ARE SPEECH RIGHTS FOR SPEAKERS?

Leslie Kendrick[*]

Though it may sound surprising, there is a great deal of debate about whether speakers have free speech rights. Those who deny it say that the freedom of speech protects listeners, not speakers. Lately, these skeptics can point for support to First Amendment case law, which is expanding in ways that draw speakers' rights into question. When search engines, Internet service providers, food producers, and so on are claiming immunity from regulation because they are speakers, the time has come to reevaluate speakers' rights.

This Article does just that. It confronts hard questions about whether speakers have rights, including the argument that it is illogical for speakers to have rights. It shows that this is not the case. In fact, under the most plausible views of freedom of speech, speakers must have free speech rights.

Nevertheless, recognizing speakers' rights is often inconvenient and difficult. Above all else, recognizing speakers' rights has tended to distract from listeners' rights, to less than salutary effect. These problems are real. But rights by definition complicate matters. The fact that they do so is not a reason to reject them.

[*] Albert Clark Tate, Jr., Professor of Law, University of Virginia School of Law. The author thanks Larry Alexander, Kimberly Kessler Ferzan, Andrew Miller, Fred Schauer, and Micah Schwartzman for very helpful comments, and Larry Alexander, Fred Schauer, Seana Shiffrin, and Micah Schwartzman for ongoing conversations out of which this paper grew. All errors are mine.

INTRODUCTION

THE First Amendment protects "the freedom of speech."[1] By all appearances, this right would seem to protect speakers. Yet important thinkers have said that it does not.[2] On their view, the freedom of speech is a right of audiences, and indeed society as a whole, to access ideas without governmental interference. When speakers assert free speech rights, they are actually invoking a sort of third-party standing on behalf of listeners and society. Speakers do not have free speech rights in and of themselves, and their activities are only of derivative importance. This view is illustrated in one of the most famous statements of one of the most famous twentieth-century First

---

[1] U.S. Const. amend. I.

[2] This includes all standard law and economics accounts of free speech, as well as some of the most distinguished free speech theorists of the past century. See, e.g., Larry Alexander, Is There a Right of Freedom of Expression? 8–9 (2005) [hereinafter Alexander, Freedom of Expression]; Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 22–27 (1948); Larry Alexander, Response, Free Speech and Speaker's Intent: A Reply to Kendrick, 115 Colum. L. Rev. Sidebar 1 (2015) [hereinafter Alexander, Reply to Kendrick]; Larry Alexander, Free Speech and Speaker's Intent, 12 Const. Comment. 21, 25–26 (1995); Larry Alexander, Low Value Speech, 83 Nw. U. L. Rev. 547, 552–53 (1989); Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1, 25–26 (1971); Daniel A. Farber, Commentary, Free Speech Without Romance: Public Choice and the First Amendment, 105 Harv. L. Rev. 554, 558–59 (1991); Richard A. Posner, Free Speech in an Economic Perspective, 20 Suffolk U. L. Rev. 1, 8–9, 49–50 (1986); Frederick Schauer, Intentions, Conventions, and the First Amendment: The Case of Cross-Burning, 2003 Sup. Ct. Rev. 197, 216–24; Eugene Volokh, The Freedom of Speech and Bad Purposes, 63 UCLA L. Rev. 1366, 1370–71 (2016).

See also T.M. Scanlon, Jr., Freedom of Expression and Categories of Expression, 40 U. Pitt. L. Rev. 519, 528 (1979) ("Although 'freedom of expression' seems to refer to a right of participants not to be prevented from expressing themselves, theoretical defenses of freedom of expression have been concerned chiefly with the interests of audiences and, to a lesser extent, those of bystanders.").

Amendment scholars, Professor Alexander Meiklejohn, who, likening public discourse to a town hall meeting, said, "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[3]

Whether speakers have free speech rights affects every free speech controversy. In every case, we might wonder whether speakers are asserting free speech claims on behalf of themselves or others. And in some cases, the answer to that question makes a very big difference. *Heffernan v. City of Paterson* was such a case.[4] Jeffrey Heffernan, a police detective, was seen by other officers picking up a yard sign supporting a candidate running for mayor against the incumbent. The officers reported this to their superiors, who were supporters of the incumbent mayor, and Heffernan was demoted the following day.[5] But the yard sign was for Heffernan's mother: he himself did not support the mayoral challenger. Heffernan sued, asserting that his demotion violated the First Amendment. The district court and the U.S. Court of Appeals for the Third Circuit held that Heffernan could not establish a First Amendment violation because he was not speaking—he did not actually support the mayoral challenger.[6] The U.S. Supreme Court disagreed, holding that if the police department penalized Heffernan because of a political view, Heffernan could contest the action, regardless of whether he actually held that view.[7]

For present purposes, the interesting thing about this case is that, if speakers do not have speech rights, it does not even get off the ground. In order to be able to assert a First Amendment claim, Heffernan would have to claim that he was producing some speech that was of value to witnesses or society at large. But his whole point is that he was not expressing a political view—he was not speaking. If his own speech rights do not matter, it is difficult to explain how free speech values are implicated by the case.

One year before *Heffernan*, the Supreme Court decided *Elonis v. United States*.[8] Anthony Elonis posted on Facebook statements

---

[3] Meiklejohn, supra note 2, at 25.

[4] 136 S. Ct. 1412 (2016).

[5] Id. at 1416.

[6] Id.

[7] Id. at 1418.

[8] 135 S. Ct. 2001 (2015).

expressing a desire to kill his ex-wife, a female co-worker, and a female FBI agent. He also posted self-composed lyrics such as, "I've got enough explosives / to take care of the State Police and the Sheriff's Department," and "Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined / And hell hath no fury like a crazy man in a Kindergarten class / The only question is . . . which one?"[9]

If the interests of listeners and society are all that matter, the First Amendment does not protect Elonis. The jury found that his statements were, objectively speaking, a "serious expression of an intention to inflict bodily injury or take the life of an individual."[10] Under current doctrine, such a finding is sufficient to account for any listener or societal interests in the speech.[11] If these interests are all that matter, then Elonis's speech should be unprotected.

If speaker interests also matter, however, then the law must consider those interests, potentially including Elonis's mental relationship to his speech. It might matter, for example, whether Elonis intended to intimidate someone, or whether he knew that he was likely to intimidate someone. Perhaps it would be unfair to hold Elonis strictly liable for the unforeseen or unintended effects of his words. The Court in *Elonis* considered but ultimately did not answer the question of what state of mind the First Amendment requires for a conviction.[12]

Heffernan and *Elonis* are only the beginning. What happens when the song "Cop Killer" comes on the radio and a listener kills a cop?[13] What

---

[9] Id. at 2005–06.

[10] Id. at 2007.

[11] Virginia v. Black, 538 U.S. 343, 358–60 (2003).

[12] *Elonis*, 135 S. Ct. at 2012. Instead the Court concluded that, as a matter of statutory interpretation, the jury instruction in Elonis's case was defective because the statute had to be read to take Elonis's state of mind into account to some degree. Id. at 2011–12. The Court did not specify, however, what mindset was necessary for a conviction. See id. It is important to note that a state of mind requirement could also arise out of a purely listener-based conception of free speech rights. See infra notes 45–47 and accompanying text. If strict liability or negligence would chill speakers, listeners could claim that they were being denied valuable speech. For a critical analysis of the chilling-based account of state-of-mind requirements, see Leslie Kendrick, Speech, Intent, and the Chilling Effect, 54 Wm. & Mary L. Rev. 1633 (2013).

[13] See, e.g., Davidson v. Time Warner, No. Civ.A. V-94-006, 1997 WL 405907, at *1, *22 (S.D. Tex. Mar. 31, 1997) (rejecting on tort and First Amendment grounds a civil lawsuit against Tupac Shakur, Time Warner, and others after Ronald Ray Howard killed Texas Trooper Bill Davidson at a traffic stop after listening to Shakur's song "Soulja's Story"). A

happens when a movie depicts a brutal rape or murder, and some viewer decides to imitate it?[14] Does a manual for hit men get less protection than mainstream songs or movies that inspire copycat crimes?[15] Are such questions only about the value of speech to listeners, or should the interests of the speakers also be taken into account?[16] Here are a few more examples of recent First Amendment claims that would be much simpler—or would not exist at all—if not for speakers' rights:

- Challenges to civil rights antidiscrimination laws by businesses who do not want to serve customers planning same-sex wedding ceremonies;[17]
- Challenges to laws prohibiting unauthorized wearing of military medals and lies about military honors;[18]

---

more well-known controversy arose around Ice-T's song "Cop Killer" and resulted in Ice-T voluntarily withdrawing the song from the market. See Chuck Philips, Ice-T Pulls "Cop Killer" off the Market, L.A. Times (July 29, 1992), http://articles.latimes.com/1992-07-29/news/mn-4656_1_cop-killer [https://perma.cc/YEH5-5ZSQ].

[14] See, e.g., Olivia N. v. Nat'l Broad. Co., 178 Cal. Rptr. 888, 890–92 (Ct. App. 1982) (discussing tort claims arising from minors' rape of a nine-year-old girl with a soft-drink bottle after viewing a movie depicting a similar assault); Byers v. Edmondson, 712 So. 2d 681, 684, 691–92 (La. Ct. App. 1998) (discussing tort claim under negligence and intentional-tort theories by paraplegic victim of two eighteen-year-old shooters claiming to be inspired by the film *Natural Born Killers*), cert. denied, 526 U.S. 1005 (1999).

[15] Rice v. Paladin Enters., 128 F.3d 233, 266–67 (4th Cir. 1997) (allowing a cause of action against the publisher of an instructional manual entitled *Hit Man*, where the manual was used in a murder-for-hire of a young boy and his nurse, and where the publisher stipulated that the manual was intended to provide instruction in how to be a hit man).

[16] I have argued elsewhere that the speaker's state of mind should matter in such cases. See Leslie Kendrick, Free Speech and Guilty Minds, 114 Colum. L. Rev. 1255, 1283–86 (2014); Kendrick, supra note 12, at 1687–89; Leslie Kendrick, Note, A Test for Criminally Instructional Speech, 91 Va. L. Rev. 1973, 1974 (2005).

[17] See, e.g., Craig v. Masterpiece Cakeshop, 370 P.3d 272, 293–94 (Colo. App. 2015) (upholding state civil rights law against First Amendment challenge by baker), cert. granted sub nom. Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 137 S. Ct. 2290 (2017); Elane Photography, LLC v. Willock, 309 P.3d 53, 77 (N.M. 2013) (same for photographer); Gifford v. McCarthy, 23 N.Y.S.3d 422, 431 (App. Div. 2016) (same for wedding venue); State v. Arlene's Flowers, 389 P.3d 543, 568 (Wash. 2017) (same for florist).

[18] See, e.g., United States v. Alvarez, 132 S. Ct. 2537, 2548–49 (2012) (striking down prohibition on falsely claiming military honors); United States v. Swisher, 811 F.3d 299, 318 (9th Cir. 2016) (invalidating law prohibiting unauthorized wearing of military medals).

- Challenges to net neutrality regulations by Internet service providers;[19]
- Challenges to a ban on credit-card surcharges;[20]
- Claims by search engines to immunity from fair competition laws;[21]
- Challenges to prohibitions on "gay conversion therapies";[22]
- Claims by tobacco companies against graphic warning labels and against corrective statements required to counteract fraudulent claims;[23]
- Challenges to a variety of labeling requirements, including labels regarding genetically modified foods,[24] origin of beef products,[25] and the calorie content of foods;[26]

---

[19] U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 743–44 (D.C. Cir. 2016) (upholding the Federal Communications Commission's ("FCC") net neutrality rule against First Amendment challenge by broadband providers); Verizon v. FCC, 740 F.3d 623, 628 (D.C. Cir. 2014) (upholding FCC authority to regulate broadband providers).

[20] Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1146–47 (2017) (concluding that a statute that bans "impos[ing] a surcharge for the use of a credit card" does implicate the First Amendment and remanding the case to determine "whether that regulation is unconstitutional").

[21] See, e.g., Langdon v. Google, Inc., 474 F. Supp. 2d 622, 629–31 (D. Del. 2007); Search King v. Google Tech., No. CIV-02-1457-M, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003); Martin v. Google Inc., No. CGC-14-539972, 2014 WL 6478416 (Cal. Super. Ct. Nov. 13, 2014).

[22] See, e.g., King v. Governor of New Jersey, 767 F.3d 216, 237 (3d Cir. 2014) (upholding law against free speech and expressive association challenges); Pickup v. Brown, 740 F.3d 1208, 1231–32 (9th Cir. 2014) (same).

[23] R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1221–22 (D.C. Cir. 2012) (striking graphic label rule); United States v. Philip Morris USA, 907 F. Supp. 2d 1, 27 (D.D.C. 2012) (upholding corrective statement required as part of RICO liability for tobacco companies).

[24] Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 648 (D. Vt. 2015) (permitting some First Amendment challenges to GMO labeling law to go forward while dismissing others), appeal docketed, No. 15-1504 (2d Cir. May 6, 2015).

[25] Am. Meat Inst. v. U.S. Dep't of Agric., 760 F.3d 18, 27 (D.C. Cir. 2014) (en banc) (upholding labeling requirement against First Amendment challenge).

[26] N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114, 131, 137 (2d Cir. 2009) (upholding calorie posting law under First Amendment analysis); see also, e.g., CTIA-The Wireless Ass'n v. City & Cty. of San Francisco, 494 F. App'x 752, 754 (9th Cir. 2012) (striking cell phone radiation warning requirement); Int'l Dairy Foods Ass'n v. Amestoy, 92 F.3d 67, 69 (2d Cir. 1996) (striking growth hormone labeling requirement for milk).

- Challenges to a variety of Securities and Exchange Commission ("SEC") disclosure requirements;[27] and
- Challenges to zoning regulations by tattoo parlors claiming to be speakers.[28]

If speakers do not have rights on their own, then the only rights at stake in these cases are those of listeners. In most, if not all, of these cases, a purely listener-driven analysis would render First Amendment claims dubious, if not out of the question. But, despite the contrary views of many free speech thinkers, speakers tend to think they have First Amendment rights, and courts tend to act as though they do. Courts do this largely without giving their reasons for recognizing speakers' rights or explaining the relationship between speaker and listener claims. And they do it without considering what, if any, conception of freedom of speech supports what they are doing.[29]

Speakers' rights create complications. Quite frankly, they are a major factor in the First Amendment's expansion and transformation into a general antiregulatory tool.[30] Skeptics of speakers' rights are not

---

[27] See, e.g., Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518, 530 (D.C. Cir. 2015) (striking down conflict mineral disclosure requirement); Full Value Advisors, LLC v. SEC, 633 F.3d 1101, 1104–08 (D.C. Cir. 2011) (holding not ripe a challenge to disclosure requirement of § 13(f) of Securities Exchange Act as applied to large investment managers); Am. Petroleum Inst. v. SEC, 953 F. Supp. 2d 5, 11, 23–24 (D.D.C. 2013) (describing but not deciding First Amendment challenge by trade associations to SEC rule requiring disclosure of payments made to foreign governments in relation to oil, gas, and mineral development).

[28] See, e.g., Buehrle v. City of Key West, 813 F.3d 973, 979–80 (11th Cir. 2015) (invalidating zoning rule under First Amendment intermediate scrutiny); Anderson v. City of Hermosa Beach, 621 F.3d 1051, 1061–68 (9th Cir. 2010) (invalidating total prohibition on tattoo parlors on First Amendment grounds); Coleman v. City of Mesa, 284 P.3d 863, 869–70 (Ariz. 2012) (en banc) (applying First Amendment intermediate scrutiny to denial of use permit to tattoo parlor).

[29] See, e.g., cases cited supra notes 17–28.

[30] On this phenomenon, see, for example, Samuel R. Bagenstos, The Unrelenting Libertarian Challenge to Public Accommodations Law, 66 Stan. L. Rev. 1205, 1228 (2014); J.M. Balkin, Some Realism About Pluralism: Legal Realist Approaches to the First Amendment, 1990 Duke L.J. 375, 386–87; Thomas H. Jackson & John Calvin Jeffries, Jr., Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1, 5 (1979); Leslie Kendrick, First Amendment Expansionism, 56 Wm. & Mary L. Rev. 1199, 1207 (2015); Jedediah Purdy, Neoliberal Constitutionalism: Lochnerism for a New Economy, 77 Law & Contemp. Probs. 195, 198 (2014); Frederick Schauer, First Amendment Opportunism, *in* Eternally Vigilant: Free Speech in the Modern Era 174, 179 (Lee C. Bollinger & Geoffrey R. Stone eds., 2003); Amanda Shanor, The New *Lochner*,

primarily skeptical *because* of these complications. But their stance highlights the differences between a free speech right that protects only audiences and society and one that applies to speakers as well.

This Article argues that speakers' rights are complicated, frustrating, and necessary. We should recognize them, even as we recognize all the problems they create. The difficulties of speakers' rights are a reason not to reject them, but to be more rigorous in analyzing them and in balancing them against listeners' rights.

To show this, the Article in Part I first sketches the anti-speaker view: the very important and persistent view that freedom of speech does not protect speakers in and of themselves. Next, it addresses the most interesting anti-speaker argument: that it is logically impossible for speakers to have rights.[31] This, I argue in Part II, is not correct. In fact, as Part III demonstrates, speakers' rights are entailed by the most plausible explanations for why we have speech rights at all. Skepticism about speakers' rights does, however, highlight an important fact: recognizing speakers' rights is complicated. In Part IV, I illustrate why this is so. Despite their inconvenience and difficulty, speakers' rights are important, though they are also, importantly, only one facet of the freedom of speech.

I. FREEDOM OF SPEECH WITHOUT SPEAKERS

Someone coming to this question for the first time might ask: how can the freedom of speech not protect speakers? Who could think this? The answer is that some important scholars quite reasonably think this, and how it works is described below.

First, some preliminaries. This is an inquiry into whom the *freedom of speech* protects. It is not a broader inquiry into, say, the contours of criminal or tort liability. Someone who thinks the freedom of speech should not take account of speakers' interests could still think, for example, that substantive criminal law should take account of

---

2016 Wis. L. Rev. 133, 134–35; Cass R. Sunstein, Lochner's Legacy, 87 Colum. L. Rev. 873, 884 (1987); Mark Tushnet, An Essay on Rights, 62 Tex. L. Rev. 1363, 1387 (1984); Howard M. Wasserman, *Bartnicki* as *Lochner*: Some Thoughts on First Amendment Lochnerism, 33 N. Ky. L. Rev. 421, 438 (2006).

[31] See Alexander, Freedom of Expression, supra note 2, at 8–10; Alexander, Reply to Kendrick, supra note 2, at 2; Larry Alexander, The Misconceived Search for the Meaning of "Speech" in Freedom of Speech, 5 Open J. Phil. 39, 40 (2015) [hereinafter Alexander, Misconceived Search].

perpetrators' interests, such as by making their state of mind relevant to culpability.[32] The current inquiry is not about what criminal liability or tort liability requires. It asks what additional protections freedom of speech brings, on top of whatever tort or criminal law already supplies. Are those additional protections driven by speakers' interests, or do they operate exclusively with listeners in mind?

From a purely doctrinal perspective, this question has attracted some controversy. It seems clear to me that First Amendment doctrine protects speakers as speakers. Courts generally proceed as though speakers have speech rights. Granted, they are not usually clear about whether those rights are derivative or held by speakers in their own right, and most cases do not require them to make a distinction. But in cases where the distinction matters, the Supreme Court has come down on the side of speakers. In cases such as *Heffernan v. City of Paterson* and *Elonis v. United States*, the Supreme Court has considered the speaker's claims when it seems implausible to do so out of concern for other people.[33] Moreover, the entire doctrines of compelled speech—protecting speakers from being required to make certain statements—and compelled association—protecting speakers from having to associate with people or ideas with which they disagree—are very difficult to justify on grounds other than speakers' intrinsic rights.[34]

Nevertheless, the First Amendment doctrine functions as somewhat of a Rorschach test. Those who reject speakers' rights tend to minimize the role that they play in the doctrine and argue that the cases that cannot be rationalized are mistaken.[35] Moreover, new cases regularly arise in

---

[32] See, e.g., Alexander, Reply to Kendrick, supra note 2, at 2 n.3. Professor Larry Alexander, for example, would argue that the criminal law must inquire into the subjective state of mind of the speaker, but that the First Amendment should not, except possibly for instrumental reasons in some cases. See, e.g., id.; Larry Alexander & Kimberly Kessler Ferzan with Stephen J. Morse, Crime and Culpability: A Theory of Criminal Law 41 (2009) (arguing that culpability requires subjective recklessness).

[33] See Heffernan v. City of Paterson, 136 S. Ct. 1412, 1418 (2016); Elonis v. United States, 135 S. Ct. 2001, 2012 (2015). For other examples, see Kendrick, supra note 12, at 1655–65.

[34] See Larry Alexander, Compelled Speech, 23 Const. Comment. 147, 148 (2006) ("The harm in compelled speech remains elusive, at least for me."). But see Laurent Sacharoff, Listener Interests in Compelled Speech Cases, 44 Cal. W. L. Rev. 329, 384 (2008) (attempting to justify compelled speech doctrine on listener-based grounds).

[35] See, e.g., Schauer, supra note 2, at 216–24 (arguing that the Supreme Court incorrectly treated speakers as intrinsic rightsholders in a threats case); Alexander, supra note 34, at 161 (arguing that compelled speech doctrine is largely misguided).

which the role of speakers' rights is in question.[36] Although it is unlikely that the Supreme Court will dismantle the compelled speech doctrine, or retract every test with an intent requirement for speakers, it regularly has opportunities to clarify or modify the role of speakers in First Amendment analysis.[37] Thus, the question of speakers' rights should matter to doctrinalists.

Quite apart from First Amendment case law, from a political or moral perspective one could be interested in whether an ideal free speech right protects speakers derivatively or as speakers. It is this question with which I will be primarily concerned, though at the end of the piece I will say more about the doctrine.[38] The two are related. If, as some contend, speakers' rights make no sense as a conceptual matter, then that might tell us something about how best to resolve their status in First Amendment law.

This Article thus asks a conceptual question about speakers, and it does so in the language of rights. By asking whether speakers have rights, I am not asking whether they have an immunity that successfully protects them from regulation in all contexts. I am asking whether they have a *claim* against governmental interference—a claim that may or may not prevail.[39] In some cases, that claim may only require balancing against other interests and obligations, and speakers may not always, or even usually, win. But the government still would have acknowledged that it has some duty toward the speaker in her role as a speaker. I will

---

[36] See, e.g., *Elonis*, 135 S. Ct. at 2012 (considering intent requirement for threats); United States v. Alvarez, 132 S. Ct. 2537, 2545 (2012) (considering speakers' right to lie); Virginia v. Black, 538 U.S. 343, 359–60 (2003) (setting a standard for unprotected threats). In addition, the government has recently declined to seek certiorari in many cases involving compelled commercial speech, cases that would require the Supreme Court to consider the rights of commercial actors to refuse to provide information to listeners. See, e.g., Nat'l Ass'n of Mfrs. v. SEC, 800 F.3d 518 (D.C. Cir. 2015); Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947 (D.C. Cir. 2013); R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205 (D.C. Cir. 2012).

[37] See supra notes 4–28 and accompanying text.

[38] See infra Part IV.

[39] The distinction drawn here is between two types of rights recognized by Professor Wesley Hohfeld—immunities and claim-rights. Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 Yale L.J. 16, 32, 55 (1913). Under the idea of a claim-right, another party has a duty to perform in some way toward the rightsholder, and the rightsholder has a corresponding claim to that performance. Id. Having a right as a speaker entails having a claim that the government give some amount of consideration to your inherent interests as a speaker.

frame that as a question of whether speakers have free speech rights. For those who prefer some other conception of rights, the discussion may be reframed in terms of whether speakers have intrinsic interests.

On the anti-speaker view, two groups have potential claims about free speech: (1) the audience of speech and (2) society generally. Audiences have claims to receive speech without undue governmental interference. Society has claims to unencumbered speech, because free communication benefits even those who do not actually receive a particular message. For one thing, those who do not receive a particular piece of information benefit from living in an informed society: one need not understand, or even have heard of, a scientific or technological breakthrough in order to benefit from it. For another, those who do not receive a particular piece of information may still have an interest in the government not acting as though denying people information is permissible. Therefore both audiences and society generally have claims of access to speech.

Going forward, I will put direct audiences and society together under the umbrella of "listeners," simply for the convenience of discussing their rights in contrast with those of speakers. What direct audiences and society have in common is that they are nonspeakers who have claims as potential beneficiaries of speech.[40] This is in contrast to speakers, whose claims, if any, arise from their interests as producers of speech.

---

[40] One interesting aspect of First Amendment doctrine is that, while courts have recognized that both audiences and society have interests in the free flow of information, see, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 763–64 (1976), they rarely consider whether audiences could bring First Amendment claims, and to my knowledge they have never dealt with whether society at large counts as a rightsholder for First Amendment purposes. The audience question arose in *Virginia Pharmacy*, and there the Supreme Court concluded that consumers who wanted price information from pharmacies had a claim against a law prohibiting price advertising. Id. at 762–63. Though the Court phrased the question as one of standing, its conclusions amounted to a recognition of audience members as rightsholders under the First Amendment. I am not aware of a case addressing the societal question—that is, whether someone could bring a First Amendment challenge to a law purely on the basis of his or her interest as a member of society. To some extent, this question seems unlikely to arise, because any member of society interested enough in a regulation to consider challenging it could likely show that they are a potential direct recipient of the information—a potential audience member. But it is interesting that many theoretical accounts of free speech focus so much on societal interests, and case law rarely does. Law and economics accounts, for example, tend to focus primarily on the benefits of information to society. See, e.g., Farber, supra note 2, at 555; Posner, supra note 2, at 8–9.

Free speech theorists are virtually united in concluding that listeners are rightsholders—that is, that they have a claim of noninterference against the government (though in some cases this claim will not prevail).[41] The debate is over whether speakers also enjoy speech rights. Some argue that they do,[42] while others say speech rights are exclusive to listeners.[43]

Those who take an anti-speaker view argue that free speech protections exist exclusively because of, and in order to facilitate, the interests of listeners in unfettered access to information. Speakers do not enjoy free speech protections because they are not the reason that free speech exists. This does not mean, however, that speakers are completely irrelevant. Speakers play two instrumental roles.

First, speakers often have the job of asserting listeners' rights. Because the government often seeks to restrict speech by penalizing speakers, speakers are often best placed to challenge allegedly censorial governmental action. In asserting the First Amendment in their defense to a criminal, civil, or administrative action, speakers assert a form of third-party standing on behalf of listeners.[44] In this way, speakers play an inevitable role in safeguarding the freedom of speech for listeners.

Second, speech rules must be sensitive to speakers because speakers control how much speech is produced for the benefit of listeners. This

---

[41] See supra note 2 and infra note 42.

[42] See, e.g., C. Edwin Baker, Scope of the First Amendment Freedom of Speech, 25 UCLA L. Rev. 964, 998, 1003 (1978); Jack M. Balkin, Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society, 79 N.Y.U. L. Rev. 1, 27–33, 40 (2004); Joshua Cohen, Freedom of Expression, 22 Phil. & Pub. Aff. 207, 235 (1993); Ronald Dworkin, A New Map of Censorship, 35 Index on Censorship 130, 131 (2006); Thomas I. Emerson, Toward a General Theory of the First Amendment, 72 Yale L.J. 877, 879–80 (1963); Robert C. Post, The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and *Hustler Magazine v. Falwell*, 103 Harv. L. Rev. 601, 638 (1990); Robert Post, Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse, 64 U. Colo. L. Rev. 1109, 1122 (1993) [hereinafter Post, Meiklejohn's Mistake]; Martin H. Redish, The Value of Free Speech, 130 U. Pa. L. Rev. 591, 604 (1982); Scanlon, supra note 2, at 521; Seana Valentine Shiffrin, A Thinker-Based Approach to Freedom of Speech, 27 Const. Comment. 283, 289–91 (2011); Cass R. Sunstein, Words, Conduct, Caste, 60 U. Chi. L. Rev. 795, 808 (1993); Cass R. Sunstein, Free Speech Now, 59 U. Chi. L. Rev. 255, 304–07 (1992).

[43] See supra note 2.

[44] Alexander, Freedom of Expression, supra note 2, at 8–10; Schauer, supra note 2, at 222 n.80.

argument is usually framed in terms of the "chilling effect."[45] A law that is insufficiently considerate of speakers may deter them from speaking, which is a problem for listeners. For example, the common law defamation rules at issue in *New York Times Co. v. Sullivan* imposed strict liability on speakers for false statements, which had the alleged effect of chilling true speech about public officials.[46] Because speakers faced strict liability for false statements, they would hesitate to speak if they were not entirely sure of the truth of their words. This hesitation would reduce the production of true speech. Because listeners had an interest in the production of true speech about public officials, the common law strict liability had to be modified.[47]

In sum, on the anti-speaker view, listeners have claims against the government when it prevents them from receiving speech. Listeners also have claims against the government when its policies deter speech production. Speakers are often the parties best situated to bring listeners' claims to the courts' attention. But the speakers themselves do not have rights in speaking. Their rights are purely derivative of listeners' rights.

One virtue of this view is its elegance. It locates free speech rights entirely on one side of the communicative relationship: rights are held by potential recipients of speech, not by its producers. At the same time, it accounts for intuitions about the importance of speakers by giving them a vital instrumental role. It therefore takes account of intuitions that both listeners and speakers are important, without assigning independent rights to speakers. Intrinsic speakers' rights, on this view, are just not *necessary*. We can have everything we want out of a free speech right without having to bother with speakers' rights.

But the fact that a view is elegant does not make it correct. And when the anti-speaker view extends to argue that speakers *cannot* have speech rights, it goes too far. That is the subject of the next Part.

---

[45] See, e.g., Kendrick, supra note 12; Frederick Schauer, Fear, Risk and the First Amendment: Unraveling the "Chilling Effect," 58 B.U. L. Rev. 685 (1978).

[46] 376 U.S. 254, 300–01 (1964) (Goldberg, J., concurring in result).

[47] Id. at 271–72 (majority opinion) (stating that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'" (alteration in original) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963))).

II. THE IMPOSSIBILITY OF SPEAKERS' RIGHTS

One set of arguments against speakers' rights holds that they are conceptually incoherent. In particular, there are two different arguments of this kind, one about the problem of speakerless speech and one about the problem of rightless speakers. Extrapolating from these problems leads to a third problem, the problem of incongruous rights. Ultimately, I argue, none of these is actually a problem for speakers' rights. I address each in turn.

A. The Problem of Speakerless Speech

One argument begins with the fact that a speaker is not, and should not be, necessary in order for freedom of speech to be implicated.[48] Professor Larry Alexander has illustrated this point with several examples. Consider the following actions:

- The state bans a book whose author is dead.[49]
- The state bans a book produced by monkeys on typewriters.[50]
- The state bans toy guns because they are believed to encourage violence.[51]
- The state forbids access to a particular rock formation because it is understood by some people to symbolize a violence-inspiring message.[52]

In each example, Alexander argues, no speaker exists. Thus, no speaker could possess an interest relevant to the restriction, or indeed any interest whatsoever in the protection of the message. Nevertheless, these examples clearly implicate freedom of speech. Doctrinally, each would be unconstitutional under the First Amendment absent highly unusual circumstances. Because free speech issues exist in these cases,

---

[48] See Alexander, Freedom of Expression, supra note 2, at 8; Alexander, Reply to Kendrick, supra note 2, at 2; Alexander, Misconceived Search, supra note 31, at 40.

[49] Alexander, Freedom of Expression, supra note 2, at 8.

[50] Id.

[51] Id. at 55.

[52] Id.; see also id. at 8–9 (banning viewing of sunsets); Alexander, Misconceived Search, supra note 31, at 40 (imagining waves breaking on rocks creating marks spelling out, "Throw the rascals out").

Alexander argues that speakers' interests are not a component of freedom of speech.[53]

Let us put aside questions about whether some other entity exists that could count as a speaker in any of these cases. For example, let us put aside questions about whether the *publishers* of works by dead authors, or by monkeys on typewriters, could count as speakers. Let us put aside whether toy gun manufacturers could count as "speakers" in claiming that they and their products are not really saying anything. We will return to these questions later.[54] Alexander deploys all these examples to demonstrate the possibility of speakerless speech, and though one may quibble with some of them, no one can gainsay that speakerless speech exists. The final example of the rock formation is one undeniable example. The point is that speakerless speech exists, and freedom of speech is implicated by it. Thus, Alexander argues, speakers do not have free speech rights.

As the examples show, a speaker is not necessary for freedom of speech to be implicated. The would-be listeners of speakerless speech have interests in receiving the speech. These interests are sufficient to generate claims against government action that would interfere with the speech.[55] In these cases, listeners have claims—rights—against governmental interference.

It does not follow, however, that where a speaker exists, she does not have rights. In an example like that of the rock formation, which no human created and which is only endowed with meaning by its potential audience, the only potential rightsholders are listeners. Where speech is produced by a speaker, the potential rightsholders may also include the speaker. The fact that speakers do not exist in some instances of speech says nothing about their status when they do exist.

Indeed, a person who believed only in speakers' rights could insist that, because free speech principles protected her diary, which no one else ever read or was intended to read, listeners never have free speech rights. But she would be wrong. Her assertion that free speech rights exist in the absence of listeners says nothing about the rights of listeners when they do exist.

---

[53] Alexander, Freedom of Expression, supra note 2, at 9 n.14.

[54] See infra Section IV.B.

[55] Alexander, Freedom of Expression, supra note 2, at 8–10.

Or one might think about parental rights. If a child has only one living parent, that parent exercises full parental rights. It does not follow that, where two parents exist, only one parent is allowed to hold parental rights. The fact that the existence of one parent is sufficient to create parental rights does not mean that only one person can have such rights in all cases.

Some might dismiss the parental analogy because we can stipulate that the two parents bear the same relationship to the child, whereas speaker and listener bear different relationships to speech. That is true, but it seems beside the point here, because the claim about speakerless speech has nothing to do with the substance of the right. The claim is that because freedom of speech exists in the absence of speakers, speakers do not have free speech rights. This seems the same as saying that because parental rights exist in the absence of, say, fathers, fathers do not have parental rights. In both cases, the existence of one rightsholder does not signify anything about the possibility of additional rightsholders.

The problem of speakerless speech is not a problem. The fact that some cases lack speakers does not mean that speakers lack rights.

B. The Problem of Rightless Speakers

There is a second argument that speakers' rights are conceptually impossible: sometimes speakers do exist, but they clearly do not have speech rights. Consider the following examples:

- An assassin shoots an official in order to make a political statement.[56]
- A motorist drives 20 miles per hour over the speed limit in order to protest the injustice of speed limit laws.[57]
- An actor practices his lines extremely loudly, annoying his neighbor.[58]

---

[56] Alexander, Misconceived Search, supra note 31, at 40 (shooting a mailman to protest the mail).

[57] Alexander, Freedom of Expression, supra note 2, at 10–11; Jed Rubenfeld, The First Amendment's Purpose, 53 Stan. L. Rev. 767, 767–68 (2001).

[58] Alexander, Freedom of Expression, supra note 2, at 10.

One thing all these examples have in common is that they are losing First Amendment claims. The assassin, the motorist, and the actor may assert rights to their hearts' content, but courts will not permit a First Amendment defense to go forward. Moreover, as a moral or political matter, most people would likely agree that these claims should fail. Here we have speakers, but no rights. To some, this is an indication that speakers do not have speech rights.

There are many different ways to understand these cases, but I want to try to take them head on by asserting that, yes, these speakers were speaking, and, yes, they can assert free speech rights in these cases. The fact that they do not have a *successful* First Amendment claim in court, or even a successful claim as a moral or political matter, says nothing about whether they have a speech claim at all, let alone about whether all speakers have speech rights.

The easiest way to see this is to consider the corresponding problem of rightless listeners. Consider:

- The bystander who receives various types of information from the political assassin's actions.
- The spectator who, in watching the speeding motorist, comes to agree about the injustice of speed limits.
- The actor's co-star, who is running lines with him while in the shower and appreciates his loud voice.

Each of these listeners has a claim to receiving information. Each of their claims will be unsuccessful. Yet we would not conclude on that basis that listeners do not have speech rights.

One could respond that the listeners in these cases do not actually have speech rights. One might hold the view that free speech rights are only implicated when the government acts for the *purpose* of interfering with a message.[59] In each of these cases, the government is interfering for other reasons—to punish murder, to address the safety risks of speeding, to remedy loud noises. In each case, the activity would be punishable whether it conveyed a message or not. Because the

[59] Alexander, for instance, both rejects speakers' rights and believes that the First Amendment is implicated only when the government targets speech in order to interfere with its message. See Alexander, Freedom of Expression, supra note 2, at 7–11; Alexander, Misconceived Search, supra note 31, at 40 ("The only proper basis for a free speech claim is whether government is attempting to prevent an audience from receiving certain ideas.").

government's intervention has nothing to do with messages, one could argue that listeners' rights are not implicated.

This response does not suffice. If these listeners do not have rights *because* the government is not interfering with speech in these cases, then the corresponding speakers also do not have rights *because* the government is not interfering with their speech. Essentially, *nobody's* free speech rights are implicated. And if this is so, then the examples say nothing about who has rights in cases in which free speech principles *are* implicated—that is, when the government *is* acting with the purpose of interfering with a message. Thus, the existence of rightless speakers in these cases would not bear on speakers' rights in other cases.

In any case, the problem of rightless listeners cannot really be resolved by appeal to the idea of government purpose. The same problem arises in cases where the government *is* acting with the purpose of interfering with messages. In fact, such cases occur throughout First Amendment law. Say a person's speech can be properly regulated because it constitutes incitement: the message presents too strong a risk that some listeners will respond with violence or serious illegal conduct.[60] Other listeners, however, might benefit from the speech while responding to it perfectly reasonably. Similarly, some listeners could gain informational benefit from unprotected threats, obscenity, or false speech. The Supreme Court expressly recognized that some amount of scientific or medical information might be lost through bans on child pornography.[61] When the state concludes that speech can be interdicted, innocent listeners lose out. Nevertheless, we think their losing is justified because the risks of the speech sufficiently outweigh its benefits.[62] We would not say, however, that because they lose, these listeners do not have speech rights. And we certainly would not say that, because they lose, *all listeners* lack speech rights.[63]

---

[60] For the standard for unprotected incitement, see *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (holding that speech is not protected by the First Amendment if it intends to incite imminent lawlessness or violence and is likely to do so).

[61] New York v. Ferber, 458 U.S. 747, 773 (1982).

[62] Id. ("We consider this the paradigmatic case of a state statute whose legitimate reach dwarfs its arguably impermissible applications.").

[63] One final twist is to consider if anything changes if we have a speaker but no listeners. Imagine that the actor is rehearsing his lines out loud to himself, with no partner. He is very loud, and his volume annoys his neighbor, but his neighbor cannot understand the words—they just come through as noise. Alexander, Freedom of Expression, supra note 2, at 10–11.

Ultimately, as the problem of rightless listeners demonstrates, the problem of rightless speakers seems to conflate having a speech claim with having a *successful* free speech claim. Having a free speech right does not mean being entitled to immunity: it means being entitled to having the court give your speaking activities the consideration they are due—which in some cases will not be a great deal, given the other interests in play.

This approach does lead to a strange proposition: I am saying that the assassin, the motorist, and the actor may have free speech claims, when raising such claims as a legal matter would be a losing proposition and would likely incur some degree of impatience, if not anger, from the presiding judge.[64] Note, however, that the same could be said for the rightless listeners. An innocent potential recipient of the message of a murderer, an inciter, a threatener, and so forth would also be laughed out of court. But this does not mean that listeners do not have free speech rights. Depending on one's particular conception of free speech, maybe *these* listeners have no claim at all *in these cases*, but that says nothing about listeners' status as rightsholders generally. Or perhaps even these listeners have claims—albeit weak ones, given the other considerations in play—but our legal system has developed fairly set views of the harms and benefits of certain types of speech, such that these listeners lose so predictably and resoundingly that they should not bother. But the fact that they do not have a successful legal claim does not mean that

---

If the neighbor seeks to enjoin the actor, the actor will not have a successful First Amendment defense. Does this mean that speakers do not have rights?

No. Again, the fact that the actor does not have a winning claim says nothing about whether his free speech rights are implicated by the injunction. Perhaps he does have free speech rights, but they are overridden by the neighbor's interest in a peaceful home. Perhaps he does have free speech rights, but only against governmental action that purposely interferes with messages. It seems likely that one or both of these intuitions is doing the work in this case. If, for example, someone burned a flag on a lonely bluff, and the only person who saw was a police officer who then arrested him for the message conveyed, this would strike many as wrongful, despite the fact that there was no audience. This suggests that speech rights can exist in the absence of listeners, which further suggests that speakers can have speech rights.

[64] Cf. Frederick Schauer, The Politics and Incentives of First Amendment Coverage, 56 Wm. & Mary L. Rev. 1613, 1616 (2015) (observing about some recent cases that a generation ago "the suggestion that the First Amendment was even applicable to some of these activities would far more likely have produced judicial laughter or incredulity, if not Rule 11 sanctions").

they are not rightsholders, still less that they could never be rightsholders. And the same is true of speakers.

Thus, the problem of rightless speakers turns out not to be a problem. It is not a reason to conclude that speakers cannot have speech rights.

C. The Problem of Incongruous Rights

Although neither speakerless speech nor rightless speakers spell an end to the possibility of speakers' rights, there is a remaining conceptual problem. Recognizing the possibility of speakers' rights leads to an apparent incongruity.[65] Consider the following scenarios:

(A) The state forbids access to a particular rock formation because it is thought to inspire violence.

(B) The state arrests a person who is wearing a shirt depicting the rock formation but is reasonably unaware of its connotation.

In each case, listeners have a claim against governmental interference with the message conveyed by the rock formation. Let us stipulate, however, that because of the disastrous consequences of the imputed message of this rock, these listeners' claims are outweighed by safety interests. Ultimately then, if only listeners matter, suppression is permissible in both (A) and (B).

If speakers also have rights, however, then the two cases are not equivalent. In (A), we need consider only listeners' claims. But in (B), we must consider the claims of both the listeners and the speaker—the wearer of the shirt. This person, who is being punished for conveying a dangerous message with his rock shirt, may want to assert that he intended to convey a different message, or no message at all. If speakers have rights, punishing someone for a message he was reasonably unaware of conveying would seem to implicate those rights.

The upshot is that the analysis of (A) differs from that of (B). It is possible that the outcomes will be the same: the exigencies of the dangerous rock message may lead us to conclude that both listeners' and speakers' rights give way to safety interests. But it is also possible that the outcomes will diverge—that, in some cases, safety interests will be

[65] See Alexander, Freedom of Expression, supra note 2, at 8–9; Alexander, Reply to Kendrick, supra note 2, at 2.

sufficient to overcome listeners' interests but not sufficient to overcome speakers' interests. If speakers have rights, the state may be permitted to ban the naturally occurring rock symbol but not to punish a wearer of the same symbol who does not mean to communicate a violent message.

I am not convinced that this apparent incongruity is a problem. Where the state may permissibly restrict speech, it is not absurd for it to have a freer hand when no speaker exists than when one does. What others may view as an incongruity seems a natural outcome of taking more than one interest into account. Where only listeners exist, only listeners' rights need to be considered. Where speakers also exist, they must be considered as well.

We might recall the analogy to parental rights. A parent who exercises parental rights alone will have more freedom to make unilateral decisions. Two parents who exercise parental rights in tandem will have their discretion constrained by each other. This leads to divergent outcomes as compared with situations in which only one parent exists. Indeed, it gives rise not just to complicated situations but also to tension and even bitter conflict. None of this, however, is a reason not to recognize parental rights in more than one person. Divergent outcomes might well be appropriate when additional rightsholders are involved. At least, the fact of divergent outcomes is not in itself a reason to conclude that other rightsholders do not exist.

Finally, caring exclusively about listeners' interests can create incongruities as well. If only listeners have speech rights, then protection for identical utterances might turn on how many potential listeners there are and what value the utterance has in a particular context. A statement might be protected if said in a newspaper and unprotected if said from one co-conspirator to another. A statement in favor of suicide might be protected if said in a philosophical treatise and unprotected if said privately to a suicidal person. Few would say that there is anything incongruous about the same statement provoking different considerations depending upon its audience and context. The existence of a speaker is just another such consideration.

Thus, the three conceptual objections to speakers' rights do not rule out such rights. The fact that some speech does not have a speaker does not say anything about a speaker's rights when one exists. The fact that some speakers do not have successful free speech claims also says nothing about whether speakers have speech rights. And the incongruities that arise from recognizing speakers' rights do not

foreclose such rights: being open to the possibility of multiple rightsholders could be a virtue rather than a flaw. Speakers may or may not deserve free speech rights as a substantive matter. But they are not foreclosed from them on the conceptual grounds raised by these objections.

III. THE INEVITABILITY OF SPEAKERS' RIGHTS

Thus, speakers' rights are not conceptually impossible. But are they required? That question can only be answered by appeal to particular substantive conceptions of what freedom of speech is. And each of the major justifications for freedom of speech, on its own logic, implies an interest in speakers as well as listeners. (The one possible exception, as we will see, says more about that justification than about speakers.)

Of course, many people reject one or more of these justifications. I have no interest in defending their merits here, and still less in endorsing a particular one. My aim is simply to show that, if a reader is willing to accept any of the major justifications for freedom of speech, she should be willing to recognize speakers' rights. Until all of these justifications are rejected, or a superior anti-speaker justification arrives to supplant them, there is reason enough to proceed with the view that speakers have speech rights, despite the difficult problems that entails.

I address the three major values often claimed for freedom of speech: that it is crucial for democratic governance, that it bears a special relationship to autonomy, and that it is justified by reference to the search for truth or the marketplace of ideas. I also address an idea considered by some proponents of the anti-speaker view: that freedom of speech rests ultimately on a requirement of government neutrality.

A. Democratic Governance

The dominant view of freedom of speech in twentieth-century America was that it arose out of and was required by commitment to democratic governance. The first free speech cases decided by the Supreme Court in the early twentieth century involved the scope of the democratic state's power to punish those who were critical of it or its policies.[66] The early modern-day scholars of the First Amendment—first

[66] See, e.g., Whitney v. California, 274 U.S. 357, 371–72 (1927) (upholding conviction under California sedition act); Gitlow v. New York, 268 U.S. 652, 672 (1925) (upholding conviction under New York criminal anarchy law); Gilbert v. Minnesota, 254 U.S. 325, 331–

Professors Zechariah Chafee and then Alexander Meiklejohn—developed arguments about the role of free speech in a democratic society.[67]

The early case law is hostile toward free speech generally and largely does not address whether speakers have speech rights (such as they are) in themselves or for derivative reasons. Meiklejohn, for his part, is quite clear that freedom of speech is about listeners having a claim to unimpeded access to information. Democracy depends on an informed electorate, and the state that interferes with the flow of information cuts democracy off at the knees.[68] He famously analogized freedom of speech to a town hall meeting, where, crucially, information is not censored on the basis of content but, equally crucially, participation is governed by strict rules of order. It was in reference to this metaphor that Meiklejohn said, "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[69]

This view makes the freedom of speech an outgrowth of the right to vote. Individuals in a representative democracy have the right to vote for representatives, who will enact policies. Because they have the right to vote, individuals have a claim to information relevant to voting—or at the least, they have a claim against state censorship of such information in the public sphere.[70] Absent such a claim, the right to vote would be fairly meaningless.

---

33 (1920) (upholding conviction under Minnesota sedition act); Abrams v. United States, 250 U.S. 616, 617, 624 (1919) (upholding Espionage Act prosecution); Debs v. United States, 249 U.S. 211, 216–17 (1919) (same); Frohwerk v. United States, 249 U.S. 204, 205–06, 210 (1919) (same); Schenck v. United States, 249 U.S. 47, 51–53 (1919) (same); Patterson v. Colorado, 205 U.S. 454, 462–63 (1907) (upholding contempt charges for newspaper that published articles critical of judges).

[67] See Zechariah Chafee, Jr., Free Speech in the United States (1941); Zechariah Chafee, Jr., Freedom of Speech (1920); Meiklejohn, supra note 2, at 24–26; Zechariah Chafee, Jr., Freedom of Speech in War Time, 32 Harv. L. Rev. 932, 947 (1919); Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 Sup. Ct. Rev. 245, 252–54.

[68] Meiklejohn, supra note 2, at 24–25; see also John Hart Ely, Democracy and Distrust: A Theory of Judicial Review 105 (1980) (noting that speech rights "are critical to the functioning of an open and effective democratic process").

[69] Meiklejohn, supra note 2, at 25.

[70] How much of a positive right voters have to relevant information held by the government, or to meaningful opportunities to receive information, is another question. See, e.g., Vincent Blasi, The Checking Value in First Amendment Theory, 1977 Am. Bar Found. Res. J. 521, 541 (arguing the importance of information in checking government misconduct).

Many have argued, however, that this account is incomplete. In their view, the premises underlying democratic government generate standing on the part of citizens not merely to receive information but also to participate in democratic deliberation. Justice Louis Brandeis, in an opinion distancing himself and Justice Oliver Wendell Holmes from the speech-restrictive standards of their day, argued that the Founders believed that "freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth" and "that public discussion is a political duty."[71]

Later scholars have picked up on the participatory aspect of Justice Brandeis's view. Professor Robert Post, for example, has argued that Meiklejohn made a mistake in not recognizing the connection between the premises of democratic government and participation by the individual:

> [D]emocracy attempts to reconcile individual autonomy with collective self-determination by subordinating governmental decisionmaking to communicative processes sufficient to instill in citizens a sense of participation, legitimacy, and identification. . . . [A]lthough there may be no determinate fusion of individual and collective will, citizens can nevertheless embrace the government as rightfully "their own" because of their engagement in these communicative processes.[72]

Professor Ronald Dworkin, meanwhile, argued that democratic legitimacy requires not merely the opportunity to receive information but also the opportunity to participate in the formulation of opinion and policy:

> [A] majority decision is not fair unless everyone has had a fair opportunity to express his or her attitudes or opinions or fears or tastes or presuppositions or prejudices or ideals, not just in the hope of influencing others, though that hope is crucially important, but also just to confirm his or her standing as a responsible agent in, rather than a passive victim of, collective action.[73]

---

[71] *Whitney*, 274 U.S. at 375 (Brandeis & Holmes, JJ., concurring).

[72] Post, Meiklejohn's Mistake, supra note 42, at 1115–16.

[73] Dworkin, supra note 42, at 131.

Democratic governance is founded upon the premise that individuals have a claim to participate in governance processes. It would be odd if that claim extended to receiving information (and voting), but not to participating in democratic discourse itself. Whether one thinks that democratic discourse is confined to evaluating the potential legislators and leaders of a democratic republic, or whether one thinks that it extends to voicing opinions about the various policies under potential consideration by those representatives, such discourse requires participants who are free to provide opinions and information, as well as to receive them. It is difficult to regard the premises of democratic governance and extrapolate from them a right to hear but not to speak.

B. Autonomy

A second set of arguments holds that freedom of speech has an important relationship to autonomy. Most of the arguments focus on personal autonomy—the individual's development and status as an autonomous person[74]—but some assert that free speech also plays a vital role in moral autonomy—the individual's development and status as a moral agent.[75]

Autonomy accounts, perhaps unsurprisingly, have tended to emphasize the role of the speaker, though generally not to the exclusion of the listener.[76] Nevertheless, there is at least one notable listener-based autonomy account. Professor T.M. Scanlon's Millian Principle posited that it is wrong for the state to interfere with allegedly harmful messages, because doing so fails to treat listeners as autonomous beings capable of evaluating messages on their own.[77] Although Scanlon

---

[74] See, e.g., Baker, supra note 42, at 990–91.

[75] See Shiffrin, supra note 42, at 290–91.

[76] See, e.g., C. Edwin Baker, Autonomy and Free Speech, 27 Const. Comment. 251, 258 (2011) (emphasizing speaker autonomy but also accounting for the impact of speech on the listener's autonomy); Redish, supra note 42, at 604 (protecting both expression and access to expression); Shiffrin, supra note 42, at 283 (protecting thinkers).

[77] See Thomas Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204, 214 (1972). The Millian Principle held:

> There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists

reserved the possibility that freedom of speech consisted of more than the Millian Principle, he placed this listener-based principle at the heart of a theory of freedom of expression.

As Scanlon himself later noted, however, a listener-based autonomy account is likely to be incomplete.[78] If the state must respect you as an autonomous being in your capacity as a listener, chances are that it must respect you in your capacity as a speaker as well. An individual's status as an autonomous being is implicated both when the government keeps speech from her and when the government stops her from speaking.[79] Thus, on autonomy accounts, too, speakers matter as well as listeners.

C. The Search for Truth or the Marketplace of Ideas

Free speech is also often justified as necessary for a search for truth or as an outgrowth of a commitment to a free marketplace of ideas. These two ideas are often conflated, but they are distinct.[80]

The search for truth as a justification assumes both societal commitment to truth-seeking and confidence that free speech furthers this aim. The justification is a consequentialist one—truth is the goal—and the relationship between free speech and the justification is one of positive correlation, if not causation—free speech promotes truth. Generally speaking, search-for-truth arguments are likely to prioritize among truth-seeking missions. The search for a cure for cancer, for example, is likely to rank higher than the question of whether two private parties are having an affair. This suggests that the "search for truth" is not a freestanding value in and of itself. Instead, it conceals other values in the form of beliefs that political, scientific, or other

---

> merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.

Id. at 213. Scanlon later retracted the Millian Principle and offered a modified account. See Scanlon, supra note 2, at 533–34.

[78] Scanlon, supra note 2, at 520–21.

[79] Indeed, Professor Seana Shiffrin has rejected the distinction as artificial: she argues that freedom of speech arises from our status as thinkers, which encompasses and blends speaking and listening. Seana Valentine Shiffrin, Speech Matters: On Lying, Morality, and the Law 79–81 (2014); Shiffrin, supra note 42, at 283; cf. Jed Rubenfeld, The Freedom of Imagination: Copyright's Constitutionality, 112 Yale L.J. 1, 38 (2002) (positing a freedom of the imagination that does not distinguish between speakers and listeners).

[80] See Frederick Schauer, Free Speech: A Philosophical Enquiry 35 (1982) (distinguishing them).

discrete forms of knowledge are particularly worth pursuing. These additional values themselves require justification, something that very few people offer when invoking "the search for truth" as a justification for free speech. These further justifications might relate back to democratic governance or autonomy, or they might import still other values into the project of defending the idea of freedom of speech. In any case, the notion of a search for truth, by itself, does not offer enough substance to begin to consider what sort of processes deserve protection and where speakers figure into them.

Meanwhile, the marketplace of ideas is a metaphor, not a justification, and indeed the metaphor can be supported by multiple justifications. The marketplace of ideas could be a metaphor for truth-seeking: we seek truth, and a free marketplace of ideas promotes truth.[81] But the marketplace of ideas can also be justified in other ways. For example, economists have argued that a free marketplace in ideas is desirable just as a free market in other goods is desirable.[82] On this view, freedom of speech may or may not promote truth. But free markets are better than regulated markets, and that is reason enough for a marketplace of ideas.

Thus, much depends on what a particular theorist means when relying on the search for truth or the marketplace of ideas. Given the variety of claims potentially concealed beneath those labels, one conclusion about the status of speakers is impossible. What is possible is to frame the question: does this particular view entail that speakers are important in themselves? For example, the view that truth-seeking is particularly important might suggest that particular people devoted to truth-seeking—scientists, reporters, intellectuals, librarians—should be rightsholders. Or it might suggest that anyone whose endeavors

---

[81] Justice Holmes appeared to conflate truth-seeking and the marketplace of ideas, which is likely why others often conflate them as well. In the passage that gave birth to the phrase "marketplace of ideas," Justice Holmes said:

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.

Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

[82] See, e.g., R. H. Coase, The Economics of the First Amendment: The Market for Goods and the Market for Ideas, 64 Am. Econ. Rev. 384, 389 (1974); Aaron Director, The Parity of the Economic Market Place, 7 J.L. & Econ. 1, 9 (1964).

contribute to truth-seeking—i.e., everyone—should be rightsholders. The alternative view is that truth is important, and listeners are important, but speakers are a mere vessel. This might be a plausible position for some truth-seeking theories, but it might not be for others.

Similarly, the specific reasons for supporting a marketplace of ideas will determine whether the marketplace requires rights for speakers as well as listeners. If all that matters is the information that is produced for consumers/listeners, then speakers' rights could be purely derivative. Standard law and economics accounts of freedom of speech take this view. Information resembles a public good: it benefits society, but it is impossible for those who produce it to internalize many of the benefits they provide. In view of this problem, information producers require subsidies in the form of special legal protections.[83] But they deserve them purely because of the benefits of their product to society: we want them to produce information not because it is important to them, but because it is important to the rest of us.

On other marketplace views, government intervention could be a wrong to speakers as well as listeners. For example, an anti-interventionist stance toward all marketplaces could be explained through something like the economic due process cases of the *Lochner*[84] era. This view suggests that regulation violates the due process rights of the regulated, be they speakers or economic market participants.[85] In this case, speakers (like economic actors) would count as rightsholders in themselves. Thus it matters on what particular premises the free market rests.

In short, the search for truth and the marketplace of ideas are too malleable to provide clear answers on the question of speakers' rights. The two labels cover a broad variety of substantive views, each of which must be considered in its particulars. Certain views may well lead to the conclusion that speakers have only derivative rights. Someone who holds such a view—and who thinks free speech is justified *only* for that reason—has cause to reject speakers' rights. Other views will lead, on their own logic, to the view that speakers have intrinsic rights.

---

[83] See, e.g., Farber, supra note 2, at 558–59; Posner, supra note 2, at 49–50.

[84] Lochner v. New York, 198 U.S. 45, 57–58 (1905).

[85] See, e.g., Richard A. Epstein, The Classical Liberal Constitution 438–39 (2014); Janice Rogers Brown, The Once and Future First Amendment, 2007–2008 Cato Sup. Ct. Rev. 9, 10 (2008).

D. Government Neutrality

Finally, some hold the view that freedom of speech is defined by a governmental obligation of evaluative neutrality: the government must not act on its own evaluation of the truth or value of a message.[86] Such a position could derive from several sources. One could, for example, arrive at it from arguments about the state's obligation to respect individual autonomy, or from a view of political liberalism that required state neutrality more broadly. For that matter, many search-for-truth or marketplace viewpoints ultimately adopt a position similar to this one. Thus, this view could be contained within any number of the views just canvassed. But precisely because so many avenues of thought lead to something like evaluative neutrality, it is worth considering the substance of the idea on its own, regardless of its antecedents.

If, for whatever reason, the government is obliged to remain neutral among ideas—if "[f]reedom of expression is implicated whenever an activity is suppressed or penalized for the purpose of preventing a message from being received"—it is not clear why this principle would generate rights only in listeners and not in speakers.[87]

The idea is that the state is under a presumptive obligation not to interfere with messages on the basis that they are wrong, harmful, or valueless. Listeners clearly have a claim when the government prevents them from receiving messages on such a basis. But the government's obligation runs to speakers as well. Speakers whose speech is interdicted will have suffered adverse state action for a bad reason. They should be able to claim that the government has an obligation not to penalize them for a bad reason.

Some might object that this view is overbroad, because it would suggests that nonspeakers, too, have rights in some contexts. This is because what matters on the government neutrality view are the reasons for governmental action. Nonspeakers punished for bad reasons would also be able to claim that the government's actions toward them violated the First Amendment.

---

[86] Alexander, Freedom of Expression, supra note 2, at 11; Alexander, Reply to Kendrick, supra note 2, at 2 ("The true free-speech issue is whether the government should be able to interdict the communication and prevent its being received by an audience."). Alexander argues that this view is the only plausible form that a human right of freedom of speech could take, but he ultimately rejects it as untenable for reasons beyond the scope of the current discussion. See Alexander, Freedom of Expression, supra note 2, at 35–36.

[87] Alexander, Freedom of Expression, supra note 2, at 9.

But providing a claim for nonspeakers in such circumstances is a good thing rather than a bad one. Indeed, recognizing rights for nonspeakers in such contexts accounts for intuitions better than recognizing rights only in listeners. For example, in *Heffernan v. City of Paterson*, the problem was that Heffernan did not support the mayoral challenger but was demoted because his superiors mistakenly thought he did.[88] Heffernan's claim was that it was wrong to punish him, because he was fired for supposedly expressing a view he did not have. The city responded that he could not invoke the First Amendment, because he in reality had not been speaking at all.[89]

On the merits here, many people will feel that it is unfair for the city government to demote someone for speaking and then insulate that decision from review on the ground that he was not in fact speaking. The majority of the Supreme Court certainly was not persuaded by the city's argument.[90] What conception of rightsholders best accounts for this outcome?

If only listeners' rights matter, it would seem that neither Heffernan nor anyone else should have a free speech claim. A free speech claim does not exist, because there was no speech from which listeners could benefit. The police officers who misunderstood Heffernan's action were his only "audience." They are not listeners whose interests could be protected indirectly by giving Heffernan a derivative right—to the contrary, they are part of the state apparatus that ultimately demoted Heffernan. With no possibility of listeners, there is no possibility of listeners' rights.

Nevertheless, the government's punishment of Heffernan seems to violate the principle of government neutrality. Under that principle, it is wrong for the government to act on the basis of its own evaluation of the truth or value of a message. The government clearly did so in this case. The best way to explain the outcome is to recognize that the principle of neutrality creates obligations on the part of the government with respect to listeners, speakers, and even nonspeakers who suffer adverse action because of the government's evaluation of messages.

In another example, a local government employee in Virginia was terminated for "liking" a Facebook post that said something positive

---

[88] 136 S. Ct. 1412, 1416 (2016).

[89] Id.

[90] Id. at 1418.

about his boss's campaign opponent.[91] The employee challenged his termination on First Amendment grounds. The district court held that his claim failed because liking something on Facebook did not count as speech, and thus he could not have a First Amendment claim.[92] But whether Facebook "likes" are speech is beside the point. It is enough that the employee was fired because his state employer *thought* he was saying something.[93] Like Heffernan, the employee was fired *because of* government dislike for his message, whether or not he was really saying anything. In both cases, the state violated the principle of government neutrality. In both cases, the violation implicates the employee's rights as a speaker, and indeed the employee appears to be the only one in a position to challenge it.

* * *

Thus, every plausible argument for free speech rights provides a basis for believing that speakers, as well as listeners, are rightsholders. The possible exception is the search for truth or marketplace of ideas, which are labels for an assorted collection of premises and conclusions. Here, too, many specific arguments will generate speakers' as well as listeners' rights, but others will not.

IV. THE INCONVENIENCE OF SPEAKERS' RIGHTS

Thus far, we have determined that recognizing speakers' rights is not forbidden, and that under most plausible versions of free speech rights it is required. Furthermore, in certain cases the recognition of speakers' rights will explain intuitions better than the anti-speaker view: *Heffernan v. City of Paterson* is one such case.

But in other cases, speakers' rights are a complication. *Elonis v. United States* is one example. If only listeners matter, their interests will entirely define whether the state may proscribe the threats in *Elonis* (as well as incitement, false speech, speech that teaches people to commit

[91] Bland v. Roberts, 730 F.3d 368, 380–82 (4th Cir. 2013), as amended (Sept. 23, 2013).

[92] Bland v. Roberts, 857 F. Supp. 2d 599, 603 (E.D. Va. 2012).

[93] The Court of Appeals also thought the status of Facebook likes was important to the case. See *Bland*, 730 F.3d at 385–86 (concluding that liking something on Facebook is protected speech). I am suggesting that a focus on government neutrality is better than either the district court or the circuit court's approach.

crimes, speech that inspires copycat actors, and so forth).[94] If speakers also have rights, both sets of claims must be acknowledged and balanced.

I began this project by listing several other recent speech controversies heavily affected by the decision to recognize speakers' rights.[95] Challenges by wedding vendors, search engines, Internet service providers, businesses with required disclosures, and so forth all hinge on claims that the regulations at issue violate the speakers' rights as speakers. These cases would be much simpler—or would go away altogether—if only listeners' claims mattered.

In the wedding vendor cases, for example, it seems unlikely that listeners would understand customer service required by a civil rights act to constitute speech—still less that their rights as listeners are infringed when civil rights acts operate to require service. In other examples, the challenged laws seem designed to *protect* listeners' interests. They regulate fraudulent claims about military service or confusing pricing practices. They provide the public with information about food origins or product safety. They ensure that Internet service providers and search engines supply the speech that customers want rather than privileging the speech that is most remunerative for them. If only listeners mattered, these claims would be much easier to resolve, or they would not even get started.

Speakers' rights make these claims more complicated not just because they add speakers to the equation, but also because doing so brings with it a host of additional questions. In this Part, I will define several of those questions. I will not attempt to resolve them here. My point is simply to make clear the challenges of speakers' rights.

A. Difficult Calculations and Divergent Outcomes

Recognizing both speakers' and listeners' rights makes cases more complex and possibly creates divergent outcomes.[96] To be clear, in many cases, recognizing both will not create complications. It is easy enough when speakers' and listeners' claims point in the same direction—when

---

[94] See supra notes 8–10, 12 and accompanying text; see also Eugene Volokh, Crime-Facilitating Speech, 57 Stan. L. Rev. 1095 (2005); Kendrick, A Test for Criminally Instructional Speech, supra note 16.

[95] See supra notes 17–28 and accompanying text.

[96] See supra Section II.C.

speakers wish to speak and listeners wish to hear them. For example, in the pornography context, there seem to be plenty of both willing speakers and willing listeners. In such cases, speakers' rights do not matter to outcomes. (And speakers' rights are doctrinally elusive because they often run alongside listeners' rights in this way.)

Problems arise when speakers' and listeners' interests are misaligned. Sometimes speakers want to speak, and listeners have no significant interest in hearing them. *Elonis* is an example. In *Elonis*, the trial court held that a statement is not protected by the First Amendment if reasonable people hearing it would take it to be a threat.[97] This is a standard that focuses on listeners to the exclusion of speakers. It essentially says, if a reasonable listener would think that this person means to do harm to the target of the statement, then listeners' interests are sufficiently outweighed by concerns about physical safety and intimidation that there is no First Amendment protection for this statement.

The Supreme Court disagreed. It held, as a matter of statutory interpretation, that the speaker mattered. In particular, the law under which Elonis was convicted had to be interpreted to allow a conviction only if Elonis had a particular state of mind (purpose to intimidate or knowledge of the likelihood of intimidation—the Court refused to say whether recklessness was enough).[98] Because the Court decided the issue on statutory interpretation grounds, it did not deal with the First Amendment question. But if attention to the speaker's state of mind is necessary for First Amendment reasons as well as statutory reasons, then speakers' rights are doing work, and they are pulling against listeners' interests.[99]

---

[97] *Elonis*, 135 S. Ct. at 2007.

[98] Id. at 2012.

[99] Several existing speech categories could be understood to work exactly this way. Incitement requires not only likelihood of imminent violence but also the speaker's intent to cause such violence. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). Parts of defamation law penalize speakers only if they knew their statement was false or were reckless about that risk. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964). Convictions for distributing obscenity violate the First Amendment unless it is proved that the distributor knew or was reckless about the obscene contents. Smith v. California, 361 U.S. 147, 153–55 (1959). Convictions for distributing child pornography violate the First Amendment unless the distributor knew or was reckless about the fact that the material depicted a minor. New York v. Ferber, 458 U.S. 747, 765 (1982).

The same phenomenon occurs not only when speech is dangerous but also when it is simply unwanted. Residents might prefer not to have picketers outside their private homes;[100] people entering abortion clinics might prefer not to navigate a crowd of strangers;[101] Supreme Court Justices might prefer not to be accosted on their way into their building.[102] Here, interests in speaking must be balanced against interests in not listening.

Conversely, sometimes listeners want to hear, and speakers do not want to speak. The public might like to know whether food includes genetically modified ingredients, and food makers might prefer not to say;[103] workers might like to know their rights under federal labor law, and employers might rather not be required to tell them;[104] society might like to know who is giving how much to what political candidate, and some donors might prefer that that information not be disclosed.[105]

In such cases, speakers and listeners stand in tension. Anti-speaker views do not have to worry about the tension—they can resolve these issues entirely on the basis of listeners' rights. Any other resolution requires adjudication between speakers and listeners. If we always side with listeners, then speakers' rights are doing no real work. If we side with speakers, then listeners are owed a justification. When both sides have legitimate claims, any resolution is likely to feel imperfect. In these

---

Of course, one might try to justify all of these doctrinal features on listener grounds: perhaps this attention to speakers is required to keep them from being chilled and thus depriving listeners of speech. See Schauer, supra note 2, at 216–24. If so, these state-of-mind requirements are just proxies for listeners' interests. But if any of these are not justified on chilling grounds (and I have argued elsewhere that they are not, see Kendrick, supra note 12, at 1659–62), then these are real-life examples in which speech that otherwise could be regulated is protected out of deference to speakers.

[100] Frisby v. Schultz, 487 U.S. 474, 488 (1988) (upholding residential picketing ban).

[101] McCullen v. Coakley, 134 S Ct. 2518, 2541 (2014) (striking down buffer zone around abortion clinic).

[102] Hodge v. Talkin, 799 F.3d 1145, 1150 (D.C. Cir. 2015) (upholding buffer zone around Supreme Court building).

[103] See, e.g., Grocery Mfrs. Ass'n v. Sorrell, 102 F. Supp. 3d 583, 607, 610, 621, 635 (D. Vt. 2015) (permitting some First Amendment challenges to GMO labeling law to go forward while dismissing others), appeal docketed, No. 15-1504 (2d Cir. May 6, 2015).

[104] Nat'l Ass'n of Mfrs. v. NLRB, 717 F.3d 947, 963–64 (D.C. Cir. 2013) (striking down National Labor Relations Board rule requiring employers to post a labor notice stating basic rights and obligations of employers and employees under National Labor Relations Act).

[105] See, e.g., Citizens United v. FEC, 558 U.S. 310, 366–67 (2010) (upholding Bipartisan Campaign Reform Act disclosure provisions against challenge by covered speaker).

respects, speakers' rights make analysis of speech claims more complicated.

B. Defining Speakers

Accounting for speakers' rights also requires one to decide who counts as a speaker. Often this is straightforward, but when it is not, it is troublesome indeed. Do dead authors have speech rights?[106] What about noncitizen authors living abroad? Do publishers count as speakers?[107] Do distributors and sellers of speech count as speakers?[108] What about the producer of a non–speech-related item that is regulated for speech-related reasons: does the manufacturer (or distributor or seller) of a toy gun count as a speaker if the state bans toy guns as having a violent message? What about machines and applications that produce data?[109] What about the developers or owners of such machines and applications? What about anonymous speech?[110] Is it incumbent upon the state to try to locate the speaker, or to take account of the unknown speaker's interests? How would the state gauge the mental state or other interests of an unknown speaker?

In short, if we recognize speakers' rights, we have to deal with all of the nuances we set aside with the problem of speakerless speech and then some.[111] Even in cases where *someone* is clearly a speaker, it will probably be important to draw a conclusion about who exactly that is: is a bookseller asserting his own rights, the publisher's rights, or the author's rights? Is a reporter asserting her own rights or her source's rights?[112]

---

[106] See Alexander, Freedom of Expression, supra note 2, at 8.

[107] Cf. Simon & Schuster v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991) (applying First Amendment to publisher).

[108] Cf. United States v. X-Citement Video, 513 U.S. 64, 78 (1994) (applying First Amendment to distributor); Smith v. California, 361 U.S. 147, 152–53 (1959) (same).

[109] See, e.g., James Grimmelmann, Speech Engines, 98 Minn. L. Rev. 868, 933 (2014); Neil M. Richards, Why Data Privacy Law Is (Mostly) Constitutional, 56 Wm. & Mary L. Rev. 1501, 1524–28 (2015); Tim Wu, Machine Speech, 161 U. Pa. L. Rev. 1495, 1497 (2013).

[110] Alexander treats the problem of anonymous speech as an objection to recognizing speakers' rights. See Alexander, Reply to Kendrick, supra note 2, at 1–2.

[111] See supra Section II.A.

[112] See RonNell Andersen Jones, Rethinking Reporter's Privilege, 111 Mich. L. Rev. 1221, 1282 (2013) (arguing that Supreme Court doctrine focusing on the reporter should be replaced with a constitutional inquiry focusing on the anonymous source).

The anti-speaker view cuts through all these questions to ask a single one: do listeners have claims to this material? If so, whether publishers, sellers, or authors have the ability to advance that claim is purely a question of standing (and likely one that any of them could easily satisfy). If speakers have rights of their own, then who counts as a speaker is a matter not just of standing but also of substantive rights—rights that might conflict with, and certainly will distract attention from, the rights of the listening public.

C. Corporate Speakers

One pressing variation on the speaker-definition problem is the problem of corporate speech rights. By "corporate," I mean not merely business entities, and not merely organizations with formal corporate status, but various multimember entities that claim First Amendment protection—for-profit corporations, nonprofits, universities, clubs, and other organizations. Defining when and why such entities have rights has generated an enormous literature and great controversy.[113]

But if speakers do not have speech rights, then this question largely goes away. The only thing that matters is whether listeners have an interest in receiving the speech in question. Granted, even under an anti-speaker account, someone might argue that listeners have lesser interests in some speech depending on who the speaker is. For example, one might argue that listeners have less of an interest in hearing the statement "buy a Chrysler" from the head of Chrysler than from *Consumer Reports*.[114] But a proponent of the anti-speaker view at least has the choice not to worry about such things.[115] The thorniest aspects of the corporate speech debate arise because corporations, institutions, and other collective entities raise claims on their own behalf. This is a product of recognizing speakers' rights.

---

[113] For examples of the literature and description of the controversy, see Richard Schragger & Micah Schwartzman, Some Realism About Corporate Rights, *in* The Rise of Corporate Religious Liberty 345, 348–53 (Micah Schwartzman et al. eds., 2016); Steven Walt & Micah Schwartzman, Morality, Ontology, and Corporate Rights, 11 Law & Ethics Hum. Rts. 1 (2017).

[114] But see Alexander, Low Value Speech, supra note 2, at 548–49 (arguing that the "value" of the statement "buy a Chrysler" "does not decline when its author is Lee Iacocca rather than Ralph Nader").

[115] See, e.g., id.; see also Scanlon, supra note 77, at 213 (proposing a purely listener-based principle of free speech that would not require inquiry into speakers' interests).

D. Commercial Speakers

Another important issue involves commercial speakers. Note that this problem is distinct from that of corporate speakers, though the two are sometimes conflated. Corporate speakers could be for-profit, such as Nike, or non-profit, such as the NAACP. Similarly, commercial speakers could be corporations, or they could be individuals, such as sole proprietors. Both dimensions raise questions for free speech rights.

The two questions—corporate rights versus commercial rights—differ in one important regard: the commercial speech question is unavoidable, whether speakers have rights or not. Even if only listeners have rights, a particular speech theory will have to decide what value commercial speech has for listeners and thus whether it comes within the ambit of freedom of speech.[116]

Although the commercial speech question still exists on an anti-speaker view, adding speakers to the mix makes it more complicated. Doctrinally speaking, the early rationales for protecting commercial speech heavily emphasized the interests of consumers and society as a whole.[117] Recent cases have focused more on the rights of the commercial speakers themselves.[118] Recognizing speakers' rights requires a determination of the relative importance of these rights.

E. Compelled Speech and Compelled Association

Without speakers' rights, there are no issues of compelled speech and compelled association. This is both a virtue and a vice. Many people have strong intuitions that compelling people to make statements, or to associate with others in a way that makes a statement, is sometimes impermissible. One prime example is *West Virginia State Board of Education v. Barnette*, in which the Supreme Court invalidated a law that required students to recite the Pledge of Allegiance on pain of

---

[116] Compare Valentine v. Chrestensen, 316 U.S. 52, 54 (1942) (holding that commercial speech is not within the scope of the First Amendment), with Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 770 (1976) (holding that it is).

[117] See *Va. State Bd. of Pharmacy*, 425 U.S. at 763–64.

[118] See Sorrell v. IMS Health, 564 U.S. 552, 579–80 (2011); 44 Liquormart v. Rhode Island, 517 U.S. 484, 511–12 (1996) (plurality).

suspension.[119] It is hard to use listeners' rights to justify the outcome of *Barnette*.[120]

It is, in fact, difficult to articulate why anything is wrong with compelled speech or association generally, if listeners' rights are all that matter.[121] At best, one could argue that compelled speech has a distorting effect on the messages received by listeners. But given that *all* government regulation affects the information people receive—the experiences they have, the phenomena they witness—bare observations about distortion require far more development and nuance before they become the basis for a legitimate objection to regulation.[122]

In contrast, if speakers' rights matter too, then we have the opposite problem: potentially too many compelled speech and association claims rather than none at all. Suddenly we must explain why speakers are sometimes compelled to speak—under subpoena, on their taxes, and in countless other scenarios. As noted earlier, many compelled statements arguably further listeners' interests, because they provide listeners with desired information. If only listeners have rights, it is difficult to see how any of these compulsions infringe them. But if speakers have rights, then we must ask who counts as a speaker and how much consideration they receive.[123]

Thus, the choice about speakers' rights in the compelled speech context is a choice about too little or too much. If only listeners' rights matter, there will be too little room for compelled speech claims, contrary to many people's intuitions. But if speakers' rights matter as well, there will be a great deal of complication—an entire realm in which speakers' and listeners' rights will regularly oppose each other.

---

[119] 319 U.S. 624, 642 (1943).

[120] See Alexander, supra note 34, at 150–53.

[121] See id.

[122] See, e.g., Larry Alexander, Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory, 44 Hastings L.J. 921, 929 (1993) ("[A]ll laws affect what gets said, by whom, to whom, and with what effect." (emphasis omitted)).

[123] For a treatment that develops a theory of speakers' rights in the context of compelled funding cases, see Micah Schwartzman, Conscience, Speech, and Money, 97 Va. L. Rev. 317 (2011).

F. Disregard of Listeners' Rights

Behind these issues is an overarching challenge: recognition of speakers' rights may lead to insufficient attention to the rights of listeners. Existing First Amendment case law illustrates this risk. On occasion, the Supreme Court has explicitly recognized that speakers have First Amendment rights.[124] On other occasions, the idea that listeners have rights is implied by—indeed, is the only plausible basis for—courts' reasoning, even if they do not spell it out.[125] On many more occasions, courts have remained silent about whose rights matter, in contexts where either speakers' or listeners' rights could be doing the work. But in many cases involving opposed rights of speakers and listeners, listeners are disregarded.

Decisions granting search engines immunity from fair competition laws do not acknowledge that listeners' rights might be furthered by the application of such laws.[126] When the D.C. Circuit upheld net neutrality rules against a First Amendment challenge, the court might have observed that the rules served listeners' rights, but it did not.[127] Labeling and disclosure requirements often further listeners' interests in receiving information, but courts do not discuss these interests in First Amendment terms.[128]

The easy explanation is that these cases are brought by speakers. Speakers, not listeners, are invoking the First Amendment. When listeners are acknowledged, they are described in terms of the governmental interests that support the law—the governmental interests balanced against the speakers' claims for purposes of strict scrutiny or whatever standard of review applies. But there is no reason that courts could not acknowledge the free speech dimension of the values supporting the law.

Courts used to be less reticent about doing so. Take, for example, *Associated Press v. United States*, in which the Associated Press claimed

---

[124] See, e.g., Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 756 (1976).

[125] See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964).

[126] See cases cited supra note 21.

[127] U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 740–44 (D.C. Cir. 2016).

[128] See, e.g., cases cited supra notes 17–28.

immunity from the Sherman Antitrust Act, partly on First Amendment grounds.[129] The Supreme Court rejected that claim with these words:

> Finally, the argument is made that to apply the Sherman Act to this association of publishers constitutes an abridgment of the freedom of the press guaranteed by the First Amendment. . . . It would be strange indeed, however, if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment, far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests.[130]

Much the same could be said about Internet service providers' First Amendment claims to immunity from net neutrality rules. The fact that the D.C. Circuit did not say it—and that it took fives pages to reject essentially the same claim that the Supreme Court in 1945 rejected in a paragraph[131]—indicates something about the changes in First Amendment law over the last seven decades and the changing role of speakers and listeners within that law.

In summary, speakers' rights create enormous complications. They make cases more complex; they give rise to questions about who counts as a rightsholder; and they generate free speech issues where once there were none. This overview can hardly convey the complexities that

---

[129] 326 U.S. 1, 19–20 (1945).

[130] Id.

[131] Compare *U.S. Telecom Ass'n*, 825 F.3d at 740–44, with *Associated Press*, 326 U.S. at 19–20.

speakers' rights can create in any given case, which might involve compelled speech, commercial speech, a corporate speaker, or all of the above and more. Moreover, perhaps because of the complications that speakers' rights entail, they seem in practice also to create disregard of listeners' rights. All in all, if the doctrine did not recognize speakers' rights, contemporary First Amendment litigation would look very different.

CONCLUSION

What is the appropriate response to these complications? One potential response is to reject the idea of speakers' rights. Again, to be clear, skeptics do not take the anti-speaker view because of the inconvenience of speakers' rights. But having recognized their inconvenience, we could choose to reject them.

Ultimately, however, this is not a sufficient reason for such a step. A reason to reject speakers' rights would be because they are conceptually impossible or incoherent, or because they are not required by any persuasive account of freedom of speech. As it happens, however, they are conceptually quite possible and coherent, and the dominant accounts of free speech, in their most plausible versions, require them.

Also required, however, is much more careful thought about speakers' rights. Some speakers' claims should be easy: most of us will have an intuition that a free speech right not to file income taxes should be a nonstarter. Most will agree that a chainsaw manufacturer has no free speech right to refuse to include an instruction manual with its product.[132] Many will conclude that businesses have no right to withhold factual information about their products when listeners have stated, through representative processes, that they want such information.[133]

Recognizing speakers' rights requires us to confront such claims and to articulate why some are good and some are not. It is highly unlikely that either the public or the courts will come to complete consensus about one view of speakers' rights. But we can surely do better than simply assuming that every time someone is doing something that can remotely be described as "speech," he or she has a First Amendment claim.

---

[132] See Frederick Schauer, The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience, 117 Harv. L. Rev. 1765, 1770 (2004).

[133] For examples of particular situations, see cases cited supra notes 23–27.

Equally careful thought must be given to the rights of listeners—direct audiences and society at large. Although the theoretical literature emphasizes listeners' rights, First Amendment case law often focuses on speakers to the detriment of listeners. The skeptics are correct that a great deal of case law that appears to protect speakers could also be read to protect them on behalf of listeners. When their interests diverge, courts are too quick to adopt the speaker's perspective, rather than considering the listener's. In this regard, speakers' rights need both more careful thought and more contextualization within a broader framework of rightsholders.

Those difficulties are very real, and they stand as a challenge for judges deciding cases and for anyone formulating a complete account of freedom of speech. But the fact that these challenges exist is not a reason to reject speakers' rights. All rights make philosophical and legal analysis more complicated. That is, in fact, their job.