SOCIAL MEDIA AND THE MESSAGE: FACEBOOK, FORUMS, AND FIRST AMENDMENT FOLLIES

The medium is the massage. Any understanding of social and cultural change is impossible without a knowledge of the way media work as environments.

—Marshall McLuhan[1]

The president, along with multiple governors and state officials, has been sued on First Amendment grounds for blocking users from accessing his social media pages and for deleting critical comments on his pages and comment sections. Instantaneous communications technologies are bringing distant people into closer and more frequent contact. Communication is taking place on the internet now more than ever, and in turn, First Amendment concerns are currently more evident on Twitter and Facebook than in the public squares of yore. With McLuhan in mind, this Note discusses relevant First Amendment doctrines, examines the emerging social media litigation involving the president and government officials, and advocates for a "mixed-speech" approach for analyzing speech issues on social media platforms.

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1. MARSHALL MCLUHAN & QUENTIN FIORE, THE MEDIUM IS THE MASSAGE: AN INVENTORY OF EFFECTS 26 (1967). For curious readers, "massage" is not a typo. There are multiple accounts as to why McLuhan used this spelling. One account is that "massage" was a typographic error which McLuhan found amusing, so he kept it to make a point; at other times, McLuhan has referred to the media's effect as one that massages the mind in powerful, seductive ways. *See* Eudaimonia, *The Medium is the Message by Marshall McLuhan*, MEDIUM (Dec. 7, 2016), https://medium.com/@obtaineudaimonia/the-medium-is-the-message-by-marshall-mcluhan-8b5d0a9d426b.

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I. INTRODUCTION

President Donald J. Trump was sued on First Amendment grounds for blocking critics from the @realDonaldTrump Twitter page, and the United States Court of Appeals for the Second Circuit has ruled that it was unconstitutional for him to do so.[2] How did we get here, and what legal precedent supported this decision?

Fully appreciating the rapid social and cultural changes taking place in society compels a brief consideration of prior communications technologies, from the days before Facebook and Twitter. For most of human history, communication has been gestural and then vocal, limited to and grounded in our senses.[3] Communication required physical proximity to address our audiences, and speech could not reliably travel far. Different cultures started developing alphabets and writing around 3300 BCE, fixing their speech in stone tablets and papyrus scrolls.[4] Information traveled slowly. In the mid-fifteenth

2. Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 230 (2d Cir. 2019).

3. *See* Gordon W. Hewes, *Primate Communication and the Gestural Origin of Language*, 14 CURRENT ANTHROPOLOGY 5, 5 n.2 (1973).

4. Ewan Clayton, *Where Did Writing Begin?*, BRIT. LIBR., https://www.bl.uk/history-of-writing/articles/where-did-writing-begin (last visited Mar. 19, 2020).

century, Johannes Gutenberg's movable-type printing press enabled the spread of typographic materials, promoting literacy and a more rapid exchange of ideas.[5] Speech could be fixed and propagated in a reproducible physical medium: the book, the newspaper, and the pamphlet.

McLuhan argues that media become physical extensions of our perceptions and rewire our brains, bringing about social and cultural changes as we adapt to those media.[6] The proliferation of written material has gradually shifted our cognitive landscape, changing our perceptual habits from being predominantly oral to predominantly visual. The rapid creation of printed secular materials allowed scientists and thinkers to build upon each other's knowledge and findings, leading to the Enlightenment Era and subsequent industrialization.[7] The telegraph, telephone, and radio would be invented and allow humans instantaneous communication from remote destinations. The telephone and radio enabled aural correspondences with people far outside our proximity, extending our sensory perceptions beyond our nervous system.

Presidential politics always adapt to the new opportunities and challenges presented by emerging technologies and communication media. Franklin D. Roosevelt famously utilized the radio in his "Fireside Chats," through which he spoke directly to the people in

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5. *See* Heather Whipps, *How Gutenberg Changed the World*, LIVE SCI. (May 26, 2008), https://www.livescience.com/2569-gutenberg-changed-world.html. The First Amendment prohibits the government from "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." U.S. CONST. amend. I. Our Constitution seems to reference Gutenberg's movable type printing "press," and our freedom of speech has extended beyond that revolutionary relic into modern communications media. In contemporary terms, "the press" is often understood to mean career journalists or news-gathering "media" organizations. However, the internet has arguably allowed everyone to publish speech and content.

6. *See* David Bobbitt, *Teaching McLuhan: Understanding Understanding Media*, ENCULTURATION (Dec. 30, 2011), http://enculturation.net/teaching-mcluhan. Many today are just confronting this reality, after a former Facebook executive stated in 2017 that the platform created "short-term, dopamine-driven feedback loops," confirming that at least this medium is rewiring our brains. Amy B Wang, *Former Facebook VP Says Social Media is Destroying Society with 'Dopamine-driven Feedback Loops'*, WASH. POST (Dec. 12, 2017, 1:37 PM), https://www.washingtonpost.com/news/the-switch/wp/2017/12/12/former-facebook-vp-says-social-media-is-destroying-society-with-dopamine-driven-feedback-loops.

7. Christopher McFadden, *The Invention and History of the Printing Press*, INTERESTING ENGINEERING (Sept. 12, 2018), https://interestingengineering.com/the-invention-and-history-of-the-printing-press.

their own homes.[8] Roosevelt's mastery of the new and powerful communications tool, in part, fostered his widespread adoration.[9] It also provided an unfiltered, unidirectional medium for him to respond to criticisms directed toward him.[10] Until the television, it was rare for the average American to see and hear their president. When Americans brought televisions into their households, citizens were enabled to view live debates, Q&As, and interviews of candidates and politicians.[11] A politician's appearance and image became more significant, perhaps more so than their voice or words. Televised debates have been credited with providing the attractive John F. Kennedy an advantage over Richard Nixon.[12] Years later, Barack Obama's use of Facebook was recognized as effective and innovative, transforming twenty-first century political campaigning.[13] Some have suggested that President Trump's use of Twitter should be seen as its own sort of "Fireside Chat."[14] Like Roosevelt, President Trump bypasses the legacy news businesses and speaks directly to the public. Politicians and public officials of all stripes are increasingly turning toward the internet to communicate their messages and to campaign for office.

This Note focuses on the application of First Amendment doctrines to disputes between citizens and government officials regarding speech on social media. In Part II, this Note will provide an overview of relevant First Amendment doctrines that will inform the subsequent Parts. Part III will examine *Packingham v. North Carolina*,[15] the Supreme Court's first case directly addressing free

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8. *See* Margaret Biser, *The Fireside Chats: Roosevelt's Radio Talks*, WHITE HOUSE HIST. ASS'N (Aug. 19, 2016), https://www.whitehousehistory.org/the-fireside-chats-roosevelts-radio-talks.

9. *See id.* (noting that President Roosevelt received approximately eight thousand letters and packages per day, many "simply thank[ing] the president for talking to [the sender]").

10. *See id.*

11. *See* Matt Sailor, *How Did the Advent of Television Impact Politics*, HOWSTUFFWORKS (Mar. 11, 2011), https://people.howstuffworks.com/culture-traditions/tv-and-culture/advent-of-television-impact-politics2.htm.

12. *See* Kayla Webley, *How the Nixon-Kennedy Debate Changed the World*, TIME (Sept. 23, 2010), http://content.time.com/time/nation/article/0,8599,2021078,00.html.

13. *See* Michael Scherer, *Friended: How the Obama Campaign Connected with Young Voters*, TIME (Nov. 20, 2012), http://swampland.time.com/2012/11/20/friended-how-the-obama-campaign-connected-with-young-voters/.

14. *See, e.g.*, Caitlin Hutson, *Trump Tweeting is the Modern Version of FDR's Fireside Chats–and That's Good for Twitter*, MARKETWATCH (Feb. 8, 2017, 1:47 PM), https://www.marketwatch.com/story/trump-tweeting-is-the-modern-version-of-fdrs-fireside-chatsand-thats-good-for-twitter-2017-02-08; Julia Manchester, *Election Analyst: Trump Should Use Twitter Like FDR Used Radio for Fireside Chats*, HILL (Aug. 7, 2018), https://thehill.com/hilltv/what-americas-thinking/400752-election-analyst-trump-should-use-twitter-like-fdr-used-radio.

15. 137 S. Ct. 1730 (2017).

speech rights regarding access to internet spaces. Part IV is the central focus, an examination of several lawsuits alleging First Amendment violations due to public officials deleting comments and blocking users from their social media pages. This Part also evaluates how *Packingham* has been extended to these cases. Part V presents alternative interpretations and difficult questions, and then promotes a mixed-speech approach to addressing future disputes that resemble the cases in Part IV. This approach would provide the court with a transparent and balanced framework for weighing government and private interests.

II. A BACKGROUND ON PUBLIC FORUMS AND GOVERNMENT SPEECH

Judge Learned Hand remarked that the First Amendment "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all."[16] Although inspiring and aspirational, this observation reflects our national commitment to free speech but does not explain doctrinal difficulties. This Note focuses on two speech doctrines: government speech and public forums.

Courts are increasingly faced with cases of alleged First Amendment violations where government actors block social media users from their pages or delete their comments.[17] Among all of these cases, a major difference arises in how the actions are framed. Some have attempted to characterize these actions as government speech or as the private speech of a government actor. However, in these cases, more courts are finding that a forum with speech protections exists. As courts address the issues arising on new communications media, differences in interpretation are to be expected.[18] To better understand the parties' positions in the various lawsuits in Part IV, Subparts II.A and II.B will provide some First Amendment background on government speech and the forum doctrines, respectively, and Subpart II.C will highlight the tension between these doctrines by considering the specialty license plate cases.

A. Government Speech

The First Amendment protects against government restrictions on private speech, but it does not regulate the government's own speech.[19] When the government "is speaking on its own behalf, the

16. United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943).
17. *See infra* Part IV.
18. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009) ("There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech.").
19. *Id.* at 467.

First Amendment strictures that attend the various types of government-established forums do not apply."[20] Generally, the government may express its own views, attempt to persuade the public, and express nonneutral viewpoints in the "marketplace of ideas."[21] If a state's officials had to remain viewpoint neutral on all issues, the government would be rendered incompetent.

The government and the people that comprise it speak in many ways. Our government speaks when it endorses a program conveying a general or specific message, when it passes laws or taxes to promote its desired ends, and when it promotes its values to its constituents. In *Johanns v. Livestock Marketing Association*,[22] the Court held it was lawful to compel cattle producers to pay into a common research and marketing program through the Beef Promotion and Research Act because the speech was deemed government speech.[23] The Supreme Court has provided only limited guidance for the government speech doctrine,[24] and circuit interpretations are not uniform.[25] Dozens of relevant questions, including whether the government speaks when it excludes the private speech of others on social media, remain unanswered by the Court.[26]

The government speech doctrine was first expressed, but not fully articulated, in *Rust v. Sullivan*.[27] The Court later explained that *Rust* stands for the following proposition: "that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker . . . or instances, like *Rust*, in which the government 'used private speakers to transmit specific information pertaining to its own program.'"[28] The government speech doctrine can apply even

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20. Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2250 (2015).

21. *See* Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 367–68 (2009).

22. 544 U.S. 550 (2005).

23. *Id.* at 562.

24. Recently, the Court held that trademarks are private speech, not government speech. *See* Matal v. Tam, 137 S. Ct. 1744, 1760 (2017).

25. *See infra* Part IV.

26. For a comprehensive review of government speech cases, their interpretations, and limitations in the doctrine, see generally Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377 (2001). The authors note that the Supreme Court has ignored many important and difficult questions about the definitions and parameters of government speech. *Id.* at 1383.

27. 500 U.S. 173, 194 (1991) ("To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect.").

28. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) (internal citation omitted).

when the government "receives assistance from private sources for the purpose of delivering a government-controlled message."[29] Although *Rust* dealt with funding-based speech, government speech can take other forms.[30]

Keeping with the theme of this Note, it bears mentioning that the Supreme Court has advised that "[e]ach medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems."[31] With this guidance in mind, consider *Sutliffe v. Epping School District*.[32] In *Sutliffe*, the plaintiff-constituents argued that various town and school officials had violated their First Amendment rights by denying them access to express their opposing viewpoints in school and town newsletters and, importantly, on the town's website.[33] The First Circuit concluded that "the Town engaged in government speech by establishing a town website and then selecting which hyperlinks to place on its website."[34] Creating a website to display information for the town's citizens and the outside world was speech, and "by choosing only certain hyperlinks to place on that website, [the Town] communicated an important message about itself."[35] Although the plaintiffs characterized the website as a designated public forum, the First Circuit rejected this argument in part because the town did not intentionally create a space for public discourse when it created its website.[36]

B. The Public Forum Doctrines

For First Amendment purposes, a forum refers to the place in which a speaker speaks. As a threshold matter, the Court has advised that to find a putative forum, "a speaker must seek access to public property or to private property dedicated to public use."[37] When a speaker speaks in a space deemed a forum for First Amendment

29. Pleasant Grove City v. Summum, 555 U.S. 460, 468 (2009).
30. *See* Bezanson & Buss, *supra* note 26, at 1389–1401.
31. Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975).
32. 584 F.3d 314 (1st Cir. 2009).
33. *Id.* at 318.
34. *Id.* at 331.
35. *Id.*
36. *Id.* at 333.
37. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 801 (1985). As we shall see, this guidance is less than straightforward, especially in light of *Packingham* discussed in Part III. *See* Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 135 S. Ct. 2239, 2242 (2015) (stating that "[f]orum analysis, which applies to government restrictions on purely private speech occurring on government property, . . . is not appropriate when the State is speaking on its own behalf" (internal citation omitted)).

purposes, the government may not exercise viewpoint discrimination through censorship or exclusion.[38]

The Supreme Court has discussed different types of forums: traditional public forums, designated forums, and nonpublic forums.[39] A traditional public forum includes places like sidewalks, public parks, and other areas traditionally associated with open speech, debate, and political speech.[40] Here, content-based restrictions and exclusions are analyzed by courts with strict scrutiny and the public is afforded maximal speech protections.[41]

A designated forum arises when the government opens public property for expression, but the property is not a "typical" traditional public forum. The Court has advised that "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, for use by certain speakers, or for the discussion of certain subjects."[42] Common rooms at state universities and city-owned theaters are a few examples.[43] These forums are intentionally designated as a space for communication; thus the government cannot remove speakers from them without a compelling interest.[44] A subcategory of designated forums, the limited forum, exists when government reserves a space "for certain groups or for the discussion of certain topics."[45]

Nonpublic forums are spaces created by and reserved for the government that are neither traditional or designated forums.[46] An

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38. *See* Members of the City Council of L.A. v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984) (stating "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others").

39. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45–54 (1983).

40. *See id.* at 45.

41. *Id.* Accordingly, restrictions must be narrowly drawn and have compelling state interests. *Id.* Time, place, and manner of expression may be regulated by the State if those restrictions are narrowly tailored, leave alternative channels of communication open, and serve a compelling government interest. *Id.*

42. *Cornelius*, 473 U.S. at 802 (citing *Perry*, 460 U.S. at 46 n.7).

43. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 264–65 (1981) (determining the constitutionality of a state university's policy of not allowing religious groups to use university facilities when these facilities were available to other student groups); Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 547 (1976) (determining if a municipal board's rejection of a musical production constituted a prior restraint).

44. *Cornelius*, 473 U.S. at 800. A designated forum can be found where, for example, a public school opens its doors to the community for after-hours communications and dialogue. *See* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993).

45. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

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

example is an airport: people primarily go there to travel but incidentally engage in speech in this semipublic, government-operated space.[47] Here, the government may craft reasonable restrictions for the space to promote the purpose for which it was intended.[48] Although viewpoint discrimination is prohibited, the government may regulate the content of speech in a nonpublic forum, including political advocacy.[49]

Due to rapid developments in communications technologies, it is possible that the forums paradigm will change or adapt, particularly because pre-internet analogies often do not fit neatly with the disputes taking place over social media speech.[50] Additionally, as communications occur more frequently online in metaphysical spaces, distinguishing between government speech and private speech taking place in a forum is becoming more obscure. For example, can public officials limit certain types of speech in their social media comment sections? Could all actions flowing from the account be interpreted as government speech? Or are these comment sections more akin to forums? Can we reasonably analyze the comment section as distinct from the account as a whole, or even from the tweets that enabled the comment thread?

C. A Preexisting Tension Between the Speech Doctrines

In a series of specialty license plate cases, courts have addressed the tension between putative forums and government speech.[51] In 2015, the Supreme Court ultimately decided the various cases in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*[52] The license plate cases, particularly *Walker* (a 5–4 decision), are instructive of the tension between the different speech doctrines. Consider the conflict in *Walker*. Texas allowed its drivers to obtain specialty license plates, in which they propose designs, graphics, and slogans for their plates to the Texas Department of Motor Vehicles

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47. *See* Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 680–81 (1992).

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

49. *Id.*; Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1885–86 (2018).

50. The recognition of new forms of First Amendment protections has "forced the Supreme Court to build an increasingly elaborate edifice on the foundation of public forum analysis, an edifice now so riven with incoherence and fine distinctions that it is on the verge of collapse." Bezanson & Buss, *supra* note 26, at 1381.

51. These disputes have provoked First Amendment litigation since the 1980s and created a multifarious circuit split. For more on the litigation over the past few decades, see Amy Riley Lucas, Comment, *Specialty License Plates: The First Amendment and the Intersection of Government Speech and Public Forum Doctrines*, 55 UCLA L. REV. 1971 (2008).

52. 135 S. Ct. 2239 (2015).

Board for approval.[53] When the Board refused the Sons of Confederate Veterans' license plate proposal, which featured a Confederate flag, the group brought suit alleging that its free speech had been violated.[54]

Although the design was created by citizens and ultimately reflects their speech, the Supreme Court held that the specialty license plates constituted government speech.[55] The Court rejected the plaintiffs' arguments that the plates were designated or nonpublic forums in part because Texas did not *intend* for the license plates to serve as a forum.[56] The Court, considering *Pleasant Grove City v. Summum*,[57] advanced three arguments for finding the plates to be government speech: they have historically been used to communicate certain statements from States, they are "often closely identified in the public mind with the [State]," and the State maintains direct control over the messages on specialty plates with the ability to reject the content.[58]

When conflicts arise that implicate government and private speech within some medium, a tension between the two doctrines presents itself. As our communication technologies become more interactive and we develop new methods of communicating and associating, situations in which multiple actors seem to speak simultaneously will increasingly arise. Part IV will survey this state of affairs after Part III explores the Court's most recent opinion regarding speech rights and social media.

III. A SERIES OF TUBES: THE COURT AND INTERNET FIRST AMENDMENT CASES

A. Packingham *Provides First Amendment Protections for Access to Social Media*

The Supreme Court has opted not to hear many cases involving the relationship between the internet and the First Amendment—perhaps because of its professed concern that the "[i]nternet's forces and directions are so new, so protean . . . that what [courts] say today may be obsolete tomorrow."[59] In 1997, the Court invalidated the application of the Communications Decency Act to the "vast democratic forums of the Internet," distinguishing the internet from broadcast radio and television, which arguably had greater

53. *Id.* at 2243.
54. *Id.* at 2245.
55. *Id.* at 2253.
56. *Id.* at 2251.
57. 555 U.S. 460 (2009).
58. *Walker,* 135 . Ct at 2248–49 (quoting *Summum*, 555 U.S. at 472).
59. Packingham v. North Carolina, 137 S. Ct. 1730, 1732 (2017).

justifications for regulation.[60] The Roberts Court has only taken one free speech case that directly involves the internet: *Packingham v. North Carolina*.

In *Packingham*, the Supreme Court considered the constitutionality of a North Carolina statute that prohibited registered sex offenders from accessing "a commercial social networking Website"[61] where the offender knew that minors were permitted to become members of that site.[62] After getting a traffic ticket dismissed, Lester Packingham shared a celebratory post to his Facebook account under the pseudonym J. R. Gerrard.[63] The Durham Police Department was investigating sex offenders thought to be using social media sites in violation of the statute.[64] Packingham was discovered, indicted by a grand jury, and sentenced.[65]

Following his conviction in a 2012 jury trial, Packingham appealed to the North Carolina Court of Appeals, which vacated the conviction, finding the statute unconstitutional on its face and as applied.[66] The North Carolina Supreme Court reversed, considering the statute sufficiently narrowly tailored to withstand a content-neutral, intermediate scrutiny analysis.[67] The North Carolina Supreme Court amazingly suggested that Packingham could instead access alternative communication channels, including "the Paula Deen Network, a commercial social networking Web site,"[68] Glassdoor, and "myriad sites that do not run afoul of the statute."[69]

The U.S. Supreme Court, with Justice Kennedy writing for the majority, reversed and remanded because the statute was an overly broad restriction on lawful speech.[70] The Court observed that Amazon and WebMD could fit the statute's criteria for an inaccessible "commercial social networking Website," although for the purposes of its decision, the Court assumed the law at least applied to "commonly understood" social media such as Facebook, Twitter, and LinkedIn.[71]

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60. Reno v. ACLU, 521 U.S. 844, 868–69 (1997).
61. *Packingham v. North Carolina*, 137 S. Ct. at 1733 (quoting N.C. GEN. STAT. § 14-202.5(a) (2018)).
62. N.C. GEN. STAT. § 14-202.5(a).
63. *Packingham v. North Carolina*, 137 S. Ct. at 1734; State v. Packingham, 777 S.E.2d 738, 742 (N.C. 2015).
64. *Packingham v. North Carolina*, 137 S. Ct. at 1734.
65. *Id.*
66. *Id.* at 1734–35; State v. Packingham, 748 S.E.2d 146, 154 (N.C. Ct. App. 2013).
67. *State v. Packingham*, 777 S.E.2d at 745, 748.
68. *Id.* at 747.
69. *Id.* at 748.
70. *Packingham v. North Carolina*, 137 S. Ct. at 1737–38.
71. *Id.* at 1736–37.

> By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the *modern public square*, and otherwise exploring the vast realms of human thought and knowledge.[72]

B. Access to the "Modern Public Square" or Something More?

Commentators, litigants, and lower courts were quick to notice the phrase "modern public square."[73] These commentators also quickly noticed when Justice Kennedy identified "cyberspace . . . 'the vast democratic forums of the Internet' in general, and social media in particular,"[74] as "the most important place[] [today] (in a spatial sense) for the exchange of views."[75] Although the case chiefly concerned *access*[76] to an array of social media sites and an overly broad statute, this persuasive Supreme Court language is used to support arguments with an attenuated connection to the narrow holding in *Packingham*.

Justice Alito's concurrence in *Packingham* provides some pushback and raises important questions. While expressing that he was "troubled by the Court's loose rhetoric,"[77] he reproached the majority for its "undisciplined dicta."[78] He wrote that "[t]he Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks,"[79] and yet, the Court "declines to explain what this means with respect to free speech law."[80] Recognizing that "[c]yberspace is different from the physical world," Justice Alito advised greater caution when creating First Amendment precedent that applies to the internet.[81]

After the decision, some commentators remarked that Justice Kennedy's statements obscure the dual public and private nature of internet spaces and expressed concern about the unclear parameters

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72. *Id.* at 1737 (emphasis added).

73. *See, e.g.*, Mutter v. Ross, 811 S.E.2d 866, 868 (W. Va. 2018); *First Amendment – Freedom of Speech – Public Forum Doctrine* – Packingham v. North Carolina, 131 HARV. L. REV. 233, 242 (2017).

74. *Packingham v. North Carolina*, 137 S. Ct. at 1735 (quoting Reno v. ACLU, 521 U.S. 844, 868).

75. *Id.*

76. *Id.* at 1732 (emphasis added) (stating as background for its analysis of the statute that "the Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that [internet] medium").

77. *Id.* at 1743 (Alito, J., concurring).

78. *Id.* at 1738.

79. *Id.*

80. *Id.* at 1743.

81. *Id.* at 1744.

of the "modern public square."[82] Part IV will examine how various courts and litigants have interpreted *Packingham*, the source from which many of the social media blocking and comment deletion lawsuits rely on.

Does *Packingham* stand for anything beyond the proposition that a State may not restrict sex offenders from accessing Facebook, Twitter, and LinkedIn? As Part IV will demonstrate, the line between *Packingham*'s narrow holding and Justice Kennedy's dicta has become obfuscated. Was the Court signaling that the public forum doctrines should be extended to free speech disputes on the social media, or was that simply "undisciplined dicta?" In the following Part, notice how each court treats (or ignores) *Packingham*.

IV. WHAT HAPPENS WHEN DONALD TRUMP AND OTHER GOVERNMENT ACTORS BLOCK PEOPLE FROM THEIR SOCIAL MEDIA ACCOUNTS?

In light of the prior circuit split on the proper application of government speech and forum doctrines in the specialty license plate cases and the lack of clarity from *Packingham*, courts are likely to take different analytical approaches to speech rights on social media. The following cases concern government officials that have blocked social media users and deleted critical comments on their social media pages. The cases preceding the lawsuit against President Trump have explored differing approaches.

A. The Fourth Circuit Endorses Forum Analysis for Blocking and Deletion Cases

The first set of cases to reach a final judgment that characterized a government official's social media page as a public forum is the Davison saga.[83] Brian Davison, a resident of Loudoun County, Virginia, brought suit against several county officials that had blocked him on Facebook.[84] Davison had two cases before the same judge, each with a different outcome in the U.S. District Court for the Eastern District of Virginia.

In *Davison v. Plowman*,[85] the plaintiff brought suit against James Plowman, the Attorney for the Commonwealth for Loudoun County (in his official capacity and individually) for blocking him on

82. *See, e.g.*, *First Amendment – Freedom of Speech – Public Forum Doctrine* – Packingham v. North Carolina, *supra* note 73, at 233; Noah Feldman, *Constitution Can't Stop Trump from Blocking Tweets*, BLOOMBERG (June 7, 2017, 12:39 PM), https://www.bloomberg.com/opinion/articles/2017-06-07/constitution-can-t-stop-trump-from-blocking-tweets.

83. Davison v. Loudoun Cty. Bd. of Supervisors, 267 F. Supp. 3d 702, 716, 718 (E.D. Va. 2017).

84. *Id.* at 706.

85. 247 F. Supp. 3d 767 (E.D. Va. 2017).

Facebook and deleting his comments on the attorney's Facebook page.[86] Davison was politically active and was entangled in a dispute with the county's public school system.[87] He believed a school official committed perjury in a court hearing related to Davison being banned from the property of his kids' elementary school.[88] He subsequently pressured public officials through Facebook.[89] When Plowman discovered a series of lengthy comments posted by Davison, he deemed them "off topic" and in violation of the Loudoun County Social Media Comments Policy.[90] Plowman then deleted the comments and blocked Davison.[91]

Relying on the text from the Loudoun County's Social Media Comments Policy,[92] the court determined that the official Facebook page served as a limited public forum.[93] In such forums, the government can create and lawfully enforce speech restrictions that are reasonable for the purposes of the forum.[94] The court found that the restriction was integral to the forum's purpose and found no First Amendment violations in the deletion of Davison's comments.[95] Furthermore, Plowman was entitled to qualified immunity for his choice to block Davison from further posting on his official Facebook page.[96] The Fourth Circuit affirmed, finding no reversible error.[97]

However, the outcome was different when Davison alleged similar conduct from the Chairperson of the county's local governing body in *Davison v. Loudoun Cty. Bd. of Supervisors*.[98] Davison alleged that his free speech rights were violated when he was banned (and subsequently unbanned within twelve hours) from the "Chair Phyllis J. Randall" Facebook page.[99] As an initial matter, Randall tried to characterize her account as a personal website, but the court found that she operated the account under color of state law because

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86. *Id.* at 770.
87. *Id.* at 771.
88. *Id.*
89. *Id.* at 773.
90. *Id.* at 774.
91. *Id.*
92. *Id.* at 771–72. Relevant portions of the policy stated that the purpose of the county's social media sites is "to present matters of public interest in Loudoun County." The county's policy also "encourage[d]" commenters to submit questions, comments or concerns through the county's social media sites but reserved the County's right to delete posts or comments for many reasons, including comments that were "clearly off topic." *Id.*
93. *Id.* at 776.
94. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829–30 (1995).
95. *Plowman*, 247 F. Supp. 3d at 777.
96. *Id.* at 778–80.
97. Davison v. Plowman, 715 F. App'x 298, 298 (4th Cir. 2018).
98. 267 F. Supp. 3d 702, 723 (E.D. Va. 2017).
99. *Id.* at 706.

her actions arose from public circumstances, she used the Facebook page as a tool of governance, and the page contained numerous indicia suggesting it was a communication channel between the chairperson and her constituents.[100] After discerning that the use of the account was more public than personal in nature, the court turned to forum analysis.

The court stated that people generally have Facebook pages to create spaces to exchange information and opinions; it then interpreted *Packingham* as the Supreme Court "comparing social media to traditional public fora such as parks and streets."[101] An important distinction from *Plowman* was, in this case, the defendant solicited conversation and participation through some of her Facebook posts and did not operate her page according to a county social media policy.[102] The court deemed that she designated the Facebook page as a space where her constituents could contact her.[103] The following Facebook post proved fatal for the defendant:

> Everyone, could you do me a favor. I really want to hear from ANY Loudoun citizen on ANY issues, request, criticism, compliment, or just your thoughts. However, I really try to keep back and forth conversations (as opposed to one time information items such as road closures) on my county Facebook page (Chair Phyllis J. Randall) or County email (Phllis.randall@loudoun.gov). Having back and forth constituent conversations are Foiable (FOIA) so if you could reach out to me on these mediums that would be appreciated. Thanks much, Phyllis[104]

The district court found this to be sufficient proof that the Facebook page qualified as a governmental designation of a place for public communication.[105] However, it declined to classify it as a "traditional" or "limited/designated" forum because the banning amounted to viewpoint discrimination, which is prohibited in all types of forums.[106] The court acknowledged that some moderation of social media pages is necessary and suggested that "[n]eutral,

100. *Id.* at 711–14.

101. *Id.* at 716. Notably, the same judge did not cite *Packingham* in the companion case that had a different outcome. *See generally Davison v. Plowman*, 247 F. Supp. 3d 767 (E.D. Va. 2017) (demonstrating that this court did not cite to *Packingham*).

102. *Davison*, 267 F. Supp. 3d at 715.

103. *Id.* at 708. One potential problem here is that it can be difficult to determine if an account actually belongs to a constituent. *Packingham* serves as a reminder that not every Facebook page accurately represents the person behind the screen.

104. *Id.*

105. *Id.* at 716.

106. *Id.* at 716–17. Moderating subject matter can be permissible, but prohibiting a particular point of view is not allowed.

comprehensive social media policies like that maintained by Loudoun County—and eschewed by [Randall] here—may provide vital guidance for public officials and commenters alike in navigating the First Amendment pitfalls of this 'protean' and 'revolution[ary],' forum for speech."[107]

The Fourth Circuit reviewed de novo and affirmed, following much of the district court's reasoning.[108] The majority opinion read *Packingham* as the Supreme Court analogizing social media sites to traditional public forums and as establishing that the internet is the most important place for the exchange of views.[109] It cited Randall's invitation for "ANY Loudoun citizen" to comment "on ANY issue" as evidence that Randall's Facebook page was a place for the exchange of views.[110] In rejecting Randall's arguments that the Facebook page was not public property, the Fourth Circuit countered that forum analysis can apply to "*private property* dedicated to *public use*."[111] The Fourth Circuit rejected the argument that Chair Phyllis J. Randall's page was entirely government speech, creating a distinction between her posts and the "interactive space" on her page and in the public comment sections.[112] In the Fourth Circuit's view, Randall's posts, comments, and the curated content on her page amounted to government speech.[113] However, the dispute involved the interactive space on Randall's page.[114] The court found that these interactive aspects of the account resembled forums and proceeded with forum analysis.[115] Like the district court, the Fourth Circuit declined to classify the public forum as traditional or designated because, regardless of the classification, the actions taken amounted to impermissible viewpoint discrimination.[116]

In a concurring opinion, Circuit Judge Barbara M. Keenan agreed with the majority but raised important questions about how

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107. *Id.* at 718 (citations omitted) (citing Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017)). Considering the same judge ruled on the *Plowman* case, the court seems to be suggesting that in the absence of adherence to a social media policy, it will look to social media posts to discern the intended nature of the platform.

108. Davison v. Randall, 912 F.3d 666, 679–80 (4th Cir. 2019).

109. *Id.* at 682 (citing *Packingham v. North Carolina*, 137 S. Ct. at 1735).

110. *Id.*

111. *Id.* at 683 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 801 (1985)).

112. *Randall*, 912 F.3d at 686. The Fourth Circuit partially relied on *Knight First Amend. Inst. v. Trump*, in which the U.S. District Court for the Southern District of New York separated the functions of Twitter into different sections and analyzed them as distinct sections. 302 F. Supp. 3d 541, 576–77 (S.D.N.Y. 2018). For more on that case, see *infra* Subpart IV.D.

113. *Randall*, 912 F.3d at 686.

114. *Id.* at 687.

115. *Id.*

116. *Id.*

to apply *Packingham*.[117] She noted "the interplay between private companies hosting social media sites and government actors managing those sites necessarily blurs the line regarding which party is responsible for burdens placed on a participant's speech."[118]

B. The Sixth Circuit May Lean Toward a Government Speech Approach

In *Morgan v. Bevin*,[119] the American Civil Liberties Union brought suit against Kentucky's former governor on behalf of constituents Drew Morgan and Mary Hargis after Governor Bevin blocked them from his official Facebook and Twitter accounts in response to their critical comments.[120] The plaintiffs sought a preliminary injunction and a declaration that these blockings were unconstitutional because, as the district court framed it, "they cannot comment on Facebook or view the posts and comments of others on Twitter."[121] The U.S. District Court for the Eastern District of Kentucky denied the plaintiffs' requests and rejected the plaintiffs' characterization of Facebook and Twitter as traditional public forums.[122] The governor asserted that Facebook and Twitter were limited forums which would allow for reasonable, viewpoint neutral speech restrictions.[123] However, the district court determined that forum analysis was not proper and instead characterized the governor's accounts as government speech.[124] This differs from the Fourth Circuit's approach where it separated the account into components and classified some parts as government speech and other parts as forums.

First, the district court relied on Supreme Court guidance that a speaker "must seek access to public property or to private property dedicated to public use" to receive First Amendment protections in a forum.[125] The court noted that "Twitter is a privately owned social networking site"[126] and that the governor's Twitter and Facebook accounts are "privately owned channels of communication and are not converted to public property by the use of a public official."[127] This argument was made by Professor Noah Feldman in reference to

117. *Id.* at 693 (Keenan, J., concurring).
118. *Id.*
119. 298 F. Supp. 3d 1003 (E.D. Ky. 2018).
120. *Id.* at 1003.
121. *Id.*
122. *Id.* at 1010.
123. *Id.*
124. *Id.* at 1011–13.
125. *Id.* at 1010 (quoting Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 801 (1985)).
126. *Id.* at 1006.
127. *Id.* at 1011.

President Trump's case. Professor Feldman noted that everyone's Twitter account is effectively owned by Twitter, and Twitter has its own First Amendment rights.[128] Because the accounts and comment sections are not public property, forum analysis seemed dubious to the court.[129]

Next, the district court looked to Governor Bevin's stated intent for creating the accounts. Intent is an important factor because the Supreme Court has cautioned that forum analysis is improper if it would lead to the closing of the putative forum.[130] The district court observed that the accounts were intended to "communicate his vision, policies, and activities to constituents and receive feedback from them on the specific topics that he chooses to address in his posts,"[131] and they were not intended to be an "open forum for general discussion of all issues by the public."[132] Additionally, the governor alleged that he only allowed Facebook users to comment on his posts but not to his timeline, and he set up filters to remove spam, expletives, and off topic comments.[133] The court considered this exercise of control as indicative that the governor did not intend to create a truly open forum.[134] It also considered spamming, raiding, and other practices that could flood his account with undesirable content if the governor were not permitted to moderate his page.[135] Furthermore, the ability to block a user is a function that is built into social media platforms, a permissible option for all users. With this backdrop, the court framed the actions: "Governor Bevin is not suppressing speech, but is merely culling his Facebook and Twitter accounts to present a public image that he desires."[136]

Relying on those facts, the court classified Governor Bevin's *accounts* as government speech,[137] rejecting a public forum analysis

128. Feldman, *supra* note 82.

129. *Morgan*, 298 F. Supp. 3d at 1010–11. However, the Fourth Circuit in *Randall* suggested that the social media platforms may be "private property dedicated to public use," and it regarded substantial control over the social media pages as sufficient control to establish public fora. Davison v. Randall, 912 F.3d 666, 682–83 (4th Cir. 2019) (citing Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 547, 555 (1975)).

130. *See* Pleasant Grove City v. Summum, 555 U.S. 460, 480 (2009) ("[W]here the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.").

131. *Morgan*, 298 F. Supp. 3d at 1011.

132. *Id.* at 1006.

133. *Id.* at 1008.

134. *Id.* at 1012.

135. *Id.*

136. *Id.* Indeed, many people use social media to present a cultivated and desirable version of themselves.

137. *Id.* at 1013. Compare this with Judge Buchwald's analysis in the lawsuit against President Trump. There, the timeline and content of the Twitter account were government speech, but the "interactive spaces," like the comment section,

because the governor "never intended his Facebook or Twitter accounts to be like a public park, . . . he has a specific agenda of what he wants his pages to look like and what the discussion on those pages will be."[138] As of the time of this Note's publication, the case is ongoing and documents have revealed the governor has blocked almost 3000 people.[139] Governor Bevin is defending his actions based on his social media policy, which critics have argued is vague and allows the governor to censor for any reason.[140]

Although the outcome is still pending, looking to the Sixth Circuit's approach to its own specialty license plate case may be instructive. In *ACLU of Tenn. v. Bredesen*,[141] the Sixth Circuit considered the degree of control exercised by the government over the messaging on the license plate to be an important factor in its analysis, and it concluded that specialty license plates were government speech rather than a forum for speech.[142]

C. The First Circuit Recognizes a Petition Clause Claim

In Maine, two residents sought declaratory and injunctive relief against then-Governor Paul LePage for deleting their comments on his social media posts and blocking them from his Facebook page.[143] The U.S. District Court for the District of Maine denied the governor's motion to dismiss[144] without fully considering the merits of the issues raised, but it did conclude that forum analysis was appropriate, and it expressly denied the court's reasoning in *Morgan*.[145] Although the governor maintained that all of what appeared on his Facebook page

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were designated public forums. Knight First Amend. Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 571–74 (S.D.N.Y. 2018).

138. *Morgan*, 298 F. Supp. 3d at 1011.

139. *Court Records: Bevin Blocks Thousands of Social Media Users*, AP NEWS (May 2, 2019), https://www.apnews.com/20738c15c37e4874a84d25f621995c5f.

140. Morgan Watkins & Phillip M. Bailey, *'Sweep out the Trash': Bevin Blocks Thousands on Social Media and Records Now Detail Why*, COURIER J. (May 1, 2019, 1:42 PM), https://www.courier-journal.com/story/news/politics/2019/05/01/matt-bevin-social-media-why-kentuckys-governor-blocks-twitter-users/3640333002/.

141. 441 F.3d 370 (6th Cir. 2006).

142. *Id.* at 375–77, 380. The court considered this factor strongly because of *Johanns v. Livestock Mktg. Ass'n*, which held that a government program that pays for beef advertisements to sponsor agricultural products is government speech, in light of the government's control over the messaging. 544 U.S. 550, 560–62 (2005).

143. Leuthy v. LePage, No. 1:17-cv-00296-JAW, 2018 WL 4134628, at *1 (D. Me. Aug. 29, 2018).

144. It is important to note that in evaluating motions to dismiss, the facts are generally constrained to only those alleged. *See* 5B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §1357 (3d ed. 2010) (noting that courts primarily look to the allegations in the complaint but may also consider "matters incorporated by reference or integral to the claim").

145. *Leuthy*, 2018 WL 4134628, at *15–16.

constituted his own speech, the district court refused to classify deleting comments or banning constituents as a form of speech.[146] It distinguished itself from the First Circuit's *Sutliffe* decision by stating that the website there "had a finite number of hyperlinks to external websites,"[147] whereas Governor LePage's "Facebook page is a forum capable of hosting an unlimited number of posts, designed to host ongoing discussion and commentary."[148] Although it recognized the problem of the town losing control of its website in *Sutliffe*, it characterized the Facebook page as more of a conversation than a display of information.[149]

In considering the application of forum analysis, the court stated that *Packingham* made social media platforms "subject to the forum analysis."[150] Unfortunately, it did not go into any depth about which social media platforms, or which aspects of those platforms, would be appropriately understood as forums. As in *Davison*, the court here declined to complete its forum analysis because the governor did not dispute that he engaged in viewpoint discrimination, which is impermissible in any forum.[151]

The plaintiffs also brought a Petition Clause claim, arguing that the governor opened a channel to be petitioned by operating an official Facebook page.[152] The Court in *Packingham* seemed to suggest this cause of action when it observed that "on 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."[153] Although this support went unaddressed in the opinion, the district court found the claim viable, unconvinced by the argument that the plaintiffs had alternative channels for petition.[154] Governor LePage eventually settled out of court, unblocked the constituents, and promised to stop blocking people based on viewpoint.[155] Although the case did not reach a final decision on its merits, it was clear that Maine courts are opposed to the approach in *Morgan*.

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146. *Id.* at *11–12.

147. *Id.* at *11 (citing Sutliffe v. Epping Sch. Dist., 584 F.3d 314, 334 (1st Cir. 2009)).

148. *Id.* This statement may be factually inaccurate though, as websites are not necessarily restricted in the number of links that it can maintain.

149. *Id.* at *11–12. Whether or not this proposition holds true for all social media pages is questionable and it may prove to be a weak justification.

150. *Id.* at *14 (citing Packingham v. North Carolina, 137 S. Ct. 1730, 1735 (2017)).

151. *Id.* at *15.

152. *Id.* at *16.

153. *Packingham v. North Carolina*, 137 S. Ct. at 1735.

154. *Leuthy*, 2018 WL 4134628, at *16–17.

155. *Leuthy et al. v. Lepage*, ACLU OF MAINE, https://www.aclumaine.org/en/cases/leuthy-et-al-v-lepage (last visited Mar, 19, 2020).

D. Knight First Amendment Institute v. Trump[156]

President Donald J. Trump, who notably credited social media for the success of his 2016 election,[157] was sued for blocking critics on Twitter.[158] Similar to the previous claims, the president was accused of infringing on the First Amendment rights of critical commenters by blocking them on Twitter because of their viewpoints.[159] One twist in the case is that the social media account in question is @realDonaldTrump,[160] an account the president previously used as a private citizen and during his campaign, rather than @POTUS, the presidential account created by Barack Obama's Whitehouse.[161] The dispute, as framed by the U.S. District Court for the Southern District of New York, was whether a public official may block a Twitter user in response to expressed political views.[162]

To orient the audience, the court introduced the case with a lengthy list of stipulations about the various functions and characteristics of Twitter.[163] It noted a distinction between blocking and muting another Twitter user, a distinction that inevitably narrowed the holding.[164] When X blocks Y's account on Twitter, Y cannot use his account to see or reply to X's tweets, search for X's content, or look at X's followers or X's followed accounts.[165] In short, Y cannot interact with X. But if X instead mutes Y's account, Y can still follow X's account and interact with X's tweets.[166] However, Y's content will be removed from appearing on X's timeline from X's point of view.[167] The court deemed this distinction critical because "the

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156. 928 F.3d 226 (2d Cir. 2019).

157. Nolan D. McCaskill, *Trump Credits Social Media for His Election*, POLITICO (Oct. 20, 2017, 7:05 PM), https://www.politico.com/story/2017/10/20/trump-social-media-election-244009.

158. Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 553 (S.D.N.Y. 2018).

159. *Id.* at 549.

160. Donald J. Trump (@realDonaldTrump), TWITTER, https://twitter.com/realDonaldTrump (last visited, Mar. 19, 2020).

161. Alex Wall, *Introducing @POTUS: President Obama's Twitter Account*, WHITE HOUSE (May 18, 2015, 11:40 AM), https://obamawhitehouse.archives.gov/blog/2015/05/17/introducing-potus-presidents-official-twitter-account. The POTUS account was handed off to Donald Trump when he took office. *See* Abby Ohlheiser, *So, What Happens to the @POTUS Twitter Account Now?*, WASH. POST (Jan. 20, 2017, 11:08 AM), https://www.washingtonpost.com/news/the-intersect/wp/2017/01/20/so-what-happens-to-the-potus-twitter-account-now/.

162. *Knight First Amendment Inst.*, 302 F. Supp. 3d at 549.

163. *Id.* at 550–52.

164. *Id.* at 551–52.

165. *Id.* at 551.

166. *Id.* at 552.

167. *Id.*

muted account may still reply directly to the muting account, even if that reply is ultimately ignored."[168]

The district court held that the "interactive space" accompanying the president's tweets is a designated public forum.[169] This space refers to the area where Twitter users can see another user's tweets, reply to tweets and other comments in a comment thread, retweet, "like," or simply observe the stream of communications.[170] The court found that the plaintiffs did not seek access to the entire account but rather to the tweets and comment section, and the court subsequently divided the account into different sections.[171] While the reply section was subject to forum analysis, the actual content of the tweet was interpreted as government speech.[172]

In determining that forum analysis was proper, the district court found that government control over the account was sufficient, not limiting the application to the "public property" requirement discussed in *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*.[173] The @realDonaldTrump page has been used to appoint officials and conduct policy, and it is subject to the Presidential Records Act.[174] Accordingly, the court found the account to be more governmental that private.[175] From this, the court found that the president had infringed on the plaintiffs' free speech rights by blocking them (instead of muting them) based on viewpoint discrimination.[176]

The Second Circuit affirmed on most of the same grounds, holding that the president engaged in impermissible viewpoint discrimination and that blocking Twitter users "limit[s] certain users' access to his social media account, which is otherwise open to the public at large."[177] It concluded that the First Amendment does not allow public officials using a social media account for official purposes to exclude people from "an otherwise-open online dialogue" based on the expression of disagreeable views.[178] The court recognized that although @realDonaldTrump was created in 2009 when the president was a private citizen, the account is now official in nature.[179] In its analysis, the Second Circuit cited *Packingham* to state that "social

168. *Id.* at 576.
169. *Id.* at 549.
170. *Id.* at 566.
171. *Id.*
172. *Id.* at 571–73.
173. *Id.* at 566–67; 473 U.S. 788 (1985).
174. *Knight First Amendment Inst.,* 302 F. Supp. 3d at 567.
175. *Id.*
176. *Id.* at 580.
177. Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 230 (2d Cir. 2019).
178. *Id.*
179. *Id.* at 231.

media is entitled to the same First Amendment protections as other forms of media."[180]

The court explicitly left open the questions of whether elected officials can block people from private social media accounts and whether social media companies must adhere to the First Amendment in managing their platforms.[181] The latter question, as well as others, is considered in the following Part.

V. ADDRESSING INCONSISTENCIES AND ADVANCING A MIXED SPEECH APPROACH FOR SOCIAL MEDIA SPEECH

Social media is a tool that facilitates new types of communication. Whether it is Facebook, Twitter, or the next big network to be developed, a social media's mores are defined by the parameters of possible and permissible actions that can be taken on the platform. With these premises, this Note next explores problems within the aforementioned legal controversies and proposes a new approach to interpreting speech on social media.

A. *An Alternative Reading of* Packingham

Although *Packingham* compares social media to forums and "the modern public square,"[182] it does not necessarily follow that comment sections associated with public officials' social media pages are best analyzed using the forum doctrines. *Packingham* certainly did not contemplate these issues, nor did it consider designating some parts of social media accounts as forums and other parts as the speech of the user.[183] However, the case is regularly used to support forum analysis regarding public official's social media comment sections.

A different way to read *Packingham* is that the Court considered access to social media as a whole comparable to access to the modern public square. This suggests that Facebook and Twitter are the modern public square. In this analogy, the platforms are the forums that are like public squares and user accounts are representations of speakers with the capacity to speak in many ways. This reading of *Packingham* highlights that access to Facebook is quite different from access to the posts and comment sections on someone's Facebook page, even if that someone is a public official with fewer privacy settings. The individual accounts within the larger forum of Facebook have agency over the exchange of communications taking place on their pages and are the moderators of their own discussions. Perhaps

180. *Id.* at 237 (citing Packingham v. North Carolina, 137 S. Ct. 1730, 1735–36 (2017)).
181. *Id.* at 230.
182. *Packingham v. North Carolina*, 137 S. Ct. at 1737.
183. *See supra* Part III.

Packingham only prevents the states from restricting our access to social media platforms, in which case it is an inadequate justification for protecting access to public officials' social media pages.

B. Deleting Comments and Blocking Accounts as a Form of Speech?

If the ordinary Twitter user can block another user for any or no reason, why should different standards apply to the president or a governor? Is it not a form of speech to delete an unsavory comment appearing on one's own Facebook page or refuse to associate with another social media user? Some of the courts insisted that deleting (and not deleting) comments on social media cannot be understood as a form of speech.[184] However, if one considers the entirety of the content, interactions, and appearances flowing from an account as speech, perhaps excluding others could be seen as speech. Given the degree of control users are afforded over their appearances and interactions on Facebook and Twitter, blocking (and not blocking) certain people may be understood as a form of communication, an expression of associational preferences. It communicates an unwillingness to engage with another; deleting a comment communicates disapproval or distaste. When Governor Bevin excludes users from his Facebook page, he is "present[ing] a public image that he desires."[185] Government officials should be able to maintain control of their official social media pages, at least to a certain degree.

C. Promoting a Mixed Speech Interpretation for Social Media Speech

Who should speech be attributed to when a social media user submits a comment to the post or the page of another user? At first glance, it seems that the speech should be attributed to the user that typed out the words and pressed send. However, this does not fully embrace social media as dynamic communication environments. Consider the functions Facebook, for example, provides its users. There, X inserts his speech into the comment section of Y's post, and X can edit or delete his speech in the form of that comment. However, because X commented on Y's post, Y exercises control over the entire comment section of the post and has the ability to delete X's comments, along with any other comments that Y wishes to erase.

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184. *See, e.g.*, Leuthy v. LePage, No. 1:17-cv-00296-JAW, 2018 WL 4134628, at *11 (D. Me. Aug. 29, 2018) (stating that "[f]or purposes of this motion, the Court is similarly unpersuaded that the Governor incorporates or adopts the comments and posts of others as his own speech simply by not deleting them after the speakers post them to his page").

185. Morgan v. Bevin, 298 F. Supp. 3d 1003, 1012 (E.D. Ky. 2018).

This is a fundamental characteristic on Facebook, deliberately designed by its developers.[186] Users can delete their own posts and comments and can delete the posts and comments of others which appear on their own page or posts. Does it follow that X's comment is only his speech when Y has the ability to delete it at any time under normal circumstances? Arguably not.

One way to understand who is speaking in the above example is to characterize comments and posts to the walls of others as mixed speech,[187] dual in nature: X's speech as the comment and Y's speech of tacit endorsement or deletion of the comment. Thus, a potential solution to the tension between government speech and forum analysis is for courts to adopt a "mixed speech doctrine" to consider these social media speech issues. Wholesale application of government speech analysis could lead to impermissible viewpoint restrictions.[188] Likewise, relying exclusively on forum analysis may overlook compelling government interests.[189] A mixed speech paradigm, with intermediate scrutiny, could better facilitate a balancing of public and private interests. This would give courts more latitude to address deleting comments and blocking users as the court can inquire into specifics that led to the deletion or blocking.[190] If an individual's repeated rude and critical posts or comments continuously appeared on a government official's Facebook page, and the public official found she was not able to effectively use that channel to communicate her message due to the deluge of unwanted and off-topic comments, a court could find a compelling interest in blocking that individual and deleting their comments. However, if a constituent is expressing contrary viewpoints on their representative's social media page in a respectful manner and is subsequently blocked, a court should favor the constituent's free speech interests.

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186. *See How Do I Hide or Delete a Comment from a Post on My Facebook Page?*, FACEBOOK, https://www.facebook.com/help/297845860255949 (last visited Mar. 19, 2020) (explaining the process through which a user can delete comments on a post).

187. Under a "mixed speech" approach, courts could recognize that a politician's Facebook page is composed of and produces government speech and also recognize that it can function as a speech forum for the public. *But see* Olree, *supra* note 21, at 379 (noting that "most federal appellate courts . . . [have] adopted a binary approach to classifying speech: a message may constitute either government speech or private speech, but not both").

188. *See supra* Subpart II.A.

189. *See supra* Subpart II.B.

190. Additionally, this may lead to more transparent reasoning from the courts.

D. Loose Ends and Unresolved Questions

Knight and the related cases are celebrated as victories against censorship,[191] but these wins are relatively small compared to other censorship problems arising on social media. If accusations about algorithmic manipulations,[192] targeted content moderation,[193] and shadow banning[194] are true, social media companies are engaging in far more censorship than the government officials blocking users from their pages.

A growing number of individuals have been banned from various platforms.[195] Do these individuals have a right to engage in the designated public forums created on President Trump's Twitter timeline? It seems that they should. However, a faceless corporation has become the gatekeeper to the modern public square, and it is immune to First Amendment complaints because it is not a state actor.[196] Corporate censors can prevent citizens from accessing what courts have deemed designated public forums. The president cannot block users from his Twitter page, but Twitter can block users from accessing the president's page. Where would a permanently banned individual turn for relief? If a person sued Twitter, it seems likely that a court would uphold the banning because Twitter is not a government entity and its abridgments of First Amendment principles are not safeguarded by the Constitution.[197] These platforms can impose speech restrictions on their users and exclude speakers in ways that our government cannot. Does it make sense that multinational corporations can exclude people from what the courts consider to be "modern public squares?"

Additional unanswered questions reveal the uncertain parameters. Can a politician ban someone from a foreign country that

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191. *See, e.g.*, John Herrman & Charlie Savage, *Trump's Blocking of Twitter Users Is Unconstitutional, Judge Says*, N.Y. TIMES (May 23, 2018), https://www.nytimes.com/2018/05/23/business/media/trump-twitter-block.html.

192. *See, e.g.*, Oliver Darcy, *How Twitter's Algorithm Is Amplifying Extreme Political Rhetoric*, CNN BUS. (Mar. 22, 2019, 7:42 AM), https://www.cnn.com/2019/03/22/tech/twitter-algorithm-political-rhetoric/index.html.

193. *See, e.g.*, Kalev Leetaru, *Is Twitter Really Censoring Free Speech?*, FORBES (Jan. 12, 2018, 5:06 PM), https://www.forbes.com/sites/kalevleetaru/2018/01/12/is-twitter-really-censoring-free-speech/#180858ea65f5.

194. *See, e.g.*, Chris Fox, *Twitter: Algorithms Were Not Always Impartial*, BBC NEWS (Sept. 6, 2018), https://www.bbc.com/news/technology-45426407.

195. For a list of people suspended or permanently banned from Twitter, see *Twitter Suspensions*, WIKIPEDIA, https://en.wikipedia.org/wiki/Twitter_suspensions (last visited Mar. 19, 2020).

196. *See* Freedom Watch, Inc. v. Google, Inc., 368 F. Supp. 3d 30, 41 (2019) ("While selective censorship of the kind alleged by the Plaintiffs may be antithetical to the American tradition of freedom of speech, it is not actionable under the First Amendment unless perpetrated by a state actor.").

197. *See id.* at 40 (noting that for First Amendment protection the infringement must arise from a state actor).

might be trying to influence their comment sections (and thus the effectiveness and appearance of their page)? How can we even know *who* the account belongs to?[198] With this uncertainty, it seems that government officials are encouraged to not ban anyone, even if that person is not their constituent. Would a private citizen running for office be subject to different legal rules regarding their social media use compared to the incumbent that they are running against? An unelected figure running for office may have more latitude to militantly maintain their digital public appearance by censoring dissenters, while their elected opponent is compelled to keep unflattering comments visibly linked to their social media pages. The campaigners would have different amounts of control over their digital campaign platforms and that difference could be a decisive factor for influencing public opinion.

Another issue is differentiating harassment from criticism, with the former potentially not worthy of First Amendment protections. Representative Alexandria Ocasio-Cortez has been sued for blocking Twitter users and the plaintiffs are eager to see if the standards will apply equally across the political aisle.[199] The New York representative maintained that she was blocking people due to harassment, not because of their political views.[200] However, it remains to be determined whether that defense will be adequate generally or as applied. There are legitimate reasons to block people that post obscenity and threats to their social media pages, but determining what content constitutes those types of unprotected speech can be difficult and reasonable minds can differ.

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198. In 1993, cartoonist Peter Steiner quipped that "[o]n the Internet, nobody knows you're a dog." *See* Michael Cavna, *'Nobody Knows You're a Dog': As Iconic Internet Cartoon Turns 20, Creator Peter Steiner Knows the Joke Rings as Relevant as Ever*, WASH. POST (July 31, 2013), https://www.washingtonpost.com/blogs/comic-riffs/post/nobody-knows-youre-a-dog-as-iconic-internet-cartoon-turns-20-creator-peter-steiner-knows-the-joke-rings-as-relevant-as-ever/2013/07/31/73372600-f98d-11e2-8e84-c56731a202fb_blog.html. Can we be sure that a tweet from @realDonaldTrump in fact was written by the president? *See* David Robinson, *Text Analysis of Trump's Tweets Confirms He Writes Only the (Angrier) Android Half*, VARIANCE EXPLAINED (Aug. 9, 2016), http://varianceexplained.org/r/trump-tweets/.

199. Deanna Paul, *Ocasio-Cortez Faces Lawsuits for Blocking Twitter Critics After Appeals Court Ruling on Trump*, WASH. POST (July 10, 2019, 9:42 AM), https://www.washingtonpost.com/technology/2019/07/10/ocasio-cortez-faces-lawsuits-blocking-twitter-critics-after-appeals-court-ruling-trump/.

200. Andrew Denney & Ebony Bowden, *AOC Will Explain Why She Blocks People on Twitter in Federal Court*, N.Y. POST (Oct. 3, 2019, 2:33 PM), https://nypost.com/2019/10/03/aoc-will-explain-why-she-blocks-people-on-twitter-in-federal-court/.

VI. CONCLUSION

Although courts have not analyzed the social media blocking and comment-deleting cases uniformly, more courts are turning to forum analysis and ruling in favor of the blocked users. Courts employing a binary approach that classifies speech as either private or governmental, but not both, may struggle to fairly balance speech interests in online spaces in which both citizens and government operate. A mixed-speech approach could be a useful analytical approach to enable a transparent weighing of interests. Until doctrinal developments are cemented, government and public officials would be wise to update their social media policies—in light of *Davison* and *Morgan*—to include rules that will allow them to run their pages the way that they wish.

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