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THE STRUCTURE OF A FREE SPEECH RIGHT

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The Structure of a Free Speech Right

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Where free speech is recognized as a legal principle, what are the structural elements or components of a free speech right? What must a person establish in order to successfully claim they have a right to free speech or that it has been violated? Although, of course, the answer to this second question will vary among legal systems, the series of sub-questions that must be addressed to arrive at this answer is largely uniform and common across jurisdictions. This is because they collectively form the underlying structure of a free speech right. It is on this series of sub-questions that this chapter focuses: identifying and clarifying what they are; showing how they are both distinct from, but also sometimes interact with, each other; and illustrating how the range of possible and actual answers to each significantly impacts the nature and extent of ‘substantive’ free speech rights in a given legal order. Accordingly, what you have in virtue of being the holder of a free speech right can vary considerably depending on how these structural elements are combined.

In providing this overview of the structure of free speech as a legal principle, this chapter will introduce, analyze, and illustrate some variations among, the following six components. The first is the ‘force’ of a free speech right. This includes what type of legal right to free speech is formally recognized or at issue: for example, common law, statutory, or constitutional. This in turn helps to determine whether and how easily a free speech right can be legally superseded. Another aspect of force is whether and how the right is judicially enforceable. The second component is the ‘subject’ of free speech rights, or who are the rights-holders: for example, all

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persons within a jurisdiction or only citizens; legal persons including corporations or only natural persons? The third is the ‘scope’ of a free speech right: a right to say or do what exactly? Does it include falsehoods, hate speech, or baking a cake? Fourthly, as a distinct structural element concerning content, does the right include not only negative prohibitions on relevant others but also positive obligations, such as a duty to affirmatively protect the free speech of rights-holders from third-party threats? The fifth component is the ‘object’ of a free speech right: who are these ‘relevant others’ that are bound by the holder’s rights? Against whom can the right be validly asserted? Finally, there is the ‘limitation’ of a free speech right. If the prior questions have all been answered to the effect that a free speech right *is* implicated and infringed in a particular situation, when, if ever, might there be a legally justified limitation of that right? Is the right an absolute bar or ‘trump’ against inconsistent action and, if not, what presumptive weight attaches to it? How, when and why can the presumption be rebutted? Collectively, by constituting and expressing the underlying structure of the right to free speech, the answers to these six questions help to define the nature and extent of any particular such right in a given legal system.

1. The Force of a Free Speech Right

By the force of a free speech right, I am referring here to its status within the normative legal hierarchy and the nature and type of judicial enforceability it is afforded.¹ In terms of status, once free speech is recognized as a legal principle, as distinct from either a moral principle only or not being recognized as a valid norm at all, the next issue becomes what type of legal free speech right exists. In common law jurisdictions, free speech may be, and historically

¹ These are not the only possible senses of the force of a free speech right, but they are the ones I focus on in this section. In section 6 on limitations below, I look at another: the relative weight that a free speech right is granted when it is ‘balanced’ against other values that potentially can limit it. In drawing his helpful distinction between the coverage and protection of a right to freedom of expression, Fred Schauer includes some of these senses within the latter. See Frederick Schauer, *Free Speech: A Philosophical Enquiry* (CUP 1982) 91.

was, a right recognized by the common law. Thus, for example, the English common law has long affirmed a free speech right against prior restraint on publication.² As with all common law rights and liberties, free speech shares the general characteristics and normative status of this source of law, although what exactly these are, beyond the narrowly formalistic, has long been a source of controversy and disagreement, especially in common law jurisdictions lacking a codified constitution.³ But the ‘narrowly formalistic’ are relatively easy to state. What the judges give, they may also take away, so that a common law free speech right can be developed by the courts over time, either expansively or restrictively. It also can be fully and completely abrogated by ordinary statute, although under both the common law principle of legality and a similar canon of construction, the statute must typically do so expressly.⁴

A free speech right may also be statutory in status, in whole or part, which generally entails that it can be modified upwards or downwards, or completely repealed, by subsequent statute. In recent years, judicial *dicta* and scholarly commentary have suggested that certain statutes may become both legally and politically entrenched,⁵ although the extent of the former is usually limited to ousting the normal doctrine of implied repeal. More typically in modern legal systems, free speech has the higher status of a constitutional right, which at least in theory entrenches it against both such ordinary legislative repeal and judicial modification downwards.

² See William Blackstone, *Commentaries on the Laws of England*, vol 4 (first published 1769) 151,152.

³ For the long-standing but unorthodox view that the common law permits judges to invalidate statutes inconsistent with its fundamental rights and liberties, see *Dr Bonham's Case* (1610) 8 Co Rep 107a, 77 ER 638 (Coke CJ); *R (Jackson) v Attorney General* [2006] 1 AC 262; TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003).

⁴ The common law principle of legality means that fundamental common law rights may only be abrogated by express words or necessary implication on the part of the legislature. See *R v Secretary of State for the Home Department ex parte Simms* [2000] 2 AC 115 (Hoffman LJ). The canon of construction is that statutes in derogation of the common law will be narrowly construed. An example of such express statutory abrogation of a fundamental common law, speech-related right is the United Kingdom's Criminal Justice and Public Order Act 1994, which mostly abolished the historic right to remain silent during police questioning and trial.

⁵ On legal entrenchment, it has been argued that ‘constitutional statutes’ are not subject to the normal doctrine of implied repeal by subsequent ones, see *Thoburn v Sunderland City Council* [2003] QB 151 (Laws LJ). On political entrenchment, see William N Eskridge, Jr and John Ferejohn, ‘Super-Statutes’ (2001) 50 Duke LJ 1215.

Here, the only formal legal means of superseding the right is via the constitutional amendment process, with its standard supermajority requirement of one sort or another. The final and highest legal status of a free speech right may be termed ‘super-constitutional’. Here, the free speech right is protected even against the formal amendment process, either as requiring a special and higher supermajority for amendment or as being unamendable altogether. This in turn may be the result either of express textual provision to this effect⁶ or judicial implication of a ‘basic structure’ doctrine that does not permit amendment of the central pillars of a constitution and includes free speech in them.⁷ In sum, the different possible legal statuses that the right to free speech may be afforded determines how easily, as a formal matter, it can be superseded by other law.

A second dimension of force is the existence and extent of protection by means of judicial enforceability of the right. As we have just seen, where free speech has only common law or ordinary statute status, courts may play a more or less significant role in both developing and protecting the right. As the creators of the right, this is obvious and inevitable in the case of the common law, although it has also been argued by some ‘common law constitutionalists’ that judicial protection of fundamental common law rights, such as free speech, extends to invalidating contrary statutes.⁸ Statutory free speech rights can also receive heightened judicial protection through various means of restrictively interpreting subsequent conflicting

⁶ For example, in South Africa, amending the Bill of Rights requires a two-thirds vote in both houses of the legislature, whereas the default amendment rule for most other parts of the Constitution is a two-thirds vote of the lower house (the National Assembly) only. See *Constitution of the Republic of South Africa*, No 108 of 1996 (1996), s 74. This phenomenon has been called ‘tiered constitutionalism’. See Rosalind Dixon and David Landau, ‘Tiered Constitutional Design’ (2018) 86 *Geo Wash L Rev* 438. In the case of complete unamendability, the textual provision is usually referred to as an ‘eternity clause’.

⁷ The basic structure doctrine originated with the Indian Supreme Court in the landmark 1973 case of *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225, and subsequently spread to other countries in south Asia and elsewhere (eg Colombia).

⁸ Allan (n 3).

enactments.⁹ But the role of courts and judicial enforceability is no less varied or consequential where free speech rights have constitutional, or even super-constitutional, status. Thus, a key issue is whether and how courts have the power to engage in constitutional review of statutes, in particular, that implicate free speech rights. Such rights can be part of a constitution's bill of rights, but that same constitution may deny to courts the power to question the validity of a statute, as in the Netherlands.¹⁰ Or, it may grant the legislature the power to 'override' a judicial decision invalidating a statute for violating free speech, as in Canada.¹¹ A further variation, albeit in the context of statutory bills of rights, exists in the United Kingdom, the Australian Capital Territory and state of Victoria, where courts are granted the power to declare a statute inconsistent or incompatible with the protected rights, including freedom of speech, but the declaration has no legal effect on the continuing validity of the statute, which the legislature may or may not elect to amend or repeal.¹² Whether these 'weaker' forms of judicial review are in practice any less 'strong' than the more standard constitutional system in which legislatures are powerless to resolve the rights issue themselves in the face of a court decision is a matter of scholarly disagreement,¹³ but for current purposes they may be.

⁹ As, for example, with the New Zealand Bill of Rights Act 1990, which (in section 6) requires courts to interpret statutes consistently with rights wherever possible.

¹⁰ *Constitution of the Kingdom of the Netherlands*, 2008, art 120.

¹¹ For a renewable five-year period. See *Canadian Charter of Rights and Freedom 1982*, s 33. In 1989, Quebec employed section 33 to override the right to freedom of expression under section 2(b) of the Charter in re-enacting its French-only commercial signs law, Bill 178, previously held unconstitutional by the Supreme Court of Canada.

¹² See Human Rights Act 1998, s 4; *Human Rights Act 2004 (ACT)*, s 32; *Charter of Human Rights and Responsibilities Act 2006 (Vic)*, s 32.

¹³ See, eg, Aileen Kavanagh, 'What's So Weak About "Weak-Form Review": The Case of the UK Human Rights Act' (2015) 13 *ICON* 1008; Stephen Gardbaum, 'What's So Weak About "Weak-Form Review": A Reply to Aileen Kavanagh' (2015) 13 *ICON* 1040. It has also been argued that such 'formal mechanisms' as section 33 and the declaration of incompatibility are not necessary for 'weak-form' judicial review, which may exist where courts engage in a dialogic approach with legislatures, either by choice or necessity. See Po Jen Yap, *Constitutional Dialogue in Common Law Asia* (OUP 2015).

2. The Subject of a Free Speech Right

The second structural element that helps to define the contours of a free speech right in any jurisdiction is the identity of the rights-holders. Assuming now the constitutional status of the right, the next question is who its beneficiaries are. Moving from broader to narrower answers, in principle these might be (1) all persons within the jurisdiction, including both natural and legal or juristic persons; (2) all natural persons or individuals; (3) all citizens, but only citizens; or (4) any given sub-set of the above, such as all female citizens or all individuals over the age of twenty-one. In addition, or alternatively, there might be a more particularized free speech right applying only to specific individuals or a group, such as the freedom of the press or academic freedom.

Although, especially in light of the well-known *Citizens United* case,¹⁴ it is sometimes thought that affording free speech rights to corporations is unique to the United States, this is not the case. Indeed, whereas in the United States such ‘constitutional corporate personhood’ has been the (sometimes controversial) product of judicial implication from a text that simply refers to ‘no law ... abridging the freedom of speech’ or depriving ‘any person of life, liberty, or property’,¹⁵ several modern constitutions grant express protection to corporations as rights-holders. Thus, the German Basic Law states that ‘[t]he basic rights [which include freedom of speech] shall apply also to domestic juristic persons to the extent that the nature of such rights permits’.¹⁶ The Final South African Constitution of 1996 borrows from this clause: ‘A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the right

¹⁴ *Citizens United v Federal Election Commission* 558 US 310 (2010).

¹⁵ Moreover, the judicial implication long pre-dates *Citizens United*. It arguably began in the 1819 case of *Trustees of Dartmouth College v Woodward* 17 US 518 (1819), in which the Court held that as a contract, a corporate charter was protected against impairment of obligation under art 1, s 10, and was clearly established in the 1888 case of *Pembina Consolidated Silver Mines and Milling Co v Pennsylvania* 125 US 181 (1888), in which the Court held that ‘under the designation “person” there is no doubt that a private corporation is included [in the Fourteenth Amendment]’.

¹⁶ *Basic Law for the Republic of Germany*, 1949, art 19(3).

and the nature of that juristic person'.¹⁷ Both provisions exclude only such inherently individual rights as life, marriage, and bodily freedom,¹⁸ but not freedom of speech. Any difference between the United States and such countries is *not* in bestowing free speech rights on corporations in the first place, but in either or both (1) the scope and content of the right, in particular the notion that free speech encompasses political donations and (2) the type and extent of countervailing values that might be taken to justify limitations on corporate free speech; that is, with respect to another structural element considered below.

Some constitutions distinguish between certain rights that are granted to all persons or individuals and others that are granted only to citizens. India and Colombia are reverse examples of this phenomenon. Thus, the Indian Constitution expressly limits the right to freedom of speech and expression (along with the other rights contained in article 19) to '[a]ll citizens', whereas several other fundamental rights, including the right to equality before the law and equal protection of the laws, to life or personal liberty, and freedom of religion, are granted to all persons.¹⁹ The Supreme Court of India has confirmed the plain meaning of the text, that non-citizens of India, including corporations, are not beneficiaries of the right to freedom of speech.²⁰ By contrast, the Colombian Constitution states that '[e]very individual is guaranteed the right to express and diffuse his/her thoughts and opinions',²¹ whereas the separate rights 'to participate in the establishment, exercise, and control of political power' and 'to move about freely across the national territory' are expressly limited to Colombian citizens.²² Indeed, in invalidating provisions of a presidential election law permitting campaign contributions by corporations, the

¹⁷ *Constitution of the Republic of South Africa*, s 7(4).

¹⁸ On Germany, see David P Currie, *The Constitution of the Federal Republic of Germany* (University of Chicago Press 1994) 12.

¹⁹ *Constitution of India*, 1950, arts 14, 21, 25.

²⁰ *State Trading Corporation of India v Commercial Tax Officer* (1964) (4) SCR 99.

²¹ *Constitution of Colombia* (1991), art 20.

²² art 24.

Colombian Constitutional Court categorized such contributions as involving the right to political participation (and, by implication, not free speech), which is held only by citizens.²³

In addition to the general category of rights-holder, there may also be more specific ones. The press is singled out as a particularly important free speech rights-holder in many legal systems, because of its distinctive role in tracking, publicizing, and revealing governmental activities as well as providing essential information and platforms for elections. Even though this does not necessarily mean the press is afforded greater free speech rights than ordinary rights-holders in order to protect these public functions, the general right is sometime expanded to take its special needs into account.²⁴ For somewhat similar reasons, members of a legislature *are* typically granted greater free speech rights, in terms of immunities, than ordinary persons or citizens.²⁵ The academic freedom enjoyed (only) by university teachers is also sometimes specially protected as part of freedom of speech in a constitution, as for example in article 5(3) of the German Basic Law and article 23 of the Japanese Constitution.²⁶

3. The Scope of a Free Speech Right

Reverting to the general right to freedom of speech, what is included? What is it the right to say or do exactly? A chapter on the structure of a free speech right is not the place to go into detail about its substance, but falling within the scope of the right is obviously an essential structural element of any successful claim. To take a well-publicized recent example from the United States, the critical threshold issue for the baker's free speech claim in *Masterpiece*

²³ Decision C-1153 of 2005, translated and discussed in Manuel José Cepeda Espinosa and David Landau, *Colombian Constitutional Law: Leading Cases* (OUP 2017) 130-132.

²⁴ As, for example, in the cases of defamation of public officials/figures and the media's protection of its sources.

²⁵ For example, the special privileges and immunities granted to legislators under article 71 of the Spanish, section 58 of the South African, and Article I, section 6 of the US, constitutions.

²⁶ See, eg, *Constitution of Japan* (3 November 1946), art 23 ('Art and science, research, and teaching shall be free. Freedom of teaching shall not release anyone from his allegiance to the constitution'); *Basic Law for the Republic of Germany*, art 5(3) ('Academic freedom is guaranteed').

*Cakeshop v Colorado Civil Rights Commission*²⁷ was whether making a cake as a self-proclaimed ‘cake artist’ is an exercise of protected free speech, rather than straightforwardly regulable commercial activity.

In some bills of rights, the scope of the right is stated in highly minimal and abstract ways—‘no law ... abridging the freedom of speech’²⁸ or ‘the right to freedom of speech and expression’²⁹—as if the meaning and coverage of these terms were settled and common knowledge, like the right to vote. But this of course is not the case as, unlike voting, there are almost endless possible forms, styles, and contents of ‘speech’ and ‘expression’. What counts as an act of speech or expression (at least away from core instances) and which should be protected may be deeply contested, as are the functions and justifications of the right that might provide guidance for what is included. In other constitutions, there is a little more content, although nowhere is the coverage of the right fully and comprehensively resolved by the text. Thus, the freedom of expression granted by section 16(1) of the South African Constitution is stated to include freedom of the press and other media, freedom to receive and impart information or ideas, freedom of artistic creativity, and academic freedom and freedom of scientific research. Article 20 of the Colombian Constitution guarantees ‘the freedom to express and diffuse one’s thoughts and opinions, to transmit and receive information that is true and impartial, and to establish mass communications media’.

A few textual provisions on free speech partially delimit the scope of the right by specifying certain things falling outside it. One well-known example is section 16(2) of the South African Constitution, which states that the right to freedom of expression set out in subsection (1) ‘does not extend to (a) propaganda for war; (b) incitement of imminent violence;

²⁷ 584 US _ (2018).

²⁸ US Const amend XIV.

²⁹ *Constitution of India*, art 19(1).

or (c) advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'. Another similar provision is article 20 of the International Covenant on Civil and Political Rights, which follows article 19 on freedom of expression and states that: '[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. Its mandatory nature implies that such advocacy does not fall within the scope of the freedom of expression in the first place; it does not state the conditions for a permissible limitation of the right (these, in any event, are set out in article 19(2)), but rather a statement of its boundaries. In the vast majority of cases, however, such provisions are lacking and the scope of the right must be judicially constructed.

Among the more contested boundary issues that, in the usual absence of much textual guidance, courts have had to resolve are whether falsehoods, political donations, the expression of 'subversive', extreme, or anti-democratic views, 'hate speech', and defamation of public officials/figures fall inside or outside the right to free speech. To some extent, they have been guided by one or more of the following: (1) general conceptions of a constitutional right, (2) perceived justifications or functions of free speech, and (3) the particular teleology of their own constitutional order.

Where the essential conception of a constitutional right is to require the government to reasonably justify the burdens it places on individuals in terms of public reasons, courts tend to take a liberal approach to the scope of a right and focus their attention and scrutiny of the proffered justification. Arguably, the Canadian Supreme Court has adopted this approach, as it has given an extremely broad definition to the 'freedom of thought, belief, opinion and expression' in section 2(b) of the Charter as 'any activity that conveys, or attempts to convey,

meaning to the exception of acts of violence or threats of violence'.³⁰ By contrast, under the 'excluded reasons' or 'motivational' conception of rights, freedom of speech means the right not to have your speech restricted for impermissible, content-related reasons.³¹

To which of the three classic justifications or goals of free speech—truth-finding, individual autonomy, and democracy—a judge, court, or constitutional order adheres also has implications for the scope of the right. Thus, for example, the US Supreme Court's scepticism, at least outside the commercial context, towards the distinction between truth and falsity for First Amendment purposes³² is explicable in significant part by the long-standing hold of the argument for freedom of expression, expressed by Mill and Holmes, founded on the fallibility of human judgment and the 'marketplace of ideas' as the 'best test of truth'.³³ Similarly, the claim of the baker to be engaged in artistic self-expression is more likely to be accepted under the individual autonomy argument for freedom of speech than the democracy argument, in which political speech is at the core.

Finally, the particular history and teleology of a constitutional order can also play a role in fashioning the contours of its free speech protections. Thus, the express exclusion of hate speech that incites harm from the scope of the right, along with many other provisions of the text, testify to the centrality of racial equality in post-apartheid South Africa. Similarly, the German Constitutional Court's interpretation of article 5 not to include protection for

³⁰ *Irwin Toy Ltd v Quebec (AG)* [1989] 1 SCR 927.

³¹ See Richard H Pildes, 'Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law' (1994) 45 *Hastings LJ* 711; Daniel Halberstam, 'Desperately Seeking Europe: On Comparative Methodology and Conceptions of Rights' (2007) 5 *ICON* 166.

³² See, eg, *Gertz v Robert Welch, Inc* 418 US 323 (1974) ('punishing [factual] error runs the risk of inducing a cautious and restrictive exercise [of free speech]').

³³ See *Abrams v United States* 250 US 616, 630 (1919) (Holmes J, dissenting); *Gertz*, *ibid* ('[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas').

demonstrably false statements of fact³⁴ and its mistrust of the marketplace of ideas derive from the history of the Nazi regime's popularity, the Holocaust, and its denial. By contrast, the United States' faith in the same marketplace, rooted in its anti-governmental political culture, cannot be fully understood without its own history of revolution against a tyrannical king.

4. Negative and Positive Free Speech Rights

A related structural issue concerning the scope of a free speech right is whether the right is exclusively 'negative' in nature—that is, a right not to be regulated or interfered with when exercising the protected free speech—or also 'positive', a right to demand that enjoyment of the protected free speech be ensured or protected.³⁵ Such a positive right may be that of the speaker, in terms of guaranteed communication or dissemination of one's ideas, or of the audience, the assurance of receiving (and not only imparting) information. From the perspective of those bound by the right rather than from that of the rights-holder, the same distinction can be expressed by asking whether the free speech right imposes a duty not to interfere only or also one to protect, ensure, or promote it.

Many older, more 'classically liberal' constitutions, as well as those of most (but not all) common law jurisdictions hue to the conception of constitutional rights generally, and free speech in particular, as a 'charter of negative rights'.³⁶ Thus, for example, in the United States, where the scope of the right to free speech is taken to include making financial contributions to political campaigns and candidates, the Supreme Court famously affirmed the exclusively negative nature of the right and its rejection of the positive conception (which, in this context,

³⁴ *Holocaust Denial Case* [1994] 90 BVerfGE 241.

³⁵ To be sure, the distinction between negative and positive speech rights is not always clear-cut and there are boundary issues, mostly depending on whether the baseline is taken to be for or against the speech claim, such as the right to demonstrate on streets and other public spaces.

³⁶ *Jackson v City of Joliet* 715 F2d 1200, 1203 (7th Cir, 1983), *cert denied*, 465 US 1049 (Posner J).

would emphasize the importance of meaningful access to effective means of political expression and information) in *Buckley v Valeo*.³⁷ According to the Court: ‘The concept that government may restrict the speech of some [in] order to enhance the relative voice of others is wholly foreign to the First Amendment’.³⁸ This also underscores the deep connection between the negative/positive rights distinction and the differing normative emphases within comparative free speech law of the value of liberty versus equality. Similarly, in Australia, the High Court rejected a claim that the constitutional right to freedom of political communication entitled a candidate in a national election to media coverage.³⁹ To the contrary, the right only prohibits interference with, or regulation of, such coverage, including potentially the mandating of it.

Examples of positive free speech rights in other jurisdictions are also numerous, and tend to range from a general textual provision obliging the state not only to respect but also to protect and promote the rights contained in more modern bills of rights,⁴⁰ to more particular textual rights of reply in the media and to receive information.⁴¹ They are also frequently the product of judicial implication. The European Court of Human Rights has interpreted several of the rights in the 1950 European Convention, including freedom of expression under article 10, to have the positive dimension of obligating the forty-seven member states to protect individuals from deprivation of these rights by other individuals. In the case of article 10, this is somewhat surprising because the text suggests only a negative prohibition: ‘This right [to freedom of expression] shall include freedom to hold opinions and to receive and impart information and ideas *without interference by public authority* and regardless of frontiers’.⁴² Nonetheless, since

³⁷ 424 US 1 (1976).

³⁸ *ibid*, 48-49.

³⁹ *McClure v Australian Electoral Commission* [1999] HCA 31; (2017) 344 ALR 421.

⁴⁰ See, eg, *Constitution of the Republic of South Africa*, s 7(2).

⁴¹ Both, for example, are contained in *Constitution of Colombia*, art 20.

⁴² art 10(1) ECHR (emphasis added).

2000, the Court has interpreted article 10 to impose an affirmative duty on government to protect the right from private threats.⁴³ A useful example is the 2001 case of *Özgür Gündem v Turkey*.⁴⁴ Here, the claimant newspaper alleged violations of both the Turkish government's positive obligation under article 10 to protect its freedom of expression against acts of violence perpetrated by private parties and the negative duty of not itself interfering with this freedom through a series of searches and prosecutions of the newspaper's offices and staff. The European Court of Human Rights upheld both claims.

Similarly the German Constitutional Court has read a duty of protection (*Schutzpflichten*) into several of the rights contained in the Basic Law. This began with the right to freedom of expression under article 5, when famously in the 1961 *First Television Case*,⁴⁵ the Court held that the state had a constitutional duty to protect and preserve broadcasting freedom by ensuring the existence of 'balance, objectivity and reciprocal respect' in programming. Although it justified this decision on the basis of the unique 'spectrum scarcity' of broadcasting as compared with the press, more general media regulation to protect pluralism against ordinary monopolizing market forces was also later held to be constitutionally required not only in Germany, but also in France and Italy.⁴⁶ Subsequently, such duties were extended to other rights in the Basic Law, most controversially to impose a constitutional obligation on the state to protect the right to life of the foetus against its mother.⁴⁷ Other common positive speech rights, such as the right of reply to attacks in the media and the right to receive information, may not directly or necessarily impose constitutional duties on government, but nonetheless normally assume the existence (or creation) of a judicial or regulatory framework in which the rights are realized and enforced.

⁴³ The key case was *Fuentes Bobo v Spain*, no 39293/98, judgment of 29 February 2000.

⁴⁴ [2001] 31 EHRR 49.

⁴⁵ [1961] 12 BVerfGE 205.

⁴⁶ See Eric Barendt, *Freedom of Speech* (2nd edn, OUP 2007) 67-71, 429-33.

⁴⁷ *First Abortion Case* [1975] 39 BVerfGE 1.

5. The Object of a Free Speech Right

Once we know the identity of the free speech rights-holder and the content of the right that is held, the further structural question arises of who is bound to respect it. Who or what is burdened or constrained by the right? This question has two dimensions: (1) in federal systems, does a federal right to free speech bind only the national government or also state or provincial ones; (2) in all systems, does a right to free speech bind only government actors or also non-governmental or private ones? To what extent does it impact the private sphere? This first sub-question is far easier to answer than the second, at least in a full or complete manner, so we will start with it.

Some federal bills of rights containing the right to free speech apply only to the federal government of a country but not to the constituent state or provincial ones. In such systems, the bill of rights is part of the set of legal limits on federal authority and not a minimum national guarantee of rights. Examples include the Canadian Bill of Rights of 1960,⁴⁸ a still operative statute the significance of which was much reduced by passage of the subsequent constitutional and province-binding Charter of Rights and Freedoms in 1982,⁴⁹ and the US Bill of Rights, including the First Amendment, for the hundred-plus years prior to selective ‘incorporation’ against the states by the Fourteenth Amendment.⁵⁰ In Australia, a proposed national bill of rights in 2009 that was ultimately never enacted would have applied only against the federal government.⁵¹ By contrast, the more common situation is for the bill of rights to be part of the supreme or fundamental law of the nation as a whole and so to bind the constituent political units

⁴⁸ SC 1960, c 44, s 1(d) contains the free speech provision.

⁴⁹ Section 2(b) contains ‘freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication’.

⁵⁰ The right to free speech was first ‘incorporated’ against the states by the 1925 case of *Gitlow v People of the State of New York* 268 US 652 (1925).

⁵¹ National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009) 363-364.

as well as the federal government as a set of guaranteed minimum rights. This is the case, for example, in India, South Africa, Brazil, Mexico, and Germany.

The complexity of the second sub-question is belied by the seemingly simple and straightforward bifurcation between the ‘vertical’ and ‘horizontal’ effect of constitutional rights, including free speech. Rights with vertical effect apply only against the government whereas horizontal rights also apply against private actors. For several well-known reasons that need not be rehearsed here, most rights in most constitutions—whether more traditional civil and political rights or less traditional economic, social, cultural, and collective ones—are and have been vertical in nature, with at a maximum only a few exceptional ones being horizontal in application. Thus, for example, the sole exception in the US Constitution to its well-known ‘state action doctrine’ of vertical effect is the Thirteenth Amendment’s ban on slavery and involuntary servitude ‘anywhere in the United States’, which applies both vertically and horizontally. The Supreme Court of India has consistently adhered to the general position that the Fundamental Rights contained in Part III of the Constitution, including freedom of speech, apply only against the government and not against private individuals.⁵² At the same time, it has recognized some exceptions, holding that the subject-less—although not expressly horizontal—provisions abolishing ‘untouchability’,⁵³ prohibiting human traffic and forced labour,⁵⁴ and prohibiting employment of children below fourteen years of age in factories, mines or other hazardous occupations⁵⁵ are ‘plainly and indubitably enforceable against everyone’.⁵⁶

⁵² *Zoroastrian Cooperative Housing Society v District Registrar* (2005) 5 SCC 632 (‘The Fundamental Rights in Part III of the Constitution are normally enforced against State action or action by other authorities who may come within the provision of article 12 of the Constitution’).

⁵³ art 17.

⁵⁴ art 23.

⁵⁵ art 24.

⁵⁶ *People’s Union for Democratic Rights v Union of India* (1982) 2 SCC 235. In addition are the textually horizontal article 15(2) against certain specified types of private discrimination and a small part of the broad modern understanding of the right to life under article 21.

By contrast, the general position under section 8(2) of the South African Constitution is that, in principle, all rights can have horizontal effect, depending on context.⁵⁷ In Colombia, article 86 of the Constitution permits *tutelas* or individual complaints for violations of constitutional rights to be brought against private actors when they are ‘providing a public service or whose conduct may affect seriously the public interest, or in respect of whom the applicant may find himself/herself in a state of subordination or vulnerability’. The Constitutional Court has regularly allowed *tutelas* to be brought by those seeking to exercise their article 20 right to rectification against private media outlets.⁵⁸

Although the vertical-horizontal distinction drawn in terms of who has constitutional duties to comply with a bill of rights remains a useful starting point, its binary nature significantly oversimplifies the reality. This is because constitutional rights may adversely impact and effectively regulate private actors even in systems that adhere to the basic vertical position. To take a well-known free speech example from Germany, in the landmark *Lüth* decision the Constitutional Court held that although the Basic Law’s rights, including freedom of expression under article 5, apply only against the legislative, executive and judicial branches of government and not private persons like the plaintiff, a Nazi-era film director, it nonetheless overturned on free speech grounds an injunction awarded to him under the Civil Code by the lower court against the boycott of his new film organized by another citizen.⁵⁹

Accordingly, a second distinction has been introduced that emphasizes this latter way in which constitutional rights may impact non-State actors: the distinction between their direct and

⁵⁷ ‘A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right’. In practice, only relatively rarely has the South African Constitutional Court directly applied constitutional rights to private actors. One instance is *Governing Body of the Juma Musjid Primary School v Essay NO* 2011 (8) BCLR 761 (CC) (private trust bound not to impair right to basic education under section 29 of the Constitution).

⁵⁸ See Cepeda and Landau (n 22), 122.

⁵⁹ *Lüth* [1958] BVerfGE 7, 198.

indirect horizontal effect. ‘Direct horizontal effect’ is the position within the basic dichotomy in which constitutional rights bind private actors. Where it applies, individuals can be sued by their fellow citizens for violating their constitutional rights, as for example under the writ of *tutela* in Colombia or constitutional tort actions in Ireland.⁶⁰ By contrast, ‘indirect horizontal effect’ means that although constitutional rights do not directly regulate and impose duties on private actors, they may nonetheless impact and indirectly regulate them. What is ‘indirect’ in the concept is the effect of a constitutional right on an individual, by comparison with the immediate, unmediated or direct application under the fully horizontal position.

Indirect horizontality typically occurs in one of two general ways. The first is where (vertical) rights impose an affirmative constitutional duty on the government to protect individuals from certain actions by other private actors, as we saw in the previous section. Here, constitutional rights indirectly impact private individuals and entities by mandating that the government enact and enforce measures against certain of their conduct that is not itself directly regulated by the constitution. For example, in the European Court of Human Rights case of *Özgür Gündem v Turkey* discussed above, article 10 was held to require the Turkish government to protect the newspaper from the private violence to which it was being subjected, which would typically result in the perpetrators being prosecuted.

The second way is through the application of constitutional rights to private law, the rules that structure the legal relationships of individuals *inter se*. Indirect horizontal effect occurs via the impact of a bill of rights on the law that individuals invoke and rely on in civil disputes, thereby limiting what they can be authorized to do and which of their interests, choices and actions may be protected by law. So whereas under direct horizontal effect, a bill of rights governs all *actions*, under indirect horizontal effect it governs all *laws*. By subjecting the

⁶⁰ See, e.g., *Hosford v. John Murphy & Sons*, [1987] I.R. 621.

provisions of private law to the requirements of a bill of rights, a constitutional system narrows the public-private gap in the scope of those rights.

This general technique, as well as the important point that indirect horizontal effect is perfectly consistent with taking a vertical position within the basic dichotomy, originated with the *Lüth* case from Germany mentioned above. Here, in overturning the lower court's damage award to the plaintiff, the Constitutional Court famously held that the rights contained in the Basic Law form 'an objective order of values' that must 'radiate' throughout the entire legal system, including in private litigation. Accordingly, private law must be compatible with these constitutional values and, if it cannot be interpreted consistently with them, is invalid.⁶¹ Since the Civil Code, under which the plaintiff was suing for economic loss, has open-ended general clauses capable of accommodating the constitutional value of free expression, it must be interpreted and applied by the ordinary courts in a way that sufficiently takes it into account. A second example is the landmark US Supreme Court decision in *New York Times v Sullivan*, overturning a state court damage award and invalidating on free speech grounds part of the private law of defamation within a constitutional system well-known for its threshold 'state action' requirement.⁶² As a result, the losing plaintiff was adversely affected by the First Amendment that was deemed to govern his legal relations with the newspaper, even though he was not bound by its provisions.

Indeed, here a further distinction has been suggested in the literature between 'strong' and 'weak' indirect horizontal effect.⁶³ The former is where all private law is fully and equally subject to a bill of rights, regardless of type (common law versus statute, or subject-matter) and

⁶¹ *Lüth* (n 59). .

⁶² *New York Times v Sullivan*, 376 US 254 (1964).

⁶³ See Gavin Phillipson, 'The Human Rights Act, "Horizontal Effect" and the Common Law: a Bang or a Whimper?' (1999) 62 MLR 824, 830; Stephen Gardbaum, 'The "Horizontal Effect" of Constitutional Rights' (2003) 102 Mich Law Rev 387, 435-37. See also;

the nature of the litigation in which it is relied upon (including ‘purely private litigation’ between individuals). By contrast, weak indirect horizontal effect means that some or all private law is not fully and equally subject to a bill of rights as compared with other types of government action. An example is the situation in Canada where the Charter of Rights and Freedoms does not apply to the common law at issue in private litigation—unlike a statute—although courts are supposed to take its values into account in developing the common law. This was decided in a case where a trade union claimed that its Charter right to freedom of expression was violated by an injunction granted to its target employer under the common law against secondary picketing.⁶⁴ By contrast, the common law at issue in private litigation in *New York Times* was fully and equally subject to the First Amendment (and held to violate it), and in the United States statutes and common law provisions would be treated identically. Of course, unlike the common law of defamation in *New York Times*, much ordinary general private law -- torts, contracts, property—will easily pass constitutional muster under current substantive understandings of the First Amendment.

6. Limiting a Free Speech Right

In practice (if not necessarily in theory), the dominant general conception of a constitutional free speech right, as with constitutionally rights generally, is that of an important prima facie legal claim that is nonetheless capable of being justifiably limited or overridden by certain conflicting public policy objectives. At least as it applies to the United States, this general conception has been referred to as constitutional rights as ‘shields’, in contrast to the peremptory

⁶⁴ *Retail, Wholesale and Dep’t Store Union v Dolphin Delivery Ltd* [1986] 2 SCR 573.

or absolute conception of rights as ‘trumps’.⁶⁵ It also contrasts, although less starkly, with a third conception of free speech and other constitutional rights as stating exclusionary reasons for government action.⁶⁶

Within this dominant general conception, the weight of the presumption in favour of the rights claim varies somewhat from country to country and in some cases from right to right. It is sometimes claimed, for example, especially in the free speech context, that the United States has a more ‘categorical’ conception of rights in this sense, not because rights are necessarily trumps but because they afford a larger shield; that is, a greater general presumptive weight in favour of a rights claim.

This general conception of a free speech or other constitutional right is typically operationalized and adjudicated through a two-step process. The first step consists of everything we have considered thus far in this chapter and determines whether a free speech right is implicated and has been infringed; that is, whether the *prima facie* claim has been established. The second step determines whether the infringement is nonetheless a justified one and asks whether the defendant has rebutted this *prima facie* case by satisfying the constitutional criteria for limited or overriding the right. The first step concerns the coverage of the right—its subject, object, and scope; the second step involves its protection: the weight of the right in the face of the strength and relevance of the public policy reasons for the infringement.⁶⁷

The capacity of free speech and other rights to be justifiably limited in this way is standardly expressed in modern constitutional texts through one of two types of ‘limitations clause’: specific or general. The former are contained in the text’s free speech provision itself,

⁶⁵ Frederick Schauer, ‘A Comment on the Structure of Rights’ (1993) 27 *Georgia LR* 415, 423. On the absolute conception, see also Grégoire Webber, ‘Proportionality and Limitations on Freedom of Speech’ in this volume.

⁶⁶ See Pildes (n 31); Halberstam (n 31).

⁶⁷ Here again, I am referencing Fred Schauer’s distinction. See Schauer (n 1).

sometimes in a separate sub-paragraph, and contain customized wording relating to the justified limitation of the right. For example, article 19(2) of the Indian Constitution states that ‘[n]othing in sub-clause (a) of clause (1) [the free speech provisions] shall ... prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right ... in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation, or incitement to an offence’. Article 5(2) of the German Basic Law states that: ‘These rights [to freedom of expression] find their limits in the provisions of general statutes, in statutory provisions for the protection of youth, and in the right to respect for personal honour’. Examples of general limitations clauses, which specify the uniform criteria for limiting all the rights in a bill of rights, are section 36 of the South African Constitution and section 1 of the Canadian Charter.⁶⁸ Free speech rights unqualified by either type of express limitation clause may still be subject to judicially implied limits, where they conflict with other protected rights or with certain public policy objectives. So, for example, the Colombian Constitutional Court has held that the textually unqualified right to freedom of expression and information may be justifiably limited where it conflicts with such other fundamental rights as the right to a good name or to privacy.⁶⁹ The US Supreme Court has never accepted Justice Hugo Black’s absolutist, strict textualist position that ‘no law abridging

⁶⁸ Section 36 of the *Constitution of the Republic of South Africa* states as follows: ‘The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—(a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose’. Section 1 of the Canadian Charter states its rights are guaranteed ‘subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.

⁶⁹ Decision T-066 of 1998.

the freedom of speech ... mean[s] no law abridging'.⁷⁰ And, having implied a right to freedom of political communication, the High Court of Australia has also implied certain limits to it.⁷¹

The second step of rights analysis and adjudication is widely and increasingly implemented by application of the principle of proportionality. Having its origins in German administrative law, proportionality began to be applied by the Federal Constitutional Court a few years after it came into being, in the late 1950s, and has spread over succeeding decades at rapid speed to the majority of domestic constitutional systems in all parts of the world, as well as to international human rights regimes.⁷² As the dominant principle applying to all protected rights, it has become a sort of one-stop shop, a near-universal test for limiting rights. Increasingly, what you have by virtue of having a free speech, or any other, right is a right against disproportionate limitation.

The proportionality principle is operationalized through a sequenced three- or four-pronged test. Where the public policy objectives that are in principle capable of justifying the limitation of a free speech right are *not* specified in the relevant limitations clause, there is typically a threshold requirement to the effect that the (usually governmental) end or objective is 'sufficiently important' or 'pressing and substantial' in the circumstances to warrant overriding it.⁷³ The remaining three prongs focus on the means employed to promote this objective: (1) are they rationally related to it; (2) are they necessary or the least restrictive of the right; (3) even if so, do they nonetheless impose disproportionate burdens on the right relative to the objective.⁷⁴

⁷⁰ *Smith v California* 361 US 147 (1959) (Black J, concurring).

⁷¹ See *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1 (preventing obstruction in the use of a road is legitimate basis for limiting the right).

⁷² Alec Stone Sweet and Jud Mathews, 'Proportionality, Balancing and Global Constitutionalism' (2008) 47 *Colum J Transnat'l Law* 68. Starting with the European Court, several international human rights courts also apply a 'margin of appreciation', or degree of state discretion, towards the domestic decision they are effectively reviewing.

⁷³ These terms come from the Canadian case of *R v Oakes* [1986] 1 SCR 103.

⁷⁴ For a more detailed analysis of these four prongs, as well as the identification of some generally unacknowledged complexities in their application, see Webber's chapter (n 65) in this volume.

This last prong is often referred to as proportionality in the strict sense (or *stricto sensu*), and requires balancing the relative weight of the right and the limitation in the particular circumstances. In this way, even though this same test (or minor variations on it) applies to limitations of all rights within a system, it does not necessarily involve a single weight attaching to all rights equally, as the final prong may take into account the relative importance of different constitutional rights, or the same right in different contexts. Such flexibility and focus on particular circumstances is often thought to be one of the distinguishing features (and, for some, benefits) of the principle of proportionality compared to a more ‘categorical’ approach to rights and their limits.

An example where the limitation of the right to free speech was held to be unjustified under the proportionality test is the South African case of *Johncom Media Investments Limited v M and Others*.⁷⁵ Here, the Constitutional Court found that the complete ban on publication of information emerging from divorce proceedings in order to protect the privacy and dignity of the parties and their children under section 12 of the Divorce Act was not the least restrictive means of promoting these legitimate objectives, and so was a disproportionate and unconstitutional infringement of the right to freedom of expression. A converse example is the Canadian case of *R v Keegstra*,⁷⁶ in which the Supreme Court held that section 319(2) of the Criminal Code prohibiting the wilful promotion of hatred, other than in private conversation, towards any section of the public distinguished by colour, race, religion or ethnic origin satisfied all four prongs of the proportionality test and so was a justified limitation on the right of expression under section 2(b) of the Charter.

⁷⁵ [2009] ZACC 5.

⁷⁶ [1990] 3 SCR 697.

An alternative second-step methodology for evaluating whether limits are justified is to have separate standards, or tiers, of review embodying differential weights and presumptions for different rights, or even for different types of laws implicating the same right, as generally in the United States. Thus, for example, whether ‘strict scrutiny’, ‘intermediate scrutiny’, or ‘rational basis review’, with their very different presumptions and likely outcomes, applies to the limitation of free speech rights under the First Amendment depends on the nature and type of the speech restriction. Under current doctrine, content-based (versus content-neutral) regulation and restriction of the right to free speech is subject to the highest tier of scrutiny, strict scrutiny, requiring that the government proves its measure was necessary for a compelling public interest. Only relatively rarely do restrictions on protected speech satisfy strict scrutiny, and generally less often than they pass the proportionality test. Again, where combined with a negative conception of the right to free speech, this effectively amounts to a stronger presumption in favour of liberty than where countervailing values, such as equality, are afforded greater scope at the second step of analysis. By contrast, content-neutral restrictions, such as time, place and manner restrictions on speech, as well as any regulation of commercial speech, are subject to the lesser standard of intermediate scrutiny, which requires the measure in question to be substantially related to an important public interest. Finally, general laws with only incidental burdens on free speech—such as ordinary private tort and contract law, including employment-at-will—are subject to rational basis review requiring only reasonable relation to a legitimate public interest, which is difficult to fail. Accordingly, an American *Keegstra*⁷⁷ could perhaps be fired from his teaching job, but not criminally prosecuted, for using the classroom as a forum for indoctrinating students with his anti-semitic views.⁷⁸

⁷⁷ Ibid..

⁷⁸ See Halberstam (n 31).

Although this alternative, tiers of review methodology is certainly more ‘categorical’ in the sense of the importance of putting things in the right box, the weight of a free speech claim varies considerably depending on into which one it is placed; the third category affords little protection compared to the first, and generally less than under proportionality. Moreover, it is widely acknowledged that this approach still requires courts to ‘balance’ rights against conflicting governmental interests, as under the final step of proportionality analysis. Indeed, much of the ‘anti-balancing critique,’ judicial and academic, originates in the United States.⁷⁹ So while it is uncontested that the United States employs neither the label nor the precise content of the proportionality test in its free speech jurisprudence, several scholars have argued that the differences between the two second-step methodologies are smaller and less significant than often assumed or claimed.⁸⁰

Apart from the exclusionary reasons conception of free speech and other constitutional rights mentioned above,⁸¹ which creates a binary of either prohibited or permissible reasons for government action and so has no conceptual space for justified limitations of rights, another alternative to both balancing methodologies is the specification theory of rights.⁸² Under this account, free speech and most other textual constitutional rights are relatively abstract statements of principle and under-determined with respect to their content in particular situations. As such, they are in need of further specification or delimitation, and this is really how the second-step process of what the conventional picture misconceives as limiting or overriding rights should be understood. The result is a bounded but absolute right.

⁷⁹ Most famously, Justice Black (n 70) and T Alexander Aleinikoff, ‘Constitutional Law in the Age of Balancing’ (1987) 95 Yale LJ 943.

⁸⁰ See Stephen Gardbaum, ‘The Myth and the Reality of American Constitutional Exceptionalism’ (2008) 107 Mich Law Rev 391; Vicki C Jackson, ‘Constitutional Law in an Age of Proportionality’ (2015) 124 Yale LJ 3094.

⁸¹ See n 31.

⁸² Grégoire CN Webber, *The Negotiable Constitution: On the Limitation of Rights* (CUP 2009); John Oberdiek, ‘Specifying Constitutional Rights’ (2010) 27 Const Commentary 231.