

Active Listening

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I. INTRODUCTION

Listeners are the red-headed stepchildren of the First Amendment: undeniably part of the family, but never quite welcome at the table. The “freedom of speech,” it is thought, obviously and primarily protects speakers. Listeners benefit enormously from speech, but it is speakers who do all the work. Speakers are creative, they are vocal, they take risks, they challenge society’s norms and generally make an obnoxious spectacle of themselves. Listeners are silent partners; their job is simply to listen.

Speakers, in other words, are active, while listeners are passive. Listeners may later be stirred to action by what they hear, but in the act of listening itself, the ideal listener is a potted plant. Listeners who do assert themselves are usually treated as censorious threats to speech rather than as valued participants in it. In one oft-repeated phrase, “[T]he 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.”¹

The blind spot in this traditional learning is its inattention to the matching process by which speakers and listeners collectively decide who will speak to whom. Speakers make countless choices about when, where, and how to speak. An author chooses whether to email her latest story to a friend or submit it to a publisher; a picketer chooses which street corner to stand on and which passers-by to harangue. So too, listeners make choices about when, where, and how to listen. A television viewer chooses from thousands of programs, a reader from millions of books, an Internet user from billions of websites. Their choices are less visible, but no less valuable. Listeners, too, are active.

In this article, I begin the project of recovering listeners’ agency. I argue that listeners make extensive choices about which speech they wish to hear, that their ability to choose serves the goals of free speech, and that the First Amendment as interpreted by the Supreme Court already extensively promotes listener choice. This active listening framework differs from more conventional accounts of the First Amendment in several ways:

- It is *content-neutral*: it focuses more on the matching process by which speakers and listeners find each other and less on the content of the speech they exchange.
- It is *listener-oriented*: it focuses more on listeners and less on speakers.
- It is *ex ante*: it focuses more on how listeners select speech before they hear it and less on how they react to speech after they hear it.
- It is *individualistic*: it focuses more on the interests of specific listeners and less on the interests of listeners in general.

1 Snyder v. Phelps, 131 S. Ct. 1207, 1220 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (2011)).

This is a large project, and the present article is directed only to three foundational tasks:

First, I give a matching-based description of speech, one that puts speakers' and listeners' choices center stage. Different technologies and legal frameworks tend to put these choices in different hands, with significantly different consequences. Speaking generally, broadcast media technologies necessarily vest these choices in the hands of those who control access to the media. But network media technologies, by eliminating the transmission bottleneck, make it possible to vest choice further downstream, with listeners. There are, of course, other constraints on effective listener choice, but in this century it is far more an option than in all that came before.

Second, I argue that as a general matter, listener choice is an essential component of any theory that claims to take freedom of speech seriously. A free-speech framework that does not give a substantial role to listener choice is incoherent. Ours is a many-to-many world, crowded with speakers and listeners. The paradigmatic communicative connection between a willing speaker and a willing listener is practically impossible if other listeners can silence the speaker or if other speakers can conscript the listener. A principle of promoting effective listener choice resolves these conflicts in the way most compatible with the basic commitments of freedom of speech.

Third, I read a few leading Supreme Court First Amendment cases through the lens of listener choice. *Lamont v. Postmaster General*² and *Rowan v. Post Office Department*³ stand for a powerful but simple distinction. The government has no power to interdict mail from a disfavored sender—but recipients can tell a sender never to mail them again. Nearly identical conduct is unconstitutional when the government acts on its own accord but unproblematic when it acts at the direction of a specific listener. *Martin v. City of Struthers*⁴ draws exactly the same distinction: a general ordinance against door-to-door solicitation is unconstitutional, but the state can enforce individual homeowners' demands that solicitors stay away. And *Erznoznik v. City of Jacksonville*⁵ illustrates the relationship between willing listeners and unwilling ones.

Active listening is not a complete theory of free speech or the First Amendment. It has little to say about the kinds of harms that speech can cause, about the political dimensions of speech, about the line between speech and other forms of human activity, or about the institutions that craft First Amendment doctrine and set free speech policy. Active listening offers mostly content-neutral insights about speech, which means that other, more familiar theories must step in to make the content-

2 381 U.S. 301 (1965).

3 397 U.S. 728 (1970).

4 319 U.S. 141 (1943).

5 422 U.S. 205 (1975).

aware distinctions that drive much of First Amendment doctrine. But for just that reason, it offers a novel perspective from which to understand the First Amendment; looking past the content to the underlying matching process offers insights not otherwise available.

Indeed, this is the most significant consequence of adopting an active listening theory of free speech: it makes listeners' agency visible. The pedestrian who stops to look at a newspaper rack, the theatergoer who leaves at intermission, the search user who crafts the perfect query, the reader who loses herself in a book and the reader who tosses it angrily aside—they are all actively engaged in the everyday practices of free speech. We need not honor all their choices, but we should take seriously the fact that they are making choices as listeners. We cannot hope to understand the lived reality of speech unless we do.

II. 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, to an advertisement for dish soap, to a friend's endless nattering about baseball, or to a street-corner drunk's alarming rant, to name just a few. The politician might, at any given moment, be speaking to a national audience on C-SPAN, to a potential donor on the telephone, to 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 out of the 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. 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).⁶ The number of possible matchings is thus

⁶ 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.
- 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 distinct ways to assign each

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. Just written out in 12-point type, it would circle the globe. And yet, every minute of every day, speakers and listeners settle on one of these different matchings.

And matching matters. Whatever information policy goals we have, different matchings will serve them 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 from the point of view of free-speech policy. 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.

I begin, therefore, with some general observations about the matching process.

A. Choices About 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, 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 them. When a flash-flood warning starts scrolling across the bottom of the screen, the government and the TV station have intervened to direct the Emergency Warning System's speech to Liz. 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, economic, cultural, and technological constraints. Spike lives in Missouri, not Malaysia; he doesn't speak Malaysian; 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, large and small, 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.

listener a speaker. Here, $n=2$ because there are two listeners, and $m=3$ because there are three speakers, for a total of $2^3=9$ possible assignments.

I will argue below that respect for speakers' and listeners' choices to seek each other out—and in particular for listeners' choices—is central to free speech. But it is also important to understand the intrinsic limits on any set of speaker and listener choices. It would be inadvisable to honor every choice made by a speaker or listener; indeed, it would be impossible. Three kinds of limits are important.

First, many choices are interdependent; this fact puts *structural* limits on how many choices it is possible to honor at once. Should one of a pair of conjoined twin insist on listening to Haydn and the other to Jay-Z, there is no way to make both of them completely 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 particularly salient structural limits on choice; so do disagreements among speakers and listeners. Structural limits are generally content-neutral; what matters is the conflicting structure of different people's choices, not the speech they are making choices about. Most of the rest of this paper is devoted to the asymmetries inherent in the structural limits; it argues that we should generally favor listener choice rather than speaker choice because speaker-speaker conflicts are more pervasive and more intractable than listener-listener conflicts.

Second, “choice” itself is a constructed category: the ways in which actual practice falls short of the ideal of fully-informed rational decision-making create *internal* limits on choice. 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. And other times we make conscious choices to speak or to listen that we later regret, as when I saw *Snake Eyes* on opening weekend. Internal limits frequently have content-based dimensions, because the capacity to make effective choices about speech often depends on what the speech is (e.g., one of the problems with false speech is that listeners are tricked into listening). Internal limits affect listeners more sharply than speakers, because listeners have less information about speech than speakers do.

And 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 in free speech theory: they are the harms to society and to third parties that weigh against speakers' right 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. External limits are almost always content-based, because the harms speech causes to third parties depends crucially on the communicative content of the speech. That said, for the most part, nothing changes about external limits when we

shift our focus from speaker to listener, because they have made similar choices. The tension between their joint interest and the interests of third parties is largely the same.

B. From Transmission to Selection

One set of structural limits on speaker-listener choice has been particularly salient throughout history: communications bottlenecks, or “scarcity,” to use a more familiar phrase. These bottlenecks have had two characteristic effects: they turn limits on transmission into limits on selection, and they move control over speech selection upstream away from listeners. These effects are related, but they are distinct. Easing bottlenecks doesn’t just make it easier for speakers and listeners to reach each other; it can also shift the balance of power between them.

Basic features of media—capacity, range, and cost—shape who can use them to speak to whom. Compare a fiber-optic network with 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 span the globe, while the tin cans won’t get you from here to the corner. 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.

Older media imposed particularly sharp constraints on possible speaker-listener matchings. 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 media; a listener circa 220 A.D. in Rome would not have been physically capable of hearing the speech of a speaker in Xi’an. Modern media have relaxed these constraints, although not evenly or completely.

The mass media that dominated the twentieth century—particularly television, radio, and mass-produced artifacts like newspapers, books, and records—had a characteristic structure. They consistently combined the potential for widespread distribution with restricted capacity. The result was that a limited set of speakers could make use of these media, but those with access could then reach very large audiences. In a mass media environment, then, transmission is a crucial bottleneck between speakers and listeners.

Wherever there is a transmission bottleneck for speech, there is also a selection bottleneck. Speech that doesn’t make it through to listeners is not available for them to choose. Almost all the speech-selection power in mass media rests with those who choose which speech will be “pushed” through those media—that is, with the speakers with access, or with those who choose which speakers will be given access. 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.

Contrast the speech situation prevailing on the characteristic twenty-first century medium: the Internet, a worldwide, distributed, high-speed, and astoundingly high-capacity network. For the billions of people with Internet access, transmission is no longer the most significant speech bottleneck. 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. To a first approximation, anyone can speak to anyone else.

Easing the transmission bottleneck, however, makes the underlying selection problem salient again. 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. 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.

Matching is speaker-directed in the mass media because it has to be; matching on the Internet is capable of being listener-directed. Provided they know it exists and where it is to be found, listeners can “pull” the speech they want from its source. Listener-directed matching is a technical affordance, not a mandate. Search engines are profoundly listener-directed: different queries let users seek out different speech. Advertising engines that let marketers slice and dice their target eyeballs along thousands of demographic and behavioral axes are profoundly speaker-directed. The point for now is merely that the possibility space for speaker-listener matching is now far more amenable to listener choices about speech than it was in the mass media era. It is up to us to decide whether this tremendous potential expansion in listener choice is a good thing, and what to do about it. We have options where we did not have them before.

C. Choices About Information

Another set of important limits, part structural and part internal, stem from the deep asymmetry between speakers and listeners. Speakers produce information; listeners

consume it. This difference plays out in two ways. On the one hand, it means that the capacity to listen is far more limited than the capacity to speak. And on the other, it means that listeners make their choices from a position of comparative ignorance about speech.

Start with capacity. Speech, being information, is infinitely replicable, and is consumed nonrivalrously by listeners. Thus, there is nothing in the nature of speech itself that 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. Speakers consume listeners' attention rivalrously: 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 matters because there are billions of speakers in the world, and millions of them are trying to reach a public audience. In this sense, listeners are saturated with choices; there are millions of speakers who would be more than happy to address them. But it also means that these speakers are competing fiercely with each other for audiences. As communications bottlenecks ease (the flipside of it becoming easier and easier to copy and transmit speech cheaply worldwide) and listeners potentially have access to more and more speakers, the competition intensifies. The underlying constraint on speech—listeners' limited attention—which once was deeply buried is now far closer to the surface.

Now for ignorance. Speech, being information, is subject to Arrow's information paradox. A listener who has not yet heard speech is not capable of making a fully informed evaluation of it. 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.

Again, 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: even if the neo-Nazi on the corner has said "Death to the Jews!" ninety-nine times already this morning, perhaps the hundredth thing he says will be an eloquent argument against bicameralism, or a proof of the Riemann hypothesis. It's unlikely, but not impossible.

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 ven-

ture 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 *ex ante*, even when they would have been glad to have heard it *ex post*.

These two concerns—attention and ignorance—mean that honoring listener choices about speech is always an act of compromise. First, to honor a listener’s choice about speech almost always means disappointing many speakers. But the same will be true no matter what choice the listener makes, and whether it is honored or not. Disappointed speakers are an inevitability. And second, the “choice” that we honor is necessarily a bit of a fiction; every listener preference among speakers is made with imperfect knowledge of what those speakers have to say. Again, the same will be true no matter what choice the listener makes, and whether it is honored or not. The next Part will give a strong defense of listener choices, but neither those choices nor the resulting speech environment are capable of perfection.

III. PROMOTING LISTENER CHOICE

So much for what we *can* do about listener choices. Now for what we *should* do. This part will make 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 bases are, they must protect the entire communicative pathway from speaker to listener. And once they do, they cannot effectively protect speakers with 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, I will argue, inherent in the nature of speech in a world with many people in it.

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 thing 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 some such reasons, 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. 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 rather than to listeners or to speakers and listeners jointly or severally makes no apparent difference

to the resulting theory. It is safe to assume that speakers can fully speak for listeners when they all want the same thing. When we move beyond willing listeners, this assumption clearly ceases to apply. But it is important to recognize that the assumption is doing significant unstated work even in the paradigm case of willing speaker and willing listeners.

Consider a pair of simple hypotheticals:

Duct Tape: S gives a speech criticizing the mayor. L is in the audience. The police place duct tape over S's mouth.

Air Horn: S gives a speech criticizing the mayor. L is in the audience. The police stand next to L blowing air horns.

In *Duct Tape*, the police have prevented S from speaking; this is an obvious and obviously unconstitutional prior restraint on speech.⁷ The net effect on free speech is that L is unable to hear to what S has to say. In *Air Horn*, the police officer has not literally prevented S from speaking. But the air horn is just as effective as the duct tape in figuratively silencing S. If *Duct Tape* is a paradigm case of a prior restraint on speech, then so is *Air Horn*. The First Amendment must regard the abusive blowing of air horns in listeners' ears as a problem of the same kind as the abusive placement of duct tape on speakers' mouths.

These examples show that 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.⁸ 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.⁹ Rather, the problem in *Air Horn* is that the police officer has used the air

7 See, e.g., *Near v. Minnesota*, 283 U.S. 697, 712 (1931) (vacating injunction against newspaper publishing allegedly defamatory material about local officials); *New York Times Co. v. United States*, 403 U.S. 713 (vacating injunction against publication of classified Pentagon Papers); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."). I have given examples involving physical, rather than legal, restraint to emphasize the paradigmatic nature of the First Amendment violation. Even the dissent in *Near* would have regarded *Duct Tape* as an impermissible prior restraint. See *Near*, 283 U.S., at 732–36 (describing "control in advance" as the essence of unconstitutional "previous restraint on publication" and quoting Story and Blackstone in support of this view). The analysis in the text would be largely the same if the police in *Duct Tape* arrested S for speaking, and the police in *Air Horn* arrested L for listening.

8 See *Procnunier v. Martinez*, 416 U.S. 396, 408 ("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."). What matters is not just the utterance value of S's speech—the sounds she makes and the words she uses—but its locutionary value—what she conveys to L.

9 Or duct tape, for that matter.

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. The right to receive speech is the “reciprocal” of the right to speak; each is meaningless without the other.¹⁰ A system that does not protect the freedom to listen will not effectively protect the freedom to speak, and vice versa.

This sounds 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; anything that interfere’s with the success of the speaker’s project is *prima facie* suspect. On the latter, core free-speech protections attach when someone speaks and someone listens; anything that interferes with the success of their joint communicative project is *prima facie* suspect. This is a narrower principle, because it requires both a speaker and a listener.

We can test this point with a pair of cases:

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 with no one else around until the police arrive to arrest L.

We might regard these as cases that ought to be protected by free speech. Or we might not. A theory focused on speakers’ and listeners’ personal liberty might regard them as problematic; a theory focused on democratic discourse might not. It is possible, in other words, 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. *Duct Tape* and *Air Horn* are core cases for free speech; *Lonely Speaker* and *Lonely Listener* are not.

We have, in other words, zoomed out far enough to see that free speech must take account of listeners as well as speakers, because both are required to make sense of a core violation of the freedom of speech. Now we are in a position to take account of the choices those listeners make about speech.

¹⁰ Virginia State Bd. of Pharmacy v. Virginia 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, and it may be asserted by these appellees.”)

B. Unwilling Listeners

Unwilling-listener cases are not typically thought of as central to free speech. That is a mistake. They are not infrequent aberrations; they are far and away the most common case. Their ubiquity makes them invisible. Most lack the high drama of the Westboro Baptist Church's protests. But that is because our system sorts them out almost automatically, as a matter of course. Most unwanted speakers never even get close to their victims. 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 numbers of unwilling-listener cases right as well. And if we do not, it is not just listeners, but speakers who suffer.

In willing-listener cases like *Air Horn*, 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.

Nothing the state does here will make everyone happy. If it leaves matters alone or sends a police officer to arrest S, L will be satisfied to have escaped S, but S will be upset to have lost her audience in L. If the state intervenes by stationing a police officer to keep L in his seat, it will satisfy S's desire to be heard but at the cost of frustrating L's desire to not to hear.¹¹ We need some further basis on which to decide, as between S and L, whose choices will be respected.

It is common to assert that in such cases we have chosen to favor speakers rather than listeners. The First Amendment refers to “the freedom of speech,” not “the freedom of listening to speech.” And in offensive-speech cases, the Supreme Court has taken a strongly speaker-favoring line. As Chief Justice Roberts reiterated

¹¹ 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.

Here, 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 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.

in *Snyder v. Phelps*, “[T]he 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.”¹² Conventional wisdom is that *Snyder* is typical and embodies an important commitment to free speech.

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.¹³ Other cases involve *one-to-many* speech, in which a speaker addresses a large and possibly indeterminate audience, not all of whom are necessarily 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. The confusion and consternation that often attends this part of First Amendment law stems from a failure to distinguish among these patterns.

The existence of one-to-many and many-to-one cases complicates the story considerably. Paradigm cases of unwanted speech 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 favoring speakers over unwilling listeners can frustrate other speakers.

There is, however, a narrower principle that can decide large swaths of these cases. Counterintuitively, many unwilling-listener cases have willing-listener cases embedded within them. If the state acts in certain ways, it violates the core commitment of free speech: not to interfere with the connection between a willing speaker and a willing listener. In a one-to-many case where some of the listeners are willing, the state cannot silence the speaker without suppressing core willing-listener speech. And in a many-to-one case where the listener has a preferred speaker, the state cannot favor the other speakers without again suppressing core willing-listener speech.

12 *Snyder v. Phelps*, 131 S. Ct. 1207, 1220 (2011) (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975)).

13 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.”

Strikingly, in both kinds of cases, it is *listeners' choices* that break the deadlock. In one-to-many cases, it is the presence of the willing listeners that causes the core protections of free speech to attach; willing listeners prevail over unwilling. And in many-to-one cases, it is the listener's preference among speakers that provides a principled basis for distinguishing among them. It takes a willing listener to elevate a speaker's free-speech claims to a level at which they command respect, rather than merely requesting it. This point, in turn, suggests that we should be more solicitous of listeners than of speakers in one-to-one cases.

1. One-to-Many

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

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

Y is an unwilling listener. S would prefer to speak to her; Y would prefer not to be spoken to. Just as in *Bored Audience*, it is not possible to make both S and Y happy. Arresting S favors Y over S, but allowing Y to continue still favors S over Y. Again, we must decide, as between S and Y, whose choices to respect.

But we also have another decision to make, because X and Y's choices are in tension as well. If S continues, her speech will reach both X and Y, satisfying X but frustrating Y. If S shuts up, her speech will reach no one, satisfying Y but frustrating X. The two listeners' choices about S cannot both be honored; one of them will go home unhappy. We 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 Y, we also harm listeners' choices by frustrating X, and vice-versa. *Controversial Protest* poses both a speaker-listener and a listener-listener conflict.

These two decisions are linked: S and X are united against Y. If S speaks, both S and X 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 X in free speech terms. They are a willing speaker addressing a willing listener—the paradigm case for free speech. If S is silenced, the state interferes with speech in *Controversial Protest* just as much as it does in *Duct Tape*, albeit for a different reason. If S is allowed to speak, the state frustrates Y's desire not to listen, but this is not the paradigm case of preventing desired speech from reaching its audience.

The paradigm of free speech favors willing listeners over unwilling ones. If X's and Y'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 does. 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 Y were ambiguous) and *Controversial Protest* (in which S's claims as a speaker against the unwilling Y are unambiguous) is precisely the presence of the additional, willing listener X. Without X's choice as a listener to listen to S, this is a hard case; with X's choice, it becomes an easy one.

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: A is giving a speech criticizing the mayor. In the room next door, B is giving a speech praising the mayor. L would like to attend A's speech.

A and B 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.

A and B, however, do not have equal claims on L's attention. As against A, L is a willing listener. There is, therefore, a close connection between *Dueling Speeches* and *Air Horn*. The police officer who compels L to attend B's speech rather than A's has interfered with A's ability to communicate with L just as much as if he blew an air horn in L's ear. The same considerations that led us to say the state interferes with A's freedom of speech in *Air Horn* should lead us to say that it also interferes with A's freedom of speech by dragging L from A's audience into B's. The effect on A's speech is the same.

B has a harder time making a similar claim. As against B, L is an unwilling listener, because L would rather be listening to A. If the state assists L in escaping from B's auditorium, B may be frustrated, but this is the lesser harm of 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*—A versus B as speakers competing for the same audience, and B versus L as a speaker trying to reach an unwilling listener—are bound up with each other. L is simultaneously a willing listener (to A) and an unwilling listener (to B).

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 A, not B. But even a theory that purports to care only about speakers' choices will still tend to prefer A to B, because A and L stand in the paradigm free-speech relationship of willing speaker and willing listener, whereas B and L do not. To choose between A and B, a speaker-regarding theory would need to appeal to the personal characteristics

of A or B, or to the respective value of pro-mayoral and anti-mayoral speech. Neither is an attractive starting point for a theory of free speech.

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. First of all, 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 an annoying speaker and an eggshell-eardrum 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 our lens out until we see the other listeners straining to hear and the other speakers straining to be heard.

In particular, when there are multiple 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. When there are multiple 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 or not 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.

Two conclusions follow. The narrower and more definite point is that we should be careful not to mistake one-to-many or many-to-one cases 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. This can be a relevant consideration, a reason to treat these cases differently. Indeed, *every* unwilling-listener case has a least 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.

The broader but also more tentative conclusion is that there are plausible free-speech reasons to prefer 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 pushed 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.

The 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 choice not to be spoken to 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 to be brought out below and in future work. Rather, the point for the moment is that we can get quite far in the direction of favoring listeners' choices even in one-to-one cases *without needing to resort* to contextual factors and normative arguments. Listeners beat speakers; willing listeners beat unwilling ones.

C. Targeting, Selection, and Separation Costs

Speakers and listeners don't just have preferences about speech, they also *act* on those preferences, and the matching process of who speaks to whom depend on both. 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 that struggle to the other.

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. X and Y are within hearing range.

X is interested in listening to S; Y is not.

S and X form a willing-listener willing-speaker pair; S and Y have irreconcilably opposed preferences. The point of *Controversial Protest* was that there is an additional listener-listener conflict between X and Y; 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 followed that S should be allowed to speak.

Unlike the conflict between S and Y, which is inherent in their choices, the conflict between X and Y is contingent. It stems from the assumption that either S speaks to both X and Y or S speaks to neither of them. If we relax this assumption, it should be clear that another and arguably better solution is possible: S speaks to X but not to Y:

	S speaks to X and Y	S speaks to X	S speaks to no one
S	<i>Good</i>	<i>Okay</i>	<i>Bad</i>
X	<i>Good</i>	<i>Good</i>	<i>Bad</i>
Y	<i>Bad</i>	<i>Good</i>	<i>Good</i>

On this outcome, both X and Y go home happy because their respective preferences (to listen and not 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 Y happy; their preferences conflict no matter what. But to the extent we are committed to listener choice, we will be less bothered by disappointing S than by disappointing Y. When X and Y 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.

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 figuratively go a long way toward solving the problem by literally going a short way. S could walk closer to X; X could walk closer to S; or Y could walk further away from the others. Whoever gets up and moves, the end result is the same: S can speak in a way that is audible to X but not to Y. In addition to these unilateral measures, there may be hybrids that combine action from two, or even all three of S, X, and Y. So S and X 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. X, who is interested, will go to the duck pond at noon; Y, who is not interested, will stay away.

Frequently, speakers and listeners collaborate in this sorting process, voluntarily and without any state intervention. Take the 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 and listeners. 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. Let us 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 X than between S and Y. 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 on it. Here, the 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, 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 he used to post his flyer). Everyone will quite naturally prefer that someone else do the necessary work of separating willing from unwilling listeners.¹⁴

To decide whether we should expect or require someone to bear separation costs, we will have to consider their magnitude and incidence, and compare them 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” requires listener selection; asking telemarketers not to call numbers on the Do Not Call list requires speaker targeting.

Second, there is a similar duality between making willing listeners *opt in* and making unwilling listeners *opt out*. Both are species of listener selection, but 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. 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

¹⁴ Of course, S may prefer that the problem not be solved at all: he has a better case to address the unwilling Y if that is the only way he can reach the willing X. To be sure, not every speaker wants to reach unwilling listeners; most 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.

away unopened, but harder to tell whether there is junk mail within an unmarked envelope. It is easy to know that there is a DJ stage at the block party outside, not so easy to ignore it.

In general, the lower a party's separation costs, the more reasonable it is to ask 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.

It is also often reasonable to ask parties to collaborate in lowering each others' separation costs. Regulations on the volume of amplification ask speakers not to use technology that overwhelms nearby unwilling listeners' practical ability to sort themselves out. Do Not Call requires unwilling listeners to provide 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 a part. 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 make those opt-outs simple and convenient, and to honor such requests. To facilitate low-cost selection by unwilling recipients deciding which emails to read, senders are required not to use certain kinds of deceptive metadata on their emails. And willing recipients who do want a company's mailings are frequently expected to affirmatively opt themselves in to promotional emails. Notice how these devices are all reasonably low-cost, how none of them interfere directly with speech to a willing listener, and how 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 at facilitating listener choice.

IV. CASELAW

The previous Part made a series of structural claims about listener choice. Despite working at an absurdly high level of abstraction, knowing only that listeners have expressed certain choices about speech, we were able to derive strong claims about what any coherent system of free speech should do. 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 protect them, but one that can be overcome by other listeners' choices to hear it when the two conflict. That conflict, in turn, can be defused when it is possible to separate willing from unwilling listeners.

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. And yet they perform surprisingly well when exposed to actual cases involving specific speech and the real speakers and listeners who care about it. This part examines a few canonical Supreme Court cases and finds them consistent with the general principle counseling respect for listeners' choices about wanted and unwanted speech.

A. Mail

Start with a matched pair of cases involving the United States mails. In *Lamont v. Postmaster General*, the Court struck down a statute interdicting “communist political propaganda.”¹⁵ In *Rowan v. Post Office Department*, it upheld a statute allowing householders to prohibit delivery of “erotically arousing or sexually provocative” matter.¹⁶ The relevant difference between the two was precisely the wishes of the addressee—the listener.

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.”¹⁷ 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.¹⁸ If the recipient filled out the card and returned it to the Postal Service, it would then deliver the mail; if the card was not returned within twenty days, the mail would be destroyed.¹⁹ The two cases decided in *Lamont* involved the detention of material that today seems almost absurdly tame: a public exchange of stilted and grandiose open letters between the Chinese and Soviet Communist Parties as they jostled over the direction of international communism. In both, the American recipients filed suit challenging the constitutionality of section 305 rather than return the reply card.

Despite the evident burden on speech, it would have been tricky to strike down the statute by relying only on speakers' rights. The senders were located abroad and the mail they sent was issued on behalf of foreign governments already subject to the United States's official disfavor. Thus, not only were the senders not before the

¹⁵ 381 U.S. 301, 302 (1965).

¹⁶ 397 US 728, 730 (1970).

¹⁷ *Lamont*, 381 U.S. at 302. A separate statute, the Foreign Agents Registration Act of 1938, defined the term “political propaganda,” and section 305(b) then defined “communist political propaganda” as political propaganda “issued by or on behalf of” certain specified countries. *Id.* at 302 n.1.

¹⁸ *Id.* at 303–04.

¹⁹ *Id.* For a time, the addressee could opt in to delivery of similar material in the future, but this option was discontinued before the Court's decision. *Id.*

court, it was unclear (and still is) that they had any First Amendment rights to assert.²⁰

The Supreme Court avoided these difficulties by invoking listeners' rights, rather than speakers'. The statute, it held, "amounts in our judgment to an unconstitutional abridgment of the *addressee's* First Amendment rights."²¹ 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."²² 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.²³

Lamont uncontroversially elevates 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 whether speakers, listeners, or both are parties to the case. Allowing either to bring suit on their own behalf when their interests are "inextricably meshed" avoids difficult and distracting questions about standing to assert each others' First Amendment rights.²⁴

²⁰ 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. 1544, 1549 (2010). See also *Bluman v. Federal Election Com'n*, 800 F. Supp.2d 281 (D.D.C. 2011), *aff'd*, 132 S.Ct. 1087 (2012).

²¹ *Id.* at 307 (emphasis added).

²² *Id.* Compare *Meese v. Keene*, which upheld a statute requiring distributors of certain films designated as "political propaganda" to provide recipients with a disclosure form identifying the foreign entity for which they acted. 481 U.S. 465 (1987), *Meese* distinguished *Lamont*, explaining, "The physical detention of the materials, not their mere designation as 'communist political propaganda,' was the offending element of the statutory scheme [in *Lamont*]." *Id.* at 480.

²³ *Lamont*, 381 U.S. at 308 (Brennan, J. concurring) (citations omitted).

²⁴ See *Procnunier v. Martinez*, 416 U.S. 396, 409 (1974). *Procnunier* 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 Belgian socialist denied visa to enter the United

Rowan takes 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.²⁵ Upon receiving such a notice, the Postmaster General was required to order the sender “to refrain from further mailings to the named addressee.”²⁶ A sender who violated such an order was subject to compliance proceedings initiated by the Attorney General in an appropriate District Court.²⁷ Notably, whether the 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.²⁸

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 unfettered and unreviewable discretion to apply a vague statutory standard in a private party. From a speaker-centric perspective, the statute in *Rowan* is more offensive; with *Lamont* on the books, it seems like an easy case for invalidation.

But when the Supreme Court decided *Rowan*, it *upheld* the statute, and unanimously. Chief Justice Burger’s opinion rests on listeners’ rights as listeners. It starts by forthrightly 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.²⁹

As between the two, it clearly favors listeners:

States, albeit subordinating those interests to the plenary Congressional power to exclude aliens).

²⁵ *Rowan v. Post Office Department*, 397 US 728, 729–30 (1970).

²⁶ *Id.* at 730.

²⁷ *Id.*

²⁸ *Id.* at 734–35.

²⁹ *Id.* at 736.

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.³⁰

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

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 answer is that no one has a right to press even "good" ideas on an unwilling recipient.³¹

The difference between *Lamont* and *Rowan* is the willingness or the unwillingness of the listener. In *Lamont*, even the incidental burden of filling out a reply card was an unconstitutional burden on willing listeners: it was a governmental action making it harder to receive disfavored speech and which impinged on the listeners' privacy interests in a chilling manner. The state cannot presume that its citizens are uninterested in learning about communism; that choice they must make for themselves. In *Rowan*, by contrast, the statute had no effect on willing listeners; it merely helped unwilling ones achieve their goal of being free from unwanted speech. The prohibitory orders did not burden the senders' speech to any willing listeners; they did not burden the speech of any other speakers. A speaker to a willing listener enjoys every presumption that First Amendment has to offer; a speaker to an unwilling listener can be silenced at a snap of the listener's fingers.³²

Lamont is a simple core violation of the 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 when we gave each residence its own postal address.³³ 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

³⁰ *Id.* at 737.

³¹ *Id.* at 738.

³² *Cf.* U.S. Postal Serv. v. Hustler Magazine, Inc., 630 F.Supp. 867 (D.D.C. 1986) (holding that Members of Congress, as could not obtain prohibitory orders against the mailing of *Hustler* to their offices). Members of Congress were "elected representatives of the people" obliged to listen, while "Private citizens bear no obligation even to acknowledge the views of others." *Id.* at 871.

³³ Substantially, but not completely. The statute in *Rowan* allowed parents to add the names of children 19 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.

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, achieving a more speech-protective result. The same exact procedure—sending a reply card—was in *Lamont* an unconstitutional burden on speech but in *Rowan* a reasonable procedure. The difference is the difference between willing and unwilling listeners. Both are protected; the former more so.

B. Doorbells

The same distinction appears in the Supreme Court’s cases on door-to-door solicitation, of which *Martin v. City of Struthers* provides a good example.³⁴ Struthers, Ohio, had an ordinance prohibiting door-to-door distribution of “handbills, circulars or other advertisements.”³⁵ A Jehovah’s Witness, fined \$10 for violating the ordinance, argued that it was unconstitutional.

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 distributor 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*.³⁶

Note that the contrast is not between the choices of the government and the choices of the speaker going door-to-door; it is between the choices of the government and the choices of the listener at home.

Three pages later, Justice Black reiterated the point that what is protected is first and foremost the listener’s right to decide whether or not to listen. The follow-

³⁴ 319 U.S. 141 (1943).

³⁵ *Id.* at 142.

³⁶ *Id.* at 143–44 (emphasis added).

ing passage would read perfectly clearly if the italicized portions on listeners' choices were deleted. They are not grammatically necessary, but they are essential to the accurate statement of the holding:

Freedom to distribute information to every citizen *wherever he desires to receive it* is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, *leaving to each householder the full right to decide whether he will receive strangers as visitors*, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.³⁷

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 distributors 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”³⁸ Subsequent caselaw involving unwanted newspaper deliveries confirms that homeowners can indeed stop unwanted speech by giving proper notice.³⁹

As before, knocking at 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 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 has the effect of giving speakers the chance to engage listeners to see whether they are interested in hearing more. Some, indeed many, of those listeners will not, and these cases arise because they 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 both depends on and is limited by the protection of willing listeners.

³⁷ *Id.* at 146–47 (emphasis added).

³⁸ *Id.* at 148.

³⁹ *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 Pub'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.

C. Drive-Ins

Finally, consider *Erznoznik v. City of Jacksonville*.⁴⁰ The University Drive-In Theatre in Jacksonville screened *Class of '74*, a film which featured “pictures of uncovered female breasts and buttocks.”⁴¹ A city ordinance prohibited showing such anatomy “if such motion picture, slide, or other exhibit is visible from any public street or public place.”⁴² 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; the Supreme Court found the ordinance unconstitutional.

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.”⁴³ The opinion itself presents the issue as a clash between speaker 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.”⁴⁴ But outside the home, Justice Powell wrote:

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.”⁴⁵

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.

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 passers-by. It was trying to reach willing viewers—paying customers—not unwilling ones. Indeed, as footnote 6 observed, “Presumably, where economically feasible, the screen of a drive-in theater will be shielded from those who do not pay.”⁴⁶ Thus, the ordinance did not simply burden the drive-in as a speaker; it also burdened the drive-

⁴⁰ 422 U.S. 205 (1975).

⁴¹ *Id.* at 206 n.1.

⁴² *Id.* at 207.

⁴³ *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.

⁴⁴ *Id.* at 208.

⁴⁵ *Id.* at 210–11 (quoting *Cohen v. California*, 403 U.S. 15, 21 (1971)).

⁴⁶ *Id.* at 210 n.6.

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 establishments."⁴⁷ That makes *Erznoznik* a one-to-many case, and to prohibit showing *Class of '74* to protect the choices of unwilling viewers would interfere with the choices of willing ones.⁴⁸

An exchange between dissent and 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."⁴⁹ 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—a cost so high as to seriously interfere with the drive-in's willingness to speak (and thus its ability to reach willing listeners).⁵⁰ 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.⁵¹

As between the drive-in and passers-by, 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 pragmatics 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 much narrower propositions about what they must endure when targeting is infeasible. Mail and knocking at doors are targetable; drive-in theaters much less so. These kinds of cases raise different issues, and it is not possible to

⁴⁷ *Id.* at 211 n.7.

⁴⁸ 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, "There 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.

⁴⁹ *Id.* at 221 (Burger, C.J., dissenting).

⁵⁰ *See id.* at 211 n.8.

⁵¹ *See id.* at 211 n.7.

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.

V. CONCLUSION

This entire argument has proceeded from a single assumption: that a free speech principle should try to protect willing speakers addressing willing audiences. Meeting this core commitment, it turns out, tells us a great deal about unwilling listeners as well. It tells us that their choices, too, are worthy of respect. Listener choice is a powerful principle. This is not yet a complete theory of listeners' choices about speech, of the normative reasons to respect and promote those choices, or of how First Amendment caselaw usually does (but sometimes does not) take listeners' choices seriously. But it should, I hope, suggest why such a theory would be interesting, important, and useful.

NOTE FOR FESC READERS

It should be apparent that this draft is the point of departure for a larger project. There are three more pieces of the argument I would like to develop:

- A discussion of the normative underpinnings of a listener-choice-centric approach to free speech. Respect for listeners is central to many theories, but the listeners themselves are often offstage. Exploring that odd disconnect will require a detailed survey of the major schools of free speech theory. Autonomy-based theories are generally most sympathetic to listeners' choices about speech, democracy-based theories, less so. Little of this will be new, but a systematic focus on listeners and their choices should bring some clarity to some murky debates.*
- An exploration of First Amendment caselaw in substantially more depth than the present Part IV. Active listening is not a standalone theory of the First Amendment, but it has applications almost everywhere, particularly in synthesizing what are often seen as unrelated or even irreconcilable lines of cases. I expect this material to deal with, inter alia, commercial speech, false speech, incitement and fighting words, the 'right to know', compelled speech, speaker and listener privacy, public forums, solicitation, protests, offensive speech, amplification technologies, hostile audiences and hecklers, threats and harassment, access to the media, the protection of minors, and various forms of filtering.*
- An application of active listening ideas to contemporary debates about digital media. Active listening represents a model of socially engaged autonomy which is particularly attractive as an ideal for computer users. The state can and should promote the development and use of tools that facilitate listener choice among speech, and I intend to evaluate a number of contemporary debates in technology policy along those lines. Examples include search engines, spam, media regulation, intermediary filtering, DRM, surveillance, and malware.*