Social Media in Local Government

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From posting on Facebook to tweeting on Twitter, using social media is a commonplace occurrence. Many municipalities and local officials operate social media accounts. Social media is a powerful tool for communicating with constituents. It can also be an aid to improve culture or build trust within the community. While social media offers several benefits, government use of social media is subject to First Amendment freedom of speech protections and proper use is critical to avoid exposure to liability.

Part of social media's appeal is its interactive nature. Users post content and individuals can respond and converse with one another in the post's thread. However, not all feedback will be positive. Inevitably, people will post negative or offensive comments. Sometimes the municipality or local official might be tempted to respond by hiding or deleting offensive comments or by blocking those who posted offensive content; but, doing so improperly can run afoul of the First Amendment.

Although the U.S. Supreme Court has recognized social media as a powerful mechanism for citizen speech and acknowledged that individuals use social media platforms to engage in protected First Amendment activity, [1] there is limited case law regarding the First Amendment's applicability to government social media accounts. There are no U.S. Supreme Court decisions directly on point.[2] There are no Seventh Circuit decisions and only a handful of Wisconsin federal district court decisions, which are only binding within the district. With limited precedential case law, we must look to factors other courts have examined for guidance on how municipalities and local officials should approach social media use.

The First Amendment prohibits the government, including individual government actors, from abridging the freedom of speech. The government's ability to regulate speech depends, in part, on where the speech occurs – i.e., what type of "forum" it occurs in. There are three basic types of forums: traditional public forums, designated public forums, and non-public forums. Traditional public forums are places that have long been associated with expressive activity, such as streets and parks.[3] A designated public forum is a place that is not traditionally open for expressive activity, but that the government has opened for expressive activity.[4] A limited public forum is a type of designated forum where the government reserves the forum for certain groups or topics.[5] Non-public forums are all other types of government, or private, property that have not been opened to expressive activity.[6]

The type of forum speech occurs in dictates the level of judicial scrutiny that courts will apply to a challenged restriction on speech. In traditional and designated public forums, strict scrutiny is applied and there is minimal ability to regulate speech. Any content-based restriction on speech will likely be found unconstitutional. However, reasonable time, place and manner restrictions are generally permitted so long as they are content-neutral, narrowly tailored, and leave open ample alternative channels of communication.[7] In limited public forums, a lesser level of judicial scrutiny is applied. The government may regulate the content of speech, but the regulation must be viewpoint-neutral and reasonable in light of the forum's purpose.[8] Regulating speech based on a person's viewpoint is never permitted regardless of forum.

Because the government's ability to restrict speech is limited, any action a municipality or local official takes on social media that can be viewed as a "restriction" on speech can invite litigation. Things like hiding or deleting comments and

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[1] *Packingham v. North Carolina*, 137 S. Ct. 1730 (2017).

[2] The only U.S. Supreme Court case is *Biden v. Knight First Amend. Inst. at Columbia Univ.*, 141 S. Ct. 1220 (2021), which simply vacated the appeal of *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019), as moot.

[3] *Arkansas Educ. Television Com'n v. Forbes*, 523 U.S. 666, 667 (1998).

[4] *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992).

[5] *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 201 (2015).

[6] Note, there is ambiguity in case law regarding whether limited public forums should be considered a subset of designated public forums or non-public forums. *DeBoer v. Village of Oak Park*, 267 F.3d 558, 566-67 (7th Cir. 2001); *Krasno v. Mnookin*, __F. Supp. 3d __, 9 (W.D. Wis. 2022). This legal comment will refer to limited public forums as a type of designated public forum.

[7] *Surita v. Hyde*, 665 F.3d 860, 870 (7th Cir. 2011).

[8] *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001).

blocking certain users are typically challenged as improper restrictions on speech. These challenges are often brought under 42 U.S.C. § 1983, which allows individuals to sue the government, and individual government actors, for violating their rights under the U.S. Constitution. The specific analysis under § 1983 depends on whether a claim is against the municipality or an individual official. Municipalities will be liable under § 1983 if a plaintiff demonstrates there is an official policy or custom that a policy maker has knowledge of and a constitutional violation whose moving force is that policy or custom.[9] Claims against individual officials in their official capacity are treated as suits against the municipality.[10] To state a claim against an individual official in their personal capacity, a plaintiff must show the government official acted "under color of state law" when taking the allegedly unconstitutional action.[11] Courts will look at the totality of the circumstances to determine if the action bore a sufficiently close nexus with the state (municipality) to be fairly treated as an action of the state (municipality) itself.[12]

When conducting a "color of state law" analysis, courts look at a variety of factors, including 1) why the account was created, 2) whether the individual used the account in their official capacity, and 3) whether the account was being used as a tool of governance. Factors indicating an account is being used as a tool of governance might include: a) providing information to the public regarding official activities, b) soliciting public input on policy issues, addressing content to constituents, and c) incorporating the trappings of the local official's office. When looking to see if an account incorporates the trappings of an official's office, courts have considered the following factors: who the account was registered to (e.g., John Doe or Mayor Doe); whether the account handle (e.g., username or account name) related to the official capacity; whether "official" images were used; whether the account's description pointed to the official's office; whether the account was linked to other official pages; and whether official contact information was listed on the account.

If a claim is regarding an official local government account or an individual official's account and the court has determined the official acted under color of state law, the court will next look to identify what type of forum the speech occurred in. As explained above, the type of forum dictates the level of judicial scrutiny courts will apply to the challenged restriction on speech. In the absence of clear guidance from the U.S. Supreme Court regarding whether a government social media account will be considered a traditional public forum, courts will likely look at whether the account is a designated public forum or a limited public forum. Courts will consider whether the account was intentionally opened for public discourse (a factor all courts thus far have found to be met) and whether any limitations were placed on users or subject matter. If a local government or individual official creates an official social media account for public discourse and places no limitations on what subjects may be discussed, the account will almost certainly be deemed a designated public forum and deleting comments or blocking users will violate the First Amendment. In contrast, when an account is created as a limited public forum, content-based regulation of speech is permitted so long as it is reasonable, viewpoint neutral, and fits within the parameters established when the limited public forum was created. If posted content is limited to a particular topic, then off-topic content may be regulated in a viewpoint-neutral manner. However, without clear evidence that a local government or official explicitly intended to create a limited public forum, a court is unlikely to conclude a social media account is a limited public forum.

Creating a social media comments policy is one way to establish a social media account as a limited public forum. A comments policy that is clearly visible to users can set the parameters on what subject matters they may discuss. Possible limitations include prohibiting unprotected speech, such as defamation or threats; limiting comments to the original post's subject matter; prohibiting posts that contain links to third-party websites; and prohibiting solicitation or advertisement of commercial services. Case law has not yet provided a definitive answer, but it is likely permissible to prohibit profanity in a limited public forum, even though profanity is protected speech, so long as the prohibition is reasonable in light of the forum's purpose. For example, if an account is created as a limited public forum to allow

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[9] *See, e.g., Robinson v. Hunt Cnty.*, 921 F.3d 440 (5th Cir. 2019). The Fifth Circuit held a county sheriff's office violated the First Amendment when it deleted a user's comments and banned her from the sheriff's office Facebook page for posting content in violation of the sheriff's office posted statement indicating posts involving "foul language, hate speech of all types and comments that are considered inappropriate" would be removed. Because the statement limited speech based on viewpoint, it constituted improper viewpoint discrimination.

[10] *Davison v. Randall*, 912 F.3d 666, 688 (4th Cir. 2019).

[11] *West v. Atkins*, 487 U.S. 42. 48 (1988); *Davison v. Randall*, 912 F.3d 666, 679 (4th Cir. 2019).

[12] *Davison v. Randall* 912 F.3d 666, 679-80 (4th Cir. 2019); *One Wisconsin Now v. Kremer*, 354 F. Supp. 3d 940, 950 (W.D. Wis. 2019).

community members of all ages to discuss matters of public concern, prohibiting profanity to encourage civility might be reasonable in light of the forum's purpose. Discriminatory/hate speech may be more problematic to regulate. Officials may understandably wish to prohibit such speech, but discriminatory/hate speech is protected speech. Unlike profanity, which may be used in a more neutral manner, it is more difficult to divorce discriminatory/hate speech from the speaker's viewpoint. In other words, it is difficult to regulate discriminatory/hate speech without the regulation amounting to impermissible viewpoint discrimination. Without additional guidance from the courts, municipalities and officials should exercise caution regarding regulating discriminatory/hate speech.

Municipalities and local officials must be thoughtful when creating a comments policy. Remember that while content may be regulated, the regulation must be reasonable and may not regulate viewpoint. Additionally, a comments policy should be administered and enforced in a consistent and non-discriminatory manner. It is unclear how consistent enforcement must be, particularly since a single post can generate thousands of comments. However, a recent case out of Wisconsin's Western District suggests that perfect enforcement is not required.[13] Nonetheless, the court noted that, depending on the facts, inconsistent enforcement can amount to viewpoint discrimination and/or support an inference that a designated public forum was intended rather than a limited public forum. A comments policy should also specify what enforcement action, if any, will be taken for policy violations – e.g., deleting comments, blocking users. If blocking will be a potential remedy, consider only blocking individuals for repeated violations and only for a limited time.[14]

Municipalities can also choose to turn off commenting on individual posts making the post a one-way communication, although this is only possible to a limited degree on Facebook and Twitter. However, eliminating public engagement would defeat one of the primary benefits social media has to offer.

Lastly, be aware that social media platforms are constantly evolving. Page layout, tools/functions, and rules routinely change. Social media accounts should be continuously monitored to ensure the use remains as intended. A comments policy posted in the about section of a Facebook page may be visible one day but disappear the next if the platform changes its layout.

Social media can be a powerful communication tool for municipalities and their officials, but it is important to establish and use accounts intentionally and understand the effect of how the page was created. Finally, individual officials wanting their account to remain personal must be mindful to keep it wholly separate from their official government role.

<u>Miscellaneous 24</u>
Legal comment discusses the First Amendment's application to government use of social media, creating social media pages as limited public forums, and implementing a social media comments policy. 5/2023.

[13] *Krasno v. Mnookin*, __ F. Supp. 3d __ (W.D. Wis. 2022).
[14] *See Garnier v. O'Conner-Ratcliff*, 513 F. Supp. 3d 1229 (S.D. Cal. 2021). Court upheld decision to block users but held that the duration of the blocking, almost three years, was not narrowly tailored.