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# The One un-American Act: Can Donald Trump Block Me On Twitter?

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The One un-American Act: Can Donald Trump Block Me On Twitter?  
(Working Title)

**I. Something Wicked This Way Comes: The First Amendment and the Internet**

Somewhere in the White House, President Donald Trump is putting the finishing touches on his latest one-hundred and forty character masterpiece—a masterpiece that is sure to both provoke the ire of his critics and elicit the exultation of his supporters. Trump’s use of Twitter, the popular social media platform, is unlike any we have seen from a United States President. In his own words, Trump characterized his use of social media not as Presidential, but as “modern day Presidential.”<sup>1</sup> Past American Presidents have no doubt been the center of scandals and public criticism, but none have been so entrenched in controversy because of a mere tweet<sup>2</sup> like Donald Trump. Although Trump may have known his twitter use would provoke contentious debate, it’s hard to say if he ever thought his use of social media would land him in court—but it’s done just that.

In July 2017, the Knight First Amendment Institute, an organization dedicated to defending and strengthening the freedoms of speech and press in the digital age, filed a complaint in the Southern District of New York against Trump, alleging that his twitter account, @realdonaldtrump, constitutes a designated public forum.<sup>3</sup> As such, when Trump blocking other users from accessing his account—the Knight First Amendment Institute argues, their first amendment rights are infringed. Since the Internet and social media sites in general are relatively

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<sup>1</sup> Donald Trump (@realdonaldtrump), TWITTER (July 1, 2017, 3:41 PM), [https://twitter.com/realDonaldTrump/status/881281755017355264?ref\\_src=twsrc%5Etfw&ref\\_url=http%3A%2F%2Fwww.latimes.com%2Fpolitics%2Ffla-pol-updates-everything-president-fake-1498958671-htmlstory.html](https://twitter.com/realDonaldTrump/status/881281755017355264?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Fwww.latimes.com%2Fpolitics%2Ffla-pol-updates-everything-president-fake-1498958671-htmlstory.html)

<sup>2</sup> A Tweet is the name for a posting made on the social media website Twitter.

<sup>3</sup> Compl. ¶ 47, <https://assets.documentcloud.org/documents/3892179/2017-07-11-Knight-Institute-Trump-Twitter.pdf>

new phenomena, there is little, if any, case law to guide the courts in determining how first amendment rights and cyberspace intersect. Interestingly enough, the Supreme Court recently addressed, for the first time, the relationship between the First Amendment “and the modern internet” in *Packingham v. North Carolina*.<sup>4</sup>

In *Packingham*, the Supreme struck down a state statute that made it “a felony for a registered sex offender to access a commercial social networking Web site where the sex offender knows that the site permits minor children to become members or to create or maintain personal Web pages.”<sup>5</sup> Recognizing that this case was “one of the first” the Supreme Court had taken “to address the relationship between the first amendment and the modern internet,” Justice Kennedy, writing for the Court, carefully avoided any insinuation that the First Amendment provided “scant protection for access to vast networks [of the modern internet].”<sup>6</sup> One of the most important places for the exchange of views in today’s modern world, Justice Kennedy asserted, is cyberspace, “the vast democratic forums of the Internet in general, and social media in particular.”<sup>7</sup> Today, “seven in ten American adults use at least one Internet social networking service,” and many use social media as a source “for knowing current events, checking ads for employment . . . and otherwise exploring the vast realms of human thought and knowledge.”<sup>8</sup> Social media spaces not only “provide the most powerful mechanisms available to a private citizen to make his or her voice heard,” but they also “allow a person with an Internet connection to become a town crier with a voice that resonates further than it could from any soapbox.”<sup>9</sup>

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<sup>4</sup> 137 S.Ct 1730, 1736 (2017)

<sup>5</sup> *Id.* at 1733

<sup>6</sup> *Id.* at 1736

<sup>7</sup> *Id.* at 1735

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 1737.

Indeed, social media sites could be thought of, as Justice Kennedy put it, as “the modern public square.”<sup>10</sup>

Recognizing social media’s influence, many government agencies have started using social media platforms to solicit and respond to public comments.<sup>11</sup> The use of social media by government agencies and officials like Donald Trump poses novel legal questions about whether social media spaces can constitute public forums for speech and, for that matter, whether the public forum doctrine itself has any applicability over cyberspace.

The public forum doctrine developed with real property in mind, not property over cyberspace or webpages. In the typical case, the government opens or uses real property for expressive activity and, if there is an alleged First Amendment violation, the court goes through a forum analysis to determine the property’s nature and the extent of the government’s ability to enforce content based restrictions on speech.<sup>12</sup> However, it is not abundantly clear that the principles applying to real property are equally applicable to property over cyberspace—or whether cyberspace constitutes property at all.<sup>13</sup> Additionally, the public forum doctrine is applicable to *government owned* property, while social media webpages and accounts are private property belonging to companies like Twitter and Facebook.<sup>14</sup> The Supreme Court has never decided whether private property, used by the government, could constitute a public forum.

This article explores the government’s ability to designate its social media accounts as public forums. Part II outlines the public forum doctrine and discusses the different approaches taken by

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<sup>10</sup> *Packingham*, 137 S. Ct. at 1737

<sup>11</sup> U.S. GOV’T ACCOUNTABILITY OFF., SOCIAL MEDIA: FEDERAL AGENCIES NEED POLICIES AND PROCEDURES FOR MANAGING AND PROTECTING INFORMATION THEY ACCESS AND DISSEMINATE 13 (2011) <http://www.gao.gov/assets/330/320244.pdf> 3

<sup>12</sup> See generally *Cornelius v. NAACP Legal Def. & Educ. Fund*, 105 S. Ct. 3439 (1985)

<sup>13</sup> David W. Opderbeck, *Cybersecurity and Executive Power*, 89 WASH. U. L. REV. 785, 837-44 (2012) (discussing ambiguity over property status of cyberspace).

<sup>14</sup> E.g. *Cornelius*, 473 U.S. 802 at 799-801.

the Circuit Courts as a result of confusing Supreme Court precedent. Part III discusses the property status of webpages. Internet companies like Twitter and Facebook own a possessory interest in their webpages, which not only establishes their status as private property, but also helps facilitate the forum analysis in the context of social media. Even though social media spaces are private property, the forum analysis can still be applied. Part IV explores how the Circuit Courts have applied the forum analysis and investigates under what circumstances the Circuit Courts have found a designated public forum. Part V discusses the importance of the Circuit Courts in resolving first amendment disputes over social media. Part VI explores how the forum analysis could be applied to a variation of the situation presented in *Packingham*. Part VII explores whether Donald Trump can constitutionally block users on twitter.

## II. **An Elegant Doctrine For A More Simplistic Time: Defining the Public Forum Doctrine**

Not all property is equal under the First Amendment. The public's right of access to particular government property, and its ability to exercise its first amendment rights on that property, depends entirely upon the character of the property itself.<sup>15</sup> In characterizing property, courts have routinely relied on the public forum doctrine. In essence, the public forum doctrine seeks to determine what publicly owned property must be made available for speech and under what circumstances. Generally speaking, publicly owned property falls into one of three categories: traditional public forum, designated public forum, or nonpublic forum.<sup>16</sup> While each forum is treated differently, public forums share some common rules.<sup>17</sup>

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<sup>15</sup> *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983) (“The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue”).

<sup>16</sup> *E.g. Cornelius*, 473 U.S. at 800

<sup>17</sup> The term “public forums” references both the traditional and designated public forum.

In order to minimize disruptions in public forums, the government may impose reasonable time, place and manner restrictions if they are “justified without reference to the content of the regulated speech,” serve a “significant government interest,” and “leave open ample alternative channels for communication of the information.”<sup>18</sup> Under the First Amendment, the government has no power “to restrict expression because of its message, its ideas, its subject matter or its content.”<sup>19</sup> The validity of the government’s content or subject matter restrictions are entirely dependent on the categorization of the property, because different levels of scrutiny apply to the different categories of forum.

On one end of the spectrum is the traditional public forum. Traditional public forums are places that “have been held in trust for the use of the public, and . . . have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions.”<sup>20</sup> Sidewalks, streets and parks have routinely been found to constitute traditional public forums.<sup>21</sup> In a traditional public forum, content based restrictions are reviewed under strict scrutiny: the regulation must be “necessary to serve a compelling state interest and is narrowly drawn to achieve that end.”<sup>22</sup>

At the other end of the spectrum is the nonpublic forum. Nonpublic forums are “public property which is not by tradition or designation a forum for public communication.”<sup>23</sup> The State is subjected to a more relaxed standard of scrutiny, rational basis review, when it tries to enforce content based restrictions in a nonpublic forum. In a nonpublic forum, the State may enforce content based exclusions and “reserve the forum for its intended purpose” so long as the

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<sup>18</sup> *Heffron v. International Society for Krishna Consciousness, Inc.*, 452, U.S. 640, 648 (1981).

<sup>19</sup> *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972).

<sup>20</sup> *Perry*, 460 U.S. at 45-46

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

“regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker’s views.”<sup>24</sup> The idea behind the nonpublic forum is that the First Amendment “does not guarantee access to property simply because it is owned or controlled by the government.”<sup>25</sup> If the principal function of the property “would be disrupted by expressive activity, the Court . . . is reluctant to hold that the government intended to designate a public forum.”<sup>26</sup> Places such as jailhouses and military reservations have been found to be nonpublic forums.<sup>27</sup>

Lying between the traditional and nonpublic forum categories is the designated public forum. This forum consists of government property that the state opens to the general public for expressive activities.<sup>28</sup> In a designated public forum, the government is subject to the same level of scrutiny as a traditional public forum: the government must show a compelling state interest to enforce content based exclusions.<sup>29</sup> While no court disputes its existence, this middle category of forum has been the subject of much confusion in the Circuit Courts.<sup>30</sup> The confusion is the result of the inconsistency by the Supreme Court in using the terms ‘designated’ and ‘limited’ when referencing both the middle category and the nonpublic forum, casting ambiguity over the applicable level of scrutiny.<sup>31</sup>

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<sup>24</sup> *Perry*, 460 U.S. at 45-46

<sup>25</sup> *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 473 U.S. 788, 803 (1985)

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Perry*, 460 U.S. at 45-46

<sup>29</sup> *Id.*

<sup>30</sup> Ascertaining the precise reason for the confusion and resolving it is beyond the scope of this article. For an in-depth discussion of the problem, see Mark Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299 (2009).

<sup>31</sup> *E.g.*, *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177, 182 (3d Cir. 1999); *Sumnum v. Callaghan*, 130 F.3d 906, 913 (10th Cir. 1997); *Cook v. Baca*, 95 F.Supp.2d 1215, 1220 n. 7 (D.N.M. 2000); *Scroggins v. City of Topeka*, 2 F.Supp.2d 1362, 1370 n. 5 (D.Kan. 1998).

### A. Pursuing the Unknown End: Supreme Court Precedent Creates Uncertainty

When describing public forum categories in *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*<sup>32</sup>, the Supreme Court did not give the middle category a specific name. Rather, the Court merely stated that this category is created when the government “opened [property] for use by the public” and that it could be “either for a limited purpose, such as use by particular groups, or for the discussion of particular subjects.”<sup>33</sup> In *Cornelius v. NAACP Legal Def. & Educ. Fund*,<sup>34</sup> the Court again failed to label the intermediate category, but underscored that it encompassed property “for use by the public at large for assembly and speech, for use by certain speakers or for the discussion of certain subjects.”<sup>35</sup> However, if the government were to “intentionally designate[] a place . . . as a public forum,” strict scrutiny would apply to content based restrictions and no speaker could be excluded without a compelling government interest.<sup>36</sup> Finally, in *International Soc’y for Krishna Consciousness Inc. v. Lee*<sup>37</sup>, the Court termed the middle category as a “designated public forum” and recognized that it could be “of a limited or unlimited character.” After defining both a traditional and designated public forum, the Court indicated that “all remaining public property” constituted nonpublic forums and would be subjected to “a much more limited review.”<sup>38</sup>

These cases make clear that the middle category of public forum, the designated public forum, can be unlimited or limited in character and is subject to strict scrutiny. But Supreme Court decisions following *Lee* began to make things a little less clear, and a little more complicated.

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<sup>32</sup> 460 U.S. 37, 45 (1983).

<sup>33</sup> *Id.* at 46 n.7.

<sup>34</sup> 473 U.S. 788 (1985).

<sup>35</sup> *Id.* at 802.

<sup>36</sup> *Id.*

<sup>37</sup> 505 U.S. 672, 678 (1992).

<sup>38</sup> *Id.*

The trouble started with *Rosenberg v. Rector and Visitors of U. of Virginia*.<sup>39</sup> There, the Court declared that when the state reserves its property “for certain groups or for the discussion of certain topics,” a “limited public forum” is created.<sup>40</sup> Justice Kennedy was right—his characterization of a public forum as one that could be “limited” is consistent with Supreme Court cases describing the designated public forum from *Perry* through *Lee*. But then Justice Kennedy did something that was inconsistent with those same cases: Kennedy stated that rational basis review, normally reserved for the nonpublic forum, rather than strict scrutiny, applies to content based restrictions in the limited public forum.<sup>41</sup>

Justice Kennedy once again faced a question over the forum status of property in *Arkansas Educ. Television Comm’n v. Forbes*.<sup>42</sup> Kennedy, referring to the middle category as a “designated public forum,” stated that “if the government excludes a speaker who falls within the class to which a designated public forum is made generally available, its action is subject to strict scrutiny.”<sup>43</sup> In distinguishing the designated public forum from the nonpublic forum, Kennedy departed from the construction used in *Perry* through *Lee*, and held that the defining quality was the level of access. If general access were granted, it would manifest an intent to create a designated public forum.<sup>44</sup> But, if the government did “no more than reserve eligibility for access to the forum to a particular class of speakers,” then a designated forum was not created.<sup>45</sup> In other words, if the government opened its property for a limited class of speakers or subjects, then the property is considered a nonpublic forum, in which content based restrictions are subject

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<sup>39</sup> 515 U.S. 819 (1995).

<sup>40</sup> *Id.* at 829.

<sup>41</sup> *Rosenberg*, 515 U.S. at 829.

<sup>42</sup> 523 U.S. 666 (1998).

<sup>43</sup> *Forbes*, 523 U.S. at 677.

<sup>44</sup> *Id.* at 679.

<sup>45</sup> *Id.*

to rational basis review. Curiously, Kennedy announced, for the first time, that property may not constitute any kind of forum at all.<sup>46</sup>

To recap, cases after *Rosenberg* arguably conflicted with earlier decisions of the Court.<sup>47</sup> The earlier decisions, *Perry* through *Lee*, established that all government property is either a traditional, designated or nonpublic forum, and that a designated public forum could be either generally accessible or limited for certain speakers or subjects. Regardless of whether a designated public forum is unlimited or limited, content-based regulations are subject to strict scrutiny. Those cases coming after *Rosenberg* indicated, for the first time, that government property could not be public fora at all.<sup>48</sup> Those cases defined the designated public forum as one that granted general access to the public. If there were any restrictions, either on the class of speakers or the topics to be discussed, then a nonpublic forum existed, and those restrictions would be reviewed under rational basis review. The ambiguity and conflict that these cases created was not lost on the Circuit Courts when attempting to determine the forum status of property. Many of the Circuit Courts have interpreted Supreme Court precedent differently, and have thus taken different approaches to the forum analysis.

### **B. A Fig For The Other Side Of Complexity: The Circuit Courts' Approach to the Designated Public Forum**

The First, Third, Fourth, Sixth, Eighth, Eleventh, and D.C. Circuits have interpreted Supreme Court precedent to say that the limited public forum and designated public forum are interchangeable terms, or that the limited public forum is a subset of the designated public

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<sup>46</sup> *Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 677 (1998)

<sup>47</sup> *E.g., Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177, 182 (3d Cir. 1999); *Sumnum v. Callaghan*, 130 F.3d 906, 913 (10th Cir. 1997).

<sup>48</sup> It appears that no Court has ever found that government property does not constitute some type of public forum.

forum.<sup>49</sup> These courts recognize that the government may designate a space for use by the public generally for expressive activities, or for a limited class of speakers or for the discussion of limited subjects.<sup>50</sup> Regardless of whether the forum is deemed a designated public forum or a limited public forum, or whether it is a subset of the designated public forum or its own category, those circuits have applied strict scrutiny to content based restrictions.<sup>51</sup>

Other Circuits, such as the Second, Fifth, and Seventh Circuits have found that a limited public forum is a subset of the designated public forum, while the Ninth Circuit<sup>52</sup> has found that a limited public forum is a subset of the nonpublic forum.<sup>53</sup> In these Circuits, when the government designates property for public discourse and the property is open to the public generally, a designated public forum is created, and content based restrictions are subjected to strict scrutiny. A limited public forum exists when the government designates property for public discourse but makes it available only to a limited class of speakers or for limited subjects. Unlike the First, Third, Fourth, Sixth, Eighth, Eleventh, and D.C. Circuits, when a limited public forum is found, the Second, Fifth, Seventh and Ninth Circuits courts have applied rational basis

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<sup>49</sup> *see New Eng. Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 20 (1st Cir. 2002) (stating that a designated public forum is sometimes called a limited public forum); *Whiteland Woods, L.P. v. Township of West Whiteland*, 193 F.3d 177, n.2 (3d Cir. 1999) (noting the confusion between the designated public forum and the limited public forum and applying the same strict scrutiny review to both); *Goulart v. Meadows*, 353 F.3d 239, 249-50 (4th Cir. 2003); *Kincaid v. Gibson*, 236 F.3d 342, 348 (6th Cir. 2001) (stating that the intermediate category has been alternatively referred to both the "designated public forum" and the "limited public forum," and that strict scrutiny applies to both); *Burnham v. Ianni*, 119 F.3d 668, 675 n.11 (8th Cir. 1997) ("designated" and "limited" used interchangeably, and settling on the term "limited public forum"); *Barrett v. Walker Cty. Sch. Dist.*, 872 F.3d 1209, 1224 (11th Cir. 2017); *Initiative & Referendum Inst. V. United States Postal Serv.*, 685 F.3d 1066, 1070 (D.C. Cir. 2012)

<sup>50</sup> *See* cases cited *supra* note 50.

<sup>51</sup> *See* cases cited *supra* note 50.

<sup>52</sup> The Ninth Circuit is included in this group because, even though they place the limited public forum as a subset of the nonpublic forum as opposed to a designated public forum, like the Second, Fifth, and Seventh Circuits, rational basis review is applied to the limited public forum.

<sup>53</sup> *Perry v. McDonald*, 280 F.3d 159, 168 n.4 (2d Cir. 2001); *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 346-347 (5th Cir. 2001); *DeBoer v. Vill. of Oak Park*, 267 F.3d 558, 566 (7th Cir. 2001); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 966 (9th Cir. 1999).

review. The difference between those two groups of circuits is the placement, and level of scrutiny applied to, the limited public forum.

While the circuit courts may use differing terms and standards of scrutiny for the designated, or limited, public forum, the circuit courts all use the same general criteria for determining which category property will fall into: the nature of the property and its compatibility with expressive activities, and the government's intent, actual practice, and policy with respect to the property.<sup>54</sup>

Considering that the public forum doctrine was created for analyzing what *real property* is available for speech, it is not immediately clear that the forum analysis would be applicable to intangible property like social media sites—but it almost certainly is.

### **III. Reason Makes More Converts Than Time: The Emerging Property Status of Social Media Webpages**

With the rise of the Cyber Age, courts have begun to apply doctrines once made for tangible property to intangible property. For instance, despite the fact that the tort of conversion normally requires tangible property, some courts have recognized that conversion is equally applicable to intangible property.<sup>55</sup> More importantly though, there have been several occasions where the Supreme Court has applied the public forum doctrine to nonphysical property.<sup>56</sup> Companies like Twitter and Facebook own a possessory interest in their domain name, which should make applying the forum analysis to social media accounts easy.

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<sup>54</sup> See e.g. *Summun v. Callaghan* 103 F.3d 906 (10th Cir. 1997); *United Food Com. Workers Union Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 355 (6th Cir. 1998).

<sup>55</sup> see e.g., *Salonclick LLC v. Superego Mgmt. LLC*, 2017 U.S. Dist. LEXIS 6871, 2017 WL 239379; *Sprinkler Warehouse, Inc. v. Systematic Rain, Inc.*, 880 N.W.2d 16, 23 (Minn. 2016) (Internet domain name constitutes intangible personal property); *Integrated Direct Mktg., LLC v. May*, 495 S.W.3d 73, 76 (Ark. 2016) (intangible property, such as electronic data, can be converted).

<sup>56</sup> *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46-47 (1983) (forum analysis of school mail system); *Cornelius v. NAACP Legal Defense & Ed. Fund., Inc.*, 473 U.S. 788, 801 (1985) (forum analysis of charitable contribution program); *Rosenberg v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 831 (1995) (forum analysis of Student Activity Fund),

Comprised of numerous interconnected communications and networks, the Internet connects “a wide range of end users to each other.”<sup>57</sup> The domain name is “an alphanumeric text representation (often a word)” that identifies an Internet Protocol address (“IP address”) and serves as “the routing address for email, pictures, requests to view a web page, and other data sent across the Internet from other end users.”<sup>58</sup> Just as a street address helps you find a specific house or property, domain names make it easier to find the webpage and content you are searching for. If you were looking to access the homepage of Twitter, all you would need to do is type the domain name, [www.twitter.com](http://www.twitter.com), into an internet search engine like Google, and you would find yourself brought directly to Twitter’s homepage.

The Ninth Circuit found a property right in domain names by using a three-part test: (1) presence of an interest of precise definition; (2) capable of exclusive possession or control; and (3) putative owner establishes a claim to exclusivity.<sup>59</sup> In describing the precise interest, the Ninth Circuit noted that “domain names are valued, bought and sold, often for millions of dollars” and are even “subject to in rem jurisdiction.”<sup>60</sup> In terms of exclusive control, the court stated that the person who registers a domain name is the only person who “decides where on the Internet those who invoke that particular [domain] name—whether by typing into their browsers, by following a hyperlink, or by other means—are sent.”<sup>61</sup> Finally, the Ninth Circuit compared owning a domain name to owning a plot of land, in that “it informs others that the domain name is the registrants and no one else’s.”<sup>62</sup>

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<sup>57</sup> *Register.com, Inc. v. Verio, Inc.* 356 F.3d 393, 409 (2d Cir. 2004).

<sup>58</sup> *Id.* at 409-10.

<sup>59</sup> *Kremen v. Cohen*, 337 F.3d 1024, 1030 (9th Cir. 2003).

<sup>60</sup> *Id.*; 15 U.S.C.A. § 1125(d)(2)(A)(ii).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

Establishing that domain names qualify as a property right is useful for the forum analysis when applied to social media websites because it establishes ownership of the underlying property and the individual user accounts. When Twitter registered the domain name [www.twitter.com](http://www.twitter.com), it essentially reserved a piece of internet real estate to be used for their service. In order to use that service, a person must register and reserve his or her own space or account within Twitter's reserved internet space. By allowing other users to create accounts and use their service, social media companies like Twitter are effectively subleasing their private space for use by private or public individuals and entities. A domain name can convey all of this information and identify ownership. Twitter allowed President Trump to register the account "@realdonaldtrump". When you want to access President Trump's Twitter account, all you have to search for is [www.twitter.com/@realdonaldtrump](http://www.twitter.com/@realdonaldtrump). The "/@realdonaldtrump" indicates that a user, in this case President Trump, has subleased a piece of Twitter's internet real estate for his own use under that name. Similarly, if you wanted to access Rihanna's twitter account, all you would have to search for is [www.twitter.com/@rihanna](http://www.twitter.com/@rihanna). Another way to think about social media accounts is in the context of an easement. Basically, by registering an account, a user has reserved a 'right of way' to use that specific account name, and Twitter's services generally. Thus, the domain name structure makes it easy to identify ownership of particular accounts.

The domain name structure and its usefulness in identifying ownership of particular social media accounts on Twitter is equally applicable to other social media sites like Facebook. The URL structure for Facebook slightly differs from that of Twitter. Twitter allows users to make account names, and those names could either be a person's real name (@BarackObama), a company name (@Starbucks), or some sort of alias (@TheNotoriousMMA).<sup>63</sup> Facebook is a

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<sup>63</sup> @TheNotoriousMMA is the twitter account of UFC champion Conor McGregor.

little different because most account names are the names of the actual people using them. However, people with identical names register for Facebook accounts all the time without any problem. This is possible because of the way that Facebook structured its domain names. [www.facebook.com/johnmayer](http://www.facebook.com/johnmayer) is the Facebook account of John Mayer, the 7 time Grammy Award winner, whereas [www.facebook.com/JohnMayerRadio](http://www.facebook.com/JohnMayerRadio) is the account of someone else with the same name. While the domain name itself can be useful in identifying account ownership by simply looking at the URL, as in the case of [www.twitter.com/@realdonaldtrump](http://www.twitter.com/@realdonaldtrump), it may take a little investigation into the actual webpage when the account name is an alias, as in the case of Conor McGregor's account [www.twitter.com/@TheNotoriousMMA](http://www.twitter.com/@TheNotoriousMMA).

A property right in a domain name should be enough to facilitate the forum analysis on social media pages. The URL structure, and the domain name in particular, help identify who owns the piece of internet real estate at issue, and also who may be subleasing part of that property for their own use.<sup>64</sup> Even though domain names can be readily identified as property, it is still not necessarily clear that the forum analysis would apply to social media websites, because those sites are privately owned. Given that the Public Forum doctrine seeks to categorize *government owned property*, or public property, it is not immediately clear whether the government has the ability to designate privately owned property as a designated public forum. However, given doctrines like the state action limitation<sup>65</sup> and principles governing the traditional public forum, there is no reason why the government should not be able to designate private property it uses for expressive activities as a public forum.

#### **A. Wisdom From The Past: Private Public Forums On Private Property**

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<sup>64</sup> This is not meant to be a guide for ownership in other areas of law. See *PhoneDog v. Kravitz*, 2011 U.S. Dist. LEXIS 129229, 2011 WL 5415612

<sup>65</sup> See source cited *infra* note 87

In most circumstances, First Amendment protections are not applicable when a person is on private property and is excluded.<sup>66</sup> And yet, the courts have recognized that the nature of the underlying property is not always outcome determinative. Such was the case in *Marsh v. State of Alabama*.<sup>67</sup> In that case, the Court considered whether a Jehovah's witness could be criminally punished for distributing religious literature, contrary to the wishes of the town's management, on the sidewalk of a privately-owned company town. The Supreme Court held that running a town is a public function, and therefore, the management of that town must be in compliance with the Constitution.<sup>68</sup> When an owner, "for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."<sup>69</sup>

The court reached a similar conclusion in *Evans v. Newton*<sup>70</sup>, where a municipality tried to circumvent its constitutional obligation to operate a public park on a non-segregated basis by resigning as trustee and transferring title of the property to a private entity.<sup>71</sup> The Court held that, even though title to the park rested in private hands, the "public character of the park requires that it be treated as a public institution."<sup>72</sup> Since "there had been no change in municipal maintenance and concern" over the facility, the Court announced that the park must be "treated as a public institution . . . regardless of who now has title under state law."<sup>73</sup>

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<sup>66</sup> *Hudgens v. N.L.R.B.*, 96 S. Ct. 1029 (1976) (no first amendment right to picket in privately owned shopping mall); *Lloyd Corp., Ltd. v. Tanner*, 92 S. Ct. 2219 (1972) (no first amendment right to leaflet in privately owned shopping mall).

<sup>67</sup> 326 U.S. 501 (1946).

<sup>68</sup> *Marsh*, 326 U.S. at 504-08.

<sup>69</sup> *Id.* at 506.

<sup>70</sup> 328 U.S. 296 (1966).

<sup>71</sup> *Id.* at 297-98.

<sup>72</sup> *Id.* at 302

<sup>73</sup> *Id.* at 300-302

In *Southeastern Promotions Ltd. v. Conrad*<sup>74</sup>, the directors of the Chattanooga Memorial Auditorium denied an application by Southeastern Promotions to put on the play ‘Hair’ at the Tivoli theater—a privately owned theater under long term lease to the municipality.<sup>75</sup> In determining whether the denial of the application constituted a prior restraint, the Court described the Tivoli theater as a municipal facility “designed and dedicated for expressive activities.”<sup>76</sup> The fact that the Tivoli was privately owned had no bearing on the constitutional question.

In *Lebron v. National R.R. Passenger Corp.*,<sup>77</sup> the Court confronted a first amendment challenge to Amtrak’s refusal to allow a man named Michael Lebron to use an advertisement space in Penn Station’s waiting room. In resolving the case, the Court determined that Amtrak, a private corporation, could be regarded as a government entity for First Amendment purposes.<sup>78</sup> Because the Constitution regarded Amtrak as governmental, congressional intent to label it a nongovernment entity does not “relieve it of its First Amendment restrictions” any more than “a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment.”<sup>79</sup> Simply put, declaring an entity to be private “does not alter its characteristics as to make it something other than what it actually is.”<sup>80</sup> The Circuit courts have generally followed the lead of the Supreme Court when it comes to resolving constitutional issues that require characterizing the nature of the underlying property.

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<sup>74</sup> 420 U.S. 546 (1975)

<sup>75</sup> *Id.* at 547.

<sup>76</sup> *Id.* at 557.

<sup>77</sup> 513 U.S. 374 (1995).

<sup>78</sup> *Id.* at 392.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

In *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*,<sup>81</sup> the Tenth Circuit determined that a public easement over otherwise private property was subject to first amendment scrutiny. In that case, the court reasoned that the “forum analysis does not require the government to have a possessory interest in or title to the underlying land,” and that “government ownership or regulation is sufficient for the first amendment to exist.”<sup>82</sup>

The Ninth Circuit reached a similar decision in *Venetian Casino v. Local Joint Executive Bd.*<sup>83</sup> In that case, the Court had to determine whether the sale of a public sidewalk to a private business altered the nature of the property enough that it no longer constituted a public forum.<sup>84</sup> In holding that the property still constituted a public forum, the Court emphasized that “property that is dedicated to a public use is no longer truly private.”<sup>85</sup> Even if a private owner retains title to the underlying property, “by dedicating the property to public use, the owner has given over to the State or to the public generally one of the most essential sticks in the bundle of rights that are commonly characterized as property, the right to exclude others.”<sup>86</sup> In that circumstance, private owners “can no longer claim the authority to bar people from using the property because he or she disagrees with the content of their speech.”<sup>87</sup>

When a private property owner opens up his property for use by the public, it is not automatically converted into a public forum that is subjected to first amendment protections. If that were the case, then almost any business that generally invites the public onto its premises to conduct business would be converted into a public forum. By virtue of allowing users to register accounts and use their service, Twitter itself does not become a public forum, and not every

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<sup>81</sup> 308 F.3d 1114 (10th Cir. 2002)

<sup>82</sup> *Id.* at 1122

<sup>83</sup> 257 F.3d 937 (9th Cir. 2001)

<sup>84</sup> *Id.*

<sup>85</sup> *Venetian*, 257 F.3d at 945-46.

<sup>86</sup> *Id.* (internal quotations omitted).

<sup>87</sup> *Id.* at 946

account on Twitter will be subjected to first amendment scrutiny. Private individuals using a private account continue to possess the right exclude those people whose message or viewpoint they do not agree with from accessing their page or commenting on it. The public forum doctrine does not seek to automatically convert private property used by a private individual for expressive activities into a public forum, and strip away one of their most precious sticks in the bundle of property rights: the right to exclude others. Rather, state action must be found—the actions of the private individual or entity must be attributable to the state in order for constitutional protections to apply.<sup>88</sup> A state action requirement “preserves an area of individual freedom by limiting the reach of federal law and federal judicial power.”<sup>89</sup> Private individuals and entities that create social media accounts may exclude others for any reason, but when the government creates a social media account, their ability to exclude others is subjected to a forum analysis, even though the underlying property is privately owned by the social media company.

Without a state action limitation, the government could simply abrogate its constitutional requirements by utilizing private entities or properties. This danger is most readily seen in *Evans v. Newton*.<sup>90</sup> The fact that a private entity, as opposed to a governmental one, is trampling on our most basic rights does not make the constitutional violation any less egregious. Private infringement of basic freedoms are just as harmful as governmental violations. The difficulty in cases like *Marsh*, *Evans*, and *Lebron* is determining the point where we can no longer make a meaningful distinction between a private entity and the government for the purposes of constitutional protections. But once you have determined that the government is acting, there

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<sup>88</sup> See Erwin Cherminsky, *Constitutional Law: Principles and Policy* 532-43 (5th ed. 2015).

<sup>89</sup> *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

<sup>90</sup> 382 U.S. 296 (1946).

seems to be no reason why the government cannot designate private property it uses as a public forum.

If the government is using private property for expressive activities for the benefit of the public, the fact that the character of the underlying property is private should not matter—the property should effectively be seen as governmental.<sup>91</sup> Cases like *Marsh*, *Evans*, *Lebron*, *Marshfield*, and *Venetian Casino* recognize that there are certain circumstances where constitutional protections are so strong that they may not be violated by either the government or by a private entity. Although these cases dealt with traditional public forums, like parks and sidewalks, their logic extends to the designated public forum. First, by virtue of reviewing content based restrictions in both a traditional public forum and the designated public forum under strict scrutiny, the public forum doctrine inherently recognizes that the public may have such a significant interest in accessing certain areas for speech that, whether the property has been historically used as places for speech or if the government has only recently used it for such a purpose, the government must show a compelling state interest to enforce content based restrictions. Second, if the law does not allow the government to circumvent its constitutional responsibilities by using a private entity or by transferring their property to private individuals, why would the government be able to do so by merely renting or occupying private property? *Marsh*, *Evans*, *Marshfield*, and *Venetian Casino* focused on the continued dedication to public use. The public's use of that property and their interest in the protection of their constitutional rights remained the same, regardless of whose hands the property was in. The same could be said when the government uses private property for expressive activities. Whether the government

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<sup>91</sup> *Marsh*, 326 U.S. at 505-09; *Evans*, 382 U.S. at 300-02.

intentionally opens up government owned or private property for expressive activities, the public's interest in accessing that space remains the same.

It is difficult to draw a distinction between property that is public and property that is private when the government is permitting the public to engage in expressive activities. If the public were permitted to freely use a municipally owned auditorium for expressive activities, there would be little doubt that the Constitution would restrict the government's ability to enforce content based restrictions. But whether the underlying nature of that auditorium is public or private, the public's interest in accessing that space to exercise free speech is the same.<sup>92</sup>

Likewise, if the government were unable to accommodate a meeting between the general public and particular government officials because of spatial issues, and if the government were to then rent out a privately owned space for that meeting, there seems to be no reason why the government should then be able to exclude people at will. The nature of the meeting and the importance to the public remains the same whether that meeting takes place in a government owned building or one owned by a private individual.

#### **IV. A Fig For the Other Side of Complexity: The Circuit Court Approach to the Forum Analysis**

Having established the contours of the public forum doctrine and its applicability to both private property and social media sites, actually applying the forum analysis to social media websites becomes quite routine. Although the Supreme Court has never articulated clear criteria for categorizing property as a public forum, the courts look to general factors such as the nature of the property, its compatibility with expressive activities, the government's intent, actual

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<sup>92</sup> see *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114 (10th Cir. 2002) (public easement over otherwise private property was subject to first amendment scrutiny).

practice and policy with respect to the property.<sup>93</sup> Likewise, the circuit courts consider “the presence of any special characteristics regarding the environment” or property at issue.<sup>94</sup> None of these factors are dispositive in the forum analysis.<sup>95</sup> It should also be noted that these factors are most often used to determine whether a designated or nonpublic forum has been created because traditional public forums are places which have “immemorially been held in the 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.”<sup>96</sup> Very few places, if any, will ever meet that criteria other than sidewalks, streets and parks.<sup>97</sup>

The government creates a designated public forum only when it *intentionally* makes property “not traditionally opened to assembly and debate” available for expressive use by the public or for specific speakers.<sup>98</sup> A designated forum is not created through “inaction or by permitting only limited discourse . . . the government must intend to grant general access to its property for expressive use.”<sup>99</sup> Courts may look to the “policy the government has adopted to govern access to the forum.”<sup>100</sup> If a person must obtain permission, “the government intends to create a limited,<sup>101</sup> rather than designated public forum.”<sup>102</sup> In the event that the government has adopted a policy governing access, courts will “examine how that policy has been implemented in practice.”<sup>103</sup> If a policy requires a speaker to obtain permission before accessing the forum, and

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<sup>93</sup> See e.g. *Summun v. Callaghan* 103 F.3d 906, n.13 (10th Cir. 1997); *United Food Com. Workers Union Local 1099 v. Sw. Ohio Reg'l Transit Auth.*, 163 F.3d 341, 355 (6th Cir. 1998).

<sup>94</sup> *Bowman v. White*, 444 F.3d 967, 978 (8th Cir. 2006)

<sup>95</sup> *Id.* at n.6

<sup>96</sup> *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

<sup>97</sup> *Ark. Educ. TV Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) (“The Court has rejected the view that traditional public forum status extends beyond its historic confines”).

<sup>98</sup> *Seattle Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489, 496 (9th Cir. 2015).

<sup>99</sup> *Id.* at 497

<sup>100</sup> *Id.*

<sup>101</sup>The Ninth Circuit applies rational basis review to limited public forum, while other circuits, like the Third, apply strict scrutiny.

<sup>102</sup> *Seattle*, 781 F.3d at 497

<sup>103</sup> *Id.*

that policy is routinely ignored, “such that in practice permission is granted as a matter of course to all who seek it, the government may have created a designated public forum.”<sup>104</sup> Likewise, the courts look to the nature of the property at issue. When a piece of property is “designed for and dedicated to expressive activities,” the courts will “more readily infer the intent to create a designated public forum.”<sup>105</sup> In contrast, if the government uses a particular piece of its property as “part of a government-run commercial enterprise, and the expressive activities . . . [permitted] are only incidental to that use, that fact tends to support a limited public forum.”<sup>106</sup>

The Ninth Circuit applied the above analysis in *Seattle Mideast Awareness Campaign v. King Cnty.*<sup>107</sup> In that case, the Ninth Circuit determined that advertising space on the side of King County Metro buses constituted a limited public forum, and the government’s content based restrictions were subject only to rational basis review.<sup>108</sup> In order to access Metro’s bus advertising program, everyone was required “to obtain permission through a pre-screening process.”<sup>109</sup> Likewise, the policy had “imposed categorical subject-matter limitations,” including the exclusion of ads for alcohol and tobacco products.<sup>110</sup> Therefore, the policy intended to grant only selective access to the advertising program.

When reviewing the implementation of the policy, the court noted that the county had “pre-screened all proposed ads and consistently rejected ads that were non-compliant.”<sup>111</sup> The Ninth Circuit noted that, when reviewing the implementation of a government policy, the focus is on the “enforcement of the policy as a whole, not just the specific provisions invoked to exclude the

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<sup>104</sup> *Seattle*, 781 F.3d at 497

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> 781 F.3d 489, 496 (9th Cir. 2015)

<sup>108</sup> *Id.* 498.

<sup>109</sup> *Id.* at 497

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 498.

ads at issue.”<sup>112</sup> The court found no evidence that “the County . . . routinely [accepted] . . . non-compliant ads.”<sup>113</sup>

The Ninth Circuit found that the nature of the property—the advertisement space on county buses—indicated the creation of a limited public forum. The Court reasoned that the purpose of the advertising program was to “generate revenue for the bus system.”<sup>114</sup> The property’s use as a commercial enterprise was found to be “incompatible with granting the public unfettered access for expressive activities” because “allowing certain expressive activity might harm advertising sales or tarnish business reputation.”<sup>115</sup> On balance, the Ninth Circuit concluded that the factors indicated that a limited public forum was created.

It should be noted that, if a particular piece of property were found to constitute a nonpublic forum—or a limited public forum if you are in the Ninth Circuit—in one circuit, it does not necessarily mean that it will be the same in another. For instance, the Second Circuit considered a similar transit advertising program in *New York Magazine v. Metropolitan Transp. Auth.*,<sup>116</sup> but found it to be a designated public forum as opposed to a limited one, and the government’s content based restrictions were subjected to strict scrutiny—not rational basis review.

In that case, the crucial factor for the Second Circuit was the nature of the exclusions. Like the Ninth Circuit, the Second Circuit stated that, if the government were acting in its “proprietary capacity for the purpose of raising revenue or facilitating the conduct of its own internal business” then the Court would consider the forum to be nonpublic.<sup>117</sup> With this in mind, the Second Circuit rejected the argument that any restriction on access to the forum evidences an

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<sup>112</sup> *Seattle*, 781 F.3d at 498

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> 136 F.3d 123 (2d Cir. 1998).

<sup>117</sup> *Id.* at 129.

intent not to create a public forum.<sup>118</sup> The Court reasoned that exclusions of categories of speech through a rule does not “ipso facto [create] a nonpublic forum” because then “every designated public forum [would] be converted into a nonpublic forum the moment the government did what is supposed to be impermissible in a designated public forum, which is to exclude speech based on content.”<sup>119</sup> Therefore, the Second Circuit looked to the nature of the excluded categories to determine whether the government was really acting in a proprietary interest. When the government disallows political speech, and only allows commercial speech, the main goal is to make money. Conversely, if political speech were allowed, then it “evidences a general intent to open a space for discourse” because “the possibility of clashes of opinion and controversy . . . [are] inconsistent with sound commercial practice.”<sup>120</sup> Since the MTA allowed both commercial and political speech in its advertising space, the Court concluded that the advertising space constituted a designated public forum and subjected the government’s content based restrictions to strict scrutiny.<sup>121</sup>

The Third Circuit was confronted with determining the forum status of a high school auditorium in *Gregoire v. Centennial School Dist.*<sup>122</sup> Looking to the district’s policy for renting school facilities, the court noted that the district’s revised policy regarding use of its facilities provided for religious discussion in some contexts, but also contained provisions “purporting to exclude certain categories of religious speech.”<sup>123</sup> By virtue of its policy, the district excluded “auditorium rental to non-profit and charitable organizations.”<sup>124</sup> The district argued that the policy evidenced its intent not to create an open forum but to create a closed forum “with access

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<sup>118</sup> *New York Magazine*, 136 F.3d at 129

<sup>119</sup> *Id.* at 129-30.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> 907 F.2d 1366 (3rd Cir. 1990).

<sup>123</sup> *Id.* at 1373

<sup>124</sup> *Id.*

properly restricted to those groups whose purpose is consistent with the educational function and mission of the school.”<sup>125</sup> The Third Circuit rejected that argument because the district routinely allowed politically active groups and commercial profit-making ventures to access the forum, none of which related to the school or other civic purposes.<sup>126</sup> The “educational mission of the school” was so vague that the school had “virtually unlimited discretion in deciding which groups qualify and which groups do not.”<sup>127</sup> Likewise, the Court noted that “the definition of the standards for inclusion and exclusion must be unambiguous and definite.”<sup>128</sup> Finally, the Third Circuit explained that “school facilities, after hours, are compatible with expressive activity” and that “a vast amount of expressive activity takes place now and has taken place in those facilities.”<sup>129</sup> On balance, the court found that a designated public forum was created and that strict scrutiny applied to the school district’s restrictions.<sup>130</sup>

While the Third Circuit found that the school facilities in *Gregoire* constituted a designated public forum, the Court reached the opposite conclusion when considering the forum status of Arnold Field, an athletic field owned by the school in *Student Coalition for Peace v. Lower Merion Sch. Dist. Bd. of Sch. Directors*.<sup>131</sup> The school board in that case maintained a policy in which non-school sponsored organizations had to obtain permission to use Arnold Field.<sup>132</sup> The Third Circuit found that neither the policy as written, nor “the actual practice” of the school board, “manifests an intent to designate Arnold Field as a public forum” because permission was never “granted as a matter of course.”<sup>133</sup> Likewise, the Court found that the special nature of the

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<sup>125</sup> *Gregoire*, 907 F.2d at 1373

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 1374.

<sup>128</sup> *Gregoire v. Centennial School Dist.*, 907 F.2d 1366, 1375 (3rd Cir. 1990)

<sup>129</sup> *Gregoire*, 907 F.2d at 1377.

<sup>130</sup> *Id.* at 1378

<sup>131</sup> 776 F.2d 431 (3rd Cir. 1985).

<sup>132</sup> *Id.* at 437.

<sup>133</sup> *Student Coalition for Peace v. Lower Merion Sch. Dist. Bd. of Sch. Directors*, 776 F.2d 431, 436 (3rd Cir. 1985).

property bolstered its conclusion that the school did not intend to create a designated public forum. Students, teachers and others do not have “an absolute constitutional right to use all parts of a school building or its immediate environs for . . . unlimited express activity.”<sup>134</sup> An athletic field does not “exist primarily for expressive activity, especially where large numbers of nonstudents are involved.”<sup>135</sup>

## **V. A New Hope: A Proposed Public Forum Application To Government Social Media Accounts**

While the public forum analysis lends itself to social media pages, not every government account should be treated the same. When the courts undertake a forum analysis, they must pay particular attention to the nature of the account, specifically, whether that account is used by a particular government official or a government agency. The presence of any policy, combined with the actual practice of the government, will often determine which forum is present because the nature and compatibility of social media with expressive activity will be the same for each account. Yet, there are also important policy reasons why accounts should be treated differently. Not only will social media accounts of government agencies often constitute a different type of forum than the social media account of specific government officials like the President, Senators and Governors, but also the social media account of a U.S. Senator should not be treated the same for public forum purposes as the social media account of a local city councilman.

### **A. Policy and Actual Practice of the Government: Why It Makes A Difference**

When Courts begin a forum analysis, the first place to start should always be to look for any particular social media policies maintained by the government and the actual practice of the

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<sup>134</sup> *Student Coalition for Peace*, 776 F.2d at 437.

<sup>135</sup> *Id.*

government with respect to that policy. For the most part, individual departments of the federal government maintain their own social media policies.<sup>136</sup> These policies will usually indicate the purpose of the social media account. For instance, the Department of the Interior’s social media policy states that its purpose is to “serve as an official means of communication or public engagement.”<sup>137</sup> Likewise, the Department of Energy uses its social media accounts to “expand the conversation on energy issues” and to “engage the public in discussion and include the public in the governing process.”<sup>138</sup>

Policies like that of the Department of Energy tend to indicate that the government is intending to designate their social media account as a designated public forum.<sup>139</sup> The policies explain *why* the government is using a social media account; it shows the government is intending to open property and do something with it, and if that ‘doing something with it’ turns out to be for public discourse, then it is likely a designated public form.<sup>140</sup> Even if there is a clear policy, courts must still look to the actual practice of the government with respect to that policy. If the government consistently enforces its restrictions, then it is more likely that a nonpublic forum was created.<sup>141</sup>

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<sup>136</sup> *E.g.* DEP’T OF INTERIOR, SOCIAL MEDIA POLICY (2010) <https://www.doi.gov/notices/Social-Media-Policy#FederalPolicies>; U.S. OFF. OF PERSONNEL MGMT, SOCIAL MEDIA POLICY (2017) <https://www.opm.gov/news/social-media-presence/social-media-policy.pdf>.

<sup>137</sup> DEP’T OF INTERIOR, SOCIAL MEDIA POLICY (2010) <https://www.doi.gov/notices/Social-Media-Policy>

<sup>138</sup> DEP’T OF ENERGY, SOCIAL MEDIA POLICY <https://energy.gov/about-us/web-policies/social-media>

<sup>139</sup> For the purposes of the following discussion, designated public forum is used to describe a place that the government has opened to the public generally for expressive activities. Content based restrictions in this forum are subject to strict scrutiny. A nonpublic forum is property not considered a designated public forum, including property that is opened for a limited class or speakers or subjects. This is not meant to be an endorsement or comment on the correct formulation of the public forum doctrine.

<sup>140</sup> *see Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, n. 17 (3d Cir. 1992).

<sup>141</sup> *E.g. Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 47 (1983) (consistent practice to require permission before access to school system indicated a nonpublic forum); *Hopper v. City of Pasco*, 241 F.3d 1067, 1076 (9th Cir. 2001) (“consistency in application is the hallmark of any policy designed to preserve the non-public status of a forum”).

Without a policy though, determining the intended use of the forum is more difficult. The government could acquire and open property for any number of reasons, not just for expressive activities—that’s why intent is the “touchstone of the forum analysis.”<sup>142</sup> Rather than affirmatively opening an account for public discourse, the government may merely be *permitting* expressive activity to occur, which tends to indicate a nonpublic forum.<sup>143</sup> Government accounts of specific officials, like President Trump, are less likely to be subjected to a specific social media policy.<sup>144</sup> While an absence of policy could indicate a nonpublic forum, it may cause these types of government officials’ accounts to be considered designated public forums for two reasons.<sup>145</sup>

First, without a clear standard for exclusion and inclusion, government content based restrictions look more like viewpoint suppression. Restrictions can come in the form of express policy statements, or even by the government turning its account to private, which forces users to require permission to view and interact with the government account. The restrictions must bear some relation to the purpose of the forum, otherwise, when the government “reserves the right to exclude a speaker *for any reason at all*, or without reference to the purpose of the forum, the potential for government censorship is at its greatest.”<sup>146</sup> If the designated public forum category is to “retain any vitality . . . the definition of the standard for inclusion and exclusion must be unambiguous and definite.”<sup>147</sup> For example, the school district in *Gregoire v. Centennial School Dist.* argued that it had created a nonpublic forum, limited to activities compatible with the

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<sup>142</sup> *General Media Communications, Inc. v. Cohen*, 131 F.3d 273, 279 (2d Cir. 1997).

<sup>143</sup> *Cornelius v. NAACP LEGAL Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (“The government does not create a public forum by inaction or by permitting limited discourse”).

<sup>144</sup> It appears as though no social media policy governs President Trump’s use of social media.

<sup>145</sup> See *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 718 (E.D. Va. 2017) (post affirmatively soliciting comments from constituents indicated a public forum was created).

<sup>146</sup> *United Food Com. Workers Union Local 1099 v. Sw. Ohio Reg’l Transit Auth.*, 163 F.3d 341, 353 (6th Cir. 1998).

<sup>147</sup> *Gregoire v. Centennial School Dist.*, 907 F.2d 1366 (3d Cir. 1990).

intended purpose of the property and its policy, which stated that performances in a school auditorium had to have a school or civic purpose.<sup>148</sup> Although the Court agreed that the school could place restrictions in order to create a nonpublic forum, the “breadth of access” granted by Centennial under its policy undercut its contention that it had created a nonpublic forum.<sup>149</sup> Clear standards for inclusion and exclusion, required in a nonpublic forum, were absent.<sup>150</sup> Effectively, the school district claimed it had created a closed forum but routinely granted access to “performances . . . not required to relate to school or civic purposes.”<sup>151</sup> Clear policy and consistent enforcement is key to creating a nonpublic forum. Without it, the accounts of government officials, like Senators and Governors, run the risk of being labeled a designated public forum because the breadth of access would actually be quite wide—the only people who would be “restricted” from the forum are those who express views the government disagrees with. In other words, the forum would truly be available to the public at large, which tends to indicate a designated public forum. For those courts that assert that a designated public forum could be reserved for a limited class of speakers or for limited subjects, and subject content based restrictions to strict scrutiny, restrictions could be helpful in distinguishing those that are meant to create a designated public forum for a limited purpose from those that are put in place in order to preserve the property as a nonpublic forum.<sup>152</sup> The distinctions between categories matters, because it determines the level of scrutiny that applies, no matter what court one is in.

Second, without clear policy, courts may give more weight to the nature and compatibility of the property with expressive activities when trying to discern the government’s

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<sup>148</sup> *Gregoire*, 907 F.2d at 1374

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 1375.

<sup>151</sup> *Id.* at 1374.

<sup>152</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983) (stating the government can “reserve the forum for its intended purpose”).

intent.<sup>153</sup> This factor will not vary by the type of government account because the nature and compatibility of social media is the same for each.

### **B. Nature of the Property and Its Compatibility with Expressive Activity**

The nature of the property and its compatibility with expressive activities is pretty straightforward. The court essentially looks at the general purpose of the property and determines if allowing expressive activity would be disruptive to that purpose. For example, the primary purpose of a military base is to train soldiers to fight wars—not provide forums for speech.<sup>154</sup> Allowing expressive activity on a military base is disruptive to its purpose and, therefore, the property is incompatible with expressive activity. When property is incompatible with expressive activity, it tends to support a finding of a nonpublic forum.<sup>155</sup>

Justice Kennedy’s description of social media as “the modern public square” is not too far off. Twitter is an online social networking service that allows users to interact with one another across the country. It allows users to broadcast information within seconds to a wide audience, which can include national or local news and the individual user’s thoughts or feelings.<sup>156</sup> That audience can then engage the original poster in the comment thread, which is public to the world.<sup>157</sup> A Twitter account can be public, meaning anyone can follow and interact with a particular account without permission, or private, in which case permission will be required in order to access an account’s page.

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<sup>153</sup> *Cornelius v. NAACP LEGAL Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (“the Court has also examined the nature of the property and its compatibility with expressive activity to discern the government’s intent”).

<sup>154</sup> *Greer v. Spock*, 414 U.S. 828, 838 (1976).

<sup>155</sup> *Sanchez v. City of Los Angeles*, 2011 U.S. Dist. LEXIS 150627

<sup>156</sup> TWITTER, <http://twitter.com/privacy> (last visited March 3, 2017) (“What you say on Twitter may be viewed all around the world instantly”).

<sup>157</sup> *Id.*

Facebook is another social networking service and is used by 145.9 million Americans.<sup>158</sup> In 2010, Time Magazine noted Facebook’s ability to connect more than half a billion people around the world, redefine relationships, and expand the ability for people to express themselves and share information.<sup>159</sup> Facebook’s timeline works similarly to Twitter: individual users can post what they are doing, thinking, or even publish links to other webpages or news sources. Via the comment section, other Facebook users may provide their own thoughts and insights to the original poster’s comments, which can often ignite a discussion. Facebook profiles or pages, like Twitter, can be public or private, the latter of which requires permission to access. One of the defining features of social media platforms in general is their ability to allow users to engage and interact from the comforts of their own home.

Social media’s compatibility with expressive activities is beyond dispute: social media was created with the explicit intention to facilitate expressive activity. For instance, Twitter’s stated mission is to “give everyone the power to create and share ideas and information instantly, without barriers.”<sup>160</sup> Likewise, Twitter states that it enables users to “see what people are talking about” and to “spark a global conversation.”<sup>161</sup> More importantly though, social media spaces have special attributes that insulate them, to some degree, from the problems that plague forums on real property.

The most frequent basis for an exclusion, and the finding of a nonpublic forum, is that the expression or speaker is distracting or disruptive to such a degree that they interfere with the forum’s purpose.<sup>162</sup> For instance, the purpose of airport terminals is to allow passengers to move

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<sup>158</sup> Trevor Puetz, *Facebook: The New Town Square*, 44 SW. L. REV. 385, 404 (2014).

<sup>159</sup> Lev Grossman, *Person of the Year 2010: Mark Zuckerberg*, TIME (Dec. 15, 2010), available at [http://content.time.com/time/specials/packages/article/0,28804,2036683\\_2037183,00.html](http://content.time.com/time/specials/packages/article/0,28804,2036683_2037183,00.html) .

<sup>160</sup> TWITTER, [https://about.twitter.com/en\\_us/company.html](https://about.twitter.com/en_us/company.html) (last visited March 7, 2017)

<sup>161</sup> TWITTER, <https://about.twitter.com> (last visited March 7, 2017)

<sup>162</sup> See e.g. *United States v. Kokinda*, 497 U.S. 720, 733-34 (1990)

“as efficiently as possible.”<sup>163</sup> If the solicitation of money were allowed in those terminals, it arguably would detract from the terminals purpose because “the individual solicited must decide whether or not to contribute (which itself might involve reading the solicitors literature or hearing his pitch), and then, having decided to do so, reach for a wallet, search it for money, write a check or produce a credit card.”<sup>164</sup> This would effectively defeat the forums purpose—to facilitate movement of passengers as efficiently as possible. As an online forum, social media spaces do not lend themselves as readily those types of disruptions.

The comments thread on social media makes it more difficult for would-be protestors to disrupt the forum—but not impossible.<sup>165</sup> If a public forum is opened at a municipal auditorium for public dialogue about local issues, protestors could disrupt the forum in any number of ways. They could physically invade the forum and take control of it, or they could chant and protest so loudly that the speaker literally cannot be heard.<sup>166</sup> But the comments section of an online forum lacks those problems. All comments and responses from the government and the public are in text format and are readily available to read without disruption. Even if the government were to hold a live Q&A via live video stream, like Facebook Live, those viewing the stream can only respond in text.<sup>167</sup> Other users could not shout or disrupt the stream in a way that the speaker cannot be heard. But that does not necessarily mean that a social media user could never detract from the conversation and be disruptive to an intolerable degree.

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<sup>163</sup> *Make the Rd. by Walking, Inc. v. Turner*, 378 F.3d 133, 148 (2d Cir. 2004) (quoting *International Soc’y For Krishna Conciousness v. Lee*, 505 U.S. 672 , 683 (1992))

<sup>164</sup> *Id.*

<sup>165</sup> see Compl. ¶ 29, <https://assets.documentcloud.org/documents/3892179/2017-07-11-Knight-Institute-Trump-Twitter.pdf>

<sup>166</sup> See Will DiGravio, *Students Protest Lecture by Dr. Charles Murphy at Middlebury College*, YOUTUBE (Mar. 2, 2017), <https://www.youtube.com/watch?v=a6EASuhefeI>

<sup>167</sup> For live video streams over social media, viewers are permitted to comment in the comments thread of the broadcast.

The internet is home to an entire online social community known as “Internet trolls.” Internet trolls are those who “deliberately tr[y] to disrupt, attack, offend or generally cause trouble within [an Internet] community by posting certain comments, photos, videos, GIFs or some other form of online content.”<sup>168</sup> As masters of sabotage, Internet trolls, working alone or with other trolls, could make a series of inflammatory posts to agitate other users and derail the purpose of the forum.

Take the Department of Energy for example. Let’s say that the Department of Energy operates a twitter account solely for the purpose of engaging citizens and sparking a conversation about energy issues facing the country. If an Internet troll comes along and begins to make a series of inflammatory posts about abortion or gun laws, or about something so outrageous like the existence of flat earth, and other users begin to discuss those issues over the Department of Energy’s twitter account. In that case, the forum has been compromised—it is no longer being used for its intended purpose of discussing energy issues. But the work of internet trolls are not nearly disruptive enough to defeat social media’s compatibility with expressive activity, and in many ways, social media sites are the quintessential public forum. Social media sites are able to instantly connect millions of people, culminating in the ultimate marketplace of ideas.<sup>169</sup>

## **VI. Why Scrutiny Matters: A Variation of *Packingham***

On balance, consideration of the policy and practice, government intent, and the nature of the property and its compatibility with expressive activities will determine what the forum status of government social media accounts are. Once you know which category of public forum the property is, you will also know what level of scrutiny to apply. But, as discussed in part V

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<sup>168</sup> Elise Moreau, *10 Types of Internet Trolls You’ll Meet Online*, LIFEWIRE (Jan. 27, 2018) <https://www.lifewire.com/types-of-internet-trolls-3485894>

<sup>169</sup> See generally, *Abrams v. United States*, 250 U.S. 616, 624-25 (1919) (Holmes, J., Dissenting).

section B, online public forums do not lend themselves as readily to the types of disruptions that plague public forums on real property. Any sort of disruption that does occur is likely to be addressed by the underlying social media company. So in what circumstances would the level of scrutiny matter? The answer is when the government adopts policies that affirmatively exclude certain speakers.

A variation of the *Packingham* case provides a good example of a restriction whose validity could be dependent on the level of scrutiny applied. The statute at issue in *Packingham v. North Carolina*<sup>170</sup> made it a “felony for a registered sex offender to access a commercial social networking web site where the sex offender knows that the site permits minor children to become members or to create and maintain personal web pages.”<sup>171</sup> The statute was struck down not only because the Court recognized social media as an important place for expressive activities, but because the statute was overly broad.<sup>172</sup> Traditional social media sites, like Twitter and Facebook, were arguably not the only ones subject to restriction: sites like “amazon.com, thewashingtonpost.com, and webmd.com” would likely qualify.<sup>173</sup> However, the Court stated that states “could [enact] more specific laws.”<sup>174</sup> Unlike the statute at issue in *Packingham*, the government could enact a social media policy that allows individual government social media accounts to block registered sex offenders from accessing their specific page. Such a restriction would not bar a registered sex offender from creating a social media account altogether, but would only prevent them from accessing and engaging a specific government account.

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<sup>170</sup> 137 S.Ct. 1730 (2017).

<sup>171</sup> *Id.* at 1733.

<sup>172</sup> *Id.* at 1736.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.* at 1737.

In resolving whether such policies are valid restrictions, what court the case is in will, in many cases, be outcome determinative because of the different approaches the circuit courts take to the categories of public forum. The categories themselves matter because they dictate what level of scrutiny the government is held to, and a restriction may survive under one test but not the other.

First, we can examine the restriction under strict scrutiny. Under strict scrutiny, content based exclusions are valid “when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest.”<sup>175</sup> In the case of the sex offender restriction, the state could argue that the compelling interest it serves is the protection of children, which has been found to be a compelling state interest.<sup>176</sup> The ultimate validity of the statute, as was the case in *Packingham*, will rest on whether that restriction is narrowly drawn to achieve that interest.

In one sense, the restriction is about as narrow you can get. There isn’t much the state can do by way of restricting other social media user’s ability to access the government account aside from deleting their comments or blocking them outright. Preventing sex offenders from accessing a government account arguably provides minors a safe place to engage other users and get information. According to the Justice Department, in 76% of sex crimes against minors, the first encounter with a predator occurred in an online chatroom.<sup>177</sup> The restriction could be seen as a way to limit the possibility of an encounter between the sex offender and minor. It does not take any stretch of the imagination to know that a sexual predator and young minor could exchange views over a government social media account’s post, continue to converse privately

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<sup>175</sup> *Hopper v. City of Pasco*, 241 F.3d 1067, 1074 (9th Cir. 2001).

<sup>176</sup> *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 88 (1st Cir. 2004).

<sup>177</sup> UNITED STATES DEPARTMENT OF JUSTICE, *Raising Awareness About Sexual Abuse: Facts and Statistics*, <https://www.nsopw.gov/en-US/Education/FactsStatistics?AspxAutoDetectCookieSupport=1#reference>

with direct messaging, which could lead to a meet up. Through the course of public debate, and especially online, users often reveal personal experiences or information in support of their viewpoint about issues like abortion. The revelation of personal information or past experiences could be used by a predator to lull an unsuspecting minor into a feeling of comfort with the predator, who may then convince the minor to meet up in person and engage in sexual activity.

On the other hand, the restriction may not be so narrowly tailored. In essence, the government restriction may have such a minimal impact on preventing an encounter that it casts doubt on the necessity of imposing the restriction.<sup>178</sup> In that case, the restriction could be seen as “burdening substantially more speech than is necessary to further its interests” because the sex offenders could not lend their viewpoint on matters of public concern.<sup>179</sup> While the validity of a restriction on sex offenders could survive strict scrutiny, it may have a better chance under rational basis review.

The lowest level of scrutiny, rational basis review, requires that restrictions are “reasonable in light of the purpose of the forum and reflect a legitimate government concern.”<sup>180</sup> These restrictions need not be the “most reasonable or the only reasonable limitation.”<sup>181</sup> Likewise, the government does not need to ensure “the presence of adequate alternative outlets.”<sup>182</sup> Even if the restriction is reasonable, “it will be struck down if it is in reality a façade for viewpoint-based discrimination.”<sup>183</sup> Since the protection of minors against abuse has been found to be a compelling interest, there is little doubt that it would qualify as a legitimate government concern. If the purpose of the forum is to facilitate public discourse, or even just to

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<sup>178</sup> See *Parents Involved in Community Schools v. Seattle School District*, 127 S. Ct 2738, 2760 (2007) (finding that the minimal impact on discrimination indicated that other methods could have been employed).

<sup>179</sup> *Warren v. Fairfax County*, 196 F.3d 186, 198 (4th Cir. 1999).

<sup>180</sup> *Make the Rd. by Walking, Inc. v. Turner*, 378 F.3d 133, 147 (2d Cir. 2004).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 151.

get the government's message out, the State could argue that, by preventing registered sex offenders from entering the forum, the forum itself does not become an enclave for the sexual predation of minors. Likewise, such a restriction is unlikely to be found as a pretext for viewpoint discrimination, because the restriction applies to all registered sex offenders, regardless of their particular views.

## **VII. Heads Will Roll: Can Donald Trump Block Me On Twitter?**

With the contours of the public forum doctrine sufficiently defined, applying it to government social media accounts is quite routine. Donald Trump's account will be used as an example for analysis because accounts like his will be the hardest to categorize. Social media accounts of agencies like the Department of Energy are easier to categorize because those accounts are more likely to be subjected to clear policy, which often evidences government intent and the standards for inclusion and exclusion. Categorizing accounts like Donald Trump are much harder, because these accounts are often not subject to policy, which makes discerning intent more difficult. It should be noted that the relevant forum is Donald Trump's twitter account as a whole, not his individual posts. For the purposes of this discussion, it will be assumed that Trump is engaged in state action, making his use of twitter equivalent to the government using twitter.<sup>184</sup>

At a bare minimum, Donald Trump's twitter account is a nonpublic forum.<sup>185</sup> Government owned property, or private property burdened by the government, will fall into one of three

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[https://knightcolumbia.org/sites/default/files/content/12\\_21\\_letter%20re%20government%20concession%20in%20travel%20ban%20case.pdf](https://knightcolumbia.org/sites/default/files/content/12_21_letter%20re%20government%20concession%20in%20travel%20ban%20case.pdf)

<sup>185</sup> Even if government property could not be forum at all, *Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 677 (1998), social media accounts could not fall into that category. Social media is so compatible with expressive activity that some form of First Amendment protections must apply. If any property were to not constitute a type of forum at all, it would most likely be jails and military bases, given the substantial disruption that expressive activity can cause on those properties.

categories of forum—traditional, designated, or nonpublic.<sup>186</sup> Since Twitter does not qualify as a traditional public forum, if Trump’s account is not found to be a designated public forum, then by default, it is a nonpublic forum.<sup>187</sup> The real question then, is whether Donald Trump’s account qualifies as a designated public forum.

As discussed in Part V section B, social media accounts are highly compatible with expressive activity. As an online forum, they do not lend themselves as readily to the types of disruptions that forums on real property do. Comments that would otherwise be disruptive in a forum on real property could have less of an impact on an online forum because the disruptive comment could easily be ignored by others in the forum—users have the choice to only respond to comments conveying legitimate arguments and ideas. Moreover, online forums eliminate spatial issues and can accommodate thousands of users and comments.<sup>188</sup> Likewise, online forums also eliminate timing issues. When the government creates a forum on real property, that forum often has a limited life span. For instance, if the government were to designate an auditorium as a public forum, it’s likely that the event will run for a specific period of time. Once the event is over, the public may not have the same right of access to that property or those speakers, because the forum will cease to exist. But this is not so on an online forum. Conversations occurring over specific government posts in an online forum can last for hours if not days later. Therefore, online forums maximize the “marketplace of ideas” because all voices

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<sup>186</sup> For the purposes of the following discussion, designated public forum is used to describe a place that the government has opened to the public generally for expressive activities. Content based restrictions in this forum are subject to strict scrutiny. A nonpublic forum is property not considered a designated public forum, including property that is opened for a limited class or speakers or subjects. This construction is not meant as an endorsement of any one interpretation or approach to the public forum doctrine by the Supreme Court or Circuit Courts

<sup>187</sup> See *Perry Educ. Ass’n v. Perry Local Educator’s Ass’n*, 460 U.S. 37, 45-46 (1983)

<sup>188</sup> See Donald Trump (@realdonaldtrump), TWITTER ( Mar. 1, 2018 1: 31 PM) <https://twitter.com/realdonaldtrump/status/969324283036971009>. This tweet generated 5.5k comments at the time of this writing.

have an opportunity to be heard at one point or another.<sup>189</sup> With these considerations in mind, this factor, the nature and compatibility of social media with expressive activities, would tend to support finding his twitter account is a designated public forum.

Turning next to policy and the actual practice of Donald Trump with respect to his use of twitter, it appears as though no clear policy controls his use of twitter. For starters, Trump's account is set to public, meaning that anyone can follow his account without first having to request permissions. If speakers do not have to obtain permission before accessing the forum, courts have concluded that the policy factor favors a designated public forum.<sup>190</sup> However, even if permission were required, an absence of clear policy could be fatal to any argument that only a nonpublic forum exists. Since the definitions for exclusion and inclusion are not clearly defined, the risk for government censorship is at its greatest. For example, the First Knight Institute alleges that Rebecca Buckwalter, a writer and legal analyst, was blocked by Trump because she asserted the Russia won the White House for Trump in the comment section of one of his tweets.<sup>191</sup> In the absence of policy, it's more likely that such an action would be considered viewpoint discrimination because Ms. Buckwalter was blocked shortly after expressing her viewpoint, one that Trump presumably does not agree with nor wants circulating around social media. In fact, in the First Knight Institute case, the government conceded that the plaintiffs were blocked because their tweets criticized the President and his policies—which is impermissible in

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<sup>189</sup> See generally Joseph Blocher, *Institutions in The Marketplace of Ideas*, 57 DUKE L. J. 821 (2008) <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1346&context=dlj>

<sup>190</sup> See e.g. *Doe v. City of Albuquerque*, 667 F.3d 1111, 1129-30 (10th Cir. 2012) (“The city does not contend that its public libraries offer anything less than general access to the public, without any need for pre-approval. Accordingly, this factor indicates the City’s libraries are designated public forum”); *Seattle Mideast Awareness Campaign v. King Cnty.*, 781 F.3d 489, 497 (9th Cir. 2015) (“Granting selective access in that fashion negates any suggestion that the government intends to open its property to the indiscriminate use by all or part of the general public, necessary to create a designated public forum”).

<sup>191</sup> Compl. ¶ 50 <https://assets.documentcloud.org/documents/3892179/2017-07-11-Knight-Institute-Trump-Twitter.pdf> ]

all types of forums.<sup>192</sup> Moreover, Trump has repeatedly stated that his social media account is the only way to combat the “Fake News Media.”<sup>193</sup> A court could readily conclude, then, that Trump intended to use his social media account as a legitimate source for reliable information gathering by the public, and to allow citizens to engage in debate in the comments section. This factor then, would tend to indicate that a designated public forum exists.

Finally, considering Trump occupies one of the most powerful offices in the world, a thumb should be placed on the scale for finding a designated public forum. Even though Trump is use to the spotlight, he must have had some expectation that, once elected President, his use of twitter would be scrutinized even further and that those tweets would carry the weight and power of the United States. In other words, Trump must have had some expectation that everything he says and does on twitter could be equated to government action because of the difficulty in separating Donald Trump the man from Donald Trump the President. This is drastically different from a run of the mill local official who uses twitter to reach local voters and discuss local issues. Holding a local official to a higher standard of review, strict scrutiny, for content based restrictions may result in less government participation at the local level, especially considering how embedded social media is in our daily lives.

On balance, all of these factors would tend to support a finding that Donald Trump’s twitter account, so long as he is President, constitutes a designated public forum. Although no one factor is dispositive in this analysis, the lack of clear policy could be fatal to the government’s assertion that only a nonpublic forum exists, because the nature and compatibility of social media sites

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<sup>192</sup> <https://knightcolumbia.org/sites/default/files/content/Cases/Twitter/2017.09.25%20Stipulation.pdf>

<sup>193</sup> Donald Trump (@realdonaldtrump), TWITTER (Dec. 30, 2017 2: 36 PM) [https://twitter.com/realDonaldTrump/status/947235015343202304?ref\\_src=twsrc%5Etfw&ref\\_url=http%3A%2F%2Ftime.com%2F5116461%2Fdonald-trump-twitter-tweets-poll-yougov%2F](https://twitter.com/realDonaldTrump/status/947235015343202304?ref_src=twsrc%5Etfw&ref_url=http%3A%2F%2Ftime.com%2F5116461%2Fdonald-trump-twitter-tweets-poll-yougov%2F)

with expressive activity is so strong and the likelihood of problematic disruptions is low.<sup>194</sup> And just from a policy perspective, courts may want to lean toward finding high government official's accounts as designated public forum given the national interest in what they do and what they have to say. But in the actual case against Trump, the type of forum his account constitutes will probably not matter in the end because Trump has engaged in viewpoint discrimination, which is impermissible in all forums.<sup>195</sup>

### **VIII. Conclusion**

Although the rise of the Digital Age will inevitably pose novel issues, our legal system is equipped to handle them. The question over the forum status of social media accounts is no different. Social media accounts constitute a significant enough property interest, by way of the domain name, that the public forum doctrine can be applied where the government creates an account to engage the public. Which category of public forum a particular account will fall into will be dependent not only on the type of account, but on which Circuit Court the case is filed in. Supreme Court precedent has created different approaches by different circuit courts, which use different names, and more importantly, differing levels of scrutiny for each category of public forum. Finally, the fact that social media websites are privately owned should have no bearing on whether a particular account can be considered a public forum. When the government uses private property for the benefit of the public, the property should effectively be seen as governmental in nature. If the property is seen as governmental in nature, then those accounts must comport with the requirements of the Constitution.

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<sup>194</sup> See *Cornelius v. NAACP Legal Def. and Educ. Fund, Inc.*, 105 S.Ct. 3439, 3450 (1985)

<sup>195</sup> *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001) (“Because the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes of the forum”); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 64 n.6 (1983) ( Brennan, J., Dissenting); <https://knightcolumbia.org/sites/default/files/content/Cases/Twitter/2017.09.25%20Stipulation.pdf>

