STATE BAR OF WISCONSIN

Home > News & Publications > Wisconsin Lawyer > Article

WISCONSIN Lawyer YOUR PRACTICE. OUR PURPOSE.

THE OFFICIAL PUBLICATION OF THE STATE BAR OF WISCONSIN

JANUARY 2020 VOLUME 93 NUMBER 1

Social Media, the First Amendment, and Government Actors

JANUARY 09 2020

An electronic device used to access Twitter, Facebook, and other social media might not physically resemble a city park or an auditorium, but if you're a government official, your social media site may be a public forum. Citizens and government officials alike should understand First Amendment implications of social media use.

CHRISTA WESTERBERG & AARON DUMAS

Government officials and entities increasingly are using social media to reach and interact with their constituents. This practice is most famously exemplified by President Donald Trump, whose Twitter account has some 50 million followers. His tweets "produce an extraordinarily high level of public engagement … typically generating thousands of replies."[1]

But use of social media by government actors carries obligations and legal risks – apart from any political risks. In 2019, in *Knight First Amendment Institute v. Trump*, the Second Circuit Court of Appeals held that President Trump's Twitter account was a public forum, and that by blocking certain users' access to the account because he disagreed with their speech, he engaged in unconstitutional viewpoint discrimination.[2]

Knight is the most high-profile case in a recent wave of litigation examining government use of social media and the public's right to participate in public forums. This wave reached Wisconsin last year, when a federal district court found that three Republican members of the State Assembly violated the First Amendment by blocking liberal group One Wisconsin Now (hereinafter OWN) from their Twitter accounts based on the content of the group's speech.[3]

Cases concerning the First Amendment and social media have also extended to local government officers and agencies. For instance, in *Davison v. Randall*,[4] the Fourth Circuit Court of Appeals found a county supervisor violated a constituent's free speech rights by blocking him from her Facebook page for just a few hours. A local sheriff's department lost a similar case in the Fifth Circuit Court of Appeals.[5]

Lawyers advising government officials, and citizens who participate in government, should be aware of the developing jurisprudence on social media and the First Amendment.

Social Media as Public Forum

Live 1

Courts have long held that when government excludes a speaker from a public forum accessible to others – such as a park or a podium at a government meeting – doing so may violate the speaker's First Amendment rights if the exclusion is based on the content of the speech or the speaker's viewpoint.[6] In 2017, the U.S. Supreme Court extended this concept to the "'vast democratic forums of the Internet' in general, and social media in particular."[7]

***Christa Westerberg**, U.W. 2002, and **Aaron Dumas**, U.W. 2015, practice with Pines Bach LLP, Madison. Westerberg is a partner focusing on open government law, environmental and land use law, and civil litigation and appeals. Dumas is an associate in the firm's civil litigation practice group, frequently handling matters involving state and local government actors and policy. They represented the plaintiff in* One Wisconsin Now v. Kremer.

A key feature of social media's role in public discourse, and in First Amendment litigation, is its interactivity. Social media sites are not simply one-way communication tools that allow the government to broadcast its messages; rather, they allow members of the public to engage with the government and with each other.

This article focuses on the interactive components of Twitter and Facebook, which have some 70 million and 200 million active users, respectively, in the United States. First Amendment case law on government social media use has thus far focused on these platforms, but this jurisprudence can be applied to encompass others – and it undoubtedly soon will, as government actors adapt their outreach to ever-changing technologies.

Twitter

Twitter users post messages, called "tweets," of up to 280 characters each. Tweets appear chronologically on a user's "timeline" page, along with biographical data and images chosen by the user. This page is universally visible online, including to viewers not logged into Twitter accounts.

However, only another logged-in Twitter user can take advantage of the platform's several interactive functions. These include "following," "liking," and "mentioning" other users, and "retweeting," which places the original tweeter's tweet, including attribution, in a retweeter's timeline.

Users also can reply to another user's tweet. The reply appears both on the original poster's and the replying poster's timelines. Any other Twitter user with access to the original account can reply either to the initiating tweet or the reply. Replies to the same tweet will appear in the same comment thread, nested below the replies to which they respond.

The content of each of these interactive mechanisms is controlled by the user who generates them. No user can prescreen or alter the content of another user's tweets, replies, likes, or mentions, regardless of the timeline on which they appear.

Twitter allows users to limit interactions by blocking or muting other users. Blocked users are entirely prevented from seeing, retweeting, and replying to the blocking user's tweets. By contrast, muted users have all the same capabilities of other users, but the muting user herself does not see the muted user's content.

Facebook

Facebook functions in similar but not identical ways to Twitter. Facebook users can post messages and photos on their pages, also called "timelines," and can respond to or share those of others. "Sharing" is analogous to "retweeting" on Twitter, while "reacting" uses emojis to connote a wider range of emotional reactions than Twitter's "liking." Users can also "follow" others' pages, allowing them to see what those users post and share, and can reply to others' posts and comments.

A Facebook user can delete both their own posts and comments and – unlike on Twitter – comments that others make on the user's posts. Like Twitter, Facebook allows a user to block others from his or her profile page. A user can also "ban" someone from a non-profile page that the user creates, but while the banned user cannot publish on that page or like or comment on its posts, he or she can still follow it and share posts from it.

Meet Our Contributors

Why do you do what you do? What's the best advice you ever received? Share your weirdest courtroom story...

Lawyers have a lot to say. Our authors are no exception. Whether its personal, insightful, or fun, it's always interesting.

Check out our Q&A with the author below

The Legal Test

The court in *One Wisconsin Now*, as well as the Second Circuit in *Knight*, applied a three-part test to assess an alleged First Amendment violation in the social media context. This test reviews whether 1) the

Live 1

defendants acted under color of law in operating their social media accounts, 2) the accounts were public forums, and 3) the defendants engaged in prohibited discrimination.[8]

Color of Law

A public employee generally acts under color of state law "while acting in his [or her] official capacity or while exercising his [or her] responsibilities pursuant to state law."[9] In the context of a social media account, courts have examined whether, under the totality of the circumstances, the actor uses the account "for conducting official business" and has given the account "the trappings of office."[10]

Conducting "official business" may include disseminating official information, communicating with constituents, and using governmental staff and resources in operating the account. The actor need not have specific authorization under law to operate the account or to block someone.[11]

The "trappings of office" may include the use of official titles, governmental language and imagery, links to official internet sites in the timeline, and frequent reference to official matters in the content.[12] That accounts are privately owned by social media companies is nondispositive, because they are still operated by public actors.[13]

Forum Type

Although a social media space might not be a traditional public forum, public speech protections still apply to less traditional, "designated" public forums. These are "locations or channels of communication that the government opens up for use by the public for expressive activity,"[14] as evidenced by the "policy and practice of the government" and "the nature of the property and its compatibility with expressive activity."[15]

Several courts have found that government-operated social media accounts easily meet the definition of a designated public forum.[16] This is largely due to the nature of social media accounts, where "interaction remains a key component." As the *One Wisconsin Now* court found, a government actor who does not wish to create a public forum has other options, such as creating a noninteractive blog.[17]

"A government actor who does not wish to create a public forum has other options, such as creating a noninteractive blog."

Defendants commonly claim that their account is government speech, which does not require neutrality under the Free Speech clause.[18] Courts have agreed that a government actor's own tweets are government speech. But they have disagreed that the "interactive space" of a government actor's social media account is government speech.[19] Courts have generally found these spaces, such as reply threads where nongovernment speakers are clearly identified, to be designated public forums.[20]

A notable minority opinion exists, however. In*Morgan v. Bevin*, a federal court in Kentucky held that the governor's Twitter and Facebook accounts constituted government speech in their entirety, and that in blocking plaintiffs who posted critical comments, he was "not suppressing speech, but [] merely culling his … accounts to present a public image that he desires."[21]

Viewpoint, Content-based, or Other Actionable Discrimination

The final question – whether the government actors engaged in discrimination in violation of the First Amendment – evaluates a government action and its motives. In the social media context, the action at issue is typically a government actor blocking another social media user.

Discrimination based on the particular viewpoint expressed in relation to a given subject matter ("viewpoint discrimination") rates as the worst in the taxonomy of government restrictions on speech. It is prohibited under any circumstance.[22]

Content-based discrimination, which is closely related to viewpoint-based discrimination, includes restrictions based both on subject matter and on the speaker's identity and status. It is permissible only if the government satisfies strict scrutiny – that is, if it shows that the restriction on speech is "necessary to serve a compelling state interest and that it is narrowly drawn to achieve that interest."[23] Even some content-neutral time, place, and manner restrictions on speech may be actionable.[24]

"Discrimination based on the particular viewpoint expressed in relation to a given subject matter ("viewpoint discrimination")

Live 1

> rates as the worst in the taxonomy of government restrictions on speech. It is prohibited under any circumstance. ”

The courts in *One Wisconsin Now* and *Davison* examined the defendants' statements and conduct and found that "[g]iven the context … the only reasonable inference" was that the defendants selectively blocked plaintiffs because of the plaintiffs' prior expression.[25] In *One Wisconsin Now*, the court cited one defendant's statement that his Twitter feed was "not for Dane County liberals to carry on conversations with me," and another defendant's statement that he blocked the plaintiff because of prior "crude comments on Wisconsin politics," despite being unable to cite any such comments.[26]

Defendants often struggle to satisfy the strict scrutiny test because less restrictive alternative methods of regulating speech online are available. For instance, instead of blocking a user over an objectionable comment, a government actor could ask the user to delete it, report it to Twitter or Facebook, or (on Twitter) mute the user.[27]

Remedies and Future Considerations

Upon a finding of liability, various kinds of relief are available to those who have been blocked on social media. Courts have so far awarded primarily declaratory relief, finding injunctive relief inappropriate or unwarranted given the case or the changing nature of social media.[28] Courts may also award prevailing plaintiffs their attorney fees and costs.[29] Damages claims may be barred by qualified immunity for acts that pre-date *Davison* or *Knight*.[30]

Government actors may ask what options they have to avoid First Amendment lawsuits but also avoid obscene or other undesirable content on their social media accounts. Courts are still developing answers on a case-by-case basis, and the U.S. Supreme Court has not directly weighed in.

In the meantime, government actors and the lawyers who represent them may wish to keep the following guidelines in mind:

- Social media accounts used by government officials or entities may constitute a public forum. Review accounts to determine whether they are used for government business or bear the "trappings of office."
- Speech on matters of public concern, including political speech, falls within the core of First Amendment protection. Government officials should avoid knee-jerk social media restrictions on sharply worded comments, because even "[g]iving offense is a viewpoint."[31]
- Before blocking a user, consider whether less restrictive options are available, such as muting on Twitter.
- Consider drafting social media policies; if such a policy is used, post it clearly and apply it even-handedly.
- Social media policies containing content-based and time, place, and manner restrictions should be carefully crafted to meet their respective levels of scrutiny. In general, certain narrow categories of speech have previously been found to justify content-based restrictions, including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.[32]

Model social media policies are few and far between. However, a policy developed to settle a blocking case brought by the ACLU against the governor of Maryland may provide a starting point.[33] It identifies content that may be removed, such as comments containing malicious software, advertising, and threats to public safety, and identifies when users may be restricted. It also provides a process for appealing the loss of access.

Conclusion

Social media presents tremendous opportunities for citizens and government officials to inform each other and interact. Awareness of developing jurisprudence on social media can help promote a healthier political discourse and forestall future First Amendment headaches.

Meet Our Contributors

What was your favorite vacation?

My favorite vacation was my month-long honeymoon in South America. My wife and I spent our free time for months before this once-in-a-lifetime opportunity planning meticulously, watching movies, and reading literature from and about South America to ground ourselves in its history and culture. This

Live 1

preparation stage alone provided a huge part (if not quite half) of the trip's fun and rewards.

Then, over a mostly charmed and frequently surreal 30-day existence on a (relative) shoestring, we boated down the Amazon, hiked the Inca Trail, off-roaded across the Uyuni Salt Flats, sandboarded dunes in the Atacama, and rode horses through Argentina's wine country (to omit many less glamorous forms of transport). I was gratified to see my long-evaporated command of the Spanish language return to near adequacy and to meet a host of lovely people, both natives and fellow tourists. (Of the latter group, a surprisingly small share were Americans – a sad commentary, I thought, on our country's comparatively low appreciation for grand adventure.)

South America sent me home with everything I could have asked for: not my wallet (pilfered in Rio), but plenty of photos; exactly the right amount of fatigue and a bit of relief at having survived (relatively) unscathed; feelings that were overwhelmed by a piqued sense of adventure and a longing to return for more; an awed mind and inspired heart; a newly discovered sense of self; enough shared memories for a lifetime of dreams and reminiscences with my traveling companion; and, best of all, a deeper love for my wife.

***Aaron Dumas**, Pines Bach LLP, Madison.*

What is your favorite book?

One of my favorite books is *All the King's Men*, by Robert Penn Warren. The book chronicles the rise and fall of an initially well-meaning but eventually corrupt southern politician. It is uniquely American and provides insights into our nation's politics that resonate even today. The writing is so well done and creative (like the line, "a slow sad susurrous rustle"), and the book won the Pulitzer Prize for literature in 1947. I try to read it every 10 years or so and am due to revisit it soon.

***Christa Westerberg**, Pines Bach LLP, Madison.*

Become a contributor! Are you working on an interesting case? Have a practice tip to share? There are several ways to contribute to *Wisconsin Lawyer*. To discuss a topic idea, contact Managing Editor Karlé Lester at (800) 444-9404, ext. 6127, or email klester@wisbar.org. Check out our writing and submission guidelines.

Endnotes

[1] *Knight First Amendment Inst. v. Trump*, 928 F.3d 226, 231 (2d Cir. 2019).

[2] *Id.* at 230.

[3] *One Wis. Now v. Kremer*, 354 F. Supp. 3d 940 (W.D. Wis. 2019). The authors of this article represented One Wisconsin Now in the case.

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

[5] *Robinson v. Hunt Cty.*, 921 F.3d 440 (5th Cir. 2019).

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

[7] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017) (internal quotation omitted).

[8] *One Wis. Now*, 354 F. Supp. 3d at 949-50; *see also Knight,* 928 F.3d at 234. *But see Novak v. City of Parma*, 932 F.3d 421, 434 (6th Cir. 2019) ("Courts have not reached consensus on how First Amendment protections will apply to comments on social media platforms.") (holding that police officers were entitled to qualified immunity as to unlawful censorship and right to receive information claims in deleting plaintiff's Facebook page comments and as to his right to remain anonymous in investigating his own Facebook page that allegedly parodied police department's page, but upholding claims for retaliatory arrest and prior restraint).

[9] *One Wis. Now*, 354 F. Supp. 3d at 950.

[10] *Knight First Amendment Inst.*, 928 F.3d at 231-32.

[11] *One Wis. Now*, 354 F. Supp. 3d at 950.

[12] *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), *as amended* (Jan. 9, 2019); *One Wis. Now*, 354 F. Supp. 3d at 951.

[13] *Knight First Amendment Inst.*, 928 F.3d at 234-35.

[14] *One Wis. Now*, 354 F. Supp. 3d at 953 (quoting *Surita*, 665 F.3d at 869 (7th Cir. 2011)).

Live 1

[15] *Id.* at 953 (internal quotations omitted); *Knight First Amendment Inst. v. Trump*, 302 F. Supp. 3d at 541, 574 (S.D.N.Y. 2018); *Davison*, 912 F.3d at 682.

[16] *E.g., One Wis. Now,* 354 F. Supp. 3d 940; *Knight First Amendment Inst.*, 928 F.3d at 238; *Davison*, 912 F.3d at 687.

[17] *One Wis. Now*, 354 F. Supp. 3d at 954.

[18] *Knight First Amendment Inst.*, 928 F.3d at 239 (quoting *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017)).

[19] *Id.* at 239; *One Wis. Now*, 354 F. Supp. 3d at 954-55; *Davison*, 912 F.3d at 686-87.

[20] *E.g., Knight,* 928 F.3d 226; *see also Leuthy v. LePage*, No. 1:17-CV-00296-JAW, 2018 WL 4134628, at *11 (D. Me. Aug. 29, 2018) (unpublished).

[21] *Morgan v. Bevin*, 298 F. Supp. 3d 1003, 1011-14 (E.D. Ky. 2018).

[22] *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009).

[23] *One Wis. Now*, 354 F. Supp. 3d at 955; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48-49 (1983).

[24] Content-neutral restrictions must be narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of the information. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *see also Bruni v. City of Pittsburgh*, 824 F.3d 353, 363-64 (3d Cir. 2016) (noting that “narrowly tailored” means the “least restrictive” means of serving the government’s interest in the context of content-based regulation but not in the context of content-neutral regulation).

[25] *One Wis. Now*, 354 F. Supp. 3d at 956; *Davison*, 912 F.3d at 687-88; *see also Knight First Amendment Inst.*, 928 F.3d at 238.

[26] *One Wis. Now*, 354 F. Supp. 3d at 956.

[27] *See, e.g., id.* at 956 & n.13.

[28] *Davison*, 267 F. Supp. 3d at 722-23; *One Wis. Now v. Kremer*, No. 17-cv-820-wmc, 2019 WL 2162231 (Slip. Op., May 17, 2019).

[29] *See Lefemine v. Wideman*, 568 U.S. 1 (2012) (per curiam) (holding declaratory or injunctive relief is sufficient to justify award of attorney fees and costs under 42 U.S.C. §1988).

[30] *See, e.g., Garnier v. Poway Unified Sch. Dist.*, No. 17-CV-2215-W (JLB), 2019 WL 4736208, at *11-12 (S.D. Cal. Sept. 26, 2019).

[31] *Matal*, 137 S. Ct. at 1763.

[32] *Knight First Amendment Inst.*, 302 F. Supp. 3d at 564-65.

[33] *See Laurenson v. Hogan*, No. 8:17-cv-02162-DKC (D. Md.). The policy is at www.aclu-md.org/sites/default/files/field_documents/social-media-policy.pdf.

Live 1