

Balancing Acts

Constitutional Rights v. Meeting Decorum in California Cities

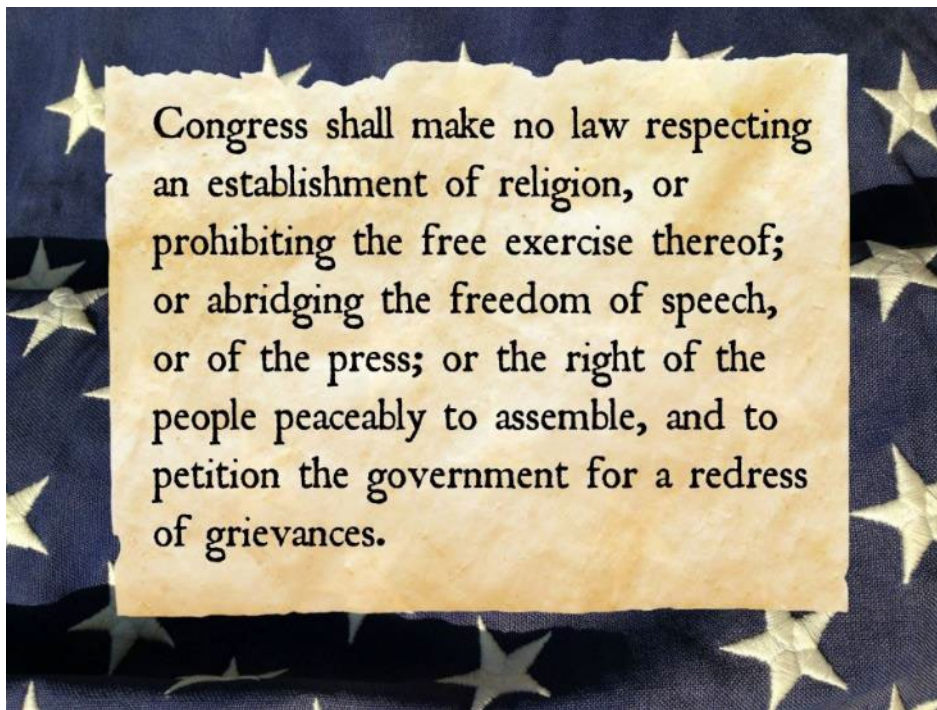
Overview

- First Amendment Basics
- First Amendment and Public Meetings
- Social Media and the First Amendment



First Amendment Basics

What is the First Amendment?



First Amendment

- Key Protections:
 - Speech
 - Press
 - Assembly
 - Petition
 - Religion



Editorial credit: Matt Gush / Shutterstock.com

Protected Speech: SCOTUS

Supreme Court has recognized that the First Amendment's protections extend to individual and collective speech "in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."

Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984).

Forms of Protected Speech

- Protests
- Books
- Newspapers
- Leaflets
- Rallies



First Amendment Basics

- Unprotected Speech
 - Obscenity
 - Defamation
 - Fraud
 - Incitement
 - True Threats
 - Fighting Words
 - Child Pornography
- Hate Speech?



Forum Selection Analysis

- The nature of the forum determines the extent to which the government can constrain free speech.
Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788, 797 (1985).
- Property is categorized as either a **traditional public forum**, a **designated public forum**, or a **limited public forum**.
Hopper v. City of Pasco, 241 F.3d 1067, 1074 (2001).

Classic Examples

Traditional Public Forum

- Where people have traditionally been able to express their ideas: *town square, park, public street*

Designated Public Forum

- Public spaces opened by the government for free expression without any stated rules or limitations



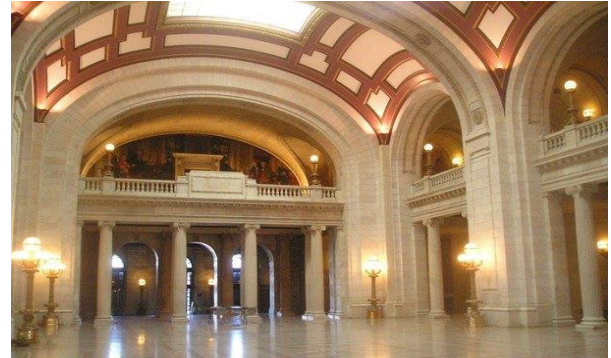
Classic Examples

Limited Public Forum

- Public spaces opened by the government for expression, but with express limitations.

Non-Public Forum

- Government property traditionally not open to the free exchange of ideas:
courthouse lobby, prison, post office, military base



Examples: Limited Public Access

- Public library meeting rooms
- Public school property



Governments Regulation of Speech

Traditional Public and Designated Public Forums:

- Limited to “time, place and manner” restrictions
- Restrictions cannot concern the content, topics, or views
- Regulations on content only permitted under the First Amendment where it meets “strict scrutiny”
 - regulation must be narrowly tailored for achieving a “compelling government interest”

Governments Regulation of Speech

Limited Public Forum:

- Content based regulations
- Example: restricting speech to certain topics
- Cannot impose viewpoint regulations
- Strict scrutiny does not apply

Governments Regulation of Speech

Non- Public Forum

- Government can limit speech to only that which it wishes to convey
- Examples:
 - City can use its website to post messages of its choosing without allowing alternative views or additional content to be supplied by the public.
 - City can exclude all content that it disagrees with and only allow content that it approves of.

Public Meetings

Maintaining Order During Public Meetings

Rules of Decorum for Public

Actual Disruption Standard

- City Council meetings are a special type of public forum
- While subject to time, place and manner restrictions, the courts have explained that a member of the public can be ejected only for “actually disturbing or impeding a meeting”

Norse v. City of Santa Cruz, 900 F.3d 966, 976 (9th Cir. 2010); *Acosta v. City of Costa Mesa*, 718 F.3d 800, 811 (9th Cir. 2013); *Ribakoff v. City of Long Beach*, 27 Cal.App.5th 150 (2018).



Rules of Decorum for Public

Actual Disruption Standard:



- Actual disruption measured by effect on audience (not individual councilmembers)
- First Amendment meaningless if councilmember's reaction to speech justified removal of a speaker
- Assess if language or action has impeded the ability of the body to get through the agenda, i.e. disrupted the meeting

Rules of Decorum for Public

Actual Disruption Standard

- Standard is relatively low, but a disruption must have occurred
- Must be more than a mere violation - but not to the level of breach of the peace or fighting words
- Cannot pre-determine what type of language or statements will equate to a disruption
- Line between an actual and potential disruption may be difficult to draw



Rules of Decorum for Public



Actual Disruption, Case Examples

- Permissible to remove man who had previously disrupted proceedings when his cohort made an obscene gesture which threatened to re-start previous disruption

(Kindt v. Santa Monica Rent Control Bd., 67 F.3d 266 (9th Cir. 1995).

- Triable issue of fact as to whether a silent Nazi salute caused an actual disruption and thus Court reversed grant of summary judgment
(Norse, 629 F.3d at 970.)

Rules of Decorum for Public

Actual Disruption, Case Examples



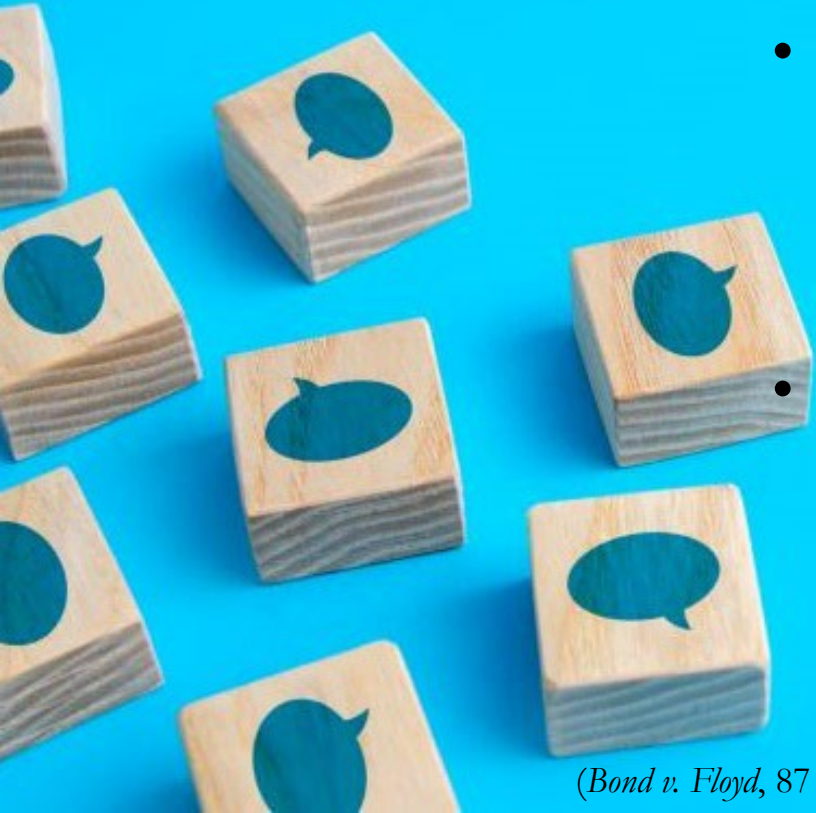
- City of Los Angeles, Dowd example:
“your president is pathetic and hopeless and is not doing a very good job and need to get together and lose her.”
(*Dowd v. City of Los Angeles*, WL 4039043, *38 (C.D. Cal. 2021 2013).)
- Hateful words, costumes and clothing –
e.g. KKK outfit, t-shirts with N word

Best Practices for Handling a Disruptive Member of the Public

- Public meeting chair/moderator determines disruption occurred
- Ejecting speakers because of disagreement with speech/choice of words is an abuse of meeting chair's discretion
- Enforce such time limits in an even-handed manner
- Allow disruptive speaker exceed time limit as a basis to remove/stop them from speaking
- City Attorney/City Manager monitor public comments



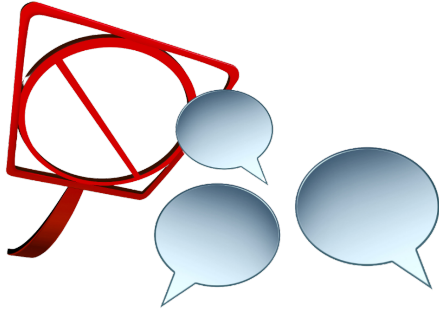
Rules of Decorum for Council



- The same metrics and First Amendment framework most prudent course in determining whether to restrict Councilmembers’ comments
- Courts have consistently held that the First Amendment requires that “legislators be given the widest latitude to express their views on issues of policy.”

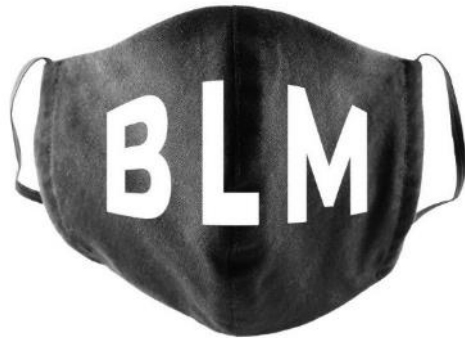
(Bond v. Floyd, 87 S.Ct. 339, 349 (1966); Degrassi v. City of Glendora, 207 F.3d 636, 647 (2000).)

Rules of Decorum for Council



- Best approach is to only prohibit speech of Councilmembers that causes an actual disruption
- To preclude and/or restrict the speech of a sitting Councilmember short of an actual disruption is uncharted legal territory
- Policies for aspirational goals for civility will not run afoul of the First Amendment

Rules of Decorum for Council



Hypotheticals

- Respectful language?
- Prohibiting comments on staff?
- Prohibiting articles of clothing (e.g. Blue Lives Matter pin; Black Lives Matter items)?

Remedies for “Outlier” Councilmembers

Considering the Options:



Censure, permissible



Stripping of titular roles and membership on committees, permissible

Remedies for “Outlier” Councilmembers

Considering the Options:

- Ejecting from meeting, only permissible where there is an actual disruption
- Attempting to remove from elected office, not permissible



Remedies for “Outlier” Councilmembers

- Assessing Council action taken against members for their speech is not analyzed as a typical First Amendment retaliation case
- If Councilmember retains full range of rights and prerogatives that come with having been publicly elected (such as voting and attending meetings) remedy will likely pass muster

(See *Blair v. Bethel School Dist.*, 608 F.3d 540, 544 (9th Cir. 2010).)



Remedies for “Outlier” Councilmembers

Courts consider the following:

- was the action taken against the elected official “a rather minor indignity, and de minimis deprivation of benefits and privileges”;
- “more is fair in electoral politics than in other contexts”; and
- elected officials are entitled to “a protected interest in speaking out and voting their conscience on the important issues they confront.”

(Blair, 608 F.3d at 545.)



Examples of “Outlier” Councilmembers

- Plaintiff, Board member of the community college system, disagreed with other Board members and brought lawsuits challenging the Board’s actions
- The Board publicly reprimanded plaintiff and then also censured him
- Supreme Court held that plaintiff did not possess an actionable First Amendment claim arising from the Board’s purely verbal censure

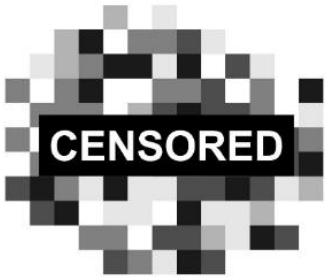
Houston Community College System v. Wilson, 141 S.Ct. 2564 (2022)



Examples of “Outlier” Councilmembers

SCOTUS ruled that:

- Plaintiff had a First Amendment right to speak out on questions of government policy, but other Board members also had a First Amendment right to speak out
- Censure itself was protected speech under the First Amendment
 - The censure at issue did not prevent plaintiff from doing his elected job nor did it deny him any privilege of office
 - Censure is not akin to exclusion from office



Houston Community College System v. Wilson, 141 S.Ct 2564 (2022)

Examples for “Outlier” Councilmembers

Do they think they won't be deported? profiled? beaten? Being a house n**** is still being a n****. You're still considered “the help.”

Case Study, *Collins v. SFUSD*:

- Old tweets by Collins resurfaced that were seen as anti-Asian and racist
- School Board passed resolution calling for Collins' resignation



Collins v. San Francisco Unified Sch. Dist., No. 21-CV-02272-HSG, 2021 WL 3616775, (N.D. Cal. Aug. 16, 2021).

Examples for “Outlier” Councilmembers

Case Study, *Collins v. SFUSD*:

- The School Board resolution also removed Collins from her role as Vice President and her committee assignments
- Board member Collins sued for First Amendment retaliation
- Court ruled in favor of the School District on a motion to dismiss



Collins v. San Francisco Unified Sch. Dist., No. 21-CV-02272-HSG, 2021 WL 3616775, (N.D. Cal. Aug. 16, 2021).

Social Media

- Public meetings and opportunities for protected speech no longer confined to in-person meetings or a physical public space
- Allows public speech using online forums and social media
- Courts recognize need to apply First Amendment principles to social media and other online environments

Social Media

- Internet and social media sites are akin to “the modern public square”
- Social media is “perhaps the most powerful mechanism available to a private citizen to make his or her voice heard”
- Anyone can “become a town crier with a voice that resonates farther than it could from any soapbox”
- Twitter enables people to “petition their elected representatives and engage with them in a direct manner”

Forum Selection Analysis & Social Media

- Social media account is for official purposes
- Forum selection analysis determines level of restriction of speech tolerated under the First Amendment
- Social media is not considered a **“Traditional Public Forum”**

Forum Selection Analysis & Social Media

Designated Public Forum

- Social media page open to the public
- Public can make comments without any limitations
- Only content-neutral time, place, and manner restrictions allowed

Forum Selection Analysis & Social Media

Limited Public Forum

- Social media page open to the public
- Consistently enforced limits on the topics for commentary
- Limited to certain content or topics provided it does not discriminate based on viewpoint

Forum Selection Analysis & Social Media

Non-Public Forum

- Social media page limited to government speech
 - i.e., city Facebook page where commenting feature has been turned off

Social Media

First Amendment ▶

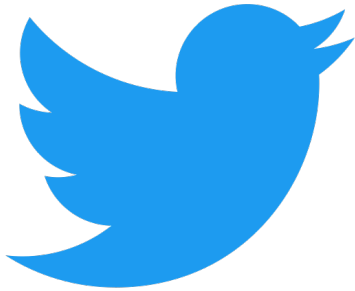
◀ Social Media

Is the social media account official or personal in nature?

- *Knight First Amend. Inst. at Columbia Univ. v. Trump*, 928 F.3d 226, 230 (2d Cir. 2019).
- *Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019), *as amended* (Jan. 9, 2019).
- *Campbell v. Reisch*, 986 F.3d 822 (8th Cir. 2021).

Social Media

Official Accounts, Case Example



Twitter account of then-President Trump was found to be a public forum and Trump could not limit speech on the account based on the views expressed by speakers, by deleting or banning certain speakers from the account

(Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 230 (2d Cir. 2019))

Social Media



Official Accounts, Case Examples

Facebook page of Board member found to be official account and blocking and deleting comments violated the First Amendment
(*Davison v. Randall*, 912 F.3d 666 (4th Cir. 2019))

Social Media

Personal Accounts, Case Example

- State representative's Twitter campaign page was not a public forum as it was not being used as a tool of governance
- Thus, blocking users from account did not violate the First Amendment
- First Amendment only applies to government action and the act of a public official taken in “the ambit of their personal pursuits” does not trigger First Amendment concerns

Campbell v. Reisch, 986 F.3d 822 (8th Cir. 2021)



Supreme Court's New Test

Personal vs. Official Accounts – *Lindke v. Freed*

- Supreme Court clarified appropriate approach and relevant standards
- Clarifies how courts should approach the First Amendment analysis concerning social media accounts
- Illustrates that this inquiry is going to be highly fact intensive

Supreme Court's New Test

Personal vs. Official Accounts – *Lindke v. Freed*

- City Manager's Facebook page addressed mostly personal matters, commenting on his job and soliciting feedback from the public
- Plaintiff would post comments expressing his displeasure with city's approach to pandemic
- City Manager would delete posts and eventually blocked Lindke

Supreme Court's New Test

Personal vs. Official Accounts – *Lindke v. Freed*

- Lindke filed a Section 1983 lawsuit alleging violations of his First Amendment rights
- District Court found that the city manager operated his Facebook page in his private capacity
- Sixth Circuit affirmed
- The Supreme Court granted cert for the express purpose of clarifying the standards that apply to such cases

Supreme Court's New Test

The Court explained that “[a] public official’s social-media activity constitutes state action under §1983 only if the official (1) possessed actual authority to speak on the State’s behalf, and (2) purported to exercise that authority when he spoke on social media.” The appearance and function of the social-media activity are relevant at the second step, but they cannot make up for a lack of state authority at the first.”

Supreme Court's New Test

- If labeled “ “personal page” – “strong presumption” that the views expressed were his in a personal capacity and not state action.
- As a general matter, a “post that expressly invokes state authority to make an announcement not available elsewhere is official, while a post that merely repeats or shares otherwise available information is more likely personal.”
- The Supreme Court ultimately reversed and remanded to the lower court to analyze the facts accordingly.

Summary of Key Points

- Viewpoint restrictions are essentially never permitted under the First Amendment.
- Traditional public forums are subject to time, place, and manner restrictions.
- Content restrictions are permitted only in limited public forums that have established rules regarding the content that will be allowed.
- City council meetings and other similar public entity board meetings are deemed to be limited public forums subject to time, place, and manner restrictions, but where content can also be regulated provided it is viewpoint neutral and consistently enforced.
- A city council cannot prevent a citizen from speaking or remove the citizen if their speech falls within the agenda topic and within the timeframe they have been afforded.

Conclusion

- A city council can prevent a citizen from speaking or remove the citizen from the meeting if their speech constitutes an actual disruption, including exceeding their allotted time period for public comment.
- Although an elected body can censure one of its members for their speech and conduct – including their speech and conduct undertaken in a personal capacity – the individual councilmember cannot be deprived of the rights of their elected office.
- In the realm of social media, courts have not been shy to use established First Amendment principles to address virtual public spaces and what level of speech regulations will be permissible. The applicable First Amendment rules that will be at play will often result in a highly fact intensive analysis as the Supreme Court's recent decision in *Lindke* illustrates.



Questions

Presenter



David Mehretu, Principal

Meyers Nave

dmehretu@meyersnave.com

510.808.2000

[linkedin.com/in/david-mehretu-1783266](https://www.linkedin.com/in/david-mehretu-1783266)