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The Undignified First Amendment

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ABSTRACT

Many commonly understand the constitutional right of free speech as an individual right of expression. One reason for this is the ascendance of the dignitarian or autonomy theory of free speech, which has supplanted the marketplace and democratic conceptions as the predominant theory of speech rights in the United States. As a result, scholars, judges, and citizens usually focus on the rights of speakers. But the United States Constitution does not describe a right to speak; the First Amendment protects a right to speech. This article argues that the preoccupation with the dignitarian basis for speech as expression has distorted the doctrinal development of First Amendment case law and distracted from the historical and theoretical bases for protecting speech constitutionally. The article argues that the primary form of constitutionally protected speech is and was meant to be reciprocal communication between a speaker and a listener. Accordingly, the article differentiates expression and communication, and then demonstrates that a coherent conception of speech as a relational right of communication exists in certain important judicial opinions of the United States Supreme Court and other federal courts. The article explains that these cases articulate a doctrinal basis for differentiating between communication and expression, and for emphasizing communication over expression when we think about the speech that the First Amendment protects.

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INTRODUCTION

This article addresses fundamental assumptions about free speech that predate our current era, animate our political divide over free speech rights and speech itself, and are widely (and perhaps surprisingly) shared across the spectrum of political ideology.[1] We now assume that freedom of speech *means* freedom of expression.[2] And freedom of expression means the right of an individual to say whatever they want to say without interference from the government. As the Supreme Court wrote in *Police Department of Chicago v. Mosley*: "[*A*]*bove all else*, the First Amendment means that

1. In a 2022 survey poll conducted by the Knight Foundation and Ipsos, when asked which constitutional rights are important to them, 91% of respondents listed freedom of speech as extremely or very important. And broken down by political affiliation, that result comprised 91% of Republicans, 88% of Democrats, and 84% of Independents. Needless to say, the responses become more divided ideologically when people are asked to weigh the relative importance of specific examples of free speech (*i.e.*, spreading misinformation about election results or kneeling during the national anthem). The complete poll results are available here: KNIGHT FOUND., *Free Expression in America Post-2020* (Jan. 6, 2022), https://knightfoundation.org/wp-content/uploads/2022/01/KF_Free_Expression_2022.pdf.

2. *See*, *e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 558 (1975) ("The basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule.") (citation omitted) (internal punctuation deleted); Cressman v. Thompson, 798 F.3d 938, 952–53 (10th Cir. 2015) ("[T]he animating principle behind pure-speech protection . . . [is] safeguarding self-expression . . ."); Doe v. City of Lafayette, 377 F.3d 757, 763 (7th Cir. 2004) (*en banc*) ("At the core of the First Amendment is the protection of the right to self-expression."); Franciska A. Coleman, *They Should Be Fired: The Social Regulation of Free Speech in the U.S.*, 16 FIRST AMEND. L. REV. 1, 14 (2017) ("[A] fundamental goal of the First Amendment is to protect rights of self-expression."). *See also* AM. C.L. UNION, *Freedom of Expression* (Mar. 1, 2002), https://www.aclu.org/other/freedom-expression ("Freedom of speech, of the press, of association, of assembly and petition – this set of guarantees, protected by the First Amendment, comprises what we refer to as freedom of expression."). For an early and influential articulation of this view, *see* Thomas I. Emerson, *Colonial Intentions and Current Realities of the First Amendment*, 125 U. PA. L. REV. 737, 758 (1977) ("The function of the system of freedom of expression in allowing personal fulfillment has, in my judgment, been substantially realized at a certain level. Every person has extensive rights to speak, write, create works of art, or otherwise express himself or herself . . .").

government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[3]

The assumption that speech means expression has altered our understanding of the proper assertion of speech rights and the purpose of protecting speech, and it has led to a fundamental misconception about what it means to say that speech is "free."[4] This article interrogates that assumption and reframes our understanding of the speech protected by the Constitution. I argue here that we should understand speech as either communicative or expressive.[5] As I will use these terms, communicative speech involves a speaker and a listener engaged in some meaningful form of mutual relationship.[6] Expressive speech is primarily an individual speaking their mind, without necessarily expecting or inviting (or, in some cases, permitting) any response by a listener. In developing this distinction here, I will argue that the constitutional protection of speech as reciprocal communication between speakers and listeners is more central to the history, theory, and principles of the First Amendment than the expressive freedom of autonomous individuals.

With this distinction in mind, the very first defining act of shared national identity by the United States was an act of communication. The Declaration of Independence was addressed to an audience that was expected to understand its meaning.[7] The conception and creation of the Constitution

3. 408 U.S. 92, 95 (1972) (citations omitted) (emphasis added).

4. The First Amendment has long been understood to protect a right of individual expression and self-realization. *See* Whitney v. California, 274 U.S. 357, 375–76 (1927) (Brandeis, J., concurring). The more recent shift that I challenge here is the insistence that this is *the* signal purpose of the First Amendment's speech protection. *See* Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1142–43 (1983). *See also infra* note 65 and accompanying text.

5. In keeping with convention, I will continue to refer to "speech" generically as including communication and expression, while distinguishing its different uses in the text as expressive or communicative. It is also worth noting here that not all forms of expression are necessarily linguistic. *See*, *e.g.*, R.A.V. v. St. Paul, 505 U.S. 377, 393 (1992) ("[T]he burning of a cross does express a message . . .") (citation omitted).

6. For the sake of simplicity and clarity, I will refer to speakers and hearers or listeners in the text. My argument is meant to encompass all of the different forms of speech protected by the Constitution: speakers and hearers, writers and readers, artists and viewers, corporations and consumers, etc.

7. *See generally* PAULINE MAIER, AMERICAN SCRIPTURE: MAKING THE DECLARATION OF INDEPENDENCE 129–30 (1998) ("A well-written preface should command the attention of its audience and begin to win them over to its message. But who was the audience? The Declaration of Independence claimed to be written from 'a decent respect to the opinions of mankind,' and submitted its 'facts to a candid world,' which has generally been taken to mean that it was intended for persons outside British North America . . ."). Maier goes on to explain that the Declaration was sent to Silas Deane so that he could "immediately communicate the piece to the Court of France,

emerged through an extended discursive process.[8] The political explanation and defense of the Constitution was communicated to the nation in the form of a sustained, albeit stylized, invitation to discussion.[9] The two most famous founding documents of the United States begin by referring to the speakers of those texts: "we" hold these truths to be self-evident,[10] and "we" are the people who wish to perfect the union.[11] Of course, exactly who "we" are has been, and continues to be, a subject that we struggle with. The same goes for which truths are self-evident and what perfection means.

In one of the earliest cases to address the application of the Bill of Rights in the states, the Supreme Court recognized that the rights guaranteed in the First Amendment were foundational for the creation of a political community in which the free exercise of these rights by citizens[12] would enable their democratic participation and ensure the accountability of the government to the electorate:

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and send copies of it to the other Courts of Europe," but that it "was designed first and foremost for domestic consumption." *Id*. at 130–31.

8. *See* CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY- SEPTEMBER 1787 (1966); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1969); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996).

9. SANFORD LEVINSON, AN ARGUMENT OPEN TO ALL: READING THE FEDERALIST IN THE 21ST CENTURY 2–3 (2015).

10. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these, are Life, Liberty, and the pursuit of Happiness."). I am here choosing to read the self-authorship of the Declaration as extending beyond the signatories to the document (as people often do). Strictly speaking, the "we" here may be read to refer solely to those who signed the document.

11. U.S. CONST. pmbl. ("We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.").

12. By focusing on citizens in the text, I do not mean to ignore others. The question whether, and to what extent, noncitizens may possess rights under the First Amendment to communicate and participate in the national community deserves serious consideration. *See* Hague v. Comm. for Industrial Org., 307 U.S. 496, 519 (1939) ("It has been explicitly and repeatedly affirmed by this Court, without a dissenting voice, that freedom of speech and of assembly for any lawful purpose are rights of personal liberty secured to all persons, without regard to citizenship. . . It has never been held that either is a privilege or immunity peculiar to citizenship of the United States . . .") (Stone, J., concurring) (citations omitted). *See also* David Cole, *Are Foreign Nationals Entitled to the Same Constitutional Rights as Citizens?*, 25 T. JEFFERSON L. REV. 367, 376–77 (2003). I will not address these issues further here, except to say that the people who have been engaged in the creation and preservation of the United States extend well beyond those who were granted the privileges of citizenship at any given time, *see* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 16–25 (1997), and the protections of the Constitution were never understood as limited exclusively to citizens. *See*, *e.g.*, Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886); Boumediene v. Bush, 553 U.S. 723, 758, 770–71 (2008).

> Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. . . The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances.[13]

This commitment of a free society to the liberties of assembly and petition, speech and press, was an endorsement by the framers of the Constitution of the legal rights and constitutional values of the common law tradition that they wished to retain rather than a revocation of the political system that they wished to reconstruct.[14]

The priority of rights to free association, speech and press in the United States is often understood as a recognition that "our constitutional command of free speech and assembly is basic and fundamental and . . . so important to the preservation of the freedoms treasured in a democratic society."[15] The

13. United States v. Cruikshank, 92 U.S. 542, 549, 552 (1876). In *Cruikshank* itself, the Court failed to protect the civil rights of African Americans and allow their participation in the political community during and after Reconstruction. As a result, some often criticize the *Cruikshank* ruling for disabling the federal government from safeguarding the rights of African Americans in the South. *See*, *e.g.*, Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1850–51 (2010). For a more favorable reading of *Cruikshank*, *see* PAMELA BRANDWEIN, RETHINKING THE JUDICIAL SETTLEMENT OF RECONSTRUCTION 119–22 (2011). The outcome of the case notwithstanding, however, the Court's emphasis on the place of citizenship in actualizing the relationship between the articulation of fundamental rights and the creation of a constitutional community is an overlooked aspect of the judgment, and the Court reaffirmed this principle in *Boyd v. Nebraska*, 143 U.S. 135, 158 (1892).

14. *See generally* Robertson v. Baldwin, 165 U.S. 275, 281 (1897) ("[T]he first ten amendments to the Constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors . . ."). *Cf.* JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS 237 (vol. 1) (1986) ("They were defending the constitution of limited government and of property in rights that once had been the English constitution. They were rebelling against the constitution of arbitrary power that the British constitution was about to become.").

15. Cox v. Louisiana, 379 U.S. 559, 574 (1965). *See also* De Jonge v. Oregon, 299 U.S. 353, 365 (1937) ("The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.") (Hughes, C.J.). The recognized priority of these rights is not limited to the United States. *See*, *e.g.*, R. v. Secretary of State for the Home Department, ex parte Simms [2000] 2 AC 115, 125 ("[t]he starting point is

primacy of free speech for constitutional and democratic government has long been understood to mean that "the first Amendment, although in form prohibitory, is to be regarded as having a reflex character and as affirmatively recognizing freedom of speech and freedom of the press as rights belonging to citizens of the United States; that is, those rights are to be deemed attributes of national citizenship or citizenship of the United States."[16] People who cannot learn, think, and speak freely are unlikely to participate fully, or even adequately, in a form of government that depends upon access to information and the ability to act upon it.[17]

Thinking of the ability to communicate freely as constituting a community who are able to participate together in their shared social and political life involves more than just an ability to speak one's mind (although it does undoubtedly include that freedom). The community engages together in defining itself as the type of political and legal community it is by virtue of the types of communication that it permits and the ways that its members choose to use their freedom when addressing one another.[18] Put differently, how we talk to each other reveals how we treat each other, and who we understand ourselves and others to be in the community constituted by our speech.

We should conceive of the right of free speech, then, not principally as a right of individuals to engage in an act of expression, but instead as a right of individuals to participate in a process of communication. There are several benefits of this conceptual reframing for our understanding of

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the right of freedom of expression. In a democracy it is the primary right: without it an effective rule of law is not possible.") (HL) (appeal taken from England).

16. Patterson v. Colorado, 205 U.S. 454, 464 (1907) (Harlan, J., dissenting). Justice Harlan dissented from the *Patterson* Court's decision not to incorporate the protection of free speech rights against the states through the Fourteenth Amendment. The Court would go on to do so in *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

17. *See* GEORGE ANASTAPLO, THE CONSTITUTION OF 1787: A COMMENTARY 67 (1989) ("[F]reedom of speech and of the press were taken for granted by the Constitution even before the First Amendment was adopted. After all, there is considerable reliance in the Constitution upon discussion."). More broadly, the relationship among access to information, informed citizenship, political accountability, self-government, and deliberative democracy are dominant themes for influential theories of free speech, such as Meiklejohn's (and others). *See* ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE 24–28 (1965).

18. *See* Jürgen Habermas, *Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?*, 83 NW. U. L. REV. 38, 42, 45 (1989) ("[A] language community is reproduced in turn through the communicative actions of its members. This explains why the identity of the individual and that of the collective are interdependent; they form and maintain themselves together . . . In his capacity as a participant in argumentation, everyone is on his own and yet embedded in a communication context . . . The equal rights of individuals, and the equal respect for the personal dignity of each, depend upon a network of interpersonal relations and a system of mutual recognition . . .").

constitutionally protected speech: (1) it reorients us away from thinking of speech as either a right of speakers or a right of listeners;[19] (2) it focuses our attention instead on speech as a reciprocal relationship between speakers and listeners; and (3) it reinforces the understanding that free speech is essential to deliberative democracy as a participatory process that depends upon the mutual exchange of ideas and the meaningful agency of the participants.

Before we can examine the proper conception of constitutionally protected communicative speech, we need to consider how we have reached the point where we assume that speech is expression. As the Holmesian "marketplace of ideas" became more and more generally accepted as the central conception of First Amendment speech protection, many widely assumed that the First Amendment primarily protected the unfettered license to speak one's mind.[20] In fact, Holmes actually referred to "free trade in ideas," which is closer in spirit to the argument I develop here.[21]

Regardless of which phrase one uses, however, free trade and a marketplace involve an exchange.[22] Moreover, although it is far less often

19. Evidence of the shortcomings of current understandings of free speech doctrine and theory may be found in the fact that some prominent contemporary free speech scholars argue that "[t]he speaker-based model dominates First Amendment jurisprudence," Daniel J. Solove and Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1688 (2009), while others contend that "[f]ree speech theorists are virtually united in concluding that listeners are rightsholders. The debate is over whether speakers also enjoy speech rights." Leslie Kendrick, *Are Speech Rights for Speakers?*, 103 VA. L. REV. 1767, 1778 (2017). *See also* RONALD DWORKIN, A MATTER OF PRINCIPLE 385–89 (1985) (evaluating free speech rights as protecting either speakers or listeners, and arguing that the "core of the First Amendment protects the speaker as a matter of principle.").

20. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See also* United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (assuming that the central "interest protected by the First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues . . .") (L. Hand, J.).

21. *Abrams*, 250 U.S. at 630. *See* Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 24 (2004). Holmes also referred to "the competition of the market" as "the best test of truth." *Abrams*, 250 U.S. at 630. On this point, *see* Vincent Blasi, *Reading Holmes Through the Lens of Schauer: The* Abrams *Dissent*, 72 NOTRE DAME L. REV. 1343, 1345 (1997) [hereinafter Blasi, *Reading Holmes*].

22. *See*, *e.g.*, Morales v. Schmidt, 494 F.2d 85, 88 (7th Cir. 1974) (en banc) ("First Amendment interests are at stake[:] . . . one's willingness to communicate and the public interest in not interfering with the exchange of information and ideas in the intellectual marketplace . . ."). (Stevens, J., concurring); Karetnikova v. Trustees of Emerson College, 725 F. Supp. 73, 81 (D. Mass. 1989) ("Free speech rights protect not only the speaker, but also the public to whose broad marketplace of ideas the speaker contributes. The interest in the exchange of differing ideas on matters of public concern . . . [is] at issue here . . ."). As a central purpose of protecting speech, this rationale is longstanding: "[B]oth sides ought equally to have the advantage of being heard by the public; and that when Truth and Error have fair Play, the former is always an overmatch for the latter . . ." Benjamin Franklin, "An Apology for Printers," THE PENNSYLVANIA GAZETTE (June 10, 1731), *quoted in* J.A. LEO LEMAY, THE LIFE OF BENJAMIN FRANKLIN: PRINTER AND PUBLISHER, 1730-1747, 12 (vol. 2) (2006).

appreciated, Holmes also emphasized in his famous *Abrams v. United States* dissent that "the principle of the right to free speech is always the same," and he identified that principle as an "effort to change the mind of the country."[23]

The value of exchanging ideas for the purpose (or possibility) of changing minds, and the understanding that this is the central principle of the right to free speech, is my focus here. This understanding grounds Brandeis's affirmation in *Whitney v. California* of Holmes's *Abrams* principle,[24] and this principle was reinforced by Justice Brennan's statement that "the First Amendment must therefore 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."[25] We have lost sight of this principle[26]—and lost faith in the underlying social and political value of

23. *Abrams*, 250 U.S. at 628. *See also* Jack M. Balkin, *Cultural Democracy and the First Amendment*, 110 NW. U. L. REV. 1053, 1054 (2016) ("Freedom of speech does more than protect democracy; it also promotes a democratic culture. The First Amendment guarantees the right of individuals and groups to participate in culture and to influence each other through participating in culture. Thus, the First Amendment not only helps to secure political democracy, it also helps to secure cultural democracy."). For a careful textual exegesis that explains the importance of *Abrams* in the development of Holmes's thinking about the First Amendment, and the importance of Holmes's thinking in the development of our understanding of the First Amendment, *see* G. Edward White, *Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension*., 80 CALIF. L. REV. 391, 438 (1992) ("Holmes then confirmed in his [*Abrams*] dissent the substantive nature of his restated test by saying that 'the principle of the right to free speech [was] always the same,' . . . First Amendment protection might be closely linked to . . . the public discussion of all public questions.") (citation omitted) (internal punctuation deleted). *See also* David M. Rabban, *The Emergence of Modern First Amendment Doctrine*, 50 U. CHI. L. REV. 1207, 1308–09 (1983).

24. *See generally* Whitney v. California, 274 U.S. 357, 375–377 (1927)("They [who won our independence] valued liberty both as an end and as a means. They believed . . . that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . [T]he path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. . . [W]ith confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.") (Brandeis, J., concurring). For a valuable discussion of the affinities and subtle but significant variances between Brandeis's and Holmes's thinking in these opinions, *see* CASS SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 27–28 (1993).

25. Columbia Broadcasting System, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 193 (1973) (Brennan, J., dissenting) (emphasis in original).

26. Scholars contest when, precisely, this shift occurred. The fact that the change happened is more important for my argument than pinpointing exactly when it happened. Michael Sandel argues that the shift occurred during the latter decades of the twentieth century, as the Court altered its focus from the public and participatory value of speech to an emphasis on an individuated and

hearing, participating in, and persuading through public discussion—and replaced it with the notion that it is more important that the Constitution permits us to speak our minds rather than to hear what others have to say, to express our views but not to have them challenged or tested.[27]

We need to return to the historical and conceptual foundation of speech rights, and restore communication as the core mode of speech protected by the Constitution. At (or around) the time of the founding, there were references that seem to reflect a view of speech as expression.[28] At the same time, there were references to speech as communication or discussion.[29] For my purposes, however, the critical point is that the right was generally premised on responsible, truthful, and minimally courteous exercise of that freedom.[30] And there was a further recognition that irresponsible or untruthful abuses of this liberty would expose the speaker to "the condition of being

self-expressive conception of speech tied to a notion of the autonomous and "unencumbered self" as the model rights holder. *See* MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 79–83 (1996). This is broadly consistent with historiographic studies of the doctrinal change. *See infra* notes 42–44 and accompanying text.

27. There is a large and expanding popular and scientific literature on the increasing tendency of people to perceive challenges to their political beliefs as personal attacks, in part because many people no longer differentiate their political and personal identities. *See*, *e.g.*, Jonas T. Kaplan, Sarah I. Gimbel, and Sam Harris, *Neural Correlates of Maintaining One's Political Beliefs in the Face of Counterevidence*, 6 SCI. REP. 39589 (2016) (available at https://doi.org/10.1038/srep39589).

28. *See*, *e.g.*, JOHN TAYLOR, AN INQUIRY INTO THE PRINCIPLES AND POLICY OF THE GOVERNMENT OF THE UNITED STATES 474 (1814) (referring to "an unlimited freedom of utterance").

29. *See*, *e.g.*, ALEXANDER ADDISON, REPORTS OF CASES IN THE COUNTY COURTS OF THE FIFTH CIRCUIT, AND IN THE HIGH COURT OF ERRORS AND APPEALS, OF THE STATE OF PENNSYLVANIA 272 (1800) ("The principles of liberty, therefore, the rights of man, require, that our right of communicating information, as to facts and opinions, be so restrained, as not to infringe the right of reputation. Unless it be so restrained, there is no liberty; for there is no just enjoyment of our rights. And, if every man's right of communication be unrestrained, every man's right of reputation is unguarded . . . [T]he freest governments, which have the most regarded and cultivated the principles of liberty . . . have been careful so to define and limit the rights of reputation and of communication of sentiments, that the right of either should not infringe that of the other. We communicate our sentiments by words, spoken, written, or printed, or by pictures or other signs. The restraints laid on the exercise of this right, so as it may not infringe the right of reputation, differ, according to the way in which the right of communication is exercised.") (spelling updated); RICHARD PRICE, OBSERVATIONS ON THE IMPORTANCE OF THE AMERICAN REVOLUTION, AND THE MEANS OF MAKING IT A BENEFIT TO THE WORLD 21–22 (1785) ("[L]iberty of discussion . . . [is] under no restraint except when used to injure any one in his person, property, or good name; that is, except when it is used to destroy itself. In liberty of discussion, I include the liberty of examining all public measures, and the conduct of all public men . . .") (spelling updated).

30. *See*, *e.g.*, Proposal by Roger Sherman to House Committee of Eleven (July 21-28, 1789), *in* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 148 (2nd ed.) (Neil H. Cogan, ed., 2015) (referring to the "rights of . . . [s]peaking, writing and publishing their Sentiments with decency . . .").

answerable to the injured party."[31] Put differently, there was a recognition that speakers exist in a relationship with those who hear and may be harmed by their words, which was consistent with the founding-era assumption that natural rights were always possessed in relation to the natural rights of others, because there could be no inherent right for one individual to infringe the equal and indivisible rights of another.[32] For this reason, among others, writers during the founding period commonly conditioned the freedom of speech—which is to say, speech exercised "with decency,"[33]—on respect for the rights of others and the responsible exercise of that liberty.[34]

31. Statement of Rep. Harrison Gray Otis, 8 Annals of Cong. 148 (1798) *See also* PA. CONST., art. IX, § 7 (1790) ("every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty."); JOSEPH PRIESTLEY, LECTURES ON HISTORY, AND GENERAL POLICY 49–50 (vol. 2) (1793) ("It is therefore in the interest of the whole that, in a state of society, every man retain his natural powers of speaking, writing, and publishing his sentiments on all subjects, especially in proposing new forms of government, and censuring those who abuse any public trust . . . [I]t will be sufficiently checked, if every man be punished for any injury that he can be proved to have done by it to others in his property, [or] good name . . .").

32. *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 304 (Peter Laslett red., Cambridge University Press 1988) (1690) ("[A]ll Men by Nature are equal being that equal Right that every Man hath, to his Natural Freedom, without being subjected to the Will or Authority of any other Man.") (italics omitted); Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 924 (1993) ("Being equally free, individuals did not have a right to infringe the equal rights of others, and, correctly understood, even self-preservation typically required individuals to cooperate—to avoid doing unto others what they would not have others do unto them."). Individuals could not always be trusted to act in accordance with reason in this regard, however, because "many individuals in the state of nature did not behave in accordance with this natural law reasoning about not injuring others." *Id*. at 930. *Cf.* DEL. CONST. pmbl. ("[A]ll men have, by nature, the rights . . . of enjoying and defending life and liberty . . . without injury by one to another . . ."). And so, the story goes, we exchange some of our natural liberty for the security provided by a government. Although many have made the same observation, the constitutional, political, social, and moral hypocrisy and indecency of proclaiming these values while at the same time enslaving human beings cannot go unremarked. *See* Frederick Douglass, "What To The Slaves Is The Fourth Of July?: An Address Delivered In Rochester, New York, on 5 July 1852," *in* FREDERICK DOUGLASS, THE FREDERICK DOUGLASS PAPERS: SERIES ONE 368 (vol. 2) (John W. Blassingame, ed.1985) (noting that Black people do not share the "rich inheritance of justice, liberty, prosperity and independence" enjoyed by white people, and underscoring the "mockery and sacrilegious irony . . . [of] drag[ging] a man in fetters into the grand illuminated temple of liberty.").

33. *See* James Wilson, "Of the Natural Rights of Individuals," *in* COLLECTED WORKS OF JAMES WILSON 1046 (vol. 2) (Kermit L. Hall and Mark David Hall, eds.) (2007) ("[Any] citizen under a free government has a right to think, to speak, to write, to print, and to publish freely, but with decency and truth, concerning publick men, publick bodies, and publick measures.").

34. *See* Jud Campbell, *Natural Rights and the First Amendment*, 127 YALE L.J. 246, 276–77 (2017) [hereinafter Campbell, *Natural Rights*] ("Speaking, writing, and publishing were thus ordinarily subject to restrictions under laws that promoted the public good . . . Consequently, even though the Founders broadly acknowledged that speaking, writing, and publishing were among their natural rights, governmental limitations of expressive freedom were commonplace Blasphemy and profane swearing, for instance, were thought to be harmful to society and were thus subject to

The conventional view of the First Amendment's history tends to treat the freedoms of speech and the press as more closely connected than we do now.[35] This is, in part, due to some recognition that the contours of the independent freedom of speech would develop over time. It was also based on the belief that, whatever else the freedoms of speech and the press might require separately, they both proceed from a shared conviction that "the 'speech' they all had in mind [at the time] must obviously have been political discourse.[T]he 'freedom of speech' in the First Amendment is likewise about political discourse at its core."[36] And the Supreme Court has consistently reaffirmed this understanding of the First Amendment's speech protection.[37] The critical element of this conception of the speech most centrally protected by the First Amendment—and its connection to Brandeis, Holmes and Brennan's principle of participating in a public discussion, exchanging ideas, and attempting to persuade others in a political community—is that it involves interpersonal communication, not just individual expression:

> [T]he protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. . . "The importance of this consists [in] its ready communication of thoughts between subjects, and its consequential promotion of union among them . . ."[38]

Along with a misconception about the form of speech that the First Amendment was meant to privilege, the current doctrinal and theoretical fixation on expressive freedom derived from individual autonomy misconstrues the historical understanding of free speech as a right and the government's role in securing its vitality. The notion that the First Amendment "means"

governmental regulation *even though* they did not directly interfere with the rights of others.") (emphasis added).

35. *See*, *e.g.*, David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 487 (1983). *But see* Campbell, *Natural Rights*, *supra* note 34, at 288–90.

36. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 815 (1999). *See also* SUNSTEIN, *supra* note 24, at 146 ("[I]t is political speech that belongs at the First Amendment core.").

37. *E.g.*, Snyder v. Phelps, 562 U.S. 443, 444 (2011); Morse v. Frederick, 551 U.S. 393, 403 (2007); FCC v. League of Women Voters, 468 U.S. 364, 375–76 (1984); Mills v. Alabama, 384 U.S. 214, 218 (1966).

38. Roth v. United States, 354 U.S. 476, 484 (1957) (quoting Letter from Continental Congress to the Inhabitants of the Province of Québec (Oct. 26, 1774), 1 Journals of the Continental Congress 108 (1774)). *See also* Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964) ("[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."). *Cf.* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 94 (1980) ("[T]he view that free expression per se, without regard to what it means to the process of government, is our preeminent right has a highly elitist cast.").

that (almost) all forms of individual expression, of whatever kind, must remain unrestricted is grounded in a view that Jud Campbell calls "neutrality principles."[39] As Campbell explains, these neutrality principles are new.[40] While the First Amendment was historically understood to protect "[w]ell-intentioned speech on matters of public concern,"[41] the assertion of individual rights as "as spheres of personal liberty, free from socially prescribed ideas of morality,"[42] emerged in the twentieth century. And as rights came to mean spheres of individual choice, the right of free speech came to mean "a privileged sphere of individual autonomy,"[43] and a right of largely unconstrained self-expression.[44]

A more historically accurate conception of the right of free speech would view the right of meaningful participation in public debate—Holmes's free trade in ideas—as the paramount concern,[45] in conjunction with Emerson's distinction between freedom of belief and freedom of expression.[46] Read carefully across time, the historically-grounded understanding of free speech rights ensured that people were free to think whatever they liked and to say whatever they thought, provided that they were "speaking in good faith about matters of public concern."[47] This framing of the scope of First Amendment liberty remained consistent throughout the nineteenth century.[48] Prominent legal scholars continued to argue (or assume) through the early twentieth century that the government had a role to play in responding to expression that "actively disturbs the public peace or shocks the moral feelings of the community" to ensure that in certain extreme circumstances

39. Jud Campbell, *The Emergence of Neutrality*, 131 YALE L.J. 861, 865 (2022) [hereinafter Campbell, *The Emergence of Neutrality*].

40. *Id*.

41. *Id*. at 866. *See also id*. at 879–80.

42. *Id*. at 869.

43. *Id*.

44. For more on the discontinuity between the modern understanding of rights and those of the founding period, *see* RAKOVE, *supra* note 8, at 291 (explaining that under the colonial conception of rights "[n]early all the activities that constituted the realms of life, liberty, property, and religion were subject to regulation by the state . . ."). *See also id*. at 329.

45. *See* Campbell, *The Emergence of Neutrality, supra* note 39, at 870–71.

46. Most of the discussion in correspondence about the proposed Amendment emphasized freedom of conscience, rather than speech itself. *See generally* Cogan, ed., THE COMPLETE BILL OF RIGHTS, *supra* note 30, at 72–76 (collecting sources). For more on Emerson's view, *see infra* notes 67–68 and accompanying text. *See also* Campbell, *The Emergence of Neutrality*, *supra* note 39, at 870, 878, 881.

47. Campbell, *The Emergence of Neutrality*, *supra* note 39, at 874–75. As Campbell points out, the other core protection of speech understood at the framing was a bar on prior restraints. *See id*. at 874–76. *See also* KENT GREENAWALT, INTERPRETING THE CONSTITUTION 200 (2015).

48. *See* Campbell, *The Emergence of Neutrality*, *supra* note 39, at 883–85.

"social interests must be weighed over against the individual interest."[49] And to this day the most stable and lucid element of First Amendment doctrine in the United States is almost certainly that freedom of speech "embraces at the least the liberty to discuss publicly and truthfully all matters of public concern."[50] This is not to say that straightforward and simple rules existed (or exist) that always plainly differentiate speech about matters of public concern from the expression of personal views in bad faith.[51] Nevertheless, an accurate appreciation of the historical context would recognize that this is where the intersections and tensions between individual liberty and government involvement should lie in free speech cases, rather than a default assumption that individual self-expression is, by definition, what the First Amendment was meant to protect.

Equating freedom of speech with freedom of expression is therefore a contemporary conception that was not the core historical meaning of free speech, and is not (and ought not to be) the cynosure of our current

49. *Id*. at 897 (quoting Roscoe Pound, *Interests of Personality [Concluded]*, 28 HARV. L. REV. 445, 455
(1915)).

50. Thornhill v. Alabama, 310 U.S. 88, 101 (1940). *See also Mills*, 384 U.S. at 218 ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."); Consol. Edison Co. v. Public Serv. Comm'n, 447 U.S. 530, 534–35 (1980); Connick v. Myers, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.") (citations omitted); *Snyder*, 562 U.S. at 451–52 ("[S]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection.'") (citations omitted). For a leading scholarly discussion of the relationship between freedom of speech and public discourse, *see* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 119–96 (1995).

51. *See* Campbell, *The Emergence of Neutrality*, *supra* note 39, at 886–88. This is one of the challenges for Meiklejohn's view that the First Amendment implicitly or textually distinguishes *the* freedom of speech and free speech. He famously argued that the First Amendment permitted the regulation of certain "forms of speech" while prohibiting the abridgment of "freedom of speech." MEIKLEJOHN, *supra* note 17, at 20–21. In his analogy to the "town meeting," Meiklejohn describes the critical distinction for constitutional purposes between the freedom of speech practiced where members of a community discuss "matters of public interest," *Id*. at 24, and other forms of speech that may occur "whenever, wherever, however [a speaker] chooses." *Id*. at 25. While I cannot address the challenges to Meiklejohn's position comprehensively here, I will just note in relation to the public/private speech distinction, that his sharp line is difficult to maintain. Matters of public concern are often discussed in private settings. *See* Paul Gewirtz, *Privacy and Speech*, 2001 SUP. CT. REV. 139, 155 (2001) ("The fact that a conversation involves a matter of 'public concern' is not inconsistent with it also warranting the label 'private' because it takes place within a private zone."). Moreover, some matters discussed in private are, in part because of the nature of the interaction, entitled to First Amendment protection: for example, what lawyers discuss with clients, *see* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 543–44 (2001), what doctors discuss with patients, *see* Conant v. Walters, 309 F.3d 629, 636–38 (9th Cir. 2002), and what teachers discuss with students, *see* Cockrel v. Shelby Cnty. Sch. Dist., 270 F.3d 1036, 1052 (6th Cir. 2001).

conceptual understanding of First Amendment protection.[52] The conventional assumption that Holmes's and Brandeis's famous opinions in *Abrams* and *Whitney* are the *locus classicus* of the modern doctrine of government neutrality and speech-as-expression is itself, at the very least, only a contested conception of their views in these cases.[53] To be very clear, I do not mean to suggest that the First Amendment does not protect self-expression or non-political speech,[54] only that communication should properly be prioritized when considering the level and intensity of protection the Constitution affords to different modes of speech. The writers and readers of a constitution engage in self-government and deliberative democracy through the shared process of defining, debating and interpreting the language of their laws and their Constitution.[55] Speech in this foundational sense is fundamentally a dynamic communicative relationship, and communication is the form of speech that is conceptually and historically at the heart of the First Amendment. Accordingly, the current assumption that we should nevertheless view this right to freedom of speech primarily a right of autonomous self- expression without government interference is, at the very least, impoverished and inadequate—both theoretically and historically.[56]

The discussion in this article proceeds in three steps. Section II reexamines and interrogates the current predominance of the dignitarian theory of free speech rights under the First Amendment as grounded in the individual autonomy of the speaker, and explains the relationship between this

52. *See*, *e.g.*, Anderson, *supra* note 35, at 488 ("'Freedom of expression,' the notion of an interrelated complex of protections for thought, belief, and expression, is a modern concept. To impose it retrospectively on the framers is anachronistic.").

53. *See* Campbell, *The Emergence of Neutrality, supra* note 39, at 903–04.

54. *See* Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of the Principle*, 30 STAN. L. REV. 299, 311–22 (1978). It is well-established that the protection of the First Amendment is not restricted solely to matters of public policy or political concern. *See*, *e.g.*, United Mine Workers v. Illinois State Bar Ass'n, 389 U.S. 217, 223 (1967) ("[T]he First Amendment does not protect speech . . . only to the extent it can be characterized as political.").

55. *See generally* JOHN BRIGHAM, CONSTITUTIONAL LANGUAGE: AN INTERPRETATION OF JUDICIAL DECISION 68 (1978) ("As a constituting instrument, the Constitution laid the contractual foundation from which the legitimacy of its functions developed. The development of political traditions in the United States, with reference to the Constitution, is part of the grammar . . . which is the basis for a view of constitutional law as a language.").

56. *See*, *e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 51 (1988) ("We have therefore been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions."); Randall P. Bezanson, *Is There Such A Thing As Too Much Free Speech?*, 91 OR. L. REV. 601, 601 (2012) ("Free speech primarily protects the individual's liberty to freely speak his or her mind."); David M. Rabban, *Free Speech in Progressive Social Thought*, 74 TEX. L. REV. 951, 1026 (1996) ("The Supreme Court's current recognition of the First Amendment [i]s a right of individuals to speak without interference from the state . . .").

theory of free speech rights and the attendant doctrinal preoccupation with speech as individual expression unconstrained by the government.

Section III then builds on the explanation of the relationship between the dignitarian theory of speech and the current assumption that the First Amendment primarily protects an individual right of expression by describing the contemporary elision of expressive and communicative speech. This section argues for the differentiation of communication from expression with respect to the speech protected by the Constitution, and draws on and develops the historical discussion from the introduction to clarify the nature of communicative speech as a mutual relationship between speakers and listeners and the centrality of this conception of the speech protected by the First Amendment.

With this understanding of speech and this distinction between communication and expression established, Section IV analyzes significant decisions of the Supreme Court and other federal courts and identifies a consistent doctrinal basis for recentering communication, rather than expression, as the core form of speech protected by the First Amendment, and for considering the right of free speech to be possessed by speakers and listeners engaged in forms of communicative speech.

Finally, the concluding section suggests some implications of foregrounding communication as constitutionally protected speech for our perception of the deliberative democracy enabled by the rights contained within the First Amendment, for our relationships with one another as participants who together articulate the content and values of our Constitution and the polity that it creates and sustains, and for our understanding of who we are when we communicate with each other about the meaning of our collective effort to define our community and our Constitution through our speech.[57]

I. DIGNITY AND AUTONOMY

The prevailing assumption that we should understand freedom of speech primarily as a freedom of individual expression is grounded in the autonomy of the individual speaker.[58] In the words of one of its prominent

57. *Cf.* H. JEFFERSON POWELL, A COMMUNITY BUILT ON WORDS: THE CONSTITUTION IN HISTORY AND POLITICS 213 (2002) ("I have argued that one way to interpret American constitutionalism is as a tradition of talk in which a persistent theme has been the inclusion of people within the conversation, within the community of discourse that the Constitution announces and constitutional law, at its best, safeguards. . . American constitutionalism can be read as an ongoing proposal to maintain political community in the teeth of, and indeed through means of, robust disagreement.").

58. Edwin Baker is one of the most prominent and influential theorists of this view. *See* C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH (1989). *See also* Joseph Blocher, *Rights To and Not To*, 100 CALIF. L. REV. 761, 804 (2012) ("[I]t has often been argued that the

proponents, "[f]ree speech is an aspect of autonomy, of the sovereignty of the individual over himself. We believe that if speakers are, within quite generous limits, simply allowed to say whatever they want this will be productive of great public and private good . . ."[59]

Another scholar describes the assumption of autonomy underlying the individual right of self-expression in this way:

> [A] thinker-based free speech theory…takes to be central the individual agent's interest in the protection of the free development and operation of her mind…[G]overnment activit[ies] inconsistent with valuing this protection are inconsistent with a commitment to freedom of speech. In developing this position, I will proceed from the assumption that, for the most part, we are individual human agents…[and] I will also assume that our possession and exercise of these capacities correctly constitute the core of what we value about ourselves. I will not say much to defend these assumptions. I do not regard them as especially controversial.[60]

When I say that these assumptions are the prevailing view of the constitutional basis for protecting speech, this is what I have in mind. However one frames it, Susan Brison calls this position the "argument from autonomy,"[61] and she considers it "the one most commonly used by liberal legal and political theorists."[62] The prevalence of this view of autonomy as the underlying basis for understanding speech rights is difficult to overstate.[63]

Moreover, this conception of autonomy is also the correlative foundation for the assertion of the dignitarian theory of free speech in the United

purpose of the free speech right is to protect individual autonomy."). *See also* SANDEL, *supra* note 26.

59. James Boyd White, *Free Speech and Valuable Speech: Silence, Dante, and the "Marketplace of Ideas,"* 51 UCLA L. REV. 799, 811 (2004).

60. Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 287 (2011).

61. Susan J. Brison, *The Autonomy Defense of Free Speech*, 108 ETHICS 312, 322 (1998).

62. *Id*. at 313. *See also* Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 9 (1990); ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 929 (3d ed. 2006) ("[A] major rationale often expressed for protecting freedom of speech as a fundamental right is that it is an essential aspect of personhood and autonomy.").

63. *E.g.*, Marc O. DeGirolami, *Virtue, Freedom, and the First Amendment*, 91 NOTRE DAME L. REV. 1465, 1515 (2016); Caroline Mala Corbin, *The First Amendment Right Against Compelled Listening*, 89 B.U. L. REV. 939, 970–71 (2009); Burt Neuborne, *Toward a Democracy-Centered Reading of the First Amendment*, 93 NW. U. L. REV. 1055, 1058 (1999); Meir Dan-Cohen, *Freedoms of Collective Speech: A Theory of Protected Communications by Organizations, Communities, and the State*, 79 CALIF. L. REV. 1229, 1232–33 (1991); Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 221–22 (1972).

States,[64] which posits self-realization or self-fulfillment as the central (or sole) underlying value animating the First Amendment's protection of expression.[65] Indeed, the Court in *Mosley* itself explicitly adopted the dignitarian basis for speech protection: "to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship."[66] This formulation of the freedom of speech echoes the influential view of Thomas Emerson. Emerson is famously associated with the dignitarian basis for speech protection. Just as in *Mosley*, Emerson frames the protection of speech "as a means of assuring individual self-fulfillment,"[67] and he views the suppression of speech as "an affront to the dignity of man."[68]

But Emerson also explicitly recognized the importance of the marketplace and deliberative democratic theories of speech protection.[69] And he carefully distinguished freedom of belief and freedom of expression. Freedom of belief, according to Emerson, "is the right of an individual to form and hold ideas and opinions whether or not communicated to others."[70] For him, this freedom "lies at the heart of democratic society."[71] Even more important for my argument here, Emerson's conception of free speech did not focus exclusively on the expressive rights of speakers. He acknowledged that "[f]rom the obverse side it [freedom of speech] includes the right to hear the views of others and to listen to their version of the facts."[72] Emerson recognized the mutuality of speech in a discursive process of public engagement and discussion, and the consequent extension of speech rights under the First Amendment to listeners as well as speakers.[73]

64. *See*, *e.g.*, Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1809 (1999); Edward J. Eberle, *Practical Reason: The Commercial Speech Paradigm*, 42 CASE W. RES. L. REV. 411, 466 (1992).

65. *See* Brison, *supra* note 61, at 336. For an example of a view Brison discusses, *see* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 611 (1982) ("[A]ll of the so-called 'values' of free speech, to the extent that they are to be accepted, derive ultimately from the single value of self-realization . . .The argument here is that, to the extent you accept the value of free speech at all, you must necessarily accept the self-realization value, for *there is no other*.") (emphasis added). Redish claims later that almost all forms of self-expression are forms of self-realization. *See id*. at 626–27.

66. *Mosley*, 408 U.S. at 96.

67. THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970).

68. *Id.*

69. *See id*. at 6–7.

70. *Id*. at 21.

71. *Id*.

72. *Id*. at 3. *See also id*. at 650 ("[T]he right to hear must be considered in First Amendment cases on equal terms with the right to speak.").

73. Nothing about the dignitarian theory is necessarily inconsistent with prioritizing speech as communication. *Cf.* STEPHEN J. HEYMAN, FREE SPEECH AND HUMAN DIGNITY 84 (2008) (The

Although a small number of scholars have questioned the theoretical grounding of autonomy and dignity as the central basis for speech protection under the First Amendment,[74] and a smaller number have attempted to provide a less atomistic (and, to them, more appealing) conception of autonomy,[75] my argument here takes a different approach. Rather than begin with

First Amendment is concerned with "the relationship that is formed through communication between the speaker and listener, or within which this communication takes place."); MATTHEW D. BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 12 (2009) (describing the view that speech protection fosters "the development of individual judgment and personality through the free discussion of ideas."). Bunker calls this version of autonomy theory "consequentialist." *Id*.

74. *See*, *e.g.*, Schauer & Pildes, *supra* note 64, at 1814–16; Gregory P. Magarian, *Regulating Political Parties under a "Public Rights" First Amendment*, 44 WM. & MARY L. REV. 1939, 1971–91 (2003); Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 583 (1991) ("[T]he special quality of speech is not its relationship to the private self of the speaker, but its relationship to the welfare of the community. It is the communal benefits derived from speech that justify greater protection for speech than for other forms of personal activity.").

75. Most of these scholars draw upon Kantian notions of intersubjective moral legitimation through considered self- legislating agency. *See*, *e.g.*, Kim Treiger-Bar-Am, *In Defense of Autonomy: An Ethic of Care*, 3 N.Y.U. J. L. & LIBERTY 548, 576–77 (2008); 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, 160–61, 165–69 (1997). Although Professor Wells claims that "the conception of autonomy underlying the Court's free speech jurisprudence derives primarily from Immanuel Kant's moral and political philosophy," *Id*. at 165, she asks a little later, "what would a system of laws designed to facilitate free expression look like if based upon a Kantian conception of autonomy?" *Id*. at 169. And she goes on to qualify her claim further by noting that she does "not assert that the Court has explicitly adopted Kantian autonomy as the basis of its doctrinal organizing principles. . . [and] other factors arguably contradict [her] argument." *Id*. at 171–72. But just to address Wells's position on its own terms in relation to my argument here, she asserts that the Supreme Court's refusal "to consider offensive speech as being low in value further bolsters the autonomy rationale argument," *Id*. at 180, because this speech "does not coerce or manipulate others to react in an immediately violent or irrational manner." *Id*. Even if we (or the Court) could consistently differentiate between offensive speech that manipulates (as opposed to persuading or convincing) and speech "that must be free from state interference in order to protect our thought processes from state coercion," *Id*. the Court's judgments cannot convincingly be said to draw this distinction. Perhaps the best demonstration of this is Wells's own (parenthetical) citation to a case as support for her argument. In this section of her essay, Wells cites Terminiello v. Chicago, 337 U.S. 1, 4 (1949), quoted in Texas v. Johnson, 491 U.S. 397, 408–09 (1989). The *Johnson* Court's reliance on *Terminiello* undercuts the doctrinal clarity Wells seeks because the *Terminiello* case involved precisely the sort of speech that invades the dignity of certain people *and* (at least) "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello*, 337 U.S. at 4. As Justice Jackson emphasized in his dissent, Terminiello chose to speak in the ways that Wells wishes to categorize as either dignity-invading or persuasive, but which have both effects on different members of the audience at the same time. *See id.* at 14–23 (Jackson, J., dissenting). While I am sympathetic to Wells's effort, the case decisions do not reveal the theoretical grounding in Kantian theory that she hopes to find there. Whatever one thinks of Kantian moral theory, it is simply not the conception of autonomy that undergirds theories of individual free speech rights under the U.S. Constitution. *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 573–74 (1995) ("[A] speaker has the autonomy to choose the content of his own message. . . "[T]he *point of all speech protection*

an assumption about autonomous individuals as the basis for understanding how and why the First Amendment protects speech, I begin instead with analysis of the nature of the speech centrally protected by the First Amendment as a basis for understanding the rights of individuals under the Constitution.[76]

II. COMMUNICATION AND EXPRESSION

The failure to differentiate expression and communication in legal and philosophical discussions of free speech is so pervasive that expression and communication are often defined in terms of one another: "'[A]cts of expression' . . . include any act that is intended by its agent to communicate to one or more persons some proposition or attitude."[77] We should nevertheless differentiate expression from communication.[78] Communicative speech is the intersubjective "transfer of meaning"—usually through language, symbols, or gestures—between a speaker and a listener that creates a relationship in which they participate together.[79] In contrast with mutual communication, expressive speech is often unilateral or unidirectional. Unlike communication, expression involves a speaker's choice to speak, but it does not necessarily produce a mutual relationship with, or at times even permit a response from, a listener.[80] And equating freedom of speech with freedom of

is to shield just those choices of content that in someone's eyes are misguided, or even hurtful.") (generally citing *Terminiello*) (internal punctuation deleted and other citations omitted) (emphasis added).

76. *See* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1411 (1986) ("[T]he key to fulfilling the ultimate purposes of the first amendment is not autonomy, which has a most uncertain or double-edged relationship to public debate, but rather the actual effect of [speech]: On the whole does it enrich public debate? Speech is protected when (and only when) it does, and precisely because it does, not because it is an exercise of autonomy. In fact, autonomy adds nothing and if need be, might have to be sacrificed, to make certain that public debate is sufficiently rich to permit true collective self-determination. What the phrase 'the freedom of speech' in the first amendment refers to is a social state of affairs, not the action of an individual or institution.").

77. Thomas Scanlon, *supra* note 63, at 204, 206.

78. *See* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 50–56 (1982).

79. *See generally* HAROLD J. BERMAN, LAW AND LANGUAGE: EFFECTIVE SYMBOLS OF COMMUNITY 38 (2013) ("[L]anguage presupposes a transfer of meanings not only *from* speaker to listener (or writer to reader) but *between* them; for some response from the listener (or reader) is presupposed in every utterance. Such reciprocal interaction is not only a purpose of language but also what language *is* operationally: speech does inevitably effectuate an exchange . . .") (emphasis in original); MARIANNE CONSTABLE, OUR WORD IS OUR BOND: HOW LEGAL SPEECH ACTS 80 (2014) ("[a] speech act is not, strictly speaking, *caused* by its speaking subject. Joint speaking and hearing do not cause, but together *are*, what the (singular) social act *is*") (emphasis in original).

80. *Cf.* Beauharnais v. Illinois, 343 U.S. 250, 257 (1952) ("Resort to epithets or personal abuse is not in any proper sense communication of information or opinion . . .") (quoting Cantwell v. Connecticut, 310 U.S. 296, 309–10 (1940)).

expression assumes that the right of free speech "belongs" to a speaker.[81] In this respect, it is especially unfortunate that the right of free speech is so often characterized as "expressive freedom."[82] This is a misleading understanding of the nature of speech and of its constitutional protection.

Conflating communication and expression ignores important distinctions among different speakers' reasons to speak, and their chosen modes of speaking. For First Amendment purposes, we must distinguish speakers who wish to speak regardless of whether others hear them, speakers who speak without regard for those who hear them, and speakers who genuinely wish to engage in a communicative relationship with listeners.[83] Expression just involves saying something. It does not necessarily involve being heard.[84]

Communication involves more than just saying something. It includes a desire to be heard, it allows for a response, and it encompasses an interaction between a speaker and a listener. Distinguishing communication and expression as different forms of speech allows us to dissect more precisely the circumstances under which speech occurs, and can assist the courts and the public in evaluating the scope and intensity of the First Amendment's protection of speech. In the next section, I will explain the doctrinal basis for differentiating communication and expression in existing judicial decisions. And while detailed explanation of the various factors that determine whether we should understand an instance of speech as communicative or

81. *See generally* BAKER, *supra* note 58, at 197 ("[T]he liberty theory focuses on the speaker and the speaker's choice to speak, not the listener and the usefulness of the content."). Baker does briefly address the First Amendment rights of listeners, but he assumes that these rights are grounded on self-realization and inhere largely (if not entirely) in the ability to receive information. *See id*. at 67. And as a result of their grounding in each individual's autonomy, he assumes that "speakers and listeners have separate constitutional claims" when they allege a First Amendment violation. *Id*. at 68. Following from this approach, Baker insists that a "listener cannot demand that a person speak who is unwilling to." *Id*. at 67. But for the purposes of my argument here, we must address the question whether a listener can demand that a person not speak (to the listener) as a result of the listener's own First Amendment rights. The question is whether we can differentiate for constitutional purposes between speech imposed (in some form) upon listeners by speakers and speech in which listeners and speakers genuinely engage together.

82. *E.g.*, Randy J. Kozel, *Precedent and Speech*, 115 MICH. L. REV. 439, 455, 468–71 (2017); Ronald J. Krotoszynski, Jr., *Free Speech Paternalism and Free Speech Exceptionalism: Pervasive Distrust of Government and the Contemporary First Amendment*, 76 OHIO ST. L.J. 659, 661, 685 (2015); Gregory P. Magarian, *Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech*, 90 MINN. L. REV. 247, 251–54, 269–70 (2005).

83. *See* Stuart Minor Benjamin, *Transmitting, Editing, and Communicating: Determining What "The Freedom of Speech" Encompasses*, 60 DUKE L.J. 1673, 1698 n.61 (2011) ("'[S]elf-expression' clarifies the inclusion of forms of expression that have been recognized as implicating the freedom of speech even though they arguably do not entail a clear substantive communication . . .").

84. *See* BAKER, *supra* note 58, at 51 (discussing various "solitary" uses of speech).

expressive is beyond the scope of this article, some preliminary points might be useful. For example, the same form of speech may be expression in one situation and communication in another.[85] Even when a speaker intends to communicate, we cannot always assume that communication has occurred or that it will.[86] And even when a speaker wishes to communicate, we should recognize that many individuals do not have meaningful opportunities to communicate their views, or even to express them.[87]

Thinking of speech not just as a right of expression, but principally as a right of communication, ensures that the "freedom of speech" primarily protects the reciprocal interaction between speakers and listeners, and therefore protects the rights of speakers and listeners.[88] In other words, the freedom

85. *See* Virginia v. Black, 538 U.S. 343, 354 (2003), 355–57 ("Often, the Klan used cross burnings as a tool of intimidation and a threat of impending violence. . . [C]ross burnings have also remained potent symbols of shared group identity and ideology . . . And while cross burning sometimes carries no intimidating message, at other times the intimidating message is the *only* message conveyed.") (emphasis in original). *See also id*. at 365 ("The act of burning a cross may mean that a person is engaging in constitutionally proscribable intimidation. But that same act may mean only that the person is engaged in core political speech.").

86. *See*, *e.g.*, Spence v. Washington, 418 U.S. 405, 409 (1974) (*per curiam*) ("[A]ppellant engaged in a form of communication. Although the stipulated facts fail to show that any member of the general public viewed the flag, . . . [t]he undisputed facts are that appellant 'wanted people to know that I thought America stood for peace.'").

87. *See* Blake D. Morant, *Equality-Based Perspectives on the Free Speech Norm: Twenty-First Century Considerations – An Introductory Essay*, 44 WAKE FOREST L. REV. 315, 316–17 (2009) ("Modern conceptualizations have seen autonomy emerge as a dominant force, particularly in the consideration of expressive freedom. Thus, freedom of speech, which many recognize as fundamental, becomes a paramount right that the government must foster with minimal restriction. However, the unabashed fostering of free speech has its drawbacks, key among them is the reality that every member of society, for a plethora of socioeconomic and political reasons, does not fully enjoy expressive autonomy. As a result, democracy suffers due to the lack of a fully participatory body politic."); Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 847 n.167 (1990) ("The guarantee of free speech benefits those who have the power to draw listeners: those with the greatest access to the market of ideas."); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 47 (1984) ("Telling an unpopular speaker that he will incur no criminal penalty for his expression is of little value if he has no effective means of disseminating his views. A right that cannot be meaningfully exercised is, after all, no right at all. Because our marketplace has severely restricted those inputs most challenging to the status quo, the resulting outputs similarly are skewed to favor established views."). *Cf*. Murdock v. Pennsylvania, 319 U.S. 105, 111 (1943) ("Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way.").

88. *See* Melville B. Nimmer, *The Meaning of Symbolic Speech under the First Amendment*, 21 UCLA L. REV. 29, 36 (1973) ("Whatever else may or may not be true of speech, at an irreducible minimum it must constitute a communication. That, in turn, implies both a communicator and a communicatee – a speaker and an audience. . . Without an actual or potential audience there can be no first amendment speech right. Nor may the first amendment be invoked if there is an audience but no actual or potential 'speaker.' . . . Unless there is a human communicator intending to convey a meaning by his conduct, it would be odd to think of it as conduct constituting a communication protected by the first amendment.").

of speech protects "speech" in the fullest sense.[89] Moreover, this understanding of the priority of communicative speech under the First Amendment coheres with and reinforces the historical view that the speech primarily envisioned and protected by the Constitution involves the exchange of ideas by members of a political community through shared discourse about matters of public concern.[90]

Frederick Schauer also differentiates expression from communication, but he draws the distinction differently from the way I do. Here is Schauer's view:

> '[E]xpression' can mean communication, requiring both a communicator and a recipient of the communication. . . On the other hand, the word 'expression' can also be used to describe certain activities not involving communication. . . For example, my reaction to the absence of colour on my new colour television set might be to throw a paperweight at the television screen.[91]

Schauer says that his throwing of the paperweight at the television is an activity that does not involve communication. But we do not yet know why. It is not clear whether throwing the paperweight does not involve communication because no one else is in the room to see it or because there is someone else in the room, but his action does not reveal his reason for throwing the paperweight. For example, from the perspective of the other person in the room, it may be unclear whether he threw the paperweight because the image is not in color, or because of the politician's message who is speaking at the time, or because he just had a heated argument immediately prior to turning on the television.[92]

89. That said, my argument is not that the First Amendment protects "speech itself" rather than or apart from speakers and listeners. *See* Citizens United v. FEC, 558 U.S. 310, 334 (2010). *See also* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961) ("The First Amendment does not protect a 'freedom to speak.' It is concerned, not with a private right, but with a public power, a governmental responsibility."). While I agree that we cannot best understand the First Amendment as primarily protecting a "freedom to speak," it seems to me that, properly understood, it does protect this freedom, as well.

90. *See supra* notes 41 and 50 and accompanying text.

91. SCHAUER, *supra* note 78, at 50–51. *See also* Elizabeth S. Anderson and Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1565–66 (2000).

92. *See* Leslie Kendrick, *Use Your Words: On the "Speech" in "Freedom of Speech,"* 116 MICH. L. REV. 667, 690 (2018) [hereinafter Kendrick, *Use Your Words*] ("[T]hese other actions do not explain very much beyond the raw fact of negative emotion. Only speech conveys feelings, propositions, and reasons with nuance, accuracy, and efficiency. Only speech offers the communication, and possible resolution, of internal states. This is not to say that speech is perfect in these regards. But it is far and away the best we've got. Attempting to interpret someone's thoughts without words is time-consuming and often impossible. It is an exercise in frustration for both those trying to send a message and those trying to receive it.").

For the most part, I will leave the ambiguities of Schauer's paperweight example aside. There are many reasons that different forms of conduct may not entirely convey a discernible message, and some of these forms of conduct will still serve as forms of expression in the way Schauer suggests and some will not. I will focus instead on the first aspect of Schauer's position. As I have mentioned, expression is simply the act of speaking or painting or writing (or throwing a paperweight at a television). Expression involves an individual voicing his views or his feelings, even if no one responds or even understands what he is trying to say. Indeed, some deliberately design their expression to preclude any meaningful form of response.[93] The value of expression as "self-realization" for the speaker is simply the liberty to voice what is in his mind.

Distinguishing expression and communication in this way also helps to explain another point in Schauer's analysis. Schauer says that expression that is communicative requires a communicator and a recipient of the communication. So, for Schauer, forms of expression are either communicative or non-communicative. But this omits categories of expression that are important to First Amendment analysis. Employing Schauer's typology, there are forms of expression that have a recipient and yet are not fully communicative, and there are forms of expression that are communicative but do not (yet) have a recipient. If someone is in the room when he throws the paperweight, it seems problematic to assume that the act of throwing an object at the screen does not express anything to that recipient, even if the meaning of

93. *See* Alexander Tsesis, *Dignity and Speech: The Regulation of Hate Speech in a Democracy*, 44 WAKE FOREST L. REV. 497, 499–500 (2009); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2331–32 (1989). Distinguishing expression from communication also helps to demonstrate that restrictions on these forms of expression do not necessarily contradict or countermand any of the values that undergird the First Amendment. *Cf*. Norman S. Marsh, "The Rule of Law as a Supra-National Concept," *in* OXFORD ESSAYS IN JURISPRUDENCE (FIRST SERIES) 244–45 (A.G. Guest, ed., 1961) ("The individual liberties of a democratic system involve in the first place the right of the members of each society to choose the government under which they live. In the second place come freedom of speech, freedom of assembly and freedom of association. Of these liberties the most important under modern constitutions is freedom of speech and it is also the best illustration of the inter-action between the substantive values on which the Rule of Law, in the sense here considered, rests and the legal procedures and institutions by which such values are given practical effect. . . The reality of freedom of speech will depend . . . on the extent to which the application of such exceptions rests on a fundamental regard for the status and dignity of the human person . . .") (footnotes omitted). *But see* Boos v. Barry, 485 U.S. 312, 322 (1988) ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment. A 'dignity' standard . . . is so inherently subjective that it would be inconsistent with our longstanding refusal to punish speech because the speech in question may have an adverse emotional impact on the audience.") (internal punctuation and citations omitted). I should mention, as I hope is clear, that my argument endorses neither a general dignity standard for evaluating speech rights under the First Amendment nor the Court's judgment in *Boos*.

the action is almost entirely obscure. The recipient has presumably received the message that Schauer feels angry for some reason (likely having something to do with the television).

In the second case, we might say that an artist can communicate through her painting or poetry, even if she never meant to. Even if she never intended to show her poems or paintings to anyone else, they may still communicate her thoughts and feelings if someone ultimately receives them.[94] Simply put, we cannot determine the meaning (or existence) of an artist's communication solely according to an artist's intentions (including the intention not to be heard).[95]

As a result of his distinction between communicative and non-communicative forms of expression, Schauer also assumes that "language is separate from communication only in the exceptional instance."[96] Although he recognizes that "there are instances in which the use of language is not communicative, such as the shrill utterance of a single word in order to prevent someone else from being heard,"[97] Schauer assumes that protecting speech is protecting the use of language and protecting the use of language is protecting communication. Again, though, this approach gets Schauer into some trouble. To use Schauer's distinction, speech does not require language and speech is often used for non-communicative purposes.[98] But beyond

94. Emily Dickinson is a well-known example of a poet who was ambivalent about publishing her work. *See* MARTHA ACKMANN, THESE FEVERED DAYS: TEN PIVOTAL MOMENTS IN THE MAKING OF EMILY DICKINSON 221 (2020) ("But she then played her usual trick with people who sought to bring her work to the public: she didn't say yes and she didn't say no."). Maintaining her reticence, Dickinson allowed very little of her poetry to be published during her lifetime, and she left instructions with her sister Lavinia (Vinnie) to burn her papers after her death. Although her sister burned her letters, she could not bring herself to destroy the poems. *See* ALFRED HABEGGER, MY WARS ARE LAID AWAY IN BOOKS: THE LIFE OF EMILY DICKINSON 587, 603–04, 628 (2001). And they were eventually published. *See* ACKMANN, THESE FEVERED DAYS, 235. We now regard Emily Dickinson as one of the most important poets of the English language. *See* Betsy Erkkila, "The Emily Dickinson wars," *in* THE CAMBRIDGE COMPANION TO EMILY DICKINSON 23 (Wendy Martin, ed., 2002). Whether the worth of her poetry vindicates Vinnie's decision is a matter for another time.

95. *Cf.* RONALD DWORKIN, LAW'S EMPIRE 49–65, especially at 59–61 (1986) ("Works of art present themselves to us as having, or at least claiming, value of the particular kind we call aesthetic: that mode of presentation is part of the very idea of an artistic tradition. . . [T]he larger social practice of contesting the mode of art's value itself assumes the more abstract goal of constructive interpretation, aiming to make the best of what is interpreted.") (internal punctuation deleted). Dworkin also notes that the meaning of ordinary communication may be more fully determined by a speaker's intended meaning than the meaning of a work of art is determined by the artist's intentions. *See id*. at 50.

96. SCHAUER, *supra* note 78, at 96.

97. *Id*.

98. *Cf. Black*, 538 U.S. at 363 ("The First Amendment permits Virginia to outlaw cross burnings done with the intent to intimidate because burning a cross is a particularly virulent form of

shouting someone down, speakers use language to threaten, silence, coerce, suppress, subordinate, and abuse others.[99] And in the sense that Schauer has in mind, these uses of language cannot be fitted so easily into a non-communicative category. The people who hear them understand them.[100] The whole notion of "freedom for the speech that we hate," assumes that the speech is understood; after all, if we could not understand it, why would we hate it?[101] The better distinction, I think, is between a speaker's use of language to express herself without any real intention to interact with those who hear her and a speaker's use of language to communicate with listeners for the purpose of gaining their understanding and receiving back their response.

Rather than distinguishing between expression that involves communication and expression that does not involve communication, we should instead differentiate expression and communication. We should recognize that the Constitution protects our right to express ourselves and our right to communicate with others. But we should also recognize, as the Supreme

intimidation Virginia may choose to regulate this subset of intimidating messages in light of the long and pernicious history of cross burning as a signal of impending violence.").

99. *See generally* Martha Minow, *Regulating Hatred: Whose Speech, Whose Crimes, Whose Power?*, 47 UCLA L. REV. 1253, 1261 (2000) ("[T]he advocates of the First Amendment ignore or try to minimize the ways in which slurs and bias-based comments both produce psychological damage for individuals and perpetuate the dehumanization of members of particular groups (which in turn can invite further degradation and violence). In the wake of biased speech, members of disadvantaged groups often have their own speech chilled. Why participate if only to be demeaned? The response of withdrawal – from classroom discussion, political debate, even from the activity of personal achievement – is understandable in the face of comments demeaning to one's group.").

100. *See* CATHARINE A. MACKINNON, ONLY WORDS 62–63 (1993) ("An argument that some races or genders or sexual [orientations] are inferior to others is an argument – an antiegalitarian argument, a false argument, a pernicious argument, an argument for hate and for hierarchy, but an argument nonetheless.").

101. I have paraphrased the original, which comes from Justice Holmes's dissent in *United States v. Schwimmer*, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) ("[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate."). *See also Abrams*, 250 U.S. at 630 ("[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe.") (Holmes, J., dissenting). The phrasing in the text has become common. *See*, *e.g.*, PHILIPPA STRUM, WHEN THE NAZIS CAME TO SKOKIE: FREEDOM FOR SPEECH WE HATE (1999). As with his marketplace metaphor, Holmes's principle from *Schwimmer* has taken firm hold of the U.S. conception of what free speech means and what the First Amendment requires. *See* Girouard v. United States, 328 U.S. 61, 68 (1946); Collin v. Smith, 447 F. Supp. 676, 702 (N.D. Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, Smith v. Collin, 439 U.S. 916 (1978). In this connection, it is worth highlighting, with some astonishment, that in *Schwimmer* the majority's rationale for upholding a denial of citizenship was that the applicant was (in her own words) "an uncompromising pacifist . . . because I consider it a question of conscience. I am not willing to bear arms. In every other single way I am ready to follow the law and do everything that the law compels American citizens to do." *Id*. at 648. Holmes's characterization of Rosika Schwimmer's view as "the thought we hate" was especially sardonic (even for him).

Court and other courts have, that expression and communication are different categories of speech for purposes of determining the application of the First Amendment: "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."[102]

The First Amendment does not refer to the "freedom of speakers." It refers to the "freedom of speech."[103] Thinking of speech as a communicative relationship will help us better understand the values that underlie the First Amendment and the judicial decisions in which these values are articulated and enforced.[104] Reading these cases together provides a coherent and integrated understanding of the First Amendment as protecting the right of "speech" as a reciprocal process of communication.[105] Protecting the freedom of speech requires protecting the process of communication *through* (and not separate from) the rights of speakers and hearers. This is not the conventional reading of the courts' free speech case law, but it is, as I argue in the next section, a doctrinal reading informed by the theoretical and historical values underlying the First Amendment, and these cases are central to developing our understanding of the content and scope of the rights protected by the Constitution.[106]

III. COMMUNICATION AND FREE SPEECH

A consilient conception of speech as a fundamental right of communication exists in certain important judicial opinions of the Supreme Court and other federal courts. The cases I will discuss are read as separate elements of divergent lines of case law rather than as reflecting a discrete

102. First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 777 n.12 (1978).

103. U.S. CONST. amend. I.

104. *See* William B. Fisch, *Plurality of Political Opinion and the Concentration of Media in the United States*, 58 AM. J. COMP. L. 505, 507 (2010) ("The federal Constitution itself does not define either 'freedom of speech' or 'freedom of the press,' and neither freedom had a precise, fully developed legal meaning at the time of adoption of the First Amendment in 1791. For the most part, therefore, subsequent interpretation provides the detail, and virtually all of the U.S. Supreme Court's work in this regard has occurred within the last century.").

105. *See* Kendrick, *Use Your Words*, *supra* note 92, at 692 ("The idea of communication advanced here is about information and interchange. First, it is about information broadly construed. I am not concerned exclusively with facts or propositions, but with the ability to figure out what others are thinking and feeling, to apprehend concepts and ideas, and to express thoughts, feelings, and ideas to others. Second, it is about interchange. . . The sharing process, the literal 'communication,' is larger than the simple acts of sending or receiving. Communication enables people to ask and answer questions, to react, to respond to reactions, to develop ideas together, to collaborate, to coordinate, and so forth.").

106. *See generally* OWEN FISS, THE LAW AS IT COULD BE 49 (2003) ("Adjudication is the process by which the values embodied in an authoritative legal text, such as the Constitution, are given concrete meaning and expression.").

understanding of the First Amendment. But, I believe that a consistent reading of the protection of relational speech and its underlying values in the U.S. constitutional system exists in them. More specifically, I will argue that we should understand these cases as articulating a doctrinal basis for differentiating between communication and expression under the First Amendment, and for emphasizing communication over expression when thinking about constitutionally protected speech.

There are two interconnected points here, which I discussed in the previous sections.

First, the speech historically and conceptually prioritized for constitutional protection under the First Amendment is reciprocal communication. Second, the constitutional protection of speech embraces speakers and listeners; speech rights do not simply "belong" to one group or the other.[107] Courts have described the freedom of speech in these terms, and I believe these cases should figure more prominently in our understanding of the concept of speech protected by the Constitution. But as I will also explain, the Supreme Court has tended to focus on speakers as the primary possessors of First Amendment rights and has tended to define the right of listeners as a right of access to the speaker's message, rather than as a right to participate in the process of communication.

The Supreme Court has seemingly adopted the assumption that the First Amendment is meant to protect the right of speakers as a means of protecting individual autonomy. The Court has written that "the *fundamental rule* of protection under the First Amendment [is] that a speaker has the autonomy to choose the content of his own message."[108] One conceptual difficulty with the mantric references to the underlying First Amendment value of the speaker's autonomy is the failure to differentiate (at least) two different applications of that principle in judicial decision-making. The application of this principle that is most in keeping with the soundest historical and theoretical grounding of the First Amendment is that the government may not compel someone to adopt or espouse a particular belief.[109] But the principle

107. *See* Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2155 (2018) ("[I]t is the current, much more formalist approach taken by the Court to free speech questions that is much more difficult to reconcile with the . . . insistence that the First Amendment was meant not only to guarantee an individual right to autonomy in thought and expression but also to facilitate and safeguard a particular kind of social institution: namely, the democratic public sphere.").

108. *Hurley*, 515 U.S. at 573 (internal punctuation deleted) (emphasis added).

109. *See*, *e.g.*, West Virginia Bd. of Ed. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47, 61 (2006) ("[F]reedom of speech prohibits the government from telling

that the First Amendment shields individuals from attempts by the government to coerce speech is entirely different from the notion that the First Amendment requires listeners to hear (or avoid) whatever a speaker may wish to say to them.[110] This is the fundamental problem with *Mosley* as an instantiation of the autonomy theory of speech. The assumption that the First Amendment extends its protection to autonomous individuals cannot apply exclusively to speakers. The First Amendment does not just define the scope of an individual's right to speak; it also determines the social value of speech by allowing speakers and listeners to exchange ideas with one another.[111] As the Supreme Court put it in *First National Bank of Boston v. Bellotti*, "The Constitution often protects interests broader than those of the party seeking their vindication. The First Amendment, in particular, serves significant societal interests."[112] Protecting a societal interest in free speech means ensuring viable processes of communication, the exchange of ideas, and the possibility of changing minds. As the right on which our other rights depend,[113] the First Amendment's speech guarantee is a recognition that our democracy and our dignity are interdependent, and neither can be secure without our freedom to speak *and* to respond.[114]

Bellotti involved a Massachusetts statute that attempted to preclude corporations from "influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation."[115] In the general election vote on November 2, 1976, voters would consider a ballot referendum introducing a graduated income tax as an amendment to the Massachusetts Constitution.[116] Several Massachusetts corporations wished to expend money to express their views

people what they must say."); *Hurley*, 515 U.S. at 576 ("[W]hen dissemination of a view contrary to one's own is forced upon a speaker . . . the speaker's right to autonomy over the message is compromised.").

110. *See*, *e.g.*, *Collin*, 578 F.2d at 1207, ("There *need be* no captive audience, as Village residents may, if they wish, simply avoid the Village Hall for thirty minutes on a Sunday afternoon . . .") (emphasis in original).

111. *See supra* notes 23–24 and 34.

112. 435 U.S. 765, 776 (1978).

113. *See* Palko v. Connecticut, 302 U.S. 319, 327 (1937) ("Of that freedom [of speech and thought] one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom."). *See also supra* note 15; Clay T. Whitehead, *Cabinet Committee on Cable Communications: Report to the President* (White House Office of Telecommunications Policy) (Jan. 14, 1974), 19 ("[F]reedom of speech and freedom of the press . . . have been described correctly as the freedoms upon which all of our other rights depend.").

114. *See supra* notes 23–25 and accompanying text.

115. Massachusetts Gen. Laws Ann., ch. 55, § 8 (1977), quoted in *Bellotti*, 435 U.S. at 768 n.2. *Bellotti* involved a referendum vote, although the language of § 8 reached more widely.

116. *Bellotti*, 435 U.S. at 769.

about the referendum.[117] The Attorney General of Massachusetts indicated that he would prosecute them for violating this statute and the corporations sued to have the statute declared unconstitutional as violation of their First Amendment rights.[118]

The Supreme Judicial Court of Massachusetts viewed the question raised in the case as "whether business corporations . . . have First Amendment rights coextensive with those of natural persons or associations of natural persons."[119] The Massachusetts court concluded that "a corporation does not have the same First Amendment rights to free speech as those of a natural person . . . [although] corporations possess certain rights of speech and expression under the First Amendment."[120]

The Supreme Court of the United States disagreed with the Massachusetts court's formulation of the issue. According to the Supreme Court, the question was "not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons," but instead whether the legislation "abridges expression that the First Amendment was meant to protect."[121] According to the Court, the critical factor in determining whether the First Amendment was meant to protect speech in a given case is whether it is "the type of speech indispensable to decision making in a democracy . . . [with respect to] the inherent worth of the speech in terms of its capacity for informing the public."[122]

Scholars and courts have interpreted *Bellotti* in various ways. In *Citizens United*, Justice Kennedy declared for the majority that in *Bellotti* "the Court ha[d] recognized that First Amendment protection extends to corporations."[123] The majority's reading of *Bellotti* in *Citizens United* is belied by two aspects of the *Bellotti* opinion itself: (1) the *Bellotti* decision expressly indicates that in reaching its judgment the Court "need not . . . address the abstract question whether corporations have the full measure of rights that individuals enjoy under the First Amendment"[124] and (2) the *Bellotti* Court stressed that the judgment was limited to the instance of a referendum vote precisely because "[r]eferenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate

117. *Id*.

118. *Id*.

119. First Nat'l Bank of Boston v. Att'y General, 371 Mass. 773, 783 (1977).

120. *Id.* at 784 (footnote omitted).

121. *Bellotti*, 435 U.S. at 776.

122. *Id.* at 777.

123. *Citizens United*, 558 U.S. at 342.

124. *Bellotti*, 435 U.S. at 777.

elections simply is not present in a popular vote on a public issue."[125] Unfortunately, the majority in *Citizens United* chose to ignore the explicit doctrinal limitation of the *Bellotti* ruling's scope as well as the fundamental distinction, which underpinned the ruling, between commentary on public issues and support for political candidates (to say nothing of corporate financial support for political candidates).

Other readings of *Bellotti* concentrate on the language in the opinion regarding the protection of speech due to its "capacity for informing the public." According to this view of *Bellotti*, the basis of the Court's opinion is the public's right to hear or access information.[126] I do not wish to contest this reading of the case, but there is more to the principle articulated in *Bellotti* than simply the public's right to hear (or a corporation's right to speak). The underlying principle is that this right of access to information is fundamental to the exchange of ideas and informed citizenship on which healthy government and participatory democracy depend.[127] Rather than viewing the case through contrasting binary rights of speakers or listeners, corporations or the public, we should see that the case is about their relationship, and the Court's chosen language demonstrates that *Bellotti* is best understood as describing the nature and scope of the speech that is interactively produced and constitutionally protected.

By focusing either on the rights of corporations as speakers or on access to information for listeners, these alternative readings of *Bellotti* truncate the reasoning and judgment. By refocusing the question in *Bellotti* from "whether corporations have First Amendment rights" to whether government action "abridges expression that the First Amendment was meant to protect," the Court emphasized that the First Amendment does not just

125. *Id*. at 790 (citations omitted). In his dissent in *Citizens United*, which Justices Ginsburg, Breyer and Sotomayor joined, Justice Stevens took the majority to task for this misreading of *Bellotti*. *See Citizens United*, 558 U.S. at 442–45 (Stevens, J., dissenting).

126. *See*, *e.g.*, Zephyr Teachout, *Neoliberal Political Law*, 77 LAW & CONTEMP. PROB. 215, 232–33 (2014); Thomas R. Kiley, *PACing the Burger Court: The Corporate Right to Speak and the Public Right to Hear After* First National Bank v. Bellotti, 22 ARIZ. L. REV. 427, 429 (1980). Some have also argued for conditioning the corporation's right to speak upon the public's desire to listen. *See* Dan-Cohen, *supra* note 63, at 1245. On this view, the (corporate) speaker's right is "a *passive derivative* right to speech. It is derivative in that it is based on another person's right; and it is passive in that it is based on an autonomy right to hear rather than to speak." *Id*. (emphasis in original).

127. Andrew Kenyon describes this dynamic as "access to receive." Andrew T. Kenyon, "Positive Free Speech: A Democratic Freedom," *in* THE OXFORD HANDBOOK OF FREEDOM OF SPEECH 245 (Adrienne Stone and Frederick Schauer, eds., 2021). In describing free speech in terms of participation in public discussion, Professor Kenyon says that this freedom "encompasses their [citizens'] ability to access substantially diverse public debate, with access being understood in terms of *access to receive* such debate and subsequently deliberate (which then may also involve them speaking)." *Id*. (italics in original).

protect speakers or listeners, it protects the speech that they create together. Not speech solely as a form of written or spoken words, the Amendment protects speech as a dynamic exchange and an interactive process.[128] As the Court explained in *Bellotti*, the inherent worth of speech that is indispensable to deliberative democracy depends upon its contribution to "[p]reserving the integrity of the electoral process, preventing corruption, and '[sustaining] the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.'"[129] Most fundamentally, then, the First Amendment ensures that speakers and listeners have "the liberty to discuss publicly and truthfully all matters of public concern."[130] And protecting free speech as a reciprocal and relational right held by speakers and listeners engaged in a process of communication creates corresponding constitutional duties of the state to ensure that social and political conditions are maintained through which these rights can meaningfully be claimed and enforced.[131]

We are brought back, then, to Holmes, Brandeis, and Brennan's preoccupation with not simply the availability of information but the opportunity to confront and exchange views, and perhaps, to change minds.[132] In an

128. *See* BAKER, *supra* note 58, at 59.

129. *Bellotti*, 435 U.S. at 788–89 (quoting United States v. Auto. Workers, 352 U.S. 567, 575 (1957)).

130. *Id*. at 435 U.S. at 776. *See also supra* notes 47–48, 50.

131. The plainest exposition of these constitutional requirements are various judicial discussions of content- and viewpoint-neutrality in relation to time, place, and manner regulations. *See*, *e.g.*, Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) ("Our cases make clear, however, that even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.") (internal punctuation deleted) (citations omitted); Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 799–802 (1985). Consistent with my argument here, these cases have long emphasized the centrality of communication in determining the rights of individuals and the role of the government. *See Hague*, 307 U.S. at 515 ("Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, *communicating thoughts between citizens*, and discussing public questions.") (emphasis added).

132. *See supra* notes 23–25 and accompanying text. In his illuminating analysis of Holmes's *Abrams* dissent through Schauer's work, Professor Blasi interprets Holmes's fundamental free speech principle of exchanging ideas and changing minds as exposing authority to "hostile criticism" through the "expression of opinions." *See* Blasi, *Reading Holmes*, *supra* note 21, at 1349. *Pace* Blasi, while this analysis may well be consistent with Professor Schauer's approach, for reasons I have explained, I believe it reveals more about the need to differentiate communication from expression than it does about Holmes's reasoning in *Abrams*. In describing the leaflets at issue in *Abrams*, Holmes wrote: "No argument seems to me necessary to show that these pronunciamentos in no way attack the form of government of the United States. . . [N]obody can suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so." 250 U.S. at 626, 628.

academic environment, for example, this includes the opportunity to read books for oneself and to hear and question the arguments of an author or scholar. Brennan articulated the scope of this mutual protection of First Amendment rights for speakers and listeners in *Pico*:

> [T]he Constitution protects the right to receive information and ideas. This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the sender's First Amendment right to send them. . . More importantly, the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom.[133]

The emphasis on the independent First Amendment rights of recipients, as well as senders, underscores the constitutionally protected value of the exchange itself. For this reason, in *Pico* and several other cases, courts have repeatedly held that the availability of alternative means of receiving information does not obviate the right of listeners to participate in the process of speech.[134] Passively accessing a recording is not enough; the participatory right to hear is sometimes the right to encounter the speaker for oneself, to process the ideas, and perhaps to respond.

Speech begins with a speaker, and so examining free speech rights should also be concerned with the rights of speakers. But communication requires a listener, and so free speech rights must also involve considerations beyond just the right of speakers to express themselves: "The constitutional guarantee of free speech serves significant societal interests wholly apart from the speaker's interest in self-expression."[135] We cannot, therefore, adequately or accurately understand the constitutional protection of speech by emphasizing speaker's rights rather than evaluating the relational rights of speakers and listeners in the process of communication.[136] This is the full

133. Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982) (emphasis in original) (citations omitted).

134. Along with the cases discussed in the text, *see*, *e.g.*, Kleindienst v. Mandel, 408 U.S. 753, 765 (1972); Clifton v. FEC, 114 F.3d 1309, 1314 (1st Cir. 1997); Harvard Law Forum v. Shultz, 633 F. Supp. 525, 531–32 (D. Mass. 1986), *vacated as moot*, 852 F.2d 563 (1st Cir. 1986).

135. Pacific Gas & Electric Co. v. Public Utilities Comm'n, 475 U.S. 1, 8 (1986) (citation and internal punctuation omitted).

136. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 756 (1976) ("Freedom of speech presupposes a willing speaker. But where a speaker exists, as is the case here, the protection afforded is *to the communication*, to its source and to its recipients both.") (emphasis added). *See also* HEYMAN, *supra* note 73, at 63, 179, 191–92; R. George Wright, *Undocumented Speakers and Freedom of Speech: A Relatively Uncontroversial Approach*, 45 GONZ. L. REV. 499, 499–500 (2010).

meaning of the Court's judgments in *Bellotti* and *Pico*, and this principle has been followed by lower federal courts:

> [T]he primary question is whether the [government action] 'abridg[es] the freedom of speech.' The First Amendment does not talk primarily in terms of 'freedom of speakers,' and . . . identifying the speaker should not be the primary focus of our inquiry. Instead, we should determine whether the government's action here was an 'abridgment' that is forbidden by the First Amendment.[137]

The courts have also expressly identified the unique value of direct interpersonal exchange between individuals as the core of communication protected by the First Amendment. For instance, the Supreme Court recognizes the importance of "particular qualities inherent in sustained, face-to-face debate, discussion and questioning"[137] when determining the application of the First Amendment.[138] Even more, the Court has unambiguously (and unanimously) held that "the most effective, fundamental . . . avenue of political discourse [is] direct one-on-one communication."[139] Both elements of this formulation—discourse about political issues and interpersonal communication—are important. Encountering each other directly, face-to-face, is an essential aspect of living together in a political community.[140] Living in the community constituted by speech means we must acknowledge our responsibilities to others. The recognition of others who face me creates tensions and obligations for me that are inescapable, and are imposed as ethical and legal requirements through the inevitability of social interaction. Read in this way, the First Amendment is itself an effort to protect each of us and to preserve space for all of us who will constantly face and interact with others,

137. Barnstone v. University of Houston, KUHT-TV, 660 F.2d 137, 140 (5th Cir. 1981) (Reavley, J., concurring) (citation omitted).

138. *Kleindienst*, 408 U.S. at 765. *See also* Cyr v. Addison Rutland Supervisory Union, 60 F. Supp. 3d 536, 549 (D. Vt. 2014); Allende v. Shultz, 605 F. Supp. 1220, 1223 (D. Mass. 1985).

139. Meyer v. Grant, 486 U.S. 414, 424 (1988) (punctuation deleted).

140. For more on the social, ethical, and political meaning of encountering each other, face-to-face, *see* MICHAEL L. MORGAN, THE CAMBRIDGE INTRODUCTION TO EMMANUEL LEVINAS (2011). Morgan summarizes a pertinent element of Levnias's thought for my argument in this passage: "The face is the way the other person . . . presents herself to me. . . Levinas means that the special significance of the face of the other challenges and shapes the status of everyday meanings and sense; it is more basic than they are, more original, presumed by them as an engagement of the self with the other that lies hidden within every other interpersonal relationship. It is, from the self's side, the responsibility to acknowledge and accept the other that is always present in ordinary life." *Id*. at 64.

and to impose an aspect of the operative constraint in this dynamic on the government.[141]

Political discourse is the central form of communication protected by the Constitution, and First Amendment protections reach their "zenith" when protecting this "core political speech."[142] Keeping in mind that political speech should be taken broadly here to mean matters of public concern, this can now be best understood when we appreciate the relationship between the communication and the constitutional community on which the ability to exchange ideas depends.[143] Neither can be sustained without the other: "the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government."[144] Although the courts have sometimes adverted to this central purpose of the First Amendment in protecting interpersonal communication, they have focused more in their decisions on whether the speech in question is political, and have yet to focus enough on whether the speech in question is communicative. They have yet to identify comprehensively the distinction between communication and expression as a conceptual basis for evaluating the relative level of protection afforded by the Constitution.

Procunier v. Martinez is a useful case in this regard for thinking about the right of speech as a right of direct one-on-one communication (even if not face-to-face), and for understanding the fundamental dynamics of communication as inhering in the relationship between speakers and listeners.[145]

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141. Although I cannot pursue this connection further here, Levinas uses the concept and image of faces and facing not only in a more literal communicative sense, but also as a synecdoche for various forms of social confrontation with human vulnerabilities, power imbalances, and socioeconomic inequities. *See id*. at 65–71.

142. Comm. to Impose Term Limits on the Ohio Supreme Court v. Ohio Ballot Bd., 275 F. Supp. 3d 849, 855 (S.D. Ohio 2017) (citations omitted). *See also* Amar, *Intratextualism*, *supra* note 36; SUNSTEIN, *supra* note 24, at 146.

143. *See generally* POWELL, *supra* note 57.

144. Richmond Newspapers v. Virginia, 448 U.S. 555, 587 (1980) (emphasis deleted) (citations omitted).

145. 416 U.S. 396 (1974). Although later decisions have ostensibly narrowed the scope of the *Martinez* holding with respect to the speech rights of prisoners, *see* Thornburgh v. Abbott, 490 U.S. 401, 412 (1989), the Court still cited the case for the central principle that courts should evaluate governmental limitations on expression according to whether "the limitation of First Amendment freedoms is *no greater than is necessary* or essential to the protection of the particular governmental interest involved." Gentile v. State Bar of Nevada, 501 U.S. 1030, 1054 (1991) (quoting *Martinez* and citing Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 (1984) (emphasis added)). Moreover, as Justice Stevens noted in *Thornburgh*, subsequent precedent indicated that the Court should not "attempt to forge separate standards for cases implicating the rights" of non-prisoners. *Thornburgh*, 490 U.S. at 425 n.9 (Stevens, J., concurring in part and dissenting in part) (specifically addressing the ability of reporters to meet with prisoners in the prison rather than the rights of those with whom prisoners are communicating). To the extent that *Thornburgh* is understood as

Martinez involved a challenge by prisoners in California to prison regulations that permitted their correspondence to be "censored for nonconformity to certain standards."[146] The basis for the regulations permitting censorship of prisoners' mail was "the general premise that personal correspondence by prisoners is 'a privilege, not a right.'"[147]

In its review of the constitutionality of these regulations, the *Martinez* Court deviated from the position taken by other courts. Specifically, the Court began its analysis by indicating that this was not a case about "prisoners' rights" or "an assessment of the extent to which prisoners may claim First Amendment freedoms."[148] The Court indicated instead that this case involved rights of individuals who were not prisoners, those outside of prison who wished to communicate with those on the inside. In the Court's view, the resolution of *Martinez* required considering the nature of communication with respect to the protections of the First Amendment. In Justice Powell's words, writing for a unanimous Court:

> Communication by letter is not accomplished by the act of writing words on paper. Rather, it is effected only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of the communication between them necessarily impinges on the interest of each. Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech.[149]

In this passage, we find the Court's sensitivity to the fact that communication is a shared and interactive process between a writer and a reader, and that both share equally in possessing a right to engage in the process of communicating with one another.[150] The reader's right to receive the writer's

differentiating on the basis of the First Amendment between outgoing and incoming correspondence, Justice Stevens pointed out that this "peculiar bifurcation of the constitutional standard governing communications between inmates and outsiders is unjustified." *Thornburgh*, 490 U.S. at 424. To the extent that *Thornburgh* is read as differentiating between the rights of non-prisoners engaged in private communications with prisoners and journalists who wish to enter a prison to interview prisoners, genuine concerns regarding prison security and administration are generally inapplicable to the former forms of communication. *See id*. at 425 (discussing Pell v. Procunier, 417 U.S. 817 (1974)).

146. *Martinez*, 416 U.S. at 398.

147. *Id*. at 399 (footnote omitted).

148. *Id*. at 408. *See also id*. ("[M]ail censorship implicates more than the right of prisoners.").

149. *Id*.

150. Courts have applied this principle to copyright, privacy, and attorney-client communications. *See* Birnbaum v. United States, 436 F. Supp. 967, 981–82 (E.D.N.Y. 1977) (Weinstein, J.), *aff'd as modified*, 588 F.2d 319 (2d Cir. 1978). Citing *Martinez*, Judge Weinstein described this

statements is protected independently as a speech right under the First Amendment.

In addition, as a useful corollary to the previous analysis of *Bellotti*, the Court clarified in *Martinez* that the addressee's right to read the communication should not be understood as a "right to hear" information. We cannot and should not attempt to fragment the speech rights of writers and readers as participants in a communicative interaction. Instead, we should understand the right to communicate as a right held by the participants in the process of speech:

> We do not deal here with difficult questions of the so-called "right to hear" . . . but with a particular means of communication in which the interests of both parties are inextricably meshed. The wife of a prison inmate who is not permitted to read all that her husband wanted to say to her has suffered an abridgment of her interest in communicating with him. . . [C]ensorship of [outgoing] prisoner mail works a consequential restriction on the First and Fourteenth Amendments rights of those who are not prisoners.[151]

By considering the rights of listeners and speakers in relation to means of communication, the *Martinez* Court pointedly eschews the notion of a separate right to hear information and instead considers the interrelated and, in an important sense, indivisible, speech rights of both parties in the process of communication. Rather than attempting to determine whether speech rights "belong" more properly to speakers or listeners, this approach recognizes that parties to communicative speech must possess their own right to communicate with each other.

The mutuality of communication, and the concomitant indivisibility of the right to communicate, also underscores an element of the communicative relationship that is too often overlooked or undervalued. The capacity to engage in a communicative relationship is presupposed by the possibility of communication.[152] Even before we know what has been said, if the speaker and the listener are communicating, we can usually take for granted that they

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as a "principle of mutuality," and emphasized that "the law recognizes this necessary interaction of communicator and communicant, refusing to exclude from its protection one of two actors." *Id*. at 982. *See also* NAACP v. Jones, 131 F.3d 1317, 1322 (9th Cir. 1997).

151. *Martinez*, 416 U.S. at 409.

152. *Cf. MORGAN*, *supra* note 140, at 73–74 ("We live in society and communicate with one another, and the latter is possible only because of the former. But what is it about our sociality that makes communication and discourse possible? . . . Only because of this nexus or event is the world ours and not mine; only because of it is there you and I . . .").

share a capacity to engage in the exchange.[153] And that participatory capacity and agency are what define the community of speakers and listeners that is the polity. Communities of all kinds depend upon this shared understanding. We rightly attach tremendous political significance to the language through which people understand their community. This is why throughout history various social and political communities have attempted to restrict access to these communities by denying certain individuals access to the language itself.[154]

Two months after *Martinez*, the Court decided *Pell v. Procunier*.[155] *Pell* involved a challenge by prisoners to a California prison regulation that prohibited face-to-face interviews of prisoners by journalists.[156] The District Court granted summary judgment for the prisoners and ruled that the California regulation violated the prisoners' First Amendment rights "insofar as it prohibited inmates from having face-to-face communication with journalists."[157] The Supreme Court vacated the District Court's decision.

The Supreme Court began with the general principle that under appropriate circumstances "the right of free speech includes a right to communicate a person's views to any willing listener."[158] However, the Court ruled that conviction and incarceration subject a prisoner's First Amendment rights to "the institutional consideration of internal security within the corrections facilities themselves."[159] The Court upheld the constitutionality of the regulation prohibiting in-person interviews with journalists, while recognizing that California could not "prohibit all expression or communication by prison inmates, [because] security considerations are sufficiently paramount in the administration of the prison to justify the imposition of some restrictions on the entry of outsiders into the prison for face-to-face contact

153. These exchanges will typically be linguistic, but they may also involve other forms of speech. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632 (1943) ("Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a short cut from mind to mind.").

154. Limiting the discussion to the political history of the United States, *see* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 35 (1978) ("Laws forbade teaching slaves to read and write. . . [S]evere penalties were established for the utterance of abolitionist doctrines and the circulation of abolitionist propaganda.").

155. 417 U.S. 817 (1974).

156. *Id*. at 819–20. The case included claims by the journalists under the First Amendment that I will not discuss here. Although the involvement of journalists also raises questions of freedom of the press in *Pell*, my focus is on the rights of the prisoners and those outside the prison to communicate (mediatedly) with each other.

157. *Id*. at 821.

158. *Id*. at 822.

159. *Id*. at 823.

with inmates."[160] In the Court's view, the existence of alternative channels of communication between inmates and those outside the prison, including journalists, meant that the California restriction fell within the "legitimate penological objectives of the corrections system."[161]

In evaluating the speech rights of prisoners after *Martinez* and *Pell*, the Supreme Court suggested in *Thornburgh v. Abbott* that the standard employed in *Martinez* ("the limitation of First Amendment freedoms must be no greater than is necessary")[162] had been supplanted by a standard "that focuses on the reasonableness of prison regulations."[163] The Court can attempt to rationalize this less-protective approach toward free speech by claiming that speech is one of the liberties prisoners have partially forfeited as a result of their decision to commit a crime.[164] But this is precisely the problem with conceiving of free speech merely as a right of speakers. The prisoners' rights are not the only rights at stake, and by less rigorously protecting the right of prisoners to communicate, this limited protection of prisoners' speech necessarily infringes the correlative right of listeners to communicate with those prisoners. U.S. courts continue to employ a standard of review that defers more to prison officials' views of "penological interests"[165] than to constitutional interests in unimpeded communication under the First Amendment. As a result, the freedom of speech is sacrificed in the name of judicial deference to the expertise of prison officials and the expediency of prison management.[166]

160. *Id*. at 827.

161. *Id*. at 822.

162. *Martinez*, 416 U.S. at 413.

163. *Thornburgh*, 490 U.S. at 409.

164. *See* Price v. Johnston, 334 U.S. 266, 285 (1948) ("[I]ncarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."). *Cf.* O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987) ("Prison regulations alleged to infringe on constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights.").

165. Turner v. Safley, 482 U.S. 78, 89 (1987) ("[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.").

166. *See*, *e.g.*, Overton v. Bazzetta, 539 U.S. 126, 132 (2003) ("We must accord substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them."); Shaw v. Murphy, 532 U.S. 223, 229 (2001), 223–24, 230 ("[T]his Court has generally deferred to prison officials' judgment in upholding such regulations against constitutional challenge. . . [P]rison officials are to remain the primary arbiters of the problems that arise in prison management. . .If courts were permitted to enhance constitutional protection based on their assessments of the content of the particular communications, courts would be in a position to assume a greater role in decisions affecting prison administration.") (citations omitted); *O'Lone*,

This is therefore about far more than "prisoners' rights." The judgment in *Martinez* emphasized that the constitutional interests at stake are more expansive than a simple right of prisoners to express themselves. The Court held that the constitutional protection of free communication extends to those outside the prison who have an interest in understanding what is happening inside the prison, and in the welfare of the prisoners themselves.[167] Incarceration does not negate the right of people to communicate with each other, regardless of whether they live inside or outside the prison walls.[168] And this communication may occur directly between speakers and listeners (as in *Martinez*) or through the press as a conduit of information between prisoners and the public. Justice Douglas, who concurred in the *Martinez* judgment, discussed this specific concern in his dissent from the *Pell* ruling:

> As with the prisoners' free speech claim, no one asserts that the free press right is such that the authorities are powerless to impose reasonable regulations as to the time, place, and manner of interviews to effectuate prison discipline and order. The only issue here is whether the complete ban on interviews with inmates selected by the press *goes beyond what is necessary* for the protection of these interests. . . The prohibition of visits by the public has no practical effect upon their right to know beyond that achieved by the exclusion of the press. The average citizen is most unlikely to inform himself about the operation of the prison system by requesting an interview with a particular inmate with whom he has no prior relationship. He is likely instead, in a society which values a free press, to rely upon the media for information.[169]

Justice Powell, the author of the Court's judgment two months earlier in *Martinez*, wrote a concurring opinion in *Pell* to explain that he distinguished *Pell* from its companion case, *Saxbe v. Washington Post Company*.[170] Although the Court in *Washington Post* acknowledged that the federal prison prohibition against in-person meetings between prisoners and journalists (and other members of the public) was effectively identical to the California prison regulations in *Pell*,[171] Powell dissented in *Washington Post* and concurred in the *Pell* judgment that the California ban on face-to-face meetings between prisoners and journalists did not violate the First

482 U.S. at 349 ("[W]e have often said that evaluation of penological objectives is committed to the considered judgment of prison administrators . . .").

167. *Martinez*, 416 U.S. at 408–409.

168. *Id.* at 407.

169. *Pell*, 417 U.S. at 840–41 (1974) (Douglas, J., dissenting) (emphasis added).

170. 417 U.S. 843 (1974).

171. *See id.* at 846.

Amendment rights of prisoners.[172] He explained his position in these cases on the ground that in *Pell* "the constitutionality of the interview ban is challenged by prisoners as well as newsmen. Thus, these appeals, unlike *Washington Post*, raise the question whether inmates as individuals have a personal constitutional right to demand interviews with willing reporters."[173]

Powell's characterization of the distinction between *Pell* and *Washington Post* notwithstanding, there is an important congruity between his views in *Pell* and *Martinez*: in both cases, Powell underscored the First Amendment's independent protection of those who wish to communicate with prisoners, beyond the prisoners' own right to speak.[174] Powell's reasoning in *Martinez*, *Pell*, and *Washington Post* identifies the speech rights of prisoners not just in terms of what the prisoners wish to say, but also in relation to the rights of those who wish to hear them. As Powell wrote in *Washington Post*, these cases concern "the societal function of the First Amendment in preserving free public discussion" and this societal function of the Amendment sustains "the ability of our people through free and open debate to consider and resolve their own destiny."[175]

IV. DIGNITY AND AUTONOMY, AGAIN

The most thoughtful and comprehensive versions of the autonomy theory recognize the necessity of restricting a speaker's autonomy where certain harms may occur as a result of certain forms of speech. For example, Baker notes that "the rationale for protecting speech draw[s] from the same ethical requirement that the integrity and autonomy of the individual moral agent must be respected."[176] And he concedes that respect for the individual moral agency of others means that "respect for autonomy involves respect for a person's choices about herself and, maybe, her resources *up until* her choice

172. *See id.* at 866–57 (Powell, J., dissenting).

173. *See id.* at 835–36 (Powell, J., concurring in part and dissenting in part).

174. *Cf. Wash. Post,* 417 U.S. at 861 (Powell, J., dissenting) ("The Government has no legitimate interest in preventing newsmen from obtaining the information that they may learn through personal interviews or from reporting their findings to the public. Quite to the contrary, federal prisons are public institutions. The administration of these institutions, the effectiveness of their rehabilitative programs, the conditions of confinement that they maintain, and the experiences of the individuals incarcerated therein are all matters of legitimate societal interest and concern . . . I believe that this sweeping prohibition of prisoner-press interviews substantially impairs a core value of the First Amendment . . .").

175. *Id.* at 862.

176. BAKER, *supra* note 58, at 59.

involves taking choice away from another about himself or his resources – and, therefore, application of the concept presupposes some distribution."[177]

But the recurring problem with autonomy as it has been deployed in defense of First Amendment protections of speech is its pervasive assumption that the operative rights under the Amendment belong to speakers.[178] Once again, here is Baker: "the [F]irst [A]mendment calls for protection of speech that manifests or contributes to *the speaker's* values or visions – speech which furthers the two key first amendment values of self-fulfillment and participation in change – as long as the speech does not involve violence to or coercion of another."[179] This solicitous concern for violence and coercion notwithstanding,[180] the autonomy theory is often dismissive of the harms caused by certain forms of speech. It views these harms as necessitating restrictions on the rights of speakers, rather than recognizing that the listeners' own rights under the First Amendment are implicated as equal participants in the instance of speech. The autonomy theory's focus on speakers and correlative discounting of the rights of listeners is evident in this remarkable passage describing the harms caused by certain forms of speech:

> [S]peech-caused harms typically occur only to the extent that people 'mentally' adopt perceptions or attitudes. Two observations deserve emphasis. First, the speaker's harm-causing speech does not itself interfere with another person's legitimate decision-making authority. At least, this follows as long as the other has no right to decide what the speaker should say or believe. And this assumption that the other has no right to control a person's speech is a necessary consequence of our respecting people's autonomy. Second, outlawing acts of the speaker in order to protect people from harms that result because the listener adopts certain perceptions or attitudes disrespects the responsibility and freedom of the listener.[181]

To the extent that listeners' perspectives are addressed, they matter only insofar as listeners remain free to decide for themselves how they feel about

177. C. Edwin Baker, *Autonomy and Free Speech*, 27 CONST. COMMENT. 251, 257–58 (2011) (emphasis added).

178. *See supra* notes 58–59 and accompanying text.

179. BAKER, *supra* note 58, at 59 (emphasis added).

180. Baker defines these forms of speech quite narrowly. *See id*. at 56, 59 ("[M]eaningful limits on government's authority to restrict speech will require a narrow, precise, and defensible concept of coercion that is clearly distinguished from the broader notion of harm . . .[T]he use of speech (normally) ought not to be viewed as coercive – even if the person's expression, for example, her racist or sexist speech, reflects and perpetuates an unjust order and affirms or promotes a much more stunted view of the person.").

181. *Id*. at 56.

what they have heard, and so long as whatever "perceptions and attitudes" the listener freely adopts do not thereby restrict the speaker's right to say whatever the speaker wishes to say. In its seeming commitment to the autonomy of the individuals involved, the theory does not just concede (as it must) that there are forms of speech that are likely to cause harm to those subjected to them,[182] the theory insists that any harm caused is the result of the listeners' autonomous choice to respond in that way.[183] Indeed, in later writing, Baker more explicitly acknowledged that the autonomy theory's focus on the rights of speakers necessitates that a speaker may engage in "self-expressive use of her resources or speech" in a manner that will "negatively affect another's realization of her aims."[184] This seems to be the extent of the autonomy theory's respect for the autonomy of listeners. It is not just that some speakers may choose to speak in ways that cause harm to listeners (who

182. *See*, *e.g.*, *Collin*, 578 F.2d at 1206 ("It would be grossly insensitive to deny, as we do not, that the proposed demonstration would seriously disturb, emotionally and mentally, at least some, and probably many of the Village's residents. The problem with engrafting an exception on the First Amendment for such situations is that they are indistinguishable in principle from speech that 'invite[s] dispute . . . induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'") (quoting *Terminiello*, 337 U.S. at 4); *R.A.V.*, 505 U.S. at 392–93 (1992) ("What makes the anger, fear, sense of dishonor, etc., produced by violation of this ordinance distinct from the anger, fear, sense of dishonor, etc., produced by other fighting words is nothing other than the fact that it is caused by a distinctive idea, conveyed by a distinctive message. The First Amendment cannot be evaded that easily. It is obvious that the symbols which will arouse 'anger, alarm or resentment in others on the basis of race, color, creed, religion or gender' are those symbols that communicate a message of hostility based on one of these characteristics.").

183. This nod toward the independent choice of the listeners might be reasonable in many instances. Where forms of directly targeted vitriol and invective are concerned, however, it seems difficult to consider the response as meaningfully free or autonomously chosen. *Cf.* Plessy v. Ferguson, 163 U.S. 537, 551 (1896) ("We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."). Justice Jackson reached a similar conclusion about anti-Semitic slurs when he dissented from the Court's cursory ruling that New York City could not restrict a minister's ability to preach this message about Jews on public streets: "All the garbage that didn't believe in Christ should have been burnt in the incinerators. It's a shame they all weren't." Kunz v. New York, 340 U.S. 290, 296 (1951) (Jackson, J., dissenting). While he focused on the "fighting words" doctrine, Jackson's analysis is noteworthy for its acute sensitivity to the effect of this speech on certain listeners, and the importance of this consideration when determining the scope of protection afforded to a speaker under the First Amendment. *See id*. at 299 ("These terse epithets come down to our generation weighted with hatreds accumulated through centuries of bloodshed. They are always, and in every context, insults which do not spring from reason and can be answered by none. Their historical associations with violence are well understood, both by those who hurl and those who are struck by these missiles. Jews, many of whose families perished in extermination furnaces of Dachau and Auschwitz, are more than tolerant if they pass off lightly the suggestion that unbelievers in Christ should all have been burned."). This opinion is uniquely compelling, coming from the author of *Barnette*, and the Chief Prosecutor of the United States at the International Military Tribunal at Nuremberg.

184. Baker, *supra* note 177, at 255–56.

choose to react that way). The autonomy theory accepts that some speakers will exercise their autonomy in ways that diminish the autonomy of others.

I should pause here to mention another point, which persists in various scholarly, public, and judicial discussions of the relationship between speakers who choose abusive or egregiously hostile forms of speech, and the listeners exposed to them. Addressing the Supreme Court's famous statement in *Chaplinsky v. New Hampshire* that certain forms of speech "by their very utterance inflict injury,"[185] Franklyn Haiman responded this way: "words, *by their very utterance*, can do nothing of the sort, and . . . it is only as the result of a mental judgment made by others about those words in a particular context that injury may be *felt*. . ."[186]

There are two fundamental problems with Haiman's "sticks and stones" approach. First, it assumes that we can somehow ground any harm caused by the speech solely in whether or how a listener responds. Versions of this view have resulted inexorably in the Supreme Court's ever-narrowing conception of which words we can reasonably understand to threaten immediate incitement to violence.[187] Moreover, in his insistence that words themselves do no harm, Haiman overlooks or ignores the salient point. Of course, "if an epithet falls in the forest" it may not make a sound, but that is entirely beside the point. Hateful bigots can wear whatever uniform, carry whatever banner, and utter whatever slogan they wish in private (or perhaps in a private meeting with like-minded individuals). And this freedom of belief is no small thing. But it is the speaker who chooses to go further and speaks these words or displays these symbols in the presence of others who are the chosen targets of this speech, often quite deliberately, to ensure that by exposing certain people to these words and symbols, they will have the maximum negative effect. In suggesting that the words only do harm if the listener makes a "mental judgment" to feel this injury, Haiman implicitly denies the speaker's responsibility for choosing to speak in this way—in

185. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

186. FRANKLYN S. HAIMAN, SPEECH AND LAW IN A FREE SOCIETY 21 (1981) (emphasis in original).

187. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) ("[T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."). The incitement test is exceedingly difficult to meet. *See*, *e.g.*, Bible Believers v. Wayne Cnty., 805 F.3d 228, 246 (6th Cir. 2015) (en banc), *cert. denied*, Wayne Cnty. v. Bible Believers, 578 U.S. 975 (2016) ("The *Brandenburg* test precludes speech from being sanctioned as incitement to riot unless (1) the speech explicitly or implicitly encouraged the use of violence or lawless action, (2) the speaker intends that his speech will result in the use of violence or lawless action, and (3) the imminent use of violence or lawless action is the likely result of his speech."); United States v. Miselis, 972 F.3d 518, 532–33, 540–41 (4th Cir. 2020).

terms of the "emotive force" of language,[188] the broader effects of the speech on the society in which this speech is present (and constitutionally protected),[189] and the realization that the First Amendment might apply differently to different forms of speech.[190]

In this connection, Haiman's response to the Court's statement in *Chaplinsky* is reminiscent of the misguided but repeated discussions of the variable significations of symbolic speech. For example, in *Virginia v. Black*, Justice O'Connor indulged in an unfortunate excursus on the different cultural and temporal meanings of a burning cross.[191] As she pointed out, "[c]ross burning originated in the 14th century as a means for Scottish tribes to signal each other. [And] Sir Walter Scott used cross burnings for dramatic effect in The Lady of the Lake, where the burning cross signified both a summons and a call to arms."[192] Similarly, other courts have observed that:

> Before the Nazi party adopted the swastika and turned it into the most potent icon of racial hatred, it traveled the world as a good luck symbol. It was known in France, Germany, Britain, Scandinavia, China, Japan, India, and the United States. The Buddha's footprints were said to be swastikas. Navajo blankets were woven with swastikas.[193]

All of this is accurate, so far as it goes, and a bit insufferable. Assuming we are not in medieval Edinburgh, or attending a reading of *The Lady of the Lake*, and that we are not looking at Buddha's footprints or a Navajo blanket, the meaning of a burning cross or a swastika in the United States is widely and well understood. Indeed, that is precisely why these symbols are chosen by those who use them.[194] So, their varying resonances for other cultures in

188. *See generally* Cohen v. California, 403 U.S. 15, 26 (1971) ("[W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.").

189. *See* Matsuda, *supra* note 93, at 2337–41, 2378–79; Charles R. Lawrence, *Crossburning and the Sound of Silence: Antisubordination Theory of the First Amendment*, 37 VILL. L. REV. 787, 791–92 (1992).

190. *See Chaplinsky*, 315 U.S. at 571–72 ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

191. 538 U.S. 343 (2003).

192. *Id*. at 352 (citations omitted).

193. United States v. Figueroa, 548 F.3d 222, 228 n.6 (2d Cir. 2008) (citation omitted).

194. *See supra* notes 5, 100 and 182.

other contexts at other times ought not to distract us when assessing what these symbols convey in the United States. If a member of the Ku Klux Klan actually believed a Black family would see a cross burning in their yard and call to mind Scotland or Sir Walter Scott, we can safely conclude that he would express himself in some other way.[195]

Beyond all of these considerations, the failure of the autonomy theory to account adequately for the First Amendment rights of listeners is a failure to consider what Baker initially identified as "the integrity and autonomy of the individual moral agent."[196] The Court's view in *Mosley*, and contemporary First Amendment doctrine in the United States, reflect the autonomy theory's preoccupation with the autonomy and dignity of speakers. In contrast, the historical and doctrinal arguments provided here demonstrate that this view distorts the historical understanding of the speech the First Amendment was principally meant to protect, as well as the means of protecting speech as a constitutional right.[197] As a result, the theory and the doctrine countenance forms of speech that degrade those who choose to speak that way, those who hear that speech, and the society in which speakers are entitled to claim the Constitution's protection for those forms of speech. And, in doing so, the theory and the doctrine devalue the agency, integrity, autonomy, and dignity of those who are told that their Constitution ensures that they can be spoken to and treated in this way.[198] This is not just a

195. In fairness, O'Connor also noted that "[c]ross burning in this country, however, long ago became unmoored from its Scottish ancestry. Burning a cross in the United States is inextricably intertwined with the history of the Ku Klux Klan." *Black*, 538 U.S. at 352.

196. *See* BAKER, *supra* note 58, at 59.

197. In addition to the historical discussion above, *see supra* notes 41, 45 and 47 and accompanying text. *See also* NATHANIEL CHIPMAN, PRINCIPLES OF GOVERNMENT: A TREATISE ON FREE INSTITUTIONS 103 (1833) (Chipman describes the freedom of speech as "the right and liberty of every citizen to discuss and propagate his opinion on every subject relating to the government, institutions, and laws with only this condition, that in so acting he violate not the rights of others, or injure the community, of which he is a member."); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (vol. 3) 732 (1833) (Story describes the freedom of speech as "a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always, that he does not injure any other person in his rights, person, property, or reputation . . ."). Story emphasized that the Founders never understood the right of free speech under the First Amendment as "an absolute right to speak, write, or print, whatever [one] might please, without any responsibility." *Id*. at 731. Story dismissed this view as "a supposition too wild to be indulged by any rational man. This would be to allow to every citizen a right to destroy, at his pleasure, the reputation, the peace, the property, and even the personal safety of every other citizen." *Id*. at 731–32.

198. *See* Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343, 385 (1991) ("Racist speech . . . separates the victim from the storytellers who alone have credibility. Not only does racist speech, by placing all the credibility with the dominant group, strengthen the dominant story, it also works to disempower minority groups by crippling the effectiveness of their speech in rebuttal.").

shortcoming of the theory, it is the most important reason that the autonomy theory cannot adequately explain or justify the interpretation and application of the constitutional right of speech under the First Amendment.

In privileging the autonomy and dignity of speakers, the autonomy theory allows speakers to disregard the autonomy and dignity of listeners.[199] That is to say, the autonomy theory undermines its own and other posited values of free speech. The theory does not adequately "assess[ ] how equal community membership can be reconciled with the individual First Amendment freedom of self-assertion. . . Aggressive advocacy against identifiable groups also attacks their sense of dignity . . . [Some] speakers seek to intimidate targeted groups from participating in the deliberative process."[200] It may be morally and politically worthwhile to allow people to speak their minds freely, but only with the recognition that some people choose to exercise that freedom in ways that are morally unworthy. The failure of the autonomy theory to address that fact is internally inconsistent with the theory's own conceptual commitments, and it is inconsistent with the rights and dignity of speakers and listeners to engage together in the mutual interchange that constitutes speech.[201]

Taken on its own terms, then, the most that can be said for the autonomy theory is that it prioritizes the individual moral agency of speakers over listeners, because it assumes the cardinal purpose of the First Amendment is ensuring the individual freedom of unrestrained self- expression. Indeed, that is precisely the view of the most prominent theorists associated with this view.[202] Even leaving aside all of the predictable and demonstrable social harms attendant to this view,[203] the theory is grounded on a misunderstanding of the historical provenance of the freedom of speech in the United States, the equal and reciprocal rights of listeners under the First Amendment, and

199. *Cf.* Neomi Rao, *The Trouble with Dignity and Rights of Recognition*, 99 VA. L. REV. ONLINE 29, 36 (2013) ("Our First Amendment jurisprudence defends freedom of individual expression, not the recognition of particular groups that may be offended by hate speech. . . When such dignities conflict, the dignity most closely connected with the U.S. Constitution is the dignity of individual autonomy and freedom – the dignity of being left alone as much as possible from the government.").

200. Tsesis, *supra* note 93, at 499. *See also id.* at 508, 512 ("[Overemphasizing] self-expression . . . preserves the rights of speakers at the expense of targeted groups. Hate speakers aim to gain supporters who share a vision of intolerance and manifest hostility rather than to engage listeners in intellectual or political debate.").

201. *See* BERMAN, *supra* note 79; CONSTABLE, *supra* note 79.

202. *See supra* notes 58–60 and 63 and accompanying text.

203. *See*, *e.g.*, Tsesis, *supra* note 93, at 503–11; DAVID A.J. RICHARDS, FREE SPEECH AND THE POLITICS OF IDENTITY 105–07 (1999).

the recognized distinction between expressive and communicative forms of speech.[204]

This leads to a further point. Scholars who are critical of the autonomy theory and attentive to the rights and interests of listeners usually frame their analysis of speech (in relation to the personal dignity and autonomy of speakers and listeners) as a contest between competing First Amendment values: self-determination vs. deliberative democracy, or individual autonomy vs. collective good, or ideological advocacy vs. equal participation.[205] This is understandable. The courts repeatedly characterize the values at stake in difficult First Amendment cases in terms of "balancing competing interests."[206] For example, here is the way one skeptic of autonomy theory put it: "[j]udicially recognized limitations on offensive speech indicate that, in our constitutional democracy, certain social values can outweigh speakers' interests in self-determined expression."[207]

Although it is easy to see why some so often frame the issues in this way, it is not the most useful or suitable approach. In the United States, when parties present a question in terms of the free speech rights of an individual to speak her mind and the interests of the government in restricting or restraining that speech, the outcome is frequently a foregone conclusion. But the question is not whether an individual has a right to speak or whether the government has a sufficiently compelling interest in preventing that speech. The question is instead how we should understand the rights of speakers and listeners in a particular instance or mode of speech: we should determine whether the form of speech is primarily communicative or expressive—and

204. Justice Jackson's dissent in *Terminiello* usefully condenses and captures the historical understandings of speech protection under the First Amendment, while also applying those principles in the evaluation of forms of expressive speech that deliberately denigrate and devalue certain members of the community who hear (and are the targets of) this speech: "I am unable to see that the local authorities have transgressed the Federal Constitution. Illinois imposed no prior censorship or suppression upon Terminiello. On the contrary, its sufferance and protection was all that enabled him to speak. It does not appear that the motive in punishing him is to silence the ideology he expressed as offensive to the State's policy or as untrue, or has any purpose of controlling his thought or its peaceful communication to others." Terminiello v. Chicago, 337 U.S. 1, 25 (1949) (Jackson, J., dissenting).

205. *See* Tsesis, *supra* note 93, at 499–500.

206. *See*, *e.g.*, Buckley v. Valeo, 424 U.S. 1, 44–45 (1976) (balancing individual's interest in expressing political support against government's interest in preventing corruption); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513–14 (balancing students' interest in protesting war against school's interest in preventing disruption); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (balancing interests of state employee as citizen commenting on public issues and public school as employer); United States v. O'Brien, 391 U.S. 367, 376–77 (1968) (balancing speech and non-speech elements in an action*);* Dennis v. United States, 341 U.S. 494, 518–19 (1951) (Frankfurter, J., concurring) (legislature must balance individuals' interests in advocating political ideology and government's interest in national security).

207. Tsesis, *supra* note 93, at 502–03.

whether we can best understand the interaction of speakers and listeners as equal participants in a process of speech that is meaningfully mutual and free. Textually, historically, theoretically, and doctrinally, this approach is most consistent with the principles and purpose of the First Amendment.

The fixation of the autonomy theory on speakers' rights and interests, and the failure of the theory to appreciate the equal and reciprocal First Amendment rights of listeners, has meant that the limitations of the theory have manifested themselves in the doctrine. And so, we wind up where we are. The problem is not simply a matter of "collateral damage" that speakers sometimes choose to exercise their freedom in ways that harm others. The problem is that speakers are exercising their freedom in ways that are fundamentally incompatible with the dignity, autonomy, and equal speech rights of listeners in the same instance of speech. We cannot theorize our way out of this problem. A better conception of autonomy as the basis for speech rights would surely be an improvement. But what we need is not a better theory of speech rights. What we need is a better understanding of the speech that the First Amendment prioritizes.

CONCLUSION

The First Amendment exists to ensure that we will always be able to talk with each other. The Supreme Court's statement in *Mosley* notwithstanding, *above all else*, the First Amendment *means* that the ability to speak freely requires more than just freedom from government restrictions on individual expression. The First Amendment means that freedom of speech is the freedom to communicate: to exchange ideas, to encounter other minds, to engage different perspectives, to persuade, to create, to participate in, and to maintain the community envisioned by the Constitution. The loss of faith in the value of the freedom to communicate will lead to the loss of that freedom, followed by the loss of those other freedoms that depend upon it, followed not too long after by the loss of the nation founded on acts of communication.

How we conceive of speech will determine how we protect it, and how it is protected will determine what constitutionally recognized speech *is*. Distinguishing expression from communication allows us to draw doctrinal distinctions among judicial rulings and refine our understanding of how powerfully the First Amendment protects different forms of speech and different participants in that process:

> In every case in which the Court has applied the First Amendment, abridgement of substantive communication has been the issue. . . Communication thus seems to require, at a minimum, a speaker who seeks to transmit some substantive message or messages to a listener

> who can recognize that message. Thus, in order to communicate, one must have a message that is sendable and receivable and that one actually chooses to send.[208]

Eliding expression and communication allows for undifferentiated First Amendment protection of speech acts that are not necessarily constitutionally equivalent. Burning a cross on a Black family's lawn sends a message to recipients who understand that message.[209] It is minimally expressive, in that sense.[210] But it is not communicative in the way I use that term because the cross-burner has no interest in participating in a reciprocal relationship or an exchange of ideas with the targets of that expression.[211] This is not to say that unilateral expression of this kind is necessarily unprotected by the First Amendment, but it does not involve mutual recognition, an exchange of ideas, or the possibility of truly engaging and changing minds.[212]

Both speakers and listeners hold relational rights in free speech as communication.[213] The democratic and deliberative value of speech is as much about who is able to participate in the discussion as it is about what the individuals may discuss. For the exchange of ideas to be authentically free, the marketplace must be as accessible as possible to the community of speakers

208. Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1460–61 (2013) (footnotes omitted).

209. *See supra* notes 5, 100, 182. *See also R.A.V.*, 505 U.S. at 402 (1992) (White, J., concurring in the judgment).

210. *But see Black*, 538 U.S. at 388 ("[T]he majority errs in imputing an expressive component to the activity in question [cross-burning].") (Thomas, J., dissenting).

211. *See* Matsuda, *supra* note 93, at 2358 ("The first element is the primary identifier of racist speech: racist speech proclaims racial inferiority and denies the personhood of target group members.").

212. *See R.A.V.*, 505 U.S. at 385 ("We have not said that they [forms of proscribable speech] constitute '*no* part of the expression of ideas,' but only that they constitute 'no *essential* part of any exposition of ideas.'") (emphasis in original) (citation omitted). *See also* SCHAUER, *supra* note 78, at 52 ("[T]he concept of self-expression is not helpful to an analysis of free speech. When speech is considered merely as one form of self-expression, nothing special is said about speech. Because virtually any activity may be a form of self-expression, a theory that does no isolate speech from this vast range of other conduct causes freedom of speech to collapse into a principle of general liberty.").

213. *See* Wali v. Coughlin, 754 F.2d 1015, 1027–28 (2d Cir. 1985) ("[T]he words of the first amendment have long been read to mean that, where the government stands as an inexorable link in a communicative chain, it has the duty – whether by affirmative action or passivity – to see to it that the communication is not stifled. If, whether by its action or inaction, the communication is interrupted, *both the speaker and attempted receiver* have standing to challenge the act of interference on the part of the state.") (Kaufman, J.) (emphasis added). As his references to "the communication" indicate, Judge Kaufman concludes in *Wali* that we cannot circumscribe the government's obligations under the First Amendment by a right to speak and a "liberty to listen." *Id*. at 1027. *See also supra* notes 133, 149, 151 and accompanying text.

and listeners taking part in an ongoing process of communication that depends upon and reinforces their community and their place in it.[214]

I have argued here that the right of free speech is centrally the right to participate in a process of communication. The freedom of speech—the liberty encompassed by that fundamental right—is the ability to participate as an equal member of a community constituted by communication. That right is the most fundamental means of perceiving and actualizing our own worth in the community that governs itself, pursues a better understanding of itself, and genuinely regards and respects each of its members as equally valuable, and equally valued.

214. *Cf.* Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 26 (1975) ("[T]he principle of equal liberty of expression serves the same ends as equality in the right to vote. Each is necessary not only for the development of the individual's capacities, but also for the sense of self-respect that comes from being treated as a fully participating citizen.").