RESPECTING LISTENERS' AUTONOMY: THE RIGHT TO BE LEFT ALONE

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INTRODUCTION

The core of First Amendment free speech doctrine concerns the right of speakers to convey the message of their choice, free of repression or retaliation by the government. In addition, a small but significant body of

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law also addresses the rights of listeners to obtain access to information and speech in the face of coercive state measures seeking to deprive them of that access. Finally, there is also a well-established "compelled speech doctrine," which addresses the right of speakers to resist government compulsions to speak—*i.e.*, a right not to speak. This paper considers a question heretofore largely ignored by the courts, which is whether the First Amendment also protects a right against compelled listening.

As it turns out, a right against compelled listening raises complex and difficult questions because such a putative right in fact has two possible aspects to it. The first would be a First Amendment right not to listen that operates against the state, restricting the state's power to force an unwilling listener to hear the state's chosen message. Such a right *must* exist if public discourse among citizens is to play its democracy-empowering role (and also must exist under autonomy-based theories of free speech, for obvious reasons). But it is also, as we shall see, necessarily and distinctly limited.

But the more interesting questions raised by a right against compelled listening concern not disputes between listeners and the state, which are the subject of the classic First Amendment tradition, but rather disputes between non-state speakers and listeners, which the state must somehow accommodate or resolve. In these situations, in short, the question is whether the state may or may not enforce a listener's desire to be left alone. Furthermore, while disputes strictly between private speakers and listeners of course do not themselves trigger the First Amendment because of the state action doctrine, when the state steps in to resolve those disputes, the First Amendment is very much implicated. This paper's ultimate goal is to identify the state's proper and constitutional role in those situations.

Part I briefly summarizes the classic First Amendment rights of speakers to speak and listeners to listen as against state coercion. It then examines the constitutional relationship between speakers, listeners, and their rights. Part II considers whether, just as the right to speak has been interpreted to generate a right not to speak, so too a right to listen should have the converse—a right not to listen. It further explores the two possible aspects of such a "right" described above,[1] and closes by considering the role of the state in the face of speaker versus listener disputes. Finally, Part III considers some doctrinal applications of a listener's right to be left alone.

1. I place the word "right" in quotations because, as we shall see, as against private speakers what is at stake is not technically a constitutional *right*, but rather a constitutionally relevant interest.

I. THE CLASSIC FIRST AMENDMENT

In this Part, we will very briefly consider the nature of "classic" First Amendment rights to speak and to listen, as against state coercion. We will then explore the relationship between those rights.

A. SPEAKERS' RIGHTS AND LISTENERS' RIGHTS

It is conventional wisdom that First Amendment law focuses almost exclusively on speakers and their "right" to speak, free from state interference. Even those of us who embrace instrumental justifications for protecting free speech, such as advancing democratic self-governance, nonetheless tend to fixate on speakers' interests in contributing to public discourse when we analyze First Amendment conflicts. Indeed, the bulk of First Amendment doctrine, including the concept of unprotected categories of speech[2] and the foundational distinction between content-based and content-neutral laws,[3] all concern government suppression of speech or speakers (often, but not always, speech or speakers the state dislikes).

One further point about the right to speak that should be a given: the right to free speech under the First Amendment must incorporate a right to generally choose one's audience (though, of course, like any other right, this right is not absolute and might be outweighed by a sufficiently strong governmental interest). The right to choose an audience is implicit in the Court's standard test to evaluate content-neutral "time, place, or manner" regulations, which requires inter alia that any regulation "leave open ample alternative channels of communication."[4] If such "ample alternative channels" referred to the ability to speak to *any* audience, the test would have no teeth at all—and that is not the case, as illustrated by numerous cases.[5] Furthermore, in the leading case dealing with expressive conduct, a topic closely related to content-neutral restrictions on speech, the second Justice Harlan also went out of his way to state that he would not uphold a regulation of conduct with an "incidental" impact on expression if the law "in practice has the effect of entirely preventing a 'speaker' from reaching a significant audience with whom he could not otherwise lawfully communicate."[6]

2. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (defining "fighting words"); Roth v. United States, 354 U.S. 476, 486 (1957) (holding that obscenity is not protected speech); Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (establishing the incitement standard); New York v. Ferber, 458 U.S. 747, 763 (1982) (prohibiting child pornography).

3. Reed v. Town of Gilbert, 576 U.S. 155, 163–64 (2015).

4. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (quoting Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

5. City of Ladue v. Gilleo, 512 U.S. 43, 58–59 (1994); McCullen v. Coakley, 573 U.S. 464, 490–91 (2014); *see also* Martin v. City of Struthers, 319 U.S. 141, 146–47 (1943).

6. United States v. O'Brien, 391 U.S. 367, 388–89 (1968) (Harlan, J., concurring).

Admittedly, the courts have not been entirely consistent on this issue. Thus, there are undoubtedly some cases, especially in the lower courts, suggesting that denying a speaker the ability to reach a specific audience need not be fatal to a content-neutral restriction on speech.[7] But this simply cannot be correct. For example, this would mean that during the 2024 presidential election, a prohibition on the Trump or Harris campaign advertising in a swing state such as Pennsylvania would be permissible if both candidates were permitted to reach alternative audiences in California and Texas. Such a result would make a mockery of the First Amendment (and democracy).

In addition to a right to speak, there is a well-developed body of doctrine protecting the right of listeners to access speech the state wishes to shield them from. The foundational case here is *Lamont v. Postmaster General of the United States*.[8] In *Lamont*, the Court unanimously struck down a federal statute that required the Post Office to block the delivery of material determined to be "communist political propaganda" and only deliver the materials on the written request of the recipient (interestingly, *Lamont* was the first case in which the Supreme Court invalidated a *federal* statute on First Amendment grounds).[9] Crucially, for our purposes, the basis of this holding was not the right of foreigners to mail communist propaganda into the United States, which almost certainly does not exist,[10] but rather the First Amendment rights of addressees to receive information without impediment[11]—a point Justice Brennan made explicit in his concurrence.[12]

If *Lamont* marks the origin of listeners' right in the Supreme Court, their apotheosis occurred a little over a decade later, in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[13] There, prescription drug consumers challenged a Virginia ethical rule that barred pharmacists from advertising prescription drug prices.[14] Because no pharmacist joined the lawsuit, the Court could only hear the merits if it recognized a First

7. Interstate Outdoor Advert., L.P. v. Zoning Bd. of Mount Laurel, 706 F.3d 527, 535 (3d Cir. 2013) (upholding content-neutral restriction on non-commercial billboards, stating that "the mere fact that Interstate will not be able to reach the distinct audience of travelers on the particular section of I-295 that it desires to target does not mean that adequate alternative channels of communication do not exist").

8. Lamont v. Postmaster Gen., 381 U.S. 301 (1965).

9. *Id*. at 302–04; Xiangnong (George) Wang, *Listeners' Rights in the Time of Propaganda: The Story of* Lamont v. Postmaster General, KNIGHT FIRST AMEND. INST. COLUM. UNIV. (Feb. 14, 2025), https://knightcolumbia.org/content/listeners-rights-in-the-time-of-propaganda-the-story-of-lamont-v-postmaster-general [https://perma.cc/48MF-JSJN].

10. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, 140 S. Ct. 2082, 2089 (2020).

11. *Lamont*, 381 U.S. at 307.

12. *Id*. at 307–08 (Brennan, J., concurring).

13. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 773 (1976) [hereinafter *Virginia Pharmacy*].

14. *Id*. at 753.

Amendment right on the part of listeners to *receive* information—which it explicitly did before holding for the first time that the First Amendment protected commercial speech.[15]

Finally, one additional case in which listeners' rights were importantly implicated, though not central to the decision, is *Red Lion Broadcasting Co. v. Federal Communications Commission*.[16] In *Red Lion*, the Supreme Court upheld the "Fairness Doctrine," which was a federal regulation requiring radio and television broadcasters who broadcast a "personal attack" on an individual or group to provide airtime to the subject of the attack to respond.[17] In doing so, the Court emphasized that in the context of broadcasting, because of the "scarcity" of available broadcast frequencies, speakers' rights could not be the focus of attention.[18] Instead, the Court said, "it is the right of the viewers and listeners, not the right of broadcasters, which is paramount" in assessing First Amendment challenges to broadcast regulations.[19] So, like *Lamont* before it and *Virginia Pharmacy* after it, the *Red Lion* Court appeared to grant constitutional status to the First Amendment interests of listeners. Indeed, *Red Lion* was cited in *Virginia Pharmacy* for that proposition.[20]

B. OF SPEAKERS *AND* LISTENERS

The Supreme Court has thus recognized robust First Amendment rights for speakers and listeners, but it has largely treated them as distinct rights—no doubt because in the two key listeners' rights cases, *Lamont* and *Virginia Pharmacy*, willing speakers were absent from the litigation. But this approach cannot be correct. After all, what exactly is the point of "speaking" if no one is listening?[21] It is true that some people keep private diaries or talk

15. *Id*. at 756–57
16. Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969).
17. *Id.*
18. *Id.*
19. *Id*. at 390.
20. *Virginia Pharmacy*, 425 U.S. at 757.
21. When I use words like "speak" here, I am referring to all forms of communication, including oral speech, writing, video, electronic communications, picketing, marching, etc. And concomitantly, the word "listener" is meant to encompass actual listeners, readers, viewers, and generally all audiences for expression. To shove all of this into "freedom of speech" is of course historical and textual nonsense, for which mea culpa. But at least in this regard I can say that I am following the (bad) lead of the Supreme Court. *See, e.g.*, JOHN INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 61–63 (Yale Univ. Press 2012) (noting the disappearance of the Assembly Clause in the Supreme Court's modern jurisprudence); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1027–28 (2011) (same regarding Press Clause); RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 10–11, 17–19, 157–62 (2012) (same regarding Petition Clause).

to themselves aloud—what is called "intrapersonal communication."[22] But there are reasons to doubt whether such audience-less "expression" falls within the First Amendment;[23] and in any event, it is certainly not the focus of most First Amendment jurisprudence or disputes. Normally, speech is meaningful, whether viewed from an instrumental or autonomy standpoint, if it has an audience. Admittedly, that audience need not be immediate or identifiable to the "speaker"; after all, we still read Shakespeare and Dickens. But reaching an audience is the point of communication. This is why in the area of expressive conduct, the Supreme Court has explicitly said that conduct is expressive—and so potentially protected by the First Amendment—only when "the likelihood was great that the message [intended to be communicated] would be understood by those who viewed it."[24]

Of course, in emphasizing the existence of listeners as necessary for speech to be meaningful, I am in some sense preaching to the choir here, since this symposium specifically focuses on listeners. But I would suggest that focusing on *listeners* in isolation is also a bit myopic, in the same way as a singular focus on speakers. Because just as speaking without an audience is meaningless, so too is listening without a speaker. What does it mean to speak about "listeners" and "listeners' rights" while ignoring *who* the listener is listening to—who, in short, the speaker is? Yet in the few contexts in which the Supreme Court has actually considered listeners' interests in First Amendment cases, that is largely what it has done.

Consider in this regard *Virginia Pharmacy*. The Court's holding in that case that the First Amendment protects recipients of speech/information rather than just speakers, is now well-accepted; but in the context of that case, it is a bit odd. In recognizing the rights of recipients of information, the Court added a caveat that such rights exist "where a speaker exists, as is the case here," citing to one page in the Stipulated Facts to support this assertion.[25] But given that pharmacists had *not* chosen to join this lawsuit and in fact had obvious, anticompetitive reasons to avoid advertising prices so long as their competitors did the same, the Court's assumption that willing speakers already existed seems unjustified. Admittedly, once the advertising

22. *See e.g.*, INTRAPERSONAL COMMUNICATION: DIFFERENT VOICES, DIFFERENT MINDS (Donna R. Vocate ed., 1994) (collecting works from various authors on the subject of intrapersonal communication); Paul N. Campbell, *Language as Intrapersonal and Poetic Process*, 2 PHIL. & RHETORIC 200, 204–05 (1969); Patrick Jemmer, *Intrapersonal Communication: The Hidden Language*, 9 J. CLINICAL HYPNOSIS 37, 38 (2009).

23. Ashutosh Bhagwat, *When Speech Is Not "Speech"*, 78 OHIO ST. L.J. 839, 854–55 (2017).

24. Texas v. Johnson, 491 U.S. 397, 404 (1989) (quoting Spence v. Washington, 418 U.S. 405, 410–11 (1974)).

25. *Virginia Pharmacy*, 425 U.S. at 756, 756 n.14.

ban was struck down, it was likely that *some* pharmacists would choose to advertise drug prices, but whether that would benefit any individual plaintiff/listener was far from clear absent widespread advertising of drug prices.

The Court did somewhat better in analyzing the relationship between speakers and listeners in *Red Lion*. Unlike in *Virginia Pharmacy*, there is little doubt that *Red Lion* involved willing speakers—in the shape of the broadcasters themselves (the plaintiff in the case was, in fact, a broadcaster[26])—who would communicate to listeners/viewers. But by failing to seriously analyze both listeners' *and* speakers' interests and incentives in assessing free speech issues, the *Red Lion* Court created a conundrum. The Fairness Doctrine may have, in theory, advanced broadcast audiences' interest in receiving balanced coverage of public issues, but it also incentivized broadcasters to avoid taking strong editorial positions on public issues other than anodyne centrist ones. Moreover, it disincentivized coverage of public issues in favor of generic entertainment, in order to avoid the strictures of the Fairness Doctrine.[27] But faced with this argument, the Court simply (and rather naively) deferred to the FCC's views that the "possibility [of any such incentive effect] is at best speculative."[28] Yet less than two decades later the FCC itself, in the course of repealing the Fairness Doctrine, concluded that the doctrine did in fact create substantial "chilling effects" because "the fairness doctrine provides broadcasters with a powerful incentive not to air controversial issue programming."[29] Of course if this was true—as is likely—then without speakers, listeners during the Fairness Doctrine era were necessarily left (so to speak) in the dark regarding public policy controversies. So again, by failing to seriously analyze both sides of the communicative relationship, the Court effectively harmed both speakers and listeners.

The point of this discussion is not to suggest that listeners/audience members lack meaningful First Amendment interests—of course they do. It is merely to suggest that discussing listeners' interests and "rights" without also considering who the relevant speakers might be produces a deeply incomplete, and sometimes meaningless analysis. Expression, in short, is not

26. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 371 (1969).

27. *See* Ashutosh Bhagwat, *The New Gatekeepers?: Social Media and the "Search for Truth"*, 3 J. Free Speech L. 41, 47 (2023); Newton N. Minow, Speech to National Association of Broadcasters, Washington, D.C.: Television and the Public Interest (May 9, 1961) (1961 speech by F.C.C. Chair describing television as "a vast wasteland"), https://www.americanrhetoric.com/speeches/newtonminow.htm [https://perma.cc/QQM5-9PP7].

28. *Red Lion*, 395 U.S. at 393.

29. *In re Complaint of Syracuse Peace Council Against Television Station WTVH Syracuse, New York*, FCC 87-266, 2 FCC RCD. 5043, 5049–50 (1987).

a solitary activity on either side of the speaker/listener coin. It is a joint activity, a form of interpersonal interaction or association between speakers and audiences. It is relational in nature. The First Amendment, after all, does not protect "the right to speak" or "the right to listen;" it protects "the freedom of speech."[30] By focusing on individual "rights," however, whether of speakers or listeners, courts and commentators have failed to recognize the relational nature of that freedom.

II. A "RIGHT" NOT TO LISTEN

Until now, we have generally considered the nature of First Amendment speakers' and listeners' rights and their interrelationship with each other. We will now apply those insights to considering what exactly it is that the First Amendment protects vis-à-vis listeners, focusing in particular on a putative right to *not* listen to unwanted speech.

In considering this issue, it is important to bear in mind a structural point. Most First Amendment law addresses the relationship between speakers or listeners on the one hand, and the state on the other. The question in those cases is what limits there are on the state's right to coerce speakers or listeners. That is where our discussion will begin, by examining rights not to speak, and not to listen, as against the state. But for reasons already discussed, "the freedom of speech" also implicates another key relationship: that between speakers and listeners. Important and difficult First Amendment questions arise about the nature of and limits on the state's power to regulate that relationship. These are the topics of Parts II.B and II.C.

A. CONVERSE RIGHTS: SPEAKERS AND LISTENERS V. THE STATE

As we have seen, the First Amendment famously protects the right of speakers to express the message of their choice, free from state interference. But the Court has also interpreted the First Amendment to protect a converse right—to not be compelled to speak against one's will.[31] The right against compelled speech was first recognized in the Supreme Court's famous decision in *West Virginia State Board of Education v. Barnette*,[32] in which the Court struck down a requirement that public school students participate in a flag salute that was challenged by school children whose beliefs as Jehovah's Witnesses forbade them from participating. *Barnette* thus established that the positive First Amendment right to speak was paired with

30. U.S. CONST. amend. I.

31. For a careful, theoretical consideration of such converse rights, see generally Joseph Blocher, *Rights To and Not To*, 100 CAL. L. REV. 761 (2012).

32. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

a negative right not to speak.

While the right against compelled speech was originally a relatively narrow and circumscribed right, in recent years, the Supreme Court has expanded its scope significantly. For example, in the 2018 case *National Institute of Family and Life Advocates v. Becerra* ("*NIFLA*"), the Court invoked the right to strike down a California statute that required so-called "crisis pregnancy centers"—medically licensed facilities run by abortion opponents who provide medical services to pregnant women—to post notices informing patients that the State of California provided funding for low- or no-cost abortions (and other family planning services) to eligible women.[33] While the *NIFLA* case raised many complex issues, such as whether "professional speech" received lesser First Amendment protection,[34] the core holding was that the required notice violated the First Amendment.[35] Importantly, in *NIFLA*, the majority blurred the distinction between the positive right to speak and the negative right against compelled speech, by holding that "compelling individuals to speak a particular message . . . 'alte[rs] the content of [their] speech.' "[36] As such, the Court suggested that in future compelled speech cases it would apply strict scrutiny, the test it uses for content-based restrictions on speech—something the Court had not done with any consistency prior to *NIFLA*.[37]

Another even more striking example of the extension of the compelled speech doctrine is *303 Creative LLC v. Elenis*.[38] In that case, the Court held that a wedding website designer could refuse to work for same-sex couples, in violation of state antidiscrimination law, because to force her to do so would "compel speech [the designer] does not wish to provide."[39] Thus, even in a situation in which a person is engaging in a commercial enterprise and providing services for payment, the Court has found that the compelled speech doctrine provides robust protections.

Of course, even in the current era, the right against compelled speech is not absolute. Most notably, the Court has indicated that in the context of

33. Nat'l Inst. of Family and Life Advocs. v. Becerra, 585 U.S. 755 (2018) [hereinafter *NIFLA*].

34. *Id*. at 766–68.

35. *Id.* at 773–75.

36. *Id*. at 766 (*quoting* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988)).

37. Admittedly, the Court had equated compelled speech with speech suppression occasionally, notably in the *Riley* case quoted in *NIFLA*, but *Riley*'s throw away comment was based on a citation to a case, *Mia. Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256 (1974), which *did* in fact involve a direct restriction on speech, because the "right of reply" statute struck down in that case was triggered by a newspaper's publication of any story attacking "the personal character or official record" of any candidate for public office. *Id*. at 244; *see also id.* at 256 ("The Florida statute exacts a penalty on the basis of the content of a newspaper.").

38. 303 Creative LLC v. Elenis, 600 U.S. 570 (2023).

39. *Id*. at 588.

commercial transactions, the First Amendment does not prohibit requiring "the disclosure of 'purely factual and uncontroversial information about the terms under which . . . the services will be available.' "[40] More broadly, the Court has said that "health and safety warnings long considered permissible" remain constitutional[41] and that the speech of professionals may be regulated as an incidental aspect of regulating professional conduct.[42] In these contexts, current doctrine recognizes that listener interests can sometimes trump a speaker's interest against compelled speech. But in the realm of ideological and cultural speech, the Court's rule against compelling expression has come to be well-nigh absolute.

Given the robustness of the modern right against compelled speech, should the First Amendment also be understood to protect a robust right not to listen? Given the general symmetry between speaker and listener rights and their interlinked, relational nature, the answer would seem to be yes. Once the relational nature of "freedom of speech" is recognized, there is no logical reason to grant speakers greater rights than listeners; they are, after all, engaged on equal terms in a joint project—though, to my knowledge, the Court has never addressed the issue.

Moreover, not recognizing a right not to listen would have catastrophic implications for both autonomy-based and instrumental understandings of the purpose of free speech protections. The autonomy point is obvious—it is hard to imagine a greater intrusion on autonomy than forcing an individual to listen to speech they wished to avoid. But the implications for instrumental, democracy-based models of free speech are equally obvious. After all, if an incumbent government party or official can *force* voters to listen to the party's propaganda but not their opponents' propaganda, it is hard to imagine how any subsequent political election could be deemed fair or legitimate. More fundamentally, the shape and content of the public discourse essential for democracy must be under the control of the *public*, not the government, if popular sovereignty is to have any meaning.

It should be noted, though, that in practice, a right not to listen as against the state, while it must be real and robust in certain spheres—notably public discourse—has significant limits. The government in fact forces us to listen to messages of its choosing all the time as a condition of engaging in certain activities—often while also compelling the relevant speech. Every time one

40. *NIFLA*, 585 U.S. at 768 (quoting Zauderer v. Off. of Disciplinary Couns. of the Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985)). As to whether going forward the Court will continue to recognize such limits on the compelled speech doctrine, see generally Alan Chen, *Compelled Speech and the Regulatory State*, 97 IND. L.J. 881 (2022).

41. *NIFLA*, 585 U.S. at 775.

42. *Id*. at 769–70.

gets on a plane, one is forced to listen to a federally mandated safety announcement (and airlines are required to communicate them). Employees are forced to suffer through state-mandated trainings, such as sexual harassment trainings, all the time (and employers are required to provide them). My own employer, the University of California—a state entity—is particularly training-happy. Safety instructions are required for employees in many hazardous industries—and so on ad infinitum. But within the core First Amendment domains such as public discourse and artistic/literary expression, a very strong right not to listen—which can be offset only by the weightiest state interests—must exist. The only reason it has not been recognized, it would seem, is that governments appear to assume the existence of such a core right and so stay clear of it.

B. RELATIONAL RIGHTS: SPEAKERS V. LISTENERS

While a right not to listen as against the state seems clearly justified by basic First Amendment principles, much harder questions arise when we consider the nature of a right to be left alone in the context of the relationship between speakers and listeners. If individuals have a right not to listen to a message the state seeks to foist on them, what about a message that a private speaker wishes to force them to absorb?

1. Four Scenarios

To understand the nature of the relationship between speakers and listeners, it is worth considering four different scenarios. In the first, both speaker and listener are willing, and wish to communicate. That is the core of First Amendment law, in which the only question is state power to coerce—when coercing either speaker or listener necessarily coerces the other. A second scenario is when neither speaker nor listener is willing or desirous of communicating. In that situation, state interference would be fairly bizarre, except under specific regulatory circumstances, such as safety videos on airlines or workplace trainings, both situations in which neither the speaker nor listener has a choice not to participate. Indeed, the fact that we sometimes compel both speech *and* listening is a further indication of how speaker and listener interests are intertwined.[43]

43. Thanks to Joseph Blocher for this insight.

The difficult question arises when speakers and listeners disagree. When a listener wishes to hear a message but a speaker does not wish to speak, the compelled speech doctrine, when applicable, prevents the government from intervening on behalf of listeners. Of course, the compelled speech doctrine does *not* always protect speakers. As noted earlier, within the commercial sphere, disclosure requirements are ubiquitous and intended to protect listeners—presumably McDonald's doesn't really want to tell customers how many calories are in a Big Mac, no matter how much the customers need or want to know. But in the sphere of political and cultural speech, the speaker's wishes will generally prevail given the strength of the modern compelled speech doctrine.[44] Nor of course can listeners engage in self-help, since physically forcing another to engage in expression is generally tortious and/or criminal conduct.

But what about the opposite situation, when a speaker wishes to speak, but their chosen audience does not want to hear their message? In that situation, does the listener have a comparable ability not to listen, as the speaker does not to speak? Note that unlike forcing someone to speak, addressing words at an unwilling listener is not inherently illegal or tortious, so speakers *can*—and often do—engage in "self-help" in those circumstances by foisting unwanted speech on listeners. The question is: what is the appropriate role of the government, and in particular, can the state protect listeners from unwanted speech? Oddly enough, the Supreme Court has barely addressed this question directly, and insofar as it has done so, it has suggested that the answer is no by giving little weight to listeners' interests.[45]

The most significant case to this effect is *Cohen v. California*.[46] In *Cohen* the Court, in a famously eloquent opinion by Justice Harlan, reversed Cohen's conviction for wearing a jacket into a courthouse with the words "Fuck the Draft" written on it.[47] The case is generally understood to hold that non-obscene but offensive or indecent speech is protected by the First Amendment. But in the course of so holding, the Court had to address the objection that Cohen had "thrust [his speech] upon unwilling or unsuspecting viewers" and that the government had the right to shield that audience from offense.[48] The Court's response was that absent an "intrusion in to the

44. For an argument that the Court has gone too far in this area in privileging speakers against listeners, see Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reforms*, 54 U.C. DAVIS L. REV. 1631, 1663–67 (2021).

45. I say "interests," not "rights," because under the state action doctrine, listeners cannot have First Amendment rights against non-state speakers.

46. Cohen v. California, 403 U.S. 15 (1971).

47. *Id*. at 16, 26.

48. *Id.* at 15.

privacy of the home," the only remedy for offended viewers was "averting their eyes."[49] The Court failed, it should be noted, to explore how that remedy would work with respect to oral speech.[50]

A more recent decision involving highly offensive speech, *Snyder v. Phelps*,[51] adopts a similar tone. In *Snyder*, members of a church (the Westboro Baptist Church of Topeka, Kansas) repeatedly protested at military funerals to publicize their belief that God was punishing the United States for its tolerance of homosexuality, especially in the military.[52] After one such protest, the father of the fallen soldier whose funeral the church picketed sued the church and its members for intentional infliction of emotional distress and after trial, won a significant verdict.[53] But the Supreme Court, by an 8-1 vote, reversed. It held that because the protesters' speech was "on a matter of public concern," the First Amendment flatly precluded imposing liability based on the offensiveness or hurtfulness of the speech.[54] And crucially for our purposes, when confronted with an argument based on the enormous (and uncontested) emotional harm that the protesters' choices imposed on the father, the Court responded as follows: "But Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a 'special position in terms of First Amendment protection.' "[55] In other words, the Court's view was that at least in the public forum, the rights of offensive speakers almost always trump those of offended listeners. Nor are *Cohen* and *Snyder* alone in holding that at least in public places, offended audiences must bear the significant burdens and costs of offense.[56]

The only nod the Court has given towards the notion that audience members have *some* interest in avoiding unwanted speech can be found in the so-called "captive audience" doctrine. In theory, the captive audience doctrine provides that when speech is being forced upon listeners who cannot reasonably avoid it, the government may step in and silence the speech.[57] And famously, in 1974 in the *Lehman v. City of Shaker Heights* decision, the Court—albeit in a splintered opinion—applied that doctrine to uphold a municipal regulation that refused to accept political advertising in the

49. *Id*. at 21.
50. *Id.*
51. Snyder v. Phelps, 562 U.S. 443 (2011).
52. *Id*. at 448.
53. *Id*. at 450.
54. *Id*. at 458.
55. *Id*. at 456 (*quoting* United States v. Grace, 461 U.S. 171, 180 (1983)).
56. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 (1975).
57. For a good, recent summary of the doctrine, see generally R. George Wright, *The Captive Audience Doctrine Today* 20 DUKE J. CONST. L. & PUB. POL'Y 1 (2025).

interior of buses and street cars, even though other advertising was accepted.[58] But in fact, a closer look shows that since 1974, the so-called "captive audience" doctrine is more bark than bite.

It is true that in a handful of cases, the Court has invoked concepts of captive audiences to uphold restrictions on speech. Thus in *Rowan v. United States Post Office Department*, the Court cited the captive audience doctrine in upholding a law that permitted mail recipients to refuse to accept more mail from a particular sender.[59] Similarly, in *F.C.C. v. Pacifica Foundation*, the Court justified a restriction on daytime broadcasts of "indecent" materials in part on the theory, citing *Rowan*, that broadcasting invades the home.[60] And perhaps most famously, in *Frisby v. Schultz*, the Court upheld a municipal prohibition on targeted, residential picketing on the basis of the state's strong interest (citing both *Rowan* and *Pacifica Foundation*) in shielding individuals from unwanted speech in their homes.[61] However, all of those cases involve *the home*, where special privacy considerations (quite aside from the First Amendment) obviously exist. Outside of the home, *Lehman* remains the only significant precedent applying concepts of "captive audiences," and truth be told under the modern (post-1974) public forum doctrine, concepts of captive audiences are likely unnecessary to uphold the City of Shaker Heights's subject-matter-based, but viewpoint-neutral, restriction on speech in a nonpublic or limited public forum.[62]

The Court's decision in *Snyder* also supports the proposition that the captive audience doctrine has, in recent years, been limited to the home. When the plaintiff in *Snyder* raised a captive-audience argument in favor of restricting the Westboro Baptist Church's funeral protests, the Court dismissed the idea that a father might be a captive audience at his son's funeral by invoking *Cohen*'s holding that the burden was on Mr. Snyder to "avert[] his eyes."[63] When posed with a captive-audience argument, the *Snyder* Court strongly suggested that that doctrine was largely restricted to speech intruding into the home, citing *Rowan* and *Frisby*.[64] It is true that in its discussion the Court also referred to the fact that when driving to the funeral, Snyder could only see the tops of Westboro's signs;[65] but, there is

58. Lehman v. City of Shaker Heights, 418 U.S. 298, 302 (1974) (plurality opinion); *id.* at 307–08 (Douglas, J., concurring).

59. Rowan v. U.S. Post Off. Dep't, 397 U.S. 728, 738 (1970).

60. FCC v. Pacifica Found., 438 U.S. 726, 748–49 (1978).

61. Frisby v. Schultz, 487 U.S. 474, 484–85 (1988).

62. Minn. Voters All. v. Mansky, 585 U.S. 1, 12–13 (2018).

63. Snyder v. Phelps, 562 U.S. 443, 459–60 (2011) (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 (1975)).

64. *Id*.

65. *Id.* at 460. Snyder saw the content of the signs later that evening on television. *Id*. at 449.

no indication in the Court's opinion that the result would have been different if Snyder *had* seen the signs, so long as the Westboro demonstration did not actively interfere with or disrupt the funeral.

Why is it that a Court that is so ready to recognize a robust right not to speak—one that operates against the state *and* listeners—seems to be unaware of the possibility of a similar right not to listen (at least outside the listener's home) as against insistent speakers? The answer, I would posit, lies in the much-neglected interaction between speakers' and listeners' rights. In particular, recognizing a right not to listen raises the problem of how to reconcile a speaker's interest in reaching a particular audience, with a listener's interest in not being part of that audience. Moreover, the leading scholarly discussion of a putative right not to listen similarly adopts a unilateral rather than a relational approach.[66] In that article, Caroline Mala Corbin makes a compelling case, based both on the autonomy interests of listeners,[67] and on more instrumental concerns about democratic self-governance,[68] for a First Amendment right not to listen, and I am happy in this article to accept and build upon that analysis. But she does not address the implications of such a right for the corresponding rights of speakers, or the relationship between what she treats as independent rights of speakers and listeners. We will therefore turn to that issue next.

2. A Right to Be Left Alone

In evaluating the nature of a right not to listen as against speakers, the crucial initial insight is that when a listener positively objects to being exposed to the speaker's message, a conflict arises between a speaker's right to choose her audience, and a listener's right to choose her speakers/messages. In that situation, the Supreme Court, in cases such as *Cohen* and *Snyder*, seems to assume that unless the speaker and speech are intruding into the home, a speaker's interest in expounding her message to any and all must prevail over a listener's desire to *not* listen, and to be left alone. But the Court gives no explanation in any of these cases for why this is so, other than generalized references to the need for robust public discourse. And because the Court has never addressed, much less recognized, a right not to listen outside the home, it does not seem to realize that the situation potentially poses a problem of competing constitutional interests, not just a speaker's right prevailing over general societal interests. But in fact, for all the reasons already stated there are strong reasons to

66. Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939 (2009).

67. *Id*. at 982–93.

68. *Id*. at 993–96.

recognize constitutionally grounded listeners' interests in such contexts, which makes some effort towards reconciliation necessary.

In seeking to reconcile speakers' and listeners' rights when they potentially conflict, it is absolutely essential to recognize the deeply interrelated nature of those rights—something the Court has failed to do. As discussed earlier, speakers and listeners are just two sides of the same expressive coin; indeed, it might be said that there are not two rights at issue here, but rather one joint right to engage in/receive expression. But as in so many other situations, when joint rights holders—or for that matter, joint property owners—disagree, resolving such conflicts is extremely difficult.

Nonetheless, recognizing the joint roles of speakers and listeners in expression does lead to some important insights. Most importantly, recognizing the relational nature of freedom of speech strongly suggests that there is little to no social value associated with speakers who address specific listeners against their will. But even here, an important distinction must be made. When unpopular or even deeply offensive ideas are expounded as a part of what I will call "one-to-many" speech, which is to say speech that is available to the public or significant portions of it,[69] speakers' rights must normally prevail over listeners' rights.[70] The reason is that in that situation, permitting listeners to prevail would scrub public discourse of unpopular ideas, a result which is anathema to the First Amendment. Put differently, permitting individual listeners to invoke a right not to listen to shut down one-to-many speech would amount to an impermissible heckler's veto.

The analysis is very different, however, when dealing with one-to-one or one-to-a few speech. When speakers address unwilling, individual listeners who have expressed their desire not to be spoken to, the primary goal of continued speech is often no longer to convince or to add to the putative "marketplace of ideas." It is rather to inflict harm on the listener/victim. As such, it has no legitimate claim to First Amendment protection in light of the greatly diminished speaker interests and very strong listener interest in not listening. It is this principle that led the Court to uphold a ban on targeted, residential picketing in *Frisby v. Schultz*, while clarifying that a ban on non-targeted residential picketing would almost certainly be invalid.[71] The Court seemed to be assuming, reasonably in my view, that targeted picketing was overwhelmingly likely to be one-to-one speech, while

69. I thank Eugene Volokh for coming up with this nomenclature. *See generally* Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking"*, 107 NW. U. L. REV. 731 (2013).

70. For a similar argument, see James Grimmelmann, *Listeners' Choices*, 90 U. COLO. L. REV. 365, 386–87 (2019).

71. Frisby v. Schultz, 487 U.S. 474 (1988).

nontargeted picketing was one-to-many. Its error was to assume in *Frisby* and other captive audience cases that a listener's interest in avoiding one-to-one speech is limited to the home.

The very idea that speakers have some sort of First Amendment right to thrust their speech on unwilling listeners is based on a rigid, "individual rights" based approach to First Amendment analysis, which does not sufficiently account for complexity. Once one recognizes the interpersonal and associational nature of communications as a joint enterprise between speaker and audience, it should be obvious that no speaker has a "right" to thrust their views on unwilling audience members any more than an individual has a right to insist on joining a First Amendment association in which they are not welcome.[72] To posit such a right—as the Supreme Court appears to in cases like *Cohen* and *Snyder*—is to posit a personal right on the part of individuals to try to persuade or convert other individuals to the speakers' beliefs *against their will*, not as a part of public debate and discourse, but as a part of a personal conversation.

But where could such a right possibly arise from? If, as I have posited, the "freedom of speech" protected by the First Amendment is an interpersonal, relational concept, then the right surely does not arise from the First Amendment. After all, we do not understand *any* constitutional right to encompass an entitlement to coerce others—the Second Amendment may protect gun ownership,[73] but it does not protect the stick up. And it must be remembered that the First Amendment only protects speakers from censorship or silencing by the *state*, not from censorship by other private individuals.[74] Recognizing this seemingly mundane point, however, points a way towards how we might reconcile a posited right to be left alone with a speaker's right to their chosen audience, all the while bearing in mind important First Amendment limits on state power.

C. RECONCILIATION: THE STATE AS REFEREE

What then, is the role of the government when a speaker seeks out a specific audience, but that audience is *not* willing to listen? And in particular, because (as noted earlier) listeners have a limited ability to engage in self-help (at least outside the home) vis-à-vis a persistent speaker, is there a role for the government in empowering unwilling listeners?

In that regard, one conclusion follows easily from basic First Amendment principles. Because "above all else, the First Amendment means

72. Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).
73. District of Columbia v. Heller, 554 U.S. 570 (2008).
74. Manhattan Cmty. Access Corp. v. Halleck, 587 U.S. 802, 808 (2019).

that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content,"[75] it is clear that the government may not *itself* decide, purportedly on behalf of unwilling listeners, that speech of a specific content or viewpoint will be unwelcome. That role lies solely with the listeners themselves, and for the government to take on the role of proxy censor could very easily become a vehicle for censoring speech the government itself disfavors. Indeed, even when empirically it seems very likely that a targeted audience will not want to be exposed to particular speech—for example, anti-abortion speech directed at abortion clinic patients, or anti-military protests directed at attendees at a military funeral—it remains true that the government's role cannot be to silence the speech on the assumption that it will be unwelcome. This is why the rule against content discrimination remains in place, and should remain in place, even in particularly sensitive situations such as the home, reproductive health care facilities, and funerals.

That said, however, once one recognizes that speakers have no First Amendment right, free of government regulation, to foist themselves upon unwilling listeners—and indeed, that listeners *do* have legitimate interests in avoiding undesired speakers or content—it seems clear that the government has a legitimate role to act as facilitator, assisting listeners to invoke their "right" to be left alone—or perhaps better put, their desire not to engage in a communicative relationship with a particular speaker. For that reason, there should be no constitutional problem with the state creating mechanisms that enable listeners to communicate to speakers that they desire to be left alone. There should also be no First Amendment barrier, assuming the listener(s) do invoke their First Amendment interest in being left alone, to the government penalizing a speaker who nonetheless persists in pursuing their unwilling victims. In that situation, the speaker has no First Amendment rights at stake, so a penalty is perfectly constitutional.

To be clear, the government has no obligation to create such a mechanism. Since unwilling listeners have no *First Amendment* rights against private speakers, they have no constitutional claim to be left alone. But what should be recognized is that in the context of willing speakers and unwilling listeners, or vice versa, given the relational nature of the "freedom of speech," neither party has a constitutional right at stake, and so some forms of government interventions should not be barred.

75. Police Dep't. of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

Putting this insight in doctrinal terms argues for the courts to recognize a separate category of unprotected speech that is based not on the unprotected content of the speech (as with obscenity, "true threats," etc.), but on the fact that it is foisted (exclusively) upon unwilling listeners after they have invoked their desire not to listen. Whatever one calls this category—harassment, stalking, or something else—it would permit punishment by the state purely upon proof that the speaker was made aware of their audience's desire not to listen but nonetheless continues to communicate.

Needless to say, however, for reasons already discussed, any mechanism designed to protect listeners' desires to be left alone cannot be invoked in one-to-many speech situations, in which there are other, willing listeners in the broader audience who would be deprived of their access to speech. In this situation, "freedom of speech" does exist, and so silencing the speaker will violate *both* the speaker's and the willing listeners' First Amendment rights. And because the First Amendment presumptively favors speech over silence, it clearly cannot permit letting some unwilling listeners' rights to trump two other sets of rights.[76] Note that with respect to speech occurring in open public dialogue, such as public protests or speech in the media (including social media platforms), there will essentially always be *some* willing listeners in the audience, and so recognizing a right to be left alone would never result in suppressing such speech. In other words, recognizing a constitutionally based interest in being left alone has little or no implications for broad, public debate. Importantly, this ensures that all individuals, even the most irascible, will regularly be exposed to viewpoints they reject, and so will have the opportunity to change their minds.

Note that under this view, *Snyder v. Phelps* was correctly decided. The speech in that case, a public protest by the Westboro Church was a form of one-to-many speech, not speech directed solely or mainly at the victim. Indeed, as noted earlier, the plaintiff in that case, the grieving father, did not even see the signs at the time of the protest.[77] In that situation, it was impermissible for the state to silence the speakers in order to protect Snyder's desire to be left alone, because the result would be to silence protected speech as to other listeners. The *Pacifica Foundation* Court, however, was wrong to uphold the FCC's restrictions on indecent broadcasting, at least insofar as it relied on the existence of unwilling listeners, because radio broadcasts are a classic form of one-to-many speech (whether protecting children might separately support the rule is a different matter).

76. I leave aside the question of whether the mere possibility of the existence of a willing listener should trump an unwilling listener's rights; my instinct is that that issue is too fact-dependent to be susceptible to abstract analysis.

77. Snyder v. Phelps, 562 U.S. 443, 449 (2011).

Therefore, a right of listeners to be left alone should not impact public debate or cleanse it of unpopular or offensive ideas. In the context of privately communicated speech, however, the implications of the above analysis are significant. It means that individuals who insist on repetitively speaking to their chosen audience/victim(s) after the listener has invoked their right to be left alone have no First Amendment rights—and so can be prosecuted without raising constitutional concerns. It also means that in a myriad of other situations in which the Court has suggested that the burden must be on listeners to avert their eyes, move on to another place, or simply suffer, the state has a legitimate role to play in reducing that burden so long as it does not impact public debate.

Developing a specific legislative proposal for how state or federal laws might assist unwilling listeners in protecting their desire to be left alone is beyond the scope of this paper. It should be noted, however, that some such mechanisms already exist and have been endorsed by the courts—though they all, unsurprisingly, involve the home. Thus in *Martin v. City of Struthers*, the Court struck down a city ordinance banning the door-to-door distribution of literature, primarily on the grounds that the city could have achieved its goal of protecting tranquility in the home with narrower means such as a model ordinance that "would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed."[78] This approach was preferable, the Court said, because such a law "leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs—with the homeowner himself,"[79] which in the language of this essay means in the hands of the unwilling listener. The Court's decision in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, recognizing a home "resident's unquestioned right to refuse to engage in conversation with unwelcome visitors,"[80] is to similar effect. The ordinance upheld in *Rowan*[81] permitting mail recipients to refuse to receive additional mail from unwanted mailers is as well.[82]

78. Martin v. City of Struthers, 319 U.S. 141, 148 (1943).

79. *Id.*

80. Watchtower Bible and Tract Soc'y of N.Y., Inc. v. Village of Stratton, 536 U.S. 150, 168 (2002).

81. Rowan v. U.S. Post Off. Dept., 397 U.S. 728, 738 (1970).

82. In *Frisby v. Schultz*, the residential picketing case discussed earlier, Justice Stevens dissented on the grounds that the ordinance banning residential picketing was overbroad because it covered picketing to which the residents did not object. Frisby v. Schultz, 487 U.S. 474, 497–99 (1988) (Stevens, J., dissenting). His point is a fair one and suggests that the statute at issue regulating residential picketing should have been triggered only when residents of the targeted home clearly communicated to the picketers their desire to be left alone.

It is true, of course, that it is much easier to put up an outdoor "No Solicitation" sign at one's home—the remedy endorsed in *Martin* and *Watchtower Bible*—than in public places. But given the above analysis, there is no good reason to limit the principle established in these cases to the home. Moreover, it is not hard to imagine a law stating that when an individual is addressing another and the listener uses unambiguous language indicating an intent to be left alone, such as "please stop talking to me," "I don't want to hear this," or "leave me alone," the speaker then will have a legally enforceable obligation to stop speaking to *that individual* (but not to others, so in one-to-many situations this law would have no impact).

Some clarifications are necessary, however. First, at least outside of the home, invoking the right to be left alone cannot be indefinite—any statute protecting that right must specify a time period after which the invocation expires and has to be re-invoked.[83] That caveat, like the continuing protection for one-to-many speech, leaves open the possibility that unwilling listeners can and will sometimes change their minds. Further, the period after which invocation by unwilling listeners expires may well vary with circumstances—and again, any statute addressing this issue must specify that. And in this respect, homes *are* arguably special. No Solicitation signs outside one's home constitute essentially permanent invocations—though signs can of course be taken down—as did the request to stop mail upheld in *Rowan*, though of course that too could be revoked. In some settings such as online interactions, one can imagine invocations lasting for weeks or months. But in personal interactions, it might well be reasonable to require reinvocations every hour or two. Details such as these are for legislatures to work out, the results of which should be due a good deal of deference from courts.

To be sure, in evaluating situations in which a speaker's desire to communicate collides with their audience's wishes not to be communicated to, and the state has stepped in to protect the listener, courts must tread with caution, bearing in mind the following considerations. First, it is inevitable that the government—in the shape of both legislatures and executive enforcers—will sometimes manufacture unwilling listeners as a tool to silence speech that the government itself objects to. Therefore, courts must examine any listeners' rights laws carefully to smoke out such censorship (most obviously by insisting that the listener, not the state, identify unwanted speech). In addition, courts themselves must be cautious to not permit their own instincts as to what constitutes "undesirable" or "offensive" speech to color their decisions, by finding listener objections when none truly exists.

83. Thanks to Christina Koningisor for this insight.

Thus courts must insist that any enforcement of a listener's right to be left alone *must* be accompanied by a clear and unambiguous invocation of that right by the rights-holder themselves.

In short, there are details to be worked out, and there are undoubtedly complexities raised by attempts to legally empower listeners to avoid unwanted speech, especially outside the home. But the crucial point is that there should be no *First Amendment* objection to government efforts to so empower listeners—with all the caveats laid out above, including in particular the point about one-to-many speech. There are statutory mechanisms available that could achieve those goals. Indeed, as the next Part discusses, some such mechanisms are already in place whose constitutionality has been questioned but should not be, albeit perhaps after some changes are made to reflect concerns discussed above.

III. APPLICATIONS

In this Part, we will consider some practical applications of listeners' rights to be left alone in areas where divisive litigation has been common and courts have struggled mightily to craft consistent and facially plausible solutions.

A. *COUNTERMAN*, STALKING/HARASSMENT, AND FIGHTING WORDS

The most obvious area in which the above analysis has application is the status under the First Amendment of laws regulating harassment and stalking. The Supreme Court considered this issue in its recent decision in *Counterman v. Colorado*,[84] but because the majority completely failed to consider listener interests in its analysis, and as a result failed to distinguish between "threats" cases (which involve the fear of violence) and harassment/stalking cases (which involve unwilling listeners), Justice Kagan's majority opinion frankly botched the analysis.

Counterman involved a criminal prosecution arising out of a deeply disturbing set of facts. The defendant, Counterman, repeatedly sent Facebook messages to C.W., a local musician whom he had never met.[85] Some were prosaic, if bizarre (since they were from a stranger), but others were menacing.[86] Ultimately, Counterman was convicted under Colorado's anti-stalking statute, the relevant part of which makes it a crime to "repeatedly . . . make any form of communication with another person" in "a manner that would cause a reasonable person to suffer serious emotional

84. Counterman v. Colorado, 600 U.S. 66 (2023).
85. *Id*. at 70.
86. *Id*.

distress and does cause that person . . . to suffer serious emotional distress."[87] The Colorado courts rejected Counterman's First Amendment defense on the grounds that his speech constituted unprotected "true threats," applying an objective definition of a threat as speech which a reasonable person would view as threatening.[88] The Supreme Court, however, reversed. In a majority opinion by Justice Kagan, the Court held that to prosecute a true threat, the First Amendment required proof of a subjective mental state, in particular recklessness, meaning that the speaker acted with conscious disregard of the risk that the speech at issue would instill fear in the victim.[89]

What is truly odd about this analysis is that *Counterman* was not actually a case about threats at all; it was a case about unwanted speech. While some of Counterman's messages may have been threatening, the harassment and stalking aspects of his awful behavior were not dependent on that—they would have existed even if all the messages were prosaic. The Colorado courts presumably applied the true threat doctrine because they reasonably believed that to uphold Counterman's conviction, they had to pigeonhole it into a category of "unprotected speech" that the Supreme Court had previously recognized, and true threats is such a category.[90] Indeed, as Genevieve Lakier and Evelyn Douek explain, since the Supreme Court's pathbreaking 2010 decision in *United States v. Stevens* sharply limiting the power of courts to recognize new categories of unprotected speech,[91] lower courts have been able to uphold anti-stalking legislation only by characterizing the speech at issue as falling within an already recognized category of unprotected speech—generally either "speech integral to criminal conduct" or "true threats."[92] Eugene Volokh similarly argues that under current law, lower courts cannot treat "harassment" as unprotected speech unless it falls within a category such as threats—a position that Justice Alito took in an opinion predating his elevation to the Supreme Court, which has been followed by numerous other jurisdictions.[93]

All of which is well and good—but it has no relevance to the Supreme Court itself, which of course *does* have authority to expand the realm of unprotected speech. Even if *Stevens* indicates that the Court will not

87. *Id*. (quoting COLO. REV. STAT. § 18-3-602(1)(c) (2022)).
88. *Id*. at 71.
89. *Id*. at 79–82.
90. Virginia v. Black, 538 U.S. 343, 359 (2003).
91. United States v. Stevens, 559 U.S. 460 (2010).
92. Genevieve Lakier & Evelyn Douek, *The First Amendment Problem of Stalking:* Counterman, Stevens, *and the Limits of History and Tradition*, 113 CAL. L. REV. 143, 148–49 (2025).
93. Eugene Volokh, *Overbroad Injunctions Against Speech (Especially in Libel and Harassment Cases)*, 45 HARV. J.L. & PUB. POL'Y 147, 191–92 (2022) (citing Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001)).

recognize new categories of unprotected speech based on the *content* of the speech absent a historical tradition,[94] it certainly does not close the door to recognizing factors other than content that might take speech outside of First Amendment protections—such as its unwanted nature. The Supreme Court had an opportunity to recognize such a category in *Counterman* but failed to do so because it failed to distinguish harassment and stalking from threats.[95]

It is quite possible that the Court's failure to consider harassment/stalking as a separate speech problem from threats was because that is how the parties to the litigation (and the lower courts) posed the issue. But by analyzing the case as it did, the Court has created a serious risk that moving forward, lower courts will treat harassment and stalking issues as co-extensive with the threats doctrine, thereby ignoring the implications of *Rowan* and the right to be left alone.[96] If the Court *had* analyzed the case properly, it would have recognized that because Counterman's speech was unwanted, and because his victim had invoked her right to be left alone, as she did in that case by repeatedly blocking Counterman on social media,[97] the existence of a threat was irrelevant. Counterman's expression was a classic case of repeated infliction of unwanted speech in a one-to-one context, and so there should have been no barrier to his prosecution under a properly drafted statute—though it is unclear whether the actual Colorado statute in that case satisfied those standards.

Nor are the implications of paying attention to listeners' interests limited to stalking. Most obviously, laws designed to enable listeners to enforce their right to be left alone, such as the Federal Trade Commission's Do Not Call Registry, are clearly constitutional on this view.[98] Similarly, prohibitions on telephone or other harassment under which penalties are triggered when the victim communicates their desire to be left alone also pose no constitutional concerns.[99] More generally, recognizing that speakers

94. *Stevens*, 559 U.S. at 472.

95. Justice Sotomayor, joined by Justice Gorsuch, were the only members of the Court who seemed to recognize the difference between the stalking behavior in that case and the broader issue of "true threats" in public discourse addressed by the Court. Counterman v. Colorado, 600 U.S. 66, 85–86 (2023) (Sotomayor, J., concurring in part and concurring in the judgment). Yet even they did not take the logical step of simply dismissing Counterman's First Amendment claims, but rather also ended up stuck in the morass of debating *mens rea*.

96. *Cf.* State v. Pierce, 887 A.2d 132, 133, 135 (N.H. 2005) (striking down a ban on "communicat[ing] with [a] person . . . with the purpose to annoy or alarm [such person], having been previously notified that the recipient does not desire further communication," without citing *Rowan*).

97. *Id*. at 70.

98. *National Do Not Call Registry*, FED. TRADE COMM'N, https://www.donotcall.gov [https://perma.cc/KXG3-Y8SM].

99. Because my analysis is limited to instances in which a victim has invoked her right to be left alone, it does not address the problem of intentional harassment initiated before such an invocation, which

have no First Amendment interest in forcing speech onto unwilling listeners opens the door to a wide range of regulations addressing such things as email spam, spam texting, and even junk mail (following in the footsteps of *Rowan*).

Consider also harassment litigation arising out of campus protests regarding the Gaza war,[100] or complaints by members of Congress that by failing to control such protests campuses permitted harassment of Jewish students.[101] Insofar as these harassment claims are rooted in one-to-one speech, such as following students around and yelling slurs or otherwise directing hostile speech at individual students who have demanded to be left alone, the First Amendment under the above analysis provides no protection to such speech. (Whether universities have a legal obligation to protect victims from such speech is, of course, a different matter.) On the other hand, to the extent that claims of harassment are rooted in slogans yelled during protests such as "From the River to the Sea," which many people consider antisemitic, or the allegedly antisemitic content of signs, this is classic one-to-many speech which cannot be condemned purely because of its unwanted nature; indeed, at least with respect to public universities silencing such speech, it would almost certainly constitute viewpoint discrimination in violation of the First Amendment. The same would be true even regarding calls for genocide that Republican members of Congress such as Elise Stefanik complained about,[102] since such calls surely would not qualify as unprotected incitement under the stringent test of *Brandenburg v. Ohio*.[103] After all, for better or for worse, there is no "awful speech" exception to the First Amendment.

Finally, consider the "fighting words" doctrine. In its 1942 decision in *Chaplinsky v. New Hampshire*, the Court held that so-called "fighting words"—which is to say curse words or insults delivered in person—are not protected by the First Amendment.[104] This holding is rooted in assumptions that fighting words are likely to trigger a violent response from their target,

many states also criminalize. Addressing that problem would require recognition of either a new category of unprotected speech or recognizing a power to regulate speech based on a combination of content and bad speaker motive, both topics beyond the scope of this paper.

100. Kathryn Palmer, *The Litigation After the Protest Storm*, INSIDE HIGHER ED (May 21, 2024), https://www.insidehighered.com/news/governance/executive-leadership/2024/05/21/litigation-after-protest-storm# [https://perma.cc/P7SJ-HCPT].

101. Jacey Fortin, *5 Takeaways From the Latest Hearing on Campus Antisemitism*, N.Y. TIMES (May 23, 2024), https://www.nytimes.com/2024/05/23/us/college-antisemitism-hearing-protests.html [https://perma.cc/6GRC-A3B7].

102. Annie Karni, *Questioning University Presidents on Antisemitism, Stefanik Goes Viral*, N.Y. TIMES (Dec. 7, 2023), https://www.nytimes.com/2023/12/07/us/politics/elise-stefanik-antisemitism-congress.html [https://perma.cc/EST5-N6YW].

103. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

104. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

and that such a response would be justified.[105] The fighting words doctrine has been subject to sharp criticism,[106] but the Court has yet to abandon it. In truth, though, the assumptions underlying the doctrine seem seriously outdated, and are also highly gendered, based as they are on a "real men" ethos. Based on the reasoning of *Chaplinsky* alone, therefore, the doctrine probably should be overruled.

On the other hand, it seems likely that in most circumstances fighting words are going to be unwanted speech, from the listener's perspective. Furthermore, the typical fighting words situation involves one-to-one speech (indeed, it is doubtful if the fighting words doctrine would apply to one-to-many speech).[107] If, however, a target of fighting words expresses to the speaker a desire to be left alone, then any subsequent speech by that speaker would, under my approach, violate the right to be left alone, and so become unprotected. Admittedly, this approach to fighting words does not address the "first blow" of curse words spoken only once; but it does have the advantage of not resting on dubious assumptions.

B. *HILL, MCCULLEN*, AND AVOIDING OFFENSE

Another area in which conflicts between speakers and listeners regularly arise is in the context of protests and other expression near health care facilities that provide abortion services. The difficulty arises because on the one hand, the speech of protestors and others—whether pro- or con-abortion rights—is obviously speech on important, controversial, and politically charged topics, and so receives the highest level of First Amendment protection. But on the other hand, it seems reasonable to assume that most members of the audience for this speech—who are overwhelmingly employees or patients of the relevant clinics—would prefer not to hear the speech, sometimes strenuously so. Therefore, courts and legislatures struggle with how to address these conflicts.

While First Amendment cases involving speech near abortion clinics, even in the Supreme Court alone, are myriad, I will focus my discussion on two of the most important and controversial of them. The first is *Hill v. Colorado*.[108] *Hill* involved a challenge to a Colorado statute that limited speech within one hundred feet of the entrance to a healthcare facility.[109] In

105. *Id*.
106. Kathleen M. Sullivan, *Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 42 (1992).
107. *Cf.* Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949) (raising, but declining to resolve, the issue).
108. Hill v. Colorado, 530 U.S. 703 (2000).
109. *Id.* at 707.

particular, the law prohibited any person within that area from approaching within eight feet of another person without their consent "for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person."[110] Characterizing the issue before it as whether this law "reflects an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners,"[111] the Court ultimately upheld the statute. In doing so, the Court relied heavily upon the government's interest in protecting an "unwilling listener's interest in avoiding unwanted communication," citing *Frisby* and *Rowan*.[112]

Justice Scalia's dissent took sharp issue with this reasoning. He argued that because the Colorado statute was based on the assumption that only speech within the statutory prohibition—"protest, counseling, and education"—was likely to be unwelcome, the law was content-based and so invalid.[113] At least as to this point, it should be noted, Justice Scalia's argument is entirely consistent with my analysis set forth above (and concomitantly, the majority's is not). The State may not decide for itself what speech is unwelcome, and insofar as Colorado did so, its law was invalid.

But Justice Scalia did not stop at this point. He went on to argue that *any* law targeting unwanted communications was automatically content-based, because the law was triggered by the communicative impact of the unwelcome communication. As such, he would have invalidated any such law.[114] But *that* goes a step too far, insofar as it suggests that speakers have a right to impose their speech on others when their audience has actively asserted a desire not to listen. In a later abortion case (discussed next), Justice Scalia suggested that his argument that the government had no legitimate interest in protecting people from unwanted speech was limited to restrictions on speech "in the public streets and sidewalks."[115] But again, Justice Scalia is off the mark. The key question is not *where* the speech occurs, but whether the speech is directed solely at unwilling listeners, as opposed to a broader audience (in other words, one-to-one versus one-to-many). Certainly, in many instances, including *Snyder*, it is reasonable to assume that speech in public places is directed at the *public*. But that assumption does not hold in the context of all anti-abortion protests, in which the speech is sometimes directed solely and directly at often-unwilling

110. *Id*. (quoting COLO. REV. STAT. § 18-9-122(3) (1999)).
111. *Id*. at 714.
112. *Id*. at 716–17.
113. *Id*. at 747–48 (Scalia, J., dissenting).
114. *Id*. at 748 (Scalia, J., dissenting).
115. McCullen v. Coakley, 573 U.S. 464, 505 (2014) (Scalia, J., concurring in the judgment).

employees and patients. In *Snyder*, the Westboro Baptist Church sought out a broader audience for their protest by contacting the press and drawing attention to themselves; it is therefore doubtful if the protest would have proceeded if no one aside from funeral attendees had shown up (remember that the plaintiff in *Snyder* did not even see the speech at the time of the protest). But the same is very much not true of anti-abortion protests, which regularly occur without any broader public presence, and which are sometimes, though certainly not always, designed and intended to cause emotional harm to their "audience."

Now consider the Court's most recent, significant decision in this area, *McCullen v. Coakley*.[116] There, the Court unanimously invalidated a thirty-five foot "buffer zone" that Massachusetts mandated around the entrances of abortion clinics, in which no one was allowed to enter or remain in, except for specific purposes such as simply walking through, people on clinic business, and law enforcement and other public functions.[117] The Court, however, divided sharply on its reasoning. A five-Justice majority (with Chief Justice Roberts writing) found the law content-neutral but nonetheless concluded that it failed intermediate scrutiny.[118] The concurring Justices (led again by Justice Scalia) would have invalidated the law as a content-based restriction on speech.[119]

What is interesting for our purposes is that in the course of finding content-neutrality, even the majority conceded (without mentioning *Hill*, oddly) that if the Massachusetts law had been "concerned with undesirable effects that arise from 'the direct impact of speech on its audience' or 'listeners' reaction to speech,' " it would have been content-based.[120] And Justice Scalia in his concurring opinion of course agreed with this point (while lambasting the majority for not expressly overruling *Hill*).[121] The only issue on which the Justices disagreed was whether this was, in fact, the actual purpose of the Massachusetts law.

But unanimous or not, the Justices seem simply wrong on this point. Certainly, anti-abortion speakers have a right to make their case to the public, even if the ways in which they do so are distasteful or offensive. And certainly, the state has no interest in purging their speech from public debate, including in one-to-many speech in particular, simply because some members of the audience object to it. But to suggest that the state has no

116. *Id.* at 464.
117. *Id*. at 471.
118. *Id.* at 485, 497.
119. *Id.* at 502–05 (Scalia, J., concurring in the judgment).
120. *Id*. at 481 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).
121. *Id*. at 504–05 (Scalia, J., concurring in the judgment).

interest in protecting unwilling speakers at all is just wrong, in giving no weight to listener interests and failing to distinguish between public debate (meaning one-to-many speech) and private speech (meaning one-to-one speech).

In short, the bottom line is that insofar as the Colorado and Massachusetts laws in *Hill* and *McCullen* were based on the *state's* assumption that anti-abortion speech is unwelcome, the Court was wrong to uphold the Colorado law and correct to invalidate the Massachusetts one. And the Justices are, to reiterate, also clearly correct that speech cannot be expunged from public debate simply because it might offend or discomfit some who hear it. But by going further and suggesting, as Justice Scalia did in *Hill* and all the Justices did in *McCullen*, that the state has no interest in enforcing *listeners*' expressed preferences to be left alone, they are just wrong. The question of how a state might design a mechanism to enforce those expressed preferences has already been discussed; but for the purposes of this discussion the key point is that the Court appears in these cases to be conflating two entirely separate questions: the exclusion of offensive speech from public debate, which is impermissible, and the enforcement of listeners' expressly invoked right to be left alone, which is not.

C. REGULATING THE INTERNET

In the summer of 2024, the Supreme Court issued an opinion in *Moody v. NetChoice, LLC*.[122] The case involved challenges to two statutes, one enacted in Florida and the other in Texas, which both regulated the content moderation practices of social media platforms. In particular, the Florida law restricted the power of such platforms to moderate posts by "journalistic enterprise[s]" and posts by and about political candidates.[123] The Texas law more broadly forbade platforms from moderating content based on the viewpoint expressed in a post or the viewpoint of the poster.[124] Both laws also granted users certain procedural rights when their posts were moderated,[125] but those aspects of the laws are less relevant to this article. The Supreme Court ultimately declined to resolve the claims because the plaintiffs had chosen to bring a facial, as opposed to as-applied, challenge, and both lower courts had failed to apply the proper standard for facial challenges.[126] But in the course of providing instructions on remand, a solid majority of the Court made it clear that the First Amendment provided strong

122. Moody v. NetChoice, LLC, 603 U.S. 707 (2024).
123. *Id*. at 720.
124. *Id*. at 721.
125. *Id*. at 720–21.
126. *Id*. at 723–26.

protections for platforms' editorial choices in the form of content moderation.[127] As such, the Court was quite clear that if platforms chose to bring as-applied challenges to the application of at least the Texas law to their moderated "feeds" or homepages, the challenges were very likely to succeed.[128]

The majority's reasoning in *NetChoice* was clearly correct as a First Amendment matter[129] and is more than sufficient to sustain properly framed challenges to the Texas, and, truth be told, Florida, laws. But a focus on listener interests suggests that there is something more fundamentally problematic about Florida's and Texas's approaches to regulating platforms. The laws of both states are rooted in the basic assumption that legislators (and Governors) know best what content listeners/users should and should not be exposed to. But that assumption and approach are antithetical to First Amendment principles. It is for individuals, not the state, to decide what expressive interactions they wish to participate in.

A much better approach would be one proposed by a group of researchers at Stanford University, led by Francis Fukuyama, which seeks to introduce competition and choice in "middleware," meaning the software that that performs editorial and content moderation functions on platforms.[130] Requiring platforms to permit users to pick their middleware of choice from a competitive menu of options empowers *users/listeners* to choose what speech to consume, and what not to consume, and so such a law would advance listeners' rights. Of course, such a legal requirement would still burden platforms' editorial rights, but in a less blatantly biased (and political) manner than Florida and Texas sought to do and so *might* be constitutionally defensible.[131]

Another area in which a listener-centric approach yields important insights is in regulations restricting targeted advertising. For example, Article 28(2) of the European Union's Digital Services Act ("DSA") prohibits platforms from delivering targeted advertising to users who are minors based on their personal data.[132] While the First Amendment of course

127. *Id.* at 726–40.

128. *Id.* at 740–43.

129. Ashutosh Bhagwat, *Do Platforms Have Editorial Rights?*, 1 J. FREE SPEECH L. 97 (2021).

130. FRANCIS FUKUYAMA, BARAK RICHMAN, ASHISH GOEL, ROBERTA R. KATZ, A. DOUGLAS MELAMED & MARIETJE SCHAAKE, REPORT OF THE WORKING GROUP ON PLATFORM SCALE 30–38 (Stanford Cyber Policy Center 2020), https://cyber.fsi.stanford.edu/publication/report-working-group-platform-scale [https://perma.cc/B29N-PUXQ].

131. How a challenge to such a law should be resolved is beyond the scope of this paper.

132. Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), Art. 28(2), https://eur-lex.europa.eu/eli/reg/2022/2065/oj/eng [https://perma.cc/GZF5-8ETT].

does not apply to the EU, given the so-called "Brussels Effect,"[133] it would not come as a surprise if the United States or one or more states within the United States, including California, followed the EU's lead in this regard.

But the EU's approach is misguided. It assumes that targeted advertising directed at children is inherently harmful or invasive. But, in fact, for vulnerable groups such as LGBTQ youth, shielding them from targeted content can cause substantial harm.[134] And more fundamentally, it is always better for the state to empower listeners, even minor listeners—who after all enjoy significant First Amendment rights to access information[135]—than to make choices for them as the DSA does. For that reason, if the United States or an individual state felt it necessary to restrict targeted advertising directed at minors, it would be much better to empower minors or their parents to opt out of all, or specific forms of, targeted advertising than to enact a flat ban as the DSA does. Admittedly, authorizing parents to restrict targeted advertising could also have deleterious effects on vulnerable youth (sometimes parents are the problem); but that is a difficulty that pervades our society and can only be addressed through broader legal reforms, particularly in family law.

CONCLUSION

This article argues in favor of recognizing listeners' rights to, and interests in, not to listen/be left alone. Such a right/interest comes in two forms. The first is a First Amendment right against the state, which generally would prohibit the state from forcing ideological content on unwilling listeners, a proposal that hopefully is not controversial. More difficult is a potential listener interest in avoiding speech from private speakers. Such an interest does not directly implicate the First Amendment, given the lack of state action; but in this paper I argue that nonetheless, the interest is a genuine one rooted in principles of free speech, which should be recognized: a right, as it were, to be left alone. The key implication of recognizing such a right is that it suggests that the First Amendment should *not* be understood to protect private speech directed at an unwilling listener who has invoked their right to be left alone, at least in a one-to-one situation. This in turn means that the First Amendment does not prohibit the state from adopting measures designed to enable unwilling listeners to invoke and legally enforce their

133. ANU BRADFORD, THE BRUSSELS EFFECT: HOW THE EUROPEAN UNION RULES THE WORLD (Oxford 2020).

134. *See* Bill Easley, *Revising the Law That Lets Platforms Moderate Content Will Silence Marginalized Voices*, SLATE (Oct. 29, 2020), https://slate.com/technology/2020/10/section-230-marignalized-groups-speech.html [https://perma.cc/S94E-5W4X].

135. Brown v. Ent. Merchants Ass'n, 564 U.S. 786, 795–96 (2011).

right to be left alone, though nor does it mandate such measures.

This is not to say that protecting the right not to listen, and the right to be left alone, do not raise concerns. For one thing, it will reduce the occasions in which individuals will be exposed to ideas they do not like, which might be to the detriment of the quality of public discourse.[136] Furthermore, a right to be left alone that must be invoked to be effective might well be less useful to the disempowered in our society, who might therefore be harmed if the government is prevented from taking the initiative in shielding them from harmful speech.[137] But all rights come with a cost; and on balance, this paper argues that recognizing and empowering listener autonomy is worth the cost.

Finally, it should be noted that the analysis above regarding a right to be left alone, and how it can be reconciled with a speaker's right to an audience, can also be extended to the converse situation—when the right to listen conflicts with the right against compelled speech. Here, too, one faces a potential conflict between two First Amendment interests when a listener desires some information or message but the speaker does not want to share it (perhaps the situation in the *Virginia Pharmacy* litigation). In this situation, as noted earlier, normally the government cannot *force* speakers to communicate because of the compelled speech doctrine. But as with a right to be left alone, it may well be that the government has a legitimate role in facilitating voluntary relationships between willing speakers and listeners, and in incentivizing reluctant speakers on behalf of listeners. But that is another, and complicated, topic of inquiry.

136. Thanks to Erin Miller for this point.
137. Thanks to Nelson Tebbe for this insight.