

WHOSE FORUM IS IT ANYWAY: INDIVIDUAL GOVERNMENT OFFICIALS AND THEIR AUTHORITY TO CREATE PUBLIC FORUMS ON SOCIAL MEDIA

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ABSTRACT

Modern technology and the internet have radically transformed the ways in which individuals interact and communicate. At the forefront of this digital-speech movement are social media sites like Twitter and Facebook, which the Supreme Court has identified as among “the most important places . . . for the exchange of views”¹ in our modern culture. But these platforms are not just for private citizens; government officials also use social media sites as a way to connect with their constituents. However, First Amendment questions have arisen as these officials have sought to regulate their pages by “blocking” individual users. To date, three cases have held that individual government officials at several levels of federal, state, and municipal government violated the “public forum doctrine” by blocking individuals from their social media pages.

This Note posits that the public forum analyses employed in these cases fail to address a fundamental question, however: When is it appropriate to apply the public forum doctrine to individual government officials’ conduct? Through a survey of applicable public forum precedent, this Note suggests an amendment to the doctrine that effectively establishes when individual government officials act with the requisite authority such that they can be considered government entities capable of creating a public forum.

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1. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

INTRODUCTION

On August 12, 2017, in the wake of the Charlottesville attacks,² Republican Senator Tim Scott of South Carolina tweeted: “We must stand together to condemn racism & violence. We are the American family, and will not be divided by hate. #Charlottesville.”³ In response, one user replied: “Second place for House Ni**er of the year is Tim Scott.”⁴ Nearly one and a half years later, this tweet remains in the conversation thread under Senator Scott’s original message.⁵

On February 7, 2019, Democratic Congresswoman Ilhan Omar, a Muslim representative for Minnesota’s Fifth District,⁶ tweeted “#Not1Dollar more for ICE” in response to a video posted of her speaking at an immigration rally.⁷ In the video, Representative Omar is wearing her hijab.⁸ Reply tweets poured in; among messages alleging her affiliation with the Islamic State⁹ and calling her an anti-Semite,¹⁰ one commenter¹¹ wrote: “Will you be voting to legalize suicide

2. For a full account of the Charlottesville events, see Maggie Astor, Christina Caron & Daniel Victor, *A Guide to the Charlottesville Aftermath*, N.Y. TIMES (Aug. 13, 2017), <https://www.nytimes.com/2017/08/13/us/charlottesville-virginia-overview.html> [https://perma.cc/3CZU-ES8L]. Summarily, on August 12, 2017, white-nationalist groups and counterprotesters clashed in Charlottesville, Virginia, resulting in one death and at least thirty-four injuries. *Id.*

3. Tim Scott (@SenatorTimScott), TWITTER (Aug. 12, 2017, 2:00 PM), <https://twitter.com/SenatorTimScott/status/896476545539289089> [https://perma.cc/89AL-Z2X9].

4. my_view_on_the_situation (@Gobble_nuts), TWITTER (Aug. 12, 2017, 7:44 PM), https://twitter.com/Gobble_nuts/status/896563012357677056 [https://perma.cc/Z89T-EHJ5] (using two asterisks in the original tweet).

5. *Id.* A conversation thread refers to the interactive spaces below a tweet where users post replies to the original message. See *About Conversations on Twitter*, TWITTER, <https://help.twitter.com/en/using-twitter/twitter-conversations> [https://perma.cc/22NN-9VZU] (describing replies in Twitter conversations). Replies in a conversation thread that are from public Twitter accounts are viewable by the general Twitter public. See *id.* (“If your Tweets are not protected, then all replies are public . . .”).

6. ILHAN FOR CONGRESS, <https://www.ilhanomar.com/about> [https://perma.cc/4RCV-JRS5]; U.S. REPRESENTATIVE ILHAN OMAR: SERVING THE 5TH DIST. OF MINNESOTA, <https://omar.house.gov> [https://perma.cc/5FSV-KLVX].

7. Ilhan Omar (@IlhanMN), TWITTER (Feb. 7, 2019, 8:06 AM), <https://twitter.com/IlhanMN/status/1093541577333587969> [https://perma.cc/TZX4-278G].

8. *Id.*

9. larry (@larrymoejoe), TWITTER (Feb. 7, 2019, 2:36 PM), <https://twitter.com/larrymoejoe/status/1093639550184890368> [https://perma.cc/VHH2-UZ9S].

10. Samuel Kessinger (@KessingerSamuel), TWITTER (Feb. 7, 2019, 3:25 PM), <https://twitter.com/KessingerSamuel/status/1093652018659450880> [https://perma.cc/45KA-PYZX].

11. For purposes of this Note, all discussions of users commenting and replying to tweets refer to a Twitter user’s ability to reply directly to another user’s tweet using the “reply” function. See *About Replies and Mentions*, TWITTER, <https://help.twitter.com/en/using-twitter/mentions->

vests? . . . Maybe ICE should have done a better [job] of keeping your tribe out of America[.]”¹² Similar to Senator Scott, these incendiary remarks linger on the conversation thread below Representative Omar’s tweet.¹³

Although these specific derogatory tweets have not spurred real-world action, disparaging comments like these are increasingly symptomatic of a larger issue: the proliferation of hate speech on digital mediums connected to physical manifestations of violence.¹⁴ Social media sites like Twitter have struggled in recent years to toe the line between encouraging free expression and regulating offensive or dangerous speech.¹⁵ Despite efforts to revamp its usage guidelines,¹⁶ Twitter’s regulatory schemes might not be adequate to address these

and-replies [<https://perma.cc/MEJ8-G67T>]. Certain courts have held these comment pages constitute public forums. *See infra* Part II.

12. Maximus (@maxikbal), TWITTER (Feb. 10, 2019, 9:20 PM), <https://twitter.com/maxikbal/status/1094828384595525633> [<https://perma.cc/K85Q-RABL>]. Unfortunately, this response was not atypical; the comment thread underneath Representative Omar’s tweet was replete with sexist, xenophobic, and Islamophobic messages. *See, e.g.*, Roger (@ok2bright1), TWITTER (Feb. 10, 2019, 10:17 AM), <https://twitter.com/ok2bright1/status/1094661676622929920> [<https://perma.cc/6U2K-64E4>] (“You need to loosen that head scarf to let blood follow [*sic*] to your brain.”).

13. *Id.*

14. *See* Zachary Laub, *Hate Speech on Social Media: Global Comparisons*, COUNCIL ON FOREIGN REL. (June 7, 2019), <https://www.cfr.org/background/hate-speech-social-media-global-comparisons> [<https://perma.cc/WDM3-ATZD>] (noting that with the increase of online speech, “individuals inclined toward racism, misogyny, or homophobia have found niches that can reinforce their views and goad them to violence” and that “[s]ocial scientists and others have observed how social media posts, and other online speech, can inspire acts of violence”); Kunal Relia, Zhengyi Li, Stephanie H. Cook & Rumi Chunara, *Race, Ethnicity and National Origin-Based Discrimination in Social Media and Hate Crimes Across 100 U.S. Cities* 8 (Jan. 31, 2019) (unpublished research study, New York University) (on file with the *Duke Law Journal*) (studying the correlation between online hate speech and hate crimes in one hundred cities across the United States and finding that “the proportion of social media discrimination that is targeted was significantly related to the number of [race-, ethnicity-, and national-origin-based] hate crimes”).

15. *See* David Goldman, *Big Tech Made the Social Media Mess. It Has To Fix It*, CNN (Oct. 29, 2018, 3:17 PM), <https://www.cnn.com/2018/10/29/tech/social-media-hate-speech/index.html> [<https://perma.cc/D57R-N6D5>] (detailing efforts by Facebook and Twitter to “stamp out hate speech and threats of violence”); Cecilia Kang & Kate Conger, *Inside Twitter’s Struggle over What Gets Banned*, N.Y. TIMES (Aug. 10, 2018), <https://www.nytimes.com/2018/08/10/technology/twitter-free-speech-infowars.html> [<https://perma.cc/37SF-M7AD>] (noting Twitter CEO Jack Dorsey’s difficulty in balancing “Twitter’s longtime guiding principle” of free expression with a belief that “safety should come first”).

16. *See* Louise Matsakis, *Twitter Releases New Policy on ‘Dehumanizing Speech,’* WIRED (Sept. 25, 2018, 9:00 AM), <https://www.wired.com/story/twitter-dehumanizing-speech-policy> [<https://perma.cc/EWA2-XTK4>] (discussing a new Twitter policy that bans “content that dehumanizes others based on their membership in an identifiable group”).

issues.¹⁷ For example, in the case of Senator Scott and Representative Omar, the long shelf life of the particular messages described above highlights the potential ineffectiveness of Twitter’s hate-speech policy, which covers only “[v]iolent threats,” “[w]ishing, hoping or calling for serious harm on a person or group of people,” “[r]eferences to mass murder [or] violent events,” “[i]nciting fear about a protected category,” “[r]epeated and/or non-consensual slurs, epithets, racist and sexist tropes, or other content that degrades someone,” and “[h]ateful imagery.”¹⁸ And Twitter has been unwilling to remove or ban users or their messages until that speech explicitly violates these guidelines.¹⁹

Courts have also been reticent to restrict such messages, but for a very different reason—the First Amendment. According to traditional free-speech principles, the location of speech can critically inform what restrictions the government may impose on free expression.²⁰ Over time, the Supreme Court has developed the “public forum doctrine” to govern this inquiry into which speech restrictions are appropriate in certain government-owned or government-operated spaces.²¹ As social

17. See Jennifer Grygiel, *Hate Speech Is Still Easy To Find on Social Media*, CONVERSATION (Oct. 31, 2018, 2:02 PM), <https://theconversation.com/hate-speech-is-still-easy-to-find-on-social-media-106020> [<https://perma.cc/CF78-AUTE>] (describing the prevalence of violent and threatening messages on Twitter despite promises from the company to combat hateful and abusive speech). While prohibiting users from “promot[ing] violence against or directly attack[ing] or threaten[ing] other people on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease,” it seems unlikely that either of the above instances would rise to the level of “[h]ateful conduct.” *Hateful Conduct Policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> [<https://perma.cc/2Z4H-8CAW>].

18. *Hateful Conduct Policy*, *supra* note 17. For Representative Omar, none of the users made explicitly racist comments or slurs. Similarly, although the tweet directed at Senator Scott featured a racial slur, the user replaced letters with asterisks, presumably as a way to avoid detection by Twitter’s algorithm. See Shirin Ghaffary, *The Algorithms that Detect Hate Speech Online Are Biased Against Black People*, VOX (Aug. 15, 2019, 11:00 AM), <https://www.vox.com/recode/2019/8/15/20806384/social-media-hate-speech-bias-black-african-american-facebook-twitter> [<https://perma.cc/5MD8-MQHH>] (describing the algorithms used by Facebook, YouTube, and Twitter to detect hate speech).

19. For example, in August 2018, Twitter CEO Jack Dorsey tweeted a decision not to suspend Alex Jones—a far-right conspiracy theorist known for his inflammatory and divisive speech—from its site for the “simple” reason that “he hasn’t violated our rules.” jack (@jack), TWITTER (Aug. 7, 2018, 7:11 PM), <https://twitter.com/jack/status/1026984242893357056> [<https://perma.cc/QA5C-MJSJ>]; see also Kang & Conger, *supra* note 15 (discussing Twitter’s decision not to ban Alex Jones, the criticisms it has received for this decision, and its continued struggles to overhaul its removal and banning policies).

20. DAVID L. HUDSON, JR., *THE FIRST AMENDMENT: FREEDOM OF SPEECH* § 2:11 (2012) (“Where speech takes place can determine the outcomes of a free-speech dispute.”).

21. See *id.* (discussing the basics of the public forum doctrine).

media's popularity has risen over the past decade,²² and as elected officials have increasingly turned to powerful platforms like Twitter and Facebook to connect with constituents,²³ courts have begun to consider whether government officials' social media pages constitute such "public forums."²⁴

As of November 2019, three cases have held that various public officials, including the chair of the Loudoun County Board of Supervisors, three members of the Wisconsin State Assembly, and the president of the United States, operated their social media accounts as "public forums" and, consequently, that each of these officials violated the First Amendment when they "blocked"²⁵ individual users from those pages.²⁶ These precedents seem to indicate that Senator Scott and Representative Omar would be similarly restricted by the First

22. See *Percentage of U.S. Population with a Social Media Profile from 2008 to 2018*, STATISTA, <https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile> [<https://perma.cc/XV9A-CKNB>] (detailing that the percentage of the U.S. population with a social media profile rose from 10 percent in 2008 to 77 percent in 2018).

23. See Monica Anderson, *More Americans Are Using Social Media To Connect with Politicians*, PEW RES. CTR. (May 19, 2015), <http://www.pewresearch.org/fact-tank/2015/05/19/more-americans-are-using-social-media-to-connect-with-politicians> [<https://perma.cc/HQ4H-P9MW>] (providing that 16 percent of registered voters in 2014 followed some candidate, political party, or elected official on social media and discussing how then-presidential candidates Hillary Clinton, Jeb Bush, and Ted Cruz used social media to announce or discuss their candidacies).

24. See generally *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019) (answering whether the personal Twitter page of President Donald Trump was a public forum); *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019) (assessing whether the Facebook page for the chair of the Loudoun County, Virginia, Board of Supervisors constituted a public forum); *One Wis. Now v. Kremer*, 354 F. Supp. 3d 940 (W.D. Wis. 2019) (examining whether the Twitter pages of three elected members of the Wisconsin State Assembly were public forums); *Morgan v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018) (considering whether a state governor's social media accounts constituted public forums); *Robinson v. Hunt Cty.*, No. 3:17-CV-0513-K, 2018 WL 1083838 (N.D. Tex. Feb. 28, 2018) (determining whether a county sheriff's Facebook page constituted a public forum), *aff'd in part, rev'd in part*, 921 F.3d 440 (5th Cir. 2019).

25. "Blocking" is a Twitter feature that empowers users to restrict other accounts from contacting them, viewing their tweets, or following them. *How To Block Accounts on Twitter*, TWITTER, <https://help.twitter.com/en/using-twitter/blocking-and-unblocking-accounts> [<https://perma.cc/FLS6-YF9A>].

26. See *Knight*, 928 F.3d at 230 (holding that President Trump violated the First Amendment by blocking users from his @realDonaldTrump Twitter page); *Davison*, 912 F.3d at 688 (determining that the Facebook page for the chair of the Loudoun County, Virginia, Board of Supervisors "constituted a public forum," and that the chairwoman "engaged in unconstitutional viewpoint discrimination when she banned [an individual] from that forum"); *One Wis.*, 354 F. Supp. 3d at 941 (determining that three elected members of the Wisconsin State Assembly "violated the First Amendment by blocking [a nonprofit corporation] from their respective Twitter pages").

Amendment from blocking offensive users from their pages or removing hateful comments.

Though the courts have only just begun applying the public forum doctrine in the social media context, legal scholarship has addressed the issue thoroughly.²⁷ As such, this Note does not attempt to relitigate that well-traversed topic. It accepts the general premise that Twitter and other social media sites can—and should—in certain instances function as First Amendment public forums. Rather, this Note identifies a fundamental incongruity with the application of the public forum doctrine to the social media context: its regulation of individual government *actors* rather than traditional government *entities*.

Importantly, the public forum doctrine requires that a “government entity” or “unit of government” create the putative public forum.²⁸ In the social media context, however, that precise doctrinal language is not always easy to apply because individuals—not “entities”—create the forum at issue. By not recognizing this distinction, the courts applying a forum analysis to officials’ social media pages have failed to address explicitly “whether an individual public official serving in a legislative capacity qualifies as a unit of government or a government entity for purposes of her ability to open a public forum.”²⁹ This means government officers at every level are left wondering “whether any and all public officials, regardless of their

27. See, e.g., Alissa Ardito, *Social Media, Administrative Agencies, and the First Amendment*, 65 ADMIN. L. REV. 301, 306 (2013) (arguing that the First Amendment should protect individuals’ right to post on the social media pages of agencies); Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1979 (2011) (considering the interaction between governmental use of social media and the public forum doctrine and “urging the Supreme Court to embrace an interactive model of government-citizen discourse”). In the past two years, focus has shifted specifically to the application of the public forum doctrine to government officials’ social media pages. See generally Elise Berry, Note, *Suppression of Free Tweets: How Packingham Impacts the New Era of Government Social Media and the First Amendment*, 9 CONLAWNOW 297 (2018) (assessing how the Court’s ruling in *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017) affects the public forum analysis, particularly in the context of public officials); Samantha Briggs, Note, *The Freedom of Tweets: The Intersection of Government Use of Social Media and Public Forum Doctrine*, 52 COLUM. J.L. & SOC. PROBS. 1 (2018) (arguing that government social media pages must be classified as public forums and that government actors must change their conduct on such sites accordingly); James M. LoPiano, Note, *Public Fora Purpose: Analyzing Viewpoint Discrimination on the President’s Twitter Account*, 28 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 511 (2018) (articulating how the district court’s analysis in *Davison v. Loudoun County Board of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va. 2017) could be applied in the then-pending case against Donald Trump in the Southern District of New York).

28. See *infra* Part III.A (making the point that only government entities can create and operate public forums).

29. *Davison*, 912 F.3d at 692 (Keenan, J., concurring).

roles, should be treated equally in their ability to open a public forum on social media.”³⁰

This Note seeks to resolve that issue. It argues that only certain public officials with the authority to take unilateral, decisive action on behalf of the government should qualify as government entities capable of creating a public forum. The argument proceeds in four parts. Part I traces the evolution of First Amendment public forum doctrine from its early days to its current form. Part II describes the only three cases to hold that government officials’ social media pages constitute public forums. Part III identifies fundamental flaws with the analyses in those cases. Finally, Part IV suggests how the doctrine can be refined and improved for application to individual public officials. It posits that before assessing whether a government official’s social media page constitutes a public forum, courts need to engage in a threshold “government entity” inquiry that asks whether the official retains the ability to create a public forum at all.

I. THE EVOLUTION OF THE PUBLIC FORUM DOCTRINE

At the turn of the twentieth century, the government’s authority to regulate speech conducted on its property was incredibly broad.³¹ But as the Court began to reexamine the scope of First Amendment protections in the wake of World War I,³² it reconsidered the government’s ability to silence speech in public places. This Part traces the origins and subsequent evolution of the public forum doctrine from the mid-twentieth century to the present.

Limitations on the government’s ability to restrict speech on its property garnered sincere attention in the mid-twentieth century when Justice Owen Roberts wrote his plurality opinion in *Hague v. Committee for Industrial Organization*.³³ In *Hague*, the Court

30. *Id.*

31. *See* Verlo v. Martinez, 820 F.3d 1113, 1144 (10th Cir. 2010) (“[T]he [Supreme] Court’s early [First Amendment] jurisprudence recognized the absolute right of the government to exclude the public from using its property.”); *see also* Davis v. Massachusetts, 167 U.S. 43, 48 (1897) (affirming the Commonwealth of Massachusetts’s authority to convict an individual for speaking in Boston Common without a permit because “[t]he right to absolutely exclude all right to use necessarily includes the authority to determine under what circumstances such use may be availed of”).

32. *See* Norman L. Rosenberg, *Another History of Free Speech: The 1920s and the 1940s*, 7 LAW & INEQ. 333, 335 (1989) (“First [A]mendment law was reconstructed, if not invented, between 1919 and 1927.”).

33. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

considered a First Amendment challenge by a famed labor union—the Committee for Industrial Organization (“CIO”)—to a city ordinance preventing “the leasing of any hall . . . for a public meeting at which a speaker shall advocate obstruction of the Government of the United States or a State.”³⁴ In sustaining the CIO’s challenge, Justice Roberts famously penned:

Wherever the title of streets and parks may rest, they have *immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.* Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.³⁵

While acknowledging some general limits, the *Hague* Court recognized the fundamental importance of an individual right to free expression in traditionally public spaces. Though the opinion never referred to the public spaces at issue as “public forums,” this dictum is often cited as the origin of the Court’s public forum jurisprudence.³⁶

The term “public forum” was not coined until 1965 when Professor Harry Kalven Jr. wrote his influential article, *The Concept of the Public Forum: Cox v. Louisiana*.³⁷ In it, Kalven opined: “[I]n an open democratic society the streets, the parks, and other public places are an important facility for public discussion and political process. They are in brief a public forum that the citizen can

34. *Id.* at 501.

35. *Id.* at 515–16 (emphasis added).

36. See HUDSON, *supra* note 20, § 2:11 (“The origins of the public-forum doctrine in modern First Amendment law are traced to Justice Owen Roberts’s opinion in [*Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939)] . . .”); Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 13 (noting Justice Roberts’s opinion in *Hague* to be “a good starting point for the argument” about public forums).

37. See Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 35 (1975) (“It was Harry Kalven who coined the term ‘public forum,’ now a commonplace of first amendment discourse.”); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1718 (1987) (“The phrase ‘public forum’ is traditionally attributed to Harry Kalven’s classic 1965 article, *The Concept of the Public Forum: Cox v. Louisiana*.”).

commandeer”³⁸ Seven years later, the Court adopted Kalven’s “public forum” terminology as a First Amendment term of art in *Police Department of the City of Chicago v. Mosley*.³⁹ In *Mosley*, the Court articulated that “under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.”⁴⁰ Rather, “[o]nce a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say.”⁴¹

Four years later, in *Greer v. Spock*⁴²—a case addressing the right to speak in the areas of a military installation open to the public—the Court established a bright line between public and *nonpublic* forums⁴³: although individuals have the unequivocal right to speak free of content-based restrictions in the former,⁴⁴ they have virtually no First Amendment protections in the latter.⁴⁵ According to the *Greer* Court, it did not matter whether the space had previously been *open* to the public.⁴⁶ Instead, it only mattered whether the area “ha[d] traditionally served as a place for free public *assembly and communication of thoughts* by private citizens.”⁴⁷ If a space lacked these traditional attributes, then individuals “had no generalized constitutional right” to speak in that place.⁴⁸

38. Kalven, *supra* note 36, at 11–12.

39. See *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 96–99 (1972) (discussing the restrictions on the government’s ability to exclude speech from “a public forum”); Post, *supra* note 37, at 1724 (“In 1972 the Supreme Court, explicitly acknowledging its debt to Kalven, began to use the phrase ‘public forum’ as a term of art.” (citing *Mosley*, 408 U.S. at 96, 99 & n.6)).

40. *Mosley*, 408 U.S. at 96.

41. *Id.*

42. *Greer v. Spock*, 424 U.S. 828 (1976).

43. See Post, *supra* note 37, at 1745 (“The lasting legacy of *Greer* has been a public forum doctrine that sharply distinguishes public from nonpublic forums”).

44. See *Mosley*, 408 U.S. at 96 (“Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone”).

45. See *Greer*, 424 U.S. at 838 (noting that individuals had “no generalized constitutional right to make political speeches or distribute leaflets” in an area that was not a public forum).

46. See *id.* at 836 (“[T]he principle that whenever members of the public are permitted freely to visit a place owned or operated by the Government, then that place becomes a ‘public forum’ for purposes of the First Amendment. Such a principle of constitutional law has never existed, and does not exist now.”).

47. *Id.* at 838 (emphasis added).

48. *Id.*

Ultimately, however, this binary distinction between public and nonpublic forums proved inadequate to address all of the possible intersections between public speech and government regulation.⁴⁹ The Court thus refined its public forum doctrine again in *Perry Education Ass'n v. Perry Local Educators' Ass'n*.⁵⁰ In *Perry*, the Court considered whether a school district's internal mail system constituted a public forum.⁵¹ Before holding the internal mail system was a nonpublic forum, the Court articulated a new three-category approach to First Amendment forum analysis. First, there are "traditional" public forums, such as public parks or city sidewalks—"places which by long tradition or by government fiat have been devoted to assembly and debate."⁵² In these "quintessential public forums," any content-based or content-neutral speech restrictions garner strict and intermediate scrutiny, respectively.⁵³ Next are "designated" public forums—"public property which the state has opened for use by the public as a place for expressive activity."⁵⁴ According to *Perry*, this second category includes places such as "university meeting facilities," "school board meeting[s]," and "municipal theater[s]."⁵⁵ In these spaces, the government is bound by the same restrictions as in a traditional public forum.⁵⁶

Within its discussion of designated public forums, the *Perry* Court recognized in a footnote that "[a] public forum may be created for a limited purpose such as use by certain groups [such as student groups] or for the discussion of certain subjects [such as school-board

49. See Post, *supra* note 37, at 1751 (noting the Court's recognition in the early 1980s that certain situations "did not fit easily into the dichotomous categories of *Greer*" and its attempt "to encompass them within a [third forum] category").

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

51. *Id.* at 39.

52. *Id.* at 45.

53. *Id.*

54. *Id.*

55. See *id.* at 45–46 (citing *Widmar v. Vincent*, 454 U.S. 263 (1981), *City of Madison Joint School District v. Wisconsin Employment Relations Commission*, 429 U.S. 167 (1976), and *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) as examples of designated public forums). In conducting a forum analysis, courts that determine a space is not a traditional public forum should nonetheless move on to this second category. See *Verlo v. Martinez*, 820 F.3d 1113, 1141 (10th Cir. 2016) ("If the district court finds that [an area] is not a traditional public forum, it must next consider whether [it] has been nevertheless designated as public fora."); see also 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 8:7 (2019) [hereinafter SMOLLA & NIMMER] ("[C]ourts often should proceed to consider the designated public forum analysis even after determining that property is not a traditional public forum.").

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

business].”⁵⁷ Later Court decisions have branded this subcategory as the “limited public forum.”⁵⁸ In a limited public forum, “[t]he State may be justified ‘in reserving [its forum] for certain groups or for the discussion of certain topics.’”⁵⁹ However, government restrictions in these spaces cannot be viewpoint discriminatory, meaning that they “must not discriminate against speech on the basis of viewpoint[] and . . . must be ‘reasonable in light of the purpose served by the forum.’”⁶⁰ As compared to the content-based standards articulated above, this viewpoint-discrimination standard is more permissive in that government regulators are permitted to restrict speech on a particular subject, so long as those restrictions do not disfavor particular viewpoints on that subject.⁶¹

57. *Id.* at 46 n.7 (citations omitted) (first citing *Widmar v. Vincent*, 454 U.S. 263 (1981); then citing *City of Madison Joint Sch. Dist. v. Wis. Pub. Emp’t Relations Comm’n*, 429 U.S. 167 (1976)).

58. *See, e.g.*, *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015) (articulating that a limited public forum “exists where a government has ‘reserv[ed] a forum] for certain groups or for the discussion of certain topics’” (citation omitted) (quoting *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995))); *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679 n.11 (2010) (“[G]overnmental entities establish limited public forums by opening property ‘limited to use by certain groups or dedicated solely to the discussion of certain subjects.’” (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 470 (2009))). Scholars have described limited public forums both as a part of designated public forums and as its own separate category of public forum. *Compare* HUDSON, *supra* note 20, § 2:11 (describing limited and designated public forums as the same category of public forum), *with* SMOLLA & NIMMER, *supra* note 55, § 8:8.50 (defining limited public forums separately from designated public forums). Courts at varying levels have similarly conflated the two categories. *See, e.g.*, *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (noting that public forums can be “of a limited or unlimited character”); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1278 (10th Cir. 1996) (holding a senior center is a “designated public forum” while simultaneously noting the “limits” imposed on that forum). For a succinct articulation of the difficult distinction between designated and limited public forums, see *Child Evangelism Fellowship of Maryland, Inc. v. Montgomery County Public Schools*, 457 F.3d 376, 382 (4th Cir. 2006) (articulating the differences between designated and limited public forums). Because limited and designated public forums impose different restrictions on what the government can regulate in those spaces, this Note will treat them as distinct public forum categories.

59. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) (quoting *Rosenberger*, 515 U.S. at 829).

60. *Id.* at 106–07 (alteration in original) (citation omitted) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

61. *See* *Giebel v. Sylvester*, 244 F.3d 1182, 1188 (9th Cir. 2001) (“‘Content discrimination’ occurs when the government ‘choos[es] the subjects’ that may be discussed, while ‘viewpoint discrimination’ occurs when the government prohibits ‘speech by particular speakers,’ thereby suppressing a particular view about a subject.” (quoting *Perry*, 460 U.S. at 59 (Brennan, J., dissenting))).

Finally, the *Perry* Court described nonpublic forums—“[p]ublic property which is not by tradition or designation a forum for public communication.”⁶² In these spaces, the government essentially operates as a private property owner and may therefore properly impose content-based restrictions on speech.⁶³ Government regulation in a nonpublic forum need only be “reasonable in light of the purpose which the forum at issue serves.”⁶⁴

As time has progressed, the Court has applied its forum analysis to new and atypical locales.⁶⁵ For instance, the Court has indicated that the public forum doctrine is not limited to government property; rather, public forums can be created in *private* spaces subject to sufficient government control.⁶⁶ Furthermore, the Court has expanded the public forum doctrine beyond merely physical locations to encompass “metaphysical” spaces. For example, in *Rosenberger v. Rector & Visitors of the University of Virginia*,⁶⁷ the Court noted that “the same principles” of the public forum doctrine applied to the University of Virginia’s student-activity fund, even though it was “a forum more in a metaphysical than in a spatial or geographic sense.”⁶⁸ As discussed in Part II, lower courts have found government officials’ social media pages to be the latest of these “metaphysical” public forums.

II. SOCIAL MEDIA AS A PUBLIC FORUM

Social media has undoubtedly revolutionized how politicians conduct campaigns and connect with their constituents.⁶⁹ Sites like

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

63. *Id.* at 49; *see also* *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018) (“[O]ur decisions have long recognized that the government may impose some content-based restrictions on speech in nonpublic forums . . .”).

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

65. *See, e.g., Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250–52 (2015) (applying a forum analysis to Texas’s specialty-license-plate program); *Rosenberger*, 515 U.S. at 830 (applying a forum analysis to the University of Virginia’s student-activity fund).

66. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (“[A]s an initial matter a speaker must seek access to public property or to *private property dedicated to public use* to evoke First Amendment concerns . . .” (emphasis added)); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (determining that a privately owned theater under lease to a municipal government constituted a public forum).

67. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 822 (1995).

68. *Id.* at 830.

69. Tom Murse, *How Social Media Has Changed Politics*, THOUGHTCO. (May 25, 2019), <https://www.thoughtco.com/how-social-media-has-changed-politics-3367534> [<https://perma.cc/C9LG-UVSB>] (“The use of social media in politics including Twitter, Facebook, and YouTube

Twitter, Facebook, and YouTube⁷⁰ allow officials to respond to events immediately, to fundraise, and to connect with voters directly and—perhaps most importantly—cheaply.⁷¹ Throughout the 2016 presidential election, Donald Trump redefined the ways in which Twitter can bolster a political campaign.⁷² By the 2018 midterms, 100 percent of U.S. senators and 99 percent of congresspeople posted on Twitter.⁷³ In spite of this rampant social media use, only a handful of courts have considered whether elected officials’ social media pages constitute public forums.⁷⁴ Three of these cases, involving three federal district courts and two circuit courts of appeals, found that the officials’ social media pages *were* public forums.⁷⁵ Those opinions, which feature remarkably similar analytical frameworks, are explored below.

has dramatically changed the way campaigns are run and how Americans interact with their elected officials.”).

70. This Note focuses specifically on public forum creation with regard to social media sites such as Facebook and Twitter, as this is where the most digital interaction between government officials and the public takes place. It does not consider whether other sites, such as campaign pages or official websites, similarly fall under the ambit of the public forum doctrine.

71. See Murse, *supra* note 69 (listing ways in which Twitter, Facebook, and YouTube have affected politics).

72. See Michael Barbaro, *Pithy, Mean and Powerful: How Donald Trump Mastered Twitter for 2016*, N.Y. TIMES (Oct. 5, 2015), <https://www.nytimes.com/2015/10/06/us/politics/donald-trump-twitter-use-campaign-2016.html> [<https://perma.cc/4TKR-YUSM>] (“Mr. Trump has mastered Twitter in a way no candidate for president ever has, unleashing and redefining its power as a tool of political promotion, distraction, score-settling and attack . . .”).

73. QUORUM, 2018 CONGRESSIONAL SOCIAL MEDIA REPORT 4, <https://readymag.com/u41777038/1235492/2> [<https://perma.cc/WX7Y-MBD4>] (last visited Mar. 15, 2019).

74. See *generally* Davison v. Randall, 912 F.3d 666 (4th Cir. 2019) (addressing whether the chair of a county board of supervisors violated the First Amendment by blocking someone from her Facebook page); *One Wis. Now v. Kremer*, 354 F. Supp. 3d 940 (W.D. Wis. 2019) (evaluating whether three Wisconsin state assemblymen violated the First Amendment by blocking an entity from their Twitter pages); *German v. Eudaly*, No. 3:17-cv-2028-MO, 2018 WL 3212020 (D. Or. June 29, 2018) (considering whether a Portland city commissioner violated the First Amendment by blocking someone from her Facebook page); *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (considering whether President Donald Trump violated the First Amendment by blocking someone from his Twitter page), *aff’d*, 928 F.3d 226 (2d Cir. 2019); *Morgan v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018) (assessing whether the governor of Kentucky violated the First Amendment by blocking an individual from his Facebook and Twitter pages).

75. See *Davison*, 912 F.3d at 687 (determining that “the interactive component of the Chair’s Facebook Page constitutes a public forum”); *One Wis.*, 354 F. Supp. 3d at 955 (holding that “the interactive portions of the defendants’ respective Twitter accounts constitute designated public forums”); *Knight*, 302 F. Supp. 3d at 575 (concluding that “the interactive space of a tweet from the @realDonaldTrump account constitutes a designated public forum”). A fourth case, *Campbell v. Reisch*, 367 F. Supp. 3d 987 (W.D. Mo. 2019), has also held a state representative’s Twitter page is a public forum. See *id.* at 992 (holding that the public forum doctrine applies to a state representative’s Twitter page and that the blocking of individuals from that page constitutes

A. Davison v. Loudoun County Board of Supervisors⁷⁶

The first case to hold that an elected official's social media page constituted a public forum was *Davison v. Loudoun County Board of Supervisors*. There, the District Court for the Eastern District of Virginia considered whether the chair of the Loudoun County Board of Supervisors, Phyllis J. Randall, violated the First Amendment when she blocked an individual, Brian Davison, from her "Chair Phyllis J. Randall" Facebook page.⁷⁷ Randall created the page the day before she took office and used it to communicate with her constituents.⁷⁸ After participating in a town-hall discussion held by members of the Board of Supervisors and School Board, Randall made a post on her Facebook page detailing the event.⁷⁹ In response, Davison commented on the post alleging that the School Board was corrupt.⁸⁰ Randall then blocked Davison from her page for a period of twelve hours, disabling him from either commenting on her page or sending her messages.⁸¹

In *Davison*, the court faced "a novel legal question" regarding when an individual official's social media account is subject to First Amendment regulation.⁸² It opined that "the best way to answer this question is to examine whether the public official acts under color of state law or undertakes state action in maintaining the social media account."⁸³ Finding that Randall's Facebook page was "born out of, and [was] inextricably linked to, the fact of [her] public office," that she used her page "as a tool of governance," that she spent county resources supporting the page, and that the page was "swathe[d] . . . in the trappings of [Randall's] office," the court held that Randall acted under color of state law in operating her Facebook page.⁸⁴

viewpoint discrimination). However, because *Campbell* features facts nearly identical to *One Wisconsin*, and because its doctrinal analysis lacks the depth of the other three cases, this Note does not focus on it.

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

77. *Id.* at 706.

78. *Id.* at 707.

79. *Id.* at 710.

80. *Id.* at 711.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 713–14.

The court then considered whether Randall created a forum via her Facebook page.⁸⁵ According to the court, controlling Fourth Circuit precedent provided that “the government may open a forum for speech by creating a website that includes ‘a chat room or bulletin board in which private viewers could express opinions or post information’ or that otherwise ‘invite[s] or allow[s] private persons to publish information or their positions.’”⁸⁶ Therefore, the *interactive* portions of Randall’s Facebook page constituted a public forum.⁸⁷ However, the court never specified what type of forum Randall created.⁸⁸ It reasoned that because Randall unequivocally engaged in viewpoint discrimination in banning Davison from her Facebook page and because “[v]iewpoint discrimination is ‘prohibited in all forums,’” it “need not pass on [that] issue.”⁸⁹

On appeal, a unanimous Fourth Circuit panel affirmed.⁹⁰ The Fourth Circuit first upheld the district court’s determination that Randall acted under the color of state law.⁹¹ Next, it turned its attention to the First Amendment issue.⁹² In its analysis, the Fourth Circuit first articulated that “the hallmark of both [traditional and limited or designated] public fora—what renders the fora ‘public’—is that *the government* has made the space available—either by designation or long-standing custom—for ‘expressive public conduct’ or ‘expressive activity,’ and the space is compatible with such activity.”⁹³ Randall’s page embodied this hallmark.⁹⁴

Although it acknowledged that Facebook is a private entity, the Fourth Circuit held that private property *can* constitute a public forum when sufficiently controlled by the government.⁹⁵ The court then found

85. *Id.* at 716.

86. *Id.* (alterations in original) (quoting *Page v. Lexington Cty. Sch. Dist. One*, 531 F.3d 275, 284 (4th Cir. 2008)).

87. *Id.* at 718.

88. *Id.* at 716.

89. *Id.* at 716–17 (quoting *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 n.2 (4th Cir. 2006)).

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

91. *Id.* at 680.

92. *Id.* at 681.

93. *Id.* (emphasis added) (quoting *ACLU v. Mote*, 423 F.3d 438, 443 (4th Cir. 2005)).

94. *Id.* at 682.

95. *See id.* at 683 (“[T]he Supreme Court and lower courts have held that private property, whether tangible or intangible, constituted a public forum when . . . the government retained substantial control over the property under regulation or by contract.”). In support of this proposition, the Fourth Circuit cited the Supreme Court’s opinions in *Cornelius v. NAACP Legal*

that “Randall, acting under color of state law, retained and exercised significant control over the page” to render it a public forum.⁹⁶ Like the district court, the Fourth Circuit determined that it “need not decide” what type of forum the interactive portion of Randall’s page constituted “because [her] ban of Davison amounted to ‘viewpoint discrimination,’ which is ‘prohibited in all forums.’”⁹⁷

*B. Knight First Amendment Institute at Columbia University v. Trump*⁹⁸

In *Knight First Amendment Institute at Columbia University v. Trump*, the Knight Institute at Columbia University and seven individual plaintiffs filed suit against President Donald Trump and senior White House aides after the plaintiffs were allegedly blocked from the president’s Twitter account, “@realDonaldTrump,” for criticizing the president and his policies.⁹⁹ Similar to *Davison*, Judge Buchwald from the Southern District of New York addressed the issue of “whether a public official may, consistent with the First Amendment, ‘block’ a person from his Twitter account in response to the political views that person has expressed.”¹⁰⁰

After a lengthy discussion regarding plaintiffs’ standing to sue,¹⁰¹ the district court turned to the First Amendment claims.¹⁰² As a threshold matter, the court articulated the need to establish the applicability of the public forum doctrine.¹⁰³ This analysis featured two distinct requirements: (1) “to potentially qualify as a forum, the space in question must be owned or controlled *by the government*”;¹⁰⁴ and (2) application of the public forum doctrine must be “consistent with the purpose, structure, and intended use” of the space at issue.¹⁰⁵

Defense & Education Fund, Inc., 473 U.S. 788 (1985), *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, 561 U.S. 661 (2010), and *Southeast Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). *Davison*, 912 F.3d at 683.

96. *Davison*, 912 F.3d at 683, 687.

97. *Id.* at 687 (quoting *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 n.2 (4th Cir. 2006)).

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

99. *See id.* at 549–555 (detailing the facts of the case).

100. *Id.* at 549.

101. *See id.* at 555–64 (addressing the standing issue).

102. *Id.* at 564.

103. *Id.* at 565.

104. *Id.* at 566 (emphasis added).

105. *Id.* at 570.

Here, the district court found both requirements satisfied. To the first prong, the court found that control over the putative forum was sufficiently “governmental in nature” to warrant designation as a public forum.¹⁰⁶ In support of these conclusions, it noted that Trump’s account presented itself as being that of the forty-fifth president of the United States, that the Presidential Records Act required tweets from that account to be preserved, and that Trump used this account to conduct “squarely executive functions,” such as “the appointment of officers . . . , the removal of officers, and the conduct of foreign policy.”¹⁰⁷

The district court then considered the second requirement: whether applying the public forum analysis to the president’s Twitter account would be consistent with “the purpose, structure, and intended use” of the Twitter account.¹⁰⁸ It first noted that since government speech lay outside the bounds of the public forum doctrine, the personal tweets from the president’s account were not subject to a forum analysis.¹⁰⁹ However, “[t]he same [could not] be said” for the interactive spaces on the president’s Twitter page.¹¹⁰ Since the replies that populated this space were not under government control and were more likely associated with the replying user than with the government, they could not qualify as government speech.¹¹¹ The court further noted that this interactive space could “accommodate an unlimited number of replies and retweets” and that its “essential function . . . [was] to allow private speakers to engage with the content of the tweet.”¹¹² Given these considerations, the district court concluded that applying a forum analysis to the interactive spaces of President Trump’s Twitter account was appropriate.¹¹³

106. *Id.* at 566–67.

107. *Id.* at 567.

108. *Id.* at 570.

109. *Id.* at 571. The government speech doctrine articulated by the district court in *Knight* refers to the concept that “when the government ‘is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply.’” *Id.* (quoting *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015)). Because President Trump acted in a manner that was “governmental in nature” in operating his Twitter account, *supra* note 106 and accompanying text, the district court held that his tweets amounted to government speech and thus fell outside the bounds of public forum regulation. *Knight*, 302 F. Supp. 3d at 571.

110. *Id.* at 572.

111. *Id.*

112. *Id.* at 573.

113. *Id.*

Unlike the courts in *Davison*, the district court in *Knight* reached the forum-classification question.¹¹⁴ Here, the court determined that the interactive portions of Trump’s tweets constituted designated public forums.¹¹⁵ In line with *Davison*, the district court then held that blocking individuals from those spaces because of their expressed views constituted viewpoint discrimination and thus violated the First Amendment.¹¹⁶

A little over a year later, the Second Circuit affirmed the district court’s decision.¹¹⁷ Similar to the Southern District, the Second Circuit’s analysis began by assessing the “official nature” of President Trump’s Twitter account.¹¹⁸ Specifically, the court articulated that “[i]f, in blocking, the President were *acting in a governmental capacity*, then he may not discriminate based on viewpoint among the private speech occurring in the Account’s interactive space.”¹¹⁹ In holding that President Trump did act “in a governmental capacity” in blocking individuals from his page, the Second Circuit emphasized the same factors as the lower court—namely, that the account was presented as belonging to the president, that its contents were commemorated as official records by the National Archives and Records Administration, and that the president used the account as a means to communicate information about his administration.¹²⁰ Importantly, however, the court clarified that “not every social media account operated by a public official is a government account.”¹²¹ Rather, it recognized that each case would require “a fact-specific inquiry” that considers how the account is used and described, who can view its contents, and how others “regard and treat the account.”¹²² After finding that the public forum doctrine applied, the Second Circuit mimicked the lower court by holding that President Trump engaged in viewpoint discrimination

114. *Id.*

115. *Id.* at 575. The court did not, however, indicate whether the spaces were limited or unlimited public forums. *Id.*

116. *Id.* at 577.

117. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 240 (2d Cir. 2019).

118. *Id.* at 234.

119. *Id.* at 234–35 (emphasis added).

120. *See id.* at 235–36 (articulating the reasons supporting the finding that President Trump and his aides acted in a governmental capacity in operating his @realDonaldTrump Twitter account).

121. *Id.* at 236.

122. *Id.*

in blocking individuals from his Twitter page and that the government speech doctrine did not apply.¹²³

C. One Wisconsin Now v. Kremer¹²⁴

In the last of a triad of cases holding elected officials' social media pages to be public forums, the Western District of Wisconsin considered whether three members of the Wisconsin State Assembly violated the First Amendment when they blocked the Twitter account for One Wisconsin Now ("OWN"), a progressive advocacy group, from their respective Twitter pages.¹²⁵ State Representatives Jesse Kremer, John Nygren, and Robin Vos operate Twitter accounts connected with their elected offices.¹²⁶ After each of these individuals blocked OWN from their pages, the group filed suit claiming that the interactive portions of the representatives' Twitter pages were public forums and that therefore the officials violated the First Amendment by blocking OWN from those spaces.¹²⁷

At the outset, the court acknowledged its reliance on the "three-step [forum] analysis set forth in [*Davison* and *Knight*]." ¹²⁸ First, in order to determine whether the public forum analysis was even applicable, the court considered whether the representatives acted under color of state law in creating and maintaining their Twitter accounts.¹²⁹ Using factors gleaned from the *Davison* decisions, the court similarly found that the officials' creation and operation of Twitter accounts constituted state action.¹³⁰ Next, it considered whether the interactive components of the defendants' Twitter accounts were public forums.¹³¹ Again leaning on the rationales in *Knight* and *Davison*, the court concluded that these spaces were designated public forums.¹³²

123. *Id.* at 236–40. Unlike the district court, the Second Circuit elected not to specify what type of forum President Trump's Twitter account created, noting only that the president's "conduct created a public forum" and that "[i]f the Account is a forum—public or otherwise—viewpoint discrimination is not permitted by the government." *Id.* at 237.

124. *One Wis. Now v. Kremer*, 354 F. Supp. 3d 940 (W.D. Wis. 2019).

125. *Id.* at 941.

126. *Id.* at 947–48.

127. *Id.* at 949.

128. *Id.*

129. *Id.* at 950.

130. *Id.* at 951.

131. *Id.* at 953.

132. *See id.* at 953–55 (citing *Knight* and *Davison* in support of the court's reasoning).

Finally, in a slight variation from *Knight* and *Davison*, the *One Wisconsin* court examined whether defendants engaged in content-based discrimination, rather than viewpoint discrimination.¹³³ Though the former prohibits all discussion on a particular topic, regardless of the views being shared, the latter disfavors only particular viewpoints or beliefs regarding a particular subject matter.¹³⁴ Finding that the defendants blocked OWN because of its “prior speech or identity”—that is, the content of its messages—and that no compelling state interest justified such action, the court concluded that the representatives violated the First Amendment.¹³⁵

III. FAULTS IN *DAVISON*, *KNIGHT*, AND *ONE WISCONSIN*

The foregoing decisions represent some of the first—but surely not the last—cases to assess whether individual government officials’ social media pages constitute public forums.¹³⁶ And as *One Wisconsin* illustrates, subsequent courts are likely to rely on earlier analyses in formulating their own decisions in this area.¹³⁷ This Part posits that *Davison*, *Knight*, and *One Wisconsin* should not be the models for social-media-page forum analysis, however, because these decisions muddy the doctrinal waters more than they clarify them.

This argument proceeds in three sections. Section A notes that the mere application of the public forum doctrine implies that a

133. *Id.* at 955. The distinction between content-based and viewpoint-based discrimination is discussed in Part I, but it is subtle enough to warrant reiteration here. A restriction constitutes content-based discrimination when it “exclude[s] speech [from a forum] based on its content.” *Id.* Government entities regulating traditional or designated public forums are prohibited from imposing content-based restrictions unless those restrictions satisfy strict scrutiny. *Id.* By contrast, a regulation is viewpoint discriminatory when it prohibits “particular views taken by speakers on a subject.” *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). Although government entities operating a limited public forum are permitted to engage in certain forms of content-based discrimination to “confine a forum to the limited and legitimate purposes for which it was created,” they are prohibited from “discriminat[ing] against speech on the basis of its viewpoint.” *Id.*

134. See *Rosenberger*, 515 U.S. at 829 (opining that the University of Virginia’s exclusion of a religious newspaper from its funding program was viewpoint discrimination because “the University does not exclude religion as a subject matter but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints”).

135. *One Wis.*, 354 F. Supp. 3d at 956.

136. See, e.g., *Hikind v. Ocasio-Cortez*, No. 1:19-cv-03956 (E.D.N.Y. filed July 9, 2019) (alleging, on the same day that the Second Circuit decided *Knight*, that Representative Alexandria Ocasio-Cortez violated the First Amendment by blocking an individual from her public Twitter page).

137. See *One Wis.*, 354 F. Supp. 3d at 953–55 (citing *Knight* and *Davison* in support of the court’s reasoning).

government entity has acted to create the putative forum. Section B then describes the doctrinal support *Davison*, *Knight*, and *One Wisconsin* seem to provide for that determination: the “under color of state law” or “governmental capacity” inquiries. Section C argues that reliance on these inquiries is misguided, however, as they do not, in fact, establish the appropriateness of the public forum doctrine’s application to the defendants’ social media pages.

A. *The Governmental-Entity Syllogism*

The mere application of a public forum analysis in *Davison*, *Knight*, and *One Wisconsin* implies that a governmental entity was involved in the creation or operation of the putative forum. This point can be proven using a simple syllogism. Traditionally, the public forum doctrine has *only* applied in cases where a “governmental entity” has acted to create a space for free speech or where individuals have acted pursuant to an authorized government program.¹³⁸ Indeed, as Dean Rodney Smolla articulates, “[t]he rich body of First Amendment public forum law consists *exclusively* of ‘cases in which a unit of government creates a limited public forum for private speech.’”¹³⁹ In other words, based on the Court’s own case law, the existence of a governmental entity appears to be a *necessary* condition for the imposition of the public forum doctrine. For example, in *Rosenberger v. Rector*, mentioned above, the Supreme Court applied the public forum doctrine only after establishing—in the very first line of the opinion—that regulation was imposed by the University of Virginia, “an instrumentality of the Commonwealth [of Virginia] . . . bound by the First and Fourteenth Amendments.”¹⁴⁰

138. See *Davison v. Randall*, 912 F.3d 666, 692 (Keenan, J., concurring) (“The Supreme Court [in *Matal v. Tam*] recently cited a series of decisions in which ‘a unit of government’ had created a public forum.” (emphasis in original) (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017))); SMOLLA & NIMMER, *supra* note 55, § 8:33.25 (“The rich body of First Amendment public forum law consists *exclusively* of ‘cases in which a unit of government creates a limited public forum for private speech.’” (emphasis in original) (quoting *Matal*, 137 S. Ct. at 1763)); see also *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 679 (2010) (“[I]n a progression of cases, this Court has employed forum analysis to determine when a *governmental entity*, in regulating property in its charge, may place limitations on speech.” (emphasis added)); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 792 (1985) (applying a forum analysis to a charitable fundraising organization conducted in the federal workplace and authorized by executive order).

139. SMOLLA & NIMMER, *supra* note 55, § 8:33.25 (quoting *Matal*, 137 S. Ct. at 1763).

140. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 822 (1995).

Given this background, one can logically conclude that if a court finds that the public forum doctrine applies, it follows that a government entity must have created or controlled the putative forum. The courts in *Davison*, *Knight*, and *One Wisconsin* found application of the public forum doctrine to be appropriate. Thus, to complete the syllogism, these courts must have implicitly determined that the parties responsible for creating or controlling those pages—the officials in question and their staffs—were, in fact, government entities.

B. The “Under Color of State Law” and “Governmental Capacity” Inquiries

The *Davison*, *Knight*, and *One Wisconsin* courts appeared to support this implicit determination by establishing that the official in question acted “under color of state law” or “in a governmental capacity.” By moving from these analyses straight to application of the public forum doctrine, the courts seemed to assume that no independent inquiry was necessary to establish the existence of a governmental entity.¹⁴¹ The primary question considered by the courts in *Davison*, *Knight*, and *One Wisconsin* was whether the defendants’ conduct in creating and maintaining their social media pages could be fairly defined as action *by* the government.¹⁴²

Because *Davison* and *One Wisconsin* dealt with § 1983 claims against *state* officials, the courts there asked whether the defendants acted “under color of state law” in creating and maintaining their social media pages.¹⁴³ The district court in *Davison* defined “under color of state law” as “occur[ing] where ‘apparently private actions . . . have a sufficiently close nexus with the State to be fairly treated as’ the actions of ‘the State itself.’”¹⁴⁴ After finding that a number of factors connected

141. This assumption can be inferred from the framework of the courts’ decisions. In each case, the court moves directly from its state-action analysis to the application of the public forum doctrine. See *infra* note 149 and accompanying text.

142. See *supra* notes 83–84, 93–97, 103–11, 118–18, 129–28 and accompanying text (discussing the state- or governmental-action analysis conducted by the courts in each case).

143. See *supra* notes 83–84, 129–27 and accompanying text (articulating the “under color of state law” analysis in *Davison v. Loudoun County Board of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va. 2017), *aff’d sub nom.* *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019) and *One Wisconsin Now v. Kremer*, 354 F. Supp. 3d 940 (W.D. Wis. 2019)); *infra* notes 144–47 and accompanying text (same).

144. *Davison*, 267 F. Supp. 3d at 712 (quoting *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003)); see also *One Wis.*, 354 F. Supp. 3d at 950 (“A court may also find action by a private actor to be under color of state law if there is a ‘sufficient nexus between the state and the private actor’ to show that ‘the deprivation committed by the private actor is fairly attributable to the

Chairwoman Randall’s Facebook page to her office, the court determined that Randall’s maintenance of her page—including barring the plaintiff from accessing it—constituted state action.¹⁴⁵ The court in *One Wisconsin* engaged in an identical analysis that asked whether the representatives’ operation of their Twitter pages constituted state action.¹⁴⁶ Conversely, because *Knight* involved claims against a *federal* official, there was no § 1983 claim and thus no need for a state-action inquiry.¹⁴⁷ Nonetheless, the *Knight* court engaged in a similar analysis that asked whether President Trump’s actions on Twitter were “governmental in nature.”¹⁴⁸

In fact, although these decisions employed nominally different inquiries, their analyses effectively boiled down to the same question—whether a “nexus” existed between the individual actor and the government. Unsurprisingly, these similar analyses led to similar outcomes. Namely, after determining that the defendants acted “under color of state law” or exercised control that was “governmental in nature,” each court found a sufficiently governmental element to justify applying the public forum doctrine.¹⁴⁹

state.” (quoting *L.P. v. Marian Catholic High Sch.*, 852 F.3d 690, 696 (7th Cir. 2017))). The courts in *Davison* and *One Wisconsin* often use the terms “under color of state law” and “state action” interchangeably to refer to the same inquiry. For clarity’s sake, this Note will exclusively use the term “under color of state law” when referring to this standard.

145. *Davison*, 267 F. Supp. 3d at 714.

146. See *One Wis.*, 354 F. Supp. 3d at 950–53 (applying an “under color of state law” analysis to all three assemblymen).

147. See *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 568 (S.D.N.Y. 2018) (noting that the court need not engage in the “under the color of state law” analysis in the forum context), *aff’d*, 928 F.3d 226 (2d Cir. 2019). Section 1983 is a federal statute that provides prospective and remedial relief to plaintiffs who have suffered violations of federal law at the hands of persons acting under the authority of state law. 42 U.S.C. § 1983 (2018); *West v. Atkins*, 487 U.S. 42, 48 (1988). Section 1983 claims cannot be brought against federal officials. See, e.g., *District of Columbia v. Carter*, 409 U.S. 418, 424–25 (1973) (“[A]ctions of the Federal Government and its officers are at least facially exempt from [§ 1983’s] proscriptions.”).

148. *Knight*, 302 F. Supp. 3d at 566–67. The court confirmed that because the president “present[ed] his Twitter account] as being a presidential account as opposed to a personal account and, more importantly, use[d] the account to take actions that can be taken only by the President as President,” his actions were “governmental.” *Id.* at 567.

149. See *Davison v. Randall*, 912 F.3d 666, 681 (4th Cir. 2019) (proceeding from the determination that Randall acted under the color of state law to the question of whether she created a public forum); *One Wis.*, 354 F. Supp. 3d at 950–953 (proceeding from a determination that each of the assemblymen acted “under color of state law” directly to a forum analysis); *Knight*, 302 F. Supp. 3d at 566–67 (indicating that President Trump and his media director’s “governmental” control over his account implicates a forum analysis).

C. *A False Equivalency: The “Under Color of State Law” and “Governmental Capacity” Inquiries’ Inability To Establish that a Governmental Entity is Acting*

These two analyses, however, are deeply flawed. Both improperly equate a finding that the individual acted “under color of state law” or “governmental in nature” with the *separate* determination that a government entity existed to create the putative forum.¹⁵⁰ Put differently, determining that an individual acted “under color of state law” or in a “governmental capacity” does not establish that the individual *is* the government or a government entity.¹⁵¹ A finding that an official acted “under color of law” merely indicates that a “sufficiently close nexus” exists between the individual’s actions and the state such that the individual action is “fairly attributable to the State.”¹⁵² It does not establish that the individual official is acting *as* the state, nor does it ask whether the official has the power to act as the state.

To illustrate, consider state-officer liability. Under § 1983, a plaintiff can bring suit for monetary damages against a state official in her *personal* capacity when that official, while acting “under color of state law,” deprives the individual of a federal right.¹⁵³ By contrast, damages suits against a state or against state officials in their “official capacities” are barred because the Court has determined that the term “persons” in § 1983 does not encompass these entities.¹⁵⁴ If, however, by virtue of acting “under color of state law,” the official was actually synonymous with the state, it would make little sense how a § 1983 suit could proceed against her; it would seem that a suit against that official, even in her personal capacity, would be “no different from a suit

150. Cf. SMOLLA & NIMMER, *supra* note 55, § 8:33.25 (“The question of whether an official is acting under ‘color of law’ or engaged in ‘state action’ should not be conflated with the *separate* First Amendment question of how and when a public forum comes into existence.”).

151. Cf. *Monroe v. Pape*, 365 U.S. 167, 183 (1961) (determining that officers can be held to have acted “under color of law” in violating the Fourth Amendment even when acting contrary to the state constitution and state statutes), *overruled on other grounds by* *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978); SMOLLA & NIMMER, *supra* note 55, § 8:33.25 (“Individual government officials who engage in action not officially authorized or endorsed by a government entity may at times be deemed to be acting ‘under color of law’ in violating a person’s federal rights.”).

152. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

153. See *Hafer v. Melo*, 502 U.S. 21, 25 (1991) (stating that government officials can be sued in their personal capacities for damages under § 1983).

154. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58, 71 (1989).

against the State itself.”¹⁵⁵ Therefore, it must be that even when state officials are acting “under color of state law,” there is some tangible difference between themselves and the state government itself. Otherwise, it would make little sense why the Court has painstakingly differentiated between the two in its § 1983 jurisprudence.¹⁵⁶

This logic applies with equal force to the governmental analysis in *Knight*. Simply because an official’s actions are “governmental in nature” does not mean that official has assumed the mantle of acting as the government.¹⁵⁷ For example, an individual congressperson speaking from the congressional floor regarding a bill could be said to be taking action that is “governmental in nature,” but no one would sincerely argue that such action could be attributed to the government itself.¹⁵⁸ That is not to say that individual government officials can *never* act as the government. For instance, if the EPA administrator posted the language of a final rule on his Twitter page after an extensive rulemaking process, that action could be characterized as both “governmental in nature” and as an act of *the* government.

The ultimate downfall of the *Davison*, *Knight*, and *One Wisconsin* analyses is that they skip the threshold question; each opinion fails to ask *who* is acting to create the putative forum, assuming instead that a determination that an official acted “under color of state law” or in a “governmental capacity” automatically proves she is a governmental entity. These courts fail to recognize the faulty assumptions underlying their own inquiries and therefore fail to establish a sound and convincing foundation for the applicability of the public forum doctrine.

In addition to being logically suspect, the courts’ analyses in these cases were flawed as a matter of free-speech policy. Specifically, their overreliance on the “under color of state law” or “governmental capacity” tests in this public forum context encroaches on public officials’ own right to free expression. Undoubtedly, individual

155. *Id.*

156. *See Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985) (“Because this distinction apparently continues to confuse lawyers and confound lower courts, we attempt to define it more clearly through concrete examples of the practical and doctrinal differences between personal and official capacity actions.”).

157. *See Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 569 (S.D.N.Y. 2018) (describing President Trump and his media director’s control of his Twitter account as “governmental in nature”), *aff’d*, 928 F.3d 226 (2d Cir. 2019).

158. *See Van Orden v. Perry*, 545 U.S. 677, 723 (2005) (Stevens, J., dissenting) (“[W]hen public officials deliver public speeches, we recognize that their words are not exclusively a transmission from *the* government . . .”).

government officials retain some capacity to act as private persons free from constitutional limitations. Of course, it is equally true that the scope of any official's ability to act as a private person is limited by the nature of his or her specific office; thus, the president's ability to conduct herself in a manner that is free from constitutional restriction is likely narrower than that of a state assemblyman.

When the *Davison*, *Knight*, and *One Wisconsin* courts overstate the bounds of the "under color of state law" or "governmental capacity" inquiries, however, this distinction between public and private speech is effectively lost, and government officials become unduly constricted by a public forum doctrine that stretches past the point of government-entity conduct and into the sphere of private, personal speech. The next Part suggests a reform to the public forum doctrine that properly limits the scope of its application to government entities only, thereby reestablishing a clear line between public and private speech for government officials.

IV. UPDATING THE PUBLIC FORUM DOCTRINE: THE "GOVERNMENT ENTITY" INQUIRY

Although *Davison*, *Knight*, and *One Wisconsin* dutifully apply the Court's precedent, their flawed analyses ultimately prove how awkward it is to analogize current public forum case law to individual social media pages. By focusing entirely on *what type* of action is necessary to establish a public forum, these analyses neglect to ask *who* has the necessary authority to create a public forum. Yet the *who* is the truly important—and potentially dispositive—issue in these cases. Thus, *Davison*, *Knight*, and *One Wisconsin* leave a key question unanswered: When can the public forum doctrine be applied to individual government actors operating a public space?

The need to delineate exactly when individual government officials can be considered governmental entities is essential to this question. This Note proposes that courts should answer this question by undertaking a "government entity" inquiry, which asks whether an official retains such authority that he or she can be properly viewed as a "government entity" with the ability to create a public forum. A "government entity" inquiry would provide not only a much-needed limiting principle to public forum analyses in cases involving individual government actors, but also would better signal to politicians and other public officials the constitutional restraints imposed on their social media presence.

This Part proceeds in four sections. First, it assesses what the term “government entity” has generally meant in public forum case law. Next, it details the specific framework for a “governmental entity” inquiry. It then applies this new inquiry to a variety of exemplary cases in order to demonstrate its utility. Finally, it discusses the benefits of this new threshold standard.

A. *What is a “Government Entity”?*

To articulate when an individual government official may be considered a “government entity” for forum-analysis purposes, it is necessary to establish what this term has signified in the public forum context. Although the Court has never explicitly defined what constitutes a “government entity,” its precedent is still instructive. For example, the Court has applied the public forum doctrine to various actions by a spectrum of federal, state, and local governments, agencies, and institutional governing bodies, including state-university boards, state transportation departments, and federal agencies.¹⁵⁹

Importantly, in each of these cases, the subject entity always exercised some independent authority to limit or alter the rights of individuals operating—or seeking to operate—within that space. For example, in the state-university cases, the schools enacted funding policies affecting the disbursement of money at their respective universities.¹⁶⁰ Likewise, in *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*,¹⁶¹ the federal government—via the Office of

159. See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2243, 2251–53 (2015) (considering whether a forum analysis applies to a specialty-license-plate program run by the Texas Department of Motor Vehicles Board); *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 561 U.S. 661, 682 (2010) (determining that the funding program coordinated by a public law school constituted a limited public forum); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 822, 830 (1995) (determining that a newspaper funding program initiated by the University of Virginia—“an instrumentality of the Commonwealth [of Virginia]”—constituted a public forum); *Int’l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 675 (1992) (applying a forum analysis to the Port Authority of New York and New Jersey’s restrictions on pamphleteering and leafletting within airport terminals); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 804 (1985) (conducting a forum analysis to determine whether restrictions imposed by the Office of Personnel Management on access to the Combined Federal Campaign, a charity drive created by executive order, violated the First Amendment).

160. See *Christian Legal Soc’y*, 561 U.S. at 670 (detailing the nondiscrimination policy enacted by the College that regulated its funding program); *Rosenberger*, 515 U.S. at 824, 830 (determining that the newspaper funding program organized by the University of Virginia and its governing board was a limited public forum and that the University set “Guidelines” regulating the disbursement of funds from that program).

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

Personnel Management—regulated what types of nonprofit organizations could participate in a charitable fundraising drive conducted in the federal workplace.¹⁶² Finally, at issue in *International Society for Krishna Consciousness, Inc. v. Lee*¹⁶³ was the policy of the Port Authority of New York and New Jersey, which prohibited leafletting and solicitation of money in airport terminals.¹⁶⁴ Based on these precedents, to qualify as a “government entity,” the individual or unit at issue must possess the ability to regulate or somehow unilaterally change the obligations or rights of persons or organizations within the putative forum.

A concurring opinion in *Davison* sheds additional light on what constitutes a government entity. Though she agreed with the ultimate outcome, Judge Keenan expressed doubts about the widespread applicability of the public forum doctrine to individual government officials’ social media pages.¹⁶⁵ Citing language from *Matal v. Tam*¹⁶⁶ indicating that “unit[s] of government” create a public forum,¹⁶⁷ she noted that “it appears to be an open question whether an individual public official serving in a legislative capacity qualifies as . . . a *government entity* for purposes of her ability to open a public forum.”¹⁶⁸ Judge Keenan further opined that “[t]he nature and extent of a public official’s authority should have some bearing on the official’s ability to open a public forum on social media.”¹⁶⁹ Despite observing that the record was “silent regarding the Chair’s authority to take any official action on her own,” Judge Keenan proceeded to note that “under given circumstances, [an elected official] can conduct government business and set official policy unilaterally, including through the use of social media.”¹⁷⁰ Judge Keenan thus appears to view a “government entity” as an institutional body or individual capable of *unilaterally* setting official policy or conducting business on behalf of the government.

162. *See id.* at 795 (articulating the fundraising policy imposed by the Office of Personnel Management that excluded certain nonprofits from participation).

163. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672 (1992).

164. *See id.* at 675.

165. *See Davison v. Randall*, 912 F.3d 666, 692 (4th Cir. 2019) (Keenan, J., concurring) (“I question whether any and all public officials, regardless of their roles, should be treated equally in their ability to open a public forum on social media.”).

166. *Matal v. Tam*, 137 S. Ct. 1744, 1763 (2017).

167. *Id.* at 1763.

168. *Davison*, 912 F.3d at 692 (Keenan, J., concurring) (citing *Matal*, 137 S. Ct. at 1763).

169. *Id.*

170. *Id.* (citing *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 567 (S.D.N.Y. 2018), *aff’d*, 928 F.3d 226 (2d Cir. 2019)).

Taken in conjunction, these sources seem to indicate that a “government entity,” in the public forum context, denotes some governing body—either federal, state, or local—capable of acting unilaterally to set government policy, conduct official government business, or otherwise change or clarify the rights or obligations of individuals operating within its purview.

B. When Should an Individual Public Official Be Considered a “Government Entity”?

This Note does not contend that public officials can never constitute government entities for forum-creation purposes. Rather, it seeks to develop a clear standard for *when* individual government officials can be considered government entities capable of creating public forums. Here, reference to § 1983 municipal-liability jurisprudence can be used to help develop a workable standard.

Under § 1983, a municipal government can only be liable where “execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible.”¹⁷¹ In other words, a § 1983 suit that alleges municipal liability for an impermissible official policy is only valid when an individual government official acts with such authority that her policy choice can be fairly characterized as a policy choice made by the municipal entity itself.¹⁷² Thus, only those municipal officials who can “make municipal policy”¹⁷³ or “speak with final policymaking authority”¹⁷⁴ are able to subject a municipality to liability through their actions. Put differently, only certain municipal officials—those with some final decision-making power—retain such requisite authority that their impermissible acts can be characterized as the acts of the municipality itself.

Akin to § 1983 municipal liability, public forum cases involving individual government actors should feature a threshold inquiry that asks whether the government official wields such authority that she can

171. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978).

172. *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 479–80 (1986) (noting that the “‘official policy’ requirement” for § 1983 suits “was intended to distinguish acts of the *municipality* from acts of *employees* of the municipality,” thereby limiting the liability of municipalities under the statute “to acts that are, properly speaking, acts ‘of the municipality’”).

173. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 124 (1988) (quoting *Pembaur*, 475 U.S. at 483).

174. *Jett v. Dall. Indep. Sch. Dist.*, 491 U.S. 701, 737 (1989).

fairly be characterized as a government entity. This “government entity” inquiry would consider whether the putative official is endowed with the authority to take unilateral, final action on behalf of the government.¹⁷⁵ Such “unilateral, final action” would include the ability to set or establish official policy, conduct government business, or otherwise clarify and alter individuals’ legal rights. Only public officials deemed to have such power would qualify as government entities. In this new public forum framework, absent a finding that the governmental official maintains such authority that she can be fairly characterized as a government entity, application of the public forum doctrine would be improper.

C. Benefits of a “Government Entity” Inquiry

The “government entity” inquiry preserves the animating purpose of the public forum doctrine, which is to lend “legal acknowledgement” to individuals “who want[] to reach a public audience” in public spaces,¹⁷⁶ while also protecting “the private choices of [certain] political officeholders . . . to choose the views with which to associate.”¹⁷⁷ Undoubtedly, the core of the First Amendment protects individuals’ right to engage in civil discourse freely, especially with their own government.¹⁷⁸ The “government entity” inquiry preserves this important principle by certifying that those individual officials that may fairly be characterized as the government or as government entities remain responsive to the public forum doctrine’s directives. However, this standard simultaneously ensures that those public officials that lack the requisite authority to be characterized as government entities remain free from First Amendment restraints. By doing so, the

175. The basis for this standard is informed by an amalgam of the abovementioned public forum precedent, § 1983 municipal liability, and Judge Keenan’s concurrence in *Davison*. See *supra* Part IV.A (discussing the meaning of “government entity” in the Court’s public forum precedent and in Judge Keenan’s concurrence in *Davison*); *supra* notes 171–75 and accompanying text (discussing § 1983 municipal-liability jurisprudence and its requirement that an official “speak with final policymaking authority” in order to characterize her misconduct as the municipality’s official policy).

176. Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 GONZ. L. REV. 113, 115 (2010).

177. SMOLLA & NIMMER, *supra* note 55, § 8:33.25.

178. See Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1538 (1998) (“[T]he public forum doctrine . . . derives from the most basic mythological image of free speech: an agitated but eloquent speaker standing on a soap box at Speakers’ Corner, railing against injustices committed by the government, whose agents are powerless to keep the audience from hearing the speaker’s damning words.”).

“government entity” inquiry embodies another core concept of the First Amendment: “[T]hat each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence.”¹⁷⁹

Normatively, the “government entity” inquiry ensures that individual officials who lack the authority to act as the government are not forced to propagate messages with which they disagree. Admittedly, it would enable certain public officials—most notably individual legislators—to block individuals from their official social media pages. However, where an individual official lacks the power to act as the government, concerns about limiting a speaker’s ability to publish views in a public space wane while the argument for allowing public officials to regulate the nongovernmental content presented on their pages increases in strength. Especially in an age when social media presence is an integral and ostensibly mandatory part of public office,¹⁸⁰ public officials that lack the requisite authority to create public forums should be able to dissociate from messages with which they disagree.

Further, an articulated “government entity” standard provides an important limiting principle for applying the public forum doctrine to individual officials’ actions. Without this limit in place, the logic of *Davison*, *Knight*, and *One Wisconsin* could conceivably subject to increased regulation *any* government official whose conduct bears a sufficiently close nexus to government authority. Such a determination that all public officials can create public forums would restrict far too much speech¹⁸¹ and flout the exhortation that “we should be cautious in applying our free speech precedents to the internet.”¹⁸² However, a categorical rule that no public official’s social media page can constitute a public forum is equally problematic because it would fail to recognize the many ways in which individual government actors can use these sites to conduct official government business. For example, President Trump has used his Twitter account to appoint and remove

179. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

180. *See supra* notes 69–73 and accompanying text.

181. *See* SMOLLA & NIMMER, *supra* note 55, § 8:33.25 (“When speaking from their private platforms, [public officeholders] retain their First Amendment rights to compose their own messages, and to determine the messages of others with which they will or will not associate, endorse, or propagate.”); Briggs, *supra* note 27, at 34–35 (detailing ways in which government officials can monitor their social media sites as public forums, including privatizing their pages or regulating using content-neutral “rules”).

182. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1744 (2017) (Alito, J., concurring).

key cabinet members.¹⁸³ A middle-of-the-road approach that recognizes only certain officials retain the requisite authority to create public forums would strike an appropriate balance between these competing interests.

D. The Inquiry in Action

To see how this “government entity” inquiry would function in a potential public forum analysis, it is instructive to apply it as a threshold question to a list of exemplary cases. Only once it is established that a public official has the requisite authority to be fairly characterized as a government entity would a court be permitted to move on to a forum analysis. As suggested by the Second Circuit in *Knight*, this inquiry should be an inherently “fact-specific” endeavor that assesses how the official uses his or her social media page and what authority those actions carry.¹⁸⁴ To illustrate the inquiry’s viability, this Section applies it to the facts of *Knight*, *One Wisconsin*, and *Davison*, as well as to the situations of Senator Scott and Representative Omar from the Introduction, to indicate how these cases would play out with this added analytical step.

Beginning with *Knight*, application of the “government entity” inquiry would likely yield the same result arrived at by the Southern District of New York. Because President Trump, as the top executive officer, used his Twitter page to set government policy, change or clarify individuals’ rights and obligations, and otherwise act unilaterally as the government, he would fairly easily classify as a government entity for public forum purposes.¹⁸⁵ By using Twitter to make cabinet-level changes in personnel, “to announce foreign policy decisions and initiatives,” and “as an important tool of governance and executive outreach,”¹⁸⁶ President Trump undoubtedly functioned as a “government entity” under this test. As such, the president would be capable of creating a public forum, and the court would proceed to its forum analysis.

183. See Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 13, 2018, 8:44 AM), <https://twitter.com/realDonaldTrump/status/973540316656623616> [https://perma.cc/V99G-EECF] (removing Secretary of State Rex Tillerson and appointing Mike Pompeo to the position).

184. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 236 (2d Cir. 2019).

185. See *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 567 (S.D.N.Y. 2018) (detailing the president’s ability to take unilateral action via his Twitter account), *aff’d*, 928 F.3d 226 (2d Cir. 2019).

186. *Knight*, 928 F.3d at 236.

Conversely, a “government entity” inquiry in *One Wisconsin* would likely preclude any finding that the individual assemblymen were capable of creating a public forum. As individual legislators, the officials at issue lack any unilateral authority to set government policy, conduct government business, or otherwise affect individuals’ rights or obligations. Indeed, the court in *One Wisconsin* is entirely silent on *how* the legislators used their pages to conduct government business; unlike *Knight*, the record is devoid of evidence indicating that the legislators were able to take any official action via their social media pages.¹⁸⁷ Without any indication that these officials were able to use their pages in order to conduct unilateral government action, they could not be considered government entities for forum-creation purposes.

Davison is the borderline case. As Judge Keenan indicated, “the record . . . is silent regarding the Chair’s authority to take any official action on her own.”¹⁸⁸ However, like President Trump, Chairwoman Randall used her page as “a tool of governance,” organizing disaster-relief efforts as well as “submit[ing] posts on behalf of the Loudoun County Board of Supervisors as a whole.”¹⁸⁹ Such use indicates that Chairwoman Randall acted as a government entity in operating her social media page, conducting official government business and setting government policy. As such, application of the public forum doctrine to her Facebook page would be warranted.

Concluding with Senator Scott and Representative Omar, a “government entity” inquiry would reveal that they do not have the ability to create public forums via their Twitter pages. Similar to the assemblymen in *One Wisconsin*, these legislators lack the authority to take unilateral government action or in any way conduct official government policy via their social media pages. As such, Senator Scott and Representative Omar would not constitute government entities and would be free to regulate their pages without fear of contravening the First Amendment.

187. See *One Wis. Now v. Kremer*, 354 F. Supp. 3d 940, 950–53 (W.D. Wis. 2019) (failing to identify any way in which the individual state assemblymen used their social media pages to conduct government business).

188. *Davison v. Randall*, 912 F.3d 666, 692 (4th Cir. 2019) (Keenan, J., concurring).

189. *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 713, 714 (E.D. Va. 2017).

CONCLUSION

The modern internet has radically transformed the ways in which individuals communicate and share their views with the world. As purveyors of this new digital-speech regime, social media sites are uniquely situated as perhaps “the most important places . . . for the exchange of views.”¹⁹⁰ With speech continuously transitioning from physical to virtual forums, the expansion of free-speech safeguards into these spaces is a necessary and appropriate outgrowth. However, vigorous protection of these new modes of free expression must be tempered with “cautious[ness] in applying free speech precedents to the internet.”¹⁹¹

With a jurisprudence predominantly focused on speech regulations in government-owned or -operated *physical* spaces, the current public forum doctrine has proven ill-equipped to assess satisfactorily the First Amendment implications at stake when individual government actors operate social media pages. By suggesting a standard that makes establishment of an official’s status as a government entity a prerequisite to application of a forum analysis, this Note helps the public forum doctrine evolve to address an emerging and important area for free speech. Undoubtedly, the doctrine’s protection of open and free access to places of public discussion is essential to the proliferation of the marketplace of ideas, especially in a world that is becoming increasingly privatized.¹⁹² However, when forum limitations are imposed absent any actual action by a government entity, that lofty conception of speech protection begins to look more like speech restriction.¹⁹³ By establishing a line between sincere government action and mere government affiliation in the forum-creation context, the “government entity” inquiry helps balance the right of individuals to the free expression of ideas in dedicated spaces with the equally important right of public officials to dissociate from content they do not wish to endorse.

190. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

191. *Id.* at 1744 (Alito, J., concurring).

192. *See* *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 607 F.3d 1178, 1201 (9th Cir. 2010) (“[O]pen access to traditional public fora guarantees the continued vitality of the First Amendment, especially in light of the growing privatization of many traditional public fora.”), *rev’d en banc*, 657 F.3d 936 (9th Cir. 2011).

193. *See* *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573–75 (1995) (noting that free speech in part “boils down to the choice of a speaker not to propound a particular point of view”).