

Panel I: Free Speech and Deference to Legislative Judgements

Franciska Coleman

From Deference to Cancel Culture

In my work on the social regulation of speech, I have often noted that communities use collective pressure on corporations and institutions to establish and enforce speech codes and norms that would violate the First Amendment if mandated by governments.¹ For this reason, those engaged in the social regulation of speech often seem to be enforcing a populist version of the First Amendment that is fundamentally different from the judicial First Amendment taught in law schools. Moreover, the gap between the two versions of the First Amendment appears to be growing, causing some to worry that the current generation no longer values free speech.

The first half of this paper will offer another way of understanding the gap between the populist and judicial versions of the First Amendment. It will suggest that the Supreme Court's move away from the legislative deference affirmed in *Gitlow* insulated (and isolated) the judicial First Amendment from community speech norms. As a result, the changing speech norms that have characterized the modern era are not reflected in First Amendment jurisprudence. This means that the populist First Amendment, enforced by communities through the informal mechanisms of social regulation, reflects a vision of free speech in a multiracial democracy that has little in common with the judicial First Amendment dedicated to preserving the ideals of 1789. The second part of this paper will discuss whether this dichotomy is an overall negative or positive from the perspective of First Amendment theory and doctrine.

¹ See generally Coleman, *Anatomy of Cancel Culture*, 2 J. FREE SPEECH L. 1, 206-256 (2023)