AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 11: The Contemporary Era – Democratic Rights/Freedom of Speech

**Morgan v. Bevin, No. 3:17-cv-00060-GFVT** (E.D.Ky. 2018)

*Governor Matt Bevin of Kentucky maintains an official Facebook page and Twitter account. Drew Morgan is a citizen of Kentucky and was blocked by Bevin on Twitter after posting a variety of negative comments about the governor. Another plaintiff was similarly blocked on Facebook. They filed suit in federal district court seeking a declaration that being blocked by the governor’s account violated their First Amendment rights and an injunction preventing the governor from blocking anyone in the future. Bevins argued that he blocks off-topic chatter, regardless of whether it is positive or negative, so that he and his staff can more efficiently engage with the public on the issues of concern to him. The trial court found that Morgan was unlikely to succeed in his suit and so denied his motion for a preliminary injunction. The court concluded that the governor’s social media feed on a private platform was an instance of government speech that he could manage as he wished, not a public forum for others to use to convey their own messages.*

JUDGE VAN TATENHOVE.

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When a state actor restricts speech in a public space, the Court first analyzes what type of space, or forum, exists. . . . Plaintiffs assert that Facebook and Twitter are traditional public fora, necessitating the highest level of scrutiny; Governor Bevin asserts Facebook and Twitter are limited fora, where speech restrictions are permissible when they are viewpoint neutral and reasonable in light of the purpose of the forum. However, neither party adequately addressed the threshold question of whether forum analysis even applies in this context. This Court finds that it does not.

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[T]his Court is convinced that Governor Bevin's use of privately owned Facebook Page and Twitter pages is personal speech, and, because he is speaking on his own behalf, even on his own behalf as a public official, "the First Amendment strictures that attend the various types of government-established forums do not apply." *Walker v. Texas Division, Sons of Confederate Veterans, Inc*. (2015). . . .

There is "no constitutional right as members of the public to a government audience for their policy views." *Minnesota State Board for Community Colleges v. Knight* (1984). Governor Bevin is under no obligation to listen to Plaintiffs, and Plaintiffs have no Constitutional right to be heard in this precise manner. "Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues." Governor Bevin has chosen to effectively, "ignore" those on Facebook he deems are not following the line of conversations he has decided to start on Facebook. . . .

Governor Bevin's Twitter and Facebook accounts are privately owned channels of communication and are not converted to public property by the use of a public official. Simply put, this is unlike any type of property typically protected by First Amendment forum analysis law. . . . Governor Bevin's Twitter and Facebook accounts are a means for communicating his own speech, not for the speech of his constituents. Governor Bevin has made a series of decisions in setting up his official Facebook and Twitter accounts that indicate he intended them to be his own speech. First, his intended purpose for the accounts was to "communicate his vision, policies, and activities to constituents and receive feedback from them on the specific topics that he chooses to address in his posts." He never intended his Facebook or Twitter accounts to be like a public park, where anyone is welcome to enter and say whatever they want; he has a specific agenda of what he wants his pages to look like and what the discussion on those pages will be. Further, individuals cannot directly post on his account. Only he posts to his own account and users are permitted to comment on whatever post he has written. Governor Bevin has an automatic filter set up so that expletives and spam comments are not posted, and he does not allow comments on his page that are "obscene, abusive, clearly off topic or spam." If he wanted a truly open forum where everyone could post or comment, he could have set up his accounts to allow that, but he did not. And the First Amendment does not require him to do so.

The Government argues, and this Court agrees, that the consequence of requiring Governor Bevin to allow anyone to access and post on his Facebook and Twitter accounts could shut down the pages altogether. Hypothetically, if this Court ruled Governor Bevin could not block anyone from his Twitter or Facebook accounts, his accounts could be flooded with internet spam such that the purpose of conveying his message to his constituents would be impossible and the accounts would effectively, or actually, be closed. This further supports the Court's conclusion that forum analysis is inappropriate in this context. . . .

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Further, the term "block" conjures an image much harsher than reality. No one is being blocked from speaking on Twitter or Facebook. They are still free to post on their own walls and on friends' walls whatever they want about Governor Bevin. Governor Bevin only wants to prevent some messages from appearing on his own wall and, relatedly, to not view those messages he deems offensive. Blocking only prevents their direct relationship to Governor Bevin's Facebook and Twitter pages, and a "person's right to speak is not infringed when government simply ignores that person while listening to others."

Ultimately, Governor Bevin is accountable to the public. The public may view his Page and account if they wish and they may choose to re-elect him or choose to elect someone else if they are unhappy with how he administers his social media accounts. Though Plaintiffs might disagree with his social media practices, the place to register that disagreement is at the polls.

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