THE FIRST AMENDMENT AND SOCIAL MEDIA: HOW FREE SPEECH DOCTRINES AFFECT THE RIGHT TO ACCESS THE SOCIAL MEDIA ACCOUNTS OF GOVERNMENT OFFICIALS

By

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ABSTRACT

Internet-based social media networks such as Facebook and Twitter have become the preferred method of correspondence among public and private citizens. Government officials often establish accounts to share important information with their constituents. Now, users who have their social media blocked by a public official are unable to interact with public officials, and allege this violates their First Amendment rights to freedom of speech and petition. This thesis examines the question: *How do the free speech doctrines of viewpoint discrimination, public forum, and government speech affect the First Amendment right to access the social media accounts of government officials?* The focus is on the law as it applies to efforts by government officials to block social media accounts. Analysis reveals that the First Amendment right to access is preserved through the creation of public fora, but the government reserves the right to delineate rules for posts, justified under the government speech doctrine.

INTRODUCTION

The First Amendment to the United States Constitution affords citizens the sacrosanct rights to free speech and to petition the government for a redress of grievances. The Amendment reads: "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."

These provisions are paramount to the American values of individual liberty and free expression, and the government generally may not infringe upon them.[1] The First Amendment is regarded as a "viewpoint neutral" doctrine—the government generally cannot censor speech because of the viewpoint, position, or opinion expressed. According to constitutional law professor Leslie Gielow Jacobs: "If the speech is private, then the fundamental question is whether the government excludes perspectives on an otherwise permissible subject."[2] The inability of government to silence its detractors is a core First Amendment tenet.

In the modern information era, communication often occurs through online platforms that allow individuals to interact within seconds. Private entities such as Facebook and Twitter are among the most popular of these platforms collectively known as "social media." According to survey giant Statista, 81% of the U.S.

[1] The U.S. Supreme Court has held that some varieties of speech are not safeguarded by the First Amendment. *See* Ashcroft v. Free Speech Coal., 535 U.S. 234, 245 – 46 (2002) ("The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity, and pornography produced with real children.")

[2] Leslie Gielow Jacobs, Clarifying the Content-Based/Content Neutral and Content/Viewpoint Determinations, 34 McGeorge L. Rev. 595 (2003).

population – nearly 262 million people – maintain a social media profile.[3] Twitter, known for brief messages called tweets, boasts nearly 70 million users in the United States, while Facebook has 213 million.[4] These accounts are used not only by everyday individuals, but also by businesses, celebrities, government agencies, and government officials due to their lack of barriers to entry, convenience, and vast, instantaneous reach.

A study conducted by the Congressional Research Service in 2016 found that electronic messages were the favorite mode of communicating among members of Congress, as well as with constituents and third-parties. By January 2013, all 100 U.S. Senators had Twitter accounts, and nearly every member of the House of Representatives had *at least* one official congressional social media account.[5] Not only used by members of Congress, more than 90% of Congressional Committees had their own social media accounts to keep constituents up to date.[6]

Beyond these federal legislative bodies, government entities and officials around the world have adopted social media accounts to quickly communicate ideas and information to followers of the accounts. According to a 2015 white paper by the Organization for Economic Cooperation and Development (OECD), heads of state in 28 out of 34 OECD countries operate a Twitter account, and 21 out of 34 operate a

[3] Statista, Social Media Usage in the United States, (2017).
[4] *Id.* at 3.
[5] Jacob R. Strauss & Matthew E. Glassman, Social Media in Congress: The Impact of Electronic Media on Member Communications, Congressional Research Service (2016).
[6] *Id.* at 7.

Facebook account.[7] "Presence and activity on social media is no longer a matter of choice for most governments as these platforms are used by large parts of the population and both formal and informal interest groups,"[8] the report notes.

The number of people who access government officials and entities through these accounts is steadily rising, while monitoring the sites for news and information is now routine for some people in the United States and abroad. As a result, many users believe they have a legal right to access content posted on the social media accounts of government officials and that this right is protected by the First Amendment.

The right of access is advocated by individuals who were blocked by government officials after making negative or critical statements about them. Holders of blocked accounts are unable to post statements in response. Individuals subjected to these blocks allege this violates their First Amendment right of free speech, as well as the right to petition government officials. Additionally, plaintiffs contend that no due process is afforded in banning as there is no method of appeals, and rarely is an explanation provided to those who have been deprived of their access to the accounts.

Multiple lawsuits have been filed by individuals who were blocked by government officials on social media sites. Most notably, ongoing legal action continues to affect United States presidents, governors, and other public officials,

[7] A. Mickoleit, Social Media Use by Governments: A Policy Primer to Discuss Trends, Identify Policy Opportunities and Guide Decision Makers, OECD Working Papers on Public Governance, No. 26, OECD Publishing, Paris, (2016).
[8] *Id.* at 36.

alleging First Amendment violations through improper use of social media accounts. The plaintiffs rely on a core First Amendment argument—that the social media accounts and related comment areas and discussion boards of government entities and officials constitute public fora and that they have been blocked because of an opposing viewpoint.

There are five core cases that merit analysis in their respective legal context.

First is the settled case *Hawaii Defense Foundation v. City and County of Honolulu* (2010) and the ongoing case of *Knight First Amendment Institute v. Trump* (2017). Alleging a violation of the First Amendment right to free speech, *Hawaii Defense Foundation* was filed on behalf of two individuals who made comments on the public Facebook page of the Honolulu Police Department (HPD). After numerous comments were deleted by HPD, no explanation or reinstatement options were provided, and the plaintiffs were permanently blocked by HPD employees responsible for the administration of the page. The plaintiffs argued that the Facebook page was an open public forum, and their profiles were blocked because of viewpoint discrimination. A key aspect of the *Hawaii Defense Foundation* case is the lack of any governing policy regarding HPD's social media page, and the *Knight First Amendment Institute* case echoes the same flaw.

Knight First Amendment Institute v. Trump was filed in July 2017 on behalf of six plaintiffs whose Twitter accounts were blocked from viewing President Trump's Twitter feed after making negative comments. On the grounds of public forum doctrine, the lawsuit alleges the account's administrators Donald Trump,

White House Social Media Director Dan Scavino, and former White House Press Secretary Sean Spicer have blocked plaintiffs unconstitutionally. Singling out the individual plaintiffs is an act of viewpoint discrimination, illegal under the First Amendment.

The thesis addresses the lack of appropriate government policy regarding social media accounts, the crucial aspect of *Knight First Amendment Institute* and *Hawaii Defense Foundation* cases. The argument focuses on viewpoint discrimination and the government's role in infringing upon First Amendment rights.

Three further cases speak to government speech doctrine as a defense, where each official maintained a social media policy, but plaintiffs nonetheless allege a First Amendment violation.

Plaintiff Brian Davison, a Virginia resident, sued James Plowman, Loudoun County, Virginia's official attorney in 2017 in *Davison v. Plowman*. Davison alleges he was blocked from the attorney's official government Facebook page after a series of comments he made on a post. However, Virginia maintains a reasonably detailed social media policy statewide, and Davison's comment was clearly off topic, as defined in the rules. The U.S. District Court for the Eastern District of Virginia ruled against Davison, concluding that Loudoun County did not violate the First Amendment rights of Davison,

citing *Child Evangelism Fellowship of MD, Inc. v. Montgomery County Public Schools*:

> [t]he government may restrict access to 'discussion of certain topics,' subject to two limitations: the government restrictions must be both reasonable and viewpoint neutral.[9]

Establishment of policy is also reflected in the 2017 case of *Leuthy v. LePage*. The ACLU of Maine sued on behalf of two plaintiffs who allege their access to Governor Paul LePage's Facebook was permanently revoked after making similarly negative statements. They argue that viewpoint discrimination was again at play and illegal in public fora. An ongoing case, the plaintiffs demand restoration of their posting privileges and seek permanent injunctive relief preventing Governor LePage from censoring other viewpoints.[10]

Finally, in *Laurenson v. Hogan*,[11] four plaintiffs allege their First Amendment rights were infringed despite the existence of a social media policy used by Governor Larry Hogan of Maryland. Negative comments were deleted from an extensive comment stream, and the lawsuit alleges Governor Hogan and his staff to be responsible. Settled in April 2018, Governor Hogan admitted no wrongdoing and agreed to re-write his office's social media policy.

Put simply, plaintiffs carry the burden of demonstrating that social media accounts established by government officials are indeed public fora. If they constitute public fora, then the viewpoint-neutrality doctrine may apply. However, a

[9] Child Evangelism Fellowship of MD, Inc. v. Montgomery Cnty. Pub. Sch., 457 F.3d 376, 383 (4th Cir. 2006).
[10] 1:17-cv-00296 (2017).
[11] Laurenson v. Hogan, No. 8:17-cv-02162-DKC (D. Md. 2017).

counterargument exists—namely, that although set up by government officials, the accounts are exempt from such regulation due to the government speech doctrine. However, a flexible interpretation of the government speech doctrine allows an exemption free from First Amendment strictures and permits the government to freely discriminate against viewpoints with which it disagrees.[12]

As recognized by the U.S. District Court for the Southern District of New York in 2013, the First Amendment allows an official to deny an encounter with an individual at a meeting held on private property.[13] In 1983, the U.S. Supreme Court recognized in *Perry Education Association v. Perry Local Educators' Association*[14] that an official can ignore an individual conversation in a public park, a location traditionally recognized as a public forum.

In brief, persuasive constitutional arguments exist on both sides of the lawsuits involving blocking of social media accounts by government officials. This thesis explores the precedents and reasoning that might lead to a sound conclusion on the matter. To do this, the thesis examines several timely cases that allege constitutional violations based on social media blocking, taking into account the arguments of officials who seek to dismiss such claims. Ultimately, the thesis answers the research question by making a case not only for protecting the rights of individual citizens, but also to afford government officials limited protections that have been carved out by the judiciary.

[12] Joseph Blocher, Viewpoint Neutrality and Government Speech, 52 B.C. L. Rev. (2011).
[13] Kalfus v. New York & Presbyterian Hosp., 476 F. Appx. 877, 879, (2d Cr. 2012)
[14] 460 U.S. 37 (1983).

Part I reviews freedom of speech arguments and core cases that allege constitutional violations, and it summarizes the arguments of the plaintiffs seeking relief. Part II then examines the arguments in favor of the plaintiffs, namely the public forum doctrine and viewpoint discrimination. Next, Part III assesses the merits of government speech doctrine and its general defense. Part IV examines the weight of both arguments, and demonstrates an appropriate conclusion, in attempting to answer the research question. Finally, the thesis concludes by briefly reviewing the arguments and providing a perspective on the future of the First Amendment right to access social media.

I. FREE SPEECH BACKGROUND

The purpose of the First Amendment, according to the United States Supreme Court in *Roth v. United States*, is to "[a]ssure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[15] First Amendment protections have been reinforced through several Supreme Court decisions, with political speech being given the utmost safeguards. In *Mills v. Alabama*, the Supreme Court invalidated an Alabama law criminalizing election-day newspaper editorials—the very heart of free political expression. Justice William Douglas wrote in his concurring opinion:

> [w]here First Amendment rights are jeopardized by a state prosecution which, by its very nature, threatens to deter others from exercising their First Amendment rights, a federal court will take the extraordinary step of enjoining the state prosecution.[16]

Justice Douglas felt that if such crucial rights were threatened by state prosecution and a subsequent chilling effect, the Court should step in to prevent frivolous legal action.

The chilling effect is another important part of free speech debate. According to Professor Frederick Schauer:

> A chilling effect occurs when individuals seeking to engage in activity protected by the First Amendment are deterred from so doing by

[15] 354 U.S. 476, 484 (1957).
[16] 384 U.S. 214, 218-219 (1966).

governmental regulation not specifically directed at that protected activity.[17]

First introduced by Supreme Court Justice Felix Frankfurter in his concurrence in *Wieman v. Updegraff*,[18] Justice Frankfurter described the chilling effect to be the result of "unwarranted inhibition"[19] on the speech of classroom teachers, subsequently intimidating the topics an instructor may cover. This effect is prevalent in cases where social media users are afraid to make critical statements, as there may be retaliation and blockage from government officials.

[17] Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the Chilling Effect, Faculty Publications, William and Mary, Paper 879 (1978).
[18] 344 U.S. 183, 195 (1952).
[19] *Id*. at 195.

II. In Favor of the Plaintiff

In order to arrive at a reasoned conclusion on constitutional grounds, one must understand the arguments that establish the importance of social media fora. This part examines the cases that plaintiffs have filed and presents their findings.

In recent years, the U.S. Supreme Court has recognized that social media are becoming the dominant form of communication. In the Opinion of the Court, Justice Anthony Kennedy wrote in *Packingham v. North Carolina* that Facebook and Twitter are "[p]erhaps the most powerful mechanisms available to a private citizen to make his or her voice heard."[20] *Packingham* addressed a North Carolina statute that forbade registered sex offenders from accessing social media sites such as Facebook and Twitter. The Court held the law unconstitutional. In doing so, it addressed growing concerns of First Amendment law and its application to social media:

> 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…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

[20] 137 S. Ct. 1730, 1738 (2017).

> cyberspace—the 'vast democratic forums of the Internet' in general, and social media in particular.[21]

The Court addressed the necessity of social media, clarifying its purpose in accessing government officials: "[o]n Twitter, users can petition their elected representatives and otherwise engage with them in a direct manner. Indeed, Governors in all 50 States and almost every Member of Congress have set up accounts for this purpose."[22] The Court's *Packingham* opinion demonstrates the importance of social media access to engage politically with one another, strongly supporting those who allege First Amendment violations.

Two legal doctrines are at the core of this debate in favor of the Plaintiffs:

a) The Public Forum Doctrine; and

b) Viewpoint Discrimination.

Each doctrine has criteria that must be strictly met, and deviations from these protections undergo strict scrutiny, which requires the government to prove a regulation is justified by a compelling interest and that no more speech than is necessary to serve that interest is regulated. In terms of social media, the government must show that there was a compelling interest in the removal of the comment, and that the action taken to remove the comment or block the account is narrowly tailored around that specific interest.

[21] *Id.* at 4.
[22] *Id.* at 5.

It is of note that a public forum does *not* need to be a physical place, as determined in *Rosenberger v. University of Virginia*.[23] An important religious free speech case, the U.S. Supreme Court held that the University of Virginia withholding funds from a Christian newspaper was unconstitutional "viewpoint discrimination—because of the speaker's specific motivating ideology, opinion, or perspective."[24] A forum can be established in a number of venues designed for public use, and jurisprudence shows that social media accounts are no exception. *Rosenberger* reiterates the neutrality that is required in public fora. In this section, the thesis analyzes each doctrine and its corresponding arguments, and it reviews substantial cases to date that address social media accounts on these grounds.

[23] 515 U.S. 819 (1995).
[24] *Id.* at 820.

A. THE PUBLIC FORUM DOCTRINE

A traditional public forum is a place where speech and debate generally cannot be restricted based upon the subject matter or topic at issue—a public park, a sidewalk, and other areas for public use. Justice Sandra Day O'Connor described in *Cornelius v. NAACP*, an early public forum and free speech case: "[a] public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech." [25]

The public forum doctrine is commonly embraced by the Supreme Court. The Court recognizes that traditional public fora "[h]ave 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…from ancient times."[26]

In addition to traditional public fora such as streets, parks and sidewalks, government entities can create other fora known as limited public fora. These areas serve a limited purpose, where a space may be available for certain groups discussing certain topics—but the government reserves the right to limit the use of the space.

[25] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985).
[26] Norman T. Deutsch, Does Anybody Really Need a Limited Public Forum?, 82 St. John's L. Rev., (2012)

"Long standing First Amendment doctrine permits the state to regulate speech and expression…but the state bears a high burden of drawing the constitutionally appropriate line."[27] The limited public forum generally allows a discussion of selected topics, such as a city council meeting addressing community issues.

> [a] speaker may be excluded from a nonpublic forum if he wishes to address a topic not encompassed within the purpose of the forum or he is not a member of the class of speakers for whose especial benefit the forum was created…[28]

The designation of limited is favored in the government's defense, arguing that public officials maintain the right to block individual followers who violate certain rules.

However, Justice Anthony Kennedy, a moderate, has taken issue with this definition in the context of the public forum doctrine, opining that the free exchange of ideas is "[a] most doubtful fiction…the purpose for the creation of public parks may be as much for beauty and open space as for discourse."[29]

With 213 million users in the United States alone, Facebook is one of the world's largest social media companies. An account is free, requires little information, and can be accessed an unlimited number of times, provided it remains active. For these reasons, many government officials maintain Facebook and

[27] John D. Inazu, The First Amendment's Public Forum, 56 Wm. & Mary L. Rev., 1159, 1187 (2015).
[28] Cornelius v. NAACP Legal Defense Fund, 473 U.S. 788, 806 (1985).
[29] Int'l Soc. For Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 697 (1992) (Kennedy, J., concurring)

Twitter as places where constituents can stay up to date with relevant information from the official, and can make public posts with their thoughts and concerns.

Beginning in 2012, a series of lawsuits was filed nationwide against government entities alleging civil rights violations, based on public forum doctrine. Perhaps the best-known case introducing this debate was *Hawaii Defense Foundation v. City and County of Honolulu*.[30] In the case, Plaintiffs Christopher Baker and Derek Scammon posted comments critical of the Honolulu Police Department (HPD) on the "official Facebook page of the Honolulu Police Department," a page that stated it was "a forum open to the public." Their comments were deleted without explanation, and the plaintiffs were banned from all further participation in the forum. Having expressly created an open forum, the HPD needed to overcome the aforementioned strict scrutiny standard of review to justify eliminating an individual's viewpoint. Additionally, HPD admitted that "there are no governing policies in regard to the administration or management of their Facebook page."[31]

Due to the arbitrary nature of the comment deletion policy, the plaintiffs were able to settle the case, arguably creating the first public forum standard for a social media site. Following the case's resolution, the City and County of Honolulu developed a new comment policy for the HPD site, eliminating the unpredictable nature of comment deletion.

[30] No. 1:2012-cv-00469 (D. Hawaii 2012).
[31] *Id.* at 8.

Subsequent cases also contend that a public forum is established on social media accounts. One of the most newsworthy is the ongoing case of *Knight First Amendment Institute v. Trump*.[32] The Knight First Amendment Institute at Columbia University sued on behalf of seven plaintiffs who allege similar First Amendment violations as their access to the personal Twitter account of President Donald Trump "@realDonaldTrump" was permanently blocked. The Plaintiffs argue that the manner in which the Twitter account is used by the president and his staff creates a public forum under the First Amendment. Through the @realDonaldTrump, @POTUS, and @WhiteHouse Twitter accounts, Trump amassed over 33 million followers at the time of the suit. According to the complaint:

> Defendants have promoted the President's Twitter account as a key channel for official communication. Defendants use the account to make formal announcements, defend the President's official actions, report on meetings with foreign leaders, and promote the administration's positions on health care, immigration, foreign affairs, and other matters. The President's advisors have stated that tweets from @realDonaldTrump are 'official statements,' and they have been treated as such by politicians, world leaders, the National Archives and Records Administration, and federal courts.[33]

[32] No. 1:17-cv-05205 (S.D.N.Y. 2017).
[33] *Id.* at 15.

The plaintiffs allege that their blockage from the president's account is the result of posting critical comments, and that they were targeted on the sole grounds of viewpoint.

The plaintiffs provide myriad examples of the paramount importance of the statements made through the Twitter account and their effects on both domestic and foreign affairs. The complaint alleges that multiple times each day, the president uses the account to:

> announce, describe, and defend his policies; to promote his Administration's legislative agenda, to announce official decisions; to engage with foreign political leaders; to publicize state visits; and to challenge media organizations who coverage of his Administration he believes to be unfair.[34]

Furthermore, the National Archives and Records Administration has advised the White House that Trump's tweets from @realDonaldTrump, like those from @POTUS, are official records that must be preserved under the Presidential Records Act. The very public nature of social media posts creates a compelling argument for a First Amendment right to access the account on the grounds of a public forum.[35]

[34] *Id.* at 14.
[35] *Id.* at 2.

B. VIEWPOINT DISCRIMINATION

The second major argument that the First Amendment is violated involves discrimination based on viewpoint. Viewpoint neutrality is at the core of the First Amendment. "Government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[36] Justice Antonin Scalia concurred in *R.A.V. vs. City of Saint Paul:* "The government may not regulate speech based on hostility—or favoritism—towards the underlying message expressed."[37] *R.A.V.* addressed a Saint Paul, Minnesota ordinance criminalizing the placement of certain traditionally hateful symbols. The Supreme Court found the law to be vague and unconstitutional, violating the right to freedom of expression. Justice Scalia's succinct summary of viewpoint discrimination underscores the importance of preventing the government from infringing upon a private viewpoint.

Justice Anthony Kennedy, concurring with the Court's decision in *Matal v. Tam*, further addressed the paramount importance of protection from viewpoint discrimination:

> [v]iewpoint discrimination—a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny…The First Amendment's viewpoint neutrality principle protects more than the right to identify with a particular side. It protects the right to create and present arguments for particular positions in particular ways, as

[36] Chicago Police Dept. v. Mosley, 408 U.S. 92, 95 (1972).
[37] 505 U.S. 377, 386 (1992).

> the speaker chooses. By mandating positivity, the law here might silence dissent and distort the marketplace of ideas.[38]

Justice Kennedy's affirmation of First Amendment protections demonstrates the Court's desire to maintain a strong safety net for free speech and avoid any chilling effect that may come from government infringement. *Matal* addressed speech a potentially disparaging title: "The Slants" being trademarked, with the U.S. Supreme Court ruling that trademarks are private speech, not government speech. Concluding his opinion, Kennedy writes: "[o]ur reliance must be on the substantial safeguards of free and open discussion in a democratic society."[39]

The precarious nature of categorizing viewpoint-based discrimination continues to come under fire in many First Amendment cases. The 2017 federal district court case of *Davison v. Plowman*[40] involved this pivotal point. Plaintiff Brian Davison, a resident of Loudoun County, Virginia, sued James Plowman in his official capacity as the attorney for Loudoun County, Virginia. Davison alleged that a lengthy comment he made in December 2015 on an official Facebook post of Plowman was deleted, and that his access to the page was blocked because of his role in a previous controversy with the county.

In 2014, Davison was involved in an alarming dispute with Loudoun County Public Schools—escalating to the point where he was banned from the grounds of his children's school. During a related hearing, Davison believed he heard testimony that constituted perjury, and he went to the official Facebook page of the Loudoun

[38] 137 S. Ct. 1744, 1775 (2017) (Kennedy, J., concurring).
[39] *Id.* at 8.
[40] 247 F. Supp.3d 767 (2017).

County Attorney to vent his concerns. His comment, although unrelated to the Facebook post, excoriated the Loudoun County Commonwealth Attorney's Office. Due to the Commonwealth Attorney's close governmental proximity with the Public Schools, Davison alleged that his comment and access to the page was blocked because of his previous problems with the school district. Davison argued that this lack of access to the Facebook page directly violated his right to petition the government as guaranteed by the First Amendment.

District Court Judge Cacheris ruled that this did not violate the plaintiff's First Amendment rights, writing:

> The restriction on speech deemed 'clearly off topic' in the original Social Media Comments Policy was reasonably related—indeed, integral—to the forum's purpose…The failure to effectively moderate a public discussion may be as deleterious to dialogue in such a forum as censorship.[41]

Another ongoing case is *Leuthy v. LePage*.[42] The ACLU of Maine sued Governor of Maine Paul LePage, alleging viewpoint discrimination in the case of two plaintiffs who were blocked from the ostensibly official Facebook page: "Paul LePage, Maine's Governor." The complaint alleges that the Facebook page was subject to a social media policy established by Maine's Office of Information Technology.

[41] *Id.* at 16-17.
[42] 1:17-cv-00296 (D. Me. 2017).

That policy provides, in pertinent part, that:

> Any scandalous, libelous, defamatory, or pornographic material, if posted, is removed as soon as discovered. Agencies must create and publish a *Terms of Comment* which describes how the Agency will manage user contributions to the extent allowed by the *Social Media* site/application. The *Terms of Comment* shall detail the review criteria for acceptable comments, such as on-topic, non-duplicative, not obscene or offensive etc.[43]

The comments made by the plaintiffs allegedly did not meet the criteria for deletion under the official policy,[44] but were nonetheless deleted.

What is unique about the *LePage* case is its defense—that the Facebook page "Paul LePage, Maine's Governor" is **not** government-run. Following the ACLU complaint, the Facebook page published a statement in its defense:

> To be clear this page was started by volunteers in the Governor's first campaign to support his candidacy. After that time it became his official political page. This page has never been managed by taxpayer-funded state employees. Under the about section of this Facebook page it states that is Paul LePage's official politician page—not a government page.[45]

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[43] *Id.* at 12.
[44] *Id.* at 13.
[45] Paul LePage, Maine's Governor, https://www.facebook.com/mainesgov/posts/10156468873414676 (last visited April 9, 2018).

Although involving apparent viewpoint discrimination similar to that of the *Davison*, *Knight First Amendment Institute*, and *Hawaii Defense Foundation* cases, there are two discrepancies in the *LePage* argument. First, the comments made by the plaintiffs did not constitute a violation of Maine's social media policy. Second, and perhaps more importantly, "Paul LePage, Maine's Governor" is not administered by any government official. This may eliminate the complaint against the governor's office, as the page began as a place for fans to congregate, not to serve as an official outlet.

While the plaintiffs may have standing to sue if the page is determined to be officially administered, they may lack further recourse if it is simply a fan-administered page. This raises another argument: Does the *appearance* of an official page allow for damages to be sought? This is the first instance of such a conflict in this type of social media-based action and any future decisions will be important precedent.

Regardless of what the District Court of Maine's findings may be, the binding tie among these cases is the existence of an overarching social media policy. *Davison* shows that the entire state of Virginia maintains a social media policy outlining the criteria for comment deletion, and the same is true for *LePage*. These policies appear to grant a limited degree of protection to the government institutions. Forthcoming opinions on the matter should clarify the impact of such disclaimers.

III. GOVERNMENT SPEECH DOCTRINE & DEFENSES

One of the most effective defenses for government agencies thus far is the government speech doctrine. Although still developing, the government speech doctrine allows the government to disseminate a given message that ostensibly is its official position. The doctrine was first articulated in the 5-4 decision of *Rust v. Sullivan*,[46] which addressed whether a government prohibition on speech regarding abortion at subsidized family-planning clinics violated free speech rights under the First Amendment. The Supreme Court held it did not. One of the key points in the decision was recognition that there was no "direct state interference with a protected activity." Rather, the speech ban was seen as "consonant with legislative policy." In simplest terms, the government forbidding the use of taxpayer funds for abortion material was concomitant with the then-current administration's agenda, and was not interfering with any constitutional right—it was only outlining the proper use of federal dollars.

Rust represents the right of the government to protect its speech on matters of public interest, and allows the government to reasonably present its position on a variety of matters. As restated in *Rosenberger*: "If the government is going to be able to disseminate any messages at all, it must be able to control what its agents say."[47] *Rust* definitively showed that even if government speech occurs through a third party, it will nonetheless be considered the position of the government.

[46] 500 U.S. 173 (1991).
[47] Rosenberger v. Univ. of Va., 515 U.S. 819, 833 (1995).

This view of message approval by the government is the point where the defense to a message will change from a public forum argument to government speech doctrine. The doctrine is further explained in *Pleasant Grove City v. Summum:* "If the government exercises approval authority in creating a message, the government can pick and choose among private speakers that it will support based on vague criteria."[48] *Summum* decided a Utah debate over the placement of religious monuments on public land. The municipality of Pleasant Grove placed a statue of the Ten Commandments on public property.

The Summum Church, a religious sect, argued that placement of its own statue on public grounds should similarly allowed—but the Court disagreed. Justice Alito, author of the unanimous opinion, wrote that allowing one type of monument while disallowing another was constitutional; rather, Pleasant Grove was exercising government speech by putting the Ten Commandments on display. *Summum* recognized the importance of government acceptance of a message as the capstone point for government speech. *Summum* also established three factors that are generally used to show government speech: history, perception, and control.

According to First Amendment scholar Lyrissa Lidsky, "Constraints on government speech come not from the First Amendment's free speech clause but rather from the political process, with voters or other political actors ostensibly 'checking' government speech (and government actions) with which they disagree."[49] This analysis of the government's position shows that the ability of the government

[48] 555 U.S. 460 (2009).
[49] Lyrissa B. Lidsky, Government Sponsored Social Media and Public Forum Doctrine under the First Amendment: Perils and Pitfalls, 19 Univ. of Fla. Pub. Law. 2 (2011).

to speak and interact is ultimately in the hands of the people. As part of the democratic values that are responsible for public officials in the United States, an individual can be voted out of office in a subsequent election cycle if the people do not agree with the government's position.

A. *KNIGHT FIRST AMENDMENT INSTITUTE V. TRUMP*: GOVERNMENT SPEECH AS DEFENSE

In *Knight First Amendment Institute v. Trump*, President Trump and his co-defendants raise the government speech doctrine as a key defense to accusations of First Amendment violations. Recognizing that a vital component of the Plaintiffs' argument rests on the grounds of public forum doctrine, the Defendants immediately contend that the two essential components establishing a forum do not apply to Trump's Twitter account. "To qualify as a 'forum,' the space in question must meet two requirements: it must be government-owned (or government-controlled), and the government must have opened up the space for private parties to '[c]ommunicate ideas to others.' If either of these attributes is lacking, forum analysis does not apply."[50]

Additionally, Defendants cite *Cornelius v. NAACP Legal Defense Fund*, for the proposition that "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."[51] If the government has not established a public forum through its use of social media, then much of the Plaintiffs' argument is void. If the government were in either charge of, or owned Twitter, then it would clearly constitute a forum. However, this is not the case. The president lacks the ability to control the comment threads that follow his tweets, and the Plaintiffs agree that Trump cannot alter any of the content posted, nor can he prevent a blocked user

[50] Def.'s Memo at 14, *Knight v. Trump* (2017).
[51] 473 U.S. 788, 802 (1985).

from participating in comment threads. Further, the information presented on the president's account is still publicly available on the page, and he has not denied access to this page to any user. Decisions regarding who may create an account, post, reply, and retweet on the platform are made by Twitter as a private company and are far beyond the reach of any government official.

B. *DAVISON V. PLOWMAN*: GOVERNMENT SPEECH AS DEFENSE

Justice Kennedy addressed the importance of control of government messages in his concurrence in *Tam*, writing: "[t]he Court's precedents have recognized just one narrow situation in which viewpoint discrimination is permissible: where the government itself is speaking…The exception is necessary to allow the government to stake out positions and pursue policies."[52]

When Plaintiff Brian Davison was blocked from the official Facebook page of the Attorney General for Loudoun County, he asserted that this was a discriminatory, viewpoint-based decision. However, a crucial aspect of government speech doctrine provides a defense for the Virginia county. Those in charge of the Facebook page adopted the social media policy that was deemed acceptable across the entire state. The social media policy clearly demonstrated that the County reserved the right to "delete submissions" that violated the enumerated rules. The Plaintiff's comment was a lengthy piece that addressed personal issues with the Attorney General's office, and was entirely irrelevant to the posted article which focused on special prosecutors. The policy allowed for the deletion of the comment, as it was clearly off topic.

It is essential that the social media accounts of public officials maintain both a certain decorum and relevance and do not allow interactive conversations to dominate their accounts. This necessity is justified through the government speech

[52] Matal v. Tam, 137 S. Ct. 1744, 1774 (2017) (Kennedy, A., concurring).

doctrine, as public officials have a reasonable expectation to disseminate their own views and exercise control over their social media accounts.

C. GOVERNMENT DEFENSE: FIRST AMENDMENT ACCESS

A further crucial element defending the government's actions is a concise explanation of the plaintiffs' failure to establish a violation of the right to petition the government for a redress of grievances. In *Knight v. Trump*, the plaintiffs allege that their individual account blockage by the president directly violates their rights—however, it is the government's position that this is incorrect.

The individual accounts of the plaintiffs are free to engage in discourse about the president on their personal accounts, and retain the ability to reply not only to the @POTUS and @WhiteHouse accounts, but they can also mention @realDonaldTrump in their comment threads. Plaintiffs can still freely express their thoughts on Twitter and face no repercussions. Additionally, there is no First Amendment right to have information delivered in a certain manner. As laid out in *Sample v. Bureau of Prisons*, federal agencies are only required to respond to Freedom of Information Act requests in "readily reproducible" forms.[53] Therefore, this does not require an information response on the Twitter platform. The relevant information that is published on the account remains publicly accessible on its generic link, and grants unlimited access to Twitter users.

[53] 466 F.3d 1086, 1088 (D.C. Cir. 2006).

According to the Defendants' Memo in *Knight*:

> [h]e can decide not to take photos with supporters, and therefore wave away anyone who expresses agreement with his views, and he can refrain from engaging with constituents that he knows to be unpleasant critics, reasoning that there are better uses of his time. If someone ignored by a public official under these kinds of circumstances tried to bring a lawsuit, he would lose. Even if a court were to conclude that the daily choices an elected official makes about whom to interact with are state action, the First Amendment would not constrain these choices.[54]

In *Minnesota Board for Community Colleges v. Knight*, the U.S. Supreme Court held individual campus faculty represented by a labor organization could not force the state-wide body to hold meetings to listen to individual grievances. Justice John Paul Stevens opined: "It is inherent in the republican form of government that high officials may choose—in their own wisdom and at their own peril—to listen to some of their constituents and not to others."[55] It is this very thought that some government officials on Twitter and Facebook follow. A willing conversation in the physical world always requires mutual consent, and precedent shows the same may be true for officials on social media. Individuals, even when organized as a whole, may not mandate that government officials address their individual concerns.

[54] Def.'s Memo at 13-14, *Knight v. Trump* (2017).
[55] 465 U.S. 271, 285 (1984).

Returning to *Packingham*, Justice Alito, in his concurring opinion, succinctly explained that the Court was perhaps too glowing in its judgment of the Internet's importance:

> I cannot join the opinion of the Court, however, because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks…The Court should be more attentive to the implications of its rhetoric for, contrary to the Court's suggestion, there are important differences between cyberspace and the physical world.[56]

Justice Alito's distaste for public forum equity between the Internet and physical places is important in the defense of the government's perspective. Alito maintains this conservative perspective in further opinions, as he wrote in the Court's opinion in *Summum*: "[i]t is hard to imagine how a public park could be opened up for the installation of permanent monuments by every person or group wishing to engage in that form of expression."[57] Such a principle can be applied in the government's defense. Social media accounts allow for unfettered instant access to officials, and sifting through which posts shall be deemed worthy of a response is an implausible task.

[56] Packingham v. North Carolina, 137 S. Ct. 1730, 1744 (2017). (Alito, J., concurring)
[57] Pleasant Grove City v. Summum, 555 U.S. 460, 476 (2009).

The government, despite its power derived from the people, cannot be expected to make an individualized response to each query from a post. Although social media pages are used to disseminate information to a multitude of constituents, it is not their primary purpose to engage on an individual level. Additionally, when there are written rules that dictate proper decorum in an online environment, a user should assume that following such rules is simply the first step in soliciting a response.

IV. How Do the Doctrines Prevail?

Creation of a public forum—one that is open to the masses, meant for discourse, and discriminates against no viewpoint—is a complex matter, and continues to be open for litigation. Furthermore, through the assertion of government speech doctrine, there can be cases that allow officials to discriminate on occasion.

To re-state the question: *How do the free speech doctrines of viewpoint discrimination, public forum, and government speech affect the First Amendment right to access the social media accounts of government officials?* The examined cases show that the First Amendment right to access these accounts remains, and government speech doctrine provides minimal rationale for eliminating problematic comments.

While the First Amendment may have its limits in terms of obscenity, defamation, and fighting words, the utmost protections are afforded to political speech. Writing a post on a government official's social media account that may offer a critique or disagreement should not warrant outright banishment because criticisms should be expected by any public official.

By establishing a Facebook profile or a Twitter account, government officials have created a limited public forum that is open for discussion among the greater public and their representatives. Although the limited public forum has a certain range and scope, the government must not discriminate against viewpoint or opposing opinion.

The unifying factor and Achilles' heel of the *Hawaii Defense Foundation* and *Knight First Amendment Institute* cases is the individual deletion of posts that are critical of the office. This is an important distinction, as it appears that viewpoint discrimination is the singular explanation for the blocking. Plaintiffs' posts did not invoke any fighting words, nor any obscene depictions, and did not effectively defame any of the named parties. These examples are clearly a sweeping violation of established viewpoint discrimination precedent, and the courts are likely to rule in favor of the plaintiffs in both cases. Each of the individuals chose to make comments on posts they deemed relevant, clearly asserting their First Amendment right to speak out freely.

Comments appear in trails numbering well into the thousands, and the act of singling out a few words for purposive deletion appears to do no more than silence opposition. All-purpose public figures have little recourse when it comes to negative statements sent their way. Conventional criticisms should come as no surprise to any politician, and eliminating them one-by-one only creates a pattern of discrimination.

Conversely, the cases against Governor Hogan of Maryland, Governor LePage of Maine, and Loudoun County Attorney James Plowman represent the limited control that public officials may retain. Both Maryland and Virginia had widely adopted standards for use of social media accounts at the time the complaints were filed, and reserve the right to delete comments that are in violation of the terms. Rulemaking of this type establishes the limited public forum where the government

shall maintain a certain decorum. Government speech doctrine grants officials protection over the proper use of their social media pages, but it is imperative that the governing social media policy is clearly defined.

The importance of *Rosenberger* continues to show—if the government is going to be able to disseminate any messages at all, it must be able to control what its agents say. "Once it has opened a limited forum, the government must respect the lawful boundaries it has itself set."[58]

At this intersection of First Amendment protections and necessity of government speech is the crux of the argument.

Above all: "If the speech restricted falls outside the bounds of the designated forum, the Court need determine only whether the speech restriction applied is viewpoint neutral and reasonable in light of the purpose of the forum."[59] U.S. District Court Judge James Cacheris outlined appropriate guidelines in his *Davison* opinion: "[t]he Court must determine (1) whether Defendant's comment was, in fact, 'clearly off topic'—i.e. whether it fell outside of the bounds of the forum—and (2) if so, whether the 'clearly off topic' restriction was viewpoint neutral and reasonable in light of the purpose of the forum."[60] As the results of the *Davison* case illustrate, when a proper social media administration policy is in place, courts may side with the enacted policy thereby allowing officials to delete comments that violate it.

[58] Rosenberger v. Univ. of Va., 515 U.S. 819, 829 (1995).
[59] Warren v. Fairfax County, 196 F.3d 186, 192 (4th Cir. 1999).
[60] Davison v. Plowman, 247 F. Supp.3d 14, (2017).

In the case against President Trump however, there is no evidence that such a policy exists. The courts should be expected to rule overwhelmingly in favor of First Amendment protections for the plaintiff.

In April 2018, First Amendment protections prevailed in *Laurenson v. Hogan*. Despite admitting no liability, Governor Hogan settled the lawsuit for $65,000 and several changes to the social media policy. The original complaint alleged that Hogan's existing policy "exerts a profoundly chilling effect on speech and specifically censors constituents who 'petition' the Governor…such a vague, ill-defined policy is an open invitation in practice to arbitrary, viewpoint-based censorship."[61] The new policy has clearly-defined boundaries for acceptable content. A relevant excerpt from the policy:

> Comments may be removed if they contain, constitute, or link to: Profanity, nudity, indecency, or obscenity; threats of violence or to public safety; disruptively repetitive content; remarks that are clearly unrelated to governmental concerns…[62]

In addition to the amended social media policy, Governor Hogan's office also created an appeals process allowing blocked persons to submit a written statement to the Maryland Office of Correspondence & Constituent Services for consideration of reinstatement.

This free speech victory should not be understated. There now exists a detailed social media policy appropriate for government officials that is in place to

[61] Laurenson v. Hogan, No. 8:17-cv-02162-DKC, 3. (D. Md., 2017).
[62] Settlement Agreement at 8-9, Laurenson v. Hogan, No. 8:17-cv-02162-DKC, 3. (D. Md., 2017).

prevent further viewpoint discrimination in Maryland's social media use. Most importantly, there is a clear mechanism in place for individuals to appeal account blockages and be afforded due process.

CONCLUSION

The importance of social media in modern communication cannot be understated. The Roberts Court solidified the role of Facebook and Twitter in the *Packingham* decision, ensuring that future cases addressing Internet exchanges understand the significance of such platforms.

The primary doctrine supporting the plaintiffs in each case is the existence of a public forum, which the government has established in the aforementioned cases. Facebook and Twitter provide citizens with essential news and information about their government representatives, and often explicitly state their open objectives. A public forum may not discriminate on the basis of viewpoint, and this is why the First Amendment right to access the accounts must be upheld.

The government speech doctrine, to which Justice Breyer referred to as a "rule of thumb, not a rigid category,"[63] provides a safety blanket to public officials when they eliminate comments based on improper conduct, rather than an opposing viewpoint. However, this exception is not a trump card for widespread deletion and it should be used sparingly to avoid allegations of impropriety. The recent decision in *Laurenson v. Hogan* demonstrates that social media policies must be clearly laid out with a reasonable appellate process.

The First Amendment protections for political speech are sacrosanct, and future cases will continue to reaffirm their constitutional significance. But given that the most widely used platforms of Facebook and Twitter are privately managed

[63] Pleasant Grove City v. Summum, 555 U.S. 460, 483 (2009) (Breyer, J., concurring)

companies, the door is open for private censorship to occur. This begs the question about potential government regulation of these platforms. If the courts are to protect the interactions among government officials and individual users, how might they ensure the neutrality of the platform? Future cases may investigate the plausibility of private platform regulation.

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