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## Tweets That Break The Law: How The President's @realDonaldTrump Twitter Account Is A Public Forum And His Use of twitter Violates The First Amendment And The President Records Act

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# Tweets That Break The Law: How The President's @realDonaldTrump Twitter Account Is A Public Forum And His Use of twitter Violates The First Amendment And The President Records Act

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## **Abstract**

Imagine one day, you send out a tweet about your opinion on a recent government policy and someone replies to that tweet criticizing you and your views in an abusive way.\* You decide to block this person because you do not agree with their views and abusive comments.\* You post another tweet, but after posting it you realize that there is a spelling error in it so you delete the tweet.\* This normally happens on Twitter with zero consequences for normal every day users, which is nothing to write home about.

# TWEETS THAT BREAK THE LAW: HOW THE PRESIDENT'S @REALDONALDTRUMP TWITTER ACCOUNT IS A PUBLIC FORUM AND HIS USE OF TWITTER VIOLATES THE FIRST AMENDMENT AND THE PRESIDENT RECORDS ACT

BRYAN C. SIDDIQUE\*

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|      |   |     |
|------|---|-----|
| I.   | INTRODUCTION.....   | 318 |
| II.  | THE DOCTRINES.....  | 322 |
|      | A. <i>Public Forum</i> .....  | 322 |
|      | B. <i>Traditional Public Forum</i> .....  | 323 |
|      | C. <i>Designated Public Forum</i> .....   | 324 |
|      | D. <i>Limited Public Forum</i> .....  | 325 |
|      | E. <i>Nonpublic Forum</i> .....   | 327 |
|      | F. <i>Government Speech</i> .....   | 328 |
|      | G. <i>Mixed Speech</i> .....  | 329 |
| III. | APPLICATION OF THE PUBLIC FORUM DOCTRINES, GOVERNMENT SPEECH DOCTRINE, AND MIXED SPEECH ANALYSIS TO @REALDONALDTRUMP..... | 331 |
|      | A. <i>Threshold Issues</i> .....  | 331 |
|      | 1. <i>Metaphysical</i> .....  | 331 |
|      | 2. <i>The Government Does Not Own Twitter</i> .....   | 332 |
|      | 3. <i>@realDonaldTrump Is Not a Personal Account</i> ..   | 332 |
|      | B. <i>Application of the Doctrines</i> .....  | 334 |
|      | 1. <i>Traditional Public Forum</i> .....  | 334 |
|      | 2. <i>Designated and Limited Forum Analysis</i> .....   | 335 |
|      | a. <i>Designated Public Forum</i> .....   | 335 |
|      | b. <i>Limited Public Forum</i> .....  | 337 |
|      | 3. <i>Nonpublic Forum</i> .....   | 338 |
|      | 4. <i>Government Speech Doctrine</i> .....  | 339 |
|      | 5. <i>Mixed Speech</i> .....  | 340 |
|      | a. <i>Central Purpose of @realDonaldTrump</i> ..  | 341 |
|      | b. <i>President's Degree of Control over @realDonaldTrump</i> .....   | 342 |
|      | c. <i>"The Identity of the Person to Whom a Reasonable Social Media User Would Attribute the Speech"</i> .....            | 343 |
|      | d. <i>Mixed Speech Conclusion</i> .....   | 344 |
| IV.  | HOW COURTS SHOULD FIND @REALDONALDTRUMP IS A DESIGNATED PUBLIC FORUM.....   | 344 |

|     |  |     |
|-----|--|-----|
| V.  | THE PRESIDENT RECORDS ACT OF 1978.....               | 347 |
| A.  | <i>President Trump's Violations of the PRA</i> ..... | 348 |
| VI. | CONCLUSION.....                                      | 350 |

## I. INTRODUCTION

Imagine one day, you send out a tweet about your opinion on a recent government policy and someone replies to that tweet criticizing you and your views in an abusive way.\* You decide to block this person because you do not agree with their views and abusive comments.\* You post another tweet, but after posting it you realize that there is a spelling error in it so you delete the tweet.\* This normally happens on Twitter with zero consequences for normal every day users, which is nothing to write home about.<sup>1</sup> But what if you are one of the most powerful individuals in the world?\* For example, the President of the United States.<sup>2</sup> That leaves the question: Are these acts, which are done by Twitter users on a frequent basis, constitutional when done by the President of the United States?\*

On May 28, 2017, President Trump tweeted that the British Prime Minister was upset that some of the information Britain gave the United States concerning the Manchester attack was leaked.<sup>3</sup> Holly O'Reilly responded to the tweet, telling the President that he was the leaker and posted a graphic interchange format ("GIF") claiming that the video in the GIF was how the world viewed the President.<sup>4</sup> *Almost immediately*, Ms. O'Reilly was blocked from viewing the President's Twitter account.<sup>5</sup> A week later, Joe Papp had a similar experience when he tweeted a question to President

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1. Travis M. Andrews, *Trump Blocked Some People from His Twitter Account. Is That Unconstitutional?*, WASH. POST: MORNING MIX (June 7, 2017), <http://www.washingtonpost.com/news/morning-mix/wp/2017/06/07/trump-blocked-some-people-from-his-twitter-account-is-that-unconstitutional-as-they-say/>.

2. *Id.*

3. Charlie Savage, *Twitter Users Blocked by Trump Seek Reprieve, Citing First Amendment*, N.Y. TIMES: POL. (June 6, 2017), <http://www.nytimes.com/2017/06/06/us/politics/trump-twitter-first-amendment.html>.

4. Andrews, *supra* note 1.

5. *Id.*

Trump.<sup>6</sup> He asked why the President did not attend his #PittsburghNotParis rally, adding to the tweet #fakeleader.<sup>7</sup> Like Ms. O'Reilly, Mr. Papp was immediately blocked.<sup>8</sup> Ms. O'Reilly and Mr. Papp are just two of many people who have been blocked by the President from @realDonaldTrump.<sup>9</sup> In fact, there are internet sites that keep a running list of individuals that come forward and show evidence that they have been blocked from the President's @realDonaldTrump account.<sup>10</sup> The blocked individuals cannot view the President's statements or opinions on policy through conventional means.<sup>11</sup> Additionally, the blocked viewers are prohibited from contributing to the threads themselves and adding their opinions or views on a tweet from the President that addresses policy.<sup>12</sup> The Knight First Amendment Institute of Columbia ("Knight"), which represents Ms. O'Reilly and Mr. Papp, believes the President has violated the First Amendment by blocking these individuals based on their views towards the President and his policies.<sup>13</sup> Knight claims that the President's @realDonaldTrump Twitter account is a "forum[] in which [he] share[s] [his] thoughts and decisions as President . . . [where] millions . . . respond, ask questions, and sometimes have those questions answered."<sup>14</sup> Specifically, Knight claims that the Twitter account @realDonaldTrump "operates as a *designated public forum*" for purposes of the First Amendment and "viewpoint-based blocking of [their] clients is unconstitutional."<sup>15</sup> On July 11, 2017, Knight filed a lawsuit against President Trump seeking an injunction, naming Sean Spicer and Dan Scavino as co-defendants.<sup>16</sup>

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6. *Id.*

7. *Id.*

8. *Id.*

9. Andrews, *supra* note 1. *Dozen[s]* have reached out to Knight First Amendment Institute of Columbia. *Id.*

10. Ashley Feinberg, *A Running List of People Donald Trump Has Blocked on Twitter*, WIRED: SECURITY (June 14, 2017, 3:38 PM), <http://www.wired.com/story/donald-trump-twitter-blocked/>.

11. Andrews, *supra* note 1; Savage, *supra* note 3.

12. Andrews, *supra* note 1.

13. Letter from Jameel Jaffer et al. to President Donald Trump, Knight First Amendment Inst., Columbia Univ., to Donald J. Trump, President 1–2 (June 6, 2017) (on file with the Knight First Amendment Institute).

14. *Id.* at 1.

15. *Id.*

16. Complaint for Declaratory & Injunctive Relief at 1, 25, Knight First Amendment Inst. at Columbia Univ. v. Trump, No. 1:17-cv-05205 (S.D.N.Y. filed July 11, 2017); Charlie Savage, *Twitter Users Blocked by Trump File Lawsuit*, N.Y. TIMES: POL. (July 11, 2017), <http://www.nytimes.com/2017/07/11/us/politics/trump-twitter-users-lawsuit.html>.

Within twenty-four hours of his presidency, President Trump's use of his Twitter account already sparked questions about legality.<sup>17</sup> The President tweeted that he was "*honored* [sic] to serve as president."<sup>18</sup> Shortly after this tweet was deleted, "a second tweet was posted that corrected the [spelling] of the previous tweet."<sup>19</sup> These deleted tweets come in conflict with the President Records Act of 1978 ("PRA").<sup>20</sup> "The PRA set[] [out] strict rules for [any] presidential record[] [that is] created during a president's [tenure]."<sup>21</sup> "Under the law, the [F]ederal [G]overnment must maintain ownership and control of all presidential records" created by the President or the President's staff.<sup>22</sup> The PRA prohibits the President from getting rid of "any presidential records without the written permission of the archivist, [a]nd presidential records that have 'administrative, historical, informational, or evidentiary value' [may not] be destroyed at all."<sup>23</sup>

An issue that arises when it comes to Trump's presidential tweeting is that he currently uses two Twitter accounts, @realDonaldTrump and @POTUS—the official Twitter account of the President of the United States.<sup>24</sup> @realDonaldTrump has been the President's Twitter account since before the election in 2016, which currently has more than 50 million followers.<sup>25</sup> The @POTUS Twitter account was turned over to him after the end of the previous administration's presidency and has over 25 million followers less than @realDonaldTrump.<sup>26</sup> However, the President continued to use his previous account along with @POTUS after taking office.<sup>27</sup> Further, the President uses his personal account to give his opinions on public policy.<sup>28</sup> The President has stated that "he will continue to use . . . @realDonaldTrump . . . to speak directly to the people about issues of

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17. See Shontavia Johnson, *Donald Trump's Tweets Are Now Presidential Records*, CONVERSATION US: POL. & SOC'Y (Jan. 31, 2017, 9:45 PM), <http://www.theconversation.com/donald-trumps-tweets-are-now-presidential-records-71973>.

18. *Id.*

19. *Id.*

20. *See id.*

21. *Id.*

22. Johnson, *supra* note 17.

23. *Id.*

24. Andrews, *supra* note 1.

25. Donald J. Trump (@realDonaldTrump), TWITTER, [http://www.twitter.com/realDonaldTrump?ref\\_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor](http://www.twitter.com/realDonaldTrump?ref_src=twsrc%5Egoogle%7Ctwcamp%5Eserp%7Ctwgr%5Eauthor) (last visited Apr. 18, 2018). As of April 18, 2018, there are 50.9 million followers of @realDonaldTrump.

26. *See* Andrews, *supra* note 1; Johnson, *supra* note 17; President Trump (@POTUS), TWITTER, <http://www.twitter.com/POTUS> (last visited Apr. 18, 2018). As of April 18, 2018, there are 22.9 million followers of @POTUS.

27. Johnson, *supra* note 17.

28. *See* Savage, *supra* note 3.

national and international importance.”<sup>29</sup> In addition, on Tuesday, June 6, 2017, former Press Secretary Sean Spicer stated that the tweets from @realDonaldTrump are “official statements [of] the President of the United States,” which leads to support claims that individuals’ tweets to the President—replying to his official statements—deserve First Amendment protection.<sup>30</sup> The President also uses @POTUS to retweet many of his tweets from @realDonaldTrump, showing that both accounts are interchangeable when it comes to the President of the United States.<sup>31</sup> Less than a week later, after former Press Secretary Sean Spicer stated that the tweets were official statements, the Ninth Circuit Court of Appeals cited to a tweet from @realDonaldTrump in a decision as evidence to block the travel ban.<sup>32</sup> In the decision, the Court cited to a CNN report that stated Spicer’s comment about the President’s tweets from @realDonaldTrump being *official statements*.<sup>33</sup> Also, @POTUS states that all tweets are archived, assumingly because of the PRA.<sup>34</sup> However, @realDonaldTrump does not have any disclaimer on it that its tweets are archived.<sup>35</sup>

Whether or not replies by individuals to the President’s tweets deserve First Amendment protection has not been addressed by the Supreme Court.<sup>36</sup> This Comment will discuss the public forum doctrines, the government speech doctrine, and the proposed mixed speech analysis by law review articles and a few courts;<sup>37</sup> it will apply the framework of each doctrine to the President’s Twitter account to determine if the @realDonaldTrump account qualifies as a public forum or government speech and if the responses to his tweets from @realDonaldTrump deserve First Amendment protection.<sup>38</sup> Additionally, this Comment will propose the best analysis for the courts to use and classify the President’s Twitter account.<sup>39</sup> Further, this Comment will discuss the PRA and its amendment in 2014, to determine if the President’s tweets from @realDonaldTrump are

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29. Johnson, *supra* note 17.

30. See Andrews, *supra* note 1.

31. See Johnson, *supra* note 17.

32. Andrews, *supra* note 1; Ana Campoy, *A US Federal Court Just Used Donald Trump’s Own Tweets to Block His Travel Ban*, QUARTZ: OFFICIAL STATEMENTS (June 12, 2017), <http://www.qz.com/1004043/the-us-9th-circuit-court-just-used-donald-trumps-own-tweets-to-block-his-travel-ban/>.

33. Campoy, *supra* note 32.

34. See Johnson, *supra* note 17; @POTUS, *supra* note 26.

35. See @realDonaldTrump, *supra* note 25.

36. See Alissa Ardito, *Social Media, Administrative Agencies, and the First Amendment*, 65 ADMIN. L. REV. 301, 303 (2013).

37. See discussion *infra* Part II.

38. See discussion *infra* Part III.

39. See discussion *infra* Part IV.

presidential records that must be archived, and if the President is violating the Act.<sup>40</sup>

## II. THE DOCTRINES

### A. *Public Forum*

In 1972, the Supreme Court recognized a public forum as a legal category, even though the right to speak on public property was recognized long before.<sup>41</sup> That decision laid out a *complex maze of categories* that the Supreme Court has used to determine whether the “government[’s] restriction on expressive use of a government place” requires it to adhere to strict scrutiny or a lesser scrutiny.<sup>42</sup> *Perry Education Ass’n v. Perry Local Educators’ Ass’n*<sup>43</sup> set a standardized test which considers *intent and historical use*.<sup>44</sup> In regards to intent, the Court requires a showing that the government “take affirmative steps to open a forum for private speech.”<sup>45</sup> In addition, courts will often view government intent narrowly, giving the government permission to define specific boundaries or limitations for *acceptable expression*.<sup>46</sup> Which constitutional category the type of speech fits in often becomes “the crucial question . . . in deciding . . . speech cases.”<sup>47</sup>

In defining the forum, courts will identify the government property in question and focus on “the access sought by the speaker.”<sup>48</sup> A forum will encompass an entire property if a speaker simply seeks *general access* to the whole property.<sup>49</sup> But a *more tailored approach* is used to determine the boundaries of a forum when a speaker seeks *limited access*.<sup>50</sup> “[P]ublic comments—private speech—on blogs on agency websites, classified as social media for their interactive quality, have the strongest argument for

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40. See discussion *infra* Part V.

41. Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 1979 (2011).

42. *Id.* at 1980.

43. 460 U.S. 37 (1983).

44. Ardito, *supra* note 36, at 359.

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

46. *Id.*

47. Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 368 (2009).

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

49. *Id.*; *Air Line Pilots Ass’n v. Dep’t of Aviation*, 45 F.3d 1144, 1151 (7th Cir. 1995). “A potential speaker’s rights depend . . . upon the type of government property that the speaker seeks to access.” *Id.*

50. *Cornelius*, 473 U.S. at 801.

applying the public forum doctrine.”<sup>51</sup> “In a public forum, by definition, all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject.”<sup>52</sup>

#### B. *Traditional Public Forum*

The first category is the traditional public forum.<sup>53</sup> It is a piece of physical property owned or controlled by the government “which, by long tradition or by government fiat, h[as] been devoted to assembly and debate.”<sup>54</sup> In *Perry*, the Supreme Court held that streets and parks “have immemorially been held in trust for the use of the public and, . . . used for [the] purposes of assembly, communicating thoughts between citizens, and discussing public questions.”<sup>55</sup> Where these *quintessential public for[a]* are found, “the government may not [restrict] all communicative activity.”<sup>56</sup> “For the [government] to enforce a content-based exclusion, it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end,” otherwise known as strict scrutiny.<sup>57</sup> This standard also applies to restrictions of *time, place, and manner*.<sup>58</sup> Further, regulations must be *content-neutral* and *narrowly tailored*.<sup>59</sup>

Traditional public fora are “defined by the objective characteristics of the property,” making it “the easiest [of the] public forum categories to [identify and] apply, but only because the Supreme Court has [narrowly] defined” the parameters with no room for the forum to expand to newer areas similar to *those created in cyberspace*.<sup>60</sup> These quintessential fora only

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51. Ardito, *supra* note 36, at 360.

52. *Perry Educ. Ass’n*, 460 U.S. at 55.

53. *Id.* at 45.

54. *Id.*

55. *Id.* (quoting *Hague v. Comm Incls. Org.*, 307 U.S. 496, 515 (1939)).

56. *Id.*

57. *Perry Educ. Ass’n*, 460 U.S. at 45.

58. *Id.*

59. *Id.*

60. Lidsky, *supra* note 41, at 1982–83 (quoting *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678 (1998)); *see also* *Ark. Educ. Television Comm’n*, 523 U.S. at 678 (rejecting the view that traditional public forum status could extend *beyond its historical confines*); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997). “Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.” *Reno*, 521 U.S. at 870. “Through the use of [w]eb pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.” *Id.*

“arise ‘by long tradition or by government fiat.’”<sup>61</sup> Since no forum in cyberspace can be attributed to being immemorially held in public trust, it cannot “possibly be a product of *long tradition*.”<sup>62</sup> It has been clearly indicated by the Supreme Court that historical use of [the] government property in question determines the placement into the category.<sup>63</sup> Which leads to the conclusion the category of the traditional public forum “is closed to new places.”<sup>64</sup>

### C. *Designated Public Forum*

Even if a forum is not historically used as the traditional public forum category requires, governments may create or designate government property or places as a public forum for *expressive activity*.<sup>65</sup> “Determining whether government property has become a designated public forum requires [courts to examine] the government’s intent in establishing and maintaining the property.”<sup>66</sup> “The Supreme Court has repeatedly held that the government must have an *affirmative intent* to create a public forum” for expressive private speech in order for the forum to qualify as one that is designated.<sup>67</sup> Courts “will not find that a public forum has been created in the face of clear evidence of a contrary intent.”<sup>68</sup> Further, courts will not find that the government created “a public forum by inaction or by permitting limited discourse, but only [if the government] intentionally open[s] a nontraditional forum for public discourse.”<sup>69</sup> To determine the intent required for the creation of a designated forum, “courts must consider both explicit expressions about intent and ‘the policy and practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum.’”<sup>70</sup> Further, courts must also “examine[] the nature of the property and its compatibility with expressive activity.”<sup>71</sup>

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61. Lidsky, *supra* note 41, at 1983 (quoting *Perry Educ. Ass’n*, 460 U.S. at 45).

62. *Id.* at 1982–83.

63. *Id.* at 1983; *see also Ark. Educ. Television Comm’n*, 523 U.S. at 678.

64. Lidsky, *supra* note 41, at 1983.

65. *Perry Educ. Ass’n*, 460 U.S. at 45.

66. *Air Line Pilots Ass’n v. Dep’t of Aviation*, 45 F.3d 1144, 1152 (7th Cir. 1995) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985)).

67. *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 76 (1st Cir. 2004).

68. *Cornelius*, 473 U.S. at 803.

69. *Ridley*, 390 F.3d at 76 (quoting *Cornelius*, 473 U.S. at 802).

70. *Id.* (quoting *Cornelius*, 473 U.S. at 802).

71. *Id.* (alteration in original) (citation omitted).

The same First Amendment protections that are afforded in a traditional public forum apply to a forum that is designated.<sup>72</sup> For example, “[r]easonable time, place, and manner regulations are [allowed],” and in order to enforce a content-based regulation, the forum must adhere to the test of strict scrutiny.<sup>73</sup> “Examples of designated public forums include municipal theaters and meeting rooms at state universities.”<sup>74</sup> The difference between traditional fora and designated fora appear “in the operation of the forum itself” because when it comes to a designated forum, the government “is not required to indefinitely” keep the forum open, but if it chooses to keep the “open character of the facility,” then the government must adhere to the same constitutional “standards [that] apply in a traditional public forum.”<sup>75</sup> In other words, the government faces strict scrutiny when it attempts to “make content-based restriction on speech” as long as the designated forum remains open, but the government “may completely close the forum [or limit the forum to speakers and topics] if it wishes.”<sup>76</sup> The government may open a designated public forum to the public as a whole, in which it operates the very same way a traditional public forum does, or it may choose to establish a designated but limited public forum.<sup>77</sup>

#### D. *Limited Public Forum*

The Court in *Perry* laid out the standards for a limited forum in an *ambiguous footnote*, which states that the government may designate or create a forum “for a limited purpose such as [for] use by certain groups, . . . or for the discussion of certain subjects.”<sup>78</sup> In a limited public forum, the government may implement some content-based restrictions to define or

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72. Alysha L. Bohanon, Note, *Tweeting the Police: Balancing Free Speech and Decency on Government-Sponsored Social Media Pages*, 101 MINN. L. REV. 341, 348–49 (2016); see also U.S. CONST. amend I.

73. Bohanon, *supra* note 72, at 348–49 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)).

74. *Id.* at 348; see also *Widmar v. Vincent*, 454 U.S. 263, 267–69 (1981) (finding *no doubt* that the public university facility qualified as a public forum); *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 555 (1975) (finding a municipal auditorium and a city leased theater were “designed for and dedicated to expressive activities” qualified as public forum).

75. Bohanon, *supra* note 72, at 349 (quoting *Perry Educ. Ass’n*, 460 U.S. at 46).

76. *Id.*; see also *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 801 (1985). The government is free to change the nature of any nontraditional forum as it wishes. *Cornelius*, 473 U.S. at 801–02.

77. *Perry Educ. Ass’n*, 460 U.S. at 45–46; Bohanon, *supra* note 72, at 349.

78. Lidsky, *supra* note 41, at 1984 (quoting *Perry Educ. Ass’n*, 460 U.S. at 46 n.7).

limit the boundaries of topics “to be discussed in the forum and . . . preserve those limits once [founded].”<sup>79</sup> A few examples of limited public fora are when “a university . . . limit[s] a public forum it establish[ed] for use by student groups . . . [or when] a school district . . . limit[s] a public forum to the discussion of a particular topic.”<sup>80</sup> However, strict scrutiny will still apply to any restrictions based on a speaker’s opinions or viewpoint.<sup>81</sup> Government restrictions on speech in these limited fora “must be viewpoint neutral and reasonable in light of the purpose served by the forum.”<sup>82</sup> The Supreme Court set forth the *constitutional standards* that govern establishing content limitations for the limited public forum in *Christian Legal Society Chapter of the University of California v. Martinez*.<sup>83</sup> The limited forum at issue “was a student organization program established by Hastings College of the Law,” and the limitation the college of law set was “to include only student organizations that complied with [the] *nondiscrimination policy*.”<sup>84</sup> The law school interpreted the policy as requiring student organizations to “allow any [Hastings] student to participate, become a member, or seek leadership positions in the organization[s], regardless of” their views.<sup>85</sup> The Christian Legal Society decided not to adopt the *all-comers policy*, and instead decided to create an access barrier, where memberships would only be given “to students who agreed that they believed in Jesus Christ and would *eschew homosexual conduct*” and premarital sex.<sup>86</sup> Hastings decided to deny the Christian Legal Society’s “funding and other privileges normally accorded to registered student organizations” because of the society’s barring of students based on religion and sexual orientation, which then caused the legal society to sue, “claiming violation of its rights to freedom of association and expression.”<sup>87</sup>

On appeal, the Supreme Court treated the “all-comers policy as a [limitation] on forum parameters.”<sup>88</sup> The Court stated that the constitutional

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79. *Id.*

80. *Id.* at 1984–85 (footnote omitted) (quoting *Perry Educ. Ass’n*, 460 U.S. at 46 n.7).

81. Ardito, *supra* note 36, at 366.

82. *Id.* (quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 99 (2001)).

83. 561 U.S. 661, 663 (2010); Lidsky, *supra* note 41, at 1985.

84. Lidsky, *supra* note 41, at 1985.

85. *Christian Legal Soc’y Chapter of the Univ. of Cal.*, 561 U.S. at 671.

86. *Id.* at 672; Lidsky, *supra* note 41, at 1985 (emphasis added).

87. *Christian Legal Soc’y Chapter of the Univ. of Cal.*, 561 U.S. at 672–74; see also Lidsky, *supra* note 41, at 1985 (quoting *Christian Legal Soc’y Chapter of the Univ. of Cal.*, 561 U.S. at 673–74).

88. Lidsky, *supra* note 41, at 1985–86; accord *Christian Legal Soc’y Chapter of the Univ. of Cal.*, 561 U.S. at 678.

standard for access barriers to limited fora “must be reasonable and viewpoint neutral.”<sup>89</sup> The Court found the all-comers policy to be constitutional.<sup>90</sup> When the government applies the criteria of the forum and excludes a speaker on the basis of his speech, “the exclusion need only be ‘reasonable in light of the purposes served by the forum’ and viewpoint neutral.”<sup>91</sup> However, if the government “opens a public forum but excludes a speaker whose speech [clearly] falls within the subject matter [restriction] of the forum, the exclusion is subject to strict scrutiny” as with traditional public forums and designated forums.<sup>92</sup>

### E. *Nonpublic Forum*

The Court has described the last category—the nonpublic forum—“as property owned or controlled by the government, ‘which is not by tradition or designation a forum for public communication.’”<sup>93</sup> “[T]he nonpublic forum is the *default category*” for everything owned by the government that is not identified in the other categories.<sup>94</sup> The government’s ability to control speech in nonpublic forums is broad.<sup>95</sup> States may implement time, place, and manner restrictions as well as “exclude a speaker from a forum, even if [the speaker’s] purpose is communicative, as long as [the] exclusion is ‘reasonable and not an [attempt] to suppress expression merely because public officials oppose the speaker’s view[s].’”<sup>96</sup> The Court stated that the government’s power over nonpublic fora was similar to those of private property owners—it has the “power to preserve the property under its control for [its] lawfully dedicated [use].”<sup>97</sup> However, in practice there is very little difference between limited fora and nonpublic fora—commentators suggest the difference is just *semantic[s]*.<sup>98</sup> Both categories require viewpoint neutrality, and state imposed exclusions are judged according to a reasonableness standard.<sup>99</sup> Examples of nonpublic fora

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89. *Christian Legal Soc’y Chapter of the Univ. of Cal.*, 561 U.S. at 679.

90. *See id.* at 690.

91. Lidsky, *supra* note 41, at 1989 (quoting *Rosenberger v. Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)).

92. *Id.* at 1982, 1984, 1989.

93. *Id.* at 1989 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)).

94. *Id.* (emphasis added).

95. *Id.*

96. Lidsky, *supra* note 41, at 1989 (quoting *Perry Educ. Ass’n*, 460 U.S. at 46).

97. *Perry Educ. Ass’n*, 460 U.S. at 46 (quoting *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129–30 (1981)).

98. *See* Lidsky, *supra* note 41, at 1980 n.14, 1991 (emphasis added).

99. *Id.* at 1991.

include “the sidewalk in front of a post office, . . . airport terminal[s], charity campaigns in federal government offices, and residential mailboxes.”<sup>100</sup> Perhaps the key difference between a public forum and a nonpublic forum is that “when [the former] is found, a citizen is entitled to access as a matter of constitutional law.”<sup>101</sup>

#### F. *Government Speech*

Another category where the President’s Twitter account could fall under is the *government speech doctrine*.<sup>102</sup> The bedrock of the government speech doctrine is that the “government[] must speak in order to govern.”<sup>103</sup> While the government has permission to use social media to communicate its views or opinions to citizens, when it decides to do so it does not need to include opposing views.<sup>104</sup> First Amendment protections that are afforded by the public fora doctrines do not apply to expression that is labeled as government speech.<sup>105</sup> *Pleasant Grove City v. Summum*<sup>106</sup> provides a clear example of government speech for purposes of examining the President’s Twitter account.<sup>107</sup> In *Summum*, a Utah municipality—a government entity—accepted placing a Ten Commandments monument in a public park, but refused to erect a monument containing the *Seven Aphorisms* of the Summum religion in a public park.<sup>108</sup> The Supreme Court of the United States concluded that “[p]ermanent monuments displayed on public property typically represent government speech,” even though “the Summum religious organization [was claiming] that the park was a public forum.”<sup>109</sup> The Court stated that because a municipality is “[a] government entity, [it] has the right to speak for itself, . . . to say what it wishes, and to select the views it wants to express.”<sup>110</sup> The proposition that is derived from *Summum* is that when the government decides to convey a message to its citizens, it does not “need [to] consider [opposing] views or accommodate other

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100. Ardito, *supra* note 36, at 339.

101. *Id.*

102. Lidsky, *supra* note 41, at 1992.

103. *Id.* (citation omitted).

104. *Id.*

105. *Id.* at 1992–93.

106. 555 U.S. 460 (2009).

107. *See id.* at 466; Lidsky, *supra* note 41, at 1993.

108. *Summum*, 555 U.S. at 466; Lidsky, *supra* note 41, at 1993.

109. Lidsky, *supra* note 41, at 1993 (alteration in original) (quoting *Summum*, 555 U.S. at 470).

110. *Id.* (alteration in original) (citation omitted) (quoting *Summum*, 555 U.S. at 467–68).

speakers.”<sup>111</sup> The Court insists that any constraint on government speech comes from the political process.<sup>112</sup> The Court assumes that the marketplace of ideas will cause competing viewpoints to emerge, allowing voters to choose which government speech they agree or disagree with.<sup>113</sup> Thus, the Court grants “government actors a powerful tool for excluding [viewpoints and] speakers from its *property*—physical or otherwise.”<sup>114</sup>

### G. *Mixed Speech*

The President’s Twitter account, as well as government-sponsored Facebook pages, are situations where it is difficult to determine if the President or the “government entity is speaking on its own behalf or is providing a forum for private speech.”<sup>115</sup> Under the current standards, the first step is to classify the speech as public, private, or government.<sup>116</sup> If private, the “courts apply the public forum” analysis; if government, the “courts apply the government speech doctrine.”<sup>117</sup> Commentators have criticized this approach because there has been no standardization for speech that contains both private and government speech.<sup>118</sup> These critics claim that the public forum analysis “consists of four categories . . . with ill-defined boundaries.”<sup>119</sup> While traditional fora have been defined and set “to parks, roads, and sidewalks,” the other categories remain undefined.<sup>120</sup> In regards to limited forums, “it is unclear what amounts of access—or content—limitations are [required] to change the forum from a designated” forum to one that qualifies as a limited forum.<sup>121</sup> Further, while examining government intent is the distinguishing factor between public and nonpublic forums, this inquiry into intent has not been standardized.<sup>122</sup> The Supreme Court of the United States has stated that when examining government intent, what must be examined is “the policy and practice of the government regarding the forum, the nature and characteristics of the forum, and the

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111. *Id.* at 1994.

112. *Id.*

113. *Id.*

114. Lidsky, *supra* note 41, at 1994.

115. Ardito, *supra* note 36, at 344.

116. *Id.*

117. *Id.*

118. Ross Rinehart, Note, “Friending” and “Following” the Government: How the Public Forum and Government Speech Doctrines Discourage the Government’s Social Media Presence, 22 S. CAL. INTERDISC. L.J. 781, 813 (2013).

119. *Id.*

120. *Id.* (footnote omitted).

121. *Id.*

122. *Id.*

compatibility of the forum with expressive activity, but [the Court] has not provided a uniform test.”<sup>123</sup>

In addition, the public forum doctrine and government speech coexist rather uncomfortably together.<sup>124</sup> *Sumnum* illustrates a dangerous path because the Court relied on the government speech doctrine “to label speech that contain[ed] . . . both private and governmental expression as government speech.”<sup>125</sup> This resulted in the Court expanding the government speech doctrine without stating why the public forum analysis did not apply to the expression in question, which contained a mixture of government and private speech.<sup>126</sup>

The Fourth and the Ninth Circuit courts have provided a four-factor test in recent cases to address whether speech qualifies as government or private, which resulted in scholars taking and proposing a three-question test to help examine and place speech into a proper category.<sup>127</sup> Before applying the factors, the first step in the approach is to determine whether the speech in question or “the forum . . . is characterized as governmental, private, or mixed speech.”<sup>128</sup> If the speech or forum in question falls solely into one of those categories, then the developed tests are to be used.<sup>129</sup> This analysis understands that—more often than not—speech in social media will contain both government and private speech.<sup>130</sup>

Thus, to determine whether the government’s social media site is characteristic of governmental, private, or mixed speech, courts should weigh the following factors: (1) the central purpose of the social media site; (2) the government’s degree of control over its social media presence; and (3) the identity of the person to whom a reasonable or average social media user would attribute the speech involved.<sup>131</sup>

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123. Rinehart, *supra* note 118, at 813 (footnotes omitted).

124. *Id.* at 814.

125. *Id.*; *see also* Pleasant Grove City v. Sumnum, 555 U.S. 460, 464 (2009).

126. Rinehart, *supra* note 118, at 814.

127. *See id.* at 823–24, 834–35.

128. *Id.* at 834.

129. *Id.* at 834–35.

130. *Id.* at 835.

131. Rinehart, *supra* note 118, at 835.

III. APPLICATION OF THE PUBLIC FORUM DOCTRINES, GOVERNMENT  
SPEECH DOCTRINE, AND MIXED SPEECH ANALYSIS TO  
@REALDONALDTRUMP

A. *Threshold Issues*

Before applying the speech doctrines discussed above to @realDonaldTrump, it is necessary to discuss three important issues.<sup>132</sup> A majority of the Supreme Court of the United States cases have “involve[d] either physical places or resources owned or . . . controlled by the government.”<sup>133</sup> Despite the fact that a Twitter account page is *metaphysical*, the *government does not own* Twitter, and the fact that some consider @realDonaldTrump a personal account does not prevent @realDonaldTrump from qualifying as a public forum.<sup>134</sup>

1. Metaphysical

First, the mere fact that @realDonaldTrump is not a physical location with “spatial nor geographical existence [does] not [prevent] it from becoming a public forum” because precedent set by the Supreme Court clearly indicates that public forum doctrines may be applied to locations that are *metaphysical*.<sup>135</sup> For example, the Supreme Court has applied public forum doctrines to cases that involved “pools of funds to subsidize speech or access to email lists on campus servers,” or a school’s internal mailing system.<sup>136</sup> “It is hardly a stretch” that the @realDonaldTrump—which is itself an interactive social media site—qualifies as a public forum when it clearly provides a meeting place for *discussion and debate*.<sup>137</sup> In addition, the Supreme Court has explained that the internet “include[s] *vast democratic for[a]* and has [likened] the use of internet distribution mechanisms to pamphleteering . . . . From a functional standpoint, there [is no] reason [not] to treat” Twitter account pages the same as *meeting rooms*<sup>138</sup> or a *digital town hall*.<sup>139</sup>

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132. See Lidsky, *supra* note 41, at 1994; Andrews, *supra* note 1.

133. Lidsky, *supra* note 41, at 1994.

134. *Id.* at 1994–95; Andrews, *supra* note 1.

135. Lidsky, *supra* note 41, at 1995.

136. *Id.*; see also *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

137. See Lidsky, *supra* note 41, at 1995; Ardito, *supra* note 36, at 360.

138. Lidsky, *supra* note 41, at 1995–96 (quoting *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 868 (1997)).

139. Savage, *supra* note 16.

## 2. The Government Does Not Own Twitter

Second, government control is not a necessity for a forum to be qualified with *public forum status*.<sup>140</sup> A Twitter account page is “neither owned nor exclusively controlled by the government actor who establishes it.”<sup>141</sup> President Trump “does not own . . . the underlying software” to Twitter, nor was Twitter created by the government; most likely, President Trump “receives a license from [Twitter] to use its proprietary software” by accepting the *terms and conditions*.<sup>142</sup> In fact, these *terms and conditions* that the President must accept to use Twitter limit his *editorial control* of his account.<sup>143</sup> Even so, the fact that the President lacks *ownership or . . . control* over @realDonaldTrump does “not preclude a finding of public forum status.”<sup>144</sup> Because, if “the government can rent a building, [auditorium, or theater] to use as a forum for public debate and discussion, so, too, can [the President of the United States] rent a [Twitter account] for the promotion of public discussion.”<sup>145</sup>

## 3. @realDonaldTrump Is Not a Personal Account

Third, the final issue left to address is that the President has two accounts that he chooses to tweet from.<sup>146</sup> @POTUS is “the official Twitter account of the [President of the United States],” which was used during the Obama administration.<sup>147</sup> @realDonaldTrump is his personal Twitter account, which he has “used well before the [2016] election,” and which is more followed and *closely watched*, evidenced by the fact that it has . . . million[s] more followers than @POTUS.<sup>148</sup> Further, @realDonaldTrump is not a private account; it is open to whoever has a Twitter account to follow him, without needing to be approved, to anyone with internet access.<sup>149</sup>

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140. Lidsky, *supra* note 41, at 1996.

141. *Id.*

142. *See id.*

143. *See id.*; *Twitter Privacy Policy*, TWITTER, <http://www.twitter.com/en/privacy> (last visited Apr. 18, 2018). The President—like every other registered Twitter user—is limited to use *140 characters* in any tweet he sends. *Twitter Privacy Policy, supra.*

144. Lidsky, *supra* note 41, at 1996.

145. *Id.*

146. *See Andrews, supra* note 1.

147. *Id.*

148. *Id.*; compare @realDonaldTrump, *supra* note 25 (as of April 18, 2018, there are 50.9 million followers of @realDonaldTrump), with @POTUS, *supra* note 26 (as of April 18, 2018, there are 22.9 million followers of @POTUS).

149. Alex Abdo, *@realDonaldTrump and the First Amendment*, KNIGHT FIRST AMEND. INST.: COLUM. U. (June 19, 2017),

Also, Spicer's statement that the tweets from the @realDonaldTrump account are "official statements [of] the [P]resident" seems to negate the fact that the account is a personal one for the man, Donald Trump, but also one that belongs to the forty-fifth President of the United States.<sup>150</sup> Additionally, the President's *bio* account line on @realDonaldTrump identifies himself in identically the same way @POTUS does.<sup>151</sup> Even his social media director promotes that the President communicates to the public via @realDonaldTrump.<sup>152</sup> Further, judges have used and cited to @realDonaldTrump as evidence in decisions because of the opinions he states on policy.<sup>153</sup> In addition, @POTUS is now mainly used by the President to simply retweet tweets from @realDonaldTrump,<sup>154</sup> which further supports the argument that, "for all intents and purposes," @realDonaldTrump is the account of the President, like @POTUS, because it is a means for the President to communicate and convey messages to citizens, just as the White House's Facebook page uses its site to convey messages to citizens.<sup>155</sup> Many commentators have taken to state that this account is a personal one for the man Donald J. Trump and not the President's, but this argument is flawed and does not take into account how the President uses his account.<sup>156</sup> Many times the President tweets "major official announcements—sometimes for the first time or only time—on the account."<sup>157</sup> A few examples are first, when the President told the public that the courts could call the ban whatever they want but it is flat out a travel

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<http://www.knightcolumbia.org/news/realdonaldtrump-and-first-amendment>. But without an account, a person cannot respond to his tweets. *Twitter Privacy Policy*, *supra* note 143.

150. See Andrews, *supra* note 1.

151. Abdo, *supra* note 149; compare @POTUS, *supra* note 26 ("[forty-fifth] President of the United States of America"), with @realDonaldTrump, *supra* note 25 ("[forty-fifth] President of the United States of America").

152. Dan Scavino Jr. (@Scavino45), TWITTER (June 6, 2017, 3:39 PM), <http://www.twitter.com/Scavino45/status/872221311090778114>.

153. Campoy, *supra* note 32. President Trump recently posted his opinion on transgender individuals serving in the military on @realDonaldTrump declaring that *[t]ransgender individuals* would not be allowed to participate in the U.S. military *in any capacity*. Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2017, 6:04 AM), <http://www.twitter.com/realDonaldTrump/status/890196164313833472>.

154. Johnson, *supra* note 17; see also @POTUS, *supra* note 26.

155. Andrews, *supra* note 1; Lidsky, *supra* note 41, at 1996; @Scavino45, *supra* note 152.

156. Andrews, *supra* note 1; Abdo, *supra* note 149. This kind of "formalistic approach . . . makes little sense." Abdo, *supra* note 149. The test should be functional, which examines how the President uses his account asking if it would be "better understood as personal or as official." *Id.* Additionally, "a federal district court allowed a public-forum claim to proceed after noting that a county board member had used her private Facebook page in a manner seemingly official in nature." *Id.*

157. *Id.*

ban—does not need a *politically correct term*.<sup>158</sup> The second, was when the President decided to “issue statements about upcoming policy changes,”—such as when he tweeted he would announce his decision on the Paris Accord—then the notice to the citizens of the announcement came from @realDonaldTrump.<sup>159</sup> The third was when the President announced that he was going to nominate Christopher Wray as the FBI director, which he announced on @realDonaldTrump “before he . . . announced it through any other channel.”<sup>160</sup> Furthermore, @POTUS never shared the information about the FBI director hiring.<sup>161</sup> The President also announces on @realDonaldTrump when he is meeting or speaking with leaders of other countries.<sup>162</sup> A quick glance at the account’s page clearly shows that the majority of the posts are either upcoming changes, success about his decisions while in office, his views on media, and upcoming meetings or dealings that the President of the United States is doing—not what Donald Trump, the man, is doing.<sup>163</sup> It is hardly a stretch that @realDonaldTrump is the voice of the President of the United States; and the account is for the President to have another platform, which he uses more frequently than any other platform available to him to address the American citizens and the public at large.<sup>164</sup>

## B. *Application of the Doctrines*

### 1. Traditional Public Forum

The traditional public forum doctrine is perhaps the easiest to apply to the President’s Twitter account because the forum historically has been applied to fora that arise from “long tradition or . . . government fiat,”<sup>165</sup> neither which apply to the President’s Twitter account.<sup>166</sup> @realDonaldTrump cannot possibly be a product that arises from long tradition, however, some commentators have raised the point that

158. Campoy, *supra* note 32.

159. Andrews, *supra* note 1; @realDonaldTrump, *supra* note 25.

160. Abdo, *supra* note 149; Donald J. Trump (@realDonaldTrump), TWITTER (June 7, 2017, 4:44 AM), <http://www.twitter.com/realDonaldTrump/status/872419018799550464>.

161. Abdo, *supra* note 149; @POTUS, *supra* note 26.

162. Donald J. Trump (@realDonaldTrump), TWITTER (July 3, 2017, 4:00 AM), <http://www.twitter.com/realDonaldTrump/status/881830110114009089>.

163. Andrews, *supra* note 1; *see also* Abdo, *supra* note 149; @realDonaldTrump, *supra* note 25.

164. Abdo, *supra* note 149.

165. Lidsky, *supra* note 41, at 1982–83 (quoting Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37, 45 (1983)).

166. *See id.* at 1983.

*government fiat* could turn a Twitter page into a traditional public forum.<sup>167</sup> If *government fiat* could turn the President's Twitter account into a traditional public forum, it likely applies to the @POTUS account since it has been passed between administrations to the sitting President and not @realDonaldTrump because the account was his since before the election.<sup>168</sup> Therefore, it is likely that the narrow boundaries the Supreme Court has placed on this category of public fora will continue to solely apply to physical areas that have been historically treated as *loci of public discourse* and will not translate to the online realm.<sup>169</sup> Essentially, the forum is closed to new places or spaces including the internet unless a future Supreme Court case indicates otherwise.<sup>170</sup>

## 2. Designated and Limited Forum Analysis

### a. Designated Public Forum

@realDonaldTrump qualifying as a designated public forum is what has garnered the most support.<sup>171</sup> Knight certainly believes so.<sup>172</sup> The argument for the designated public forum begins that @realDonaldTrump is open to the general public.<sup>173</sup> Anyone that has access to the internet can find @realDonaldTrump and view his tweets but cannot respond to them unless they set up an account.<sup>174</sup> In order for @realDonaldTrump to qualify as a designated public forum, the first step is to examine the intent of the forum.<sup>175</sup> Inaction by the government is not enough to find intent; the government must “intentionally open[] a nontraditional forum for public discourse.”<sup>176</sup> Not just any intent will do; an *affirmative intent* to create the forum must be found and that can be found by examining the three factors

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167. See *id.*

168. See *id.* at 1983, 1996; Andrews, *supra* note 1.

169. Rinehart, *supra* note 118, at 794–95 (citing *Perry Educ. Ass'n*, 460 U.S. at 44). But perhaps someday in the far future where the internet has been a common commodity to all the generations present, certain areas of the internet may be recognized as having long traditions of public discourse. See *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870 (1997).

170. Lidsky, *supra* note 41, at 1983.

171. See Andrews, *supra* note 1.

172. Letter from Jameel Jaffer et al. to President Donald Trump, *supra* note 13, at 1.

173. Bohanon, *supra* note 72, at 348; see also @realDonaldTrump, *supra* note 25.

174. *Twitter Privacy Policy*, *supra* note 143; @realDonaldTrump, *supra* note 25; Abdo, *supra* note 149.

175. *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 76 (1st Cir. 2004).

176. *Id.*

that are laid out in *Ridley v. Massachusetts Bay Transport Authority*:<sup>177</sup> The “explicit expressions about intent, . . . ‘the policy and practice of the government,’” and “the nature of the property [in question] and its compatibility with expressive activity.”<sup>178</sup>

The government did not open @realDonaldTrump; however, the government did open @POTUS and @Whitehouse, all in an attempt to create an openness between government and the public.<sup>179</sup> But, the explicit expression of the government is that the President’s tweets from @realDonaldTrump are “official statements [of] the [P]resident.”<sup>180</sup> Further, the White House’s official Twitter page states that the latest news about the President and his administration can be found at @realDonaldTrump.<sup>181</sup> This statement, in addition to the President’s own statement that he would continue to use @realDonaldTrump to inform the public at large about his policy, are explicit expressions about the policy and the intent of the government to open @realDonaldTrump as a forum for public discourse.<sup>182</sup> If the government had never made any explicit expression that tweets from the account are official statements of the President, it could be that it was simply the government’s inaction that created a forum and that it would not qualify as a designated forum.<sup>183</sup>

When examining Twitter’s compatibility with expressive activity, Twitter’s own mission statement is to “give everyone the power to create and share ideas and information instantly, without barriers.”<sup>184</sup> Twitter is considered “as dynamic and multidirectional because . . . [it allows] users the ability to reach multitudes of other users in real time, and allows those users to respond, comment, co-opt, and otherwise interact with the speech produced through [Twitter].”<sup>185</sup> Twitter provides each user with a profile that “displays the user’s tweets and other activity . . . in real-time.”<sup>186</sup> Twitter posts tweets in *real-time*, “result[ing] in Twitter breaking news stories before [any other] media outlets” are able.<sup>187</sup> Further, Twitter allows

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177. 390 F.3d 65 (1st Cir. 2004).

178. *Id.* at 76 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802 (1985)).

179. *See* Ardito, *supra* note 36, at 308–10.

180. Andrews, *supra* note 1.

181. The White House (@WhiteHouse), TWITTER, <http://www.twitter.com/WhiteHouse> (last visited Apr. 18, 2018).

182. Johnson, *supra* note 17; *see also* @WhiteHouse, *supra* note 181.

183. *See* *Ridley*, 390 F.3d at 76; Andrews, *supra* note 1.

184. *Company*, TWITTER: ABOUT, <http://about.twitter.com/company> (last visited Apr. 18, 2018).

185. Rinehart, *supra* note 118, at 789.

186. *Id.* at 788.

187. *Id.*

large public figures to spread messages *unmediated* to users.<sup>188</sup> Twitter grants users the ability to be able to select their followers—all through an option on the users’ accounts that sets the users’ accounts to private—letting only who the users wish view their tweets.<sup>189</sup> With respect to a designated forum and its expressive activity, Twitter is at the very core of today’s expressive activity, allowing the public at large to view expressive speech *in real time* and giving users the ability to respond to the tweets.<sup>190</sup> Therefore, a court could easily find that @realDonaldTrump is a designated public forum because of the explicit expressions of policy by the former Press Secretary, the White House’s Twitter page, the President’s own statements, and the expressive nature of Twitter.<sup>191</sup>

b. *Limited Public Forum*

“[While] a designated open forum . . . would best protect private speech interests, there are [a few] uncertainties with this classification.”<sup>192</sup> Even if the court is strictly relying on the public forum doctrine, the factors that have been identified in *Cornelius v. NAACP Legal Defense and Education Fund, Inc.*,<sup>193</sup> and later stated in *Ridley*, could lead a court to determine that @realDonaldTrump “fall[s] into a category with less protection for private speech [interests]—[that being] the limited public forum.”<sup>194</sup> The creation of a limited public forum is virtually the same as the creation of a designated open forum.<sup>195</sup> It requires the court to examine the President’s intent—rather than historical use—“to open such a forum to expressive activity.”<sup>196</sup> If the President opens a forum, but then decides to limit the forum to a certain topic or to certain speakers, then the President creates a limited forum.<sup>197</sup> The limitation to certain speakers or certain topics, at the moment of creation, is perhaps the most significant difference between the creation of a designated and limited forum.<sup>198</sup> However, the

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188. *Id.*

189. *Id.* at 788–89.

190. *See* Rinehart, *supra* note 118, at 788–89.

191. *See id.*

192. Bohanon, *supra* note 72, at 364; *see also* Ardito, *supra* note 36, at 337–38 n.158 (explaining that the Supreme Court has never found a designated forum but lower courts have).

193. 473 U.S. 788 (1985).

194. Bohanon, *supra* note 72, at 364; *see also* *Cornelius*, 473 U.S. at 802; *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 76 (1st Cir. 2004).

195. Rinehart, *supra* note 118, at 798.

196. *Id.* [I]ntent . . . carries the day. Ardito, *supra* note 36, at 364.

197. Rinehart, *supra* note 118, at 798.

198. *See* Ardito, *supra* note 36, at 364.

limitations must be reasonable—which is a lesser standard—but viewpoint-based exclusions remain subject to strict scrutiny as in any public fora.<sup>199</sup> Further, strict scrutiny would also apply if the President chooses to “exclude[] a speaker who falls within the class of speakers to whom the forum [has been] available or whose speech concerns a subject . . . [to] which the forum is dedicated.”<sup>200</sup>

It would be reasonable to conclude that @realDonaldTrump—or any government run Twitter account—is a limited public forum.<sup>201</sup> While virtually any person can access Twitter to view public Twitter profile’s tweets, a person must be registered to Twitter to respond to a tweet, retweet, or otherwise interact with a tweet.<sup>202</sup> This could evidence the President’s intent to open the forum and constrain the forum to a limited group of speakers, the limited group of speakers who are registered Twitter users, or it could be the President’s intent to constrain the topics to those he raises only on @realDonaldTrump.<sup>203</sup>

### 3. Nonpublic Forum

As the analysis of the public forum begins to stray further from the traditional public forum, the boundaries of each begin to blur similar to how a court could find either a designated or limited public forum; so, too, can a court find a limited public forum—but at the same time—a nonpublic forum.<sup>204</sup> Commentators go as far as to state that the boundary is *non-existent* and *maddeningly slippery*.<sup>205</sup>

The analysis for a nonpublic forum begins with identifying the forum, because the particular channel of communication constitutes the forum.<sup>206</sup> The forum in question is not access to Twitter in general, but the access sought is to @realDonaldTrump.<sup>207</sup> The courts will not find that a public forum lacks a clear and evidentiary intent to create one.<sup>208</sup> As in the designated and limited, the court will examine the policy and practice of the government to ascertain intent, as well as the compatibility of the property

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199. Rinehart, *supra* note 118, at 798.

200. *Id.* at 798–99.

201. Ardito, *supra* note 36, at 364; *see also* @realDonaldTrump, *supra* note 25.

202. *See* Rinehart, *supra* note 118, at 788–89; Andrews, *supra* note 1.

203. *See* Ardito, *supra* note 36, at 364.

204. *See* Lidsky, *supra* note 41, at 1990.

205. *Id.*

206. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 801–02 (1985).

207. *See id.* at 800–01.

208. *Id.* at 803.

with expressive activity.<sup>209</sup> A court would be hard-pressed to find that @realDonaldTrump is a nonpublic forum because of the statements by the former Press Secretary, along with the President's own statements, and Twitter's expressive nature as a foundation of the social media site.<sup>210</sup>

#### 4. Government Speech Doctrine

As stated above, when the government speaks in order to govern on social media, it need not consider opposing viewpoints.<sup>211</sup> Further, the government "speaks through agents whom they hire, pay, select, [elect,] facilitate, or subsidize."<sup>212</sup> When the government speaks, First Amendment limits imposed do not apply to government speech labeled as expression.<sup>213</sup> Information found on a government's website is government expression labeled as government speech.<sup>214</sup>

It is difficult to argue that, when the President tweets, there is no other form of expression that can be more labeled as government speech.<sup>215</sup> The President, as an elected official, need not consider opposing views; he must speak to govern and the limits on his speech must come from the political process.<sup>216</sup> When it comes to the President's tweets, a court would be hard-pressed to label it as anything other than government speech because it is arguably more apparent than what qualified as government speech in *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*<sup>217</sup> However, "whether . . . the government is speaking is not [the] issue."<sup>218</sup> At first glance, the President's Twitter account—where he tweets his opinions on policy—seems like a "textbook case [for] government speech, and the

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209. *Id.* at 802.

210. *See* Andrews, *supra* note 1; Johnson, *supra* note 17; *Company*, *supra* note 184; *supra* Sections III.B.2.a., III.B.2.b. (furthering an in-depth analysis of the intent and compatibility of expressive nature analysis).

211. Lidsky, *supra* note 41, at 1992.

212. *Id.*

213. *Id.* at 1992–93.

214. Bohanon, *supra* note 72, at 367.

215. *Id.* at 368.

216. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009); Lidsky, *supra* note 41, at 1994. Public officials' advocacy involvement can be limited by "law, regulation, or practice [a]nd . . . a government entity is ultimately 'accountable to the electorate and the political process for its advocacy.'" *Summum*, 555 U.S. at 468 (quoting *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000)).

217. 135 S. Ct. 2239 (2015). The Supreme Court found that the license plates that were submitted by citizens qualified as government speech because it contained the government's approval. *Id.* at 2252; *see also* Bohanon, *supra* note 72, at 367–68.

218. Bohanon, *supra* note 72, at 368.

[President] need not worry about violating private commenters' free speech rights under the First Amendment."<sup>219</sup>

@realDonaldTrump differs from the cases that have found government speech *in several important ways*.<sup>220</sup> First, in *Walker and Summum*, there was a “belief that the public [would] wrongly attribute messages from private parties to the government.”<sup>221</sup> Rather, where the speech is clearly the President’s, especially on his own account page where his tweets are larger, more prominent, and fully displayed on his account page as his own, “risk of . . . mistaken attribution is not an issue.”<sup>222</sup> Further, unlike the President, many other government official page owners attach disclaimers that “private comments [on their threads] do not reflect the government’s views.”<sup>223</sup> Also, the President does not play a role in accepting or approving followers, considering that his profile is public and there is no barrier to being accepted as one of his followers, nor does the President block every person that criticizes him on his page.<sup>224</sup> For the speech to be considered government speech, there would need to be some kind of affirmative action by the President towards private speech.<sup>225</sup> Unlike *Walker*, where the court found that state approved and produced license plates qualified as government speech, the President *passively allowing* comments to remain in a tweet thread—which is debatably different—will likely not be labeled as government speech by a court.<sup>226</sup>

## 5. Mixed Speech

While mixed speech has not been a recognized doctrine, the test is taken from the Fourth and Ninth Circuit Court decisions in recent cases.<sup>227</sup> The issue rears its head when it comes to the President’s Twitter account because while the @realDonaldTrump’s tweets, retweets of his @POTUS account, and his responses—if he chooses to do so—qualify as government speech, the responses by citizens on his tweets in a thread or forum are

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219. *Id.*; @realDonaldTrump, *supra* note 25.

220. Bohanon, *supra* note 72, at 368; @realDonaldTrump, *supra* note 25.

221. Bohanon, *supra* note 72, at 368.

222. *Id.*; @realDonaldTrump, *supra* note 25.

223. Bohanon, *supra* note 72, at 368.

224. *See* Abdo, *supra* note 149; @realDonaldTrump, *supra* note 25; *Twitter Privacy Policy*, *supra* note 143.

225. Bohanon, *supra* note 72, at 369.

226. *See id.*; *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2251 (2015). The state’s *effective control* over the design selection process were meant to convey a government message. *Walker*, 135 S. Ct. at 2251.

227. *See* Rinehart, *supra* note 118, at 822, 834–35.

not.<sup>228</sup> When viewing a tweet from President Trump's Twitter account, his tweet looms over the top showing his government speech; while just under, it in smaller text, shows the number of responses from a multitude of users and their private speech.<sup>229</sup> While the President's tweet is regarded as government speech, the comment section that a tweet provides users can be viewed as creating a designated or limited forum.<sup>230</sup> But the intent to create a forum as required by the Court must be *demonstrably clear*, creating "a presumption *against* a finding of public forum status."<sup>231</sup> It would be difficult to argue that the President's Twitter account did not consist of all government speech if there was a *clear and concrete statement* that he did not intend to create a public forum, and that he retained "the right to eliminate comments entirely or edit them;" but, as of yet, there is no such statement on @realDonaldTrump or on any of the White House administration's Twitter accounts.<sup>232</sup> Therefore, on its face, @realDonaldTrump contains elements of both government speech—President's tweets—and private speech—citizen responses.<sup>233</sup> However, to determine if the public forum doctrines or the government analysis should be applied to @realDonaldTrump—which consists of mixed speech—courts should apply the following test derived from the Fourth and Ninth Circuit, which require courts to determine: "(1) [T]he central purpose of [@realDonaldTrump]; (2) the [President's] degree of control over [@realDonaldTrump]; and (3) the identity of the person to whom a reasonable [person] or average social media user would attribute the speech involved."<sup>234</sup>

a. *Central Purpose of @realDonaldTrump*

The first factor requires a view at @realDonaldTrump as a whole in order to determine if the purpose of the site was to promote "government speech, private speech, or both."<sup>235</sup> If the account *severely limited . . . opportunities* for anyone other than government employees to comment and only broadcasted the President's messages, his account's purpose would

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228. See Lidsky, *supra* note 41, at 1997–98.

229. @realDonaldTrump, *supra* note 25.

230. See Lidsky, *supra* note 41, at 1997–98.

231. *Id.* at 1998 (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270 (1988)).

232. *Id.* But see, e.g., @POTUS, *supra* note 26; @realDonaldTrump, *supra* note 25; @WhiteHouse, *supra* note 181.

233. See Lidsky, *supra* note 41, at 1997–98.

234. Rinehart, *supra* note 118, at 835.

235. *Id.*

likely be considered to be the promotion of government speech.<sup>236</sup> However, the President's account does not *severely limit . . . opportunities* at all; after all, 40.6 million followers can comment, and he retweets comedians or news networks' tweets that tend to agree with him, showing that non-government employees can comment without limitation.<sup>237</sup> On the other end of the spectrum, if the President's account simply tried to elicit feedback from private citizens by asking for opinions and provided no messages of his own, it would likely be suggestive of private speech.<sup>238</sup> Yet, the President's account does not do this; he posts his opinions, and while he does not actively seek feedback from individuals, it is clearly an attempt to inform the public at large, to illicit responses, and to *engage foreign leaders*.<sup>239</sup> The central purpose of @realDonaldTrump is to facilitate the interaction of government speech by the President and permit private speech, showing the speech involved is a mix of both private and government, similar to how a government official's Facebook page that allows comments from other users.<sup>240</sup>

b. *President's Degree of Control over @realDonaldTrump*

The second factor addresses how the President maintains @realDonaldTrump.<sup>241</sup> This requires an examination of the access controls the President has used to limit access to @realDonaldTrump and whether there is an existing policy stating that the President maintains the ability "to regulate, block, or remove certain forms of speech," topics, or class of speakers.<sup>242</sup> If the President established @realDonaldTrump with severe access controls, this would suggest the presence of government speech.<sup>243</sup> If the President only publicized his tweets to followers that he had approved—requiring him to make use of Twitter's private function—and maintained a strict policy of regulating the speech that occurred on @realDonaldTrump, such as, "blocking any [and every] . . . offensive, slanderous, or irrelevant comment[ator] from commenting thereafter," it would make a strong argument for government speech.<sup>244</sup> Anything less than this strict regulation would fall into either mixed or private speech categories with First

236. *See id.*

237. *See id.*; Abdo, *supra* note 149; @realDonaldTrump, *supra* note 25. As of April 18, 2018, there are 50.9 million followers of @realDonaldTrump.

238. *See* Rinehart, *supra* note 118, at 835–36.

239. *See* Abdo, *supra* note 149.

240. *See* Rinehart, *supra* note 118, at 836; Feinberg, *supra* note 10.

241. *See* Rinehart, *supra* note 118, at 836.

242. *See id.*

243. *See id.*

244. *See id.*

Amendment implications.<sup>245</sup> The President's blocking seems rather sporadic—he does not block every irrelevant, slanderous, or otherwise offensive commentator, and he does not provide any access controls for @realDonaldTrump—because it is open for any person with a Twitter account to follow and comment on his account.<sup>246</sup> Further, his account is viewable by any person who may have access to the internet.<sup>247</sup> This leads to the conclusion that the President “cannot constitutionally exclude a speaker who falls within the class of speakers to whom the forum is made available, without satisfying strict scrutiny”—the class of speakers being the 50.9 million followers on @realDonaldTrump and anyone who has a Twitter account.<sup>248</sup> By opening @realDonaldTrump to private comments and responses, the President must accept that even if he *limits the scope* of the account to certain topics, he must surrender a significant amount of *editorial control*.<sup>249</sup>

c. “*The Identity of the Person to Whom a Reasonable Social Media User Would Attribute the Speech*”

The third factor requires an examination of exactly “to whom a reasonable or average social media user would attribute the comment that the [President] regulated.”<sup>250</sup> The content of the comment must fall into either of three categories: Government speech, private speech, or a mixture of the two.<sup>251</sup> If a fellow Twitter user simply retweeted the President's tweet without any additional commentary, this would likely be considered government speech.<sup>252</sup> If the speech is a response to the President's tweet, it would likely be considered private speech.<sup>253</sup> It would be considered a combination of the two, if a fellow Twitter follower retweeted the President's tweet and then decided to add commentary to it.<sup>254</sup> In addition, the court should take into consideration *contextual clues* that would help define the *origins of the speech*.<sup>255</sup> One example would be if the President tweeted an opinion on policy and one user retweeted it, adding his or her

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245. *Id.*

246. *See* Rinehart, *supra* note 118, at 836; Feinberg, *supra* note 10.

247. *See* @realDonaldTrump, *supra* note 25.

248. *See* Rinehart, *supra* note 118, at 836; @realDonaldTrump, *supra* note 25. As of April 18, 2018, there are 50.9 million followers of @realDonaldTrump.

249. Rinehart, *supra* note 118, at 836.

250. *Id.* at 836.

251. *Id.* at 837.

252. *See id.*

253. *See id.*

254. *See* Rinehart, *supra* note 118, at 837.

255. *Id.*

opinions criticizing the President's policy—a reasonable social media user would not attribute this speech to the President, but to the private citizen.<sup>256</sup>

d. *Mixed Speech Conclusion*

The President has stated that he will continue to use the @realDonaldTrump to communicate with American citizens, showing the purpose of @realDonaldTrump is to establish communication with the citizens.<sup>257</sup> He has maintained the forum since he took office with minimal access controls, and no stated policy of regulation.<sup>258</sup> Further, any social media user could easily attribute the comments from Mrs. O'Reilly and Mr. Papp towards the individual speakers and not the President, because Mrs. O'Reilly's comments were responses to President Trump's tweets and not a retweet of a tweet from President Trump.<sup>259</sup> Further, Mr. Papp's tweet, that he tweeted himself to the President—containing nothing from the President's Twitter account other than the fact that the tweet was directed towards him—cannot be considered anything other than private speech.<sup>260</sup> Therefore, using the mixed speech analysis can help a court navigate the slippery road of the speech doctrines and apply the proper doctrine to @realDonaldTrump, the public forum doctrine.<sup>261</sup>

IV. HOW COURTS SHOULD FIND @REALDONALDTRUMP IS A DESIGNATED PUBLIC FORUM

With the help of the mixed speech analysis, a court can properly find that the public forum doctrines apply and government speech does not.<sup>262</sup> However, this does not end the analysis; the court will still need to decide which forum was created.<sup>263</sup> The mixed speech analysis is still instructive, even at this point in the analysis.<sup>264</sup> Since the President created

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256. *See id.*

257. Johnson, *supra* note 17; *see also* Rinehart, *supra* note 118, at 837.

258. *See* Abdo, *supra* note 149; Rinehart, *supra* note 118, at 837; @realDonaldTrump, *supra* note 25.

259. *See* Rinehart, *supra* note 118, at 837; Andrews, *supra* note 1; Holly O'Reilly (@AynRandPaulRyan), TWITTER (May 28, 2017, 7:53 AM), <http://twitter.com/aynrandpaulryan/status/868842669069422592>; Joe Papp (@joepabike), TWITTER (June 3, 2017, 12:39 PM), <http://www.twitter.com/joepabike/status/871089057098551296>.

260. *See* Rinehart, *supra* note 118, at 822, 836; Andrews, *supra* note 1; @joepabike, *supra* note 259.

261. *See* Lidsky, *supra* note 41, at 1990; Rinehart, *supra* note 118, at 837, 839.

262. Rinehart, *supra* note 118, at 837–38.

263. *Id.* at 838.

264. *See id.* at 837, 839.

@realDonaldTrump and enacted zero access controls, the forum does not qualify as government speech, and the courts should presume that the President created a “designated public forum, open generally to all speakers and all topics.”<sup>265</sup> “The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.”<sup>266</sup> By taking the steps to establish his Twitter presence on @realDonaldTrump as the President of the United States, by the White House claiming that his tweets from the account are official statements of the President, and by not limiting access to his account or constraining the topics of his account once he took office, a court can reasonably assume that the President “intentionally opened a nontraditional forum for public discourse.”<sup>267</sup> Additionally, considering the open nature of Twitter, it further supports the conclusion that the President created a designated public forum for general expressive activity when he established his presence as the President of the United States without having any notice that he retained the right to limit private speech.<sup>268</sup> If the President wanted to establish a limited or nonpublic forum, he must have posted notice on the site that he “reserves the right to remove some measure of citizens’ speech.”<sup>269</sup>

Therefore, when the President attempts to regulate speech in the designated forum that he created, he is bound to the same constitutional standards that apply in a traditional forum.<sup>270</sup> Any regulation by the President is to be assessed under strict scrutiny, where regulations must be “necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”<sup>271</sup> Any attempt by the President to limit speech for relevance would likely fail just as any restriction that is not reasonable and viewpoint-based.<sup>272</sup>

Thus, the banning of Mrs. O’Reilly, Mr. Papp, Dr. Stephen King, Marina Sirtis, Aj Joshi, Bess Kalb, and many others, immediately after they announced views that are contrary to President Trump—by tweeting or responding to @realDonaldTrump’s tweets—are subject to strict scrutiny

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265. *Id.* at 839; Abdo, *supra* note 149; @realDonaldTrump, *supra* note 25.

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

267. Rinehart, *supra* note 118, at 839; Abdo, *supra* note 149; Andrews, *supra* note 1; @realDonaldTrump, *supra* note 25.

268. Rinehart, *supra* note 118, at 839–40; *Twitter Privacy Policy*, *supra* note 143; @realDonaldTrump, *supra* note 25.

269. Rinehart, *supra* note 118, at 840.

270. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983); Rinehart, *supra* note 118, at 840.

271. Rinehart, *supra* note 118, at 840.

272. *Id.*

and are violations of the First Amendment in a designated public forum.<sup>273</sup> Even if it is found that the President created a limited or a nonpublic forum, all the individuals that he banned were not a reasonable limitation—but was “an effort to suppress . . . the speakers’ view” simply because the President opposed the speaker’s view—which is evidenced by the fact that each individual was immediately banned after speaking out against President Trump or had a history of holding an opposing viewpoint to the President.<sup>274</sup> The fact that the President has only banned those that spoke out against him, and not other speakers, destroys viewpoint neutrality’s *bedrock principle*.<sup>275</sup> The users being blocked are a clear example of a viewpoint discrimination claim because President Trump prefers the messages of those that agree with him than those who do not.<sup>276</sup> There is not a subject of speech more protected by the First Amendment than those that concern political issues.<sup>277</sup> Therefore, by banning the individuals based on their viewpoints from

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273. See *id.*; Feinberg, *supra* note 10. Marina Sirtis was blocked six minutes after tweeting at the President “[w]illing to let our boys die to save his sorry ass.” Feinberg, *supra* note 10. Aj Joshi was blocked for responding to a tweet by the President saying, “[m]aking America [g]reat [a]gain means destroying the world.” *Id.* Dr. Stephen King was blocked twenty-four hours after writing, “[i]f Ivanka Trump had grown up in farm country, like some of us, [she would] know her father is reaping . . . what he sowed.” *Id.* One user tweeted “Trump is the funniest example of why you should always be nice to the makeup lady,” which resulted in her being blocked the same day. Bess Kalb (@bessbell), TWITTER (May 28, 2017, 10:01 AM), <http://www.twitter.com/bessbell/status/868874858414972928>. Christine Teigen was blocked shortly after tweeting to the President “lol no one likes you.” Christine Teigen (@chrissteigen), TWITTER (July 25, 2017, 6:01 AM), <http://www.twitter.com/chrissteigen/status/889832887041871873>.

274. See Rinehart, *supra* note 118, at 840 (quoting *Perry Educ. Ass’n*, 460 U.S. at 46); Feinberg, *supra* note 10. Even in a limited and nonpublic forum the “regulations are still unconstitutional under the First Amendment if the distinctions drawn are viewpoint-based.” *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 82 (1st Cir. 2004).

275. *Id.* at 82; accord Feinberg, *supra* note 10. “The bedrock principle of viewpoint neutrality demands that the state not suppress speech where the real rationale for the restriction is disagreement with the underlying ideology or perspective that the speech expresses.” *Ridley*, 390 F.3d at 82.

276. See *id.* at 82; Feinberg, *supra* note 10.

The essence of viewpoint discrimination is not that the government incidentally prevents certain viewpoints from being heard in the course of suppressing certain general topics of speech, rather, it is a governmental intent to intervene in a way that prefers one particular viewpoint in speech over other perspectives on the same topic.

*Ridley*, 390 F.3d at 82.

277. Jeremy S. Weber, *Political Speech, the Military, and the Age of Viral Communication*, 69 A.F. L. REV. 91, 96 (2013). “[I]ssues of social and political concern are ‘the core of what the First Amendment is designed to protect.’” *Id.* (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)).

@realDonaldTrump, the President of the United States violated the First Amendment rights of many individuals.<sup>278</sup>

## V. THE PRESIDENT RECORDS ACT OF 1978

The PRA was created because Congress feared that President “Nixon would destroy . . . tapes—[evidence]—that [eventually] led to his resignation.”<sup>279</sup> The PRA sets strict standards that the Office of the President needs to adhere to for records created during the president’s term—establishing that the president’s records are property of the United States.<sup>280</sup> The term president’s records, applies to any “documentary material[], or any reasonably segregable portion thereof, [that are] created or received by the President . . . in the course of conducting activities which relate . . . or have an effect upon the carrying out of the constitutional, statutory, or other official or ceremonial duties of the President.”<sup>281</sup> These documents can “include[] any documentary material[] [that] relat[es] to the political activities of the President . . . only if [the] activities relate” or directly affect the President carrying out his duties.<sup>282</sup> However, it does not include any *personal records* of the President, such as a personal diary.<sup>283</sup> Further, the PRA takes into account any electronic messaging account, which would include social media accounts such as Twitter and Facebook, because of the broad definition the act uses for non-official electronic messaging accounts.<sup>284</sup> The term *electronic messages* is defined as any “electronic mail and other electronic messaging systems that are used for purposes of communicating between individuals.”<sup>285</sup> The definition of *electronic messages* came by an amendment included within the Presidential and Federal Records Act Amendments of 2014.<sup>286</sup> Although the Act does not

278. See *Ridley*, 390 F.3d at 82; Weber, *supra* note 277, at 96.

279. Johnson, *supra* note 17.

280. *Id.*

281. 44 U.S.C. § 2201(2) (2012).

282. *Id.* at § 2201(2)(A).

283. *Id.* at § 2201(3)(A). Personal records consist of anything that is considered purely of private character that have no relation to carrying out the duties of the President, such as “diaries, journals, or other personal notes.” *Id.*

284. See Presidential and Federal Records Act Amendments of 2014, Pub. L. No. 113-187, 128 Stat. 2003, 2007 (to be codified at 44 U.S.C. § 2209); Rebekah Entralgo, *Trump Sued for Allegedly Violating Presidential Records Act*, NPR: TWO-WAY (June 22, 2017, 6:48 PM), <http://www.npr.org/sections/thetwo-way/2017/06/22/533977417/trump-sued-for-allegedly-violating-presidential-records-act>. “Under the Obama administration, social media posts were included as a type of communication to be archived under the PRA.” Entralgo, *supra*.

285. Presidential and Federal Records Act Amendments of 2014 § 2209(c)(2).

286. *Id.*

contain any language of social media, it caused past presidents to set up auto-archiving so that deleted tweets were also saved.<sup>287</sup>

#### A. *President Trump's Violations of the PRA*

For the purposes of the PRA, any tweet that President Trump creates needs to be archived.<sup>288</sup> While the PRA does not list that Twitter is an account that needs to be archived, Twitter perfectly fits within the definition of a messaging account that the PRA lays out.<sup>289</sup> When President Trump sends out a tweet, he sends out an electronic message[] from an *electronic messaging account* for the purpose of communication between himself and his followers.<sup>290</sup> Additionally, the United States National Archivist spokesperson has stated that “tweets are considered presidential records.”<sup>291</sup> Some commentators have argued that the President’s tweets should be considered personal records.<sup>292</sup> This may come from reasoning that the @POTUS is the official Twitter account of the President, while @realDonaldTrump is not.<sup>293</sup> Both the @POTUS account and the official Whitehouse account have clear statements that the tweets are archived.<sup>294</sup> Showing that the administration does recognize that the tweets must be archived, however @realDonaldTrump’s are not, evidencing a slight intent that @realDonaldTrump is a personal account.<sup>295</sup> But this argument is flawed for a number reasons.<sup>296</sup> The President’s account is not private.<sup>297</sup> Also, if the President decides to retweet a @realDonaldTrump tweet from the @POTUS account—which he does frequently—he is showing to the world that his tweets from @realDonaldTrump are from the President of the United States and not, the man, Donald Trump.<sup>298</sup> Further, his tweets from @realDonaldTrump—labeled *official statements*—contain information that

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287. Johnson, *supra* note 17.

288. *See id.*

289. *See* Presidential and Federal Records Act Amendments of 2014 § 2209(c)(3); Ardito, *supra* note 36, at 310; Johnson, *supra* note 17.

290. *See* Presidential and Federal Records Act Amendments of 2014 § 2209(c)(2)–(3); Abdo, *supra* note 149.

291. Johnson, *supra* note 17.

292. *Id.*; *see also* Entralgo, *supra* note 284.

293. *See* Abdo, *supra* note 149; Johnson, *supra* note 17.

294. *See* @POTUS, *supra* note 26; @WhiteHouse, *supra* note 181.

295. *See* @realDonaldTrump, *supra* note 25. At least the administration has not come out and stated that tweets from @realDonaldTrump are archived. Johnson, *supra* note 17.

296. *See* Abdo, *supra* note 149; Andrews, *supra* note 1; Johnson, *supra* note 17.

297. *See* @realDonaldTrump, *supra* note 25.

298. Andrews, *supra* note 1; *see also* @POTUS, *supra* note 26.

relate to the President conducting official duties of the President.<sup>299</sup> For example, the President has tweeted what is he going to get other countries to do for the United States.<sup>300</sup> A few of the deleted tweets contain claims the President makes against other countries.<sup>301</sup> If a tweet is going to be the spark for *a lost ally*, a provocation for an attack on the United States, or a showing of intent to create new policy, it cannot be more related to the President's official activities and "American history deserves to have a record of it."<sup>302</sup>

These issues will come to the forefront as both Citizens for Responsibility and Ethics in Washington ("CREW") and the National Security Archive filed suit claiming that White House staffers used encrypted messaging apps—such as Signal and Confide—for internal communication, which violates another provision of the PRA.<sup>303</sup> The *lawsuit draws attention* to the President's use of Twitter and alleges his deleted tweets violate the PRA.<sup>304</sup> However, an issue arises when it comes to the possible consequences the President would face if violations of the PRA are found.<sup>305</sup> A court can review whether a document or a piece of information "should be categorized as a presidential record or not."<sup>306</sup> But after the initial categorization, the President maintains "control over *creation, management, and disposal* decisions," assuming permission by the archivist has been given without court review.<sup>307</sup> With no *veto power* given to Congress or the archivist over the president's record-keeping decision, the PRA creates "a system that cannot be checked."<sup>308</sup> There does not seem to be a federal law to prohibit the President from disposing his tweets without taking steps to properly archive them.<sup>309</sup>

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299. Andrews, *supra* note 1; *see also* 44 U.S.C. § 2201(2)(A) (2012).

300. *See* Johnson, *supra* note 17.

301. *See id.* "Mexico will reimburse Americans for the *Great Wall*"—that was deleted after fifty-one seconds. *Id.* "China had stolen a United States Navy research drone—deleted after one hour." *Id.* One tweet asked if North Korea's supreme leader Kim Jong-un had "anything better to do with his life" after North Korea had launched another missile. Donald J. Trump (@realDonaldTrump), TWITTER (July 3, 2017, 7:19 PM), <http://www.twitter.com/realDonaldTrump/status/882061157900718081>.

302. Johnson, *supra* note 17.

303. Entralgo, *supra* note 284.

304. *Id.*

305. Johnson, *supra* note 17.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

## VI. CONCLUSION

One possible counterargument to @realDonaldTrump qualifying as a designated forum that will occur is that if the corporate owner *can remove abusive comments*—Twitter—what is the difference if President Trump then does it himself?<sup>310</sup> Is not relying on Twitter to regulate the President’s account simply outsourcing *the same censorship*?<sup>311</sup> The crucial difference is that the President is bound by the First Amendment, not Twitter the private corporation.<sup>312</sup> So while Twitter can block abusive comments, it must be reported to them by a third party, and reviewed to determine if it violates Twitter’s standard, which is “an arguably more objective process than [the President] removing speech [he] considers *abusive* from [his] own page, especially if that speech happens to be critical of [him].”<sup>313</sup> @realDonaldTrump being labeled a designated forum is *the best case scenario* for American citizens because the category provides the same protection as does a traditional forum and continues to safeguard the heart of “what the First Amendment [was] designed to protect”—expression of *social and political concern*.<sup>314</sup>

This Comment attempted to address what is an unprecedented occurrence in the United States, a President—a world leader, who consistently without filter—uses Twitter to communicate with his followers about his policy, his carrying out of official duties, and his opinions on other world leaders.<sup>315</sup> But then, he decides to ban certain individuals based on their views about him and his administration.<sup>316</sup> While the public forum doctrines and government speech are settled, there needs to be an addition for when it comes to social media accounts, such as the President’s Twitter account, which clearly includes both private speech and government speech.<sup>317</sup> Therefore, this is why this Comment used mixed speech proposed by different courts and articles to properly place the speech into a category to use a proper doctrine, and come to the conclusion that the President did violate the First Amendment for banning users based on their different viewpoints.<sup>318</sup> In addition, this Comment attempted to address the President Records Act and its application to the President’s Twitter account to show

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310. Bohanon, *supra* note 72, at 378.

311. *Id.*

312. *Id.*

313. *Id.* at 379.

314. *Id.* at 364; Weber, *supra* note 277, at 96 (quoting *Virginia v. Black*, 538 U.S. 243, 365 (2003)).

315. See Abdo, *supra* note 149; Johnson, *supra* note 17.

316. Feinberg, *supra* note 10.

317. See Bohanon, *supra* note 72, at 344–45; Johnson, *supra* note 17.

318. See discussion *supra* Sections III.B.5, IV.

2018]

*TWEETS THAT BREAK THE LAW*

351

that while the President's deleted or altered tweets are violations, it does not seem like there is much that can be done about stopping them.<sup>319</sup>

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319. Johnson, *supra* note 17; *see also* discussion *supra* Sections V, V.A.

