First Amendment Legal Update:

A Brief Review of First Amendment Issues for Local Government

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The First Amendment Update

- The First Amendment – a brief history
- Prayer and Speech at Public Meetings
- Social Media under *Lindke v Freed*

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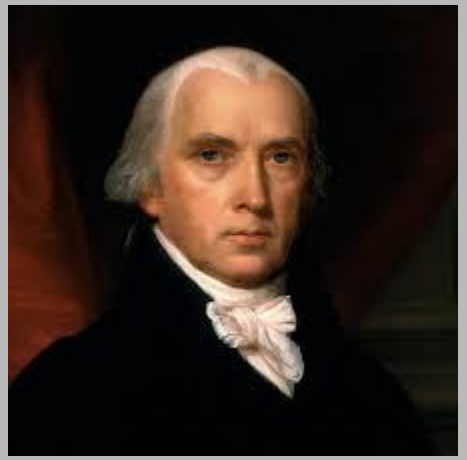
The First Amendment Update

A Short History Lesson



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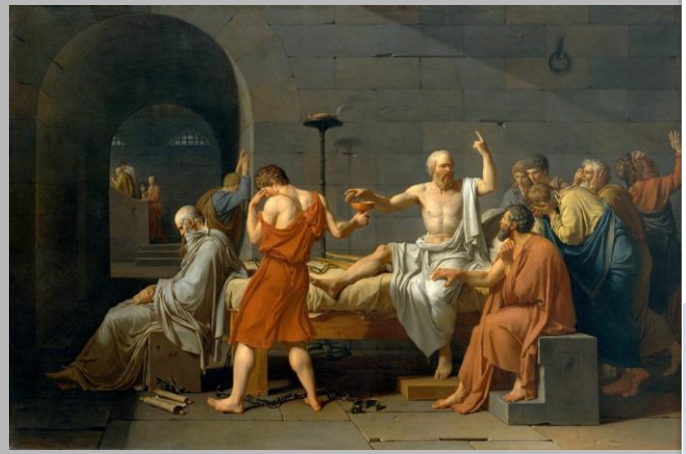
The First Amendment Update

- The First Amendment:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment Update



These ‘free speech’ and other First Amendment concepts find their origins deep in European history

The ancient Greeks:

- *isegoria* - the right of all citizens to participate in public debate
- *parrhesia*, the license to say what one pleased – “free speech”

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The First Amendment Update

English History

- 1215, *Magna Carta* – codified the right of barons to petition the government (king) for redress

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The First Amendment Update

America's Own History:

"A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy."

Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 8-9 (1947) (Black, J.)

CURRENT CONCERNS

- Public Meetings:
  - Prayer at meetings
  - Free speech at meetings
- Social Media
  - Government Speech v Private Speech
  - Forum analysis

The First Amendment & Social Media

PUBLIC MEETINGS:

- ***Bormuth v Jackson County*** (prayer at meetings)
- ***Murray v City of New Buffalo*** (decorum and free speech)

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Bormuth v Jackson County

In 2013, the “self proclaimed Pagan and Animist” Peter Bormuth sued Jackson County, alleging a violation of the anti-establishment clause of the First Amendment based on the Board of Commissioners’ prayer invocation at the beginning of their public meetings.

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Bormuth v Jackson County

Procedural History

- Magistrate Judge issued report and recommendation in favor of Plaintiff and enjoining the County's prayer invocation
- District Judge rejected the report and recommendation, finding the prayer invocation was consistent with Supreme Court precedent
- On appeal, Sixth Circuit panel sided with Plaintiff, but *sua sponte* granted rehearing *en banc*

Bormuth v Jackson County

870 F.3d 494 (2017) – 9-6 en banc decision reversed the prior panel and upheld the prayer invocation

Court focused on two seminal cases:

Marsh v. Chambers, 463 U.S. 783 (1983)

Town of Greece v. Galloway, 572 U.S. 565 (2014)

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Bormuth v Jackson County

Marsh v. Chambers, 463 U.S. 783 (1983)

In this case, the Supreme Court upheld the Nebraska state legislature's practice of opening legislative sessions with a prayer conducted by their paid Presbyterian chaplain.

The Court's decision focused primarily on the deep historical roots of such a practice:

"From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom."

Bormuth v Jackson County

Marsh v. Chambers, 463 U.S. 783 (1983)

Despite being issued more than a decade later, the *Marsh* opinion largely ignored *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and its so-called "Lemon" test:

- To comply with the Establishment Clause, the challenged governmental action must
  - (1) have a secular purpose;
  - (2) have a predominantly secular effect; and
  - (3) not foster “excessive entanglement” between government and religion.

After *Marsh*, there was confusing as to whether the “Lemon” test would continue to apply to most establishment clause claims, and if the historical-context analysis used in *Marsh* applied only to legislative prayer-invocation-based claims.

Bormuth v Jackson County

Town of Greece v. Galloway, 572 U.S. 565 (2014)

Town of Greece, NY, started opening their board meetings with a prayer led by a different “chaplain” each month, selected by simply calling local congregations until a list of “volunteers” was established.

The board did not exclude or deny anyone from giving the prayer, and did not review the prayers in advance – though for the first several years of the practice, all the prayers and ministers giving them were Christian of some denomination, reflecting the majority character of the town.

Bormuth v Jackson County

Town of Greece v. Galloway, 572 U.S. 565 (2014)

The plaintiffs attended meetings and, during public comment, complained / objected to the prayers, particularly the Christian-theme.

The board then invited non-Christians and allowed others that requested to give the invocation, including a Jewish layman, a Baha'i temple chairman, and even a Wiccan priestess, to subsequent meetings to invoke the "prayer"

Bormuth v Jackson County

Town of Greece v. Galloway, 572 U.S. 565 (2014)

Plaintiffs, still unsatisfied, filed suit alleging violation of the establishment clause.

After the District Court granted summary judgment, the Second Circuit reversed, finding the overall prayer program endorsed Christianity, and therefore, violated the anti-established clause.

Bormuth v Jackson County

Town of Greece v. Galloway, 572 U.S. 565 (2014)

The Supreme Court acknowledged that the decision in *Marsh*, which sustained the Nebraska legislative prayer, did not follow the "formal 'tests' that have traditionally" guided anti-establishment inquiry (i.e., the "Lemon" test)

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Bormuth v Jackson County

Town of Greece v. Galloway, 572 U.S. 565 (2014)

The Court rejected the plaintiffs' position that legislative prayer had to be "non-sectarian," rejecting as dictum a footnote from *Allegheny County v. ACLU*, 492 U.S. 573 (1989), which implied that the *Marsh* decision was based, at least in part, on the Nebraska state chaplain's decision to remove references to "Christ" in his legislative prayers

Bormuth v Jackson County

Town of Greece v. Galloway, 572 U.S. 565 (2014)

Continuing on that point, the Court further held that requiring the public body to ensure the prayers were "non-sectarian" would effectively:

"force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact."

Bormuth v Jackson County

Town of Greece v. Galloway, 572 U.S. 565 (2014)

The lead opinion further held:

In rejecting the suggestion that legislative prayer must be nonsectarian, the Court does not imply that no constraints remain on its content. **The relevant constraint derives from its place at the opening of legislative sessions, where it is meant to lend gravity to the occasion and reflect values long part of the Nation's heritage.** Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function. **If the course and practice over time shows that the invocations denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion, many present may consider the prayer to fall short of the desire to elevate the purpose of the occasion and to unite lawmakers in their common effort.** That circumstance would present a different case than the one presently before the Court.

Bormuth v Jackson County

Side Note:

In *Kennedy v. Bremerton School District*, 597 U.S. 507 (2022), a case involving a high school football coach that was fired for leading post-game prayers, the Court confirmed that the *Town of Greece* decision abrogated the "Lemon" test for establishment clause cases.

Therefore, the "Lemon" test is dead… long live the "Lemon" test…

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Bormuth v Jackson County

Back to Bormuth:

The Sixth Circuit applied *Marsh* and *Town of Greece*, and held that Jackson County's practice did not violate the establishment clause,

Bormuth v Jackson County

- It did not matter that the prayers were led by commissioners, as opposed to volunteer or other outside “ministers”
  - Historically, legislator-led prayers had a long tradition
- That the majority of prayers offered espoused the Christian faiths did not put the practice at odds with the establishment clause
  - Commissioners of any faith, or lack thereof, were permitted to provide an invocation of his or her choosing

Bormuth v Jackson County

Best Practices

- Invocations at the start of public meetings are generally acceptable, particularly in light of *Marsh*, *Town of Greece*, and *Bormuth*
- The prayer / invocation should not be compulsory – i.e., individuals, whether members of the council or the public, should not be required to participate (i.e., stand, bow heads, fold hands, etc.), and should be free to leave or not participate
- Individuals should not be excluded for refusing to participate or otherwise subjected to what may be considered "coercive" under either Justice Kennedy's relaxed coercion test, or Justice Thomas's preferred legal coercion test

Bormuth v Jackson County

Best Practices

- The prayer invocation should be open to members of any faith or religion
- Member-led prayer may draw more scrutiny
- If member-led, the public body should be especially careful about their own comments about any such prayers or the participation of others
  - See, e.g., *Lund v. Rowan County*, 863 F.3d 268 (4th Cir. 2017) (finding prayer violated establishment clause where meeting attendees were instructed to participate, commissioner referred to it as "worship," and implored attendees to accept Christianity")

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Bormuth v Jackson County

Best Practices

- **Make sure selection process for non-member-led prayer invocation is neutral**
  - **See, e.g., *Williamson v Brevard County***, 928 F.3d 1296 (11th Cir. 2019) (finding that practice of essentially rejecting all but mono-theistic prayers violated establishment clause)

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Bormuth v Jackson County

Want to make sure that your practice:

- Does not indicate that “the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief”[.] *Marsh*, 463 U.S. at 794-95.
- And that it does not “promote a preferred system of belief or code of moral behavior” in violation of the Establishment Clause. *Town of Greece*, 572 U.S. at 581.

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Free Speech

- The “Free Speech” Clause prohibits the government from restricting expression because of:
  - Its message
  - Its ideas
  - Its subject matter
  - Its content

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Free Speech

- Free Speech Claims are analyzed in three parts:
  - Is it protected speech
  - Where was the speech made (what forum)
  - Was the government's interference in the speech legitimate

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Free Speech

- Where was the speech made – i.e., what is the Forum?

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Free Speech

- There are several types of fora:
  - Traditional Public Forum
  - Designated Public Forum
  - Limited Public Forum
  - Nonpublic Forum
    - Regulation of speech in each type of forum may be more restrictive as you move down the list
    - Some Courts only refer to three categories, and consider a “limited public forum” as a sub-category of a “designated public forum”

Free Speech at Public Meetings

What type of “forum” is a public meeting?

That depends…

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Free Speech at Public Meetings

In ***Ison v. Madison Local School District Board of Education***, 3 F.4th 887 (6th Cir. 2021), the Sixth Circuit analyzed public comment provisions / practices of a local school board. The parties agreed that the school board meetings constituted a "limited public forum"

Free Speech at Public Meetings

Limited Public Forum:

A forum that “is limited to use by certain groups or dedicated solely to the discussion of certain subjects.”

Pleasant Grove City v. Summum, 555 U.S. 460, 470 (2009)

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Free Speech at Public Meetings

Limited Public Forum:

- Government may "regulate features of speech **unrelated to its content**" through "time, place, or manner" restrictions. *McCullen v. Coakley*, 573 U.S. 464, 477 (2014) (emphasis added).
- Restrictions must be "narrowly tailored to serve a significant governmental interest, and ... leave open ample alternative channels for communication of the information." *Id*. (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

Free Speech at Public Meetings

Limited Public Forum:

- Content-based restrictions may be okay in a limited forum, since the point is to reserve the forum "for certain groups or for the discussion of certain topics," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)
  - In other words, public comment at the Library Board meeting could be limited in topic to matters concerning the Library Board and its operations, or public comment limited to agenda items

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Free Speech at Public Meetings

In ***Ison***, the Court struck down on a facial and as applied challenge the school board's public comment rules that prohibited comments that were:

- Abusive
- Personally directed
- Antagonistic

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Free Speech at Public Meetings

In ***Ison***, the Court upheld a pre-registration requirement that required those wishing to give public comment to:

- register two days in advance, during business hours, in person

This was content neutral, related to an articulated interest in making sure enough time was allotted to those wishing to make comment, and still provided alternative means for people to communicate with the board (in writing, via email, at other functions, etc.)

Free Speech at Public Meetings

The ***Ison*** Court left in place a policy that required public commenter to "observe reasonable decorum"

- Court found this was not unconstitutionally vague, and therefore, survived a facial attack

Free Speech at Public Meetings

Where does that leave us now?

Murray v. City of New Buffalo

708 F. Supp. 3d 1313 (W.D. Mich., 2023)

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Free Speech at Public Meetings

Per Judge Jonker:

"New Buffalo is a pleasant resort community on the southwestern shore of Lake Michigan. Residents and tourists alike appreciate what it has to offer. And its proximity to the greater Chicago area makes it a natural choice for people hoping to escape the rigors of city life for a while. . . ."

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Free Speech at Public Meetings

Murray v City of New Buffalo

- City was considering a short-term rental ordinance (don’t get me started)
- Plaintiffs were amongst the group opposed to the City’s proposed STR limitation

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Free Speech at Public Meetings

Murray v City of New Buffalo

- City had "decorum" rules for public comment:
  - Rule 12(A): Speakers must "address their comments to the City Council as a whole, as mediated by the presiding officer."
  - Rule 12(D): "Speakers are not to swear or use expletives or make derogatory or disparaging comments about any one person or group. Speaker comments must be civil and respectful."

Free Speech at Public Meetings

Murray v City of New Buffalo

- On the issue of decorum rules in general:
- "Numerous federal courts have addressed the tension between a public body's interest in conducting an orderly and efficient meeting without fear of judicial intrusion, and a private citizen's interest in speaking freely to his or her elected representatives. Both interests are important. The private citizen, by definition, generally has no official power to participate in the public body's decision-making process. When the body opens that process to the general public and allows input from the individual members of the community, the private citizen has a right to expect a fair and respectful hearing even if—maybe even especially if—the message is critical of the body. The First Amendment protects that right, while still accommodating the body's need to conduct its business efficiently, by allowing reasonable and content-neutral restrictions on speech."
  - Jonker, J., citing Jonker, J., ***Shields v. Charter Tp. of Comstock***, 617 F. Supp. 2d 606 (W.D. Mich. 2009) (internal citations omitted).

Free Speech at Public Meetings

Murray v City of New Buffalo

- The Court did not resolve whether City's meetings were a designated or limited public forum

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Free Speech at Public Meetings

Murray v City of New Buffalo

- The Court did not resolve whether City's meetings were a designated or limited public forum
  - Plaintiffs preferred that it be considered a "designated public forum," which generally requires strict scrutiny for speech regulations
  - Most courts, including *Ison*, have recognized board meetings, including city commissions, school boards, etc., as 'limited public forums'. See, e.g., *Gault v. City of Battle Creek*, 73 F.Supp.2d 811, 814 (W.D. Mich. 1999); *Ritchie v. Coldwater Community Schools*, 947 F.Supp.2d 791, 807 (W.D. Mich. 2013)

Free Speech at Public Meetings

Murray v City of New Buffalo

- Court ultimately held that both Rule 12(A) and 12(B) were content neutral and reasonable for maintaining decorum and order, and therefore, survived the facial challenge.
  - The application challenge, on the other hand…

Free Speech at Public Meetings

Murray v City of New Buffalo

- Court ultimately held that both Rule 12(A) and 12(B) were content neutral and reasonable for maintaining decorum and order, and therefore, survived the facial challenge.
  - The application challenge, on the other hand…

Free Speech at Public Meetings

Murray v City of New Buffalo

- As to Rule 12(A), which required addressing the Board as a whole, the Court found it content neutral and inoffensive

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Free Speech at Public Meetings

Murray v City of New Buffalo

"Rule 12(D) is content-neutral on its face. The prohibitions on derogatory, disparaging, and disrespectful language are not based on the speech's content, but rather on a reasonable need for decorum in a meeting. 'Preservation of order in city council meetings to ensure that the meetings can be efficiently conducted' is a legitimate government interest."

Free Speech at Public Meetings

Murray v City of New Buffalo

"The Court sees Rule 12(D) as a facially valid effort to establish a reasonable rule of decorum. The rule focuses on comments that disparage 'any one person or group,' not simply words that may offend someone. And the Rule singles out for exclusion '[c]omments on ... character unrelated to public issues or performance of duties,' not simply a statement that antagonizes. Read in that context, Rule 12(D) does not prohibit speech merely because it antagonizes or offends, which is what concerned the *Ison* panel, but may fairly be seen as an effort to enforce decorum, which *Ison* continues to permit. **To be sure, the presiding officer could misapply the rule to shut down a particular point of view, but the rule as written does not inevitably lead for such a result**."

Free Speech & Social Media

Where does Social Media fall?

It depends…

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Free Speech & Social Media

Lindke v Freed – the public / private social media conundrum

Cooper-Keel v State of Michigan, et al – the public Facebook page

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Free Speech & Social Media

My advice:

Stay off social media.

Thank you for your time…

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Lindke v. Freed, 601 U.S. 187 (2024)

Background:

James Freed, city manager for Port Huron, like so many people, has a Facebook page. It was started as just a personal page, but after taking the city manager position, like so many municipal officials, it morphed. While it started with posts and photos of his daughter, dog, and home improvement projects, it started to include posts about his job.

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Lindke v. Freed, 601 U.S. 187 (2024)

Background:

During the COVID-19 pandemic, Freed continued to post both personal items as well as city / job related information.

Kevin Lindke, a local gadfly, found Freed's Facebook page and started commenting – almost exclusively, critical of Freed and the City's handling of pandemic related restrictions.

Sound familiar???

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Lindke v. Freed, 601 U.S. 187 (2024)

Background:

Freed initial deleted Lindke's comments, but after that apparently became tiresome, he "blocked" him.

- For the uninitiated and non-Facebook users, that means Lindke could not only no longer comment on Freed's posts, he couldn't see them at all (at least using his primary Facebook account…)

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Lindke v. Freed, 601 U.S. 187 (2024)

Lindke sued under 42 USC 1983, claiming Freed violated the First Amendment. Lindke claimed a right to comment on Freed's Facebook page, which he claimed was a public forum.

The District Court granted summary judgment to Freed, essentially finding that Freed's Facebook page was maintained only in his private capacity, and therefore, there was no "state action" for purposes of a § 1983 claim. The Sixth Circuit affirmed.

Lindke v. Freed, 601 U.S. 187 (2024)

The Sixth Circuit applied the following test:

An official's social media activity could only count as state action when:

(1) It is part of an officeholder's "actual or apparent duties" or

(2) couldn't happen in the same way without "the authority of the office."

Since Freed's Facebook page did not meet either category, they held it could not be "state action," and therefore, Plaintiff's claim failed as a matter of law.

Lindke v. Freed, 601 U.S. 187 (2024)

In a unanimous decision authored by Justice Barrett, the Supreme Court reversed and remanded.

Lindke v. Freed, 601 U.S. 187 (2024)

The new “Lindke” test:

An official's social-media activity counts as state action only when that official

(1) “possessed actual authority to speak on the State's behalf” and

(2) “purported to exercise that authority when he [or she] spoke on social media.”

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Lindke v. Freed, 601 U.S. 187 (2024)

This is narrower than the prior Sixth Circuit test's first prong, which allowed for state action if the posts were within the officials "actual or *apparent*" authority.

The new Lindke test requires "actual" authority.

Lindke v. Freed, 601 U.S. 187 (2024)

It is more broad than the prior Sixth Circuit test's second prong, which looked at the social media page as a whole.

The new Lindke test requires a "post-by-post" inquiry, assuming the first prong is established.

Lindke v. Freed, 601 U.S. 187 (2024)

Actual Authority:

1. Must be actual, not apparent – must be "possessed of state authority"
2. Posts / social media activity must relate to a matter "within [the official's] bailiwick" – i.e., a matter within his or her "portfolio of responsibilities"
3. Grant of authority must come from "statute, ordinance, regulation, custom, or usage."

Lindke v. Freed, 601 U.S. 187 (2024)

1. Must be actual, not apparent – must be "possessed of state authority"

Does not matter if people / citizens believe official has the authority, or if the official simply "acts" like he or she has the authority.

- Example, one single board member may make statements, but would not have "actual" authority to speak on behalf of the entire board.

Lindke v. Freed, 601 U.S. 187 (2024)

2. Posts / social media activity must relate to a matter "within [the official's] bailiwick" – i.e., a matter within his or her "portfolio of responsibilities"

   – Example, if public health code violations are not within city manager's responsibility, a post by the city manager about restaurants with health-code violations would not be considered "state action," since it would be outside his or her responsibility

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Lindke v. Freed, 601 U.S. 187 (2024)

2. Posts / social media activity must relate to a matter "within [the official's] bailiwick" – i.e., a matter within his or her "portfolio of responsibilities"

   – Courts should not rely on "excessively broad job descriptions to conclude that a government employee is authorized to speak for the State."

Lindke v. Freed, 601 U.S. 187 (2024)

3. Grant of authority must come from "statute, ordinance, regulation, custom, or usage."
   - First three are easy –
   - Custom and usage, as the Sixth Circuit recognized on remand, "are a bit harder to pin down"

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Lindke v. Freed, 601 U.S. 187 (2024)

Custom and Usage:

“‘persistent practices of state officials’ that are ‘so permanent and well settled’ that they carry ‘the force of law.’”

- Example from SCOTUS: “prior city managers have purported to speak on [the state's] behalf and have been recognized to have that authority for so long that the manager's power to do so has become ‘permanent and well settled.’ ”

Lindke v. Freed, 601 U.S. 187 (2024)

On the matter of "purporting to use" the actual authority established under the first prong, SCOTUS held this is more fact specific.

"If the public employee does not use his speech in furtherance of his official responsibilities, he is speaking in his own voice."

Lindke v. Freed, 601 U.S. 187 (2024)

From SCOTUS:

- Had Freed's account carried a label (*e.g.*, “this is the personal page of James R. Freed”) or a disclaimer (*e.g.*, “the views expressed are strictly my own”), he would be entitled to a heavy (though not irrebuttable) presumption that all of the posts on his page were personal. Markers like these give speech the benefit of clear context: Just as we can safely presume that speech at a backyard barbeque is personal, we can safely presume that speech on a “personal” page is personal (absent significant evidence indicating that a post is official).

Lindke v. Freed, 601 U.S. 187 (2024)

From SCOTUS:

- Conversely, context can make clear that a social-media account purports to speak for the government—for instance, when an account belongs to a political subdivision (*e.g.*, a "City of Port Huron" Facebook page) or is passed down to whomever occupies a particular office (*e.g.*, an "@PHuronCityMgr" Instagram account). Freed's page, however, was not designated either "personal" or "official," raising the prospect that it was "mixed use"—a place where he made some posts in his personal capacity and others in his capacity as city manager.

Lindke v. Freed, 114 F.4d 812 (6th Cir. 2024)

On remand from SCOTUS, the Sixth Circuit ultimately remanded back to the District Court for further proceedings, including potential discovery on the open issues of actual authority and the specific, allegedly offending posts.

However, the Court also instructed the district court to first consider Freed's alternate arguments for summary judgment before opening the door to further discovery.

Lindke v. Freed, 114 F.4d 812 (6th Cir. 2024)

Sixth Circuit on remand also made reference to other § 1983 case law to determine "custom" and "usage," citing:

- *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397 (1997) (widespread custom)
- *City of Canton v. Harris*, 489 U.S. 378 (1989) (pattern of conduct)
- *Pembaur v. City of Cincinnati*, 475 U.S. 469 (1986). ("formal rules or understandings" that "establish fixed plans of action to be followed under similar circumstances consistently and over time")

Lindke v. Freed, 114 F.4d 812 (6th Cir. 2024)

Should be noted that Freed allegedly "deactivated" his Facebook page, but the Court held the claim or declaratory and injunctive relief was not moot, but left it to the district court to re-evaluate.

"[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice."

This is particularly true where the complained of practice could easily be reinstituted.

Lindke v. Freed, 114 F.4d 812 (6th Cir. 2024)

The Sixth Circuit acknowledged that a host of other First Amendment issues remained for the district court:

"what kind of forum Freed's social-media accounts are, what level of scrutiny his deletion or block decisions receive, and whether he's entitled to qualified immunity."

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WHERE DOES THIS LEAVE US NOW?

We have an actual, articulated test for social media accounts (and lawyers love a good multi-part test):

An official's social-media activity counts as state action only that official

1. “possessed actual authority to speak on the State's behalf” and
2. “purported to exercise that authority when he [or she] spoke on social media.”

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WHERE DOES THIS LEAVE US NOW?

But we still have to take into consideration all of the other things the Sixth Circuit left open: forum, level of scrutiny, qualified immunity, etc.

Cooper-Keel v State of Michigan, et al

This case involves another local gadfly, Nevin Cooper-Keel, and his continual campaign against Allegan County and its various Courts and officials.

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Cooper-Keel v State of Michigan, et al

- The Allegan County Circuit Court has an “official” Facebook page
- Cooper-Keel loved posting irrelevant comments on any “post” issued on the Court’s Facebook page and generally disparaging remarks about the Circuit Court Judges

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The purpose of the Facebook page was to inform the public about events, but not to interact or debate matters.

While comments were allowed on the Facebook pages post for the first several years of its existence, in early 2022, the new chief judge ordered that the page administrator turn off the ability for users to comment on the Court's Facebook posts.

- Despite their best efforts, they could not set it up to automatically prevent comments, but instead, had to shut off the comments on each new post at the time of posting or immediately thereafter

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After the chief judge requested that comments be disabled, a new post was made in February 2022, and the page administrator inadvertently had left the ability to comment on – once discovered, he corrected it, removed any comments that were there, and blocked any further comments.

This, of course, upset Mr. Cooper-Keel…

Cooper-Keel v State of Michigan, et al

The District Court granted summary judgment in favor of the Allegan County Circuit Court.

First, the Court considered what "forum" was the Facebook page. The evidence leaned toward it being a non-public forum, "because its intended purpose was simply to inform the public about court events and news, rather than to interact or debate with the public." However, the Court did not need to resolve the issue, because the level of scrutiny is the same under either: the restrictions must be "reasonable and viewpoint neutral."

Cooper-Keel v State of Michigan, et al

The Court held that precluding all users/visitors from commenting was reasonable and viewpoint neutral.

Even though the page had previously allowed comments, the circuit court was not required to keep it that way indefinitely, particularly since it was viewpoint neutral.

Cooper-Keel v State of Michigan, et al

The Sixth Circuit affirmed.

The Sixth Circuit first analyzed the type of forum, and ultimately determining that even if the Facebook page at one time was a designated public forum (when comments were allowed), it became a non-public forum after the chief judge prohibited all public commenting, regardless of the viewpoint.

"The First Amendment does not forbid a viewpoint-neutral exclusion of speakers who would disrupt a nonpublic forum and hinder its effectiveness for its intended purpose." *Cornelius v NAACP Legal Def. & Ed. Fund, Inc.*, 473 U.S. 788 (1985)

Cooper-Keel v State of Michigan, et al

The Sixth Circuit's opinion was issued on April 9, 2024 – four weeks after *Lindke v Freed*

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WHERE DOES THIS LEAVE US NOW?

Best Practices

STOP. USING. SOCIAL. MEDIA.

– Oh, that won't do…

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WHERE DOES THIS LEAVE US NOW?

Best Practices

- Enact Social Media policies **and** enforce them
  - Inform all staff that unless otherwise authorized, they cannot post “on behalf of” the municipality
- For individual elected or appointed officials, recommend changing or amending their “personal” pages to explicitly indicate “these views are my own,” or words to that effect
  - SCOTUS already indicated that would provide a presumption of no state action

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The First Amendment & Social Media

- Social Media pages hosted by a municipal entity, such as a one operated by a City or one of its departments, will likely be considered a “limited public forum” or a “nonpublic forum”
- Make sure you are content neutral
  - All or nothing – if you allow some comments, best to allow them all
  - Just like when listening to public comments – ignore what you do not like, but do not block it from being said

The First Amendment & Social Media

Where a limited public forum is created, the government may restrict speech within the limitations of the forum it has created.

The distinction on what may be regulated is between “Content” and “Viewpoint”

- Speech may be restricted if its “content” is outside the scope of the forum
- Speech may not be restricted based on its “viewpoint” so long as its content fits within the scope of the forum

Example of a limited public forum:

- St Joseph County Department of Public Balloon Festivals creates a Facebook Page for the upcoming "St Joseph County Balloon Festival"
  - The Department may remove comments posted to the page that are not related to the balloon festival (i.e., "The County Road Commission is terrible!")
  - The Department may *not* remove a comment that is negative about balloon festival (i.e., "The balloon festival is a massive waste of our tax dollars!")

The First Amendment & Social Media

- Decisions to regulate social media commentary must be “viewpoint” neutral
- Cannot remove content simply because you do not agree with it

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QUESTIONS?

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