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Public Fora Purpose: Analyzing Viewpoint Discrimination on the President's Twitter Account

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Public Fora Purpose: Analyzing Viewpoint Discrimination on the President's Twitter Account

Cover Page Footnote

Senior Notes & Articles Editor, Fordham Intellectual Property, Media & Entertainment Law Journal, Volume XXVIII; J.D. Candidate, Fordham University School of Law, 2018; B.A. in English with Honors, and Cinema & Cultural Studies, Stony Brook University, 2013. I would like to thank Professors Olivier Sylvain and Ron Lazebnik for their thoughts and guidance during the writing process, and their patience with my many questions concerning this area of the law. I would also like to thank the IPLJ Editorial Board and staff, especially E. Alex Kirk and Jillian Roffer for their encouragement, insightful feedback, and updates on the pending litigation against the President during the publication process.

Public Fora Purpose: Analyzing Viewpoint Discrimination on the President's Twitter Account

James M. LoPiano*

Today, protectable speech takes many forms in many spaces. This Note is about the spaces. This Note discusses whether President Donald J. Trump's personal Twitter account functions as a public forum, and if so, whether blocking constituents from said account amounts to viewpoint discrimination—a First Amendment freedom of speech violation. Part I introduces the core legal devices and doctrines that have developed in freedom of speech jurisprudence relating to issues of public fora. Part II analyzes whether social media generally serves as public fora, whether the President's personal Twitter account is a public forum, and whether his recent habit of blocking constituents from that account amounts to viewpoint discrimination. In doing so, Part II also addresses the applicability of the recent decision from the U.S. District Court for the Eastern District of Virginia, Davison v. Loudoun County Board of Supervisors—wherein a local county government official was held to have engaged in viewpoint discrimination for banning a constituent from her personal social media account—to the Knight First Amendment Institute at Columbia University's pending case against the President for the same. Part III then suggests multiple approaches

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for courts to analyze these claims, while taking account of an analytical mismatch that occurs when trying to apply the Davison case to the case brought against the President.

INTRODUCTION	513
I. FIRST AMENDMENT JURISPRUDENCE: A QUESTION OF SPEAKER AND SPACES.....	522
A. <i>The First Amendment & Freedom of Speech</i>	523
B. <i>Public Forum Doctrine: A Gradient of Speech Protection</i>	525
1. An Introduction to Speech in Spaces: Traditional Public Fora, Content & Viewpoint Discrimination, Reasonable Time, Place, or Manner Restrictions, & Strict Scrutiny Review	528
2. Designated Public Fora	533
3. Limited Public Fora.....	534
4. Nonpublic Fora.....	535
C. <i>Government as Speaker</i>	537
1. Government Speech Doctrine	537
2. Section 1983 and the Color of Law Doctrines	540
II. VIEWPOINT ON THE PRESIDENT’S CONDUCT ON HIS PERSONAL TWITTER ACCOUNT	544
A. <i>Social Media (Generally) Functions as a Public Forum</i>	544
B. <i>The President’s Personal Twitter Account Is a Public Forum</i>	551
C. <i>The President Discriminates Against Protectable Viewpoints on Twitter</i>	556
III. PROPOSAL	560
A. <i>Judge Buchwald’s Recommendation in Trump</i>	561
B. <i>Twitter’s Terms and Conditions</i>	563
C. <i>Social Media Best Practices from Federal Agencies</i>	565
D. <i>Principal-Agent Relationship</i>	567
CONCLUSION.....	570

INTRODUCTION

Since his inauguration on January 20, 2017,¹ the forty-fifth President of the United States of America, Donald J. Trump,² has used his Twitter³ account⁴ “@realDonaldTrump” to communicate with constituents across the nation.⁵ Six months later, the question arose whether the President’s frequent use of his personal Twitter account rendered that account a public forum,⁶ and if so, whether blocking constituents critical of him from @realDonaldTrump amounts to viewpoint discrimination⁷—a First Amendment Freedom of Speech violation.⁸

On July 11, 2017, this issue was brought before the U.S. District Court for the Southern District of New York in *Knight First Amendment Institute at Columbia University v. Trump*.⁹ The

¹ See *Donald Trump’s Presidential Inauguration: Order of the Day*, BBC (Jan. 20, 2017), <http://www.bbc.com/news/world-us-canada-38668834> [<https://perma.cc/FWZ5-WWY4>].

² See *id.*

³ TWITTER, <https://twitter.com/?lang=en> [<https://perma.cc/K7RY-W3EL>] (last visited Feb. 2, 2017). Twitter is a social media website that allows users to share news, pictures, messages, video, links, and other media by publishing that information to their personal accounts with the service. See Paul Gil, *What Is Twitter and How Does It Work?*, LIFEWIRE (Nov. 8, 2017), <https://www.lifewire.com/what-exactly-is-twitter-2483331> [<https://perma.cc/G2S4-CAB3>].

⁴ The Author uses the term “account” loosely throughout the Note to refer to a particular Internet user’s customized webpage or website on a social media platform, as well as their preferences and settings for those platforms.

⁵ See generally Donald J. Trump (@realDonaldTrump), TWITTER, <https://twitter.com/realDonaldTrump> [<https://perma.cc/G6BT-2AM2>] (last visited Dec. 14, 2017). See *infra* 1.C.2 Section (discussing briefly the President’s @POTUS account versus his personal Twitter account).

⁶ See Complaint for Declaratory and Injunctive Relief at 24, *Knight First Amendment Inst. at Colum. Univ. v. Trump*, 1:17-cv-05205 (S.D.N.Y. July 11, 2017).

⁷ See *id.*

⁸ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” (citations omitted)).

⁹ See Complaint for Declaratory and Injunctive Relief, *supra* note 6. This case is still pending before the district court.

Knight First Amendment Institute at Columbia University¹⁰ (the “Knight Institute”) filed a complaint against the President alleging that he violated the First Amendment rights of Twitter users when he blocked them from his “@realDonaldTrump” account.¹¹ In its complaint on behalf of those blocked,¹² Knight Institute alleged that by targeting those critical of him in “tweets,”¹³ and subsequently blocking them, the President engaged in viewpoint discrimination.¹⁴ While this case was still only beginning,¹⁵

¹⁰ *About the Knight Institute*, KNIGHT FIRST AMENDMENT INST., <https://knightcolumbia.org/content/about-knight-institute> [<https://perma.cc/848W-6TAH>] (last visited Feb. 1, 2018). The Knight Institute is academic legal group that commits itself to research and tactical litigation aimed at protecting and enhancing First Amendment rights in the new digital technology environment. *See id.*

¹¹ *See* Complaint for Declaratory and Injunctive Relief, *supra* note 6, at 24.

¹² Seven plaintiffs are listed in the complaint. *See id.* at 3–4. These include: (1) Rebecca Buckwalter—journalist and legal analyst—blocked from the President’s Twitter account soon after reply tweeting that Russia won the White House for him, *see id.* at 17; (2) Philip Cohen—sociology professor at the University of Maryland—blocked fifteen minutes after reply tweeting the President’s photograph with the words “Corrupt Incompetent Authoritarian” superimposed over it, *id.* at 18; (3) Holly Figueroa—national political organizer and songwriter—blocked the same day she reply tweeted a photograph of the Pope looking angrily at the President, with words stating “[t]his is pretty much how the whole world sees you,” *id.* at 19; (4) Eugene Gu—resident surgeon at the Vanderbilt University Medical Center and CEO of Ganogen Research Institute—blocked approximately two hours after reply tweeting “[t]he same guy who doesn’t proofread his Twitter handles the nuclear button,” *id.* at 20; (5) Brandon Neely—2003 Iraq veteran, former Guantanamo Bay guard, and current Texan police officer—blocked the day after reply tweeting “[c]ongrats and now black lung won’t be covered under #TrumpCare” in response to the President’s tweet, congratulating Pennsylvania on the opening of a new coal mine, *id.* at 21; (6) Joseph Papp—author, anti-doping advocate, and former professional road cyclist—blocked the day after reply tweeting “[w]hy didn’t you attend your #PittsburghNotParis rally in DC, Sir?,” *id.* at 22; and (7) Nick Pappas—comic and writer—blocked the same day he alleged that courts are protecting us from the President in a tweet replying to the President’s tweet calling the courts “slow and political,” *id.* at 22–23.

¹³ “Tweets” are character-limited messages and posts that Twitter users publish to their Twitter account pages. *See* Jonathan Strickland & Nathan Chandler, *What are Tweets?*, Section of *How Twitter Works*, HOWSTUFFWORKS, <https://computer.howstuffworks.com/internet/social-networking/networks/twitter1.htm> [<https://perma.cc/M9UN-9SGX>] (last visited Feb. 1, 2018). “Reply tweeting,” “reply tweeted,” and “reply tweets” are all the Author’s reference to the Twitter function that allows Twitter users to reply to another user’s tweets with their own messages and posts. *See How to Reply to a Tweet on Twitter*, wikiHow, <https://www.wikihow.com/Reply-to-a-Tweet-on-Twitter> [<https://perma.cc/9672-G3HR>] (last visited Feb. 1, 2018).

¹⁴ *See* Complaint for Declaratory and Injunctive Relief, *supra* note 6, at 1 (“In an effort to suppress dissent in this forum [Twitter], Defendants [Donald J. Trump, Sean M.

another federal court decision was decided within the past year, taking up the same issue as the *Trump* case, albeit on a smaller scale.¹⁶

In *Davison v. Loudoun County Board of Supervisors*,¹⁷ a constituent of Loudoun County, Virginia, alleged the Chair of the Loudoun County Board of Supervisors (“Chairwoman”) violated his First Amendment rights when she blocked him from her personal Facebook account.¹⁸ The U.S. District Court for the Eastern District of Virginia held: (1) the Chairwoman’s use of the account as a government tool rendered it a public forum; and (2) the Chairwoman violated the constituent’s freedom of speech rights because her motive in blocking him was to silence his criticism of her and the government body she headed, in replies to her posts on Facebook, wherein she invited her constituents to speak on local government matters.¹⁹ The district court cited the U.S. Supreme Court’s 2017 decision in *Packingham v. North Carolina*, as well as the U.S. Court of Appeals for the Fourth Circuit’s 2008 decision in *Page v. Lexington County School District One*, for the proposition that the government can open a

Spicer, (former) White House Press Secretary, and Daniel Scavino, White House Director of Social Media and Assistant to the President,] have excluded—‘blocked’—Twitter users who have criticized the President or his policies. This practice [viewpoint discrimination] is unconstitutional, and this suit seeks to end it.”); *see also infra* Section I.B (explaining what viewpoint discrimination is and its importance as a First Amendment violation).

¹⁵ *See Knight Institute v. Trump — Lawsuit Challenging President Trump’s Blocking of Critics on Twitter*, KNIGHT FIRST AMEND. INST., <https://knightcolumbia.org/content/knight-institute-v-trump-lawsuit-challenging-president-trumps-blocking-critics-twitter> [https://perma.cc/9RZU-KECV] (last visited Oct. 26, 2017) (showing progress of litigation timeline and latest major action as “White House’s summary judgment motion to dismiss the lawsuit” on October 13, 2017).

¹⁶ *See infra* notes 17–22 and accompanying text.

¹⁷ 267 F. Supp. 3d 702 (E.D. Va. 2017).

¹⁸ *See id.* at 706.

¹⁹ *See id.* at 716–17 (“[T]he record demonstrates that Defendant engaged in viewpoint discrimination by banning Plaintiff from her Facebook page.”). The defendant’s motive in banning constituents can be all-important in a viewpoint discrimination claim given that viewpoint discrimination requires one to censor speech on the basis of viewpoint, rather than some other criteria, such as relevance, content, or inappropriateness. *See infra* Section I.B.1 for a full discussion of viewpoint discrimination related to other applicable free speech doctrine.

public forum on a social media site.²⁰ Having found the Chairwoman's Facebook account was rendered a public forum, the district court held that by blocking her constituent's critical viewpoint of her administration in that public forum, she had violated that constituent's First Amendment rights.²¹ Similarly, the President blocked constituents from his personal social media platform for criticizing him and his administration.²² In light of this, the *Davison* decision now begs the question whether the same result could be obtained when the defendant is, rather than a county politician, none other than the President.

The issue of politicians blocking users is not limited to the *Davison* and *Trump* cases. Currently, there is a host of complaints lodged against politicians that blocked Internet users from their social media accounts. For example, Kentucky Governor Matt Bevin, Maine Governor Paul LePage, Maryland Governor Larry Hogan, and Miami Beach Mayor Philip Levine, were all recently sued for blocking constituents from either their Facebook or Twitter accounts.²³ At the heart of these complaints is the same question addressed in *Davison* and pending in *Trump*: Whether social media accounts generally serve as public fora,²⁴ and if so,

²⁰ See *Davison*, 267 F. Supp. at 716.

²¹ See *id.* at 71617.

²² The President does not contest that he blocked the Knight Institute case plaintiffs because they criticized him on Twitter. See Stipulation at 1, Knight First Amendment Inst. at Colum. Univ. v. Trump, No. 17-cv-05205 (NRB) (S.D.N.Y. Sept. 28, 2017).

²³ See Natt Garun, *ACLU Sues Maine's Governor for Deleting Facebook Comments and Blocking Users*, VERGE (Aug. 8, 2017), <https://www.theverge.com/2017/8/8/16114636/aclu-lawsuit-maine-governor-facebook-blocking-deleting-comments-free-speech> [<https://perma.cc/4L2L-5S5P>]; Brittany Shammass, *Miami Beach Mayor Philip Levine Sued for Blocking Critics on Social Media*, MIAMI NEW TIMES (Oct. 10, 2016), <http://www.miaminewtimes.com/news/miami-beach-mayor-philip-levine-sued-for-blocking-critics-on-social-media-8837410> [<https://perma.cc/CD8R-N9CP>]; Morgan Watkins & Phillip M. Bailey, *Kentuckians Sue Gov. Matt Bevin for Blocking Them on Twitter and Facebook*, COURIER J. (July 31, 2017), <http://www.courier-journal.com/story/news/2017/07/31/kentuckians-sue-gov-matt-bevin-blocking-them-twitter-and-facebook/519427001/> [<https://perma.cc/ZT3Y-KPJX>]; Brian Witte, *ACLU Sues Maryland Governor Over Social Media Blocking*, U.S. NEWS (Aug. 1, 2017), <https://www.usnews.com/news/best-states/maryland/articles/2017-08-01/aclu-sues-maryland-governor-over-social-media-blocking> [<https://perma.cc/5JN6-GQE9>].

²⁴ The term "fora" is used throughout this Note as the plural form of the word "forum."

whether blocking constituents from a government official's account is a violation of those constituents' freedom of speech.²⁵

Considering the current combative political climate on social media,²⁶ how meritorious are these claims against the President? Barack Obama's successful election as the forty-fourth President of the United States was famously attributed, at least in part, to his skillful use of the social media platform Facebook to get his message across to online audiences.²⁷ His use of his own Facebook account to deliver political posts about his candidacy across the Internet seemed to mark the beginning of this now-popular trend among candidates for political office.²⁸ Similarly, the current

²⁵ Compare Complaint for Declaratory and Injunctive Relief, *supra* note 6, at 1–2, 24, and *Davison*, 267 F. Supp. 3d at 716–17, with *Garun*, *supra* note 23, *Shammas*, *supra* note 23, *Watkins & Bailey*, *supra* note 23, and *Witte*, *supra* note 23.

²⁶ Social media has arguably enflamed divisiveness in contemporary American politics between the left and right of the political spectrum. For example, Harvard's Berkman Klein Center found that "[d]isproportionate popularity on Facebook is a strong indicator of highly partisan and unreliable media." ROBERT FARIS ET AL., BERKMAN KLEIN CTR. FOR INTERNET & SOC'Y AT HARVARD UNIV., RESEARCH PUB. NO. 2017-6, PARTISANSHIP, PROPAGANDA, AND DISINFORMATION: ONLINE MEDIA AND THE 2016 U.S. PRESIDENTIAL ELECTION 15 (2017). This seems to indicate that the most widely shared and liked political posts on Facebook cater to extreme or exaggerated political information and viewpoints. *See id.* Corroborating this notion, in 2016, the Pew Research Center found "[m]ore than one-third of social media users are worn out by the amount of political content they encounter, and more than half describe their online interactions with those they disagree with politically as stressful and frustrating." MAEVE DUGGAN & AARON SMITH, PEW RESEARCH CTR., THE POLITICAL ENVIRONMENT ON SOCIAL MEDIA 3 (2016). If more than one-third of social media users are worn out by the volume of political content they see on social media, it stands to reason that the volume of political content on social media is substantial. *See id.* The fact that more than half of social media users are frustrated by disagreements in casual online political discourse shows how emotionally charged these disagreements really are. *See id.*

²⁷ *See* David Carr, *How Obama Tapped into Social Network's Power*, N.Y. TIMES (Nov. 9, 2008), <https://www.nytimes.com/2008/11/10/business/media/10carr.html> [<https://perma.cc/78U4-Y9VB>]. *See generally* Jennifer Aaker & Victoria Chang, *Obama and the Power of Social Media and Technology*, EUR. BUS. REV., May–June 2010, at 16–21, <https://people.stanford.edu/jaaker/sites/default/files/tebrmay-june-obama.pdf> [<https://perma.cc/XAR8-TMPE>] (explaining how Obama's innovative approach to campaigning through social media and email campaigns benefitted his election).

²⁸ *See, e.g.*, Aaker & Chang, *supra* note 27, at 20 ("Obama changed the way elections were run and would be run in the future. He and his team showed the power of social media and technology . . ."); Madeline McDowell, *Does Twitter Play Too Much of a Role in the Presidential Election?*, LOYOLA UNIV. OF MD.: EMERGING MEDIA 360 (2016), <https://www.loyola.edu/academics/emerging-media/blog/2016/twitters-role-in-presidential-election> [<https://perma.cc/HLQ5-Q7LG>] (stating "[w]hen Barack Obama

President famously leveraged the use of his own Twitter account to “go viral”²⁹ during the election for the forty-fifth president—a tactic that the President himself attributed to his overall success in getting himself elected.³⁰

Today, political candidates, both state and federal, from county supervisor, to mayor, to governor, to congresswomen and congressmen, to senators, and presidents, leverage social media to better connect with their constituents.³¹ They would be crazy not to. After all, a huge amount of American political discourse and debate takes place across the Internet today.³² Citizens comment back and forth on each other’s accounts about their views and arguments concerning trending political topics.³³ Research indicates that political debates and propaganda on social media are to blame for deepened political divisiveness among the general

first ran for President in 2008, utilizing social media as a candidate was not totally unheard of, but absolutely not being used as it is now”).

²⁹ To “go viral” means “[i]f a video, image, or story . . . spreads quickly and widely on the Internet through social media and e-mail.” *Definition of ‘Go Viral’*, COLLINSDICTIONARY.COM, <https://www.collinsdictionary.com/dictionary/english/go-viral> [<https://perma.cc/C2WN-9RWZ>] (last visited Apr. 1, 2018).

³⁰ See Chris Baynes, *Donald Trump Says He Would Not Be President Without Twitter*, INDEPENDENT (Oct. 22, 2017), <https://www.independent.co.uk/news/world/americas/us-politics/donald-trump-tweets-twitter-social-media-facebook-instagram-fox-business-network-would-not-be-a8013491.html> [<https://perma.cc/AB46-B5CZ>] (“[The President] said: ‘I doubt I would be here if it weren’t for social media, to be honest with you Tweeting is like a typewriter – when I put it out, you put it immediately on your show.[.]’” (quoting Donald J. Trump)). Scholarship agrees with the President. See, e.g., Jacob Marx, *Twitter and the 2016 Presidential Election*, CRITIQUE: A WORLDWIDE J. STUDENT POL., Spring 2017, at 34 (arguing that “Twitter was instrumental in [the President’s] successful run”); McDowell, *supra* note 28 (“Twitter can be seen as a way to connect with a candidate just as you’d connect with a friend, it shows and helps maintain the authenticity behind a candidate. In the midst of a social media revolution, the social media departments behind a candidate are studying memes and how to fit a response into 140 characters.”).

³¹ See, e.g., *How Congress Used Social Media in 2017*, QUORUM (Dec. 6, 2017), <https://www.quorum.us/data-driven-insights/congress-on-social-media-2017/192/> [<https://perma.cc/G58C-WFZ4>] (“This year the 535 members of Congress have collectively posted over [one] million times on social media platforms like Facebook, Twitter, Instagram, Medium, and YouTube.”); *supra* notes 23–25 and accompanying text.

³² See generally DUGGAN & SMITH, *supra* note 26 (discussing the voluminous political interactions that take place between those with different political viewpoints on social media).

³³ See *id.* at 2–3.

American public,³⁴ with some stating that such divisiveness has reached a level not seen since the Civil War.³⁵ Further, the organization of rallies and protests have evolved rapidly on social media, with citizens creating private and public groups³⁶ to introduce, share, and discuss their ongoing political agendas.³⁷ Political movements, such as “Black Lives Matter,”³⁸ and the counter-movements “All Lives Matter”³⁹ and “Blue Lives Matter,”⁴⁰ have social media in part to thank for their successes in reaching the mainstream media and the general public.⁴¹ Unpopular views among isolated pockets of constituents, separated

³⁴ See AMY MITCHELL ET AL., PEW RESEARCH CTR., POLITICAL POLARIZATION & MEDIA HABITS: FROM FOX NEWS TO FACEBOOK, HOW LIBERALS AND CONSERVATIVES KEEP UP WITH POLITICS 1–2 (2014).

³⁵ See, e.g., Conor Lynch, *America May Be More Divided Now than at Any Time Since the Civil War*, SALON (Oct. 14, 2017), <https://www.salon.com/2017/10/14/america-may-be-more-divided-now-than-at-any-time-since-the-civil-war/> [<https://perma.cc/WWU9-64UU>].

³⁶ “Groups” are generally virtual communities that enlist members on social media; by “public” groups, the Author is referring to those that allow open membership, and by “private” groups, the Author is referring to those that allow membership through invitation only. See Heidi Thorne, *What Are Social Media Groups?*, TURBOFUTURE.COM (Dec. 14, 2017), <https://turbofuture.com/internet/What-are-Social-Media-Groups> [<https://perma.cc/CWC6-VXDL>].

³⁷ See generally, e.g., Jose Marichal, *Political Facebook Groups: Micro-Activism and the Digital Front Stage*, FIRST MONDAY (Dec. 2, 2013), <http://firstmonday.org/article/view/4653/3800> [<https://perma.cc/ZFQ8-MWBD>] (going into detail about political activism through Facebook groups and how those groups organize and execute their agendas).

³⁸ Black Lives Matter, FACEBOOK, <https://www.facebook.com/BlackLivesMatter/> [<https://perma.cc/MT29-NZ83>] (last visited Apr. 1, 2018) (showing 321,675 users follow this account for updates); Black Lives Matter (@Blklivesmatter), TWITTER, <https://twitter.com/blklivesmatter?lang=en> [<https://perma.cc/3R65-Y4FM>] (last visited Apr. 1, 2018) (showing 285,609 users follow this account for updates).

³⁹ All Lives Matter Foundation, FACEBOOK, <https://www.facebook.com/alllivesmatterfoundation/> [<https://perma.cc/49Z2-NH8N>] (last visited Apr. 1, 2018) (showing 3,948 users follow this account for updates); #alllivesmatter, TWITTER, <https://twitter.com/hashtag/alllivesmatter> [<https://perma.cc/9A8H-NR48>] (last visited Apr. 1, 2018).

⁴⁰ Blue Lives Matter, FACEBOOK, <https://www.facebook.com/bluematters/> [<https://perma.cc/SR67-L5ET>] (last visited Apr. 1, 2018) (showing 2,000,715 users follow this account for updates); Blue Lives Matter (@bluelivesmtr), TWITTER, https://twitter.com/bluelivesmtr?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor [<https://perma.cc/2P5W-Y2Q3>] (last visited Apr. 1, 2018) (showing 34,518 users follow this account for updates).

⁴¹ See *supra* notes 38–40.

by thousands of miles or overseas, can now connect with each other painlessly across the Internet and band together to disseminate their viewpoints.⁴² Social media now provides a platform for all views to be expressed—it presses to every political camp’s lips, no matter how minor, a digital megaphone for speakers to blast their viewpoints across endless and international “market squares” of the Internet.⁴³ Even the ongoing federal investigation into Russia’s involvement with the President’s election has social media as its birthplace,⁴⁴ where so-called “fake news”⁴⁵ was allegedly spread about political candidates running for office.⁴⁶ All this is to say, social media has ingrained itself into the very fabric of American politics, and to ignore the part it plays there is to do social media a great disservice.

Until the Supreme Court weighs in, it is unclear how claims of viewpoint discrimination on government officials’ social media accounts will shape future First Amendment jurisprudence. Additionally, until the Southern District of New York decides the *Trump* case, which could possibly then go up on appeal to the U.S.

⁴² See *The Internet: Bringing People Together Virtually or Pushing Them Away Physically*, STANFORD UNIV., <https://cs.stanford.edu/people/eroberts/cs181/projects/2000-01/personal-lives/debate.html> [<https://perma.cc/YBR7-3WB7>] (last visited Apr. 1, 2018).

⁴³ See *supra* notes 32–33, 36–42 and accompanying text.

⁴⁴ See Indictment at 3, *United States v. Internet Research Agency LLC*, No. 1:18-cr-00032-DLF (D.D.C. Feb. 16, 2018) (“Beginning as early as 2014, Defendant ORGANIZATION began operations to interfere with the U.S. political system, including the 2016 U.S. presidential election . . . Defendants, posing as U.S. persons and creating false U.S. personas, operated social media pages and groups designed to attract U.S. audiences. These groups and pages, which addressed divisive U.S. political and social issues, falsely claimed to be controlled by U.S. activists when, in fact, they were controlled by Defendants.”).

⁴⁵ “Fake news” is a term that has become increasingly popular following Donald J. Trump’s election to the presidential seat. See Cristiano Lima, *Poll: [Seventy-Seven] Percent Say Major News Outlets Report ‘Fake News’*, POLITICO (Apr. 2, 2018), <https://www.politico.com/story/2018/04/02/poll-fake-news-494421> [<https://perma.cc/9HSK-LW3Q>]. “Fake news” means many things to different people, but essentially boils down to media reporting that spreads misinformation or misleading coverage based on an underlying political agenda. See *id.*

⁴⁶ See Indictment, *supra* note 44, at 4 (“Defendant ORGANIZATION had a strategic goal to sow discord in the U.S. political system, including the 2016 U.S. presidential election. Defendants posted derogatory information about a number of candidates, and by early to mid-2016, Defendants’ operations included supporting the presidential campaign of then-candidate Donald J. Trump (‘Trump Campaign’) and disparaging Hillary Clinton.”).

Court of Appeals for the Second Circuit, and the U.S. Court of Appeals for the Fourth Circuit decides the pending *Davison* appeal,⁴⁷ we must wait and see if the two cases will eventually set the stage for a new circuit split on the issue.

Social media has inescapably wedged itself into the annals of history: It is used by a majority of Americans,⁴⁸ and forms the basis for an untold number of social and cultural commentary and discussions on topics ranging from what one ate for dinner the night before,⁴⁹ to what parks and streets a local protest is going to occur in that weekend.⁵⁰ Social media has revitalized the political landscape and, further, reshaped that landscape to reflect the technology of the modern era.⁵¹ This is so much so that now at least forty-six states' governors have savvyed up and begun to use Twitter to connect more with their constituents.⁵²

In analyzing these issues, Part I of this Note opens with an introduction to the First Amendment's guarantee of freedom of speech, and then explores the various protections and exceptions that shape how the law interacts with this freedom in government or state-sponsored public spaces. Next, Part II discusses, first, whether social media overall generally serve as public fora.

⁴⁷ Both the Chairwoman and constituent appealed the decision of the Eastern District of Virginia. See Case Docket No. 1:16-CV-00932-JCC-IDD, available at Westlaw.

⁴⁸ See *Social Media Fact Sheet*, PEW RESEARCH CTR. (Jan. 12, 2017), <http://www.pewinternet.org/fact-sheet/social-media/> [https://perma.cc/3KNP-WWSN] (noting that sixty-seven percent of Americans use at least some social media).

⁴⁹ See Aleksandra Atanasova, *The Psychology of Foodstagramming*, SOCIAL MEDIA TODAY (Nov. 9, 2016), <https://www.socialmediatoday.com/social-networks/psychology-foodstagramming> [https://perma.cc/DXA6-AWQF] (“Data from digital marketing agency 360i shows that [twenty-five percent] of food photos are motivated by the need to document our day for the public.”).

⁵⁰ Cf. *The Role of Social Media in Accelerating a Revolution*, SOL PRICE SCH. PUB. POL'Y, <https://publicadmin.usc.edu/resources/infographics/the-role-of-social-media-in-accelerating-a-revolution/> [https://perma.cc/WK89-A8T5] (last visited Apr. 17, 2018) (“Participants and planners use social sites like Twitter to spread the word about upcoming protests, making it easier to gain supporters.”).

⁵¹ See generally *id.* (discussing how social media users have integrated social platforms into their political routines and education).

⁵² By 2013, the only states whose governors were not on Twitter were Indiana, North Dakota, West Virginia, and Wyoming. See Jimmy Daly & Anita Ferrer, *Social Leaders: The Complete List of State Governors on Twitter*, STATETECH (Jan. 16, 2013), <https://statetechmagazine.com/article/2013/01/complete-list-state-governors-twitter> [https://perma.cc/3KNJ-39C5].

Second, Part II analyzes whether the President’s personal Twitter account serves as a public forum. Part II then continues to discuss whether, if in fact the President’s personal Twitter account serves as a public forum, the President can violate the First Amendment by banning constituents critical of him from that account. Part II finally concludes with how the *Davison* court’s analysis, concerning a county politician’s similar action, cannot be replicated to fit the *Trump* case, although the factors it enunciated in its decision remain applicable. Finally, in Part III, the Author provides several suggestions for hurdling the analytical divide between the *Davison* case’s analysis and the approach the *Trump* case must take when answering the question whether the President acted in his governmental, rather than personal, capacity when he blocked constituents from his account.

I. FIRST AMENDMENT JURISPRUDENCE: A QUESTION OF SPEAKER AND SPACES

This Part explores First Amendment freedom of speech jurisprudence as it applies to public and personal or private spaces.⁵³ Specifically, it examines free speech’s metamorphosis into a shield against a concept called “viewpoint discrimination.”⁵⁴ It then explains the public forum doctrine and the differences between traditional public fora, designated public fora, limited public fora, and nonpublic fora. Next, it highlights the various limitations on freedom of speech, including reasonable time, place, or manner restrictions, speech with little to no social value, and the

⁵³ The Author refers to the terms “space,” “public,” “personal,” and “private” throughout this Note. In doing so, the Author is using his own definitions: “Space” is used in the sense of both the physical (i.e., spaces that a person can physically enter their body into) and metaphysical (i.e., spaces that are digital or two-dimensional); “public” spaces are those that are opened for the purpose of general public use by either a governmental or private body (e.g., parks, streets, campuses, newspapers, social media platforms, etc.); “personal” spaces are those that belong to a private person or entity and are by default reserved to the use of that person or entity, but which from time to time may be opened to the public; “private” spaces are those that belong to a private person or entity and are decidedly reserved to the use of that person or entity, with individual exceptions made occasionally for other private persons or entities to use that space after securing that private person or entity’s affirmative, as opposed to default, permission.

⁵⁴ See *infra* Section I.B.1.

government speech doctrine. Finally, it ends by highlighting color of speech doctrine and its importance to the Eastern District of Virginia decision in *Davison*.

A. The First Amendment & Freedom of Speech

The constitutional right to freedom of speech⁵⁵ originates in the First Amendment to the U.S. Constitution, ratified as part of the Bill of Rights on December 15, 1791,⁵⁶ which states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech*, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”⁵⁷ The First Amendment has since formed the basis for a constitutional jurisprudence on citizens’ right to freedom of speech, a federal right extended to the states through the Due Process clause of the Fourteenth Amendment.⁵⁸

Not all speech is protected under the First Amendment. Speech “of such slight social value as a step to truth”—because it actually works against, rather than for, enhancing public discussion—that it is “clearly outweighed by the social interest in order and morality” is not protected.⁵⁹ This is a byproduct of the notion that truth is a product of those ideas that survive challenges faced in an open

⁵⁵ What qualifies as “speech” for First Amendment protection goes well beyond verbal communication, including art, pamphlets, newspapers, the act of spending, and other forms of expression, so long as it communicates a message of the speaker. *See generally* *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (protecting student newspapers as speech and recognizing government funding as speech); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (protecting a play’s content as speech).

⁵⁶ *See The Bill of Rights: A Transcription*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/bill-of-rights-transcript#toc-the-preamble-to-the-bill-of-rights> [https://perma.cc/568D-GY3J] (last visited Oct. 26, 2017).

⁵⁷ U.S. CONST. amend. I. (emphasis added).

⁵⁸ *See id.* amend. XIV, § 1. (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

⁵⁹ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942). *See infra* text in notes 61–65 for examples.

marketplace of ideas.⁶⁰ Speech categories that courts have found harm, rather than enhance, discussions for the pursuit of truth (and thus have no benefit to society) include: lewd speech,⁶¹ obscene speech,⁶² profane speech,⁶³ libelous speech,⁶⁴ and insulting speech, also referred to as “fighting” words⁶⁵—and not to be confused with political criticism, parody, or satire, which are protected categories of speech⁶⁶—“[all of] which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”⁶⁷ This Note refers to such categories of speech as “unprotected” speech. In the example of the President’s Twitter account, this might include reply tweets that essentially amount to cursing out the President, threatening him, or that spread unfounded lies about him—all without some political context or message to give the speech social value promoting the pursuit of truth.⁶⁸

As discussed in Section I.B below, even the protection of “protected” speech (i.e., speech with a value in the market for discerning truth) varies depending upon the type of space in which the speech takes place (i.e., the type of “forum”). The public forum doctrine forms a gradient barrier for speech protection against government intervention across various types of spaces, not by whether they are physical or metaphysical, but rather dependent

⁶⁰ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”); see also *supra* notes 98–101 and accompanying text.

⁶¹ See, e.g., *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (holding lewd speech without political viewpoint unprotected by the First Amendment).

⁶² See, e.g., *United States v. Williams*, 553 U.S. 285, 288 (2008) (“We have long held that obscene speech—sexually explicit material that violates fundamental notions of decency—is not protected by the First Amendment.”).

⁶³ See, e.g., *Beauharnais v. Illinois*, 343 U.S. 250, 256–57 (1952) (noting that the prevention of “profane” speech was never thought to raise a constitutional problem).

⁶⁴ See, e.g., *id.* at 266 (“Libelous utterances [are] not . . . within the area of constitutionally protected speech.”).

⁶⁵ See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–73 (1942) (holding so-called “fighting words,” speech likely to provoke violence, unworthy of constitutional protection).

⁶⁶ See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 49–57 (1988) (holding First Amendment protections apply to political parody, satire, and criticism, even under tort damages claim).

⁶⁷ *Chaplinsky*, 315 U.S. at 572.

⁶⁸ See *id.*

upon their public, or personal or private, character.⁶⁹ This gradient has continued to develop alongside technology.⁷⁰ Even old dogs such as traditional public fora are continuously being affected by advancements in technology.⁷¹ As younger generations begin to more frequently use social media to organize, meet, and plan for protests and rallies in their local streets and parks as their forefathers did before them, they now do so with their cell phones, laptops, high-tech cameras, and GPS in tow, tracking their political movements, and those of their participants, along the way.⁷² The constitutional freedom of speech right has matured over the years, growing within new pockets of speech law in areas of technological advancement as courts continue to shape the contours of new speech doctrine.⁷³

B. Public Forum Doctrine: A Gradient of Speech Protection

Public forum doctrine governs First Amendment free speech jurisprudence concerning the treatment of speech in both physical and metaphysical public spaces.⁷⁴ In 1939, the Supreme Court first articulated the First Amendment's protection of speech in public

⁶⁹ See *infra* Section I.B (discussing how different levels of protection are afforded to traditional, versus designated, versus limited, versus nonpublic fora).

⁷⁰ See, e.g., *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 670–71, 676 (1998) (holding a live televised debate “was a nonpublic forum, from which [the broadcaster] could exclude [a relatively unpopular candidate] in the reasonable, viewpoint-neutral exercise of its journalistic discretion.”); see also *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 315 (2010) (“Rapid changes in technology—and the creative dynamic inherent in the concept of free expression—counsel against upholding a law that restricts political speech in certain media or by certain speakers.”).

⁷¹ See, e.g., *The Role of Social Media in Accelerating a Revolution*, *supra* note 50 (noting the various ways technology is used to enhance the visibility and organization of protests); see also *infra* Section I.C.1 (explaining how traditional public forum doctrine typically protects speech where protests are held).

⁷² See, e.g., *The Role of Social Media in Accelerating a Revolution*, *supra* note 50.

⁷³ Compare *Ark. Educ. Television Comm'n*, 523 U.S. 666 (deciding on freedom of speech issues relating to televised broadcasting of live debates as public fora), with *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va. 2017) (deciding on freedom of speech issues relating to politician's social media website as a public forum).

⁷⁴ See *supra* note 53; see also *infra* Sections I.C.1–4 (discussing the different kinds of spaces protected) and notes 169–70 and accompanying text (discussing newspapers and license plates as metaphysical spaces).

fora. In *Hague v. Committee for Industrial Organizations*,⁷⁵ citizens belonging to the Committee for Industrial Organization (“CIO”) sued the Mayor of Jersey City, New Jersey, among other state officials,⁷⁶ after officials forcibly removed their members from public property for attempting to pass out written material in the city and set up meetings to discuss the National Labor Relations Act.⁷⁷ Justice Robert Owens, speaking for the Supreme Court, stated in dicta that “the use of the streets and public places” had “from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.”⁷⁸ He found that citizens communicating their political views and agendas in these spaces could be regulated by the government, but only relative to the need to preserve the rights of others, the general peace, and to prevent chaos.⁷⁹ Those regulations could not be a product of government abuse against otherwise permissible protest.⁸⁰ It has been argued that Justice Owens’s opinion in *Hague* has since formed the basis for the public forum doctrine,⁸¹ which recognizes a balance between citizens’ traditional right to congregate in public spaces to speak out on political matters, and the interest of the government in managing its property.⁸²

This balance was further articulated in *Lehman v. City of Shaker Heights*,⁸³ where the Supreme Court pointed out that the “nature of the forum” and other interests involved—such as the government’s, and individuals’, interest in using their property⁸⁴—

⁷⁵ 307 U.S. 496 (1939).

⁷⁶ *See id.* at 500–03.

⁷⁷ *See id.*

⁷⁸ *Id.* at 515–16.

⁷⁹ *See id.*

⁸⁰ *See id.*

⁸¹ *See, e.g.*, Ross Rinehart, Note, “Friending” and “Following” the Government: How the Public Forum and Government Speech Doctrines Discourage the Government’s Social Media Presence, 22 S. CAL. INTERDISC. L.J. 781, 791 n.54 (2013) (citing multiple academics arguing for Hague’s place as the proper starting point for the public forum doctrine, but noting at least one skeptic).

⁸² *See id.* at 792.

⁸³ 418 U.S. 298 (1974) (emphasis added).

⁸⁴ *See id.* at 317 (noting that restrictions on speech must be “narrowly tailored to protect the government’s substantial interest in preserving the viability and utility of the forum itself.”); *see also supra* note 82 and accompanying text; *infra* notes 116–21 and accompanying text.

were integral to “*the degree of protection afforded*” to protected speech.⁸⁵ Since *Hague*, First Amendment jurisprudence has recognized at least four kinds of fora, each with their own respective characteristics and varying levels of protection for speech: (1) the traditional public forum;⁸⁶ (2) the designated public forum;⁸⁷ (3) the limited public forum;⁸⁸ and (4) the nonpublic forum.⁸⁹

Examining the different types of fora available, both public and nonpublic, is useful for understanding the distinctions between the kinds of spaces that the First Amendment protects.⁹⁰ However, it is also important to stress that, for the purposes of viewpoint discrimination analysis, the type of forum matters less, for viewpoint discrimination against protectable speech⁹¹ is prohibited in all public fora.⁹² Therefore, aside from the discussion in Section I.B.1, which also introduces the concepts of content discrimination, viewpoint discrimination, reasonable time, place, or manner restrictions, and strict scrutiny review, the various types of fora are only briefly addressed for their characteristics and the level of protection they afford. Again, this is so that readers have a better sense of what constitutes a protectable space for speech versus a purely private space, and all the gradient spaces in between.⁹³

⁸⁵ See *id.* at 302–03 (emphasis added).

⁸⁶ See *infra* Section I.B.1.

⁸⁷ See *infra* Section I.B.2.

⁸⁸ See *infra* Section I.B.3.

⁸⁹ See *infra* Section I.B.4.

⁹⁰ By examining the different characteristics of the varying types of fora, it is easier to describe the President’s Twitter account in terms of First Amendment free speech jurisprudence.

⁹¹ See *supra* Section I.A (discussing unprotectable types of speech).

⁹² *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 n.2 (4th Cir. 2006) (“The ‘viewpoint discrimination’ prohibited in all fora is ‘an egregious form of content discrimination’ in which the government ‘targets not subject matter, but particular views taken by speakers on a subject.’” (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995))).

⁹³ For examples of private spaces that do not protect against viewpoint discrimination, think of circumstances where the government or a public entity or utility is uninvolved in hosting guest speech—such as private homes and stores. See, e.g., *People v. Bush*, 349 N.E.2d 832, 839 (N.Y. 1976) (“One aspect of the balance sought to be attained concerns the circumstances under which private property may be utilized for picketing activity, for [i]t is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal[,] or state.” (quoting *Hudgens*

1. An Introduction to Speech in Spaces: Traditional Public Fora, Content & Viewpoint Discrimination, Reasonable Time, Place, or Manner Restrictions, & Strict Scrutiny Review

Traditional public fora afford the highest level of protection for freedom of speech. They are categorized as those spaces with a long American tradition of commitment to public assembly and debate, where “State” (i.e., government)⁹⁴ authority to restrict speech is viewed most skeptically.⁹⁵ This forum essentially consists of “streets and parks,” which, since before the American Revolution,⁹⁶ were used for political assembly, debate, and discourse.⁹⁷ Thus, traditional public fora are the poster-child for spaces that have been devoted to public speech, debate, and protest throughout our history. For this reason, it makes sense to begin the discussion of the other doctrines relating to public fora here, where public forum protection is strongest, and where the doctrine began. This Note then addresses the other individual types of public fora, as well as the varying constrictions and protections of public speech in other spaces (i.e., fora).

As Supreme Court Justice Oliver Wendell Holmes, Jr. famously put it, “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”⁹⁸ This is a remarkably American way of describing freedom of speech in terms of our capitalistic society: Truth is a product of those ideas that can withstand competing arguments and viewpoints; ideas

v. N.L.R.B., 424 U.S. 507, 513 (1976)); *Aluli v. Trusdell*, 508 P.2d 1217, 1222 (Haw. 1973) (holding, in the case of landlord premises, “no state action is involved, which denies or infringes the tenant’s right to exercise his First Amendment Constitutional rights”).

⁹⁴ Note, the capitalized word “State” is generally synonymous with “government” in cases where the Supreme Court refers to “State,” as the same First Amendment standard is applied to both the federal and the state government through the Fourteenth Amendment’s Due Process clause. *See* U.S. Const. amend. XIV, § 1.

⁹⁵ *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

⁹⁶ *See Parliamentary Taxation of Colonies, International Trade, and the American Revolution, 1763–1775*, Part of *Milestones: 1750–1775*, OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1750-1775/parliamentary-taxation> [<https://perma.cc/5SRE-EQ52>] (last visited Apr. 2, 2018).

⁹⁷ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

⁹⁸ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

with the best logic and evidence behind them—a distillation of truth from survival of the fittest speech.⁹⁹ In other words, the pursuit of truth, political or otherwise, depends upon an open discourse between groups with differing viewpoints, opinions, and ideologies.¹⁰⁰ The inverse also holds true: To avoid being captured by political speech divorced from logic and evidence, and thus truth (i.e., propaganda), individuals need to challenge their inner logic and philosophies in the “competition of the market” so they can identify flaws in each other’s reasoning and supplement their education with opposing viewpoints.¹⁰¹

In true American form, the Founders of the Constitution honored dissent, so that the First Amendment prevents the government from banning speech merely because of the government’s “disapproval of the ideas expressed.”¹⁰² The Supreme Court agreed, holding that government restrictions that ban speech because of its content are presumptively invalid.¹⁰³ Thus, without meeting a high bar of judicial review, called “strict scrutiny” review,¹⁰⁴ a government—state or federal—cannot selectively censor speech it agrees or disagrees with on the basis of that speech’s content.¹⁰⁵ This concept decries government-sponsored content discrimination (i.e., propaganda), while still allowing speech restrictions in cases where the restriction is content-neutral, and thus does not discriminate on the basis of content.¹⁰⁶

⁹⁹ *See id.*

¹⁰⁰ *See id.*

¹⁰¹ *See id.*

¹⁰² *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

¹⁰³ *See id.*

¹⁰⁴ *See Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (“Statutes affecting constitutional rights must be drawn with ‘precision,’ and must be ‘tailored’ to serve their legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose ‘less drastic means.’” (citations omitted) (first quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963); then quoting *United States v. Robel*, 389 U.S. 258, 265 (1967); then quoting *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969); and then quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)).

¹⁰⁵ *See R.A.V.*, 505 U.S. at 382.

¹⁰⁶ *Id.* An example of content discrimination might be a case where a local government bans all newspapers discussing foreign forms of government or bans television shows depicting women in the workplace. An example of content-neutral restrictions might

A cousin of the prohibition on content discrimination is viewpoint discrimination.¹⁰⁷ Viewpoint discrimination is similar to content discrimination, except that it prohibits the government from censoring a speaker's speech on the basis of viewpoint, rather than on the basis of content.¹⁰⁸ To allow the government to censor on the basis of viewpoint directly conflicts with the proper functioning of the "competition of the market" idea expressed by Justice Holmes for distilling truth from speech.¹⁰⁹ For example, in *Rosenberger v. Rector and Visitors of University of Virginia*,¹¹⁰ student participants of a university magazine that promoted Christianity brought suit against their school for refusing to pay for their printing costs, while paying for other magazines' printing costs.¹¹¹ The basis for the university's decision was grounded on its guidelines, which denied printing funds to magazines based on, inter alia, having a religious or political agenda, or a viewpoint that would otherwise interfere with the university's ability to file for tax-exempt status.¹¹² The Supreme Court held that because the university was a public institution (i.e., a creature of the state), and its school newspapers were public spaces (albeit, metaphysical), the university's rule requiring public officials to sift through and ban certain content because of the viewpoints expressed in them violated students' freedom of speech.¹¹³

As explained in *Rosenberger*, the Supreme Court takes a strict stance against viewpoint discrimination in public spaces—even metaphysical spaces such as newspapers.¹¹⁴ This was so even though the university newspaper at issue in *Rosenberger* was not a

include a case where the same government bans newspapers issued without a vendor license or bans all television shows after 5:00 PM. The former bans speech based on the content of the newspaper or show, whereas the latter bans speech based on some other criteria.

¹⁰⁷ See *infra* notes 108–13 and accompanying text.

¹⁰⁸ See, e.g., *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 (4th Cir. 2006) (“[W]hen the government opens its property to private speech, it may not discriminate based upon the viewpoint of the speaker.”).

¹⁰⁹ See *supra* text accompanying notes 98–101.

¹¹⁰ 515 U.S. 819 (1995).

¹¹¹ See *id.* at 826–27.

¹¹² *Id.* at 825.

¹¹³ *Id.* at 845.

¹¹⁴ *Id.* at 828.

traditional public forum.¹¹⁵ Nonetheless, the government may restrict speech in even traditional public fora by imposing reasonable time, place, or manner limitations, so long as they are content-neutral and survive strict scrutiny.¹¹⁶ The reasonable time, place, or manner doctrine allows the government to impose restrictions on speech where that speech is inappropriate or otherwise infringes on the protected rights of others.¹¹⁷ The Supreme Court explained that such restrictions are necessary because certain speech—depending on its time, place, or manner—can “frustrate legitimate governmental goals.”¹¹⁸ Consider the following apt metaphor from the Supreme Court: “No matter what its [political] message, a roving sound truck that blares at [two in the morning] disturbs neighborhood tranquility.”¹¹⁹ Why would a truck driver *have* to blare its horn in a town full of sleeping citizens at that particular time to get its political message across? What would that message even be? This logic conforms with the reasoning behind why citizens, despite a constitutional freedom of speech, and regardless of the political message, cannot shout “bomb” on an airplane. Such speech could incite panic and, foreseeably, cause serious injury.¹²⁰

Reasonable time, place, or manner restrictions are thus one type of limitation on freedom of speech in public fora. Thus, even if in protest, say, to something the President says on Twitter, a truck driver’s loud and persistent honking on a neighborhood street (a traditional public forum) in the wee hours of the night may not be protected.¹²¹ In such a scenario, where there are alternative channels for a truck driver to protest, and the goal is not to suppress the truck driver’s viewpoint, but rather to enforce the content-neutral aim of allowing citizens to sleep in their homes at

¹¹⁵ Compare *id.* (discussing a university newspaper), with *supra* notes 94–97 and accompanying text (discussing traditional public fora typically consisting of public streets and parks).

¹¹⁶ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983). See generally *infra* notes 122–26 (discussing strict scrutiny review).

¹¹⁷ See *Consol. Edison Co. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 535 (1980).

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ See *id.*

¹²¹ See *infra* notes 116–19 and accompanying text.

night, courts are less likely to find impermissible censorship of political speech if the government restricts the honking.

If the government imposes such restrictions on the freedom of speech, the restriction is subject to a “strict scrutiny” test—a court’s tool for discerning whether a Constitutional violation has occurred because of government regulation.¹²² The strict scrutiny test is the highest bar to pass for any government restriction on speech, requiring the government to show why the restriction is both necessary and cannot be accomplished in a less restrictive way.¹²³ The test is broken into two parts, determining both: (1) whether the government has a compelling interest for the restrictive law; and (2) whether that law was narrowly tailored to the interest at hand.¹²⁴ “Narrowly tailored” means: (1) that the law is neither over-inclusive (i.e., is only as restrictive as necessary to achieve the government’s compelling interest) nor under-inclusive (i.e., actually achieves the compelling interest);¹²⁵ and (2) sufficiently permits the speech to be heard through alternate means.¹²⁶ Note, while this may lead to a scenario where a reasonable restriction on content may be imposed, based on a compelling government interest (e.g., trucks honking on a public street at two in the morning, or shouting “bomb” on an airplane),

¹²² Cf. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 *UCLA L. REV.* 1267, 1273 (2007) (“In modern constitutional law, the term ‘strict scrutiny’ refers to a test under which statutes will be pronounced unconstitutional unless they are ‘necessary’ or ‘narrowly tailored’ to serve a ‘compelling governmental interest.’” (citing *Johnson v. California*, 543 U.S. 499, 505 (2005); *Miller v. Johnson*, 515 U.S. 900, 920 (1995))).

¹²³ See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983); Fallon, Jr., *supra* note 122, at 1332–33 (“The Supreme Court . . . frequently presents the strict scrutiny inquiry as if it possessed two discrete parts. First, has the government defended a challenged regulation by referring to the need to protect a genuinely compelling interest? Second, if so, is the challenged regulation narrowly tailored to that interest in the sense of being neither under- nor overinclusive?”); see also *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972).

¹²⁴ See Fallon, Jr., *supra* note 122, at 1332–33.

¹²⁵ See *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989) (“The Government may . . . regulate the content of constitutionally protected speech in order to promote a compelling interest if it chooses the least restrictive means [i.e., is not over-inclusive] to further the articulated interest [i.e., is not under-inclusive].”).

¹²⁶ *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (“[R]estrictions of this kind are valid provided that they . . . leave open ample alternative channels for communication of the information.”).

discrimination based on viewpoint is not a compelling government interest for courts.¹²⁷

2. Designated Public Fora

Designated public fora are spaces that could initially be described as private property, but which are then, by virtue of the government, opened up to the public to allow public speech and expression.¹²⁸ Examples include places such as university facilities,¹²⁹ school board meetings,¹³⁰ and town theaters.¹³¹ Thus, unlike the traditional public forum, the designated public forum consists of property not open to the public by default, but by virtue of their having been designated a public space by the government.¹³²

Designated public fora offer less protection than traditional public fora—public parks and streets—in the sense that the government can revert the space back to serving a private purpose when it desires.¹³³ This is because the space initially belonged to the government, rather than the people.¹³⁴ However, so long as the government offers the designated forum to the general public for speech and expression, the space is entitled to the same protections as a traditional public forum.¹³⁵ Thus, strict scrutiny should still apply to designated public fora, so long as they are designated as

¹²⁷ See *infra* notes 142–44 and accompanying text, and example offered for explanation in paragraph text accompanying note 144.

¹²⁸ See *Perry Educ. Ass'n*, 460 U.S. at 45.

¹²⁹ See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 276 (1981) (holding that a university that banned students belonging to a religious group from using its buildings for worship and meetings violated free speech rights).

¹³⁰ See, e.g., *City of Madison Joint Sch. Dist. v. Wisc. Emp't Relations Comm'n*, 429 U.S. 167, 175–76 (1976) (holding it improper to require a board of education to discriminate against teachers by prohibiting them from attending a public meeting while allowing union representatives to do the same).

¹³¹ See, e.g., *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 561–62 (1975) (holding a municipal board's denial of a theatrical production company's application to use a city-leased theater for their play on account of the play's content improper).

¹³² See *Perry Educ. Ass'n*, 460 U.S. at 45.

¹³³ See *id.* (insinuating government restrictions on speech in designated fora need not be subject to strict scrutiny review so long as they are not designated as public).

¹³⁴ *Cf. id.* at 46.

¹³⁵ See *id.*

open to the public.¹³⁶ Additionally, even when the designated forum is public, reasonable time, place, or manner restrictions—just as with traditional public fora—are fair game, with the caveat that any content-based restrictions still have to pass strict scrutiny review.¹³⁷ This means that, in the case of the President’s Twitter account, if that account is designated by the government as public, and then later closed for a private purpose, there is no recourse for viewpoint discrimination that occurs while the account is kept private to the individual. Viewpoint discrimination is not prohibited in an individual’s private forum, or social media account, so long as that individual is not acting in the role of the government.¹³⁸

3. Limited Public Fora

A limited public forum is characterized as a space where “the limited and legitimate purposes for which it was created” may justify restrictions on speech—even content restrictions—so long as they do not discriminate on a basis of viewpoint.¹³⁹ Thus, this type of space may confine speech to specific people and specific topics, so long as that was the purpose for which the space was created, and that purpose was legitimate.¹⁴⁰ In these fora then, the government is “like the private owner of property” that opens up their property for a specific purpose.¹⁴¹ Once the limited public forum is opened, the government must respect its restrictions and not discriminate against speech that satisfies the conditions it set for participation in the forum.¹⁴² This leads to the unique situation

¹³⁶ *See id.*

¹³⁷ *Id.*

¹³⁸ *See supra* note 93; *see also infra* Section I.C.2 (discussing when an individual elected to public office is deemed to have acted as the government, rather than his or herself).

¹³⁹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

¹⁴⁰ *See id.* Examples might include a government seminar with attendance open to the public, but limited by content to discussions on pharmaceuticals, and limited by speaker to experts in the industry; or a government chat room dedicated to a public Q&A, with discussions limited to, cybersecurity.

¹⁴¹ *See Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 390 (1993).

¹⁴² *Rosenberger*, 515 U.S. at 829 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 804–06 (1985)).

where content can be discriminated against, while viewpoint discrimination is still prohibited. This is because, regardless of the limited topic of discussion (i.e., content restrictions involved) or limited set of speakers, the viewpoints of those limited speakers, on that limited topic of discussion, are within the lawful bounds the government has set, and cannot thus be discriminated against.¹⁴³

Take the example of the President's Twitter account. Let us say the President officially opened his Twitter account to the public with two limitations in mind that he regularly enforces: (1) the topic of discussion is immigration reform; and (2) only users who are respected scholars in the field are permitted to discuss the issue. Content-based restrictions in that forum on topics dealing with issues beyond immigration reform would be permissible under the First Amendment.¹⁴⁴ Thus, Twitter users posting criticism, or anything for that matter, unrelated to immigration reform may be blocked from the forum because it was opened for a limited purpose—the discussion of immigration reform. Additionally, even Twitter users posting comments on his account related to immigration reform may be blocked from the account if they are not respected scholars in the field. However, any respected scholar in the field criticizing the President on his views relating to immigration reform, or posting *content about* immigration reform that the President disagrees with, would be protected from having their viewpoint on the topic censored (assuming, that is, that the President really did intend the forum to be open, just limited to a particular discussion).

Note how, as described above, regardless of the purpose or type of forum—whether traditional, designated, or limited—viewpoint discrimination in a public forum is always prohibited.

4. Nonpublic Fora

Nonpublic fora are characterized as “public property which [are] not by tradition or designation a forum for public

¹⁴³ *See id.*

¹⁴⁴ *See id.* at 829–30 (“[W]e have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum’s limitations.”).

communication.”¹⁴⁵ One example of such a forum is a courthouse lobby,¹⁴⁶ which is probably used for facilitating court proceedings as opposed to public discussion. Protestors may be able to voice their concerns on the courthouse steps or the street beside it, but the lobby within may justifiably prohibit protest within. These fora are thus afforded different gradients of protection from restrictions on speech,¹⁴⁷ are subject to time, place, or manner regulations,¹⁴⁸ and the government can restrict speech within the forum so long as the restriction is reasonable and not a cloaked attempt to silence particular viewpoints.¹⁴⁹ In other words, the nonpublic forum, while by its very nature not intended for public discussion, nonetheless presents the possibility that speakers with access to it for its intended purposes can bring successful viewpoint discrimination claims.¹⁵⁰

While a nonpublic forum may sound similar to a limited public forum, the difference lies in that a limited public forum is opened by the government to the public for a specific communicative purpose, whereas the nonpublic forum can conceivably be opened to a private audience for noncommunicative purposes, while still remaining subject to viewpoint discrimination.¹⁵¹ While the ability of the government to enforce time, place, or manner restrictions is expanded,¹⁵² viewpoint discrimination retains its presumptive invalidity under the First Amendment.¹⁵³ Using the President’s Twitter account again as an example, if the account was password-protected so that only White House employees could access it for work-related purposes, there may be a host of reasonable time, place, or manner restrictions. Such restrictions might limit speech or expression to work-related activity, certain time periods of the

¹⁴⁵ *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

¹⁴⁶ *See Gay Guardian Newspaper v. Ochoopee Reg’l Library Sys.*, 235 F. Supp. 2d 1362, 1367 (S.D. Ga. 2002), *aff’d sub nom. Gay Guardian Newspaper v. Ochoopee Reg’l*, 90 F. App’x 386 (11th Cir. 2003).

¹⁴⁷ *Perry Educ. Ass’n*, 460 U.S. at 46.

¹⁴⁸ *See infra* notes 116–20 and accompanying text.

¹⁴⁹ *Perry Educ. Ass’n*, 460 U.S. at 46.

¹⁵⁰ *See id.*

¹⁵¹ *See id.*

¹⁵² Namely, because the forum is capable of being private and unconcerned with communicative value.

¹⁵³ *See Perry Educ. Ass’n*, 460 U.S. at 46.

day when the account could be accessed (such as working hours), and the language and decorum of speech on the account could be restricted to professional standards. Regardless, any employees working within these constraints who are censored because of their take on a work-related issue may have a viewpoint discrimination claim.¹⁵⁴

C. Government as Speaker

Speech protections vary considerably when the government itself acts as speaker. The first part of this Section discusses when the government “speaks” through selective financial assistance to entities promoting its goals and through its discretionary rules in government license plate programs. The second part of this Section discusses when government speech transforms the private spaces of its employees into public fora.

1. Government Speech Doctrine

Viewpoint discrimination of *protectable speech*¹⁵⁵ retains its presumption of invalidity regardless of the type of forum it may take place in.¹⁵⁶ Nonetheless, the government speech doctrine provides an arguable exception to the protection against viewpoint discrimination.¹⁵⁷

Government speech doctrine is the concept that when the government, as opposed to a citizen, makes protectable (and legal) speech, it has the right to protect its own message.¹⁵⁸ For speech to qualify as government speech, the government must decide the overall message of that speech and approve what is used to convey it.¹⁵⁹ In these situations, the government can protect its speech

¹⁵⁴ See *id.*

¹⁵⁵ Remember, the analysis into different gradients of speech protection in Section I.B necessarily assumes first that the speech is the kind protected under the First Amendment. See *infra* Section I.A.

¹⁵⁶ See *supra* Sections I.B.1–4.

¹⁵⁷ See *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (“To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect.”).

¹⁵⁸ See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995).

¹⁵⁹ *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 562 (2005).

from being “garbled,” or distorted, by those sponsored by its speech, or otherwise appropriating the speech with the government’s blessing.¹⁶⁰

Government “speech,” according to the Supreme Court, includes, *inter alia*, when the government funds private entities with public monies to disseminate its message.¹⁶¹ This is the mirror image of organizations influencing the government through lobbying efforts, or of activists pressuring the government through social awareness programs; by expending private funds on the messages they want to convey to the government, private entities get the government to listen, and perhaps, obey.¹⁶² Government speech is the reverse scenario, where the government influences private entities by expending public funds, which may involve a government choice concerning which viewpoint it takes on a particular topic—abortion, health care, smoking, guns, etc. (i.e., what this Author, although not this Note, argues is akin to viewpoint discrimination).¹⁶³

If the government chooses to disburse funds to health care providers that abstain from abortion procedures, and this is a legitimate, albeit, legal cause, it may do so.¹⁶⁴ The inverse is also true: If the government chooses not to support abortions as a policy matter, then the government does not have to continue providing funds to organizations that promote opposite messages.¹⁶⁵ After all, the government is providing its sponsorship when it funds private organizations, and if those funded organizations are doing exactly what the government is fighting against, they distort the

¹⁶⁰ See *Rosenberger*, 515 U.S. at 833.

¹⁶¹ *Id.*

¹⁶² See *Resources for Foundations Funding and Supporting Advocacy*, BOLDER ADVOCACY, <https://bolderadvocacy.org/focus-on-foundations/resources-for-foundations-funding-and-supporting-advocacy> [<https://perma.cc/R3VM-4RQ7>] (last visited Feb. 1, 2018).

¹⁶³ See *Rosenberger*, 515 U.S. at 833.

¹⁶⁴ See *id.*

¹⁶⁵ *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (“When Congress established a National Endowment for Democracy to encourage other countries to adopt democratic principles, it was not constitutionally required to fund a program to encourage competing lines of political philosophy such as communism and fascism.” (citations omitted)).

government's mission to the perception of those that recognize the government's partnership with that organization.¹⁶⁶

One of a seminal set of decisions surrounding the government speech doctrine, collectively referred to as the Specialty License Plate cases, was *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*¹⁶⁷ This case marked a new distinction in public fora jurisprudence, where the Supreme Court held that specially printed license plates, although created at the request of individuals, constituted government speech and were neither limited nor designated public fora.¹⁶⁸ Thus, unlike the student newspaper at issue in *Rosenberger*, which the Supreme Court found to be a public forum despite its metaphysical, rather than physical, spatial qualities,¹⁶⁹ the Supreme Court here held that license plates were a metaphysical space where speech is reserved to the government.¹⁷⁰ It found so "based on the historical context, observers' reasonable interpretation of the messages conveyed by Texas specialty plates, and the effective control that the State exerts over the design selection process."¹⁷¹ The participation of citizens in designing and propagating the specialty license plates could not overcome the government character reflected by, nor the control exerted over, the specialty license plates.¹⁷² In so holding, the Supreme Court upheld the State of Texas's right to refuse to print specialty license plates depicting Confederate battle flags, namely because of the state's interest in protecting its own expressive content.¹⁷³ What makes this decision so significant, is that the Supreme Court allowed Texas to discriminate against Confederate battle flag designs (a form of speech) in favor of other designs in its selection process.¹⁷⁴ Thus, while not directly censoring speech on the basis of viewpoint, the government may still favor the speech of one

¹⁶⁶ See *Rosenberger*, 515 U.S. at 833.

¹⁶⁷ 135 S. Ct. 2239, 2243–44 (2015) (dealing with specialty license plate design prints requested by Texan citizens and the state government's role in approving or denying certain designs).

¹⁶⁸ See *id.* at 2250–51.

¹⁶⁹ See *Rosenberger*, 515 U.S. at 830.

¹⁷⁰ See *Walker*, 135 S. Ct. at 2251.

¹⁷¹ *Id.*

¹⁷² See *id.*

¹⁷³ See *id.* at 2253–54.

¹⁷⁴ See *id.* at 2251, 2253–54.

speaker over another so long as that speaker's goals conform with its own, even at the detriment to the cause of another speaker's viewpoint.¹⁷⁵

2. Section 1983 and the Color of Law Doctrines¹⁷⁶

The “color of law” doctrine allows plaintiffs in civil rights actions to bring claims against government actors that were conducting themselves in their public (i.e., professional), as opposed to nonpublic (i.e., private), capacities.¹⁷⁷ The color of state law doctrine deals with claims against state-based officials, and originates from title 42 of the U.S. Code, section 1983,¹⁷⁸ which provides for a civil action against the government for a deprivation of rights under the Constitution and U.S. law.¹⁷⁹ To state a claim, “[o]ne must trace the challenged conduct to the government.”¹⁸⁰ Courts look to the totality of circumstances to determine whether a public official, when infringing on the fundamental rights of others, was acting in his or her official (i.e., governmental) capacity, or as a private citizen.¹⁸¹

In *Davison*, the Eastern District of Virginia assessed whether Randall, the Chair of the Loudoun County Board of Supervisors, was acting in her official capacity as a representative of the government, or a private citizen, when she blocked the plaintiff constituent from her Facebook account.¹⁸² In weighing the totality

¹⁷⁵ See *supra* notes 161–66, 173–74.

¹⁷⁶ Throughout this Note, the Author refers to the color of state law doctrine and the color of federal law doctrine collectively and individually. Both of these concepts are defined in the Section below. For purposes of clarity, when referring to the “color of law” or the “color of law doctrine,” the Author is referring to both collectively. When the Author refers to “color of state law” or “color of federal law” doctrine, they are being treated separately from their sister doctrine.

¹⁷⁷ See 42 U.S.C. § 1983 (2012); *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 712–14 (E.D. Va. 2017).

¹⁷⁸ 42 U.S.C. § 1983.

¹⁷⁹ See *id.*

¹⁸⁰ *Davison*, 267 F. Supp. 3d 712.

¹⁸¹ See *id.* at 712–14 (quoting *Rossignol v. Voorhaar*, 316 F.3d 516, 527 n.1 (4th Cir. 2003)). Examples of factors that might appear in a color of state law totality analysis necessarily differ depending upon the facts of each case, but for examples in the social media context, see *infra* note 183 and accompanying text.

¹⁸² See *id.* at 711–14.

of the circumstances under the color of state law analysis, the court pointed to the following factors:

Among other things, (1) the title of the page includes Defendant's title; (2) the page is categorized as that of a government official; (3) the page lists as contact information Defendant's official County email address and the telephone number of Defendant's County office; (4) the page includes the web address of Defendant's official County website; (5) many—perhaps most—of the posts are expressly addressed to “Loudoun,” Defendant's constituents; (6) Defendant has submitted posts on behalf of the Loudoun County Board of Supervisors as a whole; (7) Defendant has asked her constituents to use the page as a channel for “back and forth constituent conversations”; and (8) the content posted has a strong tendency toward matters related to Defendant's office.¹⁸³

Based on these characteristics of her “personal” social media account, the court concluded that Randall's Facebook account activity was primarily a function of her professional (i.e., governmental) persona rather than her personal or private persona, and held that she acted under color of state law in maintaining her Facebook page.¹⁸⁴

The color of state law analysis the Eastern District of Virginia employed is applicable to the question of whether the President acts in his official governmental or personal capacity when maintaining his Twitter account and blocking constituents. Notably, the Twitter account at issue in the *Trump* case is the President's personal @realDonaldTrump account, rather than the official President of the United States @POTUS account.¹⁸⁵ If the viewpoint discrimination at issue in *Trump* took place on the @POTUS account, the analysis of this Note would take a different turn. There would be no need to analyze whether there is a

¹⁸³ See *id.* at 714.

¹⁸⁴ See *id.*

¹⁸⁵ See President Trump (@POTUS), TWITTER, <https://twitter.com/potus?lang=en> [<https://perma.cc/6RSW-ULWU>] (last visited Mar. 30, 2018).

sufficient connection between the private individual account of Donald J. Trump, the man, and his position/actions as the President, to render the account an “official” public account. The only analysis that would take place with respect to the @POTUS account is whether social media generally, and Twitter pages in particular, are public fora. As addressed in the Introduction, and as argued more fully in Section II.A, social media platforms, including Twitter pages, are the new public fora.

In *Davison*, a public official’s personal Facebook account was rendered a public forum. For the most part, the same factors in *Davison* can be checked against the President’s personal Twitter page. However, when looking at the actions of a federal official, we would presumably look to the color of federal law doctrine instead of the color of state law doctrine.¹⁸⁶

Federal officials cannot be liable under the color of state law doctrine.¹⁸⁷ The color of federal law doctrine is the product of a court-created work-around to the prohibition of using the color of state law doctrine in civil claims against federal officials for damages.¹⁸⁸ In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,¹⁸⁹ the Supreme Court held for the first time that individuals held a private right of action against federal officials, acting under color of federal law, for “damages [that] may be obtained for injuries consequent upon a violation of the Fourth Amendment” (a “*Bivens* claim”).¹⁹⁰ Thus, to qualify for a color of federal law claim, a plaintiff must declare both a Fourth Amendment violation¹⁹¹ and seek damages.¹⁹² Thus, a color of

¹⁸⁶ See, e.g., *Bender v. Gen. Servs. Admin.*, 539 F. Supp. 2d 702, 707 (S.D.N.Y. 2008).

¹⁸⁷ See *Wheeldin v. Wheeler*, 373 U.S. 647, 650 (1963) (“[42 U.S.C. §§ 1983 and 1985] of the Civil Rights Act are clearly inapplicable to this kind of case.”); *Duncan v. Goedeke & Cleasey*, 837 F. Supp. 846, 849 (S.D. Tex. 1993) (“Section 1983 protects persons who were deprived of rights, privileges, and immunities under color of state or local law, not federal law. Therefore, federal officers acting under color of federal law . . . are not subject to suit under 42 U.S.C. § 1983.”).

¹⁸⁸ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 427–28 (1971) (Black, J., dissenting).

¹⁸⁹ See *id.* at 395–97 (majority opinion).

¹⁹⁰ See *id.* at 395.

¹⁹¹ The Fourth Amendment protects citizens against unlawful searches and seizures by the government without a warrant:

federal law claim is brought under a Fourth, rather than First, Amendment claim.¹⁹³

Despite this, the Southern District of New York has stated, in a *Bivens* claim for monetary damages against a federal official or agent, “[t]o determine whether a defendant has acted under color of federal law for purposes of a *Bivens* action, courts look to the more established body of law that defines the analogous term—under color of state law—with regard to actions under 42 U.S.C. § 1983.”¹⁹⁴ Not only is this statement important because it comes from the Southern District of New York, where the Knight Institute brought suit against the President, but it specifically directs the court’s analysis to “the more established body of law” under color of state law analysis.¹⁹⁵ The Second Circuit, too, has recognized that “Courts of Appeals have held that section 1983 concepts of state action apply in determining whether action was taken ‘under color of federal law’ for *Bivens* purposes.”¹⁹⁶

But does color of federal law apply outside of *Bivens* cases? If so, what role do the concepts of viewpoint discrimination and government speech have to play in the analysis? How does a color of federal law claim stand up to the President of the United States?

Before addressing these questions, this Note must first determine whether, in fact, the President’s Twitter account even serves as a public forum. Namely, does a viewpoint discrimination claim have a platform, so to speak, to stand on when talking about the President’s Twitter account? As discussed above, when venturing into new areas of communicative innovation, it is important to keep an open mind as speech doctrine necessarily

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend IV.

¹⁹² See *Bivens*, 403 U.S. at 395.

¹⁹³ See *id.*

¹⁹⁴ *Id.*

¹⁹⁵ See *id.*

¹⁹⁶ *Chin v. Bowen*, 833 F.2d 21, 24 (2d Cir. 1987) (emphasis added).

attempts to keep pace with rapidly evolving technological guideposts.

II. VIEWPOINT ON THE PRESIDENT’S CONDUCT ON HIS PERSONAL TWITTER ACCOUNT

The first Section of this Part opens with the initial inquiry into whether social media generally function as public fora, rather than private fora, because a viewpoint discrimination claim will not succeed in the latter.¹⁹⁷ In the second Section, the analysis then turns to whether the President’s personal Twitter account serves as a public forum. Finally, in the third Section, this Part examines (assuming the President’s Twitter account serves as a public forum) whether the President violates the First Amendment for viewpoint discrimination when he bans constituents from his personal social media account because they posted messages that were critical of him.

A. *Social Media (Generally) Functions as a Public Forum*

In *Rosenberger v. Rector and Visitors of University of Virginia*, the Supreme Court made clear that public fora protection extends beyond traditional physical spaces into metaphysical spaces.¹⁹⁸ Specifically, the Supreme Court held that a student-run religious newspaper was “a forum more in a metaphysical than in a spatial or geographic sense, but the same principles [we]re applicable.”¹⁹⁹ Thus, although the student newspaper at issue in that case was in no sense a traditional public forum—i.e., spaces comparable to public streets and sidewalks—the Supreme Court made clear that the same principles applied.²⁰⁰

¹⁹⁷ See *Hudgens v. N.L.R.B.*, 424 U.S. 507, 513 (1976) (“[T]he constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.”); *supra* note 93 and accompanying text.

¹⁹⁸ See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995).

¹⁹⁹ *Id.*

²⁰⁰ See *id.*

The *Rosenberger* Court did little to explain how it came to this conclusion.²⁰¹ What it did do was point to its decision in *Lamb's Chapel v. Center Moriches Union Free School District*²⁰² for guidance because it was the most recent and relevant case on point.²⁰³ *Lamb's Chapel* concerned a church that wanted to use a school's facilities, pursuant to the school district's regulations, to publicly exhibit movies for religious purposes.²⁰⁴ The content of those movies related to education about modern family and child rearing issues, and the ways in which traditional Christian values remedied these issues.²⁰⁵ Despite the school regulation that school property could be used for social, civic, and recreational purposes, the local school district denied the church's request because of the movies' religious agenda.²⁰⁶ The church brought charges alleging, inter alia, that the school district had violated its freedom of speech while acting under color of state law.²⁰⁷

The *Rosenberger* Court explained how, in *Lamb's Chapel*, it had unanimously decided that it was viewpoint discrimination to allow all views on family issues to the exception of religious views.²⁰⁸ The aspects of *Lamb's Chapel* that made it most related to *Rosenberger* were most likely the factual circumstances of a school restricting access to school resources on the basis of religious viewpoint.²⁰⁹ However, in *Lamb's Chapel*, as opposed to *Rosenberger*, at issue was the use of a physical, rather than metaphysical, space.²¹⁰

The common link between the two cases, aside from the inherent tensions between a school and its religious community, rests on the restriction to use publicly available resources and

²⁰¹ See *id.* at 830–31.

²⁰² 508 U.S. 384 (1993).

²⁰³ See *Rosenberger*, 515 U.S. at 830.

²⁰⁴ See *Lamb's Chapel*, 508 U.S. at 387–89.

²⁰⁵ See *id.* at 388.

²⁰⁶ *Id.* at 388–89, 391.

²⁰⁷ *Id.* at 389.

²⁰⁸ See *Rosenberger*, 515 U.S. at 830 (alteration in original) (quoting *Lamb's Chapel*, 508 U.S. at 393).

²⁰⁹ See *id.* at 830; *Lamb's Chapel*, 508 U.S. at 393.

²¹⁰ Compare *Rosenberger*, 515 U.S. at 830 (regarding use of space within a two-dimensional newspaper), with *Lamb's Chapel*, 508 U.S. at 386–87 (regarding use of space within a three-dimensional school building).

property.²¹¹ One might argue that a metaphysical element in *Lamb's Chapel* was the restriction on films, and this was what rendered the case most related to *Rosenberger*, but it makes more sense to view the property where the public would gather to view those films as the real property at issue. In fact, one falters to find any case relating to public fora that does not involve a restriction on the use of publicly accessible property or resources; despite the fact that the focus of the protection is on speech.²¹² The Internet—and by extension social media websites—fits into this scheme, as social media is undoubtedly both a publicly accessible property and a resource.²¹³

Regardless of whatever the real rationale behind the *Rosenberger* decision was, metaphysical spaces can be, and *are*, treated as public fora when they fit the characteristics of one.²¹⁴ Thus, social media websites, which are themselves a metaphysical space,²¹⁵ cannot be excluded as public fora on mere account of their not being actual, physical spaces.²¹⁶

If newspapers are protected as public fora, why not social media? Newspapers and social media have more in common every day. Like newspapers, social media websites do not consist of a physical space in the real property sense, but rather in the metaphysical sense, because human beings cannot physically step into either a newspaper or website. Additionally, social media have

²¹¹ Compare *Rosenberger*, 515 U.S. at 830 (restricting school funds, both as property and a resource, to print student run newspaper, also as a resource and property), with *Lamb's Chapel*, 508 U.S. at 393 (restricting access to school facilities, both as property and a resource, to play films, both as property and a resource).

²¹² See *supra* Part I.

²¹³ Whether intellectual property or otherwise, social media websites are “owned” by an entity and are used by billions of people. See, e.g., Kurt Wagner, *Who Owns Twitter? A Look at the Players Who Could Make or Break a Deal.*, RECODE (Aug. 11, 2016), <https://www.recode.net/2016/8/11/12417064/twitter-stock-ownership-takeover-acquisition-challenges> [https://perma.cc/EA4A-RNTM]; see also *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (noting that, according to sources cited to the Supreme Court, Facebook has 1.79 billion active users, which is “about three times the population of North America”).

²¹⁴ See *Rosenberger*, 515 U.S. at 830.

²¹⁵ The Author uses the term “metaphysical” in the same sense the *Rosenberger* Court did, namely, spaces that are not traditional “spatial or geographic” properties. See *id.*

²¹⁶ See *id.*

increasingly taken on the same functions as newspapers.²¹⁷ In fact, a majority of Americans report using social media for their news.²¹⁸ Twitter is no exception.²¹⁹

According to the Pew Research Center, “[s]ince 2013, at least half of Twitter users have reported getting news on the site, but in 2017, with a [P]resident who frequently makes announcements on the platform, that share has increased to about three-quarters ([seventy-four percent]), up [fifteen] percentage points from last year.”²²⁰ Thus, not only do Americans increasingly use social media—and Twitter more specifically—as a news source, but the increasing use of Twitter for news actually correlates with the President’s frequent use of Twitter since he took office in 2017.²²¹ It thus stands to reason that the President’s Twitter account, if not a growing news source itself, may actually be responsible for Twitter’s increased audience for news.²²²

The Fourth Circuit has directly analogized social media to newspapers. In *Liverman v. City of Petersburg*, the court recognized that social media sites like Facebook are at least like newspapers in two respects: (1) they are spaces where news stories or opinions are shared with members of the community; and (2) individuals may submit (i.e., participate) in the content appearing on those spaces.²²³ Further, what more pertinent point of view is there to communicate and share than the President’s when it comes

²¹⁷ See Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, PEW RESEARCH CTR. (Sept. 7, 2017), <http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/> [<https://perma.cc/44GN-P8F4>].

²¹⁸ According to a new Pew Research Center study, “[a]s of August 2017, two-thirds ([sixty-seven percent]) of Americans report that they get at least some of their news on social media—with two-in-ten doing so often.” *See id.*

²¹⁹ *See id.* (describing the swell in numbers of social media users that have come to rely on Twitter as a source of news).

²²⁰ *See id.* (emphasis added).

²²¹ *See id.*

²²² *See id.* Note that, while it is tempting to assume the President’s Twitter account was directly responsible for Twitter’s increase as a news source, the data from the Pew Research Center merely supports, at most, a correlation between the two. *See id.*

²²³ *See Liverman v. City of Petersburg*, 844 F.3d 400, 410 (4th Cir. 2016) (“Facebook is a dynamic medium through which users can interact and share news stories or opinions with members of their community. Similar to writing a letter to a local newspaper, publicly posting on social media suggests an intent to “communicate to the public or to advance a political or social point of view beyond the employment context.”).

to politics?²²⁴ While reporters of every major newspaper in the United States scramble to attend White House press conferences in the hopes of asking a question or getting a word in with the President, it is the President that scrambles to Twitter.²²⁵ Twitter probably has more exposure to the President than the various traditional news outlets we would normally rely on for news about the President and the ways in which our federal government is being led.²²⁶

That is not to say that social media are only public fora in so much as they are growing to resemble the same function as newspapers. The most authoritative source for finding that social media act as public fora is the Supreme Court itself. Just this year in *Packingham v. North Carolina*, the Supreme Court majority found that the “democratic forums of the Internet,” and social media in particular, constituted the most important fora for the exchange of views in our modern society.²²⁷ At issue in that case was a North Carolina law that made it a crime for registered sex offenders to join commercial social media where the offender has knowledge that minor children can become members or create account pages.²²⁸ In striking down the law as an unconstitutionally broad abrogation of free speech, the majority stressed that the law was a “bar to the exercise of First Amendment rights on websites integral to the fabric of our modern society and culture.”²²⁹ Thus,

²²⁴ See Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 264 (2006) (“[P]residents are held politically accountable for how the federal government as a whole functions, and in particular for how administrative agencies exercise their vast delegated powers.”).

²²⁵ See Trump, *supra* note 5 (showing 1,376 tweets (or, Twitter posts) from the President this year alone since joining Twitter in January 2017).

²²⁶ See *infra* note 238 and accompanying text (describing how the President posts tweets on Twitter on a near-daily, and sometimes near-hourly, basis); see also Stack, *supra* note 224 (noting how the President is considered accountable for the federal government as a whole).

²²⁷ 137 S. Ct. 1730, 1735 (2017) (“While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and *social media in particular*.” (internal citations omitted) (emphasis added) (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997))).

²²⁸ See *id.* at 1733 (emphasis added) (quoting N.C. GEN. STAT. ANN. §§ 14-202.5(a), (e) (West 2015)).

²²⁹ See *id.* at 1738.

there exists near-explicit authority from the highest court in the United States that the Internet generally, and social media in particular, not only qualify as public fora,²³⁰ but have become necessary to “the exchange of views” in our culture and society.²³¹

Importantly, the state law at issue in *Packingham* prohibited access to *commercial* (i.e., for-profit) social media websites, such as Facebook and Twitter, and the Supreme Court still struck the law down as a First Amendment violation.²³² Thus, even government restrictions to commercial website access—those owned by private, rather than government, entities—can rise to the level of a First Amendment violation.²³³ Viewpoint discrimination analysis, which concerns itself with restrictions on speech in places open to the public for the exchange of ideas, is readily applicable to commercial social media.²³⁴

In sum it would be paradoxical to afford public forum protection to newspapers and not to social media.²³⁵ This is especially true given that public forum issues must involve a restriction to some kind of publicly accessible property or resource—of which social media is no exception.²³⁶ Further, the majority in the *Packingham* Supreme Court decision made it abundantly clear that they believe the Internet, and social media in particular, are “the most important places . . . for the exchange of views”—or the most important species of public fora—in modern society.²³⁷ Supporting this conclusion is the fact that the President’s Twitter posts have generated a greater reliance on social media as a news source this year alone, and that his heavily sought-after opinions are shared on a near-daily, sometimes near-hourly, basis.²³⁸ Thus, not only should social media be considered

²³⁰ *See id.* at 1735.

²³¹ *See id.* at 1738.

²³² *See id.* at 1733.

²³³ *See id.*

²³⁴ *See id.*; *see also supra* Section I.B.

²³⁵ *See supra* notes 227–34 and accompanying text.

²³⁶ *See supra* notes 211–13 and accompanying text.

²³⁷ *Packingham*, 137 S. Ct. at 1735.

²³⁸ *See generally* Trump, *supra* note 5 (showing December 14th posts from the President “9h[ours]” ago, “7h[ours]” ago, “4h[ours]” ago, “3h[ours]” ago, and similarly frequent posts throughout December 14th, 13th, 12th, 11th, 9th, 8th, 7th, 6th, etc.).

public fora, they should be considered the most important public fora of our time.

While social media generally should be considered one of the most important public fora of our time—so much so that states cannot enact laws to make blanket prohibitions of their use, even when directed at sex offenders and commercial spaces²³⁹—that does not necessarily mean that individual social media accounts are themselves public fora. Private entities acting in their personal, as opposed to professional, capacity are not subject to viewpoint discrimination claims if they block other social media users for criticizing them on their social media accounts.²⁴⁰ This is because a First Amendment freedom of speech claim can only be brought against the government (state or federal)—the entities the First Amendment was meant to protect us from.²⁴¹ Only the government, or public entities and individuals acting under the color of law, which attributes government action to private persons working in their official public capacity—specifically, only color of state law²⁴²—can be liable for free speech restrictions on access to social media.²⁴³

Just as private persons acting in their individual capacity are free to restrict access to their social media, so too can social media websites themselves become “private,” as they are not open for public access or comment.²⁴⁴ For example, the Author’s Facebook

²³⁹ See *Packingham*, 137 S. Ct. at 1738.

²⁴⁰ See *Hudgens v. N.L.R.B.*, 424 U.S. 507, 513 (1976).

²⁴¹ *Id.*

²⁴² Remember, color of federal law claims may only be brought under the Fourth Amendment. See *supra* notes 189–93 and accompanying text. Meanwhile, federal constitutional viewpoint discrimination claims are only brought under the First Amendment because they deal with restrictions of speech. See *supra* Section I.B.

²⁴³ See *Hudgens*, 424 U.S. at 513.

²⁴⁴ Users of the social media website Facebook, for example, can block users from viewing specific social media activity like shared pictures, websites, or messages. See *When I Post Something, How Do I Choose Who Can See It?*, FAQ Question of *Selecting an Audience for Stuff You Share*, Section of *Basic Privacy Settings & Tools*, FACEBOOK, <https://www.facebook.com/help/325807937506242/> [<https://perma.cc/S72Y-UJBW>] (last visited Feb. 2, 2017) (explaining how Facebook users can use the “audience selector tool” to choose between making certain aspects of their social media activity “public” or “private”). Or, they can make the entire account invisible to those they do not want to see it. See *Who Can Search for Me?*, FAQ Question of *Control Who Can Find You*, FACEBOOK, https://www.facebook.com/help/1718866941707011/?helpref=hc_fnav

account is “private” both in the sense that he does not invite the general public to comment on his Facebook profile, and that he has taken affirmative steps to block the general public from even viewing it by using Facebook’s privacy settings.²⁴⁵ Most importantly, though, the Author is not the government or a government official acting in their governmental capacity. Thus, viewpoint discrimination claims, and First Amendment claims more generally, cannot be brought against the Author for how he manages his personal social media accounts.²⁴⁶

In conclusion, while social media as a whole is increasingly taking on the functions of news sources²⁴⁷ and may be considered the most important public fora of our time,²⁴⁸ the social media accounts of individuals may not serve as public fora—subject to viewpoint discrimination claims—where the forum belongs to nongovernment or non-color of law entities,²⁴⁹ nor where the social media is kept private through account settings.²⁵⁰

B. The President’s Personal Twitter Account Is a Public Forum

What is it about the personal social media accounts of those who happen to be government officials that makes them so susceptible to public forum claims? As mentioned earlier, not only the President, but at least four governors and a county official have been charged with viewpoint discrimination for blocking constituents that were critical of them on social media.²⁵¹ The answer lies in the ways those public officials hold their social media accounts out to the public.

Only one case so far has rendered a final judgment recognizing a public official’s self-expressed personal social media account as constituting a public forum. That case is *Davison v. Loudoun*

[<https://perma.cc/3CZ8-RXU6>] (last visited Feb. 2, 2017) (explaining different ways to make your profile invisible to others).

²⁴⁵ See *supra* note 244.

²⁴⁶ See *supra* notes 240–43 and accompanying text.

²⁴⁷ See Shearer & Gottfried, *supra* note 217.

²⁴⁸ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

²⁴⁹ See *Hudgens v. N.L.R.B.*, 424 U.S. 507, 513 (1976).

²⁵⁰ See *supra* notes 244–46 and accompanying text.

²⁵¹ See *supra* notes 18–19, 23 and accompanying text.

County Board of Supervisors.²⁵² In *Davison*, the Eastern District of Virginia relied on Fourth Circuit jurisprudence in coming to its decision that the defendant’s self-expressed personal social media account served as a public forum.²⁵³ As the court noted, the Fourth Circuit had already suggested that governments can create Internet public fora by creating a “website that includes a ‘chat room or bulletin board in which private viewers could express opinions or post information,’ or that otherwise ‘invite[s] or allow[s] private persons to publish information or their positions.’”²⁵⁴ The court pointed to the following Facebook post in finding that Randall had affirmatively solicited the speech and viewpoints of her constituents:

Everyone, could you do me a favor. I really want to hear from ANY Loudoun citizen on ANY issues, request, criticism, compliment, or just your thoughts. However, I really try to keep back and forth conversations (as opposed to one time information items such as road closures) on my county Facebook page (Chair Phyllis J. Randall) or County email (Phllis.randall@loudoun.gov). Having back and forth constituent conversations are Fossible (FOIA) so if you could reach out to me on these mediums that would be appreciated. Thanks much, Phyllis[.]²⁵⁵

²⁵² 267 F. Supp. 3d 702 (E.D. Va. 2017). Note that another case was decided earlier in the same court, with the same plaintiff, which also recognized a public official’s social media account to be a public forum. *See Davison v. Plowman*, No. 1:16CV180 (JCC/IDD), 2017 WL 105984, at *3 (E.D. Va. Jan. 10, 2017). However, unlike in *Davison*, the public official at issue in *Plowman*: (1) banned the plaintiff from his *official* Commonwealth Attorney’s Facebook page, and (2) expressly admitted that the page was subject to a county social media policy that intended the Facebook page to serve as a limited public forum. *See id.* at *1, 3. Conversely, the defendant in *Davison* made clear that she considered her Facebook to be personal, not official. *See Davison*, 267 F. Supp. 3d at 711 (“Defendant contends that her ‘Chair Phyllis J. Randall’ Facebook page is merely a personal website that she may do with as she pleases.”).

²⁵³ *See Davison*, 267 F. Supp. 3d at 716.

²⁵⁴ *Id.* (quoting *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275, 284 (4th Cir. 2008)).

²⁵⁵ *Id.* (quoting defendant).

The court concluded, based on the above statement, that the defendant-official's deliberate designation of her Facebook page as a space for communication for use by the public was more than enough to transform it into a public forum.²⁵⁶ As such, even though the Facebook page was, allegedly, intended to be personal, it was nonetheless rendered a public forum of the county and thus subject to viewpoint discrimination claims.²⁵⁷

Interestingly, the President has done the same, if not more so, than the defendant-official in *Davison*, to open his @realDonaldTrump Twitter account to the public, and to treat it as a government tool. In the pending Southern District of New York lawsuit against the President, both parties jointly stipulated to facts pointing towards the conclusion that the President had designated his personal Twitter account a public forum.²⁵⁸ A few of the more pertinent stipulated facts were: (1) the President had used his @realDonaldTrump Twitter account to communicate and interact with his constituents about his administration since his inauguration;²⁵⁹ (2) the President, “*on occasion*,” communicated about issues “not directly related” to his official government work as President;²⁶⁰ (3) the President’s personal Twitter account was “generally accessible to the public at large” with no limiting criteria;²⁶¹ (4) the President did not use any protective measures (such as privacy settings) to protect any of his tweets, therefore anyone could view them, even without being logged in to Twitter, and anyone could subscribe to get updates from the account;²⁶² (5) the President had no rule or statement on form or subject matter of

²⁵⁶ *Id.*

²⁵⁷ *See id.*

²⁵⁸ *See* Stipulation, *supra* note 22, at 12.

²⁵⁹ *Id.*

²⁶⁰ *Id.* (emphasis added). Notably, that the President uses his personal account “on occasion” to discuss issues not *directly* related to his official government business indicates that the primary discussions on his account are in fact directly related to his official government business. *See id.* In fact, this is essentially what the language supported by the immediately preceding footnote in this Note is stating. *See supra* note 259 and accompanying text.

²⁶¹ Stipulation, *supra* note 22, at 13

²⁶² *Id.*

speech to limit replies to his tweets;²⁶³ (6) earlier in the year, on July 2, 2017, the President tweeted (i.e., published a message)²⁶⁴ from his personal Twitter account that his social media use was “MODERN DAY PRESIDENTIAL[,]” while, a month earlier, the former White House Press Secretary Sean Spicer declared at a press conference that tweets from the President were “official statements by the President of the United States”;²⁶⁵ (7) Dan Scavino, Social Media Director of the White House, promoted the President’s personal Twitter account (“@realDonaldTrump”), the President’s official government Twitter account (“@POTUS”), and the White House’s Twitter account (“@WhiteHouse”), as equal channels that the President uses to communicate “directly with you, the American people!”;²⁶⁶ (8) the White House’s Twitter account description stated that Twitter users should follow the President’s official government Twitter account, *as well as his personal Twitter account*, to get the latest news on his administration;²⁶⁷ and (9) messages from his official government Twitter account were “frequently” reposted from his personal Twitter account.²⁶⁸ The White House even once directed the House Permanent Select Committee on Intelligence to the President’s “statement” on Twitter as an official White House Record.²⁶⁹ Thus, not only has the President had his Twitter posts self-described—or at least ratified—as being official, his posts are even referred to for use by House of Representatives Committees to further intragovernmental communications.²⁷⁰

Also stipulated by both parties was that the President used his personal Twitter account “multiple times a day” to announce, promote, and defend his policies, legislative agenda, official

²⁶³ *Id.* This means the President’s Twitter account is likely a designated public forum, rather than a limited one, although the distinction is moot in performing a viewpoint discrimination analysis because viewpoint discrimination is prohibited in all public fora. *See supra* Section I.B.

²⁶⁴ *See* Strickland & Chandler, *supra* note 13 (defining “tweets”).

²⁶⁵ Stipulation, *supra* note 22, at 13.

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 13–14.

²⁶⁸ *Id.* at 14.

²⁶⁹ *See id.*

²⁷⁰ *See id.*

decisions, and state visits.²⁷¹ He also “engage[d]” with foreign leaders on the account.²⁷² “[O]n occasion” he would make statements that did not relate to his official capacity as President. Finally, he announced official White House business on his personal Twitter account before other official channels.²⁷³

It is difficult to imagine a more public social media account than the President’s Twitter account. As both parties stipulate, the number of followers—the people receiving his latest Twitter posts—is nearly equal to that of his “official” @POTUS and @WhiteHouse Twitter accounts combined.²⁷⁴ Of these, the only accounts without access are those the President has blocked.²⁷⁵ The most enlightening stipulation, though, was the first listed. Namely, that “President Trump has used the @realDonaldTrump account as a channel for communicating and interacting with the public about his administration.”²⁷⁶ This fact alone, stipulated to by both parties, means that unless a court is completely unwilling to view public fora in a social media context, the @realDonaldTrump account squarely falls within the definition of a designated public forum.²⁷⁷

With *Davison* being the only case of its kind thus far, it is difficult to say with any certainty whether other courts outside the Fourth Circuit’s jurisdiction will agree with the outcome in *Davison*. Regardless, for the time being, under the *Davison* test,²⁷⁸ and most likely under the Fourth Circuit,²⁷⁹ the President’s Twitter account has, for all intents and purposes, been rendered a public forum. And if nothing else, it certainly fits the definition of one.

²⁷¹ See *id.*

²⁷² See *id.*

²⁷³ See *id.*

²⁷⁴ See *id.* at 13 (“The account has 35 million followers—16 million more than @POTUS and 21 million more than @WhiteHouse—as of the filing of this Stipulation.”).

²⁷⁵ See *id.*

²⁷⁶ See *id.* at 12.

²⁷⁷ See *supra* Section I.B.2.

²⁷⁸ See *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 716 (E.D. Va. 2017).

²⁷⁹ See *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275, 284 (4th Cir. 2008).

C. *The President Discriminates Against Protectable Viewpoints on Twitter*

Even assuming, arguendo, the President's Twitter account constitutes a public forum, does the President violate the First Amendment when banning constituents from his social media account?

As discussed below, the answer largely depends on color of law doctrine—namely, the totality of the circumstances must indicate that the government official's actions with respect to blocking a constituent arose out of public, not personal, circumstances.²⁸⁰ This same test, expressed another way, is that the government official's apparently private actions must have a "sufficiently close nexus" with the government so as to be "fairly treated as" the actions of "the [government] itself."²⁸¹ This makes sense given that the purpose for the constitutional freedom of speech is to protect from government, not personal, abuses.²⁸² Thus, claims for viewpoint discrimination, which fall under the First Amendment freedom of speech, to have merit, must persuade courts that the government, not the individual, is the entity acting when violating plaintiffs' rights.²⁸³

This conundrum is exactly what the color of law doctrine is supposed to answer.²⁸⁴ It is important to note that both the state and federal color of law doctrines are normally unnecessary to bring a claim against the government for constitutional violations.²⁸⁵ However, when a plaintiff is trying to show that a *specific individual's* actions should be interpreted as the government's, especially when those actions relate to the specific individual's personal social media, the color of law doctrine must fill the inferential gap.²⁸⁶ The perfect example of this is, once

²⁸⁰ See *Davison*, 267 F. Supp. 3d at 712 (citing *Rosignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003)).

²⁸¹ *Id.* (quoting *Rosignol*, 316 F.3d at 523).

²⁸² See *supra* notes 56–114 and accompanying text.

²⁸³ See *Hudgens v. N.L.R.B.*, 424 U.S. 507, 513 (1976).

²⁸⁴ See *supra* Section I.C.2.

²⁸⁵ The color of law doctrine is one way of getting at government constitutional violations in the civil rights context when the violator was an individual acting on behalf of the government. See *supra* Section I.C.2.

²⁸⁶ See *supra* Section I.C.2.

again, the *Davison* case. The *Davison* case is particularly valuable in that it lays out a number of factors to consider when determining whether a social media account is subject to color of state law doctrine, and by extension, viewpoint discrimination under the First Amendment.²⁸⁷

In pointing out the Chair of the Loudoun County Board of Supervisor's efforts to "swathe the 'Chair Phyllis J. Randall' Facebook page in the trappings of her office," weighing entirely towards finding applicable color of state law, the court pointed to the following aspects of her social media account: (1) the title of the account page included her official government title; (2) the account was listed as a government official; (3) the account included her official government contact information; (4) the account listed the web address of her official government website; (5) most of her posts were expressly directed at her constituents; (6) she had submitted posts on behalf of the governing body she belonged to; (7) she asked her constituents to post on her account for "back and forth constituent conversations"; and (8) her posts from the account had a strong tendency towards matters related to her official office.²⁸⁸ Each of these factors weighed towards a finding that the defendant-official had run the social media account in her professional government, rather than personal/private, capacity.²⁸⁹ This in turn opened her up to color of state law doctrine and viewpoint discrimination claims, specifically because she had run the social media account as a forum for her constituents while representing the county government, and while doing so, censored one of those constituents for criticizing how that government was run.²⁹⁰

The court noted other aspects and circumstances playing into the analysis, particularly in the context of determining whether the official's decision to ban the plaintiff-constituent arose out of "public, not personal, circumstances."²⁹¹ They are: (9) the impetus,

²⁸⁷ See *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 712–14 (E.D. Va. 2017).

²⁸⁸ See *id.* at 714.

²⁸⁹ See *id.*

²⁹⁰ See *id.*

²⁹¹ See *id.* at 713 (quoting *Rossignol v. Voorhaar*, 316 F.3d 516, 524 (4th Cir. 2003)).

purpose, and timing for creating the social media account; (10) whether the account was used as a tool for governance; (11) whether government resources were used to support the account; and (12) whether and how often official publications from her or his office promoted or referenced the official's account.²⁹²

Finally, in noting private aspects of the official's social media account, the Eastern District of Virginia pointed to: (13) whether the official's enumerated duties included maintenance of a social media account; (14) whether the account would revert to the governing body when the official leaves office; (15) whether government-issued electronic devices were used to post to the social media account; and (16) whether and how much the official's social media activity took place outside of her or his office and normal working hours.²⁹³

By comparing the Stipulation of Facts²⁹⁴ with the factors above, one can safely conclude that the President's Twitter account weighs towards a finding of acting under color of law for most of those factors.²⁹⁵ One can say with a fair degree of certainty that, using the President's own stipulated to facts: (1) his Twitter posts, and by extension his Twitter account—which itself is essentially a collection of official Twitter posts that people comment on—are official (i.e., governmental), rather than personal;²⁹⁶ (2) the account serves as a designated public forum for constituents to “communicat[e] and interact[] with the public about his administration;”²⁹⁷ and (3) he banned constituents from that public forum on the basis of their criticism of him (i.e., their adverse viewpoints).²⁹⁸ The President, if he can be linked in his official capacity to the public nature of his personal Twitter account, through another mechanism than the color of law doctrine, violates

²⁹² *See id.*

²⁹³ *See id.* at 712.

²⁹⁴ *See generally* Stipulation, *supra* note 22 (laying out uncontested facts both plaintiffs and defendants agree to).

²⁹⁵ *See supra* notes 259–68 and accompanying text. Factors not implicated by the sample of stipulated facts listed above are all mostly addressed in the Knight Institute stipulation. *See generally* Stipulation, *supra* note 22.

²⁹⁶ *See supra* notes 259–68 and accompanying text.

²⁹⁷ Stipulation, *supra* note 22, at 12

²⁹⁸ *See id.* at 1.

the First Amendment freedom of speech when blocking constituents from his Twitter account for their adverse viewpoints—at least in every situation where an exception, such as speech unworthy of protection (e.g., fighting words, etc.) is not at play.²⁹⁹

It should be noted that because the color of law claims are based on the totality of the circumstances, the factors addressed above are neither dispositive nor exclusive to the issue of whether an official committed viewpoint discrimination in banning a constituent from their personal social media account.³⁰⁰ Further complicating the issue is the fact that the above factors were used in a color of state law analysis,³⁰¹ whereas the President is a federal public official. This means the President's actions would have to be analyzed under color of federal law, rather than color of state law, doctrine. In other words, the President cannot be held liable under either theory of the color of law doctrine because color of federal law only applies to cases involving a Fourth, rather than First, Amendment violation.³⁰²

In sum, a color of law doctrine claim will fail against the President where it succeeded against the defendant-official in *Davison*.³⁰³ While color of state law doctrine provides an answer to viewpoint discrimination claims against state and local officials when banning constituents from their personal social media accounts, color of federal law doctrine simply does not afford the same protection when confronting federal officials.³⁰⁴ As already mentioned, however, the President's Twitter account would qualify as a public forum, which means other avenues may exist to find the President liable for viewpoint discrimination claims on his personal Twitter account.³⁰⁵ It is just that the color of law

²⁹⁹ See *supra* Sections I.A–B and notes 59–68.

³⁰⁰ See, e.g., *Holly v. Scott*, 434 F.3d 287, 292 (4th Cir. 2006) (“[T]here is ‘no specific formula’ for determining whether state action is present.” (quoting *Hicks v. S. Md. Health Sys. Agency*, 737 F.2d 399, 402 n.3 (4th Cir. 1984))).

³⁰¹ See *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 711–14 (E.D. Va. 2017).

³⁰² See *supra* notes 187–93 and accompanying text.

³⁰³ See *supra* notes 187–93 and accompanying text.

³⁰⁴ See *supra* notes 187–93 and accompanying text.

³⁰⁵ See *supra* note 285 and accompanying text.

mechanism from the *Davison* analysis will be inapplicable when the case goes to trial.³⁰⁶

What may remain applicable from *Davison* as a pioneering case to the Knight Institute claim, however, are the various factors the court looked to when deciding whether the forum was of a public, rather than private, character.³⁰⁷ As discussed in Section I.B, if the government opens a forum to the general public for speech, as the President did with his personal Twitter account,³⁰⁸ then that forum is subject to viewpoint discrimination claims.³⁰⁹

III. PROPOSAL

The President's explicit use of his personal Twitter account for official purposes largely resolved the conundrum addressed in Part II of this Note because the account is self-avowedly an official government forum.³¹⁰ Nonetheless, absent explicit evidence of using social media for official government use, the reality is that the color of federal law doctrine remains inapplicable to viewpoint discrimination. As discussed above, viewpoint discrimination claims for social media require: (1) a public forum; (2) a viewpoint-based restriction on use of the public forum; and (3) a

³⁰⁶ See generally *supra* Section I.C.2 (describing both color of law doctrines and how color of state law doctrine was relied on in the *Davison* analysis).

³⁰⁷ See *supra* notes 288–93 and accompanying text. While most of the *Davison* factors were used in the color of state law analysis, they are also useful at examining whether the President's personal Twitter account was operated primarily as a public, rather than private, resource. Compare *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 711–14 (E.D. Va. 2017) (discussing factors useful for distinguishing between whether a social media account was of a governmental, rather than private, character), with Sections I.B.1–4 (discussing how if the government opens a forum for a public purpose, depending on the types of limitations government imposes on that forum, it is subject to different freedom of speech protections).

³⁰⁸ See *supra* notes 259–68 and accompanying text.

³⁰⁹ See *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1067 n.2 (4th Cir. 2006) (“The ‘viewpoint discrimination’ prohibited *in all fora* is ‘an egregious form of content discrimination’ in which the government ‘targets not subject matter, but particular views taken by speakers on a subject.’” (emphasis added) (citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995))).

³¹⁰ See *supra* notes 259–73 and accompanying text.

government defendant or a government official acting within the trappings of their office.³¹¹

In *Davison*, the third element above was found through an application of the color of state law doctrine.³¹² By holding that the Chairwoman in *Davison* had acted under color of state law, the court found that the constitutional viewpoint discrimination claim could stick because the Chairwoman had acted in the role of her office.³¹³ Without a comparable doctrine available for First Amendment claims—given that, the color of federal law doctrine only supports causes of action under the Fourth Amendment³¹⁴—what options are available to viewpoint discrimination claimants seeking redress against federal public officials who are not as candid as the President concerning their official use of their social media accounts?

Section III.A discusses U.S. District Judge Naomi Reice Buchwald’s recommendation concerning how to resolve the dispute in *Trump*. Section III.B examines Twitter’s Terms and Conditions for any information that might be useful to a court in determining how to address the question presented by Part II. Section III.C discusses the existence of social media best practices disseminated by federal agencies. Finally, Section III.D discusses the merits of treating the relationship between an elected official and his or her constituents as a fiduciary relationship, such as between lawyer and client.

A. Judge Buchwald’s Recommendation in *Trump*

According to Judge Buchwald, who heard arguments from lawyers for both the President and Knight Institute in *Trump*, the President should “mute” rather than “block” critical posts he finds unwelcome.³¹⁵ When a Twitter user “mutes” another Twitter user,

³¹¹ See *supra* notes 108–13, 239–50 and accompanying text.

³¹² See *Davison*, 267 F. Supp. 3d at 714.

³¹³ See *id.*

³¹⁴ See *supra* notes 187–93.

³¹⁵ Transcript of Oral Argument at 30–33, Knight First Amendment Inst. at Colum. Univ. v. Trump, No.17-cv-05205 (NRB) (S.D.N.Y. Mar. 8, 2018); see also Larry Neumeister, *Judge to Trump: Muting, Not Blocking Followers, May End Suit*, ASSOCIATED PRESS (Mar. 9, 2018), <https://apnews.com/e524e6eda0d84d4ca6c8e1ebd>

the other user's messages are hidden from the account holder without actually blocking or stopping the muted person's access to view or post to the account.³¹⁶ Blocking the account, on the other hand, prevents the blocked user from viewing posts, accessing the account, seeing basic information associated with the account, such as the list of people and posts the account is associated with, and information about people following the account for updates.³¹⁷ If the President muted an account, then, the muted constituent could still participate in political discourse in that forum, just without being seen or heard by the President himself.³¹⁸

For example, if the President decided to mute a constituent on Twitter, the constituent could still follow the President's Twitter account, post replies to the President's posts, and read what is on the President's account.³¹⁹ Thus, the constituent can still participate in communicating with and viewing the President's account.³²⁰ However, unbeknownst to the constituent, the President cannot see anything posted by the constituent once the constituent has been muted.³²¹ The constituent's post is still there for the world to see, but not for the President to see.³²² However, if the President had blocked the constituent instead, the constituent would not be able to view the President's account, post replies to the President's posts, or follow the President's account for updates.³²³ Thus, the constituent would be effectively locked out of perhaps one of the most personal and frequent utilities the leader of the nation, the President, uses to communicate with and update the public.³²⁴

255f8d9?utm_campaign=SocialFlow&utm_source=Twitter&utm_medium=AP
[<https://perma.cc/LDK5-H98L>].

³¹⁶ See *How to Mute Accounts on Twitter*, TWITTER HELP CTR., <https://help.twitter.com/en/using-twitter/twitter-mute> [<https://perma.cc/9YH3-9JF7>] (last visited Apr. 2, 2018).

³¹⁷ See *How to Control Your Twitter Experience*, TWITTER HELP CTR., <https://help.twitter.com/en/safety-and-security/control-your-twitter-experience> [<https://perma.cc/8S5F-59YS>] (last visited Apr. 2, 2018).

³¹⁸ See *id.*; *How to Mute Accounts on Twitter*, *supra* note 316.

³¹⁹ See *How to Mute Accounts on Twitter*, *supra* note 316.

³²⁰ See *id.*

³²¹ See *id.*

³²² See *id.*

³²³ See *How to Control Your Twitter Experience*, *supra* note 317.

³²⁴ See *id.*

Muting may appease both the critical constituent, who wants participate in political discourse on the President's account, and the President, who does not want to see the constituent's criticism.³²⁵ This is, assuming of course, the constituent is trying to reach people other than the President on the account, and that the President is more concerned with himself not seeing the message, rather than the general public with access to his account.³²⁶ Such a solution settles the constitutional claims regardless, however, as constituents do not have the right to be seen or heard by the President, and the President cannot stop users from hearing another's viewpoint in a public forum (in this case, his Twitter account).³²⁷

It remains to be seen whether, after consulting with their clients, lawyers for either side will accept Judge Buchwald's recommendation and settle the case, as the judge hopes.³²⁸ If not, Judge Buchwald has cautioned that both parties may receive an outcome they will not like.³²⁹ Unfortunately, Judge Buchwald's recommendation sounds more like an ultimatum than a promise to clear up a confusing and new area of the law.³³⁰ What if "muting" is not an option on social media, or what if a federal official refuses to mute, and continues to block? What is the appropriate outcome then? It seems an answer unfriendly to both parties in *Trump* may be forthcoming should the parties refuse to settle on the judge's recommendation.³³¹

B. *Twitter's Terms and Conditions*

What does Twitter have to say about all this? According to Twitter's Terms of Service, if any "federal, state, or local government entity in the United States using the Services in [its]

³²⁵ See *id.*; *How to Mute Accounts on Twitter*, *supra* note 316.

³²⁶ See *How to Control Your Twitter Experience*, *supra* note 317; *How to Mute Accounts on Twitter*, *supra* note 316.

³²⁷ See generally *supra* Parts I–II.

³²⁸ See Transcript of Oral Argument *supra* note 315, at 33; Neumeister, *supra* note 315.

³²⁹ See Transcript of Oral Argument, *supra* note 315, at 33; Neumeister, *supra* note 315.

³³⁰ See Transcript of Oral Argument, *supra* note 315, at 33; Neumeister, *supra* note 315.

³³¹ See Neumeister, *supra* note 315.

official capacity” cannot legally accept Twitter’s terms, then those terms do not apply to those entities.³³² Any lawsuits brought relating to those terms are instead governed by U.S. federal law where applicable, and California state law where inapplicable.³³³ Notably, Twitter is aware of the distinction between government entities using its services in an official versus an unofficial capacity.³³⁴ It is thus false to assume that just because the platform is Twitter, conduct by a government official on that platform is somehow less official—at least according to Twitter.³³⁵ Further, Twitter’s terms that might cause or enable a government official to commit viewpoint discrimination on Twitter are rendered inapplicable because these do not apply when the government cannot legally accept them; as the government cannot legally accept viewpoint discrimination in a governmental public forum.³³⁶ In sum, the government cannot hypothetically cite to Twitter’s terms as a reason to break the law, nor as a reason to doubt the official nature of the posts by government officials on there.³³⁷

Twitter’s Terms of Service also states:

You understand that by using the Services, you may be exposed to Content that might be offensive, harmful, inaccurate or otherwise inappropriate All Content is the sole responsibility of the person who originated such Content. We may not monitor or control the Content posted via the Services and, we cannot take responsibility for such Content.³³⁸

This indicates that Twitter also claims no responsibility when it comes to monitoring or controlling content others might find offensive.³³⁹ Thus, Twitter claims no obligation to police what

³³² *If You Live in the United States*, Section of *Twitter Terms of Service*, TWITTER, <https://twitter.com/en/tos> [<https://perma.cc/9C5Z-TZW6>] (last visited Apr. 2, 2018) (emphasis added).

³³³ *See id.*

³³⁴ *See id.*

³³⁵ *See id.*

³³⁶ *See id.*

³³⁷ *See id.*

³³⁸ *Id.*

³³⁹ *See id.*

people say on the President's Twitter account, nor an obligation to police when the President blocks content.³⁴⁰

Overall, Twitter has an apparent laissez-faire (hands-off) role in how government officials use their services, so long as the government is not breaking the law while using them.³⁴¹ Under these terms, Twitter disclaims responsibility from monitoring posted content, including what constituents might post on a government official's Twitter account, or what posts might be blocked by that same Twitter account.³⁴² Twitter also acknowledges that government entities might use their services in their official capacity.³⁴³ These insights from Twitter may be useful to courts considering these questions from a contractual point of view: whether government officials, including the President, can break the law when using its services; whether Twitter should stay out of such a dispute; and whether Twitter can be used for official government purposes. After all, Twitter's Terms and Conditions, its contract with its users, certainly states that all three are possible.³⁴⁴

C. Social Media Best Practices from Federal Agencies

Several federal agencies have already disseminated their own best practices as related to social media use by their employees in relation to the agency. For example, the Centers for Disease Control and Prevention has a variety of materials that govern its social media presence, specifically through its employees.³⁴⁵ They have a standalone Twitter guide and a standalone Facebook guide, in addition to their general social media policy.³⁴⁶ The social media policy goes into great length about what is considered *official* social media behavior taken on behalf of the agency itself, and what is *personal* social media behavior, as well as the agency's

³⁴⁰ *See id.*

³⁴¹ *See id.*

³⁴² *See id.*

³⁴³ *See id.*

³⁴⁴ *See id.*

³⁴⁵ *See CDC Social Media Tools, Guidelines & Best Practices*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/socialmedia/tools/guidelines/index.html> [https://perma.cc/4UGT-9E9T].

³⁴⁶ *See id.*

expectations regarding the two.³⁴⁷ The same holds true of the social media policies for the Food and Drug Administration,³⁴⁸ the Department of Energy,³⁴⁹ the Office of Personnel Management,³⁵⁰ the Department of the Interior,³⁵¹ and the General Service Administration.³⁵²

While this Note has not reviewed the full list of federal agency social media policies available,³⁵³ the above sample reflects that federal agencies are aware of the important distinction between official versus personal use of social media by their employees.³⁵⁴ Each of the policies surveyed above go to great pains to make clear what they find constitutes acceptable official versus personal social media activity by their employees.³⁵⁵

The White House might well consider implementing its own official social media policy—one that prescribes what amounts to official versus personal social media activity by its employees, including the President and those that may tweet on his behalf. However, while such a policy might clear up what the government views pertaining to its social media, it is unlikely to clear up the law on whether—should an official fail to follow the policy—a

³⁴⁷ See CTRS. FOR DISEASE CONTROL & PREVENTION, CDC-GA-2011-01, CDC ENTERPRISE SOCIAL MEDIA POLICY 2–6 (2015), <https://www.cdc.gov/socialmedia/tools/guidelines/pdf/social-media-policy.pdf> [<https://perma.cc/K5K9-HJXN>].

³⁴⁸ See U.S. FOOD & DRUG ADMIN., U.S. FOOD AND DRUG ADMINISTRATION SOCIAL MEDIA POLICY 4–6 (2015), <https://www.fda.gov/downloads/AboutFDA/AboutThisWebsite/WebsitePolicies/UCM472486.pdf> [<https://perma.cc/KW9X-XFUY>].

³⁴⁹ See *Best Practices*, Subsection of *Social Media Policy*, DEP'T OF ENERGY, <https://www.energy.gov/about-us/web-policies/social-media> [<https://perma.cc/82Q2-JR4C>] (last visited Apr. 2, 2018).

³⁵⁰ See U.S. OFFICE OF PERS. MGMT., SOCIAL MEDIA POLICY 7–15 (2015), <https://www.opm.gov/news/social-media-presence/social-media-policy.pdf> [<https://perma.cc/5CL2-AXU4>].

³⁵¹ See DEPT. OF THE INTERIOR, SOCIAL MEDIA POLICY 3–5 (2010), <https://www.doi.gov/notices/Social-Media-Policy> [<https://perma.cc/997V-6KUQ>].

³⁵² See GEN. SERVS. ADMIN., CIO 2106.1, GSA ORDER, SUBJECT: GSA SOCIAL MEDIA POLICY § 5 (2009), <https://www.gsa.gov/about-us/newsroom/social-media/gsa-social-media-policy> [<https://perma.cc/54CX-CQJT>].

³⁵³ See, e.g., Ines Mergel, *Social Media Policies*, WORD PRESS: DIGITAL INNOVATIONS IN THE PUBLIC SECTOR (Oct. 10, 2011), <https://inesmergel.wordpress.com/research/social-media-policies/> [<https://perma.cc/G5JH-6E9Z>].

³⁵⁴ See *supra* notes 345–52 and accompanying text.

³⁵⁵ See *supra* notes 345–52 and accompanying text.

federal official will be held liable for viewpoint discrimination committed on their social media account.

D. Principal-Agent Relationship

Finally, one answer is to recognize an exception allowing a new use of color of federal law doctrine. The issue for the public is how to recognize when federal public officials are acting within the trappings of their office under allegedly personal circumstances, and how to hold the government accountable for when those public officials abuse their office to abrogate the constitutional rights of others under the guise of personal, not public, pretenses.

In pondering these issues, consider the duties lawyers owe to prospective clients under section 14 of the Third Restatement of the Law Governing Lawyers (the “Restatement”),³⁵⁶ stating:

A relationship of client and lawyer arises when: (1) a person manifests to a lawyer the person’s intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or (2) a tribunal with power to do so appoints the lawyer to provide the services.³⁵⁷

In a comment dedicated to the rationale behind this rule, the Restatement makes clear that lawyers should be “held to responsibility of representation when the client reasonably relies on the existence of the relationship.”³⁵⁸ It is this aspect of the rule in particular that could provide a solution to the issue of ambiguous federal public official activity in cases where the line between official and personal action is murky.

³⁵⁶ RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 (AM. LAW INST. 2010).

³⁵⁷ *Id.*

³⁵⁸ *See id.* cmt. b.

A rule that would address the glaring pocket of absent protection discussed earlier in this Part might look similar to that of the Restatement's section 14:

A federal official acts in their official capacity on behalf of the government when: (1) a person manifests to the official the person's belief that the official is acting in their official capacity; and either (a) the official manifests to the person consent that they are; or (b) the official fails to manifest lack of consent that they are, and the official knows or reasonably should know that the person reasonably relies on the official's actions as representative of the government's; or (2) an agency or branch of government with power to do so specifies a circumstance under which the official is deemed to have acted in their official capacity on behalf of the government.

Under such a rule, public federal officials are held to their actions that provoke reasonable reliance from others that they are indeed acting in their official capacity. Assume the President had not admitted to using his personal Twitter account for primarily official purposes. If others reasonably relied on his representation (though non-explicit) that his personal Twitter account was official, plaintiffs bringing a viewpoint discrimination claim would be entitled to rely on the official representation of the account as governmental, thus opening the doors to a constitutional claim against the government.

While some might argue that a public official's relationship with their constituents is of a different nature than that of a lawyer's relationship with their clients—which is admittedly true—more than a few similarities exist. For one, just as lawyers are the agents and fiduciaries of their clients,³⁵⁹ so too should public officials be the fiduciaries of their constituents. It is axiomatic that public officials are elected by their constituents to represent their interests in government. It is not a grand leap to

³⁵⁹ See *id.* § 16(3) (stating that lawyers owe their clients fiduciary duties).

suggest that such a duty includes an agency relationship, with constituents acting as the principal.

Judge Posner, in the U.S. Court of Appeals for the Seventh Circuit decision *Burdett v. Miller*, explained that “[a] fiduciary duty is the duty of an agent to treat his principal with the utmost candor, rectitude, care, loyalty, and good faith—in fact to treat the principal as well as the agent would treat himself.”³⁶⁰ He went on to explain that “[t]he common law imposes that duty when the disparity between the parties in knowledge or power relevant to the performance of an undertaking is so vast that . . . otherwise the principal would be placing himself at the agent’s mercy.”³⁶¹ He provides examples of fiduciary duty, such as a guardian and his minor ward, or a lawyer and his client.³⁶²

Does not a federal public official, an employee of the government that protects us, owe a duty similar to that of a fiduciary duty, namely, to treat their electing constituents “with the utmost candor, rectitude, care, loyalty and good faith”?³⁶³ While many might grouse that federal officials, much less politicians, have hardly a reputation for their candor and rectitude, loyalty and good faith, this only provokes a stronger rationale for imposing the duty in the first place. Lawyers too have hardly the glittering reputation in popular culture lately, but as Judge Posner pointed out, the disparity between their knowledge and power and the client’s in legal matters necessitates that they behave according to the fiduciary duty.³⁶⁴ Otherwise, a client would be at the lawyer’s mercy in all legal matters brought to the lawyer’s attention.³⁶⁵

So too is there a large disparity between the power and knowledge a federal public official has over a constituent’s in matters of governance and politics. Constituents are at the public official’s mercy, with little authority and resources to provide meaningful oversight over, say, a governor or the President. Thus, this Note suggests that rules should be crafted tightening the

³⁶⁰ 957 F.2d 1375, 1381 (7th Cir. 1992), *as amended on denial of reh’g* (May 1, 1992).

³⁶¹ *Id.*

³⁶² *See id.*

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ *Id.*

fiduciary relationship between a federal public official and the constituents they govern for the constituents' benefit.

This Note does not have the time nor resources to dig into an overhaul of political accountability to constituents. Rather, it merely provides a survey of a range of factors for courts to consider when taking on a government social media viewpoint discrimination claim. These factors included the *Davison* factors from Section II.C, Judge Buchwald's recommendation in Section III.A, Twitter's Terms and Conditions policy from Section III.B, the social media best practices for several federal agencies in Section III.C, and the benefits of treating elected public officials as the fiduciaries of their constituents discussed in Section III.D.

CONCLUSION

As discussed in the Parts above, the President's personal social media account functions as a designated public forum and the President practiced viewpoint discrimination in maintaining that forum. Courts will find that the recent *Davison* decision, while instructive, uses a method to get at the government action element of a viewpoint discrimination claim that cannot be applied to the President. However, a color of law theory is unnecessary in the context of the President's Twitter activities, given his defense team's stipulation to facts that the President primarily uses his personal Twitter account for official purposes. Thus, the President's personal Twitter account is self-avowedly official, attributed to his governmental office, and open to constitutional protection on viewpoint discrimination grounds. It remains, however, to be seen how the problem in Part II of this Note would be resolved if the President had not explicitly marked his own Twitter posts as being official. What would fill the gap in the *Davison* color of law analysis? As suggested in Part III of this Note, there are a variety of sources for courts to look to when considering a creative solution to this latest problem in free speech cases.