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## THE STATUS OF THE HEARER IN MR. MADISON'S NEIGHBORHOOD

Burt Neuborne\*

### INTRODUCTION

Current Supreme Court free speech doctrine is relentlessly speaker-centered.<sup>1</sup> Even the government, usually the villain in any First Amendment story, is granted highly favorable legal status the moment it dons the speaker's mantle.<sup>2</sup> Why? It cannot be because the speaker is the only game in First Amendment town. As I have noted,<sup>3</sup> a census of Mr. Madison's First Amendment neighborhood reveals at least five prominent categories of residents: (1) speakers; (2) hearers; (3) conduits; (4) the subjects/targets; and (5) regulators, both private and public; as well as two less prominent players: the general audience and disinterested bystanders. Measured by

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\* Norman Dorsen Professor of Civil Liberties, NYU School of Law. I am delighted to participate in a Symposium Issue honoring my respected colleague and friend, Professor Martin Redish. I have learned much from him over the years. I have attempted in this piece to retain the informal, collegial tone of the Northwestern Symposium in Professor Redish's honor that gave rise to it, as well as my more freewheeling exchange with Professor Redish before a student audience at William & Mary Law School.

<sup>1</sup> Four recent Supreme Court decisions reflect the intensely speaker-centered nature of current free speech doctrine. *See* *Elonis v. United States*, 135 S. Ct. 2001, 2007, 2013 (2015) (reversing criminal conviction of a speaker who "knew or should have known" that his Internet communication would frighten a targeted hearer); *United States v. Alvarez*, 132 S. Ct. 2537, 2543 (2012) (plurality opinion) (invalidating criminal conviction for falsely claiming to have received the Congressional Medal of Honor); *Snyder v. Phelps*, 562 U.S. 443, 448, 450, 461 (2011) (overturning damage award for intentionally inflicting emotional distress by staging virulent anti-gay demonstration at funeral of soldier slain in Afghanistan); *United States v. Stevens*, 559 U.S. 460, 465–67, 482 (2010) (vacating the conviction for selling movies depicting the "gruesome" torture and death of small animals), *superseded by statute*, Pub. L. No. 111-294, 124 Stat. 3178 (2010).

<sup>2</sup> *See* *Walker v. Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239, 2253 (2015) (applying government speech doctrine to justify Texas' rejection of request for license plate depicting Confederate battle flag); *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009) (holding that government speech doctrine exempts city that chose to display religiously themed monument from duty to accord equal access to all other religions); *see also* *Johann v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005) (upholding compulsory financial support of mandatory industry-wide advertising deemed to be government speech); *Rust v. Sullivan*, 500 U.S. 173, 192, 203 (1991) (treating doctor providing federally funded pre-natal care as spokesman for the government, thereby empowering government to block flow of information concerning abortion from doctor to patient).

<sup>3</sup> BURT NEUBORNE, *MADISON'S MUSIC* 98–99 (2015).

the relative amount of Supreme Court ink they command, however, speakers have all but monopolized the Justices' sympathy and attention.

Beginning with the classic Holmes/Brandeis rhetoric in *Abrams v. United States*,<sup>4</sup> *Gitlow v. New York*,<sup>5</sup> and *Whitney v. California*,<sup>6</sup> the Supreme Court Reports are full of rhetoric about heroic speakers involved in dignitary self-realization, and/or earnest instrumental speakers pumping useful information and ideas into the information marketplace. Occasionally, the Court's efforts to characterize a particularly appalling or pathetic speaker as heroic or instrumental borders on the risible. Witness the Court's treatment of the pathetic liar in *United States v. Alvarez*,<sup>7</sup> whose false claims about having received a Congressional Medal of Honor were recycled by the Court as dignitary efforts at self-definition;<sup>8</sup> or the Court's characterization of the ugly anti-gay bigots in *Snyder v. Phelps*,<sup>9</sup> who hijacked the funeral of a young soldier killed in Afghanistan as a launching pad for their messages of hate directed at the soldier's grieving family, as instrumental speakers commenting on public issues.<sup>10</sup> And then, there is the wise guy in *Elonis v. United States*<sup>11</sup> who terrified his ex-wife on the Internet by quoting violent rap lyrics aimed at her on his web site, and got away with it because the Court did not want to burden Internet speakers with a criminally enforceable duty to avoid speech that they knew or should have known would frighten a particular target;<sup>12</sup> and the teenage cross-burners who frightened black families newly arrived in a white neighborhood by burning crosses on sidewalks abutting their homes, but were treated by the Court as protected speakers in the absence of proof beyond a reasonable doubt of a subjective intent to frighten their new neighbors.<sup>13</sup>

I do not recall in the intensely speaker-centered opinions anything but a passing reference to the interests or concerns of the other participants in the process. In *Alvarez*, did the families of genuine Medal of Honor winners feel that their husband's or father's heroic act of self-sacrifice had been cheapened? Did the grieving parents of the dead young soldier in *Snyder* weep? Did the terrified ex-wife in *Elonis* miss work? In *R. A. V. v. City of St. Paul*,<sup>14</sup> how did the black kids react to the burning of a cross on their doorstep? Did the other black families reconsider whether to move into the neighborhood? Did the Supreme Court care?

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<sup>4</sup> 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

<sup>5</sup> 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting).

<sup>6</sup> 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>7</sup> 132 S. Ct. 2537 (2012) (plurality opinion).

<sup>8</sup> *Id.* at 2551.

<sup>9</sup> 562 U.S. 443 (2011).

<sup>10</sup> *Id.* at 454.

<sup>11</sup> 135 S. Ct. 2001 (2015).

<sup>12</sup> *Id.* at 2005, 2012.

<sup>13</sup> *Virginia v. Black*, 538 U.S. 343, 365 (2003); *R. A. V. v. City of St. Paul*, 505 U.S. 377, 379, 394 (1992).

<sup>14</sup> 505 U.S. 377 (1992).

Perhaps the intensely speaker-protected First Amendment doctrine emerging from such cases is correct, but not because the speakers were either heroic or genuinely instrumental; or because the hearers were unworthy of concern. In fact, the speakers were instrumentally useless, loathsome, harmful, and pathetic. The hearers, on the other hand, were entitled to be treated with dignity, and received utterly no instrumental benefit from the speech. Why, then, did the speakers win all four cases so easily?

One possible explanation is that, apart from the speaker, none of the other residents of Mr. Madison's neighborhood have fully developed judicial personalities. On those relatively rare occasions where a hearer makes a featured appearance in a Supreme Court First Amendment opinion, it is usually to be lectured on how important it is to have a thick skin,<sup>15</sup> or to be conscripted as a First Amendment stand-in for a speaker who can not make it on its own.<sup>16</sup> Conduits, as opposed to speakers or hearers, rarely make an appearance in the Supreme Court,<sup>17</sup> in large part because

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<sup>15</sup> For representative cases exhorting hearers to grow a thicker skin, see *McCullen v. Coakley*, 134 S. Ct. 2518, 2526, 2541 (2014) (striking down buffer zone around abortion clinic; permitting unwanted face-to-face "counseling" of women seeking to enter clinic); *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1815 (2014) (permitting the opening of town council meeting with denominational Christian prayer); *Texas v. Johnson*, 491 U.S. 397, 399, 420 (1989) (reversing conviction for burning American flag as protest); *Cohen v. California*, 403 U.S. 15, 16–17 (1971) (invalidating conviction for wearing jacket emblazoned with "Fuck the Draft" in a courthouse). For relatively rare cases protecting involuntary hearers, see *Frisby v. Schultz*, 487 U.S. 474, 476, 483 (1988) (upholding, but limiting residential picketing statute); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 569, 574 (1942) (upholding conviction for personally directed "fighting words"); see also *Lynch v. Donnelly*, 465 U.S. 668, 672 (1984) (protecting reasonable observer of state-sponsored religious displays).

<sup>16</sup> *Citizens United v. FEC*, 558 U.S. 310, 371–72 (2010) (granting First Amendment protection to corporate speech based on interest of hearers in receiving it); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 749–50, 753–54 (1976) (granting First Amendment protection to advertising price of prescription drugs based on interest of consumers); *Lamont Basic Pamphlets v. Postmaster Gen.*, 381 U.S. 301, 302, 307 (1965) (striking down federal statute requiring recipients to request delivery of "communist propaganda" mailed from abroad).

<sup>17</sup> For a rare appearance by a conduit, see *Turner Broadcasting Co. v. FCC (Turner I)*, 512 U.S. 622 (1994), and *Turner Broadcasting Co. v. FCC (Turner II)*, 520 U.S. 180, 189–90 (1997) (cable network performs "gatekeeper function" justifying limited government regulatory power). Usually, conduits functioning under the Press Clause dress themselves up as speakers in order to secure maximum protection under the Speech Clause. See, e.g., *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 244, 258 (1974) (newspaper treated as speaker in refusing to publish reply to political attack); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (newspaper treated a speaker in connection with publishing paid political advertisement); see also *News Am. Publ'g, Inc. v. FCC*, 844 F.2d 800, 804, 814–15 (D.C. Cir. 1988) (invalidating discriminatory enforcement of cross-ownership rule against Rupert Murdoch as Bill of Attainder). But see *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 376 (1969) (treating television station as a conduit).

they have been so successful in passing themselves off as speakers.<sup>18</sup> The interest of targets or subjects is generally ignored,<sup>19</sup> as is the role of private speech regulators like mass media executives.<sup>20</sup> Government regulators, on the other hand, serve as perennial stereotypical foils for the Court's characterization of government censors as a mix of Abbott and Costello and the Wild Bunch, depicted as foolish bumbleres or ominous treats.<sup>21</sup>

I suspect that free speech outcomes would not change much even if the Court took the interests of the other neighborhood residents into serious consideration. For one thing, most of the time, the interests of speakers, conduits, and hearers move in tandem. Speakers usually want to speak. Conduits usually want to amplify or transmit. Hearers usually want to hear. Even when there is a conflict, vesting the government with regulatory power to resolve the conflict is often thought to pose risks that outweigh any regulatory benefits.

Even if, however, most outcomes remained the same, taking the interests of all participants in the speech process seriously would deepen First Amendment analysis. First Amendment doctrine would rest on a deeper foundation, and might well shift at the margins, especially in commercial speech settings, where the speaker interest is weakest or non-existent, the hearer interests are dominant, and the government regulator is at least arguably trustworthy.<sup>22</sup>

#### *A. Why Do Speakers Dominate Supreme Court Analysis?*

The Supreme Court's current preoccupation with speakers at the expense of the other residents of Mr. Madison's neighborhood rests on a blend of four factors. First, as a purely descriptive matter, it is impossible to imagine speech process without a speaker. Descriptive necessity cannot, however, fully explain the Court's fixation on the speaker. The moment we move beyond Justice Brandeis's existential vision of a heroic figure speaking to the void,<sup>23</sup> the act of speech, viewed descriptively, includes, at a minimum, both a hearer and a speaker.<sup>24</sup> You don't have to be Bishop Berkeley<sup>25</sup> to realize that speech without a hearer borders on meaninglessness;

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<sup>18</sup> See, e.g., *Miami Herald*, 418 U.S. at 258.

<sup>19</sup> See generally *N.Y. Times Co.*, 376 U.S. at 256–63.

<sup>20</sup> See *News Am. Publ'g, Inc.*, 844 F.2d at 804.

<sup>21</sup> See, e.g., *United States v. Stevens*, 559 U.S. 460 (2010) (bumbler); *Citizens United*, 558 U.S. 310 (threat).

<sup>22</sup> See *infra* Parts IV, V.

<sup>23</sup> Justice Brandeis articulated his dignitary defense of free speech in his celebrated concurrence in *Whitney v. California*, 274 U.S. 357, 372–80 (1927) (Brandeis, J., concurring), *overruled by Brandenburg v. Ohio*, 395 U.S. 444 (1969).

<sup>24</sup> See J. L. AUSTIN, *HOW TO DO THINGS WITH WORDS* 100–01 (1962); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN PHILOSOPHY OF LANGUAGE* 43 (1969).

<sup>25</sup> Bishop George Berkeley asked the famous question of whether a tree really falls in the forest if no one perceives it. See generally GEORGE BERKELEY, *A TREATISE CONCERNING*

speech without a subject or target becomes babble; and speech without an amplifying conduit named Gutenberg or Amazon is often doomed to a marginal existence. The ascendancy of the speaker cannot, therefore, be explained solely as an artifact of description.

Nor can it be explained as a matter of free speech theory. It's true, of course, that the two classic justifications for robust constitutional protection of free speech asserted by Justices Holmes and Brandeis both focus primarily on the speaker. Holmes viewed the speaker as an indispensable generator of raw material for a free market in ideas.<sup>26</sup> Brandeis imagined the speaker as Prometheus raging at the gods, endowed with an unbreakable dignitary impulse to self-realization.<sup>27</sup>

Justice Brandeis's dignitary justification for free speech as articulated in *Whitney* does not require, and may not even contemplate, a hearer. Unlike the Holmes instrumental justification that links the importance of the free flow of information and ideas to the proper functioning of institutions of free choice (like markets or democracies) operated by hearers, Prometheus is speaking to himself; although, even then, the presence of the gods as the existential audience is essential to Prometheus' heroism. Otherwise, he would just be an eccentric muttering to himself.

The conceded importance of the speaker in free speech theory cannot, however, be the full answer to why free speech doctrine is so speaker-centered. Even under the Brandeis dignitary approach, the speaker is not the only participant in the speech process endowed with human dignity. In addition to a Brandeis speaker, the hearers and/or the targets of dignitary speech are each endowed with the identical attributes of human dignity enjoyed by the speaker. Why does the Court focus exclusively on the speaker's dignitary right? Hearers have dignitary rights to self-fulfillment and self-definition, too. Why is it that the Court only seems to fully recognize a hearer's dignitary interests when they reinforce the speaker's legal position?<sup>28</sup>

Even more clearly, the hearer is a crucial player in Holmes's instrumental metaphor of a free market in ideas. Indeed, if one were to measure legal status by relative importance, the Holmesian hearer is at least as important, maybe more important, than the Holmesian speaker. It is the autonomous hearer, after all, vested with the capacity for rational choice and humane judgment, that makes free information markets possible. Thus, whether the Justices pledge allegiance to Holmes, Brandeis, or both,

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THE PRINCIPLES OF HUMAN KNOWLEDGE (Jonathon Dancy ed., New York, Oxford University Press 1998) (1710). For Berkeley's perspective, see *id.*

<sup>26</sup> Justice Holmes's instrumental defense of free speech is set forth in his dissents in *Gitlow v. New York*, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting), and *Abrams v. United States*, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

<sup>27</sup> *Whitney*, 274 U.S. at 372–80 (Brandeis, J., concurring).

<sup>28</sup> *Citizens United v. FEC*, 558 U.S. 310, 321, 339 (2010) (invalidating a statute that prohibited corporations from spending general treasury funds for advocacy of candidates for a candidate, when considering the “right of citizens to inquire, to hear . . . and to use information”).



one would have expected more judicial attention to the hearer as an essential dignitary and instrumental partner in the speech process.

Third, it may be that speakers claim the lion's share of the Court's attention because, as an artifact of the adversary process, the speaker is the only resident of the First Amendment neighborhood whose interest is almost always independently represented by counsel. Nobody else in the neighborhood gets sustained, first-person legal representation. Though hearers, targets, and conduits occasionally have their own lawyers, they are featured only sporadically in the relatively few cases in which their interests surface. Even then, as in *R. A. V.* and *Elonis*,<sup>29</sup> the interests of targets and hearers are often articulated and defended by the government speech regulator, the least trusted guy in town. As a practical matter, the hearer's alleged interest is often articulated by the lawyers for the speaker, but only when the hearer's interest overlaps with the speaker's. When the interests diverge, there is often no one but the government regulator to articulate it. And no one on the current Supreme Court trusts the government regulator. In the absence of sustained, independent hearer representation by a credible voice, it is no coincidence that First Amendment doctrine is so speaker-centered.

Finally, as a practical matter, it does not pay for the Justices (or perhaps for academics) to spend time and energy independently describing and analyzing the interests of the other residents of the First Amendment neighborhood if the outcome of the legal game is preordained by an uncompromising refusal to trust government speech regulators with any significant power. No matter how trenchant the analysis of the other interests in play, speakers will always win if the legal game is rigged against speech regulation from the beginning. Behind much of the Supreme Court rhetoric in First Amendment cases about the speakers' dignitary self-realization, and the instrumental importance of free markets in ideas, is a paralyzing fear of the government as censor. Much, perhaps all, modern free speech doctrine flows from that paralyzing fear. It is what is left of *Lochner v. New York*'s<sup>30</sup> jaundiced view of the government's ability to regulate the market.<sup>31</sup>

Do not waste your time with this Essay if you have already decided that, whatever the line-up of interests in Mr. Madison's neighborhood, the government speech regulator can never be trusted with power to interfere with the free flow of speech from speaker to hearer. You will be in good company. It is what a majority on the

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<sup>29</sup> *Elonis v. United States*, 135 S. Ct. 2001, 2008 (2015) (Federal government unsuccessfully argued it was not necessary to prove that a defendant intended that his Internet communication would be perceived as a threat; proof that he should have known should be sufficient.); *R. A. V. v. City of St. Paul*, 505 U.S. 377, 380, 394–95 (1992) (City of St. Paul unsuccessfully defended its "Bias-Motivated Crime Ordinance" by arguing the purpose was to protect victimization of members of their city historically subjected to discrimination, not to impact speakers' right to free expression.).

<sup>30</sup> 198 U.S. 45 (1905).

<sup>31</sup> *See id.* at 64 (invalidating maximum hour law as violation of substantive due process).

current Supreme Court appears to believe. I, too, am skeptical about the government's ability to regulate the flow of information and ideas. But not all the time, and not in every context.

I propose to consider the Supreme Court's treatment of hearers in three contexts: (1) as responders to speech; (2) as consumers of information and ideas; and (3) as involuntary targets of unwanted speech.<sup>32</sup> Then, I will hazard a normative guess about whether we have correctly defined the hearer's role, with special emphasis on two areas—commercial and corporate electoral speech.

### I. THE HEARER AS PAWN OR QUEEN

Speakers rarely speak just to hear their own voices, although it often seems that way. Rather, speakers aim their speech at hearers in the hope of affecting the hearer, either by persuading the hearer to do (or not do) something, like buying soap, overthrowing the government by force or violence, or voting against Hillary Clinton; or by altering the hearer's mental or emotional state. Ironically, the scope of a speaker's freedom does not turn on the Supreme Court's view of speakers. Rather, it flows from the Court's view of hearers.

If hearers are viewed as pawns, weak and malleable creatures subject to destructive manipulation at the hands of sophisticated and charismatic political speakers like Eugene Debs,<sup>33</sup> or passionate, incendiary radicals like Jacob Abrams and his four co-defendants,<sup>34</sup> powerful intellectuals like Karl Marx,<sup>35</sup> slick hucksters pushing the latest razor blade or deodorant,<sup>36</sup> or economically powerful speakers (like corporations or foreign governments) pouring one-sided messages into an unbalanced information market,<sup>37</sup> speakers will not be permitted to unleash verbal stimuli that risk triggering harmful and/or destructive behavior on the part of a pawn-like hearer. As we approach the 100th anniversary of Learned Hand's prescient 1917 decision in *Masses Publishing Co. v. Patten (The Masses)*,<sup>38</sup> striking down the decision to

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<sup>32</sup> I have attempted to describe my view of the hearer-centered nature of commercial speech in Burt Neuborne, *A Rationale for Protecting and Regulating Commercial Speech*, 46 BROOK. L. REV. 437, 454 (1980) [hereinafter Neuborne, *Regulating Commercial Speech*], and Burt Neuborne, *The First Amendment and Government Regulation of Capital Markets*, 55 BROOK. L. REV. 5, 28–63 (1989).

<sup>33</sup> See *Debs v. United States*, 249 U.S. 211, 212, 216–17 (1919) (upholding conviction of Eugene Debs for giving speech praising draft resisters).

<sup>34</sup> See *Abrams v. United States*, 250 U.S. 616, 616–17, 624 (1919) (upholding conviction for distributing leaflets calling for resistance to armed intervention in Russia).

<sup>35</sup> See *Dennis v. United States*, 341 U.S. 494, 516–17 (1951) (upholding conviction of leaders of American Communist Party).

<sup>36</sup> See *Valentine v. Chrestensen*, 316 U.S. 52, 53, 55 (1942) (rejecting First Amendment protection for commercial advertising).

<sup>37</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 375 (1969) (upholding FCC “fairness doctrine” rules requiring broadcast coverage of all sides of an issue).

<sup>38</sup> 244 F. 535 (S.D.N.Y. 1917), *rev'd*, 246 F. 24 (2d Cir. 1917).



ban the radical journal from the mails,<sup>39</sup> we should pay tribute to Hand's revolutionary insight that hearers in a free society cannot be treated as if they were merely pawns of powerful speakers. Instead, they must be viewed as powerful queens, able to move anywhere on the chessboard.<sup>40</sup>

Viewing hearers as queens celebrates the hearer as an autonomous, and rational creature with the ability to process speech through a mental prism, picking and choosing an appropriate behavioral response. Hand's respectful vision of hearers in *The Masses* not only trusts them to process speech through a rational filter; it trusts that filter to screen out most harmful and destructive responsive behavior.

Viewing the hearer respectfully, as a queen, not a pawn, is the essence of the move from the "bad tendency" test in *Schenck v. United States*,<sup>41</sup> *Debs v. United States*,<sup>42</sup> and *Dennis v. United States*,<sup>43</sup> to the modern approach to free speech in *Brandenburg v. Ohio*.<sup>44</sup> Paradoxically, therefore, the speakers' favored status in the free speech neighborhood turns on taking hearers seriously as autonomous, dignitary beings on a level with the speaker.

It is not at all clear to me, though, that Hand's romantically optimistic view of a freestanding, autonomous hearer capable of processing and filtering speech on the way to making trustworthy independent decisions about how to respond behaviorally, is descriptively accurate.<sup>45</sup> Hearers may well be less autonomous, rational, and trustworthy than they (or Hand) would like to believe. Much of what we think we

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<sup>39</sup> *Id.* at 537 (opinion of Hand, J.).

<sup>40</sup> I realize, of course, that the metaphor is flawed. Someone or something is moving both the queen and the pawn around the board. None of us are truly autonomous. But I will leave discussion of the role of Tiny Alice in First Amendment theory for someone else. See EDWARD ALBEE, *TINY ALICE: A PLAY* (1965) (Albee's challenging play about the infinite regression of the self).

<sup>41</sup> 249 U.S. 47 (1919).

<sup>42</sup> 249 U.S. 211 (1919).

<sup>43</sup> 341 U.S. 494 (1951). The essence of the Court's opinion in each of the "bad tendency" cases was a fear that hearers would respond to speech by engaging in socially destructive behavior. See *id.* at 511–17 (affirming conviction of leaders of Communist Party for conspiring to overthrow government at an undetermined time in future); *Debs*, 249 U.S. at 212, 216 (affirming conviction for speech praising draft resisters that intended "to obstruct the recruiting and enlistment service of the United States"); *Schenck*, 249 U.S. at 48–49, 51–53 (affirming conviction for speech urging lawful resistance to draft because "it had been intended to have some effect, and . . . influence [the enlisted men] to obstruct the carrying of [the enlistment] out").

<sup>44</sup> 395 U.S. 444, 444, 447–49 (1969) (per curiam) (applying strict scrutiny to invalidate a KKK member's conviction for speech threatening "revengeance").

<sup>45</sup> Tamara Piety makes the point persuasively in her provocative book. TAMARA R. PIETY, *BRANDISHING THE FIRST AMENDMENT: COMMERCIAL EXPRESSION IN AMERICA* 61 (2012); see Burt Neuborne, *Taking Hearers Seriously*, 91 TEX. L. REV. 1425 (2013) (reviewing PIETY, *supra*). Although I disagree with Professor Piety's view of the hearer as pawn, I agree fully with her opposition to efforts to provide First Amendment protection to false, or misleading commercial speech.

know about human nature, mass communication, and mass psychology warns us that hearers are often vulnerable to manipulation by sophisticated or passionate speakers backed by powerful amplifying conduits. No reasonably attentive observer of today's world can claim persuasively that rational, thoughtful hearers always (or even almost always) filter out verbal stimuli urging harmful, socially disadvantageous, or dangerous behavior. The sad truth is that free markets in ideas, and heroic speakers, do not always produce palatable results. Nazis, jihadists, bigots, and charlatans win a disturbingly high percentage of the time. And, even when they lose, they leave a trail of tears and pain.

Despite the empirical challenge, though, I believe that Hand (and the modern Supreme Court) are correct in placing all their legal chips on a vision of a rational, freestanding, trustworthy, and autonomous hearer, not because it is necessarily an accurate vision, but because such a romantic vision of hearer/queens is central to the operation of robust democracies, efficient markets, and free societies. If we were to replace the presumption of a strong, autonomous hearer-queen with the vision of a weak, malleable hearer-pawn, we not only invite massive paternalistic intervention in defense of such an infantile creature; we would erode the foundation of self-government. It is impossible to view hearers as weak and malleable pawns for the purpose of deciding how they will probably respond to troublesome speech, and also view them as freestanding, rational, autonomous hearers, capable of casting the informed votes on which democracy depends.

The truth is that our democratic institutions and our vision of free speech both largely rest on two contestable predictions about the attributes and future behavior of two categories of residents of Mr. Madison's neighborhood, and neither of them is the speaker. First, we assume, existentially if necessary, that hearers can be trusted with a steady drumbeat of information and ideas, much of which will be false, and some of which will persuasively urge the hearer to behave in ways that are harmful to the hearer, to a vulnerable target, to society, and/or all three. We presume that such a hearer will not accept a verbal invitation to cause harm in the absence of overwhelming proof that our faith in human nature will be overcome by the motive impact of the troublesome speech. In short, we believe that the hearer can be trusted not to act on bad data or to respond to dog-whistle speech stimulæ. That explains cases like *Brown v. Entertainment Merchants*.<sup>46</sup>

The presumption of the rational, autonomous hearer is, however, only one of the two contestable predictions on which modern free speech doctrine rests. The second debatable prediction is that government speech regulators are at a very bad risk to abuse power to interfere with the free flow of information and ideas from speaker to hearer, even in settings that may call for regulation. In short, where speech is

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<sup>46</sup> 564 U.S. 786 (2011). *Brown* invalidated a ban on the sale to children of violent video games because the government failed to prove (as opposed to plausibly fear) that repeated exposure to such violent, misogynistic material as children would lead to a loss of respect for women as an adult. *Id.* at 789, 799–800.

concerned, hearers are trusted to do the right thing; and government speech regulators are predicted to do the wrong thing.

Totalitarian societies reverse the process. Hearers, viewed as pawns, are assumed to be bad risks to mishandle information and ideas. Government, on the other hand, is deemed an excellent risk to manage speech in a fair and thoughtful way. Reverse the presumptions that way, and you virtually eliminate the space for a free speaker.

I am comfortable with assuming the best about hearers and the worst about government speech regulators. But I have three caveats to be discussed later in the Essay. First, as I have noted, the empirical facts underlying much of the reciprocal assumptions are disputable. It is, to be charitable, not clear that hearers can always be trusted. Nor is it clear that government speech regulators in a transparent democracy are always as bumbling or dangerous as we make them out to be.

Second, the existential necessity of treating speakers as dignitary heroes, and hearers as autonomous queens; while treating government as the local motorcycle gang, may not apply to commercial speech, where:

- (a) no dignitary speaker interest exists;
- (b) the sole justification for First Amendment protection of commercial speech is its purely instrumental ability to assist consumers in functioning as knowledgeable market participants; and
- (c) the fear of an abusive speech regulator is considerably diminished.

Finally, I am not convinced that the standard hearer/government regulator reciprocals should be applied in corporate electoral speech settings, where the corporation lacks a dignitary speech interest, and hearer/voters have an unusually strong interest in maintaining a tolerably level electoral playing field.

I will discuss the implications of the caveats in Parts IV and V, but, first, I want to finish fleshing out the Supreme Court's legal portrait of the hearer.

## II. THE HEARER AS AN INDEPENDENT SOURCE OF LEGAL RIGHT

In addition to its usual supporting role as the trusted recipient of speech urging the commission of undesirable acts, the hearer occasionally appears in a Supreme Court opinion as the star—a freestanding entity with an independent dignitary and/or instrumental First Amendment right to receive information, whether or not a willing or protected speaker is present.<sup>47</sup> The Court's recognition of a hearer's First Amendment right to know rests on the same three theoretical bases as the speaker's right to speak: (1) a powerful dignitary interest in shaping and defining the hearer's self; (2) an instrumental interest in gaining access to information and ideas that will assist the hearer in making rational, informed choices, whether economic, social,

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<sup>47</sup> See *infra* notes 48–56.

aesthetic, or political; and (3) a fear that government will abuse any power to cut the hearer off from the free flow of dignitary and instrumental speech.

Taken seriously, a hearer-centered right to know would be powerful medicine, with dramatic implication for First Amendment jurisprudence. The idea of a hearer's independent First Amendment right to receive information surfaces for the first time in the Supreme Court in *Lamont v. Postmaster General*,<sup>48</sup> when the government sought to require recipients of "communist political propaganda" mailed from abroad by Eastern European governments to place their names on a postal list requesting delivery.<sup>49</sup>

There was, of course, no protected speaker in *Lamont*. Foreign governments seeking to mail political propaganda into the United States (or to release hacked information in an effort to affect an election) receive no protection under the First Amendment.<sup>50</sup> Instead, the *Lamont* Court recognized an independent, hearer-centered First Amendment right to receive controversial information without being required to disclose that fact to the government.<sup>51</sup>

Similar reasoning led the Supreme Court in *Procunier v. Martinez*<sup>52</sup> to invalidate a prison mail censorship program.<sup>53</sup> The Court declined to confer full First Amendment status on the convict-speakers, but recognized a powerful First Amendment right in the family-hearers to receive personal mail from a family member in jail.<sup>54</sup>

Finally, in *First National Bank of Boston v. Bellotti*,<sup>55</sup> the Supreme Court carefully avoided deciding whether corporations enjoy full First Amendment rights to engage in electoral spending by relying on the independent First Amendment rights of hearers to receive the information at issue.<sup>56</sup>

The Court has not, however, developed the right to know beyond the slogan stage. The Court quickly rejected arguments that hearers, assisted by the press, had an enhanced right of access to closed institutions like prisons or mental hospitals.<sup>57</sup>

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<sup>48</sup> 381 U.S. 301 (1965). *Lamont* appears to be the first case in which the Supreme Court struck down an act of Congress on First Amendment grounds. *Id.* at 306–07.

<sup>49</sup> *Id.* at 302–03 (quoting the statute in question).

<sup>50</sup> *Id.* at 307.

<sup>51</sup> *Id.*

<sup>52</sup> 416 U.S. 396 (1974).

<sup>53</sup> *Id.* at 409.

<sup>54</sup> *Id.* at 408–09.

<sup>55</sup> 435 U.S. 765 (1978).

<sup>56</sup> *Id.* at 776. The Supreme Court used the same analytic acrobatics in *Citizens United v. FEC*. See 558 U.S. 310, 318–19 (2010) (invalidating ban on use of corporate treasury funds to influence outcome of contested election for public office).

<sup>57</sup> See *Pell v. Procunier*, 417 U.S. 817, 835 (1974) (denying press access to state prisons); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974) (denying press access to inmates in federal medium and maximum security prisons, rejecting First Amendment right to access); see also *Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) ("Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."). But see *Press-Enter. Co. v. Superior Court of Cal.*, 478 U.S. 1, 3, 15 (1986) (recognizing press access to preliminary hearing); *Press-Enter.*

Then, the Court held that information from abroad could be cut off by denying visas to politically suspect speakers,<sup>58</sup> and/or by declaring an economic boycott of the information's source, barring hearers from traveling to, or purchasing books or magazines from blacklisted countries like Cuba without an import license, despite the minuscule impact of travel, book or magazine sales on the economic boycott.<sup>59</sup>

Finally, the Court upheld Draconian over-classification systems that blocked access to troves of government records, ultimately giving birth to a culture of whistleblowers and Wikileaks.<sup>60</sup>

The hearers' First Amendment right to know has, however, been deployed in two areas to reinforce speakers who are unable to mount a persuasive free speech argument of their own. As we will see in Part IV, a hearer's right to receive truthful, non-misleading information helpful in making rational market choices was the sole explanation for the emergence of the commercial speech doctrine in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*<sup>61</sup> As we will see in Part V, it was also the analytic foundation of corporate electoral speech in *Bellotti* and *Citizens United v. FEC*.<sup>62</sup>

In both the commercial and corporate electoral speech settings, the Court was careful to avoid treating the speaker as a protected party. In the commercial speech setting, the Court feared that the speaker lacked the needed dignitary interest.<sup>63</sup> In *Citizens United*, the Court was also unprepared to assert that a corporation possessed dignitary status.<sup>64</sup> Instead, in both the commercial speech and corporate electoral

Co. v. Superior Court of Cal., 464 U.S. 501, 503, 513 (1984) (recognizing press access to voir dire examination of jurors); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (recognizing right of press access to criminal trial).

<sup>58</sup> *Kleindienst v. Mandel*, 408 U.S. 753, 756–57, 770 (1972) (upholding denial of short-term visitor's visa to respected Belgian Marxist scholar, preventing him from accepting an invitation from Stanford to deliver an address).

<sup>59</sup> *Regan v. Wald*, 468 U.S. 222, 244 (1984) (upholding Cuban travel ban); *Teague v. Reg'l Comm'r of Customs*, 404 F.2d 441, 442–43 (2d Cir. 1968) (upholding ban on foreign book purchases), *cert. denied*, 394 U.S. 977 (1969); *Zemel v. Rusk*, 381 U.S. 1, 3 (1965) (upholding Cuban travel ban). *See generally* Burt Neuborne & Steven R. Shapiro, *The Nylon Curtain: America's National Border and the Free Flow of Ideas*, 26 WM. & MARY L. REV. 719, 738–40 (1985).

<sup>60</sup> The modern fetish for government secrecy dates from *United States v. Reynolds*, 345 U.S. 1, 6–7 (1953) (recognizing state secrets privilege).

<sup>61</sup> 425 U.S. 748, 770 (1976).

<sup>62</sup> 558 U.S. 310, 340–41 (2010).

<sup>63</sup> *Va. Pharmacy*, 425 U.S. at 756 (commercial advertising protection is “afforded [ ] to the communication, to its source and to its recipients both”).

<sup>64</sup> *Citizens United*, 558 U.S. at 339–41 (prohibiting political speech adversely affects right of citizens to hear and use the information). Recall that the Supreme Court declines to afford Fifth Amendment protection against self-incrimination to corporations, reasoning that the corporation lacks the necessary dignitary status. *Braswell v. United States*, 487 U.S. 99, 100, 105 (1988) (reaffirming *Hale*'s denial of self-incrimination privilege to closely held

settings, the Court turned to the hearers, and licensed otherwise unprotected speakers to fend off the government speech regulator by borrowing—one might say hijacking—their hearers' First Amendment right to receive the information at issue.<sup>65</sup>

I have no quarrel with such a *jus tertii* slight-of-hand when, as in *Lamont*, the hearer is seeking success to the speech. Nor do I object when, as in garden-variety commercial speech cases like *Virginia Pharmacy*, unprotected speakers borrow a hearer's First Amendment rights without the hearer's consent because the hearer would probably want to receive the speech, if asked.

I do, however, object to the *jus tertii* process when, as in *Citizens United*, or in the current effort by some to secure First Amendment protection for false or misleading commercial speech, a speaker without a dignitary First Amendment right of its own seizes a hearer's First Amendment right without consent, in order to force hearers to absorb unwanted speech against their will.

The hundred-year ban on corporate electoral spending, dating from Theodore Roosevelt's 1905 and 1906 State of the Union messages,<sup>66</sup> was premised on a widely shared collective democratic judgment that elections would be fairer and less likely to be influenced by massive financial imbalance if corporations were blocked from using treasury funds to influence who wins.<sup>67</sup> It is therefore, an unpleasant irony that the Court has allowed corporations to appropriate the First Amendment rights of involuntary and dissenting hearers as the basis for ending a century-old ban on the use of corporate treasury funds to sway an election. It would, I believe, take such a compelled and involuntary *jus tertii* process to absurd lengths were the Court to permit commercial speakers with no dignitary First Amendment rights of their own to appropriate the consumer/hearer's right to receive information of use in making rational market choices in order to force-feed the consumer false and misleading information.<sup>68</sup>

So, to review the bidding, as a necessary precondition for moving from bad tendency (*Schenck*) to strict scrutiny (*Brandenburg*), the Supreme Court has come to view hearers as queens, not pawns; powerful, rational creatures capable of absorbing and rejecting speech exhorting them to engage in harmful behavior. Hearers are also occasionally treated as freestanding, autonomous searchers for speech, with First Amendment rights of their own. Unfortunately, though, the Court tends to deploy such a powerful vision of a hearer's right to know only when necessary to shore up

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corporations); *Hale v. Henkel*, 201 U.S. 43, 75–76 (1906) (granting Fourth, but not Fifth, Amendment protection to corporations).

<sup>65</sup> See Neuborne, *Regulating Commercial Speech*, *supra* note 32, at 454.

<sup>66</sup> See 4 THEODORE ROOSEVELT, PRESIDENTIAL ADDRESSES AND STATE PAPERS: MAY 10, 1905, TO APRIL 12, 1906, at 595–658 (1930); 5 THEODORE ROOSEVELT, PRESIDENTIAL ADDRESSES AND STATE PAPERS: APRIL 14, 1906 TO JANUARY 14, 1907, at 898–990 (1930). Congress responded by enacting the ban on the expenditure of corporate funds in federal elections that was struck down in *Citizens United*. 558 U.S. at 318–19.

<sup>67</sup> See *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 658–59 (1990), *overruled by Citizens United v. FEC*, 558 U.S. 310 (2009).

<sup>68</sup> See *infra* Part IV.



a weak speaker. When hearers seek to assert independent free speech rights of their own to gain access to otherwise blocked information from an unwilling speaker (including the government), hearers tend to lose.<sup>69</sup>

### III. THE INVOLUNTARY HEARER: THE HEARER AS PIÑATA

We have examined hearers in two contexts. Part I looked at how our vision of hearers as recipients of speech urging questionable behavior has evolved from mistrust to confidence, from pawn to queen. Part II described how the Supreme Court occasionally treats hearers as freestanding First Amendment searchers for speech, with a dignitary and instrumental status equal to that of a protected speaker, even when the actual speaker is unprotected or does not wish to speak. Part III will explore how the Supreme Court views hearers when they are the targets of unwanted speech. How should such a clash between speaker and hearer be resolved?

One way, of course, is to ignore the hearer/target's interests. If, however, we were serious in Parts I and II about viewing hearers as freestanding dignitary beings who enjoy the same human and instrumental attributes that generate intense concern for speakers, simply ignoring the interests of hearers would be intellectually dishonest. On the other hand, the usual paternalistic argument for resolving such a clash in favor of the hearer is, in my opinion, a non-starter. It is impossible to treat a hearer confronted with unwanted speech as a weak pawn in need of government protection one day, and then to insist that the same hearer is a strong, freestanding queen capable of demanding, absorbing, and coping rationally with quantities of troublesome speech the next. Are there, nevertheless, settings when involuntary hearers, viewed as queens, should win the clash?

I want to think about that question in three contexts. First, I want to ask whether (and how) the unwanted speech is targeted to a particular hearer, as opposed to being directed to the general public. Second, I want to think about the varying mental states generated in an involuntary hearer by unwanted speech, ranging from fear, to rage, to anger, to dismay, and, finally, to discomfort. Finally, I want to focus on the behavioral consequences to the hearer of unwanted speech, remembering that the government must bear a heavy burden of establishing the causal link between speech and behavior allegedly caused by speech.

Let us start with what should be the easy case—targeted speech aimed at unwilling hearers causing fear. Threats, blackmail, and extortion all involve speech. But no one argues seriously that the First Amendment requires that unwilling hearers be involuntarily exposed to such fear-inducing, behavior-changing speech. Whether you approach the issue as respect for the hearer's dignity, or the utter instrumental worthlessness of such fear-inducing speech, the result is the same. The hearer should win that clash.

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<sup>69</sup> See *supra* notes 49–68 and accompanying text.

But does she in today's Supreme Court? In cases like *Elonis* and *Virginia v. Black*,<sup>70</sup> the Court has complicated the hearer's right to be free from fear-inducing, targeted speech by requiring the hearer to prove that the speaker intentionally sought to frighten the hearer/target.<sup>71</sup> In a criminal context, at least, proving that the speaker should have known the speech would induce fear will not be enough.<sup>72</sup> Although the jury is still out on recklessness,<sup>73</sup> why should hearers with an equal claim to dignitary status be subjected involuntarily to negligently uttered targeted fear-inducing speech, whether or not it was consciously intended as a threat? Perhaps the right answer is a civil cause of action?

Then, there is unwanted targeted speech inducing rage. The Court in *Chaplinsky v. New Hampshire*<sup>74</sup> viewed hearers as pawns—rednecks, prone to being provoked to violence by “fighting words.”<sup>75</sup> Once the Court lifted its assessment of hearers from pawns to queens, *Chaplinsky* became indefensible on its facts, especially since the hearer was a cop.<sup>76</sup> The Court's view of a strong rational hearer, capable of absorbing and dealing thoughtfully with dangerous speech, and an autonomous rational hearer asserting a dignitary and instrumental right to know, simply cannot be squared with the *Chaplinsky* Court's vision of a redneck hearer, who will punch you if you call him a “damned racketeer,” or a “damned fascist.”<sup>77</sup> There is no way to square such a profoundly depressing vision of the hearer with the Court's decision in *Cantwell v. Connecticut*<sup>78</sup> refusing to treat anti-Catholic face-to-face speech as fighting words,<sup>79</sup> and the Court's later refusal to recognize a heckler's veto exercisable by redneck hearers.<sup>80</sup>

Perhaps the *Chaplinsky*/heckler's veto distinction is between targeted face-to-face speech as in *Chaplinsky*; and speech directed to the general public as in *Gregory v. City of Chicago*,<sup>81</sup> although *Cantwell*, a face-to-face case—complicates the picture. I believe that particularly scurrilous personally denigrating, face-to-face personal insults should be deemed unprotected; not because they may lead to a breach of the peace (nuns have rights, too), but because, if they are serious enough, they shatter the dignity of

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<sup>70</sup> 538 U.S. 343 (2003).

<sup>71</sup> *Elonis v. United States*, 135 S. Ct. 2001, 2012 (2015) (overturning conviction and requiring government to prove intentional threat); *Black*, 538 U.S. at 347–48 (invalidating evidentiary presumption that cross-burning intended to frighten).

<sup>72</sup> *Elonis*, 135 S. Ct. at 2012.

<sup>73</sup> *See id.*

<sup>74</sup> 315 U.S. 568 (1942)

<sup>75</sup> *Id.* at 573 (affirming conviction for uttering “fighting words”).

<sup>76</sup> *Id.* at 570.

<sup>77</sup> *Id.* at 569.

<sup>78</sup> 310 U.S. 296 (1940).

<sup>79</sup> *Id.* at 308–09.

<sup>80</sup> *See Gregory v. City of Chi.*, 394 U.S. 111, 111–12 (1969) (rejecting “heckler's veto”). *But see Feiner v. New York*, 340 U.S. 315, 321 (1951) (affirming conviction for refusing to stop speaking to an angry, increasingly unruly crowd).

<sup>81</sup> 394 U.S. 111 (1969).

the hearer and carry absolutely no instrumental freight. When the sole remaining interest—dignity of the speaker—collides with the dignity of the hearer, I have no difficulty siding with the hearer in particularly egregious cases. But when the dignity of the speaker runs into the dignity *and* instrumental concerns of hearers in the context of speech directed to the general public, the speaker's interest should predominate.

I feel the same way about a conscious falsehood that utterly disregards the hearer's dignity, and eventually leaves the hearer with a personally demeaning realization of having been conned. Conscious lies have no instrumental value. That leaves dignity. I believe that the speaker's claimed dignitary interest in lying about receiving a Congressional Medal of Honor should not trump the hearer's dignitary interest in not being deceived. As a matter of prophylaxis, the Court in *Alvarez* was probably right about the risks of unleashing the idea of criminalized lying in the absence of proof that the lie intended to materially benefit the liar. Perhaps the answer is to recognize a civil cause of action for damages, while keeping the Wild Bunch out of the picture.

Dismay, even discomfort, is another matter. Cases like *Cohen v. California*<sup>82</sup> and the flag-burning cases<sup>83</sup> are clearly correct in instructing involuntary hearers to remember that they are queens, not pawns; fully able to absorb offensive speech, especially when the speech is directed to the general public. A hearer too thin-skinned to deal with offensive speech directed to the general public cannot be trusted to cope rationally with dangerous speech. A return to the bad tendency test lurks down that road.

Finally, behavioral consequences may be caused by involuntary exposure to unwanted speech. The principal reason that fear-inducing speech is unprotected is because we know that it has adverse behavioral consequences. Blackmail leads to involuntary payments.<sup>84</sup> Threats lead to avoidance behavior.<sup>85</sup> Pop psychology is, of course, often too quick to ascribe adverse behavioral consequences to all sorts of speech, like linking erotic speech to sexual misbehavior, or violent video games to misogyny.<sup>86</sup> Obviously, no such assertion can be taken at face value. But speech does have behavioral consequences. That is why speakers keep grabbing for the brass ring. Ask Vladimir Putin.

I believe that where adverse behavioral consequences to involuntary hearers are clear, unwanted speech should be at its lowest constitutional ebb. Adverse behavioral consequences to an involuntary hearer, especially a targeted involuntary hearer, seem most likely in two contexts—employment and education.<sup>87</sup> Not surprisingly,

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<sup>82</sup> 403 U.S. 15, 16–17 (1971) (conviction for wearing jacket emblazoned with “Fuck the Draft” overturned).

<sup>83</sup> *United States v. Eichman*, 496 U.S. 310, 312 (1990) (overturning federal flag-burning conviction); *Texas v. Johnson*, 491 U.S. 397, 399 (1989) (overturning state flag-burning conviction).

<sup>84</sup> *See, e.g.*, *Elonis v. United States*, 135 S. Ct. 2001, 2026 (2015).

<sup>85</sup> *Citizens United v. FEC*, 558 U.S. 310, 327–29 (2010).

<sup>86</sup> *See, e.g.*, *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 799 (2011).

<sup>87</sup> I have described the behavioral consequences of such speech as impeding equal participation in significant common enterprises. *See generally* Burt Neuborne, *Ghosts in the*

workplace speech, especially targeted workplace speech, may be suppressed if its predictable behavioral consequence is to deny the unwilling hearer/target an equal right to excel on the job.<sup>88</sup>

Speech directed to involuntary hearers on college campuses raises, for me, a more difficult problem. The nature of an academic environment calls for the maintenance of robust free speech protections. But targeted speech at a member of a particular category of students may not merely cause discomfort; it may impede the student from succeeding academically. Such targeted, face-to-face speech has no instrumental value. As with workplace speech, when the dignitary interest of the speaker clashes with the dignitary interest of the hearer in a world with no instrumental issues, and a genuine risk of adverse behavioral consequences to the involuntary hearers, I opt for the hearer. But, as soon as instrumental and dignitary values of other hearers are added to the mix, as they would be in the context of speech directed to the general public, the speaker's interest should trump the hearer's.

#### IV. PRESERVING A HEARER-CENTERED COMMERCIAL SPEECH DOCTRINE

Unlike political, aesthetic, academic, or social speech, commercial speech lacks a dignitary speaker. Indeed, it is the absence of a dignitary speaker that distinguishes *déclassé* commercial speech from its aristocratic cousins, political and aesthetic speech. Perhaps it is a vestige of Victorian class bias to provide speech describing the nature, quality, and price of goods and services with less intense First Amendment protection than speech about political or aesthetic issues; but, in our culture, Prometheus does not rage at the gods in order to induce them to buy his fried chicken. That seems right to me. I find it hard to map Justice Brandeis's vision of a heroic speaker struggling for self-realization onto the grid of commercial advertising. It is not that a commercial speaker does not care deeply about telling the world about her products. I can imagine an artisan, a manufacturer of cereal, razor blades, sneakers, deodorant, or automobiles whose pride in her work overflows into heartfelt commercial speech about its nature, qualities, and price. It is also not that less imagination and talent is needed for commercial speech. I am in awe of—and a little frightened by—the persuasiveness of much commercial advertising. Rather, it is the disconnect between the core content of commercial speech—disclosure of price, availability, and qualities of products being made available for sale in the marketplace; and the romantic conception of

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*Attic: Idealized Pluralism, Community and Hate Speech*, 27 HARV. C.R.-C.L. L. REV. 371, 397 (1992).

<sup>88</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 73 (1986) (recognizing Title VII liability for maintaining “hostile [work] environment”); *see also* *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1491 (M.D. Fla. 1991) (imposing liability on employer under Title VII for failure to prevent an avalanche of erotic and demeaning speech directed to a single female employee).

human dignity, the existential struggle for self-realization that underlies the Brandeis/dignitary argument in favor of free speech.

I do not mean to say that commercial speech is not valuable and important. In fact, I often find it more valuable and important than much of what passes for political speech. But its importance, both to speaker and hearer, is instrumental, not dignitary. The free flow of commercial information is well worth protecting because of its usefulness to hearer/consumers, and its crucial importance to the efficient operation of free economic markets. Important as commercial speech may be, though, the absence of a dignitary speaker (and the presence of an instrumental and dignitary hearer) is of huge regulatory significance. We tolerate false, misleading, and much harmful speech, not because such speech has any instrumental value, but because, as in *Alvarez*, we respect Justice Brandeis's vision of the heroic speaker working out his own destiny.<sup>89</sup> Remove the dignitary speaker from the equation in commercial speech cases and what you have left is a dignitary hearer with an instrumental need for information that will be useful in making market decisions.

Add to that the existence of a government commercial speech regulator without the usual political axe to grind. Much of the almost pathological hostility to government efforts to regulate speech exhibited by the Supreme Court speech turns on two concerns: (1) Justice Brandeis's eloquent warning in *Whitney* that it is logical for government officials to wish to censor their political or ideological opponents in order to advance the censor's agenda; and (2) humility about the ability of anyone—but especially government—to separate truth from falsity.

If you deeply distrust the speech regulator's motives, and distrust his capacity to separate truth from fiction, it will be a cold day in July before you give him any power over speech. Neither factor militating against giving power to government speech regulators is present in a commercial speech context. The "fighting faiths" described by Justices Holmes and Brandeis in *Abrams*<sup>90</sup> simply do not include Ford versus General Motors, or whether Gillette's razor blades really are life changing. And, while it is reasonable to question the competence of commercial speech regulators (as it is reasonable to question the competence of government to do anything), there is no special reason to mistrust commercial speech regulators. There is no basis for fearing a hidden ideological regulatory agenda in deciding whether GM has misstated the miles-per-gallon ratio of its cars. Moreover, while separating truth from fiction in most settings is extremely difficult, objective standards often exist to measure the accuracy of the core of commercial speech.

Unlike speech in general, therefore, commercial speech: (1) lacks a dignitary speaker, but has a dignitary hearer; (2) is protected only because it is useful to

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<sup>89</sup> *United States v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (plurality opinion) (citing *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

<sup>90</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919).

hearers; and (3) very often involves assertions capable of objective verification. Add water to those three analytical ingredients, mix, and you have the Supreme Court's hearer-centered commercial speech doctrine,<sup>91</sup> expressed as five interlocking principles:

- (1) Truthful commercial speech that is useful to hearers in making rational and informed market choices receives significant, instrumentally based free speech protection.

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<sup>91</sup> The principal cases shaping the Supreme Court's commercial speech doctrine can still be listed in a single chronological footnote. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976) (protecting truthful price advertising of prescription drugs); *Linmark Assocs., Inc., v. Borough of Willingboro*, 431 U.S. 85, 86, 97 (1977) (protecting residential "for sale" signs on property-owner's lawn); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 681–82 (1977) (protecting truthful advertising of contraceptives); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 353, 382 (1977) (protecting truthful, non-misleading attorney price advertising); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978) (holding that solicitation of accident victims is not protected); *In re Primus*, 436 U.S. 412, 414, 439 (1978) (protecting pro bono solicitation by ACLU volunteer attorney); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 558, 561 (1980) (protecting truthful information urging use of electricity); *In re R. M. J.*, 455 U.S. 191, 193, 207 (1982) (invalidating restrictions on truthful, non-misleading attorney advertising); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 61 (1983) (invalidating ban on mailing of unsolicited truthful advertisements for contraceptives); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 629, 649, 652–53 (1985) (invalidating ban on use of images in attorney advertising; upholding finding of unprotected misleading advertising based on omission of material facts); *Shapero v. Ky. Bar Ass'n*, 486 U.S. 466, 468, 480 (1988) (invalidating ban on truthful attorney mail advertising linked to specific event, such as looming mortgage foreclosure); *Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 93, 111 (1990) (protecting truthful description of attorney's qualification); *Edenfeld v. Fane*, 507 U.S. 761, 763, 774–76 (1993) (protecting face-to-face solicitation by accountants; attorneys distinguished); *Ibanez v. Fla. Dep't of Bus. & Prof'l Regulation, Bd. of Accountancy*, 512 U.S. 136, 138–39 (1994) (protecting truthful statement that attorney also CPA); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 478 (1995) (invalidating ban on advertising alcohol content); *Fla. Bar v. Went-for-It, Inc.*, 515 U.S. 618, 620 (1995) (upholding thirty-day ban on direct solicitation of accident victims by lawyers); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996) (invalidating ban on truthful price advertising for liquor); *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 460, 477 (1997) (upholding requirement to pay for share of government-imposed industry-wide agricultural marketing program); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 176 (1999) (invalidating ban on broadcast advertising of gambling and lotteries in private casinos); *Thompson v. W. Med. Ctr.*, 535 U.S. 357, 360 (2002) (invalidating ban on advertising lawful "compounded drugs"); *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553, 566–67 (2005) (upholding compelled payment of fee for government-mandated generic beef marketing program; treated as valid compelled support of government speech); *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 557, 568–70 (2011) (invalidating ban on pharmaceutical company access to prescription data maintained by pharmacies, for use in advertising to doctors; distinguishing (but not overturning) *Los Angeles Police Department v. United Reporting Publishing Corp.*, 528 U.S. 32 (1999), which had dismissed a facial challenge to a Los Angeles policy of selective access to arrest records, which made information available to researchers, but not for commercial use).



- (2) As a matter of *jus tertii*, commercial speakers are authorized by the Court to assert their hearers' instrumental interest in receiving useful information.
- (3) Truthful commercial speech needed to permit hearers to make fully informed market choices can be compelled, but not forbidden.
- (4) False and misleading commercial speech can be banned because it lacks instrumental value, and insults the dignity of hearers.
- (5) Finally, respect for the dignity of the hearer as a free-standing, autonomous entity renders truthful commercial speech urging or inducing hearers to engage in behavior deemed harmful by the government fully protected.

I do not find *Sorrell v. IMS Health, Inc.*<sup>92</sup> in conflict with such a hearer-centered free speech doctrine. The essence of the Vermont scheme in *Sorrell* was to deny one category of hearers (pharmaceutical researchers) access to otherwise publicly available health data collected by private pharmacies pursuant to government compulsion solely because the government did not want the pharmaceutical researchers to make lawful and trustful use of the data, by providing the information to doctors, who, as hearers, might find such information useful.<sup>93</sup> Who is it that Vermont did not trust? The doctors/hearers could take care of themselves. The pharmaceutical speakers were providing truthful information to potential consumers. And the pharmaceutical researchers, viewed as hearers with a right to know, were simply seeking access to otherwise lawfully available public information that did not disclose personal information. Where was the First Amendment foul?

Despite *Sorrell*, regulation of access to public health data in private remains possible on privacy grounds, just as access to arrest records in public hands were regulated in *California Highway Patrol v. United Reporting Publishing Corp.*;<sup>94</sup> but not because government censors do not like the hearers, or the truthful, lawful use to which the data will be applied.

Thus, efforts to dissolve the distinction between commercial speech and non-commercial speech will (and should) fail. In the absence of a dignitary speaker, there is absolutely no basis for inflicting false and misleading speech on consumers in the name of free speech.

#### V. TOWARD A HEARER-SENSITIVE CORPORATE ELECTORAL SPEECH DOCTRINE

Corporate speech, at least by large, multi-shareholder corporations, also lacks a traditional, dignitary speaker. In both *Bellotti* and *Citizens United*, the Supreme Court centered the First Amendment analysis in the hearer's need for the information,<sup>95</sup>

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<sup>92</sup> 564 U.S. 552 (2011).

<sup>93</sup> *Id.* at 557.

<sup>94</sup> 528 U.S. 32 (1999).

<sup>95</sup> *Citizens United v. FEC*, 558 U.S. 310, 339–40 (2010); *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 775–76 (1978).

carefully avoiding the question of whether a legal fiction like a corporation possesses the dignitary qualities of a Brandeis speaker. But, unlike commercial speech where the subject-matter lacks the substantive content associated with dignitary speech, corporate speech is often intensely political. That substantive difference implicates three analytic triggers. First, government regulators in a corporate speech world often have partisan concerns implicated by the subject matter of the speech. Second, government lacks the capacity to determine truth from falsity in a political context. Finally, hearers possess both a dignitary and instrumental interest in receiving the corporate speech.

For me, that translates into significant First Amendment protection for most non-commercial corporate speech. But, in the context of corporate electoral speech, the analytic factors shift once again. For more than one hundred years, American voters have expressed an overwhelming desire to exclude corporate money from the electoral process, fearing that the bottomless resources available to profit-making corporation would risk the destruction of a level electoral playing field.<sup>96</sup> For me, that dramatically dilutes the hearers' interest, leaving neither a First Amendment protected speaker nor a willing hearer. Though we should, nevertheless, be skeptical of government speech regulation allegedly aimed at protecting hearers, I believe that the hearer/voters' often stated and compelling interest in maintaining a well-functioning democracy justifies a viewpoint-neutral ban on the ability of profit-making corporations to pour unlimited treasury funds into a contested election. Americans have every right to be furious about Russia's action in dumping a steady stream of one-sided information into the 2016 election market. But we also have every right to be furious about large, multi-national corporations doing exactly the same thing. The First Amendment should not stand in the way of stopping both efforts to manipulate American democracy.

#### CONCLUSION

In his 1972 dissent in *Sierra Club v. Morton*,<sup>97</sup> Justice Douglas, a deeply committed environmentalist,<sup>98</sup> urged the Court to depart in environmental cases from traditional Hohfeldian standing rules, which require an individually harmed plaintiff, in favor of a broader conception of defense of an abstract ideal—environmental protection.<sup>99</sup> Justice Douglas wrapped his argument in the colorful rhetorical assertion that inanimate objects in nature, like trees, should have standing.<sup>100</sup>

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<sup>96</sup> See *Citizens United*, 558 U.S. at 433 (Stevens, J., dissenting).

<sup>97</sup> 405 U.S. 727 (1972).

<sup>98</sup> Peter Manus, *Wild Bill Douglas's Last Stand: A Retrospective on the First Supreme Court Environmentalist*, 72 TEMP. L. REV. 111, 140–41 (1999).

<sup>99</sup> *Sierra Club*, 405 U.S. at 741–43 (Douglas, J., dissenting); see Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 21–23 (1913) (setting forth conception of individual right).

<sup>100</sup> *Sierra Club*, 405 U.S. at 741–43. The Warren Court had already moved in the direction of the ideological plaintiff in *Flast v. Cohen*, 392 U.S. 83, 85, 106 (1968), recognizing

Modern First Amendment doctrine often displays flashes of Justice Douglas's non-Hohfeldian approach by defending and developing an abstract idea of free speech, without paying much, if any, serious attention to the tangible interests of the individuals who constitute the speech process—the folks that I call the inhabitants of Mr. Madison's neighborhood. The result has been the emergence of a free speech doctrine that tends to ignore the separate interests and duties of hearers, conduits, targets, and regulators, in favor of a dramatically speaker-centered jurisprudence.

I call in this Essay for a shift toward Hohfeld's conception of individually centered rights and duties by building a First Amendment jurisprudence, not from the abstract top-down, but from the participant bottom-up. I do not believe that such an analytical shift would change the outcome in the bulk of free speech cases. It would, however, deepen the jurisprudence by inducing the Court to take the interest of hearers, conduits, and targets more seriously. At the margins, focusing more intensively on the interests of participants would reinforce the existing commercial speech doctrine's hearer-centered refusal to grant protected status to false and misleading speech, and trigger a reconsideration of the role of for-profit corporations in electoral campaigns.

Entirely apart from any possible shift in free speech doctrine, anchoring the doctrine in a careful analysis of the interests of actual participants in the speech process, as opposed to developing an abstract idea of free speech untethered to the flesh and blood of persons who give it life, would avoid the judicial tendency to reify abstractions as legal fictions, endowing them with a life of their own that often inadvertently misallocates power between and among the human beings who brought the abstraction into being in the first place.

Consider the legal arc of the profit-making corporation, a legal fiction invented to facilitate the exploitation of market capital. As such, the corporate fiction is one of the great triumphs of legal reasoning, providing an off-the-rack set of legal relationships between and among the human beings who populate the corporate enterprise—shareholders, creditors, management, employees, customers, victims, and regulators.<sup>101</sup> As long as courts realize that the corporate fiction is nothing more than a relational snapshot of the ties binding individual participants together in the corporate enterprise, treating the corporation as a freestanding entity with a life of its own is a useful fictional shortcut, with the resulting doctrine merely reinforcing and enforcing the interlocking set of legal relationships the parties would probably have individually bargained for without the impossibly high transaction costs of

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taxpayer standing in Establishment Clause cases. Justice Harlan vigorously defended the Hohfeldian model in his dissent. *Id.* at 116–17 (Harlan, J., dissenting). See generally Louis L. Jaffee, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968) (arguing for ideological plaintiffs in so-called “public actions”).

<sup>101</sup> I have sought to describe the relational nature of the corporate fiction in Burt Neuborne, *Of “Singles” Without Baseball: Corporations as Frozen Relational Moments*, 64 RUTGERS L. REV. 769, 771 (2012).

retail bargaining.<sup>102</sup> But, when, as in cases like *Citizens United*, the Justices forget that they are dealing with legal snapshots of relationships between and among individuals, the legal abstraction can take on a life of its own, divorced from the interests of the flesh and blood individuals who both created and populate the abstraction. Thus, in *Citizens United*, in the name of corporate personality, the individuals who constitute corporate management are given power over other peoples' money to advance a political agenda chosen by management.<sup>103</sup>

Worse, in the name of a legal abstraction called "the freedom of speech," the intensely articulated wishes of hearers are subordinated to the political agenda of a corporate speaker with no dignitary rights of its own, controlled by high-ranking corporate officials who are permitted to hijack the alleged interest of hearers to advance the managements' political agenda, in the teeth of overwhelming signals that the unwilling hearers do not wish to be bombarded with corporate electoral speech that threatens the integrity of the democratic process. In short, *Citizens United* is a morganatic marriage between two otherwise useful legal abstractions—corporate personality and free speech—that has generated an offspring deeply dangerous to the interests and relationships of the flesh and blood individuals who populate the abstractions. Mary Shelley should write the story.<sup>104</sup>

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<sup>102</sup> Thus, I have no quarrel with the line of cases permitting the corporate entity to enforce rights benefitting the participants in the corporate enterprise. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 565, 567 (1977) (corporation protected by Double Jeopardy Clause); *Hale v. Henkel*, 201 U.S. 43, 69–70, 76 (1906) (corporations protected by the Fourth Amendment, but not by the Fifth Amendment privilege against self-incrimination); *Smyth v. Ames*, 169 U.S. 466, 526 (1898) (corporation is a "person" within the meaning of the Due Process Clause of the Fourteenth Amendment); *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (statement of Waite, C.J.) (corporation is a "person" within the meaning of Equal Protection Clause of the Fourteenth Amendment).

<sup>103</sup> *Citizens United v. FEC*, 558 U.S. 310, 319, 321 (2010) (invalidating ban on use of general treasury funds to effect outcome of election). The Court does not tolerate such a result in the context of public employee labor unions. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 211, 241–42 (1977) (requiring refund of pro rata portion of dues to dissenting individual attributable to union political activity). While the *Abood* line of cases deals with settings where employees are obliged by law to pay dues to a public employee union, neither a shareholder, a customer, nor an employee has a realistic ability to exit a private corporation using treasury funds to support a candidate opposed by the supplier of the funds. Selling your shares may trigger serious economic drawbacks, including tax liability. Boycotting the product constrains an individual's market choice for political reasons. And, asking an employee to resign imposes a huge economic cost on the exercise of political rights.

<sup>104</sup> See generally MARY WOLLSTONECRAFT SHELLEY, *FRANKENSTEIN, OR THE MODERN PROMETHEUS* (James Rieger ed., Univ. Chi. Press 1974) (1818).