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FREEDOM OF SPEECH, POWER, AND DEMOCRACY

Freedom From Speech

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ABSTRACT

The importance of freedom of speech in a democratic society is usually taken as a given, but freedom from speech is no less important in safeguarding the values of truth, autonomy, and democracy. Freedom from speech includes both the right of the individual to not be forced to speak and the freedom to avoid the speech of others. This essay attempts to highlight the significance of freedom from speech in order to clarify the importance of the First Amendment right against compelled speech; provide an explanation for when the right of free speech yields to other rights; and offer a framework for evaluating unsettled or contentious questions about free speech doctrine and practice.

The importance of freedom of speech in a democratic society is usually taken as a given. This essay explores the less intuitive insight that freedom *from* speech is also extremely valuable in advancing democratic goals. “Freedom from speech” as used in this essay roughly parallels the freedom from religion protected by the Establishment Clause of the First Amendment, which prohibits the government from coercing or imposing religious beliefs on its subjects. “Freedom from speech” includes both the right of the individual to not be forced to speak and the freedom to avoid the speech of others. The former, the Supreme Court has made clear, is protected by the First Amendment. The latter, however, often conflicts with existing First Amendment protections. But the right to freedom *from* speech in both senses is as essential as freedom *of* speech to the advancement of truth, autonomy, and democracy. This essay highlights the significance of freedom from speech by bringing together disparate examples of this value in action, with the purpose of clarifying the importance of the First Amendment right against compelled speech; providing an explanation for when the right of free speech yields to other rights; and offering a framework for evaluating unsettled or contentious questions about free speech doctrine and practice.

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The right against compelled speech is familiar to First Amendment scholars. The First Amendment protects “both the right to speak freely and the right to refrain from speaking at all.”¹ In the landmark 1943 case *West Virginia State Board of Education v. Barnette*, the Supreme Court held that forcing students to recite the Pledge of Allegiance or salute the American flag was a violation of the First Amendment. As Justice Jackson wrote for the majority, “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.”² Compelled speech undermines all three primary values—autonomy, truth, and democracy—that freedom of speech is intended to vindicate.³ Forcing private individuals to support or associate themselves with ideas they find objectionable infringes upon personal autonomy, distorts the truth and the marketplace of ideas, and inhibits individuals’ ability to participate in democratic deliberation.⁴

However, this right of private actors not to engage in or associate with speech they find objectionable is less understood and accepted outside legal circles—especially when the private actors in question are social media companies. A 2019 survey by the First Amendment Center at the Freedom Forum Institute found that more than half of respondents agreed with the erroneous statement that “social media companies violate users’ First Amendment rights when they ban users based on objectionable content they post.”⁵ The error is not limited to members of the public, but also animates multiple lawsuits filed against companies such as Facebook, Twitter, and Google for alleged free speech violations,⁶ as well as an increasing number of legislative and executive actions purporting to

1. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943) (Murphy, J., concurring).

2. *Id.* at 642.

3. See, e.g., Joseph Blocher, *The Right Not to Keep or Bear Arms*, 64 STAN. L. REV. 1, 6 (2012) (noting “the First Amendment protects speech and silence because they both serve core First Amendment purposes like the protection of individual autonomy and the preservation of the marketplace of ideas”); R. George Wright, *Freedom of Speech As a Cultural Holdover*, 40 PACE L. REV. 235, 245–46 (2020) (noting that “[i]here has long been a reasonably broad consensus as to the most important values thought to justify according special constitutional protection to much speech. . . . (1) promoting in particular a general search for truth; (2) facilitating a meaningful process of democratic government; and (3) encouraging meaningful self-realization, self-actualization, or genuine autonomy”).

4. See *Wooley v. Maynard*, 430 U.S. 705, 714–15 (1977); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462–63 (1958).

5. *State of the First Amendment Survey*, FREEDOM F. INST., <https://www.freedomforuminstitute.org/first-amendment-center/state-of-the-first-amendment/> [<https://perma.cc/QGB3-9BJ7>].

6. See, e.g., Cat Zakrzewski & Rachel Lerman, *Trump Files Class Action Lawsuits Targeting Facebook, Twitter and Google’s YouTube Over ‘Censorship’ of Conservatives*, WASH. POST (July 7, 2021), <https://www.washingtonpost.com/technology/2021/07/07/trump-lawsuit-social-media/> [<https://perma.cc/73ZR-HB6H>].

force social media companies to carry certain speech or provide access to certain speakers.⁷

This misunderstanding of the First Amendment's application to social media companies is not *per se* unreasonable. The general public lacks a nuanced understanding of the state action doctrine, according to which the First Amendment, along with the rest of the Bill of Rights, restrains the government from intruding on the rights of private actors, not the other way around.⁸ The right-wing politicians who seek to turn social media platforms into state propaganda outlets cynically exploit this lack of understanding. In addition, social media platforms have become extraordinarily influential and powerful. Modern society has become so dependent on these platforms for everything from news to commerce to education that any restriction of access to those outlets can feel like a violation of constitutional significance.⁹

At least as important, however, is the lack of understanding of and support for the idea that freedom *from* speech (as opposed to the perennially fashionable freedom *of* speech) is an affirmative good. Americans across the political spectrum tend to revere the concept of freedom of speech and instinctually recoil from restrictions of speech. In a society that equates “more speech” with “free speech,” the inclusion of speech—no matter how low-quality, nonsensical, or harmful—is almost always treated with less skepticism than the exclusion of speech. Choosing not to speak is associated with censorship and cowardice, and choosing not to listen even more so. This association is heightened by the increasing prevalence and influence of social media platforms, which reward impulsive and polarized “engagement” over informed reflection and restraint.

This aspect of civil libertarianism, particularly in the hands of rightwing ideologues, has led to attacks on universities,¹⁰ media companies,¹¹ and social media platforms¹² for exercising professional judgment and enforcing quality standards. The denunciation of “safe spaces” and “trigger warnings” when universities

7. See, e.g., Cat Zakrzewski, *Florida Governor Signs Bill Barring Social Media Companies from Blocking Political Candidates*, WASH. POST (May 24, 2021), <https://www.washingtonpost.com/technology/2021/05/24/florida-gov-social-media-230/> [<https://perma.cc/9HTT-ACN>].

8. See, e.g., Stephen K. Wirth, *State Action, Government Speech, and the Narrowing Spectrum of Private, Protected Speech*, 99 CORNELL L. REV. 485, 487 (2014) (describing how “[u]nder the doctrine, state action, as opposed to private action, is necessary to trigger constitutional protection”).

9. See generally MARY ANNE FRANKS, *THE CULT OF THE CONSTITUTION* (2019).

10. See, e.g., Sophie Tatum & Jordyn Phelps, *Trump Signs Executive Order Threatening Aid to Colleges if Speakers Silenced*, ABC NEWS (Mar. 21, 2019), <https://abcnews.go.com/Politics/trump-sign-executive-order-threatening-aid-colleges-speakers/story?id=61833503> [<https://perma.cc/VWU8-JVHH>].

11. See, e.g., John McCormack, *The New York Times Caves to a Woke Mob — and Misleads Its Readers*, NAT'L REV. (June 5, 2020), <https://www.nationalreview.com/2020/06/the-new-york-times-caves-to-a-woke-mob-and-misleads-its-readers/> [<https://perma.cc/4KNJ-WDYN>].

12. See, e.g., Vera Eidelman & Kate Ruane, *The Problem With Censoring Political Speech Online – Including Trump's*, ACLU (June 15, 2021), <https://www.aclu.org/news/free-speech/the-problem-with-censoring-political-speech-online-including-trumps/> [<https://perma.cc/ZU9T-LG56>].

decline to host certain controversial speakers,¹³ criticism of book publishers for withdrawing contracts for ethical reasons,¹⁴ and attempts to punish platforms like Facebook and Twitter for banning politicians who incite violence or spread dangerous disinformation¹⁵ are emblematic of this phenomenon.

Take, for example, the popular right-wing canard that social media disproportionately censors conservative viewpoints. This claim is not just harmful because it is false.¹⁶ It also powerfully reinforces the idea that private entities setting and enforcing their own standards about what kinds of speech they wish to be associated with is contrary to free speech, as opposed to a quintessential exercise of the right of free speech. This posturing preemptively delegitimizes and discourages responsible decision-making by private actors like social media platforms (e.g., banning white supremacists,¹⁷ labeling election misinformation,¹⁸ and removing conspiracy theories¹⁹). This framing illustrates why it is so important to situate the First Amendment protected right against compelled speech in the wider context of freedom from speech as an affirmative good.

The Supreme Court did this quite effectively in a 2019 case that addressed the rights and obligations of entities that host other people's speech. While *Manhattan Corp. v. Halleck*²⁰ involved a public access television system, rather than a social media platform, the holding is relevant to the internet context. In *Halleck*, two producers of public access television programming sued a private corporation that oversees public access channels in Manhattan after the corporation refused to air their documentary and suspended them from the corporation's services and facilities. The producers argued that restricting their access based on the content of their films violated the First Amendment. The Supreme Court ruled that the corporation was not a state actor subject to First Amendment constraints.

13. See, e.g., Susan Svrluga, *Don't Ask Us for Trigger Warnings or Safe Spaces, the University of Chicago Tells Freshmen*, WASH. POST (Aug. 25, 2016), <https://www.washingtonpost.com/news/grade-point/wp/2016/08/25/dont-ask-us-for-trigger-warnings-or-safe-spaces-the-university-of-chicago-tells-freshmen/> [<https://perma.cc/8NNP-QWRA>].

14. See, e.g., Elizabeth A. Harris, *How Getting Canceled on Social Media Can Derail a Book Deal*, N.Y. TIMES (Feb. 11, 2021), <https://www.nytimes.com/2021/02/11/books/morals-clause-book-deals-josh-hawley.htm> [<https://perma.cc/J55D-KEUJ>].

15. See, e.g., Brian Fung, Ryan Nobles & Kevin Liptak, *Trump Signs Executive Order Targeting Social Media Companies*, CNN (May 28, 2020), <https://www.cnn.com/2020/05/28/politics/trump-twitter-social-media-executive-order/index.htm> [<https://perma.cc/KFR2-VRZ9>].

16. See Matthew Ingram, *The Myth of Social Media Anti-conservative Bias Refuses to Die*, CJR (Aug. 8, 2019), https://www.cjr.org/the_media_today/platform-bias.php [<https://perma.cc/WX6M-A8H3>].

17. See, e.g., Malkia Devich-Cyril, *Banning White Supremacy Isn't Censorship, It's Accountability*, WIRED (Jan. 31, 2021), <https://www.wired.com/story/banning-white-supremacy-censorship-accountability/> [<https://perma.cc/G2HK-P897>].

18. See, e.g., Queenie Wong et. al., *Here's How Social Media Companies Are Fighting Election Misinformation*, CNET (Nov. 7, 2020), <https://www.cnet.com/news/politics/heres-how-social-media-companies-are-fighting-election-misinformation/> [<https://perma.cc/DXX9-XWBH>].

19. See, e.g., Brandy Zadrozny & Ben Collins, *YouTube Bans QAnon, Other Conspiracy Content that Targets Individuals*, NBC NEWS (Oct. 15, 2020), <https://www.nbcnews.com/tech/tech-news/youtube-bans-qanon-other-conspiracy-content-targets-individuals-n1243525> [<https://perma.cc/BKH5-EZM3>].

20. See *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921, 1928 (2019).

According to the Court, “merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints.” As Justice Kavanaugh put it, “forcing private actors to carry speech they do not want to carry would intrude upon a “robust sphere of individual liberty” and “eviscerate certain private entities’ rights to exercise editorial control over speech and speakers on their properties or platforms.” This is as true for social media platforms as it is for cable channels. As private actors, these companies have a First Amendment right not to speak and not to associate with speech if they so choose.²¹

Even more controversial than a private entity’s freedom not to speak or associate with certain speech is the freedom not to listen to others’ speech.²² In the United States, restraints on other people’s speech tend to be characterized as pernicious censorship that can only be sparingly and grudgingly tolerated. This reticence towards restraints persists despite the fact that multiple forms of speech have long been denied full First Amendment protection. These exceptions include the “historic and traditional categories” of obscenity, defamation, fraud, incitement, and speech integral to criminal conduct, which are “well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”²³ One can add discriminatory speech in contexts such as employment, education, and housing²⁴; certain kinds of privacy violations²⁵; certain political campaign tactics²⁶; certain forms of commercial advertising²⁷; and true threats.²⁸ One can also infer from existing tort and criminal law that intentional infliction of emotional distress, false light,

21. See Mary Anne Franks, *The Utter Incoherence of Trump’s Battle With Twitter*, ATLANTIC (May 30, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/the-utter-incoherence-of-trumps-battle-with-twitter/612367/> [<https://perma.cc/7PK9-6FD3>].

22. See Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U.L. REV. 939, 940 (2009) (“Free speech jurisprudence – which already recognizes the right to speak, the right to listen, and the right against compelled speech – is incomplete without the right against compelled listening. The same values that underlie the other free speech rights also lead to this right. . . . regardless of whether one conceives of the primary purpose of the Free Speech Clause as creating a marketplace of ideas, enhancing participatory democracy, or promoting individual autonomy.”).

23. *United States v. Stevens*, 559 U.S. 460, 468–69 (2010).

24. See, e.g., Richard H. Fallon, Jr., *Sexual Harassment, Content Neutrality, and the First Amendment Dog That Didn’t Bark*, 1994 SUP. CT. REV. 1, 9 (1994); Helen Norton, *Discrimination, the Speech That Enables It, and the First Amendment*, 2020 U. CHI. LEGAL F. 209 (2020).

25. See, e.g., Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 WM. & MARY L. REV. 1501, 1505 (2015) (asserting that “the vast majority of information privacy law is constitutional under ordinary settled understandings of the First Amendment”).

26. See *Burson v. Freeman*, 504 U.S. 191, 192 (1992) (rejecting First Amendment challenge to Tennessee statute prohibiting solicitation of votes and display or distribution of campaign materials within 100 feet of entrance to polling place).

27. See *Friedman v. Rogers*, 440 U.S. 1, 9 (1979) (acknowledging that the First Amendment does not prohibit “restrictions on false, deceptive, and misleading commercial speech”); *id.* at 10 (“The First Amendment . . . does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.”); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980) (“[T]here can be no constitutional objection to the suppression of commercial messages that do not accurately inform the public about lawful activity. The government may ban forms of

identity theft, extortion, stalking, harassment, and civil conspiracies to deprive individuals of civil rights are also categories of speech that receive diminished First Amendment protection.²⁹

Although this list is not exhaustive, these categories of unprotected speech contribute most usefully to the concept of *freedom from other people's speech*. This should of course be a limited freedom, restricted to speech that seriously threatens one or more of the three values that the First Amendment is intended to vindicate: truth, autonomy, or democracy. This limited freedom from other people's speech can be broken down further into three sub-categories. Prohibitions against obscenity, fraud, and certain kinds of commercial advertising and political campaigning protect a limited *freedom from deceptive or manipulative speech*. Prohibitions against defamation, identity theft, false light, and invasions of privacy safeguard a limited *freedom not to be spoken about*. Prohibitions against intentional infliction of emotional distress, true threats, extortion, stalking, and harassment enforce a limited *freedom not to be spoken to*.

What undergirds these sub-categories is a recognition that some forms of *less* valuable speech silence other forms of *more* valuable speech. Numerous studies have illustrated how racist and sexist abuse, for example, causes psychological effects such as social anxiety, fear, and diminished confidence³⁰; physiological effects such as increased heart rate and stress³¹; and in some cases, jeopardizes the physical safety of the targets and their loved ones.³² These outcomes lead those targeted with abusive speech to self-censor to avoid negative effects,³³ to withdraw from political and civic participation,³⁴ and to abandon employment and educational opportunities.³⁵

communication more likely to deceive the public than to inform it, commercial speech related to illegal activity . . .”).

28. See, e.g., *Freedom of Speech and True Threats*, 25 HARV. J.L. & PUB. POL'Y 283, 288 (2001) (noting that “the Supreme Court has made clear that true threats are punishable”).

29. See, e.g., Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Saliency*, 117 HARV. L. REV. 1765, 1783–84 (2004); David A. Logan, *Tort Law and the Central Meaning of the First Amendment*, 51 U. PITT. L. REV. 493, 495 (1990).

30. *Amnesty Reveals Alarming Impact of Online Abuse Against Women*, AMNESTY INT'L (Nov. 20, 2017), <https://www.amnesty.org/en/latest/news/2017/11/amnesty-reveals-alarming-impact-of-online-abuse-against-women/> [<https://perma.cc/977D-VQMM>].

31. See, e.g., Rae Ellen Bichell, *Scientists Start to Tease Out the Subtler Ways Racism Hurts Health*, NPR (Nov. 11, 2017), <https://www.npr.org/sections/health-shots/2017/11/11/562623815/scientists-start-to-tease-out-the-subtler-ways-racism-hurts-health/> [<https://perma.cc/4NMG-MK16>].

32. See Amnesty report, *supra* note 30.

33. See, e.g., Chloe Nurik, “Men Are Scum”: *Self-Regulation, Hate Speech, and Gender-Based Censorship on Facebook*, 13 INT'L J. COMM'N 2878, 2878–98 (2019).

34. See generally MONA LENA KROOK, *VIOLENCE AGAINST WOMEN IN POLITICS* (2020).

35. See, e.g., Mary Anne Franks, “*Revenge Porn*” Reform: *A View from the Front Lines*, 69 FLA. L. REV. 1251, 1285 (2017).

The fetishization of remedies such as counterspeech ignores how responding to harmful speech is a form of compelled labor (and/or speech) that depletes time, effort, and energy from other speech activities and undermines the freedom against compelled speech. The valorization of counterspeech also ignores the problem of what I have, in previous work, referred to as “unanswerable” speech, that is, speech that is resistant to the remedy of counterspeech.³⁶ For example, disclosures of private information, such as nude photos or home addresses, endanger and harm individuals in ways that cannot be “answered” with counterspeech.

Where intimidation and abuse of historically vulnerable groups is rampant, a “more speech” approach reinforces anti-democratic tendencies.³⁷ The chilling effect of harmful speech is not limited to the individuals who are targeted for abuse, but also impoverishes wider public discourse. Social media forums, for example, have become influential spaces for democratic deliberation, so if “women, people of color, and LGB[TQ+] internet users are shying away from contributing because of well-founded fears of retaliation, their voices will be missing from this important civic sphere.”³⁸ The absence of underrepresented voices undermines democracy. For example, Danielle Keats Citron argues: “An online discourse which systematically under-represents people—particularly women and people of color—cannot effectively process our various attitudes and convert them into truly democratic decisions.”³⁹

Freedom from speech that interferes with truth, autonomy, or democracy should be as robustly protected as freedom of speech, not least because the former is so often a necessary precondition for the latter. A 2017 study found that restricting certain forms of harmful speech results in an increase of other kinds of speech, especially speech by vulnerable groups. The study’s author, Jon Penney, found that laws criminalizing online harassment and stalking “may actually facilitate and encourage more speech, expression, and sharing by those who are most often the targets of online harassment: women.”⁴⁰ When women “feel less likely to be attacked or harassed,” they are more “willing to share, speak, and engage

36. See Mary Anne Franks, *The Free Speech Black Hole: Can the Internet Escape the Gravitational Pull of the First Amendment?*, KNIGHT FIRST AMEND. INST. (Aug. 21, 2019), <https://knighcolumbia.org/content/the-free-speech-black-hole-can-the-internet-escape-the-gravitational-pull-of-the-first-amendment> [<https://perma.cc/8DR6-JPXJ>].

37. Mary Anne Franks & Ari Ezra Waldman, *Sex, Lies, and Videotape: Deep Fakes and Free Speech Delusions*, 78 MD. L. REV. 892, 893 (2019) (“To do nothing about harmful speech in the digital age is far from liberal nonintervention; rather, it is a normative choice that perpetuates the power of entrenched majorities against vulnerable minorities.”).

38. Alice Marwick, *A New Study Suggests Online Harassment Is Pressuring Women and Minorities to Self-Censor*, QUARTZ (Nov. 24, 2016), <https://qz.com/844319/a-new-study-suggests-online-harassment-is-persuading-women-and-minorities-to-self-censor/> [<https://perma.cc/E5B4-TZWJ>].

39. Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 105 (2009).

40. Jon Penney, *Can Cyber Harassment Laws Encourage Online Speech?*, BERKMAN KLEIN CTR. (Aug. 15, 2017), <https://medium.com/berkman-klein-center/can-cyber-harassment-laws-encourage-online-speech-4e1ae884bfb3> [<https://perma.cc/WP49-G9TJ>].

online.”⁴¹ Knowing that there are laws in place prohibiting harassment “may actually lead to more speech, expression, and sharing online among adult women online, not less.”⁴² Penney and Citron eloquently describe this phenomenon as “when law frees us to speak.”⁴³ When the law defends the freedom from speech, it frees the most vulnerable among us—and all of us when we are at our most vulnerable—to speak.

41. *Id.*

42. *Id.*; see also Anita Bernstein, *Abuse and Harassment Diminish Free Speech*, 35 PACE L. REV. 1 (2014).

43. Jon Penney & Danielle Keats Citron, *When Law Frees Us to Speak*, 87 FORDHAM L. REV. 2317 (2019).