GOVERNMENT-SPONSORED SOCIAL MEDIA ACCOUNTS: THE NEW DESIGNATED PUBLIC FORUM

ARTICLE

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INTRODUCTION

THE EVER-CHANGING SOCIAL MEDIA PLATFORMS THAT PREVAIL IN PRESENT times and the rules they entail pose great judicial inquiries in modern society. In general, social media exists as a space that promotes interaction between users.[1] The very purpose of most social media platforms then is to feed themselves from user-generated content to which others can react or comment. Platforms such as Facebook and Twitter host user profiles and provide a space in which said users can engage through posting and feedback. The evolution of social media over the past decade has created new forms of interactions affecting all kinds of human relationships. Hence, as the number of users on social media continues to grow, many governmental institutions and personalities have deemed it not only a useful tool but a necessary one for communicating with citizens.[2]

Throughout its ever-expanding trajectory, government entities and personalities have incrementally used social media to promote this kind of engagement

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1 *Social Media*, MERRIAM-WEBSTER.COM, https://www.merriam-webster.com/dictionary/social%20media (last visited Apr. 1, 2018).

2 Paul T. Jaeger *et al.*, *Information Policy and Social Media: Framing Government—Citizen Web. 2.0 Interactions, in* WEB 2.0 TECHNOLOGIES AND DEMOCRATIC GOVERNANCE 11-25 (Christopher G. Reddick & Stephen K. Aikins eds., 2012).

and interaction among their users. However, the place that social media occupies regarding forum classification in light of the First Amendment remains unclear and jurisprudential interpretation on this matter is rather scarce.[3] This presents a question on whether government-sponsored digital interactive media could be considered a forum designated for public speech. The purpose of this work is to explore relationships between the government and how social media, specifically Twitter, has re-shaped the way individuals interact with their elected officials. In order to answer this inquiry, it will be necessary to evaluate Twitter's nature and the way citizens and the government use it. We consider this to be a definitive factor in order to examine the way free speech operates in virtual interactions.

Furthermore, given social media's novelty, ubiquitousness and rapid development, the controversies that arise on these platforms are rarely addressed in U.S. Courts. However, recently, the Federal District Court for the Southern District of New York ruled it unconstitutional for the President of the United States to block dissenters from his Twitter handle.[4] The Plaintiffs put forth an argument under the First Amendment's right to free speech and states that the President tampered with citizens' rights. Throughout this work, free speech doctrine will also be explored in order to determine how constitutional standards apply specifically to government-sponsored social media platforms and, ultimately, to apply these standards to the case presented in Knight. We consider this to be important because it has remained unclear for the past few years which rights, interests and restrains are at stake for the different partakers in these controversies. For example, whether anyone who holds a position of authority conferred by the state — even the President of the United States— has any kind of protection, or whether citizens have a rightful claim to their free speech rights.

Addressing these issues also opens the discussion about what role social media, in this case Twitter, plays as a private entity. As social media interactions continue to develop, communication through them becomes more accessible and relevant. To achieve the objectives outlined in this introduction, we will also provide a breakdown of the inherent qualities of the main social platforms that should alter or modify what constitutes a public forum regarding the First Amendment. Furthermore, this subject will be explored in the context of contemporary actions from the President and other government officials on social media and how said behavior can, in fact, be considered unconstitutional direct interference with the citizen's right to free speech.

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3 Ross Rinehart, *"Friending" and "Following" the Government: How the Public Forum and Government Speech Doctrines Discourage the Government's Social Media Presence*, 22 S. CAL INTERDISIC. L.J. 781 (2013).

4 Complaint, Knight First Amendment Institute at Columbia University *et al*. v. Donald J. Trump, President of the United States, *et al*., 1:17-cv-05205 (2nd Cir. filed on July 11, 2017); *Federal Court Rules that President Trump's Blocking of Twitter Critics Violates First Amendment*, KNIGHT FIRST AMENDMENT (May 23, 2018), https://knightcolumbia.org/news/federal-court-rules-president-trumps-blocking-twitter-critics-violates-first-amendment.

I. THE RIGHT TO FREE SPEECH AND THE PUBLIC FORUM DOCTRINE

The First Amendment of the United States Constitution protects citizens against the Government by safeguarding their right to speech.[5] Historically, it has conferred particular rights in favor of its citizens which enable them to express their general sentiments, including grievances and petitions arising from governmental actions.[6] The rules deriving from free speech have historically hindered the government from impeding or frustrating expressions made by its constituents, being an especially effective precursor for democracy in instances where dissident expressions are on the line. Jurisprudential development of the First Amendment has provided a set of rules and exceptions that shape free speech doctrine. The precedent acknowledges constitutionally-protected speech, establishes how to recognize laws that violate it, and creates different types of scrutinies for the analysis. Additionally, it establishes a variety of speech that is not protected under the First Amendment.[7] Arising from the free speech doctrine development we find the different types of forums to which the various standards apply.

A. Forum Doctrine

Perry Education Ass'n v. Perry Local Educators Ass'n established forum classification in regards to freedom of speech.[8] Forum classification represents an important factor when determining free speech limitations. The two main categories are known as the public forum and the nonpublic forum.

Nonpublic forums are recognized as places that even though they are government-owned, have neither been traditionally used for expression nor are intentionally designated as venues for free speech, thus are excluded from full constitutional protection. This classification includes places such as military bases, public schools or jails and do not provide speech protection under the First Amendment.[9] In non-public forums, however, the government cannot discriminate based on the speaker's viewpoint and should have a reasonable motive in order to meet the First Amendment criteria. In *Perry*, the Supreme Court states that "[i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access

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5 U.S. CONST. amend. I.

6 U.S. GOVERNMENT PUBLISHING OFFICE, FIRST AMENDMENT: RELIGION AND EXPRESSION 1020 (1992), https://www.gpo.gov/fdsys/pkg/GPO-CONAN-1992/pdf/GPO-CONAN-1992-10-2.pdf.

7 The First Amendment is interpreted as to not recognize certain types of speech such as: obscenity, hate speech, incitement to illegal action, defamation, child pornography, among others. *See.* Miller v. California, 413 U.S. 15 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969); New York Times v. Sullivan, 376 U.S. 254 (1964); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

8 Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

9 Lyrissa B. Lidsky, *Government Sponsored Social Media and Public Forum Doctrine under the First Amendment: Perils and Pitfalls*, 9 Pub. Law. 2 (2011) [hereinafter, Lidksy, *Government Sponsored Social Media*].

on the basis of subject matter and speaker identity."[10] Certainly, a less rigorous principle is applied to non-public forums than to public forums.

According to *Perry*, public forums are divided into two separate categories: traditional public forums and designated (or limited) public forums.[11] Traditional or *quintessential* public forums are the spaces that have been historically and traditionally entitled as a space of expression and where the government is not allowed to restrict speech based on its content.[12] The Supreme Courts describe the forums as "places which by long tradition or by government fiat have been devoted to assembly and debate."[13] Traditional public forums spaces are outlined by the Supreme Court as to only being inclusive of parks, public plazas or sidewalks, these being the traditionally used places of assembly throughout history.[14] Although very limited, the government does hold the power to restrict speech in these forums only when it serves a compelling interest for the state and to impose restrictions on speech based on "time, place and manner".[15] This means that in order for a speech restriction to be constitutional in a traditional public forum such regulations must be content-neutral, must fulfill an important governmental interest, and must leave open other spaces for expression. This criterion is applied only when time, place and manner regulations occur and is referred to as the intermediate standard.[16] However, when content-based restrictions are on the line in a traditional public forum, a stricter scrutiny is applied. To meet First Amendment criteria, a content-based restriction on speech will only be held constitutional if the government authority that suppressed the speech made use of the least restrictive possible methods to achieve a compelling state interest.

The second forum classification is the public forum by designation. Designated public forums are defined as a place that the government deliberately and expressly denominates as a forum open for speech.[17] The creation of a designated public forum is a voluntary act of the government and therefore, it is also a revocable act. However, the government requirement of intent may be met with a "policy and practice" standard,[18] meaning that the government actor can implicitly create such forum. In regards to the designated public forums the Supreme Court has expressed that "[t]he Constitution forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the

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10 *Perry*, 460 U.S. at 49.

11 *Id*. at 45.

12 *Id*.

13 *Id*.

14 Lidksy, *Government Sponsored Social Media*, *supra* note 9, at 4; *see also* Schenck v. Pro-Choice Network of W.N.Y., 519 U.S. 357, 377 (1997); Jamison v. Texas, 318 U.S. 413, 417 (1943); Hague v. CIO. 307 U.S. 496 (1939).

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

16 Lidsky, *Government Sponsored Social Media*, *supra* note 9, at 4.

17 *Id*.

18 Laryissa Lidsky, *Public Forum 2.0*, 91 B.U. L. Rev. 1975 at 1992 (2011).

forum in the first place."[19] In other words, the government is not required to open a public forum nor is it required to keep open a forum of its own creation, but if it does, it must conform to the standards of the traditional public forums. Like in a traditional public forum, speech restrictions that are based in content, in designated public forums are subject to the strict scrutiny standard.[20]

The key difference between a traditional and a designated public forum is that the latter can be regulated or limited by the government in terms of topic of discussion or types of speaker.[21] This is known as the limited public forum, which consists of a space where the government is free to denominate a specific subject and is able to restrict speech that deviates from the context to which the forum is assigned.[22] When limiting a public forum of its own creation, the government should define the imposed restrictions as to which speakers the forum will be open to and which subjects shall be included in the discussion.[23] Even though these restrictions may be content-based, they must be viewpoint neutral and should be reasonably bound to the forum's purposes.[24] The exclusion of speakers or speech that conform to the limitations of the limited forum will result in the application of a strict scrutiny standard.

Deriving from the First Amendment doctrine is the concept of viewpoint discrimination, often mistaken as content-based discrimination.[25] However, both concepts vary in definition and it is very important to note the distinction. A content-based restriction is when the government or government actor prohibit speech of a certain category or topic altogether. As it is discussed earlier, content-based restrictions are permitted in non-public forums as well as in limited public forums. Whereas viewpoint discrimination refers to the suppression of a specific perspective on a permitted subject matter. A clear example of viewpoint discrimination is found in *Boos v. Barry*,[26] where the Supreme Court declared invalid on its face a District of Columbia law that prohibited criticism of foreign governments but did not prohibit other types of speeches regarding those foreign governments. Scholar Marjorie Heins describes viewpoint neutrality as "perhaps the single most important value underlying the First Amendment."[27] This is because the central purpose of the First Amendment is to make sure that speech is not restricted based solely on ideas.[28] Viewpoint-based restrictions are typically disfavored by the

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

20 *Id*.

21 Lidsky, *Government Sponsored Social Media*, *supra* note 9, at 4.

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

23 Lidsky, *Government Sponsored Social Media*, *supra* note 9, at 4.

24 *Id*.

25 *See* Marjorie Heins, *Viewpoint discrimination*, 24 HASTINGS CONST. L.Q. 99 (1996).

26 Boos v. Barry, 485 U.S. 312 (1988).

27 Heins, *supra* note 25, at 168.

28 *Id.*

courts, precisely to safeguard the diversification and flow of ideas. This central corollary of free speech finds a limitation, however, in government speech.

B. Government Speech

Even when the First Amendment expressively provides restrictions for governmental actions that limit the free speech of citizens, the Supreme Court has established that the Government does not violate its citizens' First Amendment rights when it promotes expressions that are not viewpoint neutral in order to convey its own message.[29] This concept is a paradoxical approach to viewpoint neutrality as it promotes the very opposite principle that free speech doctrine intends to further. The reasoning behind the concept of government speech is that "[to] function, government must be able to express its ideas and exhort its constituents."[30] In this sense, government speech is excluded form First Amendment scrutiny even when the effect of that government message is to limit private speech.[31]

Government speech was thoroughly exemplified in *Pleasant Grove City v. Summum*,[32] which recognized that: "[a] government entity may exercise this same freedom to express its views when it receives assistance from private sources for the purpose of delivering a government-controlled message."[33] In this case, the Court ruled as valid government expression the prerogative of a municipality to accept and display a privately funded monument while refusing the display of another privately funded monument on the grounds that the monument it rejected did not display the city's ideals. However, Constitutional Law Professor Jonathan Blocher warns about the potential harm the *Pleasant Grove* decision, and therefore the concept of government speech, could mean to First Amendment core values. According to his view "[g]overnment speech not only distorts the marketplace of ideas, in many cases it directly regulates individual private speakers—either forbidding them to express viewpoints they support or compelling them to express viewpoints they do not support."[34] This analysis contends that the disharmony between government speech and viewpoint neutrality might be irreconcilable when First Amendment principles are at stake.

The criticism on government speech becomes more relevant than ever in present times, where the government has vast and rapid methods for the dissemination of messages.[35] In turn, under government speech, private expression might be

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29 Lidsky, *Public Forum 2.0*, *supra* note 18.

30 Heins, *supra* note 25, at 20.

31 Joseph Blocher, *Viewpoint neutrality and government speech*, 52 B.C. L. REV. 695, 697 (2011).

32 Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009).

33 *Id.*

34 Blocher, *supra* note 31, at 698.

35 *Id*.

suppressed to make way for the government's message, an action that is inherently impermissible under the most basic First Amendment principles.

II. TWITTER AND THE PUBLIC FORUM DOCTRINE

Twitter is a social media web page originated in 2006 and is currently used by approximately 330 active users worldwide, among which 69 million are United States citizens.[36] From its beginnings Twitter has evolved into a platform that allows its users to post 280-character messages called *tweets*. These messages can be shared, replied to and "liked" by other users, promoting interaction among them. Additionally, this social network provides a system of real-time worldwide news and trends available to every user. All these Twitter functions are powered by a "follow" system where users, each having their unique Twitter handle (or username), get to subscribe to other active user's profiles to see their content first-hand. Users on Twitter range from private personas, politicians, journalists and news media to entertainment channels, brands, celebrities and other personalities. In terms of privacy control, Twitter allows its users to keep their account private or even block other users from engaging with the user's tweets or being able to use their twitter handle to tag them.

Although the platform hosts significantly less users than Facebook,[37] it holds a larger influence on the because of the way politics, journalism and activism engage on it. The platform showed its particularly influential nature through its role during the 2016 Presidential Election. [38] According to the New York Times, from the first presidential debate that took place in September, more than one billion election-related posts had been posted on Twitter and more than 40 million election-related tweets were sent on Election Day.[39]

The social media outlet's potential is not only shown during extraordinary events like an election. Twitter's popularity and accessibility proves to be a key component in the dissemination of speech throughout its everyday operations. The power of turning an average citizen into a massive disseminator of real-time information evidences how much influence power is vested in individuals through the platform. This visibility is precisely what has driven movements to increase their population reach and further their objectives. Particularly, Twitter became

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36 Brett Molina, *Twitter over-counted active users since 2014, shares surge on profit hopes*, USA TODAY (October 26, 2017) https://www.usatoday.com/story/tech/news/2017/10/26/twitter-over-counted-active-users-since-2014-shares-surge/801968001/; *Company Information*, TWITTER, https://about.twitter.com/en_us/company.html (last visited June 17, 2018).

37 Number of monthly active Facebook users worldwide as of 1st quarter 2018, STATISTA, https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/ last visited June 17, 2018).

38 Jaeger, *supra* note 2, at 12.

39 Mike Isaac, *For election day influence, Twitter ruled social media*, THE NEW YORK TIMES (November 8, 2016), https://www.nytimes.com/2016/11/09/technology/for-election-day-chatter-twitter-ruled-social-media.html.

instrumental in modern-day activism such as the #BlackLivesMatter[40] and #MeToo[41] movements, as well as many other causes that have reached the public eye with Twitter as their lifeblood. The historical impact these movements created peaked on the web through a purely virtual sphere with an unprecedented reach potential. In other words, what was once done in the public square, Twitter has now transferred into the virtual world.

A. Twitter in the Public Forum Spectrum

It is important to acknowledge the potential status of social media platforms as forums for the purposes of the First Amendment. In *Rosenberg v. Rectors and Visitors of the University of Virginia*,[42] the Supreme Court stated that in order for there to be a forum, said space need not constitute a physical location. The *Rosenberg* Court specifically stated that even when the space "is a forum more in a metaphysical than in a spatial or geographic sense, the same principles [of free speech] are applicable."[43] This is particularly relevant in the case of social media networks, which are hosted in the cyberspace and whose location is not a geographical place but rather a web-based abstract environment where computer and information technology dwell. Additionally, it must be noted that while the First Amendment protection is only enforceable against the government and not against private actors, the space where speech is granted does not have to be necessarily owned by the government. As prominent First Amendment Scholar, Professor Lyrissa Lidsky describes it: "government ownership is not a *sine qua non* of public forum status."[44]

When it comes to forum classification, the denomination of traditional public forum may be easily ruled out for social media. This is because jurisprudence interpretation of the First Amendment has narrowed the classification down to historically traditional gathering spaces such as public parks, sidewalks and plazas,[45] thus widely limiting this category. While social media is in fact becoming a key component in modern society, it is still a relatively new phenomenon within the larger communication technology spectrum; thus, its impact on civilization is still developing. It is contended that social media is expressively excluded from the classification because of the definition of a traditional public forum enunciated in

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40 Gene Demby, *Combing through 41 million tweets to show how #BlackLivesMatter exploded*, NPR (March 2, 2016), https://www.npr.org/sections/codeswitch/2016/03/02/468704888/combing-through-41-million-tweets-to-show-how-blacklivesmatter-exploded.

41 Lisa Respers, *#MeToo: Social media flooded with personal stories of assault*, CNN (October 16, 2017), https://edition.cnn.com/2017/10/15/entertainment/me-too-twitter-alyssa-milano/index.html.

42 Rosenberg v. Rectors and Visitors of the University of Virginia, 515 U.S. 819 (1995) (wherein the Court extended the public forum protection to a University sponsored student fund, deeming unconstitutional a publication denial of funds to a Christian publication).

43 *Id*.

44 Lidsky, *Government Sponsored Social Media*, *supra* note 9, at 5.

45 *Id*. at 4.

Perry; that is, a historically opened space for political speech and debate.[46] In fact, the Supreme Court has traditionally given a restrictive approach to the traditional public forum doctrine interpretation, limiting this specific classification to places which have been available for expression since time immemorial.[47] In *International Society for Krishna Consciousness v. Lee*,[48] for example, the Court considered the forum classification of an airport terminal and determined that it was not a public forum stating that "given the lateness with which the modern air terminal has made its appearance, it hardly qualifies as a property that has 'immemorially . . . time out of mind' been held in the public trust and used for the purposes of expressive activity."[49] Certainly, social media presents a different scenario to that of airport terminals, but the same restrictive principle is applicable.

Nonetheless, social media has shown to become more of a key social component than ever, thus its potential forthcoming as a basic social tool may be able to challenge that assertion in the future. In a very recent Supreme Court decision, Justice Kennedy described social networking sites as "the modern public square."[50] This determining statement the Supreme Court adopted in *Packingham* has the potential to establish the traditional forum classification for social media. As social interactions continue to drift towards virtual communications, the public square comparison becomes an increasingly relevant simile. In modern day interactions, Twitter, as well as other social media platforms, represents a primary source of communication and information for millions of citizens, especially when it comes to politics.[51] With every new user, social media continues to grow as a space to which the public confides a status comparable to the function that is been traditionally assigned to the public square.[52]

Even if the Supreme Court does not expressly establish that social media is in fact a traditional public forum, the designated public forum doctrine could still apply. The latter public forum category is defined in *Perry* as "public property which the state has opened for use by the public as a place for expressive activity."[53] In this regard it is appropriate to examine the rule set forth in *Arkansas Educational Television Commission v. Forbes* and *Cornelius v. NAACP Legal Defense and*

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46 *Id*.

47 *See* Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983); Hague v. Committee for Indus. Organization, 307 U.S. 496, 515 (1939).

48 Int'l Soc. for Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

49 *Id*. at 680.

50 Packingham v. North Carolina, 137 S. Ct. 1730 (2017) (where the Supreme Court unanimously struck down a North Carolina statute which banned registered sex offenders from accessing social media websites, deeming the law unconstitutional).

51 Tom Murse, *How social media has changed politics*, THOUGHTCO, (Aug. 16, 2017), https://www.thought.com/how-social-meida-has-changed-politics-3367534.

52 Bill Sherman, *Your major, your "friend": public officials, social networking, and the unmapped new public square*, 31 PACE L. REV. 95 (2011).

53 Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

Educational Fund, Inc.[54] In both cases, the Supreme Court reiterates that in order for a designated public forum to be created the government must do so with clear intent.[55] Specifically the court states that "the government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional public forum for public discourse."[56]. The government must open a space for speech by intentionally designating it as a public forum for the space to be validly considered as one. Government sponsored sites and social media (informative websites, blogs or government agency websites) do not meet this requisite because they are unilateral platforms and thus, are non-interactive by nature. However, the very nature of a social media outlets like Twitter promotes interaction and feedback through comment sections and reaction functions. These qualities are inherent to online networking platforms unless the user who creates a profile desires to remove its public status, limiting or closing the profile view function to certain users.[57]

Ultimately, social media platforms provide a space for public forums to be held and the very action of creating a government-sponsored profile on social media calls for citizen participation in said forum. In other words, creating a government-sponsored profile on a social media platform implicates the intention of creating a space dedicated to speech. More so, if comment sections are not closed in their entirety by the government actor, or a content is expressively prohibited in the government-sponsored interactive spaces, it cannot be inferred that the government's intent is to create a limited public forum. When it comes to the freedom of speech interpretation, the restriction of expression in governmental social media profiles certainly poses a constitutional issue, especially when it is done so with the intent of silencing dissenting speech.

Twitter as a platform is responsible for providing not only a space for instant expression, but also as a virtual connection between users from all around the world.[58] This platform is the center of many types of communications that range from private messages to worldwide news and is a host to millions of users. Due to the platform's popularity and public dominance, most notable politicians hold a Twitter handle, mainly used to communicate with voters during election time, receive feedback from constituents and to disclose general policy and information

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54 Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666 (1998); Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788 (1985).

55 *Forbes*, 523 U.S. at 677.

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

57 *Privacy Basics*, FACEBOOK, https://www.facebook.com/about/basics (last visit on June 17, 2018); *Privacy Policy*, TWITTER, https://twitter.com/en/privacy (last visited June 17, 2018).

58 Brett Molina, *Twitter over-counted active users since 2014, shares surge on profit hopes*, USA TODAY (October 26, 2017) https://www.usatoday.com/story/tech/news/2017/10/26/twitter-over-counted-active-users-since-2014-shares-surge/801968001/; (Twitter is a social media network established in 2006 consisting on microblogging 280-character posts referred to as "tweets". As of 2017, Twitter had an estimated number of 330 million active users); *Company Information*, TWITTER, https://about.twitter.com/en_us/company.html (last visit on Apr. 1, 2018).

to the public and the press. Undoubtedly, Twitter played a major role in the 2016 presidential election, where Trump used the platform to establish a substantial presence throughout the course of his campaign.[59] Overall, the platform serves as a primary news source, communication outlet and government interaction space for millions of users. Its undoubted potential for influence and feedback has also positioned Twitter amongst the most used social media networks with almost 70 million users in the United States alone.[60]

Twitter as a corporation has even promoted their functionality as one which furthers political and civic engagement. Its core value, as the company states on its website, proclaims: "[w]e believe in free expression and think every voice has the power to impact the world."[61] In terms of determining forum classification, the types of unprecedented interactions that take place on Twitter make the comparisons with other mediums such as newspapers and television difficult, if not impossible. Twitter represents a whole other category that asks for a broader inspection of its functions to determine the category to which it belongs for the purposes of the First Amendment. Unlike a newspaper, Twitter allows for real-time communications and discussions to take place, it is constantly feeding new information to the public and even permits individual conversation through its private message feature. It is not a content-controlled medium and it is constantly being fed with new information. Overall, Twitter represents the ways of modern-day reciprocity amongst individuals and it certainly sheds a light on how interactions will be in the future.

The Court's reasoning in the *Packingham* case for all purposes certainly reinforces the connection that a channel such as Twitter may be categorized as a traditional public forum.[62] However, as it is mentioned before in this work, American jurisprudence is not so lenient with forum interpretations as this is a classification that has been historically limited to immemorially recognized spaces.[63] Twitter, being a rather novel technological advance, falls very short of that definition. On the other hand, if Twitter were to be considered a public forum on its traditional sense, blocking constituents from a government-sponsored Twitter profile may certainly be facing strict scrutiny standard in Court. As we explained before, when it comes to the analysis of traditional public forums, government content-based

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59 Ashley Ward, *Elections 2016: The role social media played in the elections*, AUTHORITY LABS (November 10, 2016) https://authoritylabs.com/blog/election-2016-the-role-social-media-played-in-the-elections/.

60 *Most popular mobile social networking apps in the United States as of November 2017, by monthly users*, STATISTA https://www.statista.com/statistics/248074/most-popular-us-social-networking-apps-ranked-by-audience/(last visited June 17, 2018).

61 *Company values*, TWITTER, https://about.twitter.com/en_us/values.html (last visited on June 17, 2018).

62 Packingham v. North Carolina, 137 S. Ct. 1730, 1737 (2017) (the Supreme Court stated in this case that social media outlets "allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'").

63 Int'l Soc. for Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

restrictions are examined under a strict scrutiny. According to this test, the government has the ability to regulate access to the forum based on the content of the regulated speech only if it is by employing the least restrictive method of achieving a compelling governmental interest.[64] Ultimately, it comes down to a disharmony between the conventional application of the traditional public forum doctrine and the contentions held in the *Packingham* case. Whether the Court is going to continue to extend this approach to social media websites remains to be seen.

B. Twitter: A Private Party as a Host for Public Content

A question worth exploring in this context is how free speech standards applicable to government actions regulating citizen expression apply in the context of a government-sponsored profile hosted by a private party. Professor Noah Feldman addressed the issue in an article where he states that Twitter, as a private company, speaks through its service. His article contends that in allowing a government official to block users from his or her accounts, Twitter is in itself exercising its own right to free speech.[65] The author argues that Twitter cannot be classified as a designated public forum because it is not a public party, but rather a private actor capable of regulating itself as it pleases. While it may be true that Twitter is a private player, the free speech doctrine does not necessarily exclude private property from being subject to the designated public forum status.[66] The State may designate private property as a public forum and, as we saw earlier, this property may also refer to the metaphysical space that is the digital area.[67]

Furthermore, Feldman's argument also fails to consider the nature of social media in the modern context. In the article, Feldman parallels social networks such as Twitter and Facebook to news channels, claiming that the latter are privately owned forums. But as the Court has expressed before: "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."[68] As we exposed earlier in this article, the practice of social networking has rapidly become a necessity more than a commodity in today's society and its effects on communication and speech should not be overlooked. More so, it will inevitably continue to evolve into a vital part

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64 Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

65 Noah Feldman, *Constitution Can't Stop Trump From Blocking Tweets*, BLOOMBERG (June 7, 2017), https://www.bloomberg.com/view/articles/2017-06-07/constitution-can-t-stop-trump-from-blocking-tweets#footnote-1496850362381-ref.

66 Denver Area Educational Telecom. Consortium v. FCC, 518 U.S. 727 (1996).

67 Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009).

68 Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).

of not only communications, but government-citizen interactions, such as elections and political activism.[69] Therefore, the very nature of internet-based networking platforms differs greatly from that of television channels in that social media by definition creates an inherently immediate interactive space, whereas other media such as newspapers, magazines and television broadcast do not. Such differences should be acknowledged when categorizing a medium with an unprecedented relevance like social media. The *Packingham* decision is a clear example of the Court's acknowledgement of social media as an evolved alternative of historically utilized spaces designated for speech. It specifically contends that it is "perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[70]

C. Jurisprudential Treatment

The novelty and complexity that new technologies pose for the judicial system have provoked a somewhat slow development of jurisprudential treatment of social media. Very few cases directly address the issues presented in this work. However, *Packingham* made a pivotal determination regarding this subject: "[t]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights."[71] In *Packingham*, the Court examined a North Carolina law that prevented registered sex offenders from accessing certain social media websites. The defendant in this case was convicted under said law after posting on his private page, a decision he appealed under the stance that the law was unconstitutional. The unanimous Supreme Court opinion states that:

> A fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context. A basic rule, for example, is that a street or a park is a quintessential forum for the exercise of First Amendment rights . . . . Even in the modern era, these places are still essential venues for public gatherings to celebrate some views, to protest others, or simply to learn and inquire . . . . While 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 . . . and social media in particular.[72]

The statements delivered in the *Packingham* opinion acquire great importance because they place the topic of internet speech delivered through social media in a position of relevance for future cases. These pronouncements made about social media are fundamental for First Amendment discussion in the online communication scope, even when in *Packingham* the Court did not go as far as

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69 Murse, *supra* note 51.

70 Packingham v. North Carolina, 137 S.Ct. 1730, 1737 (2017).

71 *Id.*

72 *Id.* at 1735.

making the public forum analysis. In *Davidson v. Loudoun County Board of Supervisors*,[73] however, this analysis was made in regards to the Facebook page of a government official.

In *Davidson*, a U.S. District Judge examined a case where a citizen was banned from the elected Chair's official page for making critical comments and determined that when elected government official blocks critics on social media, it may result in an unconstitutional restriction of free speech. To reach this conclusion it applied the forum analysis to the social media platform and the government's intention in silencing critical commentary.[74] The District Court found that in this case the government official had created a limited public forum for the purposes of the First Amendment.[75] Specifically, in substantiating his decision, the Judge contended that:

> [T]the suppression of critical commentary regarding elected officials is the quintessential form of viewpoint discrimination against which the First Amendment guards. By prohibiting Plaintiff from participating in her online forum because she took offense at his claim that her colleagues in the County government had acted unethically, Defendant committed a cardinal sin under the First Amendment.[76]

As we will see in the case of *Knight First Amendment v. Trump*, this line of decisions certainly shapes the future for First Amendment analysis for government-sponsored social media pages and raises an important discussion on the way elected government officials are to use their platforms without harming freedom of speech.

D. The Knight First Amendment Institute v. Trump

On July of 2017, the Knight's First Institute filed a lawsuit against Donald Trump in which several Twitter users they represented claimed that the President violated their First Amendment rights when he blocked them on said social media platform. [77] As the lawsuit asserted, President Donald Trump's Twitter account,

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73 Davidson v. Loudoun County Board of Supervisors, 227 F.Supp.3d 605 (2017).

74 *Id.*

75 *Id.* at 609.

76 Memorandum of Decision, Davidson v. Loudoun County Board of Supervisors, 1:16-cv-932, at 29-30 (E.D. Va. 2017).

77 Rebecca Heliweil, *Trump violates First Amendement with every twitter user he blocks, lawsuit contends*, FORBES, (July 11, 2011), https://www.forbes.com/sites/rebeccaheilweil1/2017/07/11/trump-violates-first-amendment-with-every-twitter-user-he-blocks-lawsuit-contends/#645a58237a28 (the Knight First Amendment Institute is a Columbia University legal association dedicated to the litigation, research and public education regarding First Amendment rights).

bearer of almost 50 million subscribers,[78] serves as a recipient for "tens of thousands of comments in the vibrant discussion forums associated with each of the President's tweets."[79] Just a broad inspection of the President's comment and reply section in his Twitter page will show an undoubtedly feedback-loaded comment section with both supporting and opposing comments towards the current head of state's discourse.

It is important to note, for the purpose of this discussion, that while the presidential office maintains a Twitter account under the handle of @POTUS, Trump chose to keep his personal account, @realDonaldTrump, as his official account during his presidency. The lawsuit argued that the Trump Administration has made use of the account for official government actions such as starting government policies, making formal announcements and promoting foreign relations. According to the lawsuit, barring citizens from accessing such information would interfere with their First Amendment right to exercise free speech. As a remedy, the plaintiffs petitioned for an injunctive relief requiring @realDonaldTrump to unblock them from Twitter. The plaintiff's contentions were supported by an *amicus curiae* brief submitted to the Court which will be discussed throughout this work.[80]

As part of the reply to the lawsuit, defendants stated a series of arguments against those seeking this remedy. In summary, the President's legal representation contended that:

> It would send the First Amendment deep into uncharted waters to hold that a president's choices about whom to follow, and whom to block, on Twitter—a privately run website that, as a central feature of its social-media platform, enables all users to block individuals from viewing posts—violate the Constitution.[81]

The defendants argued that the remedy sought by the plaintiffs was unattainable due to the Court's impediment to interfere with the Presidency in the performance of official duties. To support this, the reply cited the Supreme Court's decision in *Mississippi v. Johnson* and Justice Scalia's concurring opinion in *Franklin v. Massachusetts*.[82] According to the defendants, by granting relief to the plaintiffs,

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78 *RealDonaldTrump*, TWITTER COUNTER, https://twittercounter.com/realDonaldTrump (last visited June 17, 2018) (President Donald Trump's Twitter holds 49.8 million followers as of April of 2018. On average, Trumps Twitter account gains close to 45,000 followers daily).

79 Complaint, *supra* note 4, at 2.

80 Brief for the Knight First Amendment Institute at Columbia et al. as Amicus Curiae supporting Petitioners, Knight First Amendment Institute at Columbia University *et al*. v. Donald J. Trump, President of the United States, et al., 1:17-cv-05205 (2nd Cir. filed on July 11, 2017).

81 Letter from Michael H. Baer, Trial Attorney, U.S. Dept. of Justice, to Naomi Buchwald, Judge, Southern District of New York (August 11, 2017) (on file with the U.S. Dept. of Justice).

82 Franklin v. Massachusetts, 505 U.S. 788 (1992); Mississippi v. Johnson, 71 U.S. 475 (1866) (in this case, the Court held that an injunctive relief against the President did not proceed because he was exercising presidential discretion in deciding to enact a law passed by Congress. Note that this case refers to Court interference with the President's power to enact laws, not to the matter addressed in Knight, which is the actions taken by the President against citizens in a public forum).

the judicial branch would undertake the discretionary authority the executive power holds. In an order on motions for summary judgment the District Court in charge of the case addressed this particular issue brought up by the defendants and concluded that redressability of this case was duly stated and a relief would not interfere with the President's discretionary power.[83]

Additional to the argument allusive to a separation of powers issue, the Defendants also denied that there was a First Amendment injury in the first place. This reasoning erodes from the fact that blocked users can continue to view @realDonaldTrump's messages on Twitter because the account is public when logged out of their account, even when that means that users cannot actively interact with the President's tweets as part of the faculties of their own account. In response to the defendant's assertion on this matter, the District Court recognized the plaintiffs' standing by stating that the limitations imposed on their Twitter account were sufficient to configure an injury subject to remedy. Specifically, the Court stated that: "While they are not tangible in nature, these limitations are squarely within the 'intangible injuries' previously determined to be concrete . . . . These limitations are also particularized, in that they have affected and will affect the individual plaintiffs in a 'personal and individual way'."[84] Thus, finding that even when blocked users can access the President's account through other mediums, not being able to use their own account represents an injury-in-fact for the plaintiffs.

In essence, the lawsuit against the Trump administration raised important questions on the modern application of the First Amendment. Specifically, whether Twitter was classified as a public forum, either traditional or by designation, determined if the President was infringing on the petitioner's rights. Other considerations that should be taken into account are the Government's intentions when sponsoring social media networks and the role that social media outlets, as corporations, play when it comes to acknowledge first amendment rights to citizens. In summary, the District Court concluded that "[t]hough Twitter also maintains control over the @realDonaldTrump account . . . we nonetheless conclude that the extent to which the President and Scavino can, and do, exercise control over aspects of the @realDonaldTrump account are sufficient to establish the government-control element . . . ."[85]

While the traditional public forum may not yet be applicable to Twitter as a whole, the designated public forum doctrine was applied to Trump's social media profile. To determine whether Trump's account was a designated public forum greatly depends on the government's intention of creating such forum. The amicus curiae brief for the Knight case confronted President Trump's use of @theRealDonaldTrump account by arguing that the President's habits on this particular

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83 Memorandum and Order on motions for summary judgment, Knight First Amendment Institute at Columbia University, *et al.* v. Donald J. Trump, President of the United States, *et al.,* 1:17-cv-05205-NRB, at 32.

84 *Id.* at 22.

85 *Id.* at 43.

social media network expresses no other intent than that of opening a forum for public and political debate.[86] The President's behavior within his Twitter account leaves little space for a different interpretation. The first and clearest example of this is his constant activity and uninterrupted posting. Just a quick examination of his Twitter account suggests that he uninterruptedly posts on his account almost every single day.[87] Additionally, the President has used Twitter to interact with his followers by creating a conversation around some of the responses posted by Twitter users on his comment section. The amicus curiae brief stated that "President Trump frequently has tweeted in response to replies to his prior tweets, to replies to other users' tweets, and even to other users' tweets that do not mention @realDonaldTrump."[88] Most likely this behavior was enough for the Court to conclude the President's intent was that of creating a public forum open to easy engagement between users and his user profile.

Furthermore, Trump's use of his Twitter account after being elected President has focused on policy-making[89] and hastening foreign relations[90] in many occasions, giving the impression that the purpose of his communications is directed at U.S. citizens affected with such policies. Trump has even used his Twitter account to fire some of his highest-ranking members of his administration.[91] Former Secretary of State Sean Spicer made a particularly relevant official assertion on behalf of the White House when he explained during a press conference that "[t]he President is the President of the United States, so [his tweets are] considered official statements by the President of the United States,"[92] when asked if Trump's tweets through his @realDonaldTrump handle were considered official White House pronouncements. This statement probably rendered the administration's intentions undoubtedly clear. It also rebated any argument that would attribute Trump's communications through Twitter as statements of his private persona, rather than his official one.

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86 Brief for Petitioner, *supra* note 80, at 8.

87 Donald Trump (@realDonaldTrump), TWITTER, https://twitter.com/realDonaldTrump?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor (last visited June 18, 2017).

88 Brief for Petitioner, *supra* note 80, at 9.

89 On July of 2017, President Trump announced via @realDonaldTrump that transgender individuals would no longer be allowed to participate in the military. Melissa Quinn, *Trump: The military will no longer allow transgender people to serve 'in any capacity'*, WASHINGTON EXAMINER (July 26, 2017), http://www.washingtonexaminer.com/trump-the-military-will-no-longer-allow-transgender-people-to-serve-in-any-capacity/article/2629714.

90 Eli Watkins, *Trump taunts North Korea: My nuclear button is 'much bigger,' 'more powerful'*, CNN, (January 3, 2018), https://edition.cnn.com/2018/01/02/politics/donald-trump-north-korea-nuclear/index.html.

91 Sarah Jeong, *Trump fires secretary of state via tweet*, The Verge (March 13, 2018), https://www.theverge.com/2018/3/13/17113950/trump-state-department-rex-tillerson-fired-tweet-twitter.

92 Elizabeth Landers, *White House: Trump's tweets are 'official statements'*, CNN (June 6, 2017), https://edition.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html.

Therefore, the Court concluded that Trump's Twitter conforms to the designated public forum doctrine.[93] Since said forum is defined as one the government has designated with the purpose of it being a place for discussion,[94] which is exactly what President Trump promoted with his account. As we have discussed earlier, unlike a traditional public forum, designated public forums are not necessarily spaces that historically used for furtherance of speech, such as a public plaza, but instead require a particular action from to government to qualify as such. However, by designating a forum as public, the government must adhere to the same criteria applied to these types of forums: while content-based restrictions are permitted to limit the forum to certain discussion or to certain speakers, viewpoint discrimination is certainly not allowed.[95]

Now, it is important to reference the kind of speech that is at stake in the Knight case. Plaintiffs often replied to the President on his Twitter page with satirical or critical comments towards his administration and policies.[96] For example, plaintiff Nick Pappes, under his Twitter handle @Pappiness, replied to Trump: "Trump is right. The government should protect the people. That's why the courts are protecting us from him."[97] After his tweet became popular, the President blocked the user from accessing his tweets. With this and other examples included by the plaintiffs in the Knight lawsuit, it becomes clear that the President merely blocked dissident and critical opinion, therefore incurring in plain viewpoint discrimination.

Lastly, while it may be argued that Trump's blocking practices are part of his administration's right to government speech discussed earlier, it is clear that his actions derive from a distaste in dissident opinions, rather than a formal accommodation and display of his own political views. It is also important to add that in *Pleasant Grove City*, the Court did find a legitimate state interest in rejecting the monument from the premises of a free speech zone. Whereas, in the Knight Institute case, Trump's intention of removing dissident opinions from his page was not considered a legitimate state interest.

CONCLUSION

The full extent of social media's impact on free speech doctrine and government action is a field that has yet to be developed, analyzed and fully understood. The novelty of emerging technologies and digital media implies a challenge for jurisprudential interpretation precisely because of the unprecedented inquiries it brings to the table. Therefore, a path for social media speech must be carefully

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93 Kevin Breuninger, *Trump can't block Twitter followers, federal judge says,* CNBC (May 23, 2018) https://www.cnbc.com/2018/05/23/trump-cant-block-twitter-followers-federal-judge-says.html.

94 Perry Education Ass'n v. Perry Local Educators' Ass'n, 460 U.S.37, 45.

95 *Id*. at 46.

96 Complaint, *supra* note 4, at 16-24.

97 *Id.*

carved in the courts—perhaps *Knight First Amendment* represents the beginning of this. Apart from the public square comparison, analogies of social media with other communication platforms are prone to fall short on their merits because of the vast possibilities that social media provides call for different and innovative approaches. On the other hand, these interpretations must be done with the utmost care and consideration for the special circumstances of the time. As a constantly evolving medium, the controversies that erode from social media continue to challenge doctrinal development with unparalleled contentions that will perhaps dramatically change the traditional ways and interpretations of free speech. The value that social media bears in today's society demands a reasonable adaptation of the precepts that currently apply to other mediums. This should be done by taking into consideration the interactions that occur in social media platforms and the parties that carry said interactions.

From the First Amendment analysis developed in this work, we conclude that social media outlets are indeed ideal forums of expression dedicated to speech and interactions between different parties. Most jurisprudential approaches to the consideration of traditional public forums have limited the scope of its application to spaces that have existed throughout history. Social media certainly does not abide by this definition. However, it does fit the description of a designated public forum when the State creates a citizen interaction-oriented platform on its behalf, even when a private party such as Twitter holds that platform. In this sense, the establishment of a government-sponsored social media platform in itself calls for an active participation and citizen interaction characteristic of a designated public forum under the provisions of the First Amendment. Therefore, we assert, just as the District Court for the Southern District of New York did, that government profiles on these platforms certainly meet the criteria of a designated public forum. The interactions that once took place in the physical space have now transferred to the virtual world, thus, the constitutional protections must be extended to these spaces so as not to harm the basic rights of speech conferred to citizens.