Comparative Constitutional Law

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22. The comparative constitutional law of freedom of expression

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Freedom of expression is among the most widely protected of constitutional rights. Rights of freedom of expression can be found in constitutions drawn from all continents: throughout western Europe as well as in the constitutions of the new democracies of Eastern Europe, in constitutions in Asia, South America, Africa and Australasia (Barendt 2005; Krotoszynski 2006; Rishworth et al. 2003; Currie and de Waal 2005; Stone 2005).

Even in those few democracies without comprehensive constitutional protection of rights, freedom of expression finds constitutional protection in other ways. It can plausibly be argued that parliamentary systems like the United Kingdom and New Zealand – even in the era before the adoption of charters of rights – recognized a constitutional principle of freedom of expression that, though not enforceable by judicial review, was understood as a fundamental value that informed the reading of statutes and the common law (Barendt 2005, p. 40; Rishworth et al. 2003, p. 308). In addition, there are some legal systems that recognize a judicially enforceable principle of freedom of expression despite the absence of a written constitutional right. The Australian Constitution contains no textual provision that protects freedom of expression but the Australian courts have recognized an unwritten principle of freedom of 'political communication' as a necessary incident of the establishment of democratic government (Stone 2005). A somewhat similar development has occurred in Israel where the Supreme Court has derived a principle of freedom of expression from the rather textually sparse provisions of Israel's Basic Law (Navot 2007, p. 234).

1 FUNDAMENTAL ELEMENTS OF FREEDOM OF EXPRESSION RIGHTS

1.1 Constitutional Text

There is some variation among the constitutions of the world in the nomination of 'speech', 'expression' and 'communication' as the subjects of constitutional protection. The Canadian Charter of Rights and Freedoms (Article 2(b)), like the Constitution of the Republic of South Africa (Article 16), refers to 'expression'; the Constitution of India protects 'freedom of speech and expression' (Article 19(a)); the Bill of Rights Ordinance of Hong Kong refers to 'freedom of opinion and expression'; and the Constitution of Japan (in the translation provided by the Ministry of Justice) refers to 'speech, press and all other forms of expression'.

There are other textual variations as well. Most commonly, these provisions are expressed as a declaration that everybody holds a certain right. For instance, the International Covenant on Civil and Political Rights provides that 'everyone shall have the right to freedom of

expression'. The form of the First Amendment to the Constitution of the United States, which is expressed as a limitation on government ('Congress shall make no law ... abridging the freedom of speech') is much less common.

Freedom of expression guarantees are often accompanied by related guarantees, though these too vary somewhat. The United States' First Amendment also protects freedom of religion (in its non-establishment and free exercise clauses), freedom of the press and rights of assembly and petition. The Canadian Charter's protection of expression is found in the second paragraph of Article 2 which, in other paragraphs, protects freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association. Other constitutions (including the South African Constitution in Section 16(c) and the German Basic Law in Article 5(1)) explicitly protect artistic and academic freedom.

These textual details are no doubt important in some contexts, but as will become apparent, there are more significant points of convergence and divergence among rights of freedom of expression and the law derived from them. Therefore this chapter will focus, first, on the conceptual structure of rights of freedom of expression and, second, upon the substantive conceptions of 'freedom of expression'.

1.2 The Structure of a Freedom of Expression Principle

1.2.1 Coverage and protection

A guarantee of freedom of expression, like other rights, has two conceptually distinct elements: 'coverage', which refers to the acts or things to which the principle applies, and 'protection', which refers to the weight of the principle or the level of protection that the right covers on those acts or things (Schauer 1982, p. 91).

The concept of 'speech' or 'expression' Determining the 'coverage' of a right of freedom of expression requires a conception of 'expression' or 'speech'. It is fairly obvious that a right of freedom of expression extends to speaking and writing, and freedom of expression rights, including those framed as rights of 'freedom of speech', routinely apply to non-linguistic means of communication as well. In addition, some non-linguistic communication is commonly recognized as the functional equivalent of 'speech' or 'expression'. Thus, there is little doubt that communication through Morse code, Braille or sign language constitutes expression for these purposes (Schauer 1982, p. 96; Greenawalt 1989, p. 52). It is also well accepted that artistic expression, even where it does not involve linguistic utterances, should be covered by a principle of freedom of expression (Greenawalt 1989, p. 55. For prominent cases treating art as 'expression' or 'speech' see *Vereinigung Bildender Kunstler v Austria* (68354/01) (25 January 2007) (European Court of Human Rights); *National Endowment for the Arts v Finley* 534 US 569 (1998) (United States Supreme Court)).

Further, it is generally recognized that much 'ordinary' conduct is expressive and therefore covered by freedom of expression principles. The United States Supreme Court has led the way, extending the coverage of the First Amendment to activities such as burning a draft card (*United States v O'Brien* 391 US 367 (1968)), flag burning (*Texas v Johnson* 491 US 397 (1989); *United States v Eichman* 496 US 310 (1990)), the wearing of a black armband (*Tinker v Des Moines School District* 393 US 503 (1969) and the display of a swastika (*Skokie v National Socialist Party of America*, 373 NE 2d 21 (1978)). The United States

Supreme Court has also recognized that sexually explicit conduct, such as nude dancing, may be expressive conduct within the coverage of the First Amendment (*Barnes v Glen Theatres* 501 US 560 (1991)).

The proposition that expressive conduct is covered by constitutional principles of freedom of expression is widely accepted in other countries. Flag desecration is recognized as expression in Germany (see *Flag Desecration Case* (1990) 81 BVerfGE 278 (Federal Constitutional Court of Germany); Hong Kong (*HKSAR v Ng Kung Siu* [2001] 1 HKC 117 (Hong Kong Court of Final Appeal)); New Zealand (*Hopkinson v Police* [2004] 3 NZLR704 (High Court of New Zealand); *The Queen v Iti* [2007] NZCA 119 (New Zealand Court of Appeal)) and the United Kingdom (*Percy v DPP* [2002] Crim LR 835).

A New Zealand court has also recognized the display of a swastika as expression within the New Zealand Bill of Rights (*Zdrahal v Wellington City Council* [1995] 1 NZLR 700); the Canadian Supreme Court has extended the coverage of Section 2(b) of the Charter to picketing (*RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573); and the Australian High Court has extended the coverage of constitutionally protected communication to a public demonstration involving holding up dead ducks in front of television cameras to protest against duck hunting (*Levy v Victoria* (1997) 189 CLR 579).

Moreover, some constitutional provisions provide specific guidance as to the kinds of expression covered by a right of freedom of expression. Section 16 of the South African Constitution protects freedom of expression in its first subsection and in Section 16(2) explicitly excludes from its coverage 'propaganda for war', 'incitement of imminent violence' and 'advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm'. A provision of this nature can be read simply as a 'carve-out', creating exceptions to the coverage without indicating anything about the nature of freedom of expression covered by the first part of the section. Alternatively, the nature of the 'carve-out' may be taken as informing the values underlying freedom of expression generally and thus may inform the freedom of expression provision as a whole. Section 16(2) appears to have been read in the latter way. These forms of expression are excluded because they threaten 'the dignity of others' and thus their exclusion gives effect to the principle of 'dignity, equal worth and freedom' on which the Constitution of South Africa is founded (*Islamic Unity Convention v Independent Broadcasting Authority* (2002) 4 SA 294 (Constitutional Court of South Africa) para. 10).

At its edges, however, determining the coverage of freedom of expression poses some difficulties. Virtually all conduct can convey a message and even if coverage is limited to activity *intended* to convey a message, the concept is still so broad that it risks merging the principle of freedom of expression with a general principle of liberty (Schauer 1982, pp. 92–4). For this reason, Frederick Schauer argues that the coverage of a principle of freedom of expression is best determined by reference to the underlying rationales for the principle (Schauer 1989, p 91. On rationales for freedom of expression see Section 2 of this chapter). This analysis explains why some undoubtedly communicative activity – violent terrorism for instance or political assassination – is unlikely to be considered expression within the coverage of a constitutional principle of freedom of expression (Barendt 2005, pp. 79–80) and non-violent expression within the context of criminal activity – the expression involved in the committing of conspiracy or fraud for instance – may be excluded as well (as appears to be the case under the First Amendment (Greenawalt 1995, p. 19)).

However, the place of criminal activity within a system of freedom of expression is not

entirely clear (see the extensive treatment in Greenawalt 1989). Even in the United States, with its long history of constitutional protection of speech, the courts have not fully and explicitly addressed the question, though it appears that courts work on the assumption that much ordinary criminal activity is excluded from the coverage of the First Amendment (Greenawalt 1995, p. 19; and on the related question of 'crime facilitating speech', Volokh 2005). The Canadian Supreme Court, by contrast, has extended the coverage of Section 2(b) of the Charter to *all non-violent action intended to convey meaning* including, somewhat controversially (see Greenawalt 1995, p. 19) illegal solicitation (*Reference re ss. 193 and 195.1(1)(C) of the Criminal Code (Man.)*, [1990] 1 SCR 1123).

Limitations on expression Determining 'coverage' is only the first step in resolving a question about the application of a right of freedom of expression. Expression that is covered by a right can nonetheless be limited in the name of competing rights or interests. So while flag desecration is recognized as 'expression' or 'speech' in the United States, Germany and Hong Kong, courts in those countries have reached quite different conclusions on the permissibility of flag desecration laws. In the United States, the challenged flag desecration laws have been ruled invalid, while in Hong Kong flag desecration laws were upheld as a protection of the public order. In Germany, though the Constitutional Court ruled invalid the law challenged in the *Flag Desecration Case*, it seems clear that the Constitutional Court recognizes a state interest in preventing flag desecration and might be prepared to accept a flag desecration law in some circumstances (Quint 1992; Barendt 2005, p. 85).

Often a constitution's text explicitly limits freedom of expression. Qualifications sometimes appear in the same provision that protects the right. For instance, Article 5 of Germany's Basic Law provides in its second paragraph that 'These rights find their limits in the rules of the general law, the statutory provisions for the protection of youth and the right to personal honor'. Article 10 of the European Convention on Human Rights, which is incorporated by the Human Rights Act 1998 (UK), provides in its second paragraph that:

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Alternatively, some constitutions include a general limitation applicable to all, or most, rights in a constitution. Section 1 of the Canadian Charter provides that the rights it protects are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. This section provided the principal model for Section 36 of the Constitution of South Africa (Currie and de Waal 2005, p. 165).

But, significantly, courts treat freedom of expression rights as limited even where limitations are not expressed in the text. The unwritten constitutional principles found in Australian and Israeli constitutional law are subject to limitation (Stone 1999; Navot 2007, p. 234). Even the United States' First Amendment, despite confusion created by its apparently absolute terms, is subject to judicially developed limitations. A truly 'absolutist' interpretation of the First Amendment's protection of expression pursuant to which 'speech' is immune from all regulation has never been advanced by a member of the Supreme Court. (Despite Justice

Hugo Black's well-known declaration that 'I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly', *Konigsberg*, 366 US 36, 61 (1961), he in fact held that view only in relation to a class of free speech cases (see Kalven 1967, pp. 442–3).) Indeed, constitutional rights of freedom of expression are universally limited and thus all constitutional systems must address the question of how, and in what circumstances, freedom of expression can be restricted.

1.3 Doctrinal Structure: Categories and Balancing

Although all constitutions limit freedom of expression rights, there are some significant methodological differences as to how these limitations are drawn. One point frequently made in the comparative literature on freedom of expression is that the American doctrine of the First Amendment is characterized by a 'conceptual' or 'categorical' approach, according to which freedom of expression law is dominated by relatively inflexible rules, each with application to a defined category of circumstances.

The dominant alternative approach – found in various forms throughout European jurisdictions, Canada and South Africa – is to use a 'proportionality' test which requires an examination of the 'end' pursued by the law and the 'means' used to pursue it, and which explicitly authorizes 'balancing' (Schauer 2005a; Stone 1999; Grimm 2007; Jackson 1999). The Canadian formulation of the test requires that a law infringing upon freedom of expression (or any other Charter right) may nonetheless be valid provided that it serves a 'pressing and substantial objective' and uses means that are 'reasonably and demonstrably justified'. The second requirement in turn requires that the law be 'rationally connected' to that objective; 'minimally impair' the protected right; and that there be 'a proportionality' between the restrictions imposed and the objective pursued (*R v Oakes* [1986] 1 SCR 103).

There is a large literature debating the competing merits of these two approaches. Early encounters in this debate occurred among scholars of the First Amendment, as over the course of the second part of the 20th century, the Supreme Court of the United States replaced a relatively flexible test which allowed for a measure of balancing competing rights and interests in the context of the case of itself with the categorical approach that now dominates American law (Frantz 1963). More recent literature has returned to the debate in the context of comparative constitutional law (Stone 1999; Schauer 2005a; Mount 2003).

To summarize a complex literature, proportionality tests are valued for their capacity to structure judicial inquiry and to provide a transparent account of judicial reasoning. In addition, the advantage of proportionality tests is said to lie in their flexibility, which allows courts more latitude to respond to the circumstances of individual cases and to unforeseen complexities. Where a court adopts a relatively determinate rule, that rule might prove to be highly inconvenient, or even erroneous, in later cases, which may provide a significant problem, especially where rules are enforced by lower courts. The intellectual modesty of the flexible approach might be thought to be especially valuable given the complexity of free speech questions (Stone 1999).

By the same token, the advantages of the categorical approach are said to lie in the formulation of rules that give judges comparatively little flexibility but correspondingly more certainty in their application. This approach thus responds to a conception of the rule of law that values an identifiable set of rules on which citizens can rely to guide their behavior (Stone 1999). In addition, a doctrine consisting of defined and relatively inflexible rules is

said to insulate the judge in any particular instance from political pressures relating to that case. A judge can appeal to a pre-determined rule rather than justify, in its own terms, the decision to protect expression over a competing right or interest – a matter thought especially significant in relation to freedom of expression (Nimmer 1968, p. 945; Ely 1980, pp. 109–116).

For the moment First Amendment law (which is dominated by categories and rules) is highly unusual in comparative terms (Gardbaum 2008, pp. 422–3; Schauer 2005a). Frederick Schauer has argued, however, that this aspect of the First Amendment's 'exceptionalism' may be temporary. The categorization of First Amendment law at least partly reflects the age of the American constitutional tradition of freedom of expression and he expects that constitutional courts outside the United States will 'develop the encrustations of doctrines, rules, caveats, qualifications, maxims, principles, exceptions, and presumptions that any mature set of legal or constitutional rights will over time develop' (Schauer 2005a, p. 56).

While a degree of convergence may be a feature of the relationship between (comparatively flexible) legal standards like proportionality and (comparatively inflexible) legal rules (Schauer 2003), there are reasons to question whether the difference in these approaches will entirely disappear. The preference of First Amendment law for defined rules reflects the high value placed on freedom of expression in American constitutional law (Nimmer 1968; Ely 1980). Other systems – which may accord different weight to freedom of expression – may be correspondingly less inclined towards the 'rulification' of doctrine and may value the flexibility of this approach for its own sake. There is some evidence of this in Canadian law. For instance, the Supreme Court of Canada has said:

> The analysis under s. 1 of the Charter must be undertaken with close attention to context. This is inevitable as the test devised in *R. v Oakes* [1986] 1 S.C.R. 103, requires a court to establish the objective of the impugned provision, which can only be accomplished by canvassing the nature of the social problem it addresses. Similarly, the proportionality of the means used to fulfil the pressing and substantial objective can only be evaluated through a close attention to detail and factual setting. In essence, *context is the indispensable handmaiden* to the proper characterization of the objective of the impugned provision, to determining whether that objective is justified, and to weighing whether the means used are sufficiently closely related to the valid objective so as to justify an infringement of a Charter right. (*Thomson Newspapers Co. v Canada (AG)* [1998] 1 SCR 877 at para. 87 (emphasis added). For similar statements see *R v Sharpe* [2001] 1 SCR 45, McLachlin CJ, paras 32, 155).

If, as these cases suggest, the flexibility of the proportionality test is valued for its own sake rather than as a staging point in the development of a more rulified approach, some resistance to 'rulification' may be expected (see Choudhry 2006).[1]

1.4 The Application of Freedom of Expression Guarantees

Positive and negative application A final set of structural considerations relates to the application, or scope, of a right of freedom of expression. Conceptually, like other rights, rights of freedom of expression might be 'positive', entitling the rights holder to demand that enjoyment of right be ensured, or 'negative', protecting the rights holder only from interference. Although the drawing of this distinction is much criticized (Sunstein 2006, p. 207), it remains significant in the constitutional law of freedom of expression. In the United States and other countries of the common law world, constitutional rights are thought to have an

exclusively negative cast. So, for instance, the High Court of Australia was quickly able to dismiss a claim that the Australian constitutional right to freedom of political communication entitled a candidate in a national election to media coverage (*McClure v Australian Electoral Commission* [1999] HCA 31).

Scholars of constitutional law in these countries have not been blind to the argument that, under a negative conception of rights, meaningful enjoyment of that right might be frustrated by inadequacies or inequality in the private distribution of resources. The insight that the capacity of citizens to engage in political discourse depends upon the private allocation of resources and thus can easily be dominated by those whose wealth allows them access to the means of communication is the foundation of arguments for the regulation of political campaigning. However, the argument, as it is usually put, is that the problem of private inequity provides a reason to consider campaign finance laws to be consistent with a right of freedom of expression, rather than that a right of freedom of expression founds a positive right of access to effective means of expression (Sunstein 1995, pp. 93–101; Fiss 1996, pp. 15–26).

In many countries, however, there is no general reticence about positive constitutional rights and some constitutions guarantee 'duties of protection' explicitly, while in other cases courts have developed them. In the freedom of expression context, the German doctrine is especially notable. An important early case recognized that Article 5 of the Basic Law imposed a duty on the state to ensure that broadcasters maintain 'balance, objectivity and reciprocal respect' in programming (*Television I Case* (1961) 12 BVerfGE 205; Kommers 1997, pp. 404–06) and this case is now seen as an important stage in the development of a more general duty to protect which gives the civil and political rights of the German Basic Law a positive cast (Grimm 2005, pp. 144–6).

Horizontal and vertical application The scope of constitutional rights of freedom of expression is also affected by their classification along another axis. Like other constitutional rights, they can be classified as 'vertical' rights (rights against the state) or 'horizontal' rights (rights that apply to private actors). The verticalist position to constitutional rights is usually taken to be exemplified by the United States, while an overtly horizontal position is adopted in Ireland pursuant to the Irish Constitution (Gardbaum 2003). In addition, a third model of the relation between constitutional rights and private action is found in slightly different forms in Canada, Germany and Australia, which have adopted a conception of 'indirect horizontal application' of the constitution to private actors. On this conception, a constitution enters the private sphere by affecting the development of the private law.

Freedom of expression cases have figured especially prominently in the development of this third position. In a foundational case in German constitutional law (*Lüth* (1958) 7 BVerfGE 198; Kommers 1997, pp. 361–8), the Federal Constitutional Court overturned an injunction against the boycott of a film on free speech grounds, finding that the lower court failed to apply the German civil code with sufficient regard for the 'influence' of the constitutional law on private law.

The position in Australia is, in effect, similar, though the question in that jurisdiction has been how the Constitution affects the judge-made common law (rather than, as in Germany, a private civil code). When considering the relationship between the Australian constitutional right of 'freedom of political communication' and the common law of defamation (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520), the Australian High Court's

approach was to develop the common law so that it conformed to the constitutional protection of political communication.

A similar result was reached in Canada. The Canadian Supreme Court first addressed the relationship between the common law and its *Charter* in *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573 in which, in a decision that predates the Australian case law on this question, it recognized that those manning a picket line were protected from the private law of trespass by virtue of the operation of Section 2(b) of the Charter. As in Australia, the Canadian position (recently confirmed in *Grant v Torstar Corporation* 2009 SCC 61 and *Cusson v Quan* 2009 SCC 62), is that the constitutional rights inform the development of the common law of Canada. But, in an apparently distinctive twist, the Canadian position is that the common law must be consistent with 'Charter values' rather than the Charter itself.

Although these systems apparently adopt a different conception of the relationship between constitutional rights and private law from the 'verticalist' position adopted under the United States Constitution, in practice these positions may be functionally equivalent. A robust state action doctrine – which recognizes for instance that 'state action' is present where private law is invoked in a dispute between private parties – can achieve much the same result as a doctrine of indirect horizontal effect (Tushnet 2003). Thus, despite its 'vertical' conception of the First Amendment, the Supreme Court of the United States had no difficulty in finding that the common law of defamation was subject to the First Amendment free speech clause (*New York Times v Sullivan* 376 US 254 (1964)).

Indeed, Stephen Gardbaum argues that the German and United States' approaches to the relationship between constitutional rights and the private law is in substance identical: in both countries, all law, public and private, is subject to the Constitution (Gardbaum 2003, p. 421). The Australian law seems much the same on this point: although the Australian Constitution applies indirectly to private individuals (in the sense that it does not grant entitlements or impose obligations upon them), the Constitution's effect on the common law is strong and direct. The common law must conform to the Constitution and those developments are immune from subsequent legislative alternation (Stone 2002).

For these reasons, Stephen Gardbaum has concluded that while the direct horizontal application of constitutional rights remains a conceptually distinct approach to the scope of constitutional rights, the 'opposing' positions are better conceived as points along a spectrum of possible positions on the scope of constitutional rights (Gardbaum 2003, pp. 434–5).

2 COMPARATIVE CONCEPTIONS OF FREEDOM OF EXPRESSION

These structural issues arise when considering freedom of expression as a question of law. But structural questions – as much as any other question about freedom of expression – reflect underlying substantive values about freedom of expression and rights in general. Indeed, the philosophy of freedom of expression lies just beneath the surface of the constitutional law of freedom of expression.

2.1 Philosophical Foundations of Freedom of Expression

In an extensive philosophical literature on freedom of expression, three especially prominent lines of argument have emerged: the first values freedom of expression for its capacity to

promote the search for 'truth'; the second values freedom of expression for its relationship to human autonomy and the third values freedom of expression for its capacity to promote democratic government or 'self-government' (Schauer 1982, pp. 15–72).

The argument from truth finds its most important statement in liberal political theory in J.S. Mill's *On Liberty*. Mill's argument for freedom of expression is founded on a belief in the fallibility of human judgement. Freedom of expression, by subjecting received wisdom to contradiction, exposes falsehoods and produces a proper understanding of the truth. Another important statement of the idea is found in United States Supreme Court Justice Oliver Wendell Holmes' famous dissent in *Abrams v United States* ('the best test of truth is the power of the thought to get itself accepted in the competition of the market': 250 US 616 (1919)).

The argument from autonomy values freedom of expression on the grounds that freedom of expression protects (or is integral to) individual autonomy because it allows individuals to form their own opinions about their beliefs and actions (Scanlon 1972). Relatedly, freedom of expression might be protected because it is integral to 'self-realization' – a version of the argument which values the relationship between freedom of expression and self-development (Emerson 1963; Redish 1982) – or because by respecting freedom of expression, we treat an individual with the equal concern and respect due to independent moral actors (Dworkin 1996, pp. 200–1).

Thirdly, the argument from democracy, perhaps the most widely adopted in modern legal systems, proceeds from the basic proposition that the capacity for citizens to hold their governments to account and to effectively exercise the power to choose their governments depends upon a free flow of information about government (Ely 1980). One influential form of this argument, advanced by Alexander Meiklejohn, draws an analogy between public discourse and the traditional New England 'town hall meeting', an analogy that allows for some regulation of expression to ensure the fair and orderly conduct of public debate.

This last argument gives rise to the problematic task of defining a category of 'political expression' (see discussion in Bork 1971; BeVier 1982; Stone 2002), but some forms of the argument from democracy seek to provide a justification for a right of freedom of expression which is not so limited. Alexander Meiklejohn focused upon the role of freedom of expression in developing 'the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express' and thus cast the net of 'political expression' very widely (Meiklejohn 1961, p. 255).

These ideas are only the main lines of thought that can be found in a large and varied literature. There are also important arguments for freedom of expression that turn on a mistrust of government, either because government is thought to be inherently self-interested or even corrupt or because of a belief that the fallibility of government officials provides a reason to mistrust government's capacity to regulate expression even when acting in good faith (Schauer 1989). Alongside these run more general arguments about the utility of suppression of expression which in some cases at least is thought to be ineffective or even counterproductive (think of the publicity given to films or books subject to censorship or to the holocaust denier who becomes a 'free speech martyr' when prosecuted) (Schauer 1982, pp. 75–7). Intimately related to the question 'why protect freedom of the expression?' is the question 'why and to what extent can freedom of expression be limited?' The Millian idea that freedom of expression can be limited only where it caused 'harm' to others is central to liberal political theory of freedom of expression (Mill 1978, p. 9), but it has opened a large debate about the nature of the harms that expression can cause.

2.2 Freedom of Expression Values in Constitutional Systems

Many of these philosophical debates have taken place with a keen awareness of, and are sometimes explicitly conducted in terms of, constitutional disputes about freedom of expression. In the United States, legal theories of freedom of expression have often been developed in the course of analyses of the law of the First Amendment. These include arguments that the First Amendment in particular, and freedom of expression in general, promotes or builds the capacity for 'tolerance' (Bollinger 1988); that it prevents state 'paternalism' and promotes 'civic courage' (Blasi 1988b); that it nurtures healthy challenges to the status quo (Shiffrin 1990); that it exposes abuse of power and corruption (Blasi 1988a) and that it provides a 'safety valve' by preventing the inflexibility and stultification associated with suppression while at the same time encouraging those who lose in the political process to accept decisions that go against them (Emerson 1969, p. 7).

Courts have also been influenced by the philosophical literature, sometimes explicitly. The Supreme Court of Canada, for instance, has acknowledged the three principal arguments for freedom of expression (the arguments from truth, autonomy and democratic self-government) ground the Canadian Charter's protection of freedom of expression (*Irwin Toy v Quebec* (1989) 1 SCR 927, 976). Indeed, as a general matter, freedom of expression has proved a fertile ground for cross-fertilization between the disciplines of law and political philosophy (Campbell 1995, pp. 207–09).

The ideas that emerge from this philosophical literature have been important in comparative analysis as well. In addition to the large literature examining freedom of expression in any given system, there is a small but growing comparative literature, much of which focuses upon distilling differences in value or motivating commitments as between constitutional systems. This literature includes some 'whole country' comparative studies which compare the law of freedom of expression in one country with others (Greenawalt 1995; Krotoszynski 2006; Barendt 2005; Cram 2006). For instance, in a significant study of freedom of expression in major democracies, Ronald Krotoszynski traces distinctive features of the constitutional law of freedom of expression, noting that the distinctive American commitment to a 'market' philosophy of freedom of expression and a strong distrust of government provides expression with especially strong protection against government regulation. He contrasts this approach with the dominance of 'dignity' as the preferred constitutional value in Germany, the Canadian emphasis on equality and multiculturalism and, in Japan, the dominance of a 'Meiklejohnian' conception of democratic self-government, each of which allows for considerably more regulation of expression (Krotozynski 2006). In addition, there are many comparative analyses that focus upon one or two controversies that have confronted courts in a number of countries: flag burning (Quint 1992), hate speech (Rosenfeld 2003), the regulation of political campaigns and advertising (Dawood 2006) and the law of defamation (Stone and Williams 2000).

Supplementing (and no doubt encouraging) the scholarly interest in comparative analysis of freedom of expression is comparative analysis by judges. Although the United States Supreme Court has generally been uninterested in foreign law on freedom of expression (Alford 2008, p. 4), there is considerable international judicial dialogue among other countries, at least in common law countries and related constitutional systems. The Israeli Supreme Court's important freedom of expression decision in *Bakri v Film Censorship Board* [2003] HCJ 314/03, for instance, cites cases from Australia and the United Kingdom as well as key First Amendment decisions.

A particularly vivid illustration of international judicial dialogue is provided by the widespread consideration of the United States Supreme Court's decision in *New York Times v Sullivan* (1964) 376 US 254 by courts in the common law world. Courts in Australia, Canada, India, Israel, New Zealand, South Africa and the United Kingdom have all considered *New York Times v Sullivan* in the course of determining their own rules regarding freedom of expression and the law of defamation (Stone and Williams 2000; Barak 1988, p. 243). (Indeed, neatly making Vicki Jackson's point that comparativism need not be 'convergent' (Jackson 2005), these courts have to varying degrees rejected or at least modified the *New York Times v Sullivan* rules.) Over time, the judicial conversation has broadened to include other common law countries so that in the Canadian Supreme Court's most recent decision on the issue, it considered decisions of courts from Australia, New Zealand and the United Kingdom, as well as *New York Times v Sullivan* and other American cases (*Grant v Torstar Corporation* (2009) SCC 61).

However, as with any comparison across constitutional systems, the task of comparing freedom of expression principles is fraught with the dangers of misunderstanding.

To begin with, identifying the value or set of values underlying any single constitutional system of freedom of expression is likely to be difficult. At the most fundamental level, the philosophy of freedom of expression itself is complex and contested. Indeed, the relationship between even the main strands of argument just stated is subject to multiple interpretation. Frederick Schauer casts Justice Holmes' 'market' of ideas argument, often advanced as an argument from truth, as an argument from democratic government: freedom of expression reflects a distrust of government, and while government neutrality as between ideas might not produce the ideal outcome of freedom of expression questions, it is better than the distortion produced by government self-interest, bias or incompetence (Schauer 1982, pp. 33–4). Robert Post has recast arguments from autonomy in a similar way. His argument is that freedom of expression gives individuals a sense of participation in the processes of government and a sense of legitimacy and identification with the government, which he takes to be an element of the 'internal logic of self-government' (Post 1993). Philosophers of freedom of expression also differ greatly as to how their fundamental commitments resolve specific problems. Ronald Dworkin, from the liberal premise that individuals are worthy of equal concern and respect, makes an argument against censorship of pornography, while Rae Langton derives the opposite conclusion from the same starting point (Dworkin 1985; Langton 1993).

Further, the sheer complexity of the problems posed by a guarantee of freedom of expression makes it unlikely that a single 'theory' or 'set of values' might be appropriate for the entire range of freedom of expression problems (Schauer 1982; Greenawalt 1989, pp. 13–15; Shiffrin 1983, pp. 1197–8). Any body of law derived from a guarantee of freedom of expression is, therefore, grounded in an amalgam of ideas and any given system of freedom of expression might be fully explained only by reference to a series of ideas or sets of values running in conjunction. In the light of all these features, and because of inevitable disagreement about the meaning of rights (Waldron 2000, pp. 227–8), there will almost certainly be disagreement about the meaning of freedom of expression within any given tradition.

Moreover, the task of divining how these arguments are reflected in the constitutional law of even one system is complicated by the nature of judicial decision-making. At least in the systems reviewed in this chapter, the constitutional law of freedom of expression is produced in the distinctive institutional context of courts engaged in the practical task of judging. The obvious constraints on courts (which include limited time, the need to produce agreement in

a multi-member institution and changes in personnel over time) make it unlikely that a court will, or will want to, produce a clear, comprehensive statement of underlying philosophy or motivating values. Nor are judicial decisions themselves likely to acknowledge that there are competing understandings of freedom of expression. On the contrary, the institutional practice of courts is to present an interpretation of a right of freedom of expression as a *correct* interpretation rather than as a choice between contested visions.

Distilling the underlying philosophy or motivating commitments of any body of law on freedom of expression of law thus has inherent difficulties. Comparative analysis complicates the task further. As with other aspects of constitutional law, freedom of expression principles are deeply affected by the cultural, legal and political context of the constitutional system in which they arise. So for instance, the place of 'dignity' within the German constitutional system (overtly declared by the Federal Constitutional Court as the pre-eminent value within an 'objective order of values' established by the Basic Law) is traced to a cultural emphasis on personal 'honor' (Whitman 2000). The special sensitivity of German law toward holocaust denial and more generally toward expression aimed at undermining democracy is readily traceable to the history of the Third Reich (Grimm 2009).

The Canadian approach to pornography and hate speech which, at least compared to the United States, is considerably more restrictive of expression, is often explained as demonstrating a distinctive commitment to equal democratic participation and multiculturalism (Mahoney 1992; Hogg 2004, pp. 954, 962; Weinrib 1991, pp. 1429–30). The Canadian commitment to these values equally responds to some important features of Canadian constitutionalism. Canada has faced the challenges of cultural diversity in an especially stark manner and thus the Canadian Charter reveals a strong commitment to their resolution through the recognition of group language and education rights.

Precisely because the conception of freedom of expression is deeply embedded in the surrounding legal and political culture, it is not easily accessible to a foreign lawyer. Moreover, for the institutional reasons already discussed, judicial decisions will usually be couched primarily in legal terms: as a discussion of the constitutional text, previous cases and other legal principles. The salient structural, cultural and political influences on the decision are likely to be unmentioned and may even be unacknowledged. It is easy therefore for comparativists to overlook important differences as between constitutional systems or to overlook the extent to which ideas about freedom of expression are contested within a given system.

For instance, the common casting of Canadian free speech law as showing a distinctive commitment to equality is often made by way of a comparison with First Amendment law, which is cast as exhibiting a preference for liberty over equality (Mahoney 1992). But simply stated, the comparison overlooks the extent to which the relationship between freedom of expression and equality is contested (Weinstein 1999). Some defend First Amendment approaches to hate speech on the basis that a highly protective free speech principle actually serves the equality interests of minorities (Weinstein 1999, p. 118). Put in general terms, the argument is that equality requires strong limitations on governmental powers of censorship to protect the most vulnerable (Strossen 1996; Amar 1992, pp. 154–5). It has also been argued that a strong free speech principle like the First Amendment can promote the tolerance required for effective multiculturalism (Bollinger 1988; Post 1997).

There are, of course, difficult questions as to which of these accounts are right. To many, the First Amendment faith that equality and cultural diversity will fare best in an open contest

of ideas seems nothing like as strong as the Canadian commitment to limiting speech in the interest of these values. The point here is not to enter into that debate but to show how the simple invocation of equality and multicultural diversity as an explanation of the difference fails to capture the whole story.

The difficulties posed by comparativism are especially acute when it is courts engaging in the comparative analysis. Courts have special limitations. They will often lack the time and institutional resources to engage in the deep comparative study required to locate foreign law of freedom of expression in its full context and to canvass critical analyses and alternative positions. But at the same time, the stakes of comparative analysis in the courts are especially high. Though courts may not necessarily seek to bring their own systems into line with others, courts will typically refer to foreign law as a source of guidance. There is a risk therefore that a superficial comparativism may lead to some hasty adoption of foreign law without a full appreciation of alternatives. (For an argument that some of the High Court of Australia's early decisions displayed uncritical over-enthusiasm for the law of the First Amendment, see Stone 1999.)

3 CONCLUSION: COMPARATIVISM AND FREEDOM OF EXPRESSION

These difficulties have led some scholars to question whether comparing free speech principles across constitutional systems is practical or useful for courts interpreting or applying constitutional principles of freedom of expression (Alford 2008). This critique is an instance of a wider critique of comparativism in the courts. The complexity of (and disagreement about) underlying philosophical commitments, the opacity of judicial decision-making, and cultural specificity of any particular body of law, though formidable problems for the comparativists, are raised as squarely by other constitutional rights and indeed by the structural elements of a constitution as well (Stone 2008).

And, to sound a by now familiar note, the case for comparativism may differ from context to context. It is strongest in relation to a constitution that explicitly signals the membership of a state in some broader community of states or a commitment to internationally shared values (such as the Constitution of South Africa, which requires courts to consider international law and explicitly authorizes the consideration of foreign law, or the New Zealand Bill of Rights, which 'affirms' a commitment to the International Covenant on Civil and Political Rights), as between constitutions that bear a historical relationship to each other (Choudhry 1999) and in relation to new constitutions, or new guarantees of freedom of expression, where courts are facing freedom of expression cases without many legal resources. The case for comparativism may be weaker in relation to constitutional principles that have developed their own rich set of resources and a distinctive conception of freedom of expression.

This latter description fits the First Amendment most neatly – it is the oldest judicially interpreted free speech provision and has produced a rich and substantively distinctive body of case law (Gardbaum 2008; Schauer 2005b) – and may partly explain the United States Supreme Court's resistance to comparativism. Moreover, this attitude is not entirely unique to that Court. It is notable, for instance, that the Federal Constitutional Court of Germany has not been much influenced by foreign law (Jackson 2010, pp. 34–5). But, outside of such contexts, the case for comparativism is much stronger. It is not surprising, then, that consti-

tutional comparativism in freedom of expression cases, as well as in other areas, is certainly very widespread (Jackson 2010, pp. 40–41, 43–5, 73–7).

In any event, this critique goes only to one use of comparative analysis in constitutional law: the use of foreign law as an interpretive resource. There remain of course many other circumstances in which comparative inquiry may be useful. Constitutional design is one obvious instance. Comparative inquiry will also be required in cases that do not involve the straightforward application of freedom of expression principles. For instance, courts may consider foreign law on freedom of expression under choice of law rules where expression originating in one jurisdiction causes or is alleged to cause harm in other jurisdictions or when questions arise as to the enforceability of foreign judgments. (Issues of this nature were raised in *Dow Jones v Gutnick*[2] and in litigation between Yahoo! Inc and the French organization La Ligue Contre Le Racism et L'Antisemitism.[3]) Cases of this kind are likely to become more common as interactions across national borders increase (Jackson 2010, pp. 278–9). In the context of freedom of expression, the increasing ease of trans-jurisdictional communication enabled by the internet seems especially significant.

Comparativism in one context or another is, therefore, an almost inevitable element of constitutional analysis in all legal systems. This fact poses a challenge for constitutionalists to which scholars are well placed to respond. Successful comparativism within the field of freedom of expression, as elsewhere, requires a rather deep and critical engagement with foreign law that encompasses critical legal and philosophical literature on freedom of expression as well as case law. There is thus an increasing need for a research 'infrastructure' of informed, critical and widely comparative studies of freedom of expression that can support this task.

NOTES

1. Thanks are due to Simon Evans for helping me develop this argument.
2. *Dow Jones v Gutnick* (2001) 210 CLR 575 (High Court of Australia) (considering whether Australian law or American law governed a defamation action brought by an Australian resident against a United States corporation in relation to material which could be downloaded in Australia but uploaded onto the World Wide Web in the United States).
3. 169 F. Supp 2d 1181 (ND Cal 2001) (refusing to enforce a French court's decision because to do so would be inconsistent with the First Amendment); rev'd 379 F. 3d 1120 (9th Cir. 2004); re-heard *en banc* 433 F. 3d 1199 (9th Cir. 2006) (the members of the Court disagreed as to whether the French court's decision was inconsistent with the First Amendment and dismissed the action for other reasons).

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