

# Free Speech

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*Abstract.* Freedom of speech is among the most cherished values of liberal democracy. But there is a surprising amount of disagreement as to what, exactly, it requires, and what priority it should take over other values. This chapter surveys debates in modern political theory on this topic. After setting out the traditional liberal defence of a strict right to free speech, it considers two critiques of that position: that the value of free speech should be balanced against (and sometimes subordinated to) other values such as equality; and that protecting the voices of all citizens sometimes requires *restricting* speech rather than protecting it. The chapter then reviews recent efforts to defend the traditionalist stance against these critiques. Finally, it considers the way free speech is increasingly dependent on the decisions of private companies that host, curate, and broker public communication. It closes with a case study on whether social-media companies should be expected to restrict hate speech on their networks.

## 1. Introduction

What should, and shouldn't, people be allowed to say? Few questions in civic life provoke such furious debate. In theory it's widely agreed that freedom of speech is a fundamental human right (-> see Chapter 11). This right is enshrined in most national constitutions, and in international human rights documents, including the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. But behind this theoretical consensus there are many disagreements about exactly what the right entails, and how it weighs against other rights and values.

This chapter explains those disagreements. We begin by outlining a traditionalist view about the grounds and limits of free speech, which has been widely endorsed

in post-war liberal societies, and which maintains a strong presupposition against government interference with most forms of speech. Traditionalists think of such interference as fundamentally inimical to values like autonomy, truth, and democracy.

We then discuss two critiques of traditionalism. The first says that free speech should not take priority over other values that it comes into conflict with, like human dignity or social equality. If this is right, then, contrary to what traditionalists say, restrictions on incendiary or hateful speech will often be justified. The second critique says that a commitment to free speech sometimes requires government to *limit* speech, instead of adopting a non-interventionist stance. On this revisionist view, we restrict speech that silences other people not in spite of free speech, but for the sake of free speech.

The chapter then reviews some recent efforts to defend the traditionalist view against these kinds of critiques, and explains the ways in which public discourse is increasingly dependent upon the policies and practices of private social media companies that host, curate, and broker public communication. We finish with a case study about whether these companies should be forced to remove hate speech on their networks.

## 2. Liberal traditionalism about free speech

### 2.1 *What is free speech?*

Imagine a society where public discourse is in excellent health. It captures the richness and diversity of people's worldviews. Everyone gets to participate in it, on fair terms, and to make their voice heard when it matters. Smart, passionate, and creative expression abounds, across all media. People tolerate, and often appreciate, ideas that are alien or opposed to their own. And collectively, people do a good job at acquiring and disseminating true information. Misinformation isn't punished, but it is relatively uncommon, as its defects are exposed via public debate.

Most philosophical writing on free speech comes from people who want to live in this world. All the same, they don't equate the concept of free speech with healthy public discourse. They use the term *free speech* to denote a set of institutional arrangements which, they believe, will help to realise that ideal, by respecting and promoting citizens' capacities for rational thought and communication. Naturally, there is disagreement about the scope of free speech protections, thus construed—about just how much they should protect. We will begin here by setting out one demanding conception of free speech, which we will call the *liberal traditionalist* view of free speech.

On this view, free speech is a principle that constrains attempts by governments to restrict citizens' communications with one another—especially, speech that constitutes the expression or exchange of *ideas*. The background assumption is that people can generally act as they please. If government is to be justified in interfering with our conduct, it must be acting on good reasons—like trying to prevent suffering, or curtail rights-violations. The liberal traditionalist says that when government interferes with *speech*, there are extra constraints that it must abide by, beyond the 'good reasons' rule. One constraint is the *higher burden of justification*. If a government restricts speech to prevent harm, the harm whose prevention supposedly justifies this must be greater than if the restriction were addressing another (non-speech) action (Schauer 1982). The other constraint is *viewpoint neutrality*. Even if a government has a potential justification for restricting speech, it cannot act on this if its purpose is to suppress specific ideas. Restrictions on when, where, and how speech is performed are justifiable, in principle – you can't hold a mass protest in a residential neighbourhood at 2am! – but not government actions whose goal is to suppress particular viewpoints (see Schauer 1982, pp. 7-8, Barendt 2005, p. 6). Together, these two constraints are meant to make it very hard for states to restrict speech of which they disapprove.

Key concept: *viewpoint neutrality*

Viewpoint neutrality is the requirement that the state must refrain from restricting speech on the grounds that it disagrees with or disapproves of the views expressed. For example, suppose the state were to punish the expression of the view that abortion is morally wrong, but permit expression of the view that abortion is morally permissible. This would constitute a form of what is called *viewpoint discrimination*, thus breaching the requirement of viewpoint neutrality.

Consider the U.S. Supreme Court case *Boos v. Barry* (1998). The case concerned a law that forbid criticism of foreign governments outside of their embassies. The Court held that such a law was viewpoint discriminatory by restricting speech that criticised foreign governments, but allowing speech that praised foreign governments. Or consider the case *West Virginia State Board of Education v. Barnette* (1943). In that case, the Court held that schools could not force students to recite the pledge of allegiance to the American flag. As Justice Jackson wrote, in a now-famous quotation:

“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”

Notice that this ruling partly rests on the view that the freedom *not* to speak is also an important aspect of freedom of speech.

In sum, free speech is about government treating speech differently to—and in some sense, with greater care and reverence than—other types of activity. This

view became an orthodoxy in liberal societies in the post-war era. The reason we have called it *liberal traditionalism* is that most of its defenders see it as the upshot of a long-standing liberal view of justice, tracing back to John Milton's *Areopagitica* (1644), and its critique of censorship practices in 17<sup>th</sup> century Britain. Some authors (including Milton) trace the concept's origins even further back, to ancient Greek ideals as epitomised in Socrates's defence of his practices of public argumentation (narrated in Plato's *Apology*). In major social movements in early modern Europe—like the Scientific Revolution, the Enlightenment, the French and American revolutions—arguments for free speech have often run alongside calls to resist unjust legal authority, either church or state.

Liberal traditionalists especially see themselves as taking up the mantle of John Stuart Mill, whose essay *On Liberty* offers an impassioned critique of conformity and censorship. Millian ideas inspire many liberal traditionalists, especially defenders of the First Amendment to the U.S. Constitution. Supporters of this view often invoke the idea of a *marketplace of ideas*, as a way of portraying and defending the type of healthy public discourse that a right to free speech is supposed to create. The general idea behind the marketplace metaphor is that public discourse works best if people are left to exchange ideas and information among themselves, rather than having authorities oversee discussions—much like, in classical liberal economic theories, free markets in goods work better than centralised economic planning (Volokh 2011). However, the marketplace metaphor has often come in for criticism, including by some liberals, who doubt that market mechanisms are capable of fostering truth or better-justified beliefs (e.g. Goldman and Cox 1996; Gordon 1997; Sorial 2010).

Key text: John Stuart Mill, *On Liberty* (1859)

Mill's *On Liberty* is among the most celebrated defences of freedom of expression in the liberal tradition. Chapter 2 sets out a famous set of arguments for broad protections of freedom of speech. According to Mill, we should almost never suppress an opinion (whether about moral or empirical matters) that we deem false, for three reasons: (1) Because the opinion might actually be true (since we are fallible); (2) Because the opinion might, even if misguided, capture *some* of the truth (and so there is something to learn from it); and (3) Because even if the opinion is obviously mistaken, we refresh our understanding of *why* it is mistaken by allowing it to be heard and engaging with it; otherwise our understanding of what is true or false becomes a “dead dogma”.

While liberal traditionalists who invoke Mill focus on state censorship, it is important to note that Mill opposed all compelled conformity in thought and expression, regardless of whether conformist pressures come from government, commercial entities, or—perhaps especially—social pressures from one's peers.

## 2.2 What justifies free speech?

Why should speech be regarded as special, such that government faces additional constraints when it acts to restrict speech? Liberal traditionalists in the second half of the 20<sup>th</sup> century emphasised three main justificatory themes in their attempts to answer this question: individual autonomy, democracy, and truth.

*Autonomy:* The liberal tradition prizes our capacity for autonomy—our power to author and pursue a plan of what to do with our lives. Many liberals think that there is an intimate relationship between *speech*, on the one hand, and the development and exercise of this capacity, on the other. Accordingly, a wrong is inflicted upon us, as autonomous beings, if we are living in a society in which people's ideas are silenced.

Some liberal traditionalists argue that restrictions on speech are inherently disrespectful to our autonomy. Thomas Nagel (1995) argues that speech-restricting laws treat people as if they lack mental autonomy, and thereby degrade their moral status. Ronald Dworkin (1981) argues that speech-restricting laws infringe upon people's right of moral independence. T. M. Scanlon (1972) argues that speech-restricting laws delegitimise government authority, insofar as people cannot, while regarding themselves as autonomous, allow government to assess the truth or goodness of ideas on their behalf. All of these authors see themselves as identifying something inherently wrongful in speech-restricting action by governments.

Other traditionalists cash out the autonomy-related argument instrumentally. They argue that speech protections help people to exercise their autonomous capacities. Martin Redish (1982) and Edwin Baker (1989), for example, emphasise an ideal of *self-realisation*. They believe some distinctive potential resides in each of us, and that its realisation is particularly endangered by the suppression of speech. It is through communicating who we are and what we believe to others, via speech, that we affirm a particular vision of ourselves in the world. Further, as Joshua Cohen notes, speech is indispensable to thinking through the different options about how we are to live our lives—which we do, in part, by talking with others and learning from others (Cohen 1993, p. 229). Rights against censorship help to mitigate this autonomy-related danger.

*Democracy:* The democratic argument for free speech holds that, in a democracy, citizens must be free to debate and consider all points of view. Without that freedom, according to this view, we are not living in a genuine democracy. This view can be understood as an implication of the autonomy argument (Scanlon 1972): our government must respect our ability to judge what we value and how we should live, which only democracy can do. As Alexander Meiklejohn influentially argues:

The principle of the freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a

deduction from the basic... agreement, that public issues should be decided by universal suffrage (Meiklejohn 1948, p. 26-27).

Just as the autonomous person needs to judge for herself which views are worth taking seriously, so too the democratic community, made up of autonomous people, needs to be able to freely discuss which views are worth taking seriously. Individual autonomy and collective democratic governance are compromised in a similar way, if a government uses its own evaluations to pre-emptively filter the ideas and viewpoints that the community can consider.

The democratic argument can be cashed out instrumentally: perhaps the quality of democratic governance tends to increase where free speech principles are applied (->see Chapter 4). Over time, though, democratic arguments for traditionalism have assumed a non-instrumental guise. Authors like Robert Post (1993) and James Weinstein (2011) argue that the democratic *status* of government is in some sense invalidated, if particular views are silenced. Certain restrictions on speech may improve the quality of democratic processes then (e.g. by countering the effects of misinformation), while simultaneously jeopardising the legitimacy of those processes.

#### Key text: Meiklejohn, *Free Speech and Its Relation to Self-Government*

Meiklejohn is among the most influential defenders of the view that free speech is essential to the practice of democratic self-government. On Meiklejohn's view, it is not possible for people to govern themselves if there isn't an open exchange of ideas and information. If the state had the power to decide what information and ideas citizens had access to, citizen self-government would be compromised. Popular sovereignty, Meiklejohn thus argued, depends upon open and unrestricted deliberation about political ideas. One implication of this argument is that public deliberation about political issues generally deserves more stringent protection than private deliberation about non-political issues.

Meiklejohn's commitment to freedom of political speech is highly demanding, as the following passage makes clear:

"Shall we, then, as practitioners of freedom, listen to ideas which, being opposed to our own, might destroy confidence in our form of government? Shall we give a hearing to those who hate and despise freedom, to those who, if they had the power, would destroy our institutions? Certainly yes! Our actions must be guided, not by their principles, but by ours. We listen not because they desire to speak, but because we need to hear. If there are arguments against our theory of government, our policies in war or in peace, we the citizens, the rulers, must hear and consider them for ourselves. That is the way of public safety. It is the program of self-government" (Meiklejohn 1948, pp. 56-57).

*Truth*: A final set of argument focuses on the role of free speech in enabling us to identify what is true and what is false. (Because of the focus on knowledge, these are sometimes called *epistemic* arguments for free speech.) These arguments have fewer defenders among liberal traditionalists, but they remain an enduring point of reference given their roots in Mill's thought, and the great influence it has had on modern free speech discourse. The idea that epistemic benefits might follow from imposing special constraints on government finds qualified support in the secondary literature on Mill (e.g. Ten 1980, Skorupski 1991, Jacobson 2000), in the social epistemology of science (e.g. Kitcher 1993), and in work on academic freedom, emphasising the particular threat that government interference poses to the discovery and dissemination of truth in universities (e.g. van Alstyne 1990). Note that few liberal traditionalists today would identify truth alone as the justifying value of free speech. Those who do appeal to truth typically invoke it in combination with other values, as part of a pluralistic justification for free speech (e.g. Emerson 1970, Cohen 1993, Barendt 2005).

### Key points

- Theorists in the liberal tradition have defended free speech as severely constraining the authority of the state to restrict citizens' expression.
- *Viewpoint neutrality* is the requirement that the state refrain from censoring views that they disapprove of or disagree with.
- Some liberal traditionalists defend free speech on the grounds of *autonomy*. They argue that people develop their autonomous capacities through speech. Others argue that we respect the autonomy of listeners by letting them hear a range of ideas so they can make up their own minds.
- Other liberal traditionalists defend free speech by appealing to its role in facilitating democratic self-government.
- Other liberal traditionalists defend free speech by appealing to the search for truth. On this account, free speech helps enable people to distinguish what is true from what is false.

Many of the authors we have cited belong to the Anglo-American tradition of political and legal philosophy, which is the home of most theoretical scholarship on free speech. Yet we stress that free speech is a norm entrenched in the legal systems of many states. As such, there is an elaborate body of caselaw and legal commentary discussing the particularities of free speech law within specific jurisdictions (see, e.g., Bhatia 2018 examining free speech law in India). While we are

focused here on the abstract philosophical issues, those interested in the legal details of particular jurisdictions would do well to dig into the relevant court opinions and commentary.

### 3. Balancing: when speech conflicts with other values

Liberal traditionalists argue that free speech is something that we all have reason to value. They explain why authoritarian regimes with no respect for free speech whatsoever are seriously unjust. Still, even if traditionalists are right that free speech matters, we might wonder whether it matters as much as they claim. Where free speech principles pose a danger to other values and interests, traditionalists typically believe that it should win out over them. But why? Why not think that free speech should instead be *balanced* in such cases against other concerns—sometimes taking priority over them, but sometimes losing out?

We can use the term *balancers* to refer to those authors who believe free speech matters, but also think it should be balanced against other things that matter, in many cases of conflict. Bhikhu Parekh aptly sums up this approach:

Although free speech is an important value, it is not the only one. Human dignity, equality, freedom to live without harassment and intimidation, social harmony, mutual respect, and protection of one's good name and honor are also central to the good life and deserve to be safeguarded. Because these values conflict, either inherently or in particular contexts, they need to be balanced. (Parekh 2012, p. 43)

This view expresses what is, in most societies today, something approaching “common sense” on free speech. In nearly all the world's democracies, legislators and courts routinely balance free speech when it comes into tension with other values. And while the U.S. courts' approach to free speech is resistant to balancing, instead adhering to the traditionalist view, it implicitly engages in some balancing in its decisions about what speech counts as protected or unprotected.

What are the values with which free speech might come into tension? It is common in political theory to suppose that values like liberty in general can come into conflict with other values such as equality (-> See Chapters 2 and 6), so it wouldn't be surprising if particular instances of those values conflicted. Consider the issue of *hate speech*, that is, speech that attacks, vilifies, or promotes the inferiority of certain social groups. As critical race theorists have argued, hate speech promoting white supremacy attacks the equal dignity of non-white citizens (Matsuda, Lawrence, Delgado, and Crenshaw 1993). In deciding whether to restrict hate speech, balancers will ask whether the value of free speech is more or less important than the value of protecting equal dignity.



Key concept: *hate speech*

Hate speech is speech that attacks, vilifies, or promotes the inferiority of certain groups. Such speech is criminalized or otherwise regulated in most democratic countries (but not the U.S.), and the content of these laws varies across jurisdictions. For example, in the UK hate speech laws restrict speech that incites hatred on the grounds of race, religion, or sexual orientation. In India, hate speech laws also restrict speech that incites hatred against others on grounds of their place of birth, residence, language, or social caste. There is extensive debate as to what, exactly, the scope of hate speech laws ought to be. There is also extensive debate as to whether these laws are effective in deterring hate speech, or the other social harms that it allegedly causes.

One explicit example of a balancing approach is found in the work of Jeremy Waldron. He concedes that suppressing speech—even hate speech—nearly always comes at a cost, forcing people to keep quiet about what they think on important social issues. Given that we value a world where people are free to express their sincere beliefs to others, silencing people always comes with a downside. But this cost can be justified for the sake of assuring all citizens of their status as citizens with equal dignity (2012, p. 147). “There is,” Waldron says, “no way of avoiding this need for balance. There really are rival values in play here” (2012, p. 172).

Equal dignity is not the only value with which free speech might come into conflict. Consider the value of security. Nearly everyone believes that speech can be restricted in emergencies where someone is inciting imminent violence. (This is one of the few categories of speech that are unprotected under the First Amendment to the U.S. Constitution; see *Brandenburg v. Ohio* 1969). As Mill famously said in *On Liberty*:

An opinion that corn dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer, or when handed about among the same mob in the form of a placard (1859).

Liberal traditionalists typically defend this exception on the grounds that, in circumstances of imminent harm, there is no opportunity to use “more speech” as the remedy. But balancers have a different explanation as to why this exception is justified: because the value of security—protecting people’s rights against violent aggression—simply trumps the value of expression in these cases.

Supposing that this balancing explanation is correct, it raises the question of whether security trumps free speech *only* during emergencies. Consider the UK’s Terrorism Act of 2006, which criminalizes speech that encourages the commission of terrorist attacks (including speech that merely “glorifies” such attacks by,

for example, celebrating past ones)—without any requirement that such speech poses imminent harm. Perhaps the importance of preventing terrorist attacks is so great as to justify more of a curtailment of speech than Mill would have favoured. While liberal traditionalists flatly oppose such a law, balancers would at least consider it.

Another value with which free speech might conflict is the value of reputation. It is widely assumed that freedom of expression does not entitle people to destroy the reputations of others by peddling falsehoods about them. Hence speakers can be sued in most states when they engage in defamatory speech. Defamation (or *libel* when written, *slander* when spoken) is speech that attacks the reputation of others by peddling falsehoods about them. In some countries, a defamatory speaker might be liable to pay damages in a defamation lawsuit, even if they didn't consciously intend to spread false information or hurt their target's reputation. This, too, reflects a balance; while we want people to be free to express their thoughts about other people, we don't want that liberty to be unlimited (→ see Chapter 2 on liberty).

Where exactly those limits should lie is a matter of debate, in all these cases. Balancers can and do disagree about the exact weights of the values they are balancing. For example, the U.S. Supreme Court has held that citizens who defame public figures can only be used if their defamation exhibits “actual malice”—that is, knowledge that the statement was false, or reckless indifference to whether it was (see *New York Times v. Sullivan* 1964). The rationale is that, to have a robust debate about public figures, citizens cannot live in fear that they will be sued if they make a mistake and say something that turns out to be false. Yet in a world in which lies about political figures can spread faster than ever thanks to online communication, we might wonder whether this leaves political figures with too little protection from defamatory speech. A policy that strikes a good balance in one era may not do so in another era. The balancing approach has the flexibility to accommodate these changes. Moreover, it is sensitive to differences between societies, since the right balance plausibly varies across contexts. For example, we might argue that Holocaust denial is appropriately restricted in Germany, given its distinctive history, without thinking that it should be restricted elsewhere.

Suppose you are attracted to the balancing approach. Importantly, this does not mean you have to deny that there is a right to free speech. Many balancers believe that free speech is important. Their dispute with liberal traditionalists concerns the weight of free speech. In other words, balancers doubt that free speech, properly understood, protects as much speech as liberal traditionalists think it does. This accords with the prevailing state of international human rights law (and the law of most liberal democracies), which include in-principle protections of free expression, while also permitting restrictions on hate speech and other kinds of harmful expression.

Other balancers are more pessimistic. For some, free speech is not a great good to be weighed against other great goods; it should instead be viewed with suspicion. On this more radical view, free speech is part of a political ideology that has presided over long-standing structures of identity-based injustice, especially racial and sexist oppression (see e.g. Gillborn 2009, Leaker 2020, Leigh 2022). This view is pessimistic about the potential of a reformed liberal politics, for which some critics of traditional liberalism have argued (Mills 2017). Yet a concern for empowering oppressed voices need not lead us to abandon free speech. As we will see in the next section, it might instead require us to rethink it.

### Key points

- Balancers argue that while free speech is important, it shouldn't always (or even usually) trump other rights or values with which it comes into conflict.
- Free speech can conflict with the values of equal dignity (as with hate speech), security (as with speech advocating criminal violence), and reputation (as with defamation).
- Different jurisdictions strike the balance between free speech and other values in different ways—e.g., through more or less restrictive laws on hate speech, criminal advocacy, or defamation.
- How to balance free speech against other values might change over time, as new technologies or social problems alter the magnitude of the harms that speech risks causing.

## 4. Revisionism: restricting speech for the sake of speech

According to balancers, liberal traditionalists grant free speech too much weight relative to other values. In this section we consider a related but distinct critique of traditionalism. This critique accepts, in theory, that free speech is very important. What it rejects is the traditionalist view about what practical response from the government is called for, in response to a recognition of speech's value. For traditionalists, free speech calls for a *laissez-faire* (or “let it be”) stance. It calls for government to stand aside, and allow the people to speak and debate as they see fit. *Revisionists*, as we will call them, see this inaction as part of the problem. If we care about empowering people to speak, and about the underlying values that make speech so important, then government has to play a role in this. However unintuitive it may seem, in the abstract, protecting free speech may call for government action that *limits speech*. For revisionists, we sometimes limit speech not for the sake of other values, but for the sake of speech itself.

How could this be? Consider the claim, defended by pioneering critical race theorists, that hate speech causes its targets to keep quiet and refrain from participating in public discourse. As Mari Matsuda notes, targets of racist speech “curtail their own exercise of speech rights” (1989: 2337)—as hate speech marginalizes them and pushes them out of the public square. Moreover, by promoting negative stereotypes, hate speech undermines its targets’ credibility, “further reducing their ability to have their speech taken seriously” (*Ibid*, p. 2376). This phenomenon is now often referred to as *testimonial injustice*, following work by Miranda Fricker (2007).

Key concept: *testimonial injustice*

A term coined by the epistemologist Miranda Fricker, testimonial injustice occurs when people suffer from an unwarranted credibility deficit—i.e., where people’s testimony is taken less seriously than is warranted, as a result of identity-based prejudice. For example, consider discussions where the contributions of women and people of colour are dismissed, due to prejudice against them. Those whose credibility is unfairly dismissed are victims of testimonial injustice, which makes it much more difficult for them to communicate successfully with others. Fricker’s solution involves cultivating better epistemic habits in citizens, part of an approach known as “virtue epistemology.”

In sum, because hate speech compromises its targets’ power to speak, we should oppose it at the bar of free speech itself. If we care about free speech, targets of racialised harassment must be free to partake in that value—and hate speech must be limited for them to do so. This inversion—the idea that, to protect the equal speech rights of all, we must limit some speech—epitomises the revisionist approach.

While balancers believe that free speech should be constrained by other values, what distinguishes revisionist arguments is the claim that the values underpinning free speech themselves militate in favour of restrictions. So, Matsuda argues that core free speech values—self-fulfilment, knowledge, participation, and stable community—“are sacrificed when hate speech is protected” (*Ibid*, p. 2377). Similar revisionist insights have since emerged outside of critical race theory, including among some liberals. For example, David Brink argues that hate speech “retards rather than advances deliberative values” (2001, p. 153). Insofar as Millian principles aim to advance deliberative values, governments have a presumptive (liberal) justification for restricting some hate speech, contrary to what liberal traditionalists would claim. On Brink’s view,

Insofar as the Millian perspective on hate speech justifies regulation by appeal to deliberative values, it appeals to the very same values that explain why censorship is normally impermissible... [thus] hate speech regulation is a well-motivated exception to the usual prohibition on censorship. (Ibid, p. 154)

This kind of argumentative move has proliferated throughout the free-speech literature. Susan Brison (1998) develops a comprehensive critique of autonomy-based arguments for liberal traditionalism, arguing that a concern for autonomy gives governments reason to restrict hate speech, not to refrain from such restriction. Katharine Gelber (2010) argues that some discriminatory speech subverts the conditions required for individuals to develop their capacities, and participate in democratic discourse, thereby arguing that a concern for democracy gives governments reason to restrict discriminatory speech. In a similar direction, Japa Pallikkathayil (2020) argues that hate speech intimidates its targets into keeping quiet and retreating from public discourse out of fear for their physical safety. In a similar vein, Etienne Brown (2022) argues that restrictions on fake news are justified, not in spite of free speech, but for the sake of the truth- and autonomy-related ideals that underpin free speech.

Note that while we have presented balancers and revisionists separately since the arguments are crucially distinct, there is nothing to stop someone from locating themselves in both camps simultaneously. Suppose you thought hate speech was objectionable because it conflicted with the value of equal dignity *and* because it undermined the capacity of vulnerable groups to speak out. Both objections would lend some support to restrictions on hate speech. The first objection appeals to balancing, while the second appeals to the revisionism, but those appeals support similar conclusions.

What other restrictions on speech might be required by respect for speech itself? Another important strand of revisionist free speech theory can be found in feminist critiques of pornography (-> see Chapter 9). Catharine MacKinnon famously argues that pornography has a *silencing* effect, and hence that using well-crafted laws to prevent or mitigate the harmful effects of pornography, on women, doesn't involve an indifference to free speech, but rather, a positive valuation of it, in a reinterpreted guise. "The free speech of men silences the free speech of women," she says (1987, p. 156), and so, state action to suppress the particular forms of communication that have this pernicious effect, has "the same social goal" (*Ibid*).

How, exactly, does pornography silence the speech of women? In short, so MacKinnon argues, by eroticizing women's refusal to engage in sexual intercourse, and suggesting that when women say 'no' they really mean 'yes', pornography makes it more difficult for women in the real world to be heard when they say 'no'. Notice that the usefulness of speech isn't only about a person's capacity to express her opinions. As the philosopher of language J. L. Austin showed, speaking is also a way of performing important social acts—like protesting,

warning, requesting, and so forth. Building on this idea, Rae Langton (e.g. 1993) and Jennifer Hornsby (e.g. 1995) both argue that the value of speech partly consists in the speaker's ability to perform various *illocutionary acts*—the acts that they perform through their speech. It is this ability, they claim, that is compromised by pornography, and whose inhibition can leave women unable to verbally deny sexual consent. Thanks to pornography, men do not hear what women are saying for what it is. Langton and Hornsby refer to this as *illocutionary disablement*.

Key concept: *illocutionary disablement*

Speakers do things with their words. Think of a parent naming a child, or a minister pronouncing “You are now husband and wife” at a wedding, or a referee calling “foul” in a sporting event. When a speaker wants to do something with her words, this is called the *illocutionary element* of her speech-act (*illocutionary act* for short). For this illocutionary act to successfully occur, certain “felicity conditions” must be in place—for example, listeners must understand the speaker's language. Illocutionary disablement occurs when an attempt to do something with words is frustrated, thanks to the frustration of some felicity condition. If misogynistic pornography causes men to think that when women say ‘no’ they mean ‘yes’, it causes a form of illocutionary disablement, effectively silencing women by preventing them from completing the speech-act of verbally refusing consent.

The revisionist insight in this argument is simple: If speech is used in ways that impair other people's capacity to perform the kinds of speech that implicate speech-related ideals—the ones that compel us to ascribe distinctive value and importance to speech—then our positive valuation of speech gives us reasons to restrict that harmful speech, in order to advance those same speech-related ideals. As Ishani Maitra (2009, p. 310) notes, when developing the Langton/Hornsby theory, “silencing turns out to be a distinctively speech-related wrong, in the sense that a silenced speaker is deprived of benefits that speech, and only speech, can provide.”

One can critique such an account of illocutionary disablement, to be sure—for example, by arguing that it mischaracterises the harmful effects of misogynistic pornography. Maybe what's really happening with misogynistic pornography is simply that it is eroticizing rape, and thereby inciting men to violence through a much more straightforward causal mechanism.

There are also some deeper political worries around revisionism. Isaiah Berlin (1958) famously warned against efforts to infringe upon liberty in the name of another more important liberty (-> see Chapter 2). Berlin was criticizing positive conceptions of liberty, which define liberty as the capacity for self-mastery and

the attainment of one's highest ideals. He believed that this conceptual reengineering aided authoritarian persecution, by allowing it to be speciously portrayed as freedom-promoting. Similar concerns may arise in relation to a revisionist approach to speech regulation. Given how dogged authoritarian regimes can be in rationalising the suppression of dissent, it isn't difficult to imagine such suppression being defended as a way of protecting the speech of silenced voices. We have at least some reason to prefer a theory of free speech that resists this terminological trickery. Revisionism is unattractive on this front.

### Key points

- While liberal traditionalists hold that we best respect and promote free speech through non-interference with people's speech, revisionists hold that sometimes we should restrict speech in order to protect and promote speech itself.
- Insofar as some speech marginalises people so that they are disinclined to participate in public discourse, or so that their contributions to public discourse aren't taken seriously, there is a revisionist justification for restricting that speech.
- In some cases, the very ideals that liberal traditionalists invoke to justify free speech—such as autonomy and democracy—may speak in favour of restricting speech.
- A distinctive way that speech can cause speech-related harm is through *silencing*, whereby speech has the effect of neutering people's ability to communicate successfully. Misogynistic pornography may have this silencing effect if it leads people to think that when women say 'no' they really mean 'yes'.
- Revisionism carries risks. The idea that we should restrict speech for the sake of speech seems ripe for abuse by authoritarian regimes.

## 5. Recent work on why speech is special

Both balancers and revisionists reject the demanding conception of free speech favoured by liberal traditionalists. Balancers show us that the proper limits of free speech should reflect the importance of other values. Revisionists show that the very value of freedom of expression can *itself* support regulations of our communicative environment and even restrictions on the content of our speech itself. The seemingly *laissez-faire* attitude of liberal traditionalists, on this approach, betrays a misunderstanding of the very value they were theorising. Both lines of argument reflect an emerging anxiety in liberal democracies that unfettered speech brings with it serious costs, and the idea that new ways of thinking are required to put free speech in its place.

In response to the greater influence of balancers and revisionists, a new wave of scholars has mustered fresh arguments to defend the strong protections for speech offered by liberal traditionalism. These authors seek to defend the traditionalist conviction that speech is fundamentally important, while explicitly acknowledging and contesting the balancing and revisionist challenges. For a theory of free speech to meet this challenge, it must tell a story about the foundational importance and role of speech in our lives—as something of special significance, which resists balancing and favours robust constraints on state action. Our interest in free speech cannot, on this picture, simply be a particular application of a more general interest in liberty or autonomy (as argued, e.g., by Alexander 2005, Husak 1985, and Schauer 2014).

How might speech have the sort of foundational importance it would need to resist balancing? Consider Seana Shiffrin's argument that *speech is an essential precondition of human thought*—itself, she argues, a precondition to nearly everything else we do that matters. This complex argument has several parts. First, we need to be able to speak freely—talking out our ideas—to figure out what we think about something (2014, p. 89). Without externalizing our mind's contents in this way, to hold them at a distance for inspection, we cannot acquire a nuanced sense of what we actually believe.

Second, Shiffrin argues that we need free speech to share our thoughts with others, and to learn what others are thinking. We are not telepaths, and we don't know what others think unless they tell us. And we need to know what others are thinking—and to tell others what we are thinking—in order to properly engage in interpersonal relations and political cooperation:

Because we cannot peer into one another's minds, we depend upon others to convey their mental contents with precision and rich content through sincere communication... we [thereby] are enabled to form and execute complex cooperative plans, to understand one another, to appreciate and negotiate around our differences... These achievements are important components of fulfilling the full range of our moral duties and ends, which involve mutual recognition, helping and respecting others, and responding to others as individuals... Protecting this channel of mutual access must, therefore, be a substantial moral priority (2014, p. 1, emphasis added).

This provides a powerful rationale for preserving stringent speech protections. Without them we will be unable to understand and discharge the demands of morality itself—both within our interpersonal relationships, and as democratic citizens. Shiffrin's view thus confers upon speech a foundational significance, such that it cannot plausibly be regarded as merely one interest among others, since it makes possible the understanding and pursuit of all our other interests. Other authors defend a similar line of argument (e.g., Macklem 2006, Gilmore 2011).



Other scholars reiterate the special significance of free speech for *democracy*. For some, the defining feature of a democracy is precisely the unrestricted prerogative of citizens to engage in public discourse without any legal restrictions on what viewpoints may be expressed (Heinze 2016). When free speech is compromised, our society is no longer fully democratic. On this picture, the right to free speech is not one right to be protected or balanced alongside others. It is a more fundamental, constitutive feature of the process through which we debate and decide what the other rights even are, a non-negotiable precondition of the legitimacy of all laws. Without the freedom to debate the wisdom of laws, those laws lack legitimate authority. Ronald Dworkin sums up this idea well: “The majority has no right to impose its will on someone who is forbidden to raise a voice in protest or argument or objection before the decision is taken” (2010, p. vii). On this view, free speech does not merely *promote* democracy; it is an essential element of what democracy *is*. On this view, free speech does not merely *promote* democracy; it is an essential element of what democracy *is*. (This contrasts with views that would cast the equal vote, or free and fair elections, as the defining elements of democracy.)

Other recent defenders of a traditionalist view claim that a refusal to restrict speech is the defining hallmark of an *ethically resilient* liberal society. On one view, the decision to restrict speech out of fear for what citizens will do in response (e.g. engage in bigotry or violence) reflects an upstream failure on the part of the state to create the right kind of citizenry. If the state did its job, inculcating a robust liberal-egalitarian ethos of self-respect and respect for others, noxious speech (such as hate speech and pornography) just wouldn’t be especially harmful at all. “Securely in a position of ethical strength,” a liberal state “can treat the wares of pornographers and the maunderings of bigots as execrable chirps that are to be endured with contempt” (Kramer 2021, p. 147). This view holds freedom of expression to be absolute and exceptionless; accordingly, while there might be occasional emergencies where we should sacrifice free speech for other values, such sacrifice always involves substantial moral wrongdoing (*Ibid.*, p. 3). This stance is reminiscent of an earlier argument, according to which tolerating the intolerant enables us to improve our character, recognizing and taming our illiberal impulses (Bollinger 1986).

These recent developments register the idea that there is something ethically distinct about speech—that speech is central to our nature as human beings. Whether such an insight can justify stringent constraints on state action is a further question. Even if speech does have a special relationship to our distinctive human character, it does not follow that it cannot be balanced against other considerations (Kendrick 2017). Offering a defence of liberal traditionalism that can successfully resist the balancing and revisionist critiques is, then, a work-in-progress.

### Key points

- Various efforts have been mounted to defend the liberal traditionalist view from its critics. The challenge is to show why free speech merits a foundational role relative to other interest and values.
- One approach emphasizes the foundational role of free speech in enabling the exercise of free thought.
- Another approach seeks to resuscitate a democratic defence of free speech as not simply promoting democracy, but constitutive of democracy.
- Another view casts free speech as the hallmark of an ethically resilient society.

## 6. Triangulation: beyond the citizen-state relationship

As we explained in §2, free speech is defined in terms of constraints on government action. The core philosophical questions about free speech are what (if anything) justifies these constraints, and whether any other concerns might counter these justifications. Customarily, then, free speech theory is treated as a sub-section of a more general inquiry, in ethics and political philosophy, centred on the legitimacy and justification of coercive government action targeting individual citizens' conduct.

Developments in online communication over the last 25 years are calling into question this general analytical framework, within which most philosophical work on free speech has been carried out, by both liberal traditionalists and their critics. Companies like Google and Meta have extraordinary power and influence, as the hosts and mediators of a large part of the world's communicative environment. This places pressure on the idea that free speech is fundamentally defined by how government abides by (or fails to abide by) constraints on its speech-restricting actions. Increasingly, with respect to our communicative ideals and interests, speech-regulations enacted by tech companies seem just as important as the laws and executive actions of government.

On the one hand, many liberal traditionalists are as hostile to restrictions on *companies'* expressive activities as they are to restrictions on *citizens'* expressive activities. Companies, after all, are made up of people, and people can still make real contributions to public discourse when speaking under the auspices of a commercial organisation. (Although traditionalists tend to make exceptions for advertising, making it easier to regulate than other speech; see Scanlon 1979, Strauss 1991.) Furthermore, social media platforms and other intermediaries (like search engines) exercise their own expressive editorial judgments when deciding what

speech to amplify, demote, or remove. Democratic, epistemic, and autonomy-related reasons for worrying about the censorship of speech, by governments, plausibly still apply when the relevant speakers are commercial entities. When authoritarian governments order a platform to remove or demote speech they dislike, we are right to worry and object.

On the other hand, if these corporate intermediaries are immunized from regulation, this also seems to carry serious risks. Part of the purpose of freedom of speech is to promote a healthy and open public discourse. But platforms have arguably undermined public discourse through architectures that optimize engagement (and so drive up advertising revenue), by amplifying incendiary, sensationalist, and divisive content. If *free speech* is understood in a way that commands governments to maintain a *laissez faire* regulatory stance towards tech powerhouses, this may result in considerable tension with one of the foremost instrumental arguments for freedom of expression.

One promising theoretical reframing, aimed at putting us in a better position to address these interconnected practical and theoretical problems, comes from the American philosopher and legal scholar Jack Balkin. Across a series of papers (2004, 2009, 2018, 2021), Balkin proposes and develops a *triangular* conception of free speech. We shouldn't conceive of free speech, dyadically, in terms of constraints that governments place directly on citizens. Free speech is better construed a triadic relation, between government, speakers, and intermediaries that host, curate, and broker public communication (see especially Balkin 2018). As Balkin says, if you (a policy architect) want to achieve the ideals for whose sake free speech is recognised and esteemed in the first place,

You need more than a legal norm that the state doesn't censor. You need more than the formal ability to speak free of government sanction. You need intermediate institutions that can create and foster a public sphere. Without those intermediate institutions, speech practices decay, and the public sphere fails. (2021: 78)

Balkin's point is that healthy public discourse doesn't spontaneously appear. Governments have a role to play in exercising their regulatory powers—on behalf of all society—to incentivise private speech platforms and brokers towards policies and practices that advance everyone's communicative interests. Governments protect free speech, on the triangular model, by wielding their power to ensure that private companies maintain a free and open discursive arena for citizens. In Balkin's words:

Our goal should be to make that digital public sphere vibrant and healthy, so that it furthers the goals of the free speech principle – political democracy, cultural democracy, and the growth and spread of knowledge. To achieve those ends, we need trustworthy intermediate institutions with the right kinds of norms. The goal of regulation should be to give social media companies incentives to take on their appropriate responsibilities... (Ibid: 96)

What, exactly, such regulation ought to involve is and will continue to be subject to debate. Should companies be required not to discriminate against certain points of view, or to promote a healthy balance of perspectives? Should companies be required *to* discriminate against hateful or false speech? The triangular reconceptualization of free speech is still in its early days. We can expect there to be a lot of development, in this space, as different authors propose different frameworks aimed at enabling us to diagnose and address the challenges that orthodox construals of free speech issues have partly obscured. Whether one accepts the particulars of Balkin’s proposal, something in its general trajectory seems hard to resist. We need a way of doing free speech theory, therefore, which enables us to conceptualise expressive freedom in relation to corporate tech’s power, and the dangers that it poses, but without conflating companies with governments, or losing sight of the genuine threats to expressive liberty that governments still pose, in a digitally-transformed world.

One thing that comes along for the ride, when we reframe free speech discourse in this way, is that something like a revisionist approach becomes hard to resist. As we said earlier, revisionists needn’t deny that there is something special about the ability to engage in public expression. What they deny is the traditionalist idea that a recognition of that value calls for a *laissez faire* regulatory stance, by governments. The limitations and downsides of this stance come into even sharper focus, once we start considering the power of tech companies, and the ways in which they can exercise that power to damage the communicative ideals that constitute our fundamental reason for recognising and defending a principle of free speech in the first place.

### Key points

- The traditional approach to free speech focuses on efforts by governments to censor individual citizens’ speech—e.g., through direct criminal punishment or by assigning civil liability.
- In the digital age, citizens’ communications are brokered by corporate intermediaries, such as Google and Meta. These companies have enormous power over what speech people express and who sees it.
- If one rationale for free speech is to enable a healthy public discourse, this has implications for the rights and duties of digital intermediaries.
- Given platforms’ power, scholars are increasingly attracted to a *triangular* approach to free speech, whereby we consider the relations between citizens, states, and intermediaries.

## 7. Conclusion

In this chapter we have offered an overview of the main lines of disagreement across the vast scholarly literature on freedom of speech. Many more disagreements—both within and across the camps we have surveyed—could have been mentioned. But the main fault lines are clear enough. Liberal traditionalists argue that it is very difficult to justify any restrictions on speech. The *laissez-faire* policy that follows from this view continues to enjoy support from a number of political and legal theorists, especially in the American legal academy. But there are an increasing number of political philosophers pushing back against this orthodoxy. While balancers defend restrictions on speech for the sake of other values, revisionists defend restrictions on speech for the sake of speech itself. While newer efforts emerge to defend liberal traditionalism from these critiques, the debate is also moving on to tackle a new set of questions raised by the power of digital intermediaries. By grasping how this debate has taken shape in recent decades, and seeing the directions it is now evolving in, you will be able to make up your own mind about what (if anything) a right to free speech should protect.

### Case Study: Moderating Hate Online

Some recent cases illustrate the challenges posted by harmful speech in the digital age:

- Since 2017, hundreds of thousands of Rohingya Muslims have been displaced from their homes and thousands have been killed as part of a broader campaign of ethnic cleansing in Myanmar. This campaign involved the dissemination of incendiary and hateful speech on social-media networks, whipping up anger toward Rohingya and peddling hateful falsehoods that they were themselves guilty of heinous crimes. In response, some Rohingya have pursued a class action lawsuit against Meta (Facebook’s owner) for \$150 billion, alleging the social-media giant owes compensation to victims for failing to do enough to limit harmful content. So far, the lawsuit has not succeeded.
- In 2023, the U.S. Supreme Court heard two cases about social-media content promoting terrorism. The first case (*Twitter, Inc. v. Taamneh*) concerned a Jordanian citizen named Nawras Alassaf, who was killed during an attack in Istanbul by the terrorist organisation ISIS. His family then sued various social-media companies for “aiding and abetting” terrorism, arguing that they had failed to limit the kind of hateful content that inspired terrorists. In its opinion, the Court ruled that while pro-ISIS content had appeared on the platforms, this was not sufficient to treat companies as accomplices. The other case (*Gonzalez v. Google LLC*) concerned an American named Nohemi Gonzalez, who was killed in an ISIS attack in Paris. Her family argued that because YouTube’s algorithms had

amplified pro-ISIS content, it should be held partly responsible for it. Here, too, the Court disagreed.

Set aside the legal complexities of these cases and focus on the core philosophical issues. Should we hold social-media companies morally responsible, at least in part, for the harms that *users* cause through the platforms? If so, would it be acceptable, in principle, for states to force social-media companies to take greater action against hate speech appearing on their platforms, and to make them pay compensation when they don't?

These are some of the questions that arise when we take a triangular approach to the issues of free speech, focusing not simply on the responsibilities of states to respect or restrict citizens' speech, but the responsibilities of intermediate entities that host speech and how the state should relate to *them*.

This debate is taking on ever greater urgency as national and supranational governments race to enact legislation to regulate social-media networks—from the Online Safety Bill in the UK to the Digital Services Act in the EU, among others. There are at least three different positions one could hold in the debate. In exploring these positions, we will focus on hate speech that falls short of inciting imminent violence.

So how should we think about companies' moral duties and their legal enforcement? First, one might think that social-media companies have no moral obligation to restrict hate speech on their networks. Just as we don't think telephone companies or mail providers have obligations to police what people say, nor should social-media platforms. On this view, we should view platforms as a kind of public utility, or even as a neutral public forum open to all, e.g. akin to Speaker's Corner in Hyde Park, London. It is individual speakers—not platforms—that are accountable.

Second, even if platforms have some moral obligation to restrict hate speech on their networks, perhaps this obligation shouldn't be legally enforced. Platforms may have a responsibility to limit the harms caused through their networks—especially if the platforms' algorithms amplify such speech, spreading it to more people. Yet if hate speech is protected by free speech, as traditionalists and neo-traditionalists claim, it would be wrong for the state to force platforms to ban it. That would be a form of indirect censorship. This seems to be the prevailing position in the U.S., where there is robust public criticism of companies for platforming hate speech, but without any viable proposal for the government forcing companies to prevent this.

For balancers and revisionists who believe that hate speech *isn't* protected speech, a third option suggests itself: platforms have a moral duty to restrict hate speech, *and* this duty should be enforced through law. This is precisely the approach that seems to motivate emerging legislation in the UK, EU, and beyond.

Even if it is appropriate, in principle, to force social-media companies to restrict hate speech, it isn't clear what form this regulation should take. Consider the Network Enforcement Act (*Netzwerkdurchsetzungsgesetz*) in Germany, which requires platforms to remove illegal hate speech within 48 hours of notification, or otherwise face massive fines. Such a stringent policy may lead to the over-removal of speech—including lots of legitimate speech—because it gives platforms an incentive to err on the side of caution and remove any speech that may trigger complaints. It's no wonder, then, that many people are worried that the burgeoning era of social-media regulation will unintentionally lead to the censorship of legitimate debate. The question that governments are grappling with is how to design regulation that suppresses dangerous and unprotected speech, but without undermining healthy public discourse.

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