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LISTENERS' CHOICES

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Speech is a matching problem. Speakers choose listeners, and listeners choose speakers. When their choices conflict, law often decides who speaks to whom. The pattern is clear: First Amendment doctrine consistently honors listeners' choices for speech. When willing and unwilling listeners' choices conflict, willing listeners win. And when competing speakers' choices conflict, listeners' choices break the tie. This Essay provides a theoretical framework for analyzing speech problems in terms of speakers' and listeners' choices, an argument for the centrality of listener choice to any coherent theory of free speech, and supporting examples from First Amendment caselaw.

INTRODUCTION

The elevator pitch version of the First Amendment is that it protects speakers' choices about what to say.[1] The

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1. *E.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.").

government must be neutral among viewpoints and topics, which means letting speakers say whatever they want.[2] The central task of First Amendment theory and doctrine is to explain when and why deviations from this neutrality principle are justified.[3] A secondary set of doctrines deal with peripheral questions about how speakers speak.[4]

In this Essay, I propose to flip the script. What would First Amendment theory and doctrine look like if we started from the *how* of speech, rather than the *what*? I will reinterpret what Thomas Emerson called "the system of freedom of expression"[5] as a mechanism for matching speakers with listeners. I will consider how speakers decide to whom to speak, how listeners decide to whom to listen, and how law creates and resolves conflicts among speakers and listeners. In so doing, I will mostly abstract away from the content of speech. This Essay is concerned with how speakers and listeners find each other, not what they say to each other once they do.[6]

From a matching perspective, *listeners' choices matter more than speakers'*. The paradigm case of free speech involves a matched pair of a willing speaker and a willing listener. A consistent commitment to protecting these willing speaker-listener pairs results in a system of First Amendment law that regularly defers to listeners' choices. In cases involving speaker-speaker conflicts, listeners break the tie. And when speakers prevail in speaker-listener conflicts, it is often because other listeners tip the balance.

Part I of this essay briefly describes the concept of matching problems, shows how free speech can be recognized as one, and highlights a few recurring constraints on possible speaker-listener matchings. Part II looks closely at different

2. *Id.* ("But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

3. *See, e.g.*, EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES AND POLICY ARGUMENTS (6th ed. 2016) (devoting two chapters and 336 pages to content-based restrictions on speech).

4. *See, e.g.*, *id.* (devoting one chapter and 49 pages to content-neutral restrictions on speech).

5. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 1 (1970).

6. Of course, the content of speech gives speakers and listeners their various *preferences* among each other; we cannot pretend that all speech is the same. My point is that important patterns emerge if we look, as much as possible, only at the structure of the resulting preferences and avoid peeking at the content-based reasons motivating them.

configurations of willing and unwilling speakers and listeners to tease out the matching issues they raise, with particular focus on listeners' choices among speakers. Part III discusses a few canonical Supreme Court cases as examples of listener-driven matching. The Conclusion adds a few thoughts on listeners' rights and fake news.

I. MATCHING SPEAKERS AND LISTENERS

A. Matching Problems

In mathematics, a "matching" is a way of pairing up the members of two sets. A "matching problem" is the challenge of finding a matching that satisfies various constraints. One familiar example is the "marriage problem": pair up a set of male-identifying persons with an equal-size set of female-identifying persons in a way that maximizes collective happiness.[7] Other familiar matching problems include shoes and feet, airplane seats and passengers, organ donors and transplant recipients, articles and law reviews, clerks and judges, and medical students and residency programs.[8] The unifying feature of these problems is that they involve pairwise interactions between members of two asymmetric groups, where the individual preferences about with whom to interact are complex, heterogenous, and frequently incompatible.

Matching problems typically have numerous possible solutions, and different algorithms for choosing matchings yield different ones. Mathematicians who study abstract matching problems and operations researchers who study real-world matching problems frequently characterize those solutions as better or worse along various dimensions, and seek algorithms that yield better ones. Some of their results are striking. For example, consider the 1962 paper by David Gale and Lloyd Shapley that essentially kicked off the study of matching problems.[9] In it they consider an algorithm for the marriage

7. D. Gale & L.S. Shapley, *College Admissions and the Stability of Marriage*, 69 AM. MATHEMATICAL MONTHLY 9 (1962). This version of the marriage problem is unrepresentative in that a matching marries off everyone; there are other matching problems in which not all participants are required to be matched.

8. For a readable general-audience overview of real-life matching problems and their solutions, see ALVIN E. ROTH, WHO GETS WHAT—AND WHY: THE NEW ECONOMICS OF MATCHMAKING AND MARKET DESIGN (2015).

9. Gale & Shapley, *supra* note 7.

problem in which each unengaged man proposes to the unengaged woman he most wants to marry, and each woman accepts the proposal of her favorite current suitor.[10] The men whose proposals were rejected repeat the process by proposing to the next woman on their lists; women break their engagements if a better suitor comes along.[11] A little surprisingly, this frenzied and hard-hearted expression of patriarchy in action is guaranteed to result in a matching in which everyone gets married.[12] Even more surprisingly, the resulting matching is "stable": there is no pair of disappointed lovers who prefer each other to their actual spouses.[13] And still more surprisingly (or perhaps not at all), this algorithm makes men happier than women: out of all possible stable matchings, it selects the one that best satisfies men's preferences.[14] If it is the women who propose to the men, exactly the reverse is true: the resulting stable matching is the one that best satisfies women's

10. *Id.* at 12.

11. *Id.*

12. *Id.* at 12–13. If it didn't, there would be a woman Weronika who never accepted a proposal and a man Mateusz who never had a proposal accepted. But Mateusz must have proposed to Weronika at some point, and she wouldn't have turned him down unless she had a proposal in hand from someone else. Since men never revoke proposals in the Gale-Shapley algorithm, this contradicts the assumption that Weronika ends up unmarried.

13. *Id.* at 13. Suppose that Manfred and Wilhelmina would rather be paired with each other. Either Manfred proposed to Wilhelmina at some point or he didn't. If he did, the reason they're not together is that Wilhelmina must have rejected his proposal; that is, she ended up paired with someone she preferred to Manfred. But if Manfred never proposed to her, it means he never worked his way down his list as far as Wilhelmina; that is, he had a proposal accepted by someone he preferred to Wilhelmina. Either way, there is a contradiction with the assumption that Manfred and Wilhelmina would rather be paired with each other. There is no such pair of unmatched lovebirds.

14. DAN GUSFIELD & ROBERT W. IRVING, THE STABLE MARRIAGE PROBLEM: STRUCTURE AND ALGORITHMS 11 (1989). Intuitively, the reason is that the Gale-Shapley algorithm goes only just as far down the men's preference lists as necessary to find a stable matching. When Wilfreda rejects Mortimer's proposal in favor of Marston's, it shows that any matching pairing Mortimer and Wilfreda is unstable. Wilfreda's rejection shows that she would rather be paired with Marston than Mortimer, and Marston's proposal shows that he prefers Wilfreda to any other woman who has not already rejected him. No matter whomever else Marston might be paired with in a matching pairing Mortimer and Wilfreda, Marston and Wilfreda would rather be paired with each other. Since any attempt to rejigger the pairings in Mortimer's favor makes the resulting matching unstable, it means that the actual matching is the best Mortimer can do out of all possible stable matchings.

preferences.[15] Thus, the choice of matching algorithm has both allocational and distributional consequences.

The stable marriage problem is a toy mathematical example. But real-life matching problems have high stakes. Finding a good matching algorithm is immensely important. The residency match is a good example of the practical politics of matching.[16] Medical students "propose" to residencies, so that the system is designed to favor students' preferences among programs over programs' preferences among students, while retaining stability.[17] In the 1990s, the algorithm was tweaked so that student couples could enter the match as a pair and receive geographically compatible matches if possible, but without favoring one member of the couple over the other.[18] Organ donations are another example where designing good matching mechanisms has immense payoffs.[19] Maximizing the number of compatible donor-donee pairs is literally a matter of life and death.[20]

We do not need to go further into the mathematical details of matching problems here.[21] My points are few and simple. First, matching problems are everywhere. Second, matching problems have better and worse solutions. A world with algorithms that find kidney donation chains is better than a world without those algorithms; fewer people die waiting for a kidney to become available. Third, "better" and "worse" are often both relative and political. A world where men propose to women is better for men; a world where women propose to men is better for women. Fourth, all real-life matching problems are "solved" in the sense that there is a matching. At any given time,

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15. *Id.*

16. *See generally* Alvin E. Roth & Elliott Peranson, *The Redesign of the Matching Market for American Physicians: Some Engineering Aspects of Economic Design*, 89 AM. ECON. REV. 748 (1999).

17. *See* ROTH, *supra* note 8, at 133–44.

18. *Id.* at 144–49. *See generally* Roth & Peranson, *supra* note 16.

19. *See, e.g.*, Alvin E. Roth et al., *Kidney Exchange*, 119 Q.J. ECON. 457 (2004).

20. *See* Itai Ashlagi et al., *Nonsimultaneous Chains and Dominos in Kidney-Paired Donation—Revisited*, 11 AM. J. TRANSPLANTATION 984 (2011).

21. For those who are interested, two elegant and illuminating treatments of matching algorithms can be found in JON KLEINBERG & ÉVA TARDOS, ALGORITHM DESIGN (2006) and DONALD E. KNUTH, STABLE MARRIAGE AND ITS RELATION TO OTHER COMBINATORIAL PROBLEMS: AN INTRODUCTION TO THE MATHEMATICAL ANALYSIS OF ALGORITHMS (Martin Goldstein trans., 1989). An exhaustive treatment of the stable marriage problem and its many extensions is GUSFIELD & IRVING, *supra* note 14.

certain people are married to certain other people, and others are unmarried. That is a matching.[22] Fifth, there are many different matching mechanisms. Some, like school assignments in many districts, are explicit: they are the output of purpose-built algorithms. Some, like the placement of feet in shoes, are implicit: they rely on uncoordinated social processes. And sixth, mechanism choice bears on both the quality and the fairness of the resulting matching. As the persistence of divorce shows, the real-life marriage matching is neither optimal nor stable. Matching *matters*.

B. Speech as a Matching Problem

Speech is a matching problem. Speakers speak; listeners listen. In each case, the question is *to whom?* I might at any given moment be listening to a politician's speech, an advertisement for dish soap, a friend's endless nattering about baseball, or a subway rapper's freestyling exploits. The politician might, at any given moment, be speaking to a national audience on C-SPAN, a potential donor on the telephone, a colleague, a sibling, a reporter, or a therapist, to name just a few more.

Some numbers may illustrate the scale of the problem. Suppose that, at any given time, one billion of Earth's seven billion people are speaking in some form, and another billion are listening. That gives each listener a billion different choices of where to direct her attention.[23] But that is just one listener. The number of ways to find a speaker for every listener is vastly larger. Each such matching is a list a billion lines long (the number of listeners); each line in such a list has one of a billion possible values (the number of speakers).[24] The number

22. It is not a matching that satisfies the constraints of the stable marriage problem (which requires that everyone be paired off). It is a matching that satisfies the constraints of the more general problem in which people's rank-ordered preferences can include "unmarried" as well as potential partners.

23. *See generally* JAMES GLEICK, THE INFORMATION: A HISTORY, A THEORY, A FLOOD (2011). Information overload is hardly a new problem. *See generally* ANN M. BLAIR, TOO MUCH TO KNOW: MANAGING SCHOLARLY INFORMATION BEFORE THE MODERN AGE (2010); ALEX WRIGHT, GLUT: MASTERING INFORMATION THROUGH THE AGES (2007).

24. Here is a simplified illustration of the problem. Suppose there are two listeners, Alice and Bob, and three speakers, Xu, Yaz, and Zelda. Then there are nine possible matchings:

- Alice listens to Xu, and Bob listens to Xu.

of possible matchings is thus one billion to the billionth power, or $10^{9,000,000,000}$. That is a one followed by nine billion zeroes, a number that defies human comprehension. And yet, every minute of every day, speakers and listeners settle on one of these different matchings.

Different matchings serve the goals of information policy differently. Consider a matching in which the Qin Emperor speaks and everyone on earth listens, a matching in which people talk only to their closest neighbor, and a matching in which each speaker has a randomly chosen pen pal. Each of these matchings is badly deficient. The first is dictatorial, the second fragmented, the third chaotic. We should hope to do better. Not matching is not an option; one way or another, the choice will be made. The alternative to matching speakers with listeners is no speech.

A few factors are particularly important in determining which of the $10^{9,000,000,000}$ or so matchings we end up with. Most obviously, speakers and listeners constantly make *choices*. When Spike comes up to Liz at a party and starts shouting in her ear about the Federal Reserve, he is a speaker selecting her as a listener. When Liz flees to the den and turns on the Orioles game instead, she is a listener selecting different speakers: the game's announcers. Sometimes, third parties—such as the state or media intermediaries—make these choices for listeners. When a flash-flood warning starts scrolling across the bottom of the screen, the government and the TV station intervene to redirect Liz's attention away from the announcers' speech and to the Emergency Warning System's speech instead.

Although every matching is a product of billions of human choices, these choices are not unbounded. They take place within an extensive framework of geographic, linguistic,

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- Alice listens to Xu, and Bob listens to Yaz.
- Alice listens to Xu, and Bob listens to Zelda.
- Alice listens to Yaz, and Bob listens to Xu.
- Alice listens to Yaz, and Bob listens to Yaz.
- Alice listens to Yaz, and Bob listens to Zelda.
- Alice listens to Zelda, and Bob listens to Xu.
- Alice listens to Zelda, and Bob listens to Yaz.
- Alice listens to Zelda, and Bob listens to Zelda.

If there are n listeners and m speakers, then there are m^n distinct matchings that assign each listener a speaker. Here, n=2 because there are two listeners, and m=3 because there are three speakers, for a total of 3^2=9 possible assignments.

economic, cultural, and technological constraints. Spike lives in Missouri, not Malaysia. He doesn't speak Malay. He doesn't have the money for a plane ticket. And, to be honest, not that many people, here or in Kuala Lumpur, are interested in his conspiracy theories about the Federal Reserve. Past choices by speakers and listeners, by governments, and by third parties, play out in present constraints. Spike's decision to major in Spanish affects whom he can effectively speak to or listen to. So do the signing of the Anglo-Dutch Treaty of 1824—and the countless other past events that we collectively refer to as "history." Speakers and listeners make choices, but they make them against a backdrop of choices already made, choices that make certain matchings infeasible.

Although there are good reasons to try to honor the matching choices made by speakers and listeners, it would be inadvisable to honor every such choice. Indeed, it would be impossible. Three intrinsic limits are important.

First, people's choices about speech, like people's choices about everything, almost always fall short of the theoretical ideal of fully informed and fully rational decision-making. Some things we do end up being unintentional choices about speech, as when George W. Bush referred to a *New York Times* reporter as a "major league asshole" in front of a microphone he didn't realize was on, or when a tenant rents an apartment near a nightclub that's far louder than she expects. Other times we make conscious choices to speak or to listen that we later regret, as when I saw the Brian De Palma/Nicolas Cage turkey *Snake Eyes* on opening weekend. I call these *internal* limits on choices about speech: people make mistakes when they choose whom to speak to or listen to. Put another way, "choice" itself is a constructed category. Sometimes we regard people's actions as sincere expressions of their preferences about speech when they are nothing of the sort, and vice versa.

Second, some combinations of choices are physically or logically impossible. These are *structural* limits on how many choices it is possible to honor at once. If I want every person on Earth to stop what they're doing and hear me simultaneously as I issue ransom demands from my evil lair deep within the sun, it is simply not going to happen. If two aging arena-rockers both want to play to a sold-out crowd at Madison Square Garden on the same evening, there is no way to make both of them happy. If I want to tell you about trademark law

and you would rather watch *Game of Thrones*, one of us is going to be disappointed. Physical, geographical, and infrastructural factors create structural limits on choice. So do disagreements among speakers and listeners.

Third, choice is not the only important value. As a society we put *external* limits on choice by trading it off against other important values. These values are familiar: they are the harms to society and to third parties that weigh against speakers' rights to say whatever they want. A bomb-bearing listener and a speaker explaining where inside a train station to detonate a bomb to cause maximum carnage might choose to communicate with each other. But there is a strong social interest in minimizing carnage; we have good reasons to interfere with their choices here.

C. Scarcities

Internal, structural, and external limits are general features of speaker-listener matching. They play out differently in different contexts. Three specific constraints on speaker and listener choices are common and important enough to require separate discussion. They are speakers' limited capacity to get their speech to listeners (*bandwidth*), listeners' limited capacity to listen to multiple speakers at once (*attention*), and listeners' limited information about what speakers will say in the future (*ignorance*). Bandwidth and attention are structural limits; ignorance is an internal limit.

1. Bandwidth

Basic characteristics of the media that people use to speak—capacity, range, audience, and cost—shape who speaks to whom.[25] Compare a fiber-optic network with a network of tin cans connected by string. A major fiber-optic cable can transmit many thousands of high-resolution cat videos per hour; a pair of tin cans can handle one low-fidelity voice conversation. Fiber-optic networks can reach billions of people while the tin cans let you reach one at a time. Fiber-optic networks span the

25. *See generally* MARSHALL T. POE, A HISTORY OF COMMUNICATIONS: MEDIA AND SOCIETY FROM THE EVOLUTION OF SPEECH TO THE INTERNET (2011) (discussing media in terms of accessibility, privacy, fidelity, volume, velocity, range, persistence, and searchability, and from both speaker and listeners' perspective).

globe; the tin cans will barely get you from here to next door. But while almost anyone can build and deploy a local-area point-to-point personal tin-can network, transcontinental cable laying has always been reserved for the few, the regulated, the well-capitalized.

Pre-modern media sharply limited the set of speaker-listener matchings. They had low capacities, variable but typically limited ranges, small audiences, and moderate to low costs. An unamplified public speaker can be heard by a few hundred people who must be gathered in the same place as the speaker; a handwritten letter can travel the globe but can only be read by a handful of people at once. Some kinds of matchings are simply incompatible with these limits; a listener circa 220 A.D. in Rome would not have been physically capable of hearing a speaker in Xi'an.

The pre-Internet mass media that dominated the twentieth century—particularly, television, radio, and mass-produced artifacts like newspapers, books, and records—were different. They had large capacity, large audiences, national range, and high costs.[26] This made bandwidth a crucial bottleneck between speakers and listeners, and one with a characteristic structure. A limited set of speakers could make use of these media, but those with access could then reach very large audiences. These media allowed a few to speakers reach large numbers of listeners. They did not let large numbers of speakers each reach smaller but scattered audiences.

Contrast the characteristic twenty-first century medium: the Internet, an astoundingly high-capacity network that spans the globe, has billions of users, and enables famously "cheap speech."[27] There are disparities among speakers, to be sure, of wealth, class, power, nationality, gender, language, education, and many others. Not everyone can push out a two-hour, high-definition video to a million viewers precisely at midnight—but almost anyone can get a book's worth of text to a few hundred or few thousand readers within minutes, or 280 characters to millions of readers within seconds. Generally speaking, anyone

26. *Id.* at 101–51 (discussing print), 152–201 (discussing audiovisual media).

27. *See* Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

can speak to a worldwide audience of any size for the cost of a basic smartphone: in some places as low as $20.[28]

These shifts in media also shift who holds the power to choose among possible speaker-listener matchings. Wherever there is a speech-transmission bottleneck, there is also a speech-selection bottleneck. Almost all the speech-selection power in mass pre-Internet media rests with those who choose which speech will be "pushed" through those media. Speakers either have access to the medium or do not; listeners' choices are limited to ordering from the speech menu placed before them, and the menu is not long. In such an environment, the capacity constraints both force an upstream choice among speakers and make that choice inherently controversial. Speakers, government, conduit operators, and various interest groups will all have claims about which speakers should be given access. Listeners' choices may provide rhetorical support for certain ways of deciding among speakers, and some of those ways will attempt to ascertain what listeners in general would prefer, but individual listeners will not be able to exercise choice *as listeners* over which speakers receive access.

Bandwidth is different on the Internet because transmission capacity no longer creates a chokepoint that forces an early upstream choice of a sharply restricted set of speakers. Speaker-listener matchings are no longer determined in the first instance by access to the mass media; listeners no longer experience the sharply restricted set of choices among speech characteristic of the mass media. Provided they know it exists and where it is to be found, listeners can "pull" the speech they want from its source. This can shift some control over speaker-listener matchings downstream, closer to listeners.[29] (This shift, we will see, tends to advance free speech goals.[30])

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28. *See* Jamie Carter, *The Land of the $20 Smartphone*, TECHRADAR (Mar. 11, 2017), https://www.techradar.com/news/the-land-of-the-20-smartphone [perma.cc/4BYP-2V9Y].

29. Interestingly, it is generally older work, from the first flourishing of legal scholarship about the Internet, that best articulates the close connection between an abundance of speech and listener choice. *See* Eugene Volokh, *Freedom of Speech in Cyberspace from the Listener's Perspective: Private Speech Restrictions, Libel, State Action, Harassment, and Sex*, 1996 U. CHI. LEGAL F. 377; Volokh, *supra* note 27; Jerry Berman & Daniel J. Weitzner, *Abundance and User Control: Renewing the Democratic Heart of the First Amendment in the Age of Interactive Media*, 104 YALE L.J. 1619 (1995).

30. *See infra* Part II.

2. Attention

There is an important asymmetry between speakers and listeners. Speech, being information, is infinitely replicable. Nothing in the nature of speech itself prevents a speaker's message from reaching the entire world, given sufficient time, effort, and expense. A speaker might lower her voice for reasons of privacy or discretion, but she does not have to. Speaking to one listener does little to detract from her ability to reach a second.

The *vis vitae* of listening, however, is not speech but attention, and human attention is always and everywhere limited. Listeners consume speech nonrivalrously, but speech consumes listeners' attention rivalrously.[31] If I am reading a book, I will have a much harder time also paying attention to the news on the radio. Unlike speakers, listeners *must* choose. Listeners have an overwhelming array of choices in the modern media environment. But they still only have two eyes, two ears, and one brain.

Limited attention particularly matters now because there are billions of speakers in the world, and millions of them are trying to reach a public audience. And since media bandwidth no longer stands in the way, almost all of their speech is actually available to interested listeners. In this sense, listeners are inundated with choices. There are millions of speakers who are ready, willing, and able to address them. But it also means that these speakers are competing fiercely with each other for audiences. A previously buried constraint on speech—listeners' limited attention—is now closer to the surface.[32]

Attention functions differently than mass-media scarcities. For one thing, it is distributed: each listener controls only a tiny fraction of the world's supply. For another, it can be taken

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31. A good is rivalrous if one consumer's use prevents others from using it. It is nonrivalrous if any number of consumers can use it at no additional cost.

32. Herbert Simon, *Designing Organizations for an Information-Rich World*, *in* COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST 37, 40–41 (M. Greenberger ed., 1971) ("Hence a wealth of information creates a poverty of attention and a need to allocate that attention efficiently among the overabundance of information sources that might consume it."); Tim Wu, *Is the First Amendment Obsolete?*, *in* KNIGHT FIRST AMENDMENT INSTITUTE, EMERGING THREATS 7 (David Pozen ed., 2017), https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete [perma.cc/8AB3-FVAK] ("[I]t is no longer speech or information that is scarce, but the attention of listeners.").

involuntarily: just try to read on the subway when there is a crying baby or an apocalyptic preacher standing next to you. For a third, it can be attacked indirectly. As Zeynep Tufekci powerfully argues, censorship today is best understood as *denial of attention*: a government can thwart an opposition movement either by keeping the media from reporting on protests (traditional "censorship") or by swamping the media with distractions, disinformation, and noise, so that few people watch the news reports or believe them.[33] Keeping people from knowing about speech can be just as effective as keeping the speech itself from them, and so can keeping them too distracted to pay attention to it.[34]

3. Ignorance

There is another important asymmetry between speakers and listeners. Because speakers produce information and listeners consume it, listeners always choose from a position of partial ignorance in a way that speakers do not. Speech, being information, is subject to Arrow's information paradox.[35] A listener who has not yet heard speech is not capable of making a fully informed evaluation of it.[36] Once she has heard the speech, she is in a better position to assess whether it is worth listening to—but by then it is too late. The speech cannot be unheard.

To repeat, this is a matter of asymmetry between speakers and listeners. Speakers have excellent knowledge of the speech they are about to engage in. Listeners have no such advantage: if someone catches your eye on the sidewalk, you don't know

33. ZEYNEP TUFEKCI, TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST 239 (2017).

34. *See* MARGARET E. ROBERTS, CENSORED: DISTRACTION AND DIVERSION INSIDE CHINA'S GREAT FIREWALL 41–92 (2018) (adding "friction" and "flooding" to "fear" as mechanisms of censorship).

35. Kenneth J. Arrow, *Economic Welfare and the Allocation of Resources for Invention*, *in* THE RATE AND DIRECTION OF ECONOMIC ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 615 (1962) ("[T]here is a fundamental paradox in the determination of demand for information; its value for the purchaser is not known until he has the information, but then he has in effect acquired it without cost.").

36. This is also a version of the learner's paradox from Plato's *Meno*. "How will you look for it, Socrates, when you do not know at all what it is? How will you aim to search for something you do not know at all?" PLATO, PLATO: FIVE DIALOGUES: EUTHYPHRO, APOLOGY, CRITO, MENO, PHAEDO 70 (John M. Cooper ed., G.M.A. Grube trans., 2d ed. 2002).

what they want. Maybe they want to rant at you about the gold standard, or tell you about an art gallery opening, or ask for directions to the train station, or get your signature on a political petition. You can guess, but you can't *know*. Only they can.

One common manifestation of listeners' limited knowledge—or at least one commonly asserted in the free speech literature—is a preference for familiar speech over unfamiliar. Some listeners are like six-year-olds demanding to watch *The Little Mermaid* for the eighty-ninth time: they know what they like and see no need to venture beyond it. Others are like Sam I Am turning up his nose at green eggs and ham; they are unwilling to give speech a proper hearing, even if in hindsight they would have been glad to have heard it.

Another manifestation of listeners' ignorance is that speakers are sometimes in a position to deceive listeners about their speech. Clickbait is a simple example. This Headline Promises Shocking Revelations. The Article Will Underwhelm You. False speech also plays on listeners' ignorance. A fully informed listener would not typically choose speech that is fraudulent or defamatory; more often, listeners to actionably false speech are listening to it only because the speaker has successfully hidden its falsity from them.

And a third way in which listeners' ignorance plays out is that simply *finding* the speech they want can be a massive challenge in an age of informational abundance.[37] Easing the transmission bottleneck makes the underlying selection problem salient in a new way. It was easy to see what was on TV when there were only three channels. Now, not so much. The characteristic media companies of the Internet age are selection intermediaries: search engines, portals, advertising networks, social networks, news aggregators, recommendation engines, marketing analytics providers, and the many others who specialize in pairing up speakers and listeners.[38] These intermediaries have a significant informational advantage over speakers and listeners, and thus a significant power to shape

37. Speakers face a version of this problem: they don't know which potential listeners in the world would be most receptive to their speech. But while speakers are ignorant about *listeners*, listeners are ignorant about the *speech itself*.

38. Some of these intermediaries are also transmission intermediaries: they make speech available or deliver it to listeners, in addition to identifying speech of interest to listeners or listeners of interest to speakers. The roles are conceptually distinct, even when a single entity performs both.

speaker-listener matchings by making different suggestions. They vary not just in how much of this power they retain for themselves, but also in whether they tilt more toward listeners or speakers in their matchmaking. Search engines are highly listener directed: different queries let users seek out different speech.[39] Advertising engines that let marketers slice and dice their target eyeballs along thousands of demographic and behavioral axes are highly speaker-directed.[40] Facebook's algorithmic News Feed is somewhere in between: it nudges users into reading friends' posts in a default, Facebook-selected order while giving users some controls to tweak that order and the ability to speak directly to or listen directly to specific other users they choose.[41]

II. THE CENTRALITY OF LISTENER CHOICE

So much for what we *can* do about speaker and listener choices. Now for what we *should* do. Or perhaps, I should say, what we *must* do. This Part makes a simple argument: any theory of free speech that does not take listener choice seriously fails as a theory of free speech. It is not necessary to delve deeply into the normative justifications for free speech. Whatever those justifications are, they must protect the entire communicative pathway from willing speaker to willing listener. And once they do, they cannot effectively protect speakers who have willing listeners unless they also frequently protect unwilling listeners from unwanted speakers. This conclusion follows from the structural constraints on speaker and listener choice imposed by other speakers and other listeners. It is inherent in the nature of speech in a world with many people in it.

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39. *See* James Grimmelmann, *Speech Engines*, 98 MINN. L. REV. 868, 894, 898–900 (2014) (arguing that good listener-directed selection is normatively desirable).

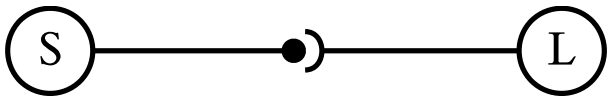
40. *See generally* JOSEPH TUROW, BREAKING UP AMERICA: ADVERTISERS AND THE NEW MEDIA WORLD (1997) (giving history of targeted advertising); JOSEPH TUROW, THE DAILY YOU: HOW THE NEW ADVERTISING INDUSTRY IS DEFINING YOUR IDENTITY AND YOUR WORTH (2011) (continuing history into Internet era).

41. *See generally* TARLETON GILLESPIE, CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION, AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA (2018) (describing in detail how Facebook and other social media platforms comprehensively filter, sort, and structure the content that flows between users).

This is a content-neutral analysis. It genuinely does not care what the speech at issue is. It does not matter what good it does for speakers, listeners, or society. It does not matter what harms it is capable of. I will use speeches about the mayor as an example, but absolutely nothing will turn on the specifics. The only things we need to know about the speech is which listeners the speakers are trying to reach and which speakers the listeners would like to hear. We do not need to look inside their choices or inquire after their reasons; it matters only that the speakers and listeners have reasons they consider sufficient.

A. Willing Listeners

The standard justifications of free speech take as their paradigm case a willing speaker facing a willing listener.[42] We can depict this case graphically, and with a simple hypothetical:

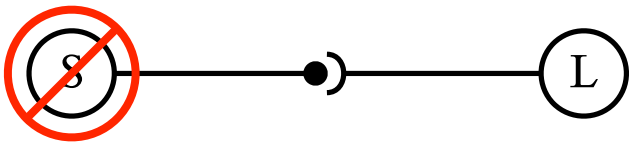


Core Free Speech: *S* gives a speech criticizing the mayor. *L* is in the audience.

This is the paradigm case for free speech. *S* is a willing speaker, *L* a willing listener. They form a matched pair: *S* and *L* both want *L* to hear what *S* has to say. In such a setting, it is possible to be imprecise about whose interests are at stake because it does not really matter. Speakers and listeners pull the same oar. Treating the relevant interests as belonging purely to speakers, purely to listeners, or jointly to speakers and listeners makes no significant difference.

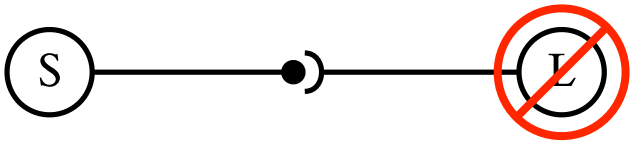
42. When I refer to a "willing" speaker, I mean one who affirmatively wants to be heard by a specific listener or listeners; when I refer to a "willing" listener, I mean one who affirmatively wants to hear a specific speaker. "Willing" and "unwilling" are relational terms. There are cases of pure self-expression in which a speaker doesn't care who listens. And there are rare cases of compelled speech in which a speaker just wants to be silent and the government doesn't care about any particular listener. Set these both aside for now.

To emphasize the point, consider the different ways that the authorities could interfere with the speaker-listener relationship between *S* and *L*.



Arrested Speaker: *S* gives a speech criticizing the mayor. *L* is in the audience. The police arrest *S*.

Air Horns: *S* gives a speech criticizing the mayor. *L* is in the audience. The police stand in the room blowing air horns.



Arrested Listener: *S* gives a speech criticizing the mayor. *L* is in the audience. The police arrest *L*.

In *Arrested Speaker*, the police have prevented *S* from speaking. This is an obvious and obviously unconstitutional restriction on speech. The net effect is that *L* is unable to hear what *S* has to say. This is censorship, plain and simple.

In *Air Horns*, the police have not literally prevented *S* from speaking. But the air horns are just as effective as an arrest in figuratively silencing *S*. This too is censorship. The First Amendment cares about more than just *S*'s ability to vibrate her vocal cords or to scribble on a piece of paper. *S*'s freedom of speech will be poorly protected indeed if the government can

interdict her speech before it reaches *L*.[43] There is nothing wrong in general with police use of air horns: they are useful, for example, to warn citizens of serious danger from a building demolition. Rather, the problem in *Air Horns* is that the police officer has used the air horn to thwart an act of communication involving both a speaker and a listener. The idea of a listener is inherent in speech and, hence, is also inherent in free speech.

Although *Arrested Listener* is a little less common, it too is a restriction on speech. Just as in *Air Horns*, the police have not literally prevented *S* from speaking. But arresting the audience has the same effect as arresting the speaker or blowing air horns because, again, *L* is unable to hear what *S* has to say. If *Arrested Speaker* is a paradigm case of a restraint on speech, then so are *Air Horns* and *Arrested Listener*. What matters is that the state has broken the communicative pathway from speaker to listener, not where along the pathway it has acted. The right to receive speech is the "reciprocal" of the right to speak.[44] Each is meaningless without the other. A system that does not protect the freedom to listen will not effectively protect the freedom to speak, and vice versa.

This may sound like an expansion of the domain of free speech. In a sense it is. The protected communicative pathway extends farther, until it reaches a listener. But in another important sense it is a contraction. We are not concerned with speech as speech (involving only a speaker), but with speech as communication (involving both a speaker and a listener). On the former, core free speech protections attach when someone speaks; interference with the success of the speaker's project is suspect. On the latter, core free speech protections attach when someone speaks and someone listens; interference with the success of their joint communicative project is suspect. This is a narrower principle because it requires both a speaker and a listener. We can test this principle's reach with a pair of cases:

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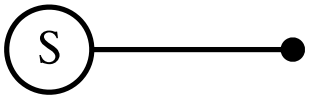
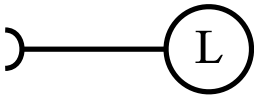
43. *See* Procunier v. Martinez, 416 U.S. 396, 408 (1974) ("Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee."), *overruled by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

44. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 757 (1976) ("If there is a right to advertise, there is a reciprocal right to receive the advertising . . . .").



Lonely Speaker: *S* gives a speech criticizing the mayor in a forest with no one else around until the police arrive to arrest *S*.



Lonely Listener: *L* stands in a forest listening to the wind with no one else around until the police arrive to arrest *L*.

We might regard these as free speech cases. Or we might not. A theory focused on speakers' and listeners' personal liberty might regard these arrests as problematic; a theory focused on democratic discourse might not. It is possible to articulate theories of free speech that do and do not protect speakers without listeners and listeners without speakers, a strong indication that these cases are not of the same importance to free speech as cases with both. *Arrested Speaker*, *Air Horns*, and *Arrested Listener* are core cases for free speech. *Lonely Speaker* and *Lonely Listener* are not.

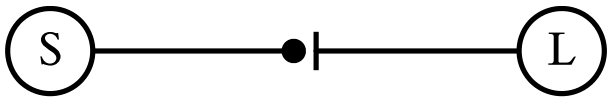
B. Unwilling Listeners

Unwilling-listener cases may not seem central to free speech, but they are. Their ubiquity makes them invisible. Most lack the high drama of the Westboro Baptist Church's funeral protests.[45] But that is because our system sorts them out almost automatically. Most unwanted speakers never even get close to their targets. Screening out vast oceans of unwanted speech is an essential feature of any system that makes free speech possible. Getting the paradigm willing-listener case right depends, as a practical matter, on getting immense

45. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443 (2011).

numbers of unwilling-listener cases right as well. And if we do not, it is not just listeners but speakers who suffer.[46]

In willing-listener cases like *Air Horns*, the state had an option—do nothing—that would satisfy both *S* and *L*. But if *L* is an unwilling listener, the state has no such option. Consider:



> *Bored Audience*: *S* gives a speech criticizing the mayor. *L*, who is within hearing range, would like to get up and leave.

S and *L* have a structural conflict because, no matter what the state does, there is no matching that will make everyone happy. If the state leaves matters alone (or sends a police officer to silence *S*), *L* will be happy and *S* will not. But if the state intervenes by stationing a police officer to keep *L* in her seat, *S* will be happy and *L* will not.[47] We need some principled basis on which to decide whose choices will be respected.

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46. Unwilling *speakers* also raise interesting issues, and there are both significant parallels and significant differences between compelled speech and compelled listening. *See generally* Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939 (2009) (comparing compelled speech and compelled listening). But teasing out the differences in relation to speaker-listener matching is a matter for another occasion.

47. Readers who prefer to break the tie in favor of state passivity should consider another hypothetical: *Loud Speakers*:

> *S* sets up an amplifier and speakers on the sidewalk in front of *L*'s house and gives a speech at 95 decibels. *L* would prefer not to listen. *Loud Speakers* has the same structure of speaker and listener choices as *Bored Audience*: a willing speaker facing an unwilling listener. The difference is that in *Bored Audience* the listener has an effective self-help technique to win the speaker-listener conflict, whereas in *Loud Speakers* it is the speaker with the effective self-help. Thus in *Loud Speakers*, if the state does nothing, it satisfies *S* but not *L*. If it intervenes to make *S* go away or unplug the speakers, it satisfies *L* but not *S*. It is easily possible to distinguish *Loud Speakers*, *see generally* Kovacs v. Cooper, 336 U.S. 77 (1949) (upholding municipal ordinance prohibiting the use of amplified sound trucks), but not on the basis of a general rule about state-versus-private action. Whatever line we draw will have the effect of determining how people can and cannot speak and when they must or need not listen to others' speech, and will have to be normatively justified in view of those consequences. Appealing to property law (e.g., that *S* speaks from

It is common to assert that in such cases the Supreme Court has chosen to favor speakers over listeners. For example, in *Snyder v. Phelps*, Chief Justice Roberts reiterated that "the Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer."[48] This view is not so much wrong as incomplete. There are three patterns of unwilling-listener cases, and they raise different kinds of issues. The simplest involve *one-to-one* speech, pitting a speaker who wants to be heard against a listener who does not want to hear.[49] Other cases involve *one-to-many* speech, in which a speaker addresses a large and possibly indeterminate audience, not all of whom are interested in what she has to say. Finally, some cases involve *many-to-one* speech, in which multiple speakers compete for the attention of a listener. If this part of First Amendment law seems confused and contradictory, it may stem from a failure to distinguish among these patterns.

The existence of one-to-many and many-to-one cases complicates the story. Paradigm cases of unwilling listeners involving one-to-one speech appear to pose a choice between favoring speakers' attempts to be heard and favoring unwilling listeners' attempts not to hear. But in one-to-many cases, there is also a listener-listener conflict: some would like the speaker to continue, while others would like her to shut up. Whatever the state does will frustrate some listeners. And in many-to-one cases, there is also a speaker-speaker conflict: each speaker would like to prevail over the others. Whatever the state does will frustrate some speakers.

There is no general speaker-favoring or listener-favoring solution to unwilling-listener cases. Some speakers and some listeners will inevitably be disappointed. One-to-many cases show that favoring unwilling listeners over speakers can frustrate other listeners, while many-to-one cases show that

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a public sidewalk or that *S* creates a nuisance) merely begs the question, as the contours of property law are themselves contestable in terms of the balance they strike between *S* and *L*.

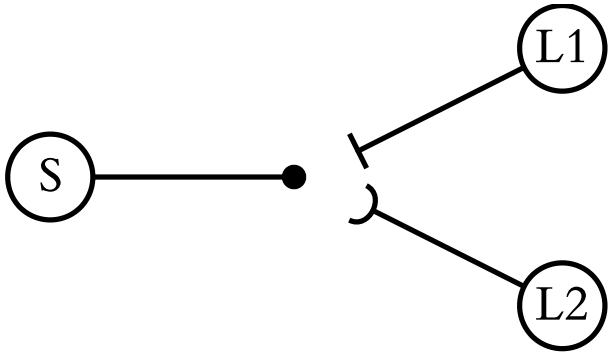
48. *Snyder*, 562 U.S. at 459 (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 210–11 (1975)).

49. The helpful terminology to distinguish "one-to-one" speech from "one-to-many" speech is taken from Eugene Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 NW. U. L. REV. 731 (2013). I have added the term "many-to-one."

favoring speakers over unwilling listeners can frustrate other speakers. But paradoxically, these intractable tensions help us understand what is truly at stake even in one-to-one cases.

1. One-to-Many

Speaker-listener conflicts are rarely just about a speaker and a listener. Often, other listeners may be interested in the outcome. Consider:



> *Controversial Protest*: *S* gives a speech criticizing the mayor and would like to reach as many listeners as possible. *L1* and *L2* are within hearing range. *L1* is not interested in listening to S; *L2* is.

Controversial Protest has *Bored Audience* embedded within it because *L1* is an unwilling listener. *S* would prefer to speak to her while *L1* would prefer not to be spoken to. Just as in *Bored Audience*, it is not possible to make both *S* and *L1* happy. Silencing *S* favors *L1* over *S*, but allowing *S* to continue favors *S* over *L1*. Again, we must decide, as between S and *L1*, whose choices to respect.

But we also have another decision to make, because *L1* and *L2*'s choices are in tension as well. If *S* continues, her speech will reach both *L1* and *L2*, satisfying *L2* but frustrating *L1*. If *S* shuts up, her speech will reach no one, satisfying *L1* but frustrating *L2*. The two listeners' choices about *S* cannot both be honored. One of them will go home unhappy.[50] We

50. Changing the physical structure of the problem changes its conceptual structure, as well. If *L1* can leave or wear headphones, or if *S* and *L2* can

cannot make the decision between them simply by appealing to a principle of satisfying all listeners' choices, or as many as possible. If we intervene in the name of listeners' choices to satisfy *L1*, we also harm listeners' choices by frustrating *L2*, and vice-versa. *Controversial Protest* poses both a speaker-listener and a listener-listener conflict.

These two decisions are linked: *S* and *L2* are united against *L1*. If *S* speaks, both *S* and *L2* are satisfied. If *S* does not, both are frustrated. This observation holds the key to the hypothetical, because there is something distinctive and special about *S* and *L2* in free speech terms. They are a willing speaker addressing a willing listener—the easiest case for protected speech. Put another way, *Controversial Protest* also has *Core Free Speech* embedded within it. Thus, if *S* is silenced in *Controversial Protest*, the state interferes with speech just as much as it does in *Arrested Speaker*,[51] just with a different proposed justification. If *S* is allowed to speak, the state frustrates *L1*'s desire not to listen, but this is not the paradigm case of preventing desired speech from reaching its audience.

Thus, any coherent free speech principle will tend to favor willing listeners over unwilling ones. If *L1*'s and *L2*'s choices as listeners are inextricably bound up with and opposed to each other, then the pro-speech outcome comes closer to the core willing-listener ideal for free speech than the anti-speech outcome. Listener choices for speech trump listener choices against speech when the two conflict. Moreover, the difference between *Bored Audience*—in which *S*'s claims as a speaker against the unwilling *L* were ambiguous—and *Controversial Protest*—in which *S*'s claims as a speaker against the unwilling *L1* are unambiguous—is precisely the presence of the additional, willing listener *L2*. Without *L2*, this is a hard case; with *L2*, it becomes an easy one.

It follows that we should be careful not to mistake one-to-many for one-to-one cases. Sometimes—as with harassing telephone calls—there really is only a single relevant listener. But at other times—as with funeral protests—there may be other listeners. The presence or absence of other listeners can be a reason to treat these cases differently.

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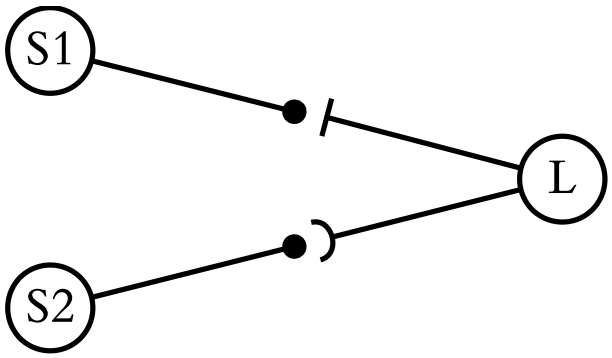
communicate in sign, the conflict may be substantially defused. *See infra* Section II.C.

51. Or in *Air Horns* or *Arrested Listener*.

2. Many-to-One

Just as other listeners may have an interest in the outcome of a speaker-listener conflict, so too may other speakers. Consider:



> *Dueling Speeches*: *S1* is giving a speech criticizing the mayor. In the room next door, *S2* is giving a speech praising the mayor. *L* would like to attend *S2*'s speech.

S1 and *S2* are both speakers. They would both like to speak to *L*. But those goals are incompatible; *L* can only attend one of the two speeches.

S1 and *S2*, however, do not have equal claims on *L*'s attention. As against *S2*, *L* is a willing listener. Thus, *Dueling Speeches* has *Core Free Speech* embedded within it. The police officer who compels *L* to attend *S1*'s speech rather than *S2*'s in *Dueling Speeches* has interfered with *S2*'s ability to communicate with *L* just as much as the police officer who arrests *L* in *Arrested Listener*. The same considerations that led us to say the state interferes with *S*'s freedom of speech in *Arrested Listener*[52] should lead us to say that it also interferes with *S2*'s freedom of speech by dragging *L* from *S2*'s audience into *S1*'s. The effect on *S2*'s speech is the same.

S1 has a harder time making a similar claim. As against *S1*, *L* is an unwilling listener, because *L* would rather be listening to *S2*. (This is *Bored Audience* again, embedded within *Dueling Speeches*.) If the state assists *L* in escaping from *S1*'s auditorium, *S1* may be frustrated, but this is the lesser harm of

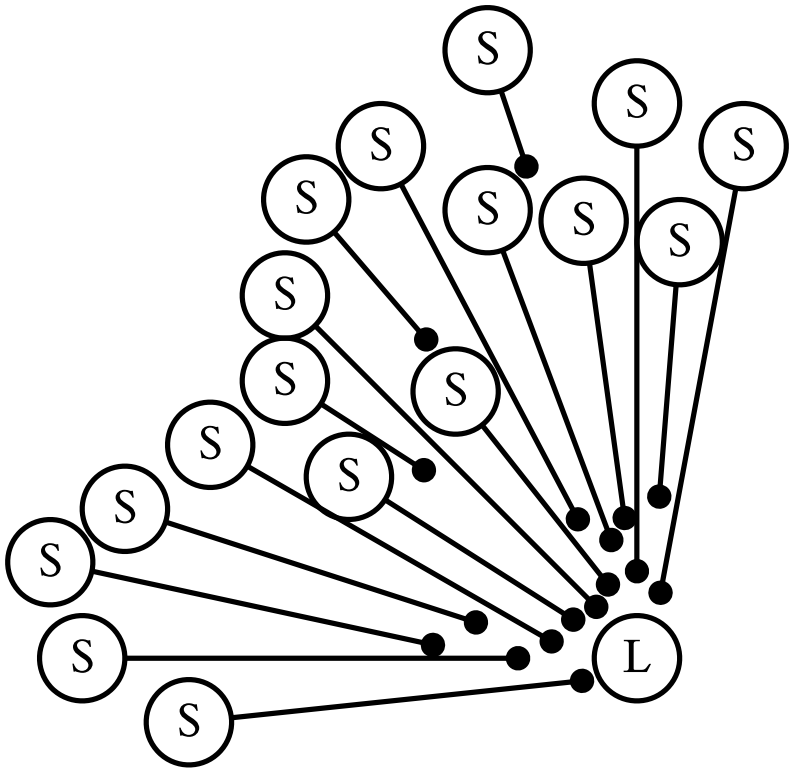
52. Or in *Air Horns* or *Arrested Speaker*.

taking sides in the tug-of-war between speaker and listener, not the greater harm of standing between a willing speaker and a willing listener. The two conflicts in *Dueling Speeches*—*S1* versus *S2* as speakers competing for the same audience, and *S1* versus *L* as a speaker trying to reach an unwilling listener—are bound up with each other. *L* is simultaneously an unwilling listener (to *S1*) and a willing listener (to *S2*).

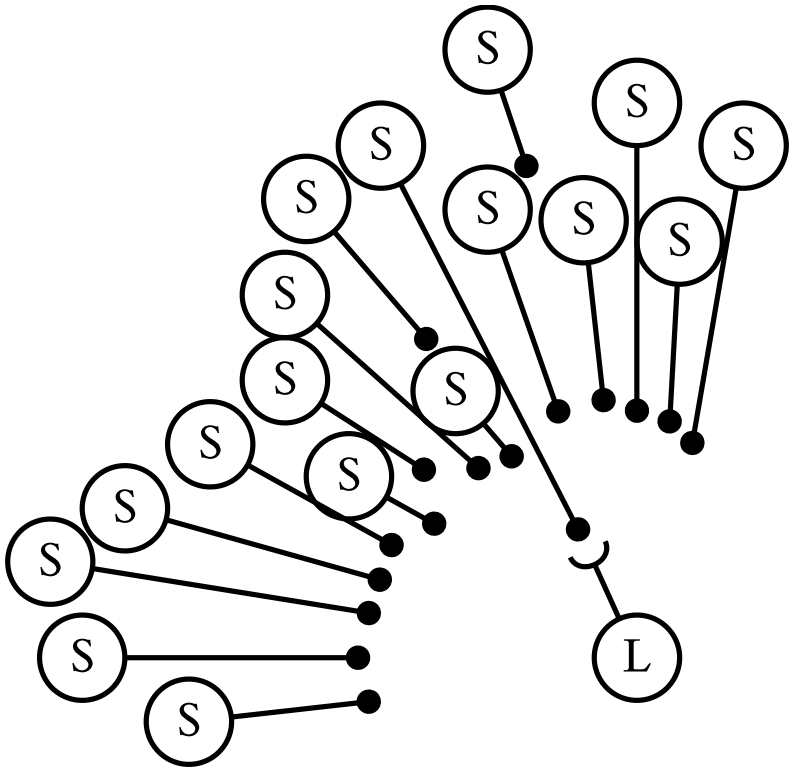
Once again, the asymmetry here comes entirely from a single source: *L*'s choice as a listener selecting among speakers. On any theory of free speech that cares about listeners' choices in their own right, this is an easy tie to break. *L* chooses *S2*, not *S1*. But even a theory that purports to care only about speakers' choices will still tend to prefer *S2* to *S1*, because *S2* and *L* stand in the paradigm free speech relationship of willing speaker and willing listener, whereas *S1* and *L* do not. To choose between *S1* and *S2* without taking *L*'s choices into account, a speaker-regarding theory would need to appeal to the personal characteristics of *S1* or *S2* or to the respective value of pro-mayoral and anti-mayoral speech. Neither is an attractive starting point for a theory of free speech, because it is usually thought that any viable theory of free speech ought to be largely neutral as to speakers and largely neutral as to viewpoints.

I would say that we should be careful not to mistake many-to-one cases for one-to-one cases, but that is not quite right, because *every* unwilling-listener case has something of a many-to-one flavor to it. There are so many would-be speakers in the world that an unwilling listener is probably being deprived of the chance to listen to someone else. Thus, there is an asymmetry at work. Zoom out from *Bored Audience* and you may or may not find additional listeners, but you will almost always find additional speakers. You may or may not be looking at *Controversial Protest*, but you are almost certainly looking at *Dueling Speeches*.

Indeed, in a world with inexpensive, worldwide, high-bandwidth, digital media, there are always millions of speakers trying to reach every listener in the world. If they had their way, *everyone* would listen to them. Even setting aside these speech megalomaniacs, every listener with Internet access is always and everywhere faced with a choice among perhaps a billion possible speakers:



The only way that a listener can attend to any one preferred speaker is by tuning the other billion out. Or, to put a sharper point on it, the only way any speaker can ever be heard by anyone is by beating out the other billion. It is a minor miracle that speech is possible at all in the modern world. It requires a combination of technologies, norms, and legal support to ensure that all the other speakers back off enough that a listener can hear the one speaker as to whom she is a willing listener. And yet, that is what the twenty-first century system of freedom of expression accomplishes, billions of times a day. Every successful communication from a willing speaker to a willing listener is a triumph of listener choice.



3. One-to-One

In light of these one-to-many and many-to-one cases, the one-to-one cases like *Bored Audience* should appear in a new light. What looks like a one-to-one case may not be: it may be a one-to-many case or a many-to-one case in disguise. Both *Controversial Protest* and *Dueling Speeches* contain *Bored Audience*, which means that even a case matching the *Bored Audience* pattern of a willing speaker facing an unwilling listener may not only be about the conflict between them. It may match a larger pattern as well, and if it does, we should zoom out until we see the other listeners straining to hear and the other speakers straining to be heard.

When there are other willing listeners, their choices as listeners help us break the *Bored Audience* speaker-listener deadlock in favor of the speaker, who has a broader and willing audience. And when there are other speakers, this time the

listener's choice helps break the *Bored Audience* deadlock in favor of the listener, who is choosing among speakers, not merely choosing whether to listen. Narrowly, these considerations cut in opposite directions: additional listeners give the speaker's desire to speak more weight, while additional speakers give the objecting listener's objections more weight. But in a broader sense, both of these considerations are appeals to listener choice.

It follows, albeit tentatively, that there are plausible free speech reasons to promote listener choice even in one-to-one unwilling-listener cases. In *Bored Audience* and similar cases, this means taking the side of the listener rather than the speaker. In every other type of case discussed above—willing listeners, many-to-one unwilling listeners, and one-to-many unwilling listeners—the basic commitments of free speech required us to adopt a principle of favoring listeners' choices. To be sure, we are not *required* by those commitments to extend the listener-choice principle to one-to-one unwilling-listener cases, but neither are we *prohibited* from doing so. Siding either with listeners or with speakers—or deciding between them on a case-by-case basis—is consistent with those commitments. But given how uniformly the listener-choice principle applies in every other type of case, it is plausible and attractive in one-to-one unwilling listener cases as well.

Thus, a listener-choice principle treats one-to-one and one-to-many cases quite differently: the unwilling listener in a one-to-one case can have her choices respected, while the unwilling listener in a one-to-many case will have to put up with the unwanted speech. The reason is not that the unwilling listener's choices themselves are more or less significant in one type of case versus the other, but rather that in a one-to-one case a listener's choices affect no other listeners, while in a one-to-many case the listeners' choices are unavoidably intertwined. A street-corner orator necessarily reaches multiple listeners, whereas a telephone harasser does not bring other listeners into the picture. His speech is limited to one highly unwilling listener. Serving him with a no-contact order will not interdict any speech to a willing listener (because there are no other listeners), but it will facilitate the speech of other speakers (because his victim can go back to reading a novel).

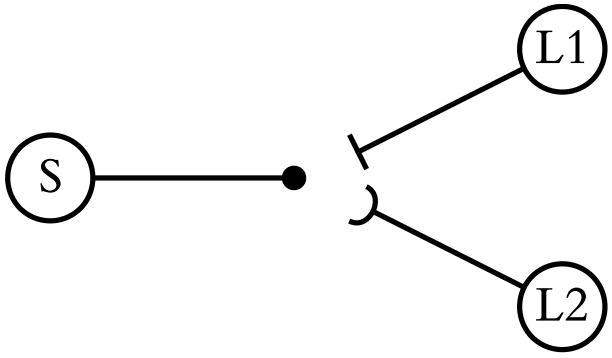
This is not a conclusive argument for listener choice in all settings. The details depend on contextual factors and

normative arguments. Different foundational theories of free speech will make very different prescriptions here. My point is narrower. We end up favoring listeners' choices in many one-to-one cases without even considering contextual factors and normative arguments.

C. Targeting, Selection, and Separation Costs

Speakers and listeners don't just have preferences about speech, they also *act* on those preferences. The speaker who chases a listener down the block and the listener who runs away are engaged in a struggle over whether they will end up matched. If one or the other stands still, she concedes to the other.[53]

But if speakers' and listeners' actions can create structural conflicts, they can also resolve those conflicts. Consider *Controversial Protest* again:



Controversial Protest (redux): *S* gives a speech criticizing the mayor and would like to reach as many listeners as possible. *L1* and *L2* are within hearing range. *L1* is not interested in listening to S; *L2* is.

53. The possibility of these self-help arms races is another reason that it is hard to state categorical rules about one-to-one cases. Compare wearing earplugs versus speaking through a megaphone, running away versus chasing after, and filtering ads versus evading ad filters: in each case the balance of power between listeners and speakers is different. There may be good reasons for the state to step in and set limits on how far the arms race can go—effectively picking a winner just to have it done with—but those reasons depend heavily on the details of who can do what; that is, on what I will shortly call "separation costs."

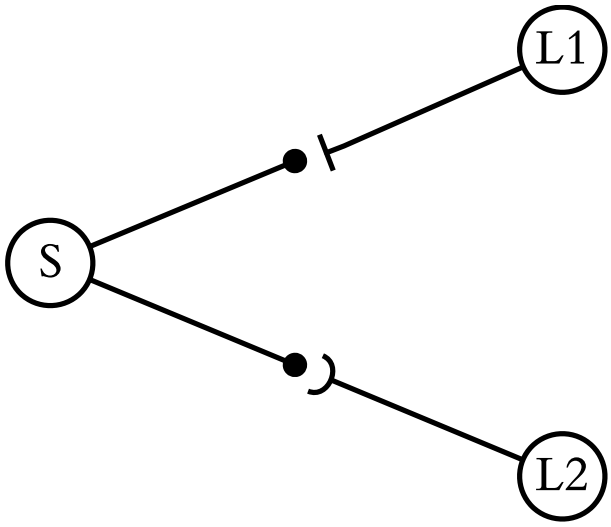
S and *L2* form a willing-listener/willing-speaker pair, whereas *S* and *L1* have irreconcilably opposed preferences. The point of *Controversial Protest* is that there is an additional listener-listener conflict between *L1* and *L2*. The state's choice of whether or not to silence *S* can resolve that conflict only by disappointing one of the two. Given the core commitment to protecting speakers addressing willing listeners, it follows that *S* should be allowed to speak.

Unlike the conflict between *S* and *L1*, which is inherent in their preferences, the conflict between *L1* and *L2* is contingent. It stems from the assumption that either *S* speaks to both *L1* and *L2* or *S* speaks to neither of them. If we relax this assumption, it should be clear that another matching is possible: *S* speaks to *L2* but not to *L1*.[54]

	S speaks to L1 & L2	*S speaks to L2*	*S speaks to no one*
S	good	okay	bad
L1	bad	good	good
L2	good	good	bad

In this matching, both *L1* and *L2* go home happy because their respective preferences (not to listen and to listen) have been honored. If we are committed to listener choice, this is a distinct improvement over the previously available options of speaking to both or to neither. It is still not possible to make both *S* and *L1* happy. Their preferences conflict no matter what. But again, if we are committed to listener choice, we will be less bothered by disappointing *S* than by disappointing *L1*. When *L1* and *L2* participate in a one-to-many case with *S*, their opposed preferences interfere; when they participate in distinct one-to-one cases with *S*, their preferences are independent. Every listener does as well or better when a one-to-many case is transformed into an aggregation of independent one-to-one cases.

54. Of course, there is also the matching in which *S* speaks to *L1* but not to *L2*, but that would just be perverse. *L1* and *L2* would gladly trade places and *S* would not object, so this is not a stable matching.



That leaves open the question of how to get there from here. This is where speakers' and listeners' actions come in. Suppose they are in a park, a few dozen feet apart. Any of the three of them could go a long way toward solving the problem by walking a short way. *S* could come closer to *L2*, *L2* could come closer to *S*, or *L1* could go further away from the others. No matter who gets up and moves, the end result is the same: *S* can speak in a way that is audible to *L2* but not to *L1*. In addition to these unilateral measures, there may be hybrids that combine actions from two, or even all three. So *S* and *L2* could each walk halfway toward the other. Or *S* could post a flyer announcing his intention to speak against the mayor at noon by the duck pond. *L2*, who is interested, will go to the duck pond at noon. *L1*, who is not interested, will stay away.

Frequently, speakers and listeners voluntarily collaborate in this sorting process without any state intervention. Consider the description of a book on a dust jacket, which lets readers decide whether they want to read the book. The resulting sorting into interested readers and disinterested non-readers suits both speakers (authors and publishers) and listeners (readers). The ubiquity of these collaborative choice structures should not blind us to their importance in achieving good matchings.

However it takes place, sorting is not free. Call the costs involved "separation costs." In the park example, there is a

literal separation: someone must move to create a greater distance between *S* and *L1* than between *S* and *L2*. More often, separation is a metaphor. In the book example, the publisher pays someone to draft the dust jacket copy and pays to print the dust jackets. Readers pay with their time when they skim the dust jacket and reflect. These separation costs are willingly borne, but they are costs nonetheless.

Sometimes separation costs may be cheap; sometimes they may be prohibitively expensive. Some separation costs will fall on speakers to target their speech, some on willing listeners to opt themselves in, and some on unwilling listeners to opt themselves out. Some separation costs may even fall on third parties or the government (perhaps the parks department maintains the bulletin board *S* used to post the flyer). The parties will quite naturally prefer that someone else do the necessary work of separating willing from unwilling listeners.[55] To decide whether we should expect or require someone to bear separation costs, we will have to consider their magnitude and incidence and compare these variables to the costs of foregone or unwanted speech.

We should be asking, in a sense, who is the least-cost avoider of unwanted speech? The answer to that question will always depend on contextual details and frequently on the content of the speech. But it is possible to make some general observations. A few distinctions are significant:

First, there is a duality between making speakers responsible for *targeting* their speech only to willing listeners and making listeners responsible for *selecting* only the speech they wish to hear. An email marketing list is speaker-targeted; an inbox spam filter is listener-selected. Asking listeners to "avert their eyes" or make the "short, though regular, journey from mail box to trash can"[56] requires listener selection; asking telemarketers not to call numbers on the Do Not Call list requires speaker targeting.[57]

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55. Of course, *S* may prefer that the problem not be solved at all: he has a better case to address the unwilling *L1* if that is the only way he can reach the willing *L2*. Not every speaker wants to reach unwilling listeners; musicians want to reach fans, not make enemies. But even those speakers who are perfectly willing not to address unwilling listeners would still prefer not to bear the separation costs.

56. Lamont v. Comm'r of Motor Vehicles, 269 F. Supp. 880, 883 (S.D.N.Y. 1967).

57. *See* 16 C.F.R. § 310.4(b)(1)(iii)(B) (2018).

Second, there is a similar duality between making willing listeners opt in and making unwilling listeners opt out. While both are species of listener selection, they differ in terms of whether willing or unwilling listeners are more responsible for taking action. Do Not Call is opt-out. Those who do not wish to be called must register with the list. But cable television channels are opt-in. Those who wish to receive them must affirmatively subscribe.

Third, separation costs depend both on the cost of physically *acting* and on the cost of acquiring the necessary *knowledge* on which to act. It is easy to throw junk mail away unopened, but harder to tell whether there is junk mail within an unmarked envelope. Contrariwise, it is easy to know that there is a DJ stage at the block party outside, but not so easy to ignore it.

In general, the lower a party's separation costs, the more often First Amendment doctrine asks that party to bear them. The argument that unwilling viewers should avert their eyes reflects in part a belief that it would be more costly to make willing viewers wear special glasses. But the captive audience doctrine deals with situations in which unwilling listeners are not effectively able to avert their eyes. We do not ask people to wear earplugs and blindfolds inside their own homes.

The law sometimes asks parties to collaborate in lowering each other's separation costs. Amplification limits require speakers not to use technology that overwhelms listeners' ability to self-select.[58] Do Not Call requires listeners to volunteer a little information that is helpful to accurate speaker targeting. Caller ID requires speakers to provide a little information that is helpful to accurate listener selection.

In many real-life settings, the actual system in use is a complex hybrid of these various separation techniques. Take spam. Our current hybrid system for sorting email expects speakers, willing listeners, and unwilling listeners all to play their part.[59] Unwilling listeners who wish not to receive commercial promotions from a given sender are expected to make an opt-out request. Senders, however, are required to

58. *See* Ward v. Rock Against Racism, 491 U.S. 781, 803 (1989) (holding that "[t]he city's sound-amplification guideline . . . is valid under the First Amendment as a reasonable regulation of the place and manner of expression").

59. *See, e.g.*, Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003, 15 U.S.C. §§ 7701–7713 (2012); 16 C.F.R. pt. 316 (2018).

make those opt-outs simple and convenient and to honor such requests.[60] To facilitate low-cost selection by unwilling recipients deciding which emails to read, senders are required not to use certain kinds of deceptive metadata in their emails.[61] Finally, willing recipients who do want a company's mailings are frequently expected to affirmatively opt in to promotional emails.[62] Notice how these devices are all reasonably low-cost, and how none of them interfere directly with speech to a willing listener. They collectively combine to create a system that facilitates the separation of willing and unwilling recipients. It is hardly a perfect system, but from a free speech perspective, it is far from a disaster either. It does a reasonable job at separating willing from unwilling listeners, and thus it facilitates speaker *and* listener choice.

III. EXAMPLES

The previous Part made a series of structural claims about speaker-listener matching. Despite working at an absurdly high level of abstraction, it showed that any coherent system of free speech will tend to protect mutually willing speakers and listeners,[63] favor willing listeners over unwilling listeners,[64] favor a willing listener's preferred speaker over competing speakers,[65] consider protecting unwilling listeners from unwanted speakers when other listeners are not implicated,[66] and try to help willing and unwilling listeners separate themselves.[67]

There is a tentative listener-choice principle running through all of these points. Listeners' choices to hear speech provide a prima facie reason to permit it. Listeners' choices not to hear speech provide a prima facie reason to prevent it, but one that can be overcome by other listeners' choices to hear it when the two conflict. That conflict, in turn, can be defused

60. *See* 15 U.S.C. § 7704(a)(3)(A)(i) (2012) (making it unlawful for a person to send a commercial email that does not contain a functioning opt-out).
61. *Id.* § 7704(a)(1).
62. *Id.* § 7704(a)(4)(B).
63. *Supra* Section II.A.
64. *Supra* Section II.B.1.
65. *Supra* Section II.B.2.
66. *Supra* Section II.B.3.
67. *Supra* Section II.C.

when it is possible to disaggregate willing and unwilling listeners' choices.

To repeat, these principles were derived solely from abstract theory and with no reference to the contents of speech or listeners' reasons for their choices. Yet they still perform surprisingly well when exposed to actual cases involving actual speech, speakers, and listeners. This Part examines a few canonical Supreme Court cases and finds them consistent with these general principles.

A. Mail

Start with a matched pair of cases involving the United States mail. In *Lamont v. Postmaster General*, the Court struck down a statute interdicting "communist political propaganda."[68] In *Rowan v. Post Office Department*, the Court upheld a statute allowing householders to prohibit delivery of "erotically arousing or sexually provocative" matter.[69] The relevant difference between the two was listener choice.

Lamont dealt with section 305(a) of the Postal Service and Federal Employees Salary Act of 1962, which required the Postal Service to detain "communist political propaganda" from certain countries mailed into the United States and deliver it "only on the addressee's request."[70] The Postal Service implemented the statute by screening all mail from those countries and sending a reply card to the addressee of any piece of mail determined to be statutory agitprop.[71] If the recipient filled out the card and returned it to the Postal Service, it would then deliver the mail; but if the card was not returned within twenty days, the mail would be destroyed.[72] The two cases decided in *Lamont* involved the detention of material that today seems almost absurdly tame, such as the public exchange of stilted and grandiose open letters between the Chinese and Soviet Communist Parties as they jostled over the direction of

68. 381 U.S. 301, 307 (1965).

69. 397 U.S. 728, 730 (1970).

70. *Lamont*, 381 U.S. at 302. A separate statute, the Foreign Agents Registration Act of 1938, defined the term "political propaganda," and section 305(a) then defined "communist political propaganda" as political propaganda "issued by or on behalf of" certain specified countries. *Id.* at 302 n.1 (citation omitted).

71. *Id.* at 303–04.

72. *Id.*

international communism.[73] In both cases, the American recipients filed suit challenging the constitutionality of section 305 rather than return the reply card.[74]

The Supreme Court avoided standing difficulties by invoking listeners' rights, rather than speakers' rights.[75] The Court held that the statute "amounts in our judgment to an unconstitutional abridgment of the *addressee's* First Amendment rights."[76] Moreover, it justified this conclusion by detailing the system's burdens for listeners. The Court noted the "affirmative obligation" it thrust on addressees and the chilling effect of needing to request delivery of "communist political propaganda."[77] In a concurrence, Justice Brennan explicitly and eloquently grounded willing listeners' rights in the First Amendment:

> It is true that the First Amendment contains no specific guarantee of access to publications. However, the protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees fully meaningful. I think the right to receive publications is such a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.[78]

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73. *See, e.g.*, *Chinese and Soviet Parties Exchange Letters*, PEKING REV., Mar. 22, 1963, at 1, 6, https://www.marxists.org/subject/china/peking-review/1963/PR1963-12.pdf [https://perma.cc/5HNQ-JK4K].

74. *Lamont*, 381 U.S. at 304–05.

75. The senders were located abroad and the mail they sent was issued on behalf of foreign governments. Thus, not only were the senders not before the court, it was unclear that they had any First Amendment rights to assert. *See id.* at 307–08 (Brennan, J., concurring). The modern First Amendment status of speech by foreigners remains unsettled, although "aliens abroad are presumed not to enjoy First Amendment rights." Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1549 (2010); *see also* Bluman v. Fed. Election Comm'n, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012).

76. *Lamont*, 381 U.S. at 307 (emphasis added).

77. *Id.*

78. *Id.* at 308 (Brennan, J., concurring) (citations omitted).

Lamont uncontroversially elevated listeners to the same plane as speakers. In similar cases where willing speakers and willing listeners oppose a government seeking to interpose itself between them, it does not particularly matter who is the plaintiff. Allowing either to sue when their interests are "inextricably meshed" avoids difficult and distracting questions about standing to assert each other's First Amendment rights.[79]

Rowan took a further and more interesting step. The Postal Revenue and Federal Salary Act of 1967 established a procedure for householders to notify the Postmaster General that they had received "erotically arousing or sexually provocative" advertising material from a specified sender.[80] Upon receiving such a notice, the Postmaster General was required to order the sender "to refrain from further mailings to the named addressee."[81] Notably, whether the mail was in fact arousing or provocative was left to the "sole discretion" of the householder, and as the statute was construed by the Court, future mailings from that sender to that addressee were prohibited regardless of their content.[82]

In many respects, the statute in *Rowan* was the more speech-restrictive of the two. It barred speech outright, rather than merely imposing an inconvenience (the reply card) on it. It could be applied to any advertising mail, not just mail advocating on behalf of communist governments. It applied to United States senders, not just aliens abroad. It imposed the threat of coercive punishments against speakers, not just the interception of their speech. And it vested a private party with unfettered and unreviewable discretion to apply a vague statutory standard. From a speaker-centric perspective, the statute

79. *See, e.g.*, Procunier v. Martinez, 416 U.S. 396, 409 (1974), *overruled by* Thornburgh v. Abbott, 490 U.S. 401, 413–14 (1989). *Procunier* involved prisoners' correspondence, so by focusing on the rights of their pen pals both as senders and as recipients, the Court could sidestep the question of "the extent to which an individual's right to free speech survives incarceration." *Id.* at 408; *see also* Kleindienst v. Mandel, 408 U.S. 753 (1972) (recognizing First Amendment interests of would-be audiences for a Belgian socialist denied visa to enter the United States, while subordinating those interests to the plenary Congressional power to exclude aliens).

80. Rowan v. Post Office Dep't, 397 U.S. 728, 729–30 (1970).

81. *Id.* at 730.

82. *Id.* at 734–35.

in *Rowan* is more offensive, and with *Lamont* on the books, it seems like an easy case for invalidation.

But when the Supreme Court decided *Rowan*, it unanimously *upheld* the statute.[83] Chief Justice Burger's opinion rests on listeners' rights as listeners. It starts by acknowledging the tension between speakers' and listeners' interests:

> But the right of every person "to be let alone" must be placed in the scales with the right of others to communicate.
>
> . . . To make the householder the exclusive and final judge of what will cross his threshold undoubtedly has the effect of impeding the flow of ideas, information, and arguments that, ideally, he should receive and consider.[84]

As between the two, it clearly favors listeners:

> Nothing in the Constitution compels us to listen to or view any unwanted communication, whatever its merit; we see no basis for according the printed word or pictures a different or more preferred status because they are sent by mail.[85]

And it finishes with a clear statement of unwilling listeners' place in the First Amendment's scheme:

> We therefore categorically reject the argument that a vendor has a right under the Constitution or otherwise to send unwanted material into the home of another. If this prohibition operates to impede the flow of even valid ideas, the

83. *Id.* at 740.

84. *Id.* at 736. I leave for another day a detailed analysis of the role that property and privacy interests play in unwilling-listener cases where (as in *Lamont* and *Rowan*) the unwanted speech is received in the home. *See, e.g.*, *Lamont*, 381 U.S. at 304–05; *Rowan*, 397 U.S. at 729, 738. In brief, real property rights provide a framework for speech separation through literal, physical separation. "Privacy" here is the right to be let alone rather than informational privacy—so appeals to privacy merely restate a listener's interest in avoiding unwanted speech, rather than providing an independent ground to recognize it.

85. *Rowan*, 397 U.S. at 737.

> answer is that no one has a right to press even "good" ideas on an unwilling recipient.[86]

The difference between *Lamont* and *Rowan* is the willingness or the unwillingness of the listener. *Lamont* is a simple violation of the core willing-speaker, willing-listener free speech principle. *Rowan* comes out as it does because mail is a one-to-one medium. The separation problem was substantially solved by giving each residence its own postal address.[87] Because mail is individually targetable, it is reasonable to ask senders to refrain from mailing unwilling recipients. To be sure, it might also be reasonable to ask recipients to throw away unwanted mail. But by the logic of listener choice, in a one-to-one case, no core violation of free speech is committed if we ask senders rather than recipients to bear this cost.

Moreover, note that the statute in *Rowan* required unwilling recipients to opt out by sending a reply card, rather than requiring willing recipients to opt in. By giving senders one bite at the apple, the opt-out rule tends to favor willing listeners over unwilling ones, achieving a more speech-protective result. It also respects listener choice while imposing a threshold condition to ensure that the listener makes a more informed choice.[88] And a burden that is reasonable for unwilling listeners may not be reasonable for willing ones. The same procedure—sending a reply card—was struck down in *Lamont* as an unconstitutional burden on speech.

B. Doorbells

The same distinction appears in the Supreme Court's cases on door-to-door solicitation. Consider *Martin v. City of*

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86. *Id.* at 738.

87. Substantially, but not completely. More than one person can live at the same address, and they may not all be equally willing or unwilling. The implicit assumption that a single head of household speaks for all listeners at the address is not always true. The statute in *Rowan* allowed parents to add the names of children nineteen and under to the removal lists; Justice Brennan's concurrence raised the possibility that teenagers might be more willing recipients than their parents. *Rowan*, 397 U.S. at 741 (Brennan, J., concurring).

88This is another aspect of the problem in *Lamont*: postal recipients were required to make decisions about mail from senders they hadn't yet received any mail from; that is, to make uninformed choices about speech.

Struthers.[89] Struthers, Ohio, had an ordinance prohibiting door-to-door distribution of "handbills, circulars or other advertisements."[90] A Jehovah's Witness argued that the ordinance was unconstitutional after being fined $10 for violating it.[91]

Justice Black's opinion striking down the ordinance under the First Amendment is notable for the contrast it draws between the government's decisions and the homeowner's. In one notable passage, it makes the same point four times in three sentences:

> We are faced in the instant case with the necessity of weighing the conflicting interests of the appellant in the civil rights she claims, as well as [(1)] *the right of the individual householder to determine whether he is willing to receive her message*, against the interest of the community which by this ordinance offers to protect the interests of all of its citizens, [(2)] *whether particular citizens want that protection or not*. The ordinance does not control anything but the distribution of literature, and in that respect it [(3)] *substitutes the judgment of the community for the judgment of the individual householder*. It submits the distributer to criminal punishment for annoying the person on whom he calls, [(4)] *even though the recipient of the literature distributed is in fact glad to receive it*.[92]

Crucially, the opinion explains (albeit in dictum) that laws punishing trespass by unwanted callers remain constitutional:

> This or any similar regulation leaves the decision as to whether distributers of literature may lawfully call at a home where it belongs—with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant . . . .[93]

89. 319 U.S. 141 (1943).
90. *Id.* at 142.
91. *Id.*
92. *Id.* at 143–44 (emphasis added).
93. *Id.* at 148.

Subsequent case law involving unwanted newspaper deliveries confirms that homeowners can indeed stop unwanted speech by giving proper notice.[94]

As before, knocking on doors is a one-to-one medium, so it is possible both to protect speakers and to ask them to target their speech only to the willing. And also as before, the compromise on the ground requires the unwilling to opt out rather than requiring the willing to opt in. The state may *enforce* a homeowner's desire not to be spoken to, but it may not *presume* such a desire, even where the presumption is rebuttable. This rule effectively gives speakers the chance to engage listeners to see whether they choose to hear more. Some, indeed many, of those listeners will not, and these cases arise because listeners object to having been bothered. But these ultimately unwilling listeners cannot prevail over those who prove willing to entertain the speaker's message. The protection of unwilling listeners' choices both depends on, and is limited by, the protection of willing listeners' choices.

C. Drive-Ins

Finally, consider *Erznoznik v. City of Jacksonville*.[95] The University Drive-In Theatre in Jacksonville screened *Class of '74*, which featured "pictures of uncovered female breasts and buttocks."[96] A city ordinance prohibited showing such anatomy "if such motion picture, slide, or other exhibit is visible from any public street or public place."[97] The drive-in's screen was visible from two public streets and a church parking lot. A prosecution and a declaratory judgment constitutional challenge ensued, and the Supreme Court eventually found the ordinance unconstitutional.[98]

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94. *See, e.g.*, Tillman v. Distribution Sys. of Am., 224 A.D.2d 79, 88 (N.Y. App. Div. 1996) ("The State need not, and in our opinion, should not, compel anyone to read, to buy, or even to touch, pick up, or handle a newspaper of which the individual in question wants to have no part."); *cf.* Reddy v. Plain Dealer Publ'g Co., 991 N.E.2d 1158 (Ohio Ct. App. 2013) (denying relief where homeowner had not provided newspaper with notice of his objection). Different considerations apply, of course, beyond the home, because there the interests of other listeners besides those with property-based exclusionary rights are implicated.

95. 422 U.S. 205 (1975).

96. *Id.* at 207 n.1.

97. *Id.* at 207.

98. *Id.* at 206, 217–18.

Of Jacksonville's various asserted justifications for the ordinance, the only one that need detain us here is the theory that the city could "protect its citizens against unwilling exposure to materials that may be offensive."[99] The opinion itself presents the issue as a clash between speakers and listeners, describing the clash as one "pitting the First Amendment rights of speakers against the privacy rights of those who may be unwilling viewers or auditors" and calling for "delicate balancing."[100] But outside the home, Justice Powell drew a distinction:

> Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes."[101]

Since "the offended viewer readily can avert his eyes" by looking away from the drive-in screen, the Court allowed the drive-in to continue showing racy B movies.

This much is standard-issue, unwilling-listener rhetoric. But the real story of *Erznoznik*—the story of willing listeners—comes in the footnotes. First, the drive-in was not screening *Class of '74* to shock unsuspecting passersby. It was trying to reach willing viewers (also known as paying customers) rather than unwilling ones. As footnote 6 observed, "[p]resumably, where economically feasible, the screen of a drive-in theater will be shielded from those who do not pay."[102] Thus, the ordinance did not simply burden the drive-in as a speaker, it also burdened the drive-in's customers as listeners. Footnote 7 acknowledged that the case involved both "the rights of those who operate drive-in theaters and the public that attends these

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99. *Id.* at 208. As a measure to protect children, the ordinance was overbroad. *Id.* at 212–14. As a traffic control measure, it was underinclusive. *Id.* at 214–15.

100. *Id.* at 208.

101. *Id.* at 210–11 (quoting Cohen v. California, 403 U.S. 15, 21 (1971)).

102. *Id.* at 211 n.6.

establishments."[103] That makes *Erznoznik* a one-to-many case. To prohibit showing *Class of '74* to protect the choices of unwilling viewers would interfere with the choices of willing ones.[104]

An exchange between the dissent and the majority makes clear that *Erznoznik* was a case about separation costs. Chief Justice Burger argued in dissent that it was difficult for disinterested viewers to look away, saying, "[T]he screen of a drive-in movie theater is a unique type of eye-catching display that can be highly intrusive and distracting."[105] But even crediting the discredited idea that visual media compel obedience, screening out the movies would have been far more difficult on the drive-in's end. By one estimate, it might have cost $250,000 to erect a sufficient wall[106]—a cost so high as to seriously interfere with the drive-in's willingness to speak (and thus its ability to reach willing listeners). As footnote 7 of the majority opinion explained, "The effect of the Jacksonville ordinance is to increase the cost of showing films containing nudity. In certain circumstances theaters will avoid showing these movies rather than incur the additional costs. As a result persons who want to see such films at drive-ins will be unable to do so."[107] As between the drive-in and passersby, the latter were the least-cost avoiders of the speech conflict here.

This point deserves amplification. When we deal with unwanted one-to-many speech, we are always asking at least two questions. The first is a question of separation costs: whether we are truly dealing with a one-to-many case or simply with the aggregation of numerous but independent one-to-one cases. Only once we have an answer to this question about the dynamics of the situation can we properly consider the speech itself and the question of its value or harm to speakers and listeners. Cases like *Erznoznik* that make sweeping statements about what listeners must endure may in fact stand only for

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103. *Id.* at 212 n.7.

104. Indeed, there is more than a hint in the case that the problem from Jacksonville's point of view was not *unwilling* viewers on public streets but *willing* ones. Justice Powell's recitation of the facts states, "[t]here was also testimony indicating that people had been observed watching films while sitting outside the theater in parked cars and in the grass." *Id.* at 207. One does not take a seat near a drive-in to avoid the movie; one takes a seat to enjoy it.

105. *Id.* at 222 (Burger, C.J., dissenting).

106. *Id.* at 213 n.8.

107. *Id.* at 212 n.7.

much narrower propositions about what they must endure when targeting is infeasible. Mail and knocking on doors are targetable, drive-in theaters much less so. These kinds of cases raise different issues, and it is not possible to lump all unwilling-listener cases together. We must be more careful about the actual structure of the flows of speech from speakers to listeners and about whose choices influence those flows. Only then can we properly articulate whose interests are truly at stake, and what conflicts the law must mediate.

CONCLUSION

Speaker-listener matching is a general, rigorous, and illuminating way of analyzing difficult First Amendment problems. It provides a new and useful way of understanding how speaking and listening are different but interdependent, it identifies the relevant relationships in First Amendment cases. It does not always apply, but when it does, it helps bring out recurring patterns.

One such pattern, which I have discussed in detail, is listener choice. This is a golden age for scholarship on listeners' rights.[108] Recent work includes powerful normative arguments for putting listeners alongside speakers at the center of free speech theory and thoughtful listener-oriented analyses of a diverse array of First Amendment doctrines. Those who are committed to listeners' rights may find the matching framework congenial for a few reasons. First, it provides a concrete way of recognizing listeners' agency, because it focuses on their *choices* rather than on their *interests*.[109] Second, it shows that listeners make choices *for* speakers and not just *against* them, which helps align listeners' and speakers' rights. Third, it shows how some conflicts among speakers and listeners can be accidents of history, so that with appropriate physical,

108. The literature on listeners' rights is extensive, and a proper survey would require an article-length literature review. In addition to the other articles in this issue, significant recent highlights include BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT (2015); Leslie Kendrick, *Are Speech Rights for Speakers?*, 103 VA. L. REV. 1767 (2007); Toni M. Massaro & Helen Norton, *SIRI-OUSLY 2.0: What Artificial Intelligence Reveals About the First Amendment*, 101 MINN. L. REV. 2481 (2017); Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283 (2011).

109. And speakers' choices, but speakers have not suffered from lack of attention to their choices.

technical, or legal interventions, the conflicts dissolve. And fourth, it shows that listener choice really is a recurring pattern:

- In one-to-many cases, willing listeners' choices prevail over unwilling listeners' choices.
- In many-to-one cases, listeners' choices break the deadlock among competing speakers.
- In one-to-one cases (once they are properly distinguished from one-to-many cases) unwilling listeners' choices are less of a threat to free speech than they are sometimes said to be.
- Some one-to-many cases can be disaggregated into one-to-one cases through appropriate separation, and this disaggregation promotes listener choice.

These observations are pragmatic rather than profound. They are not an argument for listeners' rights across the board. Instead, they suggest that in a world with many competing speakers and many diverse listeners, the structural limits of speaker-listener matching will tend to push any system of freedom of expression towards respecting listeners' choices.

But listeners' rights are not the only direction in which the theory of speaker-listener matching can go. I would like to briefly sketch another, which I think is equally important. We have a tradition of free speech theory and First Amendment doctrine that obsesses over the problem of bandwidth scarcity.[110] Much of what we think we know about speakers and listeners—think of spectrum, public fora, and compelled disclosures, to name just a few—takes it for granted that law will have to mediate conflicts among speakers and listeners over limited speech-transmission resources. But in this century, the scarcities that matter are attention and information, not bandwidth. The problem is not that speakers have a hard time reaching listeners, or that listeners are denied the ability to hear the speech they want. The problem is that listeners are flooded with speech, far more than they can possibly listen to, and that they know extremely little about that speech, so little

110. The canonical text is Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967). It has been cited by 596 articles in the HeinOnline database as of September 23, 2018.

that they can't even make minimally-informed choices about which speech to listen to.

"Fake news" is a bad way to describe the problem, but the problem is there, whether we have a good term for it or not.[111] Something has gone very wrong with the matching process in the last few years, especially but not exclusively online, something that is hard even to see from within traditional content-focused theories of free speech. Fake news and filter bubbles are problems of attention and ignorance.[112] They have to do with the content of speech, yes, but much more to do with how content spreads from speakers to listeners.[113]

Free speech theory needs to come to grips with attention and ignorance as foundational concepts.[114] In an age of virality, presidential tweets, and recommendation engines run amok, attention is *the* resource that powerful speakers fight over, and listener ignorance is often their weapon of choice.[115] Preserving a safe space for a democratic culture will require both new efforts to protect attention from hijacking and also new tools to channel attention to places where it can be used for good.[116] The truly unifying work on a coherent First Amendment law of attention and ignorance remains to be written. I hope that it will not be long. The problem is urgent.

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111. Some sources on the issues involved include ROBYN CAPLAN ET AL., DATA & SOC'Y, DEAD RECKONING: NAVIGATING CONTENT MODERATION AFTER "FAKE NEWS" (2018); James Grimmelmann, *The Platform is the Message*, 2 GEO. L. TECH. REV. 217 (2018); ALICE MARWICK & REBECCA LEWIS, DATA & SOCIETY, MEDIA MANIPULATION AND DISINFORMATION ONLINE (2018); Mark Verstraete et al., *Identifying and Countering Fake News* (Arizona Legal Studies Discussion Paper No. 17-15 (2017)), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3007971 [https://perma.cc/X6Q8-YJCD]; Claire Wardle, *Fake News. It's Complicated*, FIRST DRAFT (Feb. 16, 2017), https://firstdraftnews.org/fake-news-complicated/ [https://perma.cc/Y2ZJ-ZC5H].

112. On filter bubbles, see CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA (2017); ELI PARISER, THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU (2011).

113. *See* Zeynep Tufekci, *It's the (Democracy-Poisoning) Golden Age of Free Speech*, WIRED (Jan. 16, 2018, 6:00 AM), https://www.wired.com/story/free-speech-issue-tech-turmoil-new-censorship/ [https://perma.cc/EX97-XGGM].

114. Some initial work along these lines includes Jasper L. Tran, *The Right to Attention*, 91 IND. L.J. 1023 (2016); Wu, *supra* note 32.

115. *See* TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS (2016).

116. *See generally* 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 (2004).