Speech As Special

Leslie Kendrick[1]

[Draft—Please do not cite or quote without permission]

1. Introduction

The effort to defend a right to free speech long predates the First Amendment protection of "the freedom of speech and the press." Some might say that for all its longevity the discussion has advanced surprisingly little. What has undoubtedly advanced is our understanding of what features a "right to free speech" must have in order to constitute a discrete concept that merits that label. Since the 1970s a number of theorists have contributed greatly to this question, and the requirements they have identified have rightly become incorporated into the endeavor of developing a plausible theory of free speech.[2]

Above all, theorists have argued, speech must be special. By this they mean that, in order for it to make sense to single out a free speech right, the class of activities covered by the right must be distinguishable from activities not covered by it. If it cannot be so distinguished, then the thing that we are calling a "free speech

---

[1] Professor of Law, University of Virginia. For their helpful comments, many thanks to Micah Schwartzman, Seana Shiffrin, and participants at the UCLA Legal Theory Workshop.

[2] *See, e.g.*, LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? (2005); KENT GREENAWALT, SPEECH, CRIME, & THE USES OF LANGUAGE (1992); FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); Lawrence Alexander & Paul Horton, *The Impossibility of a Free Speech Principle*, 78 NW. U. L. REV. 1319 (1983); Robert Amdur, *Scanlon on Freedom of Expression*, 9 PHIL. & PUB. AFF. 287 (1980); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989); T. M. Scanlon, Jr., *A Theory of Freedom of Expression*, 1 Phil. & Pub. Aff. 204 (1972); Frederick Schauer, *Must Speech Be Special?*, 78 NW. U. L. REV. 1284 (1983); Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989); Frederick Schauer, *The Aim and the Target in Free Speech Methodology*, 83 NW. U. L. REV. 562 (1989); Frederick Schauer, *Free Speech on Tuesdays* (draft), available at http://ssrn.com/abstract=2387009; Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283 (2011).

right" is actually something else, and talking about it in terms of "free speech" is incoherent.

The demand for specialness has two aspects, more plainly distinguished in some writings than in others. First, theorists have argued that speech must be special in the sense of *distinct*. In order for a free speech right to be something worth talking about, it must be analytically distinct from other rights, such as a right of general liberty, which protects all conduct that is not harmful. If a free speech right is merely a subset of a broader right, such as a general liberty right, then it is senseless to single it out for independent discussion. A theory that singles out a free speech right must give a good reason for doing so.

Second, without the same forcefulness or clarity, but still with great frequency, theorists demand that speech be special in another way: that it be *robust* in the protection it affords. A free speech right should provide protection for conduct that the state could otherwise regulate. Against the background of a general liberty right, this means that a free speech right should protect some harmful conduct. A free speech right that does not do this is not very important and hence, again, not worth talking about.

These requirements—that a free speech right be *distinct* and *robust*—obviously bear an intuitive relationship to one another. They are often conjoined, as when theorists start from the premise that a free speech right must protect more speech than a general liberty right and seek to develop a speech-distinctive theory

that would justify this level of protection.[3] Analytically, however, they are separate: *distinctiveness* demands that a free speech right have a different justification from other rights; *robustness* demands that it protect more conduct than other rights would in its absence.

Thus by many accounts a free speech right must be *distinct* from other rights and *robust* in the protection it affords. There is value in distinguishing these demands and considering how much and in what way each is actually a prerequisite for a successful free speech theory. My contention here is that the first of these is only necessary to a limited extent and that the second is not necessary at all.

2. Speech Rights as Distinct

Accrued wisdom has it that, in order for us sensibly to discuss a free speech right as a freestanding concept, it must be *distinct* from other rights. The demand that speech be "special" most often refers to this requirement of distinctiveness.[4] If the so-called right to free speech is not distinct from other rights, then we should not single it out for special discussion or treatment.[5] Of particular concern is the possibility that a right to free speech is subsumed within a broader general right to

[3] *See, e.g.*, Greenawalt, *supra* note __ 10 (starting with the requirement that a free speech right protect more conduct than a minimal principle of liberty); Scanlon, *supra* note __, at 204 (starting with the premise that freedom of expression grants immunity to otherwise regulable acts).
[4] *See* Schauer, *Must Speech Be Special?*, supra note __ at 1289 (""Do the activities covered by the first amendment possess at least one and maybe more theoretically relevant differences from those activities not so covered? If they do, then we can say that the activities covered by the first amendment are in some sense special. But if they do not—if they are an analytically indistinguishable subset of a larger category, not all of which is protected by the first amendment—then we can say that speech is not special.").
[5] *See* Schauer, *Free Speech on Tuesdays*, *supra* note __, at 6 ("[T]o highlight a subset of a larger set without a special justification for doing so seems ordinarily, questions of pure political strategy aside, somewhere between nonsense and pointless.")

liberty, which immunizes all harmless conduct from state interference.[6] If speech is simply conduct like any other conduct protected by a general right to liberty, then speech is not special, and the right to free speech should not be singled out for special treatment.[7]

As others have observed, a free speech right may be special in ways other than theoretical distinctiveness.[8] It could be theoretically indistinguishable from a broader liberty right yet distinguishable as a matter of legal or social practice.[9] Perhaps, in a given society, speech has historically come under attack more often than other forms of conduct.[10] Perhaps a society has a constitutional text that mistakenly singles out a right to free speech and for all practical purposes cannot be amended.[11] Such circumstances would explain, and perhaps justify, treating speech as special in a particular context, even if as a theoretical matter it were not. Here, I am going to set aside these possibilities and focus upon the importance and possibility of a theoretically distinct free speech right.

The demand for theoretical distinctiveness requires a reason for singling out free speech for its own right. Various reasons might qualify. One reason could be that speech has a different cost-benefit profile from other conduct. If, say, the benefits of speech to society were greater than those of other conduct, that difference could be a sufficient reason for singling out speech. Another reason could be that speech specially implicates an underlying value, in a way that is different

---

[6] *See, e.g.*, Schauer, *Must Speech Be Special?*, supra note __ at 1293; Schauer, *Free Speech on Tuesdays*, *supra* note __, at 6; Greenawalt, *supra* note __, at 9-10.
[7] *See, e.g.*, Schauer, *Must Speech Be Special?*, *supra* note __ at 1292-93.
[8] *See, e.g.,* Schauer, *Free Speech on Tuesdays*, *supra* note __, at 21-22.
[9] *See* Schauer, *Free Speech on Tuesdays*, *supra* note __, at 22-26.
[10] *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY.
[11] *Cf.* Micah Schwartzman, *What If Religion Isn't Special*? 79. U. Chi. L. Rev. 1351 (2012).

from conduct generally. For example, some argue that speech bears a special relationship to autonomy, such that interference with speech either particularly damages or offends autonomy. This special relationship to autonomy could be a reason for singling out speech. Another reason could be that speech is a discrete component of a larger value. For example, some argue that a free speech right is one necessary component of democracy, a status that could justify distinguishing it from other conduct.

In offering these examples, I do not claim that they actually work. In order for a free speech theory to be successful, it must recognize the demand for distinctiveness and provide an account of distinctiveness that is actually plausible. I am unconcerned here with the actual plausibility of the above attempts at distinguishing speech. I offer them merely as examples of *types* of arguments that, if plausible, would make speech distinct. To fulfill the distinctiveness requirement, as commonly set forth, a free speech theory must make a plausible argument along some such line.

3. Speech Rights as Robust

It is also alleged that speech must be special in that it must provide *robust* protection for otherwise regulable conduct.[12] This requirement begins with the assertion that a free speech right must generate immunity for some class of

[12] When Fred Schauer asks, "Must speech be special?", I take him to be asking about what I am here calling distinctiveness. But others have made robustness a requirement for a free speech theory, *see, e.g.,* GREENAWALT, *supra* note __, at 9-10; Scanlon, *supra* note __, at 204. And if Schauer does not impose robustness as a formal requirement, he discusses it as a feature necessary to prevent a free speech right from being trivial. *See infra* note 14 and accompanying text.

activities.[13] Some theories specify particular acts that a free speech theory must protect in order to be plausible.[14] For instance, a theorist might stipulate that any plausible free speech theory must generate protection for art and music. I take this approach to be a subvariety of the more general category of approaches that take immunity for a class of activities as their starting point.

It almost goes without saying that it is equally common to stipulate that the class of activities protected by a free speech right must include some harmful conduct. It is no surprise that such would be the starting point for an account of "the freedom of speech" as a constitutional matter. Both the text of the First Amendment and its judicial applications make immunity for some harmful conduct a given as a matter of positive law. But immunity for harmful activities is also taken for granted as a matter of theory.

This premise manifests in more than one way. First, those who identify particular activities that must be protected by a plausible free-speech theory often include some harmful acts on the list. Incendiary speech, for example, frequently figures as a type of speech that any plausible theory must protect to some degree.[15] Such a requirement stipulates at the outset that a free speech right protects some harmful conduct.

---

[13] *See* Scanlon, *supra* note __, at 204 ("The doctrine of freedom of expression is generally thought to single out a class of 'protected acts' which it holds to be immune from restrictions to which other acts are subject.").

[14] *See, e.g.*, Shiffrin, *supra* note __, at 283 ("[A] decent regime of freedom of speech must provide a principles and strong form of protection for political speech and, in particular, for incendiary speech and other forms of dissent, for religious speech, for fiction, art—whether abstract of representational—and music, for diaries and other forms of discourse meant primarily for self-consumption, and for that private speech and discourse, e.g., personal conversations and letters, crucial to developing, pursuing, and maintaining personal relationships.").

[15] *See, e.g.*, Shiffrin, *supra* note __, at 283; Schauer, *Must Speech Be Special?*, *supra* note __, at 1295 (discussing existing case law on offensive speech to conclude, "Thus, we want to protect speech not because it causes no harm, but *despite* the harm it may cause.").

Second, on a more abstract level, some argue that the class of protected activities must include harmful conduct or else the idea of free speech has no meaning. If a general liberty right already protects all harmless conduct, then all harmless conduct within the class of activities protected by a free speech right is already protected. For this conduct, the protection afforded by the free speech right is unnecessary.

The implication is, because its protection is unnecessary, a free speech right that only reaches already protected conduct is not meaningful. It is the fact that a free speech right protects harmful activity that makes it worth talking about. Thus T.M. Scanlon says it is "the existence of such cases [of immunity for harm-causing activities] which makes freedom of expression a significant doctrine."[16] Kent Greenawalt argues:

> As far as speech is concerned, the minimal principle of liberty establishes that the government should not interfere with communication that has no potential for harm. To be significant, a principle of freedom of speech must go beyond this, positing constraints on the regulation of speech which are more robust.[17]

Of the possibility of "accept[ing] the principle that speech may be restricted when it causes harm to others," Fred Schauer concludes, "Yet then what is the point of a principle of free speech?"[18]

---

[16] Scanlon, *supra* note __, at 204. *See also* Scanlon, *supra* note __, at 208 ("[U]nder any nontrivial form of the doctrine there will be cases in which acts of expression are held to be immune from legal restriction despite the fact that they give rise to undoubted harms which would in other cases be sufficient to justify such restriction.").

[17] GREENAWALT, *supra* note __, at 9.

[18] Frederick Schauer, *Must Speech Be Special?*, 78 Nw. U. L. Rev. 1284, 1294 (1983); *see also* Schauer, *Free Speech on Tuesdays*, *supra* note __, at 10 ("recognizing or creating a legal or political right to ϕ presupposes a reason for doing so, and if ϕ'ing is already protected, and to the same extent, by some broader right that includes but is not limited to ϕ, then recognizing or creating a right to ϕ is superfluous.").

Thus, the claim that speech must be special breaks down into two separate claims. A free speech right must be *distinct* from other rights, and it must be *robust* in the protection it affords. Having distinguished these two aspects of specialness, we may consider the extent to which speech must be special with regard to either.

4. The Distinctiveness Requirement

First, to what extent must a free speech right be distinct from other rights? We have already put aside the possibility that it is distinct as a matter of social or legal practice in order to focus solely on theoretical distinctiveness. The claim is that for the idea of a free speech right to have intellectual coherence, there must be a reason for singling it out as a "free speech" right, rather than referring to some broader right of which it is a part. If the so-called free speech right is simply one part of a broader right, then it is not really a free speech right but something else.

4.1 Defining Speech

The above assertion must be qualified, however. It would still be appropriate to call something a "free speech right" if it covered activity beyond speech but "speech" were considered an appropriate representative of the entire class. This is in fact how the term "free speech right" is used in normal parlance. All theories of free speech rights cover activities that are not literally speech. These include the written word, non-speech systems of communication such as sign language and Morse code, and "expressive conduct";[19] they often also include nonverbal art and

[19] The terms "expressive conduct" and "symbolic conduct" have been used by the Supreme Court to refer to actions that do not belong to a comprehensive communicative system (such as sign language) but communicate a message within a given social context. The most famous examples

music. Conversely, most free speech theories exclude some speech from the free speech right, including price fixing, insider trading, and speech in furtherance of a conspiracy (such as the communication of a safe combination or a lookout's warning).[20] A free speech right claiming "speech" as an essential component of democratic government may exclude many activities, verbal and nonverbal, that would be considered "speech" in everyday parlance, including private conversations, novels, art, music, and other entertainment.[21] In defining the class of activities covered by a "free speech right," we unavoidably make normative judgments about what belongs. We then use the term "speech" as a metonym for this class of activities.

Thus the phrase "free speech right," and the word "speech" as used in relation to it, imply a normative judgment that the activities covered by these terms share a value, function, or other attribute that defines them as similar to each other and distinct from other activities.

Complications arise when that shared attribute turns out to characterize a wider class of activities beyond those characterized as "speech." At this point, a theorist faces some choices. On one hand, she may expand outward. That is, she may expand the definition of "speech" to encompass the wider class of activities. The newly formulated "free speech right" will cover this expanded class.

---

involve the immolation of objects, such as draft cards and flags. Technically we could say that all communication is "expressive conduct" or "symbolic conduct," in that all communication is conduct that employs symbols to express ideas, see ALEXANDER, supra note 1, at __. But we will use the terms in the particular way the Supreme Court has done.

[20] *See* Schauer, *supra* note __ at __.

[21] *See, e.g.*, Alexander Meiklejohn, Free Speech and Its Relation to Self-Government (1948); Robert Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1 (1971).

Alternatively, she may decide that she cannot expand the terms "speech" and "free speech right" to encompass the wider class. One reason she might draw this conclusion is that, despite the similar normative valence of the activities inside and outside her current free speech right, she feels that the term "speech" cannot, as a matter of lexical usage, be applied to the wider class of activities. The term "speech" in this context is essentially a term of art, but it is difficult to divorce it entirely from its everyday meaning. If wearing clothes, choosing a hairstyle, and driving a car all have the same normative value (say, for self-expression) as "speech," it may be hard to claim with a straight face that we should call them all that.

The theorist in this position has two further choices. One is to conclude that speech is in fact not distinct. The category "speech" dissolves into the wider class of activity, and the term "free speech right" gives way to a broader right. The other is to recognize that the activities within the wider class are conceptually identical, but to break them down by everyday categories for ease of reference and to facilitate understanding. For example, imagine that a theorist concludes that "speech" is one of a few activities that specially foster the development of intimate relationships that are an essential part of human flourishing. Imagine, for present purposes, that she concludes that the activities all foster intimate relationships in the same way, such that there is no analytical reason for distinguishing them. On a conceptual level, the theorist understands that the activities are identical in the reasons for protecting them, and that therefore they all belong to the same class. Nevertheless, in describing them she may find it practical to break them into smaller classes conforming to everyday language, in order to give others a better idea of what she

means. Rather than talking, for example, of a "right to development of intimate associations," she may identify more specific rights involving speech, sex, procreative choices, childrearing, familial identification, and so on.

4.2 Distinct vs. Singular

Where does all this leave us with regard to distinctiveness? Here are the three potential responses when activities outside of "speech" have the attribute alleged to make "speech" distinctive:

1. Expand the term "speech" to include all the activities with the relevant attribute.
2. Dissolve the term "speech" into the larger class of activities with the relevant attribute.
3. Recognize that "speech" activities are not conceptually distinct from other activities with the relevant attribute but use the term "speech" for practical reasons (while also using specific terms for other activities in the class).

The implications for distinctiveness depend on whether speech must be distinct with regard to only some other activities or all other activities. Must speech be merely distinct, or must it be singular? If speech must be singular—that is, distinct from *all* other activities—then option (2) is a failure. "Speech" has been subsumed by a larger class of activities. Similarly, option (3), while explicable as a matter of practice, fails to make speech singular on a conceptual level.

The success of option (1) depends upon the breadth of the class of activities it now defines as "speech." If the newly expanded "speech" contains all activities that have the relevant attribute, and it exists alongside other activities, none of which have the relevant attribute, then the new "speech" is a distinct class as against all other activities. If speech must be singular, perhaps the most strategic approach a theorist can take is to insist that all new examples of the relevant attribute count as

"speech." This will work right up until either (1) calling all these activities "speech" becomes absurd or (2) *all* activities are shown to possess the relevant attribute, at which point "speech" ceases to be distinct because "speech" is everything.

A version of this problem motivates most theorists' assertions that speech must be special, in the sense of distinct. A general liberty right is a protection that applies to *all activity* and provides that the state shall not interfere with it unless it poses harm to others. If speech is protected merely for the same reasons that a general liberty right protects *all activity*, then speech cannot be distinctive. There is nothing left from which to distinguish it.

Alternatively, if speech must be distinct from only *some* activities, then the three strategies above all succeed, as long as some activities remain outside the class. So long as activities exist that are not characterized by the relevant attribute, and are thus outside the relevant class, then however the class is defined, speech is still distinct from some activities.

The question then is how distinct a free speech right must be in order to be called a free speech right. At the least, there must be one or more activities lacking the attribute that compels recognition for speech. If all activities have that attribute, then it is no longer distinct under any definition. This is the minimal requirement, and it explains why a free speech right that collapses into a general liberty right is a failure. But how much more distinct must speech be?

Beyond the minimal requirement, what seems to matter most is simply being clear about our claims for the status of speech, so that others may evaluate their plausibility. If theory claims that speech is one of a class of activities all deserving

special recognition for the same reason (per either option (2) or (3), above), this is reason enough to treat speech as distinct from activities outside the class. Of course, it is also reason enough to treat all other member of the class in the same way. Further, if (per option 3), it makes sense as a matter of everyday usage to use the term "speech" to identify particular members of the class, then that is reason enough to use the term "speech" for those members, while also making clear that non-speech members of the class deserve the same treatment. Any such theory must be clear about what speech is distinct from and what it is identical to, and it must treat identical activities in the same way. A theory that explains speech as one of a class, but then favors it within that class, is playing fast and loose with the idea of specialness.

Of course, the more activities resemble speech, the less important any one of these activities seems. If only one activity in the whole world were outside of the class containing speech and its brethren, there would be little point in talking about speech or any other particular activity within so vast a class. Therefore the fewer activities resemble speech—the more activities it is distinct from—the better in terms of the value of framing and discussing a free speech right. But this sliding scale of distinctiveness should not be taken for an argument that speech must be singular. So long as a theory is clear that a free speech right is one of a class of rights, all of which deserve the same respect for the same reasons, it has discharged the burden of distinctiveness.

Implicit in the above analysis is the further assertion that a free speech right may be associated with cognate rights. Imagine a theory asserting that speech is

distinct from the class of *all activity* but associated with some activities. These activities are *not* identical to speech in the notable attribute they possess. In this regard, this scenario is different from the scenarios contemplated in Section 4.1. Instead, speech and these other activities either possess related functions or values or implicate the same function or value in analytically distinct ways.

For example, a theorist might argue that free speech and intimate association are cognate rights. The theorist might argue that free speech and intimate association have special but differing relationships to autonomy, or that they are two separate and essential components of autonomy. In such ways, two activities may each possess unique attributes, which bear a family resemblance to each other. An activity that stands in such a relation to another activity may count as distinct. It may even count as singular, so long as no other activities have its identical attribute. Thus the existence of cognate rights is no bar to distinctiveness.

I have argued that distinctiveness imposes a minimal requirement that a free speech right be distinct from a general liberty right. Beyond that, the idea of distinctiveness demands clarity in the relationship between speech and other specially protected activities. Singularity, by contrast, is not an analytical requirement. Singularity may, however, be a constitutional requirement, imposed by a text that appears to require speech (or at least speech and the press) to be distinct from all other activities. I am not interested in the constitutional question in this project, but even here our options are several. One is to conclude that we are indeed constrained to trying to find reasons for treating as singular only activities that could plausibly fit within the term "speech." Another is to take option (1) above

and claim that any activities serving the same values as speech are actually "speech." Another is to shift our interpretive focus from one part of one amendment to the constitution as a whole, and to ask whether the document protects whatever activities seem either identical to or cognate with speech. A final option is to conclude that existing constitutional protections are justified but incomplete. Even as a constitutional matter, then, a demand of singularity is not the only option. More importantly, on the theoretical level, we should not confuse the demands of precision and clarity for a requirement of singularity.

5. The Robustness Requirement

The second requirement often placed upon a free speech right is that it provide robust protection. By this I mean in particular that it must give protection to some harmful conduct. Once again the driving comparison is with a general liberty right. A free speech right, it is claimed, must offer more protection than a general liberty right, which means that it must protect some conduct that is harmful.

As some seem to have recognized, however, unlike the requirement of distinctiveness as against general liberty, this one is not actually a requirement so much as a preferred feature. It would be nice if a free speech theory were robust enough to justify protection for harmful conduct. It would be nice because it would reassure us that free speech is not a trivial thing to talk about, and because the theory might explain the law we have. But it is not necessary for a free speech right to protect harmful speech in order for it to be special.

First, a right may exist for reasons that have nothing to do with how robustly it protects harmful conduct. A general liberty right is itself an example: the right expressly does not extend to harmful conduct, yet it is no less a right for all that. The protection it gives harmless conduct is real and significant. And if for some reason a general liberty right did not exist, presumably it would be permissible to recognize a series of particular, narrower rights that protected particular forms of harmless conduct. The question is whether, given a general liberty right, a free speech right must protect harmful conduct in order to be special.

It seems not. Even against the background of a general liberty right, a right may be special in ways that have nothing to do with how robustly it protects harmful conduct. For one, a right may be important in a way that requires positive provision for its exercise. For example, some constitutions, though not the United States Constitution, protect a right to education. Such a right may place upon a government an obligation to make positive provision of educational opportunities for its citizens. It need not, however, imply that the right to education offers more robust protection for harmful conduct than what is offered by a general liberty principle. The speech right itself is sometimes framed in these terms: speech fosters self-development, or engagement in culture, or participation in democracy. These values are often tied to some protection for harmful speech, but it is not clear that they logically must be. Instead, these aspects of speech could impose upon the government an affirmative obligation to provide speech opportunities for citizens, without necessarily protecting their speech when it causes harm.

It also seems possible that if a right has a special relationship to a particular value, it may be important to single out the right in order to identify that special relationship, regardless of whether the right ultimately protects *more* conduct that a general liberty right would. For example, some of us might believe that certain sexual activities are not harmful. We might believe this, say, about the decision to use contraception. If this activity is not harmful, then it should find adequate protection in a general liberty right. But we may still think it should be singled out. Moreover, we need not think this purely for historical or pragmatic reasons, such as the state's historic tendency to regulate this particular activity as harmful. We may think that the activity has a special relationship to an underlying value, and that our taxonomy of rights should recognize this relationship.

We might also think of the free exercise right, protected by another part of the First Amendment. Imagine a theory of free exercise that provides that exercise of religion will not be protected when it causes harm to others. Also, the state will not make positive provision for free exercise opportunities, because of establishment concerns. Against the backdrop of a general liberty right, it appears that this free exercise right accomplishes exactly nothing. We may nevertheless conclude that free exercise of religion is *distinct* enough in its furtherance of particular values that it should be singled out, even if the protection for it is no greater than the protection for other forms of activity.

Of course, singling out a right as distinct from general liberty does suggest that the state must do extra work to justify regulation: it must provide a justification

that answers not only the general liberty right but also the reasons for treating this particular right as distinct. This difference matters in two ways.

First, the special right might exert a greater deterrent function on regulation than the general right. Requiring more justifications makes regulation marginally harder, which will on balance yield more protection, through judicial mistake and divergent outcomes on close cases. It might even deter state actors from intervening in the first place. In practice, then, more harmful conduct covered by the special right will be permitted than harmful conduct that falls outside of the right.

This is an argument that recognizing an additional right will in practice lead to more protection of harmful conduct. But this is not the claim that I take theorists to be making when they say that, in order to be worth talking about, a free speech right must protect harmful conduct. I take them to be saying that the right protects harmful conduct substantively, not incidentally.

Second, the additional justification might be significant because it means that courts will give more scrutiny to the state's claims that regulation is necessary to prevent harm. By requiring better evidence of harm, courts will provide more protection for the conduct covered by the special right than conduct outside it.

This is a possibility, and one that I might consider a good thing. Perhaps activities protected by both a general and a special right should warrant more evidence before they are regulated as harmful. But again, I do not take this to be the core of the robustness requirement. The robustness requirement demands not higher scrutiny but substantive protection for some harmful activities. We might imagine a world where, although claims of harm got more scrutiny in cases

involving special rights such as free speech, ultimately the state's claims of harm always passed muster. Thus speech was always protected to the same extent as other activities. This world would not seem to meet the demand that a free speech right be robust. Yet it would still be a world in which speech was special.

Thus, in order to be sufficiently special to be separately identified, a free speech right must be distinct as compared with a general liberty right, and it need not provide robust protection for harmful conduct.

One objection to this conclusion is that we want a free speech right to do more. With regard to distinctiveness, the United States has a constitutional text and jurisprudence that treat speech as essentially unique. In both legal and popular discourse, we treat "the freedom of speech" as a freestanding right. With regard to robustness, we take for granted that "freedom of speech" includes protection for harmful speech. We can identify particular instances of harmful speech that should receive protection and that an acceptable free speech right should justify.[22] It does little good to speak of the minimal analytical requirements for a right if, in reality, in the particular case of free speech we require something else.

Here, too, however, focusing on minimal requirements is worthwhile, because it enables us to distinguish the characteristics analytically necessary to a right from characteristics sufficient to meet normative expectations. A free speech

[22] *Cf.*, Schauer, *Must Speech Be Special?*, *supra* note __, at 1294-95 ("The anguish caused by the Nazis in Skokie, the offense and annoyance of Cohen's jacket and Cantwell's photograph, the damage to Damron's reputation and career, the economic losses of even the innocent merchants of Claiborne County, the distortion of the election process by money or misleading promises, and the humiliation caused by publicity about the victim of a sex offense are but a small sample of instances in which the principle of freedom of speech is understood to prevent the government from intervening to deal with the kinds of harm that are normally taken to be sufficient to justify use of the state's coercive powers.").

theory could describe a free speech right that meets minimal analytical requirements but falls short of our normative expectations. In this sense, the free speech right we want and the free speech right we can have may turn out to be different things. Nevertheless, if disappointment is our lot, there is some virtue in understanding how we are being disappointed.

6. Distinct Versus Robust

Setting minimal requirements may ultimately allow better understanding of what our normative commitments require and what theories may meet them. We may describe how a particular theory succeeds, or how it fails. Some theorists remain skeptical that freedom of speech legitimately distinct from other freedoms. And yet it seems to me that it is really our expectations of robustness, rather than requirements of distinctiveness, that cause the most problems.

Take T.M. Scanlon's *A Theory of Freedom of Expression*,[23] published in 1972 and partially withdrawn by Scanlon in a subsequent article.[24] Scanlon sought to defend what he termed the "Millian Principle," which ran as follows:

> There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.[25]

[23] Scanlon, *supra* note __.
[24] T. M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519 (1979).
[25] Scanlon, *supra* note __, at 213.

Scanlon defended the Millian Principle by appealing to the principle that "a legitimate government is one whose authority citizens can recognize while still regarding themselves as equal, autonomous, rational agents."[26] The conception of autonomy embedded within this principle was quite weak. It required only that "a person must see himself as sovereign in deciding what to believe and in weighing competing reasons for action."[27] Accordingly,

> An autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do. He may rely on the judgment of others, but when he does so he must be prepared to advance independent reasons for thinking their judgment likely to be correct, and to weigh the evidential value of their opinion against contrary evidence.[28]

Scanlon argued that, because a legitimate state must act consistently with its citizens' conception of themselves as autonomous, the state has limited ability to interfere with citizens' formation of beliefs and reasons for actions. The Millian Principle defines the limits of the state's ability in this regard.

Though framed in terms of the illegitimacy of state action, the Millian Principle's effect is to define the *robustness* of speech protection. And when Scanlon withdrew the Millian Principle, he did so partly owing to a conclusion that the protection it afforded was too robust.[29] The Millian Principle is framed as a categorical prohibition, yet a number of seemingly legitimate regulations would fall within its ambit, including a restriction on falsely shouting fire in a crowded

---

[26] Scanlon, *supra* note __, at 214.
[27] Scanlon, *supra* note __, at 215.
[28] Scanlon, *supra* note __, at 216.
[29] T. M. Scanlon, Jr., *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 532-34 (1979).

theater,[30] a law against deceptive advertising[31] or liability for certain false and defamatory statements of fact.[32] Its overly robust protection for some harmful speech thus became a reason to reject the Millian Principle.

But Scanlon's theory also makes claims for the *distinctiveness* of speech. Implicit in Scanlon's view is the claim that restrictions on speech, as opposed to other activities, especially interfere with citizens' abilities to form beliefs and judgments for themselves. Or, at the least, restrictions on speech especially interfere with citizens' ability to conceive of themselves as forming beliefs and judgments for themselves. Scanlon does not spend a great deal of time explaining why this is so, but he does find it to be a virtue of his theory that it "specifies what is special about acts of expression as opposed to other acts and constitutes in this sense the usable residue of the distinction between speech and action."[33]

Scanlon's claims for the *distinctiveness* of speech survive the demise of the Millian Principle. Scanlon proposes that speech has a distinctive role in our conception of ourselves as autonomous beings. Accordingly, state interference with expression has special implications for autonomy. Thus, Scanlon argues, per the Millian Principle, certain kinds of such interference are categorically forbidden. This last proposition does not necessarily follow from the previous ones, nor does its collapse spell theirs. As Scanlon and others recognized, despite the importance of speech, in some cases autonomous beings might reasonably choose to limit speech

[30] Scanlon recognized an exception here but characterized it as "trivial" one involving severely diminished rationality. Scanlon, *supra* note __, at 220.
[31] Scanlon, *supra* note **Error! Bookmark not defined.**, at 532.
[32] Scanlon thought liability for defamation should survive, Scanlon, *supra* note __, at 211, but did not explicitly consider it in light of the Millian Principle. *See* Amdur, *supra* note __, at 299-300.
[33] Scanlon, *supra* note __, at 215.

(their own as well as others') because of the risks it poses (to others and themselves).[34] As Robert Amdur put it,

> A]utonomous citizens, deciding whether to grant the state authority to regulate thought and discussion, would not only think of themselves as potential speakers and listeners, examining different views and deciding what to believe and when to obey the law. They would also think of themselves as potential victims of harms brought about by acts of expression. They would almost certainly settle on some sort of compromise: prohibiting the state from interfering with expression because of its content, but permitting an exception for acts of expression that result in serious harms. I am not sure exactly how such a principle would be worded. But I do not see any reason to believe that rational, autonomous citizens would demand anything as strict as the Millian principle.[35]

The problem here, however, is with robustness rather than distinctiveness. The demise of the Millian Principle shows that it is difficult to conclude how much protection speech should have, not that it is not worth singling out in the first place. On the distinctiveness question, Scanlon's argument offers a place to begin, even if the conclusion on robustness will be an uncertain one.

It seems to me that Scanlon's argument with respect to the distinctiveness of speech is a promising one. His reliance on a weak version of autonomy avoids problems to which some later autonomy justifications have fallen prey. And it seems difficult to gainsay that "speech," as we generally define the term, is distinctive in its role in forming thoughts and beliefs. It is a unique medium through which we receive and formulate ideas. Many have tried to reject this obvious proposition, which is at the root of essentially every theoretical claim for the specialness of a free speech right, from the democratic self-governance theories of Meiklejohn or Post, to

[34] Scanlon, *supra* note **Error! Bookmark not defined.**, at 532-34.
[35] Amdur *supra* note __, at 299.

the truth-seeking theories of Milton or Mill, to the marketplace of Holmes or *Virginia Pharmacy*. I will not seek to defend it here, except to observe that every claim that has been made against it has taken the form of speech.

All I want to suggest that it is not a coincidence that essentially all free speech theories posit that the category "speech" furthers some broader value—autonomy, democratic self-governance, truth-seeking—in a distinct, indeed singular, way that relates back to its communicative function. Nor is it implausible that communication would serve a larger value differently from other forms of activity. As was the case for Scanlon's theory, it may be for free speech theory generally that the real problems arise not from distinctiveness but from robustness—or, more precisely, from simultaneous expectations that what makes speech distinctive must also justify its receiving robust protection.

I have suggested that thinking about speech as special involves two different considerations: a free speech right as distinct and a free speech right as robust. I have suggested that a free speech right must be distinct in relation to a general right of liberty but that it may be part of a class, so long as this relationship is explained clearly and the class is treated consistently. On the question of robust protection, I have suggested that a free speech right, in order to be distinguished as such, need not protect harmful speech. I have suggested that free speech theories be evaluated, or reevaluated, for their distinctiveness and robustness.

Although robustness is not an analytical requirement for a free speech right, what we want, in the end, is to know whether speech receives additional protection, and if so to what degree. It is impossible to answer this question, however, until we

know whether speech is distinctive, and in what way. At the same time, a free speech theory need not help with robustness in order to be a theory. In fact, it may be that no one free speech theory can give us the level of robustness that we seek. That, too, however, would be worth learning.