

IN THE BOARD ROOM

Social Media Usage by Counties

1-24-24

ATTOLLES
LAW, s.c.



Today's Discussion

- County Board Members & Social Media Use as protected speech
- **Themes discussed:**
 1. County Regulation of Board Member Speech
 2. County Regulation of Public Speech
 - a. Board Member Social Media
 - i. Campaign and Personal Accounts
 - ii. "Official Accounts"
 - b. County Social Media
 3. Public Records issues relating to social media
 4. Open Meetings Issues relating to social media

First Amendment Overview

- Most social media activity is considered “speech” for First Amendment purposes
 - E.g., deleting/removing comments, “blocking” individuals from “liking” an official county webpage, account, or profile, or prohibiting select individuals from engaging with a County webpage
- Both the First Amendment to the U.S. Constitution and Article I, Section 3 of the Wisconsin Constitution prohibit governmental actors from abridging citizens’ and elected officials’ freedom of speech.
- But not all County Board Members’ (“Board Members”) speech is protected under the First Amendment



Why does this matter?

- Because although County Board Members are elected officials and are entitled to lead private lives, lines often blur between private and public speech on social media

An aerial photograph of a city, likely New York City, showing a mix of urban buildings and green spaces. A semi-transparent banner is overlaid across the middle of the image, containing the title text.

1. County Regulation of Board Member Speech

First Amendment Concern

- The County itself can become subject to first Amendment scrutiny when it engages in activities that cool or suppress County Board Members' rights to interact with and discuss important issues with their constituencies and the public at large



Emphasis on “Political Speech”

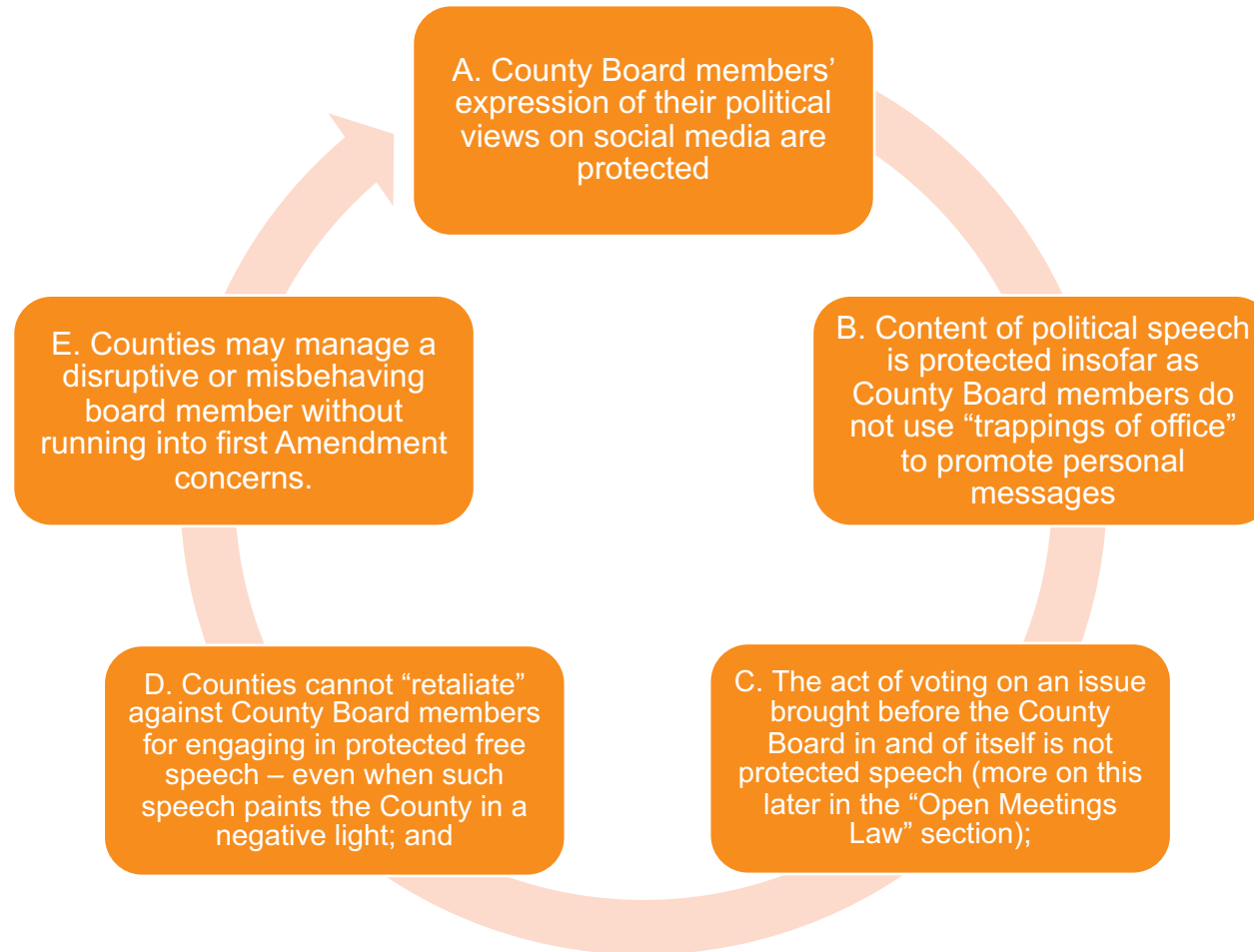
What is “political speech?”

- Political Speech includes discussions of political candidates, the form or functioning of government, or any other discussion of the political process.
- Political speech is the most protected form of speech under the First Amendment. It therefore warrants the highest level of scrutiny against laws and actions of the government that aim to regulate it.

Application

- County board members often partake in political speech, but the proliferation of social media has blurred the lines between when official county business is taking place and when board members are conversing privately

5 touch points for First Amendment protections of elected officials





A. Protection for County Board members' expression of political views

- The United States Supreme Court consistently upholds the right of publicly elected officials and political candidates to express their political views, opinions, and positions, even if unpopular, during elections and other governmental processes. This rule applies across a broad range of elected positions.
- In Bond v Floyd, the director of anti-war organization ran for and was elected to the Georgia House of Representatives in 1965. Before being sworn in, Bond issued a statement of behalf of his organization criticizing US foreign policy regarding the Vietnam War. He then reiterated his grievances on a popular radio show.
 - After the radio interview, 75 members of the Georgia House of Representatives filed petitions challenging Bond's right to be seated. They asserted that Bond's statements exemplified an inability to uphold and take an oath to support the Constitution.
 - When Bond arrived to the Georgia House of Representatives to be sworn in, the clerk refused to administer the oath to him until the issues raised in the challenge petitions had been decided.
- Bond won his ensuing First Amendment challenge in the Supreme Court, which held that "Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office; also so they may be represented in governmental debates by the person they have elected to represent them."
- **Takeaway:** while not directly on point for County Board Members, Bond v. Floyd demonstrates the Court's commitment to a candidate's rights to express his or her personal views, opinions, and positions, even if unpopular, during the election process.
 - This right extends to social media posts in the same manner as it did to radio interviews in the 1960s.



B. Use of “trappings of office” by County Board Members’ to promote personal messages

- County Board Members exert a certain degree of influence over the citizenry comprising the jurisdiction over which they govern.
- As mentioned in Section A, political advocacy is a protected activity, but the use of modalities, resources, and other “trappings” of public office may not be used to further non-governmental purposes
- That is, a County may restrict the use by a Board Member of County-specific resources to tout any number of personal undertakings, such as:
 - Business exploits;
 - Personal financial causes (e.g., a child’s school fundraiser); or
 - The advancement of one’s personal prospects in ongoing litigation.
- This prohibition applies to use of a County’s social media page – and its greater-than-average follower count – to promote a County Board Member’s personal messages.
- Thus, such conduct is regulable by the County



C. Voting on County Matters by County Board Members is not protected speech

- One of, if not the, most important functions of a County Board Member is that of voting on matters brought before the Board
 - According to Black's Law Dictionary, "[v]oting is, fundamentally, the expression of a person's preference or opinion, formally manifested, regarding a decision made by the elected body as a whole."
- But while voting is a right of public officials, it is not a right protected by the First Amendment
- In Nevada Comm'n on Ethics v. Carrigan, a city council member was asked to disclose his relationship to a party who stood to benefit from a casino development project under consideration before the City. When he refused and voted in favor of the proposal, the Nevada Ethics Commission censured him, and Carrigan brought a First Amendment claim asserting his right to vote
 - After dispute between the Nevada district and supreme courts, the United States Supreme Court explained that "a legislator's vote is the commitment of his apportioned share of the legislature's power to the passage or defeat of a particular proposal."
 - "The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it."
- **Takeaway:** Counties can impose restrictions on the ability to vote of certain Board Members without running afoul of the First Amendment.
 - So, online polling, public engagement, or information crowdsourcing efforts conducted via social media outlets cannot be asserted by Board Members to confer upon them a "protected speech right" under the First Amendment...however, no County or Board Member can limit rights of the public to vote on issues of public concern in the above-mentioned social media channels.



D. County may not retaliate against County Board Members for negative but protected speech

- The 2006 Supreme Court case of *Hartman v. Moore* forbids governments from retaliating against individual elected officials who speak out.
- In *Hartman*, the Vice President of a school board was demoted by the Board from his position as an officer after he made denigrating comments about the district's superintendent in the local newspaper. Hartman brought a First Amendment Claim for retaliation against his free speech
- This begged the question “when can a governmental body be liable under Section 1983 (action for deprivation of civil rights) for retaliating against a member of the body based on that member’s speech?”
- Hartman answered the question as follows: “[f]or the action to be found to violate the First Amendment, the actions would have to be “of a nature that would stifle someone from speaking out.”
- In *Hartman*, the Board Member’s role was not stricken, it was merely limited by a procedurally legitimate vote of the Board
- The Ninth Circuit ultimately held that although the demotion stemmed from his contrarian advocacy against [the Superintendent,] the Board’s action did not amount to retaliation in violation of the First Amendment.”
- **Takeaway:**
 - Board procedures may violate the First Amendment if they chill board members’ speech. Prohibiting board members from speaking with the public or social media, outside of the political arena, violates their freedom of speech. But prohibiting them from speaking on behalf of the Board likely does not.



E. Managing disruptive or unruly County Board Member behavior

- Unruly Board members who have been asked to cease certain behavior that is objectively counterproductive may claim First Amendment violations
 - Example: A Milwaukee County board member commented on Instagram about a recent city council election: “MKE – Do you realize because SO FEW voters took the time and responsibility to VOTE in the municipal elections – YOU NOW HAVE A ‘MUSLIM’ on the City Council!!!! What a SHAME!!!!”
- This is obviously unacceptable behavior
 - Q: How should a County Board react (within First Amendment bounds)?
 - A: Request Supervisor’s resignation first.
 - If not accepted, pursue the passing of a Public Censure action
 - Censure of a school board member for unacceptable online speech or activity rarely creates First Amendment concerns
- **Takeaway:**
 - County Board Members should also be advised that in addition to being public, negative social media comments may also be subject to a state’s open records laws and could run afoul of open meetings laws depending on the audience and topics under discussion.



E. Managing disruptive or unruly County Board Member behavior – case law

➤ Federal case law

➤ Shields v. Charter Township of Comstock

- Facts: County Board member sued County Board and fellow members individually for moving to prohibit him from bringing up extra issues in the “Citizen Comment” portion of a meeting and after speaking for nearly an hour on other subjects during other stages of the meeting.
- Held: “the predominant method of accountability for elected officials is political, not judicial, and the ‘federal courts are not the forum for redressing political injuries.’”
- Reasoning: The First Amendment does not allow a plaintiff Board member to transform a political defeat into a civil damages action merely because some members of the Board may have disagreed with the substance of his allegations.

➤ Takeaway:

- If a Board member were to be effectively “silenced” at a board meeting by properly raised procedural motion and thereafter took to social media to complain, the Board would be without power to regulate the speech, unless the post served to threaten or otherwise endanger members of the Board

An aerial photograph of a city, likely New York City, showing a mix of urban buildings and green spaces. A semi-transparent orange banner is overlaid across the middle of the image, containing the title text.

2. County Regulation of Public Speech

First Amendment Concern

- Individual County Board Members can become subject to First Amendment scrutiny when they use social media to engage in activity that cools or suppresses the free speech rights of the public while “acting in an official capacity” or “under color of state law.”



Emphasis on Context & the US Supreme Court's Public Forum Analysis

What is the Public Forum Analysis?

- Basically, the degree of permissible governmental regulation of the public's speech depends on whether the speech was made in
 - (1) a traditional public forum,
 - (2) a limited/designated public forum, or
 - (3) a non-public forum.
- Traditional Public Forum = streets, sidewalks, parks, etc.
 - Here, the government has very little ability to restrict or regulate speech
- Limited/Designated Public Forum = any location or channel for communication that the government intentionally opens up for expressive activity.
 - This includes a county's official website or social media account.
- Non-public forum = a setting in which public speech is not traditionally invited, nor did the government express any intention of inviting speech.
 - E.g., offices of county officials or other county-owned spaces maintained for conducting or facilitating government business instead of to promote public expression

Regulatory Structure and Analysis

1

Traditional forums

- A County 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.
- Aka – a “strict scrutiny approach”

2

Designated forums (i.e., social media pages

- A County may impose reasonable restrictions on protected speech so long as it is narrowly tailored to serve a significant governmental interest and leaves open ample alternative channels for communicating, except for that the government may limit the channel’s scope and purpose.

3

Non-public speech

- Courts generally uphold governmental regulation of speech in a non-public forum if the regulation is “reasonable.” However, even in a non-public forum, government regulation of speech must be applied neutrally as to viewpoint.

Board Member Social Media

Two areas where case law has
provided illustration →



01

**Campaign and
Personal
Accounts**

02

**“Official
Accounts”**



Digging into “Designated Public Forums”

- Recall that:
 - (a) Designated Public Forums are channels of communication created for the public for the purpose of promoting politically expressive activity; and
 - (b) the government can reasonably limit the channel's scope and purpose (e.g., only posting certain county-approved and county-focused content on the official county Facebook or Instagram page)
- What does this mean, practically?
 - It means that County Board Members must temper their reactions to any negative or potentially questionable comments or posts made by public citizens
- Social media activity that would typically sanction a “block” or heated response in one’s private life must be given more leeway in the context of government social media activity while elected officials are acting as agents of the government.
- This concept was illustrated by two factually similar cases, which came out opposite ways; each turning on whether an elected official’s quelling of the public’s speech on social media was made “under color of state law.”
 - Davison v. Randall in 2019; and
 - Campbell v. Reisch in 2021

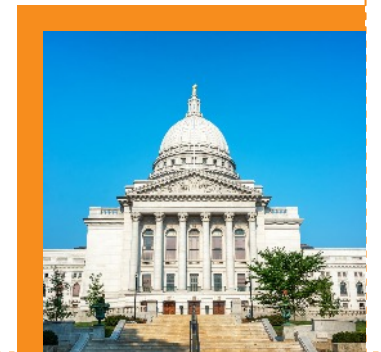
i. Campaign & Personal Accounts

- In Davison v. Randall, a Virginia resident, Brian Davison, was temporarily blocked from the official Facebook page of Phyllis J. Randall, the chair of the Loudoun County, Virginia Board of Supervisors
- Supervisor Randall's reason was that Davison posted a number of comments criticizing a recent round of county spending that Randall had on some occasions showed support for.
- Mr. Davison, an outspoken social media commentator on local politics, brought a civil action against Randall alleging that Randall's Facebook page was a "public forum" under the First Amendment, and that Randall may not exclude people from it based on a difference in views.
- Relying on the "interactive component" of a local government official's Facebook page, the Fourth Circuit unanimously held that the page constituted a public forum, and that Randall engaged in unconstitutional viewpoint discrimination by banning Davison from that forum. (remember – restrictions must be "content neutral")
- **Learning point:** If the County Board Member cannot point to a compelling county or governmental reason for a block, deletion, or post on any official county page, it is best to take the high road and let the negative messages go.



ii. “Official” Accounts

- In Campbell v. Reisch, a Twitter user sued a Missouri state representative who had blocked the Twitter user from her re-election campaign’s Twitter account after he continuously retweeted posts criticizing her for having her hands behind her back during the pledge of allegiance while attending a function.
- Following Campbell’s First Amendment action, the Third Circuit held that, because the Twitter account in question was a campaign account, Representative Reisch was not acting “under color of state law” when she blocked Campbell from her page
- The court reasoned that the Twitter account had remained focused on campaign news, rather than on communicating official news or inviting constituents’ input on policy issues.
- The main point, the court posited, was “that occasional stray messages that might conceivably be characterized as conducting the public’s business [were] not enough to convert Reisch’s account into something different from its original incarnation.”
- **Learning Point:**
 - Generally, matters of private concern, such as who a candidate for office allows to follow her campaign Twitter account, do not fall within the ambit of First Amendment protection in the same manner that posting about a recent board resolution, committee action, or anticipated county undertaking would.





Step 1

- Ask, is the County Board member “acting under color of state law” or in his or her “official capacity” in making the post, comment, block, or other social media action?
 - If “No,” the public forum analysis does not apply because the First Amendment only limits restrictions imposed by the government, of which elected officials merely act as an extension
 - If “Yes,” then the speech is likely unprotected and therefore regulable. Move to Step 2
-



Step 2

- Ask, is the County Board Member’s post, comment, or block: (a) in reference to something affecting an official governmental post (as was the issue in the Davison case), or (b) simply a response to something more personal – perhaps one’s non-public account or state election campaign account (as was at issue in Campbell)? Move to Step
-



Step 3

- If satisfied that the Board Member was “acting under color of state law” such that the speech regarded a matter of public concern, the board should assess whether the interest in commenting on matters of public concern outweighs the board’s interest in promoting efficiency and harmony among its constituency.
 - County Boards should look to the applicable member’s duties and committees served on as well as the context of their posts, blocks, or comments to assess whether the speech is a proper subject of regulation.
-

Public Forum Toolbox





3. Public Records Issues

- Generally, all social media content related to governmental business, whether public-facing or private, constitutes a public record.
- Retention is required of all record of such governmental business, including:
 - Budget discussions;
 - Personnel changes;
 - Policy initiatives;
 - Committee objectives;
 - Appointments;
 - Board complaints; and
 - Vote deliberations
- Board Members must cooperate in preservation and disclosure.
- Ask: What is the County's process for preserving the social media records?

An aerial photograph of a city, likely Madison, Wisconsin, showing a mix of urban buildings and green spaces. A semi-transparent white banner is overlaid across the middle of the image, containing the title text.

4. Open Meetings Issues

- Wisconsin Open Meetings Law ensures that all meetings of governmental bodies are held publicly and remain open to all citizens unless otherwise expressly provided by law.
- A “**meeting**” occurs when the following two elements announced in State ex rel. Newspapers, Inc. v. Showers are satisfied:
 - (1) a purpose to engage in governmental business (the purpose requirement), and
 - (2) the number of members of the governmental body present is sufficient to determine the body’s course of action (the numbers requirement).

Open Meetings, cont.

The issues of “walking quorums”

- We highlighted the requisites for public “meetings” to underscore the potential of, and relative ease of inadvertently creating “walking quorums” among board members who group together on social media.
- A “walking quorum” is a series of gatherings among separate groups of members of a governmental body, each less than quorum size, who agree, tacitly or explicitly, to act uniformly in sufficient number to reach a quorum.
- Social media groups, pages, and accounts can be easy modes to create and sustain “walking quorums.”

- **Takeaway:**

County boards must remain cognizant of the potential for social media groups, pages, and accounts of various board members to develop into “walking quorums, which can covertly affect the proper transparent functioning of county government



ANDY PHILLIPS



414.279.0962



aphillips@attolles.com





THANK YOU

ATTOLLES
LAW, S.C.

Sources Cited

A. Statutes

1. United States Constitution, amendment I.
2. Wisconsin Constitution, article I, section 3.
3. Wisconsin Statutes §§ 19.81 – 19.98 (Wisconsin Open Meetings Law).

B. Case Law

4. Bond v. Floyd, 385 U.S. 116 (1966).
5. Campbell v. Reisch, 986 F.3d 822 (8th Cir. 2021).
6. Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).
7. Davison v. Loudoun Cnty. Bd. of Supervisors, 227 F. Supp. 3d 605 (E.D. Va. 2017).
8. Davison v. Randall, 912 F.3d 666 (4th Cir. 2019), as amended (Jan. 9, 2019).
9. Hartman v. Moore, 547 U.S. 250, 256 (2006).
10. Nevada Comm'n on Ethics v. Carrigan, 131 S.Ct. 2343 (2011).
11. Packingham v. North Carolina, 582 U.S. 98 (2017).
12. Shields v. Charter Township of Comstock, 617 F.Supp. 2d 606, 609 (W.D. Mich. 2009).
13. State ex rel. Newspapers, Inc. v. Showers, 135 Wis.2d 77, 398 N.W.2d 154 (1987).
14. Ward v. Rock Against Racism, 491 U.S. 781(1989).

C. Secondary Sources

1. Anna Henning, *Developments in Constitutional Law: Elected Officials' Social Media Accounts*, Wisconsin Legislative Counsel Issue Brief (November, 2022) available at: https://docs.legis.wisconsin.gov/misc/lc/issue_briefs/2022/constitutional_law/ib_social_media_ah_2022_11_28
2. VOTE, Black's Law Dictionary (10th ed. 2014).
3. Karla Schultz, Walsh, Gallegos, Treviño, Russo & Kyle, P.C., Mark Tilley, Texas Association of School Boards, *What About My Rights? School Board Members and the First Amendment*, (Presented at the 2016 National School Board Association School Law Seminar, April 7-9, Boston, Massachusetts).
4. 69 Op. Att'y Gen. 143 (1980) (regarding "walking quorums").



EMBRACING CHALLENGE.
DELIVERING OPPORTUNITY.