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## @PublicForum: The Argument for a Public Forum Analysis of Government Officials' Social Media Accounts

Sara J. Benson

*Notes Editor, Washington University Jurisprudence Review; J.D. Candidate, Washington University School of Law Class of 2020*

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# **@PUBLICFORUM: THE ARGUMENT FOR A PUBLIC FORUM ANALYSIS OF GOVERNMENT OFFICIALS' SOCIAL MEDIA ACCOUNTS**

**SARA J. BENSON\***

## ABSTRACT

*While citizens have historically marched on the streets or protested in parks to take advantage of the First Amendment, citizens in the modern world have often turned to social media to communicate their ideas and concerns to their government representatives. As new spaces for expressive activity come to light with the development of technology, courts are tasked with determining how to properly analyze government-controlled spaces on social media. This Note will examine the various approaches courts have taken to analyzing government officials' social media accounts and will argue that Supreme Court precedent and the pluralist theory of democracy support subjecting the interactive spaces on government social media accounts to public forum analysis in order to limit the government's ability to discriminate based on viewpoint and to provide a cause of action against the government when citizens' speech is suppressed online.*

## INTRODUCTION

The Free Speech Clause of the First Amendment is one of the strongest protections that citizens have to shield their expression of diverse thoughts and opinions from government censorship.<sup>1</sup> While citizens have historically marched on the streets or protested in parks to take advantage of the First Amendment, citizens in the modern world have often turned to social media to communicate their ideas and concerns to their government representatives. The First Amendment states, "Congress shall make no law... abridging the freedom of speech, or of the press."<sup>2</sup> This language

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\* *Notes Editor, Washington University Jurisprudence Review*; J.D. Candidate, Washington University School of Law Class of 2020; Member of Washington University First Amendment Clinic; B.A. in Communications and Psychology; Minor in Crime and Justice, University of Michigan, Ann Arbor Class of 2017. Special thanks to Gregory Magarian for aiding me in the development and focus of this Note, and Priya Mistry for her continuous support throughout the editing process.

1. Kristine Phillips, 'Hate speech is not protected by the First Amendment,' *Portland mayor says. He's wrong.*, WASH. POST (May 30, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/05/30/hate-speech-is-not-protected-by-the-first-amendment-oregon-mayor-says-hes-wrong/?utm\\_term=.a6cae6150b1d](https://www.washingtonpost.com/news/the-fix/wp/2017/05/30/hate-speech-is-not-protected-by-the-first-amendment-oregon-mayor-says-hes-wrong/?utm_term=.a6cae6150b1d) [<https://perma.cc/JF8S-HXRU>].

2. U.S. CONST. amend. I.

creates a few prerequisites to a free speech cause of action against the government. The clause that states “Congress shall make no law” means that citizens can only challenge a regulation with the First Amendment if it is a regulation the government creates (also known as a “state action”).<sup>3</sup> Citizens have even stronger protections from government censorship in spaces that have traditionally been devoted to public expression.<sup>4</sup> Spaces such as public parks, sidewalks, and thoroughfares have been strongholds in our nation’s history as places where those who may not otherwise have access to a large audience may preach their message to their community.<sup>5</sup> These spaces came to be known as “public forums,” and the Supreme Court determined that if the government is trying to suppress or burden speech in one of these spaces, the Court would subject the space to forum analysis: a higher level of scrutiny for government restrictions on speech in these spaces.<sup>6</sup> Additionally, even if a space is not one traditionally used for public discourse, it may qualify for forum analysis if it is used for public expression and is government owned or controlled.<sup>7</sup> Further, a finding that a space is a public forum limits the government’s ability to regulate (or discriminate) based on the content or viewpoint of speech.<sup>8</sup>

If citizens feel that their speech is being unfairly silenced in a space that is government owned or controlled, they can ask a court to make a determination of whether the space can be subject to forum analysis.<sup>9</sup>

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3. Stephen K. Wirth, Note, *State Action, Government Speech, and the Narrowing Spectrum of Private, Protected Speech*, 99 CORNELL L. REV. 485, 485 (2014) (“Under the state-action doctrine, a plaintiff claiming a free- speech-infringement must show some state action in order to trigger constitutional protection; the constraints of the First Amendment apply not to private persons but to the government.”).

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

Wherever the title of the streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.

5. *Id.* at 515-16.

6. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (restating the principle that the state may only enforce a content-based exclusion if the regulation is narrowly tailored towards serving a compelling state interest); see also KATHLEEN ANN RUANE, CONG. RESEARCH SERV., 95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 5 (2014).

7. *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541, 556 (2018). The court in this case additionally considered the purpose, structure, and intended use of the forum to determine whether those factors were consistent with forum analysis. Following this analysis, the court classified the type of public forum to determine whether the viewpoint-based exclusions were permissible. *Id.* at 570-75.

8. RUANE, *supra* note 6, at 7-8.

9. *Perry Educ. Ass’n*, 460 U.S. at 41-45.

Citizens recently brought attention to the question of whether interactive space on government social media accounts constitutes a public forum.<sup>10</sup> After his election, President Donald Trump began blocking citizens from his @realDonaldTrump Twitter<sup>11</sup> account.<sup>12</sup> Blocked<sup>13</sup> users sued the President, arguing they were unable to access this public forum and were being discriminated against based on their viewpoint.<sup>14</sup> The Southern District of New York, and subsequently the Second Circuit Court of Appeals, were faced with the question of whether these spaces could be considered public forums and, accordingly, whether the President could discriminate based on viewpoint in these spaces.<sup>15</sup> While the plaintiffs argued that protecting these spaces was essential for free expression, the government argued that government officials had the right under the First Amendment to use their social media platforms as personal accounts where they may speak freely and associate with whomever they please.<sup>16</sup>

This note argues that Supreme Court precedent and pluralist theory<sup>17</sup> provide a strong foundation for finding that the interactive spaces on government officials' social media accounts are sufficiently government controlled to constitute private property dedicated to public use. The interactive space on government social media accounts should be subject to forum analysis in order to limit the government's ability to discriminate based on viewpoint and to provide a cause of action against the government when citizens feel that their speech is being suppressed. Forum analysis is supported by pluralist theory: a theory based on the understanding that a representative government is the backbone of democracy and key to

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10. VALERIE C. BRANNON, CONG. RESEARCH SERV., LSB10141, UPDATE: SIDEWALKS, STREETS, AND TWEETS: IS TWITTER A PUBLIC FORUM? 1-2 (2019).

11. Twitter is a social media platform where a user can post 280-character "tweets" to their personal profile. Each user has a "feed," created through an algorithm, which compiles the tweets of every other user they follow, tweets that the users they follow have "liked" or "retweeted," and promotional tweets from advertisers. If a user has a public account, their tweets, retweets, likes, and replies are visible to all other users on the site. When there are multiple replies to one tweet, Twitter compiles these and lists them in order as a conversation. *Knight First Amendment Inst.*, 302 F. Supp. 3d at 550-52.

12. *Id.* at 553-54.

13. *Id.* at 551-52. Twitter also enables users to block or mute each other. Blocked users cannot see or reply to a person who has blocked them from their feed. The blocking user does not see any blocked users tweets on their feed and is not notified if a blocked user "mentions" them in a tweet.

14. *Id.* at 549.

15. *Id.*; *Knight First Amendment Inst. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019).

16. *Knight First Amendment Inst.*, 302 F. Supp. 3d at 571-72.

17. Pluralist theory of democracy is a way of viewing American democracy and politics, characterized by the role of interest groups. Under this view, political power within a democracy is spread out among different interest groups, and those groups compete with one another to influence policy. *See infra* notes 78, 79.

preventing the realization of authoritarian tendencies.

This note is comprised of three main parts. Part I begins by explaining the current public forum doctrine, including the requirements for finding that a space is a public forum and the types of forums the Supreme Court has enumerated. Further, Part I discusses the government speech doctrine and the competing argument that social media platforms should be considered spaces for government speech, not public forums. The final section of Part I introduces pluralist theory, the theoretical framework helpful to understanding why a public forum analysis is better suited to a representative democracy than a government speech analysis. Part II explores the public forum analysis of Twitter in two factually similar cases that resulted in entirely different conclusions: a Second Circuit Court of Appeals case where the court found that social media could properly be analyzed as a public forum and a federal district court case from Kentucky where the court found that government social media accounts should be treated as government speech. Part III uses Supreme Court precedent and pluralist theory to argue that the interactive spaces created by government social media accounts should be analyzed under the public forum doctrine to preserve the government's role as mediator of the interests of the citizenry.

## I. PUBLIC FORUM DOCTRINE, GOVERNMENT SPEECH DOCTRINE, AND PLURALIST THEORY

### A. *Public Forum Doctrine*

#### 1. *Requirements for Applying the Public Forum Doctrine*

In order to apply the forum doctrine, a court must determine, as a threshold matter, that a space is owned or controlled by the government.<sup>18</sup> The Supreme Court frequently requires that the forum must be “government-owned property.”<sup>19</sup> Alternatively, a court can find that a space is a public forum absent legal ownership if it is subject to sufficient

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18. See, e.g., *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 801 (1985) (“[A] speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns.”).

19. See, e.g., *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 478 (2009); see, e.g., *Int'l Soc’y for Krishna Consciousness, Inc. (ISKCON) v. Lee*, 505 U.S. 672, 678 (1992) (discussing property that the government “owns and controls”); see, e.g., *Cornelius*, 473 U.S. at 801 (“[A] speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns.”).

government control.<sup>20</sup> The forum doctrine should only be applied when it is consistent with the “purpose, structure, and intended use of the space.”<sup>21</sup> Forum analysis is most appropriate in spaces where large numbers of speakers can use government property or a government program to communicate with the public.<sup>22</sup> However, forum analysis should not be applied when speech would jeopardize the nature and use of the space or in spaces where “the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public.”<sup>23</sup> Forum analysis is not beneficial to these spaces because substantial discretion is necessary for the forum to exist and because broad public access would force closure of the forum.<sup>24</sup>

## 2. Types of Forums

As the Supreme Court dealt with cases involving public property, two approaches developed about how to properly handle these cases.<sup>25</sup> The first, known as the incompatibility approach, concerns “whether the proposed speech is compatible with [the public property’s] other principal uses.”<sup>26</sup> The Court adopted the incompatibility approach in the 1972 case *Grayned v. City of Rockford*.<sup>27</sup> Courts using the incompatibility approach invalidated speech restrictions in public spaces based on the unique features of the space.<sup>28</sup> Courts utilizing this approach asked “whether the manner of expression is basically incompatible with the normal activity of a particular

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20. *Christian Legal Soc’y v. Martinez*, 561 U.S. 661, 679 (2010) (“[T]his Court has employed forum analysis to determine when a governmental entity, in regulating property in its charge, may place limitations on speech.”).

21. *Knight First Amendment Inst.*, 302 F.Supp.3d at 565 (2018) (citing *Pleasant Grove City*, 555 U.S. at 480).

22. *Pleasant Grove City*, 555 U.S. at 478.

23. *Id.*; *United States v. Am. Library Ass’n*, 539 U.S. 194, 204 (2003) (plurality opinion).

24. *Arkansas Ed. Television Comm’n v. Forbes*, 523 U.S. 666, 672-74 (1998) (“In the case of television broadcasting, however, broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations.”); *National Endowment for the Arts v. Finley*, 524 U.S. 569, 585-86 (1998) (“[I]t would be ‘impossible to have a highly selective grant program without denying money to a large amount of constitutionally protected expression.’”) (quoting *Finley v. National Endowment for the Arts*, 100 F.3d 671, 685 (1996) (Kleinfeld, J. dissenting)).

25. KATHLEEN M. SULLIVAN & NOAH FELDMAN, *FIRST AMENDMENT LAW 313* (University Casebook Series, 6th ed. 2016) [hereinafter SULLIVAN & FELDMAN].

26. *Id.*

27. 408 U.S. 104 (1972).

28. Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 251 (1974) (noting that the incompatibility approach depends on functional considerations that bring “streets, parks, public libraries, and other publicly owned places [all] under the same roof”).

place at a particular time.”<sup>29</sup> However, the Court migrated to the “categorical approach” after the 1983 case, *Perry Education Association v. Perry Local Educators’ Association*,<sup>30</sup> and that is the approach that will guide this note.<sup>31</sup> This approach categorizes forums based on their individual characteristics and then defines standards of review based on the differing classifications.<sup>32</sup> This approach has been used to classify public property into one of four groups: a “traditional public forum;” a “designated public forum;” a “nonpublic forum;” or a “limited public forum.”<sup>33</sup> Each of these categories has different rules and involves consideration of different factors.

“Traditional” public forums are places “which by long tradition or by government fiat have been devoted to assembly and debate.”<sup>34</sup> These public properties, including public street corners, parks, and thoroughfares, are places that have a long tradition of free expression.<sup>35</sup> These spaces “have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>36</sup> Without a well-documented history<sup>37</sup> of dedication to public use, the Court will not classify public property as a traditional public forum.<sup>38</sup> As such, the Supreme Court

29. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). Incompatibility could be determined based on the degree of interference, where expression would be protected as long as it did not preclude the normal use of the property. Incompatibility could also be based on the length of time of interference, where the court would protect expression as long as it only interfered with the space’s normal use for a brief period. See Edward J. Neveril, Comment, *Objective Approaches to the Public Forum Doctrine: The First Amendment at the Mercy of Architectural Chicanery*, 90 NW. U. L. REV. 1200 (1995-1996).

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

31. Neveril, *supra* note 29, at 1195.

32. BRANNON, *supra* note 10, at 2.

33. SULLIVAN & FELDMAN, *supra* note 25, at 335-36.

34. *Perry Educ. Ass’n*, 460 U.S. at 45.

35. Stone, *supra* note 28, at 238.

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

37. See *Int’l Soc’y for Krishna Consciousness, Inc. (ISKCON) v. Lee*, 505 U.S. 672, 679-81 (1992). A well-documented history requires that a space has “immemorially . . . time out of mind” been held in the public trust and used for purposes of expressive activity. The Supreme Court noted that a traditional public forum is a space that has a “principal purpose” of the “free exchange of ideas.” *Id.* at 679 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800 (1985)). In *ISKCON*, the Court found that an airport terminal could not be a traditional public forum because “airport terminals have only recently achieved their contemporary size and character.” *Id.* at 680. Additionally, the lateness with which modern air terminals have made their appearance means that it is not possible that they have “immemorially . . . time out of mind” been held in the public trust and used for purposes of expressive activity. Therefore, the tradition of airport activity did not suggest that airports have historically been used for speech activity. Spaces that have been found to satisfy the requirement of a traditional public forum include streets, parks, and sidewalks.

38. *ISKCON*, 505 U.S. at 680-81 (stating that the Supreme Court has “rejected the view that

has been reluctant to expand the classification of “traditional public forum” to spaces beyond public streets, parks, and sidewalks.<sup>39</sup>

When regulating a traditional public forum, the government can only impose content-neutral time, place, and manner restrictions on speech.<sup>40</sup> Content-neutral regulations are those that are unrelated to the suppression of free expression; they regulate without reference to the speech’s substance.<sup>41</sup> These content-neutral time, place, and manner regulations must pass the *O’Brien* test to be upheld.<sup>42</sup> The *O’Brien* test involves a level of intermediate scrutiny. The government must demonstrate that a regulation is narrowly tailored to serve a significant government interest and that “no alternative means would more precisely and narrowly” address the underlying issue the government is trying to regulate.<sup>43</sup> However, if the government creates a regulation that differentiates based on the viewpoint or content of speech within a public forum, the regulation must pass strict scrutiny.<sup>44</sup> Courts will only uphold a viewpoint or content-based regulation in a traditional public forum if it is necessary to promote a compelling government interest and is the least restrictive means available to further the interest.<sup>45</sup>

The second most protected type of government property is a

traditional public forum status extends beyond its historic confines”).

39. *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 679 (1998) (“The Court has rejected the view that traditional public forum status extends beyond its historic confines.”) (citing *ISKCON*, 505 U.S. at 680-81)).

40. RUANE, *supra* note 6, at 7-8 (“The Supreme Court will uphold ‘regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.’”) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)).

41. *United States v. O’Brien*, 391 U.S. 367, 376-77 (1968). *See, e.g.*, *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288 (1984) (upholding a National Park Service regulation that prohibited camping, including camping as a form of protest, in certain federal parks); *Thomas v. Chi. Park Dist.*, 534 U.S. 316 (2002) (upholding a city park-permitting scheme that required an application in advance for a gathering of fifty or more people); *Heffron v. ISKCON*, 449 U.S. 1109 (1981) (upholding a rule prohibiting the sale or distribution of merchandise, including written material, in parks). Examples of content-neutral regulations that have been upheld include: a National Park Service regulation that prohibited camping (including camping as a form of protest) in certain federal parks (*Clark v. Cmty. for Creative Non-Violence*, 464 U.S. 1016 (1984)); a city park permitting scheme that required an application in advance for gathering of 50 or more people (*Thomas v. Chi. Park Dist.*, 534 U.S. 316 (2002)); a rule prohibiting the sale or distribution of merchandise, including written material, in parks (*Heffron v. ISKCON*, 449 U.S. 1109 (1981)).

42. *O’Brien*, 391 U.S. at 376-77. The *O’Brien* test states that the regulation must 1.) be within the constitutional power of the government to enact, 2.) further an important or substantial government interest, 3.) that interest must be unrelated to the suppression of speech, and 4.) prohibit no more speech than is essential to further that interest.

43. *O’Brien*, 391 U.S. at 381.

44. RUANE, *supra* note 6, at 5.

45. *Id.*



“designated public forum,” a nontraditional public forum that the government has purposefully opened to the general public for expressive activity.<sup>46</sup> This category includes places like “municipal theatres and meeting rooms at state universities.”<sup>47</sup> In order to create this type of public forum the government must “intend to make the property ‘generally available,’ to a class of speakers.”<sup>48</sup> The Court stated that we “look to the policy and practice of the government to ascertain whether it intended to designate a place as a public forum.”<sup>49</sup> Just as in a traditional public forum, any content-neutral regulation on speech in one of these spaces must pass the *O’Brien* test, and any content or viewpoint-based regulation must pass strict scrutiny.<sup>50</sup>

The third category, a “nonpublic forum,” is government property that has not traditionally been open to public expression and has not been designated as a forum for public communication.<sup>51</sup> This is a space that is theoretically susceptible to a forum analysis but has not, by tradition or designation, become a public forum.<sup>52</sup> These types of spaces include jails and military bases.<sup>53</sup> Speech regulations in nonpublic forums are subject to rational basis scrutiny, meaning that they will be upheld as long as they are reasonable and are not intended to suppress particular viewpoints.<sup>54</sup>

The final category, “limited public forum,” has a more complex definition and categorization. In *Perry Education Ass’n*,<sup>55</sup> a case from 1982, Justice White implied in a footnote that a “limited public forum” was a type of designated public forum, suggesting that the three forum categories

46. *Perry Educ. Ass’n*, 460 U.S. at 45 (1983) (“A second category consists of public property which the State has opened up for use by the public as a place for expressive activity.”).

47. Forums, Legal Information Institute, CORNELL LAW SCHOOL, <https://www.law.cornell.edu/wex/forums> [<https://perma.cc/7YZT-BU7D>].

48. *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 672 (1998) (quoting *Widmar v. Vincent*, 454 U.S. 263, 264 (1981)).

49. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985).

50. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469-70 (2009) (“Government restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum.”).

51. *Cornelius*, 473 U.S. at 802-06.

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

53. *See Adderly v. Florida*, 385 U.S. 39 (1966) (holding that a sheriff could lawfully remove protestors from a county jail because the property was closed to the public and removing the protestors was necessary for proper security); *see also Greer v. Spock*, 424 U.S. 828 (1976) (holding that a regulation prohibiting the discussion and distribution of political expression on a military base was constitutional because of the function of a military installation is to train soldiers, rather than provide a public forum).

54. *Pleasant Grove City*, 555 U.S. at 470 (“In such a forum, a government entity may impose restrictions on speech that are reasonable and viewpoint-neutral.”).

55. *Perry Educ. Ass’n*, 460 U.S. at 45 n.7.

were “traditional public forum,” “designated public forum,” and “nonpublic forum.”<sup>56</sup> However, in a more recent Supreme Court case from 2010, *Christian Legal Society*,<sup>57</sup> the majority opinion stated in a footnote that the public forum classifications included the “traditional public forum,” “designated public form,” and “limited public forum.” The Supreme Court did not mention the “nonpublic forum.”<sup>58</sup> It is unclear at this point whether a “limited public forum” is a new category separate from the original three, if it has displaced the designated public forum, or if the Court just uses the terms nonpublic forum and limited public forum interchangeably.<sup>59</sup>

*Christian Legal Society*,<sup>60</sup> the most recent Supreme Court commentary on this point, suggested that the latter is the most likely when it stated: “[T]he Court has permitted restrictions on access to a limited public forum...[w]ith this key caveat: Any access barrier must be reasonable and viewpoint neutral.”<sup>61</sup> This description of a limited public forum is nearly identical to the way Justice O’Connor described a nonpublic forum in *Cornelius*:<sup>62</sup> “[c]ontrol over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.”<sup>63</sup> This commentary suggests that the Supreme Court understands the terms “limited public forum” and “nonpublic forum” as referring to the same types of spaces, and accordingly, this note will use the “nonpublic forum” and “limited public forum” categories interchangeably. To designate forums that are neither “traditional” nor “designated,” this note will utilize the term “nonpublic forum.”

### B. Government Speech Doctrine

Those opposed to the classification of government social media accounts as public forums argue that the social media accounts should be classified as spaces for government speech, not as spaces for citizens’ expressive activity. The Government Speech Doctrine<sup>64</sup> recognizes that when the government “is speaking on its own behalf, the First Amendment

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56. *Id.* at 45 n.1 (“A public forum may be created for a limited purpose such as use by certain groups [e.g. student groups], or for the discussion of certain subjects [e.g., school board business].”).

57. *Christian Legal Soc’y v. Martinez*, 561 U.S. 661 (2010).

58. *Id.* at 741 n.11.

59. SULLIVAN & FELDMAN, *supra* note 25, at 335-36.

60. *Christian Legal Soc’y*, 561 U.S. at 661, 741 n.11.

61. *Id.* at 679.

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

63. *Id.* at 806.

64. *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550, 560-62 (2005).

strictures that attend the various types of government-established forums do not apply.”<sup>65</sup> This doctrine developed from a number of government subsidy cases in which the Supreme Court determined that government-funded programs enable private actors to speak for the government.<sup>66</sup> As such, the government was allowed to regulate the content and viewpoint of what the private speakers said because those private speakers were essentially being paid to deliver the government’s message.<sup>67</sup>

For example, in *Rust v. Sullivan* (1991),<sup>68</sup> the Supreme Court allowed a regulation prohibiting federally funded family-planning facilities from counseling patients on abortion services because the government was funding speech on its own behalf, not regulating private speech.<sup>69</sup> The Supreme Court determined that these types of government-funded programs do not require viewpoint neutrality because the government may use its funds to promote certain viewpoints over others.<sup>70</sup> Therefore, when the government speaks to deliver its own message or when the government uses private speakers to help deliver a government-controlled message, the government speech doctrine applies.<sup>71</sup> When the doctrine is applied, it allows the government to speak freely for itself in a partisan manner, without being required to remain viewpoint-neutral.<sup>72</sup>

One difficulty of applying the government speech doctrine is determining which speech can properly be categorized as government speech. This determination is complicated by the use of private parties to convey the government’s message.<sup>73</sup> In resolving these questions, the Court

65. *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015).

66. *See, e.g., Rust v. Sullivan*, 500 U.S. 173, 194 (1991); *Pleasant Grove City*, 555 U.S. at 481; *Johanns*, 544 U.S. at 562.

67. *See, e.g., Rust*, 500 U.S. at 194; *Pleasant Grove City*, 555 U.S. at 481; *Johanns*, 544 U.S. at 562.

68. *Rust*, 500 U.S. at 194.

69. *Id.*

70. *See, e.g., Rust*, 500 U.S. at 1934.

The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program . . . . In so doing, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.

*Id. See, e.g., Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 833 (1995) (“We recognized that when the government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes.”).

71. *Johanns*, 544 U.S. at 562 (“When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.”).

72. *Rust*, 500 U.S. at 194.

73. Legal Information Institute, *The Government Speech Doctrine*, CORNELL LAW SCHOOL,

has considered a number of factors to aid in determining when speech can be properly analyzed under the government speech doctrine, including whether the government exercised “effective control” over the speech; whether the government has “final approval authority;” whether the government has a history of using the specified platform to speak; and whether the public identifies the speech as content from the government.<sup>74</sup>

The public forum and government speech doctrines are in tension with one another because they provide alternate frameworks for the regulation of government social media accounts. Under a public forum analysis, a government controlled social media account will be held out as a space for expressive activity, and the government actor controlling it cannot exclude anyone based on the viewpoint they express in the forum. On the other hand, under a government speech analysis, the account itself is a means for the government to deliver its own message. Therefore, any “blocking” is the government exercising its right to exclude messages it does not want associated with its own speech.

Both the public forum doctrine and government speech doctrine have been used to analyze government social media accounts.<sup>75</sup> Courts are split on whether government officials’ can block citizens from commenting on their social media accounts. Therefore, an alternate solution is necessary to determine which approach is better suited for the space.<sup>76</sup> Specifically, this note will look to the pluralist theory of democracy, a political philosophy that will provide a framework for understanding the conditions that allow a representative democracy to function effectively.<sup>77</sup>

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<https://www.law.cornell.edu/constitution-conan/amendment-1/the-government-speech-doctrine>  
[<https://perma.cc/7SBR-NFFP>].

74. See *Johanns*, 544 U.S. at 560-61 (holding the First Amendment does not prohibit compelled subsidization of advertisements because the underlying message was “effectively controlled” by the government); see also *Pleasant Grove City v. Summum*, 555 U.S. 460, 470-73 (2009) (holding that permanent monuments on public property that were provided by private parties were government speech because the government exercises effective control, has final approval authority, has a long history of “us[ing] monuments to speak to the public”); see also *Walker v. Texas Div., Sons of Confederate Veterans*, 576 US 135 S. Ct. 2230, 2250 (2015) (holding Texas specialty license plate designs were properly considered government speech because Texas “effectively controlled” the messages conveyed, the Board had “final approval” over each license plate design, and license plates are primarily used as a form of government ID, bearing the State’s name).

75. BRANNON, *supra* note 10, at 2, 3.

76. See, e.g., *Knight First Amendment Inst. v. Trump*, 928 F.3d 226 (2d Cir. 2019) (utilizing the public forum analysis); *Morgan v. Bevin*, 298 F. Supp. 3d 1003 (E.D. Ky. 2018) (utilizing a government speech analysis).

77. WILLIAM N. ESKRIDGE, PHILIP P. FRICKEY, ELIZABETH GARRETT & JAMES J. BRUDNEY, *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 38-39 (West Acad. Pub. 5th ed. 2014).

### C. *Pluralist Democracy*

Pluralist theory of democracy is a way of viewing American democracy and politics, characterized by the role of interest groups.<sup>78</sup> Under this view, political power within a democracy is spread out between different interest groups, which compete with one another to influence policy.<sup>79</sup> Pluralists argue that one of the key characteristics of American democracy is that no single interest group dominates the political sphere.<sup>80</sup> Strong interest groups are key because they “protect individuals against oppressive and tyrannical government.”<sup>81</sup> American policy is driven by these interest groups, some of which have vast resources and are very influential and some of which are limited to smaller sects of interest.<sup>82</sup> Examples of these organizations include “unions, trade and professional associations, environmentalists, civil rights activists, business and financial lobbies, and informal coalitions of like-minded citizens.”<sup>83</sup> Anyone who is able to organize a group and create excitement around a common cause has the ability to make a difference and influence policy.<sup>84</sup> People sort themselves into groups based on issues they care about and use their resources to improve that issue.<sup>85</sup>

Another key characteristic of pluralism is that the interest groups are politically autonomous; politicians and political parties do not control them.<sup>86</sup> Instead, the amount of influence they have depends on their ability to gather resources and gain a following.<sup>87</sup> The groups with the most influence and largest base are then able to encourage politicians to support their causes.<sup>88</sup> As these politicians need the support of interest groups to win

78. ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 146 (Univ. of Chicago Press, Expanded ed. 1956).

79. ROBERT A. DAHL, PLURALIST DEMOCRACY IN THE UNITED STATES 24 (1968). Dahl uses “pluralist democracy” to refer to a democratic government where “[i]nstead of a single center of sovereign power there [are] . . . multiple centers of power, none of which is or can be wholly sovereign.”

80. *Id.*

81. ESKRIDGE ET. AL., *supra* note 77, at 39.

82. Claude J. Burtenshaw, *The Political Theory of Pluralist Democracy*, 21 WESTERN POL. Q. 577, 577-78 (1968)

83. H.T. Reynolds, Pluralism, *American Political System*, UNIV. OF DEL.: AMERICAN POLITICAL SYSTEM (Jan. 2, 1998), <https://www1.udel.edu/htr/Psc105/Texts/pluralism.html> [<https://perma.cc/S7MB-MMWA>].

84. Burtenshaw, *supra* note 82, at 585 (“In contemporary American society, there is no considerable concentration of power anywhere; ‘at bottom, *nobody dominates.*’”).

85. *Id.*

86. JOHN F. MANLEY, NEO-PLURALISM: A CLASS ANALYSIS OF PLURALISM I AND II, 77 THE AMERICAN POLITICAL SCIENCE REVIEW 378 (1983).

87. DAHL, *supra* note 78, at 145 (“I defined the ‘normal’ American political process as one in which there is a high probability that an active and legitimate group in the population can make itself heard effectively at some crucial stage in the process of decision.”).

88. Burtenshaw, *supra* note 82 at 585.

elections, they are incentivized to advocate for the goals of these interest groups in an attempt to maintain their support.<sup>89</sup>

Pluralists emphasize the equality of political opportunity that exists in the American system, even though they recognize that actual equality is lacking.<sup>90</sup> Although pluralism recognizes that oppression continues to exist under this system, theorists argue there is a floor under it.<sup>91</sup> This floor operates as a minimum degree of political opportunity for each citizen that provides a means for persecuted groups to organize and force the system to self-correct.<sup>92</sup> Pluralists believe that “[b]y mobilizing resources (collecting signatures on a petition, for example), they can make existing groups share their influence, or they can create new organizations that will compete with established ones.”<sup>93</sup> There are always unused resources available, and if a new group recognizes that its interests are threatened, this new group can come together to take advantage of unused resources to address the injustice.<sup>94</sup>

In the pluralist system, the government serves as a mediator.<sup>95</sup> The government may be active in engaging with the democratic system, but it is meant to be impartial.<sup>96</sup> This system should work in a manner that allows the government to compromise and enact solutions based on the desires of different interest groups but in a manner that does not allow the government to unilaterally create its own “governmental interests” unsupported by the citizens.<sup>97</sup> When a pluralist system functions properly, it will prevent authoritarian governance in which the government maintains its own agenda, unsupported by a majority of the population.<sup>98</sup>

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89. *Id.* (“Leaders have an incentive to meet the wishes of their constituents, and this may cause them to reflect popular will.”).

90. *Id.*

91. *Id.*

92. *Id.*

93. Reynolds, *supra* note 83.

94. Burtenshaw, *supra* note 82, at 585. For example, in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), the Supreme Court provided greater latitude for states to restrict access to abortion. Because of this, groups of pro-choice individuals banded together because they felt their rights being threatened, and aggressively fought to prevent states from enacting laws that would limit abortion rights even further.

95. STEVEN E. BARKAN, *Theories of Power and Society*, in *SOCIOLOGY: UNDERSTANDING AND CHANGING THE SOCIAL WORLD* 518, 519 (Comprehensive ed. 2011).

96. BARKAN, *supra* note 95.

97. *Id.* (“[G]overnment as a neutral referee to ensure that the competition among veto groups is done fairly, that no group acquires undue influence, and that the needs of the citizenry are kept in mind.”).

98. Oliver Escobar, *Pluralism and Democratic Participation: What Kind of Citizen are Citizens Invited to be?* 14 *CONTEMPORARY PRAGMATISM* 416, 419 (2017) (“Dahl . . . understood pluralism as the aggregation of citizens’ interests through diverse political parties and interest groups,

Pluralism encourages a representative democracy. Representative democracy is a system where “citizens elect candidates periodically in order to represent them in institutions and make decisions on their behalf.”<sup>99</sup> While in office, elected officials are not meant to propose their own interests that counter the interests of the people they represent; their role is to actively participate in discovering what solutions will best accommodate the interests of their constituents.<sup>100</sup> In this way, “[g]overnment tends to be depicted as a mechanism for mediating and compromising a constantly shifting balance between group interests rather than as an active innovator or imposer of policies upon society.”<sup>101</sup>

Pluralist theory stresses that interest group competition and its supervision by the government is beneficial for the country for three main reasons.<sup>102</sup> First, interest group conflict manifests as debate between groups in the political process instead of as outright hostility between the groups.<sup>103</sup> Second, competition among the interest groups results in all of the groups achieving their goals, even if incrementally.<sup>104</sup> Finally, allowing the government to stand in a supervisory role helps to ensure that the competition between the groups results in an outcome that is beneficial for society as a whole.<sup>105</sup>

The pluralist framework provides an explanation of the conditions that allow a democracy to function effectively and that prevent tyrannical government. Using this framework, this note will look at two cases that analyze government social media accounts under opposite approaches in order to determine which approach is better suited to the goals of representative democracy.

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so that democracy features multiple centres of power and counters authoritarianism.”).

99. *Id.*

100. Paul M. Johnson, *Pluralist theory*, A GLOSSARY OF POLITICAL ECONOMY TERMS (Auburn University Department of Political Science 2005), [http://www.auburn.edu/~johnspm/gloss/pluralist\\_theory](http://www.auburn.edu/~johnspm/gloss/pluralist_theory) [<https://perma.cc/9J4L-NJW7>].

101. *Id.*

102. BARKAN, *supra* note 95, at 519.

103. *Id.*

104. *Id.*

105. *Id.*

II. CONTRASTING APPROACHES TO THE ANALYSIS OF GOVERNMENT  
OFFICIALS' SOCIAL MEDIA ACCOUNTS: PUBLIC FORUM ANALYSIS V.  
GOVERNMENT SPEECH ANALYSIS

*A. Twitter Analyzed as a Public Forum: Knight First Amendment Institute  
v. Trump*

*Knight First Amendment Institute v. Trump*<sup>106</sup> arose when seven individual Twitter users<sup>107</sup> separately tweeted messages that were critical of President Trump and his policies in response to a tweet from the @realDonaldTrump account.<sup>108</sup> The @realDonaldTrump account is President Donald Trump's Twitter account.<sup>109</sup> President Trump established the account in March of 2009 as a private citizen, but he continued to use the account after his inauguration and throughout his presidency.<sup>110</sup> After each of the individual plaintiffs' tweeted at the President's account, they were subsequently blocked.<sup>111</sup> The government<sup>112</sup> did not contest the allegations that these individuals were blocked because their tweets were critical of President Trump.<sup>113</sup> The government instead argued that it was completely permissible for President Trump, Daniel Scavino (the White House Director of Social Media), and two other White House staff members to do so because President Trump used the Twitter account as his personal government speech account, a space where First Amendment protections do not apply and where he can eliminate speech if he so chooses.<sup>114</sup> The plaintiffs argued that because the President uses this account for official government purposes, the First Amendment requires that portions of the @realDonaldTrump account be analyzed under the public forum doctrine developed by the Supreme Court.<sup>115</sup> Plaintiffs argued that under the public forum doctrine, the President blocking their individual accounts is

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106. *Knight First Amendment Inst. v. Trump*, 928 F.3d 226 (2d Cir. 2019) (Knight II).

107. Individual plaintiffs included Rebecca Buckwalter, Philip Cohen, Holly Figueroa, Eugene Gu, Brandon Neely, Joseph Papp, and Nicholas Pappas.

108. *Knight II*, 928 F.3d at 233.

109. *Id.* at 231.

110. *Id.*

111. *Id.* at 233.

112. The plaintiffs and the Knight Institute sued Donald Trump, Daniel Scavino (the White House Director of Social Media), and two other White House staff members as the ones responsible for blocking their accounts. The government as used in this section will refer to those named individuals. *Id.* at 233.

113. *Id.* at 232.

114. *Id.* at 234.

115. *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541, 565 (S.D.N.Y. 2018) (Knight I).



viewpoint discrimination and violates the First Amendment.<sup>116</sup>

This note will primarily utilize the analysis of the district court, as this is the level at which a majority of the significant factual determinations regarding public forum analysis were made. Significantly, these determinations were all affirmed on appeal by the Second Circuit.<sup>117</sup> The trial judge determined that the interactive spaces on Twitter, a private social media platform, could be analyzed under the First Amendment as a public forum.<sup>118</sup> The district court began by assessing which portions of the account could be subjected to forum analysis.<sup>119</sup> The district court stated, “[p]laintiffs do not seek access to the account as a whole—they do not desire the ability to send tweets as the President, the ability to receive notifications that the President would receive, or the ability to decide who the President follows on Twitter.”<sup>120</sup> The district court determined that the forum doctrine could only be applied to the specific aspects of the account that the speakers sought access to including: (1) “the content of the tweets,” (2) “the timeline comprised of the account’s tweets,” and (3) “the interactive space of each tweet[,]” where users reply, retweet, or like individual tweets.<sup>121</sup>

The district court next looked at the purpose, structure, and intended use of the relevant aspects of the @realDonaldTrump account: (1) “the content of the tweets,” (2) “the timeline comprised of the account’s tweets,” and (3) “the interactive space of each tweet.”<sup>122</sup> First, the district court looked at the content of the @realDonaldTrump account tweets.<sup>123</sup> The district court determined that the content of the tweets were properly analyzed under the government speech doctrine because they come from the President or other government officials who are delivering the President’s message.<sup>124</sup> Therefore, the content of the President’s tweets are not susceptible to forum analysis; they are a form of government speech that is not subject to First Amendment restrictions.<sup>125</sup> Second, the district court also found that the @realDonaldTrump account’s timeline was properly analyzed under the

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116. *Knight I*, 302 F. Supp. at 550.

117. *See generally*, *Knight First Amendment Inst. v. Trump*, 928 F.3d 226 (2d Cir. 2019) (Knight II).

118. *Knight I*, 302 F. Supp. at 566-67.

119. *Id.* at 565.

120. *Id.*

121. *Id.* at 566.

122. *Id.* at 570. On appeal, both parties conceded that the President’s tweets were properly analyzed under the government speech doctrine, and therefore the Second Circuit did not address this issue in depth. *Knight II*, 928 F.3d at 239.

123. *Id.* at 571.

124. *Id.*

125. *Id.*

government speech doctrine, not public forum analysis, because the timeline simply aggregated all of the President's tweets, all of which were government speech.<sup>126</sup>

However, when it came to analyzing “the interactive space for replies and retweets” created by each of the President's tweets, the district court determined that this space was not properly analyzed under the government speech doctrine.<sup>127</sup> The tweets in the interactive space are associated with the replying user, not with the initial user who sent the tweet.<sup>128</sup> The district court noted that the user who generates the replies does not maintain control over them at any point, and the replies are not likely to be closely identified with the sender of the tweet even if the sender is a government official.<sup>129</sup> Upon an evaluation of these factors, the district court concluded that the interactive space for replies and retweets that is created with each of the President's tweets is properly analyzed under the Supreme Court's public forum precedents.<sup>130</sup>

As the interactive space that the plaintiffs were trying to access was created by tweets from the @realDonaldTrump account (the personal account he used prior to his election), instead of the official @POTUS account, the Second Circuit needed to determine that the interactive space was government owned or controlled in order for the space to be subject to the limitations of the First Amendment.<sup>131</sup> The Second Circuit began by stating, “[t]he government's contention that the President's use of the Account during his presidency is private founders in the face of the uncontested evidence in the record of substantial and pervasive government involvement with, and control over, the Account.”<sup>132</sup> The Second Circuit noted that since the President was inaugurated, he has used the @realDonaldTrump account, with the assistance of the White House Social Media Director, Daniel Scavino, to:

[A]nnounce, describe, and defend his policies; to promote his

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126. *Knight II*, *supra* note 117, at 572.

127. *Id.*

128. *Id.*

129. *Id.*

[A]s to replies, they . . . appear[] most prominently in the timeline of the replying user . . . replying tweets are ‘controlled by the user who generates them’ . . . the reply is unlikely to be ‘closely identified in the public mind’ with the sender . . . [a]nd, far from ‘maintaining direct control over the messages conveyed’ in a user's replies . . . the government maintains no control over the content of the reply.

130. *Knight II*, *supra* note 117, at 573.

131. *Id.* at 234-35.

132. *Id.* at 235.

Administration's legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; [and] to challenge media organizations whose coverage of his Administration he believes to be unfair. . .<sup>133</sup>

The Second Circuit highlighted a number of factors that supported a finding that the interactive space was government controlled.<sup>134</sup> First, the court noted that the account is described by the President and the White House Staff as "belonging to, and operated by, the President."<sup>135</sup> Second, the court recognized that since becoming President, President Trump has used the account on almost a daily basis "as a channel for communicating and interacting with the public about his administration" and has used the account to announce "matters related to official government business," including "high-level White House and cabinet-level staff changes" as well as "changes to major national policies."<sup>136</sup> Finally, the Second Circuit concluded that because the President acts in an official capacity when he tweets, he acts in the same capacity when he blocks those who disagree with him.<sup>137</sup> Therefore, the Second Circuit found that the President excluded the named plaintiffs from a government-controlled property when he blocked them from his Account.<sup>138</sup>

The Second Circuit determined that the account was "intentionally opened up for public discussion," it was used as "an official vehicle for governance," and its interactive features were made "accessible to the public without limitation."<sup>139</sup> These factors indicated that the space was in fact a public forum.<sup>140</sup> Additionally, the Second Circuit went on to find that because the President was a government actor when using his account, the blocking was viewpoint discrimination by the government that was prohibited by the First Amendment.<sup>141</sup> The Second Circuit held that the

133. *Id.* at 231.

134. *Id.* at 235-36.

135. *Knight II*, *supra* note 117, at 235. On this point, the court noted that the President described his use of the account as "MODERN DAY PRESIDENTIAL," the White House social media director described the account as a channel through which "President Donald J. Trump . . . [c]ommunicat[es] directly with you, the American people!" and that the @WhiteHouse account directs users to follow both the @POTUS account and the @realDonaldTrump account. In addition, the court noted that the National Archives and Records Administration has determined that tweets from the @realDonaldTrump account "are official records that must be preserved under the Presidential Records Act." *Id.*

136. *Knight II*, *supra* note 117, at 235-36.

137. *Id.* at 236.

138. *Id.*

139. *Id.* at 237.

140. *Id.*

141. *Knight II*, *supra* note 117, at 237-38.

President violated the First Amendment when he blocked the individual plaintiffs due to their disfavored speech.<sup>142</sup>

The district court, and subsequently the Second Circuit, recognized that citizens use the interactive space created by each of the President's tweets to discuss the President's policies with the government and other citizens.<sup>143</sup> The Second Circuit noted that the President uses this space as a forum for interacting with citizens, highlighting that the President uses the "like," "retweet," and "reply" features of the Account to "understand and to evaluate the public's reaction to what he says and does."<sup>144</sup> This view aligns with pluralism's focus on allowing interest groups to compete with one another in the public sphere to evaluate which policies the public believes the government should pursue. Pluralism supports utilizing this interactive space as a public forum because the interactive space enables various interest groups to directly respond to their representatives' policies. Citizens may react to the policies put forth by their representatives, and those representatives have exposure to the reactions their policies generate. The exposure to those reactions enables the representatives to respond in a way that reflects the will of the people.

While the district court and the Second Circuit found that aspects of a governmental social media account could properly be analyzed as a public forum and that blocking users constituted impermissible viewpoint-based discrimination in this case, not every court that has considered these questions has reached the same conclusions.<sup>145</sup> Other courts have analyzed government social media accounts as spaces for government speech – spaces where viewpoint discrimination is permissible.<sup>146</sup> The following section discusses one of those cases and provides an explanation of how another court arrived at the opposite conclusion as *Knight First Amendment Institute*.

#### *B. Twitter Analyzed as a Private Account: Morgan v. Bevin*

In *Morgan v. Bevin*,<sup>147</sup> a district court in Kentucky took an alternative approach to analyzing a government social media account. This court

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142. *Id.* at 239.

143. *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d 541, 574 (S.D.N.Y. 2018) (Knight I); *see generally*, *Knight First Amendment Inst. v. Trump*, 928 F.3d 226, 233-34 (2d Cir. 2019) (Knight II).

144. *Knight II*, 302 F.3d at 236.

145. BRANNON, *supra* note 10, at 3.

146. *Id.*

147. *Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1006 (E.D. Ky. 2018).

determined that the Governor of Kentucky’s Facebook and Twitter accounts were not subject to a public forum analysis; this court analyzed these spaces under the government speech analysis, an analysis that concludes with acceptance of viewpoint discrimination.<sup>148</sup> In this case, Matt Bevin, the Governor of Kentucky, blocked Drew Morgan, a citizen of Kentucky, on Twitter after Morgan made comments about Governor Bevin’s overdue property taxes.<sup>149</sup> Plaintiff alleged that Governor Bevin had violated his First Amendment rights because he was unable to view the posts and replies of other Twitter users.<sup>150</sup> The court highlighted that Governor Bevin limited the subjects for discussion on his pages by posting a description that stated that comments should be used “to hear from the public on Facebook and Twitter” and additionally noted that “[o]n-topic comments provide Governor Bevin and his staff with quick, valuable feedback pertaining to the topics at issue.”<sup>151</sup> Governor Bevin argued that off-topic comments divert the public’s attention from the subjects he chooses to discuss and prevent him from effectively engaging with the individuals who want to discuss relevant conversation topics.<sup>152</sup> The court gave weight to the Governor’s statement that he “blocks both positive and negative comments that are off topic.”<sup>153</sup>

To determine whether Governor Bevin was a state actor restricting speech in a public space, where First Amendment protections would apply, the court needed to determine what type of space was at issue.<sup>154</sup> Plaintiffs argued that Facebook and Twitter are traditional public forums and should be subject to exacting scrutiny.<sup>155</sup> Governor Bevin argued that his social media sites were limited forums because he had limited the content on the pages to “on-topic comments” relating to the topics he discussed on the page.<sup>156</sup> He argued that because his social media sites were limited forums, restricting speech based on its content was acceptable as long as it was reasonable “in light of the purpose of the forum” and viewpoint neutral.<sup>157</sup>

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148. *Id.* at 1010-11.

149. *Id.* at 1006. Additionally, Mary Hargis, another Kentucky citizen, sued Governor Bevin for blocking her on Facebook after criticizing his right-to-work policies.

150. *Morgan, supra* note 147, at 1006.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Morgan, supra* note 147, at 1010; *see also* *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983) (“The existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue.”).

155. *Morgan, supra* note 147, at 1010.

156. *Id.* at 1008-10.

157. *Id.*

While Governor Bevin appeared to have a strong argument that he prescribed limitations for the content of the forum, the court was cautious to apply a forum analysis to Twitter.<sup>158</sup> The court seemed hesitant to apply the forum doctrine to a new space, highlighting Supreme Court guidance stating “[h]aving first arisen in the context of streets and parks, the public forum doctrine should not be extended in a mechanical way.”<sup>159</sup>

The court noted that Governor Bevin did not intend for his accounts to be used by the public.<sup>160</sup> Instead, he wanted to use the account to “communicate his vision, policies, and activities to constituents, and receive feedback from them on specific topics that he chooses to address in his posts.”<sup>161</sup> The court concluded that because allowing anyone to access and post on Governor Bevin’s accounts would shut them down due to overcrowding, applying forum analysis to these accounts was inappropriate.<sup>162</sup> The court instead viewed Governor Bevin’s use of his privately owned Facebook and Twitter profiles as personal accounts, not governmental accounts.<sup>163</sup> In the court’s view, Governor Bevin was speaking on his own behalf, and these spaces were properly analyzed under the government-speech doctrine, not a public forum analysis.<sup>164</sup> As the government speech doctrine allows viewpoint-based restrictions, Governor Bevin was allowed to block citizens from his personal page.<sup>165</sup>

The Kentucky district court’s reasoning directly contradicts the ideals of pluralism. As he stated himself, Governor Bevin wanted to use this space to “communicate his vision, policies, and activities to constituents and to receive feedback from them on specific topics that he chooses to address in his posts.”<sup>166</sup> Under a pluralist framework, a representative who opens up a space to hear feedback from his constituents should hear the feedback from all interest groups in the constituency. The court’s application of the government speech doctrine, however, allows this representative to silence the voices of constituents that he subjectively believes are “off-topic.” A

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158. *Id.*

159. *Morgan, supra* note 147, at 1010 (citing *Arkansas Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 672-73 (1998)).

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

161. *Id.* at 1011. Here, “constituents” refers to the citizens of Kentucky, whom Governor Bevin represents, as opposed to the American public, whom Donald Trump represents.

162. *Id.* at 1012 (“Hypothetically, if this Court rules Governor Bevin could not block anyone from his Twitter or Facebook accounts, his accounts could be flooded with internet spam such that the purpose of conveying his message to his constituents would effectively, or actually, be closed.”).

163. *Id.*

164. *Id.* at 1010-11.

165. *Morgan, supra* note 147, at 1010-11.

166. *Id.*

representative democracy cannot function effectively if representatives are able to cut portions of the citizenry out of the discussion. Therefore, pluralism supports a determination that interactive spaces on government social media accounts are public forums, not government speech, because a public forum analysis will allow all interest groups to reach their representatives and, in turn, allow America's representative democracy to function effectively.

### III. ARGUMENT FOR THE ANALYSIS OF INTERACTIVE SPACES ON GOVERNMENT SOCIAL MEDIA ACCOUNTS AS PUBLIC FORUMS

#### *A. Supreme Court Precedent Supporting Public Forum Analysis of Government Social Media Accounts*

Both Supreme Court precedent and pluralist ideology support a public forum analysis of the interactive spaces of government social media accounts. While the Supreme Court has yet to address this specific issue, past precedent and dicta have laid a framework that supports the conclusion that these spaces should be subject to forum analysis. Justice Kennedy has noted in a concurrence that identifying and protecting new spaces for public discourse is essential for preserving the marketplace of ideas, stating that “our public forum doctrine must recognize this reality, and allow the creation of public forums that do not fit within the narrow tradition of streets, sidewalks, and parks.”<sup>167</sup> Justice Kennedy continued to argue that “our failure to recognize the possibility that new types of government property may be appropriate forums for speech will lead to a serious curtailment of our expressive activity.”<sup>168</sup> He concluded by presenting a framework for subjecting new spaces to forum analysis: “[i]f the objective, physical characteristics of the property at issue and the actual public access and uses that have been permitted by the government indicate that expressive activity would be appropriate and compatible with those uses, the property is a public forum.”<sup>169</sup> Although Justice Kennedy's language lacks precedential value, his support for an open-minded approach to the range of forum analysis provides a strong argument that courts need to be open to subjecting new spaces to forum analysis or they risk a serious curtailment of expressive activity. Justice Kennedy's language informs that

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167. *Int'l Soc'y for Krishna Consciousness, Inc. (ISKCON) v. Lee*, 505 U.S. 672, 698 (1992) (Kennedy, J., concurring).

168. *Id.*

169. *Id.*

public that even if these new spaces do not conform to Americans' common perceptions of what a typical public forum looks like, the risk that free speech is hampered by a failure to recognize the modern day public forums is a risk we should take seriously.

Although interactive spaces on social media are not "physical forums" in the way that parks and sidewalks are, the Supreme Court has been open to subjecting non-physical spaces to a forum analysis. In *Rosenberger v. Rector and Visitors of University of Virginia*,<sup>170</sup> the Supreme Court struck down a government regulation after applying forum analysis to a non-physical forum.<sup>171</sup> In *Rosenberger*, the Court found that a Student Activities Fund providing funding for various student organizations is "a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable."<sup>172</sup> The Court determined that a Student Activities Fund constituted a limited public forum and that a guideline that prevented student groups from receiving funding for any religious editorial viewpoints was viewpoint discrimination.<sup>173</sup> The Court stated "[d]iscrimination against speech because of its message is presumed to be unconstitutional."<sup>174</sup>

The *Rosenberger* holding laid a foundation for finding that the government could be limited in how they regulate a non-physical forum. The Court's awareness that a non-physical forum could create a space where it was important to prevent exclusion of diverse viewpoints suggests that the Court's ideology is in line with the pluralist perspective. This holding demonstrates that the Court understands the importance of equality of opportunity and the importance of enabling a wide variety of speakers to have their voices heard. Finally, this holding suggests that spaces on the Internet, another non-physical forum, might be suited to this line of analysis as well.

One of the first Supreme Court cases to address the Internet was *Reno v. ACLU*.<sup>175</sup> The Supreme Court struck down portions of the Communications Decency Act due to overbroad provisions that amounted to content-based restrictions of protected free speech.<sup>176</sup> The Court provided insight into its understanding of how the meta-physical space on the Internet would be evaluated. Justice Stevens in his majority opinion noted that there

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170. *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819 (1995).

171. *Id.* at 837.

172. *Id.* at 830.

173. *See generally, id.* at 819.

174. *Id.* at 828.

175. *Reno v. ACLU*, 521 U.S. 844 (1997).

176. *Id.* at 845, 868.



were “vast democratic forums of the Internet”<sup>177</sup> and “[i]t is ‘no exaggeration to conclude that the content on the Internet is as diverse as human thought.’”<sup>178</sup> *Reno* provided the framework for how the Court would address questions that arose from regulation of the Internet. Based on the language used, the Court viewed the Internet as a marketplace of ideas and supports the Internet’s facilitation of large volumes of expressive activity.

The most recent Supreme Court commentaries on public forums and social media come from *Matal v. Tam*<sup>179</sup> and *Packingham v. North Carolina*.<sup>180</sup> In *Matal v. Tam*, the Court considered whether the publication of a trademarked term on the Federal Register could be considered a limited public forum.<sup>181</sup> The Court stated that “[w]hen government creates such a forum, in either a literal or ‘metaphysical’ sense . . . some content-and speaker-based restrictions may be allowed . . . . However, even in such cases, what we have termed ‘viewpoint discrimination’ is forbidden.”<sup>182</sup> The Court seems to understand pluralist ideology, recognizing that silencing interest groups based on their viewpoint is counterproductive to a representative democracy. This statement provided guidance informing lower courts that even if a space is the least protected type of forum, viewpoint discrimination is unacceptable.

In *Packingham v. North Carolina*, an individual convicted of a sex crime argued that a North Carolina law prohibiting registered sex offenders from accessing social media websites violated the First Amendment.<sup>183</sup> The Court began by noting that “[a] fundamental principle of the First Amendment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more. The Court has sought to protect the right to speak in this spatial context.”<sup>184</sup> The Supreme Court went on to state that while in the past it was difficult to identify the most important spaces for the exchange of views, it was clear now that cyberspace in general, and particularly social media, were essential spaces for speech.<sup>185</sup> Justice Kennedy described social media as “the modern public square” and stated that social media is one of the most

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177. *Reno*, *supra* note 175, at 868.

178. *Id.* at 852 (quoting *ACLU v. Reno*, 929 F. Supp. 824, 842 (E.D. Pa. 1996)).

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

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

181. *Matal*, *supra* note 179, at 1763.

182. *Id.*

183. *Packingham*, *supra* note 180, at 1734.

184. *Id.* at 1735.

185. *Packingham*, *supra* note 180.

important places for the exchange of views.<sup>186</sup> The Court cited *Reno* to note that “social media users employ these websites to engage in a wide variety of protected First Amendment topics ‘as diverse as human thought.’”<sup>187</sup> The Court’s unanimous decision struck down the North Carolina law for violating the First Amendment because it “bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square . . . [and] provid[ing] perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.”<sup>188</sup> The Court’s framing in *Packingham* presents clear evidence of the value the Court places in the broad exchange of ideas that occurs on social media websites. Specifically, the language describing social media as “the modern public square” provides a strong foundation for an argument that interactive spaces on social media websites are properly analyzed under the Court’s public forum precedent.

*B. Pluralist Theory of Representative Democracy Supporting Public Forum Analysis of Government Social Media Accounts*

Pluralist theory of representative democracy supports subjecting portions of government social media accounts to forum analysis. Public forum analysis of the interactive space on these accounts allows competing interest groups to have equal access to the government and prevents government suppression of the interests of the citizenry.<sup>189</sup> Public forum analysis ensures that government actors remain in the role of impartial arbiters instead of the role of active advocates of their own agendas who silence the voices of groups they disagree with.<sup>190</sup> Pluralist democracy theory stresses that it is important for the government to serve in a managerial role, to actively listen to the various interest groups and attempt to form compromises that best suit the needs of the citizenry.<sup>191</sup> A pluralist democracy cannot function effectively if the government is able to create an echo chamber where they choose not to hear from significant interest groups within their citizenry.<sup>192</sup>

The pluralist framework supports a public forum analysis of

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186. *Id.* at 1737.

187. *Id.* at 1735-36 (citing *Reno v. ACLU*, 521 U.S. 844, 852 (1997)).

188. *Id.* at 1737.

189. Johnson, *supra* note 100.

190. Escobar, *supra* note 98, at 419.

191. BARKAN, *supra* note 95, at 519.

192. BARKAN, *supra* note 95.

government officials' social media accounts for three main reasons. First, it allows political power to be spread among multiple, diverse interest groups and allows each of these groups to have access to their representative.<sup>193</sup> Second, a public forum analysis prevents the government from silencing political dissidents. Finally, a pluralist framework allows competition among the interest groups, and this competition is more likely to produce moderate, multi-faceted policies.<sup>194</sup>

Public forum analysis of government social media accounts enables the wide variety of interest groups to access and directly respond to their representatives' policies. Under a pluralist view of democracy, each interest group has an equal opportunity to inform its representative of its positions on its representative's policies.<sup>195</sup> The interactive spaces on social media sites allow elected representatives to actively engage with a wide variety of their constituents' interest groups and to make policy choices that serve as compromises. A 2015 study of Congress' interactions with social media, known as #SocialCongress 2015, noted:

Prior to the introduction of the Internet, the process of engaging with elected officials was viewed as cumbersome and intimidating, perhaps only available to wealthy campaign donors. And prior to social media, email interactions with lawmakers were viewed by many as formal and robotic . . . . Yet social media is different, and is affecting the democratic dialogue in unexpected ways. The authenticity of a tweet or Facebook post, whether by a citizen or lawmaker, has the inescapable power to change minds.<sup>196</sup>

While it is true that not every elected representative will actually take the time to listen to each of the interest groups, there is a significant interest in having a system that enables listening.

A government speech analysis would allow representatives to block interest groups from the discussion. This means that each interest group would not have an equal opportunity to engage with its elected representative. On the other hand, a public forum analysis would force elected representatives to allow a variety of interest groups into the space and give each interest group an equal opportunity to get the attention of its

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193. Escobar, *supra* note 98, at 419.

194. BARKAN, *supra* note 95, at 519.

195. Burtenshaw, *supra* note 82, at 585.

196. Bradford Fitch & Kathy Goldschmidt, #SocialCongress 2015 7 (Congressional Management Foundation, 2015), [http://www.congressfoundation.org/storage/documents/CMF\\_Pubs/cmf-social-congress-2015.pdf](http://www.congressfoundation.org/storage/documents/CMF_Pubs/cmf-social-congress-2015.pdf) [https://perma.cc/R9WW-NPFD].

representatives.

Second, public forum analysis prevents representatives from silencing political dissidents and therefore works against authoritarian tendencies.<sup>197</sup> In a pluralist democracy, public officials create compromises after hearing the interests of the people they represent, and this means keeping in mind the voices of dissidents who may object to an official's course of action.<sup>198</sup> The #SocialCongress 2015 study noted that:

Perhaps the most surprising and significant finding is how a relatively few number of citizens can affect Congress using social media. Eighty percent of congressional staff responding to these surveys noted that less than 30 posts to their office's social media platform would cause them to 'pay attention.' . . . Members of Congress, staff, and professional advocates (i.e., lobbyists) know full well that a small number of people, strategically positioned to engage a legislator, can make a difference.<sup>199</sup>

This study suggests that even a small number of citizens devoted to changing a public official's mind can get their elected representative to pay attention. If politicians are able to block groups whose interests they disagree with, those interests are entirely excluded from the pool. This type of behavior is characteristic of authoritarian governments, which often silence political dissidents on the internet in order to consolidate power. For example, the Chinese government is known for blocking words, phrases, and pictures on social media that serve to commemorate the Tiananmen Square massacre to avoid political dissent.<sup>200</sup> Allowing these small groups to have access to the interactive space makes the public official pay attention to the backlash and tailor policies in a way that will minimize it. Even if political dissidents are not able to get what they want, they can achieve their goals to some degree and, at a minimum, make their representatives aware that they disapprove of their representatives' choices. A public forum analysis enables a pluralist system in which elected representatives listen to

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197. Escobar, *supra* note 98, at 419.

198. Johnson, *supra* note 100.

199. Fitch & Goldschmidt, *supra* note 196, at 7.

200. Cate Cadell, *China's Internet Censors are on High Alert Ahead of the Anniversary of the Tiananmen Square Protests*, BUSINESS INSIDER (May 26, 2019), <https://www.businessinsider.com/china-censorship-tiananmen-square-protests-2019-5> [https://perma.cc/WVJ3-NH4P]. The Tiananmen Square massacre describes a May 1989 pro-democracy protest in central Beijing where Chinese troops killed and arrested thousands of protestors, most of whom were young students. See *Tiananmen Square Massacre Takes Place*, HISTORY (July 17, 2019), <https://www.history.com/this-day-in-history/tiananmen-square-massacre-takes-place> [https://perma.cc/F26D-BXCD].

all of their constituents and prevents an authoritarian system in which the government can silence political dissidents.<sup>201</sup>

Finally, public forum analysis ensures that the competition between interest groups benefits society as a whole. A public forum analysis enables politicians to take all ideas from their constituents into account and pick those that they think are best to implement, a system that pluralists believe improves society. The #SocialCongress 2015 study found that only 3% of representatives answered, “We don’t review comments,” which indicates that the other 97% do review social media comments to some extent.<sup>202</sup> Even if a politician is biased towards certain types of policies, exposure to alternative ideas is essential. A government speech analysis of these spaces would allow a representative to entirely eliminate the advocates of alternative policies. Government social media accounts are one of the most accessible resources for many citizens to propose policies to their representatives. Eliminating interest groups from these spaces has the potential to stifle policy that benefits large portions of the citizenry.<sup>203</sup>

The #SocialCongress 2015 study stated,

[d]espite overwhelming cynicism as to whether Congress ‘listens’ to citizens, this finding supports previous CMF research indicating that constituents can have an impact on lawmakers’ decisions . . . [T]his finding could help reaffirm citizens’ trust in their democratic institutions, knowing that their elected officials care about what they think.<sup>204</sup>

A system that at least places government officials in a position where they have access to the ideas of a large number of interest groups is more likely to lead to well-informed and tailored policies.

#### CONCLUSION

Pluralist theory coupled with precedent and dicta from the Supreme Court provides a strong basis for the argument that the interactive spaces created by government social media accounts should be analyzed as public

201. BARKAN, *supra* note 95, at 519.

202. Fitch & Goldschmidt, *supra* note 196, at 8.

203. Homero Gil de Zúñiga, Logan Molyneux, & Pei Zheng, *Social Media, Political Expression, and Political Participation: Panel Analysis of Lagged and Concurrent Relationships*, 64 J. COMM. 613 (2014) (“The ease of using and creating social media have spawned an explosion of grassroots participation, allowing individuals to express their opinions more openly and freely as well as build a more active and significant relationship with official institutions.”).

204. Fitch & Goldschmidt, *supra* note 196, at 14.

forums. Social media has truly become the “modern public square,” and these interactive spaces are the prime locations for political discussion. These spaces are unique because they provide citizens with the ability to instantaneously engage with their elected representatives directly. The discussions on these platforms are vital First Amendment speech that should be vigorously protected.

Previous Supreme Court precedent noted that in government-controlled spaces where expressive activity flourishes, regulation of content and viewpoint should be very limited. Supreme Court dicta suggests that a meta-physical forum should be analyzed under public forum analysis when the characteristics of the property and the actual public access permitted by the government indicate that expressive activity would be appropriate and compatible with the space. When a government official creates a social media account for the purpose of communicating with their constituents about their policies, it is clear that a government-controlled space has been opened for expressive activity.

One of the core concepts of free speech is that the government should not be able to restrict speech based on its content or viewpoint.<sup>205</sup> *Rosenberger v. Rector* and *Packingham v. North Carolina* suggest that when a government official blocks someone from their social media account, they are doing it because of the content or viewpoint of their speech. President Trump admitted that he blocked particular individuals because he did not like what they had to say.<sup>206</sup> Congresswoman Alexandria Ocasio-Cortez is also facing lawsuits for blocking individuals who were critical of her views.<sup>207</sup> This kind of viewpoint-based exclusion is exactly what the First Amendment and public forum analysis are meant to restrict. The goal of public forum analysis is to prevent the government from silencing the voices of political dissidents in spaces that are open for public debate and expression.<sup>208</sup>

Social media has proved to be a prime candidate for the application of public forum principles to protect that goal. While the Supreme Court would need to consider whether each social media site could be considered a

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205. *Rosenberger v. Rector and Visitors of Univ. of Virginia*, 515 U.S. 819, 828-29 (1995).

206. *Knight First Amendment Inst. v. Trump*, 928 F.3d 226, 232 (2d Cir 2019) (“The government concedes that each of them was blocked after posting replies in which they criticized the President or his policies and that they were blocked because of their criticism.”).

207. Kari Paul, *Ocasio-Cortez sued by rightwing critics for blocking them on Twitter*, GUARDIAN (July 10, 2019), <https://www.theguardian.com/us-news/2019/jul/10/alexandria-ocasio-cortez-sued-twitter-blocking-trump> [https://perma.cc/82XR-UJWG]. This case was not evaluated in this note as the litigation is ongoing.

208. *See supra*, Part III.

designated, limited, or nonpublic forum, in any situation, government officials blocking individuals from these spaces based on their viewpoint should be presumed to be unconstitutional. As viewpoint discrimination is unconstitutional regardless of the type of forum, the sole requirement is that a court determine that there is sufficient government control of a space that has been opened for public expression.

Additionally, pluralist theory suggests that a public forum analysis, as opposed to a government speech analysis, is the approach that aligns with our concepts of a pluralist, representative democracy and the role of the government as a mediator. Pluralist theory tells us that the government is intended to enact compromises based on the competing concerns of the various interest groups that make up our country. The government is intended to engage with the democratic process by listening to the needs of all interest groups and creating a solution that benefits as much of the citizenry as possible. Significantly, the #SocialCongress 2015 study suggested that lawmakers use social media for this very purpose.<sup>209</sup> If government social media accounts are analyzed as government speech, the government cannot properly fulfill this role. The government speech doctrine allows the government to discriminate based on viewpoint and reject speech it does not agree with. This means that, on their social media accounts, government officials are able to eliminate political dissidents from access to officials' accounts solely because of dissidents' viewpoints. If this were the case, the government would be acting as more of an advocate of its own agenda within the political system, creating a space for it to promulgate its own ideas, receiving input from only those that agree with it, and silencing those that don't agree with it. This system resembles an authoritative government, not a pluralist democracy.

Public forum analysis allows the government to serve its intended role in a pluralist democracy. Public forum analysis forces politicians to receive input from a wide range of interest groups and to access all of ideas of the citizens they are intended to represent. Politicians should be restricted in who they may eliminate from the forum and limited in reasons they may use to eliminate them. If the government is to remain in its role as a mediator in our pluralist, representative democracy, it must abstain from acting as an advocate and engaging in authoritarian tendencies. Instead, our pluralist democracy flourishes in a system that allows free and open debate of ideas and interests in our modern public forums.

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209. See generally, Fitch & Goldschmidt, *supra* note 196.







