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Introduction to the Oxford Handbook on Freedom of Speech

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Freedom of speech is a central commitment of political liberalism, a principle of positive constitutional law in virtually all modern constitutions and a principle of international human rights law.[1] Although among the most widely agreed upon and celebrated legal and constitutional principles of modern times, it is also the source of enduring and intense disagreement. We cannot fail to notice, moreover, that this Handbook is to be published at a time of some controversy about the power of freedom of speech in the face of new threats to democracy[2] and the challenges of the digital economy.[3] At worst, freedom of speech might even be part of the problem – a principle weaponised against the ideals from which it sprang.[4]

In this tumultuous context, this Handbook provides a comprehensive exploration of freedom of speech both as a political idea and as a legal principle. It is arranged in three parts: The chapters in Part I focus on freedom of speech as a political idea and upon the ideas and rationales that underlie it; the chapters in Part II focus on distinctive features of freedom of speech as a legal principle. In the final part of the Handbook, the chapters focus on a range of controversies that have arisen in constitutional systems throughout the world and which illustrate and elaborate upon the general themes of Parts I and II.

A. Fundamental Questions and Perspectives

Part I begins with the most fundamental questions about the nature of freedom of speech: its history and rationales. Although a form of freedom of speech was evident in ancient

[1] Freedom of speech is used here interchangeably with 'freedom of expression' though on the relationship between these concepts, see Frederick Schauer 'What is Speech? The Question of Coverage' chapter [9] in this volume.

[2] Mark Graber, Sanford Levinson and Mark Tushnet, (eds), Constitutional Democracy in Crisis? (Oxford University Press, 2018).

[3] Tim Wu, 'Is the First Amendment Obsolete?' (2018) 117 *Michigan Law Review* 547, 568.

[4] *Janus v AFSCME, Council 31*, 138 S Ct 2448, 3501 (2018). See also, Cynthia Estlund 'Freedom of Expression in the Work Place' chapter [xref] of this volume.

times,[5] it is enlightenment thinking that is usually credited with the decisive influence on modern conceptions.[6] Its influence is especially well documented by scholars of the First Amendment to the Constitution of the United States. In chapter 2, Vincent Blasi, in a subtle exploration of the classic arguments for freedom of speech, traces the first comprehensive argument for freedom of speech as a limiting principle of government to John Milton's *Areopagitica*, a polemic against censorship by a requirement of prior licensing in which Milton develops an argument for the pursuit of truth through exposure to false and heretical ideas rather than the passive reception of orthodoxy.[7]

Despite Milton's belief in the advancement of understanding through free inquiry, he was far from liberal in the modern sense of that term and he did not, for instance, extend the tolerance he advocated to Catholic religious texts. The most famous and influential exposition of a liberal theory of freedom of speech is found in the work of John Stuart Mill.[8] Mill's argument for freedom of speech, commonly understood as based on freedom of speech as a facilitator of the search for truth and knowledge,[9] is central to chapters 1 and 3. In chapter 1, Christopher McLeod reminds us of the precise nature of Mill's claim. Three especially important points come to the fore. First, Mill's argument turns on the fallibility of human knowledge and his belief in the consequent value in subjecting ideas to contradiction. Second, while in constitutional law the focus has been on interference with freedom of speech by the state, Mill was as much concerned with 'moral reproach' that arises from social intolerance and social pressure. Finally, by virtue of its focus on the pursuit of truth, the Millian argument is focussed on discussion rather than expression more broadly and therefore has little obvious application to non-propositional expression found in instrumental music and abstract art. (A theme later taken up by others,[10] including Mark Tushnet who, in

[5] D M Carter, 'Citizen Attribute, Negative Right: A Conceptual Difference between Ancient and Modern Ideas of Freedom of Speech' in Ineke Sluiter and Ralph Rosen (eds), *Free Speech in Classical Antiquity* (Brill 2004).

[6] Elizabeth Power, *Freedom of Speech: The History of An Idea* (Bucknell UP 2011).

[7] John Milton, *Areopagitica: A Speech for the Liberty of Unlicensed Printing, to the Parliament of England* (J C Suffolk ed, University Tutorial P 1968).

[8] John Stuart Mill, *On Liberty* (David Spitz ed, W W Norton 1975).

[9] An alternative understanding of Mill sees *On Liberty* as less about the search for truth and more about the development of certain virtues of intellectual character. See Vincent Blasi, 'Shouting "Fire!" in a Theater and Vilifying Corn Dealers' (2011) 39 Capital U L Rev 535.

[10] See also Frederick Schauer, 'What is Speech? The Question of Coverage', chapter [9] in this volume.

chapter 23, explores the problem of incorporating music and art into a theory of freedom of speech without also including a far wider range of human activities.)

The complexities of the truth justification for freedom of speech are further explored by William Marshall in chapter 3. Marshall identifies its many flaws: the implausibility of the claim that freedom of speech is a mechanism for producing truth; the problems of public irrationality and apathy in a 'post-truth' age; and, most fundamentally, the difficulties in identifying the normative appeal of truth itself, especially in circumstances in which it causes harm. Abandoning these traditional arguments for truth, Marshall appeals to truth as an ideal serving a narrative function 'akin to the role played by myth in religion'.[11]

The argument from truth is one of three prominent lines of thought evident in an extensive philosophical literature on freedom of expression. Each of these lines of argument are explored in chapters in Part I. A second line of argument relies on the connection between freedom of speech and autonomy. Freedom of speech is said to protect (or to be integral to) individual autonomy by allowing individuals to form their own opinions about their beliefs and actions or by enabling 'self-development'; or because respecting freedom of speech accords (or is constitutive of) dignity, equal concern and respect due to all individuals. In chapter 4, Catriona MacKenzie and Denise Meyerson explore the autonomy argument generally, and in chapter 6, Dieter Grimm explores the argument from dignity.

The third line of argument, perhaps the most widely influential in the constitutional law of freedom of speech, relies upon the connection between freedom of speech and democratic self-government. Ashutosh Bhagwhat and James Weinstein explore the argument from democracy in chapter 5.

These three lines of argument - something of a 'classic trio' of justifications for freedom of speech – are the usual starting point of philosophical inquiry. But each gives rise to complex problems. Some are common to each rationale. In an echo of some arguments made against the truth rationale, arguments from autonomy are criticised for their failure to focus on the

[11] William P Marshall, 'The Truth Justification for Freedom of Speech', chapter [3] in this volume.

conditions necessary for the realisation of autonomy. This line of thought has been especially prominent in feminist analysis of freedom of speech. In their chapter, MacKenzie and Meyerson explore a number of ways in which the problem has been addressed, from Susan Brison's forthright critique of the autonomy justification for permitting hate speech[12] and for failing adequately to distinguish autonomous speech from non-speech forms of autonomy,[13] to Susan Williams' idea of relational autonomy.[14]

Another kind of challenge for these arguments arises from the complexity of the ideas that underscore each rationale. This emerges clearly in Bhagwat and Weinstein's chapter on the democracy justification. As they show, it is well recognised that freedom of speech performs an essential informing function, enabling the people to vote and participate in public discourse, and informs representatives of the views of the people. In addition, free speech also serves a legitimating function because law's legitimacy requires that the people are free to take part in the public deliberations through which public opinion, and ultimately laws, are formed. Distinctively, Bhagwat and Weinstein take the legitimating function of freedom of speech to be crucial not just to the legal system as a whole but also to the legitimacy of *individual laws* and posit that laws banning hate speech may render other laws (such as anti-discrimination laws) illegitimate.

Equally, however, Bhagwat and Weinstein show that the nature of a right of freedom of speech will depend upon which conception of democracy, among the multiple and competing conceptions, dominates. For instance, where democracy is representative rather than direct, or where it prizes public deliberation over the aggregation of pre-existing interests, greater emphasis will be placed on public discourse. In such democracies, freedom of speech is likely to cover a broader range of public discussion beyond that required for the process of voting and law making.[15]

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[12] See Catriona MacKenzie and Denise Meyerson, 'Autonomy and Free Speech', chapter [4] in this volume,]

[13] Susan Brison, ' The Autonomy Defense of Free Speech' (1998) 108 Ethics 312.

[14] See Catriona MacKenzie and Denise Meyerson, 'Autonomy and Free Speech', chapter [4] in this volume,. See also Catriona Mackenzie and Natalie Stoljar (eds), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (OUP 2000).

[15] Ashutosh Bhagwat and James Weinstein, 'Freedom of Expression and Democracy', chapter [5] in this volume

An important distinction, which illuminates matters taken up in later parts of the book, lies in the distinction between relatively thick (or substantive) understandings of democracies over relatively thin, proceduralist accounts. Of these two conceptions, the thicker idea of democracy provides a basis for more extensive limits on freedom of speech. Where democracy is taken to be instrumental to certain ends, freedom of speech can be limited where it makes little contribution to (or even frustrates) such ends. At this point the long debate about the regulation of hate speech enters the picture again. Substantive conceptions of democracy (which usually entail that a democratic polity will 'demonstrate tolerance, mutual respect, and an embrace of diversity') provides a foundation for arguments that 'the state not only need not tolerate, but to the contrary has a positive obligation to suppress hate speech'.[16] (a matter of which Weinstein and Bhagwat are evidently sceptical).

The idea that democracy is instrumental to a more fundamental value is evident in Dieter Grimm's chapter 'Freedom of Speech and Human Dignity'. Writing from within the German constitutional tradition, in which dignity is a foundational value receiving explicit constitutional protection, Grimm writes:[17]

> We do not have freedom of speech for democracy's sake, but we have democracy because it is the form of political rule best compatible with the dignity and autonomy of the individual.

The dignity-based conception of freedom of speech requires that the principle extends well beyond political speech. Speech is valuable because it allows humans to form social relationships and develop their personality – matters integral to human dignity. However, dignitarian arguments also justify limits on freedom of speech where that speech violates human dignity. Thus Grimm shows how dignity may furnish an argument for the regulation of hate speech where that speech:[18]

[16] Ibid.

[17] Dieter Grimm, 'Freedom of Speech and Human Dignity' chapter [6] in this volume..

[18] ibid

> attempts to deny human beings individual personhood, to strip them from all rights (or from the right to have rights), to classify certain individuals as such or because of their group membership as life not being worth lived, to claim that by their behavior they have forfeited any claim to respect.

Dignity's role as both a justification for freedom of speech and for limiting it, points to a more general dynamic. Where freedom of speech is taken to be instrumental to a more fundamental value, it will usually be the case that the underlying value – equality, autonomy, dignity – will in some circumstances be deployed as an argument for freedom of speech and in others in support of a limitation. This 'double-sidedness' of freedom of speech is a particularly perplexing feature of free speech argumentation.[19] It means, as Alon Harel shows in his chapter on hate speech and as Gautam Bhatia shows in chapter on religious speech, that many arguments about freedom of speech are not a defence of a liberal ideal against illiberalism.[20] Rather, many free speech arguments occur within liberalism and their resolution depends upon a quite precise rendering of the relationship between freedom of speech and its underlying values.

As the chapters so far mentioned demonstrate, there is a rich philosophical literature about freedom of speech. A final contribution in this vein from Wojciech Sadurski shows the power of philosophical argument to illuminate even most seemingly technical aspects of free speech.[21] The chapter explores the salience of the Rawlsian idea of public reason for freedom of speech. Sadurski argues that the idea helps explain the focus in free speech law in a number of countries on the distinction between content-based and content-neutral laws (and relatedly on viewpoint based and viewpoint neutral laws). Public reason analysis explains this focus, and reveals as potentially illegitimate laws based on reasons that are non-endorseable by reasonable persons to whom they apply.

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[19] Adrienne Stone, 'Viewpoint Discrimination, Hate Speech Laws, and the Double-Sided Nature of Freedom of Speech' (2017) 32 Constitutional Commentary 687.

[20] Alon Harel, 'Hate Speech', chapter [25] in this volume; Gautam Bhatia 'Religious Speech', chapter [27] in this volume.

[21] Wojciech Sadurski, 'Freedom of Speech and Public Reason', chapter [8] in this volume.

Contributions from other disciplines to scholarship on freedom of speech has been more limited. In an important exception to this trend, Daniel Hemel, in chapter 7, explores the potential for economic analysis to illuminate freedom of speech. Information economics, he argues, has the potential to explain failures in the 'marketplace of ideas'. Just as information asymmetry in the market for goods and services allows low quality goods and services to drive high quality goods and services out of the marketplace, there is reason to think that 'bad speech' will tend to drive out the 'good'. For good information to compete in the market readers and listeners must be able to tell the difference between good and bad information – an idea with particular resonance in the age of 'fake news', and with potential implications for the design of free-speech laws.[22]

B. Freedom of Speech as a Legal Idea

Part II of the volume turns from general questions about the nature of and justifications for freedom of speech to an examination of pervasive issues that arise with particular clarity when freedom of speech is applied as a legal principle.

The focus of most of these chapters is on freedom of speech as a principle of constitutional law, which in turn provides the basis for an individual to challenge the law. However, there are many ways in which a free speech principle might operate in law: it may guide the interpretation of statutes and other instruments; in common law systems at least, it may influence the development of case law; and it is a principle of international law (as canvassed by Michael Hamilton in chapter 11).

Conceived at a high level of generality, the framework for the determination of legal free speech claims is remarkably similar across a wide range of legal systems. As Stephen Gardbaum shows in his close but broadly comparative analysis in chapter 12, the nature and extent of a free speech right depends upon a number of legal components: (1) the legal source of the right (in common law, statute or a constitution) and the force of the right having regard to how it is enforced, and whether and how it can be superseded; (2) the subject of the right

[22] Daniel Hemel, 'Economic Perspectives on Free Speech', chapter [7] in this volume.

(citizens, natural or legal persons); (3) the scope of the right; (4) the kind of obligation it imposes on others (a negative prohibition or a positive obligation); (5) who is bound to respect a right of freedom of expression and against whom the right may be asserted; and (6) whether and how a free speech right might be limited.[23]

The first two chapters in Part II take up two of these elements in detail. Tracing the distinction in free speech law between 'coverage' and 'protection' influentially illuminated in his work, Schauer, in chapter 9, addresses the question acts or behaviour a principle of freedom of speech applies.[24]

This question of coverage (or in Gardbaum's terms 'scope') can be invisible in legal analysis especially if it is abundantly clear that the activity concerned is 'speech' within the accepted meaning of the word or if techniques of legal interpretation (text, history, and precedent, for instance) provide a ready answer. But, as Schauer shows, in many cases neither speech – or the common alternative 'expression' – adequately capture the activity to which the principle applies. The only coherent way to approach the question of coverage is by reference to the underlying rationale or rationales for freedom of speech. In this light, the question of 'coverage' turns out to be highly revealing of some fundamental features of freedom of speech, namely that it is a complex ideal resting on multiple justifications.

The question of 'protection' (which corresponds to Gardbaum's final component, whether and to what extent the free speech right may be limited) goes to the weight or strength of the protection from regulation conferred on that which is covered. In the context of constitutional law, it is reflected in legal doctrines formulated by courts. The protection question brings to the fore the much-noted 'American exceptionalism' with respect to freedom of speech in constitutional law. As is well known, First Amendment law is characterised by a conceptual or categorial approach that applies relatively specific, rule-like limitations as compared with the more flexible approach of 'structured proportionality' that dominates the rest of the world.

[23] Stephen Gardbaum, 'The Structure of a Free Speech Right', chapter [12] in this volume.
[24] Frederick Schauer, 'What is Speech? The Question of Coverage', chapter [9] in this volume.

The relative merits of these approaches are the subject of an enormous literature in which proportionality analysis is usually lauded for its flexibility and context-sensitivity as well as the transparency it purportedly brings to judicial reasoning. Some of its more influential expositions – including the seminal work of Robert Alexy – make the even more ambitious claim that proportionality is necessary or inevitable[25] or that it frees courts of difficult and contested decisions.[26] In chapter 10, 'Proportionality and Limitations on Freedom of Speech', Gregoire Webber mounts a critique of these claims on behalf of proportionality, and a defence of approaches that treat freedom of speech as absolute, at least in the sense as not subject to exception within its scope.

In chapter 13, 'Positive Free Speech: A Democratic Freedom', Andrew Kenyon then takes up Gardbaum's fourth component, the kind of obligations imposed, arguing that an effective free speech right must necessarily be conceived as including positive obligations on the state.

The final chapter in Part II, 'Speaking Back', turns to the question of remedies and responses. In it, Katharine Gelber interrogates the common claim that the remedy for falsehoods and other forms of 'bad speech' is 'more speech, not enforced silence'.[27] Applied indiscriminately, the idea of 'speaking back' is 'fanciful at best and harmful at worst' but Gelber defends it in some contexts, especially if – echoing Kenyon's chapter – freedom of speech is conceived of as requiring the state to empower 'speaking back'.[28]

The notion of state-backed 'speaking back' is picked up, again, in West's chapter on pornography. If certain pornography perpetuates or legitimates harmful sexist messages, West sees a role for state-backed 'speaking back'; specifically, public education aimed at countering harmful sexist messaging. But, she cautions, there are also reasons to doubt its likely effectiveness. Harmful effects of pornography on its consumers may not be fully

[25] Robert Alexy, *A Theory of Constitutional Rights* (Julian Rivers tr, OUP 2002) 66-9.
[26] David Beatty, *The Ultimate Rule of Law* (OUP 2004).
[27] *Whitney v California*, 274 US 357 (1927) 377.
[28] Katharine Gelber, 'Speaking Back', chapter [14] in this volume.

'mentally intermediated', and so not amenable to rational revision in response to counter-speech.[29]

C. Contexts and Controversies

The chapters in Part III focus on particular contexts and controversies that have proved especially important and interesting for the application of free speech principles. The chapters are all rich with insights on the particular controversies they cover, and the themes explored in the first two parts. For example, question of 'coverage' is addressed in particular contexts by Frederick Schauer's chapter on commercial advertising,[30] Mark Tushnet's chapter on art, [31] Caroline West's chapter on pornography,[32] and Alon Harel's chapter on hate speech.[33]

Similarly, the democracy justification is revisited and elaborated upon in chapters by Joo-Cheong Tham and Keith Ewing on elections,[34] Andrew Kenyon on defamation of public officials,[35] Christoph Bezemek on public insult,[36] and Timothy Zick on parades, picketing and demonstration.[37] It is also addressed in Cynthia Estlund's chapter on the workplace, which explores the implications for democratic government of employment-based limitations on freedom of speech.[38]

These chapters are complemented by a pair of chapters that consider the challenges and complications arising from the nature of mass communication in the traditional media[39] and the digital economy.[40]

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[29] Caroline West, 'Pornography', chapter 26 in this volume.
[30] Frederick Schauer, 'Free Speech and Commercial Advertising', chapter [24] in this volume.
[31] Mark Tushnet, 'Music and Art', chapter [23] in this volume.
[32] Caroline West, 'Pornography', chapter 26 in this volume.
[33] Alon Harel, 'Hate Speech', chapter [25] in this volume.
[34] Joo-Cheong Tham and Keith Ewing, 'Free Speech and Elections', chapter [17] in this volume.
[35] Andrew Kenyon, 'Defamation Law, *Sullivan* and the Shape of Free Speech', chapter [15] in this volume.
[36] Christoph Bezemek, 'Insult of Public Officials, chapter [21] in this volume.
[37] Timothy Zick 'Parades, Picketing and Demonstrations', chapter [20] in this volume.
[38] Cynthia Estlund 'Freedom of Expression in the Workplace', chapter [22] in this volume.
[39] Dieter Grimm, 'Freedom of Media', chapter [29] in this volume.
[40] Greg Magarian, 'The Internet and Social Media', chapter [19] in this volume.

The 'double-sidedness' of freedom of speech is revisited in a group of chapters which focusses on the particular harms that may be caused by speech. Geoffrey Stone revisits the question of speech causing unlawful conduct,[41] a general theme picked upon in the contemporary context of terrorism by Eliza Bechtold and Gavin Phillipson.[42] Alon Harel's chapter on hate speech,[43] Gautam Bhatia's chapter on religious speech,[44] Caroline West's chapter on pornography,[45] and Ioanna Tourkochoriti's chapter on privacy[46] focus on harms of a different kind which implicate other fundamental rights like dignity, equality, religious freedom and privacy.

Among these chapters, First Amendment exceptionalism is evident again. As these chapters show, First Amendment law has had enormous influence on the development of free speech law globally, reflecting the comparatively long history of judicial review of the First Amendment, the volume of case law and secondary literature it has produced. But as these chapters also show that many substantive aspects of First Amendment law are almost entirely unique and, on questions a diverse as electoral funding, advocacy of illegality,[47] commercial advertising,[48] defamation and hate speech,[49] most democracies have taken a different path.[50]

The intellectual influence but substantive exceptionalism of First Amendment law is especially evident in chapters by Andrew Kenyon, Christoph Bezemek, and Joo-Cheong Tham and Keith Ewing. Each of these chapters takes an iconic First Amendment case and shows both how it illuminates freedom of speech *and* how it has been departed from elsewhere. Andrew

[41] Geoffrey Stone, 'When is Speech that Causes Unlawful Conduct Protected by Freedom of Speech? The Case of the First Amendment', chapter [18] in this volume.
[42] Eliza Bechtold and Gavin Phillipson, 'Glorifying censorship? Anti-terror law, speech and online regulation', chapter [28] in this volume.
[43] Alon Harel, 'Hate Speech', chapter [25] in this volume.
[44] Gautam Bhatia, 'Religious Speech', chapter [27] in this volume.
[45] Caroline West, 'Pornography', chapter 26 in this volume.
[46] Ioanna Tourkochoriti,'Privacy and Speech' chapter [16] in this volume.
[47] Eliza Bechtold and Gavin Phillipson, 'Glorifying censorship? Anti-terror law, speech and online regulation', chapter [28] in this volume.
[48] Frederick Schauer, 'Free Speech and Commercial Advertising', chapter [24] in this volume.
[49] Alon Harel, 'Hate Speech', chapter [25] in this volume.
[50] Frederick Schauer, 'The Exceptional First Amendment' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton UP 2005) 29.

Kenyon places *New York Times v Sullivan*[51] in the context of defamation law generally, noting how courts in other countries have been influenced by and yet departed from its approach. The exceptionalism of *Sullivan*, he argues, depends both on a relatively thin conception of the value of reputation and on a particular understanding of the idea of public debate. Christoph Bezemek takes the closely related question of 'fighting words' and the Supreme Court of the United States' decision in *Chaplinsky v New Hampshire*[52] as his centrepiece for a discussion of public insult. *Chaplinsky* is, of course, something of an 'orphan' in the First Amendment canon.[53] It is tempting to think that while its 'fighting words' exception has withered in the United States, it had found a home in Europe where insult laws are widely accepted both by the European Court of Human Rights and in domestic jurisdictions. But Bezemek shows that the approach of the European Court is structurally different, turning not on a narrowly defined categorical exception but upon case-by-case proportionality analysis of a kind that the US Supreme Court would eschew. Turning to the closely related question of insult to public officials (also discussed by Kenyon), Bezemek focuses again on structural differences in doctrine. Expanding his focus to include the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights, he shows that each proceeds on a rather different conception of 'public figure'.

Joo-Cheong Tham and Keith Ewing, in the most critical of these three chapters, take *Citizens United v Federal Electoral Commission*[54] as the centrepiece of their critique of First Amendment law. They identify the First Amendment's core non-redistributive principle as based on a uniquely American mistrust of government regulation of speech and laissez-faire attitude to the distorting power of private wealth. The European social-democratic model, by contrast, is premised on equality as a foundation of a just electoral systems and, because the state is viewed less negatively, permits more government intervention in pursuit of that equality.

[51] *New York Times v Sullivan*, 376 US 254 (1964).
[52] *Chaplinsky v New Hampshire*, 315 US 568, 570 (1942).
[53] The Supreme Court has never since upheld a conviction on the basis of the 'fighting words' exception that *Chaplinsky* apparently establishes. See Erwin Chemerinsky, *The First Amendment* (Wolters Kluwer 2018) 159.
[54] *United v Federal Electoral Commission*, 558 US 310 (2010).

Their critique introduces a second theme: the problems that that arise from the exercise of private power. Classically, freedom of speech is conceived of as a negative right that operates to restrain government power, leaving private relations untouched. But, as Cynthia Estlund shows, unrestrained power of employers to interfere with the speech rights of employees would make public discourse impossible. Similarly, an unrestrained power to regulate speech activity on private property would prevent the collective action necessary for civic engagement that is central to 'cultural identification, acts of resistance, and … political contention in a democracy'.[55] In Estlund's chapter on the workplace, and Zick's chapter on parades, picketing and demonstration, the assessment of First Amendment law is somewhat hopeful. Estlund traces the way that courts in the United States have, over the last century, carved out exceptions to the rights of employers to respect employees' freedom of speech, and detects a strand of 'neo-republican thought' in First Amendment law, sensitive to the dominating power of employers.[56] Timothy Zick shows how the United States Supreme Court, relying on the concept of the 'public forum', built an 'expressive topography', a doctrinal categorization of public places that limits powers of regulation in these spaces.[57]

Nonetheless, Estlund concludes that the protection of freedom of speech in the workplace remains normatively deficient. Indeed the 'weaponisation critique' mentioned at the outset, and pervasive in the commentary on the protection of commercial advertising, is traceable, at least in that language, to Justice Kagan's dissent in a labor law case, *Janus v AFSCME,* in which the majority held that requiring public sector employees to pay union dues was invalid on First Amendment 'compelled speech' grounds.[58] Turning to public forums, the exclusion of private property has always meant that some places (privately-owned airports, shopping centers, malls and plazas) where citizens seek to gather for free speech purposes may be excluded from the public forum doctrine. But the problem is much exacerbated by the increasing privatization of public space.

[55] Timothy Zick 'Parades, Picketing and Demonstrations', chapter [20] in this volume.
[56] Cynthia Estlund 'Freedom of Expression in the Workplace', chapter [22] in this volume.
[57] Timothy Zick 'Parades, Picketing and Demonstrations', chapter [20] in this volume.
[58] *Janus v AFSCME, Council 31*, 138 S Ct 2448, 2501 (2018) (Kagan J, dissenting).

Outside First Amendment law, attitudes toward private power are quite different and the problems posed by private actors restricting freedom of speech or distorting public discourse can be dealt with in a more straightforward fashion. Three features of free speech law are especially pertinent to this difference. First, as Ioanna Tourkochoriti explains in her chapter on privacy, other systems of law (in her chapter - Germany and France) allow for the 'horizontal' application of free speech rights against private individuals.[59] By comparison, the 'verticalist' position usually taken to be exemplified by the First Amendment, applies free speech rights only against the state, reflecting an assumption that threats to freedom of expression are characterised as arising principally or only from the state. The line between these two positions can be blurry and may be less important in practice if there is a sufficiently capacious 'state action' doctrine.[60] The distinction between horizontal and vertical applications of rights, however, is indicative of a markedly different understanding of the role of constitutional rights. Second, in most other legal systems, the mistrust of government that characterizes First Amendment law is moderated and the state is more likely to be regarded as a positive actor in pursuit of legitimate goals.[61] This moderation of mistrust of government gives governments greater scope to address harms caused by private actors notably on matters like hate speech and electoral funding.

Finally, in some systems, the problem of private power is addressed through positive obligations imposed upon the state. In his chapter on media,[62] Dieter Grimm explains Germany's broadcast jurisprudence as a means to address the problems of private power in public discourse. Under the German Basic Law, the German state is under a 'double obligation'. It must not unduly interfere with the freedom of media, but it is also required to

[59] But see also Constitution of South Africa: 4 February 1997 ('South African Constitution'), s 8(2); Constitution of Colombia: 4 July 1991 ('Colombian Constitution'), art 86; Constitution of Ireland: 29 December 1937 (as amended to 4 October 2013) ('Irish Constitution'), s 40(3), and *Meskell v CIE* [1973] IR 121 .

[60] There is also a third position - 'indirect horizontal action' - which allows for the invocation of constitutional rights in private actions under the general law, see Stephen Gardbaum, 'The Structure of a Free Speech Right', chapter [12] in this volume.

[61] As in Canada, see Adrienne Stone, 'Canadian Constitutional Law of Freedom of Expression', in Richard Albert and David R Cameron (eds), *Canada in the World: Comparative Perspectives on the Canadian Constitution* (CUP 2017).

[62] Dieter Grimm, 'Freedom of Media', chapter [29] in this volume.

act to protect the media against attempts of private actors that may lead to distortion of public discourse or dysfunction within the media.

D. The Changing Context

Grimm's chapter introduces our final theme: the changing nature and significance of the forums in which speech occurs. The most compelling development is the rise of the digital economy, which radically changes the dynamics of freedom of speech. The internet is the subject of Greg Magarian's chapter,[63] although the many complications posed by the internet as a speech forum are explored in other chapters, including those on pornography, hate speech, press freedom, and international law.

As Magarian shows, while the internet offers huge opportunities for realising the social benefits of freedom of speech making powerful contributions to political movements and promoting art, science and commerce, by the same token this new medium amplifies the possibilities for harm and poses a distinct set of challenges.

For example, the ease of communication and vast increase in the quantity of available information has led to the breakdown of the traditional media and the 'gatekeeping' function they performed. That, combined with anonymity and the highly manipulable nature of digital imagery, makes it very difficult to assess the credibility of information before us. Ordinary citizens can disguise themselves as credible news sources; political operatives and agents of foreign governments can be made to look like ordinary citizens; images and even video can be faked. The result is a torrent of low-quality information, much of it worthless or worse, deliberately spread to serve disruptive and nefarious interests, foreign and domestic. Such speech may proliferate more readily, rapidly, and to a wider audience, amplifying its potential harm.

These challenges run especially deep because the shape of a solution is very unclear. The devolved and transnational architecture of the internet poses real barriers to regulation even

[63] Greg Magarian, 'The Internet and Social Media', chapter [19] in this volume.

pursuant to horizontal and positive conceptions of freedom of speech. The problem of the internet will require creative regulatory solutions and to which constitutional rights of freedom of speech will need to adapt.[64] At the same time, creative and novel regulatory solutions to harmful online speech may also have unintended adverse consequences. As Bechtold and Phillipson observe in their chapter, there is a risk that regulations aimed at swiftly and cost-effectively stemming the proliferation of harmful material online can be excessively broad and speech-restrictive, shift the burden of regulation onto transnational corporations, and lack adequate safeguards, scrutiny, and attention to rights.[65]

This leads us to a closing reflection on the changing nature of the subject of this volume. It is barely more than a century since the United States Supreme Court began seriously to expound free speech norms; only 70 years since the end of World War II era inspired the global rise of human rights and only 30 years since democratic constitutionalism – and with it constitutional rights of freedom of speech - became a truly global phenomenon. Yet in this time, the nature of public discourse has transformed radically. Today, vast swathes of ordinary human communication occur in previously unrecognisable ways.

Freedom of speech will be a treasured norm at least for as long as democracies persist, but beyond that simple fact perhaps all that can be counted upon is that the fundamental and difficult questions the subject of this volume, and these chapters, will remain a source of contestation in law and politics.

E. With thanks

Fittingly given freedom of speech's transnational reach, this volume was a transnational effort and was both enabled – and at times challenged - by communication across the internet. As editors, we express our thanks to the authors for their commitment to this project; their willingness to revise chapters during the editing process and to keep to the necessary word

[64] See Jack Balkin, 'Free Speech is a Triangle' (2012) 118 Columbia L Rev 2011; see also Tim Wu, 'Is the First Amendment Obsolete?' (2018) 117 *Michigan Law Review* 547. 568.

[65] Eliza Bechtold and Gavin Phillipson, 'Glorifying censorship? Anti-terror law, speech and online regulation', chapter [28] in this volume.

limit. We are delighted to have brought such a talented group of scholars together in these pages.

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