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Author/s:

Kenyon, A

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Complicating Freedom: Investigating Positive Free Speech

ANDREW T KENYON

I. Introduction

Freedom of expression is commonly understood as limiting state restrictions on speech. Freedom of speech is a negative liberty; it is freedom from external restraint. And that is clearly an important part of free speech. But communicative freedom can also be understood to have positive dimensions; to involve actions that support speech as well as the absence of limitations.¹ That is, free speech is not only a formal freedom, but also a freedom that is effective, existing or realised, to some degree at least. The rationales commonly said to underlie free speech – such as knowledge, autonomy and democracy – involve more than a negative right; the absence of restrictions on speech is insufficient for such rationales.

While supports for speech could be offered by a host of actors, positive approaches to free speech, like negative ones, often focus on the state. Thus, legal analyses of positive free speech often entail the state having obligations to act in support of the freedom, to act in support of the goals or rationales underlying free speech. This reframes communicative freedom and, as I suggest below, complicates it. In a paper that prompted the workshop from which this collection emerged, I wrote:²

There seems little reason to support the idea that free speech exists primarily when the state is not directly limiting speech. If the analysis [of positive free speech] has plausibility, then arguments about free speech would be reframed. Free speech would be understood not merely as a negative legal right, but also in positive terms. New questions would emerge about what legal obligations should be applied in the name of free speech and through what methods.³

¹Free speech, free communication, freedom of expression and communicative freedom are used interchangeably here, and communicative freedom is not used in the specific sense adopted by Jürgen Habermas: see, eg J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans W Rehg (Cambridge, Polity, 1996) 119–20.

²The workshop ran over two days in 2015 at the London School of Economics (where my co-editor Andrew Scott is based, and where I was a visiting research professor at the time). While the article I quote above was a prompt for the event, participants were invited to examine the issues from their own varied perspectives, critique them, correct them and extend them. Contributions have been further developed and updated since the event, and were finalised in 2019. Thanks to all who participated in the workshop, which extended well beyond those whose work is presented in this book. A personal thanks also to Andrew Scott and his colleagues at the LSE for the invitation to visit.

³AT Kenyon, 'Assuming Free Speech' (2014) 77 *MLR* 379, 379–80.

From that beginning, the chapters that follow examine a range of ways in which such ideas about free speech obligations and methods might be extended. The chapters' interests can be grouped across three broad areas, concerning justifications, developments and openness: how positive free speech might be justified; free speech obligations that might be developed; and ways in which positive communicative freedom could support openness of justice, government and business information.

II. Positive and Negative Dimensions to Freedom

An initial point to note is that positive and negative are labels of convenience. The idea is not to divide free speech into two forms of freedom, but to draw out particular dimensions of communicative freedom. That also means positive does not replace negative communicative freedom; rather, both dimensions are significant. In later chapters, authors use a variety of terms for positive free speech – including strong free speech,⁴ the effective enjoyment of free speech⁵ or facilitative freedom⁶ – a variety which reflects the diversity in existing commentary. Labels that take the place of 'positive' include active, affirmative, collective, effective, empowering, enabling, facilitative and functional.⁷ 'Negative' can also be labelled defensive, formal, freedom from, literal, passive and subtractive.⁸

In many ways, each of the terms can be collapsed into its opposite. The state always acts in ways that affect speech; recognising positive dimensions to the freedom simply increases the range of actions that register as matters of free speech. For example, media subsidies, competition law, public media (its creation, goals, governance and funding), media ownership controls and funding transparency, editorial and journalistic independence, public

⁴T Gibbons, 'Providing a Platform for Speech: Possible Duties and Responsibilities', this volume, chapter 2.

⁵J Rowbottom, 'Positive Protection for Speech and Substantive Political Equality', this volume, ch 3.

⁶A Scott and A Burke, 'The Access to Information Dimension of Positive Free Speech', this volume, ch 4.

⁷eg S Breyer, *Active Liberty: Interpreting a Democratic Constitution* (Oxford, Oxford University Press, 2008); WE 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'); RB Horwitz, 'The First Amendment Meets Some New Technologies: Broadcasting, Common Carriers, and Free Speech in the 1990s' (1991) 20 *Theory and Society* 21 ('collective'); L Stein, *Speech Rights in America: The First Amendment, Democracy, and the Media* (Urbana, University of Illinois Press, 2006) ('empowering'); P Keller, *European and International Media Law* (Oxford, Oxford University Press, 2011) 413 ('empowered autonomy'); WC Durham, 'General Assessment of the Basic Law: An American View' in P Kirchhof and DP Kommers (eds), *Germany and Its Basic Law: Past, Present and Future* (Baden-Baden, Nomos, 1993) 37, 45–46 ('facilitative'); MK Curtis, 'Democratic Ideals and Media Realities: A Puzzling Free Press Paradox' (2004) 21 *Social Philosophy and Policy* 385 ('functional').

⁸eg Stein (n 7) ('defensive'); Curtis (n 7) ('formal'); Hocking (n 7) ('freedom from'); Horwitz (n 7) ('literal'); Hodge (n 7) 152 ('passive'); R Levy and G Orr, *The Law of Deliberative Democracy* (Abingdon, Routledge, 2017) 81–83, 98 ('subtractive'). Freedom from and freedom to are most often linked to Isaiah Berlin. See I Berlin, *Two Concepts of Liberty: An Inaugural Lecture delivered before the University of Oxford on 31 October 1958* (Oxford, Clarendon Press, 1958), with later clarifications in I Berlin, 'Introduction' in *Four Essays on Liberty* (Oxford, Oxford University Press, 1969) ix. Elsewhere, I explain why Berlin's approach has limited relevance to free speech. Among other things, it 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: AT Kenyon, *Democracy of Expression: Positive Free Speech and Law* (Cambridge, Cambridge University Press, forthcoming).

demonstrations, access to information and journalists' safety all implicate positive dimensions of free speech.⁹

Despite the variety of terms, positive and negative are commonly used (and debated) across scholarly research on freedom, well beyond law.¹⁰ Here, positive free speech and similar terms are used simply as shorthand for the positive dimensions of communicative freedom. Positive does not necessarily mean a positive right – whether the freedom has positive dimensions is one question, whether they come within a positive legal right recognised by courts is another.

While positive is a common term in the wider literature on freedom, it is worth noting different senses in which the term is often used. In simple terms, positive might mean something like self-mastery or self-perfection – a life of positive freedom being a reflective, self-directed one. Or it might mean enablement or capacity – the conditions that allow an opportunity of freedom to be exercised are part of freedom, not something separate from it.¹¹ There is more subtlety in the wider analysis, but for present purposes that is probably sufficient. The chapters in this collection lean towards the second of these two senses.

What might positive free speech mean in law? The chapters that follow are rich and detailed in their responses; little would be gained by summarising them here. They warrant careful reading. That said, I want to note the range of subjects with which the chapters engage, before drawing out five themes that recur across them and are relevant to positive free speech more generally. In terms of subject matter, the chapters explore:

- media access (and criteria for denying access), media pluralism and public debate, including for networked platforms;¹²
- political equality and campaign finance, private censorship, public forums, media regulation (including public ownership and plurality) and the roles of court, parliament and executive, including the need for courts to recognise positive dimensions of free speech when reviewing government action on these matters;¹³
- access to state-controlled information, contrasting European Court of Human Rights developments and the UK common law principle of open government;¹⁴
- promoting civic discourse through a bifurcated approach to constitutional free speech (comprising deontological-individually focused and consequentialist-public debate

⁹ See, eg E Barendt, *Freedom of Speech*, 2nd edn (Oxford, Oxford University Press, 2005) 100–08; S Fredman, *Comparative Human Rights Law* (Oxford, Oxford University Press, 2018) 349–53; M Tushnet, *Advanced Introduction to Freedom of Expression* (Cheltenham, Edward Elgar, 2018) 83–103.

¹⁰ See, eg S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford, Oxford University Press, 2008); CC Gould, *Rethinking Democracy: Freedom and Social Cooperation in Politics, Economy, and Society* (Cambridge, Cambridge University Press, 1988); V Held, *Rights and Goods: Justifying Social Action* (New York, Free Press, 1984); M Ananny, *Networked Press Freedom: Creating Infrastructures for a Public Right to Hear* (Cambridge MA, MIT Press, 2018).

¹¹ Compare, for example, the approaches to positive freedom of Berlin (n 8) (positive freedom more as mastery) and GC MacCallum Jr, 'Negative and Positive Freedom' (1967) 76 *Philosophical Review* 312 (positive freedom more as enablement); see Kenyon (n 8).

¹² Gibbons (n 4).

¹³ Rowbottom (n 5).

¹⁴ Scott and Burke (n 6).

focused dimensions) and the state's role in 'promoting conditions in which access to information or ideas is not dependent upon the exercise of another's will';¹⁵

- the free speech basis of plural forms of media in terms of financing, mission, control and so forth, drawing on the example of Germany's constitutional law on broadcasting freedom;¹⁶
- collective minority language rights and the resulting need for state-supported media, with 'scarce' state resources being 'devoted more towards enabling participation parity in ... domestic political life';¹⁷
- party anonymity in court proceedings, and ways in which positive dimensions of free speech could help strengthen and make more consistent the making of orders;¹⁸
- access to court information and court communication to the public, and the argument that recognising positive free speech could help courts facilitate public access to and understanding of law;¹⁹
- confidentiality clauses in public contracts, in which effective regulation and even appropriate oversight mechanisms remain challenging for law, and ways in which positive free speech and government accountability might assist;²⁰ and
- access to environmental data held by companies, including being able to reuse and mine the data, for the purposes of public regulation and wider involvement in that regulation.²¹

The examples of positive free speech are not comprehensive, just as a collection focused on negative dimensions of free speech could not be comprehensive. But the aim is to illustrate how the implications of free speech and their application can be rethought in comparison with analyses taking a substantially negative approach to the freedom. There is a longstanding strand of legal writing and wider literature that addresses positive free speech,²² but this

¹⁵ E Carolan, 'Promoting Civic Discourse: A Form of Positive Free Speech under the Constitution of Ireland?', this volume, ch 5.

¹⁶ AT Kenyon, 'The State of Affairs of Freedom: Implications of Broadcasting Freedom in Germany', this volume, ch 6.

¹⁷ S Broughton Micova, 'The Collective Speech Rights of Minorities', this volume, ch 7.

¹⁸ M Amos, 'The Positive Right to Freedom of Expression and Party Anonymity in Legal Proceedings', this volume, ch 8.

¹⁹ J Townend, 'Positive Free Speech and Public Access to Courts', this volume, ch 9.

²⁰ A Scott, 'Hiding the Truth in the Shadow of the Law? Addressing the Misuse of Confidentiality Clauses in Public Authority Contracts', this volume, ch 10.

²¹ M Dulong de Rosnay and L Maxim, 'Speaking and Governing through Freedom of Access to Environmental Information', this volume, ch 11.

²² As well as the examples in nn 7–10 above; see, eg JM Balkin, 'Some Realism about Pluralism: Legal Realist Approaches to the First Amendment' [1990] *Duke Law Journal* 375; CE Baker, *Media Concentration and Democracy: Why Ownership Matters* (Cambridge, Cambridge University Press, 2007); JA Barron, 'Access to the Press: A New First Amendment Right' (1967) 80 *Harvard Law Review* 1641; R Delgado, 'First Amendment Formalism Is Giving Way to First Amendment Legal Realism' (1994) 29 *Harvard Civil Rights-Civil Liberties Law Review* 169; TI Emerson, *The System of Freedom of Expression* (New York, Random House, 1970); OM Fiss, *The Irony of Free Speech* (Cambridge, MA, Harvard University Press, 1996); MA Graber, *Transforming Free Speech: The Ambiguous Legacy of Civil Libertarianism* (Berkeley, University of California Press, 1991); AC Hutchinson, 'Talking the Good Life: From Free Speech to Democratic Dialogue' (1989) 1 *Yale Journal of Law and Liberation* 17; T McGonagle, 'Positive Obligations Concerning Freedom of Expression: Mere Potential or Real Power?' in O Andreotti (Council of Europe Task Force for Freedom of Expression and Media) (ed), *Journalism at Risk: Threats,*

collection has been prompted by the sense that further consideration is warranted. Indeed, as several chapters suggest, the contemporary communications environment might make positive communicative freedom more significant.²³ Positive free speech remains relatively marginal in English language literature, and there is value in exploring why the freedom's positive dimensions might be valuable, the sorts of things they encompass, how they might be pursued and some of the challenges in doing that. Given the ways in which negative free speech is often 'entrenched' and appears to be 'the natural state of affairs',²⁴ in many common law jurisdictions at least, there is merit in merely suggesting that free speech has positive dimensions and considering questions 'about the purpose, scope and permissible extent of government action'.²⁵

All this complicates freedom. Free speech issues arise across more domains, there are more actors and actions relevant to it, and the issues can interact in a complex manner. In many ways, free speech law and analysis is already complicated, even when the focus is on negative free speech. The US First Amendment, for example, is stringently simple in its wording – 'Congress shall make no law ... abridging the freedom of speech' – but the US law that has emerged and continues to evolve is anything but straightforward. Even so, one can well say negative communicative freedom is a 'convenient simplicity' arising from 'an incomplete idea of liberty'.²⁶ It is comparatively straightforward, but it is too narrow in its focus and is based on dubious assumptions.²⁷ It can be the easier path for analysis, but its price is 'ignoring the practicalities' of speech.²⁸ It is a fiction. Complicating matters also involves recognising that dealing with both positive and negative dimensions of the freedom would not make speech in some absolute sense 'free'. It is always a contextual and relative freedom, subject to varied social infrastructures, practices and discursive contexts.²⁹ Jacob Rowbottom offers one way to assess the legal salience of some of those wider influences – such as the silencing effect of social pressures that can limit how often people raise unpopular ideas in public speech (or limit how well the ideas are heard by others). He suggests that one might ask whether those wider influences result from the abuse of concentrated communicative power.³⁰ Where that is the case, there is a free speech issue to consider.

Challenges and Perspectives (Strasbourg, Council of Europe Publishing, 2015) 9; F Schauer, 'Positive Rights, Negative Rights, and the Right to Know' in DE Pozen and M Schudson (eds), *Troubling Transparency: The History and Future of Freedom of Information* (New York, Columbia University Press, 2018) 34.

²³ See also eg PM Napoli, *Social Media and the Public Interest: Media Regulation in the Disinformation Age* (New York, Columbia University Press, 2019) 191–93; T Wu, 'Is the First Amendment Obsolete' (Knight First Amendment Institute, 2017), <https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete>; Ananny (n 10).

²⁴ Gibbons (n 4).

²⁵ Carolan (n 15).

²⁶ Gibbons (n 4).

²⁷ See, eg Kenyon (n 3).

²⁸ Gibbons (n 4).

²⁹ See, eg B Peters, *Public Deliberation and Public Culture: The Writings of Bernhard Peters, 1993–2005*, ed H Wessler, trans K Tribe (Basingstoke, Palgrave Macmillan, 2008) 81; NJ Hirschmann, *The Subject of Liberty: Toward a Feminist Theory of Freedom* (Princeton, Princeton University Press, 2002). See also Broughton Micova (n 17), who draws on Nancy Fraser's public sphere analysis: N Fraser, 'Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy' (1990) 25/26 *Social Text* 56.

³⁰ Rowbottom (n 5).

III. Five Themes: Multiple Actors and Actions; Speakers and Audiences; Equality or Parity; Democracy; and Structural Conditions

While a wide range of questions are examined in the chapters that follow, various points recur. It is not that authors always deal the same way with these issues, but they illustrate the matters that arise when free speech's positive dimensions are taken into account. Here, I draw out five such themes.

First, when free speech includes positive dimensions, *multiple actors and actions are relevant*.³¹ As noted above, freedom becomes complicated. Free speech does not only concern the legal review of government restrictions on speech. There are choices to make with regard to the freedom's positive dimensions, and they necessarily involve discretion. What public funding is appropriate for public service media? How should competition law be applied to media entities? What limits and supports are appropriate with regard to public demonstrations? In short, who should do what in terms of free speech? Merely noting those examples suggests it is unlikely to be a matter for any one actor alone, and that so many of the actions that are taken will involve discretion.

Legal analysis of positive free speech often considers the role of parliaments and courts,³² along with that of independent regulators.³³ In this collection, chapters generally consider the importance of both parliaments and courts to free speech's positive dimensions, with the legislature seen as well placed to decide which out of many possible actions supporting free speech are pursued. It is thought they can better consider the wide range of possibilities, their interactions, financial implications and so forth. At the same time, parliamentary power (which authors recognise may at times be subject to executive direction) is open to abuse. Governments can support speech in a manner that furthers their own political ends rather than freedom of communication as such. That would hardly be surprising of such political actors. Thus, courts have a vital role in reviewing actions that are taken and doing so with an understanding of both positive and negative dimensions of communicative freedom.³⁴ If only negative dimensions of the freedom are recognised by courts, plausible efforts to support positive free speech can be overruled as infringing rather than supporting freedom of communication. Concerns include that courts will focus on formal or negative qualities of the right in question, with the risk of undermining effective freedom of speech,³⁵ or will overreach their abilities or expertise if they are more assertive.³⁶

However, quite what is entailed in the role of courts varies in the analyses. Even the German Federal Constitutional Court would say many choices about broadcasting freedom are for legislatures to make, but that court is undoubtedly significant in shaping what the freedom means.³⁷ And the results in Germany would have been quite different if the

³¹ eg Townend (n 19).

³² eg Rowbottom (n 5), Scott and Burke (n 6), Carolan (n 15), Kenyon, 'State of Affairs' (n 16), focusing on one or both of parliaments and courts.

³³ eg Gibbons (n 4), Dulong de Rosnay and Maxim (n 21), noting the position of regulators.

³⁴ eg Rowbottom (n 5).

³⁵ *ibid.*

³⁶ eg Scott and Burke (n 6).

³⁷ Kenyon (n 16).

court had not maintained so much of its positive approach to communicative freedom for nearly 60 years. While both actors are significant in that example, the court's role can well be called active. It is a role the court justifies as being necessary to support the free formation of individual and collective opinion, which is required for a legitimate political process and is protected by the constitutional provision on freedom of speech and broadcasting. Similarly, European, UK and Irish courts have been active in developing positive dimensions of free speech in particular contexts.³⁸ The examples add nuance to the frequent conception of positive dimensions of free speech as something to be supported politically rather than a right that is judicially enforceable. (The same point arises in relation to positive human rights in general, and the question is also debated in that literature.³⁹) One of the courts that has recognised positive dimensions of free communication is the European Court of Human Rights. Its decisions are noted in some chapters, but are relatively tangential to the authors' concerns.⁴⁰ The decisions are more significant in Andrew Scott and Abbey Burke's comparison of European rulings on access to information and the UK Supreme Court's development of a parallel common law principle of open government.

Second, analyses tend to note free speech interests of *both speaker and audience* and treat *media freedom* as derivative of them. Whether speaker or audience is emphasised, both are relevant to the freedom: free speech is not only an interest of speakers. This may be linked to with republican approaches to democracy and the role of 'both speaker and listener interests in the process of civic engagement',⁴¹ or social (rather than individual) conceptions of agency.⁴² It also means that the freedom in relation to media is derivative of free speech in general, and media might be regulated in particular ways to further free speech. The point extends to contemporary media, such as large data businesses operating search and social media.⁴³ In that context, too, media's concentrated communicative resources need to be exercised for the benefit of others and be publicly accountable.⁴⁴ Media are 'part of the structural conditions that are necessary for the effective operation' of the right to free speech that is held primarily by others.⁴⁵ Yes, the media can act as a participant in public speech, but it is also, significantly, a platform for civic discourse.⁴⁶

Third, issues of *communicative equality or parity*, or at least freedom from domination, emerge in several chapters.⁴⁷ Substantive political equality can be a basis for positive free speech rights, with an ideal of equal distribution of 'access to communicative resources' guiding evaluation of various forms of state intervention to support opportunities to communicate.⁴⁸ The aim can be to 'enable discursive spaces' for minority languages that are

³⁸ See Scott and Burke (n 6), Carolan (n 15). Many wider examples can be given, notably France, which I examine closely in Kenyon (n 8).

³⁹ See, eg Fredman (n 10).

⁴⁰ eg Rowbottom (n 5); Amos (n 18).

⁴¹ Carolan (n 15).

⁴² Gibbons (n 4).

⁴³ eg Gibbons (n 4); Rowbottom (n 5); Carolan (n 15).

⁴⁴ Rowbottom (n 5).

⁴⁵ Carolan (n 15).

⁴⁶ *ibid.*

⁴⁷ See Rowbottom (n 5); Carolan (n 15); Broughton Micova (n 17); Dulong de Rosnay and Maxim (n 21). Gibbons (n 4) takes a more minimal approach, arguing for the freedom to extend an invitation to pursue a conversation more than some form of parity in public debate.

⁴⁸ Rowbottom (n 5).

‘needed to achieve participation parity’ in a democracy,⁴⁹ or ‘to create a closer-to-level playing field’ between companies, regulators and the public in relation to environmental risks.⁵⁰

Fourth, as with free speech writing more generally,⁵¹ the analyses here often have a *democratic focus*.⁵² While not ignoring matters such as the cultural aspects of media pluralism,⁵³ their attention tends to centre on democratic and political speech in a wide sense. What speech is included by that democratic focus varies, but it is not just election-related⁵⁴ and can extend to broad conceptions of civic discourse or individual and public will formation.⁵⁵ Chapters also consider changed democratic practices – such as the emergence of ‘monitory democracy’,⁵⁶ and continual forms of democracy not centred on periodic elections – and changed ideas about citizenship, such as recognition of minority language groups within a polity.⁵⁷ Older roots clearly exist for positive communicative freedom; republican democratic theories offer just one example.⁵⁸ But ideas such as monitory democracy illustrate how the democratic value of positive free speech can become clearer in contemporary conditions. If ‘government is [to be] held accountable not just at the polling place on election day but continuously’, and by a wider variety of actors, including ‘news media, think tanks’ and ‘non-governmental organizations that take themselves to be watchdogs of government with respect to specific policy domains’,⁵⁹ then matters of pluralism, public discourse and access to information are clearly significant.

Fifth, positive dimensions move free speech beyond a formal freedom. They bring into focus the *structural conditions underlying speech* and they can change approaches to *access* to information and *limits on speech*. Attention moves from formal freedom alone to consider ‘the “architecture” or conditions which allow speech to occur.’⁶⁰ There are questions about what speech actually happens and power over the means of communication.⁶¹ There is interest in ‘securing the structural conditions for civic discourse’⁶² or creating ‘an enabling environment for the exercise’ of minority speech rights ‘through positive state intervention.’⁶³ And there is a need for access to media, information and ideas.⁶⁴ The approach brings more ‘into’ free speech, such as the effects of people’s differing capacity and resources to speak, and (in many analyses) private controls and limitations on

⁴⁹ Broughton Micova (n 17).

⁵⁰ Dulong de Rosnay and Maxim (n 21).

⁵¹ See, eg Barendt (n 9) 20.

⁵² eg Gibbons (n 4); Rowbottom (n 5); Scott and Burke (n 6); Carolan (n 15); Broughton Micova (n 17).

⁵³ Gibbons (n 4); Broughton Micova (n 17).

⁵⁴ eg Rowbottom (n 5); Scott and Burke (n 6).

⁵⁵ eg Carolan (n 15); Kenyon (n 16).

⁵⁶ See, eg M Schudson, *The Good Citizen: A History of American Civic Life* (New York, Martin Kessler, 1998); M 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); J Keane, *The Life and Death of Democracy* (London, Simon & Schuster, 2009); J Keane, *Democracy and Media Decadence* (Cambridge, Cambridge University Press, 2013); Scott and Burke (n 6).

⁵⁷ Broughton Micova (n 17).

⁵⁸ As Carolan (n 15) notes, republican democratic theories provide an example.

⁵⁹ Schudson, *The Rise of the Right to Know* (n 56) 25.

⁶⁰ Dulong de Rosnay and Maxim (n 21).

⁶¹ Gibbons (n 4).

⁶² Carolan (n 15).

⁶³ Dulong de Rosnay and Maxim (n 21).

⁶⁴ eg Gibbons (n 4); Rowbottom (n 5); Scott and Burke (n 6); Carolan (n 15); Amos (n 18); Townend (n 19); Dulong de Rosnay and Maxim (n 21).

speech.⁶⁵ Some of the analysis echoes the ‘realist’ approach to free speech in some 1990s US scholarship,⁶⁶ but there is a wider recognition in the positive free speech literature of the importance of the framework, architecture or structural conditions for speech. This can also change what limits on speech are legal. It can suggest, for example, new approaches to the analysis of confidentiality clauses, especially when used by public bodies,⁶⁷ and to the treatment of companies’ environmental information as not being merely their property, but having importance for public knowledge and the possibilities of public regulation.⁶⁸ Or, if the ‘value of expression is the discourse it promotes’, there is less scope – but not no scope – for content-based restrictions on speech. Rather, limitations would be assessed in terms of the ‘impact of the [disputed] expression on discourse’.⁶⁹ This point from Eoin Carolan about a new approach to assessing limitations in some ways mirrors Allan Hutchinson’s 1980s work on dialogue and a dialogic community in terms of free speech, which suggested ‘the state will have to intervene’ to support speech ‘and the intervention will be based on the value of dialogue itself’.⁷⁰ The point is not only suggested in that chapter; rather, the point illustrates the longer tradition which this book seeks to draw from and extend. At the least, the authors collectively suggest that positive dimensions of free speech should now be considered more often and more fully in scholarly analysis and in law, and they ask you to read all that follows to that end.

⁶⁵ Gibbons (n 4); Rowbottom (n 5).

⁶⁶ See, eg Balkin (n 22).

⁶⁷ Scott (n 20).

⁶⁸ Dulong de Rosnay and Maxim (n 21).

⁶⁹ Carolan (n 15).

⁷⁰ Hutchinson (n 22) 25.

