VIEWPOINT DISCRIMINATION IN A PUBLIC FORUM:
When Government Officials Block Citizens on Social Media

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ONLINE CENSORSHIP

Applying First Amendment Doctrine to Social Media Speech
Use of Social Media is Protected Speech

• *Packingham v. N.C.*, 137 S.Ct. 1730 (2017)

• social media interaction is protected speech

• Interactions:
  • Comments
  • Reactions
  • Reposts
The Issue

Does it violate the First Amendment when public officials block individuals from accessing or interacting with a social media account used by the public official to communicate about their official duties?
Circuit Courts of Appeals Decisions

*Knight First Amendment Institute v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019), *reh’g en banc denied*, 953 F.3d 216 (2020)

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

*Robinson v. Hunt Cty., Texas*, 921 F.3d 440 (5th Cir. 2019)
CONTENT vs. VIEWPOINT

Different but related concepts
Content-Based Limitations

Restricts the subject matter or topics that can be discussed

Example: A rule banning political speeches in a city park.

Example: A school board’s Facebook page where discussion is restricted to matters relating to the public schools.
Viewpoint Discrimination

Restricts or bans speech based on its perspective, not the topic

Example: Trump blocks people who criticize him or his policies, but does not block people who praise him or his policies

Not the content that Trump disfavors, but the perspective that he dislikes

“an egregious form of content discrimination”

J. Kennedy

“Viewpoint discrimination is poison to a free society.”

J. Alito

UGA Law School First Amendment Clinic - 9.17.2020
Consensus of the Courts

Public Official Communicates About Official Duties

Acting Under Color of State Law / State Action

Blocks Users Because Dislikes Their Speech

Viewpoint Discrimination
PRIVATE v. OFFICIAL CAPACITY

Threshold Question
First Amendment Applies to Official Pages

- First Amendment prohibits government regulation of private speech
- Does not govern private regulation of private speech
- First Amendment analysis only applies to regulation of speech on social media by someone acting in their official capacity
First Amendment protections apply against officials acting in their official capacity on both government and personal accounts.
Government Social Media Accounts

- “Under color of state law”
- Use and regulation of “official” accounts = official capacity
- Use and regulation of “unofficial” or “personal” accounts requires a fact-specific inquiry
“Unofficial” or “Personal” Social Media Accounts

• No bright line rule
• Courts consider, for instance:
  • Does the account include the official’s title?
  • Is account publicly accessible?
  • Is account used to communicate with constituents/public about official duties and activities?
  • Does account have the “trappings” of the official’s public office?
  • How do the public official and others use, regard, and treat the account?
PUBLIC FORUM ANALYSIS

Government Controlled Social Media
Social Media Accounts as Public Forums

Interactive Account

Controlled by Public Official

Acting Under Color of State Law

Public Forum
Designated v. Limited Forum

- **Designated** – anyone can express themselves without restriction on what topics can be discussed
- **Limited** – only certain people can express themselves, or only on certain topics
Viewpoint Discrimination is Prohibited in All Government-Controlled Forums

• Supreme Court has recognized 4 types of government forums:
  • Traditional public forum
  • Designated public forum
  • Limited public forum
  • Non-public forum
• Viewpoint Discrimination is prohibited in all 4 types
Privately Owned, Government-Controlled Forums

• Social Media platforms privately owned
• Does not prevent the creation of government-controlled forum
• Public official establishes and manages the account and interactive features enabled => creates the govt. forum
The First Amendment prohibits a public official from using viewpoint as a basis for regulating speech.
Viewpoint as Basis for Blocking

• The First Amendment prohibits public officials from using viewpoint as a basis for social media content regulation, including:
  • Deleting Posts
  • Deleting Comments
  • Blocking a user from interacting with a page
  • Blocking a user from viewing a page
Content or Viewpoint-Neutral Blocking

• Removing constituents’ comments does not violate the First Amendment if the removal is viewpoint neutral

• Most applicable in a limited public forum focused on specific subject matter

• Comments or posts not related to the purpose of the limited forum may be removed

• Courts have warned that claiming content or viewpoint neutrality cannot be merely a pretext for viewpoint discrimination
Officials Don’t Have to Listen

Users have a right to interact with official social media accounts. This right does not require officials to listen to this speech.
“Work arounds” are not a cure

Ability to view content despite being blocked does not cure the First Amendment violation
Government Speech

• Public Officials’ posts are government speech
• Government speech is exempt from First Amendment
Comments are not Government Speech

• User comments on official social media accounts are not government speech

• Interactive features of social media are clearly attributable to the individual users

• The fact that a user’s comments appear on the official page does not make them government speech
Additional First Amendment Claims

Retaliation
• Censoring or blocking a user as a response to the user’s interactions

Right to Petition
• An separate enumerated right under the First Amendment
  • Could prevent someone from communicating their concerns to officials

Prior Restraint/Lack of Due Process
• Blocking prevents speech before it happens
  • This raises due process concerns

Unbridled Discretion
• No standards for regulation of speech
IMMUNITY

Qualified, Sovereign, and Legislative
Qualified Immunity

- Argument that the law was not clearly established at the time of the alleged unconstitutional conduct
- A defense to damages
- Does not bar declaratory or injunctive relief
- Neither the Supreme Court nor 11th Circuit have ruled on qualified immunity and social media blocking
Established Law

• Harder to argue officials are not on notice since *Knight v. Trump*

• The First Amendment principles implicated by these cases well established
  • viewpoint discrimination
  • speech-based retaliation
  • prior restraint

• Supreme Court:
  *Packingham v. N.C.* (2017) - social media use is protected speech
  *Brown v. Entm’t Merchants* (2011) - basic 1st A. principles the same when applied to new technology
Sovereign and Legislative Immunity

• State officials cannot claim 11th Amendment immunity in a suit alleging a violation of the federal Constitution

• Social media use does not constitute core legislative or state activity

• Blocking and censoring users not protected by this immunity
CURRENT STATE OF LAW

Overview & Suggested Practices
Interactive social media pages controlled by public officials and used to communicate with public about official duties are government forums.

These virtual forums are subject to the same First Amendment analysis as physical forums.

Blocking or censoring a user based on viewpoint violates established First Amendment doctrine.
Supreme Court
• *Packingham v. N.C.* (2017) - social media use is protected speech
• *Brown v. Entm’t Merchants* (2011) - basic 1st A. principles the same when applied to new technology

11th Circuit
• *Attwood v. Clemons* (2020) - recognized that a social media blocking case fell within the *Ex parte Young* exception to sovereign immunity
SUGGESTED PRACTICES

Personal vs. Official Social Media Pages
Maintaining an Official-Capacity Social Media Account

For maintaining an account used to communicate with constituents and the public about official duties and activities, keep the following in mind:

• Consult with Counsel before...
  • Blocking users in response to comments or posts
  • Removing comments posted by users
  • Limiting users’ access to any interactive features

• If concerned about a social media platform’s community standards being violated, make a complaint to the platform rather than blocking a user

• Develop social media policy at the office, city, or county level

• If an official page is limited to a specific purpose or topic, make sure that limitation is clearly communicated on the page
Maintaining a Private Social Media Account

To minimize risk of First Amendment violations, keep the following in mind:

- Do not associate official title, government address, or government email with the account
- Do not encourage constituents or the public to use the account as a means to contact the official.
- Do not link the account to any official social media accounts -- either the owner’s or the their public office’s.
- Do not refer to or re-post comments from the personal account on official social media accounts.
- Avoid including photos taken in an official setting or engaged in official business
- Limit posts related to official activities or events, and address any such posts explicitly to friends and family
- Set the account to be private rather than public

If any of these items are not checked account, it creates ambiguity where a court may find that it is an official page