COMMUNICATION WITH PUBLIC OFFICIALS IN THE MODERN AGE OF SOCIAL MEDIA: DOES IT VIOLATE THE FIRST AMENDMENT WHEN PUBLIC OFFICIALS BLOCK PRIVATE INDIVIDUALS FROM THEIR SOCIAL MEDIA PAGES?

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INTRODUCTION

American democracy demands that individuals can criticize the government in open discussions. Modern technology has shifted the forums where individuals air these grievances. In the past, criticism of government officials occurred in town halls, newspapers, magazines, and news shows. Modern channels of communication, however, heavily feature social media, thus expanding the population that can participate in this discussion. Social media sites, such as Twitter and Facebook, have vastly expanded the ease with which government officials can communicate with the public and with which private individuals can criticize these officials and their policies. Additionally, a hallmark of these sites is the capability of individuals to interact with one another through likes, comments, reposts, and replies. This facilitates direct interactions between the public and their government representatives on these sites.

Recently, more government officials have turned to social media to run official accounts.1 In particular, the presidency of Donald Trump

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1. See generally JACOB R. STRAUSS, CONG. RSRCH. SERV., R45337, SOCIAL MEDIA
sparked increased activity by government officials on Twitter and similar social media sites. This shift to social media has many benefits, such as increasing access to information posted by government officials and permitting more public interactions with this content, but it has also had its problems. Specifically, President Trump brought to light the capacity of government officials to block individuals from their social media pages after he blocked individuals who criticized him and his policies. Beyond preventing these individuals from viewing official information posted by the President, being blocked also prevents them from posting their opinions below the President’s tweets, barring them from interacting with members of the public to discuss government policies. Though social media theoretically broadens public knowledge and debate, blocking instead thwarts this goal by removing individuals from the discussion. Accordingly, the blocking of individuals from social media accounts owned by public officials inevitably raises a First Amendment concern: when public officials block private individuals from accessing their social media sites, do they infringe upon the right to free speech?

In most cases, when public officials block individuals from their social media accounts, they violate the First Amendment. This Note will first explore the necessary elements for a successful First Amendment claim in these circumstances. The next section will discuss five appellate courts that have examined this issue and analyze why two circuits, the Eighth Circuit and the Sixth Circuit, found no First Amendment violation based on the facts of those cases. Finally, this Note will conclude with how this issue should be handled in the future and elaborate upon potential changes with social media that raise new First Amendment issues in the future.

I. THE FIRST AMENDMENT CLAIM

The First Amendment states that “Congress shall make no law . . . abridging the freedom of speech.” Accordingly, when an individual alleges that a federal government official infringed on his right to free speech, there is a direct cause of action under the First Amendment.
When the government official is not a federal official but instead an official at the state or local level, however, a plaintiff must file suit under 42 U.S.C. § 1983. Section 1983 creates a cause of action when someone acting “under color of any statute, ordinance, regulation, custom or usage of any State” violates an individual’s federal rights. Regardless of whether the claim is against a federal, state, or local official, a plaintiff must prove three factors to make a successful claim against a government official who has blocked him on social media. First, the individual must establish that the public official was acting under color of either federal or state law. Second, the individual must prove that the public official’s social media account is a public forum. Finally, the individual must demonstrate that the public official engaged in unconstitutional viewpoint discrimination.

A. Under Color of Law

A simple textual analysis of the First Amendment demonstrates that it only applies to government action, not private action. To distinguish government action from private action, it is insufficient to show that the defendant is a public official. Instead, the first step requires determining whether a public official was acting in his official government capacity, not as a private actor, and thus under color of federal or state law.

Courts have been reluctant to identify one definition of what constitutes acting under color of law, stating that there is no singular formula. Public officials arguing that they are not acting under color of law on their social media accounts tend to advocate for a narrower definition. This narrower construction defines color of law as when a public official exercises power “possessed by virtue of state [or federal]
law and made possible only because the wrongdoer is clothed with the authority of state [or federal] law.”14 Conversely, the individuals being blocked advocate for a broader definition, where a public official’s actions “need only be ‘fairly attributable’ to the State, which ‘is a matter of normative judgment’ whose criteria lack rigid simplicity.”15 Regardless of which exact formulation a court employs, the central question stays the same: whether the act is “fairly attributable to the government.”16 Accordingly, a court, in deciding whether a public official blocking an individual on his social media violates the First Amendment must determine whether the public official's use of his social media account was so connected to his government position as to say the public official was acting under color of law.17

B. Public Forum

Traditional First Amendment law demonstrates that there can be very limited regulation of speech in a public forum.18 A public forum exists when the government “open[s] an instrumentality of communication ‘for indiscriminate use by the general public.’”19 In determining whether the government created a public forum, courts analyze “the policy and practice of the government” and “the nature of the property and its compatibility with expressive activity to discern the government’s intent.”20 The Supreme Court has recognized three main categories of public forums: traditional public forums, designated public forums, and limited public forums.21

A traditional public forum is one that has historically been used for expressive activity and includes places such as sidewalks, public streets,
and public parks. In a traditional public forum, prohibitions on speech must be “necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.”

In contrast, a designated public forum is one that the government has opened publicly for expressive activity even though the space is not typically open to the public, such as meeting rooms at state universities. Restrictions on speech in these forums are subject to the same limitations as traditional public forums.

Lastly, a limited public forum is one created by a government entity only for certain groups or for specific topics of conversation. In these forums, the government may “impose reasonable and viewpoint-neutral restrictions.” The Supreme Court has yet to directly determine whether social media sites fall into one of these categories. Therefore, as an initial matter, a court must determine whether a public official’s social media site is a space that the government voluntarily opened to the public for expressive conduct. If so, then the social media page is a public forum.

C. Viewpoint Discrimination

After proving that the public official acted under color of law in a public forum, a plaintiff must demonstrate that the official engaged in viewpoint discrimination. Viewpoint discrimination occurs when the government discriminates against an individual based on his opinion on a particular subject. The First Amendment prohibits the government from engaging in viewpoint discrimination in any public forum. Therefore, if the court determines that the defendant acted

22 Davison, 912 F.3d at 681 (quoting Am. Civil Liberties Union v. Mote, 423 F.3d 438, 443 (4th Cir. 2005)).
24 Pleasant Grove City, 555 U.S. at 469.
25 Id. at 469–70.
26 Id. at 470.
27 Id. at 470.
29 Id.
30 See id. (“And the Supreme Court recently analogized social media sites . . . to ‘traditional’ public forums, characterizing the internet as ‘the most important place . . . for the exchange of views.’” (quoting Packingham v. North Carolina, 137 S.Ct. 1730, 1735 (2017))).
31 Id. at 687 (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995)).
under color of federal or state law, the social media account fits into any category of public forums, and the defendant engaged in viewpoint discrimination, the court will likely find that the defendant violated the First Amendment. Determining whether the social media account fits into the traditional, designated, or limited public forum is therefore unnecessary so long as the account is determined to be some sort of public forum.

II. THE COURTS ON THE ISSUE

Five appellate courts have analyzed whether public officials blocking individuals on social media sites violated the First Amendment. Three courts found that the government officials’ actions did so: the Second Circuit, the Fourth Circuit, and the Ninth Circuit. The Supreme Court granted certiorari to review the Second Circuit decision in 2021, but the Court vacated the case as moot because President Trump was no longer in office. Two appellate courts, the Eighth Circuit and the Sixth Circuit, however, determined that the government official was not acting under color of law and thus that there was no First Amendment violation. The difference in the outcome in the Sixth and Eighth Circuits, the respective courts claim, is due to the defendant’s account being run as a more personal, private account. Arguably, the differences between those social media accounts and the accounts at issue in the other three circuits are trivial.

A. The Fourth Circuit in Davison v. Randall

The Fourth Circuit was the first to examine whether a government
official’s blocking an individual from her social media account violates the First Amendment. The defendant, Phyllis Randall, was the Chair of the Loudoun County Board of Supervisors. The day before her official swearing-in, she created the Facebook Page “Chair Phyllis J. Randall.” Randall held the Facebook page out as an official way for individuals to communicate with her and stated that she “really want[ed] to hear from ANY Loudoun citizen on ANY issues, request, criticism, complement [sic] or just your thoughts.”

Following a town hall meeting led by Randall in February 2016, plaintiff Brian Davison used a Facebook profile to comment on Randall’s Facebook post about the meeting. While the exact contents of the comment are unknown, it suggested that members of the School Board were taking “kickback money.” Randall then deleted this post in addition to banning Davison from her Facebook page, preventing him from commenting on any of her posts. Twelve hours later, Randall decided to unban Davison’s page.

Despite the short duration of the blocking, Davison filed suit under § 1983, arguing that this ban violated his First Amendment rights because he was prohibited from commenting on a government official’s Facebook page—a forum open to the public.

The Fourth Circuit agreed with Davison, finding that Randall violated Davison’s First Amendment rights. First, the court determined that Randall, in banning Davison from her Facebook page, acted under color of state law. Randall used her Facebook page to “further her duties as a municipal officer” through posts that inform the public about the Loudoun Board’s official policies and actions. Additionally, the banning of Davison had a direct nexus to events arising from her official status. Randall’s post on which Davison commented informed the public of the events of a town hall meeting,

43. Davison v. Randall, 912 F.3d 666 (4th Cir. 2019).
44. Id. at 673.
45. Id.
46. Id.
47. Id. at 675.
48. Id.
49. Id. at 676.
51. Randall, 912 F.3d at 676.
52. Id. at 688.
53. Id. at 680.
54. Id. at 680–81.
55. Id. at 681.
and Davison’s comment critiquing government policy was of public concern. Accordingly, the court determined that Randall acted under color of state law when she banned Davison from her Facebook page.

Next, the court determined that Randall’s Facebook page was a public forum. Randall solicited public input via comments, likes, and shares on her Facebook posts by inviting “ANY Loudoun citizen” to comment on her page. Despite Randall’s contention that her Facebook page was on a private platform and thus should not be considered a public forum, there is no rule that public forum analysis applies only to publicly owned property. Randall freely decided to operate her exchange of ideas on a private platform, and, while using her official position, controlled the page and marketed it as owned by a government official. Accordingly, the court determined that Randall’s Facebook page was a public forum.

Finally, the court determined that Randall engaged in unconstitutional viewpoint discrimination. Randall chose to ban Davison’s Facebook page because he criticized government action, so he was banned because of his view on this particular issue of public policy. Randall, while acting under color of state law, participated in viewpoint discrimination in a public forum; therefore, the court held that she violated Davison’s First Amendment right by banning him from participating in the discussion on her Facebook page comment section.

B. The Second Circuit in Knight First Amendment Institute v. Trump

Following the Fourth Circuit’s opinion, the Second Circuit addressed a case regarding a public official’s potential First Amendment violation. The defendant in this case, President Donald J. Trump, began operating his notorious Twitter account in March

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56. Id.
57. Id.
58. Id. at 687.
59. Id. at 682.
60. Id. at 684–85.
61. Id. at 683–85.
62. Id. at 687.
63. Id. at 687.
64. Id.
65. Id. at 688.
2009—many years before he ever assumed public office. After President Trump assumed office in 2017 but before being banned from Twitter on January 8, 2021, he used the account to communicate with the American public at large about his administration. In fact, President Trump’s aides and even President Trump himself contended that tweets on the account represented “official statements of the President.” Between May and June of 2017, President Trump blocked each of the named plaintiffs represented by the Knight First Amendment Institute from his Twitter account, prohibiting them from seeing or interacting with his tweets. President Trump admitted to blocking each plaintiff after the individual replied to his tweets by criticing him or his policies. The plaintiffs sued, claiming that President Trump violated their First Amendment rights by blocking them.

First, the court found that President Trump’s use of his Twitter constituted government action. President Trump contended that his Twitter account served as a space for his own private speech, and, as such, the government did not control the account. In contrast, however, President Trump presented the account as belonging to and operated by Donald Trump the President—not Donald Trump the private individual. President Trump himself described his account use as “‘MODERN DAY PRESIDENTIAL,’” and the account is directly registered to “‘Donald J. Trump, ‘45th President of the United States of America, Washington, D.C.’” After taking office, President Trump used his Twitter account as “a tool of governance and executive

67. Id. at 231.
68. Id.
70. Knight First Amend. Inst., 928 F.3d at 231–32.
71. Id. at 232.
72. Id.
73. Id.
74. Here, because President Trump was a government official at the federal level, it was not necessary for the defendant to file suit under § 1983. Instead, the plaintiff could simply sue for a First Amendment violation due to a government official restricting his right to free speech.
75. Id. at 233.
76. Id. at 236.
77. Id. at 234.
78. Id. at 235.
79. Id.
80. Id.
outreach.” Accordingly, because he acted in his official governmental capacity while tweeting, he also acted in that capacity while blocking individuals from his account, especially since the tweets leading to the blockings often surrounded issues of public policy.

Second, the court concluded that his Twitter account was a public forum. President Trump chose to use Twitter repeatedly as an instrument for governance and thereby opened a platform for public discussion by making the interactive features of his tweets available to all members of the public. The court found that President Trump engaged in viewpoint discrimination by blocking users after they replied to his tweets with criticisms or opinions that he found disagreeable. Therefore, the court found that President Trump engaged in unconstitutional viewpoint discrimination by blocking individuals based on their replies and by preventing them from further interacting with his posts through replies, likes, or retweets. Accordingly, he violated the First Amendment.

C. The Ninth Circuit in Garnier v. O’Connor-Ratcliff

The Ninth Circuit most recently addressed the issue of whether a public official violates the First Amendment when he blocks individuals on social media. The defendants, Michelle O’Connor-Ratcliff and T.J. Zane, were both members of the Ponway United School District (PUSD) Board of Trustees. In 2014, both O’Connor-Ratcliff and Zane created Facebook pages to promote their political campaigns, which they continued to operate after winning their elections. O’Connor-Ratcliff also created a Twitter account in 2016 related to her PUSD trustee activities. Plaintiffs, Christopher and Kimberly Garnier, were parents of children in the school district. They frequently left comments, often lengthy, on the trustees’ posts, criticizing the officials and the school board. The trustees first deleted

81. Id. at 236.
82. Id.
83. Id. at 237
84. Id.
85. Id. at 237–38.
86. Id. at 238.
87. Garnier v. O’Connor-Ratcliff, 41 F.4th 1158 (9th Cir. 2022). The Supreme Court recently granted cert. on this case to be heard alongside Lindke v. Freed in the 2023 term.
88. Id. at 1163.
89. Id.
90. Id. at 1165.
91. Id. at 1166.
or hid these comments, but eventually they both blocked the Garniers from their pages in October 2017.\textsuperscript{92} The Garniers then sued the trustees under § 1983\textsuperscript{93} for violating their First Amendment rights.\textsuperscript{94}

The Ninth Circuit, like the Second and Fourth Circuits, determined that the public officials acted under color of state law in the use of their social media accounts.\textsuperscript{95} The court emphasized that the defendants prominently identified themselves as public officials on their social media pages.\textsuperscript{96} The posts on the pages informed the public about their official activities, such as school board meetings and budget planning, in addition to providing information on other public policy issues, including the selection of a new superintendent and the creation of a local control and accountability plan.\textsuperscript{97} Because the plaintiffs commented on posts about the PUSD Board’s governance, the actions leading to the claim arose from events related to the defendants’ status as public officials.\textsuperscript{98} Accordingly, the court found that these public officials acted under color of state law when they blocked individuals from the page.\textsuperscript{99}

This was the first circuit court decision holding that the social media pages were designated public forums, not just public forums.\textsuperscript{100} The defendants opened their social media pages without restriction to anyone in the public for them to interact with the posts, making them public forums.\textsuperscript{101} The court went a step further, calling these pages designated public forums\textsuperscript{102} because the government officials, in creating their accounts, opened new spaces to the public.\textsuperscript{103} The court

\begin{itemize}
  \item \textsuperscript{92} Id.
  \item \textsuperscript{93} 42 U.S.C. § 1983.
  \item \textsuperscript{94} Garnier, 41 F.4th at 1166–67.
  \item \textsuperscript{95} Id. at 1170.
  \item \textsuperscript{96} Id. at 1171.
  \item \textsuperscript{97} Id.
  \item \textsuperscript{98} Id. at 1172.
  \item \textsuperscript{99} Id at 1173.
  \item \textsuperscript{100} Garnier v. O’Connor-Ratcliff, 41 F.4th 1158, 1179 (9th Cir. 2022).
  \item \textsuperscript{101} See id. at 1778 (discussing social media pages as “fora inherently compatible with expressive activity” and reasoning that defendants’ use of social media encouraged interaction between themselves and their constituents).
  \item \textsuperscript{102} Id. at 1179. The court here actually goes a step further to determine that the social media pages, upon the adoption of a word filter that removed comments that used words on a list they created, are limited public forums. However, because the sub-category of limited public forums from designated public forums is not recognized in every case, I will not elaborate on this subcategory and its relation to social media.
  \item \textsuperscript{103} See id. (“Where, as here, the government has made a forum ‘available for use by the public’ . . . it has created a designated public forum.” (quoting Giebel v. Sylvester, 244 F.3d 1182, 1188 (9th Cir. 2001))).
\end{itemize}
chose to take this extra step because it was unclear in this case whether the defendants engaged in viewpoint discrimination, unlike in the Second and Fourth Circuit cases. Instead, the defendants claimed to have blocked the plaintiffs, not because of their specific content, but because of the sheer number of comments they posted. The court, however, determined that there was still a First Amendment violation because in designated public forums, any restrictions on speech must be “narrowly tailored to serve a significant governmental interest.” Blocking the plaintiffs was extreme action taken merely to prevent the inconvenience of the repetitive comments; therefore, the court found this was neither narrowly tailored nor was there a compelling government interest. Accordingly, the court found that the public officials violated the Garniers’ First Amendment rights to engage in discussion on public officials’ social media pages.

D. The Eighth Circuit in Campbell v. Reisch

Conversely, in Campbell v. Reisch, the Eight Circuit held that the specific facts regarding the defendant blocking the plaintiff on Twitter did not create a First Amendment violation. Defendant, Representative Cheri Toalson Reisch, was a state representative for Missouri’s Forty-Fourth District. She created a Twitter account in September 2015 after first announcing her candidacy for state representative and initially used the account to promote her campaign. After her November election, she used the account to discuss her work as a representative and sometimes discussed her public policy positions. In the wake of her re-election, Reisch tweeted about her opponent, criticizing her for placing her hands behind her back during the Pledge of Allegiance. Another state representative responded to this tweet, criticizing Reisch. Plaintiff, Mike Campbell,

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104. Id. at 1179.
105. Id. at 1179–80.
107. Id. at 1180–83.
108. Id. at 1185.
110. Id. at 823.
111. Id. at 823–24.
112. Id. at 824.
113. Id. (“Reisch tweeted, ‘Sad my opponent put her hands behind her back during the Pledge.’”)
114. Id. (The tweet said “Reisch’s opponent’s ‘father was a Lieutenant Colonel in the Army. Two of her brothers served in the military. I don’t question [the opponent’s] patriotism.’”).
then retweeted this response and, shortly after, discovered Reisch had blocked him from her account.\textsuperscript{115} Campbell then filed suit under § 1983,\textsuperscript{116} alleging that Reisch, a government official, violated his First Amendment right to interact via replies and retweets with Reisch's posts in a public forum: her Twitter account.\textsuperscript{117}

The court here distinguished Reisch's actions from those of the government officials in the Second and Fourth Circuits and found that Reisch was not acting under color of state law when she used her Twitter account to block Campbell.\textsuperscript{118} Reisch created the account prior to assuming office,\textsuperscript{119} and she did so with the intent to run it as a "campaigner for political office."\textsuperscript{120} The court found that the majority of tweets on the account centered around her campaign, such as tweets announcing her candidacy, tweets soliciting donations for her campaign, and tweets promoting her success in office for future campaigns.\textsuperscript{121} Although she occasionally posted on the account to provide updates of official government activities, such as the status of bills, these types of posts were not sufficiently prominent on the account to convert it into a vehicle for official government policy.\textsuperscript{122} Therefore, because Reisch used the account in her capacity as a private individual, the court concluded that she was not acting under color of state law when she blocked Campbell on Twitter and held that she had not violated the First Amendment.\textsuperscript{123}

\textbf{E. The Sixth Circuit in Lindke v. Freed}

Only the Sixth Circuit followed the Eighth Circuit in finding that a public official did not violate the First Amendment by blocking an individual from his Facebook page.\textsuperscript{124} James Freed, the city manager of Port Huron, Michigan, originally created a private Facebook profile before being appointed to his position to connect with friends and

\begin{itemize}
  \item \textsuperscript{115} Campbell v. Reisch, 986 F.3d 822, 824 (8th Cir. 2021).
  \item \textsuperscript{116} 42 U.S.C. § 1983.
  \item \textsuperscript{117} Campbell, 986 F.3d at 823.
  \item \textsuperscript{118} Id. at 826.
  \item \textsuperscript{119} The Twitter accounts in Garnier v. O'Connor-Ratcliff were also created prior to the defendants' being elected to their official positions. However, the court here found that because Reisch's account remained focused on the campaign and reelection even after Reisch was elected to office, she was not acting under the color of state law in the use of her account.
  \item \textsuperscript{120} Id. at 825.
  \item \textsuperscript{121} Id. at 826.
  \item \textsuperscript{122} Id. at 826–27.
  \item \textsuperscript{123} Id. at 827.
  \item \textsuperscript{124} Lindke v. Freed, 37 F.4th 1199, 1206–07 (6th Cir. 2022). The U.S. Supreme Court recently granted cert. on this case to be heard alongside Garnier v. O'Connor-Ratcliff in the 2023 term.
\end{itemize}
family, but he converted the profile into a public page to access an account feature that permits having more than 5,000 friends. Upon being appointed city manager in 2014, Freed updated his page's description to reflect his position, listing the city’s email, website, and address. He then used the page for a variety of posts, ranging from personal posts about family to posts about official COVID-19 policies he implemented in Port Huron. Plaintiff, Kevin Lindke, did not agree with Freed’s COVID-19 policies and criticized Freed’s posts on the page. At first, Freed deleted Lindke’s comments, but eventually, he decided to block Lindke from commenting on his posts. Lindke then sued Freed under § 1983, claiming Freed violated his First Amendment rights to participate in discussions in the comments of Freed’s Facebook page.

The court began by determining whether Freed engaged in state action by using his Facebook page to both post and block individuals. The court here claimed to take a different approach than the other courts that have examined when a defendant acts under color of law through social media: “Instead of examining a page’s appearance or purpose, we focus on the actor’s official duties and use of government resources or state employees.” Accordingly, the court looked for particular “state-action anchors,” showing that the public official used the social media page to fulfill some “actual or apparent duty of his office” or maintained the page using his “governmental authority.” Because Freed did not use his official position to maintain the page or to complete any duty of his position, the court found that Freed acted in his personal capacity when using his Facebook page. Accordingly, because Freed was not acting under color of state law, the court found that he did not violate the First Amendment by blocking Lindke.

125. Id. at 1201.
126. Id.
127. Id.
128. Id. at 1201–02.
129. Id. at 1202.
131. Lindke v. Freed, 37 F.4th 1199, 1202 (6th Cir. 2022).
132. Id.
133. Id. at 1206. The court claimed to take this approach due to the circuit’s precedent on state action and to provide a more predictable application for both state officials and district courts.
134. Id. at 1207.
135. Id.
136. Id.
III. ANALYSIS

In a modern world where new technologies change our methods of communication, free speech doctrines must adapt. For example, evolutions like courts recognizing that public officials can violate the First Amendment through actions on their social media pages become necessary. First, finding a First Amendment violation is in line with the trend of the judicial system strengthening First Amendment protections for government criticism. Second, as more government officials turn to social media as a form of communication, it will be nearly impossible to effectively argue that a government official posting on a public account is not acting under color of law. Third, as social media continues to grow and is accessed by more individuals both to gather news and share opinions, public officials' social media sites should be recognized as public forums. Therefore, in most scenarios, public officials should be liable for violating the First Amendment when they block constituents from their social media pages.

A. The Expansion of the First Amendment with the Right to Criticize Government Officials

The Court has expanded First Amendment protections over time, particularly for criticism of public officials. Therefore, holding that public officials violate the First Amendment when they block private individuals on social media is consistent with trending expansion of protections under the First Amendment.

Starting with the 1798 Sedition Act, restrictions on the ability to criticize the government have been highly unpopular. The Sedition Act prohibited individuals from writing or saying anything “false, scandalous, and malicious . . . against the government of the United States.”¹³⁷ This law sparked massive outrage and led to campaigns by public figures, including Thomas Jefferson and James Madison, who advocated vigorously for full freedom of speech and freedom of the press.¹³⁸ Madison in particular questioned the Act’s limits on criticizing government officials, advocating for the unrestricted right to criticize government officials in order to ensure the proper functioning of the democratic process.
the government, calling it, “equivalent to a protection of those who administer the government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it, by free animadversions on their characters and conduct.” This widespread criticism of the Sedition Act set the stage, many years later, for the push for stronger First Amendment protections of the ability to criticize the government.

New York Times v. Sullivan represents the pinnacle of First Amendment protection for criticizing the government. This case significantly expanded protections for government criticism, holding that, to recover for libel, a public official must prove that the defendant had “actual malice.” Therefore, in a libel suit against a public official, the public official must show that the defendant made the allegedly defamatory statement “with knowledge that it was false or with reckless disregard of whether it was false or not.” The Court’s central reasoning behind adopting the actual malice standard was to encourage public debate and criticism of the government. The Court affirmed, “‘it is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions,’ . . . and this opportunity is to be afforded for ‘vigorous advocacy’ no less than ‘abstract discussion.’”

Although the forum for speech in Sullivan was a newspaper, at the time, newspapers were one of the most prominent ways to disseminate information criticizing public officials. In the modern era, this is no longer the case. Today, posting on social media is one of the most effective ways to circulate criticism of public officials, illustrated by the many replies under different public officials’ tweets or comments. Even the Supreme Court recognizes social media’s significance as a platform for speech, contending that social media sites “can provide perhaps the most powerful mechanisms available to a

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141. Id. at 279–80.
142. Id. at 280.
143. Id. at 269 (first quoting Bridges v. California, 314 U.S. 252, 270 (1941); then quoting NAACP v. Button, 371 U.S. 415, 429 (1963)).
144. Id. at 256. The allegedly defamatory statement appeared in an advertisement in the newspaper.
private citizen to make his or her voice heard.” Therefore, the law should afford the same broad protections to speech criticizing the government on new platforms as it does to those on more traditional platforms. As society modernizes and creates more platforms for speech, it is logical to continue expanding protections for government criticism to encompass speech on these social media sites. Blocking an individual on social media prohibits the person from posting comments or replies regarding their opinions on public policy in one of the places where it has the greatest potential to be seen and for others to interact with it. This is contrary to the spirit of Sullivan and the history of encouraging strong protections for government criticism.

**B. Public Officials Act Under the Color of Law through Activity on Social Media**

For plaintiffs to succeed in bringing First Amendment claims when they are blocked, they must prove that the public official was acting under color of law using his social media account. Public officials, when defending against such an allegation, often attempt to argue that their actions on these accounts were not within their capacity as a government official, but were instead conducted in their private capacity. But in the modern era where public officials are constantly in the spotlight, it is nearly impossible for a public official to claim that posts on social media available to the public constitute private action.

Social media has become one of the main ways the public receives information from the government. In particular, President Trump’s use of Twitter transformed how government officials interact with the public; he often announced major government policies for the first time on his Twitter page. President Trump’s widespread Twitter use for governmental matters sparked an increase in government Twitter use. In 2018, one hundred percent of U.S. Congress members in both

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146. See id. at 1735–36 (describing social media use as a mechanism to “engage in a wide array of protected First Amendment activity.”).


149. See generally JACOB R. STRAUSS, CONG. RSCH. SERV., R45337, SOCIAL MEDIA ADOPTION BY MEMBERS OF CONGRESS: TRENDS AND CONGRESSIONAL CONSIDERATIONS
the House and the Senate had Twitter accounts, while one hundred percent of senators and ninety-nine percent of representatives had Facebook accounts. With such a widespread presence of government officials on social media, the public expects that its representatives will maintain a social media presence to keep it informed of public issues and policies. Therefore, because operating a social media account is a pivotal part of a government official’s job, it is hard to find a case where a public official is not acting within his official government capacity and thus under color of law while using a public social media account.

Public officials and courts have attempted to draw a line between accounts that are official government social media accounts and accounts that, although operated by a public official, are private. This dividing line was first suggested by the Second Circuit in Knight First Amendment Institute. Although that court found that President Trump’s Twitter account was clearly an example of an official government account, the court qualified its holding by noting that “not every social media account operated by a public official is a government account.” Instead, it held that courts must conduct a fact-specific inquiry into the official nature of the account, looking at factors such as the official’s description of the account, the account’s content, who has access to the account, and how other governmental actors treat the account.

The Eighth Circuit in Reisch determined that Reisch’s account was an example of a social media page operated by a government official that was not an official government account. The court maintained that the account began as a tool to promote Reisch’s campaign, a purely private activity, and after her election, the account remained a tool to paint a positive image of her in the community for campaign purposes. Reisch’s official duties centered around voting and participating in committee meetings, and, compared to President

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150. Id. at 3 fig. I.
152. Id.
153. Id. at 234.
154. Id. at 236.
155. Id.
156. Campbell v. Reisch, 986 F.3d 822, 826 (8th Cir. 2021).
157. Id. at 826–27.
Trump, who used his account to announce appointees and communicate with foreign leaders, the court found that Reisch did not conduct her official duties through her account.\textsuperscript{158}

The Sixth Circuit in \textit{Lindke v. Freed} also found that Freed’s social media account was an instance of a public official operating a private account.\textsuperscript{159} The court determined that Freed did not maintain the page as part of his duties as city manager despite some posts about his job, likening this to communications with neighbors or friends about his employment.\textsuperscript{160} Freed expressed no plans to pass the account down to his successor, as is often done with official accounts, nor did he use government employees to run the account.\textsuperscript{161}

The Second and Eighth Circuits, by holding that the public officials do not act under color of law on their accounts, undermined the duties of a government representative and drew arbitrary distinctions between what is and is not an official duty. Serving as a representative for the public and communicating government policy to constituents is embedded in the duty of a government official.\textsuperscript{162} Reisch maintained a Twitter account after her election and included her official position in her Twitter handle,\textsuperscript{163} a photo of her in her official role in the header, and tweets discussing political issues.\textsuperscript{164} Although originally Reisch’s account may have centered on promoting her campaign and soliciting donations, she began to tweet about new laws, the work of the Missouri legislature, and her official activities.\textsuperscript{165} Similarly, Freed listed his official position in his “about” section, the email address and website of the city on his page, and his page’s address as City Hall.\textsuperscript{166} His account also originally served the private purpose of connecting with friends and family, but upon assuming office, he began to use the account to discuss

\textsuperscript{158} Id.
\textsuperscript{159} 37 F.4th 1199, 1207 (2022).
\textsuperscript{160} Id. at 1205.
\textsuperscript{161} Id.
\textsuperscript{162} Garnier v. O’Connor-Ratcliff, 41 F.4th 1158, 1173 (9th Cir. 2022) (quoting Council on Am. Islamic Rel. v. Ballenger, 444 F.3d 659, 665 (D.C. Cir. 2006)).
\textsuperscript{163} Campbell v. Reisch, 986 F.3d 822, 827 (8th Cir. 2021). At the time of the suit, Reisch’s Twitter handle was @CheriMO44, signifying her official government position in the 44th District of Missouri.
\textsuperscript{164} Id.
\textsuperscript{165} See id. at 828 (Kelly, J., dissenting) (discussing tweets such as “MO citizens will now have a choice to get Real ID compliant license,” “A big thanks to House Communications for doing this great story on this piece of legislation that was passed,” and “I spoke [on the Missouri House floor] about my 34 years experience with prevailing wage. Repeal it. Save taxpayers $.”).
\textsuperscript{166} Lindke v. Freed, 37 F.4th 1199, 1201 (6th Cir. 2022).
government policy and his activities in his position.\textsuperscript{167}

In reality, these two accounts were no different from President Trump’s Twitter account, which, while originally a private page used by President Trump in his capacity as a private individual, became an official government page when he was elected president. President Trump “clothed the page”\textsuperscript{168} in his official office, by registering the page as operated by the 45th President of the United States, posting pictures in his official position, and tweeting about government activities and policies.

It is true, as the Second Circuit contends, that, in theory, there may be instances of government officials operating a social media page that is merely private. But in the modern age, public officials inevitably lose much of their privacy through constant media attention, thus it would be rare to find a truly private account run by a government official.\textsuperscript{169} Operating a social media page that the public accesses is considered the norm, as shown by the fact all U.S. Congressmembers maintain official Twitter pages.\textsuperscript{170} By the very nature of the position, public officials “thrust themselves”\textsuperscript{171} into the spotlight, either on a national, state, or local level; therefore, when a public official operates a public social media site, it is nearly impossible to separate this page from his government position.\textsuperscript{172} As such, he essentially loses the ability to operate public social media sites in the same way as a private citizen. Therefore, in an age of strong government presence on social media sites, public officials act under color of law when using the account and thus also act under color of law when blocking individuals from that account.

\textsuperscript{167} Id.
\textsuperscript{168} Davison v. Randall, 912 F.3d 666, 683 (4th Cir. 2019).
\textsuperscript{169} A rare scenario could arise when a public official maintains a private page in which users must request to follow the page, which merely contains private posts unrelated to official duties. Because this page is hidden from public view, that public official may not be acting under the color of law.
\textsuperscript{170} Jacob R. Strauss, Cong. Rsch. Serv., R45337, Social Media Adoption by Members of Congress: Trends and Congressional Considerations 3 fig. 1 (2018).
\textsuperscript{172} Public officials, like public figures, are held to a higher standard for bringing defamation suits. The First Amendment interest in allowing public criticism to a greater extent of both public figures and public officials is because they “have thrust themselves to the forefront of particular public controversies.” See Gertz v. Robert Welch Inc., 418 U.S. 323, 345 (1974) (discussing public figures).
C. Social Media Accounts Run by Public Officials and Set to Public are Public Forums

For a successful claim that a public official blocking an individual from social media constitutes a First Amendment violation, the plaintiff must also prove that social media platforms are or at least can be public forums. The hallmark of a public forum is that the government has, through its official actions, opened a space for public expression.173 The Supreme Court has not decided whether a social media site can be considered a public forum.174 The Court in the past, however, has held that a public forum can be a metaphysical space and that there is no “spatial or geographic” requirement.175

Social media’s creation and growth has greatly changed how individuals communicate and express themselves. People turn to social media for many forms of public expression. After any major event or the release of breaking news, one can turn to the Twitter “trending” page to find tweets from thousands of members of the public expressing their opinions. In this way, social media sites like Twitter are becoming the new places for public dialogue, replacing traditional spaces such as town squares and public parks. Even the Supreme Court has recognized that social media sites are becoming nearly synonymous with the marketplace of ideas.176 The Court has also noted that social media sites are “the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”177 As society modernizes, the law must evolve to keep up. Therefore, the definition of public forum should extend to social media sites operated by government officials as one of the primary locations where the exchange of ideas takes place.

Additionally, social media accounts of individuals well-known to the public, like public officials, will have a larger following on these sites and trigger more engagement with their posts. One of the main

174. Id. at 682.
175. See Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995) (holding that “the same principles” of First Amendment law apply to the “forum” of university-recognized student organizations, which is “more . . . metaphysical than . . . spacial or geographic”).
176. See Packingham v. North Carolina, 137 S.Ct. 1730, 1732 (2017) (“Today, one of the most important places to exchange views is cyberspace, particularly social media, which offers ‘relatively unlimited, low-cost capacity for communication of all kinds.’” (quoting Reno v. Am. C.L. Union, 521 U.S. 844, 870 (1997))).
177. Id.
purposes of posting on social media sites is to solicit engagement with posts, through likes, comments, shares, and replies. The greater the following one has on a social media platform, the more likely one is to have engagement on that account.

In the cases discussed throughout this Note, the public officials used their position of government power to solicit more followers on their social media accounts. In *Knight First Amendment Institute*, the Official White House Twitter account directed individuals to follow President Trump’s personal account. In *Davison*, Randall published the Facebook page in her official newsletter and encouraged others to follow the page to “stay connected.” Even in *Reisch*, where the court did not find a First Amendment violation, Reisch consistently used hashtags such as “#MO44,” which allowed any individual looking for information on the Forty-Fourth District of Missouri to search this hashtag and find Reisch’s page. By creating social media pages on sites centered around public interactions, and, by going even a step further to promote these sites using the prestige and power of their government positions, government officials open spaces for public expression. These government actors, on a website accessible to any member of the public, create spaces of public debate and, therefore, public forums.

One question that was not addressed until the Ninth Circuit’s opinion in July 2022 is whether social media sites are considered traditional, limited, or designated public forums. Social media sites tend to fit most closely into the designated public forum category. Social media sites do share some common characteristics with traditional public forums, as claims circulate that they are the “modern public square.” Traditional public forums encompass historical centers of public discourse like the public square, public street, and park. Because the government does not own the internet or social media sites,

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however, social media sites seem to fit better in the category of designated public forums, where the government opens a space for public expression that is not typically public. A classic example of a designated public forum is when the government hosts a town-hall meeting in a space that is not typically open to the public, like a school. The government temporarily takes a space often closed to the general public and opens it for public discourse. Similarly, when a government official makes a social media account, he creates a digital town hall. Therefore, social media accounts, in the current public forum doctrine, fit best into the designated public forum category.

IV. POTENTIAL FUTURE CHANGES THAT MAY AFFECT THE DOCTRINE

The interaction between social media sites and the First Amendment is a pressing topic for the development of First Amendment doctrine, and the Supreme Court will likely address the topic in the next few years. New social media sites continue to emerge and gain popularity, and as long as these websites allow speech and expression, they will inevitably raise First Amendment questions. For example, President Trump began using a Twitter alternative, Truth Social, after being banned from Twitter. The site is currently dominated by President Trump’s supporters, as many likely joined the site because they were actively seeking out his posts. Should someone who disagrees with President Trump access the site and reply to one of his posts in a manner criticizing him or his policies, however, there could be another First Amendment claim if President Trump were to be reelected. Similarly, sites like TikTok have gained

184. Id.
186. Naomi Forman-Katz & Galen Stocking, Key Facts about Truth Social, PEW RESEARCH CENTER (Nov. 18, 2022), https://www.pewresearch.org/fact-tank/2022/11/18/key-facts-about-truth-social-as-donald-trump-runs-for-u-s-president-again/ (“About half of [the prominent accounts studied] have a reference to being right-leaning or pro-Trump in their profile—higher than any other alternative social media site studied.”).
187. This also poses the question of whether someone as prominent as a former President of the United States can still be considered a public official when he is no longer in office.
popularity in recent years, and, as we begin to see public officials join TikTok, more First Amendment questions may arise.189

Additionally, with Elon Musk’s recent purchase of Twitter, the platform has been at the center of many First Amendment issues. After acquiring Twitter, Musk pledged to create a “free-speech” platform by removing the COVID-19 misleading information policy190 and reinstating blocked members, such as President Trump and Ye, the artist formerly known as Kanye West.191 In fact, in December 2022, Musk, along with author Matt Taibbi, released internal documents from Twitter on the Twitter platform itself known as the ‘Twitter Files’.192 The Twitter thread contained an email exchange between officers of Twitter before Musk’s purchase of the site, discussing how to handle the posting of a New York Post article about Hunter Biden and his potentially problematic business dealings.193 According to Musk and Taibbi, this is evidence of censorship on Twitter via an alliance between Twitter and President Biden and the Democratic Party.194 All of these


189. A hypothetical situation would be a public official creating a public TikTok account. If that official were to post a video, any members of the TikTok community could comment and use the comment section to post a criticism of the public official and his or her policies. That public official could then block that user, preventing that person from seeing his or her TikToks and commenting on his or her TikToks. That individual could then file suit, either under § 1983 if a state or local public official or under the First Amendment directly if a federal public official.


191. Rebecca Klar, Musk’s ‘Free Speech’ Twitter Vision put to Test by Ye, THE HILL (December 3, 2022). See also Elon Musk (@elonmusk), TWITTER (Nov. 18, 2022, 1:31 PM), https://twitter.com/elonmusk/status/1593673339826212864?s=42&t=baVvNergrzXmZy3EkrLg (“New Twitter policy is freedom of speech.”); Elon Musk (@elonmusk), TWITTER (November 18, 2022, 7:47 PM), https://twitter.com/elonmusk/status/1593767953706921985?s=42&t=baVvNergrzXmZy3EkrLg (showing the final results on a public poll on whether Trump should be unblocked from Twitter). But see Elon Musk (@elonmusk), TWITTER (Dec. 2, 2022, 12:04 AM), https://twitter.com/elonmusk/status/1598543670799049574?s=42&t=bAvuNeergrzXmZy3EkrLg (relying to Ye’s tweet to re-block his account after Ye’s tweet contained antisemitic content).


194. See id. (“Mr. Musk and Mr. Taibbi framed the exchanges as evidence of rank censorship and pernicious influence by liberals.”).
discussions about Twitter and the First Amendment currently dominate the news despite the fact that the First Amendment does not apply to the ability of a private site like Twitter to regulate speech. Regardless, Musk claims that his Twitter regulations help to make the platform a better vehicle for free speech, touching upon the ideas advocated for by Justice Thomas. Justice Thomas has contended that private companies have too much power over speech on their social media platforms, undermining the idea that public officials act under color of law when using social media. Instead, private companies are the ones exercising control, not the public official running the account, through their capability to fact-check, remove tweets, and ban anyone at will. For example, in the context of Facebook, the site maintains a feature that allows individuals to limit comments on the page using the “word filter” function to create a list of words that, if commented, will result in the removal of those comments. Justice Thomas has suggested that the government should limit the power of social media companies to undertake these actions. Musk’s policies under his “new Twitter” actually attempt to decrease a private company’s power to regulate speech in line with what Justice Thomas desires. Therefore, another pressing issue will be whether private social media companies should limit their power to control speech, creating social media sites more like Musk’s newly redesigned Twitter.

CONCLUSION

It should be a First Amendment violation when a public official blocks individuals from his public social media page. Methods of expression and speech constantly change, and what the law considers a First Amendment violation must change along with it. Social media is everywhere and serves as a primary source of communication for private individuals and public officials alike. People post on social media to solicit interactions with their posts, and, when people maintain public profiles on social media accounts, they open these posts for

197. Id. at 1222.
198. Id.
199. Garnier v. O’Connor-Ratcliff, 41 F.4th 1158, 1164 (9th Cir. 2022).
200. See Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S.Ct. at 1227 (Thomas, J., concurring) (“As Twitter made clear, the right to cut off speech lies most powerfully in the hands of private digital platforms.”).
public commentary. Public officials in particular use their positions of power to gain more followers on these sites and thus solicit more interaction with their posts. Therefore, social media sites operated by a public official in a manner open to the public are public forums, and these public officials act under color of law when they post on social media. Accordingly, public officials violate the First Amendment when they block individuals on social media to prevent these individuals from engaging with the public official’s own posts.