NAVIGATING THE FUTURE OF TOWN HALLS: THE APPLICATION OF THE PUBLIC FORUM DOCTRINE TO GOVERNMENT ACTORS ON SOCIAL MEDIA

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ABSTRACT

The rise of social media platforms has dramatically impacted the methods through which the public communicates by shifting formerly in-person conversations to online discussions. Different social media platforms such as Instagram, Facebook, and X (formerly known as Twitter) are prominent hosts of online dialogue between individuals. Because the masses shifted to using online spaces as prominent venues for discussions, controversial topics such as politics, policy, and culture are now commonly disputed on these platforms. The Supreme Court has even deemed these online mediums as "modern town halls." Considering the vast amounts of individuals online, government officials have adopted social media as a form of communication with the public. The majority of government officials such as senators and representatives along with government institutions like public universities and federal and state departments maintain accounts across various social media platforms. This newfound pathway of communication with the public has prompted increased discussions on free speech as it applies to these spaces. Generally, the First Amendment protects citizens from the government prohibiting their speech rights. However, with the introduction of social media into government communication, certain officials and institutions have utilized their platforms to block or censor constituents from their pages. This begs the question: does the First Amendment and the doctrine associated with it apply to government officials when they are operating social media platforms to communicate with the public?

Introduction

From protecting expression to prohibiting government hindrance of speech, the First Amendment of the Constitution and the legal precedent surrounding it have safeguarded Americans' speech rights. With the rise of social media and its use in official and unofficial government communications, issues emerge that cause individuals to question the application of the First Amendment in online spaces. While some argue that social media accounts associated with government entities should be able to regulate content and block users, others argue that these actions violate the marketplace of ideas, which is a principle rooted in the First Amendment that establishes the free exchange of information. In this article, I argue that the public forum doctrine that is rooted in First Amendment protections should apply to government officials and institutions when using private media outlets such as Instagram, Facebook, and X (formerly known as Twitter) to prohibit the government from illegally censoring and blocking users.

To understand the weight of this issue, one must first comprehend the importance of the First Amendment. It reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[1] The First Amendment to the United States Constitution protects Americans' rights to religion, assembly, press, expression, and speech from government interference. The First Amendment prohibits any government body, institution, officer, or actor from inhibiting one's freedom of speech, except for some limited exceptions established by the Supreme Court. Such exceptions to this general rule include select cases of obscenity, defamation, incitement, fighting words, and true threats. While these exceptions contain specific conditions for the restriction of speech, the rule of law offers the government narrow guidelines to prohibit such speech to ensure this power is not misused. Moreover, the public forum doctrine is a form of protection for speech against the constraints of the government.

Any space that would commonly be deemed as a public place to hold dialogue (such as a sidewalk in a public park) would be considered a traditional public forum under the public forum doctrine. Under this doctrine, these public spaces are designated as areas where one's liberty to speak freely cannot be inhibited by the government—the government is generally prohibited from creating content-based limitations to speech in these spaces. Lyrissa Lidsky, author and faculty member of the University of Florida Levin College of Law, elaborates on the public forum doctrine utilizing the Supreme Court's precedent: "the state may not impose content-based restrictions on speech there unless they are 'necessary to achieve a

1 U.S. Constitution, amend. 1.

compelling state interest and . . . narrowly drawn to achieve that end.'"[2] Lidsky explains that government actors are prohibited from imposing on speech for the purpose of directing the topic, subject, or other additional content, unless the content directly impacts a compelling state interest, such as certain aspects of public safety or national security. Further, content-neutral restrictions, which are commonly referred to as "time, place, and manner" restrictions are acceptable under the condition that they are "narrowly tailored to serve a significant governmental interest and leave open ample alternative channels of communication."[3] These restrictions limit the government's ability to control the time, location, and manner that certain speech is conducted in particular circumstances. For instance, public universities may limit topics in a classroom, but not on the sidewalk. Further, a court might restrict speech in a courtroom to relevant individuals (such as judges and attorneys), but they cannot restrict discussions in the courthouse parking lot. Compelling government interests that warrant these restrictions could include the welfare of society, the health of the public, commerce, or similar avenues that create interest for the government. These understandings of the public forum doctrine and the First Amendment are essential for the ability to navigate free speech online.

Discussion

The public forum doctrine should transfer to social media when used in a governmental capacity to communicate with individuals; precedent establishing the state action doctrine affirms this viewpoint. Jacob Spicer, an author for the Texas A&M Law Review, argues that social media platforms used by government officials within their official authority should be subject to the public forum doctrine. His argument reveals that the courts should utilize the state action doctrine to determine if individuals are acting on behalf of the state. The state action doctrine, as used in Lindke v. Freed, is a test used by the courts to determine if an individual worked as a governmental actor online. The case establishes, "A public official who prevents someone from commenting on the official's social-media page engages in state action under §1983 only if the official both (1) possessed actual authority to speak on the State's behalf on a particular matter, and (2) purported to exercise that authority when speaking in the relevant social-media posts."[4] If the individual's governmental duty included the authority to speak on a particular subject and if the individual exercised their government-issued authority to act, then they are considered a state actor subject to the public forum doctrine. In lay terms, if a school superintendent spoke on school related issues on social media with authority from their official capacity, they would be deemed a state actor subject to the public forum doctrine. Spicer

2 Lyrissa Lidsky, *Government Sponsored Social Media and Public Forum Doctrine Under the First Amendment: Perils and Pitfalls* (University of Florida Levin College of Law, 2011), 4.

3 *Ibid.*

4 *Lindke v. Freed*, No. 22-611, 2024 U.S LEXIS 1432 (Mar.115, 2024).

argues that if one can establish that a government official has acted in this manner, then they are bound by the First Amendment on social media. If this test fails, however, he insists one must then apply the purpose and appearance test.

The purpose and appearance test helps establish that the public forum doctrine should be applied to government officials on social media platforms. For example, if the social media account's purpose is to conduct government business, or if it appears or functions like a government-run social media account, then it should be considered a public forum. One case that established the precedent of the purpose and appearance test on social media for government officials is Knight First Amendment Institute at Columbia University v. Trump. In this case, Donald Trump blocked users from his Twitter account during his presidency based on the content they expressed in the comments section of his posts. To determine if the comments section of Trump's account was a public forum and subject to the First Amendment, the courts evaluated the purpose of the social media account. The reasoning from the Circuit Court and the District Court follows, "(1) 'there can be no serious suggestion that the interactive space is incompatible with expressive activity,' and (2) the President and his staff hold the account open, without restriction, to the public at large on a broadly accessible social media platform."[5] The Second Circuit Court of Appeals found that the comments section was undisputedly open to "expressive activity" and that the President used his account for official business without establishing speech restrictions. The court cited that President Trump used his account for functions that "can be taken only by the President as President," therefore the account was under government control at the time of the blocking.[6] Because the account was being used for the purpose of government functions and the account offered a platform for expressive activity without establishing any limiting restrictions, the court found Trump had created a public forum and was therefore held to the standards of the First Amendment protections. Thus, the purpose and appearance test is important to establish whether a government official or entity has created a public forum.

Davison v. Randall is another case that utilizes the purpose and appearance test in relation to government officials' use of social media platforms. In this case, Phyllis Randall, who was the chair of the Loudoun County Board of Supervisors, banned Brian Davison from her Facebook page, where she posted summaries of school board meetings. Randall banned Davison because of a comment she claimed contained allegations against the school board members. The Fourth Circuit Court of Appeals used the purpose and appearance test to evaluate if the comments section of her post should be considered a public forum subject to First Amendment protections. The court notes how Randall invited citizens to participate in her comments section, and by doing so she created a public forum. The

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

6 *Ibid.*

appearance of Randall's account called for the expression of citizens by opening "its interactive space—for 'ANY' user to post on 'ANY issues.'"[7] Because Randall used her account for official government business and opened the comments section to discourse, she violated Davison's First Amendment rights by banning him from her Facebook page. Davison v. Randall further affirms the idea that the appearance of the social media platform in question is relevant to free speech discussion.

An essential aspect of Spicer's argument suggests that there must be a new approach to addressing government officials on social media that combines both the state action test and the purpose and appearance test. Currently, the precedent surrounding this issue is not objectively established. The Sixth Circuit Court of Appeals utilized the state action test, while the Fourth Circuit Court of Appeals and the Second Circuit Court of Appeals implemented the purpose and appearance test. In his analysis, Spicer argues that the Supreme Court should combine the two tests presented by the Circuit Courts to create a predictable and transparent precedent to weigh government officials' use of social media. By building a two-part test with the best aspects of the current precedent, the court will be able to create a clear standard for individuals to understand when evaluating public forums on social media platforms. Spicer states, "If 'the text of state [or federal] law requires an officeholder to maintain a social media account;' government funds are used to run the social media account; the 'social media account is run by employees 'on the state's payroll,' then any action involving that account will be considered state action."[8] According to Spicer, these are the first steps the court should evaluate to determine state action on social media. If state action is affirmed after this part of the test, then one can reason that the official violated their Constitutional duties to not inhibit the speech of citizens.

After state action is applied, Spicer argues that the court should compare four aspects of the purpose and appearance test: First, one must verify if the individual's social media account "displays the official government title."[9] Second, one must determine if the account is assigned to a particular government official. Third, one must determine whether or not the individual account is associated with a particular office or displays the office's contact information. Lastly, one must evaluate whether the account is used to deliberate official business.[10] Spicer argues that implementing this test across the courts will lead to uniformity and transparency, allowing citizens' rights to be protected. By utilizing the two-part test, which includes the state action doctrine and purpose and appearance test, citizens' right to freedom of speech online will be better protected against government

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

8 Jacob Spicer, "Social Media and State Action: Click 'Like' and Follow This Two-Part Test," *Texas A&M Law Review* 11 (2023): 27.

9 *Ibid.*

10 *Ibid.*

actors on social media platforms. With modern town halls moving towards digital mediums, it is increasingly important that the courts establish a clear precedent for valuing the freedom of speech online.

Alternatively, critics argue that the public forum doctrine should not transfer to private media outlets when utilized by government officials or institutions for official use. They believe it is important to establish a difference between individuals acting "under the color of the law" and officially on behalf of the state. Acting "under the color of the law" is defined by the courts as when assumed private actions are connected so closely with the state that they are deemed essentially state actions.[11] In reference to the public forum doctrine precedent surrounding this issue, Joseph D'Antonio, author for the Duke Law Journal, stated, "It does not establish that the individual official is acting as the state, nor does it ask whether the official has the power to act as the State."[12] D'Antonio argues that these tests appearing in Knight Institute v. Trump and Davison v. Randall are not sufficient to prove whether the individual should be viewed as acting on behalf of the government with the power to create a public forum. Further, he argues, "Simply because an official's actions are 'governmental in nature' does not mean that official has assumed the mantle of acting as the government."[13] The argument rests on drawing a clear distinction between the government itself and those employed by the government. For instance, an elected official speaking at a committee hearing might be recognized as governmental in practice but would not be viewed as associated with the government as a whole. The law distinguishes the government as an entity and not a person for legal reasons, so a person working in their official capacity would be considered acting as the government under the law, while personal opinions would remain private speech. D'Antonio argues that for a comment section to become a public forum, the government itself must create the forum to properly apply this doctrine.

The argument that the current precedent is not distinct enough for the public forum doctrine to be applied to government officials' social media pages is faulty logic. When one accounts for the lines of reasoning presented to demonstrate that certain officials surpassed their legal constraint, this fault becomes clear. To demonstrate how the precedent displayed in state action doctrine is distinct, one can focus on the standards presented in the case of Knight Institute v. Trump. The case revealed how, in numerous situations, private property can be considered a public forum. While both sides agreed that Trump possessed ownership of the social media account, the court was concerned with under what pretenses he was utilizing the account. Further, "according to the National Archives and Records Administration, the President's tweets from the Account 'are official records that must be

11 Davison, 912 F. 3d 680.

12 Joseph D'Antonio, "Whose Forum Is It Anyway: Individual Government Officials and Their Authority to Create Public Forums on Social Media," *Duke Law Journal* 68, no.4 (2019): 274.

13 *Ibid.*

preserved under the Presidential Records Act.'"[14] Because the presidential business that was being conducted on his account had overreached the limit of private speech, Trump's social media page was acting under the color of the government. This warranted his page to become official records under the Presidential Records Act. Additionally, Trump's social media account contained interactive features that were open to the public, which contributed to the non-private aspect of his account. Because (1) the current precedent requires that the social media platform must be used for official government business, and (2) the account contains a public aspect, it provides a transparent path to produce a public forum.

Next, some argue that the public forum doctrine should not transfer to private media outlets when utilized by government officials or institutions for official use because it could inhibit the officials' freedom of speech. D'Antonio argues that relying on state action doctrine and the "under color of the state law" test for determining public forums in this situation "encroaches on public officials' own right to free expression."[15] He argues that individuals who hold public offices can still act as private individuals without First Amendment limitations. Under the current interpretation of the public forum doctrine, D'Antonio states, "Government officials become unduly constricted by a public forum doctrine that stretches past the point of government-entity conduct and into the sphere of private, personal speech."[16] For instance, if the official posted personal information on the same page as government business, that post would be constricted to the same extent by the doctrine as the post surrounding government business. D'Antonio warns that this precedent fails to clearly distinguish between public and private speech for these individuals, effectively harming their freedom of expression on online platforms. While D'Antonio holds a valid concern, the basis for this worry—encroaching on public officials' freedom of speech—can be dismissed by the steps used in the state action test to determine if the conduct was attributed to government business or private business.

To understand the steps of the state action test, one can turn to the case precedent established in Davison v. Randall. In this case, the plaintiff was required to establish that the violation of speech rights transpired because of actions by the defendant that were "under the color of state law." To determine whether the actions met this threshold the court evaluated if the action utilized power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."[17] In other words, the court must determine if the government official's behavior that caused the silencing of the plaintiff's speech can be "fairly attributed to the state." The courts must use their judgment to evaluate if the conduct of government officials is closely linked to the state to provide evidence for

14 Knight, 928 F. 3d 226

15 D'Antonio, "Whose Forum Is It Anyway," 725.

16 *Ibid.*

17 *West v. Atkins*, 487 U.S. 42 (1988).

state action. Further, the court searches for whether the officials conduct occurred when they were executing an apparent or actual responsibility of their office. If the official is found to be utilizing the power attributed to their office to cause the infringement of speech, their actions are likely to be associated with state action. Once an official reaches the threshold of government action, even on their personal accounts they are bound by the First Amendment.

Conclusion

This paper argues that the public forum doctrine rooted in First Amendment protections should apply to private media outlets when used by government officials or institutions. Above all, free speech and the marketplace of ideas should be protected. Since social media is one of the main sources the public uses to communicate, it is imperative that comments sections and pages stay open to all viewpoints. Government officials tasked with or voluntarily distributing government business on social media platforms should be held to the same standard as government officials attempting to prohibit speech in traditional public places. The cases of Lindke v. Freed, Knight Institute v. Trump, and Davison v. Randall provide insight into how to approach the issue of government officials inhibiting individuals' freedom of speech on social media platforms. One must recognize that when government officials utilize their social media accounts in a manner that prohibits the free flow of ideas, it presents a harm to society that the First Amendment was ratified to prohibit. The state action doctrine accounts for when government officials are acting in an official context, and the purpose and appearance doctrine provides an extra level of protection when officials utilize their government influence or authority to restrict the speech of individuals. By establishing the state action doctrine along with the purpose and appearance test as a two-pronged test to determine if a government official has created a public forum, we can protect the sacredness of speech rights online. When both of these tests are applied in the ways that author Jacob Spicer argues, the constitutional rights of citizens are protected, and a clear precedent is set to establish when government officials create public forums online.

The public forum doctrine that is established within First Amendment safeguards should transfer to private media outlets when operated by government officials or institutions because the state action doctrine and the purpose and appearance test combined reveal that these practices best promote public discourse and protect free speech. The importance in this issue lies in the way it impacts individuals' ability to communicate on key issues presented by government entities on social media platforms. Social media has become the new town hall; it is time for the courts to adapt and recognize that public forums can be created in online spaces in addition to physical areas. Government officials should receive a check on their balance of power online by the public forum doctrine resting in the First Amendment of the Constitution.

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