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A. J. Colkitt

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NOTE

#BLOCKEDBYTRUMP: WHY A GOVERNMENT-RUN SOCIAL MEDIA PAGE ON A PRIVATELY-RUN PLATFORM CANNOT BE A PUBLIC FORUM

A. J. Colkitt[†]

ABSTRACT

Ten years ago, it would have been hard to imagine regular news stories opening with the phrase, “The President announced in a tweet today.” Yet in today’s reality, use of social media is an increasingly accepted norm for government officials. Although the concept may sound juvenile on the surface, the use of social networking platforms has been gaining more and more traction among public officials in the United States. With this rise in popularity, it is inevitable that tough legal issues will arise. In particular, social media has challenged courts to determine exactly what protections should be afforded to both public officials and users of social media platforms.

As private companies, social media websites maintain an immense amount of control over their platforms and the users of their websites. Not only may these companies restrict the speech of their users and suspend any user’s account, but the terms that users agree to follow are also subject to change at any time. This is because, since these companies are not government agents, users are not guaranteed a right to free speech on the companies’ respective platforms.

Despite the control that these private companies may exercise over their users, the District Court for the Southern District of New York held that the doctrine of public forum applies to the Twitter account run by President Donald Trump. Specifically, the court held that the President designated the space as a place where the public could converse without government restriction. Thus, the court held that President Trump violated the plaintiffs’ First Amendment rights when he blocked their accounts from viewing and commenting on his posts.

[†] A.J. Colkitt, Juris Doctor Candidate, Liberty University School of Law, May 2020. I would like to thank my amazing wife, family, and mentors for all of their help and encouragement through the process of writing this Note. All of your support has been instrumental.

This ruling could have a devastating impact on the law of public forum and the general public's First Amendment rights. By classifying a government-run social media page as a public forum, the court gave private companies the authority to restrict the speech of citizens in a public forum. Because Twitter is not a government entity, the restrictions that it places on its users are not subject to the same strict scrutiny as any restrictions imposed by a public employee. Such a rule would grant private companies the right to censor individuals in a way that would not be permissible if the government attempted to do the same. This would open a dangerous door to privatized censorship.

Because the website owners have discretion to impose limits on their users, it is unreasonable to hold that a user has a guaranteed right to free speech on the platform. Thus, instead of categorizing government-run social media pages as a public forum, courts should limit public figures' use of social media to the exercise of government speech. Such a limited rule would retain the majority of the benefits of government social media use while eliminating the immense risk of privatized censorship. Under this rule, officials' social media pages and posts would be treated in the same way as all other government speech.

I. INTRODUCTION

Twitter, Facebook, LinkedIn, Instagram, Snapchat, Reddit—the never-ending list of social media platforms can be difficult to keep up with at times. However, it is undeniable that the Internet has made it far easier for people across the globe to interact with one another. In recent years, government officials have taken to social networking sites to communicate with their constituents. This trend is not limited to the United States; governments around the world are increasingly making use of this new mode of communication. In fact, in 2014, twenty-six out of thirty-four member countries of the Organisation for Economic Co-operation and Development reported that their executive officials had created official social media accounts to communicate to the masses.¹ Such use of social networking sites has proven incredibly beneficial, as government officials can disseminate information to their constituents in a quick and easy manner.² However, with this new use of social media, it is inevitable that this “official” use of social media creates novel and complex legal questions. Chief among these

1. Arthur Mickoleit, *Social Media Use by Governments: A Policy Primer To Discuss Trends, Identify Policy Opportunities and Guide Decision Makers 2* (Org. for Econ. Co-operation and Dev., Working Papers on Pub. Governance No. 26, 2014).

2. Lyrrisa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 2004 (2011).

questions is the foundational inquiry: how should courts treat government-run social media pages?

In March 2018, the Second Circuit attempted to answer precisely this question in *Knight First Amendment Institute at Columbia University v. Trump*, where the Second Circuit held that the Twitter page @realDonaldTrump is a “designated public forum.”³ This means that government officials who operate “official” social media pages of government officials, such as President Donald Trump, would not have the constitutional authority to “block” accounts from accessing and interacting with their page on the basis of disagreeing with the commenter, as it would be considered impermissible viewpoint discrimination.⁴

On the surface, such a restriction seems reasonable; after all, it would seem in the government’s best interest to protect freedom of speech by allowing all members of the public to view and sound off on this platform. On the other hand, should this standard be applied uniformly, this precedent could grant private individuals and institutions the power to significantly restrict the public’s access to a forum specifically designed to be open to the public. Given the immense amount of power and control that the sites hold over the users and pages on their platform, users may be denied access to public fora without the benefit of due process. Thus, instead of applying the confusing and ill-fitting classification of “public forum” to government-run social media pages, courts should not treat these pages as an area to converse; rather, these accounts should only be used as a means to disseminate government speech to the general public.

II. BACKGROUND

Before analyzing the impact of the application of the public forum doctrine on social media platforms, there must be an understanding of the often-confusing foundations of both public fora and social networking websites. Specifically, it is vital to understand first, what constitutes a public forum, how social media sites are structured for the users and for the companies controlling the platform, and how the doctrine of public fora has already been applied to pages created by public officials wishing to communicate with their constituents.

3. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019).

4. *Id.* at 234.

A. *Law of Public Fora*

An analysis of government-run social media pages requires an understanding of the jurisprudence surrounding public fora. The public forum protects individuals from government censorship and exists where “government property has by law or tradition been given the status of a public forum.”⁵ Where a public forum exists, the government may only place “content neutral, time, place, and manner restrictions or content-based” restrictions on the individual’s speech.⁶ Content-based restrictions, however, must be subject to strict scrutiny.⁷

The Supreme Court has recognized that there are three ways that property can be construed as a public forum by either tradition or law.⁸ The first avenue involves spaces that have been open for public discourse by virtue of “long tradition or by government fiat.”⁹ These traditional public fora include sidewalks, public parks, and other areas that are considered “quintessential” public areas.¹⁰ The second avenue identified by the Supreme Court is non-public fora.¹¹ This category is reserved for instances where the government specifically opens a piece of public property not generally considered a public forum.¹² Finally, the Supreme Court has recognized that the government may create a designated public forum.¹³

In this last category, the government may “create a public forum, for purposes of the First Amendment free speech protections, by its designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for discussion of certain subjects.”¹⁴ Here, the government must deliberately open a place for the public to engage in expressive activity.¹⁵ This designation cannot be unintentional.¹⁶ Furthermore, the government must specifically intend to “make the property generally available to a class of speakers.”¹⁷ While the government may limit the public forum to a specific class, a public forum is

5. 16A AM. JUR. 2D *Constitutional Law* § 540 (2009).

6. *Id.*

7. *Id.*

8. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983).

9. *Id.* at 45.

10. *Id.*

11. *Id.* at 46.

12. *Id.*

13. *Id.* at 45.

14. 16A AM. JUR. 2D *Constitutional Law* § 541 (1979).

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

16. *Ark. Educ. Tv Comm’n v. Forbes*, 523 U.S. 666, 679 (1998) (citations omitted).

17. *Id.* at 679 (citations omitted).

not created when only specific members of the class are granted permission to use the designated public forum.¹⁸

While a public forum generally exists on government-owned property, the Supreme Court has also found that a designated public forum can be created on private property.¹⁹ This, however, is only reserved for limited circumstances: the private property must be controlled in such a way that the property has adopted the functions and workings of a town government.²⁰ This would include residential buildings, sewage systems, and business blocks.²¹ Thus, as a general matter, public fora are limited to places where the government has control over the premises. However, a designated public forum can exist in one other context: the government must exercise control over the property that is intended for public discourse.²² This analysis may apply to property in the government's charge, even if the government does not have legal title to the property.²³ The Supreme Court held that private property can be a public forum if the government exercises sufficient control over the property and opens the property for public discourse.²⁴ Therefore, the doctrine of designated public fora may apply to private property when the property is intentionally open to public discourse and subject to government control, regardless of actual government ownership.

B. *Nature of Social Media Platforms*

While a public forum may be created on private property, social networking sites have proven difficult to categorize. Unlike private property typically converted to a public forum, the Internet has no physical space that may be occupied by either the government or individuals wishing to express themselves. However, the Supreme Court has not found this problematic and has held that a “metaphysical” public forum can be created.²⁵ While this may seem reasonable on the surface, the categorization of social media sites poses multiple issues that are not readily apparent. First, in order to participate in social media platforms, users must agree to the platform's respective terms of

18. *Id.*

19. *Marsh v. Alabama*, 326 U.S. 501 (1946).

20. *See Hudgens v. NLRB*, 424 U.S. 507 (1976).

21. *Id.* at 516 (citing *Marsh*, 326 U.S. at 502).

22. *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985).

23. *Id.*

24. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975).

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

service.²⁶ For example, sending a tweet or responding to another user's tweet on Twitter requires the user first to have an account. By clicking the "sign up" button, users are met with a message that reads, "By signing up, you agree to the Terms of Service and Privacy Policy, including Cookie Use."²⁷ Similarly, users creating a Facebook account are informed that, by signing up, they agree to the "Terms, Data Policy and Cookies Policy."²⁸

Both Twitter and Facebook present a "take-it-or-leave-it" contract to the users that leaves no room for negotiation. Failure to follow these terms could potentially result in an indefinite ban of the user's account from the respective platform.²⁹ The second and even more concerning consideration is the fact that the terms of service are constantly subject to change.³⁰ In particular, both platforms have expressly reserved, within their terms of service, the right to amend the terms at any time.³¹ In an official public post, Twitter even explained that their policies are a "living document" and that Twitter is constantly "working to update, refine, and improve both our enforcement and our policies, informed by in-depth research around trends in online behavior both on and off Twitter, feedback from the people who use Twitter, and input from a number of external entities, including members of our Trust & Safety Council."³² This means that a user's conduct may conform to the platform's rules one day and the next be the cause of their account's indefinite removal from the platform.³³

After agreeing to the Terms of Service and Privacy Policy, users are given the ability to create their profile and begin interacting on the platform. Once users create their profile, they may create "posts" using their account. These

26. See *Twitter Terms of Service*, TWITTER, <https://twitter.com/en/tos> (last visited Oct. 27, 2018); *Terms of Service*, FACEBOOK, <https://www.facebook.com/terms.php> (last visited Oct. 27, 2018).

27. *Create Your Account*, TWITTER, <https://twitter.com/i/flow/signup> (last visited Oct. 27, 2018).

28. "Sign Up," FACEBOOK, <https://www.facebook.com> (last visited Oct. 27, 2018).

29. See *Twitter Terms of Service*, TWITTER, <https://twitter.com/en/tos> (last visited Oct. 27, 2018); *Terms of Service*, FACEBOOK, <https://www.facebook.com/terms.php> (last visited Oct. 27, 2018).

30. See *Twitter Terms of Service*, TWITTER, <https://twitter.com/en/tos> (last visited Oct. 27, 2018); *Terms of Service*, FACEBOOK, <https://www.facebook.com/terms.php> (last visited Oct. 27, 2018).

31. *Twitter Terms of Service*, TWITTER, <https://twitter.com/en/tos> (last visited Oct. 27, 2018); *Terms of Service*, FACEBOOK, <https://www.facebook.com/terms.php> (last visited Oct. 27, 2018).

32. Del Harvey, *The Twitter Rules: A Living Document*, TWITTER (Aug. 7, 2018), https://blog.twitter.com/official/en_us/topics/company/2018/TheTwitterRulesALivingDocument.html.

33. See *id.*

posts, once created, are then distributed by the platform so that, depending on the user's privacy settings, others with accounts may view the post and potentially respond to the user. The ability to post and comment on the platform, however, raises an odd question that must be asked about the page itself: who is responsible for the information and content of the post? There is a strange dichotomy to social media platforms, in that the sites themselves publish the posts that users create, despite the fact that the platforms have not "created" the speech themselves. In *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, the plaintiff operated a page on Facebook that focused on the "plight of religious minorities of India and their treatment by successive Indian Governments and promotes independence for Sikhs in the Indian state of Punjab."³⁴ However, Facebook blocked access to the plaintiff's page in India.³⁵ Facebook did so without providing any notice to the plaintiff.³⁶

The plaintiff filed suit alleging that Facebook discriminated against the plaintiff on the basis of "race, religion, ancestry, and national origin."³⁷ However, the Ninth Circuit held that the plaintiff failed to establish that Facebook could be held liable for "discriminatory conduct" since Facebook is merely a publisher of the plaintiff's information.³⁸ Under this standard, the publisher is able to review, edit, and decide whether to publish or withdraw any content from a third party.³⁹ This is due to the immunity provided to publishers under the Communications Decency Act.⁴⁰ Thus, Facebook was justified in refusing to publish the plaintiff's content in India and, by extension, remove users' posts from their website altogether.⁴¹ This is because this authority is within Facebook's discretion as the publisher.⁴² Therefore, because social media sites are merely publishers, social networking companies, such as Facebook and Twitter, may outright refuse to give users the ability to use their platforms to publish their posts or disseminate their speech.

Once the user creates a post and the platform publishes the post on the user's profile, the post affords others the opportunity to directly respond to

34. See *Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1090 (N.D. Cal. 2015), *aff'd* *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 Fed. Appx. 526 (9th Cir. 2017) (internal quotation marks omitted).

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 1095.

39. *Id.* at 1094.

40. *Sikhs*, 144 F. Supp. 3d at 1094; 47 U.S.C. § 230 (2011).

41. *Sikhs*, 144 F. Supp. 3d at 1095–96.

42. *Id.*

the content. This is done in an area called the “comment section.” This area of the platform, however, may not be open to all people with an account on the platform. Both Facebook and Twitter give the individual users the ability to “block” other accounts from accessing the comment sections of their posts.⁴³ This understanding of how social media operates and how a “block” impacts the users on the platform is foundational to understanding how the courts have misunderstood the nature of the platform of social media and the application of the doctrine of public forum to government-run pages.

C. Knight First Amendment Institute at Columbia University v. Trump

In recent years, the realms of public fora and social media have intersected. As the use of social media to communicate with a wide audience has become increasingly prominent among government officials, courts have been faced with the difficult task of classifying these government-run social media pages. In May of 2018, the District Court for the Southern District of New York held that Twitter accounts and the ability to directly reply to tweets are classified as a designated public forum.⁴⁴

In *Knight First Amendment Institute at Columbia University v. Trump*, the plaintiffs had been individually banned by President Trump from viewing and commenting on the President’s tweets from his account @realDonaldTrump.⁴⁵ President Trump stipulated that the plaintiffs were directly banned because they had been critical of the President and his policies.⁴⁶ As a result of President Trump’s block, the plaintiffs were unable to view or directly reply to any of the tweets from the account @realDonaldTrump.⁴⁷ The Knight First Amendment Institute brought the suit on the basis that it desired to “read comments that otherwise would have been posted by the blocked plaintiffs, and by other accounts blocked by @realDonaldTrump, in direct reply to @realDonaldTrump tweets”⁴⁸

In analyzing the nature of the plaintiffs’ speech, the district court turned to the application of the doctrine of public fora.⁴⁹ Specifically, the court narrowed its focus to the control that President Trump exercises over both

43. See *How To Block Accounts on Twitter*, TWITTER, <https://help.twitter.com/en/using-twitter/blocking-and-unblocking-accounts> (last visited Jan. 12, 2019); *Blocking People*, FACEBOOK, <https://www.facebook.com/help/290450221052800> (last visited Jan. 12, 2019).

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

45. *Id.* at 553.

46. *Id.* at 553–54.

47. *Id.* at 554.

48. *Id.*

49. *Id.* at 565.

the posts and the ability to prevent others from using the comment sections to the posts made by his account @realDonaldTrump.⁵⁰ The court found that President Trump and the White House Director of Social Media Dan Scavino had sufficient governmental control over the account.⁵¹ While the opinion mentioned in passing the fact that Twitter is a “private” company that maintains control over “all . . . Twitter accounts,” the court was more interested in the amount of control that the government exercised over the content of the tweets and accounts authorized to interact with the tweets from the account.⁵² In particular, the court found that President Trump and Director Scavino’s ability to create the content of each tweet and block specific accounts from viewing and responding to the tweets published by the account was sufficient to establish government control over the account @realDonaldTrump.⁵³

Additionally, the court held that the President intended to create a designated public forum.⁵⁴ This was because Scavino had previously told the general public that the President’s account was to be used “as a means through which the President ‘communicates directly with you, the American people!’”⁵⁵ While neither Scavino nor President Trump mentioned that the account could be used for the public to communicate back to the President, the Second Circuit analyzed the nature of the platform to determine the intent of President Trump.⁵⁶ Specifically, the court looked to the Supreme Court where the Court held that Twitter could be used to “petition their elected representatives and otherwise engage with them in a direct manner.”⁵⁷ As previously mentioned, a designated public forum can exist if the opportunity to speak is generally available to a class of speakers.⁵⁸ The court in *Knight* seemed to insinuate that the class of speakers designated for the comment section was either the general public or individuals with a Twitter account.⁵⁹

In its analysis, the court examined several factors, including the President’s “policy and past practice, as well as the nature of the property and

50. *Knight*, 302 F. Supp. 3d at 566–67.

51. *Id.* at 566.

52. *Id.* at 566–67.

53. *Id.*

54. *Id.* at 574.

55. *Id.*

56. See *Knight*, 302 F. Supp. 3d at 574.

57. *Id.* (citing *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017)).

58. *Id.*

59. *Id.*

its compatibility with expressive activity.”⁶⁰ To the policy and practice, the court pointed to statements made by Director Scavino where he represented to the people that the account was a means by which the President could communicate directly with the masses.⁶¹ Further, the court held that the account itself and the posts made by the account were accessible to the general public, provided that they had a Twitter account and were not blocked from the President’s own Twitter account.⁶²

In analyzing the nature and compatibility of the account in question, the court held that “the interactive space of a tweet can accommodate an unlimited number of replies and retweets.”⁶³ This, the court held, was more than sufficient to establish the requisite interactivity and compatibility with the “intended” use.⁶⁴ Thus, due to the specific designation of the “open” space, the government control over the space, and the apparent intent to open the account to public discourse, the court held that the Twitter account @realDonaldTrump was a designated public forum.⁶⁵ Because of this classification, the court held that the ban on the plaintiffs’ accounts was impermissible viewpoint discrimination, inconsistent with the First Amendment.⁶⁶ Thus, the court rendered judgment in favor of the plaintiffs.⁶⁷

Here, the court recognized another vital point: posts created by President Trump were not susceptible to the analysis under the doctrine of public forum.⁶⁸ This was because the President’s posts constituted “government speech.”⁶⁹ Based on the facts of the record, the court concluded that President Trump used the account to “announce, describe, and defend his policies; to promote his Administration’s legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; to challenge media organizations whose coverage of his Administration he believes to be unfair; and for other statements”⁷⁰

All of these uses were consistent with the three requirements for government speech: First, the tweets were used to convey a state message.⁷¹

60. *Id.* (quoting *Paulsen v. County of Nassau*, 925 F.2d 65, 69 (2d Cir. 1991)).

61. *Knight*, 302 F. Supp. 3d at 574.

62. *Id.*

63. *Id.* at 573.

64. *Id.* at 574–75.

65. *Id.* at 574.

66. *Id.* at 577.

67. *Knight*, 302 F. Supp. 3d at 580.

68. *Id.* at 571.

69. *Id.*

70. *Id.*

71. *Id.*

Second, the posts were often closely identified with the government, since the President himself or his staff was creating and disseminating the posts.⁷² Finally, the President maintained direct control over the content of the posts.⁷³ In so ruling, the court held that public officials might use social media accounts to disseminate official government speech to the public.⁷⁴ While this holding is collateral to the ruling that the comment section is a public forum, in general, it is monumental for determining the classification of government use of social media.

D. *Second Circuit Appeal*

Soon after the ruling, President Trump appealed the decision arguing that the Twitter account @realDonaldTrump was a personal account that had no element of government control.⁷⁵ Specifically, President Trump contended that he had created the account prior to his run for, and subsequent election to, public office.⁷⁶ According to President Trump, the mere fact that he became a public official did not transform his account into a government-run platform for the purpose of public forum analysis.⁷⁷ Regarding the platform itself, President Trump asserted that “Twitter as a whole could be characterized as a private forum for public expression—though not a ‘public forum’ in the First Amendment sense, given its non-governmental character.”⁷⁸ Presumably, the individual pages on the platform that are run by government entities or officials could be classified as a public forum given the amount of government control.

In response to the President’s brief, Knight First Amendment Institute at Columbia University argued that President Trump used the account @realDonaldTrump in his official governmental capacity.⁷⁹ Knight argued that because the Twitter account allowed the public to “hear from the President about matters relating to government, respond to him directly, and engage with one another about his and his administration’s statements and policies,” the President’s use of Twitter constituted official government use.⁸⁰

72. *Id.*

73. *Knight*, 302 F. Supp. 3d at 571.

74. *Id.*

75. Brief for Appellants at 19, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2nd Cir. Aug. 7, 2018) (No. 18-1691).

76. *Id.* at 22.

77. *Id.*

78. *Id.* at 32.

79. Brief for Appellees at 12, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2nd Cir. Oct. 12, 2018) (No. 18-1691).

80. *Id.* at 12–13.

This would place the decision to block the plaintiffs from accessing his account within the First Amendment.⁸¹ Therefore, because the President outright admitted to blocking the plaintiffs based on their expressed disagreement with his policies,⁸² the action was improper viewpoint discrimination.⁸³

After hearing oral arguments, the Second Circuit affirmed the lower court's decision that President Trump created a public forum in the space of his Twitter account.⁸⁴ The court began its analysis by examining the nature of public fora and the First Amendment.⁸⁵ The court recognized several principles from the Supreme Court: First, social media platforms could be used for First Amendment expression.⁸⁶ Second, basic principles of the First Amendment do not vary when a new mode of communication is used.⁸⁷ Finally, a public forum can exist absent a physical location and can exist in a metaphysical forum.⁸⁸

Taking all three of these principles together, the Second Circuit examined whether a public forum was created by President Trump.⁸⁹ The court adopted the Supreme Court test in *Cornelius v. NAACP Legal Defense & Education Fund* and examined both "the nature of the property and its compatibility with expressive activity to discern the government's intent" and whether the government opened the forum for indiscriminate use by the public.⁹⁰ From the outset, the court rejected President Trump's claim that he merely exercised control over his private, personal account and instead held that the account was government-controlled property.⁹¹ This followed a particularly noteworthy concession by President Trump on oral argument that the account is not "independent of [his] presidency."⁹² Because of this

81. *Id.* at 13.

82. *See* Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541, 553–55 (S.D.N.Y. 2018).

83. Brief for Appellees at 13, Knight First Amendment Inst. at Columbia Univ. v. Trump, No. 18-1691 (2d Cir. Oct. 12, 2018) (No. 18-1691).

84. Knight First Amendment Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 233–34 (2d Cir. 2019).

85. *Id.* at 237.

86. *Id.* (citing *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735–36 (2017)).

87. *Id.* (quoting *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 790 (2011)).

88. *Id.* (citing *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 830 (1995)).

89. *Id.*

90. *Knight*, 928 F.3d at 237 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983)).

91. *Id.* at 236.

92. *Id.* at 231.

connection, the court held that the President's conduct created the public forum because the account and interactive comment section were intentionally opened for public discussion without limitation.⁹³ Thus, when President Trump burdened the speech of the plaintiffs, he engaged in impermissible viewpoint discrimination.⁹⁴

Oddly, the Second Circuit seemed to expressly ignore the question of whether a public forum can even exist when a private entity maintains pervasive control over the platform and speech of its users.⁹⁵ The court overtly stated that it would not consider "whether private social media companies are bound by the First Amendment when policing their platforms."⁹⁶ Instead, the Second Circuit zeroed in on whether a public official may exclude individuals from participating in an online dialogue that would have been "otherwise-open."⁹⁷ However, in their characterization and description of Twitter as a platform, the court did not even acknowledge Twitter's ability to block, remove, or delete content posted by its users.⁹⁸

In the final paragraph of its opinion, the Second Circuit leaves the reader with a short philosophical dissertation. The court noted the "irony" of the litigants' timing given the passion and robustness of modern debate.⁹⁹ Thus, the court made it a point to acknowledge the importance of freedom of expression, especially in public discourse.¹⁰⁰ In its parting words, the Second Circuit gave a direct message to the President, the plaintiffs, and the public as a whole: "In resolving this appeal, we remind the litigants and the public that if the First Amendment means anything, it means that the best response to disfavored speech on matters of public concern is more speech, not less."¹⁰¹

E. *Post-Knight Response*

Since the lower court's ruling in *Knight*, reception of the new rule among the courts has generally been positive. In the same jurisdiction, the court for the Southern District of New York has already begun to lay the foundation to adopt this rule on a widespread level.¹⁰² In *Price v. City of New York*, the

93. *Id.* at 237.

94. *Id.* at 238.

95. *Id.* at 230.

96. *Knight*, 928 F.3d at 230.

97. *Id.*

98. *See id.* at 230–31.

99. *Id.* at 240.

100. *Id.*

101. *Id.*

102. *See Price v. City of N.Y.*, No. 15 Civ. 5871 (KPF), 2018 U.S. Dist. LEXIS 105815, at *25 (S.D.N.Y. June 25, 2018).

plaintiff began posting critical comments on @NYPD28Pct, the 28th Precinct of the New York Police Department's Twitter account.¹⁰³ In response, the plaintiff was blocked from the account and could no longer use her account to comment on any of the tweets posted by @NYPD28Pct.¹⁰⁴ In bringing a suit against the precinct, the plaintiff alleged that her First Amendment rights were violated since the government itself engaged in viewpoint discrimination by prohibiting her from voicing her opinions on the site.¹⁰⁵ While the court did not employ the *Knight* test, this was merely because the plaintiff failed to frame her argument "in a manner that tracks the analysis in [*Knight*]."¹⁰⁶ Had the plaintiff done so, it seems that the court would have adopted the analysis to determine the outcome.¹⁰⁷

The impact of *Knight*, however, has not been limited to the Southern District of New York, or even the Second Circuit. In *Davison v. Randall*, the Fourth Circuit Court of Appeals also adopted a path of analysis similar to that of the Second Circuit.¹⁰⁸ The public official in question, Phyllis Randall, was the chair for the Loudoun County Board of Supervisors.¹⁰⁹ Instead of creating a Twitter account, Ms. Randall created a Facebook Page devoted to her campaign and labeled it under the tag of "government official."¹¹⁰ After creating the Page, in a similar way to President Trump, Ms. Randall elicited public discussion on her Page by stating "I really want to hear from ANY Loudoun citizen on ANY issues, request, criticism, complement or just your thoughts."¹¹¹ However, when the plaintiff began to criticize Ms. Randall on the Page, Ms. Randall deleted a critical post that the plaintiff left on the Page and blocked the plaintiff's account from viewing and commenting on the Page.¹¹² The plaintiff brought suit alleging a violation of the First Amendment.¹¹³

In response, the Fourth Circuit Court of Appeals created a framework that is strikingly similar to the framework created in *Knight*.¹¹⁴ First, the Fourth Circuit concluded that Ms. Randall's overt declaration that the space was

103. *Id.* at *7.

104. *Id.* at *7–8.

105. *Id.* at *24–25.

106. *Id.* at *27–28.

107. *See id.*

108. *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019).

109. *Id.* at 673.

110. *Id.*

111. *Id.*

112. *Id.* at 675–76.

113. *Id.* at 676.

114. *See Davison*, 912 F.3d at 683–84.

intended to be used by the general public was sufficient to demonstrate that the public official intended to create the forum.¹¹⁵ This, the court acknowledged, was significant considering that the Page and Facebook were, in general, compatible with expressive activity.¹¹⁶ Also, the court cited to 47 U.S.C. § 230(a)(3) to bolster its conclusion that “the internet” is “a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”¹¹⁷

Second, the majority concluded that the Page was subject to government control since Ms. Randall maintained “significant control” over the relevant aspects of the Page.¹¹⁸ This is because Ms. Randall “had authority to ban Facebook profiles or Pages from using the Chair’s Facebook Page—and, therefore, the interactive component of the page—authority she exercised in banning [the defendant’s account].”¹¹⁹ These findings led the court to conclude that, like the @realDonaldTrump account, the Page was a public forum, and the block was impermissible viewpoint discrimination.¹²⁰ *Davison* demonstrates that the trend that began in *Knight* is already becoming widespread and, in all likelihood, will be an issue that will be heard by the United States Supreme Court soon.

III. LONG-TERM IMPACT OF *KNIGHT*

With these new rulings from the Second and Fourth Circuit, *Knight* could signal a significant change in public forum jurisprudence that would have a wide-reaching impact on the use of private social media platforms. This rule would apply to more than accounts owned by single individuals, as President Trump asserted in his appellate brief.¹²¹ This rule would apply to all government-run social media accounts. In fact, even though the Second Circuit only decided *Knight* within the past year, there have already been significant cases that have adopted the court’s approach to government-run social media pages. Given how popular the use of social media has become among government actors, it is time to take a step back and look at the broader scope of the impact a rule like this could generate. This section will identify potential negative impacts that may arise from the rule that government-run social media pages should be classified as public fora.

115. *Id.* at 682.

116. *Id.*

117. *Id.* (quoting *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997)). It is important to note that “the internet” is a vastly different subject than “social media sites.”

118. *Id.* at 683.

119. *Id.* at 684.

120. *Davison*, 912 F.3d at 688.

121. See generally Brief for Appellants at 32, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2nd Cir. Aug. 7, 2018) (No. 18-1691).

In analyzing the application of the doctrine of public fora to social media pages, there are three areas that are a cause for concern. First, private companies operating social media sites retain a troubling amount of control over their pages and users. While it may be true that the government maintains some control over these social media pages, there is a significant distinguishing factor between the social media pages here and other public fora: the companies that own the platforms maintain a higher degree of private control over the speech that takes place within their platform. Specifically, the control that is reserved by social network sites is so great that no page, post, or even comment section can possibly be classified as a public forum.

The second concern involves the ever-changing, take-it-or-leave-it terms of service. These terms subject the users of the respective platforms to some odd and, at times, concerning requirements in order to not be permanently banned from the platform. Finally, there are significant privacy concerns revolving around the users' data stored on the site. In order for a member of the general public to participate in the public forum, they must subject themselves to potentially invasive data mining and targeted advertising, all for the benefit of the private company. Therefore, contrary to the Second Circuit's assertion, dialogue on social media platforms cannot be classified as "otherwise-open."¹²²

A. *Private Control over Public Fora*

The first issue that should be taken into account is the level of control that private companies retain over these so-called public fora. As previously mentioned, a threshold issue for a public forum analysis is whether the government retains sufficient control over the forum in question.¹²³ However, courts have not sufficiently discussed the massive amount of control that the social media sites retain over the government's social media page and its comment section. Any analysis that has been directed toward the issue has been cursory at best. For example, the Southern District of New York in *Knight* only made brief mention of this concern in a passing comment.¹²⁴ The court noted that even though Twitter is "a private (though publicly traded) company" that owns the platform, it did not give any consideration to the amount of control that the company has over its users'

122. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019).

123. *See Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).

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

speech and ability to participate on the platform.¹²⁵ Instead, the bulk of the analysis focused on the control that Twitter shares with the user—in this case, President Trump.¹²⁶ However, the power given to the “owner” of the account is only derived from the power that Twitter inherently holds over its users.

The Second Circuit in *Knight* and the Fourth Circuit in *Davison* relied heavily on the Supreme Court’s decision in *Cornelius v. NAACP Legal Defense & Education Fund* to conclude that a public forum may exist on private property.¹²⁷ However, as noted by the Southern District of New York in *Knight*, this does not mean that the control element is ignored; rather, the government must still maintain sufficient control over the forum in question.¹²⁸ Unfortunately, the *Knight* court and the *Davison* court gave no consideration to the concurrent control that the account holder and private company share over the account.¹²⁹ This is because the Supreme Court has not analyzed a scenario where the government and a private entity have concurrent control over the speech of those participating in the forum in question. Instead, the Court has focused on cases where the government has exclusive control over the property and the ability to silence those on the property.¹³⁰ For example, a public forum may exist in a theater that is rented by the government for expressive purposes.¹³¹ In the present issue, the “lease” includes a provision that the legal owner of the forum may regulate the users’ speech. Even though the individual’s name appears on the social media account, the private company maintains legal title over the page and may revoke the individual’s privileges at any time.

This scenario presents an entirely novel question that must be taken into account when determining the categorization of the property. Otherwise, this rule could have a massive negative impact on all public fora going forward. Picture a scenario where the government leases a building where the public is free to converse and discuss issues with each other and government officers. However, while the public is conversing, the person that owns the building is listening to every conversation that is taking place and has the ability to throw out the individuals who violate his own personal rules without due process. At this point, the restrictions that the private company places on those utilizing the property are so pervasive that it distinguishes itself from any other case that the Supreme Court has previously decided.

125. *Id.*

126. *See id.* at 566–67.

127. *Id.* at 566; *Davison v. Randall*, 912 F.3d 666, 683 (2019).

128. *Knight*, 302 F. Supp. 3d at 566.

129. *See id.* at 566–67; *Davison*, 912 F.3d at 682–83.

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

131. *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975).

Thus, these additional restrictions must be considered when applying the doctrine of public fora to these Internet platforms.

Further, the terms of service that all users must agree to before they create an account on the platform are also binding on the government officials that create a profile. Once an account is created on Twitter, the user must enter into a contract with the private company (Twitter) before being allowed to participate in the forum “designated” by the government. These terms expressly identify the types of speech that may not be disseminated on their platform.¹³² Because of this, the private company becomes a gatekeeper to the public fora. This is more than the government simply renting an area for use; now, Twitter and Facebook serve as “bouncers” to the public fora before individuals can even participate in any discussion opened by the government actor.

To put this idea in perspective, let’s say that a government official created a completely government-run social media account, announced to the public that the account would be used for the purpose of communicating to and with the public, and posted the exact same content that President Trump posted on Twitter. However, imagine that the platform in question was not Facebook or Twitter; instead, the platform had an overt political or personal bias in favor of the public official. While the official would be unable to block a user from commenting on his posts, the owner of the website would have the unlimited ability to completely remove users from the platform for simply posting a contrary view to the official. Such a system would have the potential to privatize censorship based on the website or platform where the public official chooses to host their “forum.”

For example, if President Trump were to create a social media page on a platform that was overtly biased toward his policies and ideals, there would be nothing holding the platform back from deleting users’ comments and banning overly critical users from their platform. While the President would not be able to respond to criticism by blocking users, the platform owner would have the unlimited authority to do just that. This is the crux of the issue: with the amount of private control not even considered in social media analysis, a rule like the one adopted by the Fourth Circuit in *Knight* would open the door for a scenario where government officials are encouraged to selectively choose the platform that they establish their social media account on so that the platform may offer some amount of protection and censorship.

132. See 11. *Hate Speech*, FACEBOOK, https://www.facebook.com/communitystandards/hate_speech (last accessed Aug. 31, 2019). Twitter’s version of the limitations is called “hateful conduct.” *Hateful Conduct Policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> (last visited Aug. 31, 2019).

B. *Troubling Terms of Service*

In addition to the amount of control that the platform owners wield over the users of their own accounts, the reasons users may be banned from the platform are subject to change at any point.¹³³ In particular, the reserved ability of the respective platforms to change the terms of service raises serious concerns regarding the ability of the public to participate in the forums designated by the government.

Before proceeding, one disclaimer must be made: the point of this analysis is not to criticize social media platforms for their policies. As previously stated, it is well within the respective platform's rights to create these restrictions on the use of their platforms. Instead, the purpose of this analysis is to highlight the platforms' freedom to restrict speech in a greater capacity than the government. Such a system, while beneficial for a private company in the free market of ideas, does not fit within concepts of public fora.

As previously mentioned, a user must first agree to a site's lengthy Terms of Service and Privacy Policies. However, in the event that an individual reads every provision in the site's terms, this would still not be enough for that user to be adequately informed of what the terms may be for the foreseeable future. While a user may agree to a current form of the site's terms and conditions, those terms are subject to change at any time. Facebook's terms warn the user that changes will be made "from time to time to accurately reflect our services and practices."¹³⁴ According to Twitter, they also "may revise these Terms from time to time."¹³⁵ These vaguely-worded provisions can have a significant impact on those using the platform: there are no guarantees as to what type of conduct or posts will be allowed on a site for the long-term. In fact, the California Court of Appeals ruled in *Twitter v. The Superior Court for the City and County of San Francisco* that Twitter may permanently ban users' accounts for violating new changes to the site's terms of service on the basis of a recent change in Twitter's terms of service.¹³⁶ This illustrates that these social media sites may change their policies at any time

133. See *Twitter Terms of Service*, TWITTER (May 25, 2018), <https://twitter.com/en/tos> (last visited Aug. 31, 2019); *Terms of Service*, FACEBOOK (Jul. 31, 2019), <https://www.facebook.com/terms.php> (last visited Aug. 31, 2019).

134. *Terms of Service*, FACEBOOK (Jul. 31, 2019), <https://www.facebook.com/terms.php> (last visited Aug. 31, 2019).

135. *Twitter Terms of Service*, TWITTER (May 25, 2018), <https://twitter.com/en/tos> (last visited Aug. 31, 2019).

136. *Twitter, Inc. v. Super. Ct. for S.F.*, 2018 Cal. App. LEXIS 1248, at *9–10 (No. A154973) (order issuing alternative writ of mandate).

and be legally justified in deactivating a user's account on those grounds alone.

When examining the specific terms of service on both Facebook and Twitter, it quickly becomes apparent that these private companies reserve the ability to exclude the speech of users for far more reasons than allowed by the government under the First Amendment. In addition to the assortment of non-speech-related reasons for account suspension, such as six months of inactivity on Twitter's platform,¹³⁷ there are several speech-related restrictions that users must agree to when creating a new account. For example, in their respective terms of service, both Facebook and Twitter reserve the right to exclude users from their platform if the user uses their account to disseminate "hate speech."¹³⁸ Both platforms have defined this in similar yet distinct ways. For example, Facebook's Community Guidelines have an entire article dedicated to the definition and tier-ranking of hate speech, which Facebook defines as follows:

We define hate speech as a direct attack on people based on what we call protected characteristics—race, ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity, and serious disease or disability. We also provide some protections for immigration status. We define attack as violent or dehumanizing speech, statements of inferiority, or calls for exclusion or segregation.¹³⁹

In a similar way, Twitter defines hateful conduct as the promotion of "violence against or direct[] . . . attack[s] or threat[s] [to] other people on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease."¹⁴⁰ All of these definitions, while within the rights of the platforms to create, are incredibly ambiguous. These restrictions limit the amount of freedom that its users may exercise on the platforms. This could be incredibly problematic, especially

137. *Inactive Account Policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/inactive-twitter-accounts> (last visited Aug. 31, 2019).

138. See 11. *Hate Speech*, FACEBOOK, https://www.facebook.com/communitystandards/hate_speech (last visited Aug. 31, 2019); *Hateful Conduct Policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> (last visited Aug. 31, 2019).

139. 11. *Hate Speech*, FACEBOOK, https://www.facebook.com/communitystandards/hate_speech (last visited Aug. 31, 2019).

140. *Hateful Conduct Policy*, TWITTER, <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy> (last visited Aug. 31, 2019).

when the restrictions are in a place where First Amendment rights are supposed to be guaranteed.

While it may seem counter-intuitive for social media platforms to ban users from their site for the things that the user says, major social media platforms have proven that they can and will exercise this right, even if the user has a large following. In late 2018, talking head Alex Jones and his organization, Infowars, were permanently banned from all of the most popular social media platforms, including Facebook, Twitter, and YouTube.¹⁴¹ This move resulted from a long history of Jones making wild and unsubstantiated claims, including accusing the government of creating “gay bomb[s]” and tainting the water with chemicals that “turn[] the friggin’ frogs gay!”¹⁴² In one of his most disgusting claims, Jones asserted several times that the Sandy Hook massacre was a “hoax” organized by the Obama administration.¹⁴³ These claims, while incredibly disturbing, are likely protected under the First Amendment. As ridiculous and infuriating as some of these claims are, it is highly unlikely that the government would be justified in barring Jones from using his right to free speech in this manner.

This, however, does not bar private companies from limiting the type of speech that takes place on their respective platforms. Beginning in the latter half of 2018, several tech companies began to ban Jones from using their platforms to disseminate his opinions.¹⁴⁴ On August 6, 2018, Facebook announced to the world that it had permanently banned all four of Alex Jones’ accounts: “the Alex Jones Channel Page, the Alex Jones Page, the InfoWars Page, and the Infowars Nightly News Page.”¹⁴⁵ This, according to

141. Eli Blumenthal, *Twitter Bans Conspiracy Theorist Alex Jones, Infowars from Social Network for Violating “Abusive Behavior” Policy*, USA TODAY (Sept. 6, 2018), <https://www.usatoday.com/story/tech/2018/09/06/twitter-bans-alex-jones-and-his-conspiracy-site-infowars/1216107002/>.

142. Joe Sommerlad, *Alex Jones: Who Is the Ranting Alt-Right Radio Host and What Are His Craziest Conspiracy Theories?*, INDEPENDENT (Aug. 9, 2018), <https://www.independent.co.uk/news/world/americas/us-politics/alex-jones-radio-show-us-alt-right-conspiracy-theories-youtube-infowars-illuminati-frogs-a8483986.html>. The footage of Jones making these claims, which has been saved on YouTube for posterity, can only be seen to be believed. See Terrance the Psychonaut, *Alex Jones “Turning the Freaking Frogs Gay”*, YOUTUBE (Feb. 18, 2017), https://www.youtube.com/watch?v=_ePLkAm8i2s.

143. Sommerlad, *supra* note 142.

144. Craig Timberg, Elizabeth Dwoskin & Hamza Shaban, *Apple, Facebook and Other Tech Companies Delete Content from Alex Jones*, WASH. POST (Aug. 6, 2018), https://www.washingtonpost.com/technology/2018/08/06/apple-facebook-other-tech-companies-delete-content-alex-jones/?utm_term=.f95d7ed8ec2f/.

145. *Enforcing Our Community Standards*, FACEBOOK: NEWSROOM (Aug. 6, 2018), <https://newsroom.fb.com/news/2018/08/enforcing-our-community-standards/>.

Facebook, was because the accounts had ignored the warnings that were given and the strikes that were placed on the accounts.¹⁴⁶ These strikes were due to the multiple violations of the community guidelines, including what Facebook cited as “glorifying violence” and “dehumanizing language.”¹⁴⁷ Eventually, the violations resulted in a ban on the accounts.¹⁴⁸

Facebook was not alone in this move; Apple, Google, and Spotify removed Jones from their respective platforms all within the same week.¹⁴⁹ At the time, there was one major platform that remained silent on the Alex Jones controversy: Twitter.¹⁵⁰ This, presumably, was because Twitter had come under fire for seemingly targeting conservative accounts in a move to cut down on “fake accounts and automated bot networks.”¹⁵¹ However, after pressure from the community, Twitter suspended Jones’ accounts from posting for seven days.¹⁵² Soon after, on September 6, 2018, Twitter announced that they were permanently banning Alex Jones’ and Infowars’ account from the platform.¹⁵³ This was because the accounts violated Twitter’s “abusive behavior” policy.¹⁵⁴ Twitter also announced that it would “continue to evaluate reports we receive regarding other accounts potentially associated with [Alex Jones] and will take action if content that violates our rules is reported or if other accounts are utilized in an attempt to circumvent their ban.”¹⁵⁵

Actions like those taken by the aforementioned platforms in response to Alex Jones are completely independent of the First Amendment. Such a ban is well within the rights of the platforms; they have the freedom to limit access to and usage of their platform. However, Jones’ claims would likely not be censored by the government per the First Amendment. In the wake of the Alex Jones ban, Jonathan Zittrain, faculty director of Harvard’s Berkman Klein Center for Internet and Society, expressed some concern regarding the control that the platforms exercise over its users:

146. *Id.*

147. *Id.*

148. *Id.*

149. Timberg, *supra* note 144.

150. *Id.*

151. *Id.*

152. Sara Salinas, *Twitter Permanently Bans Alex Jones and Infowars Accounts*, CNBC (Sept. 6, 2018), <https://www.cnbc.com/2018/09/06/twitter-permanently-bans-alex-jones-and-infowars-accounts.html> (last updated Sept. 7, 2018).

153. Twitter Safety (@TwitterSafety), TWITTER (Sept. 6, 2018, 1:47 PM), <https://twitter.com/TwitterSafety/status/1037804428877680640>.

154. *Id.*

155. *Id.*

While private platforms aren't bound by the restrictions of the First Amendment—generally only the government is—there's a question about how much discretion they should choose to exercise over what speech they allow to flow through them. That question can't be wisely answered without noting how unfortunately central just a few intermediaries are—like Apple for podcasts, or YouTube, Facebook and Twitter for videos and links.¹⁵⁶

Zittrain is not alone in his sentiments. Chris Hughes, co-founder of Facebook, has publicly decried the influence Facebook has on modern culture and how much power rests in the platform's algorithm.¹⁵⁷ With such a pervasive amount of control vested in a small group of companies, courts should take pause when considering whether a public forum can truly exist on platforms such as this.

This massive amount of power can be especially problematic if the platforms begin to demonstrate a political bias. With the ban of Alex Jones from major social media platforms, the Washington Post even expressed concern that companies like Facebook and Twitter seemed to take more partisan stances in their recent bans of users.¹⁵⁸ The Post even noted that the platforms have become increasingly willing to ban "abusive" speech "even at the risk of impinging on free speech."¹⁵⁹ This was true for Alex Jones; even the disgusting assertion that the Sandy Hook massacre was a hoax would likely not be subjected to government censorship. Only a private company would be constitutionally able to exclude Jones' speech from its own platform. In the context of the present discussion, this would mean that if a public forum exists on these private platforms, the companies would have the unchecked authority to allow or disallow any sort of speech they desire to censor.

The power to exclude the speech of users even extends to government-run pages. Israeli Prime Minister Benjamin Netanyahu utilizes Facebook to promulgate government speech to the masses.¹⁶⁰ Since it is difficult to

156. Timberg, *supra* note 144.

157. Chris Hughes, *It's Time To Break up Facebook*, N.Y. TIMES (May 9, 2019), <https://www.nytimes.com/2019/05/09/opinion/sunday/chris-hughes-facebook-zuckerberg.html>. Hughes even suggested that it is time to "break up" Facebook. *Id.*

158. Timberg, *supra* note 144.

159. *Id.*

160. Isabel Kershner, *Facebook Suspends Netanyahu Campaign Bot for Hate Speech*, N.Y. TIMES (Sept. 12, 2019), <https://www.nytimes.com/2019/09/12/world/middleeast/facebook-netanyahu-bot.html> (last updated Sept. 16, 2019).

maintain an active social media account while running for reelection, the Prime Minister utilizes a “chatbot” to help communicate to the public. However, during his reelection campaign, the chatbot posted on Facebook an incredibly disparaging comment regarding Prime Minister Netanyahu’s opposition and the political left.¹⁶¹ Specifically, the chatbot called on users to avoid voting for “Arabs who want to destroy us all—women, children and men—and allow a nuclear Iran that will kill us.”¹⁶² Once again, while these statements would likely be permissible under the First Amendment, Facebook categorized the post as impermissible hate speech and suspended the Prime Minister’s chatbot for twenty-four hours.¹⁶³ A Facebook spokesperson even cautioned that, if there are additional violations, further action may be taken against Prime Minister Netanyahu’s account.¹⁶⁴ Such action is well within the purview of Facebook since they reserve the power to shut down pages if they violate the terms of use.¹⁶⁵ This further demonstrates how little control even government actors have over their own accounts.

Because an analysis regarding the platform’s terms and limitations on its users is fundamentally missing from both *Knight* and *Davison*, the rule that was created by both the Second and Fourth Circuits would apply to all websites, regardless of their limiting terms, political stance, or required agreements for creating an account. In the worst-case scenario, this new system could open the door to privatized censorship. The scenario mentioned above would become more and more commonplace if courts continue to ignore the massive amount of direct control that social media platforms have over the speech of their users. Thus, the need for a different rule becomes increasingly necessary for the protection of individuals’ First Amendment rights.

C. *Problematic Privacy Concerns*

Even setting aside the concerns around the ever-changing terms of service, the current privacy policies of these social media sites present major concerns for users’ privacy. These issues highlight the central reason for social media’s existence, which is the respective companies’ desire to make a profit. These companies can do this in several ways. Facebook generally uses its platform

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Terms of Service*, FACEBOOK, <https://www.facebook.com/terms.php> (last visited Oct. 27, 2018).

to sell advertising space and collect user data to sell to third parties.¹⁶⁶ For Twitter, a vast majority of its revenue comes from advertising spaces, while the remaining revenue comes from data licensing and users paying Twitter to promote their tweets.¹⁶⁷ These ways of generating revenue, however, open the door to serious privacy concerns for the platform's users.

In 2018, the policies of both Twitter and Facebook recently came under serious scrutiny. In that same year, Facebook faced allegations of major privacy leaks and the release of users' data.¹⁶⁸ A political data firm, Cambridge Analytica, was able to acquire the "identities, friend networks, and 'likes'" of over 50 million Facebook users.¹⁶⁹ This data assisted Cambridge in its advertising and developing of tools to influence the behavior of American voters.¹⁷⁰ The data also assisted some politicians who used the data in their campaigning to determine where to play political ads.¹⁷¹ In an odd twist, the data leak allegedly assisted President Trump in his successful campaign run for the 2016 presidency.¹⁷²

This breach of users' information and privacy shocked the nation. In response, both the national and international legal community began to look into the matter.¹⁷³ In the United States, the CEO of Facebook, Mark Zuckerberg, was called to testify before Congress regarding the data "leak."¹⁷⁴ These allegations have led to sanctions placed on the platform for the breach

166. Rakesh Sharma, *How Facebook Makes Money*, INVESTOPEDIA, <https://www.investopedia.com/ask/answers/120114/how-does-facebook-fb-make-money.asp> (last updated June 25, 2019).

167. Brian Beers, *How Does Twitter Make Money?*, INVESTOPEDIA, <https://www.investopedia.com/ask/answers/120114/how-does-twitter-twtr-make-money.asp> (last updated Apr. 23, 2019).

168. Jim Waterson, *UK Fines Facebook £500,000 for Failing To Protect User Data*, GUARDIAN (Oct. 25, 2018), <https://www.theguardian.com/technology/2018/oct/25/facebook-fined-uk-privacy-access-user-data-cambridge-analytica>.

169. Kevin Granville, *Facebook and Cambridge Analytica: What You Need To Know as Fallout Widens*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/technology/facebook-cambridge-analytica-explained.html>.

170. *Id.*

171. Rahul Rathi, *Effect of Cambridge Analytica's Facebook Ads on the 2016 US Presidential Election*, Towards Data Science (Jan. 13, 2019), <https://towardsdatascience.com/effect-of-cambridge-analyticas-facebook-ads-on-the-2016-us-presidential-election-dacb5462155d>.

172. *Id.*

173. Cecilia Kang, *Facebook Faces Growing Pressure over Data and Privacy Inquiries*, N.Y. TIMES (Mar. 20, 2018), <https://www.nytimes.com/2018/03/20/business/ftc-facebook-privacy-investigation.html>.

174. Ryan Browne, *Zuckerberg Survived Two Days of Grilling by Congress, But Facebook's Troubles Are Not over Yet*, CNBC (Apr. 13, 2018), <https://www.cnn.com/2018/04/13/after-zuckerberg-congress-hearing-facebook-awaits-further-scrutiny.html>.

in users' privacy; specifically, the UK Information Commissioner's Office ruled that Facebook must pay £500,000 for "fail[ing] to sufficiently protect the privacy of its users before, during and after the unlawful processing of this data."¹⁷⁵ Italy imposed its own sanctions on Facebook by fining the company €1 million.¹⁷⁶ Additionally, the Federal Trade Commission charged Facebook with several violations of a previous settlement agreement between the FTC and Facebook.¹⁷⁷ In particular, the FTC alleged that the platform lied to consumers regarding its control over private information and information shared with other companies.¹⁷⁸ These allegations led to a record-breaking settlement between the FTC and Facebook in the amount of \$5 billion.¹⁷⁹ In the future, Ireland may also impose sanctions on Facebook in the amount of \$1.6 billion for its violation of users' privacy in the wake of the Cambridge Analytica scandal.¹⁸⁰

Twitter is currently facing similar privacy troubles in the French legal system.¹⁸¹ In August of 2018, a Paris court held that Twitter's privacy policy violated its users' privacy.¹⁸² Instead of focusing on a particular breach of privacy with a company like Cambridge Analytica, the Paris court focused exclusively on the language of Twitter's 256 terms of service.¹⁸³ The court ruled that the terms users are forced to accept are "abusive" and allow users' data (particularly users' uploaded photos) to be "commercially exploited" by Twitter.¹⁸⁴ This led the court to sanction Twitter by requiring it to change its small print.¹⁸⁵

175. David Reid, *UK Watchdog Fines Facebook \$644,000 for Failing To Protect its Users' Data*, CNBC (Oct. 25, 2018), <https://www.cnbc.com/2018/10/25/uk-watchdog-fines-facebook-644000-for-failing-to-protect-user-data.html>.

176. Mark Scott, *Facebook Fined €1M over Cambridge Analytica Scandal*, POLITICO (June 28, 2019), <https://www.politico.eu/article/facebook-fined-cambridge-analytica/>.

177. Lesley Fair, *FTC's \$5 Billion Facebook Settlement: Record-Breaking and History-Making*, FED. TRADE COMM'N (July 24, 2019), <https://www.ftc.gov/news-events/blogs/business-blog/2019/07/ftcs-5-billion-facebook-settlement-record-breaking-history>.

178. *Id.*

179. *Id.*

180. Kelvin Chan, *Facebook Could Face a \$1.6 Billion Fine as Ireland Investigates Massive Data Breach*, YAHOO! (Oct. 3, 2018), <https://finance.yahoo.com/news/facebook-could-face-1-6-015017071.html>.

181. See Phoebe Weston, *French Court Orders Twitter To Alter 256 'Abusive' Clauses in its Terms and Conditions To Protect Users' Privacy and Stop Tweets from Being 'Commercially Exploited'*, DAILY MAIL (Aug. 10, 2018), <https://www.dailymail.co.uk/sciencetech/article-6046519/French-court-orders-Twitter-CHANGE-terms-conditions-new-privacy-case.html>.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

Even setting aside the intentional invasions of users' privacy, social media platforms are prone to inadvertently share users' private information without consent. Recently, Twitter admitted to two recent "issues" where users' private data was shared to advertising companies.¹⁸⁶ These leaks allowed companies to potentially view users' data including their country code, whether and when users engaged with advertisements, and information about the ad itself.¹⁸⁷ This announcement came on the heels of an announcement that another "issue" revealed many users' tweets to the public, even if users wished to keep their tweets private.¹⁸⁸

Privacy concerns continue to plague social networking sites. While America and the rest of the world are left to determine how to protect consumers from these massive breaches in privacy, courts are left to grapple with the issues of private companies' rights and rights of the individuals using these websites. Unfortunately, when it comes to the law of public fora on these sites, courts have paid little to no attention to these concerns. Instead, both the Fourth Circuit and the Second Circuit focused on the surface issues of superficial control and government authority. This misses the bigger, and more troubling, issues that social media can present to its users. Thus, courts should take these privacy concerns into account when determining the classification of government-run social media accounts.

IV. ALTERNATIVE THEORY

The aforementioned concerns lead to one conclusion: it is illogical for a public forum to exist on such a privatized and legally tumultuous platform. At the same time, both government officials and their constituents should still be able to take advantage of the positive benefits offered by these platforms. While the comment sections to social media platforms present odd issues involving the First Amendment, the foundational ability of a user to create a post on their own account still provides public officials a means of directly informing the general public of their policy stances and any relevant updates. Thus, it is vital that the courts balance the benefits of social media use with the burdens of the legal theory that must be applied.

A. *Perspective*

While the discussion thus far has centered around the drawbacks of government use of social media, it is important to not lose sight of the many

186. *An Issue with Your Settings Choices Related to Ads on Twitter*, TWITTER, <https://help.twitter.com/en/ads-settings> (last visited Sept. 6, 2019).

187. *Id.*

188. *An Issue with Protected Tweets on Twitter for Android*, TWITTER (Jan. 17, 2019), <https://help.twitter.com/en/protected-tweets-android> (last visited Sept. 6, 2019).

benefits that this use has on politics in general. It is true that the comment section of social media can present issues. However, this is not to say that government entities should stay away from social media—quite the contrary. Social media sites have become a way for representatives to quickly and directly inform the public of any declarations, updates, or to give their constituents a closer look into the political process. This serves as valuable insight for the public as a whole. In fact, other legal scholars have identified several positive benefits for government use of social media platforms. In one of the most comprehensive looks at social media in the public fora, Professor Lyrissa Lidsky argues that the government should be incentivized to use platforms like Twitter and Facebook to connect with the general public.¹⁸⁹

In her article *Public Forum 2.0*, Professor Lidsky identified six societal benefits that will incur from the use of these platforms.¹⁹⁰ First, officials will have direct access to their constituents.¹⁹¹ Second, the audience that will be reached generally would not have been reached without the platform.¹⁹² Third, these pages have the potential to build a community among those that follow the government official.¹⁹³ Fourth, these pages allow officials to accumulate feedback from their followers so that they may better understand the needs of their constituents.¹⁹⁴ Fifth, using social media to communicate with the masses is faster, cheaper, and more direct than most other forms of communication available to public officials.¹⁹⁵ Finally, social media allows government officials to directly respond and interact with members of the community.¹⁹⁶ Professor Lidsky observed that this benefit in particular is “a key impetus behind government use of social media” since public officials want to seem more responsive to their constituents.¹⁹⁷ Unfortunately, when all of the benefits are analyzed in practice, the fourth and sixth benefits identified are both subject to the control of site owners.

Not only does government use of social media benefit the government officials using the platform, but it also often benefits political constituents.¹⁹⁸ “Citizens have an interest in receiving government information quickly,

189. Lidsky, *supra* note 3, at 2011.

190. *Id.* at 2003–07.

191. *Id.* at 2003.

192. *Id.* at 2004.

193. *Id.* at 2005.

194. *Id.* at 2005–06.

195. Lidsky, *supra* note 3, at 2007.

196. *Id.*

197. *Id.*

198. *Id.* at 2008.

cheaply, and without distortion.”¹⁹⁹ However, it is here that Professor Lidsky makes an odd assertion. She argues that social media sites “have the potential to advance the First Amendment values of free speech, free association, and the petitioning of government for redress of grievances.”²⁰⁰ However, such advancement is entirely contingent on the private company that owns the forum. First Amendment privileges are in no way guaranteed on private Internet platforms where the company restricts the content of its users’ speech. Therein lies the true issue with social media sites: free speech is not guaranteed on social media platforms. Instead, it can be (and is) consistently restricted by the company through the reserved right to change their terms of service.²⁰¹ There are no speech rights on private social networking sites.

Even Professor Lidsky concedes that the confusion involved in the public forum doctrine can massively deter public officials’ use of social networking sites as a way to interact with the general public.²⁰² Unfortunately, this confusion and lack of precedent also creates several issues for courts to wrestle with, as evidenced in both *Knight* and *Davison*. Despite this fact, as previously stated, governmental use of social media should not be discouraged; there are far too many benefits for public figures to outright forego its use. However, the issue arises in the precedent that the rulings in *Knight* and *Davison* set—particularly by setting the precedent that a private company may exercise such intimate control over the discourse that takes place in a “public forum.” On the other hand, there are still benefits that Professor Lidsky identified that can exist without the use of the platform’s comment section.²⁰³ These benefits should be fostered. Of course, for this to happen, the present rule must be significantly modified to accommodate for the benefits of social media use and the limitation of private control.

B. *Proposal*

When the benefits and burdens of the *Knight* and *Davison* rule are weighed, it becomes apparent that the negative burdens far outweigh the potential benefits. Courts must recognize that social media platforms cannot be relied upon to give their users the freedom of speech guaranteed by the First Amendment due to the inherent nature of private companies and the speech restrictions that they may constitutionally place on their users. At this point, courts continue to struggle with the application of the law in a rapidly

199. *Id.*

200. *Id.*

201. *Twitter Terms of Service*, TWITTER, <https://twitter.com/en/tos> (last visited Sept. 7, 2019); *Terms of Service*, FACEBOOK, <https://www.facebook.com/terms.php> (last visited Sept. 7, 2019).

202. Lidsky, *supra* note 3, at 2002.

203. *See* Lidsky, *supra* note 3, at 2003–08.

evolving digital age where the Internet has become central to the lives of many. Thus, it is vital that courts take a more thoughtful approach to the issue.

Therefore, in order to protect the direct communication of public officials and the private interests of the public, government-run social media accounts should not be considered a public forum. With so much uncertainty revolving around the First Amendment as applied to the Internet and social media accounts, it would be unwise to create such a significant and potentially devastating rule in an area that courts do not fully understand. A rushed and ill-informed rule could have lasting implications on all public fora, even those public fora that do not exist in the Internet. Instead, until such a time that social media posts are not visible to those without an account, posts made by public officials should be seen only as public declarations. These declarations, even when made on social media platforms, would fall under the category of government speech.

The Second Circuit and the Fourth Circuit were correct on this point: the posts made by government officials on their social media accounts are properly classified as government speech.²⁰⁴ Even though the platform itself is a public forum, the government officials may still utilize it to further their own speech.²⁰⁵ This point can exist independent of the public forum analysis.²⁰⁶ That being said, it would be entirely logical to permit the government to use the platforms for the purpose of exercising government speech. Public officials may still use social media to update their followers and inform the general public and their constituents of the policy moves that they are making. This portion of the courts' analysis should remain unchanged while the remainder of the analysis should be modified so that there is no First Amendment protection for individuals posting comments on social media posts made by the public officials.

C. *Benefits of the Alternative*

Without the framework created in *Knight* and *Davison*, there are still significant benefits gained through government use of social media. For example, public officials will still have direct access to their constituents, reach a wider audience, and communicate to the masses in a faster and more cost-effective way.²⁰⁷ Further, the general public will receive information in a

204. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 239 (2d Cir. 2019); *Davison v. Randall*, 912 F.3d 666, 686 (4th Cir. 2019).

205. *Davison*, 912 F.3d at 687.

206. *See id.*

207. *See Lidsky, supra* note 3, at 2003–07.

much more direct and easy-to-access manner.²⁰⁸ While the comments and direct replies to posts made by public officials would not be legally protected, it is important to recognize the other benefits that ensue from the proposed rule: the officials may still use social media to directly disseminate information to the public. This system would greatly reduce the risk of either private censorship or excessive government regulation of private institutions.

It is unfortunate that the proposed alternative does not guarantee direct back-and-forth communication between government officials and the general public. On the other hand, this alternative does not completely close the door for users to comment on public officials' posts. The only difference between the *Knight* rule and the proposed rule is that there would be no *guaranteed* right to comment on the public official's posts. However, users are already not guaranteed the right to comment on posts or even have an account on social media platforms in the first place. Even before the *Knight* rule, users have always been, and will continue to be, subject to the restrictions that private companies place on their users. Such is the nature of social media and the private marketplace. This proposed rule, however, would not grant these companies the ability to exercise authority over the speech of individuals whose First Amendment rights are supposed to be protected. This outcome is far more preferable to the outcome of the *Knight* rule, as its drawbacks pale in comparison to the potential detriment of privatized censorship.

V. CONCLUSION

The aforementioned concerns lead to one conclusion: it is illogical for a public forum to exist on a social media platform. Instead, it is far more reasonable to allow public officials to use such a platform as a way to promulgate government speech and keep the general public informed. Adopting the rule used in *Knight* would set a dangerous precedent while also transforming privately owned and regulated platforms into a quasi-public forum subject to private censorship. Thus, government-run social media accounts and their posts should be relegated to the dissemination of informative public declarations. This would protect the public's freedom of speech in public fora from the dangerous potential of censorship by companies that operate outside of the bounds of the First Amendment.

208. *Id.* at 2008.