
by

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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

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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 quiescent 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 States

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INTRODUCTION

This Article is the companion piece to our Article, *Speech Narcissism*. 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. 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. That trend, we argued, had a chilling effect on college campuses and offended First Amendment values that are central to our democracy. 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
45th President of the United States. 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. At the same time, candidate Trump’s communicative style, allegations of fake news, and ubiquitous tweeting became news itself. His unexpected victory as the Republican nominee, surviving a field of twelve candidates, and even more surprising presidential win will be remembered as one of the most unconventional political races in the annals of history.

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. 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. Of course, it is the subject of the President’s tweets that creates news and engenders an often strong, and sometimes divisive, reaction.

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7 Id.
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. 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.

While the 280-character limitation 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. 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. Reports of spreading false news date back to the 16th century. However, the term “fake news” is much more recent. According to etymologists, the word “fake” did not appear in common use prior to the 18th century. While not a new concept or term, President Trump has made “fake news” a household term. He uses the term “to discredit a mainstream American media that is aggressively investigating his presidency.”

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18 Id.

19 Id.

20 Id.

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

Also troubling is the Trump Administration’s efforts to remove general information from government websites. 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.” 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.

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 punishment on those who criticize him, his vitriolic response to criticism can affect the economic well-being of his

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

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, the government cannot exclude speakers from public fora, and even nonpublic fora, based solely on a disagreement with the speaker’s viewpoint. In attempting to silence opposition and control access to truthful information, President Trump is acting much like a 17th century monarch. The President’s response to opposing viewpoints is to denigrate and silence the speaker. Ultimately, his fake news attack is shackling political speech and undermining the central meaning of the First Amendment.

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. 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.

30 Id.
31 Id.
33 See Summum, 555 U.S. at 469–70.
36 Id.
President Trump has effectively used social media as a persuasive tool to control information, to rally his supporters, and to silence his critics.\textsuperscript{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\textit{Knight First Amendment Institute v. Donald J. Trump},\textsuperscript{40} such an analysis has been applied to public comment sessions of public meetings\textsuperscript{41} 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."\textsuperscript{42}

The First Amendment serves as the blueprint of personal liberty.\textsuperscript{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.\textsuperscript{44} Sir William

\textsuperscript{39} See infra Part III.

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

\textsuperscript{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).

\textsuperscript{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.).

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

\textsuperscript{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.”

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. 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. Most state constitutions already included a Bill of Rights. The Framers feared that the mere enumeration of some rights would impliedly exclude other rights and provide the federal government additional powers other than those expressly written in the Constitution. However, inclusion of the Bill of Rights was necessary to secure the required number of states needed to ratify the Constitution.

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. Memories of the English crown’s suppression of opposition were fresh in the minds of former colonists.

The Framers sought to avoid repeating a tyrannical government by ensuring that speech and press would be free and open. 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. An inquiry as to the accuracy of the state-

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.
55 Id. at 300.
ments was irrelevant, as even truthful statements were punished if they were disfavored.\textsuperscript{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.\textsuperscript{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 1917\textsuperscript{58} and state syndicalism laws of that time.\textsuperscript{59} In \textit{Schenck v. U.S.}, Justice Holmes’ famous quote about falsely shouting fire in a crowded theater\textsuperscript{60} recognized that the absolute language of the First Amendment could not be literally applied.\textsuperscript{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.\textsuperscript{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.\textsuperscript{63} In its early attempts to find this balance, the Court adopted Justice Holmes’ clear and present danger test.\textsuperscript{64} Under that test, the Court upheld prosecutions for subversive advocacy by weighing “imponderables”\textsuperscript{65} in concluding that a speaker’s teaching, advocacy, or expressed beliefs came close enough to overthrow the government by force or violence.\textsuperscript{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 \textit{putsch} is about to be executed.”\textsuperscript{67}

\textsuperscript{56} \textit{Id.} at 318–19.
\textsuperscript{58} \textit{See, e.g.}, \textit{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).
\textsuperscript{60} \textit{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.”).
\textsuperscript{61} \textit{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”).
\textsuperscript{62} \textit{Id.}
\textsuperscript{63} \textit{Dennis v. United States}, 341 U.S. 494, 503 (1951).
\textsuperscript{64} \textit{Id.} at 515.
\textsuperscript{65} \textit{Id.} at 570 (Jackson, J., concurring).
\textsuperscript{66} \textit{Id.} at 516–17.
\textsuperscript{67} \textit{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.”\(^78\)

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\(^68\) 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.

\(^74\) Id.


\(^76\) Id.

\(^77\) See Abrams, 250 U.S. at 630 (Holmes, J., dissenting).

\(^78\) Id.
Although deeply entrenched in the idealized notions and jurisprudence of the First Amendment, the marketplace of ideas theory has many critics. 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. 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. Factors such as charisma, authority, or persuasiveness of the speaker play a major role.

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.

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. 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. He, too, spoke about free speech and political truth, but he adopted a slightly different focus than Justice Holmes.

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80 Id.
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.
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 theory\(^95\) 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.
\(^95\) Abrams, 250 U.S. at 630 (Holmes, J., dissenting).
\(^96\) Whitney, 274 U.S. at 375 (Brandeis, J., concurring).
\(^98\) 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. Nevertheless, these two theories survive despite the lack of social science
supporting their underlying assumptions.

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

After Brandenburg, many convictions for disorderly conduct during the Vi-
ernam War and the Civil Rights era were overturned. 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. The Brandenburg standard strengthened speech and
associational rights and lifted the threat of lengthy prison sentences for subversive
advocacy.

Like the early syndicalism laws, common law defamation provided another
threat to free speech. Public officials could stifle the press with the threat of
ruining civil damages, too easily awarded under common law libel claims. 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.

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.

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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.
102 Id. at 448.
103 Id. at 447.
104 Id. (citing Whitney v. California, 274 U.S. 357 (1927)).
107 Brandenburg, 395 U.S. at 447–49.
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*. 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.

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. In *Sullivan*, the Court addressed the extent to which the government may limit the press in its ability to criticize the government. 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. 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.

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

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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.\textsuperscript{123}

The Sullivan Court defined the central meaning of the First Amendment according to the primary values first articulated by Justices Holmes and Brandeis.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{127} It is the citizens who play a key role in safeguarding democracy.\textsuperscript{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.\textsuperscript{129} As Madison said, it is the people, not the government, who possess absolute sovereignty.\textsuperscript{130} As such, the censorial power belongs to the people over the government, not the government over the people.\textsuperscript{131} In Garrison v. Louisiana, the Supreme Court revisited the idea of the citizen-critic.\textsuperscript{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.”\textsuperscript{133}

\textsuperscript{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.”).


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

\textsuperscript{126} Sullivan, 376 U.S. at 270.

\textsuperscript{127} Id. (citing Whitney, 274 U.S. at 375–76).


\textsuperscript{129} Sullivan, 376 U.S. at 270 (citing Whitney, 274 U.S. at 375–76).

\textsuperscript{130} Id. at 274.

\textsuperscript{131} Id. at 282.


\textsuperscript{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 . . . .”\textsuperscript{134} Speech critical of the government or government officials does not lose its First Amendment protection merely because it offends their official reputation.\textsuperscript{135} Therefore, injury to official reputation is insufficient grounds for repressing speech that would otherwise be protected.\textsuperscript{136}

Shortly after the ratification of the First Amendment, Congress enacted the Sedition Act of 1798.\textsuperscript{137} At the time of its enactment, the political atmosphere was very similar to present-day—one of heightened nationalism and intolerance of foreigners.\textsuperscript{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 . . . .”\textsuperscript{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 . . . .”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{143} Congress never renewed the Sedition Act.\textsuperscript{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-

\textsuperscript{134} Sullivan, 376 U.S. at 273.
\textsuperscript{135} Id. at 272–73.
\textsuperscript{136} Id.
\textsuperscript{137} Anderson, supra note 46 at 515.
\textsuperscript{138} Rohde, supra note 53, at 28.
\textsuperscript{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)).
\textsuperscript{140} Rohde, supra note 53, at 28 (quoting Sedition Act, ch. 74, sec. 1, 1 Stat. 596 (1798)).
\textsuperscript{141} Anderson, supra note 46, at 515.
\textsuperscript{142} Id.
\textsuperscript{143} Jenkins, supra note 28, at 156.
\textsuperscript{144} Id.
significant deterrents to uninhibited public discourse. 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.

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. The strategy was effective. 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 mis-statements. However, libel laws that grant excessive damage awards—even for minor errors—would not only deter false statements; they would also deter accurate statements. 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 . . . ."

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. The Court reasoned that fear of money damages has a far greater chilling effect on speech than that of criminal prosecution. 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

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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.
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.").
153 Sullivan, 376 U.S. at 277.
system. If the First Amendment is to truly protect “uninhibited, robust, and wide-open” public discourse, then erroneous statements, absent “actual malice,” 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.” 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].” 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. Generally, content and viewpoint discrimination by the government in regulating private speech is presumptively unconstitutional. But, when the government speaks, content-based and viewpoint specific messages are the norm. In expressing its own message or selecting preferred views through its tax and spend powers, the government is not restrained by the First Amendment.

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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).
In numerous cases and contexts, the Court has upheld the right of government “to say what it wishes.”\footnote{Id. (recognizing government’s right to speak for itself and “say what it wishes”).} Government speech forms a large part of the marketplace of ideas.\footnote{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.”).} 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.\footnote{Summum, 555 U.S. at 468 (citing National Endowment of the Arts v. Finley, 524 U.S. 569, 598 (1998) (Scalia, J., concurring)).} While the Free Speech Clause does not control government speech, the government is not without limits in disseminating ideas.\footnote{Id. (other restraints on government speech exist, such as the Establishment Clause or certain laws, regulations, or practices that limit public officials’ speech).} Ultimately, a government entity is “accountable to the electorate[.]”\footnote{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.”))).} 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.\footnote{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).} The public forum doctrine refers to judicially created rules applied to expressive activity on government owned or controlled property.\footnote{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).} The public forum doctrine is triggered when the government owns the property or when the speech occurs on private property under government control. The government is accountable to the electorate to ensure that private speech is given the same level of protection as government speech. However, the government is not required to provide a forum for all forms of expression.\footnote{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 property).}
private property owner, the Court said that government may prohibit the public from using government property for expressive purposes.\textsuperscript{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.\textsuperscript{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.\textsuperscript{171} Such streets and public places “have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{174} A designated public forum can be unlimited, essentially becoming like a traditional public forum, or limited.\textsuperscript{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.”\textsuperscript{176} This type of government property is categorized as a limited public forum.\textsuperscript{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.\textsuperscript{178} The level of scrutiny depends on the categorization of the property and whether the regulation is content and/or viewpoint-based).

\textsuperscript{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.”).

\textsuperscript{170} \textit{See generally} Day & Bradford, \textit{supra} note 41, at 76.

\textsuperscript{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.”).

\textsuperscript{172} Id.


\textsuperscript{175} Cornelius, 473 U.S. at 802.

\textsuperscript{176} Summum, 555 U.S. at 470 (citing Perry Ed. Assn. v. Perry Local Educators’ Assn., 460 U.S. 37, 46, n.7 (1983)).

\textsuperscript{177} Id.

\textsuperscript{178} Id. at 469–70.
based or content-neutral. The government “need not permit all forms of speech on property that it owns and controls.” 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. Content-based speech restrictions on government property defined as a traditional or designated public forum are subject to strict scrutiny. Reasonable and viewpoint-neutral restrictions are permissible on all other public property.

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. 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.

Considering the history and practice governing airport activity, the Court said that airport terminals are unlike those transportation nodes of the past. 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. 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. 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. As such, the limitations on expressive activity in the airport terminal were subject to a viewpoint-neutral, reasonableness standard.

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179 Id. at 470.
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. 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. 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. 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. 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.

Similarly, the government may selectively fund private speakers to convey its preferred message. 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. 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.

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. 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.

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192 Id. at 464.
193 Id. at 470.
194 Id. at 470–71.
195 Id. at 472.
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-

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)).
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
*Summum* Court characterized the message associated with permanently displayed
monuments, even those privately-donated, as government speech.\(^{216}\) Like the
*Summum* 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 ‘of-
ten closely identified in the public mind’ with the government”; and (3) “the ex-
tent to which government ‘maintain[s] direct control over the messages con-
vveyed’ . . . ”.\(^{218}\)

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 gener-
ated 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 unlikeliness
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
specialty designed license plates constitute government speech denying offensive design does not
violate the First Amendment)).

\(^{219}\) *Id.*

\(^{220}\) *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-
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

\[\text{References}\]

236 Id.
237 Id.
239 Id. at 288.
242 Id.
244 Id. at 607.
245 Id. at 614.
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.\textsuperscript{248} This provided an ever-growing community of people with direct access to the President to receive information about his polices and to express their support or dissent.\textsuperscript{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 polices or expressed criticism of him as President.\textsuperscript{250}

Twitter then became merely another tool used by the President to silence his critics.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{253} But Donald Trump’s hostile response to negative

\textsuperscript{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.

\textsuperscript{249} See Oren Tsur et al., The Data Behind Trump’s Twitter Takeover, POLITICO (Apr. 29, 2016).


\textsuperscript{251} Id.

\textsuperscript{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.

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

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*, 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.


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.


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.
meaning than the one maintained by Trump. 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.”

An example of the PEN America definition of fake news is a story now known as “pizzagate.” 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. Acting on the fake article, a North Carolina man drove to Washington, D.C. with an assault rifle allegedly to “self-investigate” the claim. 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. However, “fake news” in the Trump era is not fiction disguised as news.

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. 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. In doing so, he has accused those officials “without evi-

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262 Id.


266 Id.

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

Trump’s threats to revoke the security clearances of former intelligence offi-
cers, much like his other allegations of “fake news,” appear to be “an intimidation
tactic designed to silence others from speaking out against him.” 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.” 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).

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.” Wilson warned that “if there should be dis-
loyalty, it will be dealt with a firm hand of stern repression” since disloyal individ-
uals “had sacrificed their right to civil liberties.” President Wilson held the posi-
tion 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.

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. Franklin D. Roosevelt, Ronald
Reagan, and virtually every other president held the same view of the me-

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268 Harris et al., supra note 267.
269 Id.
270 Davis & Barnes, supra note 267.
272 Rohde, supra note 53, at 29.
275 Harris & Gonchar, supra note 265.
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. 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.** 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.**

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. His frequent use of Twitter to engage in a stream of conscience soliloquy and his recent impromptu call to the morning show, *Fox and Friends*, are unique ways President Trump communicates with the public. His style, form, and content of communication wield great influence.

Indeed, President Trump has proven countless times the powerful influence his Twitter account yields. In a tweet by Trump in December 2016, he stated that Lockheed Martin’s F-35 program was “out of control.” 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. 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. Just recently, President Trump targeted Amazon

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284 Lovelace, Jr., *supra* note 282.
285 Id.
in a flurry of tweets, causing stock market fluctuations.\textsuperscript{286} His tweets corresponded with unfavorable new stories about Trump published in \textit{The Washington Post}, which is owned by Amazon’s CEO, Jeff Bezos, suggesting retaliation for news reporting the President disliked.\textsuperscript{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.”\textsuperscript{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!”\textsuperscript{289}

In reality, television licenses are granted to local stations, not to national media companies; so, his threat is mostly bluster.\textsuperscript{290} However, even if President Trump is powerless to effectuate a revocation of television station licenses, these seemingly idle threats can have chilling effects.\textsuperscript{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”).\textsuperscript{292} Viewer complaints are investigated by the FCC and could provide the basis for harsher scrutiny during a license renewal process.\textsuperscript{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.\textsuperscript{294} Therefore, his tweets may generate viewer complaints to the FCC that, in the past, have proven to be impactful in


\textsuperscript{287} Id.


\textsuperscript{289} Darcy & Stelter, \textit{supra} note 288.

\textsuperscript{290} Id.


\textsuperscript{292} Id.


\textsuperscript{294} Day & Weatherby, \textit{supra} note 293, at 484–85.
influencing FCC policy-making.\textsuperscript{295} What President Trump cannot achieve directly, he may be able to achieve indirectly.

As the \textit{Sullivan} Court underscored, the threat of pecuniary loss has a far greater potential to shackle speech than even criminal sanctions.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{301}

\textsuperscript{295} \textit{Id.}; Baker \& Kang, \textit{supra} note 291.
\textsuperscript{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”).
\textsuperscript{298} Lyrissa Barnett Lidsky, \textit{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).
\textsuperscript{299} NOSSEL, \textit{supra} note 260, at 21.
\textsuperscript{300} Stone, \textit{supra} note 147.
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.”

Trump has even said that his “use of social media is not Presidential - it’s MODERN DAY PRESIDENTIAL.”

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. 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, President Trump’s act of blocking users for criticizing him jeopardizes the foundational principles of the Free Speech Clause.

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. The user had stage four Hodgkin’s Lymphoma and explained how the Affordable Care Act was “literally keeping [her] alive.” The mere criticism of the President’s latest healthcare policy caused her to get blocked by the President on Twitter. When a user is blocked from the @realDonaldTrump ac-

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304 See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (July 1, 2017, 3:41 PM), https://twitter.com/realdonaldtrump/status/8812817755017355264?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.”).
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 Pres-
ident has endorsed. More importantly, the President is no longer able to view
the dissenting opinion of the user. Punishing a citizen for criticizing the gov-
ernment 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. 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 imper-
missible viewpoint-based restriction on the individual Plaintiffs’ participation in a
designated public forum.

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. To deny that duty or inhibit free expression by instilling fear
of punishment would abandon the central meaning of the First Amendment.
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 block-
ing critics on Twitter is a familiar playbook for authoritarian regimes. 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.”

In silencing his critics, or chilling dissenters by instilling a fear of retaliation,
Trump is projecting a misleading level of popularity. 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_59652db0eb0f05b0f0dc944da.
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).
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."

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." Trump is attempting to co-opt his own version of democracy by controlling the message and setting the agenda for the media. 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. In fact, a study by Harvard University’s Shorenstein Center has documented how effective the President’s strategy really is. The study found that in his first 100 days in office, Trump received three times the amount of coverage compared to recent presidents. According to another study, the Pew Research Center’s Journalism Project found that nearly two-thirds of news stories about Trump were negative. 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.

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. News stories about Trump’s “collusion with the Russians” have dominated the media since Trump was elected to office. To be sure, members of the Trump campaign may have lied repeatedly and Donald Trump Jr. may have

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323 Id.
326 Id.
attempted to acquire illegally obtained information on Hillary Clinton from a hostile nation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{331} Trump asked Vice President Pence to leave the stadium if any players knelted in protest during the game that Pence was attending.\textsuperscript{332} Pence left the football game during the protests as he was told.\textsuperscript{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.\textsuperscript{334} It has become a platform which has provided unprecedented access to government officials and dissemination of information.\textsuperscript{335} Today, citizens can receive up-to-the-minute traffic updates from their local transportation department on Twitter,\textsuperscript{336} join con-

\textsuperscript{329} Id.
\textsuperscript{331} Id.
\textsuperscript{332} Id.
\textsuperscript{333} Id.
\textsuperscript{336} Id.
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.\(^{349}\)

\(^{337}\) 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.


\(^{339}\) Rosenbloom, supra note 336.

\(^{340}\) Id.


\(^{342}\) Rosenbloom, supra note 336.

\(^{343}\) Id.; Landers, supra note 302; Smith, supra note 250.

\(^{344}\) Buncombe, supra note 12.

\(^{345}\) Id.


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


\(^{349}\) 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. 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. For example, Twitter was the sole platform used by Trump to announce Christopher A. Wray as the new nominee for Director of the FBI. 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.

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.”

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. These cases arose during World Wars I and II and the Cold War. 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. 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*. They recog-
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. As such, the heart of the First Amendment was to protect both the “citizen critic” and the marketplace of ideas.

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.

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.

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.

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 Institute’s 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. 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.


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 imagina-
tion.” Ultimately, President Trump’s attack on the fake news press and his si-
lencing of the citizen-critic is shackling political speech and undermining the cen-
tral meaning of the First Amendment.

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. In-
deed, even the Knight First Amendment Institute court recognized the difficulty of
enforcing a legal remedy against a sitting president. The President can—and
likely will—ignore any order of injunctive relief, posing a constitutional crisis un-
der 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 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).