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Cover Page Footnote

J.D. Candidate, May 2019, Loyola Law School, Los Angeles; B.A., History, University of California, Los Angeles. I wish to thank Professor Aaron Caplan for his guidance, encouragement, patience, and witty constructive criticism. Special thanks to Professor Marcy Strauss as well in providing the initial inspiration for this article by drawing my attention to the Davison case. I would also like to thank my friend, Jessica Hicks, as well as the editors of the Loyola of Los Angeles Law Review, for their helpful suggestions and valuable feedback. Most importantly, I would like to thank my mother, Nirva, and my father, Ara, for their continued love and support.

SOCIAL MEDIA AND THE GOVERNMENT: WHY IT MAY BE UNCONSTITUTIONAL FOR GOVERNMENT OFFICIALS TO MODERATE THEIR SOCIAL MEDIA

*Alex Hadjian**

I. INTRODUCTION

Throughout 2017, seven Twitter users who posted criticism of President Donald J. Trump in comment threads begun by the President’s Twitter account “@realDonaldTrump” discovered that they were blocked from viewing, replying to, or otherwise interacting with @realDonaldTrump.¹ In *Knight First Amendment Institute v. Trump*, these users brought suit against the President, alleging that President Trump and members of his staff violated the First Amendment by acting within their capacity as government officials to block the seven users in retaliation for their speech.² The plaintiffs now attempt to establish two key points throughout their complaint: (1) President Trump’s use of the Twitter account was in his “official capacity rather than his personal one,” and therefore (2) Defendants engaged in unconstitutional viewpoint-based exclusion by blocking users from viewing or replying to @realDonaldTrump.³

This developing case against President Trump raises the same question recently decided by a district court in Virginia: “[W]hen is a social media account maintained by a public official considered

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1. See Complaint for Declaratory and Injunctive Relief at 16–23, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 17-cv-05205) [hereinafter Complaint].

2. See *id.* at 1–3.

3. See *id.* at 3, 13.

‘governmental’ in nature, and thus subject to constitutional constraints?’⁴ In *Davison v. Loudoun County Board of Supervisors*,⁵ the court reasoned that: (1) Defendant, an elected public official, utilized a social media platform as a “tool of governance”⁶ and therefore (2) Defendant’s blocking of a private citizen for an offensive comment on social media violated the First Amendment.⁷

If theoretically extended and applied to cases such as President Trump’s, *Davison* would have courts examine certain factors under a totality of the circumstances test when determining if government officials have sufficiently acted in an “official capacity” through social media.⁸ If nothing else, the methodology and factors the court considered to reach its verdict make *Davison* an instructive blueprint for future jurisprudence where government officials’ use of social media platforms is concerned. Defining the limits of how government officials can utilize social media is important because social media allows officials to reach a public whose lives are increasingly spent online.⁹ Such elaboration not only facilitates efficient dissemination of the official’s particular policy agendas, but allows private citizens to engage with officials directly on such matters of public import.¹⁰

Part II of this Comment lays out the pertinent facts of *Davison*. Part III explains the reasoning of the court in its ultimate holding. Part IV examines the Supreme Court and appellate jurisprudence in this area of law and concludes that the court’s reasoning in *Davison* comports with that jurisprudence. Part IV also argues that the decision provides a practical and desirable methodology for future courts. Part IV concludes by applying *Davison* to the facts of the case against President Trump to illustrate the above points. Part V closes with the assertion that *Davison* is an instructive and even viable model for future cases in this area.

4. *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 711 (E.D. Va. 2017), *aff’d sub nom. Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019).

5. 267 F. Supp. 3d 702 (E.D. Va. 2017).

6. *Id.* at 713.

7. *Id.* at 718.

8. *See id.* at 711–12.

9. *See* Shannon Greenwood et al., *Social Media Update 2016*, PEW RES. CTR. (Nov. 11, 2016), <http://www.pewinternet.org/2016/11/11/social-media-update-2016>.

10. Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 2003–10 (2011).

II. STATEMENT OF THE CASE

The *Davison* case arose in the context of Facebook,¹¹ a social media platform used by “[r]oughly eight-in-ten online Americans.”¹² Plaintiff Brian C. Davison’s allegation stems from an incident where Defendant Loudoun County Board of Supervisors’ Chair, Phyllis J. Randall, banned him from her Facebook page for a single night following an offensive comment by Davison.¹³

The comment was made on a Facebook page titled “Chair Phyllis J. Randall,” which had been created and operated by Randall, in collaboration with her chief of staff, since the day before Randall was sworn into office.¹⁴ Randall’s avowed purpose in creating this page outside of the County’s official channels was to address and converse with Loudoun County residents without being constrained by the County’s official social media policies.¹⁵ This circumvention meant that Randall, rather than the County, would retain control over the page even after she left office.¹⁶

Nevertheless, Randall categorized the page as “Government Official” in the “About” section of “Chair Phyllis J. Randall” and many of her posts “relate[d] to her work as Chair of the Loudoun County Board of Supervisors.”¹⁷ In fact, some posts even stated that they were submitted “[o]n behalf of the Loudoun County Board of Supervisors.”¹⁸ Such posts were occasionally offset by more “personal” posts on the page, including documentation of an afternoon shopping trip and a declaration of affection for the German language.¹⁹

Some of the work-related posts Randall made promoted initiatives she created in her official capacity, documented meetings of the Loudoun County Board of Supervisors, or encouraged attendance at events related to Randall’s work as Chair.²⁰ One post concerned a joint town hall discussion held by the Loudoun County Board of Supervisors and the Loudoun County School Board.²¹ Soon

11. *Davison*, 267 F. Supp. 3d at 706.

12. Greenwood et al., *supra* note 9.

13. *Davison*, 267 F. Supp. 3d at 706, 710–11.

14. *Id.* at 707.

15. *Id.*

16. *Id.*

17. *Id.* at 708.

18. *Id.* at 709 (alteration in original).

19. *Id.* at 710.

20. *Id.* at 708–09.

21. *Id.* at 710.

thereafter, a Loudoun County resident by the name of Brian Davison commented on this posting and set the lawsuit into motion.²² Neither party supplied the exact wording of Davison's comment, but it apparently alleged "corruption on the part of Loudoun County's School Board involving conflicts of interests among the School Board and their family members."²³ Taking offense to the allegations against her colleagues on the school board, Randall deleted her post (including Davison's reply) and subsequently banned Davison from her page.²⁴

The ban lasted no more than twelve hours and only prevented commenting on or private messaging to Randall's page; it did not prevent reading that page or sharing content from that page on other pages.²⁵ Even so, Davison (representing himself) filed a lawsuit alleging that Randall had acted under color of state law to deprive him of his constitutional right to freedom of speech.²⁶ The court ultimately sided with Davison, finding that Randall's actions against Davison violated his right to freedom of speech under the First Amendment.²⁷

III. REASONING OF THE COURT

The *Davison* court's result rested on two key findings: (1) Randall acted under color of state law in operating the Facebook page, and (2) blocking Davison because of the viewpoint he expressed in his comment was unconstitutional viewpoint-based discrimination.²⁸

A. *Color of State Law*

The court held that Randall acted under "color of state law" in maintaining her "Chair Phyllis J. Randall" Facebook page and in actually banning Davison from the page.²⁹ It is key that Randall acted under color of state law because constitutional standards are only invoked when it can be said that the government is responsible for the conduct at issue.³⁰ Davison's claim that Randall violated his First Amendment rights hinged on Randall's conduct being fairly

22. *Id.* at 706, 710.

23. *Id.* at 710–11.

24. *Id.* at 711.

25. *Id.*

26. *Id.* at 706.

27. *Id.* at 724.

28. *Id.*

29. *Id.* at 714.

30. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

attributable to actions of the government rather than to Randall as a private citizen.³¹

Citing Fourth Circuit precedent, the *Davison* court noted that “state action occurs where ‘apparently private actions . . . have a sufficiently close nexus with the State to be fairly treated as’ the actions of ‘the State itself.’”³² Moreover, “[w]hat constitutes a sufficient nexus is largely ‘a matter of normative judgment,’”³³ and there “is ‘no specific formula’ for making this determination.”³⁴ The *Davison* court finally noted that the totality of the circumstances should be weighed in determining whether conduct is attributable to the State.³⁵ Thus, the *Davison* court assessed the totality of the circumstances in determining whether Randall’s banning of Davison was conduct fairly attributable to the State.³⁶

The following factors weighed against a finding of state action: Randall’s official duties not including operation of a social media website, the page remaining under Randall’s control when she left office, Randall never using county-issued electronic devices to post on the page, and much of Randall’s social media activities taking place outside her office and normal working hours.³⁷

In contrast to the above points in Randall’s favor, the court identified many more factors tending to show the page’s operation was fairly attributable to the State. First, the impetus for Randall creating the page “Chair Phyllis J. Randall” a day before taking office was her victorious election.³⁸ She had created the page specifically to address her new constituents, as evidenced by her redirecting supporters to visit this page from the one she had used while campaigning.³⁹

Moreover, Randall had consistently employed the page as a “tool of governance.”⁴⁰ She had identified the page as a preferred means for back and forth constituent conversations and, to that end, used it to

31. *See Davison*, 267 F. Supp. 3d at 712.

32. *Id.* (quoting *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (some internal quotation mark omitted)).

33. *Davison*, 267 F. Supp. 3d at 712 (quoting *Rossignol*, 316 F.3d at 523).

34. *Davison*, 267 F. Supp. 3d at 712 (quoting *Holly v. Scott*, 434 F.3d 287, 292 (4th Cir. 2006)).

35. *Id.*; *Rossignol*, 316 F.3d at 523 n.1.

36. *Davison*, 267 F. Supp. 3d at 711–14.

37. *Id.* at 712.

38. *Id.* at 713.

39. *Id.*

40. *Id.*

facilitate coordination of disaster relief efforts after a storm, and even to aid a constituent's daughter in her effort to study abroad.⁴¹ Randall also used the page to promote participation in initiatives she headed, invite attendance at events related to her work as Chair, and keep constituents informed about her activities as Chair and of important events in local government.⁴²

The court also noted that Randall's chief of staff, a salaried employee of the county, helped operate the page.⁴³ Randall's use of county resources to help manage "Chair Phyllis J. Randall" weighed against finding that the page was private.⁴⁴

Other factors weighing against the page being private included Randall categorizing the page as "government official," the title of the page featuring Randall's title as "Chair," the page listing Randall's official county contact information, many of the posts being addressed to Randall's Loudoun County constituents, and the content posted generally tending toward matters related to Randall's office.⁴⁵

The court concluded, based on the above, that the totality of the circumstances indicated that Randall had operated the page while "purporting to act under the authority vested in [her] by the state."⁴⁶ The court concluded so despite occasional posts on "Chair Phyllis J. Randall" which detailed "personal" matters, such as an afternoon shopping trip, due to the stronger countervailing tendency toward posts that related to matters of Randall's office.⁴⁷ Moreover, the court further noted that the actual act of banning Davison had official implications as well because Randall had done so after taking offense to Davison's comment criticizing other government officials on the county school board.⁴⁸

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 714.

46. *Id.* (alteration in original) (quoting *Hughes v. Halifax Cty. Sch. Bd.*, 855 F.2d 183, 186–87 (4th Cir. 1988)).

47. *Id.* at 710, 714.

48. *Id.* at 714.

B. Viewpoint-Based Discrimination

Having found that Randall acted under color of state law, the court then concluded that Randall's decision to ban Davison violated his First Amendment rights.⁴⁹

First, the court determined that Davison's comment was protected speech.⁵⁰ Despite the exact wording being unavailable, the court used the parties' recollections of the comment to find that the comment contained ethical questions about conflicts of interest involving school board officials' family members.⁵¹ The court noted that "such 'criticism of . . . official conduct' [was] not just protected speech, but" also speech that lay at the very heart of the First Amendment.⁵²

Next, the court found that Randall had opened a forum for speech by creating the Facebook page.⁵³ It backed this finding by referencing Fourth Circuit jurisprudence holding that the government may open fora for speech by creating websites "allow[ing] private persons to publish information."⁵⁴ The court also noted a recent Supreme Court decision likening social media platforms to traditional public fora where speech is protected, such as parks and streets.⁵⁵ Even discounting the above, the court pointed out that Randall herself designated the page as a forum for speech by posting that she wanted "to hear from ANY Loudoun citizen on ANY issues, request, criticism, compliment, or just [his or her] thoughts."⁵⁶

The court concluded that Randall "committed a cardinal sin under the First Amendment" by acting in her governmental capacity to delete Davison's post for no other reason than because it offended her.⁵⁷ This was despite the court's admission that the consequences of Randall's actions were minor—Davison was only banned for a single night and could have posted his message on multiple pages.⁵⁸ Even so, the court held that the First Amendment roundly prohibited government

49. *Id.* at 715–16.

50. *Id.* at 716.

51. *Id.*

52. *Id.* (quoting *Rosignol v. Voorhaar*, 316 F.3d 516, 522 (4th Cir. 2003) (citing *Garcetti v. Ceballos*, 547 U.S. 410, 428 (2006) (5-4 decision) (Souter, J., dissenting))).

53. *Davison*, 267 F. Supp. 3d at 716.

54. *Id.* (quoting *Page v. Lexington Cty. Sch. Dist. One*, 531 F.3d 275, 284 (4th Cir. 2008)).

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

56. *Id.*

57. *Id.* at 717–18.

58. *Id.* at 718.

suppression of “offensive” speech and applied with no less force in social media than in other types of fora.⁵⁹

The court closed the matter by clarifying that its ruling did not foreclose public officials from moderating comments on their social media.⁶⁰ Rather, the conclusion reached here was based solely on a public official engaging in viewpoint-based discrimination against a private citizen within a forum for speech where the public official eschewed the use of neutral, comprehensive social media policies like Randall did with Loudoun County’s.⁶¹

IV. ANALYSIS

The proposition that public officials could violate the First Amendment when they remove offensive commentary or commenters from their social media account may seem to some like it came from a district court overstepping its bounds. Indeed, some commentators are either unsettled on *Davison*’s potential long-term worth⁶² or outright dismissive of the ruling’s legal bases.⁶³ The court’s finding is nevertheless both legally solid and practically desirable.

A. *Davison Is Built on Solid Legal Foundations*

The *Davison* court found that Randall acted under color of state law, thereby making her viewpoint-based discrimination against Davison a violation of the First Amendment.⁶⁴ Though novel in dealing with the issue of when a government official’s actions through his or her social media page is treated as governmental,⁶⁵ the court’s holding is reasonably derived from relevant precedent from both the

59. *Id.*

60. *Id.*

61. *Id.*

62. Eugene Volokh, *Some Help for Lawsuit Challenging Bans of Subscribers from @realDonaldTrump*, WASH. POST (July 27, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/07/27/some-help-for-lawsuit-challenging-bans-of-subscribers-from-realdonaldtrump/?utm_term=.b16529b309ff. *But see* Venkat Balasubramani, *Politician Can’t Ban Constituent from Her Official Facebook Page—Davison v. Loudoun County Supervisors*, TECH. & MARKETING L. BLOG (July 27, 2017), <http://blog.ericgoldman.org/archives/2017/07/politician-ban-constituent-from-her-official-facebook-page-davison-v-loudoun-county-supervisors.htm> (opining that *Davison* “could turn into consequential precedent for constraints on the ability of politicians . . . to block members of the public”).

63. *See* Thomas Wheatley, *Why Social Media Is Not a Public Forum*, WASH. POST (Aug. 4, 2017), https://www.washingtonpost.com/blogs/all-opinions-are-local/wp/2017/08/04/why-social-media-is-not-a-public-forum/?utm_term=.18e76a291e4c.

64. *Davison*, 267 F. Supp. 3d at 723.

65. Volokh, *supra* note 62.

Supreme Court and United States Courts of Appeals. Moreover, the presumptive unconstitutionality of viewpoint-based discrimination by a government official against a private citizen is well-settled law.⁶⁶

1. Color of State Law

Victims of a First Amendment violation, like victims of any constitutional violation, may pursue damages against a state actor who infringes upon that right. Statutes like 42 U.S.C. § 1983 allow claims by private citizens against public officials who act under color of state law (as opposed to actual state action) to deprive private citizens of their constitutional rights.⁶⁷ The Supreme Court has stated “that in a §1983 action brought against a state official, the statutory requirement of action ‘under color of state law’ and the ‘state action’ requirement of the Fourteenth Amendment are identical.”⁶⁸ Of this identical requirement for a finding of state action, the Supreme Court has held that “[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance.”⁶⁹ Notably, conduct constituting “state action” satisfies the § 1983 requirement for conduct under color of state law.⁷⁰ From the above, the essential takeaway is that “state action” calls for looking at the totality of the circumstances and “color of state law” is satisfied if “state action” is found.

Indeed, *Davison* concluded as much, having noted that a totality of the circumstances test used to find “state action” would also satisfy the “color of state law” requirement.⁷¹ Thus, the *Davison* court’s application of this test was proper.

The facts the *Davison* court considered under the totality of the circumstances also comport with Supreme Court precedent. The Supreme Court has stated that “[w]hat is fairly attributable [to the state] is a matter of normative judgment, and the criteria lack rigid simplicity. . . . [N]o one fact can function as a necessary condition across the board.”⁷² Furthermore, “there may be some countervailing

66. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

67. 42 U.S.C. § 1983 (2012).

68. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982).

69. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961).

70. *Lugar*, 457 U.S. at 935.

71. *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 714 (E.D. Va. 2017), *aff’d sub nom. Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019); *Rossignol v. Voorhaar*, 316 F.3d 516, 523 n.1 (4th Cir. 2003).

72. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001).

reason against attributing activity to the government.”⁷³ In *Davison*, the factors that the court considered for finding a state action surely met this loose “normative judgment” standard.⁷⁴ The *Davison* court also noted that no one fact was dispositive in making its decision, as the above Supreme Court precedent directs.⁷⁵ Lastly, the *Davison* court did consider possible countervailing reasons against a finding of state action, such as the fact that Randall did not use county-owned electronics to post on social media.⁷⁶ The court thus fairly applied precedent in determining the factors used to find that Randall acted under color of state law in her usage of “Chair Phyllis J. Randall.”⁷⁷

2. Viewpoint-Based Discrimination

The Supreme Court has stated that “the right of free speech is not absolute at all times and under all circumstances.”⁷⁸ Thus, if the speech at issue falls within one of the enumerated categories of unprotected speech, there is no First Amendment violation.⁷⁹ The speech at issue in *Davison* was a Facebook comment raising ethical questions about the Loudoun County School Board, which the court characterized as speech critical of official conduct.⁸⁰ Such “[o]pen speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection by the First Amendment.”⁸¹ Thus, *Davison*’s comment was speech protected by the First Amendment.⁸²

Moreover, “[i]t is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys.”⁸³ Such viewpoint-based discrimination is presumptively impermissible even in forums with otherwise valid restrictions on protected speech, *i.e.*, limited public forums.⁸⁴ For this reason, Randall’s suppression of

73. *Id.* at 295–96.

74. *See Davison*, 267 F. Supp. 3d at 712.

75. *Id.*

76. *See id.*

77. *See id.* at 714.

78. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571 (1942).

79. *See id.* at 571–72.

80. *Davison*, 267 F. Supp. 3d at 714.

81. *Garcetti v. Ceballos*, 547 U.S. 410, 428 (2006) (5-4 decision) (Souter, J., dissenting).

82. *See Davison*, 267 F. Supp. 3d at 720.

83. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 830 (1995) (finding that a public university’s exclusion of a student group’s religious newspaper from accessing the “student activities fund” otherwise provided to secular groups was viewpoint-based discrimination because the fund qualified as a “metaphysical” forum).

84. *Id.* at 829–30.

Davison’s speech purely for its offensive content made determining the type of forum unnecessary, so long as the comment section of the “Chair Phyllis J. Randall” page was indeed a forum.⁸⁵

On that forum issue, the Supreme Court has found that metaphysical fora for speech are subject to the same protections as spatial or geographic fora.⁸⁶ It is likely that social media platforms like Facebook, at least on pages created by government officials like Randall, are such metaphysical fora where First Amendment protections against viewpoint-based exclusion apply.⁸⁷ Thus, the *Davison* court correctly concluded that Randall engaged in viewpoint-based discrimination against Davison.⁸⁸

One critic of the *Davison* decision argued that because users agree to the Facebook Terms of Service which “provides users the unqualified ability to ‘avoid distasteful or offensive content’ by unfriending, blocking and even reporting other users,” the courts cannot alter or limit the site’s rules.⁸⁹ However, First Amendment protections for citizens against government censorship do not cease by virtue of the interaction occurring on a privately-owned social media platform; the same is true when a government agency rents a physical space in a private building to hold a public meeting.⁹⁰ Thus, the *Davison* court’s finding rested on overall solid legal foundations.

B. The Davison Case Presents a Practical Guideline for Future Cases Involving Social Media and the First Amendment

1. The Factors Found in *Davison* are Transferrable to Other Social Media Cases

Many in the United States would be unsurprised to discover that social media platforms are a prevalent aspect of the average person’s life.⁹¹ Indeed, even the Supreme Court acknowledged that for many,

85. See *Davison*, 267 F. Supp. 3d at 716–17.

86. See *Rosenberger*, 515 U.S. at 830.

87. See Lidsky, *supra* note 10, at 1994–96; see also *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (likening “metaphysical” social media platforms such as Facebook to quintessential spatial or geographic forums for speech like streets and parks).

88. See *Davison*, 267 F. Supp. 3d at 716.

89. Wheatley, *supra* note 63.

90. Eugene Volokh, *More on the First Amendment and @realDonaldTrump*, WASH. POST (June 14, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/06/14/more-on-the-first-amendment-and-realdonaldtrump/?tid=a_inl&utm_term=.9d18c5c22742; accord Lidsky, *supra* note 10, at 1996.

91. Greenwood et al., *supra* note 9.

social media platforms “are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge.”⁹² Given this understanding of social media’s importance and prevalence, it is crucial that the courts define the limits of government officials’ use of such platforms.

Davison is therefore notable in providing a guideline for defining these limits. As noted above, *Davison* is rooted in firm precedent.⁹³ Moreover, in determining when a social media account maintained by a public official is sufficiently governmental to be subject to constitutional constraints, the court applied the proper “normative judgment” standard to select the factors to weigh under the totality of the circumstances.⁹⁴ These factors included whether the official’s duties involved maintenance of a social media website, whether the account was used during the official’s work hours, the purpose for the creation of the social media page, how the page was used, who the intended audience was, whether government resources were involved, the extent that the page referenced its creator’s office, and whether the speech was suppressed for an “official” reason.⁹⁵ Along with other factors derived from a normative judgment of the facts, these considerations could be directly applied to any case involving a government official who used social media in an official capacity.

2. *Davison* Reasonably Advocates for Policies to Guide Discussion and Avoid First Amendment Issues

As the *Davison* court notes, government officials can avoid liability for moderating their pages by setting up comprehensive rules to guide the discussion beforehand.⁹⁶ Indeed, the court acknowledges that “a degree of moderation is necessary to preserve social media websites as useful forums for the exchange of ideas.”⁹⁷ This may be the court’s implicit admission of the “disinhibiting effect.”⁹⁸ The disinhibiting effect refers to the increased tendency of a speaker to

92. See *Packingham*, 137 S. Ct. at 1737.

93. See discussion *supra* Part IV.A.

94. *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 712 (E.D. Va. 2017), *aff’d sub nom. Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019).

95. See *id.* at 711–15.

96. See *id.* at 718, 721.

97. *Id.* at 718.

98. See Lidsky, *supra* note 10, at 2025.

engage in profane and abusive speech whenever communication is computer-mediated and the speaker believes he or she is anonymous.⁹⁹

At first, it may seem incongruous with the overall holding of *Davison* to suggest that government officials may simply restrict speech so long as they set up discussion rules beforehand.¹⁰⁰ However, several circuits have found that certain reasonable or viewpoint-neutral restrictions against profane remarks in the context of city council meetings were acceptable.¹⁰¹ The reason that such restrictions on speech were allowed is that the unfiltered allowance of any remark under any circumstance could make it difficult to accomplish the business that those proceedings were scheduled for.¹⁰² For instance, a governmental entity running a planning commission meeting is allowed to limit discussion to specified agenda items and impose restrictions against off-topic matters including personal attacks against others.¹⁰³ Given both the disinhibiting effect and the fact that viewpoint-neutral rules are acceptable in such real-world spaces, there is similarly good reason to encourage the adoption of such rules in a social media context.¹⁰⁴ *Davison*, which was based off the comparison of social media platforms to a modern public forum,¹⁰⁵ merely expands upon the above reasoning.¹⁰⁶ The *Davison* court even noted, despite their overall verdict, that Randall remained free to adopt new policies for the “Chair Phyllis J. Randall” page or disallow comments altogether if she chose to do so.¹⁰⁷

C. Application to Knight First Amendment Institute v. Trump

The following is an illustration of how the factors considered in *Davison* may apply to *Knight First Amendment Institute v. Trump* and future cases where there is a dispute over whether a social media account is “governmental” enough, such that suppression of a private citizen’s speech triggers a possible violation of the First Amendment.

99. *Id.*

100. *See Davison*, 267 F. Supp. 3d at 718.

101. *See* Lidsky, *supra* note 10, at 2000–01.

102. *Id.*

103. *See* Steinburg v. Chesterfield Cty. Planning Comm’n, 527 F.3d 377, 384–85, 387 (4th Cir. 2008).

104. *See* Lidsky, *supra* note 10, at 2000–01.

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

106. *See* *Davison* v. Loudoun Cty. Bd. of Supervisors, 267 F. Supp. 3d 702, 718 (E.D. Va. 2017), *aff’d sub nom.* *Davison* v. Randall, 912 F.3d 666 (4th Cir. 2019)

107. *Id.* at 723.

This illustration also demonstrates that *Davison*'s instructional scope is not simply limited to cases involving Facebook.¹⁰⁸

1. Statement of the Case

This developing case is based around Twitter, a social media platform used by 24% of online adults.¹⁰⁹ Users of the service may send out “tweets,” or posts, which are both relayed to users that have “followed” that user and are otherwise displayed publicly.¹¹⁰ Users may also send reply tweets to other users’ tweets, or even reply to the replies of others; the collection of replies and replies-to-replies, which appear under a base tweet, are sometimes called “comment threads.”¹¹¹ Lastly, users have the option of “blocking” other users, thereby “restricting specific accounts from contacting them, seeing their tweets, and following them.”¹¹²

The complaint identifies seven Twitter users, collectively referred to as the “Individual Plaintiffs,” that were allegedly blocked from the @realDonaldTrump account “because of opinions they expressed in replies to the President’s tweets.”¹¹³ One example offered by the complaint is the blocking of Plaintiff Brandon Neely for a tweet he made to @realDonaldTrump on June 12, 2017.¹¹⁴ In response to President Trump’s tweet congratulating the “First new Coal Mine of Trump Era” opening in Pennsylvania, Neely tweeted: “Congrats and now black lung won’t be covered under #TrumpCare.”¹¹⁵ Neely discovered the next day that @realDonaldTrump had blocked him, thus rendering him unable to contact, view, or otherwise interact with President Trump’s tweets or associated comment threads.¹¹⁶ Plaintiff argued that such viewpoint-based discrimination by Defendants was

108. The feasibility of the case concerning jurisdiction or issues of constitutional separation of powers as raised by Defendants in their motion for summary judgment are not considered here. See Memorandum of Law in Support of Motion for Summary Judgment at 4, 8, Knight First Amendment Inst. at Columbia Univ. v. Trump, 302 F. Supp. 3d 541 (S.D.N.Y. 2018) (No. 17-cv-05205) [hereinafter Motion for Summary Judgment].

109. Greenwood et al., *supra* note 9.

110. See Complaint, *supra* note 1, at 5, 8, 11.

111. *Id.* at 9; *About Replies and Mentions*, TWITTER, <https://help.twitter.com/en/using-twitter/mentions-and-replies> (last visited Feb. 25, 2018).

112. *How to Block Accounts on Twitter*, TWITTER, <https://support.twitter.com/articles/117063> (last visited Jan. 25, 2018).

113. Complaint, *supra* note 1, at 2.

114. *Id.* at 21.

115. *Id.*

116. *Id.*

unconstitutional and that the Individual Plaintiffs were entitled to an injunction preventing such conduct in the future.¹¹⁷

2. @realDonaldTrump Is Likely Governmental and Defendants Likely Engaged in Unconstitutional Viewpoint-Based Exclusion

The complaint lays out its argument similarly to the reasoning of the *Davison* court. First, the complaint identifies several factors indicating that @realDonaldTrump is an official government account rather than a private personal account.¹¹⁸ The complaint then concludes that because the account was governmental, the viewpoint-based suppression of the Individual Plaintiffs was unconstitutional.¹¹⁹

a. @realDonaldTrump is likely sufficiently governmental

As noted above, the *Davison* court essentially conducted a “state action” analysis that led to the conclusion that Randall acted under color of state law in blocking Davison on Facebook.¹²⁰ This decision was the result of the court’s normative assessment of pertinent facts tending to prove or disprove that the page was used in an official capacity.¹²¹

Here, there are a few *Davison* factors weighing against a finding of state action. First, the enumerated duties of the official in question do not include the maintenance of a social media website.¹²² President Trump also possessed the @realDonaldTrump account for eight years prior to his inauguration,¹²³ indicating that he will likely continue to possess the account after he leaves office and that the account was not set up in anticipation of his presidency.¹²⁴ Additionally, while there has been debate as to whether and to what extent President Trump used a personal phone for tweeting or entrusted the task to his staff, it is possible that the devices used are at least a mix of personal- and

117. *Id.* at 25.

118. *See id.* at 2.

119. *Id.* at 2–3.

120. *See* discussion *supra* Part IV.A.1.

121. *Id.*

122. *See* U.S. CONST. art. II; *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 712 (E.D. Va. 2017), *aff’d sub nom. Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019); Motion for Summary Judgment, *supra* note 108, at 12.

123. Motion for Summary Judgment, *supra* note 108, at 2.

124. *See id.* at 12.

government-owned.¹²⁵ The use of a personal device, of course, would tend to show private use.¹²⁶ Finally, setting aside that the working hours of a President are likely erratic, President Trump's admission that he tweets from bed confirms that he does not limit his Twitter use to working hours.¹²⁷

The factors above, weighing toward private use, roughly correspond with those considered by the *Davison* court, but are not exhaustive; the facts of individual cases are subject to "normative judgment," and other factors may be found weighing toward the account being private.¹²⁸ For example, a court might consider the whole of @realDonaldTrump by comparing the eight years of tweets prior to President Trump's inauguration to after he took office and find that this history as a non-governmental account strongly indicated that the account was private.

However, many *Davison* factors support a finding of state action here.¹²⁹ First, Defendants "use the account to make formal announcements, defend the President's official actions, report on meetings with foreign leaders, and promote the administration's positions on health care, immigration, foreign affairs, and other matters."¹³⁰ This usage is reminiscent (albeit at a national scale) of the ways Randall used her Facebook page; she also consistently addressed her constituents and promoted certain policy initiatives as part of her work in office.¹³¹ Notably, such tweets by @realDonaldTrump are considered official enough that the National Archives and Records Administration advised the White House that these tweets had to be preserved under the Presidential Records Act.¹³² The Ninth Circuit, with the understanding that the President's tweets were official statements of the President, even referenced one of these tweets in

125. See Kaveh Waddell, *Is Trump Still Tweeting from His Unsecured Android Phone?*, ATLANTIC (Mar. 27, 2017), <https://www.theatlantic.com/technology/archive/2017/03/trump-android-tweets/520869/>.

126. See *Davison v. Loudoun Cty. Bd. of Supervisors*, 267 F. Supp. 3d 702, 712 (E.D. Va. 2017), *aff'd sub nom. Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019).

127. See Nick Visser, *Trump Finally Says It: He Tweets from Bed*, HUFFINGTON POST (Jan. 28, 2018, 9:49 PM), https://www.huffingtonpost.com/entry/trump-tweets-from-bed_us_5a6e66aae4b0ddb658c78a0e.

128. See *Davison*, 267 F. Supp. 3d at 712.

129. See *id.* at 714.

130. Complaint, *supra* note 1, at 2, 14.

131. See *Davison*, 267 F. Supp. 3d at 713.

132. Complaint, *supra* note 1, at 15.

striking down President Trump's temporary travel-ban of nationals from certain countries.¹³³

Moreover, like Randall, President Trump and his staff used government resources to manage the account.¹³⁴ Members of President Trump's staff (then-White House Press Secretary Sean Spicer and White House Social Media Director Daniel Scavino) helped operate @realDonaldTrump; Daniel Scavino even occasionally posted tweets on President Trump's behalf.¹³⁵ Additionally, like Randall's "Chair Phyllis J. Randall" page, the @realDonaldTrump page is swathed in references to the office: the account is registered to the "45th President of the United States of America, Washington, D.C.," the header photograph sometimes displays President Trump performing official duties like making speeches, and many posts announce policies or decisions not yet made on any other official channel.¹³⁶ One post from @realDonaldTrump even stated that "My use of social media is not Presidential—it's MODERN DAY PRESIDENTIAL."¹³⁷

Lastly, the actual act of blocking the Individual Plaintiffs could also be seen as indicative of state action. As with Randall's suppression of Davison for criticizing the conduct of government officials, Defendants blocked the Individual Plaintiffs like Plaintiff Neely following criticism they leveled toward the President.¹³⁸

Weighing the totality of the circumstances, it is likely that a court would find that @realDonaldTrump was an official, rather than personal, account.

That being the case, it would be difficult for Defendants to argue that there was no viewpoint-based exclusion of the Individual Plaintiffs. As with Plaintiff Neely's biting remark about President Trump's future healthcare policy,¹³⁹ the Individual Plaintiffs were

133. *Id.* (citing *Hawaii v. Trump*, 859 F.3d 741, 773 n.14 (9th Cir. 2017), *vacated*, *Trump v. Hawaii*, 138 S. Ct. 377 (2017)); *see also* Ali Vitali, *Trump's Tweets 'Official Statements,' Spicer Says*, NBC NEWS (June 6, 2017, 5:02 PM), <https://www.nbcnews.com/politics/white-house/trump-s-tweets-official-statements-spicer-says-n768931> (noting former White House Press Secretary Sean Spicer's statement that "the president is president [sic] of the United States, so [the Tweets] are considered official statements by the president of the United States").

134. *See Davison*, 267 F. Supp. 3d at 713; *see* Complaint, *supra* note 1, at 4–5.

135. *See* Complaint, *supra* note 1, at 4–5, 14–15.

136. *See id.* at 13–14.

137. *Id.* at 13.

138. *See Davison*, 267 F. Supp. 3d at 714; *see* Complaint, *supra* note 1, at 2–3, 21.

139. Complaint, *supra* note 1, at 21.

criticizing official conduct and therefore engaging in protected speech, which is at the very heart of the First Amendment.¹⁴⁰ Because President Trump blocked the Individual Plaintiffs shortly after such critical speech, thereby taking away their ability to engage with @realDonaldTrump through their accounts, he discriminated on the basis of the viewpoints expressed.¹⁴¹ Moreover, it is likely that the comment threads associated with @realDonaldTrump's posts are fora for speech. Defendants consistently promoted @realDonaldTrump as a channel for official communication and did not prevent access to the tweets to anyone except the blocked Plaintiffs.¹⁴² If @realDonaldTrump truly is an official account, as *Davison* indicates it is, this viewpoint-based exclusion of the Individual Plaintiffs, in the absence of any policies limiting the speech of commenters, violates the First Amendment.¹⁴³

V. CONCLUSION

The *Davison* case is very much a product of our times; social media continues to grow ever more prevalent in the lives of many, and heretofore unresolved (or unasked) questions, such as the First Amendment concerns discussed above, will have to be addressed. Even setting aside President Trump's notable use of social media, there remain government officials like Randall who interact with their constituencies through such platforms. This is natural given the efficiency and ease of interacting with one's base in this way. However, the question of whether and to what extent the Constitution follows such officials to their social media accounts must therefore be considered. For its part, *Davison* does this quite well. Reasonably derived from existing precedent, the case provides a methodology with relevant factors to consider in weighing whether a government official's social media use triggers a First Amendment issue. As such, *Davison* offers an instructive blueprint for future cases dealing with government officials' suppression of private citizens' speech on social media.

140. *See* *Garcetti v. Ceballos*, 547 U.S. 410, 428 (2006) (5-4 decision) (Souter, J., dissenting).

141. Complaint, *supra* note 1, at 16.

142. *Id.* at 12–14.

143. *Id.* at 16.