WHY FREEDOM OF EXPRESSION IS BETTER PROTECTED IN EUROPE THAN IN THE UNITED STATES

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Legal reflection on non-governmental restrictions on free speech runs two risks: the danger of exaggerating these restrictions, and the danger of ignoring them. Non-governmental restrictions are often exaggerated in public discussion, when any vehement criticism is described as a restriction of freedom of expression. However, freedom of expression is not freedom from contradiction. The second danger is to ignore the problem of genuine non-governmental restrictions on free speech through a strict application of the state action doctrine: non-governmental restrictions would simply not be a constitutional issue. The European perspective rejects this view. Where many Americans view free speech as a regulation of governmental motives, Europeans are more attentive to practical outcomes. For a speaker, it might not make a big difference whether an act of censorship comes from the government or from a private actor.

Nevertheless, Europeans also perceive the Constitution primarily as a framework dealing with governmental powers, and the most frequent approach consists in indirectly imposing on private persons the constitutional obligation to respect freedom of expression. This reasoning considers that the government is involved in private restrictions, which are reconceptualized as "GONG restrictions" (government organized non-governmental restrictions). In the end, the European speaker, less protected than her American counterpart against the government, enjoys a greater protection against private actors. This might mean that freedom of expression is better protected in Europe than in the United States.

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Introduction

The exceptional nature of free-speech protection in the United States is well known. Compared to the rest of the world, and in particular to European systems, American constitutional law restricts much more tightly the government's ability to limit expression.[1] This doctrine, however, leads to serious difficulties in grappling with the restrictions that non-governmental actors can impose on freedom of expression. This article examines these difficulties by confronting them with the solutions brought to the problem of non-governmental (or "private") restrictions on free speech in Europe, and more particularly in France and Germany.

My point can be summed up in one sentence: Thinking properly about non-governmental restrictions requires not seeing them everywhere, and recognizing that the government is never far away. In the first part, I try to identify the non-governmental restrictions, pointing out two excesses that can distort this undertaking: seeing too much of them or missing them. In the second part, I examine how the reduced protection against European governmental restrictions on freedom of expression allows for better protection against non-governmental restrictions.

I. Identifying Private Restrictions

Legal reflection on non-governmental restrictions on free speech runs two risks. The danger of exaggerating these restrictions exists both in Europe and the United States, whereas the danger of ignoring them is uniquely American.

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[1] *See, e.g.*, Frederick Schauer, *The Exceptional First Amendment*, *in* American Exceptionalism and Human Rights 29–56 (Michel Ignatieff ed., 2005).

A. Exaggerating Private Restrictions

To begin with, non-governmental restrictions are often exaggerated in public discussion, when any vehement criticism is described as a restriction on freedom of expression. In France, this thesis is expressed by a slogan: "*On ne peut plus rien dire*" ("We can't say anything anymore"[2]). The target of this complaint is not an act of governmental or even private censorship. What this thesis actually aims at is the fact that certain remarks give rise to lively and numerous criticisms.

Therein lies the major confusion that leads to the erroneous idea that freedom of expression is tending to disappear. An increase in criticism is presented as a decrease in freedom of expression. The same idea was expressed in a widely commented-upon piece by the editorial board of the *New York Times* that lamented that Americans were losing their "right to speak their minds and voice their opinions in public without fear of being shamed or shunned."[3] But freedom of expression is not freedom from contradiction. It does not entail a right not to be harshly criticized for what one said. Even very harsh criticism (such as labelling someone a "fascist" or—as is the new trend in the French public debate—an "islamo-leftist"[4]) does not amount to an infringement on freedom of expression.

A common argument in the United States seeks to broaden the concept of non-governmental restriction by insisting that certain statements may have the effect of "silencing" groups of people. Anyone who suspects that a certain remark will earn her insults may hesitate to speak up and end up remaining silent. The frequency and extent of negative and virulent reactions can therefore have a chilling effect on freedom of expression.

The deleterious effects of this hostility in public debate should not be underestimated. But aren't we mistaking the target by presenting it as an attack on freedom of expression? The finest versions of this argument have long been developed by American authors hostile to the classic reading of the First Amendment. Pornography or hate speech, they argue, would deter women and targeted minorities from speaking out, and would make their voices less audible. In short, the expression of

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[2] *See* Daniel Schneidermann, *"On ne Peut plus Rien Dire," une Expression Passée au Crible*, LIBERATION (Nov. 17, 2019).

[3] Editorial, *America Has a Free Speech Problem*, N.Y. TIMES (Mar. 18, 2022).

[4] *See* PIERRE-ANDRE TAGUIEFF, LIAISONS DANGEREUSES: ISLAMO-NAZISME, ISLAMO-GAUCHISME (2021).

some would reduce others to silence.[5]

This reasoning did not lead to the desired legal reforms, but it is nonetheless clever in a system like that of the United States, where the harms caused by the exercise of free speech hardly justify a restriction.[6] The idea is to consider the problem as an internal conflict within freedom of expression: It is indeed to preserve the freedom of some that it is necessary to limit the freedom of others.

This type of thinking has flourished less in Europe for the simple reason that it is unnecessary there. To make speech subject to regulation, it is sufficient to say that some expressions cause psychological harms (call it an infringement of "dignity," "personal honor," "reputation," etc.), that they threaten equality, or that they give rise to some abstract risk of violence. The most obvious example is of course the criminalization of hate speech. But one can also point out the case of insulting remarks, including against political figures. Such figures must endure more, but they are not deprived of any protection against insults. In a recent German case, a court of appeals had ruled that a political figure could not obtain compensation for having been called a "*Sondermüll*," a "*Stück Scheisse*," or even a "*Drecks Fotze*."[7] The Constitutional Court reversed this decision, and concluded that even political figures are protected against heavy insults. For the Constitutional Court, there are limits to the virulence of the criticism that even political figures must accept. Some insults go too far and justify giving priority to the protection of "personality" over that of expression.[8]

But one should insist that these restrictions are not justified by an effort to protect freedom of expression. Nor in Europe is there a right to speak without fear of being shamed or shunned. There is not even a right to not be shamed and shunned, but only a right to not be insulted. Insults might violate a right to honor or

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[5] For a classic exposition of this argument, see CATHARINE MACKINNON, ONLY WORDS (1996). *See also* Rae Langton, *Subordination, Silence, and Pornography's Authority*, *in* CENSORSHIP AND SILENCING: PRACTICES OF CULTURAL REGULATIONS 261–83 (Robert Post ed., 1998). Against the "silencing argument," see James Weinstein, *Viewpoint Discrimination, Hate Speech, and Political Legitimacy: A Reply*, 32 CONST. COMMENT. 715, 757–71 (2017).

[6] *See* Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 ETHICS 635, 652 (1993).

[7] The curious, non-German-speaking reader will have no trouble finding a translation on the internet.

[8] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Dec. 19, 2021, 1 BvR 1073/20 (Ger.).

reputation, but they do not infringe the freedom of expression. In the French debates about freedom of expression, it is commonplace to use a quote attributed to Voltaire (although he probably never put it this way): "I don't agree with your ideas, but I will fight for you to have the right to defend them." However, a normal speaker will also try to dissuade an opponent from repeating his ideas, even if he has the right to speak them. We do not contradict the words of another in the hope that he will reiterate them, but in the hope that he will modify them or remain silent. As Thomas Healy rightly writes, "[A]ll counterspeech has at least some chilling effect . . . . Whenever we challenge an opinion by showing that it is poorly reasoned, leads to undesirable results, or is motivated by bigotry or ignorance, we make it less comfortable for speakers to express that opinion in the future."[9]

Any guarantee of freedom of expression must therefore accept a certain amount of deterrence, self-censorship, and the triumph of certain ideas over others that become difficult to express. Total protection of everyone's ability to speak without fear of any unpleasant reaction would result in a collapse of freedom of expression. The communist could not defend his ideas so as not to inhibit the capitalist, who would have to keep silent so as not to dissuade the communist. That cannot be what freedom of expression is about.

Of course, there is still a difference between a well-argued contradiction and an avalanche of insults. The relevant distinction, however, is not the chilling effect on expression. It is forbidden, under French law, to undermine the honor or consideration of an individual,[10] to insult him,[11] to threaten him with death,[12] to provoke hatred, violence or discrimination,[13] but not to discourage others from expressing themselves by criticizing, even harshly, their positions.

A threshold is crossed when the effort aims no longer at intimidating a speaker by criticizing his positions, but instead at preventing him from speaking. It is

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[9] Thomas Healy, *Who's Afraid of Free Speech?*, KNIGHT FIRST AMEND. INST. (July 14, 2017), https://perma.cc/DPL9-3Q8M. See also Thomas Healy, *Social Sanctions on Speech*, 2 J. FREE SPEECH L. 21, 27 (2022).

[10] Loi 1881-206 du 29 juillet 1881 sur la liberté de la presse [Law 1881-206 of July 29, 1881 on the freedom of the press], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], July 29, 1881, p. 4201.

[11] *Id.*

[12] Code pénal [C. pén.] [Criminal code] art. 222–17 (Fr.).

[13] Law 1881-206 of July 29, 1881 on the Freedom of the Press, J.O., July 29, 1881, p. 4201.

nevertheless important to preserve the particularity of these veritable acts of private censorship. We tend to blur the distinction by denouncing at all costs a "cancel culture" with ill-defined contours. Criticizing even sharply the positions of an individual, calling him a fascist, a racist, or something else, calling for a boycott or the cancellation of his conference do not constitute restrictions of freedom of expression but exercises of this right. They may possibly violate laws that prohibit insult or defamation, but judges will often consider this type of qualification to be part of a free debate on matters of public interest.

A conflict between two associations in France shows it very well. *La Manif pour Tous*, an association created to oppose same-sex marriage, sued *Act-up*, an old association created to fight AIDS. *La Manif pour Tous* reproached *Act-up* for stickers that described it as "homophobic." But as the Court of Cassation explained: "The use of this qualifier . . . was part of the debate of general interest on the law authorizing the marriage of same-sex couples, to which the association bringing the case was strongly opposed, while the association chaired by the defendant had militated in its favor." Therefore, the use of the word "homophobic" was "a free opinion on the action and the positions taken by the association, it did not exceed the limits of freedom of expression."[14]

Above all, to come back more precisely to my point, such invectives can in no way be considered reprehensible on the sole ground that they intimidate others by strongly attacking their positions. Criticizing an individual does not mean "cancelling" him, "erasing" him, or making him disappear. The *Lüth* judgment, one of the most famous judgments handed down by the German Constitutional Court, demonstrates this very well.[15] In 1950, the Nazi filmmaker Veit Harlan, creator in particular of the propaganda film *Jud Süss*, returned to theaters after being acquitted by the jury during a post-war trial. Journalist Erich Lüth called for a boycott of Harlan's new feature film, *Unsterbliche Geliebte*. The film's production company obtained a court injunction that prohibited Lüth from repeating his remarks, but the Constitutional Court rejected this solution in the name of freedom of expression.

These facts, which correspond in all respects to what many denounce today as

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[14] French Court of Cassation, January 23, 2018, no. 16-87.545.

[15] BVerfG, Jan. 15, 1958, 7 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 198 (Ger.).

the "cancel culture," have therefore given rise to a founding ruling on the guarantee of freedom of expression. Erich Lüth called on cinemas not to show a work, he encouraged the public not to go to screenings, but he in no way interfered with the showing of Harlan's film. True censorship only occurs when one individual effectively prevents another from speaking. To such a case I will return later. For now, my point is that a non-governmental restriction on free speech is not present simply because someone strongly disagrees with me. The threats towards free speech should not be overstated. They do exist, however, and should not be overlooked either.

B. Ignoring Private Restrictions

A second danger is to ignore the problem of genuine non-governmental restrictions on free speech through a strict application of the state action doctrine. This position does not deny the existence of acts of private censorship, but refuses to see them as implicating freedom of expression. According to this view, non-governmental restrictions would simply not be a constitutional issue. They would affect "free speech values," but not the First Amendment.[16] This view, widely shared in the United States, seems to be rejected in Europe, for two main reasons.

First, there is an obvious inverse correlation between the strength of a right and its breadth—i.e., the set of behaviors it covers. All the American intricacies surrounding the question of whether or not certain expressive behavior is speech within the meaning of the Constitution can be explained by the difficulty of regulating conduct that is protected by the First Amendment: "Once the First Amendment shows up, much of the game is over."[17] Things are very different in European systems, where the application of freedom of expression gives no indication of the outcome of the dispute. For example, holding that Article 10 of the European Convention on Human Rights—which protects freedom of expression—applies to conduct simply means that the State will only be allowed to restrict it under the conditions provided by the second paragraph of Article 10:

> 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,

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[16] *See, e.g.*, Erica Goldberg, *Competing Free Speech Values in an Age of Protest*, 39 CARDOZO L. REV. 2163, 2164 (2018).

[17] Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1767 (2004).

> 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.[18]

As one can see, applying the guarantee of freedom of expression leaves broad possibilities for restrictions. A State can argue that obscenity is a kind of "protected" expression, but that its regulation is necessary to protect "morals" or the "rights of others." There is no need to argue that it is not "expression" in the sense of the Convention. For the very same reason, the idea that the guarantee of freedom of expression plays a role against private actors is not viewed with the same concern in Europe as in the United States. Applying the First Amendment to private parties would mean that they could hardly restrict speech. In Europe, applying the constitutional guarantee of freedom of expression would constrain private actors, but it would nevertheless leave them with wide power to restrict speech.

It is tempting to offer a second explanation for the less-strong conception of the state action doctrine in Europe. This explanation is not so much based on a legal analysis as on sociological intuitions. Where many Americans view the guarantee of free speech as a regulation of governmental motives,[19] Europeans are more attentive to practical outcomes. In an illuminating essay, Erica Goldberg defends a "formalist" conception of state action, based on the idea that "the state's abridgement of free speech is necessarily worse than a private party's chilling of speech."[20] Therefore, the government should be prohibited from intervening against private restrictions, in order to maintain its neutrality towards viewpoints.[21]

It seems to me that such a position is less usual in Europe. To be sure, Europeans also see freedom of expression—or, for that matter, constitutional rights in general—as a guarantee against the State.[22] But many authors pay greater attention

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[18] Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Sept. 3, 1953, 213 U.N.T.S. 222.

[19] Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413 (1996).

[20] Goldberg, *supra* note 16, at 2183.

[21] *Id.* at 2185. *See also* Gregory Magarian, *The Jurisprudence of Colliding First Amendment Interests: From the Dead End of Neutrality to the Open Road of Participation-Enhancing Review*, 83 NOTRE DAME L. REV. 185, 233 (2007).

[22] See, for instance, in France, LOUIS FAVOREU ET AL., DROIT DES LIBERTÉS FONDAMENTALES 1

to the factual conditions for exercising liberties. From this point of view, it might not make a great difference for the speaker whether an act of censorship comes from the government or from a private actor. As French scholar Jean Rivero wrote: "He who would escape the arbitrariness of the government only to fall under the domination of private powers would only change servitude."[23]

To use a distinction usually applied to the principle of equality, one can take into account the *real* freedom of expression, and not only the *formal* freedom of expression. A famous quote by French writer Anatole France illustrates this point. It was recently cited in an English translation by Justice Alito in a concurring opinion: "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[24] Well it seems that for some American scholars and judges, the First Amendment (or more precisely the Free Speech Clause) allows the rich as well as the poor to run a political ad.

This difference in attitude obviously has consequences for the law. Where *Citizens United v. FEC* rejects any state intervention regardless of the consequences of such a decision,[25] the French Constitution orders the legislator to intervene in order to guarantee "the pluralistic expression of opinions" and "pluralism . . . of the media."[26] More generally, some legal reasonings have been developed in favor of a constitutional guarantee of freedom of expression against private restrictions.

II. REGULATING PRIVATE RESTRICTIONS

This interest in "real" freedom of expression, and the resulting weakening of a formal state action doctrine, can be contemplated in two ways. First, one can ask whether the constitutional guarantee of freedom of expression can—or should—be applied directly against private censors. Second, and more often, the protection against non-governmental restrictions can appear indirectly through the government's entanglement with a private restriction.

(8th ed. 2021), and in Germany, THORSTEN KINGREEN & RALF POSCHER, GRUNDRECHTE § 45 (33d ed. 2017).

[23] Jean Rivero, *La protection des droits de l'homme dans les rapports entre personnes privées*, *in* 3 RENE CASSIN, AMICORUM DISCIPULORUMQUE LIBER 312 (1971).

[24] Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2274 (2020) (Alito, J., concurring).

[25] 558 U.S. 310 (2010).

[26] 1958 CONST. 4, 34 (Fr.).

A. Direct Constitutional Protection Against Private Restrictions

We generally consider the Constitution as a set of norms addressed to public authorities. But nothing prevents us from considering, when the constitutional text allows it, that a provision also imposes obligations on individuals. For example, it is established that the Thirteenth Amendment to the United States Constitution prohibits slavery perpetrated by anyone, whether a government or a private person.[27] Such a conclusion is more difficult with regard to the First Amendment, which is explicitly addressed to "Congress." In France, on the other hand, the constitutional guarantee of freedom of expression can perfectly be read as directly establishing protection both against the government and against private entities. According to Article 11 of the 1789 Declaration of the Rights of Man and of the Citizen, which is part of the French Constitution, "the free communication of ideas and of opinions is one of the most precious rights of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by Law." This can mean that neither the government nor private power is allowed to restrict unduly freedom of expression.

A major difference nevertheless remains between the two cases: The individual who is required to respect freedom of expression remains nonetheless the holder of rights guaranteed by the Constitution—what Europeans often call "fundamental rights." For this reason, the imposition of respect for fundamental rights on individuals does not have the effect of putting them in the same position as the government. The prohibition of private discrimination, for example, does not imply that a child cannot choose who to invite to his birthday party.[28] Constitutional protection against private restrictions on free speech does not imply that a newspaper is prohibited from choosing which op-ed it publishes. Simply, rather than focusing on "vertical," governmental intervention alone, the "horizontal" conception of freedom of expression takes into account the various interests involved and leads to confronting the freedom of expression of one with the fundamental rights of the other.

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[27] Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359, 1359–60 (1992).

[28] Against such arguments, see Charles L. Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69, 100–01 (1967).

In recent cases, the German Federal Constitutional Court indicated that the result of such a weighing might lead in certain circumstances to impose on some private actors obligations that are close or even similar to the obligations that apply to the government. This might be the case, explained the Court, when a private person controls the conditions for the exercise of a right.[29] One constitutional judge gives the example of the postal service: "The secrecy of correspondence," he writes, "cannot be considered less strict with regard to private operators than it was in the past for the traditional post office, still in the hands of the State."[30]

The Court first sent signals in this direction in the *Fraport* judgment, a case dealing with Frankfurt airport, which is owned and operated by a private company owned for the most part by public entities.[31] An individual wishing to protest against the deportation of aliens was notified by the company of a ban on demonstrating within the airport. This measure was confirmed by the courts applying the right to property. The Constitutional Court disagreed. It examined the case as a "classic" litigation in terms of fundamental rights: the company was assimilated to a public entity, and was therefore the recipient of the obligations to respect the freedom of assembly and the freedom of expression of the applicant. As Judge Masing, who belonged to the chamber which delivered the *Fraport* judgment, writes: "The government cannot transform itself into a private person and exchange its obligation to respect public freedoms for the right to enjoy them."[32] The prohibition to demonstrate was therefore a restriction of fundamental rights by a public person, subject to the conditions provided for by the Constitution.

The Court explains that the freedom of assembly implies the choice of the location of a demonstration, but that it does not give a right of access to all places. Places which are not open to the public, or to which access is reserved for certain

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[29] BVerfG, Feb. 22, 2011, 128 BVerfGE 226 (Ger.).

[30] Johannes Masing, *Droits Fondamentaux et Privatisations. Une Perspective Allemande*, 9 JUS POLITICUM 1, 18 (2013).

[31] 128 BVerfGE 226 (Ger.).

[32] Masing, *supra* note 30, at 10. This might recall to the American reader a recent dissenting opinion by Justice Sotomayor: "The First Amendment does not fall silent simply because a government hands off the administration of its constitutional duties to a private actor." Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1941 (2019) (Sotomayor, J., dissenting). I will return to the *Halleck* case in a few paragraphs.

uses, are thus excluded from its scope of application.[33] (The Court gives as examples hospitals and public swimming pools.) Such reasoning is familiar to American judges. As the Supreme Court of the United States put it: "The First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[34] Otherwise, "public hospitals, libraries, office buildings, military compounds, and other public facilities immediately would become Hyde Parks open to every would-be pamphleteer and politician."[35]

On the other hand, explains the German Constitutional Court in a way that is still reminiscent of American doctrine, freedom of assembly requires access to places "open to general public traffic,"[36] i.e., obviously public roads, but also other places that fulfill a similar function, such as shopping malls. To determine whether a particular place constitutes such a "public space of communication," a "public forum,"[37] it is necessary to examine whether it serves as a support for "a multitude of different activities and undertakings, which leads to the appearance of a varied and open communication network," or, more simply, if it is a "space for strolling," a "meeting place," open to various and in particular communicative uses.[38]

The concept of a "public forum" first arose with respect to public roads, in order to affirm that their normal use was not limited to movement but included the communication of ideas.[39] In the *Fraport* judgment, the German Constitutional Court underlines that the same reasoning can be applied to other places, since these communicative uses are not limited to public roads. However, by following the same functional approach, it becomes possible to identify private properties that serve as public forums. This did not escape the Court, which pointed out in an *obiter dictum* that its decision would not necessarily have been different if the

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[33] 128 BVerfGE 226, 251 (Ger.).

[34] U.S.P.S. v. Council of Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981).

[35] Lehman v. City of Shaker Heights, 418 U.S. 298, 304 (1974).

[36] 128 BVerfGE 226, 251 (Ger.) ("dort, wo ein allgemeiner öffentlicher Verkehr eröffnet ist").

[37] *Id.* at 253. Here, the Court cites a case from the Supreme Court of Canada and the U.S. case International Society for Krishna Consciousness v. Lee, 505 U.S. 672 (1992).

[38] 128 BVerfGE 226, 253 (Ger.).

[39] *See* Harry Kalven, *The Concept of the Public Forum:* Cox v. Louisiana, 1965 SUP. CT. REV. 1, 12.

owner of the premises had been a "real" private person.[40]

The question took four years to come back to the Court by means of an application for interim measures, which therefore did not give rise to a decision on the merits but indicated a solution similar to that evoked in the *Fraport* judgment. The Nibelungenplatz in Passau is located at the end of a pedestrian zone, opposite the bus station, and is surrounded by cafes, shops, and a cinema. It looks like an ordinary public square, but belongs to a private company which decided to prohibit the consumption of alcohol there. A demonstration against the privatization of public space was announced on this square. Entitled "*Bierdosen-Flashmob für die Freiheit*" (beer can flashmob for freedom), it was to consist of gathering and, at the signal ("For freedom, bottoms up!"), drinking a can of beer as quickly as possible, then listening to a short speech. The organizer received from the company a ban on entering the square at the time scheduled for the demonstration. He unsuccessfully appealed to the courts and then went before the Constitutional Court, which rendered its decision in due time.[41]

The Court followed the line drawn in the *Fraport* judgment. The company's right of property, it explained, must be reconciled with the freedom of the demonstrators. Indeed, public forums under private ownership are not excluded from the scope of freedom of assembly: "Today, the communication function of public streets and squares is increasingly supplemented by additional forums such as commercial centers and passages, or squares created and managed by private investors as places for strolling, shopping and leisure. Therefore, the freedom of assembly cannot be excluded from the surfaces which, in these facilities, are open to the public." This freedom could therefore be invoked in this case, since the Nibelungenplatz, "though it is private property, is open to public traffic and constitutes a space for strolling and meeting which corresponds to the model of a public forum."[42]

Therefore, the Court had to consider both the property rights of the company and freedom of demonstration. The result of this analysis, repeats the Court, citing the *Fraport* judgment, may lead to the imposition on private persons of obligations that are similar or identical to those of the government, especially when they find

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[40] 128 BVerfGE 226, 249 (Ger.).

[41] BVerfG, July 18, 2015, 1 BvQ 25/15 (Ger.), https://perma.cc/5RY4-ULWR.

[42] *Id.* at § 5.

themselves in a position that was traditionally occupied by the State.[43] In the context of an emergency procedure, the Court explained that it could not precisely fix the line between the right of property and the freedom to demonstrate in a public forum under private ownership. It was content to compare the respective disadvantages of the possible decisions, and remarked that the prohibition of the demonstration weighed much more heavily than the very temporary restriction on the property rights of the company. The "beer flashmob" could thus take place.

These German decisions show that privately owned public spaces (POPS) can be the subject of the same regime as "genuine"—i.e., publicly owned—public forums. Their private owners could be subjected to the same obligations as a governmental authority. This is the kind of conclusion that can be reached if one looks at the concrete conditions for the exercise of rights, rather than adopting an exclusive focus on governmental motives. In the past, the Supreme Court adopted this reasoning in *Marsh v. Alabama*, a case dealing with a privately owned city. It decided to "balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion"[44] and found that the corporation could not abridge the liberty of press and religion of the inhabitants: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it."[45] As Justice Marshall observed when he defended this precedent years later, the *Marsh* case focused on the real conditions for the exercise of rights: The Court, he observed, noted "that the stifling effect produced by any ban on free expression in a community's central business district was the same whether the ban was imposed by public or private owners."[46]

However, the Court has departed from this position. Its transposition to a shopping center, described as the "functional equivalent" of a private city,[47] was abandoned after a few years.[48] Since then, the question has arisen again. In *Packingham*

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[43] *Id.* at § 6; 128 BVerfGE 226, 248 (Ger.).

[44] Marsh v. Alabama, 326 U.S. 501, 509 (1946).

[45] *Id.* at 506.

[46] Lloyd Corp., Ltd. v. Tanner, 407 U.S. 551 (1972).

[47] Food Emps. v. Logan Valley Plaza, 391 U.S. 308, 318 (1968).

[48] Hudgens v. NLRB, 424 U.S. 507 (1976).

v. North Carolina,[49] the Court explained that social networks such as Facebook or Twitter are today the crucial place for the exchange of ideas, that they are the "modern public square."[50] This reasoning could lead to the assumption that the managers of these networks should respect freedom of expression. More recently, however, the Supreme Court has pointed in another direction. In *Manhattan Community Access v. Halleck*, it ruled that the First Amendment only applied to private persons when they performed a function traditionally exercised exclusively by the government[51]—and, according to the Court, that is not the case with the management of a place for public discussion. Where that place is privately owned, the First Amendment therefore does not protect the speaker against the owner, nor does it deprive the owner of the right to choose what expressions may be held on its property. The real conditions for exercising freedom of expression are therefore ignored in favor of an exclusive concentration on state action doctrine.

B. Indirect Constitutional Protection Against Private Restrictions

Asking whether private actors have a direct obligation, under the Constitution, to respect the freedom of expression of their counterparts leads us to think about the underlying principles. Is the most important thing that individuals can express themselves, be it on spaces belonging to the State or to private persons—or is freedom of expression in a democracy first and foremost about countering governmental censorship? But in order to think about the question in a more legal way, we must return in any case to the State. Indeed, the government is always linked in one way or another to the private restriction of freedom of expression. For instance, the *Marsh v. Alabama* case was not only or even mainly about the conduct of the private company that owned the city. Legally speaking, the Court decided against "*the State's permitting* a corporation to govern a community of citizens so as to restrict their fundamental liberties and *the enforcement of such restraint by the application of a state statute*."[52]

Therefore, another way to look at the question is to ask not whether private actors have an obligation to respect freedom of expression, but whether the government has an obligation to impose on private actors the duty to respect freedom

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[49] 137 S. Ct. 1730 (2017).

[50] *Id.* at 1737.

[51] 139 S. Ct. 1921 (2019).

[52] Marsh v. Alabama, 326 U.S. 501, 509 (1946) (emphasis added).

of expression. This is a much more promising way of looking at the problem. According to this view, the Constitution does not directly speak to private actors, but it requires the government to prevent private restrictions on freedom of speech. In this way, the constitutional protection is indirectly imposed on private actors. This construction leads to ascribing some private restrictions to the government: It is seen as responsible for them because it took part in them or, at least, because it did not prevent them. The government is therefore involved in private restrictions, which are reconceptualized as "GONG restrictions" (government organized non-governmental restrictions). The question then arises of the degree to which governmental involvement is required for a private restriction to be perceived as a GONG restriction. It is possible to distinguish between three types of GONG restrictions: government-ordered restrictions, government-enforced restrictions, and government-tolerated restrictions.

Government-ordered restrictions are the most obvious cases. In such situations, the government orders private actors to restrict expression, as in recent European laws against hate speech online. In France, a law "aimed at combating hateful contents on the internet"[53] made it punishable for big social platforms to fail to remove certain illegal contents within 24 hours. When the government orders a private actor to restrict speech, it is not hard to find that it is involved in the resulting restriction.[54] This is why a system similar to the one developing in Europe is problematic in the United States. The governmental attempts to push social media to regulate certain types of speech are seen as an effort to "suppress by proxy,"[55] in contradiction to the classic application of the First Amendment.

A lesser degree of involvement corresponds to government-enforced restrictions, following the model of *Shelley v. Kraemer*.[56] In that case, the issue was whether judicial enforcement of a racist covenant between private landlords was a

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[53] Loi 2020-766 du 24 juin 2020 visant à lutter contre les contenus haineux sur internet [Law 2020-766 of June 24, 2020 aimed at combating hateful contents on the internet], J.O., June 25, 2020, p. 156.

[54] This portion of the law was ruled unconstitutional because it induces the platforms to suppress content when in doubt: the failure to remove illegal content was punished, where the removal of legal content was not. Constitutional Council, decision no. 2020-801 DC, June 18, 2020, § 19.

[55] Rachel E. Van Landingham, *Words We Fear: Burning Tweets & the Politics of Incitement*, 85 BROOK. L. REV. 37, 41 (2019).

[56] Shelley v. Kraemer, 334 U.S. 1 (1948).

violation of the Fourteenth Amendment. Clearly, the Court explained in *Shelley*, a governmental ordinance that would limit access to property based on the color of one's skin would violate the Fourteenth Amendment. Under the state action doctrine, especially as laid down in the *Civil Rights Cases*,[57] this provision does not apply to a private agreement.[58] However, the Fourteenth Amendment binds all state bodies, including the courts, and a judge can violate this amendment by enforcing a private agreement. Therein lies the essential input of *Shelley v. Kraemer*. In this case, the seller and the buyer were consenting, and the transfer of ownership would have taken place without the intervention of the judge. This was not one of those cases where the government had simply refrained from acting, failing to prevent discrimination between private persons. Here, the judge allowed the discrimination to be effective. Enforcing the racist contract was therefore "state action" that violated the Fourteenth Amendment.[59]

Expanding on this reasoning, one could argue that a police intervention to evict people demonstrating on private property is a governmental restriction on free speech. As one author puts it, "[P]roperty law is a form of state action. If the police arrest and remove a person from private land for attempting to demonstrate against the owner's wishes, the government is, in fact, acting in a way that restrains speech."[60] However, in the dominant American view, such a factual effect on speech is not unconstitutional if the motives of the government are not linked to suppression of speech based on content. The same author considers that enforcing property rights is a content-neutral activity that raises no First Amendment issues.[61] *Shelley v. Kraemer* and its progeny in the context of segregation are seen as an exception,[62] and the widespread view is that "First Amendment state action is not triggered when the government neutrally enforces background state laws unrelated to the suppression of expression, such as property and contract rights, even if this

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[57] 109 U.S. 3 (1883).

[58] *Shelley*, 334 U.S. at 13.

[59] *Id.* at 18–19.

[60] John Fee, *The Formal State Action Doctrine and Free Speech Analysis*, 83 N.C. L. REV. 569, 610 (2005).

[61] *Id.* at 612.

[62] M.G. Paulsen, *The Sit-In Cases of 1964: "But Answer Came There None"*, 1964 SUP. CT. REV. 137, 149; M.D. Rosen, *Was* Shelley v. Kraemer *Wrongly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 459–60 (2007).

enforcement incidentally impacts speech."[63]

In Europe, on the other hand, there is absolutely no difficulty in seeing each and every judicial intervention or any other governmental enforcement of the law as involving the government. French scholar Jean Rivero had clearly perceived the ease with which a dispute between two private persons could be transformed to involve the government: "From the moment when a conflict relating to the exercise of freedom in private relations is taken to the judge, the problem leaves the framework of these relations, and arises in the field of relations between individuals and public authority."[64]

But recognition of governmental involvement in restricting speech does not have the drastic consequences that are usually attributed to it in American law. A measure that restricts freedom of expression is not *per se* unconstitutional: The government must take into account the fundamental rights of both parties. The European reasoning resembles that which Larry Alexander advocates for American law: The recognition of the "ubiquity of state action" does not mean that any support for a private restriction of free speech is unconstitutional.[65]

Until now, we have seen two types of governmental entanglement with a private restriction, i.e., two ways of conceptualizing a GONG restriction: The government can require a private actor to restrict speech or it can enforce a private restriction. The most interesting problem touches upon a third situation, namely when the government does nothing. Is the abstention of the government sufficient to involve it? Or, to put it another way: Can state inaction constitute state action?

To acknowledge governmental involvement in such a case where it did nothing more than tolerate a private restriction, one has to consider that the government has not only a (negative) obligation not to excessively restrict speech, but also a (positive) obligation to protect freedom of expression. In French law, nothing prevents interpreting in this way Article 10 of the 1789 Declaration of the Rights of

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[63] Goldberg, *supra* note 16, at 2184.

[64] Rivero, *supra* note 23, at 320. For a similar argument in the American context, see H.W. Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208, 208–21 (1957).

[65] Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMMENT. 361, 365 (1993) ("the ubiquity of state action as a conceptual matter does not affect the content of constitutional rights and duties").

Man and of the Citizen, according to which "no one may be disturbed on account of his opinions, even religious ones, as long as the manifestation of such opinions does not interfere with the established Law and Order." This provision may imply an obligation for the State to protect the free expression of opinions against private restrictions. Many laws can then be read as an implementation of this obligation. The French labor code, for example, prohibits the employer from taking any unfavorable measure against an employee because of "her political opinions," her "union activities" or even her "religious convictions."[66] Another example is the right of reply, provided for in France in Article 13 of the law of July 29, 1881 on the freedom of the press, to which I will return in a moment.

But this obligation to protect freedom of expression is especially of interest in the event of governmental abstention. It implies that the inaction of the State in the face of a private restriction on freedom of expression constitutes a violation of the obligations imposed on it by the constitutional guarantee of freedom of expression. The heckler's veto problem thus becomes a case of a GONG restriction. Faced, for instance, with the heckling of a conference, the government violates freedom of expression if it gives victory to the hecklers by banning the conference, but also if it refrains from intervening to protect it.

We can thus take a new look at a classic case in French law, the *Benjamin* judgment rendered by the high court of administrative law in 1933.[67] René Benjamin was a far-right writer who traveled around France to speak at conferences on literary subjects. Violent demonstrations often occurred in front of the places where he was expected to speak. When a city mayor prohibited his conference to avoid violence, the high administrative court ruled that it had violated freedom of expression. The government must use its police force to avoid violence, while allowing people to express themselves (the demonstrators as well as the speaker). The only time the government has the right to prohibit the conference is when it has no other way to avoid violence—a condition that is rarely found, even nowadays in a context where the police are very much in demand in the face of terrorist threats.

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[66] This prohibition of discrimination at work dates from 1982 and is now provided for in Article L1132-1 of the Labor Code (*Code du Travail*). American law likewise generally bans employment discrimination based on union activities and religious beliefs, and in many states based on political opinions, *see* Eugene Volokh, *Private Employee's Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295 (2012).

[67] Council of State (Conseil d'État), May 19, 1933, *Benjamin*, no. 17413.

But we can also deduce from this judgment that if the State remained passive, it would violate not only its obligation to protect public order—i.e., to avoid violence—but also its duty to protect freedom of expression. These two interests are often complementary: A minimum of calm is necessary to be able to express oneself. As the Constitutional Council—more or less the French constitutional court—wrote, "the exercise of freedoms cannot be ensured" if public order is not safeguarded.[68] But public order and freedom of expression can also come into conflict. Thus, the refusal of the president of a university[69] to call the police to dislodge students who were occupying the premises could be considered legal if it was precisely the intervention of the police forces that would likely give rise to violence.[70] One could apply this reasoning to hecklers who prevent an individual from speaking, without being violent, but in a situation such that the intervention of the police would lead to violence. On the other hand, one can estimate that when hecklers can be pushed back without violence, the president of the university has the obligation to call the police. The obligation to protect freedom of expression requires the university to take the necessary measures to ensure that everyone is able to express themselves.

Regarding the heckler's veto in French law, it should be noted that the criminal law does prohibit particularly coercive heckling.[71] Article 431-1 of the Criminal Code punishes "the fact of hampering, in a concerted manner and with the aid of threats, the exercise of freedom of expression, work, association, assembly or of demonstration," and also, since 2016, "the exercise of the freedom of artistic creation." The penalty is more severe when the disturbers have resorted to violence or have damaged property.

These provisions seem to be rarely used, but the only recorded example of their being used involves a textbook example of the heckler's veto. In October 1996, far-

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[68] Constitutional Council (Conseil Constitutionnel), January 25, 1985, no. 85-187 DC § 3.

[69] In France, universities are public institutions.

[70] Administrative tribunal of Versailles, March 25, 2006, no. 062824; Administrative tribunal of Marseilles, March 24, 2006, no. 0601956; Administrative Tribunal of Paris, April 18, 2008, no. 1805992/9.

[71] California Penal Code has a statute that prohibits heckling that rises to the level of "disturbing" or "breaking up" an assembly. *See* CAL. PENAL CODE § 403; Eugene Volokh, *UC Irvine Students Convicted for Disrupting Speech*, VOLOKH CONSPIRACY (Sept. 23, 2011), https://perma.cc/5TNF-WPD7.

right politician Philippe de Villiers, then a member of the European Parliament, was to give a lecture at the Institute of Political Studies in Strasbourg. As he was about to speak, about fifteen people climbed onto the tables, threw eggs at him (which he dodged), chanted various slogans ("No to the Europe of fascism," "Down with the *calotte*, long live the *capote*"[72]) but also howled "We're going to kill you" and "You won't come out alive."[73] Pushes and fights ensued, and the politician left the scene under escort before he had said a word.[74] Several hecklers were sentenced on the basis of Article 431-1. As this example shows well, and as should be emphasized again, this offense of hampering freedom of expression does not target any expression of disagreement. In the absence of violence, the offense can only take place through threats. Criticism, mockery, and insults cannot constitute the offense provided for in Article 431-1 of the Criminal Code, even if they deter the exercise of freedom of expression by their scale and their systematic nature. As we have seen above, even in Europe, expression cannot be prohibited on the mere ground that it chills speech.

The fulfillment by the government of its positive obligation to protect freedom of expression thus does not undermine its negative obligations not to limit fundamental rights excessively. The European Court of Human Rights has, for example, ruled that States have a positive obligation to protect freedom of expression and thus to open the opportunity to exercise a right of reply. But the Court added immediately that this right did "not give private citizens or organizations an unfettered right of access to the media."[75] There must be certain limits on any such positive right in order to respect the rights of the other party—for instance, in French law, the right of reply is constrained by limitations on time, place of publication, length of text, and the like.[76] Therein lies the special feature of the guarantee of freedom of expression against private parties: The private censor also enjoys fundamental rights, so the horizontal protection of free speech creates the need to accommodate contradictory interests. Freedom of expression on one side may have to be

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[72] The *calotte* is the small cap worn by Catholic priests; "*capote*" is a colloquial designation for condoms.

[73] Court of Cassation (high civil court), June 22, 1999, no. 98-81.831.

[74] *Id.*

[75] Melnychuk v. Ukraine, Eur. Ct. H.R. (2005), § 2.

[76] *See* Art. 13, Law 1881-206 of July 29, 1881 on the Freedom of the Press, J.O., July 29, 1881, p. 4201.

reconciled with freedom of expression on the other side (like in the case of the right of reply), or with other interests, such as property rights.

Conclusion

American law often tries to avoid balancing contradicting interests. But this sort of "proportionality" constraint, common in Europe, can only be avoided by clinging to a blind conception that does not perceive that state inaction can, like state action and perhaps even more so, have devastating effects on the freedom of expression. To avoid balancing interests, one is forced to erase part of the equation—to ignore that the exercise of one's rights by a private actor can suppress the rights of another. It thus appears that the strong protection against governmental infringements on freedom of expression prevents action against private restrictions, since any intervention by the State in this direction is analyzed as a restriction on the freedom of expression of the private censor. The result, as Gregory Magarian observes, is that "[t]he Court's rigid application of the public-private distinction to expressive access disputes goes far beyond the laudable aim of protecting individuals' expressive integrity to shield powerful institutions' expressive resources against distributional challenges. The substantive effect is to favor established wisdom over unruly dissent."[77]

On the other hand, a more limited protection against governmental restrictions on expression, such as exists in Europe, allows action against private infringements. It is indeed permissible for the State to restrict the expression of one in order to protect that of the other. In the end, the European speaker, less protected than her American counterpart against the government, enjoys a greater protection against private actors. This difference can have major consequences for the actual exercise of freedom of expression, since private infringements tend to become more and more widespread and significant.

The defense of a blind and formal application of the state action doctrine, first defended in an abstract manner, sometimes appears to rest ultimately on an empirical argument: The fight against government restrictions is presented as the most important issue because private restrictions on freedom of expression would be less wide-ranging and less serious than those that come from the government. Facebook cannot criminalize speech, writes Erica Goldberg: "Its ability to abridge

[77] Magarian, *supra* note 21, at 236.

speech is limited to its own platform."[78] She reinforces her point with a nice quote from a 1995 essay by Kathleen Sullivan: "If Random House rejects my manuscript, I can peddle it at Simon & Schuster. On the other hand, if the government bans my novel, I may have to move to France."[79]

But is Sullivan's observation still accurate? During the parliamentary examination of a French law against hate speech online, the French minister of digital transition observed that "[i]t is difficult to quit the very large social networks. This is also why there are not several Facebook, Twitter or TikToks. Consequently, one can consider that the large networks, which are private companies, nevertheless have certain obligations, under the supervision of public authorities."[80] In a world where a very large and increasing part of communication takes place on a handful of social-media platforms, the weight of their restrictions on freedom of expression should not be underestimated. From a speaking-ability perspective, leaving Facebook may not be so far removed from "having to move to France."

"Many people in the United States live in company-owned towns," said Judge Black in 1946 in *Marsh v. Alabama*.[81] We may be moving towards a society where we all do. As public discourse increasingly occurs on private spaces, whether virtual or real, this might mean that freedom of expression is better protected in Europe than in the United States.

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[78] Goldberg, *supra* note 16, at 2188.

[79] Kathleen M. Sullivan, *Free Speech and Unfree Markets*, 42 UCLA L. Rev. 949, 954 (1995).

[80] Assemblee Nationale, Compte-Rendu No. 45, Commission Speciale Chargee D'Examiner le Projet de Loi Confortant le Respect des Principes de la Republique (2021), https://perma.cc/D33U-USJ7.

[81] Marsh v. Alabama, 326 U.S. 501, 508 (1946).