Article

Trump, Twitter, and the First Amendment

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Abstract
This article considers the constitutional implications of US President Donald Trump's use of Twitter. This issue arose in the recent case of *Knight First Amendment Institute at Columbia University v Trump*, where a US federal court considered for the first time whether Trump's actions in blocking users from his personal Twitter account violated the First Amendment to the US Constitution. In exploring the US court's treatment of this question, the article will consider the challenges that arise in applying established free speech doctrine to newly emerging technologies, concluding with some reflections from an Australian perspective.

Keywords
Comparative law, constitutional law, freedom of speech, social media

In recent years, social media has become an integral part of the 21st-century political landscape. Politicians regularly use private online platforms such as Twitter and Facebook as a tool for communicating directly with their constituents, and debate about public affairs is increasingly conducted in this virtual space. The US President Donald J Trump is no exception to these broader trends. The President's personal Twitter account – '@realDonaldTrump'[1] – has over 54 million followers, and has been used by Trump to tweet more than 38,000 times since it was established. Notable examples since his January 2017 inauguration include Trump's frequent railing against the 'fake news' media,[2] use of Twitter to announce official government decisions (such as the nomination of Christopher Wray as FBI director),[3] provocative tweets about North Korea (calling leader Kim Jong Un a 'little rocket man'),[4] and even the now infamous 'covfefe' incident.[5]

This article will consider the novel question of the potential *constitutional* implications of Trump's Twitter practices. This issue was raised in the recent case of *Knight First Amendment Institute at Columbia University v Trump* (*Knight Institute v Trump*),[6] where a US federal court considered for the first time whether it is unconstitutional for a public official (here the President of the United States) to 'block' other users on Twitter.

First, the article will provide an overview of the relevant background facts for the case, before introducing the US 'public forum' doctrine. Next, it will examine how these legal principles were applied to 'the distinctly twenty-first century medium of Twitter',[7] and the conclusions reached regarding the constitutionality of

[1]@realDonaldTrump (Donald J Trump) (Twitter) https://twitter.com/realDonaldTrump.
[2]For example, on 17 February 2017 (shortly after his inauguration) the @realDonaldTrump account tweeted: 'The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!'
[3]On 7 June 2017, the @realDonaldTrump account tweeted: 'I will be nominating Christopher A. Wray, a man of impeccable credentials, to be the new Director of the FBI. Details to follow'.
[4]On 30 November 2017, the @realDonaldTrump account tweeted: 'The Chinese Envoy, who just returned from North Korea, seems to have had no impact on Little Rocket Man. Hard to believe his people, and the military, put up with living in such horrible conditions. Russia and China condemned the launch'.
[5]Shortly after midnight (in Washington DC) on 31 May 2017, the @realDonaldTrump account tweeted the seemingly incomplete sentence: 'Despite the constant negative press covfefe', sparking a viral response.
[6]*Knight First Amendment Institute at Columbia University v Donald J Trump*, 302 F Supp 3d 541 (SD NY, 2018) (*Knight Institute v Trump*).
[7]*Knight Institute v Trump*, 302 F Supp 3d 541, 564 (SD NY, 2018).

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President Trump's actions. Finally, the article will offer some reflections on these issues from an Australian perspective.

Factual background

Twitter is a social media platform with more than 70 million users in the United States and over 300 million active users worldwide.[8] A 'user' is an individual who has created an account on the platform. Twitter allows users to post short messages, called 'tweets', and the collection of a particular user's tweets are displayed as their 'timeline' on the Twitter website. The platform offers a number of functions for users to interact with each other, including the ability to 'follow' a user (view what they post), and 'retweet' (repost) or 'reply' to other users' tweets. Further, by 'blocking', a user can limit their interaction with another user by preventing them from viewing or replying to the blocking user's tweets or timeline.

The '@realDonaldTrump' Twitter account was established by Donald Trump in March 2009. Before his inauguration, he used this account to tweet about a variety of topics, including popular culture and politics. Since January 2017, President Trump has frequently used the @realDonaldTrump account as a channel for communicating and interacting with the public about his Administration, despite the fact that a separate '@POTUS' account exists as the official Twitter account for the officeholder of the President of the United States.[9]

Among other things, Trump has used his personal Twitter account to announce official decisions (often before publication through other channels);[10] to introduce, describe and defend government policies; to engage with foreign political leaders and publicise state visits; and to challenge media organisations whose coverage of his Administration he believes to be unfair. During this period, the account has also been used to discuss other issues not directly related to official governmental business.

In July 2017, a not-for-profit free speech organisation (Knight First Amendment Institute at Columbia University) sued President Trump, the White House social media director (Dan Scavino), and a number of other Administration officials. Joined by a group of seven Twitter users whose accounts had been blocked by @realDonaldTrump after they tweeted a message critical of the President or his policies in a reply to a tweet from the account (*the individual plaintiffs*), they argued that Trump had infringed the First Amendment to the United States *Constitution* by blocking these users on Twitter. Specifically, the plaintiffs argued that Trump had violated the free speech rights of these users to participate in a 'public forum'.

US public forum doctrine

The original United States *Constitution* of 1787 contained no express right to freedom of expression. This reflected a belief held by some of the framers that the structural arrangements adopted would provide a sufficient constraint against governmental abuses, as the limited powers conferred on the federal government were restricted and confined. However, in response to concerns that specific guarantees of individual liberties were necessary to limit government power, in 1791 a 'Bill of Rights' was inserted in the form of the first 10 amendments.

Relevantly for the purposes of this article, the First Amendment to the United States *Constitution* provides that 'Congress shall make no law . . . abridging the freedom of speech' (*Free Speech Clause*). The Supreme Court has interpreted this provision as protecting an incredibly wide range of speech and expressive conduct, to such an extent that 'freedom of speech is a much more pervasive constitutional right in the United States than in most other constitutional democracies'.[11] However, notwithstanding this, the American right to free speech is not absolute. For example, under the 'state action' doctrine, the Free Speech Clause operates 'vertically' against the coercive power of the *state* against the individual, but does not bind *private* actors. As such, there is no First Amendment right against a private corporation or individual (ie, against private censorship), or to speak on private property.[12]

From the early 20th-century onwards, the US Supreme Court has held that the government is required to keep certain public and government-owned spaces open for free speech.[13] In *Perry Education Association v Perry Local Educators' Association* (*Perry*)[14] the Court introduced the modern 'public forum' doctrine, in which it identified three categories of 'forums', each of which attracts different levels of speech protection under the First Amendment.[15]

First, a 'traditional' public forum is a space that has historically been open to public speech – for example,

[8]The summary in this section draws upon the wording adopted in the stipulation of facts between the parties in the *Knight Institute v Trump* case.
[9]The official '@POTUS' Twitter account was established under the Obama Administration.
[10]For example, the @realDonaldTrump account was used to announce for the first time that the President intended to nominate Christopher Wray for the position of FBI director (on 7 June 2017, the account tweeted 'I will be nominating Christopher A. Wray, a man of impeccable credentials, to be the new Director of the FBI. Details to follow'.). Similarly, the account was used in the removal of then US Secretary of State Rex Tillerson from office, with the 13 March 2018 tweet: 'Mike Pompeo, Director of the CIA, will become our new Secretary of State. He will do a fantastic job! Thank you to Rex Tillerson for his service! Gina Haspel will become the new Director of the CIA, and the first woman so chosen. Congratulations to all!'.
[11]Michel Rosenfeld, 'Hate Speech in Constitutional Jurisprudence: A Comparative Analysis' (2003) 24(4) *Cardozo Law Review* 1523, 1530 (footnote omitted).
[12]Note, though, that in some US states there are *state* constitutional rights that restrict private actors from limiting free speech. For example, the California *Constitution* has been found to protect speech and petitioning, reasonably exercised, in shopping centres even when the shopping centres are privately owned (see *PruneYard Shopping Center v Robins*, 447 US 74 (1980)).
[13]See *Hague v Congress of Industrial Organizations,* 307 US 496 (1939) (*Hague v CIO*) for early recognition of this constitutional principle.
[14]460 US 37 (1983) (*Perry*).
[15]See *Minnesota Voters Alliance v Mansky,* 585 US ____ (2018) for a recent discussion of the public forum doctrine.

a town square, public sidewalks and public parks. As expressed in *Perry*, these are 'places which by long tradition or by government fiat have been devoted to assembly and debate'.[16] Such spaces 'have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions'.[17] In these 'quintessential' public forums, the government cannot completely eliminate or suppress speech, and 'the rights of the State to limit expressive activity are sharply circumscribed'.[18]

In a traditional public forum, speech restrictions based upon the *subject matter* of the message (ie, its 'content') are presumptively unconstitutional. Within this category, even more stringent has been the Court's attitude towards content-based restrictions that discriminate on the basis of a particular *viewpoint*.[19] Under the relevant legal test, (described as a 'strict scrutiny' standard of review), to enforce a content-based exclusion on speech, the government must establish that the regulation is necessary to serve a compelling state interest, and is narrowly tailored to achieving that interest. As constitutional scholar Gerald Gunther famously observed, due to the exacting nature of this standard, strict scrutiny can be viewed as 'strict in theory, but fatal in fact'. While it is certainly possible to survive this standard of review,[20] a high threshold is required.[21]

In contrast, while it is permissible to enact content 'neutral' regulations of the time, place, and manner of expression (for example, noise level regulations), the government must ensure this still leaves open ample alternative channels of communication[22] (described as an 'intermediate scrutiny' standard).[23]

Second, a 'designated' public forum is a space that 'the state has opened for use by the public as a place for expressive activity'.[24] If the government creates or opens such a forum and chooses to allow the space to be used for public speech, although it is not required to leave the forum open, as long as it does so it is bound by the same standards as in a traditional public forum.[25] Relevantly, in *Rosenberger v University of Virginia,*[26] the Supreme Court recognised that the concept of a designated public forum can extend beyond physical spaces to include a forum 'more in a metaphysical sense than in a spatial or geographic sense'.[27]

Finally, a 'non-public' forum was defined in *Perry* as 'public property which is not by tradition or designation a forum for public communication',[28] and 'is governed by different standards' to the first two categories discussed above.[29] For example, in *Minnesota Voters Alliance v Mansky,*[30] the Supreme Court held that a polling place in Minnesota 'qualifies as a nonpublic forum', as '[i]t is, at least on Election Day, government controlled property set aside for the sole purpose of voting'.[31] In such spaces, the 'State may reserve the use of the property for its intended purposes, communicative or otherwise, as long as a regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view'.[32]

An important exception to the public forum doctrine is the category of 'government speech'. The Supreme Court has held that when the government 'is speaking on its own behalf, the First Amendment strictures that attend the various types of government-established forums do not apply'.[33] In particular, when the government itself is speaking, it may advance its own message without regard to the usual requirement for content- and viewpoint-neutrality.[34]

The current dispute raised a number of novel questions. Here, the 'virtual' space of Twitter was being used to engage in public discourse in a way traditionally associated with physical spaces used for congregation and debate. Further, Twitter is a *private*, and not governmental, entity. The central issue was thus whether social

[16]*Perry*, 460 US 37, 45 (1983).
[17]*Perry*, 460 US 37, 45 (1983), quoting *Hague v CIO,* 307 US 496, 515 (1939).
[18]*Perry*, 460 US 37, 45 (1983).
[19]On 'viewpoint-based' discrimination see Geoffrey Stone, 'Content Regulation and the First Amendment' (1983) 25(2) *William and Mary Law Review* 189, 197ff. See also *Rosenberger v University of Virginia,* 515 US 819, 828 (1995) (emphasis added): 'It is axiomatic that the government may not regulate speech based on its substantive content *or the message it conveys*'.
[20]For a recent example see *Williams-Yulee v The Florida Bar*, 575 US __ (2015), where the Court found that a state prohibition on judicial candidates personally soliciting campaign funds survived strict scrutiny and did not violate the First Amendment, as the asserted state interest in 'protecting the integrity of the judiciary' and 'maintaining the public's confidence in an impartial judiciary' was compelling, and the prohibition was narrowly tailored to this interest.
[21]For example, a California statute imposing restrictions and labelling requirements on the sale or rental of violent video games to minors was struck down for failing to meet this standard: See *Brown v Entertainment Merchants*, 564 US 786 (2011).
[22]*Perry*, 460 US 37, 45 (1983).
[23]*Turner Broadcasting v FCC*, 512 US 622, 642 (1994) ('[R]egulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny . . .') (citation omitted). Professor Geoffrey Stone has described the content-based/content-neutral distinction as 'the most pervasively employed doctrine in the jurisprudence of free expression'. Stone, above n 19, 189 (footnote omitted).
[24]*Perry*, 460 US 37, 45 (1983).
[25]*Perry*, 460 US 37, 46 (1983).
[26]515 US 819 (1995).
[27]*Rosenberger v University of Virginia,* 515 US 819, 830 (1995). Note that the case refers to a 'limited' public forum.
[28]*Perry*, 460 US 37, 46 (1983).
[29]*Perry*, 460 US 37, 46 (1983).
[30]585 US ___ (2018).
[31]585 US ___ (2018) slip op 8 (Roberts CJ).
[32]*Perry*, 460 US 37, 46 (1983).
[33]*Walker v Texas Division, Sons of Confederate Veterans*, 135 S Ct 2239, 2250 (2015).
[34]For example, the government can engage in expression to advance its chosen message on a policy issue – such as running an anti-tobacco campaign with slogans such as 'Don't Smoke' – without being required to also promote the alternative view.

media platforms (here Twitter) used by government officials to interact with the public are subject to the First Amendment. Specifically, the primary point of dispute between the parties was whether President Trump's blocking of the individual plaintiffs on Twitter implicated a forum for First Amendment purposes.

Relevantly, the relationship between the First Amendment and the modern Internet was recently considered by the Supreme Court in the 2017 decision of *Packingham v North Carolina*.[35] In this case, after noting the 'basic rule' that a street or park is 'a quintessential forum for the exercise of First Amendment rights',[36] Justice Kennedy (writing for the majority) expressed the view that:

> While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace – the 'vast democratic forums of the Internet' in general, *Reno v American Civil Liberties Union*, 521 US 844, 868 (1997), and social media in particular.[37]

Later in the judgment, Kennedy J further described social media sites (such as Twitter) as 'the modern public square'.[38] By framing social media sites in this way (by analogy to a physical public space), and emphasising their central communicative role in the modern context, this arguably strengthened the possibility that the public forum doctrine might be extended to cover 'digital' spaces such as government-administered social media profiles.[39]

Application in Knight Institute v Trump

On 23 May 2018, District Court[40] Judge Naomi Reice Buchwald handed down judgment in the case, introducing the decision as follows:

> This case requires us to consider whether a public official may, consistent with the First Amendment, 'block' a person from his Twitter account in response to the political views that person has expressed, and whether the analysis differs because that public official is the President of the United States. The answer to both questions is no.[41]

After establishing the plaintiffs had 'standing',[42] Judge Reice Buchwald turned to the merits of the substantive First Amendment claim – whether the public forum doctrine applied to Trump's personal Twitter account, such that his actions in blocking the individual plaintiffs should be assessed by reference to the strict speech protections afforded by the First Amendment.

First, it was emphasised that Twitter (and the @realDonaldTrump account) *as a whole* is not a 'public forum' for First Amendment purposes.[43] Instead, a number of particular *aspects* of the account were identified to which the forum doctrine could potentially apply, described as:

> . . . the content of the tweets sent, the timeline comprised of those tweets, the comment threads initiated by each of those tweets, and the 'interactive space' associated with each tweet in which other users may directly interact with the content of the tweets by, for example, replying to, retweeting, or liking the tweet.[44]

Government control or ownership

Importantly, to qualify as a public forum subject to the rules and legal scrutiny outlined above, the space in question must be 'owned or controlled by the government'.[45] Although it was emphasised that 'Twitter is a private (though publicly traded) company that is not government-owned',[46] the Judge held that Trump and Scavino exerted control over *certain* aspects of the @realDonaldTrump account:

> [Trump and Scavino] control the content of the tweets that are sent from the account and they hold the ability to prevent, through blocking, other Twitter users, including the individual plaintiffs here, from accessing the @realDonaldTrump timeline . . . and from participating in the interactive space associated with the tweets sent by the @realDonaldTrump account.[47]

[35] 137 S.Ct. 1730 (2017) (*Packingham*).
[36] *Packingham*, 137 S.Ct. 1730, 1735 (2017) (Kennedy J).
[37] *Packingham*, 137 S.Ct. 1730, 1735 (2017) (Kennedy J).
[38] *Packingham*, 137 S.Ct. 1730, 1737 (2017) (Kennedy J).
[39] That being said, some commentators, in noting the potential implications of the *Packingham* decision, have cautioned against too readily extending First Amendment doctrines to the internet. Specifically, concerns have been expressed regarding application of the public forum doctrine in this context due to 'the hybrid public and private nature of digital realms' – for example, government-administered social media profiles that are privately owned but government administered: See '*Packingham v North Carolina*' (2017) 131 *Harvard Law Review* 233, 233.
[40] United States District Court for the Southern District of New York.
[41] *Knight Institute v Trump*, 302 F Supp 3d 541, 549 (SD NY, 2018).
[42] That is, a legally recognised injury allowing them to sue: *Knight Institute v Trump*, 302 F Supp 3d 541, 555 – 564 (SD NY, 2018).
[43] *Knight Institute v Trump*, 302 F Supp 3d 541, 566 (SD NY, 2018).
[44] *Knight Institute v Trump*, 302 F Supp 3d 541, 566 (SD NY, 2018).
[45] *Knight Institute v Trump*, 302 F Supp 3d 541, 565 (SD NY, 2018).
[46] *Knight Institute v Trump*, 302 F Supp 3d 541, 566 (SD NY, 2018).
[47] *Knight Institute v Trump*, 302 F Supp 3d 541, 566-67 (SD NY, 2018). It did not matter that Twitter *also* exerted control over the account (and all Twitter accounts) (567). However, this control did not extend to *all* aspects of the account – in particular, it 'does not extend to the comment thread initiated by a tweet sent by the @realDonaldTrump account', which was therefore not a forum for these purposes (569–70).

Further, the President and Scavino's control over the account was found to be *governmental* in nature:

> [T]he President presents the @realDonaldTrump account as being a presidential account as opposed to a personal account and, more importantly, uses the account to take actions that can be taken only by the President as President.[48]

Relevant to this holding was the fact that (1) the @realDonaldTrump account is presented as being registered to 'Donald J. Trump, 45th President of the United States of America, Washington, D.C.'; (2) the President's tweets from the account are official records that must be preserved under the *Presidential Records Act*; and (3) the account has been used in the course of the appointment of officers (including cabinet secretaries), the removal of officers, and the conduct of foreign policy – 'all of which are squarely executive functions'.[49]

The Administration attempted to counter this conclusion by emphasising that the account was established by Trump in 2009 (well before his election and inauguration as President). However, the Judge found this argument 'unpersuasive',[50] as 'the President and Scavino's present use of the @realDonaldTrump account [for governmental functions] weighs far more heavily in the analysis than the origin of the account as the creation of private citizen Donald Trump'.[51]

Although the above three aspects of the account satisfied the government control criterion, the Judge found that (1) the content of the President's tweets;[52] and (2) the account's timeline (displaying all tweets generated by the account),[53] were 'government speech' and therefore not subject to public forum rules. It was noted that the Supreme Court has considered at least three factors in assessing whether speech is 'government speech': (1) whether government has historically used the speech in question to 'convey state messages'; (2) whether that speech is 'often closely identified in the public mind' with the government; and (3) the extent to which government 'maintain[s] direct control over the messages conveyed'.[54]

Applied here, the latter two considerations were particularly relevant. The *content* of tweets sent from the @realDonaldTrump account are closely associated with the President (and cannot be generated by any other user), who speaks on his own behalf about a variety of matters of official government business – for example, announcing, promoting and defending his policies and official decisions as President.[55] The same reasoning applies to the account's timeline, given that it simply aggregates the content of the account's tweets, all of which is government speech.[56]

However, '[t]he same cannot be said ... of the interactive space for replies and retweets created by each tweet sent by the @realDonaldTrump account'.[57] Relevantly, the government has no control over the content of reply tweets generated by other users, and such tweets are 'most directly associated with the replying user rather than the sender of the tweet being replied to'.[58] Taken together, the Judge held that 'these factors support the conclusion that replies to the President's tweets remain the private speech of the replying user'.[59] As such, as 'the interactive space associated with each of the President's tweets is not government speech', it was therefore 'properly analysed under the Supreme Court's forum precedents'.[60]

Classifying @realDonaldTrump's 'interactive spaces': A designated public forum

Having found that the 'interactive space' associated with each tweet from the @realDonaldTrump account was a First Amendment regulated space, and susceptible to analysis under the public forum doctrine, the Judge next considered the appropriate forum classification to be assigned. First, an 'interactive space' was not a traditional public forum, as '[t]here is no historical practice of the interactive space of a tweet being used for public speech and debate since time immemorial, for there is simply no extended historical practice as to the medium of Twitter'.[61]

However, the space opened up by each tweet from the @realDonaldTrump account was found to constitute a *designated* public forum. Relevantly, the @realDonaldTrump account is generally accessible to the public at large (without regard to any limiting criteria such as political affiliation); any (unblocked) Twitter user 'may participate in the interactive space by replying or retweeting the President's tweets'; and 'the account ... has been held out by Scavino as a means through which the President "communicates directly with you, the American people!"'[62]

[48] *Knight Institute v Trump*, 302 F Supp 3d 541, 567 (SD NY, 2018).
[49] *Knight Institute v Trump*, 302 F Supp 3d 541, 567 (SD NY, 2018).
[50] *Knight Institute v Trump*, 302 F Supp 3d 541, 569 (SD NY, 2018).
[51] *Knight Institute v Trump*, 302 F Supp 3d 541, 569 (SD NY, 2018).
[52] *Knight Institute v Trump*, 302 F Supp 3d 541, 571 (SD NY, 2018).
[53] *Knight Institute v Trump*, 302 F Supp 3d 541, 572 (SD NY, 2018).
[54] *Knight Institute v Trump*, 302 F Supp 3d 541, 571 (SD NY, 2018).
[55] *Knight Institute v Trump*, 302 F Supp 3d 541, 571 (SD NY, 2018).
[56] *Knight Institute v Trump*, 302 F Supp 3d 541, 572 (SD NY, 2018).
[57] *Knight Institute v Trump*, 302 F Supp 3d 541, 572 (SD NY, 2018).
[58] For example, a reply tweet will appear with the replying user's name/picture, and be displayed more prominently in their timeline.
[59] *Knight Institute v Trump*, 302 F Supp 3d 541, 572 (SD NY, 2018).
[60] *Knight Institute v Trump*, 302 F Supp 3d 541, 573 (SD NY, 2018).
[61] *Knight Institute v Trump*, 302 F Supp 3d 541, 574 (SD NY, 2018).
[62] *Knight Institute v Trump*, 302 F Supp 3d 541, 574 (SD NY, 2018).

Based on this conclusion (triggering the strict scrutiny test discussed above), it was therefore problematic that the individual plaintiffs had been blocked by Trump because of their political *viewpoint* – one critical of the President or his policies. For this reason, the Judge found that '[t]he continued exclusion of the individual plaintiffs based on viewpoint is . . . impermissible under the First Amendment',[63] and issued declaratory relief.[64]

Australian reflections

Knight Institute v Trump is likely to prompt reflection on how these issues might be decided under the Australian constitutional system. Like their US counterparts, it is common for Australian politicians to utilise social media to engage directly with voters and make public announcements,[65] as illustrated by the use of Twitter in the 2018 federal leadership spill.[66]

Significantly, the Australian *Constitution* contains no direct equivalent of the express First Amendment right to free speech, reflecting the influence of the Westminster tradition and model of 'political constitutionalism'[67] with respect to rights protection.[68] To the extent freedom of expression receives constitutional protection in Australia, this arises due to the more limited 'freedom of political communication' doctrine the High Court has recognised as *impliedly* provided for in the Australian *Constitution*'s text and structure (*the implied freedom*). Although the implied freedom also operates 'vertically' against the state (as a limit on the ability of the government to restrict communication about 'governmental' and 'political' matters), it has largely been conceptualised by Australian courts as a constraint on legislative power, rather than conferring a personal or individual 'right' to free speech.

Rather than the categorical tests applied in the US (where content-based restrictions in a traditional or designated public forum are presumptively invalid), in Australia the relevant analysis involves a more general 'balancing' approach, where courts inquire (1) does an impugned law effectively burden communication about political matters in its terms, operation or effect; (2) is the purpose of the law legitimate;[69] and (3) if so, is the law reasonably appropriate and adapted to achieving that legitimate object (ie, is it 'proportionate')?[70]

The implied freedom is less developed than its American counterpart, having been recognised by a majority of the High Court for the first time in 1992,[71] and modified through subsequent cases.[72] This leaves a number of interesting questions for Australian courts to grapple with going forward, particularly regarding the intersection between the implied freedom and newly emerging technologies such as Twitter.

For example, how should the burden be conceptualised when certain persons are excluded from a particular communicative 'site' (eg, the digital space on a government-endorsed social media account),[73] but can participate in broader political discourse through other channels, and in other places? What significance should be attached to the current role played by social media in public debate, replacing functions historically served by other mediums? Should the same principles apply to a 'metaphysical' digital space, as are recognised in physical places?

Notably, speech interests do not receive the same privileged level of protection in Australia as under the First Amendment. A relevant consideration in the Australian context may therefore be the issue of online bullying (or 'trolling'), and when it is permissible for a politician to 'block' an abuser. On the one hand, the High

[63] *Knight Institute v Trump*, 302 F Supp 3d 541, 575 (SD NY, 2018) (footnote omitted).
[64] '[A] declaration will therefore issue: the blocking of the individual plaintiffs from the @realDonaldTrump because of their expressed political views violates the First Amendment': *Knight Institute v Trump*, 302 F Supp 3d 541, 579 (SD NY, 2018).
[65] See, eg, the following accounts registered to Prime Minister Scott Morrison (@ScottMorrisonMP) https://twitter.com/ScottMorrisonMP and federal Opposition leader Bill Shorten (@billshortenmp) https://twitter.com/billshortenmp.
[66] On 24 August 2018 Twitter was used by former Prime Minister Malcolm Turnbull to announce a meeting of the Parliamentary Liberal Party for a leadership vote, with the @TurnbullMalcolm account (https://twitter.com/TurnbullMalcolm) tweeting: 'I have just been provided with a request for a meeting of the Parliamentary Liberal Party. It has 43 signatures. As soon as they are verified by the Whips, which should not take long, the meeting will be called'. Similarly, former Foreign Affairs Minister Julie Bishop used Twitter as a tool to announce her resignation from cabinet – on 26 August 2018 the @JulieBishopMP account (https://twitter.com/JulieBishopMP) tweeted: 'Today I advised the Prime Minister that I will be resigning from my Cabinet position as Minister for Foreign Affairs. It has been an honour', attaching the official press release.
[67] On 'political constitutionalism' see Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007).
[68] Writing shortly after the Australian *Constitution* was drafted, Sir Harrison Moore expressed the view that '[t]he great underlying principle is, that the rights of individuals are sufficiently secured by ensuring, so far as possible, to each a share, and an equal share, in political power': Sir Harrison Moore, *The Constitution of the Commonwealth of Australia* (1902) 329. As described by Stephen Gardbaum, '[Australia] most epitomizes the model of political constitutionalism with respect to rights, in that it remains today the rare country without a general charter or bill of rights at the national level. . . . Australia . . . is . . . a hybrid system . . . with judicial supremacy on the structural issues of federalism and separation of powers, and mostly parliamentary sovereignty on matters of rights'. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013), 204.
[69] As modified in *Brown v Tasmania* (2017) 91 ALJR 1089, 1112 (Kiefel CJ, Bell and Keane JJ).
[70] In 2015, a bare majority of the High Court adopted a three-part 'proportionality' test as an analytical tool to structure this final inquiry: *McCloy v New South Wales* (2015) 257 CLR 178, 193–95 (French CJ, Kiefel, Bell and Keane JJ).
[71] See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
[72] See, in particular, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1; *McCloy v New South Wales* (2015) 257 CLR 178; and *Brown v Tasmania* (2017) 91 ALJR 1089.
[73] Further, there are still areas of uncertainty regarding the doctrine's application to *executive*, rather than legislative, burdens on the implied freedom. This adds an additional complication to the issue of whether the doctrine is applicable in the case of a government minister (ie, an executive officer) imposing a 'burden' on speech by excluding persons from participating in discussion on the politician's social media account.

Court has adopted a particularly 'robust' conception of political discourse in its existing case law.[74] Conversely, at what point does such communication cease to be a constructive contribution to public debate? Is there a risk that ongoing abuse voiced through online platforms, often gendered in nature and directed at both politicians and other contributors, may drive certain participants out of the 'marketplace of ideas'?

Comparative insights?

Understandably, legal doctrine developed by foreign courts does not automatically apply in Australia. However, although not authoritative, it is common for the High Court to cite or draw upon foreign doctrine and reasoning it finds persuasive (a prominent recent example being the majority endorsement in 2015 of European-style 'proportionality' testing as an analytical tool in implied freedom cases).[75]

Interestingly, although the public forum doctrine has not been formally adopted by the High Court, certain considerations articulated in US cases have had some influence. For example, *Levy v Victoria*[76] involved a challenge to Victorian regulations that prohibited a person entering duck hunting areas during open season without a license.[77] Notably, although not determinative to the holding, one Justice (Kirby J) engaged in a detailed discussion of the US public forum doctrine, setting out the three-part *Perry* framework[78] before expressing the view that:

> In determining the scope of the constitutionally protected freedom of communication in Australia, it seems reasonable to take into consideration at least some of the matters mentioned in the United States decisions.[79]

Applied here, among other things Kirby J considered it relevant that 'the place affected by the impugned law in the present case [a duck shooting area] was not a traditional, or designated, forum for public communication'[80] – 'It was no "Hyde Park"'.[81]

Justice Kirby's use of comparison raises the question of the potential relevance of US free speech law more generally to the High Court's doctrinal development of the implied freedom. As overseas courts begin to grapple with challenging and novel legal problems also likely to arise in the Australian context, might there be value in having regard to such comparative approaches, and the concepts and considerations articulated by foreign courts to assist in adjudicating such disputes?

Conclusion

Knight Institute v Trump has attracted extensive media coverage in the United States – understandable as it is the first judicial consideration of the First Amendment free speech implications of President Trump's Twitter usage. Commentary is likely to continue, as the Administration has filed notice indicating that it is appealing the lower court decision to the Second Circuit Court of Appeals.[82]

In some respects, the ruling was relatively narrow. It does not apply to Twitter as a whole, or to 'purely personal' social media accounts that a public official 'does not impress with the trappings of her office and does not use to exercise the authority of her position'.[83] However, the case has important consequences for US public officials using social media platforms to invite public contributions, where such accounts are being used for official governmental business. Further, as illustrated in this case, even seemingly 'private' accounts may be subject to the First Amendment when used for governmental functions.

From an Australian perspective, there may well be value in having regard to how this litigation develops, as US courts continue to grapple with the challenge of applying established free speech principles to newly emerging technologies, and other such novel legal issues.

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[74]For example, Adrienne Stone notes that arguments regarding 'civility' and 'enhancement' of the quality of public debate were 'very clearly rejected by the majority' in *Coleman v Power* (2004) 220 CLR 1, in favour of a more 'robust' conception of political communication: Adrienne Stone, 'Insult and Emotion, Calumny and Invective: Twenty Years of Freedom of Political Communication' (2011) 30(1) *University of Queensland Law Journal* 79, 86–89.
[75]See *McCloy v New South Wales* (2015) 257 CLR 178, 193–5 (French CJ, Kiefel, Bell and Keane JJ).
[76]*Levy v Victoria* (1997) 189 CLR 579.
[77]*Wildlife (Game) (Hunting Season) Regulations 1994* (Vic).
[78]*Levy v Victoria* (1997) 189 CLR 579, 638–40 (Kirby J)
[79]*Levy v Victoria* (1997) 189 CLR 579, 641–42 (Kirby J) (emphasis added).
[80]*Levy v Victoria* (1997) 189 CLR 579, 642 (Kirby J), citing in footnote 215 relevant US authorities.
[81]*Levy v Victoria* (1997) 189 CLR 579, 642 (Kirby J)
[82]An intermediate appellate court in the American federal court hierarchy.
[83]The Judge acknowledged that '[n]o one can seriously contend that a public official's blocking of a constituent from her purely personal Twitter account – one that she does not impress with the trappings of her office and does not use to exercise the authority of her position – would implicate forum analysis': *Knight Institute v Trump*, 302 F Supp 3d 541, 569 (SD NY, 2018).