WISCONSIN LEGISLATIVE COUNCIL **IssueBrief**

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Developments in Constitutional Law: Public Officials' Social Media Activity

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The First Amendment of the U.S. Constitution and Article I, Section 3 of the Wisconsin Constitution prohibit government actors, including public officials acting in an official capacity, from abridging the freedom of speech.[1] Recent court decisions grapple with how to apply those constitutional guarantees to public officials' social media activity, such as deleting comments or blocking users. This issue brief summarizes the current state of this rapidly evolving area of law.

THRESHOLD QUESTION: WHEN DOES THE FIRST AMENDMENT APPLY?

Courts have addressed a critical threshold question in cases challenging public officials' social media activity: Does the First Amendment apply to the challenged action? In other words, was the elected official acting in an official capacity, and therefore under the "color of law," with respect to the social media post or account in question? If the answer is no, the First Amendment does not apply, because the First Amendment only limits restrictions imposed by the government.

In a 2024 decision, *Lindke v. Freed*, the U.S. Supreme Court announced a two-part test for determining whether the First Amendment applies to actions taken with respect to a given social media post or thread. Under the new test, a public official's social media activity can be challenged if the public official: (1) possessed actual authority to speak on the government's behalf with respect to the relevant post or thread; and (2) purported to exercise that authority in the relevant post or thread.

The new test's individual thread- or post-based approach is a shift from the more page- or account-based approach taken by lower courts in some previous decisions.[2] Under the new test, actions relating to a post that falls outside the bounds of the two-part test appear to be protected from a First Amendment challenge, even if the post is made on an "official" social media account. Conversely, actions relating to a post that falls within the test's bounds may be subject to challenge, even if the post appears on an account or page that purports to be private.

TEST IF THE FIRST AMENDMENT APPLIES

The U.S. Supreme Court has not directly addressed what legal standard applies in First Amendment challenges to public officials' social media activity. Lower courts have generally applied "Public Forum Analysis" to evaluate those cases, with differing approaches and results.

Public Forum Analysis

Under public forum analysis, the level of government regulation allowed under the First Amendment depends, in part, on the context in which constitutionally protected[3] speech occurs. Courts have identified three types of "forums" in which speech might occur: (1) a "traditional" public forum; (2) a "designated" public forum; and (3) a nonpublic forum.

Courts are most likely to find that a government restriction of speech violates the First Amendment when the speech occurs in a "traditional" public forum, such as a public park or sidewalk, which has "immemorially been held in trust for use of the public and, time out of mind, ha[s] been used for purposes of … communicating thoughts between citizens."[4] In those places, a government may impose reasonable restrictions on the time, place, and manner of protected speech, but the restrictions must: (1) be "content neutral"; (2) be narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternative channels for communicating.[5]

Alternatively, a "designated" public forum is a location or channel for communication that the government intentionally opens for expressive activity.[6] Government regulation of speech in a designated public forum generally must satisfy the same "strict scrutiny" criteria that apply in a traditional public forum, except that the government may limit the forum's scope and purpose at the outset.

Finally, a nonpublic forum is a setting in which public speech is not traditionally invited, nor did the government express any intention of inviting speech.[7] Generally, courts uphold government regulation of speech in a nonpublic forum if the regulation is "reasonable." However, even in a nonpublic forum, government regulation of speech must be applied neutrally as to viewpoint.

Application to Public Officials' Social Media Sites

As mentioned, the U.S. Supreme Court has yet to resolve whether public officials' social media posts can constitute public fora, and, if so, which type.[8] Lower courts have reached differing decisions, depending on the facts involved.

For example, in a 2022 decision, *Krasno v. Mnookin*, 638 F. Supp. 3d 954, the U.S. District Court for the Western District of Wisconsin concluded that comment threads on the University of Wisconsin-Madison's Facebook and Instagram pages are nonpublic fora.[9] The court concluded that the university's policy of removing certain "off-topic" comments was reasonable and viewpoint neutral.

In contrast, the U.S. Court of Appeals for the D.C. Circuit held in 2024 that the National Institutes of Health (NIH) violated the First Amendment by deleting certain "off-subject" comments from its Facebook and Instagram pages. The court found that NIH had created a designated public forum in the comment sections of its Facebook and Instagram pages, which was dedicated "solely to the discussion of certain subjects." However, the court concluded that NIH implemented its "content moderation policy" in a manner that was not viewpoint neutral, specifically by using keyword filters that flagged certain groups.

SUMMARY OF THE CURRENT STATE OF THE LAW

The current state of the law provides some guidance to public officials regarding whether deleting comments relating to a given social media post might be subject to a First Amendment challenge. However, the law provides less guidance regarding what legal standard applies to such a challenge. In practice, one approach to minimize legal risk may be to establish clear, viewpoint neutral policies regarding the scope of comments that will be allowed in comment threads, and to then ensure that such policies are implemented in a viewpoint neutral manner.

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[1] U.S. Const., amend. I ("Congress shall make no law … abridging the freedom of speech"); Wis. Const., art. I, s. 3 ("Every person may freely speak … on all subjects … and no laws shall be passed to restrain or abridge the liberty of speech …").

[2] For example, in *Campbell v. Reisch*, a 2021 decision, the U.S. Court of Appeals for the Eighth Circuit held that the First Amendment did not apply to actions taken by a Missouri state legislator on a Twitter account, because the Twitter account was focused on campaign news, rather than on communicating official views or inviting constituents' input on policy ideas. In contrast, in *Knight First Amendment Institute v. Trump*, the U.S. Court of Appeals for the Second Circuit rejected President Trump's argument that his Twitter account was private and therefore not subject to the First Amendment.

[3] A few, narrow categories of speech are not protected by the First Amendment, including "fighting words," "true threats," and speech that is likely to cause imminent lawless action. [See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) and *State v. Perkins*, 2001 WI 46.]

[4] *HAGUE v. CIO*, 307 U.S. 496 (1939).

[5] *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

[6] *Surita v. Hyde*, 665 F.3d 860, 869 (7th Cir. 2011).

[7] See *Cornelius v. NAACP*, 473 U.S. 788 (1985).

[8] Majority and dissenting opinions in a 2017 decision, *Packingham v. North Carolina*, did not directly address that question but provided commentary that may provide some insight for future cases. The majority opinion, written by Justice Kennedy, compared today's social media platforms to traditional public forums such as streets and parks, as both are "the most important places … for the exchange of views." In a dissenting opinion, Justice Alito cautioned against equating social media with traditional public forums, suggesting that the Court may be more likely to view elected officials' social media pages as designated or nonpublic forums in future cases.

[9] However, the court relied on criteria more typically associated with designated public fora in doing so.