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IS TROLLING TRUMP A RIGHT OR A PRIVILEGE?: THE ERRONEOUS FINDING IN *KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY v. TRUMP*

Abstract: On May 23, 2018, in *Knight First Amendment Institute at Columbia University v. Trump*, the United States District Court for the Southern District of New York considered whether the President of the United States violated the First Amendment rights of individuals by blocking them on Twitter. In doing so, the district court agreed with the plaintiffs’ allegations that blocking constituted impermissible viewpoint discrimination in the context of a public forum. Despite the long history of the public forum doctrine, the information age has presented new questions regarding the doctrine, and *Knight First Amendment Institute* marks the first instance in which a court identified a public forum within a public official’s twitter account. This Comment argues that application of the public forum doctrine to a portion of the President’s Twitter account was inappropriate.

INTRODUCTION

President Donald J. Trump is one of the first presidents to fully embrace Twitter as a means of communicating with the general public, which has stirred up considerable controversy.¹ In *Knight First Amendment Institute at Columbia University v. Trump*, the United States District Court for the Southern District of New York considered whether the President can permissibly “block” a person from interacting with his Twitter account in response to criticism expressed towards the President.² The court answered no, finding that the portion of the President’s Twitter account in which users may interact with his

¹ See Note, *Recent Social Media Posts: Executive Power—Presidential Directives—In Tweets, President Purports to Ban Transgender Servicemembers*, 131 HARV. L. REV. 934, 943 (2018) (discussing the controversy surrounding the legal status of President Trump’s tweets); Ronnell A. Jones & Lisa G. Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301, 1341–42 (2017) (discussing President Trump’s favoring of Twitter as a social media tool and concluding that his apparent decision that the media is no longer a necessary link to the public is a first in modern history); see also *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 552 (S.D.N.Y. 2018) (discussing President Trump’s use of Twitter to discuss and promote his policies and legislative agenda, to challenge and defend against media coverage of his presidency and for various governmental and non-government-related matters). Twitter is a social media platform that allows users to interact with each other by posting short messages, known as “tweets.” *Knight First Amendment Inst.*, 302 F. Supp. 3d at 550. A user can respond to another user’s tweet by replying directly to that message with their own, which appears in a thread below the original tweet; by liking a tweet; or by “retweeting” a tweet, which copies the tweet onto the responding user’s page. *Id.* at 550–51.

² *Knight First Amendment Inst.*, 302 F. Supp. 3d at 549.

tweets is a designated public forum, making blocking users in response to their political views a violation of the First Amendment.³

This Comment argues that the court's application of the public forum doctrine was inappropriate.⁴ Part I of this Comment provides an overview of the public forum doctrine and the factual and procedural background of *Knight First Amendment Institute*.⁵ Part II explains relevant case law involving the public forum doctrine and the court's application of that doctrine to President Trump's Twitter account.⁶ Part III argues that the court, in failing to consider the intricacies of the relevant case law, erred in finding President Trump's blocking of other Twitter users unconstitutional.⁷ This error is especially problematic in light of increasing scholarly criticism of courts for applying the public forum doctrine in an inconsistent, subjective manner that obscures the boundaries of the doctrine.⁸ The court's application of the doctrine risks further obscuration of these boundaries, will likely face criticism, and may contribute to discouraging government officials from participating in social media.⁹

I. PUBLIC FORUMS AND THE EXPANDING PUBLIC FORUM DOCTRINE

Section A of this Part discusses various categories of public forums that the Supreme Court has identified.¹⁰ Section B then discusses application of the public forum doctrine and the legal framework for evaluating whether applica-

³ *Id.* at 549, 580. In doing so, the court rejected the “defendants’ contentions that the First Amendment does not apply in this case and that the President’s personal First Amendment interests supersede those of plaintiffs.” *Id.* at 549.

⁴ See *infra* notes 94–106 and accompanying text.

⁵ See *infra* notes 10–49 and accompanying text.

⁶ See *infra* notes 51–80 and accompanying text.

⁷ See *infra* notes 81–106 and accompanying text.

⁸ See Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 677–78 (2008) (criticizing current categorization of government speech or public forum for being ad hoc in nature and prone to judicial bias); Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1381, 1383 (2001) (striving to clarify the Supreme Court’s incoherent distinctions among the public forum doctrine and government speech); Ross Rinehart, Note, “*Friending*” and “*Following*” the Government: How the Public Forum and Government Speech Doctrines Discourage the Government’s Social Media Presence, 22 S. CAL. INTERDISC. L.J. 781, 811, 812 (2013) (criticizing the Court’s failure to provide sufficient clarity regarding the government speech doctrine and its contours).

⁹ See Rinehart, *supra* note 8, at 785 (arguing that “the imprecision and incompatibility of both the public forum and government speech doctrines to social media speech create significant uncertainty over government authority to regulate and maintain its own social media pages”); see also Nicholas Carr, *Why Trump Tweets (And Why We Listen)*, POLITICO MAG. (Jan. 26, 2018), <https://www.politico.com/magazine/story/2018/01/26/donald-trump-twitter-addiction-216530> [<https://perma.cc/7WEE-EBMG>] (“By blurring private and public discourse, Twitter allows Trump to turn locker-room talk, his favored idiom, into presidential speech.”).

¹⁰ See *infra* notes 13–23 and accompanying text.

tion is appropriate.¹¹ Finally, Section C discusses the factual and procedural history of *Knight First Amendment Institute*.¹²

A. Categories of Forums

The Supreme Court has recognized three types of forums.¹³ The first category is the traditional public forum, such as a street or park, held in trust for public use and used for assembly, communication, and discussion.¹⁴ The second category, known as the designated public forum, consists of public property that the government has opened for use by the public for expressive activity.¹⁵ The government creates this type of public forum by intentionally opening and designating a location or channel of communication for public discourse or other forms of expression, which it can limit to use for specified topics or by certain speakers.¹⁶ The final category is the nonpublic forum, which is simply public property that has not been designated for public expression either by way of tradition or government designation.¹⁷

¹¹ See *infra* notes 24–36 and accompanying text.

¹² See *infra* notes 37–49 and accompanying text.

¹³ *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45–46 (1983); *Make the Rd. by Walking, Inc. v. Turner*, 378 F.3d 133, 142 (2d Cir. 2004).

¹⁴ *Perry Educ. Ass'n*, 460 U.S. at 45 (citing *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)). In a traditional public forum, protection given to speech is at its peak, and the government cannot alter the forum or restrict its use without completely changing the forum. *Make the Rd.*, 378 F.3d at 142.

¹⁵ *Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 677 (1998) (applying forum analysis to a televised candidate debate by a public television broadcaster); *Perry Educ. Ass'n*, 460 U.S. at 45–46; *Make the Rd.*, 378 F.3d at 142–43.

¹⁶ *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985) (applying forum analysis to a charity drive organized in the federal workplace). For example, a state university with a policy of allowing students to use its meeting facilities had created a designated public forum and therefore could not restrict use of facilities based on viewpoint. *Id.* at 802–03 (citing *Widmar v. Vincent*, 454 U.S. 263, 267 & n.5 (1981)); see *Perry Educ. Ass'n*, 460 U.S. at 45 (emphasizing that constitutional prohibitions on exclusion apply to a forum open to the general public, even when government was not required to create the forum) (first citing *Widmar*, 454 U.S. 263 (university meeting facilities); then citing *City of Madison, Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167 (1976) (school board meeting); and then citing *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975) (municipal theater)).

¹⁷ *Ark. Educ. Television Comm'n*, 523 U.S. at 678; *Make the Rd.*, 378 F.3d at 143 (citing *Gen. Media Commc'ns v. Cohen*, 131 F.3d 273, 278 (2d Cir. 1997)). Examples of public property that courts have labeled nonpublic forums include a public broadcaster-sponsored televised debate, the United States Military Academy at West Point, public school mail systems, and city fire stations. 16A AM. JUR. 2d *Constitutional Law* § 543 (database updated Aug. 2018) (first citing *Ark. Educ. Television Comm'n*, 523 U.S. at 666 (public broadcaster-sponsored televised debate among political candidates); then citing *Sussman v. Crawford*, 548 F.3d 195 (2d Cir. 2008) (the United States Military Academy at West Point); then citing *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330 (5th Cir. 2001) (public school district's mail delivery system); and then citing *Parow v. Kinnon*, 300 F. Supp. 2d 256 (D. Mass. 2004) (city fire station)).

In a nonpublic forum, the government may regulate the time, place, and manner of use, and may act to prevent the use of the forum for any unintended purpose, so long as the actions are reasonable and not solely a result of opposing the expressed views.¹⁸ Within a traditional or designated public forum, protections apply to expressive activity such that viewpoint discrimination by a public official violates the First Amendment.¹⁹ Conduct comprises expressive activity when an actor performs it with an intent to convey some specific message that those who perceive it are likely to understand.²⁰ Viewpoint discrimination occurs whenever the government restricts expressive activity because of the expressed opinion, ideology, or perspective of the speaker.²¹ Outside of a public forum, a government official is permitted to discriminate against viewpoints while engaging in government speech, which occurs when the government wishes to speak on its own behalf.²² Government speech can take various forms, including through private individuals, but essentially applies when the government is speaking or conveying some message to the public.²³

B. Public Forum Analysis

For public forum analysis to apply, the First Amendment must protect the speech at issue.²⁴ An example of such protected speech is political speech, which includes any speech relating to governmental affairs, because protection of this speech was a core concern behind the founder's enactment of the First

¹⁸ *Perry Educ. Ass'n*, 460 U.S. at 46. In evaluating whether excluding a particular type of speech is proper, courts distinguish between content discrimination, which a government official can engage in to confine the use of a forum to its intended purpose, and viewpoint discrimination, which is generally prohibited where the speech is of the type that is ordinarily permitted within the forum. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995) (citing *Perry Educ. Ass'n*, 460 U.S. at 46).

¹⁹ *Perry Educ. Ass'n*, 460 U.S. at 44–45.

²⁰ See *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (citing *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)) (holding that burning a flag on city streets is expressive conduct to which the First Amendment's protections apply); John T. Haggerty, Note, *Begging and the Public Forum Doctrine in the First Amendment*, 34 B.C. L. REV. 1121, 1124 (1993) (discussing distinction between expressive conduct and ordinary conduct).

²¹ *Rosenberger*, 515 U.S. at 829 (citing *Perry Educ. Ass'n*, 460 U.S. at 46) (holding that a state university's denial of Student Activities Funds to a Christian-affiliated student-run newspaper constituted unconstitutional viewpoint discrimination within a public forum).

²² *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2250 (2015) (classifying specialty license plates as government speech and stating that public forum analysis would be inappropriate in that context); see *United States v. Am. Library Ass'n*, 539 U.S. 194, 206, 208 (2003) (plurality opinion) (finding that a public library was not a public forum and that the library's exercise of judgment in blocking certain Internet content was constitutional).

²³ See *Rinehart*, *supra* note 8, at 807 (citing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001)) (explaining that the government speech doctrine applies when the government speaks directly to the public or when the government speaks through an individual to convey a message).

²⁴ *Cornelius*, 473 U.S. at 797.

Amendment.²⁵ In assessing whether it is proper to evaluate a space under the public forum doctrine, courts must first determine exactly what space the speaker wishes to access.²⁶ When the access sought is relatively limited, as opposed to general, courts determine the forum's borders in a more tailored manner, separating out the components of the property at issue so that the forum can be more precisely defined.²⁷ For example, where plaintiffs wanted to access the advertising space on city buses, the forum analysis was confined to the advertising space, rather than the entire bus.²⁸

The defined space can only be subject to public forum analysis if the government maintains ownership or control over the property or space at issue, which may take the form of legal title to property or regulatory power over the property in the absence of legal ownership.²⁹ Ownership or control can be used to discern whether state action exists, which is required for the First Amendment to apply.³⁰ In the absence of statutory or other legal authority granting a government official the power to exert control over the property, the government is indistinguishable from a private property owner and state action does not exist.³¹ Despite its requisite nature, if a court initially determines that a fa-

²⁵ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 329 (2010) (declining to resolve a case in a manner that would chill political speech and emphasizing that the purpose of the First Amendment was largely to protect this speech); *Mills v. Alabama*, 384 U.S. 214, 218–19 (1966) (discussing consensus that a central purpose of the First Amendment was to protect discussion regarding governmental affairs and matters relating to political processes).

²⁶ See *Cornelius*, 473 U.S. at 800 (directing that first step is to determine perimeters of forum). The court in *Cornelius* stated, “[A] speaker must seek access to public property or to private property dedicated to public use to evoke First Amendment concerns.” *Id.* at 801.

²⁷ *Id.* at 801–02; see, e.g., *Perry Educ. Ass'n*, 460 U.S. at 46 (defining a school's internal mail system, rather than the school as a whole, as the forum). To separate the components of the space at issue, courts identify the specific access sought and limit the forum to the area encompassing that access. *Knight First Amendment Inst.*, 302 F. Supp. 3d at 565.

²⁸ *Lehman v. City of Shaker Heights*, 418 U.S. 299, 303 (1974); *Knight First Amendment Inst.*, 302 F. Supp. 3d at 565 (citing *Lehman*, 418 U.S. at 300–01).

²⁹ See *U.S. Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129 (1981) (indicating that ownership or control is a threshold requirement for the First Amendment to guarantee access to government property); *Knight First Amendment Inst.*, 302 F. Supp. 3d at 566 (identifying control or ownership as threshold requirement and listing various forms of ownership or control). The requisite control or ownership may be sufficient where the government maintains power to regulate or license the forum or its use. *Int'l Soc. for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992). Ownership or control over a property alone, however, does not create a public forum. *U.S. Postal Serv.*, 453 U.S. at 129.

³⁰ See *Lehman*, 418 U.S. at 303–04 (finding that, because state action exists, First Amendment restrictions apply); *Halleck v. Manhattan Cmty. Access Corp.*, 882 F.3d 300, 307 (2d Cir. 2018) (explaining that First Amendment's application depends on whether connection between actors and governmental authority is sufficient to establish that actors are state actors).

³¹ See *Promotions*, 420 U.S. at 553 (“The restraints took a variety of forms, with officials exercising control . . . under the authority of particular statutes. All, however, . . . gave public officials the power to deny use of a forum in advance of actual expression.”); see also *Greer v. Spock*, 424 U.S. 828, 836 (1976) (rejecting the notion that allowing the public to freely visit a place that the government owns or operates creates a public forum). Compare *Halleck*, 882 F.3d at 307 (finding state action where actors

cility or space is a public forum, which implies that the government operates that forum, the court usually will not separately identify state action.³²

After identifying the government-owned or controlled forum, courts typically determine what type of forum exists: a traditional public forum, a designated public forum, or a nonpublic forum.³³ This often requires courts to discern government intent to create a forum.³⁴ To determine intent, courts evaluate the government's policy and practice and the nature of the property with regards to compatibility with expressive conduct or activity.³⁵ Courts will not find this intent where the official was instead engaged in government speech.³⁶

C. Factual and Procedural History of Knight First Amendment Institute at Columbia University v. Trump

In *Knight First Amendment Institute*, the court considered whether the President can permissibly “block” a person from interacting with his Twitter account after that person has expressed criticism of the President.³⁷ The plaintiffs, Rebecca Buckwalter, Philip Cohen, Holly Figueroa, Eugene Gu, Brandon Neely, Joseph Papp, and Nicholas Pappas, are Twitter users who the President blocked on Twitter after they had replied to one of the President's tweets in a critical manner.³⁸ They claimed that, by blocking the plaintiffs in response to

had been exercising authority designated to them by a senior municipal employee), *with Columbo v. O'Connell*, 310 F.3d 115, 118 (2d Cir. 2002) (per curiam) (finding no state action where a school official hired a private lawyer to draft a letter threatening to sue because the official's power was not possessed by virtue of state law).

³² See *Halleck*, 882 F.3d at 306–07 (first citing *Widmar*, 545 U.S. at 265–68 (regulation adopted by state University's Board of Curators, prohibiting use of University property for religious reasons); and then citing *City of Madison, Joint Sch. Dist.*, 429 U.S. at 169, 176 (order by Wisconsin Employment Relation Committee prohibiting school board from allowing teachers to speak on certain topics at public meetings)). Significantly, where a court has not yet established the public nature of the forum which would lead to an inference of state action, the court must separately identify state action in order to apply the public forum doctrine. *Id.* (citing *Widmar*, 454 U.S. at 265–68); see *City of Madison, Joint Sch. Dist.*, 429 U.S. at 169–76 (indicating that state action is required, although not often explicitly evaluated in public forum analysis).

³³ *Cornelius*, 473 U.S. at 802.

³⁴ See *id.* (emphasizing that inaction or permissive conduct by the government, in the absence of government intent, will not create a nontraditional public forum).

³⁵ *Id.* This intent is more likely to be identified where the nature of the property is compatible with expressive activity. See *id.* at 803 (declining to find intent to create a public forum where property is incompatible with expressive activity). Although instruments that can be used for communication may be compatible with expressive activity, not every such instrumentality may be considered a public forum. *Id.*

³⁶ See *Walker*, 135 S. Ct. at 2251 (declining to find intent to designate a forum and concluding that the expressive conduct at issue constituted government speech).

³⁷ *Knight First Amendment Inst.*, 302 F. Supp. 3d at 549. The court applied the public forum doctrine to evaluate whether the President's actions constituted permissible government speech or unconstitutional viewpoint discrimination within a public forum—the forum being some portion of President Trump's Twitter account. *Id.*

³⁸ *Id.* at 553.

their viewpoints, the President and members of his administration violated the plaintiffs' First Amendment rights by excluding them from a public forum created by the President's Twitter page.³⁹ They argued that this exclusion altered the forum in a way that infringed on other participants' rights as well, because those users, including the Knight First Amendment Institute, were left participating in a forum where certain views had been filtered out.⁴⁰

On July 12, 2017, the seven individual plaintiffs, along with the Knight First Amendment Institute, filed their complaint against President Trump and various White House officials in their official capacity, seeking an injunction and declaratory relief.⁴¹ The defendants moved for summary judgment on October 13, 2017, following stipulation of facts.⁴² On November 3, 2017, the plaintiffs filed a cross-motion for summary judgment.⁴³

Ultimately, the court denied the motions in part and granted the motions in part, granting only a portion of the defendants' motion due to issues involving lack of standing under Article III as to all except President Trump and Mr. Scavino.⁴⁴ In an order issued on May 23, 2018, the court found that the speech at issue was political speech protected by the First Amendment.⁴⁵ The court held that the interactive portion of the President's tweets was appropriately analyzed under the public forum doctrine and constituted a designated public forum.⁴⁶ Consequently, the exclusion of the individual plaintiffs infringed on their First Amendment rights.⁴⁷ In partially granting the plaintiffs' motion for

³⁹ *Knight Institute v. Trump—Lawsuit Challenging President Trump's Blocking of Critics on Twitter*, KNIGHT FIRST AMENDMENT INST., <http://knightcolumbia.org/content/knight-institute-v-trump-lawsuit-challenging-president-trumps-blocking-critics-twitter> [<https://perma.cc/6ZMX-2HQG>] [hereinafter *Knight Institute v. Trump Lawsuit*] (summarizing the lawsuit and the plaintiffs' arguments).

⁴⁰ *Knight First Amendment Inst.*, 302 F. Supp. 3d at 564; *Knight Institute v. Trump Lawsuit*, *supra* note 39.

⁴¹ *Knight First Amendment Inst.*, 302 F. Supp. 3d at 552, 555. The plaintiffs listed the President; Daniel Scavino, the White House Social Media Director and Assistant to the President; and Sean Spicer, the then-serving White House Press Secretary, as defendants. *Id.* at 555. When Mr. Spicer resigned soon thereafter, his successor, Sarah Huckabee Sanders, and the White House Communications Director, Hope Hicks, replaced him as defendants in the suit as required by Federal Rule of Civil Procedure 25(d). FED. R. CIV. P. 25(d); *Knight First Amendment Inst.*, 302 F. Supp. 3d at 555.

⁴² *Knight First Amendment Inst.*, 302 F. Supp. 3d at 555.

⁴³ *Id.*

⁴⁴ *Id.* at 552, 580. The court found that the plaintiffs did not have standing to sue Ms. Hicks and Ms. Sanders, but did have standing to sue the President and Mr. Scavino, who occasionally assisted the President in operating his Twitter account. *Id.* Because Ms. Sanders did not have access to the account, she was dismissed as a defendant for lack of standing. *Id.* at 580. Hope Hicks was also dismissed as a defendant, as she had resigned as White House Communications Director. *Id.*

⁴⁵ *Id.* at 541, 564–65.

⁴⁶ *Id.* at 580.

⁴⁷ *Id.*

summary judgment, the court granted declaratory relief.⁴⁸ On June 4, 2018, President Trump and Mr. Scavino filed a notice of appeal in the United States Court of Appeals for the Second Circuit.⁴⁹ The Second Circuit has calendared the case for argument on March 26, 2019.⁵⁰

II. PRECEDENT AND *KNIGHT FIRST AMENDMENT INSTITUTE AT COLUMBIA UNIVERSITY V. TRUMP*

Section A of this Part discusses the factors that courts use to discern whether conduct took place in a public forum, or whether the conduct should instead be evaluated in the context of government speech.⁵¹ Section B discusses the court's application of the public forum doctrine in *Knight First Amendment Institute*.⁵²

A. Compatibility of the Public Forum Analysis

The fact that members of the public are allowed to visit a place owned or operated by the government does not transform that place into a “public forum” for purposes of the First Amendment.⁵³ Just like a private citizen, the state has the power to restrict the use of property it controls to the uses for which it was initially intended.⁵⁴ Thus, courts distinguish between government speech and government regulation of private speech, the former of which does not fall under the First Amendment's protection and, consequently, is not subjected to forum analysis.⁵⁵

Courts employ various factors to evaluate whether speech is government speech.⁵⁶ First, courts determine whether the potential forum has historically

⁴⁸ *Knight First Amendment Inst.*, 302 F. Supp. 3d at 580. The declaration stated that the President had violated the First Amendment by blocking the individual plaintiffs from his Twitter account because of the political views they expressed. *Id.* at 579.

⁴⁹ Notice of Appeal at 1, *Knight First Amendment Inst.*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 05-5205), ECF No. 73.

⁵⁰ See *Argument Calendar, Courtroom 1703*, U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT, <http://ww2.ca2.uscourts.gov/calendar/index.php?eID=1971> [<https://perma.cc/3YT9-B3F7>] (setting oral argument in *Knight First Amendment Institute v. Trump* for Tuesday, March 26, 2019).

⁵¹ See *infra* notes 53–65 and accompanying text.

⁵² See *infra* notes 66–80 and accompanying text.

⁵³ *Greer v. Spock*, 424 U.S. 828, 836 (1976).

⁵⁴ *Id.*

⁵⁵ See *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) (declaring that the First Amendment does not abridge a government official's right to free speech and does not govern government speech); see also *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005) (recognizing that the Government's speech is not subject to First Amendment scrutiny).

⁵⁶ See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2251 (2015) (“[W]e reach this conclusion [of government speech] based on the historical context, observers' reasonable interpretation of the messages conveyed . . . and the effective control that the State exerts over the design selection process.”).

been used to express a government message.⁵⁷ Second, courts evaluate whether the public mind would likely closely identify the speech at issue with the government.⁵⁸ Finally, courts look at the extent of control maintained by the government over the messages conveyed.⁵⁹ For example, in *Pleasant Grove City v. Summon*, the Supreme Court found that a city had not created a public forum by accepting privately donated monuments for a public park, reasoning that selecting these monuments was a form of expressive conduct that constituted government speech.⁶⁰ The Court reasoned that governments have long used monuments to convey some message to the public, the public mind often views monuments as conveying some message on the property owner's behalf, and the ultimate authority of the city to approve the selected monuments effectively controlled the message.⁶¹

If a court finds that the action at issue is not government speech, then a forum analysis, and thus classification of the space or property at issue as a particular type of forum, is proper.⁶² Because the government must intend to create a designated public forum for one to exist, this classification often involves an evaluation of the government's intent to either create a forum or engage in government speech.⁶³ Discerning that intent requires a court to evaluate the policy and practice of the government and the nature of the property with respect to its compatibility with expressive activity.⁶⁴ For example, in

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *See id.* (“This authority [over selection] militates against a determination that Texas has created a public forum.”); *Pleasant Grove City v. Summum*, 555 U.S. 460, 472–73 (2009) (finding display of privately-donated monuments in public parks is government speech where the city maintained ultimate authority over approval of monuments, which allowed the city to effectively control the messages conveyed); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 47 (1983) (rejecting that the selective access created by requiring permission to access a public school’s internal mail system transformed the mail system into a public forum).

⁶⁰ *Pleasant Grove City*, 555 U.S. at 480, 481.

⁶¹ *Id.* at 470–73.

⁶² *Walker*, 135 S. Ct. at 2250.

⁶³ *See id.* (listing factors used to evaluate intent); *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 677 (1998) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985)) (explaining factors used to discern intent); *Cornelius*, 473 U.S. at 803 (explaining that courts will not find a public forum where evidence clearly indicates an opposing intent).

⁶⁴ *Walker*, 135 S. Ct. at 2250; *Cornelius*, 473 U.S. at 802. A policy or practice that involves granting general access to the public as opposed to limiting access by, for example, requiring permission, is consistent with the requisite intent. *See Cornelius*, 473 U.S. at 803 (discussing situations where policy involved limiting access as compared to those where access was generally granted and intent was recognized); *Perry Educ. Ass’n*, 460 U.S. at 47 (explaining that requiring permission to access a forum was insufficient to create a public forum). In terms of compatibility, where expressive activity would interfere with the function of the property, intent will not be found. *Cornelius*, 473 U.S. at 804. For example, where plaintiffs sought to create a prisoners’ union, the intent was not identified because the penological objectives of a prison and interests of order and stability would be disrupted by allowing associations. *Id.* at 803; *Jones*, 433 U.S. at 132; *see also* Michael Kagan, *When Immigrants Speak: The Precarious Status of Non-Citizen Speech Under the First Amendment*, 57 B.C. L. REV. 1237, 1273 (2016) (citing *Jones*,

Widmar v. Vincent, the Supreme Court concluded that a state university had displayed the requisite intent to create a public forum where the university had an explicit policy of allowing student groups to use its meeting facilities and where the university had many characteristics of a traditional public forum, making it compatible with expressive activity.⁶⁵

*B. The Southern District of New York's Application of the
Public Forum Doctrine in Knight First Amendment
Institute at Columbia University v. Trump*

In *Knight First Amendment Institute*, the court analyzed three aspects of President Trump's Twitter account to identify a potential forum: the content of the tweets, the timeline of tweets from his account, and the interactive element of his account, with which users could engage through likes, retweets, and replies, as those were the areas that the plaintiffs sought access to.⁶⁶ The court first evaluated the control that President Trump and Mr. Scavino exercised over the account and concluded that it was sufficient to meet the public forum doctrine's threshold requirement of ownership or control.⁶⁷ The court then concluded that the content of the tweets was government speech, as the tweets were the speech of either the President or an official representing the President.⁶⁸ The court found that the account's timeline, which displayed the account's tweets, was also government speech, since it simply combines the content of all tweets sent from the account.⁶⁹ The court concluded, however, that

433 U.S. at 125, 129) (discussing *Jones* and other cases where the legitimate needs and objectives of government institutions require restricting speech).

⁶⁵ *Cornelius*, 473 U.S. at 802–03; *Widmar v. Vincent*, 454 U.S. 263, 267 & n.5 (1981). In contrast, in *United States v. American Library Ass'n*, 539 U.S. 194, 205, 208 (2003), the Supreme Court rejected application of the public forum doctrine where public libraries blocked certain content from being accessed on their computers. Daniel W. Park, *Government Speech and the Public Forum: A Clash Between Democratic and Egalitarian Values*, 45 GONZ. L. REV. 113, 127 (2010). A plurality of the Court explained that libraries were not meant to serve as forums for Internet-content publishers to express themselves because the purpose of a publicly-funded library was to facilitate educational and recreational endeavors by providing materials and resources. *American Library Ass'n*, 539 U.S. at 206; Park, *supra*, at 128.

⁶⁶ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 566, 570 (S.D.N.Y. 2018).

⁶⁷ *Id.* at 567. The court found that the control held by the President and Scavino over the content of tweets, the timeline of the account, and interactions and engagements of other users with the account (exercised via blocking) was sufficient to establish ownership or control. *Id.* at 566–67. The court rejected the argument that such ownership or control must stem from authority conferred by law, a requirement that the Supreme Court has equated with state action when evaluating civil rights violations under 42 U.S.C. § 1983. 42 U.S.C. § 1983 (2012); *Knight First Amendment Inst.*, 302 F. Supp. 3d at 567.

⁶⁸ *Knight First Amendment Inst.*, 302 F. Supp. 3d at 571.

⁶⁹ *Id.* at 572.

the interactive space for likes, replies, and retweets that was created by each tweet was not government speech.⁷⁰

In evaluating the compatibility of that interactive space with public forum analysis, the court looked at the likeliness that the public would associate the messages conveyed within this space with those of the President and whether the control that the President maintained with respect to those messages was instead indicative of government speech.⁷¹ After emphasizing the prominence of the replying user's account information in each reply, the court concluded that the public mind would probably not closely identify a replying user's tweet with the President, as opposed to the replying user.⁷² Moreover, the court found that the President had no control over the content of replies by non-blocked users.⁷³ Based on these findings, the court rejected the idea that the interactive space associated with each tweet could involve government speech.⁷⁴

After concluding that public forum analysis was properly applied to the interactive portion of the President's Twitter account, the court attempted to classify the space at issue.⁷⁵ The court found that the interactive space was clearly not a traditional public forum, which the Supreme Court has limited to its traditional forms.⁷⁶ The court then considered whether the space could constitute a designated public forum, looking to the factors used to evaluate intent.⁷⁷ The court concluded that the policy and practice of the government in using the account to communicate with the American people, as stipulated by Mr. Scavino, and the compatibility of the space with expressive activity, as evinced by the interactions it provided for, supported a finding of the requisite intent to create a designated public forum.⁷⁸ The court found that blocking the individual plaintiffs was viewpoint discrimination—evidenced by the fact that the President blocked them after each had criticized the President—and concluded that the President violated the plaintiffs' First Amendment rights.⁷⁹ The

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Knight First Amendment Inst.*, 302 F. Supp. 3d at 571–72. The court highlighted the fact that the interactive space of each tweet is not constrained by selectivity or scarcity, which indicates a large degree of control and counsels against finding a public forum. *Id.* at 572–73.

⁷⁵ *Id.* at 573.

⁷⁶ *Id.* (citing *Ark. Educ. Television Comm'n*, 523 U.S. at 678). Parks and streets, for example, are forms of traditional public forums. *Perry Educ. Ass'n*, 460 U.S. at 45 (quoting *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

⁷⁷ *Id.* at 574. These factors include the policy and practice and the nature of the property with respect to its compatibility with expressive activity. *Walker*, 135 S. Ct. at 2250; *Cornelius*, 473 U.S. at 802.

⁷⁸ See *Knight First Amendment Inst.*, 302 F. Supp. 3d at 574, 575.

⁷⁹ *Id.* The court discussed an alternative action that the President could have taken: “muting.” *Id.* at 576. Muting an individual allows a user to remove that account's tweets from his or her timeline without

court concluded that, despite the fact that a blocked user can still access the President's tweets and reply to others who have replied to the tweets, the harm resulting from restricting even a small degree of speech was enough to justify relief and led the court to grant declaratory relief.⁸⁰

III. AN INAPPROPRIATE APPLICATION OF THE PUBLIC FORUM DOCTRINE

This Part argues that United States District Court for the Southern District of New York inappropriately applied the public forum doctrine and should have instead classified the President's conduct as government speech.⁸¹ Section A of this Part argues that the court's failure to separately identify state action was inappropriate, because doing so would have made it clear that the First Amendment should not be applied to the President's conduct on his Twitter account.⁸² Section B argues that the President's actions are more consistent with the government speech doctrine when evaluated in light of the nature and purpose of that doctrine.⁸³ Section C argues that the court's application of the factors used to discern government speech was erroneous and that correct application favors a finding of government speech.⁸⁴

A. Distinguishing the President's Twitter Control

The court improperly refused to consider the ownership or control held by the President in the context of state action.⁸⁵ In response to the defendants' argument that such consideration was required, the court simply pointed to a statement by the Second Circuit Court of Appeals explaining that it is typically unnecessary.⁸⁶ The Second Circuit had explained that, because a public forum is typically operated by the government, determining that a space constitutes a public forum makes separately establishing state action, in addition to estab-

unfollowing or blocking that account. *Id.* Thus, while replies to or mentions of the President's account would not result in the President receiving those notifications, the muted account may still engage with the interactive space of the President's tweets. *Id.*

⁸⁰ *Id.* at 577. The court was hesitant to impose injunctive relief and instead granted declaratory relief, relying on the Supreme Court's direction that a President is likely to abide by an authoritative interpretation of the Constitution. *Id.* at 579 (citing *Franklin v. Massachusetts*, 505 U.S. 788, 803 (1992)).

⁸¹ See *infra* notes 85–106 and accompanying text.

⁸² See *infra* notes 85–93 and accompanying text.

⁸³ See *infra* notes 94–97 and accompanying text.

⁸⁴ See *infra* notes 98–106 and accompanying text.

⁸⁵ See *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 568 (S.D.N.Y. 2018) (refusing to separately identify state action in evaluating control); Rinehart, *supra* note 8, at 816 (discussing the difficulty in reconciling the ability to block other users with classification of Twitter as a public forum).

⁸⁶ See *Knight First Amendment Inst.*, 302 F. Supp. 3d at 568 (citing *Halleck v. Manhattan Cmty. Access Corp.*, 882 F.3d 300, 306–07 (2d Cir. 2018)) (declining to evaluate state action in light of the Second Circuit's remarks in *Halleck*).

lishing government ownership or control, unnecessary.⁸⁷ In relying on that statement, the court failed to consider the fact that the Second Circuit's explanation referred to a situation where a public forum had already been identified.⁸⁸

In contrast, the court did not attempt to classify the forum until after concluding that the analysis was appropriate, making an inference of state action inappropriate.⁸⁹ The court's failure to require state action was a flawed leap, as First Amendment protections and the public forum doctrine cannot be applied without state action.⁹⁰ President Trump's control over the interactive space associated with his Twitter page, which he demonstrates by blocking other users, stems not from his official capacity as a public official or through any rules imposed by the state, but rather from his capacity as a Twitter user.⁹¹ Although plausible that the President's assumption of office may have changed the nature of his Twitter account, the President's choice to continue using his personal account rather than the designated presidential Twitter account is telling of his contrary intentions.⁹² Consequently, that control alone cannot establish state action.⁹³

⁸⁷ *Id.*

⁸⁸ *See id.* (discussing Second Circuit's explanation and declining to separately identify state action). The court's argument is further weakened by the fact that the Second Circuit explicitly identified state action in that case. *See Halleck*, 882 F.3d at 306–07 (finding connection between governmental authority and actors sufficient to establish that actors are state actors, and explaining that decision rests on finding appropriate “statutory, regulatory, and contractual framework” to apply the First Amendment).

⁸⁹ *See Knight First Amendment Inst.*, 302 F. Supp. 3d at 573 (concluding that forum analysis is proper and subsequently determining the forum's classification).

⁹⁰ *See Halleck*, 882 F.3d at 306–07 (discussing the requirement of state action); *see also* *Lehman v. City of Shaker Heights*, 418 U.S. 298, 303–04 (1974) (applying the First Amendment “[b]ecause state action exists”); *Grogan v. Blooming Grove Volunteer Ambulance Corps*, 768 F.3d 259, 263 (2d Cir. 2014) (requiring litigant alleging constitutional rights violations to first establish state action).

⁹¹ *See Grogan*, 768 F.3d at 263–64 (defining state action); *Columbo v. O'Connell*, 310 F.3d 115, 117 (2d Cir. 2002) (rejecting claim where official was not acting under color of state law); *Knight First Amendment Inst.*, 302 F. Supp. 3d at 552 (discussing President Trump's use of Twitter).

⁹² *See Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46–47 (1983) (explaining that the government is free to alter the open character of a public forum and declining to find a public forum based on past use of the forum at issue); *Knight First Amendment Inst.*, 302 F. Supp. 3d at 552 (discussing ability to close a designated public forum); Donald J. Trump (@realDonaldTrump), TWITTER, <https://twitter.com/realDonaldTrump> [<https://perma.cc/4HYU-EDLC>] (“Joined March 2009.”). For an example of President Trump's limited use of the official Presidential Twitter account, *see* President Trump (@POTUS), TWITTER, <https://twitter.com/potus> [<https://perma.cc/VWH6-6B9R>].

⁹³ *See Grogan*, 768 F.3d at 263–64 (quoting *Cranley v. Nat'l Life Ins. Co. of Vt.*, 318 F.3d 105, 111 (2d Cir. 2003)) (“To demonstrate state action, a plaintiff must establish both that her . . . ‘deprivation [was] caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State . . . , and that the party charged with the deprivation [is] a . . . state actor.’”).

B. President Trump's Incompatibility with the Public Forum Analysis

The purpose of the government speech doctrine supports the conclusion that public forum analysis is out of place in the context of President Trump's Twitter.⁹⁴ The purpose of the government speech doctrine is to allow the government to clearly express its messages, which can be done through the exclusion of alternative viewpoints and through private speakers.⁹⁵ President Trump's actions indicate an assertion of his right to express disagreement with those users and a desire to prevent them from engaging in conversation with him.⁹⁶ Moreover, doing so relates to the nature of politics, which should be valued in light of the significant role that government speech plays in our political democracy.⁹⁷

C. An Erroneous Application of Government Speech Factors

The court's finding of a designated public forum relied on an incorrect evaluation of the factors typically applied to differentiate between government speech and impermissible discrimination within a public forum.⁹⁸ First, the court seemed to conclude that, because Twitter has a limited historical context, evaluation of the historical element was unnecessary.⁹⁹ The President has consistently used his Twitter account to express his own views to the public, which favors government speech and makes failure to consider this historical context

⁹⁴ See Park, *supra* note 65, at 130 (explaining that government's approval of a message, explicitly or implicitly, is a key indicator of government speech); Rinehart, *supra* note 8, at 807 (explaining that the government speech doctrine allows the government to exclude alternative views to ensure clear conveyance of the government's message).

⁹⁵ See Park, *supra* note 65, at 131 (explaining that the government's solicitation of the assistance of nongovernmental sources to convey a specific message does not preclude government speech); Rinehart, *supra* note 8, at 808 (citing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001)) ("Notably, the Velazquez Court reasoned that the government speech doctrine exists to ensure that the government can speak clearly and without distortion.").

⁹⁶ See *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009) (emphasizing a governmental entity's right to speak for itself); *Rust v. Sullivan*, 500 U.S. 173, 194 (1991) (rejecting that the Government engages in unconstitutional viewpoint discrimination by choosing to fund a program that aims to advance some permissible end, even if it discourages alternative goals).

⁹⁷ See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2246 (2015) (explaining that the government would not be able to function if the Free Speech Clause were interpreted to apply to government speech); *Pleasant Grove City*, 555 U.S. at 468 (Scalia, J., concurring) ("It is the very business of government to favor and disfavor points of view."). Disagreement with an official's government speech should be addressed in the electoral process, rather than through expansion of the public forum doctrine. See Corbin, *supra* note 8, at 615 ("Politicians are, after all, elected because they advocate particular viewpoints, and governments need to engage in viewpoint discrimination in order to act.").

⁹⁸ See *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 34 (2d Cir. 2018) (citing *Walker*, 135 S. Ct. at 2247–48) (listing and applying factors); *Knight First Amendment Inst.*, 302 F. Supp. 3d at 572 (evaluating interactive space).

⁹⁹ See *Knight First Amendment Inst.*, 302 F. Supp. 3d at 569 (rejecting as persuasive the argument that Trump's establishment of his Twitter account in 2009, prior to his presidency).

substantial.¹⁰⁰ Next, the court incorrectly concluded that the President's control over the interactive space created by his tweets was insufficiently direct to indicate government speech.¹⁰¹ While the President has no control over messages expressed on individual users' accounts, he does maintain control over the connection between these messages and his own account, which he exerts through blocking.¹⁰² Significantly, by interacting with the President's tweets, Twitter users can alter the meaning and interpretations of those tweets, either by adding to the context of the tweet or distorting the original message conveyed by it.¹⁰³ Consequently, blocking users in response to messages that the President does not want associated with his account is a legitimate and clear display of government speech.¹⁰⁴ Finally, the court inappropriately concluded that the public mind would not associate the President with the replies of users to his tweets.¹⁰⁵ Although the replies in isolation may be most directly associated with the replying user, within the interactive space, these replies are all linked to the President's account, so one would generally associate that entire space with the President.¹⁰⁶

¹⁰⁰ See Terry Collins, *Trump's Itchy Twitter Thumbs Have Redefined Politics*, CNET (Jan. 20, 2018), <https://www.cnet.com/news/donald-trump-twitter-redefines-presidency-politics/> [<https://perma.cc/NU9U-CRUC>] (describing the President's response to criticism as retaliation "by doubling down on his virtual megaphone: Twitter"). President Trump's embrace of his Twitter account to prevent distortion of his messages by the media supports that his intent is to express views to the public himself and not to designate a public forum. See Donald J. Trump (@realDonaldTrump), TWITTER (June 6, 2017, 7:48 AM), <https://twitter.com/realDonaldTrump/status/872059997429022722> [<https://perma.cc/K2KH-QP2L>] ("The FAKE MSM [mainstream media] is working so hard trying to get me not to use Social Media. They hate that I can get the honest and unfiltered message out.").

¹⁰¹ See *Knight First Amendment Inst.*, 302 F. Supp. 3d at 572 (evaluating control); see also Rinehart, *supra* note 8, at 817 (suggesting that regulating who responds to tweets may be sufficient control over the message to indicate government speech).

¹⁰² See *Knight First Amendment Inst.*, 302 F. Supp. 3d at 572; *How to Block Accounts on Twitter*, TWITTER, <https://help.twitter.com/en/using-twitter/blocking-and-unblocking-accounts> [<https://perma.cc/BVQ5-K2K7>]; see also Rinehart, *supra* note 8, at 816 (discussing difficulty in reconciling ability to block users with classification of Twitter as a public forum). For a discussion of the government's ability to select one view over another to convey its own message, see Bezanson & Buss, *supra* note 8, at 1407.

¹⁰³ See Rinehart, *supra* note 8, at 789 (discussing ability of Twitter users to alter the meanings and interpretations of other users' tweets).

¹⁰⁴ *Id.* Notably, it is not uncommon for Twitter users to block individuals who respond to their tweets negatively. See *How to Block Accounts on Twitter*, *supra* note 102 (explaining to Twitter users how to block the accounts of others); cf. *Pleasant Grove City*, 555 U.S. at 471 (rationalizing finding government speech by noting that it is uncommon for property owners to allow messages they do not agree with to be conveyed on their property).

¹⁰⁵ See *Knight First Amendment Inst.*, 302 F. Supp. 3d at 572 (concluding that the public is unlikely to associate replies to the President's tweets with the President and basing conclusion on the prominence with which a user's account information appears in a reply tweet).

¹⁰⁶ See *Using Twitter*, TWITTER, <https://help.twitter.com/en/using-twitter> [<https://perma.cc/N8F7-KYUU>] (providing links to information about various aspects of Twitter); *About Replies and Mentions*, TWITTER, <https://help.twitter.com/en/using-twitter/mentions-and-replies> [<https://perma.cc/>

CONCLUSION

In *Knight First Amendment Institute at Columbia University v. Trump*, the United States District Court for the Southern District of New York incorrectly applied public forum analysis to President Trump's Twitter account. The President's "blocking" of Twitter users, while arguably viewpoint discrimination, does not violate the First Amendment. Moreover, careful analysis of the factors used to evaluate whether an official's conduct constitutes government speech indicates that President Trump's conduct was exactly that. In light of the large role that government speech plays in our political democracy, failure to identify the President's actions as government speech was inappropriate.

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3UU3-JNRR] (explaining that the message "Replying to . . ." appears in replies to tweets and that clicking on a reply in a user's timeline causes the tweet to which the user replied to be displayed).