Oct. 26, 2018), <https://www.nytimes.com/2018/10/26/style/digital-divide-screens-schools.html?action=click&module=Top%20Stories&pgtype=Homepage> [<https://perma.cc/F42T-93BC>]; Nicholas Thompson, *Our Minds Have Been Hijacked by Our Phones. Tristan Harris Wants to Rescue Them*, WIRED (July 26, 2017, 4:31 PM), <https://www.wired.com/story/our-minds-have-been-hijacked-by-our-phones-tristan-harris-wants-to-rescue-them/> [<https://perma.cc/E33E-7B22>]. Researchers have demonstrated that Facebook users paid to abstain from the platform for a month gained

of domestic terrorists³³ and stoking state-sponsored and stateless violence.³⁴ Devices that bring technology into our relationships have become more intimately attached to our bodies, integrated into our cognitive capabilities, and invited into our homes.³⁵ And privacy as an individual or common value may already be passé,³⁶ as people continue to use the platforms despite their misgivings because of their ubiquity, convenience, and efficiency.³⁷

B. *Social Media Involves Speech and Response*

The Supreme Court has already recognized the power of social media to encourage individual speech and self-expression. In *Packingham v. North Carolina*, the Court invalidated on First Amendment grounds a state law barring convicted sex offenders from holding social media accounts or accessing websites with social media components, including sites as varied as Facebook, Twitter, the *Washington Post*, and Amazon.³⁸ Writing for the Court, Justice Kennedy asserted that social media platforms—and Facebook in particular—are vehicles for expressive speech, for “[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular.”³⁹

about an hour of leisure time, socialized more in-person with family and friends, consumed less news, and experienced a small increase in general life satisfaction. Hunt Allcott et al., *The Welfare Effects of Social Media* 2–3 (Nat’l Bureau of Econ. Research, Working Paper No. 25514, 2019), <https://www.nber.org/papers/w25514.pdf> [<https://perma.cc/2RPX-T3LA>].

³³ See Kevin Roose, *Cesar Sayoc’s Path on Social Media: From Food Photos to Partisan Fury*, N.Y. TIMES (Oct. 27, 2018), <https://www.nytimes.com/2018/10/27/technology/cesar-sayoc-facebook-twitter.html> [<https://perma.cc/L6HT-GAYY>].

³⁴ See Nick Bilton, *How ISIS Became the World’s Deadliest Tech Start-Up*, VANITY FAIR (June 20, 2016), <https://www.vanityfair.com/news/2016/06/how-isis-became-the-worlds-deadliest-tech-start-up> [<https://perma.cc/3RWL-45UQ>]; Jacob Weisberg, *The Autocracy App*, N.Y. REV. BOOKS (Oct. 25, 2018), <https://www.nybooks.com/articles/2018/10/25/facebook-autocracy-app/> [<https://perma.cc/6KTB-55WV>].

³⁵ See Adam Greenfield, *Rise of the Machines: Who Is the ‘Internet of Things’ Good for?*, GUARDIAN (June 6, 2017), <https://www.theguardian.com/technology/2017/jun/06/internet-of-things-smart-home-smart-city> [<https://perma.cc/AZ45-6TZG>]; Judith Shulevitz, *Alexa, Should We Trust You?*, ATLANTIC (Nov. 2018), <https://www.theatlantic.com/magazine/archive/2018/11/alexa-how-will-you-change-us/570844/> [<https://perma.cc/R95H-TZR5>].

³⁶ See Antonio García Martínez, *How Facebook Binds—and Shatters—Communities*, WIRED (May 11, 2018), <https://www.wired.com/story/how-facebook-binds-and-shatters-communities/> [<https://perma.cc/WQE6-RSXS>].

³⁷ Lee Rainie, *Americans’ Complicated Feelings About Social Media in an Era of Privacy Concerns*, PEW RES. CTR. (Mar. 27, 2018), <https://www.pewresearch.org/fact-tank/2018/03/27/americans-complicated-feelings-about-social-media-in-an-era-of-privacy-concerns/> [<https://perma.cc/S6PA-B2QT>].

³⁸ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736–38 (2017).

³⁹ *Id.* at 1735 (quoting *Reno v. ACLU*, 521 U.S. 844, 868 (1997)).

The *Packingham* Court also recognized in dicta that social media is the primary tool people now choose to communicate and connect with others.⁴⁰ Social media platforms provide “perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to ‘become a town crier with a voice that resonates farther than it could from any soapbox.’”⁴¹ Recognizing that one generally does not hope to speak into a vacuum, the Supreme Court implicitly comprehended that the freedom to speak on social media is tightly connected to the ability to call to—and know that you have reached⁴²—an audience.⁴³ Social media is, at the end of the day, about connecting with others; dreams of potential connections enthrall users and encourage them to return, repeatedly, to the platform.⁴⁴

C. *Responsive and Interactive Spaces on Social Media*

Social media is social, even if the response to our call consists only of mere engagement, such as likes or retweets, in the addictive exchange of “giving and seeking attention.”⁴⁵

⁴⁰ *Id.* at 1732, 1735 (“[Social Media sites] are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. . . . On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos. On LinkedIn, users can look for work, advertise for employees, or review tips on entrepreneurship. And on Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner.”).

⁴¹ *Id.* at 1737 (quoting *Reno*, 521 U.S. at 870).

⁴² Social media addiction is increasingly recognized as a problem exacerbated by the “social-validation feedback loop” engineered into the platform’s responsive capabilities (i.e., Facebook’s “likes” and Twitter’s “retweets” and “love” clicks). Olivia Solon, *Ex-Facebook President Sean Parker: Site Made to Exploit Human Vulnerability*, *GUARDIAN* (Nov. 9, 2017), <https://www.theguardian.com/technology/2017/nov/09/facebook-sean-parker-vulnerability-brain-psychology> [https://perma.cc/ZL89-AGCM]; see Bruce Feiler, *For the Love of Being Liked*, *N.Y. TIMES* (May 9, 2014), <https://www.nytimes.com/2014/05/11/fashion/for-some-social-media-users-an-anxiety-from-approval-seeking.html> [https://perma.cc/6NG7-63TY]; Paul Lewis, *Our Minds Can Be Hijacked: The Tech Insiders Who Fear a Smartphone Dystopia*, *GUARDIAN* (Oct. 6, 2017), <http://www.theguardian.com/technology/2017/oct/05/smartphone-addiction-silicon-valley-dystopia> [https://perma.cc/TX6U-TA74]; Farhad Manjoo, *Even the Tech Elite Are Worrying About Social Media Addiction*, *N.Y. TIMES* (Feb. 14, 2018), <https://www.nytimes.com/interactive/2018/02/09/technology/the-addiction-wrought-by-techies.html> [https://perma.cc/E2HX-U26Y].

⁴³ See, e.g., Alexandra Schwartz, *#MeToo, #ItWasMe, and the Post-Weinstein Megaphone of Social Media*, *NEW YORKER* (Oct. 19, 2017), <https://www.newyorker.com/culture/cultural-comment/metoo-itwasme-and-the-post-weinstein-megaphone-of-social-media> [https://perma.cc/7C7C-4FEE].

⁴⁴ See Rainie, *supra* note 37.

⁴⁵ See Lauren Oyler, *Habitual User: Tweeting on the Verge of a Nervous Breakdown*, *BAFFLER* (No. 41), <https://thebaffler.com/outbursts/habitual-user-oyler> [https://perma.cc/DR4L-695R] (“My self-deprecating commentary—‘nothing more embarrassing than being complimented on your Twitter thread’—never quite manages to ironize itself out of what it is: a

Differentiated from traditional news media such as newspapers and broadcast journalism, social media interfaces are engineered to promote participatory discussions through a diverse range of mediums, including “text, video, audio, live feeds, [and] photos.”⁴⁶ Subsequently, private online platforms, such as Facebook and Twitter, engineer social media interfaces to promote bilateral and multilateral conversations, not just unilateral speech.⁴⁷

1. Facebook

Facebook is the largest social media platform in the United States, counting some sixty-eight percent of U.S. adults as account holders.⁴⁸ The platform’s mission is to “[g]ive people the power to build community and bring the world closer together.”⁴⁹ Facebook users connect with others through private Profiles, public Pages, or a spectrum of public or private Groups.⁵⁰ Profiles feature an individual user’s Timeline, essentially a reverse-chronological, visual, scrolling display of a person’s Facebook activity.⁵¹ Facebook users “follow”⁵² different accounts to see instantaneous and archived posts reflecting other people’s social

plea for attention among infinite other pleas for attention. The ‘connection’ we were promised is not so different from a broadcast: I make up a character and play it for ratings.”)

⁴⁶ Craig Mullaney, *Social Media Promotes Shared Stories Across Boundaries*, N.Y. TIMES: INEDUCATION, <http://nytimesineducation.com/spotlight/social-media-promotes-shared-stories-across-boundaries/> [<https://perma.cc/3A7A-RHQQ>].

⁴⁷ Marketing and advertising professionals are some of the most vocal supporters of the idea that social media is not a megaphone, but about (monetizing) relationships, conversations, and interactions. See, e.g., *A New Megaphone: Social Media Gives Consumers a Chance to Be Heard on What They Watch*, NIELSEN (Jan. 17, 2017), <https://www.nielsen.com/us/en/insights/news/2017/a-new-megaphone-social-media-gives-consumers-a-chance-to-be-heard.html> [<https://perma.cc/NQN8-B34Y>]; Carolyn Edgecomb, *Social Media Marketing: The Importance of a Two-Way Conversation*, IMPACT (Mar. 27, 2017), <https://www.impactbnd.com/blog/social-media-marketing-the-importance-of-a-two-way-conversation> [<https://perma.cc/7W7N-HVP4>]; Josh Klemons, *Your Social Media Should Act as a Telephone, Not a Megaphone*, REVERBAL COMM. (Apr. 20, 2017), <https://www.joshklemons.com/blog/your-social-media-should-act-as-a-telephone-not-a-megaphone> [<https://perma.cc/8ACL-8B2A>].

⁴⁸ Smith & Anderson, *supra* note 18.

⁴⁹ *About Facebook*, FACEBOOK, https://www.facebook.com/pg/facebook/about/?ref=page_internal [<https://perma.cc/LU5P-UWJT>].

⁵⁰ *See Converting Your Profile into a Facebook Page*, FACEBOOK: HELP CTR., <https://www.facebook.com/help/175644189234902/> [<https://perma.cc/85GK-AHM8>]; see *Facebook Tips: What’s the Difference Between a Facebook Page and Group*, FACEBOOK, <https://www.facebook.com/notes/facebook/facebook-tips-whats-the-difference-between-a-facebook-page-and-group/324706977130/> [<https://perma.cc/ED57-2TAC>].

⁵¹ Jill Duffy, *12 Things You Should Know About Facebook Timeline*, PCMAG (Jan. 25, 2012), <https://www.pcmag.com/article2/0,2817,2393464,00.asp> [<https://perma.cc/F23B-FNKJ>] (“[Timeline is] a cross between visual blog and online scrapbook.”).

⁵² *Follow: How It Works*, FACEBOOK, <https://www.facebook.com/about/follow> [<https://perma.cc/K5XU-HPCP>].

media activity (i.e., “Stories”)⁵³ in their private News Feed, a “personalized, ever-changing collection of photos, videos, links, and updates from the friends, family, businesses, and news sources you’ve connected to on Facebook.”⁵⁴ News Feed content is governed by algorithms⁵⁵ that order “Stories” based on an individual’s historical engagement with the Profile or Page that posted the update, the type of content they tend to interact with most (i.e., photos, videos, news articles), and the extent of their past interactions with similar posts.⁵⁶

Government officials can create Facebook Pages to connect with constituents who may or may not be known personally by the Page holder.⁵⁷ For example, New York City Council Member Laurie Cumbo has a Facebook Page that allows individuals with and without Facebook Profiles to follow her posted activities and announcements.⁵⁸ People without Facebook Profiles, as well as Facebook users who are logged out of their accounts, can look at the information posted on Council Member Cumbo’s Page but are unable to like, share, or comment on her posts.⁵⁹

Facebook allows for three main types of interactions, or possible responses to any given post: likes, comments, and shares.

⁵³ Joe Svetlik, *Facebook Stories: What Is It and How Does It Work?*, BT (Feb. 19, 2019), <https://home.bt.com/tech-gadgets/internet/social-media/facebook-stories-what-is-it-and-how-does-it-work-11364169985164> [<https://perma.cc/HF24-KEXF>]. Social media activity can include posting beautiful photos, useful news articles, inspirational or devastating quotes, or hot takes on the day’s news. See Shanna Mallon, *What to Post on Facebook When You Don’t Know What to Post*, POST PLANNER, <https://www.postplanner.com/what-to-post-on-facebook-when-you-dont-know-what-to-post/> [<https://perma.cc/9T4D-PFPG>].

⁵⁴ *News Feed*, FACEBOOK: FOR MEDIA, <https://www.facebook.com/facebookmedia/solutions/news-feed> [<https://perma.cc/A78K-3392>].

⁵⁵ Facebook constantly updates its algorithms, most recently doing so in Spring 2019 to prioritize Pages and Groups an individual might want most to connect with and again in August 2019 to combat the scourge of fake news, extremist messaging, and ideological bias stemming from a previous algorithm’s goal of promoting viral content. See Ramya Sethuraman et al., *Using Surveys to Make News Feed More Personal*, FACEBOOK: NEWSROOM (Aug. 5, 2019), <https://newsroom.fb.com/news/2019/05/more-personalized-experiences/> [<https://perma.cc/VU56-J8D5>]; Sidney Fussell, *Facebook Wants a Do-Over on News*, ATLANTIC (Aug. 22, 2019), <https://www.theatlantic.com/technology/archive/2019/08/facebook-news-tab-will-be-run-humans-and-algorithms/596554/> [<https://perma.cc/EQ2S-NYKH>].

⁵⁶ See *News Feed*, *supra* note 54.

⁵⁷ See *Create Your Page*, FACEBOOK: GOV’T, POL., ADVOC., <https://politics.fb.com/learn-the-basics/#component-1-create-your-page> [<https://perma.cc/7SA7-TM4R>] (encouraging elected officials and government organizations to create Pages rather than engage with constituents through private Profiles).

⁵⁸ Council Member Laurie Cumbo (@CMLauriCumbo), FACEBOOK, <https://www.facebook.com/CMLauriCumbo/> [<https://perma.cc/9JYL-2XH5>].

⁵⁹ See *Like and Interact with Pages*, FACEBOOK: HELP CTR., https://www.facebook.com/help/1771297453117418/?helpref=hc_fnav [<https://perma.cc/8UXC-AN73>].

Interactions on Facebook are generally public acts, subject to monitoring and notice by the eyes of others.⁶⁰



Clicking the “like” button under a post lets the original poster and their Facebook Friends know that someone reacted to their post; a like is akin to a “quick and easy nod” of support, affirmation, or expression of empathy.⁶² Commenters may also select one of several emoticons (“Like, Love, Haha, Wow, Sad, Angry”) to further characterize the nature of their response.⁶³

Engaged Facebook users often use the “comment” and “sharing” features to respond to posts by others, including government officials. Simply by clicking the “comment”⁶⁴ button displayed immediately beneath a new post and entering either text or GIF images,⁶⁵ Facebook users can converse directly with the original poster, reply to other people’s comments about the

⁶⁰ Such public attention to one’s comments and replies can be affirming and generative, while others are destructive and negative. Compare Eli Rosenberg, *Protest Grows ‘Out of Nowhere’ at Kennedy Airport After Iraqis Are Detained*, N.Y. TIMES (Jan. 28, 2017), <https://www.nytimes.com/2017/01/28/nyregion/jfk-protests-trump-refugee-ban.html> [<https://perma.cc/WUL3-Z3WH>], and Scott Cohn, *Fighting Fire with Tweets: California Uses Social Media to Save Lives*, MARKETPLACE (Oct. 21, 2016), <https://www.marketplace.org/2016/10/20/sustainability/fighting-fire-tweets-california-uses-social-media-save-lives> [<https://perma.cc/C3AA-JEAB>]; Skylar Kergil, *Social Media: A Lifeline for Many Transgender Youth*, HUFFPOST (Feb. 2, 2016), https://www.huffingtonpost.com/skylar-kergil/social-media-a-lifeline-f_b_6255836.html [<https://perma.cc/6R55-3FNA>], with Lauren Etter, *What Happens When the Government Uses Facebook as a Weapon*, BLOOMBERG BUSINESSWEEK (Dec. 7, 2017), <https://www.bloomberg.com/news/features/2017-12-07/how-rodrigo-duterte-turned-facebook-into-a-weapon-with-a-little-help-from-facebook> [<https://perma.cc/UN42-ZUJ9>], and Mark Fisher, *Exiting the Vampire Castle*, OPENDEMOCRACY: UK (Nov. 24, 2013), <https://www.opendemocracy.net/ourkingdom/mark-fisher/exiting-vampire-castle> [<https://perma.cc/XV8A-2VT3>], Andrew Marantz, *How Social-Media Trolls Turned U.C. Berkeley into a Free-Speech Circus*, NEW YORKER (June 25, 2018), <https://www.newyorker.com/magazine/2018/07/02/how-social-media-trolls-turned-uc-berkeley-into-a-free-speech-circus> [<https://perma.cc/NJ7N-EH37>].

⁶¹ *About Reactions to Your Ad*, FACEBOOK BUS.: ADS HELP CTR., <https://www.facebook.com/business/help/368656903954046> [<https://perma.cc/4YPG-PSJT>].

⁶² Courtney Seiter, *The Secret Psychology of Facebook: Why We Like, Share, Comment and Keep Coming Back*, BUFFER (Jan. 18, 2019), <https://blog.bufferapp.com/psychology-of-facebook> [<https://perma.cc/JDP7-2UK2>]; see *What Does It Mean to Like Something*, FACEBOOK: HELP CTR., https://www.facebook.com/help/110920455663362?helpref=uf_permalink [<https://perma.cc/M49M-4WC8>].

⁶³ *About Reactions to Your Ad*, *supra* note 61.

⁶⁴ Text boxes located underneath individual Facebook posts include the text, “Write a Comment.” *Commenting*, FACEBOOK: HELP CTR., <https://www.facebook.com/help/commenting> [<https://perma.cc/7W6G-8NVW>].

⁶⁵ Molly McHugh, *You Can Finally, Actually, Really, Truly Post GIFs on Facebook*, WIRED (May 29, 2015), <https://www.wired.com/2015/05/real-gif-posting-on-facebook/> [<https://perma.cc/9Z4N-JKTJ>].

original post, or even invite other users who have not yet engaged with the post to weigh in on the topic by “mentioning” their Facebook name.⁶⁶ Highly-engaged Facebook users also often share posts that they see in their News Feed by clicking the “Share” button,⁶⁷ which copies the content to their own Timeline, to a specific Facebook Friend’s Timeline, to the posts of a Facebook Group, or to a public Page they manage.⁶⁸

Facebook users can exercise varying degrees of control around the privacy and shareability of their posts. They can limit the audience for particular posts or restrict the ability of other users to comment or share their posts (i.e., limiting post visibility only to “Friends” or “Friends of Friends” versus allowing the “Public” to see and share posts, including Facebook users who are unknown to the original poster).⁶⁹ Public Page owners, including government officials, also have access to a suite of content moderation tools to control what shows up in their comment boxes, including blocks on certain words, a profanity filter, and options to hide or delete comments left by visitors to the Page.⁷⁰ Page owners may also ban individual Facebook users, prohibiting banned users from following the Page, liking or commenting on Page posts, using the interactive space of the Page posts to engage others through the mention function, and sending direct messages to the Page owner.⁷¹

⁶⁶ *Commenting*, *supra* note 64. “Mentioning” a person, Page, or Group in the comment box of a Facebook post involves typing their Facebook username into the comment box and selecting the name from a list that appears. *Id.* The mentioned person is then linked into that comment box, is notified that they have been mentioned, and other Facebook users can generally see that you have been mentioned. Privacy settings may limit the visibility of the link to a wider audience. *Id.*

⁶⁷ People share posts to promote information, to define themselves to others, to stay connected to others with similar interests, to support or champion political, social, or cultural issues they care about, or to feel more involved in their communities. N.Y. TIMES CUSTOMER INSIGHT GRP., *THE PSYCHOLOGY OF SHARING: WHY DO PEOPLE SHARE ONLINE* (2011), https://www.bostonwebdesigners.net/wp-content/uploads/POS_PUBLIC_0819-1.pdf [<https://perma.cc/DMJ4-9TAA>].

⁶⁸ *Sharing*, FACEBOOK: HELP CTR., <https://www.facebook.com/help/418076994900119> [<https://perma.cc/EWN5-7SZH>].

⁶⁹ *How Do I Adjust Who Can Comment on My Public Posts*, FACEBOOK: HELP CTR., https://www.facebook.com/help/1625371524453896?helpref=faq_content [<https://perma.cc/7MGU-3A3H>].

⁷⁰ *Banning and Moderation*, FACEBOOK: HELP CTR., https://www.facebook.com/help/248844142141117?helpref=hc_fnav [<https://perma.cc/NPJ4-Q348>]. “Hiding” an individual’s comments on a public Facebook Page means that only the original poster and their Facebook Friends can see and engage with the comments; Facebook users who are not Friends with the objectionable commenter will not see the comment. *Id.* Deleting a comment removes it from the Page completely. *Id.*

⁷¹ *Id.*

2. Twitter

Twitter is a social media platform that captures “what’s happening in the world and what people are talking about right now.”⁷² Unlike Facebook, which organizes user-generated content and responses around Pages, Groups, and networks of Friends, Twitter’s defining feature is unbridled interactivity amongst its millions of individual users.⁷³ There are no private or closed groups on Twitter; every aspect of an individual account holder’s activity on the platform is visible to anyone else, including those without Twitter accounts, unless a user chooses to make their own account entirely private or send a surreptitious direct message.⁷⁴

Twitter users post “tweets” up to 280 characters in length (or, alternatively, a photo, video, or link) to a webpage hosted on Twitter associated with the user’s account.⁷⁵ “Retweets” are analogous to Facebook’s “Share” button, allowing Twitter users to share another user’s tweet publicly on their Timeline (with or without adding their own commentary).⁷⁶ A record of an individual Twitter user’s tweets and retweets is found on the user’s unique webpage (a “Profile timeline”).⁷⁷ Users can “thread” together multiple tweets to tell longer stories.⁷⁸ They can also subscribe to other Twitter users’ account activities by “following” those accounts.⁷⁹ Individual Twitter users can review the tweets and retweets of other Twitter users that they follow on their “Home” page (the “Home timeline”).⁸⁰

Similar to Facebook’s News Feed, Twitter offers users a Timeline, a stream of constantly-updating, reverse-chronologically

⁷² *About Twitter*, TWITTER, <https://about.twitter.com/> [<https://perma.cc/5WRC-4WUM>].

⁷³ See Stipulation at 3, Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 17-cv-5205).

⁷⁴ *How to Use Twitter: Critical Tips for New Users*, WIRED (Aug. 29, 2018), <https://www.wired.com/story/how-to-setup-twitter-search-hashtag-and-login-help/> [<https://perma.cc/JX8A-L9JD>] (“With a private account, only the people who you’ve given permission to follow you will see your tweets. Most people choose to leave their accounts public, though. If Facebook is the dinner table with your family and friends, Twitter is a rousing bar. Most opt to stick with the default but choose to only say things they’d be comfortable saying to strangers.”). Twitter users may also send direct messages to each other, which is the only type of private communication supported by the platform. *Id.*

⁷⁵ *Id.*

⁷⁶ *How to Retweet*, TWITTER: HELP CTR., <https://help.twitter.com/en/using-twitter/how-to-retweet> [<https://perma.cc/2KTK-GYTP>].

⁷⁷ *About Your Twitter Timeline*, TWITTER: HELP CTR., <https://help.twitter.com/en/using-twitter/twitter-timeline> [<https://perma.cc/M62P-CQ7P>].

⁷⁸ *How to Create a Thread on Twitter*, TWITTER: HELP CTR., <https://help.twitter.com/en/using-twitter/create-a-thread> [<https://perma.cc/SXK5-UA85>].

⁷⁹ Stipulation at 6, Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 17-cv-5205).

⁸⁰ *About Your Twitter Timeline*, *supra* note 77.

ordered tweets from other Twitter users (often called the “Feed”).⁸¹ Twitter users engage with other people’s tweets by replying to them, liking them, or retweeting them.⁸² Twitter users adopt a “handle”—an @symbol followed by a chosen identifier (e.g., @realDonaldTrump)—that can be used to send a public “hey, over here[!]” call letting them know that they are being tweeted about and adding them to a conversation.⁸³ Hashtags (e.g., #MeToo) can be added to join a larger conversation amongst many Twitter users; they are clickable, indexed keywords that allow people to follow topics, trends, and movements they are interested in.⁸⁴



85

Unique amongst social media platforms is Twitter’s ephemerality, the rush of being at a crowded party where many distinct yet related conversations are happening simultaneously.⁸⁶ Twitter is a “weird” space where users engage in self-referential “metatextual commentary” with and about other peoples’ tweets.⁸⁷ Users have no control over the replies, retweets, and replies-to-replies generated in response to their tweets, in “multiple

⁸¹ *How to Use Twitter: Critical Steps for New Users*, *supra* note 74; see *About Your Twitter Timeline*, *supra* note 77.

⁸² *About Your Twitter Timeline*, *supra* note 77.

⁸³ *How to Use Twitter: Critical Steps for New Users*, *supra* note 74. Using the @twittername function to mention someone on Twitter is similar to mentioning a Facebook user in a comment box. *About Replies and Mentions*, TWITTER: HELP CTR., <https://help.twitter.com/en/using-twitter/mentions-and-replies> [<https://perma.cc/2RJS-RPKK>].

⁸⁴ *How to Use Twitter: Critical Steps for New Users*, *supra* note 74; *How to Use Hashtags*, TWITTER: HELP CTR., <https://help.twitter.com/en/using-twitter/how-to-use-hashtags>.

⁸⁵ Stipulation at 7, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 17-cv-5205).

⁸⁶ See *How to Use Twitter: Critical Steps for New Users*, *supra* note 74.

⁸⁷ Ezra Klein, *The Problem with Twitter, as Shown by the Sarah Jeong Fracas*, VOX (Aug. 8, 2018), <https://www.vox.com/technology/2018/8/8/17661368/sarah-jeong-twitter-new-york-times-andrew-sullivan> [<https://perma.cc/F8VL-4UME>].

overlapping” conversations among and across the Twitterverse.⁸⁸ These collections of conversations are “comment threads” that can temporally stretch over hours, days, weeks, and beyond.⁸⁹

Twitter users can exert limited control over who engages with their public tweets with the use of the “mute” and “block” functions.⁹⁰ “Muting” removes another user’s tweets from your Timeline without unfollowing them,⁹¹ whereas “blocking” prevents the other user from seeing and replying to your tweets and results in dissolution of the “following” relationship.⁹² Muted users will not know that they have been muted (and the muting party will not be notified of their attempts to engage via tweet, retweet, reply, or @ mention), whereas blocked users will immediately notice that they have been blocked if they try to visit the Profile Timeline of the blocking user while using their Twitter account.⁹³ Blocked users can log out of their Twitter accounts to view the Twitter feeds of individuals who have blocked them; however, to do so they would have to follow the blocking Twitter user with a newly created account or simply read the public tweets while logged out of Twitter. Both workarounds, however, limit the ability of the blocked user to engage with the original poster’s tweets and participate in the comment threads.⁹⁴

⁸⁸ Stipulation at 8, Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 17-cv-5205); see *About Conversations on Twitter*, TWITTER: HELP CTR., <https://help.twitter.com/en/using-twitter/twitter-conversations> [<https://perma.cc/SAJ5-ZZ8R>].

⁸⁹ For example, President Trump’s tweets regularly attract more than 100,000 likes and retweets over the course of several days. Stipulation at 16–18, Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 17-cv-5205).

⁹⁰ *How to Control Your Twitter Experience*, TWITTER: HELP CTR., <https://help.twitter.com/en/safety-and-security/control-your-twitter-experience> [<https://perma.cc/7Q4C-AAMT>]. At the time of publication, Twitter rolled out a new “hide replies” feature which allows users to click a button to move an objectionable reply to a different page; the hidden replies are still accessible to others who choose to click the “hidden reply icon.” *About Replies and Mentions: Hidden Replies*, TWITTER: HELP CTR., <https://help.twitter.com/en/using-twitter/mentions-and-replies> [<https://perma.cc/7PPT-AEBC>].

⁹¹ *How to Mute Accounts on Twitter*, TWITTER: HELP CTR., <https://help.twitter.com/en/using-twitter/twitter-mute> [<https://perma.cc/ZQ27-S52H>].

⁹² *How to Block Accounts on Twitter*, TWITTER: HELP CTR., <https://help.twitter.com/en/using-twitter/blocking-and-unblocking-accounts> [<https://perma.cc/V2J7-AGG9>].

⁹³ See *How to Mute Accounts on Twitter*, *supra* note 91; *How to Block Accounts on Twitter*, *supra* note 92.

⁹⁴ Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 232–33 (2d Cir. 2019).



95

II. LEGAL BACKGROUND

A. *The First Amendment*

Americans are an expressive people.⁹⁶ So highly did the Founding Fathers value individual and collective freedom to speak truth to power—in language and in deed—that they adopted a First Amendment prohibiting the government from “abridging the freedom of speech . . . or the right of the people peaceably to assemble.”⁹⁷ Probing the contours of what it means for individuals and groups to have five distinct yet interconnected expressive rights,⁹⁸ the Supreme Court’s modern First Amendment

⁹⁵ Stipulation at 11, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 17-cv-5205).

⁹⁶ See, e.g., Richard Wike, *Americans More Tolerant of Offensive Speech than Others in the World*, PEW RES. CTR. (Oct. 12, 2016), <http://www.pewresearch.org/fact-tank/2016/10/12/americans-more-tolerant-of-offensive-speech-than-others-in-the-world/> [<https://perma.cc/TQ5B-XZT2>]; Richard Wike, *As Censorship Spreads Globally, Americans Stand Out for Support of Free Expression*, DIPLOMATIC COURIER (June 13, 2016), <https://www.diplomaticcourier.com/posts/censorship-spreads-globally-americans-stand-support-free-expression> [<https://perma.cc/Q8KB-HQS7>]; *The Arts Contribute More than \$760 Billion to the U.S. Economy*, NAT’L ENDOWMENT FOR ARTS (Mar. 6, 2018), <https://www.arts.gov/news/2018/arts-contribute-more-760-billion-us-economy> [<https://perma.cc/9PCU-TS28>] (“The arts contribute \$763.6 billion to the U.S. economy, more than agriculture, transportation, or warehousing.”); see generally MICHAEL ADAMS, *IN PRAISE OF PROFANITY* (2016) (examining the purpose and defending the pleasure of expressive swearing and cursing in popular culture and politics).

⁹⁷ U.S. CONST. amend. I. The First Amendment was ratified into the Bill of Rights in 1791 and incorporated through the Fourteenth Amendment to the states in 1925. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (“For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and ‘liberties’ protected by the due process clause of the Fourteenth Amendment from impairment by the States.”); Akhil Reed Amar, *The First Amendment’s Firstness*, 47 U.C. DAVIS L. REV. 1015, 1021 (2014).

⁹⁸ U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”).

jurisprudence constrains the government from squelching the speech and conduct of protesters, rabble rousers, and dissidents “simply because society finds the idea itself offensive or disagreeable.”⁹⁹ The scope of the First Amendment’s protection for a contrarian’s expressive rights in the “interactive space” of government officials’ social media accounts is the focus of this note.¹⁰⁰

1. The Free Speech Clause

The Free Speech Clause of the First Amendment prohibits government officials from discriminating against speakers based on the content of their messages or the ideological viewpoint of the messenger.¹⁰¹ The right to speak—and the opportunity to be heard—is not without limits. People cannot defame or defraud others,¹⁰² distribute obscene material,¹⁰³ holler “fighting’ words,”¹⁰⁴ utter “true threats,”¹⁰⁵ or incite a mob to imminent violence¹⁰⁶ and expect to be shielded from prosecution by the Free Speech Clause.

⁹⁹ *Texas v. Johnson*, 491 U.S. 397, 409, 414 (1989) (holding that flag burning is symbolic and expressive conduct protected by the First Amendment).

¹⁰⁰ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 575 (S.D.N.Y. 2018) (“The interactivity of Twitter is one of its defining characteristics, and indeed, the interactive space of the President’s tweets accommodates a substantial body of expressive activity.”), *aff’d*, 928 F.3d 226 (2d. Cir. 2019).

¹⁰¹ *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (holding that government discrimination among viewpoints—or the regulation of speech based on “the specific motivating ideology or the opinion or perspective of the speaker”—is a “more blatant” and “egregious form of content discrimination”); U.S. CONST. amend. I.

¹⁰² *See Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (noting that libelous speech is not constitutionally-protected expression); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976).

¹⁰³ *See Miller v. California*, 413 U.S. 15, 24–25 (1973) (holding that state obscenity laws are permissible if they reflect the sensibilities of an “average person, applying contemporary community standards” to material that “lacks serious literary, artistic, political, or scientific value” and appeals to a merely “prurient” interest in sex); *see Marks v. Massachusetts*, 430 U.S. 188 (1977); *Roth v. United States*, 354 U.S. 476, 482–85 (1957), *abrogated by Memoirs v. Massachusetts*, 383 U.S. 413 (1966).

¹⁰⁴ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (holding that “insulting or ‘fighting’ words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace” are not constitutionally-protected speech); *see Cohen v. California*, 403 U.S. 15, 16, 20–23 (1971) (holding that wearing a “Fuck the Draft” jacket in a courthouse did not constitute “fighting words” under the First Amendment because an immediate violent reaction was not provoked by the expressive donning of the jacket).

¹⁰⁵ *Virginia v. Black*, 538 U.S. 343, 359 (2003) (“True threats’ encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.”); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) (stating that the government has a legitimate interest in “protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur”); *Watts v. United States*, 394 U.S. 705, 708 (1969) (holding that “political hyperbole” is not a “true ‘threat’”).

¹⁰⁶ The Supreme Court draws a distinction between individuals advocating a theoretical use of force or incitement to violate state and federal laws, and individuals whose “advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (*per curiam*); *see also NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) (“Strong and

The Supreme Court's First Amendment jurisprudence suffuses individual political speech with the highest levels of scrutiny and protection¹⁰⁷ in the service of advancing knowledge and truth in a "marketplace of ideas," facilitating representative democracy and self-government, and promoting individual autonomy, self-expression, and self-fulfillment.¹⁰⁸ Political speech includes a range of verbal, associational and symbolic expression, from face-to-face speech to door-to-door solicitation, leafleting and pamphleteering, and pro-life "sidewalk counseling."¹⁰⁹ By engaging in lawful political speech,¹¹⁰ an individual does not gain an affirmative right to be believed or heeded by others but has the freedom to advocate a public message—regardless of content¹¹¹ or viewpoint¹¹²—largely uncensored, unencumbered, and unrestrained by the government.¹¹³

2. The Assembly Clause

The Assembly Clause of the First Amendment proscribes state actors from fettering the "right of the people peaceably to

effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his [or her] audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech.").

¹⁰⁷ *Claiborne*, 458 U.S. at 913 ("[E]xpression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.'" (quoting *Carey v. Brown*, 447 U.S. 455, 467 (1980))).

¹⁰⁸ Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 478–79 (2011).

¹⁰⁹ *McCullen v. Coakley*, 134 S. Ct. 2518, 2527, 2541 (2014); see *Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 168–69 (2002); *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938); see also Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. REV. 318, 325–26 (2018) (collecting examples of types of conduct covered and protected by the First Amendment, including draft card burning, armbands, flag burning, boycotting, and public interest litigation).

¹¹⁰ See *Black*, 538 U.S. at 365 ("[S]omebody engaging only in lawful political speech [is] at the core of what the First Amendment is designed to protect.").

¹¹¹ Content-based laws are presumptively unconstitutional. See *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95–96 (1972) (holding that government regulations of expressive speech, e.g., peaceful picketing, because of its substantive message, ideas, or subject matter must be narrowly tailored to serve compelling state interests).

¹¹² State-sanctioned discrimination against speech because of preference for alternative "views on disfavored subjects" taken by speakers is impermissible viewpoint discrimination. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992); see also *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 55 (1983) ("When speakers and subjects are similarly situated, the State may not pick and choose.").

¹¹³ Debate rages on the scope and permissibility of government restrictions on speakers encountering "hostile audience[s]," provoked by the heightened political and social tensions characterizing the early years of the Trump Administration. FREDERICK SCHAUER, KNIGHT FIRST AMENDMENT INST. AT COLUMBIA UNIV., EMERGING THREATS: THE HOSTILE AUDIENCE REVISITED 2–3 (2017), https://knightcolumbia.org/sites/default/files/content/Schauer_Hostile_Audience.pdf [<https://perma.cc/93KF-6CSK>].

assemble.”¹¹⁴ Carried over from English common law, the right of assembly was “neither created nor altered”¹¹⁵ by the Framers, but affirmed separately—and “virtually without comment”¹¹⁶—into the federal Constitution. The distinct nature of the right to assemble in public spaces was sharpened in the short debate on the issue of whether to restrict the act of assembly to gatherings that promoted the common good. Absolutely not, argued one congressman, because “[i]f the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause.”¹¹⁷ Instead, the Framers agreed to qualify the right of people to collectively assemble so long as they did so *peaceably*, preserving the purpose of assemblies as forums for expressing public dissent.¹¹⁸

Courts have largely retired the Assembly Clause as an analytical tool, despite a longstanding tradition of collective social movement advocacy by abolitionists, suffragists, workers, and minorities.¹¹⁹ The Supreme Court has not issued a major decision interpreting the Assembly Clause in the past thirty-five years, relegating it to “little more than a historical footnote.”¹²⁰ Today, courts treat people’s right to gather in public spaces as a facet of their freedom of speech, centering their analysis on threshold issues of whether the government’s discrimination against legitimate expressive activity is impermissibly content- or viewpoint-restrictive.¹²¹

This singular focus on speech, rather than the acts of meeting and gathering, may have profound implications for the protection of collectives of people engaging in social and political practices “central to democratic government,” particularly in

¹¹⁴ U.S. CONST. amend. I.

¹¹⁵ James M. Jarrett & Vernon A. Mund, *The Right of Assembly*, 9 N.Y.U. L. Q. REV. 1, 33 (1931) (exploring the history of the right of assembly through a comparative lens of English and American law).

¹¹⁶ El-Haj, *supra* note 14, at 564.

¹¹⁷ 1 ANNALS OF THE CONGRESS OF THE UNITED STATES 732 (Joseph Gales ed., 1834) (quoting Congressman John Page of Virginia); see John D. Inazu, *The First Amendment’s Public Forum*, 56 WM. & MARY L. REV. 1159, 1168 (2015).

¹¹⁸ Inazu, *supra* note 117, at 1168.

¹¹⁹ INAZU, *supra* note 14, at 1.

¹²⁰ *Id.*

¹²¹ See, e.g., *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984), where the justices found that a National Park Service regulation prohibiting demonstrators from living in tent cities located in central Washington, D.C. parks did not violate the First Amendment because it was content-neutral. See also RONALD D. ROTUNDA & JOHN E. NOWAK, 5 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.54(g)(i), Westlaw (database updated May 2019) (“When the government limits the rights of persons to communicate in public, it is most common for courts to examine the governmental action in terms of the freedom of speech rather than the freedom of assembly.”).

spaces classified by the courts as public forums, which is the subject to which this note now turns.¹²²

B. *The Public Forum Doctrine*¹²³

Speech falls even further within the ambit of the First Amendment when it occurs in a public forum.¹²⁴ The Supreme Court's public forum doctrine evolved from traditional understandings of streets, sidewalks, and town squares as stages where citizens encounter each other, engage in public discourse, and enact structures of democratic governance.¹²⁵ The starting point for any review of the public forum doctrine is *Hague v. Committee for Industrial Organizations*, a 1939 case stemming from a dispute between leftist labor organizers and local government officials in New Jersey.¹²⁶

In 1937, Jersey City Mayor Frank Hague used a municipal ordinance specifically prohibiting labor meetings in public without a permit from the police chief to bar the Committee for Industrial Organization (CIO) from engaging in a recruitment drive.¹²⁷ The police chief withheld the permit on the Mayor's behalf, on the grounds that the CIO was a "Communist" organization, and "with violence and force" evicted organizers and

¹²² El-Haj, *supra* note 14, at 547. Scholars proposing a reinvigorated judicial use of the Assembly Clause generally contend that the Supreme Court's collapse of the public right of assembly into the individual right of free expression is a loss of protection for people actively engaged, or even preparing to engage, in collective action. *See id.* at 547, 589; Inazu, *supra* note 117, at 1169.

¹²³ Because the bearing of this note rests on doctrine emanating from the traditional and designated public forums and their application to government officials' social media accounts, a brief foray into the characteristics of both forums is required, with a particular focus on cases where the suppressed parties' activities include acts of collective protest and gathering. Comprehensive analyses of the public forum categorizations can be found in James M. LoPiano, Note, *Public Fora Purpose: Analyzing Viewpoint Discrimination on the President's Twitter Account*, 28 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 511, 528–37 (2018), and Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 2017–20 (2011).

¹²⁴ RODNEY A. SMOLLA, 2 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 16:3, Westlaw (database updated Apr. 2019) (noting that "the vast body of law governing the right to speak, march, or leaflet" in public forums is usually treated as a "species of free speech jurisprudence," despite also involving the "rights of assembly, association, and petition").

¹²⁵ *See Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.").

¹²⁶ *See, e.g.*, Ronald A. Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287, 1289–90 (1979); Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 13; Ross Rinehart, Note, "Friending" and "Following" the Government: How the Public Forum and Government Speech Doctrines Discourage the Government's Social Media Presence, 22 S. CAL. INTERDISC. L.J. 781, 791–92 (2013); *see also Hague*, 307 U.S. at 501–03.

¹²⁷ *Hague*, 307 U.S. at 501.

pamphleteers from the public streets, plazas, and parks, placing them on “ferry boats destined for New York” and “beyond the limits of the city” to “remote places.”¹²⁸

After two years of litigation, the Supreme Court ruled in favor of the CIO, holding that Mayor Hague had violated the organizers’ First Amendment rights of speech and assembly. Citing to an earlier case where the Court had refused to incorporate the Assembly Right to the States, Justice Roberts noted that “[t]he very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.”¹²⁹ And in declaring the Jersey City ordinance void on its face, he balanced the rights of CIO organizers to speak and assemble with the needs of local government to maintain public order by observing:

The privilege of a citizen of the United States to use the streets and parks for communications of views on national questions may be regulated in the interest of all

. . . But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right.¹³⁰

The tensions at play between the government’s “managerial interest” and the collective right of assembly grappled with by the *Hague* court culminated until the formulation of the modern public forum doctrine in *Perry Education Association v. Perry Local Educators’ Association*.¹³¹ In *Perry*, a dispute about whether a school district’s interschool mail system constituted a public forum where one union could block another from sending out recruitment mailers, the Court distinguished between several types of public forums, each triggering a different level of protection for individual and collective speech on government property.¹³² The constant factor in any public forum analysis is that the government must control the forum;

¹²⁸ *Id.*

¹²⁹ *Id.* at 513 (quoting *United States v. Cruikshank*, 92 U.S. 542, 552–53 (1876)). “It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship, by the due process clause of the Fourteenth Amendment.” *Id.* at 519 (citing *Gitlow v. New York*, 268 U.S. 652 (1925)).

¹³⁰ *Id.* at 515–16; *see id.* at 513 (“No expression of a contrary view has ever been voiced by this court.”).

¹³¹ Rinehart, *supra* note 126, at 791–93; *see Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37 (1983).

¹³² *Perry*, 460 U.S. at 45–50. The Supreme Court held that giving preference to the “duly elected exclusive bargaining representative” of the school district’s teachers did not violate the rival union’s First Amendment rights because the interschool mail system was not a public forum. *Id.* at 38, 55.

government control is required to implicate the state action doctrine, particularly in instances where the forum is located on otherwise private property.¹³³

1. Traditional Public Forums

Individual and collective speech rights are at their zenith in “quintessential public forums”: the streets, parks, and sidewalks maintained at the direction of local governments at public expense “by long tradition or by government fiat.”¹³⁴ State and local governments may regulate access to these traditional public forums with “time, place, and manner” restrictions so long as they are content-neutral, serve significant government interests, and leave open “ample” alternate communication channels.¹³⁵ For example, the NYC Parks Commissioner may lawfully require groups to apply for a special events permit out of legitimate concerns for public safety or neighborhood tranquility.¹³⁶ Under this regime, groups who wish to gather for a demonstration, protest, large-scale performance, or other gathering of more than twenty people must follow all applicable and neutrally-applied rules to maintain order, including abiding by the park hours, attendance limits, and noise amplification restrictions.¹³⁷ The First Amendment would restrain the Parks Commissioner, however, from declining to issue a permit to a group based on the content of their expression or character of their politics.¹³⁸

¹³³ See *Lloyd Corp. v. Tanner*, 407 U.S. 551, 567 (1972) (“[I]t must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on *state* action, not on action by the owner of private property used nondiscriminatorily for private purposes only.”).

¹³⁴ *Perry*, 460 U.S. at 45. Streets, sidewalks, and public parks are traditional public forums because they are “held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Id.*

¹³⁵ *Id.*

¹³⁶ N.Y.C. Parks Dep’t, § 2-08 Special Events and Demonstrations, <https://www.nycgovparks.org/rules/section-2-08> [https://perma.cc/P2CG-2NPF]; see N.Y.C. CHARTER § 533.

¹³⁷ See N.Y.C. Parks Dep’t, *Parks Special Event Permit Request*, <https://nyceventpermits.nyc.gov/Parks/> [https://perma.cc/64QJ-4MPS]; see, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 796–97 (1989) (holding that New York City did not violate performers’ First Amendment rights by requiring them to use a city-employed audio technician and city-owned equipment to exercise volume control because the government had a legitimate interest in protecting residents and park dwellers from excessive noise emanating from the Central Park Bandshell).

¹³⁸ See *Ward*, 491 U.S. at 791–92.

2. Non-Traditional Public Forums

Generally, the government owns and operates traditional public forums, and the Supreme Court has been loath to encompass spaces other than public parks, sidewalks, and streets “beyond [the] historic confines” of this categorization.¹³⁹ However, in the context of a privately-owned company town in Alabama, the Supreme Court has held that the First Amendment binds private owners and actors.¹⁴⁰ State supreme courts have found that individuals maintain free speech rights in the public spaces of some shopping malls.¹⁴¹ In *Perry*, the Court said that when a government dedicates a formerly private space to public use—perhaps by leasing a private performing arts space to serve as a municipal theater,¹⁴² offering state university students free use of the facilities,¹⁴³ or hosting a school board meeting¹⁴⁴—it creates a designated or limited public forum.¹⁴⁵

In designated public forums, individual and group expressive rights are protected in the same manner as in traditional public forums, i.e., reasonable time, place and manner restrictions that are content-neutral are permissible,¹⁴⁶ so long as

¹³⁹ Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 666, 678–79 (1998); see Int’l Soc’y for Krishna Consciousness, Inc., v. Lee, 505 U.S. 672, 680–81 (1992).

¹⁴⁰ Marsh v. Alabama, 326 U.S. 501, 508 (1946) (“Many people in the United States live in company-owned towns. These people, just as residents of municipalities, are free citizens of their State and country. Just as all other citizens they must make decisions which affect the welfare of community and nation. To act as good citizens they must be informed. In order to enable them to be properly informed their information must be uncensored.” (footnote omitted)).

¹⁴¹ The shopping mall jurisprudence depends on whether a state’s constitution affirmatively grants free speech rights on the private property and the features of the mall property that make a public space more or less akin to a traditional town square. See, e.g., Robins v. PruneYard Shopping Ctr., 592 P.2d 341, 346–47 (Cal. 1979) (people may engage in political solicitation, leafletting, and expressive speech at large shopping malls); Bock v. Westminster Mall Co., 819 P.2d 55, 62 (Colo. 1991) (people have the right to free speech in shopping malls that provide a public function, such as operating a police substation or permitting voter registration drives); Batchelder v. Allied Stores Int’l, Inc., 445 N.E.2d 590, 595 (Mass. 1983) (people may engage in signature gathering drives to qualify political candidates to appear on electoral ballots at large shopping malls); N.J. Coal. Against War in the Middle East v. J.M.B. Realty Corp., 650 A.2d 757, 782–783 (N.J. 1994) (regional and community shopping centers must permit leafletting on societal and political issues). Reasonable time, place, and manner of expressions are generally permissible, so long as they are content- and viewpoint-neutral. See *Ward*, 491 U.S. at 791.

¹⁴² See *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 573–74 (1975) (Rehnquist, J., dissenting) (describing a municipal theater’s hosting of the once-controversial *Hair: The American Tribal Love-Rock Musical*).

¹⁴³ See *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).

¹⁴⁴ See *City of Madison Joint Sch. Dist. V. Wis. Emp’t Relations Comm’n*, 429 U.S. 167, 176 (1976).

¹⁴⁵ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

¹⁴⁶ *Id.* at 46. The Court stated that content-based regulations “must be narrowly drawn to effectuate a compelling state interest,” which suggests that the Court will apply strict scrutiny in traditional and designated public forums. *Id.* (citing *Widmar*, 454 U.S. at 269–70).

the government “retain[s] the open character” of the space.¹⁴⁷ Speakers congregating in a limited public forum are similarly existentially constrained by the potential closure of the forum by the government and the reversion of the space to government property closed to public use.¹⁴⁸ However, individuals engaging with limited public forums, such as public university students seeking to access the student activity fund, may have their speech restricted on the basis of content to satisfy the requirements of the “limited and legitimate purposes for which [the forum] was created” as long as the government does not discriminate on the basis of viewpoint and is “reasonable.”¹⁴⁹ More succinctly: “[T]he application of forum doctrine must be consistent with the purpose, structure, and intended use of the space.”¹⁵⁰ And critically, designated or limited spaces opened to the public need not be physical; public forums may be “metaphysical,” perhaps even interactive.¹⁵¹

Consider a hypothetical to drive home the distinctions and implications of the public forum doctrine. Suppose the NYC Chancellor of Education leases a small private theater, Puppetworks, to use as a forum for educating public school parents about the upcoming middle school integration plan in Brooklyn’s District 15.¹⁵² He intends to open the space to sponsor

¹⁴⁷ *Id.* Reversion of a previously open designated or limited public forum to a closed space destroys the forum. *Id.* at 45–46 (“Although a state is not required to indefinitely retain the open character of the facility, as long as it does so it is bound by the same standards as apply in a traditional public forum.”).

¹⁴⁸ *See id.* at 46; *see also* David R. Lurie, *The White House Restored Jim Acosta’s Press Pass, but Hasn’t Abandoned Its Attack on Free Speech*, SLATE (Nov. 20, 2018, 7:06 PM), <https://slate.com/news-and-politics/2018/11/white-house-cnn-jim-acosta-first-amendment-trump.html> [<https://perma.cc/RT3P-CUKK>] (discussing CNN journalist’s removal from the recognized limited public forum of the White House press facilities by President Trump for persistent critical questions).

¹⁴⁹ Christian Legal Soc’y Chapter of the Univ. of Cal., *Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679, 681 (2010) (“Any access barrier [to a limited public forum] must be reasonable and viewpoint neutral[.]”); *see Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831–33 (1995) (holding that the university engaged in impermissible viewpoint discrimination against students seeking financing from the student activity fund to start a Christian newspaper when the fund was set up to finance such types of student-led publications, activities, and events); *see also, e.g.*, *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392–93 (1993).

¹⁵⁰ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 565 (S.D.N.Y. 2018), *aff’d*, 928 F.3d 226 (2d. Cir. 2019).

¹⁵¹ *Rosenberger*, 515 U.S. at 830 (asserting that a public university’s student activity fund is “a forum more in a metaphysical than in a spatial or geographic sense”); *see also* *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (considering whether a federally-distributed charity drive communication constituted a public forum “lack[ing] a physical situs”); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 300 (1974) (treating advertising spaces on city-owned buses as a public forum).

¹⁵² This hypothetical is based on the N.Y.C. Department of Education’s recent approval of a community-developed middle school integration plan for some Brooklyn

information sessions about the district's middle schools and host weekly meetings to answer questions from community members affected by the integration plan. Has he established a public forum at Puppetworks? Yes. But what kind, and what meaningful rights attach for participants?

Since Puppetworks theater is not a public sidewalk, street, or park, it is not a traditional public forum and would be either a designated or limited public forum.¹⁵³ Given the Chancellor's managerial interest in promoting public participation while maintaining public order, he can set reasonable restrictions on public attendance at the Puppetworks facility, such as limiting operating hours or capping attendance in accordance with the City's fire code.¹⁵⁴ If the Chancellor hosts a regular weekly meeting at Puppetworks to which all are invited, he has created a designated public forum where he may not eject individuals who protest his integration plan or take away their microphone during the public comment session because they are (or he fears they might be) openly, profoundly, or even profanely critical or off-topic.¹⁵⁵ But if the Chancellor further narrows the scope of a meeting to the specific issue of adopting a culturally-responsive curriculum for the affected schools, and advertises it as such, he may have established a limited forum where he must allow those with critical views of the proposal to speak, but may eject those who attend primarily to protest the City's redevelopment of a vacant Armory into a mixed-use housing development.¹⁵⁶

But what if the Chancellor decides to livestream all meetings and deliberative processes on a social media platform like Facebook or Twitter? Can he block or ban disruptive participants, spammers, or users critical of his plans? Some lawyers argue that the answer is no, because social media platforms selected by the Chancellor as spaces to host discussion, debate, and information sharing are non-traditional public forums like the brick-and-mortar Puppetworks theater, and participants in the forum have the right not to be

neighborhoods, including Park Slope, Red Hook, and Sunset Park. *See* Christina Veiga, *With a Bold School Integration Plan in Place, Brooklyn Parents Begin to Sweat the Details*, CHALKBEAT (Sept. 24, 2018), <https://ny.chalkbeat.org/posts/ny/2018/09/24/with-a-bold-school-integration-plan-in-place-brooklyn-parents-begin-to-sweat-the-details/> [<https://perma.cc/Y38W-29MX>]. Other than the existence of the middle school integration plan, the hypothetical is based purely on the author's imagination.

¹⁵³ *See* *Puppetworks*, <http://www.puppetworks.org/> [<https://perma.cc/M49Y-CTYQ>].

¹⁵⁴ *See supra* notes 134–138 and accompanying text.

¹⁵⁵ *See supra* notes 139–151 and accompanying text.

¹⁵⁶ *See supra* notes 139–151 and accompanying text; *see also* Christian Legal Soc'y Chapter of the Univ. of Cal., *Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679 (2010) ("Any access barrier [in a limited public forum] must be reasonable and viewpoint neutral[.]").

subjected to viewpoint discrimination.¹⁵⁷ This argument is explored in depth in Part III of this note.

III. LITIGATING SOCIAL MEDIA BLOCKING UNDER THE FREE SPEECH CLAUSE

Plaintiffs bringing federal cases against the government officials who blocked them from their social media accounts have invoked the public forum doctrine to protect their First Amendment speech rights. Two federal courts have weighed in on the issue of whether government officials violate the constitutional rights of their constituents by blocking them on social media, situating their rationale within the Free Speech Clause of the First Amendment.¹⁵⁸ A similar lawsuit brought against the Kentucky governor by constituents he banned on Facebook was decided in his favor, and settlements have been reached with two government officials who blocked constituents from their social media accounts.¹⁵⁹

A. *Finding Public Forums in Social Media Accounts*

1. *Davison v. Loudoun County Board of Supervisors*

On the evening of February 3, 2016, Brian Davison was banned from the Facebook Page of Phyllis J. Randall,¹⁶⁰ the elected Chair of the Loudoun County Board of Supervisors, after posting comments alleging corruption and conflicts of interest on the part of the Loudoun County School Board members and their

¹⁵⁷ See *So to Speak: Free Speech, Privacy, and President Trump's Twitter Account with Alex Abdo*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Aug. 21, 2019), <https://www.thefire.org/news-and-media/so-to-speak/> [<https://perma.cc/7WKX-S9JY>] (interview with Alexander Abdo, Litigation Director for the Knight First Amendment Institute).

¹⁵⁸ See *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va. 2017), *aff'd sub nom. Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019); Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018), *aff'd*, 928 F.3d 226 (2d. Cir. 2019).

¹⁵⁹ See *Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1014 (E.D. Ky. 2018) (holding that Governor Matt Bevin's official social media accounts are government speech immunized from First Amendment scrutiny); *Leuthy et al. v. LePage*, ACLU ME., <https://www.aclumaine.org/en/cases/leuthy-et-al-v-lepage> [<https://perma.cc/5Y3K-229D>] (announcing settlement in *Leuthy v. LePage*, No. 1:17-cv-00296-JAW, 2018 WL 4134628 (D. Me. Aug. 29, 2018)); *ACLU Wins Free Speech Settlement over Governor Hogan's Facebook Censorship*, ACLU MD. (Apr. 2, 2018), <https://www.aclu-md.org/en/press-releases/aclu-wins-free-speech-settlement-over-governor-hogans-facebook-censorship> [<https://perma.cc/Q8RK-4Q8Y>] (announcing settlement in *Laurenson v. Hogan*, No. 8:17-cv-02162-DKC (D. Md. Aug. 1, 2017), and new state government social media policy).

¹⁶⁰ Chair Phyllis J. Randal, FACEBOOK, <https://www.facebook.com/Chair-Phyllis-J-Randall-1726409590911855/> [<https://perma.cc/A9HC-HW3M>].

families.¹⁶¹ Chair Randall, offended by Mr. Davison’s accusations “regarding her colleagues on the School Board,” deleted her original post, including all comments.¹⁶² She then banned Mr. Davison’s Facebook account from commenting on her Page, reasoning that “if [he] was the type of person [who] would make comments about people’s family members, then maybe [she] didn’t want [him] to be commenting on [her] site.”¹⁶³ Chair Randall’s ban on Mr. Davison lasted “at most [twelve] hours,” at which point she “reconsidered” her action and unbanned him.¹⁶⁴ Mr. Davison then sued Chair Randall in her official and individual capacities for violating his First Amendment rights in the “limited public forum” of her Facebook Page.¹⁶⁵

The federal court in the Eastern District of Virginia had several issues to contend with when confronted with Brian Davison’s lawsuit,¹⁶⁶ including whether Randall operated the Facebook Page in her personal or official capacity.¹⁶⁷ Citing Fourth Circuit precedent,¹⁶⁸ the *Davison* court determined that Randall had opened a public forum on her “Chair Phyllis J. Randall” Facebook Page by “deliberately permitting public

¹⁶¹ *Davison*, 267 F. Supp. 3d at 711.

¹⁶² *Id.* (internal quotation marks omitted).

¹⁶³ *Id.* (first, fourth, and fifth alterations in original).

¹⁶⁴ *Id.*

¹⁶⁵ Complaint at 4–5, *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va. 2017) (No. 1:16-CV-932).

¹⁶⁶ Brian Davison had previously filed a complaint against the Loudoun County Commonwealth Attorney Jim Plowman after being blocked from his official Commonwealth Attorney Facebook Page. In response to a general post about the role of special prosecutors in criminal justice proceedings, Mr. Davison posted a comment reflecting his frustration that the Commonwealth Attorney had so far refused to investigate allegations of perjury against members of the Loudoun County School Board. The court’s rationale was dependent on finding that Plowman’s official Facebook Page was a limited public forum where content-restrictions are permissible so long as they are viewpoint-neutral. *See Davison v. Plowman*, 247 F. Supp. 3d 767, 777 (E.D. Va. 2017) (holding that Mr. Davison’s First Amendment rights were not violated when he was blocked from the Commonwealth Attorney’s official Facebook Page because his comments were “clearly off-topic” and fell outside the bounds of the limited public forum established by the County’s Social Media Comments Policy), *reh’g and reh’g en banc denied, aff’d*, 715 F. App’x. 298 (4th Cir. 2018). During litigation, the Commonwealth Attorney unblocked Mr. Davison, following the adoption of a more First Amendment-friendly social media policy where removal of “clearly off-topic” comments was no longer permitted and a third-party moderated requests to remove comments from social media accounts operated by County officials. *Davison*, 247 F. Supp. 3d at 775.

¹⁶⁷ *See Davison*, 267 F. Supp. 3d at 711. Randall contended that she had established the Facebook Page as a “personal website” to “do with as she please[d].” *Id.* The court found that she operated the “Chair Phyllis J. Randall” Facebook Page under color of state law because the impetus for the creation of the Page was “inextricably linked to” her election to public office and she had used the Page as a “tool of governance” to hold “back and forth constituent conversations” and provide government services like disaster relief coordination. *Id.* at 713.

¹⁶⁸ *See Page v. Lexington Cty. Sch. Dist. One*, 531 F.3d 275, 284 (4th Cir. 2008) (suggesting that the government may open a public forum by creating websites including a “chat room’ or ‘bulletin board’ in which private viewers could express opinions or post information invit[ing] or allow[ing] private persons to publish information or their positions”).

comment”¹⁶⁹ and requesting “virtually unfettered discussion on that [P]age.”¹⁷⁰ And interestingly, the court chose to forego the public forum analysis, because Randall engaged in quintessential viewpoint discrimination “prohibited in all forums” in banning Davison from her Page.¹⁷¹ Indeed, Randall was found to have “committed a cardinal sin under the First Amendment” because she banned Davison to suppress his “critical” viewpoint that her school board colleagues acted unethically or illegally.¹⁷²

Notably, the *Davison* district court did not thoroughly analyze the Facebook Page user interface that allows constituents like Mr. Davison to engage with their government official.¹⁷³ Eschewing discussion of Facebook’s comment boxes and Page timelines, the court simply stated that “[w]hen one creates a Facebook [P]age, one generally opens a digital space for the exchange of ideas and information.”¹⁷⁴ On appeal, however, the Fourth Circuit took up the challenge of reviewing “the interactive component of the Chair’s Facebook Page” and affirmed the district court’s decision.¹⁷⁵ Finding that the “middle column” of Randall’s Facebook Page—essentially the Page’s version of a News Feed—allowed for and indiscriminately invited all-comers to “post comments, reply to posts, and ‘like’ comments and posts,”¹⁷⁶ Judge Wynn wrote that Randall both effectively controlled the forum and had opened a public forum in calling for responses to her official speech as a government actor.¹⁷⁷ Consequently, the Fourth Circuit determined that Randall’s decision to ban Davison from the comments section of her Chair Page was the act of a government official, and the fact that her intention was to “suppress [his]

¹⁶⁹ *Davison*, 267 F. Supp. 3d at 716.

¹⁷⁰ *Id.* (“I really want to hear from ANY Loudoun citizen on ANY issues, request, criticism, compliment, or just your thoughts. However, I really try to keep back and forth conversations . . . on my county Facebook [P]age (Chair Phyllis J. Randall) or County email (Phllis.randall@loudoun.gov).”).

¹⁷¹ *Id.* at 717 (quoting *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 n.2 (4th Cir. 2006)).

¹⁷² *Id.* at 717–18; see also *Rosignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) (asserting that criticism of official conduct lies at the very “heart” of the First Amendment).

¹⁷³ See *Davison*, 267 F. Supp. 3d at 716.

¹⁷⁴ *Id.* The court also dropped a quick reference to the U.S. Supreme Court’s comparison in *Packingham* of social media to traditional public for a like parks and streets. *Id.* (citing *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017)).

¹⁷⁵ *Davison v. Randall*, 912 F.3d 666, 673, 686 (4th Cir. 2019).

¹⁷⁶ *Id.* (citing *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 572 (S.D.N.Y. 2018)).

¹⁷⁷ *Id.* at 687. (“Randall ‘effectively controlled’ certain aspects of the Chair’s Facebook Page: she curated the Chair’s Facebook Page’s left and right columns [metadata and official contact information] and made posts to the middle column. But Randall also expressly opened the Chair’s Facebook Page’s middle column—its interactive space—for ‘ANY’ user to post on ‘ANY issues,’ and therefore did not retain ‘final approval authority’ over that aspect of the Chair’s Facebook Page.” (citations omitted)).

opinion” constituted viewpoint-based discrimination in a public forum in violation of core First Amendment protections.¹⁷⁸

2. *Knight First Amendment Institute at Columbia University v. Donald J. Trump*

In July 2017, just days before the *Davison* decision, the Knight First Amendment Institute at Columbia University sued President Donald J. Trump on behalf of itself and seven individual Twitter users who found themselves blocked shortly after tweeting critical messages at his @realDonaldTrump handle.¹⁷⁹ As in *Davison*, the federal court in *Knight* was confronted with a “distinctly twenty-first century medium”—here, Twitter—and individuals alleging they were tossed out of the virtual public square because of their viewpoints.¹⁸⁰

District Judge Naomi Buchwald quickly dispatched with the threshold question of whether the blocked individuals engaged in protected speech by characterizing Twitterers’ engagement with the @realDonaldTrump account as speech that “fall[s] within the core of First Amendment protection.”¹⁸¹ She then addressed whether the public forum analysis was appropriate for the @realDonaldTrump account, hinging her rationale around how much control President Trump as a government actor has over access to Twitter’s “private property” that he may have “dedicated to public use.”¹⁸² Dividing the Twitter user interface into four distinct areas where a “metaphysical”¹⁸³ public forum “lack[ing] a physical situs”¹⁸⁴

¹⁷⁸ *Id.* at 687–88.

¹⁷⁹ See *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 543 (S.D.N.Y. 2018), *aff’d*, 928 F.3d 226 (2d. Cir. 2019). For example, University of Maryland Professor Philip Cohen was blocked shortly after tweeting a reply to a @realDonaldTrump tweet about his air traffic control initiative. Professor Cohen’s reply tweet superimposed a picture of the President with the words “Corrupt Incompetent Authoritarian.” Stipulation at 18–19, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 17-cv-5205).

¹⁸⁰ *Knight*, 302 F. Supp. 3d at 549, 564.

¹⁸¹ *Id.* at 565 (quoting *Engquist v. Ore. Dep’t of Agric.*, 553 U.S. 591, 600 (2008)).

¹⁸² *Id.* at 566 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985)). Rejecting the Government’s argument that @realDonaldTrump was a personal account held by the President rather than an official government social media account (compared with @POTUS, the official Twitter account of the President of the United States), Judge Buchwald characterized @realDonaldTrump as being “a presidential account . . . [used] to take actions that can be taken only by the President as President,” including “the appointment of officers (including cabinet secretaries), the removal of officers, and the conduct of foreign policy.” *Id.* at 567.

¹⁸³ *Id.* at 566 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995)).

¹⁸⁴ *Id.* (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985)).

could potentially lie, she examined: (1) “the content of the tweets sent,” (2) “the timeline comprised of those tweets,” (3) “the comment threads initiated by each of these tweets,”¹⁸⁵ and (4) “the ‘interactive space’ associated with each tweet in which other users may directly interact with the content of the tweets by . . . replying to, retweeting, or liking the tweets.”¹⁸⁶

Judge Buchwald then determined that the “interactive space”¹⁸⁷ associated with each @realDonaldTrump tweet is a designated public forum under the President’s exclusive control.¹⁸⁸ Considering how the social media platform allows “users to interact with other Twitter users in relation to [their tweets],” she zeroed in on how the harm done to the blocked users prevented them from engaging with their President in the “direct manner” they might expect given the nature of the social media interface.¹⁸⁹ Consistent with the Supreme Court’s directive in *Cornelius v. NAACP* to focus on the nature of the access to the public forum sought by the potential speaker,¹⁹⁰ Judge Buchwald contemplated that the desire of the blocked Twitter users is to “directly interact with a tweet sent” by the President.¹⁹¹ The “essential function” of Twitter allows individual speakers access to interactive spaces where they can engage with the content of a

¹⁸⁵ Judge Buchwald rejected the idea that the first three components of @realDonaldTrump were a public forum. She ruled that the content of @realDonaldTrump’s tweets was government speech not subject to the bounds of the First Amendment; similarly, the account’s timeline “merely aggregate[d]” the content of @realDonaldTrump’s tweets, all of which was government speech. *Id.* at 571–72. She further determined that President Trump lacked the requisite authorial control over the “subsequent dialogue” created by thousands of replies and retweets beyond “control exercised over first-order replies through blocking” to create a public forum in the comment threads. *Id.* at 570.

¹⁸⁶ *Id.* at 566.

¹⁸⁷ Unlike the *Davison* court, Judge Buchwald performed a comprehensive forum analysis outlined in *Perry Education* to determine the nature of the forum created in @realDonaldTrump’s interactive spaces. She declined to view @realDonaldTrump’s interactive spaces as traditional public forums like parks and sidewalks because “there is simply no extended historical practice” of the medium of Twitter “being used for public speech and debate since time immemorial.” *Id.* at 574–75. Neither did she perceive @realDonaldTrump’s Twitter space as “incompatible with expressive activity” that would implicate a nonpublic forum. *Id.* at 574. Rather, because the President had expressed intent to use @realDonaldTrump to “communicate[] directly . . . [to] the American people,” it is a designated forum. *Id.* at 574–75 (“The interactivity of Twitter is one of its defining characteristics, and indeed, the interactive space of the President’s tweets accommodates a substantial body of expressive activity.”).

¹⁸⁸ *Id.* at 568 (“[D]etermining that a particular facility or location is a public forum usually suffices to render the challenged action taken there to be state action subject to the First Amendment limitations.” (quoting *Halleck v. Manhattan Cmty. Access Corp.*, 882 F.3d 300, 306–07 (2d Cir. 2018))).

¹⁸⁹ *Id.* at 574 (alteration in original) (internal quotation marks omitted); *see also* *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

¹⁹⁰ *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985).

¹⁹¹ *Knight*, 302 F. Supp. 3d at 573.

given tweet through replying and retweeting.¹⁹² Unless the blocked users log out of their Twitter accounts and create new ones, they cannot interact directly with the President; the act severs a connection between speaker and forum host that “cannot be completely reestablished” until they are unblocked.¹⁹³

Judge Buchwald concluded that “continued exclusion” of the seven plaintiffs based on the viewpoints expressed in their tweets critical of the President was “impermissible” under the First Amendment.¹⁹⁴ Drawing a comparison to the traditional public forum,¹⁹⁵ where a government official is free to ignore an offensive speaker but cannot eject them from the forum on the basis of their viewpoint, Judge Buchwald recommended that the President mute critical Twitterers rather than blocking them.¹⁹⁶ While the First Amendment does not require government officials to listen or provide answers to any given speaker in a public forum,¹⁹⁷ blocking goes too far because the President would not see any tweets from a blocked user and the blocked user would be prohibited from speaking to the President in tweets or retweets in a “discrete[] [and] measurable way.”¹⁹⁸ And despite the fact that the impediment on the blocked Twitterers is a “narrow [] slice of speech,” Judge Buchwald writes that it is “real” and “no more is needed to violate the Constitution.”¹⁹⁹

The Second Circuit recently upheld the district court’s decision in *Knight*, finding that evidence of the official nature of President Trump’s use of his Twitter account is “overwhelming” and that “he may not selectively exclude those whose views he disagrees with” from a social media platform he intentionally opened to millions of followers.²⁰⁰ Furthermore, blocking accounts inhibits the expressive conduct of replying, retweeting, and liking that falls within the ambit of the First Amendment when a government

¹⁹² *Id.* at 572–74.

¹⁹³ *Id.* at 573.

¹⁹⁴ *Id.* at 575. Judge Buchwald allowed that “some content- and speaker-based restrictions may be allowed” in metaphysical forums. *Id.* (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017)).

¹⁹⁵ *Id.* (“Regulation of a [designated public forum] is subject to the same limitations as that governing a traditional public forum . . . [and must be] narrowly drawn to achieve a compelling state interest.” (first alteration in original) (quoting *Int’l Soc’y for Krishna Consciousness, Inc., v. Lee*, 505 U.S. 672, 678–79 (1992))).

¹⁹⁶ *Id.* at 576.

¹⁹⁷ See *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984); *Smith v. Ark. State Highway Emps. Local 1315*, 441 U.S. 463, 466 (1979).

¹⁹⁸ *Knight*, 302 F. Supp. 3d at 577.

¹⁹⁹ *Id.* (“[T]he First Amendment recognizes, and protects against, even de minimis harms.”).

²⁰⁰ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 234 (2d. Cir. 2019).

official like the President attempts to silence expressions of discontent in a public forum he has both created and controls.²⁰¹

B. Limitations Under the Free Speech Clause

Plaintiffs in *Davison v. Loudoun County* and *Knight Institute v. Trump* have (so far) been successful in their arguments to federal courts that their government officials' social media accounts are spaces where the public forum doctrine can apply and where they can exercise their constitutionally guaranteed right of free speech. Chair Randall and President Trump have each lost their appeals in the Fourth and Second Circuit Courts respectively,²⁰² and further development of the public forum doctrine in the context of social media is highly anticipated by both the legal and tech communities.²⁰³

On appeal, both President Trump and Chair Randall advanced arguments that their social media accounts do not constitute public forums because they are privately-owned property that serve as vehicles for their own private speech.²⁰⁴ President Trump offered a particularly compelling argument that blocking critics from @realDonaldTrump does not violate their First Amendment rights because his intention in using the account was to “disseminate his own views to the world,” not create a public forum where other Twitter users can “piggyback” on his speech to “amplify their own.”²⁰⁵ Pointing to the fact that the @realDonaldTrump account existed before he ascended to the Presidency, and will remain his primary Twitter account after he leaves office, President Trump argues that the account “belongs to him, not to the federal government” and that “bootstrapping” First Amendment protections into the “interactive space” of his tweets “by applying the ‘forum’ label” creates an unprecedented “tool for judicial superintendence of personal Twitter accounts and private interactions among Twitter users.”²⁰⁶

²⁰¹ *Id.* at 237–38.

²⁰² See *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va. 2017), *aff'd sub nom. Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018), *aff'd*, 928 F.3d 226 (2d Cir. 2019).

²⁰³ See Issie Lapowsky & Louise Matsakis, *Trump Can't Block Critics on Twitter. What This Means for You*, WIRED (May 23, 2018), <https://www.wired.com/story/donald-trump-blocking-on-twitter-unconstitutional/> [<https://perma.cc/R636-6BU5>].

²⁰⁴ See Brief for Appellants at 20, *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019) (No. 17-2002); Brief for Appellants at 1, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019) (No. 18-1691).

²⁰⁵ Brief for Appellants at 3, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019) (No. 18-1691).

²⁰⁶ *Id.* at 15, 20, 30, 33.

While the Second Circuit did not hand President Trump the victory he sought, another Circuit may yet, if not to the President then to some other government official fighting for the right to curate the content and appearance of their official social media accounts. The Second and Fourth Circuits' rulings in *Knight* and *Davison* are remarkable wins for those who wish to designate all social media sites held by government officials as putative public forums, particularly if private citizens are invited by and encouraged to communicate with the official via private social media platforms.²⁰⁷ Yet, such victories, as glorious as they are, perpetuate the use of the public forum doctrine to protect a limited view of speech where the only harm suffered by the muffled speaker is their inability to speak directly to President Trump in the form of Twitter replies and retweets and to Chair Randall in the form of Facebook comments.²⁰⁸ The provenance of social media, however, is not just unilateral or linear forms of communication, like telephone calls, emails, soapboxes in parks, or microphones at the town hall.²⁰⁹

In the context of interactive social media, where most if not all communications between users are public and open to the eyes and comments of others, the deeper harm suffered by people banned or blocked from a government official's social media presence is exclusion from the collective of followers. Even after being banned from Chair Randall's Facebook Page, Mr. Davison could post "essentially the same" critical message on multiple other Facebook Pages, including his own.²¹⁰ But Chair Randall did not merely take away Mr. Davison's ability to speak to her through her Facebook Page; she excluded him from the congregation of those assembled in the virtual space of her Page. Briefly noting that among the burdens of being blocked are the inability "to participate in the comment threads associated with the President's tweets" and "to converse on Twitter with others who may be speaking to or about the President,"²¹¹ Judge Wynn did not explore the social and political consequences of being banished from the public forum. Mostly lost in the *Davison* and *Knight* decisions is consideration for how people use social media

²⁰⁷ See, e.g., Lidsky, *supra* note 123, at 2024.

²⁰⁸ See *id.* at 2017–20 (advancing an argument that modern public forum jurisprudence is organized around a "linear model of speech [that] gives inadequate consideration to the interest[s] of speakers" and audiences).

²⁰⁹ See *id.* at 2015, 2017–19. See also *supra* Part I for a discussion of how social media engineers call-and-response into platform communication options.

²¹⁰ *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 718 (E.D. Va. 2017), *aff'd sub nom. Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019).

²¹¹ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 232, 238 (2d. Cir. 2019).

to meet others and congregate “in groups, in communities, among strangers, [and] among people they come to know.”²¹²

Social media, for better or worse, creates spaces for people to interact, protest, and assemble in groups.²¹³ The interactions may be metaphysical, ephemeral, and mediated, but that does not mean the conversations, debates, discussions, information sharing, and relationships created by and through and *in* these spaces are not real. There is a compelling need to remedy the exclusionary harms caused to individuals banned or blocked from participating in the public forum of a government official’s social media, a thoroughly modern need that calls for the revitalization of the First Amendment’s Assembly Clause and its ancient protections for the rights of people to congregate in groups for social and political purposes.

IV. CHALLENGING SOCIAL MEDIA BLOCKING UNDER THE ASSEMBLY CLAUSE: POTENTIALS & POSSIBILITIES

Modern public forum jurisprudence is limited by its singular focus on individual speech rights, particularly in the new context of social media accounts created and maintained by government officials.²¹⁴ Regardless of whether the official intended to open their account as a place where individuals could gather and discuss important political or social issues in the presence of state actors, the reality is that people are engaging interactively with the social media profiles of more than 10,000 U.S. federal agencies and sub-agencies, all 100 senators, almost all of the 435 representatives, and thousands of state and local officials and agencies.²¹⁵ Exclusion from any of these social media accounts through blocking or banning tools offered by the social media platform harms the blocked individual not only because they are deprived of a right to speak directly to the government official who holds the account, but also because they have been banished from the “virtual assembly” of their peers and fellow constituents.²¹⁶

²¹² Lawrence Lessig, *The Zones of Cyberspace*, 48 STAN. L. REV. 1403, 1403 (1996).

²¹³ See *supra* Part I.

²¹⁴ Prominent scholars John D. Inazu and Lyrissa Lidsky argue that the public forum doctrine’s reliance on the Free Speech Clause has hobbled the development of robust doctrine asserting the right of individuals to assemble in groups in public spaces. See Inazu, *supra* note 117, at 1166–67; Lidsky, *supra* note 123, at 1976–78.

²¹⁵ See *supra* note 26 and accompanying text.

²¹⁶ See John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093, 1093, 1096 (2013).

A. *The Assembly Clause Protects the Rights of Individuals to Join with Others in Public Spaces*

The Assembly Clause offers a rich historical framework for conceiving of the issues relating to recognizing public forums on social media. Recent scholarship confirms that the assembly right has deep roots in English and American systems of democratic government, stemming from early modern English recognition of a right to associate with others and petition the government.²¹⁷ Pointing to the importance of the assembly right as an essential precursor of and requirement for political activism and civic participation throughout American history—illustrated by examples as varied as precolonial Revolution Societies, the abolition movement, women’s clubs, the labor movement, and Occupy Wall Street—scholars have also argued that assembly is “essential to democratic self-governance.”²¹⁸

The Supreme Court first recognized the right of assembly in *De Jonge v. Oregon*, where Dirk De Jonge was convicted for violating the state’s “criminal syndicalism” law prohibiting advocacy of “unlawful acts or methods as a means of accomplishing or effecting industrial or political change or revolution.”²¹⁹ He was arrested for teaching Communist doctrine to several hundred people gathered in a meeting hall.²²⁰ Striking down Oregon’s law as unconstitutional, the Supreme Court held that “[t]he right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.”²²¹

Since the mid-1960s and the *Perry* decision, however, the Supreme Court has moved in the direction of presuming that government regulation of access to public forums is legitimate so long as the restriction on speech meets a “formalistic threshold” of content and viewpoint neutrality.²²² People, though, need and desire *places* to assemble, both for the value of the congregation itself as a group and as a space where they can define themselves as a group to others. The value of a right to assembly underlies the ability of individuals to “join with others . . . embolden[ing] them to come forward, and to participate in social and political

²¹⁷ See Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 991 (2011).

²¹⁸ *Id.* at 990–94; see Jason Mazzone, *Freedom’s Associations*, 77 WASH. L. REV. 639, 642–44, 700–01 (2002); El-Haj, *supra* note 14, at 554–61, 586–89; Inazu, *supra* note 117, at 1167.

²¹⁹ *De Jonge v. Oregon*, 299 U.S. 353, 357, 364 (1937).

²²⁰ *Id.* at 358–59.

²²¹ *Id.* at 364.

²²² Inazu, *supra* note 117, at 1175. *But see* Kalven, Jr., *supra* note 126, at 23 (arguing that restrictions on access to public forums should be minimal and focus on meeting the need for “some commitment to order and etiquette”).

activities[] . . . [in] a variety of *individual* acts of defiance, contention, and expression.”²²³

Amplifying the relational context, for “one can speak alone; one cannot assemble alone,” the assembly right allows members of a group to engage with and speak to an external audience “but also with one another *within* a group to foster ideas and identities in the ‘pre-political’ and ‘pre-expressive’ moments of group formation.”²²⁴ Significant modern public forum disputes have involved collectives of individuals seeking access to government properties to assemble, coordinate themselves, recruit, and share their message with the government or other members of an interested audience.²²⁵ Groups may be denied access to the town hall or the public park or the sidewalk not only because the government wants to suppress their viewpoint, but also to suppress the existence of the assembly itself. It is that right that needs to be strengthened today in the new context of social media.

B. The Assembly Clause More Accurately Evokes the Rights People Want to Claim in Social Media Spaces

People go onto social media for a variety of reasons: to speak, to see, to be seen, to be spoken to, and to be spoken about. Facebook and Twitter satisfy those all-too-human urges with user interfaces that capture all of that overlapping public dialogue, discussion, reaction, and notice, with tools like Facebook’s “mentions” and Twitter’s @ call-outs.²²⁶ Given the interactive, multilateral nature of social media platforms,²²⁷ the Assembly Clause offers a tighter conceptual fit than the Free Speech Clause to remedy the harms caused by government officials when they block critics on Facebook or Twitter.

Relying on traditional public forum doctrine that focuses on whether the government official impermissibly discriminated against someone because of their viewpoint, the courts in *Davison*

²²³ Timothy Zick, *Recovering the Assembly Clause*, 91 TEX. L. REV. 375, 394 (2012) (reviewing JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012)).

²²⁴ Inazu, *supra* note 117, at 1169.

²²⁵ Bhagwat, *supra* note 217, at 1015–16; see *Int’l Soc’y for Krishna Consciousness, Inc., v. Lee*, 505 U.S. 672, 674–77 (1992) (Hare Krishnas prevented from recruiting and soliciting); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939) (labor organizers prevented from assembling in Jersey City, N.J.); *Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8, 10–14 (1st Cir. 2004) (activists protesting a defined demonstration zone located far from the 2004 Democratic National convention); *Village of Skokie v. Nat’l Socialist Party of Am.*, 373 N.E.2d 21, 22, 25–26 (Ill. 1978) (Nazis prevented from marching in the streets of a predominately Jewish town).

²²⁶ See *supra* Part I.

²²⁷ See *supra* Part I.

v. Loudoun County and *Knight Institute v. Trump* focus on the harm of not being able to “speak” directly to the government official via Facebook comments or Twitter replies and retweets.²²⁸ The harm caused by blocking has more than an individual repercussion, however; it exerts control over the collective assembling of individuals in the virtual space created through the government official’s social media account. The integrity of the group of individuals who choose to follow the government official on social media is disrupted. To return to the earlier hypothetical about the NYC Chancellor of Education’s use of the Puppetworks theater to host regular meetings about a district’s middle school integration plan, here the critics are not being silenced by having the microphone taken away. Instead, they are being ejected from the Puppetworks theater by government bouncers and refused re-entry to the meeting space even if they promise to refrain from speaking. Absent truly disruptive, obscene, or abusive conduct, such exclusion from the assembly space should be unconstitutional in a public forum.

Consider Judge Buchwald’s deliberations in *Knight v. Trump*. She went to great lengths to divide Twitter’s user interface into different sections and to figure out which section might or might not be a public forum, and she determined that the “interactive space” of @realDonaldTrump’s tweets—but not the comment threads—constitute a public forum because that is the specific tool individuals can use to direct private speech at the government on Twitter.²²⁹ Even though “the interactive space of a tweet can accommodate an unlimited number of replies and retweets,” Judge Buchwald considers only direct responses to @realDonaldTrump’s tweets worthy of protection on First Amendment grounds.²³⁰ Only on appeal did Judge Wynn even mention the potentially implicated rights of those who wish to converse with others “about the President” in the comment threads emanating from the President’s tweets,²³¹ and that was only a passing notion written in dicta.

Importantly, we must ask: Why should we be content with such small patches of interactive cyberspace to exercise our First Amendment rights? Judge Buchwald’s conception of the forum privileges unilateral and bilateral speech between original posters and a single follower—here, between @realDonaldTrump

²²⁸ See *supra* notes 210–211 and accompanying text.

²²⁹ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 572–73 (S.D.N.Y. 2018), *aff’d*, 928 F.3d 226 (2d Cir. 2019).

²³⁰ *Id.* at 573.

²³¹ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 238 (2d Cir. 2019).

and any one of his millions of followers. But those exchanges are not where the real dialogues happen on Twitter. It is in the comment threads, which truly represent the unrestrained “vast democratic forums of the Internet” described in *Reno v. ACLU*, where users debate and discuss important issues and mobilize for protest and demonstration.²³² Users cannot easily engage in any of this public-facing activity in @realDonaldTrump’s comment threads if they are blocked. For the excluded users to engage in the prodigious waves of tweets, retweets, replies, @ mentions, and #s, they would have to use different Twitter accounts or try jumping in on the action via another Twitter follower who may respond to @realDonaldTrump’s tweets. Though the individual harm is de minimis—blocked users may use their own Twitter accounts to say whatever it is they want to say about President Trump—the exclusion is harm enough to implicate First Amendment protection.²³³

Consequentially, Judge Buchwald considers that blocked users are restricted from speaking to audiences that extend beyond mere replies to @realDonaldTrump, shifting the forum analysis focus slightly from a one-speaker-one-listener model to one more reflective of Twitter’s multilateral, overlapping structuring of user exchanges.²³⁴ Yet she places a restriction on the forum by bounding it to the interactive space allowing for direct replies and retweets that obscures the reality of how people communicate and organize on Twitter. This artificial restriction belies a disproportionate favoring of the right of speakers in the forum, rather than the rights of users to congregate in a forum to listen, learn, and perhaps speak.²³⁵

²³² *Reno v. ACLU*, 521 U.S. 844, 868 (1997); see also Moshen Bahrami et al., *Twitter Reveals: Using Twitter Analytics to Predict Public Protests* (May 1, 2018) (unpublished manuscript), <https://arxiv.org/pdf/1805.00358.pdf> [<https://perma.cc/68MB-GQT4>] (showing an analytical model for determining which Twitter hashtags calling for demonstration will result in large-scale public protests, using the post-Trump inauguration period as a case study and referencing Twitter’s role in organizing the revolutionary protests of the 2012 Arab Spring); Mike Orcutt, *How Occupy Wall Street Occupied Twitter Too*, MIT TECH. REV. (Nov. 9, 2011), <https://www.technologyreview.com/s/426079/how-occupy-wall-street-occupied-twitter-too/> [<https://perma.cc/5UNU-BX-8K>] (describing how the 2011 Occupy Wall Street movement spread across social media as people took to the streets in protest).

²³³ See *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 577 (S.D.N.Y. 2018), *aff’d*, 928 F.3d 226 (2d Cir. 2019).

²³⁴ *Id.*

²³⁵ The First Amendment freedoms of speech and assembly form a “close nexus” where freedoms of speech and assembly engender a freedom to associate with others to advocate for one’s own beliefs and, in a few cases, to receive information from others. *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); see *Thomas v. Collins*, 323 U.S. 516, 534 (1945); *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943).

Using the Assembly Clause to recognize spaces on the internet where First Amendment rights are protected would honor the historical right of people to stand with others in a group for a common political or social purpose in a thoroughly modern forum. Distinct from the Free Speech Clause, which focuses on the speaker's right, the Assembly Clause countenances the rights of the listeners, those who engage with fellow citizens and government officials "through the performance of communal acts, [whose] communicative possibility exists in joining, excluding, gathering, proclaiming, engaging, or not engaging."²³⁶ For advocates and scholars searching for an opportunity to revive the Assembly Clause, to divine new affirmative rights guaranteed by the Constitution, or to more thoroughly understand the harms suffered by users blocked, banned, or otherwise excluded from public forums on social media, the coming years could be a golden opportunity for experimentation and novel argument.

CONCLUSION

Streets, sidewalks, and parks are "quintessential public forums" for "assembly, communicating thoughts between citizens, and discussing public questions."²³⁷ The public forum has officially re-located from the streets, parks, and sidewalks to the internet, more specifically to a range of social media platforms where government officials host virtual town halls, promote their own Twitter hashtags for constituents to share and use as advocacy tools, and solicit opinions on everything from playground design proposals to middle school integration plans.²³⁸ Government officials who block, ban, or otherwise exclude their followers from their social media channels violate their constitutional rights to speak and to assemble under the First Amendment. It is time to revive the moribund Assembly doctrine to protect the rights of people to congregate in social media's public forums, particularly when user interfaces have been designed around the concept of multilateral, temporally diffuse conversations, interactions, and responsive engagement. The ephemeral and protean nature of the interactive social

²³⁶ Lidsky, *supra* note 123, at 2020 (quoting John D. Inazu, *The Unsettling "Well-Settled" Law of Freedom of Association*, 43 CONN. L. REV. 149, 177 (2010)).

²³⁷ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

²³⁸ See Brief of Electronic Frontier Foundation as Amicus Curiae in Support of Plaintiffs-Appellees at 34–36, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019) (No. 18-1691).

media environment demands no less than a newly defined right for a modern era.

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