THE FIRST AMENDMENT RIGHT AGAINST COMPELLED LISTENING

CAROLINE MALA CORBIN*

* Associate Professor, University of Miami School of Law; Research Fellow, Columbia Law School. B.A., Harvard University; J.D., Columbia Law School. I would like to thank Hiro Aragaki, Audrey Boctor, Beth Burkstrand-Reid, Aaron Caplan, Anthony Colangelo, Mary Coombs, Michael Dorf, Philip Hamburger, Rachelle Holmes, Hoi Kong, and Helene Louise Norton for their helpful comments. Thanks also to Casey Cohen for research assistance and special thanks to Michael Cheah.

This Article argues for a new First Amendment right: the right against compelled listening. Free speech jurisprudence – which already recognizes the right to speak, the right to listen, and the right against compelled speech – is incomplete without the right against compelled listening. The same values that underlie the other free speech rights also lead to this right. Furthermore, this claim holds true regardless of whether one conceives of the primary purpose of the Free Speech Clause as creating a marketplace of ideas, enhancing participatory democracy, or promoting individual autonomy. The Article starts by examining the protection afforded to unwilling listeners by the captive audience doctrine, which balances private speakers' right to communicate against listeners' rights to privacy, equality, and voting. It then argues that protection for captive listeners can be grounded in free speech values, and explores two possible approaches to delimiting the free speech right against compelled listening. The Article concludes by applying the new right to state-mandated abortion counseling and state-mandated diversity training.

INTRODUCTION

Can the state compel smokers to watch a video about the dangers of smoking before they purchase cigarettes? Can the state require employees to listen to a diversity training lecture about the necessity of embracing and celebrating gay and lesbian lifestyles? What about laws that force women who want to terminate an unwanted pregnancy to hear the state's position on when life begins? In short, can the state compel citizens to listen to its views about healthy or moral living? Certainly, the government does not force people to attend re-education sessions, as infamous totalitarian regimes have done. But in some places one cannot go to work or have an abortion without being required to hear what the government thinks about those topics.

Is this type of compulsory listening constitutional? While the right to speak,[1] the right to listen,[2] and the right against being compelled to speak[3] are well-established First Amendment rights, free speech jurisprudence has not yet recognized a "right against compelled listening." To the extent commentators have discussed government-compelled listening – and the new wave of mandatory abortion counseling laws are receiving a great deal of scholarly attention[4] – the focus has been on the equal protection or substantive due

[1] *See infra* Part III.A.

[2] *See infra* Part III.B.

[3] *See infra* Part III.C.

[4] *See, e.g.*, Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351, 372 (2008).

process rights of the patients,[5] or the free speech rights of the doctors forced to convey the government's message,[6] rather than the free speech rights of the patients forced to hear it. Although less analyzed, laws requiring diversity training in the workplace also raise issues about state-mandated listening. Yet almost no one has discussed the free speech rights of the "compelled listener."[7]

This Article argues that free speech rights should also encompass the last box in the free speech chart – a right against compelled listening. Indeed, free speech jurisprudence is incomplete without it:

Free Speech Rights

Speaker's Rights	**Listener's Rights**
Right to speak	Right to listen
Right against compelled speech	Right against compelled listening

Unwilling listeners have received some protection through the captive audience doctrine.[8] Under this doctrine, a listener's right to privacy may trump a speaker's right to communicate. For example, because the home is considered the ultimate bastion of privacy, protesters cannot picket on the sidewalk outside one's doorstep.[9] Some courts and commentators have argued for expanding the doctrine to protect captive audiences from speakers who intrude not on the right to privacy, but on the right to equal protection or the right to vote.[10] Title VII's ban on hostile work environments created by harassing speech,[11] for example, may be understood as the captive victim's right to equal opportunity in the workplace trumping the harasser's free speech right to communicate.

[5] *See, e.g.*, Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Women-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991, 1040-50 [hereinafter Siegel, *New Politics of Abortion*].

[6] *See, e.g.*, Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 972-80 [hereinafter Post, *Informed Consent*].

[7] *But see* Charles L. Black, Jr., *He Cannot Choose but Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960, 966-67 (1953) (suggesting that freedom from unwanted speech rests on the free speech goal of freedom of the mind); G. Michael Taylor, Comment, *"I'll Defend to the Death Your Right to Say It . . . but Not to Me" – The Captive Audience Corollary to the First Amendment*, 8 S. ILL. U. L.J. 211, 212 (1983) (describing captive audience doctrine as a necessary corollary of free speech).

[8] *See infra* Part I.

[9] *See infra* notes 42-49 and accompanying text.

[10] *See infra* Part II.

[11] 42 U.S.C. §§ 2000e to 2000e-17 (2000).

But captive audiences should not have to look beyond the First Amendment to avoid forced listening. The values underlying free speech, which include creating a marketplace of ideas, facilitating democratic self-government, and promoting autonomy,[12] justify an independent free speech right against compelled listening. While the captive audience doctrine as formulated primarily limits the free speech rights of other private citizens, a free speech right against compelled listening would also limit the state.

This Article does not insist on the exact parameters of this new right against compelled listening, but it suggests two approaches. To match the strong anti-paternalism and distrust of government that characterize existing free speech jurisprudence, a "categorical" approach would find the right implicated anytime the state foists its message onto a captive audience. A more "contextual" approach, however, might accept some paternalistic government intervention before the right is implicated, but only if the mandated information were factual,[13] secular, and promoted an incontrovertibly autonomy-affirming goal.

Part I presents the traditional captive audience doctrine. It explains that an audience can be considered captive if, as a descriptive matter, the listener cannot readily avoid the message and, as a normative matter, the listener should not have to avoid the message because it intrudes on her reasonable expectation of privacy.

Part II examines how the traditional captive audience doctrine, which balanced the speaker's right to communicate against the listener's right to privacy, has been expanded to also protect the listener's right to equal protection and right to vote.

Part III argues that captive audiences need not look to other constitutional provisions to protect themselves from unwanted government speech. The same values that justify the well-established free speech right to speak, right to listen, and right against compelled speech also justify a free speech right against compelled listening. This Part proposes two possible approaches for delimiting the right. A categorical approach would find the right implicated any time the government imposes its message on a captive audience. A more contextual approach would countenance some state paternalism, trusting the government to compel listeners to hear factual, secular information that would influence them to make an incontrovertibly autonomy-affirming decision.

Part IV applies the free speech right against compelled listening to two real-life examples: state-mandated counseling for women seeking abortions and state-mandated diversity training for employees. It finds that in both cases the government may overstep its legitimate powers and violate the right against compelled listening.

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[12] *See infra* Part III.A.1-3.

[13] As discussed *infra* Part III.D.1.c, "factual" information is shorthand for accurate factual information presented in a nonmisleading manner.

I. CAPTIVE AUDIENCE DOCTRINE

While the Supreme Court has not yet recognized a free speech right against government-compelled listening, free speech jurisprudence does recognize that, in some circumstances, a listener's right to not hear speech trumps a private speaker's right to convey speech. The default rule in free speech is that "citizens must tolerate insulting, and even outrageous, speech in order to provide 'adequate breathing space to the freedoms protected by the First Amendment.'"[14] Yet the right to speak is not absolute.[15] One well-recognized limit is the government's ability to curb private speech aimed at "captive audiences." While this protection for listeners is conceived as a limit on private speech, it serves as a starting point for constructing a right against compelled listening which would also limit government speech. According to the captive audience doctrine, private speakers cannot always foist their speech onto unwilling listeners. Instead, the government may restrict such speech if "substantial privacy interests are being invaded in an essentially intolerable manner."[16]

This definition of a captive audience is not self-explanatory.[17] In actuality, in order for the captive audience doctrine to apply, two requirements must be met.[18] First, as an empirical matter, the audience cannot readily avoid the message: "[T]he First Amendment does not permit the government to prohibit speech as intrusive unless the 'captive' audience cannot avoid [the] objectionable speech."[19] Second, as a normative matter, the audience should

[14] Boos v. Barry, 485 U.S. 312, 322 (1988) (quoting Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 56 (1988)).

[15] Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981) ("[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired.").

[16] Cohen v. California, 403 U.S. 15, 21 (1971); *see also* Erznoznik v. City of Jacksonville, 422 U.S. 205, 209-10 (1975).

[17] Marcy Strauss, *Redefining the Captive Audience Doctrine*, 19 HASTINGS CONST. L.Q. 85, 95-96 (1991) [hereinafter Strauss, *Captive Audience*] (arguing that the *Cohen v. California* standard is unclear and that the Supreme Court has failed to define captive audience with any precision).

[18] J.M. Balkin suggests similar requirements when he describes a captive audience as one that is "unavoidably [the empirical question] and unfairly [the normative question] coerced into listening." J.M. Balkin, *Free Speech and Hostile Environments*, 99 COLUM. L. REV. 2295, 2310-11 (1999) [hereinafter Balkin, *Hostile Environments*]. Other scholars have described the prerequisites for captive audience doctrine slightly differently. *E.g.*, Debra A. Ellis & Yolanda S. Wu, *Of Buffer Zones and Broken Bones: Balancing Access to Abortion and Anti-Abortion Protestors' First Amendment Rights in* Schenck v. Pro-Choice Network, 62 BROOK. L. REV. 547, 578 (1996) (arguing that the captive audience doctrine applies when "the target cannot practically avoid unwanted communication[s]," "a strong privacy [right] is implicated," and "the restriction on speech is minimal").

[19] Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 541-42 (1980); *see also* Frisby v. Schultz, 487 U.S. 474, 487 (1988).

not have to quit the space to avoid the message.[20] For example, courts and commentators uniformly agree that people should not be captive to unwanted speech in the privacy of their own home.[21]

A. *Can the Audience Avoid the Message?*

Captive audience cases suggest certain guidelines for determining what counts as readily avoidable speech. Visual messages are usually judged easy to avoid, while audible ones are not. Speech is also deemed harder to evade if the speaker follows the unwilling listener, so that the listener suffers not just a first exposure but repeated exposure to the unwanted message.

The Supreme Court generally considers speech avoidable if seen rather than heard. Accordingly, it has rejected captive audience claims involving visual speech on the grounds that the viewer was able to turn away. In *Cohen v. California*,[22] for example, the Court invalidated Cohen's arrest for wearing a "Fuck the Draft" jacket in the corridor of a courthouse because viewers "could effectively avoid further bombardment of their sensibilities simply by averting their eyes."[23] Similarly, the Court struck down an ordinance that prohibited showing nudity at drive-in theaters with screens visible from a public street because an offended passerby could easily avert her eyes.[24] Even in the home, where privacy protection is at its highest,[25] the Supreme Court has held that people are not captive audiences to unwanted mail because they can avoid exposure to the objectionable material simply by discarding it: "[T]he short, though regular, journey from mail box to trash can . . . is an acceptable burden, at least so far as the Constitution is concerned."[26]

In contrast, the Supreme Court has recognized that escaping audible messages poses a more difficult challenge. In *Madsen v. Women's Health Center, Inc.*,[27] for example, the Court upheld restrictions on sound audible inside a family planning clinic but not on images observable from within the

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[20] *See* Balkin, *Hostile Environments*, *supra* note 18, at 2312 ("Captivity in this sense . . . is about the right not to have to flee rather than the inability to flee.").

[21] *Id.* ("Even people in their homes are not physically prevented from leaving them. The point of captive audience doctrine, however, is that they should not have to be put to such a choice."); *infra* notes 42-49 and accompanying text.

[22] 403 U.S. 15 (1971).

[23] *Id.* at 21. Cohen was charged with disturbing the peace by offensive conduct. *Id.* at 16.

[24] Erznoznik v. City of Jacksonville, 422 U.S. 205, 206, 212 (1975).

[25] *See infra* notes 42-49 and accompanying text.

[26] Bolgar v. Youngs Prods. Drug Co., 463 U.S. 60, 72, 75 (1983) (citation omitted) (striking down a prohibition against mailing unsolicited contraceptives advertisements to a home); *see also* Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n, 447 U.S. 530, 532, 544 (1980) (striking down a prohibition against partisan advertising in utilities bills sent to a home).

[27] 512 U.S. 753 (1994).

clinic on the grounds that "it is much easier for the clinic to pull its curtains than for a patient to stop up her ears."[28] The Court also compared the ability to control what one sees with what one hears when it allowed limits on sound amplification trucks: "The unwilling listener is not like the passer-by who may be offered a pamphlet in the street but cannot be made to take it. In his home or on the street he is practically helpless to escape this interference with his privacy by loud speakers . . . ."[29] In perhaps the best-known captive audience case, the Supreme Court allowed the Federal Communications Commission ("FCC") to ban the daytime radio broadcast of George Carlin's "Filthy Words" monologue.[30] The dissent argued that unwilling listeners could turn the dial or shut off the radio, so that this speech, like unwelcome mailings, was readily avoidable.[31] The majority, however, concluded that "[t]o say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."[32] In fact, which description is more accurate depends on whether the focus is on the first exposure to speech, or the continued exposure – a distinction for which there is no clear rule.

The situation is less ambiguous when the speaker pursues the unwilling listener. Courts and commentators alike have distinguished between the speaker who stands still and offers pamphlets which the passersby can reject, and the speaker who pursues a passerby down the street and will not stop talking to her or attempting to thrust pamphlets into her hands.[33] This type of physical captivity was acknowledged in cases where women entering medical facilities were followed by abortion protesters.[34] In one typical case, sidewalk counselors "would walk alongside targeted women headed toward the clinics, handing them literature and talking to them in an attempt to persuade them not to get an abortion."[35] In *Hill v. Colorado*,[36] the Supreme Court did not expressly label such patients as captive to the protestors, but it tacitly

[28] *Id.* at 773; *see also* Franklyn S. Haiman, *Speech v. Privacy: Is There a Right Not to Be Spoken To?*, 67 NW. U. L. REV. 153, 182-83 (1972) (arguing that an audience is more captive to aural as opposed to visual communication).

[29] Kovacs v. Cooper, 336 U.S. 77, 86-87 (1949).

[30] FCC v. Pacifica Found., 438 U.S. 726, 745, 750 (1978).

[31] *Id.* at 765-66 (Brennan, J., dissenting).

[32] *Id.* at 748-49 (majority opinion). The Court also noted that "[b]ecause the broadcast audience is constantly tuning in and out, [warnings at the beginning of the show] cannot completely protect the [audience] from unexpected program content." *Id.* at 748.

[33] *See* Schenck v. Pro-Choice Network of W. N.Y., 519 U.S. 357, 363 (1997); Haiman, *supra* note 28, at 194 (arguing that a listener should be considered physically captive if mobile but pursued by the communicator); Strauss, *Captive Audience*, *supra* note 17, at 114 (arguing that a Jewish person followed down the street by someone yelling anti-Semitic remarks should be considered captive).

[34] *See, e.g.*, *Schenck*, 519 U.S. at 362-64.

[35] *Id.* at 363.

[36] 530 U.S. 703 (2000).

recognized the existence of a captive audience in making two points. First, it noted that while the right to avoid unwanted speech has special force in the privacy of the home, that right can also exist in confrontational situations in public settings.[37] Specifically, while speakers have a right to try and persuade others, listeners have "'a right to be free' from persistent 'importunity, following and dogging' after an offer to communicate has been declined."[38] Second, the Court observed "that our cases have repeatedly recognized the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling . . . auditor to avoid exposure.'"[39]

B. *Should the Audience Have to Avoid the Message?*

The captive audience doctrine does not protect everyone who cannot readily avoid unwelcome messages. To qualify as a captive audience, the unwanted message must invade the audience's privacy in an "essentially intolerable manner."[40] Whether a message invades privacy to this degree depends on a normative determination about whether the audience has a reasonable expectation of privacy. In other words, the question is not whether the audience can avoid the message by leaving a particular location – after all, most audiences are not forcibly trapped[41] – but whether they should have to. Certain places come with an expectation of privacy such that listeners are not expected to leave in order to avoid unwanted speech. The Supreme Court has held that the home is unequivocally one such place. Other possible locations identified by the Supreme Court include public transportation and medical facilities. Lower courts have split over places as diverse as welfare offices, funerals, and houses of worship.

The home is the traditional place where one can reasonably expect a zone of privacy.[42] As one scholar noted over thirty years ago, even the most ardent First Amendment supporters on the Supreme Court are willing to protect the privacy of the home.[43] The Court has proclaimed that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."[44] In fact, the Court has

[37] *Id.* at 717.

[38] *Id.* at 717-18 (quoting Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 204 (1921)).

[39] *Id.* at 718 (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975)).

[40] Cohen v. California, 403 U.S. 15, 21 (1971).

[41] Sometimes the law compels attendance, such as in school and in prison.

[42] *See, e.g.*, FCC v. Pacifica Found., 438 U.S. 726, 759 (1978) (Powell, J., concurring) ("Although the First Amendment may require unwilling adults to absorb the first blow of offensive but protected speech when they are in public before they turn away, . . . a different order of values obtains in the home.").

[43] Haiman, *supra* note 28, at 161.

[44] Frisby v. Schultz, 487 U.S. 474, 484 (1988) (quoting Carey v. Brown, 447 U.S. 455, 471 (1980)).

rhapsodized that the home is "the last citadel of the tired, the weary, and the sick,"[45] as well as "the one retreat to which men and women can repair to escape from the tribulations of their daily pursuits."[46] As a result, the Court has regularly limited a speaker's right to communicate to people in their homes. For example, the Court has upheld an ordinance barring pickets that target a particular household,[47] allowed the FCC to regulate "patently offensive" broadcasts that may be heard in homes,[48] and permitted municipalities to regulate noise levels in residential areas.[49]

The home is not the only location where a listener's privacy interests may trump a speaker's communication interests. The Court has suggested that audiences may also be considered captive on public transportation and in medical facilities. The first time the Court addressed the question of captive audiences on public transportation, it rejected finding any invasion of privacy. In *Public Utilities Commission v. Pollak*,[50] the plaintiff complained about radio broadcasts of music with news and commercials in the District of Columbia's transit system.[51] Relying on public opinion polls, the Court found that most riders favored the broadcasts.[52] The Court concluded that a small minority should not override the majority.[53] Thus, the Court focused on the rights of unwilling listeners versus willing listeners as opposed to the rights of unwilling listeners versus speakers. Justice Douglas's vigorous dissent turned the focus back to the tension between speaker and listener. In his view, people's presence on public transportation is not voluntary: "[I]n a practical sense they are forced to ride, since this mode of transportation is today essential for many thousands. Compulsion which comes from circumstances can be as real as compulsion which comes from a command."[54] Consequently, "[i]f liberty is to flourish, government should never be allowed to force people to listen to any radio program."[55]

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[45] *Id.* (quoting Gregory v. City of Chi., 394 U.S. 111, 125 (1969)).

[46] *Id.* (quoting *Carey*, 447 U.S. at 471).

[47] *Id.*

[48] FCC v. Pacifica Found., 438 U.S. 726, 727-28 (1978).

[49] Ward v. Rock Against Racism, 491 U.S. 781, 796 (1989); Kovacs v. Cooper, 336 U.S. 77, 87 (1949).

[50] 343 U.S. 451 (1952).

[51] *Id.* at 456, 458. The programming "generally consist[ed] of 90% music, 5% news, weather reports and matters of civic interest, and 5% commercial advertising." *Id.* at 461.

[52] One poll found that 93.4% of riders were not opposed to the broadcasts, and that 76.3% favored them. *Id.* at 459-60.

[53] Notably, the majority did not argue that the riders could avoid the broadcasts. Addressing the possibility that listeners have a "First Amendment guarantee[] . . . to listen only to such points of view as the listener wishes to hear," the Court held that such a right did not present itself in this case because "[t]here is no substantial claim that the programs have been used for objectionable propaganda." *Id.* at 463.

[54] *Id.* at 468 (Douglas, J., dissenting).

[55] *Id.* at 469.

The Court adopted Justice Douglas's view in *Lehman v. City of Shaker Heights*,[56] where both the plurality and Justice Douglas's concurring opinion upheld a ban on political advertising in Shaker Heights's public transportation system.[57] Citing Justice Douglas's *Pollak* dissent, the plurality noted that the public transportation audience is "a captive audience. It is there as a matter of necessity, not of choice."[58] While the plurality listed captive audience concerns as one reason among many supporting the ban on political advertisements,[59] for Justice Douglas it was the primary reason: "[T]he right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience."[60] In sum, the Court recognized that people should not have to sacrifice their right to privacy when they are forced, by circumstances beyond their control, to be in a particular location.

Another place that people may by necessity find themselves is a medical facility. In upholding buffer zones against protesters who target women entering family planning clinics, the Supreme Court argued that "the State's strong interest in residential privacy . . . [should be] applied by analogy to medical privacy."[61] The Court continued: "[W]hile targeted picketing of the home threatens the psychological well-being of the 'captive' resident, targeted picketing of a hospital or clinic threatens not only the psychological, but also physical, well-being of the patient held 'captive' by medical circumstances."[62] Just as one expects peace and quiet rather than heckling and bombardment at home, one should expect the same at a health care facility.[63] Furthermore, among the many possible meanings of "right to medical privacy,"[64] the substantive due process right to make one's own decisions regarding one's health, and particularly one's reproductive health, adds another layer of

[56] 418 U.S. 298 (1974).

[57] *Id.* at 299, 304 (Blackmun, J., plurality opinion); *id.* at 308 (Douglas, J., concurring).

[58] *Id.* at 302 (Blackmun, J., plurality opinion) (quoting *Pollak*, 343 U.S. at 468 (Douglas, J., dissenting)).

[59] *Id.* at 304 ("The city consciously has limited access to its transit system advertising space in order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon a captive audience.").

[60] *Id.* at 307 (Douglas, J., concurring).

[61] Madsen v. Women's Health Ctr., Inc., 512 U.S. 753, 768 (1994).

[62] *Id.*

[63] *Id.* at 753-56, 776.

[64] The right to medical privacy may also mean the right to not have one's medical information publicly disseminated. *See, e.g.*, Health Insurance Portability and Accountability Act Privacy Rule, 45 C.F.R. §§ 160, 162, 164 (2007) (protecting privacy of patients' medical information and records).

privacy expectations. In the protest context, it can mean the right to choose abortion without having to undergo an obstacle course.[65]

The lower courts have debated whether an expectation of privacy – and therefore a risk of being a captive audience – attaches to locations such as welfare offices, churches, and funerals. Among the places that people cannot realistically steer clear of – and therefore should not have to avoid – are social services agencies. At least two circuit courts have described social services recipients waiting in reception areas as a captive audience,[66] including an en banc panel which held that clients waiting for their welfare assistance are a "virtually captive audience" and that "[w]hen customers come to the Department of Social Services to apply for [Aid to Dependent Children] or food stamps or Medicaid . . . they have no other choice."[67]

Less clear is whether mourners attending funerals[68] and congregations at houses of worship[69] ought to be considered captive audiences. The Westboro Baptist Church's practice of protesting at the funerals of soldiers who died in Iraq and Afghanistan,[70] wielding posters such as "Thank God for dead soldiers"[71] and "God Hates Fags,"[72] has led most states to ban targeted picketing at funerals.[73] Courts and commentators are divided about whether

[65] Hill v. Colorado, 530 U.S. 703, 716 (2000) ("[T]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests." (quoting *Madsen*, 512 U.S. at 772-73)).

[66] *See* Make the Road by Walking, Inc. v. Turner, 378 F.3d 133, 149 (2d Cir. 2004); Families Achieving Independence & Respect v. Neb. Dep't of Soc. Servs., 111 F.3d 1408, 1421 (8th Cir. 1997) (en banc).

[67] *Families Achieving Independence & Respect*, 111 F.3d at 1421; *see also id.* at 1412 n.5 (noting that welfare clients "have no choice but to come to the Local Office for the basic necessities of life"). The Eighth Circuit upheld a state social service agency policy barring welfare rights organizations from the welfare office lobby while allowing groups that provided direct benefits. *Id.* at 1423-24. The Second Circuit likewise allowed a state social service agency to exclude advocacy groups from welfare waiting rooms. *Turner*, 378 F.3d at 151.

[68] *See, e.g.*, Phelps-Roper v. Nixon, 509 F.3d 480, 483, 488-89 (8th Cir. 2007); Phelps-Roper v. Taft, 523 F. Supp. 2d 612, 615, 621 (N.D. Ohio 2007); McQueary v. Stumbo, 453 F. Supp. 2d 975, 977 (E.D. Ky. 2006).

[69] *See, e.g.*, Olmer v. City of Lincoln, 192 F.3d 1176, 1178 (8th Cir. 1999); Edwards v. City of Santa Barbara, 150 F.3d 1213, 1215 (9th Cir. 1998).

[70] The Church believes that God is punishing Americans for the sin of homosexuality by killing Americans, including U.S. soldiers. Snyder v. Phelps, 533 F. Supp. 2d 567, 571 (D. Md. 2008). Church members protest at funerals in order to maximize publicity. *Id.* at 571-72.

[71] *Id.* at 570.

[72] Phelps-Roper v. Nixon, 509 F.3d at 483 n.2; *see also* Westboro Baptist Church Home Page, http://www.godhatesfags.com (last visited Mar. 27, 2009).

[73] *See* Robert F. McCarthy, *The Incompatibility of Free Speech and Funerals: A* Graynard*-Based Approach for Funeral Protest Statutes*, 68 OHIO ST. L.J. 1469, 1486 & n.94

people have a privacy interest at funerals. Even when finding portions of a ban overbroad,[74] one court observed that "mourners are a captive audience."[75] Another court similarly commented that mourners are captive because they must attend the funeral if they wish to pay their last respects to the deceased.[76] In addition, while no one would talk about the sanctity of a bus or hospital, there is a sense that funerals, like homes, are sacrosanct.[77] In contrast, the Eight Circuit held that this kind of privacy is reserved for the home and that "the government has no compelling interest in protecting an individual from unwanted speech outside of the residential context."[78] And some commentators have argued that people at funerals are not captive because they could choose to have their memorial services at more secluded locations, like at home or at a private funeral parlor.[79] These same questions and divisions have also arisen with regard to laws barring targeted picketing of houses of worship: the Eighth Circuit has held that churches are not entitled to the same level of privacy as residences,[80] while the Ninth Circuit has upheld a fixed buffer zone around houses of worship.[81] Of course, the real question is not

(2007) (listing the forty-three states that have enacted funeral protest bans as of October 1, 2007).

[74] Phelps-Roper v. Taft, 523 F. Supp. 2d 612, 620-21 (N.D. Ohio 2007) (upholding a 300-foot fixed buffer zone around the cemetery while striking down 300-foot floating zones around processions because it burdens speech more than necessary).

[75] *Id.* at 619.

[76] McQueary v. Stumbo, 453 F. Supp. 2d 975, 992 (E.D. Ky. 2006) (enjoining Kentucky's law on the grounds it was not narrowly tailored, but observing that "funeral attendees are captive. If they want to take part in an event memorializing the deceased, they must go to the place designated for the memorial event.").

[77] *See id.* at 992 (explaining that like people at home, funeral "attendees have an interest in avoiding unwanted, obtrusive communications"); *see also* Snyder v. Phelps, 533 F. Supp. 2d 567, 570, 581 (D. Md. 2008) (affirming a multi-million dollar verdict against Westboro Baptist Church members for, inter alia, invasion of privacy by intrusion upon seclusion).

[78] Phelps-Roper v. Nixon, 509 F.3d 480, 486 (8th Cir. 2007) (citing Olmer v. City of Lincoln, 192 F.3d 1176, 1182 (8th Cir. 1999)); *accord id.* at 487 ("As the Supreme Court said in *Frisby*, 'the home is different,' and, in our view, unique." (quoting Frisby v. Schultz, 487 U.S. 474, 484 (1988))).

[79] *See* Andrea Cornwell, *A Final Salute to Lost Soldiers: Preserving the Freedom of Speech at Military Funerals*, 56 AM. U. L. REV. 1329, 1359 (2007); Cynthia Mosher, *What They Died to Defend: Freedom of Speech and Military Funeral Protests*, 112 PENN ST. L. REV. 587, 617 (2007).

[80] *Olmer*, 192 F.3d at 1182 ("We cannot agree with the City that churches are indistinguishable from private residences . . . .").

[81] Edwards v. City of Santa Barbara, 150 F.3d 1213, 1216-17 (9th Cir. 1998) (per curiam). While the Ninth Circuit did not elaborate on its decision, its reasoning may have paralleled the dissent in the Eight Circuit decision, which argued that "[l]ike the home, houses of worship . . . are sacred places where people seek rest and replenishment," and that people should not have to forfeit their right to worship in order to avoid unwanted and harassing speech. *Olmer*, 192 F.3d at 1182, 1185 (Bright, J., dissenting).

whether funerals or services could be held elsewhere but the normative one of whether attendees should have to hold them elsewhere in order to avoid unwanted protestors.

The precise contours of the captive audience doctrine are uncertain, and the Supreme Court cases are far from consistent.[82] Does the protection apply to first exposure, or does it apply only to continued exposure?[83] When exactly is a message avoidable?[84] When should the rights of willing listeners – who might miss out on some speech as a result of a ban – be taken into consideration?[85] How does one know whether an expectation of privacy even attaches to a particular space?[86] Even assuming privacy rights are implicated, at what point are they invaded? As these questions demonstrate, the exact balance between unwilling listeners, willing speakers, and perhaps willing listeners, is simply not clear cut.

Nonetheless, there are still certain general conclusions that can be drawn from the Supreme Court's decisions. As to the first captive audience factor, messages are more likely to be considered avoidable if visual, and especially if written, than if audible. Probably only in the home is one protected from the first exposure to unwanted speech, and even then only if the speech is audible. As to the second factor, privacy interests are more likely to be found in places traditionally considered sacrosanct (like the home) or in places people are forced by circumstances to attend (like public transportation or medical facilities).

II. RIGHTS IN TENSION

The captive audience doctrine may be more expansive than it at first appears. While it focuses on the conflict between a speaker's right to communicate and a listener's right to privacy, privacy has multiple meanings. Furthermore, although the official captive audience doctrine protects privacy,

[82] Taylor, *supra* note 7, at 212-13.

[83] Strauss, *Captive Audience*, *supra* note 17, at 92-93 (observing that the Supreme Court did not explain why first exposure in *FCC v. Pacifica Foundation* should be considered assaultive but not first exposure in other cases); Note, *The Impermeable Life: Unsolicited Communications in the Marketplace of Ideas*, 118 HARV. L. REV. 1314, 1321 (2005) (commenting that after *FCC v. Pacifica Foundation*, "the degree to which an unsolicited first communication into the home is protected by the First Amendment is uncertain").

[84] Strauss, *Captive Audience*, *supra* note 17, at 96-98 (asking why viewers can turn away from written speech in *Cohen* and *Erznoznik* but cannot turn away from the written bus advertisements in *Lehman*). One might respond that the pedestrians in *Cohen* and *Erznoznik* could walk away from the speech, while the public transportation riders in *Lehman* could not.

[85] *Compare* Pub. Utils. Comm'n v. Pollak, 343 U.S. 451, 458-59 (1952) (arguing that most riders wanted to hear radio broadcasts), *with* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (never discussing whether any riders might favor political advertisements).

[86] Circuit splits over whether there is an expectation of privacy at funerals or at houses of worship only add to the confusion.

recent cases have applied its reasoning to protect interests besides privacy. Some of the more controversial limits on private speech, most notably bans on sexually harassing speech in the workplace and hate speech on campus, attempt to balance a speaker's free speech rights against an audience's right to equal protection. In addition, voting rather than privacy rights may justify restrictions on speech to captive audiences who are about to vote.

A. *Right to Privacy*

The captive audience doctrine has traditionally been based on the idea that the government may curtail a speaker's free speech rights when those rights are outweighed by a listener's privacy rights.[87] The right to privacy, however, is an amorphous concept that can mean several different things. As one commentator noted, "[p]erhaps the most striking thing about the right to privacy is that nobody seems to have any . . . clear idea what it is."[88] The very concept of a "right to privacy" was first advocated in a seminal 1890 article by Louis D. Brandeis and Samuel D. Warren.[89] Today, the right to privacy encompasses both constitutional rights and common law protections.

While there are four separate common law torts for invasion of privacy, it is the "intrusion upon seclusion or solitude" that is most relevant to the captive audience doctrine.[90] Being disturbed at home or on the way to work interferes with the "right to be left alone" that is so often mentioned in captive audience decisions.[91] Marcy Strauss would further break down this right to privacy into "the right to repose" and the "the right to be free from offense."[92]

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[87] *See* Haiman, *supra* note 28, at 154 ("The issue of whether there is a right to be free from speech poses a sharp conflict between freedom of speech, on the one hand, and privacy, on the other.").

[88] Strauss, *Captive Audience*, *supra* note 17, at 107-08 (quoting Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295, 295 (1975)).

[89] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

[90] William L. Prosser, *Privacy*, 48 CAL. L. REV. 383, 389 (1960). The other three common law privacy torts are "[p]ublic disclosure of embarrassing private facts," "[p]ublicity which places [a person] in a false light in the public eye," and "[a]ppropriation . . . of the [person's] name or likeness." *Id.*

[91] *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 716 (2000); Bolgar v. Youngs Drug Prods. Corp., 463 U.S. 60, 77 (1983); FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).

[92] Strauss, *Captive Audience*, *supra* note 17, at 108; *see also id.* at 111-12 (arguing that this right to peace and tranquility should not be limited to the home); *id.* at 114-16 (arguing that the right to be free from offense should cover protection against messages that may be harassing, intimidating, or distressing). Franklyn Haiman's list of justifications offered for the captive audience doctrine parallels these categories. Haiman, *supra* note 28, at 175-76 (stating that an individual has "a right not to have whatever pursuits [she] may be engaged in interrupted by untimely communication," and a right not to be subject to offensive verbal aggression). Haiman did not necessarily agree with these arguments. *See id.* at 187-92 (critiquing both justifications). For the latter justification, Haiman focused more on fighting

In addition, the Supreme Court has recognized a constitutional right to privacy and has determined that it protects a person's ability to make intensely personal decisions without undue interference from the government, including decisions about childrearing,[93] procreation,[94] marriage,[95] intimate sexual relations,[96] and medical treatment.[97] These decisions involve "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."[98] While several sources for the constitutional right to privacy have been proposed,[99] today, it is commonly

words, *id.* at 175-76, while Marcy Strauss concentrated on the contemporary concern of hate speech. Strauss, *Captive Audience*, *supra* note 17, at 114-15.

[93] *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 72 (2000) (finding that a state law allowing the court to order visitation by grandparents violated a mother's fundamental right to make decisions about the care, custody, and control of her children); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (finding that a state law requiring attendance at public school "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control").

[94] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion) (stating that the government may not impose an undue burden on a woman's right to choose abortion); Roe v. Wade, 410 U.S. 113, 153 (1973) (finding that the right to privacy is broad enough to "encompass a woman's decision whether or not to terminate her pregnancy"); Griswold v. Connecticut, 381 U.S. 479, 480 (1965) (holding that a state law forbidding use of contraceptives violates the Due Process Clause of the Fourteenth Amendment).

[95] *See* Zablocki v. Redhail, 434 U.S. 374, 375, 383, 390-91 (1978) (recognizing that the right to marry is part of the fundamental "right of privacy" implicit in the Fourteenth Amendment's Due Process Clause and striking down a Wisconsin law requiring anyone with a prior child support obligation to obtain court permission to marry); Loving v. Virginia, 388 U.S. 1, 4-5, 12 (1967) (holding that marriage is a fundamental freedom and Virginia's anti-miscegenation law violated the Due Process Clause of the Fourteenth Amendment).

[96] *See* Lawrence v. Texas, 539 U.S. 558, 572, 578 (2003) (finding that a law against homosexual sodomy by consenting adults in the privacy of a home violated due process because "liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex").

[97] *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) (acknowledging that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment"); Washington v. Harper, 494 U.S. 210, 221-22 (1990) (stating that a prisoner "possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment").

[98] *Casey*, 505 U.S. at 851.

[99] In *Griswold v. Connecticut*, 381 U.S. 479 (1965), Justice Douglas reasoned that the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments create zones of privacy. *Id.* at 484. In his concurrence, Justice Goldberg argued that a right to privacy was one of the unenumerated fundamental rights retained by the people and protected from abridgment by the Ninth Amendment. *Id.* at 488-96 (Goldberg, J., concurring).

grounded in the Due Process Clause of the Fourteenth Amendment.[100] Although the continued vitality of the substantive due process right to privacy is in dispute,[101] there is no gainsaying the constitutional protection for certain personal decisions.[102]

The substantive due process conception of privacy may also play a role in the captive audience doctrine.[103] In fact, this aspect of privacy is present in three Supreme Court cases. The trio, *Hill v. Colorado*,[104] *Schenk v. Pro-Choice Network of Western New York*,[105] and *Madsen v. Women's Health Center, Inc.*,[106] all address restrictions on abortion protestors in front of medical facilities. In all three, the Court recognized the state's legitimate interest in ensuring unimpeded access to health care facilities and pregnancy-related health services.[107] After all, a woman can not exercise her substantive

[100] *See, e.g.*, Troxel v. Granville, 530 U.S. 57, 65 (2000) ("We have long recognized that the [Fourteenth] Amendment's Due Process Clause . . . 'guarantees more than fair process.' The Clause also includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.'" (quoting Washington v. Glucksberg, 521 U.S. 702, 719-20 (1997))). This substantive component arguably developed in response to the Supreme Court's evisceration of the Privileges and Immunities Clause of the Fourteenth Amendment in *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873).

[101] What was originally described as a fundamental right to privacy that could only be overcome by a narrowly tailored and compelling state interest, Roe v. Wade, 410 U.S. 113, 155 (1973), has been downgraded to a liberty interest that can be limited so long as the restriction does not impose an "undue burden." *Casey*, 505 U.S. at 874 (O'Connor, Kennedy, and Souter, JJ., plurality opinion).

[102] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 573-74 (2003) ("[O]ur laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.").

[103] Marcy Strauss, for example, argues that the right to privacy embodied in the captive audience doctrine protects against excessive intrusion in certain decisions associated with substantive due process, including decisions about childrearing and reproduction. Strauss, *Captive Audience*, *supra* note 17, at 109. Strauss contends that while the right to make decisions without undue interference has some worth in itself, what really deserve protection are those intimate decisions that are considered central to our sense of autonomy. *Id.* at 109-10 ("[T]he real weight of that value [of autonomous decision-making] can only be assessed if there is some independent reason why making *this particular* choice is important.").

[104] 530 U.S. 703, 735 (2000) (upholding restrictions on protester speech within 100 feet of a health care facility).

[105] 519 U.S. 357, 380 (1997) (upholding a statute providing "fixed buffer zones around the doorways, driveways, and driveway entrances" of a woman's health clinic).

[106] 512 U.S. 753, 776 (1994) (upholding "noise restrictions and [a] 36-foot buffer zone around the clinic entrances").

[107] *Hill*, 530 U.S. at 715; *Schenck*, 519 U.S. at 376; *Madsen*, 512 U.S. at 767. Notably, the Court did not link protection of medical access with substantive due process. Rather, it

due process right to choose an abortion if she can not readily enter a clinic.[108] But the protection went beyond ensuring physical access. The Court in both *Hill* and *Madsen* stated that women entering a clinic should not be required to run a gauntlet: "[T]he First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests."[109] In other words, women choosing abortion are entitled to receive their medical care with a certain degree of tranquility from unwanted speech and freedom from offensive speech[110] – especially since the speech can cause physical as well as psychological injury.[111] This is not quite tantamount to recognizing a right to avoid unwanted speech. Although the *Hill* Court situated its decision in a long line of cases establishing the broader "right to be left alone" – a right it described as "the most comprehensive of rights and the right most valued by civilized men"[112] – the Court insisted that it was not establishing a right to avoid unwelcome expression.[113]

B. *Right to Equal Protection*

An audience's right to privacy – or as it has been increasingly described, its liberty interest – is not the only source of limits on a private speaker's communication to an unwilling captive listener. Equal protection values also provide an independent countervailing weight against the right to free speech. These values are evident in laws forbidding harassing speech at work and in hate speech codes on university campuses. Even the limits on aggressive abortion protestors can be re-characterized as protecting equality rather than liberty, as many have argued that the right to abortion is better understood as

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connected it to the State's traditional police powers to protect the health and safety of its citizens. *See, e.g.*, *Hill*, 530 U.S. at 715.

[108] *See, e.g.*, *Schenck*, 519 U.S. at 365 (describing how protesters' "constructive blockades" included "yelling at, grabbing, pushing, and shoving people entering and leaving the clinics").

[109] *Hill*, 530 U.S. at 716 (quoting *Madsen*, 512 U.S. at 772-73).

[110] According to a volunteer escort, some protesters held "bloody fetus signs" and yelled "you are killing your baby." *Id.* at 710 n.7; *see also id*. at 715 (describing protestors' speech as offensive).

[111] *See id.* at 718-19 n.25 (observing that the statute was designed to protect women against potential physical and emotional harm); *Madsen*, 512 U.S. at 758-59 (describing doctors' testimony that patients who had to run a gauntlet to enter the clinic had higher anxiety and hypertension and that patients inside the clinic who heard protests experienced more stress both during surgical procedures and while recuperating in recovery rooms).

[112] *Hill*, 530 U.S. at 716-17.

[113] *Id.* at 718 ("We, of course, are not addressing whether there is such a 'right [to avoid unwanted speech].' Rather, we are merely noting that our cases have repeatedly recognized the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'" (quoting Erznoznik v. City of Jacksonville, 422 U.S. 205, 209 (1975))); *see also id.* at 718 n.25 ("Furthermore, whether there is a 'right' to avoid unwelcome expression is not before us in this case.").

realizing a woman's right to equal protection and equal opportunity rather than her right to privacy.

A woman's right to terminate her pregnancy was originally envisioned as a right to make certain private decisions.[114] Almost immediately, commentators argued that the right to control reproduction should also be seen as protecting a woman's right to equal protection.[115] As Sylvia Law pointed out: "The rhetoric of privacy, as opposed to equality, blunts our ability to focus on the fact that it is *women* who are oppressed when abortion is denied."[116] Restricting abortion imposes a unique burden on women alone, denies them control over their own destiny, and compromises women's equal citizenship.[117] Furthermore, as Reva Siegel emphasized, laws that compel women to bear children perpetuate stereotypical and subordinated roles for women.[118] Today, it is widely understood that abortion restrictions implicate equality values.[119] Indeed, the Supreme Court recognized the equality dimension when it observed that "[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."[120] Consequently, abortion protesters who unduly interfere

[114] Roe v. Wade, 410 U.S. 113, 153 (1973) (stating that the right to privacy implicit in the due process guarantee of the Fourteenth Amendment is "broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

[115] *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. REV. 375, 386 (1985); Kenneth L. Karst, *The Supreme Court, 1976 Term – Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 53-59 (1977); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1016-28 (1984); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1308-24 (1991); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 352 (1992) [hereinafter Siegel, *Historical Perspective*].

[116] Law, *supra* note 115, at 1020.

[117] Karst, *supra* note 115, at 57; *see also* Gonzales v. Carhart, 127 S. Ct. 1610, 1641 (2007) (Ginsburg, J., dissenting) ("[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature.").

[118] Siegel, *Historical Perspective*, *supra* note 115, at 358 ("[T]he objective of abortion-restrictive regulation is to force women to assume the role and perform the work that has traditionally defined their secondary social status.").

[119] Abortion regulations do not trigger the Equal Protection Clause itself because the Supreme Court has held that pregnancy-related laws are not based on sex. *See* Geduldig v. Aiello, 417 U.S. 484, 494-97 (1974) (holding that a disability benefits plan that excluded coverage for pregnancy did not violate the Equal Protection Clause). While this counterintuitive holding has been widely mocked and reviled, it has never been explicitly overruled. *See* Law, *supra* note 115, at 983 (citing over two-dozen articles criticizing the decision in *Geduldig v. Aiello*).

[120] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 856 (1992).

with a woman seeking to exercise her right to an abortion may have their speech curtailed because of equality concerns, not just privacy ones.

Equal protection values take center stage for Title VII restrictions on a speaker's right to communicate. Title VII of the Civil Rights Act of 1964 forbids discrimination against any employee "with respect to [the] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[121] In passing the Civil Rights Act, Congress invoked not only the Commerce Clause, but also Section Five and the Equal Protection Clause of the Fourteenth Amendment.[122] After all, one of the main goals of Title VII is to ensure equality of opportunity in the workplace.[123]

One way Title VII fosters equal opportunity is by prohibiting racial, sexual, or religious harassment created by a hostile work environment.[124] Sexual harassment, for example, which tends to be more intense in male-dominated fields, can be used to discourage women from ever trying non-traditional jobs or to chase women out of them.[125] A hostile work environment exists when working conditions are severe or pervasive enough to alter the terms and conditions of employment and create an abusive working environment.[126] The more severe the harassment, the less pervasive it need be, and vice-versa.[127] Consequently, a single assault can create a hostile work environment if sufficiently severe.[128] At the same time, constant verbal harassment also meets this standard if sufficiently pervasive. Thus, courts have found that speech acts

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[121] 42 U.S.C. § 2000e-2(a)(1) (2000).

[122] Heart of Atlanta Motel, Inc., v. United States, 379 U.S. 241, 249 (1964); *see* U.S. CONST. amend. XIV, § 5 (authorizing Congress to enforce the Equal Protection Clause "by appropriate legislation").

[123] *See* Connecticut v. Teal, 457 U.S. 440, 449 (1982) ("Congress' primary purpose [in enacting Title VII] was the prophylactic one of achieving equality of employment 'opportunities' and removing 'barriers' to such equality."); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973) ("The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities . . . .").

[124] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986) (recognizing the existence of a hostile work environment claim under Title VII).

[125] *See infra* notes 155-161 and accompanying text.

[126] *Meritor Sav. Bank*, 477 U.S. at 67; *accord* Harris v. Forklift Sys. Inc., 510 U.S. 17, 21 (1993) (affirming the definition of hostile work environment set out in *Meritor Savings Bank*).

[127] Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 412-13 (1996).

[128] *See, e.g.*, Mormol v. Costco Wholesale Corp., 364 F.3d 54, 59 (2d Cir. 2004) (remarking that it is "well-settled in this Circuit that even a single act can meet the threshold [of hostile work environment]" if the act is "extraordinarily severe"); Smith v. Sheahan, 189 F.3d 529, 533-34 (7th Cir. 1999) (asserting that a reasonable jury could find a single physical assault sufficient to alter the terms and conditions of employment).

alone can lead to a hostile work environment.[129] In one notable case, a district court found that a workplace riddled with pictures of nude and partially nude women,[130] combined with sexual and degrading comments by co-workers,[131] amounted to an abusive work environment at a shipyard.[132]

Several free speech proponents have argued that outlawing this kind of communication at work violates free speech rights.[133] If the government cannot forbid someone from expressing the view that "women belong in the bedroom, not the boardroom" in the street, why should it become punishable at work?[134] These commentators contend that these restrictions are especially problematic as they target certain political viewpoints:[135] Because workers can make positive comments about women and minorities in the workplace but not negative ones, the government has engaged in classic viewpoint discrimination.[136]

Despite these arguments, the illegality of speech that contributes to a hostile work environment is a fait accompli. Although the Supreme Court has not directly addressed First Amendment challenges to Title VII, it has dismissed

[129] *See, e.g.*, Smith v. Nw. Fin. Acceptance, Inc., 129 F.3d 1408, 1417 (10th Cir. 1997) (holding that verbal conduct without accompanying physical conduct can establish a hostile work environment claim); Black v. Zaring Homes Inc., 104 F.3d 822, 826 (6th Cir. 1997) ("[V]erbal conduct alone can be the basis of a successful hostile work environment claim."); Farpella-Crosby v. Horizon Health Care, 97 F.3d 803, 806 (5th Cir. 1996) ("Sexually discriminatory verbal intimidation, ridicule, and insults may be sufficiently severe or pervasive as to . . . create an abusive working environment that violates Title VII.").

[130] Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1496-98 (M.D. Fla. 1991).

[131] For example, one of the plaintiff's coworkers often made comments like "'women are only fit company for something that howls' and 'there's nothing worse than having to work around women.'" *Id.* at 1498.

[132] *Id.* at 1524; *see also* Jenson v. Eveleth Taconite Co., 824 F. Supp. 847, 880-82 (D. Minn. 1993) (finding a hostile work environment at a mining site where sexualized depictions of women were ubiquitous and men regularly referred to women in terms of their body parts and commented on women's sex lives).

[133] *See generally* Kingsley R. Browne, *Title VII as Censorship: Hostile-Environment and the First Amendment*, 52 OHIO ST. L.J. 481 (1991) (arguing that hostile work environment claims based on expression cannot withstand First Amendment scrutiny and only physical harassment should be illegal); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992) (arguing that Title VII harassment law violates the First Amendment and that hostile work environment claims should only protect against harassment intentionally directed at a particular individual).

[134] Browne, *supra* note 133, at 481 (asking whether the statement "women do not belong in the medical profession; they should stay home and make babies" constituted protected speech or sexual harassment).

[135] *See, e.g.*, *id.* at 540 (describing "racist and sexist speech" as "constitut[ing] an expression of views on important issues of social policy").

[136] *Id.* at 519.

them in dicta. In *R.A.V. v. City of St. Paul*,[137] the Supreme Court held that a bias-motivated crime ordinance violated the First Amendment because it punished fighting words motivated by race, color, creed, religion or gender hostility, but not those motivated by other reasons.[138] In short, the ordinance punished certain viewpoints but not others, and the government may not regulate speech "based on hostility – or favoritism – towards the underlying message expressed."[139] Title VII's ban on sexist and racist comments seems to share the same flaw.[140] Nevertheless, the Court distinguished Title VII's prohibitions by characterizing them as restrictions on conduct as opposed to restrictions on speech,[141] and conduct has long been amenable to state regulation.[142]

Another way to conceive of the Title VII restrictions is to concede that they are limits on speech, but uphold them as justifiable under the captive audience doctrine.[143] Employees at work meet both criteria for a captive audience. As an empirical matter, workplace harassment is not readily avoidable.[144] Unlike a person on the street, an employee at work cannot simply walk away from speech she would rather not hear. An employee might have to attend certain meetings, or work in particular areas. Even harder to avoid are comments

[137] 505 U.S. 377 (1992).

[138] *Id.* at 380, 381, 391.

[139] *Id.* at 386; *see also id.* at 394 ("Selectivity of this sort creates the possibility that the city is seeking to handicap the expression of particular ideas.").

[140] In dissent, Justice White argued that Title VII suffers the same failings as the St. Paul ordinance because "it imposes special prohibitions on those speakers who express views on disfavored subjects. Under the broad principle the Court uses to decide the present case, hostile work environment claims based on sexual harassment should fail First Amendment review." *Id.* at 409-10 (White, J., dissenting).

[141] The Court distinguished between laws targeting speech and those directed at conduct that incidentally sweep up certain speech and then intimated that Title VII was the latter: "[S]exually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices." *Id.* at 389 (majority opinion); *see also* Wisconsin v. Mitchell, 508 U.S. 476, 487 (1993) (observing that *R.A.V.* "cited Title VII . . . as an example of a permissible content-neutral regulation of conduct").

[142] *See, e.g.*, Arcara v. Cloud Books, Inc., 478 U.S. 697, 702-04 (1986).

[143] *See, e.g.*, Balkin, *Hostile Environments*, *supra* note 18, at 2310; Epstein, *supra* note 127, at 421; Suzanne Sangree, *Title VII Prohibitions Against Hostile Environment Sexual Harassment and the First Amendment: No Collision in Sight*, 47 RUTGERS L. REV. 461, 515-21 (1995); Marcy Strauss, *Sexist Speech in the Workplace*, 25 HARV. C.R.-C.L. L. REV. 1, 12-13 (1990) [hereinafter Strauss, *Sexist Speech*]; Jessica M. Karner, Note, *Political Speech, Sexual Harassment, and a Captive Workforce*, 83 CAL. L. REV. 637, 682-83 (1995).

[144] *See, e.g.*, Epstein, *supra* note 127, at 421 ("Whether the workplace is a factory, office, or construction site, it is a setting in which employees are typically unable to avoid gender-based harassing speech. Outside of the workplace, an individual has a far greater degree of choice . . . .").

directed at the employee, especially when the harasser is a supervisor.[145] The plaintiff in *Robinson v. Jacksonville Shipyards Inc.*,[146] for example, encountered pornography in a toolroom trailer that she needed to enter[147] and abusive graffiti on the walls in her work area,[148] in addition to the numerous sexual and denigrating comments said to her face.[149] Not surprisingly, the court held that "female workers at [the shipyard] are a captive audience in relation to the speech that comprises the hostile work environment."[150] As a normative matter, while Robinson could escape the hostility by quitting her welding job at the shipyard, she should not have to choose between harassment and unemployment.[151]

While privacy concerns provide some justification for expanding the captive audience doctrine to cover employees facing hostile work environments[152] – the workplace, like the hospital, is one of those "necessary" places the captive cannot realistically avoid[153] – equal protection values provide another, and perhaps more logical, justification for recognizing a captive audience in the

[145] *See, e.g.*, Strauss, *Sexist Speech*, *supra* note 143, at 37 ("[W]hen a coworker or supervisor *directs* the speech at the female worker, her ability to avoid such speech is severely limited, and a finding of captivity is reasonable.").

[146] 760 F. Supp. 1486 (M.D. Fla. 1991).

[147] *Id.* at 1495.

[148] *Id.* at 1499 (discussing that graffiti included phrases like "lick me you whore dog bitch," "eat me," and "pussy").

[149] One welder said he wished her shirt would "blow over her head so he could look"; "a fitter told her he wished her shirt were tighter"; "a foreman candidate asked her to 'come sit' on his lap." *Id.* at 1498; *see also supra* note 131.

[150] *Robinson*, 760 F. Supp. at 1535; *see also* Baty v. Willamette Indus., Inc., No. 96-2181-JWL, 1997 WL 292123, at *7 (D. Kan. May 1, 1997) ("[V]ictims of workplace discrimination are captive audiences and the free speech guarantee permits great latitude in protecting captive audiences . . . .").

[151] *See, e.g.*, Epstein, *supra* note 127, at 421 ("The Constitution does not and should not force a woman into a Hobson's choice between quitting her job or facing a work environment in which she is subjected to severe or pervasive harassing speech that is not inflicted on her male counterparts."). Indeed, people are arguably more captive at work than at home, since one can leave the home without penalty. Karner, *supra* note 143, at 683; *see also* Balkin, *Hostile Environments*, *supra* note 18, at 2313 ("The practical necessities of earning a living and the economic coercion inherent in the social relations of the workplace create captive audience situations . . . .").

[152] *See, e.g.*, Strauss, *Sexist Speech*, *supra* note 143, at 12-13 ("The captive audience doctrine arises out of concern for individual privacy."); Karner, *supra* note 143, at 681-82 (discussing the possibility of finding a First Amendment privacy right in the workplace).

[153] As we saw from analyzing the captive audience cases, captive audiences have been recognized at "sanctified" sites like the home, churches, or funerals, or at "necessary" places the captive cannot realistically steer clear of like hospitals, welfare offices, or public transportation. *See supra* Part I.B. The workplace is plainly one of those necessary places that people cannot help but go.

workplace.[154] Indeed, the goal of Title VII is to achieve equality in the workplace, and hostile work environments are outlawed not because they are offensive, but because they impede that goal. Hostile work environments "can shut women and minorities out of the workplace almost as surely as would explicit discrimination."[155] "Sexist speech creates an inhospitable and degrading work environment for women, and thus operates as overt exclusion once did to erect a significant barrier to equality in the workplace."[156] As Vicki Schultz explained, sexual harassment, so common in male-dominated occupations,[157] works to drive women out of non-traditional occupations or discourage them from entering them in the first place.[158] The result is the perpetuation of sex-segregated workplaces – a segregation that keeps women in lower paying, lower status jobs.[159] Even in integrated fields, sexual harassment can impose obstacles for advancement,[160] as it deters women from participating fully in the workplace.[161] It was the equality justification that the district court in *Robinson* relied upon in rejecting a First Amendment challenge to the captive employees' hostile work environment claim.[162]

Equality concerns also drive the argument that students on campus should be considered a captive audience to certain types of hate speech.[163] Just as a

[154] Of course, it is not necessary to choose between the two justifications. Both privacy and equality concerns may justify finding a captive audience in the workplace.

[155] Volokh, *supra* note 133, at 1807; *see also id.* at 1845 (arguing that Title VII's promise of equal opportunity "could prove to be an empty promise for many [if] an employer might be required to hire minorities and women, but its employees could drive them away").

[156] Strauss, *Sexist Speech*, *supra* note 143, at 5.

[157] Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1759 (1998) ("[R]esearch shows that women who work in male-dominated settings are more likely than other women to experience hostility and harassment at work.").

[158] *Id.* at 1755.

[159] *Id.* at 1756-57 ("At each level of the occupational and educational ladder, the jobs women do tend to pay less and to offer lower status and less opportunity for advancement than those that men do."); *see also* Balkin, *Hostile Environments*, *supra* note 18, at 2305 ("Sexual harassment is a form of sex discrimination that keeps jobs and employment opportunities sex-segregated according to traditional gender roles – for example by keeping women out of higher-paying construction positions and in lower-paying secretarial positions . . . .").

[160] Balkin, *Hostile Environments*, *supra* note 18, at 2305.

[161] Strauss, *Sexist Speech*, *supra* note 143, at 40.

[162] Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1536 (M.D. Fla. 1991) (holding that even if the speech is considered fully protected, Title VII limits passed strict scrutiny: "the Court must balance [free speech interests with] the governmental interest in cleansing the workplace of impediments to the equality of women, the latter is a compelling interest that permits the regulation of the former and the regulation is narrowly drawn to serve this interest").

[163] A proposed speech code might be:

> A student who intentionally or recklessly uses hate speech, under such circumstances that another student is likely to suffer serious emotional distress or be intimidated from

hostile environment can prevent full participation in the workplace, a hostile environment can prevent full participation in the educational process.[164] Hate speech[165] – which studies show produces a range of negative emotional, psychological, and physical effects, "including feelings of guilt, shame, anxiety, fear, vulnerability, inferiority, inadequacy, and personal degradation"[166] – effectively denies targeted students an equal opportunity to learn.[167] As Mari J. Matsuda noted, "I don't think a student can hear a racial slur on the way to a lecture, and then concentrate on the lecture as though nothing has happened."[168] While privacy concerns are not absent from debates about campus speech codes,[169] the controversies are more generally viewed as a clash between free speech and equality.[170]

Like employees at work, students on campus are often a captive audience.[171] Certainly, it is not possible to avoid comments in the classroom, as courts have

full participation in any university activity or program, shall be disciplined. A student shall not be disciplined under this Policy for any conduct which s/he demonstrates has serious literary, artistic, political or scientific value.

Jack M. Battaglia, *Regulation of Hate Speech by Educational Institutions: A Proposed Policy*, 31 SANTA CLARA L. REV. 345, 381 (1991).

[164] *Id.* at 347 (proposing that "hate speech, which has the purpose and likely effect of intimidating students from full participation in educational processes, can be proscribed consistent with the first amendment"); *see also* Ellen E. Lange, Note, *Racist Speech on Campus: A Title VII Solution to a First Amendment Problem*, 64 S. CAL. L. REV. 105, 107-08, 127 (1990) (arguing that students on campuses should be protected to the same degree as employees at their workplaces).

[165] Mari J. Matsuda suggests that speech should be regulated as racist hate speech when its message is: (1) "of racial inferiority"; (2) "directed against a historically oppressed group"; and (3) "persecutorial, hateful, and degrading." Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2357 (1989).

[166] Battaglia, *supra* note 163, at 373; *see also* Matsuda, *supra* note 165, at 2336 n.84 (citing studies that demonstrate the negative effects of discriminatory attacks); *id.* at 2336-37 ("Professor Patricia Williams has called the blow of racist messages 'spirit murder' in recognition of the psychic destruction victims experience." (quoting Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 129 (1987))).

[167] Battaglia, *supra* note 163, at 369.

[168] Matsuda, *supra* note 165, at 2372 n.256.

[169] *See, e.g.*, Doe v. Univ. of Mich., 721 F. Supp. 852 (E.D. Mich. 1989) (striking down the University of Michigan's verbal harassment policy as overbroad and vague, but observing that the policy as it applied to university housing was not challenged).

[170] *See, e.g.*, Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 434 ("At the center of the controversy is a tension between the constitutional values of free speech and equality."); Matsuda, *supra* note 165, at 2377 (arguing that "[t]he constitutional commitment to equality . . . [is] emptied of meaning when" the government fails to regulate racist speech).

[171] *See, e.g.*, Lawrence, *supra* note 170, at 456 (arguing that campus hate speech regulations "can be justified as necessary to protect a captive audience from offensive or

noted.[172] In addition, living areas like the dormitory and eating halls can be equated to the home.[173] And while students might be able keep away from scheduled events such as a visiting guest speaker, hate speech that springs up as students go about college life cannot usually be avoided. A minority/female student should not "have to risk being the target of racially assaulting speech every time she chooses to walk across campus."[174] Finally, as a normative matter, students should no more have to transfer to another school than employees should have to switch jobs (even assuming the possibility) in order to escape harassment. "The value and necessity of a college education warrant giving the campus the same protected status as the workplace."[175]

C. *Right to Vote*

A speaker's right to communicate to a captive audience may also be curbed if the speech interferes with a captive audience's voting. Here, the constitutional value at stake is the right to vote[176] – a right the Supreme Court has described as essential to a democratic society.[177] Indeed, "no right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[178]

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injurious speech"); Matsuda, *supra* note 165, at 2372 (arguing that students should be considered a captive audience).

[172] *See, e.g.*, Bonnell v. Lorenzo, 241 F.3d 800, 820-21 (6th Cir. 2001) (holding that students are captive to the professor in a classroom setting).

[173] *See, e.g.*, Battaglia, *supra* note 163, at 376 (explaining that a hate speech policy "may express greater concern with speech that occurs in a dormitory or classroom, or where there otherwise is a 'captive audience,' than with speech which occurs at scheduled rallies and public addresses").

[174] Lawrence, *supra* note 170, at 457. Nor should she have to hide in her room to avoid racial or sexual assault. *Id.* at 456.

[175] Lange, *supra* note 164, at 127. Indeed, as with the workplace, there is an element of economic coercion to a student's presence on campus: "[A] college education is no longer regarded as a luxury for the fortunate few but as a necessity for most high school graduates." *Id.* at 125 (quoting Charles A. Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1032 (1969)).

[176] Reynolds v. Sims, 377 U.S. 533, 554 (1964) ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear."); *see also id.* at 555 n.28 ("The Fifteenth, Seventeenth, Nineteenth, Twenty-third and Twenty-fourth Amendments to the Federal Constitution all involve expansions of the right of suffrage.").

[177] *Id.* at 555 ("The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.").

[178] Burson v. Freeman, 504 U.S. 191, 199 (1992) (Blackmun, J., plurality opinion) (citation omitted).

The right to speak and the right to vote freely cannot always be reconciled. In *Mills v. Alabama*,[179] the Supreme Court struck down as violating the First Amendment a ban on election-day editorial endorsements despite the ban's goal of "protect[ing] the public from confusive last minute charges and countercharges and the distribution of propaganda in an effort to influence voters on election day."[180] In contrast, in *Burson v. Freeman*,[181] the Court upheld a ban against solicitation of votes or distribution of campaign literature within 100 feet of an entrance to a polling place.[182] What explains the different results? The challenged laws in *Mills* and *Burson* were to some extent motivated by the same concern. Like *Mills*, *Burson* emphasized the right of voters to "vote freely"[183] and the need to protect voters from last-minute "confusion and undue influence."[184] However, unlike the voters in *Mills*, the voters in *Burson* could be described as a captive audience. A voter can easily avoid newspaper editorials on election day, but the same person cannot so readily evade campaigners at the polling site without some kind of protective buffer zone. And as a normative matter, people should not have to give up the right to vote in person in order to avoid a gauntlet of possibly intimidating electioneering.[185]

While the *Burson* Court did not invoke the captive audience doctrine,[186] and while most commentators focus on its application of strict scrutiny to a content-based restriction,[187] the captive audience analysis nonetheless applies. Some limited protection has also been recognized for captive audiences in

[179] 384 U.S. 214 (1966).

[180] *Id.* at 219.

[181] 504 U.S. 191 (1992).

[182] *Id.* at 211 (Blackmun, J., plurality opinion).

[183] *Id.* at 199 (quoting Reynolds v. Sims, 377 U.S. 533, 555 (1964)).

[184] *Id.* ("[T]his Court has concluded that a State has a compelling interest in protecting voters from confusion and undue influence."); *see also* Raleigh Hannah Levine, *The (Un)informed Electorate: Insights into the Supreme Court's Electoral Speech Cases*, 54 CASE W. RES. L. REV. 225, 281 (2003) (asserting that the *Burson* Court was concerned that "last-minute appeals" to voters would be "unduly influential, causing them to vote in a way that does not accord with what their own conception of their best interests would be").

[185] Part of the difference may also be that the State had an additional compelling interest: preventing fraud and preserving the integrity of its election process. *Burson*, 504 U.S. at 199 (Blackmun, J., plurality opinion).

[186] *Id.* at 198.

[187] *But see* Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 253 (1994) (describing the *Burson* decision as demonstrating "[t]he power of the First Amendment to shield listeners from intrusive messages"); William S. Dodge, *Weighing the Listener's Interests: Justice Blackmun's Commercial Speech and Public Forum Opinions*, 26 HASTINGS CONST. L.Q. 165, 203 (1998) ("In *Burson*, . . . Justice Blackmun's chief concern was with the 'captive audience' and the listener's right, under limited circumstances, not to receive information.").

union elections, which have often been analogized to political elections.[188] Specifically, employers cannot require employees to assemble and listen to anti-union speech that either threatens reprisals or promises benefits.[189]

In sum, several different constitutional values have been invoked to protect what are essentially captive audiences from unwanted speech. The official captive audience doctrine explicitly recognizes privacy, which encompasses both the right to tranquility and the right to make certain intimate decisions. Moreover, the doctrine can also be supported, in the proper circumstances, by the right to equal protection or by the right to vote.

III. THE FIRST AMENDMENT RIGHT AGAINST COMPELLED LISTENING

As discussed above, speakers' rights have been curtailed when a countervailing constitutional value – including privacy, equality, and voting – justifies protecting the captive listener against unwanted messages. This Part argues that a captive audience's right against compelled listening can be derived from the values underlying free speech itself. In other words, the tensions discussed in Part II represent not only a conflict between free speech and another constitutional value, but also a conflict within the First Amendment itself. Furthermore, this claim holds true regardless of whether one conceives of the primary purpose of free speech as creating a marketplace of ideas, enhancing participatory democracy, or promoting autonomy. It also holds true whether one accepts some degree of state paternalism or not. Finally, in addition to justifying limits on private speakers, the right against compelled listening renders constitutionally suspect government-mandated listening by captive audiences.

The right to speak is well known. So is its corollary right, the right against compelled speech – that is, the right not to speak. Less widely known, but no less established, is the right to listen. Indeed, as one commentator quipped, "without both a listener and a speaker, freedom of expression is as empty as the sound of one hand clapping."[190] What is not yet established is the right to listen's corollary, the right against compelled listening – that is, the right not to hear certain speech. The following table illustrates these dimensions:

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[188] *See, e.g.*, Alan Story, *Employer Speech, Union Representation Elections, and the First Amendment*, 16 BERKELEY J. EMP. & LAB. L. 356, 363 (1995) (observing that union elections have been "reconceptualized as analogous to political elections").

[189] *See* 29 U.S.C. § 158(c) (2006); Nat'l Labor Relations Bd. v. Gissel Packing Co., 395 U.S. 575, 616-20 (1969) (upholding a regulation against First Amendment challenge). Note, however, that the employer is allowed to make any other anti-union argument.

[190] Rodney A. Smolla, *Freedom of Speech for Libraries and Librarians*, 85 LAW LIBR. J. 71, 77 (1993).

Free Speech Rights

Speaker's Rights	**Listener's Rights**
Right to speak	Right to listen
Right against compelled speech	Right against compelled listening

Recognition of the right against compelled listening fills a gap in the jurisprudence. To understand why the First Amendment implies a right against compelled listening, it is first necessary to understand the justifications for the other three recognized rights. As argued below, the values underlying the three established free speech rights also support – and in fact require – an independent free speech right against compelled listening.

A. *Right to Speak*

The paradigmatic free speech right is the right to speak, and the paradigmatic free speech violation occurs when the government silences someone because of the content of her speech. While all agree that the First Amendment protects the right to communicate, not everyone agrees on why that should be the case. The three most commonly articulated goals of the Free Speech Clause are: (1) to create a marketplace of ideas; (2) to facilitate participatory democracy; and (3) to encourage autonomy, self-realization, and self-determination.[191] Some would privilege one goal over the others,[192] while others acknowledge that free speech may have multiple purposes.[193] All three models have received support in Supreme Court decisions and scholarly commentary.

1. To Create a Marketplace of Ideas

Among the best known justifications for guaranteeing freedom of expression is to create "a marketplace of ideas." This rationale, with its roots in the philosophies of John Milton and John Stuart Mill, entered American free speech jurisprudence with Justice Holmes's famous dissent in *Abrams v. United States*.[194] In criticizing the majority's decision to uphold a conviction

[191] *See, e.g.*, Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1305 (1998).

[192] *See, e.g.*, Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 593 (1982) (arguing that self-realization is the only value underlying the First Amendment and that it encompasses other values traditionally associated with the First Amendment).

[193] *See, e.g.*, Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 120 (1989) (arguing that any attempt to articulate a single unifying theory of free speech risks oversimplication).

[194] 250 U.S. 616 (1919).

for publishing inflammatory literature,[195] Justice Holmes wrote that "[t]he ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . That at any rate is the theory of our Constitution."[196]

If government censors expression, it might suppress ideas that are true or partly true.[197] Content discrimination is anathema to free speech because it may drive certain ideas or viewpoints out of the marketplace, thus impeding the search for the truth.[198] Even if false ideas enter the marketplace, the proper response is not censorship, but more speech that exposes their falsity: "We have nothing to fear from the demoralizing reasonings of some, if others are left free to demonstrate their errors . . . ."[199] In addition, responding to the false ideas sharpens the truth: "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"[200]

Though postmodernism has raised questions about the ability to discover ultimate truths,[201] the value of a free flow of information remains. Even if robust debate fails to lead to the discovery of truth per se, it can lead to greater

[195] *Id.* at 620 (affirming the conviction under the Espionage Act of five defendants who circulated pamphlets calling the President a coward and hypocrite and urging: "Workers of the World! Awake! Rise! Put down your enemy and mine!").

[196] *Id.* at 630 (Holmes, J., dissenting).

[197] JOHN STUART MILL, ON LIBERTY 20-21 (Stefan Collini ed., Cambridge Univ. Press 1989) (1859); Greenawalt, *supra* note 193, at 130 (describing the "Truth Discovery" justification for free speech).

[198] Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991); *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 894 (1995) (Souter, J., dissenting) ("[T]he prohibition on viewpoint discrimination . . . bar[s] the government from skewing public debate.").

[199] Whitney v. California, 274 U.S. 357, 375 n.2 (1927) (Brandeis, J., concurring); *see also id.* at 377 ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

[200] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279 n.19 (1964) (quoting MILL, *supra* note 197, at 20).

[201] *See, e.g.*, C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 974 (1978) ("[T]ruth is not objective."); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 25 ("[A]lmost no one believes in objective truth today."). *But see* Greenawalt, *supra* note 193, at 132 ("[V]irtually everyone accepts some notion of empirical truth that renders claims of truth something other than wholly subjective or relative.").

knowledge and the best perspectives or solutions for societal problems.[202] At the very least, open debate allows for better informed decision-making.[203]

While scholars and judges have pointed out numerous failures and shortcomings in the "marketplace of ideas" rationale,[204] ranging from unequal access to the marketplace[205] to the false assumption of rationality,[206] free speech proponents argue that the imperfect market is still better than the alternative: permitting the government to decide what is worth saying and hearing. Allowing the state to control the free flow of information invites self-serving, intolerant, or incompetent regulations.[207] Indeed, rather than faith in the marketplace of ideas, a presumptive distrust of government power and a fear of government-prescribed orthodoxies motivates many supporters of the

[202] Ingber, *supra* note 201, at 3.

[203] Rubin v. Coors Brewing Co., 514 U.S. 476, 497 (1995) (Stevens, J., concurring) ("[M]ore speech and a better informed citizenry are among the central goals of the Free Speech Clause.").

[204] *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 592 (1980) (Rehnquist, J., dissenting) ("There is no reason for believing that the marketplace of ideas is free from market imperfections any more than there is to believe that the invisible hand will always lead to optimum economic decisions in the commercial market."); Baker, *supra* note 201, at 965-66 ("Because of monopoly control of the media, lack of access of disfavored or impoverished groups, techniques of behavior manipulation, irrational response to propaganda, and the nonexistence of value-free, objective truth, the marketplace of ideas fails to achieve the desired results."); Ingber, *supra* note 201, at 15-16 (suggesting that the marketplace of ideas is as flawed as the economic market).

[205] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 786 (2d ed. 1988) ("Especially when the wealthy have more access to the most potent media of communication than the poor, how can we be sure that 'free trade in ideas' is likely to generate truth?"); Baker, *supra* note 201, at 978 (explaining the marketplace of ideas is improperly biased in favor of dominant groups); Ingber, *supra* note 201, at 38 ("Restriction of entry to the economically advantaged quells voices today that might have been heard in the time of the town meeting and the pamphleteer.").

[206] *See* Ingber, *supra* note 201, at 7 ("On the whole, current and historical trends have not vindicated the market model's faith in the rationality of the human mind . . . ."); Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1130 (1979) ("It is naïve to think that truth will *always* prevail over falsehood in a free and open encounter, for too many false ideas have captured the imagination of men."); *see also* Baker, *supra* note 201, at 976 ("Emotional or 'irrational' appeals have great impact . . . ."); Ingber, *supra* note 201, at 35-36 (explaining that social sciences have established the irrational elements of persuasiveness, so that the "market model's reliance on public rationality is, at best, misplaced").

[207] Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 635 (2004) ("[I]n acting to 'correct' the marketplace of ideas through speech regulation, the government is likely to fall prey to the problems of incompetence, entrenchment, and intolerance . . . .").

"marketplace of ideas" rationale.[208] In short, "the prospects for advancement of understanding are more promising in open climates than in closed ones."[209]

2. To Facilitate Democratic Self-Government

Another often espoused view is that the primary purpose of the Free Speech Clause is to facilitate the democratic process.[210] The Supreme Court has frequently stated that political speech lies at the core of the First Amendment.[211] Free speech furthers democratic self-government in at least two ways. First, freedom of expression makes possible an informed electorate. Second, it encourages citizens to participate in the political process.

According to Alexander Meiklejohn, because the state governs by consent of the voters, the voters need to be properly informed before they give their consent.[212] The Supreme Court has "long recognized that one of the central purposes of the First Amendment's guarantee of freedom of expression is to protect the dissemination of information on the basis of which members of our society may make reasoned decisions about the government."[213] Free speech allows citizens to learn about the public affairs of the day and to make informed political decisions. In addition, it makes possible criticism and

[208] *See, e.g.*, FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 86 (1982) (arguing that free speech protection is based in large part on the distrust of governmental power); Ingber, *supra* note 201, at 8 n.30 (asserting that an imperfect market is preferable to any method that relies on government determination); *see also* Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring) ("The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.").

[209] Kent Greenawalt, *Speech and Crime*, 1980 AM. B. FOUND. RES. J. 645, 672.

[210] *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 27 (1965) [hereinafter MEIKLEJOHN, POLITICAL FREEDOM] ("The principle of the freedom of speech springs from the necessities of the program of self-government. . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.").

[211] *See, e.g.*, Morse v. Frederick, 127 S. Ct. 2618, 2626 (2007) ("Political speech, of course, is 'at the core of what the First Amendment is designed to protect.'" (quoting Virginia v. Black, 538 U.S. 343, 365 (2003))); Boos v. Barry, 485 U.S. 312, 318 (1988).

[212] ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26-27 (1948) [hereinafter MEIKLEJOHN, FREE SPEECH].

[213] Connick v. Myers, 461 U.S. 138, 161 (1983) (Brennan, J., dissenting) (citing Mills v. Alabama, 384 U.S. 214, 218-19 (1966)); *see also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776-77 (1978) ("[T]here is practically universal agreement that a major purpose of the First Amendment was to protect the free discussion of governmental affairs." (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966))); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269-70 (1964) ("The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.").

exposés of those in the government.[214] In short, Free Speech Clause protection ensures access to the knowledge citizens need for "the voting of wise decisions."[215]

Free speech furthers democratic self-government not only by creating the conditions for a well-informed electorate, but also by facilitating participation in political debate. The opportunity for each citizen to participate in public discourse and in the formation of public opinion is vital to the legitimacy of the democratic state.[216] "What makes a culture democratic . . . is not democratic *governance* but democratic *participation*."[217] According to this theory, the First Amendment must "safeguard not only the right of the public to *hear* debate, but also the right of individuals to *participate* in that debate and to attempt to persuade others to their points of view."[218]

3. To Promote Individual Autonomy

A third reason to protect speech is that it promotes individual autonomy.[219] Whether or not the speech contributes to the marketplace of ideas or to

[214] Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964) (reasoning that free speech guarantees "embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials'" (quoting *Sullivan*, 376 U.S. at 270)). Widespread information about government activities also helps democracy flourish by making government more accountable to the electorate. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 528 (focusing on the importance of speech relating to government misconduct).

[215] MEIKLEJOHN, POLITICAL FREEDOM, *supra* note 210, at 26; *see also* Cass R. Sunstein, *Half-Truths of the First Amendment*, 1993 U. CHI. LEGAL F. 25, 25 ("[W]hatever else it is about, the First Amendment is at least partly designed to create a well-functioning deliberative democracy.").

[216] *See, e.g.*, Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CAL. L. REV. 2353, 2368 (2000) ("[T]he participatory approach understands the First Amendment . . . as safeguarding the ability of individual citizens to participate in the formation of public opinion."); *see also* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 604 (1982) ("[T]he First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican form of self-government.").

[217] Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 35 (2004); *see also* Wellington, *supra* note 206, at 1134.

[218] Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 193 (1973) (Brennan, J., dissenting).

[219] Many scholars have identified autonomy as a central value underlying the right to free speech. *See, e.g.*, Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 875 & n.1 (1994). Granted, "autonomy is a notoriously vague concept." David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 354 (1991)

participatory democracy,[220] it furthers individual autonomy in two distinct ways.[221] The right to freedom of expression, with its strong link to freedom of thought, encourages self-realization as well as self-determination.[222]

The value of freedom of thought and expression to individual self-realization is readily apparent. As Steven Heyman points out, people define themselves through the expression of their thoughts and feelings to others.[223] "The First Amendment serves not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression. . . . To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity."[224] Freedom of thought and expression also allows the speaker to develop her faculties and abilities.[225] For example, expression allows people "to clarify and better understand [their] own thoughts."[226] In short, respect for individual autonomy dictates protection for communication that expresses, defines, or develops the "self."[227]

[hereinafter Strauss, *Persuasion*]. Nonetheless, certain aspects can be described, if not completely pinpointed. *Id.*

[220] *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 n.12 (1978) ("The individual's interest in self-expression is a concern of the First Amendment separate from the concern for open and informed discussion, although the two often converge." (citing THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970))).

[221] *See, e.g.*, SCHAUER, *supra* note 208, at 48 (suggesting that individual development and individual choice are separate values).

[222] *See, e.g.*, Baker, *supra* note 201, at 966 (arguing that under a liberty theory, free speech should be protected because it fosters self-realization and self-determination); Christina E. Wells, *Reinvigorating Autonomy: Freedom and Responsibility in the Supreme Court's First Amendment Jurisprudence*, 32 HARV. C.R.-C.L. L. REV. 159, 159 (1997) (explaining that the Supreme Court believes "that freedom from government censorship is critical to our development as individuals and our capacity for self-governance").

[223] Heyman, *supra* note 191, at 1326; *see also* Police Dep't v. Mosley, 408 U.S. 92, 96 (1972) ("[T]o assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.").

[224] Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring); *see also* Herbert v. Lando, 441 U.S. 153, 183 n.1 (1979) (Brennan, J., dissenting in part) ("[F]reedom of speech is . . . intrinsic to individual dignity."). The classic account of human dignity derives from Kant. Kant argued that people are not just means to an end, but an end in themselves, and that they possess dignity and an absolute inner worth. *See* Heyman, *supra* note 191, at 1320 ("As an autonomous being, on the other hand, man 'is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself, that is, he possesses a *dignity* (an absolute inner worth).'" (quoting IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 434-35 (Lewis W. Beck trans., MacMillan Publishing Co. 2d ed. 1990) (1785))).

[225] *See* Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[T]he final end of the State [is] to make men free to develop their faculties . . . .").

[226] SCHAUER, *supra* note 208, at 55; *see also* Redish, *supra* note 192, at 604 (explaining that speech fosters self-realization "in that the very exercise of one's freedom to speak,

In addition, freedom of speech facilitates "the individual's control of his or her own destiny through making life-affecting decisions"[228] – another quality that furthers autonomy. Indeed, individual sovereignty and the sanctity of individual choice are central to traditional notions of human autonomy.[229] Frederick Schauer argues that the freedom of thought is really the only area where the individual is truly autonomous, and that this autonomy requires that the state not invade the private domain of the mind.[230] When the state silences us, it is "asking us to acquiesce in sovereignty over our minds, our rational capacities."[231] Thus, freedom of expression protects not only speech, but the inner life that it expresses.[232]

B. *Right to Listen and Receive Information*

Whichever theory one favors, all support the right to hear and receive information.[233] Indeed, as the Supreme Court and scholars have recognized, two of the three most prominent goals of free speech – to create a marketplace of ideas and to facilitate democratic self-government – will fail without the right to hear.[234] Similarly, the goals of self-realization and self-determination are much diminished when the state limits access to information.

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write, create, appreciate, or learn represents a use, and therefore a development, of an individual's uniquely human faculties").

[227] Baker, *supra* note 201, at 992.

[228] Redish, *supra* note 192, at 593.

[229] SCHAUER, *supra* note 208, at 68.

[230] *Id.*

[231] Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 236 (1992).

[232] Heyman, *supra* note 191, at 1326 ("To be free in a full sense, a person must be free not only externally, in his body and his relation to the external world, but also internally, with regard to his own inner life of thought and feeling, and in the expression of that inner life.").

[233] *See, e.g.*, Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. REV. 799, 800 (2006) (explaining that historically courts and commentators have been more focused on protecting speakers rather than readers but that "it is now well established that the First Amendment protects not only the rights of people to engage in speech but also the right of audiences to receive it"); Philip J. Cooper, *Rusty Pipes: The* Rust *Decision and the Supreme Court's Free Flow Theory of the First Amendment*, 6 NOTRE DAME J.L. ETHICS & PUB. POL'Y 359, 360 (1992) (observing that early Supreme Court cases focused on protecting unpopular speakers but that the Court has moved away from a speaker's right theory to emphasis on the free flow of information); Jamie Kennedy, *The Right to Receive Information: The Current State of the Doctrine and the Best Application for the Future*, 35 SETON HALL L. REV. 789, 789-90 (2005); Susan Nevelow Mart, *The Right to Receive Information*, 95 LAW. LIBR. J. 175, 175 (2003).

[234] Blitz, *supra* note 233, at 809; Thomas I. Emerson, *The First Amendment and the Right to Know: Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1, 2 (arguing

The Supreme Court has acknowledged that "[i]t would be a barren marketplace of ideas that had only sellers and no buyers."[235] Indeed, the marketplace of ideas collapses without listeners since the whole purpose of the marketplace is to make a variety of ideas, information, opinions, and arguments available to listeners for their consideration. Under this model, speech has little value if no listeners can hear and analyze it.

The free speech right to listen was brought to the forefront in *Lamont v. Postmaster General*.[236] Notably, the plaintiffs, who challenged a federal statute requiring the Post Office to hold foreign communist propaganda until the addressee requested that the mail be sent, were not the speakers but the recipients of the burdened speech.[237] The Court struck down the statute for violating the First Amendment.[238] In his concurring opinion, Justice Brennan expressly defended the right to listen: "[T]he protection of the Bill of Rights goes beyond the specific guarantees to protect from congressional abridgment those equally fundamental personal rights necessary to make the express guarantees meaningful. . . . I think the right to receive information is such a fundamental right."[239]

Listeners' rights have proven determinative in cases supporting a marketplace of ideas. Protection of commercial speech, for example, is founded not in a corporation's right to speak but in a consumer's right to hear and have access to an uncensored marketplace of ideas.[240] The marketplace of ideas goal clearly animated the Supreme Court's decision in *Virginia State*

that the right to receive information is essential for seeking the truth and decision-making in a democratic society); David A. Strauss, *Rights and the System of Freedom of Expression*, 1993 U. CHI. LEGAL F. 197, 201 (positing that most justifications for free speech are actually listener-based).

[235] Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

[236] 381 U.S. 301 (1965). Previously, the right to listen was mentioned only in passing. *See, e.g.*, Thomas v. Collins, 323 U.S. 516, 534 (1945) (striking down a requirement that paid union organizers register with the state before soliciting members and noting "that there was restriction upon Thomas' right to speak and the rights of the workers to hear what he had to say"); Martin v. Struthers, 319 U.S. 141, 143 (1943) (striking down a ban on ringing doors to distribute leaflets and stating that freedom of speech "embraces the right to distribute literature . . . and necessarily protects the right to receive it").

[237] *Lamont*, 381 U.S. at 308 (Brennan, J., concurring).

[238] *Id.* at 307 (majority opinion).

[239] *Id.* at 308 (Brennan, J., concurring).

[240] *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) (holding protection of commercial speech "is justified principally by the value to consumers of the information such speech provides"); *see also* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 756 (1976) (explaining that to the extent the First Amendment protects the flow of drug price information, "it is a protection enjoyed by the appellees as recipients of the information, and not solely, if at all, by the advertisers themselves who seek to disseminate that information").

Board of Pharmacy v. Virginia Citizens Consumer Council.[241] There, a Virginia statute prohibited licensed pharmacists from advertising the prices of prescription drugs.[242] As in *Lamont*, the plaintiffs were the potential audience, not the silenced speakers.[243] The Court struck down the statute on the grounds that it impeded a free flow of commercial information – information that helps ensure that consumers' economic decisions are intelligent and well-informed.[244] The Court even claimed that a consumer's interest in the free flow of commercial information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[245]

The right of a listener to receive information is also key to participatory democracy. Democratic decision-making, after all, is about citizen listeners making informed and intelligent evaluations and judgments: "[A] people who mean to be their own governors[] must arm themselves with the power knowledge gives."[246] Indeed, Alexander Meiklejohn would privilege listeners over speakers.[247] According to Meiklejohn, what improves democratic self-rule is not the quantity of speech but its quality, so that "[w]hat is essential is not that everyone shall speak, but that everything worth saying shall be said."[248]

Supreme Court decisions advancing the democratic self-government goal have been grounded in listeners' rights. In *First National Bank of Boston v. Bellotti*,[249] for example, the Court declared unconstitutional a state law forbidding banks and corporations from spending money in order to influence referendum votes on issues unrelated to their business.[250] The Court invalidated the law not because these entities had a free speech right to speak, but because the people had a free speech right to hear all views on matters of

[241] 425 U.S. 748 (1976).

[242] *Id.* at 749-50.

[243] *Id.* at 748. In finding that plaintiffs had standing, the Court wrote that "the protection afforded is to the communication, to its source and to its recipients both." *Id.* at 756.

[244] *Id.* at 765 ("It is a matter of public interest that [private economic] decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.").

[245] *Id.* at 763.

[246] Emerson, *supra* note 234, at 1 (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822), *reprinted in* 9 WRITINGS OF JAMES MADISON 103 (G. Hurst ed. 1910)); *see also id.* at 14 ("The public, as sovereign, must have all information available in order to instruct its servants, the government.").

[247] *See id.* at 4 (arguing that Meiklejohn's theory makes the right to know the sole touchstone in the interpretation of the First Amendment).

[248] MEIKLEJOHN, FREE SPEECH, *supra* note 212, at 25.

[249] 435 U.S. 765 (1978).

[250] *Id.* at 767. The banks and corporations wanted to campaign against a proposed constitutional amendment authorizing a graduated personal income tax. *Id.* at 769.

public import.[251] The Court held that the contested speech was the type "indispensable to decisionmaking in a democracy."[252] Consequently, it was irrelevant if speech that informed the public was made by a corporation or by an individual.[253] Similar reasoning led the Court, in *Consolidated Edison Co. of New York v. Public Service Commission*,[254] to strike down a statute barring utility companies from including in their bills inserts discussing controversial public policy issues.[255] As the Court itself later observed: "In both [the *Belloti* and *Consolidated Edison*] cases, the critical considerations were that the State sought to abridge speech that the First Amendment is designed to protect, and that such prohibitions limited the range of information and ideas to which the public is exposed."[256] In short, for this aspect of democratic self-government,[257] the focus is protecting citizens' right to hear arguments, not entities' rights to make them. While the extent of the right to hear and receive information – whether it creates positive rights as well as negative rights[258] and whether it should trump other free speech rights[259] – is subject to debate, there is no denying its existence as essential to free speech.

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[251] The Court determined that the principal question was not whether and to what extent corporations have First Amendment rights, but whether the challenged statute abridged expression that the First Amendment was meant to protect. *Id.* at 775-76.

[252] *Id.* at 777.

[253] *Id.*

[254] 447 U.S. 530 (1980).

[255] *Id.* at 533-35. ConEd wanted to include pro-nuclear power inserts in its bills. *Id.* at 532.

[256] Pacific Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1, 8 (1986).

[257] The other way free speech encourages democratic self-rule – by granting everyone the opportunity to participate in political discourse – is less audience-focused. *See supra* notes 216-218 and accompanying text.

[258] Each free speech right can be formulated as a negative or positive right. In the negative rights version of the right to speak, the state cannot censor a speaker. In the positive rights version, the state must affirmatively help speakers communicate. The right to receive information can be a negative right limited to a right against state interference with communication, or a positive right requiring the state to facilitate and perhaps subsidize dissemination of information. Constitutional rights in the United States are usually limited to negative rights. *See, e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) ("The [Due Process] Clause is phrased as a limitation on the State's power to act. . . . [I]ts language cannot fairly be extended to impose an affirmative obligation on the State."); Ginsburg, *supra* note 115, at 384 ("[O]ur Constitution's Bill of Rights places restraints, not affirmative obligations, on government . . . .").

[259] In a few broadcasting cases, the Supreme Court privileged listener rights over speaker rights. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), for example, upheld the FCC's fairness doctrine which required broadcasters to grant equal time to conflicting viewpoints, especially on controversial public issues. The Court insisted that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount." *Id.* at 390; *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636-37 (1994) (requiring cable operators to set aside channels for designated broadcast signals); CBS, Inc. v. FCC,

The right to hear and receive information is also important for both the self-realization[260] and the self-determination[261] aspects of individual autonomy. Receipt of information is critical to self-realization because "individuals may develop their personal and intellectual faculties by *receiving*, as well as by expressing."[262] For example, hearing multiple views gives people the chance to develop and practice the skill of evaluating ideas.[263]

Receiving information is also crucial to self-determination and making informed choices that affect one's destiny.[264] Indeed, the right to hear is arguably more important than the right to speak for this vital component of autonomy. After all, one can hardly be considered autonomous and fully realized if forced to make important personal choices with inadequate information. Consequently, a free flow of information is just as necessary to make life-altering decisions as it is to make political decisions.[265] As Charles Fried has observed: "Our ability to deliberate, to reach conclusions about our good, and to act on those conclusions is the foundation of our status as free and rational persons."[266] Similarly, David Strauss argues that denying information in order to influence people's behavior works the same kind of wrong as lying to someone: it interferes with a person's control over their own reasoning and it attempts to control the audience's mental processes.[267] In sum, respecting autonomy means no government should have the ability to manipulate the

453 U.S. 367, 396-97 (1981) (upholding an FCC rule requiring broadcasters to grant reasonable air time to qualified federal political candidates). Outside of broadcasting, however, the Court is less willing to curtail or regulate speech in order to improve its quality. *See, e.g.*, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (striking down the right-of-reply rule as applied to newspaper editorials).

[260] Free speech encourages the development of one's human faculties. *See* Redish, *supra* note 192, at 627.

[261] Free speech ensures availability of information necessary to make decisions affecting one's destiny. *Id.* at 593.

[262] *Id.* at 620; *see also* Blitz, *supra* note 233, at 803 (arguing that reading also aids self-development); Heyman, *supra* note 191, at 1328 ("The concept of self-determination also includes . . . a right to receive images and ideas from the external world and to use them to form one's internal self.").

[263] SCHAUER, *supra* note 208, at 55.

[264] Redish, *supra* note 192, at 593.

[265] *Id.* at 604.

[266] Fried, *supra* note 231, at 233; *see also id.* ("[M]y status as a rational sovereign requires that I be free to judge for myself what is good and how I shall arrange my life . . . .").

[267] Strauss, *Persuasion*, *supra* note 219, at 355-56; *see also* Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 215 (1972) ("To regard himself as autonomous . . . a person must see himself as sovereign in deciding what to believe and in weighing competing reasons for action.").

decision-making process and distort the individual's ultimate decision by preventing her from hearing one side of an issue.[268]

Thus, the right to hear and receive information is essential to the health of the marketplace of ideas and democratic deliberation, and it is also essential to individual flourishing and decision-making.

C. *Right Against Compelled Speech*

The right against compelled speech is firmly established in First Amendment jurisprudence: "[F]reedom of thought protected by the First Amendment . . . includes both the right to speak freely and the right to refrain from speaking at all."[269] The government cannot force individuals to affirm beliefs and messages against their wishes. The state cannot, for example, force schoolchildren to pledge allegiance to the United States flag,[270] make Jehovah's Witnesses bear the state's motto on their car license plate,[271] or require private parade organizers to sponsor a pro-gay and lesbian message.[272] Forcing someone to speak or support a message not their own has several negative consequences. Most obviously, it offends the autonomy of the speaker, interfering with her self-realization and undermining the freedom of thought necessary for independent decision-making. Furthermore, by misrepresenting the speaker's true point of view, compelled speech distorts the marketplace of ideas and democratic deliberation.

As the Supreme Court has explained, forcing speakers to affirm values contrary to their own "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."[273] More specifically, the use of the state's power to compel someone to speak its message "violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."[274] It seems self-evident that forcing an individual to foster an

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[268] SCHAUER, *supra* note 208, at 68-69.

[269] Wooley v. Maynard, 430 U.S. 705, 714 (1977); *see also* Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Group of Boston, 515 U.S. 557, 573 (1995) (explaining that the First Amendment protects the right to decide what to say and what not to say); Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796-97 (1988) (explaining that the freedom of speech guaranteed by the First Amendment comprises the decision of both what to say and what *not* to say); W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 645 (1943) (Murphy, J., concurring) ("The right of freedom of thought . . . guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all . . . .").

[270] *Barnette*, 319 U.S. at 642.

[271] *Wooley*, 430 U.S. at 717.

[272] *Hurley*, 515 U.S. at 559.

[273] *Barnette*, 319 U.S. at 642.

[274] *Hurley*, 515 U.S. at 573; *see also id.* at 576 (concluding that forcing a speaker to disseminate a view she disagrees with compromises the speaker's right to autonomy); Baker, *supra* note 201, at 1000 ("[R]espect for the integrity and autonomy of the individual

idea she finds objectionable is offensive, even if no one knows it.[275] Compounding the affront to the compelled speaker's dignity is the risk that people will misperceive the speaker's true beliefs.[276] In short, we can hardly consider ourselves autonomous individuals without the right to determine how we express and present ourselves to the world.[277]

Nor can the capacity for self-realization and self-determination, both central to our notion of human autonomy, flourish if the state injects itself into our thought processes. Recall that speech furthers the self-development of the speaker by allowing her to express her emotions and ideas, and in doing so, refine and elaborate upon them.[278] Compelled speech short-circuits that process. As for self-determination, Seana Shiffrin postulates that compelled speech can illegitimately influence the autonomous thinking process of the compelled speaker.[279] Compelled speech "may come to exert an influence on the thoughts . . . of the speaker in a way that surreptitiously bypasses the agent's conscious consideration and does not reflect her sincere deliberation about the matter."[280] It is one thing to be persuaded to change one's belief; it is quite another to have it changed by evading the ordinary means of rational thought that ideally shapes one's beliefs.[281]

usually requires giving each person at least veto power over the use of her own body and, similarly, over her own speech.").

[275] *See Wooley*, 430 U.S. at 715 ("The First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable."). For example, even if no one else saw the schoolchildren unwillingly pledge allegiance to the flag, the forced speech would still offend their autonomy.

[276] For example, Tobias Barrington Wolff argues that the "Don't Ask, Don't Tell" military policy leads to a compelled affirmation of heterosexuality for gay and lesbian service members. Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military's Don't Ask, Don't Tell Policy*, 63 BROOK. L. REV. 1141, 1144 (1997); *see also* Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147, 153 (2006); Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 637-38 (2008).

[277] Heyman, *supra* note 191, at 1336 ("Coerced expression . . . does violence to the autonomy and dignity of the self. Thus the right to self-expression includes the capacity to determine whether, how, and to whom one wishes to express oneself.").

[278] *See supra* notes 223-227 and accompanying text.

[279] Seana Valentine Shiffrin, Essay, *What Is Really Wrong with Compelled Association*, 99 NW. U. L. REV. 839, 840 (2005).

[280] *Id.* at 859. For example, persistent use of the male pronoun for a generic person may make the speaker (and listener) assume that a person with an unknown gender is male. *Id.* at 855. Even if the words are spoken without conviction, the cognitive dissonance that results may exert a subtle pressure on the speaker to conform her thoughts and utterances. *Id.* at 859.

[281] *See* Alexander, *supra* note 276, at 154.

While less obvious, compelled speech also undermines the marketplace of ideas and deliberative democracy rationales for freedom of speech.[282] In *Miami Herald Publishing Co. v. Tornillo*,[283] for example, the Supreme Court struck down a right-of-reply law requiring that newspapers print responses by candidates it censured.[284] The Court worried that compelling the newspapers to run responses would chill the papers' willingness to criticize in the first place.[285] As a result, political and electoral coverage would be blunted, and the variety and vigor of public debate would be dampened.[286]

Compelled speech also distorts the marketplace of ideas and democratic decision-making by misrepresenting the views of speakers forced to propound a viewpoint that is not their own. A compelled speaker's audience may not realize that the speaker's advocacy was compelled by the state. By making it seem that private speakers favor a certain viewpoint, the government manipulates the marketplace by making its message appear more popular than it actually is – and studies show that the perceived popularity of a message can increase its persuasiveness.[287] The manipulation is especially problematic if the compelled speaker is a trusted or authoritative figure because it allows the government to add a patina of trustworthiness and expertise to its message.[288] Imagine the increased persuasiveness when, in lieu of a government campaign, the government can force a physician to tell her pregnant patient that she should carry to term when asked about abortion,[289] or force a scientist to claim that the evidence of global warming is inconclusive.[290] Even absent misattribution, government interference cannot be salubrious to the

[282] Laurent Sacharoff argues that the detrimental impact on listeners is the primary harm wrought by compelled speech. Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 333 (2008).

[283] 418 U.S. 241 (1974).

[284] *Id.* at 258.

[285] *Id.* at 257.

[286] *Id.* For similar reasons, the Court held that pamphlet authors should not be compelled to identify themselves. Talley v. California, 362 U.S. 60, 65 (1960); *see also id.* at 64 ("There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression.").

[287] *See* Corbin, *supra* note 276, at 668-69; Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1011-13 (2005) (citing studies showing that individuals are more likely to adopt views perceived to be popular).

[288] *See* Corbin, *supra* note 276, at 668; Lee, *supra* note 287, at 1001-02 (citing studies showing that the more credible the speaker, the more persuasive the speaker's message).

[289] *Cf.* Corbin, *supra* note 276, at 669-70 (arguing that the gag rule upheld in *Rust v. Sullivan*, 500 U.S. 173 (1991), which barred doctors from mentioning abortion but allowed them to provide prenatal references, may lead the patient to believe that her doctor thinks carrying to term is the best option for her).

[290] *See* Sacharoff, *supra* note 282, at 385-86 (arguing that listeners are far more likely to be persuaded that the government's position is correct if it forces a scientist to espouse the government's partisan message).

marketplace of ideas and political discourse. As the Supreme Court noted in one compelled speech case, "free and robust debate cannot thrive if directed by the government."[291]

Thus, compelled speech not only offends the compelled speaker's autonomy and impedes her self-development and self-determination, but it also distorts the marketplace of ideas and undermines political deliberation.

D. *Right Against Compelled Listening*

The same values that undergird the traditional free speech rights support a right against compelled listening.[292] When the government forces its arguments or information onto unwilling recipients, it can distort the proper functioning of the marketplace of ideas and undermine democratic decision-making by the people. More obviously, though, when the government makes a captive audience listen against its will to a government message, it runs roughshod over individuals' right to control their own development and decision-making processes. As a result, the right against compelled listening is most strongly grounded in the First Amendment values of autonomy, self-realization, and self-determination.

As a doctrinal matter, the proposed right against compelled listening builds on the captive audience doctrine. A principal difference between the existing doctrine and the free speech right against compelled listening is that while the captive audience doctrine is conceived as a limit on private speech, a constitutional right against compelled listening limits the government.[293] That difference aside, the elements required to establish a compelled listening case are similar to a captive audience claim: the listener must be a captive audience in the descriptive and normative sense.

First, as with captive audience doctrine, the listener must be unable to readily avoid the government's speech. In other words, the government need not stop speaking anytime someone in listening range would rather not hear its message. Thus, the right against compelled listening does not preclude the government from advocating policy positions or launching public education campaigns. Instead, protection against unwanted speech only attaches when there is captivity. If the government wants to run magazine advertisements detailing the dangers of smoking, it may do so as long as it does not make reading them mandatory. The state violates the right against compelled listening only when the government's message crosses over from available to

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[291] Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 791 (1988).

[292] *See Black*, *supra* note 7, at 967 (arguing that freedom from unwanted speech rests on the same values as those classically invoked to support freedom of speech in the usual sense); Taylor, *supra* note 7, at 212 ("The captive audience doctrine arises from the same first amendment values which serve to protect freedom of speech.").

[293] Of course, once established as a constitutional right against the government, a right against compelled listening could also limit private speakers.

required viewing. The magazine advertisements would not qualify because people can easily avert their eyes from them.

Second, as a normative matter, the listener should not have to forfeit the ability to be somewhere or do something in order to avoid hearing the government's message. Rather than having to establish that privacy, equality, or the right to vote is jeopardized before the unwilling listener can assert a right not to listen, the listener could satisfy this element by demonstrating that one of the core free speech values is impeded by the state's mandated listening, such as the listener's decision-making autonomy or the free flow of information crucial to the marketplace of ideas and political deliberation. As discussed below, whether paternalistic state-compelled listening enhances or diminishes autonomy is subject to dispute, as is the degree to which the state can be trusted to regulate the flow of information.[294] Such disputes give rise to potentially different delimitations of the right against compelled listening.[295]

As with any free speech right, the right against compelled listening is not absolute. Government action frequently implicates free speech rights without violating them.[296] Instead, the same levels of scrutiny applicable to the other free speech rights should likewise apply.[297] For example, conduct regulations that incidentally require compelled listening would be subject to a lower level of scrutiny,[298] but viewpoint-based compelled listening would be unconstitutional unless it passes strict scrutiny.[299] If strict scrutiny applies, the state can override the listener's free speech rights and impose a viewpoint-based message only if the state's interest is compelling, such as preventing harm to others, and its means are narrowly tailored.

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[294] *See infra* Part III.D.1.c.

[295] Paternalism can be posited as either a compelling state justification or, as discussed below, a reason why compelled listening does not infringe autonomy and free speech rights in the first place. *See infra* notes 339-341 and accompanying text.

[296] Examples abound. The state bans speech that amounts to a crime, such as fraud or threats. *E.g.*, Donaldson v. Read Magazine, 333 U.S. 178, 190-91 (1948). It imposes content-neutral time, place, and manner restrictions. *E.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 797 (1989). Indeed, government frequently regulates conduct even if it has an incidental effect on speech, provided the aim is not controlling speech. *E.g.*, United States v. O'Brien, 391 U.S. 367, 376-77 (1968). And it may regulate speech directly if the regulation passes the appropriate level of scrutiny. *E.g.*, Sable Comm., Inc. v. FCC, 492 U.S. 115, 126 (1989).

[297] Some of the same perplexing questions that bedevil other areas of free speech jurisprudence also arise with the right against compelled listening. For example, to what degree may the government abridge free speech rights as a condition of government funding? Is the government the speaker for First Amendment purposes of, for example, a message on government property? Is it a speaker when it sponsors a private speaker, or in other examples of mixed private and government speech? It is beyond the scope of this Article to address these perennially challenging free speech issues.

[298] *See* Arcara v. Cloud Books, 478 U.S. 697, 706 (1986); *O'Brien*, 391 U.S. at 276-77.

[299] *See Sable*, 492 U.S. at 126.

1. Violation of Autonomy

In compelled speech cases, the Supreme Court has recognized that "[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"[300] In other words, rather than merely protecting outward expression, freedom of speech is understood to protect a certain inner self.[301] The autonomy of this inner self can be violated when the state fails to treat individuals as rational agents capable of weighing competing arguments and deciding what to believe and assert. Just as violating the established free speech rights invades a personal sphere that should be free of government coercion, so does forcing a government message onto an unwilling captive audience.[302]

In the words of the Supreme Court: "[A]t the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State."[303] Free speech doctrine already recognizes several ways government can illegitimately coerce this inner core: by silencing a speaker, compelling a speaker, or keeping information from a listener.[304] All of these free speech checks on government power recognize that the state acts unconstitutionally when it fails to treat adults as rational agents, with the right to think their own thoughts, contribute to discourse, and make their own decisions. It is time free speech jurisprudence recognize that the autonomous, self-realizing, self-governing individual can also be coerced by compelled listening. As Steven Heyman has argued, "[t]he inner self is inviolable; any intrusion into it, or attempt to expose it to others against its will, does violence to this inner freedom."[305]

Compelled listening can interfere with individual autonomy in two distinct ways. First, it interferes with *the decision-making process* by not allowing adults to choose what information to consider in developing their thoughts and making up their minds. "The autonomous agent must have some ability to control what influences she is exposed to."[306] Second, by forcing particular information onto unwilling listeners, compelled listening can unduly influence *the ultimate decision* made.

There are several possible responses to a claim that there is a right against state-compelled listening based primarily upon notions of individual autonomy. One is that the government's greater power to forbid certain activities includes the lesser power to try and convince people to abstain from

[300] Riley v. Nat'l Fed'n of Blind of N.C., Inc., 487 U.S. 781, 797 (1988) (quoting Wooley v. Maynard, 430 U. S. 705, 714 (1977)).

[301] *See* Heyman, *supra* note 191, at 1327.

[302] *See* Black, *supra* note 7, at 966-67; Taylor, *supra* note 7, at 216.

[303] Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234-35 (1977).

[304] *See supra* Parts III.A-C.

[305] Heyman, *supra* note 191, at 1327.

[306] Shiffrin, *supra* note 279, at 875.

them. Another is that today's expansive regulatory state invariably influences the socially constructed self, and, therefore, it is impossible to separate legitimate government influences from unconstitutional government influences. Finally, one can argue that, unlike censoring information, providing more information can only improve a listener's self-development and decision-making process and therefore compelled listening actually enhances autonomy. I address each of these arguments in turn.

a. *Greater Power to Ban Includes Lesser Power to Dissuade*

One can argue that if the government can legitimately outlaw an activity, like smoking or discrimination or abortion, then it should be able to discourage people from undertaking these activities. After all, the ability to prohibit an activity outright would seem to be a greater power than the ability to merely engage in persuasion. Does the greater power to ban necessarily include the lesser power to dissuade?

One answer is that the government cannot legitimately outlaw all activities that it frowns upon, and as a result does not possess the greater power in those cases. The state cannot, at present, bar a woman from terminating an unwanted pregnancy before viability.[307] Another answer is that even if the state could constitutionally outlaw an activity in toto (such as heroin use), speech about the banned subject is still protected by the First Amendment;[308] while there may be no right to use heroin, there exists a right to talk about heroin.[309]

Still another reason is that regulating conduct imposes a different and in some ways less intrusive control over people than regulating their thought processes. It is a distinct kind of affront. Regulating the activity still leaves citizens free to criticize the policy and argue for its change. Regulating information, whether at the point of expression or reception, makes this difficult if not impossible.[310] When the state controls speech, it is "asking us to acquiesce in sovereignty over our minds, our rational capacities. That is a deeper kind of subordination than [restricting action,] which at least leaves us free to judge that what the state has done is wrong."[311] Or, put more bluntly, it is the difference between behavior control and thought control.[312] As David

[307] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992). The vast majority of abortions occur in the early weeks of pregnancy. *See infra* note 451.

[308] In other words, the ability to ban conduct does not make the right to free speech disappear.

[309] Even assuming the government speech regulation survived First Amendment scrutiny, it does not negate the existence of the free speech right that demanded heightened scrutiny of the regulation.

[310] Carpenter, *supra* note 207, at 644.

[311] Fried, *supra* note 231, at 236.

[312] Strauss, *Persuasion*, *supra* note 219, at 359-60 (calling thought control an "odious notion" and explaining that it is worse than behavior control).

Strauss argues, imagine if "the government could manipulate people's minds directly, by irradiating them in a way that changed their desires. No one would say that the power to ban an activity automatically included the 'lesser' power to irradiate people so that they no longer had the desire to engage in that activity."[313]

Indeed, the Supreme Court has explicitly challenged the claim that the power to regulate conduct is greater than the power to regulate speech: "[W]e think it quite clear that banning speech may sometimes prove far more intrusive than banning conduct."[314] Accordingly, while the Supreme Court has flirted with the notion that the greater power to regulate conduct includes the lesser power to regulate speech,[315] it has ultimately rejected it.[316]

b. *Reliance on Unrealistic Idea of the Self*

Another criticism of an autonomy-based argument for the right against compelled listening is that it relies too much on the liberal idea of a self separate and apart from culture, and thus fails to realize that who we are is a social construct. There is no completely autonomous, rational self apart from society.[317] In other words, we cannot help but be constituted and influenced by what we are exposed to and by, inter alia, our racial, social, and economic status. Given government's overwhelming presence in almost all aspects of contemporary life, there is no effective way to eliminate government influences on one's development and decision-making. If that is the case, how is it ever possible to determine where legitimate government influences end and illegitimate government influences begin? The first rejoinder is that even if the self is not a purely autonomous and rational self that stands outside the world, that does not mean it is without any agency or ability to engage in self-evaluation.[318] As Richard Fallon observes, "the self is a creature in and of the world, but one capable of at least partially transforming herself through thought, criticism, and self-interpretation."[319] Second, just as agency is not a

[313] *Id.* at 360.

[314] 44 Liquormart v. Rhode Island, 517 U.S. 484, 511 (1996) (Stevens, J., plurality opinion).

[315] *See* Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 345-46 (1986) (holding that the greater power to ban casino gambling included the lesser power to ban advertisements for it). In *Posadas*, the Court was dealing with commercial speech, which had traditionally received less protection under the First Amendment. *Id.*

[316] *See 44 Liquormart*, 517 U.S. at 510-11 (Stevens, J., plurality opinion) (addressing commercial speech and rejecting the State's argument that its power to ban alcoholic beverages must include the power to restrict advertisements offering them for sale).

[317] *See* Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2508 (1992).

[318] *See* Fallon, *supra* note 219, at 887-88.

[319] *Id.* at 888.

binary all-or-nothing proposition,[320] neither is government influence. In other words, "all influences are legitimate" or "all influences are illegitimate" are not the only choices. The situated self still has agency that can be violated.

c. *More Information Enhances Rather than Diminishes Autonomy*

A third argument against an autonomy-based right against compelled listening is that more information can only enhance decision-making, and therefore claims about infringing on an individual's self-development and sovereignty are misplaced. In other words, paternalistic compelled listening ultimately promotes autonomy.[321] Compelled listening might promote autonomy by providing information a rational decision-maker would find useful before making a choice, such as the pros and cons of each option before her. Compelled listening might also promote autonomy by influencing the decision-maker to make an agency-affirming choice, like avoiding addiction to cigarettes. Whether these arguments hold true depend both on one's vision of the autonomous agent and on the content of the state-mandated information.

At the outset, it must be recognized that paternalistic speech regulations have a slightly different focus than regulations meant to improve the quality of speech. Paternalist regulations aim to help the person whose rights are restricted.[322] The quintessential paternalistic speech regulation controls speech in order to prod individuals to make better decisions, or perhaps think better thoughts. Thus, a paternalistic speech regulation might curtail speech in the belief that hearing certain information is not in the audience's own best interests.[323] Examples include bans on advertisements pitching a product the government deems harmful to the listener, like alcohol or cigarettes. Or a paternalistic speech regulation might compel the listener to learn certain information deemed essential, such as the government-determined risks of drinking, smoking, gambling, abortion, homosexuality, or teenage sex. In contrast, a quality regulation is one that tries to improve the overall level of discourse. Barring inaccurate and misleading advertisements, curtailing campaign contributions to prevent the most powerful from dominating the debate, and requiring news media to present both sides of an issue are well known examples. Notably, paternalistic regulations (smoking is bad) are

[320] JOSEPH RAZ, THE MORALITY OF FREEDOM 156 (1986).

[321] Fallon, *supra* note 219, at 877 ("[P]aternalism can sometimes be defended as a means of preserving or promoting autonomy.").

[322] The classic definition of paternalism is: "[I]nterference with a person's liberty of action justified by reasons referring exclusively to the welfare, good, happiness, needs, interests or values of the person being coerced." Gerald Dworkin, *Paternalism*, *in* MORALITY AND LAW 107, 108 (Richard A. Wasserstrom ed., 1971).

[323] Dale Carpenter defines paternalism in the free speech context as "a restriction on otherwise protected speech justified by the government's belief that speaking or listening to the information in the speech is not in citizens' own best interests." Carpenter, *supra* note 207, at 615.

usually viewpoint-based, while regulations to improve discourse (no campaign contributions over a certain amount) are more likely to be viewpoint-neutral or even content-neutral.

Does compelled listening necessarily compromise autonomy? The answer depends on both the content of the government message as well as on one's tolerance for a certain level of paternalism – in short, how one envisions the boundaries of the sovereign self. There are two main approaches to determining whether paternalistic compelled listening implicates the free speech right against compelled listening.[324] According to one approach, any paternalistic compulsion by the government insults individual autonomy. Under this approach, the right against compelled listening is implicated anytime the state forces an unwilling captive audience to hear its message, regardless of its content. Current free speech jurisprudence, which has unequivocally rejected paternalism, embraces this strong view of autonomy.[325] But not everyone agrees with this view, which I call the "categorical" approach to defining the right against compelled listening. Under an alternative approach, a slight infringement on individual autonomy is justified if the government is attempting to boost autonomy overall.[326] In the speech context, whether mandatory listening enhances autonomy overall depends on the content of the government's message. This requires a more contextual analysis in order to determine whether the right against compelled listening is implicated. I refer to this approach as the "contextual" approach.

For those who favor the categorical approach, all paternalistic regulations cross the line. Any compulsion by the government "for your own good"[327] is an insult to agency. As John Stuart Mill argued, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."[328] Thus, a state requirement that cigarette buyers certify that they have seen a short government-approved documentary about the physical harms of smoking would implicate the right against compelled listening.[329] Under this view, if the only person at risk when a

[324] Recall that implicating the right does not necessarily equate to violating the right. *See supra* note 296 and accompanying text.

[325] As discussed in the next Subsection, *see infra* Part III.D.2, paternalism is also shunned in free speech jurisprudence because of the risks inherent in the government presuming to know best.

[326] *See infra* notes 339-341 and accompanying text.

[327] Compulsion for the good of someone else also curtails autonomy but may nonetheless be justified.

[328] MILL, *supra* note 197, at 13; *accord* Carpenter, *supra* note 207, at 579 ("There is widespread liberal revulsion against paternalism." (citing David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519, 519 (1988))).

[329] In other words, in order to make a purchase, smokers would have to provide not just proof of age, but also proof of government education.

cigarette is lit is the smoker, the government should mind its own business.[330] If a smoker wishes to learn about the perils of tobacco, she can look it up on the Internet.

This understanding of agency insists on complete control over the decision-making process and contemplates not just the right to make rational, fully informed, wise decisions, but also the right to make what others would consider foolish decisions. While some seemingly unreasonable choices may not be irrational for that particular person, even if they are, it is the individual's decision to make. As Seana Shiffrin writes, freedom of speech "encompasses a right to resist certain forms of mental interference and mind control and to make up one's own mind, even if the exercise of that right may sometimes lead a person to ignore important information, to emerge with incorrect judgments, and to make poor decisions."[331] Just as laws restricting information from reaching individuals amounts to a government attempt to substitute its thoughts and moral judgments for those of its citizens,[332] laws foisting information onto unwilling captive listeners amounts to a government attempt to substitute its thoughts and moral judgments for those of its citizens. Such compelled listening undermines the integrity of thought processes essential to our capacity for autonomy.[333] Part of being an autonomous decision-maker is deciding what information is relevant for one's decision. It is not just the ultimate decision that must be respected, but also the decision-making process itself. It only adds insult to injury if the government tries to influence the ultimate decision as well.

Numerous scholars have observed that the Supreme Court clearly rejects paternalism in its free speech decisions.[334] As Christina E. Wells noted, "the government often regulates speech because it does not trust individuals to

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[330] Some could argue, however, that anti-smoking efforts seek to protect others (e.g., non-smokers who are exposed to second-hand smoke) and, perhaps, society at large, which is burdened with higher healthcare insurance costs from smoking. In other words, even where compelled speech looks paternalistic, the behavior it targets may generate externalities affecting people beyond the individual directly engaging in the behavior.

[331] Shiffrin, *supra* note 279, at 874; *see also* Fallon, *supra* note 219, at 893 (arguing that we experience "ourselves as moral agents, with both the capacity and the right to make decisions for ourselves, even when those decisions are insufficiently informed, self-aware, or self-critical").

[332] *See* Wells, *supra* note 222, at 175.

[333] *Id.* at 169.

[334] *See* Carpenter, *supra* note 207, at 581 ("Commentators generally agree the First Amendment is hostile to paternalism."); Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 213 (1983) [hereinafter Stone, *Content Regulation*] ("[G]overnment ordinarily may not restrict the expression of particular ideas, viewpoints, or items of information because it does not trust its citizens to make wise or desirable decisions if they are exposed to such expression."); Wells, *supra* note 222, at 174 (remarking that the Supreme Court has repeatedly rejected paternalistic justifications in free speech cases).

make correct decisions . . . . Distrust of the ability of citizens to make decisions is antithetical to autonomy, and the Court has invalidated numerous content-based laws that have such paternalistic justifications."[335] As discussed in Part III.B, the Court has rejected paternalistic justifications for limiting commercial speech.[336] It has rejected paternalistic justifications in censored speech and compelled speech cases as well.[337] In short, existing free speech jurisprudence rejects paternalistic regulations when they tread on existing free speech rights not only because they may curtail available information, but also because they treat listeners as less than fully rational agents able to make their own decisions about what to hear and what to choose. The bottom line is that current free speech jurisprudence has a strong anti-paternalism streak, as can be seen in Supreme Court statements like: "[T]he law . . . is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[338]

However, a categorical rule against paternalistic regulations is not the only possible approach for determining the extent of the right against compelled listening. Some might find this categorical approach too extreme, as it may preclude government efforts to discourage a clearly harmful activity like smoking by curtailing tobacco ads or by teaching potential smokers about the dangers of smoking.[339] Indeed, the government already requires the Surgeon General's warnings on all tobacco products. An alternate approach might accept the additional requirement that cigarette buyers sign a license affirming that they have read a state-prepared pamphlet or have seen a state-prepared

[335] Wells, *supra* note 222, at 174.

[336] *See* Linmark Assocs. v. Willingboro, 431 U.S. 85, 96-97 (1977) (striking down a paternalistic municipal ordinance "restrict[ing] the free flow of . . . data because [the Council] fears that otherwise homeowners will make decisions inimical to what the Council views as the homeowners' self-interest"); Vincent Blasi, *The Pathelogical Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 487 [hereinafter Blasi, *Patheological Perspective*] (remarking that the decision in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976), striking down a ban on accurate price advertisements, gave anti-paternalism new prominence in First Amendment doctrine).

[337] *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 497 (1996) (Stevens, J., plurality opinion) (rejecting the State's "paternalistic assumption that the public will use truthful, nonmisleading commercial information unwisely"); First Nat'l Bank of Boston v. Belloti, 435 U.S. 765, 791 n.31 (1977) ("The First Amendment rejects the highly paternalistic approach of statutes . . . which restrict what the people may hear."); *Va. Citizens Consumer Council, Inc.*, 425 U.S. at 770 (rejecting a "highly paternalistic" law forbidding pharmacists from advertising the price of drugs).

[338] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 579 (1994).

[339] *See, e.g.*, Daniel Hays Lowenstein, "*Too Much Puff*"*: Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1207, 1208-24 (1988) (arguing that bans on cigarette advertising should be constitutional).

video presenting accurate facts about the effects of smoking so as to ensure that potentially self-destructive choices are at least informed and rational.[340] Furthermore, influencing listeners to stay away from smoking – a life-threatening addiction – enhances individual autonomy in the long run.[341] Under this view, even if there is some abridgement of that autonomy along the way, in the end autonomy is enhanced both by providing useful information that improves the decision-making process and by encouraging people to make agency-affirming decisions.

Nevertheless, if the state-mandated information does not improve rational decision-making or encourage autonomy-affirming choices, the state is simply infringing on the right against compelled listening. Consequently, this view of autonomy requires a more contextual approach to demarcating the right against compelled listening, including a close look at the government's motives and the government-mandated information. Failure to keep a tight rein on government's attempts to inform could easily diminish autonomy.

Comparison of the following example of compelled listening with the anti-smoking example might help identify some guidelines. Imagine that it becomes unconstitutional under the federal or a state constitution to deprive gay men and lesbian women the opportunity to marry. Nonetheless, the current state legislature vehemently disapproves of gay marriages, and would like to discourage them. Accordingly, the state requires gays and lesbians wishing to marry to read a state-produced pamphlet that lists what the state considers are negative consequences of the homosexual lifestyle, and asserts its view that true marriage is reserved for a union between a man and a woman. Only after the couple has certified that they have read and understood the government's position will the county clerk issue them a license to marry.[342]

Intuitively, this example of state-compelled listening seems far less legitimate and far more intrusive than the anti-smoking example. What are the

[340] *See* Fallon, *supra* note 219, at 900 ("In addition, virtually no one consistently maintains that respect for ascriptive autonomy precludes some version of 'soft' paternalism, which permits at least temporary, coercive intervention to ensure that a person's decision to act in a self-destructive way is informed and rational.").

[341] *Id.* at 877-78 (arguing that restrictions on manipulative cigarette ads may promote descriptive autonomy by preventing addiction); *see also* Jonathan Klick & Gregory Mitchell, *Government Regulation of Irrationality: Moral and Cognitive Hazards*, 90 MINN. L. REV. 1620, 1624 n.15 (2006) ("[P]aternalistic intervention constitutes no invasion of personal integrity when it disrupts lowly ranked concerns to protect highly ranked concerns."); *supra* note 321 and accompanying text.

[342] An alternate example might be that the state legislature strongly disapproves of premarital sex and requires that unmarried adults wishing to buy condoms or sex toys read about (or watch a video about) the centrality or sanctity of marriage, and the negative repercussions of promiscuity, especially for women abandoning their purity. Only after both the man and the woman certify that they have seen and understood the government's position may they proceed.

differences, and what guidelines do they suggest?[343] First, although both impart information, the anti-smoking information is limited to straightforward facts while much of the information conveyed in the gay marriage example represents moral judgments. For a rational decision-maker, accurate, non-misleading factual information is best calculated to inform an independent decision. In other words, in making a reasoned choice, accurate, non-misleading facts (*X* activity causes cancer) are simply more useful than opinion (we believe *X* activity is immoral).[344] (Indeed, for some, the line between acceptable and unacceptable government regulation is the difference between the state attempting to improve the decision-making process by providing useful information and the state attempting to influence the ultimate decision.)[345] In addition, factual information presented in an accurate and non-misleading manner is less likely to collide with deeply held beliefs, which can minimize the offense of being forced to listen to it. In sum, in order for state-mandated listening to count as autonomy-enhancing under the contextual approach, the compelled information must at least be composed of accurate, non-misleading facts. This first requirement would preclude the state from forcing people to listen to the gay marriage lecture, since it is not purely factual.[346]

Arguably, the state's anti-smoking information seeks to influence the listener's ultimate decision, not just inform the listener's decision-making. But even if both the anti-smoking and anti-gay-marriage materials attempt to sway the listener's ultimate decision, their effects on individual autonomy differ. It is common knowledge that smoking is physically detrimental and can shorten one's life span.[347] No one, not even smokers, would argue that smoking is

[343] It may seem like only the latter compelled listening example puts a condition on the exercise of a fundamental right (the right to marry). However, medical informed consent is another potential example of compelled listening, *see infra* Part IV.A.1, and medical informed consent to say, a vasectomy, also places a condition on the exercise of a fundamental right (the right to decide whether to have children). *Cf. supra* notes 93-97.

[344] Facts are also less subject to manipulation, making them more suitable for rational decision-making. Of course, even facts can be manipulated; hence the requirement that the government-mandated information comprise accurate and non-misleading facts.

[345] In other words, the state provides relevant information but still lets the captive listener make of it what she will. This represents a middle position between the "categorical" approach and the "contextual" approach, where the "contextual" approach presents the outer limits of acceptable paternalism. *Cf.* Thaddeus Mason Pope, *Is Public Health Paternalism Really Never Justified? A Response to Joel Feinberg*, 30 OKLA. CITY U. L. REV. 121, 122-23 (2005) (discussing hard versus soft paternalism).

[346] In addition, the unbalanced presentation also raises questions about whether it qualifies as non-misleading.

[347] *See, e.g.*, American Cancer Society, Tobacco-Related Cancers Fact Sheet, http://www.cancer.org/docroot/PED/content/PED_10_2x_Tobacco-Related_Cancers_Fact_Sheet.asp (last visited Mar. 28, 2009).

healthy.[348] As a result, no one is likely to dispute that the government's goal (if not its means) of preventing nicotine addiction and its attendant ills, is autonomy-enhancing.[349] The same cannot be said of the government's objective of discouraging gay marriage. Because no consensus exists on this topic, urging listeners to adopt the state's viewpoint cannot be described as promoting an uncontestedly autonomy-affirming goal.[350] Thus, for the gay couple seeking a marriage license, the government is providing no benefit that might ultimately mitigate the initial infringement on autonomy. In addition, the initial infringement is arguably less in the anti-smoking example because trying to persuade someone to reach a goal she approves is clearly less intrusive to her autonomy than trying to convince her to change her values. Consequently, even under an approach that tolerates a degree of government paternalism, the government's goal must be uncontestedly autonomy-affirming as opposed to urging one side of a debatable proposition or controversial issue.[351] To find otherwise could eviscerate "the privilege of each individual in a democracy to make up his own mind . . . on every political-moral issue that arises."[352] This privilege "is one of the factors that marks the difference between democracy and totalitarianism and . . . distinguishes societies with a moral orthodoxy from those designated as open."[353]

A further problem with the state-mandated anti-gay-marriage materials is that the government's viewpoints are so closely aligned with religious ones.

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[348] In other words, the proposition that smoking is harmful is not in dispute. What is in dispute between the categorical and contextual views of autonomy is whether smokers should have to hear that message before they buy cigarettes.

[349] This may be true even if the goal is something that is more appealing in the long term rather than the short term, like not smoking now to avoid addiction, or not eating high-calorie snacks now to avoid obesity in the future. For example, most smokers would prefer to stop. *See, e.g.*, Jeffrey M. Jones, *Most Smokers Want to Quit, but Feel They Are Addicted*, GALLUP, Aug. 15, 2005, http://www.gallup.com/poll/17830/Most-Smokers-Want-Quit-Feel-They-Addicted.aspx (revealing that 76-82% of smokers want to quit).

[350] In fact, the government's goal can be considered decidedly anti-autonomy.

[351] Even where the Supreme Court has approved inculcation of certain values, for example, students in public schools, *see infra* note 388, the Court has drawn a line between acceptable and unacceptable indoctrination. *See, e.g.*, Bd. of Educ. v. Pico, 457 U.S. 853, 875 (1982) (Brennan, J., plurality opinion) (holding that the school board could remove books from the school library if they were educationally unsuitable but not because it disagreed with the books' ideas).

[352] Wellington, *supra* note 206, at 1135.

[353] *Id.*; Harry Wellington also remarked:

> Although it may be consistent with such a society for its government to have authority to make contraception, abortion, homosexuality, or adultery legal or illegal, can it be consistent for it to require individuals to believe that these practices are moral or immoral? I take it that the answer must be no, unless we are prepared to define a secular democracy in a Pickwickian way.

Id.

The Establishment Clause forbids the government from espousing religion,[354] yet arguments against gay marriage are principally rooted in religious beliefs.[355] Even though a successful Establishment Clause claim is unlikely,[356] the government coercion commits exactly the sin the Establishment Clause hoped to avoid – the state taking a position on a religious truth and imposing it onto the public. Thus, the Establishment Clause overtones make the state-compelled reading on gay marriage an especially problematic viewpoint regulation.

The contrast thus suggests three prerequisites for a claim that mandated listening enhances autonomy: the message must be factual, secular, and autonomy-enhancing. To the extent the government is providing information, it should be comprised of accurate factual information presented in a non-misleading manner. To the extent the government is trying to persuade the listener to make a particular decision, the goal must be both secular and incontrovertibly autonomy-enhancing. Urging listeners to adopt the state's moral views on controversial issues, especially those with strong religious overtones, obviously fails this requirement.

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[354] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion . . . ."); County of Allegheny v. Greater Pittsburgh ACLU, 492 U.S. 573, 590 (1989) (reasoning that the Establishment Clause bars government from "promot[ing] or affiliat[ing] itself with any religious doctrine or organization").

[355] *See, e.g.*, Martha M. Ertman, *Contractual Purgatory for Sexual Marginorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107, 1159 (1996) ("The frequency of Biblical justifications offered by the Religious Right in favor of anti-gay initiatives and other anti-gay efforts vividly illustrates that the only imaginable objection to homosexuality is on moral grounds."); William N. Eskridge, Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2412 (1997) (arguing that anti-homosexual sentiment is usually traced to religious precepts); David A.J. Richards, *Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the Unconstitutionality of Anti-Lesbian/Gay Initiatives*, 55 OHIO ST. L.J. 491, 524-25 (1994) (arguing that homophobia stems from religious beliefs and that anti-gay initiatives violate the Establishment Clause).

[356] In Establishment Clause cases, the Supreme Court has held that a law is not religiously motivated even if it overlaps with religious beliefs so long as there is also some secular justification. *See* Bowen v. Kendrick, 487 U.S. 589, 617 (1988) (finding that even though many religions preach abstinence before marriage, abstinence-only-until-marriage sex education does not violate Establishment Clause because there are also secular reasons for teenagers to avoid engaging in sexual activity). However, while the Court would likely disagree, there is no convincing secular reason to oppose homosexuality or homosexual marriage. *See supra* note 355 and accompanying text; *see also* Varnum v. Brien, No. 07-1499, 2009 WL 874044, at *21-*27 (Iowa Apr. 3, 2009) (rejecting arguments that a same-sex marriage ban maintains traditional marriage, promotes an optimal environment to raise children, promotes procreation, promotes stability in opposite-sex relationships, or conserves resources); Hernandez v. Robles, 855 N.E.2d 1, 22-34 (N.Y. 2006) (Kaye, C.J., dissenting).

The categorical rule against compelled listening for paternalistic reasons is clearly the easier approach to apply: if the government foists information onto a captive audience, it automatically implicates the right against compelled listening. If the message is paternalistic and viewpoint-based, it violates the right because under this view paternalism cannot amount to a compelling government interest. The contextual approach presents more difficulty but is not without precedent. Courts already assess whether facts are "accurate and non-misleading" in commercial cases, showing that this initial screen is certainly administrable.[357] Examining whether religion plays a role in a government message is already something courts do in Establishment Clause cases.[358] And while determining whether a message promotes an incontrovertibly autonomy-affirming decision can certainly present challenges on the margins, some issues are so obviously contentious, so clearly recognized as major debates of the day, that their designation as controversial is not problematic. Few would assert that gay marriage is uncontroversial in the United States. Still, concerns about the potential fine lines in the analysis[359] might lead to the conclusion that the safest course to plot is simply to find that all paternalistic speech regulations infringe the Free Speech Clause. Indeed, this is the path the Supreme Court has adopted with the other free speech rights.

2. Marketplace of Ideas, Democratic Self-Government and Distrust of Government

The right against compelled listening also dovetails with a major theme that runs through First Amendment jurisprudence: distrust of the government.[360] One of the great evils free speech is meant to defend against is a state orthodoxy: "If there is any fixed star in our constitutional constellation, it is

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[357] *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 497 (1996) (Stevens, J., plurality opinion).

[358] *See, e.g.*, Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 301-10 (2000) (explaining that a state-sponsored message or display violates the Establishment Clause if it was motivated by the goal of advancing religion or has the primary effect of advancing religion). Given that compelled listening involves state-imposed and not just state-sponsored messages, the threshold for Establishment Clause violations might well be lower. In any case, the offense to autonomy is present even without an actual Establishment Clause violation.

[359] For example, in addition to the difficulty of determining whether a message is incontrovertibly autonomy-affirming, some might question whether a clear line can be drawn between fact and opinion, especially since the presentation of facts can be manipulated.

[360] *See, e.g.*, Geoffrey R. Stone, *Autonomy and Distrust*, 64 U. COLO. L. REV. 1171, 1171 (1993) (remarking that Supreme Court free speech jurisprudence has emphasized individual autonomy and deep-seated distrust of government efforts to regulate speech); *cf.* Blasi, *Patheological Perspective*, *supra* note 336, at 463 (remarking that free speech's commitment to tolerance is based on respect for individuals and distrust of government).

that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[361] Supreme Court decisions rejecting censorship and compelled speech regularly condemn the state's attempts to determine what ought to be said and heard.[362] And this is for good reason – besides insulting individual autonomy, neither the marketplace of ideas nor democratic self-rule can flourish if the government controls the flow of information.[363] On the contrary, allowing the government to dictate what someone must hear does precisely what free speech is meant to forestall: establish a state orthodoxy.

Dale Carpenter identifies three ways that state control can compromise the free flow of ideas crucial to both the marketplace of ideas and democratic self-determination.[364] First, the government may seek to entrench itself; the temptation for government to regulate speech to silence criticism or to push its own self-interest is well noted. Second, the history of speech regulation has shown that government can be intolerant. For example, the state has too often banned "numerous admittedly great works of art because someone thought them obscene."[365] Third, the government simply lacks the competence to make certain determinations, such as decisions about what information will be most useful to individual listeners. In the end, is the government, with all its imperfections and fallibilities, really a better judge of what is good for individuals than the individuals themselves?[366] These ever-present dangers are especially strong with contested issues like gay marriage. Why risk curtailing thought and debate on those issues that need it most?

In fact, Supreme Court decisions against compelled speech by entities other than individuals are based less on infringement of autonomy and more on anxiety over giving the state the power to decide what ought to be said. Take the right-of-reply law in *Miami Herald Publishing Co. v. Tornillo*, a law motivated by the desire to improve public discourse.[367] Proponents argued that the concentration of mass media power in the hands of the few, with cities often served by only one major newspaper, deprived people of a variety of

[361] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[362] *See supra* Parts III.A-C.

[363] *See* Black, *supra* note 7, at 968 ("Forced listening rigs the market in ideas, for it heavily and arbitrarily favors those communications agreeable to its managers."); *id.* at 967 ("Forced listening destroys and denies, practically and symbolically, that unfettered interplay and competition among ideas which is the assumed ambient of the communication freedoms.").

[364] Carpenter, *supra* note 207, at 632 ("The negative antipaternalism principle is a safeguard against three distinct evils of government speech regulation: incompetence, entrenchment, and intolerance.").

[365] *Id.* (citing SCHAUER, *supra* note 208, at 81).

[366] *See id.* at 647-48 ("The probability of error by the state in assessing what's best for individuals may be so high that we should presume against paternalism.").

[367] Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 247-54 (1974).

opinions.[368] Nonetheless, the Court rejected the state's bid to require more viewpoints, reasoning that the free press becomes in peril as soon as government starts dictating what goes in it.[369] "[S]upplant[ing] private control of the press with the heavy hand of government intrusion . . . would make the government the censor of what the people may read and know."[370] Similarly, the Supreme Court rejected an attempt to regulate charities' speech for their own benefit because "[t]he First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."[371]

The same holds true for listeners. "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion."[372] In other words, just as it is presumed "beyond the government's power to control" what an individual says as a speaker,[373] so it should be beyond its power to control what she reads as a recipient.

Again, the contours of the right against compelled listening can be defined categorically or contextually. A high level of government distrust militates in favor of a strong categorical rule that precludes the state from forcing a captive audience to listen to its message. Under this view, as Justice Scalia observed, "it is safer to assume that the people are smart enough to get the information they need than to assume that the government is wise or impartial enough to make the judgment for them."[374] Or as Dale Carpenter put it, "[t]he First Amendment expresses the idea that government should not be able to tell citizens what to speak, hear, write, or read."[375] As with other free speech rights, this right against compelled listening can be overcome,[376] but the categorical rule puts the onus on the government to justify its infringement of free speech rights.

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[368] *Id.* at 248-51.

[369] *Id.* at 258 n.24; *id.* at 259 (Brennan, J., concurring) ("We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers.").

[370] *Id.* at 260 (Brennan. J., concurring).

[371] Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 790-91 (1988).

[372] *Id.* at 791 (quoting Thomas v. Collins, 323 U.S. 516, 545 (1945) (Jackson, J., concurring)).

[373] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 575 (1995) (explaining that the choice of what to say is "presumed to lie beyond the government's power to control").

[374] *Riley*, 487 U.S. at 804 (Scalia, J., concurring).

[375] Carpenter, *supra* note 207, at 579.

[376] In the gay marriage hypothetical, for example, the state advocates a viewpoint, and viewpoint speech regulations are subject to the highest level of scrutiny. As a result, the government would have to establish that the state's mandatory lectures advanced a compelling state interest and were narrowly tailored to achieve that goal – a test they are unlikely to pass.

Alternatively, the contextual approach believes that the dangers of entrenchment, intolerance, and incompetence can be averted if the mandated information hews to the factual, secular, and incontrovertibly autonomy-enhancing.[377] Allowing the state to impose facts as opposed to opinions demands less faith in government because facts can at least be verified. Therefore even if hearing state opinions could sometimes enrich one's autonomy, distrust of government would counsel against it. Restricting the content of compelled information to accurate and nonmisleading facts would also help prevent the government from straying into the zone of religion. Finally, limiting the mandated messages to incontrovertably autonomy-enhancing ones – such as the message that smoking is harmful to one's health – minimizes the risk of curtailing debate since the issue is already settled. This contextual approach is inconsistent with current free speech law, but one can argue for it. Of course, the truly wary might question whether the courts are any more tolerant or competent than the other branches of government and would prefer the categorical rule.

In sum, judgments about autonomous decision-making and the trustworthiness of government decision-making will determine the expansiveness of the right against compelled listening. A strong sense of autonomy and high level of government distrust lead to a categorical rule that forcing any information on captive audiences implicates the right against compelled listening. This is in fact the current approach for other free speech rights. An alternate understanding would require a more context-dependent evaluation of the mandated information, considering particularly whether it is composed of accurate and nonmisleading facts, whether it aligns with religious opinions, and whether it is incontrovertibly autonomy-affirming.

Regardless of the approach, a right against compelled listening should be recognized in order to safeguard and realize fundamental free speech values. It protects the autonomy of individuals by respecting their decision-making and ultimate decisions. It also protects the free flow of information – and defends against state orthodoxy – by keeping decisions about what is said and heard out of government hands.

IV. APPLYING THE RIGHT AGAINST COMPELLED LISTENING

How would a free speech right against compelled listening apply to real-world instances of state-mandated listening? In some sense, the state "requires" citizens to read certain information all the time. The state puts health warnings on cigarette packages[378] and requires airlines to recite airplane safety features to passengers.[379] It insists that patients hear about the risks of

[377] *See supra* Part III.D.1.

[378] 15 U.S.C. § 1333 (2006).

[379] FAA Operating Requirements: Seats, Safety Belts, and Shoulder Harnesses, 14 C.F.R. § 121.311 (2009).

any medical procedures they undergo.[380] Mandatory tests for state licenses – from drivers' licenses to professional licenses – generally necessitate reading and learning certain information.[381] Public school students cannot opt out of classes that make up a school district's core curriculum.[382] Do all these government requirements violate a right against compelled listening?

The answer is likely no. These examples either do not involve a captive audience or would easily survive First Amendment scrutiny. The cigarette purchaser is not a captive: while the warnings on cigarette packages are aimed at the buyer, they are small and easily ignored so that no one is forced to read them.[383] Even assuming airline passengers were captive,[384] recall that implicating a free speech right does not automatically equate to violating it.[385] The Federal Aviation Administration's mandated airline demonstrations are factual, viewpoint-neutral, and narrowly tailored to advance government's legitimate interest in public safety. State licensing, whose main goal is to ensure and signal proficiency, is a typical example of a conduct regulation that has an incidental effect on speech and is therefore subject to a lower level of scrutiny. In any event, any compelled listening that results from licensing likewise involves neutral facts for the benefit of public safety.[386] As discussed more fully below, without medical informed consent, a doctor could be guilty of battery.[387] Public school students provide the sole example of a captive audience forced to hear state-approved viewpoint-based information. However, children's constitutional rights are not co-extensive with adults'

[380] *See, e.g.*, MASS. GEN. LAWS ch. 111, § 70E(l) (2006).

[381] *See, e.g.*, MASS. GEN. LAWS ch. 90, § 8(d) (2006) (requiring an examination and a driving test as prerequisites to obtaining a driver's license).

[382] *See, e.g.*, FLA. STAT. ANN. § 1003.428 (West 2008); MASS. GEN. LAWS ch. 71, § 1 (2006).

[383] Some might also argue that the information protects not just the smoker. *See supra* note 330. But with the exception of one Surgeon General's warning aimed at pregnant women, the warnings focus on the smoker. 15 U.S.C. § 1333 (requiring one of the following warnings: "Smoking Causes Lung Cancer, Heart Disease, Emphysema, And May Complicate Pregnancy"; "Quitting Smoking Now Greatly Reduces Serious Risks to Your Health"; "Smoking By Pregnant Women May Result in Fetal Injury, Premature Birth, And Low Birth Weight"; or "Cigarette Smoke Contains Carbon Monoxide").

[384] The airplane passenger may not be a captive, as anyone who has tuned out the safety demonstration can attest.

[385] *See supra* note 296 and accompanying text.

[386] This might also be an example where the state is regulating commercial conduct; recall that both the regulation of commerce and the regulation of conduct reduce free speech scrutiny. *Supra* notes 142, 315 and accompanying text.

[387] Common law tort principles contemplate that the failure to provide such information deprives the patient of bodily autonomy. *See infra* note 397 and accompanying text.

rights, and the Supreme Court has allowed school speech regulations that would be unconstitutional if applied to adults.[388]

On the other hand, the right against compelled listening does come into play in cases where the state forces its opinion onto people. In fact, the government rarely demands that individuals sit down and listen to its particular viewpoint. This very rarity supports the intuition that government coercion and viewpoint-based regulations, whether they be compelled speech or compelled listening, are an unconstitutional mix. At the same time, there are at least two examples of government compelled listening with a definite viewpoint that are gaining prominence. One is mandatory counseling for women seeking abortions. More and more states are requiring that women who wish to terminate their unwanted pregnancy first listen to certain government-provided information. This information, invariably above and beyond standard informed consent, usually contains an anti-abortion message. Another example is mandatory sensitivity training programs for employees that insist on respect, tolerance, and even celebration of diversity in the workplace. Under the "categorical" approach, these viewpoint-based examples violate the right against compelled listening unless they pass strict scrutiny. On the other hand, under the "contextual" approach, which accepts some degree of paternalism, the right against compelled listening might not even be implicated if the government message is secular, comprised of nonmisleading and accurate facts, and points the listener towards some incontrovertibly autonomy-affirming choice.

A. *State-Mandated Abortion Counseling*

The majority of states have enacted statutes requiring that doctors provide additional information about abortion beyond what standard medical informed consent contemplates.[389] With the Supreme Court's apparent blessing,[390] most state-mandated information espouses a pro-life point of view.[391] While mandatory abortion counseling laws that encourage women seeking abortions to change their mind have been challenged as unconstitutional for a variety of

[388] The Supreme Court has repeatedly held that the state, particularly public schools, can limit students' free speech rights in order to accomplish legitimate pedagogical goals. *See, e.g.*, Morse v. Frederick, 127 S. Ct. 2618, 2629 (2007) (allowing the school to censor a pro-drug message); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988) (allowing a principal to censor age-inappropriate student articles in a school newspaper). However, the state must have legitimate pedagogical goals. *See supra* note 351.

[389] *See* GUTTMACHER INST., STATE POLICIES BRIEF: COUNSELING AND WAITING PERIODS FOR ABORTION 1 (2009), *available at* http://www.guttmacher.org/statecenter/spibs/spib_MWPA.pdf [hereinafter GUTTMACHER INST., COUNSELING AND WAITING PERIODS] (indicating that thirty-three states require abortion counseling).

[390] *See infra* notes 446-448 and accompanying text.

[391] *See* GUTTMACHER INST., COUNSELING AND WAITING PERIODS, *supra* note 389, at 1.

reasons under existing law,[392] the focus of this Article is whether they violate the free speech right against compelled listening.

1. Informed Consent

Standard medical practice requires that before executing any medical treatment or procedure, doctors explain to their patients the nature and purpose of the treatment and the risks and benefits it entails.[393] Patients must also learn about the alternatives and their risks and benefits.[394] Is standard informed consent itself an example of unconstitutional compelled listening? Not under the contextual approach, which acknowledges that mandated information can help the listener make more rational decisions and thereby enhance autonomy. This is particularly true here because the goal of standard informed consent is to give the patient an evenhanded and accurate understanding of the proposed medical procedure and its alternatives so that the patient's consent to the treatment's physical invasion is fully informed. Notably, the goal is not to persuade the patient to adopt one course over another.[395]

Informed consent is also constitutional under the categorical approach despite the approach's resistance to any state interference in both the decision-

[392] Laws that force women to undergo an invasive, medically unnecessary, transvaginal ultrasound, for example, can be considered a substantive due process violation both because it invades women's bodily integrity and because it imposes an undue burden on women seeking to terminate their unwanted pregnancy. *See* Planned Parenthood Minn. v. Rounds, 467 F.3d 716, 727 (8th Cir. 2006), *vacated en banc sub nom.* Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724 (8th Cir. 2008). Scholars argue that counseling laws that assume a woman's main role is to bear children violates the Equal Protection Clause. *See* Siegel, *New Politics of Abortion*, *supra* note 5, at 1047-50; *see also* Robert D. Goldstein, *Reading* Casey*: Structuring the Woman's Decisionmaking Process*, 4 WM. & MARY BILL RTS. J. 787, 847-50 (1996) (arguing that the state violates equal protection if its informed consent provisions advocate outmoded gender stereotypes). The federal district court and the Eighth Circuit panel that enjoined South Dakota's mandatory counseling statute both found that it violated doctors' right against compelled speech by forcing them to tell patients information they found irrelevant for proper informed consent. *Planned Parenthood Minn.*, 467 F.3d at 727, *aff'g* 375 F. Supp. 2d 881 (D.S.D. 2005), *vacated en banc sub nom.* Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724. Numerous scholars support the view that these laws implicate compelled speech issues. *See* Post, *Informed Consent*, *supra* note 6, at 944-45. I am proposing yet another reason why these laws are unconstitutional: they violate a patient's free speech right against compelled listening.

[393] American Medical Association, Informed Consent, http://www.ama-assn.org/ama/pub/physician-resources/legal-topics/patient-physician-relationship-topics/informed-consent.shtml (last visited Mar. 27, 2009) [hereinafter AMA, Informed Consent].

[394] *Id.*; *see* Goldstein, *supra* note 392, at 808.

[395] Consequently, informed consent passes muster for those who do not mind if the state informs decision-making so long as it does not try to influence the ultimate decision. *See supra* note 345 and accompanying text.

making process and the ultimate decision. Under this view, with its strong sense of autonomy and great distrust of government, one might argue that the decision about how much to learn about a procedure or alternatives should be left to the patient. However, the roots of informed consent lie more in protecting doctors from liability than in any state attempt to ensure rational decisions.[396] Informed consent to medical treatment developed as a means to shield doctors from battery and, later, negligence claims. Doctors who fail to provide all material information, as understood by the medical community or a reasonable patient, risk liability for battery or negligence under tort law.[397] While medical informed consent is now an ethical duty,[398] its origin as a defense to tort liability means that it does not fit into the classic paternalistic model of speech regulation designed to improve the regulated person's wellbeing. In addition, leaving the details of standard informed consent to the doctor rather than the state minimizes the risk of government entrenchment, intolerance, or incompetence.[399] Even recast as a species of compelled listening, the nonmisleading factual content and viewpoint neutrality of informed consent gurantees that it will survive as a sufficiently tailored means to ensure bodily integrity.

2. Mandatory Abortion Counseling

As mentioned above, the specifics of standard informed consent in non-abortion contexts are generally left to the physician who, after all, occupies a position of trust and possesses special medical expertise.[400] The rules are different with abortion. Rather than leave informed consent in the hands of the professionals, numerous states have dictated the contents of "informed consent" for women seeking abortions.[401] There are two types of mandatory abortion information. In the first type, doctors must tell patients about the availability of certain state-decreed information.[402] Twenty-three states direct their health agencies to develop written materials that may contain information about some or all of the following: fetal development throughout pregnancy,

[396] *See* Kathy Seward Northern, *Procreative Torts: Enhancing the Common-Law Protections for Reproductive Autonomy*, 1998 U. ILL. L. REV. 489, 508-17.

[397] *See id.*

[398] AMA, Informed Consent, *supra* note 393 ("This communications process, or a variation thereof, is both an ethical obligation and a legal requirement spelled out in statutes and case law in all 50 states.").

[399] *See supra* notes 364-366 and accompanying text.

[400] *See, e.g.*, Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 483 (Cal. 1990) (en banc) (explaining that doctors have fiduciary duties to patients); Berg, *supra* note 187, at 224 (discussing the nature of patients' reliance on doctors' expertise).

[401] *See* GUTTMACHER INST., COUNSELING AND WAITING PERIODS, *supra* note 389, at 1.

[402] *See* Rachel Benson Gold & Elizabeth Nash, *State Abortion Counseling Policies and the Fundamental Principles of Informed Consent*, 10 GUTTMACHER POL'Y REV. 6, 7-12 (2007).

abortion procedures for all trimesters, the ability of a fetus to feel pain, the potential effect of abortion on future fertility, the link between abortion and breast cancer, the negative psychological responses to abortion, social services for pregnant and parenting women, and the names and addresses of nearby crisis pregnancy centers.[403] Seven states require that the materials be given to the patient, while sixteen require only that they be offered.[404] Several states also require that doctors offer patients an opportunity to view their embryo or fetus via ultrasound before having an abortion.[405]

In the second type of mandatory abortion counseling, doctors must actually convey specific information to their patients in a way that the patient cannot avoid. South Dakota and Oklahoma both have such laws. In South Dakota, doctors must tell women who have decided not to continue their pregnancy that, among other things, the abortion will "terminate the life of a whole, separate, unique, living human being" and that "the pregnant woman has an existing relationship with that unborn human being."[406] Before her abortion, the patient must sign each page of the state's messages, certifying that she has received and understood the information.[407] Her doctor must also certify that the patient has read and understood the materials.[408] Although enjoined by the district court and an Eighth Circuit panel as unconstitutionally compelling the speech of doctors, the Eighth Circuit sitting en banc upheld the South Dakota law in *Planned Parenthood Minnesota, North Dakota, South Dakota v. Rounds*.[409]

In Oklahoma, the legislature passed a law stating that women must have an ultrasound at least an hour before her abortion, and that her doctor must show her the image and provide a simultaneous description of the ultrasound.[410] In

[403] *Id.*; GUTTMACHER INST., COUNSELING AND WAITING PERIODS, *supra* note 389, at 1.

[404] GUTTMACHER INST., COUNSELING AND WAITING PERIODS, *supra* note 389, at 1.

[405] GUTTMACHER INST., STATE POLICIES BRIEF: REQUIREMENTS FOR ULTRASOUND 1 (2009), *available at* http://www.guttmacher.org/statecenter/spibs/spib_RFU.pdf.

[406] S.D. CODIFIED LAWS § 34-23A-10.1(1)(b)-(c) (2004 & Supp. 2008). Patients must also be informed of all known medical risks of the procedure, including "[d]epression and related psychological distress" and "[i]ncreased risk of suicide ideation and suicide." *Id.* § 34-23A-10.1(1)(e)(i)-(ii).

[407] *Id.* § 34-23A-10.1(1).

[408] The doctor must certify that the patient has read the materials and that she (the doctor) believes that the patient has understood them. *Id.* § 34-23A-10.1(2). In addition, any questions the patient may have, and the answers, must be reduced to writing and placed in the patient's permanent medical record. *Id.* § 34-23A-10.1(1).

[409] Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 738 (8th Cir. 2008) (en banc), *vacating sub nom.* Planned Parenthood Minn. v. Rounds, 467 F.3d 716 (8th Cir. 2006) (finding the statute also violated the Due Process Clause by imposing an undue burden on a woman's right to seek an abortion before viability), *aff'g* 375 F. Supp. 2d 881 (D.S.D. 2005); *see also infra* notes 434-441 and accompanying text.

[410] OKLA. STAT. ANN. tit. 63, § 1-738.3b(B) (West 2004 & Supp. 2009). The law specifies that the doctor must use the most effective ultrasound technique available. *Id.* § 1-

particular, her doctor must describe the size, heartbeat, and organs of the embryo or fetus, if visible.[411] While the statute allows the woman to avert her eyes from the ultrasound, she must certify that she has received the above information.[412] So although the patient cannot be compelled to view the ultrasound of her embryo or fetus, she is still confronted with it and forced to listen to a detailed description of it.

Women who are offered information that they are free to decline are not on par with a true captive audience. They can, in the end, refuse to accept it. Even if handed a state pamphlet, they are under no obligation to read it. They can, as in the direct mailing cases, discard the unwanted materials.[413] In these states, the government's message is more akin to an educational campaign that is broadcast to all but can be avoided without difficulty. Because the materials are easily avoided, they are not subject to any right against compelled listening.[414]

In contrast, there is no question that abortion-seeking women in South Dakota and Oklahoma would qualify as a captive audience in terms of their physical inability to avoid the government's message. They are captive in two separate ways. First, like the women in *Hill*, *Schenk*, and *Madsen*, they are captive to their medical condition.[415] If they want to terminate their pregnancies, they must visit a healthcare professional and undergo the state's mandatory counseling. Second, unlike any captive audience case the Supreme Court has heard to date, these women (and sometimes their doctors) must certify that they have received and understood the government's message.[416] Thus, there is no possibility of avoiding the government's speech.

The real issue is the normative one: should these women have to hear the government's message? Proponents maintain that the difference between these informed consent laws and traditional informed consent is that these laws merely give women a more complete picture before they make their

738.3b(B)(1). In the first trimester, when the vast majority of abortions are performed (about ninety percent), the most effective ultrasound requires women to insert a probe into their vagina. *Id.* (requiring a vaginal transducer if it "would display the embryo or fetus more clearly"); Gold & Nash, *supra* note 402, at 9-10. The law makes no exceptions for women who have been raped. OKLA. STAT. ANN. tit. 63, § 1-738.3b.

411 OKLA. STAT. ANN. tit. 63, § 1-738.3b(B)(4).

412 *Id.* § 1-738.3b(B)-(C).

413 *See supra* note 26 and accompanying text.

414 The fact that much of the information is false or misleading, *see infra* notes 427-431 and accompanying text, and that the women receiving the information may not realize it represents government messages rather than their doctors' actual medical judgment, raise additional concerns. *See* Corbin, *supra* note 276, at 668-71.

415 *See supra* notes 61-65 and accompanying text.

416 OKLA. STAT. ANN. tit. 63, § 1-738.3b(B)(5); S.D. CODIFIED LAWS § 34-23A-10.1(1) (2004 & Supp. 2008).

decision.[417] In reality, as numerous commentators have argued, the goal of these mandatory abortion counseling regulations is to convince women to change their minds about terminating their unwanted pregnancy.[418]

The context of the laws makes this goal clear. The same legislature that passed South Dakota's counseling law has attempted to ban abortion[419] and has approved a "trigger" law to outlaw abortion if *Roe v. Wade* is reversed.[420] Oklahoma, like South Dakota, has among the nation's most restrictive abortion rules.[421] Nor are sponsors of these laws shy about their objectives. The Senate

[417] Daniel Avila, *The Right to Choose, Neutrality, and Abortion Consent in Massachusetts*, 38 SUFFOLK U. L. REV. 511, 512 (2005) (arguing that informed consent requirements that tend to discourage abortion further neutrality given the one-sided nature of abortion-provider counseling).

[418] *See, e.g.*, Post, *Informed Consent*, *supra* note 6, at 941 (arguing that the obvious objective of South Dakota's Act "is to use the concept of 'informed consent' to eliminate abortions"); Sanger, *supra* note 4, at 375-79 (asserting that the goal of mandatory ultrasound is to reinforce the proposition that abortion does not end a pregnancy but kills an unborn child); Siegel, *New Politics of Abortion*, *supra* note 5, at 1031.

[419] In 2006, South Dakota's legislature approved by a wide margin a ban that made abortion for any reason other than to save the life of the pregnant woman a felony punishable by up to five years in prison. *See* Siegel, *New Politics of Abortion*, *supra* note 5, at 992 (describing the South Dakota law as "the most restrictive abortion statute in the nation"). It contained no exception for women whose health but not life was jeopardized, or for women who had been victims of rape or incest. Women's Health and Human Life Protection Act, ch. 119, § 6, 2006 S.D. Sess. Laws 119 (repealed by referendum 2006). The ban was subsequently defeated 56% to 44% in a referendum. Monica Davey, *S. Dakota to Revisit Restrictions on Abortion*, N.Y. TIMES, Apr. 26, 2008, at A14. Three state representatives that sponsored the near-total abortion ban also sponsored the abortion counseling statute. Hunhoff, Jean M. – Bills Sponsored, http://legis.state.sd.us/sessions/2006/mbr330.htm (last visited Mar. 27, 2009) (co-sponsor of H.B. 1215, 81st Leg. Assem., Reg. Sess. (S.D. 2006) and H.B. 1216, 81st Leg. Assem., Reg. Sess. (S.D. 2006)); Hunt, Roger W. – Bills Sponsored, http://legis.state.sd.us/sessions/2006/mbr516.htm (last visited Mar. 27, 2009) (primary sponsor of both bills); Jerke, Gary L. – Bills Sponsored, http://legis.state.sd.us/sessions/2006/mbr581.htm (last visited Mar. 27, 2009) (co- sponsor of both bills).

[420] H.B. 1249, 80th Leg. Assem., Reg. Sess. (S.D. 2005) ("This Act is effective on the date that the states are recognized by the United States Supreme Court to have the authority to regulate or prohibit abortion at all stages of pregnancy."). Like the abortion ban, the trigger law would ban all abortions except those necessary to save the woman's life. *Id.*; *see also* Evelyn Nieves, *S.D. Makes Abortion Rare Through Laws and Stigma*, WASH. POST, Dec. 27, 2005, at A1.

[421] Every state other than South Dakota provides government funding for abortions caused by rape and incest. Christine Vestal, *States Probe Limits of Abortion Policy*, STATELINE.ORG, June 22, 2006, http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=121780. Even the Hyde Amendment permits the federal government to fund terminations in those cases. Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, §§ 507-508, 121

sponsor of South Dakota's mandatory counseling law is widely quoted as saying, "it is the time for the South Dakota Legislature to . . . protect the lives and rights of unborn children."[422] In a press release, the author of Oklahoma's ultrasound bill urged the Governor "to join the Oklahoma Legislature in taking a stand for the rights of the unborn and for the sanctity of life."[423]

In addition, the one-sided nature of the mandated disclosures reveals their pro-life goals. To start, the current law of informed consent already requires that patients receive all material information needed to make a health-based decision.[424] The additional information is designed to induce women seeking abortions to change their mind. South Dakota forces doctors to tell women about: (1) the support the state offers for mothers and children; and (2) virtually every imaginable negative repercussion of abortion without requiring parallel disclosure of the risks and consequences associated with pregnancy, childbirth, and parenthood.[425] Farther afield still is Oklahoma's requirement that a woman be confronted with an ultrasound image of the embryo or fetus shortly before the procedure.[426] What possible goal does this serve but to trigger a last-minute, emotional change of heart?[427]

Besides being one-sided, the compelled counseling is often inaccurate. Several assertions about the potential consequences of abortion are false, such as increased risks of suicide,[428] infertility,[429] and breast cancer.[430] Plus, it is at

Stat. 1844, 2208-09 (2007) (detailing the Hyde Amendment in its most recent version); Vestal, *supra*. Oklahoma will not allow private insurance companies to cover abortions unless the woman's life is in danger. *Id.*

[422] Chet Brokaw, *South Dakota Senate Bans Nearly All Abortions*, DAILY TEXAN ONLINE, Feb. 23, 2006, http://dailytexanonline.com/world_nation/1.971118-1.971118. The South Dakota House sponsor, Representative Hunt, is reported as saying that the goal of the ban is to rebalance the scales: "[P]erhaps the life of an unborn child is more critical and more important than a woman making a choice . . . . [W]hen you put the proper weights on the scale, it will favor protecting the life of unborn children." Nancy Gibbs, *When Is an Abortion Not an Abortion?*, TIME, Mar. 6, 2006, http://www.time.com/time/nation/article/0,8599,1170368,00.html.

[423] Press Release, Todd Lamb, Okla. Senator, Henry Urged to Sign Pro-Life Legislation Before Midnight Deadline (Apr. 16, 2008), *available at* http://www.oksenate.gov/news/press_releases/press_releases_2008/pr20080416c.html.

[424] *See* Northern, *supra* note 396, at 508.

[425] S.D. CODIFIED LAWS § 34-23A-10.1(2)(a)-(c) (2004 & Supp. 2008).

[426] OKLA. STAT. ANN. tit. 63, § 1-738.3b(B) (West 2004 & Supp. 2009).

[427] Sanger, *supra* note 4, at 277-79 (asserting that the goal of mandatory ultrasounds is clearly to produce a confrontation that will result in a woman's change of heart regarding her abortion); *see also* Jeremy A. Blumenthal, *Abortion, Persuasion, and Emotion: Implications of Social Science Research on Emotion for Reading* Casey, 83 WASH. L. REV. 1, 26-27 (2008) (positing that mandatory counseling and ultrasounds take advantage of emotional vulnerability to influence women's decisions, because studies show messages designed to arouse negative emotions like fear and anxiety are unduly persuasive).

[428] For example, South Dakota requires that doctors tell women that abortion can cause depression and increased risk of suicide ideation and suicide. S.D. CODIFIED LAWS § 34-

a minimum medically questionable to assert that an embryo or a fetus is "whole" or "separate" given that it cannot survive outside the woman's womb during the time in which legal abortions may occur.[431]

In addition, South Dakota's law traverses the factual and enters the metaphysical and theological debate about when life begins in its statements that "abortion will terminate the life of a whole, separate, unique, living human being" and that "the pregnant woman has an existing relationship with that unborn human being."[432] Oklahoma's law advances the same message, albeit more subtly.[433] Nonetheless, South Dakota argued, and the en banc Eighth Circuit agreed, that because the statute defined human being as "an individual

23A-10.1(1)(e)(i)-(ii). Yet, study after study has shown that women who abort unwanted pregnancies do not have higher risks of psychological distress than women who carry to term. *See, e.g.*, AM. PSYCHOLOGICAL ASS'N, REPORT OF THE APA TASK FORCE ON MENTAL HEALTH AND ABORTION 71 (2008), *available at* http://www.apa.org/releases/abortion-report.pdf (examining all empirical studies published in peer-reviewed English-language journals since 1989); Post, *Informed Consent*, *supra* note 6, at 962-63 (describing studies); Emily Bazelon, *Is There a Post-Abortion Syndrome?*, N.Y. TIMES, Jan. 21, 2007, § 6 (Magazine), at 41 (describing studies). Neither the American Psychological Association nor the American Psychiatric Association recognizes any post-abortion disorder. Gold & Nash, *supra* note 402, at 11 (citing HEATHER D. BOONSTRA ET AL., GUTTMACHER INST., ABORTION IN WOMEN'S LIVES (2006), *available at* http://www.guttmacher.org/pubs/2006/05/04/AiWL.pdf; Brenda Major et al., *Psychological Responses of Women After First-Trimester Abortion*, 57 ARCHIVES GEN. PSYCHIATRY 777 (2000)).

[429] South Dakota also requires doctors to list future infertility as a medical risk even though early abortions pose virtually no long-term risk to fertility. *See* Gold & Nash, *supra* note 402, at 11.

[430] Though the National Cancer Institute has concluded that abortion is not associated with an increase in breast cancer risk, Oklahoma's written materials inaccurately assert a possible link between abortion and breast cancer, and make questionable claims about the ability of the fetus to feel pain. *Id.* at 11-12.

[431] *See, e.g.*, Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 744 (8th Cir. 2008) (en banc) (Murphy, J., dissenting) (rejecting the statutory language as misleading and inaccurate, citing doctors' expert testimonies that the statutory language is "neither a medical statement nor a fact which medical doctors are trained to address, but rather an 'ideological pronouncement,'" and arguing that a "nonviable fetus is not 'whole' in that it cannot maintain a separate life outside the woman's womb").

[432] S.D. CODIFIED LAWS § 34-23A-10.1(b)-(c).

[433] Because any information presented by the ultrasound could simply be told to the woman, Oklahoma's ultrasound requirement is meant to accomplish a different goal, and it does. As Carol Sanger has pointed out, traditionally only hopeful parents look at ultrasounds, so that the generally understood social meaning of an ultrasound image is a wanted child. Sanger, *supra* note 4, at 365-67, 375-79. Thus, Oklahoma attempts to convey a similar message. *See id.* at 375-79.

living member of the species of Homo sapiens," the mandated language was merely accurate biological information.[434]

But as the *Rounds* dissent points out, the law only mandates the isolated statement about terminating an unborn human being and not the statutory definition of a human being,[435] and even the majority concedes that when read without the statutory definition, the mandated statement could be taken to make a point about the ethics of abortion.[436] In addition, the majority failed to quote the full statutory definition – "an individual living member of the species of Homo sapiens, *including the unborn human being* during the entire embryonic and fetal ages *from fertilization to full gestation*" – which is as ideological as the mandated statement.[437] Furthermore, unless the legislature feared that women might think they are carrying dolphins or pandas instead of Homo sapiens,[438] the statement clearly has a moral message. As Robert Post explains:

> If it is obvious that a fetus is a "human being" in the sense that it is a biological entity that belongs to the species Homo sapiens, it is not at all obvious that the fetus is a "human being" in a second and distinct sense, which is whether the fetus is a member of the community of human persons whose life possesses dignity and warrants respect.[439]

Similarly, the *Rounds* dissent recognized that "[i]n the context of abortion, the term 'human being' has an overwhelmingly subjective, normative meaning, in some sense encompassing the whole philosophical debate about the procedure."[440] Indeed, when life begins and the morality of abortion are among the most contested issues in the United States today. In short, the state-dictated message to pregnant women in South Dakota is not that her embryo

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[434] *Rounds*, 530 F.3d at 735-36 (quoting S.D. CODIFIED LAWS § 34-23A-1(4)).

[435] *Id.* at 745 (Murphy, J., dissenting) (citing S.D. CODIFIED LAWS § 34-23A-7.1).

[436] *Id.* at 735 (majority opinion) ("Taken in isolation, § 7(1)(b)'s language . . . certainly may be read to make a point in the debate about the ethics of abortion.").

[437] *Id.* at 745 (Murphy, J. dissenting) (emphasis added to portions that were excluded from the majority's discussion) (quoting S.D. CODIFIED LAWS § 34-23A-1(4)).

[438] *See* Post, *Informed Consent*, *supra* note 6, at 954 ("It hardly seems plausible that a woman could be confused about whether she is carrying the biological fetus of a zebra, a raccoon, or a bat."); Reproductive Rights Prof Blog, http://lawprofessors.typepad.com/reproductive_rights/2008/week26/index.html (June 28, 2008) (critiquing the Eight Circuit's en banc *Rounds* decision and sarcastically pointing out "all those scores of women who have flocked to abortion clinics under the sad misimpression that they were carrying developing dolphins").

[439] Post, *Informed Consent*, *supra* note 6, at 954-55.

[440] *Rounds*, 530 F.3d at 742 (Murphy, J. dissenting). Similarly, in rejecting a woman's claim that her abortion was performed without her informed consent because she was not told her embryo was a "complete, separate, unique and irreplaceable human being," the New Jersey Supreme Court stated: "[P]laintiff's characterization of the embryo as a living human being is a moral, theological, or ideological judgment, not a scientific or biological one." Acuna v. Turkish, 930 A.2d 416, 425-26 (N.J. 2007).

belongs to the species Homo sapiens but that she is killing a member of the human race who deserves to live.[441]

3. The Right Against Compelled Listening Applied to Mandatory Abortion Counseling

Unlike traditional informed consent, South Dakota's and Oklahoma's ideological and viewpoint-based "informed consent" laws violate the right against compelled listening, regardless of the approach to that right.[442]

Under the "categorical" approach, the right against compelled listening is implicated any time the government forces its message onto an unwilling captive audience. As with any viewpoint-based speech regulation, the mandatory counseling laws will violate the Free Speech Clause unless they pass strict scrutiny.[443] Can the state proffer an interest the categorical view would find compelling? The state's paternalistic efforts to persuade women to think in one particular way should fail, given the categorical approach's strong sense of autonomy and high distrust of government.[444] This conclusion comports with existing free speech jurisprudence, where government attempts to manipulate the speech heard so that people make the "right" decision have been found unconstitutional.[445] Thus, government should not be able to foist information onto listeners in order to convince them to make beneficial decisions any more than it can censor information to prevent listeners from making poor decisions.

Nonetheless, abortion speech is the one area where the Supreme Court has allowed paternalism to justify viewpoint-discriminatory laws.[446] Noting that women who abort risk "discover[ing] later, with devastating psychological consequences, that her decision was not fully informed," the Supreme Court plurality in *Casey* permitted the state to tell pregnant women "that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term."[447] In letting the state try to

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[441] Post, *Informed Consent*, *supra* note 6, at 958.

[442] In contrast, standard informed consent does not attempt to influence the patient's decision. *See* Northern, *supra* note 396, at 508-09. Furthermore, it is arguably more about protecting doctors against liability for potential invasion of the patient's bodily integrity than improving patients' rational decision-making. *See id.* at 509.

[443] *See* Stone, *Content Regulation*, *supra* note 334, at 213-14.

[444] *See supra* note 327 and accompanying text.

[445] Stone, *Content Regulation*, *supra* note 334, at 213.

[446] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992) (O'Connor, Kennedy, and Souter, JJ., plurality opinion) (overruling *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983), and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986), both of which had held that the state could not influence a woman's informed choice between abortion and childbirth).

[447] *Id*. at 872, 882. In particular, the plurality reasoned that compelling women to read objectively "truthful and not misleading" information did not impose an undue burden on women's substantive due process rights to decide whether to continue or end a pregnancy.

persuade women seeking abortions to change their minds, the Supreme Court has allowed a degree of paternalism absent in traditional informed consent and forbidden in all other speech cases. Even if it were better for people to refrain from drinking, smoking, or gambling, the state cannot shield citizens from speech promoting those activities or presumably force them to listen to speech opposing them.[448] On the contrary, the Supreme Court has time and again explicitly rejected paternalistic justifications in its free speech jurisprudence. In the abortion context alone does the Court depart from its own anti-paternalism principles.

Under a true categorical approach – where state paternalism is as verbotem in the abortion context as in all other areas – the state's mandated anti-abortion lectures violate the right against compelled speech. Under this regime, the Court must treat the pregnant woman "as an adult, presuming [her rationality and] competence rather than [her] gullibility."[449] Consequently, even if it were better for women to forego abortions, government cannot shield them from speech promoting it or force them to listen to speech opposing it. In short, paternalistic attempts to influence the patient's decision is not a compelling reason under the categorical approach.

As an alternative to paternalism, the state might claim that its aim is to save the unborn, and protecting others from harm is clearly a compelling state interest. The first problem is that the counseling laws have been intentionally framed as protecting the pregnant women.[450] On the government's own terms, then, these laws serve paternalistic goals. Even assuming the goal is to prevent the death of the embryo or fetus,[451] whether this would be considered trying to prevent harm to others depends in part on one's view of when life begins. For some, the embryo or fetus only represents a potential person, and therefore, no

Id. at 882. In its most recent abortion decision, the Court assumed that some women will regret their decision to terminate an unwanted pregnancy. Gonzales v. Carhart, 127 S. Ct. 1610, 1617 (2007) ("[R]espect for human life finds an ultimate expression in a mother's love for her child. Whether to have an abortion requires a difficult and painful moral decision, which some women come to regret.").

[448] It would be unprecedented if the Court let stand a law requiring voters to read even viewpoint-neutral election guides to ensure they choose candidates who best represent their interests. *See* Sanger, *supra* note 4, at 388-89.

[449] Carpenter, *supra* note 207, at 633.

[450] The preamble to South Dakota's law illustrates this focus on the pregnant woman: "The Legislature finds that procedures terminating the life of an unborn child impose risks to the life and health of the pregnant woman." S.D. CODIFIED LAWS § 34-23A-1.4 (2004 & Supp. 2008).

[451] Eighty-nine percent of induced abortions occur in the first twelve weeks, with 61.3% occurring before the nine week mark. GUTTMACHER INST., IN BRIEF: FACTS ON INDUCED ABORTION IN THE UNITED STATES 2 (2008), *available at* http://www.guttmacher.org/pubs/fb_induced_abortion.pdf. The fertilized egg is called an embryo through week eight of the pregnancy, after which it is termed a fetus. Thus, most abortions terminate an embryo.

existing being is actually hurt. Others vehemently disagree, equating abortion with infanticide. The Supreme Court has made clear that the law cannot decide this contested moral question.[452] Instead, the Court has held that even though the state has a legitimate interest in protecting potential life, it cannot abridge a pregnant woman's substantive due process rights before viability.[453] Consequently, the state should not be able to curtail a pregnant woman's free speech rights before that point either.

Even under the "contextual" approach to the right against compelled listening, which tolerates some level of paternalistic state control over speech if it enhances autonomy, South Dakota's and Oklahoma's mandatory counseling laws are unconstitutional. The government's mandated information may enhance autonomy and therefore avoid implicating the right against compelled listening if it consists of nonmisleading and accurate facts that promote an incontrovertibly (and therefore necessarily secular) autonomy-affirming goal. That is not the case here. To start, although the two states claim merely to be imparting neutral, accurate information, the "facts" presented here are one-sided and often misleading, if not inaccurate.[454] In addition, the timing and content of the ultrasound disclosures are the stuff of emotional manipulation rather than the presentation of cold, hard facts.[455] Manipulation does not, of course, improve rational decision-making.

Moreover, the state's opinion on when life begins is intertwined with religion.[456] It would blink at reality to deny that religious doctrine underpins the convictions of most people who believe that life begins at conception and that the embryo or fetus is a unique, living, unborn human being.[457] But once religion enters the picture, the government must exit. If the Establishment

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[452] Roe v. Wade, 410 U.S. 113, 159 (1973) ("When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.").

[453] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

[454] *E.g.*, Planned Parenthood Minn., N.D., S.D. v. Rounds, 530 F.3d 724, 740 (8th Cir. 2008) (en banc) (Murphy, J., dissenting) ("Rather than focusing on medically relevant and factually accurate information designed to assist a woman's free choice, the Act expresses ideological beliefs."); *see also supra* notes 428-433 and accompanying text.

[455] *See* Sanger, *supra* note 4, at 377-79.

[456] *See, e.g.*, Larry J. Pittman, *Embryonic Stem Cell Research and Religion: The Ban on Federal Funding as a Violation of the Establishment Clause*, 68 U. PITT. L. REV. 131, 140 (2006) (positing that "arguments regarding when life begins and the sanctity of life normally are premised on the existence of God and His intent regarding human life").

[457] *See, e.g.*, Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1369 (1988) ("[M]uch of the opposition to abortion stems from highly organized, intense pressure based on sectarian religious beliefs."); Pittman, *supra* note 456, at 140; David M. Smolin, *The Religious Root and Branch of Anti-Abortion Lawlessness*, 47 BAYLOR L. REV. 119, 121 (1995) (stating that American evangelicals and Roman Catholics "form the most important opposition to abortion").

Clause means anything, it means that the government is not supposed to espouse one religious viewpoint over others,[458] and it is especially not supposed to force that viewpoint onto citizens.[459]

Finally, the laws are not indisputably autonomy-affirming. Government-compelled listening that advocates a particular viewpoint respects autonomy only if it urges a goal that all would agree is autonomy-enhancing.[460] Abortion, in contrast, is the ultimate divisive issue. Not everyone believes that choosing an abortion is detrimental for a woman encumbered with an unwanted pregnancy. To the contrary, many argue that its availability is actually critical for women's equality and autonomy. Telling a pregnant woman that the embryo is a human being and that the unnatural act of killing her unborn child will lead to a laundry list of problems[461] is the paradigmatic ideological message.

Indeed, these laws abrogate a woman's autonomy to a significant degree without providing any countervailing long-term autonomy benefit. First, as scholars and courts have emphasized time and again, autonomy means respect for the individual as a moral agent, which includes acting as the gatekeeper of the information she receives to make her moral determinations.[462] No such respect is shown the pregnant woman.

Second, the mandatory morals lecture discredits a woman's ability to make adult decisions by assuming she has not adequately thought through the moral repercussions and cannot do so without state intervention.[463] In other words,

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[458] Larsen v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

[459] *See id.* at 245. While these regulations likely do not violate the Establishment Clause under current law, the religious connotations exacerbate the free speech viewpoint issues.

[460] As discussed *supra* Part III.D.2, taking sides in a highly charged debate poses the greatest danger of state orthodoxy.

[461] South Dakota formed a task force to study abortion. S.D. TASK FORCE TO STUDY ABORTION, REPORT: SUBMITTED TO THE GOVERNOR AND LEGISLATURE OF SOUTH DAKOTA 5-6 (2005), *available at* http://www.voteyesforlife.com/docs/Task_Force_Report.pdf. The task force concluded that "it is simply unrealistic to expect that a pregnant mother is capable of being involved in the termination of the life of her own child without risk of suffering significant psychological trauma and distress. To do so is beyond the normal, natural, and healthy capability of a woman whose natural instincts are to protect and nurture her child." *Id.* at 47-48.

[462] Carpenter, *supra* note 207, at 633 (arguing that anti-paternalism "conceives of the citizen as the gatekeeper of the information he receives, of the ideas he considers").

[463] *See, e.g.*, Paula Abrams, *The Tradition of Reproduction*, 37 ARIZ. L. REV. 453, 489 (1995) ("This paternalism [of mandatory counseling] undermines the independence of women as decisionmakers and furthers the stereotype that women are emotional and irrational decisionmakers, easily swayed by authority figures."); Rachael N. Pine & Sylvia A. Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 407, 425 (1992) (arguing that counseling laws "reflect a

the insult to agency is not that the state will succeed in changing the woman's mind, but the very fact that it tries.[464] As Reva Siegel points out, the report accompanying South Dakota's mandatory counseling law refuses to "acknowledge the possibility that a 'normal' woman could make a free and informed decision to end a pregnancy."[465] This discounting of agency and independent judgment is apparent in the very language of the South Dakota statute, which assumes that any woman who wishes to end her pregnancy is subject to outside "pressures," "undue reliance on the advice of others," and "clouded judgment."[466]

Third, by trying to manipulate what the pregnant woman hears, especially by presenting misleading or even inaccurate information, the state treats her as a means to an end instead of as an autonomous agent.[467] Fourth, as discussed above, only pregnant women who choose not to become mothers are subject to this kind of paternalism.[468] Singling out women in this way is yet another insult to their autonomy. In conclusion, with no plausible paternalistic justification, the counseling laws' viewpoint-based compelled listening is unconstitutional even under the contextual approach.

For those who distrust the government and disagree with its orthodoxy, these laws exemplify why the government should not have the power to regulate what people say or hear. The state comes closest to totalitarianism when it enters the realm of ideological thought control, as it has with these laws. Even more disconcerting is the possibility that these ostensibly paternalistic laws are not that at all. One of the reasons for the strong distrust of government in free speech jurisprudence is that "the government may abuse its power to regulate paternalistically and regulate in ways that really do not benefit the people subject to regulation, but benefit those in power (entrenchment) or a select group sympathetic to those in power (government entrenchment)."[469]

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belief that women have neither the moral strength nor integrity to make independent moral choices").

[464] The twenty-four-hour waiting period requirement reflects this same tendency to treat women as thoughtless and immature decision-makers. *See* Pine & Law, *supra* note 463, at 425.

[465] Siegel, *New Politics of Abortion*, *supra* note 5, at 1032.

[466] S.D. CODIFIED LAWS § 34-23A-1.4 (2004 & Supp. 2008) ("The Legislature . . . finds that a woman seeking to terminate the life of her unborn child may be subject to pressures which can cause an emotional crisis, undue reliance on the advice of others, clouded judgment, and a willingness to violate conscience to avoid those pressures.").

[467] As C. Edwin Baker argues, "people's choices, their definition and development of *themselves*, must be respected – otherwise they become mere objects for manipulation or means for realizing someone else's ideals or desires." Baker, *supra* note 201, at 992.

[468] *See supra* note 418 and accompanying text.

[469] Carpenter, *supra* note 207, at 645.

B. *State-Mandated Diversity Training*

Mandatory abortion counseling is perhaps the most prominent example of the state forcing people to listen to particular information, but it is not the only one. Several states have passed laws requiring diversity and sensitivity training for public employees,[470] and a few for both public and private employees.[471] Even in states without such laws, government employees have been required to attend diversity or sensitivity training programs as a condition of continued employment.[472] Do these programs illustrate another example of unconstitutional compelled listening? Certainly, participants have complained about the ideological nature of their content.[473] Their captivity is evident: employees must attend under penalty of losing their jobs. The analysis turns on the details of the particular diversity training programs, which range from

[470] Florida, Illinois, Nevada, Pennsylvania, Tennessee, Texas, and Utah, among others, require anti-discrimination training for specified public employees. *See* FLA. STAT. ANN. §110.112 (West 2008); 775 ILL. COMP. STAT. ANN. § 5/2-105(B)(5) (West 2001 & Supp. 2008); NEV. ADMIN. CODE § 284.496 (2006); 4 PA. CODE § 7.595 (2003); TENN. CODE ANN. § 4-3-1703 (2005); TEX. LAB. CODE ANN. § 21.010 (Vernon 2006); UTAH ADMIN. CODE r. 477-10-4 (2008).

[471] California and Connecticut mandate anti-sexual harassment training by any employer with over fifty employees; Maine mandates these trainings for any employers with over fifteen employees. CAL. GOV'T CODE § 12950.1(a) (West 2005 & Supp. 2009); CONN. GEN. STAT. ANN. § 46a-54(15)(B) (West 2004 & Supp. 2008); ME. REV. STAT. ANN. tit. 26, § 807(3) (2007).

[472] *See, e.g.*, Altman v. Minn. Dep't of Corr., 251 F.3d 1199, 1201-02 (8th Cir. 2001) (describing a correctional facility's mandated training "dealing with issues of gays and lesbians in the workplace"). Sometimes training will be triggered by a racist, sexist, or other discriminatory incident. *See, e.g.*, Morrison v. Bd. of Educ. of Boyd County, 419 F. Supp. 2d 937, 939 (E.D. Ky. 2006) (recounting how a school board instituted mandatory diversity training devoted to issues of sexual orientation and gender harassment as part of consent decree after it refused to recognize a student gay-straight alliance club); Scott Jaschik, *If One Professor Gropes, Does Everyone Need Training?*, INSIDE HIGHER ED, Aug. 15, 2008, http://www.insidehighered.com/news/2008/08/15/harass (describing how the University of Iowa required sexual harassment training for all employees after an accusation against a political science professor). Other times, the employer simply hopes to reduce the risk of civil liability for workplace harassment. For example, Utah requires state agencies to provide "liability prevention training." UTAH ADMIN. CODE r. 477-10-4.

[473] In *Altman*, for example, plaintiffs complained that a program addressing issues of gays and lesbians in the workplace was no more than "state-sponsored propaganda promoting the acceptance of homosexuality." *Altman*, 251 F.3d at 1204. Parents have also complained about mandatory training in public schools. *See, e.g.*, *Morrison*, 419 F. Supp. 2d at 940. However, recall that the state may limit students' speech rights in a way it could not limit adults' speech rights. *See supra* note 388 and accompanying text.

programs that simply teach employees the law on harassment to programs that urge employees to embrace certain values.[474]

These laws implicate the right against compelled listening under both the categorical and contextual approach. Under the categorical approach, the right is implicated whenever the government foists information on a captive audience. Under the contextual approach, the right against compelled listening is not infringed by paternalistic regulations that enhance the captive listener's overall autonomy. However, unlike mandatory abortion counseling laws, no such claims are made for the mandatory sensitivity training programs. These programs are meant to prevent harm to others, namely certain protected groups. The question then is whether the state-mandated programs are sufficiently tailored to advance a sufficiently important government interest.

Even assuming they contain viewpoint-based state messages, most training programs designed to combat discrimination in the workplace easily survive strict scrutiny. The most common versions of diversity training are meant to create a productive, discrimination-free workplace and protect people from certain types of harassment.[475] Such goals are consistent with and are indeed required by laws like Title VII[476] – itself inspired by the constitutional mandate of the Equal Protection Clause – and clearly represent a compelling state interest. Furthermore, programs providing information about what is permissible and impermissible under the law are well tailored to achieve these goals. Consequently, just as the state may bar employees from uttering discriminatory speech in the workplace,[477] so may it mandate lessons to ensure

[474] Note that private companies acting under their own initiative have more leeway about the contents of their training programs since there is no state action triggering free speech protection.

[475] Workers subject to harassment are themselves a captive audience. *See supra* notes 152-162 and accompanying text.

[476] 42 U.S.C. §§ 2000e to 2000e-17 (2000). While sexual orientation is not yet a protected class under Title VII, Congress has introduced a bill to add it and President Obama has indicated he would sign the bill. Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (as passed by the House, Nov. 7, 2007); William R. Kapfer, *Obama Pledges 'Equality for All,'* WASH. BLADE, Jan. 16, 2009, http://www.washingtonblade.com/2009/1-16/news/national/13925.cfm. In addition, half of the states already ban discrimination based on sexual orientation, including California, Connecticut, Illinois, Maine, Nevada, and Pennsylvania. *See* NAT'L GAY AND LESBIAN TASK FORCE, STATE NONDISCRIMINATION LAWS IN THE U.S. 1 (2008), *available at* http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_7_08.pdf; *see also* CAL. CIV. CODE § 51(b) (West 2007); CONN. GEN. STAT. ANN. §§ 46a-81c to -81m (West 2004 & Supp. 2009); 775 ILL. COMP. STAT. ANN. § 5/1-102(a) (West 2001 & Supp. 2008); ME. REV. STAT. ANN. tit. 5, § 4572(1)(A) (2002 & Supp. 2008); NEV. REV. STAT. § 613.330 (2007); 4 PA. CODE § 1.161 (2000).

[477] While *Boy Scouts of America v. Dale*, 330 U.S. 640 (2000), held that a public accommodation anti-discrimination law protecting gays and lesbians did not trump the free speech rights of a volunteer expressive association, employment anti-discrimination law generally trumps free speech rights at work. *See supra* notes 133-142 and accompanying

that employees understand what counts as discriminatory speech in the workplace.[478] Though free speech rights are implicated, in neither case are they violated.

Nevertheless, some diversity training programs can go too far in their means or goals, and it is then that their constitutionality becomes suspect. It is one thing to aim to create a workplace environment where people are treated respectfully regardless of their individual differences.[479] It is quite another if the goal is more akin to "state-sponsored indoctrination designed to sanction, condone, promote, and otherwise approve behavior and a style of life . . . believe[d] to be immoral, sinful, perverse, and contrary to the teachings of the Bible."[480] In other words, the state may require its employees to learn about how to act appropriately and coexist productively with diverse individuals[481] – but lecturing a captive audience with the aim of altering employees' personal beliefs[482] or promoting a particular ideology about contested moral issues such as homosexuality likely fails the narrow tailoring required by strict scrutiny.[483]

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text; *see also* Caroline Mala Corbin, *Above the Law? The Constitutionality of the Ministerial Exemption from Antidiscrimination Law*, 75 FORDHAM L. REV. 1965, 2033-37 (2007).

[478] I am assuming that both count as speech, rather than conduct. *But see supra* notes 137-141 and accompanying text.

[479] Altman v. Minn. Dep't of Corr., 251 F.3d 1199, 1203 (8th Cir. 2001) (finding that plaintiffs may have been unfairly disciplined for reading the Bible during a mandatory training session on "Gays and Lesbians in the Workplace" because other equally inattentive participants were not punished).

[480] *Id.* at 1201; *cf.* Nat'l Ass'n of Scholars, *The Wrong Way to Reduce Campus Tensions*, NEW REPUBLIC, Feb. 18, 1991, at 31, 31 ("'Sensitivity training' programs designed to cultivate 'correct thought' about complicated normative, social, and political issues do not teach tolerance but impose orthodoxy."). The Eighth Circuit in *Altman* found that the program was more like the former, especially since the Warden emphasized that the training was "in no way . . . designed to tell you what your personal attitudes or beliefs should be." *Altman*, 251 F.3d at 1201, 1203.

[481] According to one diversity training company, every diversity awareness program should include elements such as "clarifying the value of diversity to the organization"; "increasing awareness of one's own and others' cultures and world views"; "understanding stereotyping, assumptions and bias (especially unintentional and unconscious bias)"; "considering how diversity issues manifest themselves in the work environment"; and "beginning to learn skills to promote diversity and inclusion on the personal, interpersonal and institutional level." Vernā Myers, *Making Diversity and Inclusion Awareness Training Work in the Law Firm*, ORANGE COUNTY LAW., Feb. 2007, at 18, 24.

[482] *Cf.* Buonanno v. AT&T Broadband, LLC, 313 F. Supp. 2d 1069, 1075, 1083 (D. Colo. 2004) (holding that AT&T violated Title VII when it fired an employee for refusing to sign the company's Diversity Philosophy, which requires employees to "fully recognize, respect and value the differences among all of us," on the grounds that he could not "value" behavior repudiated by Scripture).

[483] While the government cannot impose its values on a captive audience, free speech does not preclude it from launching a public education campaign aimed at changing

In fact, just as forcing government materials that suggest life begins at conception onto an unwilling audience raises Establishment Clause concerns, so does arguing that homosexuality is not sinful,[484] as one proposed diversity training program did in the "myths and facts" section of its curriculum.[485] A district court enjoined that program on Establishment Clause grounds because in attempting to debunk the myth that homosexuality is a sin, the program painted Baptists as unenlightened and biblically misguided while praising other denominations for their gay-friendly policies.[486] The court noted that it was "extremely troubled by the willingness of Defendants to venture – or perhaps more correctly bound – into the crossroads of controversy where religion, morality, and homosexuality converge."[487] It concluded that a diversity program can successfully teach tolerance and provide health-related information without opining on controversial topics such as whether homosexuality is a sin and whether churches that condemn homosexuality are on theologically solid ground.[488]

Foisting pro-gay propaganda infringes the autonomy of deeply religious people in ways similar to foisting pro-life propaganda onto women seeking abortions. It precludes individuals from determining what information is relevant in forming their own moral beliefs, it assumes they have not already given great consideration to the issue, and it treats them as a means to an end. Such compelled listening is also at odds with the values underlying a free flow of information.

In sum, mandatory diversity training programs necessarily implicate the right against compelled listening. Whether the state can justify this infringement on listeners' free speech rights depends on the program. If the program focuses on compliance with anti-discrimination law, then it is as constitutional as other free speech restrictions permitted in order to create a discrimination-free workplace. If, on the other hand, the program aims to change people's deeply held values and takes a stand on a religiously controversial proposition, then it will probably not survive strict scrutiny.

CONCLUSION

Free speech law is currently incomplete without explicit recognition of the right against compelled listening – a right that complements the existing right

attitudes, so long as a sufficiently secular justification, like eliminating discrimination, prevents it from violating the Establishment Clause.

[484] *Cf.* SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD 28 (1996) (describing abortion and gay rights as the two "major divisive, religion-linked social controversies" in the United States).

[485] Citizens for a Responsible Curriculum v. Montgomery County Pub. Sch., No. Civ.A.AW-05-1194, 2005 WL 1075634, at *4 (D. Md. May 5, 2005).

[486] *Id.* at *10-*11.

[487] *Id.* at *11.

[488] *Id.*

to speak, right to listen, and right against compelled speech. While the captive audience doctrine provides some protection for unwilling listeners, it is largely limited to protection against private speech that intrudes on a listener's nonspeech rights, such the right to privacy, equality, and voting.

But captive listeners need not look to other constitutional values to shield themselves from being forced to listen against their will. Instead, the Free Speech Clause itself justifies a right against compelled listening. The same values that underlie established free speech rights justify the right against compelled listening. This claim holds true regardless of whether one conceives of the primary purpose of the Free Speech Clause as creating a marketplace of ideas, enhancing participatory democracy, or promoting individual autonomy.

Whether the state may constitutionally compel a captive audience to listen to its message depends on one's tolerance for state paternalism and one's distrust of government. Under a highly distrustful, strict anti-paternalism approach – embodied by current free speech jurisprudence – the right against compelled listening is implicated any time the state foists a message onto a captive listener. Under a more relaxed regime, a paternalistic message may not implicate the right, but only if it is factual, secular, and incontrovertibly enhances autonomy. Regardless of the approach, the new wave of mandatory abortion counseling laws violate the right against compelled listening, as do state-mandated diversity training programs that preach ideological messages to unwilling listeners. Forcing a captive audience to listen to the state's view that life begins at conception or that homosexuality is not a sin and must be embraced replaces the marketplace of ideas, democratic deliberation, and autonomous decision-making with state orthodoxy.