

SUPPRESSION OF FREE TWEETS: HOW *PACKINGHAM* IMPACTS THE NEW ERA OF GOVERNMENT SOCIAL MEDIA AND THE FIRST AMENDMENT

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With the growing number of social media channels available for members of the public to voice their opinion, it is no surprise there have been questions as to social networking's compatibility with the First Amendment. The most recent issue that has come to light is whether public officials who ban or block users from their official social media pages risk facing a First Amendment violation.¹ One example is President Donald Trump's use of his Twitter account to block certain Twitter users from accessing his page or responding to his "tweets." President Trump has allegedly blocked at least eighty users from his Twitter,² and many of those blocked allege it was done in retaliation against their critical responses.³ Some of these users have initiated a lawsuit against President Trump, former White House Press Secretary, Sean Spicer, and White House Director of Social Media and Assistant to the President, Daniel Scavino.⁴ Asserting that the President's Twitter is a public forum, plaintiffs argue that by blocking them for their critical remarks, the President engaged in viewpoint discrimination in violation of the First Amendment.⁵

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1. See, e.g., *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 706 (E.D. Va. 2017), *appeal docketed*, No. 17-2003 (4th Cir. Aug. 29, 2017).

2. Kevin Poulsen, *Tracker for Twitter Users Blocked by @realDonaldTrump*, TRUMPBLOCKS.ME, <https://trumpblocks.me/> (last visited Dec. 26, 2017).

3. See Diana Pearl, *A Cancer Patient, Rosie O'Donnell and More Critics President Trump Has Blocked on Twitter*, PEOPLE POLITICS (Sep. 20, 2017, 6:18 PM), <http://people.com/politics/people-president-trump-blocked-twitter-chrissy-teigen-stephen-king/>.

4. *Complaint for Declaratory and Injunctive Relief, Knight First Amend. Inst. at Columbia Univ., v. Trump*, No. 1:17-cv-05205 (S.D. N.Y. July 11, 2017), <https://assets.documentcloud.org/documents/3892179/2017-07-11-Knight-Institute-Trump-Twitter.pdf>.

5. *Id.* at 2-3.

Social media's intersection with the First Amendment has become an increasingly popular topic among lower courts in recent years,⁶ and the Supreme Court's silence on the issue had led legal researchers to theorize the scope of First Amendment protection as applied to online speech.⁷ However, in its recent decision in *Packingham v. North Carolina*,⁸ the Court ruled that access to the Internet and social media is a constitutionally protected right.⁹ *Packingham* illustrates a vast shift in the Court's First Amendment analysis by embracing social media and the Internet as "the most important places (in a spatial sense)" to exercise First Amendment rights.¹⁰ In particular, the Court recognized that social networking sites like Facebook and Twitter play a significant role in providing users the opportunity to engage in political activism and public debate.¹¹

One month after the *Packingham* decision, a Virginia district court in *Davison v. Loudoun County Board of Supervisors*¹² held that a county official's act of blocking a user from her county official Facebook page for criticism was unconstitutional viewpoint discrimination.¹³ The court cited *Packingham* for the proposition that social media opens a digital forum for the exchange of ideas, demonstrating the impact *Packingham* will continue to have on the lower courts.¹⁴

This Note will analyze the public forum doctrine and examine *Packingham*'s impact on its application in the new era of social media, particularly one maintained by a public official. Part I is a summary of the

6. See, e.g., *Grutzmacher v. Howard Cty.*, 851 F.3d 332 (4th Cir. 2017) (public employee's racially insensitive Facebook status and "like" of a disrespectful picture was not protected speech under the First Amendment); *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016) (finding police department's social networking policy restricted officers' right to speak on matters of public concern); *Palmer v. Cty. of Anoka*, 200 F. Supp. 3d 842, 844 (D. Minn. 2016) (finding public employee's termination for statements made on Facebook was not in violation of the First Amendment).

7. See, e.g., Benjamin Jackson, *Censorship and Freedom of Expression in the Age of Facebook*, 44 N.M.L. REV. 121 (2014) (arguing that First Amendment protections should extend to social media communications); Lyrisa Lidsky, *Public Forum 2.0*, 91 B.U.L. REV. 1975 (2011) (analyzing First Amendment implications by applying the public forum doctrine to social media).

8. 137 S. Ct. 1730 (2017).

9. The Court invalidated a state statute that prohibited convicted sex offenders from accessing social media on the ground that its prohibition was overly-broad. *Id.* at 1737-38.

10. *Id.* at 1735.

11. See *id.* (noting that Twitter allows users to petition their elected representatives and engage in political debates).

12. 267 F. Supp. 3d 702, 706 (E.D. Va. 2017), *appeal docketed*, No. 17-2003 (4th Cir. Aug. 29, 2017).

13. *Id.* at 717 ("By prohibiting Plaintiff from participating in her online forum because she took offense at his claim . . . Defendant committed a cardinal sin under the First Amendment.").

14. See *id.* at 716.

public forum doctrine and its evolution through the years. Part II will explain when the government may speak with less constitutional restrictions and whether it would apply to a public official's social media. Part III will discuss the Supreme Court's protection of political speech against government censorship. Part IV will provide a summary of *Packingham v. North Carolina* and its potential impact on the public forum doctrine's application to a public official's social media. Finally, Part V will analyze whether the President, the highest-ranked public official, violates the First Amendment by excluding users from his public social media account. This Note concludes by offering a new approach for finding a public forum in a government official's social media.

I. PUBLIC FORUM DOCTRINE

If the government opens a forum for public discussion, the First Amendment applies a stricter standard of scrutiny for excluding speech than when it opens a nonpublic forum. Regardless of its public or nonpublic status, however, the government is prohibited from restricting speech because of its viewpoint. In 1983, the Supreme Court in *Perry Education Ass'n v. Perry Local Educators' Ass'n*¹⁵ articulated a framework for the public forum doctrine, identifying three categories of fora that apply different protections under the First Amendment. While a public forum has been applied to government-owned property, the Court has made clear that a forum may occupy a "metaphysical" space,¹⁶ or even a privately-owned property leased by the government.¹⁷ Therefore, the doctrine may well apply to a public official's social media, despite the website's private ownership.¹⁸

A. *Traditional Public Forum*

The first category is the traditional public forum, articulated as public places "which by long tradition or by government fiat have been devoted

15. 460 U.S. 37 (1983).

16. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (finding a student newspaper to be a designated public forum).

17. See *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (finding a privately-owned theater leased by the city to be a public forum); *Denver Area Educ. Telecomms. Consortium, Inc. v. F.C.C.*, 518 U.S. 727, 792 (1996) (Kennedy, J., concurring in part) (public fora are not "limited to property owned by the government.").

18. Lidsky, *supra* note 7, at 1996 ("Just as the government can rent a building to use as a forum for public debate and discussion, so, too, can it 'rent' a social media page for the promotion of public discussion.").

to assembly and debate.”¹⁹ The traditional public forum receives the greatest First Amendment protection against restricted speech, requiring the government to show any restriction on speech is “necessary to serve a compelling state interest” and “content-neutral,[and] narrowly tailored to serve a significant government interest.”²⁰ In other words, any regulation of the content of speech is subject to strict scrutiny.²¹ In *Perry*, the Court considered streets and parks to be the “quintessential public forums” for expression,²² which was widely interpreted as limiting traditional public forums to streets, parks, sidewalks, or other government property.²³ However, these public spaces alone are not sufficient to achieve traditional public forum status. Instead, the public property must possess characteristics of areas that are “traditionally open to expressive activity.”²⁴

This emphasis on tradition and historical use has been an important factor in the Court’s traditional public forum analysis, particularly where the governmental property at issue is a modern concept or a relatively new technology. For instance, the Court has refused to extend traditional public forum status to an airport terminal because, “given the lateness with which the modern air terminal has made its appearance, it hardly qualifies for the description of having ‘immemorially . . . time out of mind’ been held in the public trust and used for purposes of expressive activity.”²⁵ The Court has used this same rationale to reject its application to a broadcasted debate,²⁶ specialty license plates,²⁷ and a public library’s Internet access.²⁸ As the Court recognized in *United States v. American Library Ass’n*:

19. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (citing *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

20. *Id.* (“In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed.”).

21. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 818 (1985) (Powell, J., concurring) (“In a traditional public forum, the government rarely could offer as a compelling interest the need to reserve the property for its normal uses, because expressive activity of all types traditionally has been a normal use of the property.”).

22. *Perry*, 460 U.S. at 45.

23. *See Michael Friedman, Dazed and Confused: Explaining Judicial Determinations of Traditional Public Forum Status*, 82 TUL. L. REV. 929, 946-47, 956 (2008).

24. *United States v. Kokinda*, 497 U.S. 720, 727 (1990) (refusing to find traditional public forum for a Postal Office sidewalk that led from the parking lot to the front door).

25. *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680 (1992) (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

26. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666 (1998).

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

28. *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003).

Internet access in public libraries is neither a “traditional” nor a “designated” public forum. First, this resource—which did not exist until quite recently—has not “immemorially been held in trust for the use of the public and, time out of mind, . . . been used for purposes of assembly, communication of thoughts between citizens, and discussing public questions.” We have “rejected the view that traditional public forum status extends beyond its historic confines.” The doctrines surrounding traditional public forums may not be extended to situations where such history is lacking.²⁹

Nevertheless, the Court has stated that the “principal purpose of traditional public fora is the free exchange of ideas.”³⁰ Given the spatial ability of citizens to access social media for the intended purpose of expressing their views on important issues, it is not inconceivable for a public official’s social media account to obtain the same standard of scrutiny that is applied to a traditional public forum.³¹ The Supreme Court’s recent decision in *Packingham v. North Carolina* makes this a particularly compelling argument given the Court’s elevated stance on social media as “the most important place[] (in a spatial sense) for the exchange of views,” comparing it to streets and parks.³²

B. *Designated Public Forum*

The second category of public fora applies to circumstances in which the government has opened non-traditional public property “for use by the public as a place for expressive activity.”³³ In *Perry*, the Court explained that the First Amendment “forbids a state to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.”³⁴ However, “[a] public forum may be created for a limited purpose,” such as restricting the forum to “certain groups” or for certain topics.³⁵ When the government opens a non-traditional forum, “it is bound by the same standards as apply in a

29. *Id.* at 205-06 (multiple citations omitted).

30. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

31. See Noah D. Zatz, *Sidewalks in Cyberspace: Making Space for Public Forums in the Electronic Environment*, 12 HARV. J. LAW & TECH. 149, 200-01 (1998) (arguing that, given the mass access that the Internet provides to speakers on the general public for public debate, a framework to the traditional public forum should apply to the Internet).

32. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017); *id.* at 1737 (“These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard.”).

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

34. *Id.*

35. *Id.* at 45, n.7.

traditional public forum.”³⁶ In other words, strict scrutiny applies when the government restricts speech in an area it designates for public discussion, but unlike the traditional public forum, the government may close the forum at its discretion.

The Supreme Court has held that “the government does not create a [designated] public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”³⁷ Government intent has been discerned by looking to the government’s policy and procedure and “the nature of the property and its compatibility with expressive activity.”³⁸ In determining whether a public forum has been created, the Court has also distinguished between “selective access,” which would indicate a nonpublic forum, from “general access,” which indicates a designated public forum.³⁹ That is, a designated public forum is created when the government makes its property “generally available” to a certain class of speakers, but not when the government requires permission to its property, which it reserves for a particular class of speakers.⁴⁰ Accordingly, a designated public forum requires the government’s intent to make its property “generally available” to the public.

C. *Limited Public Forum*

While the Supreme Court has had trouble distinguishing between the limited public forum and the other non-traditional fora,⁴¹ the labels are merely a matter of semantics.⁴² Ultimately, the Court looks to whether the property involved is open to the public (either by tradition or designation), in which case strict scrutiny applies, or closed (limited to a specific purpose, specific topic, or specific speakers), in which case the restricted speech must only be reasonable and viewpoint neutral.⁴³

36. *Id.* at 46.

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

38. *Id.*

39. *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 679 (1998).

40. *Id.*

41. *Compare Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250-51 (2015) (distinguishing between traditional, designated, limited, and nonpublic fora) *with* *Am. Freedom Def. Initiative v. King Cty., Wash.*, 136 S. Ct. 1022, 1022 (2016) (Thomas, J. dissenting) (equating the limited public forum to a nonpublic forum).

42. See Mark Rohr, *First Amendment Fora Revisited: How Many Categories Are There?*, 41 NOVA L. REV. 221, 232-33 (2017) (noting that the limited and non-public fora lead to the same judicial analysis); Lidsky, *supra* note 7, at 1984 n.46 (noting that the designated public forum operates no differently than the traditional public forum, and that the only “constitutional difference” is that the designated public forum may be closed completely).

43. See Rohr, *supra* note 42, at 233.

D. *Nonpublic Forum*

The nonpublic forum has been characterized as government owned or controlled property that is neither by tradition nor designation a forum for public communication.⁴⁴ Unlike the traditional and designated public fora, the government “may reserve the forum for its intended purposes,” so long as the restrictions are reasonable and viewpoint-neutral.⁴⁵ While the nonpublic forum has the broadest discretion, viewpoint discrimination is prohibited in all fora.⁴⁶ Viewpoint discrimination is found where there is an exclusion based on a speaker’s perspective on a certain topic, and is presumed to be unconstitutional when “directed against speech otherwise within the forum’s limitations.”⁴⁷ Thus, any restriction on speech that opposes one viewpoint over another is subject to a heightened scrutiny, and likely to be found unconstitutional.⁴⁸

II. SPEECH ATTRIBUTABLE TO THE GOVERNMENT

A. *Government Speech Doctrine*

When it is determined that the government itself is speaking, either through its statements, actions, or funding, the prohibition against viewpoint discrimination does not apply. The rationale is that the government must be free to say what it wishes in order to perform its functions efficiently and govern properly.⁴⁹ Understandably, this relatively new doctrine has created tension with the public forum doctrine; where one flatly prohibits the government’s exercise of viewpoint discrimination, the other broadly permits its use.

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

45. *Id.*

46. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) (“[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.”).

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

48. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

49. *See Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring) (“It is the very business of government to favor and disfavor points of view.”); Amy Riley Lucas, *Specialty License Plates: The First Amendment and the Intersection of Government Speech and Public Forum Doctrines*, 55 UCLA L. REV. 1971, 1976 (2008) (“Were the government required to [consider viewpoints], its operations would slow to a crawl, and endless time would be spent evaluating choices rather than making decisions.”).

The Supreme Court first addressed this conflict in *Pleasant Grove City, Utah v. Sumnum*,⁵⁰ which featured a public park—a place the Court considers the “quintessential” public forum.⁵¹ The City denied a religious organization’s request to build a religious monument in the park, despite the City’s adoption and display of a Ten Commandments monument.⁵² The majority upheld the City’s denial of the monument, explaining how governments have traditionally used monuments to speak to the public, and the selective acceptance of these monuments are meant to convey the government’s message.⁵³ Acknowledging that “[t]here may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech,”⁵⁴ the Court nevertheless held that forum analysis “does not apply to the installation of permanent monuments on public property.”⁵⁵ Although the Court looked to the government’s historical use of monuments to speak to the public and its exercise of selectivity in adopting them,⁵⁶ the Court’s reasoning for rejecting the forum analysis also relied on the unreasonable consequence of a contrary holding.⁵⁷

The Court’s decision in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.* also rejected the applicability of the forum analysis and found government speech in state-issued specialty license plates designed by private speakers.⁵⁸ The Court established a three-factor inquiry for determining when the government is speaking: (1) the history of the government’s use of the property; (2) the reasonable observer’s interpretation of the property as the government’s own; and (3) the government’s direct control of the message, which may amount to mere “final approval authority.”⁵⁹

Walker has been criticized for setting a low bar for the government to take advantage of discrimination against private speech by adopting it

50. 555 U.S. 460 (2009).

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

52. *Sumnum*, 555 U.S. at 465.

53. *Id.* at 472.

54. *Id.* at 470.

55. *Id.* at 480.

56. *Id.* at 470-71.

57. *Id.* at 480 (“[W]here the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.”). This pragmatic approach is said to drive the Court’s First Amendment analysis. See Helen Norton & Danielle Keats Citron, *Government Speech 2.0*, 87 DENV. U. L. REV. 899, 915 (2010) (explaining how the Court makes decisions that produce reasonable results).

58. 135 S. Ct. 2239 (2015).

59. *Id.* at 2248-49.

as its own.⁶⁰ However, the Court's recent decision in *Matal v. Tam*⁶¹ acknowledged the doctrine's susceptibility for "dangerous misuse" and refused to find government speech in federally registered trademarks.⁶² Applying the *Walker* test, the Court determined that trademarks are neither traditionally used to convey a government message, nor commonly associated with the government; rather, the government registers a trademark without regard to whether it conveys a consistent viewpoint with its government policy.⁶³

When applying the *Walker* test to a public official's social media, it is important to note that the relevant speech analyzed are not the posts created by the public official, but the responses by private users. Therefore, the government speech doctrine does not provide any protection for a public official's viewpoint-based exclusion from his or her social media page.⁶⁴ First, social media has not "traditionally been used to convey a [g]overnment message."⁶⁵ Second, the comments and responses made by other users on the public official's page are not "closely identified in the public mind" as to be confused with the government's own message.⁶⁶ Finally, the public official does not maintain "direct control over the messages conveyed."⁶⁷ While the public official may have the power to delete comments and block users, it has no ability to edit the comments made by other users on his page.⁶⁸

60. See *id.* at 2255-56 (Alito, J., dissenting) (criticizing the majority for classifying private speech as government speech and stripping it of all First Amendment protection); Leslie Gielow Jacobs, *Government Identity Speech Programs: Understanding and Applying the New Walker Test*, 44 PEPP. L. REV. 305, 331 (stating that *Walker* sets no limitation to the government's exercise of viewpoint discrimination when adopting private speech as its own). But see Erwin Chemerinsky, *The First Amendment in the Era of President Trump*, 94 DENV. L. REV., 553, 558-62 (2017) (suggesting the Court applies special deference to government speech over private speech when the institutional interests of the government are at stake).

61. 137 S. Ct. 1744 (2017).

62. *Id.* at 1758, 1760 ("Holding that the registration of a trademark converts the mark into government speech would constitute a huge and dangerous extension of the government-speech doctrine.").

63. *Id.* at 1758-59.

64. However, government speech has been found in government websites. See *Sutcliffe v. Epping Sch. Dist.*, 584 F.3d 314, 329 (1st Cir. 2009) (upholding town's refusal to add hyperlink to town's official website); *Page v. Lexington Cty. Sch. Dist. One*, 531 F.3d 275 (4th Cir. 2008) (school district's website retained "sole control" of including links on its website).

65. *Tam*, 137 S. Ct. at 1760.

66. *Id.* (quoting *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2249 (2015)). Since users on Facebook and Twitter have distinct usernames and pictures accompanying these responses on the public official's page or posts, there is no reason to believe these messages would be mistaken for the government's own.

67. *Walker*, 135 S. Ct. at 2249.

68. See *Tam*, 137 S. Ct. at 1758 ("The Federal Government does not dream up these marks, and it does not edit marks submitted for registration.").

B. *State Action/Color of Law*

A constitutional right is only protected if the “the conduct allegedly causing the deprivation” is “fairly attributable to the State.”⁶⁹ Private conduct, “however discriminatory or wrongful,” is afforded no such protection.⁷⁰ State action may be found “if there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself.”⁷¹ Social media is no exception to the state action doctrine, since “[t]he test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised.”⁷²

Therefore, for users banned from a public official’s social media to successfully allege a constitutional violation, they must first demonstrate that the public official maintained the social media page in his or her official capacity and not as a personal account. The district court in *Davison v. Loudoun County Board of Supervisors*⁷³ looked at several factors⁷⁴ in finding that the county official operated her Facebook page “while purporting to act under the authority vested in [her] by the state.”⁷⁵ The court rejected the county official’s argument that the page was entirely private, even if she maintained the webpage “outside of both her office and normal working hours.”⁷⁶

III. POLITICAL SPEECH AND THE PROTECTION AGAINST GOVERNMENT CENSORSHIP

The First Amendment protects the right of a private individual to speak freely on matters of public debate without fear of censorship,

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

70. *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948).

71. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (internal quotations omitted) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)).

72. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964).

73. 267 F. Supp. 3d 702 (E.D. Va. 2017), *appeal docketed*, No. 17-2003 (4th Cir. Aug. 29, 2017).

74. These factors included: the page being named under the official title of the County Chair; the categorization of the page was that of a government official’s; the page included the county phone number and official county email and website link; the posts were directed to the county constituents, spoke on behalf of the county Board of Supervisors as a whole, encouraged “back and forth constituent conversations,” and related to matters regarding the county official’s office. *Id.* at 714.

75. *Id.* (internal quotations omitted) (quoting *Hughes v. Halifax Cty. Sch. Bd.*, 855 F.2d 183, 186-87 (4th Cir. 1988)).

76. *Id.* at 712.

government suppression, or retaliation.⁷⁷ This is the principle for affording heightened scrutiny to viewpoint discrimination.⁷⁸ The Supreme Court has demonstrated significant concern for ruling in a way that could potentially chill speech, particularly when it involves public or political matters.⁷⁹

Political speech is said to be “at the core of what the First Amendment is designed to protect.”⁸⁰ It is therefore entitled to the greatest constitutional protection against speech restriction in order to assure the “unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”⁸¹ That is, when a law negatively impacts political speech, the Court applies “exacting scrutiny,” requiring the government to show the restriction is “narrowly tailored to serve an *overriding* state interest.”⁸² A similar rationale was used to adopt a heightened standard for defamation claims by public officials in what is considered one of the greatest First Amendment decisions in American history, *New York Times Co. v. Sullivan*.⁸³

A. *Criticism of Public Officials: New York Times Co. v. Sullivan*

In 1964, the Supreme Court’s landmark decision in *New York Times Co. v. Sullivan* presented the question of whether a public official may bring a libel action against critics of his official conduct.⁸⁴ Recognizing

77. See *Roth v. United States*, 354 U.S. 476, 484 (1957) (“The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”).

78. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 894 (1995) (Souter, J., dissenting) (“[T]he prohibition on viewpoint discrimination serves that important purpose of the Free Speech Clause, which is to bar the government from skewing public debate.”).

79. See *Sec’y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984) (“[W]hen there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be outweighed by society’s interest in having the statute challenged.”); see also *Lane v. Franks*, 134 S. Ct. 2369, 2380 (2014) (internal quotations omitted) (citations omitted) (“Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community.”).

80. *Virginia v. Black*, 538 U.S. 343, 365 (2003) (plurality opinion); see also *Buckley v. Valeo*, 424 U.S. 1, 14 (1976); see *Police Dep’t of City of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972) (“To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.”).

81. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 346 (1995) (internal quotations omitted); see also *Connick v. Myers*, 461 U.S. 138, 145 (1983) (citations omitted) (“[T]he Court has frequently reaffirmed that speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.”).

82. *McIntyre*, 514 U.S. at 347 (emphasis added).

83. 376 U.S. 254 (1964).

84. *Id.* at 268.

that the risk and expense of liability would undoubtedly censor public discussion and political debate, even if the speech was believed to be true, the Court unanimously ruled that public officials may not recover for defamatory statements relating to their official conduct unless they can prove “actual malice,” a heightened standard requiring a showing of “knowledge that it was false or with reckless disregard for whether it was false or not.”⁸⁵

Noting that “[i]t is as much [the citizen’s] duty to criticize as it is the official’s duty to administer,”⁸⁶ the Court recognized a privileged right for citizens to criticize their public officials to ensure that public debate be “uninhibited, robust, and wide-open.”⁸⁷ He noted that the debate on public issues “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials,”⁸⁸ and that, while false and erroneous statements are inevitable, they too must be protected for the freedom to have necessary “breathing space” to survive.⁸⁹

B. *Political Speech and the Executive Branch*

Within the context of the Executive, the suppression of political speech was further condemned by the Court in *New York Times Co. v. United States*.⁹⁰ Claiming that the publication of the Pentagon Papers would “endanger the national security,” President Nixon argued that “the First Amendment was not intended to make it impossible for the Executive to function or to protect the security of the United States.”⁹¹ In his concurrence, Justice Black considered this a “bold and dangerously farreaching [sic] contention,” explaining that, “[t]o find that the President has ‘inherent power’ to halt the publication of news by resort to the courts would wipe out the First Amendment and destroy the fundamental liberty and security of the very people the Government hopes to make ‘secure.’”⁹² Indeed, Justice Stewart drove this point home in his separate concurrence:

85. *Id.* at 279-80.

86. *Id.* at 282.

87. *Id.* at 270.

88. *Id.*

89. *Id.* at 271-72. The Court notes that “[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about the clearer perception and livelier impression of truth, produced by its collision with error.” *Id.* at 279 n.19 (citations omitted) (internal quotations omitted).

90. 403 U.S. 713 (1971) (per curiam).

91. *Id.* at 718 (Black, J., concurring).

92. *Id.* at 718-19 (Black, J., concurring) (“[I]t was injunctions like those sought here that Madison and his collaborators intended to outlaw in this Nation for all time.”).

[T]he only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.⁹³

The Court has found that a thriving democracy requires the open and raw discussion and debate of public issues, politics, and the officials involved in them.⁹⁴ “No form of speech is entitled to greater constitutional protection” than political advocacy, even of a highly controversial viewpoint.⁹⁵ The Court has explained that the purpose behind the First Amendment is “to protect unpopular individuals from retaliation—and their ideas from suppression—at the hand of an intolerant society.”⁹⁶

C. *Political Speech and New Technology*

In *Citizens United v. FEC*,⁹⁷ the Court rejected the argument that the history of the First Amendment does not extend its protection of political speech to media corporations, reasoning:

[t]he Framers may have been unaware of certain types of speakers or forms of communication, but that does not mean that those speakers and media are entitled to less First Amendment protection than those types of speakers and media that provided the means of communicating political ideas when the Bill of Rights was adopted.⁹⁸

The Court refused to draw constitutional lines for the dissemination of political speech throughout the development of new technology, for the

93. *Id.* at 728 (Stewart, J., concurring). This pronounced duty to the press later served an important role in the exposure of President Nixon’s Watergate scandal less than a year later. See Stephen F. Rohde, *Presidential Power Free Press*, 40 L.A. LAW. 26, 30 (2017).

94. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 341 (2010) (“[I]t is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes.”); *Connick v. Myers*, 461 U.S. 138, 145 (1983) (“Speech concerning public affairs is more than self-expression; it is the essence of self-government.”); *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1976) (“In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.”).

95. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 347 (1995) (“That this advocacy occurred in the heat of a controversial referendum vote only strengthens the protection afforded to [political] expression.”).

96. *Id.* at 357 (acknowledging that the broad protection afforded to political speech may have “unpalatable consequences,” society nonetheless “accords greater weight to the value of free speech than to the dangers of its misuse.”).

97. 558 U.S. 310 (2010).

98. *Id.* at 353-54 (noting that the great debates by the Federalists were “published and expressed in the most important means of mass communication of that era—newspapers owned by individuals.”).

litigation and interpretive process in creating a bright-line rule would inevitably chill protected speech and create questionable precedent.⁹⁹ Nonetheless, “[t]he First Amendment was certainly not understood to condone the suppression of political speech in society’s most salient media.”¹⁰⁰ Thus, political speech is not precluded from being found in a social media post, or even in more subtle forms such as a Facebook “like.”¹⁰¹

IV. *PACKINGHAM* AND ITS IMPACT ON A PUBLIC OFFICIAL’S SOCIAL MEDIA

A. *Packingham v. North Carolina*

The Supreme Court in *Packingham v. North Carolina* unanimously struck down a statute issued to protect children from Internet predators by prohibiting registered sex offenders from accessing social networking sites.¹⁰² *Packingham* is significant for Justice Kennedy’s majority opinion, declaring the Internet to be the “modern public square.”¹⁰³ However, the opinion has been criticized for its “expansive language” that has “opened a Pandora’s box” for its implication that the public forum doctrine applies to the Internet and social media, but “failing to account for the hybrid public and private nature of digital realms.”¹⁰⁴

The majority’s opinion begins with a discussion of the First Amendment’s protection of free speech in the “spatial context,” citing an example of a “basic rule” that “a street or a park is a quintessential forum for the exercise of First Amendment rights.”¹⁰⁵ Justice Kennedy then notes that, “[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange

99. *Id.* at 326, 352 (“With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.”).

100. *Id.* at 353.

101. See *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013), *as amended* (Sept. 23, 2013) (finding a Facebook “like” to be a constitutionally protected form of expression under the First Amendment); Haleigh Jones, *Public Officials’ Facebook “Likes”: The Case for Leaving Regulation of Official “Likes” to the Torches and Pitchforks of Constituents*, 18 SMU SCI. & TECH. L. REV. 263 (2015) (explaining the political and commercial significance of a Facebook “like”).

102. 137 S. Ct. 1730, 1737 (2017).

103. *Id.*

104. Note, *First Amendment-Freedom of Speech-Public Forum Doctrine-Packingham v. North Carolina*, 131 HARV. L. REV. 233, 233 (2017).

105. *Packingham*, 137 S. Ct. at 1735.

of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular.”¹⁰⁶

The Court went on to explain the significance of social media’s relationship with the First Amendment, citing Facebook for the free expression of religion and politics; LinkedIn for seeking employment; and Twitter for petitioning and engaging with local elected representatives.¹⁰⁷ This information laid the backdrop to the Court’s finding that the North Carolina statute’s language was overly broad because it prohibited access to lawful websites that are “integral to the fabric of our modern society and culture,” such as Google and Amazon.¹⁰⁸ The Court stated:

By prohibiting sex offenders from using those websites, North Carolina with one broad stroke 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 otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. . . . [T]o foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.¹⁰⁹

The majority’s opinion was criticized by Justice Alito in his concurrence, labelling it “undisciplined dicta” and demonstrating concern for “the implications of the Court’s unnecessary rhetoric” by equating the “entirety of the internet with public streets and parks.”¹¹⁰ Since the Court previously held that “[t]he government does not create a forum by inaction . . . but only by intentionally opening a nontraditional forum for public discourse,”¹¹¹ the majority’s comparison of social media to the “quintessential public forum” of streets and parks adds more confusion to the forum doctrine’s categorization.¹¹² Equating the Internet and social media to parks and streets implies it is a traditional public forum open by default and regardless of government intent, despite the Court’s prior emphasis on historic tradition for traditional forum status.¹¹³

106. *Id.* (citation omitted) (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997)).

107. *Id.* (noting that “Governors in all 50 States and almost every Member of Congress have set up [Twitter] accounts for this purpose.”).

108. *Id.* at 1735, 1738.

109. *Id.* at 1737.

110. *Id.* at 1738 (Alito, J., concurring) (“The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks.”).

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

112. *See Packingham*, 137 S. Ct. at 1735.

113. *See supra* text accompanying notes 24-29.

B. *The Davison Cases*

Prior to the Court's decision in *Packingham*, a Loudoun County resident filed suit against two public officials, the Commonwealth Attorney and the Chair of the County's Board of Supervisors, for deleting his comments and blocking him off their respective Facebook pages.¹¹⁴ The case against the Commonwealth Attorney, *Davison v. Plowman*,¹¹⁵ was decided by a Virginia district court nearly four months prior to the *Packingham* decision. There, the court found the official's Facebook page to be a limited public forum because the Loudoun County Social Media Comments Policy served the restricted purpose of "present[ing] matters of public interest in Loudoun County."¹¹⁶ It was thereby permitted the reasonable, viewpoint-neutral regulation of speech that falls outside the forum's purpose.¹¹⁷

The Commonwealth Attorney posted a link to an article he had written concerning special prosecutors to his official Commonwealth Attorney Facebook, whereby Davison "responded by posting a lengthy comment that did not further any dialogue" regarding the article's topic.¹¹⁸ Rather, Davison claims that his comment was "political speech aimed at informing the public of [the official's] actions and to eventually have [him] voted out of office."¹¹⁹ The court found this sufficient to fall outside the scope of the limited forum and held that the comment's removal "was both viewpoint neutral and reasonably related to the purpose of the forum."¹²⁰

Four months later, the same court decided *Davison v. Loudoun County Board of Supervisors*.¹²¹ There, the Chair of Loudoun County Board of Supervisors created a Facebook outside of the County's official channels so she would not be constrained to the County's social media policies, but titled the page as "Chair Phyllis J. Randall."¹²² Randall made a post on her page concerning a discussion panel she attended, whereby Davison responded with a comment alleging "corruption on the part of

114. See *Davison v. Plowman*, 247 F. Supp. 3d 767 (E.D. Va. 2017), *aff'd*, No. 17-1771, 2018 WL 1376887 (4th Cir. Mar. 19, 2018); *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702 (E.D. Va. 2017), *appeal docketed*, No. 17-2003 (4th Cir. Aug. 29, 2017).

115. 247 F. Supp. 3d. 767 (E.D. Va. 2017).

116. *Id.* at 777.

117. *Id.* at 776.

118. *Id.* at 777.

119. *Id.*

120. *Id.*

121. 267 F. Supp. 3d 702 (E.D. Va. 2017), *appeal docketed*, No. 17-2003 (4th Cir. Aug. 29, 2017).

122. *Id.* at 707.

Loudoun County’s School Board.”¹²³ Randall subsequently deleted the post, including Davison’s comment, and banned Davison from her Facebook page for twelve hours.¹²⁴ Citing *Packingham* and noting that Randall’s posts requested open discussion on her page, the court concluded that Randall had opened a public forum and engaged in viewpoint discrimination by banning Davison from her Facebook page.¹²⁵ “By prohibiting Plaintiff from participating in her online forum because she took offense at his claim . . . Defendant committed a cardinal sin under the First Amendment.”¹²⁶

While both *Davison* cases involved the exclusion of a speaker based on his content, *Davison I*¹²⁷ is distinguishable because the Commonwealth Attorney was protected by the County’s social media policy, which placed reasonable restrictions on speech that did not relate to the limited purpose of the forum.¹²⁸ While the Chair official in *Davison II*¹²⁹ “purposely created her Facebook page outside the County’s official channels so as to not be constrained by the [County’s] policies,”¹³⁰ the court nonetheless found the official to be acting under “color of law” and her ban to be viewpoint discriminative.¹³¹ Thus, whether the public official has a social media policy is significant in finding the exclusion to be constitutional, so long as it is reasonable.¹³²

C. *Being Blocked or Banned on Twitter*

Unlike a Facebook “page”, where banning someone does not prevent them from viewing the content posted by the page,¹³³ being “blocked” on Twitter prevents the user from viewing the posts made by the Twitter

123. *Id.* at 711.

124. *Id.*

125. *Id.* at 716-17.

126. *Id.* at 717-18.

127. *Plowman*, 247 F. Supp. 3d 767.

128. *Id.* at 777.

129. *Loudoun Cty. Bd. of Supervisors*, 267 F.Supp.3d 702.

130. *Id.* at 707.

131. *Id.* at 717 (“Indeed, the suppression of critical commentary regarding elected officials is the quintessential form of viewpoint discrimination against which the First Amendment guards.”).

132. *See* *Liverman v. City of Petersburg*, 844 F.3d 400, 411-12 (4th Cir. 2016) (finding unconstitutional a police department’s social media policy prohibiting any negative comments “of great public concern”).

133. *Banning and Moderation*, FACEBOOK HELP CENTER, https://www.facebook.com/help/248844142141117/?helpref=hc_fnav (last visited Dec. 18, 2017).

account entirely.¹³⁴ However, the user is only prevented from viewing the Twitter account when he or she is logged in on the account blocked.¹³⁵ If the user logs out, or logs in to a third party account, the user may still be able to view the Twitter account he or she was previously blocked from.¹³⁶ The same is likely to be true for Facebook or any other social networking site.

If users are still able to access a public official's social media from different accounts, is there really a deprivation of free speech when they are blocked from one? This is where *Packingham* seems to have altered the realm of First Amendment analysis to social media. Prior to *Packingham*, the social media policy in *Davison I* protected the official's removal of plaintiff's comment, but it did not permit the outright ban of plaintiff from the official's Facebook page.¹³⁷ The court distinguished prior cases prohibiting a "blanket ban" from recurring public meetings, which involved "entirely forecloses a means of communication" and a failure to "leave adequate alternative channels of communication,"¹³⁸ to plaintiff's ban from the defendant's page because he "could and did avail himself of Facebook and other social media platforms to reach his audience."¹³⁹ The court was referring to plaintiff's act of purchasing Facebook ads, posting on his personal account, and creating new Facebook and Twitter accounts to voice his message,¹⁴⁰ finding these measures "adequate alternative measures of communication," despite his inability to comment directly on the defendant's page.¹⁴¹ The court found that "any First Amendment right Plaintiff might have had to continue posting comments on Defendant's Facebook page" was protected by the official's qualified immunity.¹⁴²

134. *How to block accounts on Twitter*, TWITTER HELP CENTER, <https://help.twitter.com/en/using-twitter/blocking-and-unblocking-accounts> (last visited Dec. 18, 2017).

135. *Id.*

136. *Id.*

137. *See Davison v. Plowman*, 247 F. Supp. 3d 767, 779-80 (E.D. Va. 2017), *aff'd*, No. 17-1771, 2018 WL 1376887 (4th Cir. Mar. 19, 2018).

138. *Id.* at 779 (citing *Barna v. Bd. of Sch. Directors of the Panther Valley Sch. Dist.*, 143 F. Supp. 3d 205 (M.D. Pa. 2015), *aff'd in part, vacated in part, remanded sub nom. Barna v. Bd. of Sch. Directors of Panther Valley Sch. Dist.*, 877 F.3d 136 (3d Cir. 2017)).

139. *Id.*

140. *Id.* at 775.

141. *Id.* at 779 ("Plaintiff adduced little evidence at trial tending to show that those alternative channels of communication were inadequate as compared to commenting directly on Defendant's Facebook page.").

142. *Id.* at 780.

The post-*Packingham* decision in *Davison II* demonstrated a heightened interest in protecting the communication of plaintiff's online speech. Acknowledging that the twelve-hour ban from the defendant's Facebook page was "fairly minor" and that plaintiff's speech was not "suppressed in any meaningful sense," the court nonetheless explained that "the government violates the First Amendment by disfavoring 'offensive' speech in ways far milder than outright suppression."¹⁴³ Despite the similarity in the content of the message conveyed by the plaintiff in both cases,¹⁴⁴ the court in *Davison II* was quick to find viewpoint discrimination in plaintiff's exclusion from official's Facebook page.¹⁴⁵ A big factor in this conclusion is the absence of any social media policy guiding the official's exclusion, as there was in *Davison I*.¹⁴⁶

V. APPLICATION OF THE FIRST AMENDMENT TO THE PRESIDENT'S SOCIAL MEDIA

It was not long after the decision in *Packingham* was rendered that a lawsuit was filed against President Donald Trump for the alleged blocking of users from his Twitter account, @realDonaldTrump.¹⁴⁷ The plaintiffs contend that the President blocked them "because of opinions they expressed in replies to the President's tweets," which consequentially prevented them from viewing, replying, and joining the public discussion associated with the President's posts.¹⁴⁸ Requesting declaratory and injunctive relief, the Complaint alleges that the President deprived not only the plaintiffs' right to engage in the President's Twitter discussions, but also deprived other Twitter users from reading the speech of those blocked.¹⁴⁹

143. *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 718 (E.D. Va. 2017) (citation omitted).

144. In *Davison I*, the comment related to alleged perjury on part of a Loudoun County school official and asks "[w]hy wouldn't you at least assign a special prosecutor in this case?" *Plowman*, 247 F. Supp. 3d at 773. The court disregarded the comment's reference to special prosecutors, labelling it "mere window dressing" to address his "frustration that Defendant refused to pursue Plaintiff's claims of perjury." *Id.* at 777. In *Davison II*, neither party knew the exact comment's content, but the defendant recalled it "included allegations of corruption on the part of Loudoun County's School Board." *See Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d at 711.

145. *Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d at 718.

146. *Id.* ("Neutral, comprehensive social media policies like that maintained by Loudoun County . . . may provide vital guidance for public officials and commenters alike . . .").

147. *See* Complaint for Declaratory and Injunctive Relief, *supra* note 4, at 2.

148. *Id.* at 2-3.

149. *Id.* at 3; *see City of San Diego, Cal. v. Roe*, 543 U.S. 77, 82 (2004) ("The interest at stake is as much the public's interest in receiving informed opinion as it is the [person's] own right to disseminate it.").

Silencing opposing speakers by restricting access to a forum they have a constitutional right to be in would undoubtedly chill speech, as users would risk losing access to the President's Twitter by voicing their objections to his position on a matter of public concern. First Amendment protection is afforded to both speaker and the listener, who each enjoy a privileged right to participate in discussion of the President and his qualifications for future elections.¹⁵⁰ The Supreme Court has made clear "it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes."¹⁵¹ However, finding a constitutional violation requires the determination of whether the President has created a public forum through his social media account.

A. *The President's Twitter: @realDonaldTrump*

The Twitter account, @realDonaldTrump, is commonly used by the President and his Administration¹⁵² to announce government policy, share his anticipated actions on important public and political issues, and to voice his opinion on matters relating to both his official and personal capacities.¹⁵³ The account has over 44.9 million followers that engage in the discussion of the President's posts (called "tweets") by replying (or "retweeting") to his original response and making their opinions viewable to other Twitter users.¹⁵⁴ On its face, the @realDonaldTrump account seems to be maintained by the President in his official capacity, identifying himself as the "45th President of the United States of

150. See *Buckley v. Valeo*, 424 U.S. 1, 13 (1976) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution."); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 341 (2010) ("The First Amendment protects speech and speaker, and the ideas that flow from each.").

151. *Citizens United*, 558 U.S. at 341.

152. Dan Scavino, the White House Director of Social Media, is known to occasionally tweet for the President from his @realDonaldTrump account. See Eliana Johnson, *Dan Scavino is the other @realDonaldTrump*, POLITICO (June 10, 2017, 7:22 AM), <https://www.politico.com/story/2017/06/10/dan-scavino-trump-social-media-profile-239381> [<https://perma.cc/G49B-U6RV>].

153. See generally Amanda Wills & Alysha Love, *All the President's tweets*, CNN POLITICS (last updated April 8, 2018, 9:12 AM), <http://www.cnn.com/interactive/2017/politics/trump-tweets/> [<https://perma.cc/UAY9-E7TH>].

154. See Donald J. Trump (@realDonaldTrump), TWITTER, <https://twitter.com/realDonaldTrump> (last visited Dec. 19, 2017). Since his election, the President has tweeted over 2,461 times, posting an average of six to seven times a day; Jessica Estepa, *Trump has tweeted 2,461 times since the election. Here's a breakdown of his Twitter use*, USA TODAY: ON POLITICS NEWSLETTER, (last updated Nov. 8, 2017, 12:26 PM) <https://www.usatoday.com/story/news/politics/onpolitics/2017/11/07/trump-has-tweeted-2-461-times-since-election-heres-breakdown-his-twitter-use/822312001/> [<https://perma.cc/TE5D-AFWU>].

America” beneath his name.¹⁵⁵ The President’s tweets from the @realDonaldTrump account have even been deemed “official statements” of the President of the United States by former White House Press Secretary Sean Spicer,¹⁵⁶ the Department of Justice,¹⁵⁷ the Ninth Circuit,¹⁵⁸ and President Trump himself.¹⁵⁹

A separate account designated for the President of the United States, @POTUS, was created and used by President Barack Obama back in 2015.¹⁶⁰ While President Trump is featured on the page, he appears to only use the account to retweet posts made by @realDonaldTrump and other accounts associated with his Administration.¹⁶¹ In a section beneath the name “President Trump” on the @POTUS account, there is a link to the @realDonaldTrump account, as well as a link to the official White House Privacy Policy.¹⁶² The Policy has a section beneath the heading “Third-Party Websites” stating, “The White House maintains official pages or accounts on third-party websites in order to better engage with the American public.”¹⁶³ While the Policy does not state which accounts

155. Donald J. Trump (@realDonaldTrump), *supra* note 154.

156. Elizabeth Landers, *White House: Trump’s tweets are ‘official statements’*, CNN POLITICS, (last updated June 6, 2017, 4:37 PM), <http://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html> [<https://perma.cc/URZ6-CE72>].

157. Defendant’s Supplemental Submission and Further Response to Plaintiffs’ Post-Briefing Notices at 4, James Madison Project v. DOJ, No. 1:17-cv-144-APM (D.D.C. Nov. 13, 2017), <https://assets.documentcloud.org/documents/4200037/Trump-Twitter-20171113.pdf>.

158. *Hawaii v. Trump*, 859 F.3d 741, 773 n.14 (9th Cir. 2017) *cert. granted sub nom. Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080 (2017), and *cert. granted, judgment vacated*, 138 S. Ct. 377 (2017), and *vacated*, 874 F.3d 1112 (9th Cir. 2017)(citing President Trump’s tweet to support invalidating the President’s executive order prohibiting nationals from six designated countries from entering the United States).

159. *See* Donald J. Trump (@realDonaldTrump), TWITTER (July 1, 2017, 3:41 PM), <https://twitter.com/realDonaldTrump/status/881281755017355264> (referring to his use of social media as “MODERN DAY PRESIDENTIAL”).

160. Roberta Rampton, *Obama gets his own account on Twitter: ‘It’s Barack. Really!’*, REUTERS (May 18, 2015 12:35 PM), <https://www.reuters.com/article/usa-obama-twitter/obama-gets-his-own-account-on-twitter-its-barack-really-idUSL1N0Y915O20150518> [<https://perma.cc/T5YK-KFCJ>].

161. *See* President Trump (@POTUS), TWITTER, <https://twitter.com/POTUS> (last visited Dec. 19, 2017).

162. *Id.*

163. Privacy Policy, WHITEHOUSE.GOV, <https://www.whitehouse.gov/privacy-policy/> (last updated Dec. 13, 2017) (changed to lowercase). It also states that the “White House archives some information that users submit or publish when engaging with the White House through official White House pages or accounts on third-party websites (e.g., by sending a message, posting a comment, ‘following,’ ‘friending,’ or taking similar actions).” *Id.*

are the “official White House accounts,” it may be presumed that they are those accounts that link to the Privacy Policy on the main page.¹⁶⁴

B. Public Forum or Personal Account?

The Privacy Policy’s statement that these accounts are used to “better engage with the American public” would satisfy the government intent requirement to open a public forum on those accounts linking to the Policy, but does not indicate any limitations on speech as the policy in *Davison I* did.¹⁶⁵ Nevertheless, is the absence of the Policy from the President’s @realDonaldTrump account an indication that he did not intend to open a public forum? After all, @realDonaldTrump was created long before Donald Trump was elected President,¹⁶⁶ and the Supreme Court has held that the First Amendment protects a public employee’s right to speak as a citizen on matters of public concern.¹⁶⁷ While the President’s own First Amendment rights are still afforded protection, an exception exists for public officials who “make statements pursuant to their official duties.”¹⁶⁸ However, the Court has clarified that the proper inquiry is “whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”¹⁶⁹

Even assuming the account is Donald Trump’s personal Twitter, the President’s status as the highest-ranked public official should require an affirmative showing of such to ensure his account is not viewed as a public forum welcoming open discussion.¹⁷⁰ Moreover, the Supreme Court has

164. See e.g., President Donald Trump (@POTUS), *supra* note 161; The White House (@WhiteHouse), TWITTER, <https://twitter.com/WhiteHouse> (last visited Dec. 19, 2017); Vice President Mike Pence (@VP), TWITTER, <https://twitter.com/VP> (last visited Dec. 19, 2017). Vice President Mike Pence also seems to have a second Twitter account that does not feature the Privacy Policy. Mike Pence (@mike_pence), TWITTER, https://twitter.com/mike_pence (last visited Dec. 19, 2017).

165. The social media policy in *Plowman* reserved the right to “delete submissions that violated the enumerated rules,” namely, comments that were “clearly off topic.” *Davison v. Plowman*, 247 F. Supp. 3d 767, 772 (E.D. Va. 2017) (internal quotations omitted).

166. Donald J. Trump, *supra* note 154 (indicating the account was created in March 2009).

167. See *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006) (“[P]ublic employees do not surrender all their First Amendment rights by reason of their employment.”). A public official has been regarded as a public employee whose position would “invite public scrutiny and discussion of the person holding it.” *Rosenblatt v. Baer*, 383 U.S. 75, 86 n.13 (1966).

168. *Id.* at 421.

169. *Lane v. Franks*, 134 S. Ct. 2369, 2379 (2014); see *Garcetti*, 547 U.S. at 423 (“Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government”).

170. As Professor Norton observed, “certain positions trigger such high public expectations that those employees could never escape their governmental role to speak purely as private citizens even

demonstrated a strong interest in protecting the public's right to criticize public officials.¹⁷¹ The Court in *Rosenblatt v. Baer* stated:

There is, first, a strong interest in debate on public issues, and, second, a strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues. Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized.¹⁷²

Because the President holds a title of political and public importance, the public should be free to not only criticize him, but also observe his engagement with the general public in order to determine his qualifications as an elected official.¹⁷³ By blocking users for their criticism of his official conduct, the President not only engages in viewpoint discrimination, but also censorship of constitutionally-protected political speech.¹⁷⁴ Any individual interest the President had is substantially outweighed by the selective suppression of speech from the public discussion he engages in on his publicly-accessible online forum.¹⁷⁵ Therefore, public forum status should be assigned to the President's Twitter, @realDonaldTrump.¹⁷⁶ To hold otherwise would

when off the job." See Helen Norton, *Constraining Public Employee Speech: Government's Control of its Worker's Speech to Protect its Own Expression*, 59 DUKE L.J. 1, 50 (2009); *id.* at 59-60 (explaining how a contextual approach would consider the nature of the speaker's occupation in assessing whether the public employee is speaking as a citizen or on behalf of his or her employer).

171. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 299 (1964) (Goldberg, J., concurring) ("In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be commented upon and criticized.").

172. *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

173. *Id.* at 86 ("Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, both elements we identified in [*Sullivan*] are present.").

174. See *Sullivan*, 376 U.S. at 297 (Black, J., concurring) ("For a representative democracy ceases to exist the moment that the public functionaries are by any means absolved from their responsibility to their constituents; and this happens whenever the constituent can be restrained in any manner from speaking, writing, or publishing his opinions upon any public measure, or upon the conduct of those who may advise or execute it." (citation omitted)).

175. See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 326-27 (2010) (explaining that First Amendment standards "must give the benefit of any doubt to protecting rather than stifling speech." (quoting *Fed. Election Comm'n v. Wis. Right To Life, Inc.*, 551 U.S. 449, 469 (2007))).

176. See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) ("[T]he Court must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium.").

chill “speech that is central to the meaning and purpose of the First Amendment.”¹⁷⁷

C. *A New Approach*

This Note proposes that a public forum presumption be assigned to the social media accounts of public officials that are highly ranked and maintain social media accounts within their official capacities. *Packingham* furthers this approach, given its heightened stance on the protection afforded to social media and deeming it as the “most important” place to exercise free expression.¹⁷⁸ With the massive, low-cost, and easily accessible spatial dimension of the Internet, a heightened standard is appropriate where a public forum would otherwise be opened in an area inaccessible to certain speakers.¹⁷⁹ Therefore, the higher up in government a public official is, the greater the presumption should be that his or her social media is a public forum, absent affirmative indications that he or she intended to keep the account private.

VI. CONCLUSION

While *Packingham v. North Carolina* gave hope to bringing clarity to the public forum doctrine’s application to social media, the decision may have stirred up more confusion in the application of the doctrine’s three categories. Nonetheless, *Packingham* signifies a coming-of-age perspective to the constitutional protection afforded to online speech, indicating a challenge for public officials to show that their social media pages are either limited forums or personal accounts before choosing to exclude users’ comments or ban them entirely. However, the higher up in the government hierarchy the public official stands, the greater the government’s burden should be to demonstrate that his or her social media are nonpublic or private accounts. The implications of the President’s social media bans are far greater than they would be if he wasn’t serving as the public’s highest-elected official. By excluding speakers for their criticism of his official conduct, the President is impeding on the First Amendment’s core by suppressing political speech that is necessary for democracy to function efficiently.

177. *Citizens United v. Fed. Election Comm’n*, 558 U.S. at 329.

178. *Packingham*, 137 S. Ct. at 1735.

179. *Id.* at 1737 (“[Social media] allow a person with an Internet connection to ‘become a town crier with a voice that resonates farther than it could from any soapbox.’” (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997))).