Democracy of Expression

Positive Free Speech and Law

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Preface

There are often too many people to thank with a lengthy writing project; this one is no exception. Here I note some of those that have made the research possible. Apologies to those I have forgotten. The book began with a research project funded by the Australian Research Council (ARC) (DP0985337) centred on public speech, defamation and privacy law. That research focused on negative dimensions of free speech, but questions of communicative freedom more generally arose within it and those questions began my work on this book. The research has been completed with support through the ARC Centre of Excellence for Automated Decision-Making and Society, in which I am an investigator (CE200100005). The Centre of Excellence's interests link more with future work arising from the book. But, particularly for chapter 8, I have benefitted from the Centre and researchers connected with it.

Colleagues at the University of Melbourne and the Centre for Media and Communications Law create a strongly supportive environment for research. Along with valuable periods of study leave provided by the Melbourne Law School, the library services at Melbourne and Université Paris 1 Panthéon Sorbonne have been exceptionally useful, with a wealth of material available.

Then there are academic colleagues. I am sure that they take quite varied views of my analysis, but they have helped me develop it, nonetheless. They include Hervé Ascensio, Joel Bakan, Eric Barendt, Pierre Brunet, Emmanuel Derieux, Eric Descheemaeker, Joan Divol, Maria Edström, Thomas Gibbons, Charles Girard, Georgios Gounalakis, Agnès Granchet, Kari Karppinen, Tarlach McGonagle, Victor Pickard, Dominique Rousseau, Jake Rowbottom, Katharine Sarikakis, Wolfgang Schulz, Andrew Scott, Adrienne Stone, Eva-Maria Svensson, Greg Taylor and Jim Weinstein. Thanks to them all.

Some of them took part in events at which ideas in this book were presented, including at seminars or conferences at the London School of Economics and Political Science, University of British Columbia, University of Gothenburg (supported by the Swedish Foundation for Humanities and Social Science), University of Helsinki, University of Melbourne and Université Paris 1 Panthéon Sorbonne, along with conferences of the International Communication Association, Australian and New Zealand Communication Association, Society of Legal Scholars (UK), Law and Society Association of Australia and New Zealand, International Association of Constitutional Law, European Communication Research and Education Association. Thanks for the collegiality that was evident at all those events. Special thanks to colleagues with whom I organised two of them: Andrew Scott at the LSE, and Maria Edström and Eva-Maria Svensson at the University of Gothenburg.

Some previously published material has been drawn on. Ideas from, or sections of, the following have been used, as noted in the text: 'What Conversation? Free Speech and Defamation Law' (2010) 73 *Modern Law Review* 697; 'Assuming Free Speech' (2014) 77 *Modern Law Review* 379; 'Free-Media-Speech: Free Speech and Public Media' (2014) 10 *International Journal of Media and Cultural Politics* 155; 'Who, What, Why and How: Questions for Positive Free Speech and Media Systems' in Edström, Kenyon and Svensson (eds), *Blurring the Lines: Market-Driven and Democracy-Driven Freedom of Expression* (Gothenburg: Nordicom 2016) 29; 'Positive Free Speech: A Democratic Freedom' in Stone and Schauer (eds), *The Oxford Handbook of Freedom of Speech* (Oxford: Oxford University Press, in press). The only substantial instance is the examination of German broadcasting freedom in chapter 6. It is approximately twice as long as an earlier version published as 'The State of

Affairs of Freedom: Implications of German Broadcasting Freedom' in Kenyon and Scott (eds), *Positive Free Speech: Rationales, Methods and Implications* (Oxford: Hart 2020) 83.

Finally, while writing is often solitary, its practical nurture is far from that. The day to day support of those close to me has been invaluable and has sustained me for much longer than I originally anticipated as the project took shape. I dedicate this book to all my family, to those here—especially Cécile, Jules and Clément—and to those already departed.

1 Introduction

What sort of free speech is required for democratic government and how might it be pursued? These questions capture something of my interest in this book. I examine positive dimensions of free speech and the claim that *democracy entails positive freedom of communication*, not only a negative freedom or liberty of speech. This means the state has obligations to act in support of communicative freedom as well as there being limits on state restriction of speech; both positive and negative dimensions of free speech need protection for democracy to have substantial communicative legitimacy. Within that terrain, I focus on one aspect of positive free speech; namely, the structural diversity of public speech that democratic government requires. Considering plural public speech focuses on something that is central to free speech in democratic contexts, something that connects with varied academic research and case law, and something that simply warrants greater consideration in free speech literature. More than suggesting straightforward answers, my interest lies in reframing how issues around democratic free speech are understood, prompting further lines of inquiry for research into free speech, democratic government and law.

As will become clear, my view is that positive dimensions of free speech are presupposed by democratic forms of government and law should do more to support them. Later chapters suggest more about what that means and how positive dimensions of free speech could be imagined and pursued within law. The ideas are broadly consistent with many approaches that treat (negative) free speech and (positive) media pluralism as separate issues: in my analysis, those issues are better understood as both being within communicative freedom itself. In addition, plural public speech is a richer concept than media pluralism, at least as that term is often deployed in media policy. The logic of the analysis suggests courts *could* have a substantial role regarding the freedom's positive dimensions. To suggest that is not to aim for the 'juridification' of politics as much as the enabling of democratic government. In any event, the possible role of judges is a distinct matter from the quality of *freedom* that I examine. While judicial action is possible in theory, judges acting in support of positive dimensions of free speech will be implausible in many contexts and may well not be productive in others. In such contexts, the analysis points to legislative, regulatory and other measures that could be taken without judicial prompting. Understanding those sorts of measures as being taken to further free speech refigures them. Of course, such measures are also improbable in many contexts, including many contemporary ones. Thus, the analysis brings out how democratic forms of government face challenges of public communication that cannot easily be solved. They are, in some ways, insurmountable. As the German Federal Constitutional Court emphasises, about the danger of concentrated power over public opinion, when developments in public communication 'prove to be faulty, they can only be rescinded—if at all—to a certain degree and only with considerable difficulty'.[1] Weaknesses of public communication can undermine possible responses to those weaknesses. In relation to free speech, democracy only exists in partial ways. Even where challenges are insurmountable, they can still be responded to in better or worse ways. And understanding the positive dimensions of free speech helps to illuminate the choices, and to understand the challenges. That is the ambition of this book.

[1] 57 BVerfGE 295 (Third broadcasting case).

I recognise some readers will object to the idea of positive free speech. They might suggest that even thinking about positive dimensions in the freedom makes no sense, or that any state action supporting positive free speech will be counterproductive. I offer reasons for doubting such criticisms at various points in the book, but my primary concern is simply to examine positive dimensions of free speech to consider how, and why, they might be supported by law. The analysis also suggests why effective legal responses may be improbable. But that is to get ahead of myself. While the focus is relatively narrow, the aim is not: I seek to offer a partial reorientation as to what is relevant to scholarship on free speech, democracy and law. The book aims to provide a base for future work that is sympathetic to understanding free speech in its positive and well as negative dimensions.

Terminology and sources

Six matters of terminology are worth noting at the outset. First, the 'positive' and 'negative' used here are primarily heuristic labels. In many ways, each can be collapsed into its opposite.[2] And others might use words such as active, additive, affirmative, collective, effective, empowering, enabling, facilitative, functional or strong for the positive dimensions of free speech with which I am concerned.[3] But the

[2] See eg Susan Bandes, 'The Negative Constitution: A Critique' (1990) 88 *Michigan Law Review* 2271. Even so, Bandes emphasises the affirmative aspects of constitutional rights; see eg 2345:

> [T]he exceptions which riddle the rule of negative rights are evidence of its irrelevance … [T]he rule obscures the correct focus of constitutional discourse: the requisites of the Constitution. Certain constitutional commands cannot be met without an affirmative effort by the government.

[3] See eg Thomas Gibbons, 'Free Speech, Communication and the State' in Merris Amos, Jackie Harrison and Lorna Woods (eds), *Freedom of Expression and the Media* (Leiden: Martinus Nijhoff, 2012) 19, 25 and its note 14 ('active', while noting 'positive' is often used); Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Abingdon: Routledge 2017) 81-83, 98 ('additive' measures, resembling positive free speech in part, contrasted with 'subtractive' measures); John L Hodge, 'Democracy and Free Speech: A Normative Theory of Society and Government' in Bill F Chamberlin and Charlene J Brown (eds), *The First Amendment Reconsidered: New Perspectives on the Meaning of Freedom of Speech and Press* (New York: Longman 1982) 148, 152 ('active' and 'affirmative' contrasted with 'passive' and 'negative'); William Ernest Hocking, *Freedom of the Press: A Framework of Principle, A Report from the Commission on Freedom of the Press* (Chicago: University of Chicago Press 1947) ('affirmative' and 'effective' contrasted with 'freedom from'); Michael W Huntsberger, 'Attempting an Affirmative Approach to American Broadcasting: Ideology, Politics, and the Public Telecommunications Facilities Program' (2014) 91 *Journalism and Mass Communication Quarterly* 756, 757-758 ('affirmative' approach to First Amendment); Alan Gewirth, *Human Rights: Essays on Justification and Applications* (Chicago: University of Chicago Press 1982) 319-322 (discussing free speech in terms of 'effective' freedom). Martin Bullinger, 'Freedom of Expression and Information: An Essential Element of Democracy' (1985) 28 *German Yearbook of International Law* 88 ('affirmative'); Mike Ananny, *Networked Press Freedom: Creating Infrastructures for a Public Right to Hear* (Cambridge MA: MIT Press 2018) ('positive' and 'affirmative' press freedom); Robert B Horwitz, 'The First Amendment Meets Some New Technologies: Broadcasting, Common Carriers, and Free Speech in the 1990s' (1991) 20 *Theory and Society* 21 ('collective' contrasted with 'literal', ie negative); Laura Stein, *Speech Rights in America: The First Amendment, Democracy and the Media* (Urbana: University of Illinois Press, 2006) ('defensive' and 'empowering'); Perry Keller, *European and International Media Law* (Oxford: Oxford University Press 2011) 413 ('empowered autonomy'); Thomas Gibbons, 'Providing a Platform for Speech: Possible Duties and Responsibilities' in Andrew T Kenyon and Andrew Scott (eds), *Positive Free Speech: Rationales, Methods and Implications* (Oxford: Hart 2020) 11 ('strong'); Michael Kent Curtis, 'Democratic Ideals and Media Realities: A Puzzling Free Press Paradox' (2004) 21 *Social Philosophy and Policy* 385 ('functional' contrasted with 'formal' free speech); W Cole Durham, 'General Assessment of the Basic Law: An American View' in Paul Kirchhof and Donald P Kommers (eds), *Germany and Its Basic Law: Past, Present and Future* (Baden-Baden: Nomos 1993) 37, 45-46 ('facilitative' freedom, rather than the privatised freedom of US

labels positive and negative have currency across many areas of research on freedom,[4] and free speech has elements which can usefully be labelled positive and negative.[5] These are not two *forms* of free speech, but different *dimensions* of freedom. The terms 'positive free speech' and 'negative free speech' are used as shorthand for those positive and negative dimensions of the freedom. Thus, I do not use positive in the sense of positive law or formal law, nor in the sense of positive being necessarily beneficial. Positive refers primarily to dimensions of freedom.

Second, as the above suggests, positive can be used in various ways in relation to free speech. Two ways are worth highlighting. One concerns *positive freedom*: the idea that freedom is not only a negative liberty but requires support or enablement. That is my primary interest in this book; it links positive free speech with a particular quality of speech, not in terms of 'high' or 'low' quality but in terms of what I call 'sustained plural public speech' (a label considered in chapter 2). Support for such speech can come in various ways from different actors. Another use of positive concerns a *positive right*, typically a legal right enforced through courts.[6] Constitutional rights are often understood that way. Later chapters examine two court systems that act to support positive free speech through forms of positive right. But equivalent approaches to positive free speech could be pursued by other actors: the quality of freedom is the primary concern in this study. The court examples are useful for suggesting important points about *what* free speech entails in its positive dimensions, not only for what they suggest about *who* should act and *why*. For readers who doubt constitutional judges in particular jurisdictions will act effectively to support positive free speech—a view with which I have some sympathy—considering these courts' approach helps to understand what is involved in the first sense of positive free speech and to think about how it might be pursued, whether inside or outside courts.

Third, terms such as free speech, freedom of expression and communicative freedom are generally used interchangeably here. Differences between them are not important for my purposes

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law). Some analyses are broadly parallel to the positive-negative approach to freedom of speech offered here, without using equivalent terms: see eg Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech under the Indian Constitution* (New Delhi: Oxford University Press 2016) chapter 11 'The Meaning of "Freedom"'.

[4] Eg Richard E Flathman, *The Philosophy and Politics of Freedom* (Chicago: University of Chicago Press 1987) 1:

> For several centuries, negative conceptions of freedom and unfreedom have been contrasted with and opposed to positive accounts (the 'negative-positive' terminology, although unfortunate, is so well established in moral and political philosophy that the least cumbersome course is to continue to use it).

[5] Further approaches exist that seek to go beyond positive and negative, see eg Kari Karppinen, 'Beyond Positive and Negative Conceptions of Free Speech' in Maria Edström, Andrew T Kenyon and Eva-Maria Svensson (eds), *Blurring the Lines: Market-Driven and Democracy-Driven Freedom of Expression* (Gothenberg: Nordicom 2016) 41; Christian F Rostbøll, *Deliberative Freedom: Deliberative Democracy as Critical Theory* (Albany: State University of New York Press 2008) notable for its focus on *dimensions* of freedom, and presenting four dimensions relevant to democratic deliberation (at 5 and 6): '(1) public autonomy or collective self-rule … (2) negative freedom or freedom as non-interference … (3) autonomous opinion formation or internal autonomy and (4) freedom as status' within a political structure, or 'freedom as praxis'. For my purposes, considering positive and negative dimensions appears to be the most useful 'level' of analysis. In some ways, the positive communicative freedom that I set out includes dimensions 1, 3 and 4 from Rostbøll's approach.

[6] Alexy offers a similar example, using 'positive' for any right that is protected by positive law: Robert Alexy, 'Comments and Responses' in Matthias Klatt (ed), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford: Oxford University Press 2012) 319, 333 'following their transformation into positive law, human rights are positive rights and nothing but positive rights'.

(and communicative freedom is not used in the specific sense adopted by Jürgen Habermas).[7] Perhaps the term 'communication' best conveys the idea that both speakers and audiences are involved in the freedom: it is a positive freedom of communication not only a freedom of speakers. The freedom is concerned not just with protecting against external limitations on expression; it is concerned with 'the protection of (and perhaps even support for) a relationship of communication'.[8] In any event, the term free speech is widely used, and I generally use it here. That choice should not be taken to suggest 'a preference for speakers',[9] particularly not in terms of media and free speech. Further, while my focus is on what might be called media freedom, it is a freedom derivative of and relevant to free speech as a whole.[10]

Fourth, I discuss 'diverse' and 'plural' speech. Distinctions between these terms are less significant than the breadth they encompass. Within media studies and media law, diversity and pluralism may refer to at least four ideas, as Lesley Hitchens has noted.[11] The terms may concern diverse *forms of media organisation*, such as public and commercial; diverse *ownership of commercial media*; diverse *ideas and opinions*; and diverse *types of programming*. These ideas can be grouped into external pluralism or diversity, concerning media structures and ownership, and internal pluralism or diversity, relating to opinions, content and genres. Different terminology tends to be favoured in the US and Europe. Media diversity is commonly used in US debates about commercial media ownership. In Europe, media pluralism is more commonly used for external matters of ownership and organisation, while diversity is used to refer to a multiplicity of opinions and programming. Whether using the term diversity or pluralism, my interest is to encompass all the above aspects: organisational form, ownership, ideas, opinions and content types. In addition, some analyses distinguish diversity and pluralism in terms of *descriptive* and *normative* aspects of the issues; that is, between analysing the range of existing media content, and theorising what range should exist. In such approaches, pluralism may be used as the more normatively significant and critical term, with diversity left in a descriptive role. But usage varies, and the term diversity is sometimes used normatively.[12] My use of the terms seeks to encompass both empirical and evaluative aspects; it aims to capture the sociological pluralism and value pluralism prevalent within the societies that I consider.

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[7] See eg Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (translated by William Rehg) (Cambridge: Polity 1996, original German publication 1992) 119-120. For an overview of that sense of communicative freedom see Klaus Günther, 'Communicative Freedom, Communicative Power, and Jurisgenesis' in Michel Rosenfeld and Andrew Arato (eds), *Habermas on Law and Democracy: Critical Exchanges* (Berkeley: University of California Press 1998) 234.

[8] Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press 2000) 41.

[9] Hodge, above n 3, 152. He takes a similar approach in that his paper's title and much of its text uses the term 'free speech', but he notes that 'speech' should be treated as a synonym for 'communication', a term which 'more clearly suggests the involvement of a speaker and a listener' than the terms 'expression' or 'speech', ibid.

[10] See eg Eric Barendt, *Freedom of Speech* (2nd ed, Oxford: Oxford University Press 2005) 419-424; Gavin Phillipson, 'Press Freedom, the Public Interest and Privacy' in Andrew T Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge: Cambridge University Press 2016) 136, 138-141.

[11] Lesley Hitchens, *Broadcasting, Pluralism and Diversity* (Oxford: Hart 2006) 8-9.

[12] See eg Kari Karppinen, *Rethinking Media Pluralism* (New York: Fordham University Press 2013); Danielle Raeijmaekers and Pieter Maeseele, 'Media, Pluralism and Democracy: What's in a Name?' (2015) 37 *Media, Culture and Society* 1042.

Fifth, I generally use the terms public speech and public communication interchangeably in this book. Others might use public discourse, public deliberation, public reason, political expression, the public sphere and so forth. Differences between these terms are not significant here, and I use them all at times. The aim is to underline that my concern is wider than speech by or about politicians; nor is my interest centred on speech within parliaments, for example. A democracy of expression encompasses speech beyond such institutions. Rather, sustained plural public speech and the role of communicative freedom in supporting it should be recognised as integral to a democratic constitutional structure. It is part of the 'housing' that a constitution should provide; that which 'makes politics possible by securing a place for the public realm'.[13]

My interest is also broader than approaches to the public sphere that are in effect limited to rational exchange and deliberation within a conversation aimed at reaching agreement and open to all. My interest is more speech's role in supporting choice than necessarily reaching agreement. Public speech does not comprise only egalitarian and spontaneous feedback seeking consensus. It includes passionate and emotive speech, confrontational and dissonant speech, from more diverse participants than those interested in public deliberation, and, through all those elements, it forms a type of public.[14] That formative role is also a reason for seeking diversity in public speech, because any public formed by speech excludes as well as includes. When discussing the publics that are formed by mediated speech, Michael Warner notes:

> A public seems to be self-organized by discourse but in fact requires pre-existing forms and channels of circulation. It appears to be open to indefinite strangers but in fact selects participants by criteria such as shared social space …, habitus, topical concerns, intergeneric references … One result is a special kind of politics … When any public is taken to be *the* public, those limitations invisibly order the political world.[15]

Further, public communication—including political speech—is not a dialogue. It is more varied, conflict-ridden and dramatic than that. Indeed, it is rare for speakers to address each other in any substantial sense within public speech. Bernhard Peters captures this well; public speech is conducted *for* an audience:

> Typically, public controversies, especially in the mass media, have a triadic structure: the adversaries address a public to gain its endorsement. Seldom do they address each other directly. There is also

[13] To borrow from Waldron discussing Hannah Arendt and constitutional structure: Jeremy Waldron, *Political Political Theory: Essays on Institutions* (Cambridge MA: Harvard University Press 2016) 293:

> That politics needs *housing*, and that building such housing can be equated with the framing of a *constitution*—this is an image that recurs throughout Arendt's writings. [The housing] make politics possible by securing a space for the public realm (emphasis in original).

[14] See eg Andrew T Kenyon, 'What Conversation? Free Speech and Defamation Law' (2010) 73 *Modern Law Review* 697, 707-710. In that, my approach has sympathy with some agonistic understandings of speech and democracy; see eg Ian Cram, 'Keeping the Demos out of Liberal Democracy? Participatory Politics, 'Fake News' and the Online Speaker' (2019) 11 *Journal of Media Law* 113; Johan Farkas and Jannick Schou, *Post-Truth, Fake News and Democracy: Mapping the Politics of Falsehood* (Abingdon: Routledge 2020); Kari Karppinen, 'Freedom Without Idealization: Non-Ideal Approaches to Freedom of Communication' (2019) 29 *Communication Theory* 66; and more generally eg Chantal Mouffe, *On the Political* (New York: Routledge 2005).

[15] Michael Warner, *Publics and Counterpublics* (New York: Zone 2002) 106-107 (emphasis in original). A longer outline of Warner's analysis of public speech is in Kenyon, ibid.

> a lack of social constraints, which would press for an agreement. … Quite to the contrary, public actors thrive on controversy and dissidence.[16]

Public speakers need to be 'fanatically convinced and confident enough to keep the public drama high'.[17] It is not the judgment of speakers but that of audience members which is at stake.[18] Public speech is not a conversation or, at least, it is so rarely a conversation that to call it one is generally unhelpful.[19] Overall, public speech and public communication appear to be useful labels for my purposes. A close alternative is probably public discourse or civic discourse—writers often take broad approaches when using them[20]—but they can easily be used in a more limited sense.

Finally, discussion of free speech sometimes differs depending on whether the concept is understood in terms of rights, interests, principles or values. In wider debates, the language of human rights is probably dominant but, in analysing free speech, labels such as fundamental or basic rights are also commonly used. Without seeking to engage directly with such terminological issues, what follows takes a broadly rights-based approach (one that may, but does not necessarily, involve a positive right enforced by courts). I would emphasise that free speech appears as a *constitutional principle* in the types of country with which I am concerned (more is said in chapter 3 about the countries involved). For this book, free speech is a constitutional principle or democratic right, and my enquiry concerns what meaning should be given to it. What is required in terms of free speech within a democratic constitution? Examining this issue makes positive dimensions of free speech more significant and central to the freedom than is often seen in legal writing. It is not that positive dimensions are not already addressed in law and analysis. This is seen particularly in European contexts but also some US legal writing, as chapter 5 illustrates. However, much existing work does not quite reach what positive freedom of communication would be and why it is required, nor engage in detail with how, if at all, it might be promoted in law. I think a better sense of these structural dimensions of free speech makes it clear that positive dimensions of free speech are not peripheral but central to a democracy of expression.

The term democracy of expression is taken from political historian Pierre Rosanvallon. In *Counter-Democracy: Politics in an Age of Distrust*, one in his series of books on democracy, Rosanvallon describes expression as one of three dimensions of 'interaction between the people and the political sphere' (the other two are involvement and intervention). He states: 'Democracy of expression means that *society has a voice*, that *collective sentiments can be articulated*, that *judgments* of the government and its actions *can be formulated*, and that *demands can be issued*' and

[16] Bernhard Peters, *Public Deliberation and Public Culture: The Writings of Bernhard Peters, 1993-2005* (edited by Hartmut Wessler; translated by Keith Tribe) (Basingstoke: Palgrave Macmillan 2008) 239.

[17] John Durham Peters, *Courting the Abyss: Free Speech and the Liberal Tradition* (Chicago: University of Chicago Press 2005) 132.

[18] Charles Girard, *Délibérer entre égaux: Enquête sur l'idéal démocratique* (Paris: Vrin, L'esprit des lois 2019) 302.

[19] Kenyon, above n 14.

[20] See examples from within and outside law: Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford: Oxford University Press 2016); Eoin Carolan, 'Promoting Civic Discourse: A Form of Positive Free Speech Under the Constitution of Ireland?' in Kenyon and Scott, above n 3, 65; Peters, above n 16.

heard.[21] In short, voice has political effects,[22] it is 'articulated with … political action'.[23] Rosanvallon's study examines how democracy of expression has gained strength, even while electoral democracy has eroded, how democracy has broadened from a moment of voting to ongoing, continuous interactions. Within that context, my focus remains on the institutions of constitutional democracy and their relation to free speech and the public discourse it supports, which necessarily is largely mediated speech. The point is that democracy of expression underlies normative claims to democratic legitimacy.[24] Democracy is *of expression* because of the role of public speech, and the freedom underlying it, in the varied forms of self-government suggested by the word democracy. This quality exists across multiple forms of contemporary democracy, not only 'deliberative' ones. It is not that different forms of democracy suggest no differences in free speech but, in important ways, the freedom has a consistent quality across many forms of democracy. Free public speech, in the sense examined here, should be recognised as a precondition for democratic self-government. It is the communicative requirement of democracy. It comes before and lies outside of decisions taken within the usual democratic process, because it is part of democracy's required framework or housing. Free speech, including its positive dimensions, provides the *communicative architecture* for ordinary political decisions. A democratic constitution should be recognised to entail this in terms of free speech.

Lying outside usual democratic process means the freedom raises matters parallel to what Fabienne Peter describes as 'the political egalitarian's dilemma'.[25] She suggests political equality might require that people have '*effectively* equal opportunities to participate in the deliberative process' for legitimacy.[26] At the same time, the lack of 'prior consensus on policy issues' suggests that 'potentially

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[21] Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (translated by Arthur Goldhammer) (Cambridge: Cambridge University Press 2008) 20 (emphasis removed from first three words and added to later words). While the quoted passage does not explicitly include the idea of being heard, it is clearly implicit. As Rosanvallon notes elsewhere when discussing a programmatic response to weaknesses of contemporary democracy, an important factor is that 'the country does not feel listened to': Pierre Rosanvallon, *Le Parlement des invisibles* (Paris: Seuil/Raconter la vie 2014) 9 (unless otherwise noted, translations from French are my own).

[22] See eg Sandra Braman, 'The Limits of Diversity' in Philip M Napoli (ed), *Media Diversity and Localism: Meaning and Metrics* (Mahwah: Lawrence Erlbaum 2007) 139. See also eg Natalie Fenton and Gavan Titley, 'Mourning and Longing: Media Studies Learning to Let Go of Liberal Democracy' (2015) 30 *European Journal of Communication* 554, 559 noting the dangers of 'focus[ing] on enhancing the process and quality of deliberation' even when 'deliberation has little or no impact'.

[23] Nick Couldry, *Media, Voice, Space and Power: Essays of Refraction* (Abingdon: Routledge 2020) 196.

[24] It is a legitimacy focussed more the *operation* of the democracy in question than its *origins* or 'pedigree'; see eg Joel I Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Abingdon: Routledge 2012) 103-125. It is worth noting that an approach which places the weight of democratic legitimacy on questions of constituent power still raises matters of free speech related to those I consider. For example, as Colón-Ríos, ibid 117-118 notes in his approach:

> [T]he constitutional forms must provide the means for constituent power to reappear after the constitution is in place and, if needed, to put the entire institutional arrangement into question. To begin with, there must be some basic institutional guarantees in place: freedom of assembly, freedom of expression, the right to vote; in short, those rights of political participation necessary for the very existence of democracy. If these rights are not respected, an exercise of constituent power, as well as any form of democratic engagement, would hardly be possible. (note omitted)

[25] Fabienne Peter, *Democratic Legitimacy* (New York: Routledge 2009) 75-91.

[26] Ibid 79 (emphasis added).

contested judgments' should be 'left as much as possible to the scrutiny of public deliberation'.[27] In short, there is a tension between 'the need to ensure that persons have effective opportunities to participate in deliberation as equals' and 'the need to avoid imposing controversial value judgments that are exempt from democratic scrutiny on the collective'.[28] As Peter notes, trade-offs may need to be made between substantive and procedural aspects of political equality that the dilemma highlights. However, for free speech at least, I would suggest not all matters can be left to democratic decision making. If one considers public deliberation itself, it has certain prerequisites in terms of communicative freedom.

Some political scholarship suggests 'democracy begins with the voters'[29] but, in a certain sense, I would differ. One could almost say democracy begins with speech, with public speech, because of its importance to electoral choice and wider political processes.[30] Democracy is 'an arena of discussion rather than a set of electoral laws' or, at least, *only* electoral laws.[31] 'Information and communication lie at the heart of any society's ability to govern itself'.[32] Voters and the decisions they make—basic elements of democratic government—are deeply connected with speech, and 'elections mean little when they are not embedded in a free communication process' of diverse content.[33] The 'rationale for formal equality of voice in elections', the idea of one-person, one-vote, 'is basic to democracy *and* applies to the broader arena of voice in a democratic public sphere'.[34] Public speech is what precedes and frames democratic choice, it precedes and frames society having a voice, formulating judgments and making claims of government that have some hope of being heard and having effects, to adapt Rosanvallon's description. All those matters indicate that much more than freedom of speech is needed, but the freedom is needed all the same. And the voice, judgments and claims are not only relevant at the time of voting. There is more to say about these issues, but for now the term democracy of expression flags my interest in democracy, speech and the links between them; in what it would mean for society to have a voice, formulate judgments and make claims of government that are heard and have effects; and in free communication law's role in the voice, judgments and claims.[35] As to the term democracy—a form of government that 'unavoidably involves

[27] Ibid.

[28] Ibid 87.

[29] Christopher H Achen and Larry M Bartels, *Democracy for Realists: Why Elections Do Not Produce Responsive Government* (Princeton: Princeton University Press 2016) 1.

[30] As Goodin would suggest, 'first talk, then vote', but the role of speech I envisage in a 'democracy of expression' appears to be broader than he discusses. See Robert Goodin, *Innovating Democracy: Democratic Theory and Practice after the Deliberative Turn* (Oxford: Oxford University Press 2008) ch 6; see also eg Simone Chambers, 'Deliberation and Mass Democracy' in John Parkinson and Jane Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge: Cambridge University Press 2012) 52-71.

[31] Michael Schudson, 'The Public Sphere and Its Problems: Bringing the State (Back) In' (1994) 8 *Notre Dame Journal of Law, Ethics and Public Policy* 529, 545.

[32] Mark Andrejevic, *Automated Media* (New York: Routledge 2020) 162.

[33] Dieter Grimm, 'Freedom of Speech in a Globalized World' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford: Oxford University Press 2009) 11, 14.

[34] C Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* (Cambridge: Cambridge University Press 2007) 6.

[35] I leave aside questions about democracy as self-government through 'speech' or 'writing'—models of democracy based on the people's voice in an immediate temporal sense or their voice across time: see eg Jed

continual and perpetual debate over its basic concepts and terminology'[36]—some more is said in chapter 3.

In this book, I draw mainly from sources in doctrinal law, legal scholarship, media studies and political theory. Those fields appear useful in a study that is not an exegesis of any one legal system nor, indeed, of existing law. Instances of existing law are considered, but they are not held up as exemplars. Each has weaknesses. Rather, each suggests something about how law should treat positive free speech and, together, raise questions for other legal systems about positive dimensions of the freedom. The wider literature and legal examples are used to consider structural aspects within free speech and how they might be pursued. It is not a blueprint that I seek but a more general framework, one subject to adaptation in different legal environments and traditions. More precisely, my interest in this study lies in *parts* of a framework for free speech, parts that concern the freedom's positive structural dimensions. Even so, the project is broad. Indeed, many more sources could have been used, but that could well have been counterproductive. My aim is to clarify an idea, present relevant parts of it, and prompt further investigation.

The book does not seek a comprehensive engagement with all implications of positive free speech for a democratic architecture of public communication, but it seeks to establish the positive dimensions of free speech as something that should not be ignored. In that, it is a critique of many existing legal systems. There is little reason to expect those systems will change or, at least, to think they will do so quickly. Perhaps they will over time, but that is a separate question to academic inquiry. The analysis does not offer a simple or optimistic approach to the freedom. Rather, thinking about free speech and democracy in this way demonstrates the real, and sometimes insurmountable, challenges facing both concepts. Their achievement is always limited: democracy and free speech only ever exist in partial ways.[37] There are challenges for law in doing something useful about this. While there are measures that might assist the partial and limited development of democratic free speech—measures to take things at least a little beyond their present state—analysis also suggests matters that will likely hinder such development.

Points of focus

The book is focused in several ways. One way has already been noted: my concern lies with the meaning of *freedom* more than *speech*. I am less interested in the boundaries of speech, whether some event falls within 'speech' as a concept, than in what it means for speech to be free. The study is also focused by not examining the multiple free speech rationales commonly offered in legal writing, such as speech serving knowledge, autonomy and democracy. Here, my interest is the third of those rationales. This study is an analysis of *speech and democracy*. It asks what, if any, communicative freedom does the idea of democracy entail? It is probably worth stating expressly the approach does not imply that democracy offers a complete explanation of free speech, nor that democracy is of central importance in a valuable way of life. Rather, my inquiry concerns the idea that democracy has

Rubenfeld, *Freedom and Time: A Theory of Constitutional Self-Government* (New Haven, CT: Yale University Press 2001).

[36] Pierre Rosanvallon, *Good Government: Democracy Beyond Elections* (translated by Malcolm DeBevoise) (Cambridge MA: Harvard University Press 2018) 233.

[37] Lauriane Josende, *Liberté d'expression et démocratie: Réflexion sur un paradoxe* (Brussels: Bruylant 2010) 409.

particular implications for free speech. And my response highlights one aspect of what democracy entails for free speech, to add to extensive, existing analyses of negative free speech and democracy.

These two points lead to another focus of the study: the analysis centres on *media* and *mediated speech*. For democracy to be imagined at scale, media has long been of central importance. But mediated speech now is very different than it was 10 or 20 years ago. It now includes major internet intermediaries reshaping content creation, circulation and use—and reformulating publics as they go—indeed, perhaps enabling the targeting of speech that is not even public in ways that have generally been understood before.[38] That targeting of speech arises through corporate and state surveillance of a form and extent that was impossible in the twentieth century, and through powerful processes of automation. They are reshaping the circulation of speech and changing who sees what in terms of content; they are arguably changing the 'exposure diversity' of recipients.[39] Despite such changes, this study focuses on a slightly earlier time. My analysis often draws on academic publications and law from the later twentieth century, from the age of mass media. That also means it is generally national in focus. While a national context retains relevance, not least in terms of law, it is different from much current communication.

The changed environment raises challenging questions about how the analysis in this study would be applied now. Before such an application could be attempted, however, there is value here in using the historical material to set out ideas about speech and democracy. Some might think: 'If diversity is required, surely more than enough exists now, so this whole issue can be left aside'. Clearly, the context is different now, but it is not true that there are no longer any gatekeepers to public speech or that the types of structural diversity discussed in later chapters are self-evidently present. Plausible arguments can be made for the necessity of 'structuring the social and technological conditions (such as search engine rankings, newsfeed algorithms, and content moderation systems) that lead people to the "ideas and experiences"' needed under democratic rationales for free speech.[40] And the structuring of 'social and technological conditions' would include the role of journalism in supporting sustained plural public speech. Understanding free speech's positive dimensions is likely to assist in developing such arguments. I return to the issue in chapter 8.

To consider whether legal support of positive free speech remains needed, it is helpful to examine what positive communicative freedom *would have been* in the past environment. Examples of existing law and scholarship help to do just that. Recognising what free speech would have been in an age of mass media *if* it had come closer to meeting democratic requirements is relevant for thinking about what might be desired for speech in contemporary conditions. I think the ideas in the older sources remain important and offer useful material for the future analysis of mediated speech.

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[38] See eg Joseph Turow and Nora Draper, 'Industry Conceptions of Audience in the Digital Space: A Research Agenda' (2014) 28 *Cultural Studies* 643; Nick Couldry and Joseph Turow, 'Advertising, Big Data, and the Clearance of the Public Realm: Marketers' New Approaches to the Content Subsidy' (2014) 8 *International Journal of Communication* 1710; see further chapter 8.

[39] See eg Philip M Napoli, 'Deconstructing the Diversity Principle' (1999) 49(4) *Journal of Communication* 7; Philip M Napoli, 'Exposure Diversity Reconsidered' (2011) 1 *Journal of Information Law and Policy* 246; Natali Helberger, 'Exposure Diversity as a Policy Goal' (2012) 4 *Journal of Media Law* 65; Axel Bruns, 'Filter Bubble' (2019) 8(4) *Internet Policy Review*; DOI: 10.14763/2019.4.1426.

[40] Ananny, above n 3, 38, referencing *Red Lion Broadcasting v FCC*, 395 US 367 (1969).

The focus on mediated speech is also worth bearing in mind in terms of the way in which my interest concerns *media freedom*. That freedom is not understood as merely transposing individual free speech rights to institutional media (including commercial media owners), or to journalists, editors or others within each media entity. As well as implications for journalistic and editorial freedom—the 'internal media freedom' of media professionals against media owners[41]—media freedom recognises that in democratic contexts free speech is not only an individual concern but has *structural* or *social* dimensions. It concerns speakers and audiences; it concerns public communication; speech has individual and social characteristics and so does democratic free speech. Speech involves seeking an audience and being an audience; it is relational; it is not solitary. And media freedom, in part, concerns structures that underlie public speech, the 'organizational and framework conditions'[42] or the 'structural conditions'[43] entailed by the democratic constitutional protection of free speech. Free speech and media freedom are, in an important sense, *for the audience* not only for speakers.

My interest lies in the type of communicative structure that is entailed by a democratic constitution. This is an important part of the communicative requirements of democracy. There is not only one possible structure—positive dimensions of free speech involve many discretions—but the structure will have certain qualities. Such a structure is not the only legal implication of free speech having positive dimensions. Existing literature considers many implications of positive free speech, such as rights to demonstrate (and the public resources needed to support that), access to court and other public information, protection of journalistic and editorial freedom, protection of journalists' safety and so forth.[44] My focus is just on the frameworks underlying public speech, and their link to democratic constitutional arrangements. When I state something about positive free speech, or free speech's positive dimensions, I am using a shorthand for these structural aspects of the freedom.

Analysing freedom of expression's positive dimensions in a democratic context is not new. Aspects of it can be seen across decades of law and scholarship, although generally in a less extensive

[41] See eg Barendt, above n 10, 441-444; Thomas Gibbons, 'Freedom of the Press: Ownership and Editorial Values' [1992] *Public Law* 279.

[42] Barendt, above n 10, 423; on approaches to media freedom see also Gavin Phillipson, 'Leveson, the Public Interest and Press Freedom' (2013) 5 *Journal of Media Law* 220, 221-227; András Koltay, 'The Concept of Media Freedom Today: New Media, New Editors and the Traditional Approach of the Law' (2015) 7 *Journal of Media Law* 36, 41 treating media freedom's positive dimensions as being 'in the interest of the media audience' and 'in a broader sense, of all society' and originating in democratic reasons; Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge: Cambridge University Press 2015) for a detailed study on media freedom, including (at 92-95) a careful examination of its positive dimensions and the obligation placed on states.

[43] Carolan, above n 20, 77.

[44] See eg Herdís Thorgeirsdóttir, 'Journalism Worthy of the Name: An Affirmative Reading of Article 10 of the ECHR' (2004) 22 *Netherlands Quarterly of Human Rights* 601; Barendt, above n 10, 100-108; Tarlach McGonagle, 'Positive Obligations Concerning Freedom of Expression: Mere Potential or Real Power?' in Onur Andreotti (Council of Europe Task Force for Freedom of Expression and Media) (ed), *Journalism at Risk: Threats, Challenges and Perspectives* (Strasbourg: Council of Europe Publishing 2015) 9; Sandra Fredman, *Comparative Human Rights Law* (Oxford: Oxford University Press 2018) 349-353; Mark Tushnet, *Advanced Introduction to Freedom of Expression* (Cheltenham: Edward Elgar 2018) 83-103; Frederick Schauer, 'Positive Rights, Negative Rights, and the Right to Know' in David E Pozen and Michael Schudson (eds), *Troubling Transparency: The History and Future of Freedom of Information* (New York: Columbia University Press 2018) 34; various chapters in Kenyon and Scott, above n 3.

fashion than here. In later chapters, I reconsider and extend ideas in the existing work. What would positive dimensions of free speech be? How could constitutional protection for positive free speech operate? Such questions are challenging for law. As just one illustration, Canadian author Richard Moon writes:

> The Canadian courts have not been prepared to impose on the state a general obligation to support expression. This reluctance is understandable. *It is difficult to imagine what shape a constitutional obligation to support expression could take*. At what point would we say that the communicative opportunities of some or all members of the community are so inadequate or that public discourse is so narrow in its scope that the state has a constitutional obligation to support communication?[45]

Moon's work on free speech is detailed and, notably, he goes on to examine just how Canadian courts *do* allow for the possibility of a state obligation to support expression, in circumstances not yet clearly defined by the courts.[46] His analysis is alive to the questions about public communication that relate to positive free speech. In his analysis, free speech is about protecting and perhaps supporting a relationship of communication,[47] with the goal that 'public forums carry a wide range of views concerning public issues from all segments of the community'.[48] His argument is that Canadian constitutional adjudication has internal tensions that prevent courts acting in support of effective free speech and for 'real opportunities to communicate'.[49] For instance, he states:

> [A]ny attempt to read the constitutional right to free expression as requiring the expansion of communicative opportunities for some members of the community runs up against both the conventional understanding of the freedom as a 'negative' right against state interference and the structural constraints on the courts' capacity to engage in a significant or coherent redistribution of communicative power.[50]

The observation appears apt for Canada to date. However, the point I would emphasise is that it *is* possible to imagine the shape of a constitutional obligation and ways in which various constitutional actors (in some contexts including courts) could protect positive free speech. The probability of that constitutional obligation being recognised in any particular jurisdiction is a separate question. First, it is interesting to imagine.

Examining 'freedom'—whether in positive or negative dimensions—raises questions of terminology that are not innocent or neutral.[51] Unreflectively using established concepts can weigh

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[45] Moon, above n 8, 175 (emphasis added).

[46] For a more recent analysis see Tsvi Kahana, 'Hybrid State Accountability and Hybrid Rights: Positive Rights, Exclusion, and State Action in Canada' in Tsvi Kahana and Anat Scolnicov (eds), *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (Cambridge: Cambridge University Press 2016) 173. It remains the case that the Canadian Supreme Court 'has never addressed the matter of positive rights in a comprehensive and coherent way: 173-174.

[47] See text at above n 8.

[48] Moon, above n 8, 213.

[49] Ibid 32.

[50] Ibid 7.

[51] Eg Bhatia, above n 3, 292. As Hochmann suggests, 'exceptionalism' is not an innocent term in relation to free speech; it can attempt to justify the bare refusal to adopt approaches to free speech that are widely used elsewhere: Thomas Hochmann, '*La liberté d'expression: à la recherche des exceptionnalismcs (et de l'intérêt d'une telle entreprise)*' in Marthe Fatin-Rouge Stéfanini et Guy Scoffoni (eds), *Libertés et exceptionnalismes nationaux* (Brussels: Éditions Bruylant 2015) 157, 169.

debate towards existing practices,[52] and the point may be particularly true in relation to freedom. Of all the terms of political discourse, freedom is 'perhaps the most slippery and controversial'.[53] The term is 'a conceptual labyrinth'.[54] There are countless senses of 'freedom' and yet the freedom in free speech often has a taken-for-granted meaning of being negative freedom. That is perhaps more so in common law jurisdictions, but a wider tendency exists. In part, this is understandable. Free speech's negative dimensions *are* important. Nothing in my analysis should be thought to undermine the importance of careful evaluation and control of restrictions on speech. And restrictions have increased in many democratic countries in the last decade.[55] But understanding communicative freedom as purely negative limits what can be imagined and done with free speech. My aim is to suggest ways in which positive dimensions of free speech are also significant, even if they are difficult to make real. Positive freedom is not peripheral; it is centrally important to analysing free speech and democracy. And *the relative weakness of how legal systems treat positive dimensions of free speech is an indication of their relative failures in supporting the communicative requirements of democracy*. There are many ways in which democracies fail their ideals and immanent claims, but the treatment of free speech is one. The failures may not be surprising but understanding more about them is still valuable. Among other things, it suggests possible responses to improve the protection of free speech and underlines that responses will be multiple.

Points of challenge

Despite the study being focused, rethinking democratic free speech in its positive dimensions could quickly become an impossible task. *Too much is written from disparate disciplinary bases* that is relevant to free speech, democracy and media—voluminous legal writing on speech and its control; political theory about different understandings of democracy and their requirements; extensive, often empirically focused, political research comparing existing democracies; apparently intractable philosophical differences about positive, negative and other freedom; seemingly endless scholarly sparring about judicial review and its legitimacy; ongoing debates about regulated pluralism in law and media studies, and so forth. The approach taken here is clearly selective. It is aimed at a richer understanding of positive free speech, which means wider material is sometimes engaged with at a general level, with certain nuances in academic debates left aside. The intention is not to do so when those debates are particularly relevant to my concerns, but the analysis could no doubt be developed further through some of them. Overall, the material is used to aid reasoning about communicative freedom, particularly reasoning about it within law and media studies. Later chapters offer one path through existing scholarly debates, while some further possibilities are noted. Quite clearly, more could be done.

Thinking about free speech's positive dimensions may also be challenging because of *differences between legal prohibitions and legal obligations*. For example, if free speech is understood as a bare liberty against the state—something limiting the state's ability to restrict speech—then *every*

[52] William E Connolly, *The Terms of Political Discourse* (3rd ed, Oxford: Blackwell 1993) 1, 2.

[53] Ibid 140.

[54] Benjamin Gibbs, *Freedom and Liberation* (New York: St Martin's Press 1976) 9.

[55] See eg United Nations Educational, Scientific and Cultural Organization, *World Trends in Freedom of Expression and Media Development: Regional Overview Western Europe and North America 2017/2018* (Paris: UNESCO 2018).

state restriction on speech must be evaluated. Every restriction is suspect. But free speech's positive dimensions take it beyond a bare liberty to include obligations for a certain 'state of affairs' to be pursued. Robert Alexy uses the words 'state of affairs' in relation to broadcasting freedom under the German constitution and the idea is useful for my purposes.[56] (The German approach, a clear example of the freedom having positive dimensions, is discussed in chapter 6.) The obligations are not to do some precise action, but to pursue a state of affairs. For free communication, not every possible action to support sustained plural public speech is necessary or possible at the same time: '*not every* act which represents or brings about protection or support is required'[57] and not every act can be pursued concurrently. There are multiple possible actions, open to multiple actors, in different ways. Necessarily, there is discretion over what measures are taken. But the discretion is not unlimited; a partial, but sufficient, realisation of the state of affairs is required. And the *ways* in which the choices are framed and *who* does the framing are central to protecting free speech's positive dimensions. It is possible to imagine that a *combination* of courts, legislatures, executives and regulators could be relevant to pursuing the state of affairs—the democratic precondition mentioned above.

These differences between prohibitions and obligations add complexity to thinking about positive free speech. The difficulty may be amplified where analysing free speech's positive dimensions is less familiar than its negative ones. Negative free speech also gives rise to complex analyses and constant debate—US writing focused on negative free speech, for example, can involve extremely intricate delineation of categories, tests, distinctions and so forth—but some readers may be more used to that complex categorisation than the complexity of multiple possibilities for action by multiple actors under free speech's positive dimensions.

Analysing free speech is also challenging because of the way in which *speech is formative or constitutive*. Speech and understanding, including ideas about speech, are shaped by environments of speech: preferences 'are not presocial, formed independently of debate and discussion, but are instead given form in public discourse'.[58] There is no escaping that; there is no external vantage point that avoids it. Rather, it is a reason to seek sustained plural public speech. Just one way that environments of speech are influential is the prevalence of equating the absence of censorship to free speech. For those steeped in ideas of negative free speech, are other possibilities too foreign to see? Mark Graber wrote of the US context: 'The best understanding of constitutional expression rights may be one that can be neither justified nor even imagined by persons who work and think within the framework of late twentieth-century American philosophical and jurisprudential thought.'[59] The same might be stated at this point of the twenty-first century: the challenge 'has never looked harder',[60]

[56] Robert Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers) (Oxford: Oxford University Press 2002) 330.

[57] Ibid 308 (emphasis in original).

[58] Moon, above n 8, 14.

[59] Mark A Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (Berkeley: University of California Press 1991) 222.

[60] Jeremy K Kessler and David E Pozen, 'The Search for an Egalitarian First Amendment' (2018) 118 *Columbia Law Review* 1953, 2007 drawing on writers and ideas consistent with positive free speech and 'affirmative' (2003) aspects of the Amendment and noting the 'negative liberty model' for speech is being questioned more than has happened 'in decades' (2009).

even if free speech scholarship with positive ideas continues to emerge.[61] There may too often be a 'discursive capture' that excludes positive freedom from free speech debates, especially in the US context.[62] At the least, ways in which negative approaches to free speech are commonplace in theory and doctrine—how they can sometimes be thought the natural state of affairs—suggest stronger legal recognition of the freedom's positive dimensions may be difficult and slow.[63] In addition, in jurisdictions where case law takes a largely or overwhelmingly negative approach to free speech, it is easy to imagine how that focus can capture scholarly attention. The situation can resemble the lack of attention paid to 'policy silences' noted in media studies research.[64]

Also challenging is the influence of what could be called *speech's social organisation*. Free speech debates—at least in legal scholarship—sometimes proceed as if the only relevant issue is law. If the law is 'right', speech will happen. The tendency remains even though legal writing often references Thomas Emerson's emphasis on the system of freedom of expression: communicative freedom involves practices, principles and institutions as well as rights; scholarship needs to pay attention to structures that underlie speech not just specific instances of legal control.[65] Bernhard Peters discusses speech's social organisation at length, setting out five features that shape public speech. The first is the legal and political framework, such as law's treatment of free speech and the approach to media regulation. That is my focus. But there is much more that affects public speech. Peters describes 'the social infrastructure of public deliberation'—the style of organisations, markets and channels of communication; the degree and form of the public's internal differentiation; the approach taken to speaking and listening within public speech; and the distribution of influence and

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[61] See eg Ananny, above n 3; Philip M Napoli, *Social Media and the Public Interest: Media Regulation in the Disinformation Age* (New York: Columbia University Press 2019) 192 discussing a 'collectivist' approach to the US First Amendment:

> From the collectivist perspective, the phrasing of the First Amendment clearly grants Congress the authority to make laws that *enhance* the free speech environment. Indeed, many proponents of the collectivist interpretation of the First Amendment advocate the imposition of government regulations in order to correct perceived inadequacies in the current system. (emphasis in original)

He notes the arguments are not new, but 'the news production, distribution, and consumption dynamics that characterize social media may represent the most compelling case yet for this interpretive shift to finally take place.'

[62] Victor Pickard, *Democracy Without Journalism? Confronting the Misinformation Society* (New York: Oxford University Press 2020) 175. See also, e.g., Julie E Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (New York: Oxford University Press 2019) 94: 'The contemporary First Amendment agenda blends rigid doctrinal logic and entrepreneurial, expansionist expressions of neoliberal governmentality together in a potent cocktail'.

[63] Gibbons, 'Platform for Speech', above n 3, 23.

[64] See eg Des Freedman, 'Media Policy Silences: The Hidden Face of Communications Decision Making' (2010) 15 *International Journal of Press/Politics* 344, 344:

> The analysis of media policy usually, and understandably, focuses on visible instances of policy *action*: of government intervention, regulatory activity, civil society engagement, and corporate initiatives. Less frequently considered is the process by which certain issues, frames, and proposals are neglected inside decision-making structures. (emphasis in original)

[65] Thomas I Emerson, *The System of Freedom of Expression* (New York: Random House 1970). See eg Bullinger, above n 3, 104 (1985); Bhatia, above n 3, 290; Gibbons, 'Platform for Speech', above n 3, 12; Danielle Keats Citron and Neil M Richards, 'Four Principles for Digital Expression (You Won't Believe #3)' (2018) 95 *Washington University Law Review* 1353, 1381.

social stratification related to speech.[66] Other classifications of such factors could be offered,[67] but the point is simply to note that much more than law is relevant and formative for public speech. Speech arises within institutions, cultures and histories of speech. Speech never has a 'fresh start'.[68] Even so, law can play a role, including a role underpinning structures of public speech.

If there are challenges and a sort of foreignness in the idea of positive free speech, a response could be historical and comparative analysis. For example, when considering negative freedom and developing a republican version of freedom, Quentin Skinner engaged with history rather than 'attempting directly to develop a more inclusive philosophical analysis' of freedom.[69] Regarding the approach, he observed 'it is apt to seem much less convincing to suggest that a concept *might* be coherently used in an unfamiliar way than to show that it *has* been put to unfamiliar but coherent uses.'[70] I suspect the same is true for free speech. Much of the material used here comes from relatively recent history but, more than its historical quality, the comparative nature of the legal examples and literature demonstrates how free speech's positive dimensions have been put to perhaps unfamiliar but coherent uses.

As later chapters show, some European legal approaches to free speech pay more attention to its positive dimensions than the common law generally does. But the approaches do not only exist in civil law jurisdictions,[71] and the reasons offered within the approaches are not limited to a civil law context. Rather, the examples show how free speech can be imagined and used in ways that are coherent but may be unfamiliar to readers of much US or UK free speech case law. The legal examples and wider literature help to reframe what is taken for granted or under-examined in some analyses, and they suggest ways of extending existing scholarship on positive free speech. The democratic requirements of communicative freedom entail more than existing ownership limits on commercial media, for example, even if such limits *are* one way of seeking diversity in public speech.[72] The examples are also useful for considering, in any particular context, what might be most important among the myriad actions that could support positive free speech.

Points of departure not taken

My interest lies in positive free speech and democracy, recognising that positive dimensions of free speech are difficult, if not impossible, to realise in any complete sense. (The same is true for free speech's negative dimensions.) Even so, what might be called 'rough but practical'[73] measures could be pursued. They are what should be pursued. I have outlined ways in which my study is focused on

[66] Peters, above n 16, 81.

[67] Eg Schudson, above n 31, 539 discusses similar factors as 'the ecology of the public sphere'.

[68] Wojciech Sadurski, *Equality and Legitimacy* (Oxford: Oxford University Press 2008) 87.

[69] Quentin Skinner, 'The Idea of Negative Liberty: Philosophical and Historical Perspectives' in Richard Rorty, JB Schneewind and Quentin Skinner (eds), *Philosophy in History: Essays on the Historiography of Philosophy* (Cambridge: Cambridge University Press 1984) 193, 198.

[70] Ibid (emphasis in original).

[71] See eg Carolan, above n 20 for an example of contemporary Irish law; Bhatia, above n 3 for a discussion of how aspects of Indian law take an equivalent approach; Andrew Scott and Abbey Burke, 'The Access to Information Dimension of Positive Free Speech' in Kenyon and Scott, above n 3, 43 for a consideration of UK law.

[72] See eg Baker, above n 34, 14-15.

[73] Emerson, above n 65, 667.

freedom, democracy and mediated speech, and suggested that rethinking freedom in relation to speech is not to replace negative free speech with positive, but to expand the freedom beyond negative liberty. And I have considered ways in which such an analysis is challenging, including the volume of relevant literature across varied disciplines, differences between the legal treatment of prohibitions and obligations relevant to freedom, and the constitutive role of speech.

All this suggests many possible points of departure. Some are considered here; several could be used to frame a project like mine or used to develop the analysis further. One might commence with political theory. An interest in free speech and democracy could be pursued through discourse or public sphere approaches,[74] or different strands of research on deliberative democracy, such as its systemic approaches which may more often treat media as 'crucial'.[75] Clearly, public sphere-related theories of democracy have relevance to my concerns. But they do not, I think, offer the most useful way into the issues here. I say a little more about that later in this chapter. Analysis focussed on political equality—arguably 'the most important intrinsic value of democracy'[76]—can also address similar concerns in a broadly comparable manner. The relatively brief references to equality made later could be developed substantially and clearly offer another path to explore.[77] The same might be said of republican approaches to democracy and freedom, including work examining free speech law.[78] While such research conceptualises freedom as a negative freedom from domination, what that freedom requires overlaps with the positive dimensions of free speech discussed in later chapters. There is, for example, a basic need to insulate media from 'the possibility of arbitrary interference' from both government and markets, and media may well require significant state financial support.[79] Thus, republican approaches can offer broadly similar analysis and recommendations about free speech law and democratic self-government, encompassing audience as well as speaker interests.

Alternatively, one might begin with work on media systems and politics—for example, Daniel Hallin and Paolo Mancini's study of comparative media systems and politics, as well as subsequent

[74] One could go back to John Dewey and his concern for social inquiry and publicity in an approach which moved beyond a negative freedom, see eg Slavko Splichal, *Principles of Publicity and Press Freedom* (Lanham: Rowman and Littlefield 2002) 176.

[75] See eg Jane Mansbridge, James Bohman, Simone Chambers, Thomas Christiano, Archon Fung, John Parkinson, Dennis F Thompson and Mark E Warren, 'A Systemic Approach to Deliberative Democracy' in Parkinson and Mansbridge, above n 30, 1, 19 'Although the political media are a crucial part of the deliberative system in any modern democracy, they have not played a major role in much recent deliberative democracy theory'. But see eg Rousiley CM Maia, *Deliberation, the Media and Political Talk* (New York: Hampton Press 2012) which details existing deliberative research's treatment of media and presents empirical studies; for a shorter overview, see Rousiley Maia, 'Deliberative Media' in Andre Bächtiger, John S Dryzek, Jane Mansbridge and Mark Warren (eds), *The Oxford Handbook of Deliberative Democracy* (Oxford: Oxford University Press 2018) 348-364.

[76] Peter, above n 25, 38.

[77] See eg Jacob Rowbottom, 'Positive Protection for Speech and Substantive Political Equality' in Kenyon and Scott, above n 3, 25; Girard, above n 18; Charles Girard, 'Making Democratic Contestation Possible: Public Deliberation and Mass Media Regulation' (2015) 36 *Policy Studies* 283.

[78] See eg John Charney, *The Illusion of the Free Press* (Oxford: Hart 2018). For an analysis focused on privacy as a common and collective good (which free speech resembles, in part, in my approach) that is necessary for republican self-government, see Andrew J Roberts, Privacy in the Republic (PhD thesis, University of Amsterdam 2019) https://pure.uva.nl/ws/files/42627565/Thesis.pdf.

[79] Charney, above n 78, 144-145 (emphasis removed).

engagement with and criticism of it.[80] But ideas about free speech are not their focus. Such ideas are subsumed within observations about the role of the state and whether it is 'interventionist'. In their study, 'free speech' tends to suggest the US First Amendment rather than the freedom more generally. Something that is implicit in their work is that what free speech *means* differs across the countries they study, but they do not bring out the point in detail. Taking that idea further could offer another way into my interests here.

Another possibility would be to commence with global movements for communication rights.[81] While the concept of communication rights has clear connections with positive free speech, communication rights have probably been linked with policy-focused campaigns more often than with free speech law. Even so, some analysis has long linked communication rights and free expression in law. Article 19 stated in 2003:

> A key *positive* element of the right to freedom of expression and a crucial foundation of the right to communicate is the obligation on governments to create an environment in which a diverse, independent media can flourish, thereby satisfying the public's right to receive information from a variety of different sources.[82]

As made clear in later chapters, that aim is very much part of the structural diversity entailed by positive free speech. While (negative) free speech has been used to argue communication rights should be limited to existing and long recognised legal rights,[83] once free speech is understood to have

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[80] Daniel C Hallin and Paolo Mancini, *Comparing Media Systems: Three Models of Media and Politics* (Cambridge: Cambridge University Press 2004) and see eg Thomas Gibbons and Peter Humphreys, *Audiovisual Regulation under Pressure: Comparative Cases from North America and Europe* (Abingdon: Routledge 2012) 14; Toril Aalberg and James Curran (eds), *How Media Inform Democracy: A Comparative Approach* (New York: Routledge 2012) 192-193; Jonathan Hardy, *Western Media Systems* (Abingdon: Routledge 2008); Daniel C Hallin and Paolo Mancini (eds), *Comparing Media Systems Beyond the Western World* (Cambridge: Cambridge University Press 2012); Michael Brüggemann, Sven Engesser, Florin Büchel, Edda Humprecht and Laia Castro, 'Hallin and Mancini Revisited: Four Empirical Types of Western Media Systems' (2014) 64 *Journal of Communication* 1037.

[81] For a general overview of, and introduction to, communication rights see eg Claudia Padovani and Andrew Calabrese (eds), *Communication Rights and Social Justice: Historical Accounts of Transnational Mobilizations* (New York: Palgrave Macmillan 2014); for one of the classic documents, with an international focus that is, to a large degree, centred on communication and development see International Commission for the Study of Communication Problems (MacBride Commission), *Many Voices, One World: Towards a New, More Just, and More Efficient World Information and Communications Order* (Paris: United Nations Educational, Scientific and Cultural Organization 1980); for an excellent legally-based review see Daithí Mac Síngh, 'From Freedom of Speech to the Right to Communicate' in Monroe E Price, Stefaan G Verhulst and Libby Morgan (eds), *Routledge Handbook of Media Law* (Abingdon: Routledge 2013) 175. Communication rights studies are often global, but for nationally-focused studies see eg Marc Raboy and Jeremy Shtern with William J McIver, Laura J Murray, Seán Ó Siochrú and Leslie Regan Shade, *Media Divides: Communication Rights and the Right to Communicate in Canada* (Vancouver: UBC Press 2010); Pradip Ninan Thomas, *Negotiating Communication Rights: Case Studies from India* (New Delhi: Sage 2011); Marko Ala-Fossi, Anette Alén-Savikko, Jockum Hilden, Minna Aslama Horowitz, Johanna Jääsaari, Kari Karppinen, Katja Lehtisaari and Hannu Nieminen, 'Operationalising Communication Rights: The Case of a "Digital Welfare State"' (2019) 8(1) *Internet Policy Review*, http://policyreview.info.

[82] Article 19, *Statement on the Right to Communicate* (London: Article 19 2003) https://www.article19.org/data/files/pdfs/publications/right-to-communicate.pdf (emphasis added).

[83] As Raboy and Shtern, above n 81, 256 note, 'how to reconcile' communication rights and free speech 'remained a trusted crutch for critics of a right to communicate as well as an obstacle to progress for its supporters'. Indeed, within the wider communication rights literature Article 19 (the NGO) can be positioned as

positive dimensions it fits much more easily and supportively *with* communication rights. The role of positive freedom in communication rights is well recognised;[84] its role should also be recognised within free speech. While free speech—with positive as well as negative dimensions—is narrower than communication rights, it is an important and valuable part of communication rights. Such rights justify 'state intervention to tackle and counter market failure and provide the resources and arrangements for media pluralism and diversity to be strengthened'.[85] The parallels with a positive free speech analysis are close. Rather than something undercutting communication rights, free speech supports them.

Media economics or political economy offer another pathway into the issues,[86] and my analysis has broad parallels with studies such as those by Edwin Baker.[87] His work is one of the study's key precursors, but Baker makes less of the positive dimensions of the freedom, in itself and as a legal right. When he addresses individual speech, his concern is negative liberty,[88] while for media freedom his approach argues primarily for legislative action alone.[89] I return to aspects of his work in later chapters.

Equally, one might begin from comparative constitutional law or debates about judges enforcing constitutional rights.[90] Like such research, this book is concerned with constitutional institutions and judicial review. Or one could commence with analyses of positive constitutional rights or positive constitutionalism, which offer wider avenues for understanding positive dimensions of democratic constitutions.[91] But my interest lies in comparisons of free speech more than comparative constitutional law or constitutional theory as such. Questions about judicial roles are only an element of what is presented here; they are not central to my concerns with communicative freedom. Even so, I briefly consider an example from Kai Möller in a moment.

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arguing that (negative) free speech should *limit* the recognition of communication rights. But Article 19 also recognises free speech's positive dimensions, which is the relevant point for my purposes here.

[84] See eg William J McIver Jr, William F Birdsall and Merrilee Rasmussen, 'The Internet and the Right to Communicate' (2003) 8(12) *First Monday*, http://firstmonday.org/issues/issue8_12/mciver/index.html; Bart Cammaerts, 'Communication Freedoms versus Communication Rights: Discursive and Normative Struggles within Civil Society and Beyond' in Howard Tumber and Silvio Waisbord (eds), *The Routledge Companion to Media and Human Rights* (Abingdon: Routledge 2017) 50-59;

[85] Jonathan Hardy, *Critical Political Economy of the Media: An Introduction* (Abingdon: Routledge 2014) 190.

[86] A classic study across media economics and law is C Edwin Baker, *Media, Markets, and Democracy* (Cambridge: Cambridge University Press 2002); see also eg Janet Wasko, Graham Murdock and Helena Sousa (eds), *The Handbook of Political Economy of Communications* (Oxford: Wiley Blackwell 2014).

[87] See eg Baker, ibid; Baker, above n 34.

[88] See eg C Edwin Baker, *Human Liberty and Freedom of Speech* (New York: Oxford University Press 1989).

[89] See eg Baker, above n 34. I examine this difference in chapter 8 and in Andrew T Kenyon, 'Positive Free Speech: A Democratic Freedom' in Adrienne Stone and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech* (Oxford: Oxford University Press, in press).

[90] See eg Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press 2012); Richard Bellamy, *Liberalism and Pluralism: Towards a Politics of Compromise* (London: Routledge 1999); Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346; Joseph Raz, 'Disagreement in Politics' (1998) 43 *American Journal of Jurisprudence* 25; Aileen Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron' (2003) 22 *Law and Philosophy* 451.

[91] See eg Kai Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press 2012); NW Barber, 'Constitutionalism: Negative and Positive' (2015) 38 Dublin University Law Journal 249.

Research on legal protection for positive rights under the European Convention on Human Rights, or the European Union Charter of Fundamental Rights, could also be used.[92] That work parallels my interests, but is less specific in its implications for free speech than the examples considered later. International instruments could also be used, such as the 2005 UNESCO *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*.[93] At the European level, a start could be made from the Media Pluralism Monitor, which offers a detailed comparative approach to media pluralism across a wide range of domains. It considers ownership and control, pluralism of media types, content and genre, cultural and geographic aspects of pluralism, political pluralism and the always contentious issue of arriving at indicators for pluralism.[94] The approach has promising aspects in that its idea of media pluralism is broader than merely pluralism in ownership and control. It specifically registers issues of cultural, political, geographic, content and genre pluralism. However, the translation into policy outcomes does not (yet) appear to be strong. Perhaps the greatest difference from the Media Pluralism Monitor's general approach is that I would position many of the same concerns *within* free speech and its legal protection, rather than being policy questions that are *adjacent* to the freedom.

Of the many constitutional analyses that could be used, I want to note Möller's argument for an emerging 'global' model of constitutional rights. (The model is described as global apart from US law.) Möller includes ideas of positive obligations and suggests constitutional rights concern enablement and personal autonomy. Constitutional rights as a whole are 'best explained not by the once uncontroversial idea that the point of constitutional rights is to protect the people from their governments, but rather by reference to the value of positive freedom'.[95] In this way, constitutional rights affect all areas of policy making.[96] While concerned with positive freedom, his analysis does not focus on institutional or structural elements of *speech*.[97] Möller offers a broader argument for positive freedom which, when it considers free speech, focuses on other matters. He notes the legitimacy conditions of democracy or political autonomy include free speech, but he does not closely examine what that entails.[98] Further, while some rights might be preconditions for democratic legitimacy,

[92] See eg Oster, above n 42, 92-95; McGonagle, above n 44; Koltay, above n 42; Dirk Voorhoof, 'Freedom of Journalistic News-Gathering, Access to Information and Protection of Whistleblowers under Article 10 ECHR and the Standards of the Council of Europe' in Andreotti, above n 44, 105; Lorna Woods, 'Article 11' in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford: Hart 2014) 311; Hannes Oehme, *L'indépendance de l'audiovisuel public à l'égard des institutions politiques en France et en Allemagne* (Paris: LGDJ 2019).

[93] See eg Luis A Albornoz and Mª Trinidad García Leiva (eds), *Audiovisual Industries and Diversity: Economics and Policies in the Digital Era* (New York: Routledge 2019).

[94] See eg Peggy Valcke, Miklós Sükösd and Robert G Picard (eds), *Media Pluralism and Diversity: Concepts, Risks and Global Trends* (Basingstoke: Palgrave Macmillan 2015); Elda Brogi, Konstantina Bania, Iva Nenadic, Alina Ostling and Pier Luigi Parcu, *Monitoring Media Pluralism in Europe: Application of the Media Pluralism Monitor 2016 in the European Union, Montenegro and Turkey* (Florence: Centre for Media Pluralism and Media Freedom, European University Institute 2017).

[95] Möller, above n 91, 30.

[96] Ibid 108 and see eg Mattias Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1 *European Journal of Legal Studies* 153; 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law and Ethics of Human Rights* 141.

[97] Möller, above n 91, 65-66.

[98] Ibid 100.

Möller's interest is not centred on that issue. My focus, however, is how speech rights have that precondition role for democratic government. Further, his interest lies in the 'duties the political community owes to its members individually' rather than duties 'the political community owes to itself'.[99] My focus is more on the latter, without excluding the former.

It is worth noting a little more about two other pathways not directly taken here. They involve work by Habermas and Axel Honneth. It might be thought that public sphere theories and the work of Habermas[100]—or perhaps a modified analysis taking account of writing by Nancy Fraser, Bernhard Peters, Michael Warner and others[101]—offer a useful vehicle for my study. Public sphere analyses have long been influential in media studies,[102] and are clearly relevant to two models of diverse media from James Curran and Georgina Born considered in chapter 2. Curran explores various aspects of Habermas's work before setting out his own model of diverse democratic media,[103] while Born draws particularly on Nancy Fraser's response to Habermas.[104] Further, Habermas's work has been directly drawn on in legal research on free speech, media freedom and broadcast regulation,[105] and it engages with ideas of negative and positive freedom (the latter perhaps better termed 'communal' freedom in his approach).[106] Habermas discusses the concepts in terms of liberal and republican models of democracy, and the co-original status of private and public autonomy.[107] However, I do not find the work directly useful for my purposes. One reason is it tends to say little about structural, organisational or framework conditions of public speech, at least in express terms. The primary concern is with 'certain metaprinciples of freedom' which 'define the formal conditions of a free society' without 'any

[99] Ibid 110.

[100] See eg Jürgen Habermas, above n 7; *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (translated by Thomas Burger with assistance from Frederick Lawrence) (Cambridge MA: MIT Press 1989, original German publication 1962); 'The Public Sphere: An Encyclopedia Article' (1974) no 3 *New German Critique* 49 (translated by Sara Lennox and Frank Lennox, original German publication 1964).

[101] See eg Nancy Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' (1990) no 25/26 *Social Text* 56; Peters, above n 16; Warner, above n 15.

[102] See eg Paul Jones, 'The Best of Both Worlds? Freedom of Communication and "Positive" Broadcasting Regulation' (2001) 23 *Media, Culture and Society* 385; John B Thompson, *Ideology and Modern Culture: Critical Social Theory in the Era of Mass Communication* (Cambridge: Polity 1990); John Keane, *The Media and Democracy* (Cambridge: Polity 1991); Peter Dahlgren, *Television and the Public Sphere: Citizenship, Democracy and the Media* (London: Sage 1995); Roswitha Müller, 'From Public to Private: Television in the Federal Republic of Germany' (1990) no 50 *New German Critique* 41.

[103] James Curran, *Media and Power* (London: Routledge 2002) 233-234 (on Habermas) and 240-246 (towards a working model of democratic media). Interestingly, Jones notes something Habermas lacks in *Between Facts and Norms* is 'Curran's at least implicit insight that such a rethinking also requires a more complex sectoral model of media institutions than is conveyed by [the idea of] "regulated pluralism"': Paul Jones, 'Democratic Norms and Means of Communication: Public Sphere, Fourth Estate, Freedom of Communication' (2000) 1 *Critical Horizons* 307, 315.

[104] Georgina Born, 'Digitising Democracy' (2005) 76 (Supplement 1) *Political Quarterly* 102; Fraser, above n 101.

[105] See eg Lawrence B Solum, 'Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech' (1989) 83 *Northwestern University Law Review* 54; Oster, above n 42; Hitchens, above n 11. See also work on deliberative democracy and law: Levy and Orr, above n 3.

[106] See eg the analysis of negative and communal freedom in Albrecht Wellmer, 'Models of Freedom in the Modern World' in Albrecht Wellmer, *Endgames: The Irreconcilable Nature of Modernity, Essays and Lectures* (translated by David Midgley) (Cambridge MA: MIT Press 1998) 3.

[107] See eg Habermas, *BFN*, above n 7, 268-274.

specific content' in terms of 'institutional structures, forms of life, forms of association' and so forth.[108] Habermas pays greater attention to media's structure and role in later works,[109] but the general point remains. Overall, approaching matters through other writing is a simpler way to get to the implications of positive free speech (quite apart from questions that might be raised about his approach).[110]

In *Between Facts and Norms*, for example, Habermas locates law's legitimacy within a democratic process that depends on protecting basic rights and the public sphere supported by those rights. Free speech is important in this; it is a basic right underlying the constitution of the public sphere. But the greatest weight in terms of speech appears to be left to the voluntary exercise of a (negative) freedom to speak. Or at least, the freedom's positive dimensions are not brought out in the analysis,[111] with the public sphere left to 'an energetic civil society'.[112] The idea is that a public sphere exists on the 'periphery' of institutional politics and influences that politics. The public sphere has 'capacities to ferret out, identify, and effectively thematize latent problems of social integration' for political response.[113] As Habermas states, the assumption is problematic:

> The periphery can satisfy these strong expectations only insofar as the networks of noninstitutionalized public communication make possible more or less *spontaneous* processes of opinion-formation. Resonant and autonomous public spheres of this sort must in turn be anchored in the voluntary associations of civil society and embedded in liberal patterns of political culture and socialization … The development of such … structures can certainly be stimulated, but for the most part they elude legal regulation, administrative control, or political steering.[114]

He notes that work in media sociology 'conveys a skeptical impression of the power-ridden, mass-media-dominated public spheres of Western democracies',[115] but then says relatively little about media and particularly not about media structure and regulation.[116]

In a short paper, originally published as a newspaper article, he makes clear that Germany's dual system of public and commercial broadcasting avoids the 'widespread political and cultural damage' seen wherever commercial broadcasting has dominated.[117] And he notes the significance of

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[108] Wellmer, above n 106, 21.

[109] In particular, Habermas, *BFN*, above n 7 and Jürgen Habermas, 'Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research' which is published in two versions: a shorter 7,000-word version in (2006) 16 *Communication Theory* 411; a more detailed and useful 14,000-word version in *Europe: The Faltering Project* (translated by Ciaran Cronin) (Cambridge: Polity 2009) 138.

[110] For an interesting example that does link Habermas's work to positive free speech and media regulation, see Jones, above n 103; Jones, above n 102.

[111] Positive freedom in the sense of 'pursuing one's own conception of the good' is an ethical freedom, not a legal one for Habermas: *BFN*, above n 7, 399.

[112] Ibid 369.

[113] Ibid 358.

[114] Ibid 358-359 (emphasis in original).

[115] Ibid 373.

[116] Principal references from media studies include Michael Gurevitch and Jay G Blumer, 'Political Communication Systems and Democratic Values' in Judith Lichtenberg (ed), *Democracy and the Mass Media* (Cambridge: Cambridge University Press 1990) 270; Thompson, above n 102; Keane, above n 102.

[117] Jürgen Habermas, 'Media, Markets and Consumers: The Quality Press as the Backbone of the Political Public Sphere' in his book, *Europe: The Faltering Project* (translated by Ciaran Cronin) (Cambridge: Polity 2009) 131, 133. The earlier newspaper article appeared originally in *Süddeutsche Zeitung* (Munich) 16 May 2007; and then various outlets, see eg '*Il faut sauver la presse de qualité*', *Le Monde* (Paris) 21 May 2007 ('The quality press must

constitutional law and court decisions underpinning the German situation, including judgments that require public broadcasting funding to be set independently from politically-determined state budgets.[118] In that paper, Habermas draws similar conclusions to my approach on questions of media funding. However, the points are not central to his more substantial writing.[119]

Concern with commercial domination of media is evident in his work across many decades, but in *Between Facts and Norms* he relies largely on journalistic ethics to underpin a non-dominated media performance. Paul Jones and Michael Pusey comment:

> 'Self-regulating media system' is Habermas's routine reference in his later work to a differentiated independent media sector characterized principally by professional journalism. However, on the question of which specific *institutional and regulatory forms* best enable this necessary differentiated independence, he is silent.[120]

Perhaps one could say, rather, that he is *almost* silent. Habermas cites media studies authors who clearly focus on media regulation. In addition, *Between Facts and Norms* notes media power over story selection and presentation 'is not sufficiently reined in by professional standards' to meet public sphere requirements and that, in response, the media 'is being *subjected to constitutional regulation*'.[121] It is not surprising his example of constitutional regulation concerns German broadcasting law and the Federal Constitutional Court (which I examine in chapter 6). Habermas notes 'the professional code of journalism and the profession's ethical self-understanding' on the one hand, *and* 'the formal organization of a free press by laws governing mass communication' on the other are relevant to the regulated pluralism his analysis supports.[122] In his later essay, 'Political Communication in Media Society', Habermas refers to constitutional guarantees to support a public sphere that contributes 'to the formation of considered public opinions'. The guarantees include press freedom and media diversity, and 'regulations guaranteeing mass audiences and civil society access to the public sphere and preventing the monopolization of arenas of public communication by political, social, or economic interests'.[123] As well as constitutional protection of individual liberties and political participation, he is concerned here with the conditions that would support 'government by public

be saved'); 'How to save the quality press?' *Signandsight*, 21 May 2007, www.signandsight.com/features/1349.html. It has been suggested that this paper's approach to redressing market failure may have been influenced by Baker's work: Rodney Benson, 'Shaping the Public Sphere: Habermas and Beyond' (2009) 40 *American Sociologist* 175, 191: 'The phrase "market failure" is key, and perhaps betrays Habermas's influence by C Edwin Baker whom Habermas has had occasion to meet'.

[118] Ibid 133-134.

[119] His most detailed engagement with the issues is his plenary address 'Political Communication in Media Society' given to the International Communication Association in 2006, which again does not examine much about media structures; see the two published versions: Habermas, above n 109.

[120] Paul K Jones and Michael Pusey, 'Political Communication and "Media System": the Australian Canary' (2010) 32 *Media, Culture and Society* 451, 453 (emphasis in original).

[121] Habermas, *BFN*, above n 7, 376 (emphasis added).

[122] Ibid 378; see also its citation to 'regulated pluralism' in Thompson, above n 102, 261ff.

[123] Jürgen Habermas, 'Political Communication in Media Society: Does Democracy Still Enjoy an Epistemic Dimension? The Impact of Normative Theory on Empirical Research' in *Europe: The Faltering Project* (translated by Ciaran Cronin) (Cambridge: Polity 2009) 138, 141.

opinion'[124]—or, as others might term it, democracy of expression. Hartmut Wessler notes the description of constitutional guarantees 'is a strong statement couched in unobtrusive terms':[125]

> It is not enough that the media are able to report freely (and thus also to criticize government), but they should also be diverse, enjoy privileged access to official documents … , be accessible to citizens who want to speak up, and at the same time be insulated from the influence of various power-holders in society including government agencies and corporations.[126]

But what is not brought out in these examples is the detail of how media's formal organisation under constitutional free speech provisions can take such very different forms, forms that support 'government by public opinion' to greater or lesser extent. While positive dimensions of free speech may well be drawn out of Habermasian approaches, his work engages less than might be expected with my principal interests here. My analysis could be positioned as a version of public sphere theory, but I am not sure that would assist overall.

Moving to Honneth's work, in *Freedom's Right* he develops a theory justice and examines three forms of freedom: negative, reflexive and social.[127] They involve freedom from external limitation, freedom that is internally directed, and freedom through institutionalised processes of mutual recognition:[128]

> [F]reedom in the fullest sense is neither purely a *freedom from* (objective restrictions) nor *freedom to* (assert the subject's normative view of things) but is rather *freedom with*: it is an idea defined by intersubjective engagement and mutual respect.[129]

Social freedom certainly has resemblances to positive communicative freedom as developed in this book. At this stage, noting three points is enough.

First, Honneth's approach to social freedom gives mediated speech a similar role to much of the research used in later chapters. He considers media and democracy at some length, aiming for 'the reinvention of a truly democratic media system'. This would include overcoming 'a failure of public media due to their dependence on profit-making'.[130] Media independence is vital, and that requires independence from political domination, even where it also requires involvement by the state. Honneth states:

> The chances for [media] to remain true to their democratic task of impartial and informative reporting will increase the more they gain independence from the influence of political groups or private capitalist profit interests. To judge by the historical experiences of the last half century, this

[124] Ibid.

[125] Hartmut Wessler, *Habermas and the Media* (Cambridge: Polity 2018) 59.

[126] Ibid.

[127] Axel Honneth, *Freedom's Right: The Social Foundations of Democratic Life* (translated by Joseph Ganahl) (Cambridge: Polity 2014).

[128] Negative and reflexive freedom resemble Isaiah Berlin's negative and positive freedom, see eg Gaël Curty, 'Capitalism, Critique and Social Freedom: An Interview with Axel Honneth on *Freedom's Right*' (2020) (online first) *Critical Sociology* 1-11, 8 DOI: 10.1177/0896920520918505. See also chapter 4 which examines the understanding of positive freedom in some writers after Berlin, an understanding that is closer to social freedom in Honneth's tripartite analysis.

[129] David T Schafer, 'Pathologies of Freedom: Axel Honneth's Unofficial Theory of Reification' (2018) 25 *Constellations* 421, 426 (emphasis added).

[130] Curty, above n 128, 7.

> kind of independence can only be secured over the long term if the mass media are subjected to government control.[131]

Importantly, and implicit in that passage, 'government control' must take a form that safeguards media from domination by political actors. That is something later chapters consider further.

Media's broadly similar democratic role is notable because Honneth takes a non-idealised approach to freedom (one which differs, at least somewhat, from many free speech analyses).[132] He does not start from abstract principles, but from claims seen as immanent in a range of social practices across time. In short, democratic institutions and efforts for more democratic practices include within them claims for social freedom. And they have done for centuries. Honneth analyses how freedom has been experienced (or not) historically, asking what combination of negative, reflexive and social freedom has made freedom more (or less) real. And he recognises the importance of social struggles within that history. Democratic will formation is central. He notes that, in analyses by Émile Durkheim, John Dewey and Habermas, 'all constitutive elements of the modern constitutional state, especially … its legal composition and the division of powers' must be understood through the requirement for the state to 'presuppose, protect and implement the will-formation of the citizens'.[133] Honneth continues:

> Of course, none of these three authors ever believed that the actual behaviour of state authorities could be explained according to this model. … [T]he normative idea that the constitutional state is to be anchored in the communicative will-formation of its citizens is only viewed as one guideline—one, however, that has long since been institutionalized historically and can thus can be regarded as relevant to the legitimacy of the state … This is not an idealizing conception, … rather it is merely the historical outcome of a conception that has been accepted within Western Europe ever since the days of the French Revolution.[134]

The point for my purposes is the substantially similar approach to media here and in more idealised analyses. Similar claims about the role of mediated speech in democracy can arise whether starting from principles of justice or normatively reconstructing the immanent claims of existing democracies.

Second, while more could be extracted from Honneth's analysis for my purposes, that would require some reformulation. In *Freedom's Right*, he positions law as primarily protecting negative freedom; law appears to be more significant for the possibility of freedom than its reality. His interest is how 'freedom and justice [is] instantiated in culture, society, and practices' not in constitutional law.[135] And the potential of law to support developments in social freedom is not the main concern. Elsewhere, he does note that positive freedom is, in some ways, *within* law. Honneth has

> difficulty believing that we should understand our modern system of rights primarily according to the model of negative freedom. The whole idea of having legal rights is so strongly linked with the notion of collective self-authorship, with collective sovereignty in modern conditions, that it includes almost conceptually a certain portion of positive freedom.[136]

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[131] Honneth, above n 127, 298.

[132] See eg Karppinen, above n 14 for discussion of various non-idealised theories (including Honneth's) relevant to free communication.

[133] Honneth, above n 127, 305.

[134] Ibid 306.

[135] Simone Chambers, 'Review of Honneth, *Freedom's Right*' (2016) 126 *Ethics* 505, 506.

[136] Axel Honneth, 'Negative Freedom and Cultural Belonging: An Unhealthy Tension in the Political Philosophy of Isaiah Berlin' (1999) 66 *Social Research* 1063, 1072.

It is not that law is absent from the analysis in *Freedom's Right*. But I would suggest that some of what Honneth places *beyond* law also lies within it. The wider factors he lists are clearly important for effective communicative freedom, but they are not all distinct from law. In setting out five 'conditions of social freedom in the democratic public sphere', he begins with 'indispensable legal guarantees' of speech, before noting two further conditions: 'a class-transcending, universal communicative space that enables different groups and classes affected by political decisions to enter into an exchange of opinions' and 'a highly differentiated system of mass media … which enables its audience to take part in informed processes of will-formation' and provides 'space for the independent ethos of media professionals'. (These conditions do not sound far from the model of democratic media developed in chapter 2 using existing media studies research.[137]) He then lists another two conditions: citizens' willingness to participate in the 'material preparation and execution of actual events' and a political culture that nurtures social solidarity.[138] Honneth also notes a sixth condition of social freedom in democratic will-formation, something that can be overlooked in public speech theories. People engaging in a 'communicative exchange of views must feel that the products of their will-formation are effective enough to be practised in social reality'.[139] That is, the 'articulation' of speech to political effect is an indispensable condition, as briefly noted above.[140] What I would emphasise is that important parts of these conditions lie *within* communicative freedom—as significant as the wider factors are—and free speech law has a role in supporting them.

Third, the attention paid to multiple conditions in Honneth's analysis—conditions that can only ever be partially fulfilled—is quite consistent with this book's approach to free speech. As Kari Karppinen suggests, analyses like Honneth's imply that:

> [F]reedom of communication should not be understood as an absolute, foundational ideal, or a state of affairs that can be unambiguously achieved, but more as a matter of degree, subject to a range of empirical constraints and limits.[141]

Constraints can arise from 'state, market, or technological systems, and cultural, political, and social relations of power'.[142] And it is within all those conditions that the state of affairs of communicative freedom needs to be sought.

It may also be worth noting another area of research that is largely left aside. Government speech or state-supported speech is a recurrent topic in US writing especially, which might be thought similar to my concerns. An example is Corey Brettschneider's *When the State Speaks, What Should it Say?*[143] It uses the idea of free and equal citizenship to argue against state regulation of hate speech

[137] See above nn 103-104 and accompanying text.

[138] Honneth, above n 127, 289-292. This part of Honneth's analysis builds, in particular, on John Dewey, *The Public and Its Problems: An Essay in Political Inquiry* (New York: Henry Holt 1927).

[139] Honneth, above n 127, 304.

[140] See above nn 22-23 and accompanying text. As Couldry, above n 23, 195 suggests, the issue may lie beyond public sphere theory: 'Here we reach the boundary of what that theory specifies; since this articulation is not internal to the public sphere itself, it has been little discussed'. There may be greater concern for speech's political *effectiveness* in work on systemic deliberative democracy; see eg Mansbridge et al, above n 75.

[141] Karppinen, above n 14, 82-83.

[142] Ibid.

[143] Corey Brettschneider, *When the State Speaks, What Should It Say? How Democracies Can Protect Expression and Promote Equality* (Princeton: Princeton University Press 2012). See also eg Helen Norton, *The Government's Speech and the Constitution* (Cambridge: Cambridge University Press 2019).

alongside state promotion of public equality through its own speech. The analysis largely tracks US law in relation to both aspects: protecting hate speech and promoting equality through criticism of hate speech.[144] But Brettschneider's central issue is distinct from my interests here. In short, when the state supports a diverse media environment, when it provides a structural 'housing'[145] underlying public speech, the state is not speaking. Concern about sustained plural public speech is not the same as concern about government speech. Using 'governmental powers to expand the system of freedom of expression, while at the same time controlling and limiting those powers'—as Emerson described positive dimensions of free speech—is a separate matter to the state speaking.[146] It is also the case that Brettschneider does not engage explicitly with media, whether commercial US media, public media as seen in many other democracies, or in connection with the tax and charitable status of non-profit organisations (which he does examine).[147] The media environment is taken 'as is', in its particular US form. That may not be so surprising given the work's focus, but it limits the ease with which the analysis could be applied here.

If one wanted to consider government speech in relation to communicative freedom, another entry point is Jacob Rowbottom's analysis of 'Government Speech and Public Opinion'.[148] He argues that democratic government 'should be responsive to public opinion' which 'should be formed and transmitted in a process free from government direction'.[149] I agree. In some ways, as he notes, 'concerns with government speech are analogous to democracy-based arguments for freedom of expression'. In such arguments, 'freedom of expression is necessary for people to form opinions about what they want government to do, and to put pressure on government to do those things'.[150] His analysis is particularly notable for finding that similar requirements for opinion formation apply under various forms of democracy. (I explore a similar point in chapter 3.) As Rowbottom states simply: 'All theories of democracy require a link between the people and government' and that link is, in part, communicative.[151] While the significance of public speech is easy to imagine for theories of discursive democracy, it arises even in even minimalist theories in which electors still need information about government actions and the various elites competing for their votes.[152] Rowbottom also suggests focusing on 'the *structure* of the system of communication',[153] again resembling my approach. His aim is for 'institutions independent of government' to be responsible for official information, with state support being possible 'for independent watchdogs, including sections of the media' to scrutinise

[144] Frederick Schauer, 'Book Review: *When the State Speaks, What Should It Say? How Democracies Can Protect Expression and Promote Equality*, by Corey Brettschneider' (2014) 42 *Political Theory* 498, 500:

> [The book is] a carefully argued and coherent defense of the American approach, a defense more thoughtful, more internally consistent, and more connected with the relevant philosophical literature than will ever plausibly be located in a judicial opinion.

[145] See above n 13.

[146] Thomas I Emerson, 'The Affirmative Side of the First Amendment' (1981) 15 *Georgia Law Review* 795, 796.

[147] Eg there are only two passing references to media in the book: Brettschneider, above n 143, 110 and 112.

[148] Jacob Rowbottom, 'Government Speech and Public Opinion: Democracy by the Bootstraps' (2017) 25 *Journal of Political Philosophy* 22.

[149] Ibid 23.

[150] Ibid 31.

[151] Ibid 47.

[152] Ibid 30.

[153] Ibid 42 (emphasis added).

government communications and data.[154] While media is noted in the analysis, it does not receive close consideration; the wider structure underlying mediated speech is, understandably, not the primary concern. But it is here.

The book foreshadowed

Having said something about the study's focus and challenges in this introduction, chapter 2 moves to a general consideration of *free speech, media and law*. It outlines the idea of sustained plural public speech and the place of the freedom's positive dimensions within it. It then examines two models of diverse media drawn from media studies scholarship. They suggest something of the structural diversity sought by positive free speech and the way in which constitutional protection of free speech could frame a democratic architecture of public speech. Existing legal research is used to suggest judicial roles *could* be substantial for positive as well as negative dimensions of free speech or, alternatively, the freedom's positive dimensions could be questions for non-judicial actors such as parliaments, executives and regulators. In short, varying approaches could be taken to the issue of 'who does what' in relation to free speech. Later examples suggest more weight could be placed on courts than commonly occurs for positive dimensions of free speech. Even so, all actors would be involved. Courts can only do a little of what needs to be done but doing that may be very important. Apart from anything else, it is unlikely that all relevant matters could even get to court under many democratic constitutions due to matters of constitutional design, judicial interpretation or both. Existing legal research is also used to question assumptions underlying negative approaches to free speech, such as equality existing in public speech without state action, rational public debate overcoming any speech inequality, or government 'action' being more harmful to free speech goals than 'inaction'. The assumptions appear empirically dubious.

Chapter 3 examines matters concerning *positive free speech and democracy*. It suggests positive free speech is part of the legitimacy claim of the constitutional democratic form in contemporary societies, rather than being linked to one or other version of democracy, such as libertarian, republican, agonistic or deliberative. Positive free speech is relevant to plural forms of democracy: communicatively legitimate democracy involves a basic role for sustained plural public speech, supported by positive and negative dimensions of free speech, and this is true across varied forms of democracy.

Matters then move to consider *freedom*. Chapter 4 examines illustrative scholarship on human rights and political theory. The human rights analysis suggests positive free speech could entail obligations on the state to act in support of diversity in public speech, with claims of democracy underlying the need for action, and courts having a role to support positive free speech as a democratic precondition. In terms of political freedom, the chapter suggests Isaiah Berlin's commonly cited analysis of positive and negative freedom has little relevance for positive dimensions of free speech.[155] Other writers show positive communicative freedom is highly pluralistic, contrary to Berlin's general approach to positive freedom. They show how free speech includes negative liberty but exceeds it. In addition, the freedom can well be described in terms of enablement, meaning the

[154] Ibid 42-43, noting examples such as academic freedom, official statistics and freedom of information.

[155] Isaiah Berlin, *Two Concepts of Liberty: An Inaugural Lecture Delivered before the University of Oxford on 31 October 1958* (Oxford: Clarendon 1958). See also Isaiah Berlin, 'Introduction' in *Four Essays on Liberty* (Oxford: Oxford University Press 1969) ix.

conditions of exercising freedom are central analysing freedom, again contrary to Berlin. The result is that, even for approaches generally within Berlin's tradition, his essay should be left aside when discussing free speech. A further point arising from this chapter's examples is their tendency to place responsibility on institutional politics rather than judges. Courts might have a role, but a lesser one. Similar ideas are evident in much of the legal scholarship considered in chapter 5. By the end of the book, I think it will be clear why such a limited judicial role is unlikely to result in substantial positive freedom of speech, even if a larger judicial role also raises real challenges.

Chapter 5 examines some *legal writing on free speech* that, directly or by implication, uses ideas of positive freedom. The examples come from US research, in part to show how positive dimensions of free speech can be argued for even where formal law is highly negative in approaching the freedom. The examples reinforce the analysis in chapter 4, and some come close to the German and French law addressed in later chapters (although the resemblance appears unintentional). The US examples contain repeated calls for diverse public speech that, in one way or another, is promoted by government. Some even suggest courts could take an active role in prompting government action. There is also awareness that speech arises within existing practices of communication that constrain as well as enable speech; the freedom involves dialogical, social or structural interests and not only individual ones; and government *always* affects opportunities for speech, not only when it directly restricts speech. The matters raised in chapters 4 and 5 suggest the terrain in which positive free speech is often considered. While the examples link speech with democracy, many do not specifically address any *communicative requirements* or *preconditions* of democracy, such as the idea that an architecture for speech inheres in the idea of democracy and is required by it. However, some legal scholarship does address just such preconditions. That work provides a useful introduction to the next two chapters, which consider examples of courts acting in support of positive free speech precisely because the freedom is understood to be a precondition of democracy.

Chapters 6 and 7 consider *examples of positive free speech being pursued in constitutional tribunals in Germany and France*. The two approaches display 'significant parallels',[156] but are not the only instances that could be considered.[157] There are also some ironies in using each example—France, for instance, has a notable history of government power over broadcast media.[158] Nonetheless, they are useful for my purposes. The German example, addressed in chapter 6, shows a constitutional court taking a substantial role over structural aspects of broadcasting, doing through constitutional law things that might be pursued elsewhere, if at all, through legislation or government policy (with the legislation or policy often lacking any direct reference to free speech). Despite various weaknesses, both *how* and *why* the court acts have wider significance for free speech. It is not that the court 'fixes' positive free speech; rather, it acts in a small number of ways to support some aspects of positive communicative freedom. But the results appear to be substantial. The example suggests that if courts

[156] Bernd Grzeszick, 'The "Serving" Freedom to Broadcast: Subjective versus Objective Dimensions of a Fundamental Right' in Hermann Pünder and Christian Waldhoff (eds), *Debates in German Public Law* (Oxford: Hart 2014) 75, 92; see also eg Jean Morange, *La liberté d'expression* (Brussels: Bruylant 2009) 127.

[157] See eg discussion in Kenyon, above n 14, 391-395; Carolan, above n 20; Bhatia, above n 3.

[158] See eg Giorgia Pavani, *The Structure and Governance of Public Service Broadcasting: A Comparative Perspective* (Cham: Palgrave Macmillan 2018) 134-138; Raymond Kuhn, 'Public Service Media in France' in Eva Połońska and Charlie Beckett (eds), *Public Service Broadcasting and Media Systems in Troubled European Democracies* (Cham: Palgrave Macmillan 2019) 69, 77.

do not promote structural diversity, adequate and varied financing and media independence, then positive free speech may not be realised to any democratically sufficient degree.

French decisions, considered in chapter 7, help to counter the idea that positive dimensions of free speech are not part of free speech at all, or that media pluralism is quite distinct from communicative freedom. Of course, media pluralism is often analysed separately to free speech, but it need not be separated like that, and the implications of positive freedom suggest it should not be. In France, protecting pluralism is part of the constitutional protection of free communication. As well as illustrating that pluralism extends across media platforms (and does not apply only to broadcasting), the French example is notable for basing pluralism in the sort of free speech provision that is commonplace in democratic constitutions. A quite standard constitutional wording about free speech—and one that predates twentieth century human rights or welfare state ideas[159]—contains more than might be expected. The French approach echoes ideas of sustained plural public communication raised in earlier chapters. French law aims for an effective freedom for recipients: free communication in its democratic aspects is 'a freedom of reception'.[160] For people to express an opinion and for that opinion to have political effects, as is said to occur in a democracy, people must be able to form an opinion first and form it through plural media.[161] Democracy depends on plural public speech, involving multiple diverse outlets and transparency over information source and financing. Although the French example is interesting for what it says about the freedom and how it links the freedom directly with democracy, the result in terms of what pluralism actually involves is somewhat disappointing. A great deal of the detail is left to other actors, some of which is also considered in the chapter. Overall, strong statements about pluralism do not translate into as precise or demanding legal requirements as they might. Even so, the contours of a more substantial positive freedom of speech emerge from both the German and French examples.

Finally, chapter 8 recaps the material with a view to drawing out a range of measures relevant to free speech's positive structural dimensions. It then says a little about the contemporary communications environment, in which positive dimensions of the freedom remain relevant and challenging to support. Overall, the study suggests that, in theoretical terms at least, more weight could be placed on judges to support positive free speech than in much existing legal analysis. It is a difference of degree but raises questions about contexts in which courts do *not* act and links into larger debates about judicial protection of rights and democracy. On that issue, two general points are addressed, concerning judicial review's legitimacy and effectiveness. The first considers arguments that rights review by judges is undemocratic. I suggest the arguments are, in some ways, bypassed through understanding how free speech is a *precondition* to substantially legitimate democracy. Whichever position might be preferred in debates about judicialisation and democracy in general, it appears implausible to suggest that courts should have no role supporting a democratic constitution's structural elements related to communication. The second general point involves another, sometimes related, set of concerns about judicial activity; namely, the idea that courts will prevent structural issues being addressed even where legislatures seek to do so. Such a danger may well be present, but

[159] That constitutional rights have positive dimensions might, more generally, be linked to human rights or welfare state ideas: see eg Schauer, above n 44, 36-37; Ala-Fossi et al, above n 81.

[160] See eg Louis Favoreu and Loïc Philip, *Les grandes décisions du Conseil constitutionnel* (7th ed, Paris: Dalloz 1993) 724-727.

[161] See eg Sophie Boyron, *The Constitution of France: A Contextual Analysis* (Oxford: Hart 2013) 194.

the examples of courts acting in relation to positive free speech counter a blanket concern about it. Clearly, for courts to play the sort of role this book suggests is necessary imposes requirements on courts and their operations, which links to questions about the composition of courts, judicial appointment and tenure, access, standing and so forth. While courts may have weaknesses in terms of supporting positive free speech, inaction by courts may not be preferable. Importantly, courts' actions would not amount to them determining everything about the positive structural dimensions of free speech. Far from it. But courts could provide a framework—at least where the jurisdiction's constitutional arrangements and judicial interpretations allow relevant disputes to reach court. Courts could oblige entities such as parliaments, executives and regulators to act, and set limits for those actions. Where judicial action is not possible or is highly unlikely, the analysis suggests how other actors—such as legislatures, executives and regulators—should pursue a democracy of expression. It also explains why that pursuit may not eventuate to a sufficient degree.

How much diversity—or, as Thomas Gibbons has asked, 'what is sufficient plurality?'[162]—is a question to debate in light of the general approach to free communication outlined here. There is no perfect response to it, but my concern is more with the aspects of diversity and transparency that are relevant and how they are evaluated, or who does what in supporting an environment for sustained plural public speech.[163] As emerges from later chapters, combing the models of diverse media introduced in chapter 2 suggests the type of approach that is required. It is not so much those models' precise details as the types of matters they consider and the general approach they take. In general terms, they extend the elements of pluralism seen in much work on media diversity and pluralism, and they accord with the pluralism sought by Baker in his substantial studies of media and communicative freedom.[164]

The approach I put forward to free speech is close to the contemporary analysis of Gibbons when he argues for a 'strong' conception of free speech and 'associated policies for a more active form of media pluralism'.[165] He suggests that older writing on media access suffered because it did not reconsider what is meant by 'freedom' within free speech. Gibbons is interested in doing just that and uses Gerald MacCallum's triadic approach to freedom (which I discuss in chapter 4).[166] Gibbons notes the failure to reframe freedom undermined efforts to promote media access. 'The consequence has been an impasse because, in the absence of some stronger free speech right, *the solution to structural obstacles to wider communication lies in … legislative intervention—for which there has been little political appetite*.'[167] In this way, he draws out the weakness in leaving matters of positive free speech solely to actors other than courts; namely, those actors will not act (or will not act sufficiently). That weakness is quite predictable. His general conclusion is that state action in support

[162] Thomas Gibbons, 'What Is "Sufficient" Plurality?' in Steven Barnett and Judith Townend (eds), *Media Power and Plurality: From Hyperlocal to High-Level Policy* (Basingstoke: Palgrave Macmillan 2015) 15.

[163] For a brief comparison of who does what in relation to negative and positive dimensions of free speech, see also Andrew T Kenyon, 'Who, What, Why and How: Questions for Positive Free Speech and Media Systems' in Maria Edström, Andrew T Kenyon and Eva-Maria Svensson (eds), *Blurring the Lines: Market-Driven and Democracy-Driven Freedom of Expression* (Gothenburg: Nordicom 2016) 29.

[164] See above nn 86-87 and chapter 3.

[165] Gibbons, 'Platform for Speech', above n 3, 11.

[166] Gerald C MacCallum, Jr, 'Negative and Positive Freedom' (1967) 76 *Philosophical Review* 312.

[167] Gibbons, 'Platform for Speech', above n 3, 16 (emphasis added).

of speech should be presumed to be necessary; it should not be thought exceptional.[168] I agree. But I am less sure of just focusing on constitutional actors other than courts. That is certainly one way of understanding positive free speech. As Frederick Schauer has observed, it is a difficult question whether free speech should be a positive legal right enforced through constitutional courts.[169] But I would suggest there are theoretical reasons for courts to do more than merely respond supportively to legislative, executive or regulatory action—and this is so despite weaknesses that courts might well have. The required state intervention 'to protect an interest as basic and important as freedom of speech'[170] might include—indeed it might sometimes require—action by courts as well as other actors. This ambivalence about courts underlines the very real challenges of positive free speech being supported to any democratically sufficient degree. But a first step is understanding the freedom a little more fully.

[168] Gibbons, 'Communication and the State', above n 3, 42.

[169] Schauer, above n 44, 43. See also see some of the free speech analysis by Schauer discussed in chapter 2, in particular Frederick Schauer, 'Hohfeld's First Amendment' (2008) 76 *George Washington Law Review* 914.

[170] Gibbons, 'Communication and the State', above n 3, 42.

2 Positive Free Speech from Media Studies and Law

This chapter offers an initial examination of one aspect of positive free speech: namely, its support for what I call sustained plural public speech. Research in media studies is used to outline two models of media that take this general approach. The models highlight the structural diversity that follows from positive free speech and offer a way of thinking about multiple aspects of that diversity. They suggest how the idea could frame a democratic architecture for speech. The chapter then examines some instances of legal scholarship related to positive dimensions of free speech. They suggest how the freedom might be more than a negative liberty, with states having obligations to pursue positive communicative freedom. In addition, courts could have a role in framing the possibilities for legislative, executive and regulatory action related to positive free speech. Examples in later chapters illustrate contexts where there could be value, in theory at least, in such a role.

Sustained plural public speech

What is meant by positive dimensions of free speech? Clearly, free speech can be considered in negative terms as a liberty involving the legal review of state restriction on speech, with the review generally involving judges. This is said to be the 'classical' liberal view of free speech, and the 'conventional understanding'.[1] It can be seen in political, philosophical and legal analyses. Freedom of speech limits government action that would restrict speech, particularly parliamentary or executive action, and courts have a significant role protecting speech against unwarranted restriction.

Whatever value the classic view has in terms of free speech, it is incomplete. Seeing the freedom only in negative terms can easily be criticised. As Onora O'Neill observes, the absence of overt government action does not leave communication free from influence:

> No society can guarantee that all communicators will be able to express every possible content in every possible context. Supposed attempts to do this by laissez-faire communications policies merely assign the regulation of communication to nonstate powers. They secure a particular configuration of freedom of expression, which may leave some unable to find their voices and does not guarantee the expression of diverse views.[2]

Similar statements are frequently made.[3] But I note this example because O'Neill suggests several points that are relevant for my purposes. In a democratic society the aim should be 'a set of practices that enables a wide range of communication, especially of public communication, for all'; democratic states '*cannot be* neutral or unconcerned about the regulation of mediated communication', complete non-interference being 'impossible'; minimal *legal* regulation of public speech is not necessarily minimal *interference* with speech; and 'it may not be *minimal* interference … that best secures the sustained possibility of communication'.[4] O'Neill suggests that avoiding overt government action

[1] Eg, respectively, Lesley Hitchens, *Broadcasting, Pluralism and Diversity* (Oxford: Hart 2006) 39; Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press 2000) 7.

[2] Onora O'Neill, 'Practices of Toleration' in Judith Lichtenberg (ed), *Democracy and the Mass Media: A Collection of Essays* (Cambridge: Cambridge University Press 1990) 155, 178.

[3] See eg John Charney, *The Illusion of the Free Press* (Oxford: Hart 2018) 129 (negative freedom does not remove constraints over speech but 'modifies the agent doing the domination').

[4] O'Neill, above n 2, 178 (emphasis in original).

merely leaves public speech to the influence of private powers. Governments refraining from direct action secures one configuration of freedom. Instead, the aim should be to enable sustained plural public speech in a democracy, while recognising the impossibility of complete government non-interference with communication. My interest lies in considering the role of positive dimensions of free speech within that aim.

Enabling sustained plural public speech might be thought to lie *beyond* free speech. Diversity or pluralism might be understood as being separate from free speech, even if the two are related. That is a common enough approach,[5] but it is not the only possibility. Weaknesses in a negative approach to the freedom, highlighted by O'Neill, suggest value in thinking about an inclusive approach that treats plural speech as part of the freedom. It also assists, I think, in moving the idea of plurality beyond a 'naïve pluralism' where 'a simple abundance of news' is assumed to make societies more democratic, and abundant speech 'comes to stand in for pluralism and for freedom in the same breath'.[6] Plurality is not simply a question of quantity. A parallel approach is seen in the political theory discussed in chapter 4: freedom includes the presence of multiple possibilities. In this context, it is about supporting the possibility of political choice.

As Judith Lichtenberg explains, two broad goals can be seen *within* common free speech rationales:

> The first we may call the *noninterference or no censorship principle*: One should not be prevented from thinking, speaking, reading, writing, or listening as one sees fit. The other I call the *multiplicity of voices principle*: The purposes of freedom of speech are realized when expression and diversity of expression flourish.[7]

Lichtenberg maintains that diverse, multiple voices are needed for free speech interests to be met. More than speech itself, it is debate and diversity of ideas that are required. Classic free speech aphorisms make the point well. 'Without contraries, there is no knowledge'.[8] Public debate should be 'uninhibited, robust and wide-open'.[9] What is needed is 'a struggle between combatants fighting under hostile banners' in John Stuart Mill's words.[10] Mill went on to suggest that 'if opponents of all important truths do not exist, it is indispensable to imagine them, and supply them with the strongest

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[5] See eg work on the European Media Pluralism monitor, noted in chapter 1; Nicola Lucchi, 'Media Freedom and Pluralism in the Digital Infrastructure' in Patricia Jonason and Anna Rosengren (eds), *The Right of Access to Information and the Right to Privacy. A Democratic Balancing Act* (Stockholm: Södertörn University, working paper 2017:2) 151 (discussing European approaches to freedom and pluralism as related but, implicitly, distinct matters).

[6] Natalie Fenton, 'Defending Whose Democracy? Media Freedom and Media Power' (2014) 35 (special issue) *Nordicom Review* 31, 33 and 34. See also Kari Karppinen, *Rethinking Media Pluralism* (New York: Fordham University Press 2013) 14-15:

> Some social actors will always be in a better position than others to make their voice heard. The risk of what can be called naïve pluralism is that these questions of power are veiled or ignored under the illusion of communicative abundance or limitless choice.

[7] Judith Lichtenberg, 'Foundations and Limits of Freedom of the Press' in Lichtenberg, above n 2, 102, 107 (emphasis in original).

[8] John Durham Peters, *Courting the Abyss: Free Speech and the Liberal Tradition* (Chicago: University of Chicago Press 2005) 78 (on Milton's approach to free speech).

[9] *New York Times v Sullivan* 376 US 254, 270 (1964).

[10] John Stuart Mill, *On Liberty* (edited by Currin V Shields) (Indianapolis: Bobbs-Merrill 1956) 58.

arguments which the most skilful devil's advocate can conjure up.'[11] As that quotation suggests, even classic sources, which may emphasise negative dimensions of free speech, can suggest the freedom's positive dimensions.[12] More generally, calling for debate and diversity resonates with democratic rationales for free speech. Sophie Boyron puts it succinctly when discussing French constitutional protections: for a people 'to express its opinion in democratic elections … it needs to be able to form an opinion first' and that requires plural media containing diverse public speech.[13] I would reframe that slightly: for people to express opinions in, and in-between, democratic elections they need to form opinions which requires sustained plural public speech. Not only media is relevant to forming an opinion, but mediated speech is of central importance all the same. As Christian F Rostbøll observes:

> In forming my political opinions I am substantively dependent on all of the sources of information and reasons I come into contact with: the media, public authorities, politicians, social movements, interest organizations, and so on, as well as those with whom I discuss political issues. I could not possibly form *any* political opinions without the information and advice I get from others.[14]

Notably, important aspects of the sources of information listed after 'the media' in the quoted passage have long come to people *through* media, which is one reason underlying my interest in plural mediated speech.

This book's focus on a mass media age may make it understandable if emphasis appears to be placed solely on diversity. However, as the models discussed in this chapter show, the aim is a structural diversity that includes broad and inclusive speech as well as sectoral speech, delivered by and for varied staff, organisations and audiences. The communication is 'sustained' across time and by media practices—practices theoretically aimed at serving audience deliberation. Indeed, part of what is sustained may well be the 'civic disposition' people need to make democratic use of speech.[15] The communication is 'plural' across multiple dimensions, and it is 'public' in the sense of forming smaller and larger publics, including ones of sectional and wider debate. Thus, the freedom's positive dimensions are not only about diversity. The communication is sustained in part through practices of journalism—a point worth underlining as journalism is an element of the infrastructure of public speech which has changed substantially since the period on which I focus.[16]

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[11] Ibid 73. On Mill and positive freedom more generally see eg Sven Ove Hansson, 'Mill's Circle(s) of Liberty' (2015) 41 *Social Theory and Practice* 734. Hansson considers that, in light of Mill's approach to positive freedom in terms of self-development, 'There is no way to construe Mill as a champion of an exclusively negative freedom': 744.

[12] Eg Anshuman A Mondal, 'The Shape of Free Speech: Rethinking Liberal Free Speech Theory' (2018) 32 *Continuum* 503, 506 (discussing Mill).

[13] Sophie Boyron, *The Constitution of France: A Contextual Analysis* (Oxford: Hart 2013) 194.

[14] Christian F Rostbøll, *Deliberative Freedom: Deliberative Democracy as Critical Theory* (Albany: State University of New York Press 2008) 169 (emphasis in original).

[15] See eg Mark Andrejevic, *Automated Media* (New York: Routledge 2020) chapter 3 'Automated Culture' discussing, at 49:

> the degradation of people's ability to see themselves as part of an imagined community in which the concerns and interests of others, both individually and collectively, matter to their own thriving and thus to their deliberative decision-making processes.

[16] See eg Mike Ananny, *Networked Press Freedom: Creating Infrastructures for a Public Right to Hear* (Cambridge MA: MIT Press 2018); Victor Pickard, *Democracy Without Journalism? Confronting the Misinformation Society* (New York: Oxford University Press 2020).

I have considered elsewhere how such plural public speech should not be assumed to exist in market-based mass media. Theory and practice suggest that support beyond markets is required.[17] United States media—a 'hyper-commercial media system'[18]—is arguably the classic market-based model, but the 'spectrum of views' expressed there 'may seem broad only to those … whose opinions are in the same ballpark' as those views or 'because it is all [they] are used to'.[19] (It is also worth noting that even US media history has been marked by government intervention, not its absence.[20]) Research into market-based and public media also weighs against understanding government action as necessarily harmful to free speech. Some government action—such as creating and funding independent public media—appears to be far from harmful; rather, it can enhance public knowledge. The research suggests that not having such government action fails democratic free speech. In terms of theoretical analysis, Edwin Baker's work is illustrative. In *Media, Markets, and Democracy*, he argues market-based media do not serve all audiences and the US First Amendment should not prevent 'structural interventions' aimed at improving the diversity of media speech.[21] In simple terms, commercial media construct audiences on non-discursive bases to serve particular marketing needs. Other potential audiences are ignored. Media is 'segmented' along commercial lines, not democratic ones.[22] The result is not sustained plural public speech. Under contemporary conditions, much of all media—not just commercial media—passes through data intermediaries that are commercially driven, potentially augmenting rather than overcoming the concerns raised by Baker at the start of this century.[23]

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[17] See eg Andrew T Kenyon, 'Assuming Free Speech' (2014) 77 *Modern Law Review* 379; 'Free-Media-Speech: Free Speech and Public Media' (2014) 10 *International Journal of Media and Cultural Politics* 155.

[18] Rodney Benson, 'The New American Media Landscape' in Aeron Davis (ed), *The Death of Public Knowledge? How Free Markets Destroy the General Intellect* (London: Goldsmiths Press 2017) 69, 81.

[19] Jonathan Weinberg, 'Broadcasting and Speech' (1993) 81 *California Law Review* 1101, 1152 (footnote omitted to C Edwin Baker, 'Advertising and a Democratic Press' (1992) 140 *University of Pennsylvania Law Review* 2097, 2242). Similarly, social media platforms may be experienced as 'wide open' primarily by people like the platforms' creators, while 'international human rights activists … experience them as censored, unreliable, and inhospitable to their efforts': Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (New Haven: Yale University Press 2018) 8.

[20] See eg Paul Starr, *The Creation of the Media: Political Origins of Modern Communications* (New York: Basic Books 2004). As Benson notes, despite Starr's overall argument, he 'makes it irrefutably clear that political intervention was the rule, not the exception' in US history; 'Perceiving their young republic as having a greater need for information flow than social control, American political leaders did far more than their European counterparts to pro-actively promote communication': Rodney Benson, 'The Political Shaping of the Media' (2005) 46 *European Journal of Sociology* 541, 541-542.

[21] C Edwin Baker, *Media, Markets, and Democracy* (Cambridge: Cambridge University Press 2002) 4.

[22] See also discussion in Kenyon, above n 17, 386-387, including examples from Williams on the 'novel democratic criterion' for survival of a media company; namely, the need to be the largest title within a national market, or to have sufficient readers of high socio-economic status: Raymond Williams, *The Existing Alternatives in Communications* (London: Fabian Society 1962) 6. As Williams also notes, the actual criterion of newspaper viability 'is totally different from … any theoretical account of democracy'.

[23] Among many contemporary studies see eg Nick Couldry and Ulises A Mejias, *The Costs of Connection: How Data is Colonizing Human Life and Appropriating it for Capitalism* (Stanford: Stanford University Press 2019) suggesting contemporary communications and capitalism should be understood as data colonialism, posing fundamental challenges to democratic government and free speech's role within it.

As to empirical research on the value of different forms of media, an example is work led by Toril Aalberg and James Curran,[24] which investigates print and broadcast *news content* and ordinary people's *understanding of political and public interest matters* across six countries (Belgium, the Netherlands, Norway, Sweden, the United Kingdom and the United States). The research finds that news content is affected by media commercialisation (commercial media has less serious news content and provides less context in relation to that content); less contextualised news content correlates with lower public knowledge; public media appears to be especially important in informing the less knowledgeable about political and public interest matters; and television news coverage appears to influence public perception and policy preferences about controversial matters such as immigration.[25] An important element of the research was comparing commercial and public media. The creation and support of independent public service media is an obvious example of government action in support of structurally diverse public speech. This research suggests the presence of public media correlates with greater public knowledge, including knowledge of domestic, regional and international politics, and knowledge of entertainment and celebrity information. Other research finds similar benefits to public knowledge from public broadcasting, especially where state funding substantial.[26] This is not to suggest that public service media, as it has existed, fulfils the claims of positive free speech. Public media's performance can well be criticised in terms of democratic free speech. But public media can illustrate some aspects of positive free speech, particularly in terms of some forms of content diversity, transparency over ownership and funding, and the aim of relative separation from both government and market control. It is worth underlining, however, that the diversity entailed by positive free speech extends beyond a 'dual' system of commercial and public media. It is not simply market and non-market media—what is sought is not dualism but multiplicity.

The above helps to suggest why approaches that frame free speech as merely a negative liberty might be unsatisfying. If that is the *totality* of free speech, something is lacking. Clearly, in many areas of free speech the negative approach is important. Draconian state restrictions on speech attest to that. Those restrictions do not only exist in 'failed' democratic states or 'non-democratic' states. They do not only exist in 'illiberal' or 'authoritarian' democracies. There are countless valuable sources that explore negative free speech, including scholarly, legal and civil society work. But to suggest that speech is free whenever the state does not directly restrict it, obscures the state's role in public communication and the conditions enabling such speech. And it obscures the position of free speech in a democracy.

Literature from various fields argues the state has obligations to act in support of free speech, and there are judicial illustrations suggesting how that can be pursued. The literature and judgments

[24] Toril Aalberg and James Curran (eds), *How Media Inform Democracy: A Comparative Approach* (New York: Routledge 2012).

[25] See discussion in Kenyon, above n 17, 387-390. For discussion of other empirical research on different forms of media, see eg Stephen Cushion, *The Democratic Value of News: Why Public Service Media Matter* (Basingstoke: Palgrave Macmillan 2012); Peter van Aelst et al, 'Political Communication in a High-Choice Media Environment: A Challenge for Democracy?' (2017) 41(1) *Annals of the International Communication Association* 3; Peter Beattie, *Social Evolution, Political Psychology, and the Media in Democracy: The Invisible Hand in the US Marketplace of Ideas* (London: Palgrave Macmillan 2019) ch 7 'Comparing Media Systems: What a Difference Supply Makes'.

[26] See eg Patrick O'Mahen, 'A Big Bird Effect? The Interaction Among Public Broadcasting, Public Subsidies, and Political Knowledge' (2016) 8 *European Political Science Review* 311.

help to explain what is at stake in different understandings of free speech. All this underlies my interest in exploring what positive dimensions of free speech entail and considering what role they should play in law. But is important to emphasise that doing this is not to *replace* one dimension of free speech with another, so much as to recognise a wider range of matters as relevant to free speech. The positive includes, but goes beyond, the negative in free speech. They are two dimensions of the freedom, not two 'different kinds of things'.[27] Political theory on positive freedom, examined in chapter 4, makes this clear.

Models of diverse media

Thinking about positive dimensions of free speech brings out structural, social aspects of the freedom. A sense of what I mean comes from considering how a diverse media system might be imagined. James Curran's proposal for a structurally diverse mass media system is one example. Curran draws on later-twentieth-century approaches in different European countries to set out a structurally mixed media system.[28] The model captures something of what a fuller understanding of free speech would require in terms of supporting public speech in a democracy. For my purposes, the model is particularly relevant because it has been turned to by other media and legal analyses. Multiple studies use Curran's model to illustrate a preferred approach to media.[29] While the proposal is aged, its central ideas still warrant exploration, and it has clear relevance to the mass media period which is my focus. The key change I would make to the model's previous uses is to position it as an example of what democratic free speech requires. That is, the structurally diverse media the model illustrates becomes

[27] Jean Thomas, 'Our Rights, But Whose Duties? Re-Conceptualizing Rights in the Era of Globalization' in Tsvi Kahana and Anat Scolnicov (eds), *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (Cambridge: Cambridge University Press 2016) 6, 8 (emphasis removed).

[28] See eg James Curran, 'Mediations of Democracy' in James Curran and Michael Gurevitch (eds), *Mass Media and Society* (4th ed, London: Hodder Arnold 2005) 122; James Curran, *Media and Power* (London: Routledge 2002) 240-246.

[29] See eg Baker, above n 21, 189-90; Robert B Horwitz, 'On Media Concentration and the Diversity Question' (2005) 21 *The Information Society: An International Journal* 181, especially 196-198; Karppinen, above n 6, 79. Briefer references to it also exist, eg, Picard and Dal Zotto summarise the model as one possible response to the limits of traditional media ownership regulation to promote viewpoint diversity in media content, noting 'In order to bring diversity, a more mixed media system with different mandates as well as different modes of ownership and financing is necessary': Robert G Picard and Cinzia Dal Zotto, 'The Dimension of Ownership and Control of Media' in Peggy Valcke, Miklós Sükösd and Robert G Picard (eds), *Media Pluralism and Diversity: Concepts, Risks and Global Trends* (Basingstoke Basingstoke: Palgrave Macmillan 2016) 54, 63. See also, eg, Rachel Craufurd Smith, *Broadcasting Law and Fundamental Rights* (Oxford: Clarendon Press 1997) 61; Paul Jones, 'Democratic Norms and Means of Communication: Public Sphere, Fourth Estate, Freedom of Communication' (2000) 1 *Critical Horizons* 307, 314-316; Jacob Rowbottom, 'Media Freedom and Political Debate in the Digital Era' (2006) 69 *Modern Law Review* 489, 510; Jacob Rowbottom, 'Extreme Speech and the Democratic Functions of the Mass Media' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford: Oxford University Press 2009) 608; Thomas Gibbons, '"Fair Play to All Sides of the Truth": Controlling Media Distortions' (2009) 62 *Current Legal Problems* 286, 314-315; Jacob Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics* (Cambridge: Cambridge University Press 2010) 173-177; Jonathan Hardy, *Critical Political Economy of the Media: An Introduction* (Abingdon: Routledge 2014) 69 'Curran … provides the best exposition of such a normative model' requiring democratic media to have 'a combination of media sectors differentially organised and financed, generating different communication spaces and styles'; Beattie, above n 25, 339.

part of free speech law, a point which is implicit in Curran's analysis but has not often been brought out since.

The model contains five sectors for democratic media:

- *core public media*, a sector where people 'come together to engage in reciprocal debate';
- *civic*, a sector related to various social movements, interest- and identity-groups, political parties, and 'activist organizations of civil society';
- *professional*, a sector controlled by media professionals themselves, subject to neither market financing nor external regulation, giving 'staff maximum creative freedom';
- *private enterprise*, a market-financed sector with (preferably) editorial control separated from ownership; for example, through legally protecting editorial freedom for editors and requiring staff participation in senior appointments; and
- *social market*, a sector to 'incubate new forms of competition, rooted in social forces underrepresented in the market, as a way of extending real consumer choice and power', which would also 'sustain minority media' through selective subsidies.[30]

Curran suggests that all but one of these sectors could be found in Western European media systems as they then existed. For example, civic media could be supported through grants to assist communication by civil society organisations as in Norway, or by providing civil society organisations with spectrum, facilities and funding in a system of time-shared public broadcasting as in Dutch public broadcasting.[31] Social market media would use measures like film subsidies and financial support for newspapers seen in a range of European democracies. As that example illustrates, the model is not limited to broadcasting. In principle, it encompasses all media forms and involves a wide range of actions and actors. Curran suggests the professional sector is the only one that did not already exist in a prototype form, although he suggests historical periods of the UK's BBC approximate media 'under the control of professional communicators' who 'would be in the enormously privileged position of being more independent than any of their peers'.[32] Having this sector *in addition* to public broadcasting aims to foster a different form of journalism and entertainment:

> Journalists working for market media are increasingly entertainers; those working for civic media are advocates; while those in public service broadcasting are constrained by an obligation to mediate a 'balanced' perspective. By contrast, journalists in the professional sector should be guided by truth-seeking.[33]

Public service media is the core of Curran's model, but it would comprise *competing* organisations (not only one entity) giving space to varied views and 'seeking to reflect the diversity of society'.[34] It is a democratic corporatist approach to public media, and Curran uses Germany as his exemplar of the idea, specifically noting the role of free speech under Article 5 of Germany's Basic Law (*Grundgesetz*) in the country's approach to public media. As he states, German constitutional protection means 'significant groups in society must be given the opportunity to air their viewpoints' on television, including in entertainment formats. The requirement aims to secure 'the audience's

[30] See Curran, 'Mediations', above n 28, 140-144.
[31] Ibid 140-141.
[32] Ibid 142.
[33] Ibid 142.
[34] Ibid 143.

right of access to diverse opinion'.[35] As will become clear, I suggest more of Curran's model, with its multiple actions undertaken by multiple actors, can be based in positive dimensions of free speech.

Kari Karppinen describes the model as among 'the most prominent outlines for a media system' with strengths in seeking 'different operating logics' for different media and asserting 'a democratic media system should create spaces for the communication of opposed viewpoints *and* a common space for their mediation' in which a core public media sector would be 'complemented and challenged' by multiple other sectors.[36] Curran's model is a form of '*institutional* pluralism',[37] which is another way of capturing what I have called structural diversity in a mixed media system. Robert Horwitz uses the model to argue the communicative diversity required for US democracy 'need[s] a more mixed system of mass media with different mandates and different modes of financing'.[38] He concludes:

> [A]lthough the prevailing legislative and judicial trends … appear quite hostile to the idea of establishing a mixed media system governed by structural rules and curbs on media concentration, there are clearly legitimate grounds for such a policy.[39]

The grounds are democratic: 'Different kinds of media fulfill different functions in a democracy; creating structures that facilitate diverse media is both necessary and legitimate.'[40]

Baker suggests Curran's model of 'structurally different media sectors' has advantages.[41] Media organisations having different structures 'reflects the need to perform different functions'. Dangers of 'corruption by either the government or the market' mean 'a diversity of structures and economic foundations can also strengthen the overall system'.[42] This diversity reduces the danger that political or economic 'corruption' of a media sector will undermine the media system overall. Baker continued his support for the ideas, concluding his subsequent study *Media Concentration and Democracy* with the comment:

> Probably the best way to respond to the problems … concerning democratic safeguards, as well as distribution of media power and ill effects of an exclusive focus on the bottom line, is some version of a proposal presented by James Curran.[43]

For Baker, what is 'essential' from Curran's analysis is the 'basic policy prescription': 'Strength lies in *structural* diversity. An ideal media realm will be pluralist in the types of media entities that it supports.'[44] It is worth underlining that Baker sees general elements of Curran's approach—namely a structural diversity—as essential for a democratic media system.

Baker, Horwitz and Karppinen leave the realisation of such media systems to media policy; that is, to legislation and executive action, to action by regulators, and to public campaigns relevant

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[35] Ibid 143-144.

[36] Karppinen, above n 6, 79 (emphasis added).

[37] Ibid (emphasis added).

[38] Horwitz, above n 29, 197.

[39] Ibid.

[40] Ibid 198.

[41] Baker, above n 21, 190, drawing from James Curran, 'Mass Media and Democracy Revisited' in James Curran and Michael Gurevitch (eds), *Mass Media and Society* (2nd ed, New York: St Martin's Press 1996) 82, 112.

[42] Baker, above n 21, 189.

[43] C Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* (Cambridge: Cambridge University Press 2007) 198.

[44] Ibid (emphasis in original).

to such action. Baker does this explicitly, while noting in the final words of *Media Concentration and Democracy* that 'these proposals have no chance of adoption until both media professionals and engaged citizens … realize that the mass media will continue to fail us without change to the *structure* that induces these failures'.[45] I would emphasise the structure mentioned there is, in part, legal. For Karppinen, I suspect the references to policy may result primarily from his media studies focus. That is, he is not necessarily distinguishing law (and constitutional law) from other forms of regulation as a lawyer might do. While Horwitz does engage in close reading of US case law, he is interested in how First Amendment metaphors direct policy debates more than he is concerned with the merits or legitimacy of existing First Amendment doctrine.[46] In any event, the policy issues are not seen as straightforward. Karppinen notes, for example: 'The realization of such a media system will of course be politically contested—the distribution of resources, subsidies, and regulations will always be contested, but that is what media policy is all about.'[47] My question is whether those *policy* choices can and should be framed by the *legal requirements* of free speech's positive dimensions.

At this stage, two points can be extrapolated from Curran's model. The first is the idea of a *structurally diverse media system*, with diversity in terms of organisational forms, missions, staffing, management, audiences, financing and regulation, all aimed at providing diverse content in terms of information, opinions, perspectives, genres and programming. The types of entity differ as well as their control. The second is that the model expressly draws on *principles of free speech*, with an understanding of free speech that foregrounds audience interests. My interest lies in how ideas of positive free speech might be used to support a model with those qualities. There would not be only one way of doing this; rather, the elements derived from Curran's model offer a start to framing the discretion that would be exercised in pursuing positive free speech.

Another media studies example comes from Georgina Born, an example which coincidentally Karppinen also notes.[48] Rather than media in general, Born considers *public service media* and its democratic role in the UK context. She observes:

> In such conditions, the social fabric no longer comprises—if it ever did—a cohesive, unified culture built on shared norms, values and traditions. Instead, it has become *pluralistic and culturally heterogeneous* to an unprecedented degree.[49]

This leads to an approach to public service media derived from democratic political theory on pluralism. The needs that public media should address include: a need for *presence*, not just of diverse viewpoints but diverse participants; a need for *dialogue*, recognising the irreducible plurality of society (so dialogue would not necessarily reach consensus); and a need for *voice*, in terms of varied modes and genres of speech, which would seek to counter the way in which collective deliberation can

[45] Ibid 202 (emphasis in original).

[46] Elsewhere, Horwitz has engaged more directly with questions of 'literal' and 'collective' (in approximate terms, negative and positive) readings of the First Amendment and their connections to media structure, public debate and 'substantive freedom of speech', noting the 'collectivist tradition of First Amendment interpretation … is narrowly interventionist in intent, attempting to facilitate the conditions that would permit a free and diverse marketplace of ideas': Robert B Horwitz, 'The First Amendment Meets Some New Technologies: Broadcasting, Common Carriers, and Free Speech in the 1990s' (1991) 20 *Theory and Society* 21, 35.

[47] Karppinen, above n 6, 80.

[48] Ibid 79.

[49] Georgina Born, 'Digitising Democracy' (2005) 76 (Supplement 1) *Political Quarterly* 102, 102 (emphasis added).

involve domination by particular styles of discourse.[50] In all these areas, *public culture*—and the media's role in it—has a central place in citizenship:

> [M]edia organisations—both in their social make-up and in their output—can be understood as the primary 'theatres' for contemporary pluralism. It follows that it should be a core function of public service communications to provide such diversity of cultural experience.[51]

Born extends Nancy Fraser's public sphere analysis—an analysis with 'an uncanny structural resemblance to Curran's sectoral model'[52]—to sketch 'a normative architecture for public service communications in an age of diversity'.[53] From Fraser she takes the need for multiple smaller public spheres, as well as 'a more comprehensive arena' to allow communication across difference.[54] Born's structure comprises five communicative forms, five 'dialogical flows'. It differs from Curran in focussing on *communication* more than *institutions* while, from that focus, suggesting something of media structure and activities. But it resembles his model in combining five differently scaled arenas, with varying remits. The five forms of communication Born suggests involve:

- *antagonistic opinions* presented for wide debate;
- *inter-cultural* communication occurring between cultural groups;
- *intra-cultural* communication occurring within minority, alternative or counter-public groups;
- communication for *territorially-based communities* of interest; and
- communication for *non-territorially-based communities* of interest.

The first form of communication—presenting antagonistic opinions for wide debate—is close to the traditional liberal role for mass media, in which 'majority' media is said to host 'divergent and contesting minority perspectives'. But traditional media practice was 'built on now unacceptable political and cultural exclusions'; it needs to be more inclusive of different views and voices. It 'is only in such a "universal" media space' that 'antagonisms of cosmopolitan societies can confront one another and be worked through, albeit without closure'.[55] Then follow communicative forms related to culture and territory. Inter-cultural communication, Born's second form, 'is when minority speaks both to majority and to other minorities'.[56] She suggests broadcasting and internet as avenues for it. As with the first form, inter-cultural communication involves media with 'universal' reach. In a plural public media culture 'universal channels become the means of exposure to and connection with others' imaginative and expressive worlds, via the self-representation and self-expression of diverse groups in their own voice.'[57] The third form is intra-cultural communication; that is, minority, alternative or counter-publics speaking to themselves. Born notes varied media forms as suitable: internet, certainly, but also cable, satellite and digital broadcast television and radio. As an example,

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[50] Ibid 113-114. See also eg Iris Marion Young, 'Communication and the Other: Beyond Deliberative Democracy' in Seyla Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press 1996) 120.

[51] Born, above n 49, 114. Born draws the theatre point from Stuart Hall, 'Which Public, Whose Service?' in Wilf Stevenson (ed), *All Our Futures: The Changing Role and Purpose of the BBC* (London: BFI 1993) 23, 36-37.

[52] Jones, above n 29, 314.

[53] Born, above n 49, 116.

[54] See eg Nancy Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' (1990) nos 25/26 *Social Text* 56, 69.

[55] Born, above n 49, 116.

[56] Ibid 116.

[57] Ibid 117.

she uses Australia's second public broadcaster, SBS or Special Broadcasting Service (distinct from the ABC or Australian Broadcasting Corporation). The SBS provides an extremely wide range of language content, especially on radio, with regular news and information programming in approximately 70 languages.[58] The final two forms of communication are territorially and non-territorially based interest group communication. For example, territorially-based local community networks, suited to a wide range of media forms, and non-territorial interest groups, particularly suited to internet communications that may be facilitated by public media.

Born's analysis aims to move beyond arguments that traditional public service media will *either* continue, with dangers of elitism, paternalism and relative hegemony, *or* faces an imminent and unavoidable end. She argues instead for re-visioned public service media focused on pluralism. In the UK, it would still be based heavily, but not solely, on the BBC. (Commercial broadcasters in the UK also have public service obligations.[59]) Similarly to Curran, one could easily imagine *multiple* public media organisations. In addition, many elements of her analysis could be applied to the broader media environment, beyond public service media, perhaps most simply by adding a sense of the varied *communicative forms* for which she argues to Curran's *institutionally* focused model. Born does not make his explicit link to free speech, but she draws on normative arguments that clearly resonate with democratic free speech rationales.

Both examples can be taken to suggest something of what a media environment informed by positive free speech would contain. It would be:

> a structurally mixed media environment containing multiple and varied institutional forms, internal organisation, staffing, management, participants, regulation, economic support and content, aimed at different audiences across different territories, in the service of different missions, and containing diverse arguments presented in debates aimed at wide publics, as well as communication between and within cultural and interest groups.

While the two examples do not explicitly deal with the issue of transparency around matters such as ownership and financing, that aspect should be understood as implicit (and is underlined through examining some constitutional tribunals and positive free speech in later chapters). It also emerges in broadly parallel models, such as Des Freedman and Justin Schlosberg's 'manifesto for public knowledge'.[60] While their approach is broader, media has an important place within it. They list seven principles for protecting and nurturing public knowledge: independence from vested interests; diversity in terms of minority interests and articulating differences; universality that 'cater[s] to all groups irrespective of geography, background and status' and ability to pay; plurality that provides 'multiple sources of public knowledge'; redistribution that addresses structural barriers to participation; transparency for 'public knowledge producers to declare any interests that may impede' the provision of 'independent and trusted services'; and accountability that allows 'publics to scrutinize and influence the services carried out on their behalf'.[61] Those principles offer another way to understand parts of the structurally mixed media environment described above. And positive free

[58] See eg 'SBS Language', https://www.sbs.com.au/language.

[59] Eg Jones, above n 29, 313.

[60] Des Freedman and Justin Schlosberg, 'Conclusion: Manifesto for Public Knowledge' in Aeron Davis (ed), *The Death of Public Knowledge? How Free Markets Destroy the General Intellect* (London: Goldsmiths Press 2017) 243.

[61] Ibid 246-247.

speech appears well suited for pursuing such principles of independence, diversity, universality, plurality, redistribution, transparency and accountability. These principles could well assist in society having a voice, formulating judgments and making claims of government that are heard and have effects. It is also clear, I think, that the aim is not only media pluralism as that term is often understood.

Perhaps traditional media content regulation could support many of the qualities extracted from the models. While not wanting to suggest long-standing approaches to media regulation are unimportant, my sense is that an approach based on regulating media content would raise more concerns about free speech than the above type of structural approach. It would also tend to be weaker in terms of realising the degree of diversity that is sought. A single regulator or a small group of regulators is unlikely to be able to understand and apply criteria that match the diversity being sought here—a substantial diversity of institutional forms, funding, representation and communication. Equally, content-focussed regulation of commercial mass media has historically been plausible because of the limited number of entities involved and their profitability. Both those qualities have changed. Overall, a structural approach to diversity appears more plausible as a way of promoting sustained plural public speech and, as the following chapters suggest, it can be based in democracy's requirements for free speech.

Positive free speech and law

If that is something about the idea of positive free speech from political theory and media studies, what might be said at this stage from law? Here I consider three illustrative sources, one from Eric Barendt and two from Frederick Schauer. Many more writers could be examined; some are considered in later chapters.

Legal scholarship includes explicit references to positive free speech or analyses consistent with it. But it is not common for detailed legal studies of free speech to engage with positive communicative freedom at any length. One which does so is Eric Barendt's *Freedom of Speech*.[62] It is an example of legal free speech writing with extensive comparative examination of UK, US, Canadian, German, French, Italian and Australian law (as well as wider Commonwealth references). Indeed, the extent of comparative analysis may well underlie its sympathetic treatment of positive dimensions of free speech.[63] At various points in his analysis, Barendt considers whether free speech should be understood to have positive dimensions and suggests that it should. For the purposes of my study focused on positive free speech and democracy, I consider four points from Barendt and how my approach follows or differs from them.

First, *courts determine the meaning of freedom* within free speech law. Law's texts rarely provide a definitive answer as to whether free speech has positive dimensions. Rather, the meaning

[62] Eric Barendt, *Freedom of Speech* (2nd ed, Oxford: Oxford University Press 2005). The first edition was published in 1985. Also notable is Oster's study of media freedom, which includes careful consideration of its positive dimensions: Jan Oster, *Media Freedom as a Fundamental Right* (Cambridge: Cambridge University Press 2015). As noted in chapter 1, there is also quite widespread engagement with the ideas at a more general level, especially in European work.

[63] Other examples of comparative consideration of free speech in civil law European jurisdictions *and* common law jurisdictions include Smith, above n 29 (especially France, Italy and UK with use also made of the European Court of Human Rights); Wojciech Sadurski, *Freedom of Speech and its Limits* (Dordrecht, The Netherlands: Kluwer 1999) (brief consideration of especially German and French approaches).

of freedom is a matter for determination. For example, Barendt notes: 'constitutions rarely offer guidance on the character of freedom of speech, so constitutional tribunals must determine themselves how far, if at all, it is appropriate to recognize positive speech rights'.[64] It is not that parliaments do not have a role, but that courts also do.[65] This is one way in which political theory remains important for free speech law. Gautam Bhatia similarly flags that judicial decisions 'endorse one set of political choices about what "freedom" is and reject another'.[66] And, as Ronald Krotoszynski notes, free speech's meaning 'is hardly fixed or immutable', rather being 'both contested and contestable'.[67] I would emphasise a point that follows from such observations: constitutional tribunals retain *a continuing obligation* to interpret the meaning of freedom within free speech. While the interpretation may well largely follow established patterns within a particular jurisdiction, changing communication environments and changed legal arguments could prompt more courts to recognise the democratic limitations of a purely negative approach to free speech.

Second, Barendt relates *positive dimensions of free speech to the democratic rationale* for freedom of expression.[68] He also suggests the approach means free speech can go beyond individual rights or interests when the freedom is understood to be 'a public good or value in a pluralist society'.[69] He notes, for example, Joseph Raz's argument for protecting free speech—and pluralistic speech in particular—as a public good, as well as Lichtenberg's analysis that free speech entails not only the absence of censorship 'but also means an actual robust public debate'.[70] Similarly, I would emphasise that positive dimensions of free speech take the freedom beyond an individual focus. Free speech, when linked with democracy, also has structural and collective aspects. It provides what Born calls 'a normative architecture for … an age of diversity'.[71] While Barendt makes the public good and pluralism points, his focus often returns to individual rights when analysing positive free speech, which may lead to underplaying free speech's structural positive dimensions.

Third, Barendt discusses *how positive free speech might be upheld*—in short, who does what in relation to free speech. He suggests two possible responses. Courts could find constitutional rights related to public protest or media access, for example. These would obligate a local council, media regulator or other entity to formulate positive rights. (He also notes the legislature might provide statutory rights in these areas.) Alternatively, courts may state that free speech requires diverse media

[64] Barendt, above n 62, 101.

[65] Barendt notes at the same point of his study, ibid 100-101 (emphasis added):

> In particular, *legislatures and courts must decide* whether commitment to the freedom requires the recognition of only a liberty to speak and write, free from governmental restraint, or whether, at least in some circumstances, it also entails positive rights to speak.

[66] Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech under the Indian Constitution* (New Delhi: Oxford University Press 2016) 292.

[67] Ronald J Krotoszynski Jr, *The First Amendment in Cross-Cultural Perspective: A Comparative Legal Analysis of the Freedom of Speech* (New York: New York University Press 2006) 222.

[68] Barendt, above n 62, 101.

[69] Ibid 35.

[70] Ibid 35 who cites Joseph Raz, 'Free Expression and Personal Identification' (1991) 11 *Oxford Journal of Legal Studies* 303, 323; Lichtenberg, above n 7, 107.

[71] See above n 53.

content, or adequate funding of public media, but allow 'substantial discretion' as to how these requirements are met.[72]

> In that event, the court does not formulate constitutional free speech rights or even require Parliament to enact statutory access rights. Rather, it considers that respect for freedom of speech requires the political branches of government to take active steps to foster the values associated with the freedom, but that obligation need not entail the recognition of positive rights.[73]

His two responses could certainly arise and do so in that general manner. However, instances he also discusses—such as German law on broadcast pluralism—might be captured in a slightly different way, or an aspect of his first response could be emphasised more strongly. Constitutional protection of free speech and media freedom can entail media pluralism and, as he notes, adequate funding of public broadcasting among other things. Such constitutional protection of free speech can also *obligate* parliaments to enact laws that meet the constitutional requirements. In effect, a positive right—a positive, structural right—is enunciated by the constitutional court in the German approach (examined further in chapter 6). The court certainly leaves *discretion* to parliament about aspects of the legislation that must be passed, but the discretion is limited and framed. The court is clear that legislation must be passed and must meet the constitutional requirements of free speech.

Fourth, the latter two points might lead to Barendt's suggestion that positive free speech should be relatively exceptional. He views the *positive requirements for government action to promote speech as arising only rarely*, stating for example:

> On balance, I prefer the view that free speech not only contains a set of rights, but reflects values which may on occasion require promotion through the law. Those occasions may be rare. Commitment to free speech means that courts must scrutinize carefully any attempt by government to regulate its exercise, however well intentioned that may appear. But an exclusive rights-based approach, and a blind faith in the market, also poses dangers, in particular that of a society in which only a few people can communicate their ideas effectively through the mass media.[74]

Perhaps the occasions for promotion of speech through law are rare because Barendt is not concerned solely with democratic free speech in his study; the occasions might be less rare under democratic rationales than under others. But the rarity may also link with analysing positive free speech largely in terms of individual rights. This is suggested in the quotation itself and in his discussion of Schauer's *Free Speech: A Philosophical Inquiry*.[75] There, Schauer states that free speech is best understood as a negative freedom, although he notes that negative and positive freedom are related; they are, in ways, 'two sides of the same coin'.[76] However, as well as the potential to interfere with the speech rights of others, Schauer suggests positive rights confound freedom with the conditions for its exercise. This is a classic criticism of positive freedom, one that often draws on Isaiah Berlin's analysis of freedom.[77] But it is arguably misplaced in relation to free speech (I consider the issue in chapter 4). Schauer also

[72] Barendt, above n 62, 103.
[73] Ibid 103.
[74] Ibid 36.
[75] Frederick Schauer, *Free Speech: A Philosophical Inquiry* (Cambridge: Cambridge University Press 1982) 128-129.
[76] Ibid 116.
[77] Isaiah Berlin, *Two Concepts of Liberty: An Inaugural Lecture Delivered before the University of Oxford on 31 October 1958* (Oxford: Clarendon 1958).

suggests that positive freedom necessarily involves a state authority deciding what speech is to be favoured through the support flowing from positive rights. Barendt agrees these arguments tell against '*general* positive free speech rights'.[78] Free speech for him is primarily negative. I am not convinced, at least in terms of free speech and the communicative requirements of democracy. In that context, positive dimensions of free speech appear to be both *substantial* and *central* to what free speech means. Further, it is not clear to me that states acting in support of free speech's positive structural dimensions necessarily entail state authorities deciding what speech is to be favoured. The action is aimed at promoting a substantial diversity, independence and transparency of speech. Doing that means so many types of speech are 'favoured' that I am unsure the idea of favouring makes sense. State action is structurally focused rather than content focused. In addition, the state not acting to promote diversity and, for example, leaving mediated speech substantially to market forces does not mean the state has not chosen what speech to support. As O'Neill would suggest, that approach 'secure[s] a particular configuration of freedom of expression, which may leave some unable to find their voices and does not guarantee the expression of diverse views'.[79]

Adopting, extending and to some degree altering Barendt's analysis suggests these points about positive free speech and law:

- Courts have a continuing obligation to determine whether and to what extent free speech has positive dimensions;
- Positive free speech can draw on democratic rationales and involves structural aspects, or organisational and framework conditions; it is not only an individual interest;
- Courts could in theory have an important role in upholding positive free speech, framing the possibilities for legislative, executive and regulatory actions, and requiring actions to be taken; and
- The need for actions to promote free speech may not be rare, but instead have a central place in the communicative requirements of democracy.

Assumptions and negative freedom

To this point, I have considered something of what is meant by 'positive' in relation to freedom of speech, what media structures and communicative forms may follow from that, and what role could be played by law. Here, I take a step back and outline another pathway into these issues, one which I have considered elsewhere.[80] It involves considering assumptions that can underlie negative approaches to free speech, assumptions about 'what a communicative environment—or a public deliberation—looks like when the government remains uninvolved'.[81] Of course, government never stays completely uninvolved. Negative freedom always involves underlying state actions such as those supporting contract and property law; there is no communicative environment free of state influence. In addition, substantial research examines the role of government in news production practices;

[78] Barendt, above n 62, 105 (emphasis in original).

[79] O'Neill, above n 2, 178.

[80] Kenyon, above n 17.

[81] Frederick Schauer, 'Free Speech in a World of Private Power' in Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (Aldershot: Dartmouth 1994) 1, 6.

government is clearly an active participant in public speech.[82] In that way, government may be 'part of a public sphere' more than 'a separate dimension of social life'.[83] And there is no freedom of communication that is free of the influence of prior communication and the social infrastructure of public speech. Despite all this, the shorthand of saying the state is 'uninvolved' is used routinely, and some useful ideas emerge from considering where the state is not explicitly acting.

In Schauer's analysis, at least three assumptions can be seen about public speech when government is not directly involved: that *equality* exists in public speech without state action; that *rationality* in public debate overcomes any inequality in speech; or that, even though neither equality nor rationality may be present in public speech, government action is simply more *harmful* to the goals of free speech than inaction.[84] The third assumption may be the more significant one for free speech in a democratic context; the former two appear highly implausible. Echoes of the third one can be seen in many of the concerns that are raised about positive free speech. When an argument is put forward against positive free speech, or where positive dimensions of the freedom are simply ignored, there may well be an assumption that overt government action in support of speech would necessarily be harmful.

First, criticising express government action aimed at speech might follow from an *assumption of equality* existing in public speech without government action, meaning all views could be present and effectively communicated. However, in commercial media environments clearly 'resources matter and more resources matter more'.[85] As well as resources, in any communicative environment factors such as race, gender and class are all relevant to 'who talks, who listens and who gets listened to'.[86]

> In terms of who actually speaks and of who actually listens, and of what a listener actually takes away from the speaker's speech … there seems little a priori reason to believe that all of the inequalities of society in general are not replicated when speakers who are unequal, for any number of different reasons, enter into the process of dialogue or discourse.[87]

Thus, an assumption of equality in existing public speech—in terms of accessibility, capability, audience and effect—appears to be false. Everything of 'value' is not said, heard, understood or effective. Notably, where *equality of opportunity for speech* becomes a direct focus of analysis (rather than an unexamined assumption underlying some free speech models), the results come close to arguments for a positive freedom of communication. This is seen, for example, in Wojciech Sadurski's work on free speech, democracy and legitimacy.[88] He argues for 'the equality of opportunity to speak *and* be heard'[89] with, in effect, a substantial diversity of views being present in public communication.

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[82] See eg Timothy E Cook, *Governing with the News: The News Media as a Political Institution* (2nd ed, Chicago: University of Chicago Press 2005).

[83] Michael Schudson, 'The Public Sphere and Its Problems: Bringing the State (Back) In' (1994) 8 *Notre Dame Journal of Law, Ethics and Public Policy* 529, 532.

[84] Schauer, above n 81, 1.

[85] Ibid 6.

[86] Ibid.

[87] Ibid 7.

[88] See eg Sadurski, above n 63, 73-98; Wojciech Sadurski, *Equality and Legitimacy* (Oxford: Oxford University Press 2008) 85-91.

[89] Sadurski, above n 43, 74.

Second, Schauer explains that negative free speech might follow from *an assumption of rationality*, so that 'true propositions' of fact or value would 'transcend' inequalities in public speech.[90] Truth will out, in effect. This is also questionable. As he suggests, 'distortions of power and persuasiveness in the marketplace of ideas' could just as well 'produce a world in which unsound propositions replace sound ones'.[91] How effectively will truth emerge, given an audience's prior beliefs and their relationship to the statement at issue, the speaker's reputation and ability, the intensity of communication and so forth?[92] Rather, the context-dependent nature of knowledge has been explored extensively across many aspects of humanities and social research. An assumption of rationality in social practices appears to be unwarranted.[93] One might suggest the assumption is more theoretical; namely, that people's rationality with respect to speech is *ascribed* to them within a democracy. It is part of the autonomy that, under some analyses, people are assumed to have under a democratic constitution.[94] But if such autonomy is said to exist within a state of purely negative free speech, I am unconvinced. By the end of this book, I hope it is clearer why communicative freedom should be recognised to entail more.

Third, a position against explicit government action for free speech might follow from *an assumption about relative harm*. Express government action on speech may be worse than the alternative. However flawed speech is when left substantially to non-government forces, those forces might harm free speech goals less than government regulation. Misguided but 'unregulated' speech might be less harmful than 'misguided regulation'.[95] That may well be true in some situations, perhaps even true in many countries and historical periods, but the result would be contingent, as Schauer emphasises. It would not be 'atemporal, ahistorical and universal'.[96] The third assumption appears to be implicit in many approaches that ignore or dismiss positive free speech, and it is useful to keep in mind when considering criticisms of free speech having positive dimensions. However, it may be less an argument against positive free speech than a caution about when and how it could usefully be pursued.

Existing theoretical and empirical work from media studies suggests ways in which none of the three assumptions is true for mass media environments in long-established democracies, and the implications of that work suggest that none are true under contemporary media conditions.[97] In particular, some government action in favour of public speech appears to be beneficial, not harmful,

[90] Schauer, above n 81, 8.

[91] Ibid 8.

[92] Frederick Schauer, 'Hohfeld's First Amendment' (2008) 76 *George Washington Law Review* 914, 924.

[93] As Flyvbjerg suggested in his sustained study of local government and planning in which an award-winning city development plan was transformed for the worse during its many years of implementation, 'the context of rationality is power': Bent Flyvbjerg, *Rationality and Power: Democracy in Practice* (translated by Steven Sampson) (Chicago: University of Chicago Press 1998) 2.

[94] See eg Robert C Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge MA: Harvard University Press 1995); James Weinstein, 'Participatory Democracy as the Central Value of American Free Speech Doctrine' (2011) 97 *Virginia Law Review* 491.

[95] Schauer, above n 81, 12.

[96] Ibid 13.

[97] See generally Kenyon, above n 17.

to common free speech goals.[98] Thus, another starting point for my study is the idea that analysing free speech in predominantly negative terms involves unconvincing assumptions.

I noted above that the third assumption addressed by Schauer appears more relevant in many negative free speech analyses. Slightly reframed, one might restate it as assuming state action expressly aimed at shaping the communicative environment and promoting diverse public speech will always harm freedom of speech. Perhaps so, but that depends on many variables. What the third assumption should prompt is a consideration of the circumstances in which state action can be expected to be harmful: what types of action, by what entities, with what safeguards present or absent, and so forth. These issues are well recognised in relation to negative free speech; they are also relevant to its positive dimensions. Negative free speech is implemented through a combination of roles by different constitutional actors. My sense is that where the executive, legislature and courts are unable to protect negative dimensions of free speech well, they will also fail its positive dimensions (a point to which I return). But that is a very different position to suggesting that government action aimed at speech will always be harmful. In addition, the third assumption should prompt consideration of state 'inaction'. For example, what is left of ideas of democratic legitimacy if public speech is left solely or predominantly to markets? Those markets could be economically driven, which raises one set of issues as Baker long argued. In addition, those markets could have substantial non-governmental actors (including non-domestic ones) seeking to shape public speech for their own political or strategic ends. Both concerns appear to be highly relevant to contemporary communications environments. Overall, the relative weakness of all the assumptions prompts further consideration of what comes within the idea of free speech and the implications of positive freedom of communication.

A wide communicative freedom

One matter relevant to the analysis of positive free speech is the difference between legal prohibitions and obligations. As noted in chapter 1, an obligation for a certain state of affairs to be pursued—a state of affairs I have labelled 'sustained plural public speech'—does not make every action that could support it necessary. Equally, not every action can be pursued at once. Multiple actors have multiple possibilities for action. Who should do what, and who decides? Here, another piece from Schauer is useful to consider.

Schauer considers free speech beyond negative liberty in a paper published more than 25 years after the monograph discussed above.[99] In 'Hohfeld's First Amendment', Schauer considers multiple components that might exist within free speech. As Johan van der Walt comments, Hohfeld examined how the 'state is ultimately the author of all law, irrespective of whether this law comes in the form of legislation, common law, or executive commands or the *absence* of legislation, common law, or executive commands'.[100] Schauer's approach would broaden First Amendment issues, and the freedom's negative dimensions could be 'a relatively small component of a much more broad-based approach'.[101] He outlines a range of government actions that might be more relevant to free speech

[98] See eg above nn 22-25 and accompanying text.

[99] See above nn 75-78 and accompanying text.

[100] Johan van der Walt, 'Abdications of Sovereignty in State Action and Horizontal Effect Jurisprudence' in Kahana and Scolnicov, above n 27, 149, 149 (emphasis added).

[101] Schauer, above n 92, 925.

than non-censorship, including the duration of compulsory education, the funding of libraries and research, and the provision of 'high-quality nonelite public television'.[102] Beyond that reference to public media, he does not engage more directly with the implications for media. He notes it is 'far from self-evident' that the absence of government censorship is 'more important than any or all' such policies.[103] While a choice between negative dimensions of free speech and these actions is not *logically* required, a choice is often made in practice. Schauer suggests the wider matters might be understood as lying outside the First Amendment—the Amendment would simply be under-inclusive of the rationales for free speech. But the analysis also suggests that free speech requires more than the absence of censorship. If free speech is concerned with democratic government, free speech will not only involve non-censorship. This leads to an alternative interpretation in which the First Amendment directly engages wider actions that support free speech. Under that approach, the First Amendment would not only be about negative freedom, and free speech would be seen in both positive and negative terms. This leads Schauer to suggest four categories of rights that could be sourced in the First Amendment:

- rights *against government interference with privately initiated speech*, which it is the job of the courts to enforce;
- rights *to compel the government to provide opportunities to speak* and *opportunities to obtain information*, which it might be the job of Congress and other governmental entities to provide;
- rights of *access to communicative forums* controlled by others, which it might be the job of legislatures to create and the courts to enforce; and perhaps
- rights *against nongovernmental interference with privately initiated speech*, which again it might be thought of as the job of legislatures to create and the courts to enforce.[104]

In simple terms, the first of the rights is the non-censorship principle as often understood. The others go some way towards engaging free speech's positive dimensions. Clearly, that categorisation could be debated; for example, the fourth point about private limits on speech might merely extend concern with non-censorship from state to non-state actors.[105] Notably, however, Schauer appears open to ideas beyond negative freedom. The four categories set out obligations on the state to influence the structures that support public speech. One might say they are obligations to pursue a certain state of affairs with regards to public speech.[106] In his earlier monograph, while Schauer engaged at some length with ideas of positive freedom, he found free speech was 'best characterized as the absence of governmental interference'. It was the 'liberty to communicate, unencumbered by governmental control but not necessarily unencumbered by other forms of control and not necessarily entailing the de facto ability to communicate.'[107] The more recent paper still leaves *courts* with limited roles in relation to animating the positive dimensions of free speech. Courts only have a primary role in the first of the four categories of right. Even so, the analysis suggests that free speech interests can extend beyond the negative. And it need not be limited to US law. Arguments that have some

[102] Ibid 925.
[103] Ibid 927.
[104] Ibid 929 (reformatted from the original).
[105] A point Schauer discussed in his earlier monograph: Schauer, above n 75, 119-125.
[106] See chapter 1 and Robert Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers) (Oxford: Oxford University Press 2002) 330.
[107] Schauer, above n 75, 129.

similarity, but go further, have been applied by courts elsewhere. Those examples suggest how and why courts could have a more substantial role.

For my purposes, there are two brief points to take from Schauer's paper. First, a writer who might be thought to focus on negative dimensions of free speech recognises matters relevant to free speech's positive dimensions that are entailed by commonplace free speech rationales. In relation to those matters, there are multiple actions and actors involved in protecting free speech, which accords broadly with the approach of this study. Second, despite recognitions of free speech's positive dimensions, the role of courts remains focused on negative free speech as well as enforcing what parliaments choose to do in relation to the latter three categories. That division of roles is not unusual.

American legal scholarship on positive free speech often leaves the positive dimensions to institutional politics more than to courts (as illustrated in chapter 5). Positive dimensions are matters for legislature and executive action, as well as independent governmental agencies like the Federal Communications Commission. As Schauer observes, the wider rights that he lists may be more significant to the actual environment for public speech than court judgments against censorship. That is, courts may not be the most important actors. (They are certainly not the only important actor.) But even the idea that promoting opportunities for diverse public speech is something that comes *within* communicative freedom means that arguments for action, by whichever actor, can be made in free speech terms. That could often give the arguments more weight. Just as some legislative proposals that restrict or penalise speech are criticised as breaching (negative) free speech, proposed actions that affect the structures underlying public speech—actions that would promote or undermine the sort of media described above by Curran and Born, for example—could be debated in terms of (positive) free speech. Matters might be taken further when it is recognised that, if courts do not play a more active role, it appears unlikely that positive dimensions of free speech will be pursued to any substantial degree. That is the implication of examples considered in later chapters.

None of that is to say the role of courts is simple. Schauer has more recently described US freedom of information legislation as 'a statutory grant of positive rights' and stated there is 'undoubtedly a place for positive legal rights'. However, as he continued, 'the question whether that place is in a constitution and is enforced by the normal methods of constitutional adjudication is hardly one with an easy answer.'[108]

There is another point to note about courts and parliaments. For simplicity, think of courts *or* parliaments acting over positive free speech. Much would necessarily be left to parliament even if courts acted, as already noted, but that can be disregarded for this point. The approach explored in this book might be questioned for comparing idealised courts with non-ideal parliaments: as if parliaments, *as they exist*, often show failures in supporting positive free speech, whereas courts, *as they are imagined*, do not. However, I think that is not the comparison made and the analysis stands. Here are two simple reasons. (Further, one could note that courts also show failures in this area.) First, the forms of argument and reasoning used in courts are quite different to speech in parliaments and—where matters of judicial appointment and tenure, access, standing and so forth are sufficient, which

[108] Frederick Schauer, 'Positive Rights, Negative Rights, and the Right to Know' in David E Pozen and Michael Schudson (eds), *Troubling Transparency: The History and Future of Freedom of Information* (New York: Columbia University Press 2018) 34, 43.

is clearly a significant question[109]—courts can offer room for positive free speech arguments that parliaments find challenging. Second, courts do not face the same conflicts of interest as politicians regarding free speech law. Even treating courts and parliaments in reasonably idealised forms, courts have a quite different relationship to public speech. Barendt made relevant observations on this general issue, decades ago. He stated:

> Two points may be made about this debate [about judicial action] in the context of broadcasting. They are rather obvious, yet they often escape notice. The first is that the structure and organisation of broadcasting does involve freedom of expression issues … A constitutional court called on to interpret a free speech clause will inevitably become to some extent concerned with large questions about the organisation of the media. The second point is that in an era when broadcasting is so influential in determining elections and shaping public opinion (or at least believed so to be), we would be right not to leave its arrangement entirely to politicians and their appointees. *Judges may not have much expertise in media policy, and they have their own prejudices as much as anyone. But unlike party politicians, they have no occasion to shape the basic rules of broadcasting law to suit their own ends*.[110]

I examine a somewhat similar point from Baker in chapter 8. He gives legislatures 'responsibility to make good faith judgments, embodied in law, about which aspects of the media require special, overt nurture'[111] while recognising that legislatures are likely to fail. Good faith judgments are difficult to enact in this area. Legislative outcomes will be largely controlled by media interests because of 'media's unique influence over politically salient public opinion'.[112] Politicians are subject to public speech in ways that differ from courts, whether the issue is approached in terms of theory or experience. That does not mean parliaments are unimportant, but it questions the degree to which parliaments should face no constitutional obligations about positive communicative freedom.

Conclusion

This chapter has drawn out points from media studies and legal research, before the analysis turns to democracy in the chapter 3 and a more detailed examination of human rights, political theory and law in the chapters that follow. I began by considering sustained plural public speech as a democratic aim and the way in which it can be understood as part of freedom of speech's positive dimensions. Then, two models of structurally diverse media were outlined, to illustrate aspects of the diverse communication that I have in mind. Curran suggests a democratic media of five sectors: *public*, with inclusive and reciprocal debate; *civic*, related to social movements, political parties, and civil society organisations; *professional*, controlled by media professionals themselves, and not subject to market financing or external regulation; *private*, market-financed but with editorial control preferably separated from ownership; and *social market*, for incubating new media forms to extend users' choice.[113] To this was added Born's five communicative forms with distinct remits: *antagonistic*

[109] The plausibility and effect of judicial action is contingent on matters about courts and the legal system going well beyond this book.

[110] Eric Barendt, 'The Influence of the German and Italian Constitutional Courts on Their National Broadcasting Systems' [1991] *Public Law* 93, 115 (emphasis added).

[111] Baker, above n 43, 138.

[112] Ibid 49. The lobbying power of media may be even greater in the US context than other democracies, but that does not mean it is ineffective elsewhere.

[113] Curran, 'Mediations', above n 28, 140-144.

opinions presented widely; *inter-cultural* communication between cultural groups; *intra-cultural* communication within minority, alternative or counter-public groups; and communication for *territorially-based* and *non-territorially-based communities* of interest.[114] Together, the examples suggest a structurally mixed media environment with multiple and varied institutional forms, internal organisation, staffing, management, participants, regulation, economic support and content. Media would be aimed at different audiences across different territories, in the service of different missions. It would contain diverse arguments in debates for a wide public, as well as communication between and within cultural and interest groups. While this sort of model could only be achieved to a degree, the factors within it offer a way of evaluating existing media and its treatment by law.

The chapter then turned to several examples of legal writing on free speech. They suggest that courts decide what freedom means in free speech because constitutional provisions rarely determine whether the freedom has positive dimensions. In addition, a democratic rationale underpins positive free speech, with courts commonly given a limited role in relation to it. The issues are left more to legislatures, executives and independent regulators (among others), and courts should review their actions with regard to positive as well as negative dimensions of free speech. Later chapters will consider what courts can do when they go further, which reveals more about what positive free speech entails. Before that, however, there are matters of democracy, human rights, political theory and US free speech scholarship to consider.

[114] Born, above n 49.

3 Positive Free Speech and Democracy

This chapter examines four points about democracy relevant to free speech's positive dimensions. First, speech is a distinctly democratic interest. It has qualities in relation to a democracy that are, in part, distinct from a human rights-based approach to the freedom. At the least, the democratic requirements for speech may alter an assessment based purely on human rights. Second, the approach developed here does not follow from one or other model of democracy; rather, it inheres in the democratic constitutional form in the countries with which I am concerned. It is not that the approach is required by *every* form of democracy in *exactly* the same way—there are countless forms and analyses of the term after all—but positive dimensions of communicative freedom arise under many approaches and there is an important commonality across them. In short, democracies need to be democracies of expression if they are to have substantial legitimacy in terms of public communication. Diverse public speech and the freedom which underpins it have a foundational role in contemporary constitutional democracies. Free speech, including its positive dimensions, is in that way a precondition of democracy even though there are evident challenges in supporting the freedom. These challenges of legal foundation mean the role of courts regarding positive free speech has some significance. Free speech's positive dimensions should probably not be left solely to actors other than courts to determine, at least not in theory.

The idea that positive free speech inheres in the democratic constitutional form is argued to be the case for the places with which I am concerned, and the third point examined is the range of formally democratic countries that might usefully be subject to analysis—a perhaps predictable set of older democracies, but a plausible site for present purposes. Finally, I suggest that focussing on requirements for communicative legitimacy helps in understanding weaknesses in free speech under current democratic conditions (or post-democratic conditions as some analyses suggest) and for considering free speech law and practice in specific jurisdictions.

Speech as democratically significant

It is completely commonplace to link democracy and speech.[1] Anine Kierulf notes simply: 'All accounts of democracy presuppose free speech'.[2] As raised in chapter 1, one might almost suggest democracy begins with speech. While democracy is far from the only free speech rationale, it is a ubiquitous reference in many jurisdictions. While the literature explores other rationales and contexts,[3] countless authors consider democracy as making demands on free speech. And judges often invoke free speech 'as the critical factor separating democracies from non-democratic systems'.[4]

[1] For an overview, see eg Ashutosh Bhagwat and James Weinstein, 'Freedom of Expression and Democracy' in Adrienne Stone and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech* (Oxford: Oxford University Press, in press) discussing the long history of 'the essential connection between freedom of expression and democracy'.

[2] Anine Kierulf, *Judicial Review in Norway: A Bicentennial Debate* (Cambridge: Cambridge University Press 2018) 203.

[3] See eg Monroe Price and Nicole Stremlau (eds), *Speech and Society in Turbulent Times: Freedom of Expression in Comparative Perspective* (Cambridge: Cambridge University Press 2018) which consciously explores contexts beyond the democratic.

[4] Deborah Z Cass, 'Through the Looking Glass: The High Court of Australia and the Right to Political Speech' in Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (Aldershot: Dartmouth, 1994) 179, 179.

However, democracy is a highly contested term—'perhaps the archetypal "contested concept"'[5]—taking a wide variety of inflections, including liberal, republican, deliberative, agonistic and so forth.[6] Equally, democracy has many dimensions, with different institutional forms, temporality, understandings of civic action and approaches to executive government.[7] Far from being problematic for this study, democracy's contested nature and wide variety of forms support the approach to free speech presented here. As a simple baseline, democracy contains a claim to political self-rule in some form. That claim has only been partly realised, which is unsurprising. Democracies have long seen 'exclusions and subordinations' of class, gender, sexuality, race and more; their histories involve colonial and imperial projects;[8] there are differences 'continually' between democracy's 'promises and its achievements, between its lionhearted possibilities and its sorry realities'.[9] Democratic history is 'the history of the political, social, and economic exclusion of minorities, and … a history of imperialist exploitation and interference'.[10] None of that removes the ambition in the term. Along with its weaknesses, democracy has carried 'the language and promise of inclusive and shared political equality, freedom, and popular sovereignty'.[11] And in existing democracies, 'public freedom and democratic institutions have attained a degree of—albeit precarious—reality'.[12] Existing democracies' posited reliance on public debate can well be criticised as largely illusory.[13] Much is decided without people's consent; bridging public speech to political decisions is challenging.[14] But the point for my purposes is that self-rule and the variety of ways to pursue it suggest a particular role for speech and a particular approach to free speech. They suggest this both in theory and through centuries of calls for more democratic practices within existing

[5] Michael Coppedge, John Gerring, Adam N Glynn, Carl Henrik Knutsen, Staffan I Lindberg, Daniel Pemstein, Brigitte Seim, Svend-Erik Skaaning and Jan Teorell (eds), *Varieties of Democracy: Measuring Two Centuries of Political Change* (Cambridge: Cambridge University Press 2020) 27.

[6] For examples of such categorisations, see eg Myra Marx Ferree, William Anthony Gamson, Jürgen Gerhards and Dieter Rucht, *Shaping Abortion Discourse: Democracy and the Public Sphere in Germany and the United States* (Cambridge: Cambridge University Press, 2002) 205-231; Bernhard Peters, *Public Deliberation and Public Culture: The Writings of Bernhard Peters, 1993-2005* (edited by Hartmut Wessler; translated by Keith Tribe) (Basingstoke: Palgrave Macmillan 2008) 68-118 'On Public Deliberation and Public Culture: Reflections on the Public Sphere'; Rodney Benson, 'Shaping the Public Sphere: Habermas and Beyond' (2009) 40 *American Sociologist* 175.

[7] See eg various works of Rosanvallon, discussed briefly in Pierre Rosanvallon, *Good Government: Democracy Beyond Elections* (translated by Malcolm DeBevoise) (Cambridge MA: Harvard University Press 2018) 17-18.

[8] Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (New York: Zone Books 2015) 44.

[9] John Keane, *The Life and Death of Democracy* (London: Simon & Schuster 2009) 866.

[10] Albrecht Wellmer, 'Models of Freedom in the Modern World' in Albrecht Wellmer, *Endgames: The Irreconcilable Nature of Modernity, Essays and Lectures* (translated by David Midgley) (Cambridge MA: MIT Press 1998) 3, 19.

[11] Brown, above n 8.

[12] Wellmer, above n 10, 8.

[13] See eg Natalie Fenton and Des Freedman, 'Fake Democracy, Bad News' in Leo Panitch and Greg Albo (eds), *Rethinking Democracy: Socialist Register 2018* (London: Merlin Press 2017) 130, 133 'Actually existing democracy … has given us nothing more than the illusion of democratic communications'.

[14] See eg Natalie Fenton, 'Fake Democracy: The Limits of Public Sphere Theory' (2018) 25 *Javnost: The Public* 28.

democratic institutions.[15] The idea and claims of democracy have these consequences and democratic constitutional arrangements entail them.

To take this further, I consider four points from Eric Heinze's *Hate Speech and Democratic Citizenship*,[16] as well as drawing on Edwin Baker's work[17] and examining a quite different example in the Varieties of Democracy project.[18] Heinze's study addresses a different issue than mine—he argues against the legitimacy of legal limits on hate speech in public discourse—and it will be clear I differ from him on some points, but the work contains ideas that are useful here.

First, Heinze separates free speech as a liberal or human right from free speech as a constitutive element of democracy. Whatever anchor free speech has in rights, it has a 'distinct grounding in democratic public discourse'.[19] As an idea, this appears useful when considering how law should treat free speech. This is so even if separating rights and democracy might appear unusual in some contexts—think of the place of France's Declaration of the Rights of Man and of the Citizen of 1789. Under the Declaration free speech is a 'natural right' inherent in 'human nature'[20] and, in that guise, it has become central to the analysis of French democracy. More generally, constitutional democracy is often understood as based in part on human rights, especially since the mid-twentieth century. While there are many arguments that human rights have a clear and necessary democratic role, they are not my direct concern here. Those arguments can be accepted or not. My point is just that democracy offers its own basis for the freedom, which may alter an analysis of free speech based on rights alone. Thus, I would suggest democratic aspects of free speech need to be considered in addition to any rights-based approach. I outline later in this chapter how, in some circumstances, the freedom's democratic aspect can change the result in law. In a somewhat similar vein, Heinze's approach suggests the idea of democracy itself entails something for free speech. Whatever relationship democracy has with human rights in general, it has a particular relationship with free speech. Other rights are not *democratically* significant in the way that free speech is significant. Free speech, for Heinze, is 'the only distinctly democratic interest'.[21] There may be others: a likely contender for another distinctly democratic interest of this sort would be education, at least education of a form and duration to underpin democratic choice. And one could extend the point to a baseline of subsistence rights or capabilities.[22] Education is particularly notable because references to it are reasonably common in free speech analysis, including Schauer's mention of the duration of

[15] See eg chapter 1 and discussion of Axel Honneth, *Freedom's Right: The Social Foundations of Democratic Life* (translated by Joseph Ganahl) (Cambridge: Polity 2014).

[16] Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford: Oxford University Press 2016).

[17] C Edwin Baker, *Media, Markets, and Democracy* (Cambridge: Cambridge University Press 2002).

[18] See eg Coppedge et al, above n 5. See also https://www.v-dem.net for further information on the project and to access the very substantial data sets that it has produced.

[19] Heinze, above n 16, 9.

[20] See eg Jean Morange, *La liberté d'expression* (Brussels: Bruylant 2009) 29 '*des droits naturels inhérents à la nature humaine*'.

[21] Heinze, above n 16, 5. To the idea that voting is the distinctly democratic good, he argues it should be seen as derivative of speech; voting 'is nothing but a formalized procedure for speaking'. Vote and voice are 'two manifestations of the same legitimating expressive condition' of democracy: Heinze, above n 16, 46-47.

[22] See eg Katharine Gelber, 'Nussbaum's Capabilities Approach and Freedom of Speech' in Francesca Panzironi and Katharine Gelber (eds), *The Capability Approach: Development Practice and Public Policy in the Asia-Pacific Region* (Abingdon: Routledge 2012) 38.

compulsory education as a First Amendment issue.[23] All of these wider matters also arise in scholarship on positive political freedom. Even so, speech has a particularly notable democratic significance.

Suggesting a conceptual distinction between democratic free speech and rights-based communicative freedom is not intended to imply human rights arguments are not useful for positive free speech. As chapter 4 shows, writing on positive human rights is clearly helpful. It often parallels positive free speech writing, which is unsurprising. But the positive free speech analysis offered here is not dependent on human rights as its sole foundation. Nor is it dependent on human rights in general having *positive* dimensions (nor positive dimensions about which courts should play significant roles). Those possibilities could well support the sort of approach to speech offered here, but my focus is narrower. For this book, distinguishing democratic free speech from human rights is useful for exploring free speech's democratic qualities, ways in which the freedom is required by democracy, and roles different constitutional actors might play.

The general point about speech's democratic importance might overstate matters if taken literally. It is neither that democracy needs only speech, nor that speech occurs in a vacuum. Speech that occurs needs to be translated into institutional contexts, it needs to have effects.[24] And the public speech entailed by democracy does not occur in isolation; public speech and the freedom that underlies it are linked with a host of discursive and non-discursive activities that support speech's emergence, circulation and reception. For example, writing of the historical emergence of democratic public spheres in Europe, Axel Honneth states:

> [T]he democratic exchange of opinion also included a *material substrate* of tangible political work: Organizing discussion meetings, mobilizing supporters, holding demonstrations and producing leaflets … If citizens were not willing to take on such 'menial' and non-discursive tasks, the discursive exchange of opinions would have come to an immediate halt.[25]

Bernhard Peters emphasises a similar point, noted in chapter 1, about the social organisation of public speech.[26] It is not that democracies need *only* words to meet their communicative requirements, but democracies need free speech and its substrate in a particular and significant way.

Speech and plural forms of democracy

A second point drawn from Heinze's analysis is the idea that public speech underlies democratic constitutions *in the plural*. This differs from the fact doctrinal analysis typically occurs within a

[23] Frederick Schauer, 'Hohfeld's First Amendment' (2008) 76 *George Washington Law Review* 914, 925 (and see chapter 2); see also eg Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (New York: Harper 1960) 86-87; Slavko Splichal, *Principles of Publicity and Press Freedom* (Lanham: Rowman and Littlefield 2002) 191 drawing on John Dewey to state:

> The public can be democratically organized only if three conditions are fulfilled, according to Dewey: (1) freedom of social inquiry and of distribution of its results, (2) public education, and (3) complete publicity in respect to all issues concerning the public.

[24] See eg Alvin I Goldman and Daniel Baker, 'Free Speech, Fake News, and Democracy' (2019) 18 *First Amendment Law Review* 66, 84-85; Nick Couldry, *Media, Voice, Space and Power: Essays of Refraction* (Abingdon: Routledge 2020) 195-196.

[25] Axel Honneth, *Freedom's Right: The Social Foundations of Democratic Life* (translated by Joseph Ganahl) (Cambridge: Polity 2014) 262 (emphasis added).

[26] See chapter 1, and eg Peters, above n 6, 81.

particular constitution. In such focused analysis, it could well be suggested 'the written constitution … dictates the content and structure of democracy' and thus the constitution 'is ultimate and foundational' not speech.[27] In contrast, Heinze argues it is not the written constitution which ultimately dictates democracy's content and structure. Constitutions typically contain provisions for reform (or abolition) which amounts to reform 'through public discourse'.[28] Heinze continues:

> Through such abrogation or amendment clauses, democratic constitutions expressly present themselves as constituted through nothing *but* an ongoing process of public discourse. … Within a democracy, public discourse is the constitution *of* the constitution.[29]

The idea of *public speech being the constitution of the constitution* is useful when thinking about democracy, media and law.[30] Legal research on free speech, media and democracy often catalogues differing forms of democracy (such as varieties of liberal, republican, deliberative or agonistic democracy) and then suggests what approach to free speech and media follows for each form of democracy. If democracy is of type X then media should be of type Y. As Emmanuel Derieux suggests when writing on French media law:

> Communications policy must be tightly linked with the political system globally (authoritarian, liberal, democratic…). The policy depends on and at the same time constitutes the political system. … It is only once these fundamental choices have been made, and with regard to them, that media law should be elaborated.[31]

Many more examples could be given; one from Baker is considered later in this section. This type of analysis 'reads' an approach to media law and policy from a form of democracy. As useful as it can be for understanding particular legal systems, I pursue a different approach here. It follows from public speech underlying constitutional democracies *of many forms*, with constitutional democracies containing room for a range of democratic forms to be pursued. It is an approach that moves the challenge of legitimate constitutional foundation, in part at least, to public speech.

Insofar as long-established democracies allow for constitutional reform, they all demand something in terms of public speech. They require public speech of a form sufficient to support the possibility of constitutional change. This requires *public speech that is diverse*. The diversity reflects, among other things, the irreducible plurality existing in these democracies and the many forms of change that could be made.[32] In addition, it requires *public speech that is sustained*; that is, a substantial amount of diversity within public speech across varied fora and times. And many of the fora are journalistic in the period on which I focus: public speech, at least as it relates to news and

[27] Heinze, above n 16, 96.

[28] Ibid 6.

[29] Ibid (emphasis in original).

[30] The idea could also be interrogated considering varied analyses of constituent power, but that would tend to divert matters from my primary concerns here; see eg Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press 2007); Joel I Colón-Ríos, *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Abingdon: Routledge 2012); William Partlett, 'The American Tradition of Constituent Power' (2017) 15 *International Journal of Constitutional Law* 955.

[31] Emmanuel Derieux, *Droit des médias: Droit français, européen et international* (8th ed, Issy-les-Moulineaux: LGDJ 2018) 45 [36] (my translation).

[32] Here I leave aside issues of the reception and use of such diverse media, issues of continuing interest in media studies: see eg Philip M Napoli, 'Deconstructing the Diversity Principle' (1999) 49(4) *Journal of Communication* 7; Natali Helberger, 'Exposure Diversity as a Policy Goal' (2012) 4 *Journal of Media Law* 65.

commentary, is shaped and sustained by journalism and its public-facing and -forming aspects. These qualities have been discussed in relation to the Curran and Born models in chapter 2. Beyond the issue of constitutional reform, there is also a requirement for sustained plural public speech where constitutions allow for interpretations that amplify or lessen libertarian, communitarian, republican, agonistic and other understandings of particular clauses or other elements of a constitution. Such actions occurring in a substantially legitimate fashion, perhaps especially when undertaken by legislatures or executives, depends on the presence of sufficiently sustained plural public speech.

An exception to the above requirements might exist for an overtly and exclusively elite view of democracy—one which argued *for* elitism rather than, for example, recognising the degree of its presence in existing democracies. An elite approach of this kind, which did not countenance public endorsement of elite domination or its own possible reform, would not appear to require sustained plural public speech. It might require something like that speech for governing elites but not for wider publics. However, where wider public participation could replace some members of a governing elite with others (in periodic elections for example), it would require sufficient diversity to support publications about elite incompetence or corruption.[33] In any event, a strongly elite view that did not allow for non-elite reform would be difficult to reconcile with the logic inherent in democratic structures and constitutions, even if it might come close to some contemporary democratic practices.

The constitutional role for speech suggested here differs from an approach focused on the role of speech *within* particular institutions under a democratic constitution, such as speech in parliament, speech in court proceedings (and its relationship to parliament), or perhaps speech within parliament and within specifically established, curated citizen forums or similar undertakings.[34] It is not that research focusing on parliamentary debate or citizen forums, for example, need exclude a wider role for public speech, but the significance and existence of wider public speech is sometimes left aside.

All this means I treat models of democracy and their concomitant media somewhat differently from notable examples in the literature. A useful comparison is with Baker's analysis of democracies and media,[35] which is prominent across law and media studies. Overall, his approach has similarities to Born's analysis and explicitly refers to Curran's model.[36] He concludes that a version of Curran's model should be pursued by US media policy and law, primarily by actors other than courts, with

[33] See eg Jacob Rowbottom, 'Government Speech and Public Opinion: Democracy by the Bootstraps' (2017) 25 *Journal of Political Philosophy* 22, 30.

[34] See eg Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press 2008) (discussed in chapter 4); Mark Warren and Hilary Pearse (eds), *Designing Deliberative Democracy: The British Columbia Citizens' Assembly* (Cambridge: Cambridge University Press, 2008); Eoin Carolan, 'Ireland's Constitutional Convention: Behind the Hype about Citizen-Led Constitutional Change' (2015) 13 *International Journal of Constitutional Law* 733. For a succinct review of deliberative analysis focusing on different types of institution or on wider mediated discourse, see Simone Chambers, 'Deliberation and Mass Democracy' in John Parkinson and Jane Mansbridge (eds), *Deliberative Systems: Deliberative Democracy at the Large Scale* (Cambridge: Cambridge University Press 2012) 52.

[35] Baker, above n 17, 129-153 (chapter 6, 'Different Democracies and Their Media').

[36] See eg Georgina Born, 'Digitising Democracy' (2005) 76 (Supplement 1) *Political Quarterly* 102; James Curran, 'Mediations of Democracy' in James Curran and Michael Gurevitch (eds), *Mass Media and Society* (4th ed, London: Hodder Arnold 2005) 122; James Curran, *Media and Power* (London: Routledge 2002) 240-246.

courts not striking down such legislative and other actions without careful review.[37] Overall, Baker recommends a 'complex' media for a 'complex' democracy. Outlining his approach shows my own as different—in not being based on one or other model of democracy—but also as similar, in suggesting multiple and somewhat conflicting democratic roles for media.

Baker offers four conceptions of democracy. The first is *elitist democracy*, where government is undertaken by experts and technicians who tackle technically challenging questions without widespread public involvement. As a model, it faces difficulties in terms of sustaining public legitimacy, replacing ineffective experts with others, and limiting the potential for elite corruption. The second is *liberal-pluralist or interest-group democracy*, which values the opportunity for public participation and generally sees it as necessary for democratic legitimacy. Rather than being focussed on responses to challenging problems, the model recognises a plurality of 'intractable' conflicts, individual and group-based, with incompatible interests, values and worldviews existing before, and remaining after, public debate. In that context, debate is useful in helping to facilitate 'fair' compromises or bargains between the different positions. In *republican democracy*, Baker's third conception, participation is valued slightly differently. Communal rather than atomistic interests are emphasised, and collective opinions are understood to be formed through interaction and public speech. In this view, 'politics is most fundamentally about discussing, formulating, and committing to common ends and then pursuing them'.[38] The fourth is *complex democracy*, which combines aspects of republican and pluralist approaches. Under it, participation includes 'arenas where both individuals and groups look for and create common ground' while also advancing 'their own individual and group values and interests'. But any search for common goals would still leave 'unresolvable disagreements', and then political structures need to 'facilitate fair bargains or compromises'.[39] Positions here emerge discursively, but common ground has limits. A pluralist society will contain varied groups with different conceptions of the good, which cannot be reconciled. Drawing on Fraser (as Born also does), Baker argues groups need 'adequate opportunity to develop their differing perspectives, and then have their perspectives fully voiced and given their due'.[40] Otherwise, public speech will involve unjust domination of some groups.

Baker also considers what media should exist for each democratic model. Under elite democracy, the role of public speech is relatively limited: monitoring public corruption is its central task. Public speech need not canvas complex problems because they are beyond general comprehension and interest. News media should focus on issues about which elite opinion is divided, and it should document public attitudes on issues of interest to elites, all to benefit elite debate. Under liberal-pluralist democracy, media (particularly news media) should inform people when their interests would be affected, helping to mobilise participation by divergent groups and alerting policy makers to 'the content and strength of people's demands'.[41] This needs more diverse and segmented media than elite democracy. Partisan media mobilise participation by different groups, rather than being aimed at an undifferentiated mass audience. The need is for 'separate media entities, with each entity focused on, and preferably controlled and maybe owned by, one of the various groups making

[37] Eg Baker, above n 17, 127.
[38] Ibid 140.
[39] Ibid 144.
[40] Ibid 146.
[41] Ibid 148.

up the polity'.[42] Republican democracy positions news media as 'a central democratic institution'[43] with a mission to facilitate deliberation and choice about the common good. 'The press ideally should be civil, objective, balanced, and comprehensive—although some slippage in the first three might be allowed if necessary in order to not overly restrict participation.'[44] A media that mobilises people 'may sometimes be needed, but it should be directed at general civic mobilization on behalf of honesty, good procedure, and responsiveness to popular demands'.[45] Unlike liberal-pluralist democracy, partisan and segmented media is seen as unnecessary, even as disruptive of democracy. Complex democracy—which, for Baker, captures the normative commitment of the US constitution—leads to varied media roles. Different elements of media would seek to fulfil each of the pluralist and republican approaches at a societal level and, in addition, segmented media would pursue group-level aims. Attention is not only focused on news, with group identity formation drawing on diverse media formats. Those formats are important to groups internally but, for non-dominant groups, there is a 'danger of direct suppression' or 'inadequate economic nourishment' of the formats that most interest them because dominant groups find the content unrefined, unworthy or threatening.[46]

The varied democratic practices in Baker's analysis suggest a plural approach to public speech. Using his terms, one could suggest elite, pluralistic and republican aspects of democracy are all seen within existing democracies and that, normatively, a democratic constitutional order should allow for this plurality. While that might appear just to restate Baker's complex democracy, I think the idea of public speech underlying varied and changeable democratic constitutional arrangements—of public speech being the constitution of the constitution—captures something about democracy and speech that is applicable to diverse interpretations of a country's democratic order. Whether the democracy in question is understood as liberal, republican, deliberative or agonistic, for example, whether it is a social democracy in the northern European model or a polarised pluralist democracy of southern Europe,[47] requirements for public speech that are inherent in the democratic constitutional form apply. Undoubtedly, requirements would be pursued differently in different styles and cultures of democracy, in different historical contexts and so forth, but the basic requirements would remain. The analysis is not dependent on any view being taken of existing constitutional democracies, beyond the point that they allow constitutional reform and interpretation, and that in turn is linked with plural public speech. It might be thought the approach depends on and applies social democratic thought—arguments consistent with positive free speech can well be made on a social democratic basis[48]—but

[42] Ibid 148.
[43] Ibid 143.
[44] Ibid 149.
[45] Ibid 149.
[46] Ibid 150.
[47] See eg Daniel C Hallin and Paolo Mancini, *Comparing Media Systems: Three Models of Media and Politics* (Cambridge: Cambridge University Press 2004).
[48] See eg Robert G Picard, *The Press and the Decline of Democracy: The Democratic Socialist Response in Public Policy* (Westport CT: Greenwood 1985); Trine Syvertsen, Gunn Enli, Ole J Mjøs and Hallvard Moe, *The Media Welfare State: Nordic Media in the Digital Era* (Ann Arbor: University of Michigan Press 2014); Victor Pickard, 'Towards a People's Internet: The Fight for Positive Freedoms in an Age of Corporate Libertarianism' in Maria Edström, Andrew T Kenyon and Eva-Maria Svensson (eds), *Blurring the Lines: Market-Driven and Democracy-Driven Freedom of Expression* (Gothenburg: Nordicom 2016) 61; Victor Pickard, *Democracy Without Journalism? Confronting the Misinformation Society* (New York: Oxford University Press 2020).

the analysis draws from, and claims applicability across, more types of democracy than that. It means, for example, that if one wanted to argue for a libertarian democracy that was substantially legitimate in terms of public communication, the democracy in question could not involve only a libertarian negative approach to free speech. That would presuppose or prejudge too much. To claim substantial communicative legitimacy, such a democracy would need to support positive and negative dimensions of free speech.

Another example of how positive free speech is required within multiple forms of democracy may be useful here. Of course, democracies have differences. Countless scholars have tracked and analysed this, exploring notable variations in democracy as it is conceptualised and practised. One illustration is the 'Varieties of Democracy' project (also known as V-Dem), a much more quantitatively-focused effort than Baker. It is developing measures of hundreds of democratic attributes across more than two centuries and 200 countries, and offers 'the world's largest data set on democracy, human rights and civil liberties' containing more than 27 million observations.[49] The project has developed five principles of democracy that arise from prevalent theoretical approaches: electoral, liberal, participatory, deliberative and egalitarian.[50] Each of these has been broken down into multiple components (at least those components that can be measured), and data on the components produced with the assistance of several thousand country experts.

Mapping how free speech arises in somewhat different ways within each of these five principles could be undertaken—consider, for example, the ease with which positive dimensions of communicative freedom fit within an egalitarian analysis of democracy where rights, freedom and resources must be protected and distributed 'equally across all social groups'.[51] As the researchers state:

> Rule *by* the people implies a degree of equality *among* the people. An egalitarian perspective on democracy also pays close attention to the de facto distribution of power, which may be at variance with de jure constitutional or statutory rights. Real power, not formal power, is the essence of rule by the people.[52]

But there is also a sense in which free speech, including its positive dimensions, is basic to all the approaches. In some ways, this parallels Jacob Rowbottom's analysis, noted in chapter 1, that all democratic theories link people and government in part through communication, with even minimalist elite-based theories needing free speech for all so 'people can be alerted to any major deficiencies of the government or advantages in choosing a rival elite'.[53] Varieties of Democracy places the electoral principle of democracy at its core; that is, each variety of democracy includes the electoral principle. The electoral principle is 'the *sine qua non* of democracy … We would not want to call a political regime without multiparty elections "democratic."'[54] Adapting Robert Dahl's analysis,[55] the project sets out five core attributes of the electoral principle: elected officials, clean elections,

[49] Coppedge et al, above n 5, 1, 2.

[50] These are drawn from seven values commonly associated with democracy: electoral, liberal, majoritarian, consensual, participatory, deliberative and egalitarian: ibid 28-39.

[51] Ibid 39.

[52] Ibid.

[53] Rowbottom, above n 33, 30.

[54] Coppedge et al, above n 5, 32.

[55] See eg Robert A Dahl, Democracy and Its *Critics* (New Haven: Yale University Press 1989); Robert A Dahl, *On Democracy* (New Haven: Yale University Press 1998).

freedom of expression and alternative sources of information, freedom of association, and inclusive suffrage. Thus, even the relatively minimal democratic standard of electoral democracy requires free speech and varied information sources, and the central role of elections means all varieties of democracy include these attributes. In a project focussed on different democracies and their measurement, free speech has a foundational role across all the democratic forms examined. This makes it worth noting how the project describes the required free speech and varied information sources:

> Citizens have a right to express themselves without danger of severe punishment on political matters broadly defined, including criticism of officials, the government, the regime, the socioeconomic order, and the prevailing ideology. Furthermore, citizens have a right to seek out alternative and independent sources of information from other citizens, experts, newspapers, magazines, books, telecommunications, and the like. Moreover, alternative sources of information actually exist that are not under the control of the government or any other single political group attempting to influence public political briefs and attitudes.[56]

Although it is not a question on which Varieties of Democracy focuses, the above goes some way towards free speech's positive dimensions as well as clearly invoking its negative ones. Alternative sources of information independent of political control 'actually exist'. Varieties of Democracy shows that, in a project focused on different democracies and their measurement, free speech has a foundational role across all the democratic forms examined. The components used in Varieties of Democracy to measure free speech and varied information sources also go some way towards capturing the freedom's positive dimensions.[57] They are probably weakest on questions of media financing. But there is broad consistency with Lichtenberg's simple observation that free speech involves two principles: the absence of censorship and the presence of multiple voices.[58] That is, free speech has negative and positive dimensions.

Not a freedom without limits

I have taken the idea that speech is the constitution of the constitution from Heinze, but it is worth noting I draw somewhat different implications from the phrase. Heinze is concerned, as am I, with 'democracy's *legitimating expressive conditions*'. He describes them as 'those free speech conditions without which democratic processes cannot be said to be fully in place; and which therefore, when only partly fulfilled, point to some measure of illegitimacy within the democratic process'.[59] His focus is hate speech and he argues against legal penalties for it, stating:

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[56] Coppedge et al, above n 5, 30-31.

[57] Ibid 96 describes the measures in terms of:

> a core set of indicators capturing overall media freedom … such as active state censorship of print/broadcast media, media self-censorship, and harassment of journalists. … freedom of discussion in society at large, for both men and women … whether the media is biased against opposition parties and candidates, whether major print and broadcast outlets routinely criticize the government, and whether they represent a wide range of political perspectives. (citations removed)

[58] Judith Lichtenberg, 'Foundations and Limits of Freedom of the Press' in Judith Lichtenberg (ed), *Democracy and the Mass Media: A Collection of Essays* (Cambridge: Cambridge University Press 1990) 102, 107 (and see chapter 2).

[59] Heinze, above n 16, 17 (emphasis in original).

> A longstanding, stable, and prosperous democracy can be fully held to its legitimating expressive condition, which requires *the citizen's prerogative of non-viewpoint-punitive expression within public discourse*.[60]

He uses the term 'prerogative' to indicate that expression within public discourse cannot be subject to balancing against other interests. Rather, he suggests an absolute requirement of democracy is that law cannot penalise public speech because of the viewpoint expressed. Heinze takes care to explain that, on his approach, although law cannot penalise speech based on its viewpoint the state need not remain neutral with respect to hate speech. For example, hate speech made *outside* public discourse can be subject to control, and hate speech can be subject to *non-viewpoint-based* controls, such as time and place restrictions that are applied in many legal systems. These sorts of control would be subject to evaluation on common free speech grounds. But public discourse cannot be subject to viewpoint-based limits.

In his analysis, Heinze does not explicitly address ideas of positive and negative freedom. His concerns are different, focussed on legal restriction of hate speech. But he makes some relevant observations. He suggests that, even with only negative freedom of speech, a public sphere of some form will likely arise: 'the purely sociological likelihood that such a sphere inevitably arises *incidentally* to that liberty—for the simple reason that people like to talk.'[61] However, there are suggestions that a *democratic* communicative freedom may not just be negative. Heinze distinguishes liberal rights-based and democratic approaches to free speech. He refers to Berlin when noting that the difference between negative and positive freedom is less clear than often thought.[62] He also states:

> To the extent that a liberal 'right' to free speech is construed in the classically liberal terms of a sheer 'negative liberty' … it becomes indistinguishable from any other individual liberty. … That freedom tells us something, perhaps everything, about a traditionally liberal, harm-based conception of free speech, but nothing about a distinctly democratic conception.[63]

It would appear the democratic conception of free speech could be more than a merely negative freedom. Heinze also notes that a democratic state can be *active*. The state need not be neutral regarding hate speech. He suggests the state can promote plural public speech (without imposing viewpoint-based penalties) and impose non-viewpoint-based penalties when promoting plural speech. 'Both types of rule flow legitimately from decisions reached within value-pluralist processes precisely insofar as no viewpoint has been barred from *the public discourse that surrounds those processes*.'[64] But what is required in relation to that public discourse? His focus remains on the absence of viewpoint-based legal restrictions on public discourse more than underlying structural aspects of it.

Arguing against viewpoint-punitive penalties on public speech does not logically lead to the position that, without such penalties, public discourse is free, equal or democratically sufficient. Some analyses may intend that extra step, but Heinze does not appear to do so. Rather, he notes ways in which state actions can be required in public speech; for example, how police resources may be required to support the ability of members of the public to protest. Such resources supporting public

[60] Ibid 77 (emphasis removed in part).
[61] Ibid 97 (emphasis in original).
[62] Ibid 74.
[63] Ibid 97 (emphasis removed).
[64] Ibid 111 (emphasis added).

demonstrations are often interpreted as part of positive free speech.[65] As Heinze notes, the state actions 'add up to a sizeable public cost'.[66] This means the 'citizen's prerogative of non-viewpoint-punitive expression within public discourse stands not as a sufficient condition, but only as one necessary condition for democratic legitimacy'.[67] He recognises there is no neutral state, and argues democratic states can, and should, act to promote pluralism without penalising other viewpoints in public speech.[68] He also notes Katharine Gelber's analysis of the capabilities approach and free speech, which leads her to the idea that state efforts should 'include measures to empower marginalized groups, supporting them in "speaking back" … within arenas of public discourse'.[69] But such points are not central to Heinze's analysis. His claim is that democracy requires non-viewpoint-based limits on expression 'within the sphere of open, public discourse'.[70] His focus is not on what is required for that 'open' sphere of public discourse to exist, beyond the question of viewpoint-based limits.

Overall, Heinze argues free speech is not merely important within a democracy, it is 'materially constitutive of democracy' such that states cannot be democratic 'without guaranteeing … the citizen's prerogative of expression within public discourse'.[71] The approach has broad parallels to the US-based work of Robert Post and James Weinstein.[72] As noted, Heinze's central claim is that citizens must not have their freedom of expression in public discourse limited because of the viewpoint they express. 'What emerges is not "free speech absolutism" but rather viewpoint absolutism, as no conceivable abridgement of that citizen prerogative could ever be deemed to promote democracy.'[73]

While much is similar in my approach here, I do not understand communicative freedom as being absolute in the sense Heinze means. At least, it need not be; that debate is a separate one. Instead, I would suggest that limitations may apply to public discourse or public speech, but the limitations would be different (than they otherwise would be) because of the democratic role of such

[65] See eg Mark Tushnet, *Advanced Introduction to Freedom of Expression* (Cheltenham: Edward Elgar 2018) 83-103; Eric Barendt, 'Freedom of Expression' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press 2012) 891, 898; and more generally Eric Barendt, *Freedom of Speech* (2nd ed, Oxford: Oxford University Press 2005) 268-311.

[66] Heinze, above n 16, 74.

[67] Ibid 81.

[68] Ibid 115-116.

[69] Ibid 113-114 citing Katharine Gelber, 'Reconceptualizing Counterspeech in Hate Speech Policy (with a Focus on Australia)' in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press 2012) 198; Katharine Gelber, '"Speaking Back": The Likely Fate of Hate Speech Policy in the United States and Australia' in Ishani Maitra and Mary Kate McGowan (eds), *Speech and Harm: Controversies over Free Speech* (Oxford: Oxford University Press 2012) 50. See also Gelber, above n 22.

[70] Heinze, above n 16, 209.

[71] Ibid 5 (emphasis removed).

[72] See eg Robert C Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge MA: Harvard University Press 1995); James Weinstein, 'Participatory Democracy as the Central Value of American Free Speech Doctrine' (2011) 97 *Virginia Law Review* 491. See also eg contributions from Weinstein, Jeremy Waldron, Heinze, Post and others in Symposium: Hate Speech and Political Legitimacy (2017) 32:3 *Constitutional Commentary* 527-782. I discuss Post's understanding of freedom further in chapter 8 and in Andrew T Kenyon, 'Positive Free Speech: A Democratic Freedom' in Adrienne Stone and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech* (Oxford: Oxford University Press, in press).

[73] Heinze, above n 16, 77.

speech.[74] The result is not viewpoint absolutism, but a distinct standard: the requirements of democracy would entail support for positive dimensions of free speech *and* limitation of certain democratically undermining speech. This issue of limitations is somewhat tangential to my concerns, but it relates to an understandable response to the idea of positive free speech; namely, that positive free speech means there are no legal limits to public discourse. I would not agree. Although speech can be described as the constitution of the constitution, there can be legal limits to public discourse if the constitutional form in question is to remain democratic. Limits are often understood as the result of 'balancing' communicative freedom with other interests, such as privacy or reputation. This approach can occur independently of addressing free speech's particular democratic qualities. But limits can also be *internal* to the concept of freedom, internal to the idea of speech being the constitution of the constitution, and internal to its democratic qualities. For instance, if communicative freedom in a democracy entails diversity in speech sufficient to allow collective government and constitutional reform, the freedom itself could also include limits that are required for that very aim.[75] Intuitively, that sort of approach sounds plausible for a communicative freedom that includes positive dimensions, but the issue can be largely left aside here.[76] The question of free speech limits—limits that are external to the freedom, internal to it or both—would be a substantial study. (It could also be true that limits would need to be applied differently online than in older mass media contexts.[77]) Outlining the general point with an example from another area of law is enough for my purposes.

Defamation law takes different approaches to public discourse in the jurisdictions with which I am concerned. Here, a brief Commonwealth-US comparison of free speech and defamation law is sufficient. In Commonwealth jurisdictions, some form of balancing test is often applied to evaluate restrictions on free speech. For defamation law, this has led to the gradual development of defences that, in general terms, apply to publications of public interest, that are not proven true, but were made reasonably.[78] In contrast, the treatment of public discourse by US free speech law comes closest to the approach advocated by Heinze. In general, the US law eschews overt balancing and disallows viewpoint-based penalties for public discourse. One result is that US defamation law takes a very different form. In simple terms, public figures cannot sue in defamation unless they establish, pre-trial, with clear and convincing evidence, that the publication conveyed a fact known to be false by

[74] The limits may also differ because of the support for diverse public speech offered by the freedom's positive dimensions. A somewhat similar idea might be drawn from Gelber's work, above n 69.

[75] A structurally similar analysis focused on hate speech, but extending beyond a democratic free speech rationale, is offered by eg Caroline West, 'Words That Silence? Freedom of Expression and Racist Hate Speech' in Maitra and McGowan, above n 69, 222. See also David Braddon-Mitchell and Caroline West, 'What is Free Speech?' (2004) 4 *Journal of Political Philosophy* 437.

[76] Emerson made a similar point noting that 'affirmative' aspects of the First Amendment would often raise issues for determination, not between speech and another interest, but within the right itself: Thomas I Emerson, 'The Affirmative Side of the First Amendment' (1981) 15 *Georgia Law Review* 795, 802.

[77] Eg for a critical evaluation of Germany's Network Enforcement Act (commonly known as NetzDG) focused on negative free speech issues, see Jacob Mchangama and Joelle Fiss, *The Digital Berlin Wall: How Germany (Accidentally) Created a Prototype for Global Online Censorship* (Copenhagen: Justitia 2019) available via http://justitia-int.org.

[78] See eg Andrew T Kenyon, 'What Conversation? Free Speech and Defamation Law' (2010) 73 *Modern Law Review* 697; Andrew T Kenyon, 'Rethinking Reynolds: Defending Public Interest Speech' in Doreen Weisenhaus and Simon N M Young (eds), *Media Law and Policy in the Internet Age* (Oxford: Hart 2017) 61.

the publisher when made (or the publisher had serious doubts about its veracity).[79] Greater detail about Commonwealth and US defamation law could be added to the analysis, but the point to note is the US approach *does* limit defamatory public speech. United States law constrains the 'citizen's prerogative of expression within public discourse'. Perhaps one could argue about whether the constraint is viewpoint-based or not, but its effect limits the expression of some viewpoints criticising public figures. In general terms, US defamation law means people cannot lie about public figures without risking liability. That is a low limit to public speech, but it is a limit. The example suggests how appreciating free speech's constitutional role does not mean public discourse faces no legal limits. But the limits may well be different than they otherwise would be. Assessing a legal limit depends on the constitutional role of public speech. If some form of public speech counters or undermines the possibility of self-government, it could warrant limitation. That might well apply to hate speech. Limits on public discourse would be based on the adjudged effect of the speech on the possibility of democratic self-government. Limits would remain an issue of legal and academic debate, but limits would be possible.[80]

Which democracies?

To this point, I have used two aspects of Heinze's analysis, concerning free speech as a particularly *democratic interest* and as the *constitution of constitution*. The third point to note is that he *does not apply the analysis to all democracies*. Heinze explicitly limits his analysis to what he calls 'longstanding, stable and prosperous' democracies.[81] He explains the label as approximating 'full democracies' in *The Economist* Intelligence Unit's *Democracy Index*.[82] The *Index* considers factors covering a country's 'electoral process and pluralism; civil liberties; the functioning of government; political participation; and political culture'.[83] It classifies more than 160 countries into one of four categories: full democracies, flawed democracies, hybrid regimes or authoritarian regimes. Heinze limits his argument to countries with the ability (because of political pluralism, civil liberties, government functioning, financial resources and so forth) to respond to hate speech without applying legal penalties to it. He suggests something like the *Index*'s full democracies would be the only countries subject to the argument. He takes comfort that the number is not too small; that is, the requirements he sets out are not utopian.[84] However, his approach may have needed to differ slightly under subsequent editions of the *Index*, because US democracy (of clear importance in considering hate speech and law) is no longer classified as full. Heinze uses the 2013 *Index*, in which 25 countries including the US are assessed as full democracies and 54 as flawed, covering 11% and 36% of the

[79] See eg Andrew T Kenyon, *Defamation: Comparative Law and Practice* (London: UCL Press 2006) chapter 6 (US Defamation Law and Practice) 239-280; Kenyon, 'What Conversation', above n 78.

[80] Such limits on public speech could also be explored through the concept of 'militant democracy'; for a general overview of the concept's history and variation, see eg Jan-Werner Müller, 'Militant Democracy' in Rosenfeld and Sajó, above n 65, 1253.

[81] Heinze, above n 16, 70ff.

[82] *The Economist* Intelligence Unit, *Democracy Index 2013: Democracy in Limbo* (London: EIU 2014). The *Index* takes a slightly 'thicker' approach to assessing democracy than other examples such as the US-based Freedom House's measures of political freedom and civil liberties.

[83] See eg *The Economist* Intelligence Unit, *Democracy Index 2015: Democracy in an Age of Anxiety* (London: EIU 2016) 52-53; and see Heinze, above n 16, 70.

[84] Heinze, above n 16, 70.

population respectively.[85] But in the 2016 *Index*, full democracies reduced from 25 to 19 and from 11% to only 4.5% of the population.[86] The same applies in the 2017 *Index*, with the 2018 *Index* being almost identical.[87] And the 2019 *Index* is little better, placing 5.7% of the world's population in full democracies and 42.7% in flawed ones.[88] (The sense of decline is not unique to the *Democracy Indexes*.[89]) A major aspect of the change since 2013 is that US democracy is ranked as flawed, and no democracy ranked as full in recent *Indexes* follows the general approach to hate speech suggested by Heinze.

Other ratings could be used, such as the somewhat more critical Civicus Monitor that tracks civic space. Examining freedoms of association, peaceful assembly and expression, it arrives at broadly similar but lower rankings overall than the *Index*, rating more than 80% of the world's population as having only 'repressed', 'closed' or 'obstructed' civic space.[90] In any event, perhaps my analysis could apply to more than the *Index*'s full democracies. It might be thought to encompass many of the full and flawed democracies, at least in terms of the theoretical requirements inhering in such countries' *claims* to be democratic. That would be a large group of countries. The relevant totals have been comparatively stable in recent years, at between 75 and 79 countries and nearly 50% of the world's population.[91] Or the analysis might encompass countries with 'open' and 'narrowed' civic space under the Civicus Monitor, which covers only 17% of the world's population. However, on either approach there could be real limitations in seeking to implement the approach in at least some of those countries. Just as many flawed democracies (or those with narrowed civic space) would rate poorly on negative dimensions of free speech,[92] they would also do so on positive dimensions. That does not

[85] The population percentage is of the 167 countries analysed, which is very close to total global population.

[86] See *The Economist* Intelligence Unit, above n 82, 2; *Democracy Index 2016: Revenge of the 'Deplorables'* (London: EIU 2017) 3.

[87] *The Economist* Intelligence Unit, *Democracy Index 2017: Free Speech Under Attack* (London; EIU 2018) 2 (19 countries, 4.5% of population); *Democracy Index 2018: Me Too? Political Participation, Protest and Democracy* (London: EIU 2019) 2 (20 countries, 4.5% of population).

[88] *The Economist* Intelligence Unit, *Democracy Index 2019: A Year of Democratic Setbacks and Popular Protest* (London: EIU 2020) 3. Although the Index rates 2019 as the worst year for democracy since the annual reports commenced in 2006, full democracies increased from 2018. This in part follows France's reclassification from flawed to full democracy.

[89] See eg Freedom House, *Freedom in the World 2020: A Leaderless Struggle for Democracy* (Washington: Freedom House 2020) 12 noting a decline in its measure of freedom of expression and belief across 14 years in all regions of the world.

[90] Civicus Monitor, *People Power Under Attack* (December 2019) https://monitor.civicus.org, rates 3% of world's population as having open civic space, where the 'state both enables and safeguards the enjoyment of civic space for all people'; 14% with narrowed civic space where civic rights can be exercised but there are also violations; and 16% with obstructed civic space, where civic space 'is heavily contested by power holders'; 40% with repressed civic space, where those 'who criticise power holders risk surveillance, harassment, intimidation, imprisonment, injury and death'; and 27% with closed civic space, where 'state and powerful non-state actors are routinely allowed to imprison, seriously injure and kill people with impunity'. Civicus is a South African based global alliance for citizen participation. The monitor is produced with a wide range of civil society organisations and experts.

[91] See *The Economist* Intelligence Unit, *Democracy Index 2015*, above n 82, 2; *Democracy Index 2017*, above n 86, 3, *Democracy Index 2018*, above n 86, 2; *Democracy Index 2018*, above n 88, 3.

[92] The *Index* notes that (negative) free speech and media freedom as one of the worsening factors in 'advanced democracies': *The Economist* Intelligence Unit, *Democracy Index 2019*, above n 88, 6. The *Index* continues, 7: 'In

mean the argument does not apply in such contexts, but it may be less helpful to pursue it there. This relates to a point that becomes clearer in later chapters and underlines the limited number of countries to which my analysis might usefully be applied: positive dimensions of free speech exist *in addition to* the negative, they include the negative. It is not that the positive dimensions come after negative free speech in some form of progression; it is just that both are needed. This suggests why the analysis focuses on contexts with reasonably strong protection of negative free speech. Such protection generally involves courts having a substantial role to limit excessive restrictions on speech by others. That does not mean their role should be identical for positive dimensions of free speech; in any event, differences between the legal treatment of prohibitions and obligations means the role of courts cannot be the same for the freedom's negative and positive dimensions. But it does flag questions about what courts might do, which is considered through examples in later chapters. Those examples suggest that courts, along with other actors, can and perhaps should have an important role over positive dimensions of free speech. However, if a constitutional democracy lacks that context—that is, if it lacks strong protection of negative free speech—it can be expected to lack the ability to pursue free speech's positive dimensions in a productive manner.

This suggests an initial focus on a relatively small number of countries: countries that claim to be democratic in the form of Western European and North Atlantic models and similar countries (perhaps classically in their mid-twentieth-century forms[93]) *and*, in particular, countries among them that have comparatively strong protection of negative free speech. That would be close to the countries that Daniel Hallin and Paolo Mancini examine in *Comparing Media Systems* namely, social democratic northern European countries, polarised pluralist southern European ones, and North Atlantic liberal ones, along with countries like Australia and New Zealand which they note could have been included in their study.[94] It also largely corresponds to the countries grouped in the open and narrowed civic space ratings of the Civicus Monitor.[95] Such countries have constitutional forms of democracy that can plausibly be said to entail positive dimensions of free speech, and they have a comparatively strong record—despite serious failings in particular areas—of protecting negative dimensions of free speech. And there are examples of law, including courts, protecting positive dimensions of free speech in some of these countries.[96]

My suggestion is not that these countries *meet* the democratic requirements of free speech's negative and positive dimensions. I would suggest that none of them do that to a particularly high standard, although some come closer than others in ways that are useful to understand. While the approach might well be thought universalising at one level, how communicative freedom could be

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the past decade, in fact, no scores in the Democracy Index have deteriorated as much as those related to freedom of expression and media freedom.'

[93] See eg Colin Crouch, *Post-Democracy* (Cambridge: Polity 2004) 7: 'In most of Western Europe and North America we had our democratic moment around the mid-point of the twentieth century: slightly before the Second World War in North America and Scandinavia; soon after it for many others.'

[94] Hallin and Mancini, above n 47, 7 note Australia and New Zealand's 'historical connections make them very similar to Western European countries'.

[95] Civicus Monitor, above n 90, and its world map of ratings.

[96] There are also examples of courts taking similar 'positive' roles to the freedom in countries with obstructed or even repressed civic space; consider, eg, India which is rated repressed by the Civicus Monitor and, eg, Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech under the Indian Constitution* (New Delhi: Oxford University Press 2016) chapter 11 'The Meaning of "Freedom"'.

pursued within different democracies clearly relates to the constitutional, political and historical context in the country and other aspects of its constitutional arrangements and culture. The obligation to pursue positive dimensions of free speech will exist, but the way in which that will occur will differ. Supporting positive dimensions of freedom necessarily involves discretion, which is a reason the study does not arrive at a singular blueprint for democratic free speech. Rather, it is concerned to shift the orientation taken to free speech and to provide a more general framework for the freedom so that varied issues, actions and actors are considered with an understanding of free speech's positive and negative dimensions.

A post-democratic age?

For my fourth point, I want to consider another democracy-related matter. Is it relevant to focus on democracy and legitimacy when the current age may be more one of post-democracy?[97] 'Pondering democracy's legitimating conditions may smack of an eighteenth-century quaintness', as Heinze observes.[98] However, there still appears to be value in the idea of legitimacy in relation to democracy's communicative requirements. Normal judicial analysis in these countries will treat democracy as existing and legitimate—constitutional judges do not often focus on whether the court's position and role are legitimate[99]—but that need not exhaust wider consideration. Democratic legitimacy may still have a critical weight. While account must be made of 'de-democratized spheres',[100] thinking further about speech offers a *possible* counter to a post-democratic situation. Heinze suggests:

> One of the chances still available to us for tempering the dominion of technocratic and managerial spheres is to seize back into our hands our societies' vestiges of citizen-driven democracy. Crucial to that aim is insight into democracy's roots in public discourse.[101]

Thus, focusing on 'democracy's legitimating expressive conditions'[102] offers a way of thinking about and attempting to counter, if only in part, a post-democratic age. But it needs to be tempered with a recognition of the gaps between ideas that communicative freedom supports democracy, and the question of whether public speech actually has political effects. Media is relevant to the latter question, but more is required, and this book's media focus should not be taken to suggest otherwise. Natalie Fenton and Gavan Titley make the same point that eliding pluralism and communicative freedom 'as democratic enrichment depend[s] on an implicit assumption about the *consequential relations* between pluralism, networked communication, participation and politics'.[103] As they note, the question of effects should not be assumed. My interest here is somewhat distinct from that; namely, what approaches to free speech might assist speech to have effects. And that is a question

[97] See eg Crouch, above n 93; Johan Farkas and Jannick Schou, *Post-Truth, Fake News and Democracy: Mapping the Politics of Falsehood* (Abingdon: Routledge 2020).

[98] Heinze, above n 16, 7.

[99] However, such concerns are not unknown, see eg the discussion of comments by Scalia J in the US Supreme Court in Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346, 1390-1391 (Waldron's general analysis, which appears of less relevance to my interests than might initially be thought, is considered below in chapter 8.)

[100] Heinze, above n 16, 7.

[101] Ibid 7 (note removed).

[102] Ibid 17 (emphasis removed).

[103] Natalie Fenton and Gavan Titley, 'Mourning and Longing: Media Studies Learning to Let Go of Liberal Democracy' (2015) 30 *European Journal of Communication* 554, 566 (emphasis added).

which involves examining the meaning of freedom. Further, the gaps between commonplace claims of speech serving democracy and its effects in practice might be all the greater in the contemporary communication environment with pervasive surveillance and data commercialisation reformulating public speech in challenging ways.[104] I say a little more about contemporary challenges in chapter 8.

A separate concern about legitimacy can also be noted. Some analysis criticises use of the term because legitimacy cannot be achieved in the complex societies considered here. For example, Steve Shiffrin observes of the US context: 'Any such society will be riddled with hierarchies that contain features of injustice.'[105] That may well be true, and I am not suggesting otherwise, but it appears to use legitimacy in terms of substantive justice across society. The interest in legitimacy here is different and narrower. *Communicative* democratic legitimacy would appear to be possible to varying degrees, as emerges from the present study.

There is a final matter to note about analyses of post-democracy: they can include similar roles for public speech as this book. Responding to post-democracy can involve just the sort of public speech with which I am concerned. In Colin Crouch's work, for instance, the role of strong public media within a diverse media environment is clearly relevant to alleviating a post-democratic age.[106] That is not to suggest existing public media *fulfils* such a public communicative mission. Tom Mills offers just one example of its weaknesses, in documenting the 'central problem with the BBC throughout its history' as 'the extent to which powerful interests have been able to influence its institutional culture and its output'. He argues the BBC is now 'a central institution of Britain's post-democratic settlement'.[107] As that suggests, aspects of his analysis parallel the work of Crouch. And, notably for my purposes, Mills also suggests reform to strengthen public media. Some reforms directly mirror aspects of positive free speech described in later chapters, such as placing the BBC 'on a permanent constitutional footing' with political control over finances and senior appointments being 'abolished'.[108] Other suggested reforms extend further than the examples in later chapters. But they do this in ways that are quite consistent with positive communicative freedom and the media models already outlined, such as widening BBC recruitment to be more 'representative of the audience in terms of class, race, gender, geography and so on' and 'democratising editorial power'.[109]

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[104] See eg Nick Couldry and Ulises A Mejias, *The Costs of Connection: How Data is Colonizing Human Life and Appropriating it for Capitalism* (Stanford: Stanford University Press 2019) 197 and xiii (arguing a new social order is emerging that appropriates human life to extract data continuously from it in search of profit in a fashion that is 'incompatible with every political structure built on freedom, including democracy in all its forms, liberal or otherwise' and undermining 'the autonomy of human life in a fundamental way that threatens the very basis of freedom').

[105] Steven Shiffrin, 'Dissent, Democratic Participation, and First Amendment Methodology' (2011) 97 *Virginia Law Review* 559, 562.

[106] See eg Crouch, above n 93, 46-51; Colin Crouch, *The Strange Non-Death of Neoliberalism* (Cambridge: Polity 2011) 26-27.

[107] Tom Mills, *The BBC: Myth of a Public Service* (London: Verso 2016) 214. See also eg Natalie Fenton and Des Freedman, 'Fake Democracy, Bad News' in Leo Panitch and Greg Albo (eds), *Rethinking Democracy: Socialist Register 2018* (London: Merlin Press 2017) 130, 139: the BBC's 'affiliation with establishment figures and parties remains remarkably consistent', 145: the BBC 'has, throughout its history, served the state more effectively than it has served the public'; Nick Couldry, *Media: Why it Matters* (Cambridge: Polity 2020) 104-105 discussing the BBC as '[p]erhaps the most well-known example' of media aiding governmental power.

[108] Mills, above n 107, 215.

[109] Ibid.

Conclusion

This chapter has considered free speech's distinct democratic role—its quality as a precondition to self-government. Sustained plural public speech, and the freedom that supports it, underlies the communicative legitimacy of varied constitutional forms of democracy, rather than any one form. This suggests that taking account of democratic requirements about free speech may lead to different conclusions from purely rights-based approaches to the freedom, but it does not mean free speech within public discourse should be without limits. The chapter has also noted the range of democracies within my focus, which are those with reasonably strong protection of free speech's negative dimensions. Finally, it has proposed that paying attention to 'democracy's legitimating expressive conditions' could be useful for understanding and critiquing communicative weaknesses in existing democracies.

Rather than suggesting democracy supplies a 'complete' approach to free speech, the argument is that a constitutional system's claim to be democratic carries particular implications for free speech. That does not have direct implications for what other free speech rationales might suggest about laws regulating speech. But it suggests that, within democratic contexts, those rationales cannot take precedence over what can be called the democratic imperative for free public speech, an imperative that may well modify the effect of other free speech rationales. It is also worth noting that, while the focus is on democracies, it is not suggested that understanding free speech to have positive dimensions is only possible in a democratic context. Similar approaches might be developed in relation to work that explicitly considers free speech in non-democratic societies, uses other common free speech rationales, or explores the capabilities approach.[110] But they are not my present concern. Democracy offers a useful and accessible focus for study, with clear connections to law and relevance across the other fields on which I draw. Next, analysis turns to three sources that clarify and reinforce key aspects of positive communicative freedom in a democratic context: human rights and political theory in chapter 4, and then US legal analyses of free speech's positive dimensions in chapter 5.

[110] See eg Paul Chevigny, *More Speech: Dialogue Rights and Modern Liberty* (Philadelphia: Temple University Press 1988) which develops an argument for speech based in nature of language and social problem solving; Richard Danbury, 'Where Should Speech Be Free? Placing Liberal Theories of Free Speech in a Wider Context' in Monroe Price and Nicole Stremlau (eds), *Speech and Society in Turbulent Times: Freedom of Expression in Comparative Perspective* (Cambridge: Cambridge University Press 2018) 171 which considers how liberal free speech theories can have elements that apply outside liberal democracies; Gelber, above n 22, who develops a free speech analysis using Martha Nussbaum's work on the capabilities approach, which is not limited to democratic contexts.

4 Positive Human Rights and Political Freedom

After an initial examination of positive free speech and its democratic role in chapters 2 and 3, here the focus is *positive freedom* and what that suggests for speech. I start with an example from legal scholarship on positive human rights, and then consider approaches to freedom in political theory. While the writing from human rights and political theory has a much broader scope than free speech, it suggests many points that are relevant for it. When considering political freedom, I explain why the commonly referenced work of Isaiah Berlin should be set aside: it has limited relevance for positive free speech.[1] Various later analyses are more useful, including some that engage specifically with free speech.

Overall, the work on positive human rights and positive political freedom suggests five points. First, the state has obligations to act in support of a diversity or plurality of possibilities, focussed on providing people with access to social and material conditions for realising projects of their choosing. Often, these requirements for action are sourced in democratic forms of government. Second, the approach does not entail any singular or monist vision of values or ends; it is highly pluralistic. It includes negative liberty but goes beyond it. Third, ideas of self-mastery, self-perfection or a higher self, which form part of Berlin's approach to positive freedom,[2] are not directly relevant to positive freedom as it is used here. Rather, the term 'positive' invokes an idea of enablement, with the conditions of freedom seen as part of any useful analysis of freedom, and the concept of freedom including the ability to exercise freedom. As Charles Taylor states, the 'view that freedom involves at least partially collective self-rule is essentially grounded on an exercise-concept'.[3] Similarly, the wide and varied scholarship on freedom suggests those same two senses of the term: 'Positive freedom involves enabling the capacities that allow people to develop and execute plans of life and exercise self-government individually and collectively.'[4] Fourth, a common idea in relation to positive freedom is that it serves autonomy, but that autonomy should be understood as arising within particular conditions—conditions that both enable and limit what is possible. In terms of speech, freedom always arises within existing contexts of, among other things, language and infrastructure. Fifth, the writing examined here does not generally address which institutional actors, if any, have responsibility to act in relation to positive dimensions of freedom. Some examples explicitly place responsibility on institutional politics. In contrast, some legally focussed work explores the role of courts, although that tends to be a 'secondary' role to legislatures and others. The issue of actors is examined further in later chapters.

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[1] Isaiah Berlin, *Two Concepts of Liberty: An Inaugural Lecture Delivered before the University of Oxford on 31 October 1958* (Oxford: Clarendon 1958).

[2] Skinner offers a useful summary of Berlin's approach, emphasising his use of positive freedom as self-realisation or self-perfection: Quentin Skinner, 'A Third Concept of Liberty' (2002) 24(7) *London Review of Books* 16. See also Blokland who contrasts two aspects of positive freedom that are largely conflated by Berlin, self-determination and self-realisation: Hans Blokland, *Freedom and Culture in Western Society* (translated by Michael O'Loughlin) (London: Routledge 1997) 37-38.

[3] Charles Taylor, 'What's Wrong with Negative Liberty' in Alan Ryan (ed), *The Idea of Freedom: Essays in Honour of Isaiah Berlin* (Oxford: Oxford University Press 1979) 175, 178; reproduced in Charles Taylor, *Philosophy and the Human Sciences: Philosophical Papers 2* (Cambridge: Cambridge University Press 1985) 211, 214.

[4] Carmen E Pavel and David Schmidtz, 'Introduction' in David Schmidtz and Carmen E Pavel (eds), *The Oxford Handbook of Freedom* (New York: Oxford University Press 2018) 1, 1-2.

After human rights and political theory, chapter 5 considers examples from US legal free speech scholarship to illustrate how it can approach the issues in a manner consistent with positive free speech. And this is so even in the context of US free speech law being largely negative. The examples also suggest ways matters might be taken further which, in subsequent chapters, leads to examining two countries in which courts have done just that, Germany and France. No argument or hierarchy is implicit in the order of these examples from human rights law to political theory to free speech law. All three areas of scholarship provide useful material for understanding positive dimensions of free speech. They tend to reinforce each other and are simply taken in an order that appeared practical. Clearly, many more examples could be considered from each area. But the selection flows from my aim to describe why and how law might take account of positive dimensions of free speech and to recognise at least some of the challenges facing any attempt by law to do so.

Positive human rights and law

To consider legal writing about positive human rights, I use Sandra Fredman's 2008 monograph, *Human Rights Transformed: Positive Rights and Positive Duties*. One of many possible examples,[5] it is useful for present purposes. Although her concerns are much wider than free speech, five useful points emerge for understanding communicative freedom. She does address free speech directly in later work, but there focusses more on comparative judicial approaches to negative dimensions of the freedom alongside some consideration of positive free speech and access to government information.[6] The general argument is consistent with the earlier book examined here.

First, in *Human Rights Transformed*, Fredman begins by noting human rights have traditionally been understood as negative rights against the state.[7] The state is also seen to have a range of positive obligations relevant to fulfilling rights, but such obligations have been understood as matters of institutional politics rather than legal rights. However, some approaches do treat positive obligations as legal rights, such as the Maastricht guidelines from the late 1990s.[8] While focusing on economic, social and cultural rights, the guidelines hold that *all* rights—including civil and political rights—impose three obligations on states. First is an obligation to *respect* rights: states themselves must not interfere with the enjoyment of rights. Second is an obligation to *protect* rights: states must prevent violations of rights by others. And third is an obligation to *fulfil* rights: states must 'take appropriate legislative,

[5] See eg various chapters in Tsvi Kahana and Anat Scolnicov (eds), *Boundaries of State, Boundaries of Rights: Human Rights, Private Actors, and Positive Obligations* (Cambridge: Cambridge University Press 2016); Dimitris Xenos, *The Positive Obligations of the State under the European Convention of Human Rights* (Abingdon: Routledge 2012).

[6] Sandra Fredman, *Comparative Human Rights Law* (Oxford: Oxford University Press 2018) 305-353. Placing greater attention on negative free speech in that book is unsurprising, given its substantial interest in comparative case law.

[7] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press 2008) 1-3.

[8] *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1998); see eg United Nations, *Economic, Social and Cultural Rights: Handbook for National Human Rights Institutions*, HR/P/PT/12 (Geneva: United Nations Publication 2005) 117-123. For background, see Victor Dankwa, Cees Flinterman and Scott Leckie, 'Commentary on the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 705, 705-707.

administrative, budgetary, judicial, and other measures towards the full realization of such rights'.[9] The first obligation concerns an absence of direct interference by the state; the second entails the state preventing interference by others; the third involves state action to support rights' realisation. The general idea of respect, protect and fulfil is widely recognised in human rights literature. Fredman suggests the positive freedom resulting from this trio of obligations entails substantive equality or, at least, that states take measures towards such equality.[10] Having raised the idea of positive freedom, Fredman then analyses and critiques Berlin's approach to positive and negative freedom.[11] Berlin is left aside at this point; his analysis is considered later in this chapter. The relevant point for now is simply the idea of rights *can* include states having positive obligations.

Second, what range of opportunities do states need to provide? Fredman suggests states should 'provide a range of available options for citizens to pursue, ensuring all have the capacity to pursue their valued options, and that all valued options are treated in the same way.'[12] In this, she draws on Joseph Raz's arguments about autonomy, which include the point that 'it is impossible to exercise choice unless adequate options exist, and only the State can provide these.'[13] Far from autonomy requiring state *inaction*—if such inaction were even possible—states have obligations 'to create the conditions of autonomy' which 'includes *positively encouraging the flourishing of a plurality of incompatible and competing pursuits, projects, and relationships*.'[14] Fredman does not directly relate these ideas to freedom of speech, which is not surprising given her focus, but Raz's approach can be linked with positive dimensions of the freedom. Indeed, the italicised passage just quoted could be translated almost directly to state obligations in relation to speech. As Eric Barendt observes about Raz and free speech:

> Freedom of speech reflects and reinforces pluralism, ensuring that different types of life are validated … But suppose that the principal media of expression are controlled by particular individuals or corporations and that they deny members of minority groups the opportunity to express their views, to communicate with other people who share their way of life, or to persuade others to adopt it. Should or may government intervene to promote freedom of expression in the interests of pluralism? Raz appears to contemplate this possibility when he says his views show 'freedom of expression can be supported as part of a pluralist argument for using the law to promote pluralism in the society'.[15]

Third, Fredman positions positive rights as essential to democratic forms of government, arguing they are necessary for the participation sought in democracies. She notes Schumpeter's classic claims that representative democracy necessarily entails elite domination may be 'depressingly close' to contemporary experience, but argues wider participation remains the democratic aspiration.[16] Leaving aside overtly elite democracy, Fredman considers pluralist bargaining and deliberative

[9] *Maastricht Guidelines on Violations of Economic, Social and Cultural Rights* (1998) guideline 6.

[10] Fredman, above n 7, 11-13, also links the substantive concept of freedom to writing on human capabilities, which is another source that could be drawn on when considering free speech. See also below n 143.

[11] Berlin, above n 1.

[12] Fredman, above n 7, 4.

[13] Ibid 23; see generally Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press 1986).

[14] Raz, ibid 425; Fredman, ibid 24 (emphasis added).

[15] Eric Barendt *Freedom of Speech* (2nd ed, Oxford: Oxford University Press 2005) 34-35, quoting Joseph Raz, 'Free Expression and Personal Identification' (1991) 11 *Oxford Journal of Legal Studies* 303, 323.

[16] Fredman, above n 7, 34.

approaches to democracy. She concludes existing 'democracies are a complex amalgam of individual representation, interest group bargaining, and deliberative procedures.'[17] Within this amalgam, positive human rights are necessary because of the relative equality required for both interest group bargaining and collective deliberation. Fredman describes a 'hybrid' democracy, which contains claims for state action promoting the equality required for various inflections of democracy within the hybrid. However, the analysis tends to place more normative value on *deliberative* approaches to democracy than I would suggest is necessary within positive free speech, an issue which is returned to in the next section.

Fourth, what is the structure of positive human rights? Here, Fredman uses Robert Alexy's distinction between rules and principles, with positive dimensions of rights being principles. Principles are 'optimization requirements' to be realised over time and within resource limitations. Unlike rules, they need only 'be realized to the greatest extent possible given the legal and factual possibilities'.[18] (It may be that 'optimisation' is not the best way to think of positive dimensions of rights, but the question can be left aside for my purposes.[19]) Positive dimensions of rights reveal how rights are achieved only to some degree, not absolutely. In addition, positive rights are not completely unconstrained—they do not justify all action being taken, no matter the kind of action or the circumstances. They 'do not give governments carte blanche' in using power.[20] Fredman suggests in passing that 'positive duties give no more latitude to governments than duties which require them to refrain from acting'.[21] In some ways, this may be overstated. There is a difference between not directly restraining something—the traditional view of negative liberties against the state—and acting to promote or fulfil something. In the first case, every restraint must be evaluated; every restraint is potentially problematic. In the second, not every action is required. There are multiple possible actors and actions; necessarily, there is discretion. Thus, the room for action is not quite the same. That point

[17] Ibid 38.

[18] Ibid 65 and see Robert Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers) (Oxford: Oxford University Press Oxford 2002).

[19] See eg Aleardo Zanghellini, 'Why Rights are not Optimisation Requirements' (2019) 10 *Jurisprudence* 354, 355 arguing:

> Constitutional rights are best understood as demanding compliance—within the factual and legal possibilities—with whatever the interests in which they are grounded require … not with some purported imperative to realise their object to the greatest extent possible [given legal and factual possibilities].

The term 'optimisation' does not arise in discussing German broadcasting freedom in chapter 6 and the issue can be left aside here. In short, Alexy characterises German constitutional obligations of broadcasting freedom in terms of a state of affairs that must be pursued (as noted in chapter 1). It is a right that organisational norms consistent with the constitution's protection of broadcasting freedom are legislated: Alexy, above n 18, 329. The state of affairs can never be fully realised, and necessarily involves discretions. As Zanghellini argues more generally about rights, it is not the case that positive dimensions of free speech—this state of affairs—need to be realised to the maximum extent possible given factual and legal circumstances. I would suggest, however, that they need to be realised to a democratically sufficient level. Interestingly, Zanghellini considers positive rights briefly (at 368). He notes that, 'since positive duties are generally quite burdensome' states should not be 'bound by them just because the factual and legal possibilities do not rule out' an action. Rather, the question should be whether 'the relevant right actually requires the imposition of such duties'. His analysis appears consistent with the German approach to broadcasting freedom discussed in chapter 6.

[20] Fredman, above n 7, 24.

[21] Ibid 24.

aside, the idea remains that positive rights aim to prevent state abuse of power, as do negative dimensions of rights.

Fifth, Fredman argues positive human rights are justiciable. She links their justiciability to the way positive human rights can promote participatory democracy:

> Courts have a role in reinforcing accountability of government to the people, in giving a voice to those who are necessarily marginalized in the political process, in ensuring that the material and social preconditions exist for full and equal participation, and ultimately in functioning as a catalyst for deliberative democracy.[22]

The argument contains a claim about democratic government—and perhaps particularly, deliberation within it—and the role of human rights within that form of government. Fredman does not directly link her analysis to speech, but it takes a similar form to arguments in previous chapters about the communicative requirements of democracy. It suggests there are material and social preconditions for effective democratic communication, and it calls to mind Rosanvallon's comments on a democracy of expression about society having a voice, formulating judgments and making claims in relation to government.[23]

The example of *Human Rights Transformed* suggests that understanding human rights as having positive dimensions entails:

- States have *obligations to take action towards fulfilling the rights* through 'legislative, administrative, budgetary, judicial, and other measures';
- The actions should provide a *range of options through which people can exercise autonomy*, understood as 'a plurality of incompatible and competing pursuits, projects, and relationships';
- Positive rights have a *vital democratic role* because of the need for *relatively equal participation in democracy*, with regard to both the bargaining and deliberative aspects of existing democracies;
- In their positive dimensions, *rights are not indeterminate* but require realisation to the greatest extent possible in the circumstances, while they also *constrain state attempts to abuse power*, in some ways like negative dimensions of rights constrain states; and
- *Positive rights are justiciable insofar as they promote participatory democracy*, which involves reinforcing government accountability, giving voice to the marginalised and ensuring 'material and social preconditions exist for full and equal participation'.

Positive human rights and judges

Before leaving positive human rights and law, I want to consider further Fredman's analysis of justiciability and the role of courts. Positive duties are normally understood as requiring ongoing resources and monitoring, and thus as 'quintessentially political' and not justiciable. In contrast, she argues positive rights *are* justiciable because of ways in which courts 'can contribute to strengthening democracy'.[24] This has some resonance with positive dimensions of free speech. That is, a constitutional system that claims to be democratic entails structural or architectural elements related

[22] Ibid 5.

[23] See chapter 1 and Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (translated by Arthur Goldhammer) (Cambridge: Cambridge University Press 2008) 20.

[24] Fredman, above n 7, 92.

to free speech, elements that are collective or social, and elements about which courts could have a role in setting obligations and limits. What could be called a communicative framework for democracy—one addressing its communicative requirements or preconditions—would not be left only to institutional politics or 'the people' in some general sense. It would also involve courts. Such requirements or preconditions might be thought paradoxical because they mean that, to some degree, the communicative requirements of democracy could not be chosen democratically. Placing courts in the position of protecting positive dimensions of free speech might just be another instance of elite domination of democracy—in this instance domination by a legal elite. I return to concerns about the role of courts in chapter 8.

Fredman notes judges often play an important role *excluding* positive rights from judicial enforceability. Her analysis is useful, although it may not quite reach the most relevant issue for free speech. She notes that, by excluding rights' positive dimensions, judges can undermine legislative or executive efforts to promote positive duties. While judges holding positive rights non-justiciable appears 'plausible on the surface', she argues against it:

> [T]he underlying assumption that duties of [judicial] restraint can and should be protected while positive duties should not is highly problematic. Most serious is its counter-productive impact on the very democracy it seeks to protect. This is because courts can … trump democratic decisions in the arena of positive duties, including welfare policies and social provision.[25]

Fredman analyses courts' role regarding positive rights in terms of supporting democratic participation, especially democratic deliberation. Her argument considers how courts might steer 'decision-making away from interest bargaining towards value oriented deliberation', by aiming to improve the quality of deliberation within parliaments or within courts themselves (with courts 'functioning as a forum for deliberation').[26] While questions exist around access to courts and whether court involvement would reinforce the dominance of certain groups in institutional political processes, Fredman suggests matters of who has standing to bring cases might help to address these concerns. She continues:

> The way forward is to regard courts' decisions as binding for the issue before them, but revisable in the long-term through the dynamic forum of deliberative democracy. At the point of decision-making, the duty is fixed, and the State is required to take action or is absolved from action, as the case may be. But on the broader scale, the decision remains part of a process of continuing revisability, whether through Parliament, case law or public discourse.[27]

In seeking 'a democratically justifiable role' for courts,[28] Fredman suggests judges need not have the last word even where an issue is justiciable (an approach drawing more on UK than US rights litigation). In terms of free speech, however, a democratically justifiable role for courts may be stronger, as explored in later chapters. Fredman also notes a 'process of continuing revisability' that occurs in part through public discourse. But she does not address whether democracy imposes certain requirements on that public discourse for there to be a sufficiently democratic form of revisability. This illustrates

[25] Ibid 96. The same concern exists in legal writing directly addressing free speech; see eg Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press 2000); Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press 1997); C Edwin Baker, *Media, Markets, and Democracy* (Cambridge: Cambridge University Press, 2002).

[26] Fredman, above n 7, 105.

[27] Ibid 108-109.

[28] Ibid 100.

something that is under-considered in many studies of democracy, law and public speech. If public speech has a democratic role—a role related to the legitimation of democracy, for example—are there preconditions for public speech, are there structural aspects that need to be addressed prior to or separately from speech itself?

Fredman comes close to the issue when exploring how positive duties could 'address the inequalities in influence and voice in modern representative democracy'.[29] She suggests addressing such inequalities is another basis for justiciable positive duties. But she focuses on how courts may give voice to the most disadvantaged to improve deliberation *within courts* (and perhaps within parliaments) rather than *within the wider communicative processes* raised by considering free speech more generally. Her analysis focuses on bargaining and deliberation in specific constitutional settings and how courts might augment or improve those processes. All of that could be valuable. But it does not explicitly consider the role of public speech in relation to those processes and, more generally, wider forms of public speech and contemporary democracy—think, as just two examples, of the counter-democracy of Rosanvallon, or the monitory democracy of John Keane.[30] If attention is shifted slightly to free speech rather than human rights in general, the question might become: What could courts do through free speech law to support structures of public speech such that they would help to legitimate democratic government in communicative terms? Could such judicial action bring closer a system of freedom of expression that supports sustained plural public speech?

Overall, while Fredman does not closely examine speech, much in her approach to positive human rights is consistent with positive dimensions of free speech. That is not surprising. Free speech falls within her general analysis of positive rights. Both entail obligations on the state to act to support a certain diversity or plurality, with the basis for action tied to the claims of democracy; the positive dimensions of the duty having sufficient determinacy to be justiciable and to restrain state abuses of power; and courts having a role in attempting to ensure that certain democratic preconditions exist. Analyses of positive freedom taken from political theory suggest similar points, Berlin's work notwithstanding.

Two concepts of political freedom?

The philosophical literature on freedom is immense. Even that focused on political freedom is well beyond analysis here. But taking selected examples is sufficient for thinking about freedom and communication. One of the best known essays on freedom within the analytic tradition—although many later writers have reacted against it—is Berlin's inaugural professorial lecture, 'Two Concepts of Liberty'.[31] In considering ideas of positive and negative freedom, 'there is simply no way around Berlin',[32] despite his many precursors.[33] Notably for my purposes, the work is cited in varied academic

[29] Ibid 109.

[30] Eg Rosanvallon, above n 23; John Keane, *The Life and Death of Democracy* (London: Simon & Schuster 2009); John Keane, *Democracy and Media Decadence* (Cambridge: Cambridge University Press 2013) who draws in part on Schudson; see eg Michael Schudson, *The Good Citizen: A History of American Civic Life* (New York: Martin Kessler Books 1998); Michael Schudson, *The Rise of the Right to Know: Politics and the Culture of Transparency, 1945-1975* (Cambridge MA: The Belknap Press of Harvard University Press 2015).

[31] Berlin, above n 1. Berlin equates the terms liberty and freedom.

[32] Katrin Flikschuh, *Freedom: Contemporary Liberal Perspectives* (Cambridge: Polity 2007) 4.

[33] See eg David G Ritchie, *Natural Rights: A Criticism of Some Political and Ethical Conceptions* (London: Swan Sonnenschein 1895); Thomas Hill Green, *Lectures on the Principals of Political Obligation* (London: Longmans,

analyses of free speech or media freedom.[34] This makes it particularly relevant to explain why I think his approach has limited relevance to free speech. Two published versions of the essay are useful: the initial 1958 publication and a 1969 collection that adds a lengthy introduction in which Berlin seeks to clarify and defend his analysis.[35]

On many readings, Two Concepts is taken to distinguish a negative 'freedom from' and a positive 'freedom to'. It argues the former is freedom's more important meaning, while the latter leads to paternalism or totalitarianism; or, at least, positive freedom has the tendency to be twisted to those ends. That is the key warning of Berlin's analysis but, I would suggest, it has little relevance to positive dimensions of free speech. As made clear below, one reason is simply that positive means something different in relation to speech freedom than it means for Berlin. His approach is not rare, but it is not about freedom as involving enablement in the way it most commonly is for communication. Berlin argues freedom is better understood in negative terms: freedom is an 'argument for keeping authority at bay'.[36] If state authority is not kept at bay, it will limit the options open to people. For Berlin, this is crucial. He is concerned with the limits negative freedom should impose on democracy as well the dangers of various forms of totalitarianism. Even so, his approach to negative freedom contains ambiguities:

Green and Co 1895); Bernard Bosanquet, *The Philosophical Theory of the State* (London: Macmillan 1899); Ralph Barton Perry, *Puritanism and Democracy* (New York: Vanguard 1944).

[34] See eg Barendt, above n 15, 101 (citing Berlin and Taylor, above n 3, on the idea of positive and negative freedom); Richard Collins, 'Public Service Broadcasting and Freedom' (1992) no 66 *Media Information Australia* 3, 11-13 (explaining how Berlin's approach 'offers a useful basis for analysing contemporary broadcasting policy issues and debates'); Frederick Schauer, *Free Speech: A Philosophical Inquiry* (Cambridge: Cambridge University Press 1982) 113-129 (discussing freedom from and freedom to in relation to speech, describing 'liberty and the conditions for its exercise' as two different things, and concluding free speech is 'closest' to Berlin's negative liberty); Richard H Fallon Jr, 'Two Senses of Autonomy' (1994) 46 *Stanford Law Review* 875; Kim Treiger-Bar-Am, *Positive Freedom and the Law* (Abingdon: Routledge 2019) using positive freedom differently than in this book, in a sense closer to Berlin's (more self-perfection than enablement) and arguing that positive freedom is fundamentally linked with an obligation of respect: 'Intrinsic to the right of free speech is the duty of respect for speech and speakers' and 'the essence of freedom is the duty of respect' (at 1 and 225); András Koltay, 'The Concept of Media Freedom Today: New Media, New Editors and the Traditional Approach of the Law' (2015) 7 *Journal of Media Law* 36 noting Berlin in discussing media freedom's positive dimensions; Christopher M Kelty, 'The Fog of Freedom' in Tarleton Gillespie, Pablo J Boczkowski and Kirsten A Foot (eds), *Media Technologies: Essays on Communication, Materiality, and Society* (Cambridge MA: MIT Press 2014) 195; Robert G Picard, *The Press and the Decline of Democracy: The Democratic Socialist Response in Public Policy* (Westport: Greenwood 1985) 39-40. Picard, at 45, notes ideas of positive freedom in communication were used before Berlin's formulation in Fred S Siebert, Theodore Peterson and Wilbur Schramm, *Four Theories of the Press: The Authoritarian, Libertarian, Social Responsibility and Soviet Communist Concepts of What the Press Should Be and Do* (Urbana: University of Illinois Press 1956). One could also return to the Hutchins Commission: see eg Commission on Freedom of the Press (Hutchins Commission), *A Free and Responsible Press: A General Report of Mass Communication: Newspapers, Radio, Motion Pictures, Magazines, and Books* (Chicago: University of Chicago Press 1947) and associated publications. While *Four Theories* was influential across decades, it is less so now: see eg Clifford G Christians, Theodore L Glasser, Denis McQuail, Kaarle Nordenstreng and Robert A White, *Normative Theories of the Media: Journalism in Democratic Societies* (Urbana: University of Illinois Press 2009).

[35] Isaiah Berlin, 'Introduction' in Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press 1969) ix. This later introduction is also available in Isaiah Berlin, *Liberty: Incorporating 'Four Essays on Liberty'* (edited by Henry Hardy) (Oxford: Oxford University Press 2002).

[36] Berlin, above n 1, 11.

> The sense of freedom in which I use this term entails not simply the absence of frustration (which may be obtained by killing desires), but the absence of obstacles to possible choices and activities … Such *freedom ultimately depends … on how many doors are open*, *how open they are*, *upon their relative importance* in my life.[37]

Although these words might suggest that social and economic conditions are relevant to freedom—how many doors are open and so forth—Berlin maintains otherwise. Those conditions are not the obstacles with which he is concerned. This is so even though he writes that the absence of freedom:

> is due to the *closing of such doors or failure to open them, as a result, intended or unintended, of alterable human practices* … although only if such acts are deliberately intended (or, perhaps, are accompanied by awareness that they may block paths) will they be liable to be called oppression.[38]

As Hans Blokland observes, this formulation clearly 'leaves space for a conception of liberty in which positive, non-liberal elements play a role'.[39] And it makes surprising Berlin's repeated statements that the condition of being able to exercise freedom is quite distinct from freedom itself. Separating conditions and freedom is markedly different from some other approaches to freedom, a point to which I return. In fact, Berlin has interests in both dimensions of freedom. The awkwardness in him recognising that limitations on freedom may result from alterable human practices, while also stating the conditions of freedom are not relevant, reflects his concerns with both negative and positive dimensions of freedom. Berlin emphasises the importance of the negative and the dangers of the positive, but he does not state that only negative freedom is of value.

Whatever Two Concepts might say about freedom more generally, and despite its centrality to much later writing on freedom, the piece carries limited weight for understanding positive dimensions of free speech, certainly in their democratic rationale. Berlin's argument is against the dangers of monism—against the 'conviction that there is only one correct answer to every question and that all correct answers can be arranged in a harmonious manner into a single knowable rational system'[40]—but positive freedom need not be monist, and positive dimensions of free speech link far more easily to pluralist visions of society and knowledge. Further, Two Concepts is situated within the Cold War with 'unmistakably ideological undertones'.[41] Berlin's aims appear to have been at least partly political,[42] and his method somewhat polemical,[43] with the analysis likely to be different if attempted now. And the focus in Two Concepts on freedom as entirely *individual*—or, at least, the lack of clarity in the analysis between individual and collective or social—leaves democratic self-government in an ambiguous position. It was not Berlin's primary focus. Other writers describe positive dimensions of freedom as directly supporting democracy, and the same can be said for positive dimensions of free speech. Here, I expand briefly on each of these points, before considering how Berlin meant something particular by 'positive' in his negative-positive distinction, something which differs from many other writers on positive freedom.

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[37] Berlin, above n 35, xxxix (emphasis added).

[38] Ibid xi (emphasis added).

[39] Blokland, above n 2, 26.

[40] Ibid 13.

[41] Flikschuh, above n 32, 12.

[42] Eg Edmund Fawcett, *Liberalism: The Life of an Idea* (Princeton: Princeton University Press 2014) 282 'Berlin was making more a political than a philosophical point' in dividing freedom into negative positive.

[43] Blokland, above n 2, 40.

Berlin states that negative freedom responds to the questions 'Over what area am I master?' or 'How much am I governed?'. He sees positive freedom as responding to something different: 'Who is master?' or 'By whom am I governed?'[44] As the questions suggest, the distinction is not quite the 'freedom from' and 'freedom to' that is commonly used in relation to Berlin. Questions connected with negative freedom concern a *space free from external governance*; positive freedom addresses *who is governing*. The distinction increases if people are understood as being divided between 'higher' and 'lower' selves, with the higher ruling over the lower. For Berlin, positive freedom came to hold great dangers when:

> [T]he 'higher' self duly became identified with institutions, Churches, nations, races, States, classes, cultures, parties … the general will, the common good, the enlightened forces of society, the vanguard of the most progressive class, Manifest Destiny. … [I]n the course of this process, what had begun as a doctrine of freedom turned into a doctrine of authority and, at times, of oppression, and became the favoured weapon of despotism.[45]

Positive freedom *can* be a 'freedom to' for Berlin, but that is a *freedom 'to lead one prescribed form of life'*.[46] That *singular* form of life might be 'prescribed' by oneself or by another. The latter is the sense of positive freedom that he particularly attacks. He sees it as a grave distortion of freedom, and a key point for Berlin is that, historically, positive freedom has proved susceptible to being turned into 'a specious disguise for brutal tyranny'.[47]

Here, four aspects of his analysis are examined. The first is that *Berlin argues in support of pluralism but sees pluralism as necessarily linked to negative not positive freedom*.[48] While Berlin does not explicitly link all positive dimensions of freedom to a denial of pluralism, his argument can be taken in that direction. In his 1969 introduction to Two Concepts, Berlin suggests that criticism of negative liberty in comparison with positive forms 'has its roots, *in some cases*, in an ancient doctrine according to which all truly good things are linked to one another in a single, perfect whole; or, at the very least, cannot be incompatible with one another'.[49] However, 'some cases' appears to become *all cases* in the analysis. Berlin's real target is the way in which totalitarian forms of government have used the language of freedom in pursuing a coercive, monist society that denies pluralism. Rather than seeking a comprehensive 'typology' of theories of freedom, he offers an argument against totalitarian government.[50] Berlin summarises one version of the position he criticises (in the gendered language that was then more common):

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[44] Berlin, above n 35, xliii.

[45] Ibid xliv.

[46] Berlin, 'Two Concepts of Liberty' in Berlin, above n 35 (1969 version), 118, 131 (emphasis added). In the original published essay, freedom 'to lead one prescribed form of life' was not included at this point (cf Berlin, above n 1, 16); Berlin added the clarifying words to the 1969 version.

[47] Berlin, above n 1, 16. Prescription by another, external direction by a state, is the key concern: Treiger-Bar-Am, above n 34, 51 and 56. As Blokland emphasises, Berlin's argument is historically rather than logically based: Blokland, above n 2, 41 'the chief line in his argument remains … that the growing apart of negative and positive freedom [the 'perversion' of positive freedom] must be *historically* explained' (emphasis in original).

[48] See eg Adrian Blau, 'Against Positive and Negative Freedom' (2004) 32 *Political Theory* 547, 547-548.

[49] Berlin, above n 35, x (emphasis added).

[50] Eric MacGilvray, 'Republicanism and the Market in "Two Concepts of Liberty"' in Bruce Baum and Robert Nichols (eds), *Isaiah Berlin and the Politics of Freedom: 'Two Concepts of Liberty' 50 Years Later* (New York: Routledge 2013) 114, 123.

> [F]irst, that all men have one purpose, and one only, that of rational self-direction; second, that the ends of all rational beings must of necessity fit into a single universal, harmonious pattern, which some men may be able to discern more clearly than others; third, that all conflict, and consequently all tragedy, is due solely to the clash of reason with the irrational or the insufficiently rational … and that such clashes are, in principle, avoidable, and for rational beings impossible; finally, that when all men have been made rational, they will obey the rational laws of their own natures, which are one and the same in them all, and so be at once wholly law-abiding and wholly free.[51]

Within that approach, law will follow 'the rules which reason prescribes' and will only appear 'irksome to those whose reason is dormant' and who do not understand 'their own "real" selves'.[52] Berlin's point is that once the 'real' self is identified with a collective, such as the state, the result is despotic. Against such an abuse of freedom, he argues negative liberty is required.

The second aspect is that, for Berlin, *freedom appears to be overwhelmingly individual*. As Katrin Flikschuh comments, Berlin thinks of individuals as free *before* they enter into relations with others: 'Other persons are possible causes of a person's unfreedom, not necessary causes of a person's freedom.'[53] While not rare, this is a highly contested view. George Brenkert, for example, puts a contrary position directly: freedom 'only occurs within and is defined by a complex web of relations. *It is inherently social*. The freedom of separate individuals in a state of nature is a fantasy.'[54] The point can be underlined in relation to language. Speech is necessarily social;[55] one does not communicate alone. And freedom of speech '*requires* certain social relations; to define it as merely the absence of social constraint is nonsensical'.[56]

Near the start of Two Concepts, Berlin states that negative freedom is 'the area within which the subject … is or should be left … without interference by other persons'.[57] At that point, he describes 'the subject' as 'a person or group of persons'. But groups of persons are largely left aside, except for later consideration of postcolonial self-determination, which he distinguishes from freedom. (That form of self-determination is said to involve a desire for status and recognition, rather than freedom.) The way in which Berlin discusses freedom and inequality illustrates the focus on individual freedom. Measures to increase equality are said to be quite distinct from freedom: 'it is nothing but a confusion of values to say that although my "liberal", individual freedom may go by the board [to address equality], some other kind of freedom – "social" or "economic" – is increased'.[58] Simplifying matters, but only a little, his approach is that freedom is negative and negative freedom is individual. Other values that might be described as freedom are simply not part of freedom. Rather, positive freedom (and its abuse) becomes linked with collective (and monist) endeavours. And through that it becomes a threat to true (negative) freedom. It is worth underlining that he does not see positive freedom here

[51] Berlin, above n 1, 39.
[52] Ibid 32.
[53] Flikschuh, above n 32, 46.
[54] George G Brenkert, *Political Freedom* (London: Routledge 1991) 176-177 (emphasis added).
[55] Eg Alan Gewirth, *Human Rights: Essays on Justification and Applications* (Chicago: University of Chicago Press 1982) 319.
[56] Thomas Streeter, 'Beyond Freedom of Speech and the Public Interest: The Relevance of Critical Legal Studies to Communications Policy' (1990) 40 *Journal of Communication* 43, 49 (emphasis in original).
[57] Berlin, above n 1, 7.
[58] Ibid 10.

as including the negative. Rather, positive freedom undermines or destroys negative freedom, or runs the danger of doing that.

These points lead to a third aspect of Two Concepts: *collective endeavours, including democratic government, have a problematic position* in the approach to freedom.[59] (Axel Honneth offers a somewhat similar analysis of the tensions between Berlin's support for both negative freedom and cultural pluralism.[60]) For Berlin, democracy 'is logically uncommitted' to negative freedom and has sometimes failed to protect it.[61] At the highest, he would claim democratic forms of government have been better at preserving negative freedom historically, but nothing in democracy requires that outcome. This is not to suggest Berlin views democracy as unimportant. He recognises the strength and validity of the desire 'to participate in the process by which my life is to be controlled'.[62] Democratic self-government 'is a fundamental human need, something valuable in itself'.[63] But it is distinguished from the freedom in which Berlin is interested. If democracy is linked to anything, it would be positive freedom, as is standard in many other analyses. For example, when Berlin states that positive and negative freedom are distinct, each being 'ends in themselves' that 'may clash irreconcilably', he immediately asks 'Should democracy in a given situation be promoted at the expense of individual freedom?'[64] Negative liberty ultimately aims 'to curb authority as such' rather than to place it in people's own (collective) hands.[65]

The fourth aspect is *the historical context in which Two Concepts arose*. It is an argument against totalitarian government made at the height of the Cold War and made in a time of strong welfare state policies in the UK. 'The political context … motivate[s] him to champion negative liberty and show positive liberty in the worst light possible'.[66] Berlin's interest is 'the great clash of ideologies that dominates our world',[67] with which his personal history was intertwined. Svetlana Boym describes Berlin's return to St Petersburg in the mid-1940s (he had been a child there at the time of the Russian Revolution) and states 'the visit … confirmed his deep antipathy to any form of deterministic ideology that regards human beings as instrumentalizable human material for building a bright future.'[68] That is the danger he saw historically in positive freedom. Even so, Berlin does not see negative freedom as being *only* beneficial:

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[59] In a similar manner, individual autonomy is praised by Berlin while paternalism, linked with collective and monist government, is decried: ibid 21-22.

[60] Axel Honneth, 'Negative Freedom and Cultural Belonging: An Unhealthy Tension in the Political Philosophy of Isaiah Berlin' (1999) 66 *Social Research* 1063, 1075:

> The legal institutionalization of negative freedom in Berlin's sense doesn't allow sufficiently for the need of cultural belonging, whereas the institutionalization of cultural rights immediately leads to certain restrictions in the number of options you may choose among.

[61] Berlin, above n 1, 50.

[62] Ibid 15.

[63] Berlin, above n 35, xlvii.

[64] Ibid xlix.

[65] Berlin, above n 1, 51.

[66] Nancy J Hirschmann, *Gender, Class, and Freedom in Modern Political Theory* (Princeton: Princeton University Press 2008) 3.

[67] Berlin, above n 1, 16.

[68] Svetlana Boym, *Another Freedom: The Alternative History of an Idea* (Chicago: University of Chicago Press 2010) 98.

> [N]egative freedom is compatible with, and … has played its part in generating, great and lasting social evils. … Freedom for the wolves has often meant death to the sheep. The bloodstained story of economic individualism and unrestrained capitalist competition does not, I should have thought, today need stressing.[69]

It is clear that both negative and positive dimensions of freedom have dangerous aspects as well as valuable ones for Berlin, even if his focus lies on the dangers of monist, rationalised visions of society which he links to positive freedom. He sees the case for state intervention 'to secure conditions' for *both* positive and negative liberty as 'overwhelmingly strong' because leaving matters purely to negative freedom creates a situation 'compatible with extremes of exploitation, brutality, and injustice.'[70] This shows Berlin as a social democrat,[71] although one who was 'distrusted' by the left and 'distorted' by the right.[72] Berlin understands the two dimensions of freedom as attempting to counter two evils: negative freedom against 'despotism' and positive freedom against 'an uncontrolled "market" economy'.[73] Similarly, he writes that 'liberal ultra-individualism could scarcely be said to be a rising force at present' but 'the rhetoric of "positive" liberty, at least in its distorted form, is in far greater evidence'.[74] All this is suggestive of the approach he may have taken to later developments that come far closer to an unconstrained market economy. Some criticisms of Berlin's approach emphasise it could too easily 'be invoked … to justify heartless *laissez-faire* policies' in market economies.[75] Even so, Berlin attempts to be clear that it is not a matter of negative freedom being 'an absolute value', superior to everything else. 'It is more complex and more painful.'[76] Both values are always at stake for him, and their relative weight will vary. For Berlin, the distortion of positive freedom in twentieth-century history may well be of far greater concern than the idea of positive freedom as such. As Flikschuh has suggested, 'Berlin might be thought of as reconstructing the philosophy of positive freedom in the light of its perceived political abuse'.[77]

The above points about self-government and the historical context of Two Concepts are drawn out well by Ella Myers. She explains Berlin tends to identify government itself with a monistic, or non-plural, state.[78] Although he makes statements supporting self-government, Berlin 'repeatedly conflates democratic self-government with the authoritarian monism he attacks … such that his harsh dismissals of "positive liberty" at times also serve as rejections of collective self-government'.[79] In effect, Berlin is 'repeating a totalitarian discourse that he wants to expose, and reject' in which oppression is justified 'through the rhetoric of collective freedom'.[80] The particular context of that argument bears emphasis. His analysis suggests understanding political rights as protecting people

[69] Berlin, above n 35, xlv.
[70] Ibid xlvi.
[71] Eg Gerald A Cohen, 'Freedom and Money' in *On the Currency of Egalitarian Justice, and Other Essays in Political Philosophy* (edited by Michael Otsuka) (Princeton: Princeton University Press 2011) 166, 170.
[72] Fawcett, above n 42, 279.
[73] Berlin, above n 35, xlvi.
[74] Ibid xlvi-xlvii.
[75] Benjamin Gibbs, *Freedom and Liberation* (New York: St Martin's Press 1976) 24 (emphasis in original).
[76] Berlin, above n 35, lvi.
[77] Flikschuh, above n 32, 33.
[78] Ella Myers, 'Berlin and Democracy' in Baum and Nichols, above n 50, 129.
[79] Ibid 130.
[80] Ibid 132.

from politics more than providing 'access to public power or our ability to participate in the political decisions by which our lives are shaped'.[81] It is not that Berlin thinks participation in self-government is unimportant—as noted above, for him it is 'a fundamental human need' that is 'valuable in itself'[82]—but he sees freedom as distinct from it. He asks what would make a society free and answers in terms of rights that 'insulate' individuals from state power.[83] That his response makes no clear provision for people's political involvement is telling.

Overall, Two Concepts' argument against monism need not be an argument against positive freedom as it is often understood. Many writers on positive freedom pursue a pluralist vision. They would agree with Berlin that 'variety is of the essence of the human race, not a passing condition',[84] but not make the same link between this evident pluralism and purely negative freedom. The criticism is even stronger when considering positive dimensions of free speech. Berlin's central concern has little if any relevance there, where the aim is to support sustained plural public speech. As Robert Picard observes:

> Positive press freedom is not the antithesis of negative press freedom. Ensuring the presence of conditions necessary for expression to take place is not the opposite of prohibiting governmental restraint on expression. … Because this expression is viewed as a cornerstone of the democratic process, and because positive press freedom seeks to ensure the continued opportunity for that expression, the concept of positive press freedom could not easily be used to restrict expression of minority opinion in public matters.[85]

In addition, Two Concepts' historical context makes its straightforward application now implausible, and its focus on individual freedom leaves democratic government in a difficult position. All this suggests that using Berlin's analysis is problematic for understanding the potential of structural, communicative supports for democratic forms of government. His analysis considers limits that must be applied to democracy to preserve individual freedom; his purpose is not to consider whether democracy has other requirements, including communicative ones.

After Two Concepts: another freedom

In a well-known response to Berlin, which also appears in legal scholarship,[86] Gerald MacCallum argues that analysing freedom should involve three elements, not merely freedom from or freedom to. MacCallum holds all claims about freedom have the form of an agent being free from some interference or restraint to do or become something: 'Whenever the freedom of some agent … is in question, it is always freedom from some constraint or restriction on, interference with, or barrier to

[81] Ibid 133.

[82] Berlin, above n 35, xlvii.

[83] Myers, above n 78, 140 and its note 15.

[84] Isaiah Berlin, 'Liberty' in *Liberty: Incorporating Four Essays on Liberty* (edited by Henry Hardy) (Oxford: Oxford University Press 2002) 283, 286.

[85] Picard, above n 34, 49.

[86] Carter notes the work as 'canonical': Ian Carter, *A Measure of Freedom* (Oxford: Oxford University Press 1999) 15. For legal writing, see eg Thomas Gibbons, 'Providing a Platform for Speech: Possible Duties and Responsibilities' in Andrew T Kenyon and Andrew Scott (eds) *Positive Free Speech: Rationales, Methods and Implications* (Oxford: Hart 2020) 11; Joris van Hoboken, *Search Engine Freedom: On the Implications of the Right to Freedom of Expression for the Legal Governance of Web Search Engines* (Alphen aan den Rijn: Kluwer Law International 2012) 53.

doing, not doing, becoming, or not becoming something.'[87] Different approaches to freedom vary as to how they understand each of these three elements. What are often called positive and negative freedom differ in how they understand the content and importance of 'agent', 'from' and 'to' in MacCallum's formula. Those labels are used to emphasise particular aspects of the 'triadic' relation, but the differences do not map neatly onto only two types of freedom. The binary distinction 'can, at most, be said to be attending to, or emphasizing the importance of only one part of what is always present in any case of freedom'.[88] Freedom 'is always both freedom from something and freedom to do or become something'.[89]

MacCallum offers a formal conceptual analysis, in which freedom is said to be capable of comprehensive description. For him, freedom can be specified completely—anything that cannot be specified is not part of the concept. While the result is 'a highly restricted, essentially descriptive, concept of freedom',[90] several aspects are worth noting here. First, MacCallum and Berlin are not talking about the same thing when discussing freedom. Recall the common description of Berlin's analysis in terms of freedom from and freedom to. That shorthand can obscure how Berlin distinguishes negative and positive freedom, and the way in which he uses positive differently from many writers, including MacCallum. For Berlin, 'negative freedom is a question of which possibilities are open to me, while positive freedom is a matter of *who or what is controlling me*'.[91] He treats positive freedom as less about the *ability to do* something than the *position of control*. For Berlin, 'non-perverted'[92] forms of freedom are concerned with the absence of external control for negative freedom, and the presence of internal control for positive freedom.[93] MacCallum, however, 'says nothing at all about freedom as an inner condition'. Rather, his analysis is all about 'the removal of social and economic obstacles that prevent some individuals from adequately exercising their freedom of choice'.[94] Thus, for MacCallum, positive freedom is linked with the removal of social and economic structures that limit a person's ability to act. This leads to the second point about MacCallum's analysis. He achieved a 'partial restoration to respectability of positive freedom'—far from aligning positive freedom with totalitarianism like Berlin, MacCallum links it with 'governmental provision … of socio-economic benefits'[95] to enable action and promote freedom.

Berlin is less clear about whether such social and economic conditions are obstacles to freedom. The restrictions with which he is concerned are external impediments to action arising from 'alterable human practices'.[96] Matters such as the distribution of wealth or education clearly affect the ability to enjoy negative liberties, but do these structural aspects of society count as external impediments to freedom? Even highly sympathetic analysis can conclude 'this particular problematic

[87] Gerald C MacCallum Jr, 'Negative and Positive Freedom' (1967) 76 *Philosophical Review* 312, 314.
[88] Ibid 318.
[89] Ibid 319.
[90] Flikschuh, above n 32, 42.
[91] Lars Svendsen, *A Philosophy of Freedom* (London: Reaktion Books 2014) 103 (emphasis added).
[92] Berlin suggests each form of freedom is subject to 'perversion': Berlin, above n 35, xlvi.
[93] See eg Flikschuh, above n 32, 18: 'one associates freedom with the *absence* of constraint—hence *negative* freedom—the other associates it with the *presence* of (self-imposed) constraint—hence *positive* freedom' (emphasis in original).
[94] Ibid 58.
[95] Ibid 37.
[96] Berlin, above n 35, xl.

is seriously underdeveloped in Berlin's thought'.[97] On balance, it appears that poverty, for example, is not to be regarded as limiting negative liberty for Berlin. This is despite him recognising, at times, that poverty is not at all 'irrelevant to an individual's freedom' in practice.[98] For Berlin, poverty is relevant to the conditions of liberty, not to liberty itself. As Honneth notes, excluding 'such necessary or enabling conditions' from negative freedom 'sounds not only surprising but self-contradictory'. Guaranteeing freedom in terms of 'unobstructed choice' makes no sense 'without the complementary means for its exercise'.[99] Lars Svendsen states simply:

> If poverty cannot be essentially regarded as a limitation of one's negative liberty, that implies nothing less than that *negative freedom cannot adequately account for freedom*, since poverty obviously is an impediment.[100]

That is, freedom must involve negative and positive dimensions, and the conditions of freedom should not be defined out of analysis of freedom: 'any satisfactory account of freedom will contain both parts'.[101] Of course, that is a different sense of positive freedom than the meaning Berlin was concerned with, but it is a sense of positive freedom many writers use. When positive freedom is understood in terms of being able to act, the conditions of freedom are central. Thus, MacCallum's analysis states 'general social or economic structures and conditions may render a person unfree'.[102] Berlin himself recognises both positive and negative freedom are valuable goals, but the point is worth underlining: understanding freedom should involve both parts, positive and negative, even if the analysis recognises dangers that can lie in both dimensions. In addition, MacCallum's analysis implicitly questions non-relational, individualistic accounts of freedom such as Berlin's account. MacCallum suggests positive freedom is 'a social responsibility'—one might say freedom is 'a social achievement, which has both subjective and objective components'.[103] It is not (or not necessarily) 'a commitment to the achievement of self-mastery'[104] that is open to abuse in the way criticised by Berlin. And, finally, the analysis suggests Berlin's binary distinction between positive and negative forms of freedom can easily be pluralised. (Berlin would not necessarily have disagreed. He suggested in passing there were more than 200 meanings of freedom while he focussed on two.[105])

Pluralising political freedom: effective, autonomous, participatory

To consider freedom's pluralisation, Adam Swift offers three examples of the negative-positive distinction.[106] Each is useful for my purposes; each could be applied to free speech. First, the negative-positive distinction could mirror a difference between *formal* and *effective* freedom, with formal freedom understood as the absence of state restriction while effective freedom involves the capacity to act. A formal approach would see a lack of economic resources, for example, as irrelevant to freedom. Freedom would be separate to the conditions of its exercise. A formal approach to freedom

[97] Svendsen, above n 91, 105.
[98] Ibid.
[99] Honneth, above n 60, 1070.
[100] Svendsen, above n 91, 105 (emphasis added).
[101] Ibid 111.
[102] Flikschuh, above n 32, 44.
[103] Yildiz Sìlìer, *Freedom: Political, Metaphysical, Negative and Positive* (Aldershot: Ashgate 2005) 167.
[104] Flikschuh, above n 32, 56.
[105] Berlin, above n 1, 6.
[106] Adam Swift, *Political Philosophy* (3rd ed, Cambridge: Polity 2014).

could also suggest no state action is involved in a lack of economic resources or its consequences. An approach based in effective freedom would disagree and could call for state power to redistribute resources in support of freedom. Despite the language used, however, not only one side of this distinction—the side of effective freedom—involves state action. As is commonly noted, existing law relevant to property, contract, crime and so forth is implicated on both sides of the distinction. What stops a person without money from taking an expensive holiday is not merely an absence of financial resources, but also civil and criminal law.[107] The state is always active in relation to freedom.

In the second example, rather than effective freedom, the positive side of the distinction is stated in terms of *autonomy*. To explain how this differs from the first example, Swift considers education. Someone who is educated might be regarded as being free in two ways. The first is that the person will have more options, for example, in terms of career. That is a type of freedom resembling the choices available to someone with money. It is effective freedom. Swift continues:

> But there is a second aspect to education that is not like money, and that is intimately related to freedom as autonomy. Someone who has been taught relevant information, and been taught to process it, to think for herself, to consider consequences, to evaluate different courses of action, is more autonomous, more in charge of her own life, than somebody who has not.[108]

Education, he suggests, can be seen to increase both effective freedom and freedom as autonomy. Swift notes this aspect of autonomy appears unproblematic compared with the criticism that is offered of a *collective* monist autonomy that that the state imposes under totalitarian regimes, which was the real target of Berlin's essay.

Swift's third example sees positive freedom as arising through *political participation*. One might ask how people living under law can be free. This is a question with clear relevance to many approaches to free speech and democracy. One response could be that the law's substance itself supports freedom, with freedom here understood as a purely negative liberty. An alternative answer involves the idea of autonomy as self-rule or freedom from domination. Thus, people living under law can be free if they have 'given' the law to themselves in some sense. People are free because the law arises through a process of non-dominated self-rule. (In political philosophy, one might explore such ideas through work on republican freedom such as that of Philip Pettit.[109] In law, there is clear resonance with approaches like that of Robert Post's analysis of US First Amendment law.[110]) Under this example, the foundation of law would be its basis in an imagined communal authorship.[111] Swift

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[107] Ibid 63; see also eg Cohen, above n 71.

[108] Swift, above n 106, 66.

[109] See eg Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press 1997); Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press 2012); Philip Pettit, *Just Freedom: A Moral Compass for a Complex World* (New York: Norton 2014). Pettit has applied his approach to free speech, but leaves aside matters such as people's opportunities for speech more relevant to my concerns here: Philip Pettit, 'Two Concepts of Free Speech' in Jennifer Lackey (ed), *Academic Freedom* (Oxford: Oxford University Press 2018) 61, 68. He also explores free speech, but not media freedom, in Philip Pettit, 'Enfranchising Silence: An Argument for Freedom of Speech' in Tom Campbell and Wojciech Sadurski (eds), *Freedom of Communication* (Aldershot: Dartmouth, 1994) 45.

[110] See eg Robert C Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge MA: Harvard University Press 1995); Robert C Post, *Democracy, Expertise, and Academic Freedom: A First Amendment Jurisprudence for the Modern State* (New Haven: Yale University Press 2012).

[111] I note the authorship as 'imagined' with a mind to Shiffrin's comments that, in the US context, citizens do not actually author laws, their representatives do 'and the law they produce is the product of representing some

comments that is the reason 'why there is a kind of freedom achieved by citizens of a democracy, participating in the making of the law, that is not achieved by subjects of a dictator' even if that dictator grants very substantial amounts of negative freedom to the subjects.[112]

For my purposes, these dimensions of positive freedom can be simplified to questions of *resources*, often economic; questions of *enablement*, through education and other capacity-enhancing activities that support autonomy; and questions of democratic *participation* in the symbolic, imagined authorship of law. Positive dimensions of free speech raise all three related matters: resources, enablement and participation. The result might be described as a form of situated or contextualised autonomy,[113] and freedom as autonomy need not entail the 'totalitarian menace' feared by Berlin.[114] Freedom as autonomy can involve simply providing resources and information and helping people to think for themselves—a point clearly relevant to the idea of sustained plural public speech. In addition, positive freedom does not necessarily entail a single 'system of values' that should apply to all. That is, positive freedom need not be monist, it need not take the 'view that there is one harmonious and correct system of values that tells us how we should live'.[115] Indeed, unlike Berlin's concerns about positive freedom tending towards monism, pluralism appears more likely as a central element underlying positive communicative freedom.

Positive political freedom

Similar elements of positive freedom can be drawn from many writers.[116] For example, Carol Gould draws on positive freedom when arguing to extend democratic principles to wider social and economic contexts such as workplaces.[117] For her, freedom involves *freedom from constraint* as well as the *presence of a range of social and material enabling conditions*. Freedom provides people with prima facie equal rights to the social and material conditions necessary for pursuing projects of their own

citizens more than others': Steven Shiffrin, 'Dissent, Democratic Participation, and First Amendment Methodology' (2011) 97 *Virginia Law Review* 559, 562.

[112] Swift, above n 106, 71. Swift also notes republican approaches to freedom may still be focused on negative liberty; requiring political participation as 'the most effective means of protecting' negative freedom.

[113] But see discussion below under the heading 'Discursive contexts and freedom'.

[114] Swift, above n 106, 82-92.

[115] Ibid 88-89.

[116] As well as the examples considered in the text, see eg Macpherson who, drawing on both the lecture and Berlin's 1969 introduction, argues strongly against Berlin's claim that liberty is distinct from its conditions; that is, the claim that freedom is distinct from the ability to exercise freedom. He also argues that Berlin undermines the claim through recognising the importance of the number of possibilities open to a person and the ease of actualising them: C (Crawford) B Macpherson, 'Berlin's Division of Liberty' in *Democratic Theory: Essays in Retrieval* (Oxford: Clarendon Press 1973) 95, 97-104, and at 104:

> It is a long step from absence of bullying or domination or chains or enslavement, to the number of possibilities open and the ease of actualizing them. It is a step which carries negative liberty much of the way towards positive liberty.

See also eg Brenkert, above n 54, who emphasises political freedom as entitlement, involvement and enablement. He argues that, among other things, freedom's positive dimensions require an active and independent media which, in turn, might require government funding: 'in addition to public radio and television, there might be public newspaper agencies' (232).

[117] Carol C Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy, and Society* (Cambridge: Cambridge University Press 1988); see also eg Carol C Gould, 'Retrieving Positive Freedom and Why It Matters' in Baum and Nichols, above n 50, 102.

choosing. Her approach includes aspects of the resources, enablement and participation elements of freedom noted above. Freedom includes 'not only choice but access to material and social conditions, freedom from domination, and conception of the realization of projects, the cultivation of capacities, and the formation of character over time'.[118] Again, her approach is far from monist and clearly distinct from Berlin's concerns. It entails people having 'a wide range of actual options'[119] available to them and includes freedom from constraint—that is, negative freedom—as a necessary element.

Another example from political philosophy reinforces several of these points, as well as including some direct consideration of free speech. Lawrence Crocker suggests that, while there are many understandings of liberty, it can usefully be divided into two approaches: negative 'absence of interference' and positive 'presence of diverse possibilities or opportunities'.[120] Positive or social freedom 'is a matter of the presence of options and opportunities, not a matter of self-mastery or rationality'.[121] Again, the approach avoids monism. In terms of describing the options to be promoted, Crocker notes the aim seeks 'to increase the number, diversity, desirability, and probability of alternatives available to the members of the society'.[122] Again, positive freedom includes the negative. The largest differences from a purely negative approach, however, are the

> affirmative (and probably expensive) programs aimed at the development of human capacities, the provision of free time, and the supply of equipment, facilities, and other means to the enlargement of life's possibilities.[123]

Freedom involves encouraging, not just protecting, diversity. In that way, positive *freedom* makes far larger calls on resources than a focus on positive freedom of *speech*. But the aim to encourage diversity and increase capacities resonates with positive dimensions of free speech, as does the recognition that a call on resources would follow. As Gautam Bhatia suggests, freedom has a distributive element and effective free speech is not only freedom 'under prevailing market conditions and economic arrangements'.[124]

Crocker briefly considers free speech, although not satisfactorily. He acknowledges the analysis 'falls short of canvassing all the means of encouraging a diverse public exchange of ideas'.[125] As well as being brief, it makes no direct link to democratic government (which is understandable given his overall approach). Crocker notes that some ideas—ideas liked by those with social power or liked by many people—will tend to flourish without overt state assistance. He suggests that will sometimes produce a fair deal of diversity, but asks whether the range of ideas could be widened to include ideas without 'powerful friends' or existing popularity. Crocker makes two suggestions in that regard. The first draws on John Stuart Mill's call to imagine dissenters, perhaps even creating

[118] Gould, *Rethinking Democracy*, ibid 58.

[119] Ibid 41.

[120] Lawrence Crocker, *Positive Liberty: An Essay in Normative Political Philosophy* (Melbourne International Philosophy Series v 7) (The Hague: Martinus Nijhoff 1980) 1.

[121] Ibid 4.

[122] Ibid 69-70.

[123] Ibid 70.

[124] Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech under the Indian Constitution* (New Delhi: Oxford University Press 2016) 288 (emphasis removed).

[125] Crocker, above n 120, 74.

'institutions of devil's advocacy'.[126] The second is to support publication of diverse ideas through publicly funding a range of media outlets in proportion to political parties' electoral results (a model with some similarities to certain European systems of press subsidy). These measures would take resources, which Crocker does not argue for in any detail. He merely states: 'Except in the very poorest of societies, these sacrifices are well worth it.'[127] There is no explicit link to the value of public speech in self-government, nor the idea that democracy entails something in terms of the structure or architecture of public speech.

Virginia Held's analysis of positive freedom also considers free speech. She argues that 'rights to freedom are rights to the enablements to be free and not only rights to freedom from interference'.[128] A purely negative approach to freedom, the idea that 'a man left alone could fend for himself serves to camouflage the degree to which some persons are favored by the status quo and others denied the chance to be free'.[129] The gendered wording is intentional, with Held noting the history of women under negative approaches to freedom. A libertarian approach to freedom—which was emerging when she wrote in the 1980s US context—would 'bring about an entirely unsatisfactory model' of government that protects only 'the negative freedom of the fortunate'.[130] For Held, equal liberty 'should be assured to everyone as a matter of right'. This would not require that each person has equal income or other resources. But people require 'adequate resources to resist coercion by those with economic power and by those in government'. In addition, it requires 'that *rights* to these resources be effectively assured by the power of law'.[131] There are clearly similarities to analyses considered here, such as that of Fredman.

Held then considers free speech, offering a bleak assessment of US law and practice. She comments:

> The culture, which more than anything else shapes the way society sees itself and its future, is so thoroughly beholden to commercial interests in the United States that any views seriously challenging the corporate political economy that surrounds it are perceived as little more than a kind of entertainment. …
>
> As soon as any serious challenge to the American political economy begins to become visible on a substantial scale, economic power engulfs it. … The way our cultural forms of expression, especially but not only television, contribute to turning opposition into forms that can be bought up by the prevailing economic powers is a model of efficiency.[132]

Understanding free speech as the absence of 'government censorship' is inadequate for Held, as is extending it to the absence of censorship by others (such as media owners). Those approaches are understandable given commonplace ideas of freedom as negative, but that view of freedom should

[126] Ibid 73; and see John Stuart Mill, *On Liberty* (edited by Currin V Shields) (Indianapolis: Bobbs-Merrill 1956) 58 and this book's chapter 2.

[127] Crocker, above n 120, 74.

[128] Virginia Held, *Rights and Goods: Justifying Social Action* (New York: Free Press 1984) 128. See also Virginia Held, 'Access, Enablement, and the First Amendment' in Diana T Meyers and Kenneth Kipnis (eds), *Philosophical Dimensions of the Constitution* (Boulder CO: Westview 1988) 158.

[129] Held, *Rights and Goods*, above n 128, 123.

[130] Ibid 136.

[131] Ibid 138 (emphasis in original).

[132] Ibid 215-216 (notes omitted).

'be corrected'.[133] Free speech should be understood in terms of 'positive enablements'.[134] In terms of free speech, freedom should involve 'a new set of enabling rights to expression, rights that include the economic and social and cultural *means* to express oneself.'[135] She links this idea with an argument for participation in government, and individual and collective self-development (an approach resembling some of Jack Balkin's free speech analysis, considered in chapter 5). Held also notes that, if judicial interpretation remains focused on negative dimensions of free speech and does not include 'the enablements and capacities' that are 'essential', then 'arguments must be made in terms of social policies and moral obligations'. She recognises that approaching 'rights in these terms is inadequate but apparently the most that can be expected in the near future. It is by no means unimportant'.[136]

How to interpret such speech rights raises difficult questions for Held. She draws from Jerome Barron's writing on media access as one way of developing a positive freedom of speech.[137] But her analysis consciously remains at a theoretical level more than one of implementation. She observes:

> The important point at this stage might be to recognize, as hardly anyone who writes about culture or the First Amendment yet does, that some such rights should be acknowledged at the level of social theory. And then we can get on with the discussion of what rights of access to cultural expression should include and how they can best be understood and respected. … One of the most disturbing aspects of our cultural scene is that we so rarely even *imagine* what it would be like to have the media serve human values other than the commercial gain of the economically powerful.[138]

For Held, the metaphorical 'marketplace of ideas' has become literal, which she argues is inconsistent with the meaning of free speech.

To help in the process of imagination—where media would serve values other than commercial gain—Held sketches some possible analogies to free speech. The most important one concerns education (which is unsurprising given the links between free speech and education in free speech scholarship such as Alexander Meiklejohn's,[139] as well as the common references to education in the wider literature on positive freedom). While there are educational inequalities in practice, conceptually it is clear that

> a right to education cannot be merely a right to *buy* an education, without governmental interference, *if* one's parents can afford it. We … recognize … that nonrich children must be *enabled* to be educated, that society must *provide* education or the resources with which to buy it for people who cannot already afford to buy it. And so we spend huge sums on public education.[140]

As Held notes, this suggests far more substantial changes to US freedom of expression than the limited media access arguments offered in some analyses. 'There should be social provision on a *much* larger

[133] Ibid 217.

[134] Held, 'Access', above n 128, 171.

[135] Held, *Rights and Goods*, above n 128, 223 (emphasis in original).

[136] Held, 'Access', above n 128, 174.

[137] In particular Jerome A Barron, *Freedom of the Press for Whom? The Right of Access to Mass Media* (Bloomington: Indiana University Press 1973).

[138] Held, *Rights and Goods*, above n 128, 226-227 (emphasis in original).

[139] See eg Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (New York: Harper 1960) 86-87.

[140] Held, *Rights and Goods*, above n 128, 228 (emphasis in original).

scale of opportunities for expression for those who cannot now afford it or afford more of it,'[141] and '[p]ublic broadcasting needs to be *vastly* expanded, both that which would be integrated with existing networks and that which would rely on independent outlets'.[142]

In sum, Held emphasises the need for people's free speech to be 'enabled' through resources, for free speech to be understood as in some ways analogous to education—making it clearer that the state has substantial obligations to act in its support—and for public media to be vastly expanded through multiple outlets. In line with her general approach, these rights should be provided by law, but *how* the law of free speech would do that is not explored in any detail.

Many more examples with relevance to positive freedom could be considered, including Amartya Sen and Martha Nussbaum's work on capabilities.[143] But here I examine only two further examples—one is Nancy Hirschmann's writing in feminist theory, the other is an aspect of Joseph Raz's writing on political freedom.

Discursive contexts and freedom

Feminist approaches to freedom canvas a wide range of factors affecting women in their choices, including the material conditions of freedom raised above. From Hirschmann's *The Subject of Liberty* one factor is particularly useful for my purposes; namely, the *role of discursive conditions within*

[141] Ibid (emphasis in original).

[142] Ibid 230 (emphasis in original).

[143] See eg Amartya Sen, *The Idea of Justice* (Cambridge, MA: Belknap Press of Harvard University Press 2009) and *Development as Freedom* (Oxford: Oxford University Press 1999); Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (Cambridge, MA: The Belknap Press of Harvard University Press 2011); Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge: Cambridge University Press 2000); Thom Brooks (ed), *Justice and the Capabilities Approach* (Farnham: Ashgate 2012). In relation to free speech and capabilities see eg Katharine Gelber, 'Reconceptualizing Counterspeech in Hate Speech Policy (with a Focus on Australia)' in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press 2012) 198; Katharine Gelber, 'Nussbaum's Capabilities Approach and Freedom of Speech' in Francesca Panzironi and Katharine Gelber (eds), *The Capability Approach: Development Practice and Public Policy in the Asia-Pacific Region* (Abingdon: Routledge 2012) 38; Amit Schejter and Noam Tirosh, *A Justice-Based Approach for New Media Policy: In the Paths of Righteousness* (Cham: Palgrave Macmillan 2016). For media studies research, see eg Nicholas Garnham, 'Amartya Sen's "Capabilities" Approach to the Evaluation of Welfare: Its Application to Communications' (1997) 4(4) *Javnost: The Public* 25; Robin Mansell, 'From Digital Divides to Digital Entitlements in Knowledge Societies' (2002) 50 *Current Sociology* 407, analysing digital divides in light of capabilities; Nick Couldry, *Why Voice Matters: Culture and Politics After Neoliberalism* (London: Sage 2010) especially its chapters 2 and 5, linking Sen's approach to freedom (the 'capabilities to choose a life one has reason to value') to voice, including political voice; David Hesmondalgh, 'Capitalism and the Media: Moral Economy, Well-Being and Capabilities' (2017) 39 *Media, Culture and Society* 202, suggesting Sen and Nussbaum's work can support media policy approaches such as those of Ed Baker. See also eg Matthew McManus, 'A Critical Legal Conception of Human Dignity' (2019) 18 *Journal of Human Rights* 57, arguing human dignity requires the capacity for self-authorship through expressive capabilities, drawing on, among others, Sen and Nussbaum's approaches to capabilities as a version of positive liberty. For an approach drawing on, but extending beyond, capabilities which is focused on rights as affordances in the socio-technical realm, and which focuses more directly on the contemporary communication environment, see Julie E Cohen, 'Affording Fundamental Rights: A Provocation Inspired by Mireille Hildebrandt' (2017) 4 *Critical Analysis of Law* 78.

freedom.[144] Similar points could be taken from a wide range of contemporary theory. Hirschmann is apt here because she draws out the implications of social conditions for autonomy, which suggests modifying or qualifying many of the above uses of the term autonomy.

Hirschmann does not focus directly on re-reading positive and negative liberty, but states that both contribute to understanding freedom. Negative freedom's focus on external barriers 'is an important starting point' because those barriers—male violence, workplace policies, and more—need to be recognised and removed. In addition, 'the definition of what constitutes an external barrier needs to be enlarged'. The 'productive forces of the "external" environment on the "internal"' will needs to be recognised. This means 'the line between internal and external cannot be clearly drawn; rather, the two must be seen as mutually constitutive and understood together'.[145]

The analysis includes much that resembles the political freedom writing discussed earlier in this chapter. And it draws on something like Berlin's sense of positive freedom in terms of internal control, as well as something closer to MacCallum. Clearly, it treats external barriers broadly—material conditions of freedom are central to Hirschmann's concerns. Providing 'the material conditions for choice' involves negative liberty's focus on removing restrictions as well as 'positive liberty's emphasis on the provision of enabling conditions'.[146] But her analysis also recognises that choices arise within particular contexts, including *discursive contexts*. Discourse here does not solely concern pre-existing and discourse-independent meaning; rather, discursive contexts are frameworks 'for the construction and constitution of meaning'.[147] The enabling and limiting conditions include the discursive contexts in which ideas are formed and decisions made. This is, of course, particularly relevant in understanding free speech. There is a paradox at the centre of the freedom: speech arises within the context of existing speech.

Hirschmann comments that freedom 'requires a double vision'; one recognising social construction as 'a phenomenon or process that happens to and is participated in by everyone', while also acknowledging 'that some groups of people systematically and structurally have more power to participate in the constructing than do others'.[148] For my purposes, one might simplify this point to the idea that communicative freedom involves the *ability to participate in the creation of discursive contexts* through speech and across time. The approach involves self-critical and self-aware engagement, an engagement that recognises the paradox in freedom. It recognises that such participation in creating discursive contexts 'is as far as one can go in exerting autonomy' in experiencing freedom.[149] In that, Hirschmann understands freedom as distinct from a simple idea of autonomy—freedom 'involves a combination of what individuals do and what happens to them, it is about making choices within the parameters and limitations of conditions over which they have no control'.[150] Importantly for my purposes, the parameters and limitations involve the discursive

[144] Nancy J Hirschmann, *The Subject of Liberty: Toward a Feminist Theory of Freedom* (Princeton: Princeton University Press 2002).

[145] Ibid 200-201.

[146] Ibid 202.

[147] Ibid 207 (emphasis removed).

[148] Ibid 204.

[149] Ibid 205.

[150] Ibid 212. Hirschmann's analysis could be extended through considering Foucault's work on speech and *parrhesia* (commonly translated as free speech or speaking freely, truthfully, frankly or forthrightly); this would expand her extensive use of other aspects of his approach; see eg Michel Foucault, *The Government of Self and*

contexts in which individuals find themselves when speaking or receiving speech. And references to autonomy in ideas of positive freedom should be understood in that qualified sense.

Freedom, collective goods and government action

If that is one note of caution in thinking about freedom, another emerges from Raz's *The Morality of Freedom*.[151] There he offers an autonomy-based approach to freedom based in social institutions and practices. Freedom requires 'positively encouraging the flourishing of a plurality of incompatible and competing pursuits, projects and relationships' to allow people to exercise autonomy.[152] In that, freedom is a collective good. His approach is a counterpoint to individualist liberal theories of freedom and, while in some ways sitting outside the negative-positive distinction, it can be analysed in terms of that distinction.[153] For Raz, positive and negative dimensions of freedom both have value, and government has an important role in relation to each. Overall, he argues that 'the shape of freedom'[154] has three main features, which clearly recognise its positive dimensions:

> First, its primary concern is the promotion and protection of positive freedom which is understood as the capacity for autonomy, consisting of the availability of an adequate range of options, and of the mental abilities necessary for an autonomous life. Second, the state has the duty not merely to prevent denial of freedom, but also to promote it by creating the conditions of autonomy. Third, one may not pursue any goal by means which infringe people's autonomy unless such action is justified by the need to protect or promote the autonomy of those people or of others.[155]

The point that I want particularly to note comes from the end of his analysis. It concerns the limitations of government, an important matter given the state's importance in his approach. For Raz, the idea that state power can be corrupted, is fallible and should not be trusted—an idea which commonly leads to limited government—is 'both true and false'.[156] In itself, limited government entails a failure:

> [F]reedom from governmental action is based on the practical inability of governments to discharge their duty to serve the freedom of their subjects. And *in most cases the result is that that freedom remains lacking*. In most cases there is no other body nor any other social process which can achieve what government action fails to, that is the existence of a full capacity for autonomy to all members of a community.[157]

The point that freedom mostly remains lacking where there is a purely negative approach to freedom is worth underlining. If public actors do not promote positive dimensions of free speech, then in many cases those dimensions will remain lacking. There may be contexts in which that sort of 'freedom of imperfection'[158] is the better option, but the loss should be recognised.

Others: Lectures at the Collège de France 1982-1983 (edited by Frédéric Gros; translated by Graham Burchell) (Basingstoke: Palgrave Macmillan 2010). For free speech analysis drawing on Foucault, see eg Ejvind Hansen, (2015) 'The Positive Freedom of the Public Sphere' (2015) 16 *Journalism Studies* 767.

[151] Raz, above n 13.

[152] Ibid 425.

[153] See eg Flikschuh, above n 32, 141-166.

[154] Raz, above n 13, 424.

[155] Ibid 425 (emphasis removed).

[156] Ibid 428.

[157] Ibid 428-429 (emphasis added).

[158] Ibid 429.

Conclusion

While it can be unhelpful to divide freedom into two kinds because there are more variations than simply positive and negative, and despite having some sympathy for legal approaches that seek to build on MacCallum's triadic approach to freedom,[159] I use the term positive in relation to free speech. In part this is because the term is current across so many relevant literatures. Despite MacCallum's triadic formula, Berlin's distinction 'has refused to go away'.[160] Whatever points can be made debating the positive-negative distinction, there appear to be 'two such families of conceptions of political freedom abroad'.[161] In addition, using the term in relation to free speech seeks to counter any idea that contemporary case law under the US First Amendment encapsulates all the meanings of free speech. Those US decisions generally set out *one* vision of protecting free speech, a strongly negative one. In contrast, some US legal commentary takes a much less negative approach to free speech, as considered next in chapter 5.

Beyond that point, the examples of writing on positive human rights and positive political freedom suggest:

- States have obligations to support a diversity or plurality of possibilities, focused on providing people with prima facie equal access to the social and material conditions for realising projects of their choosing. Often, these requirements for action are linked to democratic forms of government—positive rights have collective not merely individual dimensions. And the obligations to act have implications for resources, enablement and democratic involvement in the formation of law.
- The ideas of self-mastery and a 'higher' self, which can be seen in Berlin's approach to positive freedom, are not relevant to positive as it is used here. Rather, positive invokes an idea of enablement. Therefore, the conditions of freedom are understood to be part of analyses of freedom.
- The approach does not entail any monist vision of values or ends; it is highly pluralistic. It includes negative liberty but goes beyond it.
- A common idea in relation to positive freedom is that it serves autonomy, but that autonomy should be understood as arising within particular social conditions—conditions that both enable and limit what is possible. In terms of speech, freedom always arises within existing discursive and other contexts.
- Many analyses do not explore which institutional actors, if any, have responsibility to act in relation to positive dimensions of freedom, while some writing explicitly places responsibility on institutional politics. In contrast, the legally focused work of Fredman explores the role of courts. It is focused on not undermining legislative efforts towards positive freedom, while supporting more inclusive deliberation within institutional fora. In terms of obligations for speech, Held's analysis would suggest the state must enable speech, analogous to its obligations to provide a system of education, which would include a very substantial

[159] See eg Gibbons, above n 86.
[160] Flikschuh, above n 32, 60.
[161] Taylor, above n 3, 175.

expansion of public media. While she suggests such obligations should be provided in law, how law would do that in terms of free speech is left relatively unexplored.

Many of the above points emerge in a similar form through the legal scholarship examined in chapter 5. The legal examples largely reinforce these points as being those that are engaged when considering positive communicative freedom.

5 US Legal Writing on Positive Free Speech

It might be thought that free speech *law* is quintessentially about negative freedom. Certainly, negative dimensions of the freedom are important, and they are easy to find in legal doctrine and scholarship. But there are also many legal analyses based on positive political freedom. As well as the writing on human rights law considered in chapter 4, legal scholar Joel Bakan illustrates the point. Clearly, a negative liberty is insufficient for his understanding of freedom:

> Freedom involves the ability of people to develop their capacities; to determine, through deliberation, choice, and action, how to live their lives; and to participate in the democratic governance of social, economic, and political life. This conception of freedom encompasses negative freedom, or the protection of people from arbitrary uses of official authority and coercive power, but it also includes a positive dimension: the capacity—the resources, abilities, and opportunities—to exercise freedom and avoid coercion by others. Freedom thus requires a measure of social equality.[1]

But Bakan does not see a productive role for courts in relation to the positive dimensions of freedom, at least not in Canada at the time he wrote. That issue is returned to in chapter 8.

More recently, various legal authors have considered how ideas of positive free speech might play out. For example, Thomas Gibbons has published a number of papers either using the language of positive free speech or addressing closely related concepts,[2] while Tarlach McGonagle has considered positive free speech under the European Convention on Human Rights and argued there has been real development in the protection of the freedom's positive dimensions.[3] The examples

[1] Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press 1997) 10.

[2] See eg Thomas Gibbons, 'Free Speech, Communication and the State' in Merris Amos, Jackie Harrison and Lorna Woods (eds), *Freedom of Expression and the Media* (Leiden: Martinus Nijhoff 2012) 19; Thomas Gibbons, 'Active Pluralism: Dialogue and Engagement as Basic Media Policy Principles' (2015) 9 *International Journal of Communication* 1382; Thomas Gibbons, 'What Is "Sufficient" Plurality?' in Steven Barnett and Judith Townend (eds), *Media Power and Plurality: From Hyperlocal to High-Level Policy* (Basingstoke: Palgrave Macmillan 2015) 15; Thomas Gibbons, 'Providing a Platform for Speech: Possible Duties and Responsibilities' in Andrew T Kenyon and Andrew Scott (eds), *Positive Free Speech: Rationales, Methods and Implications* (Oxford: Hart 2020) 11.

[3] See eg Tarlach McGonagle, 'The State and Beyond: Activating (Non-)Media Voices' in Helena Sousa, Manuel Pinto, Joaquim Fidalgo, Stanislaw Jedrzejewski, Elsa Costa e Silva, Ana Melo, Luís António Santos, Sérgio Denicoli, Mariana Lameiras, Marta Eusébio Barbosa (eds), *Media Policy and Regulation: Activating Voices, Illuminating Silences* (Braga: University of Minho 2013) 187; Tarlach McGonagle, 'Positive Obligations Concerning Freedom of Expression: Mere Potential or Real Power?' in Onur Andreotti (Council of Europe Task Force for Freedom of Expression and Media) (ed), *Journalism at Risk: Threats, Challenges and Perspectives* (Strasbourg: Council of Europe Publishing 2015) 9. Comparison could be made between McGonagle's work and the much earlier analysis of Craufurd Smith, which found less positive dimensions in European free speech law: Rachael Craufurd Smith, *Broadcasting Law and Fundamental Rights* (Oxford: Clarendon Press 1997). On European approaches see also eg Andrew Sharland, 'Focus on Article 10 of the ECHR' [2009] *Judicial Review* 59; Joris van Hoboken, *Search Engine Freedom: On the Implications of the Right to Freedom of Expression for the Legal Governance of Web Search Engines* (Alphen aan den Rijn: Kluwer Law International 2012).

could easily be extended in law,[4] and in media studies.[5] But here I consider a small sample of US-focussed legal writing. Just as philosophical analyses of freedom are beyond comprehensive examination, legal analyses of free speech are beyond concise synthesis. Even so, a sample is enough to draw out useful points about positive free speech and law. And notably, the points emerge even in US literature. Constitutional provisions affecting communication law involve more than the First Amendment,[6] but for my purposes that focus suffices.

First Amendment law overwhelmingly treats free speech as a negative liberty. There are case law exceptions, at times historical,[7] and current US law does recognise some positive dimensions to the freedom.[8] But the weight of US law and commentary focuses on overt government restrictions on speech. That is not so surprising given the First Amendment's wording that 'Congress shall make no law … abridging the freedom of speech', which suggests a concern with negative freedom. However, US legal scholarship includes numerous examples where positive dimensions of free speech are supported. This often involves issues such as mass media access, financing political campaigns or, more recently, internet network neutrality.

United States writing engaging with positive free speech includes work from authors such as Ammori, Balkin, Baker, Barron, Curtis, Delgado, Emerson, Eule, Fiss, Graber, Haiman, Horwitz and Hutchinson.[9] That list only reaches some of the notable surnames beginning with the letters A to H; it

[4] See eg Dirk Voorhoof, 'Freedom of Journalistic News-Gathering, Access to Information and Protection of Whistleblowers under Article 10 ECHR and the Standards of the Council of Europe' in Andreotti, above n 3, 105; some of the chapters in Maria Edström, Andrew T Kenyon and Eva-Maria Svensson (eds), *Blurring the Lines: Market-Driven and Democracy-Driven Freedom of Expression* (Gothenburg: Nordicom 2016); Sandra Fredman, *Comparative Human Rights Law* (Oxford: Oxford University Press 2018) 349-353 (examining courts' attitudes to access to state-held information as part of positive free speech); Kenyon and Scott, above n 2; Peter Coe, '(Re)embracing Social Responsibility Theory as a Basis for Free Speech: Shifting the Normative Paradigm for a Modern Media' (2018) 69 *Northern Ireland Legal Quarterly* 403.

[5] See eg Simon Dawes, 'Press Freedom, Privacy and the Public Sphere' (2014) 15 *Journalism Studies* 17; Trine Syvertsen, Gunn Enli, Ole J Mjøs and Hallvard Moe, *The Media Welfare State: Nordic Media in the Digital Era* (Ann Arbor: University of Michigan Press 2014) (although positive free speech terminology is not used, broadly similar arguments are made); Ejvind Hansen, 'The Positive Freedom of the Public Sphere' (2015) 16 *Journalism Studies* 767; Douglas Allen, 'Relocating the Press: Toward a More Positive Notion of "Freedom of the Press"' (2015) 9 *International Journal of Communication* 3422; some of the chapters in Edström, Kenyon and Svensson, above n 4; Mike Ananny, *Networked Press Freedom: Creating Infrastructures for a Public Right to Hear* (Cambridge MA: MIT Press 2018); Victor Pickard, *Democracy Without Journalism? Confronting the Misinformation Society* (New York: Oxford University Press 2020).

[6] See eg Sandra Braman, *Change of State: Information, Policy, and Power* (Cambridge MA: MIT Press 2006) 79-116, 'Constitutional Principles and the Information Spaces They Create'. Equally, the First Amendment involves more than speech, even if the Amendment's speech clause receives most scholarly and doctrinal attention. For a broader analysis, see eg Ashutosh Bhagwat, *Our Democratic First Amendment* (Cambridge: Cambridge University Press 2020).

[7] See eg *Associated Press v US*, 326 US 1, 20 (1945). Consideration could also be given to 'public forum' cases; see eg Lyrissa Lidsky, 'Public Forum 2.0' (2011) 91 *Boston University Law Review* 1975.

[8] See eg Mark Tushnet, *Advanced Introduction to Freedom of Expression* (Cheltenham: Edward Elgar 2018) 82-103 (examining implicit and explicit states subsidies for speech, especially in relation to regulating public demonstrations).

[9] See eg Marvin Ammori, 'First Amendment Architecture' [2012] *Wisconsin Law Review* 1; Jack M Balkin, 'Some Realism about Pluralism: Legal Realist Approaches to the First Amendment' [1990] *Duke Law Journal* 375; C Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* (Cambridge: Cambridge University

could easily be extended across the alphabet. One could also include commentary by a legal insider like US Supreme Court Justice, Stephen Breyer. His analysis of 'active liberty' under the US constitution goes quite some way in recognising freedom's positive dimensions.[10] He notes the approach 'understand[s] the First Amendment as seeking primarily to encourage the exchange of information and ideas necessary for citizens themselves to shape that "public opinion which is the final source of government in a democratic state."'[11]

For my purposes, a few examples from the literature will do. They are taken in two groups. The first suggests four things of relevance, largely reinforcing points already drawn from work on positive human rights and political theory:

- Public speech is understood to have *central importance* for democratic forms of government.
- *Diversity* is wanted in public speech.
- Diversity needs to be *promoted by government action*.
- That *action should (generally or always) not be taken by courts*, but by other institutional actors, with courts using positive and negative dimensions of free speech to evaluate the actions.

A second group of examples emphasises three points, again generally reinforcing matters from chapter 4:

- Freedom of speech arises within *existing practices of communication that themselves constrain as well as enable speech*.
- Freedom of speech involves *dialogical, collective or structural interests as well as individual interests*.
- *Government always acts*, even when it avoids passing laws that explicitly restrict speech; a wide range of government decisions that affect opportunities for speech mean there cannot be government neutrality about speech.

The reinforcement is important. It underlines how these matters frame the terrain within which positive free speech tends to be considered. Further, the examples illustrate how positive

Press 2007); Jerome A Barron, 'Access to the Press – A New First Amendment Right' (1967) 80 *Harvard Law Review* 1641; Michael Kent Curtis, 'Democratic Ideals and Media Realities: A Puzzling Free Press Paradox' (2004) 21 *Social Philosophy and Policy* 385; Richard Delgado, 'First Amendment Formalism is Giving Way to First Amendment Legal Realism' (1994) *29 Harvard Civil Rights-Civil Liberties Law Review* 169; Thomas I Emerson, *The System of Freedom of Expression* (New York: Random House 1970); Julian N Eule, 'Promoting Speaker Diversity: Austin and Metro Broadcasting' [1990] *Supreme Court Review* 105; Owen Fiss, *The Irony of Free Speech* (Cambridge, MA: Harvard University Press 1996); Mark A Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (Berkeley: University of California Press 1991); Franklyn S Haiman, *Speech and Law in a Free Society* (Chicago: University of Chicago Press 1981); Robert B Horwitz, 'The First Amendment Meets Some New Technologies: Broadcasting, Common Carriers, and Free Speech in the 1990s' (1991) 20 *Theory and Society* 21; Allan C Hutchinson, 'Talking the Good Life: From Free Speech to Democratic Dialogue' (1989) 1 *Yale Journal of Law and Liberation* 17.

[10] Further, Breyer notes the term active liberty 'is distinct from, but bears some similarities to' Berlin's positive liberty: Stephen Breyer, *Active Liberty: Interpreting a Democratic Constitution* (Oxford: Oxford University Press 2008) 169 and its n 25. Rosanvallon concludes that Breyer's analysis 'reveals, perhaps, the greatest argument in favor of giving greater breadth to the active dimension of liberty in the modern era, thus balancing freedom's dual aspects': Pierre Rosanvallon, 'Review of Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution*' (2007) 5 *International Journal of Constitutional Law* 564, 567.

[11] Breyer, ibid 42 (internal citation omitted).

dimensions of free speech involve questions of degree—freedom is not present or absent in any binary fashion—and freedom is always subject to its context. Communication occurs within existing practices of communication; there is no freedom beyond, or transcending, those practices. Although the examples link speech with democracy, many do not focus on whether democracy has *communicative requirements or preconditions* connected with free speech; for example, whether particular communicative structures are implicit in claims to democracy, or whether there are 'pre-democratic' prerequisites for democratic public speech, as raised in chapter 3. But some examples do address such matters—what could be called 'the preconditions of freedom' regarding speech—and they are particularly useful to note.

The first group of writing comprises work by Jerome Barron, Thomas Emerson, Jack Balkin, Cass Sunstein and Laura Stein.

Barron's modest access for diversity

In Barron's classic work on rights of media access, he argues free speech requires certain rights of access to promote diversity in content. The rights could be provided by courts but, perhaps more appropriately in his view, they are matters for legislation:

> If the mass media are essentially business enterprises and their commercial nature makes it difficult to give a full and effective hearing to a wide spectrum of opinion, a theory of the first amendment is unrealistic if it prevents courts or legislatures from requiring the media to do that which, for commercial reasons, they would be otherwise unlikely to do.[12]

As Barron later noted, the claims for access were modest. In effect, only two minor changes were sought: a statutory right of reply for those attacked in editorial content; and a non-discriminatory right of access for commercial advertising, which would allow less popular causes to be aired, if they had financial resources to pay for advertising. They were the only concrete changes sought. In Barron's words, the US controversy about media access 'is really a controversy about symbolism. It is not so much the specific demands that are feared … as a symbol, an idea that there can be public rights in private media'.[13]

Emerson and the affirmative First Amendment

Another widely referenced source of that period goes further. Emerson uses the language of positive free speech to argue for different economic bases for some media. Among other values, he highlights the role of free speech in collective decision making. In his 1970 book, *The System of Freedom of Expression*, Emerson describes a growing public sector and notes that, despite dangers, there is 'enormous potential' in public funding of various mediated avenues for speech (through rules on media access, newspaper subsidies and so forth). Emerson sets out an 'argument that the affirmative power of the First Amendment may *require* the government to furnish facilities for communication' because the First Amendment recognises audience interests in the form of 'a right to hear'.[14] Such developments could have spectacular effects, leading to 'an enormous increase in the diversity of the

[12] Barron, above n 9, 1662; see also eg Jerome A Barron, *Freedom of the Press for Whom? The Right of Access to Mass Media* (Bloomington: Indiana University Press 1973); Jerome A Barron, *Public Rights and the Private Press* (Toronto: Butterworths 1981).

[13] Barron, *Public Rights*, ibid 15-16.

[14] Emerson, above n 9, 649 (emphasis added).

content of the mass media, a significant growth of popular participation at the community level, and a general invigoration of the system of freedom of expression'.[15]

While Emerson argues the obligations are required, he does not initially see them as required by constitutional law enforced by courts. Rather, the matter is one for institutional politics: 'the government has a political, if not constitutional, obligation to finance opposition to itself'.[16] Thus, he recommends actions by government—legislative and executive action, not judicial—to change the economic basis of public speech:

> Government measures to encourage a multiplicity of outlets, rather than compelling a few outlets to represent everybody, seems a far preferable course of action. Such a goal cannot be reached by mere enforcement of the antitrust laws. It will undoubtedly be necessary to go to the economic roots of the problem and either by government subsidies or other devices create an open market with a new form of economic base.[17]

A decade later, Emerson returns to similar themes. Primary responsibility still lies with the executive and legislature, but some issues—such as media access—are suitable for judicial action in 'egregious cases'.[18] The elements of diversity, government action and a limited role for courts are again evident:

> [T]he values of the system of freedom of expression, to a large degree, lie in promoting diversity, in the full and free exchange of diverse ideas, experiences, and information. Hence governmental intervention for affirmative purposes must be directed toward expanding, not contracting, the range of fact and opinion available to the community.[19]

He sees the development of 'rules for employing governmental powers to expand' free speech while also 'controlling and limiting' those governmental powers as a 'crucial' issue for the future.[20] This might be done through 'institutional devices', such as isolating regulators from partisan politics and, in that regard, courts may have a role. 'It is not clear to what extent the use of ameliorating structural devices may be required as a matter of constitutional principle, enforceable by the courts', but Emerson argues courts could 'go a considerable distance in this direction'.[21] They would not, however, be involved in 'detailed supervision' of such government action.[22] Overall, 'a rough but

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[15] Ibid 652.

[16] Ibid 652-653. One could also consider Rowbottom's analysis of government speech, discussed in chapter 1, which makes a somewhat similar point about state support for political opposition (perhaps focused more on parliamentary opposition than necessarily media): Jacob Rowbottom, 'Government Speech and Public Opinion: Democracy by the Bootstraps' (2017) 25 *Journal of Political Philosophy* 22, 40:

> One solution … is to provide other groups and voices with resources to challenge the content of the [government] communications. This approach accepts that government resources can generate an indirect subsidy to promote the views of the incumbents among the public. The aim should be to ensure that the subsidy is fairly distributed among different views, and to reinforce the structures for opposition that are expected in formal political institutions.

[17] Emerson, above n 9, 671.

[18] Thomas I Emerson, 'The Affirmative Side of the First Amendment' (1981) 15 *Georgia Law Review* 795, 807.

[19] Ibid 804.

[20] Ibid 796.

[21] Ibid 806.

[22] Ibid 807.

practical solution' would be sufficient.[23] Far better that than ignoring the challenges of positive free speech. But the contours of that 'solution' remain largely an 'open question'.[24]

There are several points worth noting from Emerson. The idea of government *financing opposition to itself*—in terms of diverse speech that argues against government positions—and having an *obligation* to do so provides a striking image of what is at stake in a system of freedom of expression and why politicians may be reluctant to act. One might add that such a requirement would presumably exist only where opposition was not otherwise present. The preference for encouraging *multiple outlets with varied financial bases* also captures something of why solely regulating content appears less likely to encourage the required diversity, especially if done by a single regulator across various forms of media that have substantially similar financial bases. Emerson seeks structural regulation aimed at creating an 'open' market for speech.[25] His approach clearly links to collective decision making—to some form of self-government—and it entails the possibility of courts having a role in this regard. Courts would not be involved in detailed supervision of speech, but would consider *structural* dimensions of public speech, and would act even if it was only in a 'rough but practical' manner. Implicit in the analysis is the point that governments may fail to meet their obligations to support diverse speech without courts acting. Without such action, the result may well be that communicative freedom 'remains lacking'.[26]

Balkin's realist free speech with constitutional obligations

Two decades later, in 1990, Balkin offers a somewhat similar approach. In one of the stronger US analyses of free speech's positive dimensions and their implications, he suggests free speech in a context of 'radically unequal economic power is not free speech at all'.[27] This makes it somewhat surprising that concern with positive freedom largely disappears in his later work on democratic culture. Positive dimensions of free speech are not rejected in Balkin's later analysis of participatory democratic culture, but little is said about what may be required to achieve effective freedom (at least in terms of a role for law). In contrast, effective freedom is central to his concerns in the 1990 paper.

Balkin's initial point is that highly unequal economic power means some views become dominant in public speech while others are essentially silenced. 'The long term effect of the unequal distribution of power and property is an unequal exposure of particular ideas, and the stifling and co-opting of more radical and imaginative ideas about politics and society.'[28] Free speech in the US context ends up being about 'the parroting of values created for us by those groups and persons who

[23] Emerson, above n 9, 667.

[24] Ibid 728.

[25] Emerson's use of 'open' here is interesting, and could be compared with Martin's distinctions between a free and an open press: see eg Robert W T Martin, *The Free and Open Press: The Founding of American Democratic Press Liberty, 1640-1800* (New York: New York University Press 2001) who notes at 3-4:

> Until the 1760s, press liberty was seen as a unified concept, even though it comprised a number of separate claims. Increasingly during the first half of the eighteenth century, these various claims coalesced into two strains of argument that I call 'free press' doctrine and 'open press' doctrine … Free press doctrine lionized the press as the prime defender of public liberty in its role as a bulwark against governmental tyranny. Open press doctrine … stressed the individual right of every man to air his sentiments for all to consider, regardless of his political perspective or the consequences for the people's liberty.

[26] Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press 1986) 428 and see the end of chapter 4.

[27] Balkin, above n 9, 379.

[28] Ibid 379.

have sufficient money and clout to monopolize our attentions and ultimately our very imaginations'.[29] Three points about the approach are noteworthy here: the strength of Balkin's *attack on a formalist understanding* of free speech; the suggestion that forms of *government expenditure might be constitutionally required*; and, despite that, the *relatively limited recommendations* that follow.

In attacking formalism, Balkin argues that effective speech rights depend on access to communication technologies. With technologies privately held, speech rights become a conflict over property rights and their enforcement. He continues:

> One can have control over the means of communication because of ownership, purchase of access, or access enforced by law. Yet following the legal realists, we might note that the third situation actually includes the first two. Ownership of the means of communication and the right to sell or to refuse to sell access are state-enforced … [F]reedom of speech can be reinterpreted as *a state enforced monopoly in the use and disposition of the means of communication*.[30]

For Balkin, free speech is necessarily related to questions of substantive freedom, and 'if the state is always implicated in access to speech' because law always helps to determine what freedom of speech one actually has, 'then it is difficult to argue that the state is neutral when some persons have vastly greater access to the means of communication than others because of vastly more economic power.'[31] Thus formal, negative freedom of speech is not really free speech, and the state is always implicated in the range of speech that exists.

This brings us to the second aspect that is noteworthy here—the idea not only that free speech may require government expenditure, but that expenditure may be constitutionally required:

> What I have said suggests that redistributive legislation might be a good means of enhancing the substantive liberty of speech (and many other liberties as well …). It also suggests that governmental investment in the modern technological equivalents of traditional public forums—for example, radio and television—would help ameliorate the situation. Whether such expenditures are required constitutionally by the first amendment is a more complicated question. Yet if (as I believe to be the case) the first amendment requires the government to create at least some public forums that provide effective means of communication, I believe the answer to that question must be yes.[32]

Here is an explicit suggestion that US constitutional protection of speech requires government expenditure to produce at least some level of diverse public discourse in support of substantive or effective freedom of expression. As Balkin notes, the 'key word in the last paragraph … is "effective"'.[33] The action required for that will always be a matter of degree but, for Balkin, effective means of communication will not exist without some state expenditure on public forums.

The third point is that, despite the above analysis, his recommendations largely resemble many other US examples. The recommendations are neither unusual nor expansive. They concern 'higher scrutiny of content-neutral regulations, greater guarantees of access to the mass media, greater judicial restraint in challenges to campaign finance reform, and a reinterpretation of the captive audience doctrine' in relation to sexually harassing speech.[34] Further, the recommendations more or less follow the usual form; that is, they are matters for institutional politics, with courts largely

[29] Ibid 379.
[30] Ibid 410 (emphasis added).
[31] Ibid 411-412.
[32] Ibid 412.
[33] Ibid 413.
[34] Ibid 386.

exercising restraint and not ruling against legislative and other measures that support positive free speech. Balkin writes:

> The point I am making is true of every affirmative liberty (such as education), and it is especially true of every negative liberty that turns out to be an affirmative liberty (like speech). Where affirmative liberties are at stake, *the most that courts can do is define a range of alternatives for the political branches to pick from, or direct the political branches to propose their own alternatives* and then accept them if they appear reasonably calculated to succeed. In other words, the effective protection of affirmative liberties requires considerably more judicial restraint than the protection of negative liberties.[35]

The notable point lies in the words 'largely' and 'more or less', which I used above to flag that Balkin departs somewhat from other examples considered here. He suggests courts could define alternatives within which the legislature or executive could choose, or courts could prompt those branches to propose other alternatives, which courts would then evaluate. As seen in later chapters, these suggestions resemble techniques used in some constitutional free speech decisions elsewhere. And such techniques can amount to quite a substantial role for courts in promoting an architecture of sustained plural public speech.

In a series of later articles,[36] Balkin develops an argument that free speech serves democratic culture and should be understood as part of a larger information policy. Democratic culture is a participatory culture, where 'people can participate actively in the creation of cultural meanings that in turn constitute them'.[37] In this work, he seeks to go beyond the liberty and democracy rationales commonly offered to explain the US First Amendment. He emphasises how digital speech involves more interaction and appropriation than previous forms of public speech and includes more topics and genres than just overtly political speech.

In the first substantial paper in this series, an examination of 'digital speech and democratic culture' in 2004, Balkin outlines his idea of democratic culture and begins to examine the contemporary infrastructure of free expression. He recognises that free speech has come to concern, largely, the protection of large media corporations' property rights; for example, in arguments over intellectual property or telecommunications regulation. But he does not suggest a rights-based response. The judicial role is limited, and it may have become more limited than he previously suggested. Balkin focuses on the system of communication and the myriad elements relevant to its existence and operation, such as 'free public education, free public libraries, common carrier rules in telephony, public interest rules in telecommunications, a public mail system, government subsidies

[35] Ibid 413 (emphasis added).

[36] See eg Jack M Balkin, 'Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society' (2004) 79 *New York University Law Review* 1; Jack M Balkin, 'How Rights Change: Freedom of Speech in the Digital Era' (2004) 26 *Sydney Law Review* 5; Jack M Balkin, 'Media Access: A Question of Design' (2008) 76 *George Washington Law Review* 933; Jack M Balkin, 'The Future of Free Expression in a Digital Age' (2009) 36 *Pepperdine Law Review* 427; Jack M Balkin, 'The First Amendment is an Information Policy' (2012) 41 *Hofstra Law Review* 1; Jack M Balkin, 'Old-School/New-School Speech Regulation' (2014) 127 *Harvard Law Review* 2296; Jack M Balkin, 'Cultural Democracy and the First Amendment' (2016) 110 *Northwestern University Law Review* 1053; Jack M Balkin, 'Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation' (2018) 51 *UC Davis Law Review* 1149.

[37] Balkin, 'How Rights Change', above n 36, 12.

for books and nonprofit publications'.[38] Because he understands legal rights as *individual*—not really surprising in the US context—the wider structural elements of rights to communication are understood as being largely beyond the reach of free speech law:

> The model of judicial protection of individual rights remains crucially important in the digital age. But it will not be able to protect freedom of speech fully. The digital age makes increasingly apparent what has always been the case—that the system of free expression relies on something more than the sum of all individual free speech rights. It relies on a technological and regulatory infrastructure. That infrastructure is produced through government regulation, through government subsidies and entitlement programs, and through technological design.[39]

This infrastructure leads Balkin to argue for a shift from understanding free speech primarily in terms of *rights* to recognising free speech *values* across a wider range of activities, values about participation, interactivity and encouraging creativity.[40] These values will be relevant across the infrastructure of free speech, which is produced through regulation, subsidies and technology. But the idea that legal protection of free speech—including protection through courts—might reach those issues and affect aspects of the infrastructure of public speech is not examined in any detail. To put it another way, the idea that rights to free speech need not be solely individual rights is left aside. The point I would note in contrast is that parts of those 'values' *can* be understood as 'rights', enforced through laws and at times framed by courts, as emerges in later chapters.

Addressing 'the future of freedom of expression' in 2009, Balkin sets out various goals for knowledge and information policy, within which free speech is subsumed. These include:

- developing a healthy and vibrant public sphere of knowledge and opinion;
- ensuring that knowledge production and opinion formation come from a broad, diverse, and antagonistic set of sources;
- encouraging widespread participation in knowledge production and dissemination; [and]
- developing human capacities through securing widespread access to knowledge and information technology.[41]

The exploration of these goals—of how a 'vibrant' public sphere comes about, how knowledge comes from 'broad, diverse and antagonistic' sources and so forth—is limited to matters of encouraging commercial competition and considering various approaches to intermediary liability. While such matters are far from irrelevant, they also appear to be far from sufficient. This is not brought out explicitly, although it is suggested by Balkin's earlier work. My sense is that much of this later analysis aims at something close to my understanding of the role of public speech, but takes a different approach to pursuing it, perhaps because of the US context in which Balkin is positioned.

In part, the freedom's positive dimensions may have been left aside as the complexity of Balkin's analysis developed. For example, the 2018 paper, 'Free Speech is a Triangle', categorises the multiple actors involved in contemporary speech regulation into a three-sided model.[42] The first comprises nation states, international organisations and supranational bodies such as the European Union. The second involves internet-infrastructure companies, including search and social media

[38] Balkin, 'Digital Speech', above n 36, 50-51.
[39] Ibid 51.
[40] Ibid 52.
[41] Balkin, 'Future of Free Expression', above n 36, 440-443.
[42] Jack M Balkin, 'Free Speech is a Triangle' (2018) 118 *Columbia Law Review* 2011, 2014-2015.

companies, domain name system registrars, caching and cyber-defence businesses, and payment services. With the third, Balkin groups individual speakers, legacy media, civil society groups, hackers and trolls. By way of shorthand, here the three sides are called states, internet companies and speakers.

Balkin outlines ways in which states still regulate speakers through 'old-school speech regulation'; states regulate internet companies, often through co-optation or 'new-school speech regulation' (in addition, companies willingly cooperate in many ways with states); and internet companies regulate speakers through private governance while also engaging in extremely extensive surveillance of speakers. Of course, state attempts to co-opt industry are not new in themselves and private governance of speech has long existed, even if the context differed. As just one example, think of longstanding concerns about commercial media limiting the content of publications due to real or perceived pressure from advertisers.

The classification set out by Balkin may well be useful in thinking about some complexities of contemporary free speech; it also raises challenges for further analysis.[43] But my interest here is just to note that positive dimensions of the freedom do not register explicitly in the analysis (or do not register much). The techniques of state regulation of speakers that are mentioned concern negative free speech,[44] while state control of internet companies is discussed in terms of collateral censorship and prior restraint.[45] In response, Balkin argues for multiple forms of regulation to protect free speech values. The regulation would aim to reduce collateral censorship and prior restraint, and to protect people from surveillance and manipulation. Notably, not all state regulation of digital infrastructure is suspect:

> Some regulations do not produce the problems of new-school speech regulation—collateral censorship and digital prior restraint. To the contrary, they actually protect free speech values. These kinds of regulations may not only be perfectly appropriate, they *may actually be necessary to provide practical freedom for end users*.[46]

As examples, Balkin includes local broadband projects and network neutrality requirements, as well as competition law. *Practical* freedom of communication—others might well say effective or positive freedom—is raised in passing, but this does not go nearly as far as Balkin's earlier work. And it is not immediately apparent that the changes in communications warrant the degree of change in analysis.

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[43] As one example, Balkin suggests the fact that internet companies act as private governors in relation to much speech does not mean they should be subject to 'public forum' doctrines, in part because this would lead online fora to become 'ungovernable' (by the internet companies) and prevent, among other things, social media companies imposing civility norms on speech: Balkin, 'Free Speech is a Triangle', above n 42, 2025-2027. An alternative response to this situation of private governance could be that First Amendment doctrine itself needs revising: the example of social media might suggest First Amendment rules should, in some ways, come closer to the style of speech regulation that is legally accepted in other democracies. A second example involves the concept of information fiduciaries. In this and other recent papers, Balkin suggests internet companies should be treated as information fiduciaries in relation to their users. For criticism of the idea, emphasising important differences between the usual fiduciary relationship and the relationship of internet company and user (as well as the similarities that Balkin notes), see Lina M Khan and David E Pozen, 'A Skeptical View of Information Fiduciaries' (2019) 133 *Harvard Law Review* 497.

[44] Balkin, 'Free Speech is a Triangle', above n 42, 2015-2016.

[45] Ibid 2016-2019.

[46] Ibid 2033 (emphasis added).

Certainly, the idea of an *infrastructure of free expression* that features in Balkin's later work is useful.[47] Free communication requires more than merely a negative liberty to speak, the structures underlying public speech are clearly important, and the stakes in all this are significant. In Balkin's analysis this is undoubtedly so: 'Good policy and good design promote democracy and a democratic culture; bad policy and bad design foster oligarchy, aristocracy, and even totalitarianism.'[48] But the analysis seems too quick to leave the wider infrastructure of free speech to commercial competition and matters of policy, even if that policy is informed by free speech values. Other possibilities could arise from free speech. Greater attention could be given to how law can frame at least some aspects of the structures underlying public speech, how it can do so as part of constitutional requirements for free speech, and how this might be required because the political process is poorly placed to create *by itself* the conditions—the communicative infrastructure—for its own legitimacy.

Another way to understand this point is that Balkin, correctly I would suggest, understands free speech as being larger than the generally negative freedom seen in judicial interpretation of the First Amendment. The First Amendment is 'an information policy for democracy', but one which needs assistance from an infrastructure of free expression.[49] Yet, whether or how the legal interpretation of the First Amendment could be revised in relation to that infrastructure is not considered closely. Such a revision to US judicial approaches may be improbable in the short term, but exploring what it would entail and what is lost by its absence could be telling. And doing so could add weight to arguments for policy decisions along the general lines that Balkin sets out.

Sunstein's new deal for democracy, diversity and (limited) government action

At a similar time to Balkin's earlier analysis, Sunstein also explored a 'New Deal' for speech. He argues for public speech. that gives 'broad and deep attention to public issues' and contains 'a broad spectrum of opinion' so people can (and do) hear 'sharply divergent views' and 'challenges to the conventional wisdom'.[50] The analysis contains points noted already from other US writing related to democracy, diversity and government action, and suggests courts should carefully evaluate rather than prompt such action. Sunstein criticises the language of positive rights because the positive-negative distinction breaks down due to the multiple ways in which state action can be characterised. It is another version of the point that the state is always involved. (While noting the point in chapter 1, I suggested the positive and negative labels remain valuable in thinking about dimensions of free speech.) In effect, Sunstein argues for property law to be understood as itself being a restriction on speech rather than, for example, property being limited by a positive speech right. He shows the

[47] The word 'infrastructure' appears in the same general sense across a range of free speech writing; see eg Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech under the Indian Constitution* (New Delhi: Oxford University Press 2016) ch 7 'The Meaning of "Freedom": Free Speech and Economic Structure'; Julie E Cohen, 'Affording Fundamental Rights: A Provocation Inspired by Mireille Hildebrandt' (2017) 4 *Critical Analysis of Law* 78; Philip Pettit, 'Two Concepts of Free Speech' in Jennifer Lackey (ed), *Academic Freedom* (Oxford: Oxford University Press 2018) 61; Ananny, above n 5. Some writing uses 'architecture' for a similar point, including Cohen, ibid; Ammori, above n 9; see generally Jeremy K Kessler and David E Pozen, 'The Search for an Egalitarian First Amendment' (2018) 118 *Columbia Law Review* 1953.

[48] Balkin, 'First Amendment Information Policy', above n 36, 8.

[49] Ibid 30. The approach's structure resembles the analysis of Schauer discussed in chapter 2: Frederick Schauer, 'Hohfeld's First Amendment' (2008) 76 *George Washington Law Review* 914.

[50] Cass Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press 1993) 20-22.

approach is not unknown under First Amendment law, which compels the provision of certain subsidies; for example, where a hostile audience is threatening a speaker, government has an obligation to protect the speaker. '[R]easonable crowd control measures are probably constitutionally compelled before the speaker can be silenced.'[51] As noted in chapter 3, such a requirement is frequently analysed as a positive dimension of free speech.[52] Even if Sunstein criticises a bare recourse to the language of positive rights, he outlines how the First Amendment does have 'positive *dimensions*'. These dimensions require government 'to take steps to ensure that the system of free expression is not violated by legal rules giving too much authority over speech' to private interests.[53]

Sunstein also considers media economics. He initially observes it 'is hardly clear' that free speech 'is promoted by a regime in which people are permitted to speak if and only if other people are willing to pay enough to allow them to be heard'. Rather, the result is that 'some will be unable to speak or to be heard at all', while 'others will be permitted to dominate expressive outlets'.[54] Such statements might be thought to precede arguments for state funding of certain structures of speech—funding for public media, for example—but here it is more about measures like the fairness doctrine and its effects on commercial media limiting diverse speech. Although focussing on broadcasting, Sunstein states the arguments also apply to print. However, his vision for reform is modest. In short, he suggests markets will provide 'a large degree of diversity':

> So long as the particular view is supported by market demand, it should find a supplier. Free markets in speech do offer an extraordinary range of opinions and options. For this reason, the broadcasting status quo is far preferable to a system of centralized command-and-control regulation of the sort that could be found, for example, in many communist nations.[55]

While one could well agree with his final point that the then-existing (or recently-existing) communist media systems were problematic for free speech, it is not clear why they are the only two options presented, nor on what basis it is thought that speech within a commercial market is an appropriate measure of diversity. It is better than nothing, but is it sufficient? One is reminded of Jonathan Weinberg's comments about the exaggerated binaries that tend to be set up in First Amendment analysis. In relation to press freedom, Weinberg states that commentators

> first conclude that the marketplace model is preferable to a regime in which the government is wholly free to suppress speech (as if those were the only two choices), and then make law as if the [marketplace] model were unflawed.[56]

As noted in chapter 2, Weinberg also suggests that US media is understood to contain a wide spectrum of views only by those with opinions 'in the same ballpark' as the media's or who are simply used to

[51] Ibid 47. On the hostile audience and state expenditure more recently, see eg Frederick Schauer, 'Costs and Challenges of the Hostile Audience' (2019) 94 *Notre Dame Law Review* 1671.

[52] See eg Eric Barendt, 'Freedom of Expression' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford: Oxford University Press 2012) 891, 898.

[53] Sunstein, above n 50, 47 (emphasis added).

[54] Ibid 50.

[55] Ibid 55-56.

[56] Jonathan Weinberg, 'Broadcasting and Speech' (1993) 81 *California Law Review* 1101, 1190.

that mix of media.[57] One could equally look to research by Edwin Baker, Toril Aalberg and others,[58] also examined in chapter 2, which does not support the idea that commercial media provide a large degree of diversity across multiple dimensions.

Notwithstanding markets' asserted strengths in supporting serious and diverse public speech, Sunstein notes a constitutional challenge might succeed '*if* it could be shown that the existing system of property rights produces little political discussion or excludes the range of views necessary to offer diversity'. However, courts should be 'extremely cautious' about such matters because they involve 'complex factual and managerial issues not easily within judicial competence'. For Sunstein, 'if the democratic process has selected a market system, courts should be reluctant to intervene'.[59] Thus, he recommends *legislative* action in support of public speech, with courts evaluating the action using a broad understanding of free speech. But there is no consideration of whether a democratic process can 'choose' to adopt a market system for speech in a substantially legitimate fashion without there already being some degree of diversity in public speech beyond that provided by a market system of speech. As will be seen in later chapters, that is an argument for courts having an obligation to act in support of positive free speech.

Stein and democracy's communicative prerequisites

More recently, Stein has analysed 'defensive' and 'empowering' speech rights.[60] Notably, she considers various prerequisites for democratic forms of government, including *communicative prerequisites*. Again, actors other than courts have primary responsibility. Interestingly, however, some of her analysis mirrors principles of German free speech law examined in chapter 6. It may be unintentional, but the similarities suggest the German example need not be thought so foreign when considering the reform of predominantly negative approaches to free speech such as current US law.

Stein starts from positive or effective freedom, referencing a range of political theory.[61] She suggests 'the empowering approach' to speech defines freedom in terms of ability to act, or capacities to act, 'and permits the state to create and protect the conditions necessary to ensure that freedom of speech is widely available'.[62] In terms of democratic communication, a key requirement is the 'right to send and receive communication in spaces that are *free from market and government coercion* alike'.[63] Law needs to take note of the *economics of speech systems* and how it leaves some audiences and content ignored. And media should be recognised as *key sites for opinion formation*. The three italicised points all resemble elements in German law, but the recommendations from Stein's

[57] Ibid 1152 (footnote omitted to C Edwin Baker, 'Advertising and a Democratic Press' (1992) 140 *University of Pennsylvania Law Review* 2097, 2242).

[58] C Edwin Baker, *Media, Markets, and Democracy* (Cambridge: Cambridge University Press, 2002); Toril Aalberg and James Curran (eds), *How Media Inform Democracy: A Comparative Approach* (New York: Routledge 2012).

[59] Sunstein, above n 50, 56 (emphasis in original).

[60] Laura Stein, *Speech Rights in America: The First Amendment, Democracy, and the Media* (Urbana: University of Illinois Press, 2006).

[61] See eg Thomas Hill Green, *Lectures on the Principals of Political Obligation* (London: Longmans, Green and Co 1895); John Dewey, *The Public and Its Problems: An Essay in Political Inquiry* (New York: Henry Holt 1927); Benjamin R Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley: University of California Press 1984).

[62] Stein, above n 60, 10.

[63] Ibid 115 (emphasis added).

analysis—such as media access rights and 'hybrid' regulatory models[64]—are less substantial than might follow, as chapter 6 illustrates through the German example.

Stein's work, which contrasts 'neoliberal' and 'participatory' democratic theories and prefers the latter, illustrates a feature common to the examples considered here; namely, they would generally be understood to sit on the political 'left'. Positive freedom, as a general concept, has clear resonance with ideas of social democracy.[65] The same may be true of much writing taking similar approaches to free speech. However, as considered in chapter 3, the argument applies to a wider variety of political positions and approaches to democracy. Positive dimensions of free speech are necessary for speech to meet its democratic role as 'the constitution of the constitution' and not only for a social democratic constitution.[66]

All the above examples suggest public speech has central importance for democratic government. Diversity in speech is sought, as well as freedom from political and market pressures. The diversity needs to be promoted by government action, and that action should (generally) not be taken by courts. Instead, it is for other institutional bodies to act, with later judicial evaluation of their actions drawing on positive and negative dimensions of free speech. There are instances, however, that suggest courts do have obligations to act, by defining a range of alternatives for other institutional actors or directing them to propose their own alternatives which would be subject to legal review.

Beyond those examples, it is useful to consider a second group of works from Owen Fiss, Allan Hutchinson,[67] Paul Chevigny and Susan Williams. They emphasise three important matters for positive free speech: the constraints of existing speech systems; the combination of structural and individual interests in speech; and the fact that government cannot be fully neutral about speech.

Fiss and constitutional preconditions for self-government

In *The Irony of Free Speech*, Fiss begins from the idea that the state can be a source of social or public freedom. In terms of speech, this means 'the state may have to act to further the robustness of public debate'.[68] He expressly links this to the communicative requirements of democracy:

> The state is not trying to arbitrate between the self-expressive interests of the various groups but rather *trying to establish essential preconditions for collective self-governance* by making certain that all sides are presented to the public.[69]

Fiss considers the implications for public broadcasting, and suggests it is incorrect to assume 'the Constitution is indifferent as to the existence of public broadcasting'. Unlike many US analyses, he states public broadcasting should not just be left to 'the fortunes of politics'.[70] These are strong

[64] That is, models which apply aspects of US regulatory approaches for print, broadcast and common carriers to one form of media.

[65] See eg Victor Pickard, 'Toward a People's Internet: The Fight for Positive Freedoms in An Age of Corporate Libertarianism' in Maria Edström, Andrew T Kenyon and Eva-Maria Svensson (eds), *Blurring the Lines: Market-Driven and Democracy-Driven Freedom of Expression* (Gothenburg: Nordicom 2016) 61.

[66] See chapter 3; as discussed there the quoted words are taken from Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford: Oxford University Press 2016) 6.

[67] While UK-trained and Canadian-based in career, Hutchinson is addressing US issues and audiences in this work, and so is considered here.

[68] Fiss, above n 9, 4-5.

[69] Ibid 18 (emphasis added).

[70] Ibid 76.

statements in the US context. The state must seek to establish essential preconditions for self-government, and constitutionally protected free speech requires public broadcasting. However, US style public broadcasting may be what is being considered here. Such broadcasting has some resemblance to what is often called community broadcasting elsewhere,[71] and it has a 'negligible role' in comparison to public broadcasting in places such as the UK or Germany.[72] Even so, the ideas that diversity in public speech is a precondition for democracy and requires more than a negative freedom are not often so clearly made in US legal literature.

Hutchinson and speech in a dialogic community

Hutchinson has subsequently criticised Fiss for lacking detail as to *how* the state should act to support free speech. On that point, one might recall Emerson's observation decades earlier that the contours of such a 'solution' largely remain an 'open question'.[73] Hutchinson focuses on *dialogue* and a *dialogic community* rather than *individual* speech rights. As well as moving beyond an individual focus, the work clearly recognises that all communication shapes subsequent communication:

> There is no form of pure communication that merely represents instead of creating. Language is a social medium: it shapes society and its individuals as they work to reshape it. No one is free to describe the world as they wish; they are always already constrained by the prevailing ways of speaking, by the package of foundational beliefs and assumptions about reality and the individual's place within it.[74]

For Hutchinson, state action needs to follow the idea of *dialogue* and equality within it—'to promote the equality between participants necessary for an effective dialogue, the state will have to intervene, and the intervention will be based on the value of dialogue itself'.[75] Although he does not use the term, the idea is something like the concept of 'voice' that appears in a range of media studies work,[76] and indeed like Rosanvallon's democracy of expression.[77] As Hutchinson puts it, people need 'to be heard and to be answered'.[78] State action aims 'to establish and maintain the social conditions for open-ended, continuing and meaningful conversations in which people emerge as equals.'[79] While

[71] Eg Lesley Hitchens, *Broadcasting, Pluralism and Diversity* (Oxford: Hart 2006) 25. She gives the example of Australia, which has a comparatively well-developed system of community radio (and a smaller, weaker community television sector) and outlines then recent developments in the UK. United States media also has what might be called 'actual' community or public access broadcasting, an even less-resourced sector sitting alongside public broadcasting; see eg Laura R Linder, *Public Access Television: America's Electronic Soapbox* (Westport: Praeger 1999).

[72] Paul Jones, 'The Best of Both Worlds? Freedom of Communication and 'Positive' Broadcasting Regulation' (2001) 23 *Media, Culture and Society* 385, 390. Barwise and Picard describe the US PBS as a 'minor' and 'barely relevant sideshow': Patrick Barwise and Robert G Picard, *What If There Were No BBC Television? The Net Impact on UK Viewers* (Oxford: Reuters Institute for the Study of Journalism 2014) 1 and 63.

[73] Emerson, above n 9, 728.

[74] Hutchinson, above n 9, 24.

[75] Ibid 25.

[76] See eg Nick Couldry, *Why Voice Matters: Culture and Politics After Neoliberalism* (London: Sage 2010); Justin Lewis, 'The Commercial Constraints on Speech Limit Democratic Debate' in Edström, Kenyon and Svensson, above n 4, 91.

[77] See chapter 1 and Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (translated by Arthur Goldhammer) (Cambridge: Cambridge University Press 2008) 20.

[78] Hutchinson, above n 9, 25.

[79] Ibid 25-26.

offering a goal for state action, the detail of how these 'Ungerian-style social entitlements to open discourse'[80] would be pursued is largely left aside. Hutchinson rather develops a value that could direct state action.

Chevigny's dialogue and access

As Hutchinson notes, his analysis has similarities to Chevigny's approach to free speech based on dialogue and the indeterminate quality of language. Chevigny does not focus only on democratic forms of government, instead being concerned with 'the general sources of legitimacy for modern governments' of various forms.[81] He sees rights of expression as having a particular priority in social arrangements because of the value of dialogue. Much of his analysis focuses on negative dimensions of free speech, but positive dimensions are also addressed in the form of media access. Indeed, the positive dimensions are significant in his consideration of free speech justifications.

A 'dialogical' approach to speech highlights that discourse occurs through systems of public communication to which all participants have strong interest in gaining access:

> At the heart of dialogical freedom of expression … is participation, the notion of dialogue in aid of appropriate decisions; the need for a right of access is much closer to the central justifications for the freedom.[82]

Chevigny is unconvinced by a purely negative approach to the freedom, which holds that all necessary information and opinion, all access to the dialogue 'can be supplied through the mechanism of free personal expression and an independent, private press'. He states simply, 'I cannot share that faith.' In those conditions, media will not present a wide range of alternative views and will not undertake 'fundamental criticism'. Instead, it will be 'systematically skewed towards the status quo'.[83] However, what flows from this analysis is somewhat limited. 'The most we can do is try to create legal structures that may somewhat compensate for the most obvious systematic biases.'[84] While that may be true, what those structures would be and how they would be arrived at—by what combination of actions by legislature, executive, regulator and court, for example—could be further examined within particular contexts.

Williams and relational narrative autonomy

More recently, Williams has considered structural dimensions of free speech, noting the limited quality of *any* communicative freedom due to speech's dependence on existing practices of communication. One of her major interests is narrative autonomy. She considers speech systems—such as media markets, library collections and political campaign financing—that provide opportunities to exercise narrative autonomy or help to develop capacities for it.[85] Williams takes a relational approach, emphasising the importance of 'certain social conditions' that exist in the form

[80] Ibid 26; and see eg Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Cambridge: Cambridge University Press 1987) 508-539.

[81] Paul Chevigny, *More Speech: Dialogue Rights and Modern Liberty* (Philadelphia: Temple University Press 1988) 18.

[82] Ibid 79.

[83] Ibid 125.

[84] Ibid 128.

[85] Susan H Williams, *Truth, Autonomy, and Speech: Feminist Theory and the First Amendment* (New York: New York University Press 2004) 199.

of speech systems.[86] One could say a certain state of affairs is what is required in relation to speech, to pick up phrasing used earlier.[87] For Williams, connections between narrative autonomy and social relationships underlie speech's democratic role. She notes the argument, as put by Robert Post, that the government cannot impose 'substantive standards on the public debate through which the political community constitutes itself.'[88] But she recognises 'there is no position of simple neutrality for government here'.[89] That is, government cannot avoid imposing standards on public debate: *all choices made about the structure of communicative systems have effects*. The 'government has always already acted, if only to set up the underlying property and contract regimes that generate speech opportunities'.[90] Williams continues:

> The great fear of government control over speech systems should not blind us to the fact that our present speech systems are also the product of government regulation. Once we recognize that we already live under conditions in which the government has structured our speech systems in ways that are often detrimental to our autonomy, perhaps the fear of allowing government to try to do better will abate a bit. Surely we cannot believe ourselves better off, our autonomy better protected, by refusing to allow government to do—*with conscious consideration and according to constitutional standards*—what it has already done unconsciously and with damaging consequences for the constitutional value of autonomy.[91]

As that quote suggests, the analysis lends itself to legislative or executive action, with careful review by courts informed by both positive and negative dimensions of free speech. Williams links narrative autonomy to a discursive model of democracy, and explores how the role of speech should be understood within discursive democracy. Beyond the 'quality' of debate—that is, its diversity and attention to public issues—she adds the importance of participation. For this understanding of democracy, it 'matters not only that we get the right result but also that I have the chance to participate in the process'.[92] Williams also recognises that 'some people are less likely to speak, less likely to be heard, or less likely to be taken seriously or believed' than others under current conditions of public speech. And she underlines that 'the public dialogue through which our future stories are shaped is limited by the inequalities generated by the present dialogue'.[93] No speech is simply or completely 'free'. Overall, there is recognition of both a need for action and contextual limits to any resulting freedom.

Conclusion

The examples of US legal writing prompt at least seven points relevant to positive free speech:

- Diverse public speech has a central place in democratic forms of government.

[86] Ibid 207.

[87] See chapter 1 and Robert Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers) (Oxford: Oxford University Press 2002) 330.

[88] Williams, above n 85, 217 quoting Robert C Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge MA: Harvard University Press 1995) 278.

[89] Williams, above n 85, 217.

[90] Ibid 219.

[91] Ibid 221 (emphasis added).

[92] Ibid 225.

[93] Ibid 228.

- Diversity in public speech needs government action; action that is generally, but not always, suggested as being for other institutional actors than courts. The requirement is not just some version of 'freedom from'. Rather, free speech requires government action towards sustained and diverse public discourse in support of an effective freedom of communication. Among other things, government can need to finance discursive opposition to its own positions.
- Government cannot avoid acting in ways that affect public speech and, instead of denying that fact, action should be taken consciously and to constitutional standards. Otherwise, free speech resembles an unreflective and uncontrolled 'state enforced monopoly' in the structure of 'the means of communication'.[94]
- Some examples explicitly note that media need varied economic bases, not only commercially dominated ones, because of audience rights in diverse public speech and the requirement for diverse public fora.
- Such a structure or architecture of public speech is a precondition for substantial democratic legitimacy. This reflects ways in which free speech has collective dimensions. Public debate or deliberation is not a solitary mode of speech and, while free speech has important individual dimensions, it is also a collective political good.
- Even if such an approach to free speech was to come about, it would not generate communicative freedom in some 'pure' sense. Public speech occurs within existing practices of speech, within discursive contexts which enable and constrain speech. At the same time, requirements of democratic government entail a broad ability to participate in the creation of discursive contexts.
- While the examples often suggest that entities other than courts act in support of positive free speech, if or when courts did act they could define alternatives for speech within which the legislature or executive could choose, or prompt those branches to propose other alternatives, which courts would then evaluate in light of positive and negative dimensions of free speech.

While all the above might sound utopian or unrealistic, there is a sense in which it is at base pragmatic: freedom is never completely realised.[95] The aim is to promote an architecture for diverse public speech but—recognising that the goal is always a matter of degree and is never fully achieved—the interest lies in actions that would promote such an architecture or framework, even if only partially. Free speech can *only* exist in a 'rough but practical' manner,[96] but it can be denied through absolutes, such as the idea that solely negative freedom is relevant to free speech.

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[94] Balkin, above n 9, 410.

[95] The approach is not utopian in the sense of completely realising an ideal; rather, it emphasises free speech's quality as never-completely-realised. In a related context addressing freedom, Wellmer states

> modernity … is intimately linked with a universalist idea of freedom. Freedom, however, is not the sort of thing that could ever be realized in a definitive or perfect sense; the project of modernity, therefore, is not the kind of project that could ever be 'completed' … The open-ended character of the project of modernity implies the end of utopia, if utopia means 'completion' in the sense of a definitive realization of an ideal.

Albrecht Wellmer, 'Models of Freedom in the Modern World' in Albrecht Wellmer, *Endgames: The Irreconcilable Nature of Modernity, Essays and Lectures* (translated by David Midgley) (Cambridge MA: MIT Press 1998) 3, 36.

[96] Emerson, above n 9, 667.

6 German Broadcasting Freedom

Germany's constitutional protection of broadcasting freedom has clear parallels with ideas about positive free speech.[1] The former German constitutional judge, Dieter Grimm, sets out the approach: democracy requires public discourse which in turn requires a 'comprehensive freedom of communication' with 'active' as well as 'passive' dimensions.[2] He was not speaking about Germany directly, but the words describe that context. German free speech is said to be a 'facilitative freedom',[3] in which communicative freedoms are recognised as 'absolutely constituent elements in any free democratic state order'.[4] Rights of communication are 'pivotal … to a functioning democracy' because democracy requires 'as a precondition' that citizens have 'sufficient information and open debate on politically, socially, and culturally relevant topics'.[5] The need for information and debate does not only entail electorally-focused communication about parties and candidates. Grimm explains the need is for 'a forum where people can venture and exchange ideas independently', where the public can gain 'an unvarnished picture of its political, social, cultural, economic situation', where society's developments can be observed and criticised, and where its 'shortcomings and scandals' can be exposed.[6] All that could be described as a forum in which society has a voice, formulates judgments, and makes claims of government that can be heard and have effects; that is, a democracy of expression.[7] German law, particularly the constitutional treatment of broadcasting, clearly resonates with ideas of positive free speech. It is not that German law encapsulates the positive dimensions of communicative freedom in some complete sense, but the law seeks to support certain aspects of free speech for reasons that are quite consistent with positive communicative freedom.

English-language literature has already examined German free speech law, but further consideration is useful here.[8] What makes the German situation notable for my purposes is

[1] A much shorter version of this chapter (approximately half as long) appears in Andrew T Kenyon and Andrew Scott (eds), *Positive Free Speech: Rationales, Methods and Implications* (Oxford: Hart 2020) 83 'The State of Affairs of Freedom: Implications of German Broadcasting Freedom'.

[2] Dieter Grimm, 'Freedom of Speech in a Globalized World' in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford: Oxford University Press 2009) 11, 11.

[3] W Cole Durham, 'General Assessment of the Basic Law: An American View' in Paul Kirchhof and Donald P Kommers (eds), *Germany and Its Basic Law: Past, Present and Future* (Baden-Baden: Nomos 1993) 37, 45-46.

[4] Christian Starck, 'Introduction' in Christian Starck (ed), *New Challenges to the German Basic Law: The German Contributions to the Third World Congress of the International Association of Constitutional Law* (Baden-Baden: Nomos 1991) 15, 19.

[5] Nigel G Foster and Satish Sule, *German Legal System and Laws* (4th ed, Oxford: Oxford University Press 2010) 253.

[6] Grimm, above n 2, 15.

[7] See chapter 1 and Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (translated by Arthur Goldhammer) (Cambridge: Cambridge University Press 2008) 20.

[8] Existing research primarily considers the law in West Germany or reunified Germany, and I will use 'Germany' to refer to both those contexts. Given my interests in this book, it is notable that East German law *did* on paper provide freedom of speech, but one enacting Isaiah Berlin's concerns with positive freedom (and a lack of negative freedom) discussed in chapter 4; see eg Martin Bullinger, 'The Constitution and Communication' in Starck, above n 4, 43, 44 (describing a '"positive" freedom of communication' aimed at a specific goal; namely, 'to further the evolution towards a socialist society, and to assist the governing communist party'). It was also a context in which negative dimensions of free speech were entirely subject to party control: see eg Isabelle

constitutional adjudication's central role in attempts to foster at least some aspects of positive free speech. The Federal Constitutional Court (*Bundesverfassungsgericht*) has sustained its analysis across six decades, in broadly consistent terms. Beyond consistency and precedential value,[9] the decisions have made the court a particularly powerful actor for media. As Wolfgang Hoffmann-Riem observed, only in Germany has 'the law be employed so massively as a battleground and weapon for changing the order of broadcasting'.[10] Broadcasting 'has been ruled, at least partially, by decisions' of the court;[11] which 'has been the most influential and determining factor in German media policymaking';[12] it has significantly affected the 'very structure of television, and in particular the balance between the public and private systems'.[13] Indeed, media studies analyses of German broadcasting that do not examine the court and its role, at length, are exceptional.[14]

The broadcasting decisions have also been important in terms of the court's own status. The first television ruling in 1961 has been called 'the Magna Carta of German broadcasting'[15] and was immediately seen as highly consequential:

> [With that decision] the Federal Constitutional Court may really be said to have come of age, for, for the first time, a … decision put the court into direct conflict with the *Bund* [Federal] government on a matter of policy which the *Bund* government considered vital; and so far the court has been able to emerge from the struggle bloodied, perhaps, but unconquered certainly.[16]

In international terms, it is worth underlining the German approach is not an entirely 'separate path'.[17] Existing legal research mentions jurisdictions such as Argentina, France, Italy, Japan, the Netherlands, Portugal and Spain where 'legal systems ascribe an objective law dimension to the basic right of the freedom of broadcasting' which 'compels the state to legally structure the broadcasting

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Bourgeois, '*Les médias dans l'Allemagne unie: De l'unification démocratique à la normalisation du marché*' (2010) nos 98-99 *Regards sur l'économie allemande* 63.

[9] The court's decisions have the weight of precedent in a manner familiar in common law systems.

[10] Quoted in Suzanne Hasselbach and Vincent Porter, 'The Re-Regulation of West German Broadcasting: Recent Decisions of the Federal Constitutional Court' (1988) 1(2) *Politics and Society in Germany, Austria and Switzerland* 48, 48.

[11] Karen Arriaza Ibarra, 'Management and Organization of Public Service Media Companies: Basic Concepts Related to Efficiency and Failure in European Public Service Media, with Two Case Examples (Germany and Spain)' in Karen Arriaza Ibarra, Eva Nowak and Raymond Kuhn (eds), *Public Service Media in Europe: A Comparative Approach* (Abingdon: Routledge 2015) 147, 155-156.

[12] Christian Potschka, *Towards a Market in Broadcasting: Communications Policy in the UK and Germany* (Basingstoke: Palgrave Macmillan 2012) 7.

[13] Eric Barendt, 'The Influence of the German and Italian Constitutional Courts on Their National Broadcasting Systems' [1991] *Public Law* 93, 93.

[14] See eg Donald R Browne, *Comparing Broadcast Systems: The Experiences of Six Industrialized Nations* (Ames: Iowa State University Press 1989).

[15] Potschka, above n 12, 162 citing Hans Bausch (ed), *Rundfunk in Deutschland*, volume 3 (Munich: Deutscher Taschenbuch Verlag 1980).

[16] Edward McWhinney, *Constitutionalism in Germany and the Federal Constitutional Court* (Leiden: Sythoff 1962) 60. For background to the decision, see eg Potschka, above n 12, 158-163; Justin Collings, *Democracy's Guardians: A History of the German Federal Constitutional Court 1951-2001* (Oxford: Oxford University Press 2015) 68-80.

[17] Bernd Grzeszick, 'The "Serving" Freedom to Broadcast: Subjective versus Objective Dimensions of a Fundamental Right' in Hermann Pünder and Christian Waldhoff (eds), *Debates in German Public Law* (Oxford: Hart 2014) 75, 75.

corporations in a particular way'.[18] And some of those examples make direct use of the German approach; for example, in 2013 the Argentinian Supreme Court explicitly drew on German case law when upholding, on free speech grounds, legislation limiting media ownership.[19] There are also common law examples that take similar approaches to areas of free speech.[20]

The German example is also interesting for the reasoning in the decisions. The key point for present purposes is the degree to which requirements of free speech underlie the decisions. Under the German constitution, free speech is not only an individual right, but has structural implications that call for particular forms of state action. Clearly, the reasoning arises in certain historical, political and legal contexts—the Federal Constitutional Court applies 'a doctrinal and methodological framework rooted in national traditions' as well as its particular cultural context.[21] In Germany, it is widely accepted that the state takes a more activist role than under, for example, the US constitution.[22] But the Federal Constitutional Court's reasoning is not, on its own terms, limited. Rather, the approach raises questions for jurisdictions where positive dimensions of free communication are less recognised. Examining the German approach brings into focus points which are not even considered in some democratic legal systems. Whether or not the example suggests ways in which other constitutional courts are likely to act, it highlights aspects of what positive freedom of communication entails.

None of this is to suggest the court's approach is without weaknesses (some are discussed later in the chapter, related both to the ideas and their implementation) nor that German media is in some sense exemplary. But the German example has important implications for free speech in democracies. German law supports a *dual broadcasting system* with substantial public and

[18] Ibid 90. Grzeszick, 90-91, notes Spain, Italy, Portugal, the Netherlands, Japan and France (including French decisions more recent than those dealt with in Eric Barendt, *Freedom of Speech* (2nd ed, Oxford: Oxford University Press 2005). See also eg Christian Calliess, 'Dimensions of Fundamental Rights: Duty to Respect versus Duty to Protect' in Pünder and Waldhoff, ibid, 27, 40 noting Austria, France, Ireland and the European Court of Human Rights; Agustina Del Campo, 'Current Trends in Argentina´s Freedom of Expression Jurisprudence' (2 May 2014) available via https://globalfreedomofexpression.columbia.edu; Giorgia Pavani, *The Structure and Governance of Public Service Broadcasting: A Comparative Perspective* (Cham: Palgrave Macmillan 2018) exploring the German law's influence on Spain.

[19] CSJN, *Grupo Clarín SA y otros c/ Poder Ejecutivo Nacional y otros/ acción meramente declarativa, Fallos*, G 439 XLIX (REX); G 445 XLIX; G 451 XLIX ; see eg Del Campo, above n 18.

[20] See eg Gautam Bhatia, *Offend, Shock, or Disturb: Free Speech under the Indian Constitution* (New Delhi: Oxford University Press 2016) 298, 300 discussing Indian Supreme Court decisions in which government-compelled speech in relation to exhibiting certain films was held 'to further free speech and expression and not to curtail it' because of the audience interest in diverse public speech; that is, the requirement was not an allowed *restriction* on speech but was *within* the freedom itself (*Union of India v Motion Picture Association* (1999) 6 SCC 150) and stating the danger of domination over broadcast content requires 'a central agency representative of all sections of the society free from control both of the Government and the dominant influential sections of the society' (*Secretary, Ministry of Information and Broadcasting v Cricket Association of Bengal* (1995) 2 SCC 161).

[21] Grimm, above n 2, 22.

[22] See eg Michaela Hailbronner, *Traditions and Transformations: The Rise of German Constitutionalism* (Oxford: Oxford University Press 2015) 179:

> Germans talk in very different, much more positive terms about the state and its role in society than do Americans—and they do so across the main political parties. And even though it took somewhat longer for constitutional law to reflect this political consensus, it is today an essential part of Germany's constitutional tradition.

commercial sectors (the court's approach concerns broadcasting not media more generally, which is a limitation also considered later in the chapter). Under this system, there are multiple public broadcasters: ARD, operating since the 1950s as a consortium of *Länder* or state broadcasters providing national and regional programming; and ZDF created in the 1960s as a national television service.[23] In addition, there are multiple commercial broadcasters (some sharing ownership), including RTL, Vox, Sat.1 and ProSieben. Approximate audience shares are near to 40% for the public broadcasters and between 5% and 10% for each of the others listed here (there are also other smaller services).[24] However, the dual system in itself does not make public media exempt from traditionally cited weaknesses, such as a relatively high degree of politically mainstream and elite content. It appears unorthodox views are 'often denied access'[25] and the public sphere has become even more 'marketized'.[26] German broadcasting, as a whole, has been described as 'centrist and rather narrowly defined', dominated by a 'spectrum of "established opinions"'.[27] The criticisms parallel those of public broadcasters elsewhere. Such observations may be accurate, but research also suggests content on German public media is distinct from that on commercial media.[28] Public media content may be open to criticism, but still be distinct from commercial content. And some assessments of public media content have been highly positive. Michael Geisler and Michelle Mattson describe German broadcasting under the public monopoly that existed until the 1980s as 'without a doubt among the most lively and innovative broadcasting structures in the world'.[29] They continue:

> Despite numerous attempts at political interference and bureaucratic structures that often turned innovative planning into a nightmare, German television between 1961 and 1984 (and perhaps beyond) provided an *open arena of unparalleled accessibility*—an opportunity to establish a truly

[23] ARD stands for *Arbeitsgemeinschaft der öffentlich-rechtlichen Rundfunkanstalten der Bundesrepublik Deutschland* (working group/association of public law broadcasting institutions/public broadcasting corporations of Federal Republic of Germany); ZDF stands for *Zweites Deutsches Fernsehen*, literally 'second German television'.

[24] See https://www.statista.com/statistics/380528/tv-channels-audience-market-share-germany (figures for 2016).

[25] Vincent Porter and Suzanne Hasselbach, 'Beyond Balanced Pluralism: Broadcasting in Germany' in Peter Dahlgren and Colin Sparks (eds), *Communication and Citizenship: Journalism and the Public Sphere in the New Media Age* (London: Routledge 1991) 94, 108.

[26] Wolfgang Streeck, 'Citizens as Customers: Considerations on the New Politics of Consumption' (2012) no 76 *New Left Review* 27, 37.

[27] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (translated by William Rehg) (Cambridge: Polity 1996, original German publication 1992) 377, citing Max Kaase, 'Massenkommunikation und politischer Prozess' (1989) 30 *Massenkommunikation: Kölner Zeitschrift für Soziologie und Sozialpsychologie Sonderheft* 97 (Mass Communication: Cologne Journal of Sociology and Social Psychology).

[28] See eg Henk Erik Meier, 'Beyond Convergence: Understanding Programming Strategies of Public Broadcasters in Competitive Environments' (2003) 18 *European Journal of Communication* 337; Runar Woldt, 'Public Service Broadcasting in Germany: Stumbling Blocks on the Digital Highway' in Petros Iosifidis (ed), *Reinventing Public Service Communication: European Broadcasters and Beyond* (Basingstoke: Palgrave Macmillan 2010) 171. For a summary of similar findings from 1990s research, see Peter Humphreys, 'Germany's "Dual" Broadcasting System: Recipe for Pluralism in the Age of Multi-Channel Broadcasting?' (1999) no 78 *New German Critique* 23, 49-50.

[29] Michael Geisler and Michelle Mattson, 'Introduction: After the Bardic Era—German Television Since 1984' (1999) no 78 *New German Critique* 3, 3.

democratic public medium that was systematically ignored by the vast majority of German intellectuals.[30]

Another point of caution concerns geography, or perhaps political geography. The role of German judges with regard to public broadcasting, along with the somewhat similar result pursued by parliaments in Nordic 'media welfare states',[31] could suggest the approach is a peculiarity of what Daniel Hallin and Paolo Mancini call 'democratic corporatist' systems of media and government.[32] In terms of history, that may hold some truth, even if Germany's 'social state' (*Sozialstaats*) can be distinguished from welfare states further north.[33] The French example, considered in the next chapter, would not sit so easily with that analysis (it is not a democratic corporatist state in Hallin and Mancini's terms) and other examples could be added.[34] In any event, understanding more about the German example still suggests weaknesses that might exist elsewhere. To that end, German law is examined here with an eye to the constitutional court's ideas about free speech and the techniques it applies.

Positive freedom: ideas and techniques

In 15 decisions from 1961 to 2018, the Federal Constitutional Court has set out detailed requirements about television broadcasting, drawing on Article 5 of the Basic Law (*Grundgesetz*).[35] When examining

[30] Ibid 3 and its note 3 (emphasis added) which also refers to Müller's early analysis of German broadcasting law as a version of Habermas's public sphere: Roswitha Müller, 'From Public to Private: Television in the Federal Republic of Germany' (1990) no 50 *New German Critique* 41. She observes that the German approach 'provided, for a short period of time, a spectrum of viewpoints large enough to accommodate programs to which even Brecht would have subscribed': ibid 46.

[31] See eg Trine Syvertsen, Gunn Enli, Ole J Mjøs, and Hallvard Moe, *The Media Welfare State: Nordic Media in the Digital Era* (Ann Arbor: University of Michigan Press 2014). Such a Nordic tendency may be more historical than current, see eg Marko Ala-Fossi, 'Finland: Media Welfare State in the Digital Era?' (2020) 11 *Journal of Digital Media and Policy* 133.

[32] See Daniel C Hallin and Paolo Mancini, *Comparing Media Systems: Three Models of Media and Politics* (Cambridge: Cambridge University Press 2004).

[33] See eg Arthur Williams, 'West Germany: The Search for the Way Forward' in Raymond Kuhn (ed), *The Politics of Broadcasting* (New York: St Martin's Press 1985) 83, 88.

[34] See above nn 18-19.

[35] There are some differences between commentators as to which decisions are included. I follow the enumeration given in Potschka (and Witteman), extended by a 14th decision in 2014 and a 15th in 2018:

- First, 28 February 1961 (12 BVerfGE 205)
- Second, 27 July 1971 (31 BVerfGE 314)
- Third, 16 June 1981 (57 BVerfGE 295)
- Fourth ('Lower Saxony'), 4 November 1986 (73 BVerfGE 118)
- Fifth ('Baden-Württemberg'), 24 March 1987 (74 BVerfGE 297)
- Sixth ('North Rhine-Westphalia'), 5 February 1991 (83 BVerfGE 238)
- Seventh, 6 October 1992 (87 BVerfGE 181)
- Eighth ('Cable Penny'), 22 February 1994 (90 BVerfGE 60)
- Ninth, 22 March 1995 (92 BVerfGE 203)
- Tenth, 17 February 1998 (97 BVerfGE 228)
- Eleventh, 20 February 1998 (97 BVerfGE 298)
- Twelfth, 11 September 2007 (119 BVerfGE 181)
- Thirteenth, 12 March 2008 (121 BVerfGE 30)
- Fourteenth ('ZDF Treaty'), 25 March 2014 (136 BVerfGE 9)
- Fifteenth ('Broadcasting Contribution Fee'), BVerfG, Judgment of the First Senate of 18 July 2018, 1 BvR 1675/16, 745/17, 836/17, 981/17, available via https://www.bundesverfassungsgericht.de.

German broadcasting, the 'communications constitution'[36] in Article 5(1) is the 'first and foremost'[37] point to consider. Article 5 protects freedom of expression, arts and sciences, and its first paragraph is traditionally translated in these terms:

> Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures, and to inform himself without hindrance from generally accessible sources. *Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed*. There shall be no censorship.[38]

One contemporary translation moves to gender neutral language and renders the highlighted second sentence as 'Freedom of the press and freedom of reporting through audiovisual media shall be guaranteed'.[39] This suggests something of the breadth of the provision, but there is more to the provision than either translation suggests.

Article 5 captures negative dimensions of free speech but is not limited to them. Its second sentence requires positive broadcasting freedom 'to guarantee that the diversity of existing opinion is articulated as broadly and thoroughly as possible and that comprehensive information is made available'.[40] Germany's *Länder*, which have constitutional responsibility for almost all broadcasting law, are obliged to pursue conditions for 'effective' speech rights.[41] The need for diversity of opinion means commercial broadcasting alone is constitutionally insufficient. Market forces cannot 'prevent the accumulation and abuse of power'[42] in broadcasting and, under court decisions to date, having only commercial broadcasting would be unconstitutional.

Germany's broadcasting cases are subject to ongoing domestic debate,[43] with general parallels to debates elsewhere about 'market-driven' or 'democracy-driven' communicative

English translations of many older free speech decisions are available via the Institute for Transnational Law at the University of Texas: https://law.utexas.edu/transnational/foreign-law-translations/german/toc.php. In general, they are used here. For earlier cases, among other sources, see also Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd ed, Durham: Duke University Press 2012) chapter 8 'Freedom of Speech, Press, and Art'; Christopher Witteman, 'Information Freedom, a Constitutional Value for the 21st Century' (2013) 36 *Hastings International and Comparative Law Review* 145. Some decisions are available in English directly from the court: https://www.bundesverfassungsgericht.de.

[36] Karl-Heinz Ladeur, 'Legal Questions of Excluding Participants from Internet Discussion Groups: On the Guaranteeing of Freedom of Communication through "Network- Adapted" Private Law' (2008) 9 *German Law Journal* 965, 966.

[37] Potschka, above n 12, 13.

[38] Basic Law for the Federal Republic of Germany (Official Translation) available via https://www.bundestag.de/en/documents/legal (emphasis added).

[39] Potschka, above n 12, 161 (emphasis added). His full translation reads: 'Everyone has the right freely to express and disseminate their opinions orally, in writing or visually and to obtain information from generally accessible sources without hindrance. Freedom of the press and freedom of reporting through audiovisual media shall be guaranteed. There shall be no censorship.'

[40] Wolfgang Hoffmann-Riem, *Regulating Media: The Licensing and Supervision of Broadcasting in Six Countries* (New York: Guilford Press 1996) 119.

[41] Kommers and Miller, above n 35, 449; see also eg Hoffmann-Riem, above n 40, 119.

[42] Hoffmann-Riem, above n 40, 119.

[43] See eg Grzeszick, above n 17, 85; Bullinger, above n 8 (taking a more market-based approach to media freedom).

freedom.[44] Argument about whether the freedom should be interpreted as an 'objective institutional task of [opinion] formation or a classic individual liberal right … continues intensively', as does debate about whether the court has sufficiently recognised changes in communications technologies, industries and uses.[45] My primary concern here, however, is what the decisions suggest more generally about free speech. The cases demonstrate certain ideas about free speech as a democratic constitutional requirement that challenge a purely negative approach, and they offer legal techniques to support free speech's positive dimensions. In short, the cases suggest reasons why and how courts might act. While similar ideas can be seen elsewhere, the judicial analysis is particularly developed in Germany. And it offers a partial response to the point noted in chapter 1 that it is difficult 'to imagine what shape a constitutional obligation to support expression could take'.[46] Of course, many of the ideas and techniques *could* be applied by actors other than courts, which means the German example also has interest for jurisdictions where it is difficult to imagine constitutional courts taking an equivalent role anytime soon.

Here, seven points about free speech in the form of Germany's broadcasting freedom are drawn from the decisions. They concern positive dimensions of free speech, the freedom's wide breadth, the dual broadcasting system, funding public broadcasting, internal pluralism, what I call the court's precautionary approach, and the contemporary media environment.

Free speech has positive dimensions

Free speech is not only a negative liberty for the Federal Constitutional Court. Article 5 is an instrumental freedom serving individual and public opinion formation. This purpose requires state action. It makes free speech both negative and positive: 'Its negativity protects the individual against official restraints on speech; its positivity obliges the state and its agents to establish the conditions necessary for the effective exercise of speech rights.'[47] Free opinion formation cannot be met by 'a mere negative duty'. Instead, 'a positive order is necessary, which ensures … the variety of existing opinion is expressed … as widely and completely as possible'.[48] Thus broadcasting freedom is a state of affairs where there is diversity in content and freedom from both state and market control; it involves pluralism in control, funding, organisation and content.[49] It would be fair to suggest that the aim is sustained plural public speech to support free opinion formation.

[44] See eg Maria Edström, Andrew T Kenyon and Eva-Maria Svensson (eds), *Blurring the Lines: Market-Driven and Democracy-Driven Freedom of Expression* (Gothenberg: Nordicom 2016).

[45] Grzeszick, above n 17, 85. The debates are longstanding, see eg Karl-Heinz Ladeur, 'Guaranteeing the Programming Mandate of Public Broadcasters and Restraints on Private Broadcasters' Programmes in Multimedia Conditions' (2004) 5 *German Law Journal* 907 (arguing for the strengthening of public broadcasting and its comprehensive public service, rather than any dismantling of the constitutional requirements given a changing broadcasting environment).

[46] See chapter 1 and Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press 2000) 175.

[47] Kommers and Miller, above n 35, 449.

[48] 57 BVerfGE 295 (1981) (Third broadcasting case).

[49] Eg Porter and Hasselbach, above n 25, 98.

In the wider constitutional context, the German state clearly has a 'protective function'[50] with constitutional rights establishing objective principles as well as subjective protections for individuals.[51] While more could be explored about the protective function, it is sufficient here to note a similar result could be reached for free speech in other constitutional systems due to the nature of speech within a democratic constitutional order, as outlined in chapter 3. In short, effective speech rights—including free speech's positive dimensions—are arguably a precondition to substantially legitimate democracy. These effective rights include those of audience *reception* not only speaker *publication*, as the freedom's breadth makes clear.

The freedom is broad.

There are two aspects to note about the freedom's breadth. First, the opinion formation goal means media freedom concerns 'communication *as a process*'[52] in which speaker and audience interests are both valued. And broadcasting is 'a particularly important medium and a significant factor' in that opinion formation.[53] Second, while Article 5(1) refers to *freedom of reporting*, the protection is not at all limited to reporting. This follows from the Article's overall purpose of opinion formation, which means the freedom encompasses a wide range of material; it includes varied forms of entertainment as well as news and commentary. In the court's words, broadcasting has the constitutional function of providing 'information in the greatest possible breadth and completeness' because opinion formation arises 'not only in news broadcasts, political commentaries or series on problems of the past, present and future, but also in audio and TV dramas, musical presentations or entertainment broadcasts'.[54] In that way, broadcasting freedom serves the free individual and public opinion formation protected by Article 5 as a whole.

A dual system with comprehensive, universally available and diverse public broadcasting

A dual system of public and private broadcasting meets the constitutional requirements. In 1961, the court reasoned that spectrum scarcity and high production costs limited the possible number of broadcasters. Therefore, a public broadcasting monopoly structured for internal pluralism met the constitutional imperative.[55] In the 1980s, a dual broadcasting system was held to meet the requirements.[56] Notably, however, public broadcasting's role is primary and vital within the dual system. Commercial private broadcasting is constitutionally permissible under a dual system only where public broadcasting can meet the Basic Law's mandate for individual and public opinion formation.[57] Theoretically, that could change if commercial broadcasting by itself met the constitutional requirements, but that situation has not been found in the court's analysis to date. The

[50] Eg Dieter Grimm, 'The Protective Function of the State' in Georg Nolte (ed), *European and US Constitutionalism* (Cambridge: Cambridge University Press 2005) 137.

[51] See eg Werner Heun, *The Constitution of Germany: A Contextual Analysis* (Oxford: Hart 2011) 198-200.

[52] Wolfgang Hoffmann-Riem, 'Law, Politics and the New Media: Trends in Broadcasting Regulation' (1986) 9:4 *West European Politics* 125, 132 (translated by Peter Humphreys) (emphasis added).

[53] Ibid; and see 12 BVerfGE 205 (1961) (First broadcasting case).

[54] 73 BVerfGE 118 (1986) (Fourth/Lower Saxony broadcasting case).

[55] 12 BVerfGE 205 (1961) (First broadcasting case).

[56] 73 BVerfGE 118 (1986) (Fourth/Lower Saxony broadcasting case).

[57] 90 BVerfGE 60 (1994) (Eighth/Cable Penny broadcasting case).

guarantee for public broadcasting's 'existence and development enshrines [it] as a prominent feature of the communications ecology, culture and society'.[58]

In earlier decisions, the court said the constitution requires the 'basic provision' to come from public broadcasting.[59] While the term 'basic' was used, the requirement is not at all 'a minimum provision to which public broadcasting is confined or could be reduced'.[60] Rather, 'basic' has the sense of a fundamental, constitutional or basic right. As the court emphasises, what is required is a *comprehensive service, available to the entire population, containing substantial diversity of opinion*.[61] That is the functional mandate and constitutional role of public broadcasting. Thus, in 2014 the court repeated:

> The mandate of public broadcasting is not restricted to providing a minimum supply, or to filling gaps and niches that are not covered by private providers. Instead, it covers the breadth of the classical mandate of broadcasting in its entirety.[62]

Public broadcasting requires sufficient, non-politically determined funding

German public broadcasting is exceptionally well-funded in comparative terms. It probably has the highest per capita funding of democratic countries (except for one or two European nations with small populations and higher per capita production costs).[63] It has been called 'by international standards unbelievably rich'.[64] This makes it important to recognise the constitutional basis of the funding. Its quantum is determined through a constitutionally required process, and one can easily conclude that its level would be lower without the constitutional court's repeated decisions.

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[58] Potschka, above n 12, 13.

[59] Eg 83 BVerfGE 238 (1991) (Sixth/North Rhine-Westphalia broadcasting case).

[60] 74 BVerfGE 297 (1987) (Fifth/Baden-Württemberg broadcasting case).

[61] 83 BVerfGE 238 (1991) (Sixth/North Rhine-Westphalia broadcasting case). The same requirements were presented in an equivalent form in the fifth broadcasting decision (74 BVerfGE 297): that is, transmission in a form that can reach the entire population; a full scope of programming to allow for the constitutional guarantee of free opinion formation to be met; and diversity in the presentation of opinion, pursued through organisation and procedural measures.

[62] 136 BVerfGE 9 (2014) (Fourteenth/ZDF Treaty case); and see the court-provided summary: 'Applications for Judicial Review Filed Against the ZDF State Treaty Successful for the Most Part', press release no 26/2014 (25 March 2014) available via http://www.bundesverfassungsgericht.de.

[63] See eg Tim Westcott, 'Public Broadcasting: How it's Funded, Whether it Has a Future' conference paper, MIPTV, Cannes, France, 4-7 April 2016; available via https://www.ebu.ch/daj/images/docs/News_30740.pdf; Nordicity, *Analysis of Government Support for Public Broadcasting* (report prepared for CBC Radio Canada) (2016) available via http://www.cbc.radio-canada.ca/_files/cbcrc/documents/latest-studies/nordicity-public-broadcaster-comparison-2016.pdf. Westcott reports German public broadcasting had the highest per capita funding in 2015 of all countries apart from Norway. ARD had the highest public revenue of any PSB, at nearly 5.8 million €, with ZDF receiving another 1.8 million €. Nordicity, using mainly 2014 figures, notes that German per capita public funding was higher than all countries except Norway and Switzerland (Switzerland has subsequently reduced its licence fee: Westcott). Benson and Powers list only Norway as having higher per capita public funding than Germany: Rodney Benson and Matthew Powers, *Public Media and Political Independence: Lessons for the Future of Journalism from Around the World* (New York: Free Press, 2011) 61; see also Rodney Benson, Matthew Powers and Timothy Neff, 'Public Media Autonomy and Accountability: Best and Worst Policy Practices in 12 Leading Democracies' (2017) 11 *International Journal of Communication* 1, 5.

[64] Castulus Kolo and Stephan Weichert, 'Germany: Evaluating Alternatives to Finance Quality Journalism' in Paul Murschetz (ed), *State Aid for Newspapers: Theories, Cases, Actions* (Heidelberg: Springer 2014) 215, 227.

Article 5 requires public broadcasting to receive funding sufficient to meet its constitutional mandate, and to do so through a relatively depoliticised process. German public broadcasters receive the vast majority of their funding via licence fees (which have become device-independent fees paid by each residence and business).[65] This is part of broadcasters' independence. The constitution requires public broadcasting to be outside state and market control: 'Broadcasting may not be abandoned either to the state or to any societal group.'[66] One aspect of the required independence concerns economic control. While allowing private broadcasters to exist, the court has emphasised that private programming 'cannot manage fully to do justice to the task of comprehensive information'.[67] An important reason for this is economic, with private broadcasting relying primarily on advertising:[68]

> Transmissions of interest to only a small part of the audience and often—as especially the case with ambitious cultural transmissions—requiring high expenditure will as a rule take second place, if not be entirely absent.[69]

However, the court sees such programming as vital for free speech's constitutional role. It is part of Article 5's requirement for public broadcasting that is comprehensive, universally available and substantially diverse. Private broadcasting's inherent weakness in this regard underlies the guarantee of public broadcasting's existence, development and funding.[70]

Thus, *economic freedom* is quite distinct from *freedom of speech* for the court. This is one of the most striking aspects of German law when compared with the US Supreme Court's tendency to equate speech and markets.[71] While German ordoliberalism has parallels with other forms of neoliberalism—which have arguably influenced the equation of speech and market negative freedoms[72]—speech remains distinct from the market under German law. The court states simply, 'Market opportunities may be a question of economic freedom, but not of freedom of opinion.'[73] The

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[65] The changes followed (and implemented much of) a report for the broadcasters by a former Federal Constitutional Court judge: Paul Kirchhof, *Gutachten über die Finanzierung des öffentlich-rechtlichen Rundfunks* (Heidelberg 2010) ('Expert Opinion on the Financing of Public Service Broadcasting') available at http://www.ard.de/download/398406/index.pdf; see eg Potschka, above n 12, 219. There were held largely constitutional in BVerfG, Judgment of the First Senate of 18 July 2018, 1 BvR 1675/16 (Fifteenth/Broadcasting Contribution Fee case): see below n 130.

[66] 90 BVerfGE 60 (1994) (Eighth/Cable Penny case); see also 83 BVerfGE 238 (1991) (Sixth case).

[67] 73 BVerfGE 118 (1986) (Fourth/Lower Saxony case).

[68] In the era focused on here, advertising-based funding tends to support the single media outlet with the largest audience; it also means that comparatively wealthy audiences are favoured where an outlet's circulation is not the largest in a market; see eg Raymond Williams, *The Existing Alternatives in Communications* (London: Fabian Society 1962) 6; Timothy E Cook, *Governing with the News: The News Media as a Political Institution* (2nd ed, Chicago: University of Chicago Press 2005) 168.

[69] 73 BVerfGE 118 (1986) (Fourth/Lower Saxony case).

[70] 90 BVerfGE 60 (1994) (Eighth/Cable Penny case). The court requires advertising by public broadcasters to remain a comparatively minor funding source, due to the 'inherent tendencies' of advertising 'to constrict programming and variety'.

[71] See eg *Citizens United v Federal Election Commission*, 558 US 310 (2010).

[72] Eg for an analysis of *Citizens United* suggesting the Supreme Court majority uses neoliberal ideas to transform the First Amendment and US democracy, see Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (New York: Zone Books, 2015) chapter 5 'Law and Legal Reason'.

[73] 74 BVerfGE 297 (1987) (Fifth/Baden-Württemberg case).

market 'by itself, and by definition, cannot provide for a fully democratic media'.[74] In its approach, the court draws on research in media economics. Financing by advertising will lead to 'a host of negative results' including 'standardisation' of programming, 'one-sided reporting', and an 'erosion' of the identity of public broadcasting.[75] Broadly parallel analyses are well known in English language literature, including the example of Edwin Baker's work noted briefly in chapter 2.[76]

As well as independence from markets, Article 5 requires separation from institutional *political control*. One way in which this is relevant is the level of the licence fee. If the fee was politically determined, funding decisions for public broadcasting could amount to indirect political influence over content. Concerns about political domination through funding decisions recurred across decades, and the court gradually developed requirements for the funding process, especially in 1994's 'Cable Penny' Eighth Broadcasting decision and 2007's Twelfth decision.[77] Concerns have also been prominent about political influence on the membership of public broadcasters' internal regulatory bodies, which is returned to below.

In relation to funding, Eva Etzioni-Halevy noted that settling the licence fee involved 'a protracted struggle' in 1983, which she expected to recur.[78] Similarly, Arthur Williams commented in the 1970s and 1980s on the fee's lack of independence from politicians, which he identified as a clear weakness.[79] More recently, Christian Potschka observed the fee's level 'had increasingly become a political issue' by the 1990s,[80] as did Henk Erik Meier.[81] In her analysis, Etzioni-Halevy quoted Hans Bausch—a former public broadcasting *Intendant* or chief officer—that public broadcasters 'must constantly plead for the means of their financial subsistence through good behaviour'. Bausch suggested that a broadcaster could 'hardly be independent when the people who are to be criticised on its programmes are the very same ones who also decide on its finances'.[82] This echoes the point drawn from Emerson in chapter 5. He suggested that free speech in a democracy means that government must finance opposition to itself, and government's probable reluctance to do that

[74] Witteman, 'Information Freedom', above n 35, 196.

[75] Christopher Witteman, 'Constitutionalizing Communications: The German Constitutional Court's Jurisprudence of Communications Freedom' (2010) 33 *Hastings International and Comparative Law Review* 95, 141-142.

[76] See C Edwin Baker, *Media, Markets, and Democracy* (Cambridge: Cambridge University Press 2002); C Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* (Cambridge: Cambridge University Press 2007).

[77] 90 BVerfGE 60 (1994) (Eighth/Cable Penny case); 119 BVerfGE 181 (2007) (Twelfth broadcasting case).

[78] Eva Etzioni-Halevy, *National Broadcasting Under Siege: A Comparative Study of Australia, Britain, Israel and West Germany* (Basingstoke: Macmillan 1987) 67.

[79] Arthur Williams, *Broadcasting and Democracy in West Germany* (London: Bradford University Press in association with Crosby Lockwood Staples 1976) 160-165 (examining political parties' views on a more independent fee setting process than existed at that time); Williams, above n 33, 91 (political setting of licence fee is a weakness of the German system).

[80] Potschka, above n 12, 207.

[81] Henk Erik Meier, 'Independent Regulatory Bodies and Impossible Jobs: The Failure of German Public Service Broadcasting Regulation' (2008) 86 *Public Administration* 133. The paper was submitted and accepted for publication in 2006, before the Twelfth Broadcasting Case 119 BVerfGE 181 (2007), but well captures commercial objections to Germany's constitutional approach.

[82] Hans Bausch, *Rundfunk in Deutschland*, volume 4 (Munich: Deutscher Taschenbuch Verlag) 744 and 87, both quoted in Etzioni-Halevy, above n 78, 68.

sufficiently means courts may well have a necessary role in structuring a system of free expression. I would add a gloss to the idea of financing being required; it would be required where 'opposing' speech is otherwise deficient, with politicians being poorly placed to judge that question.

Article 5's implications for funding are addressed at length in the court's 1994 'Cable Penny' decision.[83] It requires state legislatures to structure an appropriate procedure for determining funding, most suitably 'a multi-stage, cooperative' process 'that limits the opportunities for political influence'.[84] The procedure must begin with public broadcasters assessing their funding needs based on their own programming decisions. That assessment is then judged by an independent committee on only two issues:

> First, whether those [programming] decisions remain within the legal boundaries of public broadcasting's mandate; and second, whether the funding needs derived from these decisions were established correctly and in accordance with the principles of efficiency and thrift.[85]

This approach is said by the court to make determining funding 'a professional rather than a political task'.[86] Questions can be raised about the criteria, tenure and appointment process for the committee that assesses the fee level.[87] Structurally similar issues exist for broadcasting councils, discussed later in this chapter. In any event, any change from the amount arrived at through the committee process must be appropriately explained by *Länder* parliaments to be constitutional. Despite the court characterising the task as professional, political battles continued. In 2004, politicians reduced public broadcasters' funding below the level found by the committee. The public broadcasters went to court, which in 2007 overruled the political decision.[88] The departure from the committee's view was not sufficiently justified in the parliamentary process, meaning it breached the constitutional requirement for adequate funding of public broadcasting. The issue is considered further later in this chapter.

Political control through funding is not the only area of political interference the court has repeatedly addressed, as the next section shows.

Internal pluralism and broadcasting councils

Article 5 means public broadcaster governance must be independent from state authority, so an external regulator (as often exists elsewhere) would be unconstitutional for German public broadcasting. Instead, broadcasters' own broadcasting and administrative councils play that role.[89]

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[83] 90 BVerfGE 60 (1994) (Eighth/Cable Penny case); among subsequent decisions see in particular 119 BVerfGE 181 (2007) (Twelfth broadcasting case).

[84] 90 BVerfGE 60 (1994) (Eighth/Cable Penny case).

[85] Ibid.

[86] Ibid. The court also required the legislature to 'insure the independence of its members … [T]he panel not only should contain no broadcasting representatives, but also … no politicians.'

[87] See eg discussion in Meier, above n 81, 136-137.

[88] 119 BVerfGE 181 (2007) (Twelfth broadcasting case); see eg Thomas Gibbons and Peter Humphreys, *Audiovisual Regulation under Pressure: Comparative Cases from North America and Europe* (Abingdon: Routledge 2012) 117; Witteman, 'Constitutionalizing Communications', above n 75, 119-120.

[89] In general, public broadcasters have 'broadcasting councils' and 'administrative councils', the latter focused more on financial management and legal compliance. An overview is provided by Irini Katsirea, *Public Broadcasting and European Law: A Comparative Examination of Public Service Obligations in Six Members States* (Alphen aan den Rijn: Kluwer Law International 2008) 33-39.

Article 5 requires council membership to be diverse, with the aim that programming is not dominated by any one group or interest. As stated in the court's first broadcasting decision in 1961, broadcasters must 'be organised in such a way that all conceivable groups are able to have influence in their organs and have their say in overall programming.'[90] In 2014, the court reiterated that supervisory bodies are 'advocates of the *general* interest' (not of their own sectional backgrounds) with the aim 'that all significant political, ideological and social forces' are 'duly heard in the overall programming'.[91] Typically, state laws set out various 'socially relevant groups' from which membership of broadcasting councils is drawn, such as 'unions, business associations, religious groups, political parties, and social groups of parents, teachers, women, sports fans, artists, and trade groups'.[92] It is not intended that members *represent* the groups from which they come; rather they serve 'as agents for the public interest'. The approach to membership is, in a sense, a judicial attempt to provide control to 'civil society'.[93] Members cannot be bound by the groups from which they come, and they must have securely regulated tenure.[94] The aim of a diverse broadcasting council is to 'secure diversity of opinion' in content.[95]

As would be expected, this aspect of broadcasting freedom has only been achieved to a degree. Obviously, including all conceivable groups on a council is impossible. But a reasonable version of such diversity must be pursued. The main concern in practice appears to be political party subversion of the aims. There are clear historical examples of politicians and parties breaching the principles,[96] and it has been a repeated issue for the constitutional court. It was again central in the court's 2014 decision. That decision is examined later in this chapter. At this stage, two related aspects concerning politics and diversity are noted about broadcasting councils.

First, *councils have remained politically influenced, and perhaps politically dominated,* across long periods despite earlier court decisions. This is an important aspect of what some commentators have described as 'massive political interference' in German public broadcasting, or public broadcasting being non-governmental 'but party-dominated'.[97] In the 1970s, Arthur Williams commented that high-quality programming was achieved '*in spite of* the efforts of the political parties to influence' broadcasters.[98] In the mid-1980s, he judged the system of selecting council members as, at the least, 'less than perfect' in that 'it relates only to established interest groups' and 'favours the main political parties at the expense of other, non-political interests'.[99] In stronger terms, Eva Etzioni-Halevy observed in the 1980s:

[90] 12 BVerfGE 205 (1961) (First broadcasting case).
[91] 136 BVerfGE 9 (2014) (Fourteenth/ZDF Treaty case) (emphasis added).
[92] Witteman, 'Constitutionalizing Communications', above n 75, 106 and its n 24.
[93] Barbara Thomass, 'Public Service Media, Civil Society and Transparency' (2016) 7 *International Journal of Digital Television* 297, 300-301.
[94] 136 BVerfGE 9 (2014) (Fourteenth/ZDF Treaty case).
[95] 83 BVerfGE 238 (1991) (Sixth/North Rhine-Westphalia case).
[96] See eg Williams, above n 79, 121-123.
[97] Bullinger, above n 8, 54.
[98] Williams, above n 79,120 (emphasis added).
[99] Williams, above n 33, 91.

> [P]arty-politicisation has become pervasive in practically all boards: the representatives of the 'socially relevant groups' who were meant to be politically independent have frequently joined one political camp or another thus creating clearly delineated political blocs.[100]

In the mid-1990s, Wolfgang Hoffmann-Riem commented:

> Originally conceived of as guarantors of independence from the state and other power-holders, the Broadcasting and Administrative Councils have … in reality emerged as agents of political influence … The members of these bodies usually form coalitions along party lines, meeting in so-called cliques … to agree upon joint conduct.[101]

In Williams' view, these 'cliques' or 'circles of friends' (*Freundeskreise*) 'are certainly nobody's friends',[102] least of all friends to the constitutional requirement of pluralism. Even so, 'no better way has so far been designed to link a public broadcasting corporation to society'[103] and the court has delivered multiple rulings that address, ever more precisely, the councils' independence.

Similar concerns have been raised about public broadcaster staffing.[104] Senior appointments are seen to be politically driven, and resignations or failure to reappoint *Intendants* have been linked to the concerns. Indeed, Hans Bausch (quoted above) resigned from heading the ARD due to concerns over state control.[105] He saw the practice then as being 'labyrinthine' and not matching the aims of a 'pluralist political culture'.[106] One partially contrary influence is the multi-*Länder* approach to broadcasting, with regularly updated inter-state broadcasting agreements, which is thought to limit the ability of any one group to dominate public broadcasting nationally.[107] But that state-level diversity would not appear to prevent major political parties as a group dominating the councils, if they are otherwise able to do so.

Second, there are *questions about the degree of diversity that could be achieved* under this model. In terms of political style, Germany can be understood as a 'grand coalition state' with a consensus model of democracy (a model that may be changing).[108] 'Socially relevant groups' are those that register within this model. But there is a tension in aiming to produce diversity through relying

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[100] Etzioni-Halevy, above n 78, 94.

[101] Hoffmann-Riem, above n 42, 124. Similarly, Katsirea comments 'in practice Broadcasting Councils are often dominated by political parties': above n 89, 38.

[102] Williams, above n 79, 124.

[103] Wolfgang Schulz, 'The Legal Framework for Public Service Broadcasting after the German State Aid Case: Procrustean Bed or Hammock?' (2009) 1 *Journal of Media Law* 219, 223.

[104] See eg Williams, above n 79, 127-128.

[105] See eg Porter and Hasselbach, above n 25, 112.

[106] Ibid 112 citing Hans Bausch '*Zur Entwicklung des Rundfunks seit 1945*' in Peter Glotz and Reinhold Kopp (eds), *Das Ringen um den Medienstaatsvertrag der Länder* (Berlin: Spiess 1987) 31 (also in Vincent Porter and Suzanne Hasselbach, *Pluralism, Politics and the Marketplace: The Regulation of German Broadcasting* (London: Routledge 1991) 194).

[107] Concentrated ownership in commercial media also raises constitutional issues; see eg Peter Humphreys and Matthias Lang, 'Regulating for Media Pluralism and the Pitfalls of *Standortpolitik*: The Reregulation of German Broadcasting Ownership Rules' (1998) 7(2) *German Politics* 176. Ownership became highly concentrated soon after the emergence of commercial broadcasting, concentration subsequently increased in terms of advertising revenue, with more than 80% of commercial TV advertising revenue going to two media groups in 2009: Sebastian Müller and Christoph Gusy, *Background Information Report: Media Policies and Regulatory Practices in a Selected Set of European Countries, the EU and the Council of Europe: The Case of Germany* (Mediadem Consortium 2010) 9, https://pub.uni-bielefeld.de/download/1958177/2260277/Germany.pdf.

[108] Eg Heun, above 51, 229.

on already existing, relatively established social groups, quite apart from the dominance that political parties may have. The result may well reflect existing mainstream opinion more than the idea of a diverse broadcasting council could suggest.

On this point, research into broadsheet newspaper coverage of contentious German and US public debate is interesting to note. It suggests that political parties and state actors can dominate German news content differently than under US practice. In some ways, this is not surprising given the substantial role of political parties in Germany. Parties there have a strong constitutional position: the country is a 'political party state' (*Parteienstaat*).[109] Article 21(1) of the Basic Law states 'Political parties shall participate in the formation of the political will of the people.' Political parties have a dominance 'in public life in general'.[110] Research of newspaper content found that, in Germany, 'institutional position' is 'much more important than experiential knowledge' for journalists assessing the credibility of different voices. One result is a danger of excluding 'noninstitutional actors'.[111] For print media, diversity meant hearing from representatives of officially sanctioned groups more than it meant engaging with a wide range of civil society actors. Perhaps greater diversity exists in public broadcasting, in part due to the council structures and, as noted above, such diversity in broadcast content has been reported by some commentators. Similarly, Gibbons and Humphreys state that the public broadcasting monopoly (which existed until the mid-1980s) provided 'comparatively high quality, relatively independent and highly pluralistic and diverse national and regional television services'.[112] However, caution is warranted in thinking this form of internal pluralism—pluralism that draws largely on established social groups—meets the free speech goals involved. In addition, caution arises because the legislature has 'wide discretion' in determining which groups are relevant.[113] The court has stated that only if composition was 'grossly one-sided' would Article 5 be breached.[114] However, the question should be less about being 'one-sided' than about the composition being a reasoned attempt to reflect the plurality of thought in society.

Limitations of the 'socially relevant groups' approach were considered in the court's 2014 decision. There, the court underlined the need to include less organised sectors within councils, as well as the need to meet gender diversity requirements mandated under the Basic Law. The aim must be to include 'persons with as wide a variety of perspectives and horizons of experience as possible, from all areas of the community … [S]maller groupings which do not per se have access to the media, and perspectives which are not organised in a coherent structure, must … be presented as well.'[115] The legislature 'must effectively counteract' the danger of having only 'conventional majority perspectives' present on councils.[116] Where councils include representatives of the state (or people

[109] Donald P Kommers, 'Germany: Balancing Rights and Duties' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford: Oxford University Press 2006) 161, 168.

[110] Greg Taylor, 'Diversity Within Government Broadcasters' in Georgios Gounalakis and Greg Taylor (eds), *Media Diversity Law: Australia and Germany Compared* (Frankfurt: Peter Lang GmbH 2016) 221, 223.

[111] Myra Marx Ferree, William Anthony Gamson, Jürgen Gerhards and Dieter Rucht, *Shaping Abortion Discourse: Democracy and the Public Sphere in Germany and the United States* (Cambridge: Cambridge University Press 2002) 8, 256, 279.

[112] Gibbons and Humphreys, above n 88, 112.

[113] Katsirea, above n 89, 37.

[114] 83 BVerfGE 238 (1991) (Sixth/North Rhine-Westphalia case).

[115] 136 BVerfGE 9 (2014) (Fourteenth/ZDF Treaty case).

[116] Ibid.

close to the state), they must still 'represent diverse perspectives' and be no more than one third of the membership.[117] An equivalent limit applies to membership of any sub-committees and similar bodies. The court understands these limits as countering the possibility that informal networks of members with links to state authorities or political parties gain de facto dominance over a council. What eventuates in practice remains to be seen.[118] The issue is returned to in the section 'Free Speech and the State'.

Equally notable, given the history elsewhere of political appointments to public broadcasting governing bodies,[119] is the court's emphasis on selecting independent members; that is, members who must not be within or close to state authority. In general, specific social groups are entrusted with selecting members; each group's decision is binding in all but exceptional cases and clear justification must be provided for departing from it.[120]

Free speech requires a precautionary approach

Free speech's importance in a democratic order means the court takes what I call a precautionary approach in seeking to lessen commercial and political pressures on public broadcasting. Free speech's role in opinion formation means it has a position 'prior to' constitutional rights in general, and it needs protection in a particular way. Such a foundational role for speech exists even where the right to dignity under the Basic Law's Article 1 is generally understood to have the highest value, and to influence the interpretation of all constitutional rights. The country's democratic constitution means free speech, including its positive dimensions, requires special protection. The democratic basis can be seen in the Federal Constitutional Court's references to classic French and US sources when it first addressed free speech. In its 1958 decision in *Lüth*, the court stated:

> The basic right to freedom of expression, the most immediate aspect of the human personality in society, is *one of the most precious rights of man*. It is absolutely essential to a free and democratic state, for it alone permits that constant spiritual interaction, the conflict of opinion, which is its vital element. … [Free speech] is the basis of freedom itself, '*the matrix, the indispensable condition of nearly every other form of freedom*'.[121]

The first passage emphasised above refers to Article 11 of the French *Déclaration des Droits de l'Homme et du Citoyen* of 1789 which is considered in chapter 7. The second emphasised passage comes from US Supreme Court Justice Benjamin Cardozo.[122] Their use underlines the German court's view that the 'primacy' of speech is inherent in democratic constitutional orders.

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[117] Ibid: the dissenting opinion of Paulus J would have gone further and prevented any council membership by members of the political executive, as is the situation in most *Länder*.

[118] See eg Wolfgang Schulz, 'How to Control Informal Practices by Formal Law? The German Constitutional Court's Ruling on the Independence of the Public Service Broadcaster ZDF from the State' (2016) 7 *Journal of Media Law* 145.

[119] On this, one could consider so-called 'polarised-pluralist' models; see Hallin and Mancini, above n 32. But there are also many examples within more 'liberal' models.

[120] 136 BVerfGE 9 (2014) (Fourteenth/ZDF Treaty case).

[121] 7 BVerfGE 198 (15 January 1958) (*Lüth* decision) (emphasis added), available via https://law.utexas.edu/transnational/foreign-law-translations (translated by Tony Weir). Closely similar wording is provided by, eg, Kommers and Miller, above n 35, 445.

[122] *Palko v Connecticut*, 302 US 319, 327 (1937) referring to 'freedom of thought and speech'.

The importance of speech makes the court alive to any possible concentration of power over public opinion. Caution against such influence is warranted because 'when emerging developments prove to be faulty, they can only be rescinded—if at all—to a certain degree and only with considerable difficulty'.[123] Speech requires 'prior' protection, protection that comes prior to normal processes of parliamentary politics. Because speech is seen to underlie the possibility to realise many other rights and to shape political opinion formation, it requires a special form of protection. Because speech is believed to have individual and collective effects and to be important in wider social, cultural and political processes, speech needs particular treatment.

The court's precautionary approach can be seen in the constrained roles given to executive and legislature in relation to broadcasting freedom, and the relatively active role of the court. The court is, for some commentators, a 'positive legislator' because it is so precise in the requirements it places on the legislature.[124] Neither executive nor legislature are left to deal with broadcasting merely as a matter of policy, unrestricted by constitutional law. Rather, the court sets out requirements the legislature must meet; requirements which, in turn, restrict executive power. Discretion remains in how the requirements are met, but they must be met. On that, there is no discretion. The executive is perhaps the most constrained, but the court also limits the legislature's room to move. For example, the legislature cannot limit public broadcasting to its current technological basis.[125] Attempting to do so would be unconstitutional. Equally, the legislature faces limits in terms of funding public broadcasting, examined above. Positive dimensions of free speech, just like negative ones, are too constitutionally significant to be left entirely to a simple parliamentary majority.[126] The regulation of broadcasting is 'too serious to be left in the hands of the politicians'[127] or, at least, too important to be left *entirely* to politicians. Nothing about that analysis is inherently limited to Germany, a point to which I return in chapter 8.

A sense of the court's precautionary approach can also be drawn from Alexy's analysis of positive rights. He sets out three domains of entitlement or positive right. There are *protective rights*, where the state protects individuals against actions by non-state actors; *social rights* as commonly understood; and *organisational and procedural rights*, which promise a 'middle road between a comprehensive theory of values enforced by the constitutional court' and giving the legislature an entirely free hand.[128] That is where he places the constitutional requirements for broadcasting. They are an organisational form of positive right; namely, rights that 'the legislature pass certain organizational norms consistent with the constitution'.[129] The point I would note is that the court

[123] 57 BVerfGE 295 (Third broadcasting case). Cohen notes a similar point when discussing regulation, rather than courts, taking a precautionary approach: 'Within a precautionary paradigm, it is easier to justify interventions designed to prevent the system from tipping': Julie E Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (New York: Oxford University Press 2019) 194.

[124] Louis Favoreu and Wanda Mastor, *Les cours constitutionelles* (2nd ed, Paris: Dalloz 2016) 150-53.

[125] Eg 83 BVerfGE 238 (1991) (Sixth/North Rhine-Westphalia case); 119 BVerfGE 181 (2007) (Twelfth broadcasting case).

[126] See eg Robert Alexy, *A Theory of Constitutional Rights* (translated by Julian Rivers) (Oxford: Oxford University Press 2002) 297-298, 312.

[127] Porter and Hasselbach, *Pluralism, Politics*, above n 106, 3.

[128] Alexy, above n 126, 314.

[129] Ibid 329.

enforces such rights because of the systematic risk of democratic failures if the matter is left entirely to others.

The court takes a precautionary approach to the freedom because of the importance of diverse public speech as a precondition of democracy. As noted at the outset of this book, that suggests something of the challenges that exist where positive free speech is under-protected. In some ways, democratic forms of government face challenges of public communication that cannot be solved. And weaknesses in public communication can undermine possible responses to those same weaknesses.

The analysis continues with digital communication

Despite a transformed media environment—in particular, the development of networked digital communication, pervasive data tracking and exploitation, and huge changes in media platforms, financing, practices and use—the court has largely maintained its analysis since its first broadcasting decision in 1961. Indeed, in 2018 the court noted changes in the media environment mean public broadcasters' duties become '*more significant*',[130] while in 2014 the court simply stated that constitutional requirements 'are not superseded by the development of communication technology and media markets'.[131] Dieter Dörr, after the 2014 decision, stated that the 'crux of the matter is and remains that the public broadcasting service must fulfil its democratic and cultural mandate decisively and convincingly'.[132] Public broadcasting's constitutional mandate remains broad; its service must be comprehensive, universally available and substantially diverse. While the court has modified aspects of its reasoning over time, it has sought the same end. For instance, it has moved from spectrum scarcity to economic pressures in justifying the primary role of public broadcasting under Article 5.[133]

In addition, the court has not given broadcasting any technologically specific meaning, instead continuing the functional approach linked to individual and public opinion formation.[134] This follows the court's general method of interpreting the Basic Law in light of contemporary conditions. In 1991, the court stated broadcasting's constitutional meaning changes 'in step with factual changes in the social realm'.[135] So the constitutional guarantee 'would be breached if the legislature were to limit

[130] BVerfG, Judgment of the First Senate of 18 July 2018, 1 BvR 1675/16, para 80 (Fifteenth/Broadcasting Contribution Fee case) (emphasis added). The decision held that a residence-based (rather than equipment-based) levy used to fund public media was substantially constitutional. While it focused more on equality and revenue powers than broadcasting freedom, the court noted the importance—even increased importance—of public service media in the contemporary communications environment and the continuing role of public media in protecting journalistic diversity: ibid [77]-[80]. As well as the decision, which is available in English from the court: https://www.bundesverfassungsgericht.de, see eg Michael Wagner, 'German Constitutional Court Upholds PSM Funding Model While Highlighting PSM's Key Role in Digital Landscape', European Broadcasting Union, Legal Case Note, 18 July 2018, available via https://www.ebu.ch.

[131] 136 BVerfGE 9 (2014) (Fourteenth/ZDF Treaty case).

[132] Dieter Dörr, 'The Federal Constitutional Court's ZDF Ruling and its Consequences' (1 November 2016) https://friends.ca/explore/article/the-federal-constitutional-courts-zdf-ruling-and-its-consequences-by-dieter-doerr.

[133] Cf 12 BVerfGE 205 (1961) (First broadcasting case); 73 BVerfGE 118 (1986) (Fourth/Lower Saxony case); 119 BVerfGE 181 (2007) (Twelfth broadcasting case); 136 BVerfGE 9 (2014) (Fourteenth/ZDF Treaty case).

[134] 74 BVerfGE 297 (1987) (Fifth/Baden-Württemberg case).

[135] 83 BVerfGE 238 (1991) (Sixth/North Rhine-Westphalia case).

public broadcasting to current levels of development in programming, funding, and technology'.[136] Other forms of transmission may replace terrestrial broadcasting, but the court has said the constitutional guarantee of comprehensive, universally available and diverse information will encompass new forms of transmission. It is the 'communication process' that is constitutionally protected.[137]

In 2007, the court stated that requirements 'for the legal organization of broadcasting, to secure broadcast freedom … are not rendered moot by the development of communications technologies and media markets.'[138] While the 2007 decision 'explicitly confirmed the right of the PSBs to develop new media activities',[139] regulatory agreements have been reached in light of European Union requirements that may affect the practical ability of public media to achieve public service aims online.[140] As Runor Woldt notes, the position of public media in an evolving communication environment can be expected to return to the court.[141] Questions surrounding state aid and public broadcasting under European law are left aside in this book.[142] They are clearly one avenue that could be examined in depth, as some restrictive approaches to state aid appear to be inconsistent with positive dimensions of free speech.

Free speech and the state

The above seven points—free speech's positive dimensions, the freedom's breadth, the dual broadcasting system, public broadcasting funding, internal pluralism, the court's precautionary approach, and the contemporary media environment—suggest something of how the state has an obligation to pursue conditions under which free speech would be made effective. In Germany, the approach has led to a dual broadcasting system, rather than a structurally diverse media system more generally. But it is worth underlining that the public service is meant to be comprehensive, universally available and substantially diverse. To have these qualities, it needs adequate funding through a relatively depoliticised process, aiming to give it independence from both market and political domination. These requirements—based directly in the constitution's protection of free speech—have led the German court to act, rather than leaving matters solely to markets, regulators, executive and parliament. Thus, in the German context, it is understood that '[f]ree and independent media can be the *result* of state action'.[143] Indeed, free speech *requires* such action. However, the German

[136] Ibid.

[137] Ibid.

[138] 119 BVerfGE 181 (2007) (Twelfth broadcasting case) at its headnote 1 (translation from Witteman, 'Constitutionalizing Communications', above n 75, 175).

[139] Gibbons and Humphreys, above n 88, 117.

[140] See eg Woldt, above n 28, 178-80.

[141] Ibid 181.

[142] See eg Peter Humphreys, 'EU State Aid Rules, Public Service Broadcasters' Online Media Engagement and Public Value Tests: The German and UK Cases Compared' (2009) 1 *Interactions: Studies in Communication and Culture* 171; Gibbons and Humphreys, above n 88, 118-125, 154-161; Hallvard Moe, 'Governing Public Service Broadcasting: "Public Value Tests" in Different National Contexts' (2010) 3 *Communication, Culture and Critique* 207.

[143] Sebastian Müller and Christoph Gusy, *Case Study Report: Does Media Policy Promote Media Freedom and Independence? The Case of Germany* (2011) 21 (emphasis added), available via https://cordis.europa.eu/project/id/244365/results.

example also suggests some of the challenges in implementation. The steps taken by the court may well not cover the terrain of public speech as widely as the principles used would suggest. And, even with strong obligations set out by a constitutional court, recurring political battles may well mean legislatures and executives do not protect free speech in line with the constitutional requirements. That appears to have been part of the German experience, particularly in relation to matters of funding and broadcasting councils.

The court's 1994 decision on public funding did not mean the issue became straightforward. Meier describes how difficulties emerged in subsequent funding determinations,[144] and how the *Länder* set out 'a genuine political rationale' in 2004 for limiting the licence fee increase because of economic conditions (which had led to other reductions in public spending and consequent public hardship).[145] Some *Länder* governments also had interests in promoting commercial broadcasting. What is worth emphasising is that the apparently genuine political rationale did not meet the constitutional requirements. The ARD public broadcasters went to court after the 'stunning' reduction of the recommended licence fee and they won.[146] The reduction was unconstitutional, as Meier had correctly stated prior to the Federal Constitutional Court's decision.[147] The ARD had consciously kept open the possibility of a constitutional claim during negotiations with the *Länder* over the licence fee—just one aspect of how constitutional law frames broadcasting freedom and leads to different outcomes than would exist if politicians were not subject to constitutional free speech review. The broadcasters succeeded in having the underfunding made up in the subsequent funding round.

It may be in relation to broadcasting councils and administrative councils that the German situation has displayed the greatest gap between the idea of diverse independent media and its implementation. To consider this further, I use Greg Taylor's examination of the 2014 Fourteenth Broadcasting decision.[148] While a particularly useful analysis, overall his assessment may be a little too pessimistic or retrospective in its focus; it is worth noting more positive evaluations of the decision exist.[149] Some separate the decision from its subsequent adaption in the 17th Amendment to the Interstate Broadcasting Treaty that came into force in January 2016. For example, in a positive analysis of the decision Barbara Thomass notes the Treaty's approach to relevant social groups 'falls far from the intentions of the Constitutional Court' and 'a chance for a wider reflection on the relation of [public service media], its audiences and society was given away'.[150] Similarly, she emphasises the broadcaster response to the court's requirements about transparency were 'rather defensive' and 'a

[144] Meier, above n 81, 138-139.

[145] Henk Erik Meier, '"For a Few Cents Less"? Nested Games in German Broadcasting Regulation' (2006) 15 *German Politics* 166, 185.

[146] Ibid 166.

[147] Ibid.

[148] Taylor, above n 110.

[149] See eg Thomass, above n 93; Dörr, above n 132 (no pagination):

> The ruling is of great importance because it is the first time that the Federal Constitutional Court has dealt in depth with the issue of the extent to which guidelines pertaining to the organisation of supervisory committees in the public broadcasting service are inherent in the imperative of protecting pluralism and in the required separation of state and public media.

[150] Thomass, above n 93, 306-307. At 305, she notes 'The price for this quick procedure [translating the decision into an Interstate Treaty] was that a broad debate within civil society about representation in broadcasting control did not take place.'

compromise'.[151] And while Dörr regards the court's decision on council membership as 'a set of requirements that are far-reaching, but carefully considered', he also criticises aspects of the subsequent Treaty.[152] Overall, Taylor's analysis may underplay the extent to which the 2014 decision offers a better, if still partial, response to political party dominance in German public broadcasting. However, it raises important points about how legal attempts to support free speech's positive dimensions may well have limitations in practice: such practical issues tend to have less consideration in other analyses. As Wolfgang Schulz has observed, there are real challenges in using 'formal law' to 'control informal practices' within the councils.[153]

The 2014 decision centred on the ZDF's two governing bodies, a television council (which is generally called a broadcasting council in other public broadcasters) and an administrative council. The ZDF's regulatory arrangements had 'some peculiarities' with 'more than 40 per cent of all Council members' belonging to 'political parties, federal and state governments and city representatives' and the heads of state governments appointing remaining members rather than the different groups themselves (except for religious organisations).[154] The case arose after the administrative council blocked the contract renewal of ZDF's editor-in-chief. The court focused on council membership, which was held to be insufficiently independent from the state and insufficiently diverse. Too many appointments were determined by politicians or directly occupied by politicians, and the court set out more detailed requirements for the appointment process and the transparency of council operations. As Taylor comments, 'At first sight [the decision] sounds thought-provoking, and far ahead of what could be expected in the common-law world.'[155] But he emphasises the gap between principles and reality. In Germany, where political parties play an important role in virtually all appointments to public office, it is unsurprising their role continued for public broadcasting despite earlier court statements about the importance of independence. Politicians have been reluctant to cede their hopes of influence over broadcast content. The very fact that politicians might well act politically in appointments is why the court acted in the first place. But that did not by itself mean the appointment process achieved unqualified independence from party politics.

For my purposes, two points Taylor addresses are particularly relevant. First is the issue of what organising principle might be used for making appointments if it were not the usual German model of party affiliation. Second is the council friendship circles, mentioned above.[156] In relation to both issues, he notes the tension in requiring diverse councils to protect the public against politicians at the same time as politicians legislating (within limits set by the court) and approving council appointments. Councils are aimed at protecting broadcasters against political inference but are (partially at least) subject to political appointments.

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[151] Ibid 308.

[152] Dörr, above n 132 (no pagination).

[153] Schulz, above n 118.

[154] Pierre-François Docquir, Sebastian Müller and Christoph Gusy, 'Does the Complexity of Institutional Structures in Federal States Influence the Independence of AVM Regulatory Authorities? A Review of the Cases of Germany and Belgium' in Wolfgang Schulz, Peggy Valcke and Kristina Irion (eds), *The Independence of the Media and its Regulatory Agencies: Shedding New Light on Formal and Actual Independence Against the National Context* (Bristol: Intellect 2013) 249, 267.

[155] Taylor, above n 110, 223.

[156] See nn 101-103 and accompanying text.

As to how appointments might be organised without using political parties, the 2014 decision reduced the percentage of appointments that could be party-affiliated. But the approach could go further. For example, current and former politicians, party officials and members of government could be ruled ineligible for *any* council position. This would go beyond the 2014 majority's requirement that politicians be limited to one-third of members, a limit which lessens the direct ability of political members to block the appointment of the *Intendant*. (An intermediate limit, excluding all members of government but not parliamentarians and party representatives was proposed in the dissenting judgment of Paulus J. However, as Taylor notes, under that approach backbench politicians 'eager for promotion' would not be excluded.[157]) If all politicians were excluded, a minority of positions might require parliamentary approval of non-politician candidates that were nominated by certain actors in the political process, with the nomination requiring a supermajority in parliament to be effective. That process could well promote appointments with informal political links and relatively centrist views, but nomination criteria could also be aimed at identifying members beyond organised interest groups, members with relevant expertise of various sorts, and so forth. If parliament approved a minority of positions, further appointments could be made directly by named interest groups such as charities, unions and employer groups, subject only to parliamentary disallowance in highly restricted circumstances (which is, largely, the position that applies for those groups after the 2014 decision). Further options could be considered for interests outside existing named interest groups.

Beyond that outline of a possible approach, closer study could be made of appointment processes and safeguards for public broadcasters and media regulators (the councils subsume both roles) in a range of other systems. But the general point is that the idea of diversity would suggest there not be a single organising principle for appointments to councils, but multiple ones, with in each instance the possibility for political influence being limited. As it does now, the agreement underlying each public broadcaster should state that council members cannot be bound by external instructions (for example, from groups that nominate them) and that members are obliged to represent the public interest, not their own sectorial views. Such statements may have limited effect but not zero effect, as Taylor notes. While the above model is just one possibility, it is not in principle clear why, if public broadcasting is meant to be free of 'all state influence' in its governing bodies, any politically linked appointments at all would be warranted. In the German context, given the role of political parties more generally, it might well be understandable why that step has not been taken. However, that is a separate point to what the ideas about independent and diverse councils suggest in themselves.

In relation to the friendship circles, Taylor notes longstanding concerns have been raised about them,[158] and suggests they are an important way in which the practice of public broadcasting 'is even more saturated with party-political influence' than the rules would suggest.[159] That appears to be true; they are clearly part of the informal practices that modify formal law.[160] There are two friendship circles for ZDF, one linked to each of the country's two major political groupings. Taylor notes that, in a body as large as its broadcasting council—it had 77 members at the time of the 2014 hearing, which was reduced to 60 after the decision[161]—some caucus-like process before meetings

[157] Taylor, above n 110, 240.
[158] See eg the 1970s work of Williams above n 102.
[159] Taylor, above n 110, 231.
[160] Schultz, above n 153.
[161] Taylor, above n 110, 243.

may be understandable, even useful, in helping the council function. But he concludes that parties have captured 'to some considerable extent the governing bodies of this media institution', an entity which is 'meant to be checking up on those very same parties and the governments that they run'.[162] Illustrating this, he quotes the dissenting judgment of Paulus J on the friendship circles:

> The official [council] meetings largely follow the agreements between the friendship circles. Anyone who does not submit to the dual political structure largely forfeits influence. This may be a means of preventing one-sided television reporting. But aside from that, *societal or cultural diversity is not ensured*, *but rather the triumph of political interests*—in themselves not illegitimate—is made possible. The representatives of societal groups are far too dependent upon parties for the achievement of their lobby-group interests to stand up for themselves in debate. Thus *television becomes a site for political arguments not an experimental laboratory of diversity*. The boards—and thus the broadcasters—adjust to politics, not politics to the functions of the boards.[163]

A more independent membership *might* lessen such practices—they might aid in sustaining an experimental laboratory of diversity—as might a smaller membership, but the circles are clearly important in the German context. Equally, they would not necessarily exist elsewhere in the same style or to the same extent.

The majority judgment recognised weaknesses in the operations of the council and made a series of changes, some of which have been noted already. One issue addressed concerned transparency in council operations. The majority held the constitution did not specify the degree of transparency required beyond a 'minimum', such as making available

> information about organisational structures, the composition of the boards and their sub-committees as well as future agendas, and also that at least in principle the minutes of meetings are available promptly or that some other way is found of informing the public of the subject of deliberations and their results in a substantial way.[164]

How the requirement to inform the public 'in a substantial way' is interpreted in future would appear to be significant in whether the majority's position goes far enough.

I noted above that Taylor may be slightly too pessimistic in his assessment in how councils' lack of independent or non-political membership relates to a risk of political domination over broadcasting. Clearly, there is a risk. However, Etzioni-Halevy observed in her 1980s six-country study of broadcasting that *effective* pressure from politicians involves more than just 'politically congenial appointments'. It arises with a combination of three things: direct interference by politicians in broadcasts and policies; politicians exerting financial pressure through control of funding; and pressure through appointments. She suggests political 'power really lies' in the '*combination*' of these three areas of pressure.[165] Thus, other German court decisions should lessen the potential for influence, for example through their efforts to support an independent funding system.

The Federal Constitutional Court has repeatedly dealt with matters of public broadcaster funding and council diversity and independence. While the changes may be slow—and perhaps less dramatic in their effects than the principles themselves would suggest—it remains the case that the

[162] Ibid 232.
[163] Ibid 233 (emphasis added).
[164] Quoted in ibid 239.
[165] Etzioni-Halevy, above n 78, 204 (emphasis added).

court has played a highly significant role in German broadcasting and has gradually defined, and more clearly confined, parliament's discretion on the issues. Under these judicially declared limits

> state legislatures have assumed the role of guaranteeing … a public communicative sphere *free of state influence* … What might sound paradoxical, in fact engenders public communicative discourse if implemented properly.[166]

It is useful, I think, to separate the ideas and techniques seen in the German decisions and the context in which they are applied. In short, the same ideas and techniques in a different context would not necessarily lead to the same degree of political party influence. In addition, the multiple measures taken to promote independence appear to work against political domination of the broadcasters. And the 'path dependency' of media systems that is suggested through some media research does not in itself offer a reason for quarantining the ideas and techniques seen in the German example.[167]

However, while it is instructive, there are ways in which the German example does not appear to meet its own goals. Some weaknesses have already been noted above. Two related aspects are considered here about the range of media involved and diversity. First, in an obvious limitation the decisions address only public *broadcasting*. Historical reasons for a distinct treatment of broadcasting from print were often technical, such as the limited spectrum available for broadcasting and the need for its orderly use, but the differential treatment has long raised controversy in many jurisdictions.[168] The German court no longer relies on spectrum scarcity and high production costs to justify the constitutional requirements for public broadcasting. More recently it has emphasised that commercial broadcasting's advertising-based financing means it cannot meet the constitutional mandate. But it is not clear why this reasoning would not apply to other media as well. There may be reasons for the highly differential treatment of broadcasting and press under constitutional law, but they have not been well articulated.[169] Logically, the concern about media financing could apply in some form to all media, and such arguments have been made.

Somewhat like US debates about the 'newspaper crisis' and public financial support for journalism,[170] there have been explicit calls in Germany for state support of print journalism to parallel the approach to broadcasting. (Unlike many European countries, German print media does not receive direct forms of public funding.) Jürgen Habermas, to take an interesting example given this book's

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[166] Docquir, Müller and Gusy, above n 154, 257 (emphasis in original).

[167] On path dependency, see eg Peter J Humphreys, *Media and Media Policy in Germany: The Press and Broadcasting since 1945* (2nd ed, Oxford: Berg 1994); Gibbons and Humphreys, above n 88. Other research suggests convergence is occurring across different national systems of media and its regulation; see eg Hallin and Mancini, above n 32.

[168] See eg debates on approaches to US broadcasting and print illustrated by *Red Lion Broadcasting v FCC* 395 US 367 (1969) and *Miami Herald v Tornillo* 418 US 241 (1974).

[169] An interesting (if lengthy) approach to differential US press and broadcasting law is Jonathan Weinberg, 'Broadcasting and Speech' (1993) 81 *California Law Review* 1101; see also eg Lee C Bollinger, 'Freedom of the Press and Public Access: Toward a Theory of Partial Regulation' (1976) 75 *Michigan Law Review* 1.

[170] See eg Robert W McChesney and Victor Pickard (eds), *Will the Last Reporter Please Turn Out the Lights: The Collapse of Journalism and What Can Be Done to Fix It* (New York: New Press 2011). Some proposals take the form of encouraging charitable foundations as media funders; see eg Rodney Benson, 'Can Foundations Solve the Journalism Crisis?' (2018) 19 *Journalism* 1059. See also, eg, the French-US analysis in Julia Cagé, *Sauver les médias: Capitalisme, financement participatif et démocratie* (Paris: Seuil et La République des Idées 2015)/*Saving the Media: Capitalism, Crowdfunding, and Democracy* (translated by Arthur Goldhammer) (Cambridge, MA: Belknap Press of Harvard University Press 2016).

interests, argues that broadcasting's 'protected public legal status' offers a model for '"serious" newspapers and magazines'.[171] Such a model would support the inclusion of a wide range of viewpoints on public issues within 'a more or less discursively conducted conflict of opinions'. He concludes the question is not about the propriety of financial support. 'It is just a pragmatic question of how this can best be done.'[172] Aligning with the precautionary approach discussed above for the court's broadcasting decisions, he notes 'no democracy can afford a market failure in this [press] sector'.[173]

The general point Habermas makes here is not dependent on his wider theory of public communication; it follows from broadcasting freedom and Article 5's opinion formation purpose. At least, it follows in theory if not in current law. Freedom of communication suggests a variety of media models should exist across different forms of media, not just a dual model within broadcasting. The arguments for positive free speech suggest a need for diverse *media*, not only *broadcasting*. The diverse media models discussed in chapter 2 clearly incorporate a variety of non-market-based media sectors—James Curran using multiple media sectors which are not limited to broadcasting; Georgina Born through multiple roles for public media itself.[174]

Second, as discussed earlier, the Federal Constitutional Court has pursued a model of internal pluralism through broadcasting council membership. This is an unsurprising approach for substantial public broadcasters—entities which are constitutionally required to provide a service that is comprehensive, available to the entire population and substantially diverse. But to suggest the dual system, in itself, meets the constitutional requirements is less obvious. It is a model that deals with only two styles of organisation, public and commercial, and does so only in relation to one form of media, broadcasting. The logic of the analysis would appear to go further in requiring a structurally diverse media system. This could suggest having both 'universal' and 'sectional' media—wider inclusive media and narrower more overtly partisan media—with both types being separate from

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[171] Jürgen Habermas, 'Media, Markets and Consumers: The Quality Press as the Backbone of the Political Public Sphere' in his book, *Europe: The Faltering Project* (translated by Ciaran Cronin) (Cambridge: Polity 2009) 131, 135. See also eg Kolo and Weichert, above n 64, 227 and 230 who recommend multiple newspaper funding options, including a licence fee approach modelled on German public broadcasting. Honneth also notes the issue in passing, citing Habermas: Axel Honneth *Freedom's Right: The Social Foundations of Democratic Life* (translated by Joseph Ganahl) (Cambridge: Polity 2014) 298:

> Sooner or later … the democratic exchange of views will be faced with the question of whether, given the precarious position of almost all independent daily newspapers in Europe, the public institutionalization of the press will be necessary.

[172] The example from Habermas is, in some ways, opposite to the libertarian futurist reading of the US First Amendment offered by Ithiel de Sola Pool who calls for all US communications law to move substantially towards the negative freedom approach that is generally applied to the press (with some common carrier regulation if bottlenecks exist in communications infrastructure): Ithiel de Sola Pool, *Technologies of Freedom* (Cambridge MA: Belknap Press of Harvard University Press 1983) 246-251. See also Ithiel de Sola Pool, *Technologies Without Boundaries: On Telecommunications in a Global Age* (posthumously edited by Eli M Noam) (Cambridge MA: Harvard University Press 1990). Noam notes Pool may have had a blind spot about liberty and private power and 'may be at times overly negative about any role for government policy in achieving diversity': ibid, viii. In short, Pool was keen on pluralistic public speech; he differed in terms of how it could best be sought.

[173] Habermas, above n 171, 134-137.

[174] See James Curran, 'Mediations of Democracy' in James Curran and Michael Gurevitch (eds), *Mass Media and Society* (4th ed, London: Hodder Arnold 2005) 122; James Curran, *Media and Power* (London: Routledge 2002) 240-246; Georgina Born, 'Digitising Democracy' (2005) 76 (Supplement 1) *Political Quarterly* 102.

predominantly market-based media. It could, again, suggest something like the media models from Curran and Born, or the broadly similar legal model of Baker.[175]

The internal pluralism sought by the German court resonates with the idea of inclusive, population-wide media. The approach, however, makes little sense as the sole or overarching requirement if diversity is understood also to involve a wide range of views pursued in a 'pure' form through sectional media. The invisibility of such issues from the German cases may relate to aspects of national political culture, the parties involved in litigation, or tendencies toward conservatism in legal systems. The country's consensus- and coalition-based political model would not appear to be the easiest partner for diverse public speech.

Conclusion

The German example shows that courts may act to support positive free speech, as they act over its negative dimensions. This is notable because so often positive free speech is seen only in terms of what parliament should enact and what courts should then not strike down. Many of the arguments in the court decisions would support such parliamentary initiatives, but matters need not be left as simply an 'open' choice for legislature, executive or regulator. There are many US examples calling for an open approach, which may reflect the practical challenge of imagining or arguing for judicial support for positive free speech in that context.[176] There, legislative and regulatory action may be the most important avenues to pursue. There are countless examples of such work.[177] Under recent case law, the First Amendment is overwhelmingly negative. Under the First Amendment, '[w]hen free speech and government meet, it is to *contest* one another'.[178] But a negative First Amendment should not be equated with free speech. A constitutional free speech provision can be very different than the First Amendment's current legal interpretation. It can create judicially enforced requirements for other arms of government to support sustained plural public speech. The German approach affirms the idea of 'an independent, pluralist, and plurivocal public sphere, of more-than-formalist understanding of democratic political culture'.[179] And it goes some way to supporting the communicative freedom that underlies such public debate. The court decisions track some of the calls for media reform that follow from post-democratic analyses, such as Tom Mills' ideas to strengthen UK public media through, among other things, giving the BBC 'a permanent constitutional footing' and abolishing political control over its finances and senior appointments.[180]

If structures affecting public communication also influence political processes—which appears undeniable—the German cases illustrate that the 'architecture' of public speech must, in some sense, be *prior to* public debate. Public debate could reshape the architecture of public speech to a degree, but it could not make changes that went beyond the requirements of free speech. The German

[175] See above n 76.

[176] See eg Jerome Barron, 'Access to the Press – A New First Amendment Right' (1967) 80 *Harvard Law Review* 1641; Jack M Balkin, 'Some Realism About Pluralism: Legal Realist Approaches to the First Amendment' [1990] *Duke Law Journal* 375; Baker, *Media Markets*, above n 76; Susan H Williams, *Truth, Autonomy, and Speech: Feminist Theory and the First Amendment* (New York: New York University Press 2004).

[177] See eg various chapters in McChesney and Pickard, above n 170.

[178] Brown, above n 71, 160 (emphasis added) (the First Amendment 'positions government and speech as warring forces').

[179] Collings, above n 16, 79.

[180] Tom Mills, *The BBC: Myth of a Public Service* (London: Verso 2016) 215 and see chapter 3.

precautionary approach gives speech this sort of foundational role. There is nothing about the ideas limited to the German context or to public broadcasting. Of course, the particular constitutional history and culture is important in practice, but they are separate to what the ideas suggest: namely, certain requirements for the architecture of public communication in a constitutional democracy.

The German example flags matters for multiple state institutions, notably courts, legislatures and executives. Each of these actors is compromised in its ability to support free speech's positive dimensions, which is a reason for courts not to leave matters only to the other actors. The concerns for democratic politics if courts do not promote a framework for sustained plural public speech, suggest courts should theoretically do more than focus solely on speech as a negative liberty against government. Concerns with such a judicial role are returned to in chapter 8. The wager suggested by the German example is that explicitly addressing positive dimensions of free speech within case law in other jurisdictions would be likely to improve the architecture of public speech, compared with denying the issue's relevance or not addressing it at all. The broadcasting decisions illustrate parts of the approach and reasoning that could be used and suggest the limited and partial quality of any attempt to realise free speech. That does not make the attempt less valuable.

7 French Freedom of Communication and Pluralism

French law on freedom of communication poses challenges for comparative analysis. The law itself is complex; the main audiovisual legislation[1] is byzantine after repeated and substantial amendment;[2] and the French tradition of protecting rights differs from many democracies, although it has gradually moved towards European norms. The complexity and specificity create dangers of over-simplification. Even so, France is an interesting example to consider. Long noted in English language scholarship on positive free speech, it illustrates important aspects of positive communicative freedom including the multiplicity of actors and actions involved. This chapter considers what has been held constitutionally relevant in France (and what has not) regarding plural public speech, and examines the resulting role of legislative, government and regulatory authority. The analysis leads to observations about how French constitutional law could further its support for plural public speech.

The French constitution contains a broad protection of communication that includes the interests of recipients as well as speakers. It recognises recipient interests in diverse speech across all forms of media. And media pluralism, including the transparency which it involves, is centrally important to free communication. There are various ways to understand how pluralism relates to communicative freedom; recognising this helps to clarify just what is meant by free speech's positive dimensions and how they interact with its negative ones. France illustrates how pluralism can be understood as *part of* communicative freedom rather than as something separate from it. Some French analyses emphasise that pluralism and free speech are 'interlinked or interdependent' and 'it is difficult today to establish a precise boundary' between them.[3] The two are inherently linked: democratic free communication entails pluralism as well as non-censorship. This is so even though French law also states that aspects of free speech are limited by the demands of pluralism. The key point in the previous sentence is the word 'aspects'. The freedom as a whole is understood to be made more effective by pluralism's requirements. Looking at ways in which free speech and pluralism are sometimes treated as substantially one concern and, at other times, as relatively distinct (so that pluralism limits free speech) is instructive for understanding just what is meant by positive dimensions of free speech.

However, French constitutional rulings on freedom of communication are far less detailed and prescriptive than the German law examined in chapter 6.[4] Considering matters beyond the decisions themselves suggests some of the complexity of regulating positive free speech, complexity which exists well beyond France. The principle that democracy requires plural public speech is simple to state, but the principle's 'contours [and] implementation are complex'.[5] This relates in part to the

[1] In France, the term 'audiovisual communication' is commonly used to encompass radio as well as actual audiovisual media.

[2] See eg Serge Regourd and Laurence Calandri, '*Avant-propos*' in Serge Regourd and Laurence Calandri (eds), *La régulation de la communication audiovisuelle: Enjeux et perspectives* (Clermont-Ferrand: Institut Universitaire Varenne 2015) 11, 12: multiple reforms have progressively made the legislation 'a true textual "mille-feuille"' (unless otherwise noted, translations from French are my own).

[3] Lauriane Josende, *Liberté d'expression et démocratie: Réflexion sur un paradoxe* (Brussels: Bruylant 2010) 372.

[4] The contrast with German constitutional decisions has long been noted; see eg Thomas Hochmann, '*Motivation et justice constitutionnelle: le modèle allemand*' (2017) nos 55-56 *Les Nouveaux Cahiers du Conseil constitutionnel* 23.

[5] Charles Debbasch, '*Préface*' in Philie Marcangelo-Leos, *Pluralisme et audiovisuel* (Paris: LGDJ 2004) v.

multiple actors and actions relevant to the freedom. As far as positive dimensions of the freedom have support in France, it is through the combined actions of courts, parliament, executive[6] and regulators, at the least.[7] Their interaction underlines that free speech concerns much more than constitutional law, even if constitutional law offers a useful entry point for my purposes. While predicting law's development might be imprudent, changes to date suggest the need for plural and independent media could be recognised more powerfully by French law over time.

Before proceeding, there are two matters to note, concerning terminology and law reform. First, 'freedom of communication' is sometimes used to refer to *media* freedom in France, while 'freedom of expression' refers to *individual* speech.[8] Some legal analyses also separate freedom of audiovisual communication from other areas of free speech.[9] Different forms of mediated communication have differences—such as licensing systems for broadcasting and different historical timelines for gaining a degree of independence from government[10]—but links across the forms exist. And, as discussed in this section and the next one, freedom of communication in French law is based in the general protection of free speech. Thus, while 'freedom of communication' is often used in this chapter, there is no intention to depart from my focus on media freedom as an aspect of free speech more generally. In the French context, I treat broadcasting law as part of a wider media law—with differences from other parts of media law but a common interest in publication and public speech—more than a legally distinct area that cannot be assimilated to the wider concept.[11] In any event, my

[6] Consistent with much commentary, I use the term executive as a shorthand for France's three constitutional seats of executive power: president, prime minister and government: Sophie Boyron, *The Constitution of France: A Contextual Analysis* (Oxford: Hart 2013) 56.

[7] Clearly, media professionals and those who interact with them, especially their regular sources, are also significant but they are not a focus here. For a comparison of French and US journalistic fields (including the influence of the French context on plural public debate) see Rodney Benson, *Shaping Immigration News: A French-American Comparison* (Cambridge: Cambridge University Press 2013). For a French-German comparison, see Peter Maurer, 'In the grip of politics? How political journalists in France and Germany perceive political influence on their work' (2019) 20 *Journalism* 1242. For a US consideration of media professionals and government, with some resonance for ideas of positive free speech, see Timothy E Cook, *Governing with the News: The News Media as a Political Institution* (2nd ed, Chicago: University of Chicago Press 2005).

[8] Some analyses use the term 'freedom of communication' to cover both aspects; see eg Emmanuel Dreyer, *Droit de la communication* (Paris: LexisNexis 2018). This may be linked to the wording of Art 11 of the *Déclaration des Droits de l'Homme et du Citoyen of 1789* (discussed in the section, 'Article 11 of the Declaration of 1789, Pluralism and Free Communication').

[9] See eg Pierre Roujou de Boubée, *Les fondements constitutionnels de la liberté de la communication audiovisuelle: Approche comparative entre les grands modèles dans l'Union européenne* (Bayonne: Institut Universitaire Varenne 2018) 172 noting reasons for treating freedom of audiovisual communication as separate from and complementary to free speech. As he notes, this differs from German law which assimilates it with free speech. Roujou de Boubée also notes that the UK approach (which probably mirrors a wider English-language approach) treats broadcast freedom as part of free speech: ibid 450.

[10] In France, broadcasting remained effectively an arm of government until late in the twentieth century. See eg Serge Regourd, '*Généalogie du droit français de la communication audiovisuelle*' in Regourd and Calandri, above n 2, 17, 19 who notes an 'umbilical cord between audiovisual media and executive power' existed before the Law of 29 July 1982, a tendency which continued as he explains.

[11] See eg Jacques Chevallier, '*Réflexions sur la gouvernance du système audiovisuelle*' in Regourd and Calandri, above n 2, 375, 385 comparing the approaches of Serge Regourd (broadcasting as distinct) and Emmanuel Derieux (broadcasting as part of media law).

inquiry is largely for an audience beyond France; ideas about free communication in French law say something about free speech more generally.

Second, substantial law reform was partly left aside in 2020 due to the global coronavirus pandemic. Among other changes, a bill on 'audiovisual communication and cultural sovereignty in the digital age' would have created a single holding company for the public broadcasters *France Télévisions*, *Radio France*, *France Médias Monde* and the National Audiovisual Institute, and moved nomination of public broadcasting heads to broadcasters themselves (subject to regulatory and parliamentary approval).[12] It would have merged two regulators for the sector,[13] relaxed advertising limits and prohibitions on broadcasting films on certain days each week, and updated the system financing much French audiovisual production by requiring contributions from streaming platforms. The government abandoned the bill in mid-2020, planning to introduce some urgent measures via ordinance before proceeding with a smaller bill.[14] Despite the scale of the original plans (and of what was expected to continue), this chapter's analysis remains largely unchanged. The bill's stated aims included 'continuing to prevail over a strictly market logic' with essential French values for the sector, such as 'cultural diversity in all its forms' and 'pluralism of currents of ideas and opinions'.[15] The latter words, in particular, have a central place in the French context.

Protecting rights in the French tradition

Part of the complexity of analysing French law on free communication arises from the country's multiple court systems, with two supreme courts and a separate constitutional tribunal. Public and private law are divided, with the Cour de cassation being the final court for civil and criminal matters, and the Conseil d'État being the final court for administrative matters.[16] Alongside them is the Conseil constitutionnel. It is the sole court to determine French constitutional questions,[17] but it is not a Supreme Court as that would generally be understood.[18] For my purposes, the Conseil constitutionnel is most relevant to free communication, but the others can be important in practice. The Conseil d'État, for example, exercises control over the broadcasting regulator, the Conseil supérieur de l'audiovisuel (CSA), including its treatment of pluralism. The Conseil d'État 'plays an important role in

[12] See *Projet de loi 2488 relatif à la communication audiovisuelle et à la souveraineté culturelle à l'ère numérique*, JO, 5 December 2019.

[13] It would have merged the *Conseil supérieur de l'audiovisuel* (CSA), which is discussed below, and the *Haute autorité pour la diffusion des œuvres et la protection des droits sur internet* (HADOPI, High authority for the dissemination of works and the protection of rights on the internet).

[14] See eg Sandrine Cassini and Aude Dassonville, '*Le gouvernement taille en morceaux la loi sur l'audiovisuel*', *Le Monde*, 18 June 2020.

[15] Above n 12, 5.

[16] Consistent with much commentary, I do not italicise the courts' names. The Conseil d'État is also an advisory body to government.

[17] France's multiple court systems (also including the Cour de comptes) are outlined by eg Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Oxford: Hart 2013) 45-59.

[18] Michel Verpeaux, *Le Conseil constitutionnel* (2nd ed, Paris: La Documentation française 2014) 155. Its name is often translated as constitutional council, but I would use the term court in English to reflect its contemporary position and role.

determining the practical scope of the powers of independent authorities' such as the CSA.[19] and the Conseil d'État and the Cour de cassation rule on French law's compliance with international obligations, such as the European Convention on Human Rights (ECHR).[20] (In this chapter, I often use the shorthand of Conseil to refer to the Conseil constitutionnel. Other tribunals are named in full, as is the Conseil constitutionnel where that assists clarity.)

While the Conseil constitutionnel is important for pluralism, it is an unusual tribunal. In the 1990s, the Conseil's president described its 'hallmark', compared with other constitutional courts, as 'more restraint than boldness'.[21] While pluralism is an area in which it has been active, the observation is apt even there.

One reason the Conseil's protection of pluralism is limited may be the French tradition of protecting rights. Rights were traditionally protected by *parliament* rather than *courts*. Rights were not constitutionally entrenched; they were held not 'against the state but through the state',[22] especially through statutes.[23] At base, legislation was understood to express the people's will, and it was legislation that protected rights. Dominique Rousseau observes this meant the people had no constitutional existence independent of parliament: governed were identified with governors, and the people could have no will other than that expressed by their representatives.[24] Parliament 'was itself the guardian of freedom', with freedoms being 'political rather than legal standards against which the performance of the legislature could be judged'.[25] The approach echoes Jean-Jacques Rousseau's idea of the general will: sovereignty resides in the people and their will is expressed through legislation. Thus, legislation expresses the general will as stated by Article 6 of the *Déclaration des Droits de l'Homme et du Citoyen* of 1789 ('Declaration of 1789'). This tradition of rights protection left no place for judicial review of substantive rights. Rather, legislation had 'a quasi-sacred status'; statutes could not 'be controlled nor their jurisdiction and importance reduced'.[26]

It could be misleading to use the past tense (as the previous paragraph does) to suggest the tradition of protecting rights through parliament has ended. Parliament maintains a significant role regarding speech, and the tradition remains influential in much French law and commentary. However, the Conseil's role has evolved substantially from the time when judicial review was 'all but

[19] Diane de Bellescize and Laurence Franceschini, *Droit de la communication* (2nd ed, Paris: Presses Universitaires de France 2011) 146.

[20] Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

[21] Robert Badinter, 'In Defense of the Constitutional Council', *Le Monde* (Paris) 11 November 1993 in Martin A Rogoff, *French Constitutional Law: Cases and Materials* (2nd ed, Durham NC: Carolina Academic Press 2014) 228, 230-231.

[22] Eg Michel Troper, 'Constitutional and Legal Framework for Rights Protection in France' in Dennis Davis, Alan Richter and Cheryl Saunders (eds), *An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law* (Oxford: Hart 2015) 177, 178 (emphasis removed).

[23] Also noteworthy was the public law role of the Conseil d'État, which 'developed, very much in the manner of the common law, a … complex system of protection mainly based on "general principles of law" that [it] claimed to have discovered and constructed': ibid.

[24] Dominque Rousseau, '*La V^e République se meurt, vive la démocratie*' (2007) ('The Fifth Republic is Dying, Long Live Democracy') extracts in Rogoff, above n 21, 237.

[25] John Bell, *French Constitutional Law* (Oxford: Oxford University Press 1992) 138.

[26] Boyron, above n 6, 48.

unthinkable'.[27] The Conseil 'has developed from a political institution of marginal importance into a full-fledged constitutional court';[28] it could better be called the *Cour constitutionnel* or Constitutional Court.[29] Judicial review is now commonplace in France, and the general will is no longer expressed solely in legislation. It emerges through, at the least, parliament, executive and Conseil.

Changes to the Conseil's role to protect constitutional rights reflect a newer understanding of rights and democracy.[30] The changes could be sourced to the 1958 French constitution but, perhaps more realistically, can be traced to a 1971 Conseil decision and a 1974 constitutional amendment. With those steps, the Conseil stopped behaving 'as a dutiful servant of the executive'.[31] And there have been further, marked developments in its role following constitutional revisions passed in 2008.

Under the 1958 constitution, the Conseil was originally envisaged as protecting the executive against parliamentary overreach, not as a constitutional court protecting rights. The French parliament's powers to legislate are not general. They are specified in the constitution. At the same time, the government has wide powers.[32] Governmental decrees may resemble regulations that implement details under parliamentary legislation (as happens in many jurisdictions). However, in areas not within parliament's remit, decrees can also function *as* legislation. Enforcing the division of power between parliament and government was central to the Conseil's originally envisaged role. It would prevent parliament from 'encroach[ing] on the government's autonomous regulatory domain'[33] and 'police the … horizontal division of powers between the executive and Parliament'.[34] This helps explain the Conseil's original power of *a priori* abstract review. It also makes the Conseil's membership, which includes all former presidents, more plausible.[35] If a body is to protect the executive, it is less surprising that former presidents have automatic membership (and that membership requires no legal training). If the body is a constitutional court protecting people's rights, such membership appears incongruous: 'It evidently poses many problems.'[36] The Conseil's 'membership, organisation and original mechanisms for control all seemed to indicate a quasi-political entity'.[37] However, the 1971 Freedom of Association decision redefined the Conseil's role by expanding the constitution's content.[38] '[T]hrough its own decision', the Conseil 'declared itself to be the judge of the constitutionality of laws.'[39]

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[27] Alec Stone, *The Birth of Judicial Politics in France: The Constitutional Council in Comparative Perspective* (Oxford: Oxford University Press 1992) 23.

[28] Mak, above n 17, 46.

[29] Verpeaux, above n 18, 181.

[30] See eg Dominique Rousseau (ed), *La démocratie continue* (Paris: Bruylant/LGDJ 1995).

[31] Stone, above n 27, 17.

[32] See Constitution of 4 October 1958, Arts 34 and 37 and eg Boyron, above n 6, 48-49.

[33] Martin A Rogoff, 'Fifty Years of Constitutional Evolution in France: The 2008 Amendments and Beyond' (2011) no 6 *Jus Politicum: Le Parlement français et le nouveau droit parlementaire après la réforme de 2008*, 17 available via juspoliticum.com.

[34] Maartje de Visser, *Constitutional Review in Europe: A Comparative Analysis* (Oxford: Hart 2014) 244.

[35] However, former presidents cannot take part in the Conseil's proceedings if they hold another public appointment.

[36] Michel Fromont, *Justice constitutionnelle comparée* (Paris: Dalloz 2013) 79.

[37] Boyron, above n 6, 150.

[38] Conseil constitutionnel 71-44 DC, 16 July 1971.

[39] Roland Drago, 'General Introduction' in George A Bermann and Etienne Picard (eds), *Introduction to French Law* (Alphen aan den Rijn: Kluwer Law 2012) xxix, xxxv.

One reason the Conseil lacked a role protecting rights is the absence of an express bill of rights in the 1958 constitution. Given that, how did the Conseil protect freedom of association in 1971? The constitution's preamble refers to earlier rights declarations, but the preamble had been understood to have no legal effect. In 1971, the Conseil reinterpreted this and created the *bloc de constitutionalité* (or constitutional block).[40] It incorporated into the constitution various sources referred to in the 1958 preamble. The constitution was held to comprise the text of 1958, the Declaration of 1789, economic and social rights from the 1946 constitution's preamble and 'fundamental principles recognised in the laws of the Republic' to which that preamble referred. More recently, the 2004 Charter for the Environment has been added.[41] In 1971, the Conseil held freedom of association to be a fundamental principle recognised in law due to its legislative protection early in the twentieth century. Thus, the Conseil disallowed a statute making the formation of associations subject to government registration. More importantly for my purposes, the Conseil laid the basis for its later free communication decisions by giving constitutional status to the Declaration of 1789. This made statutes subject to the right of free communication in Article 11 of the Declaration, which reads:

> The free communication of ideas and opinions is one of the most precious human rights: every citizen may therefore speak, write and publish freely, except in such cases of abuse of this freedom as shall be determined by *la Loi* [legislation].

Relevant actors appear to have quickly accepted the constitution's expansion.[42] Soon after the decision, a 1974 constitutional amendment allowed 60 members of either house—in practice opposition politicians—to seek review of legislation before its promulgation.[43] (The Conseil could not review laws after promulgation until much more recently.) Previously, only the French president, prime minister and presidents of each parliamentary house could refer matters to the Conseil. The change 'proved decisive'.[44] It 'unlocked the potential of the institution',[45] led to a marked increase in decisions, and was 'the starting-point for a whole new development of fundamental liberties law in France'.[46] Key examples include the 1980s free communication decisions, considered in the next section.

Substantial change also occurred through constitutional revisions passed in 2008. The reforms aimed at better defining and controlling executive power, augmenting parliamentary power and improving protection of rights.[47] Concern to protect rights underpinned a change allowing constitutional review of legislation *after* its enactment, though the *Question prioritaire de*

[40] Verpeaux, above n 18, 132 notes the Conseil itself does not use the term *bloc de constitutionalité*, rather describing the elements as rules and principles of constitutional value. But the term is used widely in commentary.

[41] Constitutional Law 2005-205 of 1 March 2005 on the Charter of the Environment.

[42] Boyron, above n 6, 39.

[43] Law 74-904 of 29 October 1974.

[44] Louis Favoreu and Wanda Mastor, *Les cours constitutionelles* (2nd ed, Paris: Dalloz 2016) 97

[45] Boyron, above n 6, 153.

[46] Bell, above n 25, 138.

[47] See eg the official report preceding the revisions: *Comité de réflexion et de proposition sur la modernisation et le rééquilibrage des institutions de la V^e^ République*, *Une V^e^ République plus démocratique* (chaired by Édouard Balladur) (Paris: La Documentation française 2008) and, for an overview of that report, Rogoff, above n 33.

constitutionalité (QPC) or priority question of constitutionality under the constitution's Article 61-1.[48] Before the change took effect in 2010, only abstract *a priori* review was possible. Under QPC review, legislation's constitutionality can be raised in ordinary litigation in public or private law, and (subject to filtering by the Cour de cassation or Conseil d'État) referred to the Conseil constitutionnel to rule on constitutionality. Review through QPC can only be sought when a dispute is in progress, and only at the instigation of a party. It can encompass laws the Conseil has previously reviewed where circumstances have changed, such as changed factual conditions for the law's application or changed legal conditions from legislative reform.[49] However, QPC review concerns only legislative provisions that infringe 'rights and freedoms guaranteed by' the constitution as Article 61-1 states. It does not concern all aspects of the constitution. I will return to what is meant by rights and freedoms guaranteed by the constitution.

One reason for introducing QPC review was that, without something like it, rights protected under the ECHR could receive stronger protection in French courts than constitutional rights. The fact that ECHR rights are available to the Cour de cassation and the Conseil d'État prompted repeated proposals to develop the Conseil constitutionnel's powers. Overall, introducing QPC review has been described as revolutionary for French law's fundamental principles.[50] If one keeps in mind where the Conseil began and subsequent changes in its role, the description is quite plausible. And it suggests that French rights protection may develop further, with the Conseil playing a more substantial role. At the least, QPC review has 'undeniably' become part of French constitutional culture.[51]

After that overview of changes in French law from having no judicial rights review, to only abstract a priori review of legislation, to forms of *a priori* and *a posteriori* review, the general approach of French law to free communication can be considered.

The aim: an effective freedom for recipients

English language scholarship on French media law often considers 1980s decisions of the Conseil constitutionnel, decisions which remain important. Alternating parliamentary majorities reformed media law several times that decade, and both press and broadcasting legislation came before the Conseil.[52] In the 1980s, the 'search for coherent, stable, and pluralistic regimes to govern' French press and broadcasting was 'extraordinarily active'.[53] As already noted, the Conseil could then only review legislation before its promulgation, and such abstract a priori review often happened when opposition politicians referred legislation to the Conseil.

A central free communication decision is the Conseil's 1984 ruling on press concentration and transparency, which evaluated legislation passed under François Mitterrand's presidency.[54] French newspaper ownership had become much more concentrated during the 1970s, especially through the

[48] Constitutional Law 2008-724 of 23 July 2008 and Organic Law 2009-1523 of 10 December 2009, which came into effect on 1 March 2010.

[49] See eg Boyron, above n 6; Verpeaux, above n 18, 169.

[50] See eg Rogoff, above n 33, 46-52.

[51] Favoreu and Mastor, above n 44, 100; Troper, above n 22, 180.

[52] A detailed analysis in English of successive reforms, debates and Conseil constitutionnnel decisions is provided by Stone, above n 27, 173-208.

[53] Ibid 173.

[54] Conseil constitutionnel 84-181 DC, 10-11 October 1984.

holdings of Robert Hersant. While concentrated ownership appears to have been a real concern, interest in Hersant was also party political. Imprisoned after World War II for collaboration, Hersant was later elected to parliament, serving across decades with various parties and becoming 'an avowed foe' of the left-wing Mitterrand.[55] Concurrent with his political career, Hersant developed a publishing empire with assistance, some thought, from right-wing politicians.[56]

The 1984 legislation imposed various ownership limits, generally 15% market share, which Hersant's holdings far exceeded.[57] It also required public disclosure of newspaper ownership and finances, developing ideas of transparency from France's Press *ordonnance* of 26 August 1944. The *ordonnance* provisions had not been strictly applied, and Hersant's holdings also appeared to breach them. The ownership limits and transparency measures were both challenged in the Conseil as infringing free communication under Article 11 of the Declaration of 1789.

As Eric Barendt states, the Conseil held that the transparency provisions 'promoted the effective choice of readers, enabling them to make informed judgements about newspapers':

> More generally, it ruled that Parliament is entitled to regulate freedom of communication to make its exercise more effective and to balance it with other constitutional rules and values. Among those values is pluralism. Pluralism requires the public to enjoy access to a variety of newspapers, representing different strands of opinion.[58]

Thus, the freedom in Article 11, which might be thought to concern only *speakers*, also protects *recipients*. They are among the freedom's 'essential addressees'.[59] And protecting recipients entails pluralism and transparency, with the aim to promote readers' effective choice.

Other decisions have applied parallel reasoning to broadcasting and internet access.[60] That the requirement of pluralism applies across press, broadcasting and internet is a notable aspect of French law. Pluralism of *all* media forms is a constitutional objective and protecting recipients' ability to form opinions and exercise political choice is a central aim in pursuing an 'effective' freedom of communication.

To explore the Conseil's approach further, I examine three broad issues. First, pluralism arises directly out of Article 11 and is an important part of how French law seeks to make freedom of communication effective. Second, media pluralism is required for democracy: pluralism of currents of expression 'is the necessary corollary of democracy'.[61] Third, the constitutional approach is somewhat disappointing in terms of what pluralism involves. Even if the Conseil's statements about pluralism appear to be strong, much is left to parliament, government and regulators, as well as media professionals and those that interact with them. While many aspects would necessarily be left to those entities—and the Conseil's approach is arguably influenced by the French tradition of protecting rights through parliament and parliament's current constitutional role in relation to free, plural and independent media[62]—the constitutional analysis remains somewhat frustrating. It may leave other

[55] Rogoff, above n 21, 305.

[56] See eg Stone, above n 27, 176-177.

[57] See eg ibid 182-183 (Table 7.1) for an overview of ownership limits in the earlier and final versions of the Bill.

[58] Eric Barendt, *Freedom of Speech* (2nd ed, Oxford: Oxford University Press 2005) 69.

[59] Conseil constitutionnel 84-181 DC, 10-11 October 1984.

[60] Eg Conseil constitutionnel 86-217 DC, 18 September 1986 and 2009-580 DC, 10 June 2009.

[61] Richard Ghevontian, '*Le Conseil constitutionnel, juge électoral et la liberté d'expression*' (2012) no 36 *Nouveaux Cahiers du Conseil constitutionnel* 45, 46.

[62] See below n 102 and preceding text.

actors with relatively free hands, particularly with regard to government influence on public broadcasting.

Article 11 of the Declaration of 1789, pluralism and free communication

For the Conseil, the requirement of media pluralism arises from Article 11 of the Declaration of 1789. The free communication protected by Article 11 requires 'preserving the pluralistic character of sociocultural currents of expression' or currents of ideas and opinions,[63] and sufficient press outlets of different viewpoints. Article 11 is also the constitutional basis for protecting negative, non-censorship dimensions of free speech. For example, the Conseil has used it when reviewing defamation law where, just as in the pluralism decisions, it stated 'freedom of expression and communication is all the more precious because its exercise is a condition of democracy and one of the guarantees of the respect of other rights and freedoms'.[64] That is, the freedom under Article 11 contains both positive and negative dimensions. It is 'a double-sided principle'.[65] Even scholarly analyses that emphasise non-censorship dimensions of free speech recognise the Conseil's 'protective jurisprudence' in this regard.[66] As to the freedom's positive dimensions, the requirement to respect pluralism is the Conseil's 'privileged domain of intervention',[67] with media pluralism 'an objective of constitutional value' to be *reconciled with* freedom of communication.[68]

Media pluralism is also addressed in French legislation, such as the primary broadcasting legislation, the 1986 Law on Freedom of Communication. Article 1 states, in part:

> Communication to the public by electronic means is free. The exercise of this freedom can only be limited to the extent required … by respect for human dignity, the freedom and property of others, the pluralistic character of expression of currents of ideas and opinions and … the protection of childhood and adolescence, the safeguarding of public order, the needs of national defence, the requirements of public service, the technical constraints inherent in the means of communication, as well as the necessity … to develop audiovisual production.[69]

I noted earlier that the Conseil's words suggest pluralism is to be *reconciled with* free communication—pluralism *counterbalances* free communication in some fashion—while the 1986 Law even more directly treats pluralism as *limiting* the freedom. But these ideas do not capture all of Article 11 and pluralism. The Conseil also views pluralism as necessary to make free communication effective. That is what is meant by pluralism being an objective of constitutional value. The Conseil first raised objectives of constitutional value in a 1982 decision on audiovisual communication.[70] Such

[63] The terminology has varied from 'sociocultural currents of expression' in more recent decisions; see eg Pierre de Montalivet, '*La Constitution et l'audiovisuel*' (2012) no 36 *Nouveaux Cahiers du Conseil constitutionnel* 7, 14-15.

[64] Conseil constitionnel 2011-131 QPC, 20 May 2011, considérant 3.

[65] Jean Morange, '*La protection constitutionnelle et civile de la liberté d'expression*' (1990) 42 *Revue internationale de droit comparé* 771, 774.

[66] See eg Sylvia Preuss-Laussinotte, *La liberté d'expression* (Paris: Ellipses 2014) which frames free speech in terms of the history of censorship, using the press law of 29 July 1881 as its centre piece, but also notes the 'protective jurisprudence' of the Conseil: 72.

[67] De Bellescize and Franceschini, above n 19, 143.

[68] See eg Conseil constitutionnel 82-141 DC, 27 July 1982, considérant 5.

[69] Law 86-1067 of 30 September 1986 on Freedom of Communication, Art 1 as amended.

[70] Conseil constitutionnel 82-141 DC, 27 July 1982.

objectives have 'the purpose of ensuring the effectiveness of the various constitutional rights and freedoms', with the objective of media pluralism 'considered to guarantee a meaningful right to freedom of expression.'[71] In that way, pluralism can be understood as a central element *of* free communication, rather than a limit to free communication. For example, the Conseil's 1984 press decision states:

> [P]luralism of newspapers providing political and general information ... is itself an objective of constitutional value; … free communication of ideas and opinions, guaranteed by Article 11 of the Declaration of 1789, would not be effective if the public … did not have access to a sufficient number of publications of different views and characters; … ultimately, the objective to be realised is that the readers, who figure among the essential addressees of the freedom proclaimed by Article 11 … should be able to exercise their free choice without private interests or public power substituting their own decisions, and without the freedom being made the object of a market.[72]

In this analysis, recipients are essential beneficiaries of free communication and they need to be able to exercise choice free of commercial or political domination. Pluralism is a part of that freedom. Without pluralism, free communication would be ineffective; it would be incomplete; it would lack one of its essential dimensions. As Barendt comments, pluralism is recognised as 'essential to effective freedom of speech'.[73] Free communication, and the choice it supports, would not be 'real' without pluralism.[74]

All this suggests pluralism is both a counterbalance to, and an element of, free communication. The characterisation depends on what is in focus. For example, requiring (positive) measures to support media pluralism can be understood as limiting the (negative) free speech of media companies. But the same actions can also be understood as protecting the audience's (positive) free speech interests: their right to information as some French analyses put it. In the former instance, pluralism limits free speech. In the latter, pluralism seeks to make free speech effective. The same duality exists in the commentary. At various points, the speakers' speech is said to be limited by the requirement of pluralism. At others, free speech is said to be made meaningful only with pluralism—pluralism being a necessary dimension of free communication. Philie Marcangelo-Leos addresses the point explicitly when examining French audiovisual law. For the Conseil, pluralism 'appears *at the same time* as the essential aspect of freedom of communication, which conditions its effectiveness, and as a limit to that freedom with which it must be reconciled'.[75] Similarly, Jean Morange states the Conseil holds pluralism 'as a necessity in order for freedom of communication to be fully assured' while also allowing 'limitation of the freedom of broadcasters in order to protect the liberty of the audience, that is to say the public'.[76] Understanding an objective of constitutional value—pluralism—

[71] de Visser, above n 34, 247. See also eg Pierre de Montalivet, '*Les objectifs de valeur constitutionnelle*' (2006) no 20 *Cahiers du Conseil constitutionnel*, available via www.conseil-constitutionnel.fr.

[72] Conseil constitutionnel 84-181 DC, 10-11 October 1984, considérant 38.

[73] Barendt, above n 58, 433.

[74] See eg Marcangelo-Leos, above n 5, 93 'This choice, which freedom [of communication] presupposes, would not be real without the constitutional objective of pluralism, the constitutional purpose of freedom of communication'.

[75] Ibid 3 (emphasis added).

[76] Jean Morange, *La liberté d'expression* (Brussels: Bruylant 2009) 124. See also eg Camille Broyelle and Laurence Franceschini, *Droit de la régulation audiovisuelle* (LGDJ: Paris 2020) 153-154 contrasting the position of

as only limiting rights, as something counterbalanced with free communication, 'provides only a partial explanation'.[77] Pluralism is more than that.

The distinction can also be analysed through a (negative) right to free expression and a (positive) right to information or right to be informed. That approach bases both negative and positive dimensions in Article 11 of the Declaration of 1789; that is, it bases both dimensions in freedom of communication. Emmanuel Derieux and Agnès Granchet describe French media as comprising 'general elements of a system of freedom of expression … and, *in a manner much more complementary than contradictory*, some particular elements of a newer theory called the right to information'.[78] The right to information adds to the freedom and corrects or lessens harms that economic liberalism causes to public speech. In short, economically liberal media is not free media in the constitutionally required sense. Thus, negative free speech is supplemented by positive dimensions of the freedom within a right to information. This right seeks to make free communication 'more "real" … [rather than] only theoretical, virtual or "formal"'.[79] The right to information is not express in French law (or is only exceptionally so), but it can explain various state interventions aimed at making free expression more real.[80] All this makes it plain that the right to information is another way of explaining positive dimensions of free speech. Derieux and Granchet note earlier French research with similar ideas, often from the 1960s and 1970s,[81] as well as referencing the US Hutchins Commission from the 1940s, another classic source of ideas about positive free speech.[82] The right to information includes measures for the audience's benefit, such as press transparency and editorial freedom. It could even include matters such as public financial aid for press, film and broadcast media; rules on party electoral broadcasts; certain content requirements for public and private broadcasters;

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recipients and editors with regard to the freedom's two sides; Dreyer, above n 8, 19-20 [26] who treats pluralism more as a limit to free communication for the benefit of the audience and its right to information.

[77] Montalivet, above n 71.

[78] Emmanuel Derieux with Agnès Granchet, *Droit des médias: Droit français, européen et international* (7th ed, Issy-les-Moulineaux: LGDJ 2015) 55 [62] (emphasis added); see more recently the same point in Emmanuel Derieux, *Droit des médias: Droit français, européen et international* (8th ed, Issy-les-Moulineaux: LGDJ 2018) 55 [64].The same general idea of treating positive communicative freedom as a 'right to know' is noted outside the French context by András Koltay, 'The Concept of Media Freedom Today: New Media, New Editors and the Traditional Approach of the Law' (2015) 7 *Journal of Media Law* 36, 41.

[79] Derieux, above n 78, 55 [61].

[80] Derieux and Granchet, above n 78, 60 [81]. They note the closest French law comes to stating the concept explicitly is through the 2008 reform to Art 34 of the constitution which addresses the need for free, plural and independent media; they also refer to the Art 4 reform which now states that law guarantees the pluralist expression of opinions and equal participation of political parties and groups in democratic life: ibid 61 [84]; also see slightly updated version in Derieux, above n 78, 61 [87].

[81] Derieux and Granchet, above n 78, 60 [83], citing eg Bernard Voyenne, *Le droit à l'information* (Paris: Aubier-Montaigne 1970); Joseph Folliet, *L'information moderne et le droit à l'information* (Lyon: Chronique sociale de France 1969); Denis Périer-Daville, *La liberté de la presse n 'est pas à vendre* (Paris: Seuil 1978).

[82] Ibid; see eg Commission on Freedom of the Press (Hutchins Commission), *A Free and Responsible Press: A General Report of Mass Communication: Newspapers, Radio, Motion Pictures, Magazines, and Books* (Chicago: University of Chicago Press 1947); William Ernest Hocking, *Freedom of the Press: A Framework of Principle: A Report from the Commission on Freedom of the Press* (Chicago: University of Chicago Press 1947); and see generally Victor Pickard, *America's Battle for Media Democracy: The Triumph of Corporate Libertarianism and the Future of Media Reform* (New York: Cambridge University Press 2015). In the subsequent edition (Derieux, above n 78), the Hutchins references are omitted, perhaps to manage the book's overall length.

and source protection for journalists.[83] That list illustrates how a wide range of legal actions and actors are relevant to communicative freedom. But a central aspect of the concept is media pluralism.

Through pluralism, 'freedom of expression corresponds … more to a social and political right than to an individual prerogative in the strict sense of the term':[84] free speech is a public freedom. In that regard, Sophie Boyron notes the 'rather impressive' protection created by the Conseil, which extends free expression 'beyond the protection of individual citizens' to give it 'a wider remit'.[85] Negative and positive dimensions of free speech might thus be approximated to a difference between individual and social: individual (negative) dimensions of free speech on one side, social or collective (positive) dimensions of free speech on the other. It is only a rough approximation—both aspects can be seen in positive and negative dimensions of the freedom[86]—but the idea might help to clarify the French approach and, indeed, more general aspects of positive free speech.

Article 11 of the Declaration of 1789 might be thought to concern only *speakers*—after all, it states 'every citizen may … speak, write and publish freely'. However, the *audience* is an essential beneficiary of free communication for the Conseil. The interpretation has been described as 'very bold' and 'audacious',[87] even as 'astonishing'[88] and lacking a real basis in the ideas of 1789.[89] Derieux notes Article 11 'might be thought the most classic liberal [that is, negative] enunciation of free speech' and suggests that the Conseil perhaps only 'pretended' to base its analysis on the Article.[90] But the approach has also been explained in terms of free speech itself or, more particularly, Article 11 protecting the free *communication* of ideas and opinions. Communication always involves an audience, not only a speaker. Thus, free speech always involves audience interests.[91] As Barendt states simply, the 'recipient interest in freedom of speech' has been 'fully recognized' by the Conseil.[92] Audience interests are important in free speech and necessarily require pluralism of speech. This means the Conseil's approach can be understood as giving weight to 'the spirit' of the Declaration of 1789,[93] and the spirit of free speech in a democracy. It is a 'constructive' interpretation that tempers

[83] Derieux, above n 78, 62-63 [92]-[101].

[84] Josende, above n 3, 374.

[85] Boyron, above n 6, 194.

[86] As Kierulf suggests in the Norwegian context, 'the individual-collective dichotomy is less clear' in relation to free speech than other judicially protected rights: Anine Kierulf, *Judicial Review in Norway: A Bicentennial Debate* (Cambridge: Cambridge University Press 2018) 166.

[87] Eg Morange, above n 76, 124; Marcangelo-Leos, above n 5, 100.

[88] Dreyer, above n 8, 20 [26]

[89] Bell, above n 25, 171; similarly, Morange, above n 76, 124 describes the interpretation of Art 11 as something which in no way could have been imagined at the time of the Declaration of 1789.

[90] Derieux, above n 78, 61 [88].

[91] See eg Dominique Rousseau, Pierre-Yves Gahdoun and Julien Bonnet, *Droit du contentieux constitutionnel* (11th ed, Issy-les-Moulineaux: LGDJ 2016) 644, [725].

[92] Barendt, above n 58, 69.

[93] See eg Morange, above n 76, 124; cf Marcangelo-Leos, above n 5, 102 suggesting that the Conseil's interpretation, while justified by the contemporary social and economic context, contradicts the spirit and letter of Art 11 (although her analysis at that point is focused on the historical context of the Declaration of 1789 and the Constitution of 3 September 1791). She also notes that the current approach to Art 11 takes into account economic and social aspects of freedom of communication, bringing it closer to the economic and social rights contained in the preamble to the 1946 Constitution. Somewhat similarly, Dreyer, above n 8, 20 [26] notes the interpretation accords more with the welfare state ideas and social guarantees in the preamble to the 1946 Constitution, which is also part of the *bloc de constitutionalité* along with the Declaration of 1789.

the freedom of some (speakers) to ensure the freedom of many (recipients).[94] In short, freedom of communication is 'a freedom of reception' applying across all forms of mediated communication.[95]

Pluralism's democratic basis

For the Conseil, democracy underlies the need for pluralism. In 1986, the Conseil declared media pluralism to be one condition of democracy.[96] In 1990, pluralism of political ideas and opinions was stated to be the foundation of democracy.[97] Subsequently, pluralism has often been described as *a* (rather than *the*) condition of democracy but, even if the qualification varies, pluralism remains inseparable from democracy.[98] Legitimate democracy does not exist without free expression which must be plural. People need to be able to form political opinions, which requires diverse information. There may be tensions between some types of pluralism and the French conception of a singular and indivisible republic.[99] But here, it is enough to note the Conseil emphasises the pluralism of currents of sociocultural expression, or pluralism of ideas, opinions and viewpoints, rather than linguistic or territorial pluralism.[100] It is pluralism of public speech, which coincides with a unitary republic and is important for democratic legitimacy. Free speech is 'a social and political right, the recognition of which determines the whole organisation of the state and the free and equal consent of individuals to state power'.[101]

The pluralism recognised in the 1980s decisions has subsequently been expressed in the constitution. After its 2008 revision, Article 4 provides '*La loi* [legislation] guarantees the pluralistic expression of opinions and the equitable participation of political parties and groups in the democratic life of the Nation', and Article 34 (which contains parliament's legislative powers) states that legislation shall determine rules concerning 'freedom, pluralism and independence of media'. In these provisions, pluralistic expression of opinions is central to democratic sovereignty, and media freedom and pluralism are linked and made subject to legislative support. The constitutional changes do not remove the importance of Article 11 of the Declaration of 1789; rather, they reinforce the Conseil's

[94] Marcangelo-Leos, above n 5, 3.

[95] See eg Louis Favoreu and Loïc Philip, *Les grandes décisions du Conseil constitutionnel* (7th ed, Paris: Dalloz 1993) 724-727; Patrick Gaïa, Richard Ghevontian, Ferdinand Mélin-Soucramanien, Éric Oliva and André Roux, *Les grandes décisions du Conseil constitutionnel* (16th ed, Paris: Dalloz 2016) 477-478. Similarly, Bell comments, 'the Declaration's right of publishers to publish becomes the right of the audience to receive information': Bell, above n 25, 170-171.

[96] Conseil constitutionnel 86-217 DC, 18 September 1986, considérant 11.

[97] Conseil constitutionnel 89-271 DC, 11 January 1990, considérant 12. See also discussion in Rousseau, Gahdoun and Bonnet, above n 91, 418; Marcangelo-Leos, above n 5, 244-245 (noting the arguable regression in a subsequent decision: Conseil constitutionnel 93-333 DC, 21 January 1994).

[98] Marcangelo-Leos, above n 5, 245.

[99] See eg ibid 245ff. Art 1 of the 1958 French constitution begins with: 'France shall be an indivisible, secular, democratic and social Republic' (translation of Conseil constitutionnel).

[100] See eg ibid 246. Similarly, Kuhn notes the challenges for public media of representing ethnic diversity and the 'much broader and highly contentious socio-political debate on how the tradition of universal republicanism can be reconciled with greater ethnic and cultural pluralism' in France: Raymond Kuhn, 'Public Service Media in France' in Eva Połońska and Charlie Beckett (eds), *Public Service Broadcasting and Media Systems in Troubled European Democracies* (Cham: Palgrave Macmillan 2019) 69, 79.

[101] Josende, above n 3, 4.

approach based on Article 11.[102] In effect, the provisions set out the requirements of Article 11, which remains a constitutional foundation of free communication and its need for pluralism, and the parliamentary role to legislate for media pluralism does not exclude constitutional review of laws passed by parliament. Indeed, the Conseil requires legislation under Article 34 to be detailed and comprehensive so it 'defines the essential conditions of exercising the liberty'; otherwise, legislation 'runs the risk of being censured for "negative incompetence"'.[103]

Overall, the Conseil seeks to support 'a democratic and constitutional space', protecting free speech's negative and positive dimensions. Before the 2008 constitutional revisions, Sophie Boyron examined the question in just these terms:

> For the Conseil constitutionnel, freedom of communication must be protected to ensure that a lively and healthy democratic space exists; only a pluralist organization of the media can allow the diversity of expression and opinions which is so necessary to democracy.[104]

Free communication, including pluralist media, is required for the diverse expression and debate needed for democracy. It is worth emphasising that this approach is based on an ordinary textual description of free speech in the underlying constitutional document—a classic enunciation of the freedom, as Derieux notes.[105] While the constitutional basis is French, the ideas are not inherently limited to the French context.

Boyron has since developed her analysis, capturing points from Conseil decisions about pluralism's relevance to democracy and the importance of a constitutional and democratic space of communication:

> The Conseil constitutionnel was the first to recognise that beyond voting rights and the regulation of political parties, a democracy depends on the existence of a constitutional and democratic space. … *For the sovereign to express its opinion in democratic elections or referendums, it needs to be able to form an opinion first*. Public opinion is informed in part only by the activity of political parties. Nowadays, the media plays a key role in shaping public opinion … Consequently, the Conseil constitutionnel took great care when developing its case law on freedom of expression to create a democratic and constitutional space where political parties and the media could express themselves.[106]

Under French law the people hold sovereign power,[107] and for the people to express an opinion they must be able to form an opinion first and form it through plural media. Democracy depends on plural public speech.

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[102] Eg de Bellescize and Franceschini, above n 19, 271. However, Dreyer, above n 8, 20 [26] suggests the Conseil will now refer more to Art 34 as the basis for pluralism rather than Art 11 which might be a disavowal of its prior use of Art 11.

[103] Fromont, above n 36, 290.

[104] John Bell, Sophie Boyron and Simon Whitaker, *Principles of French Law* (2nd ed, Oxford: Oxford University Press 2008) 163. While published in 2008, the year of the constitutional changes, the preface (at v) notes the book reflects the law at 1 January 2007 with some additions to the text made later in 2007. Boyron wrote the constitutional law chapter, from which this passage comes. The point was less clearly made twenty years earlier in the first 1998 edition.

[105] Above n 90.

[106] Boyron, above n 6, 194 (emphasis added).

[107] Constitution of 4 October 1958, Art 3 'National sovereignty shall vest in the people, who shall exercise it through their representatives and by means of referendum' (translation of Conseil constitutionnel). I note, but leave aside here, concerns about ideas of a 'sovereign people' or 'the people' linking with formal equality and

In many ways, the 2008 revisions to Articles 4 and 34 make explicit what was already in the Conseil's decisions, so they do not necessarily result in stronger protection for pluralism.[108] The strength of protection is the next issue to consider.

A limited vision of pluralism in the Conseil constitutionnel?

The Conseil's decisions have had some notable effects. For example, the 1984 press decision rejected core elements of the legislation at issue: it 'destroyed the bill, a total annulment in all but name'.[109] And the 1986 press and broadcasting decisions effectively directed politicians to pass new legislation, which they did. Overall, however, the Conseil's approach to pluralism appears limited. Its control of media pluralism has been described as timid or diffident.[110] The description seems apt. The Conseil's approach may not go far enough to meet its stated aims.

In its 1984 press decision, the Conseil is clear that press pluralism comes within Article 11, free communication would be ineffective without 'a sufficient number of publications of different views and characters', readers are 'among the essential addresses of the freedom', and they should be able to exercise choice free of public or private power.[111] (Substantially equivalent statements exist in the 1986 audiovisual communication decision, which also states that respecting the pluralism of currents of socio-cultural expression is a condition of democracy, with the requirements applying across 'the totality of the means of communication'.[112]) The 1984 press decision also upheld statutory requirements for financial transparency. They were allowed, but not required, as a method of promoting the constitutional objective of pluralism. However, the Conseil restricted the 15% ownership limit to future acquisitions; it would not apply to current holdings or market growth. This interpretation preserved Hersant's position, even though he was the legislation's target. For example, the 1984 legislation drew on a 1979 report by eminent law professor Georges Vedel (soon after appointed to the Conseil and part of the 1980s decisions). His report singled out only Hersant when discussing problems where a newspaper group 'may attempt to build an "ideological monopoly"' through its holdings.[113] In the early 1980s, Hersant held approximately 30% of the Paris daily newspaper market and 20% of the much more substantial regional market.[114] These holdings were quarantined by the Conseil's interpretation, preserving the attempted 'ideological monopoly'. But nobody else could acquire equivalent holdings because of the 15% limit, a limit approved by the

excluding, in practice, the poor and underprivileged. See eg John P McCormick, *Machiavellian Democracy* (New York: Cambridge University Press 2011) 179; Giorgio Agamben, *Means Without End: Notes on Politics* (translated by Vincenzo Binetti and Cesare Casarino) (Minneapolis: University of Minnesota Press 2000) 29:

> [I]n modern European languages this term [the people] always indicates also the poor, the underprivileged, and the excluded. The same term names the constitutive political subject as well as the class that is excluded—*de facto* if not *de jure*—from politics.

[108] See eg Rousseau, Gahdoun and Bonnet, above n 91, 414 [440]

[109] Stone, above n 27, 187 (emphasis removed).

[110] Rousseau, Gahdoun and Bonnet, above n 91, [441].

[111] Conseil constitutionnel 84-181 DC, 10-11 October 1984.

[112] Conseil constitutionnel 86-217 DC, 18 September 1986, considérants 11 and 35.

[113] Stone, above n 27, 178 discussing (and quoting from) the report by Georges Vedel to the Economic and Social Council, '*La gestion des entreprises de presse*', *Avis et rapports* no 21, 23 May 1979.

[114] See eg de Bellescize and Franceschini, above n 19, 82.

Conseil to protect an objective of constitutional value, pluralism. The result is an unusual way to protect pluralism. It appears to have protected Hersant more than diversity of voice and viewpoint.

Two 1986 Conseil decisions dealt with further legislation on press and audiovisual communication passed after the election of a government opposed to Mitterrand. The 1986 press legislation doubled the ownership limit from 15% to 30%.[115] The change was held unconstitutional, but not because of the increase to 30%, even though that increase might have been thought to undermine pluralism. The unconstitutionality arose because the statutory wording did not exclude the use of front companies (and similar methods) to exceed the limit. A subsequent law of 27 November 1986, which avoided those problems, confirmed the 30% limit.[116] As with many of the reforms, politics appears to have driven the limit's quantum. The 30% figure allowed the parliamentary majority to validate Hersant's holdings; without such a limit, the holdings would have breached general competition law.[117]

The 1986 audiovisual communication decision involved, among other things, ownership limits and privatisation of the largest public television channel, *Télévision française 1* (TF1).[118] The ownership limits were held unconstitutional, with concerns resembling the press decision, but the Conseil approved privatising TF1. This was a major shift from public to private ownership as TF1 then had a 40% national audience share and, as Serge Regourd notes, no other European state had privatised a public television service. For him, the TF1 case demonstrates the 'singularity of the French model'.[119] Applicants for privatisation had to detail their plans, including plans about pluralism, while the regulator (which was to choose among applicants) had an overriding duty to limit concentration in the sector.[120] The Conseil held these safeguards sufficient for pluralism which, as Michel Fromont notes, is quite different than German law's requirements in the same circumstances.[121]

This brief review suggests questionable aspects of Conseil decisions, such as only giving press ownership controls prospective application without detailed explanation, and the ease of privatising the largest public television channel. Here I focus on six further points about positive free speech law with potential relevance beyond France. They concern the freedom's origins, the Conseil's style of reasoning, established social groups, ownership limits, financing public media and the regulator's replacement under successive laws.

The origins of a freedom of reception

From where did the Conseil's 1980s statements about pluralism and free communication as a freedom of reception come? One might suggest parliament. Express use of the idea came in two laws at the start of the 1980s[122] (and earlier material such as the 1944 Press *ordonnance* implicitly treats pluralism

[115] Conseil constitutionnel 86-201 DC, 29 July 1986.

[116] See Law 86-210 of 27 November 1986 completing Law 86-897 of 1 August 1986 on the Legal Regime for the Press; and Law 86-1067 of 30 September 1986 on Freedom of Communication, Art 7 which inserted Art 11 into Law 86-897.

[117] Stone, above n 27, 192.

[118] Conseil constitutionnel 86-217, 18 September 1986.

[119] Regourd, above n 10, 24.

[120] Conseil constitutionnel 86-217, 18 September 1986, considérants 38-43.

[121] Fromont, above n 36, 447.

[122] Law 81-994 of 9 November 1981 Ending the State Monopoly on Radio Broadcasting; Law 82-652 of 29 July 1982 on Audiovisual Communication.

as important).[123] The Law of 9 November 1981 stated that ending radio's public monopoly should 'ensure the free and pluralistic expression of ideas and currents of opinion'.[124] But it did not go further as to what that freedom required. The audience interest in pluralism was clearer in the Law of 29 July 1982 on Audiovisual Communication. It began with the simple words 'audiovisual communication is free' and stated, among various mentions of pluralism, that 'citizens have the right to free and pluralistic audiovisual communication'.[125] That right must have been a right primarily to *receive* pluralistic communication.

That brings us to 1984. Alec Stone's detailed account of Conseil decisions points out that its approach echoed a prominent political position on the 1984 reforms. Debates had presented press freedom either in terms of business freedom and property rights or in terms of transparency and pluralism: 'the rights of readers to be informed as to ownership and control, and to have the possibility to choose from among a variety of papers representing the diversity of opinion in society'.[126] The Conseil adopted the latter view, which had been argued for by the parliamentary left. Stone analysed the Conseil as being a third legislative chamber more than a judicial one. (His chapter on the decisions is entitled 'The Council Legislates: In Search of Media Pluralism'.) Interpreting the Conseil as a legislator rather than court was perhaps more plausible then than now, although such a label has been rejected in other analyses.[127] The Conseil remains an unusual entity but is now far closer to a constitutional court as generally recognised. France has arguably moved toward being a 'continuous democracy', or at least one in which the Conseil plays an important role protecting rights and limiting legislative power in the name of democracy.[128] That does not make the Conseil a legislator, more a democratic guardian. Understanding democracy as continuous—an approach which can be related to Rosanvallon's democracy of expression[129]—has been linked to requirements for plural communication. Plural media is a precondition of democracy, with mediated public speech 'widen[ing] the space of participation of the citizen'.[130]

For present purposes, the point is that understanding free communication as a freedom of reception was a prominent position in political debates in the early 1980s.[131] While the Conseil's

[123] Eg Bell, above n 25, 169.

[124] Law 81-994 of 9 November 1981 Ending the State Monopoly on Radio Broadcasting, Art 1, which inserted Art 3-4 into Law 72-553 of 3 July 1972.

[125] Law 82-652 of 29 July 1982 on Audiovisual Communication, Art 1.

[126] Stone, above n 27, 180.

[127] See eg Favoreu and Mastor, above n 44, 145-146 emphasising the Conseil's powers are limited, compared with parliament, and that it is not 'a third parliamentary chamber'.

[128] See eg Rousseau above n 30; Alexandre Viala (ed), *La démocratie: mais qu'en dise les juristes ? Forces et faiblesses de la rationalité juridique* (Issy-les-Moulineaux: Lextenso/LGDJ 2014); cf Pierre Brunet, '*La démocratie entre essence et expérience: Réponse à Dominique Rousseau*', *La vie des idées*, 9 October 2008, www.laviedesidees.fr/La-democratie-entre-essence-et.html.

[129] See chapter 1 and Pierre Rosanvallon, *Counter-Democracy: Politics in an Age of Distrust* (translated by Arthur Goldhammer) (Cambridge: Cambridge University Press 2008) 20.

[130] Marcangelo-Leos, above n 5, 275.

[131] Understanding free communication as a freedom of reception has a much longer lineage, as a quotation of Georges Clemenceau illustrates (although it is not clear the statement had wide currency in intervening decades). At the start of the Third Republic in the nineteenth century, Clemenceau (who had an important place in French journalism history as well as his elected political roles) stated that 'freedom of the press is not only freedom to speak, but freedom to read' ('*La liberté de la presse, ce n'est pas seulement la liberté de dire, mais*

approach was 'a remarkable extension of the corpus of constitutional values' in France,[132] it was also one that could be seen to emerge from parliamentary action. This is not so surprising when the Conseil's history and French constitutional traditions are considered.

The Conseil's style of reasoning

Some commentary flags the Conseil's style of reasoning in its written decisions as problematic. It is certainly different than expected in common law constitutional review. Stone again offers an example. He highlights a lack of typical judicial reasoning in the Conseil's decisions. In part, that may reflect French judicial traditions with 'concise and abstract' judgments used to express collective, negotiated decisions.[133] Eva Steiner notes foreign commentators often describe French civil, criminal and administrative judgments as, among other things, 'peculiar, terse, cryptic … formalistic, spartan' and 'assertive'.[134] This extends beyond commonplace differences between common and civil law approaches. Among civil law systems, French judges are said to 'display the most cryptic and formalised style of justification in their decisions'.[135] It has been described as a style of 'breathtaking brevity', quite unlike the German court's 'exercise in encyclopedic scholarship'.[136]

The style of judgments appears to be changing, with greater consideration of comparative material arguably affecting French practices and leading to more detailed analysis.[137] Even in the 1980s, however, Conseil decisions appear to contain more explicit reasoning than usual in the Cour de cassation and Conseil d'État. The Conseil constitutionnel's audiovisual decision of 18 September 1986 'is an extremely long decision, which was not usual in the doctrine of the time, but which is becoming normal today'.[138] More recently, the Conseil itself has prompted consideration of providing fuller reasoning in its decisions.[139]

Perhaps more relevant for my purposes is the result of the Conseil's style of reasoning, and how it leaves pluralism's content relatively undefined. A 'core' phrase is used to explain pluralism: currents of ideas and opinions. The lack of more detailed constitutional meaning raises questions

c'est aussi la liberté de lire'), quoted by Michel Mathien, '*Un sujet d'actualité et de confrontation entre les valeurs de la démocratie et de l'économie*' in Alain Kiyindou and Michel Mathien (eds), *Évolution de l'économie libérale et liberté d'expression* (Brussels: Bruylant 2007) 1.

[132] Bell, above n 25, 169.

[133] Boyron, above n 6, 176.

[134] Eva Steiner, *French Law: A Comparative Approach* (2nd ed, Oxford: Oxford University Press 2018) 129 (formatting altered, commas added).

[135] Ibid 139.

[136] Donald P Kommers, 'Germany: Balancing Rights and Duties' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford: Oxford University Press 2006) 161, 210.

[137] Other reasons can be offered for the Conseil's concise approach, including for QPC review. A succinct decision that says the least possible in response to the question at issue leaves more room for future questions to pass the QPC's 'filtering' stage in that later questions will more easily appear novel.

[138] Jacques Viguier, 'Le juge constitutionnel et al régulation audiovisuelle' in Regourd and Calandri, above n 2, 143, 152; Conseil constitutionnel 86-217, 18 September 1986. The decision is approximately 11,000 words.

[139] See eg '*Dossier : La réforme de la motivation des décisions du Conseil constitutionnel à l'épreuve des modèles étrangers*' (2017) nos 55-56 *Les Nouveaux Cahiers du Conseil constitutionnel* 5-67; available via www.conseil-constitutionnel.fr.

about how the Conseil evaluates legislative actions affecting pluralism. While Stone provides multiple examples of this point,[140] considering one is sufficient here.

For the Conseil, free communication under Article 11 entails pluralism in the audience's interests. However, as noted above, the Conseil restricted the 15% ownership limit to future acquisitions. Reasons for this could be given that were not spelt out in the decision—such as non-retrospectivity in applying laws.[141] Even so, the Conseil was not entirely silent on the issue. It said parliament could limit existing situations relevant to public liberties in only two instances: 'where the situations were illegally acquired' or where it 'would really be necessary to ensure the realisation of the constitutional objective being pursued'.[142] Thus, Hersant's holdings could be reduced only if they had been illegally acquired or reduction was really necessary to ensure pluralism. Without any detailed explanation, the Conseil held that neither ground applied. Arguably, Hersant's holdings had been acquired illegally due to the 1944 Press *ordonnance*,[143] but the point was not addressed. Even more relevant for my purposes is the second criterion—that the reduction be necessary to ensure pluralism. The holdings exceeded what would be possible for any future acquisition, but they did not need to be reduced to meet the constitutional requirement of pluralism. That calls for some explanation, but the Conseil simply stated:

> Considering … national daily newspapers, it cannot validly be maintained that their number, variety of characters and tendencies, and conditions of dissemination fail to meet the requirement of pluralism in such a serious way that it would be necessary, in order to restore pluralism, to change existing situations, including through transfers … possibly against the wishes of readers.[144]

That may not be a brief explanation compared with many French rulings, but it does not make media pluralism very clear as to its content. Pluralism appears to be a less demanding standard than some of the commonly quoted words of the decisions suggest—words concerning pluralism's constitutional value, the need for effective freedom of communication so that recipients can form opinions free from public or private power, and so forth.

Stone's wider point is that the Conseil's reasoning on pluralism remains too general to be sufficiently useful to legislators. Legislators can make various choices to meet the constitutional requirement of pluralism, but the Conseil does not make clear *where* the boundaries of choice lie and *why*; it does not really make clear what is *required* and what is *possible*. This may lead to subsequent legislation using words taken directly from Conseil decisions, without further clarifying the meaning of pluralism. For example, Stone notes legislation passed in response to the 1986 decisions 'incorporated, often word-for-word, the express terms of the decisions'.[145] Article 1 of the 1986 Law on Freedom of Communication now refers to 'the pluralistic character of the expression of currents

[140] Stone, above n 27, 186-191.

[141] Commentary differs on whether non-retrospectivity underlies the decision; eg cf de Bellescize and Franceschini, above n above n 19, 82 ('this text, which was not applied to the Hersant empire because of the non-retroactivity of the law') and Favoreu and Philip, above n 95, 601 ('the idea of retroactivity is here without interest'). Favoreu and Philip base the decision on the Conseil's express statements that public liberties could be limited only if they had been illegally acquired or the limitation was necessary to realise the constitutional objective in question. Recent editions of that text do not comment directly on the retroactivity point.

[142] Conseil constitutionnel 84-181 DC, 10-11 October 1984, considérant 47.

[143] Stone, above n 27, 188.

[144] Conseil constitutionnel 84-181 DC, 10-11 October 1984, considérant 49.

[145] Stone, above n 27, 200-201, internal citations omitted.

of thoughts and opinions'.[146] This approach avoids unconstitutionality, but does it advance the goal of free communication or defer challenges to other actors more than is warranted?

Pluralism and established groups

Until recently pluralism of 'sociocultural currents of expression' has been largely institutional for the Conseil, linked to existing political, union and religious groups.[147] Providing media access in various ways to those groups has been said to meet the requirement of plural sociocultural expression. Decisions moved from referring to pluralism of 'ideas and opinions' to sociocultural expression,[148] but the same point remained. In contrast to that institutional approach, one might think such groups' voices are relevant to plural public speech but not necessarily sufficient. The institutional approach had general resemblance to German law, but it did not articulate an aim to include less organised voices along with established groups. However, both the Conseil's approach—at least in relation to political pluralism in election periods—and regulatory practices more generally have moved to include wider voices beyond established political groups. The change is an interesting example of how the Conseil's statements may well influence wider practices relevant to pluralism. This is returned to later in this chapter in the section 'Other Legal Actors and Positive Communicative Freedom'.

Weakened ownership limits

Legal limits on media ownership have been weakened repeatedly without infringing the constitutional requirement of pluralism. Dominique Rousseau and his colleagues refer to Conseil decisions that, in 1994, upheld weakened ownership limits and, in 2004, addressed digital terrestrial television's introduction.[149] They conclude the latter ruling 'seemed to signify the practical abandonment of the constitutional requirement to limit concentration' with the Conseil endorsing 'a legislative judgment [to reduce limits] to encourage the development of local and digital television'.[150] This, in part, reflects a commonplace tension between domestic and international media companies: domestic companies arguing they need to grow (including through mergers) to compete with international media. Similarly, Diane de Bellescize and Laurence Franceschini state French limits on media ownership concentration 'have never been very effective'.[151] If anything, general competition law may have been more relevant;[152] that is, law which does not overtly consider free communication and its requirement of pluralism.

Public media finances

[146] Above n 69.

[147] See eg Marcangelo-Leos, above n 5, 86.

[148] Cf Conseil constitutionnel decisions such as 86-217 DC, 18 September 1986; 88-248 DC, 17 January 1989; 93-333 DC, 21 January 1994; 96-378 DC, 23 July 1996; 2000-433 DC, 27 July 2000 with decisions such as 89-271 DC, 11 January 1990; 2001-450 DC, 11 July 2001; 2004-497 DC, 1 July 2004; 2007-550 DC, 27 February 2007; 2010-3 QPC, 28 May 2010. See eg de Montalivet, above n 63.

[149] Conseil constitutionnel, 93-333 DC, 21 January 1994; 2004-497 DC, 1 July 2004.

[150] Rousseau, Gahdoun and Bonnet, above n 91, 415, [443].

[151] de Bellescize and Franceschini, above n 19, 87.

[152] Eg competition law is a prominent part of the analysis of pluralism offered by Serge Regourd, *Droit de la communication audiovisuelle* (Paris: Presses universitaires de France 2001) 194-207.

Finances for public media remain a matter for parliament or, perhaps in practice, for government. In many countries, this would not be surprising for public media, but it is worth examining given French law's general approach to positive communicative freedom. It is unsurprising that finances are left to parliament in some manner, but it appears to happen more than the Conseil's general approach suggests is warranted. Constitutional requirements for funding public media are not strong. For example, the end of the public radio monopoly in the early 1980s aimed to add community radio alongside public radio. But how would the new stations be funded? John Bell observed:

> Freedom to broadcast is not much use without the money with which to establish the broadcasting operation. The Conseil, however, did not restrict the legislature in its decisions on how the new free radio stations were to be funded.[153]

It was constitutional for parliament to prevent advertising on the new stations, leaving them without any substantial funding. Parliament's wide hand continues, although it is now subject to some constraints. These include legislating each year for public media finances, a requirement that aims to reduce political pressure on public media.[154] Funding is a legislative decision, not one purely for executive decree. As suggested later in this chapter, however, the requirement may not be that effective in insulating funding from government power.

In relation to media funding, France's substantial, varied and complex forms of state aid to the press could also be explored,[155] as could French law regulating press distribution.[156] Such laws are a significant part of how communicative freedom is made, to some degree, 'real' and not just 'formal'.[157] They do not appear to have received much judicial attention in free speech terms,[158] although aid in the form of partial forgiveness of a newspaper's debt has been held constitutional as it aimed 'to preserve the pluralism of daily newspapers of political and general information'.[159] It is not that French law understands press subsidies as being *required* for media pluralism, but they are *consistent* with free communication. The idea that some form of subsidy might be required could be explored. For example, thinking of positive free speech as a 'right to information' (considered earlier in this chapter) allows press subsidies to be a constitutional issue. French press subsidies have long been criticised for their complexity and opacity, and various reforms have been proposed.[160] As noted in chapter 6, the idea of subsidies has been raised in Germany, very much in terms of the constitutional

[153] Bell, above n 25, 169.

[154] Rousseau, Gahdoun and Bonnet, above n 91, 416-417, [445] and see Conseil constitutionnel 2009-577 DC, 3 March 2009, considérant 19.

[155] See eg Derieux, above n 78, 115-136; Matthieu Lardeau and Patrick Le Floch, 'France: Press Subsidies—Inefficient but Enduring' in Paul Murschetz (ed), *State Aid for Newspapers: Theories, Cases, Actions* (Heidelberg: Springer 2014) 195.

[156] See eg Derieux, above n 78, 105-114; Dreyer, above n 8, 147-169.

[157] Derieux, above n 78, 904 [3826].

[158] That is the simple reason that press subsidies are not a point of focus in this chapter. They could clearly offer a method for supporting positive dimensions of free speech and warrant separate study. See eg Murschetz, above n 155.

[159] Conseil constitutionnel 2000-441 DC, 28 December 2000, considérant 18.

[160] See eg Sébastien Fontenelle, '*Aides à la presse, un scandale qui dure*', *Le Monde diplomatique*, November 2014, 22-23; Pierre Rimbert, '*Projet pour une presse libre*', *Le Monde diplomatique*, December 2014, 20-21; Julia Cagé, *Sauver les médias: Capitalisme, financement participatif et démocratie* (Paris: Seuil et La République des Idées 2015) ; translated as *Saving the Media: Capitalism, Crowdfunding, and Democracy* (translated by Arthur Goldhammer) (Cambridge, MA: Belknap Press of Harvard University Press 2016).

protection of media freedom.[161] The issues are left aside here; sufficient points arise from public broadcasting and its funding.

One constitutional requirement is that annual funding must compensate public television for any loss of income where advertising is restricted. Advertising was introduced on what was then state television in 1968,[162] and the amount of advertising on public broadcasting was limited in 2009.[163] The effectiveness of the compensation requirement appears debatable,[164] and it remains distinct from the power to set the quantum of all public media funding. The Conseil has, however, stated that public funding is an element of the media's independence, which the legislator must preserve under Article 34 of the constitution.[165] In principle, that point could be developed into a fuller funding guarantee. In relation to removing advertising, the Conseil has observed:

> It is … incumbent upon each Finance Act, in accordance with the independence of France Télévisions, to fix the amount of the financial compensation due from the State to set off the loss of commercial revenue sustained by said company in order to enable it to perform the public service duties entrusted to it.[166]

This statement is not so far removed from the German Federal Constitutional Court's holding that adequate funding for public broadcasting is constitutionally required because of the obligation to provide a comprehensive service underpinning individual and public opinion formation. The French statement, however, appears to be markedly less demanding in practice. Among other things, the Conseil does not so clearly suggest that free communication requires a comprehensive service, available to the entire population and containing substantial diversity of opinion.[167] The statement is directed, rather, to compensatory funding for 'public service duties entrusted to' public broadcasting. The independence of funding from political control is only 'relative' compared with Germany.[168]

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[161] See eg Jürgen Habermas, 'Media, Markets and Consumers: The Quality Press as the Backbone of the Political Public Sphere' in Jürgen Habermas, *Europe: The Faltering Project* (translated Ciaran Cronin) (Cambridge: Polity 2009) 131.

[162] A type of advertising—'spots' that were known as 'compensated advertising'—had existed on state television since 1959: Roujou de Boubée, above n 9, 193 citing Regourd, above n 152, 274. See also Broyelle and Franceschini, above n 76, 57, [78].

[163] See eg Raymond Kuhn, *The Media in Contemporary France* (Maidenhead: Open University Press 2011) 89-93; Derieux, above n 78, 210-211 [799].

[164] See Conseil constitutionnel 2009-577 DC, 3 March 2009, considérants 3 and 16-20. Cf eg Kuhn, ibid, 91 who notes

> there is clearly nothing unacceptable in having an advertising-free public service provider of television content – but rather the government's reluctance to raise the level of the licence fee and the problematic nature of the proposed additional revenue streams.

[165] Conseil constitutionnel 2009-577 DC, 3 March 2009, considérant 18.

[166] Conseil constitutionnel 2009-577 DC, 3 March 2009, considérant 19 (translation of Conseil constitutionnel). It was argued that suppressing advertising without providing compensatory public funding was beyond the legislator's authority under Art 34 of the Constitution, which requires the legislator to guarantee media independence. However, other provisions of the 1986 Law did require compensation to be provided each year for the loss of advertising, and the Conseil noted that, with those provisions, the removal of advertising was not unconstitutional.

[167] See chapter 6's discussion headed 'A dual system with comprehensive, universal and diverse public broadcasting'.

[168] Roujou de Boubée, above n 9, 189-192.

In addition, some parliamentary powers related to public broadcasting's mission and financing may, in practice, lie with government. Commentators differ,[169] but Derieux considers how parliament, regulator and government might each have control. First, he describes the regulator's powers in this area as not very significant:

> Whatever may have been said, and in spite of the creation of a so-called 'regulatory' body, the role of the Government remains very important and extensive in terms of the organization, regulation, control and supervision of audiovisual communication.[170]

Further, he suggests parliamentary powers are less substantial than might be thought. There are a wide range of detailed provisions relevant to parliament in the 1986 Law on Freedom of Communication.[171] And the Law contains provisions for parliament about financing, but that is one of the places where Derieux suggests power may remain more with government. Public media financing primarily involves raising and distributing the 'contribution to public broadcasting' or licence fee, which has existed since the 1930s.[172] The fee is determined in the tax code and does not appear to have raised issues of constitutionality as to its level or indexing.[173] In the Law on Finance passed each year, parliament approves how the sum is divided between France's multiple public broadcasters.[174] While formally a power of parliament, Derieux describes this as effectively an executive decision.[175] Similarly, Raymond Kuhn notes the state remains interventionist with regard to public media:

> It is the state, notably the President and the minister for Culture, that sets out the mission for public service media, fixes the budget, sets out the key strategic goals and determines the broad outlines of structural reform. It is also the state that imposes operating conditions and content regulations.[176]

It is also notable that changing the amount of advertising permitted on public broadcasting did not raise constitutional problems beyond the question of compensation when advertising is limited.[177] Allowing substantial advertising on public broadcasting does not in itself raise matters about free communication for the Conseil. In 1998, for example, advertising formed nearly 40% of

[169] See eg Dreyer, above n 8, [446]-[449] whose analysis in some ways suggests the powers of parliament and the CSA are more substantial and independent of government. But he also notes that understanding the will of parliament (rather than government) to be implemented through legislation about the CSA involves 'a great deal of artifice' and fragile reasoning: [449].

[170] Derieux, above n 78, 178, [646].

[171] Law 86-1067 of 30 September 1986.

[172] Dreyer, above n 8, [439].

[173] Eg the discussion in Derieux above n 78, makes no mention of any Conseil decisions in this regard.

[174] As noted in Raymond Kuhn, 'France: Funding Public Service Media in the Digital Age' in Christian Herzog, Heiko Hilker, Leonard Novy and Orkan Torun (eds), *Transparency and Funding of Public Service Media: Die deutsche Debatte im internationalen Kontext* (Wiesbaden: Springer VS 2017) 55, 56:

> In recent years there has been a regrouping of the public television companies within the single framework of France Télévisions. However, there has been no concerted attempt to reintegrate public radio and television (and their associated online services) into some kind of French-style BBC.

[175] Derieux, above n 78, 177 [640]; 199 [744].

[176] Kuhn, 'PSM in France', above n 100, 77.

[177] Advertising on public television during broadcasts aimed at children under 12 (and for 15 minutes before and after the broadcast) was prohibited only from the start of 2018: Law 2016-1771 of 20 December 2016.

public television revenue,[178] in 2007 approximately 30%,[179] and by 2013 (after advertising was limited) the figure was 10%.[180] None of these percentages raised constitutional questions in themselves. In short, there is not a requirement that public television be substantially free of the commercial pressures on content widely thought to flow from advertising. And the issue of whether advertising on public media could become too dominant a source of funding has not been addressed as a question of free speech law (not even in the relatively limited way the issue has arisen in Germany). This point and the extent of government power raise questions about just what the Conseil means when it states the constitution requires plural media free of market and political direction.

The French approach is less one of limiting parliament's ability to set funding levels, than leaving parliament and executive a great deal of space in which to determine funding. The German situation is quite different on paper. There, parliament's ability to depart from the relevant expert committee's funding recommendation is limited, as discussed in chapter 6.[181] Questions of finances for public media, as well as their general mission and independence, may well return to political debate under planned reform of broadcasting law.[182]

Replacing the broadcasting regulator

Repeatedly abolishing and replacing the broadcasting regulator during the 1980s was held to be constitutional.[183] While the Conseil required protection of fundamental freedoms not be weakened through a new regulator, membership terms could be terminated by abolishing and then replacing the regulator: 'deference to Parliament remains very strong in this area.'[184] Equally, shifting the power to nominate the presidents of *France Télévisions* and *Radio France* from the regulator to the French President, with an obligation for some consultation, did not infringe free communication and its requirement of pluralism.[185] That Conseil decision has been criticised for allowing a political power of

[178] Eg Kuhn, *Contemporary France*, above n 163, 90. See also Kuhn, 'Funding PSM', above n 174.

[179] Kuhn, *Contemporary France*, above n 163, 90. In comparison, ZDF, one of the German public broadcasters is reported to have received about 83% of their (much higher) total revenue from public funding in 2008: Bernd Grzeszick, 'The "Serving" Freedom to Broadcast: Subjective versus Objective Dimensions of a Fundamental Right' in Hermann Pünder and Christian Waldhoff (eds), *Debates in German Public Law* (Oxford: Hart 2014) 75, 77.

[180] Eg Nordicity, *Analysis of Government Support for Public Broadcasting: Prepared for CBC Radio Canada* (11 April 2016) available via www.nordicity.com, 15. The amount of advertising had previously been limited to 25% in the 1970s: Broyelle and Franceschini, above n 76, 57 [78] who also note the 1970s limit was legislative; it was later set in the *Cahier des charges*.

[181] In either the French or German approach to public funding, there may be questions about European limitations on state aid, but they are a separate point to the question of whether the constitutional protection of free speech requires certain approaches for media funding.

[182] See above nn 12-15 and accompanying text.

[183] *La Haute autorité de la communication audiovisuelle* was replaced by *La Commission nationale de la communication et des libertés* (commonly identified as CNCL) and then by the CSA.

[184] Bell, above n 25, 175 (internal citation omitted).

[185] See Conseil constitutionnel 2009-576 DC and 2009-577 DC of 3 March 2009. The same move happened for the organisation responsible for international broadcasting, now called *France Médias Monde*.

nomination over public media.[186] (The nomination power subsequently returned to the regulator under a legislative reform.[187])

At the same time, the existence of *an* independent regulator may well be constitutionally necessary for such an important value as free communication and the pluralism it entails. Jean-Jacques Menuret observes that 'through successive decisions, the constitutional judge has intimately linked the existence of the audiovisual regulatory authority with the guarantee of exercising the fundamental freedom of audiovisual communication'.[188] However, the regulator often has an advisory role rather than formal powers over public broadcasting, and governmental decrees have great influence. Both those matters are considered further in the next section.

Overall, the above points suggest the Conseil's vision of pluralism is limited. In summary:

- The Conseil's approach contains more that appears to have come from parliament than an outside observer might expect, which is consistent with French traditions of the role of parliament and rights;
- The Conseil leaves pluralism's requirements relatively general, with much of its meaning a matter for parliament, government and regulator, and quite a degree of deference has been shown to legislative judgments relevant to pluralism;
- Pluralism has been understood primarily in institutional terms—involving the voices of existing political, union and religious groups—which appears to be changing;
- Repeatedly weakening commercial media ownership limits has not breached pluralism requirements;
- Public media funding does not appear to be substantially influenced by constitutional requirements of free communication; financing decisions that are on paper parliamentary may be largely governmental in practice; and
- Ending membership terms of members of the broadcast regulator by abolishing and replacing the regulator has been held constitutional.

Overall, the Conseil's impressive words on pluralism amount to less in constitutional requirements than might be expected. The words do not require the more substantial structural diversity seen in earlier chapters' consideration of theoretical and legal approaches to positive free speech: the wider structural diversity suggested by positive free speech is not well developed in the decisions. That is part of why the Conseil's approach to pluralism can be described as timid,[189] or hesitant.[190]

[186] See eg Roujou de Boubée, above n 9, 142.

[187] Organic Law 2013-1026, Art 1 and Law 2013-1028 of 15 November 2013 on the Independence of Public Broadcasting, Art 12.

[188] Jean-Jacques Menuret, '*La place du Conseil supérieur de l'audiovisuel au sein des autorités administratives indépendantes*' in Céline Bloud-Rey et Jean-Jacques Menuret (eds), *Le droit de la régulation audiovisuelle et le numérique* (Brussels: Larcier 2016) 13, 18.

[189] Rousseau, Gahdoun and Bonnet, above n 91, [441].

[190] Viguier, above 138, 148.

Other legal actors and positive communicative freedom

Not surprisingly, legal actors beyond the Conseil are important for free communication. Here, I consider examples about parliament, the primary media regulator and the executive.[191] They illustrate parliament legislating to promote positive dimensions of free speech; the regulator gradually moving from institutionally focused pluralism towards wider speakers and viewpoints; and government retaining significant power regarding public broadcasting, power which appears inconsistent with free speech. All that leads to further consideration of the Conseil's role in the following part of the chapter.

Article 34 of the constitution states legislation shall determine rules concerning media freedom, pluralism and independence. Parliament acts regularly in this regard, such as in the 2016 Law on the Freedom, Independence and Pluralism of the Media.[192] That Law considers internal media freedom, providing all journalists with a 'right of opposition' to refuse to sign articles, broadcasts or contributions modified without their knowledge or consent.[193] Further, journalists cannot be forced to act contrary to their professional beliefs, formed in accordance with the code of ethics each media employer is now required to have.[194] As Derieux notes, the first provision mirrors existing French law on the moral right of attribution, while the second is comparable to the 'conscience clause' that previously existed for public broadcast employees. It just provides greater financial compensation than otherwise if employment ends when journalists act on their conscience.[195]

The 2016 Law's requirement for codes of ethics, agreed jointly by management and journalists' representatives, is enforced in multiple ways. Each broadcaster of political and general information must create a committee on the 'honesty, independence and pluralism of information', with the committee informing the CSA of any likely code contraventions.[196] The CSA also has specific roles to guarantee the honesty, independence and pluralism of information and broadcasts, and to ensure proprietor and advertiser economic interests do not interfere with ethical codes.[197] Broadcaster compliance should be considered by the CSA in licence renewals.[198] Criticism of the 2016 changes noted differences might arise between the CSA and each organisation's committee on honesty, independence and pluralism, and suggested the provisions largely follow principles long stated by the Conseil constitutionnel (and arguably already in the CSA's powers, and detailed in *Conventions* the CSA signs with private broadcasters).[199] Press obligations of transparency about ownership and finances have been increased. The possibility of removing direct and indirect public financial aid that would otherwise be received underpins such obligations.[200] Despite debates, the

[191] I leave aside other regulators in the sector, such as the general competition authority and HADOPI, the high authority for the dissemination of works and the protection of rights on the internet. For an overview, including of ways in which competition is also a concern to the CSA, see eg Broyelle and Franceschini, above n 76, 75-79, [108]-[113].

[192] Law 2016-1524 of 14 November 2016 on Reinforcing the Freedom, Independence and Pluralism of the Media.

[193] See now Law of 29 July 1881 on the Freedom of the Press, Art 2bis.

[194] Ibid.

[195] Emmanuel Derieux, '*Liberté, pluralisme et indépendance des médias*' (2016) no 344 *Légipresse* 682, 683.

[196] Law 86-1067 of 30 September 1986, Art 30-8.

[197] Ibid Art 3-1.

[198] Derieux, above n 195.

[199] See eg Grégoire Weigel, '*Les dispositions audiovisuelles de la loi « Indépendance des médias » étaient-elles nécessaires?*' (2017) no 346 *Légipresse* 75.

[200] Law 86-897 of 1 August 1986, Art 15-1.

2016 Law is broadly consistent with a 'right to information' and illustrates the legislature acting for positive dimensions of communicative freedom.

As that Law suggests, the CSA has a significant role in free communication. In simple terms, the Conseil constitutionnel has stated that various principles of free communication require legislative enactment. Then legislation often uses the same wording as the Conseil—a tendency which Stone noted in the 1980s[201]—which leaves much to the regulator. This exists in relation to aspects of pluralism. The CSA has long monitored broadcast content pluralism, using varied quantitative approaches to pluralism in information broadcasts. Here, the general method used for national television outside elections is considered (more detailed rules apply during election periods).[202]

At the end of the 1960s, the *Office de Radiodiffusion-Television Française*, regulating what was effectively state (not public) media, developed a 'rule of thirds'.[203] The rule measured different political groupings' broadcast time. It became highly influential, but its content might surprise an external observer: one third of time each for government, parliamentary majority and opposition. That tends to markedly over-represent government interests, given their frequent overlap with parliamentary majorities.[204] It also overemphasises parliamentary voices over wider political viewpoints, and disregards broadcasts' different audience sizes. Historically, the rule took no account of political formations unrepresented in parliament and ignored civil society. For evaluating internal pluralism, the method has clear imperfections. Overall, it is an uncomplicated approach to a clearly complex question.[205]

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[201] Above n 145.

[202] De Bellescize and Franceschini, above n 19, 272-276, discuss CSA monitoring. Local and cable services self-report to the CSA. The authors also analyse pluralism during election periods, as well as the government's ability to communicate material on public television (with provision for replies where the government material is party political) and 'direct expression programs' by professional organisations, unions and so forth, where the CSA has a large margin for action: ibid 275-281. There have been fairly substantial amendments to the CSA's legal position since they wrote, but the changes do not appear directly relevant on this point; for example, the CSA having legal personality independent of the state, with criteria for CSA membership (relating to nomination, term and composition) which arguably support its independence; separating CSA functions of investigation and judgment; and augmenting its financial independence. See Organic Law 2013-1026 and Law 2013-1028 of 15 November 2013 on the Independence of Public Broadcasting and eg, discussion in Bloud-Rey and Menuret, above n 188; Stéphane Miannay, '*Le statut du Conseil supérieur de l'audiovisuel: texte et pratique de l'indépendance*' in Regourd and Calandri, above n 2, 33.

[203] Literally, 'the rule of three thirds': de Bellescize and Franceschini, above n above n 19, 272. On the ORTF and state media see eg Kuhn, *Contemporary France*, above n 163, 18; Jean K Chalaby, 'French Political Communication in a Comparative Perspective: The Media and the Issue of Freedom' (2005) 13 *Modern and Contemporary France* 273; and for a longer study of battles to bring about changes to state broadcasting so that it was no longer the governmental 'voice of France', see Ruth Thomas, *Broadcasting and Democracy in France* (London: Bradford University Press in association with Crosby Lockwood Staples 1976) who details longstanding practices of tight government control, with de Gaulle's practices during and after the Algerian crisis described as an 'abuse[] [of] legal control of broadcasting, making radio and television into instruments of propaganda for his régime' (13). That tendency towards state control has recurred, see eg Raymond Kuhn, '"*Les médias, c'est moi*." President Sarkozy and News Media Management' (2010) 8 *French Politics* 355.

[204] See eg Broyelle and Franceschini, above n 76, 155, [228] (the rule 'does not correspond to French political life' and does not allow for 'the coincidence of governmental and parliamentary majorities').

[205] These sorts of criticisms of the rule of thirds are well recognised in French scholarship; see eg Dreyer, above n 8, 334-335 [630].

In 2000, the CSA modified its evaluation of pluralism, adding requirements for equitable time for political formations not represented in parliament and for the parliamentary opposition to receive not less than half the time of the government and parliamentary majority (a requirement implicit in the rule of thirds in any event). Further, in 2009 the Conseil d'État held that statements of the French president relevant to national political debate had to be included in the CSA's calculations.[206] Such statements were previously not counted.

Across many years, the CSA reformulated the requirements to provide for one third of time for government (including presidential statements relevant to national political debate) and 'equitable' coverage for parties and political groupings 'express[ing] the major viewpoints of national political life' and animating political debate.[207] Express requirements of time for parliamentary majority and opposition were removed. Some commentary suggested a 'great risk' for coverage of opposition parliamentarians,[208] but the change arguably comes closer to covering more views, including smaller parliamentary voices outside party groupings.[209] In some ways, it mirrors German developments seeking wider representation on broadcasters' internal regulatory bodies (discussed in chapter 6). The French change emerged differently in institutional terms, through the CSA's actions. But it follows a 2017 Conseil constitutional ruling on allocating public broadcast time to political groups during elections. The Conseil, requiring inclusion of a wider range, used substantially the same wording—about major viewpoints and animating political debate—as the CSA adopted for pluralism outside elections.[210] This suggests how the Conseil may influence pluralism's treatment beyond the direct effect of its decisions.

Despite weaknesses, the approach to pluralism has arguably improved,[211] within the historical movement away from French broadcasting's strongly governmental focus. Ruth Thomas observes French television in the 1950s and 1960s 'was more than a medium for propaganda: it became an instrument of government',[212] with regional television news 'an unadulterated government organ of the most blatant kind'.[213] Television's partisan qualities only began to change in any meaningful, if limited, way in the 1970s. While issues or viewpoints outside the political majority and opposition can remain overlooked, Kuhn suggests that seeking '"stopwatch pluralism" between the major political forces of government and opposition should not be undervalued' where broadcasting 'was for many years used by the governing party in a crude partisan fashion.'[214] Even so, he notes the time-based

[206] Conseil d'État, Assemblée, 8 April 2009, request 311136.

[207] Conseil supérieur d'audioviseul, Deliberation 2017-62 of 22 November on the principle of political pluralism in radio and television services. Potential penalties for breach of the obligation are addressed in Conseil supérieur d'audioviseul, Deliberation 2018-01 of 24 January; see eg Broyelle and Franceschini, above n 76, 156, [229].

[208] Grégoire Weigel, '*Synthèse, Droit de l'audiovisuel (juillet 2017-juillet 2018)*' (July-August 2018) no 362 *Légipresse* 403, 408.

[209] Dreyer, above n 8, 334-335 [630].

[210] Conseil constitutionnel 2017-651 QPC, 31 May 2017.

[211] Perhaps 'major viewpoints' and 'animating political debate' still tend towards conformism in views more than the ambition for diversity would entail; see eg Dreyer, above n 8, [223].

[212] Thomas, above n 203, 13.

[213] Ibid 134.

[214] Kuhn, *Contemporary France*, above n 163, 77-78.

method 'clearly only scratches the surface' of ensuring pluralism.[215] The aim is general equity in coverage, not precise equality,[216] with the whole approach being as 'delicate as it is uncertain' and remaining 'easily open to criticism'.[217]

Beyond parliament and the CSA, government power over mediated communication remains considerable. As explained above, for the Conseil Article 11 aims to enable media recipients to exercise choice free of commercial or political domination.[218] Even so, governmental decrees and contracts with public broadcasters remain important. For public broadcasting, Derieux observes that government 'maintains a substantial power of regulation, if not intervention, even if it is in part shared with the CSA'.[219]

The control can be illustrated by the *Cahier de charges* and *Contrat d'objectifs et de moyens*. A *Cahier de charges* defines each public broadcaster's obligations in areas listed in Article 48 of the 1986 Law on Freedom of Communication, especially its educational, cultural and social mission. This includes matters of pluralism; for example, the *Cahier* states 'the division of responsibilities within the broadcaster so that its acquisitions, production and programming ensure respect for the pluralism of currents of thought and opinion'.[220] While the CSA has an advisory role, the *Cahier* is set by governmental decree. In addition, under Article 53 of the 1986 Law, a *Contrat d'objectifs et de moyens* (contract of objectives and means) is entered between each public broadcaster and the state. Again, the power is governmental, with parliamentary committees and the CSA having advisory roles.[221] The contracts last for between three and five years and, among other things, determine priorities for each broadcaster's development, commitments to diversity and innovation in content creation, estimated annual operating costs, the expected amount of public resources, advertising and sponsorship revenue: 'their object is above all financial'.[222] The *Cahiers* and *Contrats* give substantial power to government despite the independent media regulator. It is far from clear that public media is separated from government power in the way communicative freedom requires. (For private broadcasters, the CSA enters *Conventions*, or agreements, with broadcasters setting out their obligations, including in relation to pluralism.[223])

The *Cahiers* and *Contrats* do not appear that problematic in terms of their content on pluralism, but concerns arise from how they are determined. Their content suggests a richer sense of pluralism than the Conseil's brief words. The preamble to the *Cahier de charges* for *France Télévisions*, for example, includes statements recognising: public television's importance for France as a whole and for organising public debate and reflecting society in its different elements; *France Télévisions*'

[215] Ibid.

[216] See eg Derieux, above n 78, 255 [974]; Conseil d'État, Juge des référés, 4 April 2019, no 429370.

[217] Emmanuel Derieux, '*Revendication d'un droit de participation de diverses formations politiques à un débat télévisé*' (2019) no 371 *Légipresse* 296, 299.

[218] Conseil constitutionnel 84-181 DC, 10-11 October 1984, considérant 38.

[219] Derieux, above n 78, 180, [656].

[220] Law 86-1067 of 30 September 1986 on Freedom of Communication, Art 48.

[221] Derieux, above n 78, 180, [658]; Broyelle and Franceschini, above n 76, 51, [68]

[222] Broyelle and Franceschini, above n 76, 52, [70]. See generally Law 86-1067 of 30 September 1986 on Freedom of Communication, Art 53 modified by Law 2016-1771 of 20 December 2016, Art 2.

[223] See Conseil supérieur d'audioviseul, '*Conventions des éditeurs*', available at https://www.csa.fr/Arbitrer/Espace-juridique/Les-relations-du-CSA-avec-les-editeurs/Convention-des-editeurs; and eg Broyelle and Franceschini, above n 76, 97-100, [141]-[150].

need to search for audiences across all genres and not abandon any element of the public; and public television's purpose of serving as a reference point regarding pluralism and democratic debate.[224] The statements resemble German law's sense of broadcasting freedom, but they emerge at a very different point in the constitutional structure, one more clearly connected to government.

Similar ideas recur throughout the *Cahier*, including quite specific requirements for cultural programming each day during peak viewing times, and provisions for content relating to music, theatre, science, education, sports, films, documentaries, children, religion and Europe. There are provisions about protecting minors, human dignity, non-discrimination, representation of people's diversity, as well as communication by government, union and professional organisations. Multiple provisions address television's role in the service of citizenship. Article 35 concerns pluralism of information and, among other things, states:

> France Télévisions ensures the honesty, transparency, independence and pluralism of information as well as the pluralistic expression of currents of thought and opinion. It does not resort to processes that may impair viewers' comprehension. Controversial issues must be presented honestly and the expression of different points of view must be assured.[225]

The above examples suggest a relatively detailed view of plural public speech. But it is worth repeating government formulates the *Cahier*. Government also has a monitoring role: *France Télévisions* must provide the relevant minister and CSA annual reports on each channel's activities under the *Cahier*.[226]

Overall, the examples about parliament, regulator and government suggest gaps exist between ideas of free communication and their implementation. That, in turn, leads to further consideration of the Conseil's approach.

Protecting rights and the Conseil constitutionnel

This chapter has examined the Conseil constitutionnel's development; French law's aim for effective free communication; the freedom's democratic basis; the understanding of pluralism in French constitutional law, legislation and regulation; and the continuing power of government. Here, I return to the Conseil to consider more closely its approach to pluralism and suggest ways it might change.

The Conseil distinguishes *objectives* of constitutional value and constitutional *principles*. Objectives are not a basis for QPC review; rather, the Conseil can address them in a priori review.[227] Since the 1980s, the Conseil has described pluralism of ideas and opinions as an objective—indeed, the idea of objectives was first articulated in relation to pluralism and free communication. This continued after the express addition of media freedom, pluralism and independence to the legislature's obligations in Article 34 of the constitution, with the Conseil stating:

> Considering the terms of Article 34 … it is for the legislator, within the framework of its constitutionally recognised competence, to lay down the rules regarding the freedom of

[224] *Décret* 2009-796 of 23 June 2009, modified by *Décret* 2010-253 of 10 March 2010, *Décret* 2011-1725 of 1 December 2011, *Décret* 2012-758 of 9 May 2012, *Décret* 2013-323 of 16 April 2013 (consolidated version available via https://www.csa.fr/Arbitrer/Espace-juridique/Les-textes-de-references/Decrets-et-arretes). Some amendments, not relevant to my purposes, were made in *Décret* 2017-1746 of 22 December 2017 and *Décret* 2019-1499 of 28 December 2019.

[225] Ibid, Art 35.

[226] Ibid, Art 70.

[227] Eg Dreyer, above n 8, 20 [26].

> communication which derives from Article 11 of the Declaration of 1789, and the pluralism and independence of the media, which are objectives of constitutional value.[228]

Even so, pluralism's treatment could develop in at least two ways. First, QPC review might become available, not necessarily in relation to all objectives, but in relation to pluralism and its effects on free communication. Second, pluralism might be recognised as a constitutional principle rather than an objective—in some regards, it already is.

Objectives are usually described as obligations on public authorities—like the legislature—not freedoms granted to individuals. For example, Emmanuel Dreyer notes that, 'while respect for pluralism now seems to be consubstantial with the concept of freedom of communication in a democratic society, it is still only an objective and not a principle of constitutional value'.[229] However, objectives' status has long been ambiguous. Through them, French law is said to recognise an objective dimension to rights. Pierre de Montalivet states:

> By the obligations they place on public authorities, the objectives allow fundamental constitutional rights to have positive dimensions. Thus, they constitute an important manner of importing into the French legal system the notion of objective guarantees of fundamental rights, found in Germany or in … the European Convention on Human Rights.[230]

The direct references made there to Germany and the positive dimension of fundamental rights suggest how treatment of objective qualities in free speech could develop. Objective dimensions of rights are not necessarily only supported through political (rather than judicial) avenues, as the German example shows. Insofar as objectives aim to make rights like free communication effective, their constitutional status may need reconsideration in France. It could be recognised that insufficiently meeting the objective of pluralism undermines communicative freedom, including recipient interest in free communication. And constitutional objectives—or at least pluralism and independence as they relate to free communication—might become justiciable in more contexts. Failing to meet such objectives could thus allow QPC review based on the effect on free communication.

Alternatively, pluralism and independence might be recognised as being more than objectives of constitutional value. In that regard, it is notable that pluralism was added to the constitution's Article 4 in the 2008 revisions (as well as being added to Article 34). Under Article 4, 'legislation guarantees the pluralistic expression of opinions and the equitable participation of political parties and groups in the democratic life of the nation'. As Montalivet notes, pluralism of ideas and opinions in the *political and electoral domain* has often been described by the Conseil in terms stronger than an objective of constitutional value:

> [The Conseil] seems in reality to distinguish an *objective* of pluralism in the audiovisual field and a *principle* of pluralism in the political field. However, it is difficult to understand to what extent such a distinction is justified with regard to the constitutional text.[231]

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[228] Conseil constitutionnel 2009-577 DC, 3 March 2009, considérant 3.

[229] See eg ibid. He continues: 'This means that "it is an obligation on the public authorities and not a freedom granted to individuals"' (quoting Pierre de Montalivet, '*Les droits et libertés constitutionnels invocables en matière de communication*' (2015) no 54 *Legicom* 7).

[230] Montalivet, above n 71.

[231] Montalivet, above n 63, 15 (emphasis added).

'Principle' suggests a subjective right, while 'objective' does not in French law to date. The Conseil has treated pluralism in the political realm as a principle that can be raised in QPC review.[232] The Conseil has also held legislation unconstitutional for dividing election broadcasts primarily between political groups already in parliament, to the detriment of newly emerging political groups.[233] Among other failures, the legislation breached the constitutional 'principle of pluralism of currents of ideas and opinions'.[234] Overall, a stronger approach to pluralism more generally could emerge in the Conseil. It is not only at election time, after all, that people's opinions are formed, or that plural public speech is needed, or that a democracy of expression operates. The distinction between principle under Article 4 and objective under Article 34 should be revisited.

Similar suggestions exist in the literature, such as introducing 'a constitutional norm prohibiting the undermining of media pluralism', a norm that would act 'in a categorical way beyond a mere objective of constitutional value',[235] or constitutionalising a regulator of audiovisual pluralism (whether the CSA or a new entity) to strengthen pluralism's independence from political power.[236]

Conclusion

French law on free communication has complexities with its multiplicity of actors including legislature, executive and regulator. But it also illustrates positive communicative freedom and its legal support, or at least aspects of such freedom and what law might do. Pluralism and the transparency it involves are central to the French example. Pluralism is a 'cardinal principle' of the law,[237] and democracy is its basis: 'pluralism of sociocultural currents of expression constitutes the centrepiece of freedom of communication'.[238] Pluralism is the freedom's 'constitutional purpose'.[239] The approach encompasses all media and seeks an effective freedom. Whether pluralism is understood as internal to free communication or a counterbalance depends on whether the focus is placed on speakers or recipients. The aim of free communication includes being an effective freedom for recipients; that is the sense in which pluralism is part of the freedom. French decisions illustrate how pluralism or multiplicity of voice and viewpoint, and the transparency linked to that, is a dimension *of* communicative freedom not something separate.

The approach is based in Article 11 of the Declaration of 1789, a text which might be thought to require only negative dimensions of free communication. But Article 11 also supports positive

[232] Ibid 16. He also notes (in his footnote 39) that the Conseil's decisions are inconsistent on the treatment of audiovisual pluralism, with some statements allowing legislation affecting such pluralism to be challenged under QPC review. For examples of QPC decisions referring to the 'principle of pluralism of currents of ideas and opinions' see eg Conseil constitutionnel 2012-233 QPC, 21 February 2012; 2013-353 QPC, 18 October 2013; 2014-407 QPC, 18 July 2014.

[233] Conseil constitutionnel 2017-651 QPC, 31 May 2017.

[234] Ibid, [5].

[235] Viguier, above n 138, 164.

[236] Ibid and see eg Montalivet, above n 63, 13 who notes recommendations of such reform in two official committees that reviewed the 1958 Constitution, the Vedel committee in 1993 and the Balladur committee in 2007; see Comité consultatif pour la révision de la Constitution, *Propositions pour une révision de la Constitution* (chaired by Georges Vedel) (Paris: La Documentation française 1993) [33]; Comité de réflexion, above n 47, 94-95.

[237] Didier Truchet, '*Les missions et les pouvoirs du CSA*' in Regourd and Calandri, above n 2, 43, 48.

[238] Broyelle and Franceschini, above n 76, 94 [136]

[239] Marcangelo-Leos, above n 5, 93.

dimensions. Free speech under French law is double-sided, supporting the freedom of speakers and listeners, writers and readers, transmitters and receivers.[240] And it does not support the latter of each pair simply by supporting the negative freedom of the former. Recipients' democratic needs demand more than that: for people to express opinions, as democracy is said to entail, they need to form opinions through plural public speech. In that way, free communication is a freedom of reception.[241]

While the Conseil constitutionnel has been significant in the law's development, its decisions are less detailed and prescriptive than they could be (and less so than some rulings elsewhere). The Conseil's notable words—about free communication, pluralism, independence from government and market domination, requirements for transparency of ownership information and so forth—do not amount to as much as might be thought. Multiple aspects of that situation have been examined above. The Conseil's reasons are generally brief or even cryptic, and do not clearly delimit the space in which others must act. Permissive approaches have been taken to ownership limits, public media funding and the regulator's replacement. To be effective, free speech requires freedom from political and economic domination. It is not clear that such freedom is substantially promoted under current French law. Overall, a sense of government power comes through, perhaps especially in relation to public media. That appears to be a legacy of a very different approach to free communication—one involving state media not free media. While the approach has certainly changed, more is warranted.

The Conseil's approach leaves important issues for other actors to develop, perhaps with too much of a free hand. Even parliament's obligation to enact detailed and comprehensive legislation within its powers under Article 34 of the constitution (or risk censure for 'negative incompetence')[242] appears to have less effect than expected, when legislation merely repeats the Conseil's words about pluralism. For objectives of constitutional value, the legislature retains a wide margin of appreciation.[243] Even so, some legislation clearly promotes positive dimensions of free speech, and the regulator is gradually moving from institutionally focused measures of pluralism towards a broader understanding. In all, government retains significant power over public broadcasting, a power hard to reconcile with communicative freedom. The Conseil's approach has developed, but more change appears to be needed. As Fromont notes, when distinguishing French and German free speech law from the US approach,

> French and German case law places more emphasis on communication between a transmitter and receivers and on the *necessity of imposing some rules of the game* on the different participants in the exchange of opinions.[244]

Fromont describes both as having a 'balanced conception' of free communication, with earlier German developments having influenced French law.[245] Beyond that, however, important differences remain. There are notable lessons French law could take from the German example: pluralism could be fully recognised as a constitutional principle; its requirements could be detailed further through case law; and the issues treated as more clearly justiciable in multiple aspects. Developments could include public media funding, for example, with the Conseil specifying funding requirements and requiring an

[240] Morange, above n 65, 774.
[241] See above n 95.
[242] See above n 103.
[243] Eg Fromont, above n 36, 294.
[244] Ibid 439 (emphasis added).
[245] Ibid 442-443.

independent authority to have a role in their implementation. Such an approach has not yet been taken, even though finances are an 'essential' aspect of public media's independence and mission.[246]

If pluralism really is to be 'consubstantial' with free communication[247]—if the two are of the same substance and nature—then more is needed. Of course, that could be said much more strongly for many countries with which I am concerned. But changes in the Conseil's position, particularly since 2008's constitutional reforms, suggest further evolution could occur. Over time, clearer delineation of structural requirements for speech under the constitution might eventuate. French law might come closer to framing an effective freedom of communication. As Dominique Rousseau emphasises, the Conseil can now be understood as a central actor in continuous democracy, protecting the governed in their relationship with the executive and parliament. State intervention is both necessary and difficult,[248] and requires judicial control: state actions based on positive communicative freedom 'must … themselves be judicially determined or organised'.[249]

Over time, the goal of realising communicative freedom could be framed more fully by the Conseil for the other institutional actors involved. All this may amount to wanting the Conseil to be a constitutional court in a manner outside the French tradition, to be what it has not been. While undoubtedly true to some degree, the Conseil's role has already 'been transformed beyond recognition'[250] and it has gone further than many courts. In doing so it has revealed important points about free speech in a democracy of expression.

[246] Emmanuel Derieux, '*Missions et gouvernance de l'audiovisuel public – Spécificités du secteur public?*' in Regourd and Calandri, above n 2, 343, 354.

[247] See above n 229.

[248] See eg Morange, above n 76, 113 (complex contemporary media mean state invention is 'rendered very delicate but also necessary').

[249] Agnès Granchet and Emmanuel Derieux, '*Libéralisme économique et liberté d'expression: un débat pour l'avenir*' in Kiyindou and Mathien, above n 131, 79, 81.

[250] Boyron, above n 6, 151.

8 Framing Communicative Freedom

A legal framework for positive free speech emerges from the earlier chapters. At least, parts of a framework emerge. The framework can assist in evaluating judicial, legislative, executive and regulatory measures in light of the freedom's positive dimensions alongside its negative ones. The negative dimensions have long been recognised under democratic constitutions; the positive also warrant attention. The framework does not seek to define all the relevant elements completely: it is not a comprehensive set of rules, but a set of guiding principles. Many factors underlie this quality, including the use of case law. Only some matters become subject to litigation and there is little reason to think a study like this one should be driven by case law. Even so, the constitutional judgments and their reasoning suggest points of wider relevance. The literature and judgments suggest how one could imagine a constitutional right to free speech that includes positive as well as negative dimensions. Aspects of it already exist. Judicial interpretation of free speech is, theoretically, quite able to include the freedom's collective and structural aspects. This has long been done in some jurisdictions, for reasons that are significant in constitutional democracies generally. Positive free speech does not only involve structural diversity and related matters of transparency; among other things, there are issues of electoral funding, rights to demonstrate and information access.[1] Even so, sustained plural public speech is centrally important to positive free speech in a democracy. The media diversity that helps to support it is a direct requirement of the freedom and it should be recognised as a constitutional imperative.

As I noted at the outset, 'positive' in positive free speech can refer to a quality of freedom (concerning support or enablement) and a quality of right (typically enforced through courts). My primary concern remains the former, but the preceding chapters suggest it might depend on the latter. Courts are never the only relevant actors for positive communicative freedom, but their role may be important. It is not that I think many courts will suddenly become active on positive dimensions of free speech. Long-established legal cultures tell against that. Indeed, I am ambivalent about the role of courts overall, but not about the need for sustained plural public speech if a democracy is to have substantive communicative legitimacy. Thus, there is value in exploring what courts can do, while noting four points about the exercise.

First, understanding what courts do elsewhere shows part of what is possible. Beyond demonstrating that the concept of free speech '*might* be coherently used in an unfamiliar way', it shows 'it *has* been put to unfamiliar but coherent uses'.[2] In addition, courts' reasons for acting are

[1] See eg Eric Barendt, *Freedom of Speech* (2nd ed, Oxford: Oxford University Press 2005) 100-108; Herdís Thorgeirsdóttir, 'Journalism Worthy of the Name: An Affirmative Reading of Article 10 of the ECHR' (2004) 22 *Netherlands Quarterly of Human Rights* 601; Tarlach McGonagle, 'Positive Obligations Concerning Freedom of Expression: Mere Potential or Real Power?' in Onur Andreotti (Council of Europe Task Force for Freedom of Expression and Media) (ed), *Journalism at Risk: Threats, Challenges and Perspectives* (Strasbourg: Council of Europe Publishing 2015) 9; Sandra Fredman, *Comparative Human Rights Law* (Oxford: Oxford University Press 2018) 349-353; Mark Tushnet, *Advanced Introduction to Freedom of Expression* (Cheltenham: Edward Elgar 2018) 83-103; various chapters in Andrew T Kenyon and Andrew Scott (eds), *Positive Free Speech: Rationales, Methods and Implications* (Oxford: Hart 2020).

[2] Quentin Skinner, 'The Idea of Negative Liberty: Philosophical and Historical Perspectives' in Richard Rorty, JB Schneewind and Quentin Skinner (eds), *Philosophy in History: Essays on the Historiography of Philosophy* (Cambridge: Cambridge University Press 1984) 193, 198 (emphasis in original) and see chapter 1.

significant (and not only for the legal systems in question). The actions and the reasons raise questions for legal systems that ignore the issues. They also link into wider debates about courts and judicial diversity, appointment, tenure and so forth. Clearly, positive freedom in general may not be something which typical judges in the jurisdictions I consider are best placed to appreciate. One might think here of the various feminist and critical judgments projects, which produce alternative judgments in significant cases (generally judgments that *could* have been written in the place and time in question).[3] Some of the projects engage with areas of negative free speech, and concerns broadly parallel to positive freedom and the equality it entails run through the projects.[4] While remaining within existing practices of judging, they demonstrate that much is possible within those practices. They offer a powerful claim about how ideas could reshape law, and positive free speech offers another project. But the simple point here is that examples of courts acting raise questions about communicative freedom in legal systems where courts do not act.

Second, over time those questions *might* have effect. Some courts could find ways to act more 'positively' regarding free speech. Think of what has changed in negative free speech law in the last four decades in many jurisdictions (and somewhat longer for US law). Far more protection has developed through case law, generally based on ideas of democratic governance and public debate. Many examples could be given,[5] even if recent trends illustrate challenges to protecting negative free speech in the countries with which I am concerned.[6] Over time, questions raised by the judicial

[3] See eg Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart 2010); Kathryn M Stanchi, Linda L Berger and Bridget J Crawford (eds), *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge: Cambridge University Press 2016). There was also an earlier Canadian project, see eg Diana Majury, 'Introducing the Women's Court of Canada' (2006) 18 *Canadian Journal of Women and the Law* 1, and other rewriting projects, see eg Jack M Balkin (ed), *What Brown v Board of Education Should Have Said: The Nation's Top Legal Experts Rewrite America's Landmark Civil Rights Decisions* (New York: New York University Press 2002).

[4] On free speech in the various judgment projects see eg Katharine Gelber, 'Commentary on *McLeod v Power*' in Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Oxford: Hart 2014) 405; chapters by Susan Bird, Nicole Rogers and Matthew Rimmer in Nicole Rogers and Michelle Maloney (eds), *Law as if Earth Really Mattered: The Wild Law Judgment Project* (Abingdon: Routledge 2017); Gabrielle Appleby and Rosalind Dixon (eds), *The Critical Judgments Project: Re-Reading Monis v The Queen* (Leichhardt, NSW: Federation Press 2016); Ursula Cheer, 'Commentary on *Brooker v Police*: Rights Balancing Rejected' in Elisabeth McDonald, Rhonda Powell, Māmari Stephens and Rosemary Hunter (eds), *Feminist Judgments of Aotearoa New Zealand: Te Rino, A Two-Stranded Rope* (Oxford: Hart 2017) 73; Thomas DC Bennett, 'Commentary on *AAA v Associated Newspapers Ltd*' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments: From Academic Vision to New Practice* (Oxford: Hart 2017) 193 and Kirsty Hughes, '*AAA v Associated Newspapers Ltd*', ibid, 200; Merris Amos, Maribel Canto-Lopez and Nani Jansen Reventlow, '*Ruusunen v Finland*' in Loveday Hodson and Troy Lavers (eds), *Feminist Judgments in International Law* (Oxford: Hart 2019) 303.

[5] Examples include developments analysed in Barendt, above n 1; the implied protection for political communication judicially recognised in Australia's constitution since the early 1990s, see eg Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant?* (Aldershot: Ashgate 2000); and substantial changes in the Canadian Supreme Court's analysis of defamation law, which have moved its defamation law from one of the most traditional in common law systems, and invited re-examination of further aspects of the law in the process, cf *Hill v Church of Scientology of Toronto* [1995] 2 SCR 1130 with eg *WIC Radio v Simpson* 2008 SCC 40 and *Grant v Torstar* 2009 SCC 61.

[6] See eg United Nations Educational, Scientific and Cultural Organization, *World Trends in Freedom of Expression and Media Development: Regional Overview Western Europe and North America 2017/2018* (Paris: UNESCO

examples might affect the freedom's positive dimensions too, so free speech is more fully recognised by more courts. There are many areas of law where this could occur. My focus has been sustained plural public speech, but free speech's positive dimensions are broader than sustained pluralism, independence and transparency. Courts might consider, for example, the existence, structure and quantum of media subsidies; political equality and public speech; competition law applied to media and communications; speech rights of minority populations; access to information held by state and other entities; and providing public resources when demonstrations are held.[7] It would be surprising if some of these issues do not receive more free speech-based judicial oversight or prompting of legislative or regulatory action. That said, challenges in making any such predictions are clear. Consider the confidence in Thomas Emerson's view in the early 1980s that US constitutional law would develop stronger, more coherent doctrine on 'affirmative' free speech.[8] Clearly, that has not yet come to pass.

Third, even without courts changing, the examples illuminate what positive free speech entails. Other actors could apply the lessons; over time they may do so and enrich free speech—making it clear that freedom is not only negative, it is not only freedom from restriction, and law is not 'always a fetter' on freedom.[9] When a parliament or executive acts on public media funding and independence, appointment processes for public media management, transparency of media ownership, diversity of media entities, funding bases, missions and so forth, it engages free speech. The actions should be debated in those terms. If the free speech issues are explicitly acknowledged, courts may be more likely to interpret the resulting actions using positive as well as negative dimensions of communicative freedom. Understanding more about positive free speech could lead courts not to strike down, or otherwise limit, legislation supporting a democracy of expression.

Fourth, as well as illustrating what free speech contains, the examples show why sufficient action by legislatures or executives is fairly unlikely. Democracies require an improbable situation: various institutional actors must act against their own perceived interests. Vested powers need to support free speech by and for others. There is a need for 'genuine redistribution of voice and communicative power'; for instance, through measures such as funding levies and transparency requirements for political-media relations, as well as substantially reformed governance of algorithm-driven services.[10] Such redistribution of voice might be prompted by people's struggles influencing politicians to act,[11] despite the many counterforces to overcome. It might also be aided by a fuller understanding of free speech. Overall, there are clearly reasons to doubt the required measures will eventuate sufficiently, but even partial improvements could be valuable (and, in many contexts, non-judicial avenues may be the only ones with potential). Whoever acts, the ideas in free speech uncovered by thinking about a democracy of expression should assist them.

2018) 4 'Despite historically well-established traditions of robust legal frameworks aimed at securing the freedom of the media, the legal environment has recently become more restrictive'.

[7] See above n 1.

[8] Thomas I Emerson, 'The Affirmative Side of the First Amendment' (1981) 15 *Georgia Law Review* 795.

[9] John Charney, *The Illusion of the Free Press* (Oxford: Hart 2018) 125 quoting Isaiah Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press 1969) 3.

[10] Justin R Schlosberg, *Media Ownership and Agenda Control: The Hidden Limits of the Information Age* (Abingdon: Routledge 2017) 153 and see generally its chapter 17 'Safeguards and Remedies'.

[11] Ibid 153. Consider also my discussion in chapter 1 of Axel Honneth, *Freedom's Right: The Social Foundations of Democratic Life* (translated by Joseph Ganahl) (Cambridge: Polity 2014).

Emerson long ago suggested only 'rough but practical' responses would be possible for positive free speech.[12] In many ways, I agree. But I also think matters might be extended beyond his observation. Before summarising the earlier chapters to that end, I want to consider how this book relates to older work. Clearly, this is not the only work treating democratic free speech as more than a negative freedom. Earlier, I noted an example from Frederick Schauer suggesting negative dimensions of the First Amendment could be 'a relatively small component of a much more broad-based approach' to free speech.[13] He offers four categories of rights that might arise: rights against government interference with private speech; rights that the government provide opportunities to speak and obtain information; rights of access to forums controlled by others; and rights against nongovernmental interference with speech. He suggests only the first category would be given primarily to courts, although courts would enforce legislation about the third and fourth categories.[14] It might be thought that I have not gone much further: free speech is broad, broader than a negative liberty against governmental restraint, and it should be protected in various ways. Many people have suggested the same, even if law has often left the issues aside (perhaps especially in common law jurisdictions).

However, compared with quite a deal of the prior research, I think more has been said here about what a democratic structure of public communication would require in terms of positive free speech, the analysis has not been limited to one democracy, and the theoretical claim for courts to act in support of the communicative structure is stronger. The book has considered ways in which positive free speech has structural implications in various democracies and has emphasised the role of courts in pursuing those aspects of free speech, where possible, because legislatures and others are unlikely to pursue them sufficiently without prompting. The result places free speech's positive dimensions in a similar position to its negative ones: they are not matters for courts to leave aside, at least not in general and in theory. Saying that denies neither the challenges in courts acting, nor the importance of supporting communicative freedom via legislative, regulatory and other means beyond law. It does not suggest courts are especially well suited to acting, nor does it claim courts are particularly likely to act, at least not soon in many countries with which I am concerned. However, the study underlines the importance of structural media diversity within democratic free speech and the way some courts support it. This clarifies more about what is required in terms of media diversity, and why it is unlikely to be achieved.

The study takes models of diverse media to illustrate the communicational diversity required in contemporary democracies.[15] Those models capture something of the range of matters addressed in the wider scholarship and case law considered throughout the book. Sustained plural public speech involves a structure like those models, but such a mixed media system can be positioned *within* free speech law. It is an element of free speech and, in turn, a democratic constitutional requirement. I

[12] Thomas I Emerson, *The System of Freedom of Expression* (New York: Random House 1970) 667.

[13] Frederick Schauer, 'Hohfeld's First Amendment' (2008) 76 *George Washington Law Review* 914, 925; and see chapter 2.

[14] Ibid 929.

[15] See James Curran, 'Mediations of Democracy' in James Curran and Michael Gurevitch (eds), *Mass Media and Society* (4th ed, London: Hodder Arnold 2005) 122; James Curran, *Media and Power* (London: Routledge, 2002) 240-246; Georgina Born, 'Digitising Democracy' (2005) 76 (Supplement 1) *Political Quarterly* 102; and see chapter 2.

have drawn on models from media studies, along with a wide range of sources, to reimagine free speech in law. All this offers material to change the terms of analysis and argument, in scholarly terms and perhaps in doctrinal, legislative and regulatory ones.

I now turn to earlier chapters before further examining judicial protection of constitutional rights and commenting briefly on contemporary communication environments.

Earlier chapters reviewed

Positive free speech from media studies and law

Initial consideration of positive free speech suggested the aim in a democratic context should be sustained plural public speech involving diverse media entities, funding, missions and people.[16] As well as content, structural aspects of its production, circulation and use are raised. Free speech supports this aim through its two broad dimensions: one being non-censorship, the other being multiplicity of voice and viewpoint.[17] To express opinions and have political effect—as is said to happen in a democracy—people need to form opinions and, for that to be substantially legitimate, it needs sustained plural public speech.[18] Not only media is important to opinion formation, but media *is* important even so.

What might such a framework for public speech look like? Two models of diverse media, from James Curran and Georgina Born, were used in illustration.[19] The models involve *diversity across media sectors*, including diverse staffing, missions and funding, with five suggested sectors—public, civic, professional, commercial and social market. And they involve *diversity in terms of media content and audiences*, again in five ways—antagonistic opinions presented for wide debate, intercultural communication between groups and intracultural communication within groups, and communication for communities of interest, both territorially-based and non-territorially based. These models for institutional and communicative pluralism aim for media with different 'operating logics' encompassing diverse, sectoral speech as well as wider public communication.[20] As Edwin Baker suggested of Curran's model, '[s]trength lies in *structural* diversity'[21] and, as emphasised by Born, the diversity includes communication with varied aims, audiences and genres.

The examples suggest something of what a media environment would contain under conditions of positive free speech. They offer 'a normative architecture' for communication under contemporary conditions of social diversity.[22] Extending those models suggests there would be:

> a structurally mixed media environment, containing multiple and varied institutional forms, internal organisation, staffing, management, participants, regulation, economic support, and content, with transparency of ownership, control and content, aimed at different audiences across different territories, in the service of different missions, and containing diverse arguments presented in

[16] Eg Onora O'Neill, 'Practices of Toleration' in Judith Lichtenberg (ed), *Democracy and the Mass Media: A Collection of Essays* (Cambridge: Cambridge University Press 1990) 155, 178.

[17] Eg Judith Lichtenberg, 'Foundations and Limits of Freedom of the Press' in Lichtenberg, above n 16, 102, 107.

[18] Eg Sophie Boyron, *The Constitution of France: A Contextual Analysis* (Oxford: Hart 2013) 194.

[19] See above n 15.

[20] Kari Karppinen, *Rethinking Media Pluralism* (New York: Fordham University Press, 2013) 79.

[21] C Edwin Baker, *Media Concentration and Democracy: Why Ownership Matters* (Cambridge: Cambridge University Press, 2007) 198 (emphasis in original).

[22] Born, above n 15, 116.

> debates aimed at wide publics, as well as communication of varied genres between and within cultural and interest groups.

It is quite a list, and clearly it could only ever be achieved to a degree. That is to be expected in a list concerning freedom, perhaps especially its positive dimensions. Even so, elements of the list are seen in existing law; the requirements of free speech suggest more elements should be legally recognised. It is not hard to imagine using a list like that to ask whether a particular jurisdiction has, through whatever actors and actions, sufficiently supported those qualities. And it allows the factors to be argued about in terms of free speech. While public media might play an important role within this sort of approach, it is not public media as it has existed in the countries in question. That should be obvious from the list but is probably worth underlining. It is public media pluralised, more multi-dimensional and less closely connected with 'establishment' interests. And public media is only part of what the list entails. Also, the list suggests there is value in legal approaches focused on matters of structure, funding, staff independence, transparency and so forth, more than approaches based primarily on regulating media content.[23] For these positive dimensions, a structural focus appears less challenging in terms of negative free speech where direct content regulation may pose challenges. A structural focus is supported by the examples in earlier chapters, and basic the aim of substantial diversity of public communication.

One point is immediately apparent from the list: the contemporary environment of networked communication, data capture and exploitation does not, in itself, provide all the elements listed. Some aspects certainly have more visibility than in a mass media age: think of communication within interest groups across different territories, at least where a group's economic resources are attractive to intermediaries and content producers. Other aspects have become more difficult: think of the past image—even if it was not the reality—of wide and inclusive public debate occurring via mass media, with professionally produced and public-serving content not driven by commercial or governmental imperatives. Structures and practices have changed, but they have not necessarily become more suited to supporting sustained plural public speech. While largely a topic for future examination, I return to the contemporary environment below.

Initial points were also drawn from legal scholarship. First, courts have a role in determining the meaning of freedom within free speech law because constitutional provisions rarely provide any definitive answer to whether, and in what way, the freedom has positive dimensions.[24] Second, the positive dimensions can be based in a democratic rationale, which suggests free speech has structural qualities. A third point concerned who does what in relation to positive free speech and who decides. A common response in English-language literature is that courts have a limited role in relation to free speech's positive dimensions. The issues are largely left to legislatures, executives and independent regulators among others, with courts reviewing their actions with an understanding of positive free speech. This study would suggest courts should in theory go further where other actors have not done enough; otherwise positive free speech is unlikely to be sufficiently supported. Courts could take a substantial role upholding positive free speech, *framing* the possibilities and obligations for legislative,

[23] This is not to deny the potential value of content-focused regulation, which can also be argued for on positive free speech grounds; see eg Paul Jones, 'The Implied Constitutional Freedom of Political Communication and Australian Media Policy' (2003) 5 *UTS Law Review* 65.

[24] Eg Barendt, above n 1, 101.

executive and regulatory action. The need for such framing may not be rare, but instead central to the communicative requirements of democracy.

Positive free speech and democracy

Suggesting courts might act raises a host of possible objections, some coming from the literature on judicial review's legitimacy and effectiveness. I consider that issue below, but one could also simply note courts' role regarding foundational aspects of democratic constitutions. Constitutions are not something for executives to rewrite or reinterpret at will. Courts uphold constitutional provisions about the powers of different arms of government, requirements for electoral processes, constitutional reform and so forth. Courts arguably should do the same for free speech in all its constitutionally required aspects. That is not to say courts decide everything, far from it, but they have a role framing the obligation to act and the limits of that action. Understanding public speech's place within democratic constitutions—its role as 'the constitution of the constitution'[25]—dovetails with the idea of courts having an important responsibility. Public speech's place is also a reason the structurally mixed media environment, outlined above, is needed. Communicative freedom has a particular democratic quality; the freedom in its positive and negative dimensions is entailed by a democratic constitution. That follows both from democratic principles and from centuries of democratic practice and struggle—'claims that have not yet been redeemed … for the realization of institutional promises of freedom'.[26] Democratic constitutions and practice necessarily recognise, even if only implicitly, that public speech relates to institutional politics, which means sustained plural public speech is presupposed. Otherwise, the constitutional arrangements are not substantially legitimate in communicative terms. In that way, democracy *is* democracy of expression. Sustained plural public speech is underpinned, in part, by free speech. It is a freedom that involves multiplicity of voice and viewpoint as well as non-censorship, a freedom with both positive and negative dimensions.

None of this is to suggest that democracy needs only speech. A host of concerns can be raised about existing democracies' structure and operation.[27] Further, it is not only law that speech needs. Public speech is linked with a wide range of activities that support its emergence, circulation and reception. Speech has a social organisation which extends well beyond law. Even so, democracies need free speech and its legal protection in an important way. Further, the arguments do not only apply to a certain form of democracy. They are not based on one or other model of democracy—liberal, republican, agonistic or deliberative, for example. Clearly, broadly similar arguments sit easily within a social democratic tradition.[28] And republican approaches to democracy, while explicitly dealing with free speech as a negative freedom from domination, can also arrive at similar positions.[29] But even a

[25] Eric Heinze, *Hate Speech and Democratic Citizenship* (Oxford: Oxford University Press 2016) 6 (emphasis removed).

[26] Honneth, above n 11, viii.

[27] For an example of wider concerns with relevance to questions of speech and law, see Jacob Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics* (Cambridge: Cambridge University Press 2010).

[28] See eg Victor Pickard, 'The Strange Life and Death of the Fairness Doctrine: Tracing the Decline of Positive Freedoms in American Policy Discourse' (2018) 12 *International Journal of Communication* 3434; Victor Pickard, *Democracy Without Journalism? Confronting the Misinformation Society* (New York: Oxford University Press 2020).

[29] See eg Charney, above n 9, 144 emphasising the importance of insulating journalism from domination by governments and markets.

libertarian democracy, to be substantially legitimate in communicative terms, could not only involve a libertarian approach to free speech. That would pre-judge matters in a way that undermines claims to self-government. The variety of democratic forms and practices means sustained plural public speech is required for democracy to have communicative legitimacy. In that way, my approach does contain a certain 'substantive conception' or 'political truth' of democracy as John Charney puts it.[30] But that is evident from the book's title: the substance concerns communication and its role in democratic self-government. And that role inheres in multiple forms of democracy. As well as negative dimensions of free speech being important, its positive dimensions require legal support.

The 'political truth' underlying my analysis might be thought to resemble Robert Post's work, in giving a central place to speech, opinion formation and self-government (and I have used his work in considering negative aspects of the freedom).[31] Charney provides a critical evaluation relevant to positive dimensions of communicative freedom:

> Post's theory might work well in a society where participation in the public sphere is merely a matter of personal choice. However, when there are structural disadvantages, when certain groups or individuals cannot gain or have difficulties gaining *access* to public debates as a consequence of economic, political, social, ethnic, educational or any other disadvantage, Post's theory will tend to reproduce the inequality.[32]

The approach taken to *access* to public discourse is significant. I have explored a somewhat similar concern about the viability of public speech under Post's analysis,[33] while noting he recognises that some face challenges in accessing public discourse. He also supports the possibility of the state 'act[ing] positively to subsidize … supplement and improve public discourse'.[34] To do that would not 'deny the principle of speaker autonomy', it would not 'deny the concept of individual rights' and it would not 'set up the state as the pedagogical arbiter of public discourse'.[35] All that sound similar to my analysis. Even so, Post's overall approach appears to follow from a different conception of freedom and what is required for free public discourse to exist.

Post argues the requirement that 'citizens should have sufficient access to public debate so as to ensure that public debate serves for them the function of reconciling individual and collective autonomy' is something 'entailed by' free speech.[36] But what that means 'turns on the nature of liberty' as Post notes.[37] Like Morris Lipson, I would suggest the access to public debate involves access

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[30] Ibid 79.

[31] See eg Andrew T Kenyon, 'What Conversation? Free Speech and Defamation Law' (2010) 73 *Modern Law Review* 697.

[32] Charney, above n 9, 76 (emphasis added). Somewhat similarly, Rowbottom states that, while Post 'highlights the problem of granting … broad power to the state to fix the political agenda, a similar objection can be made if those with more economic resources determine the agenda': Jacob Rowbottom, *Democracy Distorted: Wealth, Influence and Democratic Politics* (Cambridge: Cambridge University Press 2010) 51.

[33] See further Andrew T Kenyon, 'Positive Free Speech: A Democratic Freedom' in Adrienne Stone and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech* (Oxford: Oxford University Press, in press) which is drawn on here.

[34] Robert C Post, 'Equality and Autonomy in First Amendment Jurisprudence' (1997) 95 *Michigan Law Review* 1517, 1539, citing Robert C Post, 'Subsidized Speech' (1996) 106 *Yale Law Journal* 151, 176-194.

[35] Post, 'Equality and Autonomy', above n 34, 1539.

[36] Ibid 1538 and its note 41 (internal citation removed).

[37] Ibid.

as speakers *and* as audience.[38] What one can hear is central to democratic choice, not only what one can say. And this changes what is required for access to be realised to a democratically sufficient degree. If free public debate aims to serve democratic self-government, questions arise about freedom, its meaning and requirements. Predominantly negative freedom may well describe much First Amendment law but, as this study has shown, constitutional law can differ. It can be concerned with collective self-government (as is commonly said of US law) but take a very different approach to what that entails. The law can require state action in pursuit of communicative freedom.

The analysis has considered formally democratic countries in Western European and North American styles (and similar countries elsewhere) which also have comparatively strong protection of negative free speech. Usefully, there are examples of positive free speech's legal protection among these countries. But the suggestion is not that positive dimensions of free speech necessarily come after negative ones in some historical progression, nor that free speech's positive and negative dimensions are well protected now. As chapter 3 noted, perhaps only 3% of the world's population live in 'open' civic space, where the 'state both enables and safeguards the enjoyment of civic space for all people', with another 17% in 'narrowed' civic space, and over 80% in 'repressed', 'closed' or 'obstructed' civic space.[39] The point is that, without law and culture sufficiently protective of negative free speech, its positive dimensions are unlikely to be pursued well. The positive freedom includes the negative, and protection of both is needed.

Positive human rights and political freedom

Ideas about positive freedom were explored through academic writing on human rights law and political theory. The analysis can be summarised into ten points, five coming from Sandra Fredman's analysis of positive human rights,[40] and five from a range of work on political theory. It is worth repeating that the approach does not depend on ideas of positive human rights or positive freedom in general. Those ideas could be supported or not. Clearly, they have much to offer, but that is a distinct question. My aim is narrower; it focuses on communicative freedom, while drawing from these wider analyses.

Human rights having positive dimensions suggests five things for my purposes. First, *states have obligations to act* in support of rights in multiple ways, through multiple measures, including legislative, regulatory and financial ones. Multiple state actors have the obligations, which can include courts. Second, the actions should give people a *range of options for exercising autonomy* and 'a plurality of incompatible and competing pursuits, projects, and relationships',[41] a point matching the plurality within the societies I consider. Third, *positive rights have an essential democratic role* because of democracy's need for relatively equal participation. This is so whether democracies are understood more in terms of interest-group bargaining or collective deliberation. Fourth, *positive dimensions of rights involve questions of degree*. They are not indeterminate but require realisation to the greatest extent possible in the circumstances. This means they constrain state attempts to abuse power, in some ways like the constraints imposed by negative rights. Fifth, *positive rights are justiciable* insofar

[38] Morris Lipson, 'Autonomy and Democracy' (1995) 104 *Yale Law Journal* 2249.

[39] Civicus Monitor, *People Power Under Attack* (December 2019) and see further detail in chapter 3.

[40] Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford: Oxford University Press 2008).

[41] Fredman, above n 40, 24.

as that promotes participatory democracy and reinforces government accountability. Thus, positive rights aim to give voice to the marginalised and support material and social preconditions for participation.

Work from political theory on positive freedom reinforces these points, taking the total to ten. Sixth, *states have obligations to support diverse possibilities for people's lives*, aiming to give them prima facie equal access to social and material conditions for realising projects of their choosing. These obligations on states have implications for resources, enablement and democratic involvement in the formation of law. Seventh, *the approach is highly pluralistic*. Contrary to Isaiah Berlin's analysis of positive freedom,[42] it does not entail a monist vision of the end being sought. Positive freedom includes, but goes beyond, negative liberty. That does not make it less pluralistic, quite the opposite. While Berlin's work might have interest in the history of ideas it has little relevance to free speech. Eighth, 'positive' in *positive freedom involves an idea of enablement*, meaning the conditions of freedom are within analyses of freedom, again contrary to Berlin. Ninth, while analyses of positive freedom often reference autonomy, that *autonomy should be understood as arising within particular social conditions*—conditions that both enable and limit what is possible. More than autonomy, it is a question of freedom within social and discursive contexts, of choices made within wider conditions not of one's own making.[43] Tenth, the examples often do not address *which institutional actors have responsibilities* for positive dimensions of freedom. Where the actor is considered, institutional politics is often the focus.

Two examples were considered on that last point. Virginia Held suggests the state must enable speech in an analogous manner to its obligation to provide a system of education. This would mean, for example, very substantially expanding US public media.[44] While this would be a legal obligation, how law would have such effects is not explored in detail. In contrast, Sandra Fredman does consider law's role. She suggests courts should not undo legislation supporting positive freedom, and should promote inclusive deliberation within institutional fora such as courts and perhaps parliaments.[45] The first aspect is relatively common in legal writing: courts should not invalidate legislative actions that support positive freedoms, without interpreting those actions in light of positive as well as negative freedom. The second aspect, in its focus on deliberation *within* institutions, may well be valuable and it would occur in a democracy of expression. But the focus leaves aside the wider communication relevant to democratic government that emerges through considering free speech specifically. Deliberation within institutions, without more, might suggest a narrower form of public communication than democracy requires.

[42] Isaiah Berlin, *Two Concepts of Liberty: An Inaugural Lecture Delivered before the University of Oxford on 31 October 1958* (Oxford: Clarendon 1958); 'Introduction' in *Four Essays on Liberty* (Oxford: Oxford University Press 1969) ix (also available in *Liberty: Incorporating 'Four Essays on Liberty'* (edited by Henry Hardy) (Oxford: Oxford University Press 2002).

[43] Eg Nancy J Hirschmann, *Gender, Class, and Freedom in Modern Political Theory* (Princeton: Princeton University Press 2008) 205.

[44] Virginia Held, *Rights and Goods: Justifying Social Action* (New York: Free Press 1984) 230.

[45] Fredman, above n 40, 100-113.

US legal writing on positive free speech

First Amendment law is commonly understood to be a free speech outlier due to the strength of its negative approach to the freedom. Even so, there is repeated engagement with positive dimensions of free speech in US scholarship. The examples considered largely reinforce points from the work on positive human rights and political theory. Of course, the examples are not the only approach to the First Amendment, but it is striking that positive dimensions of free speech can be seen so easily across decades of legal research there.

Seven matters were drawn from the examples. Perhaps the key point of difference from this book is the theoretical value of courts acting to support positive free speech. An important reason for this is the way that free speech, including its positive dimensions, is a precondition of democracy that should not be left entirely to other institutional actors. First, diverse public speech, which involves audience as well as speaker interests, is *centrally important for democratic government*. Second, that *diversity needs government action*. Third, *government always affects public speech* so government actions should be subject to constitutional standards not only constrained by institutional politics.[46] Fourth, some analyses extend to the media needing to have *varied economic bases*, not just commercial ones.

Many of these points are seen in Emerson's work. He argues the First Amendment's 'affirmative power' means government should 'furnish facilities for communication' because even the First Amendment recognises the audience's 'right to hear'.[47] The point resembles analysis of French free speech law as containing a right to information.[48] For Emerson, the right extends to the opportunity to hear speech opposed to government positions—and that opposition should not only be driven by the financial or political self-interest of particular media outlets or speakers. In short, free speech means government has an obligation to finance opposition to itself, where varied opposing viewpoints are not otherwise prevalent. The required diversity is structural, involving multiple media outlets with different financial bases. The aim is to create an 'open' terrain for speech.[49] Somewhat similarly, Jack Balkin (in his legal realist-inspired free speech analysis) emphasises that constitutional protection of speech could require government expenditure to produce diverse public discourse in support of effective freedom of expression.[50]

A further three matters were drawn from US writing. Fifth, some examples address the relationship between *public speech and democratic legitimacy*. Owen Fiss links state action supporting 'the robustness of public debate' to democratic preconditions. In supporting diverse public speech, the state is 'trying to establish the essential preconditions for collective self-governance'.[51] Sixth, *public speech occurs within existing practices of speech*, within contexts which enable and constrain speech. This means people need broad ability to participate in shaping discursive contexts.[52] Seventh,

[46] Eg Susan H Williams, *Truth, Autonomy, and Speech: Feminist Theory and the First Amendment* (New York: New York University Press 2004) 225-228.

[47] Emerson, above n 12, 649.

[48] Eg Emmanuel Derieux with Agnès Granchet, *Droit des medias: : Droit français, européen et international* (Issy-les-Moulineaux: LGDJ 7th ed 2015) 60-65.

[49] Emerson, above n 12, 671.

[50] Jack M Balkin, 'Some Realism about Pluralism: Legal Realist Approaches to the First Amendment' [1990] *Duke Law Journal* 375. Balkin's somewhat different later work is discussed in chapter 5.

[51] Owen Fiss, *The Irony of Free Speech* (Cambridge, MA: Harvard University Press 1996) 4-5, 18.

[52] Williams, above n 46, 225.

the *examples often suggest entities other than courts would act* to support positive free speech. However, some do consider courts.

On the seventh point, Emerson initially leaves positive free speech to institutional politics more than courts, describing the government's obligation as 'political, if not constitutional'.[53] But he later suggests courts could have an important role, such as protecting media regulators from partisan political interference (an issue of perennial interest in many jurisdictions).[54] The focus should be on structural diversity, based on constitutional free speech principles, which courts could 'go a considerable distance' towards requiring.[55] Emerson writes:

> Such a goal cannot be reached by mere enforcement of the antitrust laws. It will undoubtedly be necessary to go to the economic roots of the problem and either by government subsidies or other devices create an open market with a new form of economic base.[56]

This would not amount to detailed judicial supervision of media, but structural oversight and framing of media and through that of public speech. While Emerson does not expressly raise the point, his analysis is based on governments and parliaments likely failure to meet constitutional requirements of free speech if courts do not act. As noted below, the German analysis suggests that is a key reason for judicial action.

Balkin's early work addresses similar concerns to Emerson. His approach generally leaves matters to institutional politics, with courts allowing legislation in support of free speech's positive dimensions. However, for 'affirmative liberties' such as speech, Balkin suggests courts can 'define a range of alternatives for the political branches to pick from, or direct the political branches to propose their own alternatives' and review whether 'they appear reasonably calculated to succeed'.[57] These ideas closely resemble practices where courts do act for positive dimensions of free speech: they define alternatives, while leaving room for discretion, and evaluate the steps taken by others in response.

<u>German broadcasting freedom and French pluralism</u>

Beyond the points emerging from the academic writing considered above, German and French constitutional decisions suggest something of why courts could act and what they would address. The decisions also illustrate more about what positive communicative freedom entails, whoever acts to support it. The case law displays a 'facilitative model'[58] of free communication in which diverse public speech is 'a precondition'[59] to substantially legitimate democracy.

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[53] Emerson, above n 12, 652-653.

[54] See eg Wolfgang Schulz, Peggy Valcke and Kristina Irion (eds), *The Independence of the Media and its Regulatory Agencies: Shedding New Light on Formal and Actual Independence against the National Context* (European Communication Research and Education Series) (Bristol: Intellect 2013).

[55] Emerson, above n 8, 806.

[56] Emerson, above n 12, 671.

[57] Balkin, above n 50, 413.

[58] W Cole Durham, 'General Assessment of the Basic Law: An American View' in Paul Kirchhof and Donald P Kommers (eds), *Germany and Its Basic Law: Past, Present and Future* (Baden-Baden: Nomos 1993) 37, 45-46.

[59] Nigel G Foster and Satish Sule, *German Legal System and Laws* (4th ed, Oxford: Oxford University Press 2010) 253.

There are many similarities in the two examples. In both, the aim is 'to establish the conditions necessary for the effective exercise of speech rights',[60] with the freedom encompassing audiences as much as speakers. In both, the constitutional requirement supports recipients' opinion formation and political practice. Freedom is sought from state and market domination.[61] Recipients 'should be able to exercise their free choice without private interests or public power substituting their own decisions, without the freedom being made the object of a market'.[62] Market freedom is quite distinct from media freedom.[63] The approach's rationale is democratic: media diversity or pluralism is a condition of democracy.[64] The freedom is broad and both jurisdictions have maintained largely consistent approaches to the freedom across substantial change in technology and its use, industry structure and operation, and audience practices. In Germany, the meaning of broadcasting is not technologically specific, and the mandate of public broadcasting remains large—a service that is *comprehensive, universally available and substantially diverse*. This consistency follows from the way Article 5 of the Basic Law protects communication as a process. In France, Article 11 of the Declaration of 1789 requires diverse speech across all forms of media, with broad equivalence across press, broadcasting and internet. In both jurisdictions, the requirements of diversity or pluralism arise directly from the constitutional provision.

There are also notable differences between the examples. I address four aspects of the German approach, before moving to five points about French law. The German matters concern the forms of media to which the freedom extends, funding public media, independence of regulation and the court's precautionary approach to the freedom.

The first point is simple: German law emphasises the position of broadcasting and public broadcasting within that. The *role of public broadcasting is primary and vital* within the country's dual broadcasting system because, to date, commercial broadcasting by itself cannot meet the constitutional requirements for a service that is comprehensive, universally available, and contains substantial diversity of opinion. The broadcasting focus can be understood historically, both in terms of technology and constitutional litigation. But the logic of the analysis suggests a wider application of positive free speech to diverse *media* rather than only broadcasting.

Second, the German approach aims for *sufficient funding of public broadcasting determined independently of institutional politics*, or at least determined with a meaningful degree of independence. As well as concerns with potential political domination, the court finds that funding is required because of advertising's effects on media content. Advertising-funded services by themselves will not include the diversity of material required by free speech under a democratic constitution. The services will not be comprehensive, universally available and substantially diverse. Political battles over funding are perennial in many countries with public broadcasting. The reason for seeking to determine funding independently of politicians follows from the media's posited role of, among other things, monitoring and criticising politicians. That is a powerful reason why courts may

[60] Donald P Kommers and Russell A Miller, *The Constitutional Jurisprudence of the Federal Republic of Germany* (3rd ed, Durham: Duke University Press 2012) 449.

[61] 57 BVerfGE 295 (Third broadcasting case).

[62] Conseil constitutionnel 84-181 DC, 10-11 October 1984, considérant 38.

[63] 74 BVerfGE 297 (1987) (Fifth/Baden-Württemberg case) 'Market opportunities may be a question of economic freedom, but not of freedom of opinion'.

[64] Eg Conseil constitutionnel 86-217 DC, 18 September 1986, considérant 11.

need to act regarding the framework for media funding, as well as regarding media's independence from government in terms of mission, staffing and regulation. Extending the general point to a contemporary context, the constitutional importance of media with independence from advertising raises questions where public media is distributed via internet 'custodians', whose businesses centre on content moderation and commercial data exploitation.[65] The German courts' reasoning suggests such platforms, in themselves, could not provide democratically required communication; what about their role in reformulating the environment for speech?

Even if determining funding cannot be entirely a matter of expert opinion divorced from politicians—consider the process of appointing experts to assess the required funding, for example—the point to take from Germany is the need to remove funding decisions from politicians acting alone, subject only to political constraint. Courts themselves do not appear obvious decisionmakers for broadcasting budgets, nor do broadcasters. Another process is required, one that is less politically dominated than the executive or parliament, and one that takes a plausible approach to determining the funding's sufficiency. To require more independent determination of funding and then to review the reasonableness of the method adopted is clearly something courts could do. Free speech suggests they should, unless such funding already exists and is substantially equivalent to what would be arrived at through a suitably independent process. Courts can require that funding be sufficient for a constitutionally legitimate service and can clarify that general economic conditions are not a reason to reduce funding: speech is prior to general economic concerns. Of course, it is rare for public media funding to be removed from direct political decision, but such removal is supported by the logic of democratic free speech. The result in Germany is that public broadcasting remains very well-funded, even 'unbelievably rich'.[66] Given the German funding's constitutional basis and the funding's determination through a comparatively non-political process, the question for other countries—and their legal systems—is *how does a lower level of public media funding meet democratic requirements free speech*?

Third, the German approach is also stronger, on paper at least, in pursuing *regulatory independence from political control*. For public broadcasters, there is a form of internal regulation by broadcasting councils. As chapter 6 discusses, there are questions about how far this process is removed from politics in practice. However, the stated aims remain notable. The need for independence from government control, which follows from free speech itself, suggests a *non-state regulator with diverse social representation* is required. The goal of this independence is diversity of voice; namely, 'that all significant political, ideological and social forces' can be 'heard in the overall programming'.[67] Challenges implementing this approach in Germany speak to courts' ongoing role monitoring political attempts to undermine independent regulation. The importance of independent

[65] For a useful study of moderation as the essence of social media platforms, see Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (New Haven: Yale University Press 2018). He notes, at 207, 'I mean this literally: moderation is the essence of platforms, it is the commodity they offer.'

[66] Castulus Kolo and Stephan Weichert, 'Germany: Evaluating Alternatives to Finance Quality Journalism' in Paul Murschetz (ed), *State Aid for Newspapers: Theories, Cases, Actions* (Heidelberg: Springer 2014) 215, 227.

[67] 136 BVerfGE 9 (Fourteenth/ZDF Treaty case).

media regulators is well-recognised beyond Germany,[68] but its free speech basis is not often explicitly addressed.

Fourth, the German court takes what I have called a *precautionary approach* to the freedom. Free speech's role supporting opinion formation gives it a foundational position in democratic constitutions. Law needs to take precautionary action against possible concentration of power over public opinion because 'when emerging developments prove to be faulty, they can only be rescinded—if at all—to a certain degree and only with considerable difficulty'.[69] Thus, *speech requires protection prior to normal political processes*. A similar understanding is commonplace for negative dimensions of free speech, but it should not be limited to that. Free speech has a structural or architectural role within democratic constitutional orders, so its regulation cannot be left completely to institutional politics. In this way, a constitutional court's role regarding communicative freedom is an example—perhaps one of the most important—of the necessity of courts acting over 'systemic malfunctions' of a democratic constitution.[70] I return to this point shortly.

A similar emphasis on diverse public speech being a condition of democracy is seen in Lipson's analysis of democratic autonomy already mentioned in this chapter. People need to be able to form opinions which can have political effects, but those effects cannot undermine the communicative requirements of democratic opinion formation. As Lipson states, when considering what should and should not be left to people's democratic choice:

> [T]he following is not a *choice* for democratic citizens: The announcement of available relevant information over free communication channels should be enabled. For such enabling, where possible, is a *condition* of the collective self-determination that defines democracy … In short, commitment to enabling such announcements is … an essential feature of any polity that could count as a democracy.[71]

Moving to the French example, there are five points concerning the relationship between media pluralism and free speech: pluralism's basis in the freedom, the freedom's application to all media, the law's focus on established social groups, media funding, and the comparative lack of detail about positive communicative freedom in the legal decisions. The first point resembles Germany but is probably clearer in France; the other points are differences, with most appearing to be less well recognised in the French cases. But French law could develop further, as considered in chapter 7. The constitutional role of pluralism, and its recognition by the Conseil constitutionnel, may well evolve.

First, the French example illustrates how *media diversity flows from free speech* itself. Media pluralism is a constitutional value aimed at making free communication more effective. That makes pluralism a central element of free communication more than a limit to it. Second, under French law *media pluralism extends to all forms of media*. Positive communicative freedom is not only relevant to broadcasting. However, while the Conseil's words about plural media resemble those of the German court, and are notable for requiring transparency, the overall approach appears

[68] See eg Schulz, Valcke and Irion, above n 54.

[69] 57 BVerfGE 295 (Third broadcasting case).

[70] Niels Petersen, *Proportionality and Judicial Activism: Fundamental Rights Adjudication in Canada, Germany and South Africa* (Cambridge: Cambridge University Press 2017) 9.

[71] Lipson, above n 38, 2270-2271 (emphases in original).

comparatively weak. The Conseil's control of media pluralism is timid or diffident.[72] Third, pluralism has been understood in institutional terms, focused on the *representation of established social groups*—existing political, union and religious groups.[73] Aiming to include voices that are not organised or established is less clearly articulated in French cases than in Germany, even if its implementation in Germany appears to be challenging. However, the French approach is changing with statements from the Conseil and regulatory action encompassing a broader range of interests.

Fourth, the Conseil writes eloquently of *speech and opinion formation not being 'made the object of a market'*.[74] But it has not really addressed what this means; for example, what of the importance of diverse financing mechanisms and different economic bases within a plural media environment? Nor does the Conseil clearly address the value of public media funding being sufficient to provide a comprehensive, universally available and diverse service that is not dominated by the need for advertising. In France, the constitutional question about determining public media funding asked whether a committee could even be involved in the decision-making process because of parliament's exclusive powers in relation to media freedom, pluralism and independence under Article 34 of the constitution. The issue was not whether politicians could depart from expert committee recommendations, which politicians have limited ability to do under German law.[75] In contrast, French public media funding does not appear to be substantially influenced by constitutional requirements of free communication. Further, financing decisions that are on paper parliamentary may be largely governmental in practice.[76] That is one way in which the other major aspect of freedom flagged in the cases—freedom from political domination—also appears to be weaker in France, which is the next point noted.

Fifth, the Conseil is *less precise about framing the area within which politicians can act* regarding positive free speech. Examples include its approach to commercial media ownership limits, privatisation of public media, and the regulatory authority's repeated abolition and re-creation. Pluralism's requirements are left relatively general, with much of its meaning left to parliament, executive and regulator. The lack of specificity follows in part from the style of Conseil decisions, which may be understandable given France's history of rights protection through parliament. But the Conseil does not clearly recognise a need to frame the legislature's constitutional obligations because of politicians' conflicts of interest regarding the media: protecting speech may require a different approach by the Conseil than other rights. The Conseil does less to specify where the boundaries of choice lie for legislators and why. As well as France's history of parliamentary rights protection,[77] the

[72] Dominique Rousseau, Pierre-Yves Gahdoun and Julien Bonnet, *Droit du contentieux constitutionnel* (11th ed, Issy-les-Moulineaux: LGDJ 2016) 414.

[73] See eg Philie Marcangelo-Leos, *Pluralisme et audiovisuel* (Paris: LGDJ 2004) 86.

[74] Conseil constitutionnel 84-181 DC, 10-11 October 1984, considérant 38.

[75] See eg Conseil constitutionnel 2013-238 L, 18 April 2013; 90 BVerfGE 60 (1994) (Eighth/Cable Penny case); 119 BVerfGE 181 (2007) (Twelfth broadcasting case).

[76] See chapter 7's discussion of 'Public media finances'.

[77] Note should also be made of the longstanding role of the Conseil d'État regarding rights; see eg Michel Verpeaux, *Le Conseil constitutionnel* (2nd ed, Paris: La documentation Française 2014) 124-125.

challenges may be greater because of broadcasting's history as the governmental 'voice of France'[78] and 'a Fifth Republic tradition of presidential interventionism' in public service media.[79]

It is important to recognise the Conseil has changed markedly since its mid-twentieth-century creation. It has moved from being a quasi-parliamentary body focused on protecting the executive against encroachment by the legislature, to a constitutional court determining rights and freedoms, both before and after legislation takes effect. Even so, there remains room to develop greater appreciation of its role protecting the country's democratic architecture, the position of plural public speech within that architecture and just what the structurally diverse media required by a democratic constitution entails. The Conseil could more fully articulate the implications of positive free speech or a 'right to be informed' encompassing, among other things, ownership transparency, editorial freedom, and public financial aid across all media forms, with all these elements linked to media diversity.[80]

Overall, each of Germany and France has a reasonably straightforward constitutional free speech provision, even if more detailed than some other constitutions.[81] In each, the provision is interpreted to protect positive and negative dimensions of free speech. And in each case, this includes diversity or plurality in the interests of the audience and democratic governance. The examples suggest courts can deal with positive structural dimensions of free speech, seeking to protect a broad freedom and diverse media systems, addressing issues of funding and regulation's independence from government, and recognising free speech is a precondition for democracy—a quality which underlies the need these courts see for acting in its support.

The examples also suggest something of the complexities of regulating positive free speech and the multiple actions by multiple actors that are relevant. There is a sense in which judicial actions do not foreclose political debate as much as seek to allow it. The examples suggest different ways that a variety of actors are involved, with the discretion of some limited by the constitutional court's framing of obligations. The complexities may also include, as in Germany, federal-state relations and the challenges of regulating informal practices in broadcasting councils. All that suggests the value in closer study of particular jurisdictions and various actors' interaction, undertaken with an eye to democratic free speech's structural positive dimensions.

Judicial action and constitutional rights

The role of constitutional judges is a prominent aspect of the German and French examples. The issue is not limited to those jurisdictions or to positive free speech. It relates to what some call judges' role over 'systematic malfunctions of the democratic process'.[82] Supporters of courts acting suggest judges

[78] See eg Ruth Thomas, *Broadcasting and Democracy in France* (London: Bradford University Press in association with Crosby Lockwood Staples 1976).

[79] Raymond Kuhn, 'Public Service Media in France' in Eva Połońska and Charlie Beckett (eds), *Public Service Broadcasting and Media Systems in Troubled European Democracies* (Cham: Palgrave Macmillan 2019) 69, 70.

[80] See eg Derieux and Granchet, above n 48, 60-65.

[81] But note examples such as Sweden, which has longstanding and far more lengthy constitutional provisions on free speech and media freedom; see eg Andrew T Kenyon, Eva-Maria Svensson and Maria Edström, 'Building and Sustaining Freedom of Expression: Considering Sweden' (2017) 38(1) *Nordicom Review* 31; Kristina Örtenhed and Bertil Wennberg (eds), *Press Freedom 250 Years: Freedom of the Press and Public Access to Official Documents in Sweden and Finland – A Living Heritage from 1766* (Stockholm: Swedish Parliament 2017).

[82] Petersen, above n 70, 9.

who protect fundamental rights are not undermining democracy when their actions are directed at a democratic system's structural or institutional weaknesses. Such commentary does not often focus on free speech, but the logic appears close to that applicable to speech. There are many ways in which judges and rights could be examined. Here, I consider three matters concerning judicial action, its legitimacy and effectiveness.[83]

Action over systemic democratic weaknesses

From a wide literature on these issues, Niels Petersen offers a useful initial example.[84] He highlights two types of systemic democratic weakness judicial review could address. First, where minority interests are disregarded in political processes; second, where organised lobby groups 'capture' political processes.[85] In both instances, one could imagine sustained plural public speech might help respond to the problems. Petersen's concern is courts' use of proportionality review and he does not focus on positive dimensions of free speech. However, the idea of courts addressing systemic democratic weaknesses—the overlooking of minority interests or capture of political processes—clearly relates to speech's role in democratic legitimacy. In relation to minorities, for example, Petersen notes three dangers they face: their interests being disregarded due to insufficient political representation; their interests being misunderstood through false stereotypes; and their interests being overlooked when political actors lack information about them.[86] He suggests law responds indirectly to such problems through a system of rights protection applied to laws emerging from the flawed political processes. It should be clear that efforts to support public speech could also respond to these weaknesses. As Petersen notes, 'the majority is rarely in need of institutional protection in order to be heard',[87] but others can well need it. His concern focuses on having a voice and being heard *in* parliament, while mine encompasses having a voice and being heard *outside* it as well. Such public speech should be understood as having a foundational role in democratic constitutions.

The suggested judicial approach might be described as proportionality review, but academic analysis of proportionality generally focuses on measures *restricting* rights.[88] Reference might also be made to judicial review of socio-economic rights, which is often analysed in terms of reasonableness more than proportionality.[89] Characterising the review in terms of reasonableness may be more useful

[83] See also the discussion near the end of chapter 2 about the differing interests and pressures related to speech facing courts and parliaments, including the quotation from Eric Barendt, 'The Influence of the German and Italian Constitutional Courts on Their National Broadcasting Systems' [1991] *Public Law* 93, 115: 'Judges … unlike party politicians, they have no occasion to shape the basic rules of broadcasting law to suit their own end'.

[84] Petersen, above n 70. On the wider literature see eg John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980) and the almost innumerable later works across many jurisdictions.

[85] Petersen, above n 70, 9; he discusses the issue at length at 18-34.

[86] Ibid 24.

[87] Ibid 25.

[88] Kai Möller, *The Global Model of Constitutional Rights* (Oxford: Oxford University Press 2012) 179-180: the language of proportionality review 'does not make much sense with regard to … positive obligations', but the 'fair balance' language used for reviewing positive obligations by the European Court of Human Rights 'requires the same balance that for negative rights is conducted at the final stage of the proportionality test'.

[89] See eg Stephen Gardbaum, 'Positive and Horizontal Rights: Proportionality's Next Frontier or a Bridge Too Far?' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge: Cambridge University Press 2017) 221; Katharine G Young, 'Proportionality, Reasonableness, and Economic and

for positive free speech. In German broadcasting cases, for example, the court sets out various requirements which must be met under Article 5's broadcasting freedom and leaves discretion as to how the requirements are met. The court defines and confines available choices. It creates obligations to act while leaving discretion to the actor. In Germany, the constitutional court sets out obligations and confines the discretion surrounding them. In France, it does so but perhaps less precisely than is warranted. In theoretical terms at least, it is not clear why many other courts do not do so.

Presupposing public speech

Debates about judges and rights are large and contested, but in some ways distinct from my concerns. It is not just that other actors can also support positive dimensions of free speech. Rather, I suggest commonplace positions in debates about judges *presuppose* effective public speech. If it is thought that such speech generally exists without action by courts, or that any attempt by courts to support free speech's positive dimensions will necessarily be harmful, I am unconvinced. But the way in which scholarly debates about rights review often presuppose effective public communication means the debates do not matter greatly for my purposes. Let me explain why.

First, some arguments against judicial enforcement of social rights—rights clearly having positive dimensions—do not necessarily apply to positive free speech. For example, Conor Gearty argues against judicial enforcement of social rights, suggesting the rights are important and worth protecting through politics, while lawyers and judges are particularly poorly suited to the task.[90] (I would agree lawyers and judges may well be poorly suited but suggest that, in relation to public communication at least, parliaments by themselves may well be worse.) Gearty states, in a passage extending beyond social rights:

> [T]he primary way of embedding human rights generally (and social rights particularly) in any given culture is via the political process. This is true where ever the focus of rights activities happens to be. … Human rights are always most effectively inculcated into modes of behaviour when they are reached through, rather than in spite of, politics.[91]

The relevant point for present purposes is that the argument involves the existence of a political realm in which social rights can be debated and pursued. But positive dimensions of free speech, like negative ones, are positioned at an earlier point as well: they are part of the viability of a democratic political arena in which debate occurs. That does not make institutional politics unimportant for free speech, nor wider social struggles. But, to be substantially legitimate in communicative terms, political processes need to occur within environments of sustained plural public speech. As noted already, that does not mean judges and lawyers are especially well suited to supporting such communicational structures. But a communicative architecture for speech supported by constitutional law appears to

Social Rights' in ibid, 248. Consider also wider arguments for courts engaging in Socratic contestation of actions by public authorities, with judges not assessing whether 'public authorities have found *the one right answer* to the questions they have addressed'; rather judges '*police the boundaries of the reasonable*': Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law and Ethics of Human Rights* 141, 169 (emphasis in original); see also eg Möller, above n 88.

[90] Conor Gearty, 'Against Judicial Enforcement' in Conor Gearty and Virginia Mantouvalou, *Debating Social Rights* (Oxford: Hart 2011) 1.

[91] Ibid 22.

be a more plausible approach to this challenge of democratic foundation than institutional politics without constitutional law.

Second, the extensive literature about judicial review of rights in general (rather than social rights specifically) often turns on the comparative legitimacy or competence of parliaments and courts. One frame for those questions is the longstanding debates about political and legal constitutionalism.[92] Again, arguments for political constitutionalism tend to presume a political realm exists in which rights can be debated and pursued. As Lars Vinx has noted:

> The idea that decisions about rights will be legitimate and deserving of respect if they are taken democratically would appear to presuppose that the democratic process functions adequately and that it has sufficient integrity to justify a demand for respect from those who disagree with the results.[93]

To 'function adequately' and with 'sufficient integrity' requires, among other things, a certain quality of public speech. There is a 'threshold' that must be met.[94] To repeat the basic point, sustained plural public speech is a structural precondition to substantially legitimate democracy. Pursuing such public communication may need judicial support. Institutional politics can be too compromised over free speech to be left a free hand regarding it. What judges might do for rights in general—whether socio-economic rights or civil-political rights—does not necessarily apply to free speech in a democracy. Yes, judges may sometimes hinder the development of positive dimensions of free speech. This is a longstanding criticism of judges and rights in general, but the context for that concern is somewhat different if it is recognised that the alternative—judicial inaction—may be worse. It is a little like examples of English judges not protecting rights in relation to various security-related matters, which Helen Fenwick and Gavin Phillipson argue has almost always followed parliamentary failure to protect the rights in question. They emphasise that it has been incorrect to think judges *not* acting would accompany greater political debate about, and protection of, the measures in question.[95]

To return to the general point, I want to consider Jeremy Waldron's 'core' case against judicial review.[96] Waldron makes an argument against strong judicial review of legislation to protect individual rights. He suggests there is no reason to think judicial review better protects rights and, in his view, it lacks democratic legitimacy: 'it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality'.[97] He aims 'to identify a core argument against judicial review that is independent of both its historical manifestations and questions about its

[92] See eg Adam Tomkins, *Our Republican Constitution* (Oxford: Hart 2005); Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press 2007); TRS Allan, *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford: Oxford University Press 2013); NW Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press 2018).

[93] Lars Vinx, 'Republicanism and Judicial Review' (2009) 59 *University of Toronto Law Journal* 591.

[94] Ibid 593.

[95] See eg Helen Fenwick and Gavin Phillipson, 'Covert Derogations and Judicial Deference: Redefining Liberty and Due Process Rights in Counter-Terrorism Law and Beyond' (2011) 56 *McGill Law Journal* 864; see also Gavin Phillipson, 'Deference, Discretion and Democracy in the Human Rights Act Era' (2007) 60 *Current Legal Problems* 40.

[96] Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346.

[97] Ibid 1353.

particular effects',[98] making it an interesting example to consider here.[99] Waldron expressly notes his case depends on certain conditions. However, public speech's role within those conditions is only touched on in passing. The result is an argument without great relevance for ideas about positive free speech, about sustained plural public speech in a commutatively legitimate democracy, or about the theoretical role of courts and others in supporting public communication. Contrary to the idea that 'judicial review of legislation is inappropriate as a mode of final decision-making in a free and democratic society',[100] analysis suggests that not having judicial review of legislation (and wider government actions) in relation to structural positive dimensions of free speech means a society is unlikely to be 'free and democratic'. At the least, it is highly unlikely to have substantial legitimacy in terms of its government. (Of course, courts will never be the sole decision-makers in this area; choices will necessarily be left to other actors as well, given the nature of positive speech rights.)

> Waldron summarises the conditions underlying his analysis. It depends on a society having:
> (1) democratic institutions in reasonably good working order, including a representative legislature elected on the basis of universal adult suffrage; (2) a set of judicial institutions, again in reasonably good order … (3) a commitment on the part of most members of the society and most of its officials to the idea of individual and minority rights; and (4) persisting, substantial, and good faith disagreement about rights … among the members of the society.[101]

Waldon expands on the first assumption of working democratic institutions. It is 'a situation in which laws are made and … public policies are set by the people and their representatives working through elective institutions'.[102] The legislature is deliberative, with formal and elaborate procedures. And 'these processes connect both *formally (through public hearings and consultation procedures) and informally with wider debates in the society*'.[103] That sentence raises a crucial matter. How do such processes connect informally with wider debates in society, and are the connections and debates relevant to questions of democratic legitimacy? Is anything required in terms of publicising and monitoring public consultation? Is any type of informal connection or any type of wider debate sufficient? The same point arises when he writes that 'legislatures are constituted in a way that ensures that information about the tolerability of various options to different sections of the society is fed into the decision-process'.[104] How is this information fed into the process? Can parliament decide how that occurs with a completely free hand? For my purposes, it is less a question of whether the conditions set out are realistic in particular jurisdictions (their lack of realism is commonly raised). Rather, the conditions themselves leave unexplored a structural matter that underpins legitimate democratic decision-making. If the aim, as Waldron suggests, is to 'give each person the greatest say possible compatible with an equal say for each of the others … that is, equal voice and equal decisional authority',[105] that requires positive free speech. Speech here is not only an 'individual and minority'

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[98] Ibid 1351.

[99] One could also consider various iterations of the argument focused, for example, on civic republicanism, Bentham and Rousseau, or continental approaches to popular sovereignty: see work cited at ibid 1352 and its note 19.

[100] Ibid 1348.

[101] Ibid 1360.

[102] Ibid 1361.

[103] Ibid (emphasis added).

[104] Ibid 1378.

[105] Ibid 1388-1389.

right to which people are committed (as Waldron's third point describes rights). It is more. I can see no way around that.

Waldron raises another matter worth addressing. For some defenders of judicial review, it is unproblematic for democratic legitimacy because judges merely enforce a society's precommitment to rights.[106] Waldron counters that society has not committed to a particular view of what rights entail, 'so when citizens disagree about this, it is not clear why giving judges the power to decide' upholds a society's precommitment.[107] However, in relation to speech, I suggest democracy does entail protection of the freedom's positive and negative dimensions. That follows from the logic of democratic government, from centuries of democratic practice as well as agitation for better practice, and from the many forms in which democracies can exist. A commitment to free speech—including support for free speech's positive structural dimensions—should be recognised as inherent in democratic forms of government. It is required for legitimate political processes that positions like Waldron's suggest should protect rights in general. As the analysis in earlier chapters suggests, the meaning of free speech should not generally be left to parliamentary debate alone. There is no democratically 'perfect' diversity in terms of speech or the structures that support it. Even so, there remain matters to analyse in terms of who decides and on what basis they decide about free speech's positive dimensions. There are multiple elements that can be judged, in communicative democratic terms, as sufficient or not. Are the many elements of sustained plural public speech outlined above supported? If so, is the support communicatively sufficient or legitimate?

Effective judicial action?

As well as questioning its legitimacy, judicial rights protection is also criticised in terms of its effectiveness, or lack thereof. Formally independent judges constraining legislative or executive restrictions on speech may offer benefits. Battles have long been fought for that approach and those battles will no doubt continue. But a range of weaknesses have also been raised about the judicial role. Such criticism may follow the absence (or under-appreciation) of the freedom's positive dimensions in common judicial understandings of free speech. An illustration is Joel Bakan's analysis of the Canadian Charter of Rights and Freedoms.[108] He emphasises the limited impact of Charter free speech litigation on ordinary people's capacity to communicate in ways affecting public life. The Charter's experience holds out little hope of fostering 'voice',[109] it is 'just words', as his analysis of the Charter is entitled. Bakan argues that understanding free speech in negative terms, as is almost always done under the Charter, means being suspicious of state power, invoking free speech only against government action, and hardly ever requiring the state to support speech. The approach involves an 'atomistic' conception of rights that 'constructs social conflict in dyadic terms, as an accumulation of

[106] Ibid 1393.

[107] Ibid 1394.

[108] Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press 1997). See also eg Marc Raboy and Jeremy Shtern, 'Toward a Canadian Right to Communicate' in Marc Raboy and Jeremy Shtern with William J McIver, Laura J Murray, Seán Ó Siochrú and Leslie Regan Shade, *Media Divides: Communication Rights and the Right to Communicate in Canada* (Vancouver: UBC Press 2010) 249, 262 who emphasise the negative free speech weight of Canadian free speech case law: 'the application of the *Charter* to the Canadian media represents a classic invocation of the negative rights approach'.

[109] Eg Nick Couldry, *Why Voice Matters: Culture and Politics After Neoliberalism* (London: Sage 2010).

discrete clashes between rights-bearers and duty-holders'.[110] While negative aspects of free speech might constrain discrete government restrictions on speech, they do little for structural aspects of speech and do little to support diversity. Bakan's analysis may well be accurate in terms of the bulk of Canadian law but, as the German and French examples illustrate, courts need not take such an 'atomistic' approach to free speech. It is possible for some courts to draw out the freedom's structural, social and collective implications. As Bakan suggests, however, the general disposition of judges may tell against such reimagining of communicative freedom where it is currently understood in negative terms.

Bakan argues that freedom includes positive aspects. It involves people developing 'their capacities', determining 'through deliberation, choice, and action, how to live their lives', and participating in 'democratic governance of social, economic, and political life'.[111] Recognising the positive dimensions inherent in democratic free speech offers at least the possibility of change in judicial ideas and actions. Case law from Germany and France, and further available examples,[112] suggest courts could recognise, at least in part, 'the social, cultural, and economic determinants of people's communicative capacities'[113] and free speech's role in that context. Clearly, certain courts can recognise the freedom's 'objective' dimensions as well as its 'subjective' ones.

Promoting something closer to sustained plural public speech could go some way towards addressing the 'most substantive constraints' on communicative freedom that Bakan describes. He sees the 'most important limitations on people's power to communicate effectively' as 'the economic and technological organization of knowledge production and the effects of ideological processes'.[114] One might agree with his analysis but, as earlier chapters show, the freedom in free speech can be understood differently. Further, that understanding need not be tied to one version of democracy, which means reimagining the freedom need not be an 'activist progressive' choice by law.[115] With all that in mind, some of Bakan's critique of judicial rights review falls away in relation to speech at least. His position may well describe Canadian law of that time but does not capture the position in some broadly similar democracies. He argues for public questions to remain subject to political debate, rather than being frozen in place by constitutional law.[116] He wants 'all people to have an effective voice in determining the conditions of their lives'.[117] Here is an echo of the idea implicit in other arguments against rights review, about an effective public speech existing irrespective of judicial action. Bakan seeks that sort of public communication and argues that Canadian free speech law does not support it. But free speech law can, in part, support the public communication required under such visions. Law should do so through *multiple actors*—in principle this could include courts, parliaments, executives and regulators. Where law cannot do so, the loss should be recognised. It is a loss of communicative legitimacy without any easy method of redressing it.

[110] Bakan, above n 108, 47.
[111] Bakan, above n 108, 9.
[112] See eg Kenyon and Scott, above n 1.
[113] Bakan, above n 108, 65.
[114] Ibid 70.
[115] Ibid 100.
[116] Ibid 138.
[117] Ibid 152.

And now?

This study has focused on a mass media age, partly because of the relevant writing and law dating from that period. My sense has been that focusing on positive free speech in that context helps in understanding communicative freedom in general and in law. But what about now? How do these ideas play out in a very different environment for public speech? This is really a question for future, and urgent, study. Here, I just want to make a few short points, drawing from a handful of recent work as examples. In short, the changed environment does not supersede the need for positive free speech; sustaining public speech in the contemporary environment looks to be challenging; and there is ongoing value in recognising public media's potential and its links with communicative freedom.

First, as I noted in chapter 1, the *changes in communication do not mean positive freedom no longer has importance*. As Mike Ananny emphasises, there is still a need to structure 'social and technological conditions' underlying the availability of the public speech needed for democratic government.[118] In Julie Cohen's words, an 'institutional foundation' with 'structural safeguards' is needed for preserving a 'networked public sphere' as part of the 'material conditions of possibility for human freedom'.[119] Supporting positive dimensions of free speech, or what some call a 'collectivist First Amendment', is not a new argument.[120] But, as Philip Napoli suggests, the need to re-evaluate free speech's positive dimensions may now be essential:

> [T]echnological change may finally be compelling the embracing of the collectivist approach to the First Amendment … an adjustment that many collectivist proponents have compellingly argued is in fact the more democracy-reflective and -enhancing interpretation of the First Amendment. …
>
> [T]he news production, distribution, and consumption dynamics that characterize social media may represent the most compelling case yet for this interpretive shift to finally take place.[121]

His analysis is also interesting for, in effect, echoing one of the key points that arises from Germany: the need for a precautionary approach to speech. Napoli writes: 'A broken democracy is, by definition, debilitated in terms of effectively formulating and implementing the policy solutions necessary to fix itself.' This means being 'proactive and anticipatory seems both justifiable and advisable'.[122] That need arises, for Napoli, because of the intersections of social media and journalism (which links to my second observation below). Clearly, the position of internet intermediaries and data corporations raises questions of democratic free speech. The requirements of positive free speech that I have

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[118] Mike Ananny, *Networked Press Freedom: Creating Infrastructures for a Public Right to Hear* (Cambridge MA: MIT Press 2018) 38. Similar ideas could be applied to structuring the conditions under which data is collected and used; as Andrejevic notes, unlimited data does not amount to 'frameless' or complete information: Mark Andrejevic, 'Automating Surveillance' (2019) 17 *Surveillance and Society* 7, 12:

> Taken to its limit, the endpoint of data-driven decision-making is the automation of judgment. … In practical terms, the goal of automation is to develop systems that replace societal decisions governing life, liberty, and opportunity.

[119] Julie E Cohen, *Between Truth and Power: The Legal Constructions of Informational Capitalism* (New York: Oxford University Press 2019) 254 (emphasis added; citation removed to, among others, Ananny, above n 118) 249.

[120] Philip M Napoli, *Social Media and the Public Interest: Media Regulation in the Disinformation Age* (New York: Columbia University Press 2019) 192.

[121] Ibid 192.

[122] Ibid 201.

examined, once translated to the current sociotechnical landscape, offer some lessons for what is needed in structuring the communicative architecture underlying public speech.[123]

Damain Tambini and Martin Moore make a similar observation about urgency and the contemporary environment. When examining the regulation of major internet companies, they note many approaches have 'been wedded to a particular market-driven notion of negative freedom of expression'.[124] But this is undermining the role of free public debate in liberal theories of government (even if that role has often been more theoretical than actual). They comment on the theory and challenges:

> Periodic elections are accompanied by a constant process of free and open deliberation, which permits processes of individual and collective will formation. Any forms of power and control that undermine autonomy and liberty to engage in that process of will formation risk making these principles appear more as rhetorical aspirations and less as genuine institutions of legitimate self-government.[125]

Even the *possibility* that platforms could affect election outcomes 'arguably changes everything' for Tambini and Moore because it undermines traditional claims to democratic legitimacy. They do not use the words, but one could easily hear ideas about a democracy of expression here (as well as the German court's understanding of will formation). Notably, their conclusion is based on potential effects. 'Whether this potential power is in fact exercised is a secondary question: the effect on legitimacy of the opaque gatekeeping power and potential for targeted propaganda is fatal in itself.'[126] My point here is that, in line with their analysis, part of the response to such challenges should be informed by understanding positive communicative freedom. Such freedom is part of responding to contemporary challenges from data business and their practices, including the very 'compatibility of democratic political processes with the dramatic concentration of economic capital and communicative and cultural control' in their hands.[127] It is part of responding to

> the defining question about the economic structures that underpin news, information, and cultural institutions: that is, what mix of funding models for search, social media, and cultural production and distribution are most conducive to democratic processes?[128]

Second, this brings me to one aspect of the sustained plural public speech on which I have focused in this study: namely, '*sustained*'. For news and related commentary—only a subset of the content relevant to democratic government, but an important one—sustained has meant sustained to quite some degree by journalism, by that field's professional practices. Journalism has curated content; it has curated public speech; it has provided a version of the public-facing disposition required by so many analyses of democratic deliberation. It has been a gatekeeper, clearly, but has also enabled particular forms of public debate and, indeed, formed particular publics. In all that journalism has

[123] Ananny, above n 118, 185.

[124] Damian Tambini and Martin Moore, 'Conclusion: Dominance, the Citizen Interest and the Consumer Interest' in Martin Moore and Damian Tambini (eds), *Digital Dominance: The Power of Google, Amazon, Facebook, and Apple* (New York: Oxford University Press 2018) 396, 400.

[125] Ibid 396.

[126] Ibid 401.

[127] Mark Andrejevic, 'Data Civics: A Response to the "Ethical Turn"' (2020) 21 *Television and New Media* 562-567, 566.

[128] Ibid.

fostered what Mark Andrejevic calls a civic disposition in the people who use it.[129] Journalism has operated across time, within different cultures of media usage, and has provided sustained attention to certain issues (and overlooked others, too often without good reasons). It has generated common knowledge and habits of debate. How speech has been sustained by journalism—and by journalistic practices of different national or regional styles—has rightly been critically evaluated. One of the implications of the structurally mixed media environment described above,[130] is the need for varied staff, missions, financing and so forth across media; there is still curation, but multiple and varied streams of curation beyond 20th century historical examples.

The contemporary environment raises concerns about the viability of such a sustaining role regarding public speech, but approaches to free speech and democracy have assumed sustained public speech; they have assumed that people can form and express opinions with political consequences; they have assumed, in effect, journalism (along with the public-facing disposition of its audience). In Victor Pickard's words, journalism is 'an essential public service—a core infrastructure—that democracy needs to survive'.[131] But how journalism occurs has changed; it has far fewer human and financial resources, and it reaches much of its audience in different ways, within a transformed communication environment.[132] Among many changes, journalism is now subject to the practices of businesses whose interest is commercialising data. They are not media companies in the way older entities have been, even if they may be subject to some media-related laws. And their practices of curation are not journalistic in any traditional understanding of journalism's democratic intentions. Their business is exploiting data, data derived from more and more human activity. Through their practices, news may become understood more as 'a matter of personal preference or ideological allegiance' than 'a resource for communal action'.[133] Their business is not supporting the creation of publics that can govern themselves.[134] Ananny develops the point in this passage:

> If Facebook reconstituted itself as a place for listening publics, it would not prioritize sorting people according to individually satisfying and commercially profitable information preferences; it would acknowledge and take normative responsibility for what its audiences are able to hear and what kind of publics such hearing creates. … This would mean acknowledging that it is more than a technology company that organizes the speech of others and that *it is a media organization with*

[129] Mark Andrejevic, *Automated Media* (New York: Routledge 2020) 48-50.

[130] See text above after n 22.

[131] Pickard, *Democracy Without Journalism*, above n 28, 165.

[132] Charney provides a succinct overview focused on implications for republican approaches to media freedom, above n 9, 138-140. Changes include less money in media, fewer journalists, less autonomy in their work, and greater dependency on both press agencies and public relations. See also, eg, José van Dijck, Thomas Poell, Martijn de Waal, *The Platform Society: Public Values in a Connective World* (Oxford: Oxford University Press, 2018) 49-66 for an overview of the changed communication environment facing news and ways in which it has undermined public values (such as 'journalistic independence' and 'accurate and comprehensive news coverage') within news media.

[133] Andrejevic, above 129, 60.

[134] See eg Nick Couldry and Ulises A Mejias, *The Costs of Connection: How Data is Colonizing Human Life and Appropriating it for Capitalism* (Stanford: Stanford University Press 2019) 189: such companies are part of a

> drive to capitalize human life itself in all its aspects and build through this a new social and economic order … This is the fundamental cost of connection, and it is a cost being paid all over the world, in societies in which connection is increasingly imposed as the basis for participating in everyday life.

> *interests and values, speaking through curation—a dominant powerhouse creating conditions under which people hear and, thus, listening publics*.[135]

In that analysis, Ananny leans toward various versions of self-help (including by journalists) in response to the problems,[136] but he also recognises more is needed. Among other things, it is difficult to think that platforms have any interest in voluntarily reconstituting themselves to support autonomy.[137] With self-regulation 'proving insufficient', platforms should not be allowed to 'define for themselves the terms of their own regulation'.[138] Annany concludes that institutional avenues relevant to democratic legitimacy—courts, parliaments, elections, civil society—should be pursued, despite their flaws.[139] To that end, I think historical and comparative analysis offers valuable guidance, even if the challenges for law may now be greater.[140]

Third, there is value in examining *links between positive free speech and public media* in the contemporary environment and, in doing that, more closely examining comparative law.[141] As one example, consider analyses of disinformation and the role of public media. Among many recent studies, Edda Humprecht, Frank Esser and Peter Van Aelst propose quantifiable indicators of the conditions which influence a country's 'resilience to online disinformation'.[142] They are applied to

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[135] Ananny, above n 118, 40 (footnote removed, emphasis added). As many have noted, this is not Facebook's history to date; see eg Paul Bernal, 'Fakebook: Why Facebook Makes the Fake News Problem Inevitable' (2018) 69 *Northern Ireland Legal Quarterly* 513, 529 emphasising Facebook's commercial drivers: 'Its business essence is about advertising' and the 'evidence so far suggests … allowing fake news and political misinformation makes it more money than focusing on the truth'.

[136] Ananny, above n 118, 183-192. Andrejevic, above n 129, 46 notes that such recommendations (Andrejevic lists self-regulation, public pressure, competition law and media literacy) are commonplace but appear to be insufficient.

[137] As Cammaerts and Mansell note, ideas for reforming platform regulation appear unlikely to substantially change their development 'because, in most of these deliberations, the underlying logics of the platforms' business strategies are not being fundamentally challenged': Bart Cammaerts and Robin Mansell, 'Digital Platform Policy and Regulation: Toward a Radical Democratic Turn' (2020) 14 *International Journal of Communication* 135, 137.

[138] Mike Ananny, 'Tech platforms are where public life is increasingly constructed, and their motivations are far from neutral', *NiemanLab*, 10 October 2019, https://www.niemanlab.org/2019/10/tech-platforms-are-where-public-life-is-increasingly-constructed-and-their-motivations-are-far-from-neutral.

[139] Ibid.

[140] See eg Cohen, above n 119, 271 'overarching rule-of-law constructs designed for a slower, more atomistic, and more court-centered era require rethinking and revision'; Couldry and Mejias, above n 134; Sebastian Benthall and Jake Goldenfein, 'Data Science and the Decline of Liberal Law and Ethics', Ethics of Data Science Conference (Sydney 2020) arguing data science (and the corporations within which it is embedded) substantially bypass the possibilities for legal regulation as it has been understood to date. Elsewhere, Goldenfein explores how the challenges may relate to contemporary human identity and its relationship to law: Jake Goldenfein, *Monitoring Laws: Profiling and Identity in the World State* (Cambridge: Cambridge University Press 2020).

[141] At a general level, needs and challenges for public media are recognised; eg Poell observes that 'the growing dominance of platform corporations' makes it 'vital to develop and sustain online public service media and alternative noncommercial platforms' while also making that 'especially difficult': Thomas Poell, 'Three Challenges for Media Studies in the Age of Platforms' (2020) 21 *Television and New Media* 650, 654. He continues, more than just 'alternative content', it requires 'interventions in the online infrastructure through which content is distributed and recommended'. And, I would note that those interventions, in one way or another involve law.

[142] Edda Humprecht, Frank Esser and Peter Van Aelst, 'Resilience to Online Disinformation: A Framework for Cross-National Comparative Research' (2020) 25 *International Journal of Press/Politics* 493-516.

eighteen democracies (of the style considered in this book) to find three groups. One group has high resilience to online disinformation—labelled 'media-supportive and more consensual'[143]—while two groups have low resilience: southern European examples ('polarized') and, in a class of its own, the US system. It is labelled 'low-trust, politicized, and fragmented'.[144] The authors observe:

> [T]he last cluster only comprises the United States. This finding reflects the exceptional role of the United States in the context of online disinformation. The country stands out because of its large advertising market, its weak public service media, and its comparatively fragmented news consumption. … Moreover, the country is characterized by high levels of populist communication, polarization, and low levels of trust in the news media.[145]

As that passage illustrates, one element in the analysis is public media, alongside populist communication, societal polarization, shared media use and so forth. In their first group of 'media-supportive' countries, public media is comparatively strong in terms of funding, independence and audiences; it is weakest in the US context. A simple observation, but one which could be extended by understanding how free speech law can support strong public media.

Humprecht and her colleagues draw on the analysis of disinformation by Yochai Benkler, Robert Faris and Hal Roberts in *Network Propaganda*.[146] That book focuses on the US experience, while examining some comparative contexts. Relevant to my concerns, the authors refer to 'high trust in public media in Germany' and suggest it lessens the anti-democratic effects of disinformation.[147] The *legal* underpinnings of that public media, and their basis in German *free speech law*, are alluded to but are not really engaged with. For example, the authors observe:

> [Trust in public media] likely helped keep Russian propaganda on the margins in the 2017 German election, and the highly stable political institutional structures further limited the destabilizing effect of network propaganda and kept the far right at the margins of political significance despite electoral success. On the other hand, *perhaps it is precisely Germany's willingness to wade into regulating its public sphere*, born of its own bitter historical experience with democratic failure, *that has given it its relatively stable media ecosystem*.[148]

Again, more closely examining the role of free speech law could assist here. In short, the German experience goes beyond a *willingness to regulate* as that might be understood by many readers, it is a *constitutional requirement of freedom* that creates legal imperatives to act in support of positive communicative freedom.

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[143] The group comprises Austria, Belgium, Canada, Denmark, Finland, Germany, Ireland, the Netherlands, Norway, Sweden, Switzerland, and the UK: ibid 504. As the authors note, most of these countries can be described as having democratic-corporatist media systems (following Daniel C Hallin and Paolo Mancini, *Comparing Media Systems: Three Models of Media and Politics* (Cambridge: Cambridge University Press 2004)), while others have some of the same tendencies within a more liberal approach, including in terms of supporting public media.

[144] Humprecht, Esser and Van Aelst, above n 142, 506; they adopt the label from Efrat Nechushtai, 'From Liberal to Polarized Liberal? Contemporary US News in Hallin and Mancini's Typology of News Systems' (2018) 23 *International Journal of Press/Politics* 183.

[145] Humprecht, Esser and Van Aelst, above n 142, 506.

[146] Yochai Benkler, Robert Faris and Hal Roberts, *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics* (New York: Oxford University Press 2018).

[147] Ibid 22.

[148] Ibid (emphasis added); see also 341 ('the central role and high trust that traditional public broadcasters enjoy in the German media ecosystem').

The authors are certainly aware of the importance of a 'country's entire media ecosystem' and 'political-institutional system' in their analysis.[149] But I suspect that considering more details about what exists elsewhere could help to understand US weaknesses. United States public media is noted—particularly National Public Radio—but there is little exploration of how public media there is an outlier and in the recommendations offered, increased public media funding is only mentioned in passing.[150] That may follow from an interest in steps that are plausible in the US context, but it suggests an acceptance of common understandings of the First Amendment, which warrants reconsideration.

Through a different focus from mine—but which also recognises journalism's 'critical role' in public discourse[151]—Benkler, Farris and Roberts arrive at a place not far from my comments (made earlier in this chapter) about the possible roles of institutional actors. They conclude:

> [T]here is no easy fix for epistemic crises in countries where a politically significant portion of the population does occupy a hyperpartisan, propaganda rich environment. Regulation of, or self-regulation by, platforms can help deal with some of the commercial pollution effects. National security identification of foreign propaganda campaigns may be able to help cleanse public debate from them, although at the cost of substantial surveillance of the major platforms of public discourse. If, however, the origins of crisis are primarily domestic and comprised of intentional manipulation of large parts of the population by its own political leaders and preferred media, there is little that technocratic solutions can do consistent with a *commitment to free expression*.[152]

Rather than 'a commitment to free expression' preventing possible responses to disinformation, it may be more a commitment to prominent interpretations of the First Amendment. It may also follow from understanding free speech as a negative freedom, and the authors' evaluation of certain restrictions on speech as problematic. However, free speech should be more than negative freedom. As their references to German public media suggest, free speech can be consistent with, and even require, some interventions in the legal architecture underlying public speech.

Similar issues can be seen in other work. An older example is offered by Baker, whose analysis I have used several times in this book.[153] It resembles my approach in many ways: 'democratic concerns' are 'central',[154] the aim is wider distribution of 'communicative power',[155] and Curran's model of a mixed media system is used. Baker states: 'To be self-governing, people require the capacity to form public opinion and then to have that public opinion influence and ultimately control public "will formation" —that is, government laws and policies', words mirroring Sophie Boyron's comment that to express opinions with democratic effects, people need to be able to form opinions first through plural public speech.[156] Like much analysis, Baker suggests courts should not be active on structural matters underpinning such public speech: that is for legislation, which courts should sympathetically review. Somewhat differently, I think there can be value in courts prompting legislative action, in theoretical terms at least and where others fail to act sufficiently. But this

[149] Ibid 348
[150] Ibid 387.
[151] Ibid 386.
[152] Ibid 386.
[153] The analysis of Baker here expands on part of Kenyon, above n 33.
[154] Baker, above n 21, 5 (emphasis removed).
[155] Ibid 6-16.
[156] Ibid 7; Sophie Boyron, *The Constitution of France: A Contextual Analysis* (Oxford: Hart 2013) 194 and see chapter 2.

difference may often not amount to much because the issues will come down to the will of legislatures and other actors in practice. Baker's approach could well be the best under US law and, indeed, in other jurisdictions where the idea of courts supporting effective free speech is just too foreign, or where their action would be more harmful than good. But that pragmatic choice is distinct from where the logic of democratic free speech leads. Baker appears aware of that logic, and he refers to European examples of it without really exploring their implications for democratic free speech. In that way, his analysis resembles the point I raised above about *Network Propaganda*.

In *Media Concentration and Democracy*, Baker argues 'legislation aimed at limiting … concentration' of communicative power is constitutional under the First Amendment.[157] He notes some European constitutions go further and require dispersal of such power,[158] but he does not engage in any detail with the *reasons* for those approaches. He recognises, for example, German public broadcasting. is constitutionally required, with a dual public-private system 'constitutionally permissible *only* if private broadcasters are subject to considerable regulation, including regulation aimed at promoting diversity'; and the German court 'constantly reads "broadcasting freedom" to require regulation of broadcasting … to provide for plurality of opinion'.[159] But more of the German approach, and the reasons why communicative freedom constitutionally *requires* regulation there, are not explored. He argues free media is 'an essential *institution* of democracy' and the US constitutional press clause should be understood as a 'structural' provision not a rights-based one.[160] Again, one could imagine European parallels. And he sees the 'ultimate beneficiary' of US constitutional protection as 'the audience or the public',[161] which again invites European comparison. But Baker's US interests prompt arguments about 'judicial activism', where 'courts [are] active in reviewing and second-guessing political judgments about the structure of the media industry' under some form of heightened scrutiny.[162] He argues against such activism in relation to laws that limit ownership concentration. Instead, parliament's view on such matters should generally hold. Baker acknowledges that judicial review might not be thought problematic. He even raises democratic legitimacy being *aided* by such judicial review,[163] a significant aspect of German and French cases. But he concludes that 'constitutional doctrine appropriately leaves the matter to legislative assessment' because of 'the legislature's greater sensitivity to variable empirical factors'.[164]

That leaves aside the challenges in parliament acting, and whether leaving matters to parliaments is often plausible. For Baker, legislatures 'have the responsibility to make good faith judgments, embodied in law, about which aspects of the media require special, overt nurture'.[165] Even so, he recognises this is unlikely to occur:

> The media's unique influence over politically salient public opinion can make political resistance to dominant media's interests more difficult than resistance to the lobbying power of other economic

[157] Baker, above n 21, 125.
[158] Ibid 125 and its note 6, citing discussion of French, German and Italian law in Barendt, above n 1.
[159] Ibid 161 (emphasis in original) and 245. He makes other references of similar kinds.
[160] Ibid 131 (emphasis in original)
[161] Ibid 127.
[162] Ibid 129.
[163] Ibid 129-130 (emphasis in original).
[164] Ibid 148.
[165] Ibid 138.

> monoliths. … Concentration increases the likelihood that the economic interests of huge media conglomerates will largely control the policy debates and legal outcomes relating to media policy.[166]

That is just the sort of challenge that leads Germany to its precautionary approach to media freedom. Baker comes to a similar point, but without supporting court action. He recognises that concentrated media ownership risks undemocratic dominance of public speech, and states simply: '*no democracy should risk the danger*'.[167] The precautionary approach would state just the same.

Conclusion

None of the above observations mean historical media and law offer a simple framework for contemporary challenges. But history clarifies some of what is now at stake, in the different future that must be imagined. As I noted at the outset of this study, the aim has been to reframe legal analysis of free speech: it should always ask about positive *and* negative dimensions. Both are not always relevant, but the issue should be considered, especially in any democratic approach to free speech. Democracy needs to be democracy of expression to have substantial communicative legitimacy. That requires sustained plural public speech. Issues of enablement, voice, reception and diversity are central to free speech, not peripheral, just as the non-censorship dimensions of the freedom are central.

Points from the historical and comparative material I have examined could be taken up in many ways in imagining the future of free speech law. They might, for example, inform exercises like rewriting legal judgments in light of positive free speech or—something which may well be easier to imagine—rewriting legislation.[168] In such exercises, pluralism is recognised as part of free speech, not separate to it, and a structurally diverse media environment lies within the freedom, not beside it. The media environment needs multiple sectors, each having organisations with different institutional forms, internal organisation and staffing, management, funding, regulation, and so forth. It is not a dual broadcasting system as seen in the German example, but something clearly beyond a 'dual' communications environment. And it applies across all media forms, not only broadcasting, with media organisations having varied missions, staffing, participants and audiences. Media also need a range of economic bases and funding mechanisms, including adequate public funding for services that are comprehensive, universally available and substantially diverse in content. Independence from political domination is needed across media regulation, funding, staffing, management and operation. Transparency of media ownership and content is centrally important, and not only for overtly political content.

Legal systems need to adopt a precautionary approach in this domain: sustained plural public speech is a democratic precondition, and all constitutional actors should take responsibility for it. Legislatures and executives tend not to think that their political interests are served by such measures, but the interest of people within a democracy are. Thus, the precautionary approach could include judicial support of positive free speech, especially where other actors fail. Even in theory, courts can only do a little of what is needed but doing that could be very important. They would not replace other avenues of protecting positive free speech but aim to support the viability of those avenues. Courts

[166] Ibid 49 (note omitted).

[167] Ibid 16 (emphasis in original).

[168] Hunter and her colleagues suggest legislative rewriting as another possibility for applying ideas in the feminist judgments projects discussed above: Hunter, McGlynn and Rackley, above n 3, 17.

would frame the freedom in the interests of opinion formation and democratic government, aiming at robust, varied public speech, independent of government and market domination, sustained across time by varied practices of journalism and varied genres in support of publics with civic disposition. In doing so, courts would frame the obligations to act and the boundaries of choice for other actors.

Translating such requirements to the contemporary environment is clearly challenging. It is less about 'recapturing'[169] the role of media in older communication systems as much as working out what from the analysis can be applied now. Structures underlying public communication, whatever their form, influence the possibilities for democratic debate. Given that, consciously engaging in some structuring or framing on free speech grounds appears useful,[170] at least when a constitution provides multiple strong institutional roles, including an independent judiciary, and has a comparatively strong record of protecting negative free speech. Saying that does not deny challenges in judicial action; the challenges exist in any event. The theoretical reason for judicial action on positive free speech, in the end, resembles the reason for acting on the freedom's negative dimensions: how is it likely to aid democratic self-government if free speech's limits and supports are matters for institutional politics alone? Once communicative freedom is understood more fully, judicial roles are less plausibly limited to evaluating express state restrictions on speech. Rather, they involve framing the freedom and its boundaries, not with the aim of removing the architecture of public speech from politics but of enabling a communicatively legitimate politics, or one that comes a little closer to legitimacy.

A democracy of expression, in which society has a voice, formulates judgments, and makes claims of government that can be heard and have effects, is highly improbable as history shows. It needs a free speech infrastructure, of positive and negative freedom, protected by law, with broadly dispersed agenda-setting power; it needs sustained plural public speech. The freedom involved is not only negative, and not only individually focused: 'seeking simply negative freedom is to want a part which is inseparable from a whole'.[171] The required state of affairs remains unlikely, but understanding communicative freedom at least makes it a possibility.

[169] Eg Andrejevic, above n 129, 164; similarly, Couldry and Mejias, above n 134, 205 note their argument is not 'nostalgic' and 'there is no unchanged point of origin to which we can return'.

[170] See eg discussion in chapter 5 of Williams, above n 46, 221.

[171] George G Brenkert, *Political Freedom* (London: Routledge 1991) 179.

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