



## Can a Public Official Block You on Social Media?

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**[00:00:00] Jeffrey Rosen:** This week, the Supreme Court heard oral arguments in two cases about social media and the First Amendment. The question is when and whether the First Amendment prevents public officials from blocking users on their Facebook accounts.

**[00:00:15] Jeffrey Rosen:** Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center. And welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan, nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people.

**[00:00:32] Jeffrey Rosen:** In this episode of We the People, we'll break down the arguments in both of the cases the Supreme Court heard and discuss how they might shape the future of free speech online. Joining me to discuss this crucially important question are two of America's leading experts on the First Amendment.

**[00:00:48] Jeffrey Rosen:** David Cole is National Legal Director of the ACLU. He's litigated many cases before the court including the recent Mahanoy Area School District v. B.L. That involved student speech and social media. He's the author of 10 books, including most recently Engines of Liberty: How Citizens Movements Succeed. He filed briefs in both of the cases we're talking about today, Lindke v. Freed and O'Connor-Ratcliff v. Garnier.

**[00:01:14] Jeffrey Rosen:** David, it is wonderful to welcome you back to We the People.

**[00:01:17] David Cole:** Always great to be with you, Jeff.

**[00:01:19] Jeffrey Rosen:** And Eugene Volokh is Gary T. Schwartz Distinguished Professor of Law at UCLA School of Law. He teaches First Amendment law and the First Amendment amicus brief clinic. He's the author of the textbook The First Amendment and Related Statutes and nearly 100 law review articles, and is the founder and coauthor of The Volokh Conspiracy, a leading legal blog.

**[00:01:41] Jeffrey Rosen:** Eugene, it is wonderful to welcome you back to We the People.

**[00:01:44] Eugene Volokh:** Always a great pleasure to be on.

**[00:01:46] Jeffrey Rosen:** David, let's begin, as Professor Kingsfield says, with the facts. They're useful here because both of these cases involved Facebook accounts, but they were set up in different ways and used in different ways. So, tell us what was going on and how the public officials were using them.

**[00:02:01] David Cole:** So, in both cases, they are government officials who are using their so-called private Facebook pages but to talk about their government work and arguably to do their government work.

**[00:02:15] David Cole:** So, in *Lindke v. Freed*, the government official was a city manager. And he had a Facebook page that he'd set up when he was in college. So it was his personal page. But once he became the city manager, he began using that page, not just to post photos of his dog and his wife and his kids, but also to post critical information about how the city was responding to COVID. And in many instances, it was the only, or may well have been the only, place that citizens could get access to that information.

**[00:02:51] David Cole:** In the other case, *O'Connor-Ratcliff*, which I believe comes out of California, it comes out of the Ninth Circuit. In that case, it was two school board members who had, again, ostensibly private pages, but they identified themselves on the page as school board members and they use the pages almost entirely to run school board business. Probably 97% of their posts were school board business. "Here's what's going to be on the agenda. Here's what we're going to talk about. Tell me what you think about this proposal, that proposal," and the like.

**[00:03:29] David Cole:** And the question in both cases is, when does a government official using his private Facebook page, when is he responsible as a state actor and therefore constrained by potential constitutional limits that would apply to a state actor but would not apply to a private individual? And the difficulty is that government officials, when they are doing their job, are state actors. They embody the state, they use the authority of the state to announce their work, to announce meetings and to hold meetings and the like.

**[00:04:09] David Cole:** But they're also private citizens. They're not only government officials, they're also private citizens. So, how do you distinguish between the private speech which is protected by the First Amendment and the speech on behalf of the government which is constrained by a host of constitutional constraints, including the First Amendment?

**[00:04:32] Jeffrey Rosen:** Very helpful to understand that central question when a public official is acting under color of law when they block someone from social media. Eugene, before we jump into the various tests, anything more to say about the facts? How did the officials in both of these cases block users and to what degree did that seem like state action or not?

**[00:04:54] Eugene Volokh:** Well I don't have that much more to say about the facts of these cases. But let me just lay out the facts of the agreed parts of the debate. It's interesting how much everybody agrees on here.

**[00:05:08] Eugene Volokh:** First, I think there's pretty broad agreement that when a government organization, a school board let's say, has a webpage and allows comments on it, those comments are, one might call it probably a limited public forum. The school board doesn't have to keep them open unless state laws require. But it can't discriminate based on viewpoint. Pretty much, I think everybody agrees on that. That's the fact there.

**[00:05:35] Eugene Volokh:** On the other side, pretty much everybody agrees that government officials sometimes wear their private hat. So sometimes they may have a private page. In particular, I think there's pretty broad agreement that in much of the average government official's tenure, which is occupied by running for office again or running for a higher office, they could have candidate webpages.

**[00:06:01] Eugene Volokh:** And in the candidate webpages, naturally, they're going to mostly talk about their plans, but also what they have done, what they are doing. So, there's pretty broad agreement that in the context of candidate pages, government officials are quite free to talk as private citizens, they're running for office about what they're doing. And then they could block people from those candidate pages, just like they can have a rally that's only open to supporters and not otherwise.

**[00:06:30] Eugene Volokh:** And likewise, pretty much everybody agrees that even when somebody's not a candidate, there are a lot of interactions that they could have where they're wearing the private hat. So, one question that came up at oral argument was what if somebody comes up to the government official in the supermarket? And it's actually pretty normal, I'm told, that, especially lower-level government officials, somebody comes up to them. They'll talk to them, partly because they do have an eye towards the next election, and partly because they see it as their duty.

**[00:06:59] Eugene Volokh:** Can they say to somebody who they know as kind of an enemy, say, "I don't want to talk to you now, call me at the office." Whereas to their friends, they can explain what's going on in government? Yes, everybody agrees they could do that, too.

**[00:07:12] Eugene Volokh:** So, what's left is this really narrow zone of pages that some say are the person wearing one hat, the government official hat, and others say, "No, no, that person is wearing the private hat." And the question is what hat in that fairly narrow zone the person is wearing? That's the real issue here.

**[00:07:37] Jeffrey Rosen:** David, I want to very much get your thoughts about that question of what hat he's wearing. But let me just put on the table at least three of the tests the court was grappling with, and you can help us unpack them because they're confusing.

**[00:07:48] Jeffrey Rosen:** So, the Sixth Circuit in Lindke-Freed case says, "Is the challenged action part of the government actor's official duties? And if not, could the action happen the same way without the authority of the office?" The Ninth Circuit says, "Is there a close nexus between the state and the challenge to action?" And your test, which was also embraced by Pam Karlan in the oral argument, is are government officials acting under color of state law? And the test is when they perform official duties or appear to exercise state authority.

**[00:08:19] Jeffrey Rosen:** So, that's a lot of legalism, but help us understand the difference between those three approaches.

**[00:08:25] David Cole:** I want to go back for a second before we get into the details of the tests because it isn't actually ... What the oral arguments made clear is that it's actually pretty hard to identify where the daylight is between these tests. But I think it's fair to say that the people representing the government officials, including the United States' Solicitor General, which sided with the government officials, want to make it pretty darn hard to conclude that a public official, when speaking on his or her private Facebook page or Twitter account, is engaged in state action.

**[00:09:03] David Cole:** They want to make it very, very rare that that is the case. Only where the government official has a duty to speak or is directed to go to the private page and speak for the government and otherwise not. And duty understood very, very narrowly, according to the Fifth Circuit, there has to be some law on the books, can even be custom etcetera.

**[00:09:29] David Cole:** On the other side there's a sense that, if you make this test too restrictive, then it creates a real temptation for government officials to essentially migrate a lot of what they do to their private accounts and thereby avoid constitutional constraints. And so, you need a test that ensures that we hold the state accountable when the state is acting, allows government officials the freedom to act in their private capacity when they are in fact active in their private capacities.

**[00:10:07] David Cole:** And I think the court is really struggling with how you draw that line in a way that balances the First Amendment interests on both sides. Because there really are First Amendment interests on both sides. There is a First Amendment interest on the part of the government official to be able to speak in his or her private capacity.

**[00:10:25] David Cole:** But there's also a strong First Amendment interest in citizenry, being able to have access to public information that their public officials are putting out on their channels, have access to their public officials of... Mr. Lindke in the first case, even the city manager, he would put out directives. He would get questions from his constituents on his private Facebook page. He would answer those on his private Facebook page. He certainly seemed to be doing his job.

**[00:10:57] David Cole:** But he says, "No, I wasn't doing my job. I was just answering that question in my free time." And that's the difficulty. How do you assess whether they're acting in

their private for their public capacity? The reason that we adopt a view that says when they're doing their job, yes. And everybody agrees, when they're doing their job, yes.

**[00:11:17] David Cole:** But also when they appear to be doing their job, when they appear to be exercising their authority, they should be bound by the constraints that apply to state authority. And that comes from some old cases involving private security guards, working at an amusement park, who were deputized by the state to have some state authority, but they weren't actually exercising that state authority. They were working in their private capacity for a private employer and they engaged in race discrimination.

**[00:11:53] David Cole:** And the question was, are they bound by the Constitution when they engage in race discrimination when working for a private employer in their private capacity, but appear to be exercising the authority of the state? And the court said, yes, when they purport to be exercising the authority of the state, they should be bound, in addition to when they actually are.

**[00:12:19] David Cole:** Because to the citizen, if this individual who actually is close with state authority purports to be using that authority then the citizen believes the government is acting against him. And the official should be constrained by the Constitution.

**[00:12:40] David Cole:** When we think about this, we should think about this not only from the standpoint of First Amendment rights of access to social media accounts. But more broadly, if a public school teacher, for example, decides to have a party at his home and he invites his students and he does it in his personal capacity, on his own time. He pays for all the food himself. He's not using any government resources. He's not doing his job. And he invites only the white students.

**[00:13:14] David Cole:** Is that a violation of the Constitution? Should he be bound by the Constitution because he is a teacher, he exercises that authority? And when he invites his class, he is purporting to exercise that authority even if in fact, he's not using any school resources or school authority or not? And I think the answer to that should be yes, he ought to be bound.

**[00:13:37] David Cole:** And I think similarly, when a government official on a private page presents himself as acting as the government, he should be held accountable. You can always say, "I'm not acting as the government. I'm doing this in my personal capacity." But that is not what Mr. Lindke did. And that's not what the school board officials in the O'Connor-Ratcliff case did. Quite the opposite.

**[00:14:01] Jeffrey Rosen:** So interesting. Thank you so much for that. And thanks for calling our attention to those cases. You said in your brief, including *Williams v. US*, that's from 1951 where, as you say, the private detective was held liable for conducting interrogation because... and the court focused on the appearance of state action, not on whether he was actually exercising that authority.

**[00:14:22] Jeffrey Rosen:** Eugene, you quoted, in your blog, Judge Thapar's opinion on the Sixth Circuit, which held that Mr. Freed's Facebook activity was not state action because it didn't derive from the duties of his office or depend on his state authority and preferred a narrower test about whether or not he was acting under an official duty. Do you agree with the Sixth Circuit test or not?

**[00:14:47] Eugene Volokh:** You know, I think there are plausible arguments on both sides here. I can't get too worked up because again, I think the issues are... in many ways are relatively minor issues, what's left of it after the parts that everybody agrees on.

**[00:15:02] Eugene Volokh:** But part of the problem is, I think sometimes there's this tendency to talk about this in the abstractions about authority and such. When we think of government authority, we usually mean the government authority to arrest people, let's say, beyond the right to citizen's arrest. Or the apparent authority that a police officer has to do something to you. Or in a context of an interrogation, often the interrogation involves authority and that you can't leave.

**[00:15:29] Eugene Volokh:** These cases involve a very specific kind of authority which is important to flag because it's very close to the exercise of ordinary constitutional right that everybody has, which is the authority to talk and to talk to people. And then to listen to them if you want to, and to have other people you're talking to listen to them. That's what's really at stake here.

**[00:15:51] Eugene Volokh:** And I do think that the party at someone's home example is a good one. One thing to make... to recognize is not all things that are bad are unconstitutional. They would be very bad for a school teacher to invite only the white students or only the Black students to his party. And I think that probably most schools are going to, if they learned about this, are going to essentially say, "We're going to have a rule as a school rule," not as a constitutional but a school rule along those lines.

**[00:16:19] Eugene Volokh:** But let's look at actually some, I think, more common and more plausible examples. So, I am a school teacher, albeit at a university where ... Let's set aside the questions of possible impressionable children and coercion. Let's look at speech to adults which is really what's at stake in this case.

**[00:16:36] Eugene Volokh:** Let's say I have a party at my home and I invite students, but just students who are members of the American Constitution Society, kind of a liberal student group, or the Federalist Society, a conservative student group. Is that unconstitutional because I'm exercising my apparent authority as a professor?

**[00:16:59] Eugene Volokh:** Well, probably, they... I may send out even an email to people saying, or talk... I wouldn't mention it to my class, but I might send out an email to members of the Federalist Society. And they're probably, if they show up, it will be because I'm a professor.

But the only authority that I am exercising is my authority to talk to them if they want me to talk to them.

**[00:17:23] Eugene Volokh:** Conversely, if somebody says, "Volokh, I'm not a member of the Federalist Society and you can't force me to be a member of the Federalist Society. You can't discriminate against me. I say, 'Well, you know, at school, I certainly can't discriminate against you. But when I'm inviting you to a party I could say this is a party for the Federalist Society. You want to talk to me about something else, please feel free.'"

**[00:17:45] Eugene Volokh:** Or I'll give you another example. I'm not religious myself but let's say I was a religious Jew. And then I would say, "I just want you to know we have an interesting session on how Jewish law relates to American law at my synagogue after services every Saturday. If any of you want to show up, you can."

**[00:18:10] Eugene Volokh:** Now, if I required my students, using my real authority, threat of giving them bad grades, to show up at my synagogue, that would be unconstitutional. But I think if I open up this meeting, but open it up only based on religion, again maybe the university will tell me I shouldn't do that. But I don't see that as a First Amendment problem. Because again, to the extent I'm using my authority, it's only the authority that I have to speak, albeit using, in some measure, my position. Again, people are more likely to show up to those things because I'm a professor. If I wasn't, then they wouldn't.

**[00:18:44] Eugene Volokh:** The same thing, by the way, comes up pretty often with regard to elected officials, I think. So imagine an elected official says "The area that I represent is overwhelmingly of a particular religious group. It could be an Orthodox Jewish community, or it could be a Somali Muslim community, or it could be a Protestant, a Baptist community. White Baptists, Black Baptist, various churches are out there. And I'm a member of one of them.

**[00:19:14] Eugene Volokh:** And I often talk to fellow church members about what's going on. They ask me at church. Every Sunday, they ask me at church or every Friday they ask me at mosque "What's going on?" And I talk to them. And they give me some suggestions and I listen to them. I mean, I listen to other people, too, but this is my particular listening session at my place of worship.

**[00:19:38] Eugene Volokh:** Is that a violation of the Establishment Clause, of the Free Speech Clause, or the Free Exercise Clause, because people get access to me there because of being part of the religion? I don't think so. I think it's actually pretty normal for government officials to do that in one form or another, although sometimes they wouldn't because of political pushback, let's say.

**[00:19:57] Eugene Volokh:** So, it's hard for me to see why, when all that's going on is somebody is just talking to people, why that necessarily means that just because he's a government official talking about government matters that he's acting in his governmental capacity.

**[00:20:12] Eugene Volokh:** Now, if what he was doing is he was saying, "Okay, I'm going to hold a zoning board hearing at my church and only allow church members to show up," that would be very different. That would be exercising government power that the rest of us don't have. But if it's just the power to talk about what I do at my job, even if it's a government job, hard for me to see a very strong case why that has to be seen as government action on my part.

**[00:20:37] Jeffrey Rosen:** Let's talk about the oral arguments. To Pam Karlan, Justice Alito said, "Are you saying that any time a website tells constituents about what the person is doing if they're a public official, that constitutes state action?" And she says, "Yes, the state action is maintaining the ongoing site for the exchange of information but it's rebuttable."

**[00:20:54] Jeffrey Rosen:** And she had a great line. She said, "If you're talking at Thanksgiving dinner and someone says, 'Pass the gravy,' and you say, 'I also passed a bill last month,' that would be private." And that led to a series of questions about whether it's a site-by-site determination or message by message.

**[00:21:09] Jeffrey Rosen:** David, help us parse that and what did it tell us about where the court is going?

**[00:21:12] David Cole:** That question of whether you ask whether the site is being used as a channel of official communication or whether you ask whether a particular post is government speech or private speech depends on what's being sued about.

**[00:21:32] David Cole:** So if you are being, as in these cases, you are being blocked as a constituent, you're being blocked from the page altogether, then I think the question is, is the page part of this government official's job? Is he using the page as a channel of communication for his job? If so, he shouldn't be able to block people because he disagrees with their point of view.

**[00:21:54] David Cole:** If what is happening is not blocking someone from a page but say muting somebody's comment or deleting somebody's comment from a particular post, then I think, if the post is about a dog and someone says something no one would think that even though it's a government official, no one would think that he's acting as a government official with respect to muting that comment to that post about a dog.

**[00:22:19] David Cole:** But if it's a comment about, "Here's what I'm proposing we do to respond to the COVID crisis," and somebody responds and he silences them because he doesn't agree with their criticism of his official action, then that's a stronger case for a state action. So, it depends.

**[00:22:37] David Cole:** In these cases, I think it is site by site. And the parties representing the constituents are blocked really offered kind of two tests. One test is if the government official is doing his job on the site, he should be held accountable as a state actor. The other side said, "If the government official has established a channel of communication between him and his



constituents on the site and that's part of his job in that context, the site should be treated as state action."

**[00:23:11] David Cole:** And the other thing I would say in response to Eugene's excellent real-world analogies is that I think that one of the things that's difficult about this case is that it's not always accurate to analogize to the real world, right? In the real world, it would be pretty hard for a government official to use his private property to exclude whole groups of people and yet speak to lots of other people on the basis of race or on the basis of religion or on the basis of viewpoint. It is now very possible to do that. And so, I think that's one of the reasons this case is difficult.

**[00:23:56] David Cole:** Then the second thing I'd say is it's important to realize that all that's an issue in these cases is whether the Constitution should apply at all. Whether there ought to be any constitutional accountability for what the government official is doing, not whether there's a First Amendment violation. So, there may well be, in situations where a government official is acting, the Constitution may apply, but the First Amendment isn't violated because he didn't establish a public forum or a limited public forum or designated public forum at all. And so, there's no problem with the particular exclusion.

**[00:24:31] David Cole:** So, it's important to keep in mind that all this is about is the threshold of whether we're going to apply any constitutional scrutiny to what the government official is doing. And I think oftentimes and the vast majority, 95%, of state action cases are cases where private individuals are acting. And the claim is, even though the individual is private, he should be held accountable as a state actor because the state is compelling him to do it or because the state is directing him to do it or because he's doing it in conjunction with the state.

**[00:25:03] David Cole:** And there, the presumption is a private actor is a private actor. And only where there's a really strong showing of state involvement would you hold the state accountable. But these cases are different. These are government officials. Nobody doubts they're government officials. And they're talking about, on their Facebook pages, their government work. And so the question is, when should a government official be treated as acting for the state?

**[00:25:30] David Cole:** And I would think there, the presumption should be the opposite. Generally speaking, a government official when working, when doing his work, should be treated as a state actor. And only in extraordinary circumstances should we say that he is a private actor.

**[00:25:46] Jeffrey Rosen:** Very helpful. Eugene, I want to ask the obvious question, how the court's decision will play into the Trump Twitter case which is the one that listeners will be familiar with. There, the Second Circuit held that President Trump couldn't block people from his Twitter account. It didn't go up to the Supreme Court.

**[00:26:06] Jeffrey Rosen:** Would choosing one test or another change the result in that case? And what are the broader implications for this case to situations like Trump and Twitter?

**[00:26:17] Eugene Volokh:** Yeah. This issue did indeed first make it to the public in a big way in the Trump case, which eventually was dismissed because it was rendered moot by his leaving office.

**[00:26:30] Eugene Volokh:** But there, as I understand it, Trump was actually using White House staff. And that makes it much more plausible that this should be treated as the action of this person as a government official. Because as a private person, he has no power to order around White House staff. In fact, that also helps create a nice line with distinguishing this from the campaign context because it's quite clear, certainly at the federal level. My sense is pretty much everywhere, that you're not allowed to use your government employees as part of your reelection campaign.

**[00:27:09] Eugene Volokh:** So, I think that case probably would have come out the same way under any of the tests that have been recently adopted because of the use of government staff. As I understand it, in these cases, government staff wasn't used.

**[00:27:24] Eugene Volokh:** And if I could just respond briefly to what David was saying. I think government officials act in their private capacity all the time. Many of them act in their private capacity and, particularly clearly, Sunday mornings. They go to church. I mean, obviously for other denominations, other days.

**[00:27:41] Eugene Volokh:** And even people who I think take a pretty broad view of the Establishment Clause, that says that government officials should not engage in any religious conduct while acting in their official capacity, would say, "But of course." Some of the time, they are wearing their private citizen hat.

**[00:28:02] Eugene Volokh:** Speaking of private citizen hats, let's say - and now we're shifting from Sundays to Saturdays. Let's say a government official shows up to work wearing a yarmulke. I think again, even people who have a very broad and muscular view of the restraints the Establishment Clause places on the government would say, "Well, of course, it doesn't stop someone from wearing a yarmulke to work," because even when he's on the job, there is a private capacity in which he is acting, wearing a yarmulke or by wearing a cross or Magen David...the Star of David or something like that as jewelry or something along those lines.

**[00:28:46] Eugene Volokh:** So, I think we can come up with a lot of scenarios where government officials are indeed acting in their private capacity whether because it's during a reelection campaign or because they're engaging in religious worship or religious activity or maybe a combination of both. Maybe they show up at their place of worship and talk to people about their day jobs.

**[00:29:11] Eugene Volokh:** So I think we can just say, "Well, the person has a government job as a government official." Maybe even a government employee, we're talking about a school teacher. That would be a lot of people. So, we presume everything they do is government action. Or even most things they do is government action. It's not.

**[00:29:30] Eugene Volokh:** We are on the job 40 hours a week. There are 168 hours in every week, maybe 120 when we're awake. Most of the time, we're not on the clock. And in particular, when somebody does post from home, off duty hours, without using government staff, I don't think there's anything that odd about saying that may very well be private action even if, as many of us do off the job, talk about what we do on the job and answer questions from friends and acquaintances and others about what we do on the job.

**[00:30:05] David Cole:** Yeah. So if I could just clarify, I don't think anybody thinks that the government official who goes to church is acting in his official capacity when he's at church and talking to his fellow parishioners. And so, under no test would that be state action. The question is whether, when an official appears to be actually doing his job but happens to be doing it on a personal page but has not made clear that he is acting in his private capacity.

**[00:30:40] David Cole:** So, these cases would have, I think, come out very differently if the officials had said on their pages, "I am acting in my private capacity and I'm not doing my job here. I am not speaking for the government. I am not speaking as the city manager. I am not speaking as a school board manager." Fine, then that's private speech and you can do what you want.

**[00:31:02] David Cole:** But that ... They said ... They did exactly the opposite. They said, "Here's my page. I am the city manager. I am the school board. If you have further questions, here's the email to the city manager, official email, work email, to the school board official email, not to my private email." And so in those situations, it seems to me, it's fair to hold them accountable. And I think the Trump example is a good one.

**[00:31:28] David Cole:** I mean, Eugene is right that the Trump case was easy in some sense because he used government resources to write his tweets. But suppose he hadn't. Suppose he hadn't. I still think someone who is the president of the United States who is clearly using his real Donald Trump Twitter page to issue orders to announce government actions and the like should be held accountable because he is holding himself out as a government official using his authority to do his job.

**[00:32:04] David Cole:** And I think the reason that these cases are hard is because part of, at least for some government officials, and not all but certainly for the President, certainly for the city manager, certainly for school board members, not maybe for government lawyers or something. Part of your job is actually communicating the policies of the government to the people. That is actually part of your job. So that's why it's so hard to distinguish between when they are doing their job and exercising their authority and therefore should be held accountable and when they are not, when they're acting in their personal capacity.

**[00:32:41] David Cole:** And I think, the easy way to resolve the situation is to say, "Just be clear about it. Just put on your page, 'I am not speaking in my government capacity. I am not.'" This is what the Justice Department instructs all of its employees. If you have a private Facebook account, use it for your private stuff. Don't use it for your government work.

**[00:33:04] David Cole:** Here's the official account. Here's the private account. Keep that stuff separate. And that's what people do for campaigns as well. They have a separate campaign account because you're not allowed to use your government authority and your government resources on your campaign account. So, I think we can solve this problem.

**[00:33:22] David Cole:** But in this situation, the government officials did exactly the opposite. They made it look like they were doing their job. And I think they were doing their job on this page. And just because it's a page that Facebook denominates as private or as theirs, rather than assigning it to the city, it seems to me, from the standpoint of citizen access, they ought to be the same.

**[00:33:47] Jeffrey Rosen:** Eugene, did you hear on the court sympathy for a view like the one David suggests? Justice Kagan did say about the Trump case, "I don't think any citizen would be able to understand the Trump presidency without access to the things the President said on that account. It was an important part of how he wielded his authority. And to cut a system off in that is to cut a system off from part of the way government works." Was Justice Kagan moving toward a response like David's and were other justices on the other side?

**[00:34:19] Eugene Volokh:** Well, part of the difficulty is to figure out what exactly this kind of focus on this apparent authority and such means. One thing that I heard from David and from some of the justices is that it's just a question of what the default assumption is can be easily changed with a disclaimer.

**[00:34:39] Eugene Volokh:** So, if you just put up a disclaimer saying, "I'm a man who happens to be president or who happens to be the manager. I'm going to talk about things I care about which are mostly politics and what I've done and what the government is doing. But this is not the government's account. This is my own account."

**[00:34:59] Eugene Volokh:** If that's so, then in that case, that's enough and then there'd be no dispute, no lawsuit, no nothing. Some justices suggested this could be a sort of a trap for the unwary. A lot of low-level government officials didn't know that you need this disclaimer, might not even read this opinion, might not learn about it, and as a result might run afoul of this requirement for lack of knowledge.

**[00:35:23] Eugene Volokh:** But let's say it's widely made clearer. Then, yes, this would show that this case is about even less than at first it might have appeared because it's just a matter of whether you have these words on your page or not. But I also heard at times, and I think a little bit from David, and from that passage you read from Justice Kagan, that maybe a disclaimer isn't enough.

**[00:35:47] Eugene Volokh:** I mean, after all, even with a disclaimer, it's true people couldn't understand what's happening to the Trump presidency without seeing what he tweeted out. But often you can't understand what's happening, what has happened - let's say, if you're a historian in somebody's presidency - without listening to this person's campaign stump speeches or

watching the person's campaign account. Which we all agree would be private speech and non-government speech.

**[00:36:17] Eugene Volokh:** So, part of the thing is there just needs to be a rule and people need to know what the rule is. But the other part is, I do think if the rule is simply “have a disclaimer,” then at least somebody who really does want to maintain their own conversations with friends and acquaintances which also talk about their work. That's what we often do on our Facebook pages is talk to our friends and acquaintances about our jobs. Then they'll be free to do that with just a disclaimer.

**[00:36:48] Eugene Volokh:** On the other end, if that's not enough, if the disclaimer stops being relevant, if you talk enough about decisions you're making, then that will really sharply limit people.

**[00:37:00] Eugene Volokh:** Let me give you one other point that I think is worth thinking about, although I'm not sure which way it ultimately cuts. So, let's say your page is just your own private page. If somebody persistently posts things that are really rude or that you view as racist or anti-Semitic or pro-terrorist or whatever else, then you can block them and say, "I'm trying to maintain a pleasant conversation here for my acquaintances, for my friends, maybe for my political supporters." I just think that this is a nicer conversation to have.

**[00:37:31] Eugene Volokh:** If, however, it is a government action, then the one thing that is pretty clear is, once you open up comments, you can't then impose viewpoint-based rules. You can say no comments at all, or you can have maybe content-based but viewpoint neutral rules, but you can't have viewpoint-based rules. And that's the rule for the school board and such.

**[00:37:53] Eugene Volokh:** But if the government official can't do that because the page is an official page, it makes it harder for the government officials to have the kind of conversation you might want to have. It seems to me that it's actually a pretty good feature of Facebook and Twitter. I'm not wild about Facebook and Twitter trying to block certain viewpoints on its own, but it's a pretty good feature that it allows the operators of pages and accounts to decide for themselves what they and their readers are going to see. That's going to be lost.

**[00:38:27] Eugene Volokh:** Now, maybe the answer is it should be lost. People should be completely free to express whatever viewpoints they wanted even if some people view them as toxic. Well, that's the public square. There's a lot to be said for that in many situations. I just think in this kind of context, it's probably better if government officials, again when all they're doing is they're speaking to their friends, their acquaintances, their supporters and others, have some more flexibility about what kinds of comments to allow rather than less.

**[00:38:53] Jeffrey Rosen:** David, what about the question of what kind of blocking is permissible in the Garnier case? The Garniers were posting 200 comments on various threads and the public official first blocked them and then used the filter to basically block everyone

except for giving thumbs-up symbols. And in the Lindke case, the man was commenting on COVID posts and he was blocked, just for that.

**[00:39:26] Jeffrey Rosen:** What's a content neutral rule for blocking when it's permitted? And are the differences in the facts here relevant or not?

**[00:39:33] David Cole:** Well, those are hard questions. Those are First Amendment questions, right? We only get to those questions if, in fact, they are state actors. If they're non-state actors, you don't have to answer those questions at all. If they are state actors, it's not obvious what the right answer is.

**[00:39:50] David Cole:** I agree with Eugene that viewpoint discrimination is almost always going to be impermissible as a basis for excluding someone from a public forum if, in fact, you've created a public forum. But those are First Amendment questions, right?

**[00:40:04] David Cole:** And your assessment of how they should come out ought not affect whether the threshold determination is this action that should be constrained by the Constitution at all? If it should be constrained by the Constitution because it's a government official purporting to do his job, purporting to use his authority and nonetheless excluding citizens, then we should address the merits.

**[00:40:35] David Cole:** And it may be that the First Amendment...you would support a different result on the First Amendment. But I don't think it's right to sort of say, "Well, I don't really like the result of the First Amendment." So let's just pretend that this person is not exercising his government authority.

**[00:40:48] David Cole:** And let me go back to, one second, to the disclaimer point that Eugene talked about because I do think disclaimer solves a lot of these problems. It's not ... It's ... It doesn't solve every problem. And I think all sides agree that if it was a clearly private page, but on that private page the government official used that private page to do some government job like take notice and comment on a proposed school board thing, that would be state action. No one disagreed with that.

**[00:41:21] David Cole:** So, yes, sometimes disclaimer won't resolve all of... won't mean that the Constitution is not relevant. In most instances, it will. And what it does do is it resolves this question of are you exercising apparent authority? Are you purporting to use your authority as the government and yet treating some citizens differently than other citizens?

**[00:41:50] David Cole:** As a private individual, you are free to treat people differently on all sorts of bases including viewpoint, including religion, including race. As a government official purporting to exercise your government responsibilities, vis-a-vis the citizenry, generally you're not. And sometimes you can but you'll have to answer to the Constitution for it.

**[00:42:11] Jeffrey Rosen:** Eugene, that question "Are you exercising apparent authority or not," is one that's hard to answer and the justices were struggling to come up with an answer. How significant is that question in the broader debate on the court about the First Amendment in social media?

**[00:42:26] Jeffrey Rosen:** Justice Thomas, in saying that he approved of the court's decision to vacate the Trump ruling, said that the justices will soon have no choice but to address how our legal doctrines apply to highly concentrated privately owned information infrastructure such as digital platforms. And there's obviously a hugely important debate on the court about whether to reconsider doctrines like *New York Times versus Sullivan* in a digital age.

**[00:42:52] Jeffrey Rosen:** Do these cases raise those broader questions or not?

**[00:42:56] Eugene Volokh:** Well, not directly but I think the justices will be thinking about it. Justice Thomas also raised this issue at oral argument. And I do think it's a complicated issue. I'd love to hear what David thinks about it.

**[00:43:09] Eugene Volokh:** Let's just step back a bit. We have a debate here about whether, on a particular kind of webpage, whether government officials can impose certain kinds of viewpoint-based restrictions. But on anything that's on Facebook or Twitter or these services, the platforms impose their own viewpoint-based restrictions.

**[00:43:33] Eugene Volokh:** There have been examples of YouTube removing video of city council meetings because some commenters said something that YouTube disapproved of with regard to COVID, that YouTube claimed was COVID misinformation.

**[00:43:50] Eugene Volokh:** I'm wondering if we really do think that these kinds of places should be viewed as places where government work is being done. And when it comes to government entities' social media accounts, I agree that that is a place with ... that is a limited public forum where government work is being done.

**[00:44:12] Eugene Volokh:** I am not sure that it should be seen as constitutional for them to operate those things on private platforms that themselves exercise the right to block things that they are unelected, owners decide they want to block.

**[00:44:33] Eugene Volokh:** One way of thinking about it is let's say that the city decided to have a city council meeting in some hotel because the old city hall is being renovated or it doesn't have a good sound system or is too small. But the hotel has a policy that says when people say certain things, when people say pro-Hamas things or when people say anti-Muslim things or when people say things that we think are misinformation, we're going to eject them.

**[00:45:04] Eugene Volokh:** So there's a city councilman sitting there. He's about to say something, he gets ejected. Or perhaps they don't want to eject the city councilman. When a commenter is getting up, the city council isn't allowed to restrict the commenter's views, but they

just sit there while the hotel security drag the guy out because they say, "We do not allow this on our property."

**[00:45:29] Eugene Volokh:** One possible answer may be, well, okay, you maybe have the legal right not to allow it your property, then it's hard for us as the government to see how we can use your property to have what is a public meeting which is supposed to be a place for robust, uninhibited debate and discussion without viewpoint constraint when we know for a fact that you have all of these viewpoint restrictive policies that you are prepared to enforce against members of the public and maybe even against us as government officials.

**[00:46:03] Eugene Volokh:** That's a serious issue and creates this weird contrast between people talking about these relatively minor viewpoint-based restrictions that are imposed on one particular page which is not clear it's a government page or not, and much broader viewpoint-based restrictions which are also imposed on government pages.

**[00:46:23] Eugene Volokh:** I will say, by the way, one way of dealing with that is, it would be nice if at least Facebook, Twitter and such said, "Look, whatever viewpoint restrictive policies we have, we're not going to impose them on government meetings." For example, I know the University of California System worked out a special contract with Zoom where Zoom relaxes... essentially removes virtually all of its content restrictions.

**[00:46:48] Eugene Volokh:** Because UC says, "Look, we have academic freedom obligations to have broad debate about various things without having some private entity tell people that they can't participate." So, I do wonder if governments ought to demand of the platforms, "Look, you have to allow commenters, our commenters without interference from you or else we're going to have to leave your platforms and try to come up with some rival platform that doesn't impose these kinds of viewpoint-based constraints."

**[00:47:22] Jeffrey Rosen:** Very interesting. David, what do you think about this broader question Eugene raises? Is it constitutional for government officials to operate accounts on private platforms that engage in broader viewpoint discrimination?

**[00:47:35] David Cole:** Yeah. So this is why Eugene is such a great professor. Because he's able at the drop of the hat to come up with endless hypotheticals. And this is an interesting one. I think the question would be whether the private actor here in this instance, you've got ... It's clearly a government meeting, the government action, state action. What the government is doing is clearly state action. And it has essentially delegated in some sense to a private actor the power to exclude or admit people to that government function.

**[00:48:10] David Cole:** I think that'd be a pretty strong argument under traditional state action doctrine that in that context, the private actor is a state actor because of the close interconnection, the nexus between the private action and the government action. In the sense, the government has delegated its authority to the private entity. That's a context in which we do hold private individuals.



**[00:48:32] David Cole:** So, I would think Facebook or Twitter, it wouldn't be unconstitutional for the government to do it on their platform. But if the platform started excluding people, those people could sue Facebook if they're the platform as a state actor because of the authority that had been given to them. I don't know ... Professor Volokh, is that ... would that satisfy you [laughs] or no?

**[00:48:58] Eugene Volokh:** Well, I think that's certainly one way of thinking about it, that it does become state action when platforms are doing things to government hearings essentially that are hosted there. Or again, another possibility, maybe that the government just asked to insist to have a special deal with the platform's rules, keep off of the platforms or maybe set up its own or something.

**[00:49:20] Eugene Volokh:** I'm not wild about setting up its own, but I'm also not wild about government hearings being censored by some third party. I don't want them censored by the government, but I also don't want them censored by some corporation.

**[00:49:36] David Cole:** Now, I agree but I think the way you solve that is by treating the private actor as a state actor. And I think that would actually be a fairly straightforward state action case because the government has delegated its authority, which has the authority to let people in, or exclude them to a private act or to take that action at that point.

**[00:49:58] David Cole:** It is fair to attribute responsibility to the state which is ultimately what state action doctrine is about. These cases are tougher because...is it fair to attribute responsibility to the state when it's a government official but he is ostensibly speaking in his private capacity, but he hasn't made that clear and he appears to be in some sense exercising authority? Much harder, much harder.

**[00:50:26] Jeffrey Rosen:** Just one last question to Eugene before we pull back and wrap up. Does that mean under your analysis, that the platforms like Facebook would have to apply First Amendment standards rather than their own hate speech standards and they wouldn't be able to ban offensive speech unless it was intended to and likely to cause imminent lawless action?

**[00:50:47] Eugene Volokh:** Yes. If David is right that when it comes to hosting government fora or, again, let's make it clear, a school board meeting, hosting a school board meeting. Not just a particular page of a school board member but the meeting of the actual board. If David is right that they become state actors when they're being used to host this then, yes, they can't say, "Oh, we're going to delete this video or exclude this or delete these comments because we don't like the things the commenters or the school board members are saying."

**[00:51:23] Eugene Volokh:** And I think that would be, I'm not sure about the state action issue, but I think that would be good. Whatever your view is about the proper role of platforms policing just public debate generally, I don't think they should be policing what is said in a public forum, limited public forum, that's set up by a government entity.

**[00:51:45] Eugene Volokh:** Or for that matter, imagine a congressional hearing which is being live-streamed on YouTube and YouTube says, "Oop, we're going to get rid of this particular witness because we think this witness's views are hateful or misleading," or whatever else. I don't think that should be the role of these private corporations when they're essentially agreeing to be used as venues for providing for the citizen's access to what their government is currently doing live right there on video from Washington, DC.

**[00:52:25] Jeffrey Rosen:** Wonderful. Well, let us begin to wrap up in this great discussion. David, later this term, the court will hear oral arguments on Texas and Florida laws that the Texas law allows state residents to sue social media companies if they believe there were unfairly banned or censored and the Florida law would penalize the social media companies for blocking politicians' post.

**[00:52:47] Jeffrey Rosen:** Do we have any sense from these oral arguments about whether there's a divide on the court about these questions and how the court might approach the Florida and Texas cases?

**[00:52:58] David Cole:** I'm not sure we have a sense from these oral arguments. I think there will be a divide on the court. I would predict there will be a divide on the court, but that a solid majority of the court will say that both the Texas and the Florida laws are unconstitutional, at least to the extent that they seek to control the substantive editorial decisions of these large social media platforms.

**[00:53:27] David Cole:** I think that's not a road too far. I recognize that this is an entirely new media forum that the court has only touched on in a host of cases. But so far where it has touched on, it has rejected arguments that it should be treated differently under the First Amendment or said, "No, it ought to be treated the same."

**[00:53:48] David Cole:** And you basically can't run a social media platform without making content decisions all the time. If you didn't make content decisions all the time and viewpoint decisions all the time, social media would be totally unusable, be filled with spam and porn and junk and it would be unusable.

**[00:54:07] David Cole:** And so, it's an inescapable aspect of the enterprise. It is a First Amendment enterprise like editing a newspaper. And so, I think the court is going to be... The majority of the court will be quite skeptical of government efforts to try to regulate that.

**[00:54:25] David Cole:** I mean, the ACLU, we are in favor... I think we side with Eugene on social media platforms should be as open as they possibly can. And we find very troubling efforts to silence people because of their viewpoints. But we are more troubled by the government intervening and trying to regulate the platforms in the first instance. So we think public pressure and norms are a better way to ensure an open social media environment than empowering every state to impose the regulations that its politicians prefer.

**[00:55:05] Jeffrey Rosen:** Eugene, your final thoughts on this big question, how will the court decide the Florida and Texas cases and how should it decide it?

**[00:55:14] Eugene Volokh:** Yeah, hard to know quite how it will decide them. And I don't think anything the argument's on this very different social media question more much on that. But as to how they should, I agree and I think the justices will agree that social media should be treated similarly to other media. But the question is which other media, right?

**[00:55:35] Eugene Volokh:** If you say social media platforms are like newspapers, well, then yes, newspapers have the right to include and exclude whatever they want. In fact, that's their job. But their job is to protect us readers from misinformation. For magazines, which are opinion magazines, their job is to discriminate based on viewpoint.

**[00:55:53] Eugene Volokh:** On the other hand, if you think social media platforms should be treated similarly to, say, a telephone company, well, they are regulated by the government in a way that keeps them from removing someone based on that person's viewpoint.

**[00:56:10] Eugene Volokh:** If a phone company including non-monopoly phone companies, including the famously competitive cell phone company, say, "Well, we're just not going to have communist advocacy or communist get-out-the-vote or pro-Hamas get-out-the-vote calls," or something like that. Maybe not get out the vote but let's say some sort of advocacy lines, "because we just disapprove of that." The answer is you don't get to disapprove, or rather you could disapprove of that. You don't get to act on your disapproval. You're the phone company. You have an obligation to carry everyone.

**[00:56:42] Eugene Volokh:** Likewise, in my State of California, it varies. Only a few states have this, but some do. There's a rule that says private shopping malls have to allow speakers on their property, or rather at least leafleteers and signature-gatherers. They don't like them? Too bad. It's their property? Sure. But state law limits property owner's rights in this respect.

**[00:57:02] Eugene Volokh:** The Supreme Court in a case called *Pruneyard Shopping Center* said, "Yes, that is constitutionally permissible if a state wants to do this." Likewise, the Supreme Court said it's permissible for universities to be required to let military recruiters on their property. Again, unanimously, the court said, "Sure it's their private property, but if the Congress wants to say that you have to allow military recruiters on, it's entitled to do that."

**[00:57:29] Eugene Volokh:** So, the question is what the platforms are more similar to? One possibility is it may depend on the function of the platform. I actually agree with David that when it comes to, what I call, the platform's recommendation function - here are some things you might want to see, here are some posts from the people that you're friends with - then I do think that the platforms, in picking and choosing, they have to pick and choose. Their job is to pick and choose in that situation ought to have First Amendment discretion to do that.

**[00:57:58] Eugene Volokh:** Likewise, if they want to put up disclaimers or responses, that's their own speech. But when it comes to just the decision whether to host or not, whether to allow some site, allow a real Donald Trump on their property, on their computers systems, I'm not sure that they have any more First Amendment right to exclude that real Donald Trump than a phone company would have the right to exclude the Donald Trump, Trump campaign from its phone system.

**[00:58:29] Eugene Volokh:** So, that's the real question is to what the analogies will be drawn? There'll definitely be analogies. That's the way lawyers operate. Maybe that's the way humans operate is by analogy. But the question is what is really the most analogous?

**[00:58:44] Jeffrey Rosen:** Wonderful. Well, it is a privilege to hear you both think aloud about how to decide these complicated and incredibly important cases. The reward or punishment for this great discussion is that I'm going to try to persuade you to return to discuss the Texas and Florida cases when the court hears them because, as always, you educate We the People, listeners, in such wonderful ways.

**[00:59:06] Jeffrey Rosen:** David Cole and Eugene Volokh, thank you so much for joining.

**[00:59:11] Eugene Volokh:** I do. Thanks very much for having us.

**[00:59:16] Jeffrey Rosen:** Today's episode was produced by Lana Ulrich, Bill Pollock and Samson Mostashari. It was engineered by Bill Pollock. Research was provided by Cooper Smith, Samson Mostashari and Yara Daraiseh.

**[00:59:27] Jeffrey Rosen:** Please recommend the show to friends, colleagues or anyone anywhere who's eager for a weekly dose of constitutional illumination and debate. Sign up for the newsletter at [constitutioncenter.org/connect](https://constitutioncenter.org/connect). And always remember, the National Constitution Center is a private nonprofit. We rely on the passion, the generosity, the engagement of people from across the country who are inspired by our nonpartisan mission of constitutional education and debate.

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**[01:00:14] Jeffrey Rosen:** On behalf of the National Constitution Center, I'm Jeffrey Rosen.