

SHACKLED SPEECH: HOW PRESIDENT TRUMP'S TREATMENT OF
THE PRESS AND THE CITIZEN-CRITIC UNDERMINES THE
CENTRAL MEANING OF THE FIRST AMENDMENT

by

Terri R. Day and Danielle Weatherby***

Just recently, the Southern District of New York in Knight First Amendment, Inc. v. Trump applied existing First Amendment doctrine to President Trump's @realDonaldTrump Twitter account in considering whether he violated the First Amendment when he blocked citizens from accessing his tweets. After concluding that the interactive space associated with each of the President's tweets is a designated public forum, the District Court held that President Trump's act of blocking users who criticize him constituted viewpoint-based discrimination, which violates the First Amendment. This Article is one of the first of its kind to analyze the question considered by the Knight First Amendment court and to disentangle the thorny intersection between the government speech doctrine and the public forum doctrine.

Social media plays a significant role in how Americans engage in public discourse. Town hall meetings on matters of public concern have moved from the physical spaces of streets, parks, and the brick and mortar seats of government to the virtual world. At no time was the influence of social media more present than during the 2016 presidential primary. From his candidacy to the present, President Trump has used Twitter as his primary mode of communicating with the American people, foreign leaders, and the media. Today, the President's Twitter account has a world-wide following. His tweets are notable both for their content, frequency, and tenor and also for the way he employs them as a weapon against his critics. Twitter has been an

* Professor of Law, Barry University School of Law; LL.M. 1995, Yale University; J.D. 1991, University of Florida; M.S.S.A. 1976, Case Western Reserve University; B.A. 1974, University of Wisconsin, Madison. The author is deeply indebted to Abraham Elmazhi, who contributed immensely to this paper. Also, special thanks to Dean Leticia Diaz and Barry University for supporting this research and writing project.

** Associate Professor of Law, University of Arkansas School of Law; J.D. 2005, University of Florida; B.A. 2002, Franklin and Marshall College. The author is grateful to Dean Brian Gallini, a constant source of support and encouragement and Maggie Geren and Jessica Guarino, for their excellent research assistance.

effective medium for President Trump to denigrate the press and dismiss criticism as fake news.

In the Trump era, criticism of the President personally or politically is labeled unpatriotic. Much like the English seditious libel laws which our forefathers eschewed, the truth of the assertion is immaterial. In fact, historically, the truer a criticism of the King was, the harsher the penalty. Although President Trump does not have the power to impose criminal sanctions on those who criticize him, his vitriolic response to criticism can affect the economic wellbeing of his critics. He occupies a world stage and wields his power to discredit the press and silence opposition viewpoints.

This Article argues that President Trump's attempts to manipulate what he has dubbed as the "fake news" media and to silence the citizen-critic undermine the central meaning of the First Amendment and shackles political speech. In doing so, the Article explores the nuanced and often murky line between government speech, which falls outside the ambit of the First Amendment's protective umbrella, and government censorship of private speech, which is the hallmark of a First Amendment offense.

Applying existing First Amendment principles and doctrines to social media platforms is still in its infancy. However, existing legal frameworks can and should be retrofitted to the Internet and social media. It is not difficult to recognize public comment spaces on government social media platforms as the virtual equivalent of public discussion in the town square. In fact, this past term, the Court opined that cyberspace and, in particular, social media is the virtual venue for public gathering, while a street or a park was the quintessential public forum of the past.

While the Knight First Amendment Institute case may have little impact on changing the lacuna in First Amendment law as applied to social media, this Article urges courts to adopt a public forum analysis to future cases in which a government actor virtually muzzles the citizen-critic on social media. Ultimately, it may be up to the electorate—not the courts—to exercise its power at the ballot box and end President Trump's assault on the First Amendment once and for all.

"It is not 'freedom of the press' when newspapers and others are allowed to say and write whatever they want even if it is completely false!"

—Donald J. Trump, President of the United States¹

¹ Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 14, 2016, 10:06 AM), <https://twitter.com/realdonaldtrump/status/764870785634799617?lang=en>.

2019]	SHACKLED SPEECH	313
Introduction		313
I. Background: the First Amendment Free Speech Clause		318
A. <i>The Marketplace of Ideas</i>		321
B. <i>Brandeis’s Notion of the Citizen-Critic: A Public Duty</i>		322
C. <i>The Sullivan Standard</i>		325
1. <i>Safeguarding the Role of the Citizen-Critic</i>		326
2. <i>Eliminating Free Speech Deterrents in Preservation of the Marketplace of Ideas</i>		327
II. Government Speech and Then the President’s Speech		329
A. <i>The Government Speech Doctrine</i>		329
B. <i>The Public Forum Doctrine</i>		330
C. <i>The Public Forum Doctrine and Twitter: The Modern-Day Town Square</i>		334
III. President’s Trump’s Speech and the Erosion of the First Amendment... ..		339
A. <i>Fake News: A Kinship with Seditious Libel</i>		340
B. <i>Trump and Twitter</i>		346
Conclusion.....		349

INTRODUCTION

This Article is the companion piece to our Article, *Speech Narcissism*.² In that Article, we considered the First Amendment implications of the political correctness movement on college campuses, defining a “speech tolerance spectrum” on which two opposite and competing groups of listeners simultaneously, but for different reasons, shut down speech that they deemed personally offensive.³ One far end of the spectrum was the focus of *Speech Narcissism*, where the hyper-sensitive university population sought, pursuant to modern-day political correctness measures such as safe spaces and trigger warnings, the silencing of classroom speech that offended the most vulnerable of student listeners.⁴ That trend, we argued, had a chilling effect on college campuses and offended First Amendment values that are central to our democracy.⁵ This Article addresses the opposite end of the speech-tolerance spectrum, whereby President Trump’s distaste for and resulting censorship of both private speakers and the “fake news” media have resulted in a devastation of the central meaning of the First Amendment.

As a former reality television star and a business mogul, President Trump had a public image long before becoming a presidential candidate and, eventually, the

² Terri Day & Danielle Weatherby, *Speech Narcissism*, FLA. L. REV. 1, 1 (forthcoming).

³ *Id.* at 2.

⁴ *Id.* at 1.

⁵ *Id.*

45th President of the United States.⁶ But, for Americans who shun reality TV and are not entrepreneurial-minded, President Trump's emergence on the national and international stage began with his 2016 campaign for the Republican presidential nomination.⁷ At the same time, candidate Trump's communicative style, allegations of fake news, and ubiquitous tweeting became news itself.⁸ His unexpected victory as the Republican nominee, surviving a field of twelve candidates,⁹ and even more surprising presidential win will be remembered as one of the most unconventional political races in the annals of history.¹⁰

While President Trump is not the first president to use social media, his constant tweets have become fodder for front-page news and lively debate by political pundits and everyday people both in the United States and abroad.¹¹ His tweets are notable for their frequency and for the fact that the President uses this nontraditional medium as his primary means of communicating with the American people and the world at large.¹² Of course, it is the subject of the President's tweets that creates news and engenders an often strong, and sometimes divisive, reaction.

⁶ *Donald Trump Fast Facts*, CNN (Aug. 2, 2018), <https://www.cnn.com/2013/07/04/us/donald-trump-fast-facts/index.html>.

⁷ *Id.*

⁸ See, e.g., Michael Barbaro, *Pithy, Mean and Powerful: How Donald Trump Mastered Twitter for 2016*, N.Y. TIMES (Oct. 15, 2015), <https://www.nytimes.com/2015/10/06/us/politics/donald-trump-twitter-use-campaign-2016.html>; Amanda Hess, *Trump, Twitter, and the Art of His Deal*, N.Y. TIMES (Jan. 15, 2017), <https://www.nytimes.com/2017/01/15/arts/trump-twitter-and-the-art-of-his-deal.html>; Meg Kelly, *President Trump Cries 'Fake News' and the World Follows*, WASH. POST (Feb. 6, 2018), https://www.washingtonpost.com/news/fact-checker/wp/2018/02/06/president-trump-cries-fake-news-and-the-world-follows/?utm_term=.6f51dae08954.

⁹ Stephen Collinson & Tal Kopan, *It's Official: Trump is Republican Nominee*, CNN (July 19, 2016), <https://www.cnn.com/2016/07/19/politics/donald-trump-republican-nomination-2016-election/index.html>.

¹⁰ See, e.g., Matt Flegenheimer & Michael Barbaro, *Donald Trump Is Elected President in Stunning Repudiation of the Establishment*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html>; Holman W. Jenkins, Jr., *The Non-Accidental Presidency*, WALL ST. J. (Jan. 5, 2018), <https://www.wsj.com/articles/the-non-accidental-presidency-1515192946>.

¹¹ See, e.g., David Faris, *Trump's Tweets Show Why Social Media Could Hurt Democracy*, NEWSWEEK (Dec. 6, 2017), <http://www.newsweek.com/trumps-anti-muslim-retweets-prove-social-media-bad-democracy-736211>; Chris Graham, *'Modern Day Presidential': Donald Trump Defends Use of Social Media in Twitter Storm*, THE TELEGRAPH (July 2, 2017), <https://www.telegraph.co.uk/news/2017/07/01/modern-day-presidential-donald-trump-defends-use-social-media/>; David Moye, *Donald Trump Lashes Out At 'So-Called Leaks' and Twitter Users Pounce*, HUFFINGTON POST (Mar. 14, 2018), https://www.huffingtonpost.com/entry/donald-trump-tweet-leakers-traitors_us_5af9fdfae4b0200bcab80175.

¹² Andrew Buncombe, *Donald Trump One Year On: How the Twitter President Changed Social Media and the Country's Top Office*, THE INDEPENDENT (Jan. 17, 2018), <https://www>.

Not only are President Trump's tweets unique in their frequency and content, but the use of his personal cell phone to tweet also raises security concerns.¹³ Nonetheless, President Trump remains undeterred by the advice of his closest advisors to stop (or even moderate) his constant tweeting, regardless of whether he is acting through unsecured cell phones or other digital devices.¹⁴

While the 280-character limitation¹⁵ of Twitter makes a nuanced communication of executive policy almost impossible, it has been an effective medium for President Trump to denigrate the press and dismiss criticism as fake news.¹⁶ This Article considers the First Amendment implications of President Trump's assault on the press and his attempt to chill political speech by labeling critics as unpatriotic and peddlers of fake news.

The concept of false news is not new to politics.¹⁷ Reports of spreading false news date back to the 16th century.¹⁸ However, the term "fake news" is much more recent.¹⁹ According to etymologists, the word "fake" did not appear in common use prior to the 18th century.²⁰ While not a new concept or term, President Trump has made "fake news" a household term.²¹ He uses the term "to discredit a mainstream American media that is aggressively investigating his presiden-

independent.co.uk/news/world/americas/us-politics/the-twitter-president-how-potus-changed-social-media-and-the-presidency-a8164161.html.

¹³ See, e.g., Sam Sanders, *Is Trump Tweeting From a 'Secure' Smartphone? The White House Won't Say*, NPR (Feb. 3, 2017), <https://www.npr.org/sections/alltechconsidered/2017/02/03/513256171/is-trump-tweeting-from-a-secure-smartphone-the-white-house-wont-say>; Maegan Vazquez, *Dem Reps Seek Answers on Trump's Cell Phone Use*, CNN (Apr. 25, 2018), <https://www.cnn.com/2018/04/25/politics/democratic-letter-donald-trump-cellphone/index.html>.

¹⁴ Peter Baker & Glenn Thrush, *Less Tweeting, Lawyers Beg. 'Covfefe,' the President Says.*, N.Y. TIMES (May 31, 2017), <https://www.nytimes.com/2017/05/31/us/politics/trump-twitter-russia.html>.

¹⁵ Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 550 n.2 (S.D.N.Y. 2018).

¹⁶ See, e.g., Chris Cillizza, *Donald Trump Just Issued a Direct Threat to the Free and Independent Media*, CNN (Oct. 12, 2017), <https://www.cnn.com/2017/10/11/politics/donald-trump-media-tweet/index.html>; Michael M. Grynbaum, *Trump's Attacks on the Press: Telling Escalation from Empty Threats*, N.Y. TIMES (Oct. 12, 2017), <https://www.nytimes.com/2017/10/12/business/media/trump-news-media-attacks.html>.

¹⁷ See *The Real Story of 'Fake News,'* MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/words-at-play/the-real-story-of-fake-news> (last visited May 17, 2018).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Steven Erlanger, *'Fake News,' Trump's Obsession, Is Now a Cudgel for Strongmen*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/2017/12/12/world/europe/trump-fake-news-dictators.html>.

cy.”²² President Trump’s use of the term has served as an example to “many of the world’s autocrats and dictators.”²³

Also troubling is the Trump Administration’s efforts to remove general information from government websites.²⁴ Groups that monitor government data collection and information sharing report that presidential “[a]ppointees have been scrubbing and rewriting text to erase climate change, sexual health care, civil rights—and even our nation’s history.”²⁵ Limiting access to truthful information and distributing misinformation are two dangerous ways in which totalitarian governments rule. In fact, such re-writing of history and controlling access to information are exactly the type of horrors George Orwell described in his dystopian novel, *1984*.²⁶

In the Trump era, criticism of the President personally or politically is labeled unpatriotic.²⁷ Much like the English seditious libel laws which our forefathers eschewed, the truth of the assertion is immaterial.²⁸ In fact, historically, the truer a criticism of the King was, the harsher the penalty.²⁹ Although President Trump does not have the power to impose criminal punishment on those who criticize him, his vitriolic response to criticism can affect the economic well-being of his

²² *Id.*

²³ *Id.*; see, e.g., Uri Friedman, *The Real-World Consequences of ‘Fake News,’* ATLANTIC (Dec. 23, 2017), <https://www.theatlantic.com/international/archive/2017/12/trump-world-fake-news/548888/>; James Tager & Yabana, *The Global Consequences of Trump’s Attacks on the Media,* HUFFINGTON POST (June 23, 2017), https://www.huffingtonpost.com/entry/the-global-consequences-of-trumps-attacks-on-the-media_us_594c02a2e4b07cdb1933c096.

²⁴ Robin Marty, *Five Things the Trump Administration Is Removing from Federal Websites,* TRUTHOUT (Mar. 3, 2018), <http://www.truth-out.org/news/item/43721-five-things-the-trump-administration-is-removing-from-federal-websites>.

²⁵ *Id.*

²⁶ See generally GEORGE ORWELL, *1984* (1949). See also Alexander J. Urbelis, *How ‘1984’ Can Decode Trump’s First 100 Days,* CNN (Jan. 31, 2017), <https://www.cnn.com/2017/01/31/opinions/why-we-read-1984-urbelis-opinion/index.html> (discussing the parallels between George Orwell’s dystopian novel, *1984*, and President Trump’s administration).

²⁷ See, e.g., Michael Calderone, *Trump Takes Authoritarian Stance in Portraying Journalists as Anti-American Enemy,* HUFFINGTON POST (Aug. 23, 2017), https://www.huffingtonpost.com/entry/donald-trump-portrays-journalists-as-anti-american_us_599da653e4b0d8dde99a844c; Jenna Johnson & Matea Gold, *Trump Calls the Media ‘the Enemy of the American People,’* WASH. POST (Feb. 17, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/02/17/trump-calls-the-media-the-enemy-of-the-american-people/?utm_term=.9c11349a5cee.

²⁸ David Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence,* 45 AM. J. LEGAL HIST. 154, 162 (2001).

²⁹ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 150–51 (William S. Hein & Co. 1992 ed.) (1765–1769).

critics.³⁰ He occupies a world stage and wields his power to discredit the press, control information, and silence opposition.³¹

In condemning unfavorable reporting, President Trump is attempting to control the message and shape the viewpoints to which the American people are exposed. Although the government speech doctrine recognizes that government speech is viewpoint-specific and is not subject to the First Amendment,³² the government cannot exclude speakers from public fora, and even nonpublic fora, based solely on a disagreement with the speaker's viewpoint.³³ In attempting to silence opposition and control access to truthful information, President Trump is acting much like a 17th century monarch.³⁴ The President's response to opposing viewpoints is to denigrate and silence the speaker.³⁵ Ultimately, his fake news attack is shackling political speech and undermining the central meaning of the First Amendment.³⁶

Part I of this Article will discuss the values inherent in the First Amendment's protection of political debate as articulated in *New York Times v. Sullivan*.³⁷ Part II argues that the President's speech occurs in a public forum and falls outside the ambit of government speech, permissible viewpoint-based speech that passes First Amendment scrutiny. Part III considers the First Amendment implications of President Trump's tweets and allegations of fake news. While it is natural for public officials to dislike criticism and to desire support for government policies, President Trump's act of waging war on the press and his attempt to control public debate by silencing those who disagree with him pose serious First Amendment concerns.³⁸

³⁰ *Id.*

³¹ *Id.*

³² See *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467 (2009); see also *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005) (stating that "the Government's own speech . . . is exempt from First Amendment scrutiny.").

³³ See *Summum*, 555 U.S. at 469–70.

³⁴ See Jordan E. Taylor, *Why Trump's Assault on NBC and "Fake News" Threatens Freedom of the Press – and His Political Future*, WASH. POST (Oct. 12, 2017), https://www.washingtonpost.com/news/made-by-history/wp/2017/10/12/why-trumps-assault-on-nbc-and-fake-news-threatens-freedom-of-the-press-and-his-political-future/?utm_term=.32d948ef59e0.

³⁵ Joseph Russomanno, *The Right and the Duty: Jefferson, Sedition and the Birth of the First Amendment's Central Meaning*, 23 COMM. L. & POL'Y 49, 88–89 (2018).

³⁶ *Id.*

³⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

³⁸ Ashley Parker & Josh Dawsey, *Trump's Effort to Stop Publication of Scathing Book Is a Break in Precedent*, WASH. POST (Jan. 4, 2018), https://www.washingtonpost.com/politics/trumps-effort-to-stop-publication-of-scathing-book-is-a-break-in-precedent/2018/01/04/057b70ce-f16f-11e7-97bf-bba379b809ab_story.html?utm_term=.fcc45a33c304; Alan Rappoport, *Donald Trump Threatens to Sue the Times Over Article on Unwanted Advances*, N.Y. TIMES (Oct. 13, 2016), <https://www.nytimes.com/2016/10/14/us/politics/donald-trump-lawsuit-threat.html>.

President Trump has effectively used social media as a persuasive tool to control information, to rally his supporters, and to silence his critics.³⁹ In discrediting the mainstream media, he has stifled political discourse and weakened the traditional role of the press as a check on government abuses. In conclusion, Part IV proposes a legal framework that incorporates both the public forum analysis and the government speech doctrine to interactive spaces of social media websites, which would provide First Amendment protection to citizen critics of government officials and their policies. Although this was the analysis followed by the recent decision in *Knight First Amendment Institute v. Donald J. Trump*,⁴⁰ such an analysis has been applied to public comment sessions of public meetings⁴¹ and is a logical extension to the virtual town hall meeting. While effective use of social media is only one way in which President Trump attempts to shackle political speech, the @realDonaldTrump Twitter phenomena has highlighted a vacuum in First Amendment jurisprudence. Application of First Amendment principles to twenty-first century modern technology is still in its infancy. It is time to retrofit well-established First Amendment doctrines to the ever-advancing world of technology.

I. BACKGROUND: THE FIRST AMENDMENT FREE SPEECH CLAUSE

“Congress shall make no law . . . abridging the freedom of speech, or of the press.”⁴²

The First Amendment serves as the blueprint of personal liberty.⁴³ Without freedom of speech, a citizen could not criticize government or speak out against abuses by its actors. That was the liberty right that the First Amendment drafters valued as they were all too familiar with the tyranny of the English crown and the consequences of the limited freedom of speech and press in England.⁴⁴ Sir William

³⁹ See *infra* Part III.

⁴⁰ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018).

⁴¹ See generally Terri Day & Erin Bradford, *Civility in Government Meetings: Balancing First Amendment, Reputational Interests, and Efficiency*, 10 FIRST AMEND. L. REV. 57 (2011) (characterizing public comment sessions of public meetings as a designated limited public forum to which content-based restrictions may apply so long as they are reasonable and viewpoint-neutral).

⁴² U.S. CONST. amend. I. (The First Amendment was initially submitted as the third amendment by Virginian Congressman James Madison who submitted twelve amendments for consideration by his colleagues in the U.S. House of Representatives. The First Amendment, as we know it today, was elevated to that position when the U.S. Senate failed to pass the first two proposed amendments.)

⁴³ DAVID L. HUDSON, JR., *FIRST AMENDMENT: FREEDOM OF SPEECH* § 1:1 (Thomas Reuters ed. 2012).

⁴⁴ Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295, 313

Blackstone warned that the “liberty of the press is indeed essential to the nature of a free state,” and to limit a citizen’s right to express his or her sentiments before the public would essentially “destroy the freedom of the press.”⁴⁵

Despite this history, a majority of the Framers maintained that the Bill of Rights was superfluous as Congress did not have the power to enact laws that would violate those rights recognized as inalienable under natural law.⁴⁶ Furthermore, the design and structure of the Constitution allocated to the federal government limited and enumerated powers, with all other powers reserved to the people and the states.⁴⁷ Most state constitutions already included a Bill of Rights.⁴⁸ The Framers feared that the mere enumeration of some rights would impliedly exclude other rights⁴⁹ and provide the federal government additional powers other than those expressly written in the Constitution.⁵⁰ However, inclusion of the Bill of Rights was necessary to secure the required number of states needed to ratify the Constitution.⁵¹

As the Bill of Rights was ratified by three-fourths of the state legislatures, history suggests that early-era Americans believed that an express limitation on the power of the federal government was essential to ensure liberty. According to the prevailing view, the First Amendment Press Clause was necessary, not merely to provide a check on governmental power but also to protect the press as it attempted to keep the government in check.⁵² Memories of the English crown’s suppression of opposition were fresh in the minds of former colonists.⁵³

The Framers sought to avoid repeating a tyrannical government by ensuring that speech and press would be free and open.⁵⁴ Indeed, under the limited freedom of speech and press in England, harsh penalties were imposed if the King did not approve of the statements made.⁵⁵ An inquiry as to the accuracy of the state-

(2001).

⁴⁵ 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 151–52 (William S. Hein & Co. 1992 ed.) (1765–1769).

⁴⁶ David A. Anderson, *The Origins of the Press Clause*, 30 U.C.L.A. L. REV. 455, 466–67 (1983).

⁴⁷ Chief Justice Thomas J. Moyer, *The Bill of Rights—Its Origins and Its Keepers*, 18 OHIO N.U. L. REV. 187, 188 (1991).

⁴⁸ *Id.* at 189.

⁴⁹ *Id.*

⁵⁰ Anderson, *supra* note 46, at 467.

⁵¹ Moyer, *supra* note 47, at 189.

⁵² Anderson, *supra* note 46, at 491.

⁵³ Stephen F. Rohde, *Presidential Power vs. Free Press*, L.A. LAWYER 26–27 (2017).

⁵⁴ Michael I. Meyerson, *The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link between the First Amendment and the Separation of Powers*, 34 IND. L. REV. 295, 320–21 (2001).

⁵⁵ *Id.* at 300.

ments was irrelevant, as even truthful statements were punished if they were disfavored.⁵⁶ The First Amendment not only avoids such oppressive behavior by the government by barring such punishment, it also does not require any test for truth before statements are permitted to enter free debate.⁵⁷

In the early 1900s, the first Supreme Court cases to breathe life into the First Amendment Speech and Press Clauses addressed prosecutions under the Espionage Act of 1917⁵⁸ and state syndicalism laws of that time.⁵⁹ In *Schenck v. U.S.*, Justice Holmes' famous quote about falsely shouting fire in a crowded theater⁶⁰ recognized that the absolute language of the First Amendment could not be literally applied.⁶¹ While acknowledging that the original intent underlying the Free Speech Clause may have been to prohibit government from imposing prior restraints on speech, Justice Holmes interpreted the First Amendment's prohibition against government speech restrictions more broadly.⁶² The challenge for the Supreme Court was to articulate a rule that struck the proper balance between free speech and the exercise of governmental power to prevent legitimate substantive evils.⁶³ In its early attempts to find this balance, the Court adopted Justice Holmes' clear and present danger test.⁶⁴ Under that test, the Court upheld prosecutions for subversive advocacy by weighing "imponderables"⁶⁵ in concluding that a speaker's teaching, advocacy, or expressed beliefs came close enough to overthrow the government by force or violence.⁶⁶ The line between protected speech and illegal activity was often hard to draw, since the clear and present danger test did not require the government to "wait until the *putsch* is about to be executed."⁶⁷

⁵⁶ *Id.* at 318–19.

⁵⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

⁵⁸ *See, e.g., Schenck v. United States*, 249 U.S. 47 (1919) (upholding prosecution for conspiracy to violate the Espionage Act based on distribution of documents opposing military conscription during WWI).

⁵⁹ *See, e.g., Gitlow v. New York*, 268 U.S. 652 (1925).

⁶⁰ *Schenck*, 249 U.S. at 52 (frequently misquoted by adding the word "crowded" before theater, J. Holmes said: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.").

⁶¹ *Id.* (recognizing that the words "shall make no law . . . abridging the freedom of speech" do not prevent prohibition of words that cause a "substantive evils that Congress has a right to prevent").

⁶² *Id.*

⁶³ *Dennis v. United States*, 341 U.S. 494, 503 (1951).

⁶⁴ *Id.* at 515.

⁶⁵ *Id.* at 570 (Jackson, J., concurring).

⁶⁶ *Id.* at 516–17.

⁶⁷ *Id.* at 509.

Although a majority of the Court continued to uphold prosecutions for interference with war efforts and seditious advocacy merely for expressing opposition to the government and its policies, Justices Brandeis and Holmes became early dissenters.⁶⁸ Dissenting in *Abrams v. U.S.*, Justice Holmes concluded that “the surreptitious publishing of a silly leaflet by an unknown man, without more,” would present no danger to the government’s war efforts or have any tendency to do so.⁶⁹ Justice Holmes cautioned against punishing the expression of government opposition because “the ultimate good . . . is better reached by free trade in ideas.”⁷⁰ Indeed, the concept of the marketplace of ideas is closely connected to core First Amendment values and had its genesis in American jurisprudence in Justice Holmes’ *Abrams* dissent.⁷¹

A. *The Marketplace of Ideas*

The principal philosophy of the First Amendment Free Speech Clause is the “marketplace of ideas” theory.⁷² In his eloquent *Abrams* dissent, Justice Holmes wrote that “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”⁷³ Justice Holmes established a laissez-faire economics style of analysis into First Amendment jurisprudence.⁷⁴ This theory proposes that government interference into debate is unnecessary as uninhibited debate will lead to the discovery of truth.⁷⁵ Like the competitive commercial market, the intellectual marketplace that Justice Holmes envisioned is an unrestricted and robust exchange of views and opinions that would facilitate and maximize participation in public discussion on matters of public concern.⁷⁶ With maximum participation, each person may accept or reject the uttered speech based on its merits.⁷⁷ Ultimately, only the true speech will prevail under these market conditions which provide the “best test of truth.”⁷⁸

⁶⁸ See, e.g., *Pierce v. United States*, 252 U.S. 239, 253 (1920) (Brandeis, J., dissenting); *Schaefer v. United States*, 251 U.S. 466, 482 (1920) (Brandeis, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

⁶⁹ *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).

⁷⁰ *Id.* at 630.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 3 (1984).

⁷⁵ *Id.*

⁷⁶ See *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

⁷⁷ *Id.*

⁷⁸ *Id.*

Although deeply entrenched in the idealized notions and jurisprudence of the First Amendment, the marketplace of ideas theory has many critics.⁷⁹ Much of Justice Holmes's underlying assumptions about an unregulated market of ideas as the best test of truth are unsupported and contrary to how people actually form opinions.⁸⁰ In fact, social science research suggests that there are several factors, other than the *truth* of a proposition, that determine whether or not a statement would be accepted into the marketplace of ideas.⁸¹ Factors such as charisma, authority, or persuasiveness of the speaker play a major role.⁸²

Even if Justice Holmes' underlying assumptions are wrong, it is difficult to imagine anything other than a laissez-faire approach for government involvement in regulating a marketplace of ideas. Another idealized notion of free speech, also supported by untested assumptions, is Justice Brandeis's theory of political truth and public duty.⁸³

B. Brandeis's Notion of the Citizen-Critic: A Public Duty

Like Justice Holmes, Justice Brandeis was an early defender of the First Amendment Free Speech Clause and also struggled to apply the clear and present danger test to particular facts.⁸⁴ Although he concurred in *Whitney v. California*, upholding Ms. Whitney's conviction for participating in and attending the convention of the California Communist Labor Party, Justice Brandeis articulated his own view of the central meaning of the First Amendment.⁸⁵ He, too, spoke about free speech and political truth, but he adopted a slightly different focus than Justice Holmes.⁸⁶

⁷⁹ See, e.g., Frederick Schauer, *Facts and the First Amendment*, 57 U.C.L.A. L. REV. 897, 909 (2010).

⁸⁰ *Id.*

⁸¹ See *id.* (citing David A. Bright & Jane Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, 30 L. & HUM. BEHAV. 183 (2006); Jessica R. Gurley & David K. Marcus, *The Effects of Neuroimaging and Brain Injury on Insanity Defenses*, 26 BEHAV. SCI. & L. 85 (2008); Aura Hanna & Roger Remington, *The Representation of Color and Form in Long-Term Memory*, 24 MEMORY & COGNITION 322 (1996)).

⁸² *Id.* Other influential factors include: (1) the consistency between the proposition and the prior beliefs of the hearer; (2) the consistency between the proposition and what the hearer believes that other hearers believe; (3) the frequency with which the proposition is uttered; (4) the extent to which the proposition is communicated with photographs and other visual or aural embellishments; and (5) the extent to which the proposition will make the reader or listener feel good or happy for content-independent reasons. *Id.*

⁸³ *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

⁸⁴ See *id.* at 374.

⁸⁵ See *id.* at 375–78.

⁸⁶ Compare *Whitney*, 274 U.S. 375–78 (Brandeis, J., concurring) (stating that “public discussion is a political duty . . .”), with *Abrams v. United States*, 250 U.S. 616, 630 (Holmes,

Justice Brandeis viewed political truth with the goal of creating an educated, enlightened electorate.⁸⁷ According to Justice Brandeis, citizens had a public duty to engage in public discussion, which requires the freedom to “discuss freely proposed grievances and proposed remedies.”⁸⁸ Referring to our Founding Fathers and their fight for independence, Justice Brandeis said that “[t]hey valued liberty both as an end and as a means . . . [and as] the secret of happiness.”⁸⁹ The biggest threat to freedom according to Justice Brandeis is “an inert people.”⁹⁰ He described “a fundamental principle of the American government” to enable public discussion so citizens can be involved in public life.⁹¹ Free speech and assembly facilitate “thought, hope and imagination,”⁹² all of which are essential to liberty and, ultimately, to happiness.⁹³

Early in its efforts to give meaning to the First Amendment, the Supreme Court identified two important values underlying the Speech and Press clauses.⁹⁴ These values are exemplified by Holmes’ marketplace of ideas theory⁹⁵ and Brandeis’ citizen critic/public duty theory.⁹⁶ Both concepts require an environment that promotes robust public discussion and limits the power of government to silence opposition or criticism of public officials and their policies.⁹⁷ Both theories further the ultimate goals of promoting self-governance and thwarting government tyranny.⁹⁸

Like the criticism of the marketplace of ideas theory, there is little empirical support that more political debate will lead to more involved, educated citizens. Just as the connection between more ideas leading to more truth is questionable,

J., dissenting) (stating that the best test of truth is the power of an idea to get itself accepted into the “marketplace of ideas”).

⁸⁷ *Whitney*, 274 U.S. at 377 (In his concurring opinion, Justice Brandeis stated: “To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present. . . . If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”).

⁸⁸ *Id.* at 375.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *See id.*; *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁹⁵ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

⁹⁶ *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

⁹⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270, 279–80 (1964).

⁹⁸ *Whitney*, 274 U.S. at 375–76 (Brandeis, J., concurring); *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

voter turnout does not seem to be influenced by more information on public issues.⁹⁹ Nevertheless, these two theories survive despite the lack of social science supporting their underlying assumptions.¹⁰⁰

Ultimately, the Court replaced the clear and present danger test with a standard that provides more protection for the freedoms of speech, press, and association.¹⁰¹ Known as the *Brandenburg* test, the Court concluded that the “mere abstract teaching” of subversive advocacy, without more, is protected by the First Amendment.¹⁰² Instead, the advocacy must be “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.”¹⁰³ The Court recognized that previous cases upholding prosecutions for teaching communist ideology, which includes violent overthrow of the government, or associating with the communist party “have been thoroughly discredited”¹⁰⁴

After *Brandenburg*, many convictions for disorderly conduct during the Vietnam War and the Civil Rights era were overturned.¹⁰⁵ The Court invalidated laws that required a fidelity oath, disavowing any ideology that advocates violent or forceful overthrow of the government as a condition of public employment, bar licensing, and ballot access.¹⁰⁶ The *Brandenburg* standard strengthened speech and associational rights and lifted the threat of lengthy prison sentences for subversive advocacy.¹⁰⁷

Like the early syndicalism laws, common law defamation provided another threat to free speech.¹⁰⁸ Public officials could stifle the press with the threat of crushing civil damages, too easily awarded under common law libel claims.¹⁰⁹ In protecting the vital role of the press as a check on governmental abuses, the Court held that per se libel laws gave too little protection to First Amendment rights.¹¹⁰

While the clear and present danger test did not survive, the values rooted in the First Amendment as articulated by Justices Brandeis and Holmes endured.¹¹¹

⁹⁹ See generally Scott Ashworth & Ethan Bueno de Mesquita, *Is Voter Competence Good for Voters?: Information, Rationality, and Democratic Performance*, 108 AM. POL. SCI. REV. 565, 565 (2014).

¹⁰⁰ See, e.g., *Sullivan*, 375 U.S. at 254.

¹⁰¹ *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

¹⁰² *Id.* at 448.

¹⁰³ *Id.* at 447.

¹⁰⁴ *Id.* (citing *Whitney v. California*, 274 U.S. 357 (1927)).

¹⁰⁵ See, e.g., *Hess v. Indiana*, 414 U.S. 105, 108 (1973).

¹⁰⁶ See, e.g., *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 450 (1974).

¹⁰⁷ *Brandenburg*, 395 U.S. at 447–49.

¹⁰⁸ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

¹⁰⁹ *Id.* at 271.

¹¹⁰ *Id.* at 271–72.

¹¹¹ *Id.* at 269–70.

The marketplace of ideas and citizen critic theories—so fundamental to First Amendment values—reappeared in *New York Times v. Sullivan*.¹¹² Recognizing the critical role of a free press in contributing to the marketplace of ideas and supporting the citizen critic, the Court applied a constitutional standard to public official defamation claims.¹¹³

C. *The Sullivan Standard*

Over a half century ago, the Court decided *New York Times v. Sullivan*, which represented a seismic shift in First Amendment free speech jurisprudence.¹¹⁴ In *Sullivan*, the Court addressed the extent to which the government may limit the press in its ability to criticize the government.¹¹⁵ In considering a public official's libel claim against the New York Times, the Court defined the central meaning of the First Amendment Free Speech Clause as a commitment to the principle of "uninhibited, robust, and wide-open" debate.¹¹⁶ Further, the Court emphasized that "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" are not immune from First Amendment constitutional protections.¹¹⁷

Writing for the majority, Justice Brennan began with the premise that erroneous statements are inevitable in free debate.¹¹⁸ As such, the errors themselves must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive."¹¹⁹ If the First Amendment is truly a guarantee of uninhibited debate, then there cannot be an exception for a test of truth.¹²⁰ Uninhibited speech means that political discussion must flow without restraint—uncensored by the threat of criminal and civil penalties.¹²¹ Indeed, if there were an inquiry into the truth of an assertion, then the inquiry itself would act as a restraint on the speech.¹²² In reaching this conclusion, the Court did not endorse

¹¹² *Id.*

¹¹³ *Id.* at 279–80 (holding that a public official may recover damages for defamation only by showing that the statements were made with "actual malice," defined as knowledge of falsity or reckless disregard as to the truth as to the truth of a publication).

¹¹⁴ *Id.* at 254.

¹¹⁵ *Id.* at 268.

¹¹⁶ *Id.* at 270.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 271–72.

¹¹⁹ *Id.* at 271–72 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)).

¹²⁰ *Id.* at 271.

¹²¹ *Id.* at 279.

¹²² *Id.*

false statements; rather, it opined that the First Amendment demanded that false statements be tolerated as they are inevitable in free and open debate.¹²³

The *Sullivan* Court defined the central meaning of the First Amendment according to the primary values first articulated by Justices Holmes and Brandeis.¹²⁴ In order to promote self-governance and thwart tyranny, Justices Holmes and Brandeis conceived the notion of free speech connected to the marketplace of ideas and the citizen-critic theories.¹²⁵ Building upon these notions, the *Sullivan* Court discussed the role of the citizen-critic in our democracy and underscored the importance of maintaining a robust marketplace of ideas by eliminating any significant deterrents to uninhibited public discourse.¹²⁶

1. *Safeguarding the Role of the Citizen-Critic*

Indeed, the role of the citizen-critic served as a backdrop for the central meaning of the First Amendment. The United States was founded upon the fundamental principle that public discussion is a political duty.¹²⁷ It is the citizens who play a key role in safeguarding democracy.¹²⁸ Public discussion is the duty of the citizen which must be guarded against the fear of punishment as that mere fear would discourage thought.¹²⁹ As Madison said, it is the people, not the government, who possess absolute sovereignty.¹³⁰ As such, the censorial power belongs to the people over the government, not the government over the people.¹³¹ In *Garrison v. Louisiana*, the Supreme Court revisited the idea of the citizen-critic.¹³² Again, in writing for the majority, Justice Brennan determined that, “[S]peech concerning public affairs is more than self-expression; it is the essence of self-government.”¹³³

¹²³ *Id.* at 271–72 (stating that “erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”).

¹²⁴ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *Whitney v. California*, 274 U.S. 372, 375–78 (Brandeis, J., concurring).

¹²⁵ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); *Whitney*, 274 U.S. at 375–78 (Brandeis, J., concurring).

¹²⁶ *Sullivan*, 376 U.S. at 270.

¹²⁷ *Id.* (citing *Whitney*, 274 U.S. at 375–76).

¹²⁸ Joseph Russomanno, *The “Central Meaning” and Path Dependence: The Madison-Meiklejohn-Brennan Nexus*, 20 COMM. L. & POL’Y 117, 137 (2015).

¹²⁹ *Sullivan*, 376 U.S. at 270 (citing *Whitney*, 274 U.S. at 375–76).

¹³⁰ *Id.* at 274.

¹³¹ *Id.* at 282.

¹³² See *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

¹³³ *Id.* at 74–75, 78 (holding that the statute was invalid as it did not incorporate the *Sullivan* rule of “actual malice”).

Brennan described government officials as “men of fortitude, able to thrive in a hardy climate”¹³⁴ Speech critical of the government or government officials does not lose its First Amendment protection merely because it offends their official reputation.¹³⁵ Therefore, injury to official reputation is insufficient grounds for repressing speech that would otherwise be protected.¹³⁶

Shortly after the ratification of the First Amendment, Congress enacted the Sedition Act of 1798.¹³⁷ At the time of its enactment, the political atmosphere was very similar to present-day—one of heightened nationalism and intolerance of foreigners.¹³⁸ The Sedition Act was completely inconsistent with the newly-ratified First Amendment as it made it a crime to “write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame”¹³⁹ The Act applied to both citizens and non-citizens alike and prohibited both from assembling “with intent to oppose any measure . . . of the government”¹⁴⁰

Following its enactment, the government invoked the Sedition Act to control and punish the press, resulting in the convictions of prominent editors and forcing two newspapers to cease publication permanently.¹⁴¹ The Sedition Act deterred opposition press at such a fundamental level that it served as a national lesson on the importance of the freedom of the press and public discourse.¹⁴² The Sedition Act was never challenged in court. It expired in 1801, a century before Justices Brandeis and Holmes began to give shape and meaning to the First Amendment.¹⁴³ Congress never renewed the Sedition Act.¹⁴⁴

2. *Eliminating Free Speech Deterrents in Preservation of the Marketplace of Ideas*

Another key concern of the *Sullivan* Court and a second factor in defining the central meaning of the First Amendment focused on the elimination of signifi-

¹³⁴ *Sullivan*, 376 U.S. at 273.

¹³⁵ *Id.* at 272–73.

¹³⁶ *Id.*

¹³⁷ Anderson, *supra* note 46 at 515.

¹³⁸ Rohde, *supra* note 53, at 28.

¹³⁹ Anderson, *supra* note 46, at 515 (quoting An Act for the Punishment of Certain Crimes Against the United States (Sedition Act), ch. 74, sec. 2, 1 Stat. 596 (1798)).

¹⁴⁰ Rohde, *supra* note 53, at 28 (quoting Sedition Act, ch. 74, sec. 1, 1 Stat. 596 (1798)).

¹⁴¹ Anderson, *supra* note 46, at 515.

¹⁴² *Id.*

¹⁴³ Jenkins, *supra* note 28, at 156.

¹⁴⁴ *Id.*

cant deterrents to uninhibited public discourse.¹⁴⁵ The theoretical free market of ideas, so essential for uninhibited public debate, could not exist when common law libel suits served as legal weapons to stifle government criticism.¹⁴⁶

The *Sullivan* Court recognized that public officials in southern states strategically brought libel suits to deter the national media from covering the civil rights movement.¹⁴⁷ The strategy was effective.¹⁴⁸ Citizens of the south were concerned about public opinion surrounding the civil rights protests, and jury members had a propensity to grant excessive damage awards for even the smallest inadvertent misstatements.¹⁴⁹ However, libel laws that grant excessive damage awards—even for minor errors—would not only deter false statements; they would also deter accurate statements.¹⁵⁰ Indeed, the judgment awarded by the lower court in *Sullivan* was nearly “one thousand times greater than the maximum fine provided by the Alabama criminal statute”¹⁵¹

Fear of such excessive damage awards would impose a form of self-censorship on speakers in public debate that would have a severe chilling effect.¹⁵² The Court reasoned that fear of money damages has a far greater chilling effect on speech than that of criminal prosecution.¹⁵³ While criminal libel laws provide safeguards such as the requirements of an indictment, proof beyond a reasonable doubt, and a double-jeopardy limitation, there are no equivalent safeguards under the civil

¹⁴⁵ See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (reasoning that a rule which requires critics of official conduct to guarantee the truth of their factual assertions and “do so on pain of libel judgments virtually unlimited in amount” may deter the “would-be critics” from voicing their criticism, thus “dampen[ing] the vigor and limit[ing] the variety of public debate.”).

¹⁴⁶ *Id.*

¹⁴⁷ Geoffrey R. Stone, *Celebrating Sullivan: The Central Meaning of the First Amendment*, HUFFINGTON POST (May 9, 2014), https://www.huffingtonpost.com/geoffrey-r-stone/celebrating-sullivan-the_b_4930935.html#.

¹⁴⁸ *Id.*

¹⁴⁹ See *id.*

¹⁵⁰ *Sullivan*, 376 U.S. at 279 (claiming that the threat of litigation leads to self-censorship even when the defamatory statement “is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.”); see also Frederick Shauer, *Social Foundations of the Law of Defamation: A Comparative Analysis*, 1 J. MEDIA L. & PRAC. 3, 11 (1980) (“Because of these risks and uncertainties in the process of ascertaining and demonstrating factual truth, a rule that penalizes factual falsity has the effect of inducing some self-censorship as to materials that are in fact true.”).

¹⁵¹ Harry Kalven, Jr., *The New York Times Case: A Note on “The Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 203 (1964).

¹⁵² See Mark Tushnet, *New York Times v. Sullivan Around the World*, 66 ALA. L. REV. 337, 344–45 (2014).

¹⁵³ *Sullivan*, 376 U.S. at 277.

system.¹⁵⁴ If the First Amendment is to truly protect “uninhibited, robust, and wide-open” public discourse, then erroneous statements, absent “actual malice,”¹⁵⁵ must be tolerated in free debate, since factual misstatements are inevitable.

II. GOVERNMENT SPEECH AND THEN THE PRESIDENT’S SPEECH

The development of First Amendment principles to the internet and specifically to social media is still in its infancy. Although the internet is not new technology, it is difficult for case law to keep up with the lightning pace of advancing technology. Just last term, the Court had one of its first opportunities “to address the relationship between the First Amendment and the modern Internet.”¹⁵⁶ In dicta, the Court expressed caution about setting precedent that would limit First Amendment protection “for access to vast networks in that medium [the Internet].”¹⁵⁷ In the past few election cycles, social media has played a major role in campaigning and influencing voters. Beginning with his 2016 presidential primary race and continuing through his presidency, President Trump is revolutionizing the relationship between politics and social media with his @realDonaldTrump twitter account. The scant case law in this area converges two First Amendment doctrines: the Government Speech Doctrine and the Public Forum Doctrine.

A. *The Government Speech Doctrine*

The First Amendment Free Speech Clause targets government censorship of private speech.¹⁵⁸ Generally, content and viewpoint discrimination by the government in regulating private speech is presumptively unconstitutional.¹⁵⁹ But, when the government speaks, content-based and viewpoint specific messages are the norm.¹⁶⁰ In expressing its own message or selecting preferred views through its tax and spend powers, the government is not restrained by the First Amendment.

¹⁵⁴ *Id.* at 277–78.

¹⁵⁵ *Id.* at 270, 280 (defining “actual malice” as “knowledge that [the statement] was false or with reckless disregard” for the truth).

¹⁵⁶ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017) (addressing the constitutionality of a state statute prohibiting access to a vast array of social media websites to registered sex offenders).

¹⁵⁷ *Id.*

¹⁵⁸ *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 467–68, 482 (2009) (explaining that the Free Speech Clause does not apply to government speech; however, other constitutional limitations may apply to government speech, such as the Establishment Clause).

¹⁵⁹ *See e.g., Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2226 (2015) (striking sign ordinance and discussing application of strict scrutiny to government speech regulations that discriminate based on subject or viewpoint).

¹⁶⁰ *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995).

In numerous cases and contexts, the Court has upheld the right of government “to say what it wishes.”¹⁶¹

Government speech forms a large part of the marketplace of ideas.¹⁶² It is the very function of government to shape public discourse, favor and support specific viewpoints, and advocate for its officials and policies. Without the freedom of government to favor and disfavor points of view, it is hard to imagine how government could function.¹⁶³ While the Free Speech Clause does not control government speech, the government is not without limits in disseminating ideas.¹⁶⁴ Ultimately, a government entity is “accountable to the electorate[.]”¹⁶⁵ Further, the government is limited in its ability to regulate private speech on government property.

B. *The Public Forum Doctrine*

Although the Free Speech Clause has no application to government speech, it does provide safeguards against government suppression of private speech on public property.¹⁶⁶ The public forum doctrine refers to judicially created rules applied to expressive activity on government owned or controlled property.¹⁶⁷ Over a century ago, the Supreme Court equated public property to private property.¹⁶⁸ Like a

¹⁶¹ *Id.* (recognizing government’s right to speak for itself and “say what it wishes”).

¹⁶² STEVEN H. SHIFFRIN ET AL., *THE FIRST AMENDMENT CASES-COMMENTS-QUESTIONS* 437 (6th ed. 2015) (government speech occurs in many contexts including “official government messages; statements of public officials at publicly subsidized press conferences; artistic, scientific, or political subsidies; even the classroom communications of public school teachers.”).

¹⁶³ *Sumnum*, 555 U.S. at 468 (citing *National Endowment of the Arts v. Finley*, 524 U.S. 569, 598 (1998) (Scalia, J., concurring)).

¹⁶⁴ *Id.* (other restraints on government speech exist, such as the Establishment Clause or certain laws, regulations, or practices that limit public officials’ speech).

¹⁶⁵ *Id.* at 468–69 (quoting *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 235 (2000) (“If the citizenry objects [to the government’s position], newly elected officials later could espouse some different or contrary position.”)).

¹⁶⁶ *See generally* Day & Bradford, *supra* note 41, at 75–84 (2011) (discussing evolution of public forum analysis and its application to public comment sessions in government meetings).

¹⁶⁷ *Id.* at 75; *see, e.g.*, *Christian Legal Soc’y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661, 679 (2010) (explaining that forum analysis is triggered either when the government owns the property or when the speech occurs on private property under government control); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995) (recognizing that space subject to forum analysis may be “a forum more in a metaphysical than in a spatial or geographic sense . . .”); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 801 (1985) (discussing property which government may control subject to forum analysis); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 547, 555 (1975) (finding that “privately owned . . . theater under long-term lease to the city” was a public forum).

¹⁶⁸ *Davis v. Massachusetts*, 167 U.S. 43, 47 (1897) (discussing government’s power to prohibit use of government property akin to a private owner’s power to limit others’ use of his

private property owner, the Court said that government may prohibit the public from using government property for expressive purposes.¹⁶⁹ However, decades later, corresponding with the Court's nascent development of its free speech jurisprudence, the Court modified its restrictive view of public property.¹⁷⁰

To give meaning to First Amendment speech rights, the Court recognized that streets and parks are traditional public fora and have "immemorially been held in trust" for public discourse.¹⁷¹ Such streets and public places "have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."¹⁷²

Over time, the Court's public forum analysis defined government property according to three categories: (1) traditional public fora; (2) designated public fora, both limited and unlimited; and (3) all remaining public property.¹⁷³ A designated public forum is "government property that has not traditionally been regarded as a public forum, [but is] intentionally opened up for that purpose."¹⁷⁴ A designated public forum can be unlimited, essentially becoming like a traditional public forum, or limited.¹⁷⁵ Government can designate public property for expressive purposes that is "limited to use by certain groups or dedicated solely to the discussion of certain subjects."¹⁷⁶ This type of government property is categorized as a limited public forum.¹⁷⁷

When citizens challenge government restrictions of expressive activity on government property, the level of judicial scrutiny dictates the rigor with which courts will judge the challenged restriction.¹⁷⁸ The level of scrutiny depends on the categorization of the property and whether the regulation is content and/or viewpoint-

property).

¹⁶⁹ *Id.* ("For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.")

¹⁷⁰ See generally Day & Bradford, *supra* note 41, at 76.

¹⁷¹ *Hague v. Comm. For Indus. Org.*, 307 U.S. 496, 515 (1939) (invalidating ordinance prohibiting the distribution of leaflets and pamphlets on city streets and opining that the use of streets and parks for the public to assemble, to communicate, and to discuss public questions, "has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.")

¹⁷² *Id.*

¹⁷³ *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

¹⁷⁴ *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 469 (2009) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985)).

¹⁷⁵ *Cornelius*, 473 U.S. at 802.

¹⁷⁶ *Summum*, 555 U.S. at 470 (citing *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, n.7 (1983)).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 469–70.

based or content-neutral.¹⁷⁹ The government “need not permit all forms of speech on property that it owns and controls.”¹⁸⁰ Generally, “[w]here the government is acting as a proprietor, managing its internal operations, rather than acting as a lawmaker with the power to regulate or license” speech, a lower standard of scrutiny is applied.¹⁸¹ Content-based speech restrictions on government property defined as a traditional or designated public forum are subject to strict scrutiny.¹⁸² Reasonable and viewpoint-neutral restrictions are permissible on all other public property.¹⁸³

It is not always easy to place government property squarely into one of the Court’s recognized categories. In considering whether a regulation prohibiting solicitation and distribution of literature within an airport terminal building violated the First Amendment, the Court applied a forum-based analysis and concluded that airport terminals are not public fora.¹⁸⁴ The Court rejected the argument that airport terminals are “‘transportation nodes’ such as rail stations, bus stations, wharves, and Ellis Island[,]” which historically have been centers for expressive activity.¹⁸⁵

Considering the history and practice governing airport activity, the Court said that airport terminals are unlike those transportation nodes of the past.¹⁸⁶ The size and character of airport terminals were of recent vintage, and the pressing security interests that attached to airport terminals had no historical analogue.¹⁸⁷ In applying a forum analysis to new types of government property, the Court looked to whether the expressive activity subject to restriction was compatible with the purpose of the forum.¹⁸⁸ Given the contemporary nature of airport terminals and their security needs, the Court concluded that an airport terminal is neither a public forum nor a designated public forum.¹⁸⁹ As such, the limitations on expressive activity in the airport terminal were subject to a viewpoint-neutral, reasonableness standard.¹⁹⁰

¹⁷⁹ *Id.* at 470.

¹⁸⁰ *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (citing *United States Postal Service v. Council of Greenburgh Civic Assns.*, 453 U.S. 114, 129 (1981)).

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 694 (Kennedy, J., concurring).

¹⁸⁴ *Id.* at 680.

¹⁸⁵ *Id.* at 681.

¹⁸⁶ *Id.* at 680, 681–82.

¹⁸⁷ *Id.* at 680.

¹⁸⁸ *Id.* at 683.

¹⁸⁹ *Id.* at 680, 683.

¹⁹⁰ *Id.* at 694 (Kennedy, J., concurring).

In addition to the difficulty in applying a public forum analysis to modern day forms of public property, like airport terminals, the Court has occasionally struggled with determining whether certain speech is private or public.¹⁹¹ For instance, in *Pleasant Grove City, Utah v. Summum*, the Court considered whether monuments donated by private citizens and permanently placed in public parks implicated First Amendment concerns when a city accepted some monuments and rejected others.¹⁹² The Court recognized that monuments are a forum of expression; throughout history, governments have “[spoken] to the public” through the monuments they commissioned and financed for public display.¹⁹³ The Court saw no distinction between government-commissioned and financed monuments and those that are privately financed and donated for public display on government property.¹⁹⁴ Consequently, privately-donated monuments for permanent display on government land are government speech, and government may be selective in choosing the monuments it wishes to permanently display.¹⁹⁵

Similarly, the government may selectively fund private speakers to convey its preferred message.¹⁹⁶ In *Rust v. Sullivan*, the Court found no viewpoint-based discrimination when the government awarded grants to family planning centers on the condition that the recipients would not counsel, refer or perform abortions.¹⁹⁷ The *Pleasant Grove City* and *Rust* holdings make clear that the government is not subject to the First Amendment prohibition against viewpoint-based speech restrictions when the government selectively chooses donated monuments or funds private entities to support its preferred policy choices.¹⁹⁸

In neither *Pleasant Grove City* nor *Rust* did the Court apply a forum-based analysis. In *Pleasant Grove*, although a public park is a traditional public forum, the city’s display of permanent monuments from selectively chosen privately-donated monuments did not create a public forum for privately-donated monuments.¹⁹⁹ Likewise, in *Rust*, the government was not creating a public forum by funding some family planning centers and not others based on the government’s antipathy to abortion.²⁰⁰

¹⁹¹ *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 470 (2009).

¹⁹² *Id.* at 464.

¹⁹³ *Id.* at 470.

¹⁹⁴ *Id.* at 470–71.

¹⁹⁵ *Id.* at 472.

¹⁹⁶ *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

¹⁹⁷ *Id.* at 179, 180, 194, 198.

¹⁹⁸ *Summum*, 555 U.S. at 470–71; *Rust*, 500 U.S. at 193.

¹⁹⁹ *Summum*, 555 U.S. at 480.

²⁰⁰ *Rust*, 500 U.S. at 193.

C. The Public Forum Doctrine and Twitter: The Modern-Day Town Square

The digital age has driven a paradigm shift in the way society communicates and expresses its speech and thoughts. Today, citizens are more likely to take to the internet and social media to voice their opinion or to protest than they are to head down to the local town square or public sidewalk.²⁰¹ This shift was recently recognized by the Supreme Court in *Packingham v. North Carolina* where the Court seemed to equate the internet to long-established public fora like streets or public parks.²⁰² In writing for the majority, Justice Kennedy opined that, “[w]hile in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the ‘vast democratic forums of the Internet’ in general, and social media in particular.”²⁰³ The Court expressly recognized that “to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights.”²⁰⁴

Equating the internet to the “modern public square,” the Court in *Packingham* invalidated a state statute prohibiting registered sex offenders from visiting “a vast array of websites” because of the statute’s sweeping scope.²⁰⁵ While the Court did not go so far as to apply a forum analysis to the Internet in general or any social media platform specifically, in *dicta*, the Court suggested that anyone “with an Internet connection [can] ‘become a town crier with a voice that resonates farther than it could from any soapbox.’”²⁰⁶

However, the government speech doctrine and the public forum doctrine converged in a recent case involving President Trump’s Twitter account and his act of blocking users based on their political views.²⁰⁷ In considering whether the President’s actions involved impermissible viewpoint-based speech discrimination, the District Court in *Knight First Amendment Institute v. Donald J. Trump* consid-

²⁰¹ See *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–36 (2017).

²⁰² *Id.* at 1737. The court struck down a North Carolina law that prohibited sex offenders from accessing social networking websites, such as Facebook, which allowed minor children as members. In applying strict scrutiny, the Court held that the statute impermissibly restricted lawful speech as it was not narrowly tailored to protect minors from registered sex offenders because it “foreclose[d] access to social media altogether,” thereby “prevent[ing] the user from engaging in the legitimate exercise of First Amendment rights.” *Id.*

²⁰³ *Id.* at 1735 (citation omitted).

²⁰⁴ *Id.* at 1737.

²⁰⁵ *Id.* at 1737–38. *But see id.* (Alito, J., concurring) (declining to join the opinion of the Court “because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks.”).

²⁰⁶ *Id.* at 1737 (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997)).

²⁰⁷ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 571 (S.D.N.Y. 2018).

ered the government speech doctrine²⁰⁸ and applied the forum analysis to the @realDonaldTrump Twitter account.²⁰⁹ While recognizing that Twitter is a privately owned company, the Southern District of New York determined that several aspects of @realDonaldTrump, such as the tweets' content and timeline compiling and their associated interactive spaces, may be analyzed under the government-controlled prong of the public forum doctrine.²¹⁰ To further bolster its conclusion that aspects of @realDonaldTrump may satisfy the control prong of the public forum analysis, the court considered that President Trump's tweets are official records under the Presidential Records Act²¹¹ and that President Trump uses the account for official executive functions.²¹²

The recognition that there is sufficient government control over the content, timeline compiling, and interactive spaces of @realDonaldTrump tweets to satisfy a forum analysis is only the first step in deciding whether these aspects of the President's account constitute a public forum. Application of forum analysis must be consistent with the purpose, structure, and intended use of the property.²¹³ In the *Summum* case, the Court explained that "public forum principles . . . are out of place in the [park donation] context" and recognized that a city must be selective in its choice of accepting privately-donated monuments for permanent display.²¹⁴ To require cities to justify their selection decisions even under a viewpoint neutral standard would threaten them with "an influx of clutter" or require them to "face the pressure to remove longstanding and cherished monuments."²¹⁵

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See Day & Bradford, *supra* note 41, at 76; *Knight First Amendment Inst. at Columbia Univ.*, 302 F. Supp. 3d at 566 (rather than considering the Twitter account as a whole, the court considered the government-control prong of the forum analysis to the tweets' content and timeline compiling as well as to their associated interactive spaces); *id.* at 569–70 (government control of private property sufficient to satisfy the forum doctrine "does not extend to the comment thread initiated by a tweet sent by the @realDonaldTrump account").

²¹¹ *Knight First Amendment Inst. at Columbia Univ.*, 302 F. Supp. 3d at 567 (the parties stipulated that the Presidential Records Act applies to the President's tweets; the tweets meet the Act's definition of Presidential records and are required to be preserved).

²¹² *Id.* (the President has used his Twitter account to appoint and remove officers and conduct foreign policy, all activities that fall within the President's Art. II powers).

²¹³ See *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 478 (2009) ("The forum doctrine has been applied in situations in which government-owned property or a government program was capable of accommodating a large number of public speakers without defeating the essential function of the land or the program.").

²¹⁴ *Id.* (quoting *US v. American Library Ass'n, Inc.*, 539 U.S. 194, 205 (2003)) (reasoning that "the installation of permanent monuments in a public park [cannot be analogized] to the delivery of speeches and the holding of marches and demonstrations").

²¹⁵ *Summum*, 555 U.S. at 479.

In rejecting the application of forum analysis to the park monuments, the *Sumnum* Court characterized the message associated with permanently displayed monuments, even those privately-donated, as government speech.²¹⁶ Like the *Sumnum* Court, the District Court in *Knight First Amendment Institute* addressed the characterization of the President's tweets in terms of their content, their timeline compiling, and their associated interactive spaces.²¹⁷ In determining that the tweets' content and timeline compiling constituted government speech, the court addressed three factors considered by the Supreme Court in its application of the government speech doctrine: (1) "whether the government has historically used the speech in question 'to convey state messages'"; (2) "whether that speech is 'often closely identified in the public mind' with the government"; and (3) "the extent to which government 'maintain[s] direct control over the messages conveyed'"²¹⁸

In light of these factors, the District Court had no trouble characterizing the content of the President's tweets as government speech and, therefore, not subject to forum analysis.²¹⁹ First, the President clearly "convey[s] state messages" when he tweets about his policies, his legislative agenda, foreign affairs, and his criticism of unfavorable media coverage.²²⁰ As such, "the content of the tweets sent by @realDonaldTrump are solely the speech of the President or of other government officials."²²¹ Since the account's timeline is simply a display of all the tweets generated by @realDonaldTrump, the timeline compiling is likewise government speech and forum analysis is likewise inapplicable to this aspect of the President's twitter account.²²²

Next, the District Court considered the interactive space of @realDonaldTrump. The replies and retweets generated by the President's tweets appear in the interactive space.²²³ The district court concluded that these tweets are private speech based on the lack of government control and the unlikelihood that these tweets would be identified in the public mind with the government.²²⁴

²¹⁶ *Id.* at 470.

²¹⁷ *Knight First Amendment Inst. at Columbia Univ.*, 302 F. Supp. 3d at 571–72.

²¹⁸ *Id.* at 571 (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1760 (2017) (finding government speech doctrine does not apply to registered trademarks and disparagement provision of the Lanham Act prohibiting offensive marks violates the First Amendment)) (quoting *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 U.S. 2239, 2246–49 (2015) (finding that specialty designed license plates constitute government speech denying offensive design does not violate the First Amendment)).

²¹⁹ *Knight First Amendment Inst. at Columbia Univ.*, 302 F. Supp. 3d at 571.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.* at 572.

²²⁴ *Id.*

The user sending the reply or retweets has total control over his content and these tweets appear with the user's picture, name, and handle making attribution of their content to the government highly unlikely.²²⁵ Finally, unlike a park's limited capacity to display an unlimited amount of permanent monuments, "the interactive space of a tweet can accommodate an unlimited number of replies and retweets."²²⁶

Finding that the interactive space associated with the President's tweets is private speech and subject to a forum analysis, the court characterized this aspect of the @realDonaldTrump account as a designated public forum.²²⁷ A designated public forum is public property the government "has [intentionally] opened for use by the public as a place for expressive activity."²²⁸ Objective factors of use and practice informed the court's decision. First, the interactive space is open to anyone with a Twitter account who has not been blocked.²²⁹ Second, government officials have described the President's Twitter account, "including all of its constituent components . . . as a means through which the President 'communicates directly with you, the American people!'"²³⁰ Finally, the interactive space is ideal for expressive activity and intended for that use.²³¹

Forum analysis dictates the level of judicial scrutiny applied to a challenged speech restriction based on the categorization of the forum.²³² Traditional and designated public fora are analyzed under the same standards of judicial scrutiny.²³³ However, even in a nonpublic forum, viewpoint-based discrimination is subject to heightened judicial scrutiny, requiring the government to establish that its actions are narrowly tailored to a compelling government interest.²³⁴

In *Knight First Amendment Institute*, the District Court found that blocking Twitter users from @realDonaldTrump because they criticized the President and his policies constitutes viewpoint discrimination in a designated public forum.²³⁵ As such, the President's actions must satisfy the highest standard of judicial scruti-

²²⁵ *Id.*

²²⁶ *Id.* at 573.

²²⁷ *Id.* at 574.

²²⁸ *Id.* at 573 (quoting *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45–48 (1983)) (describing the three types of public fora and holding that a school mail facility is not a public forum).

²²⁹ *Id.* at 574.

²³⁰ *Id.*

²³¹ *Id.* at 574–75.

²³² *Id.* at 575.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *Id.*

ny.²³⁶ The contention that he “retains a personal First Amendment interest in choosing the people with whom he associates and retains the right not to engage with (*i.e.*, the right to ignore) the individual plaintiffs” cannot justify his actions.²³⁷

Indeed, citizens have no First Amendment right that requires “government policymakers to listen or respond to individuals’ communications on public issues.”²³⁸ Government is free to ignore a speaker and may amplify the voice of one speaker over those of others.²³⁹

However, blocking an individual from speaking in a designated public forum because of his viewpoint is impermissible under the First Amendment. This goes beyond ignoring a speaker and constitutes viewpoint discrimination which is presumptively unconstitutional.²⁴⁰ Viewpoint based speech restrictions are a particularly pernicious form of government censorship.²⁴¹ Such speech restrictions drive out unfavorable views from the marketplace of ideas and silence citizen critics.²⁴²

The case law on how to apply the First Amendment to government’s use of social media in this new digital era is in its embryonic stage. Even if the *Knight First Amendment Institute* decision is appealed to the Second Circuit Court of Appeals, it is unlikely that this case will reach the Supreme Court any time soon. Meanwhile, courts are continuing to address this issue, albeit slowly.²⁴³ For example, the Federal District Court in the Eastern District of Virginia addressed this issue when a County Commissioner blocked a resident from her official Facebook page, giving rise to a First Amendment claim.²⁴⁴ The case survived summary judgment.²⁴⁵

Seven in ten American adults use at least one social networking service.²⁴⁶ During the 2016 presidential election, Donald Trump used Twitter as a central campaign tool.²⁴⁷ With over 300 million active users worldwide, including nearly

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 285 (1984).

²³⁹ *Id.* at 288.

²⁴⁰ *Matal v. Tam*, 137 S. Ct. 1744, 1766 (2017) (Kennedy, J., concurring).

²⁴¹ *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

²⁴² *Id.*

²⁴³ *See, e.g., Davison v. Loudoun Cty. Bd. of Supervisors*, 227 F. Supp. 3d 605 (E.D. Va. 2017).

²⁴⁴ *Id.* at 607.

²⁴⁵ *Id.* at 614.

²⁴⁶ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017).

²⁴⁷ Amber Phillips, *The Surprising Genius of Donald Trump’s Twitter Account*, WASH. POST FIX (Dec. 10, 2015), https://www.washingtonpost.com/news/the-fix/wp/2015/12/10/reading-6000-of-his-tweets-has-convinced-us-donald-trump-is-a-social-media-master/?utm_term=.b0a2229af32e.

70 million users in the United States alone, Donald Trump has been able to use Twitter to get his message to a mass audience at virtually no cost.²⁴⁸ This provided an ever-growing community of people with direct access to the President to receive information about his policies and to express their support or dissent.²⁴⁹ Indeed, that exchange is vital to a healthy democracy. However, after being elected President, Donald Trump continued his practice of blocking people on his Twitter account who disfavored his policies or expressed criticism of him as President.²⁵⁰

Twitter then became merely another tool used by the President to silence his critics.²⁵¹ Trump's Twitter antics represent a persistent effort to suppress the political involvement of individuals critical of his policies through fear-based tactics and threats of punishment.²⁵² Trump's actions to exclude certain groups of citizens and viewpoints from fully participating in the political process are not only harmful to the individual citizen he silences. His repeated attempts to silence the citizen-critic are dangerous to our democracy; they may drive official criticism from the marketplace of ideas and undermine the central meaning of the First Amendment.

III. PRESIDENT TRUMP'S SPEECH AND THE EROSION OF THE FIRST AMENDMENT

On his first full day in office, President Trump declared that he has a "running war with the media," and that "they [reporters] are among the most dishonest human beings on Earth."²⁵³ But Donald Trump's hostile response to negative

²⁴⁸ Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 550 (S.D.N.Y. 2018); see Phillips, *supra* note 247.

²⁴⁹ See Oren Tsur et al., *The Data Behind Trump's Twitter Takeover*, POLITICO (Apr. 29, 2016).

²⁵⁰ See Lydia Smith, *Donald Trump Is Acting Like a Dictator by Blocking Critics on Twitter, Law Scholars Say*, INDEP. (Nov. 7, 2017), <https://www.independent.co.uk/news/world/americas/us-politics/donald-trump-dictator-blocking-critics-twitter-law-scholars-latest-a8041321.html>.

²⁵¹ *Id.*

²⁵² John Ganz, *Trump's New Target in the Politics of Fear: Citizenship*, N.Y. TIMES (July 23, 2018), <https://www.nytimes.com/2018/07/23/opinion/trump-birthright-citizenship-mccarthy.html>. Recently, the President has used these fear-based tactics and threats of punishment in the context of his desired denaturalization policies. *Id.* The Trump Administration's efforts to deport individuals who do not disclose on their citizenship applications offenses they committed before they become citizens are likely to cause "immigrants . . . [to] not exercise their rights for fear that they will lose them all, or at least be dragged in front of a court and required to pay expensive lawyers' fees." *Id.*

²⁵³ Stephen F. Rohde, *Presidential Power vs. Free Press*, L.A. LAW. 26, 31 (2017) (quoting Alex Shashkevich, *Stanford Experts on President Trump and the Media*, STAN. NEWS (Jan. 30, 2017), <https://news.stanford.edu/2017/01/30/stanford-experts-president-trump-media/>).

press began before he assumed the office of the presidency.²⁵⁴ Early on the campaign trail for the 2016 presidential election, Donald Trump began to embrace and spread the notion of the “fake news” media.²⁵⁵ Candidate Trump, at that time, invoked the phrase “fake news” in an effort to undermine his political opponents and discredit unfavorable news coverage.²⁵⁶

The press is adversarial in nature; there is an understandable need to neutralize or rebut negative reporting, especially in the current harsh political environment. However, in his war against opposition press, President Trump is attacking the central meaning of the First Amendment. In doing so, President Trump threatens the protection afforded political speech articulated in *New York Times v. Sullivan*,²⁵⁷ which serves as the cornerstone of First Amendment jurisprudence.

A. *Fake News: A Kinship with Seditious Libel*

The phenomenon of the phrase “fake news,” perpetuated by Donald Trump during the 2016 presidential election campaign, has taken on an entirely new life and meaning. Donald Trump strategically uses the term as a tool to undermine media scrutiny.²⁵⁸ However, fake news in its truest sense has an entirely different

²⁵⁴ Dylan Byers, *Donald Trump: Media King, 2015*, CNN (Dec. 28, 2015), <https://www.cnn.com/2015/12/28/politics/trump-media-king/index.html>.

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964). Respondent L. B. Sullivan was one of the three elected Commissioners of the City of Montgomery, Alabama. *Id.* at 256. Sullivan brought a civil libel action against the New York Times Co. for publishing a paid advertisement entitled “Heed Their Rising Voices” by a civil rights organization criticizing the response of a Southern community to demonstrations led by Dr. Martin Luther King. *Id.* The advertisement did not refer to Sullivan by name or title, though he contended that the article accused Sullivan’s police force of conducting a wave of terror against African-American students and brutally harassing Dr. King. *Id.* at 256–57. The advertisement did contain several false or exaggerated statements. *Id.* at 257. The publication stated that students staged a demonstration on the State Capital steps and sang “My Country, ‘Tis of Thee” when in fact they sang the National Anthem. *Id.* at 258–59. The advertisement also falsely stated that nine students were expelled by the State Board of Education for leading the demonstration at the Capitol. *Id.* at 259. Sullivan claimed that the advertisement had libeled him as it could be read as referring to him supervising the police who allegedly “ringed the Alabama State College Campus” armed with shotguns and tear-gas. *Id.* at 257–58, 259. Further, he claimed that the paragraph could be read as imputing to the police, and hence to him, in the padlocking of the dining hall in order to starve the students into submission. *Id.* at 258. Sullivan also contended that the advertisement defamed him by implying that he was involved in the bombing of Dr. King’s home; although, the bombing occurred prior to Sullivan assuming office. *Id.* at 259.

²⁵⁸ See Lili Levi, *Real “Fake News” and Fake “Fake News,”* 16 FIRST AMEND. L. REV. 232, 258 (2017) (characterizing Trump’s use of the term “fake news” as a “governance technique designed to identify Trump as the only authoritative source of information and to delegitimize any critical source of news”).

meaning than the one maintained by Trump.²⁵⁹ PEN America, a non-profit focused on the protection of freedom of expression, defines fake news as “demonstrably false information that is being presented as a factual news report with the intention to deceive the public.”²⁶⁰

An example of the PEN America definition of fake news is a story now known as “pizzagate.”²⁶¹ This fake publication from Macedonia, widely shared on social media, reported that then-presidential candidate Hillary Clinton and her campaign chief, John Podesta, were involved in a child sex trafficking ring operating out of a Washington, D.C. pizzeria known as Comet Ping Pong.²⁶² Acting on the fake article, a North Carolina man drove to Washington, D.C. with an assault rifle allegedly to “self-investigate” the claim.²⁶³ Luckily, no one was hurt; but, it served as a good example of how dangerous actual fake news can be. While actual fake news like “pizzagate” may have little constitutional value, even the “pizzagate” story would receive First Amendment protection unless it rose to the level of the *Brandenburg* “inciting . . . imminent lawless action” standard.²⁶⁴ However, “fake news” in the Trump era is not fiction disguised as news.²⁶⁵

The term “fake news” is used to undermine the credibility of anyone or any report that is critical of Trump, while the term “alternate facts” refers to actual false statements.²⁶⁶ Recently, Trump has threatened to revoke the security clearances of former top government officials who criticized his unwillingness to confront Russia over its interference in the 2016 election and called into question his fitness for office.²⁶⁷ In doing so, he has accused those officials “without evi-

²⁵⁹ See Callum Borchers, *How to Squash Fake News Without Trampling Free Speech*, WASH. POST FIX (Oct. 12, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/10/12/how-to-squash-fake-news-without-trampling-free-speech/?utm_term=.b18050cc0372.

²⁶⁰ *Id.* (quoting SUZANNE NOSSEL, PEN AMERICA, *FAKING NEWS: FRAUDULENT NEWS AND THE FIGHT FOR TRUTH* 19 (2017), https://pen.org/wp-content/uploads/2017/10/PEN-America_Faking-News-Report_10-17.pdf).

²⁶¹ David O. Klein & Joshua R. Wueller, *Fake News: A Legal Perspective*, 20 J. INTERNET L. 1, 5 (2017).

²⁶² *Id.*

²⁶³ Aria Bendix, *‘Pizzagate’ Shooter to Serve Four Years in Jail*, THE ATLANTIC (June 22, 2017), <https://www.theatlantic.com/news/archive/2017/06/dcs-pizzagate-shooter-sentenced-to-4-years-in-jail/531381/>.

²⁶⁴ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

²⁶⁵ See Kate Harris & Michael Gonchar, *Analyzing the Relationship Between the Press and the President: A Lesson Plan*, N.Y. TIMES (May 11, 2017), <https://www.nytimes.com/2017/05/11/learning/lesson-plans/analyzing-the-relationship-between-the-press-and-the-president-a-lesson-plan.html>.

²⁶⁶ *Id.*

²⁶⁷ Julie H. Davis & Julian E. Barnes, *Trump Weighs Stripping Security Clearances From Officials Who Criticized Him*, N.Y. TIMES (July 23, 2018), <https://www.nytimes.com/2018/07/23/us/politics/trump-security-clearances.html>; Shane Harris et al., *White House Says Trump*

dence . . . of leaking classified information to journalists, concocting facts to undermine the legitimacy of his election, and of profiting off their prior access to him by writing memoirs”²⁶⁸

Trump’s threats to revoke the security clearances of former intelligence officers, much like his other allegations of “fake news,” appear to be “an intimidation tactic designed to silence others from speaking out against him.”²⁶⁹ Instances like this fall in line with Trump’s continual attacks on intelligence agencies and news sources alike, “portraying them as part of a so-called deep state, an unelected cabal seeking to steer United States policy and undercut him.”²⁷⁰ Through his characterization of former top intelligence officials statements against him as “baseless accusations,” Trump furthers his narrative of a media pitted against him and paints himself as one of very few legitimate information sources (namely, those who promote his stances).²⁷¹

President Trump is not the first President to attempt to censor dissent. Like Trump, President Woodrow Wilson had little tolerance for those who criticized him and viewed them as “disloyal.”²⁷² Wilson warned that “if there should be disloyalty, it will be dealt with a firm hand of stern repression’ since disloyal individuals ‘had sacrificed their right to civil liberties.’”²⁷³ President Wilson held the position that “authority to exercise censorship over the press . . . is absolutely necessary to the public safety,” within the backdrop of a newly-declared war and a Congress that was debating the Espionage Act of 1917.²⁷⁴

Indeed, President Trump’s hostility toward the media and his dissenters echoes the views of many past presidents. During the Watergate scandal, President Nixon expressed great contempt toward the press.²⁷⁵ Franklin D. Roosevelt, Ronald Reagan, and virtually every other president held the same view of the me-

Wants to Revoke Security Clearances for Former Officials Critical of Him Over Russia, WASH. POST (July 23, 2018), https://www.washingtonpost.com/politics/rand-paul-says-hell-ask-trump-to-revoke-former-cia-director-john-brennans-security-clearance/2018/07/23/8eb11ccc-8e7c-11e8-b769-e3fff17f0689_story.html?noredirect=on&utm_term=.6dd783df0f61.

²⁶⁸ Harris et al., *supra* note 267.

²⁶⁹ *Id.*

²⁷⁰ Davis & Barnes, *supra* note 267.

²⁷¹ *Id.*; see also Philip Bump, *The Only Information Trump Supports Is Information That Makes Him Look Good*, WASH. POST (Apr. 3, 2018), https://www.washingtonpost.com/news/politics/wp/2018/04/03/the-only-information-trump-supports-is-information-that-makes-him-look-good/?utm_term=.493ac0b44d35.

²⁷² Rohde, *supra* note 53, at 29.

²⁷³ *Id.* (quoting *Wilson Demands Press Censorship*, N.Y. TIMES, May 22, 1917, at A1).

²⁷⁴ *Id.* (alteration in original) (quoting *Wilson Demands Press Censorship*, N.Y. TIMES, May 22, 1917, at A1).

²⁷⁵ Harris & Gonchar, *supra* note 265.

dia.²⁷⁶ However, what makes the Trump era extraordinary is his use of the media itself and particularly the use of social media to greatly influence a large segment of the public.²⁷⁷

Having a background in reality TV and no previous experience holding public office seems to enable President Trump to thwart the formality, caution, and etiquette to which most heads of state adhere when communicating in their official capacity. In reaction to an unflattering segment regarding Trump on “The Kelly File,” Trump threatened to “unleash” his “beautiful Twitter account” against Megyn Kelly of Fox News.²⁷⁸ His frequent use of Twitter to engage in a stream of conscience soliloquy²⁷⁹ and his recent impromptu call to the morning show, *Fox and Friends*,²⁸⁰ are unique ways President Trump communicates with the public. His style, form, and content of communication wield great influence.²⁸¹

Indeed, President Trump has proven countless times the powerful influence his Twitter account yields.²⁸² In a tweet by Trump in December 2016, he stated that Lockheed Martin’s F-35 program was “out of control.”²⁸³ The impact of a single tweet was staggering, as it cost Lockheed Martin’s market value to drop by \$4 billion in a single day.²⁸⁴ Just a week prior to that incident, Trump caused Boeing’s stock to drop by \$1.4 billion based on a single tweet threatening to cancel its 747 Air Force One program.²⁸⁵ Just recently, President Trump targeted Amazon

²⁷⁶ See Olivia B. Waxman, *Donald Trump Wouldn’t Be the First President to Rethink Press Briefings*, TIME (Dec. 20, 2016), <http://time.com/4606413/donald-trump-white-house-press-briefings/> (describing how presidents disfavored press briefings).

²⁷⁷ Phillips, *supra* note 247.

²⁷⁸ Erik Wemple, *Megyn Kelly’s Personal Horror Stories, Starring Donald Trump and Roger Ailes*, WASH. POST (Nov. 13, 2016), https://www.washingtonpost.com/opinions/megyn-kelly-divulges-her-own-private-horrors-of-donald-trump/2016/11/11/01f2da30-a82f-11e6-8042-f4d111c862d1_story.html?utm_term=.256431392f64.

²⁷⁹ Brandon Kochkodin, *It’s Not Your Imagination. President Trump is Tweeting More Than Ever.*, BOSTON GLOBE (Nov. 13, 2017), <https://www.bostonglobe.com/news/politics/2017/11/13/not-your-imagination-president-trump-tweeting-more-than-ever/8Ty5ypg7phbFzdfMroKYxL/story.html>.

²⁸⁰ Brian Stelter, *Trump’s Call to ‘Fox and Friends’ Explains Why We Don’t Hear Much From Him*, CNN (Apr. 26, 2018), <http://money.cnn.com/2018/04/26/media/trump-call-to-fox-and-friends/index.html>.

²⁸¹ Phillips, *supra* note 247.

²⁸² See, e.g., Berkeley Lovelace, Jr., *Lockheed Martin Shares Drop After Trump Says F-35 Program Too Expensive*, CNBC (Dec. 12, 2016), <https://www.cnbc.com/2016/12/12/lockheed-martin-shares-drop-after-trump-says-f-35-program-too-expensive.html>.

²⁸³ Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 12, 2016, 5:26 AM), <https://twitter.com/realDonaldTrump/status/808301935728230404>.

²⁸⁴ Lovelace, Jr., *supra* note 282.

²⁸⁵ *Id.*

in a flurry of tweets, causing stock market fluctuations.²⁸⁶ His tweets corresponded with unfavorable new stories about Trump published in *The Washington Post*, which is owned by Amazon's CEO, Jeff Bezos, suggesting retaliation for news reporting the President disliked.²⁸⁷

Other retaliatory responses to unfavorable news reporting include threats to revoke the television station licenses of those media companies that President Trump accuses of airing "fake news."²⁸⁸ After NBC stations reported a story about President Trump's desire to increase the U.S. nuclear arsenal, one of his tweets said: "At what point is it appropriate to challenge their License? Bad for country!"²⁸⁹

In reality, television licenses are granted to local stations, not to national media companies; so, his threat is mostly bluster.²⁹⁰ However, even if President Trump is powerless to effectuate a revocation of television station licenses, these seemingly idle threats can have chilling effects.²⁹¹ His tweets might be a call to action to his supporters to file claims against the news stations with the Federal Communications Commission ("FCC").²⁹² Viewer complaints are investigated by the FCC and could provide the basis for harsher scrutiny during a license renewal process.²⁹³ In fact, viewer complaints to the FCC initiated successful change to the long-standing indecency policy and created potentially harsh fines against local TV stations for a fleeting expletive or an isolated incident of nudity, both of which were not actionable under the previous policy.²⁹⁴ Therefore, his tweets may generate viewer complaints to the FCC that, in the past, have proven to be impactful in

²⁸⁶ Peter Nicholas, *What's Driving Trump's Attacks on Amazon? It's Personal*, WALL ST. J. (Apr. 6, 2018), <https://www.wsj.com/articles/trumps-criticism-of-amazon-its-personal-1523007001>.

²⁸⁷ *Id.*

²⁸⁸ See, e.g., Oliver Darcy & Brian Stelter, *Trump Continues NBC Threats, Says 'Licenses Must Be Challenged'*, CNN (Oct. 11, 2017), <http://money.cnn.com/2017/10/11/media/trump-nbc-licenses-tweet/index.html>; Hayley Miller, *Donald Trump Goes After the Free Press Yet Again*, HUFFINGTON POST (October 11, 2017), https://www.huffingtonpost.com/entry/donald-trump-media-attacks_us_59de2349e4b0b26332e852f2.

²⁸⁹ Darcy & Stelter, *supra* note 288.

²⁹⁰ *Id.*

²⁹¹ Peter Baker & Cecilia Kang, *Trump Threatens NBC Over Nuclear Weapons Report*, N.Y. TIMES (Oct. 11, 2017), <https://www.nytimes.com/2017/10/11/us/politics/trump-nbc-fcc-broadcast-license.html>.

²⁹² *Id.*

²⁹³ Communications Act of 1934, 47 U.S.C. § 151 (2012); see also Terri R. Day & Danielle Weatherby, *BLEEEEEEP! The Regulation of Indecency, Isolated Nudity, and Fleeting Expletives in Broadcast Media: An Uncertain Future for Pacifica v. FCC*, 3 CHARLOTTE L. REV. 469, 497 (2012) (viewer complaints of indecency on local television stations initiated a change in the FCC's indecency policy, creating more First Amendment restrictive rules).

²⁹⁴ Day & Weatherby, *supra* note 293, at 484–85.

influencing FCC policy-making.²⁹⁵ What President Trump cannot achieve directly, he may be able to achieve indirectly.

As the *Sullivan* Court underscored, the threat of pecuniary loss has a far greater potential to shackle speech than even criminal sanctions.²⁹⁶ Fear of being the target of presidential tweets, which have the power to cause substantial financial harm, would certainly chill statements that might conceivably displease the President.²⁹⁷ The result of this chilling effect is that even accurate statements would be eliminated from the marketplace of ideas if they are arguably critical of President Trump.²⁹⁸ In fact, like seditious libel laws from centuries ago, the truer the criticism, the more likely President Trump's retaliation will be swifter and harsher.

President Trump's "fake news" assertions and retaliatory tweets strike at the heart of the First Amendment. The theories and values defining the central meaning of the Free Speech and Press Clauses developed over a century of First Amendment jurisprudence. Eschewing seditious libel laws and loose standards supporting syndicalism prosecutions and crushing defamation awards, the Supreme Court recognized that democracy and liberty could not exist without protections for the free trade of ideas and the preservation of the civic duty to engage in open, dynamic, rational discourse.²⁹⁹

When the South was using civil libel laws to resurrect a form of seditious libel, the Court found that tactic to undermine the central meaning of the First Amendment as it dampened the vitality of public discourse and our democracy.³⁰⁰ The same parallel can be drawn to the practical effects that Trump's conduct has on free expression which has undermined, if not completely abandoned, the central meaning of the First Amendment—the freedom to engage in "uninhibited, robust, and wide-open" debate on matters of public concern.³⁰¹

²⁹⁵ *Id.*; Baker & Kang, *supra* note 291.

²⁹⁶ *New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964) (reasoning that due to the constitutional safeguards afforded to criminal defendants, such as a higher burden of proof, the fear of damage awards in a civil action "may be markedly more inhibiting than the fear of prosecution under a criminal statute").

²⁹⁷ See, e.g., Dean Obeidallah, *Chilled by Trump's Tweets? You Should Be*, CNN (Nov. 21, 2016), <https://www.cnn.com/2016/11/20/opinions/trump-tweets-on-hamilton-snl-obeidallah/index.html>; Jack Watkins, *Tyranny by Twitter: 'Chilling Effect on Free Speech'*, MEDIUM (Dec. 8, 2016), <https://medium.com/@Jaxon47/tyranny-by-twitter-chilling-effect-on-free-speech-d95e4a1dcf0a>.

²⁹⁸ Lyrissa Barnett Lidsky, *Silencing John Doe: Defamation and Discourse in Cyberspace*, 49 DUKE L.J. 885, 888 (2000) (discussing when defamation law "overdeters"—that is, when the threat of a defamation lawsuit deters an individual not only from communicating defamatory falsehoods, but also from engaging in speech that is truthful).

²⁹⁹ NOSSEL, *supra* note 260, at 21.

³⁰⁰ Stone, *supra* note 147.

³⁰¹ *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

B. Trump and Twitter

While the @POTUS and @WhiteHouse Twitter accounts have traditionally served as the official social media accounts of the President, former White House press secretary Sean Spicer stated that Donald Trump's tweets are indeed "official statements by the President of the United States."³⁰² Trump has even said that his "use of social media is not Presidential - it's MODERN DAY PRESIDENTIAL."³⁰³

Donald Trump has cultivated his Twitter account into a digital town hall which regularly generates tens of thousands of comments discussing the President's policies.³⁰⁴ Since the First Amendment bars public officials from punishing individuals on the basis of their viewpoints, unless it is for the purpose of harassing, spamming, or threatening the President,³⁰⁵ President Trump's act of blocking users for criticizing him jeopardizes the foundational principles of the Free Speech Clause.³⁰⁶

When the President blocks a Twitter user, there are punitive and silencing effects on the user. For example, President Trump blocked one citizen after she expressed her opposition to the latest Republican effort to repeal the Affordable Care Act on Twitter.³⁰⁷ The user had stage four Hodgkin's Lymphoma and explained how the Affordable Care Act was "literally keeping [her] alive."³⁰⁸ The mere criticism of the President's latest healthcare policy caused her to get blocked by the President on Twitter.³⁰⁹ When a user is blocked from the @realDonaldTrump ac-

³⁰² Elizabeth Landers, *White House: Trump's Tweets Are 'Official Statements,'* CNN (June 6, 2017), <http://www.cnn.com/2017/06/06/politics/trump-tweets-official-statements/index.html>.

³⁰³ Donald J. Trump (@realDonaldTrump), TWITTER (July 1, 2017, 3:41 PM), <https://twitter.com/realdonaldtrump/status/881281755017355264?lang=en>.

³⁰⁴ See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (July 1, 2017, 3:41 PM), <https://twitter.com/realdonaldtrump/status/881281755017355264?lang=en> (generating more than 70,000 comments).

³⁰⁵ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. . . . Government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the Government, contravenes this essential right."); see also *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

³⁰⁶ See *Turner Broad. Sys.*, 512 U.S. at 641.

³⁰⁷ Christal Hayes, *Trump Twitter-Blocked A Woman with Stage 4 Cancer – and She Has a Message for Him*, NEWSWEEK (Sept. 20, 2017), <https://www.newsweek.com/trump-just-blocked-woman-stage-4-cancer-twitter-she-has-message-him-668459>.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

count, the blocked user is unable to follow the President's announcements, view tweets by the President when logged in to the service, or view tweets that the President has endorsed.³¹⁰ More importantly, the President is no longer able to view the dissenting opinion of the user.³¹¹ Punishing a citizen for criticizing the government or depriving her of the ability to dissent is damaging to the American democracy and a step back toward the tyranny of the English crown.

Undoubtedly, Trump's conduct of blocking users who disagree with him on Twitter is troubling. It is well-established in First Amendment jurisprudence that viewpoint discrimination—such as blocking critics while allowing supporters to express their views—is proscribed by the Constitution.³¹² As discussed in Part III above, the *Knights First Amendment Institute* court held that President's blocking of the individual Plaintiffs from the @realDonaldTrump account was an impermissible viewpoint-based restriction on the individual Plaintiffs' participation in a designated public forum.³¹³

Far more concerning, however, is President Trump's use of Twitter as a tool to suppress the citizen-critic. Holding true to the central meaning of the First Amendment, the citizen-critic has a duty to safeguard democracy by engaging in public discussion.³¹⁴ To deny that duty or inhibit free expression by instilling fear of punishment would abandon the central meaning of the First Amendment.³¹⁵ A group of legal experts, including Erwin Chemerinsky, Dean of the University of California Berkeley School of Law, explain that the President's practices of blocking critics on Twitter is a familiar playbook for authoritarian regimes.³¹⁶ The group said, “[c]ultivating a false sense that political leaders are adored by the public is critical to warping the public's understanding of how those leaders are really viewed by the public and, in turn, to quashing democratic impulses.”³¹⁷

In silencing his critics, or chilling dissenters by instilling a fear of retaliation, Trump is projecting a misleading level of popularity.³¹⁸ Donald Trump has been highly preoccupied with his approval rating since the beginning of the Presidential

³¹⁰ Matt Ferner, *Trump Users Who Were Blocked by Trump Take Him to Court*, HUFFINGTON POST (July 12, 2017), https://www.huffingtonpost.com/entry/trump-twitter-users-lawsuit_us_59652db0e4b005b0fdc944da.

³¹¹ *Id.*

³¹² *See, e.g.*, Davison v. Loudoun Cty. Bd. of Supervisors, 227 F. Supp. 3d 605, 612 (E.D. Va. 2017) (holding that county could not block an individual from the county's official Facebook page).

³¹³ Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 577 (S.D.N.Y. 2018).

³¹⁴ Whitney v. California, 275 U.S. 357, 375 (1927).

³¹⁵ *Id.* at 375–76.

³¹⁶ Smith, *supra* note 250.

³¹⁷ *Id.*

³¹⁸ *Id.*

election campaign. Trump routinely dismisses any negative poll as “fake news.”³¹⁹ Even in reaction to a positive poll that rated him at forty-six percent, Trump tried to control the narrative by reminding the public that “FakeNews likes to say [that he is] in the 30’s [and that they] are wrong.”³²⁰ Trump is attempting to co-opt his own version of democracy by controlling the message and setting the agenda for the media.³²¹ Trump’s Twitter account has become a finely-tuned mechanism that controls which news families consume each day.

In what has become known as the Trump Twitter phenomenon, the President is able to control the message by diverting attention from serious policy decisions with a single absurd tweet.³²² In fact, a study by Harvard University’s Shorenstein Center has documented how effective the President’s strategy really is.³²³ The study found that in his first 100 days in office, Trump received three times the amount of coverage compared to recent presidents.³²⁴ According to another study, the Pew Research Center’s Journalism Project found that nearly two-thirds of news stories about Trump were negative.³²⁵ That is twice the negative news coverage that Presidents Bill Clinton, George W. Bush,

or Barack Obama received during the same time period in office.³²⁶

Donald Trump has offered himself up as the villain to the media, while portraying himself as a victim of fake news to his supporters. The attacks are a strategic distraction.³²⁷ News stories about Trump’s “collusion with the Russians” have dominated the media since Trump was elected to office.³²⁸ To be sure, members of the Trump campaign may have lied repeatedly and Donald Trump Jr. may have

³¹⁹ Levi, *supra* note 258, at 258.

³²⁰ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 14, 2017, 12:07 AM), <https://twitter.com/realdonaldtrump/status/930346433177378817?lang=en>.

³²¹ Levi, *supra* note 258, at 260.

³²² Erik Wemple, *Study: 91 Percent of Recent Network Trump Coverage Has Been Negative*, WASH. POST (Sept. 12, 2017), https://www.washingtonpost.com/blogs/erik-wemple/wp/2017/09/12/study-91-percent-of-recent-network-trump-coverage-has-been-negative/?utm_term=.7a09302b6f3a.

³²³ *Id.*

³²⁴ *Id.*; Thomas E. Patterson, *News Coverage of Donald Trump’s First 100 Days*, SHORENSTEIN CTR., (May 18, 2017), <https://shorensteincenter.org/news-coverage-donald-trumps-first-100-days/>.

³²⁵ Danielle Kurtzleben, *Study: News Coverage of Trump More Negative Than for Other Presidents*, NPR (Oct. 2, 2017), <https://www.npr.org/2017/10/02/555092743/study-news-coverage-of-trump-more-negative-than-for-other-presidents>.

³²⁶ *Id.*

³²⁷ Catherine Rampell, *Everything Is a Distraction from Something Much, Much Worse*, WASH. POST (July 13, 2017), https://www.washingtonpost.com/opinions/everything-is-a-distraction-from-something-much-much-worse/2017/07/13/a42384e0-6809-11e7-a1d7-9a32c91c6f40_story.html?utm_term=.f47b7288839f.

³²⁸ *Id.*

attempted to acquire illegally obtained information on Hillary Clinton from a hostile nation.³²⁹ However, that is merely one example of one news story that Trump has perpetuated in the news cycle to distract from his Administration's mishandled policy decisions.³³⁰

While the Trump Administration continued to mismanage the ongoing crisis in Puerto Rico resulting from Hurricane Maria, Trump diverted media attention to the NFL's protests.³³¹ Trump asked Vice President Pence to leave the stadium if any players kneeled in protest during the game that Pence was attending.³³² Pence left the football game during the protests as he was told.³³³ That story dominated headlines instead of the far more important hurricane recovery efforts led by the Trump Administration.

As Trump continues to set the agenda for the media, it is Trump who decides which policies get covered comprehensively and which headlines reach American families. That is destructive to our democracy as it denies the citizens the information that is necessary to assess what the President is doing. Indeed, the American citizen cannot properly evaluate the President without full and accurate information. It is that duty, belonging to citizens, to evaluate and criticize government officials and policies that is an essential guarantee of democratic freedom.

CONCLUSION

The last two years in American politics have been fascinating, as social media has become a powerful tool for federal, state, and local governments.³³⁴ It has become a platform which has provided unprecedented access to government officials and dissemination of information.³³⁵ Today, citizens can receive up-to-the-minute traffic updates from their local transportation department on Twitter,³³⁶ join con-

³²⁹ *Id.*

³³⁰ See, e.g., Ezra Klein, *Trump Picks Cultural Fights to Distract Americans from His Policies and Their Results*, VOX (Oct. 9, 2017), <https://www.vox.com/policy-and-politics/2017/10/9/16447610/trump-pence-nfl-distraction>.

³³¹ *Id.*

³³² *Id.*

³³³ Eli Watkins, *Pence Leaves Colts Game After Protest During Anthem*, CNN (Oct. 9, 2017), <https://www.cnn.com/2017/10/08/politics/vice-president-mike-pence-nfl-protest/index.html>.

³³⁴ Matt Anthes, *Social Media as a Vital Engagement Platform for Government Outreach*, FORBES (Oct. 2, 2017), <https://www.forbes.com/sites/forbesagencycouncil/2017/10/02/social-media-as-a-vital-engagement-platform-for-government-outreach/#29eabc24b29>.

³³⁵ *Id.*

³³⁶ E.g., Stephanie Rosenbloom, *How to Use Twitter and Facebook for Emergency Travel Information*, N.Y. TIMES (Sept. 21, 2017), <https://www.nytimes.com/2017/09/21/travel/social->

gressional town hall meetings on Facebook Live,³³⁷ or read live blog posts of public school meetings when they are unable to attend in person.³³⁸ Social media has provided access to government that has simply not been possible to the same degree before. In some instances, it is more than a mere convenience; it is life-saving.³³⁹ As Hurricane Sandy pounded the U.S. Atlantic coast in 2012, Twitter became the lifeline for thousands of citizens who were left without power.³⁴⁰ The New York City Mayor's office used Twitter to provide residents with critical food and water distribution points.³⁴¹ During Hurricane Maria, Twitter once again served as an essential tool for the government to provide life-saving information to residents—from emergency evacuation routes to shelter information.³⁴²

Like many government social media sites, President Trump's Twitter account, @realDonaldTrump, has become an important source of information about his policy views and has served as a *digital-age designated public forum* for speech by and to the President.³⁴³ Twitter has become the hallmark of the Trump Administration.³⁴⁴ Trump and aides in his Administration have used Twitter with a frequency and intensity unlike that of any other President in U.S. history.³⁴⁵ Twitter had been used to announce, describe, and defend Trump's policies;³⁴⁶ express opinions on local and global events and leaders;³⁴⁷ and to broadcast calls for congressional action.³⁴⁸ Trump has also used it to engage with foreign political leaders, which has provided American citizens an unprecedented, intimate insight into the President's Article II power as he engages with foreign leaders.³⁴⁹

media-emergencies.html.

³³⁷ E.g., Kerry Flynn, *Facebook's 'Town Hall' Is Probably the Best Thing the Social Network Has Ever Done*, MASHABLE (Mar. 27, 2017), <https://mashable.com/2017/03/27/facebook-town-hall-launch/#6EZ.HatCniq5>.

³³⁸ E.g., T. Keung Hui, *Wake County Streaming School Board Meetings Online*, THE NEWS & OBSERVER (Mar. 27, 2014), <https://www.newsobserver.com/news/local/education/wake-ed-blog/article10301432.html>.

³³⁹ Rosenbloom, *supra* note 336.

³⁴⁰ *Id.*

³⁴¹ NYC Mayor's Office (@NYCMayorsOffice), TWITTER (Nov. 1, 2012, 5:24 PM), <https://twitter.com/NYCMayorsOffice/status/264161022443651072>.

³⁴² Rosenbloom, *supra* note 336.

³⁴³ Landers, *supra* note 302; Smith, *supra* note 250.

³⁴⁴ Buncombe, *supra* note 12.

³⁴⁵ *Id.*

³⁴⁶ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 23, 2017, 3:18 PM), <https://twitter.com/realdonaldtrump/status/933837062293291008>.

³⁴⁷ Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 8, 2018, 6:00 AM), <https://twitter.com/realdonaldtrump/status/982966315467116544>.

³⁴⁸ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 2, 2017, 11:33 AM), <https://twitter.com/realdonaldtrump/status/926155393490878464?lang=en>.

³⁴⁹ Donald J. Trump (@realDonaldTrump), Twitter (May 10, 2018, 7:37 AM),

As Trump tweets nearly ten times daily (he has tweeted up to fifty-nine times in a single day), Twitter has become the primary channel of communication between the President and his constituents.³⁵⁰ There are many instances in which Twitter was not merely an alternative channel of information, or even a primary one; rather, on many occasions, it has been the President's exclusive vehicle to disseminate important information.³⁵¹ For example, Twitter was the sole platform used by Trump to announce Christopher A. Wray as the new nominee for Director of the FBI.³⁵² Trump also acknowledged for the first time on Twitter that he "did not make, and do not have" any "tapes" or recordings of his "conversations with James Comey" concerning some serious allegations regarding his campaign's possible ties to Russia.³⁵³

This new wave of online political engagement has resulted in a forum whereby citizens can engage in real time with the highest elected officials on social media. Indeed, in response to his tweets, citizens comment, like, and post about the President and his policies. The Internet has undoubtedly become this generation's "modern public square."³⁵⁴

While an increase in political discourse and civic engagement is positive, First Amendment lawyers and scholars worry that the punitive use of social media by government officials may erode the foundational principles articulated by the First Amendment's earliest champions, Justices Holmes and Brandeis.

Indeed, early in its First Amendment jurisprudence, the Supreme Court struggled to articulate a workable rule to govern criminal prosecutions under syndicalism laws.³⁵⁵ These cases arose during World Wars I and II and the Cold War.³⁵⁶ Often citizens, who opposed a particular war or government policy, were criminally punished for merely voicing opposition through words and association with disfavored political ideology.³⁵⁷ Early champions of free speech, Justices Brandeis and Holmes, helped define the First Amendment Free Speech and Press Clauses and provided a foundation for *New York Times v. Sullivan*.³⁵⁸ They recog-

<https://twitter.com/realDonaldTrump/status/994587349718847489>.

³⁵⁰ Buncombe, *supra* note 12.

³⁵¹ See *supra* notes 247–49.

³⁵² Donald J. Trump (@realDonaldTrump), TWITTER (Jun. 7, 2017, 4:44 AM), <https://twitter.com/realdonaldtrump/status/872419018799550464?lang=en>.

³⁵³ Donald J. Trump (@realDonaldTrump), TWITTER (Jun. 22, 2017, 9:55 AM), <https://twitter.com/realdonaldtrump/status/877932956458795008?lang=en>.

³⁵⁴ *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017).

³⁵⁵ See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, (1969); *Dennis v. United States*, 341 U.S. 494, (1951); *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring).

³⁵⁶ *Brandenburg*, 395 U.S. at 444; *Dennis*, 341 U.S. at 494; *Whitney*, 274 U.S. at 357.

³⁵⁷ See *Whitney*, 274 U.S. at 371.

³⁵⁸ *Id.* at 375–78 (Brandeis, J., concurring); *Abrams v. United States*, 250 U.S. 616, 630–31 (1919) (Holmes, J., dissenting); *Schenck v. United States*, 249 U.S. 47, 52 (1919).

nized that the freedom of the press to criticize public officials and the right of citizens to engage in robust public discourse without fear of retaliation are essential to democracy.³⁵⁹ As such, the heart of the First Amendment was to protect both the “citizen critic” and the marketplace of ideas.³⁶⁰

The increase of political engagement via social media tools like Facebook and Twitter has resulted in a backlash for citizens who express their disagreement with or criticism of President Trump, posing grave threats to these cherished values. He has infamously blocked Twitter users that expressed discontent with his policies.³⁶¹

Courts are currently grappling with the constitutionality of such an act. Certainly, President Trump’s act of blocking users from his Twitter account is susceptible to First Amendment scrutiny under existing legal doctrines, although they have not, until recently, been applied to the internet and social media websites. Indeed, at least one court has held that the President’s blocking of individuals from the @realDonaldTrump account was an impermissible viewpoint-based restriction on the individual Plaintiffs’ participation in a designated public forum.³⁶² In doing so, it proscribed a workable legal framework for judging government limitations on access to interactive spaces on social media websites that included a nuanced public forum analysis.³⁶³

The *Knight First Amendment Institute*’s convergence of the government speech doctrine and the public forum analysis can serve as a blueprint for future courts considering similar questions. If the public forum analysis does not apply, President Trump can likely block and refuse to communicate with any one Twitter follower he chooses. But even more critical is the *Knight First Amendment Institutes* decision’s reclaiming of hallmark First Amendment principles.

Whether it’s his bashing of the “fake news” media or his punitive blocking of Twitter users after they disagree with him, President Trump’s caustic rhetoric, online censorship, and attack on the press are highly destructive and, in combination, are an onslaught on the very First Amendment principles and values that serve as the basis of the American democracy. Indeed, by condemning the press and manipulating the message heard by citizens, President Trump is attempting to control the marketplace of ideas, articulated by Justice Holmes as essential to uncovering the truth.³⁶⁴ And by censoring the speech of private citizens on social

³⁵⁹ *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring) (stating that citizens have a political duty to engage in public discussion and “that the greatest menace to freedom is an inert people”).

³⁶⁰ *Id.*

³⁶¹ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 575 (S.D.N.Y. 2018).

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ *Whitney*, 274 U.S. at 375.

media, President Trump is jeopardizing the role of Justice Brandeis's notion of the citizen-critic, described as essential to cultivating "thought, hope, and imagination."³⁶⁵ Ultimately, President Trump's attack on the fake news press and his silencing of the citizen-critic is shackling political speech and undermining the central meaning of the First Amendment.³⁶⁶

While the courts are struggling to respond with legal remedies, it may be up to the voters—not the courts—to constrain the President's acts of censorship. Indeed, even the *Knight First Amendment Institute* court recognized the difficulty of enforcing a legal remedy against a sitting president.³⁶⁷ The President can—and likely will—ignore any order of injunctive relief, posing a constitutional crisis under the separation of powers doctrine.

Ultimately, the American people can wield a much more powerful baton at the ballot box in 2020. The electorate can simply vote President Trump out of office, ending the impermissible government censorship once and for all. Then, as a private citizen, he can go on to tweet as often as he wants without fear of First Amendment reprisal.

³⁶⁵ *Id.*

³⁶⁶ *See id.*

³⁶⁷ *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 578 (S.D.N.Y. 2018).